Determination Compendium – SMSFD 2011/1

This is a compendium of responses to the issues raised by external parties to draft SMSFD 2010/D1 – Self Managed Superannuation Funds: for the purposes of the Superannuation Industry (Supervision) Regulations 1994, can a benefit payable with a cheque or a promissory note be 'cashed' at the time the cheque or note is issued?

This compendium of comments has been edited to maintain the anonymity of entities that commented on the draft determination.

Summary of issues raised and responses[*]

Issue No.	Issue raised	ATO Response/Action taken
1.	*Determination question* The question in SMSFD 2010/D1 differs from the question published on the July Public Rulings Program.	*No change.* Question revised to improve clarity. The changes made do not alter the intended meaning or application of the product.
2.	*Section 65 of the Superannuation Industry (Supervision) Act 1993 (SISA)* If a promissory note made by the trustee to a member satisfies the requirements of paragraph 1, does this mean that the requirements of section 65 of the SISA would also be satisfied?	*No change.* Section 65 of the SISA concerns loans to or financial assistance given to members or their relatives. This provision is not applicable to the issue in the Determination.
3.	*Recontributions* Can a promissory note be used in cases where members who do not require their minimum income stream amount to record a payment from the income stream and a subsequent contribution?	*Change made.* No cashing will occur in cases where a cheque or note issued by the trustee is indorsed back to the fund as a purported contribution. There is no actual payment of benefits from the fund to the member or beneficiary.

[*] Unless otherwise noted, references to examples and paragraphs in the Issue raised column are to SMSFD 2010/D1(the draft Determination) and in the ATO Response/Action taken column to SMSFD 2011/1 (the final Determination).

Issue No.	Issue raised	ATO Response/Action taken
3. cont	The use of promissory notes in these cases would make it easier for members who would not have to sell shares to raise cash, pay out the cash and then contribute cash back to the fund to buy the same shares.	Paragraph 25 has been amended to make this outcome clear.
4.	*Recontribution* Clarification required if benefit and contribution standards are met where a benefit is paid via an electronic funds transfer from the SMSF's account to the member's account and an amount is then transferred back from the member's account into the SMSF's account as a contribution.	*No change.* Paragraphs 21 and 22 explain that cashing involves an actual distribution of funds from the SMSF to the member or beneficiary. Whether the benefit payment standards are met will depend on the facts of each case. For guidance on superannuation contributions refer to Taxation Ruling TR 2010/1 Income tax: superannuation contributions.
5.	*Trustee covenant – investment strategy* If a member requests a benefit and the fund is not liquid, the fund has not complied with the requirement that the investment strategy considers the liquidity needs of the fund.	*Change made.* Footnote 10 has been added to make reference to paragraph 52(2)(f) of the SISA.
6.	*Application of the Determination* Can the principles in the Determination be used to determine whether the requirements of subregulation 1.06(9A) have been met?	*Change made.* Paragraph 20 has been added to explain that the time at which benefits are paid by cashing is relevant to the operation of the payment standards, including the standards for pensions and annuities.

Issue No.	Issue raised	ATO Response/Action taken
7	*Example 2 – heading* The heading used in Example 2 should be amended for better clarification. In our opinion the heading should be ‘Payment using a cheque where insufficient funds are available’ to more accurately reflect the example. The factual circumstance of a delay of presentation of a cheque in the example occurs because of a lack of liquidity in the fund.	*Change made.* Example 2 has been amended to clarify that immediate cashing will not occur in any case where there is no objective intention to make an immediate payment.
7. cont		Accordingly, even in cases where the fund has sufficient liquidity, immediate cashing will not generally occur without prompt payment of benefits from the fund to the member. Paragraph 15 has been added to Example 2 to make this outcome clear. This is subject to an exception where prompt payment is prevented by circumstances beyond the trustee’s control; see Example 1, paragraph 10 and paragraphs 34-35.

Issue No.	Issue raised	ATO Response/Action taken
8	*Example 2 – application* An example with the heading ‘Payment using a cheque where presentation is delayed’ could be better applied to a situation where a trustee remits a cheque to a beneficiary before 30 June, with the objective intention of the benefit being paid (i.e. there is sufficient liquidity for the cheque to be honoured). The beneficiary may then fail to deposit the cheque into a bank account for many weeks after 30 June for reasons which are out of the trustee’s control. Note: it is conceded this scenario may not arise often because of the close relationships between trustee and beneficiary. A clear distinction should be made between scenarios that are within the trustee’s control and those which may be beyond the control of the trustee.	*Change made.* Paragraph 15 now extends Example 2 to cover a case where presentation is delayed despite sufficient liquidity; see further, the response to issue 7. Paragraph 35 explains that cashing is not prevented by the independent actions of a third party. Paragraph 10 of Example 1 illustrates this point. Whether cashing is prevented by actions or circumstances beyond the control of the trustee will depend on the facts of each case.
9	*Structure* A better structured Determination would clarify its intent. By setting out the relevant provisions regarding cheques and the cashing of cheques; how the ATO intends to treat cheques in these situations and providing clear examples would better assist comprehension. Recommendation made for the clarification of the terms used in the determination to better serve its intent, as well as further examples to cover contingencies which may arise.	*Change made.* Paragraph 20 has been added to explain the relevance of determining the time at which benefits are paid. It is considered that the Examples adequately illustrate how the principles explained in the Determination apply to the most common scenarios involving the use of cheques and promissory notes for the payment of benefits.

Issue No.	Issue raised	ATO Response/Action taken
10	*Electronic funds transfers* The principles explained in the draft determination could be applied to the use of electronic banking. For example, if a trustee authorises an electronic transfer at 10pm on June 30, the payment is deemed to be 'cashed' regardless of whether the benefit was received into the recipient bank account immediately or received the following day (e.g. the transferee account is not linked, is held with another financial institution or the bank has made an error). Cashing would not be deemed to have occurred if there were insufficient funds or an election was made for a delayed transfer to occur after the June 30 date. The confusion often arises where the trustee is or should have been aware that the benefit would not be received until the following business day.	*No change.* This issue is beyond the scope of the Determination. Consideration will be given to the development of future ATO guidance on this issue.
11	*Prompt payment* This requirement is open to interpretation and abuse within the SMSF area. Cheques can easily be post marked 30 June and excuses given why it was not immediately banked. There is no reason why the SMSF trustees cannot ensure that the money has left the SMSF bank account within the financial year claimed.	*No change.* It can be argued that a benefit is not 'cashed' until money has actually been received by the member or beneficiary. However, on balance, we consider the better view to be that a benefit is cashed once the trustee has demonstrated an objective intention to make an immediate payment of benefits from the fund, and has taken all reasonable steps to ensure that this occurs promptly. This approach focuses on the perspective of the trustee, on the basis that it is the trustee who is required to comply with the payment standards. It ensures trustees do not fail to cash benefits due to circumstances beyond their control.

Issue No.	Issue raised	ATO Response/Action taken
11. cont	Members in SMSFs should not be given advantages over members in APRA regulated funds. APRA regulated funds have systems set to put the money electronically in the member's bank account within the year claimed and the same should apply for SMSFs. It only encourages SMSF trustees to have lax administration processes in place.	As discussed in paragraph 34, the circumstances in which a benefit can be cashed immediately, without prompt payment, are limited. In most cases, benefits will not be cashed immediately where there is a significant delay between the time a cheque or note is accepted and the time it is honoured by a payment of money.
12	*Payments from SMSF accounts* To ensure payments are being made in cash from an SMSF, pension payments should be required to be paid from the SMSF's bank account. Payments made directly from private investment trusts, property assets etc. in which an SMSF has its assets invested, should not be allowed to be identified as pension payments.	*No change.* This issue is beyond the scope of the Determination. Consideration will be given to the development of future ATO guidance on this issue.
13	*Meaning of 'cashed'* The ATO should consider explaining the meaning of 'cashed' in more detail. For example, the ATO could footnote that a pension payment cannot be 'cashed' by way of transferring an asset in specie to the member, whereas a lump sum payment could be 'cashed' with an in specie transfer.	*No change.* This issue is beyond the scope of the Determination. Consideration will be given to the development of future ATO guidance on this issue.