

**Superannuation Industry (Supervision) (related party assets) determination No.
1 of 2010**

EXPLANATORY STATEMENT

Prepared by the Australian Prudential Regulation Authority

Superannuation Industry (Supervision) Act 1993, subparagraph 66(2)(d)(ii)

Paragraph 66(2)(d) of the *Superannuation Industry (Supervision) Act 1993* (**the Act**) provides that subsection 66(1) of the Act does not prohibit a trustee or investment manager acquiring an asset from a related party of the fund if the asset is an asset of a kind which APRA, by legislative instrument, determines may be acquired by any fund (subparagraph 66(2)(d)(i)) or a class of funds in which the fund is included (subparagraph 66(2)(d)(ii)).

1. Background

APRA made a determination under subparagraph 66(2)(d)(i) of the Act on 2 May 2003 (**the 2003 Determination**) to permit any fund to acquire from a related party of the fund, at market value, units in a unit trust that is registered as a managed investment scheme under the *Corporations Act 2001* (**the Corporations Act**), where the trustee of the trust is the responsible entity of the registered scheme and is a related party of the fund.

The 2003 Determination was not lodged for registration within the time period specified in subsection 29(1) of the *Legislative Instruments Act 2003* (**the LI Act**). Consequently, in accordance with subsection 32(2) of the LI Act, the 2003 Determination ceased to have effect from 2 January 2006.

2. Purpose of the instrument

Superannuation Industry (Supervision) (related party assets) determination No. 1 of 2010 (**Determination No. 1 of 2010**) provides an exception to the prohibition on the acquisition of certain assets from a related party of a regulated superannuation fund and is identical in substance to the 2003 Determination. Determination No. 1 of 2010 provides that units in a unit trust where:

- (i) the unit trust is registered as a managed investment scheme under section 601EB of the Corporations Act;
- (ii) the trustee of the unit trust is the responsible entity of the registered scheme;
- (iii) the trustee of the of the unit trust is a related party of the regulated superannuation fund; and
- (iv) the units are acquired at market value,

are assets of a kind which may be acquired by a class of funds (consisting of all regulated superannuation funds other than self managed superannuation funds) from a related party of the fund.

APRA takes the view that investments in such vehicles by regulated superannuation funds are not contrary to the spirit of the Act and the investment prohibitions it contains provided the investment is acquired at market value.

3. Operation of the instrument

The prohibition in s 66(1) of the Act

Subject to the exceptions in subsections 66(2) and (2A), subsection 66(1) of the Act provides that a trustee or an investment manager of a regulated superannuation fund must not intentionally acquire an asset from a related party of the fund. APRA considers that in certain circumstances, a superannuation fund's investment in a unit trust, the trustee of which is a related party of the fund, are inadvertently caught by this prohibition. If a unit in a unit trust would not be an in-house asset (because the unit trust is not a related trust), then neither should a fund be prohibited from acquiring the unit provided the appropriate safeguards are in place (which are that the trustee of the unit trust is subject to the managed investment schemes regime in the Corporations Act and the units are acquired for fair value. The mechanics of how certain structures breach subsection 66(1) is considered in detail below.

Is the investing in units in a unit trust the 'acquisition of an asset'?

In order for subsection 66(1) to come into play, the superannuation fund must as a first step 'acquire an asset'.

The expression 'asset' is defined in subsection 10(1) of the Act to mean 'any form of property and, to avoid doubt, includes money (whether Australian currency or currency of another country).'

There is no general definition of the expression 'acquire an asset' in the Act, however, subsection 66(5) of the Act provides that for the purposes of section 66, the expression 'does not include accept money'.

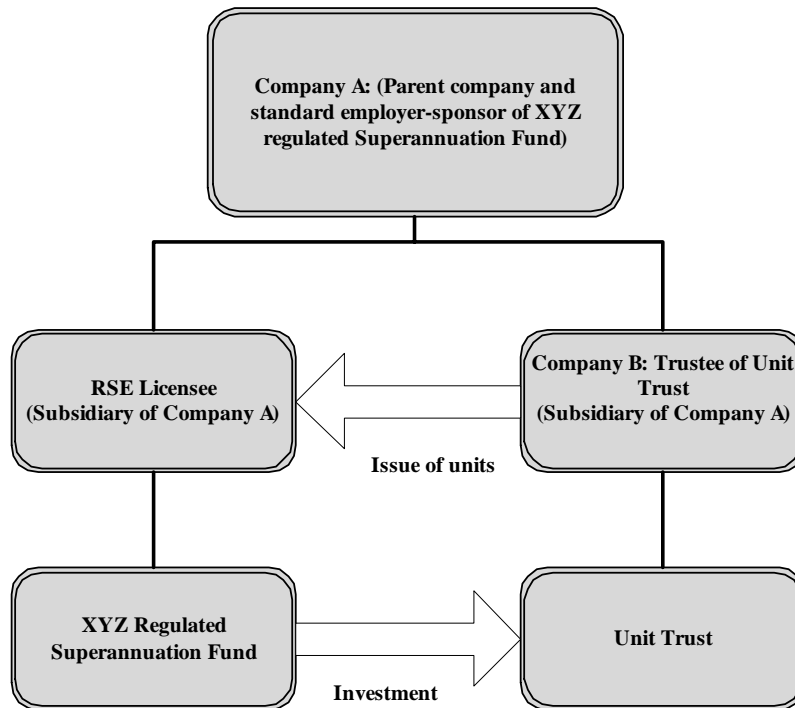
APRA considers that the issue of units in a unit trust to a trustee of a regulated superannuation fund, in consideration for the payment of subscription moneys for those units, amounts to an acquisition of an asset in terms of section 66. This view is consistent with the decision of the Full Court of the Federal Court in *Allina Ltd v Federal Commissioner of Taxation* (1991) 99 ALR 295.

Has there been an acquisition of an asset from a 'related party of the fund'?

Subsection 66(1) of the Act prohibits a trustee intentionally acquiring an asset from a 'related party of the fund'. Diagram 1 below illustrates one situation in which a trustee of a unit trust may be a 'related party' of a superannuation fund (NB: the structure depicted in Diagram 1 is not intended to limit the structures to which this Determination may apply but is merely for illustrative purposes):

Diagram 1

ABC Group



The following is noted in relation to Diagram 1:

- The definition of ‘related party’ in relation to a superannuation fund includes the standard employer-sponsor and its ‘Part 8 associates’.
- Company A is a standard employer-sponsor of the XYZ Superannuation Fund and is therefore a ‘related party’ of the XYZ Superannuation Fund.
- The expression ‘Part 8 associates’ is defined in section 70C. Under paragraph 70C(e), Part 8 associates of a company (the primary entity) include another company (a controlled company) where the controlled company is sufficiently influenced by, or where a majority voting interest in the controlled company is held by, inter-alia, (i) the primary entity or (ii) another entity that is a Part 8 associate of the primary entity.
- As Company A holds a majority voting interest in Company B, Company B is a Part 8 associate of Company A.
- It follows that Company B is a related party of the XYZ Superannuation Fund.

In the structure depicted in Diagram 1, the RSE Licensee has acquired an asset (being units in the Unit Trust) from Company B, which is responsible for issuing the units and is

a related party of the XYZ Superannuation Fund. Consequently, the RSE Licensee is in breach of subsection 66(1) of the Act unless one of the exceptions in subsections 66(2) or (2A) applies.

Exceptions in subsections 66(2) or (2A) of the Act

There are a number of exceptions in subsections 66(2) and (2A) to the prohibition in subsection (1) on intentionally acquiring an asset from a related party of the fund, Depending on the circumstances, it is likely that these exceptions may not apply to a structure such as that set out in Diagram 1.

Subsections 66(2) and (2A) respectively provide:

- (2) Subsection (1) does not prohibit a trustee or investment manager acquiring an asset from a related party of the fund if:
 - (a) the asset is a listed security acquired at market value; or
 - (b) if the fund is a superannuation fund with fewer than 5 members --the asset is business real property of the related party acquired at market value; or
 - (c) the trustee of a regulated superannuation fund acquired the asset under a merger between regulated superannuation funds; or
 - (d) the asset is an asset of a kind which the Regulator, by legislative instrument, determines may be acquired by:
 - (i) any fund; or
 - (ii) a class of funds in which the fund is included.

- (2A) Subsection (1) does not prohibit the acquisition of an asset by a trustee or investment manager of a superannuation fund from a related party of the fund if:
 - (a) the acquisition of the asset constitutes an investment that:
 - (i) is an in-house asset of the fund within the meaning of subsection 71(1); or
 - (ii) would be an in-house asset of the fund within the meaning of subsection 71(1) apart from the operation of Subdivision D of Part 8; or
 - (iii) is a life insurance policy issued by a life insurance company (other than a policy acquired from a member of the fund or from a relative of a member); or
 - (iv) is referred to in paragraph 71(1)(b), (ba), (c), (d), (e), (f), (h) or (j); and
 - (b) the asset is acquired at market value; and
 - (c) the acquisition of the asset would not result in the level of in-house assets of the superannuation fund exceeding the level permitted by Part 8.

In relation to the exception in paragraph 66(2)(a), it is noted that while units in a unit trust may well be listed, this may not always be the case. Further, the exceptions in paragraphs 66(2)(b) and (c) might only apply in limited circumstances and there are no applicable determinations under paragraph 66(2)(d) currently in force.

The exceptions in paragraph 66(2A)(a) do not prohibit a trustee from acquiring an asset from a related party of the fund if that asset is an in-house asset within the meaning of subsection 71(1) of the Act (provided the asset is acquired at market value and would not result in the in-house asset limit being exceeded by the level permitted in Part 8 of the Act). Subsection 71(1) of the Act provides that an asset of the fund that is an investment in a related party or a related trust is an in-house asset of that fund.

In the example in Diagram 1, there will not be an investment in a ‘related party of the fund’ within the meaning of subsection 71(1). This is because while Company B is a ‘related party’ of the XYZ Superannuation Fund, the Federal Court decision in *Re Romano Trevisan and Valerie Anne Trevisan the Trustees of the Forli Pty Ltd Superannuation Fund v Commissioner of Taxation of the Commonwealth of Australia* [1991] FCA 172 held that an investment in a unit trust is not an investment in its trustee, rather it is an investment in the property the subject of the trust deed. Diagram 1 also may not involve an investment in a ‘related trust of the fund’. A ‘related trust’ of a superannuation fund is defined in subsection 10(1) of the Act as ‘a trust that a member or a standard employer-sponsor of the fund *controls* (within the meaning of section 70E), other than an excluded instalment trust of the fund’.

Subsection 70E(2) of the Act provides that an entity *controls a trust* if:

- (a) a group¹ in relation to the entity has a fixed entitlement to more than 50% of the capital or income of the trust; or
- (b) the trustee of the trust, or a majority of the trustees of the trust, is accustomed or under an obligation (whether formal or informal), or might reasonably be expected, to act in accordance with the directions, instructions or wishes of a group in relation to the entity (whether those directions, instructions or wishes are, or might reasonably be expected to be, communicated directly or through interposed companies, partnerships or trusts); or
- (c) a group in relation to the entity is able to remove or appoint the trustee, or a majority of the trustees, of the trust.

In relation to the structure in Diagram 1, the Unit Trust may not meet the definition of a related trust of the XYZ Superannuation Fund, in all circumstances, if the trust is not *controlled* within the meaning of 70E(2).

¹ Subsection 70E(3) provides that for the purposes of subsection 70E(2) “*group*” in relation to an entity means:

- (a) the entity acting alone; or
- (b) a Part 8 associate of the entity acting alone; or
- (c) the entity and one or more Part 8 associated of the entity acting together; or
- (d) 2 or more Part 8 associates of the entity acting together.

In summary, there may not have been an investment in an in-house asset within the meaning of subsection 71(1) of the Act because:

- (a) although there is an investment in a unit trust, the unit trust is not a 'related trust' of the superannuation fund; and
- (b) although the trustee of the unit trust may be a 'related party' of the superannuation fund (being a subsidiary of the employer-sponsor), there is no investment in the trustee of the unit trust (the investment is in the unit trust).

The other exceptions in subparagraphs 66(2A)(a)(ii) to (iv) (read with paragraphs 66(2A)(b) and (c)) may also not apply to a structure such as that depicted in Diagram 1. In particular, the investment in the unit trust may not be an investment in a 'widely held unit trust' and hence not fall within paragraph 71(1)(h).

Consequently, a trustee may not be able to rely on subsections 66(2) or (2A) where there is a breach of subsection 66(1) arising out of a structure such as that in Diagram 1.

Need for a determination under subparagraph 66(2)(d)(ii) of the Act

APRA considers that structures such as the one in Diagram 1 should not be prohibited provided that appropriate safeguards are in place, namely the trustee of the unit trust is subject to the managed investment schemes regime in the Corporations Act and the units are acquired at market value. In APRA's view, Determination No. 1 of 2010 strikes the appropriate balance between allowing superannuation funds broad investment options and ensuring that the investment does not jeopardise the retirement savings of members.

Entities covered by the Exemption

Responsibility for the administration of the Act is shared between APRA, the Commissioner of Taxation and the Australian Securities and Investments Commission. Subsection 6(1) of the Act provides that APRA has the general administration of Part 7 of the Act, which includes section 66, except to the extent that its provisions relate to self managed superannuation funds. To avoid doubt, Determination No. 1 of 2010 is expressed to apply to regulated superannuation funds other than self managed superannuation funds.

4. Consultation

APRA has consulted the relevant government agencies and industry organisations about its intention to re-issue the lapsed 2003 Determination. No substantive issues were identified in the process.