

What if I lose capacity while Trustee of my Self-Managed Superannuation Fund (SMSF)?

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If a Trustee or Director of a corporate Trustee (Trustee Director) of a Self-Managed Superannuation Fund (SMSF) loses legal capacity to make decisions for themselves, then they will no longer be able to perform their duties as a Trustee or as a Trustee Director.

It may be possible for another person to take over the role but the ability to do so will depend on the terms of the following documentation:

- The SMSF Trust Deed;
- The Company Constitution where the Trustee is a company; and
- Powers conferred under the incapacitated member's Enduring Power of Attorney.

Can my Enduring Power of Attorney delegate my Trustee or Trustee Director power?

There is a general rule that an Enduring Power of Attorney will not be effective in delegating any responsibility that someone may have as a Trustee or as a Director. However, there are exceptions to this rule.

Where a Trustee or Trustee Director of an SMSF has appointed an Attorney pursuant to an Enduring Power of Attorney, then that person can take on the role of Trustee or Trustee Director in their place provided that the SMSF Trust Deed allows for this appointment.

With a Trustee Director, the Constitution of the corporate Trustee must also allow for this power to be delegated. Examples of ways in which the Constitution may allow for this power to be delegated is through an Enduring Power of Attorney or the ability to appoint an alternate Trustee Director.

Do you want your Attorney to be able to act on your behalf as Trustee or Trustee Director?

Provided that your SMSF Trust Deed (and Company Constitution if there is a corporate Trustee) allows you to delegate your Trustee or Trustee Director power by way of an Enduring Power of Attorney, then you may or may not wish for the Attorney to act on your behalf in respect to your SMSF.

If it is your wish for your Attorney appointed under an Enduring Power of Attorney to be able to act on your behalf in relation to your SMSF, then a standard Enduring Power of Attorney should suffice. There is no need to refer to your SMSF in the Enduring Power of Attorney.

However, for certainty when dealing with financial institutions or other organisations you may wish for your Enduring Power of Attorney to specifically authorise your Attorney to act on your behalf in relation to your SMSF.

If you do not want your Attorney to be able to act on your behalf in relation to your SMSF, then your Enduring Power of Attorney should limit the Attorney's powers. The Enduring Power of Attorney should specifically state that it does not allow the Attorney to act on your behalf as Trustee or Trustee Director of your SMSF.

What if I have appointed more than one Attorney in my Enduring Power of Attorney?

It is common for Enduring Powers of Attorney to appoint more than one person as Attorney, to act either jointly or jointly and severally. If you have appointed more than one Attorney, then one or more of those Attorneys can be appointed as Trustee or Trustee Director in your place. One for one substitution is not necessary.

What if the SMSF’s other Trustee or Trustee Director is appointed as my Attorney?

A person who is already a member of the SMSF, and is also an existing Trustee or Trustee Director, can act on your behalf in the event of incapacity if they are appointed as Attorney under your Enduring Power of Attorney.

This means a person can act in both the capacity as Trustee or Trustee Director for themselves and also as Trustee or Trustee Director on your behalf.

What steps does my Attorney have to take to be appointed as Trustee or Trustee Director on my behalf?

If your Attorney is acting on your behalf under your Enduring Power of Attorney, then to act in your capacity as Trustee or Trustee Director the Attorney will need to consent in writing to the appointment.

This will not need to be done until such a time as your Attorney is required to act on your behalf. At this time, you would be removed from the role of Trustee or Trustee Director by the Attorney to allow the Attorney to act as Trustee or Trustee Director in your place.

What responsibilities will my Attorney have by acting on my behalf as Trustee or Trustee Director?

Where you are an individual Trustee of your SMSF, then the Attorney appointed under your Enduring Power of Attorney can step into the role as Trustee but also assumes all the responsibilities of the Trustee. This includes taking on all personal liability in acting as Trustee and being responsible for ensuring compliance with the laws governing superannuation funds.

If there is a corporate Trustee of which you are a Director, then your Attorney appointed under your Enduring Power of Attorney can seek to be appointed as Director of the corporate trustee in substitution. Again, your Attorney would be exposed to personal liability in acting as a Director of the corporate trustee and would be required to ensure compliance with the laws governing superannuation funds.

The new Trustee or Trustee Director assumes all the responsibility of a Trustee or Trustee Director and must sign all documentation in the capacity of Trustee or Trustee Director. They cannot indicate that they are signing on your behalf pursuant to your Enduring Power of Attorney.

Be informed if accepting the role of Trustee or Director on behalf of someone who has lost capacity

Anyone accepting the role of Trustee or Trustee Director on behalf of someone who has lost capacity would need to:

- be aware that they have to ensure that assets of the super fund are protected and are in the SMSF's name;
- ensure that annual tax returns and audits of the SMSF are carried out diligently;
- understand that all decisions must be made with the main obligation of superannuation in mind, namely that the SMSF be there to provide for the members of the SMSF in retirement; and
- make decisions primarily for that sole purpose and not make decisions for their own benefit.

Get help from a Wills and Estates lawyer

If you have a self-managed super fund and would like to ensure you have the right documentation in place should you lose capacity, our lawyers can assist you in reviewing your current situation and advising on your needs.

Likewise, if you are being asked to take on the role of Trustee or Director of an SMSF (as you are the Attorney to someone who has lost capacity) and you would like advice on the risks, feel free to get in touch with one of our commercial lawyers.

You can contact us by phone or email to arrange a consultation.

Contacting E&A Lawyers

For more information or to arrange a consultation with a lawyer, you can call or email us.

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