

# LRBA Third Party Service

Complete and return this form to Heffron at:

Fax: (02) 4930 2199

Email: docprep@heffron.com.au

Post: PO Box 200 Maitland NSW 2320

**Price Package:** \$1650 (inc GST). If Heffron is facilitating the establishment of a Corporate Custodian Establishment, it is an additional \$715 (inc GST).

## Section A: Contact Details – documents will be forwarded to this person

Name: ..... Postal Address: .....

Phone: ..... Email: .....

Please elect how you would like to receive the documents (one only):  Email (PDF format)  Mail

## Section B: Fund Details

Super Fund Name: ..... ABN: .....

Please attach the Fund's current Trust Deed (and where applicable, previous Trust Deed(s)).

Corporate Trustee Name: ..... ACN: .....

Company Director Name(s): .....

## Section C: Custodian Details

Custodian Name: ..... ACN: .....

Company Director Name(s): .....

**New Corporate Custodian** Heffron to establish a company to act as the custodian of the asset under this Borrowing Agreement.

Each director will be issued with 1x\$1 share and director 1 will be Company Secretary, Signing Officer and Public Officer

Principal Place of Business will default to Director 1 Residential Address

Preferred Name: .....

Registered Office: .....

|   |   |
|---|---|
| 1. Title: Mr/Mrs/Miss/Ms/Dr<br>Full Name: .....<br>Residential Address: .....<br>.....<br>Date of Birth: .....<br>Place of Birth: ..... | 2. Title: Mr/Mrs/Miss/Ms/Dr<br>Full Name: .....<br>Residential Address: .....<br>.....<br>Date of Birth: .....<br>Place of Birth: ..... |
| 3. Title: Mr/Mrs/Miss/Ms/Dr<br>Full Name: .....<br>Residential Address: .....<br>.....<br>Date of Birth: .....<br>Place of Birth: ..... | 4. Title: Mr/Mrs/Miss/Ms/Dr<br>Full Name: .....<br>Residential Address: .....<br>.....<br>Date of Birth: .....<br>Place of Birth: ..... |

## Section D: Borrowing Arrangement Details

Name of third Party lender/ Party: .....

Contact Person: ..... Phone: .....

Email: .....

**Section E: Asset Details**

Please attach Contract of Sale

Asset Details: .....

Governing laws:  NSW  QLD  VIC  SA  WA  TAS  ACT  NT

**Section F: Acknowledgement**

By signing this form, you acknowledge that you have read and understood our attached outline of the basis on which we will proceed to do the work and the assumptions we will rely on.

**Signed** \_\_\_\_\_

**Section F: Payment Details**

|   |   |
|---|---|
| <input type="checkbox"/> Cheque Attached<br>Amount: \$.....   | <input type="checkbox"/> Direct Debit Agreement in place<br>Amount: \$.....<br>Name: .....<br>Signature: .....  |
| <input type="checkbox"/> Credit Card<br><input type="checkbox"/> VISA <input type="checkbox"/> Mastercard<br>Amount: \$.....<br>Cardholder's Name: .....<br>Card Number:<br>.....<br>Expiry Date: .....<br>Signature: ..... | <input type="checkbox"/> EFT Transfer<br>Amount: \$.....<br>BSB: 082 691<br>Account: 561309446<br><i>Please attached transaction receipt of payment to service form as confirmation of payment.</i> |

**A few other things you need to know**

As part of this service Heffron will:

- Review the Trust Deed to investigate whether any changes are required in order for the self managed superannuation fund to enter in to the LRBA; and if required will amend for \$440.
- Convey your instructions to Sydney Business Lawyers to document a LRBA between the trustee of the self managed superannuation fund ("SMSF") and the bare trust trustee ("Custodian"). Note the *the SMSF and the Custodian must not be the same entity – refer to Guide.*

As part of this service Sydney Business Lawyers will prepare a package which will include:

- |  |  |
|--|--|
| <ul style="list-style-type: none"> <li>• Signing instructions</li> <li>• Set up instructions</li> <li>• Resolution of SMSF trustee</li> <li>• Resolution of custodian</li> </ul> | <ul style="list-style-type: none"> <li>• Waiver of rights</li> <li>• LRBA set up checklist</li> <li>• SBL's LRBA newsletter</li> <li>• Limited recourse borrowing arrangement</li> </ul> |
|--|--|

Where legal advice or guidance is required in respect to implementing the LRBA, **additional costs will apply**. Additional costs may also apply where purchasing real property in Queensland.

**Note that this a documentation service only.** We strongly recommend that you seek advice in the benefits of entering in to a borrowing structure from a person who holds an Australian Financial Services Licence and who has expertise in the area of borrowing. Consideration of the relevant parties' personal circumstances including liability for the taxation or asset protection and the self managed superannuation fund's investment strategy has been undertaken by Heffron or Sydney Business Lawyers and this should be undertaken by you prior to entering in to a borrowing structure.

# LRBA Third Party Guide



Thank you for enquiry about our related party lender SMSF limited recourse borrowing arrangement package. Outlined is what makes up our package to put in place a limited recourse borrowing arrangement for a SMSF. The outline also sets out the basis on which we will complete the work and certain assumptions that will be relied on. You must tell us before we start the work if anything arises from what is set out in the outline.

The package will consist of:

- Signing instructions
- Set up instructions
- Resolution of SMSF trustee
- Resolution of custodian/ lender
- Waiver of rights
- LRBA set up checklist
- SEPL's LRBA newsletter
- Limited recourse arrangement
- Our bill

## **What borrowing arrangement is this documentation suitable for?**

This form of our LRBA documentation is for a related party loan and is not suitable for a loan directly from an unrelated third party lender / bank to your SMSF

## **Structure of the transaction using the borrowing**

The LRBA documentation must be prepared on the basis that a lender will lend money to your SMSF on limited recourse terms and conditions and unless the SMSF trustee uses a third party lender's custodian, a related party custodian will purchase an asset to hold on bare trust for the SMSF

## **The loan and any security - limited recourse**

The loan from the lender and any security provided to support it must only be limited recourse. That is, the SMSF's liability under the loan agreement and any security must be limited to the SMSF's interest in the asset. This requirement also applies to the rights of any SMSF member or third party that may provide a guarantee or collateral security for the loan to the SMSF.

## **Identity of the borrower and custodian**

Remember that the trustee of the SMSF and the custodian can't be exactly the same party or parties (but there can be a commonality between them). If they are exactly the same, there may not be a valid trust. It is acceptable for members of the SMSF to also be the custodians and / or lender. Although, this will always be subject to the lender's requirements where the lender is a third party.

## **Unpaid purchase price is normally not a borrowing**

**IMPORTANT NOTE** - unpaid purchase price repayable by after a property transfer to the SMSF from any party will not normally satisfy the SIS borrowing of money requirements and a formal borrowing of money will be required. See SMSFR 2009/2 (ie paragraphs 39, 40 and 52).

## **Borrowing costs, including stamp duty**

Under a LRBA entered on and from 7 July 2010, the SMSF can use the borrowing to pay costs incurred in connection with the purchase such as stamp, legal costs, brokerage, loan establishment fees

## **Sections 67A, 67B and 71(8) of the SIS Act**

We note that all arrangements under the LRBA must be in compliance with sections 67A, 67B and 71(8) of the SIS Act. Our fees do not include any part of this work other than to make sure the documents

themselves comply. So, we do not accept liability and are not liable for ensuring that the proposed arrangements are in compliance with these provisions **including the single acquirable asset requirements.**

### **Your trust deed**

It is important that your trust deed permits this form of borrowing arrangement and for the asset to be held on trust. If it does not, the trust deed must be amended before the borrowing is entered into.

### **Investment strategy**

All superannuation funds must have an investment strategy. If you have not already done so, you need to prepare, adopt, and continually review your fund's investment strategy. The strategy must permit the proposed investment under the LRBA. If your investment strategy does not, you will need to modify it accordingly.

### **Section 71 of the SIS Act**

You need to ensure that any lease to a related party of the SMSF is in place and complies with the "enforceable" requirement before the purchase of the single acquirable asset is settled/completed.

### **Arm's length terms and conditions of the borrowing**

Section 109 of SIS only requires the borrowing to be on terms and conditions no more favourable to the SMSF trustee than had the SMSF trustee and the lender been dealing with one another at arm's length.

However, the non arm's length income provisions of Subdivision 295H (295.550) of the ITAA 1997 (**NALI**) requires the terms and conditions of the borrowing to be on arm's length terms and conditions or the income from the asset purchased is likely to be taxed at 45%. **See ATOID 2015/27 and 2015/28.**

In each case, you look at the terms and conditions as a whole in considering compliance.

Compliance with the NALI provisions will normally mean compliance with the section 109 provisions of SIS.

In Practice Compliance Guideline 2016/5, the ATO sets out safe harbour terms and conditions that, on the basis of the written terms and conditions of the borrowing alone, the ATO accepts as being arm's length terms and conditions. Those safe harbour terms and conditions are set out at the end of these set up instructions.

If the SMSF trustee is borrowing from a third party, it is reasonable to expect the terms and conditions of that borrowing to be arm's length terms and conditions, as they have been negotiated in the market place and there is normally evidence that those terms and conditions are also offered to other parties. That will be a matter for the SMSF trustee to determine.

If the SMSF trustee is borrowing from a related party, **unless you instruct us not to use the ATO's safe harbour terms and conditions**, the LRBA will have been prepared on the basis that its terms and conditions will always be the ATO's safe harbour terms and conditions.

If the SMSF trustee is borrowing from a related party and you instruct us not to use the ATO's safe harbour terms and conditions, if the SMSF trustee is taken to task by the ATO about whether the terms and conditions of the loan as a whole are arm's length terms and conditions, it will be up to the SMSF trustee to prove that they are. So written evidence about that (preferably from more than 1 source) should be kept.

## **Tax**

We note that we have not given taxation advice. However, until clarified further by the ATO, we draw your attention to the capital protected borrowing provisions of Division 247. There is also the non arm's length income provisions of Subdivision 295H (295.550) of the ITAA 1997 mentioned earlier in this document and with which the SMSF must comply and about which we have not given advice that has been relied on in entering this transaction. Normally, the custodian will not need to apply for its own TFN and the SMSF's TFN should be used.

## **GST**

You should discuss with your accountant whether there are any GST implications arising from the purchase and use of the asset to be purchased with the loan. If GST registration is required while the custodian holds the assets, it will normally be the SMSF trustee that needs to be registered (see GSTR 2008/3)

## **Division 7A**

If the lender is a company, you must ensure that the borrowing arrangements comply with Division 7A of the Income Tax Assessment Act 1936. A deeming clause has been added to the agreement as a compliance safety net (but it is subject to the ATO's NALI safe harbour terms and conditions if they apply). If applicable, you should discuss this with your accountant, including if anything other than the deeming clause is required.

## **Land tax**

Please note that the SMSF as the new owner of a property is responsible for registering for land tax and complying with any land tax obligation that it may have as an owner of the property. Where the property is held on bare trust for the SMSF, technically it is the bare trustee that is required to register for land tax purposes. However, apparently, the OSR takes a more practical approach and allows only the SMSF to register for land tax where it is payable for the property. The bare trust should be raised with the OSR if registering the property for land tax but otherwise, we note that we are not responsible for the giving of land tax advice about the structure.

## **Accounting records**

Even though the asset is held by the custodian as trustee for the SMSF, until the asset is transferred to the SMSF, it is the SMSF trustee that should account for all transactions relating to the asset. You should talk to your accountant about this.

## **Nature of our Service**

Our service is merely to supply LRBA documentation to you as set out in this document.

## **Asset protection**

We note that we have given no asset protection advice in preparing the documentation. Any human custodian will be personally liable for actions against the custodian, subject to the custodian's limited right of indemnity against the asset acquired.

## **Financial advice**

We note that we have given no financial advice to you about the benefits or otherwise of entering into the LRBA, which can only be given by someone who holds a financial services licence.

## **Stamp duty**

No state or territory in Australia charges stamp duty on a loan.

Stamp duty will not normally be payable in any state or territory of Australia on any purchase or later transfer of listed securities.

Stamp duty is normally payable in all states and territories of Australia on any purchase or declaration of trust over land and any later transfer of that land.

Subject to the following notes, in all states and territories, only nominal stamp duty normally applies on both the attached bare trust documentation [in NSW of \$500, Victoria \$0, Tasmania \$20, ACT \$20, Northern Territory \$5, Western Australia \$20, Queensland \$0 and South Australia \$0] and when the purchased asset is later transferred from the custodian to the SMSF trustee similar nominal stamp duty applies.

**In all of those states and territories, that is only the case if the SMSF can prove that it paid for the purchase price of the asset either from its funds or from a loan.** It will not be sufficient to simply claim that the SMSF has paid the purchase price, it has to be physically proven from reconciling purchase contracts and settlement statements to the payment of the purchase price through producing bank statements and loan documents.

**Note** If the asset is not dutiable property, such as a listed security, the initial declaration of bare trust may be liable to duty, in NSW of \$500, Victoria \$200, Tasmania \$20, ACT \$0, Northern Territory \$0, Western Australia \$0, Queensland \$0 and South Australia \$0.

In the Northern Territory the attached bare trust documentation must be executed prior to any contract to purchase the asset and you need to be able to prove that. Signing and dating the attached bare trust 1 day prior to the purchase contract is the best way to do this.

If a charge / mortgage is granted over the asset to be purchased under the agreement, stamp duty would normally be payable on that charge / mortgage in NSW before 1 July 2016. Mortgage duty was abolished in South Australia from 1 July 2009, Western Australia from 1 July 2008, Victoria since 2004, Tasmania from 1 July 2007 and Queensland from 1 July 2008. There is no mortgage duty in the ACT or Northern Territory.

In NSW, Victoria and Tasmania, interest will normally be charged on unpaid stamp duty from the date 3 months after first execution of any document that is liable for stamp duty. In the ACT, it is 90 days. In the Northern Territory it is 60 days and Queensland, 30 days. In Western Australia and South Australia, lodgement must take place within 2 months. In Western Australia penalties of up to 10% apply for late lodgement and in South Australia, interest and penalties can apply.

#### **ATO's LRBA views**

The ATO's published LRBA views can be located at:

<https://www.ato.gov.au/super/self-managed-super-funds/in-detail/smsf-resources/smsf-technical/limited-recourse-borrowing-arrangements---questions-and-answers/>

We note our prior comments about the capital protected borrowing provisions of Division 247 and the non arm's length income provisions of Subdivision 295H (295.550).

Care should be taken to ensure taxation compliance of the proposed arrangements and prior to entering the arrangement to otherwise satisfy yourself about the potential taxation implications arising from them, including those arising from the proposed use of the asset that is acquired.

#### **Loan to valuation ratio and NALI**

It is not our responsibility to monitor compliance with the ATO's view on the Loan to valuation ratios set out in the ATO's Practical Compliance Guideline 2016/5.

On a LRBA for land, the maximum LVR is 70%.

On a LRBA for securities, the maximum LVR is 50%.

For a new LRBA, the LVR is set at the time of the draw down of the loan.

In the case of a marginal LVR for land, an independent registered valuer's valuation is the best form of evidence.

Last trade evidence would be adequate evidence for a listed security.

A private security may require a formal valuation to show that the maximum LVR of 50% has not been breached.