PS LA 2009/5 - Provision of advice and guidance by the Australian Taxation Office in relation to the application of the Superannuation Industry (Supervision) Act 1993 and the Superannuation Industry (Supervision) Regulations 1994 to self-managed superannuation funds

This cover sheet is provided for information only. It does not form part of *PS LA 2009/5 - Provision of advice and guidance by the Australian Taxation Office in relation to the application of the Superannuation Industry (Supervision) Act 1993 and the Superannuation Industry (Supervision) Regulations 1994 to self-managed superannuation funds*

This document has changed over time. This version was published on *21 November 2024*

Generated on: 23 November 2026, 11:58:18 PM

Australian Government
Australian Taxation Office

Law Administration Practice Statement

PS LA 2009/5

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

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

SUBJECT: **Provision of advice and guidance by the Australian Taxation Office 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 we provide about the application of the *Superannuation Industry (Supervision) Act 1993* and *Superannuation Industry (Supervision) Regulations 1994***
- **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.**

TABLE OF CONTENTS **Paragraph**

KEY PRINCIPLES – SUMMARY

SCOPE **1**

BACKGROUND **4**

EXCLUSIONS FROM THIS PRACTICE STATEMENT **12**

TERMS USED IN THIS PRACTICE STATEMENT **14**

STATEMENT **15**

PART A – SMSF ADVICE **18**

SMSF public rulings 21

Issue and withdrawal of SMSF public rulings 23

SMSF rulings and SMSF determinations 26

SMSF-specific advice 33

Applying for SMSFSA 38

Requirements for SMSFSA 43
Declining to provide SMSFSA 48
Providing SMSFSA 50
Timeframes – ATO service standards 55
Withdrawal of SMSFSA application 56
Review of SMSFSA 57
Providing indicative advice before issuing SMSFSA 59
Informal discussions 65
PART B – SMSF GUIDANCE 71
Written guidance 76
SMSF publications 79
Published speeches, minutes of consultation groups, media releases and decision impact statements 80
Published materials produced for internal ATO purposes 84
ATO interpretative decisions 84
Law administration practice statements 89
Technical skilling materials 90
Oral guidance 91
PART C – WEIGHT GIVEN TO SMSF ADVICE AND GUIDANCE 98
Examples of weight given to SMSF advice and SMSF guidance 105
Example 1 – circumstances materially different from SMSFSA supplied 105
Example 2 – SMSF advice is subsequently withdrawn 106
Example 3 – reliance on SMSF guidance for complex transactions 107
Example 4 – reliance on SMSFSA, further circumstances not covered 108
Example 5 – reliance upon SMSF guidance, breach due to circumstances beyond the trustee's control 109
Example 6 – reliance upon draft SMSFR 110
Example 7 – subsequent amendments made 111

KEY PRINCIPLES – SUMMARY

Providing assistance in the form of SMSF advice and SMSF guidance on the application of the *Superannuation Industry (Supervision) Act 1993* (SISA) and *Superannuation Industry (Supervision) Regulations 1994* (SISR) is an important part of the Commissioner of Taxation'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 us. A reference to SMSFs in this Practice Statement also includes a reference to former SMSFs that are regulated by us.

[1] 'Former' SMSFs refers to super funds that have ceased being SMSFs for the purposes of the SISA and the trustee of the fund is not a registrable superannuation entity (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.

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*, we set out the level of protection that is available under the laws administered by us to taxpayers who rely on the advice or guidance we have 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 our advice or guidance 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 us 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 we are not legally bound by the advice we provide, the Commissioner has agreed that we 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 ATO in respect of the views we express about the operation of the SISA or SISR. It is not possible for us to be administratively bound by the views that we give as an administrator of the SISA or SISR in the same manner that we are, or have agreed to be, bound by tax advice that we give. This is because SISA and SISR provisions relate to the compliance of an SMSF and its trustees with their regulatory obligations, rather than the determination of a tax liability.

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 we give 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 ATO provides as regulator of SMSFs under the SISA and SISR.

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

SMSF advice

Written SMSF advice is provided on our opinion on the application of the SISA and SISR to SMSFs. There are 2 main types of SMSF advice:

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

The requirement for 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 taxation public ruling, an SMSF public ruling is not binding on us.

SMSF rulings and determinations are aimed at providing our 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-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 private ruling, SMSF-specific advice is not binding on the ATO 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 us. SMSF guidance provides general assistance and, especially for published products, is simply expressed, often providing step-by-step guidance but unlikely to cover all possibilities. Generally, it does not address an SMSF's or other entity's[2] specific circumstances.

Weight given to SMSF advice and SMSF guidance

SMSF advice and SMSF guidance is not binding on the ATO. 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 we later take 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 our 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 SMSFSA or SMSF oral guidance, a full and true disclosure had been made to us when the advice or guidance was 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 we provide about the application of the SISA and the SISR.

[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.

2. It 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. This Practice Statement identifies sources of further information on developing and issuing different forms of SMSF advice or SMSF guidance.

BACKGROUND

4. PS LA 2008/3 explains the forms of advice and guidance we provide about the application of laws administered by us. 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 trustees) 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 us about the application of the SISA or SISR.

7. SMSF advice and SMSF guidance is issued by the Commissioner 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 issuance by us of SMSF advice and guidance is consistent with the ATO 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 we provide 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 we are seeking to provide. SMSF advice is aimed at providing the ATO'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, and
   - 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.

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

EXCLUSIONS FROM THIS PRACTICE STATEMENT

12. This Practice Statement does not deal with the following:

- 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 80 to 128 of PS LA 2008/3)
- public rulings made (or withdrawn) in accordance with Division 358 of Schedule 1 of the TAA (see also paragraphs 29 to 79 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 paragraphs 161 to 189 of PS LA 2008/3)
- administratively binding advice provided in accordance with paragraphs 190 to 204 of PS LA 2008/3
- a private indirect tax rulings provided in accordance with paragraphs 129 to 144 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]

13. 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

14. The terms set out in Table 1 are used in this Practice Statement.

Table 1: Terms 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.

[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
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 (ORCLA)*.
Scheme	The term 'scheme' means[6]: (a) any agreement, arrangement, understanding, promise or undertaking: (i) whether express or implied, or (ii) 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.
SISA	*Superannuation Industry (Supervision) Act 1993*
SISR	*Superannuation Industry (Supervision) Regulations 1994*
SMSF	self-managed super fund
SMSFD	self managed superannuation funds determination
SMSFR	self managed superannuation funds ruling
SMSFSA	self managed superannuation fund specific advice
ATO website	ato.gov.au

STATEMENT

15. There are many forms of assistance that we provide to SMSFs, both orally and in writing, about the application of the SISA and SISR. In accordance with Our Charter, we aim to provide complete, accurate and consistent advice. This guidance is to make taxpayers aware of their rights and entitlements and to help them understand and meet their obligations.

16. This Practice Statement explains:

- each form of SMSF advice and SMSF guidance we provide, 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.

17. The views expressed in SMSF advice and SMSF guidance represent the ATO's views. They cannot be considered to bind the Australian Prudential Regulation Authority or the Australian Securities and Investment Commission in any way. However, the other regulators' views on the interpretation of the

[6] Subsections 66(5) and 85(4) of the SISA.

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.

PART A – SMSF ADVICE

18. SMSF advice is our 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, and
        - self managed superannuation funds determinations.
    - SMSF-specific advice (SMSFSA).

19. The weight given to the fact that an SMSF trustee has relied on SMSF advice is outlined in paragraphs 98 to 111 of this Practice Statement.

20. Our basic administrative policy 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 our position in relation to the scheme.
    - 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 incorrect.

SMSF public rulings

21. An SMSF public ruling is a published statement of our 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. They're not 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. You should refer to Producing PAG product (link available internally only) for procedures on producing an SMSF public ruling.

22. 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 ATO.

[7] Regulators' have powers of general administration under section 6 of the SISA.

Issue and withdrawal of SMSF public rulings

23. Unlike public rulings on direct or indirect taxes, there are no legislative provisions dealing with the making or withdrawal of SMSF public rulings. SMSF public rulings are accessible internally via ATOlaw or externally through the Legal database on the ATO website.

24. We may withdraw either the whole or part of an SMSF public ruling.

25. 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 we consider 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

26. In the interests of sound administration, we provide 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.

27. 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.

28. Topics on which we are preparing SMSFRs and SMSFDs are listed on the Advice under development program (AUDP). The relevance and performance of the AUDP is monitored by the National Tax Liaison Group. This group consists of representatives of the major tax, law and accounting professional associations and ATO senior staff. Topics on the AUDP arise from or reflect suggestions made either internally through our escalation processes or from external sources, such as professional and industry representative bodies. These topics are subject to risk assessment and prioritisation according to the technical engagement process.[8]

29. Our Public Advice and Guidance Panel (Panel) was established to consider and advise on the proposed interpretation of the law in SMSF public rulings. It is comprised of senior tax officers, as well as external representatives who are respected practitioners or academics. The primary role of the Panel is to discuss the technical and practical merits of the draft ruling as presented to them by the authoring team, as well as to advise on the proposed interpretation of the law. The Panel is advisory and is not a decision-making body. It is one of a number of measures to ensure the highest quality of public rulings.

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

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

32. A draft SMSFR or SMSFD will represent our preliminary, though considered, view. 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.

[8] See Law Administration Practice Statement PS LA 2012/1 *Engaging Tax Counsel Network on tax technical issues*.

Once the final SMSFR or SMSFD is released, an SMSF trustee should follow the final SMSFR or SMSFD.

SMSF-specific advice

33. SMSFSA is a written expression of our 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.

34. While similar in form to a 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 us and does not have the same review rights as a private ruling.[9]

35. The prerequisite for SMSFSA is that the SMSF trustees and their advisors, representatives or authorised auditors who are 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.

36. An SMSFSA will not be provided on an SMSF's complying status or where the exercise of a discretionary power is required.[10] However, the trustee should be assisted to obtain information or guidance suited to their needs.

37. When preparing SMSFSA, we must refer to ORCLA and relevant procedures for assistance, including approval for issue by our authorising officers.

Applying for SMSFSA

38. 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.

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

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

41. If another form of assistance could resolve their query, we must explain the alternatives available. For instance, SMSF guidance such as an ATO publication. We 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.

[9] However, see paragraphs 71 and 72 of this Practice Statement.
[10] See paragraph 12 of this Practice Statement.

42. A tax agent who is registered as a user of our online services may lodge the SMSFSA application via the relevant option for either tax agents or businesses.

Requirements for SMSFSA

43. The following are requirements that we will follow in considering an application for SMSFSA.

44. The trustees or their advisor must describe the facts on which the request is based. This includes, 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, as well as further information supplied by the trustee or their advisor after the initial application (such as in response to any request by us for further information), and
- any assumptions made by us on which the correctness of the SMSFSA might depend.

45. 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 is to be actioned so that the work proceeds with continuity.

46. We 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), we 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.

47. Generally, if a trustee does not provide enough information for an SMSFSA to be provided, we must attempt to provide written SMSF guidance. As an example, we may 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

48. 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 (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[11]
- the question to be determined is in relation to the trustee covenants as set out in subsection 52(2) of the SISA.

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

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

Providing SMSFSA

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

51. We 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 we cannot undertake discussions with the trustees or their advisors to establish the particulars of the scheme and its purpose, nor does this mean that we are precluded from general discussions with a trustee in relation to an issue. These processes are encouraged. However, we must ensure that the trustee is not misled and must clearly explain that any comments made will not be binding on us.

52. 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.[12] Where there is no precedential ATO view and the issue is not a straightforward application of the law, the general rule[13] is that the interpretative issue must be referred by the Superannuation and Employee Obligations (SEO) business line to the Tax Counsel Network (TCN) to establish a precedential ATO view on the issue.[14] An SMSFSA is only made after the precedential ATO view has been established.

53. 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.

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

Timeframes – ATO service standards

55. In accordance with ATO service standards, we aim 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, we aim 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, we aim to contact the applicant within 14 days of receiving all necessary information to negotiate an extended reply date.

Withdrawal of SMSFSA application

56. 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 issued and we will provide written confirmation of the withdrawal.

---

[12] See paragraph 13 of Law Administration Practice Statement PS LA 2003/3 *Precedential ATO view*, which describes circumstances where you 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.

[13] Note that there are some exceptions to this general rule. Refer to PS LA 2012/1.

[14] See PS LA 2012/1 and PS LA 2003/3.

Review of SMSFSA

57. 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 us for a 'second look'[15] at a decision we have made. This second look is a review process undertaken as good administrative practice under Our Charter. We are committed to reviewing our decisions to ensure that all SMSF trustees are treated fairly and to improve the quality and consistency of its decisions.

58. Our decision not to issue an SMSFSA is not reviewable under the *Administrative Decisions (Judicial Review) Act 1977*. The reason is that an SMSFSA is not made under an enactment. We provide this advice because the ATO 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 us for a second look at the decision not to issue SMSFSA.

Providing indicative advice before issuing SMSFSA

59. During the preparation of SMSFSA, we 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 61 of this Practice Statement, we are not to provide indicative advice. This ensures that no advice is provided unless the actual details of the proposed scheme, transaction or arrangement and its purpose have been firmly established. Additionally, we must have finalised our view on how a SISA or SISR provision applies so as not to mislead entities However, we can undertake informal discussions with entities raising, for example, areas of possible concern.[16]

60. Providing indicative advice before the actual details of the proposed scheme, transaction or arrangement and its purpose have been firmly established may create expectations that we 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 our administration of the superannuation system.

61. Nevertheless, there may be occasions (where we have established the details of the proposed scheme, transaction or arrangement, but have 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.

[15] You should refer to Chief Executive Instruction *Respecting taxpayers' rights of review* (link available internally only) for further information.
[16] The discussion about indicative advice in this section applies generally to SMSFSA and SMSFPR.

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

63. SMSF indicative advice will not carry the weight that may otherwise be applicable to entities who rely on SMSF advice or guidance.[17]

64. Consistent with corporate record-keeping requirements[18], accurate and complete notes must be made of all discussions prior to, and in the course of dealing with, an application for SMSFSA. 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

65. We can have informal discussions with trustees of an SMSF or their advisors on technical matters. ATO staff are encouraged to do so, especially where there is an opportunity to clarify matters or to understand better the entity's position.

66. Informal discussions can be undertaken with an entity about a particular scheme, either before or following the receipt of a written request for guidance. 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.

67. If we receive a request for SMSFSA 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 their representative those areas where we have concerns.

68. Where the tax officer and any relevant technical specialist believe that those concerns may lead to an unfavourable response from the ATO, it may be appropriate to inform the trustees or their representative accordingly. In these circumstances, we (including any appropriate relevant technical specialists) are to explain the basis of the concerns to the trustees or their representative. 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 and to help them decide 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.

69. In undertaking these discussions, we must ensure that the trustees or their representative are not misled and must clearly explain that any comments made will not be binding on us. Relevant documentation is to be prepared and, where appropriate, captured on the relevant case management system.

70. Should the SMSF trustees or their representative submit material changes to the scheme upon which the SMSFSA 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 with continuity.

[17] See paragraphs 71 to 79 of this Practice Statement.
[18] Chief Executive Instruction *Information asset management* (link available internally only).

PART B – SMSF GUIDANCE

71. Assistance provided in a form other than SMSF advice may answer a trustee's query or question 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 an ATO publication. This includes ATO website material.

72. Our SMSF guidance is provided to help trustees of SMSFs understand their obligations, duties and entitlements under the SISA and the SISR administered by the Commissioner. SMSF guidance is not binding on us.

73. If a trustee or their representative wants us to provide specific advice about the applicability of the SISA or SISR to their individual circumstances, they should apply for SMSFSA.

74. It may sometimes be difficult to draw a distinction between requests for SMSF guidance and SMSFSA. 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 provide no other information about their specific circumstances.

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

Written guidance

76. Written guidance is issued to help trustees of SMSFs understand their obligations under the SISA and SISR administered by us. It provides only general assistance and cannot cover all possibilities or individual circumstances. Written guidance may also be in the form of an ATO publication. This can include ATO website content.

77. 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. We should refer to ORCLA for further information about providing written guidance.

78. This Practice Statement sets out the different forms of written guidance we publish. 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 paragraphs 98 to 111 of this Practice Statement.

SMSF publications

79. 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. This would be a factor that we 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 consultation groups, media releases and decision impact statements

80. Speeches by senior tax officers and minutes of consultation groups reflect our current thinking on particular issues. Minutes are a record of proceedings at a consultation group and reflect the discussion between us and the other attendees. They are published for transparency reasons.

81. 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.

82. Decision impact statements[19] are published to the Legal database on the ATO website to publicise to the community our reaction to adverse and other significant court or tribunal decisions. They:

- include a summary of the case details
- summarise the facts and issues decided
- note any consequences in relation to public advice or guidance
- if relevant, set out how the law will be administered as a consequence of the decision, pending any change to existing public advice or guidance (but are not normally expected to contain advice).

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

Published materials produced for internal ATO purposes

ATO interpretative decisions

84. An ATO interpretative decision (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. They represent a source of the precedential ATO view that we must apply in resolving interpretative issues. Alternatively, if we consider the application of the precedential view will result in an incorrect decision or unintended outcome, we must escalate the matter for review.[20]

85. An ATO ID provides the ATO view for SMSFSA 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*.

86. ATO IDs were produced for the purpose of facilitating consistent and timely interpretative decision making by us. 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.

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

[19] For further information on decision impact statements, refer to Law Administration Practice Statement PS LA 2009/9 *Conduct of ATO litigation and engagement of ATO Dispute Resolution*.
[20] See PS LA 2003/3.

88. The weight given to the fact that a trustee of an SMSF has relied on a current ATO ID where their own circumstances are not materially different from those described in the ATO ID, and the ATO ID is later found to be incorrect or misleading, is outlined in paragraphs 98 to 111 of this Practice Statement.

Law administration practice statements

89. Law administration practice statements[21] are produced principally to direct and assist us with 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 us.

Technical skilling materials

90. We produce educational material for the purpose of enhancing the knowledge and skills of tax officers engaged in technical decision making. Other materials are published to assist external entities who have corresponding educational needs.

Oral guidance

91. We may provide oral guidance about the application of SISA or SISR to a trustee of an SMSF.

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

93. Where an SMSF trustee seeks assistance on a matter that is not of a straightforward or simple nature, we should suggest that the trustee apply for SMSFSA or written guidance as appropriate, then 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.

94. 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.[22]

95. 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 Views), and
- ATO website material (other than that produced by external publishers).

96. 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 paragraphs 98 to 111 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.

[21] For further information, see Law Administration Practice Statement PS LA 1998/1 *Law administration practice statements*.
[22] 'Precedential ATO view' is defined in PS LA 2003/3. This Practice Statement also identifies the ATO documents that contain those views.

97. For procedures for providing oral guidance, refer to paragraphs 253 to 261 of PS LA 2008/3.

PART C – WEIGHT GIVEN TO SMSF ADVICE AND GUIDANCE

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

99. However, if we later take 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 our exercise of any discretion as to what, if any, action is to be taken in response to a breach of that law.

100. 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.
- In the case of SMSFSA or SMSF oral guidance, a full and true disclosure had been made to us when the advice or guidance was sought.

101. 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 (for example, SMSFSA) is likely to be (though not necessarily) a more significant factor weighing in favour of the trustee in contrast to 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.

102. 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.[23] Any action we may take, and the timing of such action, resulting from our 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.

103. We 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, we may seek an informal agreement or enforceable undertaking involving actions to rectify the breach, including possibly unwinding or reversing of transactions, or

[23] *Commissioner of Taxation (Cth) v Wade* [1951] HCA 66; 84 CLR 105 at [117].

- to take other compliance action[24] – for example, making the fund non-complying.

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

Examples of weight given to SMSF advice and SMSF guidance

Example 1 – circumstances materially different from SMSFSA supplied

105. *The trustees of an SMSF seek SMSFSA from us on their plan to purchase listed securities from the members of the fund at market value for $6,000. The SMSFSA is sought on whether this proposed transaction would breach the prohibition on acquisitions from related parties in subsection 66(1) of the SISA. We issue SMSFSA based on these facts that state that the proposed transaction meets the requirements of an exception to the prohibition and therefore does not breach subsection 66(1) of the SISA. The trustees of the SMSF rely upon this SMSF advice and proceed with the transaction. However, a later review determines that the listed securities were acquired for $10,000, which is in excess of their market value. Therefore, 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 has 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 the trustee's favour in our exercise of any discretion as to what, if any, action is to be taken in response to a breach of that law.*

Example 2 –SMSF advice is subsequently withdrawn

106. *In determining whether a particular arrangement contravenes a provision of the SISA, the trustees of an SMSF rely upon a final SMSFR, as their facts are materially the same as one of the examples in the SMSFR. The trustees therefore, proceed with the arrangement. However, due to the findings of a post-implementation review, we withdraw the SMSFR. We reconsider and redraft certain aspects of the SMSFR and reissue it. Consequently, the trustees discover that the views in the reissued SMSFR indicate that the arrangement resulted in a breach of the SISA. However, the trustees of the SMSF relied upon an SMSFR in entering into the arrangement and the facts relating to the arrangement were not different from those stated in the SMSFR. These are relevant factors operating in the trustees' favour in relation to how we 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, we decide not to make the SMSF non-complying or disqualify the trustees based on this specific breach. We may, however, request the trustees rectify the breach where this is possible.*

[24] See Law Administration Practice Statements PS LA 2006/19 *Self-managed superannuation funds – issuing a notice of non-compliance*, which outlines the factors we will consider in deciding whether a notice of non-compliance should be given to a fund, and PS LA 2006/17 *Self-managed superannuation funds – disqualification of individuals to prohibit them from acting as a trustee of a self-managed superannuation fund*, which outlines the circumstances in which we will consider disqualifying an individual under section 126A of the SISA.

Example 3 – reliance on SMSF guidance for complex transactions

107. *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, determining that the entities would not be related parties. Therefore, the SMSF would not breach the in-house asset rules by making these investments. It is open to the trustees to seek SMSFSA in relation to the proposed transactions. No other professional advice is sought by the trustees on the application of the SISA and SISR in relation to the proposed transactions. Upon a later review by us, it is found that the entities in which the SMSF have invested are controlled by the members and thus the in-house asset rules were breached by investing above the allowed limit in the related parties. When exercising the Commissioner's discretion as to whether compliance action is required, we 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 these 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. Therefore, we have an expectation that the trustees rectify the breach by reducing its in-house assets in a timely manner. We 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 – reliance on SMSFSA, further circumstances not covered

108. *The trustees of an SMSF are looking to invest in an unrelated unit trust in which they would acquire a 15% share, the equivalent of 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 apply to us for SMSFSA on whether the investment represents an 'investment in a related party of the fund'. In their application, the trustees make a full disclosure regarding the nature of the relationship between the SMSF and the unit trust. We issue SMSFSA stating that as the unit trust is not a related party of the SMSF and the investment in the unit trust does not represent an in-house asset. However, a later review by us shows that though the investment was not an in-house asset, as previously stated in the SMSFSA, in making the investment the trustees of the SMSF have breached other sections of the SISA and SISR. They have borrowed extensively to fund the investment and, via this borrowing, have also placed a charge over the SMSF's assets. Throughout the review, the SMSF trustees refuse to rectify the breaches. They believe that the investment was a good investment and that the borrowings and charge do not really place the SMSF's assets at risk. In exercising the Commissioner's discretion as to what, if any, compliance action should be taken, we take into account the fact that the trustees did seek SMSFA 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, we also took into account all the other circumstances of the SMSF, including though not limited to, that the trustees:*

- *did not rely on public SMSF advice or guidance when making the decision to borrow money and place a charge over the SMSF's asset*
- *seem unwilling to recognise the seriousness of these contraventions, and*
- *do 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, in this instance we exercise the Commissioner's discretion to make the fund non-complying after taking into account all other relevant factors, including the seriousness of the other breaches.

Example 5 – reliance upon SMSF guidance, breach due to circumstances beyond the trustee's control

109. *Miss Smith has a single member SMSF with a corporate trustee and a separate company through which she runs her business. Miss Smith is looking to acquire 2 properties from an unrelated party – one for her SMSF and one for her business. Miss Smith relies upon SMSF guidance in the form of ATO publications and information on the ATO website. She determines that as the purchase of the property would be from an unrelated party, there would be no breach of section 66 of the SISA. Miss Smith documents this in a trustee minute, along with detailed instructions to her agent to make the acquisitions before she leaves for business overseas. Upon her return, she discovers that an error has been made and that her business company has 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. In an attempt to rectify this error, the agent then transfers the purchase price of the property intended for the SMSF from the SMSF's bank account to the business company's bank account, then organises for the legal title to be transferred into the name of the SMSF. Miss Smith voluntarily discloses this information to us as she has received independent advice that a breach of section 66 of the SISA may now have occurred. In exercising the Commissioner's discretion as to what, if any, compliance action needs to be taken, we take 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 are no other circumstances indicating a breach of the SISA or SISR, we decide not to make the SMSF non-complying or disqualify the trustee based on this specific breach.*

Example 6 – reliance upon draft SMSFR

110. *The trustees of an SMSF enter into an instalment purchase contract for an asset. They rely upon a draft SMSFR on charges over assets which specifically state that such a transaction complies with the SISA and the SISR. As a result of the feedback received during the consultation process on the draft SMSFR, it is decided that the position taken in the draft SMSFR in relation to such transactions was incorrect. As a result, when the ruling is finalised 6 months after it was released as a draft, it indicates that the transaction entered into by the trustees placed a charge over the assets of the fund and therefore breaches section 34 of the SISA and regulation 13.14 of the SISR. The breach is discovered in a review of the SMSF carried out by us 2 months after the ruling is finalised. The trustees are aware of the change in our position in the final SMSFR but have 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, we allow a reasonable time for the trustees to unwind the transaction. If, however, the trustees choose not to rectify the breach or the breach is discovered several years after the*

SMSFR was finalised then, depending on the circumstances, we may look to take compliance action in relation to the breach.

Example 7 – subsequent amendments made

111. *The trustees of an SMSF rely upon SMSF guidance in the form of question and answer on the ATO website. This information states they can continue to accept personal contributions for a member who was over 75 years of age. They include a printout of this information in their trustee minutes. Unfortunately, due to a typographical error, the ATO website information indicates a fund can accept personal contributions after the member turns 75 years of age if the member is gainfully employed on at least a part-time basis. As this member is still employed on a full-time basis, the trustees decide, based on this website information, that they can continue receiving personal contributions. However, a later review by us confirms that the trustees were prohibited from accepting personal contributions for this member. 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. This 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.*

Date issued: 12 August 2009

Date of effect: 12 August 2009

Business line: SEO

Amendment history

21 November 2024

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

2 February 2015

Part	Comment
Throughout	(i) Remove reference to SMSFPR 2009/1 following its withdrawal. (ii) Also remove all reference/s to SMSF product rulings as this is no longer a form of SMSF advice issued by the Commissioner.

6 September 2012

Part	Comment
Contact details	Updated.

30 March 2012

Part	Comment
Contact details	Updated.

24 November 2011

Part	Comment
Title – subject:	Minor typographical error fixed. The word ‘officer’ changed to ‘Office’.

15 June 2011

Part	Comment
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

Part	Comment
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.

References

Legislative references	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 85(4) SISA 126A TAA 1953 Sch1 105-60 TAA 1953 Sch1 Div 358 TAA 1953 Sch1 Div 359 TAA 1953 Sch1 Div 360 SISR 13.14 Administrative Decisions (Judicial Review) Act 1977
Related practice statements	PS LA 1998/1 PS LA 2001/8 PS LA 2003/3 PS LA 2003/9 PS LA 2006/17 PS LA 2006/19 PS LA 2008/3 PS LA 2008/15 PS LA 2009/9 PS LA 2012/1
Case references	Commissioner of Taxation (Cth) v Wade [1951] HCA 66; 84 CLR 105; [1951] ALR 962; 9 ATD 337
Other references	Advice under development program Chief Executive Instruction Information asset management (link available internally only) Chief Executive Instruction Respecting taxpayers' rights of review (link available internally only) ORCLA – Resources for Law Administration (link available internally only)

	Our Charter Producing PAG product (link available internally only) Schedule of Documents containing Precedential ATO Views

ATO references

ISSN	2651-9526
File no	08/17065; 1-14MZWYE0
ATOlaw topic	Administration ~~ Rulings and other advice

© AUSTRALIAN TAXATION OFFICE FOR THE COMMONWEALTH OF AUSTRALIA

You are free to copy, adapt, modify, transmit and distribute this material as you wish (but not in any way that suggests the ATO or the Commonwealth endorses you or any of your services or products).