SMSF Association Budget Submission 2023/24

January 2023

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 servicing SMSFs. The SMSF Association continues to build integrity through professional and education standards for advisers and education standards for trustees. 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 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 insisting on tight controls, accrediting, and educating advisors, and providing accurate and appropriate information to trustees is the best way to ensure that self-managed super funds 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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SMSF ASSOCIATION

Foreword

The SMSF Association welcomes the opportunity to put forward our 2023-2024 Pre-Budget submission.

We thank the Government and Treasury for the consideration given to our pre-budget submissions. While not a Budget pronouncement, we acknowledge the exposure draft consultation regarding the *Superannuation Auditor Registration Imposition Regulations 2022* in November. We welcome the proposed reduction of the SMSF auditor cancellation fee from $899 to $193. We have long advocated that a fee should not be a barrier to exit.

We also welcome the passage of the *Treasury Laws Amendment (Enhancing Superannuation Outcomes for Australians and Helping Australian Businesses Invest) Bill 2021.* This the Bill contained several important superannuation measures, including decreasing the age at which downsizer contributions can be made from 65 to 60 and removal of the work test for members aged less than 75 making non-concessional contributions and the extension of the bring forward rule for non-concessional contributions.

The potential for disproportionately severe outcomes for breaches relating to fund expenses remains a live issue for the entire superannuation sector. We note the release of the Government's Consultation Paper on this issue and encourage the Government to implement a solution which maintains tax neutrality across the superannuation sector. At the very least, to avoid disproportionally severe outcomes in the SMSF sector, SMSF trustees should be given the opportunity to rectify expense breaches in certain situations.

In the current inflationary environment, the indexation of various superannuation thresholds and caps will be triggered. We urge the Government to allow this natural process to operate as legislated and in accordance with the original policy intent.

The impact from inflationary pressures and its effects on Australian households are well documented. For those on fixed incomes and finite resources, the risk of eroding their future income benefits is very real. Noting for many retirees, they do not have access to other sources of income and are unable to return to the workforce to address any income shortfall. The impacts of the current environment must be considered alongside longevity risk as Australians live longer, increasing medical costs and aged care funding.

We note that other important superannuation measures included in the May 2021 Budget, are still to be legislated or opened for consultation. These are the two-year amnesty for legacy pensions conversions, and the reform of the SMSF residency rules with the removal of the active member test and the extension of the temporary absence rule for non-residents from 2 to 5 years. It is acknowledged that these announcements were made by the former Government. We therefore thank the Government for the October 2022 Budget announcement which confirmed that the reform of the residency rules has been incorporated into the Government's policy agenda.

Both of 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.

Legacy pensions have created distorted outcomes for individuals trapped in these products. They have been left stranded as a result of significant legislative reform that occurred after the commencement of their pension accounts. Due to the balance of their account, many are unable to access an

alternative product to rollover their benefits. Further, there are limited options available in the market, providing little choice or opportunity to access an alternative product provider. They are unable to simply withdraw their benefits due to the strict regulatory restrictions that apply to these products. In some cases, the cost to administer is more than the pension payments they receive each year.

The SMSF Association supports a diverse superannuation ecosystem that allows consumer choice. While SMSFs have an important role to play we also advocate that they are not suitable for everyone. This includes where an individual's circumstances have changed and an SMSF ceases to be fit for purpose. Feedback from our members is that there are individuals trapped with these legacy pensions, in an SMSF where the product and/or the SMSF itself are no longer fit for purpose but are unable to exit. The situation is becoming untenable for affected pensioners with relief needed as a matter of urgency.

The concessions made during Covid-19 around SMSF temporary absence rules showed that the proposed changes to the residency rules are practical and workable, with trustees operating in a compliant matter. The modernisation of the temporary absence rules and abolition of the active member test aligns to the broader policy objective of ensuring that the superannuation system operates efficiently and removes the need for the duplication of superannuation accounts. We encourage the progress of both limbs of these proposed reforms.

A legislative solution to these outstanding measures would be a quick win for Government and provide vital solutions and certainty for those individuals. We would be pleased to further discuss these issues and how the required reform can be achieved with the appropriate policy settings.

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. Noting the complexities emerging will be magnified with the further indexation of the cap to occur on 1 July 2023.

- **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.

- **Indexing key small business capital gains tax concession thresholds.** Some of these thresholds have not been reviewed or updated for a considerable period. With no update or indexation, the thresholds are not reflective of the current environment.

- **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.

- **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.

SMSF ASSOCIATION

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. Further complexity will be added when cap indexation occurs again on 1 July 2023.

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.

This table illustrates the spread of individual TBCs under 1 July 2021 indexation. Following the indexation of the TBC to $1.9 million on 1 July 2023, the range of individual TBCs will expand significantly.

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.

We acknowledge that reforms have seen the removal of the $1,000,000 transfer balance reporting threshold (quarterly or annual reporting test) for SMSFs from 1 July 2023.

The following TSB threshold tests continue to apply:

TSB Threshold	Applicable Measure
$300,000	Work-test exemption – concessional 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 tiered TSB thresholds for bring forward non-concessional contribution (NCC) thresholds.**
    a. This will reduce the complexity involved in making bring forward NCCs when nearing the 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 and are cap limited.
    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 apply to balances below $1.4m, increase to $1.48m. The two year bring forward threshold moved from a range of $1.4m to less than $1.5m to $1.48m to less than $1.59m.
    e. We propose a single threshold, with NCCs, spousal and co-contributions aligned with the general TBC. Allowing the NCC three year bring forward to be applied where the member has a balance under the TSB threshold.
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.

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 has not been indexed since 2007, and the $2m threshold for the aggregate turnover test also has not changed since 2007. These thresholds need modernising and ongoing indexation to maintain currency.

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

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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
- Such an application must be made prior to making the desired contribution
- 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

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.

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"*[2].

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."[3]

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'".[4]

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.

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

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

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

Now that these provisions have been operative for more than three months (having commenced on 5 October 2021), 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: Expressly 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[5] extracted on 7 September 2022 shows the distribution of SMSFs based on the number of members:

Number of members	2020–21
1	24.4%
2	68.7%
3	3.4%
4	3.5%
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:

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.

[5] ATO, 2022, *Self-managed super fund quarterly statistical report – September 2022,* [online] <https://data.gov.au/data/dataset/self-managed-superannuation-funds > , Table 4: Membership Size