






REPURPOSING SOLE PURPOSE

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Craig Day

Executive Manager, Technical Services, Colonial First State






Craig is the Executive Manager of Colonial First State's highly regarded technical services team, FirstTech, and has over 20 years' experience in the financial services industry.

In his role Craig is responsible for leading a team that provides specialist technical support to financial advisers and to Colonial First State's superannuation and platform businesses. He also acts as a media spokesman for Colonial First State on superannuation and retirement planning issues and represents Colonial First State on a number of industry association committees. Craig is a sought after presenter at industry conferences and professional development events and is actively involved in providing ongoing specialist adviser education. Craig holds a Bachelor of Science, is completing his Masters of Taxation and is an SMSF Specialist Advisor.

Mark Ellem

Executive Manager, SMSF Technical Services, SuperConcepts

Mark holds the position of Executive Manager, SMSF Technical Services with SuperConcepts, providing technical and compliance support on SMSFs to financial advisors, accountants and SMSF trustees, as well ensuring that SuperConcepts' leading SMSF administration and compliance platform, SuperMate, is compliant with the latest superannuation and taxation rules. An accredited SMSF Specialist Advisor with the SMSF Association, he was awarded the 2019 CEO award for his contribution to the association. He is also a Fellow of CPA Australia and the Institute of Public Accountants (IPA), as well as being a Registered Tax Agent. Prior to his current role with SuperConcepts, Mark spent considerable time in accounting practices and SMSF administration companies, including running his own accountancy practice and SMSF administration and compliance advice company for ten years.

Legislative background



Income tax exemption

Income exempt where derived by:
Provident, benefit or superannuation fund established for the benefit of employees, and Fund is being applied for the **purpose** for which it was established

Case law:

If fund is a super fund?
If fund was being applied for the purpose for which it was established?
- Scott v FCT



Deductibility

Contributions deductible:
Made for the **purpose** of providing benefits for members or their dependents

Case law:

If employees could be expected to benefit?
Purpose of employer in making contributions?
- Raymore Contractors v FCT

Key concepts



Purpose

Has a meaning which refers to the end in mind

Determination based on objective analysis of all the facts and circumstances surrounding the maintenance of a fund

Taken to intend the natural and probable consequences of their acts - purpose may be inferred from those acts

Subjective intentions irrelevant



Incidental benefits

Permitted where incidental, remote or insignificant

Benefit cannot be incidental where purpose was to provide the benefit

Tests:

- Did trustee seek out or negotiate benefit?
- Did benefit influence decision making of the trustee?
- Was benefit provided to the financial detriment of the fund?

Incidental benefits



Example

Coles Myer discount card provided where acquired Coles Myer shares

Inherent benefit

- Permitted for trustee to use in personal capacity

Scheme amended

- Administration costs recovered by dividend reduction if applied for card
- Breach

Incidental benefits

Example II



Qantas frequent flyer points if join Industry Fund

- \$350 minimum deposit to new member account within 6 months of joining
- 20,000 Qantas frequent flyer points earned 2-3 months after satisfying requirement
- Applicable from January 2019 to 31 December 2019
- Not available to existing (specific) Industry fund members or those who commence TRIS

Another fund offers 1 Velocity frequent flyer point for every \$5 contribution

Legislative context

Section 62 SISA



Trustees of regulated super funds must maintain the fund solely for:

- One or more core purposes; or
- One or more core purposes and one or more ancillary purposes.



Core Purposes
Retirement benefits
Benefits from age 65
Death benefits pre-retirement



Ancillary Purposes
Benefits post employment
Invalidity benefits
Death benefits post retirement
Other benefits regulator approves in writing

The ATO's view

SMSFR 2008/2



- Objective assessment surveying all of the events & circumstances
- Must be complied with at all times
- Strict standard - exclusivity of purpose
- Incidental, remote or insignificant benefit does not itself result in non-compliance
- Specifically relevant to SMSFs
 - related party investment decisions
 - personal use nature of some assets
- Collectables

SPT - ATO view

SMSFR 2008/2



What's ok in one fund may not be ok in another

Requires holistic assessment of all the circumstances associated with the maintenance of a fund

Each fund has its own peculiar set of circumstances

Test concerned with how/why a trustee came to make a particular investment or undertake a particular activity

Example: Two funds make the same investment in bank shares

- Fund A decision based on projected growth and dividend yield
- Fund B decision based on availability of shareholder discount/benefits that will be used by trustees individually

SPT - APRA view

Superannuation Circular No III.A.4 (Feb 2001)



Serves critical prudential function

Prescribes types of activities an RSE can undertake using fund assets

Requires RSE to justify why actions do not contravene

- reasonable, direct and transparent connection between actions and core and ancillary benefit
- services limited to members only
- benefits accrue to current or future members
- advice/info limited to superannuation issues

SPT - Hayne review

Fees deducted from member accounts



Question use of super monies to pay for broad financial advice not consistent with SPT

"it is not consistent with the sole purpose test for a trustee to apply funds held by the trustee in paying fees charged by an adviser to consider, or re consider, how best the member may order his or her financial affairs generally or may best make provision for post retirement income."

Fees for advice about particular actual or intended super investments would comply with SPT:

- ✓ Consolidation of super accounts
- ✓ Selection of super funds or products
- ✓ Asset allocations within a fund

Final Report Volume 1 - page 240

SPT - APRA view

Fees deducted from member accounts



Open letter to RSE licensees (27 March 2019) - "Areas of focus for the year ahead"

Sole Purpose Test

- Ambiguity
- Undertake review with ASIC to identify:
 - clear principles
 - examples of breaches requiring action
 - whether law could be clarified to better reflect intent
- Release update guidance (Superannuation Circular No III.A.4 (Feb 2001))

SPT - APRA & ASIC view

Fees deducted from member accounts



APRA/ASIC open letter to RSE licensees (10 April 2019)

Trustees must exercise appropriate oversight over fees and charges being levied on member accounts and paid to advisers

"Is the deduction consistent with the sole purpose test?"

- Only costs associated with advice that relates to the member's super & insurance obtained through super may be deducted
- Advice that relates to investments outside of super not allowed to be deducted from member's account



WORKSHOP CASE STUDIES



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Case study 1



Questions for discussion and consideration:

Will the lease arrangement cause any compliance issues for Phil and Lizzie's SMSF?

Case study 1A



Questions for discussion and consideration:

Would your answer to case study 1 change in these circumstances? Why/why not?

Case study 2



Questions for discussion and consideration:

1. What, if any, are the issues for the sole purpose test?
2. Does sole purpose come into question where all transaction are on an arm's length basis?
3. What evidence would the trustee of the Cornwall Super Fund need to provide as evidence that sole purpose has been complied with?

Case study 2A (late addition)



Charles & Camilla have all their super in an APRA regulated fund. They also run their own business.

Charles says:

- *“We’ll move a certain portion of our super into an SMSF because we want to buy a property to lease to our business, but we’ll leave the other half in our original fund because it’s generating 10 to 12 per cent returns, which we can’t do ourselves.”*

Questions for discussion and consideration:

Sole purpose test issue?

Decision impact statement - Aussiegolfa



“We do not consider that the case is authority for the proposition that a superannuation fund trustee can never contravene the sole purpose test when leasing an asset to a related party simply because market-value rent is received.”

“It is the purpose of making and maintaining a fund’s investments that is central to identifying if there is a contravention of the sole purpose test. We note the observations of the court that a collateral purpose, and a contravention of section 62 of the SISA, could well be present if, for example, the circumstances indicated that leasing to a related party had influenced the fund’s investment policy.”

“For example, in the Commissioner’s view a superannuation fund trustee will contravene the sole purpose test if the fund acquires premises for the collateral purpose of leasing the premises to an associate of the fund, even where the associate pays rent at market value.”

SPT declaration - DomaCom



ATO/ERDL/16/44 Release

ATO Provides Sole Purpose Test Guidance to DomaCom
31st October 2019



DomaCom Limited (ASX: DCL) (DomaCom) is pleased to announce that DomaCom and the Australian Tax Office (ATO) have reached agreement on the conditions under which the ATO will not apply compliance measures regarding the Sole Purpose Test (SPT) for an investment by an SMSF into a DomaCom sub-fund that earns a residential property, where a related party of the SMSF may happen to become a tenant.

The conditions agreed with the ATO include:

- Acknowledgement to the DomaCom Platform to allow trustees to make a SPT Declaration (see attached declaration) when making an investment. The declaration ensures that SMSF trustees do not engage in behaviour that suggests they are exploiting their SMSF for the collateral purpose of providing accommodation to a related party tenant.
- The platform will issue the declaration and make it available to the ATO and SMSF auditors.
- Amendments to the Product Disclosure Statement (PDS) and Supplementary PDS for the DomaCom Fund covering the SPT Declaration.

DomaCom CEO, Arthur Newlands, says “we are pleased to confirm that DomaCom has obtained ATO confirmation on how SMSF trustees in DomaCom can satisfy the Sole Purpose Test after the Full Federal Court of Australia judgment in *Applegate Pty Ltd (Trustee) v Commissioner of Taxation* (2018) 154 FCR 322.”

“We thank the ATO for providing the practical clarification so that SMSF can continue to invest in DomaCom property sub-funds where, subject to certain protocols being observed, related parties may happen to become the tenant of the underlying properties.”

ATO guidance

SMSF trustee has signed the ‘Sole Purpose Test Declaration’ and:

- retains a copy of this declaration
- provides a copy to their approved auditor
- we’re not subsequently made aware of evidence that indicates the trustee has acted inconsistently with the terms of the declaration

SPT declaration - DomaCom



ATO guidance

By signing declaration trustee agrees to avoid behaviour that may be of concern. This includes:

- acquiring property based on potential to provide related-party accommodation
- influencing property manager to lease property to a related party
- influencing a related party to lease the property.

SPT declaration - DomaCom



Trustee declaration in respect of the purpose of a proposed investment

I/We as an individual trustee/trustees or as director(s) of the corporate trustee of

SMSF name	(Fund)
SMSF Trustee(s) name(s)	(Trustee)

in respect of the Fund's contemplated investment in

DomaCom Sub-Fund	(Sub-Fund)
Underlying Property	(Property)

declare that:

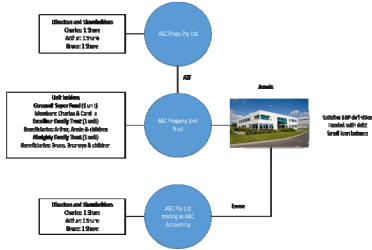
Case study 3



Questions for discussion and consideration:

1. Does the fund have a sole purpose issue?
2. Would there be a sole purpose issue if the terms of the loan were substantiated as commercial?
3. What if the loan was made by the fund to Lorna, a non-related party of the SMSF?

Case study 4



Questions for discussion and consideration:

1. Is there a sole purpose issue for the Cornwall Super Fund?
2. What action, if any, should the trustees of the Cornwall Super Fund take?
3. Are there any other SIS compliance issues?

Case study 5



Questions for discussion and consideration:

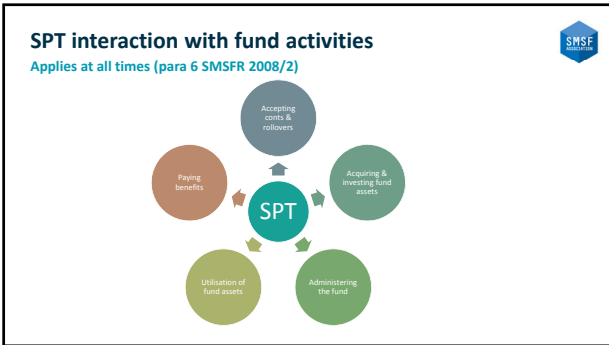
1. Could the WK SMSF be deemed to breach the sole purpose test by implementing this insurance reserve strategy?
2. What other compliance issues should also be considered?

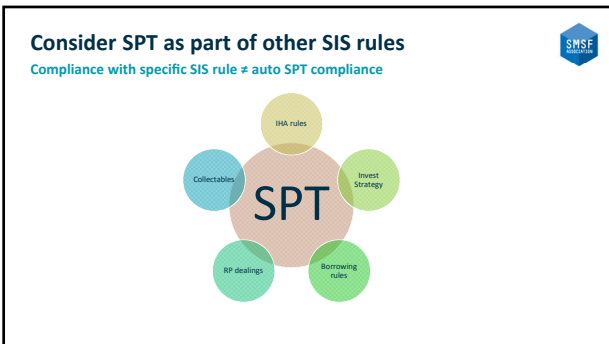
Case study 6



Questions for discussion and consideration:

1. Can Simon's SMSF pay for part of his personal advice costs under the sole purpose test, and if so, for which aspects of the advice can the fund pay?
2. Could the fund claim a deduction for any advice costs it pays on Simon's behalf?
3. If Simon instead decided to pay the \$8,000 advice cost out of his own back pocket what issues would that raise?





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