

Role and responsibilities of trustees

Operating a self managed superannuation fund (SMSF).



OUR COMMITMENT TO YOU

We are committed to providing you with advice and information you can rely on.

We make every effort to ensure that our advice and information is correct. If you follow advice in this publication and it turns out to be incorrect, or it is misleading and you make a mistake as a result, we must still apply the law correctly. If that means you owe us money, we must ask you to pay it. However, we will not charge you a penalty or interest if you acted reasonably and in good faith.

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If correcting the mistake means we owe you money, we will pay it to you. We will also pay you any interest you are entitled to.

If you feel this publication does not fully cover your circumstances, please seek help from the Tax Office or a professional adviser.

The information in this publication is current at July 2007.

We regularly revise our publications to take account of any changes to the law, so make sure that you have the latest information. If you are unsure, you can check for a more recent version on our website at www.ato.gov.au or contact us.

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FOREWORD

The decision to become a trustee of a self managed superannuation fund should not be taken lightly. As a trustee, you are responsible for ensuring your fund complies with the *Superannuation Industry (Supervision) Act 1993* (SIS Act) and other relevant legislative and administrative requirements.

The objective of Australia's superannuation system is to assist and encourage people to achieve a higher standard of living in retirement than would be possible from the age pension alone. This is to ensure Australians have security in retirement.

To achieve this, superannuation funds that comply with the superannuation laws receive significant tax concessions. So, non-compliance by trustees with these laws may result in the loss of tax concessions.

We recommend that you read this guide and familiarise yourself with the administrative responsibilities and the legislative compliance requirements of running a self managed superannuation fund before setting up a fund. You may wish to consult a qualified professional such as a financial adviser, accountant, superannuation fund administrator or tax agent to discuss whether a self managed superannuation fund is the best retirement saving option for you.

All references are to the SIS Act unless otherwise stated.

Your responsibilities as a trustee include:

- lodging an annual income tax return and superannuation fund annual return
- lodging *Superannuation member contributions statements*
- appointing an approved auditor to complete the annual audit
- maintaining records for up to ten years, and
- complying with investment requirements.

Some of the key restrictions under the SIS Act include:

- meeting the sole purpose test
- not accessing your money without meeting a specific condition of release
- not providing loans or financial assistance to members or relatives, and
- not borrowing money to invest.

 View the SIS Act, SIS regulations and other legislative references at www.apra.gov.au/superannuation or <http://law.ato.gov.au>

IMPORTANT CHANGES

As part of the 2006 Federal Budget, the Treasurer announced major reforms to the superannuation system and released *A Plan to Simplify and Streamline Superannuation*.

The following changes directly impact on self managed superannuation funds and are effective from 1 July 2007.

– Trustee declaration

The declaration aims to ensure that new trustees, or directors of corporate trustees, understand their duties as trustee of a self managed superannuation fund. Any trustee, or a director of a corporate trustee appointed after 30 June 2007, must sign a declaration in the approved form, no later than 21 days after becoming a trustee or director.

– Increase in supervisory levy

From the 2007–08 financial year, the supervisory levy will increase from \$45 to \$150 per year and will now be payable at the same time as the fund's income tax liability.

– Simplifying reporting

We are merging the fund's income tax and regulatory return with the member contributions statement to produce a single annual return for self managed superannuation funds. This commences for reporting from the 2007–08 financial year.

– Penalty expansion

Expanded administrative penalties apply for failing to lodge returns on time, providing false and misleading statements, failing to keep and retain records and failing to advise us of a change of trustees or other changes in the fund.

– Auditor contravention reports

The auditor contravention report will become an 'approved form'. Auditors can expect more guidance around what is required when performing their audit duties for a self managed superannuation fund. If a fund is established on or after 1 July 2007 and has a contravention in its first year of operation, the auditor is required to report to us, regardless of the type of contravention or the amount involved.

– Expansion of our regulatory powers

A change to the legislation provides us with more powers to manage instances where funds fail to meet the definition of a self managed superannuation fund.

– Change of trustees notification

Funds are now legally required to inform us of any changes of trustees within 28 days of the change occurring.



For more information refer to our website www.ato.gov.au



Severe penalties may apply if you contravene these or any other requirements set out in the legislation.



If your fund has already been established and you feel that you cannot meet your responsibilities or have reconsidered your decision, refer to 'winding up a self managed superannuation fund' or phone us on **13 10 20** for assistance.

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SUPERANNUATION AND SELF MANAGED FUNDS

01

There are numerous trust law and legislative requirements involved in setting up a self managed superannuation fund.

This section outlines these requirements and defines a self managed superannuation fund.

DEFINITION OF A SELF MANAGED SUPERANNUATION FUND

For a **self managed superannuation fund** to be considered a complying superannuation fund for the purposes of the *Income Tax Assessment Act 1936*, it must first elect to be a regulated superannuation fund and abide by the rules of the *Superannuation Industry (Supervision) Act 1993* (SIS Act). A complying superannuation fund's income is taxed at a rate of 15%, while a non-complying fund's income is taxed at 45%.

The SIS Act sets out a number of requirements that a superannuation fund must meet to be a self managed superannuation fund.

Generally a superannuation fund is a self managed superannuation fund if (with a few exceptions):

- it has four or fewer members
- no member of the fund is an employee of another member of the fund, unless they are related
- each member is a trustee, and
- no trustee of the fund receives any remuneration for their services as a trustee.

or

A self managed superannuation fund can have a company as a trustee (known as a corporate trustee) if:

- the fund has four or fewer members
- each member of the fund is a director of the company
- no member is an employee of another member, unless they are related
- the corporate trustee does not receive any remuneration for its services as a trustee, and
- no director of the corporate trustee receives any remuneration for their services as a director in relation to the fund.

Employees cannot be in the same self managed superannuation fund as an employer member, unless they are related.


SINGLE MEMBER FUNDS

It is possible to have a self managed superannuation fund with only one member. A single member fund may have a corporate trustee, but the member must:

- be the sole director of the trustee company, or
- be related to the other director of the trustee company and there are only two directors of that company, or
- not be an employee of the other director of the trustee company and there are only two directors of that company.

A single member fund may alternatively have two individuals as trustees. The member must be one trustee and the other trustee must be:


- a person who is related to the member, or
- any other person, provided the member is not an employee of that person.

 We regulate funds that meet the definition of a self managed superannuation fund. All other superannuation funds are regulated by APRA.

WHO CAN BE A TRUSTEE?

Generally, anyone 18 years of age and over, who is not under a legal disability, can be a **trustee** of a superannuation fund unless they are a disqualified person. An individual is a disqualified person if they:

- have ever been convicted of an offence involving dishonesty
- have ever been subject to a civil penalty order under the SIS Act
- are insolvent under administration
- are an undischarged bankrupt, or
- have been disqualified by a regulator.

 A person who is a disqualified person must not act as trustee of a self managed superannuation fund. Action should be taken to remove the disqualified person as trustee. Penalties can apply to those who act as trustees while disqualified.

A company would not be permitted to act as trustee if:

- the company knows or has reasonable grounds to suspect that a responsible officer of that company is a disqualified person (a responsible person includes a director, secretary or executive officer)
- a receiver, official manager or provisional liquidator has been appointed to the company, or
- action has commenced to wind-up the company.

Where a trustee becomes bankrupt, they are required to immediately notify us in writing. We will then work with the individual to ensure the fund retains its complying status.

EXAMPLE: A person who is bankrupt establishes a self managed superannuation fund

Undischarged bankrupts cannot act as a trustee of a fund. We will write to these trustees to ask for further information and requesting that they resign as trustee.

If the trustee fails to do so, we can remove the trustee of the fund and appoint an acting trustee. We may then instruct the acting trustee to wind-up the fund and roll the remaining superannuation benefits into a public offer superannuation fund.

Legal personal representative

A legal personal representative can be a trustee (or director of a corporate trustee) for a:

- member who is under a legal disability (but not if the member is an undischarged bankrupt or insolvent under administration)
- member for whom the representative holds an enduring power of attorney, or
- deceased member, up until the time the death benefits commence to be payable from the fund.

A disqualified person cannot:

- have a legal personal representative acting as trustee on their behalf
- have a legal personal representative acting as director of a corporate trustee on their behalf, or
- be a member of a self managed superannuation fund.

Minors

Generally, members under 18 years of age are under a legal disability and cannot be trustees of a superannuation fund.

A parent or guardian can be a trustee for a member who is under 18 and does not have a legal personal representative.

RESIDENCY OF A FUND


In order to be entitled to tax concessions available to complying funds, a self managed superannuation fund must meet certain residency conditions and be considered a resident regulated fund at all times during the income year.

A fund can retain its residency status while the trustees (or directors of the trustee) of the fund are temporarily overseas, for a period of up to two years.

For more information refer to '**Accepting contributions for members who are overseas**' on page 15.

CHANGING THE STRUCTURE OF A FUND

As of 1 July 2007, whenever a new trustee is appointed or removed you have to notify us of this change in circumstance within 28 days of the event. You can do this either online at www.abr.gov.au (if you have an ATO digital certificate) or by lodging a *Change of details for superannuation entities form* (NAT 3036).

 You cannot notify a change in the structure of a fund by lodging an income tax and regulatory return.

As a trustee, you need to be aware that changing the structure of your fund in some cases can result in the fund no longer meeting the definition of a self managed superannuation fund. For example, if you:

- admit a new member, increasing membership of the fund to more than four, or
- appoint a non-member as trustee (apart from the exceptions already listed).

WHAT IF A FUND CEASES TO BE A SELF MANAGED SUPERANNUATION FUND?

If a fund no longer meets the definition of a self managed superannuation fund, we retain powers of administration as regulator of the fund unless a registrable superannuation entity (RSE) licensee is appointed as trustee. This allows us to take appropriate action where necessary.

Funds that no longer meet the definition of a self managed superannuation fund need to change their situation by:

- restructuring to again meet the self managed superannuation fund conditions,
- appointing an RSE licensee as trustee and become regulated under APRA, or
- winding up the fund.

If the trustees of the fund do not rectify the situation, we may take action such as suspending or removing a trustee, or removing a fund's complying status. Removing the fund's complying status results in the tax rate being increased to 45%.

You must notify us within 21 days of your fund ceasing to be a self managed superannuation fund. You can do this online at www.abr.gov.au or by lodging a *Change of details for superannuation entities form* (NAT 3036).

You cannot do this by lodging an income tax and regulatory return. A return does not include the information we require.

SETTING UP A SELF MANAGED SUPERANNUATION FUND

There are a number of trust law and legislative requirements involved in **setting up a self managed superannuation fund**. If you are thinking about setting up a fund, it may be useful to consult a professional adviser before committing to this option. Many accountants, solicitors and superannuation specialists also have packages and kits to assist the process.

The major steps involved in setting up a self managed superannuation fund begin with the establishment of a trust.

1 ESTABLISHING A TRUST

Before you can register a self managed superannuation fund with us, you need to establish a trust.

A **trust** is required to have the following:

- trustees
- property
- identifiable beneficiaries, and
- intention to create a trust.

Under the SIS Act, trustees need to consent in writing to their appointment as a trustee. Trustees are responsible for ensuring that the fund is properly managed and that it complies with the SIS Act and other legal obligations (see **'Who can be a trustee?'**)

Once you have the trustee's written consent you need to transfer property or 'settle' property on the trustee with a declaration that the property is to be held on trust for identified members.

A trust deed should be prepared when a trust is created. The deed would form part of the governing rules for operating the fund. Make sure the deed is correctly drafted to achieve your fund's objectives. The SIS Act also contains rules that apply to the operation of your fund and are deemed to be part of every regulated fund's trust deed.

2 APPOINT TRUSTEES

All regulated superannuation funds must have a trustee. Trustees are solely responsible for ensuring the fund is properly managed and that it complies with the SIS Act and other legal obligations.

For a fund to be a self managed superannuation fund, generally all fund members must have consented in writing to their appointment as a trustee of the fund. There are some exceptions, including where a member does not have the capacity to be an active trustee. Also, there are limited circumstances where a trustee will not be a member of the fund, such as a single member fund with individual trustees. A single member fund cannot have a single individual trustee but it can have a single director corporate trustee.

For further information refer to **'Who can be a trustee?'**

Corporate trustee or individual trustees

A self managed superannuation fund will have either a corporate trustee or individual trustees. A corporate trustee is subject to the *Corporations Act 2001*. Individual trustees are subject to regulation by the Commonwealth through the pension powers within the Constitution.

A fund that has a corporate trustee may pay benefits in the form of a lump sum or a pension.

A fund that has individual trustees must state in the trust deed that the fund was established for the sole or primary purpose of providing old aged pensions. However this does not prevent the fund from paying lump sum benefits providing the trust deed allows for this.


3 SIGN TRUSTEE DECLARATION

Any trustee, or a director of the corporate trustee appointed after 30 June 2007, must sign a declaration. The declaration must be signed in the approved form, no later than 21 days after becoming a trustee or director.

The declaration aims to ensure that new trustees, or directors of corporate trustees, understand their duties as a trustee.

Although the form is not required to be lodged with us, the declaration must be readily available if we require it. Failure to produce the signed trustee declaration at the time we audit or review may result in penalties being imposed. The declaration must be retained for as long as it is relevant, and in any case for at least 10 years.

The trustee declaration is available for download from our web site or by ordering from the Tax Office Publications Ordering Distribution system.

 For more information, refer to our website www.ato.gov.au

4 ELECT TO BE REGULATED, AND OBTAIN A TAX FILE NUMBER AND AUSTRALIA BUSINESS NUMBER

You must elect for your fund to be regulated under the SIS Act and comply with its requirements if you want to receive tax concessions.

You can elect for the fund to be regulated and obtain a tax file number (TFN) and Australian business number (ABN) by completing the *Application to register for superannuation entities form* (NAT 2944). Elections can be lodged with us:

- electronically – complete the online form on the Australian Business Register website at www.abr.gov.au, or
- manually – you can obtain the application form and instructions:
 - from our website at www.ato.gov.au or
 - by phoning **13 10 20**.

Online registration offers a number of advantages, including quicker processing of your application.

If you do not notify us of an election to be a regulated superannuation fund within 60 days after setting up your fund, the fund may not be accepted as a regulated fund. Funds that are not regulated are not entitled to tax concessions and the employer (and members who are self-employed) cannot claim a deduction for contributions made to the fund.

Funds electing to become regulated more than 60 days after coming into existence, must provide reasons for the delay in writing to us.

Once you have elected for your fund to become regulated, the decision cannot be reversed (that is, the fund has to be wound up to cease to be regulated under the SIS Act).

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RESPONSIBILITIES OF TRUSTEES

02

This section explains the more common rules of the SIS Act that you will confront in the day-to-day operations of your fund. However, this guide is not an exhaustive coverage of your responsibilities as a trustee.

There are many other responsibilities under different laws, including numerous administrative requirements.

As a trustee, you need to be familiar with these responsibilities, and, when in doubt, seek professional advice.


As a trustee of a self managed superannuation fund, you are ultimately responsible for running your fund. It is imperative that each trustee understands the duties, responsibilities and obligations of being a trustee. Any trustee, or a director of the corporate trustee appointed after 30 June 2007, must sign a trustee declaration in the approved form. The trustee declaration aims to ensure that new trustees, or directors of corporate trustees, understand their duties as trustee of a self managed superannuation fund.


There are significant penalties imposed on trustees who fail to perform their duties.

As a trustee of a self managed superannuation fund, you must act in accordance with:

- the clauses of your fund trust deed
- the provisions of the SIS Act and the SIS regulations
- the *Corporations Act 2001*, and
- other general rules, such as those imposed under tax and trust law.

Where the SIS Act conflicts with the trust deed, the SIS Act overrides the trust deed.

 New trustees and newly appointed directors of corporate trustees are required to sign a declaration indicating that they understand their duties as trustees of a self managed superannuation fund.

 For more information, refer to our website at www.ato.gov.au

SIS ACT REQUIREMENTS

The SIS Act contains rules that impose minimum requirements on trustees and are deemed to be included in the trust deed of every regulated fund. These reflect the duties imposed on all trustees under trust law in general.


The rules bind you to:

- act honestly in all matters concerning the fund
- exercise the same degree of care, skill and diligence as an ordinary prudent person in managing the fund
- act in the best interest of all fund beneficiaries
- keep the money and assets of the fund separate from other money and assets (for example, your personal assets)
- retain control over the fund
- develop and implement an investment strategy
- not enter into contracts or behave in a way that hinders trustees from performing or exercising their functions or powers, and
- allow members access to certain information.

While you can engage other people to do things on your behalf as a trustee (for example, engage the services of an accountant, superannuation fund administrator, tax agent or financial planner), the ultimate responsibility and accountability for running a fund in a prudent manner lies with the trustees.


You must keep money and other assets of the fund separate from your personal assets and any business assets. A self managed superannuation fund must be treated as if it is a separate body from the trustees, members and any employer-sponsor of the fund.

Money belonging to the fund must not be used for personal or business purposes under any circumstances. You should not view the fund's assets as a form of credit or contingency fund when faced with a sudden need.

 As a trustee, if you fail to act in accordance with the SIS Act, you risk:

- your fund being made a non-complying fund and losing its tax concessions
- disqualification as a trustee
- prosecution, and/or
- penalties.

If you fail to act in accordance with the trust deed, other affected members of the fund may take legal action against you. (Any person who suffers loss or damage as a result of the breach of any of these duties may sue any person involved in the breach.)

 Refer to the '**Penalties and compliance**' section for more information.


COMPLY WITH THE SOLE PURPOSE TEST

The object of the **sole purpose test** is to ensure that self managed superannuation funds are maintained for the purpose of providing benefits to members upon their retirement, or their dependants if a member dies before retirement. As a trustee of a regulated superannuation fund, you must comply with the sole purpose test for the fund to be eligible for the tax concessions available to a complying superannuation fund.

The sole purpose test is divided into core and ancillary purposes.

A regulated fund must be maintained solely for:

- one or more core purposes, or
- one or more core purposes and one or more ancillary purposes.

 It is unacceptable for a fund to be maintained for any purpose other than a core or ancillary purpose, or even only for one or more ancillary purposes.

CORE PURPOSE

A self managed superannuation fund must be maintained for at least one of the following:

To provide benefits for each member of the fund on or after the:

- member's retirement from gainful employment
- member's attainment of a prescribed age
- either the member's retirement from gainful employment or attainment of a prescribed age, whichever comes first, or
- member's death, if the death occurred before they retired from gainful employment or before they attained a prescribed age, where the benefits are provided to their dependants or legal personal representative.

ANCILLARY PURPOSE

Ancillary purposes for maintaining a fund are to provide benefits for members in the following circumstances:

- termination of a member's employment with an employer who made contributions to the fund for that member
- cessation of employment due to physical or mental ill health
- death of a member after retirement, or after attaining a prescribed age where the benefits are paid to their dependants or legal representative, or
- other ancillary purposes approved in writing by the regulator.

This purpose allows a fund to provide benefits in situations of financial hardship and/or on compassionate grounds, subject to the SIS Act, the governing rules of the fund and the approval of the appropriate regulator.

CONTRAVENING THE SOLE PURPOSE TEST

One of the main ways to determine if a fund has contravened the sole purpose test is to examine the character and purpose of the fund's investments. For example, providing a direct or indirect financial benefit to any party cannot be a consideration when making investment decisions and arrangements (other than increasing the return to the fund).

A possible indication that the sole purpose test has been contravened is where a fund is running an active business as part of its investment strategy. If a superannuation fund is conducting a business, it may not be being maintained for the sole purpose of providing benefits for the members and beneficiaries of the fund.

There are no specific restrictions on investing in collectables such as art or wine, however, the sole purpose test means that members cannot enjoy a direct or indirect benefit from the investment, for example, members should not display art owned by the fund in their home at no cost or at cheap rates.

Common breaches of the sole purpose test are:

- seeking out an investment that offers a pre-retirement benefit to a member or associate, or
- entering into an arrangement to provide financial assistance or a pre-retirement benefit to a person or entity at a financial detriment to the fund.

EXAMPLE: Can my superannuation fund purchase a golf club membership?

The short answer is almost always no. A trustee should not receive a personal benefit from any investment. In some cases, trustees may be able to divest the self managed superannuation fund and its members of benefits attached to an investment that are outside those allowed under the sole purpose test so that the fund can participate in an otherwise sound investment. For example, by assigning golf membership rights attaching to an investment to an unrelated party at market rates (although any arrangement where persons arranged to 'swap' membership rights at market value is still a breach of the test).

The principle that all investments are primarily for the trustee's retirement benefit must be followed. Most properties with an attached golf membership still attract annual fees, which would reduce the trustee's benefit in the fund. Even if the trustee used money from outside the fund to pay the fees, they would still be obtaining an advantage that would not normally be available to them.

Any investment that attracts a benefit that the trustee intends to use should be examined very carefully to ensure that it meets all investment rules and requirements. If unsure, contact us or your adviser.

PENALTIES FOR CONTRAVENING THE SOLE PURPOSE TEST

Contravening the sole purpose test is very serious and may lead to trustees facing civil and criminal penalties. It can result in a fine of up to 2000 penalty units and/or five years imprisonment for individual trustees, and may result in the fund losing its complying status. Higher penalties apply to corporate trustees. The value of a penalty unit is \$110.

ACCEPT CONTRIBUTIONS IN ACCORDANCE WITH THE RULES

It is important that, as a trustee, you are aware of the minimum standards for **accepting contributions under the SIS regulations**. These standards are designed to ensure that contributions are made for retirement purposes only. However, you should also be aware that these are minimum standards, and the trust deed of your fund may prescribe more restrictive acceptance rules.

Trustees are required to allocate to member accounts any contributions received within 28 days after the end of the month in which they were received.

TYPES OF CONTRIBUTIONS

The two major categories of contributions are mandated employer contributions and non-mandated contributions.

Mandated employer contributions

Mandated employer contributions are contributions made by an employer for the benefit of a fund member that are:

- superannuation guarantee contributions
- superannuation guarantee shortfall components
- award-related contributions, or
- certain payments from the superannuation holding accounts special account.

Non-mandated contributions

Voluntary superannuation contributions include contributions made by employers over and above their *Superannuation Guarantee (Administration) Act 1992* or award obligations, personal contributions made by employees, personal contributions made by self-employed people, other personal contributions and spouse contributions.

DEFINITION OF TERMS

There are a number of terms that need to be explained before discussing whether a fund can accept contributions.

Gainfully employed means employed or self-employed for gain or reward in any business, trade, profession, vocation, calling, occupation or employment. Gain or reward is the receipt of remuneration such as wages, business income, bonuses and commissions in return for personal exertion from these activities. It does not include gaining passive income such as rent or dividends.

Employment on a full-time basis means gainful employment for at least 30 hours each week.

Employment on a part-time basis, for the purposes of a fund accepting contributions, means gainful employment for at least 40 hours in a period of not more than 30 consecutive days in that financial year.

ACCEPTANCE OF CONTRIBUTIONS

Mandated employer contributions

Under the SIS regulations, you can accept mandated employer contributions for members at any time. This means you may accept mandated employer contributions for a person regardless of the age of the person or the number of hours they are working at that time.

Non-mandated contributions

These are also known as member contributions and non-mandated employer contributions. You can accept non-mandated contributions only in the following circumstances:

- **For members under 65 years of age**, you can
 - accept member contributions if the member has quoted (for superannuation purposes) their TFN to you
 - accept all other contributions.
 Note special acceptance rules for fund capped contributions.
- **For members aged 65 but less than 70**, you may
 - accept contributions only if the member is gainfully employed on at least a part-time basis
 - accept member contributions if the member has quoted (for superannuation purposes) their TFN to you.
 Note special acceptance rules for fund capped contributions.
- **For members aged 70 but less than 75**, you may
 - accept non-mandated employer contributions or member contributions made by the member if the member is gainfully employed on at least a part-time basis
 - not accept other non-mandated contributions, such as spouse contributions or voluntary employer contributions
 - accept member contributions if
 - the member has quoted (for superannuation purposes) their TFN to you, and
 - the contribution is received on or before the day that is 28 days after the end of the month in which the members turns 75.
 Note special acceptance rules for fund capped contributions.
- **For members aged 75 and over** – You are not able to accept any non-mandated contributions for a member aged 75 and over.

No tax file number quoted

If you have accepted member contributions for a member where their TFN has not been quoted (for superannuation purposes) to you, you must return the amount to the individual or entity that made the contribution within 30 days of becoming aware that you had received it and did not hold the member's TFN. However, you do not have to return the amount if the member's TFN is quoted (for superannuation purposes) to you within 30 days of receiving the contribution.

Fund-capped contributions

From 1 July 2007, non-concessional contributions made to superannuation are capped at \$150,000, or \$450,000 over a three-year period. You cannot accept any fund-capped contributions in a financial year for a member that exceed:

- **For members aged 64 or less on 1 July of the financial year** – three times the non-concessional contributions cap, which is \$450,000 for the 2007–08 financial year.
- **For members aged 65 but less than 75 on 1 July of the financial year** – the non-concessional contributions cap, which is \$150,000 for the 2007–08 financial year.

Fund-capped contributions are member contributions other than a:

- contribution that is covered by a valid and acknowledged notice of intent to claim an income tax deduction
- contribution that arises from a structured settlement or order for personal injury. The member or their legal personal representative must have notified you on or before making it that it was such a contribution
- contribution that is covered by a choice to treat it as a contribution for a capital gains tax (CGT) small business concession. The member must have notified you of their choice on or before making the contribution
- superannuation guarantee charge or superannuation holding account special account payment from us
- super co-contribution, or
- contribution that is a directed termination payment.

Member contributions are contributions by, or on behalf of, a member, but do not include employer contributions made for the member.

Eligible spouse contributions

You may accept eligible spouse contributions at any time if the spouse is under the age of 65. If the spouse is aged between 65 and 70, eligible spouse contributions may be accepted only if the receiving spouse is at least gainfully employed on a part-time basis. If the spouse is 70 or over, you cannot accept eligible spouse contributions. There is no age limit or employment test for the person making the contribution.

Super co-contributions

The super co-contribution assists eligible low and middle income earners to save for their retirement. Eligible individuals can receive a super co-contribution of up to \$1,500 (\$3,000 for the 2005–06 year), which is normally paid to their superannuation account. We determine eligibility for the **super co-contribution** based on information from income tax returns and member contributions statements.

There has been changes to the super co-contribution that mean more individuals are eligible.

Effective from 1 July 2007:

- if your member is self employed and makes personal superannuation contributions, they may receive a super co-contribution, providing they satisfy the eligibility requirements
- 10% or more of the member's total income for the income year must be from either employment activities or activities from carrying on a business
- the lower threshold of \$28,980 is indexed each year and
- the higher threshold is the lower threshold plus \$30,000. The higher income threshold for 2007–08 year is \$58,980.

Further information on the Super Co-contribution is available at www.ato.gov.au

In specie contributions

In specie contributions are contributions to the fund in the form of an asset other than money. Trustees of regulated superannuation funds are generally prohibited from intentionally acquiring assets (including in specie contributions) from related parties of the fund. Exceptions to this rule include listed securities and business real property, which must be acquired at arm's length and at market value. There are additional exceptions for in-house assets.

There is more information about acquiring assets from related parties in the section '**manage the fund's investments**'.

EXAMPLE

A retired person under the age of 65 wishes to make contributions to the fund, however the trust deed of the fund only allows contributions from people in employment. The fund is not able to accept these contributions due to the restriction in the deed.

SOME OF THE CHANGES TO CONTRIBUTIONS

CONCESSIONAL CONTRIBUTIONS

Concessional contributions are employer contributions and personal contributions that the member or their employer claims as an income tax deduction. Employer contributions include superannuation guarantee contributions and salary sacrifice contributions. These contributions are taxed at a lower 'concessional' rate of 15% which is often referred to as 'contributions tax'.

From 1 July 2007 there is a limit on concessional contributions of \$50,000 (indexed) a year. For people 50 or over, the transitional limit is \$100,000, (not indexed) until 30 June 2012. Contributions over the limit are subject to excess concessional contributions tax.

Excess concessional contributions tax is 31.5% on concessional contributions over the cap. The member is personally liable for this tax, but can ask their super fund to release money to pay it.

NON-CONCESSIONAL CONTRIBUTIONS

Non-concessional contributions are personal contributions that are not claimed as an income tax deduction. These also include contributions made by the member's spouse to the member's super account.

From 1 July 2007, non-concessional contributions made to super are capped at \$150,000, or \$450,000 over a three-year period. A tax of 46.5% is levied on the member for non-concessional contributions over the cap. The member is personally liable for this tax and **must** ask their super fund to release an amount of money equal to the tax.

SELF EMPLOYED CONTRIBUTIONS CLAIMED AS AN INCOME TAX DEDUCTION

From the 2007–08 income year, there have been some changes to self employed deductible contribution. Eligible self employed individual may claim a full income tax deduction for their superannuation contributions.

There have been some changes to the timing of when the notice of intent to deduct these conditions must be lodged with the super fund. The notice of intent to deduct these contributions is now required to be given by the earlier of the:

- time the member lodges their income tax return or
- end of the financial year following the year the contribution was made.

A notice is not valid in certain circumstances. From the 2007–08 income year these circumstances have been expanded to include when:

- a notice is given to you but you no longer hold the contribution, for example because of a partial roll-over that includes the contribution, or
- you have begun to pay a superannuation income stream that includes the contribution.

There have also been some changes to when a notice of intent can be varied. A notice can only be varied (including varied to nil) up until the after the earlier of the time the member lodges their income tax return or the end of the financial year following the year in which the contribution was made. After this time the notice cannot be varied unless:

- a deduction for the contributions is not allowable, and
- the variation reduces the amount by the amount that is not allowable as a deduction.

NO-TFN CONTRIBUTIONS INCOME

From 1 July 2007, if you do not have a member's TFN:

- you will have to pay additional income tax on some types of contributions
- you may not be able to accept some types of contributions, and
- your member may miss out on super co-contributions.

If you pay additional income tax and your member gives you their TFN later, you can claim a tax offset for the amount of the additional tax paid.

What additional tax applies?

While it is not compulsory for members to provide their TFN, if you do not have it you will have to pay additional income tax on those contributions that are assessable income of the fund.

The contributions that will be taxed in this way include:

- contributions made by an employer on behalf of a member, including salary sacrifice contributions, and
- any part of a transfer from a foreign superannuation fund that is assessable income of the fund.

If your member has not quoted their TFN by the end of your income year and their account was opened:

- before 1 July 2007, the assessable contributions will be taxed an extra 31.5% once those contributions reach \$1,000 in an income year. The extra tax is on all assessable contributions made in the income year, which include the first \$1,000, or
- on or after 1 July 2007, all the assessable contributions made during the income year will be taxed an extra 31.5%.

The extra tax on these assessable contributions is in addition to the standard 15% rate of tax payable by superannuation funds on their taxable income.

You have to work out your liability for the additional tax at the end of the income year in which the contributions are made. As the new tax applies to contributions made on or after 1 July 2007, members will have until the end of the income year (generally 30 June 2008) to give you their TFN before the additional income tax will apply. For the next income year, your members have until the end of that income year to quote their TFN to you.

There are transitional provisions that apply to super funds whose 2006–07 income year ends after 1 July 2007. In this case, the period of their 2006–07 income year after 1 July 2007 will be taken to be part of their 2007–08 income year for the application of the additional tax. TFN contributions income received on or after 1 July 2007 that are included in the fund's 2006–07 income year will not be treated as if they had actually been made in the super fund's 2007–08 income year.

If you pay the additional tax and, at a later stage, your member gives you their TFN, you may be able to claim back the additional tax as a 'no TFN income tax offset' in your income tax return. You claim the tax offset in the financial year that the member provides their TFN. You can only claim this offset within three years from the end of the financial year in which the member's contributions that were subject to the additional tax were made.

If you have debited the amount of additional tax from your member you should refund this money to their account.

➤ For more information on these changes, refer to our website at www.ato.gov.au

ROLLOVERS AND TRANSFERS

Most employment termination payments (previously known as eligible termination payments) can no longer be rolled over into superannuation. Some transitional arrangements apply.

Transitional termination payments may be:

- contributed (in full or in part) to a super fund, or
- used (in full or in part) to buy a super annuity before 1 July 2012.

➤ For more information on these changes, refer to our website at www.ato.gov.au

A member's benefits can generally be rolled over or transferred within the superannuation system with the member's consent.

The superannuation system includes:

- regulated superannuation funds
- approved deposit funds
- retirement savings accounts
- exempt public sector funds
- deferred annuities, and
- unclaimed money authorities.

A current listing of regulated complying superannuation funds can be obtained from the ABN Lookup website at www.abn.business.gov.au

If you roll over benefits from another superannuation fund, that fund can ask you to show that you are a member of your self managed superannuation fund before processing your request.

There is more information about the reporting requirements for rolling over and/or transferring benefits in the section on '**Pay benefits in accordance with the rules**'.

⊖ There are substantial penalties for not complying with the contribution standards.

ACCEPTING CONTRIBUTIONS FOR MEMBERS WHO ARE OVERSEAS

If a member of a fund goes overseas and becomes a non-resident in any year, you need to be aware that accepting contributions on behalf of the non-resident member has the potential to make your fund a non-resident fund and consequently, a non-complying fund. Contributions for a non-resident member can be accepted only if they relate directly to a time when the member was a resident. If you are in doubt, contact us.

If a member of a fund goes overseas for less than two years, a superannuation fund is considered ordinarily in Australia even if the central management and control is temporarily outside Australia.

MANAGE THE FUND'S INVESTMENTS

As a trustee of a self managed superannuation fund, one of your key areas of responsibility is to manage the fund's investments. The SIS Act places certain duties and responsibilities on trustees when making investment decisions. They are designed to protect and increase member benefits for retirement.

INVESTMENT STRATEGY

As a trustee, you are required to prepare and implement an **investment strategy** for your fund, and regularly review it.

The strategy must reflect the purpose and circumstances of the fund and consider:

- investing in such a way as to maximise member returns, taking into account the risk associated with the investment
- appropriate diversification and the benefits of investing across a number of asset classes (for example, shares, property, fixed deposit) in a long-term investment strategy
- the ability of the fund to pay benefits as members retire and pay other costs incurred by the fund, and
- the needs of members (for example, age, income level, employment pattern and retirement needs).

An appropriate investment strategy should set out the investment objectives of the fund and detail the investment methods the fund will adopt to achieve these objectives. An investment strategy should be unique to the requirements of the fund and its members, and should be reviewed regularly and updated as required.


You must make sure all investment decisions are made in accordance with the investment strategy of the fund. If in any doubt, you should seek investment advice or appoint an investment manager in writing.

EXAMPLE

The trustees of a self managed superannuation fund are approaching retirement age. As a result, they have decided to amend their investment strategy with the aim of investing in assets which give a lower return but less risk. They believe this will provide more stability for their benefits until they are paid out.

RESTRICTIONS

The superannuation law does not prescribe what a fund can and cannot invest in, but it does restrict the entities the fund can invest in or with and the entities from which the fund can acquire assets. The investment restrictions aim to protect fund members by ensuring fund assets are not exposed to particular undue risks (for example, the risk of an associated business failing). The restrictions also aim to ensure that funds make investment decisions with the primary purpose of generating retirement benefits for members, rather than providing current-day support to members or other parties.

 The investment rules are one of the most important requirements of the SIS Act and failure to comply with the rules could result in trustees being imprisoned, removed as trustees or fined, and/or the fund losing its complying status.

Securing the assets of a fund

Trustees must ensure that the fund's ownership of its investments is assured. We require the fund's assets to be held in a legally recognised ownership arrangement. We prefer the assets to be in the names of all of the individual trustees as trustees for the fund, or in the case of a corporate trustee, in the name of the company as trustee for the fund.

EXAMPLES

- 1 The *Smith Family Superannuation Fund* has two individual trustees, Bill and Mary Smith. Where legally possible, the fund's assets must be held in the name of 'Bill and Mary Smith as trustee for the *Smith Family Superannuation Fund*'.
- 2 The *Johnson Superannuation Fund* has a corporate trustee, being *ABC Pty Ltd*. Where possible, the fund's assets should be held in the name of '*ABC Pty Ltd* as trustee for the *Johnson Superannuation Fund*'.

It is recognised that in certain states, restrictions may prevent self managed superannuation funds from holding assets using the fund's name at all. In this circumstance, a caveat, legal instrument or declaration of trust should be properly executed for the asset, to clearly show the fund's ownership of the property. Failure to take appropriate action to protect the fund's assets is a breach of trustee duties and responsibilities. If the restriction from holding the assets in the name of the fund exists, it should be clearly documented.

Loans/financial assistance to members or a member's relative

As a trustee, you are prohibited from lending money or providing direct or indirect financial assistance (including the provision of credit) from the fund to a member or a member's relative.

The use of a fund asset by a member or a member's relative as a guarantee to secure a personal loan, for example, would contravene this investment restriction.

In relation to a member, a relative means:

- a parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendant or adopted child of that individual or of his or her spouse, or
- a spouse of that individual or of any individual specified above.

A spouse includes another person who, although not legally married to the person (that is, a de facto spouse), lives with the person on a genuine domestic basis as a husband or wife of the person.

EXAMPLE

Your son is looking to finance a business and asks you to loan him some money. The money cannot be loaned from your fund.

Borrowings

As a trustee, you are prohibited from borrowing money except in limited circumstances including:

- for a maximum of 90 days to enable you to meet benefit payments due to members or to meet an outstanding surcharge liability as long as the borrowing does not exceed 10% of the fund's total assets, or
- for a maximum of seven days to cover the settlement of security transactions if the borrowing does not exceed 10% of the fund's total assets. You cannot borrow to settle security transactions, unless at the time the transaction was entered into it was likely that the borrowing would not be needed.

Acquisition of assets from a related party

As a trustee, you are prohibited from acquiring assets for the fund from a related party of the fund. There are limited exceptions to this rule where:

- the asset is a listed security (for example, shares, units or bonds listed on an approved stock exchange) and the asset is acquired at market value
- the asset is business real property and acquired at market value, or
- the asset is an in-house asset and would not result in the level of in-house assets of the fund exceeding 5% of the fund's assets, or is an asset specifically excluded from being an in-house asset.

A related party of a fund covers all members of the fund and their associates, and all standard employer-sponsors of the fund and their associates.

An associate of a particular member of a self managed superannuation fund includes every other member of the fund, the relatives of each member, the business partners of each member and any spouse or child of those business partners, any company a member (or the members together) controls or influences and any trust the member (or the members together) controls.

Associates of standard employer-sponsors would include business partners and any companies or trusts the employer controls (either alone or with their other associates), or companies and trusts that control the employer.

A standard employer-sponsor is an employer who contributes to a superannuation fund for the benefit of a member, under an arrangement between the employer and the trustee of a fund.

Business real property of an entity generally relates to land and buildings used wholly and exclusively in a business. Trustees are permitted to acquire up to 100% of the fund's total assets in the form of business real property from a related party. Where business real property is used in primary production business, such as a farm, it can still meet the test of being used wholly and exclusively in a business, if an area of land of not more than two hectares contains a dwelling that is used for private or domestic purposes. However, the main use of the whole property cannot be for domestic or private purposes.

EXAMPLES: Transferring property to a self managed superannuation fund

- Q** Leo owns a residential property that is rented to an arm's length tenant. Leo is also a member of the Leo Superannuation Fund. The fund has four members. Can the Leo Superannuation Fund acquire the property from Leo?
- A** No, the property is a residential property, the acquisition of which is not covered by one of the exceptions under the acquisition of property from a related party rule.
- Q** Dianne owns a factory that is rented to an arm's length tenant. She is also a member of the Dianne Superannuation Fund. the fund has four members. Can the Dianne Superannuation Fund acquire the property from Dianne?
- A** Yes, as the property is a factory used in a business, it would fall under the business real property exception under the acquisition of property from a related party rule.
- Q** Joe owns a farm on which an area of land of less than two hectares contains a dwelling that is used for domestic or private purposes. Joe is a member of a self managed superannuation fund. Joe wants to sell the farm to his superannuation fund. Can Joe's superannuation fund acquire the farm?
- A** Yes, the fund could acquire the farm as the amount of land being used for domestic or private purposes is less than two hectares, thus the exemption under the acquisition of property from a related party rule.

In-house assets

An in-house asset is a loan to, or an investment in a related party of the fund, or an investment in a related trust of the fund. An asset of the fund that is leased to a related party is also an in-house asset. In general, as a trustee you are restricted from lending to, investing in or leasing to a related party of the fund more than 5% of the fund's total assets.

There are some exceptions, including for business real property that is subject to a lease between the fund and a related party of the fund. There is a limited exemption for certain investments in related non-g geared trusts or companies.

EXAMPLE

A self managed superannuation fund has total assets of \$1,000,000. One of the assets of the fund is a holiday home at the beach, valued at \$138,000. The trustees of the fund want to pay market rent and stay in the house for six weeks over summer. But they are correctly advised by their accountant that they cannot do this as the value of the house is more than 5% of the total value of their fund's assets.

Investments must be made and maintained on an arm's length basis

Investments by trustees must be made and maintained on a strict commercial basis. The purchase and sale price of fund assets should always reflect a true market value for the asset. Income from assets held by the fund should always reflect a true market rate of return.

Special investment rules

Special investment rules may apply to investments made by funds before 11 August 1999. If your fund was established before this date, contact us or your adviser if you need more information.

Investing in real estate

You must ensure the level of investment in business real property still meets the investment strategy of the fund, including diversification of assets, liquidity and maximisation of member returns in the fund. A fund with 100% investment of assets in business real property could struggle to meet these requirements.

As with other superannuation fund investments, there cannot be a charge over a property (that is, a loan or covenant).

PAY BENEFITS IN ACCORDANCE WITH THE RULES

As a trustee of a self managed superannuation fund, you need to know the requirements of the SIS Act and the SIS regulations when paying benefits from your fund. The payment standards contained in the SIS Act and the regulations, the sole purpose test and the preservation rules ensure monies in the fund are paid to members only in appropriate circumstances. A member's benefits in a fund may be paid only by being 'cashed' in accordance with the SIS Act.

CASHING OF BENEFITS

There are two forms of cashing of benefits – compulsory and voluntary.

Compulsory cashing of benefits

A member's benefits must be paid out as soon as possible after the member dies.

⚠ There is no compulsory cashing out rule for superannuation payments because a member has reached a particular age.

➔ For more information, refer to our website at www.ato.gov.au

Voluntary cashing of benefits

A member's benefits in a fund will be classified as one or more of the following:

- preserved benefits
- restricted non-preserved benefits, and/or
- unrestricted non-preserved benefits.

Regardless of their source, all contributions made by or on behalf of a member and all earnings in respect of the period after 30 June 1999 are preserved benefits. Employer eligible termination payments rolled over into a superannuation fund are also preserved benefits.

Preserved benefits may be cashed voluntarily only if a condition of release is satisfied and then subject to any cashing restrictions imposed by the SIS Act. Cashing restrictions specify what form the benefits must be taken in.

Restricted non-preserved benefits cannot be cashed until the member satisfies a condition of release. They are subject to the same cashing restrictions as preserved benefits, with one exception (see the section on **terminating gainful employment**).

Unrestricted non-preserved benefits do not require a condition of release to be satisfied, and may be paid upon demand by the member. An example of this type of benefit is where a member has previously satisfied a condition of release and decided to keep the money in the superannuation fund.

PRESERVATION AGE

Preservation age is generally the age at which a person is allowed to access their superannuation benefits if they have stopped working, unless other extenuating circumstances occur and the requirements which permit accessing the benefits early are met.

A person's preservation age depends on their date of birth, as set out in the following table.

Date of birth	Preservation age
Before 1 July 1960	55
1 July 1960 – 30 June 1961	56
1 July 1961 – 30 June 1962	57
1 July 1962 – 30 June 1963	58
1 July 1963 – 30 June 1964	59
After 30 June 1964	60

Preservation age is important for a condition of release. Refer to '**What are the conditions of release**'

FORM OF PAYMENT BENEFITS

Member benefits may generally be paid in any the following forms, provided the governing rules of the fund allow it:

- a single lump sum
- one or more pensions or the purchase of one or more annuities
- a combination of the above.

EARLY ACCESS TO BENEFITS

Early access or release of preserved benefits and restricted non-preserved benefits is permitted only in cases of severe financial hardship, on tightly restricted compassionate grounds, or in the event of permanent incapacity. These situations occur only in very limited circumstances.

Setting up or using a self managed superannuation fund to gain improper early access to superannuation is **illegal**. Significant penalties apply to both the trustee of the fund and the recipient of the early release if a benefit is unlawfully released.

⊖ Be aware of promoters who claim they can help you access your retirement benefits, such as for buying a house, car or a holiday or for solving your financial problems. These schemes are illegal. Early access to superannuation is allowed only in cases of severe financial hardship or on compassionate grounds or permanent incapacity. Such requests do not require the services of a promoter. In cases of severe financial hardship and in the event of permanent incapacity, the decision to release benefits will be made by the trustee of the fund. Compassionate grounds should be referred to **APRA** who will consider and process such requests free of charge.

WHAT ARE THE CONDITIONS OF RELEASE?

Conditions of release are the nominated events, under the SIS Act, that a person must satisfy to enable them to withdraw their benefits from a superannuation fund. You need to be aware that the conditions of release are also subject to the rules of your individual superannuation fund (as set out in the trust deed). It is possible that a benefit may be payable under the SIS Act but cannot be paid under the rules of your fund.

Superannuation is money invested for a member's retirement. It enjoys tax concessions, provided it is not accessed until the member meets certain conditions, which are generally retirement-related.

According to the SIS Act, a member's preserved benefits and restricted non-preserved benefits may be paid out for the following reasons:

1 Retirement

Actual retirement depends on a person's age and, for those under 60 years of age, their future employment intentions. A retired member cannot access their preserved benefits before they reach their preservation age.

For people aged less than 60

A member who is aged less than 60 who has reached their preservation age, retires when the arrangement under which they were gainfully employed ceases and the member does not intend to be gainfully employed for at least 10 hours a week, in the future.

When a member reaches 60

When the member has reached 60 years of age, their retirement occurs when an arrangement under which they were gainfully employed ceased on or after they reached age 60 or the member does not intend to be gainfully employed on a full-time or part-time basis. There are no 'cashing restrictions' for retirement.

For members aged 60 or more

Where a member who is aged 60 or more gives up one employment arrangement but continues in another employment relationship, they:

- a** may cash all preserved and restricted non-preserved benefits accumulated up until that time, but
- b** may not cash any preserved or restricted non-preserved benefits accumulated after that condition of release occurs.

They cannot cash those benefits until a fresh condition of release occurs. If a member aged 60 or more commences a new employment arrangement after satisfying a condition of release, such as retirement from a previous employment arrangement at or after age 60, benefits related to the new employment remain preserved until a further condition of release is satisfied.

2 Attaining age 65 or more

If a member has reached age 65 they may cash their benefits at any time. There are no cashing restrictions on attaining age 65 or more.

3 Terminating gainful employment after 1 July 1997 – benefits less than \$200

A member may voluntarily cash their benefits where they have terminated employment with a standard employer-sponsor of the fund and their preserved benefits are less than \$200. There are no cashing restrictions on payment of these benefits.

4 Terminating gainful employment – benefits of \$200 or more

Subject to the governing rules of the fund, where a member has terminated employment with an employer who had contributed to the member's fund, preserved benefits may be paid, but the benefits must be taken as a non-commutable lifetime pension or annuity. On termination, all restricted non-preserved benefits become unrestricted non-preserved benefits and therefore can be cashed out on request from the member (no cashing restrictions).

5 Permanent incapacity

A member's benefits may be cashed if they cease gainful employment and you are satisfied that the member is unlikely, because of ill health, to engage in gainful employment for which they are reasonably qualified by education, training or experience. There are no cashing restrictions on payment of benefits.

6 Temporary incapacity

A member's benefits may be paid where you are satisfied that the member has temporarily ceased work due to physical or mental ill health which does not constitute permanent incapacity. In general, temporary incapacity benefits may be paid only from the insured benefits or voluntary employer-funded benefits.

It is not necessary for the member's employment to fully cease but, generally, a member would not be eligible for temporary incapacity benefits if they were receiving sick leave benefits. The cashing restriction is that the benefit must be paid as a non-commutable income stream for the period of the incapacity.

7 Severe financial hardship

Different conditions for release and cashing restrictions apply depending on the age of the member:

- Where the member is under their preservation age plus 39 weeks, you must be satisfied that the member:
 - cannot meet reasonable and immediate family living expenses, and
 - has been receiving relevant Commonwealth income support payments for a continuous period of 26 weeks and was receiving that support at the time of applying to the trustee.

The cashing restriction is that the payment must be a single gross lump sum of no more than \$10,000 and no less than \$1,000 (or a lesser amount if the member's benefits are less than \$1,000). Only one payment is permitted in any 12-month period.

- Where the member has reached their preservation age plus 39 weeks, you must be satisfied that the member:
 - has been receiving Commonwealth income support payments for a cumulative period of 39 weeks since reaching their preservation age, and
 - was not gainfully employed on a full-time or part-time basis at the time of applying to the trustee.

There are no cashing restrictions if releasing benefits under these circumstances.

8 Compassionate grounds

Benefits may be released on specified compassionate grounds where:

- a member does not have the financial capacity to meet an expense
- release is allowable under the governing rules of the fund, and
- APRA determines, in writing, that release is permitted.

There are specific grounds for release and, once APRA has approved the release, the final decision to release the benefits lies with you as trustee.

9 Temporary residents departing Australia

People who have entered Australia on an eligible temporary resident's visa and who permanently depart Australia after 1 July 2002 can be paid any superannuation they have accumulated. The member will have to prove their eligibility under this condition of release.

The payment is subject to special withholding tax. You are required to issue a withholding payment summary to the individual and report details of the amounts withheld annually to us. See our website at www.ato.gov.au for more information.

10 Attaining preservation age (transition to retirement)

Members who are under the age of 65 and have reached preservation age, but remain gainfully employed on a full-time or part-time basis, may access their preserved benefits and restricted non-preserved benefits as a non-commutable income stream.

As a trustee, you have very important responsibilities in determining whether (and when) a member can receive their benefits. You may be subject to significant penalties if you fail to comply with the payment standards.

! All of the conditions of release are subject to the fund's rules. You must ensure the trust deed of the fund allows members to be paid benefits in the above circumstances.

ROLLOVERS AND TRANSFERS

Generally, rollovers or transfers do not require a condition of release to be satisfied, subject to the governing rules of the fund. However money rolled over from an employer into a superannuation fund is preserved and can only be cashed once the member reaches preservation age and meets a condition of release.

! Reasonable benefit limits have been abolished for benefits received from 1 July 2007.

➤ For more information about withdrawing from superannuation, refer to *APRA Superannuation Circular No 1.C.2 – Payment standards for regulated superannuation funds* at www.apra.gov.au

TYPES OF PENSION BENEFITS

As outlined, benefits from a superannuation fund may generally be paid as a lump sum, pension or annuity, provided the member has satisfied a condition of release (for example, retirement).

There are new rules for paying pensions and annuities. There are also restrictions about what money can be used to purchase an income stream and restrictions on reversionary beneficiaries.

From 20 September 2007, all new pensions and annuities must meet the new rules.

Superannuation pensions

From 20 September 2007, any new pension must fall into one of the following classes:

- account-based pensions
- non account-based pensions

Account-based pensions have the following general characteristics:

- They require a minimal annual payment to be made with no maximum amount stipulated.
- They can only be commuted in particular circumstances.
- They can not have a residual capital value.
- They cannot be paid to a non-dependant beneficiary.

A new account based transition to retirement pension may be commenced on or after 1 July 2007. These pensions must meet the standards of ordinary account based pensions but are also required to have a maximum annual payment limit of 10% of the account balance. Commutations of these pensions cannot be taken in cash except in limited circumstances.

Non account-based pensions have the following general characteristics:

- They may be paid for life or for a fixed term or years.
- They can only be commuted in particular circumstances.
- Certain non-account based pensions may have a residual capital value.
- They can not be paid to a non-dependant beneficiary.

Pensions commenced before 20 September 2007 that meet the SIS regulations pension rules as they existed immediately before 1 July 2007, will generally be taken to be superannuation pensions for the purposes of the SIS Act.

➤ For more information refer to our website
www.ato.gov.au

⚠ Self managed superannuation funds cannot pay a defined benefit pension unless they were paying a defined benefit pension to a member before 12 May 2004.

➤ Before starting to pay any pension, we recommend that you seek the advice of a professional adviser such as an accountant, financial planner or actuary.

ADMINISTRATIVE OBLIGATIONS

There are administrative obligations that trustees of self managed superannuation funds must meet when paying benefits to members or rolling over benefits between funds.

Reporting and registering requirements

When paying a benefit, the trustee will need to consider the following administrative obligations:

1 Register for pay as you go (PAYG) withholding

If you are required to withhold an amount from a payment, you must be registered for PAYG withholding. You must register as soon as you know you will be making payments from which you need to withhold.

What types of payments do you need to withhold from?

You will need to withhold tax from a payment that is made to a member under 60. If the benefit is paid as:

- a pension or annuity (otherwise called a superannuation income stream), the rate at which you need to withhold tax is detailed in *Schedule 34 – Tax table for superannuation income streams* (NAT 70982), and
- a lump sum, the rate at which you need to withhold tax is detailed in *Schedule 33 – Tax table for superannuation lump sums* (NAT 70981).

You will also need to withhold from a payment made to a member who is 60 or more if the benefit is paid from an untaxed source. The fund will be making a payment that contains an amount from an untaxed source where the fund pays a death benefit superannuation lump sum and the fund has received proceeds from an insurance policy for which the fund has claimed a deduction for:

- a part of the premium for the life policy or
- an amount based on the fund's future liability to pay the death benefit.

A superannuation death benefit is a payment from the fund to a person because of the death of a fund member.

What types of payments do you not need to withhold from?

You do not need to withhold tax when paying a benefit if:

- the benefit is from a taxed source
- the benefit is being paid as either a pension (superannuation income stream) or a lump sum, and
- the member receiving the benefit is 60 years or over at the time of the payment.

You do not need to withhold tax or report these payments to us, because these payments are tax free.

2 Obtain a Tax file number declaration from the member

The *Tax file number declaration* (NAT 3092) allows the member to quote their TFN and supply information to determine the withholding rate.

If you are required to withhold from a payment and the member does not quote their TFN you will need to withhold from the payment at 46.5% for residents and 45% for non residents.

3 Issue payment summaries

If you have withheld tax from the payment of a benefit to a member you need to issue a PAYG payment summary form. If the payment was a:

- pension or annuity, you need to issue a *PAYG payment summary – superannuation income stream* (NAT 70987). For information about how to complete the form refer to *How to complete the PAYG payment summary – superannuation income stream* (NAT 70986),
- lump sum, you need to issue a *PAYG payment summary – superannuation lump sum* (NAT 70947). For information about how to complete this form refer to *How to complete the PAYG payment summary – superannuation lump sum* (NAT 70946).

You need to provide payment summaries to the person you made payment to for payments of:

- pensions and annuities (the *PAYG payment summary – superannuation income stream* form), by 14 July following the end of the financial year in which payment is made.
- lump sum payments (the *PAYG payment summary – superannuation lump sum* form), within 14 days of making the superannuation lump sum payment.

If you have issued payment summaries, you also need to lodge a *PAYG withholding payment summary statement* (NAT 3447) with the Tax Office by 14 August.

You may be able to lodge your payment summaries and PAYG withholding reports using the electronic commerce interface (ECI) software. To find out more about ECI and our other online services, visit our website at www.ato.gov.au/onlineservices

In addition, you may also be able to lodge your forms using electronic media such as disks, CD-ROMs or DVDs. For more information on lodging using electronic media, obtain a copy of *How to submit your PAYG withholding annual report electronically* (NAT 3367) at our website www.ato.gov.au

If you provide your PAYG withholding payment summary annual report to us electronically, you do not need to forward copies of payment summaries to us. You are also not required to complete a PAYG payment summary statement.

4 Use the Rollover benefits statement when rolling over benefits

When rolling over benefits, the trustee must complete a *Rollover benefits statement* (NAT 70944) and pass this form, along with the benefits being rolled over, to the receiving fund/s within seven days of paying the rollover. A copy of the statement must be given to the individual within 30 days of paying the rollover to the receiving fund. For information about how to complete this form refer to *How to complete a rollover benefits statement* (NAT 70945).

The trustee must ensure this rollover is to a complying fund. A current listing of regulated complying superannuation funds can be obtained from the ABN Lookup website at www.abn.business.gov.au

Actuary's certificates

Requirements under the *Income Tax Assessment Act 1936*

A fund that is paying a pension is generally required to obtain an actuary's certificate to qualify for exemptions from tax on the fund's income from assets used to make current pension payments as they fall due. The assets being used to provide the current pension payments are classed as segregated or unsegregated.

- segregated current pension assets are assets of the fund that are used to generate income in order to fund current pension liabilities and are segregated from other assets in the fund. An actuary's certificate may be required and may cover a maximum of three years.
- unsegregated current pension assets are assets used to fund pension liabilities that are not segregated. An actuary is required to determine what proportion of the fund's income relates to the current pension liabilities and is therefore exempt from tax. A new actuary's certificate is required each year.

However, a fund does not need to obtain an actuary's certificate if the fund is paying account-based, allocated pensions and/or market linked pensions from income generated from current pension assets. The income from these segregated current pension assets will be exempt from the need to have an actuary's certificate.

Requirements under the *SIS act*

Where a fund provides a pension (other than an annuity purchased through a life insurance company, an allocated pension or market-linked income stream), you have to obtain an actuary's certificate confirming that the fund will be able to meet its pension liabilities. This certificate is required every year.

There are a range of administrative obligations imposed on self managed superannuation funds under the law. As a trustee, you are responsible for ensuring all these obligations are met.

MEET LODGMENT AND ADMINISTRATIVE OBLIGATIONS

ANNUAL INCOME TAX AND REGULATORY RETURNS


All self managed superannuation funds must lodge annual income tax and superannuation regulatory information with us, using the *Fund income tax and regulatory return* (NAT 0658) for the relevant year.


The lodgment and payment date for all self managed superannuation funds that prepare their own income tax and regulatory return is 31 October each year.

The lodgment and payment dates for all tax agent prepared income tax and regulatory returns for self managed superannuation funds are in accordance with the tax agent lodgment program. An up-to-date program is available from our website at www.ato.gov.au or by phoning **13 10 20**.

All self managed superannuation funds are required to have the financial accounts and statements of the fund audited each year by an approved auditor (see '**Appoint an approved auditor**' section.)

You must not lodge the income tax and regulatory return until after the audit of the fund has been finalised, as information from the audit report is required to complete the regulatory return.

 When reporting for the 2007–08 financial year, the fund's income tax and regulatory return will be merged with the member contributions statement to produce a single annual return for self managed superannuation fund. This will be called the SMSF annual return. For all previous financial years, trustees should continue to report on the *Fund income tax and regulatory return* (NAT 0658).

 Failure to lodge your annual return by the due date can result in penalties and/or the loss of the fund's tax concessions.

EXAMPLE

A fund is established on 10 June. The fund must lodge an income tax/regulatory return, and obtain an audit report from an approved auditor prior to lodgment of the return, for that financial year.

EXAMPLE

A trustee of a self managed superannuation fund fails to lodge a fund regulatory and income tax return. We send a letter to the trustee advising of their requirement to lodge the return. No response is received from the trustee. We will send a reminder letter, requesting the lodgment of the return. The trustee fails to lodge the return and can be referred for prosecution action. A maximum penalty of \$5,500 can be imposed by the court.


Member contributions statements

All self managed superannuation funds must lodge a member contributions statement for contributions received for every year that their fund operates.

The member contributions statement records all contributions that are received by the fund on behalf of its members. This information is used as part of the process for determining whether self managed superannuation fund trustees are eligible to receive the super co-contribution as well as determining contribution caps (see the '**Contributions**' section for more information on contribution caps).


 Failure to lodge a *Superannuation member contributions statement* (NAT 2710) can result in penalties.

SUPERVISORY LEVY

 From the 2007–08 financial year, the supervisory levy will increase from \$45 to \$150 per year and will now be payable at the same time as the fund's income tax liability (that is, at the same time that you lodge the SMSF annual return).

Previously, the annual \$45 superannuation supervisory levy was paid to us by the lodgment date for your fund's income tax and regulatory return. Supervisory levy payment advices were issued shortly before the due date for the income tax/regulatory return.

RECORD KEEPING REQUIREMENTS

 We have identified poor and inadequate record keeping as a problem for self managed superannuation funds. Make sure you give this area your detailed attention.

You must keep the following records for a minimum of five years:

- accurate and accessible accounting records that explain the transactions and financial position of the fund
- an annual operating statement and an annual statement of the fund's financial position, and
- copies of all annual returns lodged.

You must keep the following records for a minimum of 10 years:

- minutes of trustee meetings and decisions (where matters affecting the fund were discussed)
- records of all changes of trustees
- trustee declarations recognising the obligations and responsibilities for any trustee, or director of a corporate trustee, appointed after 30 June 2007
- members' written consent to be appointed as trustees, and
- copies of all reports given to members.

Once you have established your fund, you are legally required to:

- lodge a *Fund income tax and regulatory return* (NAT 0658)
- lodge a *Superannuation member contributions statement* (NAT 2710)
- pay the supervisory levy, and
- have an audit report prepared.

You have to do this each year, including the year you establish the fund. You have to do this regardless of whether there are any assets in the fund or whether there have been any transactions.

EXAMPLE: Multiple transactions in line with an investment strategy

In accordance with the investment strategy of the Mary and Joe Superannuation Fund, 20% of the fund assets would comprise foreign shares. Mary and Joe engaged in 12 transactions involving foreign shares in April. A summary, rather than all the details of the 12 transactions in the trustee minutes is sufficient for record keeping purposes.

EXAMPLE: Change within asset class

The investment strategy of the *Mary and Joe Superannuation Fund* states that 20% of fund assets would comprise of foreign shares. The balance of 80% would comprise of investments in two particular Australian companies and a listed unit trust in equal proportions. Mary and Joe decide to sell the investment in one of the Australian companies to invest the proceeds in another Australian company. Mary and Joe update their investment strategy and then proceed with the transactions. They also prepare a minute to document the reasons for the decision, including details of the new investment.

APPOINT AN APPROVED AUDITOR

As a trustee of a self managed superannuation fund, you are required to appoint an approved auditor to audit the operations of the fund for each year or part year the fund is in existence. The auditor is required to assess the fund's overall compliance with the SIS Act (compliance audit) and the fund's financial statements (financial audit).

You must provide the auditor with any relevant documentation requested to enable the auditor to finalise the audit. The approved auditor must provide an audit report in the approved form to you prior to the due date of the fund's income tax and regulatory return. Some of the information in the audit report must be used to complete the regulatory return.

Auditors must bring to our attention and the attention of trustees, any concerns about the fund's financial position or its compliance with the SIS Act. Auditors must report certain SIS Act contraventions that they may identify during an audit to us. The SIS Act contraventions are listed in the *Instructions for completing an auditor/actuary contravention report* (NAT 11299). This is in addition to the existing auditor obligation to report all contraventions to the trustees.

An approved auditor may be a registered company auditor, the Auditor-General of the Commonwealth or of a state or a territory, or a member or fellow of one of the following professional organisations.

Professional organisation	Manner of association
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

An approved auditor reporting concerns to us may not necessarily result in compliance action from the regulator. While these reports form an important part of our risk assessments, a fund may still be subject to compliance action even when a report has not been received from an auditor.

We use auditor reports, along with other information provided in returns and from our own compliance activities, to identify high-risk funds for case selection.

IMPORTANT CHANGES

The obligations for to auditor reporting have changed. From 1 July 2007:

- where a fund established from 1 July 2007 has any contravention in its first year of operation, an approved auditor will be required to report this to us
- the auditor contravention report will become a standard approved form
- we will be able to prescribe the contraventions and associated materiality levels for all issues, this may be provided as a percentage or in dollar terms, and
- all approved auditors are encouraged to report outside of these minimum requirements where they perceive it is justified.

Approved auditors should continue to report for the 2006–07 financial year as they have been. These new rules will impact approved auditors when reporting for the 2007–08 financial year, onward.

AUDITOR INDEPENDENCE

The SIS Act has no specific requirement for auditor independence, however a lack of independence may be a factor contributing to a self managed superannuation fund's failure to meet legislative guidelines.

Auditors need to follow the standards as outlined by their professional bodies. The code of Professional Conduct of the CPA and the Institute of Chartered Accountants in Australia (ICAA) can be a useful guide. The CPA's Professional statement F1 'Professional Independence' provides guidance to members of the CPA and ICAA. Threats to independence in this guide include:

- **self review (F1 Appendix 1.23)** – where the person who prepared the fund's accounts also conducted the fund's audit
- **self interest (F1 Appendix 1.22)** – this could occur, for example, if the auditor benefits financially from an investment the client has made (eg. shares in the same company), and
- **intimidation (F1 Appendix 1.26)** – this could occur, for example, if a trustee threatens to stop using the auditor's services for related work (eg the auditor may be engaged to provide other services such as financial advice or preparing the accounts of other entities belonging to the trustee).

The Professional Statement F1 is available at www.cpaaustralia.com.au

It is in the interest of the trustee to ensure the highest possible standards of professional conduct from the approved auditor.

➤ Trustees can do everything to fulfil the requirements of the SIS Act except audit the fund. They must appoint an auditor who is not a trustee to do this.

WINDING UP A SELF MANAGED SUPERANNUATION FUND

As a trustee of a self managed superannuation fund, you must notify us as soon as possible if you have decided to close your fund.

Then you will need to lodge your final income tax and regulatory return with us and completing the relevant wind-up labels on the return.

You should ensure that all tax and reporting obligations have been met at the time of winding up the fund. These obligations may include:

- lodging *Fund income tax and regulatory returns* (NAT 0658) with the relevant wind-up labels completed
- lodging all *Superannuation member contributions statements* (NAT 2710) for each member
- reporting any benefits paid by the fund to its members for reasonable benefit limit purposes for financial years up to 30 June 2007
- issuing *PAYG payment summary – superannuation lump sum* (NAT 70947) where any superannuation lump sums have been paid to members, which had tax withheld
- issuing *PAYG payment summary – superannuation income stream* (NAT 70987) where any pension or annuity payments have been paid to members, which had tax withheld
- lodging *PAYG withholding payment summary statements* (NAT 3447) where any payment summaries were issues, and
- paying any outstanding tax liabilities and the supervisory levy.

You must also ensure that all assets and members have left the fund and that everything has been done in accordance with the trust deed.

PENALTIES AND COMPLIANCE

03

A range of penalties apply to a self managed superannuation fund or a trustee of a fund depending on which obligation has been contravened. This section provides a summary of the main sanctions used when breaches occur.

PENALTIES

REGULATORY PENALTIES AND SANCTIONS

To protect members' retirement incomes, we regulate self managed superannuation funds to ensure they comply with both the SIS Act and the SIS regulations. Failure to comply is known as a 'contravention' of the Act and/or regulations and may result in compliance action:

- We can suspend or remove a trustee or all the trustees of a self managed superannuation fund. If we suspend all trustees, we will appoint a constitutional corporation or an individual to act as the trustee during the period of suspension. The appointee is called the acting trustee. We have the power to direct the acting trustee to act in a certain manner.
- We can disqualify a trustee if the trustee has contravened the SIS Act or if the trustee is not a fit and proper person.
- We may, by written notice given to the trustee or investment manager, direct them not to dispose of or otherwise deal in a particular way, any of the assets of the fund until the notice is revoked.

A complying fund that has been made non-complying can suffer serious tax consequences. The fund's total assets (less any member contributions for which no tax deduction has been claimed) are subject to tax at the highest marginal rate. In addition, any income in a year in which a fund is non-complying is taxed at the highest marginal rate.

Setting up or using a self managed superannuation fund to gain improper early access to superannuation is illegal. Trustees who knowingly allow improper access to benefits may suffer severe penalties, including heavy fines and imprisonment. This action may also result in the fund being declared non-complying and the fund's assets being taxed at the top marginal tax rate.

If a trustee is prosecuted and is found guilty of either a civil and/or criminal offence under a civil penalty provision, the maximum penalties that may apply under Part 21 of the SIS Act are \$220,000 (civil proceedings) and/or five years imprisonment (criminal proceedings).

Important changes

From 1 July 2007, increased administrative penalties may be applied where funds:

- fail to lodge returns on time
- provide false and/or misleading statements
- fail to keep and maintain records, or
- fail to advise us of a change of trustee or other changes in the fund.



Using your self managed superannuation fund to gain early access to your superannuation benefits is a breach of the law. As a trustee, you will face a range of penalties. As a member of the self managed superannuation fund, any benefits you access will lose their tax concessions and you are likely to face higher taxes and additional penalties.

INCOME TAX PENALTIES

An administrative penalty may be applied where a trustee makes a statement (or fails to make a statement) that results in an underpayment of tax.

A penalty may apply if a superannuation fund does not lodge an income tax and regulatory return and/or fails to make a true and correct statement.

As a trustee, you are liable for an administrative penalty if you make a false or misleading statement and:

- you take a position that is not reasonably arguable, or
- you fail to make a statement when required.

Depending on your conduct with respect to the shortfall, the base penalty ranges from 25% to 75% of the shortfall amount or tax-related liability for failing to make a statement. This penalty range is affected by circumstances such as the trustee:

- voluntarily disclosing information
- hindering the Commissioner's enquiries, and/or
- repeating the error.

Shortfall interest charge (SIC) will apply to amended income tax assessments, where a taxpayer's assessment is amended to increase the amount of tax payable. The SIC will apply from the due date of the original assessment to the date before the issue date of the amended assessment for the shortfall amount, and is due 21 days after the notice of the penalty is given.

For income tax shortfalls, the SIC will replace the existing general interest charge (GIC) with a charge that is four percentage points lower than the GIC rate.

The GIC is a single rate of interest for all tax where a payment is not received by the due date. The charge applies to (but is not limited to):

- an amount of tax that remains unpaid after the due date
- an underestimation or underpayment of an instalment of tax
- late lodgment of income tax returns for certain years
- an underpayment of tax that remains unpaid after the due date of the amended assessment
- an underpayment of tax following a revision of an activity statement, and
- failure to lodge penalties that remain unpaid after the due date.

The GIC rate for a day is worked out by adding seven percentage points to the 90 day bond accepted bill rate for that day, and dividing that total by the number of days in the calendar year.

OUR COMPLIANCE APPROACH

Since November 1999 we have focused on education and we will continue to do so. However, we are concerned about the compliance of some self managed superannuation funds. Therefore we are increasing our audit activity on high-risk funds and our focus on timely lodgment. For self managed superannuation funds, compliance activities will be more extensive than any time in the past. We will be undertaking around 10,000 compliance activities in 2007–08. We expect every fund to:

- lodge their income tax and regulatory return,
- lodge member contributions statement, and
- pay the supervisory levy.

We want to make sure trustees, auditors, tax practitioners and financial planners are aware of the rules governing self managed superannuation funds. We will also have a dedicated compliance program around approved auditors. We will risk rate and choose approved auditors and check their reporting against the guidelines, along with looking at accuracy and completeness. We will cover 7% of all auditors each year. This will be around 900 to 1,000 reviews of approved auditors each year.

Where we find that trustees are genuinely making an effort to meet their obligations, we will work with them to rectify any breaches.

Our aim is to achieve further compliance improvement, mainly through education, fund reviews and client service, to help self managed superannuation funds self-regulate.

Our objective is to encourage self-management, self-regulation and self-assessment.

Through our consultation process, we have developed practical materials to help trustees better understand their responsibilities. There are many publications now available to help you.

Accepting a written undertaking from trustees may be another method we use to ensure any serious compliance problems are addressed. The undertaking provides the promised action to be taken by the trustees to deal with the contravention. Where the terms of the undertaking are not met by the trustees, we may apply to the court for an order requiring the trustees to:

- comply with the undertaking,
- pay an amount up to the amount of any financial benefit the trustees obtained that is reasonably attributable to the breach, or
- comply with any other orders the court considers appropriate.

We will take a firm approach with trustees who fail to make a genuine effort to comply, or who set out to deliberately avoid meeting their legal obligations. Depending on the severity of the breach, such action may include:

- declaring the fund to be non-complying (so that it loses valuable tax concessions), and
- prosecuting trustees for failing to obey the law.

As the regulator of self managed superannuation funds, we take all possible steps to ensure that enforcement action in relation to contraventions is appropriate and taken only after due consideration has been given to all the circumstances.

Our approach to ensuring that trustees take responsibility for protecting and investing members' retirement benefits appropriately is based on our compliance model.

We also recognise the importance of the role of intermediaries (for example, auditors, actuaries, tax agents and financial planners). We are working with trustees and intermediaries to develop cooperative strategies and support tools.

OTHER SANCTIONS

As regulator, we can also take action to protect the assets of a self managed superannuation fund if we determine that the assets of the fund are at risk. Such action may include:

- disqualifying a trustee
- removing a trustee, and
- freezing a fund's assets.

COMPLIANCE PROGRAM

We regularly update and publish the compliance program, which includes self managed superannuation funds. Our **compliance program** is available from www.ato.gov.au

WHAT WE EXPECT OF TRUSTEES DURING AN AUDIT

We expect that during an audit you will:

- provide full and free access to all records, documents, buildings and premises
- allow us to make copies or extracts of records and documents
- provide reasonable facilities and assistance
- provide complete and accurate responses to requests for information, and
- be truthful and honest in your dealings with us.

COMPLIANCE CHECKLIST FOR TRUSTEES

04

The checklist in this section is designed to draw your attention to details that you, as a trustee of a self managed superannuation fund, must be aware of in the day-to-day operation of your fund. It does not cover every detail for managing your self managed superannuation fund.

Your fund's compliance is a matter that can be determined only at a given point in time and considering all the facts at that time.

HOW TO USE THE CHECKLIST

The checklist highlights some of the more important rules under the SIS Act and the SIS regulations that you, as a trustee, must comply with. We recommend that you consult the checklist regularly to ensure you are complying with all requirements in running your self managed superannuation fund. If we identify that you have contravened your legislative requirements, you may be penalised and lose your tax concessions. For more information see the section on **'Penalties and compliance'**.

If, when using this checklist, you identify a possible problem with your fund or need more information you should seek advice from your tax agent, accountant, financial planner/adviser, or seek more information from us by phoning **13 10 20**.

CHECKLIST

TRUST DEED

My fund's trust deed must:

- be properly executed
- state the name of the fund
- include a statement that the fund must appoint a corporate trustee or that the sole or primary purpose of the fund is to provide old age pensions.

It also sets out:


- who the trustees are
- how the trustees are appointed and how they can be removed from the fund
- the powers of the trustees.

Deeds may also cover:

- that the members agree to act as trustees
- confirmation that the trustees are not 'disqualified persons'
- that trustees cannot accept payment for services as trustees
- paying benefits to members
- what contributions the fund can accept
- who can be members
- winding up the fund.

Overall:

- I have read and understand my trust deed
- I know the deed sets out the rules that all the trustees of the fund must comply with.

 As a trustee, you are bound by your deed and responsible for any contravention of the rules set out in the deed. For these reasons, it is very important that you know the contents of the deed.

TRUSTEES AND MEMBERS

My fund is a self managed superannuation fund because it meets all these requirements:

- there are four or fewer members in the fund
- all members of the fund are trustees of the fund (or directors of the trustee company)
- each individual trustee of the fund, or director of the trustee company, is a member of the fund
- no member of the fund is an employee of another member of the fund, unless those members are related
- no trustee of the fund receives any remuneration for their services as a trustee.

Or, for single member funds:

- the member is the sole director of the trustee company
- the member is related to the other director of the trustee company (and there are only two directors of that company)
- the member is not an employee of the other director of the trustee company (and there are only two directors of that company)
- the member is one of only two trustees, of whom one is the member and the other is a relative of the member, or
- the member is one of only two trustees and the member is not an employee of the other trustee, and
- no trustee of the fund received any remuneration for their services as a trustee.

There are some exceptions to these general rules, for example, where a member is under a legal disability.

ELECTING TO BE REGULATED

- An election that the SIS Act is to apply to the fund was lodged with the Tax Office within 60 days of establishing the fund.

A fund must elect to be a regulated superannuation fund and comply with the requirements of the SIS Act to ensure it is a complying superannuation fund. If it does not, the fund may not receive concessional tax treatment and/or other sanctions may be imposed on the trustees of the fund or contravening the SIS Act where the fund is a regulated superannuation fund.

TAX FILE NUMBER

- The fund has its own tax file number.

AUSTRALIAN BUSINESS NUMBER

- The fund has its own Australian business number (ABN)

Although it is not compulsory that your fund has its own ABN, it is beneficial in dealing with Commonwealth agencies. Obtaining an ABN does not mean a fund is registered for GST, it is primarily used for identification purposes.

GST REGISTRATION

- The trustees need to consider if the fund is required to be registered for GST.

A self managed superannuation fund must register for GST if its annual turnover is greater than \$75,000. Common items that a superannuation fund's annual turnover may include are gross income derived from the lease of equipment or commercial property, and the provision of salary continuance insurance cover.

TRUSTEE DECLARATIONS

- Each new trustee appointed after 30 June 2007 has signed a declaration in the approved form stating that they understand their duties as trustee.
- The declaration will be retained for as long as it is relevant, and in any case for at least 10 years,
- The declaration is available on request by the Tax Office or the fund's auditor.

SEPARATE BANK ACCOUNT

- A separate bank account has been opened so that money belonging to the fund can be kept separate from accounts of the members, the trustees and related employers (employer-sponsors).

This is very important to prevent the fund contravening the SIS Act rules and also assists trustees in preserving and protecting their retirement income.

ACCEPTING CONTRIBUTIONS

- The trustees are aware of the SIS Act rules that relate to gainful employment, and age restrictions for accepting contributions.
- The trustees are aware that funds can accept contributions only in accordance with their fund's deed. The deed can also impose restrictions on the fund's ability to accept contributions so trustees need to decide what contributions they wish to accept and to ensure the fund's deed allows those contributions to be accepted.
- The trustees are also aware they cannot accept contributions from related parties in the form of assets other than money (known as 'in specie' contributions), except assets that are expressly allowed to be acquired from related parties under the SIS Act.

According to my trust deed, the fund:

- can accept contributions from a member's employer
- can accept contributions from members
- can accept rollover payments
- can accept contributions in respect of a member's non-working spouse
- can accept contributions in respect of minors.

INVESTMENT STRATEGY

My fund has a medium to long term investment strategy that considers:

- A wide range of investment possibilities, including such things as:
 - cash-based, low risk investments
 - growth investment, for example, shares
 - combinations of investment types
- the return on investments compared with risks involved
- the ease of converting assets to cash in order to meet payments due by the fund
- members' ages and individual retirement benefit needs
- overall, the aim of my fund's strategy is to increase members' benefits over time.

Contravention of the requirement to have an acceptable investment strategy can result in the trustees being fined or sued for loss or damages. The fund can lose its compliance status and, as a result, its concessional rate of tax.

Investing

- The assets of the fund are kept separate at all times from those of:
 - the members
 - the trustees
 - related employers
- Each member has a separate account in the fund.
- The fund's accounting and banking records are kept separate from those of members, trustees or employers.
- All transactions by the fund are conducted on a strict commercial basis.
- The fund can demonstrate that market value has been paid and received on all transactions.
- All assets are in the name of the fund or a **caveat, legal instrument or declaration of trust** has been executed to clearly show the fund's ownership of the property.

These requirements are very important to prevent the fund:

- contravening the sole purpose test, and
- exposing the members' retirement benefits to unnecessary risk.

Investment restrictions

The trustees can demonstrate that they have not:

- lent money to or provided financial assistance using the resources of the fund to a member or member's relative
- borrowed money except in the limited permitted circumstances
- acquired assets from 'related parties' of the fund other than those specifically permitted by the law. Related parties include all members of the fund and their associates and all employer-sponsors of the fund and their associates
- leased, loaned or invested more than 5% of the fund's total assets in related parties of the fund. These assets are known as 'in house assets'.

RECORD KEEPING

Wherever possible, responsible practices will be adopted by the trustees, such as:

- joint signatories to signing cheques
- separating of accounting functions, for example receipts and payments
- segregation of duties.

Trustees must keep the following records for at least five years:

- accurate and accessible accounting records that explain the transactions and financial position of the fund
- an annual operating statement and an annual statement of the fund's financial position
- copies of annual returns lodged.

Trustees must keep the following records for at least 10 years:

- minutes of all meetings
- records of changes of trustees
- records of changes of directors, if corporate trustees
- written consents by members to be appointed as trustees.

Penalties apply if trustees fail to keep the records listed above for the required period.

PAYING A BENEFIT

The trustees:

- will pay benefits only in accordance with the SIS Act, SIS regulations and the trust deed of the fund
- are aware that the SIS Act set payment standards based on events such as reaching a certain age and termination of employment, and can place restrictions on how a benefit can be paid.

All paperwork in relation to the following may need to be completed:

- superannuation payments, including lump sum payments and superannuation income stream payments (pension and annuity payments)
- withholding tax from superannuation lump sums and superannuation pensions and annuities and reporting and remitting the tax to the Tax Office
- rolling benefits over to a complying superannuation fund, and
- reasonable benefit limits for benefits paid in financial years up to 30 June 2007.

Benefits should be checked for accuracy before payment. The payment standards of the SIS Act work with the sole purpose test and the preservation rules to ensure monies are paid to members only in appropriate circumstances.

ANNUAL REQUIREMENTS

The trustees will:

- appoint an approved auditor to examine the records at the end of the financial year
- lodge the combined income tax and regulatory return (Form F) with the Tax Office by the due date
- pay the supervisory levy and the fund's tax liability when due
- lodge member contributions statements.

There are penalties for failing to meet the annual requirements listed above.

TAX MATTERS

The trustees have kept records of:

- deductions claimed for administrative and operating expenses of the fund
- sales/purchases of assets for capital gains purposes
- tax file numbers of members
- deductions claimed for the provision of death and disability benefits for members.

MORE INFORMATION

If you need more information about self managed superannuation funds, you can:

- visit our website at www.ato.gov.au
- phone **13 10 20**
- write to
Superannuation
PO Box 277
World Trade Centre VIC 8005

If you do not speak English well and want to talk to a tax officer, phone the Translating and Interpreting Service on **13 14 50** for help with your call.

If you have a hearing or speech impairment and have access to appropriate TTY or modem equipment, phone **13 36 77**.
If you do not have access to TTY or modem equipment, phone the Speech to Speech Relay Service on **1300 555 727**.

For more information about Australian Prudential Regulation Authority (APRA) circulars referred to in this guide:

- visit the APRA website at www.apra.gov.au
- phone **1300 13 1060**.

