

# Does a criminal record disqualify you as an SMSF trustee?

It is best for SMSF trustees to continuously maintain a clean record to keep their SMSF but getting a criminal record is not yet the end of the world.

An SMSF is a great way for people to manage their own super if they are willing to put in their time and effort to invest and make it grow. To establish an SMSF, a person intending to be a member must also be a trustee or director of the corporate trustee of the SMSF. As the SMSF trustee will be managing the money of the SMSF, a person must not be a disqualified person to be an SMSF trustee.

If an SMSF trustee gets a criminal record, are they disqualified from continuing to act as such?

Not quite. Not all criminal records disqualify a person from being an SMSF trustee. A person must be convicted of an offence of dishonest conduct whether committed in Australia or overseas. The *Superannuation Industry (Supervision) Act 1993* ("SIS Act") does not define what offences constitute dishonest conduct but the ATO website provides fraud, theft, illegal activity or dealings as examples. Perjury, money laundering, bribery and corruption can also be considered offences of a dishonest conduct.

In SMSFs, honesty is not just the best policy – it's the only policy. The SIS Act even requires an SMSF trustee to act honestly in all matters concerning the SMSF. Honesty is so important as the SMSF trustee will be responsible in handling the money of the members in the SMSF and ensuring the SMSF's compliance with the SIS Act. If a person has been convicted of an offence of a dishonest conduct, they cannot be expected to act in the best financial interests of all the members of the SMSF and ensure that their money and other assets are kept separate from the money and other assets of the SMSF.

If a person was convicted of an offence of dishonest conduct, is there an exception?

Yes. They can apply for a waiver of disqualified status if the offence is not a serious dishonest conduct (i.e. penalty imposed for the offence was not either a term of imprisonment for more than 2 years or fine of more than 120 penalty units). If the penalty imposed for the offence is imprisonment of more than 2 years but the person spends less than 2 years in prison, they are still disqualified to act as SMSF trustee.

The application should be made within 14 days of the conviction but the ATO will accept late applications if they can explain the reason for the delay. They need to wait for the ATO's acceptance of the waiver of disqualified status before they can continue to be an SMSF trustee.

If found to be disqualified to act as SMSF trustee, they must resign as SMSF trustee immediately. Consequently their resignation as SMSF trustee will mean the SMSF ceases to comply with the SIS Act. To remain compliant with the SIS Act, the disqualified person has the following options:

1. Stay in the fund. As the disqualified person can no longer act as trustee, they can appoint a registrable superannuation entity licensee as trustee and convert the SMSF into a small APRA fund. By converting the fund, they still keep their membership in it.
2. Leave the SMSF. If the SMSF has more than one member, they can rollover their benefits to a complying super fund (e.g. retail super fund) or withdraw their benefits as a lump sum if they are eligible to do so. These are all possible if the SMSF has enough cash to pay their benefits. By leaving the SMSF, the other members can continue managing the SMSF.
3. Wind up the SMSF. If the SMSF is a single member super fund, they can wind up the SMSF by rolling over their benefits to another super fund or withdrawing their benefits as a lump sum if they are eligible to do so. Even if the SMSF has other members, the SMSF will also need to be wound up if keeping it will not make any practical sense.

It is best for SMSF trustees to continuously maintain a clean record to keep their SMSF but getting a criminal record is not yet the end of the world. If an SMSF trustee foresees conviction of an offense and is unsure they are disqualified to act, they should seek professional assistance as early as possible to make sure they do not contravene the provisions of the SIS Act.

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