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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TAX LAWS AMENDMENT (STRONGER SUPER SELF MANAGED
SUPERANNUATION FUNDS) BILL 2012: ADMINISTRATIVE PENALTIES

EXPLANATORY MEMORANDUM

(Circulated by the authority of the
Minister for Financial Services and Superannuation, the Hon Bill Shorten MP)

EXPOSURE-DRAFT

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
Bill	Tax Laws Amendment (Stronger Super Self Managed Superannuation Funds) Bill 2012: Administrative Penalties
Commissioner	Commissioner of Taxation
Commonwealth	Commonwealth of Australia
RIS	regulation impact statement
SIS Act	<i>Superannuation Industry (Supervision) Act 1993 (Cth)</i>
SIS Regulations	<i>Superannuation Industry (Supervision) Regulations 1994</i>
SMSF	self managed superannuation fund
TAA	<i>Taxation Administration Act 1953 (Cth)</i>

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General outline and financial impact

Stronger Super

On 16 December 2010, the Assistant Treasurer and Minister for Financial Services and Superannuation, the Hon Bill Shorten MP, announced the Stronger Super reforms.

Stronger Super represents the Government's response to the review of the governance, efficiency, structure and operation of Australia's superannuation system, the Super System Review (Review).

To provide input on the design and implementation of the Stronger Super reforms, the Government undertook extensive consultations with industry, employer and consumer groups. In addition, the Government established a specialised working group for reforms affecting self managed superannuation funds (SMSFs).

The Review found that the existing penalty regime applicable to trustees of SMSFs limits the Commissioner of Taxation's (the Commissioner's) ability to achieve optimal regulation of the SMSF sector. The Review concluded that additional tools (both punitive and educational), in conjunction with its existing powers are required to give it more flexibility to deal with non-compliance with the law.

This Bill provides for administrative consequences for contraventions relating to SMSFs by introducing:

- rectification and education directions which may be issued by the Commissioner for contraventions of the *Superannuation Industry (Supervision) Act 1993* (Cth) (SIS Act) and *Superannuation Industry (Supervision) Regulations 1994* (Regulations); and
- an administrative penalty regime for SMSF trustees for certain contraventions of the SIS Act.

Date of effect: The provisions apply to contraventions that occur on or after 1 July 2013.

Proposal announced: On 16 December 2010, the Minister announced the Stronger Super reforms. In September 2011, the Minister released the Stronger Super Information Pack, outlining key aspects of the Stronger Super reforms. On 13 July 2012, the Minister announced that administrative penalties regime would commence from 1 July 2013.

[Click here and insert the name of the Bill]

Financial impact: Commonwealth costs associated with implementation of a range SMSF Stronger Super reforms, including these measures is \$40.2 million over 5 years. These costs will be offset by increases to the SMSF Supervisory Levy.

Human rights implications: This Bill does not raise any human rights issues. See *Statement of Compatibility with Human Rights* — Chapter 2, paragraphs 2.1-2.3.

Compliance cost impact: Nil.

Summary of regulation impact statement

Impact: A RIS exemption was granted for measures contained in this Bill, which will be the subject to a post-implementation review.

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Chapter 1

Administrative directions and penalties

Outline of chapter

1.1 This chapter outlines the administrative consequences for contraventions relating to SMSFs including:

- rectification directions;
- education directions; and
- administrative penalties.

Context of amendments

1.2 SMSFs are a form of superannuation fund where membership is restricted to a maximum of four members and all members must also be trustees or directors of the corporate trustee.

1.3 At the time of the Review, there were approximately 423,000 SMSFs in Australia. Since this time, the number has increased. The Review noted that although most SMSF trustees seek to operate their funds properly to secure their own retirement, in an industry of this size there will be a proportion of SMSFs that disregard the rules.

1.4 The Commissioner of Taxation (Commissioner) is responsible for the regulation of SMSFs. The Review concluded that the Regulator needs to have and apply effective, flexible and proportionate powers to address non-compliance with superannuation laws.

1.5 Currently, the Regulator has a limited number of tools available to address instances of non-compliance including:

- making an SMSF non-complying for taxation purposes;
- applying to a court for civil penalties to be imposed. A person may also face criminal penalties for more serious breaches of the law;
- accepting an enforceable undertaking in relation to a contravention; and

- disqualifying a trustee of an SMSF.

1.6 The Review acknowledged the benefits that the current penalty regime provides in dealing with and deterring non-compliance. However, it did highlight some areas of the current regime which limit the Regulator's ability to achieve optimal regulation.

1.7 Applying current penalties can be costly and time-consuming and the potential consequences can be disproportionately high. The Regulator is unlikely to use his existing range of powers except in cases of significant non-compliance with the law.

1.8 The absence of graduated penalties results in a number of SMSF trustees avoiding sanction for contravening conduct by simply rectifying the conduct when it is detected. This may be appropriate in certain circumstances, but it is not appropriate that trustees can continue to contravene the law and for their actions to have no consequences.

1.9 The Review recommended that the Regulator be given additional tools, both educational and punitive, in conjunction with its existing powers. Credible and proportional penalties will support the ongoing integrity of the system.

1.10 The power to give directions and impose administrative penalties for contraventions of the SIS Act will provide the Regulator with effective, flexible and cost-effective mechanisms to issue sanctions that reflect the seriousness of the breach.

1.11 It is the intention that the power to issue administrative directions and penalties will form an integral part of the suite of options already available to the Regulator to respond to non-compliance with the law.

1.12 This Bill implements the Government's response to the Review's recommendations in relation to penalties for SMSF trustees.

Summary of new law

1.13 Schedule AP of this Bill introduces administrative consequences for contraventions relating to SMSFs including:

- giving the Regulator the power to give rectification directions and education directions; and
- imposes administrative penalties for certain contraventions.

1.14 This Bill provides the Regulator with the ability to give a rectification direction and/or an education direction where it reasonably believes that a trustee or director of a corporate trustee of an SMSF has contravened a provision of the SIS Act or Regulations.

1.15 A rectification direction will require a person to undertake specified action to rectify the contravention within a specified time and provide the Regulator with evidence of the person's compliance with the direction.

1.16 An education direction will require a person to undertake a specified course of education within a specified time frame and provide the Regulator with evidence of completion of the course. Trustees and directors of corporate trustees will also be required to sign or re-sign the SMSF trustee declaration form to confirm that they understand their obligations and duties as trustees (or directors of corporate trustees) of an SMSF.

1.17 The Regulator may approve courses of education for the purposes of the education direction. A fee must not be charged for an approved course, undertaken in compliance with an education direction.

1.18 A person will be liable to an administrative penalty if certain provisions of the Act are contravened in relation to an SMSF. The amount of the penalty is an amount specified in the law.

1.19 An administrative penalty must not be paid or reimbursed from the assets of the fund in relation to which the administrative penalty was imposed.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
A rectification direction is a written direction requiring a person to take specified action to rectify the contravention and provide the Regulator with evidence of the person's compliance with the direction.	No equivalent.
A rectification direction may be given to a person where the Regulator reasonably believes that person has contravened a provision of the SIS Act or Regulations in relation to the	No equivalent.

fund, having regard to any financial detriment to be suffered by the fund as a result of the person's compliance with the direction, and the nature and seriousness of the person's contravention.	
A rectification direction must not be given to a person in relation to a contravention if the Regulator has accepted an undertaking by any person under section 262A in relation to the contravention and the undertaking has neither been withdrawn nor varied such that the contravention is no longer covered by it.	No equivalent.
The rectification direction must specify the period within which the person must comply with the direction, which must be a period that is reasonable in the circumstances.	No equivalent.
An education direction is a written direction requiring a person to undertake a specified course of education and to provide the Regulator with evidence of completion of the course	No equivalent.
An education direction may be given to a person where the Regulator reasonably believes a person has contravened a provision of the SIS Act or Regulations in relation to the fund.	No equivalent.
The education direction must specify the period within which the person must comply with the direction, which must be a period that is reasonable in the circumstances.	No equivalent.
The Regulator may approve in writing a course for the purpose of giving education directions. A fee must not be charged for the course undertaken in compliance with an education direction.	No equivalent.
The Regulator may at any time, vary or revoke a rectification direction or an education direction by giving written notice to the person to whom	No equivalent.

the direction was given.	
A person to whom a rectification direction or education direction is given may request the Regulator to vary the direction. The Regulator must make a decision within 28 days, or the Regulator is taken to have refused the request.	No equivalent.
If a person contravenes a section of the SIS Act specified in the table in section 166, the person is liable to an administrative penalty.	No equivalent.
An administrative penalty must not be paid or reimbursed from the assets of the SMSF.	No equivalent.

Detailed explanation of new law

1.20 The Commissioner has general administration of Part 20, administrative consequences for contraventions relating to SMSFs. *[Schedule AP, item 1, section 4; item 2, subparagraph 6(1)(e)(v)]*

Definitions

1.21 Item 3 inserts a definition for ‘education direction’ as having meaning given by subsection 160(2). *[Schedule AP, item 3, subsection 10(1)]*

1.22 Item 4 inserts a definition for ‘rectification direction’ as having meaning given by subsection 159(2). *[Schedule AP, item 4, subsection 10(1)]*

1.23 A superannuation fund is treated as an SMSF for the purposes of Part 20 if it has ceased being a SMSF for the purposes of the rest of the SIS Act and the trustee of the fund is not a registrable superannuation entity (RSE) licensee. *[Schedule AP, item 5, subsection 10(4)]*

1.24 This amendment is intended to ensure that penalties may be imposed on trustees and directors of corporate trustees of funds that fail the definition of an SMSF in section 17A of the SIS Act, but are none the less treated as an SMSF and remain regulated by the Commissioner. This will ensure that trustees and directors who contravene the SIS Act or Regulations do not escape any sanction due to the fund no longer meeting the definition of an SMSF under section 17A of the SIS Act.

1.25 Administrative penalties are imposed for contraventions of specified provisions of the SIS Act. Items 6, 7, 8, 10, 11, 12, 13, 14, 15, 18, 19, 20, 21, 22, 24, 25 and 26 insert notes to explain that section 166 imposes an administrative penalty for contraventions of the relevant provisions in relation to an SMSF. ***[Schedule AP, items 6, 7, 8, 10, 11, 12, 13, 14, 15, 18, 19, 20, 21, 22, 24, 25 and 26, subsections 34(1) and 35B(6), section 35B, subsections 65(1), 67(1) and 84(1), section 103, subsection 104(1), 104A(2), 105(1), 106(1), 106A(1), 124(1), 254(1) and 347A(5)]***

Indemnification from assets of the SMSF

1.26 It is intended that costs imposed under the new administrative penalty regime are payable personally by the person who has committed the breach and not paid or reimbursed from assets of the SMSF.

1.27 A provision in the governing rules of an SMSF is void in so far as it would have the effect of exempting a trustee of the SMSF from, or indemnifying a trustee or a director of the trustee of the SMSF against:

- liability for the costs of undertaking a course of education in compliance with an education direction; or
- liability for an administrative penalty imposed by section 166. ***[Schedule AP, item 9, paragraphs 56(2)(c) and (d) and 57(2)(c) and (d)]***

Trustee declaration

1.28 A trustee or a director of a corporate trustee of an SMSF who undertakes a course of education in compliance with an education direction, is required to sign a declaration that he or she understands his or her duties as a trustee of a SMSF (or as director of a body corporate that is such a trustee) no later than 21 days after completing the course of education. ***[Schedule AP, items 16 and 17, paragraph 104A(1)(c) and subparagraph 104A(2)(ba)]***

1.29 It is intended that trustees and directors of a corporate trustee who undertake a course of education in compliance with an education direction will gain a better understanding of their obligations and responsibilities as trustees and prevent them from contravening the law again in the future.

1.30 These trustees and directors will be required to confirm that they understand their obligations and responsibilities as trustees or directors of a corporate trustee by signing a declaration to that effect.

1.31 Trustees and directors who fail to sign the declaration in accordance with section 104A will be liable to an administrative penalty imposed by section 166.

Administrative consequences for contraventions relating to SMSFs

1.32 Schedule AP inserts Part 20 – Administrative consequences for contraventions relating to SMSFs. [*Schedule AP, item 23, Part 20*]

1.33 Schedule AP inserts Division 1 – Object and Scope of this Part. [*Schedule AP, item 23, Division 1*]

Object and scope of Part 20

1.34 The object of Part 20 is to provide administrative consequences for contraventions of the SIS Act or the Regulations that relate to SMSFs. Part 20:

- gives the Regulator power to give rectification directions and education directions; and
- imposes administrative penalties for certain contraventions of the SIS Act. [*Schedule AP, item 23, section 157*]

1.35 Part 20 only applies to SMSFs that are regulated superannuation funds. Regulated superannuation fund is defined in section 19 of the SIS Act. [*Schedule AP, item 23, section 158*].

Directions

1.36 Schedule AP inserts Division 2 – Directions. [*Schedule AP, item 23, Division 2*]

1.37 A direction under Division 2 may not be given in relation to a contravention of the superannuation data and payment regulations and standards in Part 3B of the SIS Act. [*Schedule AP, item 23, subsections 159(1) and 160(1)*]

Rectification directions

1.38 Currently, rectification of contraventions commonly occurs through the enforceable undertaking process under section 262A of the SIS Act. Enforceable undertakings rely on a person initiating the enforceable undertaking with the Regulator. The Regulator then has the ability to accept or decline the enforceable undertaking that has been offered. If accepted and not complied with, the Regulator must apply to

the Court to have it enforced. The Review found this process inefficient and time consuming.

1.39 Unlike enforceable undertakings where a person is not limited to the undertaking it may offer the Regulator, a rectification direction given by the Regulator will be restricted to rectifying contraventions of the SIS Act or Regulations.

1.40 A rectification direction may be given if the Regulator reasonably believes that a person who is a trustee or a director (of a body corporate that is a trustee) of an SMSF has contravened the SIS Act or Regulations in relation to the fund. ***[Schedule AP, item 23, subsection 159(1)]***

1.41 Provisions contained in the SIS Act and Regulations must be adhered to by all trustees (individual trustees and corporate trustees) of SMSFs. Additionally, certain provisions in the SIS Act or Regulations may apply directly to directors of body corporates that are trustees of SMSFs, for example, section 104A. A trustee or director who does not adhere to these provisions and contravenes the Act may be given a rectification direction.

1.42 A rectification direction may therefore be given to:

- an individual trustee of an SMSF that has contravened the SIS Act or Regulations;
- a body corporate that is the trustee of an SMSF that has contravened the SIS Act or Regulations;
- a director that has contravened the SIS Act or Regulations;

1.43 The Regulator may give a person a rectification direction requiring the person to take a specified action to rectify the contravention and to provide the Regulator with evidence of the person's compliance with the direction. ***[Schedule AP, item 23 subsection 159(2)]***

1.44 The term *rectify* is defined in subsection 10(1) of the SIS Act and will generally involve putting into operation managerial or administrative arrangements that could reasonably be expected to ensure that there are no further contraventions of a similar kind.

1.45 Certain transactions, if not rectified may cause trustees to contravene the SIS Act or Regulations over a number of financial years. For example:

- Section 67 of the SIS Act prohibits an SMSF trustee from borrowing money or maintaining an existing borrowing of money except under limited circumstances. Trustees may contravene this provision in:
 - the year of income that the borrowing is undertaken (this will result in a contravention of paragraph 67(1)(a)); and
 - each year of income the borrowing is maintained (this will result in contraventions of paragraph 67(1)(b)).

In these circumstances, it may be appropriate for the Regulator to give a rectification direction to the trustee of the SMSF specifying that the trustee must ensure that the borrowing is paid off over a specified period of time. Such action will ensure that the trustee does not continue to maintain a borrowing in contravention of paragraph 67(1)(b).

1.46 Some contraventions only occur in the year of income the transaction took place. For example:

- Paragraph 65(1)(a) prohibits a trustee from lending money of the fund to a member or relative of a member of the fund. In cases where a trustee is found to have lent money of the fund to a member, the Regulator may issue a rectification direction to specify that the trustee must ensure the money lent to the member or member's relative is paid back to the fund with interest within a specified time.
- Where the market value of a fund's in-house assets exceeds 5% at the end of an income year, subsection 82(1) requires the trustees of a fund to prepare a written plan before the end of the following income year that sets out:
 - The amount by which the market value ratio of the fund's in-house assets exceeds 5%; and
 - The steps that the trustees will take to ensure that in-house assets are disposed of and that the value of those assets disposed of will return the fund to a market value ratio of 5% or less.

If the Regulator determines that the trustees have not carried out the steps of the plan they prepared within the relevant time period, the Regulator may issue a direction to dispose of assets in accordance with the plan prepared by the trustees.

1.47 In deciding whether to give a person a rectification direction, the Regulator should have regard to:

- any financial detriment that might reasonably be expected to be suffered by the fund as a result of the person's compliance with the direction; and

- the nature and seriousness of the person's contravention; and
- any other relevant circumstances.

These factors do not limit the matters that the Regulator may have regard to in determining whether to issue a rectification direction. *[Schedule AP, item 23, subsection 159(3)]*

1.48 In relation to the financial detriment that might reasonably be expected to be suffered by the fund, it is intended that the significance of the financial detriment, whether issuing a rectification direction will have a major impact on the retirement savings of the members of the fund, and whether there are other pecuniary compliance mechanisms that might be more appropriate in the circumstances would be considered. *[Schedule AP, item 23, paragraph 159(3)(a)]*

1.49 In deciding to give a person a rectification direction, the Regulator is to also have regard to the nature and seriousness of the person's contravention. *[Schedule AP, item 23, paragraph 159(3)(b)]*

1.50 The nature and seriousness of a contravention will always be a question of fact and degree and each case will need to be considered in light of its particular circumstances. The Regulator should consider all the facts relating to the contravention including but not limited to:

- the provision contravened and the nature of the contravention;
- the behaviour and circumstances of the person who contravened the act, including the past compliance history;
- the value of the assets involved.

1.51 A rectification direction must specify the period within which the person must comply with the direction, which must be reasonable in the circumstances. *[Schedule AP, item 23, subsection 159(4)]*

1.52 In determining the period of time to specify in the direction, the Regulator should have regard to factors including, but not limited to:

- the type of action specified in the direction;
- the circumstances of the person to whom the direction is issued.

1.53 The Regulator must not give a rectification direction in relation to a particular contravention if the Regulator has accepted an enforceable undertaking given by a person in relation to the contravention, the contravention is covered by that undertaking and the undertaking has

neither been withdrawn nor varied in a way that means the contravention is no longer covered by it. ***[Schedule AP, item 23, subsection 159(5)]***

1.54 The introduction of rectification directions does not affect the operation of enforceable undertakings under section 262A. However if an enforceable undertaking has been accepted by the Regulator in relation to a contravention, the Regulator cannot subsequently issue a rectification direction in relation to that same contravention unless the undertaking has been withdrawn or varied in a way that means the contravention is no longer covered by the undertaking.

1.55 A person to whom a rectification direction is given must comply with the direction before the end of the period specified in the direction. If the person fails to comply with the direction within that period, the person commits an offence of strict liability and is liable for a maximum of 10 penalty units. The current value of a penalty unit is \$110 (see section 4AA of the *Crimes Act 1914* (Cth)). ***[Schedule AP, item 23, subsections 159(6) and (7)]***

1.56 Making a failure to comply with a rectification direction an offence of strict liability is consistent with offences relating to the contravention of other regulatory provisions contained in the SIS Act and Regulations and is necessary to ensure the integrity of the regulatory regime.

1.57 ‘Strict liability’ is defined in section 6.1 of the *Criminal Code Act 1995* (Cth). The strict liability relates to the lack of action by a person to whom the direction was issued, and who is personally liable for the offence. This is designed to discourage careless non-compliance. Additionally, the penalty is less than 60 penalty units and does not include imprisonment.

1.58 The Regulator is not prevented from giving a rectification direction in relation to a contravention if an administrative penalty applies in relation to a particular contravention under section 166 of the SIS Act.

1.59 Additionally, the Regulator is not prevented from imposing or applying for other sanctions for a contravention, such as giving an education direction or issuing a notice of non-compliance, if the rectification direction is not complied with.

Education directions

1.60 An education direction may be given to:

- a trustee of an SMSF, if the Regulator reasonably believes that the trustee has contravened a provision of the SIS Act or the Regulations in relation to the fund: or
- a director of a body corporate that is trustee of an SMSF if the regulator reasonably believes that:
 - the director has contravened a provision of the SIS Act or the Regulations in relation to the fund; or
 - the trustee which is a body corporate has contravened a provision of the SIS Act or the regulations in relation to the fund. ***[Schedule AP, item 23, subsection 160(1)]***

1.61 Provisions contained in the SIS Act and Regulations must be adhered to by all trustees (individual trustees and corporate trustees) of SMSFs. Additionally, certain provisions in the SIS Act or Regulations may apply directly to directors of body corporates that are trustees of SMSFs, for example, section 104A. A trustee or director who does not adhere to these provisions and contravenes the Act may be given an education direction.

1.62 The Regulator may give a person an education direction requiring the person to undertake a specified approved course of education and provide the Regulator with evidence of completion of the course. ***[Schedule AP, item 23, subsection 160(2)]***

1.63 It would be appropriate for the Regulator to issue an education direction to a person where the person's lack of knowledge and/or understanding of their obligations has contributed to them contravening the SIS Act or Regulations.

1.64 It is intended that an approved course of education will provide trustees and directors with appropriate knowledge relating to the contravention that has occurred. Additionally, this will also provide an opportunity for trustees and directors to gain and refresh their overall knowledge of relevant superannuation laws and should reduce the likelihood of trustees and directors committing contraventions in the future.

1.65 An education direction must specify the period within which the person must comply with the direction, which must be a period that is reasonable in the circumstances. ***[Schedule AP, item 23, subsection 160(3)]***.

1.66 In determining the period of time to specify in the direction, the Regulator should have regard to factors including, but not limited to:

- the nature of the education course specified in the direction;
- the circumstances of the person to whom the direction is issued.

1.67 A person to whom an education direction is given must comply with the direction before the end of the specified period. If the person fails to comply with the direction within that period, the person commits an offence of strict liability. [*Schedule AP, item 23, subsections 160(4) and (5)*]

1.68 Making a failure to comply with an education direction an offence of strict liability is consistent with offences relating to the contravention of other regulatory provisions contained in the SIS Act and Regulations and is necessary to ensure the integrity of the regulatory regime.

1.69 ‘Strict liability’ is defined in section 6.1 of the *Criminal Code Act 1995* (Cth). The strict liability relates to the lack of action by a person to whom the direction was issued, and who is personally liable for the offence. This is designed to discourage careless non-compliance. Additionally, the penalty is less than 60 penalty units and does not include imprisonment.

1.70 The Regulator is not prevented from giving an education direction in relation to a contravention if an administrative penalty is imposed for that contravention by section 166 of the SIS Act.

1.71 Additionally, the Regulator is not prevented from imposing or applying for other sanctions for a contravention, such as giving a rectification direction or issuing a notice of non-compliance, if a contravention of the same kind occurs in the future.

Approval of courses of education

1.72 The Regulator may, in writing, approve one or more courses of education for the purpose of giving education directions. [*Schedule AP, item 23, subsection 161(1)*]

1.73 An approved course may be provided by the Regulator or another entity whose course has been approved by the Regulator. However, no fees may be charged in respect of persons who undertake the course. [*Schedule AP, item 23, subsection 161(2)*]

1.74 An approved course of education is intended to provide trustees and directors of a corporate trustee with the appropriate knowledge relating to their compliance obligations under SIS Act and Regulations, and not to impose a monetary penalty. Other sanctions such as

administrative penalties imposed by section 166 will impose a monetary penalty for the contravention. It is therefore considered appropriate that trustees and directors of a corporate trustee should not be subject to fees from providers for undertaking an education course specified in the direction.

1.75 To assist readers, this item makes it clear that an approval of an education course given by the Regulator is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003* (Cth). [*Schedule AP, item 23, subsection 161(3)*]

Costs of course of education

1.76 In keeping with the broad intention that costs incurred under the new administrative penalty regime are payable personally by the person who has committed the breach and not paid or reimbursed from assets of the SMSF, a person must ensure that none of the costs of undertaking the course are paid or reimbursed from the assets of the fund in relation to which the education direction was given. [*Schedule AP, item 23, section 162*]

1.77 Although trustees and directors will not be subject to fees for undertaking a course of education, they may incur other costs in complying with the education direction such as travel costs, costs incurred in notifying the Regulator that the education direction has been complied with and expenses relating to using the internet if the course is undertaken on-line. These costs cannot be paid or reimbursed from the fund.

Review rights

Variation or revocation on the Regulator's own initiative

1.78 The Regulator may, at any time, vary or revoke a rectification direction or an education direction by written notice given to the person to whom the direction was given. [*Schedule AP, item 23, section 163*]

1.79 The Regulator is not limited in when he or she may vary or revoke a rectification direction or an education direction.

Variation on request

1.80 Section 164 allows a person, to whom rectification direction or an education direction is given, to request the Regulator to vary the direction. [*Schedule AP, item 23, subsection 164(1)*]

1.81 Section 164 provides an alternative mechanism for a person to apply to the Regulator to vary a direction. Section 164 does not affect the

ability for a person to, under section 165, object against the Regulator's decision to give the direction or vary one under section 163.

1.82 A person may request the Regulator to vary the direction in any way. For example, the person may request a variation to the period specified in the notice if the person requires more time to undertake a course of education or take action to rectify a contravention.

1.83 The request must be made by written notice to the Regulator before the end of the period specified in the rectification direction or education direction within which the person must comply with the direction. ***[Schedule AP, item 23, subsection 164(2)]***

1.84 A person cannot request the Regulator to vary the direction under section 164 if the period specified in the rectification direction or education direction has passed.

1.85 The request must set out the reasons for making the request. This will assist the Regulator in making a decision on the request. ***[Schedule AP, item 23, subsection 164(3)]***

1.86 The Regulator must decide whether or not to vary the direction in accordance with the request, vary the direction otherwise than in accordance with the request, or to refuse to vary the direction. ***[Schedule AP, item 23, subsection 164(4)]***

1.87 If the Regulator does not make a decision on the request before the end of the period of 28 days after the day on which the request was made, the Regulator is taken, at the end of that period to have refused the request. ***[Schedule AP, item 23, subsection 164(5)]***

1.88 If the Regulator makes a decision within 28 days the Regulator must notify the person of his or her decision. If the decision is to vary the direction, the Regulator must give the person a copy of the varied direction. If the decision is to refuse to vary the direction, or to vary the direction otherwise than in accordance with the request, the Regulator must give the person written reasons for the decision. ***[Schedule AP, item 23, subsection 164(6)]***

1.89 If a person makes a request under section 164, then the period specified in a rectification direction or an education direction within which the person must comply with the direction is extended by one day for each day in the period beginning the start of the day on which the request was made, and ending the earlier of the end of the day the Regulator makes a decision, and the end of the 28 day period given to the Regulator to make a decision on the request. ***[Schedule AP, item 23, subsection 164(7)]***

Taxation objections

1.90 A person may object against a decision of the Regulator in the manner set out in Part IVC of the *Taxation Administration Act 1953* (Cth) (TAA) ***Schedule AP, item 23, section 165***

1.91 A person may lodge an objection if they are dissatisfied with a decision of the Regulator:

- to give a rectification direction or education direction;
- to refuse to vary a direction;
- to vary a direction otherwise than in accordance with a request under section 164.

1.92 The manner and timeframe within which an objection must be made is provided for in Part IVC of the TAA.

Administrative penalties

1.93 Schedule AP inserts Division 3 – Administrative penalties. ***[Schedule AP, item 23, Division 3]***

1.94 If a person contravenes a provision of the SIS Act specified in the table in section 166, the person is liable to an administrative penalty. The amount of the penalty is the amount specified in the table for the provision. ***[Schedule AP, item 23, subsection 166(1)]***

1.95 An administrative penalty is not imposed for all contraventions of the SIS Act, only those listed in the table in subsection 166(1). Additionally, administrative penalties are only imposed by section 166 in relation to SMSFs.

1.96 Persons on whom an administrative penalty may be imposed on are:

- A trustee of an SMSF (including an individual trustee or a corporate trustee); or
- A director of a body corporate that is a trustee of an SMSF. ***[Schedule AP, item 23, subsection 166(2)]***

1.97 Provisions listed in the table in subsection 166(1) must be adhered to by all trustees (individual trustees and corporate trustees) of SMSFs. Additionally, certain provisions in the table apply directly to directors of body corporates that are trustees of SMSFs, for example, see

section 104A. A trustee or director who contravenes these provisions will be liable to an administrative penalty.

1.98 Collection and recovery of administrative penalties imposed by section 166 is dealt with in Part 4-15 of Schedule 1 to the *Taxation Administration Act 1953* (Cth). Division 298 provides machinery provisions for penalties. The term *entity* is used in Schedule 1 of the TAA is defined by section 960-100 of the ITAA97, and provides that the term *entity* may refer to the different capacities in which a person does things. Subsection 166(3) clarifies that if a trustee of an SMSF on whom a penalty is imposed by section 166 is an individual, a reference in Part 4-15 of Schedule 1 or Division 298 of the TAA to an entity is taken to be a reference to that individual in their personal capacity. [**Schedule AP, item 23, subsection 166(3)**]

Administrative penalty and civil penalty

1.99 Despite the operation of section 166, the Regulator may cause proceedings against a person to commence for a contravention of a civil penalty provision. Section 167 ensures that whether or not such proceedings are withdrawn, the person is not liable to pay the administrative penalty. If an amount of the administrative penalty has been paid, then it is to be refunded or applied by the Regulator in total or partial discharge of another tax-related liability. [**Schedule AP, item 23, section 167**]

1.100 For the avoidance of doubt, section 8ZE of the TAA deals with the situation of a person against whom a criminal prosecution is instituted.

Penalty must not be reimbursed from the fund

1.101 An administrative penalty imposed by section 166 must not be paid or reimbursed from the assets of the fund in relation to which the administrative penalty was imposed. [**Schedule AP, item 23, section 168**]

1.102 Penalties imposed under the new administrative penalty regime are payable personally by the person who has committed the breach and must therefore not be paid or reimbursed from assets of the SMSF.

Joint and several liability of directors of corporate trustees

1.103 If a trustee that is a body corporate becomes liable to an administrative penalty under section 166, then the directors of that body corporate are jointly and severally liable to pay the amount of the penalty imposed on the body corporate. [**Schedule AP, item 23, section 169**]

1.104 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 section 284-95 of the TAA.

Examples

1.105 The following examples explain how an administrative penalty may be imposed on persons who are directors of a corporate trustee of an SMSF.

Example 1.1– corporate trustee that contravenes a provision

Stuart and Alison are members and the directors of a body corporate that is the trustee of the Green SMSF. Stuart and Alison fail to ensure that accounts and statements for the Green SMSF are prepared for the 2013-14 year of income. As a result, the trustee has contravened section 35B.

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 the administrative penalty of \$1,100 imposed on the body corporate.

Example 1.2 – director of corporate trustee that contravenes a provision

Marita and Peter become directors of a body corporate that is trustee of the Blue SMSF in September 2013. Peter fails to sign a trustee declaration and contravenes subsection 104A(2).

An administrative penalty of 10 penalty units is imposed on Peter. Peter will be liable to the administrative penalty of \$1,100.

Taxation Administration Act 1953

1.106 The machinery provisions for penalties in Division 298 of the TAA will apply to an administrative penalty imposed by section 166 of the SIS Act. *[Schedule AP, item 27, Schedule 1, paragraph 298-5(d)]*

1.107 The machinery provisions in Division 298 deal with:

- how the Regulator must notify a person of their liability of an administrative penalty;
- due date for payment of the administrative penalty;
- ability for the Regulator to remit all or part of the administrative penalty and objection rights; and

- the imposition of general interest charge on unpaid penalties.

1.108 A liability to an administrative penalty imposed by section 166 of the SIS Act is a tax-related liability for the purposes of subdivision 255-A of Schedule 1 of the TAA.

1.109 The collection and recovery rules contained in Part 4-15 of Schedule 1 of the TAA will apply to administrative penalties imposed by section 166.

Application and transitional provisions

1.110 The amendments made by Schedule AP apply to contraventions that occur on or after 1 July 2013. *[Schedule AP, item 28]*

Consequential amendments

1.111 There are no consequential amendments.

EXPOSURE-DRAFT

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Chapter 2 Statement of compatibility with human rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

Overview of the Bill

2.1 This Bill introduces administrative consequences and penalties for contraventions of the SIS Act and Regulations by trustees of SMSFs and directors of corporate trustees of SMSFs.

Human rights implications

2.2 This Bill does not engage any of the applicable rights or freedoms.

Conclusion

2.3 This Bill is compatible with human rights as it does not raise any human rights issues.

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