

# SELF-MANAGED SUPER FUND (SMSF) WILL

NIU OVERHEAD SOLUTION SUPER FUND

FERESHTEH LEILIABADI

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# PRODUCT DISCLOSURE STATEMENT FOR THE SMSF WILL

NB: The SMSF Will is a member's set of "Binding Death Benefit Directions and Nominations" and may be referred to as just the "SMSF Will".

## 1. Introduction

"The payment of death benefits from a superannuation fund is determined in accordance with the governing rules of the superannuation fund and not in accordance with the terms of the deceased's will." *The Commissioner of Taxation - SMSFD 2008/D1*

Estate planning is the process of planning and documenting a person's wishes for the distribution of all assets owned and controlled by the deceased at the time of death. But take a look at the Commissioner's statement above – look hard! If you have a SMSF then any normal will or estate planning that you may have completed has no impact on a SMSF. So let's compartmentalise SMSF estate planning – what is it?

SMSF estate planning is the process of planning and documenting a member's wishes in relation to the distribution of a deceased member's superannuation interests, both accumulation and pension to their dependants — including non-dependant children, as well as their legal estate.

### ❖ Case study — SMSF Estate Planning Disaster

The father of a family died of a sudden heart attack at age 70 in November 2018. There was no pain and according to his family he lived his life to the fullest. The funeral was attended by a wide circle of friends and family, but only close family were invited to the reading of the father's legal will. The father left behind a house that was jointly owned with his wife, a portfolio of \$200,000 in blue chip shares and an account-based pension in the family SMSF which had a balance of \$850,000. His wife was the only other member of the family SMSF with a small superannuation fund account balance.

In his will, which had been recently made by the family lawyer who claimed his estate planning expertise, the eldest of his three sons was appointed as executor, essentially the person to carry out the wishes of his will. His wishes were that his wife be able to live in the house for the rest of her life or for as long as she desires. The executor was also to provide financial support to her for life — any assets remaining after she dies were to be split equally among their children. The father had not made any directions regarding his superannuation believing upon the advice of his lawyer that his superannuation would automatically pass to his legal estate for distribution as part of his estate via the will.

In effect, the will has pitted the children against his wife and left one of the children in full control of his estate. If the child executor looks after his mother like his father wanted, he and his brothers may see their inheritance being spent? Or, the executor may decide to provide his mother with very little money by investing in capital growth assets so he and his brothers receive more on her death. Is it possible to create a balance where everyone is happy?

What happens when one of the boy's spouses becomes involved? What happens if one of the boys feels that his father should have looked after him more because of his financial predicament and takes the matter to the Supreme Court?

Unlike the Commissioner of Taxation, many people and lawyers don't understand that the father's superannuation benefits cannot be dealt with in a will.

In terms of the distribution of the father's superannuation benefits, it is a matter for the trustee of the fund solely to handle the superannuation benefits of the deceased in line with what is in the governing rules of the fund, and the SMSF Will made by the father and held by the trustee. If a SMSF Will or other direction has not been lodged with the trustee, the trustee has complete discretion to deal with the benefits as they see fit including giving it to themselves if they are a non-dependant adult child — see *Katz v Grossman [2005] NSWSC 934*.

In the current case, the remaining trustee upon the member's death is the deceased member's wife. With no SMSF Will in place, she as trustee has full power over the disposition of his superannuation benefits. In this instance, she could convert the deceased member's account-based pension into a lump sum and pay it to the estate where the executor could look after it. Alternatively, she could continue paying her husband's pension to her in line with his desire to look after her for life. On her demise, she may pass all of her superannuation benefits to charity and there is little her children can do about it despite their father's wishes.

The children have almost no rights of legal redress against the trustee. Outside of a SMSF, the Australian Financial Complaints Authority (AFCA) which encompasses the Superannuation Complaints Tribunal provides dependants and others who feel as though they have been hard done by in terms of the distribution of a deceased member's superannuation benefits with a legal forum to challenge a trustee's decision. However, this is not the case with SMSFs which are exempted from the jurisdiction of the AFCA.

This scenario is an example of many family SMSF estates. Moreover, SMSF estate planning can become extremely complicated if second and third marriages as well as de facto relationships are involved, and there are children from different relationships.

## 2. Key elements of an effective SMSF Estate Plan

Creating an effective SMSF estate plan can be a long and drawn out task, requiring great skill of your SMSF adviser to get to the right issues as well as ensuring that all contingencies are covered. Great care and time needs to go into developing any SMSF estate plan and, more importantly, designing and documenting it.

The key elements of an estate plan are to:

- determine what is important to the SMSF member in relation to looking after their family and dependants in the event of their death;
- determine who is going to control the distribution of the deceased member's superannuation interests as superannuation benefits upon the person's death;
- create a blueprint to deliver the desired SMSF estate planning goals using the right combination of vehicles and life insurance if need be;
- make sure the plan is simple, certain and easy for all parties to understand before the person dies;
- ensure the person or persons left in charge of implementing the plan on behalf of the deceased know what they are doing or use experienced advisers to deliver the plan. For a SMSF, this is the trustee of the fund;
- ensure the SMSF estate plan is tax effective; and
- ensure that it complies with the laws and any chance of legal disputation is minimised.

## 3. Payment of Death Benefits

For the most part, SMSF estate planning can be carried out via the direct transfer of a deceased member's superannuation interests from their family SMSF. This may be by way of a lump sum or pension — although there are legal limitations for the trustee of a fund paying an income stream or pension. The SMSF strategic possibilities for a member of a fund in terms of their SMSF estate planning are seen in the following table:

**Table 1: The Payment of Death Benefits to a Member's SMSF estate**

<b>Beneficiary</b>	<b>Allowable Superannuation Benefit</b>
Spouse	Lump sum, income stream and/or both
Dependant child under the age of 18	Lump sum, income stream and/or both. However, any income stream must cease by age 25
Dependant child between the ages of 18 and 25	Lump sum, income stream and/or both. However, any income stream must cease by age 25
Dependant grandchild	Lump sum, income stream and/or both
Non-dependant grandchild	Lump sum via the legal estate
Dependant child over the age of 25	Lump sum
Non-dependant child over the age of 18	Lump sum
Non-dependant (not a child of the member)	Lump sum via the legal estate
Legal estate	Lump sum

#### **4. Who is a Dependant?**

The sole purpose test provides that the Trustee of a SMSF can pay death benefits to a “dependant” upon the death of a member. There are different definitions of dependant for SISA and ITAA97. The above table on Payment of Death Benefits – looks at SISA which includes a child as a dependant even though they may not be financially dependant. For tax purposes as a dependant receives favourable taxation treatment the Government in its wisdom provides a much narrower definition.

A death benefits dependant for taxation purposes includes:

- a deceased person’s spouse or former spouse; or
- a deceased person’s child, aged less than 18; or
- any other person with whom the deceased person had an interdependency relationship just before he or she died; or
- any other person who was a dependant of the deceased person just before he or she died — that is a financial dependant.

It also includes someone receiving a super lump sum because the deceased died in the line of duty as a member of:

- the defence force;
- the Australian Federal Police;
- the police force of a state or territory;
- a protective service officer; or
- the deceased member's former spouse or de facto spouse.

The meaning of “interdependent relationship” has been described as “one of continuing mutual commitment to financial and emotional support between two people who reside together. The definition will also include a person with a disability who may live in an institution but is nevertheless interdependent with the deceased. For example, two elderly sisters who reside together and are interdependent will be able to receive each other’s superannuation benefits tax-free. Similarly, an adult child who resides with and cares for an elderly parent will be eligible for tax-free superannuation benefits upon the death of the parent.”

#### **❖ Who is a Financial Dependant**

The issue of who is a financial dependant has occupied the court’s mind for more than a century in relation to workers compensation, taxation and superannuation matters. For super there have been two significant cases concerning the meaning of financial dependant, for the purposes of the Superannuation Laws — *Malek v FC of T 99 ATC 2294* and *Faull v Superannuation Complaints Tribunal [1999] NSWSC 1137*.

In *Malek's case*, Antoine Malek was aged 25 when he died. He was single, had no children and, prior to his death, he and his widowed mother lived together. Mrs Malek received a disability support pension of approximately \$153 per week, but her accountant estimated that Antoine Malek contributed approximately \$258 per week to Mrs Malek's living expenses for food, mortgage payments, taxi fares, medical expenses and other bills.

The tribunal reviewed the cases on financial dependence and in its decision cited the following authoritative statement from Gibbs J of the High Court:

Gibbs J said in *Aafjes v Kearney* (1976) 180 CLR 1999 at page 207:

"... In *Kauri Timber Co. (Tas.) Pty. Ltd. V. Reeman* (1973) 128 CLR 177 at pp 188–189, I accepted that one person is dependent on another for support if the former in fact depends on the latter for support even though he does not need to do so and could have provided some or all of his necessities from another source. I adhere to that view."

In the end, the Administrative Appeals Tribunal held that Mrs Malek was a financial dependant because the financial support she received from her son maintained her normal standard of living. Moreover, she was reliant on the regular continuous contribution of the other person to maintain that standard.

In *Faull's case*, the Court held that the mother of 19-year-old Llewellyn Faull was a financial dependant of his at the time of his death, and determined that his death benefit in its entirety should be paid to her. At the time of her son's death, Mrs Faull had regular employment that earned her income of \$30,000 pa. Her wages were supplemented by an amount of \$30 per week paid by her son as board and lodging. Although the sum paid to Mrs Faull every week by her son was small, the court stated that "the payment of that amount augmented her other income and, to that extent, she was dependent upon the deceased for the receipt of some of her income. Accordingly, she was partially dependent upon the payments made by the deceased".

The courts have looked at financial dependence in the broad sense of the meaning, and concluded that partial dependence and reliance is enough to establish financial dependence for the purposes of SISA provided the payment is ongoing and recurring.

#### ❖ Regulator Guideline

APRA has considered the issue of financial dependence and in its payments standard guideline — APRA Guideline No.I.C.2 stated the following:

"There is no need for one person to be wholly dependent upon another for that person to be a 'dependant' for the purposes of the payment standards. Financial dependency can be established where a person relies wholly or in part on another for his or her means of subsistence. Nor must the recipient show a need for the money received from the deceased member in order to qualify as a dependant. Moreover, since partial financial dependency can generally be sufficient to establish a relationship of dependence, it is possible for two persons to be dependent on each other for the purposes of the payment standards."



Given the significance to the Commissioner of Taxation of the meaning of financial dependence, expect this area of the superannuation laws to be hotly contested in the courts over the next decade or more.

## **5. Why a Lump Sum may not be suitable for some Beneficiaries**

A lump sum can be extremely popular to the recipient, but it can also prove a financial disaster. Consider whether a parent, on their death, should provide a lump sum to the following children:

- A child under age 18, resulting in the remaining parent or guardian having full control of where and how the lump sum is invested, and how much is to be dedicated to looking after the child. This may be exacerbated if the remaining parent had a dysfunctional relationship with the deceased member as a consequence of a divorce or relationship split.
- An adult child who is currently in a dysfunctional or concerning relationship. On death, any lump sum payment will become part of matrimonial property if the child is married (or joint property if they are in a de facto relationship). Is this what the deceased member wanted?
- A child with a history of alcohol, spending, drug or criminal problems — irrespective of their age. Is it appropriate to leave a lump sum with someone who may just spend it on the wrong things?
- A child with a business. The danger of the lump sum payment is that the child may use it for the business — although this may be good for business expansion it may place the lump sum at risk. An income stream may mean that the business does not need to pay out as much cash flow to the owners, and has a better chance to survive and flourish.
- A child or person with no financial common sense.

However, the superannuation laws limit the payment of an income stream to some dependants and also non-dependants of a deceased member. As such, the provision of an income stream needs to be by way of a lump sum death benefit payment to the legal estate for allocation to a testamentary trust or a Leading Member Discretionary Trust.

## **6. SMSF Estate Planning Taxation**

Where superannuation benefits are paid as a lump sum or income stream to a dependant, non-dependant or the legal estate of a deceased beneficiary, they may be taxed. This will depend upon the recipient and also the component of the superannuation benefit paid. As we have seen when looking at the payment of superannuation benefits from a SMSF they may consist of:

- tax-free component;
- taxable component; and
- untaxed element of the taxable component.



Where the recipient of the superannuation benefit is the trustee of the deceased member's legal estate, the taxation of the benefit or part of the benefit will relate to the intended distribution by the trustee of the benefit or part of the benefit. The taxation of the benefit will follow the intended or actual distribution to a dependant or non-dependant of the deceased as shown in the following tables:

**Table 2 — The Taxation of Death Benefit Lump sums**

Benefit component	Dependant*	Non-dependant
Tax-free component	Nil	Nil
Taxable component	Nil	17%
Untaxed element of the Taxable component <sup>1</sup>	Nil	32%

\*Dependant means a tax dependant

**Table 3 — the Taxation of the Taxable Component of Death Benefit Pensions**

Benefit component	Deceased died aged 60 or above or dependant aged 60 or above	Deceased died aged under 60 and dependant aged under 60
Tax-free component	Nil	Nil
Taxable component	Nil	Assessable income + 15% tax offset
Untaxed element of the taxable component	Assessable income + 10% tax offset	Assessable income

**Warning:** A reversionary income stream can only be paid to dependants of the deceased member and only until age 25 where the dependant is a child, after which time the income stream must be commuted.

#### ❖ Pension Transfer Balance Limits and Death Benefits

A member in receipt of a pension may make a pension auto-reversionary meaning that upon their death, it transfers automatically to a spouse or dependant, as allowed under SISA. If there is no auto-reversionary the member or Trustee may have directions via a SMSF Will, binding death benefit nomination or Trustee's discretion to pay a reversionary beneficiary a pension.

As the beneficiaries will be in receipt of a new pension, sourced from the deceased member, it is to be tested against their Personal Transfer Balance Amount just like any new pension. However, for auto-reversionary beneficiaries the testing is delayed - see Commissioner's LCG2017/3:

<sup>1</sup> The untaxed element of a taxable component may arise pursuant to s 307-290 of the ITAA 97 where the trustee of the fund has claimed a tax deduction in relation to life insurance premiums in the fund or has self insured its members in the fund. The untaxed element of the taxable component is to be determined according to the formula in s 307-290(3). Ensure SMSF legal advice is taken by the Trustee of the SMSF where any member dies and there is an insurance payout.

"If you are the recipient of a reversionary death benefit income stream, you are a reversionary beneficiary and a transfer balance credit arises in your transfer balance account. The time at which the credit arises is:

- for death benefit income streams commencing before 1 July 2017 - the later of 1 July 2017 or 12 months from the day the death benefit income stream first became payable; and
- for death benefit income streams commencing on or after 1 July 2017 - 12 months from the day (the starting day) when you started to be the retirement phase recipient of the death benefit income stream."

## **8. Binding Nominations and Directions in a SMSF**

The Commissioner has stated on a number of occasions that the super laws that establish binding death benefit nominations - do not apply to SMSFs. In particular he has stated at SMSFR 2009/3 that:

*"Section 59 of the Superannuation Industry (Supervision) Act 1993 (SISA) and Superannuation Industry (Supervision) Regulations 1994 (SISR) regulation 6.17A do not apply to SMSFs. This means that the governing rules of a SMSF may permit members to make death benefit nominations that are binding on the trustee."*

This means that before any death benefit nomination or direction is made, the trustee of the fund, the member concerned and their advisor should review the current SMSF deed and governing rules to assess what type of death benefit nominations, if any apply. Remember if the trust deed is silent on the matter, no death benefit nomination is applicable. In addition, if the trust deed provides that the trustee may make a binding death benefit nomination in accordance with the SISA, then as the death benefit nomination rules under SISA to SMSFs, this clause has no meaning and once again, the trustee cannot offer a member a binding death benefit nomination.

An acceptable SMSF trust deed would have as a bare minimum rules enabling a binding death benefit nomination and more importantly specific governing rules that allow a binding death benefit direction – a document that once accepted by the trustee of the fund, becomes a binding, non-revocable (except at the member's request) direction by a member allowing the passing of specific superannuation interests to specific dependants, the deceased member's legal estate.

The value of a binding direction over a binding death benefit nomination is that, like a will, it may provide for the passing of specific assets when the Trustee pays any death benefits. It may also provide the Trustee with directions in relation to the reserves of a fund, the appointment adviser dealing with the payment of any of the deceased member's death benefits and for what fee. It is a detailed, but not complex document. In a similar form to a Will this is a SMSF Will.

## 9. The LightYear SMSF and the Leading Member SMSF Deed for Family SMSF Wealth Protection

### ❖ Introduction

The opportunity of legal challenge is dramatically reduced when death benefits are not paid or payable to the legal estate of a deceased member by the trustee of a complying SMSF but directly to a beneficiary as specified by the deceased member. The payment of superannuation death benefits are not subject to the provisions of the member's will but should be catered for in a SMSF binding direction which we call a SMSF Will as it is similar in shape and form to a Will.

### ❖ What is a SMSF Will?

A SMSF Will consisting of a set of Binding Directions and Nominations is an important legal document that becomes part of the governing rules of the fund detailing how a member seeks to provide superannuation death benefits to their dependants, non-dependants or legal estate in the event of their death. Following on from discussions above, there are several possibilities in a SMSF Will:

- the provision of a superannuation lump sum — by way of cash or specific assets to dependants and/or the deceased member's legal estate;
- the payment of a superannuation income stream to dependants (as defined for taxation purposes) of a deceased member subject to SISA;
- the payment of a reversionary superannuation income stream to a dependant subject to SISA. A reversionary pension is the continuation of an existing superannuation pension that was payable to a deceased member of the fund;
- The payment of an adult child dependants benefits directly to the child or to a Leading Member Discretionary Trust to protect the benefits and protect from any legal challenge to the estate; and
- where a member of a SMSF has more than one superannuation interest in a fund consisting of varying tax-free/taxable components — the choice of allocating from these interests to various dependants and non-dependants.

**Note:** A SMSF Will is a defined set of procedures and requirements purpose built into a SMSF trust deed to allow a member to provide specific benefits, assets, and otherwise direct what is to happen to their superannuation benefits in the event of their death. Not all superannuation fund trust deeds have the capacity to offer comprehensive and strategic SMSF estate planning or a SMSF Will.

# APPLICATION BY FERESHTEH LEILIABADI TO THE TRUSTEE OF THE FUND TO ACCEPT A SMSF WILL

**DATE:**

**FUND NAME:** NIU Overhead Solution Super Fund

**TRUSTEE:** NIU Overhead Solution Pty Ltd ACN: 648 252 537 of 806/3 Carlton St, Chippendale New South Wales 2008

**MEMBER NAME:** Fereshteh Leiliabadi

## REQUEST TO TRUSTEE TO ACCEPT THE FOLLOWING NOMINATIONS AND DIRECTIONS AS THE SMSF WILL

The Member hereby requests the Trustee to accept the following Binding Death Benefit Nomination and Directions ("The SMSF Will") in accordance with the Fund's Trust Deed and Governing Rules.

## SMSF WILL for Fereshteh Leiliabadi in NIU Overhead Solution Super Fund

**The Member hereby makes the following Nomination and Directions:**

### 1. Death Benefit Payments

"Lineage" as defined is the direct descendant of the deceased member only but may include any other person if deemed to be a lineage beneficiary.

#### 1.1 Death Benefits from the Fund

I hereby direct that the Trustee of the Fund, provided the Fund has the specific assets or resources to do so, make or transfer the following benefits or assets to the following beneficiaries:

##### a) INTERDEPENDENT RELATIONSHIP – FATEMEH LEILIABADI

##### DEATH BENEFIT PAYABLE:

- 100% of my superannuation interest

This benefit may be paid as an income stream if allowed under the Superannuation Laws or transferred directly to the designated beneficiary or any trust, company, person or other entity that the beneficiary directs, including a transfer to the deceased member's estate for the asset to be held specifically for the beneficiary or in a trust for that purpose. At the direction of the beneficiary or any Leading Member the Trustee may create a SMSF Death Benefits Trust to hold the designated bequest. The SMSF Death Benefits Trust is a discretionary trust whereby the beneficiary or their assign is to be the Trustee and appointor. Further the beneficiary is to be designated primary beneficiary of the Trust along with any lineage or such other beneficiaries as the beneficiary includes in the constituent SMSF Benefits Trust Deed. The exact terms and conditions of the SMSF Death Benefits Trust are to be determined upon advice of any Professional engaged under this SMSF Will to look after the deceased member's superannuation estate.


**i IF NO DESIGNATED BENEFICIARY ALIVE**

If no designated party above are alive at the time of the death of the member then their share of the deceased's death benefits are to be paid to the deceased's estate for the benefit of their family and estate beneficiaries and charities.

**2. Superannuation Benefits not payable**

If the above benefits are not payable due to the Superannuation Laws my superannuation benefits are to be distributed in a fair manner by the Trustee of the Fund directly to my lineage as at the time of my death and in such manner or form as the Trustee wishes.

**i. Signed by:**


  
.....  
Fereshteh Leiliabadi  
Member

**SIGN HERE**

08,03,2021  
.....  
Date

**DATE HERE**

**Witnessed by:**

  
.....  
Witness Signature


**WITNESS**

08-03-2021  
.....  
Date

**DATE HERE**

  
.....  
Witness Name

**Witnessed by:**

  
.....  
Witness Signature

**WITNESS**

8/3/21  
.....  
Date

**DATE HERE**

  
.....  
Witness Name

# RESOLUTION BY THE TRUSTEE TO ACCEPT MEMBERS SMSF WILL

**DATE:**

**NAME OF FUND:** NIU Overhead Solution Super Fund

**ATTENDED BY:** Fereshteh Leiliabadi

**HELD AT:** 806/3 Carlton St, Chippendale New South Wales 2008

**CHAIRPERSON:** Fereshteh Leiliabadi

**PURPOSE OF THE MEETING:**

The Trustee has received a request from Member Fereshteh Leiliabadi to accept a SMSF Will as detailed in that said application.

**TRUSTEE RESOLUTIONS:**

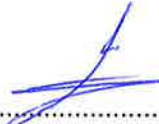
The Trustee has reviewed the Member's application to put in place a SMSF Will (a set of binding death benefit directions and nominations) and may have sought professional advice in that regard. It was resolved by the Trustee to accept the SMSF Will on behalf of the Member. The Member's SMSF Will is to form part of the Fund's Governing Rules and afforded the protection of the Superannuation Industry Supervision Act 1993 and the Commonwealth Crimes Act. It cannot be varied except by the Member and will continue in effect even where the Trustee of the Fund varies the Fund's trust deed and other governing rules.


The Trustee is to forward this trustee minute to the Member as notification of the revocation of all earlier death benefit nominations and directions and the commencement of the SMSF Will as noted in the Members application.




**EXECUTED BY THE TRUSTEE:**

NIU OVERHEAD SOLUTION PTY LTD – ACN : 648 252 537 ATF NIU OVERHEAD SOLUTION SUPER FUND and signed by the persons authorised to sign for the company under section 127 of the Corporations Act 2001:

  
.....  
Fereshteh Leiliabadi  
Director

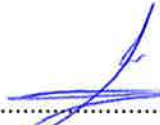






.....  
Date 08.03.2021

**ACKNOWLEDGED BY MEMBER:**

i. Signed by:

  
.....  
Fereshteh Leiliabadi  
Member





.....  
Date 08.03.2021