

Lowensteins Tax Matters for the Arts

ARTS MANAGEMENT

September / October 2010



Jerzy W. Michalski, *The Edge*, Oil on Belgian Linen, 61cm by 122cm, 2010 — the artist's personal response to the Cooper Report

The Cooper Report, its recommendations to ban artworks from SMSFs and the new SPAA Draft Guidelines

On 30 June the Cooper Review into Superannuation came up with more than 150 recommendations to protect our national retirement savings. One of these proposals – to ban artworks from self-managed super funds (SMSFs) – which concern only 0.1% of their total assets - provoked a public outcry and through the Save Super Art campaign led to its rejection by all political parties within a month.

At the time of writing Recommendation 8.14 relating to Section 8.3 Collectables and Personal Use Assets is the only part of the Final Report the Gillard Government has ruled out. But this is with the proviso that there will be new draft guidelines in order that SMSFs

may continue to invest into the art and collectables market and hold these collections until retirement of the members in due course. If these guidelines could not be met SMSFs would have a five-year period to sell their collections.

We provided consultation in drawing up the SPAA* Best Practice Guidelines for Acquiring and Holding Artworks in an SMSF which were presented to the Ministry of Finance in late June and accepted in principle a month later, clearing the way for the rejection of Cooper's Recommendation 8.14. These guidelines were also developed so as to allow the continued investment by SMSFs into the other collectables



The Directors of Lowensteins Arts Management are pleased to announce Cheree Tucker was appointed Senior Associate on 1 July.

Cheree was admitted as a Chartered Accountant in 2006 and is a specialist in superannuation, currently completing her Financial Services diploma. She commenced with Lowensteins in 2008 following an extended period of work experience in the United Kingdom.

During her time with our firm Cheree has demonstrated great client relation skills and shown her knowledge in a wide area of taxation and superannuation law.

categories such as antiques, numismatics, jewellery, stamps, wine and the like – but for the purpose of this discussion I will focus on artwork collections.

The Save Super Art campaign revealed the multi-faceted nature of this contentious area. The arts industry has become reliant on SMSF investment and it now probably accounts for 15% of its annual turnover. For the Aboriginal art sector this figure could be higher. No one knows for sure how much is held in SMSF collections. The Cooper Panel estimated half a billion dollars but it could well be many times more than that. Just these facts alone made Cooper's recommendation to have SMSFs divest all their collections within 5 years not only poor public policy but comments sent to the campaign indicated that it could be potentially unconstitutional.

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buying artworks and hanging them in their living room. At face value this would seem to breach the “sole purpose” test - that is, the artwork is providing an immediate benefit through its aesthetic quality whereas investments should only be made for the sole purpose of retirement. Leaving aside the argument that the benefit derived is really just incidental, this issue has become political and led to accusations that the art market is emotion-driven and not a legitimate area of investment.

The new guidelines were drafted with this political reality in mind. Any artwork collections held by SMSFs will have to

be stored on an arms-length basis in the future except for those that comply with the in-house asset rule. (It is permissible to hold 5% of the net market value of a SMSF in the form of artworks at the home of a member – however it is recommended that even in this case the SMSF receives a rental payment from the member for the enjoyment of the artworks).

If the guidelines are accepted each SMSF will have to have a Specialist Advisor who will advise on the acquisition of artworks and ensure that such purchases are within the broader investment strategy of the fund. The creation of advisors to SMSFs is a consequence of the transfer of their administration from the ATO to ASIC.

Artwork lease or rent arrangements will be monitored. At the end of each financial year the risk and return parameters of artwork collections will be assessed to see whether the SMSF should continue with these collections.



The launch of the Save Super Art Campaign Melbourne, June 2010. Image courtesy Michael Blamey

There will have to be an annual valuation of all artworks held by SMSFs and only appropriately qualified valuers will be allowed to prepare these valuations and condition reports. Currently there is no such requirement.

There are a number of significant implications for the art industry that flow from the draft SPAA guidelines. The guidelines were drafted with the knowledge that the Resale Royalty Right for Visual Artists Act 2009 would in time provide valuers with much greater information about the resale of artwork by artists who previously would not have appeared on the secondary market.

This information will assist SMSFs wishing to buy into the contemporary and Aboriginal art markets. One of the major problems of the Cooper Report was the recommendation that SMSFs convert to Small Apra Funds (SAF) and surrender control of their investment decisions if they wished to avoid the mandatory divestment of their collections. If that happened I could envisage a much more

conservative artwork purchasing strategy than is currently the case. It would also be considerably more expensive to administer.

Save Super Art received emails from all over the country attesting to the important role that SMSFs play in Australia's visual arts industry. For example key works in the Canning Stock Route exhibition at the National Gallery of Australia were made available through these collections. Similarly, a \$1 million collection of Aboriginal artworks set to tour Italy next year originated from a SMSF.

On the other hand there are also instances of inappropriate marketing of artworks to self-managed funds. With ASIC about to administer the sector such marketing would not be recommended. With the new guidelines it would probably not be prudent for a SMSF to buy a \$5,000 painting if this was to be the only artwork held amongst its other assets and it is incumbent upon the marketers of artworks to understand these concerns.

In the end, the Cooper Report inadvertently created an opportunity to address issues that had been dogging the art market for too long and allowed those in the finance sector to deride it as an inappropriate area of investment. The key now is for the arts industry to develop its own code of practice to enable self-managed super funds to continue their investment into the sector.

With projected funds of \$5 trillion to be held by superannuation funds within the next 25 years it is my considered opinion that it will only be a matter of time before another Jeremy Cooper appears on the horizon unless such a move towards self-regulation is made.

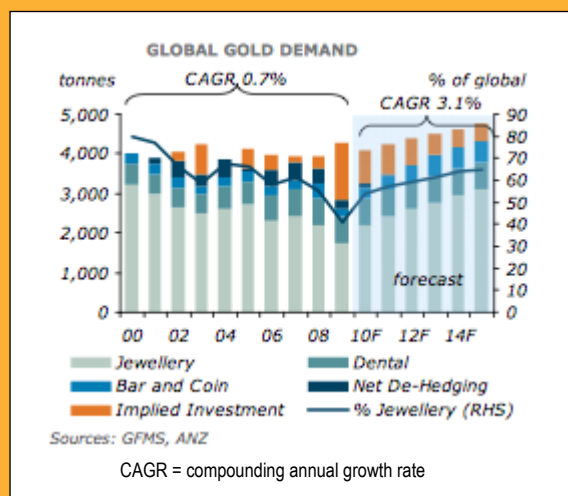
* SPAA is the SMSF Professionals' Association of Australia

Components of the Gold Price - An Analysis

The attached graph shows that over the past 10 years and in particular since 2008 there has been an increasing amount of gold demand represented by investors as opposed to those purchasing for the traditional reasons of jewellery and dental.

This would seem to indicate that gold is being viewed more and more as an alternative asset class to property and equities and this has led to a marked increase in its pricing as a commodity since 2000.

The same phenomenon appears to be occurring in the world art markets. Could this be one of the reasons behind the Cooper Report recommendations to ban artworks, gold bullion and other collectables from self-managed superannuation funds?



2010 Superannuation Statistics

According to the latest APRA Quarterly Superannuation Statistics total estimated superannuation assets decreased by 2.5 per cent in the June 2010 quarter to \$1.23 trillion, however during the past financial year there was a 14.1 per cent increase in total estimated superannuation assets.

At 30 June 2010, self-managed superannuation funds (SMSFs) held the largest proportion of superannuation assets

accounting for 31.8 per cent of assets.

According to the Australian Taxation Office there was an increase of 26,269 SMSFs in existence over this 12-month period. This would indicate at least 2,000 of these funds are being formed in Australia every month. During the same period of this statistical survey the number of corporate, industry, public sector and retail superannuation funds declined from 463 to 426 entities.

Superannuation industry quarterly estimates

By fund type	Assets (\$billion)			Number of entities		
	Jun 2009	Dec 2009	Jun 2010	Jun 2009	Dec 2009	Jun 2010
Corporate	54.0	59.9	56.2	190	171	168
Industry	191.8	218.8	225.5	67	65	65
Public Sector	153.0	172.7	175.3	40	39	39
Retail	304.7	345.7	339.0	166	154	154
Subtotal	703.5	797.0	795.9	463	429	426
Self-managed Funds	334.2	387.7	390.8	401,929	415,233	428,198
Small APRA Funds	2.0	1.8	1.6	4,277	3,878	3,869
Other	35.6	40.6	38.9	112	106	103
Subtotal	371.8	430.1	431.3	406,318	419,217	432,170
Total	1,075.3	1,227.2	1,227.2	406,781	419,646	432,596

(Source: APRA Quarterly Superannuation Statistics June 2010 — issued 9 September 2010)

The New Federal Arts Ministry

Peter Garrett has lost his Arts Ministry in what may well be another consequence of the Save Super Art campaign against the Cooper Report recommendations to ban artworks from self-managed super funds.

The new Gillard Cabinet announced in early September saw Garrett replaced in the Arts Ministry by Simon Crean.

Garrett's demotion was foretold by Katrina Strickland in The Australian Financial Review a fortnight before the federal election. In an article titled "Collectables are safe, but it may not save Garrett" on 3 August she wrote:

The former Midnight Oil frontman received a rock star welcome when he took over as Arts Minister in 2007, which was apt because he was, well, a rock star. Nearly three years later the gloss has worn off and you don't have to go far to hear arts executives complaining... about how disappointing Garrett has been.

It appears that the arts will now be managed as a stand-alone portfolio. This is a positive sign that the issues that have beset the arts industry this year – code of conduct, resale royalties and Cooper – will now be properly addressed by the experienced Mr Crean.

However Crean will also have carriage of the potential powderkeg of Regional Australia, Regional Development and Local Government in his new ministry. This is an extremely sensitive portfolio in the minority Gillard government, which is dependent on the support of the two NSW country independents and Andrew Wilkie in Tasmania to prosecute its agenda over the next three years.

In relation to the Cooper Report its recommendations will now be handled by Bill Shorten, who has been promoted to Assistant Treasurer, Financial Services and Superannuation.

Prime Minister Julia Gillard has indicated that she will be pursuing the legislative agenda of her former government regardless of the current minority status she holds.

If this is the case we will soon know when Federal Parliament resumes if the Cooper Report recommendations in relation to artworks and collectables are still planned to take effect from July 1 2011.

Education Tax Refund

The education tax refund (ETR) helps families and independent students meet costs associated with primary school and secondary (high) school education costs.

In order to be eligible for the ETR:

1. You have to have eligible education expenses for a child
2. The child must be in primary or secondary school
3. You received Family Tax Benefit Part A.

Families can claim up to 50% of their eligible educational expenses such as

costs incurred in purchasing, leasing or hiring:

- laptops, home computers and associated costs
- printers, USB flash drives, disability aids in use of computers for students with special needs
- home internet connections
- computer software for educational use eg word processors, spreadsheets, database
- school textbooks, prescribed textbooks, associated learning material, study guides and stationery

The maximum you can claim in the 2009-2010 income year is 50% of

eligible expenses up to:

- \$780 for each eligible child in primary school (i.e. refund of up to \$390)
- \$1558 for each eligible child in secondary school (i.e. refund of up to \$779)

If your expenses are greater than these, the excess can be carried forward into the following year.

You do not have to be eligible for the entire year to be able to claim ETR. You can claim the ETR for any period during the year you met the eligibility requirements.

Key Election Policies of the ALP and the Greens

It would be fair to say that the arts did not feature prominently as an issue in the 2010 Federal Election. From the viewpoint of the industry this was disappointing considering the upheavals it has endured this year in implementing the Code of Conduct for Aboriginal Art, coping with the introduction of resale royalties and surviving the dangerous recommendations of the Cooper Report.

Even more disappointing is the government's silence over its National Cultural Policy, for which submissions were finalised in February this year. At an arts industry forum at Melbourne University in July then Arts Minister Peter Garrett did not even make mention of its existence – it has truly become the arts policy that dare not speak its name.

The key ALP arts policy pronouncements during the Federal Election seemed to recognise the need for some stability to this fragile portfolio but lacked vision and reform. Instead the government's election policies were characterised by the need to “consult”, “negotiate”, “develop”, “plan” and “finalise” the administrative concerns of its stakeholders.

In contrast the Greens proposed new funding structures, reforms to welfare payments for artists and amendments to the resale royalties scheme. Importantly the Greens have recognised the costs borne by the arts industry in implementing resale royalties and have proposed a \$5 million fund to be set up to assist galleries in its implementation – but this also comes with the scrapping of the first-transfer exemption.

Their major arts policy announcements made during the 2010 Federal Election are tabled to the right.

ALP	Greens
<ul style="list-style-type: none"> • \$10 million in extra funding over 5 five years into the Australia Council, to be dispersed in annual grants of up to \$80,000 for new work; of \$50,000 for additional shows, including to regional and rural audiences; and of \$60,000 for fellowships for young and emerging, and mid-career artists. • Move the administration of six funds out of the department and into the Australia Council, to streamline and maximise cost efficiencies. Includes Playing, Visions and Festivals Australia and others. • Develop a National Cultural Policy • Negotiate with the State governments to develop a new funding model for the major performing arts companies that better rewards success. • Finalise a strategic contemporary music industry plan. • Consult with the Australian screen production industry to respond to a review of the sector, which is due to be finished by the end of the year. 	<ul style="list-style-type: none"> • Establish a \$5 million research and development fund to support new Australian work, risk taking and “truly innovative social artistic ventures”. • Establish a \$10 million overseas touring fund and increase funding to Playing Australia for regional tours. • Allow artists to count artistic practice as work for the purposes of meeting dole requirements. • Initiate a round table to discuss reforming the copyright agenda. • Pay artists for exhibitions and performances through a new \$3 million fund. • Reinstate the purchase of artwork by young and emerging artists by the Federal Parliament. • Impose the resale royalty on the first resale of any artwork, not the second, as legislation now dictates; remove its opt-out clause; recognise indigenous communal ownership of artworks; and set up a \$5 million fund to help galleries administer the scheme.

Taxation of Overseas-based Employees

On 1 April, then Assistant Treasurer, Senator the Hon Nick Sherry, issued a media release announcing that he has moved to provide additional clarity on specific issues raised by industry regarding the implementation of changes to the taxation of Australian residents employed overseas. The announcement detailed the procedures relating to the lodgement of tax returns by Australians working overseas and certain fringe benefit tax (FBT) arrangements.

The measure was first announced in the 2009-10 Budget and received Royal Assent on 29 June 2009. The 2009-10 Budget measures means that from 1 July 2009, the foreign employment income of most Australians working overseas was no longer exempt from Australian income tax. The measure also brought overseas based Australian employees into the FBT base for the first time.

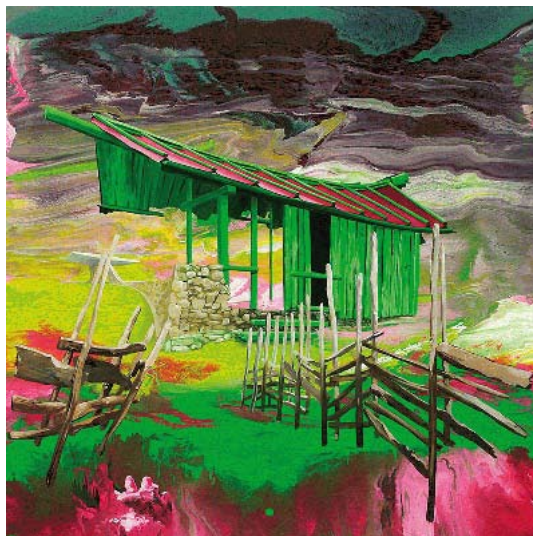
The media release provided further details on how the implementation of this measure ensures that there is no double taxation of Australians working overseas. The Assistant Treasurer also announced the operation of the current FBT exemption for fly-in fly-out arrangements that apply for domestic arrangements will be maintained and applied to Australian workers in similar situations involving international work.

It was confirmed that Australians working overseas will not be required to lodge a foreign tax return to demonstrate and claim amounts of foreign tax paid.

In addition, the ATO has indicated that there is no impediment to the "otherwise deductible" rule that applies within Australia also being applied to overseas fly-in/fly-out arrangements that are factually similar in nature other than the difference of one being domestic and one being international.



Robert Juniper born 1929
King of the Hill Mine c.1980
Oil on canvas
242cm by 182cm
GFL Fine Art, Perth, 01/06/2010, Lot No. 43
\$56,000 – a new Australian record price for this artist



Stephen Bush born 1958
Southeast in the Summer 2006
oil and enamel on linen
183cm by 183cm
signed, dated and inscribed on stretcher
verso: Stephen Bush 'southeast in the
summer' 2006
\$24,000 – a new Australian record price
for this artist.
Menzies Art Brands, Sydney, 24/06/2010

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Image courtesy Paul Green and the artist

Ken Unsworth's Popera — The House of the Blue Leaves

Ken Unsworth delighted and disturbed his audience as he took them on an operatic journey that veered from the surprising to the surreal in a temporary theatre installation created in the central court of the Art Gallery of New South Wales in three special performances in Sydney late August.

Unsworth's legacy is boundless. He is best known for his outstanding sculpture and installation art - his work *Suspended Stone circle II*, is one of the most popular in the AGNSW collection. Many may recall Unsworth's moving tribute last year to his late wife, Elisabeth. Created in a series of specially constructed rooms on Cockatoo Island, *A Ringing Glass* (Rilke), was an amazing combination of giant sculptures, video, live and recorded music, and unexpected happenings like a grand piano emerging from the ceiling playing a pianola roll recorded by Elisabeth.

With a sense of urgency, nearing 80 years of age, Unsworth was keen to present his latest project. "If I don't do it this year, I may not be around. I have got to do as much as I can while I have the chance", he said prior to the recent performances..

The House of Blue Leaves is a collaboration with Australian dance artists for whom Ken Unsworth created a phantasmagorical array of sculptural structures and contraptions to which Susan Barling, Anca Frankenhaeuser, Norman Hall, Patrick Harding-Irmer and Ross Philip applied the wisdom of their international experience and vivid imaginations with a combined expressive power to create unsettling, darkly humorous and arresting images and situations.

International composer and performer Jonathan Cooper composed and arranged the score expressly for Blue Leaves and its principal singer, the renowned and admired cabaret artist Natalie Gamsu, was joined by a counter tenor and a quartet of boy sopranos.

http://www.artgallery.nsw.gov.au/media/archives_2010/ken_unsworth_popera

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ARTS MANAGEMENT

Tax Matters for the Arts has been written and edited by Michael Fox with the assistance and advice of Tom Lowenstein, Evan Lowenstein and Adam Micmacher. Publication design by Jen Spiers.