

# ***PS LA 2010/2 (Withdrawn) - Self-managed superannuation funds - approved auditors - disqualification and/or referral to a professional association***

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! Law Administration Practice Statement PS LA 2010/2 was withdrawn on 13 February 2013 as effective 31 January 2013, the Commissioner no longer has the power to disqualify approved auditors of SMSFs, or refer same to their professional association.

! This document has changed over time. This version was published on *19 February 2013*



# Practice Statement Law Administration

**PS LA 2010/2**

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**FOI status: may be released**

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*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 Australian Taxation Office (ATO) staff unless doing so creates unintended consequences or is considered incorrect. Where this occurs ATO staff must follow their business line's escalation process.*

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<b>SUBJECT:</b>	<b>Self-managed superannuation funds – approved auditors – disqualification and/or referral to a professional association</b>
<b>PURPOSE:</b>	<b>To outline considerations for the Commissioner, as the Regulator of self-managed superannuation funds, when deciding whether to:</b> <ul style="list-style-type: none"><li>• <b>disqualify a person from being an approved auditor for the purposes of the <i>Superannuation Industry (Supervision) Act 1993</i>, and/or</b></li><li>• <b>refer an approved auditor to their professional association</b></li></ul>

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## BACKGROUND

1. The *Superannuation Industry (Supervision) Act 1993* (SISA)<sup>1</sup> requires that, for each year of income, each trustee of a superannuation entity must ensure that an approved auditor is appointed to give the trustee(s) a report in the approved form on the operations of the entity for that year.<sup>2</sup> A superannuation entity includes a self-managed superannuation fund (SMSF). The approved form is the *Self-managed superannuation fund independent auditor's report* (audit report).
2. An approved auditor of an SMSF for the purposes of the SISA is:<sup>3</sup>
  - a (natural) person registered (or taken to be registered) as an auditor by the Australian Securities and Investments Commission;<sup>4</sup>
  - if an auditor of a self-managed superannuation fund only – a member/fellow of a professional association, or an SMSF specialist auditor, as specified in Schedule 1AAA of the SISR;<sup>5</sup> or
  - the Auditor-General of the Commonwealth, a State or Territory, or a delegate of the Auditor-General.<sup>6</sup>
3. An approved auditor, as a professional, plays a critical role in Australia's superannuation system when he or she forms an opinion that the trustee(s) of an SMSF has, or has not, complied with their obligations as trustee. The auditing function is important because it goes to ensuring that the retirement savings of Australians are managed in accordance with the law. Approved auditors must act independently, with honesty and integrity to ensure that the financial integrity and prudential management of superannuation funds are maintained.<sup>7</sup>

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<sup>1</sup> All legislative references in this practice statement are to the SISA unless otherwise indicated and all references to regulations in this practice statement are to the Superannuation Industry (Supervision) Regulations 1994 (SISR) unless otherwise indicated.

<sup>2</sup> Subsection 35C(1).

<sup>3</sup> Definition, approved auditor, subsection 10(1); specified by subregulation 1.04(2).

<sup>4</sup> Sub-subregulation 1.04(2)(a)(i).

<sup>5</sup> Sub-subregulation 1.04(2)(a)(ii): approved auditors of this kind must be associated with the professional organisations as follows:

- CPA Australia Limited – Member
- The Institute of Chartered Accountants in Australia – Member
- National Institute of Accountants – Member
- Association of Taxation and Management Accountants – Member or Fellow
- National Tax and Accountants Association Ltd – Fellow
- SMSF Professionals' Association of Australia Limited – SMSF Specialist Auditor.

<sup>6</sup> Sub-subregulation 1.04(2)(a)(iii). This practice statement does not apply to the Auditor-General of the Commonwealth, a State or Territory, or a delegate of the Auditor-General.

<sup>7</sup> *Fearon and Australian Prudential Regulation Authority* [2006] AATA 918 (*Fearon's Case*) at paragraph 42 per JW Constance, SM.

## STATEMENT

### The Commissioner disqualifying a person from being an approved auditor

4. Section 131 grants the Commissioner the power to disqualify a person from being an approved auditor for the purposes of the SISA.<sup>8</sup>
5. The Commissioner may disqualify a person from being an approved auditor, if the person:
  - has failed, whether within or outside Australia, to carry out or perform adequately and properly:
    - the duties of an auditor under the SISA or the SISR;
    - any duties required by a law of the Commonwealth, a State or a Territory to be carried out or performed by an auditor;
    - any functions that an auditor is entitled to perform in relation to the SISA or the SISR or the *Financial Sector (Collection of Data) Act 2001*; or
  - is otherwise not a fit and proper person to be an approved auditor for the purposes of the SISA.
6. Ordinarily, the power in section 131 will be exercised by the Commissioner if, as a matter of fact, a person has failed to perform a duty or function adequately and properly, or is otherwise not a fit and proper person to be an approved auditor. In other words, if a reasonable person would conclude that at least one of the criteria in section 131 is satisfied, then the Commissioner would ordinarily disqualify the person from being an approved auditor.
7. There may be cases, however, where at the time the Commissioner would ordinarily disqualify a person from being an approved auditor because the person has failed to perform a duty or function adequately and properly, the Commissioner is also satisfied that the person is likely to carry out his or her auditing duties adequately and properly in the future; and is otherwise a fit and proper person. In such circumstances, the grounds for revocation of a disqualification order in subsection 131(7) would be satisfied and the Commissioner would not disqualify the person concerned.
8. A decision to disqualify a person from being an approved auditor must be fair and reasonable and should be made in accordance with the principles of procedural fairness. Therefore, before the Commissioner decides to disqualify a person from being an approved auditor, that person will be given an opportunity to demonstrate to the Commissioner that he or she has not failed to perform the duties or functions of an approved auditor adequately and properly; and is otherwise a fit and proper person to be an approved auditor.

### The Commissioner referring matters to an approved auditor's professional association

9. Section 131A provides that where the Commissioner is of the opinion that an approved auditor:
  - has failed, whether within or outside Australia, to carry out or perform adequately and properly:
    - the duties of an auditor under the SISA or the SISR

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<sup>8</sup> Section 131 also gives the Commissioner the power to disqualify a person from being an actuary but this practice statement does not apply to actuaries.

- any duties required by a law of the Commonwealth, a State or a Territory to be carried out or performed by an auditor
- any functions that an auditor is entitled to perform in relation to the SISA or the SISR or the *Financial Sector (Collection of Data) Act 2001*, or
- is otherwise not a fit and proper person to be an approved auditor for the purposes of the SISA,

then the Commissioner may refer details of the matter to the approved auditor's professional association.<sup>9</sup>

10. The Explanatory Memorandum to the Superannuation Industry (Supervision) Legislation Amendment Bill 1995<sup>10</sup> explains that section 131A was enacted to give the Commissioner an option, other than, or in addition to, disqualifying approved auditors who in the opinion of the Commissioner have failed to adequately and properly carry out their duties. Accordingly, the Commissioner is not obliged to take that option instead of, or before, disqualifying a person.
11. A decision to refer an approved auditor to his or her professional association should be fair and reasonable and made in accordance with the principles of procedural fairness. Therefore, before the Commissioner refers an approved auditor to their professional association, he or she will be given an opportunity to show cause as to why the power in section 131A should not be exercised. Any action a professional association may take when the Commissioner refers an approved auditor is not pertinent to the matters considered in this practice statement.

## EXPLANATION

### The Commissioner disqualifying a person from being an approved auditor

12. The purpose of the SISA is to provide for the prudent management of certain superannuation funds, approved deposit funds and pooled superannuation trusts and for their supervision.<sup>11</sup> The basis for supervision is that those funds and trusts (which include SMSFs) are subject to regulation under the Commonwealth's powers with respect to corporations or pensions. In return, the supervised funds may be eligible for concessional taxation treatment.
13. Auditors play a key role in supervising superannuation funds for the purposes of the SISA and they need to fulfil all their functions and meet their obligations with integrity, care and diligence. Where a person fails to perform those functions and meet those obligations adequately and properly, the Commissioner is empowered, under section 131 to disqualify a person from being an approved auditor for the purposes of the SISA. To allow approved auditors who have failed to adequately perform their duties or carry out their functions, or who are otherwise not fit and proper persons, to continue to be approved auditors could put some Australians' retirement savings at risk contrary to the retirement income policy underpinning the taxation concessions for superannuation.

<sup>9</sup> The persons specified in relation to an approved auditor for the purposes of subsection 131A(1) are those members of the auditor's professional association whom the Commissioner believes will be involved in deciding whether the professional association should take any disciplinary or other action against the auditor in respect of the matter referred, or in taking that action: subsection 131A(2).

<sup>10</sup> See paragraph 111.

<sup>11</sup> See section 3.

14. The Commissioner ordinarily would not disqualify a person from being an approved auditor, if at the time when the Commissioner would otherwise exercise his power to disqualify the person the grounds for revoking such an order are also satisfied. In other words, if the Commissioner is satisfied that the person concerned is likely to carry out and perform adequately and properly the duties of an auditor in the future, and the person is otherwise fit and proper to be an approved auditor, the Commissioner would not ordinarily disqualify the person.<sup>12</sup>

**What considerations will be taken into account when the Commissioner is making a disqualification decision?**

***The duties and functions of an approved auditor***

15. The duties and functions required to be carried out or performed adequately and properly by an approved auditor for SISA purposes include meeting the obligations specified in the SISA, as well as performing the duties required of an auditor by their position or occupation under any other Commonwealth, State or Territory law.
16. When considering whether a person has performed his or her duties and functions adequately and properly, the Commissioner will look at if and how the person has fulfilled the following SISA obligations as the approved auditor of one or more SMSFs for which he or she is responsible. For each SMSF:
- The approved auditor must conduct a mandatory audit on the operation of the SMSF for a year of income and report information on the *Self-managed superannuation fund independent auditor's report* (audit report) (approved form) as required, and give the report to the SMSF trustee(s).<sup>13</sup>
  - The audit must be conducted in accordance with Australian Auditing Standards and the applicable Standards on Assurance Engagements.<sup>14</sup>
  - The approved auditor must complete and submit to the ATO an *Auditor/actuary contravention report* (ACR) (an approved form)<sup>15</sup> when he or she has formed an opinion that the SMSF has contravened a provision of the SISA or SISR. In the *Instructions for SMSF auditors and actuaries – Completing the Auditor/actuary contravention report*, the ATO provides criteria which auditors must apply to determine what contraventions of the SISA and the SISR must be reported on the ACR. The Commissioner expects the approved auditor will apply the criteria, thus ensuring that the prescribed contraventions and associated materiality levels are reported as specified. The approved auditor may also have to report other important information on the ACR as required.<sup>16</sup>
  - The approved auditor must advise the Commissioner and the trustee(s) when the financial position of the SMSF may be, or may be about to become, unsatisfactory: see section 130 for more detail.
  - The trustee(s) must be advised in writing, when appropriate, that in the approved auditor's opinion it is likely that a contravention of the SISA or the SISR may have occurred, may be occurring, or may occur: see section 129 and the exceptions in subsections 129(2) or (3A).

<sup>12</sup> See subsection 131(7).

<sup>13</sup> Subsection 35C(1).

<sup>14</sup> See audit report.

<sup>15</sup> See paragraph 129(3)(c).

<sup>16</sup> The *Instructions for SMSF auditors and actuaries – Completing the Auditor/actuary contravention report*, should be followed by the auditor to enable the ACR to be completed accurately and properly.

17. By virtue of their position and occupation approved auditors must perform their duties with integrity, objectivity, due care and diligence. They must act professionally and competently. Approved auditors who are so by reason of membership in; fellowship of; or are an SMSF specialist auditor in; a specified professional association, will be subject to that association's professional and ethical standards or code of conduct – which include the principles of independence. When an approved auditor has breached those standards or codes this will provide information which may be relevant to whether the auditor has performed his or her duties and functions adequately and properly.

***Has an approved auditor carried out his or her duties and functions adequately and properly?***

18. The ATO will need to review one or more audits undertaken by an approved auditor to ascertain whether an approved auditor has failed to carry out his or her duties and functions adequately or properly. In cases where an approved auditor has not prepared any documentation, such as audit working papers, to evidence that an actual audit has been undertaken it would be reasonable to conclude that the person has not carried out the duties or functions of an approved auditor adequately or properly. Documentation of an audit of an SMSF is necessary to evidence that an audit has been properly conducted. This is the case even though the trustee(s) of SMSFs may not have contravened the SISA or the SISRs.
19. It is not necessarily the case that where an approved auditor has failed to identify or report a single contravention during an audit of an SMSF that the auditor has failed to carry out the duties or functions of an approved auditor adequately and properly; the failure to identify or report the contravention may be trivial in the context of the particular audit. The decision will depend on the facts in the particular case.<sup>17</sup>
20. For example:
- In one case, a trustee of an SMSF withdrew a significant amount of money from the fund; the withdrawal did not satisfy a condition of release and the approved auditor did not qualify the audit report or lodge an ACR as required.  
  
It would be reasonable to expect that an auditor performing his or her duties properly would have identified the withdrawal, determined that its withdrawal did not satisfy a condition of release, and report appropriately. The failure to qualify the audit report and lodge the ACR where a reporting test had been met is a material dereliction of duty.
  - In another case, the trustee of an SMSF made a large cash loan to a relative of a member of the SMSF. The making of the loan resulted in a number of contraventions of the SISA. The approved auditor did not qualify the audit report by identifying the material contravention or report the contravention to the Commissioner on an ACR, as required.  
  
A reasonable person would conclude that an audit had not been carried out adequately and properly.

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<sup>17</sup> 'Case' in the context of this practice statement relates to any case involving an approved auditor. That is, a case involving an approved auditor specifically, or a case involving any SMSF/s the approved auditor has audited.

21. By contrast, in the following example a reasonable person would not consider the auditor had failed to carry out his or her duties or functions adequately and properly.

An approved auditor (a sole practitioner) has been auditing several SMSFs annually for the past ten years. The ATO reviewed the auditor's audits in the past and consistently found that he or she performed the audits diligently and thoroughly.

During a recent ATO audit of one of the SMSFs which the auditor had audited, it was discovered that he or she had not identified and reported a contravention in respect of the most recent income year.

However, the auditor was able to provide documentation to satisfy the Commissioner that the audit sampling methodology used was in accordance with the appropriate professional standards but in this case a transaction which was not selected as part of the sampling undertaken would have highlighted the possibility of a contravention.

22. Where a person has failed to perform any of his or her duties and functions adequately and properly, that person would not be fit and proper to be an approved auditor. Senior Member Constance reached such a conclusion in the Administrative Appeals Tribunal decision in *Fearon's Case*. In that case, Senior Member Constance upheld APRA's decision to disqualify Mr Fearon from being an approved auditor for not only failing to carry out the obligations of an approved auditor under the SISA adequately or properly and breaching the standards set by the professional association of which he was a member, but also because Mr Fearon's 'conduct was such as to require action to protect the public and the integrity of the superannuation system'.<sup>18</sup>
23. Senior Member Constance agreed 'with the submission of Counsel for the Authority [APRA] that the financial integrity and the prudential management of superannuation funds is dependent upon auditors and trustees and their professional independence, honesty and integrity in the way in which they carry out their functions'.<sup>19</sup> Senior Member Constance concluded that Mr Fearon was not a fit and proper person to be an approved auditor and he was disqualified to protect the public and the integrity of the superannuation system, rather than as a penalty.
24. In addition to, or instead of, considering how a person has carried out the duties or functions as an auditor, the Commissioner may consider matters pertaining to the character, reputation and conduct of an approved auditor to assess whether the integrity of the superannuation system is at risk if the person were permitted to continue to be an approved auditor. In other words, the Commissioner may consider whether the person is otherwise fit and proper to be an approved auditor.

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<sup>18</sup> [2006] AATA 918 at paragraph 43.

<sup>19</sup> [2006] AATA 918 at paragraph 42.



### When is a person otherwise not fit and proper to be an approved auditor?

25. The expression 'fit and proper person' is not defined in the SISA but the expression has been considered by the courts on a number of occasions. In the High Court decision in *Australian Broadcasting Tribunal v. Bond* (*Australian Broadcasting*), Toohey and Gaudron JJ observed that:

The expression 'fit and proper person', standing alone, carries no precise meaning. It takes its meaning from its context, from the activities in which the person is or will be engaged and the ends to be served by those activities. The concept of 'fit and proper' cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities. However, depending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur. The list is not exhaustive but it does indicate that, in certain contexts, character (because it provides indication of likely future conduct) or reputation (because it provides indication of public perception as to likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question.<sup>20</sup>

26. Their Honours then went on to say that:

Whether the fitness and propriety of a licensee to hold a commercial licence are sufficiently ascertained by reference to its character or reputation, or must be ascertained by reference to the conduct of its affairs and activities, is a question the answer to which must be found by implication from the provisions of the Broadcasting Act dealing with the grant, renewal and revocation or suspension of a commercial licence and from the activities to be undertaken pursuant to the licence.<sup>21</sup>

27. The concept of a 'fit and proper person' was also considered by the High Court in *Hughes and Vale Pty Ltd v. The State of New South Wales (No. 2)*. Dixon CJ and McTiernan and Webb JJ observed that:

The expression 'fit and proper person' is of course familiar enough as traditional words when used with reference to offices and perhaps vocations. But their very purpose is to give the widest scope for judgment and indeed for rejection. 'Fit' (or 'idoneus') with respect to an office is said to involve three things, honesty knowledge and ability: 'honesty to execute it truly, without malice affection or partiality; knowledge to know what he ought duly to do; and ability as well in estate as in body, that he may intend and execute his office, when need is, diligently, and not for impotency or poverty neglect it' – Coke.<sup>22</sup>

28. Having regard to the provisions of the SISA, the Commissioner considers that whether a person is a 'fit and proper person' for the purposes of section 131 (and section 131A) needs to be ascertained both by way of assessing the person's character or reputation and by reference to their conduct or activities. All these factors go to whether a person can be relied upon to properly perform his or her function as an approved auditor.

<sup>20</sup> *Australian Broadcasting Tribunal v. Bond* (1990) 170 CLR 321 per Toohey and Gaudron JJ at 380.

<sup>21</sup> (1990) 170 CLR 321 (1990) 170 CLR 321 at 380.

<sup>22</sup> *Hughes and Vale Pty Ltd v. The State of New South Wales (No 2)* (1955) 93 CLR 127 at 156-7.

29. In two of the following examples a person's conduct or activities were taken into account when consideration was given to whether the person was fit and proper to be a tax agent. The factors taken into account in those examples would also be relevant to whether a person is a fit and proper person to be an approved auditor.
- Professional competency

*In Re Su v. Tax Agent's Board of South Australia*<sup>23</sup> the Board cancelled Mr Su's registration as a tax agent, primarily for failing to lodge his personal income tax returns and failing to pay group tax instalments [PAYG withholding] on time. Davies J., considered this reflected poorly on Mr Su's competence.

Davies J. emphasised that the notion of competence plays a crucial role in the 'fit and proper' test with regard to a tax agent. His Honour said that a person such as a tax agent should be 'a person of such competence and integrity that others may entrust their taxation affairs to his care. He should be a person of such reputation and ability that officers of the taxation department may proceed upon the footing that taxation returns lodged by the agent have been prepared by him honestly and competently.'

In the context of trustee(s) of SMSFs relying on the professional competence and behaviour of an approved auditor, the same principles apply. Where auditors fail to comply with their professional competency and ethical obligations, including failing to satisfactorily deal with threats to auditor independence, they can be seen to be not fit and proper to be approved auditors for SISA purposes.
  - Honesty

*In Stasos v. Tax Agents' Board of New South Wales*,<sup>24</sup> Mr Stasos's registration as a tax agent was cancelled as he had evaded tax; held bank accounts in false names; and deductions for many clients were not claimed in their returns.

Hill J. considered that the agent was not a fit and proper person to be registered. His Honour was of the view that to be a fit and proper person in relation to an office or vocation, a person must have honesty, knowledge, ability, diligence and professionalism which includes putting the interests of one's clients before one's self-interest.
  - Failure to act appropriately

*In Fearon's Case*, Senior Member Constance considered the applicant's 'conduct was such as to require action to protect the public and the integrity of the superannuation system'.<sup>25</sup> One of the considerations of Senior Member Constance in making that decision was that Mr Fearon had 'repeatedly failed to comply with requests of and to heed the warnings of APRA'.<sup>26</sup>
30. Where a person has been found to be dishonest in a role outside that of an approved auditor for SISA purposes, this would be a relevant consideration in any decision regarding the fitness and propriety of the person to be an approved auditor of SMSFs. For instance if a person was found to be a promoter for the illegal early release of superannuation monies, the

<sup>23</sup> (1982) 82 ATC 4284 at 4286.

<sup>24</sup> *Stasos v. Tax Agents' Board of New South Wales* 90 ATC 4950.

<sup>25</sup> [2006] AATA 918 at paragraph 43.

<sup>26</sup> [2006] AATA 918 at paragraph 43.

Commissioner would consider that even if that person had not audited any SMSFs, the risk to the superannuation system is such that he or she should be disqualified from being an approved auditor.

***Is the Commissioner satisfied that the person concerned is likely to carry out and perform adequately and properly the duties of an auditor; and is otherwise a fit and proper person to be an approved auditor?***

31. There may be cases where although an approved auditor has failed to adequately and properly perform their functions and duties, the Commissioner may nevertheless be satisfied that he or she will carry out their functions and duties adequately and properly in the future, and is otherwise a fit and proper person to be an approved auditor. In such circumstances, the Commissioner ordinarily would not disqualify the person.

32. For example:

- During an ATO audit of an approved auditor (an audit practice) the ATO discovers that the approved auditor had failed to identify and report several contraventions of the SISA in the audits conducted over a 12 month period. Accordingly the approved auditor has not carried out the duties and functions of an approved auditor adequately and properly.

The ATO provided the approved auditor with the opportunity to show cause as to why he or she should not be disqualified. In response, the approved auditor showed convincingly that the contraventions were not detected because a junior staff member failed to follow certain audit procedures.

To prevent this happening again the approved auditor had introduced new sign-off procedures in addition to those already in place. The new procedures ensured that contraventions would be detected in future audits. The approved auditor also provided the ATO with a copy of the firm's audit manual and a list of staff showing their professional training and professional memberships. This information supported the auditor's submission that he or she would perform his duties adequately and properly in the future.

On the basis that the Commissioner was satisfied that the person concerned would carry out and perform adequately and properly the duties and functions of an auditor in the future the person would not be disqualified.

- By contrast, if the approved auditor did not respond to the opportunity to show cause as to why he or she should not be disqualified, and/or he or she was not prepared to provide any evidence such as that mentioned, then the Commissioner would be unable to satisfy himself that the person concerned is likely to carry out or perform adequately and properly the duties of an auditor in future audits and the person would be disqualified as an approved auditor.

**The Commissioner referring matters to an approved auditor's professional association**

33. Section 131A provides that if the Commissioner forms an opinion that an approved auditor has failed to perform his or her duties or functions adequately and properly or the person is otherwise not a fit and proper person

to be an approved auditor, the Commissioner may refer details of the matter to the approved auditor's professional association.

34. A matter of opinion is to be distinguished from a matter of fact: see *Federal Commissioner of Taxation v. Westgarth* (1950) 81 CLR 396; 24 ALJ 129; [1950] ALR 439 per Latham CJ at p 407. Also see *Bisset v. Wilkinson* [1927] AC 177. An opinion is a personal view.
35. It is not possible to describe exhaustively when the Commissioner will form such an opinion. However, the Commissioner may do so if, for example:
- The Commissioner reviewed the working papers for several SMSF audits undertaken by the auditor and in doing so he discovered that some aspects of the audits were poorly documented. On the basis that the working papers were inadequate, the Commissioner could form an opinion that the approved auditor has failed to perform his duties and functions adequately and properly.
- In such circumstances, the Commissioner has not determined as a matter of fact that the approved auditor has failed to perform a duty or function adequately and properly, so the Commissioner cannot disqualify the auditor, but he can refer the auditor to his or her professional association.
36. In cases where an approved auditor has not complied with the principles of independence, that is, independence of mind as well as independence in appearance, the Commissioner might refer these matters to the auditor's professional association.
37. For instance, this may occur when an approved auditor:
- carries out an audit of his or her own SMSF, or
  - has audited the SMSF of a friend or relative, and:
    - the trustee(s) of the SMSF has contravened the SISA and the approved auditor has advised the trustee in the audit report accordingly, but not lodged an ACR when it was appropriate to do so, or
    - the trustee(s) of the SMSF has not contravened the SISA but the approved auditor provides limited or no evidence of having carried out a proper audit, or
  - the approved auditor also carries out the accounting functions for that fund.
38. Referral of an approved auditor to his or her professional association does not preclude the Commissioner from disqualifying the person concerned if he considers it appropriate to do so. In cases where the Commissioner disqualifies a person from being an approved auditor, he will always provide details of the disqualification order to the approved auditor's professional association.

## **ADDITIONAL INFORMATION**

### **Review rights**

39. A person affected by the Commissioner's decision to issue a disqualification order may, if dissatisfied with the decision, request the Commissioner to reconsider the decision. A request to reconsider must be made in writing, setting out the reasons for making the request, and must be made within 21 days after the person receives notice of the decision, or within such further time the Commissioner allows.<sup>27</sup>

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<sup>27</sup> Subsection 10(1) (definition of 'reviewable decision') and section 344.

### **Referral of matters to a professional association – section 131A**

40. The decision to refer details of matters to a professional association under section 131A is not a 'reviewable decision' as defined in subsection 10(1) and therefore is not subject to the formal review procedures in section 344. The auditor may be entitled to a review in accordance with Corporate Management Practice Statement CMPS 2007/01 – Respecting clients' rights of review.

### Amendment history

Date of amendment	Part	Comment
28 October 2011	Paragraph 11	Paragraph 11, the word "section" has been inserted before "131A".
	Footnotes 3 & 27	Legislative references in footnotes 3 and 27 have been corrected.
19 July 2010	Footnotes 5, 6 and 22	Minor typographical errors corrected.
	References	Subject references updated and minor typographical errors corrected.

Subject references	<p>approved auditor</p> <p>auditors – disqualification</p> <p>grounds for revocation</p> <p>regulator may refer matters to a professional association</p> <p>self managed superannuation fund</p>
Legislative references	<p>SISA 1993</p> <p>SISA 1993 3</p> <p>SISA 1993 10(1)</p> <p>SISA 1993 35C(1)</p> <p>SISA 1993 129</p> <p>SISA 1993 129(2)</p> <p>SISA 1993 129(3)(c)</p> <p>SISA 1993 129(3A)</p> <p>SISA 1993 130</p> <p>SISA 1993 131</p> <p>SISA 1993 131(7)</p> <p>SISA 1993 131A</p> <p>SISA 1993 131A(1)</p> <p>SISA 1993 131A(2)</p> <p>SISA 1993 344</p> <p>SISR 1994</p> <p>SISR 1994 1.04(2)</p> <p>SISR 1994 1.04(2)(a)(i)</p> <p>SISR 1994 1.04(2)(a)(ii)</p> <p>SISR 1994 1.04(2)(a)(iii)</p> <p>SISR 1994 Sch 1AAA</p> <p><i>Financial Sector (Collection of Data) Act 2001</i></p>
Related practice statements	<p>PS CM 2007/01: Respecting clients' rights of review</p>
Case references	<p>Australian Broadcasting Tribunal v. Bond (1990) 170 CLR 321; (1990) 94 ALR 11; [1990] HCA 33</p> <p>Bisset v. Wilkinson [1927] AC 177</p> <p>Fearon and Australian Prudential Regulation Authority [2006] AATA 918; 64 ATR 1161</p> <p>Federal Commissioner of Taxation v. Westgarth (1950) 81 CLR 396; (1949) 24 ALJ 129; [1950] ALR 439; [1950] HCA 59</p> <p>Hughes and Vale Pty Ltd v. The State of New South Wales (No 2) (1955) 93 CLR 127</p> <p>Re Su v. Tax Agents' Board of South Australia (1982) 82 ATC 4284; (1982) 13 ATR 192; (1982) 61 FLR 1</p> <p>Stasos v. Tax Agents' Board of New South Wales 90 ATC 4950 (1990) 21 ATR 974</p>
Other references	<p>Explanatory Memorandum, Superannuation Industry (Supervision) Legislation Amendment Bill 1995</p> <p><i>Auditor/actuary contravention report &amp; Instructions for SMSF auditors and actuaries – Completing the Auditor/actuary contravention report</i>, (NAT 11299) available from the ATO's website <a href="http://www.ato.gov.au">www.ato.gov.au</a>.</p>

	<i>Self-managed superannuation fund independent auditor's report</i> , (NAT 11466) available from the ATO's website <a href="http://www.ato.gov.au">www.ato.gov.au</a> .
File references	08/17328 1-1OI3RW7
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Other Business Lines consulted	TechNet representatives Charter Review team Law and Practice