

APPOINTING A TRUSTEE OR DIRECTOR – FAQ

2025-26

Document provided by

TOWNSENDS BUSINESS & CORPORATE LAWYERS

Tel 02 8296 6222 www.townsendslaw.com.au

© TL SCAPTEE F- 10 May 2025

Q1 Must the Individual be 18 years or older?

In short, yes. An individual under age 18 cannot be appointed as either a trustee or as a director of the corporate trustee.

Q2 Can the Individual be in financial difficulties?

No. The individual cannot be an insolvent under administration.

Q3 Who is an insolvent under administration?

A person will be an insolvent under administration if:

- (a) they are bankrupt (and have not been discharged from their bankruptcy);
- (b) their property is subject to control by the Official Trustee (or a registered trustee) pursuant to a Court Order made under s50 of the *Bankruptcy Act, 1966*;
- (c) their property is subject to control by the Official Trustee (or registered trustee or solicitor) in accordance with their request pursuant to s188 of the *Bankruptcy Act 1966*, to call a meeting of their creditors for the purpose of entering into a personal insolvency agreement; or
- (d) they have, as a debtor, executed a personal insolvency agreement.

A person who has, as a debtor, entered into a personal insolvency agreement and who has fully performed their obligations under the agreement will not be treated as an insolvent under administration if the trustee of the agreement has provided a certificate under s 232 of the *Bankruptcy Act*, certifying their performance of their obligations under the agreement.

Q4 Must the Individual be qualified?

Yes, they must be qualified in the sense that they are not disqualified either under the *Superannuation Industry (Supervision) Act* or under the *Corporations Act*.

An individual can be disqualified from acting as a trustee or as a director of a corporate trustee of a superannuation fund if:

- (a) they have been convicted of an offence in respect of dishonest conduct (whether in Australia or elsewhere);
- (b) they are an insolvent under administration;
- (c) the Commissioner of Taxation has disqualified them under s126A of the *Superannuation Industry (Supervision) Act*;
- (d) (in case where the individual is to be appointed a director) – they have been disqualified from being a director of a company under the *Corporations Act*.

If they have been disqualified, they cannot (except in limited and special circumstances) be appointed as or to continue to act as either a trustee or as a director of a corporate trustee of a self managed superannuation fund.

Q5 Must the Individual also be a member?

As a general statement, the Individual must also be a member or must become a member. Fund membership and the appointment as a trustee or a director of the company which acts as the Trustee (as the case may be) must occur within six months.

It is important to note that the appointment of the Individual as a trustee or director must be done prior to their admission as a member of the Fund otherwise the Fund may cease to qualify as a *Self Managed Superannuation Fund*.

In special situations, the Individual need not be a member. For example, in the case of a single-member fund, the Individual could be the second trustee/director but need not be a member.

Another situation is where the Individual is acting as a "representative trustee/director" for a member who is under age 18 (and therefore cannot be trustee/director) or who is not mentally competent to act as a trustee/director.

Q6 Can the Individual be a non-resident?

Being an Australian resident is not a prerequisite to being appointed as a trustee or director. However, appointing a non-resident may adversely affect the satisfaction by the fund of the "central management and control" requirement. In order for the fund to qualify as a complying superannuation fund (and thereby enjoy taxation concession), the central management and control of the fund must be located in Australia.

Appointing a non-resident trustee/director may cause the central management and control of the fund to be located outside Australia.

Expert advice should be obtained as to the implications of appointing a non-resident as trustee or director.

Q7 Must the Individual be an Australian citizen or permanent resident?

Being an Australian citizen or permanent resident is not a prerequisite to being appointed as a trustee or director. However, appointing an individual who is a foreign person (ie not an Australian citizen or permanent resident) may cause the fund to be treated as a foreign person/foreign trust for the purposes of the higher transfer duty rates on real estate purchasers and on the higher rate of land tax.

Expert advice should be obtained as to the implications of appointing a non-citizen or non-resident as trustee or director.

Q8. Must the Individual have a Director's Identification Number?

This issue only applies if a company is the trustee of the fund.

To be appointed on or after 5 April 2022, as a director of the corporate trustee, the Individual must have a director's identification number (DIN). This number is unique to the Individual and it is allocated by Australian Business Registry Services.

Application for a DIN is generally made online via the MyGov website and various identification documents (akin to the 100 points test to open a bank account) are required.

The DIN is a 15 digit number which begins with "036" (which is code identifying Australia).

If the individual who is to be appointed as director has been allocated a DIN in a foreign country, they must use that DIN and are neither eligible for nor entitled to apply for an Australian issued DIN.

DINs are not currently provided to or notified to ASIC. The DIN must be provided by the individual to the corporate trustee who must retain details of the DIN.

Q9. Must the Individual make any declaration for the ATO?

The Individual must sign a NAT 71089 – ATO Trustee Declaration form within 21 days of becoming a trustee or director of a company acting as trustee of the self managed superannuation fund.

Q10 What is the ATO Trustee Declaration?

It is a requirement (s104A) of the *Superannuation Industry (Supervision) Act, 1993* that each person appointed as a trustee or as a director of a superannuation fund must sign a declaration that they are aware of their role and responsibilities as a trustee or director. The ATO has summarised the key roles and responsibilities of trustees/directors on their website at <https://www.ato.gov.au/super/self-managed-super-funds/setting-up/appoint-your-trustees/> in the section entitled "What it means to be a trustee or director". This information should be read before signing the declaration.

The declaration is an approved form prepared by the ATO.

The declaration must be signed within 21 days of being appointed and must be retained for as long as the person is a trustee or a director (but in any event for at least 10 years after the self managed superannuation fund winds up).

The auditor of the Fund will normally want to sight the signed declaration as part of the annual audit of the Fund. The signed Declaration is not forwarded to the ATO unless the ATO requests it.

Under the new ATO Penalty Regime, the ATO can impose an administrative penalty of 10 penalty units (\$3,300) for a breach of these requirements.

Q11 What notification must be given to the ATO of an appointment of a trustee/director?

It is a requirement (Reg 11.07AA) of the *Superannuation Industry Regulations, 1994* that certain information (called “registration information”) about each SMSF be provided to the ATO and any changes to the registration information must also be provided to the ATO.

Registration information includes information as to the names of the trustees and directors of SMSFs.

Consequently, upon a change in the trustees/directors (eg by the appointment of a trustee or director), the ATO must be advised of the change. The information required to be provided includes the full name of the Individual, their relationship to the Fund (eg trustee or director), date of birth, sex and tax file number.

Notification must be made within 28 days of the appointment taking place.

Notification can be paper-based (by completing and submitting the ATO form NAT 3036) or electronically online (but only if the Fund has a digital certificate for its correspondence with the ATO).

Q12 Must the consent to be appointed and the resolution be kept?

These documents must be kept by the trustees or trustee for at least 10 years (*this is required s103 of the Superannuation Industry (Supervision) Act 1993*).

Q13 Can a trustee/director cease to be eligible to be a trustee/director?

Yes, if the trustee/director becomes disqualified after being appointed.

In this situation, the affected trustee/director cannot continue to act as trustee/director. Consequently, the affected trustee/director must resign and, if a member, must also cease to be a member by transferring their super balance to another super fund.

They cannot transfer their super balance to another SMSF but must transfer their super balance to a public offer fund, industry fund or a small APRA fund.

The affected trustee/director must cease to be involved with the SMSF within six months of disqualification.

Q14 How does a trustee or a director become disqualified?

Disqualification usually arises from the trustee/director becoming an insolvent under administration – such as becoming bankrupt.

Disqualification can also arise if the trustee/director is convicted of an offence of or arising out of dishonest conduct or if the ATO disqualifies the trustee/director pursuant to s126A of the *Superannuation Industry (Supervision) Act 1993*.

If a director is disqualified under the *Corporations Act, 2001* from being a director or involved in the management of a company, the director will be disqualified from being a director of a corporate trustee of a self managed superannuation fund.

Q15 Can a disqualified trustee/director apply for a concession to continue to act?

There is a limited concession for disqualified trustees/directors. The limited concession only applies if the reason for the disqualification is that the individual has been convicted of an offence which involves dishonesty and the dishonesty involved is not serious (ie the penalty imposed was imprisonment for two years or less or the penalty was a fine of less than \$39,600 – ie less than 120 penalty units).

If the reason for the disqualification is that the individual has become a bankrupt (or otherwise become an insolvent under administration eg by signing, as a debtor, a personal insolvency agreement) then there is no concession.

Similarly, if the reason for the disqualification is that the individual has been disqualified by the ATO under s126A of the *Superannuation Industry (Supervision) Act 1993* or has been subject to a civil penalty order, there is no concession.

If a person is eligible to apply for the concession, the application must be made to the ATO in writing within 14 days after conviction. Certain information must be provided to the ATO.

If an application is made within the 14 days, then the person will be treated as not being disqualified (by reason of the conviction) while the application is pending.

If the ATO decides to grant the concession then the conviction will not be treated as disqualifying the person as a trustee/director.

If the ATO decides not to grant the concession then the person will be treated as being disqualified from the date the ATO decides not to grant the concession.

It should be noted that if the ATO grants the concession, this will not preclude the person from being disqualified if another ground arises.



Could this FAQ be improved?

If so, please let us know by contacting info@supercentral.com.au or info@townsendslaw.com.au.