

Sydbane Saunders Super Fund

SMSF Borrowing — Bank lender

Declaration of Custody Trust for the Sydbane Saunders Super Fund document package

Prepared for **Grant Saunders**
Matter name **Sydbane Saunders Super Fund**
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What to do next

Read the Establishment Kit and understand the Pack – and its limitations

How to use this Declaration of Custody Trust for the Sydbane Saunders Super Fund document package (for SMSF borrowing from a Bank lender), and how to establish the Custody Trust it contemplates, is explained in the Establishment Kit, prepared and provided by Maddocks. The Establishment Kit is attached to this document.

As the Establishment Kit explains, you must:

- 1 Be aware of how this Pack works;
- 2 Be aware of the consequences of establishing the Custody Trust using this Pack;
- 3 Ensure that the Pack will help you achieve your objectives; and
- 4 Be aware of what else you need to do in addition to purchasing this Pack.

The Kit, to accompany your documents, has been prepared by the law firm Maddocks (not Cleardocs). The legal information and commentary in this Kit, and the master documents on which your documents are based, are general only. Cleardocs does not endorse the legal information and commentary, and the master documents and it disclaims responsibility for them. Your documents affect your legal rights and liabilities. You must consult a lawyer about their suitability and legal issues, and consult other professional advisers about other issues, including tax and financial issues.

To use this Pack, the Fund must obtain legal advice

As the Establishment Kit explains, you must arrange for the fund to obtain legal advice, and accounting and financial advice, before using this Pack.

Questions or further information about this Pack (not about your instalment warrant arrangement)

If you have any questions, you can call Cleardocs on 1300 307 343.

Cleardocs will answer all your administrative queries. These include, queries about our service, our website, registering as a user, payment or feedback.

Maddocks will answer all your questions about the nature, content, use, consequences, drafting and effectiveness of our documents.

All the legal information contained in this document and the Establishment Kit is provided by our lawyers at Maddocks.

Establishment Kit: Declaration of Custody Trust for the Sydbane Saunders Super Fund document package (for SMSF borrowing from a Bank lender)

This Establishment Kit is prepared and provided by Maddocks.

Introduction: Summary

In summary, you must:

- 1 Read this Establishment Kit;
- 2 Understand the documents in the Pack; and
- 3 Obtain legal advice before using this Pack — including in relation to how to establish the 'Custody Trust contemplated by the Pack.

Understand the documents in this, and understand the Pack's limitations

- 1 **Self Managed Super Funds only** This Pack is suitable only for a regulated self managed superannuation fund, or SMSF. It is not suitable for any other type of superannuation fund.
- 2 **The 'Instalment Warrant Arrangement' is a limited recourse Loan Arrangement** Although section 67(4A) of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) refers to 'Instalment Warrant Arrangements', more accurately section 67(4A) allows the fund to enter into a limited recourse loan arrangement. Basically, the fund is borrowing money to purchase or help purchase certain assets. If the fund defaults on its obligations to the lender to repay that loan then the lender will have rights against the assets purchased with the loan monies (including to sell the assets and keep the proceeds). However, if those assets are of insufficient value to satisfy all of the fund's liabilities to the lender then the lender has no other rights against the fund or its assets.
- 3 **This Pack** comprises the following main documents to enable a SMSF to borrow money in accordance with section 67(4A) of the *Superannuation Industry (Supervision) Act 1993 (SIS Act)*, as part of an instalment warrant arrangement. The documents contemplated by the Pack operate, in simple terms, as follows:

Declaration of Custody Trust for the Sydbane Saunders Super Fund –

Section 67(4A) of the SIS Act requires that the assets purchased with the loan monies must be held by a custodian pursuant to a simple trust arrangement (which is a different trust from the SMSF itself). This trust arrangement is established by the Declaration of Custody Trust for the Sydbane Saunders Super Fund. The Custody Trust commences when the assets purchased with the loan monies are transferred to the custodian named in the Declaration of Custody Trust for the Sydbane Saunders Super Fund.

Minutes – by which the trustee(s) approves the establishment of the Custody Trust

Compliance letter – by which the trustees attest to the compliance of the Custody Trust arrangement in respect of section 67(4A) of the SIS Act.

- 4 **The limitations of this Pack** This Pack evidences the necessary custody trust contemplated by section 67(4A) of the SIS Act as part of an instalment warrant arrangement. **However, it does not** provide the loan and security documents required for the fund to purchase the assets which will be purchased with the loan monies. These additional documents are required to formalise the transfer of title to those assets from the vendor to the fund.

The fund must obtain these documents from its lawyer, who will need to provide these documents as part of the legal services referred to below under the 'Obtain Legal Advice' section.

- 5 **The 'Instalment Warrant Arrangement' must comply with all other requirements of Superannuation Law** This Pack provide documents which satisfy the requirements of section 67(4A) of the SIS Act for evidencing an 'instalment warrant arrangement'. However, the 'instalment warrant arrangement' must comply with all other requirements of superannuation law. These include, but are not limited to:

Requirements relating to the loan monies Section 67(4A) provides that the loan monies borrowed by the fund from the lender may only be used to acquire the assets. Consequently, they cannot be used to pay costs in the nature of taxes such as stamp duty or legal fees, but must be paid in consideration for the assets. This also means that interest under the loan agreement cannot be capitalised.

Requirements relating to the vendor Superannuation law must not prohibit the fund from purchasing the asset from the vendor. For instance, section 66 of the SIS Act prohibits many acquisitions of assets from a 'related party' of the fund.

Requirements relating to the asset Superannuation law must not prohibit the fund from purchasing the assets.

For instance, section 62 of the SIS Act requires that the fund be maintained in accordance with the sole purpose test: the purchase and ownership of certain assets may contravene the sole purpose test if, for instance, the assets are not assets of the type that have the purpose of providing benefits for fund members in retirement.

Another example is section 71 of the SIS Act, and related provisions, which limit a fund to investing no more than 5% of its assets in in-house assets. Consequently, the investment in the assets must not result in the fund breaching this rule.

Requirements relating to investing prudently and strategically By purchasing the asset, the fund must be investing prudently and strategically. Section 52 of the SIS Act requires the trustee (and its directors, if any) to exercise the care, skill and diligence of an ordinary prudent person, and to formulate an investment strategy for the fund. Consequently, by purchasing the asset the trustees, or the trustee and its directors, must act prudently and in accordance with the fund's investment strategy. The investment strategy itself may need to be reviewed or amended prior to purchasing the assets.

Requirements relating to investing at arm's length By purchasing the asset, the fund must be investing either at arm's length or in a manner which ensures the other party to the transaction enjoys terms and conditions which are no more favourable to them than one would expect if the parties were dealing at arm's length. These requirements are contained in section 109 of the SIS Act and can apply to all aspects of the 'instalment warrant arrangement' including the terms on which the fund purchases the asset, or the terms on which the fund obtains the loan.

The Fund must obtain legal advice

- 1 There are two primary reasons why the fund must obtain legal advice:
 - 1.1 **The limitations of this Pack** As explained above, this Pack does not include the loan and security documents (which the Bank lender will provide), nor the transaction documents required for the fund to purchase the assets which will be purchased with the loan monies. These additional documents are required to formalise the transfer of title to those assets from the vendor to the fund. A lawyer can provide these documents.
 - 1.2 **SMSF Compliance with Superannuation Law** Although this Pack provides documents which will satisfy the requirements of section 67(4A) of the SIS Act, the 'instalment warrant arrangement' must otherwise be in compliance with all the requirements of superannuation law. A lawyer can advise on these matters.
- 2 Options for obtaining legal advice:
 - 2.1 As the land is located in Queensland, you will have to contact a lawyer in that State or Territory to undertake the conveyancing necessary to transfer the land to the fund.
 - 2.2 The fund may also wish to seek advice from this lawyer concerning the fund's compliance with superannuation law.

The fund may require other advice

- 3 **The fund may need tax and financial advice** In addition to legal advice, the fund may require taxation and, or alternatively, financial advice. The fund may require advice concerning the taxation implications of the purchase of the asset, including any stamp duty which may be payable on the transfer of the asset to the fund, or concerning the fund's investment strategy.
- 4 For these reasons the fund may require taxation advice from its lawyer or accountant, or financial advice from its accountant or financial planner.

Stamp Duty implications associated with this Pack

- 5 **Duty may be payable on the documents provided with this Pack** Either Maddocks or your lawyer will confirm whether any stamp duty is payable on the documents provided with this Pack. Set out below is a summary of the likely stamp duty treatment:
 - 5.1 **Declaration of Custody Trust for the Sydbane Saunders Super Fund**
Stamp duty treatment of the Declaration of Custody Trust for the Sydbane Saunders Super Fund is as follows depending on the relevant jurisdiction:
 - New South Wales – \$500
 - Victoria – \$200
 - Queensland – No duty
 - Tasmania – \$20
 - Australian Capital Territory – \$200
 - South Australia – No duty
 - Western Australia – No duty
 - Northern Territory – \$20

Any questions?

Obtaining legal advice from Maddocks

If you wish to obtain legal advice from Maddocks for any of the reasons identified above then you can contact Maddocks by calling 03 9288 0555 and asking for a member of the Cleardocs Help Desk Team.

General questions concerning this Instalment Warrant document pack

If you have any general questions concerning Cleardocs or this Pack, then you can call Cleardocs on 1300 307 343.

Cleardocs will answer all your administrative queries. These include, queries about our service, our website, registering the user, payment or feedback.

Maddocks will answer all your questions about the nature, content, use, consequences, drafting and effectiveness of our documents.

All the legal information contained in this document is provided by our lawyers at Maddocks.

Minutes of Meeting of the Trustees of the Sydbane Saunders Super Fund

Venue	14 Scampi Place, Redland Bay Qld 4165
Date	17/03/2010 15:00
Present	Grant Russell Saunders, Joy Elaine Saunders
Chair	Grant Russell Saunders

Instalment Warrant Arrangement for the fund

1 **Noted** by the persons present that:

1.1 The fund has applied to St George Bank LIMITED (**Lender**) to borrow money for the purchase of the following assets (**Assets**):

5 Ashley Court
Calliope, QLD, 4680
Australia

Lot 140 on SP 200686, Clinton, East Stowe, 50724340

1.2 The fund has been provided with copies of the documents by which the fund will formally purchase the Assets;

1.3 The Lender has agreed to lend \$130,000.00 (**Loan Money**) to the fund on the condition that the Lender is provided with a charge or mortgage over the Assets, a Custodian is appointed to hold legal title to the Assets and the arrangements are otherwise in accordance with section 67(4A) of the *Superannuation Industry (Supervision) Act 1993 (SIS Act)*;

1.4 Joygra Pty. Ltd. (**Custodian**) has agreed to act as Custodian of the Assets;

1.5 The fund has agreed with the Lender to ensure that the Custodian provides the Lender with a charge over the Assets;

1.6 The arrangement is in compliance with the requirements of section 67(4A) of the SIS Act; and

1.7 The arrangement, including all associated transactions, will not result in the fund breaching the SIS Act or any other requirements of superannuation law.

2 **Tabled** by the persons present:

2.1 a declaration of custody trust by which the Custodian agrees to hold legal title to the Assets for the fund; and

2.2 a compliance letter being a letter from the fund to the Lender attesting to the fund's current and on-going compliance with the SIS Act and all other requirements of superannuation law.

3 **Resolved unanimously** by the persons present to:

3.1 Adopt and execute each of the documents by the chair executing the compliance letter and all the trustees executing the Declaration of Custody Trust by the trustee; and

3.2 To pay all relevant duty on the documents.

4 There being no further matters to discuss, the meeting was closed.

Date: 17/03/2010

Signed:



Grant Russell Saunders

Chair

Sydbane Saunders Super Fund

17 March, 2010

From:

Grant Russell Saunders
14 Scampi Place
Redland Bay, QLD, 4165
Australia

Joy Elaine Saunders
14 Scampi Place
Redland Bay, QLD, 4165
Australia

To whom it may concern

Loan to the trustees of the Sydbane Saunders Super Fund (Fund)

We refer to the proposed loan for \$130,000.00 (**loan money**) by the St George Bank LIMITED ACN 055513070 (**lender**) to the Fund.

The Fund understands that, before the lender makes the loan money available to the Fund, the lender must be satisfied that the Fund complies with superannuation law. Accordingly, the trustees:

- 1 **Attach** the most recent letter from the Fund's auditor confirming the Fund complies with superannuation law as at the date of the audit referred to in that letter;
- 2 **Confirm** that the Fund is registered with the Australian Taxation Office as a regulated and complying self-managed superannuation fund under the *Superannuation Industry (Supervision) Act 1993 (SIS Act)*;
- 3 **Attach** a print out from the Federal Government's Super Fund Lookup Service ([http://abr.business.gov.au/\(ifiauv453isr2445sb1uat45\)/super.aspx](http://abr.business.gov.au/(ifiauv453isr2445sb1uat45)/super.aspx)) confirming that the Fund has a 'complying' status;
- 4 **Confirm** that the purchase of, investment in and holding of the assets which will be purchased with the loan money will comply in all respects with superannuation law, including:
 - 4.1 The requirements of section 67(4A) of the *Superannuation Industry (Supervision) Act 1993*:
 - 4.1.1 that the loan money only be used to purchase the assets; and

- 4.1.2 concerning the structure of the 'instalment warrant arrangement' by which the assets will be purchased and held;
- 4.2 The requirements of the SIS Act concerning the restrictions on acquiring assets from related parties of the Fund;
- 4.3 The requirements of the SIS Act concerning the purchase of, investment in and holding of the assets complying with the 'sole purpose test' and not breaching the 'in-house asset rules';
- 4.4 The requirements of the SIS Act that the purchase of, investment in and holding of the assets constitutes a prudent investment made in accordance with the Fund's investment strategy; and
- 4.5 The requirements of the SIS Act that all relevant transactions contemplated by the 'instalment warrant arrangement' are entered into at arm's length or on arm's length terms in accordance with section 109 of the SIS Act.
- 5 **Confirm** that the Fund has an investment strategy and **attach** a copy of that investment strategy; and
- 6 **Confirm** that clause 142 of the Fund's trust deed authorises, and that the trustees have done all things necessary to authorise, the borrowing of the loan money from the lender, including authorising of the Loan Agreement, Declaration of Custody Trust for the Sydbane Saunders Super Fund and Mortgage.

Any questions in relation to the above should be directed to the Fund's trustees as follows:

Grant Russell Saunders
14 Scampi Place
Redland Bay, QLD, 4165
Australia

Joy Elaine Saunders
14 Scampi Place
Redland Bay, QLD, 4165
Australia

Yours sincerely



Grant Russell Saunders

For and on behalf of the trustees of the Fund

