PS LA 2006/17 - Self-managed superannuation funds - disqualification of individuals to prohibit them from acting as a trustee of a self-managed superannuation fund

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PS LA 2006/17

Self-managed superannuation funds – disqualification of individuals to prohibit them from acting as a trustee of a self-managed superannuation fund

This Practice Statement outlines the circumstances in which you can consider disqualifying an individual and thereby prohibit them from acting as a trustee of a self-managed superannuation fund.

This Practice Statement is an internal ATO document and an instruction to ATO staff.

1. What this Practice Statement is about

An individual[1] may be disqualified from acting as a trustee of a self-managed super fund (SMSF) in 2 ways – through the operation of law[2] or by a decision of the Commissioner of Taxation under section 126A of the *Superannuation Industry (Supervision) Act 1993* (SISA).

All legislative references in this Practice Statement are to the SISA, unless otherwise indicated.

This Practice Statement sets out what you need to consider when making a decision under section 126A.

A person must not act as a trustee of an SMSF or a responsible officer of a corporate trustee when they know they are a disqualified person. Doing so is considered as committing an offence.[3]

Under section 120, an individual is a disqualified person by operation of law where they have been or are:

- convicted of an offence involving dishonesty (subparagraph 120(1)(a)(i))
- subject to a civil penalty order (subparagraph 120(1)(a)(ii))
- an undischarged bankrupt (paragraph 120(1)(b))
- disqualified by the Commissioner under section 126A (subparagraph 120(1)(c)(i)).

2. When an individual can be disqualified under section 126A

Under section 126A, an individual can be disqualified if:

- they contravene the SISA or the *Financial Sector (Collection of Data) Act 2001* and the nature, seriousness or number of the contravention or contraventions provide grounds for disqualification[4], or
- the Commissioner is satisfied that the individual is otherwise not a fit and proper person.[5]

Subsection 126A(3) uses the phrase is 'otherwise' not a fit and proper person. The use of that word does not mean that subsections 126A(1) and (2) raise completely different issues. Whether there have been contraventions of the SISA will be one of the factors in deciding whether the person is not a fit and proper person.[6]

An individual can be disqualified under subsections 126A(1) and (2) for contraventions of the SISA that happened when the entity was a regulated super fund and meets the definitions under sections 10 and 19.

Where a regulated super fund never existed, it is possible to disqualify an individual under the fit and proper provisions contained in subsection 126A(3).

Even if an individual is not presently acting or has never acted as a trustee of an SMSF, they may still be disqualified as a preventative measure because they present a future compliance risk. In these instances, the disqualification can only be under subsection 126A(3) – not being a fit and proper person.

3. Disqualification – general considerations

When making a decision about disqualification, you should keep in mind the overarching principles of:

- Our Charter
- the Compliance model
- the Good decision-making model (link available internally only).

Disqualification under section 126A is primarily aimed at protecting the integrity of the superannuation system. It should be applied where we are concerned

[1] In their own right or as responsible officer for a corporate trustee.
[2] Section 120 of the *Superannuation Industry (Supervision) Act 1993*.
[3] Section 126K.
[4] Subsections 126A(1) and (2).
[5] Subsection 126A(3).
[6] *VCA and Ors and Australian Prudential Regulation Authority* [2008] AATA 580.

that allowing the individual to remain in the position of trustee would present a future compliance risk.

Where an individual removes themselves voluntarily from the position of trustee prior to the decision being made, disqualification may no longer be necessary. However, if the offer to remove themselves is not considered to be *bona fide*, disqualification may still be an appropriate step.

Disqualification may be done in isolation or in conjunction with other compliance options. However, the seriousness and nature of the contraventions and a person's fitness to be a trustee must be considered on a case-by-case basis to determine if disqualification is still an appropriate course of action.

4. Options other than disqualification that can be taken in relation to a contravention

Options other than disqualification include:

- administrative penalties in relation to SMSFs[7]
- issuing a direction to undertake education if the contravention occurred after 1 July 2014[8]
- issuing a direction to rectify a contravention if the contravention occurred after 1 July 2014[9]
- accepting an undertaking from the trustee to rectify the contraventions[10]
- issuing the fund with a notice of non-compliance[11]
- as part of an investigation, freezing the assets of the fund where there is a risk of the members' benefits being eroded or further eroded[12]
- consideration of other applicable Commonwealth laws available to us.

5. Our process

Where appropriate, prior to disqualification you should allow the individual to preserve their benefits, but clearly set out the time limits in which they must do so. For example, we may provide the individual with the opportunity to rollover the funds to an independently managed super fund.[13]

Where a decision is made to disqualify one particular individual, this does not lead to the conclusion that all other individuals who are or were trustees of the same fund should be disqualified. The circumstances surrounding each individual's actions must be considered with a holistic view of the facts.

Once a decision has been made to disqualify an individual, you must:

- give the individual written notice of the disqualification[14], and
- publish details of the disqualification in the Federal Register of Legislation as a notifiable instrument, in accordance with Disqualifying an individual under SISA (link available internally only).[15]

Disqualifying under subsections 126A(1) or (2) – contraventions

6. General considerations

When considering disqualification in relation to contraventions of the relevant legislation, you should:

- look at the acts of the individual
- consider all the facts of the case
- consider whether there is a future compliance risk.

The nature, number and seriousness of contraventions are a question of fact and degree, and it is not possible to apply prescriptive rules to the decision to disqualify.

Each case has to be considered individually. Some examples of relevant considerations when determining the seriousness of a contravention are the:

- behaviour of the trustee in relation to the contravention
- extent to which the fund's assets were affected by the contravention
- extent to which the fund's assets were exposed to financial risk and whether there was any loss to the value of the fund
- number and extent of contraventions over a period of time[16]
- nature of the contravention in the overall scheme of the legislation. For example, a contravention involving an artificial arrangement

[7] Section 166.
[8] Section 160.
[9] Section 159.
[10] See Law Administration Practice Statement PS LA 2006/18 *Self-managed superannuation funds – enforceable undertakings*.
[11] See Law Administration Practice Statement PS LA 2006/19 *Self-managed superannuation funds – issuing a notice of non-compliance*.
[12] Section 264.
[13] Defined by Logan J in *Raelene Vivian, suing in her capacity as the Deputy Commissioner of Taxation (Superannuation) v Fitzgeralds* [2007] FCA 1602 at [38] as a fund that is contradistinctive to an SMSF.
[14] Subsection 126A(6).
[15] Subsection 126A(7).
[16] *Preuss and Australian Prudential Regulation Authority* [2005] AATA 748.

intended to undermine the regulatory provisions or the tax concessions offered to SMSFs is likely to be serious.

7. Assessing the future compliance risk

Disqualification is designed to protect the investing public against the risk that people with a history of non-compliance will re-offend.[17] A key factor in making the decision to disqualify an individual is whether, by not taking such action, there will be a future compliance risk.

An individual will be considered to have a future compliance risk if it is reasonable to draw that conclusion from their compliance history. This includes considering matters in relation to their SMSF, own personal tax affairs or that of any other entity in which they have been in a position of responsibility.

Consideration should be given to all 4 of the following aspects of compliance, both before and after a contravention:

- registration – whether the trustee is registered for all relevant roles
- lodgment – whether the individual has lodged all returns in the correct format on time without prompting from us
- reporting – whether the individual has demonstrated a willingness to report correctly
- payment of debt – whether the individual paid debts voluntarily by their due dates. Further, if the individual has an outstanding debt, whether they have entered into a payment arrangement and fulfilled their payment obligations under the arrangement.

It is imperative to remember that sometimes mistakes are made. What is important is that the individual demonstrates a willingness to comply with their obligations.

Disqualifying under subsection 126A(3) – fit and proper person

8. What to take into account when assessing an individual as fit and proper

You need to consider 2 things when deciding whether an individual is a fit and proper person.

- The fitness of the person – which is determined with reference to the skills required for them to satisfy the obligations as trustee, including their qualifications, experience and competence.

  Factors to consider, in relation to fitness of the person, include whether the person
  - possesses a reasonable level of skills, knowledge, expertise, experience, diligence and soundness of judgment to undertake and fulfil particular duties and responsibilities of being an SMSF trustee
  - answers questions from us in a manner that is reasonable in the circumstances.
- Deciding whether an individual is a proper person to be a trustee entails looking at their general behaviour and conduct in the discharge of their duties, and also their reputation and character in relation to the conduct of any relevant business activities. Some considerations, in relation to whether an individual is a proper person to be a trustee, are whether they have
  - demonstrated a willingness to comply with regulatory or other professional requirements
  - carried out their role with proper independence
  - been reprimanded or otherwise sanctioned by a professional or regulatory body
  - managed their personal debts
  - demonstrated a high level of integrity
  - been substantially involved in the management of entities which have been wound up or failed.

Both fitness and propriety need to be considered in light of the reasonable risks of the individual potentially:

- misappropriating fund monies
- dealing with fund assets in an illegal way
- failing to keep proper records
- knowingly providing inaccurate or misleading information to us, and
- repeatedly and or deliberately failing to provide information to us in compliance with their reporting obligations.

Generally, situations where a trustee may be found not to be a fit and proper person include, but are not limited to, where the trustee:

- allows a contravention by another trustee to occur

[17] *The Taxpayer and Commissioner of Taxation* [2002] AATA 1233 at [12].

- fails to take reasonable steps to prevent a contravention
- fails to notify the Regulator as soon as is reasonably practicable to do so after becoming aware of a contravention by another trustee
- performs their duties in a manner which allows other trustees to contravene the SISA or the *Financial Sector (Collection of Data) Act 2001*.

In making the decision to disqualify an individual for not being fit and proper, we will take into account the following indicators:

- any contraventions of the SISA
- the circumstances surrounding the contravention
- considerations other than the individual's compliance with the SISA which go to establishing the character and repute of the person
- non-compliance with other taxation laws
- whether the individual has been subject to sanctions under any other relevant laws. (relevant laws in this instance would generally include those laws dealing with financial responsibilities, honesty and business transactions)
- the association the individual has with other trustees of the SMSF and the impact this relationship has on their ability to perform their duties as a trustee, and
- all the circumstances of the case including the reasonably assessed honesty, competence, diligence, knowledge, ability, soundness of judgment, reputation and character of the individual.

Where there is sufficient evidence to identify contraventions which justify a disqualification under subsections 126A(1) or (2), and evidence that provides grounds to disqualify under subsection 126A(3), the individual can be disqualified under both limbs.[18]

9. Review rights

The decision to disqualify is for an indefinite period, subject to any applications the individual makes to have the decision revoked under subsection 126A(5) or reviewed under section 344.[19]

Both the decision to disqualify under subsections 126A(1), (2) and (3) and the refusal to revoke the disqualification are reviewable decisions.[20]

A request to reconsider must be made in writing, setting out the reasons for making the request, and be made within 21 days after the person receives notice of the decision, or within such further time that the Regulator allows.

Where a request for a review of the disqualification decision is made under subsection 344(1), the Commissioner does not have the power to stay the decision. However, the trustee can apply to the Administrative Review Tribunal to have the decision stayed pending a review of the decision.[21]

10. More information

For more information on:

- accepting an undertaking from a trustee, refer to PS LA 2006/18
- issuing notices of non-compliance, refer to PS LA 2006/19.

Date issued: 30 November 2006

Date of effect: 30 November 2006

Business line: SEO

[18] *Hart and Commissioner of Taxation* [2018] AATA 1267.
[19] Sections 10 (definition of 'reviewable decision') and 344.
[20] A disqualification under section 126A does not automatically disqualify a person from operating as a company director under the *Corporations Act 2001*.
[21] Subsection 344(10). See also subsection 32(2) of the *Administrative Review Tribunal Act 2024*.

Amendment history

20 February 2025

Part	Comment
Throughout	Content checked for technical accuracy and currency. Updated in line with current ATO style and accessibility requirements.
Section 5 Our process	Updated the last dot point to reflect the fact that disqualifications are now published via notifiable instrument under subsection 126A(7) of the SISA.

17 October 2024

Part	Comment
Throughout	Content checked for technical currency and accuracy. Updated in line with current ATO style and accessibility requirements.

22 November 2018

Part	Comment
Paragraph 8	Corrected reference to subsection 126A(3).

27 September 2018

Part	Comment
All	Updated to reference the decision in *Hart and Hart v. Commissioner of Taxation* [2018] AATA 1267.

9 June 2016

Part	Comment
All	Updated to new LAPS style and template.

11 March 2014

Part	Comment
Paragraph 13	Paragraph 13 deleted as it referred to only SES officers being able to make a decision to disqualify an individual. Now EL2 level officers are authorised.

20 May 2010

Part	Comment
Paragraph 1	Minor clarification explaining SMSF membership can be either one of two or more individuals to a maximum of four.
Contact officer	Updated.

2 September 2009

Part	Comment
Contact officer	Updated.

6 April 2009

Part	Comment
Paragraph 1	Amended so it only refers to a director of a body corporate.
Paragraph 2	Deleted word intentionally.
Paragraphs 16 to 20	Amended to remove references to appointing an acting trustee in making the decision to disqualify an individual.
Paragraph 20	Replaced by new paragraph 20.

27 June 2008

Part	Comment
Generally	Section 120A is now 126A and section 121 is now 126K.
Paragraph 10	Updated to clarify that assets are only frozen where it is part of an investigation.
Paragraph 19	Corrected to advise acting trustee is appointed only where all trustees are removed.
Legislative references	Updated.
Contact phone number	Updated.

References

Legislative references	SISA 1993 10 SISA 1993 19 SISA 1993 120 SISA 1993 120(1)(a)(i) SISA 1993 120(1)(a)(ii) SISA 1993 120(1)(b) SISA 1993 120(1)(c)(i) SISA 1993 126A SISA 1993 126A(1) SISA 1993 126A(2) SISA 1993 126A(3) SISA 1993 126A(5) SISA 1993 126A(6) SISA 1993 126A(7) SISA 1993 126K SISA 1993 159 SISA 1993 160 SISA 1993 166 SISA 1993 264 SISA 1993 344 SISA 1993 344(1) SISA 1993 344(10) Administrative Review Tribunal Act 2024 32(2) Financial Sector (Collection of Data) Act 2001 Corporations Act 2001
Case references	Hart and Commissioner of Taxation [2018] AATA 1267; 107 ATR 966 Preuss and Australian Prudential Regulation Authority [2005] AATA 748; 60 ATR 1137; 87 ALD 629; 41 AAR 332 Raelene Vivian, suing in her capacity as the Deputy Commissioner of Taxation (Superannuation) v Fitzgeralds [2007] FCA 1602; 2007 ATC 5105; 69 ATR 834 The Taxpayer and Commissioner of Taxation [2002] AATA 1233; 51 ATR 1192; 71 ALD 532 VCA and Ors and Australian Prudential Regulation Authority [2008] AATA 580; [2008] AATA 580
Other references	Compliance model Good decision-making model (link available internally only) Our Charter
Related practice statements	PS LA 2006/18 PS LA 2006/19

ATO references

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