PS LA 2009/5 - Provision of advice and guidance by the Australian Taxation Office (ATO) in relation to the application of the Superannuation Industry (Supervision) Act 1993 and the Superannuation Industry (Supervision) Regulations 1994 to Self Managed Superannuation Funds

Australian Government
Australian Taxation Office

Practice Statement Law Administration

PS LA 2009/5

FOI status: may be released

This practice statement is issued under the authority of the Commissioner of Taxation and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by tax officers unless doing so creates unintended consequences or is considered incorrect. Where this occurs, tax officers must follow their business line's escalation process.

SUBJECT: **Provision of advice and guidance by the Australian Taxation Office (ATO) in relation to the application of the *Superannuation Industry (Supervision) Act 1993* and the Superannuation Industry (Supervision) Regulations 1994 to Self Managed Superannuation Funds**

PURPOSE: **To explain:**

- **the forms of Self Managed Superannuation Fund (SMSF) advice and guidance the ATO provides about the application of the *Superannuation Industry (Supervision) Act 1993* (SISA) and Superannuation Industry (Supervision) Regulations 1994 (SISR)**
- **the weight given to the fact that an SMSF trustee has relied on SMSF advice or guidance in relation to a scheme, and**
- **where to find further information about procedures for developing and issuing each form of SMSF advice and guidance**

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KEY PRINCIPLES – SUMMARY

Providing assistance in the form of SMSF advice and SMSF guidance on the application of the SISA and SISR is an important part of the Commissioner's role as the regulator of SMSFs. The provision of this assistance enables SMSF trustees to understand and meet their obligations under the SISA and SISR.

This provision of assistance has no application to entities other than SMSFs and former[1] SMSFs that are regulated by the Commissioner. A reference to SMSFs in this practice statement also includes a reference to former SMSFs that are regulated by the Commissioner.

Distinction between taxation advice and guidance as described in PS LA 2008/3 and SMSF advice and SMSF guidance

In Law Administration Practice Statement PS LA 2008/3 Provision of advice and guidance by the ATO, the Commissioner sets out the level of protection that is available under the laws administered by him to taxpayers who rely on the advice or guidance that he has provided. This level of protection is expressed in terms of protection from tax, penalty and interest. In most cases, the level of protection available to a taxpayer who relies on advice or guidance from the Commissioner about a tax matter arises from the operation of a taxation law.

'Advice' as described in PS LA 2008/3 is mostly, though not always, advice provided by the Commissioner in the form of legally binding advice that protects a taxpayer who relies on it from primary tax. In a limited number of cases, while the Commissioner is not legally bound by the advice that he provides, he has agreed that he will be administratively bound and gives taxpayers the same level of protection as if the law provided the protection. 'Guidance' provides a lower level of protection than advice.

However, PS LA 2008/3 specifically excludes matters involving the Commissioner's administration or application of the SISA and SISR.

The law does not legally bind the Commissioner in respect of the views he expresses about the operation of the SISA or SISR. It is not possible for the Commissioner to be administratively bound by the views that he gives as an administrator of the SISA or SISR in the same manner that he is, or has agreed to be, bound by tax advice or guidance that he gives. That is because there is no tax, penalty or interest that can be raised under the SISA or SISR and the response by the Commissioner to a breach of the SISA or SISR usually involves the exercise of a discretion, which must involve a consideration of the merits of the particular case.

Accordingly, the levels of protection that apply in respect of advice or guidance concerning, for example, a direct or indirect tax matter have no application in respect of any views that the Commissioner gives in respect of a SISA or SISR matter. The categories of 'advice' and 'guidance' discussed in PS LA 2008/3 in relation to tax matters are not relevant to assistance the Commissioner provides as regulator of SMSFs under the SISA and SISR.

Trustees of SMSFs can seek advice or guidance from the Commissioner in respect of the direct and indirect tax liabilities of the SMSF. Tax officers must refer to PS LA 2008/3 when giving advice or guidance to a trustee on a direct or indirect tax matter.

[1] Former SMSFs refer to superannuation funds that have ceased being SMSFs for the purposes of the SISA and the trustee of the fund is not an RSE licensee, see subsection 10(4) of the SISA. These funds are treated as SMSFs for the purposes of sections 6, 42 and 42A of the SISA.

SMSF advice

Written SMSF advice is provided on the Commissioner's opinion on the application of the SISA and SISR to SMSFs. There are two main types of SMSF advice:

- SMSF public rulings (SMSF rulings, SMSF determinations and SMSF product rulings), and
- SMSF specific advice.

The requirement for SMSF product rulings and SMSF specific advice is that SMSF trustees, or the principals or implementers of products, should make a full and true disclosure of all relevant facts in relation to the matters on which the SMSF advice is sought.

SMSF public rulings

An SMSF public ruling is a published statement that is intended to contain advice on the way the SISA or SISR applies in circumstances that are common to many SMSFs. While similar in form to a tax public ruling, an SMSF public ruling is not binding on the Commissioner.

SMSF rulings and determinations are aimed at providing the Commissioner's technical views on the way in which the SISA or SISR are to be interpreted. The primary audience for SMSF rulings and determinations are tax professionals, trustees or entities who have, or seek, a technical understanding of the underlying law.

SMSF product rulings are a form of public written guidance provided to the principals or implementers of investment or financial products offered to SMSFs. They deal with the prospective application of the SISA or SISR to SMSF trustees who invest in the product covered by the guidance. However, they do *not* deal with the commercial or financial viability or merits of any product.

SMSF specific advice

SMSF specific advice is provided in writing and applies to a specific transaction or arrangement that has been or might be entered into by the trustees of an SMSF. It is based on the facts of the specific transaction or arrangement defined in the trustees' application for SMSF specific advice. While similar in form to a tax private ruling, SMSF specific advice is not binding on the Commissioner and does not have the same review rights as a private ruling.

SMSF guidance

SMSF guidance is provided to help SMSF trustees understand their obligations and duties under the provisions of the SISA and SISR administered by the Commissioner. SMSF guidance provides general assistance and, especially for published products, is simply expressed, often provides step by step guidance but is unlikely to cover all possibilities. Generally, it does not address an SMSF's or other entity's[2] specific circumstances.

[2] An 'entity' is a defined term in subsection 10(1) of the SISA. Within this practice statement the term is used as relevant to the particular context.

Weight given to SMSF advice and SMSF guidance

SMSF advice and SMSF guidance is not binding on the Commissioner. A trustee or other entity that relies on SMSF advice or guidance will remain responsible for their actions under the SISA and SISR.

However, if the Commissioner later takes the view that the law applies less favourably to SMSFs than SMSF advice or guidance indicates, the fact that a trustee acted in accordance with the advice or guidance would be a relevant factor in their favour in the Commissioner's exercise of any discretion as to what action to take in response to a breach of the law. This is on the basis that:

- the advice or guidance is applicable to the SMSF's particular circumstances
- the trustee acts, reasonably and in good faith, in accordance with the advice or guidance, and
- in the case of SMSF product rulings, SMSF specific advice or SMSF oral guidance, a full and true disclosure has been made to the Commissioner when the advice or guidance is sought.

The weight to be given to the reliance placed on the SMSF advice or guidance would depend on all the circumstances applicable to the SMSF. Each case must be considered on its own merits. SMSF advice or guidance that is specific to the circumstances of the SMSF in question is likely to be, though is not necessarily, a more significant factor weighing in favour of the trustee than if the SMSF advice or guidance was general in nature. Likewise, reliance on SMSF advice is likely to be more significant than reliance on SMSF guidance.

SCOPE

1. This practice statement provides an explanation of the different forms of SMSF advice or SMSF guidance that the ATO provides about the application of the SISA and the SISR.
2. The practice statement also explains the weight given to the fact that a trustee of an SMSF has relied on SMSF advice or SMSF guidance in relation to a scheme.
3. The practice statement also identifies some sources of further information on developing and issuing different forms of SMSF advice or SMSF guidance.

BACKGROUND

4. Law Administration Practice Statement PS LA 2008/3 explains the forms of advice and guidance the ATO provides about the application of laws administered by the Commissioner. It also explains the level of protection available to taxpayers who rely on each form of advice or guidance from the payment of any tax shortfall, penalty or interest.
5. PS LA 2008/3 does not deal with matters involving the Commissioner's administration or application of provisions of the SISA or SISR.[3] Such matters relate to the compliance by an SMSF (and its trustee(s)) with its regulatory obligations, rather than the determination of a taxation liability.
6. Accordingly, the levels of protection that apply in respect of advice or guidance concerning a direct or indirect tax matter have no application in respect of any SMSF advice or SMSF guidance that is given by the ATO about the application of the SISA or SISR.

[3] Refer to paragraph 6 of PS LA 2008/3 for further information.

7. SMSF advice and SMSF guidance is issued by the Commissioner of Taxation in the role of regulator of SMSFs under the SISA. It is not covered by any legislative framework and is not legally or administratively binding on the Commissioner. The issue by the Commissioner of SMSF advice and guidance is consistent with the Commissioner having, under section 6 of the SISA, the general administration of the relevant parts of the SISA and SISR.

8. Accordingly, the levels of protection that apply in respect of advice or guidance concerning, for example, a direct or indirect tax matter have no application in respect of any views that the Commissioner gives in respect of a SISA or SISR matter. The distinction made in this practice statement between SMSF advice and SMSF guidance does not relate to a level of protection provided to trustees of SMSFs who rely on them. Rather, it relates to the kind of assistance that the Commissioner is seeking to provide. SMSF advice is aimed at providing the Commissioner's technical views on the way in which the SISA or SISR are to be interpreted, either in general or in relation to specific circumstances. SMSF guidance is aimed at providing more practical general assistance.

9. This practice statement explains the weight to be given to the fact that an SMSF trustee has relied on the SMSF advice or guidance in relation to a scheme when the Commissioner determines what compliance action, if any, will be taken if that SMSF trustee is later found to have contravened the SISA or the SISR as a result of that scheme.

10. SMSF advice and SMSF guidance also does not bind SMSF trustees. A trustee is entitled to apply the law to the circumstances of the SMSF.

11. This practice statement makes a number of references to PS LA 2008/3. When directed by such references, you should refer to PS LA 2008/3 for further information about the forms of advice and guidance under the laws covered by that practice statement.

EXCLUSIONS FROM THIS PRACTICE STATEMENT

12. This practice statement does not deal with the following matters:

- The application for, making of or declining to make a private ruling in accordance with Division 359 of Schedule 1 of the *Taxation Administration Act 1953* (TAA). See also paragraphs 75 to 128 of PS LA 2008/3.
- Public Rulings provided (or withdrawn) in accordance with Division 358 or section 105-60 of Schedule 1 of the TAA. See also paragraphs 25 to 74 of PS LA 2008/3.
- The application for, making of, or withdrawal of oral rulings in accordance with Division 360 of Schedule 1 of the TAA. See also paragraphs 161 to 191 of PS LA 2008/3.
- Administratively binding advice provided in accordance with paragraphs 205 to 216 of PS LA 2008/3.
- A private indirect tax ruling provided in accordance with paragraphs 129 to 160 of PS LA 2008/3.

- An actual exercise of a discretion under the SISA. However, this practice statement provides information on the appropriate form of assistance to be provided to respond to a trustee's query involving the exercise of a discretion.[4]
- Matters relating to the making of, and review of, a decision that is a 'reviewable decision' under subsection 10(1) of the SISA.
- Matters which fall within the ambit of the Australian Prudential Regulation Authority's regulatory role.
- ATO audit position papers. These generally represent a preliminary view of the relevant facts and law applying to a particular situation.
- Taxpayer Alerts.[5]

Any requests in relation to the above matters, or on any other matters not dealt with by this practice statement, are to be dealt with in accordance with current ATO business practices and procedures.

TERMS USED IN THIS PRACTICE STATEMENT

13. The following terms are used in this practice statement:

Term	Explanation
Entity	The term 'entity' is defined in subsection 10(1) of the SISA. Entity is defined to mean any of the following: (a) an individual (b) a body corporate (c) a partnership, or (d) a trust
Legal personal representative	The term 'legal personal representative' is defined in subsection 10(1) of the SISA as: • the executor of the will or administrator of the estate of a deceased person • the trustee of the estate of a person who is under a legal disability, or • a person who holds an enduring power of attorney granted by a person.
ORCLA	Online Resource Centre for Law Administration. It contains (or links to) policies and procedures governing the provision of various forms of advice and guidance. See Law Administration Practice Statement PS LA 2003/9 The Online Resource Centre for Law Administration.

[4] A Commissioner's discretion may be exercised under a power conferred by an administrative provision or a provision affecting liability or an anti-avoidance provision. The granting of a waiver of an individual's disqualified status is an example of discretion exercised under the SISA.
[5] Refer to Law Administration Practice Statement PS LA 2008/15 Taxpayer Alerts.

Term	Explanation
Scheme	The term 'Scheme' means: (a) any agreement, arrangement, understanding, promise or undertaking: • whether express or implied, or • whether or not enforceable, or intended to be enforceable, by legal proceedings, and (b) any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.[6]
SISA	*Superannuation Industry (Supervision) Act 1993*
SISR	Superannuation Industry (Supervision) Regulations 1994
SMSF	Self Managed Superannuation Fund
SMSFD	Self Managed Superannuation Funds Determination
SMSFPR	Self Managed Superannuation Funds Product Ruling
SMSFR	Self Managed Superannuation Funds Ruling
SMSFSA	Self Managed Superannuation Fund Specific Advice
ATO website	www.ato.gov.au

STATEMENT

14. There are many forms of assistance that the ATO provides, both orally and in writing, about the application of the SISA and SISR to SMSFs. In accordance with Taxpayers' Charter principles the ATO aims to provide complete, accurate and consistent advice and guidance to make taxpayers aware of their rights and entitlements and to help them understand and meet their obligations.

15. This practice statement explains each form of SMSF advice and SMSF guidance provided by the ATO (subject to the exclusions set out in paragraph 12 of this practice statement) and the weight given to the fact that an SMSF trustee has relied on SMSF advice or SMSF guidance in relation to a scheme.

16. The views expressed in SMSF advice and SMSF guidance represent the views of the Commissioner of Taxation. They cannot be considered to bind in any way, the Australian Prudential Regulation Authority or the Australian Securities and Investment Commission. However, the other regulators' views on the interpretation of the SISA and SISR will be taken into account in the preparation of SMSF public rulings as necessary given these bodies also have powers of general administration[7] in relation to the SISA.'

[6] Subsections 66(5) and 85(4) of the SISA.
[7] Regulators' have powers of general administration under section 6 of the SISA.

PART A – SMSF ADVICE

17. SMSF advice is the Commissioner's opinion on the application of the SISA and SISR to SMSFs. The SMSF advice is provided in the form of:

    - SMSF Public Rulings:
        - Self Managed Superannuation Funds Rulings
        - Self Managed Superannuation Funds Determinations, and
        - Self Managed Superannuation Funds Product Rulings (SMSFPRs),
    - Self Managed Superannuation Fund Specific Advice (SMSFSA).

18. The weight given to the fact that an SMSF trustee has relied on an SMSF advice is outlined in paragraphs 111 to 126 of this practice statement.

19. The basic administrative policy of the ATO is to only depart from what is said in SMSF advice if there are good and substantial reasons to consider the advice to be incorrect or inappropriate. SMSF advice may be considered incorrect or inappropriate in one of the following circumstances:

    - there have been legislative changes since the advice was made that affects the basis for the advice
    - a tribunal or court decision has affected the interpretation of the law on which the advice is founded since the advice was given
    - commercial practice which provided the context for the advice has changed
    - the advice has been exploited in an abusive or unintended way such that it is no longer an accurate reflection of the ATO's position in relation to the scheme, or
    - the advice is no longer considered to be correct, because it is found on reconsideration to be based on or to express a view of the law that is wrong.

SMSF public rulings

20. An SMSF public ruling is a published statement of the Commissioner's opinion of how a provision of the SISA and SISR applies, or would apply, to SMSFs in relation to a class of schemes or to a class of SMSFs generally, rather than in respect of the specific circumstances of a particular SMSF. SMSF public rulings provide advice for tax officers, trustees of SMSFs and their advisors on the interpretation of the provisions of the SISA and SISR that affect their compliance with those laws. Tax officers should refer to the intranet version of the *Public Rulings Manual* for current procedures on producing an SMSF public ruling.

21. While similar in form to a tax public ruling, an SMSF public ruling is not a public ruling for the purposes of Division 358 of Schedule 1 to the TAA. SMSF public rulings are not, therefore, binding on the Commissioner.

Issue and withdrawal of SMSF public rulings

22. Unlike public rulings on direct or indirect taxes, there are no legislative provisions dealing with the making or withdrawal of SMSF public rulings. However, as is the case for public rulings on direct and indirect taxes, notice of the making of an SMSF public ruling is published in the *Commonwealth of Australia Gazette*. SMSF public rulings are accessible internally via ATOlaw or externally through the 'Legal database' on the ATO website.

23. The Commissioner may withdraw either the whole or part of an SMSF public ruling. Where an SMSF public ruling is withdrawn, a notice of the withdrawal will also be published in the *Commonwealth of Australia Gazette*.

24. To the extent that a ruling is withdrawn, it does not apply to arrangements entered into after the date of withdrawal. The extent to which a withdrawn ruling continues to apply to arrangements so far as they have commenced to be carried out before the withdrawal would depend on the circumstances in which the ruling is withdrawn. The notice of withdrawal will outline the extent to which the ruling may continue to apply. There may be circumstances where the Commissioner considers that, given the severity of the impact to retirement savings, it is necessary for transactions entered into as a result of relying on an SMSF public ruling to be unwound.

SMSF Rulings and SMSF Determinations

25. In the interests of sound administration, the Commissioner has provided advice, in the form of SMSF public rulings about the application of SISA and SISR which do not form part of a binding rulings framework.

26. SMSFRs generally deal with a subject that involves a consideration of several issues or the answering of several questions. On the other hand, SMSFDs generally deal with discrete issues that can usually be dealt with by answering a single question.

27. Topics on which the ATO is preparing SMSFRs and SMSFDs are listed on the 'Public Rulings Program,' which is publicly available on the ATO website, including to trustees of SMSFs. The relevance and performance of the Public Rulings Program is monitored by the National Tax Liaison Group, which consists of representatives of the major tax, law and accounting professional associations and senior staff of the ATO. Topics on the program arise from or reflect suggestions made either internally through ATO escalation processes, or from external sources such as professional and industry representative bodies. These topics are subject to risk assessment and prioritisation according to 'Priority Technical Issues' procedures.[8]

28. The ATO's Superannuation Rulings Panel was established to consider and advise on the proposed interpretation of the law in SMSF public rulings.[9] It is comprised of senior tax officers as well as external representatives who are respected practitioners and/or academics. The primary role of the Panel is to discuss the technical and practical merits of the draft ruling presented to them by the authoring team and to advise on the proposed interpretation of the law. The Panel is advisory and is not a decision making body. The Superannuation Rulings Panel is one of a number of measures to ensure the highest quality of public rulings.

[8] See Law Administration Practice Statement PS LA 2003/10 Management of Priority Technical Issues and the Public Rulings Manual.

[9] The Superannuation Rulings Panel would not ordinarily consider SMSFPRs.

29. SMSF public rulings usually apply both before and after their date of issue, but may apply from the date of issue, or from an earlier or later time, as specified in the ruling.

30. Usually, SMSFRs and SMSFDs will be first issued publicly as a draft to allow for consultation.

31. A draft SMSFR or SMSFD will represent the preliminary, though considered, view of the Commissioner. The weight given to the fact that an SMSF trustee has followed a draft prior to finalisation is the same as that given to all SMSF advice and guidance. Once the final is released an SMSF trustee should follow the final SMSFR or SMSFD.

SMSF product rulings (SMSFPR)

32. An SMSFPR[10] is SMSF advice on the application of the SISA and SISR to schemes in which the trustees of a number of SMSFs enter into substantially the same transactions with a common entity or group of entities.

33. SMSFPRs enable trustees of SMSFs to obtain the Commissioner's public views on the SISA and SISR treatment claimed to be applicable to participants in investment or financial schemes (or 'products').[11] The product may be offered to the general public but an SMSFPR will only be provided where it is intended for the product to be offered to SMSFs as potential investors or intended investors. An SMSFPR sets out the Commissioner's opinion as to the way in which the relevant provisions of the SISA and SISR would apply to SMSFs in relation to the product.

34. It is expected that the SMSFPR would usually be sought for those products for which product rulings (which deal with tax issues) are also sought.[12] Where a tax product ruling is sought and there is also a request for an SMSFPR in respect of that product, then a separate SMSFPR would issue where possible in conjunction with the tax product ruling. While similar in form to a tax product ruling, an SMSFPR is not a public ruling for the purposes of Division 358 of Schedule 1 to the TAA. An SMSFPR is not, therefore, binding on the Commissioner.

35. An SMSFPR does not provide any assurance about the commercial or financial viability or merits of the product. Prospective participants in a scheme may wish to seek an independent opinion as to the commercial and financial viability and merits of the product.

36. An SMSFPR has no application to superannuation funds other than SMSFs that are regulated by the Commissioner.

[10] The process for issuing non-binding SMSFPRs largely follows that for the product ruling system. For more information see Chapter 17 of the Public Rulings Manual.
[11] See paragraph 7 of Self Managed Superannuation Funds Product Ruling SMSFPR 2009/1 The self managed superannuation fund product rulings system for a discussion of the term 'product'.
[12] For further information refer to Product Ruling PR 2007/71 The Product Rulings system.

Applying for, and issuing of, SMSFPRs

37. A written application is required for an SMSFPR. The information that should be provided as part of an application is detailed in a checklist, which can be downloaded from the ATO website. Providing the information required by the checklist will assist in expediting the issue of the SMSFPR. Where an incomplete application is submitted the applicant will be contacted, advised that their application is insufficient and that the ATO cannot begin work on it until the missing information has been provided.[13] The requirement for SMSFPRs is that the principals or implementers of schemes should make a full and true disclosure of all relevant facts in relation to the matters on which the SMSFPR is sought.

38. The Commissioner may refuse to issue an SMSFPR in some circumstances.[14]

39. A draft SMSFPR is sent to the applicant to obtain certain agreements and statements. These include an agreement that the applicant will abide by the 'Agreement on Terms of Use' of the SMSFPR and statements that the description of the scheme is accurate, covers all relevant features and that all parties named in the SMSFPR consent to being so named. A breach of the agreement or the making of any false statement will mean that the SMSFPR based on the agreement or statement will not be applicable to the scheme and will be considered to be of no effect.

40. At the time it is issued to the applicant, a draft SMSFPR is no more than a document prepared for the purposes of discussion and does not represent a commitment by the Commissioner that an SMSFPR will issue either at all or in the same terms as the draft. The provision of the draft SMSFPR allows the applicant an opportunity to suggest changes for consideration by the Commissioner.

How the scheme dealt with in an SMSFPR is carried out

41. If the scheme described in the SMSFPR differs from the scheme that is actually carried out, the SMSFPR has no effect. This is because it does not apply to the scheme actually carried out, but to a different scheme. In those circumstances, the Commissioner will consider the nature of the variation found and the SMSFPR may be modified to reflect a difference in the implementation of the scheme. This may occur by way of an 'Addendum' to the SMSFPR, or by a replacement SMSFPR.

42. The relevant SMSFPR will be withdrawn if the Commissioner finds that there is a material difference in the implementation of the scheme from the scheme described in the SMSFPR. There will be a material difference in circumstances where the scheme has not been implemented as described in the SMSFPR, and the difference in implementation results in a change in SISA or SISR outcome for the participants.

43. Prospective participants in a defined scheme may wish to seek assurances from the principal or implementer of the scheme that it will be carried out in the manner described in the SMSFPR relating to the scheme.

44. Further information about SMSFPRs is contained in SMSFPR 2009/1.

[13] For more information about lodging an application for an SMSFPR see paragraphs 55 to 70 of SMSFPR 2009/1.
[14] For more information about refusal to issue an SMSFPR see paragraphs 80 to 82 of SMSFPR 2009/1.

SMSF specific advice (SMSFSA)

45. SMSFSA is a written expression of the Commissioner's opinion on how a SISA or SISR provision applies to a specific transaction or arrangement that has been or might be entered into by the trustees of an SMSF. It is provided to the trustees of an SMSF, their advisor, their legal personal representative, or an auditor of an SMSF acting under a duly-sighted letter of authority. SMSFSA only pertains to the specific SMSF and transaction or arrangement in question.

46. While similar in form to a tax private ruling, an SMSFSA is not a private ruling for the purposes of Division 359 of Schedule 1 to the TAA. An SMSFSA is not, therefore, binding on the Commissioner and does not have the same review rights as a private ruling.[15]

47. The requirement for a SMSFSA is that the SMSF trustees and their advisors, representatives or authorised auditors involved in seeking the advice should make a full and true disclosure of all relevant facts in relation to the matters on which specific advice is sought. If relevant facts are not fully and truly disclosed the advice is not applicable to the specific transaction.

48. An SMSFSA will not be provided on an SMSF's complying status or where the exercise of a discretionary power is required.[16] However, the trustee should be assisted to obtain information or guidance suited to their needs.

49. Tax officers must refer to ORCLA and relevant procedures for assistance in preparing an SMSFSA, including approval for issue by authorising officers.

Applying for SMSFSA

50. A written application for an SMSFSA must be submitted and contain such information as required by the application form. A standard application form is available from the ATO website.

51. However, it is not mandatory to use the standard application form. A request for an SMSFSA will be considered provided it is made in writing and contains all the necessary information, including copies of all relevant documents, the check listed items and declaration referred to in the standard application form. The trustees and their advisors are also encouraged to provide a summary of research and analysis of the technical issues involved so that their views on the issue can be considered in providing the SMSFSA.

52. If the type of technical assistance requested is not clear, the tax officer should contact the trustees or their advisor to ascertain the type of assistance required. If their needs can only be satisfied by an SMSFSA, they should be invited to supply the necessary information and be given assistance in submitting an application.

53. If another form of assistance could satisfy their needs, for instance, SMSF guidance such as a ATO publication, the tax officer must explain the alternatives available. The tax officer must then invite the trustees or their advisor to choose the form of assistance preferred, provided the form of assistance is appropriate for the request. For example, SMSF guidance is generally inappropriate in relation to complex SISA or SISR arrangements or transactions.

54. A tax agent that is registered as a user of either the Tax Agent Portal or the Business Portal may lodge the SMSFSA application via the relevant portal. The portals are secure online environments for communicating with the ATO.

[15] However see paragraphs 69 and 70 of this practice statement.
[16] See paragraph 12 of this practice statement.

Requirements for SMSFSA

55. The following are requirements that tax officers will follow in considering an application for SMSFSA.

56. The trustees or their advisor must describe the facts on which the request is based, including where relevant, the income year or the accounting period that the advice will relate to. The SMSFSA is made on the basis of:

- information (including documents identifying that information) provided in the application and by the trustee or their advisor after the application (such as in response to any request by the ATO for further information), and
- any assumptions made by the Commissioner on which the correctness of the SMSFSA might depend.

57. Importantly, if a trustee or their advisor provides further information indicating that the facts on which the request is based are materially different from that described in the original application, this is to be treated as a new application for an SMSFSA. However, the request will be actioned so that the work proceeds without any discontinuity.

58. Tax officers must attempt to identify all the facts necessary to arrive at a decision. If providing an SMSFSA would depend on a fact that may not occur, for instance about a future event, the Commissioner may either decline to provide the SMSFSA or provide the advice on the basis of an assumption. If the trustee could reasonably be expected to have knowledge of the relevant fact, then an assumption should not be made.

59. Generally, if a trustee does not provide enough information for an SMSFSA to be provided, tax officers must attempt to provide written SMSF guidance (for example quote some or all of an SMSF public ruling and allow the trustee to consider how to apply the law as stated to their circumstances).

Declining to provide SMSFSA

60. A request for an SMSFSA may be declined if:

- the SMSF has not yet been established
- the trustee already has an SMSFSA on the issue and the particular request is considered unnecessary
- the SMSF is, at the time of the request, the subject of a ATO audit relating to the particular question being raised (although the trustee may seek clarification from the tax officer conducting the audit)
- it relates to a 'reviewable decision' under subsection 10(1) of the SISA[17]
- the question to be determined is in relation to the trustee covenants as set out in subsection 52(2) of the SISA.

61. A request for an SMSFSA may also be declined where a trustee does not provide the additional information requested by the Commissioner within a reasonable time.

[17] Examples of reviewable decisions include a decision by the Commissioner not to issue a determination that an asset is an in-house asset or the decision of the Commissioner to not waive a trustee's disqualified status.

Providing SMSFSA

62. SMSFSA is to be given in writing to the trustees of an SMSF.

63. Tax officers should not provide pre-SMSFSA opinions, draft SMSFSA or any other written expressions or written endorsements of informal assistance that may mislead trustees if that preliminary view is subsequently changed or that might restrict development and application of the actual SMSFSA. File notes of telephone conversations or minutes of interviews may be provided to the trustees if they do not contain advice, or if the risk of misleading trustees is properly managed. This does not mean that tax officers cannot undertake discussions with the trustees or their advisors to establish the particulars of the scheme and its purpose. Nor does this mean that a tax officer is precluded from general discussions with a trustee in relation to an issue. These processes are encouraged. The tax officer must ensure that the trustee is not misled and must clearly explain that any comments made will not be binding on the Commissioner.

64. An SMSFSA on an interpretative issue is provided if there is a precedential ATO view of the relevant law or if the issue involves a straightforward application of the law.[18] Where there is no precedential ATO view and the issue is not a straightforward application of the law, the general rule[19] is that the interpretative issue must be referred by the Superannuation Business Line to a Centre of Expertise to establish a precedential ATO view on the issue.[20] An SMSFSA is only made after the precedential ATO view has been established.

65. An SMSFSA:

- states that it is an SMSFSA
- identifies the SMSF to which it applies
- specifies the scheme and the relevant provision to which the SMSFSA relates, and
- details any assumptions made.

66. An SMSFSA applies from the time when it is made.

Timeframes – ATO service standards

67. In accordance with the ATO service standards, the ATO aims to provide a response to an application for an SMSFSA within 28 days of receiving all the necessary information. If all the necessary information has not been supplied in the application, the ATO aims to contact the applicant within 14 days of receiving the application to ask for the information. If the application raises a complex matter that will take more than 28 days to resolve after receiving all the required information, the ATO aims to contact the applicant within 14 days of receiving all necessary information to negotiate an extended reply date.

[18] See paragraph 13 of Law Administration Practice Statement PS LA 2003/3 Precedential ATO view, which describes circumstances where tax officers are not required to identify and apply a precedential ATO view. These situations include the exercise of a discretion, making an ultimate conclusion of fact, or determining the value of something.

[19] Note that there are some exceptions to this general rule. See paragraph 13 of Law Administration Practice Statement PS LA 2004/4 Referral of interpretative issues to Centres of Expertise for the creation of the precedential ATO view, and early engagement of internal technical specialists in active compliance cases.

[20] See PS LA 2004/4 and PS LA 2003/3.

Withdrawal of SMSFSA application

68. A trustee of an SMSF or their advisor may withdraw their SMSFSA application, either orally or in writing, at any time before the advice is made and the Commissioner will provide written confirmation of the withdrawal.

Review of SMSFSA

69. There are no formal review rights under the SISA or SISR if a trustee of an SMSF is dissatisfied with their SMSFSA. However, they may ask the Commissioner for a 'second look'[21] at a decision he has made. This 'second look' is a review process undertaken as good administrative practice under the Taxpayers' Charter. The ATO is committed to reviewing its decisions to ensure that all SMSF trustees are treated fairly and to improve the quality and consistency of its decisions.

70. The ATO's decision not to issue an SMSFSA is not reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). The reason is that an SMSFSA is not made under an enactment. The Commissioner provides this advice because he has the general administration of the SISA and SISR in relation to SMSFs (see section 6 of the SISA). However a trustee of an SMSF may ask the Commissioner for a 'second look' at the decision not to issue SMSFSA.

Providing indicative advice before issuing SMSFPR or SMSFSA

71. In the course of preparing an SMSFPR or SMSFSA, tax officers may be asked to provide an indication of the likely ATO view of the law in relation to a scheme, transaction or arrangement. Subject to paragraph 74, tax officers are not to provide indicative advice. This is to ensure that no advice is provided unless the actual details of the proposed scheme, transaction or arrangement and its purpose have been firmly established, and the ATO has finalised its view on how a SISA or SISR provision applies, so as not to mislead entities. However, tax officers can undertake informal discussions with entities raising, for example, areas of possible concern.[22]

72. Providing indicative advice before, say, the actual details of the proposed scheme, transaction or arrangement and its purpose have been firmly established may create expectations that the ATO will adopt a particular view in relation to a particular scheme that may not subsequently be met. This has the potential to undermine confidence in the ATO's administration of the superannuation system.

73. A draft SMSFPR is not indicative advice but is provided to the principal or implementer of a scheme as part of finalising the ATO view.

[21] Tax officers should refer to Corporate Management Practice Statement PS CM 2007/01 Respecting clients' right of review for further information.

[22] The discussion about indicative advice in this section applies generally to SMSFSA and SMSFPR. However, there are special procedures in Part 17 of the Public Rulings Manual which must be followed when issuing draft SMSFPR to an entity.

74. Nevertheless, there may be occasions (where the ATO has established the details of the proposed scheme, transaction or arrangement, but has not finalised the position on the SISA or SISR consequences) that call for the provision of indicative advice. For example, the provision of favourable indicative advice could occur where all the following conditions are met.

- There is:
  - a substantial and time dependent business need
  - a very low risk of a different view being taken
  - appropriate documentation and transparency, and
  - involvement of appropriate tax officers, including relevant technical specialists.
- The entity is fully aware and acknowledges that:
  - the matter is still under consideration and therefore the view is preliminary only, and
  - the view should not be relied on as representing the ATO view of the law on the matter.

There must be no undue delay by the tax officer in providing the final advice, and the entity must be kept informed of the progress of the matter at appropriate intervals.

75. Where the indicative advice is provided to an applicant for an SMSFPR, and that advice may be conveyed to third parties, the tax officer must request the applicant to ensure that the conditions on which the ATO's view is provided are also explained to the third parties.

76. SMSF indicative advice will not carry the weight that may otherwise be applicable to entities who rely on SMSF advice or guidance.[23]

77. Consistent with corporate record keeping requirements, accurate and complete notes must be made of all discussions prior to, and in the course of dealing with, an application for an SMSFSA or SMSFPR. Where SMSF indicative advice is provided in connection with a request for written advice, a record of the SMSF indicative advice must be attached to the case record on the relevant case management system.

Informal discussions

78. Tax officers can have informal discussions with trustees of an SMSF and/or their advisors on technical matters. Tax officers are encouraged to do so, especially where there is an opportunity to clarify matters or to understand better the entity's position.

79. Informal discussions can be undertaken with an entity about a particular scheme, either before or following the receipt of a written request for guidance. Indeed, such discussions may reveal the need for a written request for advice, and shed light on the information and material that should be provided with the request, or is needed to answer an existing request.

[23] See paragraphs 111 to 120 of this practice statement.

80. If the ATO receives a request for an SMSFSA or SMSFPR involving complex matters, general discussions about ambiguity in the law or its application are often a necessary part of ensuring that all relevant material is provided and considered, to enable the facts to be correctly established. Such discussions may also highlight to the trustee (or principal or implementer of a scheme) those areas where the ATO has concerns.

81. Where a tax officer and any relevant technical specialist, believes that those concerns may lead to an unfavourable response from the ATO, it may be appropriate to inform the trustees (or principal or implementer of a scheme) accordingly. In these circumstances, the tax officer and, if appropriate, the relevant technical specialist, are to explain the basis of the concerns to the trustees (or principals or implementers of a scheme). It must be made clear to them at the time of this discussion that:

- these concerns are being communicated so that they can take the possibility of a final unfavourable view into account in deciding whether to continue to expend time and money preparing to implement the proposed scheme, and
- communicating concerns in this informal way does not constitute an indication of the ATO's view of the law in relation to the scheme.

82. In undertaking these discussions, the tax officer must ensure that the trustees (or principals or implementers of a scheme) are not misled, and must clearly explain that any comments made will not be binding on the Commissioner. Relevant documentation is to be prepared and, where appropriate, captured on the relevant case management system.

83. Should the SMSF trustees, or principal or implementer of a scheme, submit material changes to the scheme upon which the SMSFSA or SMSFPR is sought following the discussions, the revised scheme should be treated as a new application. However, the request will be actioned so that the work proceeds without any discontinuity.

PART B – SMSF GUIDANCE

84. Assistance provided in a form other than SMSF advice may fulfil a trustee's need for information without them having to satisfy the conditions that apply to the making of SMSF advice. SMSF guidance may be given in writing or orally, including by way of a ATO publication (including ATO website material).

85. ATO SMSF guidance is provided to help trustees of SMSFs understand their obligations and entitlements under the SISA and the SISR administered by the Commissioner. SMSF guidance is not binding on the Commissioner.

86. If a trustee (or principal or implementer of a scheme) wants the Commissioner to provide specific advice or a product ruling about the applicability of the SISA or SISR to their individual circumstances, they should apply for an SMSFSA (or SMSFPR).

87. It may sometimes be difficult to draw a distinction between requests for SMSF guidance and SMSFSA or an SMSFPR. It may be unclear whether a trustee of an SMSF has a specific transaction in mind and is expecting SMSFSA or whether they are just broadly considering a course of action and are only expecting general guidance. For example, a trustee of an SMSF might simply ask if a residential property can be acquired from a member and provides no other information about their specific circumstances.

88. If there is any doubt whether the request is for SMSF guidance, or SMSFSA or an SMSFPR, the entity should be contacted and their needs ascertained. If their needs can only be satisfied by SMSFSA or an SMSFPR, they must be invited to supply the necessary information and be given information about how to make an appropriate application.

Written guidance

89. Written guidance is issued to help trustees of SMSFs understand their obligations under the SISA and SISR administered by the Commissioner. It provides only general assistance and cannot cover all possibilities or individual circumstances. Written guidance may also be in the form of a ATO publication (including ATO website content).

90. Written guidance is usually provided if the trustee of an SMSF has enquired about the broad operation of the law and has not provided details of their specific circumstances. A trustee of an SMSF who receives written guidance must decide how the guidance applies to their circumstances. Tax officers should refer to ORCLA for further information about providing written guidance.

91. The discussion below sets out the different forms of written guidance published by the ATO. The weight given to the fact that a trustee of an SMSF or other entity has relied on any of these forms of written guidance, as they relate to SISA or SISR issues, is outlined in paragraph 111 to 126 of this practice statement.

SMSF publications

92. An entity should not use SMSF publications or ATO website material that is out of date. That is because, generally, reliance on an earlier document at a time where a later publication that correctly reflects the law is available would not be considered to be reasonable and would be a factor that the Commissioner would take into account in determining any action to take in response to a breach. All current SMSF publications are contained on the ATO website.

Published speeches, minutes of consultative forums, media releases and decision impact statements

93. Speeches by senior tax officers and minutes of consultative forums reflect our current thinking on particular issues. Minutes are a record of proceedings at a consultative forum and reflect the discussion between the ATO and the other attendees. They are published for transparency reasons.

94. Media releases are used to communicate what our intention is in relation to certain issues. As such media releases may contain statements intended to be relied on.

95. Decision impact statements[24] are published in the 'Legal database' on the ATO website to communicate to the community the ATO reaction to adverse and other significant court or tribunal decisions. They include a summary of the case details, a summary of the facts and issues decided, and they note any consequences in relation to public rulings. They set out how the law will be administered as a consequence of the decision, pending any change to existing ATO rulings, but are not normally expected to contain advice.

96. An entity that needs guidance about the applicability to their own specific circumstances of information contained in published speeches, minutes, media releases or decision impact statements should apply for an SMSFSA or SMSFPR.

Published materials produced for internal ATO purposes

ATO Interpretative Decisions (ATO IDs)

97. An ATO ID is an edited and summarised decision on an interpretative matter that is indicative of how a provision of the law might be applied in a particular instance. ATO IDs do not provide advice to trustees of SMSFs. ATO IDs represent a source of the precedential ATO view that tax officers must apply in resolving interpretative issues. Alternatively, if a tax officer considers the application of the precedential view will result in an incorrect decision or unintended outcome, they must escalate the matter for review.[25]

98. An ATO ID provides the ATO view for an SMSFSA or SMSFPR to be given to an entity in relation to the interpretative matter it covers, and for dispute resolution and compliance activity by tax officers. However, ATO IDs do not in themselves represent any established general administrative practice of the Commissioner. Further information about ATO IDs is contained in Law Administration Practice Statement PS LA 2001/8 ATO Interpretative Decisions.

99. ATO IDs are produced for the purpose of facilitating consistent and timely interpretative decision making by tax officers. However, they may not always contain a complete statement of all the facts in summarising the application of the law to complex circumstances. For transparency reasons, they are made publicly available through the 'Legal database' on the ATO website.

100. ATO IDs state the date of the decision and are withdrawn if a review finds that they are no longer accurate.

101. If a trustee of an SMSF relies on a current ATO ID where their own circumstances are not materially different from those described in the ATO ID, but the ATO ID is later found to be incorrect, or misleading and the trustee makes a mistake as a result, the weight given to this fact is outlined in paragraph 111 to 126 of this practice statement.

[24] For further information on decision impact statements refer to Law Administration Practice Statement PS LA 2009/9 Conduct of Tax Office litigation.
[25] See PS LA 2003/3.

Law Administration Practice Statements

102. Law administration practice statements[26] are produced principally to provide direction and assistance to tax officers on approaches to be taken in performing duties involving the application of laws administered by the Commissioner. They are published primarily for transparency and accountability reasons. They are not intended to provide interpretative advice but may provide guidance on the law in the course of providing directions to tax officers.

Technical skilling materials

103. The ATO produces educational material for the purpose of enhancing the knowledge and skills of tax officers engaged in technical decision making. Some of this material is published to assist tax practitioners who have corresponding educational needs.

Oral guidance

104. Tax officers may provide oral guidance about the application of SISA or SISR to a trustee of an SMSF.

105. Oral guidance is to be provided only on matters of a general, straightforward or simple nature and applies only to such matters.

106. Where an SMSF trustee seeks assistance on a matter that is not of a straightforward or simple nature, the tax officer should suggest that the trustee apply for SMSFSA or written guidance and, as appropriate, provide information about making a valid application. This ensures that the trustee receives a properly considered opinion on the application of the law to the SMSF's circumstances.

107. Oral guidance must be consistent with the precedential ATO view in relation to any interpretative issue raised by the trustee of an SMSF or other entity.[27]

108. Reference may also be made to the following ATO documents that either reflect precedential ATO views or contain a clear, unambiguous interpretation of the relevant legislation:

- online reference materials (for example, client contact scripts)
- current ATO publications (not otherwise included in the *Schedule of documents containing precedential ATO view*s), and
- ATO website material (other than that produced by external publishers).

109. The weight given to the fact that a trustee of an SMSF has relied on oral guidance that is incorrect or misleading and makes a mistake as a result, is outlined in paragraph 111 to 126 of this practice statement. The oral guidance will only carry weight where the trustee of the SMSF has made a full and true disclosure of the material facts relevant to their enquiry.

110. For procedures for providing oral guidance refer to paragraphs 262 to 270 of PS LA 2008/3.

[26] For further information see Law Administration Practice Statement PS LA 1998/1 Law Administration Practice Statements.

[27] 'Precedential ATO view' is defined in PS LA 2003/3. This practice statement also identifies the Tax Office documents that contain those views.

PART C – WEIGHT GIVEN TO SMSF ADVICE AND GUIDANCE

111. SMSF advice and SMSF guidance is not legally or administratively binding on the Commissioner. An entity that relies on SMSF advice or guidance will remain responsible for their actions under the SISA or SISR.

112. However, if the Commissioner later takes the view that the law applies less favourably to SMSFs than the SMSF advice or guidance indicates, the fact that the trustee acted in accordance with that advice or guidance would be a relevant factor in their favour in the Commissioner's exercise of any discretion as to what, if any, action is to be taken in response to a breach of that law.

113. This is on the basis that:

- the advice or guidance is applicable to the SMSF's particular circumstances
- the trustee acts, reasonably and in good faith, in accordance with the advice or guidance, and
- in the case of an SMSFPR, SMSFSA or SMSF oral guidance, a full and true disclosure has been made to the Commissioner when the advice or guidance is sought.

114. The weight to be given to the reliance placed on the SMSF advice or guidance would depend on all the circumstances applicable to the SMSF. Each case must be considered on its own merits. SMSF advice or guidance that is specific to the circumstances of the SMSF in question (for example, if it is SMSF specific advice or an SMSFPR) is likely to be, though is not necessarily, a more significant factor weighing in favour of the trustee than if the SMSF advice or guidance was general in nature. Likewise, reliance on SMSF advice is likely to be more significant than reliance on SMSF guidance, given the general nature of SMSF guidance and that SMSF advice is either based around a specific set of facts or a defined topic, such as business real property.

115. When the time comes to determine action to be taken in relation to non-compliance of a trustee of an SMSF with the SISA or SISR, the law at that time must be applied to the facts as established at that time.[28] Any action the Commissioner may take, and the timing of such action, resulting from the ATO's departure from SMSF advice or guidance will depend on the circumstances, and may be announced in subsequent SMSF advice or guidance. In the case of legislative change, the timing of a departure from previous advice or guidance will depend on the date of effect of the legislation, and would normally apply to transactions entered into after the date of effect, unless particular circumstances warranted another approach.

116. The Commissioner may, having regard to all the circumstances, decide that it is appropriate, in response to a breach:

- to take no action
- for the trustee to take rectification action (for example, where the SMSF trustee has appropriately relied upon SMSF advice or guidance, and that advice or guidance is later found to be incorrect, the Commissioner may seek an informal agreement or enforceable undertaking involving actions to rectify the breach, including possibly unwinding or reversing of transactions), or

[28] *Federal Commissioner of Taxation v. Wade* (1951) 84 CLR 105 at 117.

- to take other compliance action[29] (for example, making the fund non-complying).

117. The following examples illustrate the weight to be given to the use of SMSF advice or guidance by SMSF trustees.

Examples

Example 1

118. The trustees of an SMSF sought SMSF specific advice (SMSFSA) from the Commissioner on their plan to purchase listed securities from the members of the fund at market value for $6,000.The SMSFSA was sought on whether this proposed transaction would breach the prohibition on acquisitions from related parties in subsection 66(1) of the SISA. The Commissioner issued SMSFSA based on the above facts that stated that the proposed transaction met the requirements of an exception to the prohibition and therefore did not breach subsection 66(1) of the SISA. The trustees of the SMSF relied upon this SMSF advice and proceeded with the transaction. However a later review determined that the listed securities were acquired for $10,000 which was in excess of their market value. Thus as the listed securities were not acquired at market value, their acquisition did not meet the exception to the prohibition and a breach of subsection 66(1) of the SISA had occurred. The transaction that was carried out was materially different to the transaction that the SMSFSA was based upon, that is the listed securities were not acquired at market value. In these circumstances the SMSFSA is not a factor that counts in favour in the Commissioner's exercise of any discretion as to what, if any, action is to be taken in response to a breach of that law.

Example 2

119. In determining whether a particular arrangement contravened a provision of the SISA, the trustees of an SMSF relied upon a final Self Managed Superannuation Fund Ruling. As their facts were materially the same as one of the examples in the Ruling, the trustees relied upon this SMSF advice in proceeding with the arrangement. However due to the findings of a post-implementation review the ATO withdrew the SMSFR. The ATO reconsidered and redrafted certain aspects of the SMSFR and reissued the SMSFR. Consequently the trustees discovered that the views in the reissued SMSFR indicated that the arrangement resulted in a breach of the SISA. However, the fact that the trustees of the SMSF relied upon an SMSFR in entering into the arrangement, and that the facts relating to the arrangement were not different from those stated in the SMSFR, is a relevant factor operating in the trustees' favour in relation to how the Commissioner would deal with the breach. The SMSF has a good record of compliance with the SISA and SISR and there are no other circumstances indicating a breach of the law. Having regard to all those circumstances, the Commissioner decides not to make the SMSF non-complying or disqualify the trustees based on this specific breach. The Commissioner may, however, request the trustees to rectify the breach where this is possible.

[29] See Law Administration Practice Statement PS LA 2006/19 Self managed superannuation funds – notice of non-compliance, which outlines the factors the Commissioner will consider in deciding whether a notice of non-compliance should be given to a fund, and Law Administration Practice Statement PS LA 2006/17 Self managed superannuation funds – disqualification of individuals, which outlines the circumstances in which the Commissioner will consider disqualifying an individual under section 126A of the SISA.

Example 3

120. An SMSF plans to invest a large amount of money in a complex set of transactions in entities in which the members have also invested. The trustees of the SMSF rely upon SMSF guidance available on the ATO website and determine that the entities would not be related parties and the SMSF would therefore not breach the in-house asset rules by making these investments. It was open to the trustees to seek SMSF specific advice in relation to the proposed transactions. No other professional advice was sought by the trustees on the application of the SISA and SISR in relation to the proposed transactions. Upon a later review by the ATO it was found that the entities in which the SMSF had invested were controlled by the members and thus the in-house asset rules were breached by investing above the allowed limit in the related parties. As such, the Commissioner when exercising his discretion as to whether compliance action is required will take into account all factors including the fact that the trustees relied upon SMSF guidance. It was not reasonable for the SMSF trustees to rely on the guidance in the circumstances, because the complexity of the transactions undertaken by the trustees of the SMSF was not contemplated by the guidance. The trustees had responsibility for their actions and as such the Commissioner would have an expectation that the trustees rectify the breach by reducing its in-house assets in a timely manner. The Commissioner may also consider whether further action, such as making the fund non-complying or disqualifying the trustees is necessary, having regard to all the circumstances of the fund.

Example 4

121. An SMSF relied upon an SMSFPR to invest in a financial product issued by XYZ Pty Ltd pursuant to which a personal property asset is purchased by instalments. The SMSFPR stated that an investment in this product by way of an instalment purchase agreement was not a borrowing and thus not a contravention of subsection 67(1) of the SISA. A later review by the ATO identified that the purchase of the asset was not in accordance with the investment strategy of the SMSF and that the asset was leased to a partnership comprised of the fund members who needed the asset to maintain a family business venture. On payment of the final instalment by the fund, and expiry of the lease, the partnership purchased the asset from the SMSF. The rental and purchase consideration recoup the SMSF's capital outlay. The ATO finds on the facts that the trustees have provided prohibited financial assistance to the members, have failed to give effect to the fund's investment strategy, and have failed to deal with their investments in accordance with the arm's length requirements. In these circumstances the SMSFPR would not be considered relevant by the Commissioner in deciding what action is to be taken in response to the breaches of the SISA. Although the transactions that were carried out with XYZ Pty Ltd were not materially different to the transactions that the SMSFPR was based upon, the particular circumstances of the case reveal other breaches of the law.

Example 5

122. An SMSF relied upon an SMSFPR to invest in a financial product issued by XYZ Pty Ltd. The SMSFPR stated that an investment in this product by way of an instalment purchase agreement was not a borrowing and thus not a contravention of subsection 67(1) of the SISA. A later review by the ATO identified, however, that on several occasions the trustees overdrew the SMSF's bank account, by virtue of an overdraft facility, when the SMSF made instalment payments for the product. As part of the review the ATO drew to the trustees' attention that though the investment by way of the instalment purchase agreement was not a contravention of subsection 67(1), that use of the overdraft facility attached to the SMSF's bank account was. The trustees of the SMSF reviewed the matter and reorganised the SMSF's finances so that the overdraft facility was removed and that sufficient cash funds were always available in that account for the instalment payments. The Commissioner when exercising his discretion in this case took into account all factors including (though not limited to) the facts that: the trustees relied upon SMSF advice in making the initial investment, that the subsequent borrowing by way of the overdraft facility appeared inadvertent, was minor in amount, that there were no other instances of borrowing by the fund and that the trustees promptly rectified the situation so that it could not occur in the future. As such taking into account these and other factors the Commissioner exercised his discretion to take no compliance action in regard to this specific breach.

Example 6

123. The trustees of an SMSF were looking to invest in an unrelated unit trust in which they would acquire a 15% share of the trust's units (equivalent to about 25% of the SMSF's current assets). To ensure that the investment would be compliant with the in-house asset rules in the SISA, the trustees of the SMSF applied to the ATO for SMSFSA on whether the investment represented an 'investment in a related party of the fund'. In their application the trustees made a full disclosure regarding the nature of the relationship between the SMSF and the unit trust. The ATO issued SMSFSA stating that as the unit trust was not a related party of the SMSF the investment in the unit trust did not represent an in-house asset. However, a later review by the ATO showed that though the investment wasn't an in-house asset (as previously stated in the SMSFSA) that in making the investment the trustees of the SMSF had breached other sections of the SISA and SISR, as they had borrowed extensively to fund the investment and via this borrowing had also placed a charge over the SMSF's assets. Throughout the review the trustees of the SMSF refused to rectify the breaches as they believed that the investment was a good investment and that the borrowings and charge did not really place the SMSF's assets at risk. The Commissioner in exercising his discretion as to what, if any, compliance action should be taken, took into account the fact that the trustees did seek SMSF advice about whether the investment was an in-house asset and did make a full disclosure regarding the nature of the relationship between the SMSF and the unit trust. However, the Commissioner also took into account all the other circumstances of the SMSF including (though not limited to): that the trustees did not rely on SMSF advice or guidance when making the decision to borrow money and place a charge over the SMSF's asset, that the trustees seem unwilling to recognise the seriousness of these contraventions, did not attempt to rectify the breaches and continued to place the SMSF's assets at risk. As such, though the SMSFSA was relevant to the fact that the investment did not breach the in-house asset rules, the Commissioner in this instance exercised his discretion to make the fund non-complying after taking into account all other relevant factors including the seriousness of the other breaches.

Example 7

124. Miss Smith has a single member SMSF with a corporate trustee and a separate company through which she runs her business. Miss Smith was looking to acquire two properties from an unrelated party, one for her SMSF and one for her business. Miss Smith relied upon SMSF guidance in the form of ATO publications and information on the ATO website to determine that as the purchase of the property would be from an unrelated party that there would be no breach of section 66 of the SISA. Miss Smith documented this in a trustee minute along with detailed instruction to her agent to make the acquisitions before she left for business overseas. Upon her return however she discovered that an error had been made and that her business company had been used to acquire both properties, even though her instructions and documents had made it clear that one of the properties was to be purchased by the SMSF. The agent in an attempt to rectify this error had then transferred the purchase price of the property intended for the SMSF, from the SMSF's bank account to the business company's bank account and had organised for the legal title to be transferred into the name of the SMSF. Miss Smith voluntarily disclosed this information to the ATO as she had received independent advice that a breach of section 66 may now have occurred.
The Commissioner in exercising his discretion as to what, if any, compliance action needed to be taken, took favourably into account that Miss Smith (as the trustee of the SMSF) appropriately relied upon SMSF guidance in making her decision regarding the acquisition, as well as the fact that circumstances beyond the trustee's control led to a technical and inadvertent breach of section 66 of the SISA. Further as the SMSF has a good record of compliance and there were no other circumstances indicating a breach of the SISA or SISR the Commissioner having regard to all those circumstances decided not to make the SMSF non-complying or disqualify the trustee based on this specific breach.

Example 8

125. The trustees of an SMSF entered into an instalment purchase contract for an asset having relied upon a draft SMSFR on charges over assets which specifically stated that such a transaction complied with the SISA and the SISR. As a result of the feedback received during the consultation process, it was decided that the position taken in the draft ruling in relation to such transactions was incorrect. As a result, when the ruling was finalised six months after it was released as a draft, it indicated that the transaction entered into by the trustees placed a charge over the assets of the fund and therefore breached section 34 of the SISA and regulation 13.14 of the SISR. The breach was discovered in a review of the SMSF carried by the ATO only two months after the ruling was finalised. The trustees were aware of the change in the ATO's position in the final SMSFR but had not been able to rectify the breach. Given that the draft SMSFR had only recently been finalised and the trustees relied on it correctly and in good faith at the time, the Commissioner would allow a reasonable time for the trustees to unwind the transaction.
If, however, the trustees chose not to rectify the breach or the breach was discovered several years after the SMSFR was finalised, then the Commissioner, depending on the circumstances, may look to take compliance action in relation to the breach.

Example 9

126. The trustees of an SMSF relied upon SMSF guidance in the form of a Q&A on the ATO website on whether they could continue to accept personal contributions for a member who was over 75 years of age. They included a print out of this information in their trustee minutes. Unfortunately due to a typographical error the Q&A information indicated a fund could accept personal contributions after the member had turned 75 if the member was gainfully employed on at least a part-time basis. As this member was still employed on a fulltime basis the trustees decided, based on this website information that they could continue receiving personal contributions. However a later review by the ATO confirmed that the trustees were prohibited from accepting personal contributions for this member. The fact that the trustees of the SMSF relied upon this SMSF guidance, and the facts relating to the arrangement were not materially different from those stated in the SMSF guidance, is a relevant factor operating in the trustees' favour in relation to the Commissioner's discretion as to what, if any, action should be taken in relation to this breach of the SISR.

Amendment history

Date of amendment	Part	Comment
6 September 2012	Contact details	Updated.
30 March 2012	Contact details	Updated.
24 November 2011	Title – Subject:	Minor typographical error fixed. The word ‘officer’ changed to ‘Office’.
15 June 2011	Paragraph 126	Minor typographical errors fixed. The word ‘to’ added to the third sentence.
	Footnote 24	Minor typographical errors fixed. The word ‘of’ changed to ‘on’.
8 April 2011	Throughout	References to Tax Office updated to ATO as per Style Guide recommendations.
	Various	Minor revisions to correct titles of referenced documents.
	Footnote 24	LAPS reference updated from PS LA 2007/2 to PS LA 2009/9.

Subject references	self managed superannuation funds, SMSFs, SMSF advice products, publications, self managed superannuation fund ruling, self managed superannuation fund determination, self managed superannuation fund product ruling, self managed superannuation fund specific advice, SMSF guidance
Legislative references	SISA SISA 6 SISA 10(1) SISA 10(4) SISA 34 SISA 42 SISA 42A SISA 52(2) SISA 66 SISA 66(1) SISA 66(5) SISA 67(1) SISA 85(4) SISA 126A TAA 1953 Sch1 105-60 TAA 1953 Sch1 Div 358 TAA 1953 Sch1 Div 359 TAA 1953 Sch1 Div 360 Administrative Decisions (Judicial Review) Act 1977 SISR
Related public rulings	SMSFPR 2009/1; PR 2007/71
Related practice statements	PS LA 1998/1, PS LA 2001/8, PS LA 2003/3, PS LA 2003/9, PS LA 2003/10, PS LA 2004/4, PS LA 2006/17, PS LA 2006/19, PS LA 2008/3, PS LA 2008/15, PS LA 2009/9 PS CM 2007/01 (link available internally only)
Case references	Federal Commissioner of Taxation v. Wade (1951) 84 CLR 105; 9 ATD 337
Other references	Commonwealth of Australia Gazette Online Resource Centre for Law Administration (link available internally only) Public Rulings Manual (link available internally only) Taxpayers' Charter
File references	08/17065
Date issued	12 August 2009
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Other Business Lines consulted	