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SISFA note – SMSF landlords and offering rent relief

A hot topic for SMSF trustees during the COVID-19 crises is whether SMSF trustees that hold land can offer rent relief to their tenants, in particular to related tenants, without breaching the superannuation laws.

Rent relief by SMSF trustee landlords can potentially cause issues for SMSF trustees. That could include breaches of the sole purpose test (section 62 of the *Superannuation Industry (Supervision) Act 1993 (SIS Act)*), the prohibition against providing financial accommodation (section 65 of the SIS Act), the prohibition against dealing on a non-arm's length basis (section 109 of the SIS Act) and the in-house asset rules (Part 8 of the SIS Act). Rent relief is unlikely to breach the non-arm's length income rules (NALI) on the basis that the SMSF will not receive more income than it should.

For unrelated tenants, offering rent relief is unlikely to breach the superannuation laws as any rent relief will be either negotiated by arm's length parties or compelled under various State based legislative regimes.

For related tenants (of business real property), the position is not so clear cut. In "normal times", an arm's length landlord would be expected to enforce the terms of the lease and any deviation from the lease terms, or altering the terms of the lease in favour of the related tenant, could breach the superannuation laws. In simple terms, this is because such actions would be a non-arm's length dealing.

However, during the COVID-19 crises there is arguably no "normal" and, therefore, arm's length dealings could incorporate discounting rent, deferring rent or both. This is particularly so for tenants who can avail themselves of the statutory rent relief measures.

So, where does this leave SMSF landlords who want to offer rent relief to their related party tenants.? Well, the Australian Taxation Office (ATO), in its [Q&A website material](#), has confirmed that their "compliance approach for the 2019-20 and 2020-21 financial years is that we will not take action if an SMSF gives a tenant – even one who is also a related party – a temporary rent reduction, waiver or deferral because of the financial effects of COVID-19 during this period." This applies to both land held by SMSFs and regulation 13.22C unit trusts. The ATO website material is silent as to what relief can be offered and whether it can be offered to all tenants (even those not suffering a downturn).

This raises the question as to what relief can be offered. In the author's view, the following should be considered in relation to rent relief granted to related tenants:

- match the rent relief to that which is offered under the various statutory COVID-19 measures (this approach is best practice);
- SMSF landlords could structure their relief against benchmarking materials (e.g. from estate agents) of what relief is being granted in the rental market by arm's length parties for similar properties; or
- Determine their own terms for the relief (although this carries the greatest risk of being found to be a non-arm's length dealing).

It is also important, if a SMSF landlord offers rent relief, that the relief be formally documented (ego through a deed of variation of the lease or an exchange of letters). It is also recommended that the reasons for offering the rent relief be recorded (e.g. in the formal documents or a trustee resolution).

What is Self-managed Independent Superannuation Funds Association (SISFA)?

SISFA is an association that has represented the interests of the self-managed superannuation fund (SMSF) sector for over a decade and is currently the only SMSF industry body solely representing all participants in the sector including administrators, accountants, auditors, lawyers, actuaries and advisers.

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Media Comment

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