
*Tax Laws Amendment (2013
Measures No. 1) Bill 2013: self
managed superannuation
funds and related parties*

The Treasury

**Submission by the Superannuation Committee of the Legal Practice Section of the
Law Council of Australia**

16 January 2013

SUBMISSION ON THE EXPOSURE DRAFT OF *TAX LAWS AMENDMENT (2013 MEASURES NO. 1) BILL 2013: SELF MANAGED SUPERANNUATION FUNDS AND RELATED PARTIES*

Submission of the Superannuation Committee of the Legal Practice Section of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian Legal Profession and represents some 60,000 legal practitioners nationwide. The Superannuation Committee (the Committee) is a committee of the Legal Practice Section of the Law Council of Australia. The Committee's objectives are to ensure that the law relating to superannuation in Australia is sound, equitable and demonstrably clear. The Committee fulfils these objectives in part by making submissions and providing comments on the legal aspects of virtually all proposed legislation, circulars, policy papers and other regulatory instruments that affect regulated superannuation funds.

In this submission, the Committee provides comments on the exposure draft of the *Tax Laws Amendment (2013 Measures No. 1) Bill 2013: self managed superannuation funds and related parties* released by Treasury for comment on 21 December 2012.

The Committee would be pleased to discuss its submission in greater depth and to provide any further information to Treasury in respect of the submissions made.

In the first instance, please contact the Chair of the Committee, Heather Gray on 03 9274 5321, heather.gray@dlapiper.com – or, in her absence, Chair of the Tax Sub-committee, Suzanne Mackenzie on 08 82102226, smackenzie@dmawlawyers.com.au.

1. KEY ISSUES

The key issues identified by the Committee are potential difficulties with the proposed changes to the following:

- the exemption relating to mergers of funds which assume that an asset will be acquired for value by the transferee fund;
- references to the acquisition or disposal of an asset to the extent it is "money";
- the anti-avoidance provisions not requiring that there be an intention to avoid the new prohibitions under sections 66A and 66B;

2. SUBMISSIONS

3.1 Merger exception

Proposed new paragraph 66A(3)(c) provides an exception to the prohibition on an SMSF acquiring an asset from a related party of the SMSF if it is acquired under a merger between regulated superannuation funds and at market value, as determined by a qualified independent valuer.

The Committee has two concerns in connection with this exception:

- (a) a mirror exception should apply under paragraph 66B(3) in respect of the transferor fund in a merger situation because it follows that if the transferee

fund will be acquiring an asset from a related party (which is likely to be an SMSF) then the transferor fund will also be disposing of an asset to a related party via the merger arrangement;

- (b) further, the requirement that it be acquired at market value implies that an amount would be paid or other consideration given to the transferor fund – however, this is most unlikely in a merger situation as the transfer will typically be made for nil consideration as the transferee fund takes on the liabilities with respect to benefits payable for the members of the transferor fund. Accordingly, we suggest that sub-paragraph 66A(3)(c) would be improved if it required the transferee fund to “recognise” the asset at market value, as determined by a qualified independent valuer.

3.2 Money exception

Instead of the express exceptions specified at sub-paragraphs 66A(3)(e) and 66B(3)(d) the Committee would prefer that each of proposed new sections 66A and 66B include the following:

“For the purposes of subsection 66A(2) acquire an asset does not include acceptance of money.”

“For the purposes of subsection 66B(2) dispose of an asset does not include payment of money.”

These alternative provisions put beyond doubt that any payment of money by or to a trustee of an SMSF will not be caught by the new provisions in a manner that is consistent with the existing operation of section 66. To change the approach as is proposed by the Bill gives scope to argue that the new paragraphs 66A(3)(e) and 66B(3)(d) have a different meaning and operation to the corresponding provision under existing subsection 66(5). In particular, the Committee would be concerned if there is any scope for the proposed money exceptions to be given a more narrow application than the corresponding provision under subsection 66(5).

3.3 Anti-avoidance

New section 66C introduces the anti-avoidance measures in connection with new sections 66A and 66B. However, in contrast to the anti-avoidance measures that apply under subsection 66(3), section 66C does not require that there be any intention to enter into a scheme to circumvent the prohibitions under sections 66A and 66B.

Given the breadth of the definitions of “scheme” and “related party” (in particular, due to the extremely broad application of the definition of “Part 8 Associate”) it would seem that there is potential scope for SMSF trustees to unwittingly breach section 66C.

As section 66C is a civil penalty provision then in order for criminal sanctions to be imposed either dishonesty or an intention to deceive or defraud a person is required to be established (see section 202).

However, for civil sanctions to be imposed, it is only necessary for a Court to establish that a person has contravened section 66C (which, as mentioned, could be innocently and unknowingly contravened).

Further, as a civil penalty provision, there is potential for an innocent contravention to cause an SMSF to be treated as a non-complying fund. In contrast the operation of subsection 66(3) is such that a contravention would only occur if the requisite intention to defeat or circumvent the prohibitions under subsection 66(1) is established.

Accordingly, the Committee would prefer that section 66C be drafted in similar terms to existing subsection 66(3) and for equivalent offence provisions to operate as those that would apply to non-SMSF regulated superannuation funds in breach of subsection 66(3).

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's constituent bodies. The Law Council's constituent bodies are:

- Australian Capital Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the constituent bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Joe Catanzariti, President
- Mr Michael Colbran QC, President-Elect
- Mr Duncan McConnel, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Ms Leanne Topfer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.