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By Email: instalmentwarrantcorpregs@treasury.gov.au

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RE: Exposure Draft - Corporations Amendment Regulations 2012 (No.) - Limited Recourse Borrowings by Superannuation Funds (Instalment Warrants)

Dear sir/madam

The National Tax & Accountants' Association (NTAA) is very concerned about the above proposed regulations.

Whilst we recognise, and are supportive of, the need to protect consumers from financial advice that is not in their best interests, the regulations as proposed are too broad and could have many unintended consequences.

In particular, we are concerned about proposed regulation 7.1.04H regarding the meaning of "issued" and "issuer" for limited recourse borrowing arrangements.

Proposed regulation 7.1.04H(1) would make "an arrangement relating to the acquisition of an acquirable asset under section 67A or 67B of the Superannuation Industry (Supervision) Act 1993" (SIS Act) a financial product. This clearly extends beyond the actual borrowing, and would appear to include the actual acquisition of the asset, as well as advice regarding the borrowing and the acquisition, and anything else that could be seen to 'relate to' the acquisition of the asset.

Proposed regulation 7.1.04H(2) then states that such an arrangement "is issued when a person enters into a legal relationship that sets up the arrangement" and that "each party to the arrangement is an issuer of the product". Again, both of these are extraordinarily, and ambiguously, broad.

For example, if a self-managed superannuation fund (SMSF) was to borrow to acquire land, the parties to this arrangement would include:

- the trustee of the SMSF;
- the trustee of the holding trust that would legally acquire the land;
- the vendor of the land;

- the lender of the borrowed moneys; and
- anyone providing advice "relating to" anything connected with the borrowing and acquisition, possibly including (as has been suggested by other commentators) the real estate agent responsible for selling the property, not to mention the accountant for the SMSF who provides advice generally to the trustee of the SMSF (particularly regarding compliance with the SIS Act and avoiding the taxation consequences of becoming a non-complying superannuation fund).

Each of these may be an "issuer" of a financial product, and the timing of the issuance of each of these would be when the relevant legal relationship was entered into (which will most likely differ for each "issuer", and may be difficult to ascertain for an adviser who has a longstanding professional relationship with the SMSF and who provides advice over time).

Excluding a "custodial or depository service" from being a financial product, or excluding a limited recourse borrowing arrangement from being a credit facility, would not appear to fix the above problem created by proposed regulation 7.1.04H in relation to the holding trustee and the lender, since the holding trustee and the lender would still be parties to, and therefore issuers of, the limited recourse borrowing arrangement.

From a practical perspective, some financial institutions are unwilling to lend on a limited recourse basis, so some SMSFs resort to borrowing from related parties. In addition, the SIS Act supports SMSFs acquiring certain assets from related parties, including business real property. If an SMSF intends to borrow from a related party to acquire business real property of the same or another related party, it appears that the proposed regulations would require each of them to have a financial services licence (AFSL), which is obviously impractical (and, in cases where all the relevant parties are related to each other, unnecessary).

The Explanatory Memorandum to the proposed regulations implies that the reason for these amendments is because "Superannuation funds may be receiving inappropriate advice when purchasing instalment warrants from unlicensed and unqualified dealers." The above examples regarding SMSFs borrowing from and/or acquiring assets from related parties would not seem to fall within such reasoning.

Therefore, we submit that these regulations should not be made as proposed, but should be rewritten to be very clear about exactly who should be required to have an AFSL and in what circumstances (despite the difficulty there may be in identifying such persons and circumstances, this should not mean that vague regulations that nonetheless impose serious penalties are the answer). Related parties of the fund, including the holding trustee, should not be required to obtain an AFSL.

In addition, we submit that any such regulations should make it clear that the accountants' exemption in regulations 7.1.29 and 7.1.29A will apply to these

arrangements, so that they will not be required to obtain an AFSL when advising SMSF clients that enter into limited recourse borrowing arrangements (at least, unless and until the proposed new requirements regarding accountants providing advice in respect of SMSFs generally are finalised).

Yours faithfully

Riley Jones
Legal counsel for and on behalf of the NTAA