



# ***PS LA 2018/1 - Self-managed superannuation funds - referral of approved SMSF auditors to ASIC***

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This Practice Statement provides guidance to ATO staff when considering the Commissioner's power to refer matters concerning approved self-managed superannuation fund (SMSF) auditors to the Australian Securities and Investments Commission (ASIC).

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

### 1. What this Practice Statement is about

This Practice Statement sets out what you need to consider in determining whether matters concerning approved SMSF auditors should be referred to ASIC.<sup>1</sup>

All legislative references in this Practice Statement are to the *Superannuation Industry (Supervision) Act 1993* (SISA), unless otherwise indicated.

### 2. Background

There is a registration regime for approved SMSF auditors, effective from 31 January 2013.<sup>2</sup>

ASIC is the registration body for approved SMSF auditors. The registration of SMSF auditors is intended to raise the standard of SMSF auditor competency and ensure there is a set of minimum standards of competency that apply across the entire sector.<sup>3</sup>

The Commissioner is provided with powers to monitor auditors' compliance with relevant standards and refer any non-compliant auditors to ASIC for enforcement action consideration.<sup>4</sup>

ASIC is responsible for taking enforcement action against auditors who have not met their ongoing obligations.

Any action ASIC may take when the Commissioner refers details of a matter to it is not pertinent to the considerations in this Practice Statement.

### 3. When matters concerning an approved SMSF auditor can be referred to ASIC

You may refer the details of the matter to ASIC if you are of the opinion that:

- an approved SMSF auditor<sup>5</sup> is not a fit and proper person to be an approved SMSF auditor, or
- in relation to the conduct of an audit of an SMSF, an auditor has contravened the SISA or the *Superannuation Industry (Supervision) Regulations 1994* (SISR) or has failed to carry out or perform adequately and properly
  - the duties of an auditor under the SISA or the SISR
  - the duties required by a law of the Commonwealth, a state or a territory to be carried out or performed by an auditor, or
  - any function an auditor performs in relation to the SISA, the SISR or the *Financial Sector (Collection of Data) Act 2001*.

The Commissioner may exercise the power in relation to an approved SMSF auditor whether or not an order disqualifying or suspending the approved SMSF auditor has been made.<sup>6</sup>

**Note:** A person is guilty of an offence if the person holds themselves out as an approved SMSF auditor and the person is not an approved SMSF auditor.<sup>7</sup>

<sup>1</sup> See section 128P of the *Superannuation Industry (Supervision) Act 1993*.

<sup>2</sup> *Superannuation Laws Amendment (Capital Gains Tax Relief and Other Efficiency Measures) Act 2012*.

<sup>3</sup> See the Explanatory Memorandum to the *Superannuation Laws Amendment (Capital Gains Tax Relief and Other Efficiency Measures) Bill 2012*.

<sup>4</sup> See the General outline and financial impact section of the Explanatory Memorandum to the *Superannuation Laws*

*Amendment (Capital Gains Tax Relief and Other Efficiency Measures) Bill 2012*.

<sup>5</sup> See subsection 10(1) for the definition of 'approved SMSF auditor', which came into effect on 31 January 2013. In this Practice Statement, reference to an auditor may be taken to be a reference to an approved SMSF auditor, unless otherwise indicated.

<sup>6</sup> See subsection 128P(2).

<sup>7</sup> See subsection 131B(2).

#### 4. Considerations you will take into account in forming the opinion that an approved SMSF auditor is not a fit and proper person to be an approved SMSF auditor

The expression 'fit and proper person' is not defined in the SISA. However the expression has been considered by the courts on a number of occasions. The following were considered when looking at whether a person is fit and proper:

- their character or reputation
- the qualities of honesty, knowledge (or professional competency) and ability (that is, the ability to act appropriately)
- the failure to perform any of their duties and functions adequately and properly, including auditing funds they were a member of or failing to obtain sufficient evidence or having inadequate documentation in support of an audit.<sup>8</sup>

These are not the only considerations that you need to take into account; an evaluation of all the relevant particulars of each case will need to be made.

Whether an approved SMSF auditor in another role, such as a trustee of an SMSF, has complied with their SISA obligations would also be a relevant consideration as to whether they were a fit and proper person to be an approved SMSF auditor.

#### 5. ASIC's considerations when determining whether a person is a fit and proper person to be an approved SMSF auditor

Paragraph 243.38 of ASIC's [Regulatory Guide 243 Registration of self-managed superannuation fund auditors](#) provides the following considerations for ASIC to determine whether a person is a fit and proper person to be an approved SMSF auditor.

If any of these matters come to your attention in the course of actioning a relevant case, these too should be considered and will assist ASIC to make its determination. That is, whether the person:

- has not carried out or performed adequately and properly the duties and functions of an approved SMSF auditor
- has been or is currently subject to disciplinary action including, but not limited to, suspension and exclusion from practice by a regulatory body or a professional association
- has been or is currently disqualified or banned under provisions of an Act or legislative

<sup>8</sup> See the Appendix to this Practice Statement for more information on court cases that have considered 'fit and proper person'.

instrument under Commonwealth, state or territory law

- has been or is currently the subject of administrative, civil or enforcement action, which was determined adversely (including consenting to an order or direction, or given an undertaking to not engage in unlawful or improper conduct) in any country
- has been convicted or has legal proceedings pending for any criminal offences, any acts of dishonesty (such as theft or fraud), any breach of trust or fiduciary duty, any professional misconduct or other misconduct
- has served a term of imprisonment
- has been obstructive, misleading or untruthful in dealing with regulatory bodies, or a court
- has failed to deal with conflicts of interest appropriately, or
- has or has had the status of undischarged bankrupt or there is any such action pending.

#### 6. Considerations you will take into account in forming the opinion that an approved SMSF auditor, in conducting an audit of an SMSF, has contravened the SISA or the SISR or has failed to perform adequately and properly any of their required duties and functions

Generally, you would only form an opinion that an approved SMSF auditor has failed to properly discharge their duties or functions after reviewing one or more audits of SMSFs conducted by the auditor.

It is not necessarily the case that where an approved SMSF auditor has failed to identify or report a single contravention during an audit of an SMSF that the Commissioner would consider that they have failed to properly discharge the duties or functions required in the conduct of an audit of an SMSF. The failure to identify or report the contravention may be trivial in the context of the particular audit, so the decision will depend on the facts in the particular case.<sup>9</sup>

For each audit conducted, you will consider the auditor's compliance with the SISA and the SISR, including the obligations outlined in this Practice Statement.

<sup>9</sup> In the context of this Practice Statement, 'case' relates to any case involving an approved SMSF auditor specifically, or a case involving an audit of an SMSF.

## Professional obligations

An approved SMSF auditor must comply with their professional obligations, which include the requirement to:

- complete the continuing professional development requirements prescribed by regulation 9A.04 of the SISR
- hold a current policy of professional indemnity insurance, of a level prescribed by the regulations, for claims that may be made against the auditor in connection with audits of SMSFs<sup>10</sup>
- comply with
  - any competency standards that the Regulator [ASIC] determines<sup>11</sup>
  - any auditing standards, made by the Auditing and Assurance Standards Board (AUASB), that are applicable to the duties of an approved SMSF auditor under the *Corporations Act 2001*
  - any auditing and assurance standards, formulated by the AUASB under section 227B of the *Australian Securities and Investments Commission Act 2001*, that are applicable to those duties<sup>12</sup>, and
  - the auditor independence requirements.<sup>13</sup>

## Reporting obligations

An approved SMSF auditor must be appointed by the trustees to give the trustees an audit report in the approved form (the [Self-managed superannuation fund independent auditor's report](#)).<sup>14</sup>

If an approved SMSF auditor forms an opinion that it is likely that a contravention of the SISA or SISR may have occurred, may be occurring or may occur, the auditor must immediately tell:

- the trustee about the matter in writing, and
- the Commissioner about the matter in the [Auditor/actuary contravention report](#) (ACR) (the approved form) if the matter is specified in that approved form.<sup>15</sup>

We provide criteria that auditors must apply to determine what contraventions of the SISA and the

SISR must be reported on the ACR.<sup>16</sup> The auditor may also have to report other important information on the ACR as required.

## Advising the Commissioner of the financial position of SMSF

The approved SMSF auditor must advise the Commissioner and the trustee when they form an opinion that the financial position of the SMSF may be, or may be about to become, unsatisfactory.

## Failure to comply with requests for information

When monitoring an approved SMSF auditor, you may by written notice require the auditor to provide access to information relating to an SMSF (for example, books).

If the auditor fails to comply with such a notice, then the auditor may, if they have intentionally or recklessly refused or failed to comply with such a requirement, be prosecuted and convicted of a criminal offence. This non-compliance would be a relevant consideration in any decision to refer details of the matter to ASIC.

## 7. Examples

The following are examples of when you may consider that an approved SMSF auditor has failed to adequately and properly discharge the duties or functions required in the conduct of an audit of an SMSF.

### Example 1 – audit documentation not adequate to evidence that an audit has been undertaken

*Where the 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 believe that they have not properly discharged the duties or functions required in relation to the conduct of an audit of an SMSF. Documentation of an SMSF audit is necessary to determine that the audit has been properly conducted. This is the case even though the trustee may not have contravened the SISA or the SISR.*

<sup>10</sup> See regulation 9A.05 of the SISR.

<sup>11</sup> See ASIC Class Order [\[CO 12/1687\]](#) *Competency standards for approved SMSF auditors* (in force from 17 December 2012 to 20 April 2023).

<sup>12</sup> AUASB – Standards on assurance engagements (SAEs).

<sup>13</sup> For assistance, refer to the Accounting Professional and Ethical Standards (APES) Board Compiled [APES 110](#)

*Code of Ethics for Professional Accountants (including Independence Standards).*

<sup>14</sup> See subsection 35C(5).

<sup>15</sup> See the exception in subsection 129(2).

<sup>16</sup> See Instructions for SMSF auditors and actuaries – [Completing the auditor contravention report](#).

### **Example 2 – approved SMSF auditor is trustee of the fund they are auditing**

An auditor may have audit working papers adequate to evidence that an actual audit of an SMSF has been undertaken, however, the auditor is a trustee of that fund. This is a breach of the auditor independence requirements prescribed by regulation 9A.06 of the SISR<sup>17</sup>, which a reasonable person would consider a failure by the auditor to properly discharge the duties or functions required of an approved SMSF auditor.

### **Example 3 – non-reporting to the trustee or the Commissioner of material contravention**

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 auditor did not qualify the audit report or lodge an ACR as required. It would be reasonable to expect that an auditor performing their duties properly would have identified the withdrawal, determined it 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.

### **Example 4 – non-reporting to the trustee or the Commissioner of material contravention**

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 SMSF auditor did not qualify the audit report identifying the material contravention nor was the contravention reported to the Commissioner on an ACR, as required. A reasonable person would form the opinion that the audit had not been carried out adequately and properly.

### **Example 5 – non-reporting of material contravention to the Commissioner**

It was identified during an audit of an SMSF that the approved SMSF auditor had formed an opinion that a contravention of the SISA had occurred in relation to the SMSF.<sup>18</sup> The auditor had told the trustee of the SMSF about the matter in the annual audit report, however, the Commissioner was not told about the matter in an ACR as required. The auditor is guilty of an offence and may be prosecuted.<sup>19</sup>

### **Example 6 – approved SMSF auditor has carried out duties and functions adequately and properly**

An approved SMSF auditor (a sole practitioner) has been auditing several SMSFs annually for the past 10 years. We reviewed the auditor's audits in the past and consistently found that they had performed the audits diligently and thoroughly.

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

As the SMSF had a high volume of investment transactions, the auditor had used an audit sampling method that did not include the transaction; consequently, the contravention was not identified.

The auditor was able to provide documentation to satisfy the tax officer conducting the case that the audit sampling method used was in accordance with the appropriate professional standards but, in this case, as the transaction was not significant, it was not included in the sample and the contravention was not identified by the auditor.

**Note:** If the contravention involved a significant transaction, it would be expected that the auditor's sampling method should have been such that the event would have been selected for check and the contravention identified. In this scenario, you would not consider that the audit had been conducted satisfactorily.

## **8. Review of the Commissioner's decision to refer the auditor to ASIC**

Referral of details of matters to ASIC is not a reviewable decision and therefore is not subject to the formal review procedures. A decision to refer details of matters to ASIC should be fair and reasonable and be made in accordance with the principles contained in the [Good decision-making model](#) (link available internally only). Therefore, applying the principles of natural justice, before you refer a person to ASIC, the auditor will be given an opportunity to provide reasons as to why details of the matter should not be referred.

## **9. More information**

For more information, see:

- [Self-managed superannuation fund independent auditor's report](#)
- instructions for SMSF auditors and actuaries – [Completing the auditor contravention report](#).

<sup>17</sup> See Compiled APES 110 Code of Ethics for Professional Accountants (including Independence Standards).

<sup>18</sup> See subsection 129(1).

<sup>19</sup> See subsection 129(5).

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## Appendix

### *Sample of court cases that have considered whether someone is a 'fit and proper person'*<sup>20</sup>

#### *Australian Broadcasting Tribunal v Bond* [1990] HCA 33

In the High Court decision, it was observed by Toohey and Gaudron JJ (170 CLR 321 at [380]) that:

[t]he 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.

Consideration of the characteristics and qualities taken into account in this court case, such as a person's:

- character (because it provides indication of likely future conduct), or
- reputation (because it provides indication of public perception as to likely future conduct)

are relevant in the context of forming an opinion about the fitness and propriety of an approved SMSF auditor.

#### *Hughes & Vale Pty Ltd v New South Wales* [No 2] [1955] HCA 28

The concept of a 'fit and proper person' was considered by the High Court in this case. Dixon CJ and McTiernan and Webb JJ observed that the purpose of the fit and proper person test was 'to give the widest scope for judgment and indeed for rejection'. They also stated at (93 CLR 127 at [156–7]) that 'Fit' with respect to an office is said to involve 3 things:

- honesty to execute the office truly, without malice affection or partiality
- knowledge to know what needs to be done in the office, and
- ability to act appropriately (intends to and actually executes office diligently; not neglect duties).

#### *Confidential and Commissioner of Taxation* [2011] AATA 403

The qualities of honesty, knowledge (or professional competency) and ability (that is, the ability to act

appropriately) were also considered in this case where Senior Member (SM) Walsh reviewed a decision by the Commissioner to refuse to revoke the disqualification order of the approved auditor of various SMSFs.

SM Walsh affirmed the decision under review and observed that approved SMSF auditors should possess these qualities to be a 'fit and proper' person, similar to those qualities considered relevant for tax agents in previous cases.

Two of the cases SM Walsh referred to are *Stasos, M. v Tax Agents Board* [1990] FCA 545 and *Re Stephen Tien-Ping Su and Tax Agents' Board, South Australia* [1982] AATA 127.

#### *Samuel and Australian Securities and Investments Commission* [2016] AATA 696

The Administrative Appeals Tribunal (AAT) upheld a decision by ASIC to disqualify an SMSF auditor who audited funds in which he was a member and who failed to obtain sufficient evidence and had inadequate documentation in support of his SMSF audits.

The AAT found the auditor failed to 'comply with two fundamental aspects of auditing: independence and diligence' and 'also failed to demonstrate insight into his critical deficiencies' with conduct falling 'far below the standards expected and required of an approved SMSF auditor'.

The AAT was satisfied that the auditor failed to carry out or perform adequately and properly the duties of an auditor and, furthermore or alternatively, the auditor was 'not a fit and proper person to be an approved SMSF auditor'.

#### *Fearon and Australian Prudential Regulation Authority* [2006] AATA 918

SM Constance upheld the Australian Prudential Regulation Authority'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, but breaching the standards set by the professional association of which he was a member. Also, at [43], it was stated that '...Mr Fearon's conduct was such as to require action to protect the public and the integrity of the superannuation system'.

<sup>20</sup> See also *Henley and Australian Securities and Investments Commission* [2024] AATA 82.

## Amendment history

20 June 2024

Part	Comment
Section 5	Replaced reference to Explanatory Memorandum with ASIC Regulatory Guide 243 and included additional criterion.
Section 6	Updated to indicate that ASIC Class Order CO 12/1687 is no longer in force.
Appendix	Addition of footnote to <i>Henley and Australian Securities and Investments Commission</i> [2024] AATA 82.
Sections 3, 4, 7 and Appendix	Removal of minor extraneous or incorrect language.
Throughout	Updated in line with current ATO style, citation and accessibility requirements.

## References

<b>Legislative references</b>	SISA 1993 10(1) SISA 1993 35C(5) SISA 1993 128P SISA 1993 128P(2) SISA 1993 129(1) SISA 1993 129(2) SISA 1993 129(5) SISA 1993 131B(2) SISR 1994 9A.04 SISR 1994 9A.05 SISR 1994 9A.06 Australian Securities and Investments Commission Act 2001 227B Corporations Act 2001 Financial Sector (Collection of Data) Act 2001 Superannuation Laws Amendment (Capital Gains Tax Relief and Other Efficiency Measures) Act 2012
<b>Case references</b>	Australian Broadcasting Tribunal v Bond [1990] HCA 33; 170 CLR 321; 94 ALR 11 Confidential and Commissioner of Taxation [2011] AATA 403; 84 ATR 282; (2011) 122 ALD 592 Fearon and Australian Prudential Regulation Authority [2006] AATA 918; 64 ATR 1161 Henley and Australian Securities and Investments Commission [2024] AATA 82 Hughes & Vale Pty Ltd v New South Wales [No 2] [1955] HCA 28; 93 CLR 127; [1955] ALR 525 Re Stephen Tien-Ping Su and Tax Agents' Board, South Australia [1982] AATA 127; 82 ATC 4284 Samuel and Australian Securities and Investments Commission [2016] AATA 696 Stasos, M. v Tax Agents Board [1990] FCA 545; 90 ATC 4950; 21 ATR 974

<b>Other references</b>	<p>Accounting Professional and Ethical Standards Board (2023) <i>Compiled APES 110 Code of Ethics for Professional Accountants (including Independence Standards)</i>, <a href="https://apesb.org.au/standards-guidance/apes-110-code-of-ethics/">https://apesb.org.au/standards-guidance/apes-110-code-of-ethics/</a></p> <p>ASIC Class Order [CO 12/1687] <i>Competency standards for approved SMSF auditors</i> In force 17 December 2012–20 April 2023</p> <p>ASIC (2019) <i>Regulatory Guide 243 Registration of self-managed superannuation fund auditors</i>, <a href="https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/">https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/</a></p> <p>Explanatory Memorandum to the Superannuation Laws Amendment (Capital Gains Tax Relief and Other Efficiency Measures) Bill 2012</p>
<b>File references</b>	File 1-G14S8S2

#### ATO references

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