SMSF Association

Budget Submission

2022/23

September 2022

About the SMSF Association

The SMSF Association is the peak body representing the self-managed superannuation fund (SMSF) sector which is comprised of over 1.1 million SMSF members and a diverse range of financial professionals. The SMSF Association continues to build integrity through professional and education standards for practitioners who service the SMSF sector. The SMSF Association consists of professional members, principally accountants, auditors, lawyers, financial advisers, and other professionals such as tax professionals and actuaries. Additionally, the SMSF Association represents SMSF trustee members and provides them with access to independent education materials to assist them in the running of their SMSF.

Our Beliefs

- We believe that every Australian has the right to a good quality of life in retirement.
- We believe that every Australian has the right to control their own destiny.
- We believe that how well we live in retirement is a function of how well we have managed our super and who has advised us.
- We believe that better outcomes arise when professional advisors and trustees are armed with the best and latest information, especially in the growing and sometimes complex world of SMSFs.
- We believe that accrediting, and educating advisors, and providing accurate and appropriate information to trustees is the best way to ensure that SMSFs continue to provide their promised benefits.
- We believe that a healthy SMSF sector contributes strongly to long term capital and national prosperity.
- We are here to improve the quality of advisors, the knowledge of trustees and the credibility and health of a vibrant SMSF community.
- **We are the SMSF Association.**

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Foreword

The SMSF Association welcomes the opportunity to put forward our Pre-Budget submission for the first Federal Budget of the Albanese Government. We look forward to working with Government and Treasury.

We would also like to take the opportunity to highlight several key measures announced in Budget 2021-22 which remain outstanding. We acknowledge that these were policy proposals of the previous Government. However, these measures address two significant issues for the SMSF sector.

The measures relate to the two-year amnesty for legacy pensions conversions, the removal of the active member test and the extension of the temporary absence rule for non-residents from 2 to 5 years. Both measures were intended to apply from 1 July 2022.

These measures are important reforms for the SMSF sector, and we ask the Government and Treasury to undertake the necessary industry consultation and progress the required legislation as a matter of priority. We would welcome the opportunity to further discuss these with you.

Executive Summary

Summary of Recommendations

Our submission seeks to highlight and address several key issues impacting on the SMSF and broader superannuation sectors. Simplification, review, and the modernisation of the sector are the overarching themes of our submission. We believe this can be achieved by:

- **Simplifying Transfer Balance Caps.** The indexation of the Transfer Balance Caps on 1 July 2021 has added further complexity to the superannuation system. The system has shifted from having a single cap to individual caps ranging from $1.6 to $1.7 million. This is causing confusion and increased costs across the sector. The use of a single cap will reduce costs, uncertainty and benefit all stakeholders.

- **Reducing the number of Total Super Balance thresholds**. The introduction of multiple Total Super Balance thresholds is unnecessarily adding to the complexity of the superannuation system. This has made it increasingly difficult for individuals to understand the superannuation system and their options. The SMSF Association believes the number of Total Super Balance threshold could be significantly reduced.

- **Rewording or modifying the non-arm's length income provisions with new principles**. The introduction of the non-arm's length expenditure rules with effect from 1 July 2018, will have far-reaching and unjustifiable consequences for the superannuation industry. The rules should be re-worded or re-drafted to require the Commissioner of Taxation to make a determination that the section applies and to allow trustees to rectify transactions in certain situations.

- **Removing the cancellation fee that applies to approved SMSF auditors**. This will provide equitable treatment with registered company auditors and removes a significant financial barrier to exit.

- **Removing ambiguity regarding the application of the of the design and distribution obligations and target market determinations to SMSFs**. The SMSF Association believes these provisions should not apply to the establishment of an SMSF, when adding a new member to an SMSF, or when commencing a pension in an SMSF.

- **Indexing key small business capital gains tax concession thresholds.** Some of these thresholds have not been reviewed or updated for a considerable period.

- **Protecting an individual's unused concessional contributions cap** due to the late payment of prior years' superannuation guarantee amounts. Under this measure the Commissioner of Taxation would be given the necessary powers to apply such amounts to the relevant year of income.

- **Providing practical regulatory and compliance relief for minor breaches of the non-geared unit trust rules**. Currently remediation is strictly limited to the winding up of the unit trust which can be costly and have a severe impact on the fund. Temporary measures adopted by the Commissioner of Taxation due to Covid-19 have demonstrated that such a framework with the right setting, can function appropriately.

Red Tape Reduction - Simplification & Harmonisation

Personal Transfer Balance Cap complexity

With the indexation of the general transfer balance cap (TBC) on 1 July 2021, individuals are now subject to a personal TBC. The value of an individual cap will depend on an individual's circumstances and will range from $1.6 million to $1.7 million, rather than one single cap for all individuals. This is causing significant complexity and is compounded by the lack of access for financial advisers and SMSF administrators to the ATO reports needed to obtain an individual's TBC.

Initially the general TBC was $1.6 million, rising to $1.7 million on 1 July 2021.

A member's personal TBC will equal the general TBC in the year they first have a retirement phase income stream counted against their transfer balance account.

However, post 1 July 2021, a member 's personal TBC may differ from the general TBC due to proportional indexation. Under proportional indexation, the unused portion of the member's personal TBC (based on the highest percentage usage of their TBC) will be indexed in line with the indexation of the general TBC.

This is an overly complex situation which over time will result in most individuals with a retirement phase income stream having a personal TBC which is different to the general TBC maximum. This distortion will continue to grow in complexity as future indexation of the TBC is applied.

Individuals who haven't used their cap will have a maximum TBC of $1.7 million, individuals who have used a portion of their cap (based on their highest percentage usage) will fall somewhere between $1.6 million and $1.7 million and individuals who have used all their cap will remain at $1.6 million.

Due to the complex nature of proportional indexation, it is inevitable that mistakes will be made leading to inadvertent breaches of the TBC.

The table below, published by the ATO, clearly illustrates the complexities associated with proportional indexation. The indexation which is applied to a member's TBC is dependent on the member's highest ever transfer balance which in-turn determines the amount of indexation (between nil and $100,000) that is applied to their TBC. The information in this table is generic and does not determine an individual's exact TBC. It however highlights the significant variability resulting from individual TBCs.

[Refer to table overleaf]

Proportional indexation of your transfer balance cap[1]

If your highest transfer balance was between	Your unused cap percentage will be between	Your personal TBC will increase between	Your personal TBC after indexation will be between
$0.00 and $159,999.99	100% and 91%	$100,000 and $91,000	$1,700,000 and $1,691,000
$160,000 and $319,999.99	90% and 81%	$90,000 and $81,000	$1,690,000 and $1,681,000
$320,000 and $479,999.99	80% and 71%	$80,000 and $71,000	$1,680,000 and $1,671,000
$480,000 and $639,999.99	70% and 61%	$70,000 and $61,000	$1,670,000 and $1,661,000
$640,000 and $799,999.99	60% and 51%	$60,000 and $51,000	$1,660,000 and $1,651,000
$800,000 and $959,999.99	50% and 41%	$50,000 and $41,000	$1,650,000 and $1,641,000
$960,000 and $1,119,999.99	40% and 31%	$40,000 and $31,000	$1,640,000 and $1,631,000
$1,120,000 and $1,279,999.99	30% and 21%	$30,000 and $21,000	$1,630,000 and $1,621,000
$1,280,000 and $1,439,999.99	20% and 11%	$20,000 and $11,000	$1,620,000 and $1,611,000
$1,440,000 and $1,599,99.99	10% and 1%	$10,000 and $1,000	$1,610,000 and $1,601,000
$1,600,000 or more	0%	nil	$1,600,000

Proposed solution: Remove TBC proportional indexation

One simple way of addressing the complexities associated with proportional indexation would be to align all members TBC with the general TBC. This would provide certainty, reduce costs, and simplify the administration involved for the Australian Taxation Office, financial advisers, SMSF administrations and tax agents as well as the members themselves.

[1] Australian Taxation Office, 2021, *Indexation of the general transfer balance cap,* (10 February 2021) QC 60627

Indexing the TBC in this manner ensures that superannuation members in retirement are not disadvantaged by the impacts of inflation. Allowing members to retain more in the retirement phase, including on the death of a spouse.

The costs of allowing broad application of TBC indexation and the incremental loss of tax revenue are not expected to be significant, particularly when we consider the oncosts of indexation including the costs of administration and complex system redesign. These system costs will be incurred each time indexation falls due.

The need for access to timely and accurate data is fundamental to ensuring that members comply with their TBC. This highlights the need for Government to ensure that access to this data is not limited and can be accessed by all authorised advisers in an efficient way.

Total Super Balance threshold complexity

Since 1 July 2017, an individual's Total Super Balance ("TSB") has been used to determine an individual's ability to access certain superannuation concessions. The SMSF Association has been supportive of this method as an effective way to target appropriate cohorts of superannuation members.

However, the introduction of multiple TSB thresholds is unnecessarily adding to the complexity of the superannuation system. This has made it increasingly difficult for individuals to understand the superannuation system and their options.

Currently, the following different TSB thresholds apply:

TSB Threshold	Applicable Measure
$300,000	Work-test exemption contributions
$500,000	Catch-up concessional contributions
$1.48m, $1.59m, $1.7m	Bring forward non-concessional contribution caps
$1.7m	Non-concessional, spousal contributions, and co-contributions
$1.6m	Disregarded small fund asset rule

In addition to the number of thresholds, confusion, complexity and added costs arise because some of these thresholds are indexed and some are not, and those that are indexed are subject to different methods of indexation.

The number of thresholds that apply have not only made it more difficult for superannuation members to understand and use the superannuation system, it has also made it more difficult for their advisers and superannuation fund administrators. It increases the professional services fees paid by superannuation members as they need specialised advice to understand the different layers of thresholds that may apply to them and when they apply.

Furthermore, when inadvertent errors are made by superannuation fund members and/or their advisers, it can result in breaches of the contribution caps which are often difficult, time consuming and expensive to resolve.

Proposed solution: Reduce the number of TSB thresholds

The SMSF Association proposes the following amendments which will help streamline and simplify the use of TSB thresholds:

1. **Remove the $1.48 million and $1.59 million TSB bring forward non-concessional contribution (NCC) thresholds.**
    a. This will reduce the complexity involved in making bring forward NCCs when nearing the $1.7 million TSB threshold.
    b. This reduces the ability for confusion and complexity in the system which has increased with the recent indexation of thresholds and rates.
    c. It allows individuals to increase their superannuation balance and better prepare for their retirement. We do not anticipate that this will incur a significant revenue cost to the Government as individuals are only able to make use of the bring forward rule once every three years.
    d. Indexation of these amounts results in less intuitive figures. For example, indexation applied from 1 July 2021 saw the NCC three year bring forward threshold increase from $1.4m to $1.48 million.
    e. It will result in the use of one single $1.7 million threshold, with NCCs, spousal and co-contributions aligned with the general TBC.
2. **Align the disregarded small fund assets threshold to the general TBC**:
    a. This will align this amount with the general TBC and ensure that it is subject to indexation at the same time as other measures using this cap.
    b. It will ensure consistency and alignment with the broader policy objectives with regards to the TBC and the operation of the disregarded small fund asset rules.

The net effect of all these changes would be a substantial reduction in the number of superannuation and tax rules which require a member's TSB to be assessed against a prescribed threshold. It would significantly reduce complexity and red tape while having a negligible impact on Government revenue.

Non-arm's length expenditure reforms

The introduction of the non-arm's length expenditure (NALE) rules with effect from 1 July 2018, and the ATO's interpretation of the provisions, as published in the recently finalised LCR 2021/2, will have far-reaching and unjustifiable consequences for the superannuation industry.[2]

The SMSF Association does not disagree with the purpose of the non-arm's length expenditure rules and is supportive of the original policy intent of these provisions. Our overarching concern is that rather than merely addressing the mischief at which the previous government's policy was directed, the rules could result in unjustifiable, substantial, and long-term detriment to fund members.

The case studies set out below provide two high level scenarios which illustrate the unjustifiable and severe financial consequences of NALE causing the fund to fall foul of the non-arm's length income (NALI) provisions.

[2] Joint Professional Bodies submission to Ms Lynn Kelly, First Assistant Secretary, Retirement Income Policy Division, titled 'Reform of Non-Arm's Length Income and Expenses', 21 December 2021.

Case study 1 — SMSF member who is a licensed professional

A member of an SMSF is a qualified plumber who carries on a business. The SMSF holds a residential rental property. The member undertakes a renovation of the bathroom in the property and on-charges only the cost of materials.

Under the current law, the ATO's view is that not only is **all** rent forever subject to NALI tax at the top rate of 45%, but the entire capital gain on disposal of the property in the future is also subject to the NALI tax rate of 45%.

Case study 2 — Nexus to all the income of the fund

A member of an SMSF engages an accounting firm to provide accounting services for his SMSF. The services provided include services other than those relating to complying with, or managing, the SMSF's income tax affairs and obligations. Because the member is a partner of the accounting firm, the accounting firm charges a lower fee then would ordinary be charged to other clients. The company does not have a formal policy in place to provide discounted fees to partners and staff.

Under the current law, the NALE has a sufficient nexus with all the ordinary and statutory income derived by the SMSF for the income year. As such, **all** the SMSFs income for the income year, including realised capital gains and taxable contributions received by the fund during the income year, is NALI and taxed at 45%.

In both above case studies, NALI could have easily been avoided by the SMSF trustees ensuring the fund incurs arm's length expenditure for the services provided by the related entity. Nevertheless, the penalty for getting it wrong, including situations where inadvertent mistakes have been made, should not give rise to the severe and punitive consequences outlined above.

In scenarios like case study 2 above, LCR 2021/2 states that from 1 July 2022, the ATO will not apply any compliance resources in checking compliance with the NALI provisions if the parties have made a reasonable attempt to determine a NALE amount. However, it is unclear what a 'reasonable attempt' means and how this should be applied in practice by SMSF trustees and SMSF Approved Auditors. We believe a legislative fix, as proposed below, is a better solution.

It should also be noted the potential for NALE to have severe and unjustifiable consequences is not limited to the SMSF sector. The ATO's interpretation of NALE also extends to some common APRA fund scenarios. For example, a common structure for large APRA-regulated funds is where the trustee company incurs, in addition to the mere appointment of directors and payment of trustee/directors' liability insurance, the various trustee office costs (occupancy costs, staff costs, etc). In some cases, in addition to the trustee office costs, the trustee company (in its personal/corporate capacity) may also be the party contracting with third parties such as the external administrator or custodian.[3]

While the trustee fee paid by the superannuation funds in the retail sector will frequently include a profit margin, the usual structure for those superannuation funds in the profit for member sector using this approach is that the only fee paid by superannuation funds to their corporate trustees is comprised of cost recovery of the underlying costs.[4]

[3] Ibid
[4] Ibid

Based on the current interpretation of the law, as these expenses are general in nature, the NALI rule applies, and all the income of the APRA-regulated Fund will be taxed at 45%.

Proposed Solution: Re-write the legislation with new principles or redraft the existing principles within the provision.

Section 295-550 of the *Income Tax Assessment Act 1997* should be re-worded and require the Commissioner of Taxation to make a determination that this section applies. The Commissioner could make a determination that this section applies where a member, an associate of a member, or another person under an arrangement between the member and that other person, enters into a scheme or arrangement with the trustee of the member's fund, and as a consequence of that scheme or arrangement the fund receives NALI or incurs NALE (including situations where the scheme or arrangement results in no expenditure being incurred by the fund). In the process of making this determination, the Commissioner would be bound by the usual rules of administrative decision making and therefore such a determination must always be reasonable.[5]

If the Commissioner makes a determination that this section applies, he would be required to give a notice to the trustee of that determination and of the difference between the relevant amount (or part thereof) of the transaction and the arm's length amount (the **Arm's Length Shortfall Amount**).

Within a prescribed period, the trustee would then be required:

(a) if the Commissioner is satisfied that the Arm's Length Shortfall Amount arose from an honest or inadvertent error, rectify the transaction such that it reflects the correct arm's length amount; or

(b) advise the Commissioner that it will treat the Arm's Length Shortfall Amount as an excess concessional contribution of that member, and unless the Commissioner is satisfied that the Arm's Length Shortfall Amount arose from an honest or inadvertent error:

  (i) not claim a deduction for the arm's length shortfall amount; or

  (ii) where the arm's length shortfall amount would otherwise be included, or deemed to be included, either directly or indirectly, in the cost base or reduced cost base of an asset, reduce the cost base or reduced cost base of the asset by that amount.

Where the trustee makes a choice to treat the Arm's Length Shortfall Amount as an excess concessional contribution, the trustee must release, the Arm's Length Shortfall Amount as an excess concessional contribution less the applicable tax payable by the complying superannuation entity.[6]

Alternatively, the existing provisions of section 295-550 could be modified using the guiding principles described above.

An important feature of the guiding principles is the option for the trustee to rectify the transaction if the Commissioner is satisfied that the Arm's length Shortfall Amount arose from an honest or

[5] Ibid
[6] Ibid

inadvertent mistake. This should encourage greater self-compliance and engagement with the system to resolve NALE amounts.

Requiring the Commissioner to make a determination ensures that the provision continues to operate as intended but empowers the Commissioner to not make a determination if doing so would result in inappropriate outcomes – for example where a fund would incur a significant tax impost even where the relevant NALE is immaterial. It also provides a mechanism for rectifying non-arm's length dealings in a controlled and reasonable manner. By taxing Arm's length Shortfall Amounts as an excess concessional contribution, it provides an adequate disincentive to engage in non-arm's length arrangements.

Barriers to Exit – Approved SMSF Auditor Cancellation of Registration Fees

In 2017, the *ASIC Supervisory Cost Recovery Levy (Collection) Act 2017* was passed, introducing the industry funding model for ASIC.

Levies payable under the cost recovering model were first applied for the 2017/18 financial year.

The intention of the industry funding model is to ensure that the costs of regulation are borne by those creating the need for regulation.

The *ASIC Supervisory Cost Recovery Levy Regulations 2017* sets out amounts that are to be excluded from the regulatory costs and not subjected to the cost recovery regime.

Regulation 5(1) prescribes *"amounts [that] must not be included in the amount of ASIC's regulatory costs for a financial year*". The costs of regulating approved SMSF auditors pursuant to *Superannuation Industry (Supervision) Act 1993* are included in this listing.

The costs of regulating approved SMSF auditors therefore do not form part of ASIC's regulatory costs and will not be recovered under the industry funding regime. Approved SMSF auditors are instead subject to a separate schedule of ASIC fee which are outlined in the table below.

Superannuation Auditor Registration Imposition Act 2012 and *Superannuation Auditor Registration Imposition Regulations 2012* were amended in 2018 to increase the legislated cap on fees to $3,000.

An extract of applicable ASIC Fees for the 2012 and 2021 financial years, prescribed in the *Superannuation Auditor Registration Imposition Regulations 2012* are set out in the table below:

Item	Fee Payable For	2012 ($)	2018 ($)
1	applying for registration as an approved SMSF auditor	100	1,927
1A	applying for conditions imposed on registration as an approved SMSF auditor to be varied or revoked under section 128D of the SIS Act	n/a	1,028
1B	applying for registration as an approved SMSF auditor to be cancelled under section 128E of the SIS Act	n/a	899
2	undertaking a competency examination in accordance with section 128C of the SIS Act	100	107
3	giving the Regulator a statement under section 128G of the SIS Act	50	0

The fees struck in 2018 are still current and apply to the 2021 financial year.

Of particular concern to our members is item 1B, the applicable fee when an approved SMSF auditor applies to cancel their registration. A fee of $899 applies.

The impost of a fee should not be a barrier to exit. Someone who is seeking to cancel their registration and exit the sector should be encouraged to do so and not encouraged to maintain their registration due to the cost.

The fee to cancel an approved SMSF auditor registration is almost half that of the fee to apply for registration.

Proposed Solution: Remove the cancellation of registration fee for approved SMSF auditors

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For a comparison, when we examine the annual fees that apply for individuals who register as a company registered auditor, a significant divide is immediately evident:

Item	Fee Payable For	2021 ($)
9	Apply for registration as an individual auditor	338
159	Notify that you are ceasing practise	Nil
10	Lodge your annual statement	Nil

We acknowledge that a corporation applying for registration as an authorised audit company is subject to an application fee of $3,429. However, a corporation is not required to be registered in an SMSF context.

Similarly, the lodging of annual statements or notifying cessation of practise by a corporation are not subject to any charge.

There is a significant disparity on the fees that apply between these two groups. Particularly with regards to the application for registration and the application for the cancellation of registration.

It is unclear why such a significant disparity in the fees exist for an individual who is a registered company auditor versus one who is a registered SMSF auditor.

We recommend that the cancellation fee that applies for approved SMSF auditors is removed, providing a clear pathway for individuals seeking to exit the sector. This should be implemented as a priority.

Design and Distribution Obligations/Target Market Determinations

Significant ambiguities reside in the current legislation and regulations regarding the application of the design and distribution obligations (“DDO”) and target market determinations (“TMD”) to SMSFs.

During the public consultation in 2018, ASIC noted that the proposed legislation, unless amended, would unlikely apply to SMSFs as *"the initial distribution of interests in SMSFs may not be captured by the revised exposure draft legislation"*[7].

The SMSF Association consistently raised concerns on the ambiguities arising around the establishment of SMSFs and other related dealings.

Given the original drafting of the Bill and the fact the Senate Economics Legislation Committee made no mention of the need for SMSFs to be included, it is our belief that the DDO/TMD regime was not intended to apply to the establishment of an SMSF and financial dealings with regards to an SMSF.

> The legislation and regulations are not sufficiently clear to enforce this intent.

Other parties noted during the various consultations that, in the context of the DDO and TMD legislation, an SMSF was a shell that needs to be considered distinctly differently to the financial products it acquires.

> "There is one important financial product where there is a greater level of uncertainty about the applicability of the Design and Distribution Obligations legislation, and we would have liked to have seen this uncertainty addressed through this regulation. Self Managed Superannuation Funds (SMSF) are classified as a financial product, however they are different from other financial products in a number of ways.
>
> We believe that there are grounds for treating SMSFs differently, including the fact that they are more of a service than a product and are typically used to house other products that will be caught under the Design and Distributions Obligations legislation. In addition, the product provider is technically the trustees of the SMSF, who are also the members of the fund. Thus, the benefit of this legislation is less apparent in the case of SMSFs."[8]

Treasury in their evidence to the Senate Economics Legislation Committee inquiry into the Bill, noted the need to exclude SMSFs from the regime:

> "it would be inappropriate to include SMSFs because the design and distribution obligations require the issuer to determine a class of consumers, whereas a person designs an SMSF and in effect is 'selling it to themselves'".[9]

[7] ASIC, 2018, *Design and distribution obligations and product intervention power: Revised exposure draft legislation – Submission by the Australian Securities and Investments Commission,* Paragraph 75

[8] AFA, 2019, *AFA Submission – Corporations Amendment (Design and Distribution Obligations) Regulations 2019*

[9] Ms Kate O'Rourke, Principal Adviser, Consumer and Corporations Policy Division, The Treasury, Committee Hansard, 1 November 2018, p. 35

The financial products acquired by and held in the SMSF are subject to the DDO and TMD requirements. This is entirely appropriate and aligns with the policy intent of these measures.

Since these provisions have been operative, conflicting views have emerged on whether the provisions apply to SMSFs and, if they do, how they should be applied in an SMSF context. It has been described as "a lawyer's picnic".

Proposed solution: Exclude SMSF establishments, addition of new members and commencement of pensions in an SMSF from the DDO/TMD requirements

The DDO applies to issuers and distributors of financial products that are available for acquisition by issue or by regulated sale in Australia.

A product distributor is required to take reasonable steps that will, or are reasonably likely to, result in distribution of a financial product being consistent with the product's TMD.

Financial advisers are expected to consider a product's TMD when providing advice and meeting their best interest duty.

Each SMSF is unique to its members. The members and trustees are one and the same. As such they will each have very different investment objectives, risk profiles, preferences and needs.

An SMSF is a private fund and does not offer membership to the public at large. Therefore, the requirement to have a publicly available TMD as required under the legislation does not align to the principles or function of an SMSF.

SMSFs meet the definition of a financial product. However, when we look at how it resides within the DDO/TMD framework, it is a structure in which to house financial products. Those financial products will need to comply with the DDO/TMD regime obligations.

There are no consumer or public benefits to be gained by extending the DDO/TMD provisions specifically to the SMSF structure itself. Rather, including SMSFs will add unnecessary complexity and cost burdens for no benefit. The logic that applies to commercial product issuers does not apply in an SMSF context as the SMSF structure is not being offered to the public at large.

More concerning, the current ambiguities are camouflaging potential contingent liabilities that may arise for both financial advisers and licensees, were a different interpretation of the law is applied in the future. This may occur due to action of a regulator, litigation, or formal complaint with AFCA.

ASICs regulatory guide RG 274 *Product design and distribution obligations* is completely silent on SMSFs and the issues surrounding SMSFs. There is no clear, practical, interpretive guidance from the regulator and no clear exemption in the current legislation and regulations.

SMSFs are consumers of financial products and services. The financial products acquired by the fund will be subject to the DDO/TMD regime. In addition to a PDS, a TMD must also be provided to the trustees in relation to each financial product acquired. This is the appropriate point for the DDO/TMD regime to apply in an SMSF context.

The legislation is silent on the express inclusion or exclusion of SMSFs from the DDO/TMD regime.

The operation of the existing legislation, including the pre-existing PDS provisions, do not provide a sufficiently clear framework to assist with the interpretation and application of the DDO/TMD provisions to SMSFs.

Under Sub-section 1012D(2A) of the *Corporations Act 2001*, a product disclosures statement (PDS) does not have to be given to a new member of an SMSF where the trustee believes on reasonable grounds that the member has received, or knows they have access to, all the information that a PDS would be required to contain. Therefore, SMSFs and their trustees or firms advising SMSFs require disclosure but are exempted under reasonable grounds.

This exemption may not be able to reasonably be relied upon in in the context of the DDO/TMD when we consider other situations that regularly arise in an SMSF context:

1. A member requests the payment of a pension from the SMSF trustee. A PDS is required to be issued by the Fund.
2. The trustee voluntarily executes a PDS on establishment or addition of a new member, although not required to do so. By default, a PDS will be included as part of the standard document package provided. It is then up to the trustee to determine whether they require or use the PDS provided.

It is not uncommon for the PDS to automatically included in the documents adopted or executed by the trustees and members. If a PDS was not required, would the SMSF be captured under the DDO/TMD provisions for the mere fact a PDS has been prepared, executed and/or adopted?

The SMSF structure itself addresses a range of issues that from part of the operative intent of the DDO/TMD regime.

Under the existing legislative framework that applies to SMSFs, the trustees have obligations imposed by way of trustee covenants under SISA s.52B. Of particular relevance to the application and operation of the DDO/TMD regime is the covenant in SISA s.52B(2)(f) and SISR 4.09 that require the SMSF trustees to *formulate, review regularly and give effect to an investment strategy.*

The trustees must ensure that the investment strategy is documented, monitored, complied with, and maintained by the SMSF trustees. The investment strategy must have regard to whole of the circumstances of the fund, including, but not limited to:

*a) the **risk** involved in making, holding and realising, and the **likely return** from, the entity's investments, having regard to its **objectives** and expected **cash flow requirements**;*

*b) the **composition** of the entity's investments as a whole, including the extent to which they are diverse or involve exposure of the entity to risks from inadequate **diversification**;*

*c) the **liquidity** of the entity's investments, having regard to its **expected cash flow** requirements;*

*d) the ability of the entity to discharge its existing and prospective **liabilities**;*

e) *whether the trustees of the fund should hold a contract of insurance that provides **insurance cover for one or more members** of the fund.*

In addition to the above and the trustee's fiduciary duty, the legislation also requires the trustees to consider the 'best financial interests' of all fund members.

The trustees of the SMSF are directly responsible for the operation of the fund, including ongoing fund compliance, formulating investment strategies, and making investment decisions. Indeed, they may engage various professionals and services to assist them in fulfilling their duties and obligations. However, this does not alleviate or remove the core trustee duties and obligations.

SMSF trustees are not required to be licensed financial advisers, product manufacturers, issuers, or providers. Further, they do not engage in retail product distribution. Although they may engage these services and acquire financial products from an appropriately licensed provider.

The trustee's duties and obligations ensure that the needs of individual members are appropriately considered, documented, and actioned. These all align with the policy objective of the DDO/TMD obligations. Noting that the DDO/TMD obligations would still apply to financial products acquired by the Fund.

The requirement for a TMD to be publicly available does not align with SMSFs which are a private, closely held fund, as the members and trustees are one in the same.

Since 1 July 2021, SMSFs are permitted a maximum of 6 members. We understand that the number of SMSFs using these updated measures are low. Prior to this legislative amendment, membership was limited to a maximum of 4 members. A significant majority of funds have two members. We do not expect this to significantly change.

Australian Taxation Office data[10] extracted on 14 July 2021 shows the distribution of SMSFs based on the number of members:

Number of members	2019–20
1	23.7%
2	69.2%
3	3.4%
4	3.6%
Total	100%

If SMSFs are to be included in the DDO obligations, this could include unreasonable design parameters and restricted distribution obligations for trustees dealing with themselves or entities which deal with SMSFs.

Given the current legislative uncertainty, and the apparent intent to exclude SMSFs, we believe it is appropriate for the legislation and regulations to be amended to specifically exclude SMSFs from the DDO/TMD regime with regards to:

[10] ATO, 2022, *Self-managed super fund quarterly statistical report – March 2022,* QC 69809, Table 4: Membership Size

1. Establishment of an SMSF
2. Admission of new members to an SMSF
3. Commencement of a pension in an SMSF

This will align the legislation to the policy intent, reduce red tape and compliance costs for the SMSF sector and provide important clarity for financial advisers, document providers and SMSF trustees.

Gender Equity in Retirement

Superannuation Benefit Spousal Rollovers

The gender retirement gap is an ongoing problem for the superannuation system. Research by the Melbourne Institute shows, on average, Australian men enter retirement with $476,744 while women had just $289,277[11].

MARIA analysis undertaken by Treasury in 2019 found that while future superannuation balances at retirement will continue to increase for both genders, women's balances will continue to lag, and remain behind men's balances until post 2060.[12]

Due to the recent introduction of the transfer balance cap (TBC) and the lack of opportunity for couples to adjust for its introduction, most couples have balances which are heavily weighted to one member. As highlighted, typically, this is normally the male member who has more likely had uninterrupted working patterns and a higher wage and benefited from higher superannuation guarantee contributions.

In most families, women are still the primary carers of children, which means they spend more time out of the workforce than men, and often return to work part time. There are also larger systemic issues such as the gender pay gap, rise of the gig economy and design of the superannuation system which means it is not as effective for part-time or low-income earners.

Typically, the compounding effect of long-term savings, like superannuation, sees underlying differences between gender pay, participation rates and other factors make the retirement gap larger.

Given superannuation is based on a percentage of income earned, it is difficult for many women to contribute similar amounts to men over their full working lifetime.

Conversely, we are seeing a change in working patterns for some men who step into the caregiver role while their spouse returns to fulltime work. This cohort will be similarly impacted in the long terms as discussed above.

Taking these factors into account, we believe superannuation should be viewed in the framework as a 'couple' where it is appropriate to do so. Couples make considered mutual decisions in which one partner usually makes sacrifices to support another. This means there should be effective mechanisms to facilitate this approach.

[11] Melbourne Institute, 2021, *The Household, Income and Labour Dynamics in Australia Survey: Selected Findings from Waves 1 to 19*

[12] Treasury Research Institute, 2019, *Superannuation Balances at Retirement*

Additionally, the introduction of the TBC and the ATO's view on the 'cashing' of death benefits have significantly changed the superannuation landscape, particularly when we consider the importance of individual superannuation balances of a couple.

The reforms now mean that on death of a member, death benefits are much more likely to leave the superannuation system earlier. This is because when a member dies their TBC ceases. Therefore, in absence of any space that can be utilised in a spouse's personal TBC through a reversionary pension, sums of money must be 'cashed' out of the system as a death benefit lump sum. Previously, on death of an individual, the entire death benefit sum would normally revert to a spouse who was entitled to keep this amount in superannuation as a death benefit.

The introduction of the TBC also significantly affected the taxable proportions of many individuals in superannuation. Individuals who exceeded this cap were forced to remove money from superannuation or move the money into the 15% taxable accumulation phase. This has had a significant impact on many individuals in retirement phase, who previously did not need to actively manage their superannuation balance exceeding a certain size.

Gaining access to certain superannuation measures such as catch-up concessional contributions are also targeted through TSB thresholds. Unequal superannuation balances may mean that certain spouses are unable to access these measures because superannuation has been contributed to only one member of the couple.

Therefore, fund member balance equalisation strategies are more important than ever to ensure members can address imbalance, use their personal TBC, improve retirement income and death benefit plans, and gain access to TSB thresholds.

Current strategies in this regard have been to employ a re-contribution strategy, use spouse contribution tax offsets, or spouse contribution splitting. However, these strategies are limited in effectiveness due to contribution threshold and cap restrictions, withdrawal restrictions, and lack of flexibility and impact of the spousal contribution measures.

The removal of the work test and the extension of the non-concessional contribution bring-forward arrangements for individuals aged 67 to 74, will enable more individuals in this age bracket to potentially employ a re-contribution strategy. However, the effectiveness of these strategies is still limited by the contribution caps.

In addition, an SMSF with two members under the age of 65 who have not met a condition of release may not be able to utilise a re-contribution strategy. The ability for these individuals to employ an effective balancing strategy is limited to spousal contributions or contribution splitting which take long time frames and do not make a significant impact.

The main problem with these measures is convincing young couples to take advantage of these strategies. Younger individuals tend to concentrate on other issues such as paying off mortgages and educating children and couples are more likely to consider these strategies when they are approaching retirement when it may be too late to implement effectively.

In our view, the ability for individuals to equalise superannuation balances due to the gender pay gap and the current superannuation regulatory context is limited.

Proposed solution: Create a superannuation benefit spousal rollover

The SMSF Association proposes that a spousal rollover measure be introduced for superannuation fund members.

In essence, the measure would allow an individual with a higher superannuation balance to rollover a portion of their superannuation balance to their spouse to help equalise balances.

The spousal rollover could be targeted to be used by appropriate cohorts through the use of age limits and limits on amounts. For example, it could be limited to a once-off maximum rollover amount, and to individuals under the age of 75.

This measure would provide an effective and efficient way to improve the superannuation retirement gap between spouses and would particularly benefit women.

It would also provide an attractive opportunity for couples who could restructure their superannuation to make better use of the TBC, facilitate simpler death benefit plans with an ageing population and reduce administrative complexity in retirement.

An example of the potential application for two SMSF members is:

Member	**Age**	**Balance**	**Rollover**	**Balance**
Male	54	$652,000	-$210,500	$441,500
Female	52	$231,000	$210,500	$441,500

Member	Age	Balance	Rollover	Balance
Male	61	$1,805,000	-$725,500	$1,079,500
Female	59	$ 354,000	$725,500	$1,079,500

In the first example, both members would now have the ability to access the concessional catch-up concessional contributions as they have TSBs below $500,000. The couple are not penalised by having one individual sacrifice their working arrangements over parts of their career resulting in a lower balance in retirement for one.

Members of this age would not be able to implement a recontribution strategy as they are below their preservation age. The measure allows for pro-active pre-retirement planning at an appropriate time in their working life.

In the second example, both members of the fund would remain under the TBC and avoid the complexities of administering savings held in both retirement and accumulation phase. It also reduces the complexity in death benefit plans where one individual has a significantly higher balance than their remaining spouse.

This proposal is based on rectifying the superannuation gender gap and the lack of effectiveness of current spousal contribution measures.

In essence, a superannuation benefit spousal rollover provides for a simple and efficient mechanism where couples approaching or at retirement are engaged and able to plan for their de-accumulation of assets.

Modernisation of Existing Measures

Small Business Capital Gains Tax Concessions

The small business CGT concessions have an important role to play in the retirement planning for many small business owners. It is common for them to forgo wages and superannuation benefits for themselves for a variety of reasons including cash flow restraints and to reinvest in the business.

The reduced superannuation contribution opportunities experienced by many small business owners was one of the reasons for the introduction of the small business CGT concessions in 1999 and remains relevant today.

This has been particularly highlighted during the COVID-19 pandemic, the effects of which continue to impact businesses around Australia. Due to compulsory shutdowns and ongoing capacity limits, many businesses have or are still experiencing loss of revenue and reduced or interrupted cashflows. As a result, many employers have not drawn a wage opting instead to use their scarce funds to support their employees and the future viability of their business.

A number of the key qualifying thresholds for the small business CGT concessions are not subject to indexation and have not been reviewed for some time. For example, the $6m maximum net asset value test threshold, and the $2m threshold for the aggregate turnover test have not changed since 2007.

Whilst the threshold for superannuation contributions under the 15-year exemption are indexed annually, the retirement contributions cap is fixed at $500,000 and has not been reviewed or updated since its introduction in 1999. This contribution cap needs to be modernised and updated.

In contrast, the CGT cap amount that applies to contributions made under the 15-year exemption was $1,000,000 when it was first introduced in the 2007/08 financial year. The legislation provides for this cap to be indexed on an annual basis. The applicable cap for the 2022/23 financial year is $1,650,000.

Given that the retirement contribution cap was 50% of the lifetime CGT cap amount when the CGT cap amount was first introduced, the retirement contribution should be updated and aligned in the same manner going forward. This will ensure that in future years the cap continues to align with the indexation of the CGT cap amount. A retirement contribution cap of $825,000 should therefore apply for the 2022/23 financial year.

Proposed solution: Modernise and provide for indexation of the small business CGT concessions and the retirement superannuation contribution cap

Practical relief – Addressing ambiguity and unintended consequences

Unused Concessional Contributions

An issue has been identified where the late payment of superannuation guarantee payments may deny some individuals access to their unused concessional contributions. This appears to be an unintended legislative consequence.

The superannuation guarantee amnesty, which concluded in September 2020, highlighted the issue. The amnesty covered a period spanning 1 July 1992 to 31 March 2018 and resulted in a significant amount of outstanding superannuation guarantee contributions being paid to super funds during the 2020 and/or 2021 financial years.

Currently there is no distinction in reporting of superannuation guarantee amounts received by a superannuation fund that relate to a previous financial year or the current year's concessional contributions. Concessional contributions include employer superannuation guarantee, salary sacrificed and personal deductible contributions.

A well-established process is in place to address circumstances where excess concessional contributions arise. We refer to *Income Tax Assessment Act 1997* section 291-465, PS LA 2008/1 ***The Commissioner's discretion to disregard or allocate to another period superannuation contributions for excess contributions purposes,*** and form NAT 71333 *Application – Excess Contributions Determination.*

These concessions enable an affected taxpayer to apply for Commissioner discretion where an excess contribution occurs due to the receipt of superannuation guarantee amounts that relate to a previous financial year. It allows the contributions that relate to an earlier period to instead be applied to that earlier period for contribution cap purposes.

The ATO's online resources regarding the superannuation guarantee amnesty and employee entitlements also stated:

> *Where an employee exceeds the contributions cap because of these contributions, the Commissioner of Taxation will exercise discretion to disregard the contributions made under the amnesty.*
>
> *Contributions made under the amnesty will not count towards your employees' income or contributions for Division 293 purposes.*
>
> (Ref: QC 55626, August 2020)

Prior to 1 July 2018 when the concessional contributions caps operated on a 'use it or lose it' basis, the process provided for in PS LA 2008/1 were relevant and practical. Indeed, it remains current for the sole purpose of remediating excess contributions assessments.

However, since its introduction, we have seen new measures allowing individuals with a TSB of less than $500,000 to utilise unused concessional contribution cap amounts for up to five years, but no earlier than the 2018/19 financial year (ITAA97 s.291-20(3)-(7)).

The unused concessional contributions cap amounts have the effect of increasing an individual's concessional contribution cap (ITAA97 s.291-20(3)).

What has become evident is that upon receipt of superannuation guarantee amounts that relate to a prior year, an individual's expanded concessional contribution cap under the carry forward unused concessional contributions cap, will be diminished or extinguished. This issue is magnified for those who have been beneficiaries of the superannuation guarantee charge amnesty.

Currently there are no mechanisms in place to allow for an adjustment to an individual's carry forward unused concessional contributions, where they are reduced or extinguished due to the receipt of superannuation guarantee amounts that relate to an earlier year.

Furthermore, the current provisions to formally apply for Commissioner discretion fail in this scenario. To apply to have the superannuation guarantee amounts applied to an earlier year, you must first have an excess concessional contribution. Consideration is given to:

1. Whether the excess amount was reasonably foreseeable.

    - A choice was made to trigger the excess, despite the presence of the historical superannuation guarantee amount. The resulting excess would therefore be foreseeable.

2. Consideration is given to the amount of control the person has over the making of the contribution.

    - Whilst an individual has no control over the superannuation guarantee amount, they do have control over any subsequent contributions they make. Exercising this choice will trigger an excess contribution.

When the process for excess contributions was first introduced, the concept of unused concessional contributions did not exist. Similarly, when the SGC amnesty was first proposed in early 2018, the unused concessional contributions were not yet available. As a result, there are some unintended consequences.

Proposed solution: Allow individuals to apply to the Commissioner to allocate late superannuation guarantee payments to the relevant year of income

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Given that the current processes available do not provide a remedy for affected taxpayers, it is our recommendation that the legislation is updated and amended to:

- Allow a taxpayer to make an application to the Commissioner in the approved form
- To request that any prior year/s superannuation guarantee amounts received are applied to the original year of income
- Application can be for up to five of the previous financial years (in line with the unused concessional contributions measures)
- The member has a TSB of less than $500,000
- Provide the Commissioner of Taxation with the power to receive and make such assessments or determinations.

While it is individuals who were compensated during the amnesty period that are of most concern here, this issue could arise at any time where historical cases of unpaid or underpaid superannuation are identified.

These changes are not expected to have any material fiscal impact on budget expenditure as it is a rectification of an anomaly in the operation of the relevant law.

A practical approach to non-geared unit trust breaches

Non-geared unit trusts (NGUTs) are a popular investment structure for many SMSFs. They allow SMSF trustees to pool money with other investors, who may or may not be related, to invest in property. These trusts are permitted under the superannuation legislation if they comply with strict criteria under Division 13.3A of the SIS Regulations. When requirements are not met, the units held by an SMSF in the NGUT are regarded as an in-house asset of the fund.

The SMSF Association believes the practical administrative nature of dealing with breaches to the strict criteria causes an unnecessary cost to SMSF trustees.

The below checklist provides a high-level simplification of the criteria for the unit trust under SIS regulation 13.22C:

- The superannuation fund with no more than 6 members.
- The trustee of the unit trust does not have a lease with a related party of the superannuation fund. An exception applies if the lease relates to business real property.
- The trustee of the unit trust does not have outstanding borrowings (including small overdrafts).
- The assets of the unit trust do not include:
    - An interest in another entity; or
    - A loan to another entity except a deposit with an authorized deposit-taking institution (e.g., certain approved banks); or
    - An asset that is subject to a charge (including a mortgage); or
    - An asset (excluding money) that was ever owned by a related party, subject to certain excluded timeframes. An exception also applies if the asset was business real property acquired at market value.

SIS regulation 13.22B mirrors the above requirement for NGUTs established prior to 28 June 2000.

These criteria must be met at the time of the initial investment by the SMSF. SISR Regulation 13.22D regulates trigger events which cause a NGUT to breach regulation 13.22B or 13.22C and render the investment as an in-house asset. These trigger events align with the criteria in 13.22B and 13.22C. For example, if the trustee of the unit trust undertakes a borrowing or invests in a listed share, the unit trust will no longer be a 13.22B or 13.22C unit trust.

Importantly, if any of the requirements of regulation 13.22D are breached, the unit trust ceases to be a 13.22B or 13.22C unit trust. Such a breach can never be rectified. This means a trigger event in regulation 13.22D will taint the unit trust forever for that superannuation fund.

The consequence of this is that the unit trust would then form part of the in-house assets of the SMSF. In that case:

- if the value of those units breaches the 5% limit, ultimately, the fund would need to dispose of its interest in the unit trust (at least up to the 5% limit). This could trigger significant taxation and stamp duty consequences; or

- if the value does not breach the 5% limit, the SMSF has the option to retain its investment in the unit trust and, in which case, it would need to continue to monitor the 5% limit.

The SMSF Association believes the penalty for a breach of regulation 13.22D is unnecessarily strict and impractical. This is because the usual remedy is for SMSF trustees to sell the units they hold in the NGUT as required by the law and then re-purchase the same structure.

Regardless of how small a breach is, such as a $1 overdraft, the unit trust is compromised. This includes the approved SMSF Auditor not being able to apply any prospective green tick of approval.

If we assume a NGUT has commercial property valued at $1.4 million and the NGUT is 100% owned by an SMSF and the NGUT then breaches the criteria in reg 13.22C:

- Despite the NGUT owning business real property ('BRP'), the units will need to be transferred from the SMSF as these constitute an in-house asset. As an example, Victorian stamp duty on transfer of these units is $77,000. An exemption may be possible if the transfer is to a member in kind if they are entitled to be paid (e.g., attained 65 years). However, in many instances, duty would be payable unless the value of dutiable property in the NGUT was below the relevant threshold (e.g., Vic $1m and NSW $2m).
- Capital gains will also need to be paid on the disposal of the asset
- To facilitate this transfer, the members may wish to retain the property:
    - If we assume it is retained in the SMSF – It would cost approximately $2,000 to establish a new NGUT (including corporate trustee and duty), plus adviser costs of approximately $5,000 and transfer costs of property title to the new NGUT of approximately $5,000.

Therefore, a relatively minor contravention could give rise to around $100,000 in costs.

Alternatively, if the members wish to transfer the property outside super, they may need to arrange borrowings and incur adviser and legal costs. In addition, the usual disposal costs with property would apply.

Proposed solution: Allow trustees to implement a plan to rectify the breach before the end of the following financial year

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We propose that breaches of regulation 13.22D can be rectified in an appropriate period. A breach would still occur but the ability to rectify the breach removes the cost and administrative burden of selling assets and re-purchasing them.

This would be akin to the practical approach taken when trustees breach the in-house asset rules.

The in-house asset rules require the trustees of SMSFs who have assets that exceed the 5% in-house asset limit at the end of a financial year to prepare a written plan to rectify the situation before the end of the following financial year.

The plan must specify the amount that is above the in-house asset limit and set out what steps will be undertaken to reduce the fund's in-house assets to below the 5% limit (generally by disposing or selling excess assets). Each trustee of the fund must ensure that the steps in the plan are carried out within the next year of income.

Practical compliance concessions have been adopted by the Australian Taxation Office as regulator in addressing issues compliance that have arisen with regards NGUT due to the impacts of COVID-19. These measures have provided practical temporary relief. Whilst the application of the concessions will have a limited shelf-life in their current form, they do however provide a current, and relevant case study, demonstrating that such measures can be practically and reasonably applied by the sector.