ARLYINGTON WHYTE FP PTY LTD SUBMISSION

Manager
Financial Services Unit
Retail Investor Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir,

I refer to the release of the draft regulations and Ex. Memo regarding Limited Recourse Borrowing Arrangements ("LRBA").

In the case of Self Managed Superannuation Funds ("SMSF") with assets associated with an LRBA, if the draft regulations have the effect of making the bare trust that holds the property a party to the transaction and consequently an "issuer", will require the bare trust/ trustee to hold an AFSL. Such a requirement makes the entire proposal uncommercial, and un-workable. [Reg 7.1.04H sub 2.]

The typical Self Managed Superannuation Fund ("SMSF") has a husband and wife as trustees, or a company as trustee of which the husband and wife are directors. Those same people control the bare trust which holds the property until such time as the debt has been retired. The SIS act provides for a trust to hold the property while the debt is in place.

As trustees of the SMSF the Corporations Act exempts them from the requirement to hold an AFSL. In their role as trustees of the bare trust the position is not clear. These people / trustees lack the necessary experience or credentials to hold an AFSL. Nor do they have the means to meet the significant costs in attempting to obtain an AFSL. Further there can be no sound regulatory purpose in exempting the SMSF from the need for an AFSL, but not extend that to the bare trust / trustee; the creation of which is only consequential to entering into an LRBA.

If the bare trust is caught as an *issuer* this legislation will destroy LRBA arrangements for *all* assets. It will effectively defeat the provisions of the SIS Act that established the capacity to undertake this arrangement.

An alternative view is this. Sections 67A and 67B of SIS provides that a conforming LRBA must have a bare trust and trustee to hold the asset on behalf of the beneficial owner - the SMSF. The financial accounts of the SMSF clearly reflect the asset with is associated liability, notwithstanding that it is legally held by the bare trust for and on behalf of the SMSF at all times. No separate financial accounts are produced for the bare trust. Accordingly we are of the view the SMSF exemption to hold an AFSL extends to the bare trust and trustee by virtue of the substance of the transaction, irrespective of its legal form. It is not, however, safe to rely upon that logical inference.

I cannot see that the proposed unintended consequential provisions apply to the bare trust and its trustees. If the bare trust is within the exceptions, e.g. to be a defined custodian, this needs to be made explicit in the regulations. Section 766E does not on it face, appear to be cast in terms that will allow the bare trust to fall within the custodian definition.

It seems logical that the underlying policy purpose for not requiring the SMSF to hold an AFSL should be explicitly extended to the bare trust to put the matter beyond doubt.

I trust that you will give this further consideration. I will be happy to discuss this with you should that be useful.

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