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entertaining the law

SMSFs – get borrowing!

It has been possible since 24 September 2007 for a SMSF to borrow to purchase property using structured instalment warrant arrangements.

The ability for a SMSF to purchase and lease business real property financed by a direct lend to the SMSF, or a back to back lend via a related party, presents an excellent opportunity for your clients to leverage and usefully apply their super before preservation age whilst holding the property in the concessionally taxed and legally robust environment of a SMSF.

The law was amended on 7 July 2010 and the ATO issued a further *questions and answers* document on 29 July 2010. The changes to the law and the *questions and answers* document provide important clarification on a number of issues.

It is now clear that:

- ✓ SMSFs can purchase business real property from, and lease business real property to, related parties in connection with an instalment warrant arrangement.
- ✓ SMSFs can pay conveyancing fees, stamp duty, broker's fees, loan establishment costs and other borrowing/ purchase related expenses from the SMSF borrowing.
- ✗ SMSFs cannot pay for capital improvements or construction costs from the SMSF borrowing. Joint venture arrangements must be considered instead.
- ✓ It is possible for SMSFs, without jeopardising the instalment warrant arrangement:
 - ✓ to amend the terms of a subsisting SMSF borrowing;
 - ✓ to refinance a subsisting SMSF borrowing;
 - ✓ to borrow from a related party rather than a financial institution;
 - ✓ to capitalise interest and other borrowing charges;
 - ✓ to arrange for personal guarantees/ other third party security from SMSF members and others to lenders.
- ✗ A payment under a personal guarantee may be a SMSF contribution.
- ✗ SMSFs cannot:
 - ✗ grant security over the acquired/ financed asset to any person other than the lender;
 - ✗ use an instalment warrant arrangement for an existing asset of the SMSF;
 - ✗ purchase more than 1 real estate title under a single instalment warrant arrangement. Multiple transactions are required.
- ✗ The Custodian cannot continue to hold the property for the SMSF after the borrowing has ended without jeopardising the arrangement. In South Australia, stamp duty may apply upon concluding the Custodian arrangement.

The law is complicated. Successful execution of an instalment warrant arrangement requires a handle on banking, tax, superannuation, stamp duty and property law issues.

Baggiolegal has that expertise and has developed its own suite of compliant documents. We have successfully implemented numerous direct and indirect lends to SMSFs utilising instalment warrant arrangements.

If you require advice, or wish to implement or discuss SMSF instalment warrant arrangements, please let us know.

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The Australian Consumer Law in the Trade Practices Act 1974 (Cth) recently commenced. Australia now has uniform unfair contracts legislation. If a contract term is unfair, a court may declare it void – important examples include default interest clauses and retention of title clauses.

Do your client's terms and conditions comply?



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