SMSF Association Q&A

Administrative penalty

Key Points

- s166 and s169 SISA
- Directors of corporate trustee are jointly and severally liable for a penalty
- Individual Trustees are each individually liable for a penalty

Q	With the new administrative penalties that commence from 1 July 2014 is each director liable for the same penalty as it would apply to individual trustee?
A	The following information is provided to assist you in your research: Where a corporate trustee of an SMSF breaches one of the provisions that can attract an SMSF administrative penalty, the penalty is applied to the corporate trustee and not on each individual director. Instead the directors of the corporate trustee are jointly and severally liable to pay the penalty. This means the directors need to pay the penalty together rather than each of them being penalised separately. The Act which introduces the SMSF admin penalties specifies the following section (http://www.comlaw.gov.au/Details/C2014A00011/Html/Text#_Toc383079942): **169 Joint and several liability of directors of corporate trustee liable to administrative penalty under section 166** (1) This section applies if a trustee of a self managed superannuation fund: (a) is liable to an administrative penalty imposed by section 166; and (b) is a body corporate. (2) The directors of the body corporate at the time it becomes liable to the penalty are jointly and severally liable to pay the amount of the penalty.

The explanatory memorandum (http://www.comlaw.gov.au/Details/C2014B00009/Explanatory%20Memorandum/Text) provides the following explanation and examples in regards to SMSF penalties and corporate trustees:

> 2.95 If a trustee that is a body corporate becomes liable to an administrative penalty, then the directors of that body corporate are jointly and severally liable to pay the amount of the penalty. ***[Schedule 2, item 22, s 169]***
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> 2.96 The power to control the management of a company, its property and affairs is vested collectively in the board of directors. Directors are therefore responsible for the actions of a corporate trustee, and it is appropriate that they are jointly and severally liable to an administrative penalty. This is consistent with the treatment of a corporate trustee of a SMSF in s 284-95 in Schedule 1 to the TAA 1953.
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> **Example 2.2: Corporate trustee that contravenes a provision**
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> Stuart and Alison are members and the directors of a body corporate that is the trustee of Green SMSF. Stuart and Alison fail to ensure that accounts and statements for Green SMSF are prepared for the 2014-15 year of income. As a result, the corporate trustee has contravened s 35B.
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> An administrative penalty of 10 penalty units is imposed on the body corporate that is the trustee of the Green SMSF. Stuart and Alison as directors of the body corporate become jointly and severally liable to an administrative penalty of 10 penalty units imposed on the body corporate.
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> **Example 2.3: Individual trustees who contravene a provision**
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> Jill and Merryn are members and individual trustees of Yellow SMSF. Jill and Merryn fail to ensure that accounts and statements for Yellow SMSF are prepared for the 2014-15 year of income. As a result, each individual trustee has contravened s 35B.
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> An administrative penalty of 10 penalty units is imposed on each individual trustee of Yellow SMSF in their personal capacity. Jill and Merryn are each liable to an administrative penalty of 10 penalty units.

However, there are limited circumstances where an individual director may be liable for a penalty by themselves where as an individual director they contravene a provision. For example, where a director fails to sign the trustee declaration. The explanatory memorandum gives this example:

> **Example 2.4: Director of corporate trustee that contravenes a provision**
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> Marita and Peter become directors of a body corporate that is trustee of Blue SMSF. Peter fails to sign a trustee declaration and contravenes ss 104A(2).

	An administrative penalty of 10 penalty units is imposed on Peter, as a director of the corporate trustee. Peter is liable to an administrative penalty of 10 penalty units.

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