Special SMSF paper — University of Melbourne

Bryce Figot from DBA Lawyers recently presented the SMSF component of the subject 'Superannuation Law', which is part of the University of Melbourne's Law Masters course. Bryce prepared a detailed paper for the Masters students. The paper focuses on the key legal areas of SMSFs and contains summaries of key cases and AAT decisions. As a special 'value add', you can download the paper here.

All investment strategies must change!

Insurance

The Cooper Review recommended that the Government amend the investment strategy laws so that SMSF trustees are required to consider *life* and *TPD* insurance. The Government agreed with this recommendation and has passed legislation accordingly. See reg 4.09(2)(e) of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) ('SISR').

However, the text of the actual law is broader than the recommendation. It requires that the investment strategies of all SMSFs now must consider:

> whether the trustees of the fund should hold a contract of insurance that provides insurance cover for one or more members of the fund.

In other words, the legislation is not limited to life and TPD insurance. The explanatory statement says that this change 'will ensure that members consider their personal circumstances in regards to their need for insurance cover *such as* life insurance.'

However, many other insurances cover members of SMSFs. Theoretically, even more obscure insurances could be relevant. For example, consider an SMSF that has invested in real estate. If the building burns down, the SMSF's ability to generate rental income is impeded and thus the member is affected. In other words, building insurance is relevant to providing cover for members especially if the fund wishes to continue paying a pension. Other types of insurance may also be considered such as trustee/director legal risk and audit insurance.

Regular review

The investment strategy laws have also changed to specify that trustees must not just formulate and give effect to an investment strategy, but also that they must 'review regularly' the strategy. See reg 4.09(2) of the SISR.

This raises the question of what 'regularly' means.

Presumably, the review here would regular if it occurred annually. That being said, in a 'large' superannuation fund context, APRA says that a review should occur as frequently as every six months (APRA Superannuation Circular No. II.D.1 [87]).

Also, consider a fund whose investment strategy involves CFDs, options and other derivatives. The trustee might need to monitor the implementation of the strategy very frequently, possibly even daily. However, this would not necessarily mean that the strategy itself needs to be reviewed so frequently. Again, presumably annual review would suffice.

In addition to the SISR requirement, most State and Territory trustee acts have separate and additional investment strategy requirements (eg, s 6(3) of the *Trustee Act 1958* (Vic)). Unless the SMSF deed excludes these requirements, these must also be complied with. (DBA Lawyers' SMSF deed does exclude these requirements.)

SMSF SUCCESSION PLANNING DAY

Lawyers from DBA Lawyers will be presenting a special one day intensive SMSF succession planning seminar on 8 October 2012 in Coffs Harbour.

It will cover all the steps — and all the top tax strategies — you need to take to ensure that you have fully planned for all aspects of succession, including ensuring the right people will be running the fund when members lose capacity. It will consider the strategies arising from TR 2011/D3 and much more (eg, anti-detriment deductions).

For more information or to register please visit www.dbalawyers.com.au/smsf-succession-planning-day

All investment strategies must change

In light of the above, almost all investment strategies would need to be changed. DBA Lawyers' investment strategy kit (see below) caters for these legislative amendments.

All reporting at market value

The Cooper Review also recommended that the Government legislate to require SMSFs to value their assets at 'net market value'.

Legislation implementing this has now been passed. See reg 8.02B of the SISR. Importantly the legislation does not require reporting at net market value, but rather only at market value. This is a welcome respite for many in the SMSF industry who feared that calculating net market value would be onerous and problematic because selling costs would be needed to be taken into account.

SMSFs are typically non-reporting entities and so many have not been in the habit of reporting at net market value or market value. Naturally, for these funds this will be marked change.

This raises the next question: how to determine market value? The ATO have released a web page titled 'Valuation guidelines for self-managed superannuation funds'. It replaces Superannuation Circular 2003/1, which previously was the best official ATO statement regarding valuing SMSF assets.

The web page states that the ATO will generally accept a determination of an asset's value, as long as:

- it does not conflict with this guide or market valuation for tax purposes
- there is no evidence that a different value was used for the corresponding capital gains tax event and
- it was based on objective and supportable data.

Some key practical points are:

- typically each year the reported value of assets should change (unless trustees can demonstrate that the market value has remained exactly the same since the last 30 June)
- typically there is no obligation to use a qualified independent valuer (although the ATO do state that you should also consider the use of a qualified independent valuer if either the value of the asset represents a significant proportion of the fund's value or the nature of the asset indicates that the valuation is likely to be complex or difficult).

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