SMSF Association National Conference address

Deputy Commissioner Emma Rosenzweig's address at the SMSF Association National Conference.

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Good afternoon, everyone. Thank you for having me along today.

Most of you would have heard the earlier keynote address from the Commissioner of Taxation, Rob Heferen. As Rob mentioned, since the introduction of SMSFs in 1999, the sector has grown from being a niche retirement product to a significant component of Australia's superannuation landscape.

Back then we started with around 200,000 SMSFs holding approximately $70 billion worth of assets which has now grown to more than 625,000 funds, holding assets worth just over $1 trillion, making up a quarter of the total assets held in superannuation funds. With this scale comes an increase in scrutiny from the public and government alike.

I remind you that having an SMSF is a choice, and while having excellent advisers is very helpful and is encouraged by us, the 'self' in self-managed super fund should be taken seriously. SMSFs and superannuation generally, is attractive because of the generous tax concessions available. As Rob discussed, the regulatory rules that apply to the running of a SMSF, that have been put in place by successive parliaments, and that the ATO has been charged with upholding, are the price of those generous tax concessions.

Government and the public also have expectations that the ATO takes seriously in its responsibilities to administer the rules to ensure a fair and level playing field, and that the purpose of superannuation is realised whether you are saving for retirement through an SMSF, or another type of fund.

While acknowledging the maturity of the sector, I thought I would talk about issues that still concern us, and that we'd like to see SMSFs focus on. As advisers there have also been some big changes in legislation recently that could impact you, and so I would also like to bring to your attention today the recent changes to the promoter penalty laws and the Tax Practitioners Board requirements for registered tax agents.

Our data is telling us that between 96 and 97% of funds each year do not have any contraventions reported by their auditor, which demonstrates a strong level of compliance within the industry. This is terrific because it means the vast majority of SMSFs are doing the right thing.

While 3 to 4% isn't a large number of SMSFs, in the context of a $1 trillion sector, the amount of super savings at risk is not insignificant. I will talk later about lodgment of annual returns, but it is important here to note that this 3–4% is only based on SMSFs that have lodged their annual returns.

On average, the most common contraventions are in relation to:

- administration (such as market valuations)
- illegal early access, including access via a loan
- in-house assets, and
- the sole purpose test.

But a single statistic can't tell the whole story. There was a 10% increase in funds with contraventions reported during the 2024 income year and, for the first half of the current income year, we have noted a further increase in contraventions of almost 13% compared to the same time last year. This is not an ideal way to start the income year and is something we will be keeping a close eye on.

It was a year ago when I announced to you our illegal early access estimate. This issue continues to be of significant concern to us, with our latest estimate of the amount accessed illegally either blatantly, or through loans being $481.8 million. This is a small, but ultimately

statistically significant increase from the 2021 estimate, showing that some trustees continue to treat their SMSF as a convenient source of funds.

Over the last few years we have been scaling up our compliance action to address this heightened risk. Individuals who access their retirement savings before a condition of release had been met not only impact their retirement income but also the integrity of the system and put pressure on taxpayer funded pensions.

For the member, there can be significant financial impacts because illegally accessed benefits are assessable and penalties, interest, and disqualifications can also be applied. Also, sanctions for promoters of illegal early access schemes can be severe and include the loss of professional licences, substantial additional tax, penalties, and criminal prosecution which can result in imprisonment.

We disqualified 660 trustees in the 2023–24 financial year. This is not a sanction we apply lightly. Disqualification is extremely serious, and we will disqualify a trustee where we are concerned that allowing the individual to remain in the system presents a future compliance risk compromising retirement savings.

The disqualification of a trustee is enduring and effectively forces the person out of the SMSF system. Disqualification of an individual from acting as a trustee or director of a corporate trustee is published in the ATO's Disqualified Trustee Register and this information is also published in the Federal Register of Legislation where individuals' names remain permanently on public record. This can impact more than just an individual's ability to be a trustee ever again, it can also affect their personal and professional reputation and even careers. Additionally, we have seen financial institutions, here and abroad, undertaking searches of disqualifications as part of their due diligence processes to meet the requirements of the anti-money laundering and counter-terrorism financing rules.

As well as disqualifications, members who have illegally accessed funds will be taxed on those amounts, and additionally are subject to penalties of up to $6,600 per breach. In the 2023–24 year, 350 of our illegal early access cases resulted in amendments to the income tax assessment of the members as well as having penalties imposed.

As well as blatant illegal early access, we are also seeing worrying levels of breaches of conditions of release through loans to members. Loans to members are prohibited by the SIS Act and constitute a

serious contravention which is subject to a penalty of up to $19,800 for each contravention. Worryingly, we have seen some advice from advisers that implies that if the early access is done in the form of a loan, that it is somehow 'less bad'. Even more worryingly, we have seen some suggestions of ways to retrospectively make an illegal access of superannuation look like a loan, by putting into place loan documentation that is backdated. Behaviour which could constitute fraud. I would like to remind you that a loan to a member is just as serious a breach as accessing benefits early without having a loan agreement in place. Neither of these breaches of the SIS Act should be encouraged. An SMSF cannot be used to prop up the cashflow of your business, to pay for a holiday or a car, or worse, to support a gambling habit. For the 2022 income year, our estimate of the amounts loaned to members in breach of the SIS Act is $231.7 million, a 10% increase from the year before.

Non lodgment of superannuation annual returns continues to be a concern. Lodgment is a basic expectation if you choose to run your own super fund. For the 2023 income year there are approximately 85,000 funds that are still yet to lodge their annual return – so they are nearly a year overdue. In addition to that, we have approximately 54,000 SMSF annual returns that are still outstanding for the 2022 income year. So, while I mentioned earlier that only 3–4% of SMSFs have a contravention reported, this is only based on those who have lodged their annual return. We expect that a higher proportion of non-lodgers have contravened the regulatory rules.

For example, we know that non-lodgment is a serious red flag for illegal early access. This is especially the case for newly established funds who haven't lodged their first return. There are still 4,600 funds established in the 2023 income year who have not lodged their first return which is now well overdue.

Non-lodgment also restricts the ATO in correctly administering the rules around concessional and non-concessional contribution caps, Division 293 and assessing transfer balance caps. These are important rules that have been put in place to ensure equity in the superannuation system, and avoidance of them by failure to lodge returns and report accurate information to the ATO is serious.

As the regulator of SMSFs, we have a responsibility to respond accordingly. For those who miss the annual return lodgment due date and don't contact us, their fund will no longer display as 'complying' on Super Fund Lookup. Instead, their regulation details will be removed.

Removal from the register means that rollovers cannot occur to that fund, and employers may stop contributing. If an employer cannot confirm the complying status of a fund then they are putting their own compliance with their SG obligations at risk, and are likely to refuse to pay contributions to your SMSF.

We do understand that there are times when people may need a bit more time to meet their obligations, so if they are having trouble, we expect trustees or their agents to contact us as soon as possible to seek an extension in those scenarios.

Another issue we have observed is that several SMSF trustees are ignoring release authorities issued by the ATO to release the excess contribution amounts from their fund. This means that super is being taxed concessionally when it shouldn't be and there are consequences for this. For trustees who fail to release the nominated amount a non-compliance penalty up to a maximum of 20 penalty units, or $6,600, may be incurred.

Sadly, it's a similar story with commutation authorities where we are observing similar instances of non-response by SMSF trustees where the member has exceeded their transfer balance cap and we have sent them an excess transfer balance determination. Trustees need to ensure they are following their legal requirements and respond with the required action as set out in the notice. Not doing so may affect the SMSF's entitlement to exempt current pension income and trustee's may also be liable for penalties or subject to compliance action.

As you can see there are a number of areas we are concerned about that should be considered fundamental expectations. Your direct access to clients puts you in an ideal position to influence trustees and members to ensure that they meet their obligations that they have accepted in choosing to run their own super fund.

With the growth in the sector, we continue to be concerned about the risk of fraudsters and scammers having an increasing presence in the SMSF industry.

Identity fraud is becoming particularly more prevalent across the community generally and to combat this, we have implemented some additional identity checks when a fund is first established and we also issue protective alerts when there are changes to a fund's details, or when a new member is added. If your clients receive an alert from us about changes to their fund's details, they should take it seriously if

they are not aware of those changes. It's good practice for you to remind your clients to pay attention to these alerts.

We will continue our efforts to ensure that the system and those running an SMSF are protected from fraud, but I also encourage you to educate your clients about the importance of being vigilant to attacks from identity fraudsters.

We have also seen an increase in scammers trying to convince individuals to either set up an SMSF and invest in fraudulent products or trying to convince them to access their super early to fund personal expenses such as holidays, buying a house to live in or even a new car.

Often, these scammers are promising high returns and making other promises that are too good to be true. In these circumstances it's good to remember the adage, if it sounds too good to be true it probably is. These arrangements are also unlikely to comply with tax and super laws. In the worst cases the scammers actually take the money, which can then be very hard for that member to find and recover. Unfortunately, we have all read stories like these in the media.

We continue to work closely with and share intelligence about these scammers with other law enforcement agencies such as ASIC, the State and Federal Police and the Tax Practitioners Board.

One of the tools that the ATO has in its kit to act against the promoters of unlawful schemes are the promoter penalty laws.

The recent changes to the promoter penalty laws have expanded the current regime including broadening the scope of when it will apply. Those who receive a benefit from promoting the scheme will be caught by the promoter penalty provisions. These include penalties for a scheme which ignores our advice as stipulated in our ATO rulings, and the timeframe for us to investigate has been extended from 4 to 6 years. There is a significant increase in penalties, with the maximum penalty moving from $7.8 million to $780 million.

Understanding these laws is not just about compliance but protecting you, your clients and the integrity of the system. As professionals you play an important role in ensuring that your clients receive strategies and advice that are compliant with the law and are in their best interests.

There have also been recent changes to the Code of Professional Conduct by the Tax Practitioners Board and other law changes

affecting tax professionals, for those of you who are registered tax agents to be aware of such as:

- your obligation to keep clients informed
- ensure appropriate client records are maintained
- to not make false or misleading statements
- not employ disqualified entities to provide tax agent services on your behalf without approval from the TPB, and
- conflict of interest and confidentiality obligations when engaging with government agencies.

Additionally, the breach reporting provisions require that you notify the TPB when a ‘significant breach of the Code’ has occurred, by you or a member of your profession.

While I am aware there may be some apprehension in the industry about the new Code obligations, these changes are consistent with existing principles of the Code and most registered tax practitioners will already be complying with the new requirements. What the new Code obligations will in fact create is a level playing field by restricting undesirable behaviour that undermines public trust and confidence in the integrity of the tax profession and tax system. It does this by clearly setting expectations for appropriate practice and accountability for those tax professionals that don’t meet them.

I’ve talked a lot about things that we are concerned about. But our first goal as the regulator is always to help trustees to get things right, and to make sure that they have good information to help them do that. As part of our commitment to this we have recently released our new online education course for trustees.

I highly recommend this course for all trustees. Each module of this course has its own knowledge check to verify understanding of each topic and so the course also satisfies the requirements of an ‘approved course’ required to be undertaken in response to a direction to educate and will enable immediate visibility in our systems of compliance by a trustee. Access to this course is available via the ATO website and is also free.

I encourage you to visit our booth in the main hall where you can test drive this course for yourself. My team are looking forward to walking you through it and answering your questions.

At our booth you will also be able to access lots of information to assist you in supporting trustees and members and be able to get your hands on the last to be published in our suite of SMSF lifecycle publications, Running an SMSF. And if you missed out last year, we also have copies of our other two lifecycle publications, Starting an SMSF and Winding up an SMSF, so swing by and grab a copy.

Lastly, another thing to be mindful of, with the proposed commencement of Payday Super in July 2026, this reform will almost certainly drive significant change for funds in the way contributions are received and the biggest mistake you can make is to think that Payday Super is just an employer problem.

SMSFs will need to be prepared to receive contribution payments and data for their members more frequently and faster than they currently do, and that they remain compliant with their SuperStream obligations.

We are improving SuperStream contribution error messaging to help employers more easily understand why a contribution could not be allocated. We are also exploring new messages within the SuperStream data channel that will assist employers confirm choice account and member information before making the first contribution payments. This will significantly reduce the most common errors that occur today. One of these common errors relate to SMSFs where the Electronic Service Address was never activated with the provider or is no longer active, meaning the employer receives a SuperStream error message, but do not receive any refunded contributions that should be returned with that error. SMSFs should ensure they have an active ESA that will receive SuperStream contribution data to continue receiving contributions from employers.

I am sure you will agree with me when I say that managing one's own super is a privilege and everyone involved in the SMSF sector should ensure that they demonstrate the required care, skill and diligence expected of them, to ensure that individuals have adequate retirement savings to meet their retirement goals.

With a combined asset pool of over $1 trillion dollars, you can expect to see us take our role as regulator seriously. Whilst each of our respective roles in the sector comes from different perspectives, undoubtedly a common objective for us all is that we want SMSFs to continue to thrive well into the future. We are all custodians of the system, and we want trust and confidence in the credibility of SMSFs as a retirement planning choice to remain strong.

Thank you and I will now hand back to Tracey.

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