

## Undetected super crime

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Confidence in superannuation is at a low ebb. Whilst declared investment returns of the last three years have fuelled this lack of confidence this is not the sole reason. Much of the blame must be carried by successive governments, which have found it impossible to leave the superannuation system alone for more than a few months at a time. This, and the steady erosion of superannuation tax concessions, has led the average sceptical Australian to view super as a necessary evil, rather than a welcome opportunity to fund for retirement.

There is no doubt that this continual superannuation tinkering has added to Australia's love affair with the family home. Tying up capital in the family home has proven to be the only wealth shelter from Government tax grabs.

However, there is another factor that, irrespective of Government tinkering, has the potential to undermine confidence in superannuation once and for all; the incidence of superannuation fraud.

And the fear of fraud has fuelled another phenomenon in superannuation, the self managed superannuation fund (SMSF's). But is this really the answer?

Whether you believe that it is true or not, be prepared, the first politician racing for the ballot box has generated this daily headline; *Superannuation funds at mercy of selves and con men*. Senator Nick Sherry is said to have described the Government's super safety measures as "weak" and to have failed to provide adequate compensation.

What is a superannuation fund member to think when our political leaders cry foul play and dance the tune of doom and gloom? It is no wonder that many are looking at setting up their own superannuation fund, to not only take control of their financial futures but to also take it out of reach of the scoundrels. But is this right?

Superannuation fraud has received relatively scant publicity in Australia, mostly because there appears to be little interest in it. There is no doubt that it exists, the evidence is in Australian and Securities Commission banning orders, Senate enquires and even in Australian Taxation Office announcements. It seems that superannuation fraud exists on a significant scale, but that the few official figures drastically understate the true picture.

It was almost eight years ago that the Insurance and Superannuation Commission (now the Australian Prudential Regulatory Authority) said that, over the prior eight years to June 1996, superannuation fund losses arising from identified cases of fraud amounted to something like \$17 million.

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The key word is 'identified'. Many believe that the \$17 million figure was just the tip of the iceberg. As the superannuation industry now approaches \$600 billion, superannuation fraud in all of its disguises must be considered to be a growth industry. And we should expect that a vast amount of it goes undetected.

There is little doubt that this lack of confidence in the integrity of the system has added to the growth of SMSF's which today account for more than 99% of Australia's almost 300,000 superannuation funds.

However, any investigation into Australian superannuation uncovers evidence of theft, extortion, excessive charges, secret commissions and unlawful conduct in superannuation funds large and small. These offences are perpetrated by a range of people connected with the administration of funds – including investment managers, accountants, auditors and financial consultants – sometimes in collusion with dishonest trustees.

In many ways, defrauding a superannuation fund is one of the easiest and most insidious of white-collar crimes. How many fund members would know if their administrator had been systematically skimming off some of their investment earnings into the account of a fictitious member? How many thousands of members might have already retired or left their jobs, received a smaller payout than they were entitled to, and been none the wiser?

But this still leaves unanswered the question; Is a DIY or SMSF the answer?

On the best available evidence the answer is clearly no. Taking responsibility of their own superannuation may give a person control and take it away from the managed superannuation sector but it also opens them up to the unscrupulous actions of the host of 'professionals' who will charge fees to steal their superannuation in other ways.

The January 2004 joint press release of ASIC and the ATO described one scam in which promoters urge people to set up a SMSF into which they roll their preserved superannuation. The client is told that as trustee of the SMSF they can decide how its assets are spent.

"These schemes specifically target people on low incomes, and those in financial difficulty, such as those having trouble paying their phone bills, credit cards or mortgages," Mr Peter Kell, ASIC's Executive Director of Consumer Protection said. "They may falsely claim you can withdraw your super, or use a self managed fund, to pay off debts, make a deposit on a home, or buy a car or holiday."

Deputy Commissioner of Taxation, Mr Mark Jackson, said that under the scam "The promoter then charges a commission, usually 20 per cent or more of the fund's assets, for their services".

Such a scam is an insidious threat to the system that will target and seek to punish the owner of the SMSF who, as trustee, breached the superannuation laws, but only did so at the urging of someone who charged for their dubious advice. These are the risks inherent in a system that has grown so complex that the technicalities and jargon can easily be used to disguise outright theft.

Setting up a SMSF to take control of superannuation can be one step forward, but handing it over to professionals and not taking an active role in its management, administration and integrity is taking four steps back!

Why four steps back?

Only members of the publicly marketed superannuation sector have access to the Superannuation Complaints Tribunal, an independent tribunal set up by Government to deal with superannuation complaints in a no-cost, lawyer free environment. SMSF's only have recourse to the costly and time-consuming State Supreme Courts.

The audit trail that exists for the publicly marketed superannuation sector is far superior to SMSF's and soon only qualified trustees will be allowed to exist within an APRA regulated superannuation fund.

Also, SMSF members do not have the opportunity of Government resurrection from a fraud or theft. Part 23 of the Superannuation Industry (Supervision) Act 1993 allows the Minister to direct that financial assistance be given to certain funds. For these purposes, "fund" does not include a SMSF. Commercial Nominee superannuation members got back 90% of their account balance. A SMSF superannuation member would still be chasing their money.

Put another way, despite the *sky is falling* bleating of the politicians such as Senator Nick Sherry, there are present systems in place that, from a protection and restoration perspective, better serve the average superannuation investor. Incidentally it is curious that Senator Sherry bemoans that the Government's super safety measures are "weak" since the measures that are in place were in fact designed and introduced by the then Federal Labor Government.

But SMSF's that deal with reputable professionals that are required to have compensation arrangements in place should feel some comfort from the system of responsibility and accountability that exists. Financial Services Reform of the Corporations Act came into full operation from March 2004. Under these reforms Australian Financial Services Licensees are fully responsible and liable for the actions of their Authorised Representative financial planners. A lack of a SMSF member's access to the SCT may be made up with access to the no-fee and lawyer-free Financial Industry Complaints Scheme, as long as the financial loss is less than its jurisdiction limit of \$100,000.

So SMSF's that stay within the financial services industry enjoy a measure of protection that is certainly not available to the SMSF that have taken personal control. For these the only protection is diligence, suspicion and trust of no one else other than the trustee/member.

Does some of this sound confusing? It should, an actuary designed Australia's superannuation system and since its modern re-birth in 1983 it has constantly been a tool of Federal Treasury and the plaything of politicians of all hues.

So what should a person chose, SMSF or public marketed superannuation fund?

Really it is a personal choice, however, no matter what is chosen, diligence in superannuation is necessary, only the member has enough interest to ensure that what is meant to fund them in their retirement will still be there when they retire, and not in another's pocket.