

ASSISTANCE FOR CONVEYANCERS ACTING FOR SUPERANNUATION FUNDS BORROWING TO PURCHASE PROPERTY (NSW, VIC, TAS & ACT ONLY)

This information is provided to assist conveyancers in NSW, VIC, TAS and ACT who do not normally practice in the area of superannuation to understand the requirements of the legislation relating to borrowing by super funds.

It is not in the nature of legal advice and the reader may not rely on the contents. The authors take no responsibility for any loss or damage as a result of reliance on any of the contents of this outline.

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1. Outline of the standard transaction

- 1.1 The trustees of the super fund identify a property that the fund wishes to purchase.
- 1.2 The trustees negotiate price and terms for purchase. Any so-called 'good faith' deposit paid to the agent prior to the formal exchange of contracts must be paid only from the super fund's account. If it is not, then the good faith amount must be refunded by the vendor at the time of exchange and the super fund then pays the full deposit from its account.
- 1.3 The trustees arrange in-principle approval for a loan from a lender confirming to the lender that the trustees wish to borrow in accordance with s 67A and s 67(1) of the *Superannuation Industry (Supervision) Act 1993* ("SIS Act").
- 1.4 The trustees identify who will be the apparent purchaser/Holding Trustee who will hold the property in accordance with the requirements of s 67A and the trustees advise the lender accordingly.
- 1.5 The apparent purchaser/Holding Trustee can be anyone except the SMSF trustee or the lender.
- 1.6 The apparent purchaser/Holding Trustee is listed on the contract as the purchaser.
- 1.7 The deposit is paid by the super fund from its own funds. The deposit must be paid by the super fund from the bank account of the Fund Trustee.
- 1.8 The super fund may use a deposit bond in lieu of paying the deposit if agreed by the vendor. However the super fund must ensure that the deposit and balance are paid entirely by the super fund (and moneys loaned to the Fund) at settlement.
- 1.9 If the super fund wishes to use a bank guarantee to pay the deposit, it is critical that no guarantee is given to the bank over any asset of the fund as part of the arrangements for that bank guarantee. To do so would be in breach of superannuation law.
- 1.10 If a bank guarantee is to be used we recommend that the super fund seeks sign-off of the arrangement by their superannuation lawyer prior to obtaining the bank guarantee. It is important to understand that in the event that the super fund does not pay the deposit and balance owing at settlement, and the bank guarantee is called upon, this will jeopardise the compliance of the transaction.
- 1.11 After the date of the contract for purchase the apparent purchaser/Holding Trustee and the real purchaser/SMSF trustee execute a deed recognising the apparent purchaser's role as Holding Trustee.
- 1.12 Normal ad valorem duty is paid on the purchase contract and transfer from the vendor to the apparent purchaser/Holding Trustee.

- 1.13 On settlement the lender provides the loan funds and the super fund provides only from its own funds any additional amount to complete the purchase.
- 1.14 The property is transferred into the name of the apparent purchaser/Holding Trustee.
- 1.15 The super fund applies to the relevant State duties authority to pay duty on the Holding Trust deed with accompanying evidence as required by the respective authority to prove that the money for the purchase was provided only by the SMSF trustee and its lender.
- 1.16 The respective State duties authority stamps the Holding Trust deed, once duty has been paid on the deed.
- 1.17 The Holding Trust deed is then held in safe keeping by the super fund until the loan is repaid.
- 1.18 Once the loan is repaid the stamped Holding Trust deed is presented to the duties authority together with the transfer from the apparent purchaser/Holding Trustee to the super fund trustee and an application for nominal duty on that transfer.

2. Important things to note

- 2.1 The lender must lend the money to the super fund and not to the apparent purchaser/Holding Trustee.
- 2.2 The SMSF must have the necessary investment strategy to allow investment in the property.
- 2.3 The loan must be on commercial terms, in writing and limited recourse (ie the lender's rights to recover the loan are limited to security against the property being acquired).
- 2.4 The super fund is not permitted to provide any further security. Personal guarantees by the members of the fund are permissible so long as the member's superannuation interests are excluded from such guarantees.
- 2.5 The super fund must provide all of the purchase money either directly from its own funds or from funds borrowed by the super fund in accordance with the SIS Act requirements.
- 2.6 The property must be held by a separate trustee (who is not the SMSF trustee) of a Holding Trust recognised by a trust deed. This trust deed must not be executed until after exchange of purchase contracts to avoid double stamp duty consequences.
- 2.7 The Holding Trustee must purchase the property as apparent purchaser with the money provided by the super fund and the lender. Neither the super fund nor its trustee may appear as the purchaser on the contract to purchase the property.
- 2.8 The loan should be used only to purchase the land and fixtures and no chattels. So-called inclusions should be dealt with separately.

- 2.9 The apparent purchaser/Holding Trust deed should be stamped and/or marked soon after settlement while all documents and recollections are readily available. Delay will cause substantial additional time and expense as old files, bank statements and other documents are located (if possible) and the necessary evidence gathered for the application to the duties authority.
- 2.10 Great care should be taken to ensure that funds used in the purchase are withdrawn only from the super fund's bank accounts or by the lender at the written direction of the super fund trustee. Copies of bank statements and communication with the lender, including the loan agreement, may need to be exhibited to the duty authorities to obtain the exemption from ad valorem duty on the Holding Trust deed and perhaps the later transfer of the property from the apparent purchaser/Holding Trustee to the super fund trustee once the loan is repaid.
- 2.11 The super fund must use its resources, including the income from the property, to pay interest and to repay the loan in accordance with the loan agreement.
- 2.12 If and when the loan is fully repaid to the lender the Holding Trustee can transfer the property to the super fund. Provided the Holding Trust has been originally stamped (or marked 'not dutiable'), this transfer from Holding Trustee to SMSF trustee should attract only nominal duty.

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