

# Worrall Moss Martin News

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## Is There a Need for 'Notional Estate' Law Reform in Tasmania? Tasmanian Law Reform Institute Verdict is No

On 4 September 2019, the Tasmanian Law Reform Institute ('**the TLRI**') released its Final Report in whether non-estate assets should be available to fund successful claims against estates under the *Testator's Family Maintenance Act 1912* (Tasmania) ('**the TFM Act**') by introducing new 'notional estate' legislation, or amending existing legislation to introduce 'notional estate' provisions.

**The TFM Act:** The TFM Act enables spouses and children (and sometimes parents) to make a claim against an estate where they consider that they were not properly provided for under a Will or intestacy.

The court can only make provision for an applicant under **the TFM Act** out of assets that are in the deceased's estate. Often there are assets that will not form part of the estate, including property gifted prior to death, or superannuation or life insurance paid directly to beneficiaries.

It also excludes assets held in a trust, including trusts where the deceased held a controlling role during their life. This can result in there being no 'estate' to claim against, or an estate that is so small that making a claim is not practical.

**New South Wales 'Notional Estate Provisions':** In New South Wales, the *Succession Act 2006* (NSW) allows the court to designate non-estate assets as 'notional estate' for the purposes of funding provision for a successful claimant, or to pay legal costs. This extended 'notional estate' can include joint tenancy properties and accounts, superannuation, life insurance proceeds, and trust assets. It



can also allow certain gifts the deceased made within three years of their death to be 'clawed back' and treated as part of the pool of assets. Notional estate laws give the court access to a larger pool of assets from which to fund successful claims than are presently available in Tasmania. They impact upon people's ability to protect their assets from risk of challenge.



New South Wales is the only Australian jurisdiction to have notional estate laws. While the National Committee for Uniform Succession Laws has endorsed the concept, similar laws have not been supported by the Victorian Law Reform Commission or South Australian Law Reform Institute.

**Consultation with the Public and Legal Profession:** In preparing the report, **the TLRI** consulted with specialists of the legal profession, and received submissions from the public about whether the Supreme Court of Tasmania should be able to deem assets as 'notional estate' so that they may be used to fund successful claims.

The responses received from both the public and the legal profession were divided, with many concerned about the potential encroachment by the court on an individual's freedom to decide how their assets should be distributed both during their life, and after their death. The majority of the responses argued that people should be free to choose how their estate is distributed after death.

Interestingly, both the legal profession and the public opinion were split, with submissions from each group providing arguments both in favour of, and against, the introduction of notional estate legislation.

**The Recommendation:** **The TLRI's** Final Report recommended against Tasmania introducing notional estate legislation unless and until nationally uniform laws are enacted. One of the key arguments against the introduction was the potential for notional estate laws to be avoided through "jurisdiction shopping".

Other concerns identified in the Final Report:

- the lack of any evaluation of the effectiveness of the notional estate provisions in New South Wales;
- the potential increase in the frequency, complexity and cost of estate litigation; and
- the impact of the introduction of notional estate provisions on estate planning and tax planning strategies.

**The TLRI's** Final Report emphasised that the asset protection strategies currently adopted by estate planning professionals remain an effective measure to prevent assets from being claimed by potential applicants. The Final Report also reinforces the need to assess what assets form part of the estate when considering the merits of a claim for provision under **the TFM Act**.

For more information, see **the TLRI's** Final Report available (under the notional estates tab) at <https://www.utas.edu.au/law-reform/publications/completed-law-reform-projects>. Kimberley Martin, a director of Worrall Moss Martin Lawyers, was involved in the consultation process, and stars in a video released by **the TLRI** that can be viewed here: [https://www.youtube.com/watch?time\\_continue=3&v=ciixBBpepA4](https://www.youtube.com/watch?time_continue=3&v=ciixBBpepA4).

Worrall Moss Martin Lawyers has specialist skills and experience in both estate planning and estate litigation. If you, or your client, need expert advice and guidance about structuring an estate plan to avoid a potential claim under **the TFM Act** please contact Peter Worrall or Kimberley Martin. If you, or your client, need expert advice and guidance about the eligibility and merits of an actual,

anticipated or potential claim under **the TFM Act** please contact Robert Meredith, Thomas Slatyer or Eve Hickey.

## Self Managed Superannuation Funds: What Can Go Wrong When a Person Loses Capacity?



Although incapacity may be far from the forefront of an individual's mind, particularly when considering the minefield that is self-managed superannuation fund (SMSF) planning and compliance, the importance of proper estate planning for people who have a SMSF cannot be understated. An individual trustee of a SMSF, or a director of a corporate trustee of a SMSF, may lose capacity, and potentially catastrophic consequences could arise if there is inadequate estate planning.

**The Statistics:** Although they have existed for nearly a century, in the past twenty years SMSFs, and the value of funds invested in them, have grown to become one of the biggest elements in Australia's retirement system.

Recent statistics show that:

- the number of Australian SMSFs is 598,429 (up from 210,667 in 2001);[\[1\]](#)
- the estimated assets in Australian SMSFs is \$747 billion (up from \$78 billion in 2001, but down from \$750 billion in June 2018);[\[2\]](#)
- 84.3% of Australian SMSF members are 45 years or older;[\[3\]](#) and
- one third of Australian SMSF trustees have no proper arrangements in place for the proper and compliant control of their SMSF in the event of incapacity.[\[4\]](#)

That final statistic is alarming, and highlights that a particularly important aspect of retirement, succession and estate planning remains an "afterthought" for a large number of SMSF trustees.

**The Issue:** When person loses capacity, they cannot practically continue their role as trustee/director. If there is an inadequate estate plan in place (or no estate plan as the case may be) and a trustee/director loses capacity:

- the SMSF could lose its compliance status, and all operations and assets could be frozen;
- there could be catastrophic tax consequences;
- losses could arise from not being able to buy and sell investments at the right time;
- members may be required to be removed from the SMSF altogether;
- members may be unable to rollover their SMSF funds to a public superannuation fund, as the superannuation regulations require member consent (which cannot be given if the member is incapacitated);
- control of the SMSF may fall into the wrong hands, and result in unintended consequences; and
- significant legal fees could be incurred applying to specialist tribunals to have a person appointed as administrator for the person who has lost capacity.

**Our Advice:** Worrall Moss Martin Lawyers recommends that all clients who have a SMSF consider the following estate planning documents and strategies.

- Every member and trustee/director should have an **Enduring Power of Attorney** (drafted to suit their specific circumstances) in place that appoints one or more attorneys (and one or more substitute attorneys) to manage their financial affairs and make decisions on their behalf. Under superannuation legislation, an Enduring Power of Attorney is the key document that allows a fund to continue to qualify as a SMSF in the event that a member suffers incapacity and can no longer be a trustee/director.

When completing the Enduring Power of Attorney, important questions that should be considered include:

- who should be appointed as an attorney?
  - if more than one Attorney is appointed together, should they be required to act jointly or alone?
  - should the powers of the Attorney be restricted?
  - if the Attorney can act alone, should they be required to consult with, or report to, each other (or another person)?
- A full and proper review of **the governing rules of the SMSF** must be undertaken to ensure that: it contains proper provisions for the succession of the trustees; any bespoke clauses are appropriate given each member's circumstances; and it does not include provisions that would contradict the appointment of an Attorney as a trustee/director.

Unfortunately, the rules and provisions in SMSF governing rules are extremely varied. There are hundreds of different providers who "specialise" in superannuation, and who develop their own set of governing rules/provisions for SMSFs. In many instances, these providers implement bespoke requirements that may not suit every SMSF or SMSF member and trustee/director. Care must be taken when varying and updating the governing rules to ensure that specific provisions are not lost.

- Where the trustee of the SMSF is a corporate trustee, in addition to the first two estate planning documents/strategies, it is necessary that a full and proper review of the **company constitution** be undertaken to ensure that:
  - it contains proper provisions for the succession of the directors;
  - it contains adequate provisions for the control of an incapacitated member's shares; and
  - all provisions and processes are capable of being complied with when appointing a new director, particularly in circumstances where a member's Attorney can become a director on the member's incapacity.

Although these documents and strategies are vital, they do not represent the totality of what should be considered, and put in place, for proper estate and succession planning for a SMSF. Other documents that should be considered include:

- a non-lapsing binding death benefit nomination (BDBN);
- a set of instructions that confirms the intention of a member in the event of their incapacity;
- a binding investment strategy that provides for what happens when a member loses capacity; and
- an up-to-date modern Will that (where appropriate):

- contains provisions (even if only as a backup) for the distribution of any superannuation death benefits that form part of the estate;
- deals properly with any shares in any corporate trustee company; and
- provides for an adjustment between beneficiaries, where a distribution of superannuation is made that alters the overall intended division of assets.

This material is taken from a detailed paper and webinar by Director, Kimberley Martin titled "Managing the Estate Plan When a Trustee or Corporate Trustee Director of a SMSF Loses Capacity". Kimberley has specialist knowledge in the area of SMSFs, including assisting clients to put an effective and comprehensive plan in place to deal with the incapacity of a SMSF trustee or director. Please contact Kimberley if you wish to discuss any matters relating to SMSFs.

[1] Australian Taxation Office, *Self-managed super fund quarterly statistical report - March 2019*, available at: <https://www.ato.gov.au/Super/Sup/Highlights--SMSF-quarterly-statistical-report-March-2019/>.

[2] Ibid.

[3] Australian Taxation Office, *Self-managed super fund quarterly statistical report - June 2018*, available at: <https://www.ato.gov.au/Super/Sup/Highlights--SMSF-quarterly-statistical-report-June-2018/>.

[4] Australian Securities & Investment Commission, *Report 575 SMSFs: Improving the quality of advice and member experiences*, June 2018, page 79.

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## Further Information

**Our Website:**

A wealth of information in relation to estate and commercial matters can

be found at our website [www.pwl.com.au](http://www.pwl.com.au)

**Contributions:**

Contributions and suggestions from Worrall Moss Martin News readers are always appreciated. Email us at [info@pwl.com.au](mailto:info@pwl.com.au)

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