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Trustee Duties



The trustee cannot delegate its overall responsibility

As an SMSF is a trust, the trustees are bound to comply with their obligations under legislation and trust law. For example, section 14B of the New South Wales Trustee Act 1925 explicitly states the following duties:

- > Exercise the powers of a trustee in the best interests of all present and future beneficiaries of the trust.
- > Invest trust funds in investments that are not speculative or hazardous.
- > Act impartially towards beneficiaries and between different classes of beneficiaries.
- > Take advice.

The other states have similar legislation.

In addition, an SMSF trustee has a number of obligations under the SIS Act, most notably to ensure that the fund complies with the legislation such as in relation to in-house assets, the borrowing restrictions and ensuring the fund satisfies its reporting obligations. A trustee may authorise another person or entity to perform various activities related to the operation of the fund, but the trustee cannot delegate its overall responsibility for those activities.



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Penalties

The ATO has wide ranging powers to levy penalties and directions and these powers were increased further on 1 July 2014 when the ATO received the ability to administer administrative penalties directly without having to go through the courts. This is part of a new system which allows the ATO to have a more graduated response to breaches depending on their seriousness.

each
penalty
unit is
equal to



Under this system, when a breach is brought to the attention of the ATO, they have the ability to issue a rectification direction, an education direction and/or an administrative penalty.

A rectification direction is simply a written direction from the ATO to take a specified action within a specified period of time to rectify the contravention.

The trustees are also obligated to provide evidence of their compliance with that direction.

An education direction is a written direction requiring a person to undertake a specified training course within a specified period of time and to provide the ATO with evidence of completion of the course. The ATO will usually issue an education direction where they believe a trustee's failure to comply with their obligations was due to a lack of knowledge and understanding of their obligations. Interestingly, the legislation prohibits a fee being charged for this course and in addition, a trustee cannot be reimbursed from the fund for expenses incurred in undertaking this course, such as travel expenses.

The ATO also has the ability to apply administrative penalties where the breach is on the table following. The dollar amount of the penalties is based on a number of penalty units, with each penalty unit equal to \$170 as at 1 July 2014.



Breach	Sis Act	Penalty
Non-compliance with 'electronic portability request scheme'	34(1)	\$3,400
Financial accounts not prepared	35B	\$1,700
Lends or provides financial assistance to a member or their relative	65(1)	\$10,200
SMSFs borrowings are non-compliant with legislation	67(1)	\$10,200
In-house assets rules not complied with	84(1)	\$10,200
Minutes of trustee meetings not kept for 10 years	103(1)	\$1,700
Minutes of trustee meetings not kept for 10 years	103(2)	\$1,700
Elections in relation to pre-99 trusts not kept for 10 years	103(2A)	\$1,700
Records of changes to trustees not kept for 10 years	104(1)	\$1,700
Signed trustee declaration not kept for 10 years	104A(2)	\$1,700
Member/ beneficiary reports not kept for 10 years	105(1)	\$1,700
ATO not informed of significant adverse event	106(1)	\$10,200
ATO not informed that a superannuation fund has become or cease to be an SMSF	106A(1)	\$3,400
Trustee makes non-written appointment of investment manager	124(1)	\$850
Non-compliance with education direction	160(4)	\$850
Failure by new SMSF to give prescribed information to ATO within seven days	254(1)	\$850
Non-compliance with ATO request for statistical information	347A(5)	\$850



The penalty is levied per trustee, per breach

The penalty is levied at the trustee level and the trustee cannot be reimbursed from the fund. In addition, the penalty is levied per trustee, per breach. For example, where a fund borrowed funds to purchase shares for above market rate from a member, the trustee could be guilty of 2 major breaches, each carrying a penalty of \$10,200.

If there is a corporate trustee, the penalty is levied on the company with the directors jointly and severally liable for the penalty. Where it is individual trustees the penalty of \$20,800 is levied on each trustee and therefore, in a 2 member fund, having individual trustees will result in a doubling of the penalty.

Court levied penalties

In addition to the penalties above, the ATO have the ability to take SMSF trustees to court where the court can levy both civil penalties and criminal convictions under the SIS Act.

For example, where a new SMSF trustee doesn't sign a trustee declaration within 21 days of becoming a trustee or fails to keep the declaration for 10 years, the court can levy a penalty of up to 50 penalty units (\$8,500).

However, other offences are treated far more seriously. For example, someone who enters a scheme to avoid the prohibition on acquisitions from related parties is guilty of an offence which can be punished by imprisonment by up to 1 year.



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Fund non-compliance

A final action the ATO can take is to make a fund non-complying. The ATO only does this in the most serious of circumstances due to the significant adverse consequences to the fund.

When a fund is non-complying, its assessable income is taxed at the top marginal tax rate, from and including the income year the fund is made non-compliant. Furthermore, any taxable component of benefits held for members have to be included in the assessable income of the fund for the year it is made non-compliant.

For example, an SMSF with \$500,000 of benefits in accumulation where \$300,000 is taxable and \$200,000 is tax-free and income of \$50,000 for the year would have an income tax liability of \$7,500 if it was a complying fund.

If that fund was declared non-complying, the \$300,000 of taxable component would be included in the assessable income giving a total of \$350,000. In addition, that income would no longer be taxed at 15% but at 47%, resulting in a tax liability of \$164,500.

Furthermore, non-complying SMSFs have certain restrictions, including:

- > They cannot accept eligible spouse contributions, personal superannuation contributions or the Government co-contributions.
- > Contributions made do not count towards Superannuation Guarantee.
- > Special CGT rules do not apply.
- > They do not receive exemptions for income attributable to current pension liabilities.
- > Contributions made to a non-complying superannuation fund are not tax deductible and all employer contributions made on behalf of an employee or their associate will be subject to fringe benefits tax.



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