



## Do BDBNs need to be renewed every three years?

There has always been some uncertainty as to whether binding death benefit nominations (BDBNs) prepared by members of an SMSF last indefinitely. This is due to the relevant legislation not being clear in relation to this point.

Specifically, S.59(1) of the Superannuation Industry (Supervision) Act 1993 (SIS Act) states that only the trustee of a superannuation fund other than an SMSF can exercise discretions under the fund's governing rules.

Taking this literally, this directs that BDBNs are not allowed in an SMSF.

However, S.59(1A) provides that a fund's governing rules can allow a discretion to be exercised by a member in respect of the paying out of death benefits, subject to the trustee complying with any conditions contained in the regulations.

This would appear to contradict S.59(1), and allow the use of a BDBN in an SMSF

In relation to the three-year time frame for BDBNs, regulation 6.17A(7) of the SIS regulations provides that any BDBN given by a member can only last for a maximum of three years.

But it is argued that regulation 6.17A(7) does not apply to SMSFs due to its application to S.59 (as noted above). Because of this, it follows that there is no time limit to apply a BDBN in an SMSF.

This issue was addressed by the ATO in their SMSFD 2008/3, which specifically states that these sections (S.59 and regulation 6.17A) do not apply to SMSFs, and therefore the governing rules of an SMSF may permit members to make BDBNs that are binding on the trustee, whether or not in circumstances that accord with the rules in regulation 6.17A.

However, it must be remembered that an SMSFD issued by the ATO is not law. While it does indicate the ATO's view on this issue, it is not legally binding on any court or tribunal, or even on the Commissioner.

Beyond these legislative issues, the trust deed for the SMSF also needs to be considered. The relevant provisions should be clear that regulation 6.17A (or at least the three year rule contained in that regulation) is not to apply.

Also, of course, a BDBN will only be valid if it provides for a member's death benefits to be left to a "dependant" as defined, or to the member's legal personal representative.

We must always come back to the legislation however, and as stated initially, the treatment of BDBNs in an SMSF is not clear. In the absence of such clarity, it is suggested that the existence of a BDBN is proof of the desire of the member for a trustee to take account. On this basis, its existence will give some support should any question of the distribution of proceeds ever arise.

Further, as to whether a nomination should be renewed every three years, the distribution requirements of a client is an important part of their estate planning and should be reviewed at least annually. In making this a formal part of an SMSF review, renewal can be maintained on at least a three year basis to ensure that no issues arise should the nomination every be called upon.



## Practical compliance guidelines issued regarding SMSF limited recourse loans

On 6 April 2016 the ATO issued Practical Compliance Guideline PCG 2016/5, which sets out 'safe harbours' for limited recourse borrowing arrangements ('LRBAs'), entered into by SMSF trustees to acquire assets for the 2015/16 and 2016/17 income years.

A major consideration is that the taxation non-arm's length income ('NALI') provisions may apply when an SMSF trustee acquires an asset under an LRBA that is not an arm's length dealing.

The ATO accepts that an LRBA structured in accordance with PCG 2016/5 is consistent with an arm's length dealing, and that the NALI provisions do not apply purely because of the terms of the borrowing arrangement.

The Guideline applies to SMSF trustees whose LRBAs meet the relevant legislative requirements, including where the LRBA commenced before 6 April 2016.

### 'Safe Harbours' for loans

The ATO's 'safe harbours' for LRBAs set out the characteristics of relevant loans which, if present, will be accepted as being consistent with an arm's length dealing.

There is one 'safe harbour' for LRBAs used to acquire real property or to refinance a borrowing used to acquire real property, and another 'safe harbour' for LRBAs to acquire shares in a stock exchange listed company or units in a listed trust, or to refinance a borrowing used to acquire such a collection.

To be covered by the 'safe harbour' requirements, LRBAs must meet conditions with regard to:

- ◆ interest rate;
- ◆ whether the interest rate is fixed or variable;
- ◆ term of the loan;
- ◆ the loan to valuation ratio;
- ◆ loan security;
- ◆ the nature and frequency of repayments; and
- ◆ the need for a written loan agreement.

The Guideline notes that if an LRBA does not meet the safe harbour terms, the trustee may still be able to establish (by providing evidence) that it is on arms' length terms.

The ATO expects SMSF trustees to review LRBA arrangements and ensure they are consistent with arm's length dealings by 30 June 2016 or if not, they are terminated (on arm's length terms) by 30 June 2016. If that is done, the ATO will not conduct an income tax review of the SMSF for the 2014/15 year or earlier years purely because the SMSF has entered into an LRBA.

## Paperwork and actuarial requirements for an SMSF pension

One of the main benefits of paying a pension from an SMSF is the tax exemption afforded to the income derived from the assets supporting the pension (provided that the pension meets the pension standards prescribed in the relevant legislation).

However, if a pension is not properly documented, the ATO is likely to conclude that the pension is not a complying pension, and therefore ineligible to claim the tax exemption in respect of income derived from pension assets.

When an SMSF member commences a pension, the SMSF's trustee(s) must decide whether to finance the member's pension using **segregated** or **unsegregated** assets.

A **segregated** asset is an asset that is set aside solely to enable the fund to discharge its pension obligations, whereas an **unsegregated** asset is an asset that simultaneously funds a pension and supports accumulation entitlements in the fund.

In order to claim the tax exemption for income and net capital gains derived from pension assets, an actuarial certificate must generally be obtained by the fund, before the date for lodgment of the SMSF's annual return for the relevant income year.

However, an actuarial certificate is **not** required where there are **segregated pension assets** to support a pension that is prescribed by the regulations.

An issue that often arises is whether an actuarial certificate is required for the income year in which an SMSF **commences** paying a prescribed pension part way during the year.



The ATO has recently advised that where an SMSF commences to pay a prescribed pension part-way through the year (i.e., on a date other than 1 July), an actuarial certificate will not be required in respect of any segregated assets, provided that the fund does not pay any non-prescribed pensions during the income year. This approach is consistent with industry practice.

For support of this position, reference should be made to the ATO's published fact sheet entitled *Actuarial certificate for segregated methods* in which they have clarified their view (i.e., that an actuarial certificate is generally not required under the segregated method, even in the year a prescribed pension commences).

## Still time to prepare for 1 July

Recently, ASIC announced that unless applications were submitted by the end of March for a Limited Australian Financial Services (AFS) Licence, that there was no guarantee of having that application completed by 30 June.

Many accountants took this as meaning they had lost the opportunity to be licensed.

However, this statement was only relevant to those accountants wanting to obtain their own licence direct from ASIC, to make use of the concession to have their practicing certificate provide the experience requirement for that licence.

For those accountants who are considering becoming authorised representatives of an external licence (such as SMSF Advisers Network or InterPrac Financial Planning), the ASIC announcement does not apply.

So those who have yet to gain their accreditation or commit to a particular licence group, you still have time to take action.

If you don't meet the requirements by 1 July 2016 you can still be authorised after that date.

**Just take care that from 1 July you don't provide any clients with direction on their superannuation situation until you are authorised to do so.**

*If you still have yet to complete the required RG146 accreditation go to Pinnacle Financial Services Academy for course to complete to meet your needs:*

[www.pinnacle.edu.au](http://www.pinnacle.edu.au)

*While becoming accredited, you should consider your licensing options. The NTAA offers a solution for those wanting only to continue providing superannuation advice – SMSF Advisers Network. Check out our service at:*

[www.smsfadvisersnetwork.com.au](http://www.smsfadvisersnetwork.com.au)

