

Superannuation and borrowing

Prior to September 2007 there was a blanket prohibition under the Superannuation Industry (Supervision) Act 1993 (SIS Act) against borrowing for regulated superannuation funds (super funds) except in very limited circumstances. However, in September 2007 the SIS Act was amended to allow super funds to borrow. Colloquially these products are known as 'super warrants' although the legislation allows for a broader application than typical warrant products often seen in the market as applying to listed securities. For the purposes of this factsheet we have referred to these new arrangements as a superannuation instalment trust (SIT).

In order to qualify for the exemption available under the SIS Act, a SIT must satisfy the following conditions:

- The borrowed monies are used to acquire an asset which the fund is not otherwise prohibited from acquiring.
- The asset acquired (or a replacement asset) is held on trust so the super fund receives a beneficial interest in the asset.
- The super fund has the right to acquire legal ownership of the asset (or, if applicable, then the replacement asset) by making one or more payments after acquiring the beneficial interest.
- Any recourse the lender has under the arrangement against the super fund is limited to rights relating to the asset acquired (or if applicable, then the replacement asset). That is, the lender is able to have the right to recover monies where there is a default on the borrowing by repossessing or disposing of the asset acquired, but cannot have the right to recover such monies through recourse to the super fund's other assets.

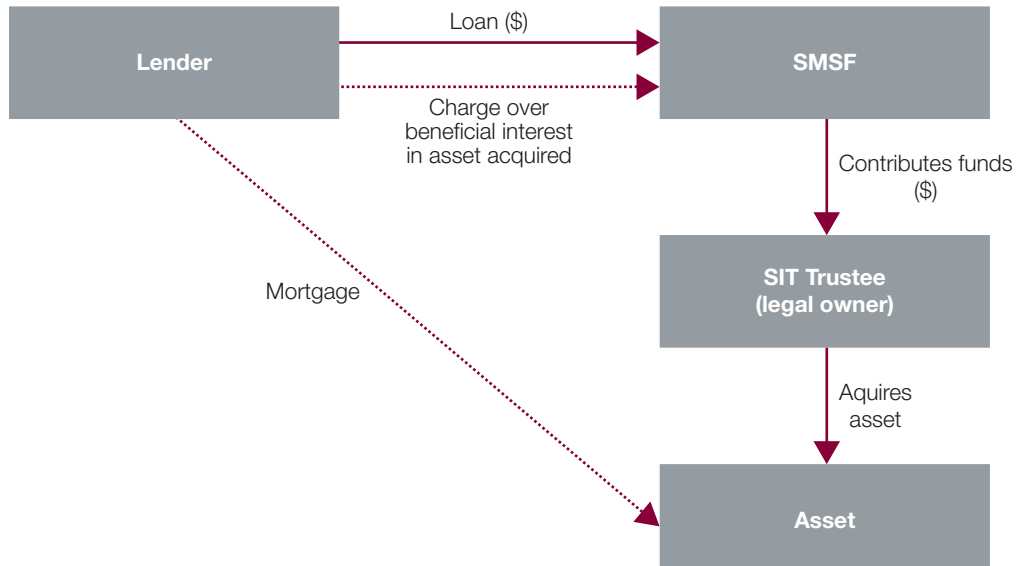
There has already been a significant amount of interest from trustees of self-managed superannuation funds (SMSFs) in using SITs to acquire real property. Advisers and their clients need to carefully consider the stamp duty implications of using SITs to acquire assets, especially in circumstances where the warrant holder (e.g. the SMSF) ultimately repays the loan and seeks transfer of legal title of the asset from the trustee. In some states, this transfer is likely to incur stamp duty, despite the fact stamp duty will obviously have been paid on the initial acquisition when the SIT was established and the original asset acquired. That is, there is potentially a double duty situation, albeit there may be a significant time lapse between when the SIT is originally written and when the loan is finally paid and title to the asset transfers to the trustee of the SMSF.

Funding options

There are essentially two funding options available to super funds wishing to use a SIT arrangement:

- Third party funding. There are a number of major banks now offering funding packages which suit the requirements of the SIS Act.
- Self-funding. This is for those clients with the ability to lend to their super fund using resources held outside super. It is critically important for clients adopting a self-funding approach to have their loans fully documented. Without adequate documentation to substantiate loans provided by a related party as being by way of a borrowing, it is likely the advance will be treated as a contribution received by the super fund. This could lead to significant tax consequences should it result in a contributions cap being exceeded.

Set out below is a diagrammatic representation of the SIT arrangement.



McMahon Clarke Legal has developed a SIT package for SMSFs for clients using both third party lenders and those intending to self-fund.

The package includes the following:

- Review of your existing superannuation trust deed to ensure it contains appropriate powers.
- Preparation of the superannuation instalment trust deed.
- Detailed advice and document summary of the SIT structure and stamp duty implications.

For clients who are providing internal funding the package includes appropriate loan and security documentation.

Please contact a member of the private client team at McMahon Clarke Legal on 07 3831 8999 to request an order form or for more information and details about professional fees.

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For more information contact a member of our private client team on 07 3831 8999 or info@mcmahonclarke.com