# SMSF Trustee and Member Disputes

For self managed superannuation funds (**SMSFs**) the issues in relation to trustee decision making can be particularly complex, due to the legislative requirement for all trustees (or directors of a corporate trustee) to be members, and vice versa.

The conservative approach for SMSFs is easily stated; ensure the only members admitted are commercially minded and likely to act responsibly in discharging their duties.

This said, particularly given the ability to have up to 6 members in an SMSF, a range of mechanisms may be available where founding members are wanting to minimise the risk of requiring court intervention (as was required in the case of *Notaras v Notaras* [2012] NSWSC 947. This decision, as profiled in a previous View post, saw 1 of 2 brothers who were members of an SMSF have the court remove the other brother and appoint a co-trustee of a company of which the applicant brother was the sole shareholder and director of).

Some of the approaches available for SMSFs to reduce the prospects of needing to apply to court in the event of dispute include:

1. 'Proportionate voting' whereby each individual trustee's voting rights are proportionate to their member account, as compared to the total member interests. While this approach may provide a 'day to day' pathway, if there is a desire to use the approach to force out a trustee it is unlikely to be helpful because the party being exited needs to consent in their role as a member. Therefore, under View's SMSF deed, any proportionate voting can be automatically revoked on the request of any trustee. Having this approach attempts to address wider concerns such as ensuring trustees act in the interests of all members (and not unreasonably represent factional interests).

2. Principal, guardian or appointor role allowing a party to unilaterally remove a trustee. Again, practically, the utility of this style of power is questionable given the SMSF rules require a member to consent to any removal from a fund (see Regulation 6.28). Furthermore, as explored in previous View posts, this style of role may be a fiduciary one, meaning someone cannot exercise the power for their own benefit.

3. Mandated dispute resolution via mediation. This approach can provide a framework for a process designed to avoid a court application, however particularly if there is a wider dispute (for example the breakdown of a spousal relationship), having compulsory mediation in relation to SMSF decision making is unlikely to provide significant benefits. This style of approach can also mandate arbitration following an unsuccessful mediation, as another mechanism to avoid court proceedings.

4. Bespoke trustee company shareholder crafting. Where an SMSF has a corporate trustee, the superannuation rules mandate only that all members are directors. There are therefore a number of share related strategies available to otherwise regulate management and control of the trustee company (and in turn the SMSF). For example, there is complete autonomy on who the shareholders of the company are and how shareholder decisions are to be made. The rights of the shares on issue can also be tailored to hardwire the desired outcomes. None of the share related approaches will extend to the ability to remove a member however, unless that member has consented.

5. Revocable, conditional or unilaterally removable member (**URM**). Under this approach, on admission to an SMSF, the relevant member has a membership with rights that are modified from what would otherwise be the case for a 'full' member. The member who is a URM pre-signs their consent to exiting the fund. The SMSF trust deed is tailored to empower the 'founder' trustee with the right to remove the person admitted as a URM as a trustee if certain 'triggering events' occur or otherwise in the relevant trustee's discretion. The rights of the founder include the ability to transfer the URM's interest out of the SMSF. Superficially, using the URM approach can be of interest where children, wider family members or second spouses are being admitted to a 'founder's' SMSF. Practically, and probably understandably, many potential members are resistant to the concept of being a URM and may prefer to either set up a SMSF where they will be a 'full' member, or otherwise have their superannuation entitlements held via an industry fund.
6. Power of attorney. An iteration on the URM approach is for the relevant member to instead have full membership rights, however appoint another trustee as their attorney for the purpose of signing all documents required to remove them as a trustee and member and roll their member benefits to another complying fund. Again, practically, potential members may be resistant to granting these extensive rights to another party.
7. Founder member exit. With the URM and power of attorney approaches, these can be 'flipped' to instead provide the founding member the right to exit the SMSF.

In relation to each of the above approaches, and particularly the URM and power of attorney pathways, it is likely that the relevant member will need to obtain independent legal advice before signing the implementation documents, otherwise there is a material risk that the arrangements will not be considered enforceable if subsequently challenged.

Furthermore, each of the above approaches, particularly those at items 5, 6 and 7, would need to consider the potentially adverse tax and duty consequences of funding the payment of the exiting member's benefits to a new fund.