

4 November 2012

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CONSULTATION PAPER 216 – ADVICE ON SELF-MANAGED SUPERANNUATION FUNDS: SPECIFIC DISCLOSURE REQUIREMENTS AND SMSF COSTS

B1Q1 Do you agree with our proposed disclosure requirement in Table 1? If not, why not?

No.

The problem with this proposal is that it seeks to treat a self-managed superfund (SMSF) as an 'investment product' when it is quite simply an investment vehicle. Fraud or theft, if it occurred via a SMSF would be due to the actions of the trustee which are the members – the same people. The chances of this occurring are low.

If, as I am assuming, you are targeting, fraud or theft via inappropriate advice or investment manager activity, the fact that the SMSF doesn't have redress via Part 23 SISA 1993, does not render the SMSF trustee without any redress. They are able to access the same compensation options available to anyone who is the subject of fraud or misappropriation. The compensation options would include those available for a trustee of a closely held trust, for example. In other words, there are controls in place that are appropriate for SMSFs.

I will emphasize many times in this submission; SMSFs are not investment products but investment vehicles. Members of public offer funds require specific compensation options due to the removal of control they have over their superannuation savings whereas, SMSFs are generally set-up for that very purpose.

B1Q2 Do you think that the proposed warning will benefit clients who are considering setting up or switching to an SMSF? If not, what other warnings would help clients decide whether it is appropriate in their circumstances to establish or switch to an SMSF?

No.

It may raise additional discussion on the issue however, in the many years I have been an advisor to SMSFs, the issue around investment management is the key reason for setting up a SMSF. Individuals want greater control and, if not sophisticated in investment portfolio management, will seek advice. Access to compensation is not a threshold feature.

The main understanding that individuals should have around the decision to establish a SMSF is that they, as the trustee, are responsible for the management of the SMSF. They can outsource some of the capability but they cannot outsource the ultimate responsibility.

B1Q3 Do you think the proposed warning should be given to clients in a prescribed format? For example, should the warning be given in a stand-alone document, or should it feature more prominently in the SOA? If you do not think the warning should be given in a prescribed format, please explain why.

No.

The establishment of a SMSF is a structural arrangement not an investment. The underlying investment portfolio should be the subject of a SoA (retail) or Advice Paper (Wholesale), if, it pertains to financial investments (products). How does ASIC reconcile its treatment of SMSF as financial products when the underlying investment constitutes real property only?

This demonstrates the lack of understanding of the structure.

Here is the nub of the Corporations law on advice disclosure – the lack of clarity around wholesale/retail investors as it pertains to SMSFs. It demonstrates clearly a lack of understanding of SMSFs as the investment vehicles they are.

B1Q4 Do you think that clients should be asked to sign a document acknowledging that they understand that SMSFs are not entitled to receive compensation under the SIS Act? Are there any alternatives to obtaining client acknowledgement that will help to ensure that investors understand the lack of compensation available to SMSFs? If so, please provide details.

No.

I can't see how this issue has become so important. A better way forward would be for ASIC to insist that only specialists can advise on this complex area and this DOESNOT mean that some industry body (such as SPAA) hold the Regulator captive on this. I have been advising excluded funds and then SMSFs since the roll out of SISA (as an Auditor with the ISC). I do not feel the need for SPAA accreditation and would prefer a regime similar to what you have done for SMSF Auditors.

B1Q5 Are our proposed disclosure requirements likely to result in additional compliance costs for AFS licensees and their authorised representatives? Please give details, including figures and reasons.

Most likely.

Unfortunately mandated disclosure requirements have become so vast that the advice and valuable client communication is buried. There is no substitute for a personal client communication followed up by written confirmation but once mandated, the legal people that maintain the AFSL turn the Advice document into a compliance tick-off.

I consider that much of the mandatory compliance should be housed in a stand-alone document - such as the FSG - is a special purpose disclosure document. The client could be asked to sign to acknowledge the receipt of the info and, the actual (meaningful) client advice paper could reference it specifically. There are better ways of achieving the very worthwhile objective of disclosure.

The Trustee Declaration required by all new SMSF trustees is another way disclosure can be more meaningfully achieved. That document could move from a personal declaration to include a knowledge element.

B1Q6 Are there any practical problems with the implementation of this proposal? Please give details

For all of the above reasons.

B2Q1 Do you agree with our proposed disclosure requirements in Table 2? If not, why not?

1. The Trustee Declaration required by all new SMSF trustees is another way disclosure can be more meaningfully achieved. That document could move from a personal declaration to include a knowledge element.

2. Switching recommendations should address the insurance position before and after.

In addition, the Investment Strategy of a SMSF or the Trustee Minutes includes a requirement to consider insurance needs.

If you are not licensed to advise on insurance, you cannot go too far with this but can factually state what the before and after position would be.

The "Other Risks" identified in Table 2 are not generally relevant to SMSFs as the members are the trustees and, in most cases, related parties.

The suggested disclosures could potentially be useful for SMSFs where the membership is associates rather than family members but, in the case of closely held SMSFs, the disclosure would be of little use and unnecessarily burdensome.

3. The requirement to develop and implement an Investment Strategy has always existed for SMSFs and is a part of the attestation required in the TRUSTEE DECLARATION. I have attached this declaration for your review as, a lot of this Consultation Paper suggestions are already apparent in that document. The answer isn't more regulation, just effective use of the processes already developed. Again I re-iterate, ASIC should be the Regulator for SMSFs. The fact that so many issues that are supposed to be covered by the ATO designed Trustee Declaration are being repeated in this Consultation Paper is a serious indictment of the ATO's effectiveness in regulating SMSFs.

4. Again the Trustee declaration makes this clear.

5. Agree, this is poorly done. Advisors should never recommend ANY structure before fully scoping the exit strategy. Too much consultation fees are made trying to advise on exit strategies after the structure has been in place for some time.

6. This is a motherhood statement, at best, and provides little practical assistance to the decision making process.

B2Q2 Do you think the proposed disclosure requirements will benefit clients who are considering setting up or switching to an SMSF? If not, what other disclosures do you think would help clients decide whether it is appropriate in their circumstances to establish or switch to an SMSF?

See above comments

B2Q3 Do you think that the proposed disclosure requirements in Table 2 should be given to clients in a prescribed format? If not, why not?

Apart from the insurance impact of switching to a SMSF, all other disclosures should form a part of the Trustee Declaration

B2Q4 Do you think that clients should also be asked to sign a document acknowledging the responsibilities and risks associated with running an SMSF? Are there any alternatives to obtaining client acknowledgement that will help to ensure that clients understand the risks associated with SMSFs? If so, please provide details.

Yes, as they do now – the Trustee Declaration

B2Q5 Are our proposed disclosure requirements likely to result in additional compliance costs for AFS licensees and their authorised representatives? Please give details, including figures and reasons.

Unfortunately mandated disclosure requirements have become so vast that the advice and valuable client communication is buried. There is no substitute for a personal client communication followed up by written confirmation but once mandated, the legal people that maintain the AFSL turn the Advice document into a compliance tick-off.

I consider that much of the mandatory compliance should be housed in a stand-alone document - such as the FSG - is a special purpose disclosure document. The client could be asked to sign to acknowledge the receipt of the info and, the actual (meaningful) client advice paper could reference it specifically. There are better ways of achieving the very worthwhile objective of disclosure.

The Trustee Declaration required by all new SMSF trustees is another way disclosure can be more meaningfully achieved. That document could move from a personal declaration to include a knowledge element.

B2Q6 Are there any practical problems with the implementation of this proposal? Please give details.

It is being considered at a time if significant change for personal advisors and more change at this stage will not be welcomed. Much of what has been proposed already exists and, if Advisors aren't managing this information dissemination well, that's what needs to change. None of what you are suggesting is new to the way I have ever advised SMSFs clients.

B2Q7 Do you think we should provide further guidance on the disclosure obligations? If so, please provide details.

You are either the Regulator of SMSFs or the Tax Office is. The clarity is required and, if the Tax office is not up to the job, they need to cede it.

This is a double up on ATO responsibilities.

When I worked at ISC, there was talk of a "Super Regulator" that took in (ISC), ASIC and ATO to enhance the delivery of many of the interrelated responsibilities. It never got off the ground and there is still duplication across the Regulators.

C1Q1 Do you agree with Rice Warner's findings? In particular, do you agree with:

(a) the way that Rice Warner has described SMSF costs in its report? If not, why not?

It was an interesting exercise however; the results are what experienced SMSF Advisors have always known.

The trouble with this emphasis on costs helps the "industrialisation" of SMSFs and makes them more attractive to the major wealth managers. Once SMSFs become "cookie cut products", they will lose their unique appeal.

(b) Rice Warner's analysis about the points at which an SMSF becomes cost-effective compared with an APRA-regulated fund? If not, why not?

This maybe relevant to retail clients however, an APRA fund is not comparable to a SMSF. If an investor wants what is offered in an APRA fund, I would question whether it is worth the

effort of having a SMSF. There must be an overriding reason to have a SMSF and cost is only one factor.

C1Q2 Do you agree that we should provide guidance on the costs associated with setting up, managing and winding up an SMSF? If not, why not? If yes:

(a) what are the costs associated with setting up, running and winding up an SMSF?

(b) is insurance purchased through an SMSF cost-effective compared with insurance through an APRA-regulated fund? If not, why not?

(c) do you think we should provide actual dollar costs (or a range of dollar costs) for the following SMSF costs? If not, why not?

(i) the costs associated with setting up, running and winding up an SMSF; **YES**

(ii) the time cost associated with managing an SMSF; **NO**

(iii) the cost of an SMSF not having access to compensation under the SIS Act; and **NO**

(iv) the cost of obtaining insurance; and **IF APPLICABLE BUT NOT IF NOT**

(d) what are the costs or benefits of SMSF structures compared with other superannuation vehicles? Please provide details. **SHOULD FOCUS ON WHY THE CLIENT IS INTERESTED IN THE STRUCTURE**

C1Q3 Should advisers be required to consider and inform clients of the costs in Table 4 before establishing an SMSF? If not, why not?

Cost disclosure is a part of the advice process.

KYM BAILEY

CPA Financial Planning Specialist

Registered SMSF Auditor

Author – Thompson Reuters – *Superannuation Factbook*

I have been working with Excluded Funds and then SMSFs since 1995.

I joined the ISC to roll out the Superannuation Industry (Supervision) Act 1993 as an Auditor. I was instrumental in the design of the Audit Program for Excluded Funds which has largely been incorporated into modern templates.

I continue to work as an advisor to SMSFs, audit SMSFs and update a technical handbook, twice a year for Thompson Reuters.

I have been immersed in the investment vehicle for 20 years.

Trustee declaration

To be completed by new trustees and directors of corporate trustees of self-managed super funds.



Read this declaration in conjunction with *Self-managed super funds – key messages for trustees* (NAT 71128).



WHO SHOULD COMPLETE THIS DECLARATION?

You must complete this declaration if you become a **new** trustee (or director of a corporate trustee) of:

- a **new** self-managed super fund (SMSF)
- an **existing** SMSF.

You must sign this declaration within 21 days of becoming a trustee or director of a corporate trustee of an SMSF.

A separate declaration is required to be completed and signed by each and every new trustee (or director of a corporate trustee).

You must also complete the declaration if you are a legal personal representative who has been appointed as trustee (or director of a corporate trustee) on behalf of a:

- member who is under a legal disability (usually a member under 18 years old)
- member for whom you hold an enduring power of attorney
- deceased member.

INFORMATION YOU NEED TO READ

Make sure you read *Self-managed super funds – key messages for trustees* (NAT 71128). It highlights some of the key points from the declaration and some important messages for you.

BEFORE COMPLETING THIS DECLARATION

Before you complete and sign this declaration, make sure you:

- read each section
- understand all the information it contains.

➤ If you have any difficulties completing this declaration or you do not fully understand the information it contains:

- speak to a professional adviser
- visit www.ato.gov.au/smsf
- phone us on **13 10 20**.

If you are not familiar with some of the terms used in this declaration or you need more information, refer to *Running a self-managed super fund* (NAT 11032).

WHEN COMPLETING THIS DECLARATION

When you complete this declaration, remember to:

- insert the full name of the fund at the beginning
- sign and date it
- ensure it is signed and dated by a witness (anyone 18 years old or over).

WHAT SHOULD YOU DO WITH THE DECLARATION?

You must keep your completed declaration for at least 10 years and make it available to us if we request it.

We recommend that you keep a copy of your completed declaration and refer to it and *Self-managed super funds – key messages for trustees* (NAT 71128), which is available on the ATO website, when making important decisions, such as those relating to choosing investments, accepting contributions and paying benefits.

⚠ Do not send your completed declaration to us.



I understand that as an individual trustee or director of the corporate trustee of

Fund name

I am responsible for ensuring that the fund complies with the *Superannuation Industry (Supervision) Act 1993* (SISA) and other relevant legislation. The Commissioner of Taxation (the Commissioner) has the authority and responsibility for administering the legislation and enforcing the fund's compliance with the law.

I must keep myself informed of changes to the legislation relevant to the operation of my fund and ensure the trust deed is kept up to date in accordance with the law and the needs of the members.

If I do not comply with the legislation, the Commissioner may take the following actions:

- impose administrative penalties on me
- enter into agreements with me to rectify any contraventions of the legislation
- disqualify me from being a trustee or director of a corporate trustee of any superannuation fund in the future
- remove the fund's complying status, which may result in significant adverse tax consequences for the fund
- prosecute me under the law, which may result in fines or imprisonment.

SOLE PURPOSE

I understand it is my responsibility to ensure the fund is only maintained for the purpose of providing benefits to the members upon their retirement (or attainment of a certain age) or their beneficiaries if a member dies. I understand that I should regularly evaluate whether the fund continues to be the appropriate vehicle to meet this purpose.

TRUSTEE DUTIES

I understand that by law I must at all times:

- act honestly in all matters concerning the fund
- exercise skill, care and diligence in managing the fund
- act in the best interests of all the members of the fund
- ensure that members only access their super benefits if they have met a legitimate condition of release
- refrain from entering into transactions that circumvent restrictions on the payment of benefits
- ensure that my money and other assets are kept separate from the money and other assets of the fund
- take appropriate action to protect the fund's assets (for example, have sufficient evidence of the ownership of fund assets)
- refrain from entering into any contract or do anything that would prevent me from, or hinder me in, properly performing or exercising my functions or powers as a trustee or director of the corporate trustee of the fund
- allow all members of the fund to have access to information and documents as required, including details about
 - the financial situation of the fund
 - the investments of the fund
 - the members' benefit entitlements.

I also understand that by law I must prepare, implement and regularly review an investment strategy having regard to all the circumstances of the fund, which include, but are not limited to:

- the risks associated with the fund's investments
- the likely return from investments, taking into account the fund's objectives and expected cash flow requirements
- investment diversity and the fund's exposure to risk due to inadequate diversification
- the liquidity of the fund's investments having regard to the fund's expected cash flow requirements in discharging its existing and prospective liabilities (including benefit payments)
- whether the trustees of the fund should hold insurance cover for one or more members of the fund.

Investment restrictions

I understand that, as a trustee or director of the corporate trustee of the fund, subject to certain limited exceptions specified in the law, I am prohibited from:

- lending money of the fund to, or providing financial assistance to, a member of the fund or a member's relative (financial assistance means any assistance that improves the financial position of a person directly or indirectly, including the provision of credit)
- acquiring assets (other than business real property, listed securities, certain in-house assets and acquisitions made under mergers allowed by special determinations or acquisitions as a result of a breakdown of a relationship) for the fund from members or other related parties of the fund
- borrowing money (or maintaining an existing borrowing) on behalf of the fund except in certain limited circumstances (while limited recourse borrowing arrangements are permitted, they can be complex and particular conditions must be met to ensure that legal requirements are not breached)

- having more than 5% of the market value of the fund's total assets at the end of the income year as in-house assets (these are loans to, or investments in, related parties of the fund – including trusts – or assets subject to a lease or lease arrangement between the trustee and a member, relative or other related party)
- entering into investments on behalf of the fund that are not made or maintained on an arm's length (commercial) basis (this ensures the purchase or sale price of the fund's assets and any earnings from those assets reflects their market value).

Accepting contributions and paying benefits

I understand that I can only accept contributions and pay benefits (income streams or lump sums) to members or their beneficiaries when the conditions specified in the law and the fund trust deed have been met.

Administration

I understand that the trustees of the fund must:

- keep and retain for at least 10 years
 - minutes of all trustee meetings at which matters affecting the fund were considered (this includes investment decisions and decisions to appoint members and trustees)
 - records of all changes of trustees, including directors of the corporate trustee
 - each trustee's consent to be appointed as a trustee of the fund or a director of the corporate trustee
 - all trustee declarations
 - copies of all reports given to members
- ensure that the following are prepared and retained for at least five years
 - an annual statement of the financial position of the fund
 - an annual operating statement
 - copies of all annual returns lodged
 - accounts and statements that accurately record and explain the transactions and financial position of the fund
- ensure that an approved auditor is appointed within the prescribed period (currently this is no later than 31 days before the due date for lodgment of the fund's annual return but this may change to 45 days) to audit the fund for each income year, and provide that auditor with documents as requested
- lodge the fund's annual return, completed in its entirety, by the due date
- notify the ATO within 28 days of any changes to the
 - membership of the fund, or trustees or directors of the corporate trustee
 - name of the fund
 - contact person and their contact details
 - postal address, registered address or address for service of notices for the fund
- notify the ATO in writing within 28 days of the fund being wound up or after becoming aware that the fund has ceased to be an SMSF.

DECLARATION

By signing this declaration I acknowledge that I understand my duties and responsibilities as a trustee or director of the corporate trustee of the self-managed superannuation fund named on this declaration (or if the fund's name changes, that name). I understand that:

- *I must ensure this document is retained for at least 10 years or while I remain a trustee or director of the corporate trustee (whichever is longer) and, if I fail to do this, penalties may apply.*
- *I may have to make this document available for inspection by a member of staff of the ATO and, if I fail to do this, penalties may apply.*
- *I do not have access to the government's financial assistance program that is available to trustees of Australian Prudential Regulation Authority (APRA) regulated funds in the case of financial loss due to fraudulent conduct or theft.*

Trustee's or director's name

Trustee's or director's signature

Date

Day Month Year
 / /

Witness' name (witness must be 18 years old or over)

Witness' signature

Date

Day Month Year
 / /