

Mr D & Mrs B Walker
Walker Medical Australia Pty Ltd
Walker Superannuation Fund
C/- Marsh Tincknell Pty Ltd
PO Box 6243
UPPER MOUNT GRAVATT Q 4122

22 October 2008

Dear David and Bernadette

WALKER SUPERANNUATION FUND BORROWING

You have sought our advice about the conditions under which this Fund may borrow to acquire a property known as Unit 4, 51 Freda Street, Upper Mount Gravatt, Queensland (the Property).

You have provided the following information:

1. The Property is being acquired from an unrelated third party.
2. The purchase price of the Property is \$775,000.
3. The National Australia Bank proposes to lend the Fund an agreed amount to part finance the acquisition of the Property.
4. D & B Walker Properties Pty Ltd ACN 133 788 511 has been established to hold the legal interest of the Property while the Fund will have a beneficial interest.

This office has not reviewed the loan agreement under which the National Australia Bank proposes to lend the Fund the cash required to part finance the acquisition of the Property. Consequently, this advice includes no conclusion as to whether that agreement satisfies the requirements of s section 67(4A) of the *Superannuation Industry (Supervision) Act 1993* (the SIS Act).

Before the loan agreement provided by the National Australia Bank is signed, you should ensure that the agreement complies with the SIS Act and in particular, that the loan will be on a limited recourse basis as required by section 67(4A).

Analysis of Legislation

Section 67(4A) of the *Superannuation Industry (Supervision) Act 1993* (the SIS Act) provides a limited exception to section 67(1) that prohibits a trustee of a superannuation fund from borrowing:

*(4A) Subsection (1) does not prohibit a trustee (the **RSF trustee**) of a regulated superannuation fund from borrowing money, or maintaining a borrowing of money, under an arrangement under which:*

- (a) the money is or has been applied for the acquisition of an asset (the **original asset**) other than one the RSF trustee is prohibited by this Act or any other law from acquiring; and*
- (b) the original asset, or another asset (the **replacement**) that:*
 - (i) is an asset replacing the original asset or any other asset that met the conditions in this subparagraph and subparagraph (ii); and*
 - (ii) is not an asset the RSF trustee is prohibited by this Act or any other law from acquiring; is held on trust so that the RSF trustee acquires a beneficial interest in the original asset or the replacement; and*
- (c) the RSF trustee has a right to acquire legal ownership of the original asset or the replacement by making one or more payments after acquiring the beneficial interest; and*
- (d) the rights of the lender against the RSF trustee for default on the borrowing, or on the sum of the borrowing and charges related to the borrowing, are limited to rights relating to the original asset or the replacement; and*
- (e) if, under the arrangement, the RSF trustee has a right relating to the original asset or the replacement (other than a right described in paragraph (c))—the rights of the lender against the RSF trustee for the RSF trustee's exercise of the RSF trustee's right are limited to rights relating to the original asset or replacement.*

As can be seen, this section sets out a number of conditions that must be satisfied before the prohibition on borrowing would not apply. These conditions may be summarized:

1. The borrowing must be used to acquire an asset; and
2. The asset must be one that the Fund can acquire without breaching any law;
3. The asset must be held on trust with the superannuation fund acquiring a beneficial interest in the asset; and
4. The fund must have the right to acquire legal ownership of the asset by making payments; and
5. The rights of lender must be limited to rights relating to the asset.

I will now apply these conditions to the information you have provided.

- 1 The borrowing must be used to acquire an asset
You have advised that the express purpose of the borrowing is to allow the Fund to acquire the Property. This purpose should be documented in the loan agreement between the trustee of the Fund and the National Australia Bank.

This condition would therefore be satisfied.

- 2 The asset must be one that the Fund can acquire without breaching any law
Section 66 of the SIS Act provides certain prohibitions in relation to the acquisition of assets from related parties. As the Property is being acquired from an unrelated third party this prohibition would not apply.

This condition would therefore be satisfied.

In addition, unless the property is used wholly and exclusively in the conduct of a business, to avoid being an in-house asset of the Fund and causing the Fund to be in breach of the SIS Act, the Property must not be leased to a related party.

A related party of the Fund includes the Fund members and their relatives and business partners.

- 3 The asset must be held on trust with the superannuation fund acquiring a beneficial interest in the asset
As the Property will be acquired by D & B Walker Properties Pty Ltd as the apparent purchaser on trust for the trustee of the Fund this condition would be satisfied once D & B Walker Properties Pty Ltd completes a Declaration of Trust concerning the Property.
- 4 The fund must have the right to acquire legal ownership of the asset by making payments
This condition will be satisfied if the loan agreement entered into between the parties allows the trustee of the Fund to acquire legal ownership of the Property once the loan has been repaid.
- 5 The rights of lender must be limited to rights relating to the asset
The loan must be of a limited recourse nature. This means that the lender's rights under the loan agreement must be limited to the Property for this condition to be satisfied.

As mentioned above, this office has not reviewed the loan agreement under which the National Australia Bank proposes to lend the Fund the cash required to part finance the acquisition of the Property. Consequently, this advice includes no conclusion as to whether that agreement satisfies the requirements of section 67(4A) and in particular whether the loan is of a limited recourse nature.

A Declaration of Trust that accords with the conditions has been prepared by our office and is enclosed for execution by D & B Walker Properties Pty Ltd.

Conclusion

It is our opinion that provided that the parties execute a Loan Agreement and a Declaration of Trust that accord with the conditions set out in this advice, this Fund may proceed to borrow to acquire the Property.

Implementation

We now provide the following breakdown of the steps that are in the process of being implemented so that the Fund can borrow money to acquire the Property.

1. The Fund wishes to buy the Property;
2. You must ensure that the Fund's investment strategy supports the acquisition of the Property;
3. D & B Walker Properties Pty Ltd has been incorporated to act as a trustee of a trust in respect of which the beneficiary will be the Fund;
4. A bank account for D & B Walker Properties Pty Ltd will be required to be opened.
5. An application for an Australian business number and tax file number for D & B Walker Properties Pty Ltd will be required to be made;
6. The National Australia Bank has agreed to lend the Fund the balance of the money needed to purchase the Property;
7. The National Australia Bank will execute the loan agreement and will lend the Fund an agreed loan amount. As mentioned above, before you enter the loan agreement provided by the

National Australia Bank you should ensure that the agreement complies with the SIS Act and in particular, that the loan will be on a limited recourse basis as required by section 67(4A);

8. The Fund will advance D & B Walker Properties Pty Ltd the cash needed to settle the purchase of the Property;
9. D & B Walker Properties Pty Ltd will execute a Declaration of Trust on the terms set out in the Declaration of Trust prepared by Morrows Legal Pty Ltd which is enclosed and which confirms the basis upon which it purchased the Property;
10. D & B Walker Properties Pty Ltd will pay the purchase price and receive the transfer of the Property executed by the vendor;
11. On the instructions of the trustee of the Fund, D & B Walker Properties Pty Ltd will execute a charge over the Property in favour of the National Australia Bank that the National Australia Bank may require in compliance with the terms in the loan agreement; and
12. D & B Walker Properties Pty Ltd will lease out the Property for a commercial rate of rent and direct the tenant to pay the rent directly to the Fund. A written lease agreement will be required to be executed.
13. The Fund is entitled to input credits on the purchase of the Property and will permit GST to be collected on the rent; and
14. The Fund will receive rental from the occupant of the Property in accordance with lease documents and will pay interest to the National Australia Bank as provided for by the terms of the loan agreement.

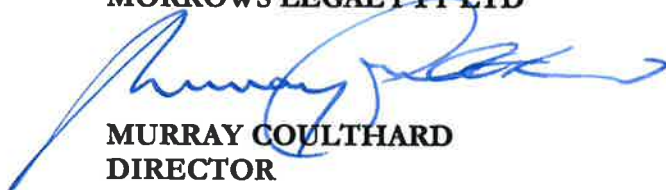
Disclaimer

The views expressed in this advice are based upon

1. the information set out in this advice;
2. an assumption (without independent verification) that all information considered is accurate and not misleading;
3. existing income tax and superannuation legislation, which legislation may be subject to change at any time, as may its interpretation by the Courts;
4. your understanding that this opinion should not be considered a representation, warranty or guarantee that the Australian Taxation Office or the courts will concur with the views expressed in this opinion.

Yours faithfully

MORROWS LEGAL PTY LTD



MURRAY COULTHARD
DIRECTOR

CURRENT TITLE SEARCH

NATURAL RESOURCES AND WATER, QUEENSLAND

Request No: 5471054

Search Date: 05/12/2008 10:23

Title Reference: 50400882

Date Created: 11/07/2002

Previous Title: 12759168

REGISTERED OWNER

Interest

Dealing No: 706115676 13/11/2002

JOHN LUPPINO

DEBORAH ANN LUPPINO

GRAZIELLA LUPPINO

MICHAEL LUPPINO

JOINT TENANTS INTER SE

1/2

JOINT TENANTS INTER SE

1/2

AS TENANTS IN COMMON

ESTATE AND LAND

Estate in Fee Simple

LOT 4

SURVEY PLAN 151830

County of STANLEY

Parish of BULIMBA

Local Government: BRISBANE CITY

COMMUNITY MANAGEMENT STATEMENT 30427

EASEMENTS, ENCUMBRANCES AND INTERESTS

1. Rights and interests reserved to the Crown by
Deed of Grant No. 10116233 (POR 340)

2. MORTGAGE No 706115679 13/11/2002 at 15:12
SUNCORP-METWAY LTD A.B.N. 66 010 831 722

ADMINISTRATIVE ADVICES - NIL

UNREGISTERED DEALINGS - NIL

CERTIFICATE OF TITLE ISSUED - No

Caution - Charges do not necessarily appear in order of priority

** End of Current Title Search **

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Requested By: CITEC CONFIRM