

What happens if an SMSF member loses capacity ?

It is possible that a member of an SMF loses capacity e.g. due to stroke or old age.

The trustee/member rules for SMSF require that a member of an SMSF also needs to be the 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 arise in the event that a member of an SMSF loses mental capacity.

The Superannuation Industry (Supervision) Act 1993 (SIS Act) (S17A(3)(b)(i) provides that:

“A superannuation fund does not fail 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”.

Self Managed Super Fund in Australia

It is important to note the following:

- A member would need to be 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 place of that member -S17A (10) of the SIS Act.

It may also be appropriate for the member who has lost mental capacity to roll over to another (non- [SMSF](#)) superannuation fund.

Detailed advice should be sought in relation to be abovementioned.

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