

A guide for individuals

Self managed superannuation funds

A guide for trustees running a self managed superannuation fund



SUPER
It pays to take an interest



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Foreword	4
Introduction	5
Part 1 What is a self managed superannuation fund (SMSF)	6
An SMSF 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.	
Part 2 Setting up a self managed superannuation fund	10
There are a number of trust law and legislative requirements involved in setting up an SMSF. They include: obtaining a trust deed; appointing trustees; electing to become a regulated fund; and obtaining a TFN and ABN.	
Part 3 Trustees duties	12
A trustee of an SMSF must act in accordance with: the clauses of the superannuation fund trust deed; the provisions of SISA; and other general rules.	
Part 4 The sole purpose test	13
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.	
Part 5 Accepting contributions	14
It is important that trustees are aware of the minimum standards relating to the acceptance of contributions under SISA. These standards are designed to ensure that contributions are made for retirement purposes only.	
Part 6 Managing investments	16
A key area of responsibility for trustees of an SMSF is investment management. SISA places certain duties and responsibilities on trustees when making investment decisions. They aim to protect and increase member benefits over time for retirement purposes.	
Part 7 Paying benefits	19
A member's benefits in a fund may only be paid by being 'cashed' in accordance with the requirements of SISA. The payment standards of SISA work with the sole purpose test and the preservation rules to ensure monies in the fund are only paid to members in appropriate circumstances.	
Part 8 Administrative obligations	23
There are a range of administrative obligations imposed on SMSFs. Trustees are responsible for ensuring these obligations are met. Failure to do so may result in the trustees being fined and may also jeopardise the fund's eligibility for tax concessions.	
Part 9 ATOs compliance approach	26
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.	
Part 10 Compliance checklist for trustees/index	28
This brief checklist is designed to draw your attention to these details that you, as a trustee of an 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 an 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* (SISA). The decision to become a trustee of an SMSF should not be taken lightly. Trustees are responsible for ensuring their fund complies with SISA as well as many other legislative and administrative requirements. Severe penalties may apply if trustees contravene 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.

Need more information?

For further information on this topic:

- visit the ATO superannuation website at www.ato.gov.au/super
- phone the Superannuation Infoline on **13 10 20** for the cost of a local call
- obtain *A Fax from Tax* on **13 28 60**
- if you do not speak English and need help from the ATO, phone the Translating and Interpreter Service on **13 14 50**
- people with a hearing or speech impairment with access to appropriate TTY or modem equipment can communicate with the ATO by first contacting the Australian Communication Exchange Relay Service on **13 25 44**.

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.

Regulated and complying superannuation funds

It was mentioned above that superannuation funds receive favourable taxation treatment. For an 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 SISA that an 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 SISA. In short, a complying SMSF is a superannuation fund that has elected to be regulated, has complied with SISA 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

1

What is an SMSF?

With the exception of single member funds, an SMSF is defined in the following ways:

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.)

An 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 SISA, 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 an 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 an SMSF?

If the fund no longer meets the definition of an 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 an 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 an 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 an 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 an SMSF by lodging an *Application to Register for The New Tax System Superannuation Entities Change of Details* form.

Single member funds

It is possible to have an 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.



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 an 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.

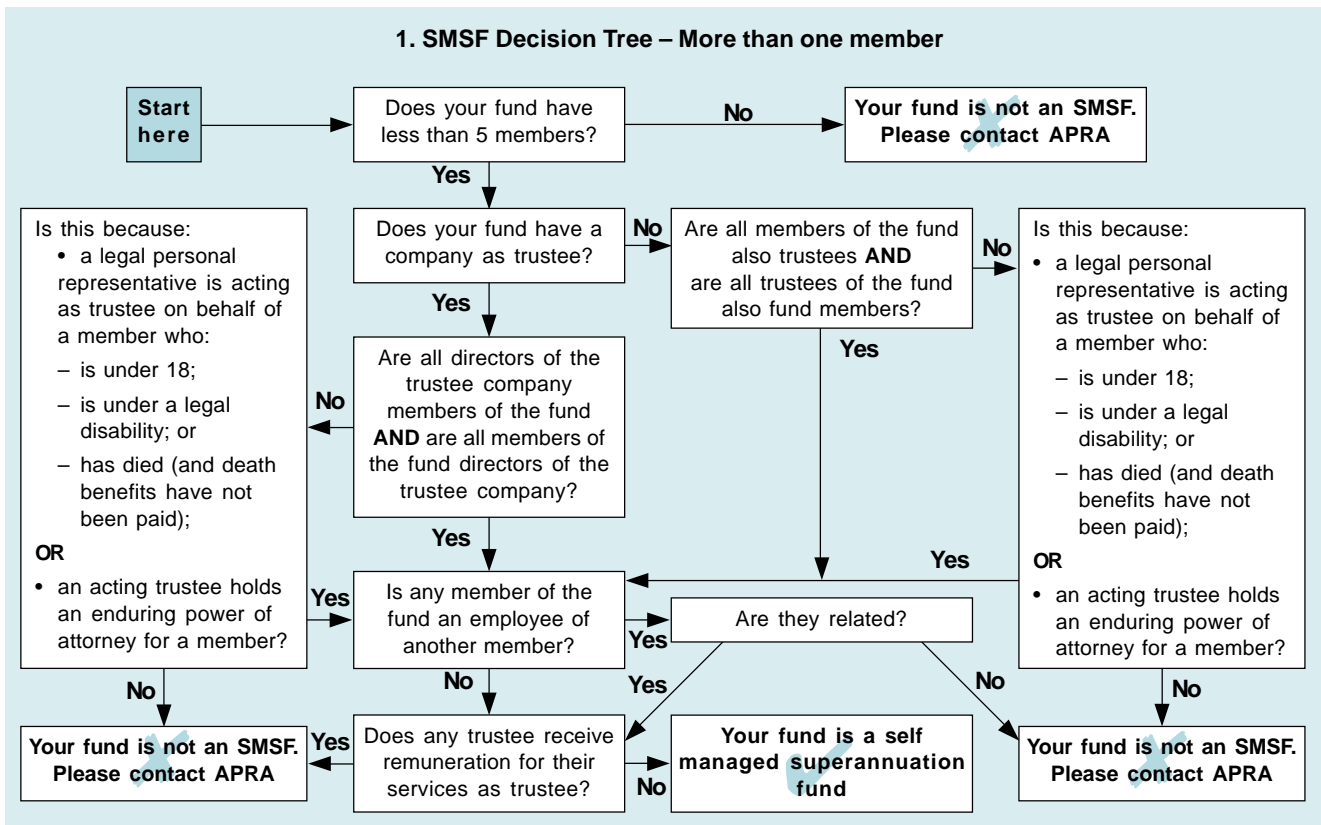
Q. Ivan’s employer, Monica, wishes to join the fund. Would the fund still be an SMSF if Monica joins?

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

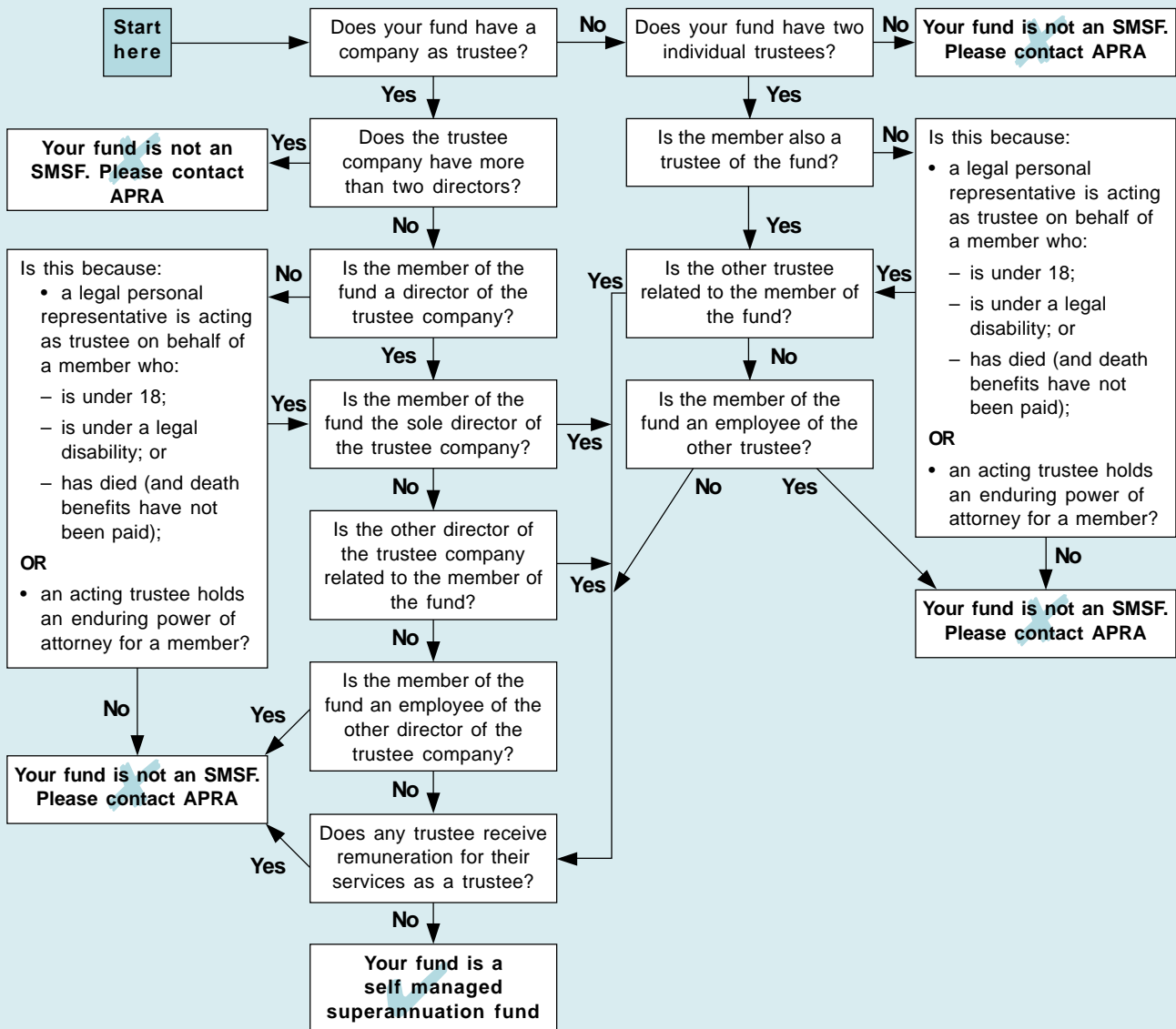
Q. Nick is a director of XYZ Pty Ltd. Bruce is an employee of XYZ. At 30 June 1999 George (Nick’s brother) was a member of the same excluded superannuation fund as Bruce. Could Bruce and George be in the same SMSF?

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 an SMSF. Single member funds must use the decision tree on page 9.



2. SMSF Decision Tree – Single member funds



Part

2

Setting up

There are a number of trust law and legislative requirements involved in setting up an SMSF. 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 SISA rules and other legal obligations.

To be an 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 SISA, or
- the person is an insolvent under administration (eg. an 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 SISA 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 by calling the Superannuation Infoline on **13 10 20**. Alternatively the form is available on the ATO tax reform website at www.taxreform.ato.gov.au

Once an 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 SISA).

4. Obtain a tax file number (TFN)

A TFN is a unique number issued by the ATO for each taxpayer. The trustees of an 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 supporting 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 adviser. This is discussed in more detail under **Administrative obligations**.*



Part

3

TIPS

- *If a trustee fails to act in accordance with the rules of SISA 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 affected 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 SISA that a trustee will confront in the day to day operations of a fund.*

Trustees duties

A trustee of an SMSF must act in accordance with:

- the clauses of the superannuation fund trust deed (governing rules);
- the provisions of SISA; and
- other general rules, for example those imposed under tax law and trust law.

SISA covenants (rules)

SISA 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.

SISA 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 an 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 an SMSF must notify the ATO if a decision is made to close the superannuation fund. Please refer to Part 8 **Administrative obligations** for more information.

Sole purpose test

It was previously mentioned that a complying superannuation fund is basically a regulated superannuation fund that meets the operational standards of SISA. 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.

An 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).

Contravention of the sole purpose test

One of the main ways to determine if a fund has contravened 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 possible contravention of the sole purpose test is where 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

A contravention of the sole purpose test is very serious and may lead to the trustees facing civil and criminal penalties. 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 involving the contravention 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

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.

Accepting contributions

It is important that trustees are aware of the minimum standards relating to the acceptance of contributions under SISA. 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

SISA 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 70 but less than 75

A trustee may only accept contributions if the contributions are personal contributions made by the member and the member is gainfully employed on at least a part-time basis. A trustee is unable to accept other non-mandated contributions, eg, spouse contributions, voluntary employer contribution, in respect of a member who is aged 70 or over.

For members aged over 75

A trustee generally cannot accept contributions (other than mandated employer contributions) for a member aged over 75.

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.

Superannuation for life: Child accounts

From 1 July 2002, parents, grandparents and friends will be able to contribute to superannuation on behalf of children. Contributions of up to \$3000 per child during a 3 year period can be made on behalf of a child under the age of 18.

Baby bonus contributions

From 1 July 2002, contributions may be accepted in respect of the recipient of the baby bonus in the 12 month period after the person receives the baby bonus. The amount of contributions is not limited — it may be less or more than the baby bonus they receive.

In specie contributions

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 an 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 SISA which may result in the fund being fined and/or 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.*
- *Prior to 1 October 2001, to remain a complying superannuation fund and be eligible for tax concessions, a fund was required to remain a resident regulated superannuation fund for the entire year.*
From 1 October 2001, in recognition of a potential problem that could arise if the trustees of an SMSF were seconded to work temporarily overseas, an amendment was passed allowing trustees to temporarily move overseas for a period of less than two years without jeopardising the funds complying status.
- *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 SMSFs is investment management. SISA 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 (eg. 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 a contravention 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. The trustees are permitted to acquire up to 100% of the fund's total assets in business real property from 12 May 1998 (previously 40%).



Changes to the investment rules

The investment rules outlined in this section incorporate 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 have applied from **11 August 1999**, not 12 May 1998 as previously proposed. An exception is the change to the acquisition of business real property which applied 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.

- **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.

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

In-house asset investments made between 11 August 1999 and 23 December 1999 were not subject to the in-house limits until 1 July 2001 (provided they would not have been captured under the previous rules).

Paying benefits

A member's benefits in a fund may only be paid by being cashed in accordance with the requirements of SISA. The payment standards of SISA 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 75) and is no longer gainfully employed for at least 10 hours each week;
- the member has reached age 75 and is no longer gainfully employed for at least 30 hours per 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 SISA.

Preserved benefits

Preserved benefits may only be cashed voluntarily if a condition of release is satisfied, subject to any cashing restrictions imposed by SISA. Cashing restrictions specify the form the benefits must be taken in. For example, the SISA 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.



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

What are the conditions of release?

Conditions of release are the nominated events under SISA 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 SISA but cannot be paid under the rules of the fund.

According to SISA, 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 75) 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 on at least a part-time basis (at least 10 hours per week), the benefits must be cashed on reaching age 65 (as per the section 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.

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.

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 the Regulator.

TIPS

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



9. Temporary residents departing Australia

From 1 July 2002, persons who have entered Australia on an eligible temporary residents visa and who subsequently permanently depart Australia will be able to receive payment of any superannuation they have accumulated. The payment will be subject to special withholding tax.

The fund will be required to issue a withholding payment summary to the individual and report details of the withholding annually to the ATO. Further details are available on the ATO superannuation website at www.ato.gov.au/super

10. 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 governing rules of the fund.

Reporting requirements

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. where the ETP is paid in cash, issue an *ETP Payment Summary*;
 6. where an ETP is rolled-over, complete an *ETP Roll-over Statement*;
 7. 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 a *Tax file number declaration* form;
 2. report the payment to the ATO for RBL purposes.
- Trustees should refer to the ATOs publication titled *Eligible termination payments (ETP) – A practical guide for superannuation payers who are paying an eligible termination payment to a member* 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

There are a range of administrative obligations imposed on SMSFs. Trustees are responsible for ensuring these obligations are met. Failure to do so may result in the trustees being fined and may also jeopardise the fund's eligibility for tax concessions.

Annual returns & other lodgment requirements

1. Annual income tax and SISA compliance returns

All SMSFs must lodge annual income tax and SISA compliance information with the ATO using the combined *fund income tax and regulatory return*.

The lodgment and payment date for all SMSFs that prepare their own income tax and regulatory return (ie. self preparers) for the financial year 2001/2002 was originally 31 October 2002 but this has now been extended to **28 February 2003**.

The lodgment and payment dates for all tax agent prepared Fund Income Tax and Regulatory returns for SMSFs are in accordance with the tax agent lodgment program as detailed below:

Superannuation fund	Requirement and due dates
<ul style="list-style-type: none"> Taxable large superannuation funds (that have either an annual total income of greater than \$10 million or investment of more than \$50 million or both) as per latest year lodged All non complying superannuation funds with lodgment due date of 15 January 2003 	Lodgment 15 January 2003 Payment 2 December 2002
<ul style="list-style-type: none"> All superannuation funds where one or more prior year returns were outstanding as at 30 June 2002 	Lodgment & Payment 2 December 2002
<ul style="list-style-type: none"> New superannuation fund registrations – taxable with no previous lodgment history 	Lodgment & Payment 14 February 2003
<ul style="list-style-type: none"> Superannuation funds (excluding large superannuation funds) with total income of latest year lodged in excess of \$1 million Large superannuation funds that are non-taxable as per latest year lodged 	Lodgment & Payment 28 February 2003
<ul style="list-style-type: none"> Lodgment end date – All superannuation funds that are taxable 	Lodgment & Payment 15 May 2003
<ul style="list-style-type: none"> Non-taxable new registrants superannuation funds All other superannuation funds that are non-taxable or refund in the prior year as well as actual non-taxable or refund in the current year 	Lodgment 3 June 2003



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 2000/2001 financial year, SMSFs that can self assess the surcharge liability for each and every member of the fund can provide this information to the ATO electronically as part of the combined fund income tax and regulatory return. The due date for surcharge reporting is the same as the due date for the income tax return. Payment of any self assessed liability will be within 7 days of lodgment.

3. Reasonable benefit limits (RBLs)

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 would have to be reported by 14 August. Information can be lodged electronically or in paper form. Trustees can contact the Superannuation Infoline on **13 10 20** for further information.

Supervisory levy

Trustees of SMSFs must pay the annual \$45 superannuation supervisory levy to the ATO with lodgment of the annual combined return. Please note that the first levies payable to the ATO were due on lodgment of the 1999/2000 annual return. For the 2002 and following financial years, the levy is due to be paid by the lodgment date for an SMSF's combined income tax and regulatory return.

Record keeping requirements

Under SISA, 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.

Annual audit

All SMSFs are required to have the financial accounts and statements of the fund audited each year by an approved auditor (financial audit). In addition the approved auditor is required to assess the funds overall compliance with SISA (compliance audit). The audit report is required to be completed, the day before the fund is required to lodge its combined income tax and regulatory return.

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 SISA. 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.

Winding up

Trustees of SMSFs must notify the ATO if a decision is made to close down the superannuation fund. This is done by completing the relevant wind up labels in the fund's income tax and regulatory return. The ATO does not require a separate notification of the wind up. Trustees should also ensure that all taxation and reporting obligations at the time of winding up are met. These include:

- reporting of all benefit payments made to members for RBL purposes;
- reporting of superannuation surcharge contributed amounts transferred as a result of the wind up of the fund; and
- ensure all requirements associated with paying out an ETP are met.

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

Professional organisation	Manner of Association
CPA Australia	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 SISA.

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 evident from the series of fact sheets, trustee checklists and publications which are available to trustees of SMSFs.

A number of communication channels (for example, the internet and email, 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 pro-active approach by the ATO aims to encourage self regulation and enable the trustees to quickly address any compliance problems.

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 contravene the law in a serious manner, the ATO will undertake enforcement action.

Need more information?

For further information on this topic:

- visit the ATO superannuation website at www.ato.gov.au/super
- phone the Superannuation Infoline on **13 10 20** for the cost of a local call
- you can write to:
Superannuation Business Line
Australian Taxation Office
PO Box 277
WTC VIC 8005
- obtain *A Fax from Tax* on **13 28 60**
- if you do not speak English and need help from the ATO, phone the Translating and Interpreter Service on **13 14 50**
- people with a hearing or speech impairment with access to appropriate TTY or modem equipment can communicate with the ATO by first contacting the Australian Communication Exchange Relay Service on **13 25 44**.



Part 10

Compliance checklist

Purpose

This brief checklist is designed to draw your attention to those details that you, as a trustee of an SMSF, must be aware of in the day to day operation of your fund. A regulated 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 SISA 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 Infoline on **13 10 20** for assistance.
- Obtain *A Fax from Tax* on **13 28 60**.
- Visit the ATO Superannuation website at **www.ato.gov.au/super**

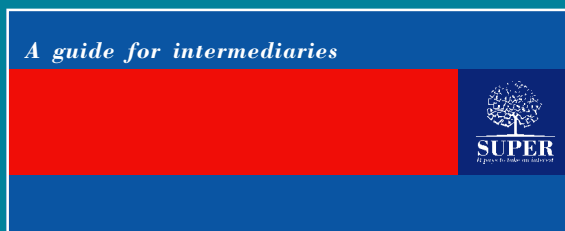
Compliance	If my fund complies with ALL the rules of SISA it can take advantage of tax concessions	page 5	
Set up of fund	The members of my fund are also trustees. My fund meets the new SMSF definition	page 6	
Election	A one off election to be regulated and comply with section 19 of SISA was made by my fund with the ATO, within 60 days of establishing the fund	page 11	
TFN & ABN	My SMSF has it's own TFN and ABN* (* after 1/11/99)	page 11	
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	
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	

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 SISA	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 SISA	page 19	<input type="checkbox"/>
Reporting requirements	My fund will prepare all necessary paperwork in relation to ETPs, PAYG instalment and withholding payments, GST, RBLs 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;"> <p>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.</p> </div> <ul style="list-style-type: none"> • TFNs of members; • deductions claimed for the provision of death and disability cover for members; • deductions claimed for administrative and operating expenses of the fund; <div style="border: 1px solid black; padding: 5px; margin: 5px 0;"> <p>For more information about the deductibility of expenses incurred by a superannuation fund please refer to Taxation Ruling TR 93/17.</p> </div>		<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>



Notes

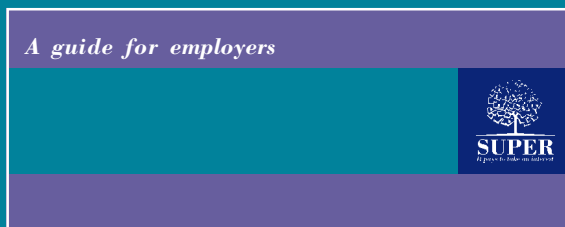
To simplify the identification of publications,
the ATO's Superannuation Business Line has colour coded
material addressed to a particular audience



Colour scheme for all publications
addressed to intermediaries



Colour scheme for all publications
addressed to individuals



Colour scheme for all publications
addressed to employers



Colour scheme for all publications
addressed to retirement product providers