



SMSF Working Group

Issues paper on Trustee Penalties

April 2011

PROPOSED REFORM

It is acknowledged that most SMSF trustees operate their funds properly and comply with the obligations and standards set by legislation, however there will always be some who disregard the rules. A flexible and effective penalty regime is required to prevent a repetition of misconduct and deter others from disregarding the rules.

To address non-compliance with superannuation law, the current penalty regime:

- allows a fund to be made non-complying for taxation purposes;
- contains civil and criminal penalties for breaches of the law;
- allows the ATO to accept an enforceable undertaking; and
- allows the ATO to disqualify a trustee.

The Super System Review acknowledged the benefits that the current regime provides in dealing with and deterring non-compliance. However, it did highlight some areas of the current regime which limits the ATO's ability to achieve optimal regulation.

For example, due to the severity of an SMSF being made non-complying, the ATO is unlikely to use this tool except in cases of significant non-compliance with the law. In some cases, trustees may avoid any sanction by simply rectifying a contravention if and when it is detected.

The Government supports the recommendations to give the ATO additional tools to deal more effectively with non-compliance of the law. These new measures are intended to support the ongoing integrity of the system.

ISSUES

Issue 1

Recommendation 8.2 – Administrative penalties

The Government has supported the recommendation to introduce legislation to provide the ATO with the power to issue administrative penalties against SMSF trustees on a sliding scale reflecting the seriousness of the breach. The penalties would not be payable from the corpus of the fund, and may be applied jointly or severally against trustees or directors of corporate trustees.

A new administrative penalties framework would utilise the existing penalty provisions in the SIS Act as a base. The Super System review suggested the penalty framework could be modelled on either:

- the attributes of the *Tax Administration Act 1953* (TAA) penalty framework including the application of penalty units, approach to remission, assessment, objection, amendment and review processes; or
- the ‘speeding ticket’ concept applied under the *Financial Sector (Collection of data) Act 2001*. A trustee that breaches an offence provision may be issued with an administrative penalty, the maximum amount set by legislation. The trustee could seek internal review of the decision to impose the penalty and may contest the matter in a court.

These 2 options are detailed in **Appendix A**.

The TAA model is the preferred option for the new administrative penalties framework. Although the ‘speeding ticket’ concept has some appeal in its relative simplicity, the TAA model is likely to result in less litigation and provides greater flexibility to assign penalty amounts according to the seriousness of the contravention.

Under a framework modelled on the TAA the preferred penalty regime would:

- provide for base penalty amounts referenced to penalty units;
- provide for statutory increases and decreases in the base penalty amount for aggravating and mitigating factors;
- allow the Commissioner to remit all or part of a penalty;
- allow penalties to be assessed through an active compliance examination of the contravention where all compliance treatments would be considered; and
- enable trustees to object to the imposition of an administrative penalty and decisions not to remit the penalty.

A possible option for the calculation of the base penalty amount is for the amount to be determined by an assessment of the behaviour that gave rise to the contravention. This is consistent with the existing shortfall and non-shortfall penalty regimes that focus on behavior. The associated degree of culpability is what differentiates the level of sanction. The relevant behaviours are;

- failure to take reasonable care;

- recklessness; and
- intentional disregard.

Considerations about the relative seriousness of the contravention that has occurred, or the 'value' of the breach where relevant, are matters that would be taken into account in considering remission of the penalty.

Fines imposed under the new penalty regime would be payable personally by the trustees who have committed the breach and not drawn from the corpus of the SMSF.

Questions

Is a penalty framework modelled on the TAA appropriate?

Is assessing the behaviour of the trustee appropriate in determining the base penalty amount?

Are there any other models that should be considered?

Issue 2

Recommendation 8.3 – Direction to rectify

The Government supports the recommendation to amend SIS legislation to provide the ATO with the power to issue relevant persons with a direction to rectify specified contraventions within a specified reasonable time. A breach of a direction would be a strict liability offence.

Existing enforceable undertaking arrangements rely on SMSF trustees initiating the undertaking with the ATO. The ATO then has the option to accept or decline the enforceable undertaking that has been offered. This process can often be inefficient and time consuming. The purpose of this measure is to improve the efficiency and timeliness of rectification.

Rectification of a contravention may involve actions to ensure the fund is put back into the position it was prior to the contravention and ensure there is no detriment to the fund. For example, a breach of the prohibition of lending to members can be remedied by the repayment of the loan by the member to the fund with interest where appropriate.

In other cases, rectification may not be possible or appropriate as some transactions in contravention of SIS legislation may still be valid and cannot be reversed. In such cases the ATO may use other penalties and sanctions to deal with the contravention.

The length of time given to rectify a contravention will depend on what contravention is being rectified and what action the relevant person must take to follow the direction.

A direction to rectify would be used in tandem with current and proposed compliance treatments such as mandated education, administrative penalties, civil and criminal penalties, removal of the fund's complying status and disqualification of trustee/s.

Publication

Unlike the current enforceable undertaking arrangements, this power will be restricted to directing rectification of a contravention only. Trustees will still be able to offer the ATO a written undertaking under the existing legislation.

Questions

What factors should be considered in determining whether a direction to rectify should be issued?

Who would be considered a 'relevant person'?

Should those who receive a direction to rectify have objection and review rights?

Issue 3

Recommendation 8.4 – Mandatory trustee education

The Government supports the recommendation for the ATO to be given the power to enforce mandatory education for trustees who have contravened SIS legislation. Such education would be provided by a body (which could include commercial providers) approved by the regulator and would be at the cost of the trustees and not the corpus of the fund.

It is anticipated that the ATO would issue a direction to a trustee to undertake mandatory education where the trustee's lack of knowledge and/or understanding of their obligations has contributed to a contravention occurring. Trustees could be directed to:

- complete a universal course that covers all aspects of running an SMSF and meeting compliance obligations regardless of the contravention that has occurred; or
- complete a course on a specific topic relating to the contravention that has occurred.

Although completing a topic specific course will provide trustees with appropriate knowledge relating to the contravention that has occurred, directing trustees to complete a universal course would provide an opportunity for trustees to gain and refresh their overall knowledge of SMSFs. This should reduce the chance of the trustee unintentionally committing another contravention

As part of the course being undertaken by the trustee, it is expected that the trustee would be required to pass an assessment in order to satisfactorily complete the course. The trustee would advise the ATO when they have completed the course. In the event that the trustee fails to enrol and/or does not complete the course, further penalties and action may be applied by the ATO.

There are various options for the development of education courses.

One option would be for the ATO to define education competencies that would provide the framework for content to be developed and delivered by Registered Training Organisations (RTO's). This could be done through existing units relating to SMSFS with appropriate customisation or modification to ensure they are at the right level for trustee education. While the existing units cover universal content, more investigation and work may be needed if units for specific topics were required to be developed, as these may not be currently available.

To be recognised, accredited courses must meet the Australian Quality Training Framework (AQTF), be run by RTO's registered with a State or Territory Training Authority, and provide qualifications in accordance with the Australian Qualifications Framework (AQF).

An alternative option would be for the ATO to review and accredit training courses. This would require the development of an accreditation framework by the ATO to allow training providers to build training packages to meet the desired content and standard. Course content and standards of education would need to be reviewed and monitored by the ATO.

Questions

What factors should be considered in determining whether mandatory education should be imposed?

Should course content be broad or topic specific?

What option is most suitable for the development of trustee education?

How long should trustees be given to attend a course?

What evidence should trustees submit to the ATO to show they have attended a course?

What sanctions should be applied if trustees fail to attend a course?