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REPLY TO MELBOURNE OFFICE

16 January 2013

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Dear Sir/Madam

STRONGER SUPER ACQUISITIONS AND DISPOSALS OF CERTAIN ASSETS BY SMSFS AND RELATED PARTIES

This submission by M+K Lawyers is a response to the Exposure Draft (and explanatory material) issued by the Government relating to acquisitions and disposals of certain assets between self managed superannuation funds ('SMSFs') and related parties.

In particular, the draft legislation requires acquisitions and disposals of assets between related parties and SMSFs be conducted through an underlying market where one exists, or where one does not exist, must be supported by a valuation from a suitably qualified independent valuer.

M+K welcomes any legislative reform which will have the effect of providing greater transparency to related party acquisitions and disposals, enabling SMSF approved auditors and the Commissioner, as Regulator, to monitor these transactions more effectively, which will enhance the integrity of the SMSF sector.

However, in our view, the draft legislation is concerning as it imposes a significant cost and compliance burden for SMSFs, for example, it:

- Requires the acquisition of certain in-house assets (those covered by subparagraph 66(2A)(a)) by the SMSF be supported by a valuation from a qualified independent valuer (regardless of the market value of the asset). For example, a SMSF may acquire some units in an ungeared unit trust that complies with Regulation 13.22C. The SMSF may acquire some more units in the same unit trust 2 months later. Under the draft legislation, an independent valuation is required for each acquisition.
- Requires every acquisition of business real property by the SMSF be supported by a valuation from a qualified independent valuer (regardless of the market value of the property).

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- Disallows shares to be transferred to and from a related party off-market, such that listed securities must be sold on and purchased through the market (we are uncertain of the implications if there is a small parcel of unmarketable shares - although there is scope for the regulations to deal with this).

A SMSF is a vehicle for saving and retirement planning. The new rules impose significant costs for the SMSF particularly in relation to non-market investments (including the cost of obtaining an independent valuation and additional brokerage costs), which would deplete the value of the assets of the SMSF. As a result there will be less funds available to provide retirement benefits thus imposing a greater burden on the government to fund retirees. The new requirements will also lengthen the time it takes for transactions between related parties and SMSFs to be undertaken while the parties obtain the required valuations.

The current law already requires listed securities, business real property and certain in-house assets (such as units in an ungeared unit trust that complies with Regulation 13.22C) be acquired at 'market value' (as defined in the *Superannuation Industry (Supervision) Act 1993*). Under the draft legislation, it appears an appraisal by a qualified, independent real estate agent would not be sufficient. We submit the current law is sufficient; requiring that an independent valuation be obtained would cause SMSFs to incur significant costs unnecessarily.

In our view, the draft legislation is also unclear about whether the rules apply equally for both direct acquisitions for consideration and also for in-specie contributions to the SMSF, and, which entity is liable to pay for the additional costs. In relation to the latter, if the costs are paid by the SMSF, it is another expense which will reduce the funds available for retirement. If the costs are paid by the related party, this may constitute a contribution to the SMSF (refer to Taxation Ruling TR 2010/1), and therefore impact the contribution caps.

Specifically, we have the following suggestions:

- The Government consider removing the requirement that an independent valuation be obtained in all circumstances, for instance, introducing specific exemptions from this requirement in relation to acquisitions and disposals of business real property and unlisted shares and units.
- For instance:
 - if the market value of a particular asset (where the market value is determined under the current law) is less than a certain market value, then the SMSF is not required to obtain a valuation from an independent valuer.
 - if there is a large number of small acquisitions or disposals between a SMSF and related parties of unlisted shares or units within an income year, then the SMSF is not required to obtain a valuation from an independent valuer in relation to each of the transactions. Please refer to the example above.
- The Government consider providing guidance for valuations for related party transactions where there is no underlying market.

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- The Government consider providing certainty in relation to the circumstances in which the new rules apply, for instance, whether they apply equally for both direct acquisitions for consideration and also for in-specie contributions to the SMSF.
 - The Government consider clarifying which entity is liable to pay for the additional costs (in particular the independent valuations), and the consequences (please refer above).

In summary, M+K supports any reforms designed to have the effect of increasing transparency but submits that the draft legislation could be amended to reduce the significant costs and compliance burden that would be imposed on SMSFs.

If you would like to discuss this matter, please do not hesitate to contact us.

Yours faithfully



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