

10 steps to protect your SMSF from loss of mental capacity

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If you have an SMSF, you need to plan ahead to ensure that it can keep going if you lose mental capacity due to dementia or other reasons such as suffering a stroke. Otherwise, the fund's assets and operations could be frozen. This may result in losses from being unable to buy or sell investments at the right time, control of the fund falling into the wrong hands (including total strangers), and even the loss of complying fund status with catastrophic tax consequences.

Before the unthinkable happens, here are 10 ways to protect your SMSF from your incapacity:

1. Talk to your financial adviser about what you want with your fund if you lose mental capacity. This should include:

- Who should be in control
- What should happen to the investment strategy and ongoing management of the fund
- Whether the fund should be wound up and your member benefits rolled into an APRA fund
- What should happen to your death benefits, and so forth.

Your adviser should counsel you and co-ordinate further assistance from an accountant or a lawyer where necessary.

2. Put into place a corporate trustee rather than individual trustees. This is easier as there will be no need to change the ownership of the fund assets (which can be a costly and time-consuming exercise) as they will be in the name of the corporate trustee, and all that needs to happen is that you will be replaced as a director.

Enduring Power of Attorney

3. Put into place an Enduring Power of Attorney to appoint someone who you trust to handle your financial affairs and to be appointed in your place as a director of the corporate trustee (or a trustee of the fund if you are not using a company as trustee) if the need arises.

4. Check the SMSF's trust deed to ensure it allows an Enduring Attorney to be appointed in your place as a trustee of the fund or as a director of the corporate trustee. If it doesn't, then have it updated accordingly.

5. Provide written instructions to your Enduring Attorney and the other trustees or directors of the corporate trustee. Let them know that you want your Enduring Attorney to be appointed in your place. Advise their roles and responsibilities and specific instructions regarding issues such as dealing with particular fund investments.

6. Appoint one or more substitute or 'back up' Enduring Attorneys, especially if you appoint your spouse as first choice, as they may be the same age as you and therefore at risk of developing dementia at the same time as you do. In this case, the substitute attorneys should be younger than you (such as one or more of your trusted children).

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Investment and governance strategy

7. The investment strategy should set out what should happen both before and after a member loses capacity, and ensure that the strategy binds all the fund trustees.

8. If you are a director and shareholder in a corporate trustee of the fund, check the constitution of the company to make sure that your Enduring Attorney can exercise the voting power on your shares so that they can be appointed as director in your place.

9. Put into place a Non-lapsing Binding Death Benefit Nomination (and if necessary update the trust deed for your SMSF to allow you to do this). Otherwise, if you lose capacity and your nomination lapses, you will not be able to renew it and the trustee of the fund will have the discretion to pay your death benefit, perhaps to someone you did not intend as a receiver.

10. Make sure your will is properly updated, because once you lose capacity, you can no longer make or change your will. This can be critical in the context of your SMSF, as the only way you can give your super to persons who are not eligible to receive benefits directly from your SMSF is via your will. For instance, unless you were in an interdependency relationship with them or they were your financial dependants, you cannot nominate grandchildren to receive a death benefit directly from your fund. Instead, you have to direct the death benefit to your deceased estate and then make a gift of the death benefit to your grandchildren under your will.

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The ATO provides [guidelines on winding up an SMSF](#), and it's more complicated than most people expect.

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