




**A REGULATORY UPDATE FROM THE ATO ON PRACTICAL ISSUES WITH SMSFS**

Dana Fleming, Assistant Commissioner – SMSF Segment, Australian Taxation Office

#NC2020

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**Dana Fleming**  
Assistant Commissioner – SMSF Segment, Australian Taxation Office



Dana Fleming is the Assistant Commissioner responsible for the self-managed superannuation fund segment.

Dana has over 25 years' tax experience, both in Australia and overseas, specialising in superannuation and managed funds. Prior to joining the ATO, Dana was a partner at KPMG where she led KPMG's Asset and Wealth Management tax practice in Australia for four years. Her client portfolio included major industry and retail funds to boutique managed funds. She advised and worked with them on the tax implications of their strategic planning as well as day to day activities.

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**The growth of self-managed super funds**

SMSFs make up 26% of all super assets

\$747.6<sup>b</sup> at 30 June 2019

Over 1.1 MILLION SMSF members

47% at June 2019 53%

FEMALE MALE

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## Overview



- ❖ Our role as regulator
- ❖ ATO's current enforcement approach
- ❖ Impacts of the Royal Commission
- ❖ Review of our enforcement approach
- ❖ Guidance and support post Royal Commission

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## Our role as regulator



To understand our approach to enforcement in the SMSF sector it is important to understand our strategic direction and our vision

- ❖ As the regulator, our priorities are to ensure:
  - SMSF trustees are informed, confident and capable
  - the superannuation savings of SMSF members are protected, and
  - approved SMSF auditors are conducting adequate and proper annual regulatory SMSF audits.



These reflect the ATO's role as the SMSF regulator in protecting the integrity of the sector through a balance of enforcement and support



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## Current SMSF enforcement powers



- ❖ Prior to 1 July 2014:
  - accepting an enforceable undertaking in relation to a contravention
  - applying to a court for civil penalties to be imposed
  - disqualifying a trustee of an SMSF
  - making an SMSF non-complying
- ❖ From 1 July 2014:
  - education directions
  - rectification directions
  - administrative penalties under section 166 of the SISA



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### Enforcement actions

❖ Disqualifying a trustee or issuing a notice of non-compliance will only be considered after other enforcement actions

There are two pathways for trustees:

1. Remediate - can they get back on track?
  - direction to educate
  - direction to rectify
  - enforceable undertaking
2. Removal - required to exit the system?
  - disqualification
  - notice of non-compliance

Amendment of returns and imposition of both SISA and TAA admin penalties may be considered and imposed under both pathways depending on the behaviour we are trying to address

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### SMSF regulatory contraventions

❖ FY2018 there were 8,215 SMSFs with 16,909 regulatory contraventions

❖ FY2019 there were 10,330 SMSFs with 27,719 regulatory contraventions

❖ The most common contraventions are:

- loans (21.1%)
- in-house assets (18.5%)
- separation of assets (12.7%)

✓ Approximately 50% self rectified

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### SMSF regulatory contraventions

For FY2018 and FY2019, the following enforcement actions were taken:

SMSF enforcement action	2017-18	2018-19
Direction to educate (trustees)	32	45
Direction to rectify	31	34
Enforceable undertakings	138	131
Notice of non-compliance	11	26
Disqualified trustees	257	145
Disqualified trustees (funds)	169	103
Number of SMSFs with penalties imposed	100	146
Net admin penalties raised	\$1.7m	\$3.1m

Less than 500 enforcement actions

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## Compliance program



❖ Our current compliance risk focus areas are:

- Regulatory contraventions
- Illegal early release (IER) and promoters
- Non-lodgment
- Top 100 SMSFs and tax planning
- Top 100 auditors
- High risk auditors
- SAN misuse




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## The Royal Commission




 **Community expectations of regulators has increased**


❖ ASIC & APRA undertook reviews of their enforcement approaches

- APRA – shift in enforcement stance to “constructively tough”
- ASIC – change to “why not litigate” mindset

❖ ATO undertook review process:

- assessed the effectiveness of our regulatory powers
- considered the impact on compliance behaviour after application of regulatory powers
- identified opportunities to increase our regulatory effectiveness



 **ATO has not shifted its stance - balance of support and enforcement**

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## Review of SMSF enforcement action



❖ Our review identified:

- use of our regulatory powers
  - removal powers used appropriately
  - lack of consistency in application of full range of enforcement powers
  - Over the last 3 years, 75% of administrative penalties were fully remitted
- effectiveness of the use of these powers
  - post-enforcement action, a significant proportion of SMSFs subsequent compliance, in terms of meeting lodgment obligations, was significantly below the level of the general SMSF population

 **Enforcement balanced with support to ensure trustees are swimming in between the flags rather than outside of them**

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### Improving our regulatory effectiveness



❖ Our actions to improve regulatory effectiveness and build trust and confidence in our actions as regulator include:

- improving **consistency** in case outcomes and post-enforcement action processes
- improving the effectiveness of our actions by **recalibrating our enforcement approach**
- improving trust and confidence in the ATO as regulator by being **more transparent** in our enforcement approach and outcomes



Our target was to have completed all these actions by the end of this FY which we are on track to achieve

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### Improving our regulatory effectiveness



#### ❖ Consistency

- Updated and refreshed Practice Notes and Law Administration Practice Statements
- Recalibrated approach for education directions and administrative penalties
- Creation of a strategic compliance panel for more complex cases
- Process implemented for monitoring compliance for all exit pathway actions



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### Improving our regulatory effectiveness



#### ❖ Improving effectiveness

- Greater utilisation of directions to educate to address poor post enforcement action compliance
- Recalibrated our approach to remission of administrative penalties to require case officers to take into account broader considerations when considering grounds for remission



Trustees should be aware that breaches of the law are more likely than not to attract a penalty

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## Improving our regulatory effectiveness



### ❖ Improving transparency

- Conversion of Practice Notes dealing with directions to educate, rectification directions and administrative penalties into Law Administration Practice Statements
- Publish ATO's approach to using SISA enforcement powers
- Publish annual "Enforcement Report" summarising compliance actions we have taken
- Disqualified Trustees Public Register already published




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## SMSF regulatory contraventions



For FY2018, FY2019 and YTD FY2020, the following enforcement actions were taken:

	2017-18	2018-19	YTD 2019-20
Direction to educate (trustees)	32	45	95
Direction to rectify	31	34	74
Enforceable undertakings	138	131	58
Notice of non-compliance	11	26	21
Disqualified trustees	257	145	127
Disqualified trustees (funds)	169	103	91
Number of SMSFs with penalties imposed	100	146	84
Net admin penalties raised	\$1.7m	\$3.1m	\$3.3m

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## Support and guidance going forward



- ❖ Investment strategy campaign
- ❖ On-line SMSF trustee information package
- ❖ Auto-subscription to SMSF News of all SMSF members
- ❖ Regulator's Bulletin on SMSF property development




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## Bushfire 2019-20



 **If you're living in the affected postcodes the 2019 SAR lodgment due date has been deferred to 28 May 2020**

- ❖ Refer to our dedicated **Bushfires 2019-20** page for more information and details of impacted postcodes
- ❖ If you've been affected by this disaster and you need assistance, or you've been affected but are outside of the listed postcodes, call our Emergency Support Infoline on **1800 806 218**.

 The deferral **does not** relate to your TBAR reporting obligations if your member has **exceeded their transfer balance cap** and we have sent the member an excess transfer balance determination or the fund a commutation authority

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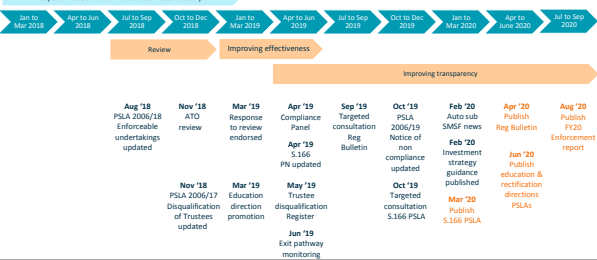
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## The journey



Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry



Month	Event
Jan '18	ATO review
Aug '18	PSLA 2006/18 Enforceable undertakings updated
Nov '18	PSLA 2006/17 Disqualification of Trustees updated
Mar '19	Education direction promotion
May '19	Trustee disqualification Register
Jun '19	Exit pathway monitoring
Apr '19	Compliance Panel
Apr '19	S.166 PN updated
Sep '19	Targeted consultation Reg Bulletin
Oct '19	PSLA 2006/19 Notice of non compliance updated
Oct '19	Targeted consultation S.166 PSLA
Feb '20	Auto sub SMSF news
Feb '20	Investment strategy guidance published
Mar '20	Targeted consultation S.166 PSLA
Mar '20	PSLA
Apr '20	Reg Bulletin
Jun '20	Education & rectification directions
Aug '20	FY20 Enforcement report

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