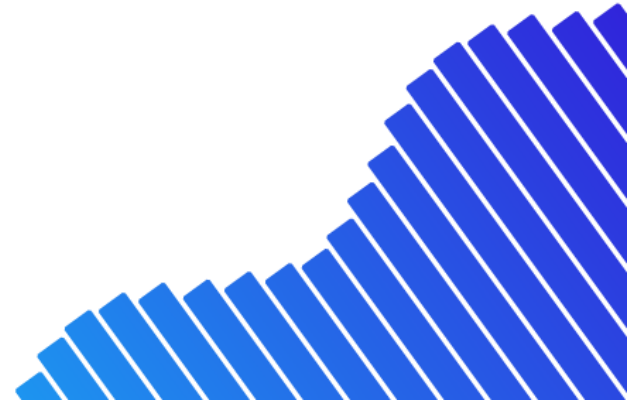


# Case Summary

Written by The Tax Institute's Tax Policy and Advocacy Team

Correct as of 8 July 2022



## Hill v Zuda Pty Ltd – Validity of a binding death benefit nomination

[Hill v Zuda Pty Ltd](#) [2022] HCA 21

High Court of Australia

Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ

Date: 15 June 2022

Decision: in favour of the Respondents

### Synopsis of decision

The High Court of Australia (HCA) has dismissed this appeal and confirmed the requirements in regulation 6.17A of the *Superannuation Industry (Supervision) Regulations 1994 (SISR)* – that prescribe the requirements for a binding death benefit nomination (BDBN) to be valid – do not apply to self-managed superannuation funds (SMSFs). The case confirms reg 6.17A is made specifically for the purposes of section 59(1A) of the *Superannuation Industry (Supervision) Act 1993 (SISA)* and that provision excludes SMSFs.

The High Court's finding provides SMSF trustees and members with clarity by removing any ambiguity in the interpretation as to the application of the legislation. Although plainly written, the industry has lacked confidence as to the strictures associated with the making of a valid BDBN that is binding on the trustee.

### Facts

#### Background

Zuda Pty Ltd (**Zuda** or **the Respondent**) was the corporate trustee of the Holly Superannuation Fund (**the Fund**), being an SMSF. The Fund was created by a deed dated 14 June 2000 (**the Trust Deed**) and had two members, Mr Sodhy and his de facto partner Ms Murray, who acted as directors for Zuda. Ms Hill (**the Appellant**) is the only child of Mr Sodhy.

On 13 December 2011, the Trust Deed was amended by a Deed (**amending Deed**) that replaced the rules governing the Fund. Clause 5 and 6 of the amending Deed, described as being a BDBN clause, required Zuda to distribute the deceased member's balance to the surviving member if either Mr Sodhy or Ms Murray died. Mr Sodhy died on 22 November 2016.

In the Supreme Court of Western Australia, Ms Hill sought declaratory and injunctive relief against Ms Murray and Zuda under the *Family Provision Act 1972* (WA). Ms Hill contended that the BDBN was invalid and not binding on the trustee as it was not laid out in the required form as prescribed by reg 6.17A(6)(b) or (c) of the SISR and did not comply with the time-bound provisions of reg 6.17A(7)(a) of the SISR.

## Legislative background

It is helpful to understand the legislative framework governing the making of BDBNs, as the High Court's reasoning hinges on interpreting and construing the relevant provisions and their interactions. The regulation of superannuation funds is governed by the SISA and the SISR.

Subsections 31(1) and 32(1) of the SISA allow the SISR to prescribe standards applying to regulated superannuation funds and approved deposit funds (**ADFs**) respectively. Trustees are required to ensure that the superannuation fund complies with all standards applicable to its operations by section 34 of the SISA.<sup>1</sup>

Relevantly, section 59(1A) of the SISA enables a fund's governing rules to permit the creation of BDBNs. The section allows members to provide a notice that requires the trustee to distribute their death benefits to their legal personal representative and or specified dependants. In other words, provided the notice is made in accordance with the regulatory requirements, it can override the trustee's discretion when it comes to the distribution of a member's death benefits.

The requirements of section 59(1) apply to superannuation funds other than SMSFs. As the operation of section 59(1) is dependent on section 59(1A), section 59(1A) also does not apply to SMSFs. Consequently, the standards in the SISR governing the conduct of trustees and notices relating to BDBNs do not apply to SMSFs.<sup>2</sup>

## SIS REGULATIONS

Regulation 6.17A of the SISR contains the requirements and standards relevant for a BDBN to be valid. Notable aspects of reg 6.17A include the following:

- The standards in reg 6.17A apply to regulated superannuation funds and ADFs.<sup>3</sup>
- In relation to the contents of the notice:<sup>4</sup>
  - the persons identified in the notice must be the member's legal representatives or dependents; and

---

<sup>1</sup> *Hill v Zuda Pty Ltd* [2022] HCA 21 at [8].

<sup>2</sup> *Ibid* at [12].

<sup>3</sup> Subreg 6.17A(1) of the SISR.

<sup>4</sup> *Ibid*, subreg 6.17A(4).

- the share of the benefits to be paid to the above persons must be certain or readily ascertainable from the notice.
- The form of the notice must:<sup>5</sup>
  - be in writing;<sup>6</sup>
  - be signed and dated in the presence of two witnesses<sup>7</sup>; and
  - contain a declaration signed and dated by the witnesses stating that the notice was signed in their presence.<sup>8</sup>
- Each notice lasts for three years after the day it was first signed, confirmed or amended by the member unless it is revoked earlier. The governing rules of the fund may reduce the three-year period.<sup>9</sup>

## WA Supreme Court decision

In [Hill v Zuda Pty Ltd](#) [2021] WASCA 59, the WA Supreme Court dismissed Ms Hill's case and held that reg 6.17A of the SISR did not apply to an SMSF. Thus, although the BDBN in the Fund was not in the approved form or made on time, it was still valid because the relevant requirements did not apply.

The Supreme Court reached this decision based on similar decisions concerning reg 6.17A of the SISR in the Supreme Courts of Queensland and South Australia.<sup>10</sup>

The Appellant then sought and was granted special leave to appeal the decision of the WA Supreme Court to the High Court.

## Decision

The High Court unanimously dismissed the appeal, finding that the standards relating to BDBNs under reg 6.17A of the SISR do not apply to SMSFs.

Their Honours began by observing that reg 6.17A was made for two complementary purposes:

1. Subregulations 6.17A(4) to (7) were made for the purposes of section 31(1) and 32(1) of the SISA. This means that the trustee of every regulated superannuation fund and ADF to which reg 6.17A applies must comply with its terms.<sup>11</sup>

---

<sup>5</sup> Ibid, subreg 6.17A(6).

<sup>6</sup> Ibid, subreg 6.17A(6)(a).

<sup>7</sup> See Ibid, subreg 6.17A(6)(b) for further details of legitimate witnesses.

<sup>8</sup> See Ibid, subreg 6.17A(6)(c) for further details on the form of the declaration.

<sup>9</sup> Ibid, subreg 6.17A(7).

<sup>10</sup> *Hill v Zuda Pty Ltd*, at [23].

<sup>11</sup> Ibid, at [28].

2. Subregulations 6.17A(2) and (3) were made for the purposes of section 59(1A) of the SISA. This means that a governing rule of a regulated superannuation fund to which it applies is invalid if it purports to confer a discretion on a member that does not comply with the conditions of reg 6.17A of the SISR or section 59(1) of the SISA.<sup>12</sup>

The High Court rejected the Appellant's assertion that reg 6.17A is applicable to all regulated superannuation funds, including SMSFs. Their Honours traced backwards, finding that subreg 6.17A(2) ties the standards under reg 6.17A to the operation of subsection 59(1) of the SISA. As noted above, subsection 59(1) does not apply to SMSFs. Accordingly their Honours determined that subreg 6.17A(2) also does not apply to SMSFs. Similar reasoning was extended to the rest of reg 6.17A.<sup>13</sup> In confirming this view, the High Court cited the explanatory materials which state that subreg 6.17A(4) is the operating standard for the application of s 59(1) of the SISA.<sup>14</sup>

## Significance of the decision

### BDBNs and SMSFs

The issue of whether BDBNs must comply with the requirements under reg 6.17A of the SISR has been a contentious and unresolved issue for many years. The High Court's decision in the present case brings clarity and certainty to SMSF members and their families, as it confirms that the validity of BDBNs is governed by the trust deed and the fund's governing rules in the context of SMSFs.

Although the need to re-confirm BDBNs makes sense in the context of a large, regulated superannuation fund where the trustee is unknown to the members, members of an SMSF are also the directors of the corporate trustee of the SMSF or the trustees themselves, making the re-confirmation process seem superfluous. The High Court also shared these views, noting that 'the purposes of reg 6.17A – enabling members to compel trustees to distribute death benefits in accordance with their wishes and ensuring that members have sufficient information – are inapt to administration of an SMSF.'<sup>15</sup>

---

<sup>12</sup> Ibid, at [29].

<sup>13</sup> Ibid, at [30].

<sup>14</sup> Ibid, at [31].

<sup>15</sup> Ibid, at [32].

## Maximum period for BDBNs

Subregulation 6.17A(7) of the SISR provides that the maximum period for a BDBN is generally three years (unless the governing rules of the fund prescribe a shorter period), after which point it will lapse unless it is re-confirmed or amended by the relevant member. The High Court's decision in the present case means that SMSFs are not bound by the above rule and may allow BDBNs to be non-lapsing where the trust instrument allows as such. Other requirements such as having two witnesses present are also irrelevant to an SMSF where the trust instrument for the SMSF permits this.

In practice, this case is a timely reminder for SMSF members and their advisers to review their existing BDBNs and trust instruments to ensure that they are non-lapsing, are valid and appropriately reflect the members' wishes. Failure to do so may result in a member's BDBN being invalid and therefore unenforceable before the courts.

## Is it plain sailing from here for SMSFs?

This case has ensured the primacy of the trust deed when a SMSF member wishes to make a BDBN and therefore, the terms of the deed must be read and understood. Where a deed has been amended over time, the deed history is important to ensure that the current variation is valid and enforceable.

For example, if a SMSF trustee has requested the deed be amended and the document provider has not requested a copy of the current deed, extra care is indicated as a deed can only be made in accordance with the amendment power which must be mapped back to the original deed.

Death benefits occur after the member can no longer have a say in the destination of the capital so any dispute will be resolved by looking at the fund's governing rules in conjunction with legislative requirements. Resolution of SMSF death benefit disputes in favour of the appellant is often due to weaknesses in the history of the trust deed, subsequent amendments or, documents executed without consulting the trust deed.

Accordingly, ensuring the deed is sound is the next frontier for SMSF trustees.

## Further guidance and information

If you have any specific concerns that have not been outlined above, please email [taxpolicy@taxinstitute.com.au](mailto:taxpolicy@taxinstitute.com.au).

**DISCLAIMER:** The material and opinions in this article should not be used or treated as professional advice and readers should rely on their own enquiries in making any decisions concerning their own interests.

© 1996-2021 The Tax Institute (ABN 45 008 392 372 (PRV14016)).  
All rights reserved. The Tax Institute is a Recognised Tax Agent Association (RTAA) under the *Tax Agent Services Regulations 2009*.

