



11 October 2019

Manager
Financial Services Reform Taskforce
The Treasury
Langton Crescent
PARKES ACT 2600

Email: ProductRegulation@treasury.gov.au

Dear Sir/Madam,

SMSF ASSOCIATION SUBMISSION ON DESIGN AND DISTRIBUTION REGULATIONS

The SMSF Association welcomes the opportunity to make a submission on the Corporations Amendment (Design and Distribution Obligations) Regulations 2019.

It is our belief that the design and distribution obligations (DDO) are not intended to be applicable to the establishment and financial dealings with regards to an SMSF. This is due to the drafting of the original legislation, its extended application post the Senate Economics Legislation Committee inquiry into the Bill which did not include SMSF establishment and the impracticalness in applying the obligations to an SMSF structure. However, the legislation and regulations are not sufficiently clear to enforce this intent.

This lack of clarity was highlighted at an Australian Securities and Investment Commission (ASIC) DDO consultation on 22 August 2019. ASIC and other invited professional associations were not able to sufficiently rule out or in, the application to SMSFs.

The DDO regime applies to:

- financial products requiring disclosure under Chapter 6D.2 and Part 7.9 of the Corporations Act; and
- financial products that are not regulated under the Corporations Act, but are regulated under the ASIC Act (which includes credit)

The regulation of SMSFs currently falls under the Corporations Act. Under Sub-section 1012D(2A) of the Corporations Act, 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 of the information that a PDS would be required to contain. Therefore typically, SMSFs and their trustees or firms advising SMSFs require disclosure but are exempted under reasonable grounds.

Due to SMSFs being regulated under the Corporations Act, SMSFs would also not fall under DDO application under the ASIC Act.



However, there may be certain interpretations of the Corporations Act which requires an SMSF and affected stakeholders to provide a PDS. For example, in the circumstances of a new member joining an SMSF many years after the fund was established, it may not be reasonable to assume that they know or have access to all the information in relation to that particular fund that would be contained in a PDS. The exemption mentioned above may not be able to reasonably be relied on in this particular circumstance. Commencement of a pension in an SMSF for such a new member following the death of a member of the SMSF, may also prove to be a problem.

If this interpretation is deemed correct by ASIC, they may have remit to apply the DDO obligations with dealings in an SMSF. This could include unreasonable design parameters and restricted distribution obligations for trustees dealing with themselves or entities which deal with SMSFs.

Given this uncertainty, we believe it is appropriate for the regulations to specifically exclude SMSFs as they have other financial products. This will provide clarity to the industry but also ensure that the intent of the legislation is not circumvented.

We attach our previous submission on this issue in the Appendix which details why we believe SMSFs should be excluded. It highlights that the obligations may be impractical and onerous as determining a class of potential SMSF trustees would be difficult given that SMSFs can be suitable for individuals in a wide variety of circumstances. The decision to establish an SMSF is contingent on a person's individual traits and circumstances. This makes it difficult to describe a narrow 'target market' for which SMSFs are a suitable superannuation vehicle.

As referenced in the Senate Economics Legislation Committee inquiry into the Bill, Treasury also stated, "that 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'".¹

We note that, in consultation to the exposure draft legislation introducing DDOs, ASIC recommended that the legislation be expanded to apply to the establishment of an SMSF. A more targeted version of ASIC's recommendation could be appropriate if it was limited to targeting SMSF establishment that was high risk, such as by property spruiking firms. However, the regulations or legislation should be sufficiently consulted and drafted to only be applicable in those circumstances and currently this is not the case.

If you have any questions about our submission please do not hesitate in contacting us.

Yours sincerely,

A handwritten signature in black ink that reads "John L. Maroney". The signature is written in a cursive style with a large initial 'J' and 'M'.

John Maroney

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



CEO
SMSF Association

ABOUT THE SMSF ASSOCIATION

The SMSF Association is the peak body representing SMSF sector which is comprised of over 1.1 million SMSF members who have more than \$750 billion of funds under management and a diverse range of financial professionals servicing SMSFs. The SMSF Association continues to build integrity through professional and education standards for advisors and education standards for trustees. The SMSF Association consists of professional members, principally accountants, auditors, lawyers, financial planners 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.



Appendix

30 October 2018

Mr. Mark Fitt
Committee Secretary
Senate Standing Committees on Economics
PO BOX 6100
Parliament House
Canberra ACT 2600

Email: economics.sen@aph.gov.au

Dear Mr. Fitt,

The SMSFA would like to highlight concerns in relation to the Australian Securities and Investments Commission (ASIC) submission to the Senate Economics Legislation Committee inquiry into Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018 which proposed including SMSFs into the scope of the design and distribution obligations and product intervention powers.

The SMSFA's previous submission on the draft legislation was supportive of the design and distribution regime which will promote the provision of financial products to suitable consumers. We believe it should already be inherent in issuers' and distributors' behaviour to conduct themselves with the intent to appropriately market and distribute financial products.

We also supported the clarification and distinction made between obligations on issuers and distributors. In particular, the amendments made in regards to the scope of regulated distribution activity should now make the application of the law sufficiently clear to issuers and distributors.

We also supported the exclusion of personal financial advice being subject to the distribution obligations, apart from the required record-keeping and notification obligations. This allows the opportunity for consumer choice to remain by allowing consumers access to specific products if they receive financial advice that determines a product is appropriate for them.

However, we have concerns if the legislation is extended to cover SMSF promoters (those who promote or arrange for the establishment of an SMSF). We believe that the obligations may be impractical and onerous as determining a class of potential SMSF trustees would be difficult given that SMSFs can be suitable for individuals in a wide variety of circumstances. The decision to establish an SMSF is contingent on a person's individual traits and circumstances. This makes it difficult to describe a narrow 'target market' for which SMSFs are a suitable superannuation vehicle.

It is unclear who would create effective 'target markets' for a superannuation vehicle, which is distinct to the creation of a 'target market' for a financial product which is created by an issuer. This is further confused by the fact SMSFs can cater for a wide range of individuals in accumulation phase and retirement phase. It may also be difficult to practically define and separate the wide range of



SMSF professionals such as accountants, advisers and administrators as promoters, issuers or distributors.

We believe there are a number of valid reasons as to why an SMSF is established which are both quantitative and qualitative, which will be difficult to evaluate under this legislation.

We also note that there is already legislation, such as the best interests duty, which governs advice on an interest in an SMSF (which is a financial product). These laws should be adhered to and appropriately enforced to ensure that SMSF establishment advice is being made appropriately.

While we strongly advocate that SMSFs are not for everyone, SMSFs play a key competitive role in superannuation. Raising barriers to SMSF establishment would be detrimental to overall outcomes for consumers. A key competitive pressure that SMSFs contribute within the superannuation industry is providing flexibility and adaptability to cater for unique circumstances. This could be significantly reduced by defining a target market.

However, the SMSFA believes an appropriate policy solution to increase consumer protections is for advisers who provide advice to individuals about SMSFs to have specific SMSF education and qualifications that underpin their advice. This was mentioned in ASIC's Report 575 where ASIC stated the results of their review of SMSF advice indicate "a need to increase the education and training requirements for advice providers who provide personal advice on SMSFs." ASIC further stated "a specific SMSF qualification for advice providers wishing to provide SMSF advice" would be under discussion.

The SMSFA understands the intent of the legislation and shares concerns particularly relating to property spruikers who seek to inappropriately establish SMSFs for some individuals. The Association has developed policy solutions to mitigate these risks. A more targeted version of ASIC's recommendation could be appropriate if it was limited to targeting SMSF establishment that was high risk, such as by property spruiking firms or unlicensed SMSF establishment providers. If ASIC's proposal is to go forward we would recommend extensive consultation on this aspect to ensure that the obligations are practical, not onerous, do not duplicate existing financial advice legislation and will effectively protect consumers by targeting spruikers.

If you have any questions about our submission please do not hesitate in contacting us.

Yours sincerely,

A handwritten signature in black ink that reads "John L. Maroney".

John Maroney
CEO
SMSF Association



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