



# Self Managed Super Funds to purchase property



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**Coolangatta Office (Head Office)**  
Suite 1 – Level 2 Showcase on the Beach  
Cnr Marine Parade & Warner Street  
PO Box 334 Coolangatta QLD 4225

**Robina Office**  
Suite 5010 – Level 4 Arbour Lane Terraces  
Robina Town Centre  
PO Box 3089 Robina 4230

**Kingscliff Office**  
1b Pearl Street  
PO Box 1413 Kingscliff NSW 2487

**Telephone: +61 7 5536 9777 | Facsimile: +61 7 5536 9755**

**[info@attwoodmarshall.com.au](mailto:info@attwoodmarshall.com.au)**  
**[www.attwoodmarshall.com.au](http://www.attwoodmarshall.com.au)**

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## 1. The New Rules

In September 2007 Section 67(4A) of the Superannuation Industry Supervision Act was amended to allow Self-Managed Superannuation Funds (SMSF) Trustees to borrow money to acquire assets subject to certain conditions.

## 2. Limited Borrowing

- The borrowing is limited recourse, meaning the lender's only security is the property purchased. In other words, the rights of the lender against the SMSF for default on the borrowing is limited only to rights relating to the property purchased.
- This is a quite significant issue for banks. Traditionally banks require recourse over all of the borrower's assets. This is not allowed under SMSF borrowings.
- It is also usually bank practice to require related parties to give personal guarantees for borrowings. In fact many banks have been asking members of SMSF's to give personal guarantees.
- The ATO has however flagged related party guarantees as a cause for concern. The ATO has stated that related party guarantees "may result in the recourse being made to the assets of the SMSF other than the asset acquired" and this will be contrary to the intent that the borrowing only applies to limited recourse borrowings.
- One solution to overcome this issue is for clients to borrow personally, giving personal guarantees to the bank. Because this loan is a personal loan it is not subject to any superannuation borrowing restrictions. Clients can then on-lend the money to their SMSF on commercial terms and conditions.

## 3. Security Trustee

- A third party holds legal title to the asset on trust for the SMSF Trustee. The SMSF Trustee then has a beneficial interest and a right to call for a transfer of legal title when the loan is repaid and the mortgage discharged.
- As a general proposition there are no restrictions on who can hold the asset on trust for the SMSF whilst the borrowings are repaid.
- It is highly recommended to use a "sole purpose corporate entity" as the Trustee of the asset. This entity must hold no other assets or business interest and its sole function must be to hold the asset on trust for the SMSF.
- However, it is important to note the ATO have stated a Unit Trust cannot hold the asset "on trust" for the SMSF.

## 4. Documentation Required

- The purchaser in a contract for the purchase of real property will be described as follows: "AB Pty Ltd as Trustee for the AB Family Trust on behalf of the AB Super Fund".
- It is also preferable to have a Special Condition in the contract stating the purchaser is buying the property in its capacity as custodian for the Super Fund.
- The transfer will only refer to the trustee with no reference to the Super Fund.
- It is also preferable to execute a Declaration of Trust between the SMSF and the custodian trustee to avoid any doubt that the custodian is acting as bare trustee for the SMSF.

## 5. Considerations for SMSF Trustee

- The loan must comply with the Superannuation Industry Supervision Act, including the lender's rights on default.
- The SMSF has sufficient cash flow to repay the principal and interest (without relying on member contributions).
- The SMSF Deed allows the trustee to borrow and acquire the relevant asset.
- The structure of the transaction and the investment is signed off by the fund auditor as compliant with the Superannuation Industry Supervision Act.

## 6. Conclusion

The amendment of the rules has opened the market for investments by superannuation funds. However, all parties involved in the investment, including the financiers, should be aware of the rules relating to the borrowing and lawyers should attend to the drafting of the required documents to ensure the investment and borrowing complies with the new rules. It is therefore important to obtain proper legal advice before entering into such an investment and/or borrowing.

**N.B. The above is general advice and should not be relied upon as legal advice. Each party should obtain its own legal advice in relation to the matters raised above.**

For enquiries regarding buying or selling property please contact Christine Martin on (07) 5506 8245 or by email [cmartin@attwoodmarshall.com.au](mailto:cmartin@attwoodmarshall.com.au).



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