

March 2009

# **Business Succession and Estate Planning Bulletin**

**In this bulletin:**

**Update on borrowing through superannuation**

**The use of binding death benefit nominations within self-managed  
superannuation funds**

**Case update - enduring powers of attorney**

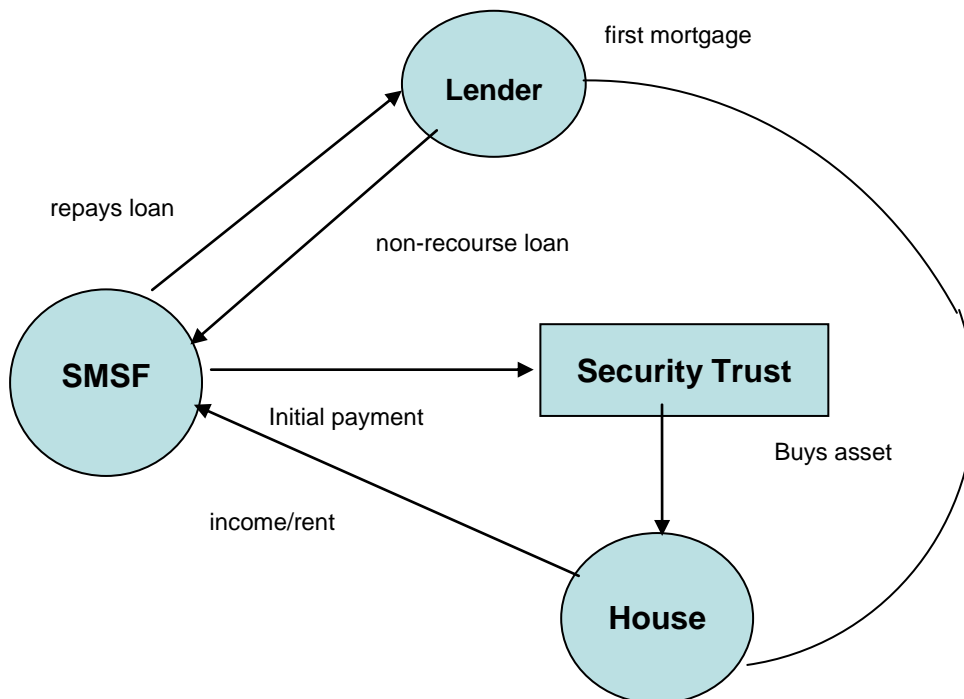
# Business Succession and Estate Planning Bulletin

## Update on borrowing through superannuation

As discussed in our June 2008 bulletin, amendments to *Superannuation Industry (Supervision) Act (SIS)* in September 2007 now permit superannuation funds to borrow money to acquire assets on certain conditions. Briefly, those conditions are:

- the assets purchased have to be held in a separate security trust;
- the moneys borrowed must be used only for the acquisition of the assets;
- the trustee of the super fund must have the right to acquire legal ownership; and
- the right of the lender against the trustee of the super fund for default must be limited in recourse to a right against the asset purchased only and held by the security trustee.

A geared superannuation investment structure is as follows:



With dropping interest rates and rising yields on commercial property, we are seeing more clients taking advantage of the SIS changes by gearing their super funds and purchasing their place of business through the fund.

The ATO continues to provide assistance in this area by publishing a raft of questions and answers as they impact upon superannuation borrowings. Recent questions and answers in the publication are:

- (a) **Does the requirement that the asset be held on trust for the fund mean that the fund acquires an asset from a related party on repaying the borrowing?**

The ATO's answer to this question is that the security trust which holds the asset is a related party of the SMSF. However, when legal title to the asset passes from the security trustee to the SMSF when the borrowing is repaid, the Tax Office takes the view that that transaction would not contravene the provisions of section 66 of SIS which prohibit a fund from acquiring assets from a related party.

- (b) **Is a fund allowed to put an existing fund asset into an instalment warrant arrangement?**

The ATO's answer makes it clear that money borrowed must be applied for the acquisition of an asset. Transactions which amount to a "cash extraction" arrangement are not allowed.

- (c) **Is a fund allowed to borrow from a related party?**

The ATO makes the point that the SIS amendments do not, of themselves, prohibit the lender from being a related party. However, other provisions of SIS must be applied so that, for example, the super fund must satisfy the sole purpose test and comply with existing investment restrictions such as those applying to in-house assets.

- (d) **Does an arrangement that permits capitalisation of interest or other borrowing charges satisfy the new laws?**

The ATO says that interest can be capitalised if:

- (i) the amounts capitalised are costs of the original borrowing;
- (ii) the original borrowing is applied to acquire the underlying asset; and
- (iii) the lender's rights against the fund in the event of default in repaying the capitalised amounts remain limited to the asset acquired.

An amount drawn down under the arrangement to pay interest on the outstanding loan or other fees associated with the borrowing is considered to be money applied for the purpose of acquiring the asset. However, this does not extend to amounts drawn down to pay costs for improving or maintaining the asset which had been acquired.

## The use of binding death benefit nominations within self-managed superannuation funds

Binding death benefit nominations are an increasingly important estate planning tool to ensure a person's superannuation death benefit goes to the desired person on death.

The ATO has recently issued a determination<sup>1</sup> concerning the question of whether there is any restriction in SIS on a self-managed superannuation fund trustee accepting from a member a binding nomination of the recipients of any benefits payable in the event of the member's death.

In response to the question, the determination provides that the relevant provisions of SIS do not apply to self-managed superannuation funds, which, in turn, means that the governing rules of an SMSF may permit members to make death benefit nominations that are binding on the trustee. However, a death benefit nomination is not binding on the trustee to the extent that it nominates a person who cannot receive a benefit in accordance with the operating standards in the regulations to SIS.

This determination makes it clear that, for self-managed superannuation funds, it is important to check the terms of the trust deed to make sure that they allow for a fund member to make a binding death benefit nomination. Of course, any nominated beneficiary must be able to receive the benefit. To take one of the examples in SMSFD2008/3:

*"Tom is a member of an SMSF and has provided the trustee with a written death benefit nomination made in accordance with the governing rules of the fund. The nomination directs the SMSF trustee to pay Tom's death benefits to his nephew Cameron.*

*Tom dies in July 2008 and is survived by his spouse, the other member of the SMSF. At the time of Tom's death Cameron was financially independent and living in his own flat.*

*Cameron is not Tom's dependant and falls outside the range of persons to whom Tom's death benefits can be cashed in accordance with regulation 6.22 of the SISR. This is because regulation 6.22 restricts, subject to limited exceptions, the recipients of death benefits to the dependants and personal legal representative of the deceased member.*

*As Tom's nomination is not valid due to the operation of section 55A, it is not binding on the trustees. As such the payment of death benefits is a matter for the discretion of the trustee acting in accordance with the governing rules of the SMSF and the requirements of legislation including SIS and the SIS regulations."*

## Case update - enduring powers of attorney

Enduring powers of attorney are an important feature of any well constructed estate plan. Mental incapacity or absence overseas are 2 examples of occasions when an enduring power of attorney will be important for the ongoing, proper conduct of a person's affairs.

---

<sup>1</sup> Self-managed Superannuation Funds determination 2008/3

One aspect of an enduring power of attorney is that the people who are appointed as attorneys of the principal must accept that appointment. But is "acceptance" critical to the enforceability of the enduring power of attorney?

This issue was considered recently by the Queensland Supreme Court in *Whitney -v- National Australia Bank Limited (NAB)*. In this case the Court was called upon to decide whether a power of attorney was valid in the situation where the attorney did not accept the appointment until after the principal had lost his capacity.

The Court held that the enduring power of attorney was still valid. The power that was granted before the principal lost his capacity was subject to acceptance by the attorneys before they commenced to act under the power; but that did not affect the legality of the document.

### **Comment**

The case makes it clear that the granting of a power of attorney is a unilateral power of the principal. The ability to act on the power requires a further act; namely, acceptance by the attorney. However, it is not necessary for both acts to have been concluded at the same time although they must both have been concluded before the attorney acts on the power.