



Self-Managed Superannuation Funds (Assets Acquired on Marriage Breakdown) Determination 2006

Explanatory Statement

General Outline of Instrument

1. This determination is made under paragraph 66(2)(d) of the *Superannuation Industry (Supervision) Act 1993* (the SIS Act).
2. The determination will allow a trustee of a self-managed superannuation fund to acquire an asset from a related party of the fund in certain circumstances relating to the marriage breakdown of a member of the fund.
3. The determination is a legislative instrument for the purposes of the *Legislative Instruments Act 2003* (LIA) but:
 - o is not subject to disallowance because of Item 39 in the table in subsection 44(2) of that Act, and
 - o will not cease to have effect according to Part 6 of the LIA because of Item 42 in the table in subsection 54(2) of that Act.

Date of effect

4. The determination is taken to have commenced on 28 December 2002. This is the commencement date for the provisions in Part VIIIB of the *Family Law Act 1975* (FLA) that deal with splitting superannuation interests in a marriage breakdown.
5. The determination has retrospective effect to ensure that a trustee of a self-managed superannuation fund that, prior to the making of the determination, acquired an asset in the circumstances covered by the determination will be taken not to have contravened subsection 66(1) of the SIS Act. The trustee will therefore not be guilty of an offence under subsection 66(4) of the SIS Act.
6. In accordance with subsection 12(2) of the LIA, the retrospective operation of this determination does not adversely affect the rights or liabilities of any person other than the Commonwealth.

What is this instrument about:

7. The trustees of a self-managed superannuation fund are prohibited from acquiring an asset from a related party of the fund – subsection 66(1) of the SIS Act. Subsection 66(2) of the SIS Act contains three specific exceptions to this prohibition and empowers the Commissioner of Taxation to create further exceptions in relation to any self-managed superannuation fund or class of self-managed superannuation funds.
8. The determination will create a new exception to the prohibition in subsection 66(1) of the SIS Act.

What is the effect of this instrument:

9. The determination will ensure that the trustees of a self-managed superannuation fund (the acquiring fund) will be able to acquire an asset from the trustees of another regulated superannuation fund (the transferring fund) where the trustees of the transferring fund are related parties of the acquiring fund. The determination will apply where the acquisition of the asset occurs as a result of the marriage breakdown of a member of the acquiring fund and is in satisfaction of either or both:
 - o a member's entitlements to their spouse's interests in the transferring fund as provided for under Part VIIIB of the FLA, and
 - o that members own interests, if any, in the transferring fund.

Background:

10. The SIS Act regulates superannuation funds. Part 7 of the SIS Act contains various provisions that apply to regulated superannuation funds. Part 7 includes section 66, the provision under which this determination is being made.
11. Generally, the Commissioner of Taxation and APRA are the regulators of regulated superannuation funds for the purposes of Part 7 of the SIS Act. The Commissioner of Taxation is the regulator of Part 7 to the extent that the Part relates to self managed superannuation funds – paragraph 6(1)(e) SIS Act. APRA is the regulator in relation to all other funds – paragraph 6(1)(a) SIS Act.
12. In a *self-managed superannuation fund*:
 - o the fund will have less than five members;
 - o each member of the fund will be a trustee of the fund, or a director of a company that is the corporate trustee of the fund;
 - o no member of the fund will be an employee of another member of the fund, unless they are related; and
 - o no trustee of the fund will be paid for their services as trustee.

(subsection 17A(1) SIS Act)

Restriction on the assets acquired by certain trustees

13. The trustee of a regulated superannuation fund must not intentionally acquire an asset from a related party of the fund – subsection 66(1) SIS Act.
14. Subsection 66(2) of the SIS Act provides that two particular classes of assets (listed securities and business real property acquired at market value) can be acquired from a related party of the fund despite the subsection 66(1) prohibition – paragraphs 66(2)(a) and (b) SIS Act. Assets acquired as a result of a merger of two regulated funds are also excepted from the prohibition – paragraph 66(2)(c) SIS Act.

15. In addition to these exceptions, the Regulator can determine that certain assets may be acquired by any fund or a class of fund (paragraph 66(2)(d) of the SIS Act).
16. A *related party* of a superannuation fund means:
 - o a member of the fund;
 - o a standard employer-sponsor of the fund; and
 - o a Part 8 associate of a member of the fund or of a standard employer-sponsor of the fund.

(subsection 10(1) SIS Act)
17. Therefore, the trustee of a superannuation fund (the acquiring fund) cannot acquire an asset from the trustee of another superannuation fund (the transferring fund) where the trustee of the transferring fund is a Part 8 associate of one of the acquiring fund's members or a Part 8 associate of the acquiring fund's standard employer-sponsor.
18. The definition of a *Part 8 associate* is found in Part 8 of the SIS Act. Section 70B of the SIS Act states that the Part 8 associates of an individual include:
 - o a relative of the member;
 - o if the fund has fewer than five members – each other member of the fund, each director of any company that is the trustee of the fund, and any trustees of the fund who are individuals if the fund is a single member fund; and
 - o a trustee, acting in its capacity as trustee of a trust, where the individual member controls the trust.
19. *Relative* is defined in relation to an individual and includes a spouse of the individual but not a former spouse.
20. Subsections 70E(2) and (3) of the SIS Act provide that an individual will control a trust where they and/or their Part 8 associate:
 - o have fixed entitlement to more than 50% of the capital or income of the trust,
 - o have an influence with the trustee such that the trustee is accustomed or under an obligation to act in accordance with their wishes, or
 - o are able to remove or appoint the trustees of the trust.
21. In relation to self-managed superannuation funds, one self-managed fund (the first fund) is likely to be a related party of another self-managed superannuation fund where:
 - o there is one person who is a member of both funds, or
 - o the relative of a member of the first fund controls the other self-managed superannuation fund.

Family Law Act provisions affecting superannuation

22. Part VIIIB of the FLA, allows certain payments that are payable in respect of a person's superannuation interests to be allocated between the parties to a marriage, either by agreement of the parties or by court order – section 90MA FLA. A superannuation agreement or court order will establish how much of a member's interest in a superannuation payment is payable to their spouse. This will be either a particular percentage of a payment or a particular amount.

23. Splitting a future payment may not satisfy the needs or goals of the parties involved in a marriage breakdown, particularly where they are some time away from retirement. Accordingly, the spouse's entitlement established under Part VIIIB of the FLA (either by agreement between the parties or a court order) may be transferred or rolled over to another superannuation fund to ensure that the parties have a clear separation. The transfer or roll over may be achieved, for example, in the following ways:

- o Part 7A of the Superannuation Industry (Supervision) Regulations 1994 (SIS Regulations) contains rules that facilitate the creation of separate superannuation interests for the spouse and the transfer or roll over of these interests to another fund. For example, regulation 7A.03B empowers the trustee to create a new interest in a superannuation fund for the spouse. Regulation 7A.03D allows the spouse to request the roll over or transfer of the benefits represented by that interest to another fund. The trustee may make a roll over or transfer of those benefits even without the request of the spouse – regulation 7A.03H.
- o The governing rules of the superannuation fund may allow the creation of a separate account for the spouse or the transfer or roll over of an amount to another fund for the benefit of the spouse. If this action by the trustee meets the requirement of Division 2.2 of the Family Law (Superannuation) Regulations 2001 the requirement to split future payments is brought to an end.
- o Under section 90MZA of the FLA a member of a self-managed superannuation fund (the acquiring fund) may serve a waiver notice on the trustee of another fund (the transferring fund) in respect of a court order or superannuation agreement made under Part VIIIB of the FLA. In such a case, the trustee of the transferring fund will transfer an asset to the trustee of the acquiring fund in satisfaction of the interest the member has in the transferring fund as a result of the court order or superannuation agreement.

24. Subsection 66(1) of the SIS Act will not be breached in any of the above situations where the transfer occurs as a payment of cash. For the purpose of section 66 of the SIS Act accepting money is not considered to be acquiring an asset – subsection 66(5) SIS Act. However, as many small superannuation funds will not have sufficient cash to make the payment, the trustees may wish to separate the superannuation interests of the members by transferring assets to another fund.

25. The determination will provide an exception to the prohibition in subsection 66(1) of the SIS Act by allowing the trustee of a self-managed superannuation fund to acquire an asset from a trustee of another regulated superannuation fund following the marriage breakdown of a member of its fund.

26. The acquisition in these circumstances is considered to be appropriate and consistent with the objects of both the SIS Act generally and the provisions of the FLA. Further, from a policy perspective, an acquisition resulting from a marriage breakdown ought not be prohibited by subsection 66(1) of the SIS Act. Accordingly, the legislative determination made pursuant to paragraph 66(2)(d) of the SIS Act will allow a trustee of a self-managed superannuation fund to acquire an asset in this situation.

Consultation:

27. The determination was developed after consultation with Treasury, the Australian Prudential Regulatory Authority, and the Attorney-General's Department. Comments have also been received from the Family Court of Australia. Limited

consultation was also undertaken with a number of members of the Tax Office's National Tax Liaison Group Superannuation Subcommittee.

28. Wider consultation is not considered necessary as the determination provides a concession to allow the trustee of a self-managed superannuation fund acquire an asset from a related party on marriage breakdown.

Commissioner of Taxation

Date: 28 August 2006

Legislative references:

FLA Part VIIIB
FLA 90MA
FLA 90MZA
Family Law (Superannuation) Regulations 2001 Division 2.2
LIA 12(2)
LIA 44(2)
LIA 54(2)
SIS Act 6(1)(a)
SIS Act 6(1)(e)
SIS Act 10(1)
SIS Act 17A(1)
SIS Act Part 7
SIS Act 66(1)
SIS Act 66(2)
SIS Act 66(2)(c)
SIS Act 66(2)(d)
SIS Act 66(4)
SIS Act 66(5)
SIS Act Part 8
SIS Act 70B
SIS Act 70E(2)
SIS Act 70E(3)
SIS Regulations Part 7A
SIS Regulations 7A.03B
SIS Regulations 7A.03D
SIS Regulations 7A.03H