

## Key changes in the ATO's updated Merchant DIS

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Following the high-profile decision involving Billabong Surf Clothing co-founder Gordon Merchant's SMSF, the Tax Office released a decision impact statement (DIS), but the recently updated version contains two key changes.

In the Merchant case, Merchant and Commissioner of Taxation [2024] AATA 1102, it was held that, despite three relevant breaches of the Superannuation (Industry) Supervision (SIS) Act 1993 being concluded as serious, the offending SMSF trustee, Gordon Merchant, should not be disqualified.

The following key issues were flagged by the Tribunal in support of its conclusion to not disqualify Gordon Merchant, despite the clear breaches of SIS:

- a. The Tax Office had itself concluded that Gordon Merchant was a fit and proper person.
- b. At no time had his advisers suggested that the improper transaction risked breaching the provisions of the SIS Act, and while the member's accountants had advised there were tax risks, this was not relevant to the question of disqualification.
- c. It was fair for the member to have thought that the transaction was lawful from a superannuation compliance perspective given it would not be expected that the SMSF's auditor would put forward a transaction which would cause breaches of the SIS Act.
- d. Appropriate and reasonable undertakings had been given by the member, which mitigated the risk of future non-compliance;
- e. While the SIS Act breaches were serious, they all arose from one course of conduct (being a share sale), thus this was not a case of multiple breaches on multiple occasions.
- f. No weight needed to be placed on protecting the investing public against the risk of re-offending, given the member was only ever likely to be a director of the trustee of his own SMSF, and there was no need to protect the member from himself.

### Draft DIS

In the initially released DIS, the Tax Office largely accepted the decision in Merchant, although specifically reiterated that "the nature, number and seriousness of contraventions are questions of fact and degree, and it is not possible to apply prescriptive rules to the decision to disqualify".

The DIS also confirmed that the holistic consideration by the Tribunal of all of relevant facts was consistent with the Tax Office's approach as outlined in Law Administration Practice Statement PS LA 2006/17 Self-managed superannuation funds – disqualification of individuals to prohibit them from acting as a trustee of a self-managed superannuation fund.

In particular, the DIS confirms that the Tax Office, when contemplating SMSF trustee disqualification under the SIS Act should consider:

- a. The acts of the individual.
- b. All the facts of the case.
- c. Whether there is a future compliance risk.

## Updated DIS

In the updated version of the DIS, the Tax Office has made two key changes to the initial publication:

1. The Tribunal confirmed that the SIS Act and Regulations do not impose a direct requirement that a trustee must consider or reconsider each of the matters in paragraphs 4.09(2)(a) to (e) of the SIS Regulations when making a particular investment decision. Rather, in making each investment decision, the trustee must “give effect” to the investment strategy which has been formulated having regard to the circumstances of the entity, including the matters in paragraphs 4.09(2)(a) to (e) of the SIS Regulations, and review that strategy regularly.

2. It is important to contrast differences in factual matrixes, which may mean different outcomes in determining whether there will be a disqualification. In particular, in a subsequent decision to Merchant, namely *Coronica and Commissioner of Taxation [2024] AATA 2592*, the Tribunal applied the same above-mentioned factors and arrived at a different outcome, affirming the Tax Office's original trustee disqualification decision.

In *Coronica*, the Tribunal confirmed the disqualification was appropriate given the:

- i. Nature and seriousness of the contraventions.
- ii. Number of contraventions over a number of years, all arising directly from the member's own decisions and actions (that is they were not accidental or due to honest mistakes, nor did the member seek and rely on external independent advice - indeed the member had failed to act professionally, competently and with due diligence in carrying out his duties as a trustee of the fund).
- iii. Conclusion that the member was not a fit and proper person to act as a trustee of a superannuation fund.
- iv. Seriousness and recurrence of the past contraventions.
- v. Risk of future non-compliance.
- vi. Desire of the Tribunal to issue a message of general deterrence.

Finally, the attempt by the member to <https://www.smsfadvicer.com/news/23661-ato-disqualifies-smsf-trustee-who-tried-to-use-merchant-case-in-defence>, given Merchant had undertaken the relevant transactions based on independent advice and there was no suggestion at the time that his actions were unlawful - a factual matrix radically different to the situation in *Coronica*.