1 March 2013

Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
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Parliament House
Canberra ACT 2600

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Dear Madam/Sir

Tax and Superannuation Laws Amendment (2013 Measures No. 1) Bill 2013

The Self Managed Superannuation Funds Professionals' Association of Australia (SPAA) welcomes the opportunity to make a submission to the Parliamentary Joint Committee on Corporations and Financial Services' review of the Tax and Superannuation Laws Amendment (2013 Measures No. 1) Bill 2013 ("the Bill"). Our submission to the inquiry focuses on Schedule 4 of the Bill, "Self managed superannuation funds and related parties."

SPAA believes that the Bill's proposed amendments take a sensible approach to transactions between SMSFs and related parties, with independent valuations being required where an asset is acquired from or disposed to a related party. We believe that the requirement to have an independent valuation for off-market transfers by SMSFs will ensure that off-market transfers are carried out with sufficient integrity to protect the retirement income system.

While we are comfortable with this approach, we encourage the Government to quickly expedite the release of the regulations which will govern how acquisitions and disposals of listed securities to and from SMSFs will function. We are aware of existing difficulties stemming from the *Corporations Act 2001* that make it difficult to govern off-market transfers for SMSFs. We believe the best approach to governing SMSF off-market transfers is via a *Superannuation Industry (Supervision) Regulations 1994* (SISR) operating standard. We have provided further details of our concerns about off-market transfers and proposed solution in the attachment.

They key points of this submission are:

- **SPAA supports the requirement to have an independent valuation to ascertain market value for off-market transfers with related parties.**
- **SPAA encourages the Government to expedite the release of the draft regulations prescribing how SMSF off-market transfers of listed securities are to operate.**
- **SPAA recommends a SISR operating standard approach to regulating the off-market transfer of listed securities between SMSFs and related parties. Alternatively, SPAA supports an on-market transfer solution where SMSFs are exempt from the *Corporations Act 2001* crossing provisions.**

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- **The prohibition of acquiring assets from and disposing assets to related parties of SMSFs should only apply to acquisitions and disposals intentionally involving related parties.**

- **The explanatory memorandum should provide examples of where the acquisition or disposal of an asset at market value should suffice valuation requirements for difficult to value SMSF assets.**

- **The amendments should include transitional provisions to cater for contracts entered into prior to 1 July 2013 where settlement occurs after 1 July 2013.**

These issues and SPAA's recommendations are discussed in detail in the Attachment.

About SPAA

SPAA is the peak professional body representing the SMSF sector throughout Australia. SPAA represents professionals, irrespective of their personal membership and professional affiliations, who provide advice to individuals aspiring to higher levels of participation in the management of their superannuation savings. Membership of SPAA is principally accountants, auditors, lawyers, financial planners and other professionals such as actuaries.

SPAA is committed to raising the standard of professional advice and conduct in the SMSF sector by working proactively with Government and the industry. In doing so, SPAA has contributed to SMSF advisors providing a higher standard of advice to SMSF trustees. This in turn has enabled trustees to make more informed decisions addressing the adequacy, sustainability and longevity of their own retirement savings. SMSFs offer trustees greater control and flexibility and have become an integral part of the Australian Superannuation landscape by providing significant and viable options for managers, business owners, executives and retail operators alike.

We would be happy to provide further information or to discuss any questions you may have about this submission with you.

Yours sincerely

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Listed security off-market transfers

Proposed SISR Operating Standard

SPAA has previously advocated and still advocates for a *Superannuation Industry Supervision Regulations 1994* (SISR) operating standard to govern off-market transfers of listed securities by SMSFs. We have attached our suggested operating standard for the Committee's consideration.

Our suggested SISR operating standards can be adopted to overcome the concerns raised by the Super Review Panel and the Stronger Super Peak Consultative Panel regarding SMSFs and off-market transfers. Our suggested SISR operating standard seeks to apply tighter restrictions on off-market transactions in order to quell any integrity concerns.

An important feature to highlight in the suggested SISR operating standard is that it requires SMSF trustees to forward an off-market transfer form to the relevant registrar within 5 business days of receiving it. This will ensure the time delay between the transfer of beneficial ownership and legal ownership is minimised and the potential for any price manipulation is severely reduced. We advocate that this requirement should be embedded in the SISR so that auditors will then have a clear obligation to review and report a breach of this requirement as a contravention.

We acknowledge that in most cases off-market transfers forms are forwarded to the relevant registrar within a few days but there will be occasions when due to workload and other considerations it may take longer than normal to forward such forms to the registrar. For example, a high volume of off-market transfers typically occurs around the end of the financial year and it may be difficult for many SMSF administrators to forward transfers forms to the relevant registrar in less than 5 working days.

The Government and Cooper have committed to improving integrity, consumer confidence and the efficiency and effectiveness of the super system and we believe the attached SPAA SISR operating standard.

Exclusive application to SMSFs

SPAA is concerned that the requirement to acquire listed securities from a related party (or to dispose listed securities to a related party) in a prescribed manner is limited to transactions involving SMSFs. Off-market transfers of listed securities also occur in the Australian Prudential Regulatory Authority (APRA) regulated sector of the superannuation industry, where the buyer and seller of the securities is essentially the same entity. This would suggest that similar integrity concerns regarding off-market transfers and the manipulation of transfer prices of listed securities would similarly arise in the APRA sector.

Contrary to APRA's observations, and based on our own observations and discussions with APRA funds (including a major Small APRA Funds (SAF) provider), off-market transfers do take place in APRA funds and members are permitted to nominate a transfer date which can be significantly different to the transfer date of legal ownership.

We believe that if off-market transfers of listed securities are to be regulated, the regulations should apply to all superannuation funds, not just SMSFs. This would make sure that all superannuation funds are treated equitably, and one sector of the superannuation market is not treated favourably over another, ensuring an efficient level playing field for retirement income vehicles.

An alternative solution

SPAA would support a move to ensure that the acquisitions and disposals of listed securities involving SMSFs and related parties occurred on-market if SMSFs were exempted from the *Corporations Act 2001* crossing provisions (section 1041B) by either amendment to the Act or by regulations. We believe this would be an appropriate alternative solution as the relevant transactions are not seeking to manipulate the market by crossing but are merely transferring securities from one party to another. Exempting SMSFs from the crossing prohibition would permit transactions which effectively transfer listed securities between a SMSF and a related party to occur in an on-market method without contravening the *Corporations Act 2001*.

Change from intentional acquisition

The Bill changes the existing requirement in section 66 of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) that an SMSF must **intentionally** acquire an asset of a related party of a fund to be prohibited from acquiring the asset. The proposed section 66A has changed the requirement from "must not intentionally acquire an asset from a related party of the fund" to "must not acquire an asset from a related party." We understand that the original wording of section 66 of the SIS Act included "intentionally acquire" to ensure that acquisitions that were inadvertently or unknowingly made from related parties were not caught by the prohibition. We are concerned that the change from this wording in the proposed section 66A will result in expanding the operation of the related party asset prohibition for SMSFs to cases that should not be caught by the prohibition. This is especially relevant due to the complexity of the definition of related party in the SIS Act which can result in entities being a related party of a fund, even where there is little evidence of a direct link between the fund and the entity.

An example of such a case could be a SMSF that acquires an investment from what appears to be an unrelated party but due to a series of ownership links and the operation of the SIS Act related party definition, the entity invested in is a related party. This could happen in the case of a company ("Company A") which is an employer-sponsor of the SMSF, and is consequently defined as a related party of the SMSF, and a subsidiary of Company A ("Company X") which is further down the chain of ownership and is defined as a related party.

For example, Greg, an employee of Company A, a public company which is an employer-sponsor of the SMSF that Greg is a trustee/member of, purchased an asset from Company X in capacity as trustee of the SMSF. If Company A held more than 50% of the shares in Company B which held at least 50% of the shares in Company C and so on until we got to Company X, then the asset would be acquired from a related party. However, Greg, acting in capacity as trustee of the SMSF, did not have evidence of the ownership linkage between Company A and Company X and acquired the investment in Company X, believing it was not a related party. Under the existing section 66 of the SIS Act Greg would not be caught by the operation of the related party prohibition because he

did not **intentionally** acquire an asset from a related party. However, under proposed section 66A, Greg would likely be caught by the prohibition unfairly.

The need for the provisions to apply only to intentional acquisitions of an asset from a related party is made more relevant by the penalties that are attached to the ban on related party acquisitions. A contravention of the related party acquisition rules can be punished with an administrative penalty from the ATO under section 166 of the SIS Act. A contravention of either subsections 66A(2) or 66B(2) attracts a penalty of 60 penalty units which currently translates to a $10,200 penalty. We believe that a $10,200 penalty for an unintentional contravention of the related party acquisition rules is an excessively harsh punishment due to the broad operation of the Bill's proposed related party acquisition provisions. Also, it should be noted that both provisions are civil penalty provisions.

We believe that the new section 66A should follow the wording in the existing section 66 so that subsection 66A(2) reads:

> A trustee or investment manager of a self managed superannuation fund must not ***intentionally*** acquire an asset from a related party of the fund.

This would continue the effect of the original section 66 by only prohibiting intentional purchases of related party assets (outside the exceptions) and not penalise inadvertent purchases of assets from related parties. This would also maintain an equitable position between APRA-regulated superannuation funds regulated under the amended section 66 and SMSFs under proposed section 66A. We do not see any reason for holding SMSF trustees/investment managers to a higher standard than APRA-regulated superannuation fund trustee/investment managers in regards to mistakenly acquiring an investment from a related party.

A similar principle applies to the wording of the proposed section 66B regarding disposals to related parties — that is, the prohibition should only apply where an asset is disposed of to a related party intentionally.

Qualified independent valuations

The Bill's proposed amendments will require the market value of a non-listed asset acquired by a SMSF from a related party, or a non-listed SMSF assets sold to a related party, to be determined by a qualified independent valuer.

The Bill says a valuer will be considered a "qualified valuer" either through holding formal valuation qualifications or by being considered to have specific knowledge, experience and judgement by their particular professional community. This may be demonstrated by being a current member of a relevant professional body or trade association.

However, there are many types of assets held by SMSFs (many types of collectables for example), where no individual has the specific knowledge, experience and judgement necessary to be considered a qualified valuer. In these scenarios, the absences of a qualified independent valuer may result in the SMSF being unable to dispose of the asset which may then prevent the SMSF from being wound up even if it is clearly in the member's best interest to do so.

To overcome these issues, consideration should be given to removing the requirement to obtain a qualified independent valuation in situations where the SMSF trustees, after making reasonable attempts, has been unable to find a qualified independent valuer. In these situations the acquisition or disposal of the asset at market value should suffice. The explanatory material could be used to explain and clarify what would constitute "reasonable attempts" for this purpose.

There will also be situations where a qualified independent valuer does exist but the requirement to obtain a market valuation as determined by a qualified independent valuer provides little or no added benefit. Units held by an SMSF in a widely held unit trust are an example. In the vast majority of cases the investment manager of the widely held unit trust will declare a regular unit price using valuations practices which comply with industry standards.[1] Requiring the unit holder to obtain a market value for the units as determined by a qualified independent valuer in this scenario serves little purpose and will only result in unnecessary transaction costs being incurred by the SMSF.

To overcome these practical issues, the explanatory material could be used to outline scenarios where the market value of an asset, which has been determined independently, would suffice as a market value determined by a qualified independent valuer. To overcome issues with out-dated unit prices being used as the transfer value, and to uphold the integrity of these new provisions, it should be a requirement that the last declared price prior to the date of transfer is used.

Transitional provisions: contracts entered into before 1 July 2013

We believe that the Bill needs a transitional provision to cater for contracts entered into prior to 1 July 2013 but where settlement occurs after 1 July 2013. In these circumstances, the current law – which is proposed to operate until 30 June 2013 – should apply to acquisitions where the contract was entered into prior to 1 July 2013. This is important, as contracts made under the existing law should benefit from the certainty of that law, especially as settlement can often occur long after the contract is entered into. We believe it would be an unfair result for trustees/investment managers contracting to acquire an asset before 1 July 2013 to be subject to the new rules when the contract settles.

This approach to transitional provisions was used for the change to the definition of in-house asset in 1999. The transitional rules for those changes ensured a smooth and efficient change to the new in-house asset definition. Similarly, transitional rules for the changes to acquisitions and disposals with related parties would ensure a similarly smooth transition.

[1] For example, the Financial Services Council has recently issued pricing valuation standards for members of their association who manage investment trusts.

Off-market transfers — SPAA proposed SIS Operating Standard

1.	In-specie contributions and rollovers
1.1	A contribution or rollover by way of a transfer of an asset is considered to have been made when the trustees of a SMSF obtains ownership of the asset from the contributor.[2]
1.2	For classes of property, where there is no formal registration process that evidences ownership, the ownership of property will pass when the SMSF trustee acquires [physical] possession of the property.[3]
1.3	For a class of property, the legal ownership of which is evidenced by a system of formal registration (for example shares in a publicly listed company or real estate), legal ownership will pass when the SMSF trustee is registered as the legal owner. However, beneficial ownership may be transferred earlier.
1.4	A SMSF trustee acquires the beneficial ownership of real property when the trustee obtains possession of a properly executed transfer that is in registrable form together with any title deeds and other documents necessary to procure registration of the superannuation provider as the legal owner of the land.
1.5	A SMSF trustee acquires the beneficial ownership of shares or units in an Australian Stock Exchange listed company or unit trust when the trustee obtains a properly executed off-market share transfer in registrable form.
2.	Transfer of beneficial ownership
2.1	On receipt of a properly executed off-market share transfer form, SMSF trustees must forward the registrable form to the appropriate registrar within: - five (5) business days from the date of receipt of the off market transfer by the SMSF trustees; or - the time required for notification to the register whether required by statute, legislation or guidance (ie ASX guidance statements for notification)

[2] Tax Ruling TR 2010/1 - The Commissioner accepts that a superannuation provider obtains ownership of an asset when beneficial ownership of the asset is acquired and that beneficial ownership can be acquired earlier than legal ownership.

[3] However, the Commissioner accepts that ownership of property may be acquired earlier than [physical] possession is obtained, for example, on execution of a deed of transfer of the property.