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 and 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 do not 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) or *Superannuation Industry (Supervision) Regulations 1994*, one method for managing that contravention is to accept a written undertaking given by the trustee[1] of a regulated self-managed superannuation fund (SMSF)[2] under subsection 262A(1) of the SISA.

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

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:

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

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 them 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
- the trustee's past behaviour
- 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 has 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.

4. The form the undertaking should take

The undertaking needs to include the following essential terms:

- the actions required to rectify the contravention

[1] 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.

[2] A regulated SMSF is one that meets the definitions in sections 10, 17A and 19.

- the timeframe in which the contravention will be rectified[3]; this should be within a reasonable period of time depending on the circumstances of the case[4]
- 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.

The written undertaking must be signed by all trustees and, if accepted by us, will be enforceable on both parties.[5]

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

5. Withdrawal or variation of an undertaking by a trustee

We can consent to a trustee withdrawing or varying an undertaking.[6] Initially, a trustee should propose an undertaking using the best information available to them at the time. However, unforeseen 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. The trustee breaches the undertaking

If we consider the trustee has breached a term of the undertaking, we can apply for a court order.[7]

However, we will consider all compliance alternatives available listed in section 7 of this Practice Statement prior to making any decision.

7. 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[8]
- issuing a direction to undertake education if the contravention occurred on or after 1 July 2014[9]
- 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[10]
- disqualifying the trustee[11]
- suspending or removing the trustee[12]
- freezing the assets of the fund if there is a risk of the members' benefits being eroded[13]
- seeking a court order or seeking civil and criminal penalties through the courts.[14]

8. Informal arrangements

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

[3] In general, a rectification period would rarely exceed 12 months.
[4] 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.
[5] If the undertaking meets the requirements set out in section 262A.
[6] Subsection 262A(2).
[7] Subsections 262A(3) and (4).
[8] Informal arrangements are discussed further in section 8 of this Practice Statement.
[9] Section 160.
[10] Section 159.
[11] 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.*
[12] Subsection 133(1). This would only occur in exceptional circumstances.
[13] Section 264. This would only occur in exceptional circumstances.
[14] Part 21. This would occur only in exceptional circumstances.

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 confirmation of its terms, including the proposed action and the timeframe in which that action will be finalised, should be confirmed with the trustee in writing.

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[15] 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 Law Administration Practice Statement PS LA 2006/19 *Self-managed superannuation funds – issuing a notice of non-compliance*
- disqualifying a trustee, see PS LA 2006/17.

Date issued: 30 November 2006

Date of effect: 30 November 2006

Business line: SEO

[15] 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 (the Commissioner) 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. Note: You can only propose an enforceable undertaking (EU) where the underlying contraventions can be wound back or you are implementing strategies that ensure the contravention or that of a similar kind, never happens again.>*

2.0 **Undertakings**

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

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

These undertakings need to include:

- *What actions will be taken by you as the trustee of the fund to rectify the contravention. (Note: This EU is between the trustee of the fund and the Commissioner. This means that it cannot compel other entities not party to the EU to take a course of action. The EU should not be conditional on the basis of events outside of the trustee's control.)*
- *The time in which you as the trustee of the fund intend to complete each of these actions. (Note: You must include a due date in which you agree to fulfill all the obligations of the EU.)*
- *How and when you as the trustee of the fund will report to us on your progress towards completion of the EU.*
- *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 or trustees> of the <insert fund's name> <acknowledge or acknowledges> that:

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

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) of the SISA
- 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 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 their 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>)

<Note: EU must be signed by all Trustees.>

_____	_____	_____
<Director or Trustee>	Print name	Date
_____	_____	_____
<Director or Trustee>	Print name	Date
_____	_____	_____
<Director or Trustee>	Print name	Date
_____	_____	_____
<Director or Trustee>	Print name	Date

Amendment history

12 September 2024

Part	Comment
Throughout	Content checked for technical currency and accuracy. Updated in line with current ATO style and accessibility requirements.
Sections 1 to 9, and 10 Attachment A – subparagraphs 1.1, 2.1, 3.2 and 3.4	Minor revisions.
Section 1	Footnote 1 removed and inserted into the paragraph.
Contact details	Updated.

30 August 2018

Part	Comment
All	Updated to new LAPS format and style. Contact details updated.

6 September 2012

Part	Comment
Contact details	Updated.

30 March 2012

Part	Comment
Contact details	Updated.

21 October 2011

Part	Comment
Contact details	Updated.

16 August 2011

Part	Comment
Paragraph 35	Revised to clarify a trustee's obligations are under certain tax laws. Footnote 6 inserted to define those tax laws.

19 March 2009

Part	Comment
Footnote 2	Inserted.
Paragraph 31 and Attachment A	Significant revisions.
Paragraphs 5, 16, 19, 21, 24, 27, 32, 33 and 36	Minor revisions.

9 January 2009

Part	Comment
Paragraph 6	Legislative reference 120A of the *Superannuation Industry (Supervision) Act 1993* updated to section 126A of that Act.
Contact details	Updated.

16 April 2008

Part	Comment
Contact details	Updated.

11 February 2008

Part	Comment
Contact details	Updated.

20 December 2007

Part	Comment
Title (purpose) and paragraph 32	Replaced 'an enforceable' with 'a written'.

References

Legislative references	SISA 1993 10 SISA 1993 17A SISA 1993 19 SISA 1993 126A SISA 1993 133(1) SISA 1993 159 SISA 1993 160 SISA 1993 Pt 21 SISA 1993 262A SISA 1993 262A(1) SISA 1993 262A(2) SISA 1993 262A(3) SISA 1993 262A(4) SISA 1993 264 SISA 1993 344 SISR 1994 Administrative Decisions (Judicial Review) Act 1977
Other references	Compliance model Good decision-making model (link available internally only) Our Charter
Related practice statements	PS LA 2006/17 PS LA 2006/19

ATO references

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