PS LA 2009/8 - The Commissioner's determination under paragraph 71(1)(e) of the Superannuation Industry (Supervision) Act 1993 that an asset is not an in-house asset of a self-managed superannuation fund

Australian Government
Australian Taxation Office

Law Administration Practice Statement

PS LA 2009/8

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SUBJECT: **The Commissioner's determination under paragraph 71(1)(e) of the *Superannuation Industry (Supervision) Act 1993* that an asset is not an in-house asset of a self-managed superannuation fund**

PURPOSE: **To outline the circumstances where we would exercise the Commissioner's discretion to issue a determination that an asset is not an in-house asset**

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BACKGROUND

1. All legislative references in this Practice Statement are to the *Superannuation Industry (Supervision) Act 1993* (SISA), unless otherwise indicated. Additionally, all references in this Practice Statement to self-managed superannuation funds (SMSF) include former SMSFs, unless otherwise indicated.

2. The Commissioner of Taxation has the general administration of Part 8 to the extent that the Part relates to SMSFs.[1] Part 8 contains the in-house asset rules that apply to regulated superannuation funds.

3. The primary policy objective of the in-house asset rules in Part 8 is[2]:

> … to ensure that the investment practices of superannuation funds are consistent with the Government's retirement incomes policy. That is, superannuation savings should be invested prudently, consistent with the SIS requirements, for the purpose of providing retirement income and not for providing current day benefits.

4. Subject to some exceptions, an in-house asset of a superannuation fund is an asset of the fund that is:

   - a loan to, or an investment in, a related party of the fund
   - an investment in a related trust of the fund, or
   - an asset of the fund subject to a lease or lease arrangement between a trustee of the fund and a related party of the fund.[3]

5. However, not all assets of the fund that meet the descriptions in paragraph 4 of this Practice Statement are in-house assets. Part 8 contains a number of exclusions to the general definition of an in-house asset[4], including transitional

[1] Paragraph 6(1)(e).
[2] The Regulation Impact Statement in the Explanatory Memorandum to the Superannuation Legislation Amendment Bill (No. 4) 1999.
[3] Subsection 71(1). For discussion of the meaning of 'asset', 'loan', 'investment in', 'lease', 'lease arrangement', 'related party' and 'related trust' in the definition of an 'in-house asset', see Self Managed Superannuation Funds Ruling SMSFR 2009/4 *Self Managed Superannuation Funds: the meaning of 'asset', 'loan', 'investment in', 'lease' and 'lease arrangement' in the definition of an 'in-house asset' in the Superannuation Industry (Supervision) Act 1993*.
[4] Paragraphs 71(1)(a) to 71(1)(j) and subsection 71(8) list assets of a superannuation fund that are not in-house assets.

provisions which apply to certain related party assets which were held at 11 August 1999 and were not in-house assets of the SMSF prior to that date.[5] In addition, particular regulations specify exclusions to the in-house asset definition for a class of assets or a class of funds.[6]

6. Part 8 limits the value of in-house assets that a trustee of a superannuation fund may acquire and hold to 5% of the market value of the fund's total assets.[7] If the 5% limit is breached as at the end of a year of income, the trustee is required to make and implement a plan to reduce the level of the fund's in-house assets to 5% or below before the end of the following year of income.[8]

7. The Commissioner, as the Regulator of SMSFs under the SISA, has the power to make a determination under paragraph 71(1)(e) that a particular asset of an SMSF is not, or will not be, an in-house asset of the fund.

8. A determination may be made with retrospective effect.[9] It may also be revoked.[10]

9. Our decision, refusing to make (or revoke) a determination, is a reviewable decision.[11] A trustee affected by our decision may, if dissatisfied with the decision, request us to reconsider.[12]

STATEMENT

10. The policy in this Practice Statement applies to SMSFs[13] and former SMSFs.[14]

11. In considering whether to make a determination under paragraph 71(1)(e), we will take into account all relevant facts and circumstances of the case.

12. We may consider it appropriate to issue a determination if:

- the facts of the case indicate circumstances that are unusual or out of the ordinary, and
- by making the determination it will not undermine the purpose of the in-house asset rules in Part 8.

13. We may consider circumstances to be unusual or out of the ordinary where:

- a trustee of an SMSF has complied with the SISA requirements in investing the fund's assets
- certain events occur, which are unforeseeable and beyond the trustee's control, and

[5] The transitional provisions are contained in Subdivision D of Part 8, which includes sections 71A to 71F.
[6] Divisions 13.3A of the *Superannuation Industry (Supervision) Regulations 1994* (SISR), which includes Regulations 13.22A to 13.22D.
[7] Section 83.
[8] Section 82.
[9] Subsection 71(5).
[10] Paragraph (j) of the definition of 'reviewable decision' in subsection 10(1) provides that a decision to revoke a determination under paragraph 71(1)(e) is a reviewable decision. This implies that the determination under paragraph 71(1)(e) can be revoked.
[11] 'Reviewable decision' is defined in subsection 10(1) and paragraph (i) and (j) of that definition respectively include the refusal to make and the decision to revoke a determination under paragraph 71(1)(e).
[12] Subsection 344(1). Subsections 344(2) and subsection 344(3) and Regulation 13.25 of the SISR set out requirements for making a request.
[13] SMSFs are defined in section 17A.
[14] A former SMSF is a superannuation fund that has ceased being an SMSF and has not appointed a registrable superannuation entity (RSE) licensee as trustee. It is treated as an SMSF for the purposes of sections 6, 42 and 42A – subsection 10(4).

- these events when they relate to the fund result in the in-house assets of the fund exceeding the 5% in-house asset limit.

14. Examples of such circumstances that are unusual or out of the ordinary include (but are not limited to) where legislative change leads to assets, previously excluded under the transitional provisions, being transferred to new SMSFs and becoming in-house assets. See Example 1 of this Practice Statement.

15. Where the circumstances are considered unusual or out of the ordinary, we may issue a determination under paragraph 71(1)(e) if it is not inconsistent with the intent of the in-house asset rules. The in-house asset rules require assets of a fund to be invested prudently, consistent with the SISA requirements, and only for the purpose of providing retirement income for members and not for providing current-day benefits.

16. Without further relevant facts, we would not normally consider the circumstances as unusual or out of the ordinary where the in-house assets of the fund exceed the 5% in-house asset limit as a result of the following events:

- fluctuations in economic conditions
- the trustee is not aware of the requirements of the in-house asset rules
- the trustee relies on the exercise of due care and diligence by a professional and necessary advice is not provided
- there is a significant benefit to the fund from the investment
- the trustee does not want to incur any difficulties or costs in keeping the in-house assets under the 5% limit
- there is a failure to satisfy the exclusions to the in-house asset definition specified by regulation under paragraph 71(1)(j), or
- the transitional provisions allowing additional investments in particular related party assets expired at 30 June 2009 and further additional investments in assets of that kind are made after that date.

17. We therefore would not ordinarily issue a determination that an asset is not an in-house asset of the fund for the events listed above. However, these circumstances will be taken into account when considering whether to exercise our discretion under subsection 42A(5) to allow the fund to maintain its complying status in relation to the year of income.[15]

18. The decision to issue a determination under paragraph 71(1)(e) must be approved by an Executive Level 2 (EL2) officer or above. When making a recommendation to the EL2 officer, you are required to provide them with sufficient information to approve the issue of a determination.

19. A determination under paragraph 71(1)(e) is issued to a specific SMSF in relation to its particular assets and on the basis of its particular facts and circumstances. Therefore, a determination cannot be relied on by other SMSFs even if their situation is argued to be the same. A trustee of an SMSF that seeks an exercise of our discretion to issue a determination should apply on behalf of their fund.

20. A determination under paragraph 71(1)(e) may be made on a prospective or retrospective basis.

[15] Refer to Law Administration Practice Statement PS LA 2006/19 *Self managed superannuation funds – issuing a notice of non-compliance* for factors the Commissioner will consider in deciding whether to give an SMSF a notice of non-compliance.

21. A determination under paragraph 71(1)(e) can be issued on a conditional basis where it is expressed to include facts and circumstances that we consider relevant in exercising the discretion. The determination continues to apply as long as the facts and circumstances that justified exercising the discretion continue into the future.

22. We may revoke a determination issued under paragraph 71(1)(e). This Practice Statement does not examine the timing of a revocation. To ensure full consideration, approval of the revocation by the relevant Senior Executive Service (SES) officer in the Superannuation and Employment Obligations (SEO) business line is required. The need for escalation to any other area will be in accordance with SEO's work practices.

23. If the determination ceases to apply because the facts are no longer as set out in the determination or the conditions are no longer satisfied, we are not required to revoke the determination.

EXPLANATION

24. Paragraph 71(1)(e) does not specify the form or timeframe in which a request for a determination is to be made. However, we will ordinarily consider a determination request from a trustee of an SMSF when it is in writing and contains all necessary information for us to make a decision regarding the request.

25. Paragraph 71(1)(e) does not provide any criteria limiting when we may exercise the discretion to issue a determination, nor does it provide any guidance as to when it would be appropriate. While our discretion to issue a determination is unfettered, it does not mean the power can be exercised on any basis. It must be exercised by reference to the legislative context in which it appears.

26. We will consider the policy intent of imposing limits on investments in in-house assets when making a decision on whether to issue a determination that a particular asset not be an in-house asset of an SMSF. This decision will be made by taking into account the facts and circumstances of the individual case. As a guiding principle, we may exercise the discretion and issue a determination if:

- there are circumstances that are unusual or out of the ordinary, and
- the issue of the determination would not undermine the purpose for which the in-house asset rules in Part 8 were introduced.

Factors taken into account when deciding to exercise an unfettered discretion

27. Before determining whether it is appropriate to exercise the discretion, we must consider the scope and purpose of the in-house asset rules, and thus ensure that the exercise of the discretion is consistent with the identified purpose.

28. In *Shrimpton v Commonwealth* [1945] HCA 4, the High Court considered the Treasurer's power to approve purchases of land. Latham CJ commented[16]:

> Accordingly, it should be held that the discretion entrusted to the Treasurer must be exercised for the purpose of attaining the object and securing the purpose of the Regulations, such object and purpose being ascertained by an examination of the terms of the Regulations.

[16] 69 CLR 613 at [620].

29. Later, in *Water Conservation and Irrigation Commission (NSW) v Browning* [1947] HCA 21, Latham CJ also stated that[17]:

> On several occasions this Court has had to consider provisions vesting a wide discretion in an administrative body and to consider whether the discretion was intended by the legislature to be absolutely unlimited … The intention of the legislature is to be ascertained from the words of the statute as applied to the subject matter with which the statute deals.

30. In the case of *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40, Mason J stated[18]:

> If the relevant factors – and in this context I use this expression to refer to the factors which the decision-maker is bound to consider – are not expressly stated, they must be determined by implication from the subject-matter, scope and purpose of the Act.

31. In *Chief Commissioner of State Revenue v Pacific General Securities Ltd and Finmore Holdings Pty Ltd (No 2)* [2005] NSW ADTAP 54 (*Pacific General*), the New South Wales Administrative Decisions Tribunal Appeal Panel considered an appeal against the exercise of an unfettered discretion by the NSW Administrative Decisions Tribunal. Referring to dispensing powers in revenue legislation, the Appeal Panel stated at [29]:

> The discretion belongs to a context. The discretion must be applied in a manner which does not defeat the fundamental legislative objectives of the scheme of regulation within which the dispensing power is located. It is a relief mechanism for hard cases.

32. When describing how the discretion was to be applied, the Appeal Panel in *Pacific General* noted at [31]:

> On its face there is nothing special about this transaction, and there would have to be some unusual or special considerations which would take the case outside the normal application of duty. To use the discretion to relieve a purchaser from duty would require special justification. A dispensing power should not lightly be applied.

33. Further, at [39] of *Pacific General*:

> We see the purpose of the kind of discretion given by s 25(2) as to provide a measure of discretion to deal with unforeseen consequences, anomalies or unexpected outcomes (such as the unexpected application of more than one head of duty). The discretion might be open to be applied also where there is an unexpected social policy consequence of a taxation measure which should be ameliorated in the short term, ahead possibly, in some instances, of amending legislation.

34. In *JNVQ and Commissioner of Taxation* [2009] AATA 522, when considering an appeal against the exercise of discretion to issue a notice of compliance by the Commissioner of Taxation, Carstairs MJ stated at [41]:

> Any exercise of discretion must have regard to considerations of unfairness in a particular case, but must be applied in a manner consistent with the objects of the relevant Act. It is important to have regard to whether, by exercising the discretion in a particular case, the decision-maker will be achieving or frustrating those objects.

35. Therefore, to justify our decision to issue a determination under paragraph 71(1)(e), there needs to be something unusual or out of the ordinary about the situation. The power to exercise the discretion allows us to deal with unforeseen consequences, anomalies or unexpected outcomes.

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17 74 CLR 492 at [496].
18 162 CLR 24 at [39–40].

Exercise of the discretion under paragraph 71(1)(e)

36. The fact that paragraph 71(1)(e) does not provide any limits to a discretionary power does not mean that the power can be exercised on any basis. Rather, the discretion should be exercised consistently with the scope and purpose of the legislation in which it appears.

37. The broad definition of an in-house asset indicates that the provision was intended to identify a wide range of assets of the superannuation fund that were exposed to or contribute to the financial viability of a related party of the SMSF. This is consistent with the primary policy objective of Part 8, which is to ensure that the investment practices of superannuation funds are consistent with the Government's retirement incomes policy.

38. Rather than making a judgment about the quality of an in-house investment, the in-house asset rules simply limit the amount of investment in a related party to 5% of the market value of the fund's total assets. The main aim is to reduce the risk to superannuation savings.

39. In *The Taxpayer and Commissioner of Taxation* [2000] AATA 238, the purpose of the in-house investment limits was mentioned at [22], where McMahon DP stated that '[t]he in-house investment limits are intended to ensure that the fates of the company [a related party] and of the Fund member[s] are not inextricably linked.'

40. The in-house asset rules have an object of not only ensuring prudential investment of savings, but also that these investments are consistent with SISA requirements to limit the risks associated with superannuation investments in related parties. Superannuation fund assets must be maintained for the purpose of providing retirement income for members, rather than providing current-day benefits to members or any related party of the fund.

Circumstances considered unusual or out of the ordinary

41. In determining whether the circumstances of a given case are unusual or out of the ordinary, a tax officer should consider whether the resulting breach of the in-house asset rules is inadvertent and has arisen through no fault of the trustee or the related party of the fund.

42. Circumstances may be considered unusual or out of the ordinary where a trustee of an SMSF has complied with all SISA requirements when investing the fund's assets and certain events occurred which are unforeseeable and beyond the trustee's control, causing the fund to exceed the 5% in-house asset limit.

43. 'Beyond the trustee's control' does not include circumstances where the trustee, due to their ignorance, has no knowledge of, or participation, in the related party's business activities or decisions.

44. While each case must be determined on its facts, the following are examples of circumstances we may regard as unusual or out of the ordinary. These examples are not designed to fetter the exercise of our discretion but are for illustrative purposes only.

Example 1 – legislative changes such as the introduction of the registrable superannuation entity licence

45. *Following the introduction of the RSE licence in 2004, trustees of some small Australian Prudential Regulation Authority (APRA) funds want to transfer their*

funds to SMSFs because they are unwilling to become licensed. Assets[19] *which are not in-house assets of the APRA funds due to the operation of the transitional provisions continue to be excluded from the in-house assets of the SMSFs if the APRA fund itself is to become an SMSF. However, if an APRA fund wishes to divide, assets transferred from the former APRA fund to the new SMSFs would become in-house assets of the SMSFs because the transitional provisions will not apply to the new SMSFs that received the assets. In this scenario, the in-house assets of the SMSFs may have exceeded the 5% limit.*

46. *We regard the introduction of the licensing regime as unusual or out of the ordinary. This is because this situation is outside of the trustee's control and at the time the assets which were not in-house assets of the APRA fund are acquired, the trustees of the APRA funds are not in a position to foresee the introduction of new licensing requirements.*

47. *Assets are acquired from the APRA funds when they are transferred to the new SMSFs. However, each member's rights, interests and entitlements in the assets of the SMSFs are effectively maintained in the same position as they would be if the fund had not been split. The circumstances therefore make it possible for us to conclude that the purpose of the in-house asset rules does not require the assets that were previously not in-house assets of the former APRA funds to be treated as in-house assets of the SMSF. As a result, we issue a determination under paragraph 71(1)(e) excluding those assets from the definition of an in-house asset of the SMSFs.*

48. *To ensure that the same individuals retain their interest in the same assets, the determination is issued on a conditional basis by stipulating that all members of the new SMSFs were members of the former APRA fund and no new members be added into the fund until after 30 June 2009.*[20]

49. *If there were members in the SMSFs who were not members of the former APRA fund, we do not issue a determination to provide the SMSFs relief from the in-house assets rules. Similarly, the determination ceases to take effect if new members were added to the fund before 1 July 2009.*

Example 2 – state or territory law changes result in water access rights being recognised as assets, separate from underlying business real property primary production land

50. *A trustee of an SMSF acquires business real property (BRP) primary production land (along with the attached water rights) which the SMSF then leases to a related party. The related party uses the land in carrying on a primary production business. At the time of acquisition, the water rights are not recognised as a separate asset and the acquisition of the BRP primary production land is covered by the exception in paragraph 66(2)(b) and does not result in a contravention of the SISA. The leasing of the BRP primary production land is also covered by the in-house asset exception in paragraph 71(1)(g).*

51. *State or territory law changes result in the water right being unbundled from the underlying BRP primary production land. This results in the SMSF holding 2 separate assets, being the BRP primary production land and the water right (commonly referred to after separation as a water access entitlement (WAE)). The WAE, now recognised as a separate asset from the land, is no longer excluded by the BRP exception*[21] *when leased to a related party. It is therefore*

[19] Such assets include existing related party assets and additional investments or payments in relation to these assets.
[20] The date the transitional provisions in section 71A to section 71F expire.
[21] Self Managed Superannuation Funds Ruling SMSFR 2009/1 *Self Managed Superannuation Funds: business real property for the purposes of the Superannuation Industry (Supervision) Act 1993*.

included as an in-house asset in working out if the 5% in-house asset limit has been exceeded.

52. *We consider the unbundling of the WAE from the related BRP primary production land under a state or territory law is an unusual or out of the ordinary event and the trustee complied with the SISA requirements when originally acquiring and leasing the BRP primary production land to the related party.*

53. *In these circumstances, we consider it appropriate to issue a determination under paragraph 71(1)(e) to exclude the WAE from being an in-house asset of the SMSF while the:*

- *SMSF leases the BRP primary production land to a related party[22] of the SMSF*
- *BRP primary production land is used by the related party in carrying on a primary production business, and*
- *WAE continues to be used by the related party in carrying on that primary production business.*

54. *The issue of the determination thereby returns the SMSF and the members to the same position as before the unforeseen event. It also ensures that no additional benefits are conferred upon the trustee or the members beyond those that were in place before the unbundling of the WAE.*

55. *On the day that any of these circumstances are no longer satisfied, the determination will cease to apply. On that day, the WAE will no longer be excepted under paragraph 71(1)(e) and the WAE will be an in-house asset of the SMSF.*

Circumstances not considered unusual or out of the ordinary

56. We would not ordinarily issue a determination that an asset is not an in-house asset of the fund where the circumstances are not considered unusual or out of the ordinary. The circumstances however will be taken into account when considering whether to exercise the Commissioner's discretion under subsection 42A(5) to allow the fund to maintain its complying status in relation to the year of income.[23] The circumstances are generally not considered unusual or out of the ordinary where the in-house assets of the fund exceed the 5% in-house asset limit as a result of the following events.

Fluctuations in economic conditions

57. We will not ordinarily consider a decrease in market value of the fund's assets due to fluctuations in economic conditions to be sufficient reason in itself to exercise the discretion. While the circumstances may be outside of the trustee's control, fluctuations in values, including substantial fluctuations, are normal features of the financial market and other markets.

58. A fluctuation in economic conditions may result in a change in the market values of an SMSF's assets, such as shares and property. An economic downturn may cause the overall market value of the fund's assets to decrease,

[22] It does not affect the determination if the related party changes.
[23] Refer to PS LA 2006/19 for factors the Commissioner will consider in deciding whether to give an SMSF a notice of non-compliance.

and this may cause the market value ratio[24] of the fund's in-house assets to exceed the 5% in-house asset limit.

59. Regardless of the magnitude of the change in the value of an investment due to fluctuations in economic conditions, it would be contrary to the object of the in-house asset rules for in-house assets with a value in excess of 5% of the total asset value to be permitted merely because of a decline in the value of an investment.

The trustee is not aware of the requirements of the in-house asset rules

60. Failure to comply with the in-house asset rules because the trustee was not aware of the requirements will not be considered unusual or out of the ordinary.

61. A trustee of an SMSF is responsible for ensuring their fund is properly managed and complies with the SISA and all other relevant legislative and administrative requirements. To comply with their obligations, a trustee of an SMSF must keep themselves abreast of the requirements relevant to the operation of the fund (this may include seeking professional advice). Therefore, a trustee who seeks to acquire an asset for the fund will need to determine whether the investment is excluded from the definition of in-house asset and, if not, the trustee has to comply with the requirements of the in-house asset rules.

62. In considering whether ignorance of the law can be regarded as special circumstances, in *B and Insurance and Superannuation Commissioner* [1994] AATA 104 (*Insurance and Superannuation Commissioner*), McMahon B stated at [20] that '[i]gnorance of the law … is difficult to regard as a special circumstance, particularly where the trustee has had ample opportunities to seek advice'.

Example 3 – failure to identify an investment as an in-house asset

63. *The partners of a partnership decide to operate a new business through a unit trust. The trustees of the SMSFs associated with those partners also invest in the same unit trust. Each partner of the partnership is a related party, thus each fund that a partner is a member of is also a related party. As SMSFs associated with the partners hold more than 50% of the units in the unit trust, the trust is defined to be a related party of the funds.[25] Since no exclusion to the in-house asset definition applies, all investments in the unit trust by trustees of the SMSFs associated with the partners are in-house assets.*

64. *Failing to identify the unit trust as a related party of the fund before making the investment is not considered a circumstance outside of the trustees' control.*

Example 4 – failure to identify a separate water access entitlement as not being business real property of the fund

65. *A trustee of an SMSF acquires both BRP primary production land and a WAE, which it then leases to a related party. At the time the assets are acquired and leased, the WAE is recognised by the relevant state or territory law as a separate asset from the land. The land and the WAE are used by the related party in carrying on a primary production business.*

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[24] The market value ratio is the value of the fund's in-house assets as a proportion of the value of all assets of the fund.

[25] Section 70B and subsections 70E(2) and (3).

66. *As the freehold interest in the land is BRP at all times, the land is excepted from the definition of in-house asset when leased to a related party.*[26] *The WAE, being a separate asset from the land, is not an eligible interest in real property and therefore cannot be BRP of the fund.*[27] *Since no exclusion to the in-house asset definition applies to the separate WAE, it is an in-house asset of the fund when leased to a related party and subject to the 5% in-house asset limit.*[28]

67. *The trustee's failure to identify the separate WAE as an in-house asset of the fund when leased to a related party is not considered to be an unusual or an out of the ordinary event which was unforeseeable or beyond the trustee's control.*

The trustee relies on the exercise of due care and diligence by a professional and necessary advice is not provided

68. Failure to comply with the in-house asset rules when investing the fund's assets because the trustee relies on the exercise of due care and diligence by a professional, and necessary advice is not provided, will generally not be considered unusual or out of the ordinary.

69. A trustee of an SMSF may use services of a professional to complete certain tasks on their behalf – for example, a tax agent to lodge the fund's annual return, or an investment advisor or accountant for investment or financial advice. However, the trustee of an SMSF is still solely responsible and accountable for managing and making all decisions relevant to the operation of the fund.

70. In *Re Insurance and Superannuation Commissioner* [1994] AATA 164, the fund was in breach of the in-house asset rule. The trustee claimed that he did not receive advice from his accountant in relation to the loans of the fund and we should exercise the discretion. The Tribunal, at [35], in affirming our decision not to allow the fund to maintain the tax-exempt status, was satisfied that the trustee of the fund had:

> … an obligation to inform himself as to the true factual situation at or prior to the time he signed the return. Reliance upon the accountants, even be it that they had done all they could by reason of the letter to inform the trustees of the situation, does not constitute a special circumstance.

There is a significant benefit to the fund from the investment

71. There is nothing within the in-house asset rules that considers the quality of a particular investment. A significant benefit to the fund from the investment will not be considered unusual or out of the ordinary.

72. In *Insurance and Superannuation Commissioner*, when considering whether there were special circumstances in respect to a particular investment, McMahon B stated at [21]:

> The fact that there was a benefit to the fund by the investment, that the fund was a small one, and that there was no detrimental effect to the assets of the fund caused by anything resembling a speculative investment do not, it seems to me, take the matter out of the ordinary course. These facts do nothing to

[26] See paragraph 71(1)(g).
[27] See paragraphs 266 to 269 of SMSFR 2009/1.
[28] In addition, if the trustee of the fund acquires the separate WAE from a related party, the trustee of the fund contravenes the related-party asset acquisition rule in section 66.

distinguish the present circumstances from those of a host of other funds in other contexts.

Example 5 – significant benefit to the fund by the investment

73. *Trustees of 2 related SMSFs combine their resources and invest almost their entire assets into a related unit trust. Aiming to improve the risk and return outcomes for the unit holders (which are trustees of the 2 SMSFs), the trustee of the unit trust buys shares in a company. This results in the unit trust holding interests in another entity. As no exclusion of the in-house asset definition applies, investments of the 2 funds in the unit trust are in-house assets of the funds. The value of each fund's in-house assets is more than 5% of the value of the fund's total assets.*

74. *The fact that there were significant benefits to the fund by the investment does not 'take the matter out of the ordinary course'.*[29] *While it can be said that the trustees of the SMSFs have succeeded in gaining greater buying power by making large investments through the unit trust, they have failed to comply with the in-house asset rules. The circumstances will not be considered unusual or out of the ordinary.*

The trustee does not want to incur any difficulties or costs in keeping the in-house assets under the 5% limit

75. If a trustee of an SMSF decides to make investments in related parties and the investments are in-house assets of the fund, the trustee is required to ensure the fund's in-house asset level is kept under the 5% limit. Where a fund's in-house assets exceed 5%, the trustee must prepare and carry out a written plan by the end of the following income year to dispose of some of or all the in-house assets so that the 5% in-house asset market value ratio is no longer exceeded.

76. In undertaking either of the options listed in paragraph 75 of this Practice Statement, the trustee may incur some difficulties and costs, such as administrative and transaction costs, and income tax or capital gains tax implications. The difficulties and costs the trustee may incur in fulfilling this requirement are not considered of themselves to be unusual or out of the ordinary. Therefore, the trustee would not be likely to be able to obtain a favourable determination under paragraph 71(1)(e).

There is a failure to satisfy the exclusion to the in-house asset definition in paragraph 71(1)(j)

77. Paragraph 71(1)(j) allows regulations to be made specifying a class of assets not to be in-house assets of any fund or of a class of funds in which the fund belongs. Correspondingly, Division 13.3A of the SISR was introduced to allow SMSFs to invest in certain related company and unit trusts where specific requirements are met. These requirements are designed to maintain the objectives of the investment rules that apply directly to SMSFs.[30]

78. If one of the specific requirements is breached (for example, an event in regulation 13.22D of the SISR occurs), the exclusion to the definition of in-house asset ceases to apply to all existing and future investments by the fund

[29] *Insurance and Superannuation Commissioner* at [21].
[30] Refer to page 1 of the Explanatory Statement to the Superannuation Industry (Supervision) Amendment Regulations 2000 (No. 2) (ES).

in the related company or unit trust, regardless of whether the event is corrected.[31]

79. The words of the SISR make it clear that a one-off breach of the requirements and consequently a failure to satisfy the conditions specified in the paragraph 71(1)(j) for the exclusion to apply would prevent an investment in that company or unit trust from being eligible for that concessional exclusion from being an in-house asset ever again. This is a deliberate policy of the government.[32]

80. A trustee of an SMSF who wants to use the concession under the SISR is required to have a detailed ongoing knowledge of the activities of the related company or unit trust. The trustee has an option of using the concession, and to judge whether the benefits of the concession outweigh the associated compliance costs.

81. Therefore, if the trustee of an SMSF decides to use the concession and there has been a breach of a specific requirement by the related company or trust, we would not consider this as an unusual or out of the ordinary circumstance.

Example 6 – an investment no longer satisfies one of the requirements in regulation 13.22D of the Superannuation Industry (Supervision) Regulations 1994

82. *A trustee of an SMSF invests in a related unit trust and, due to the operation of regulation 13.22C of the SISR, the investment is excluded from the definition of in-house asset. The trustee of the unit trust buys shares in a company for the unit trust. This results in the unit trust holding an interest in another entity which is an event in regulation 13.22D of the SISR. This causes any investments of the fund in the unit trust to become in-house assets of the fund. As a result of this, the fund's in-house assets exceed the in-house asset limit.*

83. *The happening of the event (that is, buying shares in a company) was not outside of the control of the trustee of the related unit trust. Therefore, there are likely to be no unusual or out of the ordinary circumstances which might take the case out of the intended operation of regulation 13.22D of the SISR.*

The expiration of the transitional provisions on 30 June 2009

84. We will not ordinarily consider the circumstances unusual or out of the ordinary if the fund exceeds the in-house asset limit because:

- there are additional investments in relation to existing related-party assets
- the existing assets were excluded from being in-house assets under the transitional provisions, and
- these additional investments were made after 30 June 2009.

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[31] Subregulation 13.22D(3) of the SISR. See paragraph 3 of Self Managed Superannuation Funds Determination SMSFD 2008/1 *Self Managed Superannuation Funds: how does the happening of an event in subregulation 13.22D(1) of the Superannuation Industry (Supervision) Regulations 1994 affect whether a self managed superannuation fund's investments in related companies or unit trusts are in-house assets of the fund?*

[32] Refer to page 5 of the ES:
This subregulation ensures that if an investment by a superannuation fund in a company or unit trust becomes ineligible for the exception from the in-house asset rules, all other investments made by the fund in the company or trust are also ineligible for the exception.

85. The circumstances are not unusual or out of the ordinary because it is foreseeable that any additional investments made after 30 June 2009 in existing related-party assets would be in-house assets of the fund.

86. A trustee of an SMSF has a choice whether to use a transitional arrangement and continue to make additional investments in relation to existing related-party assets, only until 30 June 2009, or make new investments that are not in-house assets. If the trustee takes advantage of the transitional provisions, they need to identify pre-and-post-11 August 1999 assets and liabilities and monitor future investments and flow of funds to ensure there are no additional investments or payments into those identified pre-11 August 1999 assets after 30 June 2009.

87. The underlying policy intent of the transitional provisions was to recognise the difficulties and costs that could be incurred by superannuation funds in unravelling existing investment arrangements. It is expected the period of 10 years given by the transitional provisions has been sufficient time for a trustee of an SMSF to unwind these investments by 30 June 2009, if required.

We issue a determination under paragraph 71(1)(e)

88. The issue of a determination under paragraph 71(1)(e) to a particular SMSF that an asset of the fund is not an in-house asset could have a significant impact on the fund. Therefore, the issue of a determination must be approved by an EL2 officer or above. When making a recommendation to the EL2 officer, you are required to provide them with sufficient information to approve the issue of a determination.

89. Once issued, the determination will apply to the particular asset of the particular SMSF that has applied for the determination. It therefore does not apply to assets of any other SMSFs even if the funds are in what may appear to be the same situation. A trustee of an SMSF that seeks an exercise of the Commissioner's discretion to issue a determination should apply on behalf of their fund and set out the fund's particular situation.

90. A determination may be issued on a conditional basis to mitigate the risks identified. However, the conditions must support the purposes for which the discretion is conferred in paragraph 71(1)(e) and not some other objective. Latham CJ gave the following example in *Shrimpton v Commonwealth*[33]:

> In *Rossi v. Edinburgh Corporation* … it was held that a power to grant a licence did not authorize the licensing authority to impose any conditions upon the grant of a licence which commended themselves to it irrespective of "the object which the legislature must be presumed to have had in view".

91. When specified conditions are no longer satisfied, the determination ceases to apply to the asset at that time and the asset is an in-house asset (assuming no other in-house asset exception is relevant).

We revoke a determination under paragraph 71(1)(e)

92. We may revoke a determination issued under paragraph 71(1)(e). This Practice Statement does not examine the timing of a revocation. To ensure full consideration, approval of the revocation by the relevant SES officer in SEO is required. The need for escalation to any other area will be in accordance with SEO's work practices.

[33] [1945] HCA 4; 69 CLR 613 at [620].

Our refusal to issue, or decision to revoke, a determination under paragraph 71(1)(e)

93. Our decision, refusing to make (or revoke) a determination, is a reviewable decision. The notification of our decision therefore must be accompanied by a statement of our reasons for the decision and a statement of review rights.[34]

94. A trustee who is affected by our decision refusing to make (or revoke) a determination may request us to reconsider if the trustee is dissatisfied with the decision. The request must be made in writing, setting out the reasons for making the request, and must be made within 21 days after the day on which the trustee first received the notice of decision or within such further period as we allow.[35]

95. If the trustee is still dissatisfied with our decision on reconsideration of the original decision, they may, in accordance with the *Administrative Review Tribunal Act 2024*, make an application to the Administrative Review Tribunal for a review of our decision to confirm or vary the original decision.[36]

Date issued: 15 October 2009

Date of effect: 15 October 2009

Business line: SEO

[34] Subsection 345(1) and regulation 13.24 of the SISR.
[35] Subsection 344(1) to (3) and regulation 13.25 of the SISR.
[36] Subsection 344(8) and regulation 13.26 of the SISR.

Amendment history

14 November 2024

Part	Comment
Throughout	Updated to align with current ATO style and accessibility guides.

30 March 2012

Part	Comment
Contact details	Updated contact officer, section and telephone number.

16 August 2011

Part	Comment
Paragraphs 67 and 93 and footnote 12	Minor revisions to clarify language.

21 February 2011

Part	Comment
Paragraphs 20 to 22	New paragraphs covering conditional determinations, revoking determinations and why a determination does not get revoked.
Paragraphs 49 to 54 and 64 to 66	New examples covering water access entitlements.
Paragraph 88	Add that conditions must support the purpose for which discretion is conferred.
Paragraph 90	New paragraph covering revoking a determination.

References

Legislative references	SISA 6 SISA 6(1)(e) SISA 10(1) SISA 10(4) SISA 17 SISA 42A SISA 42A(5) SISA 66 SISA 66(2)(b) SISA Pt 8 SISA Pt 8 Subdiv D SISA 70B SISA 70E(2) SISA 70E(3) SISA 71(1) SISA 71(1)(a) SISA 71(1)(b) SISA 71(1)(c) SISA 71(1)(d) SISA 71(1)(e) SISA 71(1)(f) SISA 71(1)(g) SISA 71(1)(h) SISA 71(1)(j) SISA 71(5) SISA 71(8) SISA 71A SISA 71B SISA 71C SISA 71D SISA 71E SISA 71F SISA 82 SISA 83 SISA 344(1) SISA 344(2) SISA 344(3) SISA 344(8) SISA 345(1) SISR Pt 13 Div 13.3A SISR 13.22A SISR 13.22B SISR 13.22C SISR 13.22D SISR 13.22D(1) SISR 13.22D(3) SISR 13.24 SISR 13.25 SISR 13.26 Administrative Review Tribunal Act 2024
Related public rulings	SMSFR 2009/1 SMSFR 2009/4

	SMSFD 2008/1
Related practice statements	PS LA 2006/19
Case references	B and Insurance and Superannuation Commissioner [1994] AATA 104; 28 ATR 1058; 94 ATC 198 JNVQ and Commissioner of Taxation [2009] AATA 522; 74 ATR 730 Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; 162 CLR 24; 60 ALJR 560; 66 ALR 299 Chief Commissioner of State Revenue v Pacific General Securities Ltd and Finmore Holdings Pty Ltd (No 2) [2005] NSW ADTAP 54; (2005) 63 ATR 127; [2009] ALMD 2399 Re Insurance and Superannuation Commissioner [1994] AATA 164; 28 ATR 1220; 94 ATC 306 Shrimpton v Commonwealth [1945] HCA 4; 69 CLR 613; 19 ALJR 25; [1945] ALR 125 The Taxpayer and Commissioner of Taxation [2000] AATA 238; 44 ATR 1074 Water Conservation and Irrigation Commission (NSW) v Browning [1947] HCA 21; 74 CLR 492; 21 ALJR 105; [1948] 1 ALR 89
Other references	Explanatory Memorandum to the Superannuation Legislation Amendment Bill (No. 4) 1999 Explanatory Statement to the Superannuation Industry (Supervision) Amendment Regulations 2000 (No 2)

ATO references

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