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## A Guide to the ATO's New Penalty Regime for SMSF Trustees

### *Be prepared for new penalty powers*

The Australian Taxation Office (ATO) is putting all Trustees of a Self-Managed Super Fund (SMSF) on notice that a new penalty regime is coming. *Tax and Superannuation Laws Amendment (2014 Measures No. 1) Bill 2014* is expected to quickly progress through parliament, allowing for the new ATO powers and penalty regime for contraventions to take effect from 1 July 2014.

Currently if an SMSF contravenes Superannuation Laws and Regulations the ATO only has three courses of action:

1. Overlook the contravention;
2. Seek an enforceable undertaking; or
3. Issue a notice of non-compliance. The ATO issues a non-compliance notice only as a last resort in serious cases.

The consequences of becoming non-complying are severe. The SMSF:

- is no longer eligible to receive superannuation guarantee contributions,
- will lose its tax concessional status and
- will have to pay additional tax equal, in effect, to all of the tax concessions that it has received in the past.

Being made non-complying and the ATO's ability to overlook contraventions (either because they are trivial or have been rectified) limits the ability of the ATO to regulate the behaviour of Trustees who refuse to take their responsibilities seriously.

Back in 2011, The Cooper Review recommended that the ATO be given the power to issue administrative penalties against SMSF trustees on a sliding scale reflecting the seriousness of the breach.

This would give the ATO a range of penalties to impose on SMSF trustees who contravened the regulatory requirements rather than the existing "all or nothing" nature of the non-compliance notice.

### *The new penalty regime will allow the ATO to:*

**Issue a rectification direction** - if the ATO reasonably believes that a contravention has occurred it can require the offending trustee to take specific action to fix the problem within a specific timeframe, including putting in place arrangements to prevent further contraventions of a similar kind;

#### **Rectification directions**

These are enforceable and legally binding directions to fix a breach of Superannuation law and regulations.

When issuing a rectification direction, the ATO takes into account the financial loss to the SMSF, the nature and seriousness of the breach and any other relevant circumstances.

If a trustee or director does not comply with a rectification direction and provide evidence to the ATO of compliance, they are liable to a fine of \$1,700 for each breach.

**Issue an education direction** - if the ATO reasonably believes that a contravention has occurred it can require a person to successfully complete a free, ATO-approved education course within a specified time;

#### **Education directions**

If a trustee or director does not complete the education course and notify the ATO, they are liable to a fine of \$1,700 and an administrative penalty of \$850.

Once an education course has been completed, the individual must re-sign a trustee declaration form confirming they understand their duties as a SMSF trustee.

**A person will be able to object to an ATO decision to impose a rectification direction or an education direction.**

**Impose an administrative penalty** - this only applies in relation to specific contraventions and may result in a penalty of up to \$10,200 for each breach.

#### **Administrative Penalties**

If a trustee or director of a corporate trustee breaches specific sections of the Superannuation Industry (Supervision) Act 1993 then they will be liable to an administrative penalty ranging from \$850 to \$10,200, depending on the provision breached.

**Where the administrative penalty is payable by the corporate trustee, each director will be jointly and severally liable for the penalty.**

### Costs and penalties not to be passed on to the SMSF

The costs of complying with an education direction must be paid for by the person to whom the notice was issued — it cannot be refunded by the SMSF.

Similarly, an administrative penalty is payable personally by the offending trustee or director and cannot be reimbursed out of the SMSF assets. Interestingly, no such prohibition applies in relation to the costs of complying with a rectification direction.

### Mix and match

- The new powers will generally be additional to the ATO's existing enforcement powers — so that the ATO could impose a rectification direction and an administrative penalty in relation to a particular contravention.
- The ATO could issue a notice of non-compliance if a rectification direction was not complied with.
- However, the ATO cannot use the rectification option in conjunction with another punishment

### The use of the new powers

- The new regime represents a middle ground between the existing options of overlooking the contravention and making the SMSF non-complying — which gives the ATO scope to fine tune the penalty to fit the contravention.
- We can presume that the ATO will be less likely to overlook contraventions and will use its other powers to issue rectification directions, issue administrative penalties and education directions in order to encourage the right behaviour among SMSF Trustees
- It is probably less likely that an SMSF will be made non-complying.
- It remains to be seen how the ATO will apply its new powers in practice.
- The ATO presently receives considerable information in relation to SMSF breaches through auditor contravention reports and its own compliance activities.
- In the future, the ATO is likely to be more inclined to impose penalties — particularly for repeat offenders or where recklessness, disregard for the law or lack of reasonable care is present.

### What you need to do as an SMSF Trustee

#### Know your Roles and Responsibilities

Now is the time to refresh and educate yourself on your roles and responsibilities as Trustees of your SMSF.

The **Wealth Education** page of our website [www.carnegiefin.com.au](http://www.carnegiefin.com.au) contains ATO publications and links to videos that can help you know more about running your SMSF. Start with the ATO's "Running a Self-Managed Super Fund".

#### Get your SMSF House in Order

If you know that you could be doing things better, get in contact with us now so we can help get your SMSF in order and complying by 1 July 2014. Something that you might consider trivial like being behind in your SMSF Annual Tax Returns will actually trigger an Administrative Penalty and a Late Lodgment Fee.

#### Seek advice and guidance from your Carnegie SMSF Team BEFORE you act

Sheila Cabacungan and her team of SMSF Specialists are available as advisers and guides for all of our SMSF Trustees.

Getting in contact with us to discuss your investment, insurance or contribution decisions before you implement them can help you stay on the right side of Superannuation Law and the ATO.

To get the most out of your relationship with Carnegie, here is a list of our SMSF Specialist and their areas of expertise.

For	Company and Key Contact Person	Contact Details
<b>SMSF Advice – Strategic and Investment Product</b> <ul style="list-style-type: none"><li>• Contributions</li><li>• Investment Strategies</li><li>• Insurance Strategies</li><li>• SMSF Rules</li><li>• Your Role as Trustee</li><li>• Succession and Estate Planning</li></ul>	<b>Sheila Cabacungan</b> Certified Financial Planner SMSF Specialist Adviser  For: <b>Carnegie Financial Planning</b> Australian Financial Services Licensee No 389528	02 96871966 0418 454 880 <a href="mailto:sheila@carnegiefin.com.au">sheila@carnegiefin.com.au</a>
<b>SMSF Administration and Accounting</b> <ul style="list-style-type: none"><li>• Quarterly BAS preparation</li><li>• Monthly Bank Reconciliation</li><li>• Annual financial accounting</li><li>• Ongoing record keeping</li><li>• Trustee Minutes and Documents</li><li>• Annual Tax Return preparation</li></ul>	<b>Mohammed Farook</b> SMSF Accountant & Administrator <b>Smitha Nair</b> SMSF Accountant & Administrator  For: <b>Carnegie Financial Planning</b> Registered Tax Agent No.28933015	02 9687 1966 <a href="mailto:mfarook@carnegiefin.com.au">mfarook@carnegiefin.com.au</a> 02 96871966 <a href="mailto:smitha@carnegiefin.com.au">smitha@carnegiefin.com.au</a>
<b>SMSF Audit and Compliance</b> <ul style="list-style-type: none"><li>• Annual Audit of Financial Statements</li><li>• Annual Audit of SMSF Compliance with Superannuation Industry Supervision Act, Income Tax Assessment Act,</li><li>• Annual Audit of SMSF Compliance with ATO Regulators Practise Statements, Rulings and Regulations</li></ul>	<b>Jonathan Fowell</b> Certified Practising Accountant SMSF Specialist Auditor Registered SMSF Auditor No.100130176  For: <b>JA Fowell and Co</b> Registered Tax Agent No.58064015	02 9687 1966 <a href="mailto:jon@carnegiefin.com.au">jon@carnegiefin.com.au</a>