

Running a self-managed super fund

Your role and responsibilities as a trustee



Our commitment to you

We are committed to providing you with guidance you can rely on, so we make every effort to ensure that our publications are correct.

If you follow our guidance in this publication and it turns out to be incorrect or misleading, and you fail to comply with the law as a result, we must still apply the law correctly. However, we will take the fact that you followed our guidance into account when deciding what action, if any, we should take.

If you make an honest mistake in trying to follow our guidance in this publication and you fail to comply with the law as a result, we will take the reason for the mistake into account in deciding what action to take.

If you feel that this publication does not fully cover your circumstances, or you are unsure how it applies to you, you can seek further assistance from us.

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.

This publication was current at **June 2010**.

Terms we use

For more information about terms we use in this introduction, see 'Super terms explained' on page 32.

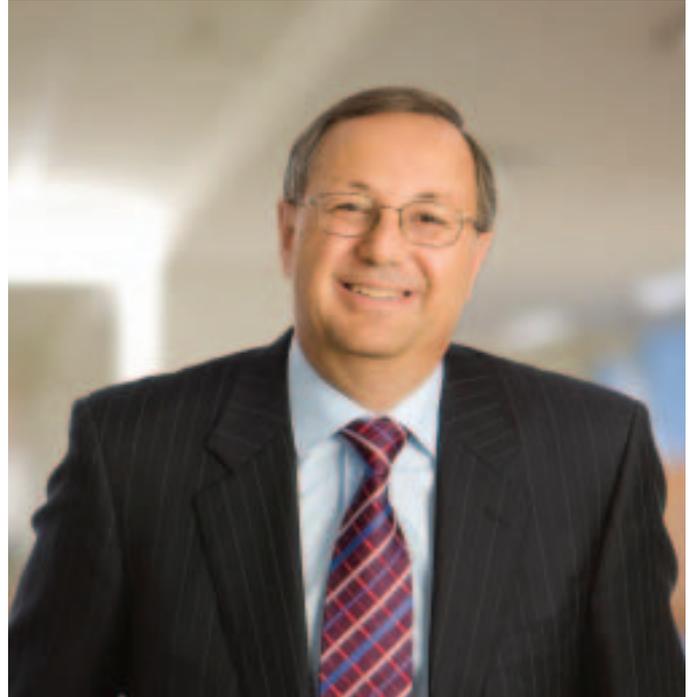
Commissioner's foreword

Self-managed super funds (SMSFs) are now the largest and fastest growing segment of the super industry.

For trustees of SMSFs, managing your own fund and getting it right is very important. There are many rules and regulations in the various laws that govern super that are designed to protect your retirement income. As a trustee, you need to adhere to the rules and know that you are ultimately responsible for the running of the fund, even if you use tax, financial and super professionals to help to manage it.

Regulating SMSFs is an important responsibility entrusted to us. We provide products and advice to support you and help you to comply with the rules and regulations. But not everyone does the right thing and we have a growing audit program to address these risks.

You and the other members of your SMSF have now taken responsibility for managing your retirement savings and complying with super and tax laws. This publication should help you do this.



Michael D'Ascenzo

Michael D'Ascenzo
Commissioner of Taxation

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Running an SMSF

Generally, as an Australian resident, you can choose to direct your super guarantee payments and your personal super contributions to an independently managed super fund or to run your own SMSF.

SMSFs have the same role as any other super funds; the difference is, generally, that the members of SMSFs are also the trustees. They control the investment of their contributions and the payment of their benefits.

For your fund to be an SMSF it needs to meet several requirements under the super laws.

The requirements are different depending on whether your fund has one of the following:

- a corporate trustee
- individual trustees
- a single member.

If your fund has individual trustees, it's an SMSF if all of the following apply:

- it has four or less members
- each member is a trustee
- no member is an employee of another member, unless they're related
- no trustee is paid for their duties or services as a trustee.

If your fund has a corporate trustee, it's an SMSF if all of the following apply:

- it has four or less members
- each member of the fund is a director of the company
- each director of the corporate trustee is a member of the fund
- no member is an employee of another member, unless they're related
- the corporate trustee is not paid for its services as a trustee
- no director of the corporate trustee is paid for their duties or services as director in relation to the fund.

Single member funds

It's possible for you to set up your fund with only one member.

If you have a corporate trustee for a single member fund, the member needs to be one of the following:

- the sole director of the trustee company
- one of only two directors, that is either of the following
 - related to the other director
 - not an employee of the other director.

You can also have two individuals as trustees. One trustee needs to be the member and the other needs to be one of the following:

- a person related to the member
- any other person who does not employ them.

A trustee or director can't be paid for their services as a trustee or director in relation to the fund.

Your obligations

As an SMSF trustee, you are ultimately responsible for running your SMSF. It is important you understand the duties, responsibilities and obligations of being a trustee.

As a trustee of an SMSF, you need to act according to the following:

- your fund's trust deed
- the provisions of the super laws, including
 - *Superannuation Industry (Supervision) Act 1993* (SISA)
 - *Superannuation Industry (Supervision) Regulations 1994* (SISR)
- the *Income Tax Assessment Act 1997* (ITAA 1997)
- the *Tax Administration Act 1953* (TAA 1953)
- the *Corporations Act 2001*
- other general rules, such as those imposed under other tax and trust laws.

If there is a conflict between the super laws and the trust deed, the law overrides the trust deed. If you fail to perform your duties according to the laws, you may face penalties.

If you are a new trustee or newly appointed director of corporate trustees, you need to sign the Trustee declaration within 21 days of your appointment to show that you understand your duties as a trustee of an SMSF.

To obtain a copy of the *Trustee declaration* (NAT 71089):

- visit our website at www.ato.gov.au
- phone us on **13 10 20**.

 Remember, the purpose of setting up your SMSF is to provide for your retirement. It is illegal to set up an SMSF to gain early access to your funds. If benefits are unlawfully released, significant penalties including fines and jail terms of up to five years can apply to you, your fund and the recipient of the early release.

Understand the rules

The rules you need to follow as a trustee of an SMSF, include the following:

- you need to act honestly in all matters concerning your fund
- you need to exercise skill and diligence in managing your fund
- you need to act in the best interest of all members
- keep the money and assets of your fund separate from other money and assets (for example, your personal assets)
- retain control over your fund
- develop and implement an investment strategy
- you can't enter into contracts or behave in a way that hinders you or other trustees from performing or exercising functions or powers
- allow members access to certain information
- you can't access or allow others to access funds early (see 'Paying benefits to members' on page 16).

The SISA 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.

You can appoint other people to help you or provide services to your fund (for example, an accountant, super fund administrator, tax agent or financial planner). However, the ultimate responsibility and accountability for running the fund in a sensible manner lies with you.

Money belonging to your SMSF can't be used for personal or business purposes under any circumstances. The SMSF's assets are not a form of credit or emergency fund when faced with a sudden need and should never be used as such as the penalties applicable can be severe.

! If you don't follow the rules, you risk one or more of the following:

- your SMSF being deemed non-compliant and losing its tax concessions
- getting disqualified as a trustee
- prosecution
- penalties.

If you fail to act according to the trust deed, other members of your fund may take legal action against you.

➤ For more information, see 'Understanding compliance and penalties' on page 29.

Accepting contributions and rollovers

Contributions

There are minimum standards for accepting contributions. This ensures that contributions are made for retirement purposes only. However, these are minimum standards, and the trust deed of your fund may have more rules around accepting contributions.

You need to allocate contributions to a member's account within 28 days after the end of the month in which you received them.

Types of contributions

The two major categories of contributions are:

1 Mandated employer contributions

These are contributions made by an employer under a law or an industrial agreement for the benefit of a fund member. They can include any of the following:

- super guarantee contributions
- super guarantee shortfall components
- award-related contributions
- some payments from the superannuation holding accounts (SHA) special account.

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.

2 Non-mandated contributions

These include voluntary super contributions such as the following:

- 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.

You can only accept non-mandated contributions in the following circumstances:

- **For members under 65 years of age**, you can accept all types of contributions (within certain limits). However, you can only accept member contributions if the member's tax file number (TFN) has been quoted.
- **For members aged 65 but less than 70**, you may accept non-mandated contributions where
 - the member is gainfully employed on at least a part-time basis
 - the member has quoted their TFN.
- **For members aged 70 but less than 75**, you may accept non-mandated contributions where
 - the member is gainfully employed on at least a part time basis
 - the member has quoted their TFN, but you can only accept non-mandated employer contributions and member contributions made by the member

In both cases, the contribution needs to be received on or before the day that is 28 days after the end of the month that the members turns 75.

! There are special acceptance rules for fund-capped contributions for all age groups.

- **For members 75 and over**, you can't accept any non-mandated contributions.

Fund-capped contributions

Non-concessional contributions are currently capped at \$150,000 annually or \$450,000 over a three year period. The caps are indexed annually. You can't accept any fund-capped contributions in a financial year that exceed the following:

- For members aged 64 or less on 1 July of the financial year, three times the non-concessional contributions cap, which equals \$450,000 for the 2009–10 financial year.
- For members aged 65 or more but less than 75 on 1 July of the financial year, the non-concessional contributions cap, which is \$150,000 for the 2009–10 financial year.

Fund-capped contributions are member contributions, other than any of the following:

- a contribution that your member advises they intend to claim an income tax deduction for
- a contribution from a structured settlement or personal injury payment. The member, or a legal personal representative should have notified you before indicating they would make such a contribution
- a contribution that is covered by a choice to treat it as a contribution for a capital gains tax (CGT) small business concession. The member should have notified you of their choice before making the contribution
- a super guarantee charge or SHA special account payment from us
- a super co-contribution
- a contribution that is a directed termination payment.

! Member contributions are contributions made by, or on behalf of, a member, but don't include employer contributions made for the member.

Eligible spouse contributions

You can accept eligible spouse contributions for a member that is made by their spouse at any time if that member is under the age of 65.

If your member is aged between 65 and 70, eligible spouse contributions made for the member can be accepted only if that member is at least gainfully employed on a part-time basis. If your member is 70 or over, you can't accept eligible spouse contributions for them.

There is no age limit or employment test for the person making the contribution.

- For more information about the changes to the definition of spouse due to new same-sex relationship laws, visit our website www.ato.gov.au and search for 'Same-sex relationships'.

Super co-contributions

We work out your members' eligibility for the super co-contribution based on information they include in their tax returns and on details of contributions you and other super funds report for them. Your members could be eligible for the super co-contribution if the following apply:

- your member is an employee or is self-employed and makes personal super contributions
- 10% or more of your member's total income (assessable income plus reportable fringe benefits plus, from 1 July 2009, reportable employer super contributions) for the financial year is from employment activities or activities from carrying on a business
- your member's total income less any business expenses is less than the higher threshold for that financial year.

- For more information on co-contribution rates and thresholds, visit our website at www.ato.gov.au and select 'Individuals' – 'Check your superannuation' – 'Superannuation essentials' – 'Advanced topics' – 'Growing and consolidating your super' – 'Super co-contributions'.

Members who are overseas

Your SMSF needs to meet the definition of an 'Australian super fund' as outlined in the super laws. Part of that definition requires your SMSF to be a resident super fund.

It is important for you to review your management and contribution arrangements before you or any member of your fund leaves Australia. This is required to ensure your SMSF continues to be a complying fund.

If you or any of the members of your SMSF are planning to travel outside Australia, you'll need to know current rules around the definition of an Australian super fund to make sure your SMSF maintains its complying status.

- For more information, visit our website at www.ato.gov.au and select 'Super funds' – 'Self-managed super funds' – 'Running your self-managed super fund' – 'Advanced topics' – 'Residency'.

In specie contributions

In specie contributions are contributions to your fund in the form of an asset, rather than money or cash.

Generally, you can't intentionally acquire assets (including in specie contributions) from related parties of your fund. However, there are some exceptions to this rule, such as listed securities and business real property acquired at market value.

- For more information about acquiring assets from related parties, see 'Managing your fund's investments' on page 11.

Recording your member's TFN

If you don't have a member's TFN:

- you'll have to pay additional income tax on some contributions (generally employer contributions)
- you may not be able to accept member contributions.

If you've accepted member contributions and the member's TFN has not been quoted, you need to return the contribution within 30 days of becoming aware that you received the contribution. If your member's TFN is quoted to you within 30 days of receiving the contribution, you don't have to return the amount.

If you receive employer contributions on behalf of a member and you pay additional income tax because you did not have your member's TFN, you can claim a tax offset in a later financial year if the member later gives you their TFN.

Additional income tax and offsets

Not quoting a TFN means you'll pay additional income tax on contributions that are assessable income of your fund. The contributions taxed in this way include the following:

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

If your member has not quoted their TFN by the end of the financial year, all the assessable contributions made during the financial year will be taxed an extra 31.5%. You have to work out your liability for the additional tax at the end of the financial year that the contributions are made.

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 SMSF annual return. You can only claim this offset within three years from the end of the financial year that the contributions subject to the additional tax were made.

If you've debited the amount of additional tax from your member's account and you claim the tax offset in a later year, you need to re-credit this money back to their account.

Deductions for personal contributions

Eligible people, including the self-employed, may claim a full income tax deduction for super contributions they make for their own benefit.

A member who intends to claim a deduction needs to give you a notice of this intent. The notice is required to be given by the earlier of the following:

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

The notice is invalid when any of the following occurs:

- a notice is given to you but the person is no longer a member of your SMSF
- you no longer hold the contribution because of a partial rollover that includes the contribution
- you have paid a lump sum or you have started to pay a super income stream that includes the contribution.

In these circumstances, the member will not be able to claim a deduction for the personal contribution made.

If the member claiming the deduction has made an error with their notice of intent to claim a deduction, the notice can be varied (including varied to nil) by the earlier of the following:

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

After this time the notice can't be varied unless:

- a deduction for the contributions is not allowable (that is the member was ineligible to claim a deduction)
- the variation reduces the amount shown on the original notice by the amount that is not allowable as a deduction.

⚠ When deciding to claim a tax deduction, your members should consider the contribution caps. Deducted personal contributions are counted against the concessional contributions cap, with amounts over the concessional cap also counting against the non-concessional cap.

Rollovers and transfers

Most employment termination payments (previously known as eligible termination payments) can no longer be rolled over into super. However, some transitional arrangements apply.

Generally, transitional termination payments are employment termination payments received after 1 July 2007 that an employee was entitled to receive in an employment contract that existed before 10 May 2006. Transitional termination payments need to be made before 1 July 2012 and can be contributed or rolled over into a super fund.

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

➤ For a current listing of regulated complying super funds, visit the ABN Lookup website at www.abn.business.gov.au

If you accept a roll over of benefits from another super fund, that fund can ask you to show that your fund is a complying fund before processing your request.

➤ For more information about the reporting requirements for rolling over or transferring benefits, see 'Paying benefits to members' on page 16.

! If you don't comply with the contribution standards, substantial penalties may apply.

Check you can accept your member's contribution

- Make sure a member is entitled to make a contribution to your SMSF before accepting the payment
- Make sure you have the TFN of all members
- Only accept allowable contributions
- If you are accepting an asset as a contribution (an in specie contribution), make sure it meets one of the exceptions and conditions
- If a member claims a deduction for their contributions, make sure they give you a notice
- Make sure your SMSF meets the definition of an Australian super fund.

Managing your fund's investments

One of your key areas of responsibility is to manage your fund's investments. You have certain duties and responsibilities when making investment decisions. They are designed to protect and increase your member's benefits for retirement.

Your investment strategy

You need to prepare and implement an investment strategy for your fund, and review it regularly. The strategy needs to reflect the purpose and circumstances of your fund and consider the following:

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

The investment strategy should set out your investment objectives and detail the investment methods you'll adopt to achieve these objectives.

You need to make sure all investment decisions are made according to the investment strategy of your fund. If in any doubt, you should seek investment advice or appoint an investment manager in writing.

Restrictions

Super laws place restrictions on the types of entities your fund can invest in or with, and the entities that your fund can acquire assets from.

Investment restrictions exist because they protect fund members by making sure fund assets are not exposed to undue risks, like a business failing.

- ⚠ **The investment rules are one of the most important requirements of the super laws. Failure to comply with the rules can result in your fund losing its complying status and you as trustee of the fund being either:**
 - disqualified
 - removed
 - prosecuted, which may result in you being fined or imprisoned.

Securing the assets of your fund

You need to ensure that your fund's ownership of its investments is secure. Your fund's assets should be held in a legally recognised ownership arrangement. We prefer the assets to be in either of the following:

- the names of all of the individual trustees as trustees for your fund
- the name of the company as trustee for your fund in the case of a corporate trustee.

! In certain states, legislation may prevent you from holding assets using your fund's name at all. In this circumstance, a caveat, instrument or declaration of trust needs to be executed for the asset.

Loans or financial help to members or a member's relative

You can't lend money or provide direct or indirect financial help (including the provision of credit) from your fund, to a member, or a member's relative. For example, using fund assets to guarantee a personal loan would contravene this investment restriction.

A member or a member's relative means any of the following:

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

! From 1 July 2008, changes were made to the definition of spouse to include those in same-sex relationships.

> For more information about these changes, visit our website at www.ato.gov.au and search for 'Same-sex relationships'.

Borrowings

You can only borrow money in very limited circumstances. The circumstances include:

- borrowing money for a maximum of 90 days to meet benefit payments due to members or to meet an outstanding surcharge liability. The borrowings can't exceed 10% of your fund's total assets
- borrowing money for a maximum of seven days to cover the settlement of security transactions if the borrowing does not exceed 10% of your fund's total assets. You can only borrow to settle security transactions if at the time the transaction was entered into it was likely that the borrowing would not be needed
- borrowing, using instalment warrants or instalment warrant like arrangements that meet certain conditions.

> For more information, visit our website at www.ato.gov.au and select 'Super funds' – 'Self-managed super funds' – 'Running your self-managed super fund' – 'Advanced topics' – 'Borrowing money'.

Acquisition of assets from a related party

You can't acquire assets for your fund from a related party of your fund. However, 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
- the asset is an in-house asset, but the level of your fund's in-house assets does not exceed the threshold for SMSFs of a maximum 5% of total fund assets, or is an asset specifically excluded from being an in-house asset.

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

An associate of a particular member of an SMSF includes the following:

- every other member of your fund
- the relatives of each member
- the business partners of each member
- any spouse or child of those business partners, any company a member (or the members and/or their associates) controls or influences and any trust the member (or the members and/or their associates) controls.

! From 1 July 2008, changes were made to the definition of spouse to include same-sex relationships.

> For more information about these changes, visit our website www.ato.gov.au and search for 'Same-sex relationships'.

Associates of standard employer-sponsors include business partners and 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 super fund for the benefit of a member, under an arrangement between the employer and the trustee of a fund.

Business real property generally relates to land and buildings used wholly and exclusively in a business.

If business real property is used in a 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, no more than two hectares, contains a dwelling that is used for private or domestic purposes. However, the main use of the whole property can't be for domestic or private purposes.

In-house assets

An in-house asset is a loan to, or an investment in a related party of your fund, or an investment in a related trust of your fund. An asset of your 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 your fund more than 5% of your fund's total assets.

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

Special investment rules

Special investment rules may apply to investments made by funds before 11 August 1999. However, the transition period for in-house asset rules applying to such investments expired on 30 June 2009. If your fund was established before this date and has assets acquired under the rules applying before then, contact us or your adviser for more information.

> For more information about in-house asset transitional rules, visit our website at www.ato.gov.au and select 'Super Funds' – 'Self-managed super funds' – 'Running your self-managed super fund' – 'Advanced topics' – 'In-house assets transitional rules'.

Investments need to be made and maintained at arm's-length

Any time your SMSF makes an investment, it needs to be made and maintained on a strict commercial basis. This is referred to as an investment at arm's-length. The purchase and sale price of fund assets should always reflect a true market value for the asset.

Income from assets held by your fund should always reflect a true market rate of return.

Investing in business real property

You need to ensure the level of investment in business real property still meets the investment strategy of your fund, including diversification of assets, liquidity and maximisation of member returns in your fund. A fund with 100% investment of assets in business real property could have some problems meeting these requirements.

As with other super fund investments there can't be a charge over an asset (that is a loan or covenant).

Save only for your retirement

Your SMSF needs to meet the sole purpose test. This means your fund needs to be maintained for the sole purpose of providing retirement benefits to your members, or to their dependants if a member dies before retirement. As a trustee, you need to maintain your SMSF so that it complies with the sole purpose test at all times while your SMSF exists, including when investing fund assets and paying benefits upon retirement of members.

Your fund needs to comply with the sole purpose test to be eligible for the tax concessions available to a complying super fund.

The sole purpose test is divided into core and ancillary purposes. Your fund needs to be maintained solely for either of the following:

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

Core purpose

Generally, core purposes are the provision of benefits for each member of your fund, on or after the:

- member's retirement from gainful employment
- members reaching the prescribed age
- 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

Generally, ancillary purposes are the provision of benefits for members in the following circumstances:

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

This purpose lets an SMSF provide benefits where there is financial hardship or compassionate grounds, subject to the super laws, the governing rules of your fund and the approval of the Australian Prudential Regulation Authority (APRA).

Contravening the sole purpose test

One of the main ways we work out if an SMSF has contravened the sole purpose test is to look at the character and purpose of your investments. For example, if you or any party directly or indirectly obtain a financial benefit when making investment decisions and arrangements (other than increasing the return to your fund), it is likely your fund will not meet the sole purpose test.

Working out the purpose for which an SMSF is being maintained requires looking at all of the events and circumstances relating to the SMSF's maintenance.

When investing in collectables such as art or wine, you need to take care to make sure that SMSF members are not granted use of or access to the assets of the SMSF in contravention of the sole purpose test. The most common breaches of the sole purpose test are:

- investments that offer a pre-retirement benefit to a member or associate
- providing financial help or a pre-retirement benefit to someone at a financial detriment to your fund.

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 your fund losing its complying status. Higher penalties apply to corporate trustees. The value of a penalty unit is currently \$110.

Check you are managing your fund investments

- Make sure the SMSF complies with the sole purpose test at all times while the fund is in existence, including when investing fund assets and paying benefits upon retirement of members.
 - Make sure you developed an investment strategy that you regularly review.
 - Ensure your investment strategy takes into account the retirement goals of your members.
 - Take into consideration the risks involved in certain investments.
 - Take into consideration what bills your SMSF has to pay and allow enough cash to meet these expenses.
 - Take into consideration when benefits will need to be paid.
 - Consider diversifying your SMSF's investments.
 - Have a separate bank account for your SMSF and pay the expenses of your fund from that bank account only.
 - Make sure that your fund's ownership of its investments is assured. We prefer the assets to be in the names of all of the individual trustees as trustees for your fund, or in the case of a corporate trustee, in the name of the company as trustee for your fund.
- ! In certain states, legislation may prevent you from holding assets using your fund's name. In this circumstance, a caveat, instrument or declaration of trust needs to be executed for the asset.**
- Make investment decisions that will provide for your retirement.
 - Don't invest without considering your strategy and your overall goals for retirement.
 - Don't mix your SMSF money with other money.
 - Don't have the assets of your SMSF in another entity's name.
 - Don't provide financial assistance to members or relatives of members.
 - Don't make investments to help someone else out.
 - If your SMSF buys art, generally you can not use it privately.
 - Don't buy wine as an SMSF investment and then drink it.
 - Don't buy jewellery as an SMSF investment and then wear it.
 - Don't use any of the assets of your SMSF for your own personal use or allow members or related parties to use those assets.

➤ We have published a number of final and draft rulings and determinations to provide you with guidance on a range of issues for SMSFs. To obtain a copy of these SMSF rulings and determinations, visit our website at www.ato.gov.au

Paying benefits to members

You need to know the rules for paying benefits from your SMSF.

The payment standards contained in the super laws, the sole purpose test and the preservation rules, ensure money in your SMSF is paid to members only when they are legally allowed to have it. Penalties apply in circumstances where these requirements are not met.

Cashing of benefits

There are two forms of cashing of benefits:

1 Compulsory cashing of benefits

The only circumstance where compulsory cashing of benefits is required is when a member dies. Your member's benefits need to be paid out as soon as possible after the member's death.

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

 **For more information, visit our website at www.ato.gov.au and search for 'Cashing of benefits'.**

2 Voluntary cashing of benefits

Your member's benefits will be classified as one or more of the following:

- preserved benefits
- restricted non-preserved benefits
- unrestricted non-preserved benefits.

Regardless of their source, all contributions made by, or on behalf of a member and all earnings for the period after 30 June 1999 are preserved benefits. Employer eligible termination payments (before 1 July 2007) rolled over into a super fund, are also preserved benefits.

Preserved benefits may be cashed voluntarily only if a condition of release is met and then subject to any cashing restrictions imposed by the super laws. Cashing restrictions tell you what form the benefits need to be taken in.

Restricted non-preserved benefits can't be cashed until the member meets a condition of release. They are subject to the same cashing restrictions as preserved benefits, with one exception (see 'Terminating gainful employment' on page 18).

Unrestricted non-preserved benefits don't require a condition of release to be met, and may be paid upon demand by the member. For example, where a member has previously satisfied a condition of release and decided to keep the money in the super fund.

Preservation age

Preservation age is generally the age that you can access your super benefits, unless other extenuating circumstances occur that permit accessing the benefits early and legally.

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.

 **For more information, see 'Conditions of release' below.**

Payment of benefits

Provided the governing rules of your fund allow it, member benefits may generally be paid in any of the following forms:

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

Conditions of release

Conditions of release are the events your member needs to satisfy to withdraw benefits from their super fund. The conditions of release are also subject to the rules of your SMSF (as set out in the trust deed). It is possible that a benefit may be payable under the super laws, but can't be paid under the rules of your SMSF.

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 less than 60 years of age, their future employment intentions. A retired member can't 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

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

- cash all preserved and restricted non-preserved benefits accumulated up until that time
- not cash any preserved or restricted non-preserved benefits accumulated after that condition of release occurs.

They can't cash those benefits until a fresh condition of release occurs. If a member aged 60 or more starts 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 your 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 your 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 need to 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 that they are reasonably qualified for 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 that 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 needs to 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 need to be satisfied that the member:

- can't meet reasonable and immediate family living expenses
- has been receiving relevant government income support payments for a continuous period of 26 weeks and was receiving that support at the time of applying to the trustees.

The cashing restriction is that the payment needs to 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 need to be satisfied that the member:

- has been receiving government income support payments for a cumulative period of 39 weeks since reaching their preservation age
- was not gainfully employed on a full-time or part-time basis at the time of applying to the trustees.

If releasing benefits under these circumstances, there are no cashing restrictions.

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 your fund
- 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 and your fellow trustees.

9 Temporary residents departing Australia

People who have entered Australia on an eligible temporary resident's visa and who permanently depart Australia can be paid any super 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.

➤ **For more information, visit our website at www.ato.gov.au/departaustralia**

10 Transition to retirement (attaining preservation age)

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.

11 Terminal illness or injury

If a member has a terminal medical condition and two medical professionals certify that the condition is likely to result in the member's death in the next 12 months, you may pay them a lump sum benefit.

➤ **For more information, refer to *Access to super for members with a terminal medical condition* (NAT 71600).**

12 Rollovers and transfers

Generally, rollovers or transfers to other super funds don't require a condition of release to be satisfied, subject to the governing rules of your SMSF. However, money rolled over from an employer into a super fund (before 1 July 2007) is preserved and can only be cashed once the member reaches preservation age and meets a condition of release.

⚠ **A Rollover benefit statement needs to accompany all rollovers (see 'Reporting and administration obligations' on page 24).**

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

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

Early access to benefits

Early access or release of preserved benefits and restricted non-preserved benefits is permitted only in the following cases:

- severe financial hardship
- terminal illness or injury
- on tightly restricted compassionate grounds
- in the event of permanent incapacity.

These situations occur only in very limited circumstances.

Setting up or using an SMSF to gain improper early access to super is illegal. If a benefit is unlawfully released, we will apply significant penalties to you, your SMSF and the recipient of the early release.

⚠ **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. If you access your super before you're legally entitled to do so, there are severe penalties.**

Types of pension benefits

Benefits from a super fund may generally be paid as a lump sum, income stream (pension) or annuity, provided the member has satisfied a condition of release (for example, retirement).

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

Super income streams

Income streams need to fall into one of the following classes:

- account-based
- non account-based.

Account-based income streams 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't have a residual capital value
- they can't be paid to a non-dependant beneficiary.

A new account-based transition to retirement income stream may be started on or after 1 July 2007. These income streams need to meet the standards of ordinary account based income streams but are also required to have a maximum annual payment limit of 10% of the account balance. Commutations of these pensions can't be taken in cash except in limited circumstances.

Non account-based income streams 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 income streams may have a residual capital value
- they can't be paid to a non-dependant beneficiary.

Income streams started before 20 September 2007 that meet the SISR pension rules as they existed immediately before 1 July 2007, will generally be taken to be super income streams for the purposes of the super law.

! **SMSFs can't pay a defined benefit income stream unless they were paying a defined benefit pension to a member before 12 May 2004.**

! **Before starting to pay any income stream, we recommend that you seek the advice of a professional such as an accountant, financial planner or actuary.**

! **For the 2008–09 and 2009–10 financial years, the minimum annual payment for account-based income streams has been halved. For more information, visit our website at www.ato.gov.au and search for 'Minimum pension relief for self-funded retirees'.**

Administrative obligations

There are administrative obligations that you need to meet when paying benefits to members or rolling over benefits between funds.

Reporting and registering requirements

When paying a benefit, you'll 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 need to be registered for PAYG withholding. You need to register as soon as you know you'll be making payments from which you need to withhold an amount from.

What types of payments do you need to withhold tax from?

You'll need to withhold tax from a payment that is made to a member less than 60 years of age. If the benefit is paid as any of the following:

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

If a member is 60 years of age or more and the benefit is paid from an untaxed source, you'll also need to withhold an amount. Your fund will be making a payment that contains an amount from an untaxed source where your fund pays a death benefit lump sum and your fund has received proceeds from an insurance policy that they have claimed a deduction for either of the following:

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

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

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

You don't need to withhold tax when paying a benefit if the following applies:

- the benefit is from a taxed source
- the benefit is being paid as either a super income stream or a lump sum
- the member receiving the benefit is 60 years old or over at the time of the payment
- the benefit is being paid as a lump sum because the member has a terminal illness or injury.

You don't 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 your member to quote their TFN and supply information to work out the withholding rate.

If you are required to withhold from a payment and your member does not quote their TFN, you'll need to withhold from the payment 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:

- an income stream 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 don't need to provide a payment summary if the payment is a lump sum because the member has a terminal illness or injury.**

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

- income streams 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 super lump sum payment.

If you have issued payment summaries, you also need to lodge a *PAYG withholding payment summary statement* (NAT 3447) with us 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 the ECI and our other online services, visit our website at www.ato.gov.au/onlineservices**

If you provide your PAYG withholding payment summary annual report to us electronically, you don't need to forward copies of payment summaries to us. You also don't need to complete a PAYG payment summary statement.

Obtaining an actuary's certificate

Requirements under the ITAA 1997 to claim a tax exemption

If you are paying an income stream, you may need to get an actuary's certificate to qualify for exemptions from tax on your SMSF'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 the income may be exempt under a proportional method.

Segregated current pension assets method

The income that is exempt from tax is derived from the assets of your fund that are used to pay current pension liabilities and are segregated from other assets in your fund. The assets are specifically identified as solely supporting the payment of pensions.

The tax exemption on income generated by these assets used to support the fund's pension payments does not apply to income derived from assessable contributions or non-arm's length income.

Proportional method (Unsegregated current pension assets)

A proportion of the fund's income that is used to support the payment of the fund's current pension liabilities is exempt from tax.

The proportion is based on the average value of the fund's current pension liabilities to the average value of the fund's superannuation liabilities.

The calculated proportion of income that is exempt from tax does not include any income generated from segregated current pension assets, non-arms length income, assessable contributions or segregated non-current pension assets.

Actuary's certificates

If your fund wants to claim a tax exemption on the fund's income while it is paying a pension, you'll need a certificate from an actuary to work out the amount of exempt income from assets that support the pension payments. An actuarial certificate is required in each year that the exemption is claimed.

However, an actuarial certificate is not required if, at all times during the financial year, the only super income stream (pension) benefits being paid by the fund are of a type prescribed by the ITAA 1997. These are allocated pensions, market linked pensions and account based pension types.

Other requirements

In addition to the requirements for actuarial certificates, the following needs to be considered if you are intending to claim an exemption on income received from your fund's pension assets:

- Before you start paying a pension, you should ensure that all assets of the fund are revalued to their current market value.
- If you are intending to use the segregated method (as discussed above) consider if your SMSF's pension assets meet the requirement of being segregated. That is, can you clearly identify the assets dedicated to funding the super income stream benefit and there is a clear relationship established between the relevant assets and the member's account.
- If your SMSF is not just solely paying a pension, that is, there are members who are still in accumulation phase, make sure you are keeping records in a manner that allows you to clearly identify what expenses you have and how much is related to the income earned to pay pensions. The reason for this is, if you are entitled to a tax exemption on the income that is used to pay current pension liabilities you won't get a deduction for the expenses related to earning that exempt income and you can't claim these expenses as a deduction in the fund's income tax return.

There are a range of administrative obligations imposed on SMSFs under the law. You are responsible for ensuring all these obligations are met.

Check you have paid benefits to your members correctly

- Report payments made to members.
- Report within the required time.
- Tell us of any changes in the fund using the correct form.
- Don't leave out pension payments.

Reporting and administration obligations

SMSF annual return

All SMSFs need to lodge an SMSF annual return with us each year, in order to:

- report income tax
- report super regulatory information
- report member contributions
- pay the supervisory levy.

The lodgment and payment date for all SMSFs that are not new registrants and prepare their own SMSF annual return is 31 October each year. For all new registrants the lodgment date for their SMSF annual return is 28 February.

The lodgment and payment dates for all tax agents who prepare the annual return for SMSFs are according to the tax agent lodgment program.

All SMSFs are required to have the financial accounts and statements audited each year by an approved auditor (for more information, see 'Appoint an approved auditor' on page 26).

You can't lodge the SMSF annual return until after the audit of your SMSF has been finalised, as information from the audit report is required to complete the regulatory information in the return.

- ⚠ **The SMSF annual return is for the 2007–08 financial year and onwards. For all previous financial years, trustees should report on *Fund Income tax and regulatory return* (NAT 0658).**
- ⚠ **Failure to lodge your SMSF annual return by the due date can result in penalties and/or the loss of your SMSF's tax concessions.**

Member contributions information

From the 2007–08 financial year, member contributions information for each member is reported in your SMSF annual return (under sections F and/or G) rather than in separate member contributions statements.

For every financial year that your SMSF operates, you need to report all contributions you receive for each member in the SMSF annual return. You need to include contributions rolled into the SMSF and reported to you on the *Rollover benefits statement* (NAT 70944). You need to be able to characterise contributions correctly in your SMSF annual return.

Member contributions information is used to:

- work out if your members are entitled to a super co-contribution and where to pay any entitlements
- work out if your members have exceeded their contributions caps and, if so, assess their excess contributions tax liability
- check employer compliance with the super guarantee.

The contribution caps have the effect of limiting the amount that can be contributed for each member each financial year.

- **For more information about how to report, visit our website at www.ato.gov.au and search for 'Completing the SMSF annual return'.**

Rollover benefits statement

When rolling over benefits and current year contributions, the trustee needs to 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 needs to be given to the member whose benefits are being rolled over within 30 days of making the payment.

The *Rollover benefits statement* allows the receiving fund to:

- apply the correct income tax treatment to the components rolled over
- maintain the preservation status of the benefits rolled over
- report correctly to us, on the *Member contributions statement* or SMSF annual return, any contributions included in the rollover that were made in the same financial year as the payment occurred.

- **For information about how to complete this form, refer to *How to complete a rollover benefits statement* (NAT 70945).**

The trustee needs to ensure the rollover is to a complying fund.

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

Trustee declaration

If you are a new trustee (or new directors of corporate trustees) appointed from 1 July 2007, you need to complete and sign the trustee declaration within 21 days of becoming a trustee, or a director of the corporate trustee.

If you are an existing trustee (appointed before 1 July 2007), you need to ensure that new trustees complete the declaration.

Once you've done this, keep it with your records. You don't need to send it to us.

Supervisory levy

SMSFs need to pay the \$150 supervisory levy every year to us which is included in the SMSF annual return.

For the 2008–09 financial year and later financial years SMSFs are sent a reminder letter notifying them of their lodgment and payment due dates. For SMSFs the balancing date is 30 June 2009 and the statutory due date for payment is 1 December 2009, however for most SMSFs a later payment due date will apply under the tax agent lodgment program.

Taxation

You need to understand SMSF tax requirements. Your tax responsibilities should not be left solely with any of the following:

- tax agents
- accountants
- super fund administrators
- financial planners.

We want to ensure all trustees are aware of how the tax laws may affect their SMSFs and consequences of non-compliance with the tax laws.

➤ **For more information about SMSF taxation requirements, refer to:**

- **Self managed superannuation fund annual return instructions (NAT 71606)**
- **our website at www.ato.gov.au and search for ‘Completing the SMSF annual return’.**

Appoint an approved auditor

As a trustee of an SMSF, you are required to appoint an approved auditor to audit your fund each year, at least 30 days before the due date of the SMSF annual return.

Your auditor is required to:

- examine your fund’s financial statements
- assess your fund’s overall compliance with the super law.

⚠ **You should appoint your auditor early to allow enough time to do the audit, and lodge the SMSF annual return on time.**

Generally, an approved auditor may be a registered company auditor, or a member or fellow of one of the following professional organisations.

Professional organisation	Manner of association
CPA Australia Ltd	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
SMSF Professionals’ Association of Australia	SMSF specialist auditor

Before an auditor can start to audit, you or your SMSF professional need to prepare information about your accounts and transactions for the previous financial year. This information is then sent to the approved auditor.

Your approved auditor needs to:

- provide you with an audit report before the due date of the SMSF annual return
- bring to our attention and the attention of trustees, any concerns about your fund’s financial position or its compliance with the super law
- report to us certain contraventions of the super law that they may identify during an audit.

If your auditor identifies a contravention, you need to take immediate steps to rectify the contravention.

⚠ **You can do everything to fulfil your requirements except audit your fund. You need to appoint an auditor (who is independent) to do this.**

Record keeping requirements

We have identified poor and inadequate record keeping as a problem for SMSFs. You need to keep the following records for a minimum of five years:

- accurate and accessible accounting records that explain the transactions and financial position of your SMSF
- an annual operating statement and an annual statement of your SMSF's financial position
- copies of all SMSF annual returns lodged
- copies of any other statements you are required to lodge with us, or provide to other super funds.

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

- minutes of trustee meetings and decisions (where matters affecting your 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
- copies of all reports given to members.

Once you've established your fund, you are legally required to:

- lodge an SMSF annual return
- pay the supervisory levy
- have an audit report prepared.

You have to do this each financial year, including the year you establish your SMSF.

! Don't forget that income tax record keeping requirements also need your attention. Especially documents on deductions, CGT and losses.

> For further information about record keeping requirements, refer to *Self managed superannuation fund annual return instructions* (NAT 71606).

Notifying us if there is a change

As a trustee of an SMSF, you need to notify us within **28 days** if there is a change in the following:

- trustees
- directors of the corporate trustee
- members
- contact details (contact person, phone and fax numbers)
- address (postal, registered or address for service of fund notices).

If you change the structure of your SMSF, this may result in your fund no longer meeting the definition of an SMSF. For example, if you:

- admit a new member, increasing membership of your SMSF to more than four
- admit a new member without that member being an appointed trustee.

To tell us about changes to your SMSF, either:

- use our online service at **www.abr.gov.au** if you have a primary digital certificate
- lodge a *Change of details for superannuation entities* (NAT 3036) form.

! You can't tell us about a change in the structure of an SMSF by lodging the SMSF annual return.

Check you have met your reporting and administration obligations

- Appoint an approved auditor to audit your SMSF.
- Lodge your SMSF annual return for your SMSF each year by the due date, providing all the information required and paying the supervisory levy.
- If you are having trouble lodging by the due date, seek an extension of time to lodge.
- Lodge accurate *Rollover benefits statements* (NAT 70944) when rolling benefits into other funds.
- Keep minutes outlining investment decisions and how decisions are made.
- Keep records to explain the transactions of your SMSF.
- Keep annual operating statements and annual statements of your SMSF's financial position.
- Keep records to show who the trustees of your SMSF are and their consent to act as trustees.
- Keep copies of returns and information provided to members.
- Keep required income tax and deduction documentation as part of your record keeping obligations.
- Don't make decisions without documenting them.
- Notify us of any change of details for the SMSF (for example, change in trustee or members).
- Keep the original copy of the trustee declaration with your records.
- Don't send us the trustee declaration.
- Make sure you have any actuary certificates you need and keep a copy with your records.

Understanding compliance and penalties

Our compliance approach

Our compliance approach has traditionally focused on help and education.

However, we are concerned about the compliance of some SMSFs. Therefore, we have increased our compliance activity on high-risk funds and our focus on timely lodgment. For SMSFs, compliance activities will be more extensive than in the past.

If you are a trustee of an SMSF, we expect you'll:

- know, understand and complete your responsibilities and obligations
- lodge your SMSF annual return every financial year
- pay the supervisory levy.

We want to make sure trustees, auditors, tax practitioners and financial planners are aware of the rules governing SMSFs.

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

If you become aware of a problem which results in your SMSF being non-complying we encourage you to contact us so we can work with you to rectify the problem.

Our aim is to achieve further compliance improvement and to help you self-regulate your SMSF, mainly through the following:

- education
- fund reviews
- client service.

Our objective is to encourage the following:

- self-management
- self-regulation
- self-assessment.

Accepting a written undertaking from you may be another method we use to ensure any serious compliance problems are addressed. The undertaking provides the promised action to be taken by you to deal with the contravention. If you don't meet the terms of the undertaking, we may apply to the court for an order requiring you to either:

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

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

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

As the regulator of SMSFs, 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 you take responsibility for protecting and investing members' retirement benefits appropriately, is based on our compliance model.

Other sanctions

As regulator, if we work out that the assets of your fund are at risk, we can take action to protect them. Such action may include:

- disqualifying you as trustee
- removing you as trustee
- freezing your SMSF's assets.

Compliance program

We regularly update and publish the compliance program that includes SMSFs.

➤ **For more information, refer to our most recent *Compliance program (NAT 7769)*.**

What we expect during compliance activity

We expect that during a compliance review or audit you'll:

- 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
- be truthful and honest in your dealings with us.

Check you are complying

- Keep and maintain accurate records of your SMSF.
- Don't set up an SMSF with the expectation of gaining early access to super.
- Don't make a false or misleading statement or fail to make a statement to avoid paying the correct income tax.
- Lodge your SMSF annual return, and pay the supervisory levy.
- Don't fail to make a genuine effort to comply, or set out to deliberately avoid meeting your legal obligations.

Penalties

Regulatory penalties and sanctions

To protect members' retirement incomes, we regulate SMSFs to ensure they comply with the super law. Failing to comply is known as a contravention of the SISA or SISR. This will result in some type of compliance action. For example, we can:

- prosecute you if you've contravened the super law
- make your SMSF non-complying
- disqualify you as a trustee if you've contravened the super law or if you are not a fit and proper person
- suspend or remove one or all of the trustees of an SMSF. 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
- by written notice given to you or the investment manager, direct you not to dispose of, or otherwise deal in a particular way, any of the assets of your fund until the notice is revoked.

For less serious matters we may enter into agreements with trustees about a plan for them to rectify the problem without necessarily imposing the above sanctions.

A complying fund that has been made non-complying will suffer serious tax consequences. Your fund's total assets (less any member contributions that no tax deduction has been claimed for) are subject to tax at the highest marginal rate. Any income in a financial year that a fund is non-complying is taxed at the highest marginal 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 SISA are \$220,000 (civil proceedings) and/or five years imprisonment (criminal proceedings).

In addition, offences of strict liability (such as acting as trustee while disqualified) that are punishable under the Criminal Code can also be subject to penalties and/or imprisonment.

Administrative penalties may be applied if you:

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

! Improper early access to super is illegal. Remember significant penalties can be applied to you, your SMSF and the recipient if benefits are unlawfully released.

Income tax penalties

An administrative penalty can be applied if you make a statement (or fail to make a statement) that results in an underpayment of tax.

If you don't lodge an SMSF annual return and/or fail to make a true and correct statement, a penalty may apply.

You are liable for an administrative penalty if you make a false or misleading statement and you either:

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

Depending on your conduct regarding 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 if you:

- voluntarily disclosed the information
- hindered our enquiries
- repeated 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.

The general interest charge (GIC) is a single rate of interest that applies when a payment of a taxation liability 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
- 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.

Super terms explained

Gainfully employed

Means employed or self-employed for gain or reward in any business, trade, profession, vocation, calling, occupation or employment. Gain or reward means you receive 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.

Employed on a part-time basis

For the purposes of a fund accepting contributions, means has been gainfully employed for at least 40 hours in a period of not more than 30 consecutive days in that financial year.

Concessional contributions

Generally, are contributions made into your SMSF that are included in the SMSF's assessable income. The most common types are employer contributions and personal contributions that your members claim as an income tax deduction. Employer contributions include super guarantee contributions and salary sacrifice contributions. These contributions are taxed in your SMSF at a 'concessional' rate of 15%, which is often referred to as 'contributions tax'.

Concessional contributions are subject to a yearly cap. From 1 July 2009:

- for people less than 50 years old, the concessional cap is \$25,000 (indexed) per financial year
- for people aged 50 years or older, the transitional concessional cap is \$50,000 per year until 30 June 2012 (thereafter, it will become the same amount as the indexed concessional cap in that year). The transitional concessional cap is not indexed.

In addition to the 15% contributions tax payable by your SMSF, contributions that exceed the cap are subject to excess concessional contributions tax of 31.5%. However, your member will be personally liable for this tax. Your member can ask their super fund to release money to pay the excess tax.

Non-concessional contributions

Generally, are contributions made into your SMSF that are not included in the SMSF's assessable income. The most common type is personal contributions that your members do not claim as an income tax deduction.

Non-concessional contributions are subject to a yearly cap of \$150,000, or \$450,000 over a three-year period (for members under age 65). From 1 July 2009, the non-concessional contributions cap is set at six times the concessional contributions cap. If a member's non-concessional contributions exceed the cap, a tax of 46.5% is levied on the excess contributions. Individual members are personally liable for this tax and must have their super fund release an amount of money equal to the tax.

Non-concessional contributions also include excess concessional contributions for the financial year. They don't include super co-contributions, structured settlements, orders for personal injury and CGT related payments which the member has validly elected to exclude from their non-concessional contributions.

More information

Finding the right information for you

This introduction highlights your responsibilities and obligations as a trustee when operating your SMSF.



Thinking about self-managed super (NAT 72579) provides you with the steps you need to consider before setting up an SMSF.



Setting up a self-managed super fund (NAT 71923) provides basic information about how to set up an SMSF.



Winding up a self-managed super fund (NAT 8107) provides you with the requirements you need to follow when winding up your fund.



Useful services

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- visit www.ato.gov.au
- phone us on **13 10 20** between 8.00am and 6.00pm, Monday to Friday
- phone our publication ordering service on **1300 720 092**
- write to us at
Australian Taxation Office
PO Box 3100
PENRITH NSW 2740

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**.

