
Elder Abuse Discussion Paper

Dixon Advisory Submission to the
Australian Law Reform Commission



Executive Summary

Dixon Advisory, was founded in 1986 by Daryl Dixon, now widely recognised as one of Australia's leading superannuation advisers. Since inception, Dixon Advisory has assisted individuals navigate the superannuation system by providing tailored advice on a fee-for-service basis. Dixon Advisory and its team are very familiar with all aspects of the superannuation system through the advice they provide to individuals in all four key sectors: public sector superannuation, industry funds, retails funds and SMSF's.

Dixon Advisory commends the extensive work and consideration the Australian Law Reform Commission have shown in their comprehensive discussion paper released in December 2016.

The package of proposals is extensive and provides a wide reaching framework to establish a comprehensive plan to help reduce the risks older Australians – a growing percentage of our population – may face in the future. As a specialist in retirement planning, formulated from our 30-year experience in assisting more than 20,000 families with their superannuation decisions and over 4,500 families with SMSFs, Dixon Advisory has the unique knowledge and first hand experience in the common issues people face as they retire and age; particularly financial issues. Our clients include our own family members and loved ones and the importance of the service and advice we provide is at the forefront of everything we do. This client centric approach saw Dixon Advisory take an early adopter approach to educating our clients about managing finances as they age-including succession planning, intergenerational planning and building financial capability skills for less active SMSF trustees.

Our comments and responses to the Australian Law Reform Commission Discussion paper focus on managing the risk of financial abuse. And are centred around our company ethos to value older Australians; to empower the individual through education, the sharing of knowledge and transparent communication; to provide assistance in a form suited to the needs of the individual, and at all times to respect the rights of the individual to their own autonomy and agency.

- We strongly support the development of a national plan, national prevalence study and the granting of investigation powers to State and Territory public advocates.
- We strongly support the focus on improving the standards and protections under enduring power of attorney and guardians, including harmonising rules across jurisdictions and the development of a national register. Further, we support enhancing education for enduring power of attorneys on their obligations as a vital component of the reforms.
- For SMSF trustees, a continued educative focus around the benefits of a corporate trustee along with broadening the focus to include the concept of succession planning will be beneficial.
- Programmes to build greater awareness and understanding of succession planning for SMSF trustees are already underway in some organisations. We refer to our own award winning education service which aims to increase financial capability skills for women in the baby boomer and silent generation. We note- SMSFs are highly regulated and there are extensive restrictions on who can advise the set up of SMSFs. These restrictions significantly enhance the integrity of the system and improve consumer protections.

-
- By adopting a synchronised approach now - where the government, industry actors and community groups work together – will result in a meaningful and effective solution for all future Australians.

Once again we thank you for allowing the opportunity to provide comments on this important issue. If you have any questions regarding Dixon Advisory's submission, please do not hesitate to contact me on 0421 567 345.

Kind regards



Nerida Cole

Managing Director, Head of Advice

Table of Contents

Executive Summary	2
Chapter 2: National Plan	4
Chapter 3: Powers of Investigation	6
Chapter 5: Enduring Powers of Attorney and Enduring Guardianship.....	7
Chapter 7: Banks and Superannuation	10
Q7-1(a)	12
Q7-1(b)	17
Q7-1(c)	19
Q7-1(d)	23
Q7-2	28
Chapter 7: Conclusion	30
Bibliography.....	32
Appendix 1	33

Chapter 2: National Plan

Proposal 2-1

Dixon Advisory welcomes and supports the ALRC's proposal for a National Plan, including the components of the national plan listed under paragraph 2.11.

- Principal goal - promoting the autonomy and agency of older people;
 - Promoting respectful intergenerational relationships;
 - Making systems work together effectively;
 - Improving responses to elder abuse;
 - Improving the evidence base

Abuse of older people is very complex. It often involves family members as the perpetrators and there is a general lack of understanding from society about what elder abuse is (affected by societal views of ageing and family dynamics) and if identified, how to report it.

Dixon Advisory emphasises the need for the National Plan to be sufficiently broad to lift awareness and understanding across all stakeholders that interact with older Australians (families, community groups, industry and government bodies). Gathering the views from a broad cross section of society is essential for the success of the National Plan and the other proposed measures.

Proposal 2-2

Dixon Advisory supports the recommendation to commission a National Prevalence study to improve the elders abuse evidence base. Reliability of data is critical in assessing elder abuse, identifying at risk groups and in measuring the success of programs and initiatives. Careful planning and scoping of data requirements and exact specifications will be vital to the consistency of data collected. This is especially relevant for the small business sector, which may have limited resources to expend on data collection, reporting and monitoring systems. Cross sector and industry round tables in the scoping stage may be useful to co-ordinating specifications and to ensuring practical concerns, including consistency of data and privacy issues are fully discussed and addressed.

Chapter 3: Powers of Investigation

Proposal 3-1

Dixon Advisory supports the proposal to give state and territory public advocates or public guardians the power to investigate elder abuse as there is an investigative gap in elder abuse reporting. While statistical data should be collected from cases, the details of the case should be kept private. This will ensure that vulnerable individuals are not identifiable from media stories and potentially exposed to public criticism or labelling in the public arena. If this was to occur, the impact on the victim could be devastating and may exasperate existing problems such as social isolation and depression.

As the scope of the work the public advocate is proposed to take on would be complex and wide ranging, due to expectations that resourcing will be constrained, it may be necessary to limit the focus to investigating matters which concern individuals with limited or impaired decision making abilities. This is because individuals without impairment are more readily able to access other mechanisms to bring forward elder abuse concerns.

The Public Advocate will also need to closely monitor individuals without impairment but who may be vulnerable to elder abuse due to a language barrier or social disadvantage, including individuals from non-English speaking backgrounds.

Chapter 5: Enduring Powers of Attorney and Enduring Guardianship

Proposal 5-1

Dixon Advisory commends the call for a national online register of enduring documents. However, we note the complexity of co-ordinating an online register at a national level, given that currently these documents are legislated at a state and territory level, is significant and may take a number of years to deliver. To achieve this, it is expected that state and territory governments would need to prioritise the discussion of this issue at a Council of Australian Governments meeting or similar level. It may also be beneficial to consider state based registration schemes should intergovernmental discussions be prolonged. At the scoping stage of the national online register, consultation must consider operational logistics and minimum performance criteria so that the final system is fit for purpose.

Proposal 5-2

Dixon Advisory broadly agrees with the proposal that the making or revocation of enduring documents should not be valid until registered. However, the realisation of this obligation would be entirely contingent on the success of an online registration system that is efficient, accurate, accessible and secure. Therefore, it may be appropriate to move this proposal into a latter phase of the reform for enduring documents. Once the national online registration system is implemented and meeting expectations, this proposal could be scheduled in with an appropriate transition period.

Proposal 5-3

Dixon Advisory strongly suggests transitional arrangements are imperative to the success of an online register.

Question 5-1

It is critical that the proposed national register is accessible to all professionals and groups who will depend on that information on a regular basis (such as lawyers, doctors and financial advisers). There is also a need for active and thorough consultations with potential groups who require access to the system. The financial services industry will need to be a primary consideration due to active engagement with enduring power of attorneys and guardians for approving financial transactions.

Question 5-2

Presently, the Guardianship Division of the NSW Civil and Administrative Tribunal has the power to investigate the affairs of the enduring power of attorney and, if necessary, revoke the appointment. Further, the proposed Public Advocate will also have the power to investigate incapacitated individuals' cases. As both investigative arms will extensively encompass the scope of at-risk elder abuse investigations, any additional random checks into the affairs of an enduring power of attorney may not add substantial value, but rather create unnecessary stress on individuals involved.

Proposal 5-5

In most cases people appointed under an enduring power of attorney, do make every effort to comply with their obligations and it may be their lack of awareness about their responsibilities that is attributable to a breach – rather than a malicious attempt at breaking the rules. Therefore, thorough consideration into the best practice of educating enduring power of attorneys is expected to be highly beneficial. An educational approach that makes clear what the consequences of breaching an enduring power of attorney's obligations are fundamental to the success of reform. Proactive educational approaches are undoubtedly more effective in addressing breaches than reactive punitive measures.

Proposal 5-6

Dixon Advisory broadly supports the introduction of a conflict of interest requirement. However, the proposal must be carefully researched to ensure that the introduced scope of conflict is not overly simplistic. In order to promote enduring power of attorney confidence, regulations and laws will need to clarify what elements constitute a conflict of interest transaction. Enduring power of attorney's will also need to be educated on these requirements. Further, there may be transactions that appear to be a conflict but are actually prudent and advisable transactions. The act therefore should specify an avenue for an individual to get timely approval for a transaction, specifically in the case where the principal has lost capacity or needs access to funding quickly. A suggested avenue could be from an independent lawyer.

Proposal 5-7

Dixon Advisory broadly agrees with the introduction of proposal 5-7 but notes in relation to part (d), family members should be excluded. It is not uncommon that a family member may also be a health provider or care worker to the individual. It would cause great injustice if family members were excluded from being an enduring power of attorney on the grounds that they cared for the individual.

Proposal 5-8

Dixon Advisory supports this proposal, presuming that subsection (c) refers to the voting in parliamentary elections as opposed to listed entity elections/voting. In the latter case, we think that this subsection should be removed as the enduring power of attorney should have the ability to vote in certain shareholder interest scenarios on behalf of the principal.

Proposal 5-11

Dixon Advisory supports this proposal. However, we note that the re-labelling of substitute decision making into the term "representative" will require an administrative update (of forms and application procedures) and a system update at an institutional level.

Chapter 5 Conclusion

Managing the risks of financial abuse are significantly complicated when an enduring power of attorney is in use. We strongly support the focus on improving the standards and protections under an enduring power of attorney, including harmonising laws across jurisdictions and the development of a national register.

In our experience, both the principal and enduring power of attorney are put at risk when the person appointed as the enduring power of attorney does not understand their duties or the needs of the principal. Difficulties also arise if the attorney has not been educated on appropriate financial decision making for an individual in the post retirement phase of life, as opposed to a pre-retiree individual.

To this point the reforms of the enduring power of attorney and guardianship model should include a component oriented towards educating attorneys on their roles and regulatory requirements. To assist, the ATO and ASIC could develop online modules explaining to individuals what their obligations are, and referrals in case further support is needed. Without complementing educational programs, the gap between regulatory obligations and the enduring power of attorney's/guardians knowledge of them may increase and create further operational gaps.

The educational approach can be modelled on the positive proposals outlined in chapter 6: Guardianship and Financial Administration Orders. Our experience has shown that the large majority of enduring power of attorneys and guardians voluntarily take on appointments in good faith and out of compassion- rather than because it is required. Prioritising a supportive and educational model would result in a more efficient, effective and proactive process for individuals who take on either of these roles.

Chapter 7: Banks and Superannuation

Why do people set up SMSFs?

There are usually a number of reasons why people set up SMSF funds. The general feedback we get from our clients is that having greater visibility over their retirement savings has led to a deeper understanding of how their overall wealth is tracking, and given them more confidence in their investment and lifestyle decisions.

Below we underline some of the reasons why people set up SMSFs:

- Investment choice
 - SMSFs provide more investment options than any other super fund. Trustees can access direct shares, high-yielding cash accounts, term deposits, income investments, direct residential property, business real property, unlisted assets, international markets, commodities and more.
- Flexibility
 - SMSFs allow couples to facilitate their retirement planning choices together even if at different superannuation stages. Members can run a mixture of accumulation and pension accounts within one fund. The structure and investments can be adapted quickly and efficiently as required by changes like the work status of the members or legislative change.
- Transparency
 - SMSFs offer significant transparencies that allow trustees to align their personal goals with their investment decisions. Whether they are passionate about property, shares or sustainable and ethical investing, SMSFs allow their members to better track and understand where and how their money is invested. This is particularly important during times of market volatility or decline, when understanding the exposure to specific sectors, regions or investments can inform the actions that may need to be taken.
- Cost
 - SMSF trustees must lodge an annual tax return, and audit and pay a supervisory levy to the ATO. Generally, the more an SMSF grows, the more cost-effective it becomes, but the total cost of running an SMSF will depend on the related investments and the costs associated with engaging professional support.
- Consolidation of superannuation
 - An SMSF allows a trustee to combine their super assets with up to three other members (such as spouse or other family members). Consolidating of super accounts immediately creates larger fund balances, which increases the fund assets and investment opportunities. From a family perspective this also allows parents to encourage their children to take an interest in finances and investments, building lifelong good habits. Many young adult children at the early stages of their working life are likely to benefit from a better fee arrangement than holding multiple default accounts with minimum flat account keeping fees.

-
- Administrative efficiency through alignment of member and trustee interests
 - Although tax benefits are often held up as a feature of SMSFs, SMSFs do not have access to tax benefits that are not also available to APRA regulated funds. SMSFs are governed by the same legislation that covers APRA regulated funds (i.e. Superannuation Industry (Supervision) Act 1993).
 - It would be more appropriate to consider that the real benefit members gain from an SMSF is an alignment of their individual interests with the features offered by the fund. With APRA regulated funds largely focused on accumulation members, in the large part they do not offer their members access to the administrative systems support that would allow them to obtain the full benefits of the super system.

Question 7-1(a) Should the Superannuation Industry (Supervision) Act 1993 (Cth) be amended to (a) require that all self-managed superannuation funds have a corporate trustee

Background

The 2009-2010 Treasury review into the Governance, Efficiency, Structure and Operation of Australia's Superannuation System chaired by Mr. Jeremy Cooper (Cooper review) considered the use of corporate trustees and individual trustees for SMSFs. The review concluded that Corporate trustees do provide an efficient way to manage succession. However ultimately concluded that, rather than imposing a mandatory requirement to use corporate trustees, the better solution was an improved standard of advice (which will be addressed in Q7-2). In our experience from assisting over 8,000 SMSF trustees, we have found that educating individuals about the benefits of corporate trustees does increase the proportion of new SMSFs set up with a corporate trustee structure. However, there is a percentage of new trustees that make a fully informed decision not to employ a corporate trustee, choosing the individual trustee method instead.

Noting that one of the primary principles underpinning an SMSF is the premise that SMSF members are entirely responsible for their own decisions (as affirmed in the Cooper review¹), we therefore support SMSF trustees maintaining the choice of the trustee structure- thereby continuing the assumed sole responsibility for their retirement savings.

All of the noted principles in the Cooper review (like 'ultimate responsibility' and 'freedom from intervention') are inherent characteristics of all SMSFs. The review affirms that these principles "should underpin the regulations of SMSFs"². In order to ensure consistency in SMSF policy, any proposals must not encroach on these designated principles.

Current obligations

Although individual and corporate trustees have different characteristics, they have closely aligned obligations and regulatory safeguards which assist to protect the interests of the members.

The below passage by His Honour Justice Paul Bereton AM RFD describes the constraints imposed on all trustees (corporate and individual): *"A trustee of an SMSF has extensive duties arising from the trust deed and/or rules of the fund, the law of trusts, the provisions of the SIS Act and regulations, and other legislative requirements including the Income Tax Acts, the Corporations Act, the Trustee Acts, and, of course, the Family Law Act. Breaches of these duties can result in civil and criminal penalties, as well as loss of complying fund status (with significant taxation consequences). It is therefore essential that individuals who are trustees of self-managed superannuation funds are fully conversant with the duties required of them as trustees and also any regulatory and reporting obligations imposed by superannuation law"*³.

¹Super System Review (Cooper review),

'Review into the Governance, Efficiency, Structure and Operation of Australia's Superannuation System' Chapter 8 (page 218) (viewed 23 February 2017)

<http://www.treasury.gov.au/~media/Treasury/Consultations%20and%20Reviews/Reviews%20and%20Inquiries/2009/supersystem/Documents/Final%20Report/PDF/Final_Report_Part_2_Chapter_8.ashx>

² Above n2 (Cooper review) pg. 219.

³ Brereton Paul (the Hon Justice), 'A trustee's lost is not a happy one- Discretionary trusts and self-managed superannuation funds'

Address to the National Family Law Conference, Canberra, 19 October 2010, page 8

<<http://www.austlii.edu.au/au/journals/NSWJSchol/2010/23.pdf>>

Trust Deed

Both individual trustees and corporate trustees require a trust deed to be created in order to set up an SMSF. A trust deed essentially provides guidance on how the superannuation fund can pay out a members' benefits⁴ (whether as a lump sum, income stream or a hybrid). Further, a trust deed stipulates conditions, such as, what investments the fund can make, the auditing and reporting requirements of the fund, and when to remove trustees⁵. An SMSF trustee (applicable both for a corporate trustee and individual trust) must ensure that all clauses of the deed do not breach any provisions of the Superannuation Industry (Supervision) Act 1993, Corporations Act 2001 (if a corporate trustee) as well as other general rules (i.e. tax law).

Obligations for trustees under SIS act

As stated, trustees of an SMSF have a wide array of responsibilities. One of the primary mechanisms in codifying trustee obligations are held within the *Superannuation Industry (Supervision) Act 1993* (SIS act). This imposes minimum requirements on trustees and are deemed to be included in the trust deed of every regulated fund⁶. As per the SIS act⁷, the rule binds the trustees to:

- (1) Act honestly in all matters concerning the fund;
- (2) Exercise the same degree of care, skill and diligence as an ordinary prudent person in managing the fund;
- (3) Act in the best interest of all fund beneficiaries;
- (4) Keep the money and assets of the fund separate from other money and assets (e.g. personal assets);
- (5) Retain control over the fund;
- (6) Develop and implement an investment strategy;
- (7) Not enter into contracts or behave in a way that hinders trustees from performing or exercising their functions or powers; and
- (8) Allow members access to certain information.

As can be seen, these provisions impose a wide array of responsibilities on trustees.

Another further obligation under the SIS act is the sole purpose test. The test (which is wide ranging) ensures that an SMSF must be maintained for the sole purpose of providing benefits to the members during their retirement. Actions that are deemed to be inconsistent with the sole purpose test are defined as breaches with civil or criminal penalties potentially applying. Common breaches of the sole purpose test can occur, when the enduring power of attorney benefits personally from the assets of the SMSF.

Trustee declaration form

Since July 2007, the ATO has required that all individual SMSF trustees; and, directors of corporate trustees for SMSFs, complete a declaration acknowledging their understanding of the duties and responsibilities for running an SMSF. The 'Trustee Declaration' (Appendix 1) specifies that the trustee, consistently with the SIS act obligations, act honestly, in the best interests of the members of the fund, and exercise skill, care and diligence in the management of the fund. The declaration

⁴ Sanderson Jemma, 'SMSF Guide 2014: Current issues and strategies for the self-managed superannuation funds adviser' (Tax Institute Publication, 6th edition, 2014) page 2.

⁵ Above n4 (Sanderson), page 9.

⁶ Above n4 (Sanderson), page 11.

⁷ Above n4 (Sanderson), page 12.

form further outlines information about the general trustee duties, investment restrictions, record keeping and reporting/lodgement obligations.

Each trustee must sign the declaration within 21 days of becoming an individual trustee or the director of the corporate trustee. The declaration must further be retained for at least 10 years and made available to the Commissioner of Taxation on request.

Corporations Act 2001 for corporate trustees

The director(s) of a corporate trustee are also liable to abide by requirements in the *Corporations Act 2001 (Cth)*. The Corporations Act sets out further duties to the director(s) to act reasonably and in good faith. For example, certain duties under Chapter 2D of the Act require directors to:

- Act with skill, care and diligence (s180(1))
- Act in good faith in the best interests of the company (s181(1)(a))
- To Act honestly (s184(1)(b)).

General law duties

In addition to the duties and responsibilities imposed on trustees under the SIS act and the Corporations Act, trustees and directors also have duties under common law and equitable law⁸. Common law obligations on trustees include a duty to exercise reasonable care and skill, a duty to act in good faith and a duty not to make an unconsented gain from the role⁹.

All of these duties are wide encompassing and will be assessed by the courts on a holistic case-by-case basis. However, as an example, the duty to exercise reasonable care and skill in common law is consistent with the following interpretation given by the Honourable Justice Bereton in 2010: “A trustee must strictly adhere to and carry out the terms of the trust, and must discharge their duties to the standard of what an ordinary prudent person of business would do in managing similar affairs in the interests of another”¹⁰. The test is therefore not a low standard, but rather expects the trustee to act with prudent skill and with a business outlook of managing affairs.

Monitoring compliance

SMSF trustees have significant annual reporting requirements. This provides a mechanism for oversight and monitoring compliance and includes;

- Each year, SMSF trustees (individual and corporate) must complete an income tax and regulatory return with the ATO.
- Each year, the SMSF must be audited by an independent ASIC registered auditor, to ensure that the trustee is complying with the SIS act and the SIS regulations.

⁸ Michael Chaaya, ‘Trustee Duties and Legal Responsibilities Update- Roundtable Discussion 1’ presented at the Gold Coast Convention and Exhibition Centre 28-30 March 2011 (viewed on 23 February 2017)

<<http://www.aist.asn.au/media/6203/Mon%20MR3%201400-1500%20Chaaya,%20Michael%20-%20Trustee%20Duties.pdf>>

⁹ Above n8, (Chaaya).

¹⁰ Above n3, (Bereton) pg 5.

Auditor requirements

The obligations for an auditor to audit an SMSF are wide ranging and were significantly enhanced by ASIC in 2013. Firstly, the auditor must follow ethical principles outlined in the APES 110: Code of Ethics for Professional Accountants. The code sets out mandatory requirements on auditors when providing professional services and covers areas like integrity, objectivity, professional competence and due care, confidentiality and professional behaviour.

Secondly, auditors must ensure that they follow standards issued by the Auditing and Assurance Standard Board (an Australian Government Board), which are onerous and broad. Thirdly, auditors are required to comply with Australian Auditing Standards and ASAE 3100 Compliance Engagements, which state how the auditor: *“shall comply with the fundamental ethical principles of integrity, objectivity professional competence and due care, confidentiality and professional behaviour”*¹¹. Lastly, auditors are obliged to follow quality safeguards, such as implementing quality control processes.

To be eligible to audit an SMSF, the auditor must be registered with ASIC as an approved SMSF auditor. This registration requires the individual to hold a tertiary accounting qualification, meet a fit and proper test, hold professional indemnity insurance, pass a competency exam, and satisfy 300 hours of experience in auditing SMSFs in the three years prior to registration¹².

An auditor must also be independent from the entity that it audits (i.e. the SMSF), as well as from other service providers associated with the SMSF¹³.

Penalties for breaches of auditor rules are severe and range from monetary fines to imprisonment. For example, if the auditor fails to inform the trustee of breaching an SMSF, a penalty of up to \$9,000 can be enforced.¹⁴ Or, if an auditor does not make a report to the ATO about a breach, and misleads another auditor to believe that they have in fact reported the incident, the resulting penalty for this action is imprisonment for up to 12 months¹⁵.

The auditor is required (as per s129 of SISA¹⁶) to report to the trustee any breaches of SIS act or SIS regulations in writing. In addition, if the breach is a reportable event (discussed below) that breach must be directly reported to the ATO.

The following are examples of directly reportable events to the ATO:

- Sole purpose test:
 - The sole purpose test of an SMSF prescribes the need to maintain the SMSF for the sole purpose of providing benefits to its members. The Australian Taxation Office in its ruling 2008/2¹⁷ states that *“any trustee who maintains an SMSF for other purposes contravenes section 62 [of the SIS act]”*. The ATO further notes that the sole purpose test is a strict standard of compliance. Any actions taken by

¹¹ Australian Government- Auditing and Assurance Standards Board *“Standard on Assurance Engagements ASAE 3100 Compliance Engagements* (Reissued September 2008) page 13. (viewed 22 February 2017) <http://www.auasb.gov.au/admin/file/content102/c3/ASAE_3100_9-09-08.pdf>

¹² As set out in ASIC regulatory guide 243 *“Registration of self-managed superannuation fund auditors”*. Web location (viewed on 27 February 2017): <<http://download.asic.gov.au/media/1247123/rg243.pdf>>

¹³ Australian Securities and Investment Commission, *“Auditor Independence and audit quality”* (viewed 22 February 2017) <<http://asic.gov.au/regulatory-resources/financial-reporting-and-audit/auditors/auditor-independence-and-audit-quality/>>

¹⁴ Australian Taxation Office, *“Penalties”* (viewed on 22 February 2017) <<https://www.ato.gov.au/super/self-managed-super-funds/SMSF-auditors/Auditor-compliance/Penalties/>>

¹⁵ Australian Taxation Office, *“Penalties”* (viewed on 22 February 2017) <<https://www.ato.gov.au/super/self-managed-super-funds/SMSF-auditors/Auditor-compliance/Penalties/>>

¹⁶ If, during the course of an audit, the Approved Auditor discovers a breach of the legislation, regardless of its materiality or its affect on members' balances, the auditor must bring the breach (or potential breach) to the attention of the trustees.

¹⁷ Australian Taxation Office Legal Database, Self Managed Superannuation Funds Ruling, *“SMSFR 2008/2”* (viewed 22 February 2017) <<http://law.ato.gov.au/atolaw/view.htm?DocId=SFR/SMSFR20082/NAT/ATO/00001&PiT=99991231235958>>

a trustee that provide no benefit to the member directly, would therefore be inconsistent with the sole purpose test and would need to be reported.

- Separation of assets:
 - As stated by the SIS (regulations) sub-regulation 4.09A(2): A trustee of an SMSF must keep the money and other assets of the fund separate from any money and assets held by the trustee personally.
- Other examples of reportable events include lending financial assistance to members or relatives, borrowing by fund, and failing to provide documents to the auditor. Finally, the auditor also has an obligation to use his/her judgment in assessing whether a breach is required to be reported.

The ATO can decide penalties which may range from education requirements through to deeming a fund non-compliant. The ATO may also apply to the courts for criminal or civil penalties (i.e. in cases where the sole purpose test has been breached, or there is a duty to notify the regulator of significant adverse events¹⁸).

Dixon Advisory comments

The fact that the Auditor Contravention Report monitors a wide range of trustee obligations, provides a consistent check and balance on trustees to ensure that they are acting within the obligations of the SIS rules.

The thorough application of the laws and obligations relevant to SMSF trustees (whether individual or corporate) are comprehensive. Further the reporting obligations, via the auditor and ATO provide a high level of monitoring against these obligations.

¹⁸ Australian Taxation Office, 'How we deal with non-compliance', (viewed on 22 February 2017) <<https://www.ato.gov.au/Super/Self-managed-super-funds/Administering-and-reporting/How-we-help-and-regulate-SMSFs/How-we-deal-with-non-compliance/#Civilandcriminalpenalties>>

Question 7-1(b) Should the Superannuation Industry (Supervision) Act 1993 (Cth) be amended to (b) prescribe certain arrangements for the management of self-managed superannuation funds in the event that a trustee loses capacity?

Background

In the event that an individual SMSF trustee, or the director of a corporate trustee loses capacity, assuming that person has a valid enduring power of attorney, there is a prescribed set of actions that occurs dependent on the trustee structure in operation.

In the event that the SMSF operates under an individual trustee structure and has a valid enduring power of attorney, the incapacitated trustee is replaced by their enduring power of attorney and that nominated individual then steps in to become the replacement trustee. The incapacitated individual maintains their membership status in the SMSF. See Smyth Family Super fund case study 1 below.

Case study 1: SMSF operating with Individual trustees

John Smyth and Jane Smyth As Trustee For The Smyth Family Super Fund

John Smyth and Jane Smyth are each individual trustees for the Smyth Family Super Fund. As is commonly the case, John and Jane have appointed each other as their reciprocal enduring power of attorney. After many happy years of jointly managing the fund, John loses capacity after a serious car accident. John can no longer act as a Trustee. Jane, under the power of John's enduring power of attorney takes over John's trustee position within the SMSF. That is, Jane retains her trustee role as well as additionally becoming a trustee in place of John. John and Jane are still members of the fund.

In the case where the SMSF operates with a corporate trustee scenario, if a director of that corporate trustee loses capacity, the enduring power of attorney then steps in as the director. Refer to case study 2 below. Corporate trustees can also operate with one director.

Case study 2: SMSF operating with a corporate trustee

BBB Pty Limited As Trustee For The Jones Family Super Fund

Belinda Jones and Bob Jones are directors of BBB Pty Limited. The company BBB Pty Limited does not run any business or operations; the sole purpose of the company is to act as the trustee of the SMSF. Accordingly, Bob and Belinda have made sure BBB Pty Limited is registered with ASIC as a special purpose company.

After obtaining legal advice on their estate and succession planning, Belinda and Bob have completed their wills and appointed each other as their reciprocal enduring power of attorney.

Things are running smoothly when Bob falls ill. After a long illness, Bob loses capacity. Bob can no longer act as a director. However, the corporate trustee BBB Pty Limited can continue to operate with a sole director. Therefore, Belinda continues on as the sole director of BBB Pty Limited and maintains the investment strategy and other responsibilities of the SMSF. Bob and Belinda are still members of the fund.

Current requirements

Regardless of the trustee structure of the SMSF scenarios, where the enduring power of attorney is required to step into the role of trustee or director of the corporate trustee, that individual must be willing to accept the nomination as the new trustee or director appointment. If required, a replacement enduring power of attorney can be appointed by the NSW Trustee and Guardian.

In the event that an individual (who has lost capacity) has no suitable arrangement in place to manage their affairs, or there is no other suitable person willing to be legally appointed as their private manager, the New South Wales Trustee and Guardian can be appointed by a court or tribunal to provide direct financial management services instead¹⁹. An application for a financial management order can be made by anyone (family members, doctors or aged care providers) who has a genuine concern for the welfare of that person.

¹⁹ New South Wales Trustee and Guardian, 'Financial Management Service', (viewed on 22 February 2017) <<http://www.tag.nsw.gov.au/managed-clients-overview.html>>

Managing a long term investment strategy

SMSFs often have tailored strategic approaches and unique investments that require individualised management strategies. Noting our increasing life and retirement phase expectancy, it is entirely appropriate for SMSF trustees to hold investment that have a long term focus. SMSF trustees may also hold business and residential property, unlisted assets and other sophisticated investments which can, at times, be less liquid. A prescribed event, such as rolling a member out of the SMSF within a set period of time, may cause significant losses for the members and beneficiaries in these situations.

Each SMSF is set up and managed by the trustees in accordance with their individual appetite for risk, their need for income, family and personal situation and their investment holdings outside of the SMSF. The complexity of an SMSFs investment portfolio depends on a range of factors like the trustee's interest in investments, willingness and capacity to dedicate time to managing and monitoring a complex portfolio (versus a less complex portfolio), employment status, changes in market conditions, and travel. These fluid factors mean that the diversity of SMSF strategies across the sector are significant. A prescribed unitary approach that results in the sale or transfer of assets without an appreciation or consideration to the overall retirement strategy (for example where the SMSF trustee has not appointed an enduring power of attorney and loses capacity) can create adverse financial consequences for the members and beneficiaries.

Question 7-1(c) Should the Superannuation Industry (Supervision) Act 1993 (Cth) be amended to: (c) impose additional compliance obligations on trustees and directors when they are not a member of the fund

The proactive and consistent law abiding approach of SMSF trustees is demonstrated by the very low rates of non compliance breaches. In the year ending 30 June 2015, only 8,200 SMSFs had auditor contravention reports lodged against them - that is about 2 per cent of all SMSFs²⁰. It must be noted that this is a 7 per cent decrease from the number of Auditor Contravention Report lodgements in 2014.

The table below analyses the current laws applicable to trustee actions. As underlined, the obligations are both specific (like the need to keep personal funds separate from the SMSF assets), as well as broad (like the duty to act in the best interests of the beneficiaries).

Good faith and conflicts

In addition to the below rules, there is an obligation in general law that requires a trustee to act in good faith and avoid conflicts of interest. The case of *Boardman v Phipps* exemplifies how strictly the courts apply conflict of interest issues. In that case, Boardman²¹ - who owed a duty to the beneficiaries of the trust - took over the management of a company, which ultimately benefited not only him but also the beneficiaries. The court nevertheless still maintained that there was a conflict of interest. This case illustrates how narrowly conflict breaches are interpreted and how careful a trustee must be in her/his actions.

²⁰ Australian Taxation Office, 'Compliance', (viewed 22 February 2017) <<https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Super-statistics/SMSF/Self-managed-superannuation-funds--A-statistical-overview-2013-2014/?page=26>>

²¹ Figot Bryce, Professional Planner, Issue 46 (September 2012) pg. 40 (viewed 22 February 2017) <<http://search.informit.com.au.ezproxy.uws.edu.au/fullText;dn=749985334881899;res=IELBUS>>

Best interests

As outlined in the below table, trustees are required to act in the best interests of the beneficiary. The SIS act goes far to ensure that at any time the interests of the trustee and beneficiary are in conflict, the trustee must “(i) give priority to the duties to and interests of the beneficiaries over the duties to and interests of other persons and to (ii) ensure that the duties to the beneficiaries are met despite the conflict and (iii) to ensure that the interests of the beneficiaries are not adversely affected by the conflict; and (iv) to comply with the prudential standards in relation to conflicts²²”. The stringent implication of the act means that the interests of the beneficiaries need to be superior to all other considerations of the trustee.

Extent of duties

The table below summarises the legislative obligations on the trustee. As can be seen, the obligations of a trustee not only require them to act in a manner that is consistent with the beneficiaries’ interests, but rather as mentioned before, the trustee is required to take on the role of a “prudent” individual; careful and principled in his pursuit of actively managing the member’s funds. Dixon Advisory submits that the wide array of responsibilities imposed on trustees are sufficient to ensure a regulated approach in managing the affairs of the member. The imposition of further requirements would not only create confusion and overlap in the operation of the laws, but may potentially create obligations that infringe and restrict the way that a large majority of *bona fide* trustees operate.

²² *Superannuation Industry (Supervision) Act 1993* act s52(2)(d)(i)-(iv).

**Superannuation Industry (Supervision)
act 1993**

S52(2)

- (a) to act honestly in all matters concerning the entity;
- (b) exercise the same degree of care, skill and diligence as an ordinary prudent person in managing the fund
- (c) act in the best interests of all fund beneficiaries
- (d) the interests of the beneficiary must be prioritised over the interests of the trustee
- (g) keep the money and assets of the fund separate from other money and assets
- (h) not enter into contracts or behave in a way that hinders trustees from performing or exercising their functions or powers
- (j) allow members access to certain information

Section 52(6)(a) to formulate and regularly review an investment strategy for the whole entity

Section 62: Each trustee must ensure that the fund is maintained for the sole purpose of providing benefits to members upon their retirement. The sole purpose test is fairly broad in its interpretation and further restricts people from withdrawing money early (unless they have met a condition of release).

Section 103: trustees must keep records of all meetings for at least 10 years, as well as annual returns lodged and copies of all report given to members

Section 35A: trustee must keep accurate and accessible records that explain the transactions and financial position of the fund

Section 109: trustees must not lend money, or provide assistance to a member or a members relatives.

Section 67: SMSF prohibits the borrowing of money, except in limited circumstances. (such as not being able to borrow more than 10 per cent of the funds total assets)

	<p>Section 120: a disqualified person may not act as a trustee (in the event that they have been disqualified by a regulator, have been convicted of an offence involving dishonesty- please refer to section for full list).</p> <p>Section 35D: the trustee is required to lodge a combined fund income tax and regulatory return. For the regulatory return, trustees are required to have the financial accounts and statements of their SMSF audited each year by an approved auditor.</p>
Superannuation Industry (Supervision) Regulations 1994	<p>reg 4.09(2)(e) the investment strategy must also consider insurance for members of the funds</p> <p>reg 7.04(1) the trustee must ensure that any contributions are made for retirement purposes only.</p>
Corporations Act 2001 (Cth) (Corporate trustees only)	<p>Section 180(1): The Director is required to act with skill, care and diligence</p> <p>S181(1)(a): act in good faith in the best interests of the company</p> <p>S181(1)(b): to act for a proper purpose</p> <p>S184(1)(b): to act honestly</p>
Common law and equitable law²³	<ul style="list-style-type: none"> • duty to exercise reasonable care and skill • duty of care (tort duty) • duty not to obtain an unauthorised benefit

²³ Michael Chaaya, 'Trustee Duties and Legal Responsibilities Update- Roundtable Discussion 1' presented at the Gold Coast Convention and Exhibition Centre 28-30 March 2011 (viewed on 23 February 2017)
<<http://www.aist.asn.au/media/6203/Mon%20MR3%201400-1500%20Chaaya,%20Michael%20-%20Trustee%20Duties.pdf>>

Question 7-1(d) Should the Superannuation Industry (Supervision) Act 1993 (Cth) be amended to: (d) give the Superannuation Complaints Tribunal jurisdiction to resolve disputes involving self-managed superannuation funds?

The 2009/10 Cooper review considered whether to extend the SMSF dispute jurisdiction to the Superannuation Complaints Tribunal. The review concluded that such reform, “*would unfairly result in the majority of SMSFs, who would not utilise the SCT, cross-subsiding the few SMSFs who would use the services of the SCT*”²⁴. It was also argued that, in the majority of cases, disputes would not be limited solely to superannuation matters and would ultimately be decided in court (due to the multifaceted nature of SMSFs expanding into corporation law breaches as well as family law matters). Access to the Superannuation Complaints Tribunal to resolve only one issue (and leave the other issues like family law unanswered for) would not increase efficiencies²⁵, but rather fragment the litigation process. The existing dispute resolution mechanism for SMSFs is underlined below.

Mediation, conciliation or arbitration

Mediation involves the assistance of a neutral third party to identify the issues and propose options to reach agreement. Courts today are increasingly promoting the use of mediation and requiring parties to attempt to resolve their disputes in that arena, before approaching a court for settlement²⁶.

Supreme Court

In NSW, the Supreme Court has jurisdiction to supervise trusts and trustees²⁷. The Supreme Court has a wide array of powers to direct and resolve issues that involve an SMSF. For example, section 63 of the Trustee Act 1925 (NSW) provides trustees with the right to apply to the court for its opinion or direction. The Supreme Court can also enforce the terms of the trust deed. If an SMSF dispute involves a contravention of the SIS act by any person, an application can be made to the court to restrain that individual from engaging in certain conduct and/or pay damage to any affected person. Ultimately, the court can also remove the trustee, as was decided in the case of Basil Notaras v Brinos Notaras²⁸ where the court held that “*failure to participate in his fund's administration and management, together with his misuse of those powers he did exercise, justified his removal as trustee*”²⁹.

The Public advocate

As outlined chapter 3, Dixon Advisory supports Proposal 3-1 (giving the power to the public advocate to investigate elder abuse incidents). Having a first point dispute resolution directive in place, like the public advocate, will streamline disputes through a low cost alternative channel before then being either resolved through mediation or the Supreme Court.

²⁴ Above n1 (Cooper review) pg 229.

²⁵ Above n1 (Cooper review) pg 229.

²⁶ Gray, Heather, ‘Managing disputes in SMSFs’, Taxation in Australia, Vol. 50, No. 7, 381 (viewed 24 February 2017) <<http://search.informit.com.au.ezproxy.uws.edu.au/fullText;dn=924180871385532;res=IELAPA382>>

²⁷ Above n27 (Gray), 382

²⁸ [2012] NSWSC 947.

²⁹ Jeff Holowaychuk, ‘What does it take to be removed as an SMSF trustee? Views from the NSW Supreme Court’, ClearLaw Legal Bulletin (September 2012) (viewed on 22 February 2017) <<https://www.cleardocs.com/clearlaw/superannuation/smsf-trustee-removal-views-from-court.html>>

Question 7- (2) Should there be restrictions as to who may provide advice on the establishment of self-managed superannuation funds?

Please note, for simplicity, Dixon has divided Question 7-2 into 2 different parts; (1) advice on establishment of SMSFs and (2) prepare documentation for establishment of SMSFs

Advice restricted to certain requirements

Requirements and restrictions on who can provide advice on the establishment of SMSF have significantly increased over the last 5 years. Substantial change occurred as recently as 1 July 2016 (less than 8 months ago), when the accountant's exemption was repealed.

ASIC considers SMSFs to be Financial Products. As such, for any individual or company providing financial product advice must meet a number of specific standards. Because SMSFs trustees have more responsibilities, ASIC has set out additional mandatory standards on what needs to be considered in providing advice and what information needs to be provided to the consumer.

Financial product advice and the Australian financial services licence

Financial product advice, as defined by ASIC³⁰, is where an individual influences a person in making a decision about a particular financial product. The provision of financial advice is currently restricted to a rigid set of requirements.

In order to provide a financial service, such as giving advice, the individual needs to hold an Australian Financial Services Licence (AFSL) or be a representative of a AFSL holder. An AFSL licensee must comply with several requirements³¹:

- The licensee must ensure that its licensees are adequately trained and comply with financial services law.
- The licensee must have compensatory arrangements in place in case of loss or damage suffered because of breaches of the relevant obligations.
- The licensee must have arrangements in place to ensure that they are complying with their obligations as an AFSL licensee.
- Have adequate measures in place to ensure that the licensee is managing conflicts of interest.

Failure to meet the above obligations may mean a suspension or cancellation of an AFSL (as per section 915C of the Corporations Act).

In each instance where there is a provision of personal financial advice, the client must be given a statement of advice. The statement of advice records the advice to the client, including the risks, costs and benefits. The standards, in regards to what must be included in a statement of advice are set out in ASIC's Regulatory Guide 175³² as well as the Corporations Act and oblige the adviser to provide:

³⁰ Australian Securities and Investments Commission, Regulatory Guide 36- Licensing: Financial Product advice and dealing (June 2016) page 5 (viewed on 22 February 2017) <<http://download.asic.gov.au/media/3889417/rg36-published-8-june-2016.pdf>>

³¹ Above n30 (RG-36), page 33.

³² Australian Securities and Investments Commission, Regulatory Guide 175- Licensing: Financial Product Advisers- Conduct and Disclosure (October 2013) pg 26-28 (viewed on 22 February 2017) < <http://download.asic.gov.au/media/1240967/rg175-published-3-october-2013.pdf>>

- A statement setting out the advice
- Information about the basis on which the advice is given (such as risks, fees, any benefits that clients will or may lose as per section 947D of the Corporations Act).
- Details of any interest or associations that might be expected to influence the providing entity in providing the advice.

Further the consumer has the right to recourse via complaints processes both internally with the provider (at no cost to the consumer) as well as externally through dispute services, such as the Financial Ombudsman Service and Small Claims Courts and Tribunal - which are at no cost to the consumer.

ASIC training requirements

Advisors giving financial product advice under an Australian Financial Services License must also satisfy ASIC's training standards which are outlined in Regulatory Guide 146. The Regulatory Guide subscribes standards that are knowledge based as well as skills based. Specifically, when the adviser deals with SMSFs, he/she is required to have specialist knowledge and skills in the area of SMSFs and SMSF trustee responsibilities.

- Any person advising on SMSFs must have knowledge of all superannuation products³³.
- ASIC requires advisors to meet continuous professional training requirements to persons giving advice.

Breach of these provisions can lead to a fine and/or up to 2 years' imprisonment (Corporations act 262C).

In addition to ASIC requirements, many individual advisors are members of Professional bodies, such as Financial Planners Association or SMSF Association. These bodies impose further ethical and professional codes of conduct on advisers. Each professional association also subscribes additional Continuing Professional development requirements in addition to those required by ASIC; including specialist knowledge areas relevant to the associations focus (i.e. SMSF Association CPD requirements incorporate a higher focus on SMSF knowledge). The recently passed Corporations Amendment (Professional Standards of financial advisers) Bill 2016 further raises education standards to ensure that new advisers have a degree qualification, as well as requiring 1 year of work experience before becoming a qualified financial adviser.

Provision of advice

Further to the requirements above, there are numerous restrictions and requirements that need to be followed by the adviser when giving financial advice. These are prescribed in *Corporations Act 2001*. Advisers are legally required to:

- Act in the best interest of the clients (s961B)
- Prioritise the interests of the client (s961J)
- Ensure that they warn the client if the advice is based on incomplete or inaccurate information (s961H)
- That advice is appropriate financial advice (s961G)
- That they prioritise the interests of the client in the provision of the financial advice (s961J).

These breaches may lead to three possible adverse consequences, such as:

³³ Australian Securities and Investments Commission, Regulatory Guide 146- Licensing- Training of financial product advisers, (July 2012) pg 17 (viewed on 22 February 2017) < <http://download.asic.gov.au/media/1240766/rg146-published-26-september-2012.pdf> >

- A civil penalty under the Corporations Act civil penalty provisions
- An administrative penalty, such as a banning order
- Civil sanctions, such as damages ordered by a court or an alternative disputes resolution forums such as the Financial Services Ombudsman or the Credit and Investment Ombudsman.

ASIC information sheet

Where an advisor is considering recommending the establishment of an SMSF, ASIC has set out a range of additional considerations. These are detailed in the ASIC information sheet (Info 205)³⁴ and list the following requirements:

- (1) Advisers need to advise the client on the risks and costs associated with setting up and/or switching to an SMSF, the potential benefits that may be lost, the time commitment required and any other significant consequences if the advice is followed.
- (2) The need to underline to the client that SMSFs are not legislated by the same government regulations as non-SMSF (e.g. APRA) funds.
- (3) The impact on insurance. Unless the SMSF trustee specifically takes out insurance there may be no cover.
- (4) The clients need to be made aware that the Superannuation Complaints Tribunal is not an open channel for dispute resolution for SMSFs, rather the clients need to seek other dispute avenues like the Financial Ombudsman Service Limited or the Credit and Investment Ombudsman.
- (5) Advisers need also discuss and consider the appropriate SMSF structure (whether individual or trustee). The adviser should also consider with the clients the important tax and succession planning implications after the SMSF has been established.
- (6) Advisers need to take the trustee through their obligations as an SMSF trustee. Further, if the advice includes switching from an existing superannuation fund to an SMSF, under section 947D of the Corporations Act 2001, the statement of advice (which is required to be provided in instances of any advice) must disclose the potential benefits that may be lost and any other significant consequences to the retail client if the advice is acted upon.
- (7) Trustees need to be made aware of the time and skill required to operate an SMSF. The requirements of auditing, maintaining the fund for the sole purpose of providing retirement benefits, having the accounts and statements audited each year, and the requirement to meet the reporting standard imposed by the ATO.
- (8) Advisers need to explain to trustees the need to develop an investment strategy, the costs of asset diversification and restrictions on SMSF investments.
- (9) Exit strategies also need to be discussed.

³⁴ Australian Securities and Investments Commission, Information Sheet 205: Advice on self-managed superannuation funds: Disclosure of risks (viewed on 22 February 2017) < <http://asic.gov.au/regulatory-resources/financial-services/giving-financial-product-advice/advice-on-self-managed-superannuation-funds-disclosure-of-risks/> >

Removal of accountant's exemption

Accountants are not allowed to provide advice unless they specifically meet the above requirements, or are also qualified and registered financial advisors. This is a recent change as accountants previously could provide advice around establishing an SMSF under what was known as "accountant's exemption". Since the removal of this exemption on the 30th June 2016, accountants can no longer give financial advice to set up SMSFs, unless they are appropriately licensed.

The maximum penalty for carrying on a financial services business without a licence is two years' imprisonment and/or \$22,000 fine³⁵.

ATO restrictions

The Australian Taxation Office, acts as a further safeguard, by approving the registration of newly established SMSFs to ensure they are done correctly. In the case that a member, or the super fund is not registered correctly, the SMSF will not be eligible to receive rollovers. This could occur for a range of reasons:

- Trustees who are disqualified are recorded by the ATO, and the fund will become non-complying unless a substitute is named.
- The ATO can also contact a trustee, who has had a poor tax return history, to see if they are aware of their responsibilities as a trustee and could also determine that the nominated trustee does not have the capacity to act as a trustee.

Trustee declaration

Finally, before an individual can become an SMSF trustee, the ATO requires the trustee to sign off on a trust declaration. The trust declaration is an extensive document that outlines the roles and responsibilities of the trustee. The declaration alerts the trustee to responsibilities like:

- Acting honestly.
- Exercising care, skill and diligence in managing the fund.
- Ensuring that the trustees money is kept separate from the SMSF funds.
- The trustee declaration also underlines the penalty imposed if the declaration is not signed.

The trustee declaration is a direct acknowledgement by the individual- before the establishment of an SMSF- that they are aware of the certain responsibilities and obligations required of the trustee. The trustee needs to ensure that they retain the declaration for at least 10 years, as the ATO may inspect the documents.

³⁵ John Sutton, 'Carrying on financial services business without a licence' Armstrong Legal Website (viewed on 22 February 2017) <<http://www.armstronglegal.com.au/corporate-crime/asic-offences/directors-financial-services-licenses>>

Question 7-(2) Should there be restrictions on who can prepare documentation for the establishment of SMSFs

SMSF Trustee and Member Profile

SMSF owners are a diverse group of individuals. They often include business owners, managers and senior executives in the public and private sectors. These individuals are well informed of the procedures in place, either through their own professional experience or through the engagement of a professional. Further, it is generally accepted that SMSF trustees are usually well educated and have a sound understanding of the superannuation system in general as well as their own SMSF. As underlined by RiceWarner in their 2012 report about SMSF needs and concerns³⁶ 81 per cent of trustee respondents held a tertiary qualification. Income level of SMSF trustees are also an area of contrast, as the average income earned by SMSF trustees is \$109,000 while the median taxable income is \$57,000³⁷. These statistics all indicate that SMSF trustees have a positive bias to engage with their superannuation and retirement planning structures. The structure of SMSFs, and the approach that is taken to set one up is usually a considered and calculated decision. As stated before (on page 16) only 2 per cent of SMSFs are deemed non compliant. Dixon Advisory submits that the vast majority of times, a wide array of professionals are engaged to ensure that the establishment of and running of SMSFs is consistent. Further, there are also compulsory documents for the establishment of SMSFs which need professional supervision or approval before they are valid.

Trust deed

In establishing a SMSF, all documents need to be strictly adhered to for them to be valid. A trust deed is a technical document that usually requires the services of a solicitor to ensure that it is valid and operational.

Creation of an enduring power of attorney document

A number of elements need to be complied with to ensure an enduring power of attorney document is valid. Firstly, the document must be witnessed by a barrister or solicitor³⁸ and that witness must explain what it means to be an enduring power of attorney and be of the belief that the person signing understands the effect of the document.

³⁶ Rice Warner, 'Survey of financial needs and concerns of SMSF members (October, 2012)', page 2, <http://www.smsfassociation.com/media/93653/121127_spaa-vanguard_research_report.pdf>

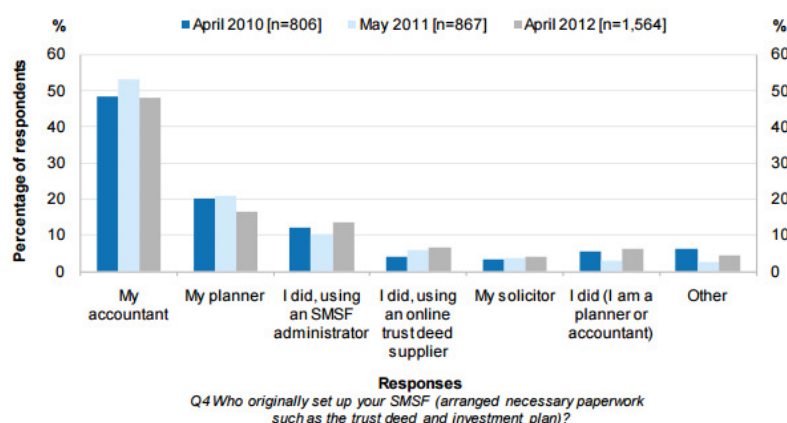
³⁷ Australian Taxation Office, SMSF Statistics 2013/14 – Income (viewed 22 February 2017) <https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Super-statistics/SMSF/Self-managed-superannuation-funds--A-statistical-overview-2013-2014/?page=14#SMSF_members_by_income>

³⁸ Powers of Attorney Act 2003 (NSW) s19(2).

Use of a professional in establishing an SMSF

The vast majority of SMSF trustees utilise professionals to establish their SMSF. As illustrated in the graph below, approximately only 12 per cent of individuals do not utilise a professional to set up an SMSF.

Figure 9: Intermediaries who set up SMSFs



Note: Base sample: 1,564 SMSF members sourced via an online survey. Samples were sourced from a broad-based survey of the Australian population and further SMSF members were recruited via Investment Trends' institutional clients.

Source: Investment Trends 2012 report, volume 2 of 3, p. 13.

Graph reference: Reference for graph: Australian Securities and Investments Commissions, 'SMSFs: Improving the quality of advice given to investors' (April 2013) page 18: figure 9 (viewed 23 February 2017) < Reference for graph: Australian Securities and Investments Commissions, 'SMSFs: Improving the quality of advice given to investors' (April 2013) page 18: figure 9 (viewed 23 February 2017)>

The multi-faceted nature of SMSF establishments and operations

Usually the preparation of an SMSF is multi-faceted. When it comes to the preparation of fund accounts and annual financial position, it is most commonly completed using an accountant.

When the process of annual tax returns is due for an SMSF, a tax agent will usually be utilised. The tax agent must also be registered with the Tax Practitioners Board (TPB) as well as being CA/CPA qualified. The Tax Practitioners Board:

- Prescribes a code of professional conduct that sets out certain requirements of all tax practitioners.
- A code of conduct that each tax practitioner must act honestly and with integrity, must be independent.

Fund administrators and/or financial advisers usually manage the day-to-day running of the fund and ensure that all individuals meet their reporting and administrative obligations. These fund administrators/advisers must possess the qualifications as discussed in the first section of Q7-2.

Legal practitioners are usually employed to prepare and update the fund's trust deed. All legal practitioners are required to have a practising licence. Further, all legal practitioners also need to comply with various rules (in NSW these are the Legal Profession Act 2004, the Legal Profession Regulation 2005 and the Solicitors Rules).

In fact, there are also firms like Dixon Advisory who provide all of the services available for setting up an SMSF. This includes the relevant accountants, lawyers, account managers, and tax agents to ensure that the full SMSF process is followed accordingly.

As outlined, the establishment and operational procedure of SMSFs is strongly aligned to appropriately utilising various professionals in ensuring that the SMSF is valid. The proactive nature of SMSF trustees ensures that they engage with professionals in accordance with their personal appetite as well as their regulatory obligations.

Chapter 7 Conclusion

A continued educational focus on the benefits of a corporate trustee structure, along with an emphasis on educating and empowering enduring power of attorneys on their obligations is expected to be highly beneficial for new and existing SMSF trustees

We suggest a practical way to assist SMSF trustees in their future decision making revolves around continued efforts, across the sector, in building awareness and understanding of succession planning as part of a broader retirement concept. Such models are well underway in some organisations. Dixon Advisory, as an example, offers a succession planning service and seminar series for existing SMSF trustees. Dixon Advisory provides specific information to potential new SMSF trustees about the importance of corporate trustees and establishing a succession plan, as well as delivering specialist content at annual client updates. Such presentations educate trustees about the importance of enduring power of attorney's and promote dialogue within the trustees' family. Dixon Advisory has designed an award winning education service focused on increasing financial capability and confidence in financial decision making, for the less active SMSF trustee (often women). The popular program is customised for the baby boomer and silent generation age group and aims to reduce risks for trustees who may need to take on the role of the primary decision maker.

It makes commercial sense that these type of programmes are taken up by other businesses operating in the sector. The high numbers of training sessions presented by the SMSF Association on this topic could also be considered as an indicator that the sector is proactively engaging individuals.

Rather than creating new administrative requirements, we strongly encourage considering how the existing regulatory avenues can be further utilised to raise awareness of succession planning. For example, the ATO Trustee Declaration (signed by every trustee at inception) could be expanded to include a specific clause referring to the importance of succession planning. This could include, in our view, touch on the benefits of corporate trustees, the importance of appointing an appropriate enduring power of attorney and educating the trustees of their role and responsibility.

Further, to help increase awareness for the over 1.08 million existing SMSF members³⁹, the annual reporting requirements to the Auditor or ATO could contain a declaration stating that the trustee has considered succession planning for each of the Trustees. The annual declaration could include considerations like: the benefits of corporate trustees, the importance of appointing an appropriate

³⁹ Australian Taxation Office, 'Population and asset allocation tables'; (viewed on 1 March 2017) < <https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Super-statistics/SMSF/Self-managed-super-fund-statistical-report-September-2016/?anchor=SMSFannualdata#SMSFannualdata> >

enduring power of attorney and executor as well as educating the trustee appropriately on their preferences.

We note SMSFs are highly regulated and there are extensive restrictions on who can advise on the establishment of SMSFs. These regulations significantly enhance the integrity of the system and improve consumer protections. As an additional safeguard, professional associations such as the SMSF Association have also incorporated extensive succession planning modules into member conferences and training seminars. Codifying succession planning into the annual continuing professional development requirement for financial advisors, accountants and auditors would provide further support in helping SMSF trustees and enduring power of attorneys execute their role appropriately and prudently.

Dixon Advisory submits that prescribed arrangements (as raised in Q7-1b) should only be activated as a last resort, where all other avenues have failed. This will ensure the integrity of strategic long term investment decisions as well as the maintenance of the self-directed nature of SMSFs.

Dixon Advisory continues to support the conclusions from the Cooper review not to extend the jurisdiction of the SCT to hear SMSF cases. Noting that such reform, *“would unfairly result in the majority of SMSFs, who would not utilise the SCT, cross-subsiding the few SMSFs who would use the services of the SCT”*⁴⁰.

⁴⁰ Above n1 (Cooper review) pg 229.

Bibliography

- 1) Brereton Paul (the Hon Justice), '*A trustee's lost is not a happy one- Discretionary trusts and self-managed superannuation funds*' Address to the National Family Law Conference, Canberra, 19 October 2010, <<http://www.austlii.edu.au/au/journals/NSWJSchol/2010/23.pdf>>
- 2) Carey Bernadette, Colin Biggers and Paisley Lawyers- Insights June 2013, 'Trustees must take care when investing trust funds: a cautionary tale from the life of crocodile dundee', <http://www.cbp.com.au/insights/2013/june/trustees-must-take-care-when-investing-trust-funds>
- 3) Cooper Jeremy et al, 'Super System Review: Review into the Governance, Efficiency, Structure and Operation of Australia's Superannuation System' (2009-10, Treasury, Australian Government) <http://www.treasury.gov.au/ConsultationsandReviews/Reviews/2009/Super-System-Review>
- 4) Figot Bryce, '*The law expects every trustee to do his duty*' Professional Planner, Issue 46 (September 2012) pg. 40
<<http://search.informit.com.au.ezproxy.uws.edu.au/fullText;dn=749985334881899;res=IELBUS>>
- 5) Gray, Heather, '*Managing disputes in SMSFs*', Taxation in Australia, Vol. 50, No. 7, 381
<http://search.informit.com.au.ezproxy.uws.edu.au/fullText;dn=924180871385532;res=IELAPA>
- 6) Jeff Holowaychuk, '*What does it take to be removed as an SMSF trustee? Views from the NSW Supreme Court*', ClearLaw Legal Bulletin (September 2012)
<https://www.cleardocs.com/clearlaw/superannuation/smsf-trustee-removal-views-from-court.html>
- 7) John Sutton, 'Carrying on financial services business without a licence' Armstrong Legal Website (viewed on 22 February 2017) <http://www.armstronglegal.com.au/corporate-crime/asic-offences/directors-financial-services-licenses>
- 8) Michael Chaaya, '*Trustee Duties and Legal Responsibilities Update- Roundtable Discussion 1*' presented at the Gold Coast Convention and Exhibition Centre 28-30 March 2011
<<http://www.aist.asn.au/media/6203/Mon%20MR3%201400-1500%20Chaaya,%20Michael%20-%20Trustee%20Duties.pdf>>
- 9) Rice Warner, '*Survey of financial needs and concerns of SMSF members (October, 2012)*', <http://www.smsfassociation.com/media/93653/121127_spaa-vanguard_research_report.pdf>
- 10) Sanderson Jemma, '*SMSF Guide 2014: Current issues and strategies for the self-managed superannuation funds adviser*' (Tax Institute Publication, 6th edition, 2014)

Websites

Authors extensively used the resources and guides available on:

- The Australian Taxation Office website: <https://www.ato.gov.au/>
- Australian Securities and Investment Commissions website: www.asic.gov.au
- New South Wales Trustee and Guardian Website: www.tag.nsw.gov.au
- New South Civil Administrative Tribunal website: www.ncat.nsw.gov.au
- The Treasury (Australian Government) website: <https://www.treasury.gov.au/>
- Australasian Legal Information Institute (AustLII): www.austlii.edu.au

Appendix 1

Document: Trustee declaration issued by the Australian Taxation Office

Instructions and form for SMSF trustees

Trustee declaration

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

 Read this declaration in conjunction with *Key messages for self-managed super fund trustees* at ato.gov.au/smsfessentials

NAT 71089-08.2014



Australian Government
Australian Taxation Office

Who should complete this declaration?

You must complete this declaration if you become a trustee or director of a corporate trustee (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.

You must also complete the declaration if you:

- have been directed to do so by us
- are a legal personal representative who has been appointed as 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 *Key messages for self-managed super fund trustees* at ato.gov.au/smsfessentials. It highlights some of the key points from the declaration and some important messages.

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 ato.gov.au/smsf
 - phone us on 13 10 20.

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 the information in *Key messages for self-managed super fund trustees* when making important decisions, such as those relating to choosing investments, accepting contributions and paying benefits.

- ❗ Do not send your completed declaration to us.

© Australian Taxation Office for the Commonwealth of Australia, 2014

You are free to copy, adapt, modify, transmit and distribute this material as you wish (but not in any way that suggests the ATO or the Commonwealth endorses you or any of your services or products).

Published by

Australian Taxation Office
Canberra
August 2014
JS 32597



Self-managed super fund trustee declaration

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
- give me a written direction to rectify any contraventions or undertake a course of education
- 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.

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.

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 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).

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
- appoint an approved SMSF auditor each year, no later than 45 days before the due date for lodgment of the fund's annual return and provide documents to the auditor 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 if the fund becomes an Australian Prudential Regulation Authority (APRA) regulated fund.

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 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
 / /