

SMSF Borrowing Documentation

DBA advises on and provides documentation to implement SMSF borrowing arrangements, also known as 'instalment warrant'-type loans.

Packages

DBA offers **standard** and **premium** packages for both direct bank and related party loans (all prices are GST inclusive):

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

*Add \$300 for each if the asset being acquired is real estate that consists of two titles, add \$600 if it consists of three titles, \$900 if it consists of four titles, etc.

Our costs may exceed these estimates if significant issues arise beyond the scope of a typical borrowing transaction, or if the client requires additional advice on particular issues related to the transaction.

These costs also exclude conveyancing costs incurred by the client, as well as any additional documents required such as any entities that need to be set up, a deed update or documents to change the fund's trustee.

Standard and premium packages

DBA recommends the premium service due to the complex nature of SMSF borrowings and the stamp duty, tax and super compliance issues these arrangements can give rise to. Our premium service includes all of the documents outlined below, plus our lawyers' typical attendances in assisting with implementation (eg, liaising with the conveyancer and lender and providing assistance to the adviser/accountant acting on behalf of the trustee).

However, those who wish to order documents only can order our standard package. This includes the same documents but DBA's lawyers are not involved in liaising with the conveyancer or providing any other assistance during implementation. If you later require our assistance with any aspect, we would be pleased to assist and our attendances will be billed at our hourly rates.

Direct bank loans

If the SMSF trustee will borrow from a bank or other commercial lender, our package includes:

- a letter to the adviser/client
- checklist providing guidance on the timing and implementation of the arrangement
- suggested resolutions for the SMSF trustee and custodian
- bare trust deed (*see overleaf regarding set up of the 'bare trustee' company*)
- supplementary agreement
- SMSF Borrowing Memo

Related party lenders

A related lender (eg, a related family trust, company or the members personally) can also lend to an SMSF, provided this meets all relevant laws, such as the requirement that the related party lend to the SMSF on arm's length, commercial terms. The related party may also in turn borrow from a bank to finance this arrangement.

Our package includes similar documents to the 'direct bank' package above, but also includes a limited-recourse loan agreement and a guarantee and indemnity to ensure the parties' loan complies with superannuation law.

Do I need to set up a 'bare trustee' company?

Yes, the asset being acquired must be held on trust outside the SMSF during the term of the loan. This means that an entity other than the SMSF trustee must hold legal title to the asset.

DBA recommends that a new company be incorporated for this purpose. Further, this company should have no other active duties. The risk of additional taxes and duties being incurred may increase if this is not the case.

DBA can set up a new company for an additional \$800 incl. GST (this includes ASIC's incorporation fee). Alternatively, advisers may set up this company with their own company supplier. (Note that there are strategic requirements for correct set up and structuring of the bare trustee company.)

Do I need to get advice?

We strongly recommend that SMSF trustees and their advisers obtain advice before entering into such transactions given that these laws are relatively new and there are a number of complexities and traps from superannuation compliance, stamp duty and taxation viewpoints. It is also important to ensure that trustees and advisers understand the correct timing and procedures for implementing an SMSF borrowing arrangement.

Note that you should obtain advice on the conveyancing practice and requirements and stamp duty and land tax in your State or Territory as these differ across jurisdictions and may impact the implementation of the borrowing. You should also ensure that you have obtained advice on the taxation implications of the arrangement as these can have significant consequences for taxes such as stamp duty, CGT and GST.

What other costs can arise?

Many SMSF deeds do not have adequate powers for a borrowing and may need amendment. DBA can review the SMSF's deed and advise accordingly.

Although it is not necessary, DBA also recommends that an SMSF have a corporate trustee before entering into a borrowing arrangement. Some lenders also require that an SMSF switch to a corporate trustee before it will lend to the SMSF. DBA can prepare documents to appoint a corporate trustee. Please contact our office for further information.

SMSF Borrowing Memo

The Memo is a useful point of reference for advisers who wish to know more, have unanswered questions or those who want to be better equipped to consider borrowing opportunities for their clients. The Memo is priced at \$200 + GST.

Those who purchase an SMSF Borrowing Memo now and decide to order a documentation package later will receive a discount of \$200 off the price of the documentation package.

To order documents

To order documents or to find out more, please visit our website at www.dbalawyers.com.au or contact our office on **(03) 9092 9400**.