

# SMSF's Borrowing to Buy Property

Peter Johnson - The SMSF Expert

CST Corporate Solutions Pty Ltd



# What's in the download?

- This Powerpoint Presentation
- Tax Office Publications
  - TA 2008/5
  - Instalment Warrants & Super Funds Q & A's
  - TR2009/D3
  - Discussion Paper - March 2010
  - SIS Amendment Bill & Explanatory Memorandum
- State Revenue Rulings
  - DUT 30
  - DUT 31
- Legal Opinions & Articles
  - Memorandum of Advice concerning GST
  - Guarantee & “Instalment Warrant Arrangements”
  - Memorandum of Advice concerning “Off the Plan” purchases
- Sample Documents



SMSF's Borrowing to buy Property



# History

- Telstra 1 – ATO says funds can invest in Instalment Warrants.
- Quantum product gets ruling – PR 2005/27
- ATO then decides warrants are borrowings & in house assets
- September 2007 – Sections 67(4A) and 71(8) of SIS passed.
  - TA 2008/5
  - TR2009/D3
  - Discussion Paper - March 2010
- March 2010 – New Section 67A introduced – replaces 67(4A)
- June 2010 Corporations Law changing to make limited recourse borrowing a financial product under FSRA (Still nothing more)
- Recent FOFA amendments



SMSF's Borrowing to buy Property



# Changes to SIS

- Tax Law amendment Bill No.5, 24 September 2007 two amendments to SIS Act section 67 & 71
  - Sec 67...borrowing prohibition clause.....has new clause 67(4A)
  - Sec 71(8).....definition of in-house assets..... specifically excludes warrant trust as in-house asset



SMSF's Borrowing to buy Property



# Changes to SIS

- Superannuation Industry Supervision Amendment Bill 2010
  - Section 67A introduced
  - Section 67(4A) repealed
  - Passed by the Senate 24<sup>th</sup> June 2010



SMSF's Borrowing to buy Property



# New Section 67A

- So what does it mean?
  - Trustee must borrow for purpose of acquiring an asset, not against an existing asset
  - Asset must not be prohibited (ie. Acquiring an asset from a member)
  - Asset must be held on trust
  - SMSF must have beneficial interest in underlying asset
  - Lenders rights against the trustee are only against the asset purchased



SMSF's Borrowing to buy Property



# New Section 67A

- So what has changed?
  - Only one asset per arrangement
    - One share for companies
    - Can't buy furnished apartments or car parks
  - You can now refinance (SMSFR2009/2)
  - Guarantors no rights against SMSF
  - Replacement Assets



SMSF's Borrowing to buy Property



# Bare Trust Structure

- The recommended structure is a bare trust
  - This effectively makes the original asset an asset owned directly by the SMSF
  - Only used to satisfy s67A requirement that the asset be “held in trust”
  - If structured correctly will mean no CGT, Stamp Duty or GST upon unwinding the arrangement (Except SA)
  - State based structures



SMSF's Borrowing to buy Property



# What is a Bare Trust?

- What is a bare trust?
  - An asset is held by the trustee for the absolute benefit of a beneficiary.
- Who can be the trustee?
  - Anyone except the trustee of the SMSF (you can't hold an asset in trust for yourself).
- No name for the trust



SMSF's Borrowing to buy Property



# ATO Q & A – July 2010

- Update from TA2008/5
- Update from original Questions & Answers
- So What is new?
  - Confirms Property is OK
  - Confirms you can borrow off related parties
  - Can refinance
  - Can keep DRP Shares



SMSF's Borrowing to buy Property



# ATO Q & A – July 2010

- So What is new?
  - Can't borrow to build on vacant land \*\*
  - Can't borrow to make improvements
  - Can borrow for repairs (but how?)
  - Can Capitalise Interest
  - Can't buy & sell within parcel of shares



SMSF's Borrowing to buy Property



# GST

- Nominee makes agreement on behalf of beneficiary (SMSF)
- Use ABN of SMSF
- Do not register Bare Trustee for GST
- Special Conditions in Contract for Sale to include SMSF Trustee



SMSF's Borrowing to buy Property



# Stamp Duty

- Two events that may be subject to duty
  - Declaration of Trust
  - Transfer of Property from Bare Trustee back to SMSF Trustee
- Refer NSW Revenue Rulings DUT 30 and DUT 31
- Evidence to obtain minimal duty
  - Bank statements to prove SMSF paid for property, not the Bare Trustee (be wary of deposits paid direct by members)
  - Loan agreement to show SMSF as principal borrower
  - Declaration of Trust
  - Statutory Declaration
  - Copy of Contract for Sale
  - Similar evidence when transferring the property back to SMSF trustee
  - SMSF Deed
- \$50 in duty if evidence shown plus \$10 per copy otherwise full duty.



SMSF's Borrowing to buy Property



# Stamp Duty

- New Section 62A Duties Act NSW
- \$50 duty where
  - Property held in individual names
  - Property transferred to SMSF for the benefit of the individuals
  - Property held in SMSF trustee's Name
- \$500 duty where
  - Property held in individual names
  - Property transferred to SMSF for the benefit of the individuals
  - Property held in nominee's name on behalf of SMSF Trustee
  - Used for borrowing arrangements
- Need special clauses in your deed
- Other duty free states are Vic & WA



SMSF's Borrowing to buy Property



# So what is the process?

- 1. Establish SMSF (28 days for ABN)
- 2. Determine lender & borrowing capacity
- 3. Determine correct structure
- 4. Establish structures (note conflict with 1. above)
- 5. Ensure deposit monies are in the SMSF
- 6. Select a property
- 7. Obtain loan approval – SMSF Trustee is the borrower



SMSF's Borrowing to buy Property



# So what is the process?

- 8. Sign contract in name of Bare Trustee (no mention of the trust)
- 9. Pay deposit from SMSF and keep proof
- 10. Settle with loan funds and SMSF funds (keep proof)
- 11. After settlement stamp the Security Deed
- 12. Manage the property as if it were a direct asset of the SMSF
- 13. When the loan is paid off transfer the property back to the SMSF Trustee's name.



SMSF's Borrowing to buy Property



# Lenders

- Current Lenders:
  - NAB
  - Westpac
  - The Rock Building Society
  - Investec Experien
  - St George
  - Bendigo Bank
  - CBA
- Be careful of specialist lenders – some have withdrawn from the market
- Get loan approval first
- Cheapest to borrow in own name and then on lend to the SMSF (need adequate equity)



SMSF's Borrowing to buy Property



# Other Issues

- Can't refinance but consider setting up a new fund to purchase a property (need to be business real property)
- Separate Land Tax thresholds for superannuation funds
- Can use bare trusts to acquire shares but will need a friendly lender (i.e. the members)
- Can use same bare trustee for new properties but will need new bare trust documents (but consider land tax)



SMSF's Borrowing to buy Property



# Costs and Fees

- Bare Trust \$198
- New SMSF or Rules update of existing SMSF \$198
- New Company \$598
- Bank Charges around \$2,500
- Planners/Accountants Fees:
  - New SMSF around \$5,000
  - Existing SMSF around \$3,500
- Conveyancing – Fixed at \$1,100 plus disbursements from Access Business Lawyers for NSW property
- Will now probably also need a financial plan written



SMSF's Borrowing to buy Property



# What to do now?

- Get the word out to your clients – not just SMSF's.
  - Run a seminar or do a mail out.
  - Make sure your clients know not to sign anything until their Security Trustee is in place.
- Get loan pre approvals early
- Ensure you are using the right solicitors / conveyancers
- Call us to take you through it



SMSF's Borrowing to buy Property



