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14 February 2011

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Dear Sir/Madam,

**FORMAL SUBMISSION TO BE CONSIDERED IN RELATION TO THE DRAFTING
OF TAX LAWS AMENDMENT (2011 MEASURES NO.2) BILL 2011: SMSF
INVESTMENT IN COLLECTABLES AND PERSONAL USE ASSETS**

The Australian Artists Association (AAA) hereby makes its submission in response to the Media Release No. 022 issued by the Assistant Treasurer and Minister for Financial Services and Superannuation, The Hon. Bill Shorten MP on 1 February 2011.

We are disappointed that we had to learn about these proposals from a Press Release, and concerned that we have only been provided with a time span of two weeks to prepare our submission. With so many individuals and businesses whose livelihood is likely to be affected by the proposed legislation, it does not provide us with an opportunity to adequately research some of the repercussions and to canvas the views of our members.

In making this submission, particular reference is drawn to the following documents:

- (1) Australian Labor Party Campaign Media Release 30 July 2010 issued by both the Minister for Financial Services, Superannuation and Corporate Law and the Minister for Environment Protection, Heritage and The Arts: "New standards for storing collectables and personal use assets held by self-managed superannuation funds";
- (2) SPAA Best Practice Guidelines for acquiring and holding artworks in an SMSF; and

- (3) Motion moved by Senator Christine Milne and passed by the Federal Senate on 10 February 2011, in particular clause (b) part (ii) of that motion.

Background to Submission

The Australian Artists Association ran the Save Super Art campaign against the recommendations of The Cooper Review to ban artworks and collectables from self-managed superannuation funds (SMSFs) in 2010. It also provided input to the initial drafting of the SPAA Best Practice Guidelines.

Subsequent events to the drawing up of these audit guidelines have caused the AAA concern as to their intent and to the effect of the wider Australian art market should they be implemented in their draft stage without further refinement. We refer in particular to:

- The collapse of Smith & Hall in October 2010;
- The general decline in sales activity in both the primary and secondary art market, especially in Aboriginal art in the past 9 months;
- The ability of the art market to absorb any further significant changes other than what has been wrought by the introduction of the resale royalties legislation since June last year.; and
- The additional costs of complying with some proposed guidelines for storage and valuation of artworks.

Firstly - Smith & Hall, which commenced its operations as Galleries Direct, was an art gallery which based its business model heavily on the ability to conform to laws which would allow SMSFs to purchase artworks from it. SMSFs were sold artworks for which Smith & Hall guaranteed a rental return. In fact its model would have complied with Example 1.1 to the Explanatory Memo to the Draft Bill which is the subject of this submission.

Unfortunately the art market cannot be treated like the property market and Smith & Hall found itself in more and more trouble the longer its business model ran due to conflicts of interest in the selling and the valuing of works to its clients. This had a flow-on effect to the ability to service the rental guarantees made on the underlying assets i.e. the artworks. By the time the business model completely collapsed in October 2010 more than 800 artworks and \$4 million of investor funds (with many of those investors being SMSFs) were entangled in its ruin.

The AAA is not convinced that the adoption of the SPAA Best Practice Guidelines would prevent a recurrence of another Smith & Hall business model seeking to exploit legislation governing the way SMSFs are able to acquire artworks. At the same time the AAA recognises that there are occasions when it is appropriate for a SMSF to lease out its artwork investments. For your reference we attach an article on the Smith & Hall collapse by Jane Raffan that was published by the Australian Art Sales Digest on 13 October 2010.

Secondly - there is no doubt that the art market was seriously affected by the Cooper Report Recommendations of SMSF' investing in art. Despite the eventual undertakings by the Government to reject the Recommendations,(subject to guidelines being introduced which would ensure that members of Funds would receive no personal benefit), these undertakings have not translated into increased activity in the art market. We are regularly consulted by art investors, who have put off buying art until they are satisfied that new regulations will not create unreasonable demands on them.

Thirdly - it is now clear that the resale royalty legislation introduced in June 2010 is causing significant problems within the Australian arts industry. Without going into detail the main cause of these problems is the compliance and reporting obligations placed on commercial galleries, which has made some business owners question the wisdom of remaining in such an industry and in the writer's opinion this has caused a barrier to entry for new participants.

The AAA is extremely concerned that the proposed legislative changes to the way that SMSFs are able to invest in Australian art will worsen the already tenuous condition of the Australian art market.

Finally - we are concerned that the additional expenses such as storage fees, insurance and maintenance, associated with the storage of artworks under the new proposals, will create an additional burden on investors.

Due to these concerns, as part of our submission, it is proposed that the storage of artworks be permitted on the premises of related parties, provided that these works are not on display. Such an arrangement could be satisfied by a Statutory Declaration by the SMSF trustees to the Fund's auditors.

It is also proposed that the in-house asset rule be retained for artwork investment by SMSFs. We submit that the in-house asset rule as it applies to artwork investment operates in a different way to other SMSF investments (like property) because the benefit enjoyed by the member is merely incidental as it applies to an aesthetic and not a monetary benefit.

Concerns have also been expressed by investors as to the cost of annual valuations of all artworks of SMSFs, and suggestions have been made that with the exception of current acquisitions, valuations of the whole collection should not be required every year.

We would also suggest that the valuer should not be the vendor of the artwork or associated with the vendor.

In summary we quote from a speech Axa Asia-Pacific Holdings chief executive Andrew Penn made in July last year where he called on the government to adopt a balanced approach to regulatory change within the financial services sector.

To quote Mr Penn:

"Whilst we understand the drivers for some of the regulatory changes being contemplated, it is also important to be aware that they can have unintended consequences. While the industry will obviously respond to regulatory changes, one of the challenges they present for Australia and Australians is the ongoing uncertainty they create.

"It is important to balance the need for regulatory change with the need to provide a stable environment that supports confidence for all superannuation members, otherwise we will undermine private savings.

"I understand the logic behind the recommendation to ban the holding of art in SMSFs. However, I don't agree with it.

"We need to ensure that we continue to support our development culturally as well as economically. Australia has a talented but fragile visual arts sector and the benefits of protecting this far outweigh the rationale for this specific recommendation."

Submission

The AAA submits the following:

1. This submission relates to the guidelines for acquiring and holding artworks in an SMSF and does not relate to other classes of collectables.
2. The definition of artwork per the *Resale Royalty Right for Visual Artists Act 2009* is **accepted for the purposes of this submission.**
3. In the event that the drafting of *Tax Laws Amendment (2011 Measures No.2) Bill 2011: SMSF Investment in Collectables and Personal Use Assets* makes reference to the SPAA Best Practice Guidelines for acquiring and holding artworks in an SMSF the AAA makes particular reference to these audit guidelines in parts 4 to 8 of this submission.
4. In relation to the SPAA best Practice Guidelines Part 1 Investment assessment:
 - a. Part 1.1 is accepted.
 - b. Part 1.2 is accepted.
 - c. Part 1.3 should read as follows: "SMSF trustees must obtain (1) professional advice from a suitably qualified art valuer to assist with the assessment of the appropriateness of the investment; and (2) professional independent advice from a licenced financial advisor in relation to the associated SMSF compliance issues." The AAA would recommend a person registered with the Federal Government's Cultural Gift Scheme as the minimum professional standard for an art valuer.

5. In relation to the SPAA best Practice Guidelines Part 2 Acquisition:
- a. Part 2.1 should read: "The acquisition price must be accompanied by a written opinion from a suitably qualified art valuer who is independent to the art market professional selling the artwork."
 - b. The first paragraph of Part 2.2 is accepted.
 - c. The second paragraph of Part 2.2 should read as follows: "Photographic documentation must be included with the valuation. This documentation should be updated on a regular basis during the life of the artwork to correctly identify the artwork."
 - d. Part 2.3 is accepted save for our submission #6b. below.
 - e. Part 2.4 is accepted.
 - f. Part 2.5 is accepted.
 - g. Part 2.6 is accepted.
6. In relation to the SPAA best Practice Guidelines Part 3 Asset security and maintenance:
- a. The first paragraph of Part 3.1 is accepted.
 - b. The second paragraph of Part 3.1 should read as follows:

The investment is not to be displayed in any premises owned or occupied by related parties, however it may be stored in these premises, under conditions that satisfy the Sole Purpose test as set out by the ATO in SMSFR 2008/2. The terms and conditions of existing lease arrangements with related parties, which are currently permitted under the SIS Act, can remain in place until the expiration of the lease, including any option period or 5 years, whichever is the latter to the extent that such lease agreements were contracted on artworks whose value did not exceed 5% of the net asset value of the SMSF."
 - c. Part 3.2 is accepted.
 - d. Part 3.3 is accepted.
 - e. Part 3.4 should read: "A condition report from the valuer must be included in the purchase documents of an artwork. The SMSF trustees must review and update the condition report on a regular basis during

the life of the artwork to identify any major restoration or recent additions made or recommended to be made to the artwork.”

7. In relation to the SPAA best Practice Guidelines Part 4 Valuation and impairment:
 - a. Part 4.1 is accepted with the proviso that valuations of artworks are to be carried out every 2 years.
 - b. Part 4.2 is accepted.
 - c. Part 4.3 is accepted.
8. In relation to the SPAA best Practice Guidelines Part 5 Disposal:
 - a. Part 5.1 should read: “The SMSF trustees should obtain a written opinion from a suitably qualified art valuer immediately before disposing an artwork to ensure the investment is sold for its market value.”
 - b. Part 5.2 is accepted.

We recognise that this Submission represents a change from the SPAA Guidelines prepared last August, to which the AAA had input.

However, with the benefit of additional research, we submit that the current SPAA Guidelines would not achieve the requirements set out by the Cooper Review, and would lead to untold damage to the Australian art industry.

We consider the regulations we now propose will achieve the appropriate level of fiduciary care required for SMSF's by the Cooper Review, without causing unintended damage to the Australian arts industry.

We submit that our revised proposals would achieve the Government's stated aims, while delivering on the Australian Senate's recent commitment to "ensure that any conditions do not act as a disincentive for DIY superannuation funds to invest in Australian art.

I would be happy to discuss our proposals in greater detail.

Yours sincerely



Tom Lowenstein
Executive Director



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New Standards for Storing Collectables and Personal Use Assets Held by Self-Managed Superannuation Funds

Chris Bowen, Peter Garrett *posted Friday, 30 July 2010*



A re-elected Gillard Labor Government will ensure that from 1 July 2011 collectables and personal use assets owned by self managed superannuation funds (SMSFs) must be stored according to new rules to prevent them from giving rise to a personal benefit.

SMSFs can continue to invest in personal use and collectable assets provided they are held according to these new legislative standards that will ensure the assets do not give rise to a personal benefit and are held for the purposes of providing retirement benefits. Existing assets that cannot meet these rules must be sold within five years.

Federal Labor recognises that collectables like artworks can be a legitimate asset class, providing investment opportunities for self managed retirees as well as important commercial benefits to Australia's artists.

However, Labor acknowledges concerns over such assets attracting superannuation's concessional tax treatment while being available for 'personal benefit' (for example, being displayed in the home of a super fund member).

There are currently no enforceable guidelines around how these assets can be held to prevent them from giving rise to such personal benefits.

The Government acknowledges the concern and uncertainty that arose in the self managed fund and art and collectables community following the publication of the Super System (Cooper) Review report. The Review recommended that SMSFs that are not APRA regulated funds be prohibited from investing in such assets, and that a five year transition period should be applied to existing SMSFs, during which SMSFs would be required to convert to a small APRA fund or dispose of existing collectable and personal use assets (Recommendation 8.14).

That is why it was important that the Gillard Labor Government thoroughly consider and outline its detailed response on this issue as quickly as possible.

Labor's approach is broadly in line with the best practice artwork investing guidelines that were recently released by the Self Managed Super Funds Professionals Association of Australia (SPAA) and the Australian Artists Association (AAA).

A re-elected Gillard Labor Government will consult with industry and community groups on the details of legislation to implement these new standards.

This announcement will have no cost to the budget.

30 JULY 2010

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SPAA Best Practice Guidelines for acquiring and holding artworks in an SMSF

The guidelines have been prepared in conjunction with and endorsed by the Arts Association of Australia (AAA) and the Australian Antique & Art Dealers Association (AAADA)

1. Investment assessment	
1.1	The investment must be consistent with the fund's investment strategy and the sole purpose of providing retirement benefits to members (the "sole purpose test"). SMSF trustees must consider the risk involved in acquiring, holding and realising the investment and the likely return from the investment having regard to the fund's investment objective and likely cash-flow requirements. ¹
1.2	The investment must be permitted by the fund's governing rules.
1.3	SMSF trustees must seek professional independent advice from a licensed financial advisor to assist with the assessment of the appropriateness of the investment and associated SMSF compliance issues. SPAA recommends a SPAA SMSF Specialist Advisor (SSA).
2. Acquisition	
2.1	The acquisition price must be accompanied by a professional independent valuation from an appropriately qualified valuer. ²
2.2	The investment must be appropriately authenticated, provenance and the didactics confirmed and documented (this includes the source or history, the name of the artist, a correct description, its key and any distinguishing features, the year it was completed). This information should be maintained in the same format as art professionals are required to report commercial resales to comply with the <i>Resale Royalty Right for Visual Artists Act 2009</i> . The documentation must include photographs showing the back, front and other relevant angles of the artwork. Annual date marked photographs of in situ storage should be taken and any other relevant details so as to correctly identify the artwork.
2.3	SMSF trustees must be able to reasonably demonstrate the commerciality of any lease and/or exhibition terms and conditions. The investment must not be leased either directly or indirectly under a formal or informal arrangement to a related party of the SMSF. ³ Existing lease arrangements with related parties, which are currently permitted under the <i>Superannuation Industry (Supervision) Act</i> (SIS Act) are permitted to remain in place until the expiration of the lease, including any option periods or 5 years, whichever is the lesser.
2.4	The investment must not be acquired from a related party of the SMSF whether intentionally or unintentionally. ⁴
2.5	The investment must not be co-owned by the fund under a joint tenancy or tenants in common agreement with a related party of the fund.
2.6	The investment must be insured for its market value against damage or destruction from the signing date on the purchase contract and annually thereafter.

Please turn over...

¹ The sole purpose test is defined in section 62 of the Superannuation Industry (Supervision) Act (the SIS Act). The requirement to formulate and give effect to an investment strategy is a deemed trust deed covenant under section 52(2) of the SIS Act.
² Art valuers must be a member of an internationally recognised valuation body or registered as an art valuer under the Australian Government's Cultural Gifts Program.

³ "Related Party" is defined in section 10(4) of the SIS Act.

⁴ Acquisitions of certain assets from members and other related parties of regulated superannuation funds is prohibited under section 66(1) of the SIS Act.



3.	Asset security and maintenance
3.1	Storage or exhibition conditions must comply with the accepted climate ranges for the particular class of art so as not to cause deterioration to its condition. The investment must not be stored or maintained in any premise owned or occupied by any related party. The terms and conditions of existing lease arrangements with related parties, which are currently permitted under the SIS Act, can remain in place until the expiration of the lease, including any option period or 5 years, whichever is the lesser.
3.2	Authentication details should be maintained in the same format as art professionals are required to report commercial resales to comply with the <i>Resale Royalty Rights for Visual Artists Act 2009</i> .
3.3	SMSF trustees must review the appropriateness of the investment annually. This assessment must include: <ul style="list-style-type: none"> • a review of the fund's investment strategy and whether or not the investment remains consistent with that strategy; • the sole purpose test; • other requirements in the SIS Act and SIS Regulations; and • SPAA best practice guidelines.
3.4	A condition report from the valuer must be included in the purchase documents and must be reviewed annually by the SMSF trustees. This report must contain details of the condition of the artwork and any major restoration or recent additions made or recommended to be made to the artwork.
4.	Valuation and impairment
4.1	The investment should be valued annually by an appropriately qualified valuer. ⁵
4.2	To maintain the currency of agreements and to ensure commerciality, insurance and lease/exhibition terms and conditions must be reviewed annually.
4.3	The Approved Auditor must, as part of each annual audit, apply appropriate audit procedures to verify the existence, ownership and valuation of the artwork.
5.	Disposal
5.1	The investment must be valued by a qualified valuer immediately prior to disposal and sold for its market value. ⁶
5.2	The disposal of the investment must comply with the superannuation payment standards. In-specie lump sum benefit payments are permitted as long as the payment complies with the superannuation payment standards in the SIS Act. ⁷

⁵ Art valuers must be a member of an internationally recognised valuation body or registered as an art valuer under the Australian Government's Cultural Gifts Program.

⁶ Art valuers must be a member of an internationally recognised valuation body or registered as an art valuer under the Australian Government's Cultural Gifts Program.

⁷ Section 10 of the SIS Act outlines the payment standards applicable to regulated superannuation funds.

Thursday 10 February 2011

The Senate:

(a) Notes:

- (i) That the Cooper Review into superannuation last year recommended that private investment in art no longer be eligible investments for DIY superannuation schemes;
- (ii) That, after a strong campaign by artists concerned that the local art market would be seriously damaged by this move, the government promised during the 2010 election campaign to reject that recommendation; and

(b) Calls on the government to:

- (i) Abide by its election promise; and
- (ii) Ensure that any conditions do not act as a disincentive for DIY superannuation funds to invest in Australian art.

Christine Milne

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Smith & Hall Collapse Sends a Chill through SMSF Sector

By Jane Raffan, on 13-Oct-2010

Having recovered from the tremors of the Cooper Review recommendation to ban art as an asset class in their Self Managed Super Funds, trustees will now have to overcome the rolling aftershocks, including potential loss of value across holdings, and financial imposts associated with impending government regulation.

The collapse of Smith & Hall (formerly Galleries Direct) is reported to involve 800 works of art with a value in excess of \$4 million[1]. Today's coverage in the Financial Review reveals the company's modus operandi behind their business model, whereby investors were induced to purchase works on the promise of capital gain, in addition to a dividend style income stream from the works being leased out with a guaranteed rental return of between 6% and 8% a year.

What the article doesn't reveal is that Smith & Hall specifically targeted investors of Self Managed Super Funds (SMSFs). Various company marketing spiels indicate that their investment model was "particularly popular with owners of self-managed super funds...", and provided "...a healthy income from the asset, while it is potentially appreciating in value".

The leasing angle is an attractive element of the investment pitch because of the Australian Tax Office's controversial 'sole purpose' test, which prohibits trustees with art holdings from enjoying the *additional benefit* of having their assets on the walls. The Smith & Hall model, used by several other investment operators, appeals to 'art lovers' because the rewards wrap pleasure and profit together in an emotionally satisfying bundle.

But in the end it's the lure of profit that clinches most deals.

In 2009, an article from one of the many online magazines devoted to superannuation issues promoted Smith & Hall as having provided art market analysis that showed Aboriginal Art outperforming other art investment options, with a yield of 24.8% compound annual growth rate (CAGR) compared to 15.1% for other blue chip artists.[2]

The article further extrapolates these statistics to suggest that "an initial investment of \$20,000 in Aboriginal art or blue chip Australian artists five years ago becomes valued at \$58,000 or \$40,000 respectively." When Smith & Hall exhibited works in Dubai in 2008 (as Galleries Direct), they promoted a compound annual growth rate for Aboriginal art at 34.1%. [3]

What the article doesn't account for, is that art is commonly sold to SMSF investors at retail prices, and secondary market trends suggest that 5 years is the absolute minimum, in most cases, that one should expect to hold works of art purchased retail before to seeing *any* return on the secondary market; 10 years is a more realistic assessment and that's without the gamble of buying works by artists who don't perform.

Investing in works by contemporary artist for capital gain is a gamble by nature, and this applies to Aboriginal art as much as non Indigenous art. And the Aboriginal art sector has great complexity due to the vast array of practising artists and diversity of styles, in addition to the volume of work available from a large number and variety of sources.

Investors in SMSFs need to consider the implications mooted by the Federal Government in the wake of the Cooper Review debacle. While rejecting its recommendations to ban art as an asset class, the Labor Government has indicated it will bring in new regulations for SMSFs from 1 July 2011. For trustees with art holdings, these regulations will potentially impact the value of their holdings, as well as their purse.

From all accounts the SMSF sector largely comprises investment in Aboriginal art over non Indigenous Australian art.[4] And for this reason alone it is highly likely that the Government would have introduced specific and separate regulations for art holdings. For some time now they have been targeting the Indigenous art market, in particular, with increased oversight and regulation.[5]

Amid the drama of the Cooper Review, the SMSF Professionals' Association of Australia drafted 'Best Practice Guidelines for Acquiring and Holding Artworks in an SMSF', which were accepted in principle in July.

Should these guidelines be formally adopted, SMSFs will be required to make a number of significant changes to the management of portfolios. Lowensteins Arts Management has reported that each SMSF will require a 'Specialist Advisor' to advise on the acquisition of artworks and ensure that purchases are within the broader investment strategy of the fund.[6]

In addition, one mooted guideline is for the requirement of acquisitions to be independently valued on an annual basis, and only by appropriately qualified valuers. There is no such current requirement, and this measure will place significant responsibility and financial imposts on SMSF trustees who will need to marshal resources for sourcing and paying for valuations.

And as a result, SMSF trustees may find the value of their holdings downgraded. It is not uncommon for some sellers to provide valuations at time of sale in excess of a 'discounted' purchase price, and regulated asset validations will need to be assessed for fair market conditions and not retail replacement.

And what of the Smith & Hall holdings reportedly worth \$4 million? Book values can range from purchase price to insurance values, and asset liquidation valuations are usually dramatically different to retail values.

The administrators are now on the case and given current market conditions it is likely that this figure will keep changing. This is potentially bad news for the SMSF creditors whose holdings, if recovered, may be dramatically devalued.

And adding injury to insult, some investors may have taken out financing for art purchases, a common enough practice amongst collectors and another featured service provided by Smith & Hall.

SMSFs should not be discouraged from buying art, which has been demonstrated time and again to be a worthy asset class, and which continues to achieve stronger capital gains than many other investment options.

Given this prospect they should, however, seriously consider supporting their strategy with purchases through entities with proven expertise, whether they are consultants or dealers, and irrespective of whether the works are sourced from the primary or secondary markets. The extra outlay, a miniscule amount when weighed against potential returns, should prove to be a worthy investment in itself.

[1] Katrina Strickland, 'Collapse not a pretty picture', Financial Review, 14 October 2010, p24.

[2] Kerry Lotzof, 'A Picture Perfect Investment', 1 September 2009, Superliving, <http://www.superliving.com.au/storyview.asp?storyID=1034500§ionsourc=IND%3A+SL+Feature>

[3] Soura Magazine, p29, http://www.artdubai.ae/documents/ArtDubaisupplementwithSoura_000.pdf

[4] See media and commentary, Save Super Art Campaign, <http://savesuperart.org.au>

[5] Jane Raffan, 'Moral Lip Service, Government's Hard Hit at the Art Market is a Soft Form of Redress', SAM, March 2010, http://sydney.edu.au/alumni/sam/archive/SAM_March10.pdf

[6] Lowensteins Arts Management, Tax Matters for the Arts, September/October 2010, p1.

About The Author

Jane Raffan runs ArtiFacts, an Art Services Consultancy based in Sydney, with a specialist focus in the field of Aboriginal and Torres Strait Islander Art. Jane is an accredited valuer in Aboriginal Art for the Australian Government's Cultural Gifts Program. She has over 20 years experience in the arts sector, working initially for the Art Gallery of New South Wales, and then over twelve years in the auction industry. www.artifacts.net.au.