
Disqualified Trustee

Self-Managed Superannuation Funds (SMSFs) operate under regulations governed by the Superannuation Industry (Supervision) Act 1993 (SIS Act). One critical aspect of compliance is ensuring that all SMSF trustees are qualified and meet legal requirements. In certain circumstances, individuals may become disqualified trustees, which can have serious consequences for the SMSF.

What is a disqualified trustee?

A disqualified trustee is an individual who is legally prohibited from acting as a trustee or director of a corporate trustee of an SMSF. Under section 120 of the SIS Act, a person is automatically disqualified from being a trustee if they:

- ▶ have been convicted of an offence either in Australia or overseas involving dishonest conduct.
- ▶ have been subject to a civil penalty order under the SIS Act.
- ▶ are insolvent under administration (i.e., declared bankrupt).
- ▶ have been disqualified by the Australian Taxation Office (ATO) or a court from acting as a trustee.

Once disqualified, the individual is no longer eligible to act as a trustee or director of a corporate trustee of an SMSF under section 126k of the SIS Act.

Rectification Process for a Disqualified Trustee in an SMSF

If a trustee becomes disqualified, immediate action is necessary to rectify the situation. There is a six-month grace period in which the fund can still be treated as an SMSF if the basic conditions are unable to be met. The SMSF must ensure compliance by following these steps:

- 1. Cease Acting as Trustee:** The disqualified person must cease their role as a trustee or director of the corporate trustee immediately. The disqualified trustee must notify the ATO in writing within 28 days of resigning as a trustee.
- 2. Re-structure the SMSF:** If the fund wishes to remain an SMSF, the disqualified trustee must transfer his/her superannuation interest out of the SMSF either to a complying super fund or withdraw as a lump sum if meets the condition of release. If the remaining trustee is a qualified trustee, appoint a new trustee to replace the disqualified trustee if it is an individual trustee fund or change to a corporate trustee structure to meet SMSF definition under section 17A of the SIS Act.

If the fund no longer meets the SMSF definition requirements under section 17A of the SIS Act, the only available option is either to wind up the fund and roll over the benefits to an APRA-regulated fund, or convert the SMSF into a small APRA fund within 6 months from the date of the trustee's disqualification.

3. Lodgement of Documents:

- ▶ **Notification to the ATO:** Updated trustee or director details must be lodged with the ATO using the appropriate forms, such as the Change of Trustee form (NAT 3036), within 28 days.
- ▶ **Proof of Trustee Removal:** Documents showing that the disqualified trustee has been removed, such as updated trust deeds or minutes from trustee meetings.
- ▶ **Appointment of New Trustee:** If a new trustee is appointed, documents showing the appointment of a new trustee, such as consent to act as trustee/director, ATO trustee declaration and minutes from trustee meetings.
- ▶ **Corporate Trustee Documentation:** If the SMSF has a corporate trustee, ASIC records must be updated to reflect the resignation or removal of the disqualified director.

Consequences of Having a Disqualified Trustee

Failure to remove a disqualified trustee from the SMSF can lead to severe consequences, both for the fund and the disqualified person:

- ▶ **Non-Compliance:** If the SMSF continues with a disqualified trustee, it can be deemed non-compliant by the ATO. This results in significant tax penalties, where the fund's assets are taxed at the highest marginal rate (45%).
- ▶ **Fines and Penalties:** The disqualified trustee and other fund trustees may be subject to penalties for continuing to act in contravention of the law.
- ▶ **Civil and Criminal Consequences:** The disqualified trustee may face civil penalties, and in some cases, criminal charges may be pursued.

Applying to waive disqualified status

To apply for a waiver of disqualified status as a trustee, you can refer to the ATO website for detailed guidance. The ATO provides a process that allows disqualified individuals to request a waiver under specific circumstances. More information, including eligibility criteria and application procedures, can be found on the ATO website: [Apply to Waive Disqualified Status](#).

Reference:

[Section 120 of SIS](#)

[Section 126K of SIS](#)

If you are aware that a trustee has become disqualified, please notify us through the portal when submitting the fund for audit. You can upload any relevant documents regarding the disqualified trustee and include comments for clarification.

A screenshot of a web interface showing a 'Comments' window. The window has a dark grey header with the word 'Comments' on the left and a close button (an 'x' icon) on the right. Below the header, the text 'Regulatory Documents' is displayed. Underneath, there is a large, light-colored text input area with a thin blue border. The input area contains the placeholder text 'Enter your comments here...' and a vertical cursor (I-beam) is positioned at the end of the text.

We also require the following documents to confirm that the disqualified trustee has been removed as trustee of the fund:

1. For a corporate trustee: An updated ASIC statement or ASIC extract confirming the current directors, along with Form 484E showing the resignation date of the disqualified trustee.
2. For all trustees: A minute or resolution confirming the resignation date.