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submission made to the

Financial Services Unit
Retail Investor Division
The Treasury

Att: Mr Warwick Walpole

with respect to the proposed

Corporations Amendment Regulations 2012 (No.) (proposed Regulations)

16th March 2012

1. Quantum Group Holdings Pty Ltd (**'Quantum'**) submits its response with the policy approach contained in the draft *Corporations Amendment Regulations 2012* (**'the Draft Regulations'**), for the proposed changes to the *Corporations Regulations 2001* (Cth) that (amongst other things) seek to make arrangements pursuant to sections 67A and 67B of the Superannuation Industry (Supervision) Act 1993 (Cth) (**'Gearing Arrangements'**) a 'financial product'.

2. Quantum notes the policy intention behind the Draft Regulations. In particular, it is noted that the intention is to ensure that investors obtain access to consumer protection mechanisms, such as product disclosure, indemnity insurance and dispute resolution mechanisms.

3. It is submitted that given the state of the Gearing Arrangement market – particularly in the context of Gearing Arrangements which have as their underlying asset real property – investors at the moment have little consumer protection recourse.

4. Our principle concern is in relation to the Draft Regulations is whether the whole, or any part of, a Gearing Arrangement may be characterised as a a 'credit facility'. Indeed, in a typical self-managed superannuation fund Gearing Arrangement, it is submitted that in substance the real 'issuer' (i.e. a third party, without whom a Gearing Arrangement cannot be effected) is in fact the financier.

5. That is, without a third party financier's involvement, it is submitted that the majority of Gearing Arrangements would not in fact be possible.

6. We note the comment in the accompanying Explanatory Memorandum, which provides that the proposed new Sub-Regulation 7.1.06(2A), which seeks to *'… prevent persons that merely provide credit as part of a limited recourse borrowing arrangement from being caught by the new requirements*', coupled with the context of the new subregulation (e.g. the whole of Regulation 7.1.06A – which provides that 'credit providers' are not 'issuers' of financial products in certain circumstances) – seems to allow mere financiers to be 'carved out' of being involved in the provision of a financial product.

7. We consider that such an approach – particularly given that typically the only 'independent' third party that is typically involved in 'mum and dad' **Gearing Arrangements** is a financier – will cause the proposed changes to be of either little, or no effect.

8. That is, it is submitted that the type of **Gearing Arrangement** which has little consumer protection are those that involve self-managed superannuation funds acquiring real property. Currently, in such situations, financiers do not consider that they are obliged to be licenced, and there is no consumer protection (pursuant to the Corporations Act) afforded to the individuals involved.

9. Under an arrangement where (for example) an individual:

   (a) establishes a SMSF;
   (b) establishes a 'security trust' / bare trustee;
   (c) sources a property; and
   (d) applies for finance from (say) a bank so as to acquire a property subject to a Gearing Arrangement,

   the only 'independent' party is in fact the financier.

10. It is submitted that having the individual, as (for example) the directors of the bare / holding trustee and corporate trustee of the superannuation fund, as the 'issuer' of a financial product would be of little or no effect (indeed, in any event the individual would usually not be carrying on a financial services business and so the transaction could not proceed at all as currently envisaged).

11. By allowing the financier to escape the scope of being an 'issuer' in these circumstances would cause the proposed regulatory / consumer protection measures to be otiose. This is particularly so given that the only party which currently assesses whether an arrangement is viable / commercial, is the financier.

12. That is, it is the financier (in assessing the application for credit) that:

    (a) Determines whether the underlying asset is of sufficient security;
    (b) Assesses the returns of the asset (as well as the other income of the borrower) for the purposes of determining the interest coverage / repayment capacity; and
    (c) Determine whether (on the whole) the arrangement is worthy of finance.

13. It is submitted that in most **Gearing Arrangements** involving self-managed superannuation funds, other than for an adviser with an AFSL, it is the financier that is best placed to determine the appropriateness of the arrangement given the particular circumstances.

14. Further, much of the 'risk' involved in **Gearing Arrangements** sits with the borrowing arrangement. Any asset risk is determined at the borrowing assessment stage.

15. Given the general legislative regime which superannuation funds are subject to, and on the basis that the principle concern of the regime is to ensure that retirement savings are protected, it is submitted that those best placed to ensure that a Gearing Arrangement satisfies the general regime – are either an adviser with an AFSL or third party financiers.

16. The argument that a **Gearing Arrangement** which has as its underlying asset real property should only be treated as a mere 'investment property' transaction fails to take into account the fact that the transaction is being conducted within a protected regime – one that has the aim of protecting and promoting retirement savings.

15. We consider that the better approach is to:

    (a) Cause all those concerned with a s 67A and 67B arrangement to be deemed issuers of a 'financial product' (including those which provide credit as part of the arrangement); and
    (b) Require an AFSL holder who is appropriately licenced to provide advice, issue a product disclosure statement and a Statement of Advice and if that is done, all of those 'involved with' the arrangement (or any part of the arrangement) are entitled to rely on the AFSL's licence so as to discharge their financial services consumer protection obligations

    In this way, large financiers can either outsource the AFSL and consumer protection compliance requirements or comply with it themselves and transactions funded by other financiers can independently satisfy the AFSL and consumer protection compliance requirements.