

Your Financial Advice Newsletter

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Binding death benefit nominations – what you definitely need to know

In many cases, people die before accessing their superannuation benefits, and often the value of their superannuation benefits exceeds the value of their assets outside of superannuation.

This highlights the importance of a member's superannuation benefits being paid on their death in accordance with their wishes. A member can only be certain of this if they have already made a valid binding death benefit nomination ('BDBN'), otherwise it will be at the discretion of the surviving trustee(s) of the superannuation fund as to how and to whom the deceased member's benefits in the fund are to be paid, which may not reflect the member's wishes.

Members of superannuation funds also should be aware that (a) their superannuation benefits generally do not form part of their estate to be dealt with according to their Will, and (b) the superannuation legislation requires that a deceased member's benefits be paid out of the fund 'as soon as practicable' after their death.

Having regard to the above, members of superannuation funds need to at least consider making a BDBN. And in making a BDBN, they should also consider the following issues in particular:

- ❑ the trust deed for the superannuation fund should specifically allow for the making of BDBNs – if it does not, any BDBN that the member makes may not be valid;
- ❑ a member's superannuation benefits on their death generally can only be paid to one or more 'dependants' of the member as defined in the superannuation legislation (which includes a spouse or child), or to the member's legal personal representative to be dealt with according to the member's Will;

- ❑ the member should ensure that any BDBN that they make does not conflict with any arrangements they already have in relation to their superannuation (such as a reversionary pension that is already being paid); and
- ❑ a BDBN may be drafted to provide for a member's superannuation benefits to be paid either as a lump sum, or as a pension (or both), (although a member's superannuation death benefits generally cannot be paid as a pension to the member's child).

Detailed advice should be sought as required in relation to the above issues, and also in relation to the preparation and proper execution of a BDBN.

Farms and SMSFs

The superannuation legislation generally prohibits an SMSF from either (a) acquiring an asset from a related party of the SMSF; or (b) leasing an asset to a related party of the SMSF.

However, the above prohibitions do not apply for SMSFs where the asset is 'business real property' as defined in the superannuation legislation; that is, real property used wholly and exclusively for business purposes.

The definition of 'business real property' generally means that the property cannot also be used for non-business (i.e., residential) purposes.

However, this is not necessarily the case where the property is farm property. More particularly, S.66(6) of the *Superannuation Industry (Supervision) Act 1993* provides as follows:

*"For the purposes of the definition of business real property in subsection (5), **real property used in one or more primary production businesses does not cease to be used wholly and exclusively in***

that business or those businesses only because:

(a) an area of the real property, not exceeding 2 hectares, contains a dwelling used primarily for domestic or private purposes; and

(b) the area is also used primarily for domestic or private purposes;

provided that the use for domestic or private purposes referred to in paragraphs (a) and (b) is not the predominant use of the real property.”

[Emphasis added]

Therefore, an SMSF may either (a) acquire farm property from a member or other related party of the SMSF, or (b) lease farm property to a member or other related party of the SMSF, even though there is a dwelling on the farm property, provided that:

- ❑ The farm includes land “used in one or more primary production businesses” as referred to above – (‘primary production businesses’ is defined in S.995-1 of the Income Tax Assessment Act 1997); and
- ❑ The dwelling on the farm does not exceed 2 hectares in area, and the farm as a whole is used mainly for ‘primary production purposes’, rather than for residential purposes.

There are various other issues to be considered in relation to an SMSF acquiring farm property from, or leasing farm property to, a related party, and detailed advice should be sought in this regard as required.

“A superannuation fund does not fail to satisfy the conditions [required to be an SMSF] by reason only that:

(b) the legal personal representative of a member of the fund is a trustee of the fund or a director of a body corporate that is the trustee of the fund, in place of the member, during any period when:

(i) the member of the fund is under a legal disability;.....”

“Legal personal representative” (LPR) is defined in S.10 of the SIS Act to include “the trustee of the estate of a person under a legal disability or a person who holds an enduring power of attorney granted by a person”.

It is important to note the following:

- ❑ A member would need to grant an enduring power of attorney (refer above) while the member still has mental capacity; and
- ❑ the LPR of a bankrupt member **cannot** be a trustee/director in the place of that member – refer to S.17A(10) of the SIS Act.

Having regard to the above, it may be appropriate for the benefits of a member who has lost mental capacity to be rolled over to another (non-SMSF) superannuation fund.

Detailed legal and superannuation advice should be sought in relation to the above and other issues (including who may be the ‘trustee of the estate’ of a member – refer above) in the event that a member of an SMSF loses capacity.

What happens when a member of an SMSF loses capacity?

It is always possible that a member of an SMSF may lose mental capacity, e.g., as a result of suffering a stroke, or acquiring a brain injury in a car accident.

The trustee/member rules for SMSFs generally require a member of an SMSF to also be a trustee (or director of the corporate trustee) of that SMSF. Trustees (and directors of a corporate trustee) of SMSFs need to have mental capacity – if they do not, they are considered at law to be under a legal disability.

Therefore, issues obviously arise in the event that a member of an SMSF loses mental capacity.

In this regard, S.17A(3)(b)(i) of the Superannuation Industry (Supervision) Act 1993 (SIS Act) provides as follows: