



COOPER GRACE WARD
LAWYERS

Audit issues when an SMSF member loses capacity

SMSF Auditors Association of Australia



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Contents

1. Why it matters
2. Auditors requirements
3. Trustees, directors and incapacity
4. Section 17A requirements and how we comply
5. Common deed issues

Why it matters

- Section 17A = Who needs to be the trustee
- Trust deeds – Are they still a member
- Have decisions been validly made



Auditor requirements

Section 17A

- Trustee member rules

Section 103

- Duty to keep minutes & records

Section 104

- Duty to keep change of trustee & director records

Section 104A

- Director/trustee sign declaration within 21 days

Section 126K

- No disqualified person

Regulation 4.09A

- Keep assets separate

Regulation 13.14

- No charges



Auditor requirements

Section 129

Likely a contravention occurred, is occurring or may occur



Reporting to ATO v Trustee

*Cam & Bear Pty Ltd v
McGoldrick*

*Ryan Wealth Holdings Pty Ltd v
Baumgartner*



Incapacity and attorneys

What can an attorney do?

Attorney can look after the affairs of a person

- In accordance with terms of appointment
- Usually once lost capacity, but can start earlier

Regulated on a state by state basis

Attorney can exercise proprietary rights (not personal appointments)

What can an attorney do?

Propriety rights

- Financial decisions generally
- Member decisions
- Binding nominations – *Re Narumon*

Personal

- Testamentary acts
- Trustee decisions
- Directors decisions

Example

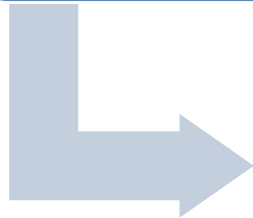
- Don and Mel
- Don 3 children to a prior relation
- Don and Mel have one child together
- SMSF with Don and Mel members and individual trustees
- Don's EPOA appoints his friend Vlad for financial matters
- What can Vlad do if Don loses capacity?
 - Make member decisions?
 - Make trustee decisions?
- What if corporate trustee?
 - Make shareholder decisions?
 - Make director decisions?

Incapacity and SMSFs

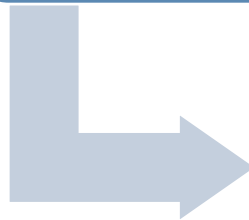
If a trustee/director loses capacity...



Not always
automatically
removed



Practically do not
want them as
trustee/director –
quorum for
meetings?



But if cannot be a
trustee/director,
how can you
remain a
member?

SIS and incapacity

s17A – trustee/member rules


S 17A(3)(b)(ii) - exception where attorney under enduring power of attorney is trustee/director in their place

Compliance, does not make appointment happen

SMSFR 2010/2 – any financial attorney can act (regardless of how document appoints)

ATOID 2010/139 – guardians under State legislation

Incapacity...



<h2>How do we do it?</h2>	
<h2>Individual trustees</h2>	<ul style="list-style-type: none">• Remove existing trustee without capacity• Appoint attorney as trustee• Follow trust deed• Tell ATO• Change title to assets
<h2>Company as trustee</h2>	<ul style="list-style-type: none">• Remove existing director without capacity• Appoint attorney as director• Follow company constitution/Corporations Act• Tell ASIC (Form 484)

Individual trustees – Example 1

- Don and Mel
- Don 3 children to a prior relation
- Don and Mel have one child together
- SMSF with Don and Mel members and individual trustees
- Don's EPOA appoints his friend Vlad for financial matters
- Don loses capacity

Individual trustees – Example 1

- Is Don automatically removed?
 - If not, how do trustees make decisions?
- How are trustees removed and appointed?
- What needs to be done to comply with section 17A?

Individual trustees – Example 2

- Same facts, except
- Don's EPOA appoints Mel & his friend Vlad for financial matters
- If Don loses capacity, what must be done for the SMSF to remain complying?

Corporate trustee – Example 1

- Don and Mel
- Don 3 children to a prior relation
- Don and Mel have one child together
- SMSF with Don and Mel members
- Don and Mel both directors of the corporate trustee
- Don and Mel each hold 1 share in the corporate trustee
- Don's EPOA appoints his friend Vlad for financial matters
- Don loses capacity

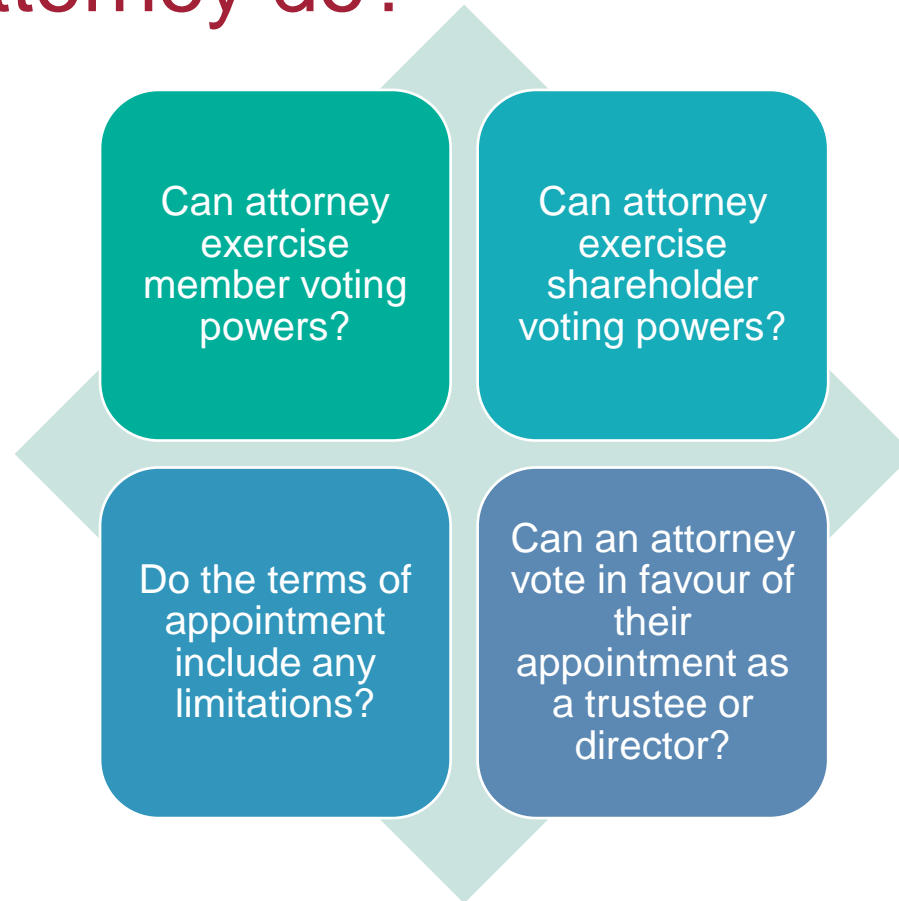
Corporate trustee – Example 1

- Is Don automatically removed?
 - If not, how do directors make decisions?
- How are directors removed and appointed?
- What needs to be done to comply with section 17A?

Corporate trustee – Example 2

- Same facts, except
- Don's EPOA appoints Mel & his friend Vlad for financial matters
- If Don loses capacity, what must be done for the SMSF to remain complying?

What can attorney do?



Ongoing role of EPOA

EPOA determines eligibility to be a director/trustee

Attorney is director/trustee in own right

- Subject to all powers, duties & obligations of directors/trustees
- EPOA does not govern or empower them to make decisions as director/trustee

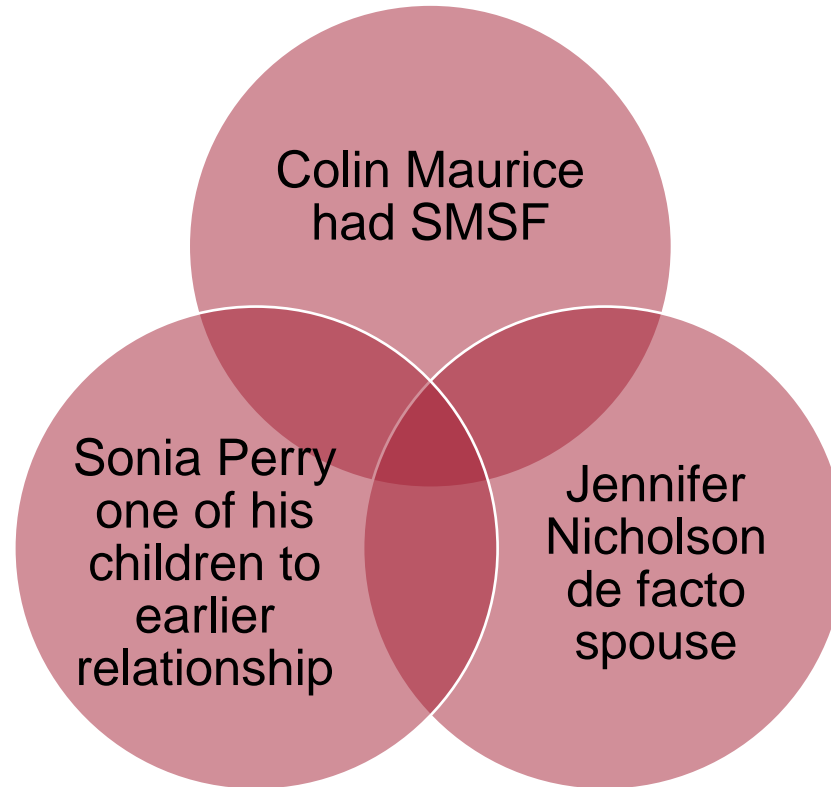
EPOA still relevant for:

- Determining end date of appointment
- Voting on behalf of incapacitated member & shareholder



Incapacity and SMSF trust deeds

Perry v Nicholson [2017] QSC 163



Perry v Nicholson [2017] QSC 163

April 2015
change of trustee
minutes
removing
daughter and
appointing
spouse prepared
by accountants

January 2017
BDBN to spouse

Colin dies March
2017

Late 2016 Colin
diagnosed with
melanoma

February 2017
accountants
prepared change
of trustee deed,
dated April 2015



Perry v Nicholson [2017] QSC 163



Daughter challenged
change of trustee in
April 2015

- She was still trustee (and made death benefit decision)
- BDBN invalid

Court upheld change
of trustee (just)

If not, death benefit
planning would not
have worked

Moss Super Pty Ltd V Hayne *[2008] VSC 158*

- Hayne was a member of the SMSF
- Hayne died
- Moss (Hayne's partner) attempted to change the trustee to Moss Super Pty Ltd
- 'Founder' had power to change the trustee
- Moss was the sole director of the 'Founder'
- Change of trustee signed by Moss as member, not as director of 'Founder'
- Court held change of trustee invalid

Read the deed (repeat twice)...

What does the trust deed
say?

Who are the members?

Does it allow a non-member to
be a trustee/director?

Does it require
member to roll
out if no longer a
trustee/director?

Common deed issues

Recites part of s17A

- But leaves out the attorney bit
- Don't need s17A in deed at all!

Requires all members to be trustees/directors

Removes trustee/company if not a member

Ceases membership if not a trustee/director

Deed provisions example 1

- Clause 5.2 - A company may only be a Trustee if:
 - all the directors of the company are Members; and
 - all Members are directors of the company.
- Clause 5.3 - Notwithstanding the above rules the LPR of a Member may be an alternate director of the Trustee where that Member is also a director of the Trustee but the alternate director may only act as director when the Member is not performing his/her duties and powers as a director
- Clause 10.5 - A person ceases to be a Member upon the earliest to occur of the following:
 - (d) the date that person ceases to be a Trustee or a director of a company that is the Trustee;

Deed provisions example 2

- A person ceases to be a member of the fund as soon as the first of the following happens:
 - The person dies;
 - The person ceases to be a trustee or a director of the trustee of the fund;
 - When payment of all the member's benefits is made to the member or to an approved benefit arrangement for the member; or
 - When benefits to or for the member cease to be payable.
- When a person ceases to be a member of the fund, the person ceases to be a trustee or director of the trustee of the fund (as applicable), if he or she has not already ceased to act in that role.

Deed provisions example 3

- Subject to these Rules and the Act a person or company is removed as a Trustee:
 - if the Trustee is a Member – upon that person ceasing to be a Member;
 - If the Trustee is a Member – upon that Member becoming incapable of acting as Trustee unless a Legal Personal Representative of that Member is appointed as a Trustee in place of that Member;
 - if the Trustee is a company – on that date four months from the time one or all of the directors of the company cease to be Members or the Legal Personal Representatives of Members;
 -

Why it matters?

SMSF needs to satisfy section 17A

Incorrect trustee/director appointment affects validity of all subsequent actions

Invalid actions of attorney

Impact on audit

- Contravention
- Scope of audit opinion

Any questions?





Thank you



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