SUBMISSION TO THE CULTURAL POLICY PROCESS

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ART MARKET AND THE ARTS INDUSTRY.

Since the advent of Covid and even before the pandemic , the primary art market has been substantially depressed.

- Sales in the primary market had been greatly reduced. Many galleries have closed. There is a general feeling of pessimism.
- Many artists have suffered as a consequence , and it has left many artists depressed and forced onto Centrelink Benefits .
- This malaise has extended into the Covid period and the post Covid period with artists suffering substantial lack of income .

REASONS FOR THE DECLINE

Whilst it is generally acknowledged that the Covid Period has been responsible for the initial downturn, it is interesting to note that the rest of the world has recovered, while Australia has not.

The main cause for Australia remaining in the doldrums is that the introduction of the regulations back in 2011 affecting the ability of the Self Managed Superannuation Funds acquiring art as an investment, and the introduction of Resale Royalties.

SELF MANAGED SUPERANNUATION FUNDS

These regulations affecting storage, insurance, and administrative costs make it virtually impossible for advisers to recommend the acquisition of art to trustees of SMSFs. The situation is aggravated by the uncertainty and the confusion surrounding these regulations.

The Government, as well as all other major political parties, passed a Senate resolution in February 2011 that it would only enact the new super art laws it was able to “ensure that any conditions do not act as a disincentive.”

The Rudd Labor Government, after being elected, proceeded with undue haste and without consultation or consideration of the consequences of their action, to introduce the New Regulations, which, although it did not prohibit the acquisition of art by SMSF, it made the conditions of acquisitions so difficult that it effectively had the result of SMSF's not investing in art.

Galleries and dealers have confirmed that since the new regulations were introduced, the acquisition of art by SMSFs has completely dried up due to the uncertainty.

This situation was exacerbated by the additional requirement for all SMSFs to comply with the New Regulation by 2016 in relation to artworks that were acquired prior to the introduction of the Regulations, which is effectively retrospective legislation.

It is estimated that SMSFs have invested between $600 million and $800 million in art and collectables,

Australian art sales for the last two were just over $100 million per annum.

SOME INTERESTING OBSERVATIONS

- The acquisition of art by SMSF has been incorrectly regarded by members of the Cooper report as a 'pastime of the rich", whilst other individuals see the transaction as taxpayers buying art in their SMSF, and getting a tax deduction for it. In reality the process is quite different. My contention is that tax payers will put the maximum funds that they have available into Superannuation, and as a result of this, they receive a tax deduction. It is only once these funds are in the SMSF Bank Account, that the trustees will then decide where to invest these funds.
- There is no doubt that art has been regarded by most people, including the ATO, as an accepted investment. The New Regulation only applies to SMSF and not to APRA Funds or Industry Funds, which are not affected by the "new regulations". In fact we have been advised that an alternative to complying with the new regulations is to convert existing SMSF's into APRA Funds. Naturally most members who have set up their own SMSF's do not wish to lose control of decision making and investment strategies of their Funds, nor do they wish to see their Funds outlaying substantial fees to outside management
- It has to be realized that Artists, especially Visual artists, are the least militant group of individuals. With few exceptions, they are not likely to march towards Parliament House to voice their grievances with new legislation, even if it is seriously affecting their lives and livelihood. Nor do they have the

financial resources to mount campaigns, like trade unions or mining companies. Consequently their voice is not heard very often.

- The new regulations were designed to prevent SMSF trustees from gaining current day benefit from an investment in collectibles and personal use assets and to ensure that SMSF investments are made for genuine retirement income purposes. I have always maintained that there is no impediment to superannuation funds investing in art provided it fell within the investment strategy laid down by the trustees of the fund and provided the investment met the guidelines of sound business principles. I have held the view that hanging a painting on a wall and deriving pleasure from it is purely an incidental benefit, and does not differ from the pleasure derived from looking at a property that has been acquired by a SMSF. To the best of my knowledge, the question of whether hanging artworks on the wall of members or associates creates a breach of the sole purpose test, has never been tested by the Courts, and I understand it is purely the ATO's interpretation.
- What is clear to me is that the introduction of the new regulations, especially the storage and insurance rules, have created such uncertainty that no financial advisor will recommend buying art in SMSF's. The requirement to insure artworks within 7 days of acquisition is impractical, and in many instances unobtainable. This is so despite the fact that art is a legitimate investment asset, and has been accepted as such by the ATO.
- It is perhaps ironic that according to these regulations the necessity to insure a work of art, even if it is valued at say, $1000, is specifically spelt out in the regulations, whereas there is no such requirement to insure a property owned by the Fund.
- It is also interesting to note that these regulations apply only to SMSF, and not Industry or Union funds.

RECOMMENDATIONS

We would like to see the repeal of the Superannuation Industry (Supervision) Amendment Regulations 2011 (No2), referred to as 'New Regulations" which were introduced and effective from the 1st of July 2011.

The Sole Purpose test should be redefined as the current narrow interpretation by the ATO is not in line with international opinion.

Div 35 Non Commercial losses

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INTRODUCTION

We are a firm of Accountants and tax agents who have about 3000 clients involved in mainly arts related fields.

We have offices in both Sydney and Melbourne and have a wide experience in dealing with the tax affairs of the artistic/creative community Australia wide.

We are finding that the provisions of Div 35 adversely affect many of our clients. The clients of our firm who face the main brunt are those earning over $40,000 from other sources and have losses from their artistic endeavours.

Most of these taxpayers are professional artists who are academics of some seniority who by necessity need to be practising artists in order to obtain employment in tertiary level art schools.

TEST CASE

In June 2002, we applied for a private ruling requesting the Commissioner to exercise his discretion pursuant to Div 35-55 with regards to a senior academic who agreed to be used as a test case for the purposes of seeking clarification on whether his loss from artistic activity could be offset against his income derived from employment as a senior academic at the University.

The Tax Office responded with a very comprehensive Notice of Private Ruling of which the main thrust was that there is a distinction between the taxpayer's activity as an artist and that of a Professor.

We disagree with the intent of the legislation even though we have no argument with the legalistic interpretation of the Ruling.

We submit that the grounds for the exercise of the Commissioners Discretion is exercised in too narrow a fashion that does not take into account the career path of those in the arts. From evidence gleaned anecdotally, the Commissioner is mainly biased towards giving discretion to Primary Production activities.

Compliance Issues

The legislation which enables taxpayers to apply for a private ruling gives rise to a questionnaire which places extreme and unrealistic burden on the Rulee to provide information which is extremely hard to quantify, Many questions do not apply to the vast majority of those who are asking for the exercise of the discretion.

To ask a senior Artist to seek outside verification for the fact that it takes time to earn a profit in the arts is not realistic.

When the legislation was first introduced, we calculated that the cost to get a private ruling to be almost 3 times the normal cost of preparing a tax return. Simply the length of the questionnaire was so involved that we envisaged an extra $500 to $1000 per return depending on the extent of the input from the Taxpayer themselves.

Therefore we have the situation where the Taxpayer is foregoing what could theoretically be a positive ruling and therefore gain the ability to claim losses against a large accounting bill from his/ her Accountant.

UNINTENDED CONSEQUENCES

The Board is assessing the likelihood of unintended consequences of a substantive nature.

We submit that the Arts Community has been caught up in the net, which seeks to disqualify certain people who can not pass the 4 tests from claiming losses against other income.

We do not have any trouble with the intent of the Legislation which seeks to prevent the Collins /Pitt Street farmers from claiming uncommercial losses against their other income, as often it is an artifice designed to avoid tax.

However from our experience the vast majority or members of the Arts Community are caught up in this notwithstanding the amendments, which gave them a $40,000 cap on

earnings and put them on a par with Primary Producers.

Most senior artists are also senior academics and are earning in excess of $40,000.

It is a condition of their employment that they practise their art and some are even given a day off a week to pursue their commercial art practice.

To distinguish as the Tax office have between the 2, 3 or many more activities on the basis that one activity is employment and the other is business seems to be quite unfair from the point of view of equity.

An artist does not make that distinction; teaching, painting; writing is all an intrinsic part of their career as a professional artist.

We believe this to be an unintended consequence of the legislation.

We as a firm have been active in pursuing changes to this legislation. We continue to be available to the Government should it seek some further clarification of some of the points listed above.