

HOW A TRUSTEE OF A SELF-MANAGED SUPER FUND CAN RECTIFY NON-COMPLIANCE

- 1 Non-compliances are usually unearthed during the independent audit that self-managed superfunds are obliged to undertake. In short, the nature and seriousness of the non-compliance will govern the mode of rectification or remedy.
- 2 The Commissioner of Taxation, as the regulator, has a number of avenues available to him in dealing with the trustee of a non-compliant SMSF. Many of these avenues carry significant (if not fatal) consequences for the trustee and indeed the fund itself and include:
 - 2.1 The Commissioner may issue an education direction.¹ This direction obliges the trustee to complete an education course and sign a declaration that the trustee understands his or her obligations. Note, however, that such a decision by the Commissioner is reviewable.²
 - 2.2 The Commissioner may issue a direction to rectify a contravention.³ The trustee must take the specified action and provided evidence to the Commissioner of compliance. The decision to issue or vary a rectification direction by the Commissioner is also reviewable.⁴
 - 2.3 The more serious responses to contraventions include:
 - 2.3.1 The Commissioner seeking to disqualify⁵, suspend or remove⁶ the trustee. Suspension or removal may be sought where it is considered by the Commissioner that the financial position of the fund is becoming unsatisfactory. These decisions are also reviewable;⁷
 - 2.3.2 The Commissioner may issue a notice to the trustee effectively freezing the assets of the fund where it appears to the Commissioner that the trustee's conduct is likely to significantly adversely affect the

¹ S.160 *Superannuation Industry (Supervision) Act 1993* (SISA).

² S.165 SISA.

³ S.159 SISA.

⁴ S.165 SISA.

⁵ S.126A SISA.

⁶ S133(1) SISA.

⁷ S.344 SISA.

values of the interests of the beneficiaries.⁸ Such a decision is also reviewable;⁹ and

2.3.3 The Commissioner may seek a court order or seek civil and/or criminal penalties through the courts. This is a likely last resort in the most egregious of cases.

3 For the trustee of a non-complying SMSF, proactive engagement with the Commissioner is critical. Once the Commissioner initiates formal action (such as outlined above) then the outcome is less likely to be positive for the trustee. A proactive trustee can propose to the Commissioner a number of alternatives to rectify the non-compliance and avoid the more severe consequences:

3.1 first, a trustee may make informal arrangements with the Commissioner to rectify the non-compliance. The situations where this is likely to be acceptable is where there is low risk and the contravention is relatively minor;

3.2 second, a trustee may offer to enter into an enforceable undertaking.¹⁰ At a minimum the undertaking must address: the actions required to rectify the contravention; the time frame for rectification (which must be reasonable); how the trustee will report on compliance; a commitment to cease the behaviour which resulted in the contravention; strategies to be used by the trustee to prevent future non-compliances.

The Commissioner is not obliged to accept an undertaking, but his decision to refuse one is subject to review;¹¹

3.3 third, a trustee may offer to voluntarily submit to the issue of an education direction;¹²

3.4 fourth, the trustee may offer to voluntarily submit to a direction to rectify a contravention.¹³ The trustee must take the specified action and provided evidence to the Commissioner of compliance; and

⁸ S.264 SISA.

⁹ *Administrative Decisions (Judicial Review) Act 1977*.

¹⁰ *PS LA 2006/18*.

¹¹ *Administrative Decisions (Judicial Review) Act 1977*.

¹² S.160 SISA.

¹³ S.159 SISA.

3.5 Finally, the trustee can seek to wind up the fund and roll the fund assets into a larger “retail” type APRA regulated fund.

5 The important point is that there are alternatives available to the way in which non-compliances can be rectified, the appropriateness of which will be determined by the circumstances of the non-compliance. However, timely and proactive action (both in rectifying the non-compliance and engaging with the Commissioner) affords a trustee with the best chance of avoiding the more serious consequences of non-compliance. An experienced and skilled advocate is of significant value in such situations.

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