

SUPER NEWS



SMSF TRUSTEE ROLE & RESPONSIBILITIES AND PROPOSED PENALTY REGIME

ONE OF THE KEY DRIVERS OF THE GROWTH OF SELF-MANAGED SUPERANNUATION FUNDS (SMSF) IS THE ABILITY FOR YOU TO TAKE CONTROL OF YOUR OWN SUPERANNUATION.

However, it is important to understand that with this control comes increased responsibility, as trustee of your SMSF you are ultimately responsible for the prudent management of your super fund. The incentive to maintain your SMSF as a complying super fund is to ensure your super fund continues to receive favourable concessional tax treatment.

What are my key responsibilities as trustee?

As trustee of an SMSF you must act in accordance with:

- The provisions of the Superannuation Industry (Supervision) Act 1993 (SISA) and its Regulations
- The SMSF trust deed rules and provisions
- Other rules imposed, for example under Taxation law and Trust law.

What are the SISA 'Covenants'?

The Superannuation Industry (Supervision) Act (SISA) contains covenants (i.e. rules) that are automatically deemed to be included in the trust deed of every regulated super fund in Australia. These covenants reflect the duties imposed on all trustees under general trust law, and require trustees to:

- Always act honestly
- Exercise the same degree of care, skill and diligence as an ordinary prudent person in managing your SMSF
- Act in the best interest of all your SMSF's beneficiaries
- Keep the SMSF's assets and money separate from other money and assets, such as business and personal money and assets
- Retain control over your SMSF
- Develop and implement your SMSF's investment strategy

- Not enter into contracts or behave in a way that hinders trustees from properly performing their duties or powers
- Allow beneficiaries access to certain information about the SMSF.

Delegating your responsibility

While you are allowed to engage the services of professionals (accountants, investment advisors and financial planners) to assist you with running the SMSF, it is important to remember that the ultimate responsibility of the SMSF always rests with you as trustee. Additionally, you cannot receive any remuneration for your duties as trustee.

Sole Purpose Test

One of the most important responsibilities for a SMSF trustee is ensuring that your super fund is maintained for the purpose of providing benefits to members, generally upon their retirement, or to their dependants in the event of their death.

A breach of the Sole Purpose Test is very serious and can result in you facing civil or criminal penalties and your super fund losing its complying status and tax concessions.

Keeping the SMSF money and assets separate

A common issue is where a SMSF trustee intermingles the money and assets of the SMSF with either their personal assets, or those of a related entity (example: business or unit trust). The trustee must keep the SMSF money and assets separate at all times. These rules are designed to protect the members' retirement benefits and failure to do so could see the SMSF lose its tax concessions.

"... it is important to understand that with this control comes increased responsibility"

The simplest way to ensure you comply with this separation requirement is to have all the SMSF's bank accounts and investment ownership registrations (where possible) under the name of the individual trustees or corporate trustee with reference to the SMSF's full name.

For example:

Individual trustees: John Smith and Joan Smith as trustee for the J & J Smith Super Fund

Corporate trustee: J & J Super Pty Ltd as trustee for the J & J Smith Super Fund

Some of the benefits of having a 'special purpose' corporate trustee for your SMSF are:

- The special purpose corporate trustee can only act as a SMSF trustee
- Directors can be added or removed via the ASIC registry without the need to update the SMSF investment ownership registrations
- Can reduce the personal liability in certain legal circumstances compared to individual trustees
- Easier to segregate and identify SMSF assets.

Another serious breach can occur when the trustee allows SMSF money or assets be used by the members, their relatives or a related business. This is a continuous compliance focus of the Australian Taxation Office (ATO) (as Regulator of SMSFs) due to the temptation to provide short-term credit or financial assistance when unforeseen needs arise.

Investment strategy

Under SISA, all super funds are required to have an investment strategy, and the strategy needs to be reviewed on a regular basis (suggested at least annually). When making investment decisions, you must act in accordance with your SMSF's trust deed, the investment strategy and the provisions of SISA.

SISA does set out some investment restrictions which include:

- Lending to members and their relatives
- Acquiring assets from 'related parties' of the superannuation super fund
- Borrowing by superannuation super funds
- Making and maintaining investments on an 'arm's length' basis
- Holding investments in, or with related parties.

Loans to members

As noted above, you must ensure that no SMSF money or assets are loaned to any member or their relative, regardless of the nature or the term of the loan or provide financial assistance. There have been high profile court cases relating to these provisions and while the argument put forward by many trustees is 'it's my money', your responsibility as trustee overrides this argument.

Acquisitions from related parties

SMSFs are generally prohibited from acquiring assets from related parties, however there are a few exceptions to this rule including where the asset is:

- A listed security such as a share listed on an approved Stock Exchange
- Business real property (e.g. land and buildings used wholly for business purposes)
- Widely held unit trust (e.g. public unit trust)
- An 'in-house asset' and its acquisition would not result in the level of in-house assets of the SMSF exceeding 5% of the SMSF's total assets.

Importantly, when acquiring an asset from a related party the terms and conditions of the acquisition must be on an 'arms-length' commercial basis, and the asset's purchase price must reflect its true market value.

Borrowing

SMSFs are generally prohibited from being able to borrow subject to some very limited exceptions. These rules can be found under section 67 of SISA and make reference to a structure called 'Limited Recourse Borrowing Arrangements' (LRBA), which can be complex. Trustees should seek professional advice before entering into any purchase or investment contracts.

Caution is also needed where your super fund's bank account allows overdrafts or ability to overdraw (even if inadvertently) as this can be considered a breach of the borrowing provisions under SISA.

Payment of benefits

As a SMSF trustee, you must ensure that benefits are only paid in accordance with the preservation and condition of release rules outlined in SISA. Furthermore, the trustee must also adhere to the SMSF's trust deed provisions.

This is another good reason to regularly update your super fund's governing rules. There are instances where out-dated trust deed rules (say prior to 2007) either do not allow members to commence transition to retirement income streams whilst employed; or force compulsory cashing of superannuation once the member attains 65, due to superseded provisions. A simple amendment to the SMSF's governing rules can overcome these limitations.

Additional obligations introduced from 1 July 2013

Additional measures were introduced as part of the Government's Stronger Super package in 2012, which place additional responsibilities on SMSF trustees such as the requirement to:

- Regularly review the SMSF's investment strategy
- Consider insurance for members as part of the SMSF's investment strategy
- Value the SMSF's assets at market value for the purposes of preparing financial accounts and statements.

The ATO has published some valuation guidelines to assist SMSF trustees and can be found [here](#).

What are the SMSF reporting obligations?

There are a number of administrative and reporting tasks that must occur throughout the year in relation to running your SMSF.

Annual obligations include:

The annual preparation of financial reports

The completion of the annual independent audit to assess overall compliance with the super law

The lodgement of the SMSF Annual Return, remembering it contains information about the auditor and audit, and cannot be lodged until the signed audit report has been issued.

Record keeping obligations include:

Additionally, as trustee of the SMSF, you must maintain certain records relating to decisions affecting your super fund. These include decisions around admitting new members, changes to the trustee, buying and selling investments or starting a pension. Different records have different retention periods.

The following records must be held for 5 years:

- Annual financial statements
- Supporting accounting records for the financial statements
- SMSF Annual Returns.

The following records must be held for 10 years:

- Minutes of meetings
- Changes and appointments of trustees
- Copies of all reports given to members.

Keeping the ATO informed

You must inform the ATO within 28 days if there is a change in:

- Trustees
- Directors of the corporate trustee
- Members
- Contact details (contact person, phone and fax numbers)
- Address (postal, registered or address for service of super fund notices).

The easiest way to do this is let us know and we can update most of this information electronically with the ATO on your behalf.

What happens if you fail in your trustee duties?

As a SMSF trustee, if you fail to act in accordance with the super and tax laws then you risk:

- Your SMSF becoming non-complying and losing its tax concessions
- Disqualification, removal or suspension as a trustee of the SMSF
- Civil or criminal prosecution
- Financial penalties.

Furthermore, if you fail to act in accordance with your SMSF trust deed, other impacted members of the SMSF may take legal action against you.

SMSF Trustee Penalty Regime

The new penalty regime for SMSF trustees will now proceed according to a recent announcement made by Assistant Treasurer Arthur Sinodinos. The new laws will give the ATO (the Regulator of SMSFs) power to issue a range of penalties to trustees of SMSF that breach the superannuation laws from 1 July 2014.

Currently, the Commissioner of the ATO only has the following options when dealing with a SMSF non-compliance issue:

- Accepting an enforceable undertaking in relation to a contravention
- Making a SMSF non-complying for taxation purposes (i.e. loss of tax concessions)
- Applying to a court for civil penalties to be imposed
- Disqualifying a trustee of an SMSF.

There is no scope to deal with minor breaches of SISA, as all of the above measures are time consuming, costly and generally inefficient to implement and review.

If the new measures are implemented as announced, the Commissioner will now have greater flexibility in dealing with SMSF non-compliance by issuing:

- Rectification directions for contraventions of the superannuation law
- Education directions to trustees of the SMSF
- An administrative penalty regime for SMSF trustees for certain contraventions of the SISA.

A rectification direction will require a trustee to undertake specified action to rectify the contravention within a specified time, and provide the ATO with evidence of compliance with the direction.

An education direction will require a trustee to undertake a specified course of education within a specified time frame, and provide the ATO with evidence of successful completion of the course.

Where an administrative penalty is imposed it must be paid personally by the trustee or the director of the trustee company and cannot be paid or reimbursed by the SMSF.

Some of the proposed penalties include:

SISA SECTION	RULE	ADMINISTRATIVE PENALTY
s35B	Failure to prepare Financial Statements	\$1,700
s65	Lending or providing financial assistance to members & their relatives	\$10,200
s67	Super fund borrowings, outside the permitted exemptions (e.g. limited recourse borrowing arrangement)	\$10,200
s84	Trustees have not taken reasonable steps to comply with the In House Asset Restrictions	\$10,200
s.103(1) & (2)	Failing to keep trustee minutes for at least 10 years	\$1,700
s.104	Failing to keep records of change of trustees for at least 10 years	\$1,700
s.104A	Failing to sign Trustee Declaration within 21 days of appointment and keeping for at least 10 years	\$1,700
s.105	Failing to keep member reports for 10 years	\$1,700
s.106	Failing to notify ATO of an event that has significant adverse effect on the super fund's financial position	\$10,200
s.106A	Failing to notify ATO of change of status of SMSF, e.g. super fund ceasing to be a SMSF	\$3,400
s.160	Failing to comply with ATO Education directive	\$850
s.254(1)	Failing to provide the Regulator with information on the approved form within the prescribed time upon establishment of the super fund	\$850
s.347A(5)	Failing to complete a form with requested information provided by the Regulator as part of the Regulator's Statistical Program	\$850

For more serious compliance breaches or where a SMSF continues to breach the law, the ATO still has access to its existing powers.

To learn more contact your BDO adviser.

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