




PS LA 2018/1 - Self-managed superannuation funds - referral of approved SMSF auditors to ASIC

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 This Law Administration Practice Statement provides guidance to ATO staff when considering the Commissioner's power to refer matters concerning approved SMSF auditors to the Australian Securities and Investments Commission (ASIC).



Self-managed superannuation funds – referral of approved SMSF auditors to ASIC

This Law Administration Practice Statement provides guidance to ATO staff when considering the Commissioner's power to refer matters concerning approved SMSF auditors to the Australian Securities and Investments Commission (ASIC).

This practice statement is an internal ATO document, and is an instruction to ATO staff.

1. What this practice statement is about

This practice statement sets out what you need to consider in determining whether matters concerning approved self-managed superannuation fund (SMSF) auditors should be referred to ASIC.¹

2. Background

There is a registration regime for approved SMSF auditors, effective from 31 January 2013.²

ASIC is the registration body for approved SMSF auditors. The registration of SMSF auditors is intended to raise the standard of SMSF auditor competency and ensure there is a set of minimum standards of competency that apply across the entire sector.³

The Commissioner is provided with powers to monitor auditors' compliance with relevant standards and refer any non-compliant auditors to ASIC for enforcement action consideration.⁴

ASIC is responsible for taking enforcement action against auditors who have not met their on-going obligations.

Any action ASIC may take when the Commissioner refers details of a matter to it, is not pertinent to the considerations in this practice statement.

3. When can matters concerning an approved SMSF auditor be referred to ASIC?

If you are of the opinion that:

- an approved SMSF auditor⁵ is not a fit and proper person to be an approved SMSF auditor, or
- in relation to the conduct of an audit of an SMSF, an auditor has contravened the SISA or the *Superannuation Industry (Supervision) Regulations 1994* (SISR), or has failed to carry out or perform adequately and properly:
 - the duties of an auditor under the SISA or the SISR
 - the duties required by a law of the Commonwealth, a State or a Territory to be carried out or performed by an auditor, or
 - any function an auditor performs in relation to the SISA, the SISR or the *Financial Sector (Collection of Data) Act 2001*,

you may refer the details of the matter to ASIC.

The Commissioner may exercise the power in relation to an approved SMSF auditor whether or not an order disqualifying or suspending the approved SMSF auditor has been made.⁶

Note: A person is guilty of an offence if the person holds them self out as an approved SMSF auditor and the person is not an approved SMSF auditor.⁷

4. What considerations will you take into account in forming the opinion that an approved SMSF auditor is not a fit and proper person to be an approved SMSF auditor?

The expression 'fit and proper person' is not defined in the SISA, however the expression has been considered by the courts on a number of occasions.

¹ See section 128P of the *Superannuation Industry (Supervision) Act 1993* (SISA). All legislative references in this practice statement are to the SISA unless otherwise indicated.

² *Superannuation Laws Amendment (Capital Gains Tax Relief and Other Efficiency Measures) Act 2012*.

³ See the Explanatory Memorandum (EM) to the *Superannuation Laws Amendment (Capital Gains Tax Relief and Other Efficiency Measures) Bill 2012*.

⁴ See the EM to the *Superannuation Laws Amendment (Capital Gains Tax Relief and Other Efficiency Measures) Bill 2012*, General outline and financial impact section.

⁵ See section 10(1) for the definition of 'approved SMSF auditor', which came into effect on 31 January 2013. In this practice statement, reference to an auditor may be taken to be a reference to an approved SMSF auditor, unless otherwise indicated.

⁶ See section 130F.

⁷ See subsection 131B(2).

The following were considered when looking at whether a person is fit and proper:

- their character or reputation
- the qualities of honesty, knowledge (or professional competency), and ability (that is, the ability to act appropriately)
- the failure to perform any of his or her duties and functions adequately and properly, including auditing funds they were a member of or failing to obtain sufficient evidence or inadequate documentation in support of an audit.⁸

These are not the only considerations that you need to take into account; an evaluation of all the relevant particulars of each case will need to be made.

Whether an approved SMSF auditor in another role, such as a trustee of an SMSF, has complied with their SISA obligations would also be a relevant consideration as to whether he or she was a fit and proper person to be an approved SMSF auditor.

5. What considerations do ASIC use to determine whether a person is a fit and proper person to be an approved SMSF auditor?

The EM to the Superannuation Laws Amendment (Capital Gains Tax Relief and Other Efficiency Measures) Bill 2012⁹ provides the following considerations for ASIC to *determine* [emphasis added] whether a person is a fit and proper person to be an approved SMSF auditor.

If any of these matters come to your attention in the course of actioning a relevant case, these too should be considered and will assist ASIC make its determination. That is, whether the person:

- has been or is currently subject to disciplinary action, including, but not limited to, suspension and exclusion from practice, by a regulatory body or a professional association
- has been or is currently disqualified or banned under provisions of an Act or legislative instrument under Commonwealth, State or Territory law
- has been or is currently the subject of administrative, civil or enforcement action, which were determined adversely (including consenting to an order or direction, or given an undertaking to not engage in unlawful or improper conduct) in any country

⁸ See Appendix for more information on court cases that have considered 'fit and proper person'.

⁹ See paragraph 1.29.

- has been convicted or have legal proceedings pending for any criminal offences, any acts of dishonesty (such as theft or fraud), any breach of trust or fiduciary duty, any professional misconduct or other misconduct
- has served a term of imprisonment
- has been obstructive, misleading or untruthful in dealing with regulatory bodies, or a court
- has failed to deal with conflicts of interest appropriately, or
- has or has had the status of undischarged bankrupt or there is any such action pending.

6. What considerations will you take into account in forming the opinion that an approved SMSF auditor, in conducting an audit of an SMSF, has contravened the SISA and/or the SISR or has failed to perform adequately and properly any of their required duties and functions?

Generally, you would only form an opinion that an approved SMSF auditor has failed to properly discharge their duties or functions after reviewing one or more audits of SMSFs conducted by the auditor.

It is not necessarily the case that where an approved SMSF auditor has failed to identify or report a single contravention during an audit of an SMSF that the Commissioner would consider that they have failed to properly discharge the duties or functions required in the conduct of an audit of an SMSF. The failure to identify or report the contravention may be trivial in the context of the particular audit so the decision will depend on the facts in the particular case.¹⁰

You will consider for each audit conducted, the auditor's compliance with the SISA and the SISR including the following obligations.

Professional obligations

An approved SMSF auditor must comply with their professional obligations which include the requirement to:

- complete the continuing professional development requirements prescribed by regulation 9A.04 of the SISR
- hold a current policy of professional indemnity insurance, of a level prescribed by the

¹⁰ 'Case' in the context of this practice statement relates to any case involving an approved SMSF auditor specifically, or a case involving an audit of an SMSF.

regulations, for claims that may be made against the auditor in connection with audits of SMSFs¹¹

- comply with:
 - any competency standards that the Regulator [ASIC] determines¹²
 - any auditing standards, made by the Auditing and Assurance Standards Board (AUASB), that are applicable to the duties of an approved SMSF auditor under the *Corporations Act 2001*¹³
 - any auditing and assurance standards, formulated by the AUASB under section 227B of the *Australian Securities and Investments Commission Act 2001*, that are applicable to those duties¹⁴, and
 - the auditor independence requirements.¹⁵

Reporting obligations

An approved SMSF auditor must be appointed by the trustees to give the trustees an audit report in the approved form (the *Self-managed superannuation fund independent auditor's report*).¹⁶

If an approved SMSF auditor forms an opinion that it is likely that a contravention of the SISA or SISR may have occurred, may be occurring or may occur, the auditor must immediately tell:

- the trustee about the matter in writing, and
- the Commissioner about the matter in the *Auditor/actuary contravention report* (ACR) (the approved form) if the matter is specified in that approved form.¹⁷

We provide criteria that auditors must apply to determine what contraventions of the SISA and the SISR must be reported on the ACR.¹⁸ The auditor may also have to report other important information on the ACR as required.

¹¹ See regulation 9A.05 of the SISR.

¹² See ASIC Class Order [CO 12/1687] Competency standards for approved SMSF auditors.

¹³ AUASB – Australian auditing standards.

¹⁴ AUASB – Standards on assurance engagements (ASAEs).

¹⁵ For assistance, refer to the Accounting Professional and Ethical Standards (APES) Board APES 110 Code of Ethics for Professional Accountants.

¹⁶ See subsection 35C(5).

¹⁷ See the exception in subsection 129(2).

¹⁸ See Instructions for SMSF auditors and actuaries - Completing the Auditor/actuary contravention report.

Advising the Commissioner of the financial position of SMSF

The approved SMSF auditor must advise the Commissioner and the trustee when they form an opinion that the financial position of the SMSF may be, or may be about to become, unsatisfactory.

Failure to comply with requests for information

When monitoring an approved SMSF auditor, you may by written notice, require the auditor to provide access to information relating to an SMSF (for example, books).

If the auditor fails to comply with such a notice, then the auditor may, if they have intentionally or recklessly refused or failed to comply with such a requirement, be prosecuted and convicted of a criminal offence. This non-compliance would be a relevant consideration in any decision to refer details of the matter to ASIC.

7. Examples

The following are some examples of when you may consider that an approved SMSF auditor has failed to adequately and properly discharge the duties or functions required in the conduct of an audit of an SMSF.

Example 1 – audit documentation not adequate to evidence that an audit has been undertaken

Where the auditor has not prepared any documentation such as audit working papers to evidence that an actual audit has been undertaken, it would be reasonable to believe that they have not properly discharged the duties or functions required in relation to the conduct of an audit of an SMSF. Documentation of an SMSF audit is necessary to determine that the audit has been properly conducted. This is the case even though the trustee of SMSFs may not have contravened the SISA or the SISR.

Example 2 – approved SMSF auditor is trustee of the fund they are auditing

An auditor may have audit working papers adequate to evidence that an actual audit of an SMSF has been undertaken however the auditor is a trustee of that fund. This is a breach of the auditor independence requirements prescribed by regulation 9A.06 of the SISR¹⁹, which a reasonable person would consider a failure by the auditor to properly discharge the duties or functions required of an approved SMSF auditor.

¹⁹ See APES 110 Code of Ethics for Professional Accountants.

Example 3 – non-reporting to the trustee or the Commissioner of material contravention

A trustee of an SMSF withdrew a significant amount of money from the fund. The withdrawal did not satisfy a condition of release and the auditor did not qualify the audit report or lodge an ACR as required. It would be reasonable to expect that an auditor performing their duties properly would have identified the withdrawal, determined it did not satisfy a condition of release and report appropriately. The failure to qualify the audit report and lodge the ACR where a reporting test had been met is a material dereliction of duty.

Example 4 – non-reporting to the trustee or the Commissioner of material contravention

The trustee of an SMSF made a large cash loan to a relative of a member of the SMSF. The making of the loan resulted in a number of contraventions of the SISA. The approved SMSF auditor did not qualify the audit report identifying the material contravention nor was the contravention reported to the Commissioner on an ACR, as required. A reasonable person would form the opinion that the audit had not been carried out adequately and properly.

Example 5 – non-reporting of material contravention to the Commissioner

It was identified during an audit of an SMSF that the approved SMSF auditor had formed an opinion that a contravention of the SISA had occurred in relation to the SMSF²⁰. The auditor had told the trustee of the SMSF about the matter in the annual audit report, however the Commissioner was not told about the matter in an ACR as required. The auditor is guilty of an offence for a contravention of for which the auditor may be prosecuted.²¹

Example 6 – approved SMSF auditor has carried out duties and functions adequately and properly

An approved SMSF auditor (a sole practitioner) has been auditing several SMSFs annually for the past 10 years. We reviewed the auditor's audits in the past and consistently found that they had performed the audits diligently and thoroughly.

During a recent ATO audit of one of the SMSFs that the auditor had audited, it was discovered that they had not identified and reported a contravention in respect of the most recent income year.

As the SMSF had a high volume of investment transactions, the auditor had used an audit sampling method that did not include the transaction; consequently the contravention was not identified.

The auditor was able to provide documentation to satisfy the tax officer conducting the case that the audit sampling method used was in accordance with the appropriate professional standards, but in this case as the transaction was not significant it was not included in the sample and the contravention was not identified by the auditor.

Note: If the contravention involved a significant transaction, it would be expected that the auditor's sampling method should have been such that the event would have been selected for check and the contravention identified. In this scenario you would not consider that the audit had been conducted satisfactorily.

8. Can the approved SMSF auditor request a review of the Commissioner's decision to refer the auditor to ASIC?

Referral of details of matters to ASIC is not a reviewable decision and therefore is not subject to the formal review procedures. A decision to refer details of matters to ASIC should be fair and reasonable and be made in accordance with the principles contained in the good decision-making model. Therefore, applying the principles of natural justice, before you refer a person to ASIC the auditor will be given an opportunity to provide reasons as to why details of the matter should not be referred.

9. More information

For more information, see:

- Self-managed superannuation fund independent auditor's report
- Instructions for SMSF auditors and actuaries – Completing the Auditor/actuary contravention report

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²⁰ See subsection 129(1).

²¹ See subsection 129(5).

Appendix

Sample of court cases that have considered whether someone is a 'fit and proper person'

Australian Broadcasting Tribunal v. Bond (1990) 170 CLR 321

In the High Court decision it was observed by Toohey and Gaudron JJ at paragraph 380 that:

The expression 'fit and proper person', standing alone, carries no precise meaning. It takes its meaning from its context, from the activities in which the person is or will be engaged and the ends to be served by those activities.

Consideration of the characteristics and qualities taken into account in this court case, such as a person's:

- character (because it provides indication of public perception as to likely future conduct), or
- reputation (because it provides indication of public perception as to likely future conduct)

are relevant in the context of forming an opinion about the fitness and propriety of an approved SMSF auditor.

Hughes and Vale Pty Ltd v. The State of New South Wales (No. 2)(1955) 93 CLR 127

The concept of a 'fit and proper person' was considered by the High Court in this case. Dixon CJ and McTiernan and Webb JJ observed that the purpose of the fit and proper person test was 'to give the widest scope for judgment and indeed for rejection'. They also stated at paragraphs 156-7 that 'Fit' with respect to an office is said to involve three things:

- honesty to execute the office truly, without malice affection or partiality
- knowledge to know what needs to be done in the office, and
- ability to act appropriately (intends to and actually executes office diligently; do not neglect duties).

Confidential and Commissioner of Taxation [2011] AATA 403

The qualities of honesty, knowledge(or professional competency), and ability (that is, the ability to act appropriately) were also considered in this case where Senior Member (SM) Walsh reviewed a decision by the Commissioner to refuse to revoke the disqualification order of the approved auditor of various SMSFs.

SM Walsh affirmed the decision under review and observed that approved SMSF auditors should possess these qualities to be a 'fit and proper' person,

similar to those qualities considered relevant for tax agents in previous cases.

Two of the cases SM Walsh referred to are: *Stasos v. Tax Agent's Board of New South Wales* (1990) 90 ATC 4950, and *Re Su v. Tax Agent's Board of South Australia* (1982) 82 ATC 4282.

Samuel and Australian Securities and Investments Commission [2016] AATA 696

The AAT upheld a decision by ASIC to disqualify an SMSF auditor who audited funds in which he was a member, and who failed to obtain sufficient evidence and had inadequate documentation in support of his SMSF audits.

The Tribunal found the auditor failed to 'comply with two fundamental aspects of auditing: independence and diligence' and 'also failed to demonstrate insight into his critical deficiencies' with conduct falling 'far below the standards expected and required of an approved SMSF auditor'.

The Tribunal was satisfied that the auditor failed to carry out or perform adequately and properly the duties of an auditor, and furthermore, or alternatively, the auditor was 'not a fit and proper person to be an approved SMSF auditor'.

Fearon v. Australian Prudential Regulation Authority [2006] AATA 918

Senior Member Constance upheld APRA's decision to disqualify Mr Fearon from being an approved auditor for not only failing to carry out the obligations of an approved auditor under the SISA adequately or properly, and breaching the standards set by the professional association of which he was a member. Also, at paragraph 43 it was stated that because Mr Fearon's 'conduct was such as to require action to protect the public and the integrity of the superannuation system'.