bastion SUPERANNUATION SOLUTIONS

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Loss of capacity by an SMSF member

With the growth in SMSFs and our ageing population the SMSF industry is likely to see more instances of the loss of capacity by a member. This could be due factors such as the onset of dementia.

If the member concerned does not have a valid enduring power of attorney (EPOA) the other fund members and/or their family risk having to deal with resulting compliance issues.

Even where individuals do not have an SMSF there are other reasons to have an EPOA to ensure that personal affairs and health matters can be managed in the event of loss of capacity.

What happens to the SMSF where a member loses capacity?

Where a member loses capacity then in practice they are not able to continue to act as an individual trustee or director of a corporate trustee.

Generally to be an SMSF and satisfy the SMSF definition the rules in Section 17A of the Superannuation Industry (Supervision) Act (SISA) requires that all members must be trustees or trustee directors.

Accordingly, loss of capacity may cause the fund to cease being an SMSF as:

- where there is a corporate trustee because the incapacitated person typically automatically ceased to be a director.

  Most company constitutions provide that individuals cease to be a directors on loss of capacity; or

- where there are individual trustees as the incapacitated person will need to be removed so that the other trustee(s) can continue to make trustee decisions.

  Generally, if there are multiple trustees, all are needed to make a trustee decision.

EPOAs provide an exception

One exception to the requirements of Section 17A of SISA is that a fund will not fail to be an SMSF merely because a member is not a trustee/director if someone who holds an EPOA in respect of that person is a trustee/director.

Impact of no EPOA

If no one holds an EPOA for a member then six months after the member loses capacity one of the following options needs to followed:

- The incapacitated member leaves the fund and receives their benefit as a lump sum.

- An "approved" licensed trustee is appointed as the fund trustee by converting the fund into a small APRA fund. The downside with this approach is approved licensees charge fees to act and can be very conservative as to when and how they act.

- The incapacitated member is rolled to a new retail superannuation fund.

  Unfortunately, there can be problems with this approach as there is a provision in the SIS regulations that essentially prohibits rolling members out of funds unless they consent which they will not be able to do.

  Also if there is no existing retail fund membership signing application forms may be problematic.

- No action is taken. However the Auditor will need to report a breach of SIS requirements and eventually the ATO will take action.

  Their powers in this situation include removing the fund's complying status, which can be very costly.

Acting as a trustee under an EPOA

If a member has appointed an attorney under an EPOA, then the attorney can become the trustee or director of the trustee company in the place of the member.

This allows the trusteeship to be restructured to comply with SISA requirements with the attorney replacing the member as trustee/director. The member can then remain in the fund.

It is important that any trustee change complies with the requirements of the Fund's Trust Deed and for a corporate trustee the constitution of the company.

Once appointed, the attorney performs their duties as trustee (or director of the trustee) rather than as attorney or agent for the member. For an individual trustee a deed of change of trustee will be required. For a change to company directors appropriate notice must be given to the Australian Securities and Investments Commission.

The attorney will need to comply with the obligations applicable to acting as SMSF trustee or trustee director and must sign the required Australian Taxation Office trustee declaration stating that they understand their duties as a trustee. The attorney must be eligible to be appointed as trustee and cannot be a disqualified person.

Where a husband and wife are the only two members and trustees of an SMSF it is possible for them to hold EPOAs for each other. Depending on the Trust Deed if one loses capacity it is possible for the other trustee to become the only trustee with the fund not then failing the SMSF definition due to the EPOA exception.

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Loss of capacity by an SMSF member - Arranging an EPOA (cont'd)

Arranging an EPOA can be fairly simple to organise and can either be prepared as a stand alone document or considered it in the context of the member's estate planning.

Each state and territory in Australia has a prescribed form that must be used for an EPOA to be effective. For example in Queensland the following forms are available on the Queensland Government Department of Justice and Attorney General web site at:

http://www.justice.qld.gov.au/justice-services/guardianship/power-of-attorney/enduring-power-of-attorney

- *Short form EPOA* which can be used where you wish to appoint the same attorney/s for both financial matters and personal matters (including health care). You may also use it to appoint an attorney (or attorneys) for financial matters only or for personal matters (including health care) only.
- *Long form EPOA* which can be used where you wish to appoint an attorney/s for personal matters (including health care) and a different attorney/s for financial matters.
- *Advance Health Directive* which is a formal way of giving instructions for your future health care, and comes into effect only if your are unable to make your own decisions.

Recommendation

We recommend that SMSF members review the need for an EPOA with their financial adviser and/or solicitor if they wish to avoid potential compliance issues on their incapacity.

ATO Ruling on when a pension starts and stops finalised

On 31 July 2013 the Australian Taxation Office (ATO) released their final ruling regarding when a superannuation pension starts and ceases. Initially issued as draft ruling TR 2011/D3 in 2011 with industry comment sought this has been finalised as both:

- taxation ruling TR 2013/5 When a superannuation income stream commences and ceases; and
- self managed superannuation fund determination SMSFD 2013/2 .

The ruling is important given that SMSF assets supporting pensions are exempt from tax and when a pension stops the exemption ceases.

As with the draft ruling the commencement date is 1 July 2007. However the finalised materials do provide some good news as it is noted in the ruling that it is not appropriate for the ATO to take compliance action to apply their views where a pension has ceased on the death of a member before the 2012-13 income year.

When an income stream starts

The ruling notes a pension starts when the pension documents say so and therefore it will be very important to make sure pension documents specify a valid start date to avoid any confusion.

This can be before the first payment but not before the member applies for the pension or where the pension is funded from contributions and rollovers, before these are received by the fund.

When an income stream ceases

The ruling outlines a number of common circumstances as to when a pension ceases:

1. *Failure to comply with the pension rules and payment standards*

   When the trustee does not comply with the payment standards rules the pension will cease. For example if the trustee does not make the required minimum payment during a year the pension ceases on 1 July of the year of the non-compliance.

2. *Exhaustion of capital*

   If the account supporting the pension runs out.

3. *Upon full commutation of the pension*

   When a pension is wholly commuted. In this case it is important to ensure the minimum annual pension rules are met.

4. *Upon death of the Member*

   A pension ceases upon a member's death except where the pension automatically transfers to another person (for example because the pension is reversionary, the trust deed requires it to continue in that way, or there is a binding death benefit nomination requiring the benefit continues as a pension).

   Other recent changes to superannuation legislation provides that the pension exemption will continue past death until:

   - if the pension is not automatically reversionary - as soon as it is practicable to pay the death benefits; or
   - if the pension is automatically reversionary - until the trustee or reversionary beneficiary ceases the pension.

Minimum pension levels

Following the global financial crisis the Federal Government permitted reduced minimum pension draw-downs for a number of financial years. This relief has finally ended. The table below illustrates the annual minimum pension level that applies from 1 July 2013 and also shows the required minimum pension for each $100,000 of an account balance.

	Minimum Limits from 1 July 2013	
Age	**Minimum payment as % of account balance**	**Annual Pension Level for each $100,000**
55 - 64	4 %	$4,000
65 - 74	5 %	$5,000
75 - 79	6 %	$6,000
80 - 84	7 %	$7,000
85 - 89	9 %	$9,000
90 -94	11 %	$11,000
95+	14 %	$14,000

Superannuation Contributions 2013-14

Increased limit for over 60s - This year the concessional contributions cap for individuals aged 60 and over has increased from the last year's limit of $25,000 to $35,000. Government legislation received assent in late June 2013 which provided that the concessional contribution cap will be increased so that: From 1 July 2013 taxpayers aged 60 and over will have a $35,000 cap and from 1 July 2014 taxpayers aged 50 and over will have a $35,000 cap. These changes replace the Government's previous proposal of a higher cap for over 50s with balances under $500,000.

The amount of contributions that can be made to superannuation on behalf of an individual depends on a member's age and the contribution caps. The contribution eligibility rules are illustrated in the table below.

Age	**Member's Employer**	
	Superannuation Guarantee/mandated	***Voluntary/non-mandated***
Under Age 65	Allowable	Allowable
Age 65 - 74	Allowable	Only if you have worked at least 40 hours in not more than 30 consecutive days in the financial year
Age 75 and over	Allowable	Not allowed

	Member
Under Age 65	Allowable
Age 65 - 74	Only if you have worked at least 40 hours in not more than 30 consecutive days in the financial year
Age 75 and over	Not allowed

	Member's Spouse
Under Age 65	Allowable
Age 65 - 69	Only if the member has worked at least 40 hours in not more than 30 consecutive days in the financial year
Age 70 and over	Not allowed

The table below summarises the *main* types of concessional and non-concessional contributions and limits for 2013-14 year as well as the penalties for breaching the caps:

Type of Contribution	**Consists of**	**Annual Limit 2013-14**	**Breach of Cap**
Concessional Contributions (CCs)	Employer contributions (including Salary Sacrifice) Personal contributions where a tax deduction is claimed Certain amounts allocated from a reserve unless the allocation meets the exemptions	$25,000 (indexed annually with average weekly ordinary time earnings (AWOTE) and rounded down to the nearest $5,000. Indexation is paused in 2013-14) $35,000 (not indexed) if aged 60 or over on 30 June 2014 An increased contributions tax can apply for high income earners	*Before 1 July 2013* • Excess taxed at 31.5% in addition to the 15% contributions tax. Excess also count towards the NCC cap and if that cap is breached can be taxed twice • Excess CCs of $10,000 or less may be refunded and instead taxed at marginal rates for first time breaches from 1 July 2011 *From 1 July 2013* • All excess CCs will be taxed at the individual's marginal tax rate plus an interest charge in addition to the 15% contributions tax • Individual has option to withdraw excess amount from super (net of 15% contribution tax)
Non-concessional Contributions (NCCs)	Personal contributions not claimed as a tax deduction Contributions made by a spouse Amounts in excess of the CCs cap (excluding the amount of excess CCs made from 1 July 2013 which are withdrawn (grossed up to include the 15% fund tax))	$150,000 Members under age 65 at any time in the financial year may bring forward up to two future years' entitlements by making NCCs in a financial year of more than $150,000 (if member age 65 or more at time of contribution, work test applies). Where bring forward used, total NCCs in a 3 year period (starting on 1 July of first financial year NCCs exceeded $150,000) cannot exceed $450,000.	Excess taxed at 46.5%

Other Contributions

Personal injury contributions may also be permitted.

In addition certain payments made into superannuation are also treated as contributions. These include:

- Contributions from either:
  - the capital proceeds of asset sales that meet the CGT small business 15 year exemption (or would have if a capital gain had arisen), or
  - a capital gain that meets the CGT small business retirement exemption.

  Choice is made using an ATO form no later than the time the contribution is made.

  A small business lifetime limit of $1,315,000 applies (indexed annually with AWOTE).
- Foreign termination payments transferred from overseas funds after a person has taken up residence in Australia.

Please contact our office if you need information on these types of contributions.

SMSF supervisory levy

The government has changed when the levy is collected from Self Managed Superannuation Funds (SMSFs) by increasing the levy to ensure regulatory costs are fully recovered.

In the 2012-13 mid-year economic and fiscal outlook (MYEFO) report, the Government announced a reform of the levy to bring forward payment of the levy so that it is levied and collected in the same year of income. This is consistent with Australian Prudential Regulation Authority (APRA) regulated funds, which pay the superannuation supervisory levy in the same financial year it is levied.

However the change in the timing of the collection of the SMSF levy will be phased in over the two financial years (2013-14 and 2014-15) to give SMSFs time to adjust.

The government will increase the annual SMSF levy from $191 (in 2012-13) to $259 from 2013-14 onwards to ensure full cost recovery.

The levy applicable for the 2012-13 year is $191.

Consequently, the SMSF Supervisory levy for the relevant year is as follows:

	Financial Year	Levy ($)
	2007-08	45
	2008-09	150
	2009-10	150
	2010-11	180
	2011-12	200
	2012-13	191
	2013-14	259

This means the levy actually paid by the SMSF in 2012/2013 will be $321 being $191 for the 2012/2013 year and half of the 2013/2014 levy unless the fund is winding up in the 2012/2013 year when it will only pay $191 for that year.

Changes to the super guarantee

In March 2012, the Superannuation Guarantee (Administration) Amendment Bill 2011 received royal assent. The Bill amends the Superannuation Guarantee (Administration) Act 1992 to incrementally increase the superannuation guarantee charge percentage from 9% to 12%.

The Bill also amends the legislation to abolish the upper age limit at which superannuation guarantee payments need to be provided for an employee.

The superannuation guarantee (SG) rate will gradually increase to a rate of 12% from the year commencing 1 July 2013. The increases are as follows:

	Financial Year	Rate (%)
	2013-14	9.25%
	2014-15	9.50%
	2015-16	10.00%
	2016-17	10.50%
	2017-18	11.00%
	2018-19	11.50%
	2019-20	12.00%

SG contributions made up to 30 June 2013 could only apply to people aged up to 70. However employers could make voluntary deductible superannuation contributions for employees under 75, and self-employed people can make deductible contributions until they turn 75.

About Bastion Superannuation Solutions

Bastion Superannuation Solutions specialises in the provision of administration and compliance services to self managed superannuation fund trustees and advisers.

For further information on our range of services please see our web site.

Our range of services include**:**

- Self managed superannuation fund establishment
- Fund Administration including preparing financial accounts and maintaining member records
- Superannuation compliance and technical guidance
- Group Life Insurance Pool for superannuation fund members
- Assistance with updating self managed superannuation fund trust deeds

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