


PS LA 2020/3 - Self-managed superannuation funds - administrative penalties imposed under subsection 166(1) of the Superannuation Industry (Supervision) Act 1993

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Self-managed superannuation funds – administrative penalties imposed under subsection 166(1) of the *Superannuation Industry (Supervision) Act 1993*

This Law Administration Practice Statement provides guidelines for the administration of the penalties imposed under subsection 166(1) of the *Superannuation Industry (Supervision) Act 1993* for contraventions in relation to self-managed superannuation funds.

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

1. What this Practice Statement is about

The purpose of this Practice Statement is to provide guidance on:

- when an entity becomes liable to one or more administrative penalties under the *Superannuation Industry (Supervision) Act 1993* (SISA)¹
- which entities are liable to pay the administrative penalty
- the Commissioner's remission considerations, and
- objection, review and appeal rights relating to the remission decision.

The SISA provides rules that the trustees of self-managed superannuation funds (SMSFs) must comply with.

Division 3 of Part 20 sets out the general rules for imposition of the administrative penalties.

The imposition of administrative penalties

If a trustee contravenes a provision of the SISA listed in section 166, an administrative penalty² is imposed by the law. Administrative penalties apply to contraventions which occur on or after 1 July 2014. Contraventions which occur prior to 1 July 2014, may constitute an offence which has criminal or civil consequences.

A contravention occurs at a point in time. There is no one continuing contravention which carries over successive financial years. There may, however, be circumstances when a contravention remains

unrectified at the end of a financial year. For some contraventions, this causes an additional, separate contravention at the start of the following financial year. You must identify the contraventions that occur on or after 1 July 2014.

The SISA sets out who is liable to the penalty, noting that the liability cannot be reimbursed from the SMSF. The penalty is imposed on the following persons:

- a trustee of an SMSF (including an individual trustee or a corporate trustee), or
- a director of a body corporate that is a trustee of an SMSF.³

The Commissioner has the discretion to remit an administrative penalty imposed under section 166.⁴

You may decide that full remission, partial remission or no remission of the penalty is appropriate based on the individual circumstances of the case.

2. Compliance treatments – general principles

The penalties, in conjunction with other compliance treatments under the SISA, give us effective, flexible and cost-effective mechanisms for applying appropriate sanctions.

You are not precluded from applying one or more compliance treatments within the one case. The appropriate compliance treatment depends on the circumstances of each case.

Any one or more of the following compliance treatments may also be appropriate:

- issuing a direction to educate⁵

¹ All references in this Practice Statement are to the SISA unless otherwise indicated.

² A list of sections and corresponding penalty units is set out in section 166. The value of a penalty unit is contained in section 4AA of the *Crimes Act 1914*, and is indexed regularly. The value of a penalty unit is \$222 from 1 July 2020 and will automatically be indexed every three years. A table containing relevant historic penalty values can be found by searching for 'penalty unit' on ato.gov.au

³ Paragraph 103(2)(a), subsection 104A(2) and subsection 160(4) are currently the only three relevant provisions subject to an administrative penalty under section 166 having application to a director of a body corporate that is the trustee of an SMSF.

⁴ Section 298-20 of Schedule 1 to the *Taxation Administration Act 1953* (TAA).

⁵ See section 160.

- accepting an enforceable undertaking⁶
- issuing a direction to rectify⁷
- disqualifying an individual and prohibiting them from acting as a trustee of a super fund or as a responsible officer of a corporate trustee of a super fund⁸
- issuing a notice of non-compliance to the fund⁹
- seeking civil and/or criminal penalties through the courts.¹⁰

The following are relevant when administering these penalties (including in any review process undertaken):

- The principles underpinning the compliance model require us to be fair to those trustees wanting to do the right thing, and being firm but fair with those choosing to disengage and avoid their taxation obligations.
- The *Taxpayers' Charter* requires us to treat a trustee as being honest. We accept that what they have told us is the truth and the information they have provided is complete and accurate unless we have reason to think otherwise.
- Decisions must be supported by the available facts and evidence. Conclusions about the trustee's actions or behaviour should only be made where they are supported by facts, or can be reasonably inferred from those facts.
- The trustee will be invited to explain their actions before the remission decision is finalised and they may exercise their right to object to our penalty decision.
- We need to be mindful of our commitment to avoid or resolve disputes as early as possible in accordance with the *ATO Disputes policy* and annual *Dispute management plan*.¹¹

3. Administering the penalty

There are four basic steps in administering the penalty imposed under section 166:

- step 1 – determine if a penalty is imposed by law
- step 2 – determine who is liable to the penalty
- step 3 – determine if remission is appropriate
- step 4 – notify each trustee and/or each director of the corporate trustee of the liability to pay the penalty.

⁶ See section 262A.

⁷ See section 159.

⁸ See section 126A.

⁹ See subsection 40(1).

¹⁰ See Part 21.

4. Our approach to administering the penalty

Step 1 – determine if a penalty has been imposed by law

Once a contravention of a relevant provision listed in section 166 occurs, the law imposes a penalty. Section 166 sets out the amount of the penalty imposed each time a listed provision is contravened.

The penalty is imposed on the person that contravened the SISA. This may be either the trustees of the SMSF or the directors of the corporate trustee at the time of the contravention.

Step 2 – determine who is liable to the penalty

The penalty cannot be paid using the SMSF's resources.

You need to work out who is liable to pay the penalty. This will be determined by the type of trustee the fund has and who the penalty was imposed on.

Corporate trustee

If a penalty is imposed on a trustee that is a body corporate, then the directors of that body corporate are jointly and severally liable to pay the penalty.¹²

This means that any amount paid by one of the directors will reduce the amount that the other directors need to pay by the same extent. The penalty is paid when one or more of the directors make payments totalling the full amount.

Individual as trustee

If the SMSF has individual trustees, separate penalties are imposed on each individual trustee. Each trustee is personally liable to pay any penalty imposed.

If an individual trustee joins an SMSF after the relevant contraventions have occurred, that trustee is not responsible for the contravention and the administrative penalty will not be imposed.

Individual as director

A penalty may be imposed on an individual as a director for contraventions of paragraph 103(2)(a), subsection 104A(2) and subsection 160(4).

¹¹ For further information on the ATO Disputes policy and Dispute management plan, refer to Law Administration Practice Statement PS LA 2013/3 *Alternative Dispute Resolution (ADR) in ATO disputes*.

¹² Section 169.

If the penalty has been imposed on an individual director, that director is personally liable to pay the penalty.

Step 3 – determine if remission is appropriate

You must make a remission decision whenever penalties are imposed, and the remission decision must be made separately for each trustee on whom a penalty is imposed.

You have discretion to remit all, part or none of a penalty imposed under section 166. This discretion is 'unfettered' meaning that there is no legal restriction on when you can and cannot remit. Remission provides the administrative flexibility to ensure that the penalty imposed is appropriate for the observed behaviour.

You need to consider the following factors when making your remission decision.

These are not exhaustive and are not intended to prescribe the only relevant factors.

They are intended to encourage an analytical approach to each case and the application of sound judgment in making a remission decision.

The purpose of the penalty provision

You must have regard to the purpose of the provision. The main objectives of the provision are to:

- encourage greater levels of voluntary compliance by ensuring that there are consequences for non-compliance appropriate to the conduct
- promote consistent treatment by specifying the amount of penalty for each relevant contravention
- shift the behaviour of trustees so they do not contravene again.

These objectives would be compromised if the amount of penalties specified in the law were remitted without just cause, arbitrarily or as a matter of course.

Trustee behaviour and circumstances

You should consider if the trustee has acted in a way that would reasonably be expected of another trustee in the same circumstances. The fact that the trustee genuinely tried to act with care and diligence is not the test. A trustee who acted in accordance with paragraph 52B(2)(b) by exercising the same degree of care, skill and diligence as an ordinary, prudent person would exercise in dealing with property of another for whom the person felt morally bound to provide, would be considered to be acting reasonably.

Your decision should take into account the individual circumstances of each case, giving appropriate consideration to the background and experience of the trustees and/or directors, as well as their intentions surrounding the circumstances of the contravention.

In considering this factor, it should be acknowledged that all trustees and directors of corporate trustees of SMSFs are required to sign a declaration upon setting up their SMSF that they understand their duties.

Furthermore, all trustees are subject to other covenants under section 52B, and fiduciary duties and obligations under general trust law. Each trustee is ultimately personally responsible for ensuring their fund complies with the SISA and other relevant legislation.

With respect to the trustee's behaviour or circumstances, you may also consider the following as relevant factors:

- the compliance history of the trustee or director of a corporate trustee of an SMSF
- whether rectification has occurred or the trustee is in the process of rectifying before any ATO contact
- whether the trustees made a voluntary disclosure before any ATO contact
- whether there were circumstances beyond the trustee's control that
 - caused the contravention
 - affected their ability to comply with their regulatory obligations, or
 - impacted on their capacity to rectify any contraventions.

Seriousness of the contravention

When considering whether to remit in full, in part or not at all, you should consider the scale and impact of the contravention on the SMSF. The following are examples of factors that could be considered:

- To what extent were the fund's assets affected?
- Over what period of time did the contraventions occur?

Unintended or unjust results

Your decision needs to be fair and reasonable and ensure that the prescribed amount of penalty does not cause unintended or unjust results.

You must ensure the cumulative penalty imposed on a trustee or director is appropriate.

For example, a penalty may be considered unjust where it is so large as to be excessive in light of the purpose of the penalty provision, the circumstances and behaviour of the trustee, the seriousness of the contravention and the size of the fund.

Multiple penalties

In some circumstances, the trustee's behaviour may result in more than one administrative penalty applying under the law. Consider whether the cumulative penalty is defensible, proper and just, having regard to the overall circumstances of the case.

For example, did the multiple penalties arise from a single course of conduct or a particular event?

Multiple breaches of the same provision

In some cases a single course of conduct or behaviour may result in multiple penalties being imposed from multiple contraventions of the same provision.

Such circumstances may warrant penalty remission if the cumulative penalty is considered otherwise inappropriate (refer to Example 8 of this Practice Statement).

Multiple provisions breached

An unjust result may also occur in situations where multiple administrative penalties are imposed when a particular event results in contraventions of more than one provision.

The following table lists examples of possible circumstances where multiple penalties could arise under more than one provision due to a particular event, noting this is not an exhaustive list:

Circumstances or event	Contravening provisions	Primary contravening provision
A loan to member or relative that was greater than 5% of the fund's assets	Subsection 65(1) for the loan and subsection 84(1) for the in-house asset	Subsection 65(1)
Access to member benefits without meeting a condition of release	Subsection 34(1) for operating standards and subsection 65(1) for financial assistance	Subsection 34(1)

If one particular event results in multiple penalties under more than one provision, we would generally remit to a level reflecting the primary contravention. The primary contravention is determined by considering the behaviour and intention of the trustees.

Referring to the above table, in the first example of a loan, the in-house asset breach is considered the secondary breach as it only occurs because of the primary contravention of loaning money to a member or relative. In the second example, financial assistance is considered to be the secondary breach as it only occurred because of the primary contravention of the operating standards when member benefit payments did not meet a condition of release, that is, illegal early release occurred.

However, this depends on the circumstances of the case. For example, a remission should generally not be granted simply on the basis that multiple penalties exist, particularly in instances of fraud, evasion or egregious contraventions.

Any further remission of the penalty in relation to the primary contravention could then be assessed against the remaining penalty in line with the considerations outlined in this section (refer to Example 7 of this Practice Statement).

Step 4 – notify each trustee and/or director of the liability to pay the penalty

You must give a written notice to the trustee or director informing them of their liability to pay the penalty, and of the reason they are liable to pay the penalty. If the penalty has not been remitted in full, you must also provide an explanation of why this has not occurred either before, or at the same time.

You must ensure the reasons are supplied at or before the time the trustee or director receives the written notice.

5. Review rights available to the trustee or director

A trustee or director who is dissatisfied with a decision to refuse to remit, in full or in part, an amount of penalty, may object in the manner set out in Part IVC of the TAA if the amount of penalty remaining after the decision is more than two penalty units.

If dissatisfied with an objection decision by the Commissioner, the trustee may apply to the Administrative Appeals Tribunal for review of the objection decision, or appeal to the Federal Court of Australia against the objection decision.¹³

Where a remission decision cannot be reviewed by objection (for example, if the amount of penalty that

¹³ Section 14ZZ of the TAA.

remains payable after the remission decision is two penalty units or less), the entity may seek a review of the decision under the *Administrative Decisions (Judicial Review) Act 1977*.

6. More information

For more information, see:

- [PS LA 2006/18](#) *Self-managed superannuation funds – enforceable undertakings*
- [PS LA 2006/19](#) *Self-managed superannuation funds – issuing a notice of non-compliance*
- [PS LA 2008/3](#) *Provision of advice and guidance by the ATO*

- [PS LA 2012/5](#) *Administration of the false or misleading statements penalty – where there is a shortfall amount*
- [PS LA 2013/3](#) *Alternative Dispute Resolution (ADR) in ATO disputes*
- [Dispute management plan](#)
- [Disputes policy](#)
- [Taxpayers' Charter](#)

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ATTACHMENT A – EXAMPLES

When considering these examples, remember that you may apply more than one compliance treatment in each case. Depending on the circumstances, it may be appropriate for you to apply a combination of enforcement responses.

The following examples of administrative penalty considerations are indicative only. Other regulatory and income tax consequences may also arise in some of these examples and should be considered separately. These examples only address the treatment of administrative penalties under the SISA.

Examples – imposition of administrative penalty

Administrative penalties under section 166 can only apply to contraventions which occur on or after 1 July 2014. Contraventions which occur prior to 1 July 2014 may constitute an offence which has criminal or civil consequences.

Example 1 – loan to a member and financial assistance given

An SMSF makes a loan to a member on 31 December 2013 in contravention of paragraph 65(1)(a). The loan remains fully outstanding as at 1 June 2015 when an ATO audit commenced.

The contravention relating to the loan occurred before 1 July 2014, so no administrative penalty can be imposed for this breach.

The trustee does not seek repayment of the loan during the 2013–14 or 2014–15 financial years. From documentation provided, the case officer is satisfied that a loan is still in place. By delaying any recovery action, the trustee is considered to have provided financial assistance and therefore contravened paragraph 65(1)(b).

From 1 July 2014, every occasion where the trustee failed to follow up a loan repayment, in accordance with the loan repayment schedule, constitutes a contravention of paragraph 65(1)(b). That is, if the loan repayment schedule illustrated that six repayments were not followed up from 1 July 2014, then an administrative penalty of 360 penalty units is imposed (6 x 60 penalty units).

As noted in Example 8 of this Practice Statement, it may be appropriate to consider remission of those multiple penalties on the basis the paragraph 65(1)(b) contraventions were the result of a single course of conduct or behaviour.

Example 2 – loan to a member and no financial assistance given

Similar to Example 1, an SMSF made a loan to a member on 31 December 2013 in contravention of paragraph 65(1)(a). An audit commenced on 1 June 2015 and the trustees provided a copy of the loan repayment schedule which illustrated the loan was to be repaid including appropriate interest over a 24-month period starting in January 2014 with a final repayment due in December 2015.

Even though a portion of the loan remains outstanding at the time of the audit, the trustee has made all the required repayments on time. In this situation, there has not been a contravention of paragraph 65(1)(b) as the repayments were in accordance with the loan repayment schedule. Therefore no administrative penalties will apply in the 2014–15 financial year.

Example 3 – borrowing and maintaining a borrowing

The trustee of an SMSF borrowed money on 1 January 2013 in contravention of paragraph 67(1)(a). The borrowing agreement required the SMSF to repay the borrowing including appropriate interest by 31 December 2013. No repayments have been made to the lender, therefore the borrowing remains outstanding.

No administrative penalty can be applied for the original contravention as it occurred prior to 1 July 2014.

The fund is audited on 7 July 2015. The case officer notes the fund is still maintaining the borrowing which occurred in the 2013–14 financial year. By failing to make repayments in accordance with the terms of the borrowing agreement, the trustees have contravened paragraph 67(1)(b) for maintaining an existing borrowing in both the 2014–15 and 2015–16 financial years. Administrative penalties under section 166 of 60 penalty units are imposed for each year, resulting in a total imposed penalty of 120 units.

Example 4 – joint and several liability, corporate trustee

John and Christine are members of the JC SMSF and directors of the corporate trustee of the fund. In the 2018–19 financial year, the corporate trustee contravened subsection 67(1) by allowing the fund to enter into a prohibited borrowing with John and Christine in their individual capacities.

As a result, an administrative penalty of 60 penalty units is imposed on the corporate trustee. As directors of the corporate trustee, John and Christine are jointly and severally liable for payment of the penalty.

Example 5 – personal liability, individual trustees

Larry and Adam are members and trustees of the Redrock SMSF. In the 2019–20 financial year, an auditor contravention report found that the trustees of the SMSF had contravened subsection 84(1) by providing a loan to a related party, who is not a member, in excess of the in-house asset limits.

Each trustee of the Redrock SMSF is individually liable for the full administrative penalty. The administrative penalty for this contravention is 60 penalty units. Larry and Adam are each issued a separate penalty notice for 60 penalty units.

Example 6 – personal liability, directors of a corporate trustee

Jim and Pete are members of the JP SMSF and directors of the body corporate that is the trustee of the fund, which was established in the 2017–18 financial year. Pete signs a declaration as required by paragraph 104A(2)(a) but Jim fails to do so.

The administrative penalty for this contravention is 10 penalty units. Jim is issued with a penalty notice and is personally liable to pay the full amount.

Examples – remission of administrative penalty

Every remission decision must consider the specific circumstances of each case.

Example 7 – illegal early release and financial assistance

The trustees and members of the Jones Family Super Fund are Mr Jones (47 years old) and Mrs Jones (43 years old). The fund has been in existence since 2005 and is a regulated SMSF. As at 30 June 2015, the fund's total assets were \$150,000.

An ATO audit reveals that the trustees authorised a single lump sum withdrawal of \$50,000 from the fund's bank account in the 2015–16 financial year.

This was the first time that a withdrawal was made from the fund and no other contraventions have been identified. The members had not met a condition of release and did not expect to repay the amount withdrawn¹⁴. The members have advised that the withdrawal was used to buy a new car. The trustees were aware of their obligations under the SISA, however, they stated they needed immediate accessible finance and could not obtain finance elsewhere.

The trustees are liable to pay penalties for the 2015–16 financial year for:

- contravening subsection 34(1) by paying super benefits to the members of the fund where a condition of release had not been met (20 penalty units), and
- contravening paragraph 65(1)(b) by providing financial assistance to the members (60 penalty units).

Identify the primary contravention

As multiple penalties arose under different provisions from a particular event, the case officer determines the primary contravention occurs under subsection 34(1) (payment of super benefits to members where a condition of release has not been met).

¹⁴ The amounts may also be included in the individual's assessable income (section 304-10 of the ITAA 1997).

Accordingly, using the principles in Step 3 of this Practice Statement, the case officer remits the total penalty by 60 penalty units, which is an amount equivalent to that imposed under the secondary contravention of paragraph 65(1)(b) for the provision of financial assistance to members.

Consider further remission

The case officer then considers whether any further remission of the remaining 20 penalty units (equivalent to the penalty for the primary contravention under subsection 34(1)) is warranted.

The case officer considers that the trustees' good compliance before the contravention is a factor that supports remission. But they consider this to be outweighed by the following factors:

- the trustees were aware of the rules and knew they should not have withdrawn the money
- the withdrawal was within the trustees' control
- there are no events that affected the trustees' capacity to comply with their obligations
- the trustees/members gained a benefit through a deliberate act
- the seriousness of the contravention as the fund's assets were significantly affected.

In coming to their decision, the case officer acknowledges that the penalty amounts are set within the SISA to promote consistent treatment of parties liable to the contravention. There were no mitigating factors which could be said to have caused the trustee's contravention, and a reasonable trustee in this situation who was aware of the rules would not have paid a benefit where a condition of release was not met.

Given this, the case officer decides that further remission is not appropriate.

Example 8 – illegal early release and financial assistance (multiple withdrawals)

The trustees of the PS Family Super Fund (established in 2007) authorise 10 withdrawals of \$5,000 each from the fund's bank account in the 2015–16 financial year.

The members advise that the withdrawals were used to buy a new car. They arranged to finance their purchase over 10 monthly payments commencing 1 August 2015.

Each trustee is liable to pay administrative penalties of a total of 800 penalty units for the 2015–16 financial year for:

- contravening subsection 34(1) by paying super benefits to the members of the fund where a condition of release had not been met 10 times (200 penalty units), and
- contravening subsection 65(1) by providing financial assistance to the members 10 times (600 penalty units).

Contravention	Penalty units	Penalty amount
Subsection 34(1)	$10 \times 20 = 200$	\$36,000
Subsection 65(1)	$10 \times 60 = 600$	\$108,000
TOTAL	800	\$144,000¹⁵

Identify the primary contravention

As multiple penalties arose from a particular event, the case officer determines the primary contravention occurs under subsection 34(1) – payment of super benefits to members where a condition of release has not been met.

Accordingly, using the principles in Step 2 of this Practice Statement, the case officer remits the total penalty by 600 penalty units, which is an amount equivalent to that imposed under the secondary contravention of subsection 65(1) for the provision of financial assistance to members.

¹⁵ The value of each penalty unit from 31 July 2015 to 30 June 2017 was \$180.

Consider further remission

The case officer then considers whether any further remission of the remaining 200 penalty units (equivalent to the cumulative penalty applied for the primary contravention under subsection 34(1)) is warranted.

Because of the multiple withdrawals, the case officer considers the intention of the trustees at the time they made the withdrawals. They also consider the other factors of the case – similarly to Example 7 of this Practice Statement.

In this case, the trustees withdrew \$50,000 to buy a car, over a number of transactions rather than one withdrawal, triggering multiple penalties from a single course of conduct or behaviour, that is the purchase of a car. In circumstances such as this, further remission would be warranted to ensure that the cumulative penalty is fair and just by aligning the remission to a level equivalent to the penalty applied in Example 7 of this Practice Statement for a single contravention.

This scenario must be distinguished from situations where the trustees' knowledge, actions and intentions clearly demonstrate a different level of culpability. For example, it is not appropriate to apply the approach in the previous paragraph when a trustee authorises access to money from their SMSF multiple times for separate courses of conduct.

Example 9 – loans to members and in-house assets

The trustees and members of the Smith Super Fund are Mr Smith (46 years old) and Mrs Smith (41 years old). The fund has been in existence since 2004 and is a regulated SMSF with a previously good compliance history.

Mrs Smith does not have a member balance, however she was appointed as a trustee in 2013–14 when their son removed himself from the fund. Mr Smith makes all decisions when it comes to the fund, he is aware of his trustee obligations and acknowledges full culpability for the course of conduct.

During an ATO audit, Mr Smith provided information to the ATO advising of the following withdrawals from the fund's bank account:

Financial year	Amount	Date withdrawn
2016–17	\$30,000	31 December 2016
2017–18	\$50,000	31 July 2017
TOTAL	\$80,000	

The fund's financial statements report the amounts withdrawn as loans to Mr Smith. Each withdrawal from the fund was documented in a separate loan agreement, which included interest payments, those loan agreements were provided during audit.

The following repayments of the principal loan amounts have been made over the course of the two financial years in accordance with the respective loan agreements and repayment schedules:

Financial year	Amount	Terms of loan agreement
2016–17	\$15,000	The loan started on 31 December 2016 and is to be repaid across the 2016–17 and 2017–18 financial years
2017–18	\$65,000	The loan started on 31 July 2017 and is to be repaid prior to the end of the 2017–18 financial year
TOTAL	\$80,000	

As a consequence of the loans, the fund's in-house asset percentage (IHA %) at the end of the relevant financial years were as follows:

Financial year	In-house assets	Total fund assets	IHA %
2016–17	\$15,000	\$100,000	15%
2017–18	Nil	\$120,000	0%

The trustees have multiple contraventions covering the 2016–17 and 2017–18 financial years.

2016–17 financial year

Firstly, paragraph 65(1)(a) was contravened by lending money to a member of the fund.

The case officer also determined the trustees have contravened subsection 84(1) by making the loan in the 2016–17 financial year which exceeded the in-house assets limits (specific to subsection 83(3)).

Each trustee is liable to a total of 120 penalty units (2 contraventions × 60 penalty units). See the following table for the penalty applied per trustee.

Contravention	Penalty units per contravention	2016-17 penalties
Subsection 65(1)	60	1 × \$10,800
Subsection 84(1)	60	1 × \$10,800
TOTAL		\$21,600¹⁶

Identify the primary contravention for the 2016–17 financial year

As multiple penalties arise under different provisions from a particular event, the case officer determines the primary contravention occurs under paragraph 65(1)(a).

Accordingly, using the principles in Step 3 of this Practice Statement, the case officer remits the total penalty applied by 60 penalty units (\$10,800) which is an amount equivalent to the secondary contravention of the in-house asset rules.

2017–18 financial year

Paragraph 65(1)(a) was again contravened when the fund loaned a further \$50,000 to a member of the fund.

The case officer again determines the trustees have contravened subsection 84(1) by making the loan when the fund's in-house assets already exceeded the 5% limits (specific to subsection 83(2)).

Each trustee is liable to a total of 120 penalty units (2 contraventions × 60 penalty units). See the following table for the penalty applied per trustee.

Contravention	Penalty units per contravention	2017–18 penalties
Subsection 65(1)	60	1 × \$12,600
Subsection 84(1)	60	1 × \$12,600
TOTAL		\$25,200¹⁷

¹⁶ The value of each penalty unit from 31 July 2015 to 30 June 2017 was \$180.

¹⁷ The value of each penalty unit from 1 July 2017 to 30 June 2020 was \$210.

The circumstances for the 2017–18 financial year are identical to the 2016–17 financial year in regard to determining a primary and secondary contravention.

The act of entering into a new loan to a member on 31 July 2017 results in a primary contravention of paragraph 65(1)(a), and because that loan was made when the fund's in-house assets already exceeded the 5% limit, a secondary contravention of subsection 84(1) (specific to subsection 83(2)) occurred from the same event.

Accordingly, using the principles in Step 2 of this Practice Statement, the case officer remits the total penalty applied by 60 penalty units (\$12,600) which is an amount equivalent to the secondary contravention of the in-house asset rules.

Consider further remission

The case officer then considers whether any further remission of the remaining 120 penalty units per trustee, is appropriate. That is:

- the remaining 60 penalty units (\$10,800) equivalent to the penalty applied for the subsection 65(1) contravention in the 2016–17 financial year, and
- the remaining 60 penalty units (\$12,600) equivalent to the penalty applied for the subsection 65(1) contravention in the 2017–18 financial year.

The case officer considers that these two factors support remission:

- The contraventions were rectified before the audit.
- The trustees had a good compliance history before making the loans.

However, they consider these factors weigh against further remission:

- The trustee, Mr Smith, was aware of the rules and knew he should not have made loans to himself.
- The loans made to the member were within the trustees' control.
- No events affected the trustees' capacity to comply with their obligations.
- The member gained a benefit through a deliberate act.
- The penalty imposed, per trustee, is not unjust in light of the circumstances, including the amount of the residual penalty (\$23,400) versus the value of the contravention (\$80,000).
- The contravention is not a one-off occurrence. There has been repeated poor behaviour, as multiple loans were made from the fund. The contraventions significantly impacted the fund assets.

The rectification of the contravention before the audit should be acknowledged with some remission for both trustees, however as both trustees were aware of their obligations prior to contravening the SISA multiple times, the case officer decides there are no grounds for further remission.

Passivity is not an excuse and both trustees are equally responsible for ensuring appropriate controls are in place to mitigate contraventions and to ensure they are fully informed about the actions of the other trustee.

Example 10 – loan to a member and financial assistance

Katy and Jason are members of the Shamrock SMSF and directors of the corporate trustee of the fund. In June 2018, the SMSF makes a loan of \$150,000 to Katy in contravention of section 65(1).

The loan was made on arm's length terms with a repayment schedule that determined that repayments were to be made on a monthly basis, with the loan scheduled to be repaid by the end of June 2020. The amount of the loan was less than 5% of the market value of the assets of the fund.

An ATO audit commenced in May 2019, and the case officer identified that Katy had not adhered to the schedule of repayments on four occasions:

- the repayment for July 2018 was made one week late
- the repayment for November 2018 was made over three months late
- the repayments for March 2019 and April 2019 have not been made and remain outstanding.

In this case, there are two primary contraventions across multiple years. The act of entering into a loan to a member in June 2018 results in the first contravention (of paragraph 65(1)(a)), and the failure to seek recovery of the repayments of the loan in the subsequent year is the second contravention (of paragraph 65(1)(b)).

2017–18 financial year

The making of the loan to Katy results in a contravention of paragraph 65(1)(a) and a penalty of 60 penalty units (\$12,600¹⁸) in the 2017–18 financial year.

2018–19 financial year

The case officer determines that, in relation to the repayments due in November 2018 and March 2019, there was a delay in taking recovery action when compared to usual commercial practices for collecting a debt of this type from an arm's length party. Each of these delays amounted to a separate provision of financial assistance in contravention of paragraph 65(1)(b). The case officer determined that there was no contravention in relation to the July 2018 repayment or the April 2019 repayment which has just become overdue, as it was within normal commercial practice not to pursue repayment within the first few weeks of a payment becoming overdue.

As a result, the corporate trustee is liable to 180 (3 × 60) penalty units (\$37,800) for the one contravention of paragraph 65(1)(a) and two contraventions of paragraph 65(1)(b), that is, November 2018 and March 2019.

Consider remission in relation to each separate primary contravention

The case officer determines that making the loan and delaying recovery action regarding the repayments are separate events. Therefore, there is no secondary contravention principle to be considered in relation to the remission of penalties.

The trustees did not provide any reason or explanation to the case officer to justify any grounds for remission of penalties in relation to the first primary contravention.

However, using the principles in Step 3 of this Practice Statement, the case officer identifies that it is appropriate to consider further remission in relation to the second primary contravention on the basis that there were multiple paragraph 65(1)(b) contraventions arising from the single overarching course of conduct of failing to pursue repayment. The trustees agree to implement processes to follow up overdue payments on a timelier basis.

Accordingly, the case officer remits the overall penalty to 120 penalty units (\$25,200), which is the level equivalent for one contravention of paragraph 65(1)(a) and one contravention of paragraph 65(1)(b).

Financial year	Primary contraventions	Initial penalty	Penalty after remission
2017–18	65(1)(a)	60 units	60 units
2018–19	65(1)(b)	120 units	60 units

Example 11 – borrowing and voluntary disclosure

Willow and Daniel are members and trustees of the Theme SMSF. The fund has been in existence since 2010 and is a regulated SMSF.

In February 2019, Willow determined that the Theme SMSF should acquire an asset as part of the fund's investment strategy. Rather than sell an existing SMSF asset when prices were not optimal, Willow decided to advance the required money to the SMSF which would repay the amount once SMSF assets could be disposed of more advantageously.

In March 2019, Willow received advice from the accountant that an SMSF may not borrow outside limited exceptions and made a voluntary disclosure of a contravention of subsection 67(1) to the ATO. When contacted, the trustees provided all required information to the ATO and agree to repay the borrowing before the end of the 2018–19 financial year.

¹⁸ The value of each penalty unit from 1 July 2017 to 30 June 2020 was \$210.

Each trustee is liable to pay administrative penalties of 60 penalty units for the contravention of subsection 67(1).

Consider remission

During the investigation, the trustees informed the case officer that Daniel was temporarily incapacitated in hospital during the majority of February and March 2019 and provided supporting documents. Willow provided a statement that she acknowledged full culpability for the course of conduct.

The case officer determines that the borrowing was within the trustees' control, no events affected the trustees' capacity to comply with their obligations and the level of penalty is appropriate in relation to the size of the fund and amount of the contravention. However as the trustees acted as soon as they became aware of the contravention by immediately repaying the borrowing and promptly engaging with the ATO by lodging a voluntary disclosure of the contravention, these factors and their previous good compliance history warrant significant remission of penalties for the trustees.

Daniel, as a trustee of the SMSF, is equally responsible for ensuring appropriate controls are in place to mitigate contraventions and ensure he is fully informed about the actions of the other trustee. However, as Willow acted on her own and claimed full responsibility for the contraventions, and we have evidence that circumstances beyond his control affected Daniel's ability to fulfil his duties, the case officer decides that there are grounds for further remission for Daniel.

Example 12 – failure to prepare accounts and statements and obtain asset valuations

The trustees and members of the Thomas Family Super Fund are Mr Thomas (69 years old) and Mrs Thomas (67 years old). The fund has been in existence since 2002 and is a regulated SMSF.

The fund has a history of late lodgment and at the commencement of an audit the 2017–18 and 2018–19 SMSF annual returns (SARs) were not lodged.

In a reply to an audit letter, the trustees advised that they have not prepared their financial statements or obtained valuations for the fund's assets in the 2017–18 and 2018–19 financial years. However, they have now engaged a new tax agent to get the lodgments up to date.

The trustees believed that because the fund was in full pension phase and expected to receive refunds for the 2017–18 and 2018–19 financial years, the ATO would have no issues with the late lodgment of the SARs.

The fund's total assets as at 30 June 2017 were \$1.5 million.

The case officer decides to accept an enforceable undertaking (EU) from the trustees in accordance with Law Administration Practice Statement PS LA 2006/18 Self-managed superannuation funds – enforceable undertakings to lodge outstanding SARs within three months.

The trustees have contravened section 35B by not preparing financial statements and not obtaining asset valuations. As a result, each trustee is liable for administrative penalties of 10 penalty units for the 2017–18 financial year and for the 2018–19 financial year.

To support the remission, the case officer considers that the trustees' behaviour was not a deliberate act to obtain a personal gain.

However, the case officer decided that this was outweighed by the following factors:

- the trustees have a history of late lodgment and the contravention is not a one-off occurrence
- no events prevented the trustees from complying with their regulatory obligations
- they did not seek advice about their lodgment obligations, and committed to rectify only after an ATO audit had commenced.

The case officer more broadly considers that the timely lodgment of SARs is a central pillar to the regulation of the SMSF system. SMSFs that do not comply with their reporting obligations may gain inappropriate access to tax concessions and therefore undermine the integrity of the system as a whole.

The case officer decides that there are no grounds for remission. The apparent misunderstanding of their lodgment obligations does not reconcile with the evidence of their established poor compliance history. Trustees are expected to understand their obligations and comply with them, or seek advice regarding how to comply where it is reasonable to do so.

References

Legislative references	<p>SISA 1993 34(1) SISA 1993 35B SISA 1993 40(1) SISA 1993 52B SISA 1993 52B(2)(b) SISA 1993 65(1) SISA 1993 65(1)(a) SISA 1993 65(1)(b) SISA 1993 67(1) SISA 1993 67(1)(a) SISA 1993 67(1)(b) SISA 1993 83(2) SISA 1993 83(3) SISA 1993 84(1) SISA 1993 103(2)(a) SISA 1993 104A(2) SISA 1993 104A(2)(a) SISA 1993 126A SISA 1993 159 SISA 1993 160 SISA 1993 160(4) SISA 1993 166 SISA 1993 169 SISA 1993 262A SISA 1993 Pt 20 Div 3 SISA 1993 Pt 21 ITAA 1997 304-10 TAA 1953 Pt IVC TAA 1953 14ZZ TAA 1953 Sch1 298-20 Administrative Decisions (Judicial Review) Act 1977 Crimes Act 1914 4AA</p>
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ATO references

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