

18 September 2020

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

Dear Mr Fitt

Re: Treasury Laws Amendment (Self Managed Super Funds) Bill 2020

CPA Australia and Chartered Accountants Australia and New Zealand (Chartered Accountants ANZ) welcome the opportunity to provide comments on the *Treasury Laws Amendment (Self Managed Super Funds) Bill 2020* ("the Bill").

CPA Australia and Chartered Accountants ANZ represent over 200,000 professional accountants in Australia and New Zealand. Our members work in diverse roles across public practice, commerce, industry, government and academia throughout Australia and internationally.

Proposed Legislation Solves Known Self Managed Super Funds (SMSF) Member Limitation

We agree with the Minister's second reading speech that the current four-member limit for self-managed superannuation funds (SMSFs) limits choice and flexibility for larger families. We also agree with the Minister's comment in that speech that, "for families with more than four members, currently the only real options are to create two SMSFs (which would incur extra costs) or place their superannuation in a large fund. This limits their choice and flexibility."

Whilst we have no strong objections to this policy we do not believe this is a first order issue. We note that the latest Australian Taxation Office (ATO) statistics state that less than four per cent of SMSFs have four members. There are a similar number of three member SMSFs. That is, over 90 per cent of SMSFs are either single member or two member funds.

We expect the number of five and six member SMSFs to be modest.

Common Weaknesses Potentially More Likely In Larger SMSFs

As noted above we do not have a strong view about the need for legislative change to raise the member limit for SMSFs.

We envisage that some common problems in the SMSF structure that are more likely to occur in SMSFs with a larger number of members include:

1. Ability for majority of members to override the wishes of the minority

By way of example, consider a common family unit comprising parents and up to four children. If all were members of the same SMSF then it would be possible for four of them to decide amongst themselves to vote against two other members thus thwarting the minority's preferences. Differences, and sometime rivalries, between family members is common and the larger the family the more likely these disagreements are to occur.

What is best for one member may not be best for another and sometimes it can be difficult, and costly, for a compromise to be reached.

These differences might be about a member joining or exiting the fund or it may be about particular fund investments or how and to whom a benefit should be paid.

Such differences can cause ongoing disputes which ultimately require the ATO, as SMSF regulator, to step in and assist in sorting out some of the resultant problems.

2. Elder abuse including when a power of attorney is in place

As noted by the Australian Law Reform Commission¹ the scourge of elder cruelty, especially financial abuse, is real and needs careful legislative reform.

As a person reaches older ages, often their desire to make financial decisions declines. In addition, in many cases mental capacity deteriorates, and a person becomes incapable of making financial decisions.

The potential currently exists for a person appointed under a power of attorney to act immorally and illegally and use the donors' wealth for their own purposes. These actions may not necessarily be according to the donor's wishes or in their best interests.

Those with an enduring power of attorney can gain access to a donor's SMSF, as they are able to represent ill or injured trustees (or trustee directors).

We encourage the Federal Parliament to work expeditiously with all State/Territory Governments and interested parties to assist in removing these structural weaknesses.

¹ <https://www.alrc.gov.au/inquiry/elder-abuse-2/>

3. Death benefit nominations

We agree with the sentiments expressed by Justice Blue in the South Australian Supreme Court decision – *Retail Employees Superannuation Pty Ltd v Pain*² – in which he said, “It is highly desirable that those provisions [dealing with binding death benefit nominations] be reviewed by the Commonwealth and recast.”

We acknowledge that permitting larger number of SMSF members will not necessarily lead to more SMSF death benefits disputes. However, the potential for such disputes to arise is increased, and given that death benefits disputes are an increasing problem for all superannuation funds, a proactive legislative and regulatory solution needs to be considered to address this concern.

4. Residency

Under the *Superannuation Industry (Supervision) Act 1993* and *Income Tax Assessment Act 1997* all super funds must navigate their way through complex residency issues. Permitting up to six members in a SMSF members will likely see an increase in the number of funds falling foul of these rules. When a fund fails these residency tests significant tax penalties apply. We encourage a thorough review of these penalties even if the Bill, as drafted, does not become law.

5. Governance matters

The increase in the maximum number of members of an SMSF from four members to six is expected to have several impacts on the governance of funds.

It is likely that trust deeds – and in the case of a corporate trustee, companies’ constitutions – will need to be amended to allow for more members. This could be an expensive complication, and amendments may take time to draft and approve or adopt.

Also, trustees are expected to assess, as part of their annual audit, that there has been no fraud, or material misstatement of the financial position of the fund. Trustees should re-assess a fund’s internal controls periodically, and an event which increases the number of trustees may potentially require an increase to a fund’s internal controls. The internal controls in place may include how often passwords are changed, where documents are kept, and the location of safe combinations.

One of the changes which may be needed by the fund relates to who can sign documents, including cheques, and other authorisation requirements. This presents a range of issues, from amendment or adoption of trust deeds and/or company constitutions through to changing the method of operation at banks, stockbrokers and service providers. Depending on the wording

² <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/sa/SASC/2016/121.html> - see pars 460 and following

used, annual returns may have to be physically signed by multiple trustees (or directors) and minutes to trustee meetings may be mailed to remotely located members for their physical signatures. The risks associated with remotely located signatories may mean that there are delays in investment decisions and settlement, as well as transactions required for the ongoing operation of the fund, for example payment of external auditor. It may be the case that meetings are unable to be held in person, as is the case presently for funds which may, for example, have members who reside in Victoria, or are barred from entering a State or Territory.

Even in the case where members are able to be together for meetings, issues can still prevent trustees (or directors of corporate trustees) from being present due to illness or injury. Powers of attorney, which are subject to State/Territory law, are also examples of documents which require physical signatures, and with an increase in the number of trustees (or directors) on an SMSF, there is an increased likelihood that one or more may be unable to be present physically for a meeting.

We note that there is still a limited ability to hold meetings electronically, such as via the internet. Notwithstanding, throughout the COVID-19 pandemic business has adapted to conducting meetings via electronic media, and believe that this has revolutionised business in Australia, and globally.

We would recommend that the ATO works with accountants and auditors to ensure that adequate guidance is provided for trustees to better assess and manage any increased risks that a larger number of members may present.

We would also recommend that the Federal Government works with State and Territory governments to develop protocols to ensure that the barriers presented by the need for physical signatures are reduced to a manageable minimum.

Finally, we recommend that laws in relation to trustee meetings be changed to better accommodate electronic meetings.

6. Additional matters

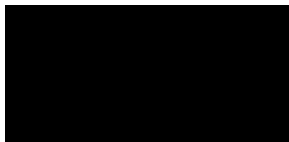
The following issues are likely to be made more complex by the addition of members to funds:

- Additional complexity in matching investment risk and return requirements of additional members with the assets of the fund
- Increased risk to members of the fund by conflicts of interest involving other trustees (see *Wareham v Marsella*)³, and
- Increased complexity in the event of fund dissolution due to members leaving the fund, including events involving marital and familial estrangement.

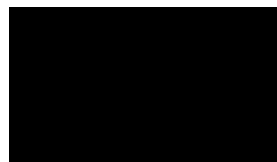
³ *Wareham v Marsella* [2020] VSCA 92

For further information in relation to our submission, please contact Tony Negline,
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Yours sincerely



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