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# Ownership and separation of fund assets

When to report contraventions about ownership and separation of fund and personal assets, and what evidence you need.

**Published** 11 August 2025

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## Audit evidence

When conducting the annual statement and annual compliance audit of a self-managed super fund (SMSF), approved SMSF auditors must obtain sufficient appropriate audit evidence that the:

- [fund has ownership of its assets \(#Ownershipoffundassets\)](#) (Part A Report requirements)

- trustees are complying with the 'separation of asset' rules (#Separationoffundassets) in the super laws (Part B Report requirements).

## Ownership of fund assets

As an approved SMSF auditor, you need to obtain sufficient appropriate audit evidence over the ownership of fund assets when:

- conducting the annual financial audit (/tax-and-super-professionals/for-superannuation-professionals/smsf-auditors/auditing-an-smsf/financial-audit-of-an-smsf) of a SMSF, and
- providing an opinion about whether the financial statements fairly represent the fund's financial position and is free from material misstatement.

You need to use the rights and obligations assertion (whether the fund holds or controls the rights to assets) to comply with Australian Auditing Standards (<https://www.auasb.gov.au/standards-guidance/auasb-standards/auditing-standards/>).

The way an asset is held and titled is relevant when determining whether an SMSF owns the asset and whether it is being held beneficially by the trustees on behalf of the fund.

## Reporting requirements

If you form the view that an asset is not a fund asset, or there is not sufficient appropriate audit evidence to support the ownership of fund assets, if the asset is material you:

- must modify Part A of the SMSF independent auditor's report (/forms-and-instructions/self-managed-superannuation-fund-independent-auditor-s-report) (SMSF IAR) (by providing a qualified or adverse opinion)
- can report the issue to us via an Auditor/actuary contravention report (/forms-and-instructions/auditor-actuary-contravention-report-instructions) (ACR) at Section G (Other regulatory information).

You should consider whether the situation gives rise to other contraventions under the *Superannuation Industry (Supervision) Act 1993* (SISA) or *Superannuation Industry (Supervision) Regulations 1994* (SISR).

You should also bring the issue to the attention of the SMSF trustees in a management letter so they can address it.

## Separation of fund assets

Regulation 4.09A of the SISR requires trustees of SMSFs to keep the money and other assets of the fund separate from those held by the trustees personally, or by a standard employer-sponsor or their associates.

This is a prescribed operating standard all trustees must comply with for the purposes of section 31 of the SIS. This means it applies equally to individual trustees and corporate trustees. Both types of trustees can hold assets in their personal capacity for the purposes of applying regulation 4.09A.

The requirement to keep fund and personal assets separate is also reflected in the trustee covenant in paragraph 52B(2)(d) of the SIS.

These rules aim to protect fund assets in the event of a creditor dispute and prevent costly legal action to prove who owns them.

When conducting the annual compliance audit of an SMSF, you must obtain sufficient appropriate audit evidence to form an opinion on whether the fund has complied with regulation 4.09A.

The way an asset is held and titled is relevant to determining whether regulation 4.09A has been complied with.

## Reporting requirements

If the SMSF trustees fail to comply with regulation 4.09A, this is a reportable contravention for the purposes of the ACR and SMSF IAR.

If you identify non-compliance with regulation 4.09A when conducting the annual [compliance audit of an SMSF \(/tax-and-super-professionals/for-superannuation-professionals/smsf-auditors/auditing-an-smsf/compliance-audit-of-an-smsf\)](#), or form the view there is not sufficient appropriate audit evidence of compliance with the provision, you must:

- notify the fund trustees in writing so they can rectify the matter (for example, via a management letter)

- modify Part B of the SMSF IAR if the contravention is material (by providing a qualified or adverse opinion)
- report the contravention to us via an ACR at Section E (Contraventions) provided the reporting criteria are met.

You should also consider whether the situation gives rise to other SISA or SISR contraventions.

Even if the circumstances do not result in a contravention of regulation 4.09A, it may still be considered prudent management of the fund that the trustees take steps to have an asset held or titled in a certain way to ensure it is adequately protected. You should consider whether it is appropriate to:

- bring it to the attention of the trustees via a management letter
- report the issue to us via an ACR at Section G (Other regulatory information).

## Evidencing ownership and separation of assets

For SMSF trustees to comply with their obligations under the SISA and SISR and help protect the fund's assets, they should ensure assets are recorded in a way that:

- distinguishes them from the trustees' personal or business assets
- clearly shows legal ownership of the assets by the fund.

A separate bank account must also be maintained for the SMSF.

Where possible, fund assets should be held in the name of the:

- individual trustees 'as trustees for' the fund (for example, Jack and Jill Smith as trustees for the Smith SMSF), or
- corporate trustee 'as trustee for' the fund (for example, Smith Pty Ltd as trustee for the Smith SMSF).

However, there may be situations where it is not possible for assets to be held in the name of the trustees 'as trustee for' the fund. This may occur, for example, because of the:

- state or territory laws
- type of asset
- ownership documentation for purchasing assets
- system that records asset ownership or account used to purchase assets.

Where this is the case, we still expect you to obtain sufficient appropriate audit evidence that the assets are held by the trustees beneficially on behalf of the fund and are kept separate, and are distinguishable, from the assets the trustees hold personally.

For example, the trustees may be able to provide evidence of a declaration or acknowledgment of trust over property. If trustees don't have this evidence readily available, they should seek legal advice about how they can obtain this.

If an asset is not held in the name of the trustees 'as trustee for' the fund, but it can be corrected, it would be appropriate for the trustees to take steps to do so as soon as possible. It would be prudent for you to bring the issue to the trustee's attention so they can rectify the matter and put any interim arrangements in place to protect the fund asset if required.

## Common scenarios

Whether an asset belongs to the fund and is being kept separate to assets held by the trustees personally will ultimately depend on the individual circumstances.

In all scenarios, if you conclude that an asset is not a fund asset or there is uncertainty as to whether it is, or there is a contravention of regulation 4.09A, you:

- should seek clarification from the trustees
- must follow the above reporting requirements
- must consider whether the situation gives rise to other contraventions under the SISA or SISR.

The fund's trust deed may also contain additional rules that need to be complied with.

## Asset not held 'as trustee for'

If an asset is held in the name of the SMSF trustees (whether individual or corporate trustee) but not 'as trustee for' the fund, this does not of itself mean it does not belong to the fund and the trustees have contravened regulation 4.09A.

You will need to obtain sufficient appropriate evidence that the assets are:

- held by the trustees beneficially on behalf of the SMSF
- distinguishable from the assets the trustees hold personally.

For example, documents for purchasing property on behalf of the fund, such as a contract of sale for real property, should be executed in the name of the trustees 'as trustee for' the fund. If the fund name cannot be reflected in the property title, the contract may be used as evidence that the asset belongs to the fund and regulation 4.09A has been complied with (together with other evidence relating to the acquisition such as bank transactions).

As regulation 4.09A also applies to money, the bank account should be recorded in the name of the fund, or in the name of the trustee 'as trustee for' the fund and should only be used for fund transactions. For example, if a fund has a corporate trustee, and the bank account is not recorded in the name of the company as fund trustee, you should check whether the:

- company is a special purpose corporate trustee, or operates in a separate capacity
- bank account has been used for transactions unrelated to the fund.

## **Asset not recorded in all individual trustee names**

Where a fund has individual trustees, assets should be held in the name of all trustees 'as trustee for' the fund where possible.

However, there may be circumstances where this is not possible, for example some:

- ownership documents, such as contracts of sale, do not allow 6 individual trustee names to be recorded.
- share trading accounts do not allow more than 3 names to be recorded on the online share application form as trustees of the account
- banks may not allow a bank account to be opened or recorded in the name of all trustees 'as trustee for' the fund.

A contravention of regulation 4.09A will not occur just because a fund asset is held in the name of some but not all trustees 'as trustee for' the SMSF.

## Change in trustee

If an SMSF has individual trustees, and a trustee joins or leaves the fund, you need to check that the names on the ownership documents (such as a title deed) for each fund asset have been updated, as applicable.

If a fund asset is held in the name of more than one current trustee (as trustee for the SMSF) and a trustee either joins or leaves the fund and the ownership documents are not updated, this will not result in a contravention of regulation 4.09A.

If an SMSF has a corporate trustee and the company directors change, the name on the ownership documents for each fund asset does not need to be updated as the corporate trustee remains the same. However, if the corporate trustee changes, or the fund changes from having individual trustees to a corporate trustee, you need to check that the fund's records and ownership documents have been updated as applicable.

The auditor should note in the management letter that trustees should take steps to ensure the asset is recorded in the name of the current trustees for the prudential management of the fund and to protect the fund's assets.

## Special purpose corporate trustee

A contravention of regulation 4.09A will not occur just because a SMSF has a special purpose company, and the assets are recorded in the name of the company but not 'as trustee for' the fund.

The special purpose company must be one where the constitution of the company prohibits distribution of its income or property to its members. The sole purpose of the company must be to act as trustee of a regulated superannuation fund.

You will still need to confirm with the trustees that the company does not act and hold assets in another capacity, for example, as a trading entity or as a trustee for another SMSF.

If a SMSF has a corporate trustee that operates and holds assets in another capacity, and the asset is not held 'as trustee for' the fund, you must obtain sufficient appropriate evidence that the asset is:

- owned by the fund (this may require requesting the trustee to update ownership documents to show the corporate trustee owns the asset on behalf of the fund), and
- kept separate from the assets held by the company in that other capacity.

For example, you can check transactions on fund bank statements to ensure fund money is not being mixed with money of the trustee company operating in another capacity to check compliance with regulation 4.09A.

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