

## **Vincents** *Insights*

### **Borrowing through super**

Since September 2007 Self Managed Superannuation Funds (SMSF's) can obtain finance directly to acquire certain assets. This permission is detailed in Section 67(A) of the Superannuation Industry Supervision Act (SIS), and is known as a limited recourse loan arrangement.

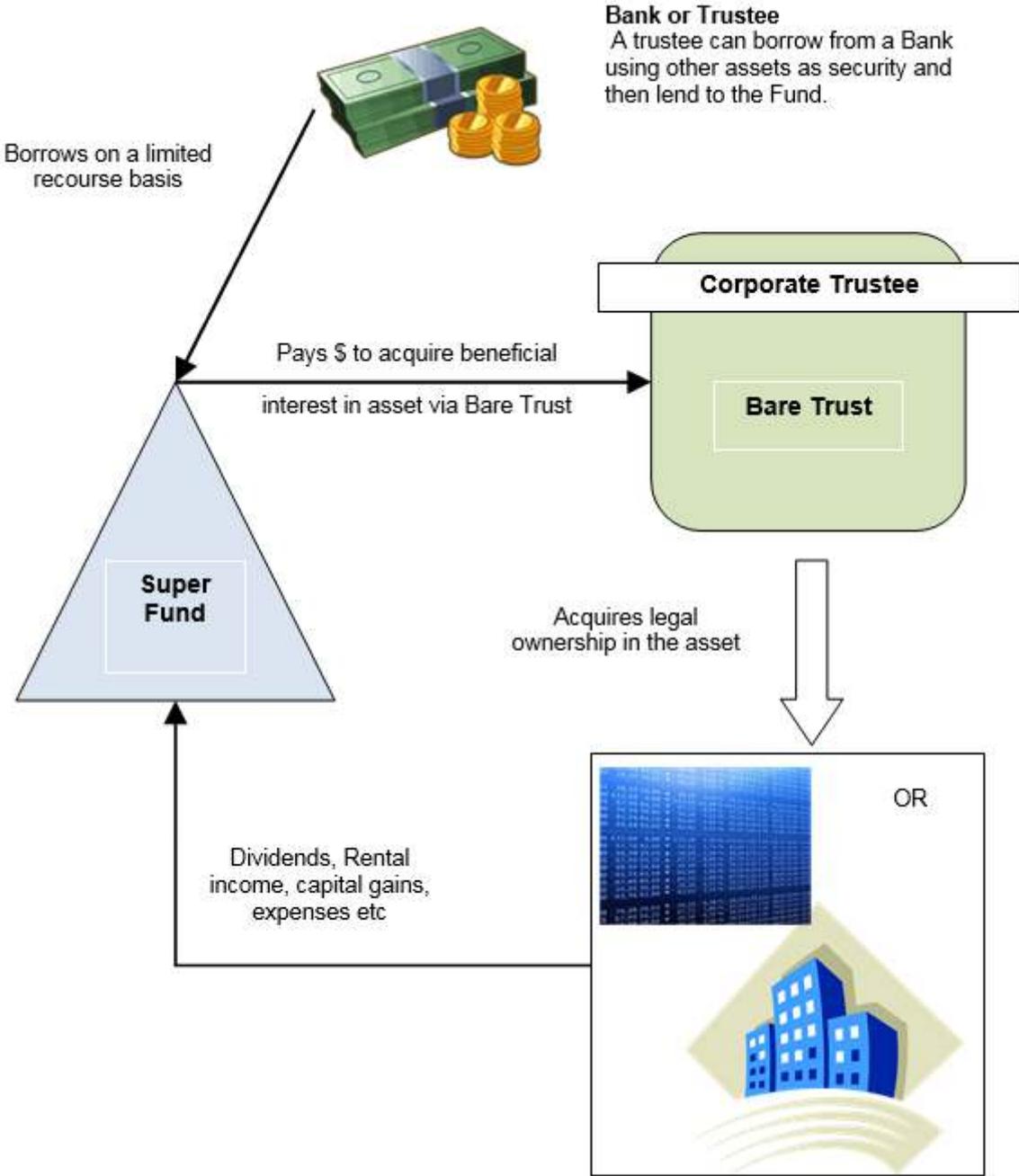
Basically, this section says that the trustee of a super fund can borrow to acquire a single asset providing that the asset is held on trust until such time as the borrowings are paid and that the only asset to be provided as security for the borrowing is the asset being purchased.

Some important things to consider when looking at this arrangement are:

- The preferred method for purchasing the asset is by using a “Bare Trust”. This is to ensure that when you finally pay for the asset and transfer it back to the name of the SMSF trustee you do not incur stamp duty, GST or capital gains tax;
- You can only purchase an asset that you would otherwise be allowed to purchase anyway. This means that the trustee must still comply with the sole purpose test and also the in house asset rules;
- You must be borrowing to purchase an asset so you may not borrow against an asset the Fund already owns. Therefore you may not borrow to put a building on a block of land currently owned by the fund or to make improvements on an existing fund asset;
- The asset purchased must be a “single acquirable asset”. This is a property on one title or a parcel of shares in one company.
  - If the property is on multiple titles, it depends if there is some physical or legal impediment that allows the property to be treated as a single asset (such as a factory which sits across two titles), otherwise multiple arrangements are required.

- » A separate car park acquired with an apartment which has a notice of restriction over it, meaning the car park and apartment must be transferred and registered together are under a legal impediment, so can be under the one arrangement;
- » A separate car park acquired with an apartment which is on separate titles, in the absence of any legal impediment, would need to have two trust structures.
- If an apartment is being purchased with a furniture package, the loan cannot be used to cover the purchase the furniture under the same trust arrangement as the apartment. It should be removed from the contract and funded from the existing liquidity in the Fund.
- Shares must be treated like one asset. That is, purchased together and sold together. If shares in multiple companies are desired, multiple arrangements are also required;
- It is possible for the Trustees of the Fund to borrow in their own names and then on-lend that money to the SMSF. This needs to be done with caution however, as if not done correctly, the super fund could end up paying top marginal tax rate on the income derived;
- Personal guarantees are permitted to be given to underwrite the lender's risk in the borrowing arrangement;
- The asset subject to the arrangement is not subject to a charge other than to the lender in respect of the borrowing arrangement itself;
- The asset within the arrangement can only be replaced by a different asset in very limited circumstances;
- It is very important that the property conveyancing (if applicable) be done correctly as small errors can cost your clients double or even triple stamp duty and the errors may not be picked up until you go to unwind the bare trust relationship. We suggest that your clients use solicitors who are conversant with these arrangements and not just property transfers;
- Trustees can refinance a borrowing including accrued interest if the new borrowing arrangement is over the acquirable asset from the first arrangement.

# The structure



## What next

The following process should be adopted if you wish to borrow to purchase a property in an SMSF:

1. You should seek advice prior to entering into a contract;
2. If you have an existing SMSF, an amendment to the Trust Deed may be required allowing the Fund to borrow. Just because the law says you can borrow, doesn't mean the Trust Deed allows it (Or set up a new fund if required);
3. A new investment strategy will be needed to provide for borrowing to acquire a particular type of asset and to consider the risks associated with a loan and the liquidity issues that can occur on death of a member(s);
4. Pre approval of a loan for a particular amount of money may be advantage so the trustees know that they can borrow the money before they lock in to purchase a particular property. You should also confirm with the lender at this time whether they require a corporate trustee of the SMSF as some do, or charge a different interest rate on the borrowing;
5. Set up their Corporate Trustee of the Bare Trust to hold the asset on their behalf. This will need to be a separate company to the trustees of the SMSF. The reason for this is that you can't hold an asset in trust for yourself and section 67(A) clearly requires the asset to be held on trust. Lenders are also showing that they will only lend to a corporate Bare Trust trustee. You MUST ensure that the Bare Trust trustee is set up BEFORE you enter into a contract to purchase the asset as the Bare Trust Trustee will need to be the purchaser on the contract;
6. Once you have set up the Bare Trust Trustee you can formally apply for the loan and also set up the Bare Trust deed. If the loan is to be from a related party, a formal loan agreement must be prepared;
7. Contracts can now be exchanged. For property, it is important that your conveyancing is done correctly having regard to stamping the Bare Trust documents. Poor conveyancing will lead to stamp duty concerns in the future if you have difficulty proving the real purchaser. You also need to ensure that the timing of the documents does not create a double conveyance of the property;
8. It is now just a case of settling the loan and the purchase. The asset is then shown as an asset of the SMSF. It is not an investment in a trust (where a bare trust is used). The bare trust deed can be used to provide evidence of ownership to the fund's auditor;
9. The Bare Trust need not apply for a TFN or ABN. All financial transactions are direct with the SMSF trustee. The asset is to be treated as a direct asset of the SMSF Trustee. The asset is shown as an asset of the SMSF in the fund's accounts. It is not an investment in a trust that then holds the asset.

## Establishment costs

To establish the SMSF	\$1,100
To establish a company as trustee of the SMSF	\$1,100
To establish a company to act as trustee of one or more Bare Trusts	\$1,100
To establish a Bare Trust	\$1,650
If multiple Bare Trusts required, add \$660 for each additional Bare Trust	

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