



# SMSF Association National Conference 2019

The Other NDIS – Neutralising  
Disability in SMSFs

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**SMSF**  
ASSOCIATION

## What do I need to think about...

### WHEN CONTRIBUTING COMPENSATION PAYMENTS TO AN SMSF

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#### 1. Ensuring exclusion from NCC/TBC/TSB

The ATO provides guidance on their website as to the requirements for injury compensation payments to be excluded from the Non Concessional Contribution Cap, Transfer Balance Cap and Total Super Balance for a member. Primarily the below four things must be satisfied in order to qualify for such exemptions:

##### A. injury payment is an eligible type

Firstly, the settlement must arise from the correct type of claim (based on the commission of a wrong, or a right created by statute). Where there is any uncertainty, legal guidance is always a good idea. Secondly, the personal injury compensation amount must be easily determined; particularly where compensation is also made in the same orders/agreement for other types of compensation or damages. For instance compensation for loss or damage to property cannot be contributed to super and excluded from the caps and TSB, only compensation paid for personal injury.

Obtaining a copy of the orders/settlement agreement is important. Again, where there is any uncertainty seek legal advice and quickly (advise them of the intention to contribute within the window under the *Tax Act*)!

##### B. contribution is made within time

This is likely to be the hardest aspect. You have 90 days from the date of the order/agreement or the payment being received (whichever is the latter) to make the contribution of the compensation payment into super (if it is to be excluded from the caps and TSB).

##### C. correct medical certification is obtained

Two legally qualified medical practitioners must certify that because of the personal injury the client is unlikely to ever be gainfully employed in a capacity for which they are reasonably qualified because of education, experience or training (if this is applicable).

##### D. notification is provided to the super fund

The relevant notification must be made to the fund of the intention to make the contribution. The relevant form is outlined below.

#### 2. Notifying the ATO

*Contributions for personal injury election form* (NAT 1162)

- where a personal injury contribution is made on or after 1 July 2007
- SDM lodges form with super fund before or when you make the contribution
- Super fund notifies ATO

*Transfer balance event notification form* (NAT 74919)

- where a personal injury contribution was made prior to 1 July 2007
- SDM/Agent lodges form with ATO to ensure the information for the member is updated

## What do I need to think about...

### WHEN CONSIDERING APPOINTMENT OF A SUBSTITUTED DECISION MAKER

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#### 1. Who made the appointment

Appointment may have been made by an Enduring Power of Attorney document (that was validly executed). Some states and territories have additional requirements for Enduring Powers of Attorney; in Tasmania registration with the land titles office is required for the appointment to be valid, and in Northern Territory Enduring Power of Attorney documents are no longer prepared as they now have Advance Personal Plan documents instead.

Alternatively the appointment may have been made by a Court or Tribunal. It may have been as part of the settlement of a compensation claim following personal injury or as an application for a financial manager or administrator to be appointed (as the result of no valid Enduring Power of Attorney document being in existence).

#### 2. How was the appointment made - checking the wording

Either of the above appointment methods must be supported by documentation; either an Enduring Power of Attorney (not a General Power of Attorney as this ceases when the person loses capacity) or an order made by the Court or Tribunal.

You should request a copy of the appointment documents and any variation made to that appointment. You can then review the terms of the appointment and, if necessary, seek further guidance. The appointment may often be limited to financial decisions (which may further detail whether superannuation is included or excluded; sometimes a separate appointment may be made for decisions relating to super). It may also include personal or health decisions; often referred to as Guardianship related decisions.

#### 3. Is the appointment for a specific timeframe and if so when should it be checked

The appointment may be for a particular timeframe or an appointment that is subject to regular review; for instance if the appointment has been made by a Tribunal that wishes to continue to monitor the way the duties and obligations are being met by the Substituted Decision Maker ('SDM'). Some Tribunals however do not have this review requirement and the appointment remains in place unless challenged.

For an Enduring Power of Attorney it may be that the appointment only commences upon the person losing capacity and there is no other mention of timeframes. It will similarly remain in place unless challenged through a Tribunal or Court.

Where reviews are scheduled/conducted it may be a prudent move to confirm with the relevant body (Tribunal or Court) that the appointment has not been displaced by the latest review. You may also request a copy of the latest orders which confirm this.

#### 4. What is the plan if the SDM passes away or loses capacity

You need to be aware of the plan if the SDM is no longer in the picture and ensure this is recorded on file. Having alternate contact details would also be a wise move during onboarding to ensure continuity of service can be provided to the client irrespective of succession of their SDM.

## What do I need to think about... FOR SMSF ESTABLISHMENT/ONGOING OPERATION

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### 1. Who is your client

It is important to remember that the client is the person for whom the Substituted Decision Maker ('SDM') is acting. The SDM themselves are not your client.

Engagement documents should be prepared to acknowledge the SDM by using words to the effect of:

signed for and on behalf of NAME OF CLIENT by their Attorney NAME OF ATTORNEY appointed under Enduring Power of Attorney dated X/X/XXX of which there is no notice of any revocation

or

signed for and on behalf of NAME OF CLIENT by their Administrator appointed by VCAT orders dated X/X/XXXX

Advice documents, invoices etc should all be prepared/addressed to acknowledge the SDM by using words to the effect of:

NAME OF CLIENT by their attorney/administrator NAME OF ATTORNEY/ADMINISTRATOR, ADDRESS of Attorney/Administrator

### 2. Can the Substituted Decision Maker operate other entities for the person

For establishing an SMSF it is important to get a copy of the proposed trust deed to ensure that you are fully briefed on what the SDM can and cannot do; as amended may be required prior to establishing the SMSF. For ongoing SMSF operation – a similar review is important to ensure all necessary provisions and powers are included in the trust deed for an SDM.

Not all trust deeds will contain 'catch all' phrases that give the same powers of the member to their Legal Personal Representative; some deeds may be a lot more restrictive. You must understand what the SDM will need to be able to do i.e. giving instructions to commence/change a pension, giving instructions as to death benefit nominations (new or amending existing) etc.

For non SMSF structures such as family discretionary trusts, unit trusts, non SMSF superannuation benefits the same review exercise should be carried out to ensure that the structures are workable via an SDM.

### 3. Constitution provisions

Where the SMSF trustee (or even bare trustee as part of a Limited Recourse Borrowing Arrangement) is a company, it is also important to review the company constitution. Are there any provisions which need to be considered based on an SDM taking over for the client if they are presently a director (if this is the case)? For new and pre-existing companies consideration also needs to be given to shareholdings and how this is to be structured. As there are no requirements under super law in this regard this should be part of a conversation to have with the SDM as to the estate planning intentions for the member.

### 4. Money in/Money out and Assessment of Needs

Understanding how money is able to flow in and out of the SMSF (and other vehicles) is important. Having an appreciation of the general needs of your client and their condition is the only way that you can make an assessment. Knowing how the condition might progress, anticipated timeframes, changes to medication, care or residential accommodation are critical for consideration and inclusion in advice.

## What do I need to think about...

### WHEN CONSIDERING LONGER TERM ARRANGEMENTS FOR THE CLIENT

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#### 1. When the Substituted Decision Maker is gone

Have the discussion as to what happens in the absence of the current Substituted Decision Maker ('SDM') for the benefit of your client and continuity of your services to the client. If something was to happen (death, loss of capacity or removal) what is the backup plan? Would another person (perhaps relative, family friend) or professional organisation be the next option? Asking (and recording on the client file) how the decision making will be altered when the current arrangement ends is an important part of the onboarding process. If you fail to ask the question and something happens it can leave you in limbo as to who to contact and who is authorised. Any new appointment must of course be reviewed in the same way outlined above and new engagement documents would also need to be prepared to re-confirm engagement for that particular client. Fee arrangements would also require particular care to be taken in the period of changing between SDM's.

#### 2. When the client passes away

If the client's money or assets are held in any trust structure (including SMSFs), what are the rules for it following death – how are they paid out and to whom? If the client is leaving money or assets in their personal name do they have a Will or may it be important to understand other what outcomes other options may yield i.e. intestacy provisions in the absence of a Will, or seeking a statutory (court made) Will. The latter may prove to be a difficult and costly exercise however may be an option for some clients where a specific outcome is necessary.

#### 3. SMSFs and other structures

Specialist advice may be needed to ensure that the most appropriate structures are used for the client with their specific circumstances and goals. SMSFs, Special Disability Trusts, Superannuation Proceeds Trusts and Testamentary Trusts could be used as part of a strategy to support a person living with disability.

Using structures also has the benefit of continuity beyond the life of a personal controller (provided they are drafted correctly). Considering the needs and particular situation for the client is a critical part of the process. Understanding how money can flow in and out of the structures is of great importance (and whether there is an impact on any benefits paid to the client by the government).

#### 4. Divorce when there is a SDM

Divorce can occur with an SDM signing the required documentation on behalf of the client. Generally it is accepted that an Attorney cannot enter into a marriage however they are able to exercise their decision making to end a marriage.

The impact of divorce may also displace the SDM appointment, particularly if it is the soon to be ex-spouse that was appointed as the SDM. It is not uncommon for the SDM to engage a lawyer to represent the client in this regard (however where the SDM is the soon to be ex-spouse it is likely that a new SDM will need to be appointed before the divorce process can progress).

As always this is a specialist area and care should be taken to engage professionals with the relevant practical experience.

## Information is current as at 1 February 2019

*This paper contains excerpts from an oral presentation, and therefore is not a complete record of the discussion held. No part of this paper should be used elsewhere without prior consent from the author.*

*The information in this document is general information only and cannot be relied upon as a substitute for professional advice. You should seek specific advice relevant to your own circumstances from appropriately qualified persons.*

## FURTHER RESOURCES

*Information regarding disability discrimination*

Australian Human Rights Commission

<https://www.humanrights.gov.au/know-your-rights-disability-discrimination>

*Information to help you service clients*

Australian Network on Disability

Disability etiquette factsheet (note this is generic and not tailored for a service provider)

<https://www.and.org.au/pages/etiquette.html>

*Information on inclusive language*

Australian Network on Disability

Inclusive language factsheet (note this is generic and not tailored for a service provider)

<https://www.and.org.au/pages/inclusive-language.html>

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