



29 September 2023

Retirement, Advice and Investment Division
Treasury
Langton Cres
Parkes ACT 2600

Email: MISReview@treasury.gov.au

Dear Sir/Madam,

SMSF ASSOCIATION SUBMISSION – REVIEW OF THE REGULATORY FRAMEWORK FOR MANAGED INVESTMENT SCHEMES: CONSULTATION PAPER

The SMSF Association welcomes the opportunity to provide this submission in response to the Government's Review of the regulatory framework for managed investment schemes. In this submission, we would like to take the opportunity to address the wholesale client regime in the context of self managed superannuation funds (SMSFs).

The requisite thresholds have been in place since their inception in 2001, and not subject to any form of review, update, or indexation. With the effects of inflation, these are now significantly outdated. A review into the appropriateness of the regime as part of the *Future of Financial Advice (FOFA)* reforms in 2011 delivered no outcomes. This was despite a range of issues and concerns being raised at that time.

The regime would also benefit from a rationalisation and consolidation of the existing measures. This will align with the work undertaken by the Australian Law Reform Commission, which has advocated for the removal of duplication and unnecessary complexity from the system.

Accountant's certificates are no longer fit for purpose and must now be removed. The regulation of the financial services sector has significantly changed since 2001. An unlicensed accountant is unable to advise a client to acquire or dispose a financial product. This includes advice not to do so. Pursuant to the Accounting Professional Ethical Standards Board APES 110 *Code of Ethics for Professional Accountants*, accountants have both professional and ethical obligation to their clients. Where an accountant is not licensed to provide financial advice, these duties, and obligations conflict.

We have also observed an emerging trend in the certificates being requested requiring the accountant to attest to information beyond the statement of fact required, placing accountants at significant, personal risk. This was not the original policy intent of these provisions.

This is an area of growing concern for our members, and we are receiving an increasing number of queries on the application of the regime to SMSFs. Some segments of the market appear to be placing



an over reliance on the use of accountant's certificates. We have also heard of circumstances where accountants have been approached, unsolicited, by non-clients, who have been referred to the accountant, seeking the completion of an accountant's certificate.

Issues also arise around the loss of capacity and requests for certificates for individuals subject to enduring power of attorneys.

In the context of SMSFs, a number of issues are in need of urgent remediation. Whilst the acquisition of a superannuation product will always be considered a retail client product or advice, the placement of investments and insurance products within the fund can be made as either a retail or wholesale client. However, the operation of the assets and income test for an SMSF are unclear.

In the 2011 review, issues were raised on the application of the assets test for SMSFs, as no specific provisions are made. The question is whether the \$10 million professional investor test for superannuation funds applied to SMSFs, rather than the \$2.5 million asset test. This issue persists and remains unresolved. This legislative ambiguity means that no formal guidance has been issued by ASIC on the operation of the law in the context of SMSFs.

In 2014, ASIC issued a media statement stating that where the \$2.5 million asset test is applied for an SMSF, no regulatory action would be taken. However, ASIC also warns that this *'will not affect any private rights of action that may be available to third parties. Persons providing financial services to trustees of SMSFs need to make their own commercial decisions after considering the legal risks.'*¹ We note that prior to this announcement, ASIC held the view that the \$10 million asset test would apply in an SMSF context. Despite the 2014 media release, no formal guidance has ever been issued.

This gap in the legislative framework poses a significant risk to advisers, accountants, and their clients. We therefore ask that Treasury and Government please carefully examine these issues and provide legislative certainty.

Greater clarity on how the asset and income tests are to apply to an SMSF would also be welcomed. While many funds will have a special purpose corporate trustee, some SMSFs still have two or more individual trustees. The application of the test differs, depending upon the SMSF trustee structure. The question remains whether it is appropriate to apply the tests at the trustee level or whether the tests should be based on the individual member's interest in the fund.

Further, the control test pursuant to section 50AA of the *Corporations Act 2001*, operates counter to the trustee fiduciary duties, legislated trustee covenants and obligations, that apply to all trustees or directors of the corporate trustee of the fund.

¹ ASIC, 14-191 MR *'Statement on wholesale and retail investors and SMSFs'*, 8 August 2014, [online] <<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2014-releases/14-191mr-statement-on-wholesale-and-retail-investors-and-smsfs/>>



If you have any questions about our submission, please do not hesitate to contact us, and we thank you again for the opportunity to provide this submission.

Yours sincerely,

Peter Burgess
Chief Executive Officer

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, 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.