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The Treasury  
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VIA EMAIL: [strongersuper@treasury.gov.au](mailto:strongersuper@treasury.gov.au)

Dear Sir/Madam,

**SISFA SUBMISSION ON DRAFT REGULATIONS RESTRICTING A SELF MANAGED SUPERANNUATION FUND'S INVESTMENT IN COLLECTABLES AND PERSONAL USE ASSETS**

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The position of SISFA is that the proposed legislation is unnecessary, highly complex and substantially overlaps with existing provisions of the superannuation law.

Investments of this nature by SMSFs are already covered by various provisions contained in the Superannuation Industry (Supervision) Act 1993 (SISA) and the Superannuation Industry (Supervision) Regulations 1994 (SISR) and are robust and specific enough to prevent members of self managed superannuation funds (SMSFs) from receiving a present benefit from collectable assets without the need for specific legislation.

Consider the following existing legislative provisions:

- Section 52 & Regulation 4.09 – Investment strategy requirements
- Section 62 – Sole purpose test requirements
- Section 65 – Financial assistance prohibition
- Section 66 – Acquiring assets from related parties prohibition
- Section 71 – In-house asset restrictions
- Section 109 – Arms length dealing requirements

On top of this, there are various ATO public rulings, determinations and interpretative decisions which clarify the operation of the existing provisions in relation to collectables and personal use assets. Please refer to our submission dated 15 February 2011 (attached) for further commentary on these points.

Consistent with our position, the following issues have been identified with the draft regulations:

**Regulation 13.18AA(1)** - The assets to which the proposed legislation applies is limited to specifically named investment assets. Is it intended that other collectable assets such as those listed below are to be excluded from the operation of these provisions?

For example:

- Livestock;
- Boat moorings;
- Licenses;
- Racehorses;
- Collectable bank notes;
- Non-wine beverages (eg, whisky, rum or cognac)
- Gold bullion;
- Discount cards;
- Barter cards;
- Plant & equipment;
- Water rights etc.

**Regulation 13.18AA(2)** – These provisions override the current in-house asset rules. With regard to the specified assets not being leased to a related party, this matter hinges on whether or not the arrangement is in the nature of a lease.

- How would the Regulator determine when exclusive possession has been granted?
- Are artworks or collectables on display (not rented) in the boardroom of a related business considered a lease arrangement?
- Is there a distinction between the meaning of the words “stored” and “lease arrangement” with regard to the mere location of a collectable?
- Is any use or storage in the residence of a related party deemed to be a lease arrangement?

Currently, an SMSF can lease collectables to related parties provided the fund complies with Part 8 and section 109 of the SISA, which requires the investment to represent no more than 5% of the market value of the fund and that lease is subject to strict commercial terms.

These draft provisions would severely limit the ability of the SMSF to derive an income return from the collectable asset.

**Regulation 13.18AA(3)** – The specified asset cannot be “stored” in the “private residence” of a related party. SISFA is of the view the manner of storage is more important than location. Moreover, many other issues arise with this sub-regulation in its current form.

- What is the intended meaning of the phrase “private residence”? Could the asset be stored in an unattached garage or granny flat or is legal title relevant?

- Can the asset be “stored” in a holiday house, apartment or flat of a related party subject to usual Part 8 and section 109 restrictions? Is the answer different if the property is leased to both related and unrelated parties throughout the year?
- What is the intended meaning of the word “stored”?
- Can a collectable be stored (displayed, and not leased) in a related business premises?
- Where should jewelry be stored if not in the residence of the related party?
- Would storage at the residence of a friend or relative be allowable?
- Are these provisions leading towards unrelated parties owning and storing each other’s collectables?
- Is the intention to drive an asset’s storage towards bank safes, galleries, restaurants even if this is contrary to maximizing fund returns?

**Regulation 13.18AA(5)** – There will no doubt be practical difficulties with regard to insuring collectables in the name of the fund. The requirement to insure all collectables, regardless of value, is unnecessarily restrictive and in many instances, unlikely to be possible.

- Is there an insurance market for all of the items mentioned in subregulation (1)?
- If insurance is available would an insurer insure within 7 days?
- If part of home & contents insurance, would this breach the storage rule?
- Is there a method with which general insurance can be separate to that of the fund trustee?

Assuming insurance is available, SISFA endorses the comments made by Williams Partners Independent Audit Specialists (WPIAS) in their submission and their suggestion the percentage of collectables should be at least 10% of a fund’s value before insurance is made mandatory. An extract from their WPIAS submission is below:

*“..... to introduce a legislative requirement for insurance of all collectibles, regardless of value, seems bizarre where there is no requirement in the governing legislation to insure other assets. EG: Fund assets of \$1,201,000 at market value comprise cash of \$200,000, artwork of \$1,000 and real property of \$1,000,000. The legislation will require the immaterial painting to be insured but not the real property? The only explanation appears to be to deter funds from investing in these assets. Furthermore, the exposure regulation requires insurance, not adequate insurance. If the fund holds a material investment in artwork of \$100,000 and insures same for \$50 has the trustee of the fund complied with the regulation?”*

**Regulation 13.18AA(6)** – The requirement that the item must not be used by a related party does not appear to cover all of the specified assets. Unwanted attention could be drawn to the fact that wine, artefacts, memorabilia among other collectables may be “used” because they are not expressly named in the provisions.

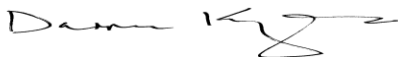
The provisions also prevent related parties from using a collectible car. Do the rules allow related parties to drive the vehicle for short distances for no reason other than to maintain engine and therefore the car’s market value?

**Regulation 13.18AA (7)** - Section 109 of the SISA already operates to ensure disposals of fund assets are on arm's length terms and auditors should already be obtaining sufficient appropriate evidence of market value when disposals occur in favour of related parties.

**Proof of ownership** – If the Government wishes to continue down this path then another fundamental flaw to the draft provisions is around proof of ownership. In most cases, it would be highly unlikely that a formal ownership register exists for collectables and personal use assets, so new provisions should be built to evidence and confirm ownership as a matter of priority.

**Conclusion** – In SISFA's view, the draft provisions in their present form serve no purpose other than phase out an SMSF's investment in collectables and personal use assets. If you have any questions about this submission, please contact the writer on (07) 3211 1132.

Regards,



**Darren Kingdon**  
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7 June 2011