

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument 2011 No. 130**

Subject - *Superannuation Industry (Supervision) Act 1993*

*Superannuation Industry (Supervision) Amendment Regulations 2011 (No. 2)*

Subsection 353(1) of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) provides, in part, that the Governor-General may make regulations prescribing matters required or permitted by the SIS Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the SIS Act.

Section 62A of the SIS Act provides that the regulations may make rules in relation to trustees of self managed superannuation funds (SMSF) making, holding and realising investments involving collectables and personal use assets.

The purpose of the Regulations is to amend the *Superannuation Industry (Supervision) Regulations 1994* (SIS Regulations) to include rules with which SMSF trustees must comply when investing in collectables and personal use assets.

In 2009, the Government commissioned an independent review of the governance, efficiency, structure and operation of the superannuation system (the Super System Review). The final report of the Super System Review was provided to the Government in June 2010 and recommended, among other things, that SMSF trustees should be prohibited from investing in collectables and personal use assets because of the risk that the investment may be made for current day benefits rather than retirement income purposes.

On 30 July 2010, the Government rejected the recommendation on the basis that it would restrict investment choice for SMSF trustees. However, the Government announced that it would tighten the restrictions on SMSF investment in collectables and personal use assets to ensure that they do not give rise to current day benefits for SMSF trustees.

The Regulations specify rules that prevent SMSF trustees from gaining current day benefit from an investment in collectables and personal use assets and ensure that such investments are made for genuine retirement income purposes.

Details of the Regulations are provided in the Attachment.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations would commence on 1 July 2011.

The Stronger Super SMSF Working Group, comprising superannuation, accounting and financial services industry representatives, was consulted in the development of these Regulations. Four weeks public consultation was also undertaken.

Twenty-two submissions were received, including two confidential submissions.

The public submissions are available at [strongersuper.treasury.gov.au](http://strongersuper.treasury.gov.au).

Authority: Subsection 353(1)  
of the *Superannuation  
Industry (Supervision) Act  
1993*

**Details of *Superannuation Industry (Supervision) Amendment Regulations 2011* (No. )**

**Regulation 1** specifies the name of the Regulations as the *Superannuation Industry (Supervision) Amendment Regulations 2011* (No. ).

**Regulation 2** provides that the Regulations commence on 1 July 2011.

**Regulation 3** provides that Schedule 1 amends the *Superannuation Industry (Supervision) Regulations 1994*.

**Schedule 1 Amendments**

**Item 1**

The Regulations insert a new regulation after regulation 13.18 specifying the rules that apply to SMSF investment in collectables and personal use assets.

Subregulation 13.18AA(1) specifies the assets that are taken to be collectables and personal use assets (section 62A items) and therefore to which regulation 13.18AA applies. These assets are: artwork (within the meaning of the *Income Tax Assessment Act 1997* (ITAA97)); jewellery; antiques; artefacts; coins, medallions or bank notes; postage stamps or first day covers; rare folios, manuscripts or books; memorabilia; wine or spirits; motor vehicles; recreational boats; and memberships of sporting or social clubs.

Artwork is defined in subsection 995-1(1) of ITAA97 as: a painting, sculpture, drawing, engraving or photograph; a reproduction of such a thing; or property of a similar description or use. Coins and bank notes are collectables if their value exceeds their face value. Spirits includes, but is not limited to, whiskey, gin, vodka, tequila, brandy and rum.

Investments involving a section 62A item include where the SMSF has full or part ownership of the item and where the SMSF enters into a lease or lease arrangement in relation to the item.

Subregulation 13.18AA(2) specifies that each trustee of an SMSF commits an offence if the fund enters into a lease or lease arrangement with a related party in relation to a section 62A item. Lease arrangements are informal arrangements under which a person uses or controls the use of fund property, including where no rent is payable in exchange. This prevents SMSF trustees from making an investment in a section 62A item for the purpose of leasing it to a related party. 'Related party' and 'lease arrangement' are defined in subsection 10(1) of the *Superannuation Industry (Supervision) Act 1993*.

Subregulation 13.18AA(3) specifies that each trustee of an SMSF commits an offence if the fund stores a section 62A item in the private residence of a related party. This allows SMSF trustees to store a section 62A item in premises owned by a related party, such as a purpose-built storage facility, provided that the premises is not the home of a related party. This limits any personal enjoyment that a related party can

gain from an investment in a section 62A asset. Private residence includes the land used for a private residence and other buildings on that land, such as a garage or shed.

Subregulation 13.18AA(4) specifies that each trustee of an SMSF commits an offence if the fund does not keep a record of the reasons for the decision on where to store a section 62A item. This ensures that SMSF trustees give consideration to what is appropriate storage for maintaining their section 62A item as an investment that produces retirement income rather than one that provides current day enjoyment.

Subregulation 13.18AA(5) specifies that each trustee of an SMSF commits an offence if the fund does not insure a section 62A item in the name of the fund within 7 days of acquisition of the item. This subregulation does not apply to memberships of a sporting or social club because these items generally cannot be insured. This subregulation protects the section 62A item from damage, which would result in a loss of retirement income.

Subregulation 13.18AA(6) specifies that each trustee of an SMSF commits an offence if a related party uses a section 62A item that is held by the fund. This subregulation prevents a related party from obtaining personal enjoyment from a section 62A item.

Subregulation 13.18AA(7) specifies that each trustee of an SMSF commits an offence if the fund disposes of a section 62A item to a related party at a price other than a market price determined by a qualified independent valuer. This ensures that a related party does not receive current day benefit from such a transaction, for example by purchasing the section 62A item from the fund at below market value, and also that the transaction does not cause detriment to the fund.

Subregulation 13.18AA(8) specifies that an offence against any of the subregulations (2) to (7) is an offence of strict liability. ‘Strict liability’ is defined in section 6.1 of the *Criminal Code*. The offences were made ones of strict liability to ensure that they are an effective deterrent to contraventions. Other forms of penalty in the SIS legislation, for example civil penalty offences and operating standard offences, are more severe, and are costly and time-consuming to apply. They are applied sparingly and only to the most serious cases of non-compliance, which limits their effectiveness as a deterrent. Making the offences ones of strict liability is consistent with the broad direction of other penalty provisions in the SIS Act. A number of former fault liability provisions have been converted to strict liability, or two-tier strict and fault liability provisions, since January 2001 to strengthen the superannuation regulatory framework and facilitate the prosecution of contraventions of the SIS Act.

Subregulations 13.18AA(9) and (10) provide for a transitional period for existing SMSF investments in a section 62A item. Subregulations (2) to (7) do not apply to an investment in a section 62A item that is held by an SMSF on 30 June 2011. This exemption ceases to apply on 1 July 2016, at which time the SMSF trustees are required to comply with subregulations (2) to (7) in relation to those items held on 30 June 2011. This transitional period provides SMSF trustees with existing investments in collectables and personal use assets time to comply with the new rules.