



28 January 2022

Financial Regulator Assessment Authority
The Treasury
Langton Crescent
PARKES ACT 2600

Email: FRAA@treasury.gov.au

Dear Sir/Madam,

SMSF ASSOCIATION SUBMISSION – REVIEW INTO THE EFFECTIVENESS AND CAPABILITY OF THE AUSTRALIAN INVESTMENTS AND SECURITIES COMMISSION

The SMSF Association welcomes the opportunity to provide this submission in response to the Financial Regulator Assessment Authority’s review into the effectiveness and capability of the Australian Investments and Securities Commission (“ASIC”).

Our submission focuses on the consultation questions in section one of the paper: ‘Strategic prioritisation, planning and decision making.’ While we acknowledge the five (5) ‘key questions’ asked, particularly questions (2) and (3), we have not segmented our response as our submission intersects each of the questions asked.

We acknowledge the important regulatory role of ASIC which includes a mandate to reduce the risk of harm to consumers, while helping to educate and inform them.

We have concerns about the potential for declining engagement between ASIC and professional associations and an emerging culture of reduced consultation and engagement.

As a case study, we refer, to the ASIC SMSF factsheet, *SMSFs: Are they for you?* published on 11 October 2019. This publication was released without any prior consultation, engagement, or notice. It was particularly disappointing given our long, productive, and consultative relationship with ASIC.

The factsheet produced was intended as consumer education and was a tool in an early intervention project with the ATO. All new SMSFs applying for registration were issued a copy of the factsheet during that project in 2019.

Whilst we support such activities to protect and educate consumers, the gross errors in the factsheet instead indicated a strong bias against the use of self-managed superannuation funds (SMSFs).

An apparent lack of willingness of ASIC to engage with industry to address these issues persisted for some time. Approaches by the Association were dismissed, or responses received were inadequate and did not sufficiently address the core issues. Concerns about the factsheet were raised in several parliamentary committee hearings.



The Association firmly believes that SMSFs are not suitable for everyone and frequently articulates this position. Education, access to reliable, impartial information and professional advice are essential to ensure the integrity of the SMSF sector.

The data supporting the factsheet was obtained from the Australian Taxation Office. Due to the nature of the data collected by the ATO, several key issues arose:

1. The data are collected from fields in the SMSF Annual Return lodged with the Commissioner of Taxation
2. The data collected are for a specific purpose, being the calculation of taxation and reporting information required by the ATO as regulator
3. The fields are limited due to the nature and purpose for which the data is collected
4. The data may not be suitable for alternative use, without significant qualification and/or careful analysis
5. Fund age or lifecycle stage are not considered. New fund establishment costs and wind-up costs are known statistical outliers, having disproportionately lower balances and higher costs, skewing the data set.
6. There is a diverse range of investment strategies and allocations adopted across the sector, which impacts a range of other data points such as, investment returns and advice, administration, and investment costs
7. The data are often summary in nature and may not be granular enough to allow for deeper analysis of the amounts reported

These issues were well known prior to the commencement of this project.

The Association and others have previously highlighted concerns regarding the inappropriate use of ATO data and its unsuitability for other analysis or comparison. The issue was prominent during the Productivity Commission inquiry into Superannuation in 2017 and 2018.

Concerns by various stakeholders on the incorrect use or application of ATO data, and the methodology adopted by the ATO in calculating returns and use of averages are well documented.

The use of data and technology are important in many ways to regulators. Quality and timely data allow regulators to actively monitor, interpret behaviours, identify trends, undertake early intervention activities, plan, and develop compliance activities, and to measure the outcomes of actions taken.

It is essential where such a strong reliance is placed on data sources that the suitability, details, timeliness, and limitations are all carefully considered. A readily accessible and cost-effective data source, including that of another regulator does not mean that it is fit for purpose.

It was therefore disappointing that ASIC sought to utilise ATO data when publishing its SMSF factsheet, without adequate consideration of the suitability of that data. The fact sheet was presented as a source of truth. It however was an example of confirmation bias. The data were used and presented in such a way to align with a desired outcome of directing consumers away from the use of an SMSF, even when professional opinion may have considered that an SMSF was a suitable option for some or many of those consumers.



Information published by ASIC has far reaching implications that extend beyond their consumer education and protection remit. We know that many Australian Financial Services Licensees (“AFSL”) will strictly adopt into their policies and procedures information and guidance published by ASIC. ASIC’s guidance in effect becomes ‘law.’ In this case, it has made the provision of advice recommending an SMSF for some advisers very challenging.

The response by some AFSLs to the ASIC factsheet was swift, with the ‘statistics’ published, including that an SMSF below \$500,000 was not cost effective, adopted as ‘black-letter law’. This is counter to the legislative requirements of the financial advice sector to consider the application of the best interest’s duty in the *Corporations Act 2001*, and compliance with the *Financial Advisers Code of Ethics 2019* which requires an ethical application of a best interest duties, including the need to consider the long-term effects of advice.

While an SMSF is not suitable for everyone, there are many examples where an SMSF may be more cost effective and appropriate, and therefore in the client’s best interests.

ASIC issued a media release on 22 June 2020 advising that the factsheet was now outdated and should not be relied upon. The reason given being the issue of a more current year’s data set, being the 2017-18 ATO SMSF annual return data.

At the end of what was the original, and lengthy two-page media release is a small statement that the factsheet has ‘expired’. A small note stating the same appears on the factsheet. Its expired status lacks the expected prominence given the issues highlighted and should at least be watermarked prominently across the face of each page.

The ASIC website also states that *“ASIC has decided not to update the factsheet and it is no longer being distributed.”* However, the factsheet clearly remains on the ASIC website and is easily discoverable when conducting a Google search.

The errors and misrepresentation of facts have never been acknowledged. Despite the very small notes made on the ‘currency’ of the document, it remains readily accessible, is still in active use, and has never been corrected. This is despite the factsheet being inaccurate and not fit for purpose when it was first published.

Projects of this nature should:

1. Have a clear framework and strategic objective
2. Be carefully planned and considered
3. Be accurate and based on reliable and appropriate data sources
4. Be aware of the risk of bias and actively seek to identify and minimise the risk of bias throughout the life cycle of a project
5. Be objective and balanced (e.g. consider both advantages and disadvantages)
6. Engage with professional associations and relevant stakeholders. Active engagement and clear lines of communication will assist ASIC in the performance of their role and deliver stronger and sustainable outcomes



7. Recognise that factsheets, info sheets and guidance published by ASIC significantly impacts stakeholders and are often adopted as 'black-letter law.' While this is not ASIC's intent, greater care, and consideration on how users will interpret and adopt should be considered
8. Take action to acknowledge and remediate errors or misinterpretations that may occur in a timely and clear fashion
9. In cases such as the example discussed, documents should be completely withdrawn or if continued to be published, have their status stated with clear prominence
10. Welcome feedback and engage with stakeholders in a constructive manner

If you have any questions about our submission, please do not hesitate to contact us, and we thank you again for the opportunity to provide this submission.

Yours sincerely,

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

John Maroney
CEO
SMSF Association

ABOUT THE SMSF ASSOCIATION

The SMSF Association is the peak body representing SMSF sector which is comprised of over 1.1 million SMSF members who have more than \$700 billion of funds under management and a diverse range of financial professionals servicing SMSFs. The SMSF Association continues to build integrity through professional and education standards for advisors and education standards for trustees. The SMSF Association consists of professional members, principally accountants, auditors, lawyers, financial planners and other professionals such as tax professionals and actuaries. Additionally, the SMSF Association represents SMSF trustee members and provides them access to independent education materials to assist them in the running of their SMSF.