

SMSF compliance treatments



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The ATO has a number of options available to deter and address instances of non-compliance by SMSF trustees including:

- Education directions
- Administrative penalties
- Rectification directions
- Accepting enforceable undertakings
- Disqualification of a trustee
- Allowing the SMSF to wind-up
- Issuing an SMSF with a notice of non-compliance
- Civil and criminal penalties
- Freezing SMSF assets if there is a risk of the members' benefits being eroded

What does this mean for SMSF trustees?

The ATO is able to use a combination of the above measures. For example, trustees may be required to undertake education in addition to having to pay an administrative penalty and being directed to rectify the contravention. To ensure a fair and reasonable outcome is received, the ATO's approach will depend on the specific circumstances of the compliance breaches.

- Any administrative penalties imposed on trustees cannot be reimbursed or paid from the fund, trustees must pay the penalties out of their own pockets.
- Administrative penalties apply per trustee. For example, where a fund has 4 individual trustees, the amount payable would be 4 times more compared to where the fund has a corporate trustee.
- The ATO has no discretion to reduce or withhold administrative penalties meaning even inadvertent or accidental breaches may attract a penalty.
- The message is that trustees must be even more vigilant in their record keeping and in the transactions which the fund undertakes.

Education direction

Trustees may be directed to undertake a course and provide the ATO with evidence of completion where a contravention has occurred due to a lack of knowledge or understanding by the trustee. The ATO website lists the relevant approved courses trustees can choose from.

Administrative penalties

The administrative penalty regime applies penalty units on a sliding scale to certain contraventions based on the seriousness of the breach. The minimum penalty amount is \$1,050 and the maximum \$12,600.

The penalty applies per trustee and cannot be paid for by the fund. Where the fund has individual trustees, each trustee will be individually liable to pay the penalty amount. Where the fund has a corporate trustee, all directors are jointly and severally liable to pay the penalty amount.

The value of a penalty unit is \$210 from 1 July 2017 which is indexed every three years.

Legislative provisions and associate penalties

SIS section		Penalty units	Dollar value
Subsection 34(1)	Compliance with prescribed operating standards	20	\$4,200
Section 35B	Preparation of accounts and statements	10	\$2,100
Subsection 65(1)	Lending or giving financial assistance to members or relatives	60	\$12,600
Subsection 67(1)	Borrowing prohibition	60	\$12,600
Subsection 84(1)	In-house assets	60	\$12,600
Subsection 103(1)	Keeping minutes and records 10 years (individual trustees)	10	\$2,100
Subsection 103(2)	Keeping minutes and records 10 years (corporate trustees)	10	\$2,100
Subsection 103(2A)	Keep trustee election 10 years	10	\$2,100
Subsection 104(1)	Keep change of trustee/director records 10 years	10	\$2,100
Subsection 104A(2)	Sign and retain trustee declaration	10	\$2,100
Subsection 105(1)	Keep member reports 10 years	10	\$2,100
Subsection 106(1)	Notify regulator of significant adverse events on financial position	60	\$12,600
Subsection 106A(1)	Notify commissioner of change in status of entity	20	\$4,200
Subsection 124(1)	Investment managers must be appointed in writing	5	\$1,050

SIS section		Penalty units	Dollar value
Subsection 160(4)	Must comply with an education direction within specified period	5	\$1,050
Subsection 254(1)	Information to be given to the regulator	5	\$1,050
Subsection 347A(5)	Obligation to participate in regulator's statistical programs	5	\$1,050

Rectification direction

Where a rectification direction is issued, trustees will be required to take specified action to rectify the contravention and provide the ATO evidence of their compliance with the direction. If the trustees fail to comply with the rectification direction within the specified time frame, they have committed an offence of strict liability and will be required to pay a penalty.

Accepting enforceable undertakings

Trustees may initiate in writing an undertaking to rectify a contravention which the ATO can choose to accept or reject. The undertaking must include:

- a commitment to stop the behaviour that led to the contravention
- the action that will be taken to rectify the contravention
- the timeframe to rectify the contravention
- how and when the trustee will report that the contravention has been rectified
- the strategies to prevent the contravention from occurring again

Disqualification of a trustee

If the ATO is concerned with the actions of an individual or their suitability as trustee they can be disqualified. When an individual is disqualified, they must remove themselves from the role of trustee or director of the trustee company.

Civil and criminal penalties

The ATO may apply to the courts for civil or criminal penalties to be imposed. These penalties may be financial and are expressed in penalty points and may vary depending on whether the breach was reckless or intentional.

For some breaches, imprisonment is an available outcome for maximum terms between 12 months and two years. Penalties imposed by courts are not permitted to exceed 2,000 penalty points or 5 years imprisonment.

Additional civil and criminal penalties may also apply for persons who promote schemes that result, or are likely to result, in super being accessed illegally.

Notice of Non-compliance

In certain cases the ATO will take the step of removing an SMSF from the ability to receive concessional tax treatment. This is usually seen as a 'last' resort. For this action to be taken, it is required that either the number or level of the breaches is serious and that all members/trustees were directly or indirectly involved in the activity that caused the breach.

The outcome of this action results in the tax rate for the SMSF rising to the equivalent of the top marginal tax rate. This rate is not restricted just to the income earned in the year that the SMSF is made non-complying but also 'claws back' the tax concessions granted in all prior years.

Further information



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