

# REMOVAL OF PROPOSED RELATED PARTY RESTRICTIONS

Proposed changes to the SIS Act, limiting the transfer of assets from members to their SMSF, did not proceed.

When legislation titled the *Tax and Superannuation Laws Amendment (2013 Measures No. 1) Bill 2013* was introduced to Parliament, it contained a number of schedules covering a broad range of predominately taxation related amendments. Schedule 4, however, made changes to the Superannuation Industry (Supervision) Act 1993 (SIS Act) which, if passed, would have limited the ability of trustees to acquire certain assets from related parties. The particular assets included listed shares and business real property, assets which SMSF trustees have previously been able to acquire under specific conditions.

However, Schedule 4 was withdrawn before the Bill was passed, meaning no change to the previous rules at this stage, at least. Whether the change will be reintroduced at a later date remains to be seen, although the comments of the then Assistant Treasurer, the Hon David Bradbury, when announcing the removal of the schedule, stated that although the amendments were initially introduced following a recommendation of the Super System (Cooper) Review, "Further consultation with industry has indicated that the concerns the measure is seeking to address are not as pressing as they were at the time of the review."

In other words, the response from the industry that the Government was taking a sledgehammer to crack the proverbial walnut has been

listened to, and the words of the then Assistant Treasurer indicate that we may not see the changes reintroduced.

## What changes were proposed?

The changes proposed under the legislation included:

- **banning the off-market transfer of securities for which an underlying market exists.**

Investments such as shares that are listed on the Australian Securities Exchange (ASX) or similar markets could not have been transferred from a member to their SMSF. Instead, the member wishing to have their investments held in their SMSF would potentially have needed to:

- sell their investments on the market;
- await settlement and contribute the proceeds in cash to their SMSF; and
- have their SMSF purchase the investments on the market.

Ironically, such transactions could have breached the Corporations Act and ASX trading rules.

- **requiring a valuation from a qualified valuer for the transfer of other assets.**

In transferring any assets, for which no formal market existed, from a member to the SMSF, a qualified valuer would need to determine the value of the asset at the time of transfer. The transfer of investments

such as business real property, or units in a related unit trust, would have been caught under this section.

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The SIS Act, at s 109, currently contains provisions in regards to dealing with related parties, although the restriction limits transactions which are more favourable to the related party than to the SMSF, with no corresponding provision in respect of transactions more favourable to the SMSF.

## ■ unintentional acquisition of assets from related parties

Section 66 of the SIS Act currently prevents trustees of superannuation funds from intentionally acquiring an asset from a related party of the fund. The proposed changes included the addition of a new section, s 66A, specifically for SMSFs which removed the word 'intentionally' so that it read "A trustee ... must not acquire an asset from a related party of the fund."

The effect of the change is that, if an acquisition was inadvertently made from a related party, such as in the instance where a relationship between the related party and a member was unknown by the trustee of the SMSF, a breach of the SIS Act will have automatically occurred.

## ■ disposal of assets to related parties

The proposed legislation also included a new s 66B of the SIS Act which, for the first time, specifically limited the disposal to related parties of investments from a SMSF.

The provisions were basically a mirror image of the provisions regarding acquisition by a SMSF, including the requirement for a valuation by a qualified valuer in respect of assets which are not listed securities. The prohibition again did not include the word 'intentionally'

when prohibiting the disposal of assets to related parties.

## Why were the changes considered necessary?

In the Cooper Review, the ability to transfer assets between the SMSF and a related party were considered and whilst it was acknowledged that many related party transactions were consistent with the Government's retirement policy, it was felt by the panel "that the off market acquisition and disposal of assets between related parties and SMSFs ... lacks transparency, is inherently risky and is open to greater abuse than non-related party transactions".

In response, the industry accepted that potential for abuse did exist and suggested a range of much less draconian options than those proposed in Schedule 4 to the Bill.

For example, it was suggested that off market transfers in respect of listed investments be lodged with registries within a certain period of time of the actual transaction, so as to overcome the suggestion that the date of disposal and acquisition was 'managed' to be the most appropriate (i.e. the highest value or lowest value, depending on circumstances, over a period of time) for the parties involved.

## Where to from here?

It is likely that changes will be introduced to improve the transparency and reduce risk, but in a more reasonable approach.

Additionally, it could be expected that ATO audit activity of transactions between individuals and their SMSF will increase - in fact it appears that data matching has

resulted in certain audits being undertaken, particularly when share prices have significantly increased after the date of transfer of listed securities from a related party to their SMSF.

We strongly suggest that appropriate records be retained when transferring assets from an individual to their SMSF, or from the SMSF to an individual, so as to be in a position to answer any questions regarding timing which may arise in an ATO audit.

## More information

Should you have any queries or require more information, please contact the team at Topdocs on 1300 659 242.

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