



26 February 2021

Data Economy Unit
Market Conduct Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: mbcomms@treasury.gov.au

Dear Sir/Madam,

SMSF ASSOCIATION SUBMISSION ON MODERNISING BUSINESS COMMUNICATIONS

The SMSF Association welcomes the opportunity to provide a submission on how to improve the technology neutrality of Treasury portfolio laws, as part of the Government's renewed deregulation agenda.

We support measures that facilitate the removal of legal impediments to adopting both current and future technology, where appropriate. The lockdowns caused by the COVID-19 pandemic have highlighted the limitations of the current electronic transaction regime. While emergency reforms have been put in place to provide temporary relief from some of the signing and witnessing requirements, more permanent and broader reform is required to ensure the legislation keeps pace with advancements in the digital economy.

Our responses to the consultation questions are provided in Appendix A. Our responses focus on the communicating with regulators, written signature and record keeping categories of business communication, and identify an additional business communication category which we believe should also be a focus of this consultation – Access to information.

The SMSF Association is the peak body representing the SMSF sector. The SMSF sector is comprised of over 1.1 million SMSF members who have more than \$730 billion of funds under management and a diverse range of financial professionals servicing SMSFs. Our membership 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 trustees and provides them access to independent education materials to assist them in the running of their SMSF. Our submission is limited to the areas of business communication most relevant to our membership base and SMSF trustees.

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

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Peter Burgess', written over a faint circular stamp or watermark.

Peter Burgess
Deputy CEO/Director of Policy and Education
SMSF Association



Appendix A – Responses to the consultation questions

Question 1

- Do the business communications requirements in Treasury laws create a burden on business?
- a. If so, what categories of communications (as outlined in the consultation paper) or legislative provisions are creating a burden and should be prioritised for reform?
 - b. Are there non-regulatory requirements that inhibit businesses, consumers, or regulators from using their preferred method of communication? If so, please provide examples.

For our membership base and SMSF trustees, we consider the business communications requirements in Treasury Laws create a burden on business in the following categories of communication:

Communicating with regulators

As highlighted in the consultation paper, the holder of an Australian Financial Service Licence (AFSL) is required to report breaches of their licence to ASIC in hard copy. There are also several other provisions in the law which require financial services licensees to provide written statements or reports, either upon a request by ASIC or an occurrence of a prescribed event. In most cases this information can be provided to the Regulator using different channels of communication, or a specific channel stipulated by the Regulator. This varied and inconsistent approach to the format of communications means advice businesses are often required to support multiple communication channels which increases cost and creates a burden on businesses.

As outlined in the consultation paper, several provisions in the *Corporations Act 2001*, require ASIC to offer an AFSL holder, or their representative, an opportunity to appear at a hearing before ASIC exercises its power of functions. While the relevant legislative provisions do not specifically state that the hearing must be held in person, we agree with the comments in Case Study 5 of the consultation paper that the legislation implies this must be the case. We believe it is reasonable to conclude that the legislative requirement that hearings must be conducted at a single physical location would lead to higher costs for attendees of hearings (both in terms of time and direct travel costs) then would be the case if the hearings could be conducted virtually.

Signatures

There are various provisions in the *Superannuation Industry (Supervision) Regulations 1994 (SISR)*, that require a physical signature, and in some cases for the signature to be witnessed. The most common example is SISR 6.17A which relates to binding death benefit nominations. Even though for SMSFs the validity of a binding death benefit nomination is determined by the fund's governing rules and is not required to conform with SISR 6.17A, it is common for the governing rules of an SMSF to import the requirements of SISR 6.17A.¹

Other examples include the requirement under section 104A of the *Superannuation Industry (Supervision) Act 1993 (SISA)*, for SMSF trustees to sign a trustee declaration when they are added to an SMSF, and the requirement under SISA section 35B for SMSF trustees to sign the annual financial statements before finalising the fund's audit each year. As the SISA is exempt from the application of the *Electronic Transactions Act 1999 (ETA)*, these requirements can only be satisfied by providing a physical signature. As part of the ATO's COVID-19 relief measures, SMSF trustees who are unable to sign the fund's financial statements in person can sign their financial statement using an electronic signature such as a digital signature. However, this measure is only intended to provide temporary relief from the need to physically sign the fund's annual financial statements.

¹ SMSFR 2008/3 states Section 59(1A) and SISR 6.17A does not apply to SMSFs.



Record keeping requirements

Some sections of the SISA and SISR require information to be recorded or retained in writing. Some of these provisions apply to SMSFs more so than other types of superannuation funds, such as the need for superannuation fund trustees to prepare an in-house asset rectification plan in writing under section 82 of the SISA. Other specific SMSF examples include SISA section 103 which requires SMSF trustees to keep copies of trustee minutes for 10 years, SISA section 104 which requires SMSF trustees to keep up to date records of all trustee changes and trustee consents for 10 years, SISA section 104A which requires SMSF trustees to retain copies of signed trustee declarations, SISA section 105 which requires SMSF trustees to keep copies of all member or beneficiary reports for 10 years, SMSF Approved Auditors requesting written records under section 35AB and section 35C, and the requirement to make written records of decisions about the storage of collectable and personal use assets under SISR 13,18AA and to retain these records for at least 10 years.

As the SISA and SISR are exempt from the operation of the ETA, many of the above requirements can only be satisfied by a physical written document. This approach can be costly and imposes a greater regulatory burden than if the person was able to record and store the information electronically.

Question 2

What is the cost of complying with the current regulations? Please provide a breakdown of costs and an indication of the frequency at which these communications occur.

- a. Would these costs be reduced if the law were technology neutral? Please provide a breakdown of any anticipated savings and any non-monetary benefits.

As outlined above, the SMSF industry and the SMSF establishment process and ongoing financial reporting process requires, in many instances, physical signatures and physical documents to be stored. While it is difficult to quantify the cost of having to comply with these requirements, we believe the implementation of electronic measures as an alternative to having to record and store physical documents for an extended period, would improve efficiencies and result in reduce administration and compliance costs for an SMSF.

Question 3

Do you agree with the categories of communications outlined in the consultation paper?

- a. Are there other types of business communications that should be considered?
- b. Do you agree with the proposed principles outlined in the consultation paper or are there additional or alternative principles that should be considered?
- c. What, if any, barriers would restrict the implementation of the proposed principles?

We agree with the policy goals and proposed principles as outlined in the consultation paper. It is critical that the electronic method of signature provides, at least, an equally reliable indication of the person's identity and their intention in respect of the document. Regarding the record-keeping requirements, it is important the information is readily accessible, in a format that can be easily reused and where the integrity of the information can be maintained over a relevant period.

We believe the categories of communications outlined in the consultation paper are appropriate. However, there is an additional business communication category which we believe should also be a focus of this consultation – Access to information.



Currently, only registered tax agents (typically accountants) are able to access the Australian Tax Office (ATO) portal to obtain total superannuation balance (TSB) and transfer balance cap (TBC) information which is crucial for SMSF advice. Ironically, these advisers are generally not able to provide SMSF advice as they are not licensed or authorised with ASIC. Incongruously, those licensed advisers who have the ability to provide SMSF advice (such as financial advisers) have no reasonable way of sourcing ATO portal information directly from the ATO as they are not, generally, the member's personal tax agent.

In essence, there is a fundamental lack of information for SMSF advisers who need to provide timely advice based on a myriad of complex caps, thresholds, and balances. Accountants are able to obtain information but cannot provide advice and financial advisers are unable to obtain information but are the advisers authorised to provide advice. This jeopardises the quality and efficiency of advice that is being provided to members.

Even advisers who are registered with the TPB as a tax (financial) adviser are restricted from this access.

Without direct access to this information, SMSF advisers and administrators must rely on clients accessing the information through their MyGov account, downloading the information, and then sending it to their adviser. Some advisers have been forced to send in written requests signed by the taxpayer and wait upwards of six weeks for a written reply. This is hardly conducive to giving timely and affordable SMSF advice.

This problem has been acknowledged by the ATO Deputy Commissioner James O'Halloran². He noted it was a frustrating aspect of professionals dealing with TBC reporting or excess TBC determinations.

For example, advisers are unable to see the information the ATO has relied on when determining their client has exceeded their TBC.

SMSF administrators and software providers are also locked out of this data and do not have efficient ways of accessing it. The majority of SMSFs are administered with the assistance of purpose-built software. If these providers could access relevant ATO application programming interfaces (APIs) (subject to privacy protection and formal authorisations) for all client members, they would have access to the only source of officially consolidated member information across all superannuation funds available. This vital information would enable SMSF service providers to protect the integrity of the superannuation system in general, and the SMSF sector in particular, by minimising the potential for errors in both reporting and action.

Once indexation of the general TBC occurs on 1 July 2021, there will be no single cap which applies to all individuals with a personal TBC. 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.

² <https://www.smsfadvisor.com/news/16956-ato-makes-moves-to-fix-unworkable-tbc-data-access>



If an individual's financial adviser is unable to provide them with timely and efficient advice because of restricted access to essential information, this will add further complexity to the system.

We understand providing broader access to the ATO portals will incur a cost for the ATO and require an allocation of additional ATO resources to implement. We see this as a major barrier to providing financial advisers and others with broader access to the ATO portals.

Question 4

How could stakeholders (such as consumers and investors) benefit or be disadvantaged from greater technology neutrality in Treasury laws? Please provide any relevant data, if possible.

As outlined above, we believe the implementation of electronic measures as an alternative to having to record and store physical documents for an extended period, should improve efficiencies in the SMSF sector resulting in reduce administration and compliance costs for an SMSF. Ensuring the member's trusted financial adviser can access information efficiency via the ATO portals will make it easier and more cost effective for advisers to provide advice to members. It will also reduce instances of inadvertent breaches of the TBC and contribution caps which can often lead to time consuming and expensive remediation.

Question 5

Which of the options identified on page 3 do you consider would provide the biggest benefits while appropriately managing risk?

We believe reducing or removing exemptions to the ETA for Treasury portfolio laws would enhance technology neutrality and deliver the biggest benefits.

Specifically, removing the SISA, SISR, and the relevant provisions of the *Corporations Act 2001* which relate to hearings and the requirement for AFSL holders to provide information to ASIC, from the exemptions to the ETA would provide the biggest benefits to our membership base and SMSF members. Online methods of verifying identity and storing information and data are now readily available and used extensively, providing the same or higher levels of assurance. Presumably, it was the absences of this high level of assurance and protection in the past that led to the SISA and SISR being exempted from the ETA.

Removing the SISA and SISR from the exemptions to the ETA would send a clear message to the SMSF sector that electronic measures are permitted and, likely, would lead to a greater take-up of these measures.

Similarly, online methods are now available which enable information to be provided in a manner which allows it to be readily accessible and useable by regulators and ensures regulated entities can comply with the relevant requirements at the lowest cost.

Question 6

If technology neutral reforms are introduced, what should businesses do to manage the impact of these changes, to ensure that benefits are realised, and disadvantages overcome?

It will be critical that businesses have in place adequate and reasonable protections so that their clients are not at risk of poorly or illegally executed corporate documents. This will require businesses to ensure they strike the right balance between securing the integrity of their systems and processes and using appropriate electronic measures to lower costs.



Question 7

What transitional issues do you foresee for businesses, consumers, and regulators in moving to technology neutral communication methods?

- a. What are the key implementation risks and their likelihood of occurring? How can we mitigate these risks? Please provide examples.

The most significant transitional and implementation issues that we see relate to the requirement for SMSF Approved Auditors to express an opinion on the trustees' compliance, in all material respects, with the listed provisions, for the year ended 30 June. Many of the SISA and SISR provisions which require physical records to be kept are also the provisions which the auditor is required to express an opinion on the trustee's compliance. For example, SISA sections 82, 103, 104, 105 and SISR 13.18AA. Therefore, to reduce complexity and uncertainty, it may be necessary for the removal of the SISA and SISR exemption from the ETA to occur effective from the commencement of a financial year.