



# Voluntary disclosure to the ATO

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**T**his paper provides important background context on why SMSF trustees may wish to consider using the Australian Taxation Office's (ATO) early engagement and voluntary disclosure service to notify the ATO regarding contraventions of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) or *Superannuation Industry (Supervision) Regulations 1994* (SISR).

There can be significant advantages to making a voluntary disclosure including the potential to rectify and minimise penalties and other adverse consequences.

## Should I make a voluntary disclosure?

Some SMSF trustees may, on first blush and without the benefit of obtaining expert advice, not be immediately attracted to the idea of proactively approaching the ATO regarding a fund's compliance issues.

However, there can be numerous advantages in making a timely voluntary disclosure to the ATO, and it is worth noting that many contraventions are detected and reported via various means in any event. Thus, approaches based on trying to 'fly under the radar' or hoping the problem will go away are generally not a prudent course. Indeed, in many situations timely action can minimise being placed in a significantly riskier position if things are left to fester.

## How will the ATO find out?

Most contraventions are reported to the ATO by SMSF auditors via the auditor contravention reporting (ACR) system. For example, between 1 July 2020 and 30 June 2021 there were 13,600 SMSFs

with 40,000 contraventions reported at an average of nearly three contraventions per SMSF.

Where an SMSF auditor forms the opinion that it is likely that a contravention of the SIS Act or SISR:

- may have occurred
- may be occurring
- may occur,

they are required under section 129 of the SIS Act: Obligations of actuaries and auditors – compliance, to report the contravention or potential contravention to the ATO via the ACR notification system.

In addition to SMSF lodgement obligations under section 35B of the SIS Act, it is compulsory that every SMSF is audited each year by an independent auditor covering the fund's financial statements, investments and operations for the year. For instance, the auditor must determine whether the financial statements are materially true and correct and verify compliance with various provisions in the SIS Act, the SISR and the *Income Tax Assessment Act 1997* (ITAA 1997).

Further, there is a range of other surveillance methods used by the ATO to collect information, including undertaking reviews or audits of SMSFs; especially where a potential contravention has been identified or flagged via the ATO's systems or other intelligence gathering mechanisms.

Thus, SMSF trustees must be mindful that, if there is any contravention, including any potential contravention yet to occur, there is a significant risk that it will be notified to the ATO or detected by the ATO in due course, so early engagement and voluntary disclosure is generally a wise move.

## Are there any advantages with voluntary disclosures?

The ATO's voluntary disclosure process is designed to encourage funds to proactively engage with the regulator to achieve better compliance, reduce the ATO's use of resources and typically result in lower penalties and adverse consequences. Therefore, by disclosing contraventions upfront, SMSF trustees should be in a better position. The ATO state that it will:

*Take your voluntary disclosure and your willingness to engage with us at an early stage and throughout the review process into account when:*

- *determining the level of enforcement action that is required*
- *making a decision about the remission of any administrative penalties that may be applicable.*

## How to prepare an appropriate submission

Those preparing to disclose a contravention of superannuation law to the ATO should ensure that the submission includes all relevant material facts and supporting documents, as well as the details of any rectification plan that has been put in place or contemplated. It is best to have an experienced SMSF adviser or SMSF lawyer assisting in preparing the submission.

In certain cases, a proposed enforceable undertaking may also be appropriate. This is where the SMSF trustee still must rectify the breach and proposes the steps the trustee will take to do so.

The drafting of an enforceable undertaking should be prepared by a lawyer since it involves legal work. A non-qualified person cannot charge a fee for preparing these types of agreements and would generally not be covered by their professional indemnity insurance in any event.

A submission should be carefully worded and prepared and ideally lodged prior to any ATO audit or compliance action. If the SMSF auditor is proposing to lodge an ACR, then timely action should be taken to lodge a voluntary disclosure prior to the auditor lodging any ACR.

Moreover, the submission must be checked to ensure it is true and correct and supported by appropriate evidence, as any false or misleading statement can be subject to serious consequences. The ATO may, and in many cases will, ask further questions or request further supporting information or evidence to verify some or all the contents in the submission.

Thus, having a lawyer involved to prepare, or at least review and check the draft submission and to assist as and when needed, is highly recommended.

## What is the ATO's process?

Further details on the ATO's early engagement and voluntary disclosure process can be found on the ATO's website: *SMSF voluntary disclosure service*.<sup>1</sup>

On the face of it, the voluntary disclosure process may appear relatively straightforward—using the prescribed form to describe the situation, contravention and the rectification plan. However, the submission should be

appropriately worded and supported and is best prepared by an experienced SMSF adviser or SMSF lawyer.

Note, the ATO webpage, among other things, states:

We expect you to:

- engage with your SMSF professional to devise a proposed plan of action to rectify the contravention
- provide the proposed plan for rectifying the contravention and relevant supporting documentation with your voluntary disclosure
- provide information that demonstrates that measures have been put in place to mitigate the risk of similar contraventions occurring in the future
- actively engage with us throughout the review process
- bring any outstanding SMSF annual return lodgements immediately up to date
- make any necessary amendments to SMSF annual returns and/or individual members' income tax and pay any outstanding income tax liabilities that may arise.

## What about a disclosure for tax purposes?

This paper focuses on voluntary disclosures to the ATO for regulatory purposes, specifically in relation to the SIS Act and SISR compliance. However, where relevant, tax-related disclosures should also be carefully considered.

A voluntary disclosure for taxation purposes can also prove beneficial and may result in a potential reduction of up to 80% in certain tax liabilities. Again, the ATO seek to encourage voluntary compliance by taxpayers as a stricter approach is typically applied if the ATO uncovers issues during its ongoing audit and surveillance activities.

## Are there any risks?

An experienced SMSF adviser should be in a position to provide some guidance on the risks and penalties that might be involved as a result of going through a disclosure process—after assessing the particular background facts and circumstances of the matter. Given the nature of the process, there are no guarantees of the outcome as the ATO makes the final determination.

In any event, SMSF trustees and members should be ready for a range of penalties and compliance actions being taken by the ATO including administrative penalties, rectification and education directions, being rendered non-compliant, being rendered a disqualified person and other sanctions.

The administrative penalties alone can be significant as, currently, several administrative penalties are around \$20,000 per breach and as noted in 2020/21 an average of three contraventions per SMSF were reported to the ATO via the ACR system. Currently, the administrative penalties for contravention of the SIS Act can range between 5 and 60 penalty units, with each penalty unit attracting a \$330 fine from 7 November 2024. As such, administrative penalties can approach a maximum of \$20,000.



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### The quote

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### ATO compliance action penalties for SMSFs

In 2014, a new regime added the following compliance powers to the ATO's arsenal:

- education directions
- rectification directions
- administrative penalties.

In addition to the above, the ATO has the following compliance powers to deal with trustees of SMSFs who have not complied with superannuation laws:

- enforceable undertaking
- disqualification of a trustee
- civil and criminal penalties
- allowing the SMSF to wind up
- notice of non-compliance
- freezing an SMSF's assets.

If a fund has individual trustees, this penalty is multiplied by the number of trustees. Naturally, a corporate trustee can result in a substantial saving if appointed prior to the relevant breach occurring. The imposition of administrative penalties on each individual trustee, in essence, means that every SMSF with individual trustees should be moving to a corporate trustee as soon as practicable because an administrative penalty can easily be imposed even if you have acted honestly and in error.

Thus, even where a voluntary disclosure is made, an SMSF still faces the risk of being subject to a range of penalties and, in certain more extreme cases, rendered non-compliant.

Also, increasingly, the ATO are seeking to disqualify trustees/directors from forever being involved in an SMSF. The total potential cost and severity of the range of penalties and sanctions that can be imposed means it is vital to obtain expert assistance and representation.

### Conclusion

Advice should be obtained on the particular facts and circumstances to assess what would be involved with making a voluntary disclosure and obtaining feedback on the potential expected outcomes. Broadly, the benefits typically significant outweigh the risks and its best to be proactive and not defer as the outcome is likely to be worse. **FS**

### Notes

1. Australian Taxation Office, 'SMSF voluntary disclosure service' <https://www.ato.gov.au/individuals-and-families/super-for-individuals-and-families/self-managed-super-funds-smsf/help-and-support-for-smsfs#ato-SMSFearlyengagementandvoluntarydisclosure-service> [accessed 5 May 2025]