PS LA 2006/18 - Self-managed superannuation funds - enforceable undertakings

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Australian Government
Australian Taxation Office

PS LA 2006/18
Self-managed superannuation funds – enforceable undertakings

This practice statement provides guidance on the acceptance and enforcement of written undertakings proposed by trustees of self-managed superannuation funds.

This practice statement is an internal ATO document which is an instruction to ATO staff.

Taxpayers can rely on this practice statement to provide them with protection from interest and penalties in the following way. If a statement turns out to be incorrect and taxpayers underpay their tax as a result, they will not have to pay a penalty. Nor will they have to pay interest on the underpayment provided they reasonably relied on this practice statement in good faith. However, even if they don't have to pay a penalty or interest, taxpayers will have to pay the correct amount of tax provided the time limits under the law allow it.

1. What this practice statement is about

Where there has been a contravention of the:

- *Superannuation Industry (Supervision) Act 1993* (SISA)[1], or
- Superannuation Industry (Supervision) Regulations 1993 (SISR)

one method for managing that contravention is to accept a written undertaking given by the trustee[2] of a regulated self-managed superannuation fund (SMSF)[3] under section 262A(1).

This practice statement sets out the factors that may be considered when deciding whether to accept a written undertaking, the form that written undertaking should take, and the options for enforcing the written undertaking should it be breached.

2. Accepting a written undertaking – general considerations

Whether an undertaking is appropriate will depend on the individual circumstances of the case. You should look to achieve a fair and reasonable outcome, and take into account the principles of:

- the *Taxpayers' Charter*
- the compliance model
- the good decision-making model.

It is the trustee who proposes the undertaking. However, alternatives may be discussed with the trustee to remedy the contravention, and what would need to be included in the undertaking.

Where the trustee has either taken steps to fully rectify, or is genuinely making an effort to meet their obligations, you should work with the trustee to rectify the contravention wherever possible. However, it is generally not reasonable to accept an undertaking for repeat offenders, even if they are willing to rectify.

3. Accepting a written undertaking – relevant factors

Factors to consider, in no particular order, when deciding if it is appropriate to enter into an undertaking include, but are not limited to:

- Whether the trustee is genuinely making an effort to meet their obligations.
- Past behaviour of the trustee.
- Whether the contravention can be rectified, taking into consideration any intervening or interdependent actions required by the trustee.
- Whether there is information available which indicates the trustee will not or cannot comply with the undertaking offered.
- Whether there is evidence that the trustee/members have knowingly been involved in an arrangement where the anti-avoidance provisions may apply.
- The number, nature and seriousness of the contraventions and whether the contravention gives rise to criminal or other prosecution consequences.

[1] All legislative references in this practice statement are to the SISA unless otherwise indicated.
[2] The term 'trustee', as used in this practice statement, refers to either the individual trustees or the corporate trustee of the fund, as the case may be.
[3] A regulated SMSF is one that meets the definitions in sections 10, 17A and 19.

- The written undertaking must be signed by all trustees, and if accepted by the Commissioner, will then be enforceable on both parties.[4]

4. What form should the undertaking take?

The undertaking should contain the following essential terms:

- The actions required to rectify the contravention.
- The time frame in which the contravention will be rectified.[5] This should be within a reasonable period of time depending on the circumstances of the case.[6]
- How and when the trustee will report their progress in fulfilling the obligations of the undertaking.
- A commitment to cease the behaviour which resulted in the contravention.
- Strategies which will be implemented by the trustee to prevent a contravention happening again.

Attachment A provides a format that may be used by trustees to provide this information.

5. Can a trustee withdraw or vary an undertaking?

We can consent to a trustee withdrawing or varying an undertaking.[7] Initially a trustee should propose an undertaking using the best information available to them at the time. However, unforseen events may occur making it necessary to vary the terms of the undertaking. In order to withdraw or vary an undertaking the trustee must:

- show evidence of reasonable grounds for the withdrawal or variation of the undertaking.
- propose an alternative and appropriate course of action that still results in a timely rectification of the contravention, and allows for the protection of member benefits.

When a trustee seeks to withdraw or vary an undertaking, all relevant circumstances of the proposal must be considered.

A withdrawal or variation of the terms of an undertaking will not be allowed if it compromises the rectification of the contravention, or results in an adverse impact on the retirement benefits of members that did not exist with the original undertaking.

Further, if the trustee can no longer meet the terms of the original undertaking, a variation to extend the undertaking is not an appropriate outcome.

6. What if the trustee breaches the undertaking?

If the Commissioner considers the trustee has breached a term of the undertaking, the Commissioner can apply for a court order.[8]

However, we will consider all compliance alternatives available listed at paragraph 7 of this practice statement prior to making any decision.

7. Are there options other than accepting a written undertaking that can be taken in relation to a contravention?

Where an undertaking is not accepted or is not complied with, other options include:

- Informal arrangements.[9]
- Issuing a direction to undertake education if the contravention occurred on or after 1 July 2014.[10]
- Seeking wind up of the fund and rollover of the fund assets into an APRA fund through an oral or written request by the trustee or individual.
- Issuing a direction to rectify a contravention that occurred on or after 1 July 2014.[11]
- Disqualifying the trustee.[12]
- Suspending or removing the trustee.[13]
- Freezing the assets of the fund if there is a risk of the members' benefits being eroded.[14]
- Seeking a court order or seeking civil and/or criminal penalties through the courts.[15]

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[4] If the undertaking meets the requirements set out in section 262A.
[5] In general a rectification period would rarely exceed 12 months.
[6] For example, it would be reasonable to give a longer period of time to dispose of an asset such as residential property, than shares in a publicly listed company.
[7] Subsection 262A(2).
[8] Subsections 262A(3) and (4).
[9] Informal arrangements are discussed further at paragraph 8 of this practice statement.
[10] Section 160.
[11] Section 159.
[12] Section 126A. See also Law Administration Practice Statement PS LA 2006/17: *Self-managed superannuation fund – disqualification of individuals to prohibit them from acting as a trustee of a self-managed superannuation fund.*
[13] Subsection 133(1). This would only occur in exceptional circumstances.
[14] Section 264. This would only occur in exceptional circumstances.

8. Informal arrangements

In limited circumstances, it might also be appropriate for the Commissioner to enter into an informal arrangement with the trustee.

This would be accepted in low risk cases only where contraventions are minor and able to be rectified in a very short period of time – for example, where the trustee has already commenced the action required and has a reasonable compliance history.

An informal arrangement does not have to be in writing, but it should be recorded in an appropriate way; noting the proposed action and the timeframe in which that action will be finalised.

This enables any required future compliance action to consider what was determined and acted upon during the informal arrangement.

9. Review rights

If you decide not to accept an undertaking, you should notify the trustee in writing, informing them of the decision and the reasons for that decision.

The decision regarding the accepting of an undertaking is not a reviewable decision[16] under section 344. However, we will conduct an informal internal review if a request is received from a trustee who is dissatisfied with the decision.

This request should be made in writing, within a reasonable period of time (generally 28 days) from the decision being made.

A decision not to accept an undertaking is reviewable under the *Administrative Decisions (Judicial Review) Act 1977.*

10. More information

For more information on:

- Issuing notices of non-compliance, see PS LA 2006/19.
- Disqualifying a trustee, see PS LA 2006/17.

Date issued 30 November 2006

Date of effect 30 November 2006

[15] Part 21. This would occur only in exceptional circumstances.
[16] Section 10.

Attachment A

ENFORCEABLE UNDERTAKING

AUSTRALIAN TAXATION OFFICE

SUPERANNUATION INDUSTRY (SUPERVISION) ACT 1993

Section 262A

The commitments in this undertaking are offered to the Commissioner of Taxation by:

The Trustee

<insert name> Superannuation Fund (ABN: <insert fund's ABN>)

<insert address>

1.0 **Background**

1.1 *<This needs to clearly describe how you as a trustee of the fund contravened. Only those aspects relevant to the fund and the contravention should be mentioned.>*

1.2

1.3

2.0 **Undertakings**

Pursuant to section 262A of the *Superannuation Industry (Supervision) Act 1993* (SISA), the trustee(s) of the <insert fund's name> give(s) the following undertakings to the Commissioner of Taxation:

2.1 *<Insert the rectification/undertaking requirements here. These undertakings must describe the actions you as a trustee of the superannuation fund will do.*

2.2 *These undertakings need to include:*

- *what actions will be taken by you as the trustee of the fund to rectify the contravention*
- *the time in which you as the trustee of the fund intend to complete each of these actions*
- *how and when you as the trustee of the fund will report to us on your progress towards completion of the undertaking*
- *the records you as the trustee of the fund will maintain to prove that you have rectified the contravention*
- *your commitment as the trustee of the fund to cease the behaviour which resulted in the contravention*
- *the strategies required to be implemented by you as the trustee of the fund to prevent the contravention from occurring again (if appropriate).>*

3.0 **Acknowledgments** *<The undertaking will not be accepted if the acknowledgments are changed.>*

The trustee(s) of the <insert fund's name> acknowledge(s) that:

3.1 The undertaking may be withdrawn or varied only with the consent of the Commissioner of Taxation.

3.2 If any of the terms of the undertaking are contravened or not met the Commissioner will consider all the options listed below in determining the appropriate compliance treatment:

- issuing a fund with a notice of non-compliance
- seeking a court order under subsection 262A(4)
- disqualifying a particular individual and prohibiting them from acting as a trustee of a superannuation fund
- suspending or removing a particular trustee
- freezing the assets of a fund if there is a risk of the members' benefits being eroded, or

- seeking civil and/or criminal penalties through the courts

3.3 This undertaking does not inhibit or restrict the Commissioner or any other person impacted by the conduct of the trustee in fulfilling the undertaking from pursuing the rights and remedies available under the law.

3.4 The Commissioner's acceptance of this undertaking does not affect the Commissioner's powers to investigate a contravention arising from future conduct.

3.5 The undertaking has no effect until accepted by the Commissioner.

EXECUTED BY

The Trustee

<insert name> Superannuation Fund (ABN: <insert ABN of fund>)

_____	_____	_____
Director/Trustee	Print name	Date
_____	_____	_____
Director/Trustee	Print name	Date
_____	_____	_____
Director/Trustee	Print name	Date
_____	_____	_____
Director/Trustee	Print name	Date