

ATO Penalty Regime for SMSF's

The costly result of getting it wrong

On 1 July 2014 the ATO was handed additional powers to deal with compliance breaches for self-managed super fund's (SMSF) targeting the duties and obligations of Trustees. The regime may prove very costly in some situations, regardless of whether the action was intentional, and targets the individual rather than the SMSF. The regime allows the ATO to issue any of the following:

- A Rectification Notice
- An Education Notice, or
- An Administrative Penalty Notice.

While all three of the above will incur costs to the Trustee it is the administrative penalty notice which may cause the greatest heartache with fines of up to 60 penalty units being issued to, and personally liable on, the Trustee. The current penalty unit is \$180 making Trustees personally liable for up to \$10,800 per breach.

Provision in SISA	Description	Administrative penalty Units	Amount
Subsection 34(1)	Operating standards	20	\$3,600
Subsection 35B(1)	Preparation and retainment of accounts and statements	10	\$1,800
Subsection 65(1)	Lending to relatives and members	60	\$10,800
Subsection 67(1)	Borrowings	60	\$10,800
Subsection 84(1)	In House assets	60	\$10,800
Subsection 103(1)	Duty to keep minutes	10	\$1,800
Subsection 103(2)	Duty to keep minutes of meetings	10	\$1,800
Subsection 103(2A)	Retention of copy of 71E election – Pre '99 Unit Trusts	10	\$1,800
Subsection 104(1)	Duty to keep records of changes of trustees	10	\$1,800
Subsection 104A(1)	Declaration of recognition of obligations and responsibilities	10	\$1,800
Subsection 105(1)	Duty to keep and retain member or beneficiary reports	10	\$1,800
Subsection 106(1)	Duty to notify of significant adverse events	60	\$10,800
Subsection 106A(1)	Duty to notify of change in status of entity	20	\$3,600
Subsection 124(1)	Written appointment of investment managers	5	\$900
Subsection 160(4)	Education direction	5	\$900
Subsection 254(1)	Information to be given to the Regulator	5	\$900
Subsection 347A(5)	Participation in the Regulator's statistical program	5	\$900

A Rectification Notice requires action to be taken by the trustees within a specific time frame to correct the breach and rectify the contravention.

An Education Notice requires a person to undertake a specific educational course within a specified time frame. Evidence of attendance must be given to the ATO and no compensation of costs may occur from the SMSF to the trustee.

An Administrative Penalty Notice requires a penalty to be paid in relation to the breach of SISA and where the ATO believes the trustee has made false or misleading statements.

Directors of corporate trustees are jointly liable for any penalties issued while non-corporate trustees are individually liable and a separate fine is issued per person. Depending on the circumstances of each case there is the possibility of having the penalty wholly or partially remitted on application to the ATO. Additional action may be taken by the ATO depending on their review.

Disqualification of Trustee

If continued serious breaches resulting in non-compliance, and audit contraventions are reported for a SMSF, the ATO may decide that an individual is not suitable to act as trustee or director of the corporate trustee and may permanently disqualify them from ever being a trustee of a SMSF. Once disqualified, a person must be removed from the role and, in most cases, this will involve rolling part or all of a SMSF to an APRA regulated super fund. If not removed additional penalties may apply.

Civil and Criminal Penalties

In certain cases where specific provisions of SIS have been breached the ATO may apply to the courts for civil and criminal penalties to be imposed. These include breaches of the sole purpose test, lending to members, the borrowing rules, in-house asset rules, avoidance schemes, arm's length rules for investments and promotion of early release schemes.

Allowing the SMSF to Wind Up

The Trustee may decide to wind up the SMSF and rollover the member benefits following a contravention report being issued. Depending on the severity of the breach the ATO may issue the SMSF with a notice of non-compliance and/or apply any other compliance treatments.

Notice of Non-Compliance

A Notice of non-compliance is only issued on serious contraventions of superannuation laws. It applies for not only the year in which the notice is given but also for all subsequent years until the SMSF is issued with a notice of compliance. The SMSF is taxed at the top marginal rate of the asset, currently 49%, and the income of the fund is also taxed at this rate.

Freezing an SMSF's Assets

The ATO may give notice to the trustee or investment manager to freeze the SMSF assets where it appears conduct by either of these parties has had or will have an adverse effect on the interest of the beneficiaries.

Contact a member of our self-managed super team if you would like more information

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