

ART AND SUPERANNUATION

Lisa Monique Gluck 2010

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INTRODUCTION

The recent disruption to the visual arts and superannuation industries in Australia has uncovered some ground worthy of discussion and debate. In Part 1, the current state of the Self-Managed Super Fund sector will be explored, including statistics, laws and current practice with regard to the investment of artwork.

Part 2 will inform on the Super System Review, which provided recommendations to the Government for the superannuation industry as a whole. Key attributes of this review will be considered, with a particular focus on recommendations relating to the investment of art through Self-Managed Super Funds. Arguments both for and against these recommendations, including the reasons behind their endorsement and their potential impacts to the visual arts industry, will be evaluated. A look into some classic economic studies, as well as some examples of contemporary investment collections, will provide an analysis of art's current position in the market place and its legitimacy as an investment class. Alternative benefits of the superannuation industry's investment in art will also be investigated, with regard to government funding.

In Part 3, the Save Super Art campaign process will be outlined, including the development of the three major political party responses. A summary of the best practice guidelines will also be provided, which were developed by the finance and arts sectors to be drawn upon by the Government in the wake of the debate.

PART 1

SELF-MANAGED SUPER FUNDS

The Self-Managed Super Fund (SMSF) sector is the largest superannuation sector by asset size and number of funds in Australia. In March 2010, there were approximately 423,000 SMSFs, (99% of all superannuation funds), comprising of over 30% of the total assets held in superannuation.¹ SMSF members are typically aged between 35 and 59 years, where 17% earn less than \$20,000 per year and 16% earn greater than \$100,000 per year.² These figures show a concentration of wealth in this sector,³ which is becoming the largest and fastest growing superannuation sector in the Australian economy.⁴

SMSFs have 806,000 members or accounts, making up 2.5% of the 32 million accounts currently active.⁵ In 2006, membership growth rates for SMSFs were close to 12% per annum and had consistently exceeded industry funds, growing at an average of around 8%.⁶ Since 2003, the number of SMSFs have increased from 250,000 to over 400,000, where an average of 2,100 new funds are set up monthly.⁷

SMSFs have been in existence for over 30 years, where fund assets have increased from \$132 billion to \$332 billion between June 2004 and June 2009, an annual growth rate of 20%.⁸ Since 2000, SMSFs have outperformed APRA and industry funds by up to 6% per annum and managed to survive the global financial crisis in a healthier state than many of the larger funds.⁹

In 2010, SMSFs account for over 30% of the total funds invested and member contributions are predicted to increase from 9% to 12%. It is therefore projected that funds will reach \$5 trillion in the next 25 years, where the popularity of SMSFs may affect the membership base of larger APRA and industry funds.¹⁰

¹ Commonwealth of Australia, 2010a, p. 218.

² Vivian, 2006.

³ Boland, 2010.

⁴ Lowenstein, 2010.

⁵ Commonwealth of Australia, 2010a, p. 218.

⁶ Vivian, 2006.

⁷ Lowenstein, 2010.

⁸ Commonwealth of Australia, 2010a, p. 218.

⁹ Lowenstein, 2010.

¹⁰ Lowenstein, 2010.

SMSFs are similar in function to other funds, the key difference being that members are also trustees and control the investment of contributions and payment of benefits.¹¹ Members must comply with a number of obligations, such as satisfying the fund's deeds and abiding by superannuation law.¹²

In order to be eligible for super fund tax concessions, members must comply with all of its associated laws,¹³ such as the sole purpose test. This law requires that the fund's sole purpose is to provide benefits to members only after they retire. Early access to or benefit from a SMSF investment, such as hanging a piece of artwork at home, is considered a breach of this law.¹⁴

There are also strict reporting and administration obligations. SMSFs have previously been regulated by the ATO which takes a compliance approach to regulation, rather than a prudential approach.¹⁵ As such, all SMSFs must undertake an annual audit through an approved auditor, ensuring all financial statements comply with super law.¹⁶ Failure to comply results in severe penalties, ranging from the cessation of a fund to removing tax concessions.¹⁷

¹¹ Australian Taxation Office, 2009, p. 3.

¹² Australian Taxation Office, 2009, p. 4.

¹³ Australian Taxation Office, 2009, p. 5. Laws include honesty, skill, ensuring the best interests for all members, keeping fund assets separate from personal assets, retaining control of the fund, following investment strategies and ensuring no early access.

¹⁴ Australian Taxation Office, 2009, p. 14.

¹⁵ Commonwealth of Australia, 2010a, p. 218.

¹⁶ Australian Taxation Office, 2009, p. 26.

¹⁷ Australian Taxation Office, 2009, p. 29.

PART 2

THE SUPER SYSTEM REVIEW & SAVE SUPER ART

The Super System Review (Review) was presented to Chris Bowen, Minister for Financial Services, Superannuation and Corporate Law, by the chair of the review panel, Jeremy Cooper, on 30 June 2010. The main premise of the Review and its recommendations is to simplify the superannuation system in Australia,¹⁸ with the overall aim of optimising retirement benefits for members.¹⁹ The Review claims that the recommendations will provide member benefits, such as collective savings of \$1.55 billion a year in the short term and \$2.7 billion a year in the long term.²⁰

The main issue seen to permeate throughout the superannuation industry is a lack of regulatory frameworks.²¹ The SMSF sector is summarised as being fundamentally successful, where only minor changes are required relating to regulatory frameworks, auditors and service providers.²² In spite of this, the Review makes certain recommendations for the sector, acting as the catalyst for the mobilization of the Australian arts industry and the establishment of the Save Super Art campaign.

Recommendation 8.14 states that:

‘SIS legislation, in relation to SMSFs, should be amended so that:

‘(a) the acquisition of collectables and personal use assets²³ by SMSF trustees be prohibited;

‘(b) SMSFs that own collectables or personal use assets be provided a five year transition period, in which to convert to a SAF or, alternatively, dispose of those assets. No acquisitions of collectables and personal use assets would be permissible during the transition period; and

‘(c) APRA regulated funds be exempted from these changes.’²⁴

According to the Review, certain occurrences in the SMSF sector have necessitated these recommendations, such as members’ collective failure to comply with various regulations, i.e. the

¹⁸ Financial Planning, 2010.

¹⁹ Commonwealth of Australia, 2010b, p. iii.

²⁰ Wilson, 2010.

²¹ Commonwealth of Australia, 2010a, p. 217.

²² Commonwealth of Australia, 2010b, p. 1.

²³ Commonwealth of Australia, 2010a, p. 246. According to the Review and for tax purposes, ‘collectables’ include paintings, jewellery, antiques and stamp collections. ‘Personal use assets’ include wine, exotic cars, golf club memberships, race horses and boats.

²⁴ Commonwealth of Australia, 2010a, p. 247.

sole purpose test.²⁵ A 2005 ATO audit of 5000 SMSFs shows a high number of compliance breaches, where 17% loaned assets to members or relatives, 13% breached the in-house asset rule and 7% breached the sole purpose test.²⁶ These figures have caused concern in the SMSF sector, necessitating the recommendations put forward in the Review.

These breaches attract severe penalties, such as the confiscation of the concessional tax rate of 15% and the application of the regular tax rate of 45%.²⁷ The Review recommendations claim to reduce the risk of these breaches and therefore avoid such penalties for fund owners.

The Save Super Art (SSA) campaign emerged in opposition to the recommendations put forward in the Review, due to their predicted impact on the visual arts and its related industries. The Review panel argued that there was no logic behind these claims²⁸ and it was not long before accusations arose pertaining to the emotionally-driven nature of the arts sector and its opposition of the Review.²⁹

Tom Lowenstein, SSA Convenor, questioned the Review's 'logic', when facts were available to the contrary.³⁰ Artwork and collectables in SMSFs contribute to a minor 0.1% of total investments, to the value of around \$400 million. Some would argue that this small figure, relative to the whole super industry, supports the Review's claim. There is, however, another asset class entitled 'Other', which is accountable for 3.0% or \$12 billion of investments in SMSFs. Artwork and collectables are often reported in documentation as 'Other' by accountants.³¹ This points to a level of uncertainty surrounding the true quantity of assets that may be affected should these recommendations be considered, necessitating an enquiry into the situation.

The SMSF sector contributes to 15-20% (\$100 million) of the art market's annual income;³² for example it accounts for as much as one third of Roslyn Oxley9 Gallery's business³³ and 15-20% of GFL Fine Art's auction sales.³⁴ These figures led Tamara Winikoff, Executive Director of National Associated for the Visual Arts, to suggest that the Review did not duly consider the long-term financial, social and cultural impacts of the recommendations, including the instability of the

²⁵ Commonwealth of Australia, 2010a, p. 245.

²⁶ Read, 2005.

²⁷ Vivian, 2006.

²⁸ Lowenstein, 2010.

²⁹ Fox, 2010c.

³⁰ Lowenstein, 2010.

³¹ Fox, 2010b.

³² Boland, 2010.

³³ Fox, 2010e, p. 103.

³⁴ Fox, 2010e, p. 105.

art market, due to rushed divestment, as well as a decrease in art sales and income possibilities for artists.³⁵

From the finance sector, Andrew Penn, Chief Executive of Axa Asia-Pacific Holdings, did see the Review's logic, however, did not agree with it, suggesting that the protection of the already fragile visual arts industry far outweighed the recommendations' rationale.³⁶

Since the initial draft of the Review was issued, the panel shortened the transition period from ten to five years. In this time members could either convert their SMSF to a Small APRA Fund (SAF), or divest their collectable assets.³⁷ The reason given for decreasing this timeframe was to reduce uncertainty in the market for art investors.³⁸

This speed further exacerbates the impact, due to the influx of art on the market. In a meeting between Tom Lowenstein and Chris Bowen, on 19 July 2010, Lowenstein warned that recommending to divest art over five years could be a breach of Section 55 of the Constitution, such that, 'loss in value caused by their forced sale would represent a tax-like measure,'³⁹ where the loss represents a tax.⁴⁰ In addition, due to the recent legislation of the Resale Royalty Rights for Visual Artists, thousands of retirees could lose an additional 5% of the value of artwork upon sale. These impacts contradict the original premise of the Review, which seeks to protect retirement savings.⁴¹ Furthermore, Andrea Slattery, Chief Executive Officer of Self-Managed Super Fund Professionals' Association of Australia (SPAA), finds the forced sale of investments to contradict a government policy principle, which seeks to prevent directing investments towards or away from a particular asset class.⁴²

For members who wish to continue to invest in collectables, the Review recommends they convert their SMSF to a SAF, which operates under a more prudent and regulated framework. According to the Review, the differences between SMSFs and SAFs are minor. Converting to a SAF bears no impact on the current structure of the fund or its member entitlements, nor are there any tax consequences. It merely means that the regulation of the fund falls under APRA, instead of the ATO. While members still have the ability to self-direct investments, an RSE trustee must be

³⁵ Winikoff, 2010.

³⁶ Teckchandani, 2010.

³⁷ Commonwealth of Australia, 2010a, p. 244.

³⁸ Boland, 2010.

³⁹ Fox, 2010b.

⁴⁰ The Australian, 2010.

⁴¹ Fox, 2010a.

⁴² SPAA, 2010b.

appointed, at additional cost. The Review maintains that this cost will be offset by the added protection afforded to the fund's investments.⁴³

What the Review does not highlight is that SAFs attract an upfront transfer fee of \$2400, as well as higher annual fees. In addition, all assets in the SMSF would have to be transferred, on top of the art, ensuring less control of investments overall. The new trustee may have little or no knowledge of the art market, with the possibility of derailing the investment strategies of the former SMSF. For this reason, SAFs have generally been a less popular option in the past.⁴⁴

ART AS AN INVESTMENT CLASS

While the Review claims to support freedom of investment choice, it also holds that certain asset classes, such as collectables and personal use assets, are not legitimate investments for the purpose of building retirement savings.⁴⁵

Michael Levitt, an Australian collector with a significant art portfolio in his SMSF, sparks the analysis of whether or not art should be considered a legitimate asset class, with his simple yet poignant questioning of the difference between investing in risky stocks and art.⁴⁶ As an active collector of art for investment purposes, the rhetorical nature of his question becomes evident. The analysis of its answer, however, will help us find the 'logic' that SSA claims the Review does not do, as well as demonstrating a non-emotional line of argument. Over time, numerous economists have engaged in colourful dialogue on this topic, arriving at contrasting results. Examples of contemporary investment collections, both public and private, will also be used to unpack this debate.

William J. Baumol provides a clear breakdown of the fundamental differences between stocks and artwork for investment purposes. He also conducts a study of artwork resales over a period of 300 years. Both elements contribute to his conclusions on art as an investment.

Baumol points out that stock are homogenous securities with a determined value, such that they can be easily substituted, whereas art is unique. Stocks can be owned by multiple parties, but a collector has a monopoly over the particular piece that is owned. Stocks undergo frequent transactions, while the resale of art may not even occur once in a century. The price of stock is

⁴³ Commonwealth of Australia, 2010a, p. 244.

⁴⁴ Kahler and Strickland, 2010. To the 4000 SAFs in existence, holding \$1.6 billion worth of assets, there are 422,687 SMSFs, with \$400 billion in assets.

⁴⁵ Commonwealth of Australia, 2010a, p. 245.

⁴⁶ Fox, 2010d.

public information, as opposed to the secrecy surrounding art prices, often only privy to parties involved in the transaction. The equilibrium price of stock is based on a measured look at how those stocks have been performing and what is predicted for the future, while even the savviest dealer would shy away from claiming to know the true equilibrium price of art.

Baumol finds, therefore, that art attains 'unnatural' price points, which tend to float aimlessly and unpredictably. In contrast, the prices of manufactured products often reach an equilibrium level, due to the reliable forces of supply and demand. It is therefore difficult, according to Baumol, to make predictions about art, deeming it untrustworthy as an investment.⁴⁷

Baumol supports his claim by looking at resales data from Gerald Reitlinger.⁴⁸ His study shows an average annual return rate of 0.55%,⁴⁹ 2% lower than the return on risk averse bonds.⁵⁰ This supports the claims that art does not perform on the market in comparison to stocks and therefore should not be encouraged in SMSFs.

Another study, by Jianping Mei and Michael Moses,⁵¹ indicates that expensive paintings, such as Old Masters, underperform, even though these works are considered to be less risky, than, for example, contemporary art. They also find that art is a more glamorous investment, but one which underperforms stock.⁵² While glamour may be an aspiration of many collectors, it does not meet the investment requirements for a SMSF.

William N. Goetzmann's⁵³ study makes a comparison between price movements of artwork and the stock market in London. He finds that the demand for art increases with the wealth of collectors, concluding that a major factor limiting the price of art is the wealth of the buyer. Unlike the disparity found between stocks and art by Baumol, Goetzmann finds that the art market is in direct correlation with the stock market, such that, as stocks rise, so does wealth and with it the price of art and quantity of sales. He cites the sale of Van Gogh's *Sunflowers* which sold for an extraordinary price during a decade of unprecedented investment on the global stock market.⁵⁴

⁴⁷ Baumol, 1986, pp. 10-11.

⁴⁸ Baumol, 1986, pp. 12-13. Baumol's study comprises of an analysis of multiple resales by world class painters, occurring more than 20 years apart, between 1650 and 1950.

⁴⁹ Baumol, 1986, p. 13.

⁵⁰ Buelens and Ginsburgh, 1991, p. 1351.

⁵¹ Mei and Moses, 2002, p. 1656. Mei and Moses' study uses newer data, ranging from 1875 to 2000, with a higher number of repeated sales, comprising of 4896 price pairs. With this data, Mei and Moses are able to create an annual art index, and annual subindices for various genres across various periods.

⁵² Mei and Moses, 2002, p. 1666.

⁵³ Goetzmann, 1993, p. 1370. Goetzmann's study looks at paintings brought to market at least twice between 1715-1986, using Reitlinger's data, as well as data from Enrique Mayer.

⁵⁴ Goetzmann, 1993, p. 1375.

On this basis, investing in art with SMSFs will drive art prices up, especially as the wealth of the SMSF sector is expected to accelerate over the next 25 years.⁵⁵ This could therefore facilitate growth in the art market and improve returns for investors.

With an even more expanded dataset,⁵⁶ Bruno S. Frey and Werner W. Pommerehne conclude that returns for art are lower than financial assets. The perceived profitability of art after WWII is explained as a result of damage to financial assets and inflation, rather than the price of art itself increasing. This shows that external factors, such as global politics and economics, influence the art market, but still does not prove the legitimacy of art as investment. Aside from return rates, Frey and Pommerehne cite other reasons for investing in art, such as the psychological benefits, that art is often not subject to property tax or death duties and that donating art to public museums lends itself to significant tax concessions.⁵⁷ However, once again, as a SMSF investment, these factors do not hold up.

In response to Baumol, Nathalie Buelens and Victor Ginsburgh's study uses the same data sample, but with a different approach. They divide artists into various categories allowing geographic origins and time periods to bear weight on their findings.⁵⁸ As a result, a higher rate of return is found, 0.65%,⁵⁹ compared with Baumol.

Buelens and Ginsburgh is the only study which finds some areas of the market with higher returns on art than stock.⁶⁰ They find low returns on long term investments, spanning 300 years, but higher returns on shorter term investments, spanning 20 to 40 years.⁶¹ The study does not suggest that art is always a better investment, but that there are periods, when it is.⁶² These periods are not predicable, as they depend on taste and, according to Goetzmann, wealth. It can be argued that the 20 to 40 year timeframe correlates to the timeframe of a super fund, however banking on the whims of taste may still not be considered a sound investment strategy.

⁵⁵ Lowenstein, 2010.

⁵⁶ Frey and Pommerehne, 1989, p. 396. While the other studies use limited data samples, stemming from Anglo Saxon auctions, such as Christies and Sotheby's in London, excluding French and German auctions, Frey and Pommerehne use data from more countries and include the impact of the change in profits that occurred before and after WWII.

⁵⁷ Frey and Pommerehne, 1989, p. 406.

⁵⁸ Buelens and Ginsburgh, 1991, p. 1353 – 1355. For example, 1870 is a landmark year, as it reflects the rise of Impressionism and therefore effects taste. The years between 1914 and 1919 are also treated with caution, due to the political and economic turbulence of WWI. Sales that took place within 20 years and less are also used.

⁵⁹ Buelens and Ginsburgh, 1991, p. 1353.

⁶⁰ Buelens and Ginsburgh, 1991, p. 1351.

⁶¹ Buelens and Ginsburgh, 1991, p. 1352.

⁶² Buelens and Ginsburgh, 1991, p. 1356.

Overall, these studies do not give art a good rap when it comes to investment returns. There are, however, many examples of active art portfolios in current SMSFs showing very different results. In his landmark 2009 study, mathematician Roger Dedman, tracked 100 Australian artists, whose work increased more than threefold from 1995 to 2009, while the benchmark stock index only doubled.⁶³ He states that carefully selected Australian paintings can expect to see a positive rate of return if held for at least five years, but more favourably, ten years.⁶⁴ It must be noted that Dedman's study is sponsored by an auction house, a fact to be considered when using his findings. Nonetheless, there appears to be a direct correlation between the divestment timeframe recommended by the Review and the investment timeframe recommended by Dedman. As such, SMSFs members would miss out on potential returns if they are forced to sell newly acquired work within five years.⁶⁵

John Cruthers, an independent curator and art consultant, advises many clients with SMSFs, recommending the careful consideration of timeframe when purchasing and selling art. A client in their 30s, intending to cash in their super at 65 or 70, may consider the purchase of contemporary art, which results in higher returns compared to the purchase of more established artists.⁶⁶ The obvious risk is if the contemporary artist does not succeed. We are reminded here of Buelens and Ginsburgh's caution about investing in taste, which is difficult to predict, but also of Mei and Moses' findings that established artists are not always a sure thing, perhaps also determined by taste.

Another issue surfacing here, is the impact on investments currently in place if owners are forced to divest within a five year period. Cruthers himself planned to fund his retirement by selling his SMSF art collection between 2020 and 2030. If forced to sell by 2015, his collection will not reach the price, and therefore the retirement package, he planned for.⁶⁷

Canberra retiree Bernie Ayers has witnessed his family's art portfolio outperform their share portfolio over the past two years. During this period many SMSF managers shifted to art investments when they saw their shares drop during the GFC.⁶⁸ Here we see a contemporary example of the impact of external forces influencing the market, as demonstrated by Frey and Pommerehne. In this case, external influences are not only impacting the art market, but also the stock market. This brings the discussion back to the original question, as posed by Michael Levitt,

⁶³ Whitley, 2010.

⁶⁴ Fox, 2010d.

⁶⁵ Fox, 2010e, p. 105.

⁶⁶ Gibbon, 1999.

⁶⁷ Whitley, 2010.

⁶⁸ Coslovich, 2010.

in search of the true difference between investing in art and shares. It appears that both have the potential for risk, but also the potential for gain.

Examples of such gain are prevalent, seen in both public and private collections. Art investments made by the British Rail Pension Fund have generated more than 10% in returns per annum over the long term.⁶⁹ Cbus, a union super fund, shows how targeted art investment can benefit both the fund and the community. The fund regularly lends its 310 works, including many major pieces, to public galleries. Overtime, the collection has increased in value fivefold.⁷⁰ In this case, a mixture of sound investment strategy, with value added as a result of provenance, has ensured a positive investment for Cbus members, as well as the general public who have access to view the work.

Three individual Australian SMSF members have been approached to comment specifically on their art portfolio, each presenting unique collections and investment strategies. The artwork found in Collector 1's SMSF art portfolio shows a contemporary trend, with examples of both established and emerging artists. Many artists in this collection have practiced and exhibited at highly innovative institutions, such as Bill Henson, Sam Leach, Kate Just and Matt Hinkley.⁷¹ While there is risk associated with collecting contemporary art, the collecting strategy in place appears to follow the trends of highly influential galleries and institutions, that support and nurture artists in the development and success of their professional and commercial careers.⁷²

Collector 2's art portfolio consists mainly of Indigenous Australian artworks, where the development of an important relationship appears to exist between the collector and the artists, such that the collector plays a part in the artists' career and success. An example is seen through an international touring exhibition, coordinated by Collector 2. Featured artists include Billy Doolan, Turbo Brown, Luke Cummins and John Cummins, with a total of 264 works being presented to an international community over a two-year period.⁷³ According to valuation records, works by many of the artists in Collector 2's art portfolio have already increased.⁷⁴ The added

⁶⁹ Sharpe, 2010. In 1974 British Rail Pension Fund purchased over 2,500 objects for £40 million. In 1980 they sold 20% of the fund for £34 million, which saw a return of 20% per annum. The remaining works were sold throughout the next decade, amounting to an aggregate return of 11.3% per annum during the 25 year period between 1974 and 1999.

⁷⁰ Save Super Art, 2010.

⁷¹ Collector 1, 2010. Artist names were provided via email from the Collector.

⁷² Uplands Gallery, 2010: Matt Hinkley, for example, was a Gertrude Contemporary Art Spaces studio artist, has exhibited as part of the Australian Centre for Contemporary Art's NEW08 exhibition and has work in the Artbank collection.

⁷³ Collector 2, 2010a.

⁷⁴ Collector 2, 2010b. An example of Billy Doolan's work has increased in value from \$4000 to \$10 000 since 2007. Collector 2's entire collection increased from \$730,198 in 2007 to 926, 987 in 2009.

value of provenance, following a tour of prestigious international galleries, will serve to both enhance the value of the collection for SMSF purposes, but equally, further the individual careers of the artists. The tour will also inform an international community about Indigenous art, upon viewing work that otherwise remains stored in accordance with the sole purpose test.

In Collector 3's art portfolio, 95% of the collection is made up of Australian paintings by post-colonial artists, from 1930 onwards. A strong collection strategy is in place, where work by established artists, who already have a secure presence on the secondary art market and much critical acclaim, are considered. State and national galleries have also acquired works by most artists in the collection. Collector 3 will only make significant acquisition decisions after consulting with art advisors. The best quality works have increased in value, some very substantially, where the assessment of more recent works by less established artists is more difficult.⁷⁵

While these collectors plan and develop their investments in line with SMSF protocol, unfortunately, there are some parties that take advantage of the system, utilising the SMSF sector as a marketing tool to sell art. The market does appear to have its way of naturally restoring order. As we shall uncover in Part 3, the recommendations in the Review were finally overturned by all major political parties in the lead up to the 2010 federal election.⁷⁶ To celebrate this win for the arts industry, a recently collapsed arts company, Smith & Hall, sent an email newsletter to their database with a special offer of \$500 off for every SMSF portfolio acquired in the month of August.⁷⁷ This appears to push artwork sales, without necessarily incorporating investment strategies as required by SMSFs.

Smith & Hall's business model sought to encourage investors, particularly those with SMSFs, to purchase art for the purpose of acquiring capital gain, as well as an income stream of between 6% and 8% per year from the rental of the works. The leasing aspect of this arrangement was attractive to SMSF members, as it prevented the risk of breaching the sole purpose test.⁷⁸

The collapse of Smith & Hall left behind a collection supposedly valued at \$4 million. While valuation methods range from purchase price to insurance values, asset liquidation valuations are often drastically different to retail values. This is potentially bad news for Smith & Hall's SMSF creditors, whose holdings may now be devalued. While this should not discourage SMSFs from buying art, as there are demonstrated examples of positive returns, it should encourage them to

⁷⁵ Collector 3, 2010.

⁷⁶ Power, 2010.

⁷⁷ Smith, 2010.

⁷⁸ Raffan, 2010.

develop investment strategies using entities that show proven expertise and transparent operations.⁷⁹

SUPER ART AS ARTS FUNDING

Another item for discussion is the additional benefit SMSF investments in art can provide for the government. As Jeremy Cooper himself points out, 'superannuation costs the government a lot of money through tax concessions' in order for it to work.⁸⁰ While the fundamental aim of super is to relieve government pressure from retirees, the government is at a loss in the present, through these tax concessions, in order that they may save later, as retirees begin to live off their super funds. In any event, it is of government interest to ensure that super investments are sound, such that their present loss does not turn into an additional future loss, bailing out fund owners with bad investment.

Another of the government's pressures is to provide subsidies to the arts. As the arts industry diversifies, so too does public taste, such that tax payers find themselves contributing to subsidies for arts products they don't particularly value, or vice-versa.⁸¹ Therefore, government funding activities become less effective, as they do not please everyone equally. Michael Rushton suggests that funding practices need to evolve to better suit this diversification of taste,⁸² including private funding.⁸³ Looking back to super, we might argue that SMSFs provide part of the solution to this problem.

To illustrate this point, let us consider the fact that government spend directly on the arts is often less than what it sacrifices through tax concessions given to individuals for their private contributions to the arts.⁸⁴ In essence, there are more subsidies through tax exemptions than direct funding. In the case of super, government subsidies apply to all investments, regardless of whether they are in art, property or shares. Therefore, there is no additional sacrifice to the government if SMSFs invest in art, as opposed to other assets. Looking at SMSFs as a kind of subsidy to the arts, the more investments made in art, the less the government may need to spend in direct or other subsidies. Here we find an added benefit for allowing SMSFs to invest in art.

⁷⁹ Raffan, 2010.

⁸⁰ Boland, 2010.

⁸¹ Rushton, 2003, p. 5.

⁸² Rushton, 2003, p. 6.

⁸³ Rushton, 2003, p. 5.

⁸⁴ Grampp, 1989, p. 230.

Citing Henry Geldzahler, former commissioner of New York's Department of Cultural Affairs, arts funding is like an accordion, it plays the best sound when all of its compartments are working in unison.⁸⁵ On this note, Kitty Carlisle Hart, supports the notion of a pluralistic funding system, outlining the various sources of funding available to the arts, such as private patrons, federal, state, local, foundations and corporations.⁸⁶ In many ways, investment in art by way of super can be said to cover a few of these sources, through fund owners' individual contributions, government tax concessions making this possible and corporate funds also investing in art, such as Cbus. Non-monetary contributions are also made through art in super, such as lending to public institutions and touring exhibitions, as demonstrated by both Cbus and Collector 2.

Before returning to the campaign itself and how these points played out in the lead up to the final outcome, we will highlight what we have uncovered from the analysis of the Super System Review and Save Super Art so far. While there may be inherent issues with regard to regulation and compliance in the SMSF sector, perhaps it is *these* areas that need to be addressed and strengthened, rather than enforcing restrictions on investment choices, especially since there are demonstrated examples of art performing well on the market. While addressing regulation and compliance issues may take more time and effort, it will certainly avoid the damage predicted to take place in the arts industry. Furthermore, it is possible to say that investment in art through super has the potential to aid government in its arts funding activities.

⁸⁵ Hart, 1984, p. 46.

⁸⁶ Hart, 1984, p. 46.

PART 3

THE CAMPAIGN OUTCOME

The Save Super Art campaign was launched at David Bromley's studio on 16 June 2010, by convenor, Tom Lowenstein and artists Lisa Roet, Jeremy Kibel, Matthew Johnson and David Bromley. Lowenstein highlighted that no other issue, in his 40 year career, had unified the art world quite like this one.⁸⁷ This united front presented the arguments, as outlined throughout this investigation, to the media, to the arts industry, to collectors, to the general public and of course to politicians.

Political response was varied in both timing and subject matter. The Coalition was the first to affirm its stance, in a Media Release on 6 July. Shadow Minister for the Arts, Steven Ciobo, called for the Labor Government to immediately oppose any recommendations in the Review that would impact the Australian art's sector and also advocated the legitimacy of art as an investment class, equal to both property and shares.⁸⁸ Towards the end of July, the Greens announced their official position, along similar lines to the Coalition.⁸⁹

With still no response from the Labor Government, on 29 July SSA called for a public rally to take place outside the Royal Exhibition Building during the Melbourne Art Fair. The very next day, Labor revealed its position.

The key feature of Labor's stance was that assets held by SMSFs would have to be stored according to new laws, as to prevent them from providing a personal benefit and from breaching the sole purpose test. SMSFs could still invest in artworks and collectables, however if they do not meet the new requirements, they would have to be sold within five years. That art is a legitimate investment class for SMSFs was recognised, as well as the crucial commercial benefit SMSF investments gave to artists.⁹⁰ The SSA public rally was thus called off.

SPAA and the Australian Artists Association (AAA) worked together on a new set of best practice guidelines, created from both the arts and finance perspective, on which the Government could draw in order to finalise future legislation. These guidelines provide an alternative to the Review,

⁸⁷ Fox, 2010e, p. 103.

⁸⁸ Liberal Party, 2010.

⁸⁹ Power, 2010.

⁹⁰ Bowen and Garret, 2010.

as they seek to direct the treatment of assets, such as art, in terms of storage, valuation and documentation, rather than preventing art as an investment class point blank.⁹¹

The guidelines state that all artwork held in SMSFs will need to be stored. The in-house asset rule, which allows 5% of the net market value of SMSF assets to be stored in the home of a fund member, will still be permissible. However, a rental payment will be recommended. The guidelines also state that each fund will require a specialist advisor to counsel on artwork acquisitions, ensuring they fit the investment strategy set up for that fund. As opposed to the ATO, who previously worked on a non-prudential compliance approach, the introduction of advisors is a consequence of the reassignment of SMSF administration to ASIC. In addition, fund activities, including risk and return outcomes, would need to be monitored and assessed at the end of each financial year, using data acquired by a qualified valuer. These regulations will determine whether the investments are sound and should remain in the SMSF.⁹²

The Government has thus ensured investment in art can continue, where divestment is only necessary if a SMSF does not abide by the regulations. This compromise will impose an additional financial load on SMSF holders, who face the responsibility of funding advisors and valuations.⁹³ While this may serve to downgrade the value of their investment, due to additional costs, it still presents a better alternative to the original proposal to convert to a SAF, where advisors may not necessarily have arts industry expertise. In addition, these reforms may serve to establish concrete structure in the SMSF sector with regard to artwork purchases. This may in turn strengthen and stabilise practices, ensuring SMSF members reach optimal returns on their investments, as well as the arts industry continuing to benefit for years to come.

⁹¹ SPAA, 2010a.

⁹² Fox, 2010a.

⁹³ Raffan, 2010.

CONCLUSION

The turbulent response to the Super System Review paved the way for some important issues to arise concerning both the visual arts and superannuation industries. Previous activities by SMSF members, such as compliance breaches, resulted in the need to review the system and the practice of investment in art. The impacts predicted to occur within the arts industry as a result of recommendations made in the Review, led to the public debate which ensued. While arguments both for and against the recommendations have been highlighted, as well as a discussion of the investment properties of art and other benefits that SMSF investment in art can provide, the overall outcome of this debate appears to be positive, or at the very least, constructive. Raising these issues to the surface has resulted in the need to impose structure on a sector that has up until now, existed under the radar. While some of the outcomes, such as higher costs for specialist advice, may hinder current investments, the recent attention drawn to the sector, may in fact strengthen it. With the added insurance from advisors, SMSF member confidence to invest in art may increase and provide even greater benefits to the visual arts industry into the future.

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