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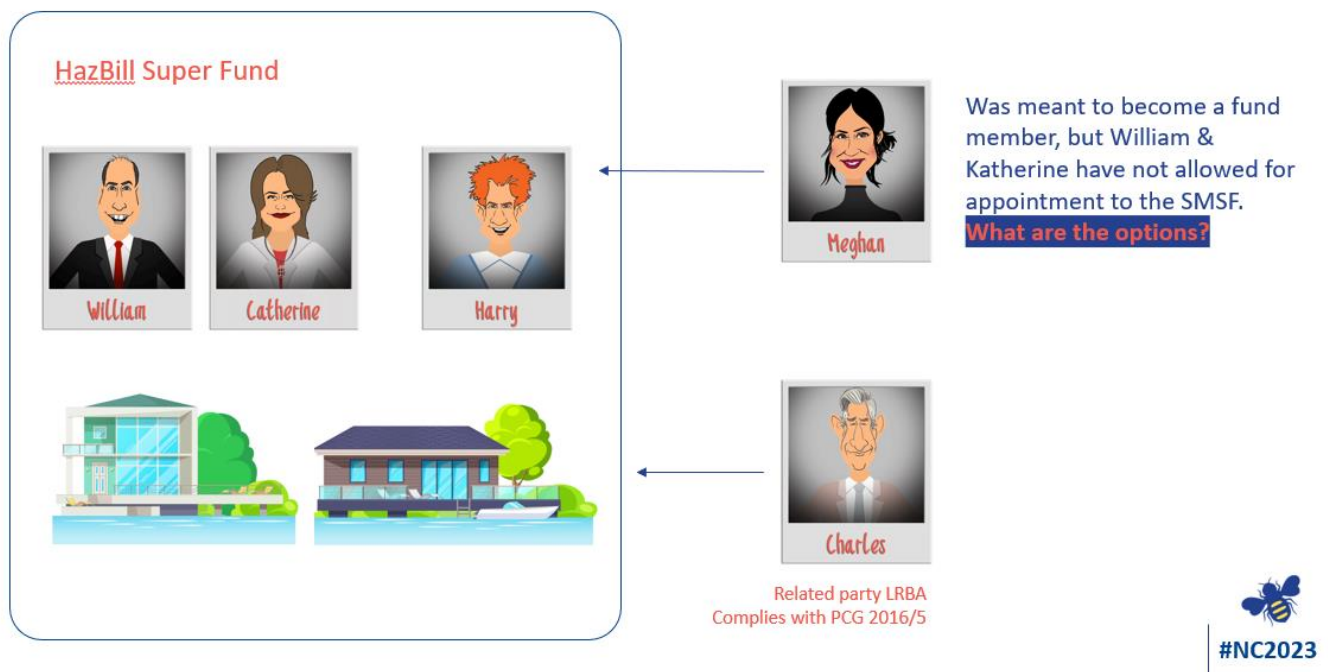
**SMSF ASSOCIATION  
NATIONAL  
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## Introduction

Historically, individuals, organisations and the Regulators have explored and adopted technologies at varying levels of pace – this time difference in technology adoption created the innovation adoption life cycle (Diffusion of Innovation theory - Rogers, 1971). However, the impact of the COVID-19 pandemic has seen a huge acceleration in the adoption of technology, enabling people to sign and deal with a number of key items relating to the operation of an SMSF in a digital form.

This presentation and technical paper through the use of the conference case study, explores the various technical issues relating to the use of new digital measures within the super and tax laws for the operation of the HazBill Super Fund, and potential set up of a new SMSF for Harry and Meghan (HazMeg Super Fund).



## Case study facts

The facts of the case study that this presentation focuses on are as follows:

- William and Harry were the initial members & directors of the HazBill Super Fund ('the Fund')
- Kate was subsequently appointed as a member to the Fund – and for the purposes of this example, as a director of the corporate trustee.
- Meghan upon getting married was to be appointed as a fund member and director, but William and Kate have declined to let her into the Fund.
- The Fund holds 2 x residential coastal properties, with related party loans in place initially from Grandpa Philip - now deceased, so for the purposes of the case study, the asset (as lender) is assigned to Charles.
- As part of this process, Harry & Meghan may set up a new SMSF, however they are considering moving overseas?

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The decision by William and Catherine to not allow Meghan to join the HazBill Super Fund has meant that Harry and Meghan have a number of important options to consider moving forward. This technical paper explores these options in detail in respect to the various trustee and member level issues, along with a number of compliance considerations of the HazBill Super Fund.



## 1. Can Meghan be added to the HazBill Super Fund?

To understand the decision by Will & Kate to not allow Meghan to become a member of the Fund, we are required to look at and assess the rules contained within the Fund's constitution for decision making – that is, where a corporate trustee exists. Furthermore, we are required to explore the Fund's governing rules (i.e. trust deed) to understand the issues around membership. Importantly, we need to understand the interaction between these two documents (constitution & deed) to ensure that they are aligned in their decision-making, in particular where issues may arise, such as with Meghan's membership application, where Will & Kate are supposedly blocking this decision.

**NB.** If the Fund has individual trustees, we will need to refer to the Fund's trust deed for decision making by the trustees, along with the membership requirements.

Let's explore a number of these important issues to assess the decision-making powers of the current directors to be able to accept or decline Meghan's intention to become a fund member:

### 1.1 Where the Fund has a corporate trustee - Ask yourself?

- What type of company is the trustee?
  - A special purpose superannuation trustee only company? or standard company (trading)?
    - It is not uncommon that SMSFs will utilise an existing trustee company, such as with a family trust to also act as the trustee of the SMSF. The rules relating to special purpose trustee companies are quite different in respect to decision making, dealing with alternate directors (e.g. in respect to incapacity), etc.
- What does the constitution say about:

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- The appointment of a new director? Is this a decision to be made by the shareholders, the company (directors) or both?
  - How is a decision made within the company? Is any decision based upon a simple majority (more than 50%), or does it require something higher (e.g. 75%, unanimous)?
  - Are decisions made based upon one vote per director or shareholder in attendance, or does each director or shareholder get to vote based upon dollar of the member's account balance in the Fund?
    - **NB.** A situation could arise where the member could be outvoted by the number of directors (e.g. 2 to 1), but the (1) has a higher member account balance and therefore effectively controls most of the Fund's decision making (where a majority would be required).
- Who are the current shareholders in the company?
    - With the Fund initially set up with William and Harry, when Kate was appointed as a director of the corporate trustee, was she allotted shares in the trustee company? To meet the requirements of s.17A of the SIS Act (i.e. SMSF definition), there is no requirement to issue shares to any new member of the Fund. That is, if William and Harry were initially allotted say 1 x share each when the company was established, the company's share register may still remain the same, even though Kate has been added as a director of the company, and as a member of the Fund.
      - Therefore, in this scenario, Harry may have more decision-making power within the Fund to appoint Meghan than he thinks... Again, we need to contemplate the decision-making powers of the constitution, in particular in the event of a deadlock (William and Harry, both 1 x ORD share) – is there any casting vote at a meeting, or other mechanism that may provide Harry with the opportunity under shareholder approval to allow for Meghan's application to be accepted as a director?
    - Where Kate was allotted 1 x share in the trustee company, this would provide Will and Kate with a controlling position, both from a director and shareholding standpoint.
      - This would mean that Will & Kate could arguably veto any decision regarding the appointment any potential fund member (e.g. Meghan).
    - The other step to check would be to ensure that the appointment of Kate as a director completed correctly – i.e. were the rules of the constitution followed correctly that allowed for her appointment? If not done correctly, this may null her directorship in the company and therefore decision-making powers, which are currently aligned with William.

## 1.2 Can William & Kate change the constitution without Harry's approval?

It depends. Under the Corporations Act, a variation to the constitution would require a special resolution to be passed, which requires a 75% approval by the shareholders<sup>1</sup> for the rules to be amended.

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<sup>1</sup> Section 136(2) of the Corporations Act 2001

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### **1.3 Can William & Kate change the fund's deed to limit membership?**

It depends. The decision to vary the existing trust deed would require a decision of the directors, which will be subject to the voting rights within the constitution.

### **1.4 Individual Trustees**

For individual trustees, these decision-making powers will reside for the trustees within the SMSF trust deed. Again, different SMSF trust deeds will provide different mechanisms on voting, including:

- vote per trustee (including chairperson having a casting vote in the event of a deadlock),
- vote per dollar of account balance; or
- any combination of the two (e.g. voting by account balance in the event of deadlock).

Any decision in respect to Meghan's membership (and application to become a member) is therefore going to only occur once there is an understanding of her ability to be appointed as a director of the corporate trustee.

### **1.5 Dispute resolution**

In circumstances where they may be a stalemate in decision making within the fund, there may be some type of mechanism that would mandate dispute resolution via mediation, with the aim to avoid a costly and process through the courts. This process could also include mandate arbitration following an unsuccessful process of mediation – this would be a last measure to avoid court proceedings.

#### **1.5.1 What if Will & Kate wanted Harry out? Can he be forcibly removed?**

No. whilst Will & Kate may hold decision making power within the Fund, it would require the consent of Harry as a fund member to be able to transfer his existing super benefits to another complying super fund (see SISR 6.28). Conversely, if Harry wants to leave the Fund and transfer his benefits to another fund (APRA regulated or SMSF), it will require the trustee's approval to do so.

In certain circumstances where the Fund is in deadlock, it may be appropriate to consider 'conditional' membership for certain members. This type of membership may grant others within the Fund (e.g. that hold a larger account balance) to obtain 'consent' upfront from the potential new member in both their capacity as a member and trustee. The consent would operate such that, upon the occurrence of specific events including material disagreement, relationship breakdown or legal dispute, the trustee can use the consent to remove the other member and transfer their benefit to another complying superannuation fund.

### **1.6 Accepting Meghan into the Fund**

If Meghan was accepted as a member of the HazBill Super Fund (where conditional or not), there are a number of important issues that would need to be resolved including:

1. Application for a director ID (if not already obtained in respect to an entity of which Meghan is already a director)



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2. Appointment as a director – consent to Act (electronic execution measures for signing under the Corporations Act 2011)
  3. Issuing of shares in trustee company – understanding the impact on future decision making in the Fund
  4. ATO trustee declaration – use of electronic measures to sign the document (s. 104A, SIS Act)
  5. Membership application – requirements of the Deed to accept as a member.
  6. Rollover in of super benefits – SuperStream considerations

Items 1 – 5 will be explored further in Part 3 of this technical paper, and Item 6 will be explored further in Part 2.

### **1.7 Upgrades and other changes**

As the super laws continue to change over time, it is common for trustees to amend their SMSF trust deed to accommodate legislative amendments, and the impact case law decisions. However, where a fund has a corporate trustee in place, it is equally important to ensure that any change to the fund's governing rules in adequately 'matched' to the constitution so that the decision making aligns to those rules set out within the deed. An inconsistency in this approach could have a profound impact on decision making and control of the fund in the event of a breakdown in communication between members and/or appointed attorneys.

## **2. Harry wants to leave & setup a SMSF with Meghan**

Part 3 of this technical paper explores a range of issues where Harry and Meghan decide to establish their own SMSF. As part of this process, we will consider the issues of Harry looking to depart the HazBill Super Fund.

### **2.1 Can Harry leave the HazBill Super Fund?**

As touched on in part 1 of this paper, if Harry wants to leave the Fund and transfer his benefits to another fund (APRA regulated or SMSF), it will require the trustee's approval. There may be a number of reasons that Will & Kate may not want Harry to leave the HazBill Super Fund, including that it may be an inappropriate time to sell down one or both of the investment properties in the Fund.

The other, and arguably more important consideration is the fact that the Fund currently has LRBAs in place for the two residential properties – these would need to be dealt with as part of any rollover of benefits by Harry from the Fund.

There are a number of factors here that need to be considered based upon the current assets within the Fund, including:

- How can Harry transfer his superannuation interest from the SMSF? Does it require assets to be disposed over to facilitate a 'cash' rollover, or are there fund assets that could be in-specie transferred into the new SMSF?
  - **Q – can a property within the HazBill Super Fund be in-specie transferred across to Harry's new SMSF?** No, where the property is residential due to the related party acquisition rules. That is, there is nothing prohibiting the in-specie transfer out of the asset from the current SMSF to a member, however, s.66 of the SIS Act prohibits the acquisition of assets from a related party, in which HazBill Super Fund meets this requirement with Harry's new SMSF.
  - **Q – can the new fund enter into an LRBA to acquire an existing asset from the HazBill Super Fund?** In respect to any residential property, the related party acquisition rules will apply (as above). However, if the current fund had assets that formed part of the exception within s.66(2A) of the SIS Act (e.g. listed shares, BRP, etc), then the receiving fund could as part of the in-specie rollover enter into an arrangement to acquire the asset using an LRBA.
  - **Q – could Charles (as related party lender) forgive any or all of the loan debt?** Yes, he could, with the amounts being treated as a NCC for William and/or Harry (see TR 2010/1). This would not impact the ability to transfer a property to Harry's new SMSF - i.e. a disposal would be required.
- Timing of the request for rollover to ensure that the trustee can meet the 3 business day requirements for SuperStream – that is, after all the information needed to process the request is received (SISR 6.34A(2)).
- Harry's cessation as director and shareholder of the corporate trustee, and as a member of the HazBill Super Fund.

Failure to comply with the 3-business day for SuperStream purposes is a SIS breach of rule SISR 6.34A, and the auditor may be required to report a contravention of payment standards - SISR 6.17.

## 2.2 What needs to be considered in setting up a new SMSF (HazMeg Super Fund)?

A decision by Harry and Meghan to set up their own SMSF means that they have a number of important steps that they need to ensure are followed, including:

- Director ID requirements** – with Harry already a director of the corporate trustee for HazBill Super Fund, Harry was required to comply with the transitional requirements to obtain a director ID by 30 November 2022. Where Meghan does not hold any prior directorship positions, she is required to obtain her director ID (s.1272A of the Corporations Act 2001) at least the day before becoming an eligible officer (s.1272(C)(2)(a)(i)).
- Apply as a director & shareholder** – both Harry and Meghan will be appointed as directors of the corporate trustee, as well as shareholders. It is important that as part of the process of appointing the directors, that the directors are not disqualified from holding the position - this will be acknowledged through the consent to act as a director, along with the ATO trustee declaration. Refer to section 3.3 below for details on the current laws relating to the signing of these documents.

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- iii) **Apply for membership of the HazMeg Super Fund** – both Harry and Meghan are to become members of the Fund, completing membership applications.
  - iv) **Sign ATO trustee declarations within 21 days of Harry and Meghan being appointed as a director.**
  - v) **Apply for the ABN/TFN and to become a regulated super fund** – the fund is required to complete this task, noting that ATO recently made a change to the SMSF registration process which removes the ability to add the bank account details to the online and paper application form. This step has been taken to reduce the risk of fraud. As a result, the ATO will need to be advised of the bank account details separately and before any rollover is requested (along with an electronic service address (ESA)).
  - vi) **Request the rollover of each member's super benefits** – there are compliance requirements within Division 6.5 of the SIS Regulations for both the transferring fund (HazBill Super Fund) and also for the receiving fund (HazMeg Super Fund). As the receiving fund, the trustees are required to comply with:
    - **SISR 6.33A** - where the rollover request was received by the SMSF directly from the member (i.e. Harry requests, the trustee of HazMeg Super Fund uses SuperStream to request the rollover from the transferring fund (HazBill Super Fund)).
    - **SISR 6.34C** - where the rollover was made by the transferring fund (HazBill) to the receiving fund (HazMeg) using SuperStream, the receiving fund is able to receive the rollover information and payment electronically.
    - **SISR 6.34D** - the rollover is allocated to the member within 3 business days after it is received, and all information is received to enable it to occur.

### **2.3    *How can the documentation be currently signed?***

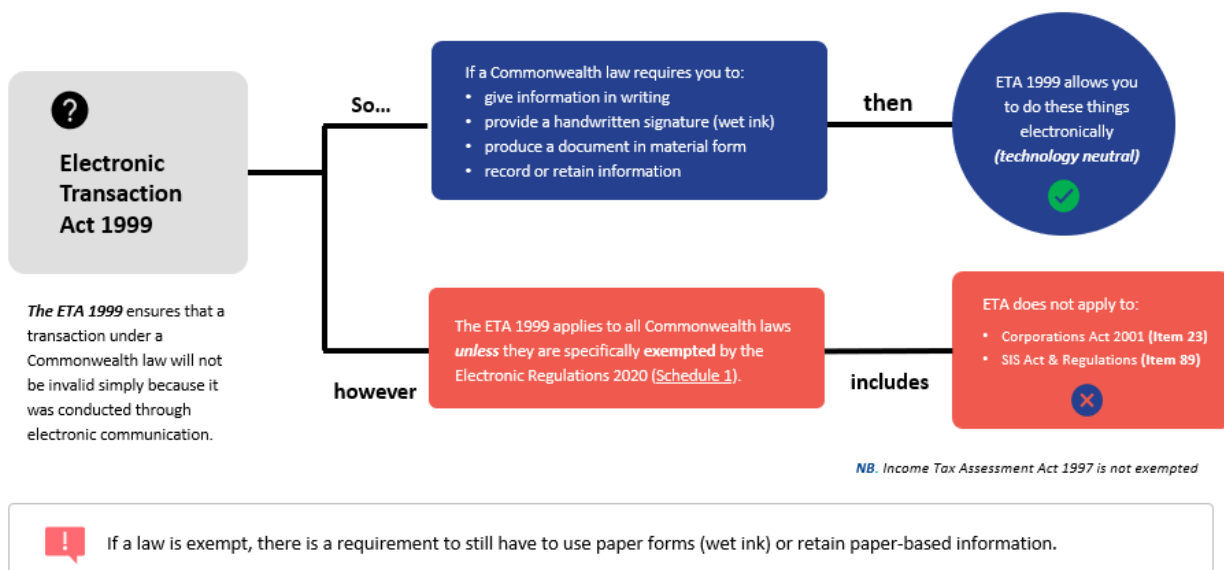
Throughout the COVID-19 pandemic, we saw the Treasurer use his temporary instrument-making powers under various Treasury Laws to enable the use of electronic measures for the signing and witnessing of documents, holding of virtual meetings and more.

This technology neutral approach to the Treasury Laws forms part of the Government's [Modernising Business Communications](#) ('MBC') program, which commenced in December 2020. Since this time, we have seen a number of measures become law, the [Corporations Amendment \(Meetings and Documents\) Act 2022](#) that took effect from 1 April 2022, amending section 127(1) of the Corporations Act to allow for companies to be able to execute certain documents (incl. deeds) and meeting related documents in a 'technology neutral manner.'

Whilst this change has been seen as an important step forward, it is only a small part of the MBC program. Therefore, understanding how the current laws impact the Corporations Act, SIS and tax laws plays an important role in how technology may be utilised.

The diagram below sets out the current laws and how the application of the Electronic Transactions Act (ETA) 1999 applies to various Commonwealth Laws:





It is important to note that the operation of the Electronic Transaction Act (ETA) 1999 do not currently apply to some laws contained within various Treasury portfolios – that is, they are exempted from its application. These exempted laws include (amongst others) the Corporations Act 2001 and the SIS Act.

We did see the ETA Regulations 2020 make an amendment during the pandemic to allow the use of electronic signatures for the purposes of meeting s.35B of the SISA – for the signing of financial statements. Furthermore, we saw the changes to s.127 of the Corporations Act 2001, making it clear that a person may sign a document in a technology neutral manner as per the requirements within Division 1 of Part 1.2AA of the Corporations Act. Specifically, this currently means to sign a document:

- By signing a physical form of the document by hand (**s.110A(1)(a)**); or
- By signing an electronic form of the document using electronic means (**s.110A(1)(b)**).

so long as the method of signing satisfies the requirements of s.110A(2).

Paragraph (2) requires that:

- The method identifies the person and indicates the person's ***intention*** in respect of the information recorded within the document (**s.110A(2)(a)**); and
- The method was either:
  - as reliable as appropriate for the purpose for which the information was recorded, in light of all the circumstances, including any relevant agreement (**s.110A(2)(b)(i)**); or
  - proven in fact to have fulfilled the functions described in paragraph (a), by itself or together with further evidence (**s.110A(2)(b)(ii)**).

### 2.3.1 What must the intention cover?

For the purposes of paragraph (2)(a) above, the person is not required to indicate an intention in relation to:

- any material identifying another person signing the document or indicating another person's intention in respect of the information recorded; or
- the signature of another person signing the document; or
- if a common seal is fixed to the document--the seal; or
- any immaterial information in a form of the document generated for the purposes of signing and which arises in the normal course of communication, storage or display.

For the avoidance of doubt paragraph (4) does **not** require:

- a person to sign the same form of the document as another person; or
- a person to sign the same page of the document as another person; or
- a person to use the same method to sign the document as another person; or
- all the information recorded in the document to be included in the form of the document signed by a person as mentioned in paragraph (1)(a) or (b).

For example, a company may execute a document by one director signing a physical form of the document by hand, and another director signing an electronic form of the document by electronic means.

The following table explains these different types of acceptable signing options of documents:

How can a document be signed?	Known as...
Signatories can physically sign different copies of the document	<b>Split execution</b>
Signatory #1 can print, sign and scan the document and send that document to signatory #2 who does the same	<b>Modified split execution</b>
Signatories can apply their e-signature to electronic versions of the document, including <b>pasting</b> a signature to a document, <b>signing</b> a PDF on a tablet, smartphone or laptop or using <b>cloud-based</b> signature platform – e.g. DocuSign or Adobe Sign	<b>Electronic execution</b>

### 2.3.2 A person signing in different capacities

Paragraph (5) outlines that a person who is to sign a document in more than one capacity:

- is treated as a different person in each such capacity they sign the document (e.g. where EPA may exist within a SMSF)
- may sign the document in some or all of those capacities by signing the document once, if the document:

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- requires or permits the person to do so; and
  - states the capacities in which the person is signing the document.

The following examples are included of where a person is to sign in more than one capacity:

- **Signature block requires signing once as Sole director, then as secretary** - the person may sign the document as the sole director and sole company secretary by signing that signature block.
- **Signing on behalf of two companies as an agent for both companies** - the person may sign the document as an agent for both of those companies by signing that signature block (e.g. SMSF trustee & bare trustee)
- **Signing in their capacity as the director of one company and their capacity as the company secretary of another company** - must sign the document twice if:
  - one signature block in the document requires or permits the person to sign as the director of the first company; and
  - another signature block in the document requires or permits the person to sign as the company secretary of the second company.

Ultimately, this means that:

- a document will be validly signed if it identifies the person signing the document, indicates their intention to be bound by the document and the method of signing is appropriate in all the circumstances.
- a person may sign or execute the document in one or more capacities by signing the document only once if that person's signature block states each capacity in which they are signing; and
- a document does not need to be signed on paper, parchment or vellum or meet common law delivery requirements to be validly executed.

Different circumstances existing for individual trustees, where various state and territory laws need to be considered for both the execution and witnessing of documents. You should refer to the various Commonwealth and State legislation for further guidance.

## **2.4 Expanding the technology neutral signing**

Currently before the Parliament (with Senate as at 7 February 2023) is [Treasury Laws Amendment \(Modernising Business Communications and Other Measures\) Bill 2022](#), which was introduced into Parliament on 23 November 2022, and replaces the previous lapsed Bill under the former Government. This Bill proposes to amend the Corporations Act 2001 to enable **all documents** under the Act to be signed electronically and for certain documents to be sent in either hard copy or electronic form.

Part 1 of Schedule 1 to the Bill amends the Corporations Act to provide that:

- **all documents** which are required or permitted to be signed under the Corporations Act can be signed electronically or in wet ink.

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- documents sent under Chapters 2A to 2M, 5 to 5D, 6 to 6C, 8A, 8B and 9 or Schedule 2 to the Corporations Act can be sent in either hard copy or electronic form; and
  - companies are not required to send documents to a member where the contact details for that member are known to be incorrect.

The rules for signing and executing documents, which apply to documents covered by the Meetings and Documents Act (s.110A), will apply to all documents that are required or permitted to be signed by a person under the Corporations Act.

It should be noted that ASIC or the Registrar cannot refuse to receive or register a document on the sole basis that it was signed or executed electronically – although, Part 1 of Schedule 1 to the Bill does not restrict the ability of ASIC or the Registrar to refuse to receive or register documents for other reasons, including where the document does not meet the prescribed lodgement requirements (such as the requirements under Chapter 2P).

#### **2.4.1 What impact will this have on SMSF trustee companies?**

This change in the law, if passed, will provide for the ability to sign a number of additional documents electronically under the Corporations Act, including (but not limited to):

- appointment of member and directors (s120),
- consent to act as director (s201D),
- resignation of directors (s203A),
- appointment of an alternate director (s201K),
- directors' meetings (Chapter 2G)
- Issuing and redeeming shares (Chapter 2H)

Whilst these amendments are likely to become law, it will be important to ensure that the constitution will allow for the execution of documents in a technology neutral way (either digitally or wet-ink) – i.e. may require a constitution upgrade.

With the use of any electronic measures for the signing of documents, the initial process should establish the electronic contact details (email) of the member/director to allow for the sending of documents via electronic means. Utilisation of the same email address would most likely not satisfy the method of identifying the various persons for the purposes of signing a document using an electronic means.

If the Bill is passed, the changes would commence the day after the Bill receives Assent.

## **2.5 Signing of Fund documents**

As mentioned earlier, the establishment of the new SMSF requires a number of steps including:

- The signing of various documents, such as the trust deed, applications for membership, trustee declarations and other ancillary documents (incl. trustee minutes/resolutions)

- Applying for the ABN/TFN and to become regulated.
- Bank account establishment
- The rollover of super monies into the SMSF
- Developing an investment strategy

### 2.5.1 New SMSF documents

The table below summarises the current laws regarding how the various documents need to be executed regarding the establishment of the HazMeg Super Fund:

Signing documents	Electronic execution	Wet ink	Comments
1. SMSF Trust Deed	✓	✓	Electronic execution allowed under s.127(1) of Corporations Act
2. Consent to act as a director	✗ #	✓	Electronic execution will be allowed once Treasury Laws Amendment (Modernising Business Communications and Other Measures) Bill 2022 receives Royal Assent.
3. ATO trustee declaration	✗	✓	SIS Act is exempt from the ETA 1999 (Cth) – s.104A requires a director to sign within 21 days to acknowledge their understanding of duties as a director of the corporate trustee.
4. Member applications	?	✓	This will be prescribed by the Fund's trust deed
5. Trustee minutes / resolutions	?	✓	This will be prescribed by the Fund's trust deed
6. BDBN	?	✓	This will be prescribed by the Fund's trust deed as confirmed in the High Court decision of Hill v Zuda
7. Investment strategy	?	?	No current legislative requirement for an investment strategy to be in a written format and executed by the directors.

1. **SMSF trust deed** - Electronic execution of the deed is allowed under s.127(1) of the Corporations Act as the Fund has a corporate trustee. Where individual trustees existed, the fund would need to consider the relevant state laws for the use of electronic execution and the witnessing of this document.
2. **Consent to act as director** - The Corporations Act 2001 is currently exempt from the Electronic Transaction Act 1999 (Cth) – section 201D requires the company to be given a signed consent to act as a director of the company before being appointed. Currently, this must be completed in 'wet ink' due to the current exemption of the Corporations Act from the ETA 1999. However, amendments to the Corporations Act are currently before Parliament and are expected to become law which will provide technology neutrality to all documents required to be signed under the Act.
3. **ATO trustee declaration** - SIS Act is exempt from the ETA 1999 (Cth) – section 104A requires director to sign within 21 days to acknowledge their understanding of duties as a director of a corporate trustee of a SMSF. It is the Government's intention through the Modernising Business Communications process to allow for such documents to be completed in a technology neutral manner.
4. **Member applications** – these forms can only be signed as prescribed by the fund's trust deed – the governing rules will outline the procedural aspects that must be complied with.



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5. **Trustee minutes / resolutions** - As per (4), with record keeping requirements need the minutes/resolutions to be stored for at least 10 years.
  6. **Binding Death Benefit Nominations (BDBNs)** – Following on from the High Court decision in Hill v Zuda, that form in which the BDBN must be prepared, the procedures that must be followed and the way in which the document must be signed – all to make the BDBN valid, is prescribed by the fund’s trust deed.
  7. **Investment strategy** – there is currently no legislative requirement for an investment strategy to be in a written format, nor to be executed by the trustees/directors.

## 2.6 Technology neutrality for SMSFs

It is expected that the modernising business communications measures will also look to modernise requirements within the SIS Act & SIS Regulations. Similar outcomes are expected to the proposed changes to Corporations Act 2001, that formed part of the Corporations Amendment (Meetings and Documents) Act 2022, and the Treasury Laws Amendment (Modernising Business Communications and Other Measures) Bill 2022.

The SMSF Association has been active in previous consultation with Treasury on how the technology neutrality can operate in respect to:

- **Signatures** - written signature requirements that will broadly align Treasury’s position on the use of electronic execution within the Corporations Act to apply to all documents (i.e. similar view to apply to the SIS Act & SIS Regulations).
- **Record keeping** - the keeping of books and registers in accordance with the requirements set out in the superannuation laws. The focus is on addressing the inconsistency in retention periods (5, 10 years), including understanding the compliance burden of the current requirements and how change might result from technology neutrality options being implemented.
- **Communications** - lodgment of documents, ability to attend hearings, and more that can be completed with the Regulator(s). Focus is on challenges encountered when communicating with the Regulators as part of legislated/regulatory obligations and the current compliance burden.

### 3. Compliance considerations within HazBill Super Fund

The HazBill Super Fund has a range of compliance obligations that it must satisfy throughout each income year. Part 3 of this paper explores a range of considerations in respect to these trustee responsibilities and the use of various electronic measures.

#### 3.1 What does the ETA apply to with SMSFs?

Not much! There are a number of areas with the SIS Act and SIS Regulations that are currently exempted from the ETA 1999 applying that would benefit the SMSF industry from changes to the technology neutrality laws. These include (but are not limited to):

Section / Regulation	Details
s.35AE – Accounting Records	Retention of records for a minimum of 5 years (financials, TBAR, decisions on benefit payments, etc)
s.35C(2) – Auditor requests	Auditor requests for documents to be provided within 14 days
s.82 – IHA written plan	Plan setting out steps to reduce the level of in-house assets during the following income year
s.103 – Duty to keep minutes & records	Retention of records for a minimum of 10 years for all minutes of meetings
s.104 - Duty to keep records of changes of trustees	Retention of records for a minimum of 10 years for all changes of trustees, directors, consents
s.104A – Trustee declarations	Must sign the declaration within 21 days of become a trustee or director and retain for at least 10 years
s.105 - Duty to keep reports	Retention of records for a minimum of 10 years for all member and beneficiary reports
s.118 – Consent to appointments	Requires the person to have consented in writing to the appointment as trustee or director
SISR 13.18AA – storage of collectables & personal use assets	Requires a written record for the decision and to be retained for at least 10 years
SISR 4.09 – Investment Strategy #	Requirement to formulate, regularly review and give effect to an investment strategy

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The SMSF Association initially met with Treasury in March 2022 to discuss the impact of the Modernising Business Communications (MBC) project to improve the technology neutrality for the SMSF sector. The SMSFA supports the measures to facilitate the removal of legal impediments to adopting current and future technology (where appropriate) - i.e. SMSF documents that should be allowed to be signed electronically and those that potentially shouldn't (testamentary documents, such as a BDBN).

The MBC project will also consider record-keeping requirements across the various Treasury laws that will facilitate electronic record-keeping (including retention periods).

### **3.1.1 Opportunity for legislative fix to investment strategies**

In line with these reform measures, it has been noted that an opportunity exists to address a legislative fix for investment strategies (SISR 4.09). As it currently stands, the regulation has not requirement for an investment strategy to be written – however, it is the Regulator's expectation that SMSF trustees prepare a written investment strategy.

Any written requirement under the SIS Regulations would require it to currently be done only in 'wet ink'. Under the proposed reforms, this would enable trustees to be able to prepare, maintain and review their fund's investment strategy in electronic form.

**NB.** Treasury is interested to hear views from SMSF Association members on the costs of SMSF record keeping – you can email [submissions@smsfassociation.com](mailto:submissions@smsfassociation.com) if you have any data or figures on costs that can be utilised in their response.

### **3.2 What happens if Harry is away overseas – can he sign the financials?**

If Harry has moved overseas with Meghan, the central management of control (CM&C) will still likely ordinarily reside within Australia due to Both William and Kate being directors of the HazBill Super Fund. For the purposes of this technical paper, I am not exploring the residency issues and whether Harry's absence may be temporary or permanent.

In respect to the completion of the financial statements, section 35B of the SIS Act, requires each director to sign if the corporate trustee has 2 directors, otherwise, at least 50% of the director must sign (e.g. 6 members, then a minimum of 3 to sign).

During COVID-19, the laws were permanently changed to provide an exception to the exclusion of the operation of the Electronic Transaction Act 1999 to the SIS laws (ETA Regulations 2020). This measure provides the directors with the ability to sign these documents in a technology neutral way – that is, either in wet ink, or via electronic means, including through the use of a digital signature.

Therefore, even though Harry is overseas, this would not inhibit any ability for the trustee of the HazBill Super Fund to arrange for Harry to sign the financial statements, where required to do so. However, where Will and Kate signed these documents without Harry as a director, s.35B(3)(a) would be satisfied.

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Where items such as the SMSF Annual Return is required to be signed, this can be done in a technology neutral way as the Income Tax Assessment Act 1997 is not excluded from the operation of the ETA 1999. This would extend to signing other documents under the tax laws including activity statements, TBAR reports (as required)

Unless the document is specifically prescribed with the super laws (e.g. ATO trustee declaration, or IHA written plan), the execution of such documents will be subject to the governing rules of the fund.

This might include, but not be limited to:

- Adding or removing members
- Pension commencements, lump sums and other income stream-based events (e.g. TRIS to retirement phase)
- Death benefit nominations (following the High Court decision of Hill v Zuda, [Case P48/2021](#))
- Creating and reviewing an investment strategy
- Various minutes and resolutions for with member meetings and decision making.

All of these items have requirements contained within the super laws; however it is the procedural aspects of these matters that are set out in the governing rules of the fund. Therefore, dealing with the execution of these documents is going to be subject to how the trust deed prescribes such documents can be executed.

### 3.3 Rollovers into a SMSF

From 1 October 2021, any rollovers into a SMSF will need to be completed via SuperStream (V3.0), unless an exception applies. This requires the fund to have an Electronic Service Address (ESA) that also provides for rollovers – Harry and Meghan will need to choose an ESA provider and either:

- Provide this as part of the ABN/TFN registration; or
- Update the ATO records with the ESA before requesting any rollover.

Where Harry or Meghan is requesting to rollover their entire super balance, they can do so by completing a ‘whole of balance request’ to the HazMeg Super Fund – this is completed via submission of an Electronic Portability Form (EPF) through ATO’s Online Services (using MyGov, linked to ATO), or via paper form.

If Harry or Meghan were to request a partial rollover, this can be activated via the SMSF or alternatively they can make contact with the departing fund about the info required to action the request.

When it comes to rolling money into a SMSF, there are a number of important tips that you should undertake prior to instigating any request with the transferring fund. These include:

- Ensure that the ATO has all information about the HazMeg Super Fund – including bank account details (now must advise the ATO separately to the ABN/TFN registration process) and electronic service address (ESA).

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- Make sure that the bank account is unique to the SMSF – e.g. the ATO records from SMSF Annual Return may show a trust account (to deduct fee from the refund)
    - SVS verifies against the details held against those sent through the message request (ATO not do any further checks)
  - Ensure that member's name at departing fund matches against ATO's most up-to-date contact record (e.g. from last individual tax return)
  - Once the rollover has been received for Harry and/or Meghan, the fund must send a response back to the transferring fund that it has been received.
    - Rollover transaction outcome response must be sent within 3 business days (applies to both APRA funds & SMSFs)

Note that both Harry and Meghan will receive an ATO alert via SVS to notify them about their rollovers – no action is needed, unless it's an unauthorised request.

This paper was written by:



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**Disclaimer:**

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