


Senate Select Committee on Superannuation and Financial Services

Main Inquiry Reference (a) + (c)

Submission No. 93

(Supplementary to Submission Nos. 7 & 75)

Submittor: **Australian Taxation Office**
PO Box 2000
MOONEE PONDS VIC 3039
Mr David Diment
Assistant Commissioner
Superannuation (Compliance)
 - (03) 9275 5022

Senate Select Committee on Superannuation and Financial Services

ANSWERS TO QUESTIONS ON NOTICE

Australian Taxation Office

Superannuation and Financial Services public hearing, October 17

Topic: Complaints

Hansard Page: Page 844

Senator Watson asked: Do you have a complaints register? If so, could we have a summary of the issues that come across your desk?

Answer: Yes. Generally, the type of superannuation complaints received by the ATO relate to:-

- i) perceptions that employers are not making superannuation contributions for employees (something in the order of 30% to 50% of these types of complaints are later found to be groundless);
- ii) our inability to 'guarantee' employees' superannuation;
- iii) we do not keep notifiers informed of what we are doing in relation to their complaints about employers' failure to make superannuation contributions (it can take some time to recover superannuation guarantee amounts – if an employer cannot pay immediately and can satisfy us that it is capable of paying over time, then we will enter into arrangements to accept payment over time);
- iv) the ATO does not inform notifiers of action taken (the secrecy provisions of the law prevent us from discussing action taken against third parties); and
- v) loss of superannuation entitlements when an employer becomes bankrupt or is placed into liquidation.



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Australian Taxation Office

Superannuation and Financial Services public hearing, October 17

Topic: Prosecution strategy

Hansard Page: Pages 844 and 855

Senator Watson asked: Could we have a copy of prosecutions strategy?

Answer: Attachment 1 is a copy of the prosecution strategy we developed following recommendations of the Australian National Audit Office.

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Australian Taxation Office

Superannuation and Financial Services public hearing, October 17

Topic: Fund surplus

Hansard Page: Page 849

Senator Conroy asked: Is it okay for them (employers) to pay the amounts (superannuation contributions) out of the surplus?

Answer: The fact an employer may not actually contribute amounts to a defined benefit fund to meet its obligations in relation to superannuation guarantee (because it uses the fund surplus) does not mean employees will not get their benefits.

Defined benefit funds are required to have a current benefit certificate and a current funding and solvency certificate (both of which are prepared by an actuary) if they wish to provide superannuation guarantee benefits. The benefit certificate specifies the minimum benefits that are to be provided to satisfy superannuation guarantee. The funding and solvency certificate specifies the minimum contributions that need to be paid into the fund to provide the benefits (if a defined benefit fund has sufficient surplus, the minimum contributions can be nil).

The fund auditor must satisfy himself/herself on an annual basis that the minimum contributions have been made and that the minimum benefits have been provided. The *Superannuation Industry (Supervision) Act* requires the auditor to notify the regulators if this is not the case.

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Australian Taxation Office

Superannuation and Financial Services public hearing, October 17

Topic: Bay Waves Family Hair Care

Hansard Page: Pages 853 and 854

Senator Conroy asked: As part of your ongoing compliance strategy, you have a number of projects – that is right, isn't it? You told the Senate Economics Committee that there were 100 cases in the hairdressing industry as part of a special project – did you look at Bay Waves Family Hair Care?

Answer: Yes, there are a number of projects and there were a number of cases we looked at in the hairdressing industry as part of a special project.

As a result of that project and other activities, we raised a superannuation guarantee charge against a number of employers who had not made superannuation contributions for their employees. We then attempted to recover the charge raised. Any amounts we recovered were paid to employees by way of vouchers which the employees could deposit with their superannuation funds.

There are many avenues open to us to recover outstanding amounts, not all of which involve pursuit of the debt through the Courts. As a general principle, we do not consider there is a benefit in liquidating corporate debtors or bankrupting individual debtors if they can demonstrate to us they have the ability to pay their debts over time. We are prepared to accept payment over time to maximise the return to employees of their correct entitlements.

However, no matter what we do (including taking action through the Courts), we cannot recover if an employer does not have any available funds to make any payments. We need to weigh up the costs of initiating further action when we know that that action will not result in payment. Our experience tells us that it is unlikely we will be able to recover when a business ceases to operate.

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Australian Taxation Office

Superannuation and Financial Services public hearing, October 17

Topic: Complaints, employers with shortfalls, general interest charge

Hansard Page: Page 854

Senator Conroy asked:the total complaints about super guarantee in 1999 – 2000, the percentage and number of employees (sic) who have made insufficient contributions in 1999 – 2000, late payment penalty general interest charge for 1998 – 99 and the number of employers charged with late payment penalty general interest charge for 1998 – 99.

Answer: During 1999 - 2000, we received 8 974 complaints from employees. A 1999 – 2000 survey of 4 800 employers across Australia indicated that 71% of employers were fully compliant, 28% were partially compliant and 1% were non-compliant. The total late payment penalty general interest charge for 1998 – 99 imposed on 5 669 employers amounted to \$2.67m.

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ANSWERS TO QUESTIONS ON NOTICE

Australian Taxation Office

Superannuation and Financial Services public hearing, October 17

Topic: Trustee kit

Hansard Page: Page 855

Mr Bator said:We have developed a trustee kit for self-managed super funds so that they can know whether they are complying with the requirements of SIS.

Senator Watson asked: Can we have that – the kit?

Answer: Attachment 2 is a copy of the trustee kit.

Senate Select Committee on Superannuation and Financial Services

ANSWERS TO QUESTIONS ON NOTICE

Australian Taxation Office

Superannuation and Financial Services public hearing, October 17

Attachment 1

SUPERANNUATION (SPR)

**PROSECUTION
STRATEGY**

February 2000

CP4: Strategic Research and Compliance Team

Senate Select Committee on Superannuation and Financial Services

ANSWERS TO QUESTIONS ON NOTICE

Australian Taxation Office

Superannuation and Financial Services public hearing, October 17

1. PROSECUTABLE AREAS

Superannuation Guarantee

An employer must provide a minimum level of superannuation support for each employee.¹ These contributions must be paid to a complying superannuation fund by 28 July after the end of the financial year. If this deadline is not met, the employer is liable to pay the superannuation guarantee (SG) charge and must lodge a SG statement by the 14 August.² If the employer refuses or fails to provide statements or information, penalties could be imposed under subsection 59(1) of the *Superannuation Guarantee (Administration) Act 1992* (SGAA). The penalty is calculated at 200% of the amount of SG charge payable by the employer in the year.³

Another avenue to collect the information is provided by s 34 SGAA. The Commissioner has the power to require the employer to specify, within a specified period of not less than 14 days, whether the person has a SG shortfall for the year and if so, include the relevant details. Additionally, the Commissioner has wide powers under s 77 SGAA to obtain information from any person, whether or not a taxpayer. This section corresponds with s 264 of the *Income Tax Assessment Act 1936*. The notice only extends to documents in the custody and control of the recipient when the notice is received and cannot compel the bringing into existence of documents or copies that do not already exist.

If the employer does not comply with s 34 or s 77, prosecution action may be initiated. It is an offence if a person refuses or fails to furnish any information as required by the law to the extent that the person is capable of doing so. This offence is created by s 8C(1)(a) of the *Taxation Administration Act 1953*, Part III (TAA). The phrase "to the extent that the person is capable of so doing" excuses a failure to comply beyond the person's capacity, but not simple unawareness of the requirement in question.⁴ This provision is a statutory offence of strict responsibility as a "guilty mind" (*mens rea*) is not required. Accordingly, an honest and reasonable mistake is not a good defence. If convicted, these offences carry fines and in some cases, a term of imprisonment.

Furthermore, as prescribed in s 8K TAA, a taxpayer can be prosecuted if they have made a false or misleading statement in a material particular or omitted something from a statement made to a taxation officer, which makes the statement misleading in a material particular. Additionally, if a scheme has been entered into, prosecution is possible under s 17 of the *Crimes (Taxation Offences) Act 1980*. It is an offence to enter into an arrangement with a purpose of securing that a company or trustee will be, or will be likely to be, unable to pay a SG charge that is payable, or that will or

¹For the 1999/2000 financial year, the charge percentage is set at 7%.

²Section 33 of the *Superannuation Guarantee (Administration) Act 1992*. There is discretion to extend the time to lodge the SG statement (refer to *Superannuation Guarantee Ruling SGR 94/2*).

³The Commissioner may remit all or some of the penalty (s 62(3) SGAA). The circumstances in which the Commissioner can remit the penalty is explained in *Superannuation Guarantee Ruling SGR 94/3*.

⁴*Ambrose v Edmonds-Wilson* (1988) 19 ATR 1217 at 1220; 88 ATC 4173.

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may reasonably be expected to become payable in the future. The maximum penalty is 10-year jail term, a fine of \$121,000 or both. If tax fraud is committed, conviction can occur under s 29D of the *Crimes Act 1914*.

Superannuation Contributions Surcharge

Taxpayers are liable to the superannuation contributions surcharge if their adjusted taxable income for the financial year is greater than the surcharge threshold. Section 13 of the *Superannuation Contributions Tax (Assessment and Collection) Act 1997* (SCTA) requires superannuation providers to lodge statements ("member contributions statement") with the Commissioner containing prescribed information by 31 October. It is on this information that the surcharge assessments can be raised. If the provider does not fulfil their obligation under section 13, they are guilty of an offence punishable on conviction by a fine.⁵

As an alternative to prosecution, the Commissioner may serve a contravention notice under s 35A SCTA.⁶ This imposes an administrative penalty. If a notice is served, it must state that in order for the matter not to be dealt with by court, they must lodge the statement and pay the penalty within 14 days after the notice date. The penalty is set at \$500 per week or part of a week during which the contravention continues.

To obtain information or evidence for the purposes of the surcharge, the Commissioner has wide powers under s 39 SCTA. This section is equivalent to s 77 SGAA. As discussed above, this provision does not contain any sanctions. This function is fulfilled by the TAA.

Lost Members Register and Unclaimed Money

The ATO administers a lost members register. Under the *Superannuation (Unclaimed Money and Lost Members) Act 1999*, which received Royal Assent on the 13 October 1999, the regulations may set up a scheme in which providers are to inform the Commissioner of any lost members. Additionally, details on any unclaimed money held for members who have reached eligibility age⁷ or who have died⁸ must be given to the Commissioner. The unclaimed money statements must be given before 1 November for the half-year ending 30 June in that calendar year and by 1 May for the half-year ending 31 December in the previous calendar year. If a superannuation provider does not fulfil their duties, they could be liable to a fine of up to 100 penalty units.⁹ This Act also contains provisions dealing with access to premises and information gathering powers.¹⁰ If the provider does not comply with their obligations, prosecution action can be initiated under the TAA.

⁵Subsection 13(6) SCTA (Not more than \$6,600 for an individual; \$33,000 for a corporation).

⁶There is no requirement for a contravention notice to be served and does not affect the liability of the person to be prosecuted (s 35A(8) SCTA).

⁷The eligibility age is 65 for a man and 60 for a woman.

⁸Statements do not need to be provided to the Commissioner if there is applicable State or territory legislation for unclaimed money.

⁹Subsections 16(5), 17(6), 23(5).

¹⁰Sections 46 and 47.

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Eligible Terminations Payments (ETP)

An employer, superannuation fund or other entity, which makes an eligible termination payment (ETP), must comply with ETP information and reporting obligations. The requirements are prescribed in regulation 99 to 100J of the Income Tax Regulations. If the payer breaches their duties, the Commissioner may issue a contravention notice (reg 100A to 100J). The contravention notice must state that, if the person does not want the matter to proceed to court, they may lodge with the Commissioner a signed statement to that effect and pay the penalty imposed. The penalty for a contravention is \$100. If these conditions are not met, the Commissioner can prosecute the person for contravention. In that case, there is no limit on the fine that the court can impose.

Reasonable Benefit Limits (RBLs)

A payer who makes an ETP, or starts to pay a superannuation pension or annuity, must provide certain information to the Commissioner. This is required under s 140M ITAA 1936. Also, under s 140Q, roll-overs are to be notified to the Commissioner. If the payer fails to comply with these notification requirements it is an offence under s 8C TAA. This section creates an offence if a person refuses or fails to furnish any information as required by the law to the extent that the person is capable of doing so (see above for discussion).

2. CIRCUMSTANCES IN WHICH PROSECUTION WOULD BE UNDERTAKEN

Prosecution is an effective enforcement method to deal with tax offenders. It can result in widespread deterrence extending beyond the original offender and encourage people towards compliance. However, it is not appropriate for prosecution action to proceed in all circumstances. For instance, if the taxpayer made an honest and inadvertent mistake caused by an oversight or omission, the Commissioner will be responsive to the taxpayer's efforts to comply. An adjustment will be made together with an explanation of the decision. Prosecutions would only be appropriate where the taxpayer has acted fraudulently, deliberately, recklessly or intentionally to disregard their obligations under the law.

ATO Compliance Model

Various compliance strategies have been recognised by the ATO and adopted in a 'Compliance Model'. This model represents the attitudes to compliance and the regulatory strategies. It advocates a hierarchical approach to compliance improvement. The ATO aims to keep taxpayers at the bottom of the hierarchy by promoting self-regulation strategies such as education, record keeping and service delivery. There is however opportunity to escalate the enforcement strategies if voluntary compliance has been unsuccessful. Stronger compliance strategies, such as prosecution, are only recommended at the top of the hierarchy. This threat of such severe action is still real and is an incentive to encourage more voluntary regulation.

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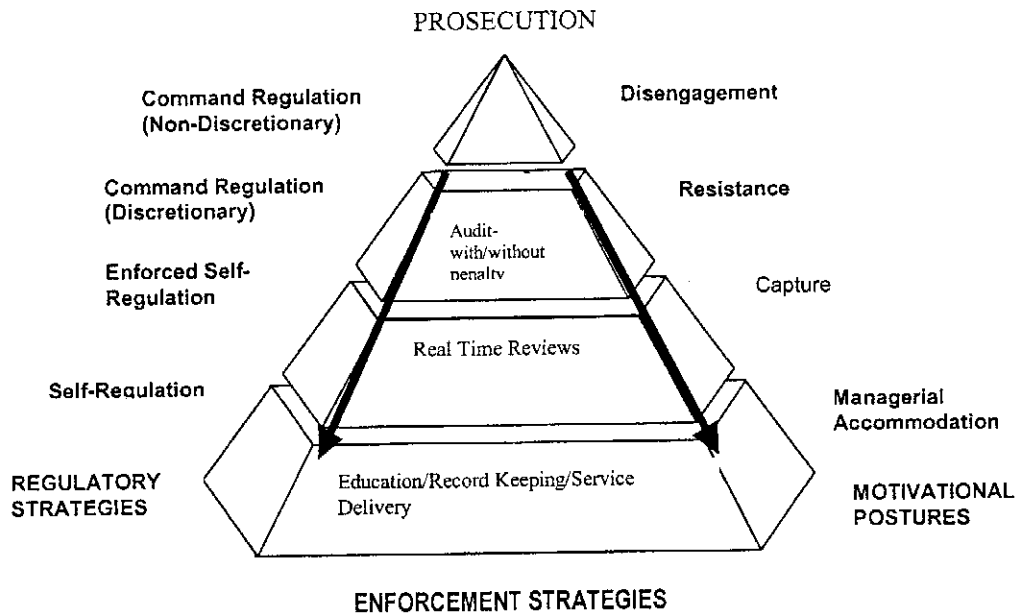
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ATO Compliance Model

Ayres and Braithwaite (1992)



ATO Prosecution Policy

This paper should be read with the understanding that the decision to prosecute is made by the Department of Public Prosecutions (DPP) independently of the ATO. However, the DPP has agreed that the ATO's In-House Prosecutor (IHP) is able to conduct certain prosecutions. This includes cases for failure to supply information under section 8C of the TAA, which are the majority of cases referred by the Superannuation Business Line. When an offence is identified, the matter should be referred to the Prosecution Investigation Unit (PIU). This unit will then examine it and refer all suitable cases to the DPP or IHP.

According to the ATO Prosecution Policy (May 1999), prosecution action will not commence unless:

- The matter is consistent with the Prosecutions Policy of the Commonwealth and the principles underlying the ATO prosecution policy, in particular, that it is in the public interest for the prosecution to proceed;
- The charge adequately reflects the nature and extent of the non compliant conduct disclosed by the evidence, and was laid as soon as practicable after the offence was committed;
- There is sufficient admissible evidence likely to prove an offence was committed by the taxpayer, which will provide the Court with an adequate basis for sentence;
- The accused taxpayer is given reasonable opportunity to present their case.

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The Prosecutor has the sole preserve to determine the evidentiary sufficiency as they have obligations to fulfil by virtue of being an Officer of the Court. The referring area, such as the Superannuation Business Line should respect this discretion.

Additionally, the case selection strategy of the ATO is to select cases:

- that are particularly serious, blatant or involve persistent (habitual) offenders
- which are representative of significant or prevalent non-compliance practices
- for which there is no other effective means of securing compliance or no other sanction and if prosecuted on a timely basis may carry effects wider than those in the particular case.¹¹

Criteria to Assess Potential Cases

Following the ATO Prosecution Policy and Compliance Model, prosecutions in superannuation would only be initiated in certain circumstances. To determine if prosecution action is suitable, cases should be assessed according to the following criteria:

➤ Revenue involved

It is important to consider the total of revenue to be collected by the ATO and also any income owing to an individual, such as a large amount of superannuation guarantee for the employee.

➤ Public Interest¹²

Relevant factors include:

- Any mitigating or aggravating factors;
- The youth, age, intelligence, physical health, mental health or special infirmity of the taxpayer;
- The staleness of the alleged offence;
- The prevalence of the offence and the need for deterrence, both personal and general; and
- The necessity to maintain public confidence in such basic institutions as the Parliament, the Courts and the tax system.

➤ The taxpayer's attitude to compliance

The compliance strategy adopted should depend on the particular taxpayer. Factors such as the degree of cooperation, seriousness of the conduct and the history of the taxpayer should be taken into account. The likelihood that a strategy will influence the taxpayer to change their attitude to compliance within a reasonable time should also be considered. As depicted in the Compliance Model, the ATO should apply strategies that encourage a downward movement of taxpayers from resistance to the preferred self-regulation.

¹¹ATO Prosecution Policy – May 1999.

¹²Refer to the Prosecution Policy of the Commonwealth.

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- Availability of an administrative penalty
In many situations a breach of the law can be handled by prosecution and/or an administrative penalty. Administrative penalties are useful as they are simple to implement; impacts directly on the taxpayer; offers greater flexibility; can be applied consistently; are less costly to the community and are immediately available to the ATO. However, an administrative penalty is not always suitable. It will depend on the seriousness of the offence; the degree of culpability; deterrent effect, probability of changed attitude and the characteristics of the taxpayer.¹³

- Size of the employer / superannuation provider and Location
When prosecution action is initiated, the public become aware of the types of offences and penalties involved. As a result, there is an increase in compliance extending beyond the original offender. The Compliance Model endorses this view. Therefore, it is not advisable to prosecute in small isolated cases as the associated publicity will probably be unsuccessful and there is a risk that the general community will be alienated. Alternatively, a number of similar “small” cases can be bundled together to highlight the issue. This is likely to have greater impact than issuing media releases on isolated cases.¹⁴ Associated costs would also be reduced. Furthermore, local communities in rural areas could be alienated if the ATO acts heavy handed and does not respond in the appropriate manner. However, in circumstances where the offences attract publicity and the Magistrate deals with the defendant on a one to one basis, prosecutions could result in a positive experience for those in rural areas.

- The breaches of the law
The compliance strategy selected by the ATO should reflect the requirements which were breached and the manner in which it occurred. For instance, if the taxpayer maintained more than one set of records or used a false name or false documents, a firm response, such as prosecution action, is appropriate.

The response of the officer will be dependent on the facts of each case. But in all cases, the ATO Prosecution Policy should be considered. The court can dismiss the charge or discharge the offender without proceeding to conviction under s 19B of the *Crimes Act 1914*. Factors such as character, age, health, triviality of the offence and other extenuating circumstances are taken into account.

Case Studies

A prominent superannuation provider (or several), with a large number of members, has breached several superannuation requirements. They have failed to lodge statements required for surcharge purposes and the lost members register. The first strategy is to ensure that the provider is well aware of their obligations under the law. If the provider still fails to provide the

¹³ATO Prosecution Policy.

¹⁴ATO Prosecutions Publicity Policy.

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statements, the next step is to serve a notice requesting the information. A reasonable opportunity should be given to the provider to comply. If they still chose to be non-compliant, the ATO should then use stronger compliance strategies. In these circumstances, prosecution action could be initiated.

However, there are many situations where prosecution is not the appropriate course of action. For example, an employee has not received any superannuation guarantee payments and has completed an employee notification of insufficient employer contributions. An initial telephone call will be made to the employer from an outbound call centre. After speaking to the employer, risk assessment methods are used to allocate the most efficient strategy to deal with the notification received. If the employer is assessed as high risk, they are sent a SG statement that is to be returned to the ATO within four weeks. Follow up action is then undertaken to ensure the statement has been lodged. If the employer fails to return the statement, a default assessment is raised. In addition to the outbound calls, projects are initiated using information contained on the SG database. Strategies undertaken during these projects may include a mixture of education, reminder, warning, or audit measures. By targeting 'groups' of employers (for example by industry, location, PAYE payment record) rather than individual employers, it aims to improve overall compliance in that 'risk profile'. Throughout this process, the degree of non-compliance by the employer does not qualify for the ATO to commence prosecution action.

Publicity

Any publicity which arises from a prosecution should be accordance with the ATO Media Policy.

It is important to note that real or potential publicity is not a relevant consideration in identifying cases suitable for prosecution. Cases will be selected on the basis of the evidentiary strength of the case and whether it is in the public interest that prosecution proceed.

Recommendations

It is recommended that this prosecution policy be used as a guideline in the Superannuation Business Line. Accordingly, officers need to consider the type of work they undertake knowing that prosecution action is unlikely to occur. For instance, it is ineffective to complete work which will result in nil responses and there is no prospect to prosecute. For that reason, prosecutions should be included into any process at the start and not simply added at the end to be used as a weapon.

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A procedure should be established for any future prosecution action. A senior officer or a selected committee needs to consider and approve any proposed prosecution case before it is initiated. This would ensure that prosecution action would only occur in appropriate circumstances and is not the regular course of action for work undertaken.

REFERENCES

1. ATO Prosecution Policy
2. ATO Case Selection and Prosecution Guidelines
3. DPP/ATO Liaison Guidelines
4. Penalties, Prosecutions and Offences – Training Module by OCTC Skilling Network

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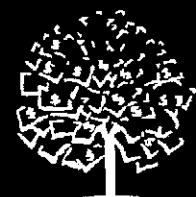
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Attachment 2

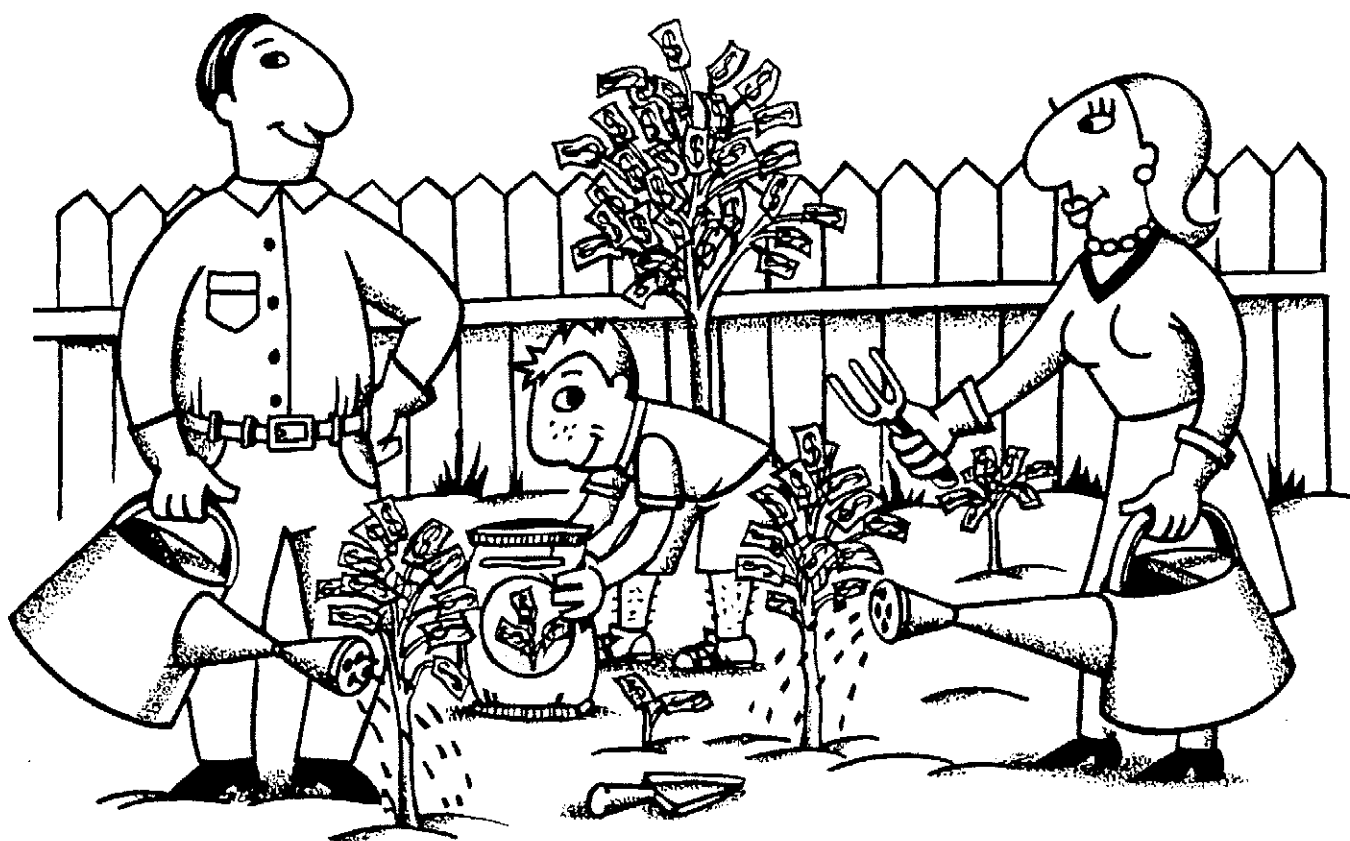
A guide for individuals

Self Managed Superannuation Funds

A do it yourself guide for trustees running
a Self Managed Superannuation Fund



SUPER
It pays to take an interest



Australian
Taxation
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Information is current as at 1 July 2000

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ISBN 0-642-30812-8

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As part of our commitment to produce accurate publications, taxpayers will not be subject to penalties if they can demonstrate that they based a tax claim on wrong information supplied by the ATO. However, interest could be payable depending on the circumstances of each case.

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There are a range of administrative obligations imposed on SMSFs under SIS. Trustees are responsible for ensuring these obligations are met. Failure to do so may jeopardise the fund's eligibility for tax concessions.	
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Superannuation funds with fewer than 5 members now have the opportunity to be truly self-managing. All SMSF members are now obligated to be involved in the decision making processes of the fund and share responsibility with the other trustees for the protection and appropriate investment of the member's retirement benefits.	
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This brief checklist is designed to draw your attention to these details that you, as a trustee of a SMSF must be aware of in the day to day operation of your fund. A fund that is complying with the rules is taxed at 15%.	



Foreword

In October 1999, the Government changed the way small superannuation funds (funds with less than 5 members) are regulated in response to the recommendations of the Financial Systems Inquiry (FSI). Prior to this date, all small funds were classed as 'excluded superannuation funds' and were regulated by The Australian Prudential Regulation Authority (APRA). The FSI recognised that members and trustees of small funds are commonly the same people who are able to protect their own interests and therefore, these funds could be subject to less regulation than other types of funds.

As a result, the definition of excluded superannuation fund was replaced with the new definition:-

Self Managed Superannuation Fund (SMSF). The Australian Taxation Office (ATO) regulates superannuation funds that meet the definition of a SMSF. Funds with less than 5 members that are not SMSFs remain subject to prudential regulation by APRA and are required to have an approved trustee. Non-SMSF enquiries should always be directed to APRA.

This guide has been written for new SMSF trustees as an introduction to the rules governing the operation of SMSFs as set out in the *Superannuation Industry (Supervision) Act 1993 (SIS)*. The decision to become a trustee of a SMSF should not be taken lightly. Trustees are responsible for ensuring their fund complies with SIS as well as many other legislative and administrative requirements. Severe penalties may apply if trustees breach any of these requirements. It is recommended trustees read this guide and familiarise themselves with the requirements of running a fund before committing to this option. It would also be sensible to discuss alternatives with a professional adviser (e.g. accountant, superannuation fund administrator, tax agent, financial planner etc) before taking the next step.

If you need more information and help you can:

- telephone the Superannuation Helpline on **13 10 20** for the cost of a local call. This service is linked to the Translating and Interpreting Service for non-English speakers
- visit the ATO's superannuation website at **www.ato.gov.au/super**
- have superannuation and tax information sheets faxed directly to you by accessing *A Fax from Tax* on **13 28 60**

Superannuation is a long-term savings arrangement that operates primarily to provide income for retirement. Superannuation involves employers, the self-employed and employees making contributions on a regular basis over a long period to a superannuation fund.

The superannuation fund holds the contributions in trust for the member and invests the contributions to increase the fund's assets. These assets are then used to provide benefits to members when they retire or suffer a serious disability, or to a member's family if the member dies.

The Government taxes superannuation savings at lower rates than normal savings if the superannuation fund complies with certain conditions. This and the accumulation of the fund's earnings from investment, combine to produce a larger benefit for retirement.

Retirement Incomes Policy in Australia

Superannuation is part of the Government's plan to ensure an adequate income for Australians when they retire.

The overall objective is to improve total retirement income. The higher the level of superannuation, the higher the level of retirement income without the need to increase the level of support required from the Government. Given that Australia's population is ageing, this is important for the entire community.

Funds with less than 5 members

At 30 June 1999 there were 192 245 superannuation funds with less than 5 members. This represented 98% of the total number of superannuation funds. In addition, these funds held around \$52 billion in assets meaning an average fund balance of \$270 000.

Regulated and Complying Superannuation Funds

It was mentioned above that superannuation funds receive favourable taxation treatment. For a SMSF to be considered a **complying superannuation fund** for the purposes of the *Income Tax Assessment Act 1936* – and thereby receive concessional taxation treatment – it must first be a **regulated superannuation fund**.

There are a number of requirements set out in SIS that a SMSF must meet to be a regulated fund. These are discussed in the following chapters, however one requirement is that the fund has made an election to be governed by the rules of SIS. In short, a complying SMSF is a superannuation fund that has elected to be regulated, has complied with SIS and has not received a notice of non-compliance from the regulator.

Advantages people see in running their own superannuation fund:

- they can have greater investment freedom;
- they feel the monies are safer being invested by them as trustees;
- they can actively participate in the management of the fund;
- there are reduced formal reporting requirements.



Part

I

What is a SMSF?

A self managed superannuation fund is defined in the following way:

The SMSF definition

- has less than 5 members;
- each individual trustee of the fund is a fund member;
- each member of the fund is a trustee;
- no member of the fund is an employee of another member of the fund, unless those members are related; and
- no trustee of the fund receives remuneration for his or her services as a trustee. (Note: Trustees can receive remuneration for non-trustee services they provide to the fund in a separate professional capacity.)

A SMSF can also have a company as a trustee (known as a corporate trustee) if:

- each director of the company is a member of the fund;
- each member of the fund is a director of the company; and
- the fund has less than 5 members; no member is an employee of another member (unless related) and the trustee does not receive remuneration for their services as a trustee.

The requirement that all members be trustees ensures that each member is fully involved and has the opportunity to participate in the decision-making processes of the fund. This promotes true self-management.

What is the definition of employee?

Under SIS, an employee generally includes, a person engaged to perform services for salary and wages, a person working under a contract wholly or principally for their labour, paid company directors and certain sports persons, artists and performers.

Special rules also apply if a member is an employee of the employer sponsor of the fund. These rules generally mean the employee of the employer sponsor cannot be in a SMSF with people associated with the employer sponsor of the fund unless they are related. One exception is for directors of the same employer sponsor company. Regulations have been passed which effectively mean these individuals can be members of the same SMSF (providing all other SMSF rules are met). Please refer to our Fact Sheet '*What is a self managed superannuation fund?*' or contact the ATO for further information.

What if the fund ceases to be a SMSF?

If the fund no longer meets the definition of a SMSF it will remain an SMSF until the earlier of:

- the appointment of an approved trustee; or
- 6 months from the event that caused the fund to fail the SMSF definition.

This 6 months allows the fund time to restructure (for example, by transferring the member(s) out of the fund) if it wishes to remain within the SMSF definition. However, this extension does not apply if the reason for ceasing to be a SMSF is the admission of one or more new members.

Changing Fund Structure

Trustees have to be aware that any decision to change the fund structure may result in the fund no longer meeting the definition of a SMSF. For example if a fund admitted a new member (increasing membership of the fund to 5) or appointed a non-member as trustee, the fund would no longer qualify as a SMSF. Funds that are not SMSFs are subject to different regulatory requirements and should contact APRA. A fund must notify the ATO within 21 days of ceasing to be a SMSF.

Single member funds

It is possible to have a SMSF with only one member.

If the single member fund has a corporate trustee, the member must:

- be the sole director of the trustee company; or
- be related to the other director of the trustee company and there are only two directors of that company; or
- not be an employee of the other director of the trustee company and there are only two directors of that company.

If the single member fund does not have a corporate trustee, the fund must have two individuals as trustees. The member **must** be the trustee with:

- another person who is a relative of the member; or
- any other person provided the member is not an employee of that person.

Minors

Minors (members under 18 years of age) are considered to be under a legal disability and are unable to be trustees of a superannuation fund. A parent or guardian can be a trustee in place of a member if the member is a minor without a legal personal representative.

Legal personal representative

A legal personal representative can be a trustee (or director of a corporate trustee) in place of a member who is under a legal disability or if the representative holds an enduring power of attorney in respect of the member.

Death of a member

A legal personal representative can be a trustee (or director of a corporate trustee) in place of a deceased member, up until the time that death benefits are paid from the fund.



Part I
What is a SMSF?

SMSF examples

Q. Ivan and Antoine have been good friends for many years and decided to set up their own small superannuation fund. They have used the services of an accountant, Clancy, to set up the fund and have asked Clancy if he would like to be a member also. Would this fund be a SMSF?

A. Yes, providing all members are also trustees, no member is employed by another member and no member receives any remuneration for their services as trustee.

Q. Ivan's employer, Monica, wishes to join the fund. Would the fund still be a SMSF if Monica joins?

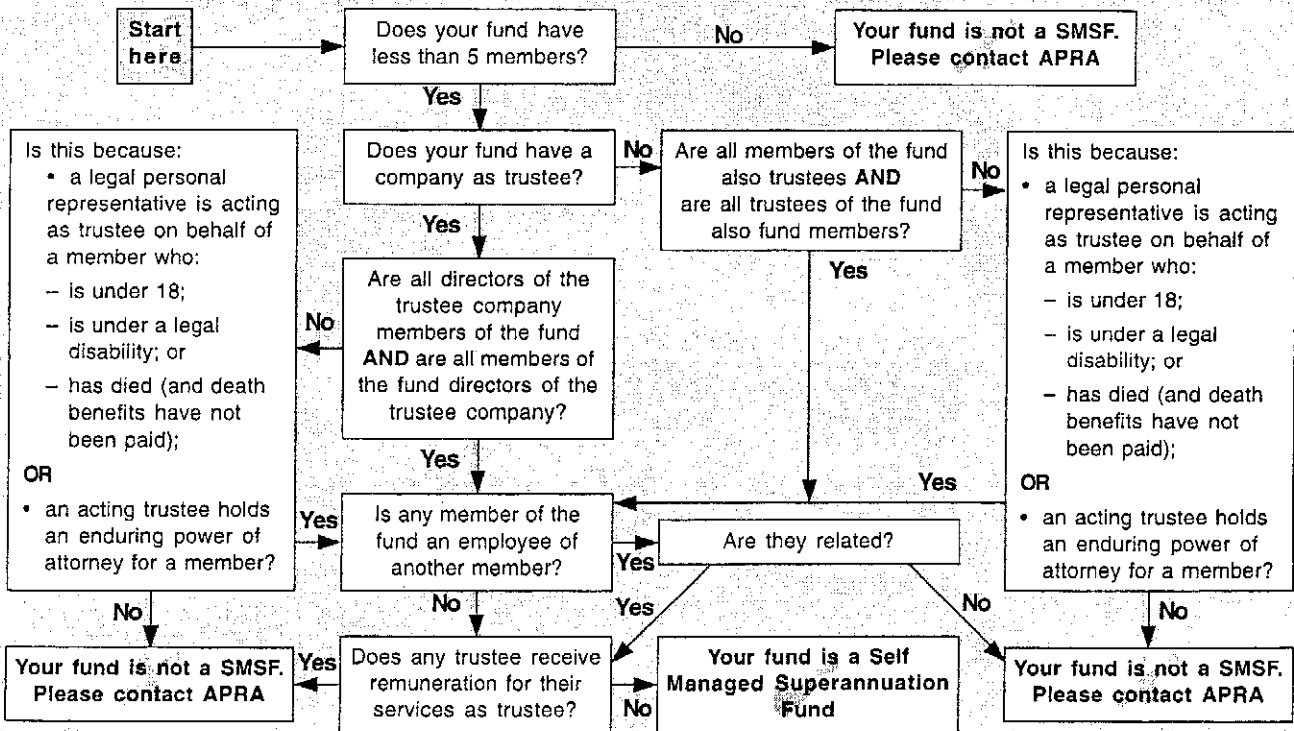
A. No, because Monica is Ivan's employer. However, if Monica and Ivan were related, the fund would still meet the definition of SMSF.

Q. Nick is a director of XYZ Pty Ltd. Bruce is an employee of XYZ. At 30 June 1999 George (Nick's brother) was a member of the same excluded superannuation fund as Bruce. Could Bruce and George be in the same SMSF?

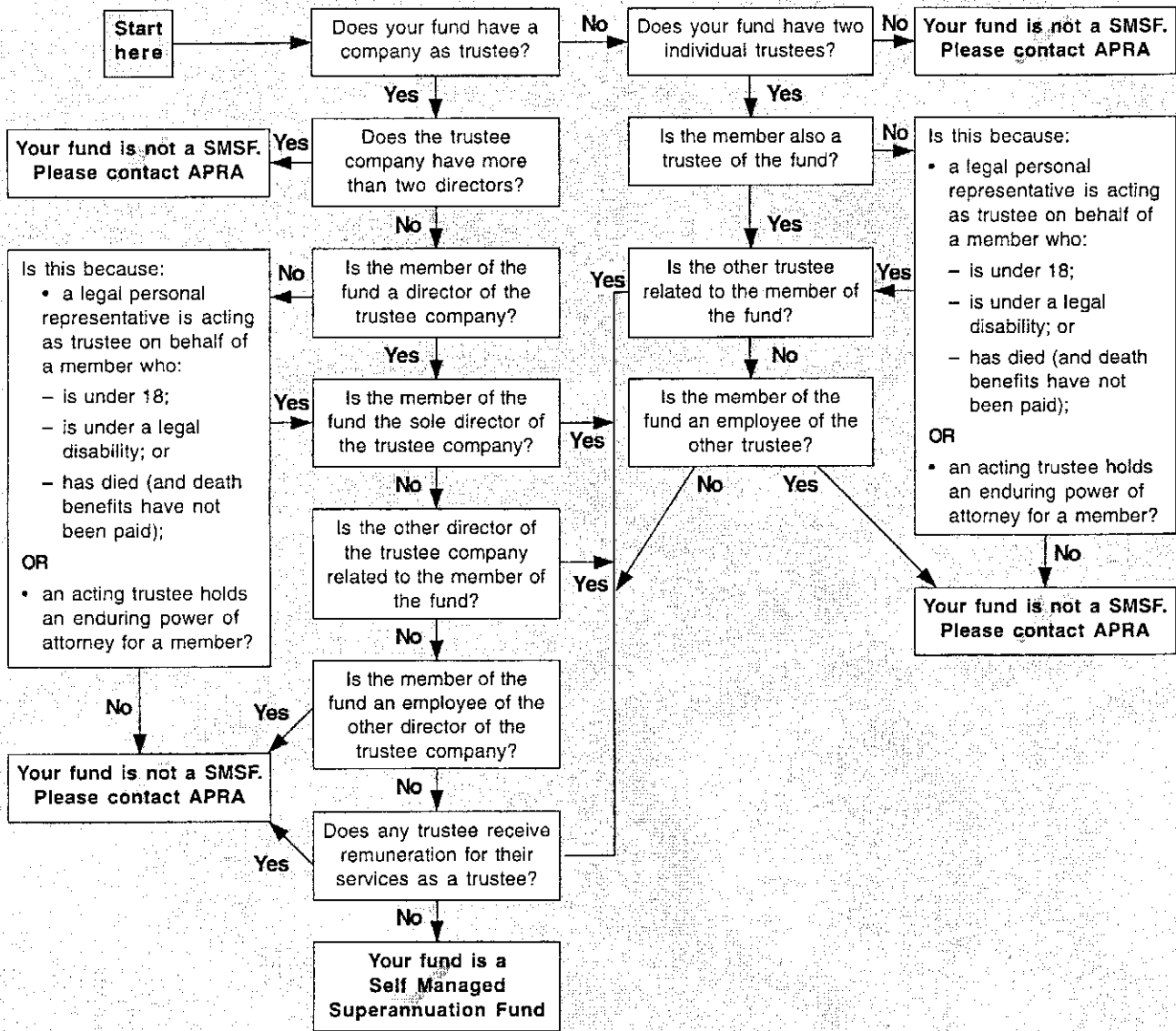
A. No. George is a relative of Nick, the director of the employer-sponsor company. This means Bruce would be considered an employee of George.

Use the following decision trees to determine if your fund is a SMSF. Single member funds must use the decision tree on page 9.

1. SMSF Decision Tree – More than one member



2. SMSF Decision Tree – Single member funds



Part

2

Setting Up

There are a number of trust law and legislative requirements in setting up a self managed superannuation fund. If you are thinking about setting up your own SMSF it may be useful to consult with a professional adviser before committing to this option. Many accountants, solicitors and superannuation specialists also have packages and 'kits' available which simplify the process. This chapter sets out the major steps involved.

TIPS

The **trust deed** may set out the following:

- details of who can be a trustee;
- how to appoint & remove trustees;
- decision making powers of trustees;
- who can be a fund member;
- who can make contributions;
- when to pay benefits to members;
- procedures for winding up the fund.

1. Obtain a Trust Deed

The first thing you need to do is to have a trust deed prepared. The deed (commonly referred to as the 'governing rules' of the fund) evidences the existence of the trust and establishes the rules of operation of the fund. An accountant, solicitor or legal service company may prepare the deed. You should ensure that the deed is correctly drafted to achieve the fund's objectives.

The deed must be dated and properly executed.

2. Appoint Trustees

All superannuation funds are required to appoint trustees. Trustees are responsible for ensuring the fund is properly managed and that it complies with the SIS rules and other legal obligations.

To be a SMSF all fund members must also be appointed as trustees of the fund (except single member funds).

• Who can be a trustee?

Essentially anyone over the age of 18 can be a trustee of a superannuation fund except if they are a 'disqualified person'. An individual is a 'disqualified person':-

- at any time, the person has been convicted of an offence involving dishonesty, or
- at any time, the person has been subject to a civil penalty order under SIS, or
- the person is an insolvent under administration (e.g. and undischarged bankrupt).

A company would not be permitted to act as trustee if:

- a responsible officer of that company is a disqualified person (a responsible person includes a director, secretary or executive officer); or
- a receiver, official manager, or provisional liquidator has been appointed to the company; or
- action has commenced to wind up the company.

3. Elect to become a regulated fund

A trustee must elect to be 'regulated' under SIS if the fund wishes to receive concessional taxation treatment. The trustees of a new SMSF must, within 60 days after establishment of the fund, give the Regulator a notice of election to be a regulated superannuation fund.

Elections must be lodged with the ATO by completing an *Application to Register for the New Tax System Superannuation Entity* form. The form and instructions may be obtained from the Superannuation Helpline on **13 10 20**. Alternatively the form is available on the internet at www.taxreform.ato.gov.au

Once a SMSF has elected to become regulated, the decision cannot be reversed (that is, the fund would have to be wound up to cease to be regulated under SIS).

4. Obtain a Tax File Number (TFN)

A TFN is a unique number issued by the ATO for each taxpayer. The trustees of a SMSF must obtain a TFN for the superannuation fund.

Superannuation funds are allocated a TFN after lodgment of the *Application to Register for the New Tax System Superannuation Entity* form referred to above.

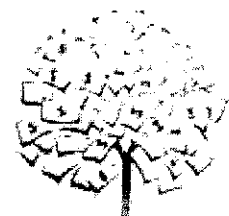
5. Obtain an Australian Business Number (ABN)

The ABN is the new public identification system being introduced to support business to government interactions across all agencies. An ABN will be allocated to superannuation funds who lodge an *Application to Register for the New Tax System Superannuation Entity* form from 1 November 1999.

Funds in existence prior to 1 November 1999 may also obtain an ABN by lodging an *Application to Register for the New Tax System Superannuation Entity* form with the ATO.

TIPS

- *Often new SMSF members want to roll-over or transfer balances from other superannuation funds into their SMSF. This can be done subject to certain conditions. Please refer to **Accepting Contributions** for a more detailed explanation of roll-overs and transfers.*
- *Trustees should be aware of the need to establish an appropriate investment strategy for the fund. This is discussed in more detail under **Managing Investments**.*
- *Trustees need to be aware that there are a number of administrative obligations that need to be met throughout the life of the fund. Trustees are ultimately responsible for ensuring these obligations are met even if they have hired the services of a professional advisor. This is discussed in more detail under **Administrative Obligations**.*



Part

3

Trustees Duties

A trustee of a self managed superannuation fund must act in accordance with:

- the clauses of the superannuation fund trust deed (governing rules);
- the provisions of the *Superannuation Industry (Supervision) Act 1993* (SIS); and
- other general rules, for example those imposed under tax law and trust law.

The SIS covenants (Rules)

The SIS Act contains covenants that impose minimum requirements on trustees and are deemed to be included in the trust deed of every regulated fund. These covenants reflect the duties imposed on a trustee under trust law in general.

The **SIS covenants** bind trustees to:

- act honestly in all matters;
- exercise the same degree of care, skill and diligence as an ordinary prudent person;
- act in the best interest of the fund members;
- keep the assets of the fund separate from other assets (e.g. the trustees personal assets);
- retain control over the fund;
- develop and implement an investment strategy;
- allow members access to certain information.

Delegating certain responsibilities to a service provider

Whilst trustees can engage other people to do certain acts or things on their behalf (eg. engaging the services of an accountant, superannuation fund administrator, tax agent, financial planner, etc), they are bound to retain control over the fund. Ultimate responsibility and accountability for running the fund in a prudent manner lies with the trustees.

Keeping superannuation money and other assets separate

Trustees of SMSFs must keep money and other assets of the superannuation fund separate from their own personal assets. Similarly, the assets of the superannuation fund must also be kept separate from those belonging to a business (eg. a business run by two partners who decide to set up a SMSF).

Money belonging to the fund must not, under any circumstance, be used for personal or business purposes. The fund's assets must not be viewed as a form of credit or a contingency when faced with a sudden need.

Winding Up

Trustees of SMSFs must notify the ATO if a decision is made to close the superannuation fund. Notification must be given to the ATO before the actual winding up begins.

Tips

- *If a trustee fails to act in accordance with the rules of SIS they risk the fund being deemed a non-complying fund and losing its concessionally taxed status.*
- *If a trustee fails to act in accordance with the trust deed they may be sued by effected members of the fund (if they were unaware of his/her actions).*
- *The above is not an exhaustive coverage of the responsibilities of trustees. Many others exist under different laws including numerous administrative requirements. Trustees need to be familiar with them and when in doubt, professional advice should be sought.*
- *The following chapters explain more common rules of SIS that a trustee will confront in the day to day operations of a fund.*

Part

4

Sole Purpose Test

It was previously mentioned that a complying superannuation fund is basically a regulated superannuation fund that meets the operational standards of SIS. Complying superannuation funds are taxed concessionally (ie. a complying fund is taxed at a rate of 15% while a non-complying superannuation fund is taxed at 47%).

The object of the sole purpose test is to ensure that regulated superannuation funds are maintained for the purpose of providing benefits to fund members upon their retirement, or their dependants in the case of a member's death. The trustees of a regulated superannuation fund must comply with the sole purpose test to attract the taxation concessions available to complying superannuation funds.

The sole purpose test is divided into core and ancillary purposes. A regulated fund must be maintained for at least one core purpose OR at least one core purpose and one or more ancillary purposes. It is unacceptable for a fund to be maintained for one or more ancillary purposes only.

A SMSF must be maintained for at least one of the following **core purposes**:

- paying benefits to members on or after retirement from gainful employment; or
- paying benefits to members when they have reached a prescribed age (currently 65); or
- paying benefits to members on the member's death. (This may require the benefits being passed on to a member's dependants or legal representative).

Breach of the sole purpose test

One of the main ways to determine if a fund has breached the sole purpose test is to examine the character and purpose of the fund's investments. One example is where the investment arrangement indicates that the purpose of the fund is to provide financial assistance to another party who is not a member or beneficiary of the fund itself.

Another indication of a breach of the sole purpose test occurs when a fund is 'running a business' as part of its investment strategy. The view is that if a superannuation fund is conducting a business, then it is not being administered for the sole purpose of providing benefits for the members and beneficiaries of the fund.

Penalties

Trustees who breach the sole purpose rule face civil and criminal penalties. A breach of the sole purpose test is a most serious breach. It can result in a fine of up to \$220 000 and 5 years imprisonment for individual trustees and may result in the fund losing its complying status. Higher penalties apply to corporate trustees.

CASE NOTE

The 'Swiss Chalet' Case

An interesting case on breaching of the sole purpose test was decided in 1995. It is known as the 'Swiss Chalet Case' (*Case 43/95, 1995 ATC 374*). In this case, the fund had purchased shares, which enabled access to a golf club for the managing director of the employer-sponsor of the fund. The fund had also invested in a Swiss Chalet which provided a source of income for the managing director and his family trust. Except for the managing director and his wife, the members of the fund were employees of the employer-sponsor. The employees were mainly high turnover, young, casual workers who had never received any benefit from the fund and were not even aware of the fund's existence. The Court decided that the fund had failed the sole purpose test as the money in the fund was not used for the retirement purposes of its members.



Part

5

Accepting Contributions

It is important that trustees are aware of the minimum standards relating to the acceptance of contributions under SIS. These standards are designed to ensure that contributions are made for retirement purposes only. However, trustees should also be aware that these are minimum standards only, and that the trust deed of a particular fund may prescribe more restrictive acceptance rules.

Accepting Contributions

• Mandated employer contributions

SIS allows funds to accept mandated employer contributions **at any time**. This means a trustee may accept mandated employer contributions for a person regardless of the age of the person or the number of hours they work.

Mandated employer contributions – are contributions made by an employer for the benefit of the fund member that are:

- contributions to reduce the employer's potential liability to the Superannuation Guarantee Charge; or
 - Superannuation Guarantee Shortfall components; or
 - contributions made in order to satisfy an obligation under an industrial award or agreement; or
 - payments to a fund from the Superannuation Holding Accounts Reserve.
- **Other contributions**

Contributions which are not mandated employer contributions (such as the member's own contributions) can only be accepted in the following circumstances.

For members under 65 years of age:

Contributions can be accepted if the member:

- has, at any time in the previous 2 years, been gainfully employed on at least a part-time basis (even if this was for a single week).

Trustees may also accept contributions in some circumstances if the member has left employment because of ill health or if the member is on leave from their employer for the purposes of raising children and the leave is less than seven years. The ATO can assist trustees with further information in these situations.

For members aged 65 but less than 70

A trustee may only accept contributions if the member is presently gainfully employed on at least a part-time basis.

For members aged over 70

A trustee generally cannot accept contributions (other than mandated employer contributions) for a member aged over 70.

Gainfully employed – means employed or self-employed for gain or reward in any business, trade, profession, vocation, calling, occupation or employment. Gain or reward is the receipt of remuneration such as wages, business income, bonuses and commissions, in return for personal exertion from these activities. It does not include passive gaining of income (e.g. receipt of rent or dividends).

Full-time employment – means *gainful employment* for no less than 30 hours each week.

Part-time employment – means *gainful employment* for at least 10 hours each week and less than 30 hours.

Eligible spouse contributions – are contributions made by a person for the benefit of their spouse.

‘Eligible Spouse Contributions’

Eligible spouse contributions may be accepted by the fund at any time if the spouse is under the age of 65. If the spouse is aged 65 but under 70, eligible spouse contributions may only be accepted if the spouse is at least gainfully employed on a part-time basis. If the spouse is 70 or over, the fund cannot accept eligible spouse contributions. There are no age limit or employment tests for the person making the contributions.

‘In specie’ contributions

As trustees of regulated superannuation funds are prohibited from intentionally acquiring assets from related parties of the fund, contributions to the fund in the form of an asset other than money (known as an in specie contribution) are effectively prohibited from being made to the fund by related parties of the SMSF.

Refer to the following section ‘**Managing Investments**’ for exceptions to this rule.

Roll-overs and transfers

Members benefits can generally be rolled-over or transferred within the superannuation system with the consent of the member concerned. It’s important to remember that a roll-over or transfer of superannuation money to a SMSF is not a contribution. Reporting requirements for rolling-over and/or transferring benefits are detailed on page 22.

Penalties

Trustees must ensure that the contribution standards are complied with at all times. A trustee who intentionally or recklessly fails to do so is guilty of an offence under SIS which may result in the fund being fined and treated as ‘non complying’ for taxation purposes.

TIPS

- *The **superannuation system** includes regulated superannuation funds, approved deposit funds, retirement savings accounts, exempt public sector funds, deferred annuities and unclaimed money authorities.*
- *Trustees may roll-over or transfer a members benefits to a successor fund without the consent of the member. A successor fund is basically a fund that has equivalent member rights as the transferring fund.*
- *To remain a complying superannuation fund and be eligible for tax concessions, a fund must remain a resident regulated superannuation fund for the entire year. A problem can arise if trustees of a SMSF are seconded to work temporarily overseas. Under this scenario, control of the fund may no longer be in Australia (and therefore the fund may not be eligible to receive concessional tax treatment). If this situation occurs, advice should be sought from your adviser or the ATO.*
- *Similarly, if a member of the fund becomes a non-resident of Australia in a year, the trustees should not accept contributions on behalf of the member in order to protect the fund’s eligibility for tax concessions.*



Part

6

Managing Investments

A key area of responsibility for trustees of self managed superannuation funds is investment management. SIS places certain duties and responsibilities on trustees when making investment decisions. They aim to protect and increase member benefits over time for retirement purposes.

Investment Strategy

The trustees of every SMSF are required to prepare and implement an investment strategy for the superannuation fund. The strategy must reflect the purpose and circumstances of the fund and consider:

- Investing in such a way as to maximise member returns having regard to the risk associated with holding the investment;
- Appropriate diversification and the benefits of investing across a number of asset classes (e.g. shares, property, fixed deposit) in a long term investment strategy; and
- The ability of the fund to pay benefits as members reach retirement and other costs incurred by the superannuation fund.

An appropriate investment strategy will set out the investment objectives of the fund and detail the investment methods the fund will adopt to achieve these objectives.

Trustees must make sure all investment decisions are made in accordance with the documented investment strategy of the fund and should seek investment advice or appoint an investment manager in writing if in any doubt.

Investment Restrictions

The superannuation law does not state exactly what a fund can and cannot invest in. It does however restrict some investment practices of superannuation funds. The investment restrictions aim to protect fund members by ensuring fund assets are not overly exposed to undue risk (for example the possible risk of an associated business failing). Secondly, they aim to ensure that funds make investment decisions with the primary purpose of generating retirement benefits for members rather than providing current day support.

Investment rules are one of the most important requirements of SISA and failure to comply with the rules could result in trustees being fined and/or the fund losing its compliance status.

• **Loans/Financial assistance to members or a member's relative**

Trustees are prohibited from lending money or providing financial assistance from the fund to a member or a member's relative. The use of a fund asset by a member or a member's relative for no cost or as a guarantee to secure a personal loan for example would be in breach of this investment restriction.

- **Borrowings**

SMSFs are prohibited from borrowing money except in some limited circumstances. Trustees are able to borrow for a maximum of 90 days to meet benefit payments due to members or to meet a surcharge liability as long as the borrowing does not exceed 10% of the fund's total assets. Trustees can also borrow for a maximum of 7 days to cover the settlement of security transactions if the borrowing does not exceed 10% of the fund's total assets. However, trustees cannot, as a matter of course borrow to settle security transactions, unless at the time the transaction was entered into it was likely that the borrowing would not be needed.

- **Acquisition of assets from a 'related party'**

Trustees are prohibited from acquiring assets for the superannuation fund from a 'related party' of the fund. Limited exceptions to this rule exist, if:

- the asset is an in-house asset and would not result in the level of in-house assets of the fund exceeding 5% of the fund's assets, or is an asset specifically excluded from being an in-house asset;
- the asset is a listed security (e.g. shares, units or bonds listed on an approved Stock Exchange);
- the asset is 'business real property'.

- **Related party of a fund**

A 'related party' of a fund covers all members of the fund and their associates and all employer sponsors of the fund and their associates.

Associates of members would include their relatives, business partners and any companies or trusts that they control (either alone or with their other associates).

Associates of employers would include business partners and any companies or trusts that the employer controls (either alone or with their other associates) or companies and trusts which control the employer.

- **In-house assets**

An 'in-house asset' is a loan to, an investment in, and leases with, a related party of the fund. In general, SMSFs are restricted from lending, investing or leasing more than 5% of the fund's total assets in a related party of the fund.

Some exceptions do exist, including allowing an exemption for 'business real property' which is subject to a lease between the fund and a related party of the fund and a limited exemption for certain investments in related non-g geared trusts or companies.

- **Investments to be made and maintained on an 'arms length' basis**

Investments by SMSFs must be made and maintained on a strict commercial basis. The purchase and sale price of fund assets should always reflect a true market value for the asset. Income from assets held by the fund should always reflect a true market rate of return.

'Business real property' of an entity generally relates to land and buildings used wholly and exclusively in a business. Trustees are permitted to acquire up to 100% of the fund's total assets in 'business real property' applying from 12 May 1998 (previously 40%).



Recent changes to the Investment Rules

The investment rules outlined in this section incorporate recent amendments which received Royal Assent on 23 December 1999. The main changes from the previous rules are:

- previously only acquisitions of assets from members and relatives were restricted, now acquisitions from the broader category of 'related parties' are restricted;
- previously only investments in certain employers and their associates were considered in-house assets and subject to the 5% restrictions, now investments in the broader category of 'related parties' (which includes related trusts) are restricted to 5%;
- previously assets being leased to related parties were not considered in-house assets, now they are and are thus generally restricted to the 5% limit; and
- previously the exemption allowing the acquisition of business real property only applied if property so acquired was less than 40% of fund assets, now the percentage is effectively 100%.

These changes apply from 11 August 1999, not 12 May 1998 as previously proposed. An exception is the change to the acquisition of business real property which will apply from 12 May 1998.

Transitional Rules

A number of transitional measures apply to the introduction of the new rules. These are as follows.

- **Existing Investments at 11 August 1999**

Fund investments and leases in place at 11 August 1999, are not subject to the new rules. That is, they are not counted as in house assets (unless they were already in house assets under the old rules).

A fund cannot, however, make additional investments in such an arrangement (eg. purchase additional units in an existing related trust investment) unless specifically allowed under the transitional rules discussed below.

- **Investments made between 11 August 1999 and 23 December 1999**

Investments and leases with related parties made between 11 August 1999 and 23 December 1999 will have until 1 July 2001 to comply with the new rules. That is, they are not counted as in house assets until 1 July 2001.

- **Certain specified investments after 11 August 1999**

Certain specified investments made after 11 August 1999 will also not be subject to the changes. Funds can choose to take advantage of one (but not both) of the following exemptions:

- If a fund had an investment in a related entity (eg. a trust) at 11 August 1999 it can make additional investments in that trust after that date (provided the investments do not exceed the level of the debt in the trust at that date and are made no later than 30 June 2009); OR
- If a fund had an investment in a related entity (eg. a trust) at 11 August 1999, it can, after that date but not later than 30 June 2009, reinvest earnings from that trust back into the trust. Also, if a fund had partly paid shares or units at 11 August 1999 it may make additional payments on those shares or units after that date (provided they are made no later than 30 June 2009).

If in any doubt the validity of an investment decision trustees should seek professional advice or contact the ATO for assistance.

Paying Benefits

A member's benefits in a fund may only be paid by being 'cashed' in accordance with the requirements of SIS. The payment standards of SIS work with the sole purpose test and the preservation rules to ensure monies in the fund are only paid to members in appropriate circumstances.

When can/must benefits be cashed?

There are two forms of cashing - compulsory and voluntary.

Compulsory cashing of benefits;

Benefits in a regulated SMSF **must** be paid to the member (ie. cashed) when:

- the member has reached age 65 (but not yet 70) and is no longer gainfully employed for at least 10 hours each week; or
- the member has reached age 70 and is no longer gainfully employed for at least 30 hours each week; or
- the member has died.

The benefits may be paid in the form of a lump sum, pension or annuity.

Voluntary cashing of benefits

A member's benefits in a fund will be classified as one or more of the following:

- preserved benefits;
- restricted non-preserved benefits; and/or
- unrestricted non-preserved benefits.

From 1 July 1999, **all** contributions, irrespective of their source, made by or on behalf of a member and all earnings in respect of the period after 30 June 1999 are preserved (ie. they are preserved benefits).

Trustees should refer to Superannuation Circular '*Payment Standards for Regulated Superannuation Funds*' issued by APRA for a more detailed explanation on the preservation rules of SIS.

Preserved benefits

Preserved benefits may only be cashed voluntarily if a 'condition of release' is satisfied, subject to any 'cashing restrictions' imposed by SIS. Cashing restrictions specify the form the benefits must be taken in. For example, the SIS regulations may state that the benefit needs to be taken as a non-commutable life pension.

Part

7

Preservation of benefits:-

- **restricted non-preserved benefits:-** also cannot be cashed until the member satisfies a condition of release and are subject to the same cashing restrictions as preserved benefits with one exception (refer '4. Terminating gainful employment' on page 21).
- **unrestricted non-preserved benefits:-** do not require the fulfillment of a condition of release, and may be paid upon demand by the member. An example of this type of benefit is one where the member has previously satisfied a condition of release and decided to keep the monies in the superannuation fund.



What are the conditions of release?

Conditions of release are the nominated events under SIS which a person must satisfy to enable them to withdraw their preserved benefits and restricted non-preserved benefits from a superannuation fund. Trustees need to be aware that the conditions of release are also subject to the rules of the individual superannuation fund (as set out in the trust deed) and that it is possible that a benefit may be payable under SIS but cannot be paid under the rules of the fund.

According to SIS, a member's preserved benefits and restricted non-preserved benefits **may** be paid out at:-

1. 'Retirement'

Actual 'retirement' depends on the person's age and for those under 60 years of age, their future employment intentions. A 'retired' member cannot access their preserved benefits before they reach their 'preservation age.' From 1 July 1999, depending on the member's date of birth, preservation age increases from age 55 to age 60.

A member who has reached their preservation age and is less than 60, retires when the arrangement under which they were gainfully employed ceases and the trustees are reasonably satisfied the member does not intend to be gainfully employed (for at least 10 hours per week) in the future.

When the member has reached aged 60, their retirement occurs when an arrangement under which they were gainfully employed ceases.

There are no 'cashing restrictions' for retirement.

2. Attaining age 65 or more

If a member has reached age 65 (but not yet 70) and is gainfully employed for at least 10 hours per week, they may cash their benefits at any time. Trustees should remember that if the person is not gainfully employed for this minimum per week, the benefits must be cashed on reaching age 65 (as per the section on 'Compulsory cashing of benefits'). There are no 'cashing restrictions'.

3. Terminating gainful employment after 1 July 1997— benefits less than \$200

A member may voluntarily cash their benefits where the member has terminated employment with a standard-employer sponsor of the fund and the member's preserved benefits are less than \$200. A standard-employer sponsor is an employer who contributes to the fund under an arrangement between the trustee of the fund and the employer. There are no cashing restrictions.

Preservation age

A person's **preservation age** depends on their date of birth, as set out in the following table:

Date of Birth	Preservation Age
Before 1 July 1960	55
1 July 1960 – 30 June 1961	56
1 July 1961 – 30 June 1962	57
1 July 1962 – 30 June 1963	58
1 July 1963 – 30 June 1964	59
After 30 June 1964	60

4. Terminating gainful employment

Where a member has terminated employment with an employer who had contributed to the member's fund, preserved benefits may be paid however the benefits must be taken as a non-commutable lifetime pension or annuity. On termination all restricted non-preserved benefits become unrestricted non-preserved benefits and therefore can be cashed out on request from the member.

5. Permanent incapacity

A member's benefits may be cashed if the member ceases gainful employment and the **trustees are satisfied** that the member is unlikely ever again to engage in gainful employment of the type for which the member is reasonably qualified by education, training or experience. There are no 'cashing restrictions'.

6. Temporary incapacity

A member's benefits may be paid where the **trustees are satisfied** that the member has temporarily ceased work due to physical or mental ill health which does not constitute 'permanent incapacity'. It is not necessary for the member's employment to fully cease and generally, a member would not be eligible for temporary incapacity benefits if they were receiving sick leave benefits. The cashing restriction is that the benefit must be paid as a non-commutable income stream.

7. Severe financial hardship

Different conditions for release and cashing restrictions apply depending on the age of the member.

- Where the member is under their 'preservation age plus 39 weeks', they must **satisfy the trustees** of the fund that:
 - they cannot meet reasonable and immediate family living expenses; and
 - they have been receiving Commonwealth income support payments for a continuous period of 26 weeks and were receiving that support at the time of applying to the trustee.
 - the cashing restriction is that the payment must be a single gross lump sum of no more than \$10 000 and no less than \$1000 (or a lesser amount if the member's benefits are less than \$1000). Only one payment is permitted in any 12 month period.
- Where the member has reached their 'preservation age plus 39 weeks', they must **satisfy the trustees** of the fund that:
 - they have been receiving Commonwealth income support payments for a cumulative period of 39 weeks since reaching their preservation age; and
 - they were not gainfully employed on a full or part-time basis at the time of applying to the trustee.
 - there are no cashing restrictions if releasing benefits under these circumstances.

TIPS

Remember – all of the 'conditions of release' are subject to the fund's rules. Trustees must ensure the deed of the fund allows members to be paid benefits in the above circumstances.



8. Compassionate grounds

Benefits may be released subject to fund rules on the determination by the Regulator that certain specified grounds for release have been met. A member must lodge a written application with APRA.

9. APRA approved purposes

APRA may give written approval for the cashing of benefits in restricted circumstances. APRA has the power to approve 'ancillary benefits' and accordingly has the power to approve circumstances in which those benefits can be cashed.

Roll-overs and transfers

Generally, roll-overs of eligible termination payments (ETPs) and transfers do not require that a condition of release is satisfied, subject to the fund rules.

Penalties

There are certain **reporting requirements** that trustees of SMSFs must follow when paying benefits to members or rolling-over benefits between funds:

- where the benefit is paid as **an ETP**:
 1. calculate the eligible service period and ETP components;
 2. calculate the ETP preservation amounts and other amounts;
 3. give your member an ETP Pre-payment Statement (unless an exemption applies);
 4. either pay the ETP in cash or pay the ETP to a roll-over fund according to the members instructions, ensuring that the correct amount of tax is withheld if paid in cash;
 5. issue an ETP Payment Summary
 6. report the payment to the ATO for Reasonable Benefit Limits (RBL) purposes.
- where the benefit is paid as a **superannuation pension or annuity**,
 1. ask the member to complete an '*Annuity and Superannuation Pension Declaration*';
 2. report the payment to the ATO for RBL purposes.
- Trustees should refer to the ATOs publication titled '*Eligible termination payments (ETP) – A guide for superannuation payers*' for a more detailed explanation of this area).

As can be seen from the above, trustees have very important responsibilities in determining whether (and when) a member can receive their benefits. Significant penalties may apply to trustees who fail to comply with the payment standards.

Administrative Obligations

Part

8

There are a range of administrative obligations imposed on self managed superannuation funds under SIS. Trustees are responsible for ensuring these obligations are met. Failure to do so may jeopardise the fund's eligibility for tax concessions.

Annual Returns & Other Lodgment Requirements

1. Annual Income Tax and SIS Compliance Returns

In the past all superannuation funds were required to lodge an annual income tax return ('Form F') to the ATO and an annual compliance return to APRA [to check the fund's compliance with SIS].

From the 1999/2000 financial year, all SMSFs will only need to lodge one combined return with the ATO. The return will be available from the ATO after 1 July 2000 and must be lodged in accordance with the income tax superannuation fund lodgment program.

Lodgment and payment arrangements for superannuation funds			
Superannuation fund category 1999-2000	Payment schedule 1999-2000	Instalment amount 1999-2000	Lodgment and payment dates 1999-2000
Entities classified as SMALL but actual tax payable for the current year exceeds \$300 000.	1 December 2000*	Balance of tax liability*	Pay balance by 1 December 2000 and lodge return by 15 January 2001
Entities classified as SMALL but actual tax payable for the current year is less than or equal to \$300 000.	15 December 2000* 15 March 2001*	100% of likely tax Balance of tax liability*	Lodge return and pay balance by 15 March 2001
Entities classified MEDIUM	1 June 2000 1 September 2000 1 December 2000* 1 March 2001*	25% of likely tax 25% of likely tax 25% of likely tax Balance of tax liability*	Lodge return and pay balance by 1 March 2001
Entities classified LARGE	1 March 2000 1 June 2000 1 September 2000 1 December 2000*	25% of likely tax 25% of likely tax 25% of likely tax Balance of tax liability*	Pay balance by 1 December 2000 and lodge return by 15 January 2001
NON-TAXABLE • entities which are non-taxable in the immediate prior year and remain non-taxable in the current year • entities taxable in the immediate prior year but have lodged an estimate varying tax payable to nil by 15 March; or • new entrants which are non-taxable.			Lodge return by 1 May 2001

* Transitional arrangements for the new PAYG income tax instalment system allow taxpayers, who are part of the quarterly instalment system for the 2000-2001 income year, to defer some or all of their income tax instalments for 1999-2000. The amount that can be deferred depends on the amount of tax payable in 1999-2000. The deferred amount is then paid in a number of equal, interest free, quarterly payments. More details are shown in the table below.

Tax payable 1999-2000	Deferral%	No. of interest free quarterly payments	PAYG quarter payment commences
<\$8 000	100	21	3rd
\$8 000 - \$300 000	42	21	3rd
>\$300 000	20	10	2nd

- corresponding dates apply to superannuation funds that balance on dates other than 30 June
- the grouping provisions of the legislation can have the effect of re-classifying an entity that would individually be classified as a MEDIUM entity to the status of a LARGE entity with the consequent lodgment and payment requirements of a LARGE entity.



2. Superannuation Surcharge

All SMSFs are required to report member contribution information to the ATO. This information is used to determine whether members of the fund have a superannuation surcharge liability in a particular year.

Trustees must provide this information by 31 October following the end of the financial year (or as otherwise notified). SMSFs can provide this information to the ATO electronically or prepare and lodge a '*Superannuation Surcharge Member Contributions Statement*'.

From the 1999/2000 financial year, SMSFs that can self-assess the surcharge liability for each and every member of the fund and provide a statement to the Commissioner of Taxation by electronic means will have until 31 March of the following year to report, however they will have to pay the self assessed surcharge liability at the time of reporting.

3. Reasonable Benefit Limits (RBL)

All SMSFs are required to report payments of benefits (superannuation pensions, annuities and eligible termination payments) made to members. Information relating to payments must be sent to the ATO within 14 days of the end of the month in which the payment was made. For example, a benefit payment made on 1 July 2000 will have to be reported by 14 August 2000.

Information can be lodged electronically or by form. Trustees can contact the RBL Helpline on **13 28 64** for further information.

Supervisory Levy

Trustees of SMSFs must pay the annual \$45 superannuation supervisory levy to the ATO with lodgment of the annual return. Please note that the first levies payable to the ATO will be due on lodgment of the 1999/2000 annual return.

Record Keeping Requirements

Under SIS, SMSF trustees are required to:

- Keep accurate and accessible accounting records that explain the transactions and financial position of the fund for a minimum of 5 years;
- Prepare an annual operating statement and an annual statement of the funds financial position and keep these records for a minimum of 5 years;
- Prepare minutes of trustee meetings and decisions (where matters effecting the fund were discussed), records of all changes of trustees and members written consent to be appointed as trustees for a minimum of 10 years;
- Keep copies of all annual returns lodged for a minimum of 10 years;
- Keep copies of all reports given to members for a minimum of 10 years.

Poor and inadequate record keeping has been identified as a major problem for small superannuation funds. Trustees need to give this area detailed attention.

Part 8
Administrative Obligations

Annual Audit

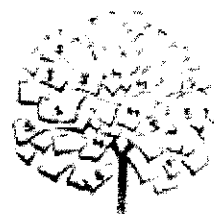
All SMSFs are required to have the financial accounts and statements of the fund audited each year by an **approved auditor**.

Auditors must provide a certificate to the trustees stating that the fund has been audited.

Auditors are obliged to bring to the attention of trustees any concerns about the funds financial position or with the funds compliance with SIS. If an auditor is not satisfied that the trustees have taken appropriate action to rectify the problem then they must inform the ATO of the problem.

An **approved auditor** may be a registered company auditor or a member with one of the following bodies:

Professional Organisation	Manner of Association
Australian Society of Certified Practising Accountants	Member
The Institute of Chartered Accountants in Australia	Member
National Institute of Accountants	Member
Association of Taxation and Management Accountants	Member or Fellow
National Tax and Accountants Association Ltd	Fellow



Part

9

Our Compliance

Approach

Superannuation funds with fewer than 5 members now have the opportunity to be truly self-managing. All SMSF members are now obligated to be involved in the decision making processes of the fund and share responsibility with the other trustees for the protection and appropriate investment of the members' retirement benefits.

Regulation of SMSFs will rest with the Superannuation Business Line of the ATO

The Superannuation Business Line already administers the Superannuation Guarantee, the Superannuation Holding Accounts Reserve and the Lost Members Register, which have as their principal focus, the provision and protection of retirement income. The role as Regulator of SMSFs combines well with these other superannuation functions.

Our Approach is based on the ATOs Compliance Improvement Model

This model reflects the government's intention that trustees must take greater responsibility in managing the compliance of their fund. The importance of the role of intermediaries (for example, tax agents, financial planners, etc) is also recognised in this model. The ATO is working with trustees and intermediaries to develop co-operative strategies and support tools.

Education, communication and client service

The ATO recognises that the majority of SMSFs are complying with the rules, or would be, if made aware of the rules.

Using this knowledge, our approach will be based on self-regulation.

Our aim is to achieve further compliance improvement, mainly through education and client service, to help SMSFs to self regulate.

Our objective is to encourage self-management, self-regulation and self-assessment.

The ATO is committed to educating and assisting trustees to voluntarily comply with the requirements of SIS.

Tips:

A registry of interested parties is available to assist intermediaries and trustees to continually update their knowledge.

Register your e-mail address by contacting the ATO. Contact details are listed on page 4.

Self Regulation/Assisted Regulation

The ATO will promote self-regulation rather than enforced regulation

Through our consultation process, practical materials to assist trustees to better understand their responsibilities will be developed as necessary. This process is well underway with an initial series of fact sheets, trustee checklists and this publication already available.

A number of communication channels (for example, the internet and e-mail, industry publications and seminars) will be used to convey relevant information to trustees.

ATO compliance action, in general, will focus on making sure that trustees of SMSFs are aware of their responsibilities, understand the rules and the reasons for the rules.

Where non compliance is identified, the ATO will initially encourage trustees to change their behaviour and comply, through targeted education. This proactive approach by the ATO aims to encourage self-regulation and enable the trustees to quickly address any compliance breaches.

Enforced Regulation

The ATO also recognises that some SMSFs may need a motivator to comply and some may need enforced regulation

In those cases where funds deliberately breach the law in a serious manner, the ATO will undertake enforcement action.

If you need more information and help you can:

- telephone the Superannuation Helpline on **13 10 20** for the cost of a local call. This service is linked to the Translating and Interpreting Service for non-English speakers
- visit the ATO's superannuation website at **www.ato.gov.au/super**
- have superannuation and tax information sheets faxed directly to you by accessing *A Fax from Tax* on **13 28 60**



Part

10

Compliance Checklist

Purpose

This brief checklist is designed to draw your attention to those details that you, as a trustee of a SMSF, must be aware of in the day to day operation of your fund. A fund that is complying with the rules, is taxed at 15%.

AN EXPANDED CHECKLIST IS ALSO AVAILABLE

NOTE: *This checklist is intended to be used as a guide.*

Compliance of your fund is a matter which can only be determined at a given point in time, on all the facts as presented at that time.

How to use the Checklist

The checklist highlights some of the more important rules under the *Superannuation Industry (Supervision) Act 1993* (SIS Act) that you, as a trustee, must comply with.

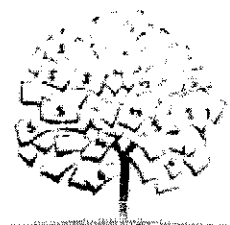
If, when using this checklist, you identify you may have a problem with your fund, avenues to resolve this are:

- Obtain a copy of the expanded checklist.
- Seek advice from your tax agent, accountant, financial planner, etc.
- Obtain a fact sheet.
- Contact the Superannuation Helpline on **13 10 20** for assistance.
- Obtain *A Fax from Tax* on **13 28 60**.
- Visit our website for assistance at www.ato.gov.au/super
- Add your electronic contact details to the register of interested parties which has been developed so that practitioners and trustees can continually update their knowledge.

Compliance	If my fund complies with ALL the rules of SIS it can take advantage of tax concessions	page 5	<input type="checkbox"/>
Set up of Fund	The members of my fund are also trustees. My fund meets the new SMSF definition	page 6	<input type="checkbox"/>
Election	A one-off election to be regulated and comply with section 19 of the SIS Act was made by my fund with the ATO, within 60 days of establishing the fund	page 11	<input type="checkbox"/>
TFN & ABN	My SMSF has it's own TFN and ABN* (* after 1/11/99)	page 11	<input type="checkbox"/>
Responsibilities of Trustees	All the trustees of my fund are aware that they are solely responsible for the compliance of the fund, even if advice is obtained from a tax agent, accountant, financial planner, etc	page 12	<input type="checkbox"/>
Separate Bank Account	My fund maintains a separate bank account. Money belonging to the fund is kept entirely separate from accounts of the members, the trustees and related employers (employer-sponsors)	page 12	<input type="checkbox"/>

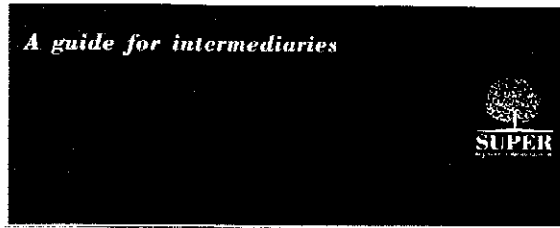
**Part 10
Compliance Checklist**

Purpose of Fund	My fund is managed and maintained by the trustees for the sole purpose of providing retirement benefits for members	page 13 <input type="checkbox"/>
Accepting Contributions	My fund accepts contributions only as set out in the Trust Deed and allowed under the SIS Act	page 14 <input type="checkbox"/>
Investment Strategy	My fund has a medium to long term investment strategy. The aim of my fund's strategy is to increase members' benefits over time	page 16 <input type="checkbox"/>
Investing	The assets of my fund are kept separate at all times from those of: <ul style="list-style-type: none"> • the members; • the trustees; and • related employers 	page 16 <input type="checkbox"/>
Transactions at arm's length	All transactions by the fund are conducted on a strict commercial basis . The fund can demonstrate that market value has been paid and received on all transactions	page 17 <input type="checkbox"/>
In-house assets	I am aware that special rules apply to restrict certain investments in assets when dealing with a related party of the fund. These are known as in-house assets	page 17 <input type="checkbox"/>
Paying Benefits	My fund makes payments only as allowed under the Trust Deed and allowed under the SIS Act	page 19 <input type="checkbox"/>
Reporting Requirements	My fund will prepare all necessary paperwork in relation to Eligible Termination Payments, Payment of amounts withheld, Reasonable Benefit Limits and Surcharge	page 21 <input type="checkbox"/>
Annual Requirements	The fund will: <ul style="list-style-type: none"> • have the records examined by an approved auditor and prepare member reports at the end of each year; • lodge its SMSF annual return with the ATO, in March, for the previous financial year; • pay the lodgment fee and tax liability, when due; and • comply with Surcharge requirements 	page 23 <input type="checkbox"/>
Keeping of Records	The fund will keep (for 5 years) accounting records which comply with accounting guidelines for true and accurate accounts. Responsible accounting practices will be adopted by the trustees. The trustees will keep (for 10 years) records which relate to the management of the fund, for example, minutes of all meetings	page 24 <input type="checkbox"/>
Significant Adverse Event	If my fund cannot meet payments to a beneficiary due to lack of funds, the ATO will be notified within three days and all members of the fund will be informed	<input type="checkbox"/>
Tax Matters	Records will be kept by my fund in relation to: <ul style="list-style-type: none"> • sales/purchases of assets for Capital Gains Tax purposes: <div style="border: 1px solid black; padding: 5px; margin: 5px 0;"> For more information about the Capital Gains Tax rules please refer to the ATO publication <i>'Guide to Capital Gains Tax'</i> or contact our general enquiry area on 13 28 61. </div> • Tax File Numbers of members; <input type="checkbox"/> • deductions claimed for the provision of death and disability cover for members; <input type="checkbox"/> • deductions claimed for administrative and operating expenses of the fund; <input type="checkbox"/> <div style="border: 1px solid black; padding: 5px; margin-top: 5px;"> For more information about the deductibility of expenses incurred by a superannuation fund please refer to Taxation Ruling TR 93/17. </div>	

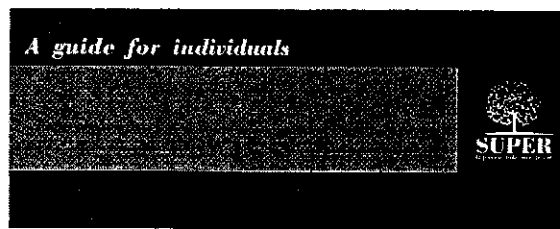


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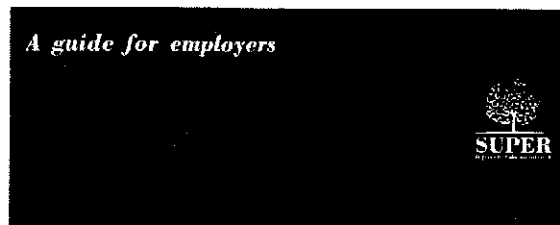
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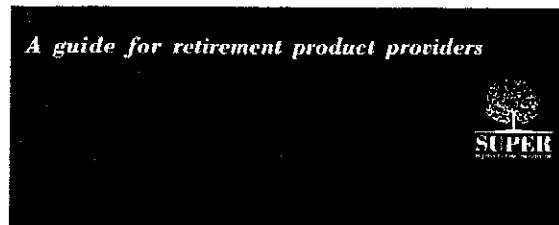
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