

# When & When not to Lodge an Auditor Contravention Report

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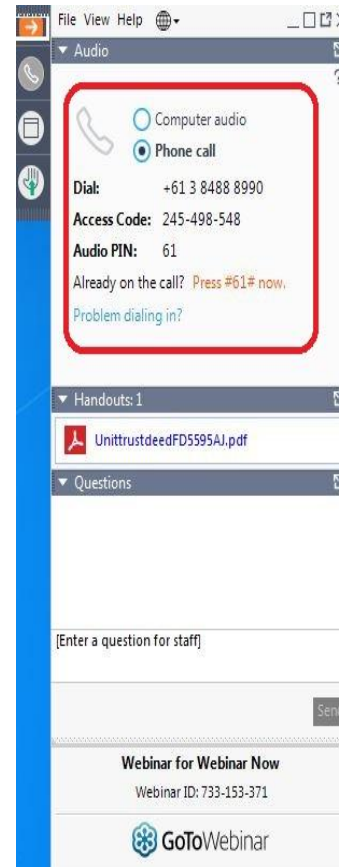
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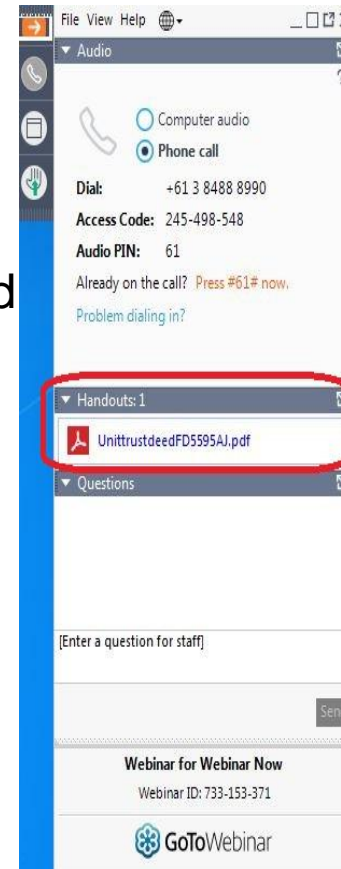
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# House Keeping – Hand Out

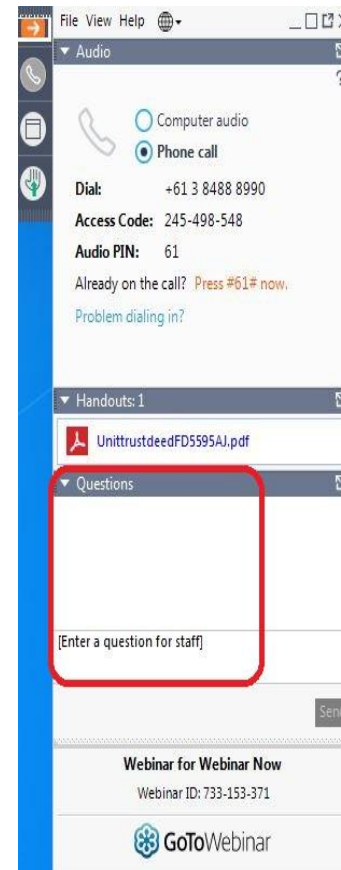
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# What is a Complying Superannuation Fund

## Section 45 SIS Act

Complying superannuation fund

(1) A fund is a complying superannuation fund **for the purposes of the Income Tax Assessment Act** in relation to a year of income (the ***current year of income*** ) if, and only if:

Comply .... to obtain tax concessions

a) Lower Tax Rate    b) ECPI

# Requirement of Audit

## Section 35C

### Audit of accounts and statements

For each year of income, each trustee of a superannuation entity that is a self managed superannuation fund must ensure that **an approved SMSF auditor is appointed** to give the trustee or trustees **a report, in the approved form**, of the operations of the entity for that year.

# Requirement for Audit Report

Section 35C (5)

- (b) must include a statement by the auditor as to the extent of the auditor's compliance with the **auditor independence requirements** referred to in [paragraph](#) 128F(d); and
- (c) must include a statement by the auditor as to whether, in the auditor's opinion, each trustee of the entity has, during the year of income, **complied with the provisions of this Act** and the regulations that are **identified in the form.**



# What is a Contravention

## Section 39

### Meaning of contravention

- (1) For the purposes of this Division, a contravention of a regulatory provision is to be ignored **unless the contravention is:**
- (a) an offence; or
  - (b) a contravention of a civil [penalty](#) provision (Section 193); or
  - (c) a contravention of a provision mentioned in [paragraph](#) 38A(ab).
- (1A) In relation to a regulatory provision that states that a person commits an offence if they engage, or fail to engage, in specified conduct, a person is, for the purposes of this Division, taken to contravene the provision **if the person engages, or fails to engage, in that conduct.**

# Civil Penalty Provisions

## Section 193

Each of the following provisions of this Act is a civil [penalty](#) provision:

- (a) [subsection](#) 62(1);
- (b) [subsection](#) 65(1);
- (c) [subsection](#) 67(1);
- (ca) [subsection](#) 68B(1);
- (d) [subsection](#) 84(1);
- (e) [subsection](#) 85(1);
- (f) [subsection](#) 95(1);
- (g) [subsection](#) 97(1);
- (h) section 98;
- (i) [subsection](#) 106(1);
- (j) [subsection](#) 109(1);
- (ja) [subsection](#) 109(1A);
- (k) [subsection](#) 117(3);
- (l) [subsection](#) 242M(1);
- (m) section 388;
- (n) section 394.

# What is a Provision of the Act

## Section 38A

- (a) a provision of this Act or the regulations; or
- (aa) a provision of the [Financial Sector \(Collection of Data\) Act 2001](#); or
- (ab) for a superannuation entity that is a self managed superannuation [fund](#)--any of the following provisions in Schedule 1 to the *Taxation Administration Act 1953*:
  - (i) [subsections](#) 284-75(1) and (4) and section 284-95;
  - (ii) Division 390;
  - (iii) [subsection](#) 136-80(1); or
- (b) any of the following provisions of the [Corporations Act 2001](#) as applying in relation to financial products (within the meaning of Chapter 7 of that Act) that are interests in the superannuation entity:
  - (i) [subsection](#) 1013K(1) or (2);
  - (ii) [subsection](#) 1016A(2) or (3);
  - (iii) [subsection](#) 1017B(1);
  - (iv) [subsection](#) 1017C(2), (3) or (5);
  - (v) [subsection](#) 1017D(1);
  - (vi) [subsection](#) 1017DA(3);
  - (vii) [subsection](#) 1017E(3) or (4);
  - (viii) [subsection](#) 1020E(8) or (9);
  - (ix) [subsection](#) 1021C(1) or (3);
  - (x) [subsection](#) 1021D(1);
  - (xi) [subsection](#) 1021E(1);
  - (xii) [subsection](#) 1021O(1) or (3);
  - (xiii) section 1041E;
  - (xiv) [subsection](#) 1041F(1);
  - (xv) [subsection](#) 1043A(1) or (2);
  - (xvi) any other provisions that are specified in regulations made for the purposes of this subparagraph; or
- (c) any of the following provisions of the [Corporations Act 2001](#):
  - (i) [subsection](#) 1021NA(1), (2) or (3);
  - (ii) [subsection](#) 1021NB(1), (2) or (3);
  - (iii) [subsection](#) 1021NC(1), (2), (3) or (4).

# What is a Contravention

Either an:

- **Action prohibited (Engages)** under the SISA and SISR
  - Lending to a related party (**Sec. 65**)
  - SMSF borrows (**Sec. 67**)
- **Inaction (Fails to Engage) that results** in the trustee not meeting their obligations under the SISA and SISR.
  - Not withdrawing the minimum pension amount (**Sec 1.06**)
  - Not adding member as Director of Corporate trustee of the SMSF (**Sec 17A**)

# Trustees Duty to notify the Regulator of significant adverse events

## Section 106

If a trustee of a superannuation entity becomes aware of the occurrence of an event having a significant adverse effect on the financial position of the entity, the trustee must ensure that a **trustee of the entity immediately notifies the Regulator in writing of the event.**

# Obligations of auditors--compliance

## Section 129

- (a) the person forms the opinion that it is likely that a contravention of any of the following may have occurred, may be occurring, or may occur, in relation to the entity:

### Trustee and Regulator to be told about the matter

## Section 130

- (a) the person forms the opinion that the financial position of the entity may be, or may be about to become, unsatisfactory; and

### Regulator and trustee to be told about the financial position

# Auditor can be liable for damages

## Section 218

### Recovery of profits, and compensation for loss, resulting from contravention

- (1) If a civil [penalty](#) provision in relation to a superannuation entity is contravened **by a person other than a trustee of the entity**, a trustee of the entity may, by proceedings in a court of competent jurisdiction, recover from the person, as a debt due to the trustee:
- (a) if that or another person has made a profit because of the act or omission constituting the contravention--an amount equal to the amount of that profit; and
  - b) **if the entity has suffered loss or damage as a result of that act or omission--an amount equal to the amount of that loss or damage;**

# What needs to be Reported

1. **Financial position** of the fund may be, or may be about to become, **unsatisfactory**
2. **Contravention** of the *Superannuation Industry (Supervision) Act 1993* (SISA) or SISR specified in the contravention report **may have occurred, may be occurring or may occur**, and the contravention meets the prescribed reporting criteria (Section 38 etc)
3. **Anything else** you consider will assist ATO in performing their duties under the SISA and the SISR



# Types of contraventions reported to the ATO (up to 30 June 2016)

Contravention types	Number (%)	Value (%)
Loan to member/financial assistance (Sec. 65)	20.9%	14.4%
In-house assets (Sec. 71)	18.3%	27.2%
Administrative-type contraventions (Various)	12.0%	1.8%
Separation of assets (Section 52 (2) (d))	12.9%	26.2%
Operating standard-type contraventions (Various)	8.3%	6.5%
Borrowings (Sec. 67)	8.0%	7.8%
Sole purpose (Sec. 17A)	7.8%	5.7%
Investment at arms length (Sec. 109)	7.5%	7.4%
Other	2.8%	0.7%
Acquisition of assets from related parties (Sec. 66)	1.5%	2.3%
<b>Total</b>	<b>100%</b>	<b>100%</b>

# 3 types of contraventions represent 67.8% of the value of assets

1. In-house assets (**Section 71**)
2. Separation of assets (**Section 52 (2) (d)**)
3. Loans to members/financial assistance (**Section 65**)

# 4 types of contraventions represent 64% of number of contraventions

1. Loans to members/financial assistance (**Section 65**)
2. In-house assets (**Section 71**)
3. Administrative-type contraventions (**Various**)
4. Separation of assets (**Section 52 (2) (d)**)

# SEC. 65 Lending to members of regulated superannuation fund prohibited

- (1) A trustee or an investment manager of a regulated superannuation fund must not:
- (a) **lend money** of the fund to:
    - (i) a **member** of the fund; or
    - (ii) a **relative of a member** of the fund; or
  - (b) give any other **financial assistance** using the resources of the fund to:
    - (i) a **member** of the fund; or
    - (ii) a **relative of a member** of the fund.

# SECT 71 Meaning of in-house asset

- (1) For the purposes of this Part, an in-house asset of a superannuation fund is an asset of the fund that is a **Loan to**, or an **investment in**, a **related party of the fund**, an investment in a **related trust** of the fund, or an asset of the fund subject to a **lease or lease arrangement** between a trustee of the fund and a related party of the fund,

## But does not include:

- (g) if the superannuation fund has fewer than 5 members real property subject to a lease, or to a lease arrangement enforceable by legal proceedings, between a trustee of the fund and a related party of the fund, if, throughout the term of the lease or lease arrangement, **the property is business real property** of the fund; or
- (h) an investment in a **widely held unit trust**; or
- (i) property owned by the superannuation fund and a related party as tenants in common, **other than property subject to a lease or lease arrangement** between a trustee of the fund and a related party ;

# Sec 52 Covenants to be included in governing rules

## Section 52

If the governing rules of a superannuation entity do not contain covenants to the effect of the covenants set out in subsection (2), **those governing rules are taken to contain covenants to that effect**

## Section 55

### Consequences of contravention of covenant

Covenants must be complied with

- (1) A person must not contravene a covenant contained, or taken to be contained, in the governing rules of a superannuation entity.

# Money and other assets to be kept separate

## ***Reg 4.09A***

to **keep the money and other assets of the entity separate from any money and assets**, respectively:

- i) that are held by the trustee personally; or
- ii) that are money or assets, as the case may be, of a standard employer-sponsor, or an associate of a standard employer-sponsor, of the entity;

# Reporting Contraventions

You must report contraventions and other matters **resulting from an event**.

An event is something that may lead, or has led, to one or more contraventions. If an event leads to a contravention of **more than one section or regulation**, you should **list each contravention** that relates to the event

- E. G : Acquiring an restricted asset (Gold or residential property) from a related party with borrowing

You must **lodge a report within 28 days of completing the audit** if, in the normal course of conducting the audit, you form the opinion that a contravention of the SISA or SISR has occurred either:

- during the year of income being audited
- before or after the year of income being audited.

The contravention **must meet the reporting criteria**.



# Reporting Criteria

## Test 1 Fund definition test

Consider if the fund meets the definition of an SMSF  
(**Section 17A**)

## Test 2: New fund test

If the fund is **less than 15 months old** from date of establishment (date it first holds assets) and value of any single contravention is **more than \$2000**

## Test 3: Trustee behaviour test

Trustees received advice of a contravention and they have breached again (**breached the same section or regulation**)



Report  
Contraventions

# Test 3, 4 & 5 Trustee behaviour test

Trustees received advice of a contravention previously from **reviewing the fund's prior-year working papers**

Or

Management letter issued by the **previous auditor** =  
breached again

Contravention of previous year is **not rectified** at the time of  
the audit

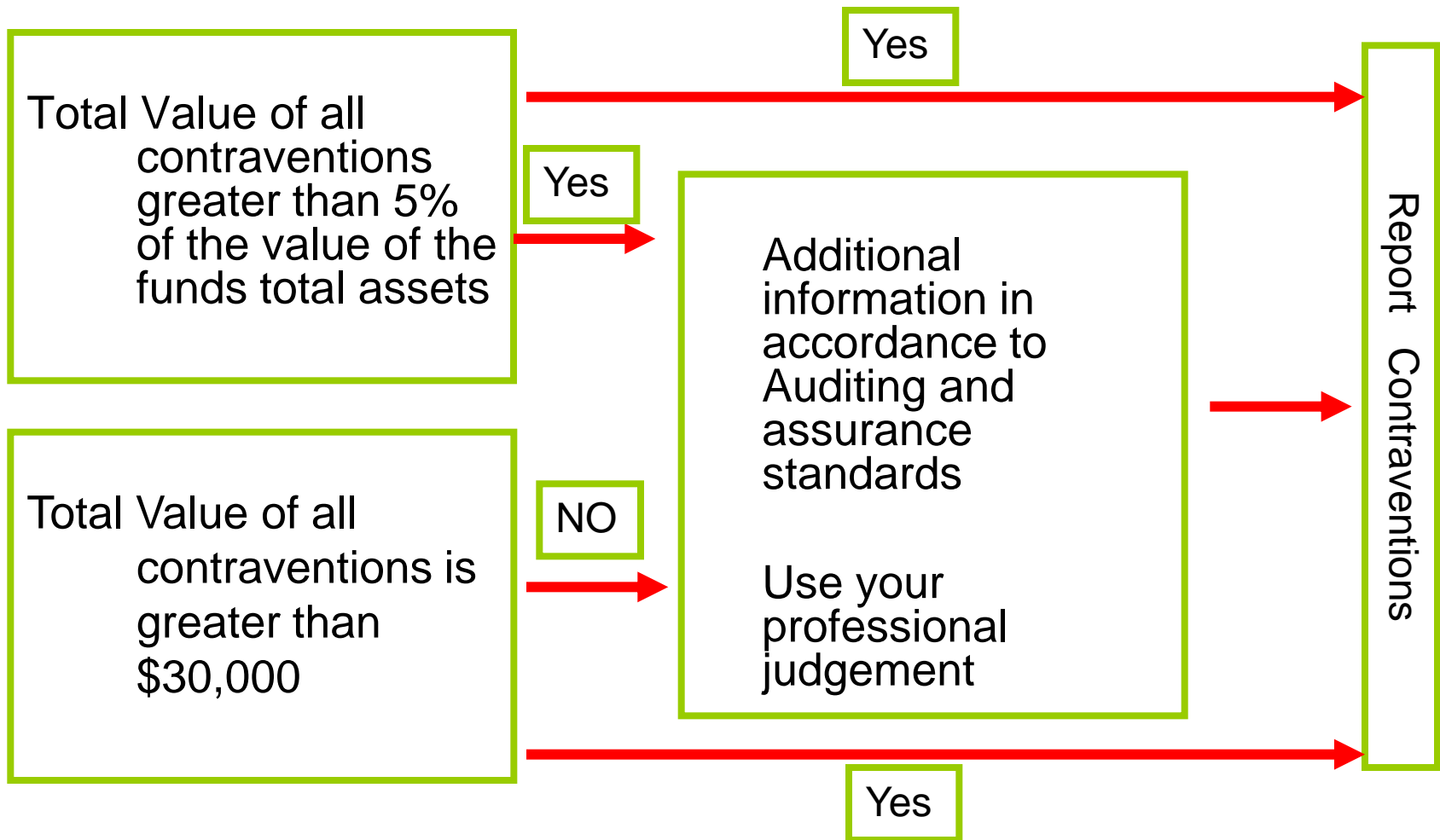
14 Day have expired from requesting documents

**Sec 35C(2)**



Report  
Contraventions

# Test 6 & 7 Financial threshold test



# Financial Position and Other Regulatory information of ACR

## Question 18

While performing your duties, did you form the opinion that the SMSF's **financial position is, or may become, unsatisfactory?**

## Question 19

Do you want to **provide any additional information** about the fund or trustees that will help us perform our functions under the SISA or SISR?

# Administrative consequences for contraventions

## Section 157 & 159

Allows the Regulator to give **rectification directions** and **education direction**

The Regulator may give the person a written direction (a ***rectification direction*** ) requiring the person:

- (a) to take specified action to rectify the contravention; and
- (b) to provide the Regulator with evidence of the person's compliance with the direction.  
requiring the person:

To undertake a specified approved course of education (see section 161) – cannot be paid by the SMSF

Imposes administrative penalties for certain contraventions.

# Some Auditors never lodge ACR's

Reporting the breach to the ATO **doesn't necessarily mean** that a **super fund will be penalised** for breaking the rules, particularly if the SMSF takes **immediate action to rectify the situation**.

If a contravention involves a **financially insignificant amount**, and it is a first 'offence' then a fund auditor is **not required to report** the breach to the ATO, except when the auditor is concerned about the fund's financial position

A fund auditor may then use their **professional judgement** and report the breach to the ATO

# Question Time

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