# *SMSFR 2008/2EC - Compendium*

This cover sheet is provided for information only. It does not form part of *SMSFR 2008/2EC - Compendium*

# Ruling Compendium – SMSFR 2008/2

This is a compendium of responses to the issues raised by external parties to SMSFR 2007/D1 – Self Managed Superannuation Funds: the application of the sole purpose test in section 62 of the *Superannuation Industry (Supervision) Act 1993* to the provision of benefits other than retirement, employment termination or death benefits

This compendium of comments has been edited to maintain the anonymity of entities that commented on the draft ruling.

**Summary of issues raised and responses**

**Please note:** This Compendium does not provide responses to queries regarding particular arrangements that were raised in some comments. Instead, where appropriate, these types of comments have been used in considering whether further examples could be presented to illustrate different principles that were not covered in the draft Ruling.

The Tax Office also considers that providing a series of examples where one or two factors are adjusted, as sought in some comments, would promote a formulaic approach to the sole purpose test which is inconsistent with its nature.

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| 1. | Entity 1 | *Binding status*<br>It should be clearly spelt out and highlighted that these rulings and determinations do not carry the same weight of law as a Tax Ruling and are not binding on the Commissioner.<br>A suitable example is the protection label in TR 2007/1 with the highlighted statement 'This publication provides you with the following level of protection'. | *No change*<br>The preamble outlines the status of the Ruling and states that the Ruling (draft or final) is not binding on the Commissioner. The protection labels in Taxation Rulings have specifically been developed in the context of these rulings being public rulings that are binding under Part 5-5 of Schedule 1 to the *Taxation Administration Act 1953*. |

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| 2. | Internal | *Paragraph 1 – definition of a regulated superannuation fund*<br><br>In paragraph 1 subsection 62(1) refers to a regulated superannuation fund rather than an SMSF. Subsection 19, which defines a regulated superannuation fund, makes no reference to an SMSF. It should explain why an SMSF is a regulated superannuation fund. | *Change accepted*<br><br>Footnote 2 has been added to explain when a SMSF will be a regulated superannuation fund. |
| 3. | Internal | *Footnote 2 – SISA reference*<br><br>Footnote 2 does not require a reference to SISA. | *Change accepted*<br><br>Footnote 3 (previously footnote 2) has removed the reference to SISA. |
| 4. | Internal | *Paragraph 2 – ROSA*<br><br>In line with ROSA, 'arrangements' in paragraph 2 should be 'scheme'. | *No change*<br><br>Income Tax Rulings refer to the term 'scheme' due to the term's use in Division 358 of Schedule 1 to the *Taxation Administration Act 1953.* The term 'scheme' is used in a different context in the SISA. For example the concept of a 'public sector superannuation scheme'.<br><br>Therefore it is considered that the use of 'scheme' may cause confusion. |
| 5. | Internal | *Paragraph 3*<br><br>Paragraph 3 should refer to paragraph 62(1)(a) rather than the subsection. | *No change*<br><br>The reference is to all of the core purposes outlined in subsection 62(1) rather than the specific core benefit referred to in paragraph 62(1)(a). |

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| 6. | Entity 2 | *Paragraph 7 – requires clarity*<br>The structure of paragraph 7 requires refining to for clarity as the wording is ambiguous. | *Change accepted*<br>Paragraph 8 (previously paragraph 7) has been rewritten. Paragraph 9 has also been added. |
| 7. | Internal | *Paragraphs 9 and 10 – list of factors*<br>Paragraph 9 and 10 should state '…benefits not specified in section 62 **include**…' to align with paragraph 8 that the list of factors is not exhaustive. | *Change accepted*<br>Paragraphs 12 and 13 (previously paragraphs 9 and 10) have been updated.<br>Please note that the general wording of these sentences has been updated. |
| 8. | Entity 2 | *Paragraph 9 dot point 1 – requires clarity*<br>Paragraph 9, dot point 1 '…the benefit whether or not trustee..' requires clarity for the word 'whether' as it is not clear what the statement should say. | *Change accepted*<br>Paragraph 12 dot point 1 (previously paragraph 9) has been expanded. The dot point now states:<br>The trustee negotiated for or sought out the benefit, **even if the additional benefit is negotiated for or sought out** in the course of undertaking other activities that are consistent with section 62. |

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| 9. | Entity 2 | *Paragraph 9 dot point 3 – requires clarity*<br><br>Paragraph 9, dot point 3 '…party at a cost or financial detriment…' – the reference to cost should be explained more fully and should be consistently referred to throughout the paper as either 'net cost' or 'no extra cost' (Refer to pages 2, 3 & 5). Details as to whether cost is to be valued in dollar terms or does the ATO intend for it to include intrinsic costs or opportunity costs could be addressed. | *Change accepted*<br><br>A footnote (footnote 6) has been added to paragraph 12 dot point 3 (previously paragraph 9) to explain the reference to cost.<br><br>The same footnote (footnote 8) has also been added to paragraph 13 dot point 3 (previously paragraph 10).<br><br>These footnotes state:<br><br>In this context, the terms 'cost' and 'financial detriment' may include expenses incurred by an SMSF to provide a benefit or income foregone to provide a benefit. |
| 10. | Entity 2 | *Paragraph 10 dot point 3 – normal commercial terms*<br><br>Paragraph 10, dot point 3 '… on normal commercial terms….' the reference should be consistent for clarity throughout the document by referring to 'market value (and rates) or commercial terms' rather than just referring to 'normal terms'. The term 'normal' should be clarified or defined for appropriate terminology and the use in this document.<br><br>When defining commercial terms it should be consistent with section 109 'arm's length basis' as well. | *Change accepted*<br><br>Paragraph 13 dot point 3 (previously paragraph 10) has been expanded. A footnote (footnote 8) has also been added as per issue 9 to explain the terms 'cost' and 'financial detriment'.<br><br>The dot point now states:<br><br>The benefit is provided by the SMSF on arm's length commercial terms (for example, if the benefit is provided at market value), consistent with the financial interests of the SMSF and at no cost or financial detriment to the SMSF. |

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| 11. | Entity 2 | *Paragraph 10 dot point 5 – investment strategy*<br><br>We suggest the Commissioner also review the issue of the Investment Strategy (IS) being in writing. Currently there is no requirement for the IS to be in writing.<br><br>The ATO does suggest in paragraph 10, dot point 5, that the SMSF investments and activities are undertaken as part or are consistent with a properly considered and formulated investment strategy. A way of confirming this issue is to have an IS which is written and able to be considered. This concept may need to be clarified for trustees. | *Change accepted*<br><br>A footnote (footnote 9) has been added to paragraph 13 dot point 5 (previously paragraph 10).<br><br>The footnote states:<br><br>Although not a legal requirement, documentation of the SMSF's investment strategy will assist in identifying that this factor applies to a given case. Seeking independent advice in some circumstances may also provide objective evidence that investments or activities are consistent with a properly considered and formulated investment strategy. |
| 12. | Internal | *Paragraph 11 – TR 2006/10 reference*<br><br>Paragraph 11 should not refer to TR 2006/10 as that only deals with public rulings not SMSF rulings. | *Change accepted*<br><br>The reference to TR 2006/10 has been removed in paragraph 18 (previously paragraph 11). |
| 13. | Internal | *Paragraph 12- funds to which this Ruling applies*<br><br>Funds to which this Ruling applies should be in the Ruling section as is the practice with other Ruling templates. | *No change*<br><br>This format has been agreed to due to the co-regulator role of the Tax Office under the SISA. |
| 14. | Entity 2 | *Paragraph 13 – grammar*<br><br>Paragraph 13 has a double negative and would benefit from a rewriting of this paragraph for clarity. | *Change unnecessary*<br><br>Paragraph 19 (previously paragraph 13) has been changed in response to issue 15. As a result of this change the paragraph no longer contains a double negative. |

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| 15. | Internal | *Paragraph 13 and 8 – Ruling section*<br><br>Paragraph 13 is more specific than paragraph 8 in the Ruling section. The examples should not introduce new concepts. Paragraph 8 therefore needs to be updated. | *Change accepted*<br><br>Paragraph 19 (previously paragraph 13) and paragraph 10 (previously paragraph 8) have been updated to ensure new concepts are not introduced in the Examples Appendix. |
| 16. | Entity 2 | *Paragraph 15 – requires clarity*<br><br>Paragraph 15 '.. concerned with how an SMSF came to make..' should read as '..concerned with how a trustee of an SMSF came to make..'; | *Change accepted*<br><br>Paragraph 16 (previously paragraph 15) reflects this change.<br><br>Please note the general wording of this paragraph has been updated due to the general review of this part of the ruling. |
| 17. | Entity 3<br>&<br>Internal | *Example 1 and Example 2 – use of holiday apartments*<br><br>Example 1 & Example 2 both seem to suggest that the members of the SMSF are able to use 'holiday apartments' owned by the fund if market rental was paid.<br><br>We were of the opinion that the members of the fund (and their families) were not able to use residential property owned by the SMSF for their own purposes regardless of rental paid – similar to that which is described in paragraph 58 regarding the *'Swiss Chalet'* case.<br><br>As NAT 11032 *Roles and responsibilities of trustees* outlines that a trustees staying in a holiday house may breach in-house asset rules these examples may be misleading. | *Change accommodated*<br><br>Often holiday apartments owned are not able to be rented to members due to the in-house asset provisions. Examples 1 and 2 have been updated to make it clear that the holiday apartments will not be in-house assets.<br><br>It is important that the facts are viewed holistically and applied to the circumstances of each particular case. The weight of each factor taken into account to determine if the benefit provided is remote, insignificant or incidental will vary according to these circumstances. This approach is outlined in paragraphs 10-16 of the Ruling section.<br><br>For example, paragraph 105 (previously paragraph 58) outlines that after considering **all the circumstances** making funds available for use of family and friends was a breach of the sole purpose test in *Swiss Chalet*. |

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| 18. | Entity 4 | *Example 1 – pooled income*<br><br>I refer to Example 1 in SMSFR 2007/D1.<br><br>Most resort style holiday accommodation facilities now offer the income to the owners on a pooled basis.<br><br>That is the income received by the owner of a unit is not from their own unit but a share of the total units combined.<br><br>A typical standard feature of these arrangements is to then also allow the owner to use their own accommodation free of charge. During the time that the owner does not make the individual unit available for rental the owner forfeits their share of the pooled income arrangement on a pro rata basis.<br><br>1. If a SMSF acquired a unit of accommodation under one of these arrangements and the members used the accommodation for their own use at no cost for 4 weeks out of the whole year and made it available for rental for the balance of the year would this arrangement in your view breach the sole purpose test.<br><br>2. Would your view be different if during the 4 week period that the accommodation was used by the members the members paid full commercial rates for the accommodation? | *Change accommodated*<br><br>Examples 1 and 2 have been updated to reflect more realistic examples, including some of the features identified in this comment. |

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| | | 3. What if the members paid a discount rate directly to the super fund and not to the resort manager during their 4 week period of use?<br>4. What if the members made the accommodation available for rental for the whole year with the resort manager and slotted themselves in only when the accommodation was not occupied by third parties? | |
| 19. | Entity 5 | *Example 1 –investment property*<br>Example 1. How can trustees be allowed to rent holiday apartments without breaching the sole purpose test, however an SMSF is unable to rent an investment property within the fund. | *No change*<br>While outcomes of necessity depend on the facts of each case, the sole purpose test is more likely to be breached in a residential lease case than in a short-term holiday property case due to the size and scope of the benefit provided.<br>SMSF investments also need to comply with all sections of the SISA, such as in-house asset provisions (section 71) and business real property provisions (section 66). |

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| 20. | Entity 6 | *Example 1 Swiss Chalet*<br><br>The reference to the *Swiss Chalet Case* in paragraph 20 suggests the trustee in the case contravened the sole purpose test solely because of a pattern in investing in assets that provided pre-retirement benefits to members. However, the fund in this case was also found to contravene the sole purpose test through inconsistent application of vesting provisions, particularly in relation to favourable treatment of the trustee's wife, and the use of golf club memberships. Full reference to this case would provide a better understanding of the complex issues involved and also assist with example 4. | *Change accepted*<br><br>A change has been made to paragraph 29 (previously paragraph 20) to highlight that other benefits provided in *Swiss Chalet* were of a substantial nature. |
| 21. | Entity 2 | *Example 1 – number of stays*<br><br>Example 1 – benefit inherent in investment. We suggest that there also be an explanation as to the appropriate lengths and number of stays by the trustee will assist in providing clarity. This will assist to distinguish between what is considered to be incidental versus material for usage as well as upgrades and those others stated. | *No change*<br><br>Given the nature of the sole purpose test, the Tax Office considers that it would not be appropriate to specify benchmarks for the length of a stay or the number of stays. While relevant, neither of these factors is of itself determinative and it is important that these factors are assessed together with other relevant factors. Cases need to be examined holistically based on all the facts to determine whether the stays are an incidental, remote or insignificant benefit. |
| 22. | Entity 2 | *Example 3 – clarity*<br><br>We suggest that this example be rewritten for clarity as it does not explain easily what the | *Change accepted*<br><br>Example 5 (previously Example 3) has been reviewed and updated. |

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| | | Commissioner is trying to say in the ruling. | |
| 23. | Entity 2 | *Example 3 –independent advice*<br>There is also no reference to independent financial advice being another avenue for clarity of the sole purpose requirement for this example. | *No change*<br>An individual factor, such as seeking independent advice, is not a determinative factor in applying the sole purpose test. It is not used as a factor in every example. The Tax Office considers that the outcome in Example 5 (previously Example 3) can stand with or without the trustee seeking independent advice. |
| 24. | Entity 6 | *Example 4 –Swiss Chalet*<br>More weight would be added to this example if it referred to the similar situation and findings in the *Swiss Chalet* Case concerning golf memberships. | *Change accepted*<br>Now Example 6. Paragraph 51 has been inserted to refer to *Swiss Chalet* and outline how the facts in this scenario can be compared to the facts in *Swiss Chalet*. |
| 25. | Entity 7 | *Example 5 & 6 – facts given make the example too obvious*<br>The examples in 5 and 6 are not particularly useful, as the conclusions were very obvious, given the facts.<br>What would be far more useful would be to provide examples which take aspects from both examples, providing more useful guidance for people. | *No change*<br>Examples 7 and 8 (previously Examples 5 and 6) have been updated in response to all of the comments received. The Tax Office considers the relevant factors to be appropriately balanced in the revised versions.<br>Examples referring to art work are now outlined in Examples 7 to 11. |

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| 26. | Entity 6 | *Example 5 – storage of art work*<br><br>With reference to works of art being displayed in the trustee's residence, the example should be expanded to include how the commissioner would treat the situations where the art was stored in the home for the primary reason of security or to reduce the otherwise prohibitive cost of insurance or if it wasn't displayed in a prominent section of the home, for example in a little used guest bedroom. | *No change*<br><br>Examples 7 and 8 (previously Examples 5 and 6) have been updated in response to all of the comments received.<br><br>While the Tax Office considers that there is a benefit in providing examples where the factors do not unanimously support one conclusion, any expansion where only one or two relevant factors are changed may give a misleading impression that these factors are determinative of whether the sole purpose test is contravened.<br><br>A key message in the Ruling is that all facts and circumstances must be taken into account and balanced in each case when determining whether the sole purpose test has been contravened.<br><br>Examples 8 and 9 have been revised to incorporate factors relating to insurance and other conditions of use. |
| 27. | Entity 2 | *Example 5 – use of artwork at no cost*<br><br>We suggest that the 3 issues within this example be clearly outlined and reinforced. Currently there are only 2 referred to and they are not quite clear in their delivery. | *Change accepted*<br><br>Example 7 (previously Example 5) has been updated in response to all of the comments received. |

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| 28. | Entity 8<br>&<br>Entity 9<br>&<br>Entity 10 | *Example 6 – in house assets*<br>It should be made clear that leasing the artwork to a member at a market value is an in-house asset. | *Change accepted*<br>The examples have been updated to state when a transaction is an in-house asset.<br>Paragraph 20 has been included before the examples explaining the particular application of the in-house asset rules to the examples provided and that footnotes in the examples indicate where the in-asset rules may have relevance. |
| 29. | Entity 11<br>&<br>Entity 12 | *Example 6 – dominant purpose*<br>The hanging of art work by a member on a wall is incidental as the dominant purpose of acquiring the asset is for providing benefits to members on their retirement. | *No change*<br>Each case needs to be considered in light of all of its facts and circumstances. It is considered that in many instances a member hanging art on the wall will not be an incidental benefit.<br>The test in section 62 is not one of dominant purpose. Instead, the test is a stricter one requiring a sole purpose. Secondary benefits must be assessed in the context of the purposes set out in section 62 so that it can be determined whether these secondary benefits are truly incidental, remote or insignificant or whether they are instead collateral or independent.<br>The examples dealing with art works have been updated in response to other comments received. |

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| 30. | Entity 11<br>&<br>Entity 12 | *Example 6 & further art work examples – commercial practicality*<br><br>Example 6 is not practical for the following reasons:<br><br>1. The Trustees can lease the artworks to third parties.<br><br>It would be necessary to find some Corporation or individual who likes the work and who is prepared to lease the work, whilst at the same time the Trustees have to ensure that the lessees are trustworthy and that the works are properly looked after.<br><br>With the exception of the Art Bank which was established by the Government as a support for the acquisition of art from emerging artists and a few commercial galleries that have limited leasing operations, there is no effective rental market and no mechanism whereby an owner of a limited number of artworks can find an unrelated party for leasing purposes. | *Change accepted*<br><br>The examples dealing with art work have been updated with the intention that they better reflect commercial realities.<br><br>Examples referring to art work are now outlined in Examples 7 to 11. |

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| | | 2. Trustees can give the artworks on loan to State or Regional Galleries or other cultural institutions.<br>Whilst this may be of interest of the Institutions for major works, it is unlikely to attract very much enthusiasm for other works, as many of the State and Regional Galleries have their own storage problems.<br><br>3. The trustees can place the artworks in storages and ensure that the works are property protected.<br>Conservators frown on the idea of wrapping paintings in bubble pack and storing them in cellars and attics.<br>In addition some artworks are quite delicate and would need to be properly stored and climatically controlled.<br>The cost of professional storage and the insurance associated with it can range from 8-10 per cent of the value of the artwork and would therefore affect the viability of the investment. | |

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| | | 4. The trustees can arrange for the art worlds to be leased to members (who in most cases are also the Trustees or Directors of the Trustee) to be hung on their walls or on the walls of their associates, or leased to them or their associates in their business premises, with an agreement that the works are insured and preserved. | |
| 31. | Entity 11<br>&<br>Entity 5<br>&<br>Entity 12 | *Example 6 and further artwork examples – artwork and capital growth*<br><br>The sole purpose test should focus more on the capital growth of the art work rather than its ability to provide income. | *No change*<br><br>The capital growth of an investment is not a determinative factor in ascertaining whether there is a breach of the sole purpose test.<br><br>As outlined in paragraphs 10-16 of the Ruling a holistic approach needs to be taken when applying the test.<br><br>However a financial detriment to a fund or inability to provide income, when balanced against all of the facts, may suggest a contravention of the sole purpose test.<br><br>Given the current commercial realities associated with art work, the Tax Office would accept that factors relating to the capital growth of the asset may have greater relevance to the application of the sole purpose test than the asset's capacity to provide income when art work is compared to other assets that have the potential to produce income.<br><br>Example 8 has been significantly revised and Example 9 has been added to demonstrate these principles. |

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| 32. | Entity 11 | *Example 6 and further artwork examples – commercial rent and related parties*<br><br>The requirement to pay a 'commercial' rental by members who hang works in their homes should not be critical to the sole purpose test.<br><br>The main purpose of hanging artwork on the wall is to assist in the preservation of the work.<br><br>If the art work complies with sound investment strategies, hanging the work in the home of the members confers only a remote or insignificant benefit. | *No change*<br><br>Now Example 8. Please note this example has been significantly revised.<br><br>The test in section 62 is not one of main or principal purpose. Instead, the test is a stricter one requiring a sole purpose. Secondary benefits must be assessed in the context of the purposes set out in section 62 so that it can be determined whether these secondary benefits are truly incidental, remote or insignificant or whether they are instead collateral or independent.<br><br>A significant factor in this case is that members enjoy the benefits of having the art work hung in the member's office without themselves paying an amount that reflects the market value of that benefit or providing conditions otherwise required in relation to the use of the art work. It is not merely the enjoyment of the art work that is relevant, but also the financial arrangements that allow for the art work to be enjoyed. |
| 33. | Entity 5 | *Example 6 and further art work examples – art compared with investment properties*<br><br>Why can a member lease art work from a fund without breaching the sole purpose test, however is not able to lease an investment property to a member. How can art be distinguished from investment properties. | *No change*<br><br>Depending on the facts of each case the sole purpose test is more likely to be breached in a residential lease case (as opposed to leasing art) due to the size and scope of the benefit provided.<br><br>SMSF investments also need to comply with all sections of the SISA, such as in-house asset provisions (section 71). |

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| 34. | Entity 13 | *Purposeful benefit versus incidental benefit*<br><br>It is unclear from Example 6 in that the benefit provided to the member from displaying a work of art owned by their SMSF in their home is incidental and not purposeful.<br><br>The comments at paragraph 38 and 40 infer that an arms length lease arrangement at market rates will always relegate any personal use and enjoyment derived from the asset. Paragraph 40 states that the benefit is the opportunity to use the SMSF assets by paying an arm's length amount. There is no cost or financial detriment to the fund as a consequence of the use of the work of art by the member. These factors weigh in favour of a conclusion that an SMSF is being maintained in accordance with section 62 as per paragraph 10 of the draft ruling.<br><br>But what if the SMSF trustee acquires the painting for investment purposes and to display in their home for enjoyment? Is this a purposeful benefit? The ruling makes this distinction unclear. | *Change accepted*<br><br>Now Example 9. The facts of this example have undergone significant change as part of a general review of the art work examples in response to all of the comments received.<br><br>The examples illustrate that the sole purpose test requires that all of the facts and circumstances need to be taken into account.<br><br>Paragraph 64 has been added which explains that the impact of an arrangement on the SMSF's resources is always a relevant consideration in considering whether the sole purpose test has been contravened but is not determinative.<br><br>Examples 10 and 11 are illustrative of this. |

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| | | The example suggests that as long as the SMSF has an arm's length lease arrangement in place with a related party (subject to in-house asset provisions), then any personal use and enjoyment of that asset is incidental and not purposeful. We think the ruling should make it clear what the Tax Office's view is in various circumstances. | |
| 35. | Entity 2 | *Example 7 – loan of art work to an unrelated party.*<br><br>We suggest a further clarification of this example | *Change accepted*<br><br>Now Example 10. This example has been changed as part of a general review of the art work examples in response to all of the comments received. |
| 36. | Entity 6 | *Example 7 – art work at no cost*<br><br>The provision of the work of art to the gallery at no cost seems at odds with the common investment practice of the SMSF stated in paragraph 37, whereby the works of art are normally leased to third parties at market rates. This brings into question whether the investment strategy is being adhered to and suggests that there is actually a financial detriment to the fund in the form of the lease income foregone. There is also the question of who is receiving recognition for providing the art to the gallery. Is it the fund or the trustee? | *Change accepted*<br><br>A review of the facts in Example 10 (previously Example 7) has clarified that the loaning of the works to the gallery is consistent with the SMSF's investment strategy due to the ability to enhance the value of the work.<br><br>On the facts of this case we do not consider that the identity of who is receiving recognition for providing art to the gallery will influence the conclusion drawn in the example. |

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| 37. | Internal | *Example 7 – wording change*<br>In paragraph 42 should read: Following on from Example 6, **rather than dealings with a member, the SMSF deals with a related party of the SMSF**…. | *Change unnecessary*<br>Due to the general review of the art work examples, this paragraph has been deleted. |
| 38. | Internal | *Example 7 and 8 – wording change*<br>Example 7 and 8 need to be more clearly distinguished from Example 6. Paragraph 44 should read…'Following on from example 6, **rather than lending the work of art to the member**…..' | *Change unnecessary*<br>Due to the general review of the art work examples, this paragraph has been deleted. |
| 39. | Entity 6 | *Example 8 – gallery's influence on investment decision*<br>In this example, we believe the primary focus should actually be on the fact the gallery influences the trustee's investment decisions with the benefits gained by the related party being secondary. | *Change accepted*<br>Example 11 (previously Example 8) has been updated.<br>Facts have been added to paragraph 70 (previously paragraph 45) to make it clearer the art gallery is influencing the trustee's decisions. |
| 40. | Entity 2 | *Example 8 – pattern of investments*<br>Paragraph 46. We suggest that the ATO clarify what pattern of events they are referring to by highlighting them in this example. | *Change accepted*<br>Now Example 11. Paragraph 71 (previously paragraph 46) has been updated to clarify the pattern of events referred to. |

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| 41. | Entity 14 | *Example 9 – post retirement benefits*<br><br>In Example 9 what is meant by 'the provision of benefits for each member on or after the member's retirement'? | *Change accepted*<br><br>Further material has been added at paragraph 133-136 to explain what is meant by the provision of benefits after retirement. |
| 42. | Entity 5 | *Example 9 – shares vs. investment property*<br><br>Why are shares acquired from a related party distinguished from an investment property acquired from a related party?<br><br>Both assets are independently valued. This causes an unnecessary increase in agent fees and stamp duty when having to sell the property outside the fund and then buy a separate property inside the fund. | *No change*<br><br>Example 13 (previously Example 9) does not deal with shares acquired from a related party.<br><br>Instead the SMSF acquires the discount card shares on-market when the shares are listed. The shares provide a secondary benefit (in the form of a discount on retail purchases) that is enjoyed by members of the SMSF. This is the issue that the example is concerned with. |
| 43. | Entity 2 | *Examples – clarity and independence*<br><br>Each example may be read independently of the total document in some instances and it cannot be presumed that the ruling, including examples, will be always read in its entirety.<br><br>We would therefore encourage the ATO to rewrite each example for clarity for that set of circumstances. | *Change accepted*<br><br>Each example is now factually independent. Examples 9, 10 and 12 rely on some common facts, but this is clearly signposted in each example. |

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| 44. | Entity 6 | *Examples and independent advice*<br><br>The examples all refer to the trustees seeking or not seeking independent advice. Given the trustee is under no obligation to act on any advice obtained, or may act contrary to it, and still take action that may contravene the sole purpose test, we believe these facts are superfluous and do not add to the examples. | *No change*<br><br>The Tax Office considers that the act of seeking independent advice on an investment choice and what, if anything, an SMSF trustee does in response to any such advice remains a relevant factor in determining whether the sole purpose test is contravened.<br><br>Whether or not the trustee is obliged to seek advice or act in accordance with advice sought does not, in the Tax Office's view, detract from the relevance of these factors. Nevertheless, because of the holistic nature of the enquiry under the sole purpose test (together with the issues highlighted in these comments), the Tax Office considers that these factors will not be determinative. |
| 45. | Entity 2 | *Independent advice – Example 6*<br><br>We suggest that the ATO also provides an example, or distinguishes this example, for those members who are not experts as well.<br><br>Some may read this area as only being able to invest if the member is an expert. | *Change accepted*<br><br>Example 9 (previously Example 6) has been reviewed as part of the general review of the art work examples. This example now contemplates the trustees not being experts in art investments. |

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| 46. | Internal<br>&<br>Entity 2 | *Independent advice*<br>The reference to independent advice in Example 4, Example 5 and Example 6, requires defining what 'expertise' is in this document. | *No change*<br>As SMSFs are not specifically required to seek independent advice, it is not considered necessary to define the type of independent advice sought. These examples merely seek to identify the relevance of seeking independent advice and, where advice is sought, the SMSF trustee's response to that advice in the overall assessment required under the sole purpose test. |
| 47. | Entity 2 | *Financial, taxation and specialist SMSF advice*<br>The ATO review the inclusion of any suggestion for 'financial, taxation and specialist SMSF advice' in its terminology throughout the document and that the references be consistent and relevant | *No change*<br>Apart from references in the example to the SMSFs obtaining independent advice, the Ruling has not referred specifically to financial, taxation or specialist SMSF advice.<br>Please refer to issues 44 to 46 for changes made in relation to independent advice. Also refer to issue 11 in relation to investment strategies. |
| 48. | Entity 6<br>&<br>Entity 14<br>&<br>Entity 15 | *Interaction of the sole purpose test with other sections of the SISA*<br>Other sections should be referred to (for example section 65, section 71 and section 109). | *Change accepted*<br>Footnotes have been added to the examples to flag the possible application of other SISA provisions.<br>Paragraphs 20 and 21 have also been added to flag other SISA and Superannuation Industry (Supervision) Regulations 1994 that may apply. |

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| 49. | Entity 6 | *Interaction of the sole purpose test with other sections of the SISA*<br><br>It needs to be emphasised that while the sole purpose test may be contravened in isolation, with no other contraventions occurring, it is more likely the conclusion that a SMSF has contravened the sole purpose test will be reached as a result of a number of other provisions of the SISA This should also be emphasised in paragraph 51 of Appendix 2 (referred to in the footnote to paragraph 2), that the other provisions of the SIS Act do not so much complement section 62 as more the contravention of a number of these provisions may also indicate a contravention of the sole purpose test. | *Change accepted*<br><br>This has been clarified in paragraph 97 (previously paragraph 51). |

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| 50. | Entity 2 | *Interaction with other standards*<br>While this ruling relates solely to the sole purpose test, the ATO will need to indicate that other SISA standards need to be taken into account when a fund makes a particular investment. While the ruling mentions the importance of an investment strategy, the ruling needs also to indicate the importance of the other SIS investment standards. A person who reads this ruling in isolation may not consider the importance of the other investment standards as set out by SISA. | *No change*<br>Other SISA investment standards are outlined in paragraph 97 (previously paragraph 51).<br>Footnotes have also been added to the examples highlighting other provisions of the SISA that may need to be considered. |
| 51. | Entity 14 | *Objective vs. subjective purpose*<br>Paragraph 64 is an incorrect interpretation of case law.<br>Case law clearly shows that the objective facts are used by the courts and other judicial bodies to gain an insight into the subjective intention or purpose of the trustee. | *Change accommodated*<br>Paragraph 112 has been added to outline how the Tax Office considers subjective factors may be taken into account under the objectively based purpose test in section 62.<br>Paragraph 96 (previously paragraph 50) has been updated to change the term ‘paramount purpose’ with ‘The Commissioner considers that the sole purpose test is designed to ensure that the retirement income objective of SMSFs remains unqualified’. |

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| | | The sole purpose test merely states the objectives to which trustees of a superannuation fund must aspire. It does not say how the end is to be achieved and objective tests that prove the possibility of other objectives or intentions that might have influenced the trustee do not necessarily lead to one to conclude that trustees were acting in breach of the sole purpose test.<br><br>It is impossible for any individual to so divide their motivations as to comply with the 'sole purpose test'.<br><br>At paragraph 6 the sole purpose test is described as a 'strict standard of compliance' where any other purpose considered by or influencing a trustee in their decision making is an automatic breach.<br><br>Paragraph 50 states that the objective of the SMSF remains paramount and not an exclusive test. | |

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| 52. | Entity 16<br>&<br>Entity 14<br>&<br>Entity 5 | *Post retirement benefits*<br><br>The sole purpose test says investments must be made for the purpose of the member's retirement. Is there any difference in the interpretation once a member has retired?<br><br>To use one of your examples, a beach house used by the members is an in-house asset during the accumulation stage. Once the members are retired the sole purpose test would seem not to apply any more. | *Change accepted*<br><br>Further material has been added at paragraphs 133-136 to outline the treatment of the sole purpose test and post retirement benefits.<br><br>Example 12 has also been added. |
| 53. | Entity 5 | *Post retirement benefits – art work*<br><br>Why are you able to hang art on the wall after you are retired however not before hand? | *Change accommodated*<br><br>The treatment of art work is not necessarily different after retirement. Unless the art work has been provided to a member in accordance with the benefit payment standards, the fact of retirement does not change the analysis under the sole purpose test.<br><br>Paragraphs 133-136 and Example 12 have been added to clarify the application of the sole purpose test to post retirement benefits. |

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| 54. | Entity 17 | *Reimbursement of expenses*<br><br>Could you include in your deliberations the following example, and decide if it complies with the sole purpose test.<br><br>My investment strategy states that I buy undervalued shares or property, that return a gross income of at least 3%, and that the income return must be higher where the asset is not very undervalued. For example, 3% income return is acceptable if the asset is extremely undervalued, but 5% would be acceptable if the asset is merely undervalued. When there are no opportunities, or assets held become overvalued, and subsequently sold, the proceeds are kept in cash until another opportunity arises. Shares can only ever comprise 75% of the fund, and this percentage varies depending on whether the market is under or overvalued as determined by the Austin Donnelly zone system. The fund can comprise wholly Houses and shares. | *Change accommodated*<br><br>Some of the issues in this example have been addressed in a discussion of reimbursement of expenses included at paragraphs 129-132.<br><br>This particular example has not been included in the ruling due to its complexity and the need to deal with issues outside the scope of the sole purpose test.<br><br>A simpler example has been included as Example 15. |

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| | | To this end, I have noticed that a house can be purchased in the US for between $US130,000 to $US230,000. When the Aust $ is at a favourable level, This represents a bargain, particularly with their real estate crisis at the moment. As well, the gross rent is between 7 to 8%. So the investment fits my strategy VERY WELL. However, I will have to visit the US with my wife (Also a member) to see the available stock, and sign contracts etcetera. Only one trip will be needed, since all preliminary work can be done in the internet, and by phone etcetera. However, a house can't be bought without seeing it. In addition, we will have more than one area to explore. We will be there only to search for house(s) to buy. Any other tourist activities will be incidental. The trip should cost about $15,000. We consider this to be a cost that can still be borne to give us a good ongoing income (better than in Australia), and a good prospect of cap gain from either a depreciation in the A$ from its high point (we would only consider an investment if the A$ was at a high point), and an eventual recovery from the US housing crisis. | |

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| | | Question is – If the fund paid or our trip, would this contravene the sole purpose test. If this trip was conducted in Australia, would that contravene the test. What about travel to Shareholder's meetings in another state? | |
| 55. | Entity 18 | *Example – staying in property when vacant*<br><br>If a residential unit maintained in Melbourne and let through an agency at normal commercial rates to unrelated parties and from time to time to members of the SMSF at the same commercial rate would result in any components of the sole purpose test being breached.<br><br>Our client travels to Melbourne regularly for business purposes and if the Unit was available would stay in it. The Unit is not zoned specifically for short term stay nor is it holiday accommodation but in essence it may be used by unrelated parties and by our client for short term accommodation purposes.<br><br>In my view it is an unwarranted inconsistency that allows a related business to utilize premises at commercial rates but not real persons to do likewise with property that is regarded as being residential in nature, especially where the use is for short term purposes and no financial loss has been suffered by the Fund through this use. | *Change accepted*<br><br>Example 4 has been added to outline the principles applying to this example. |

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| 56. | Entity 19 | *Benefits provided with ordinary shares*<br><br>Example 9 should be elaborated, to confirm the Tax Office view on investing in ordinary shares with discount cards.<br><br>Many companies will often supply a discount card which entitles the holder to a range of discounts when acquiring services from the company. ANZ Bank is a good example. Often, the members being trustees, are able to use this discount card to procure discounts for themselves personally. Our advice to clients has always been to cut up the card as they should not be seen as getting a benefit from the fund.<br><br>However, the ruling seems to suggest that where the trustees invest in **ordinary** shares of a company (as opposed to discount card shares) and the discount card is granted as a shareholder of the company, then the benefits may be seen as incidental. | *Change accepted*<br><br>This scenario has been added as Example 14. |
| 57. | Entity 5 | *Sole purpose test – income tax principles*<br><br>Investment strategies for the SMSF should more closely match investment approaches outside of super. The sole purpose test is too restrictive, wealth building within the SMSF should be judged on the same criteria of investments outside of super. | *No change*<br><br>This comment relates to a matter of broader retirement income policy which is outside the scope of this ruling.<br><br>Paragraphs 7 and 104 (previously paragraphs 6 and 57) outlines that the sole purpose test is a strict test requiring exclusivity of purpose. |

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| | | For example: Accumulating wealth outside super you can live in your investment property and still have the benefit of tax concessions, for example negative gearing. | |
| 58. | Entity 13<br>&<br>Entity 6<br>&<br>Entity 15 | *Carrying on a business*<br>TR 93/17 states that superannuation funds are generally prohibited from undertaking speculative activities or carrying on a business.<br>The Ruling should mention whether carrying on a business within an SMSF would breach the sole purpose test<br>A definition should be addressed as to what is considered carrying on a business within an SMSF.<br>If this is not included the Ruling needs a reference as to why this issue is not addressed. | *No change*<br>The Tax Office considers this issue to be outside the scope of this current Ruling, which is concerned with how the sole purpose test applies to the provision of benefits outside of those stipulated in section 62, particularly to members or other related parties. The Ruling is not intended to cover all aspects of the sole purpose test.<br>A separate Ruling is being considered to address the question of whether an SMSF can carry on a business. |
| 59. | Entity 13 | *Trauma insurance*<br>As the APRA Circular No III.A.4 makes reference to Trauma insurance, The SMSF ruling should therefore consider whether trauma insurance in an SMSF would breach the sole purpose test. | *No change*<br>The Tax Office considers this to be outside the scope of the current Ruling, which is concerned with how the sole purpose test applies to the provision of benefits outside of those stipulated in section 62, particularly to members or other related parties. The Ruling is not intended to cover all aspects of the sole purpose test.<br>A separate product is being considered to address the issue of trauma insurance. |

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| 60. | Entity 13 | *Example – related party staying in vacant property incidental benefit*<br><br>David and Fiona are the trustees of Our SMSF. Our SMSF owns a residential property that was purchased arm's length from an unrelated party several years ago. The property is being leased to Terry, an unrelated party. Terry is about to move out so the SMSF advertises to find a new tenant. By chance, David's son is about to start university in the area and needs a new place to rent.<br><br>If the property is leased to David's son on an arm's length basis, will this breach s.62? There is no financial cost to the SMSF. Having a 'trusted' tenant may also add value to the property in terms of repairs and maintenance. Is the benefit provided to David's son (a 'related party') incidental or purposeful?<br><br>In this example it is difficult to draw a conclusion regarding the sole purpose test as none of the factors specified at Paragraph 9 apply (although not an exhaustive list).<br><br>There is a question whether the benefit (that is, use of the property) is an inherent or unavoidable part of other activities undertaken by the trustee consistent with s.62. | *No change*<br><br>A separate product is being considered to address the issues raised in this comment. |

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| 61. | Entity 13 | *Repairs and maintenance and incidental purpose*<br>What is the view where the use of an asset is incidental to its main intended purpose? For example:<br>*Sebastian and Nicola are the trustees of the Green SMSF. The Green SMSF owns a beach house in a remote part of North Queensland.*<br>*The beach house is leased to unrelated parties for most of the year. On occasions there are short vacancies (1-3 days) which mainly occur during the off-peak season. Sebastian and Nicola decide to stay at the beach house during these times to conduct repairs and maintenance. They also pay the SMSF the normal arm's length occupancy rate.* | *Change accepted*<br>This scenario has been incorporated in Example 3. |
| 62. | Entity 6<br>&<br>Entity 15<br>&<br>Entity 20 | *Target audience*<br>As these products are targeted towards SMSF trustees as well as professional associations the ruling should be easier to understand.<br>Paragraphs 13, 14, & 15 are too legal, defensive and esoteric to be useful. | *No change*<br>The Ruling outlines the Tax Office view in relation to the sole purpose test and the technical basis for it. The document is therefore of necessity technical in character.<br>Nevertheless, the Tax Office does not contemplate that SMSF trustees will be primary users of this product. The Tax Office has sought to take this into account when drafting the ruling section and the examples.<br>The Explanation is primarily intended for use by advisers of SMSF trustees. |

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| | | | The Tax Office does intend to issue other products in conjunction with the publication of the ruling as a final. These products will be targeted more specifically to SMSF trustees and will be couched in less technical terms.<br><br>Generally the Tax Office welcomes any specific suggestions in relation to how SMSF rulings and determinations can be made more accessible while remaining technically accurate.<br><br>Please note that paragraphs 17, 18 and 19 (previously 13, 14 and 15) have been reviewed. |
| 63. | Internal | *Paragraph 40*<br><br>Paragraph 40 should refer to an SMSF for consistency, rather than a fund. | *Change accommodated*<br><br>Example 9 (previously Example 6) has been reviewed as part of the general review of the art work examples. References throughout the Ruling have been made to SMSF rather than fund wherever appropriate. |
| 64. | Internal | *Paragraph 50 – core or ancillary purposes*<br><br>Paragraph 50 should state if the purposes, refer to core or ancillary purposes. | *Change accepted*<br><br>Paragraph 96 (previously paragraph 50) has been updated to state the purposes refer to both core and ancillary purposes. |
| 65. | Internal | *Paragraph 50 – definition of employer-sponsors*<br><br>The reference to employer-sponsors in paragraph 50 should be defined. | *Change accepted*<br><br>Footnote 36 has been added to paragraph 98 (previously paragraph 50) to identify that the term ‘employer-sponsor’ is defined in subsection 16(1). |

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| 66. | Internal | *Paragraph 50 – Transition to Retirement*<br>Paragraph 50 as currently drafted seems to sit a little uncomfortably with transition to retirement benefits and any potential legislative instrument. | *Change accepted*<br>Paragraph 102 (previously paragraph 50) has been updated.<br>Please note that this change has also been reflected in paragraph 3. |
| 67. | Internal | *Paragraph 51 – maintaining existing borrowings of money*<br>Paragraph 51 dot point 4 should be changed to :<br>Subject to specific exceptions, an SMSF trustee is prohibited from borrowing **or maintaining existing borrowings of money.** | *Change accepted*<br>Paragraph 97 (previously paragraph 51) has been updated to include this change. |
| 68. | Internal | *Paragraph 51 – legislative reference*<br>Paragraph 51 dot point 5 should state Part 8 **Division 3.** | *Change accepted*<br>Paragraph 97 (previously paragraph 51) has been updated to include a legislative reference to Division 3. |
| 69. | Internal | *Footnote 16 – legislative reference*<br>Footnote 16 refers to section 113. This section was repealed on 24 September 2007. The new reference is section 35C in the new Part 4. | *Change accepted*<br>Footnote 39 (previously footnote 16) has been updated accordingly. |
| 70. | Internal | *Paragraph 52 – approved form*<br>Paragraph 52 should have a footnote stating that the approved form is dealt with in section 11A | *Change accepted*<br>In paragraph 99 (previously paragraph 52), footnote 41 has been added to include a reference to section 11A. |

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| 71. | Entity 6 | *Paragraph 52 – Contraventions – audit requirement and consequences*<br>Paragraph 52 should comment on what factors and information the approved auditor would look at when considering the sole purpose test. | *No change*<br>The Tax Office considers that this information would be more appropriately conveyed in another product specifically tailored for SMSF auditors. |
| 72. | Entity 6 | *Paragraph 53 – Penalties*<br>Paragraph 53 should be expanded to provide details of what the penalties are if the sole purpose test is contravened. | *No change*<br>The Tax Office considers that paragraph 100 (previously paragraph 53) adequately identifies the penalties the Commissioner may apply if the sole purpose test is breached in the context of this ruling. The practice statements identified in the footnote 44 to this paragraph 106 provide further details in this regard. |
| 73. | Internal | *Paragraph 55 – legislative instrument*<br>Paragraph 55 would benefit from a reference to this legislative instrument if the timing is helpful. | *Change accepted*<br>Now paragraph 102. A reference to the legislative instrument has been made at footnote 45. |
| 74. | Internal | *Paragraph 62 – italics*<br>Paragraph 62. The reference to Roche should be in italics | *Change accepted*<br>The reference to Roche in paragraph 109 (previously paragraph 62) has been italicised. |
| 75. | Internal | *Paragraph 76 – cross referencing*<br>In Paragraph 76 the cross reference should be to paragraph 75 not paragraph 73 | *Change accepted*<br>A cross-reference to paragraphs 78 to 80 (Example 13) has been included in paragraph 125 (previously paragraph 76). This is original source of the proposition that is made. |

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| 76. | Internal | *Paragraphs 60-64 Cameron Brae v FC of T*<br>Paragraphs 60-64 might benefit from some reference to *Cameron Brae v FC of T [2007] FCAFC 135*. | *No change*<br>Now paragraphs 107-110. The principles in *Cameron Brae v FC of T* are adequately reflected by these paragraphs and the authorities referred to there. |
| 77. | Internal | *Paragraph 75 – 'better' return*<br>Paragraph 75 refers to a 'better' return. The Tax Office has usually steered away from this and preferred terms like 'higher' (or 'safer' or whatever element is intended). | *Change accepted*<br>Paragraph 124 (previously paragraph 75) has been updated to reflect this suggestion. |
| 78. | Internal | *Legislative references*<br>I would have said it was more common for the ATO historically to refer to, for example, paragraphs (a) and (b) of 62(1) rather than paragraphs 62(1)(a) and 62(1)(b), | *No change*<br>The approach in the Ruling is consistent with the Tax Office style guide. |
| 79. | Internal | *Grammar – indefinite article*<br>References should be to **a** SMSF not **an** SMSF. | *No change*<br>The approach in the Ruling is consistent with the Tax Office style guide. |