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SUPERANNUATION GEARING

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Barrister

13 Wentworth Selborne Chambers

- S 67A – Commissioner’s recent views
- Off the plan purchases
- ‘Beneficial interest’ – type of trust?
- End of a borrowing arrangement
- S 55 Duties Act – *Platinum Investment*
- *Transfer of real property into super – s 62A Duties Act*
- *Transfer of real property between funds – s. 61 Duties Act*
- *Refinancing issues*

s. 67A – Commissioner's views



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- SMSFR 2011 / D1
- Improvements – ‘replacement asset’
- Fundamentally change character of an asset?
- Consider:
 - Physical object
 - Proprietary rights
- Improvements v repairs

S 67A – Commissioner's views



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- Change in title
- Improvements
- Subdivision
- Acquire two titles – one improvement

- Commr – looks to ‘substance’ rather than legal ‘form’
- Does not explain how this deals with legislative regime / definitions etc.
- Subjective analysis [i.e. form]?

- Different approach of Courts and OSR?

Off the plan purchase



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- Not prima facie prohibited
- Exchange in name of custodian
[agreement to transfer is 'creation of rights not a transfer']
- Settlement not to occur until development completed
- Funds sourced (and documented) from resources of SMSF
- No charge in contract or other documents
- No prohibitions in documentation
- Funds invested for the SMSF until exchange
- No recourse to fund



Ending of borrowing arrangement

In-house asset rules apply when the borrowing repaid?

■ Commissioner's Q & A:

Can the holding trustee continue to hold the property for the investor after the borrowing has ended?

■ Answer:

*Yes, **but the SMSF's interest in the holding trust will be an in-house asset** of the SMSF if the interest represents an investment of the SMSF trustee in the holding trust. This is because, **under subsection 71(8) of the SISA, once a limited recourse borrowing arrangement has ended**, even if there are other amounts outstanding, the in-house asset exception ceases to apply.*

End of borrowing arrangement



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- In-house asset test will not apply as:
 - not an investment in a related trust, but an investment in the 'acquirable asset'; and
 - ss. 71(8) is a look-through provision – not a deeming provision.

- Trustee of a SMSF can hold assets via custodian:
 - para 52(2)(d) SIS Act
 - s. 123 SIS Act

Creation of 'beneficial interest'



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- S 67A of the SIS Act – requires RSF trustee to have a 'beneficial interest'
- 'Beneficial interest' not defined – Trustee Act?
- Type of trust? [Commr has not confirmed]
 - Bare trust?
 - Security trust?
 - Custodian?
- 'Beneficial interest' – trust required?
- Declaration of trust – transfer title back
 - s. 55 Duties Act – apparent purchaser
 - s. 62 Duties Act – transfer between trustee of SMSF and custodian

- Decision of NSW Court of Appeal
- Considered application of s 55 of the Duties Act
- Held – declaration of trust before trust property in existence [i.e. future property]:
 - Declaration of trust over future property – s 8(3):

“declaration of trust” means any declaration ... that any identified property vested or to be vested ... is or is to be held in trust ...
 - Apparent purchaser provisions – s 55:

A declaration of trust vested in the apparent purchaser ... to be vested in the apparent purchaser ...

- Court of Appeal considered *Pendal Nominees*
- Disjoint in previous legislation:
 - Vested and to be vested – declaration
 - Only vested – apparent purchaser
- Ensure:
 - Declaration of trust executed after exchange;
 - Documentary evidence – tracing funds;
 - Custodian established before exchange;
 - Exchange in name of custodian

- Sale of going concern exemption
- Recipient provides undertakings
- Bare trust – recipient not party to contract [i.e. trustee of SMSF]
- Commr – bare trustee can provide undertakings [no confirmation s 67A is a bare trust]
- Recipient become a party to contract and provide undertakings

Stamp duty – s 62A *Duties Act*



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- Section 62A of the Duties Act
 - ss 62A(1) - transfer to trustee SMSF – \$50
 - ss. 62A(3) – transfer to custodian - \$500

- Requirement that:
 - transferor is the sole member; or
 - held solely for the benefit of the transferor (ss 62A(3A)).

- Solely for the benefit:
 - Held specifically for transferor
 - Cannot be pooled
 - No other member to obtain interest

Stamp duty – s 62A *Duties Act*



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Considerations:

- (1) s 66 SIS Act – ‘business real property’
- (2) SMSF trust deed deal with s 62A
 - Irrevocable amendment
- (3) ss. 62A(4) – claw-back if transaction cause non-compliance
- (4) CGT still an issue

Stamp duty – s. 61 *Duties Act*



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- Transfers between funds
 - tower of ad valorem or \$500

- Require a ‘relevant transfer’ in connection with:
 - ceasing to be a member or otherwise becoming entitled to benefits;
 - becoming a member or otherwise becoming entitled to benefits.

- ‘Relevant transfer’ [ss. 61(1A)]:
 - Transfer, or agreement to transfer between trustee of fund and custodian [para (b)].

Stamp duty – s 61 *Duties Act*



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- Documentary evidence required
- Revenue Ruling No SD 218, entitled *Transfer of Assets Between Superannuation Fund*:
 - Former *Stamp Duties Act 1920* (NSW)
 - Not available if the transfer is in the course of the fund's investment activities?
 - When will it not be in the course of such activities [i.e. purpose of fund and holding asset]?
 - Not a condition for application of concession
 - Ruling does not consider SMSF's and change in superannuation regime

Stamp duty – s. 61 *Duties Act*



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- Method of unlocking value – transfer between funds?

Issues

- (1) No prohibition – transfer between funds
- (2) Regulation 13.14 SIS Regulations – charge an existing asset of a fund?
- (3) s. 66 SIS Act – need ‘business real property’
- (4) CGT event

- s. 67A of the SIS Act allows for refinancing
- s. 67A – require a ‘holding trust’
- Trust traditionally used for security purposes

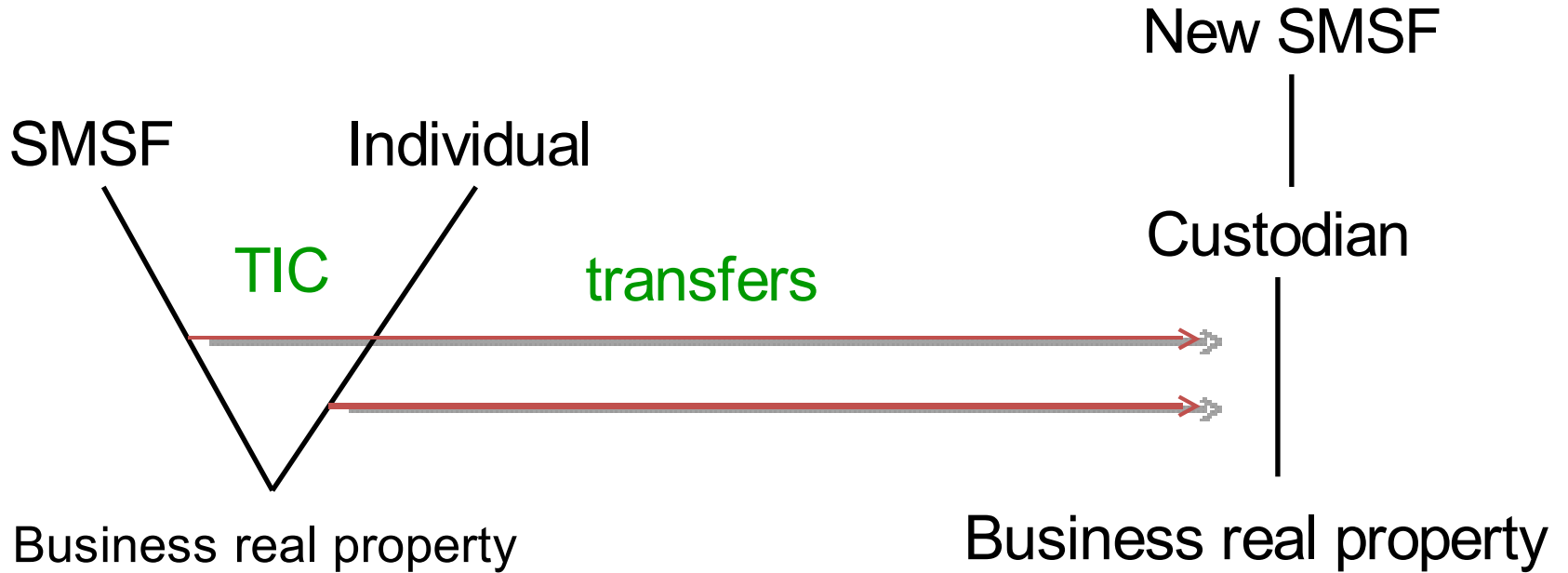
- New ‘custodian’?
 - CGT – s 106-50 / 106-60 ITAA 1997
[vesting of asset if not]

 - SD – s. 62 Duties Act
[transfers between trustees of funds and custodians]

Example



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Example



- 'Business real property' held jointly (tenants in common):
 - Trustee of a SMSF
 - Individual
- Transfer that part held by the individual
- Use s 67A of the SIS Act
- Issue – will subject an asset already held subject to the SMSF to a charge – Reg 13.14 SIS Regs.

Strategy

- Establish new SMSF
- New SMSF borrow to acquire the whole (subject to LVR)
- Two transfers:
 - Individual to trustee of new SMSF
 - Trustee of existing SMSF to trustee of new SMSF

Example



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Implications

- CGT event A1 when transferred
- GST (going concern?)
- Stamp duty:
 - s. 62A – part held by individual
 - s. 61 – part held by trustee of existing SMSF

OSR

- Not a 'single acquirable asset' – ss. 62A(4)?
 - Look at asset in hands of new SMSF
- Transfer in the course of fund's investment activities – s. 61?
 - Sole purpose test – why else established?