

UNDERSTANDING SIS CONCEPTS

This article provides an understanding of the SIS concepts relating to superannuation funds.

Regulated Superannuation Fund

Whether a fund is established as a SMSF or not, all funds must be a **"regulated superannuation fund"** in order to receive concessional taxation treatment as a complying superannuation fund (see sections 42, 42A and section 45 of SIS).

A "regulated superannuation fund" is defined under section 19 of SIS. It means a fund that complies with sections 19(2) and (3) of SIS and whose trustee has lodged an election with the regulator pursuant to sub-section 19(4) of SIS agreeing to be bound by SIS.

In order for a fund to be able to lodge an election under sub-section 19(4), the following two requirements must be satisfied:

- a. the fund in question must have a trustee; and
- b. the trust deed or governing rules of the fund must either require the trustee to be a "constitutional corporation" (ie. a trading or financial corporation), or provide that the sole or primary purpose of the fund is the provision of old-age pensions.

The second requirement was incorporated in order to give the Federal Government the necessary powers under the constitution to directly regulate the superannuation industry. Under the constitution, the Federal Government is given power to regulate trading and financial corporations as well as the provision of old-age pensions.

The Topdocs trust deed caters for both corporate and individual trustees and meets both of these requirements (see Clauses 2.1, 14 and 37.4(b)). The trust deed contains the necessary requirements specified under sub-sections 19(3) and (4) of SIS to facilitate the lodgement of an election form to enable the fund to become a regulated superannuation fund within the meaning of SIS.

The trust deed also includes provisions addressing the situation where the Trustee considers that it is not possible or reasonably practicable for the fund to continue to be an SMSF, or where the Members request in writing that the fund become another type of regulated superannuation fund (clause 2.3).

The trust deed also provides flexibility in the sense that it permits the payment of benefits in the form of a lump sum or income stream whether the fund has a corporate trustee or individual trustees, by providing a right to full commutation of pensions into lump sum benefits and visa versa. This means the nature of the trusteeship of the fund may be changed from individual to corporate, or vice versa, without difficulty under the trust deed.

Once an election under sub-section 19(4) of SIS is made, the fund in question becomes a regulated superannuation fund. The election is irrevocable (see sub-section 19(5) of SIS).

Non-Regulated Funds

A non-regulated fund is a fund that has never elected into the SIS regime. Non-regulated funds are not eligible for taxation concessions because they cannot qualify to become complying funds (see section 42 of SIS). Rollovers and benefit transfers from regulated funds to non-regulated funds are not permitted (see regulations 6.28 and 6.29 of the Superannuation Industry (Supervision) Regulations 1994 (SIS regulations)).

Compliance Status

a. Complying Fund

A regulated fund may either be complying or non-complying. A regulated fund is a complying fund only if the fund's regulator (for a SMSF, the ATO) has given a notice of compliance to the trustee under section 40 of SIS in relation to the relevant year of income, or if such a notice has been issued in relation to a previous year of income and the regulator has not issued a notice of non-compliance in relation to that or a subsequent year of income (see section 45 of SIS).

b. Compliance Test – Fund which is a SMSF

A SMSF loses its complying status if it fails the "Compliance Test".

Under section 42A(1)(b) of SIS a regulated fund which is a SMSF can contravene the provisions of SIS or the SIS regulations on one

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or more occasions but as long as the fund passes the "Compliance Test" it will remain a complying fund. The compliance test is set out in section 42A(5) of SIS and will be passed if the ATO, after considering:

- i. the tax consequences that would arise if the fund were to be treated as non-complying;
- ii. the seriousness of the contravention; and
- iii. any other relevant circumstances,

thinks that despite the contraventions, the fund should be given a notice stating that the fund is a complying superannuation fund.

c. Culpability Test – Fund other than SMSF

Under SIS a fund other than a SMSF, loses its complying status only if it fails the "culpability test".

d. Culpability Test

Under section 42(1)(b) of SIS, a regulated fund which is not a SMSF can contravene the provisions of SIS or the SIS regulations on one or more occasions, but as long as the fund did not fail the "culpability test", then the fund will maintain its complying status. The culpability test is set out in section 42(1A) and in order for it to be failed, there must be involvement of the members of the fund - they must be either directly or indirectly knowingly concerned in or a party to the contravention. If this is proven, then APRA must determine whether, on the basis of:

- i. the tax consequences that would arise if the fund were to be treated as non-complying;
- ii. the seriousness of the contravention; and
- iii. any other relevant circumstances

the fund should be declared a non-complying fund.

e. Alternative Culpability Test

An alternative manner in which the culpability test will be failed is if:

- i. one or more members were directly or indirectly knowingly concerned in or a party to the contravention;
- ii. some innocent members were not knowingly concerned in or a party to it;
- iii. none of the innocent members would suffer substantial financial detriment if the fund were to be treated as non-complying; and
- iv. APRA believes that the non-complying notice should be given, based on the tax consequences, the seriousness of the contravention and other relevant circumstances.

The effect of this test, in conjunction with the other provisions of SIS, is that breaches of SIS will in the main attract APRA or ASIC action against the trustee, which will lead to fines against the particular persons concerned. It will not lead to a failure of the fund to comply.

f. Continuing Relevance

It should be noted that the Culpability Test will remain relevant for a former excluded fund which has converted to a SMSF, over the years of income when the fund existed as an excluded fund.

It is only when there is a failure of the culpability test, which will of necessity only occur in small or excluded funds, that the non-complying status will arise.

g. Residency

Further, only Australian superannuation funds can be complying funds. If an Australian regulated superannuation fund at any time during the relevant income year fails the residency test contained in section 295-95(2) of the Income Tax Assessment Act 1997 (**Tax Act**), then it will cease to be complying in respect of that year.

Section 295-95(2) provides that a fund will be an Australian superannuation fund if:

- i. it was established in Australia, or it has an asset in Australia; and
- ii. the central management and control of the fund is ordinarily in Australia; and
- iii. if there is at least one active member of the fund, the percentage worked out using the following formula is not less than 50%:

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Total of accumulated entitlements of resident active members	X 100
Total of accumulated entitlements of active members	

An "active member" is a person who is contributing to the Fund, or having contributions made in respect of them. Subsection 295-95(3) excludes a member of a fund from being an "active member" at the relevant time if at the time they are not a resident of Australia, they are not a contributor and the only contributions that have been made on their behalf since they ceased being a resident were made in respect of a time when they were a resident. The benefits of such a member will not count in the calculation of the proportion of benefits of the fund held for active members.

It should be noted that the central management and control of a superannuation fund will be taken to be ordinarily in Australia even if that central management and control is temporarily outside Australia for a period of not more than two years (see section 295-95(4) of the Tax Act).

h. Non-Complying Fund

i. Definition and Taxation

A non-complying superannuation fund is defined in section 995-1(1) of the Tax Act, and is a superannuation fund which is not a complying fund in relation to the relevant year of income. Clearly, any self managed superannuation fund which has not elected into SIS

will be considered to be non-complying until an election to become a regulated fund is lodged. Similarly, any fund which has elected into SIS but which either ceases to be an Australian superannuation fund, or contravenes SIS and either does not pass the compliance test or fails the culpability test will also be non-complying.

- ii. The earnings of non-complying funds will continue to attract a higher rate of tax (45%) for the current year. Subject to sections 295-320 and 295-325 of the Tax Act discussed below, the 45% rate will apply to both earnings and any deductible contributions made to the fund.
- iii. A non-complying superannuation fund is not entitled to the refund of any imputation credits attaching to dividends received by the fund on its shareholding portfolio.
- iv. Taxation of Non-Complying Funds
- v. Sections 295-320 and 295-325 of the Tax Act impose a severe penalty on a fund which changes its status from complying to non-complying, by bringing to account for tax purposes the entire assets of the fund, less undeducted contributions, at the 45% rate applicable to non-complying funds in that year. In practical terms, it means that where a fund is complying but becomes non-complying in the next year, the total assets of the fund, less undeducted contributions are taxed at the 45% non-complying rate, with no credits given for tax previously paid.

Responsible Entity

Under SIS there must be one entity responsible for the management and control of a regulated fund. The "responsible entity" is the trustee or trustees of the fund in question.

In practical terms, this means that although the trustee may delegate any of its tasks and duties, the trustee remains responsible for all decisions affecting the operation of the fund. Thus, delegation of responsibility as opposed to tasks is not permitted under SIS.

For this purpose, restrictions have been imposed in relation to trustee decision making under SIS. In this respect, directions to trustees, exercise of discretions under the trust deed by persons other than the trustee and amendment of the trust deed without the consent of the trustee are, subject to a number of narrow exceptions, prohibited under SIS (see sections 58-60 of SIS and regulations 4.03-4.05 of the SIS regulations).

SMSFs

A SMSF is a fund with fewer than five members which satisfies the member and trustee tests set out in section 17A of SIS. These tests are described fully in section 3 of this chapter. Under SIS, a distinction is made between SMSFs and other funds, with less stringent SIS requirements being applied to SMSFs.

There are two kinds of funds that have less than five members. These are:

- a. SMSFs which are defined as superannuation funds where all members of the fund are trustees (or where the trustee is

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a company, and each member is a director) and there are no other trustees. These funds are regulated by the ATO;

- b. other small funds (known as small APRA funds) - superannuation funds which do not meet the criteria of a "SMSF" which must have a trustee which is APRA-Licensed, and are regulated by APRA.

SMSFs are exempt from many of the SIS requirements. The following is a list of the main SIS requirements from which SMSFs are exempt:

The Superannuation Industry (Supervision) Act 1993	
Subject Matter	Relevant SIS Provision
Public Offer Fund	S.18(1)(aa)
Trustee and Fund Licensing	Part 2A
Trustee not to be subject to direction	S.58*
Exercise of discretion by person other than trustee	S.59
Amendment of governing rules by third parties without trustee consent	S.60(1)
Acquisition of business real property from related parties of regulated superannuation funds prohibited	S.66*
Equal employer/employee trustee representation rules	S.92*/93*
Duty to establish arrangements for dealing with inquiries or complaints	S.101
Duty to establish procedure for appointing member representatives and independent trustee or director on trustee boards.	S.107*/108
Restrictions in relation to the repayment of surplus or other moneys to an employer-sponsor.	S.117
Persons who may be appointed to be custodians of superannuation entities.	S.123
Persons who may be appointed to be investment managers of superannuation entities	S.125
Financial assistance to certain funds.	Part 23

**denotes a provision from which all funds with less than 5 members are exempt, whether a SMSF or small APRA fund.*

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The SIS regulations also reflect different standards applicable to SMSFs. These are set out in the following list.

The Superannuation Industry (Supervision) Act 1993

Subject Matter	Relevant SIS Provision
SMSF members are excluded from the definition of "protected member" for the purposes of the member protection rules	Division 5.5; Reg. 1.03(1), 1.03B
Governing rules of a superannuation entity – giving of directions by employer-sponsor or associate	Reg. 4.03
Governing rules of a superannuation entity – prescribed exercise of discretion by non-trustee.	Reg. 4.04
Governing rules of a superannuation entity – prescribed circumstances of amendment.	Reg. 4.05
Superannuation interests subject to payment split.	Part 7A

c. Other Funds

These include Small APRA Funds and funds with five or more members. These funds, unlike SMSFs, are subject to more stringent SIS requirements.

Most of the SIS standards discussed in this chapter generally impact more on non-SMSFs than SMSFs, although some are of general application to both types of funds.

d. Employer-Sponsored Fund

An employer-sponsored fund is defined under section 16 of SIS. It means a regulated fund (whether or not also a SMSF) to which at least one employer-sponsor contributes, or would, except for a temporary cessation of contributions, contribute for the benefit of a member or dependants of a member who is an employee of the employer-sponsor or an associate of the employer-sponsor.

A fund can be operated as both an employer-sponsored fund and a personal fund ie. accept both employees and self-employed persons as members.

However, for SIS purposes, the definition of an employer-sponsored fund is important for two main reasons. The first is that except for special provisions applicable to funds with more than 4 but fewer than 50 members, non-Self-Managed employer-sponsored funds are required to comply with the equal employee/employer trustee representation rules (see Part 9 of SIS). The second is that a "standard employer-sponsored fund" (see 1(e)(v) below), is by definition not caught by the "public offer" fund definition (see section 18 of SIS) unless a non standard employer-sponsored member is admitted into the fund. "Public Offer" funds are subject to more stringent requirements (see 1(e)(vi) below) than non-public offer funds.

e. Standard Employer-Sponsored Fund

Section 16 of SIS contains provisions intended to distinguish employer-sponsored and non-employer-sponsored funds. A "standard employer-sponsored fund" is defined essentially as a fund to which employer contributions are

made (or would be made except for a temporary cessation) under arrangements made between the employer (as opposed to the member) and the trustee of the fund.

f. Public Offer Funds

A public offer fund is defined under section 18 of SIS. It means a fund that is not a standard employer-sponsored fund (see 1(e)(v) above), or a standard employer-sponsored fund with at least one member who is not a "standard employer-sponsored member" - i.e. a member who is not an employee of one of the standard employer-sponsors or a former standard employer-sponsored member of the fund.

This means that by definition, a fund with a self-employed person as a member would be a public offer fund. However, section 18(1)(aa) of SIS modifies the definition of a public offer fund to exclude SMSFs and the SIS regulations also limit the effect of section 18.

Regulation 3.01 of the SIS regulations provides that the presence of certain types of

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members in the fund who are not standard employer-sponsored members will not cause the fund to be a public offer fund, e.g. a former standard employer-sponsored member and the spouse of a standard employer-sponsored member.

Although no public offer implication will arise with respect to a fund which meets the tests to be a SMSF, you should be mindful of the effect of section 18 and its exceptions in relation to changes to the membership and trustee structure of SMSFs.

It is important to note that APRA has the power to declare a non-public offer fund to be a public offer fund (see section 18(6)). Also, the trustee of a non-public offer fund can make an election to APRA for the fund to become a public offer fund. There is also provision under section 18 (7) of the SIS for APRA to declare a fund not to be a public offer fund.

Public offer funds are subject to more stringent SIS requirements than non-public offer funds. These include the following:

i. Trusteeship

Public offer funds are required to be operated under an APRA approved licence (RSE). To be granted approval, the applicant must have at least \$5 million in net tangible assets (NTA), or must be entitled to an approved guarantee of an equivalent NTA amount. Alternatively, the combined NTA amount and the amount of the approved guarantee must be at least \$5 million.

ii. Asset Custodial Arrangements

The other alternative where the trustee of a public offer fund is unable to meet the \$5 million NTA requirement is to put in place fund asset custodial arrangements acceptable to APRA. This may involve the use of one of the public trustee companies as a custodian.

iii. Reporting Requirements

The member and fund reporting requirements are applicable to all funds with some limited exceptions. The range of information required to be provided by all funds under the Corporations Act is, for practical purposes akin to prospectus type information.

For example, all funds are required to prepare a product disclosure statement (PDS).

iv. Other SIS Requirements

Other miscellaneous SIS requirements also apply to public offer funds. These include:

- the requirement to give new members (other than employer supported members) a 14 day "cooling-off" period;
- restrictions in relation to payment of commissions and brokerage;
- insider trading provisions;
- restrictions in relation to the issuing of "regulated" documents, including penalties for misleading information or omissions in such documents; and
- the establishment of policy committees in respect of

members who are employees of a participating employer.

g. Penalties Regime

i. General

The penalties regime under SIS is directed at trustees. Trustees may be personally liable for the payment of monetary penalties, and in extreme cases, where culpability is involved, to imprisonment. It is important to note that in the event of a civil penalty being imposed upon a trustee, it will not be possible for that trustee to seek reimbursement from the fund.

Penalties on trustees were introduced so that the withdrawal of taxation concessions was not the only discipline for superannuation funds. While this is appropriate for large funds with arm's length members, for SMSFs the withdrawal of taxation concessions remains a powerful enforcement tool of the ATO.

Section 56 of SIS allows trustees to be indemnified from the assets of the fund. However, this right is denied when:

- the trustee fails to act honestly;
- the trustee intentionally or recklessly fails to exercise the necessary degree of care and diligence; or
- a monetary penalty under a civil penalty order is imposed.

In addition, where a monetary penalty is imposed on a trustee under a civil penalty order, the trustee becomes a "disqualified person" i.e. can no longer act as trustee of a regulated fund.

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ii. Types of Penalties

SIS contains over 100 different offences ranging in seriousness from \$110 fines to a maximum penalty of \$220,000 or five years imprisonment. These are divided into four categories as follows:

iii. Civil Penalty Orders

Part 21 of SIS deals with the civil and criminal consequences of contravening the civil penalty provisions. Specific penalty provisions applicable to superannuation funds are as follows:

- a breach of the sole purpose test;
- the provision of loans or financial assistance to members or relatives of members;
- borrowings by trustees which are not approved;
- breach of the in-house asset provisions;
- involvement in an avoidance scheme to breach the in-house asset rules;
- failure to notify the Regulator of a significant adverse event;
- breach of the arms length investment requirements (2 provisions); and
- breach of requirements in relation to payments of money to an employer.

Penalties of up to \$220,000 may be imposed on individuals and \$1 million in respect of corporations for breaches of civil penalty provision. Applications for civil penalty orders may only be made by the Regulator (see section 197(1) of SIS). However, in any application before a court, the court must be satisfied that in imposing a penalty, the contravention is a "serious" one.

Where a civil penalty provision is contravened knowingly, intentionally or recklessly and either where the trustee acts dishonestly and intending to gain from the contravention, or intending to deceive or defraud, then the provisions of section 202 of SIS provide that the trustee will be guilty of a criminal offence, punishable by up to five years in prison.

Section 221 of SIS imports similar provisions to relieve trustees from liability in proceedings instituted as a result of the contravention of civil penalty provisions, to those which exist in State Trustee Acts where the proceedings are civil proceedings to recover loss. Pursuant to section 221, where it appears to a court that a person has or may have contravened a civil penalty provision, but that the person:

- has acted honestly; and
- having regard to all the circumstances the person ought fairly to be excused for the contravention,

then the court may relieve the person either wholly or partially

from a liability in respect of the contravention.

iv. Strict Liability

The following provisions of SIS are "strict liability":

- failure to notify APRA of a breach of condition regarding an APRA exemption from public offer status – section 18(7B)
- failure to notify APRA of a change in circumstances or a breach of conditions – section 29(3)
- failure to notify APRA of a breach of an RSE licence condition – section 29JA
- failure to comply with a direction to follow licence conditions – section 29JB
- failure to comply with a direction to modify the Risk Management Strategy – section 29JC
- failure to comply with a direction to modify the Risk Management Plan – section 29Q
- the lodgement of annual returns – section 36(2A) and 36A(7)
- failure to comply with directions by the Regulator regarding contributions from certain employer-sponsors – sections 63(7), 63(7B) and 63(10)
- record keeping – sections 103(3), 104(2) and 105(2)
- failure to notify the Regulator of disqualification of trustee – section 121(3)
- appointing a custodian without written consent of trustee – section 122(2)
- incorrectly appointing a custodian – sections 123(4) and 123(5)
- investment manager not appointed in writing – section 124(2)

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- holding oneself out to be an approved auditor or actuary when they are not – section 131B(1) and s131B(2)
- former trustee fails to hand over all books, accounts and trust property – sections 141A(3) and 141A(6)
- failure to assist APRA in application for civil penalty order – section 201(4)
- failure to give information to Regulator regarding fund with fewer than 5 members – section 252A(2)
- information to be given to the Regulator – section 254(4)
- employer not informing trustee of tax file number within required timeframe – section 299C(3)
- incorrectly keeping records – section 303(1)
- contravening condition of exemption granted by Regulator – section 331(1)
- failure to notify members of appointment of new trustee – section 377(3).

The result of a strict liability offence is that under the Criminal Code, trustees who contravene the provisions are guilty of an offence unless and until they can make out the defence of "mistake of fact" or any other allowable defence, eg. of intervening conduct. The mistake of fact defence requires the trustee to show that, at or before the time of the conduct constituting the offence, the trustee considered whether or not facts existed, and was under a mistaken but reasonable belief about those facts, and that had those facts existed, the conduct would not have constituted an offence.

As a result, under the strict liability system, once the fact of a contravention has been revealed, either through the auditor's report, annual return or SIS section 129, or otherwise, in order to place the trustee in a position where it must seek to prove its own defence, the Regulator would need only to demonstrate the existence of the contravention as a question of fact.

For other provisions, there are "dual" offences, one with a high penalty, applicable where the Regulator can prove that the relevant provision was intentionally not complied with and the other with a lesser penalty where the trustee has contravened the relevant provision but the required mental element was not present (or cannot be established). These include:

- failure to notify APRA of modifications to Risk Management Strategy – sections 29HC(4) and 29HC(5)
- failure to give specific information sought by APRA regarding Risk Management Strategy – sections 29HD
- failure to notify APRA of modifications to risk Management Plan – sections 29PC(4) and 29PC(5)
- failure to give specific information sought by APRA regarding Risk Management Plan – sections 29PE(2) and 29PE(3)
- failure of trustee to lodge annual return with APRA – sections 36(2) and 36(2A)
- failure of trustee of an SMSF to lodge annual return with the ATO – sections 36A(7) and 36A(7A)

- failure of employer to remit contributions deducted from salary – section 64(3) and 64(3A);
- failure of trustee of an employer-sponsored fund to establish procedure for appointing member representatives – sections 107(3) and 107(4)
- failure of trustee of an employer-sponsored fund to appoint an independent trustee or independent director of corporate trustee – sections 108(3) and 108(4)
- keeping of accounting records and their retention for five years – sections 111(3) and 111(4);
- failure to make and keep accounts and financial statements – section 112(5) and 112(6);
- failure to appoint approved auditor – sections 113(1), 113(2) and 113(2A);
- failure of approved auditor to report – sections 113(4), 113(5) and 113(6);
- failure of auditor or actuary to tell trustee and Regulator of a contravention - 129(5) and 129(6)
- failure of auditor or actuary to inform trustee and Regulator of unsatisfactory financial position of the fund – section 130(4) and 130(5)
- failure to notify APRA of a failure to implement actuarial recommendation regarding contributions to the fund – sections 130C(6) and 130C(7)
- failure to comply with the requirements related to commission and brokerage for an application for the issue of a superannuation interest, or an application to become a

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- standard employer sponsor – sections 154(2) and 154(2A);
- failure of trustee to submit investigator's report to APRA within specified time – sections 260(2) and 260(3)
- failure to comply with APRA directions when appointing an investigator – sections 262(1) and 262(2); and
- the collection and use of tax file numbers in sections 299F to 229Y, except for section 299N which is a fault liability provision.

For the affected offences, the Regulators are relieved of gathering the evidence necessary to sustain a prosecution based on the previous "intentionally or recklessly" offences. Instead, enforcement actions can be commenced by observation of the fact of a contravention and of which trustees could or could not satisfactorily explain or justify their actions or inactions.

v. Fault Liability

Where a trustee fails to comply with many of the requirements dealing with the administration and management of the fund, then that trustee may be prosecuted, convicted in a court and a penalty imposed. The court must be satisfied beyond reasonable doubt that the contravention by the trustee was intentional or reckless. The penalties range from as low as \$110 up to \$220,000 or imprisonment of a period not exceeding five years. The remainder of the SIS offences are currently structured as fault liability offences, including the failure to comply with an operational standard (section 34 of SIS).

In this context, there are some other offence provisions which are relevant to APRA or the ASIC exercising its direct enforcement powers.

Section 285 is a "catch all" provision and prevents a person from intentionally or recklessly refusing or failing to comply with the requirements of APRA or the ASIC without reasonable excuse. There are other similar types of offences in Part 25, dealing with the investigation of superannuation funds, such as concealment, destruction or removal of the books of a fund (see section 286 of SIS).

vi. Civil Liability

Civil liability is imposed in certain circumstances where trustees contravene provisions of SIS, such as a breach of any of the covenants (section 55(3) of SIS).

More information

Should you have any queries or require more information, please contact the team at Topdocs on 1300 659 242.

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