

The Auditor-General
Audit Report No.40 2011–12
Performance Audit

Interpretative Assistance for Self Managed Superannuation Funds

Australian Taxation Office

Australian National Audit Office

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Canberra ACT
8 June 2012

Dear Mr President
Dear Mr Speaker

The Australian National Audit Office has undertaken an independent performance audit in the Australian Taxation Office in accordance with the authority contained in the *Auditor-General Act 1997*. Pursuant to Senate Standing Order 166 relating to the presentation of documents when the Senate is not sitting, I present the report of this audit, and the accompanying brochure, to the Parliament. The report is titled *Interpretative Assistance for Self Managed Superannuation Funds*.

Following its presentation and receipt, the report will be placed on the Australian National Audit Office's Homepage—<http://www.anao.gov.au>.

Yours sincerely



Steve Chapman
Acting Auditor-General

The Honourable the President of the Senate
The Honourable the Speaker of the House of Representatives
Parliament House
Canberra ACT

AUDITING FOR AUSTRALIA

The Auditor-General is head of the Australian National Audit Office (ANAO). The ANAO assists the Auditor-General to carry out his duties under the *Auditor-General Act* 1997 to undertake performance audits, financial statement audits and assurance reviews of Commonwealth public sector bodies and to provide independent reports and advice for the Parliament, the Australian Government and the community. The aim is to improve Commonwealth public sector administration and accountability.

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Abbreviations

ANAO	Australian National Audit Office
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ASMA	Australian SMSF Members Association
ATO	Australian Taxation Office
ATO ID	ATO Interpretative Decision
CPA Australia	Certified Practising Accountants Australia
CTU	Complex Technical Unit
CWC	Client, Work and Case management
IGT	Inspector-General of Taxation
IQF	Integrated Quality Framework
JCPAA	Joint Committee of Public Accounts and Audit
LRBA	Limited Recourse Borrowing Arrangement
MOU	Memorandum of Understanding
NTLG	National Tax Liaison Group
NTLG-STG	NTLG-Superannuation Technical Sub Group
OECD	Organisation for Economic Cooperation and Development
PTI	Priority Technical Issue
SCC	Superannuation Consultative Committee
SIS Act	<i>Superannuation Industry (Supervision) Act 1993</i>

SIS Regulations	<i>Superannuation Industry (Supervision) Regulations 1994</i>
SMSF	Self Managed Superannuation Fund
SPAA	SMSF Professionals Association of Australia
T3DM	Transforming Tax Technical Decision Making

Summary and Recommendations

Summary

Introduction

Superannuation and self managed superannuation funds

1. Superannuation is a long-term vehicle for building retirement savings and is a key element of the Government's policies to address the financial independence of Australia's ageing population. In 2009–10, superannuation was the largest financial asset of Australian households. Three-quarters of all households had some superannuation assets, averaging \$154 000 per household.¹ Over the period from June 1999 to June 2011, total nationwide superannuation assets grew from \$411 billion to \$1340 billion.² By 2035, Australians are projected to have increased their collective superannuation savings to \$6100 billion.³

2. Superannuation funds are broadly categorised under the Superannuation Industry (Supervision) Act 1993 (SIS Act) into large funds, regulated by the Australian Prudential Regulation Authority (APRA) and self managed superannuation funds (SMSFs), which are regulated by the Australian Taxation Office (ATO). APRA-regulated funds usually involve a large number of members who pool contributions together. The capital created is professionally managed by trustees in compliance with superannuation law. Members may have a choice about the levels of risk they accept in their managed investments, but little or no influence over the specific investment strategies. In contrast, SMSFs must have fewer than five members who are also trustees. SMSF trustees decide on the investment strategies for their funds and are responsible for the compliance of the funds with the SIS Act and Regulations.

3. The SMSF sector is the largest superannuation sector by number of funds, and in 2011 held 30 per cent of all superannuation assets (\$407.6 billion). Ninety-nine per cent of all superannuation funds were SMSFs. As at June 2011,

¹ Australian Bureau of Statistics, *Household Wealth and Wealth Distribution 2009–10*, 2011, p. 4.

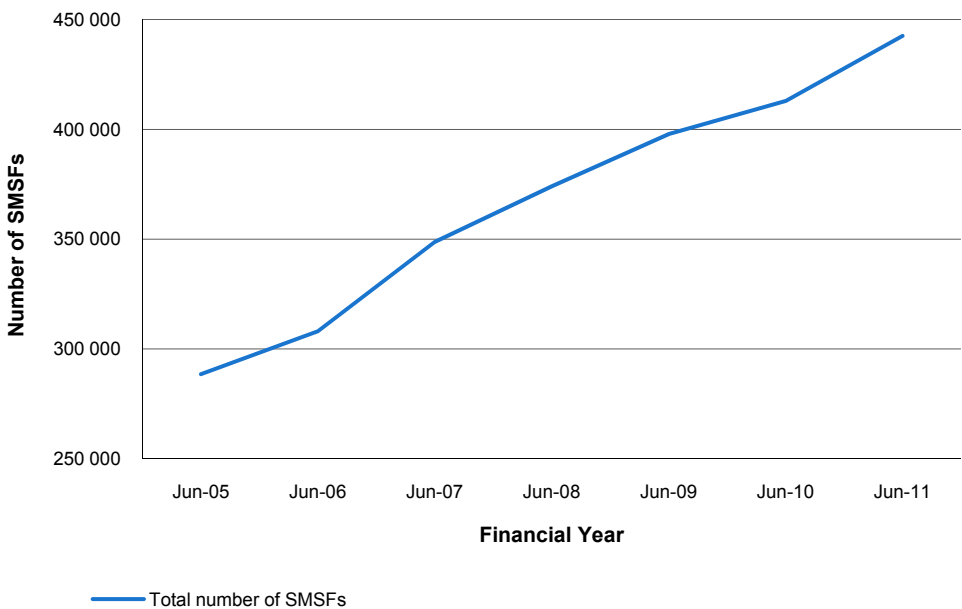
² Attorney's-General Department, *Super System Review Final Report, Part One - Overview and Recommendations*, 2010 p. 61 and Australian Prudential Regulation Authority, *Statistics – Annual Superannuation Bulletin, June 2011* (issued 29 February 2012), p. 4.

³ Attorney's-General Department, *op. cit.* p. 5, based on superannuation policy settings in force in June 2010.

there were 442 528 SMSFs, with 841 283 members.⁴ The SMSF sector has been growing rapidly (Figure 1). Since 2004–05, the number of SMSFs has increased by 64 per cent. During 2010–11, 32 875 new funds were registered, compared to 29 578 in the previous financial year.⁵

Figure 1

Growth in total number of SMSFs, June 2005 to June 2011



Source: ANAO analysis of ATO, *Self Managed Super Funds Statistical Report – December 2011*.

4. The value of the SMSF sector has also been growing rapidly in recent years, increasing from \$162 billion to \$407.6 billion (estimated total assets) in the six years to June 2011, an average growth rate of 19 per cent. Comparatively, the average growth rate of APRA-regulated funds was 10 per cent.⁶

⁴ Australian Prudential Regulation Authority, *Statistics – Annual Superannuation Bulletin, June 2011* (issued 29 February 2012), pp. 4 and 26.

⁵ Australian Taxation Office, *Self Managed Super Funds Statistical Report – Dec. 2011*, Available from <<http://www.ato.gov.au/superfunds/content.aspx?menuid=0&doc=/content/00309172.htm&page=6&H6>> [accessed 29 March 2012]

⁶ Australian Prudential Regulation Authority, op. cit., p. 30.

5. SMSF trustees are on average older, earn a higher income and have larger superannuation balances.⁷ For these people the level of personal control over the investment strategies, and a perception that management fees are lower than those of APRA-regulated funds, are among the key factors making SMSFs an attractive retirement savings vehicle. However, SMSF trustees also assume a number of specific risks, including having sole responsibility for meeting all legal obligations in relation to the compliance of their fund. While some trustees may decide to rely on advisers (such as financial or tax advisers) to help them with their investment decisions and with the management of their fund, they remain personally accountable for the compliance of their decisions with the SIS Act and Regulations. Significant penalties apply for non-compliance, which can include disqualification as a trustee, heavy financial penalties, prosecution and imprisonment.

Interpretative assistance for SMSFs

6. The ATO considers interpretative assistance to be a core part of the Commissioner's role as the regulator of SMSFs.⁸ Interpretative assistance provides the Commissioner's opinion on the application of taxation and superannuation law. The provision of interpretative assistance is a cornerstone of the ATO's self-assessment and compliance regime and its importance is recognised in the ATO Taxpayers' Charter which states that the ATO:

... aim[s] to provide accurate, consistent and clear information to help you understand your rights and entitlements and meet your obligations.⁹

7. Since 2000 and following the identification of a knowledge deficiency among SMSF trustees in relation to their obligations, the ATO has considered that the provision of a range of education products would be the most effective way of improving trustees' knowledge, understanding and compliance with their obligations under the SIS Act and Regulations.¹⁰

⁷ Attorney's-General Department, *Super System Review Final Report*, op. cit., p. 218.

⁸ Australian Taxation Office, *Practice Statement Law Administration 2009/5 – Provision of Advice and Guidance by the ATO in relation to the application of the Superannuation Industry (Supervision) Act 1993 and the Superannuation Industry (Supervision) Regulation 1994 to Self Managed Superannuation Funds*, 2009.

⁹ Australian Taxation Office, *Taxpayers' Charter: What you need to know*, June 2010, p. 9. Available from <http://www.ato.gov.au/content/downloads/cor63133_n2548.pdf> [accessed 15 February 2012].

¹⁰ Australian Taxation Office, *Practice Statement Law Administration 2009/5*, op. cit., p. 9.

8. Since 2009¹¹, the ATO has defined SMSF interpretative assistance as comprising the following key products¹²:

- SMSF public rulings, determinations and product rulings: these are published statements of the Commissioner's opinion of how a provision of the SIS Act or Regulations applies, or would apply, to SMSFs generally, rather than in respect of the specific circumstances of a particular SMSF;
- Specific advice and written guidance¹³: These apply to specific transactions or arrangements that have been or might be entered into by the trustees of a SMSF. Whilst specific advice provides detailed information relating to a particular situation, written guidance delivers general assistance that cannot cover all individual circumstances of the recipient; and
- SMSF publications, which include brochures and ATO website material.

9. The volume of SMSF interpretative assistance products delivered is small compared with the interpretative assistance products delivered on tax matters. For instance, the ATO has delivered nine SMSF public rulings since 2007–08, whereas it has delivered 32 tax public rulings. About 400 SMSF specific advice products were produced in 2009–10 and 2010–11, compared with approximately 18 000 tax private rulings.¹⁴

10. While the ATO provides interpretative assistance on the application of taxation *and* superannuation law, there is a substantive difference between the two types: a large proportion of taxation advice is legally or administratively binding on the Commissioner, and as such, provides the highest level of protection for taxpayers who rely on it.¹⁵ This means that if the taxation advice

¹¹ Before 2009, specific advice and written guidance were not defined SMSF advice products. These types of advice were delivered under the form of 'written correspondence'.

¹² Australian Taxation Office, *Practice Statement Law Administration 2009/5*, op. cit.

¹³ Oral guidance, although it exists as a form of SMSF interpretative advice in ATO's documentation, is not currently implemented. Customers are able to contact a call centre where they can access general information about SMSFs, however the ATO advised that any specific request should be made in writing.

¹⁴ Private rulings are comparable to SMSF specific advices in all but two key aspects: Tax private rulings are legally binding on the Commissioner, and they are published on the ATO website, in a de-identified form.

¹⁵ Australian Taxation Office, *Practice Statement Law Administration 2008/3 – Provision of Advice and Guidance by the ATO*, 2008, p. 3.

given by the ATO is incorrect and the taxpayer makes a mistake as a result, they are protected from paying tax that would otherwise be payable under the law and also from false and misleading statement penalties or interest charges.

11. By contrast, SMSF advice is not legally or administratively binding on the Commissioner and a trustee that relies on SMSF advice remains responsible for their action under SIS Act and Regulations. However, the ATO states that the fact that the trustee acted in accordance with that advice would be considered a relevant factor in their favour in the Commissioner's exercise of any discretion as to what action would be taken in response to a breach of the law.¹⁶

Audit objective and criteria

12. The objective of the audit was to assess the effectiveness of the ATO's management of its interpretative assistance activities for SMSFs.

13. The audit assessed whether:

- the ATO's current interpretative assistance framework takes adequate account of the various aspects of quality;
- trustees and other SMSF stakeholders are satisfied that the ATO's interpretative assistance processes meet their needs and that they have appropriate means of contributing to and providing feedback on interpretative assistance products and services; and
- information provided by the ATO in relation to SMSF interpretative assistance is readily accessible to trustees and other SMSF stakeholders.

Overall conclusion

14. The self managed superannuation fund (SMSF) sector has been growing rapidly in recent years, with the value of SMSF assets increasing by 19 per cent per year in the six years to June 2011. This sector was, at June 2011, the largest superannuation sector by number of funds and held 30 per cent of all superannuation assets. While SMSFs provide individuals with a higher degree of control over their investment strategy, trustees also assume sole responsibility for their financial security in retirement and for the compliance of their funds with the SIS Act and regulations. The provision of interpretative

¹⁶ Australian Taxation Office, *Practice Statement Law Administration 2009/5*, op. cit., p. 22.

assistance to improve SMSF trustees' knowledge, understanding and compliance with their legal obligations is an important part of the Commissioner's role as the regulator of SMSFs.

15. Since December 2007, when the first SMSF determination was released, the ATO has produced nine public rulings and six determinations. In 2009–10 and 2010–11, the ATO has also produced 386 specific advice and 776 written guidance products. These numbers are small compared with the volume of interpretative assistance products delivered on tax matters and with the number of SMSFs.

16. Overall, the ATO's management of SMSF interpretative assistance is effective and uses many of the elements which support the delivery of interpretative assistance in relation to taxation law. The ATO has implemented sound processes for the development of SMSF interpretative assistance products. Nevertheless, one area requiring a stronger focus is the timeliness of delivery, which has been inconsistent over time; fewer than half of the SMSF public rulings and determinations have been delivered within the ATO's standard timeframe¹⁷ since 2008. There would also be value in the ATO assessing the extent to which interpretative assistance products meet the expectations of the SMSF market. In this regard, accessing information on SMSF matters and on interpretative assistance is difficult, and could be impacting negatively on the level of demand for interpretative assistance products, in particular originating from trustees.

17. The ATO has in place a suite of arrangements to engage key SMSF stakeholders in the development of interpretative assistance. These arrangements ensure that the role of other government agencies (Treasury, APRA and ASIC) in the administration of SMSFs is recognised. The ATO also effectively engages industry groups (representing professionals supporting the SMSF market) in the process of developing interpretative assistance. There would be benefit in the ATO considering ways to increase the direct engagement of trustees, through the further involvement of organisations representing SMSF trustees in the consultation process.

18. A quality assurance process (the Integrated Quality Framework, IQF) has been used across the ATO since 2009 and is applied to SMSF specific

¹⁷ The standard timeframe is the timeframe the ATO applies as a general rule to the delivery of rulings and determinations. There are no service standards for these products.

advice and written guidance products. The IQF provides a valuable perspective on the quality of these products. The timeliness of interpretative assistance was an issue in 2009–10 and 2010–11, with a significant proportion of interpretative assistance products not being delivered within the ATO's applicable timeframes. The ATO has established a range of measures, including the Transforming Tax Technical Decision Making (T3DM) project, which should assist in timelines being more consistently met. Given the potential implications for trustees of having to wait for long periods of time for the ATO's decisions, the timeframe to produce SMSF public rulings (16 months as a general rule) could be reconsidered, to match that of taxation public rulings (12 months).

19. Although the model for delivery of SMSF interpretative assistance closely mirrors the model used for taxation matters, a substantive difference between the two is the level of protection that trustees can expect. Unlike tax interpretative assistance, SMSF assistance is not legally or administratively binding on the Commissioner. This difference may not be apparent to all trustees, and it is not certain that trustees fully understand the legal weight of SMSF interpretative assistance.

20. The ATO has been delivering SMSF interpretative assistance in its current form since 2009. An assessment of the extent to which these products meet the expectations of the market would be timely. In particular, such an assessment could confirm to the ATO that interpretative assistance products are appropriate to the market's requirements and circumstances, and that trustees understand the level of legal reliance that can be given to SMSF interpretative assistance.

21. The ATO provides access to a wide range of information and interpretative assistance products to the SMSF market. Most of these products are posted on the ATO website, which is an essential gateway. Navigating through this information, however, is difficult, which may impact on the useability of the information, especially by non-professionals. Improving access to the ATO information about SMSFs and about interpretative assistance products may, in turn, increase the level of demand for these products. In this way the ATO could further support SMSF trustees who wish to be 'genuinely self-directed and self-sufficient'.¹⁸

¹⁸ Attorney's-General Department, *op. cit.*, p. 219.

22. To support the ATO's efforts to make ongoing improvements to the delivery of interpretative assistance to SMSFs, the ANAO has made two recommendations. These recommendations concern the ATO assessing the extent to which interpretative assistance products meet the expectations of the SMSF market, and improving access to SMSF information and interpretative assistance products.

Key findings by chapter

Developing SMSF interpretative assistance (Chapter 2)

23. While the ATO is the regulator for SMSFs under the SIS Act and Regulations, other government agencies also have a role in the administration of this legislation. A suite of arrangements are in place for the ATO to engage Treasury, APRA and ASIC in the administration of interpretative assistance for SMSFs. These arrangements address the risks of inconsistency and inefficiencies that may occur in matters that involve cross-agency partnerships, and support the effective development of interpretative assistance for SMSFs.

24. Two key consultative committees are engaged in the development of SMSF public rulings and determinations: the National Tax Liaison Group – Superannuation Technical Subgroup (NTLG–STSG) and the Superannuation Consultative Committee (SCC). These two forums, in particular the NTLG–STSG, provide industry with an opportunity to directly and effectively participate in the development of the ATO's precedential views. From the ATO's perspective, the committees represent a conduit to gather intelligence and marshal industry expertise to assist in developing the ATO's understanding of the significance and implications of issues affecting the industry. Membership to the two committees primarily includes professional organisations. Groups directly representing SMSF trustees do not have a strong representation at these committees. The ATO should continue to monitor the emergence of groups representing SMSF trustees and consider further including these groups in the consultative committees.

25. Since 2009, the ATO has used a quality assurance process (the Integrated Quality Framework, IQF) for written interpretative decision-making, which aims to continuously improve and assure the quality of specific advice and written guidance. Overall, the IQF results for specific advice and written guidance products and for 2009–10 and 2010–11 indicated a generally high level of performance against all the criteria measuring quality.

The criteria that did not rate as well were appropriateness, administrative soundness and timeliness.

26. The impact of having to wait excessively for the ATO's advice can be significant for trustees and their representatives; trustees may miss market opportunities or take financial decisions before advice is received and a lack of certainty can affect industry members' ability to advise their clients. In this context, the ATO's timeliness performance in delivering SMSF interpretative assistance products has not been consistent over time. Since 2008, fewer than half of the public rulings and determinations have been delivered within the ATO's standard timeframe. In 2009–10, just 67 per cent of specific advice and 53 per cent of written guidance products were delivered within the specified 28-day timeframe.

27. The ATO does not conduct research specifically aimed at assessing the satisfaction of trustees and their representatives with SMSF interpretative advice products. Research on satisfaction with information and advice conducted by the ATO among tax agents indicates that just 59 per cent of respondents are satisfied or very satisfied. SMSF industry representatives also indicated that while the advice and information provided by the ATO were considered valuable overall to professional advisers, they could be too technical and legalistic, narrowly focused and impractical for trustees.

Access to SMSF information and interpretative assistance (Chapter 3)

28. SMSF trustees are typically tertiary educated and are characterised by a desire to control their superannuation investment choices. A significant proportion of trustees choose to engage a professional adviser to help them set up and manage their fund. However, even in this case, trustees remain solely accountable for the decisions made and for the compliance of the fund with the SIS Act and Regulations. Consequently, it is important that the ATO, in order to effectively fulfil its role as SMSF regulator and to achieve high levels of voluntary compliance among trustees, ensures that trustees are able to access easily SMSF information and interpretative assistance products.

29. The ATO has a wide collection of material and information services available to trustees through a range of channels. However, access to this material is not straightforward:

- information on the website is not organised, overall, in a logical or practical manner;

- access to the 'Life Cycle' brochures and the superannuation call centre, which are expected to provide general information on SMSFs, is difficult because information about these two sources is not in a prominent location in the website;
- while the newsletter SMSF News is aimed primarily at trustees, its distribution list is minimal compared with the number of SMSFs and SMSFs trustees (the reasons for this low distribution are not clear); and
- information about the availability of specific advice and written guidance, which are the only services providing personal and circumstance-specific information, is not clearly advertised in ATO's publications and website.

30. In a context where the subject matter (SMSFs) is complex and where decisions relating to SMSFs may have significant consequences for trustees, access to information and interpretative assistance is not as easy or practical as it could be. This does limit the extent to which this information and interpretative assistance products are useful to trustees and, in turn, the level of demand for SMSF interpretative assistance products. Improving trustees' direct access to SMSF interpretative assistance could also reduce their dependence on professionals to administer their SMSF.

Summary of agency response

31. The ATO provided the following response to the audit report:

The ATO welcomes this review and believes the report generally reflects positively on our overall administration of interpretative assistance for self managed superannuation funds (SMSFs). We have worked to progressively improve the assistance provided to trustees and their advisers through targeted products and services that have been well received in the industry.

The ATO agrees with the recommendations you made in the report and we undertake to initiate the necessary action to implement our responses to them, as outlines in the attachment.

The ATO's full comments are included at Appendix 1.

Recommendations

Recommendation No. 1

Para 2.75

To ensure that the SMSF interpretative assistance products address the most significant needs of the SMSF market, the ANAO recommends that the ATO evaluate the satisfaction levels of trustees and their representatives with SMSF interpretative assistance products, and implement potential improvements, as relevant.

ATO response: Agreed

Recommendation No. 2

Para 3.50

In order to assist trustees to comply with their obligations under the SIS Act and Regulations, the ANAO recommends that the ATO review the different forms of interpretative assistance currently provided with a view to improving the direct access of trustees to this assistance, including:

- reconsidering the content and organisation of the SMSF pages of the ATO website;
- within the SMSF webpages, improving access to downloadable stand-alone information brochures and the SMSF written advice services; and
- investigating the reasons behind the low distribution of the newsletter SMSF News.

ATO response: Agreed

Audit Findings

1. Introduction

This chapter provides background information on superannuation and self managed superannuation funds (SMSFs), and the ATO's role in administering SMSFs. It also outlines the audit approach, including the objective, criteria and methodology.

Background and context

Superannuation

1.1 Superannuation is a long-term vehicle for building retirement savings and is a key element of the Government's policies to address the financial independence of Australia's ageing population. The objective of Australia's superannuation system is:

... to assist and encourage people to achieve a higher standard of living in their retirement than would be possible from the age pension alone, to ensure that Australians have security and dignity in their retirement.¹⁹

1.2 To ensure the fiscal sustainability of the retirement income policy, the Australian superannuation system comprises three elements:

- a means-tested, taxpayer funded age pension;
- mandatory private superannuation saving; and
- voluntary saving (including voluntary superannuation saving).²⁰

1.3 In 2009–10, superannuation was the largest financial asset of Australian households. Three-quarters of all households had some superannuation assets, averaging \$154 000 per household.²¹ Over the period from June 1999 to June 2011, total nationwide superannuation assets grew from \$411 billion to

¹⁹ Explanatory Memorandum to the Tax Laws Amendment (Simplified Superannuation) Bill 2006, p.186.

²⁰ Department of Treasury, 'Towards Higher Retirement Incomes for Australians: A History of the Australian Retirement Income System Since Federation', *Economic Roundup Centenary Edition*, Australian Government Publishing Service, Canberra, 14 May 2001. Available at <<http://www.treasury.gov.au/documents/110/PDF/round4.pdf>> [accessed 28 November 2011].

²¹ Australian Bureau of Statistics, *Household Wealth and Wealth Distribution 2009–10*, 2011, p. 4.

1340 billion.²² By 2035, Australians are projected to have increased their collective superannuation savings to \$6100 billion.²³

Types of superannuation funds

1.4 Superannuation funds are broadly categorised under the *Superannuation Industry (Supervision) Act 1993* (SIS Act) into large funds, regulated by the Australian Prudential Regulation Authority (APRA), and self-managed superannuation funds (SMSFs), which are regulated by the Australian Taxation Office (ATO).

1.5 When the SIS Act was introduced, the then Insurance and Superannuation Commission, now APRA, had responsibility for the supervision of all types of superannuation funds, including what were then known as excluded funds. Excluded funds allowed self-employed people and small businesses to maintain their own cost-effective superannuation vehicles. The 1997 *Inquiry into the Australian Financial System*—known as the Wallis Inquiry—noted that the then 140 000 excluded funds were largely self-managed and ‘provide a worthwhile and competitive option for superannuation investors... [however] it should be made clear that such schemes are conducted entirely at the risk of the beneficiaries’. The inquiry recommended some changes to the regulation of excluded funds, including replacing them with self managed superannuation funds and transferring responsibility for their supervision to the ATO.²⁴ The Government implemented these recommendations in 1999 by amending the SIS Act.²⁵

1.6 SMSFs have a number of key characteristics, as specified in the SIS Act:

- they must have fewer than five members;
- all members must be trustees or directors of the trustee company;

²² Attorney-General's Department, *Super System Review Final Report, Part One - Overview and Recommendations*, 2010 p. 61 and Australian Prudential Regulation Authority, *Statistics – Annual Superannuation Bulletin, June 2011* (issued 29 February 2012), p. 4.

²³ Attorney-General's Department, *op. cit.*, p. 5.

²⁴ The inquiry provided a number of reasons why the ATO was the most appropriate agency to manage SMSFs: 1) the ATO already had responsibility for ensuring taxation rules were met; 2) the ATO had the resources and powers appropriate for this kind of regulation; and 3) the ATO would have a less onerous regulatory role than other comparable regulators (for example APRA), as it should not have a ‘prudential’ regulatory role. Department of The Treasury, *Financial System Inquiry Final Report* [the Wallis Report], 1997, pp. 333–334.

²⁵ Leslie Nielson, *Chronology of superannuation and retirement income in Australia*, Parliamentary Library, Canberra, 1 June 2010, p. 10.

- there may not be any members who are employees of other members (unless they are relatives);
- no trustee of the fund may receive any remuneration for their services as trustee; and
- SMSF trustees decide on the investment strategies for their funds.

1.7 In contrast, superannuation funds regulated by APRA generally have a corporate trustee and have been granted a Registrable Superannuation Entity licence. These funds usually involve a larger number of people who pool contributions together. This creates capital which is professionally managed by trustees in compliance with superannuation law. The larger capital allows these funds to diversify their investment strategies. Contributors may have a choice about the levels of risk they tolerate in their managed investments, but little or no influence over the specific investment strategies.

SMSF regulation framework

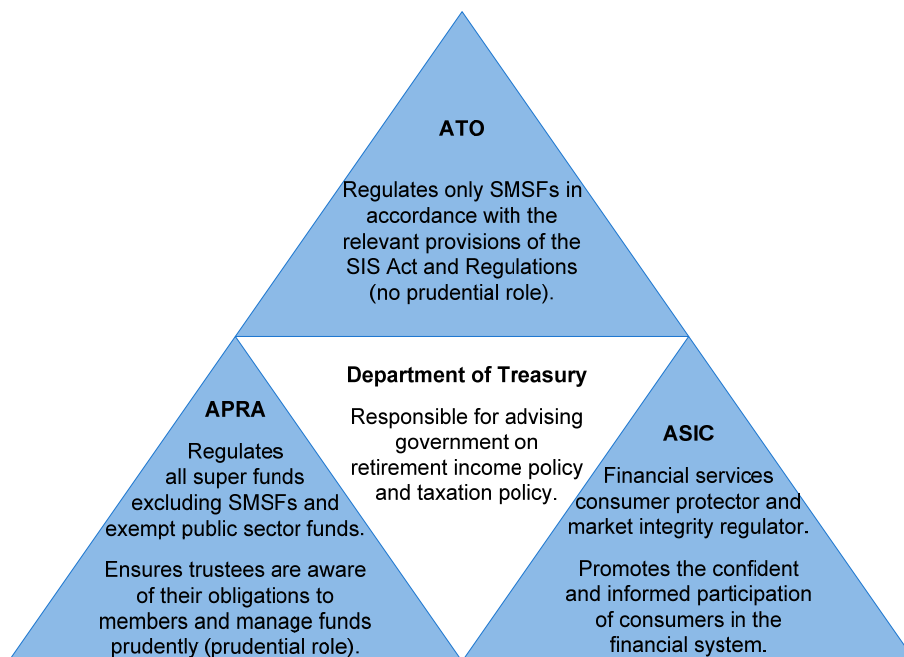
1.8 Two legislative instruments principally define the obligations of SMSF trustees, and the regulatory role of the ATO. These are:

- the SIS Act; and
- the Superannuation Industry (Supervision) Regulations 1994 (SIS Regulations).

1.9 A tripartite framework regulates distinct aspects of the superannuation industry, comprising APRA, the Australian Securities and Investment Commission (ASIC), and the ATO. This framework is illustrated in Figure 1.1.

Figure 1.1

Tripartite superannuation regulatory framework



Source: ANAO.

1.10 APRA's and the ATO's roles as regulators of superannuation funds are significantly different, with APRA adopting a prudential approach to regulation and the ATO applying a compliance-focused approach to regulation. Prudential supervision is designed to ensure, so far as is reasonably possible, that the trustee operates the fund in such a way as to meet its financial promise to members while also observing the Government's retirement income policy objectives as reflected in the SIS legislation. For SMSFs, prudential oversight is not required because trustees are operating the funds directly and have a direct incentive and responsibility to protect their own interests. The ATO's primary regulatory focus is therefore on trustees' legislative compliance and on ensuring that minimum standards are met.²⁶

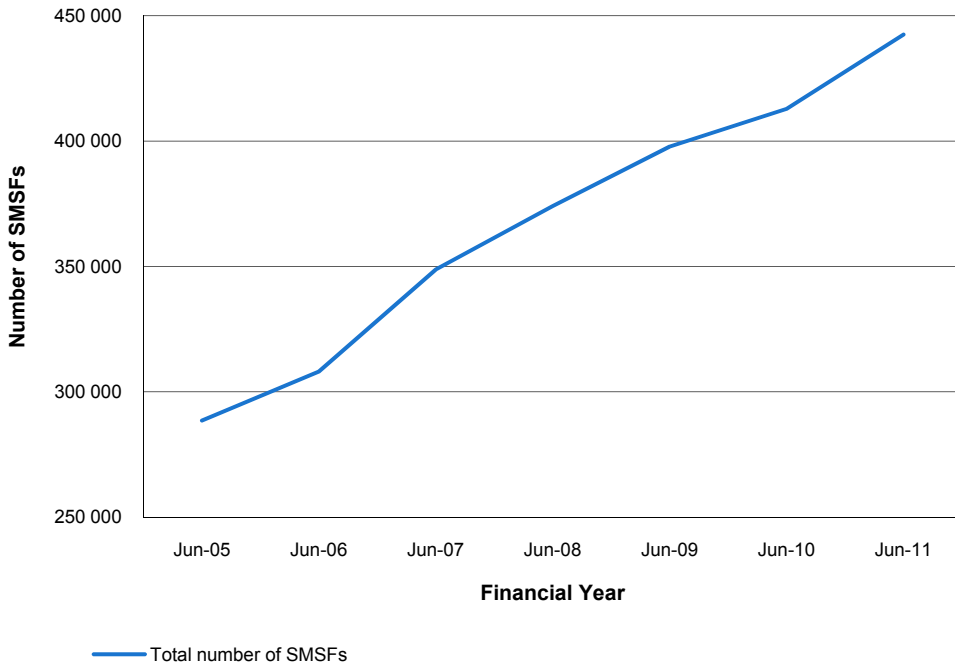
²⁶ Attorney-General's Department, *Super System Review Final Report Part Two – Recommendation Packages*, 2010, p. 225.

Self managed superannuation funds

1.11 The SMSF sector is the largest superannuation sector by number of funds, and in 2011 held 30 per cent of all superannuation assets (\$407.6 billion). As at 30 June 2011, 99 per cent of all superannuation funds were SMSFs. There were 442 528 SMSFs, with 841 283 members.²⁷ The SMSF sector has been growing rapidly. Since 2004–05, the number of SMSFs has increased by 64 per cent. During 2010–11, 32 875 new funds were registered, compared to 29 578 in the previous financial year.²⁸ Figure 1.2 shows this growth is consistent with the long-term trend in the number of SMSFs.

Figure 1.2

Growth in total number of SMSFs, June 05 to June 11



Source: ANAO analysis of ATO, *Self Managed Super Funds Statistical Report – December 2011*.

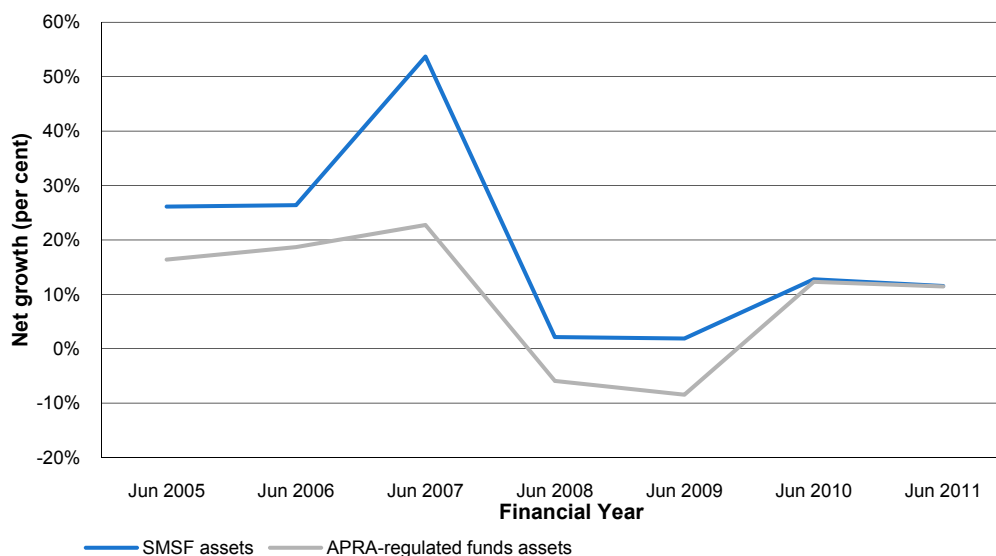
²⁷ Australian Prudential Regulation Authority, *Statistics – Annual Superannuation Bulletin, June 2011* (issued 29 February 2012), pp. 4 and 26.

²⁸ Australian Taxation Office, *Self Managed Super Funds Statistical Report – Dec. 2011*. Available from <<http://www.ato.gov.au/superfunds/content.aspx?menuid=0&doc=/content/00309172.htm&page=6&H6>> [accessed 29 March 2012].

1.12 The value of the SMSF sector has been growing rapidly in recent years, increasing from \$162 billion to \$407.6 billion (estimated total assets) in the six years to June 2011, an average growth rate of 19 per cent. Comparatively, the average growth rate of APRA-regulated funds was 10 per cent.²⁹ Figure 1.3 compares SMSFs' and APRA-regulated funds' net growth in asset size annually over seven years.

Figure 1.3

Net growth in estimated total assets of SMSFs and APRA-regulated funds, June 05 to June 11



Source: ANAO analysis of APRA, *Statistics – Annual Superannuation Bulletin*, June 2011.

Benefits and risks of self managed superannuation

1.13 Compared to members of other superannuation funds, SMSF members are on average older, earn a higher income and have larger superannuation balances.³⁰ Research into the interests and behaviour of SMSF trustees also shows that they are a tertiary educated³¹ and independent group who are

²⁹ Australian Prudential Regulation Authority, op. cit., p. 30.

³⁰ Attorney-General's Department, op. cit. p. 218.

³¹ Fifty-nine per cent of trustees responding to an ATO survey hold a Bachelor or higher degree. Australian Taxation Office, *Super Reforms Research: SMSF Trustees Quantitative Findings*, pp. 56-57, January 2012. For more details on this research, see footnote 91.

interested in controlling their own affairs but need information to support their decisions.³²

1.14 For these people, SMSFs are an attractive retirement savings vehicle over other categories of superannuation investment. Key benefits associated with SMSFs include:

- direct control over the fund's investment strategies;
- SMSFs being exempt from a number of restrictions, which are applicable to APRA-regulated funds, governing investment in certain types of asset; and
- a perception among trustees that SMSF fees are lower than those of APRA-regulated funds.³³

1.15 However, as members are also trustees, they assume a number of risks associated with the operation of a SMSF, including:

- sole responsibility for investing their savings. This means that their wealth in retirement will depend on the quality of their investment decisions;
- being responsible to the ATO for meeting their legal obligations. Significant penalties apply for non-compliance, which can include disqualification as a trustee, heavy financial penalties, prosecution and imprisonment;³⁴
- understanding and abiding by the SIS Act and Regulations, which can be complex and can make compliance difficult; and
- reliance on advisers (such as financial and tax advisers) to help them with their investment decisions and with the management of their fund. This reliance may foster a false sense of security, in a context

³² SMSF Professionals Association of Australia and Russell Investments, *Intimate with Self Managed Superannuation: An inaugural annual study of Self Managed Superannuation Funds*, [Russell Investments and SPAA, Adelaide] 2011, and CPA Australia, *Self Managed Super funds Insights*, CPA Australia, Melbourne, 2009.

³³ Research conducted by the ATO indicates that reducing the fees associated with the management of their superannuation funds is a key motivation for entering into a SMSF. Australian Taxation Office, *Super Reforms Administrative Design Research: Qualitative Findings*, January 2012, p. 30. For more details on this research, see footnote 91.

³⁴ Australian Taxation Office, *Running a self managed super fund*, June 2010, pp. 29-31. Available from <<http://www.ato.gov.au/content/downloads/spr46427n11032.pdf>> [accessed 8 March 2012].

where trustees remain ultimately responsible for the decisions made, and where the ATO does not have the power to regulate SMSF advisers.³⁵

Interpretative assistance

The role of the ATO in the delivery of interpretative assistance

1.16 The provision of interpretative assistance is a cornerstone of the ATO's taxation and compliance regime. The origins of interpretative assistance as a particular form of support to taxpayers can be traced back to the reform of the Australian taxation system in the late 1990s and the introduction of taxation provisions reflecting general principles rather than detailed prescriptions.³⁶ Making legislation less prescriptive and more principle-based, however, created a demand for interpretations of the law, either as applicable to the public generally or to particular taxpayers. Taxation laws provide the Commissioner of Taxation with powers to provide types of interpretative assistance and also offer legislative protection to taxpayers who rely on the Commissioner's advice. The importance of interpretative assistance is recognised in the ATO Taxpayers' Charter which states that the ATO:

... aim[s] to provide accurate, consistent and clear information to help you understand your rights and entitlements and meet your obligations.³⁷

1.17 The ATO applies the Taxpayers' Charter in its regulation of SMSFs. As early as 2000, the ATO identified a knowledge deficiency among SMSF trustees in relation to their obligations, and considered that the provision of a range of education products would be the most effective way of improving trustees' knowledge, understanding and compliance with their obligations under the SIS Act and Regulations. The provision of interpretative assistance, delivered in its current form since 2009³⁸, was part of this strategy, and is a core part of

³⁵ Advisers are often subject to regulation in their capacities as tax agents or financial services providers. They are also often subject to the standards of their professional association. However, there is no restriction on who may provide advice to a SMSF trustee, and the ATO does not have responsibility for regulating SMSF advisers.

³⁶ Department of the Treasury, *Tax reform: not a new tax, a new tax system*, Commonwealth of Australia, 1998, p. 146. Available at <http://www.treasury.gov.au/documents/167/PDF/Whitepaper.pdf> [accessed 3 April 2012].

³⁷ Australian Taxation Office, *Taxpayers' Charter: What you need to know*, June 2010, p. 9. Available from <http://www.ato.gov.au/content/downloads/cor63133_n2548.pdf> [accessed 15 February 2012].

³⁸ Before 2009, specific advice and written guidance were not defined SMSF advice products. These types of advice were delivered under the form of 'written correspondence'.

the Commissioner's role as the regulator of SMSFs.³⁹ Interpretative assistance for SMSFs is integrated into a compliance-focused regulation approach which is determined by the Commissioner's powers under the SIS Act, rather than under taxation law.⁴⁰ It is also integrated in the ATO's compliance framework, as a means to help improve voluntary compliance.

SMSF interpretative assistance products

1.18 Interpretative assistance provides the Commissioner's opinion on the application of the SIS Act and Regulations to SMSFs. The Practice Statement Law Administration 2009/5⁴¹ defines the range of products included in SMSF interpretative assistance. Table 1.1 describes these products.

Table 1.1

Types of SMSF interpretative assistance product

Product	Description
SMSF Public Ruling	A published statement of the Commissioner's opinion of how a provision of the SIS Act and Regulations applies, or would apply, to SMSFs in relation to a class of schemes or to a class of SMSFs generally, rather than in respect of the specific circumstances of a particular SMSF.
SMSF Determination	'Short form' ruling. Deals with discrete issues that can usually be dealt with by answering a single question.
SMSF Product Ruling	SMSF advice on the application of the SIS Act and Regulations to schemes in which the trustees of a number of SMSFs enter into substantially the same transactions with a common entity or group of entities.
SMSF Specific Advice ^a	A written expression of the Commissioner's opinion on how a SIS Act and Regulations provision applies to a specific transaction or arrangement that has been or might be entered into by the trustees of a SMSF. Only pertains to the specific SMSF and transaction or arrangement in question.
Written Interpretative Guidance ^a	Provides general assistance and cannot cover all possibilities or individual circumstances.

³⁹ Australian Taxation Office, *Practice Statement Law Administration 2009/5 – Provision of Advice and Guidance by the ATO in relation to the application of the Superannuation Industry (Supervision) Act 1993 and the Superannuation Industry (Supervision) Regulation 1994 to Self Managed Superannuation Funds*, 2009, p. 9.

⁴⁰ SMSFs are also taxpayers, and in this capacity have access to interpretative assistance under taxation law. However, this interpretative assistance relates to ATO views which are more generally applicable to taxpayer groups and as such are not considered within the scope of this audit.

⁴¹ Australian Taxation Office, *Practice Statement Law Administration 2009/5*, op. cit.

Product	Description
Oral Interpretative Guidance ^b	Provides on matters of a general, straightforward or simple nature.
SMSF publications and materials produced for internal purposes	Includes SMSF brochures and ATO website material (speeches, minutes, decision impact statements) Also includes published materials produced for internal ATO purposes (ATO Interpretative Decisions, Law Administrative Practice Statements)

Source: ANAO, based on *Practice Statement Law Administration 2009/5 – Provision of Advice and Guidance by the ATO in relation to the application of the SIS Act 1993 and the SIS Regulation 1994 to SMSFs*.

Note (a): Until the publication of the 2009/5 Practice Statement, specific advice and written guidance were not defined advice products. These types of advice were delivered under the form of 'written correspondence'.

Note (b): Oral guidance, although it exists as a form of SMSF interpretative assistance in the ATO's documentation, is not currently implemented. Customers are able to contact a call centre where they can access general information about SMSFs, however the ATO advised the ANAO that any specific request should be made in writing.

1.19 Two key characteristics influence the way the ATO develops its interpretative assistance and the impact it may have on its users. These characteristics are whether the:

- advice is precedential, because the ATO has not previously determined its view on the matter; and
- ATO is legally or administratively bound by the advice, and what legal weight the advice has.

Developing the precedential 'ATO View'

1.20 A precedential view is the ATO's documented interpretation of any of the laws administered by the Commissioner in relation to a particular interpretative issue. A requirement to develop a precedential view may arise in the course of developing any form of interpretative assistance, regardless of the significance of the issue or the number of people to which the view may apply. Where a need for a precedential view is identified during the development of a type of assistance that would not normally be widely distributed, such as when making a decision for the purpose of a specific advice, the ATO will first document the precedential view in a more widely accessible form, such as a public ruling or a determination.

1.21 When applied to the range of SMSF interpretative products, this means that public rulings, determinations and product rulings represent the ATO's precedential view. In contrast, specific advice and written guidance represent

the application and explanation of existing views in response to specific questions from trustees and their advisers.

Legal weight of SMSF interpretative assistance

1.22 While the ATO provides interpretative assistance on the application of taxation *and* superannuation law, there is a substantive difference between the two types. A large proportion of taxation advice is legally or administratively binding on the Commissioner, and as such, provides the highest level of protection for taxpayers who rely on it.⁴² This means that if the taxation advice given by the ATO is incorrect and the taxpayer makes a mistake as a result, they are protected from paying tax that would otherwise be payable under the law and also from false and misleading statement penalties or interest charges.

1.23 By contrast, SMSF advice is not legally or administratively binding on the Commissioner and a trustee that relies on SMSF advice remains responsible for their action under SIS Act and Regulations. However, the ATO states that the fact that the trustee acted in accordance with that advice would be considered a relevant factor in their favour in the Commissioner's exercise of any discretion as to what action is to be taken in response to a breach of the law.⁴³

1.24 In 2007, the ANAO advised that, in order to avoid public uncertainty about the role and legal weight of the SIS Act-based interpretative assistance regime, SMSF public rulings and advice should be clearly differentiated from the existing regime of taxation public rulings which are, unlike superannuation public rulings, binding on the Commissioner.⁴⁴ The ATO has developed a structure for the SMSF interpretative assistance that closely mirrors the model used for taxation interpretative assistance, although in this advice the ATO correctly points out the level of reliance SMSF trustees may place in it. Figure 1.4 provides a simplified representation of the different types of interpretative assistance provided by the ATO in relation to taxation and SMSF law.

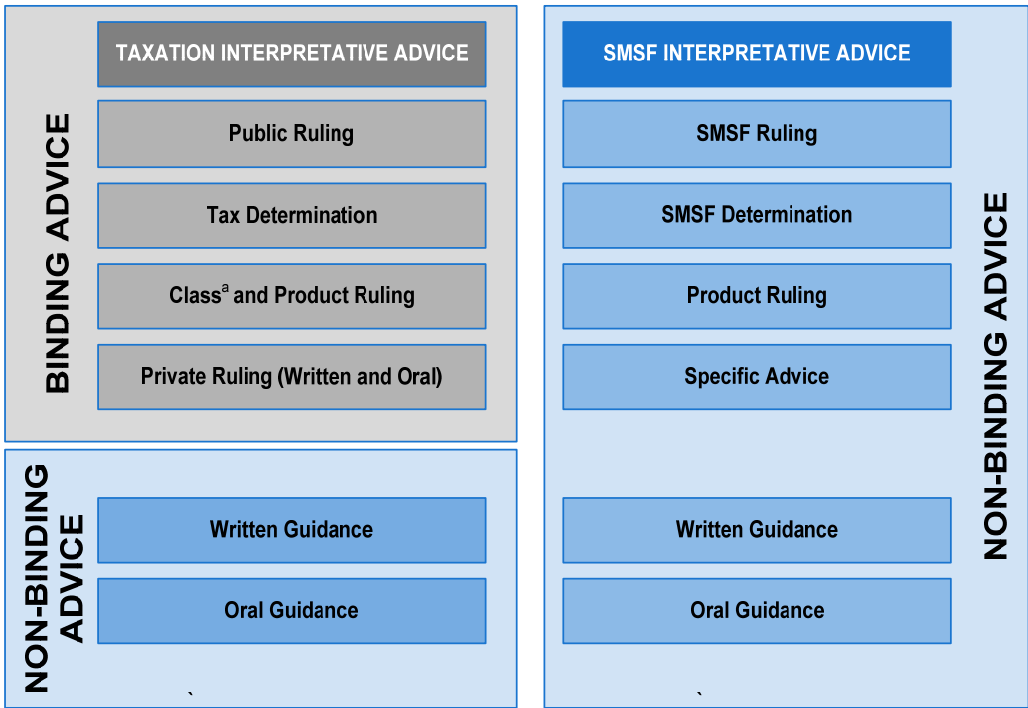
⁴² Australian Taxation Office, *Practice Statement Law Administration 2008/3 – Provision of Advice and Guidance by the ATO*, 2008, p. 3.

⁴³ Australian Taxation Office, *Practice Statement Law Administration 2009/5*, op. cit., p. 22.

⁴⁴ ANAO Audit Report No. 13 2007–08, *The ATO's Approach to Managing Self Managed Superannuation Fund Compliance Risks*, pp. 72–73.

Figure 1.4

Structure of taxation interpretative assistance and SMSF interpretative assistance



Source: ANAO, based on Australian Taxation Office, *Practice Statement Law Administration 2008/3 – Provision of Advice and Guidance by the ATO*, 2008, and Australian Taxation Office, *Practice Statement Law Administration 2009/5 – Provision of Advice and Guidance by the ATO in relation to the application of the SIS Act and the SIS Regulation to SMSFs*, 2009.

Note (a): Class rulings are public rulings issued in response to a request from an entity seeking advice about the application of relevant provisions of tax law to several taxpayers in relation to a defined scheme.

1.25 Table 1.2 presents the number of each different type of interpretative assistance product provided by the ATO since the delivery of SMSF interpretative assistance began in 2007.

Table 1.2**Volume of SMSF interpretative assistance products, 2007–08 to 2010–11**

	2007–08	2008–09	2009–10	2010–11	Total
Public rulings	0	2	4	3 ^a	9
Determinations	3	1	1	1	6
Product rulings	0	0	1	0	1
Specific advice ^b	–	–	202	217	419
Written guidance ^b	Data not available	Data not available	621	903	1524

Source: ANAO analysis of ATO data.

Note (a): The latest SMSF public ruling was released in May 2012.

Note (b): Until the publication of the 2009/5 Practice Statement, specific advice and written guidance were not firmly defined SMSF advice products. These types of advice were delivered under the form of 'written correspondence'.

1.26 The volume of SMSF interpretative assistance products delivered is small compared with the volume of interpretative assistance products delivered on tax matters. For instance, the ATO has delivered nine SMSF public rulings since 2007–08, whereas it has delivered 32 tax public rulings. About 400 SMSF specific advice products were produced in 2009–10 and 2010–11, compared with approximately 18 000 tax private rulings.⁴⁵

Recent reviews

The Super System Review (Cooper Review)

1.27 In May 2009, the then Minister for Superannuation and Corporate Law announced a review into the governance, efficiency, structure and operation of Australia's superannuation system. The Super System Review final report (also known as the Cooper Review) was published in June 2010⁴⁶, and noted that the SMSF sector was largely successful and well-functioning. The final report made a range of recommendations which it believed would benefit members by providing them with greater resources to carry out their responsibilities,

⁴⁵ Private rulings are comparable to SMSF specific advices in all but two key aspects: Tax private rulings are legally binding on the Commissioner, and they are published on the ATO website, in a de-identified form.

⁴⁶ Attorney-General's Department, *Super System Review Final Report, Parts One and Two*, 2010. Available from <http://www.supersystemreview.gov.au/content/content.aspx?doc=html/final_report.htm> [accessed 16 February 2012].

improve the competence of both trustees and their advisers, and provide greater confidence and certainty through enhanced advisory and regulatory powers for the ATO.⁴⁷

1.28 The report also noted that:

Unlike larger superannuation funds, SMSFs are regulated only by the ATO which takes a compliance, rather than prudential, approach to regulation. ...

As SMSF trustees have ultimate responsibility they can choose to be entirely self-directed and self-sufficient (that is make investment decisions and look after the SMSF's administration and compliance obligations) or they can delegate, part or all of, these functions (but not responsibility) down to service providers (for example accountants, financial planners and administrators).⁴⁸

1.29 This observation underpins the 10 'guiding principles' for SMSFs set out in the report, which include:

- Ultimate responsibility. The regulatory settings for SMSFs must take into account the fact that SMSF members have effectively assumed sole responsibility for their retirement savings;
- Freedom from intervention. Given that SMSF members are entirely responsible for their own decisions, the Panel sees the ability to be genuinely self-directed and self-sufficient as an important feature of SMSFs;
- No complete absence of intervention. Because SMSFs, like other types of funds, benefit from tax concessions that are designed to encourage and help members to save for retirement, some intervention in the way that they are managed is appropriate;
- Service providers. Consistent with the principles relating to responsibility and intervention, SMSFs should not be required to use a service provider, other than for an annual audit. However, service providers play an important role and should maintain a high standard of competency and compliance;
- Appropriate entry. Members who wish to form a SMSF without advice should be able to continue to do so. However, the vast majority of

⁴⁷ Attorney-General's Department, op. cit., p. 217.

⁴⁸ Ibid., p. 218.

people do so based on advice from professional service providers, and advice standards need to be high within a robust regulatory framework to ensure potential members are not being inappropriately advised; and

- Compliance, rather than prudential, regulatory focus. The focus of supervision for large APRA funds is on ensuring that trustees are acting in members' best interests, while a focus on legislative compliance is more appropriate for SMSFs.⁴⁹

1.30 The report also included 28 recommendations aimed at improving the operation of SMSFs, the majority of which were supported by the Government. Recommendations which the Government did not support included a recommendation aimed at giving the ATO the power to issue binding rulings in relation to SMSFs. A binding ruling system, the report noted, would provide for greater certainty and would also likely lead to technical issues being resolved more expeditiously.⁵⁰ The Government put forward that, in the context of a system designed to protect long-term retirement savings, binding rulings could result in a SMSF being permitted to maintain an investment that could subsequently be found to be in breach of the regulatory rules and therefore contrary to retirement income policy.⁵¹

Related audits

1.31 The ANAO has previously conducted two audits relating to SMSFs.

1.32 ANAO Audit Report No. 52 2006–07 *The Australian Taxation Office's Approach to Regulating and Registering Self Managed Superannuation Funds* examined the efficiency and effectiveness of the ATO's approach to their regulatory role. The audit assessed the ATO's governance of its regulatory responsibilities, the environment in which SMSFs operated, and the systems, processes and controls in place to enable registration of SMSFs and enforce the lodgment of fund income tax and regulatory returns.

⁴⁹ Attorney-General's Department, op. cit., pp. 219–220. The remaining four principles are described as: Consistent treatment with large APRA funds where appropriate; Recognition of special risks in a SMSF environment; Leverage (that is, borrowing to invest); and Pursuit of excellence.

⁵⁰ Attorney-General's Department, op. cit., p. 229.

⁵¹ Department of The Treasury, *Government Response to the Review into the Governance, Efficiency, Structure and Operation of Australia's Superannuation System*, 2010, available from <http://strongersuper.treasury.gov.au/content/Content.aspx?doc=publications/government_response/recommendation_response_chapter_8.htm> [accessed 16 February 2012].

1.33 ANAO Audit Report No. 13 2007–08 *The Australian Taxation Office's Approach to Managing Self Managed Superannuation Fund Compliance Risks* examined the efficiency and effectiveness of the ATO's approach to risk management surrounding SMSF compliance. The report also assessed the processes used by the ATO to identify risks relevant to SMSF non-compliance, to mitigate those risks and to administer fund wind-ups.

1.34 The present report is not a follow-up audit of the 2006–07 and 2007–08 audits. However, it considered the ATO's progress in implementing the previous reports' recommendations and suggestions where relevant to interpretative assistance.⁵²

Audit objective and criteria

Audit objective

1.35 The objective of the audit was to assess the effectiveness of the ATO's management of its interpretative assistance activities for self managed superannuation funds.

Audit criteria

1.36 The audit assessed whether:

- the ATO's current interpretative assistance framework takes adequate account of the various aspects of quality;
- trustees and other SMSF stakeholders are satisfied that the ATO's interpretative assistance processes meet their needs and that they have appropriate means of contributing to and providing feedback on interpretative assistance products and services; and
- information provided by the ATO in relation to SMSF interpretative assistance is readily accessible to trustees and other SMSF stakeholders.

Audit approach

1.37 The audit examined the ATO's administration of the key types of interpretative assistance provided by the ATO to SMSFs: public rulings and determinations, specific advice and written guidance. It also assessed the

⁵² More details on the recommendations made in the two previous ANAO reports are included in Appendix 2.

accessibility of interpretative assistance products, including public rulings and determinations; specific advice and written guidance; and public material available from the ATO website (SMSF publications).⁵³

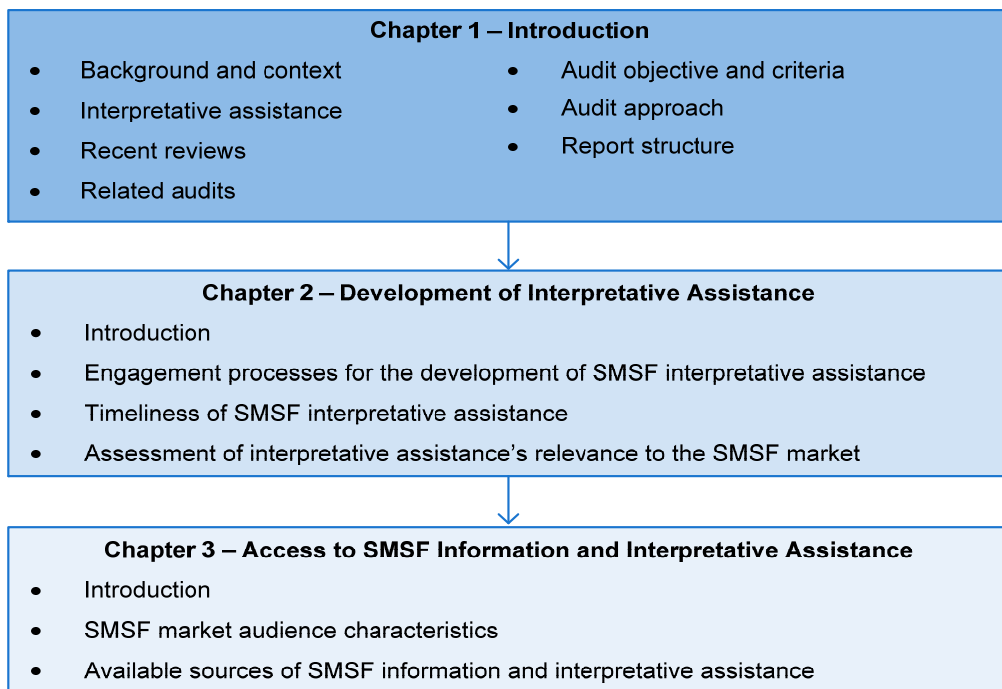
1.38 The audit has been conducted in accordance with ANAO's auditing standards at a cost of approximately \$422 350. The audit fieldwork, conducted mostly between July and November 2011, included the review of relevant documentation and interviews with key ATO staff. Quantitative and qualitative analysis of the systems, processes and controls the ATO uses to administer its interpretative assistance activities for SMSFs was undertaken and a number of superannuation stakeholder groups, and accounting and tax professional bodies were consulted.

Report structure

1.39 The audit findings are reported in the following chapters (Figure 1.5).

Figure 1.5

Report structure



⁵³ ATO Interpretive Decisions are excluded from the scope of the audit because they are produced for internal ATO purposes and published for transparency purposes only.

2. Development of SMSF Interpretative Assistance

This chapter assesses the administrative processes established by the ATO to produce interpretative assistance to trustees and their representatives, and whether these processes support the delivery of timely and appropriate interpretative assistance.

Introduction

2.1 In 2007, following the Simplify Superannuation reforms⁵⁴, the ATO reaffirmed its goal of achieving high levels of voluntary compliance with Australia's tax and superannuation laws. To achieve this goal, the ATO committed to making its services relevant and easy to use, and to increase the ATO's focus on education to make sure that trustees and advisers were aware of the rules governing SMSFs. The program to enhance the ATO's education activities included:

- redesigning the superannuation content of the ATO website to improve accessibility;
- expanding the range of available brochures; and
- introducing a quarterly newsletter to provide information to trustees and advisers.⁵⁵

2.2 This program was undertaken as planned and consequently the key sources of general SMSF information provided by the ATO include the ATO website, a suite of brochures and a newsletter. Oral assistance is also offered through the ATO call centre.

2.3 At the same time, the ATO began to implement a range of products aimed at delivering technical or individual assistance, including:

⁵⁴ The Simplify Superannuation reforms were implemented through the *Tax Laws Amendment (Simplified Superannuation) Act 2007* and related legislation from July 2007. They were aimed at streamlining and simplifying superannuation contributions. For more details, see <<http://simplersuper.treasury.gov.au/>> [accessed 13 April 2012].

⁵⁵ Australian Taxation Office, *Self Managed Super Funds: Compliance, Risks and New Measures*, Speech by Ian Read, Assistant Deputy Commissioner of Taxation, Taxpayers Australia Annual Conference, Friday 9 November 2007, p. 6. Available from <<http://www.ato.gov.au/corporate/content.aspx?doc=/content/00109674.htm>> [accessed 13 April 2012].

- public rulings and determinations, which present the ATO precedential views⁵⁶; and
- specific advice and written guidance products provided to SMSF trustees and their representatives, which explain how SMSF legislation applies to specific situations.⁵⁷

2.4 The ATO implements similar processes to develop interpretative assistance products relating to taxation and SMSF law. The main difference resides in the timeline required to develop public rulings: the standard timeframe⁵⁸ for tax public rulings is 12 months whereas the timeframe for SMSF public rulings is 16 months.

2.5 The ANAO examined:

- the stakeholder engagement processes supporting the delivery of key SMSF interpretative assistance products: public rulings, determinations, specific advice and written guidance;
- the development processes underpinning the production of these products, including the quality assurance system;
- the ATO's performance in delivering these products in a timely manner; and
- how the ATO assesses the relevance of interpretative assistance products to the SMSF market.

Engagement processes for the development of SMSF interpretative assistance

2.6 Interpretative assistance can only be effective if it meets users' expectations while providing an interpretation of the law that reflects the intent of Parliament and the ATO's view. Ways to ensure that interpretative assistance products address the expectations of the SMSF market include employing a process of engagement during the products' development and,

⁵⁶ The Law and Practice Business Line (Corporate Services and Law sub-plan) is responsible for the development of rulings and determinations relating to taxation and superannuation legislation.

⁵⁷ The Technical Leadership Branch within the Superannuation Business Line (Compliance sub-plan) is responsible for the delivery of these products.

⁵⁸ The standard timeframe is the timeframe the ATO applies as a general rule to the delivery of rulings and determinations. There are no service standards for these products.

following the products' delivery, conducting evaluation activities. The ANAO examined how the ATO engages with other regulatory bodies and with the SMSF market to gain assurance that SMSF interpretative assistance is meeting the needs of the trustees and their representatives.

Engagement with regulatory bodies

2.7 Under the SIS Act and Regulations, the ATO is the regulator for SMSFs. A number of other agencies also have a role in the administration of this legislation:

- Treasury manages the legislation and the associated policy;
- APRA implements the SIS Act for prudential superannuation funds; and
- ASIC has a role supervising the financial market.⁵⁹

2.8 The role of each of these bodies is further outlined in Chapter 1. A strong relationship between the ATO and Treasury is required to manage the balance between the development of policy and interpretative assistance. As a general rule, tax legislation is principles-based and there is a strong reliance on the ATO's interpretative support to implement it in a practical sense. To provide this interpretative assistance, the ATO in turn relies on Treasury to manage the clarification of legislation.

2.9 The relationship between APRA and the ATO is guided by a Memorandum of Understanding (MOU). The current MOU, due to be reviewed by 1 September 2013, requires the two agencies to consult on proposed policy statements, technical documents, legislative modifications, and publications that have an impact on or may be relevant to either agency. It also governs the formal referral of matters between the two agencies.⁶⁰

2.10 The ATO's relationship with ASIC is also supported by an MOU, which guides collaboration and cooperation between the two agencies. Both agencies have an interest in protecting and promoting public confidence in the financial

⁵⁹ Australian Taxation Office, *How Your Self Managed Super Fund is Regulated*, Australian Taxation Office, Canberra, 2011.

⁶⁰ Australian Taxation Office and Australian Prudential Regulation Authority, *Memorandum of Understanding between Australian Taxation Office and Australian Prudential Regulation Authority for the provision of mutual assistance and exchange of information*, 2010, available at <<http://www.apra.gov.au/AboutAPRA/Documents/MoU-ATO-and-APRA.pdf>> [accessed 10 October 2011].

system and the MOU identifies specific areas of mutual interest including illegal phoenix activity⁶¹, auditor and liquidator misconduct, superannuation and illegal schemes.

2.11 A suite of arrangements are in place to engage Treasury, APRA and ASIC in the development of interpretative assistance for SMSFs, including the following:

- the ATO meets monthly with the Superannuation, Retirement and Savings Division of Treasury to discuss issues related to superannuation; Treasury is also part of the development of public rulings and is able to attend Ruling Panel meetings; and
- Treasury, APRA and ASIC are members of the National Tax Liaison Group (NTLG) and of the Superannuation Consultative Committee (SCC), which meet quarterly. The ATO and APRA hold a further quarterly meeting, the APRA/ATO Technical Forum, to prepare these meetings.

2.12 These arrangements address the risks of inconsistency and inefficiencies that may occur in matters that involve cross-agency partnerships, ensuring they are controlled in a way that supports the effective development of interpretative assistance for SMSFs.

Engagement with SMSF trustees and their representatives

2.13 The development of SMSF precedential advice (public rulings and determinations) is supported by two key consultative committees:

- the SCC⁶²: this forum is intended to provide an opportunity for superannuation organisations to discuss high-level issues relating to ATO administration, including advising on the implementation of government policy in superannuation and providing input into the ATO's strategies involving superannuation; and

⁶¹ The ATO defines fraudulent phoenix behaviour as the evasion of tax and/or superannuation guarantee liabilities through the deliberate, systematic and sometimes cyclic liquidation of related corporate trading entities.

⁶² Australian Taxation Office, *Superannuation Consultative Forum Charter*, [Internet], available at <<http://www.ato.gov.au/superfunds/PrintFriendly.aspx?ms=superfunds&doc=/content/00114017.htm&pc=001/149/029/001/001&mnu=48905&mfp=001/149&st=&cy=>> [accessed 13 March 2012].

- the National Tax Liaison Group–Superannuation Technical Subgroup (NTLG–STSG)⁶³: the role of this group is to provide a forum to discuss superannuation issues of significance and help the ATO prioritise work on interpretative issues. This group has a more specific and limited role than the SCC, dealing with legal matters including technical interpretation of superannuation law. It provides industry with an avenue for raising technical issues and obtaining an initial ATO view on how it will apply the SIS Act or taxation law in certain circumstances.

2.14 While the NTLG–STSG has a larger membership (approximately 35 members compared with 23 for the SCC), many of the same organisations are represented in both forums. These include, in addition to the ATO, the Treasury, APRA and ASIC, representatives from the accounting and legal professions, superannuation industry and business associations (see list of members in Appendix 3). SCC and NTLG–STSG meetings are held quarterly, with one scheduled in the morning and the other in the afternoon of the same day, to facilitate the cross-over of membership. In addition, ad hoc meetings may be convened on specific topics.

2.15 Membership of these two forums, in particular the NTLG–STSG, provides industry with an opportunity to directly and effectively participate in the development of the ATO’s precedential view on particular matters. From the ATO’s perspective, the forums represent a conduit to gather intelligence and marshal industry expertise to assist in developing the ATO’s understanding of the significance and implications of issues affecting the industry.

2.16 The industry bodies consulted by the ANAO broadly agreed it was their role as representatives of trustees to provide a link between trustees and the ATO in the development of the ATO’s view. Nevertheless, the occasional emergence of trustee-focused representational groups may indicate an increasing interest in direct representation by SMSF trustees to government bodies. While it may be impractical to involve individual SMSF trustees in the development of precedential interpretative assistance, the ATO should continue to monitor the emergence of groups representing SMSF trustees and

⁶³ Australian Taxation Office, *National Tax Liaison Group – Superannuation Technical Subgroup Charter*, [Internet], available at <<http://www.ato.gov.au/taxprofessionals/content.aspx?doc=/content/00095990.htm&pc=001/005/073/002/014&mnu=43140&mfp=001&st=&cy=>> [accessed 13 March 2012].

consider including these groups in the membership of its key consultative forums. This would contribute to the more direct engagement of trustees in the development of the ATO's precedential advice.

Interpretative assistance development processes

Interpretative assistance presenting the ATO's precedential view

2.17 SMSF interpretative assistance products presenting the ATO's precedential view are public rulings, determinations and product rulings. The ATO follows a strict process for developing its precedential views. The development of SMSF public rulings involves the following steps (Figure 2.1)⁶⁴:

- an interpretative issue in need of clarification is identified internally (for instance through input from other ATO business lines) or externally (for instance through the ATO's consultations with industry or following a request for advice by an individual) as a Priority Technical Issue;
- following a period of initial research to determine the preferable medium to provide guidance, the ruling's topic is listed on the Public Ruling Register⁶⁵;
- the Law and Practice business line prepares a draft public ruling. As a general rule, draft rulings should be developed within a timeframe of eight months from the listing on the Public Ruling Register. Draft rulings are published on the ATO's website and comments are invited for a standard period of six weeks. Responses to and comments on the draft rulings are formally acknowledged and a written compendium of comments is created; and
- final public rulings should also be developed within a timeframe of eight months from the date of publication of the draft ruling. Final public rulings and associated compendia are published on the ATO website and the Commonwealth Gazette, and tabled in Parliament.

2.18 During the development of SMSF public rulings, consultation with the SMSF industry and the general public is conducted at several points. The

⁶⁴ Australian Taxation Office, *Public Rulings Manual*, CMSWeb.dot V5.0.2 [Intranet].

⁶⁵ The Public Ruling Program is a list of public rulings in preparation for the year, and is posted on the ATO website: <<http://www.ato.gov.au/taxprofessionals/content/19658.htm>> [accessed 10 October 2011].

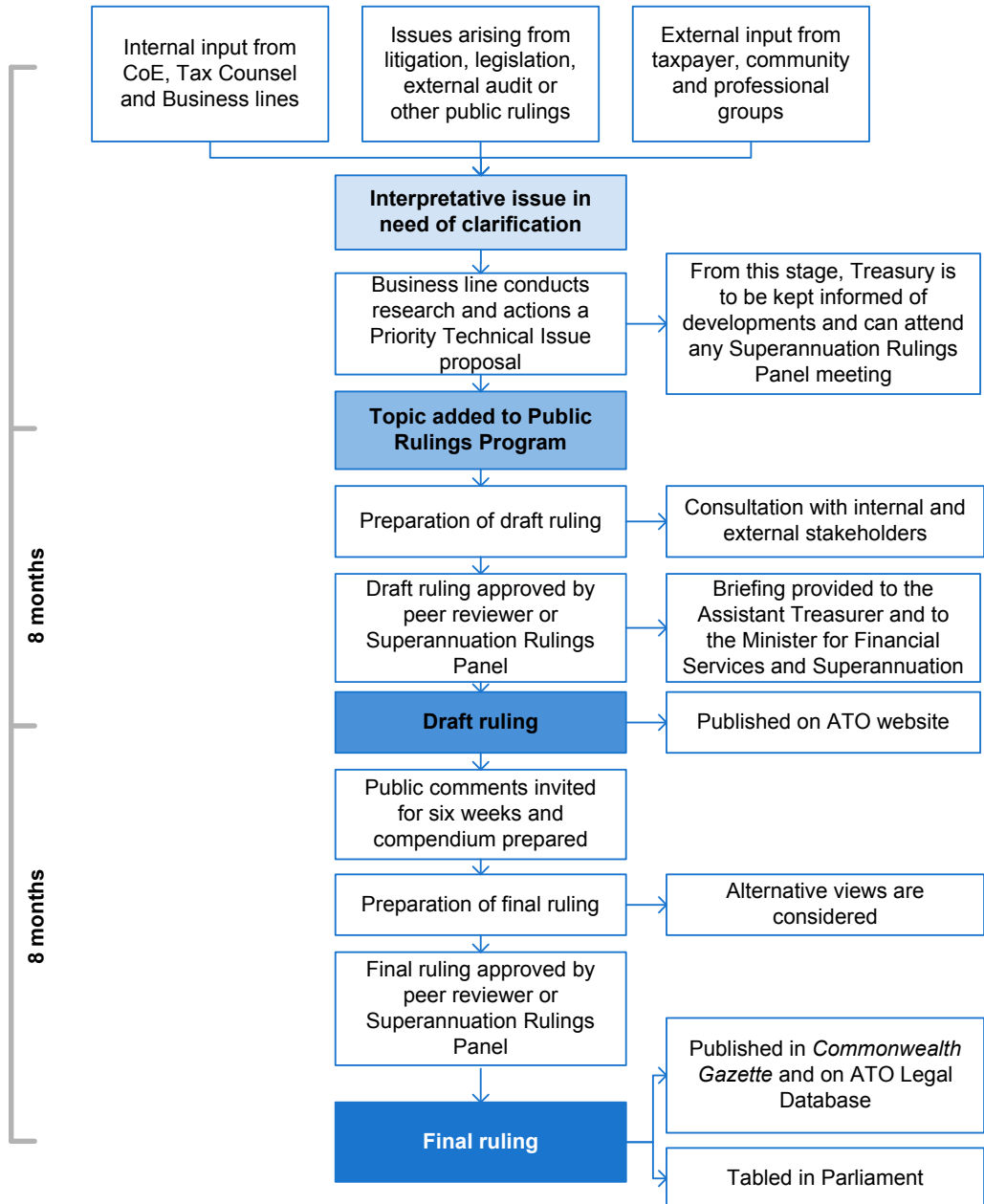
Superannuation Rulings Panel, whose role is to 'consider and advise on the proposed interpretation of the law in public rulings'⁶⁶, is involved in the development of the draft and final rulings. The publication of the draft ruling on the ATO website and the invitation for comment present further opportunities for involvement by the industry and the general public.

2.19 The Department of the Treasury is also part of the public ruling development process. When the ATO has given approval for a public ruling to be produced, Treasury is notified, and is also invited to be part of the consultation process (including the Superannuation Rulings Panel) and is expected to be informed of relevant developments on a regular basis.

⁶⁶ Australian Taxation Office, *Public rulings panels: Role of the rulings panels*, [Internet], 2011, available at <<http://www.ato.gov.au/taxprofessionals/content.aspx?menuid=0&doc=/content/41286.htm&page=2&H2>> [accessed 26 February 2012]. The Superannuation Rulings Panel's membership is published on the ATO website, and comprises a deputy chief tax counsel, a senior tax counsel and three external consultants, selected by the ATO.

Figure 2.1

Processes in the production of a SMSF public ruling



Source: ANAO analysis.

2.20 The process for the development of determinations is similar to that of public rulings, with some key exceptions:

- the timeframe for the development of determinations is eight, rather than 16 months;
- a draft determination that is deemed non-controversial or that has already been subject to adequate public scrutiny may not be issued for public comment; and
- a determination will only be referred to the Superannuation Rulings Panel at the draft and final stages if the ATO considers it necessary. It is expected that most determinations will not need to be considered by a panel and instead undergo internal review and approval at the appropriate stages.

2.21 Only one superannuation product ruling has been produced since the introduction of SMSF interpretative assistance in 2007. This ‘foundation’ product ruling was issued in 2009 and described the SMSF product ruling system. No further SMSF product rulings have been issued since that date. The development process for product rulings also includes the production of a draft ruling that is submitted to the applicant for confirmation of accuracy and consent to release. However, the process:

- has a total timeframe of three months⁶⁷, from the time of application to the time of publication of the product ruling; and
- includes internal consultation and quality assurance only (no external stakeholder involvement).

2.22 The industry representatives interviewed by the ANAO expressed overall satisfaction with the consultation process undertaken by the ATO for the development of precedential advice. However, they also conveyed some concern with the length of time that some precedential advice took to be completed. The history of the ATO’s provision of advice on limited recourse borrowing arrangements (also referred to as instalment warrants), outlined in the case study below, provides an illustration of the issues raised by industry. The case study suggests that issues relating to these investments have been a source of uncertainty for trustees and their advisers for a number of years,

⁶⁷ The completion standard is that 99 per cent of product rulings should be completed within 90 days.

pointing to a potential issue with the ATO's performance in issuing precedential views in a timely manner.

Case Study

The ATO's provision of advice on limited recourse borrowing arrangements (instalment warrants)

An instalment warrant is a form of derivative or financial product that involves borrowing to invest in an asset, such as real property or shares, referred to as the underlying asset. An instalment warrant arrangement allows investors to make a partial payment up front and delay the future instalments to a later date. In this sense, instalment warrants represent a form of loan, in that the investor borrows funds from the warrant issuer to buy the underlying asset. The underlying asset is held in trust to provide security for the outstanding loan until the final instalment is paid. The investor, however, has all of the benefits of ownership of the underlying asset, such as income (for example, dividends or rent) and capital growth.

Under the SIS Act, superannuation funds, including SMSFs, are not allowed to borrow to invest. Because instalment warrants can be considered as a form of borrowing, the question of whether instalment warrants were a legal form of investment for SMSF was raised in the early 2000s. An opinion developed in the financial market, based on guidelines produced by APRA and the ATO, that instalment warrants were not breaching the prohibition on borrowing funds as long as, in case of default, the lender only had recourse to the underlying assets, and not to other assets of the superannuation fund. Instalment warrants subsequently became a widespread form of investment by superannuation funds.

Between 2002 and 2011, against a background of legislative change (the relevant legislation was amended twice, in 2007 and 2010), the ATO produced a number of guidelines and product rulings that, while expressing reservations about the legitimacy of instalment warrants as investments for SMSFs, did not provide an unequivocal interpretation of the SIS Act. In September 2011 the ATO published a draft ruling clarifying the status of instalment warrants under the SIS Act, and the final ruling was published in May 2012.

Specific advice and written guidance

2.23 The ATO considers that the key difference between specific advice and written guidance is the level of specific detail provided by the applicant in their submission and by the ATO in their reply.⁶⁸ Written guidance is provided when applicants have a general question relating to the application of the law and do not wish or do not need to provide detailed information about their SMSF. If applicants need more specific advice, they must submit detailed information about the specific arrangement or transaction, as well as identification details for their SMSF and about the object of their request, which will enable the ATO to provide a more targeted response.

⁶⁸ Australian Taxation Office, Practice Statement Law Administration 2009/5, op. cit.

2.24 In both cases, applicants must submit a written application. In the case of specific advice, the ATO provides a standard application form (available on the ATO website) that outlines the information required.⁶⁹ There is no form or template for written guidance requests. The ATO aims to provide a response to an application for SMSF specific advice or written guidance within 28 days of receiving all the necessary information.

2.25 Once received, the applications are reviewed by an ATO officer for completeness and relevance. If the officer is of the view that information is missing, or a different form of assistance from that requested would be more appropriate, the ATO indicates that contact must be made with the applicant within 14 days and options for different types of advice, such as written guidance or a SMSF publication, should be provided.

The Transforming Tax Technical Decision Making (T3DM) project

2.26 In 2010, the ATO initiated a project, the Law Improvement Project, aimed at identifying the practical steps that could be implemented to improve the corporate business process for delivering tax technical decisions, including interpretative assistance. While the Project review did not identify any systemic problems, it uncovered a number of concerns relating to the transparency and timeliness of decisions, the need for early access to technical experts, and the assessment of risk in relation to precedential issues. The Project made a number of recommendations, which were endorsed by the ATO Executive in March 2011 and which outline a new model for the delivery of interpretative assistance.

2.27 The implementation of this new model is the responsibility of the T3DM project, and applies to all interpretative assistance relating to tax and superannuation legislation. The T3DM project's goal is to deliver a new tax technical decision-making model that will support the effective and efficient use of tax technical resources across the ATO. In particular, the project seeks to respond to issues of delays in response times for delivering interpretative assistance by bringing increased expertise to problems earlier in the ATO's process, and by reserving the most expensive, high-expertise resources for the issues presenting the greatest risk. One of the key initiatives to achieve the project's objective is to transfer law experts from the ATO's Centres of

⁶⁹ It is not mandatory for applicants to use this form, as long as the information necessary for the ATO to provide the advice is included.

Expertise and Tax Counsel to front line areas to strengthen the technical expertise available in operational areas. A series of pilots were conducted during 2011, and the new arrangements were expected to be in place by July 2012.⁷⁰

2.28 The T3DM project is an ATO-wide initiative, and does not have a specific focus on decisions relevant to interpretative assistance on superannuation law. While the Superannuation Business Line was not one of the areas selected for the pilot stage, a transfer of staff from the Law and Practice Business Line to the superannuation area was conducted in April 2012 and the T3DM project was implemented from this date.

The ATO's quality assurance system: the Integrated Quality Framework

2.29 Since 2009, the ATO has used a quality assurance process for specific advice and written guidance called the Integrated Quality Framework (IQF). IQF aims to 'continuously improve and assure the quality of [the ATO's] written interpretative decision making'.⁷¹ SMSF public rulings and determinations are excluded from the IQF, as quality control mechanisms such as a review of the public rulings by the Superannuation Ruling Panel and public consultation are an integral part of the public rulings and determination development process.

2.30 Interpretative assistance can be assessed using IQF at two points:

- 'pre-issue' assessment: the advice is assessed before being released to the applicant. 'Pre-issue' assessments are conducted by a senior technical officer, recorded in a database and the results are communicated to the case officer and the team leader; and
- 'post-issue' assessment: the advice is assessed for QA after release to the applicant. 'Post-issue assessments' are conducted on a sample of cases each month by quality and technical leaders. The results are also communicated to the case officer and the team leader

⁷⁰ Australian Taxation Office, *NTLG Minutes September 2011* [Internet], available from <<http://www.ato.gov.au/taxprofessionals/content.aspx?menuid=0&doc=/content/00300528.htm&page=13&H13>> [accessed 13 April 2012].

⁷¹ Australian Taxation Office, *Practice Statement Law Administration 2009/6, Quality Improvement and Assurance: Application of and Conformance with the Integrated Quality Framework*, p. 2. [Internet] Available at <<http://law.ato.gov.au/atolaw/view.htm?Docid=PSR/PS20096/NAT/ATO/00001>> [accessed 5 March 2012].

2.31 The proportion of cases undergoing IQF is based on a consideration of the risks associated with each product and varies over time. For instance, in 2009–10 and 2010–11, the ANAO determined that between 51 and 90 per cent of all SMSF specific advice products had been selected for IQF. The vast majority (approximately 97 per cent) of the cases selected undergo a pre-issue assessment.

2.32 Each product selected is assessed against nine IQF criteria, summarised in Table 2.1 below.

Table 2.1

Integrated Quality Framework Criteria

Criterion	Explanation
Administrative soundness	Products and processes comply with administrative law requirements and principles, and meet internal and community standards of conduct. An administratively sound process will be well managed, will comply with recognised and established work practices, and will be able to withstand external scrutiny.
Integrity	A measure of ethical standards and how they are applied in ATO products, processes and decisions. A measure of ATO's relationships with clients and the wider community; and of how well the ATO conforms to taxpayers' charter principles. This criteria is expected to help to shape community confidence in the tax system.
Correctness	Decisions and actions comply with the relevant ATO precedential view or views.
Appropriateness to clients' requirements and circumstances	ATO staff understand their clients' situations, identify all their issues, and respond to them clearly in a way which is understandable and which addresses their needs.
Effectiveness	The extent to which decision making processes have supported the ATO strategy and vision, positively impacted upon the risks associated with the product or client relationship, and have enhanced the client experience.
Transparency	The ATO is open and honest in its actions, and its processes and decisions are accessible. It also includes explaining decisions, ensuring that those reasons are accurate and clear, and informing clients of their review rights.
Consistency	The ATO treats clients and client groups in an equivalent fashion when presented with similar circumstances, while taking account of individual factors.
Timeliness	The ATO's ability to promptly provide an advice, decision, output or result to our clients, with a particular focus upon the extent to which the ATO meets clients' expectations.
Efficiency	Appropriate use is made of ATO resources, and positive outcomes are reached promptly and in a cost-effective manner.

Source: ANAO analysis of ATO information.

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Self Managed Superannuation Funds

2.33 All nine criteria are applied to each product and are rated individually on the following scale: 'not aligned'; 'aligned'; 'meets standards'; 'high'; and 'very high'. Quality criteria that achieve an 'aligned', 'meets standards', 'high' or 'very high' grade are deemed a 'pass'. Criteria graded 'not aligned' are considered a 'fail'. The consequences of a product being rated as a 'fail' differ. When the 'fail' relates to the correctness criteria, the rating would result in a product not being issued to clients or being recalled if the product had already been issued. The ATO has established a difference between the ratings 'aligned' and 'meet standards'. An 'aligned' rating means that although the product meets quality standards, some improvement could be made, and this may trigger a review of processes.

2.34 The ANAO analysed IQF results for all specific advice and written guidance products for 2009–10 and 2010–11.⁷² Overall, the IQF results indicated that the specific advice and written guidance products performed highly against all the criteria measuring quality, except in relation to the timeliness criterion. The timeliness criterion was the issue found to be 'not aligned' (fail) most frequently (in up to 10 per cent of specific advice products, and up to 28 per cent of written guidance products). The issue of timeliness is examined in more detail in the following section.

2.35 A higher proportion of products, although still small overall, were assessed as 'aligned'. In 2010–11, two criteria in particular attracted more than 10 per cent of 'aligned' ratings:

- administrative soundness (21 per cent of specific advice products and 23 per cent of written advice products); and
- appropriateness (11 per cent of specific advice products and 15 per cent of written advice products).

2.36 The T3DM project, when it is fully implemented, may have a positive impact on the ATO's performance in relation to these two criteria. The project has the potential to address some of the issues in relation to the quality and timeliness of SMSF interpretative assistance products, by bringing increased expertise to complex decisions earlier in the process, and by reserving the most expensive, specialized expertise for the issues presenting the highest risk.

⁷² The rules adopted by the ATO to identify the different types of SMSF interpretative assistance selected for assessment by the IQF have changed over time. In particular, a number of SMSF advice products were grouped together before 2009–10. For this reason, the analysis of IQF results for specific advice products was not possible prior to 2009–10.

Nonetheless, the fact that administrative soundness and appropriateness were identified through the IQF process as potential issues reinforces the need to assess the extent to which specific advice and written guidance address the SMSF market's expectations.

Conclusion

2.37 While under the SIS Act and Regulations the ATO is the regulator for SMSFs, other agencies including Treasury, APRA and ASIC, also have a role in the administration of this legislation. The arrangements established by the ATO to engage these three agencies in the development of interpretative assistance for SMSFs address the risks of inconsistency and inefficiencies that may occur in matters that involve cross-agency partnerships, and support the effective development of interpretative assistance for SMSFs.

2.38 The two key consultative forums, the SCC and the NTLG-STSG, allow industry to engage directly and participate in the development of the ATO's precedential view. They also allow the ATO to gain a better understanding of the significance and implications of issues affecting the industry. Membership of the two committees, however, includes mainly professional organisations. Groups directly representing SMSF trustees do not have a strong representation at these committees. While professional organisations provide a link to trustees through their members' professional relations with trustees, the ATO could consider ways to increase the direct engagement of trustees, through further implication of organisations representing SMSF trustees in the consultation process.

2.39 Since 2009, the ATO has used the IQF to continuously improve and assure the quality of non precedential SMSF interpretative advice. Overall, the IQF results for 2009–10 and 2010–11 indicated a high level of performance against all the criteria measuring quality. The criteria that did not rate as well were appropriateness, administrative soundness and timeliness.

Timeliness of SMSF interpretative assistance

2.40 The ATO's commitment to provide timely advice is established in the Taxpayers' Charter, where the ATO undertakes to provide timely responses to enquiries and requests and to be accountable for its performance under the

Charter.⁷³ The ANAO examined the time taken by the ATO to produce four key types of SMSF interpretative assistance: public rulings, determinations, specific advice and written guidance⁷⁴ since the ATO started to deliver SMSF interpretative assistance in 2007.

Public rulings and determinations

2.41 Public rulings and determinations are not subject to the ATO's Service Standards. As a general rule, the ATO aims to issue public rulings and determinations within the following timeframes:

- for SMSF public rulings: the issue of a draft SMSF ruling within eight months of the topic's listing in the Rulings Program and the issue of a final SMSF public ruling within eight months of the issue of the draft (16 months in total) ; and
- for SMSF determinations: the issue of a draft determination within four months of the topic's listing in the Rulings Program and issue of a final determination within four months of issue of the draft (eight months in total).⁷⁵

2.42 Where it is apparent to the ATO, from the outset or at a later point of the production process, that these timeframes cannot be met, different timeframes are adopted and published in the Rulings Program. However, the ATO's Public Rulings Manual indicates that timeliness is an important aspect of the public rulings process, and that every effort must be made to meet the scheduled timeframes.⁷⁶

2.43 Figures 2.2 and 2.3 outline the number of months taken by the ATO to deliver SMSF public rulings and determinations (both draft and final versions).

⁷³ The ATO also commits through its Charter to providing information that is accurate, consistent and clear, to making it easier and cheaper for taxpayers to comply and to provide products and services that 'make sense to you'. Australian Taxation Office, *Taxpayer's Charter – what you need to know*, Canberra, 2010.

⁷⁴ The analysis does not include SMSF product rulings because only one was produced, and as for other ruling products, this initial ruling described the product ruling system. Also the time period examined for specific advice and written guidance is restricted to 2009–10 and 2010–11, because these two categories of advice did not exist in these forms before the second half of 2009.

⁷⁵ Australian Taxation Office, *Public Rulings Program*, [Internet] available at <[http://law.ato.gov.au/atoLaw/view.htm?dbwidetocone=03%3AATO%20Rulings%20and%20Determinations%20\(Including%20GST%20Bulletins\)%3ARulings%20Program%3A%230600000000%23Public%20Rulings%20Program%20-%202012%20April%202012%3B](http://law.ato.gov.au/atoLaw/view.htm?dbwidetocone=03%3AATO%20Rulings%20and%20Determinations%20(Including%20GST%20Bulletins)%3ARulings%20Program%3A%230600000000%23Public%20Rulings%20Program%20-%202012%20April%202012%3B)>, accessed 27 April 2012.

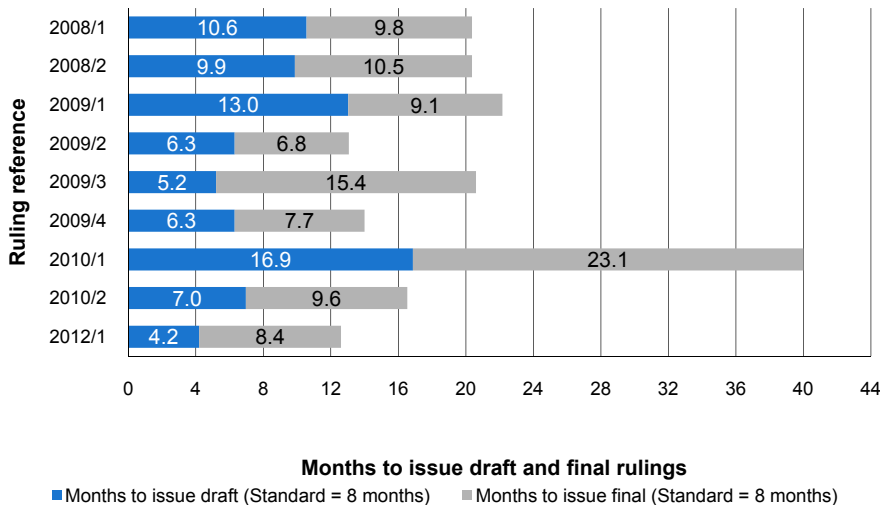
⁷⁶ These new timeframes should be documented and approved by the Deputy Chief Tax Counsel. Australian Taxation Office, *Public Rulings Manual*, CMSWeb.dot v5.0.2 [Intranet], p. 28.

Three out of the nine rulings were produced in less than 16 months, and one ruling took 40 months to be delivered. Three out of the six determinations were produced in approximately eight months, and the three remaining determinations exceeded the standard timeframe by three, six and nine months respectively.

2.44 The timeframes in Figures 2.2 and 2.3 do not take into account the time taken before an issue is listed on the Public Rulings Program. The ATO may spend considerable time and resources on interpretative issues before determining that a public ruling is the appropriate way of resolving a technical problem. For example, while the release of the SMSF public ruling *Self Managed Superannuation Funds: limited recourse borrowing arrangements—application of key concepts*⁷⁷ was conducted in just over 12 months, within the ATO’s nominated timeframes, issues relating to the status of instalment warrants have been under consideration by the ATO and industry for a significantly longer period (see paragraph 2.22 for more details on the development of this ruling).

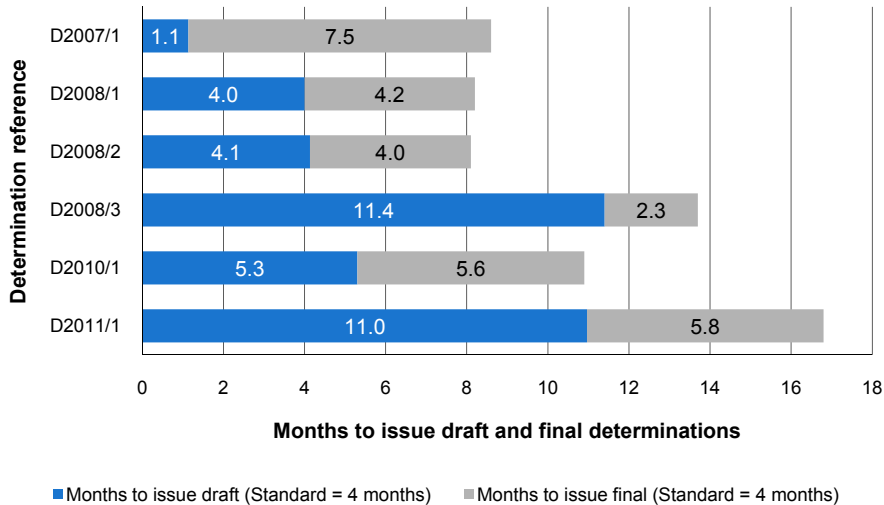
Figure 2.2

SMSF public rulings: ATO timeliness performance against 16-month completion target



Source: ANAO analysis, based on ATO data.

⁷⁷ ATO, *Self Managed Superannuation Funds: limited recourse borrowing arrangements – application of key concepts*, Self Managed Superannuation Funds Public Ruling 2012/1. This ruling was finalised in May 2012.

Figure 2.3**SMSF Determinations: ATO timeliness performance against eight-month completion target**

Source: ANAO analysis, based on ATO data.

2.45 The ATO advised that the extensive time required to finalise SMSF public rulings and determinations was justified by the large number of stakeholders (including APRA) whose views must be taken into consideration in the establishment of the ATO's view. Further, the ATO considered that in the future, the number of public rulings and determinations should not be significant as the majority of ruling requirements had been addressed.

2.46 The timeframe for completion of SMSF public rulings is already considerably longer than for tax rulings (16 months to issue a SMSF public ruling compared with 12 to issue a taxation public ruling).⁷⁸ While the ANAO recognises that some tension may exist between the requirement to conduct external and internal consultations and the timely delivery of public rulings and determinations, by setting indicative timeframes, the ATO does create an expectation in the SMSF market which it should endeavour to fulfill.

⁷⁸ The ATO advised that the longer timeframe for SMSF rulings was justified by the need for the ATO to consult with the prudential regulator, APRA, on SIS Act rulings, which is not required in the case of tax law rulings.

Specific advice and written guidance

2.47 Delivery of non-precedential interpretative assistance (such as specific advice and written guidance) is subject to service standards. The ATO adopts the following performance standards:

- 80 per cent of specific advice to be finalised within 28 days (published standard), and 99 per cent within 90 days; and
- 85 per cent of written guidance to be finalised within 28 days (published standard) and 99 per cent within 90 days.

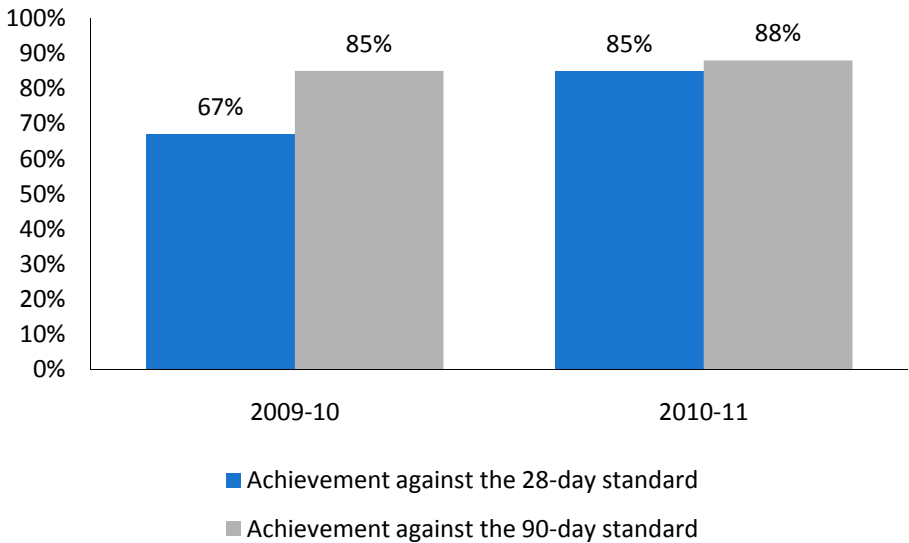
2.48 The ATO's performance in delivering specific advice and written guidance within time standards has improved between 2009–10 and 2010–11. In 2009–10, the ATO issued 202 specific advice products, but only met its 28-day timeliness standard in 67 per cent of cases. In 2010–11, however, the ATO delivered 217 specific advice products, and exceeded their standard by issuing 85 per cent of these products within 28 days.

2.49 The timeliness of written guidance products also improved over the two years, but did not achieve the standard of 85 per cent of products within 28 days. In 2009–10, 621 written guidance products were issued, a little more than half within 28 days. In 2010–11, the ATO provided 903 written guidance products, 65 per cent of which were given within 28 days.

2.50 Figures 2.4 and 2.5 present the ATO's performance in delivering specific advice and written guidance against these standards.

Figure 2.4

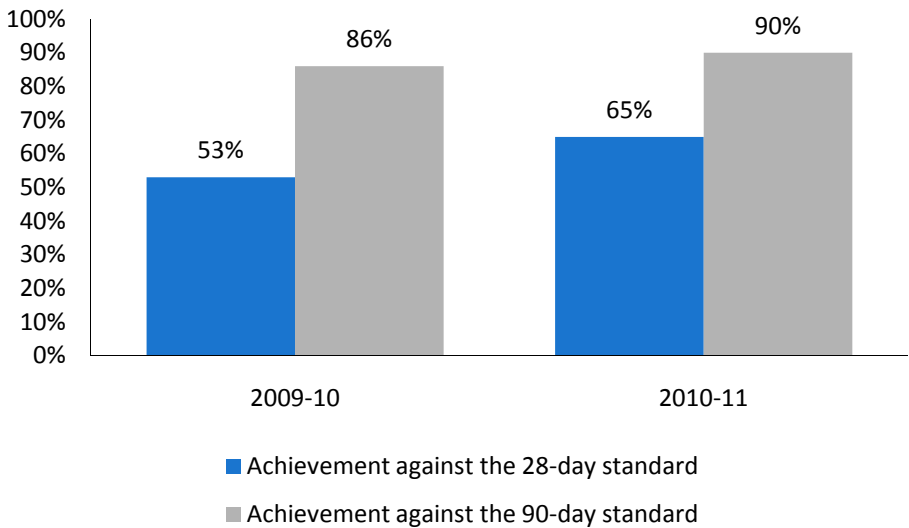
Specific advice: ATO timeliness against 28-day and 90-day completion targets



Source: ANAO analysis, based on ATO data.

Figure 2.5

Written guidance: ATO's achievement against 28-day and 90-day completion targets



Source: ANAO analysis, based on ATO data.

2.51 The ATO indicated that a number of factors had contributed to the lack of timeliness in issuing specific advice and written guidance in 2009–10. Firstly, the Superannuation business line received an increased number of requests in the period.⁷⁹ Secondly, the introduction in 2009 of a new case management system (the Client Contact – Work Management – Case Management System (CWC))⁸⁰, and the need for substantial staff training, were identified as factors contributing to the ATO’s inability to meet its service targets.

2.52 In October 2011, the ATO implemented a change in the methodology employed to record SMSF advice products. The ATO advised that as a result, SMSF advice products were identified more accurately after this date. Because of this change in methodology, the ANAO was not able to confirm the timeliness performance for 2011–12. The ATO advised, however, that as at April 2012, it is meeting the 28-day and 90-day completion standards for SMSF specific advice and written guidance products.

2.53 The improvements to timeliness in 2010–11 are consistent with the ATO’s view that it is addressing those factors which affect its performance. In addition, the T3DM project aims to enable, through a more effective use of technical expertise, the delivery of quicker and better-formed advice products.

2.54 Nonetheless, the ATO sets service standards to assure itself and the community that the services it provides are of a consistent and high standard and the ATO should meet these. At present, for the simpler forms of interpretative assistance that are specific advice and written guidance, applicants must often wait several weeks to receive an answer to their queries.

Conclusion

2.55 The impact of having to wait for the ATO’s advice can be significant for trustees and their representatives: market opportunities may have been missed or financial decisions may have needed to be taken before advice is provided. Professional groups consulted by the ANAO raised the issue of timeliness in obtaining clarity on the ATO precedential view in certain circumstances. A lack of certainty can affect industry members’ ability to advise their clients on

⁷⁹ These requests related primarily to Excess Contribution Tax levied on superannuation contributions, including SMSFs, and for which taxpayers requested the Commissioner to exercise his discretion and disregard or reallocate the tax.

⁸⁰ The implementation of this management system was examined by the ANAO in 2010. ANAO, Audit Report No. 6, *The Tax Office’s Implementation of the Client Contact – Work Management – Case Management system*, 2010–11.

the implications of specific investment strategies or on the taxation implications of certain aspects of the SIS Act or tax law with relation to superannuation. The ATO contends that it is prepared to err on the side of 'correctness' over timeliness in the preparation of its advice products. Industry responses, however, indicate that this does not satisfy its need for advice that reflects real-world circumstances.

2.56 Taking into consideration the impact of time delays in providing interpretative assistance, the ATO could consider reducing the timeframe to produce SMSF precedential advice (currently 16 months), and endeavour to deliver all SMSF interpretative assistance products (precedential and non-precedential) consistently within the applicable timeframes.

Assessment of interpretative assistance's relevance to the SMSF market

2.57 A key legislative objective behind the establishment of SMSFs was to provide individuals with a chance to control the investment of their contributions and the payment of their benefits. The assumption was that, unlike in the large funds, trustees would have an incentive to protect their own interests, and that accordingly, SMSFs would not need a strong prudential regime under the SIS Act.⁸¹ For these reasons, the ATO's role as a regulator is primarily compliance-focused, and unlike APRA, does not extend to reviewing or commenting on specific investment strategies prepared by SMSF trustees, or whether SMSFs are financially sound.

2.58 While a majority of SMSF trustees are tertiary educated⁸², the ATO has recognised that they do not have overall the levels of resources and financial management expertise of the trustees from large APRA funds. In a minute to the Minister for Revenue and Assistant Treasurer in 2007 presenting the ATO's plans for publishing advice for SMSF trustees, the then Assistant Commissioner for Superannuation indicated that:

Trustees of SMSFs are a significantly different market to the trustees of large funds regulated by APRA. They are typically less sophisticated than

⁸¹ Attorney's-General Department, *Super System Review Final Report, Part Two, Recommendation Packages*, Canberra, 2010, p. 225.

⁸² Australian Taxation Office, *Super Reforms Research: SMSF Trustees Quantitative Findings*, pp. 56-57, January 2012. For more details on this research, see footnote 91.

professional fund trustees and have more limited resources to access professional advice.⁸³

2.59 The ATO is responsible for helping to protect the retirement income system by ensuring that SMSFs follow the rules outlined in the superannuation and income tax legislation, and interpretative assistance is a critical instrument to meet this responsibility. The ATO's role is to provide effective support to trustees to enable them to be 'genuinely self-directed and self-sufficient' in the management of their retirement savings through sound investment practices.⁸⁴

Legal weight of SMSF interpretative assistance

2.60 Overall, the model chosen by the ATO to deliver SMSF interpretative assistance generally mirrors the model used for interpretative assistance relating to taxation legislation:

- similar products are provided, including public rulings, determinations, product rulings, private rulings (called specific advice when provided for SMSFs), and written guidance;
- the same process is used to produce taxation and SMSF interpretative assistance, with, in particular, timeliness standards; and
- the same templates are used by the ATO to present both types of interpretative assistance.

2.61 A significant factor, however, differentiates taxation from SMSF interpretative assistance: unlike a large proportion of taxation interpretative assistance products, SMSF interpretative assistance is not legally binding on the Commissioner.

2.62 Under a binding tax decision, if the advice is later found to be incorrect (for example if a court reaches a different conclusion in a later case) and the taxpayer makes a mistake as a result, they are protected from paying tax that would otherwise be payable under the law and also from false or misleading statement penalty or interest charges. The decision does not bind the taxpayer,

⁸³ Australian Taxation Office, *Taxation Administration: Tax Office Advice for Self Managed Superannuation Fund Trustees*, Minute to the Minister for Revenue and Assistant Treasurer, 20 February 2007, p. 1.

⁸⁴ The second of the 10 principles that underpin the regulation of SMSFs as established by the Cooper Review panel is 'Freedom from intervention': 'Given that SMSF members are entirely responsible for their own decisions (Principle 1), the Panel sees the ability to be genuinely self-directed and self-sufficient as an important feature of SMSFs...' Attorney's-General Department, *op. cit.*, p. 219.

who retains their entitlements under the law where those entitlements are more favourable to the taxpayer than is expressed in the decision.

2.63 By contrast, SMSF advice and SMSF guidance is not legally or administratively binding on the Commissioner. This fact has important implications on the level of protection offered to trustees by the advice. A trustee who relies on SMSF advice or guidance remains responsible for their actions under the SIS Act or Regulations.⁸⁵ If the ATO provides wrong advice, trustees are not entitled to rely on it to support, for example, the maintenance of investments that are in fact outside the legislative rules.⁸⁶

2.64 The ATO indicates that if a trustee follows the ATO's advice, and this advice turns out to be incorrect or misleading and the trustee fails to comply with the law as a result, the Commissioner would consider favourably the fact that the trustee acted upon the ATO's advice and would use his discretion to decide what, if any, action is to be taken in response to the breach.⁸⁷ In practical terms, while trustees should not expect legal protection from SMSF interpretative advice, they can expect the advice to provide them with 'a good level of practical certainty'.⁸⁸

2.65 Since the ATO started delivering SMSF interpretative assistance in 2009, there has not been any case where the advice provided has subsequently been found to be incorrect by the ATO. Consequently, although the ATO states that SMSF advice does provide a level of protection – at the discretion of the Commissioner – this statement has not been tested.

2.66 The ATO indicates, in the body of SMSF interpretative assistance products and in most SMSF publications, that the advice provided is not binding. For instance, specific advice products include a disclaimer at the end of the advice, stating:

⁸⁵ Australian Taxation Office, *Practice Statement Law Administration 2009/5*, op. cit., paragraph 111.

⁸⁶ Australian Taxation Office, *Regulating the self managed super fund market*, Speech by Neil Olesen, Deputy Commissioner of Taxation, The Institute of Chartered Accountants in Australia, SMSF Conference, Sydney Exhibition and Convention Centre, New South Wales, 27 February 2009, [Internet] Available from <<http://www.ato.gov.au/corporate/content.aspx?doc=/content/00183217.htm>> [accessed 13 April 2012].

⁸⁷ Australian Taxation Office, *Practice Statement Law Administration 2009/5*, op. cit., paragraph 114.

⁸⁸ Australian Taxation Office, *Self Managed Superannuation Funds and the Global Recession: an ATO Perspective*, Speech by Michael D'Ascenzo, Commissioner of Taxation to the Self Managed Super Fund Professionals' Association of Australia (SPAA) National Conference, Adelaide 11 March 2009, [Internet] Available from <<http://www.ato.gov.au/corporate/content.aspx?doc=/content/00182952.htm>> [accessed 13 April 2012].

This SMSF specific advice is not legally or administratively binding on the Commissioner. ... An entity that relies on SMSF advice will remain responsible for their action under the SIS Act or Regulations. However, if the Commissioner later takes the view that the law applies less favourably to a SMSF than the SMSF advice indicates, the fact that the trustee acted in accordance to this advice would be a relevant factor in their favour in the Commissioner's exercise of any discretion as to what, if any, action is to be taken in response to a breach of that law.

2.67 Written guidance products include a short statement at the beginning of the letter indicating that 'this guidance is general in nature and not binding on the Commissioner', and later on specifying that although the guidance is 'not binding on the Commissioner, it will provide certainty for you in relation to a particular transaction and comfort in that it meets the requirements of the SIS Act and Regulations'. Given the complexity of these statements, it is not certain that all trustees fully understand that SMSF interpretative assistance will provide them with certainty and comfort that their legal requirements are met, but not with legal protection.

ATO's evaluation activities

2.68 An effective way to assess the extent to which the ATO's interpretative assistance meets the SMSF market's expectations is to conduct post-delivery assessments.

2.69 The ATO does not conduct research specifically aimed at assessing the satisfaction of trustees and their representatives with SMSF interpretative advice products. However, the ATO commissions a yearly satisfaction survey among tax agents.⁸⁹ In the 2011 edition of this survey, only 28 per cent of respondents indicated that they were satisfied or very satisfied with the overall service provided by the ATO. When asked about their satisfaction with the advice and information provided by the ATO, 59 per cent indicated being satisfied or very satisfied. For both questions, the 2011 satisfaction ratings were significantly lower than in 2010.⁹⁰ While these results relate to ATO advice in general, and not only to SMSF advice, they signal that a variance may exist

⁸⁹ Australian Taxation Office, *Tax Agent Services Survey 2011* [research conducted by Chant Link & Associates], June 2011. The online survey was completed by a total of 863 tax agents across Australia.

⁹⁰ Australian Taxation Office, *ibid.*, pp. 25 and 80. The results for 2010 were: 60 per cent of respondents indicated that they were satisfied or very satisfied with the overall service provided by the ATO; and 69 per cent of respondents indicated that they were satisfied or very satisfied with the advice and information provided by the ATO.

between the assessment of advice quality made by the ATO and by the users of the advice.

2.70 The ANAO consulted with industry representatives specifically about interpretative assistance for SMSFs. The discussions indicated that, while the advice and information provided by the ATO were considered valuable overall to professional advisers, they could be too technical and legalistic, narrowly focused and impractical for trustees. Research commissioned by the ATO in 2011⁹¹ further indicated that the need to educate SMSF trustees about their roles and responsibilities was seen as an ongoing challenge among tax agents and financial planners. They would like to see the ATO play a larger role in education to ensure trustees are performing their obligations appropriately.⁹² In the same body of research, trustees reported that, while their primary concerns were in relation to administration, compliance and changes to the super system, there was a gap in the information provided by the ATO between 'basic' information and 'very technical advanced information/legislation'.⁹³

2.71 These findings would suggest that, after two and a half years of delivering these products, a specific assessment of the extent to which they address the expectations of the SMSF market, including SMSF trustees and their representatives, would be appropriate. This assessment could also explore the degree to which trustees understand the level of reliance that they can give to SMSF interpretative assistance.

Conclusion

2.72 Providing interpretative assistance in a timely manner is important to effectively support trustees' potentially time-sensitive decisions. The ATO's timeliness performance in delivering SMSF interpretative assistance products has been inconsistent over time. The ATO indicated that a number of factors

⁹¹ Australian Taxation Office, *Super Reforms Communications Developmental Research: Qualitative Findings*, November 2011, *Super Reforms Administrative Design Research: Qualitative Findings*, January 2012, and *Super Reforms Research: SMSF Trustees Quantitative Findings*, January 2012 [research conducted by Colmar Brunton and Associates]. Across the three research pieces, 24 focus groups and 74 interviews with a range SMSF stakeholders (including professional advisers and trustees), and a survey of 1433 trustees, were conducted.

⁹² Australian Taxation Office, *Super Reforms Administrative Design Research: Qualitative Findings*, op. cit., p.40.

⁹³ Australian Taxation Office, *Super Reforms Communications Developmental Research: Qualitative Findings*, op. cit., p. 28.

had contributed to the inconsistency in timeliness, including the requirement to conduct external and internal consultations for public rulings and determinations, and changes in the information management systems which support the delivery of specific advice and written guidance.

2.73 In addition, in 2011, the ATO commenced the implementation of the Transforming Tax Technical Decision Making (T3DM) project. Through the T3DM, the ATO should continue its effort to ensure that all SMSF interpretative assistance products are delivered consistently within applicable timeframes. There would also be benefit in the ATO considering reducing the timeframe to produce SMSF public rulings (currently 16 months) to match that of taxation public rulings (12 months).

2.74 The ATO does not conduct research specifically aimed at assessing the satisfaction of trustees and their representatives with SMSF interpretative advice products. After two and a half years of delivering SMSF interpretative assistance products, an evaluation of the extent to which these products meet the expectations of the market would be timely. Given that, unlike tax interpretative assistance, SMSF interpretative assistance is not legally or administratively binding on the Commissioner, confirming that trustees understand the legal weight of SMSF assistance could be included in this evaluation.

Recommendation No.1

2.75 To ensure that the SMSF interpretative assistance products address the most significant needs of the SMSF market, the ANAO recommends that the ATO evaluate the satisfaction levels of trustees and their representatives with SMSF interpretative assistance products, and implement potential improvements, as relevant.

2.76 ATO's Response: Agreed

The ATO will survey subscribers to SMSF News to obtain their views on the extent to which SMSF interpretative assistance meets their current needs. These subscribers provide a suitable survey group to evaluate satisfaction levels in this area as through their subscription they have demonstrated an interest in active participation in the operation of their SMSF and should therefore be representative of those trustees and advisers likely to be seeking interpretative assistance from the ATO.

3. Access to SMSF Information and Interpretative Assistance

This chapter reviews the key characteristics of the audiences for SMSF interpretative assistance: trustees and their representatives. The chapter then examines the different sources through which the ATO provides SMSF information and interpretative assistance, to assess how readily they are accessible to the SMSF market.

Introduction

3.1 Interpretative assistance for SMSFs fulfils an important function: to enable SMSF trustees to understand and meet their obligations under the SIS Act and Regulations⁹⁴ and to make it as easy as possible for trustees to comply.⁹⁵ These objectives can only be effectively met if trustees and their representatives are able to access SMSF interpretative assistance easily, and if the assistance, once accessed, is easily understood.

3.2 The Organisation for Economic Cooperation and Development (OECD) has identified the ‘right to be informed, assisted and heard’ as a basic taxpayer right.⁹⁶ The ATO reflects this right in its Taxpayers’ Charter, and undertakes to offer professional assistance to help taxpayers to ‘get things right’.⁹⁷ The Taxpayers’ Charter states:

We aim to provide accurate, consistent and clear information to help you understand your rights and entitlements and meet your obligations.⁹⁸

3.3 The Joint Committee of Public Accounts and Audit (JCPAA) has also commented on the manner in which the ATO communicates with its clients and has expressed concern at the complexity of the ATO’s communication

⁹⁴ ATO, Practice Statement Law Administration, PS LA 2009/5, *Provision of advice and guidance by the ATO in relation to the application of the SIS Act and Regulations to SMSFs*, p. 3.

⁹⁵ Australian Taxation Office, *How your self-managed super fund is regulated*, 2011, available at <<http://www.ato.gov.au/content/downloads/spr00162377n71454.pdf>> [accessed 14 October 2011].

⁹⁶ OECD Committee of Fiscal Affairs Forum on Tax Administration, *Taxpayers’ Rights and Obligations—Practice Note*, Centre for Tax Policy and Administration (Tax guidance series General Administrative Principles—GAP002 Taxpayers’ Rights and Obligations), Paris, 1990.

⁹⁷ Australian Taxation Office, *Taxpayers’ charter: what you need to know*, Australian Taxation Office, Canberra, 2010. Available at <http://www.ato.gov.au/content/downloads/cor63133_n2548.pdf> [accessed 17 March 2012].

⁹⁸ *Ibid.*, p. 9.

with taxpayers. In its 2011 Biannual Hearing with the Commissioner of Taxation Report, the Committee noted:

Acknowledging that tax law and its interpretation is a complex area ...the Committee cannot stress enough the importance of plain language communication. Taxpayers need to understand in clear and simple language what is being communicated to them and what they need to do about it.⁹⁹

3.4 The Cooper Review also supported this view and considered that trustees should be 'supported with access to information that is relevant, reliable and comparable'.¹⁰⁰ The review stressed the risks associated with a SMSF trustee's lack of financial literacy or understanding of longevity risk, and indicated that increasing the provision of SMSF-oriented information and education would lead to an improvement of overall trustee knowledge.¹⁰¹

3.5 The ANAO examined the profile of the main audience for interpretative assistance to gain a better understanding of their information needs. Key sources of SMSF information and interpretative assistance were then reviewed to assess if these sources are easily accessible and can be readily understood by trustees and their representatives.

SMSF market audience characteristics

3.6 Effective communication should be tailored to clients' needs and made available in a form that is readily accessible and suited to them. The SMSF market is differentiated and includes:

- Trustees: In 2011, there were 442 528 SMSFs representing 841 283 members.¹⁰² While trustees are often represented by advisers, they remain ultimately responsible for their own decisions and for the compliance of their retirement savings with SMSF rules. The ATO has a duty to ensure that SMSF information and interpretative assistance are effective in supporting them in this role.

⁹⁹ Joint Committee of Public Accounts and Audit, Report 426, *Ninth Biannual Hearing with the Commissioner of Taxation*, November 2011, p. 22.

¹⁰⁰ Attorney's-General Department, *Super System Review Final Report, Part Two, Recommendation Packages*, 2010, p. 221.

¹⁰¹ *ibid.* p. 224.

¹⁰² Australian Taxation Office, *Self Managed Super Funds Statistical Report – Dec. 2011*. Available from <<http://www.ato.gov.au/superfunds/content.aspx?menuid=0&doc=/content/00309172.htm&page=6&H6>> [accessed 29 March 2012].

- Potential SMSF trustees: with an average growth rate of 19 per cent per annum in the six years to June 2011¹⁰³, SMSFs are perceived to be an attractive option for a number of superannuation fund members. However, unlike other types of superannuation fund, SMSFs are regulated only by the ATO and the ATO is therefore likely to be a primary source of information about SMSF rules and the obligations of potential trustees.
- Trustees' representatives and advisers: The SIS Act and Regulations are complex and trustees often choose to seek the assistance of a range of professionals to help them manage their SMSF. Further, trustees have an obligation to engage an ATO-approved auditor to have their financial accounts and compliance with the Act audited annually. These representatives also seek the support of the ATO's information and interpretative assistance services.

3.7 The ANAO reviewed existing research on the characteristics of the SMSF market audience to gain an understanding of their information and interpretative assistance needs.

Trustees and potential trustees

3.8 Research carried out by the ATO and by professional associations helps to build a profile of trustees and of their motivations when choosing to enter into a SMSF arrangement. Several surveys indicate that the main motivation for trustees to establish a SMSF is the perception that SMSFs allow a higher level of control over investment choices. A questionnaire conducted by the ATO with new SMSF trustees in 2008 indicated that 'control of investment' and 'greater flexibility over investment options' were the two most frequently reported reasons for entering into a SMSF arrangement.¹⁰⁴ This finding was confirmed by two surveys commissioned by CPA Australia and by the SMSF Professionals' Association of Australia (SPAA) in 2009 and 2011 respectively.

¹⁰³ ANAO analysis, based on Australian Prudential Regulation Authority, *Statistics – Annual Superannuation Bulletin, June 2011* (issued 29 February 2012), p.34.

¹⁰⁴ In 2008, 2404 trustees responded to this question. 'Control of investments' was quoted in 86 per cent of responses and 'greater flexibility over investment options' was quoted by 64 per cent of respondents. *2008 ATO new trustee questionnaire*, quoted in Attorney-General's Department, *A Statistical Summary of Self Managed Superannuation Funds*, December 2009, p. 22.

These surveys found that a key driver for trustees to establish a SMSF was to have control over their money and their investment decisions.¹⁰⁵

3.9 A desire to reduce the fees paid to APRA-regulated funds and a perception that SMSFs incurred lower fees were reported to be other important drivers behind trustees' decision to establish a SMSF. Recent ATO research indicated that most SMSF trustees were cost-conscious in the management of their SMSF and as such sought to take on most of the compliance obligations themselves.¹⁰⁶ Consistent with their intent to control their financial decisions, trustees were found to be highly involved in the management of their SMSF. Eighty-seven per cent of respondents reported adopting an active or very active role in the overall management of their SMSF and overall, respondents spent on average 3.7 hours per week managing their SMSF.¹⁰⁷

3.10 In terms of the socio-economic profile of SMSF trustees, the majority (56 per cent) are over 55 years old¹⁰⁸ and tertiary educated, with 59 per cent of respondents to an ATO survey holding a Bachelor or higher degree.¹⁰⁹

Professional support for SMSF trustees

3.11 The appointment of an independent auditor is the only legislative requirement trustees must meet under the SIS Act for professional support. However, SMSF trustees may engage the services of a range of professionals to help them meet their obligations and develop their investment choices, including:

¹⁰⁵ The CPA research included an online survey with 179 SMSF trustees, 63 previous SMSF trustees, and 166 potential trustees (who had considered establishing a SMSF). It also included a telephone survey with 300 CPA public practitioners and 300 financial planners. SPAA and Russel Investments, *Intimate with Self-Management Superannuation: An Inaugural Annual Study of Self Managed Superannuation Funds*, 2011, p. 14. The SPAA research included an online survey with 431 SMSF trustees, a focus group with SMSF and another online survey with 599 professionals (mostly financial planners and accountants); CPA Australia, *Self Managed Super Funds Insights*, CPA Australia, Melbourne, 2009, p. 6.

¹⁰⁶ Australian Taxation Office, *Super Reforms Program Research: Qualitative Findings*, op. cit. pp. 35 and 41.

¹⁰⁷ Australian Taxation Office, *Super Reforms Research: SMSF Trustees Quantitative Findings*, op. cit. pp. 40 and 38.

¹⁰⁸ Australian Taxation Office, *Self Managed Super Funds Statistical Report*, December 2011, available at <<http://www.ato.gov.au/superfunds/content.aspx?menuid=49150&doc=/content/00309172.htm&page=12&H12>> accessed 20 March 2012.

¹⁰⁹ Australian Taxation Office, *Super Reforms Research: SMSF Trustees Quantitative Findings*, op. cit. pp. 56–57.

- tax agents or fund administrators, who may prepare fund accounts as well as annual financial position and operating statements, lodge annual returns, provide tax advice or represent trustees in dealing with the ATO;
- legal practitioners, who may be engaged to review and update a fund's trust deeds or provide legal advice regarding the application of the SIS Act and Regulations; and
- financial advisers, who may assist in preparation of an investment strategy.

3.12 In addition, related parties such as real estate agents, banks and entrepreneurs may create investment packages which are targeted at SMSF investors. As previously mentioned, while advisers need to meet legal and professional requirements specific to their own roles, the ATO has no legislative obligation to regulate them as a defined group of SMSF professionals.

3.13 Most trustees (98 per cent) lodge their SMSF return using a tax agent¹¹⁰ and all trustees must engage an independent auditor to audit their fund's operation each year. However, these professionals generally do not provide a comprehensive service covering both compliance and investment advice. The 2010 SMSF Professionals Association of Australia (SPAA) research found that only 38 per cent of trustees have a dedicated adviser.¹¹¹ Where an adviser is engaged, the survey found that approximately one third of these trustees use their adviser for 'high level' ideas only and a further third 'partially' use them, with both of these groups preferring to undertake independent research before making their investment decisions.¹¹²

3.14 In addition, professional advisers are rarely the first source of information used by trustees, with general newspapers, magazines or websites filling this role.¹¹³ Advice from friends and relatives is just as influential on the decision to establish a SMSF as advice from financial planners and

¹¹⁰ Australian Taxation Office statistics, unpublished.

¹¹¹ SMSF Professional's Association of Australia Limited (SPAA) and Russell Investments, *Intimate with Self Managed Superannuation: An Inaugural Annual Study of Self Managed Superannuation Funds*, 2011, p. 23.

¹¹² *ibid.*

¹¹³ *ibid.*

accountants.¹¹⁴ For trustees who do rely on advisers (for instance older trustees who do not feel that they are able to handle all SMSF matters on their own), receiving independent, appropriate information and support from the ATO is important.¹¹⁵

Ensuring that the SMSF market's communication needs are addressed

3.15 The diversity of the SMSF market means that the ATO's information sources and interpretative assistance products have to reach a broad audience, ranging from potentially interested individuals to existing SMSF trustees and professional advisers, and that these groups have different information requirements. This challenge is not unique to the SMSF market and has been acknowledged by the ATO.¹¹⁶ The importance of direct communication between the ATO and taxpayers has also been recognised by the Inspector-General of Taxation (IGT), who recommended that:

The Tax Office should ensure that when it is dealing with a compliance issue that affects a significant segment of the taxpayer population it employs appropriate communication processes to ensure that its concerns on this compliance issue are made known to that population directly and as soon as possible. The Tax Office should not seek to rely on communicating these concerns only in publications or speeches to limited audiences.¹¹⁷

3.16 To address this issue of different communication needs, the ATO uses a mix of communication channels, including communication targeted at professional advisers. SMSF advisers represent an important segment of the SMSF market and it is appropriate that the ATO should direct some of its communication and interpretative assistance towards them. However, research indicates that a large section of trustees prefer to keep control of their investment decisions and choose not to employ the services of professional advisers outside their legal requirements. Further, even if trustees decide to use a SMSF professional to help them set up and manage their funds, trustees

¹¹⁴ CPA Australia, op. cit., p.7.

¹¹⁵ Australian Taxation Office, *Super Reforms Administrative Design Research: Qualitative Findings*, op. cit. p. 34.

¹¹⁶ Inspector-General of Taxation, *Follow up review into the Australian Taxation Office's implementation of agreed recommendations included in the six reports prepared by the Inspector General of Taxation between June 2006 and October 2008: A report to the Assistant Treasurer Inspector-General of Taxation*, June 2010, p. 18.

¹¹⁷ *ibid.*, p. 26.

are still responsible for the decisions made and for ensuring that the fund is compliant with the SIS Act and Regulations.

3.17 In a recent ATO commissioned study, trustees have indicated that while, at present, they most frequently receive information on changes to laws regulating SMSFs from their tax agent or accountant, they would prefer to receive information directly from the ATO.¹¹⁸ An increased role for the ATO in providing information and interpretative assistance that SMSF trustees can easily access and understand is also supported by professional advisers themselves. Several research reports indicate that the insufficient understanding of legal obligations among SMSF trustees and the need for advisers to educate trustees on these obligations, are two of the advisers' biggest challenges when servicing trustees.¹¹⁹

Available sources of SMSF information and interpretative assistance

3.18 The superannuation call centre and the ATO website are the two main channels for accessing SMSF information or interpretative assistance. The website in particular is the gateway to general SMSF information, stand-alone documents such as SMSF brochures and SMSF public rulings, and forms (for instance to request specific advice). Table 3.1 describes the main types of SMSF information and interpretative assistance sources.

Table 3.1

Available sources of SMSF information and interpretative assistance

Channel	Allows access to
Superannuation call centre	Members of the public are able to access a call centre providing general information relating to superannuation (including SMSF) issues.
ATO website	Accessible at ATO.gov.au, the website is a repository of most publicly available ATO SMSF information, from general information brochures to highly technical information such as public rulings and determinations. In particular, the ATO website provides access to the following forms of SMSF information and interpretative assistance:

¹¹⁸ ATO, *Super Reforms Research: SMSF Trustees Quantitative Findings*, op. cit. p. 48.

¹¹⁹ ATO, *Super Reforms Communications Developmental Research: Qualitative Findings*, op. cit., p. 40; and SMSF Professional's Association of Australia Limited (SPAA) and Russell Investments, op. cit. p. 24.

Channel	Allows access to	
	General information brochures	A suite of five brochures providing general information about SMSFs and covering the 'Life Cycle' of a SMSF.
	SMSF News	An electronic newsletter sent out to any interested parties (including trustees and their representatives) who have subscribed to the service.
	Specific advice and written guidance	Trustees and their representatives are able to write to the ATO to ask technical questions relating to their SMSF's specific circumstances. Specific advice and written guidance products are not publicly available. However, the ATO website provides access to information about how and when to request these products and to the forms that applicants can use.
	Technical information (including public rulings and determinations)	A large collection of technical and policy material including public rulings and determinations, legislations and Law Administrative Practice Statements. Some of this material is produced for internal ATO purposes but published for transparency purposes and to address the needs of professionals engaged in technical decision making.

Source: ANAO analysis.

Superannuation call centre

3.19 The ATO has a dedicated superannuation call centre number which can also be used for SMSF inquiries. The ANAO reviewed the six scripts used by the call centre staff to respond to SMSF queries. The information provided is of a general nature, similar to the information that can be found on the website and in the brochures. While call centre staff do not provide advice relating to individual situations, they are able to escalate certain queries to other areas of the ATO (such as, for compliance-related issues, the insolvency hotline, the superannuation registry business line or the illegal early release area) for either a direct response or a call back within a matter of days.

3.20 Locating the call centre number on the SMSF website is not a straightforward exercise: the ANAO could only find the number on the last page of the PDF 'Life Cycle' brochures, but not on any of the SMSF webpages. The number was also found in the list of ATO contact numbers, on the page '*Speak to a customer service representative*'.

ATO website

3.21 The ATO website provides an extensive range of resources intended to cover the three legislative areas under the ATO's responsibility: taxation, excise, and superannuation. SMSFs have a dedicated homepage, found under the 'Super Funds' tab in the ATO website homepage (Figure 3.1). This section of the ATO website contains general material, such as brochures, newsletters and step-by-step guidelines to establishing and administering a SMSF and the roles and responsibilities of trustees. Technically focused material relating to SMSFs, such as legislation and regulations, public rulings and determinations, is mostly located in another section of the ATO website called 'Law, rulings & policy'.

Figure 3.1

SMSF Homepage

The screenshot displays the ATO website's 'Self-managed super funds - home' page. The top navigation bar includes links for 'For educators', 'Careers centre', 'About us', 'Contact us', 'What's new', 'Feedback', 'A-Z index', and a 'Subscribe' button. Below this is the Australian Government and Australian Taxation Office logo, a search bar, and language options for 'ato.gov.au' and 'legal database'. The main navigation menu on the left lists 'Home', 'Individuals', 'Businesses', 'Non-Profit', 'Government', 'Tax Professionals', and 'Super Funds'. The 'Super Funds' section is expanded, showing 'Self-managed super funds' as the selected option. The main content area is titled 'Self-managed super funds - home' and contains a brief introduction to SMSFs, a link to 'View previous years' pages', and several sections of links: 'What you need to know' (Overview, Thinking about self-managed super, Setting up an SMSF, Managing your fund's investments, Accepting contributions and rollovers, Reporting, record keeping and administration, Accessing your super, Understanding tax and SMSFs, Winding up an SMSF), 'Calculators, rates and forms' (Calculators and tools, Rates and codes, Forms and instructions), 'News' (What's new for SMSFs, SMSF newsletter), and 'In detail' (Tips and traps, SMSF statistics, Establishing and maintaining an SMSF, Reporting, record keeping and administration, Assets and investments, Contributions and benefits, Rollovers, Print publications). A right sidebar contains 'Online services' (e-tax, Download now, AUSkey, SuperSeeker, Find your lost super, Other online services) and a 'Give us your feedback' button.

Source: Australian Taxation Office, [Internet] Available at http://www.ato.gov.au/superfunds/pathway.aspx?sid=42&pc=001/149/030&mfp=001/149&mnu=49150#001_149_030 [accessed 13 April 2012].

3.22 SMSF information on the ATO website represents an important source of information for trustees; ATO-commissioned research indicates that the most common form of educational activity undertaken by trustees over the previous 12 months was visiting the ATO website (used by 83 per cent of respondents).¹²⁰

3.23 The SMSF homepage comprises two main menus, located on the left and centre of the page. The central menu appears to be the most comprehensive and presents a larger number of topics. However, the two menus overlap and cover similar but not identical topics. Under each menu, a range of sub-topics is listed, some unique and some duplicated in both menus. The effect is that users cannot readily establish if the information contained in one menu is additional, complementary to or duplicative of the other. For instance:

- the central menu includes two topics called '*Reporting, record keeping and administration*' (under the '*What you need to do*' section, and under the '*In detail*' section). The left menu also includes a topic called '*Lodge, report & pay*'. All three topics have different lists of sub-topics.
- the central menu includes a topic called '*Calculators, rates and forms*'. The left menu also includes a topic called '*Find a rate or form*'. Both include different sub-topics.
- the left menu includes a topic called '*SMSF auditors*' which does not appear in the central menu. A topic called '*Appoint an approved auditor*' appears in the central menu under the topic '*Reporting, record keeping and administration*', but does not include the same information.
- the topic '*Setting up a SMSF*' appears under the '*What you need to do*' section and under the '*In detail*' section, where a page called '*Setting up a self managed fund*' is proposed. However the two pages present different information.

3.24 A breadcrumb trail is a textual representation of a site's structure, for example:

> Self managed super funds > News and latest changes > SMSF news.

¹²⁰ Australian Taxation Office, *Super Reforms Research: SMSF Trustees Quantitative Findings*, op. cit. p. 50.

This representation of information is used to aid website navigation by linking major categories of information along a continuum of sequential order.¹²¹ Breadcrumbs may be especially useful to assist with navigation through a website when individuals 'arrive' within the website via a search engine rather than having navigated through the site itself from an entry page. The ANAO found that the use of 'breadcrumbs' was often inconsistent or incorrect throughout the website.

3.25 The SMSF webpages present a large quantity of information. However, access to this information is made difficult by the lack of clear logic in the way the information is laid out: some sections appear to present similar, but not identical information; the information is fragmented across several locations; and some information seems to be presented in a circular way. This may generate a sense of disorientation among users as well as the impression that they are not in possession of all the information. In a context where the subject matter of the website (SMSFs) is complex and where decisions relating to SMSFs may have significant consequences for trustees, the ATO website is a key repository of information. However, in its current form, access is not as easy or practical as it could be and this could limit the extent to which the website is useful to trustees.

3.26 Industry representatives consulted by the ANAO confirmed that accessing information on the ATO website about superannuation, and SMSFs in particular could present a range of difficulties including: poor experiences with using the site's search engine; a lack of confidence that the search engine had retrieved all relevant and up-to-date information; and a fragmented site structure that is not intuitive to navigate. In a study commissioned by the ATO, trustees also reported that, although they are prolific information seekers, they encountered difficulties finding the information they were looking for on the ATO's website.¹²²

3.27 The Cooper Review panel suggested that SMSF trustees should have access to resources, such as general advice, statistics and educational material, that would help them build their knowledge and competency. To do this, the

¹²¹ Rogers B and Chaparro B *Breadcrumb Navigation: Further Investigation of Usage*, University of Wichita Kansas, [no date], Available from <<http://psychology.wichita.edu/surl/usabilitynews/52/breadcrumb.htm>> [accessed 1 November 2011].

¹²² Australian Taxation Office, *Super Reforms Communications Developmental Research: Qualitative Findings*, op. cit., p. 29.

Review’s final report suggested an online resource where all SMSF information is brought together, catalogued and indexed, and incorporated with an enhanced ‘search tool’ enabling information to be identified and accessed.¹²³

3.28 While the Cooper Review envisaged a ‘one-stop-shop’ for SMSF trustees as an element of a broader, whole-of-government ‘super.gov.au’ website, the ATO could play an important role in building up trustees knowledge and competency by consolidating and improving the access to the information available on its website. The ATO advised that as part of ongoing site maintenance, the superannuation funds website was being reviewed in order to make it easier for users to discover topic locations and to improve the consistency and clarity of some sections of the site.

SMSF brochures

3.29 The ATO provides potential and current trustees with information on starting up and running a SMSF in the form of five key brochures linked to the ‘Life Cycle’ of a SMSF. The content of these brochures, available for download on the website and in hard copy, is described in Table 3.2.

Table 3.2

SMSF ‘Life Cycle’ brochures

Self Managed Super Funds ‘Life Cycle’ brochures
<i>Thinking about self managed super</i>
Co-branded with ASIC, this brochure encourages potential trustees to find out if a SMSF is the right kind of fund for them, understand what will be required of them to successfully set up and run a SMSF, and to consult professional advisers on setting up a fund and appropriate investment strategies. It emphasises that ultimate legal responsibility lies with the trustees and asks them to consider whether they possess the time and skill required to manage a SMSF and outlines the legal and administrative responsibilities of trustees as well as their reporting requirements.

¹²³ Attorney-General Department, *Super System Review Final Report Part Two*, op. cit., p. 251.

Setting up a self managed super fund

This brochure includes advice on ensuring that individuals are eligible to be trustees and that a fund complies with residency requirements. The processes for structuring a fund in accordance with the type of trustee (corporate or individual), obtaining and understanding a trust deed and registering the fund with the ATO are outlined. Instructions on managing fund operations via a bank account, keeping assets held in trust separate from assets owned as individuals, and meeting recordkeeping and reporting requirements are included. The brochure offers advice on preparing an investment strategy to suit the needs of members and planning for the fund's future, including by insuring assets, arranging death benefit nominations and paying benefits in accordance with the release conditions.

Running a self managed super fund

This brochure includes instructions on accepting contributions and rollovers. It outlines the processes, administrative requirements and laws related to the acquisition of assets, the paying of benefits to members, satisfying conditions of release and early access to payments. The brochure also provides an explanation of compliance expectations and related penalties.

Winding up a self managed super fund

This brochure includes a list of common situations in which funds are wound up and a list of actions that trustees should and should not undertake during wind-up. It also provides an outline of reporting obligations for trustees when dealing with distributing members' benefits and completing the wind-up of a fund.

How your self managed super fund is regulated

This brochure provides a guide to the ATO's role in regulating SMSFs. It includes information on what the ATO does and does not do in relation to SMSFs and the advice it can and cannot provide. It outlines the roles and responsibilities of SMSF trustees and related professionals including auditors, actuaries, tax agents, accountants, financial advisers, fund administrators and legal practitioners. It also provides a series of case studies to illustrate potential SMSF issues and the ATO's role in given situations.

Source: ANAO analysis.

3.30 The ATO conducted usability testing for four of the five 'Life Cycle' brochures in 2010.¹²⁴ The testing found that the brochures were well received by both professionals and trustees, who considered them to be authoritative and easy-to-use sources of information. Trustees preferred to use hard-copy versions rather than online versions, mostly because of the density of the brochures' contents.

3.31 The ANAO conducted readability testing of the online consolidation of the ATO's general guidance for trustees known as the *'Guide to self managed*

¹²⁴ Australian Taxation Office, *SMSF Publications, Useability testing of current publications, quarterly newsletter and proposed promotional postcard*, March 2010. A total of 11 trustees, four potential trustees, and 12 administrators and advisers participated in two-on-one test sessions of the publication material.

superannuation funds’ which includes the ‘Life Cycle’ brochures, and of the introductory brochure ‘*Thinking about self managed superannuation*’. These tests used the Flesch Reading Ease Formula and the Flesch–Kincaid Grade Level test.¹²⁵ The information products tested were outside standard benchmarks for readability for general online information, but they remain at acceptable levels, considering that the subject matter (SMSF) is of a technical nature and the target audiences (trustees, potential trustees and professionals) have, in their majority, a high level of education.¹²⁶

3.32 The ANAO also examined how easily the brochures can be accessed on the ATO website. The SMSF webpages do not include any clear mention of the existence and purpose of the brochures. Although the brochures belong to the same ‘Life Cycle’ suite and complement each other, they are not located on the same page, but disseminated over different pages across the SMSF site.

3.33 In the usability testing conducted by the ATO in 2010, most trustees reported having difficulties navigating and locating the brochures on the website, and most needed assistance to eventually locate the brochures.¹²⁷ Following the testing, the ATO changed the access to the brochures, in particular by including a ‘*Print publications*’ section where a link to the brochures can be found. However, this new section is not readily accessible (it is in the sub menu ‘*In detail*’); also the brochures are not clearly labelled as being downloadable brochures, providing stand-alone, recapitulative information.

3.34 Consequently, learning about the existence of the brochures and then finding them on the SMSF site are likely to be complex tasks for most interested readers who do not have a pre-established level of familiarity with the SMSF webpages. As part of the ATO’s work to improve the accessibility of SMSF information on its website, it would be beneficial for the ATO to review

¹²⁵ The Flesch Reading Ease and Flesch–Kincaid Grade Level tests are among the best known readability tests. Generally accepted levels of readability for online information are a:

- Flesch Reading Ease score of between 60 and 70 out of 100, where a high score indicates greater readability; and
- Flesch–Kincaid Grade Level of 8, where a high grade level indicates lesser readability. There is no ‘maximum’ score for the Flesch–Kincaid Grade Level, as this scoring relates to the number of years of education required to comprehend the text.

¹²⁶ As indicated in paragraph 3.10, 59 per cent of trustees hold a Bachelor or higher degree.

¹²⁷ Australian Taxation Office, *SMSF Publications, Useability testing of current publications, quarterly newsletter and proposed promotional postcard*, March 2010, p. 10.

the accessibility of the 'Life Cycle' brochures to ensure that they are located in a more prominent, accessible place.

SMSF News

3.35 SMSF News is an electronic newsletter providing a range of information for trustees and advisers including guidance on administrative matters, updates on technical issues, relevant case studies and links to more detailed content. ATO's internal policy document indicates that:

The principal market for the newsletter is trustees of SMSFs but that a significant secondary market includes approved auditors, tax agents, accountants, financial planners as well as professional and industry associations associated with the SMSF sector.¹²⁸

3.36 The newsletter is available via subscription through a link on the ATO website¹²⁹ and was first published in 2007. In March 2012, SMSF News was distributed to 27 000 email addresses.¹³⁰ The electronic newsletter is likely to be more widely read than the distribution suggests, because a number of SMSF representatives receiving SMSF News forward the newsletter to their clients. Nevertheless, in 2011, the distribution represented just six per cent of registered SMSFs and three per cent of all trustees.

3.37 Considering that this publication is aimed primarily at SMSF trustees, it is not clear why the subscription level is so low. The usability testing conducted by the ATO in 2010 indicated that while all participants reacted positively to the newsletter, professionals unanimously expressed the view that the newsletter was far too technical for clients. Although trustees are on average highly educated, this may point towards an explanation for the low subscription level.

3.38 As SMSF trustees included in the quantitative research conducted by the ATO in 2011 reported their preference for direct communication from the ATO (through the newsletter or emails)¹³¹, the ATO should investigate further

¹²⁸ Australian Taxation Office, *What is SMSF News?*, [Intranet] CMSWeb.dot v5.0.2.

¹²⁹ <<http://www.ato.gov.au/super/content.aspx?doc=/content/00098951.htm>> [accessed 23 March 2012].

¹³⁰ Australian Taxation Office, *Self Managed Super Funds Statistical Report, Dec. 2011*. Available from <<http://www.ato.gov.au/superfunds/content.aspx?menuid=0&doc=/content/00309172.htm&page=6&H6>> [accessed 13 April 2012].

¹³¹ Australian Taxation Office, *Super Reforms Research: SMSF Trustees Quantitative Findings*, op. cit. p. 48.

the reasons for the low SMSF News subscription rate and consider ways to increase this rate.

Accessing SMSF specific advice and written guidance

3.39 Individuals who are seeking advice about how a superannuation law applies to their SMSF's particular circumstances can apply for specific advice or written guidance from the ATO. Both trustees and their representatives are able to request this advice and decisions are not published.¹³² While the SMSF written advice provided by the ATO is not binding, it is still an essential service for the SMSF market, in particular for trustees who may wish to manage their funds without the support of professional advisers.

3.40 Paragraphs 3.31 to 3.34 commented that the 'Life Cycle' suite of brochures is difficult to access on the ATO website. While three of the brochures mention the specific advice service in the Commissioner's Foreword, only one (*'Setting up a self managed super fund'*) also indicates where to find more information about this service and the application procedures on the website.

3.41 Nine pages in the SMSF section of the ATO website are dedicated to the definition of specific advice and written guidance and to the application procedures for this service. However, accessing these pages is not straightforward: the section *'How to apply for specific advice'* is located in the *'Calculators, rates and forms'* section under the *'Forms and instructions'* page. The distinction between written guidance and specific advice is not made clear until the readers reach the fourth of these nine pages, *'When should you consider applying for SMSF specific advice'*. Importantly, the time standard for receiving the ATO's response, 28 days, is not indicated in any of the documents available from the website, including the brochures.

3.42 Another avenue for trustees to receive information about specific advice and written guidance is through the superannuation call centre. Only one of the six scripts used by the staff from the call centre to address callers' queries indicated that trustees can 'make written request for interpretative advice to the ATO'.

¹³² A de-identified version of the private ruling (the SMSF specific advice equivalent for tax advice) is published on the ATO website.

3.43 In 2010–11, the ATO received 217 requests for specific advice and 903 requests for written guidance. For the same period, the ANAO estimated that less than 50 per cent of the requests for specific advice originated from trustees (the majority are requested by trustees' representatives). Considering that there were approximately 440 000 SMSFs in 2011, and that the ATO does not deliver personalised advice on the phone (the call centre only provides general information), the number of specific advice requests from trustees is very low. It is not clear to what extent the usage rate reflects low demand or knowledge deficit. In order to ensure that trustees are adequately informed about the availability of this service, the ATO should take steps to improve the manner in which specific advice and written guidance are advertised on the website, in the brochures and through the superannuation call centre.

Technical information

3.44 A large collection of technical documents is publicly accessible from the ATO website, in particular from the 'Legal Database', a section of the website also referred to as 'ATO Law'. The ATO considers this level of information to be aimed directly at 'trustees or entities who have, or seek, a technical understanding of the underlying law'.¹³³

3.45 The ATO legal database is a compendium of documents and decisions relating to all the legislative areas under the ATO's responsibility. It is a collection of legal and policy information used by the ATO when making its decisions and includes legislation and supporting material, public rulings and determinations, policy papers and Law Administration Practice Statements.¹³⁴ Information relating to SMSFs is not located in one specific space, but distributed throughout different categories covering tax and superannuation topics. While the database is keyword searchable, providing a means of access for users who have a particular query, using the database to gain an understanding of what technical information is relevant to SMSFs is not straightforward.

¹³³ Australian Taxation Office, *Practice Statement Law Administration PS LA 2009/5*, op. cit.

¹³⁴ Australian Taxation Office, *Legal Database*, Australian Taxation Office, Canberra, 2011, available at <<http://law.ATO.gov.au/ATOlaw/Browse.htm?ImA=folder&Node=10~0&OpenNodes=10&DBTOC=03%3AATPA%3A2011#10~0>> [accessed 10 October 2011].

Conclusion

3.46 SMSF trustees are on average highly educated and are characterised by a desire to control their superannuation investment choices. A significant proportion of trustees choose to engage a professional adviser to help them set up and manage their fund. However, even in this case, trustees remain solely accountable for the decisions made and for the compliance of the fund with the SIS Act and Regulations. Consequently, it is important that the ATO, in order to effectively fulfil its role as SMSF regulator and to achieve high levels of voluntary compliance among trustees, ensures that trustees, primarily, are able to access and easily understand SMSF information and interpretative assistance products.

3.47 The different forms of SMSF information and interpretative assistance have a critical role to play in helping trustees be aware of and compliant with their obligations under the SIS Act and Regulations. While a large number of trustees choose to use the services of professionals to support them in the administration of their fund, research has demonstrated that a significant proportion wish to stay in control of their financial matters. Further, even when trustees prefer to be represented by advisers, they remain responsible for the decisions made and are personally exposed to the consequences of potential breaches.

3.48 The ATO has a wide collection of material and information services available to trustees through a range of channels. However, access to this material is not straightforward:

- information on the website is not organised, overall, in a logical or practical manner;
- access to the 'Life Cycle' brochures and the superannuation call centre, which are expected to provide general information on SMSFs, is difficult because information about these two sources is not in a prominent location in the website;
- while the newsletter SMSF News is aimed primarily at trustees, its distribution list is minimal compared with the number of SMSFs and SMSFs trustees (the reasons for this low distribution are not clear); and
- information about the availability of specific advice and written guidance, which are the only services providing personal and circumstance-specific information, is not clearly advertised in the ATO's publications and website.

3.49 Trustees' representatives are an important section of the SMSF market. Nonetheless, it is critical that the ATO focuses its communication on trustees as a primary target, in order to effectively fulfil its role as the SMSF regulator and achieve high levels of voluntary compliance among trustees. Improving trustees' direct access to SMSF interpretative assistance could, in turn, reduce the dependence of trustees on professionals to administer their SMSF.

Recommendation No.2

3.50 In order to assist trustees to comply with their obligations under the SIS Act and Regulations, the ANAO recommends that the ATO review the different forms of interpretative assistance currently provided with a view to improving the direct access of trustees to this assistance, including:

- reconsidering the content and organisation of the SMSF pages of the ATO website;
- within the SMSF webpages, improving access to downloadable stand-alone information brochures and the SMSF written advice services; and
- investigating the reasons behind the low distribution of the newsletter SMSF News.

3.51 ATO's Response: Agreed

Improving superannuation information on the ATO website is an ongoing exercise, but currently operates within corporate frameworks, which limits our ability to re-organise the SMSF pages. There is a current project (Ektron) to upgrade the look and feel and increase the functionality of ato.gov.au. Delivery of the first phase is expected in April 2013. We will work as a key corporate stakeholder to best place Super and the SMSF pages in the new environment.

We agree that access to electronic versions of our publications on ato.gov.au is important and it is a priority. Since 2010 the publications can be found in both html and pdf format on the SMSF and are also searchable by title or NAT number in the search engine. We will work within the new ATO web site design guidelines (Ektron project) to ensure that links to downloadable publications are visible and easy to access. In the interim, we will use specific Web banners to further promote the new or revised SMSF publications on the Super 'landing' page from now until June 2013.

We will investigate the current distribution list for SMSF News and

profile of subscribers using available information, and document the findings. Under the super reform program, we are conducting a direct mail out (February 2013) which will promote SMSF News. We will analyse the effectiveness of this promotion.



Steve Chapman

Acting Auditor-General

Canberra ACT

8 June 2012

Appendices

Appendix 1: Detailed ATO response to the proposed audit report



Australian Government
Australian Taxation Office

SECOND COMMISSIONER OF TAXATION

Mr Mark Harradine
ANAO Performance Audit Executive Director
Australian National Audit Office
GPO Box 707
CANBERRA ACT 2601

Dear Mr Harradine

Thank you for your letter of 30 April 2012 in which you provided the proposed audit report on the Australian Taxation Office's management of interpretative assistance for self managed superannuation funds.

The ATO welcomes this review and believes the report generally reflects positively on our overall administration of interpretative assistance for self managed superannuation funds (SMSFs). We have worked to progressively improve the assistance provided to trustees and their advisors through targeted products and services that have been well received in the industry.

The ATO agrees with the recommendations you have made in the report and we undertake to initiate the necessary action to implement our responses to them, as outlined in the attachment.

I would like to commend to you the work of your audit team, who were committed and professional in their dealings with the ATO throughout the course of the audit.

If there are any questions concerning our response, please contact Christine Dacey on (02) 6216 1617.

Yours sincerely

Bruce Quigley
Second Commissioner Compliance
24 May 2012

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Attachment A

ANAO Performance Audit: Interpretative Assistance for Self Managed Superannuation Funds – ATO response

Recommendation No. 1

To ensure that the SMSF interpretative assistance products address the most significant needs of the SMSF market, the ANAO recommends that the ATO evaluate the satisfaction levels of trustees and their representatives with SMSF interpretative assistance products, and implement potential improvements, as relevant.

Agree

The ATO will survey subscribers to SMSF News to obtain their views on the extent to which SMSF interpretative assistance meets their current needs. These subscribers provide a suitable survey group to evaluate satisfaction levels in this area as through their subscription they have demonstrated an interest in active participation in the operation of their SMSF and should therefore be representative of those trustees and advisers likely to be seeking interpretative assistance from the ATO.

Recommendation No. 2

In order to assist trustees to comply with their obligations under the SIS Act and Regulations, the ANAO recommends that the ATO review the different forms of interpretative assistance currently provided with a view to improving the direct access of trustees to this assistance, including:

- reconsidering the content and organisation of the SMSF pages of the ATO website;
- within the SMSF webpages, improving access to the downloadable stand-alone information brochures and the SMSF written advice services; and
- investigating the reasons behind the low distribution of the newsletter SMSF News.

Agree

Improving superannuation information on the ATO website is an ongoing exercise, but currently operates within corporate frameworks, which limits our ability to re-organise the SMSF pages. There is a current project (Ektron) to upgrade the look and feel and increase the functionality of ato.gov.au. Delivery of the first phase is expected in April 2013. We will work as a key corporate stakeholder to best place Super and the SMSF pages in the new environment.

We agree that access to electronic versions of our publications on ato.gov.au is important and it is a priority. Since 2010 the publications can be found in both html and pdf format on the SMSF and are also searchable by title or NAT number in the search engine. We will work within the new ATO web site design guidelines (Ektron project) to ensure that links to downloadable publications are visible and easy to access. In the interim, we will use specific Web banners to further promote the new or revised SMSF publications on the Super 'landing' page from now until June 2013.

We will investigate the current distribution list for SMSF News and profile of subscribers using available information, and document the findings. Under the super reform program, we are conducting a direct mail out (February 2013) which will promote SMSF News. We will analyse the effectiveness of this promotion.

Appendix 2: Previous ANAO Audits on SMSFs

The ANAO has previously conducted two audits relating to SMSFs.

ANAO Audit Report No. 52 2006–07 *The Australian Taxation Office's Approach to Regulating and Registering Self Managed Superannuation Funds* examined the efficiency and effectiveness of the ATO's approach to their regulatory role.

The report recommended that the ATO:

- improve and clearly define process and procedures surrounding the timely identification of risks;
- improve accountability and reporting for regulatory services and the collection of the SMSF levy;
- improve the quality of planning, risk management and reporting, including improving the accuracy of SMSF data;
- provide more accurate and complete SMSF asset information to the Government and public;
- increase assurance that non-complying funds are identified by developing a risk-based methodology and using intelligence from the SMSF registration process; and
- consult with APRA and ASIC to assess the benefits of developing a central register of persons disqualified from acting as SMSF trustees.

ANAO Audit Report No. 13 2007-08 *The Australian Taxation Office's Approach to Managing Self Managed Superannuation Fund Compliance Risks* examined the efficiency and effectiveness of the ATO's approach to risk management surrounding SMSF compliance.

The report recommended that the ATO:

- develop benchmarking processes to assist in determining its SMSF compliance program;
- improve the quality of information held on approved auditors;
- continue to improve the selection of high-risk SMSFs for compliance action;
- refine existing SMSF education products and approaches;

- update wind-up information published on the ATO's website and available in other publications and through seminars to reflect legislative requirements; and
- consider simplifying the wind-up process to assist trustees in meeting their obligations.

Appendix 3: Members of the National Tax Liaison Group – Superannuation Technical Subgroup and Superannuation Consultative Committee

National Tax Liaison Group – Superannuation Technical Subgroup (NTLG-STSG) ¹³⁵	
Government Representatives	
Australian Prudential Regulation Authority	
Australian Securities and Investment Commission	
Australian Taxation Office	
Treasury	
Superannuation Industry Representatives	
Association of Super Funds Australia	
Association of Taxation and Management Accountants	
Australian Bankers Association	
CPA Australia	
Financial Planning Association of Australia Limited	
Financial Services Council	
Institute of Actuaries of Australia	
Institute of Chartered Accountants in Australia	
Institute of Public Accountants	
Law Council of Australia	
National Tax and Accountants Association	
SMSF Professionals' Association of Australia	
Small Independent Superannuation Funds Australia	
The Tax Institute	
Taxpayers Australia	
Trustee Representatives	
Australian Institute of Superannuation Trustees	

¹³⁵ Australian Taxation Office, *NTLG Superannuation Technical Sub-group Membership*, available at <<http://www.ato.gov.au/taxprofessionals/content.aspx?doc=/content/66280.htm&pc=001/005/073&mnu=43140&mfp=&st=&cy=1>> [accessed 10 April 2012].

Superannuation Consultative Committee (SCC)¹³⁶**Government Representatives**

Australian Prudential Regulation Authority

Australian Securities and Investment Commission

Superannuation Complaints Tribunal

Treasury

Superannuation Industry Representatives

Association of Super Funds Australia

Association of Taxation and Management Accountants

Australian Chamber of Commerce and Industry

CPA Australia

Council of Small Business Organisations of Australia Limited

Financial Planning Association of Australia Limited

Industry Funds Forum

Institute of Chartered Accountants in Australia

Investment Financial Services Association

Law Council of Australia

Mercer Human Resources Consulting

National Institute of Accountants

National Tax and Accountants Association

SMSF Professional Association of Australia Limited

Smart Super Proprietary Limited

Superannuation Aust Pty Ltd

Taxation Institute of Australia

Trustee Representatives

Australian Institute of Superannuation Trustees

¹³⁶ Australian Taxation Office, *Superannuation Consultative Committee Membership*, available at <http://www.ato.gov.au/superfunds/content.aspx?doc=/content/64991.htm> [accessed 10 April 2012].

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Department of Defence

ANAO Audit Report No.2 2011–12

Confidentiality in Government Contracts: Senate Order for Departmental and Agency Contracts (Calendar Year 2010 Compliance)

ANAO Audit Report No.3 2011–12

Therapeutic Goods Regulation: Complementary Medicines
Department of Health and Ageing

ANAO Audit Report No.4 2011–12

Indigenous Employment in Government Service Delivery

ANAO Audit Report No.5 2011–12

Development and Implementation of Key Performance Indicators to Support the Outcomes and Programs Framework

ANAO Audit Report No.6 2011–12

Fair Work Education and Information Program
Department of Education, Employment and Workplace Relations

ANAO Audit Report No.7 2011–12

Establishment, Implementation and Administration of the Infrastructure Employment Projects Stream of the Jobs Fund
Department of Infrastructure and Transport

ANAO Audit Report No.8 2011–12

The National Blood Authority's Management of the National Blood Supply
National Blood Authority

ANAO Audit Report No.9 2011–12

Indigenous Secondary Student Accommodation Initiatives
Department of Families, Housing, Community Services and Indigenous Affairs
Department of Education, Employment and Workplace Relations

ANAO Audit Report No.10 2011–12

Administration of the National Partnership on Early Childhood Education

Department of Education, Employment and Workplace Relations

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