# *SMSFR 2007/D1 - Superannuation: the application of the sole purpose test in section 62 of the Superannuation Industry (Supervision) Act 1993 to the provision of benefits other than retirement, employment termination or death benefits*

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# Draft Self Managed Superannuation Funds Ruling

Superannuation: the application of the sole purpose test in section 62 of the *Superannuation Industry (Supervision) Act 1993* to the provision of benefits other than retirement, employment termination or death benefits

Contents Para

**What this Ruling is about 1**
**Ruling 3**
**Date of effect 11**
**Funds to which Ruling applies 12**
**Appendix 1:**
**Examples 13**
**Appendix 2:**
**Explanation 50**
**Appendix 3:**
**Your comments 77**
**Appendix 4:**
**Detailed contents list 78**

***Preamble***

*This publication is a draft for public comment. It represents the Commissioner's preliminary view about the way in which provisions of the Superannuation Industry (Supervision) Act 1993, or regulations under that Act, apply to superannuation funds that the Commissioner regulates: principally self managed superannuation funds.*

*Self Managed Superannuation Funds Rulings (whether draft or final) are not legally binding on the Commissioner. However, if the Commissioner later takes the view that the law applies less favourably to you than the final version of this ruling indicates, the fact that you acted in accordance with the final version of this ruling would be a relevant factor in your favour in the Commissioner's exercise of any discretion as to what action to take in response to a breach of that law. The Commissioner may, having regard to all the circumstances, decide that it is appropriate to take no action in response to the breach.*

## What this Ruling is about

1. Subsection 62(1) of the *Superannuation Industry (Supervision) Act 1993* (SISA)[1] requires each trustee of a self managed superannuation fund (SMSF) to ensure that the SMSF is maintained solely for the purposes specified in that subsection. However, there are some circumstances where an SMSF may be maintained solely for these purposes while providing members or other entities with benefits other than those specified in section 62 of the SISA. This Ruling clarifies when the provision of such benefits will not contravene the sole purpose test in section 62 of the SISA.

[1] All legislative references in this draft Ruling are to the SISA unless otherwise indicated.

2. This Ruling does not provide the Commissioner's views on how other SISA provisions apply to any of the arrangements discussed in the Ruling.[2]

# Ruling

3. The sole purpose test in section 62 prohibits trustees from maintaining an SMSF for purposes other than for the provision of benefits specified by subsection 62(1). The core purposes specified in that subsection essentially relate to providing retirement or death benefits for or in relation to SMSF members.[3] The SMSF can also maintain the fund for one or more of these purposes and other specified ancillary purposes, which relate to the provision of benefits on the termination of a member's employment and other death benefits not specified under the core purposes.[4]

4. Any trustee who maintains an SMSF for other purposes contravenes section 62. Determining the purpose for which an SMSF is being maintained requires a survey of the events and circumstances relating to the SMSF's maintenance. This enables an objective assessment of whether the SMSF is or has been maintained for any purpose other than those specified by subsection 62(1).

5. A trustee must maintain an SMSF in a manner that complies with the sole purpose test at all times while the SMSF is in existence. This extends to all activities undertaken by the SMSF during its life cycle, which broadly encompasses:

- accepting contributions;
- acquiring and investing fund assets;
- administering the fund (including maintaining the structure of the fund); and
- paying benefits.

6. A strict standard of compliance is required under the sole purpose test. The test requires exclusivity of purpose, which is a higher standard than the maintenance of the SMSF for a dominant or principal purpose.

[2] Other provisions of the SISA that complement section 62 of the SISA are outlined in paragraph 51 of this draft Ruling.
[3] Paragraph 62(1)(a).
[4] Paragraph 62(1)(b).

7. However, the provision of incidental, remote or insignificant benefits that fall outside the scope of those that are specified in subsection 62(1) may occur, particularly as an inherent or unavoidable part of the legitimate activities of the SMSF. If the provision of such benefits, when viewed objectively in the overall context of the circumstances of the SMSF's maintenance, does not displace an assessment that the SMSF is being maintained solely for the purposes specified in subsection 62(1), the trustee does not contravene the sole purpose test.

8. The Commissioner considers the factors listed in paragraphs 9 and 10 of this draft Ruling are relevant in determining whether the provision of a benefit that is not specified in section 62 is of such a nature that it does not cause a contravention of the sole purpose test. This is not an exhaustive statement of the factors that may be relevant in a particular case, but rather reflects the factors that commonly arise in considering the provision of benefits not specified in subsection 62(1) in the context of the sole purpose test.

9. Factors that would weigh in favour of a conclusion that an SMSF **is not** being maintained in accordance with section 62 because of the provision of benefits not specified in section 62 are:

- The trustee negotiated for, or sought out, the benefit (whether or not the trustee does so in the course of undertaking other activities that are consistent with section 62).
- The benefit has influenced the decision-making of the trustee to favour one course of action over another.
- The benefit is provided by the SMSF to a member or another party at a cost or financial detriment to the SMSF.
- There is a pattern or preponderance of events that, when viewed in their entirety, amount to a material benefit being provided that is not specified under subsection 62(1).[5]

10. Factors that would weigh in favour of a conclusion that an SMSF **is** being maintained in accordance with section 62 despite the provision of benefits not specified in section 62 are:

- The benefit is an inherent or unavoidable part of other activities undertaken by the trustee that are consistent with the provision of benefits specified by subsection 62(1).

[5] As happened, for example, in the *Swiss Chalet* case - *Case 43/95* 95 ATC 374; (1995) 31 ATR 1067. See further at paragraph 20 and paragraphs 57 and 58 of this draft Ruling.

- The benefit is remote or isolated, or is insignificant (whether it is provided once only or considered cumulatively with other like benefits) when assessed in light of other activities undertaken by the trustee that are consistent with the provision of benefits specified by subsection 62(1).
- The benefit is provided by the SMSF on normal commercial terms consistently with the financial interests of the SMSF and at no cost or financial detriment to the SMSF.
- All of the activities of the trustee are in accordance with the covenants set out in section 52.
- All of the SMSF's investments and activities are undertaken as part of or are consistent with a properly considered and formulated investment strategy.

# Date of effect

11. It is proposed that when the final Ruling is issued, the Ruling will apply to years of income commencing both before and after its date of issue. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

# Funds to which this Ruling applies

12. This Ruling applies to SMSFs[6] and former SMSFs.[7] References in the Ruling to SMSFs include former SMSFs unless otherwise indicated.

**Commissioner of Taxation**
5 September 2007

[6] As defined in section 17A.
[7] A former SMSF is a fund that has ceased being a SMSF and has not appointed a registrable superannuation entity (RSE) licensee as trustee - see subsection 10(4).

# Appendix 1 - Examples

***This Appendix provides examples to help you understand how the Commissioner's preliminary view will apply to particular factual scenarios.***

13. The examples in this Appendix illustrate the influence of the factors set out in paragraphs 9 and 10 of this draft Ruling, which the Commissioner considers are relevant in determining whether a benefit provided by an SMSF that is not specified by section 62 is incidental, remote or insignificant and therefore does not lead to a contravention of the sole purpose test.

14. It is stressed that in each case all of the facts and circumstances associated with the maintenance of the SMSF are relevant in deciding if the trustee has complied with the sole purpose test. Accordingly, additional facts and circumstances may alter the conclusions reached below.

15. The nature of investments made or other activities undertaken by an SMSF in the course of its maintenance are necessarily a relevant consideration in applying the sole purpose test. However, the test may provide for different outcomes for different SMSFs that each make a particular investment or undertake a particular activity. All of the facts and circumstances surrounding the investment or other activity must be taken into account in applying the sole purpose test. Such facts and circumstances are often peculiar to each SMSF. In addition, the sole purpose test is particularly concerned with *how* an SMSF came to make an investment or undertake an activity.

**Example 1 - benefit inherent in investment: no breach of section 62**

16. *As part of a portfolio of property investments and in line with the SMSF's investment strategy, the trustee invests in a number of holiday apartments through a property syndicate. All investors in the property syndicate pay normal market rates when staying at the apartments but, subject to availability on the day of arrival, may be able to upgrade their accommodation at no extra cost. The SMSF cannot dispose of this right to its financial advantage. Two members of the SMSF stay at the apartments and their accommodation is upgraded.*

17. *This benefit, being the upgrade right, is incidental to the SMSF's investment in the holiday apartments. The trustee does not contravene the sole purpose test in these circumstances.*

18. *The trustee did not seek to obtain this benefit for the members and there is nothing to suggest that it influenced the trustee's decision-making. Further, it is an inherent feature of investing in the apartments available to all investors and is a relatively insignificant benefit.*

19. *Even if the trustee makes a pattern of like property investments (for example, due to expertise the trustee has in making property investments in certain holiday destinations) that each provide a similar benefit, the facts as set out here do not suggest a purpose of maintaining the fund in contravention of the sole purpose test.*

20. In contrast, *Case 43/95* (the *Swiss Chalet* case)[8] is an example where there was a pattern of investing in assets that provided significant pre-retirement benefits to the members of the fund. This was sufficient for the Administrative Appeals Tribunal to infer an ulterior purpose in relation to the maintenance of the fund. The following example broadly reflects similar facts to that case.

**Example 2 - separately negotiated benefit: breach of section 62**

21. *The trustee of an SMSF invests in a block of holiday apartments at a popular tourist destination. The members of the SMSF holiday in this area every year and prior to making the investment owned a separate holiday house nearby.*

22. *The trustee, when undertaking the investment, additionally negotiated for members of the SMSF to be able to stay at the apartments for free. This is not a standard feature of the investment. The members of the SMSF sell their holiday house immediately after the SMSF makes the holiday apartment investment.*

23. *The separate negotiation of the benefit, which also has the potential to materially affect the return on the SMSF's investment, demonstrates that the benefit is purposeful and not incidental. The facts given in this example reveal that the SMSF is being maintained for a purpose of providing benefits to members other than those specified by section 62. Therefore, the trustee contravenes the sole purpose test in these circumstances.*

24. In some cases, trustees may be able to divest the SMSF and/or its members of benefits attaching to an investment that are outside of those specified by subsection 62(1) to ensure that the trustee does not breach the sole purpose test by making the investment.

**Example 3 - benefit assigned to unrelated party at market value: no breach of section 62**

25. *In line with the SMSF's investment strategy, the trustee invests in shares in the Solo Golf Club. Membership rights attach to the shares, which can be assigned by the owner of the shares on nomination of a person who may exercise the rights.*

[8] 95 ATC 374; (1995) 31 ATR 1067. See paragraphs 57 and 58 of this draft Ruling.

26. *The SMSF arranges for the golf club to assign the membership rights independently from the SMSF. The golf club advertises widely and the membership rights are assigned to a person unknown to the trustees and members of the SMSF at market value. The SMSF is entitled to the proceeds of the assignment.*

27. *In these circumstances, the trustee does not contravene the sole purpose test even though the investment in the shares includes membership rights for an individual.*

28. *The circumstances show that the SMSF's purpose in investing in the shares was not to provide membership rights to members or any other entity other than at market value.*

**Example 4 - benefit assigned to unrelated party at market value: breach of section 62**

29. *Lee and Andrew are keen golfers who regularly play golf together. Lee and Andrew are each a member and individual trustee of their respective and unrelated SMSFs.*

30. *Both SMSFs invest in shares in the Tango Golf Club. The trustees did not receive independent advice regarding the investment. Membership rights attach to the shares, which can be assigned by the owner of the shares on nomination of a person who may exercise the rights.*

31. *Lee and Andrew agree to assign the membership rights attaching to the golf club shares to each other at market value.*

32. *The facts given in this example indicate that both SMSFs are being maintained for a purpose other than that specified under subsection 62(1). Lee and Andrew negotiated with each other for a purposeful benefit outside of those specified in subsection 62(1). The failure of Lee and Andrew to seek independent advice in relation to the investment reinforces this conclusion. In these circumstances, the trustees have contravened the sole purpose test in relation to their respective SMSFs.*

33. In the case of collectables and boutique investments such as works of art, antiques, jewellery, classic cars and wine, trustees must take care to ensure that SMSF members are not granted pre-retirement use of or access to the assets in circumstances that suggest that the trustee is maintaining the fund for a purpose not specified in subsection 62(1).

**Example 5 - use of work of art at no cost: breach of section 62**

34. *A trustee of an SMSF acquires a work of art and does not seek independent advice in relation to that investment. The investment strategy of the SMSF requires the fund to hold a certain percentage of its asset in a portfolio of listed securities. The trustee liquidates all of the listed securities that the SMSF has invested in to fund the acquisition of the work of art. Soon after the work of art is acquired, it is displayed in the home of a member at no cost to that member.*

35. *The trustee contravenes the sole purpose test in these circumstances.*[9]

36. *Where the work of art is provided for the use of the member at no cost, or at less than market value, it indicates that a purpose of the investment is to provide a benefit otherwise than in accordance with subsection 62(1). The liquidation of a class of assets forming part of the SMSF's investment strategy reinforces the conclusion that the provision of the benefit outside of those stipulated in subsection 62(1) was purposeful.*

**Example 6 - lease of work of art to member at market value: no breach of section 62**

37. *An SMSF maintains an investment in a significant art collection as part of its investment strategy, and commonly leases works of art to unrelated third parties at market rates. The trustee has expertise in investing in works of art, but nevertheless receives independent advice in relation to each of its investments.*

38. *The SMSF acquires a work of art after it has received independent advice regarding the soundness of investing in it. The SMSF then enters into an arrangement with a member whereby the member leases the work of art from the SMSF at market rates and subject to normal commercial conditions and controls. The work of art is displayed in the home of the member.*

39. *There is no contravention of the sole purpose test in these circumstances.*[10]

40. *The benefit to the member is the opportunity to use the SMSF assets by paying an arm's length amount. There is no cost or financial detriment to the fund as a consequence of the use of the work of art by the member.*

[9] The application of the arm's length rules in section 109 may also be relevant in these circumstances.
[10] Trustees may also need to consider the in-house asset provisions in Part 8 in these circumstances.

41. Nevertheless, trustees need to ensure that they do not provide a purposeful benefit to the members when undertaking SMSF activities, even if there is no net cost to the SMSF in providing the benefit. Although the impact of an arrangement on the SMSF's resources is a relevant consideration, it is ultimately the objective purpose of providing the benefit rather than the net financial impact of the arrangement on the SMSF's resources that determines whether the sole purpose test is contravened.

**Example 7 - loan of work of art to an unrelated party: no breach of section 62**

42. *Following on from Example 6, the SMSF provides, at no cost, the work of art to a local gallery, for display in a special exhibition that is to run for two months.*

43. *The work of art provides a benefit for the community at large. However the facts given in this example establish that there is not a contravention of the sole purpose test as the cost or financial detriment to the fund and the benefits provided by the SMSF outside of those specified by subsection 62(1) are remote and insignificant. The display of the work of art at the exhibition may in fact enhance its future value.*

**Example 8 - loan of work of art to a related party: breach of section 62**

44. *Following on from Example 6, a related party of the SMSF owns an art gallery. The related party charges the general public an admission fee for viewing the works of art at the gallery. It also sells picture cards and pens in the gallery gift store, promoting the paintings currently on display.*

45. *The SMSF regularly loans its works of art to the gallery at no cost. Its investment choices are also largely determined by the art gallery's desire to acquire certain paintings.*

46. *In this example there is a pattern of events that result, when viewed in their entirety, in a contravention of the sole purpose test.*

**Example 9 - choosing an option that provides a benefit to members: breach of section 62**

47. *A public company has issued Discount Card shares on the Australian Securities Exchange that are listed separately to the company's ordinary shares. From the date of listing, the purchase of a nominal number of Discount Card shares entitles a shareholder to participate in the Shareholder Discount Plan provided they agree to a debit on their dividend payments each six months. The only difference between the rights attaching to the shares relates to the Discount Card. The trustee of an SMSF invests in Discount Card shares and obtains a shareholder discount card, which allows its members to purchase discounted goods at particular stores.*

48. *The investment contravenes the sole purpose test in these circumstances.*

49. *By investing in the Discount Card shares rather than the ordinary shares, an objective assessment of the circumstances indicates that the trustee has purposefully sought to provide a benefit to the members otherwise than in accordance with subsection 62(1), particularly in view of the reduced dividend rights attaching to the shares. Such a purpose would not be evident had the SMSF invested in the company's ordinary shares.*

# Appendix 2 - Explanation

***This Appendix is provided as information to help you understand how the Commissioner's preliminary view has been reached.***

### Background

50. The sole purpose test in section 62 ensures that an SMSF uses concessionally taxed superannuation savings for the specified core purposes of providing retirement or death benefits for or in relation to its members[11] or for one or more of these purposes and other stipulated ancillary purposes. Ancillary purposes generally relate to the provision of benefits on the termination of a member's employment and other death benefits not specified under the core benefits.[12] These purposes can be contrasted with a purpose of providing pre-retirement benefits to members or benefits to other entities, in particular employer-sponsors, relatives or associates of members or businesses related to members or employer-sponsors. The Commissioner considers that the sole purpose test is designed to ensure that the retirement income objective of SMSFs remains paramount.

51. The sole purpose test in section 62 is complemented by other rules in the SISA which apply to dealings with members, their relatives and other related parties[13] of the SMSF. For example:

- an SMSF trustee or investment manager is prohibited from lending money, or providing any other financial assistance using the resources of the SMSF, to a member of the SMSF or relative of a member of the SMSF - section 65;
- subject to specific exceptions, an SMSF trustee is prohibited from acquiring assets from related parties of the SMSF - section 66;
- subject to exceptions in relation to certain derivative contracts, an SMSF trustee cannot recognise or in any way sanction an assignment of a superannuation interest or a charge over or in relation to a member's benefits or an SMSF asset - regulations 13.12, 13.13 and 13.14 of the Superannuation Industry (Supervision) Regulations 1994 (SISR);
- subject to specific exceptions, an SMSF trustee is prohibited from borrowing - section 67;

[11] Paragraph 62(1)(a).
[12] Paragraph 62(1)(b).
[13] The term 'related party' is defined in subsection 10(1).

- all SMSF investments dealings must be at arm's length or must be conducted on arm's length terms and conditions - section 109; and
- subject to transitional provisions and specific exceptions, an SMSF trustee is prohibited from acquiring or maintaining in-house assets[14] that have a total market value in excess of 5% of the total market value of SMSF assets - Part 8.

### Contraventions - audit requirements and consequences

52. SMSF trustees are required to appoint an approved auditor to audit the financial accounts and statements of the fund each year.[15] When conducting an audit, the approved auditor is also required to conduct a compliance audit to ensure the SMSF has complied with the SISA and SISR. There is an approved form for notifying the Tax Office of contraventions.[16]

53. Non-compliance with these rules may expose trustees or investment managers of SMSFs to penalties.[17] Contravention or involvement in a contravention attracts both civil and criminal consequences and places at risk the SMSF's status as a complying superannuation fund under the SISA.[18]

### Legislative context

54. Subsection 62(1) requires each trustee of an SMSF to ensure that the SMSF is maintained for either:

- one or more of the core purposes stipulated in paragraph 62(1)(a); or
- one or more of these core purposes and one or more of the ancillary purposes stipulated in paragraph 62(1)(b).

[14] 'In-house assets' are defined in section 71 and are, subject to specific exceptions, assets that are a loan to or an investment in a related party of the SMSF, or investments in a related trust or assets that are subject to a lease or lease arrangement with a related party of the SMSF.
[15] See section 113.
[16] See section 129.
[17] See subsection 62(2).
[18] See subsection 42A(5) in relation to SMSFs. The status of a fund as complying or non-complying for SISA purposes will also have consequences for the fund under the income tax law and other parts of the superannuation law. Also see generally Law Administration Practice Statements PS LA 2006/17, PS LA 2006/18 and PS LA 2006/19.

55. The permitted core purposes in paragraph 62(1)(a) relate to the provision of age retirement and death benefits in respect of SMSF members. Permitted ancillary purposes in paragraph 62(1)(b), which a trustee may also maintain the SMSF for in addition to one or more of the core purposes, include the provision of transition to retirement pensions[19] and benefits paid to a member on cessation of work due to incapacity.

### The nature of the sole purpose test

56. Establishing whether the provision of a benefit not specified in section 62 has contravened the sole purpose test requires all activities associated with the SMSF's maintenance to be viewed holistically. Thus, determining the purposes for which an SMSF is being maintained requires a survey of all facts and circumstances to enable an objective assessment of whether the SMSF is maintained for any purpose other than those specified under subsection 62(1).

57. The sole purpose test in section 62 is a strict test requiring exclusivity of purpose. This is supported by the Administrative Appeals Tribunal decision in the *Swiss Chalet* case.[20] This case considered whether a fund was maintained solely for the purpose of the provision of benefits in the event of retirement for each member.[21] As the Tribunal explained:[22]

> The legislature, by adopting the 'sole purpose' test, has expressly determined that a strict standard of compliance should be adhered to. Under the Act, the test requires more than the presence of a dominant or principal purpose in the maintenance of a superannuation fund - it requires an exclusivity of purpose commensurate with that purpose being the 'sole purpose'.

58. In the *Swiss Chalet* case, the fund's assets included a holiday house, shares in a private company (the only asset of which were shares in a golf club), and units in a family trust (the only asset of which was a chalet in Switzerland). The Tribunal considered all of the circumstances and was satisfied that the fund failed the sole purpose test because the managing director of the fund's trustee company had a second purpose, namely to make fund assets available for his use and the use of family and friends.

59. Judicial guidance on the application of the sole purpose test is also found in the consideration, in an income tax context, of the related questions of whether a superannuation fund was established or maintained solely for the provision of superannuation benefits for employees and their dependants.

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[19] As defined in subregulation 6.01(2) of the SISR, this is a pension that commences after reaching a prescribed age but prior to retiring from work.
[20] 95 ATC 374; (1995) 31 ATR 1067.
[21] Although this case concerned the former provisions of the *Occupational Superannuation Standards Act 1987*, which was subsequently renamed the *Superannuation Entities (Taxation) Act 1987* and was effectively replaced in 1993 by the SISA, the provision under consideration is comparable to section 62.
[22] 95 ATC 374 at 382; (1995) 31 ATR 1067 at 1075-1076.

60. In *Raymor Contractors v. Federal Commissioner of Taxation* (*Raymor Contractors*), Davies J, when considering whether a contribution was made 'for the purpose of making provision for superannuation benefits' in subsection 82AAC(1) of the *Income Tax Assessment Act 1936* (ITAA 1936) said that purpose 'did not look primarily to the subjective factors actuating the setting aside or payment of the sum claimed'.[23]

61. In summarising previous judicial consideration of whether a superannuation fund was established or maintained solely for the provision of superannuation benefits for employees and their dependants, Davies J went on to state:[24]

> …to ascertain whether a fund was being maintained and applied for the benefit of employees, it was proper to examine not merely the terms of the deed under which it was managed and controlled, but also the use made by the trustee of the trust funds and of the powers and discretions conferred on the trustee, the extent to which employees actually received benefits from the fund and the extent to which the funds went to the benefit of persons who were not employees.

62. The investment activities of an SMSF are of particular relevance in determining whether its maintenance complies with the sole purpose test. In *Federal Commissioner of Taxation v. Roche (Roche)*,[25] the Commissioner argued that a fund was not exempt from tax under former subsection 23F(15) of the ITAA 1936 because it was not 'established and maintained solely' for the purpose of providing superannuation retirement or death benefits for employees. In this respect, Pincus J said:[26]

> To determine the purpose for which a fund is maintained, one must examine the circumstances surrounding the payments into the fund and the way in which the fund is invested.

63. Similarly, in *Case X60,* which concerned whether a fund was 'established and maintained solely' for the purposes specified in former paragraph 23F(2)(a) of the ITAA 1936, Member Hogan indicated that a purpose inconsistent with the sole purpose test is to be 'established by consideration of the facts of the manner in which the trustees' investment program has been conducted'.[27]

64. Based on these authorities, the Commissioner considers that the matter of determining whether an SMSF is maintained solely for purposes consistent with those stipulated in section 62 is discerned from an objective consideration of all the facts and circumstances of the case and is not determined by the subjective intention or purpose of the trustee or trustees involved.

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[23] 91 ATC 4259 at 4260; (1991) 21 ATR 1410 at 1412.
[24] 91 ATC 4259 at 4261; (1991) 21 ATR 1410 at 1412-1413.
[25] 91 ATC 5024; (1991) 22 ATR 828.
[26] 91 ATC 5024 at 5027; (1991) 22 ATR 828 at 831.
[27] 90 ATC 438 at 446; (1990) 21 ATR 3477 at 3485.

**Benefits outside of those specified by subsection 62(1)**

65. Although the sole purpose test is a strict test requiring exclusivity of purpose, the case law supports the proposition that activities conducted by an SMSF can demonstrate its maintenance consistent with the sole purpose test in section 62, even though benefits, other than those stipulated in section 62, are provided to a member or some other entity.

66. In *Case X60*, it was held by Member Hogan that:[28]

> …an incidental, but *not purposeful*…..benefiting of someone other than the employees and their beneficiaries by the trustee in the conduct of their investment program cannot be seen, of itself, as a contravention of the sole purpose test … (Member Hogan's emphasis).

67. Similarly, in the *Swiss Chalet* case, the Tribunal noted:[29]

> …it may be that there are isolated incidents which, viewed in the overall context of the way in which a superannuation fund is being maintained, are so incidental, remote or insignificant, that they cannot, having regard to the objects sought to be achieved by the Act, be regarded as constituting a breach of the sole purpose test. Such incidents will be rare.

68. The comments of Hill J in *Walstern Pty Ltd v. Federal Commissioner of Taxation* (*Walstern*)[30] support the accommodation of incidental benefits in the context of a sole purpose test. This case considered the phrase 'for the purpose of making provision for superannuation benefits for an eligible employee' under former section 82AAE of the ITAA 1936. His Honour accepted that the 'purpose' required by section 82AAE was a sole rather than a dominant or principal purpose;[31] but nevertheless did not think that the test would be failed simply by the contributor incidentally taking into account a purpose other than the provision of superannuation benefits for the employee.

69. In *Walstern*, the context of the issue was whether the availability of tax deductions was the object of a superannuation contribution or was merely incidental to the purpose of making provision for superannuation benefits. The Commissioner considers that, in a SISA context, superannuation tax concessions, although a form of benefit, are not a factor when applying the sole purpose test.

70. In light of these decisions, the Commissioner considers that section 62 is not contravened if a benefit which is otherwise not specified in subsection 62(1) is incidentally and not purposefully provided to a member or other entity and all other activities undertaken by the trustee demonstrate that the SMSF is being maintained consistently with section 62.

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[28] 90 ATC 438 at 446; (1990) 21 ATR 3477 at 3485-3486.
[29] 95 ATC 374 at 382; (1995) 31 ATR 1067 at 1075.
[30] [2003] FCA 1428; (2003) 138 FCR 1.
[31] See also *Roche* 91 ATC 5024 at 5030; (1991) 22 ATR 828 at 835-836.

71. Conversely, a benefit is not incidental where it is one of the objects or purposes of the trustee to provide that benefit. The question of whether a benefit is incidental and not purposeful is discerned from an objective consideration of all the facts and circumstances of the case.

72. Further, the Commissioner considers that section 62 is not contravened if the provision of a benefit which is otherwise not specified in subsection 62(1) is an isolated or rare occurrence in the context of the overall maintenance of the fund and the benefit is remote or insignificant. In addition, the nature of some benefits that are not specified in subsection 62(1) will be so remote or insignificant that a pattern or preponderance of the fund providing such benefits will not result in a contravention of the sole purpose test.

73. Paragraphs 9 and 10 of this draft Ruling set out some factors that the Commissioner considers will be particularly relevant in making a decision about whether an SMSF is being maintained in accordance with the sole purpose test in section 62.

74. However, it is important to note that the listing of these factors is not intended to limit those that are relevant for these purposes. A holistic assessment of all relevant factors must be taken into account and balanced. It would be inconsistent with the nature of the sole purpose test if a particular conclusion about an SMSF trustee's compliance with the sole purpose test necessarily followed from the mere fact that the trustee has met one or more of the factors associated with that conclusion.

75. One of the factors listed at paragraphs 9 and 10 of this draft Ruling is whether or not the benefit in question is provided by the SMSF to a member or another party at a cost or financial detriment to the SMSF. In the Commissioner's view, the question of whether a benefit is provided at a cost or financial detriment to the SMSF extends to circumstances where there is a net opportunity cost to the SMSF associated with providing the benefit. For example, the SMSF will incur a net opportunity cost if, by pursuing the provision of a particular benefit, the SMSF is unable to undertake another course of action that objectively would provide a better return.

76. Example 9[32] illustrates a case where this factor is influential in finding a contravention of the sole purpose test. In that example, the clear alternative available to the SMSF was to invest in ordinary shares of the same company, which did not involve the provision of the discount benefit to the members of the SMSF or the debiting of the dividends paid to the SMSF in recognition of this benefit. However, consistent with the overall approach to the sole purpose test discussed at paragraph 73 of this draft Ruling, the mere fact that a benefit is provided at a net opportunity cost to the SMSF may not determine whether the test is contravened. Example 7[33] is illustrative of this.

[32] See paragraphs 47 to 49 of this draft Ruling.
[33] See paragraphs 42 and 43 of this draft Ruling.

# Appendix 3 - Your comments

77. We invite you to comment on this Draft Self Managed Superannuation Funds Ruling. Please forward your comments to the contact officer by the due date. (Note: the Tax Office prepares a compendium of comments for the consideration of the relevant Rulings Panel or relevant Tax officers. The Tax Office may use a version (names and identifying information removed) of the compendium in providing responses to persons providing comments. Please advise if you do not want your comments included in the latter version of the compendium.)

| | |
|---|---|
| **Due date:** | **19 October 2007** |
| **Contact officer:** | **Melissa Harrison** |
| **Email address:** | **Melissa.harrison@ato.gov.au** |
| **Telephone:** | **(08) 8208 1065** |
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# Appendix 4 - Detailed contents list

78. The following is a detailed contents list for this Ruling:


| | Paragraph |
|---|---|
| **What this Ruling is about** | **1** |
| **Ruling** | **3** |
| **Date of effect** | **11** |
| **Funds to which this Ruling applies** | **12** |
| **Appendix 1 - Examples** | **13** |
| Example 1 - benefit inherent in investment: no breach of section 62 | 16 |
| Example 2 - separately negotiated benefit: breach of section 62 | 21 |
| Example 3 - benefit assigned to unrelated party at market value: no breach of section 62 | 25 |
| Example 4 - benefit assigned to unrelated party at market value: breach of section 62 | 29 |
| Example 5 - use of work of art at no cost: breach of section 62 | 34 |
| Example 6 - lease of work of art to member at market value: no breach of section 62 | 37 |
| Example 7 - loan of work of art to an unrelated party: no breach of section 62 | 42 |
| Example 8 - loan of work of art to a related party: breach of section 62 | 44 |
| Example 9 - choosing an option that provides a benefit to members: breach of section 62 | 47 |
| **Appendix 2 - Explanation** | **50** |
| Background | 50 |
| Contraventions - audit requirements and consequences | 52 |
| Legislative context | 54 |
| The nature of the sole purpose test | 56 |
| Benefits outside of those specified by subsection 62(1) | 65 |
| **Appendix 3 - Your comments** | **77** |
| **Appendix 4 - Detailed contents list** | **78** |

# References

*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 2006/10

*Subject references:*

- breach of sole purpose
- self managed superannuation funds
- sole purpose
- superannuation

*Legislative references:*

- ITAA 1936 23F(2)(a)
- ITAA 1936 23F(15)
- ITAA 1936 82AAC(1)
- ITAA 1936 82AAE
- SISA 1993
- SISA 1993 10(1)
- SISA 1993 10(4)
- SISA 1993 17A
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- SISA 1993 52
- SISA 1993 62
- SISA 1993 62(1)
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- SISA 1993 62(1)(b)
- SISA 1993 62(2)
- SISA 1993 65
- SISA 1993 66
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- SISR 1994 13.12
- SISR 1994 13.13
- SISR 1994 13.14
- Occupational Superannuation Standards Act 1987
- Superannuation Entities (Taxation) Act 1987

*Case references:*

- Case 43/95 (the Swiss Chalet case) 95 ATC 374; (1995) 31 ATR 1067
- Case X60 90 ATC 438; (1990) 21 ATR 3477
- Federal Commissioner of Taxation v. Roche 91 ATC 5024; (1991) 22 ATR 828
- Raymor Contractors v. Federal Commissioner of Taxation 91 ATC 4259; (1991) 21 ATR 1410
- Walstern Pty Ltd v. Federal Commissioner of Taxation (2003) 138 FCR 1; [2003] FCA 1428; 2003 ATC 5076; (2003) 54 ATR 423

*Other references:*

- PS LA 2006/17
- PS LA 2006/18
- PS LA 2006/19

ATO references

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