

New borrowing law passed

New superannuation fund borrowing rules commenced on 6 July 2010. The old rules (contained in s 67(4A)) were deleted and replaced with revised provisions being ss 67A and 67B of the *Supervision Industry (Supervision) Act 1993* (Cth) ('SISA').

This is good news for SMSFs as it will provide them with more flexibility in some respects. However, the new rules also contain some limiting features.

Key features

Refinancing allowed

There is now an express provision to allow SMSFs to refinance. Practically this means that SMSFs are no longer locked into a single permanent financier. An advantage is that SMSFs are now allowed to refinance if they obtain a better deal elsewhere.

Replacement asset clarification

The circumstances permitting a 'replacement asset' are now strictly limited. In order to qualify as a 'replacement asset', an asset must be a share in the same company as the original share and worth the same amount as the original share. There is some ability for the replacement asset rules to apply where the replacement occurs as a result of a takeover, merger, demerger or restructure of the original company or unit trust.

There is no scope for the replacement asset rules to apply to real estate.

Repairs and maintenance

SMSFs are no longer permitted to borrow to pay for improvements to real estate. Money under a borrowing arrangement can only be applied for expenses incurred in acquiring the asset, ie, conveyancing fees, stamp duty, loan establishment costs or maintaining and repairing the asset to ensure that the value of the asset is not depleted.

Specifically an SMSF can borrow for repairs and maintenance. The new legislation does not make a distinction between initial repairs (which are not deductible) and those repairs which are ongoing. Moreover where repairs and maintenance go beyond

the mere form and function of the asset, it will be considered an improvement.

Personal guarantees

The rights of the lender (or any other person) *against the SMSF's trustee* for a default on the borrowing and interest and other charges must be limited to rights relating to only the asset being acquired.

Documentation which seeks to provide greater rights would contravene the new provisions. Thus you should carefully review your documentation to ensure no other party obtains greater recourse than that in relation to the single acquirable asset.

Share acquisitions

Where an SMSF acquires a collection of shares (or other permitted securities) as a 'single asset', those shares must be acquired and disposed of as a collection and not progressively.

If an SMSF wants to acquire more than one collection of shares, separate borrowing documentation for each collection of shares acquired by the SMSF will be needed. For example, two arrangements would be required to acquire NAB and BHP shares.

Practical concerns with real property

If the borrowing is for the acquisition of real property, a house and land are a single asset. However additional items which are not fixed to the land or do not form part of the title, ie, furnishings, body corporate and car parking rights, cannot be acquired through the same limited-recourse borrowing arrangement.

Consider for example an apartment that is on one title and a car park on a separate title. Two borrowing arrangements would be needed: one for each title.

Single acquirable asset

SMSFs can only borrow for the acquisition of a 'single acquirable asset'. The definition of 'asset' however means the singular (prohibiting borrowing arrangements over multiple non-identical assets) and only permits borrowing over a single asset or a collection of assets that are identical and have the same market value, eg, a collection of shares of the

same class in a listed company or equal and identical commodities eg, a collection of gold bars.

In practice this may result in hurdles as many properties are now sold with separate but related rights to the car park, storage room or body corporate entitlements to the main property title.

What does this mean for borrowing arrangements entered into before 6 July 2010?

Where borrowing arrangements have been entered into prior to 6 July 2010, those borrowing arrangements will be subject to the old borrowing rules.

However, if the arrangement is entered into after 5 July 2010 the new borrowing rules apply. Broadly the relevant date will be the date of execution of the

borrowing documents, rather than the purchase of the asset. Documents supplied and that were not executed prior to 6 July 2010 will need to be reviewed to make sure they comply.

Arrangements entered into before 5 July 2010 and subject to the old provision may now be refinanced with a new lender.

Moving forward, advisers and clients must ensure that they are getting documents which are up to date with the new law. Failure to do this may cause clients to be in breach of SISA, resulting in substantial penalties. There are significant risks associated with obtaining documents from off the shelf or web based suppliers particularly as most of these suppliers are still unaware of the recent changes.

DBA Lawyers' SMSF Borrowing Documentation

DBA Lawyers offer standard and premium packages for both direct bank and related party loans:

	Standard	Premium
Direct bank loan	\$1,200	\$2,750
Related party loan	\$1,600	\$3,850

For more information, please visit <http://dbalawyers.com.au/index.php?p=IWB>

Special Intensive SMSF Borrowing Seminar

DBA Lawyers are running special intensive SMSF borrowing seminars to ensure that practitioners know all they need to know about these arrangements. Topics include:

- all the implications from the recent changes
- the must-know SIS issues
- the key taxation and stamp duty issues
- key planning tips and traps
- how to practically implement a borrowing
- advanced topics including, borrowing for shares, property development, vendor terms, arrangements

The seminars will be held in Sydney on 28 July, Brisbane on 29 July and Melbourne on 30 July.

For more information regarding these seminars, visit <http://dbalawyers.com.au/index.php?p=BOR> or call Marie on 03 9092 9400.

For further Information please contact:

DBA LAWYERS PTY LTD (ACN 120 513 037) Level 1, 290 Coventry Street, South Melbourne Vic 3205

Ph 03 9092 9400 Fax 03 9092 9440 dba@dbalawyers.com.au www.dbalawyers.com.au

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