# Audit

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# Six SMSF breaches you may not know about

Although they may seem obvious, practitioners and trustees alike continue to be confused by potential SMSF breaches

The ATO's enhanced powers, taking effect from 1 July 2014, could see an increase in penalties imposed on SMSF trustees. SMSF rules can be complex; however, many contraventions can simply be avoided when the trustees are informed. Listed below are six reportable breaches that you may not be aware of.

## 1. Not getting back to the auditor on time S.35C(2)

Trustees must ensure that requested relevant documents are given to the auditor within 14 days of the request being made. S.35C(2) is one of the regulatory requirements that includes a statutory time period. If the contravention is a breach of a statutory time period by more than 14 days, then the contravention must be reported to the ATO. In other words, it is a reportable breach if it takes a trustee more than 28 days to provide documents requested by the auditor.

## 2. Bank overdraft S.67

Generally, SMSFs are prohibited from borrowing money. There are limited circumstances in which SMSFs can borrow, such as when borrowing to settle securities (where borrowing is less than seven days and 10 per cent of the value of the fund's assets) and borrowing to pay beneficiaries (where the borrowing is for less than 90 days and 10 per cent of the value of the fund's assets).

When the balance of an SMSF's transaction bank account is running low, the bank account may go into overdraft. Regardless of the amount of overdraft, the contravention rules still apply. If the amount is small, it is not reportable in the first year, but if the bank account is overdrawn for two years in a row it has to be reported to the ATO.

## 3. Not signing ATO Trustee Declarations S.104A

Trustees and directors of corporate trustees of an SMSF appointed after 1 July 2007 are required to complete and sign an ATO-approved trustee declaration. The declaration is to make sure trustees understand their obligations and responsibilities. A separate declaration is required to be completed and signed by each and every trustee. This rule generally doesn't apply to funds set up prior to 1 July 2007. However, new trustees added o the fund after 1 July 2007 need to sign the declaration.

The declaration must be signed within 21 days of the trustee appointment. This is another example of a regulatory requirement which includes a statutory time period. If the contravention is a breach of this period by more than 14 days, then the contravention must be reported.

## 4. Mixed understanding of in-house asset rules and provision of financial assistance to members and relatives S.65

An SMSF trustee must not give financial assistance using the resources of the fund to a member or a relative of a member of the fund. There could be some confusion and mixed understanding regarding the application of in-house assets rules (s.82-84) and financial assistance rules. An in-house asset could be a loan to a related party of the fund. And when the in-house asset is within 5 per cent of the market value of the assets of the fund, there will be no contravention of the in-house asset restrictions. However, complying with in-house asset rules does not mean section 65 is not breached. When the in-house asset loan is used to provide financial assistance to a member or a relative of a member of the fund, section 65 is breached. There is no allowable limit under section 65 of SISA. To rectify this contravention the loan must be repaid in full to the super fund.

For example, an SMSF provides a loan to a relative of one of the members; the loan is used to enable the relative to enter an aged care facility. The loan is supported by a written loan agreement and is less than 5 per cent of the market value of the assets of the fund. There is no contravention of the in-house asset rules, however, since section 65 is breached, the full amount of the loan must be repaid to the fund.

The ATO has issued further guidance on what it considers to constitute the provision of financial assistance in SMSFR 2008/1.

## 5. Buying a computer and proportioning its costs S.62

An SMSF cannot pay for a computer, given that the computer is also likely to be used for other private purposes. Similarly, an SMSF cannot pay for travel expenses, given that travel is also likely to be used for other private purposes.

Unlike individuals and companies, SMSFs cannot proportionate expenses with private elements between personal use and income-producing purposes. Apart from disallowing payments with an element of private use, section 62's sole purpose test prohibits any activity that is providing current benefits to members, such as storing a collectable item of the fund at home or living in a holiday house owned by the fund.

## 6. No insurance for collectables R.13.18AA

There is no requirement to insure real properties owned by a super fund. However, collectables and personal use assets must be insured within seven days of acquisition. This rule applies to all collectables and personal use assets purchased from 1 July 2011. For items held by the fund prior to 1 July 2011, the fund has until 30 June 2016 to comply with this rule. ●