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EXPOSURE DRAFT

SUPERANNUATION LEGISLATION AMENDMENT
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EXPLANATORY MATERIAL

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Glossary

The following abbreviations and acronyms are used throughout this explanatory material.

<i>Abbreviation</i>	<i>Definition</i>
ATO	Australian Taxation Office
SIS ACT 1993	<i>Superannuation Industry (Supervision) Act 1993</i>
SIS Regulations 1994	<i>Superannuation Industry (Supervision) Regulations 1994</i>
SMSF	Self managed superannuation fund

Chapter 1

Superannuation and relationship breakdowns

Outline of Chapter

1.1 Schedule 1 to this Exposure draft amends the *Superannuation Industry (Supervision) Act 1993* (SIS Act 1993) to allow the trustee of a regulated superannuation fund to acquire an asset in-specie from a related party of the fund, following the relationship breakdown of a member of the fund, without contravening the prohibition in subsection 66(1).

Context of amendments

1.2 Subsection 66(1) of the SIS Act 1993 generally prohibits a trustee from acquiring assets from a related party of the fund.

1.3 Paragraphs 66(2)(a) to (c) respectively provide exceptions relating to listed securities, business real property, and assets acquired under a merger of two regulated funds. Subsection 66(2A) provides an exception for certain in-house assets. Paragraph 66(2)(d) empowers the regulators, by legislative instrument, to create further exceptions.

1.4 Part VIIIIB of the *Family Law Act 1975* (FLA 1975) allows, on the breakdown of a marriage or a de facto relationship, certain payments that are payable in respect of a person's superannuation interests to be allocated between the parties to the relationship. This may be achieved in various ways, for example, the *Superannuation Industry (Supervision) Regulations 1994* (SIS Regulations 1994) contain rules that facilitate the creation of separate superannuation interests for the non-member spouse and the acquisition of these interests by the trustee of another regulated fund.

1.5 Subsection 66(5) of the SIS Act 1993 provides that accepting money is not considered to be acquiring an asset. However, in the event of a relationship breakdown many small superannuation funds may not have sufficient cash to make a payment to another fund. As a result, trustees may wish to separate the superannuation interests of the parties by making an in specie transfer.

1.6 This is facilitated to some extent by Australian Taxation Office (ATO) Determination SPR 2006/MB1, made on 28 August 2006. The Determination ensures that a trustee of a self managed superannuation fund (SMSF) does not breach section 66 of the SIS Act 1993 when it acquires an asset from another regulated superannuation fund following the marriage breakdown of a member of the SMSF, even where it is acquired from a related party.

1.7 The ATO Determination has a number of limitations:

- it does not apply to opposite-sex or same-sex de facto relationships (and is therefore inconsistent with legislative developments to avoid discrimination toward opposite-sex and same-sex de facto relationships in superannuation, taxation and family law); and
- by virtue of the scope of the Commissioner of Taxation's regulatory powers under the SIS Act 1993, it does not cover transfers or roll-overs made to funds regulated by the Australian Prudential Regulation Authority (APRA).

1.8 With these gaps, subsection 66(1) of the SIS Act 1993 can have the effect of preventing certain in specie acquisitions resulting from a relationship breakdown.

1.9 In addition, the ATO Determination is not consistent with recent legislative developments to extend the capital gains tax marriage breakdown roll-over (including for opposite-sex de facto relationships), to in-specie transfers of personal superannuation interests from a small superannuation fund to another complying superannuation fund.

Summary of New Law

1.10 Schedule 1 amends section 66 of the SIS Act 1993 so that a trustee or investment fund manager of a regulated superannuation fund is not prohibited from acquiring an asset from a related party of the fund where the acquisition occurs as the result of the relationship breakdown of a member of the fund.

1.11 The schedule also amends Subdivision D of Division 1 of Part 8 of the SIS Act 1993 to ensure equitable application of the transitional arrangements in relation to in-house assets where an asset transfer occurs as the result of the relationship breakdown of a member of the fund.

1.12 Relationship covers those in respect of marriage, and opposite-sex and same-sex de facto relationships.

1.13 These amendments will ensure that section 66 is not an impediment to separating partners achieving a ‘clean break’ from each other in terms of their superannuation arrangements, and does not discriminate against opposite-sex and same-sex de facto relationships.

Comparison of Key Features of New Law and Current Law

<i>New law</i>	<i>Current law</i>
An exception to the subsection 66(1) prohibition is provided through a provision in the SIS Act 1993.	An exception to the subsection 66(1) prohibition is provided through ATO Determination SPR 2006/MB1.
<p>A trustee or investment manager of a regulated superannuation fund may acquire an asset in specie from a related party of the fund, following the relationship breakdown of a member of the fund.</p> <p>Relationship breakdown covers those in respect of marriage, and opposite-sex and same-sex de facto relationships.</p> <p>The asset may be acquired from a trustee or investment manager of another regulated superannuation fund.</p>	<p>A trustee of a SMSF may acquire an asset in specie from a related party of the fund, following the marriage breakdown of a member of the fund.</p> <p>The asset may be acquired from a trustee or investment manager of another regulated superannuation fund.</p>
Where a transferred asset would have been subject to the in-house asset transitional exemption provisions had it always been held by the receiving fund, that exemption will apply to the asset in the receiving fund even where it did not in the transferring fund.	Where a transferred asset is subject to the in-house asset transitional exemption provisions in the transferring fund, that exemption no longer applies to the asset in the receiving fund.

Detailed explanation of new law

1.14 These amendments allow for a trustee or investment manager of a regulated superannuation fund to acquire assets from a related party where the acquisition occurs as the result of the relationship breakdown of a member. *[Schedule 1, item 2, subsections 66(2B) and (2C)]*

1.15 They also allow for the application of the transitional exemption provisions in relation to in-house assets where assets are acquired as the result of a relationship breakdown. *[Schedule 1, item 3, section 71EA]*

Scope of the Measure

1.16 Subsection 66(1) of the SIS Act 1993 does not prohibit a trustee or investment manager acquiring an asset from a related party of the fund if:

- the asset is acquired for the benefit of a particular member of the acquiring fund from the trustee or investment manager of another regulated superannuation fund *[Schedule 1, item 2, paragraph 66(2B)(a)]*; and
- at the time of the acquisition: the member and his or her spouse or former spouse are separated and there is no reasonable likelihood of cohabitation being resumed *[Schedule 1, item 2, paragraph 66(2B)(b)]*; and
- the acquisition occurs because of reasons directly connected with the breakdown of the relationship *[Schedule 1, item 2, paragraph 66(2B)(c)]*; and
- the asset represents the whole, or a part, of either:
 - the member’s own interests in the transferring fund *[Schedule 1, item 2, paragraph 66 (2B)(d)]*; or
 - the member’s entitlements as determined under Part VIIIIB of the FLA 1975 in relation to the interests of the member’s spouse, or former spouse, in the transferring fund. *[Schedule 1, item 2, paragraph 66 (2B)(d)]*

Relationship Breakdown

1.17 For the purposes of subsections 66(2B) and 71EA(3), the question whether the spouses, or former spouses, have separated is to be determined in the same way as it is for the purposes of section 48 of the FLA 1975 (as affected by sections 49 and 50 of that Act). *[Schedule 1, item 2, subsection 66(2C) and item 3, subsection 71EA(2)]*

1.18 The mere fact that two separated people live in the same home (that is, they are genuinely separated but living under one roof) does not amount to ‘cohabitation’ for this purpose.

Transitional arrangements in relation to in-house assets

1.19 The effect of section 71EA is that for the purpose of applying Subdivision D of Division 1 of Part 8 (Transitional arrangements in relation to in-house assets) to an asset acquired by the trustee or investment manager of a fund as mentioned in subsection 71EA(1), treat:

- the acquisition as having occurred at the time the trustee or investment manager of the transferring fund acquired the asset [*Schedule 1, item 3, paragraph 71EA(3)(a)*]; and
- anything done by, for or in relation to the transferring fund in relation to the asset before the acquisition time as having been done by, for or in relation to the acquiring fund [*Schedule 1, item 3, paragraph 71EA(3)(b)*]; and
- anything done by, for or in relation to the trustee or investment manager of the transferring fund in relation to the asset before the acquisition time as having been done by, for or in relation to the trustee or investment manager of the acquiring fund. [*Schedule 1, item 3, paragraph 71EA(3)(c)*]

1.20 Consequently, where an asset is transferred as the result of a relationship breakdown, it will be considered to be an in-house asset in relation to the acquiring fund only to the same extent it would have been had that asset always been held by the trustee or investment manager of that fund.

Example 1.1

Seamus and Lucy each have a personal interest in a regulated superannuation fund. The fund is subject to a payment splitting order which requires that the trustee transfer all of the assets reflecting Seamus's personal interest to another regulated superannuation fund for Seamus.

The assets reflecting Seamus's personal interest include a unit in a related trust acquired by the fund prior to 11 August 1999 and covered by the in-house asset transitional exemption provisions.

If the trustee transfers the unit in the related trust to the other regulated superannuation fund it would continue to be exempt from the in-house asset rules, even if the unit trust is a related trust of the other regulated superannuation fund.

Note: This would be the outcome even if the unit was transferred for Lucy's benefit.

Example 1.2

Harry is a member of a SMSF which holds an asset consisting of a partly paid unit in a related trust. Since a payment was made on the unit to the issuer after 30 June 2009, the asset is an in-house asset but has a reduced value for the purposes of working out the total value of in-house assets in the fund according to the formula set out in subsection 71A(3).

As a result of a relationship breakdown the asset is transferred to a superannuation fund in which Harry's former partner Matthew is a member. The unit trust is a related trust of the regulated superannuation fund of which Matthew is a member. Any payments made on the asset while in the hands of Harry's fund would now be taken to have been made by the trustee of Matthew's fund with the result that the asset would have the same value for the purpose of working out the total value of in-house assets in the fund as it did in Harry's fund.

Example 1.3

Paul is the sole member of a SMSF which holds an asset subject to an uninterrupted series of lease agreements which commenced before 11 August 1999 with a partnership, in which his spouse Rachael, but not himself, is a partner. Under this arrangement the asset is not an in-house asset of the SMSF.

As a result of a relationship breakdown the asset in question is transferred to a SMSF of which Rachael is the sole member and continues to be leased to the partnership. The asset would now be considered to be an in-house asset. However, as the lease agreements would be taken to have commenced before 11 August 1999, the asset would be covered by the in-house asset transitional exemption provisions even though they did not apply in the hands of the transferring fund.

Example 1.4

Paul is the sole member of a SMSF which holds an asset that is subject to a lease agreement which commenced on 1 July 2009 with a partnership, in which his spouse Rachael, but not himself, is a partner. Under this arrangement the asset is not an in-house asset of the SMSF.

As a result of a relationship breakdown the asset in question is transferred to a SMSF of which Rachael is the sole member and continues to be leased to the partnership. The asset is an in-house asset of Rachel's SMSF. This is the case despite the fact that the asset was not an in-house asset of Paul's SMSF.

Transferring fund must give any section 71E election to the acquiring fund

1.21 If the trustee of the transferring fund has a duty under subsection 103(2A) to retain an election or a copy of an election, under section 71E, the trustee must, within 14 days of the asset being acquired by the acquiring fund, give the election or copy of the election to a trustee or investment manager of the acquiring fund. If the trustee fails to do so, they commit an offence of strict liability.

[Schedule 1, item 3, paragraphs 71EA (4), (5) and (6)]

1.22 Given the difficult circumstances of relationship breakdown it is necessary to ensure the trustee of the transferring fund is compelled to comply with the requirement to provide a copy of an election to the acquiring fund. This may be particularly relevant for assets transferred from a single member fund.

1.23 A 'regulated superannuation fund' has the meaning given in subsection 19(1) of the SIS Act 1993.

1.24 Under subsection 10(1) of the SIS Act 1993, a *related party* of a superannuation fund means any of the following:

- a member of the fund or a Part 8 associate of a member; or
- a standard employer-sponsor of the fund or a Part 8 associate of a standard employer-sponsor of the fund.

1.25 Under subsection 10(1) of the SIS Act 1993 a *spouse* of a person includes:

- another person (whether of the same sex or a different sex) with whom the person is in a relationship that is registered under a law of a State or Territory prescribed for the purposes of section 22B of the *Acts Interpretation Act 1901* as a kind of relationship prescribed for the purposes of that section; and
- another person who, although not legally married to the person, lives with the person on a genuine domestic basis in a relationship as a couple.

[Schedule 1, item 1, subsection 10(1), definition of relative]

Application and transitional provisions

1.26 These amendments will apply in relation to assets acquired by a superannuation fund trustee or investment manager on or after the date of Royal Assent.

