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15 February 2011

Manager
Benefits and Regulation Unit
Personal and Retirement Income Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: strongersuper@treasury.gov.au

RE: Exposure draft –Tax Laws Amendment (2011 Measures No. 2) Bill 2011: SMSF Investment in Collectables and Personal Use Assets

Dear Sir/Madam,

The Association of Superannuation Funds of Australia (ASFA) would like to lodge this submission with respect to the above exposure draft legislation and explanatory memorandum.

The Association of Superannuation Funds of Australia (ASFA) is a non-profit, non-political national organisation whose mission is to advance effective retirement outcomes for members of superannuation funds through research and advocacy. We focus on the issues that affect the entire superannuation industry. Our membership, which includes corporate, public sector, industry and retail superannuation funds as well service providers some of whom deal with self managed superannuation funds (SMSFs), has over 90% of the approximately 12 million Australians with superannuation as members. ASFA members manage or advise on the bulk of the \$1.3 trillion in superannuation assets as at September 2010. ASFA is the only organisation that represents all types of superannuation funds and associated service providers.

Comments on the exposure draft legislation

ASFA has reviewed the draft and has some concerns with the construction of the exposure draft as discussed below.

The draft legislation proposes to allow the Government to make regulations relating to SMSFs investing in “collectables” and “personal use assets”, where these terms have the same meaning as the definitions in subdivisions 108B and 108C of the *Income Tax Assessment Act 1997* (ITAA). It is noted that these subdivisions are concerned with describing capital gains tax (CGT) assets. Of further note is the fact that the ITAA defines both terms as assets that “are used or kept mainly for your (or your associate’s) personal use or enjoyment.”

This appears to give rise to a fundamental conflict between the *Superannuation Industry Supervision Act 1993* (SISA), namely s62 the Sole Purpose Test, and the ITAA in that the former specifically prohibits current day use of assets by a regulated superannuation fund while

the latter requires the asset to be used mainly for personal use or enjoyment of the owner or an associate.

Further the definition of personal use assets is a broad definition that is unsuitable for the purposes of defining such assets in a superannuation fund. The definition as it appears in subsection 108-20(2) of ITAA refers to personal use assets as being “a CGT asset (except a collectable)”. A CGT asset is then defined in subsection 108-5(1) as any kind of property or a legal or equitable right that is not property.

ASFA understands that for convenience and ease of drafting where an appropriate definition exists in one part of the law, that that definition is used in other parts. It is ASFA’s view in this case however, that leveraging off the CGT definitions does not work in a superannuation sense as the CGT definitions are either too broad or are in conflict with key parts of SISA.

ASFA therefore recommends that for the proposed change to the SIS legislation to be effective an appropriate definition of collectable and personal use asset is needed and because of the unique aspects of the SISA, namely the Sole Purpose Test, that the definition of collectables and personal use assets reside within SISA itself.

Should you have any questions please contact our Senior Policy Adviser, Tony Keir, on 02 8079 0815

Yours sincerely

A handwritten signature in black ink that reads "D. Graus". The signature is written in a cursive, flowing style.

David Graus

General Manager, Policy & Industry Practice