PS LA 2006/19 - Self managed superannuation funds - notice of non-compliance

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Practice Statement Law Administration

PS LA 2006/19

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This law administration practice statement is issued under the authority of the Commissioner and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. ATO personnel, including non ongoing staff and relevant contractors, must comply with this law administration practice statement, unless doing so creates unintended consequences or is considered incorrect. Where this occurs, ATO personnel must follow their business line's escalation process.

SUBJECT:	**Self-managed superannuation funds – notice of non-compliance**
PURPOSE:	**To outline the factors the Commissioner will consider in deciding whether a notice of non-compliance should be given to a fund under subsection 40(1) of the *Superannuation Industry (Supervision) Act 1993* where the trustee has contravened one or more of the regulatory provisions**

BACKGROUND

1. For a self-managed superannuation fund (SMSF) to qualify for concessional tax treatment for income tax purposes, it must be a complying superannuation fund under sections 42A and 45 of the *Superannuation Industry (Supervision) Act 1993* (SISA).[1]

2. The Commissioner is the Regulator of SMSFs and as such is responsible for determining whether or not an SMSF is a complying superannuation fund.

3. The Commissioner may give an SMSF a written notice stating that the fund is or is not a complying superannuation fund (referred to as a notice of compliance or non-compliance, as the case may be) for a year of income.

4. A newly established SMSF will normally be given a notice of compliance when its first *Self-managed superannuation fund annual return*[2] (which combines the income tax return and regulatory return, and member contributions information) is lodged, and the return indicates that it has complied with all relevant requirements under the SISA.

5. A notice is not required to be given to an SMSF for each and every year of income. A notice of compliance given in relation to a year of income will be effective for that year and all subsequent years until such time, if any, as a notice of non-compliance is given to the fund.

[1] All legislative references are to the SISA, unless otherwise stated.
[2] Prior to the 2007-08 income year, a notice of compliance was issued when the first *Fund income tax and regulatory return* was lodged.

6. An SMSF that holds a notice of compliance that is still in effect is eligible for concessional tax treatment for income tax purposes in relation to a year of income.

7. Where an SMSF is holding a notice of compliance that is still in effect, but does not satisfy the conditions for a complying superannuation fund for a year of income, the Commissioner may give the fund a notice of non-compliance for that year of income.

8. For income tax purposes, a notice of non-compliance will be effective for the year for which it is given and all subsequent years until such time, if any, as a notice of compliance is given to the fund.

STATEMENT

9. This practice statement outlines the factors that the Commissioner will consider in making the decision on whether to give an SMSF a notice of non-compliance for a year of income, where the trustee[3] has contravened one or more of the regulatory provisions in the relevant year of income.

10. This practice statement only applies to an SMSF that is a resident regulated superannuation fund.

11. The Commissioner has a range of options available under the SISA to deal with a contravention by the trustee of an SMSF. The options include:

    - making the fund a non-complying superannuation fund by giving the fund a notice of non-compliance (subsection 40(1))
    - accepting an undertaking from the trustee to rectify the contravention[4] (section 262A)
    - disqualifying individual trustees and prohibiting them from acting as a trustee of a superannuation fund or as a responsible officer of a corporate trustee of a superannuation fund[5] (section 126A)
    - suspending or removing the trustee (section 133)
    - as part of an investigation, freezing the assets of the fund if there is a risk of the members' benefits being eroded (section 264), and
    - seeking civil and/or criminal penalties through the courts. (Part 21).

    The Commissioner may use one or more of these options to deal with a contravention.

12. The most appropriate option(s) to deal with a contravention will depend on the circumstances of the case. The option(s) chosen must accord with the compliance model. The model helps in understanding the factors and attitudes that motivate a taxpayer to comply or not comply with the law. It also helps in choosing the most appropriate response depending on the taxpayer's behaviour and individual circumstances.

[3] 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.
[4] The ATO policy on undertakings is in PS LA 2006/18.
[5] The ATO policy on disqualifying trustees is in PS LA 2006/17.

13. In making the decision on whether to give an SMSF a notice of non-compliance for a year of income, the Commissioner will consider the following factors:

- the taxation consequences that would arise if the fund was to be treated as a non-complying superannuation fund[6] (refer to paragraphs 27 to 30 of this practice statement)
- the seriousness of the contravention(s) (refer to paragraphs 31 to 34 of this practice statement), and
- all other relevant circumstances (refer to paragraphs 35 and 36 of this practice statement).

14. The decision will be made on a case by case basis, taking into account the individual circumstances of the case. The final decision will be the result of a process of weighing up the factors set out in paragraph 13 of this practice statement. No one factor by itself will be conclusive and the weight given to each factor will vary depending on the circumstances of the case.

15. To ensure that a fair and reasonable outcome is achieved in each case, the decision will be made in accordance with the statements and principles set out in the taxpayers' charter, compliance model, and the good decision-making model. In particular, the taxpayers' charter requires that taxpayers be treated fairly and reasonably, so a decision to give a fund a notice of non-compliance will need to be fair and reasonable in the circumstances. This is further underlined by the good decision-making model, which requires that the decision be legal, ethical, overt, sensible, timely and in accordance with the principles of natural justice.

16. Generally, a notice of non-compliance will not be given to an SMSF if the Commissioner has accepted an undertaking (including an informal arrangement)[7] by the trustee to rectify a contravention and/or to wind-up the fund, provided the trustee is genuinely attempting to satisfy the terms of the undertaking.

17. Also, in most circumstances, a notice of non-compliance will not be given to an SMSF if the Commissioner is satisfied:

- with the wind-up of the fund by the trustee prior to any ATO compliance action, and
- any money in the SMSF has been rolled-over to another fund and is independently managed now and into the future.

It would not be appropriate to give the SMSF a notice of non-compliance in this situation because any money in that fund has effectively been placed in a position where it will no longer be at risk from further contraventions by the trustee.

However, if after the trustee has wound-up their SMSF, the Commissioner finds that actions of the trustee preceding the wind-up were such that the Commissioner considers it appropriate to give the SMSF a notice of non-compliance, he is not precluded from doing so on the basis that the SMSF has been wound-up. Nor is the Commissioner precluded from exercising any of the option(s) available to him as listed in paragraph 11 of this practice statement.

[6] Refer to Part IX of the *Income Tax Assessment Act 1936* for income years prior to the 2007-08 income year. Refer to Part 3-30 of *Income Tax Assessment Act 1997* for the 2007-08, and later income years.
[7] The ATO policy on undertakings is in PS LA 2006/18.

18. Where the Commissioner believes that there is a risk of non-compliant behaviour by the trustee in the future, action will be taken against the trustee in accordance with Law Administration Practice Statement PS LA 2006/17.

EXPLANATION

19. For the purposes of this practice statement, a fund is assumed to be a resident regulated superannuation fund.[8]

20. An SMSF that is not a resident superannuation fund will not be a complying superannuation fund.

21. An SMSF is a complying superannuation fund if it satisfies the conditions set out in section 42A. In essence, an SMSF is a complying superannuation fund for a year of income if the fund was a resident regulated superannuation fund at all times during the year of income when it was in existence, and the trustee has not contravened any of the regulatory provisions during the year of income.[9] For income tax purposes, the SMSF will be a complying superannuation fund if the Commissioner has issued a notice of compliance in the current or previous years of income and has not subsequently issued a notice of non-compliance.

22. Where the trustee has contravened one or more of the regulatory provisions during a year of income, the fund will still be a complying superannuation fund for that year of income if the Commissioner considers that a notice of compliance should nevertheless be given to the fund (if such a notice has not already been given).

23. For the purpose of determining whether an SMSF is a complying superannuation fund, a contravention of a regulatory provision under the SISA is to be ignored unless the contravention is:

- an offence under the SISA provisions, or
- a contravention of a civil penalty provision,[10] or
- a contravention of a regulatory provision listed in paragraph 38A(ab).[11A]

Factors to consider in deciding whether to give a notice of non-compliance

24. Where the trustee of an SMSF has contravened one or more of the regulatory provisions during a year of income, paragraph 42A(5)(b) provides that the Commissioner must consider the following factors in deciding whether a notice of compliance should be given to the fund for the year of income:

- the taxation consequences that would arise if the fund was to be treated as a non-complying superannuation fund[11]
- the seriousness of the contravention(s), and
- all other relevant circumstances.

[8] See section 10 for the definition of 'resident regulated superannuation fund'.
[9] The term 'regulatory provision' is defined in section 38A and includes any provision of the SISA or the Superannuation Industry (Supervision) Regulations 1994.
[10] For a list of the civil penalty provisions, refer to section 193.
[11A] Section 39.
[11] Refer to Part IX of the *Income Tax Assessment Act 1936* for income years prior to the 2007-08 income year. Refer to Part 3-30 of *Income Tax Assessment Act 1997* for the 2007-08, and later income years.

25. While paragraph 42A(5)(b) sets out the factors that must be considered in deciding whether to give an SMSF a notice of compliance for a year of income, they are equally relevant in deciding whether to give an SMSF a notice of non-compliance.

26. Paragraphs 27 to 36 of this practice statement discuss the factors set out in paragraph 42A(5)(b) and explain how the Commissioner will consider them.

Taxation consequences

27. The first factor the Commissioner is required to consider is the taxation consequences that would arise if an SMSF is to be treated as a non-complying superannuation fund.[12]

28. When an SMSF is treated as a non-complying superannuation fund it will lose its concessional tax treatment which applies to the low tax component of a complying superannuation fund.[13] Accordingly the taxable income of a non-complying fund is taxed at 45%.

29. If an SMSF is made a non-complying superannuation fund for a year of income and it was a complying superannuation fund for the previous year, the fund's assessable income for the income year will include the following amounts from previous years:

Sum of the market values of the fund's assets just before the start of the income year	–	Sum of the part of the crystallised undeducted contributions that relates to the period after 30 June 1983 and the contributions segment for current members at that time so far as they have not been, and cannot be, deducted[14]

30. As the decision to change the status of an SMSF from complying to non-complying will have a significant financial impact on the fund, due consideration will be given to each and every case. The Commissioner will consider whether it would be reasonable for the fund to be treated as if it is a complying fund and still receive concessional tax treatment. This will depend on the particular circumstances of the case, the seriousness of the contravention, and the trustee's attitude to complying with the regulatory provisions.

Seriousness of the contravention

31. The second factor the Commissioner is required to consider is the seriousness of the contravention.[15]

32. The seriousness of a contravention will always be a question of fact and degree, and each case will need to be considered in light of its particular circumstances. In line with the compliance model, the ATO response to a contravention must be appropriate and proportionate. A notice of non-compliance should only be given to a fund if it would be reasonable, given the seriousness of the contravention, for the fund to be treated as a non-complying fund.

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[12] Subparagraph 42A(5)(b)(i).
[13] The 'low tax component' of the taxable income of a complying superannuation fund is taxed at the rate of 15%, but the 'non-arm's length' component' is taxed at 45% (section 26 of the *Income Tax Rates Act 1986*).
[14] This formula is applicable to the 2007-08 income year and later years (section 295-325 of the ITAA 1997). Refer to section 288A of the ITAA 1936 for the formula applicable to income years prior to 2007-08.
[15] Subparagraph 42A(5)(b)(ii).

33. The following is a list of items to consider in determining the seriousness of a contravention.

- The behaviour of the trustee in relation to the contravention.[16] A contravention resulting from recklessness or intentional disregard[17] for a regulatory provision is likely to be considered more serious than a contravention resulting from an honest mistake.
- The extent to which the contravention affects the fund's assets.[18] The greater the proportion of the fund's assets affected by the contravention, the more serious the contravention is likely to be.
- The extent to which the fund's assets are exposed to financial risk and whether there is any loss to the value of the fund. The greater the proportion of the fund's assets exposed to financial risk and the greater the loss suffered by the fund, the more serious the contravention is likely to be. However, a contravention may still be serious if a significant proportion of the fund's assets has been put at risk, even though the fund has not suffered any actual loss.[19]
- The number and duration of contraventions over a period of time.[20] A single contravention on its own may not be considered serious, but a number of contraventions taken together may make the situation more serious. In addition, the longer a contravention continues without any attempt to rectify it, the more serious it is likely to be.
- The nature of the contravention in the overall scheme of the legislation.[21] For example, a contravention involving an artificial arrangement intended to undermine a regulatory provision is likely to be considered a serious contravention.

34. While any one of those items in paragraph 33 of this practice statement may prove decisive in particular cases, it will always be necessary to consider all of them together to determine the seriousness of a contravention.

All other relevant circumstances

35. In addition to the taxation consequences and the seriousness of the contravention, the Commissioner is required to consider all other relevant circumstances.[22] The circumstances do not necessarily have to be special or unique, they only have to be relevant. Some of the circumstances that may be relevant in particular cases are listed in paragraph 36 of this practice statement. The list is not intended to be exhaustive, it is merely illustrative.

36. Relevant circumstances may include the following.

- Whether the trustee has rectified the contravention, entered into an enforceable undertaking to rectify the contravention, or taken any

[16] For example, see *Australian Prudential Regulation Authority v. Derstepanian and Anor* [2005] FCA 1121; 60 ATR 518.
[17] 'Recklessness' and 'intentional disregard' are well established concepts. For a discussion of these concepts see, for example, PS LA 2012/5 *Administration of penalties for making false or misleading statements that result in shortfall amounts*, and Miscellaneous Taxation Ruling MT 2008/1 Penalty relating to statements: meaning of reasonable care, recklessness and intentional disregard.
[18] For example, see *Case 47/94* 94 ATC 417; *AAT Case 9689* 29 ATR 1086.
[19] For example, see *Re QX971 and Australian Prudential Regulation Authority* [1999] AATA 6.
[20] For example, see *Re Preuss and Australian Prudential Regulation Authority* [2005] AATA 748; (2005) 60 ATR 1137.
[21] For example, see *Australian Prudential Regulation Authority v. Holloway and Anor* [2000] FCA 1245; (2000) 45 ATR 278.
[22] Subparagraph 42A(5)(b)(iii).

action (where possible) to prevent the contravention occurring again. Actions or behaviours that indicate a willingness to comply with the law will be considered favourably.

- The trustee's level of skill and knowledge. The higher the level of skill and knowledge of the trustee in managing a fund, the more likely it is that they are expected to understand the impact of their action or inaction. A trustee with a more comprehensive understanding is expected to meet a higher standard of behaviour in order to demonstrate that the fund should be given another opportunity to improve compliance before being made a non-complying fund.
- The compliance history of the fund before and after the contravention. A fund with a good compliance record will be treated more favourably than a fund with a history of non-compliance.
- The events which led to the contravention and whether these influenced the trustee's decision. Examples include, but are not limited to, serious illness or death of a trustee or close relative, or natural disasters.
- In the event that the ATO may have facilitated or contributed to the trustee's adopting a course of action, reference should be made to PS LA 2011/27 *Matters the Commissioner considers when determining whether the Australian Taxation Office (ATO) view of the law should only be applied prospectively* as the principles discussed in that practice statement are relevant in deciding whether to give an SMSF a notice of non-compliance.

  For instance, the trustee relied upon a final Self Managed Superannuation Fund Ruling (SMSFR) when proceeding with an arrangement. The SMSFR was subsequently withdrawn and re-issued with certain aspects changed. Consequently the views in the reissued SMSFR indicated that the arrangement resulted in a contravention of the SISA. As the trustee relied upon an SMSFR when entering into the arrangement this is a relevant factor when making a decision whether or not to give the fund a notice of non-compliance.

  If a decision is made, in light of the principles discussed in PS LA 2011/27 to not give the fund a notice of non-compliance there is still a need to ensure that the trustee takes action to ensure the fund complies with the SISA, as it is now understood, for future years.

Review rights

37. A person who is affected by the decision of the Commissioner to issue a notice of non-compliance may request the Commissioner to reconsider if the person is dissatisfied with the decision. The request must be in writing, setting out the reasons for the request, and must be made within 21 days after the person receives notice of the decision, or within such further period as the Commissioner allows. If the person is dissatisfied with the outcome of the request, the person may apply to the Administrative Appeals Tribunal for a review of the decision.[23]

[23] Sections 10 (definition of reviewable decision) and 344.

Examples

38. The following examples are provided as a guide only. It is emphasised that tax officers must decide each case on its own circumstances, applying the guidelines provided in this practice statement.[24]

Example 1 – Self-managed superannuation fund annual returns[25] not lodged for several years

39. An SMSF, a resident regulated superannuation fund, was established in 2000. The trustee lodged *Fund income tax and regulatory returns* for the 2000-01 and 2001-02 years of income, but has not lodged returns for the 2002-03, 2003-04 and 2004-05 years of income. The ATO has requested the lodgment of the outstanding returns on several occasions under the ATO lodgment enforcement program. The trustee disregarded each and every ATO request without offering any reasons. The ATO has also notified the trustee of a liability to pay penalties in respect of the outstanding income tax returns.

40. Failure by the trustee of a fund to lodge a return for a year of income constitutes an offence.[26] In this case, the trustee has failed to lodge returns for three years of income, so there are three contraventions. Each of the contraventions is serious because lodging returns is a fundamental requirement of the regulatory regime and the trustee is expected to know this requirement. The number of contraventions involved and the trustee's disregard of the ATO's requests add to the seriousness of the contraventions.

41. Under these circumstances and after giving due consideration of the taxation consequences of this fund being treated as a non-complying superannuation fund, the Commissioner decided that it would be reasonable to give the fund a notice of non-compliance because of the seriousness of the contraventions; the trustee's attitude to compliance as indicated by the trustee's disregard of the ATO's requests; and the fact that there are no relevant circumstances to mitigate the trustee's failure to lodge the outstanding returns.

Example 2 – a loan made to a relative of a member

42. The trustee of an SMSF (a resident regulated superannuation fund) made a loan to a relative of one of the members of the fund. The loan represented 60% of the total market value of the fund's assets and was made to the relative with little prospect of recovery. After two years the loan is still outstanding. The fund previously made a number of smaller loans to other relatives of the members. The loans were only repaid after action by the ATO.

43. The loan to the relative was made in contravention of the SISA, as the trustee of a fund is prohibited from lending money of the fund to a member or a relative of a member of the fund.[27] The contravention is serious because the loan represented a large proportion of the fund's assets and the trustee has previously been advised that loans to relatives are not permitted. In addition, failure by the trustee to pay regard to the ATO's previous action is a clear

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[24] Please note that only the question of whether the SMSF should be given a notice of non-compliance has been considered in these examples. A contravention may also give rise to other penalties or actions.

[25] Prior to the 2007-08 income year, *Fund income tax and regulatory returns*.

[26] Subsection 35D(4). In determining the complying status of a fund, a contravention is only taken into account if it is an offence or a contravention of a civil penalty provision or a contravention of a provision mentioned in paragraph 38A(ab) (section 39).

[27] Subsection 65(1); this is a civil penalty provision. In determining the complying status of a fund, a contravention is only taken into account if it is an offence or a contravention of a civil penalty provision or a contravention of a provision mentioned in paragraph 38A(ab) (section 39).

indication that the trustee is not willing to operate within the regulatory regime. Under these circumstances, it would be reasonable for the Commissioner to give the fund a notice of non-compliance because of the seriousness of the contravention; the fund's history of non-compliance; and the fact that the trustee is not willing to comply with the law. The Commissioner considered that these factors outweighed the taxation consequences that will occur when this fund is treated as a non-complying superannuation fund.

Example 3 – a trustee has wound-up their SMSF

44. An SMSF was set-up in the 2004-05 income year. The trustee wound-up the fund in the 2007-08 income year and rolled-over money into an independently managed fund. The ATO conducts an audit of the fund for the 2005-06 income year and finds there were a number of contraventions over the life of the fund. Whilst some of these contraventions may not on an individual basis be considered serious, the Commissioner determined it appropriate to give the fund a notice of non-compliance as the contraventions, when aggregated, were serious. When considering the taxation consequences that would result when the fund is treated as a non-complying superannuation fund, the Commissioner took into account that when these contraventions occurred the fund had received the benefit of concessional tax treatment to which it was not entitled as it had been non-compliant prior to it being wound-up. The fund's income tax assessment for the 2005-06 income year will be amended accordingly.

Amendment history

Date of amendment	Part	Comment
15 November 2012	Footnote 17	Updated to reference PS LA 2012/5 as PS LA 2006/2 has been withdrawn.
1 September 2011	Paragraphs 13, 14, 17, 26, 34 and 35	Paragraph number references updated after former paragraph 9 was deleted.
28 July 2011	Paragraph 9 Paragraph 36 Examples	Deleted for currency purposes. Updated to include reference to matters articulated in PS LA 2011/27 *Matters the Commissioner considers when determining whether the Australian Taxation Office (ATO) view of the law should only be applied prospectively*. Updated to reflect the Commissioner has considered the taxation consequences of the SMSF being treated as a non-complying superannuation fund.
13 May 2010	Various	Minor revisions to update 'Tax Office' to 'ATO' and improve the technical currency of the document.
3 July 2009	Paragraphs 17 and 18 and Example 3	Updated to reflect that the Commissioner may give a fund a notice of non-compliance even though the fund has been wound-up.
	Various	Minor updates to improve the technical currency of the document.
25 November 2008	Paragraph 12	Updated as a result of the *Financial Sector (Review of Prudential Decisions) Act 2008.*
	Paragraphs 14, 21, 29, 30, and Example 38	Updated to reflect amendments made by the *SLA (Simplification) Act 2007.*
	Various	Minor updates to improve the technical currency, clarity and readability of the document.

Subject references	complying superannuation fund notice of compliance notice of non-compliance self-managed superannuation fund
Legislative references	ITAA 1936 Part IX ITAA 1936 288A ITAA 1997 ITAA 1997 295-325 ITAA Part 3-30 ITRA 1986 26 SISA 10 SISA 35D(4) SISA 38A SISA paragraph 38A(ab) SISA 39 SISA 40(1) SISA 42A SISA 42A(5)(b) SISA 42A(5)(b)(i) SISA 42A(5)(b)(ii) SISA 42A(5)(b)(iii) SISA 45 SISA 65(1) SISA 126A SISA 133 SISA Part 21 SISA 193 SISA 262A SISA 264 SISA 344 SISR 1994
Related public rulings	Miscellaneous Taxation Ruling MT 2008/1
Related practice statements	PS LA 2006/17 PS LA 2006/18 PS LA 2011/27 PS LA 2012/5
Case references	*Australian Prudential Regulation Authority v. Derstepanian and Anor* [2005] FCA 1121; 60 ATR 518 *Australian Prudential Regulation Authority v. Holloway and Anor* [2000] FCA 1245; (2000) 45 ATR 278 *Case 47/94* 94 ATC 417; *AAT Case 9689* (1994) 29 ATR 1086 *Re QX971 and Australian Prudential Regulation Authority* [1999] AATA 6 *Re Preuss and Australian Prudential Regulation Authority* [2005] AATA 748; (2005) 60 ATR 1137
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