THE TAX INSTITUTE

5th Annual Tax Forum

Superannuation – Gearing

Written by:
Denis Barlin
Barrister
13 Wentworth Selborne Chambers

Presented by:
Denis Barlin
Barrister
13 Wentworth Selborne Chambers

New South Wales Division
18 May 2012
Hilton, Sydney

Overview

Although the *Superannuation Industry (Supervision) Act 1993* (Cth) (**'the SIS Act'**) has permitted gearing in a superannuation environment since 2007, the implementation of such arrangements has substantially increased. With the increase in such arrangements the legal, taxation and practical issues relating to them have been brought to the surface.

This seminar will consider:

- the key concepts relating to gearing arrangements including:
    - what are 'acquirable assets' and 'single acquirable assets'?
    - distinguishing between 'maintaining' / 'repairing' as opposed to 'improving' an asset.
    - when will an asset be considered a 'replacement asset'?
- how the Commissioner of Taxation's views with respect to some aspects of the arrangement may differ from the position at law
- stamp duty considerations relating to the establishment and winding-up of such arrangements
- the application of duties concessions when roll assets into a geared superannuation environment
- land tax and GST considerations
- dealing with the financiers, structuring and planning considerations generally;
- stamp duty strategies which may be used to unlock value in assets held within a superannuation environment
- application of State legislation, general law and other prudential regulations which apply to superannuation funds.

Table of Contents

1 Gearing in superannuation funds

1.1 On 3 November 2006, the Minister for Revenue and Assistant Treasurer, the Hon. Peter Dutton, M.P. in Press Release No. 078 ('**the Press Release**') announced that instalment warrants contain an element of borrowing, and are therefore a prohibited investment for superannuation funds. This is notwithstanding longstanding practice and that '*Over a number of years instalment warrants have been marketed to superannuation funds — particularly to self managed superannuation funds (SMSFs)*.'[1]

1.2 Further, both the Australian Prudential Regulation Authority and the Australian Taxation Office (collectively '**the Regulator**'), both being the regulators of the superannuation industry, had previously formed the view that instalment warrants did not involve a 'borrowing'.

1.3 Indeed, the Regulator had issued guidelines as to what constitutes a borrowing for the purposes of section 67 of the SIS Act. The Regulator, in Superannuation Circular No II.D.4 entitled *Borrowing by superannuation entities* ('**the Borrowings Circular**'), considered that not all liabilities incurred by a superannuation fund would be a 'borrowing'. As an example, the Regulator at paragraph 16 of the Borrowings Circular distinguished between 'borrowings' and other debts:

> *'… in general ... a borrowing involves receiving a payment from someone in the context of a lender/borrower relationship on the basis that it will be repaid. A transaction that gives rise to a debtor/creditor relationship does not necessarily give rise to a lender/borrower relationship and hence does not necessarily represent a borrowing for the purpose of the restriction.'*

1.4 Further, the Regulator, at paragraph 17 of the Borrowings Circular, provided examples of borrowings, which includes a loan (whether secured or unsecured) and a bank overdraft (in normal circumstances). However, at paragraph 19 of the Borrowings Circular, the Regulator considered that the following would not be a borrowing:

> *'… amounts paid on behalf of, or owed by, regulated superannuation funds … [that include] … the purchase by a trustee of property where ownership of the property passes to the trustee before the instalments are finalised. Under this example, an investment in **endowment warrants or instalment receipts** may not be considered borrowing. It is necessary to check the obligations that lie with the purchaser to*

[1] See also paragraph 3.6 of the Explanatory Memorandum.

meet the instalment(s), as these determine whether the investment is a borrowing. Where the ***remaining instalment(s) is not "compulsory"*** *and the* ***warrant / receipt holder receives the value of the warrant / receipt (less handling or sales costs)*** *on "default", APRA considers the warrant / receipt does not constitute a borrowing.'* [emphasis added]

1.5 Further, the Regulator at paragraph 6 of the Borrowings Circular gives examples of endowment warrants and instalment warrants as not involving borrowings by a Fund. The Regulator reiterated the views that it expressed in the Borrowings Circular regarding instalment warrants in the *Guidelines on Instalment Warrants for Superannuation Trustees* ('**Guidelines**'):

'… prohibition on borrowing was developed before many currently available geared products had been developed … The regulators had previously taken the view that a superannuation fund investment in an instalment warrant ***may not*** *constitute a borrowing under section of the SIS Act.'* [emphasis added]

(a) *Prohibition against borrowing in superannuation funds*

1.6 Notwithstanding the change in the Government's view as announced in the Press Release, the *Tax Laws Amendment (2007 Measures No 4) Bill 2007* (Cth) ('**the Bill'**) amended the SIS Act so as to ensure that investments in instalment warrants do not breach the prohibition against trustees of regulated superannuation funds from borrowing. Subsection 67(1) of the SIS Act expressed the prohibition, by providing that:

'… a trustee of a regulated superannuation fund must not

(a) borrow money; or

(b) maintain an existing borrowing of money.'

1.7 However, there are a number of exceptions to the prohibition contained in subsection 67(1) of the SIS Act, which includes (as a result of the enactment of the Bill) the former subsection 67(4A) of the SIS Act. Subsection 67(4A) of the SIS Act was repealed by *Superannuation Industry (Supervision) Amendment Act* 2010 which commenced on 7 July 2010. The former subsection 67(4A) was replaced by sections 67A and 67B.

1.8 Section 67A of the SIS Act provide:

'(1) Subsection 67(1) does not prohibit a trustee of a regulated superannuation fund (the RSF trustee) from borrowing money, or maintaining a borrowing of money, under an arrangement under which:

(a) the money is or has been applied for the acquisition of a single acquirable asset, including:

(i) expenses incurred in connection with the borrowing or acquisition, or in maintaining or repairing the acquirable asset (but not expenses incurred in improving the acquirable asset); and

Example: Conveyancing fees, stamp duty, brokerage or loan establishment costs.

(ii) money applied to refinance a borrowing (including any accrued interest on a borrowing) to which this subsection applied (including because of section 67B) in relation to the single acquirable asset (and no other acquirable asset); and

(b) the acquirable asset is held on trust so that the RSF trustee acquires a beneficial interest in the acquirable asset; and

(c) the RSF trustee has a right to acquire legal ownership of the acquirable asset by making one or more payments after acquiring the beneficial interest; and

(d) the rights of the lender or any other person against the RSF trustee for, in connection with, or as a result of, (whether directly or indirectly) default on:

(i) the borrowing; or

(ii) the sum of the borrowing and charges related to the borrowing;

are limited to rights relating to the acquirable asset; and

Example: Any right of a person to be indemnified by the RSF trustee because of a personal guarantee given by that person in favour of the lender is limited to rights relating to the acquirable asset.

(e) if, under the arrangement, the RSF trustee has a right relating to the acquirable asset (other than a right described in paragraph (c))--the rights of the lender or any other person against the RSF trustee

for, in connection with, or as a result of, (whether directly or indirectly) the RSF trustee's exercise of the RSF trustee's right are limited to rights relating to the acquirable asset; and

(f) the acquirable asset is not subject to any charge (including a mortgage, lien or other encumbrance) except as provided for in paragraph (d) or (e).'

1.9 Further, sections 67B of the SIS Act deals with replacement assets.

1.10 A summary of the key features of the former subsection 67(4A) of the SIS Act is provided in paragraph 1.5 of the Explanatory Memorandum for the *Superannuation Industry (Supervision) Amendment Act* 2010:

'Schedule 1 of this Bill amends the Act to make sure that superannuation fund assets are protected in the event of a default on a limited recourse borrowing arrangement by ensuring that:

- *the recourse of the lender and of any other person against the superannuation fund trustee for default on the borrowing is limited to rights relating to the acquirable asset;*
- *the asset within the arrangement can only be replaced in prescribed circumstances that arise from owning the original asset; and*
- *the borrowing is referable and identifiable only over a single asset (excluding money) or in prescribed circumstances, a collection of assets which are identical and are treated as a single asset.*

1.11 A comparison of the key features of the new sections 67A and 67B with the former subsection 67(4A) of the SIS Act is also provided in the Explanatory Memorandum:

New law	Current law
Explicitly defines the interpretation of acquirable asset in the singular.	While the Act refers to 'asset' in the singular, it is possible to interpret asset in the plural.
Ensures that the recourse of the lender or of any other person against the superannuation fund trustee for default on the borrowing is limited to rights relating to the acquirable asset.	The Act limits the rights over the original asset in terms of the direct lender and associated borrowing only.
Limits borrowing arrangements to a single	Allows borrowing arrangements over

asset or a collection of identical assets together treated as a single asset.	multiple assets which may permit the lender to choose which assets are sold in the event of a default on the loan.
Clearly defines circumstances under which assets can be replaced.	Allows arrangements where the asset subject to the borrowing can be replaced at the discretion of the trustee or the lender.

(b) *The legal relationships required to obtain the borrowing carve-out*

1.12 It is essential to consider the legal relationships that arise when seeking to avail oneself of the borrowing carve-out in sections 67A and 67B of the SIS Act. The provisions require the following conditions to be satisfied:

Condition	Description
One	A trustee of a superannuation fund borrows money (or indeed maintains a borrowing of money).
Two	The asset that has been acquired by the borrowed money.
Three	The asset that has been acquired is held on trust so that the trustee of the superannuation fund has a 'beneficial interest' in the asset.
Four	The trustee of the superannuation fund has an option (i.e. a right to acquire) the 'legal ownership' by making further (instalment) payments.
Five	The right of the lender is limited in recourse – to the asset acquired and held by the trustee.
Six	If, under the arrangement, the trustee of a superannuation fund has a right relating to the asset (other than a right to acquire the underlying asset) – the rights of the lender against the trustee of the superannuation fund are limited to rights relating asset.

1.13 That is:

1.13.1 The trustee of the superannuation fund borrows to acquire the underlying asset (i.e., the '**Investor**');

1.13.2 The trustee of the superannuation fund needs to have the 'beneficial interest' in the underlying asset;

1.13.3 The underlying asset is held on trust (indeed – bare trust) for the benefit of the trustee of the superannuation fund (held by a '**Security Trustee**');

1.13.4 The trustee of the superannuation fund has an option to acquire the underlying asset after paying the loan amount;

1.13.5 The lender's rights with respect to the borrowing are limited in recourse, to the underlying asset;

1.13.6 Any rights that the trustee of a superannuation fund has to the underlying asset (except the option to acquire) may be subrogated in the lender, but only to the extent that the rights apply to the underlying asset.

1.14 The Security Trustee needs to hold the legal title in the underlying property. The Security Trustee acts as a 'bare trustee' with respect to the underlying property, as the Security Trustee does no more (under the trust relationship) than hold the legal title in the underlying property. It is also essential from a taxation perspective (see discussion below) that the relationship as between the Security Trustee and the Investor with respect to the underlying property is a 'bare trust' - i.e. the Investor is 'absolutely entitled' to the underlying asset and the Security Trustee has no active duty with respect to the underlying asset.

1.15 There are a number of contractual relationships that need to be established. A lender / borrower relationship needs to be established as between the lender and the Investor. Under that relationship, the Security Trustee is prohibited from dealing with the underlying asset on behalf of the Investor, unless the Security Trustee is required to do something which involves the discharge of the loan (for example):

1.15.1 the lender exercises a power of sale with respect to the underlying asset;

1.15.2 the Investor pays the outstanding amount and the legal title in the underlying asset transferred to the Investor; or

1.15.3 the Investor wants to dispose of the underlying asset and repay the outstanding loan.

1.16 It needs to be ensured that the only right that the lender has (including with respect to the repayment of the loan) is limited to the underlying asset. None of the other assets of the Investor can be at risk. As a result, all of the Investor, the Security Trustee and the lender need to enter into a contractual relationship.

1.17 Further, and in some situations, the Security Trustee may be granted a power of attorney by the Investor with respect to the underlying asset, until the borrowing is discharged and the legal title is transferred to the Investor.

2 'Improvements' to real property – whether it causes there to be a 'replacement asset'.

2.1 Draft Self Managed Superannuation Fund Ruling SMSFR 2011/D1, entitled *Self Managed Superannuation Funds: limited recourse borrowing arrangements – application of key concepts* (**'the Draft Ruling'**) outlines (amongst other things), the Commissioner's views with respect to improving an asset held subject to a section 67A of the SIS Act arrangement.

2.2 The Commissioner considers that an 'improvement' to an asset may result in an 'acquirable asset' becoming a different asset to that which was acquired pursuant to a section 67A of the SIS Act arrangement. The Commissioner contended at paragraph 30 of the Draft Ruling that:

> ***Money other than borrowings used to improve an asset***
>
> *Although borrowings under an LRBA cannot be used to improve a single acquirable asset that is the subject of the LRBA, money from other sources could be used to improve (or repair or maintain) that asset. However, any improvements must not result in the acquirable asset becoming a different asset.*

2.3 The Commissioner considers that an improvement will result in the acquirable becoming a different asset if the asset is changed '*… to such an extent that it fundamentally changes the character of the asset …*'. Commissioner at paragraph 37 of the Draft Ruling observed that:

> *If the acquirable asset is changed (including by way of improvements) to such an extent that it **fundamentally changes the character of the asset** such that it becomes a different asset, the exception in section 67A will cease to apply to the LRBA. If the borrowing is maintained the trustee will contravene subsection 67(1).*

2.4 The Commissioner at paragraph 34 of the Draft Ruling observed that '*… it is necessary to consider both the physical object (assuming it is not an intangible asset) and the proprietary rights comprising the asset, to determine if the character of the asset as a whole has fundamentally changed. That is, it is necessary to consider both the qualities of the physical object and the attributes of the proprietary rights …*'.

#	Single acquirable asset	Whether it is a different asset(s)
1	Vacant block of land on single title	The vacant block of land is subsequently subdivided resulting in multiple titles. One asset has been replaced by several different assets as a result of the subdivision.
2	Vacant block of land on single title	A residential house is built on that vacant land (still single title). The character of the asset has fundamentally changed from vacant land to residential premises. This is a different asset.
3	A house and land	The house is demolished and is replaced by three strata titled units. The character of the asset has fundamentally changed along with the underlying proprietary rights. This has created three different assets.
4	A house and land	Rezoning of the land is granted and the house is renovated and is now commercial premises. The character of the asset has fundamentally changed from residential premises to commercial premises. This is a different asset.
5	A four bedroom house and land	A fire destroys the four bedroom house and a four bedroom house is constructed using insurance proceeds. Rebuilding a four bedroom house does not fundamentally change the character of the asset held under the LRBA. Rebuilding the house restores the asset to a house and land.

2.5 As discussed at **paragraph 3.9** and following below, 'property' for the purposes of section 67A of the SIS Act does not end with the physical object, but rather the rights which attach (e.g. the powers) to the land. The 'property' is (for example, in the context of land) the interest in the land. As a result, if the Trustee of the Fund acquires the 'land', it is actually acquiring the freehold interest in the land, which includes all of the powers which attach to the land (and any fixtures – e.g. improvements – which attach to the land). It is the real

property interest (i.e. the Trustee of the Fund's powers with respect to the land) which are to be acquired pursuant to section 67A of the SIS Act, and not the actual land or fixtures (improvements) on the land itself.

2.6 However, a change in title to the land, will cause there to be a different item of property (see for example *Sportscorp Australia Pty Ltd & Ors v Chief Commissioner of State Revenue* [2004] NSWSC 1029).

3 Off-the plan purchases by trustees of self-managed superannuation funds using borrowed funds

3.1 An issue that regularly arises is whether a trustee (**'Trustee'**) of a self-managed superannuation fund (**'the Fund'**) can acquire a property 'off-the-plan', particularly in the context of a Trustee of the Fund wishes to borrow to acquire a property (which has yet to be constructed – e.g. 'off the plan').

3.2 The property that is to be exchanged upon is usually a vacant block of land (at the time of exchange), with the redeveloped land to be charged, and acquired by the Trustee of the Fund pursuant to section 67A of the SIS Act.

3.3 Tips in such a situation

3.3.1 The Contract for Sale of Land (which is exchanged prior to exchange) could be exchanged in favour of the Trustee of the Fund before the land is improved.

3.3.2 The Trustee of the Fund should use its cash resources to pay any deposit upon exchange of the contract. The Trustee of the Fund should only borrow pursuant to section 67A of the SIS Act upon exchange.

3.3.3 Any assets of the Trustee of the Fund held by the vendor before settlement should be held by the vendor as trustee for the benefit of the Trustee of the Fund. For example, such amounts should not be used by the vendor (e.g. in developing the land), the interest referable to the assets should be that of the Fund, and the amounts should not be subject to a charge.

3.4 Subsection 67(1) of the SIS Act contains a general prohibition against a trustee of a superannuation fund from borrowing. However, section 67A of the SIS Act allows trustees of superannuation funds to borrow, provided that the conditions contained in that provision is satisfied.

3.5 Paragraph 67A(1)(a)(i) of the SIS Act provides that:

> *Subsection 67(1) of the SIS Act does not prohibit a trustee of a regulated superannuation fund (the RSF trustee) from borrowing money, or maintaining a borrowing of money, under an arrangement under which:*
>
> *(a) the money is or has been applied for the acquisition of a single acquirable asset, including:*
>
> *(i) expenses incurred in connection with the borrowing or acquisition, or in maintaining or repairing the acquirable asset (but not expenses incurred in improving the acquirable asset) …*
>
> *Example: conveyancing fees, stamp duty, brokerage or loan establishment costs.*

3.5 The Commissioner in a document entitled *Limited recourse borrowing arrangements by self-managed super funds – questions and answers* (**'the Commissioner's Q&A'**), poses the following question: *For real property held by the holding trust in a limited recourse borrowing arrangement, can an SMSF trustee draw down under the arrangement to make capital improvements to the real property without contravening the super law?*. In answer, with respect to arrangements entered into on or after 7 July 2010, the Commissioner responds:

> *No. The super law applying to these arrangements specifically prohibits borrowing to make improvements under subparagraph 67A(1)(a)(i) of the SISA.*
>
> *However, drawdowns to capitalise interest interest, maintain the asset and meet other costs of the arrangement continue to be allowed.*

3.6 Further, the Explanatory Memorandum to the *Superannuation Industry (Supervision) Amendment Bill 2010* (Cth) indicates that the improvement of real property may cause a single acquirable asset to change, and becomes a replacement asset. None of the replacement asset provisions contained in section 67B of the SIS Act deal with such a situation (with the result that if an improvement did cause an asset to change / become a replacement asset, there will be a breach of the gearing regime if it is continued to be held by a trustee of a superannuation fund).

3.7 That is, paragraph 67A(1)(a)(i) of the SIS Act provides that the Trustee of the Fund may borrow money (or maintain a borrowing of money) if the money is used to acquire a 'single acquirable asset'.

3.8 The term 'acquirable asset' for the purposes of section 67A of the SIS Act is defined in subsection 67A(2) of the SIS Act as:

> *An asset is an acquirable asset if:*
>
> *(a) the asset is not money (whether Australian currency or currency of another country); and*
>
> *(b) neither this Act nor any other law prohibits the RSF trustee from acquiring the asset.*

3.9 The term, 'asset' is in turn defined in subsection 10(1) of the SIS Act as meaning '*… any form of property and, to avoid doubt, includes money (whether Australian currency or currency of another country)*'.

3.10 That is, whilst the definition of asset contained in subsection 10(1) of the SIS Act includes '*…money (whether Australian currency or currency of another country) …*', the definition of 'acquirable asset' contained in subsection 67A(2) of the SIS Act carves out '*… money (whether Australian currency or currency of another country) …*'.

3.11 The term 'property' for the purposes of definition of 'asset' as contained in the definition of that term in subsection 10(1) of the SIS Act takes its ordinary meaning. Latham CJ in *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 observed when discussing the definition of the term 'property':

> *It has often been explained by writers upon jurisprudence that the term 'property' is ambiguous. As applied to land it may mean the land itself in relation to which rights of ownership exist, or it may refer to the rights of ownership which exist in relation to the land … . In the former sense a man may say that his property consists of land. In the latter sense a man's property would consist not of land, but of rights in respect of land which were rights of ownership. I can see no reason why, so far as land is concerned, 'property' … should not be interpreted so as to include land itself and also proprietary rights in respect of land.*

3.12 Starke J in *Minister of State for the Army v Dalziel* observed that:

> *Property, it has been said, is nomen generalissimum and extends to every species of valuable right and interest including real and personal property, incorporeal hereditaments such as rents and services, rights of way, rights of profit or use in land of another, and choses in action. And to acquire any such right is rightly described as an 'acquisition of property'.*

3.13 Similarly, Jordan CJ in *McCaughey v Commissioner of Stamp Duties* (1945) 46 NSWSR 192 observed that:

> *The word 'property' is used in different senses. It may denote either objects of proprietary rights, such as pieces of land, domesticated animals, and machines; or the proprietary rights themselves … . In common parlance it is usually employed in the former sense, but in the language of jurisprudence in the latter. Property, in the sense of proprietary rights, may exist in relation to physical objects, ot to intangible things such as debts or patent rights.*

3.14 That is, 'property' does not end with the physical object, but rather the rights which attach (e.g. the powers) to the land. The 'property' is (for example, in the context of land) the interest in the land. As a result, if the Trustee of the Fund acquires the 'land', it is actually acquiring the freehold interest in the land, which includes all of the powers which attach to the land (and any fixtures – e.g. improvements – which attach to the land). It is the real property interest (i.e. the Trustee of the Fund's powers with respect to the land) which are to be acquired pursuant to section 67A of the SIS Act, and not the actual land or fixtures (improvements) on the land itself.

3.15 As a result, by improving land (which is subject to a section 67A of the SIS Act arrangement), whilst the 'value' of the property may increase, the Trustee's powers in relation to the land (and any fixtures) will not change. As a result, it is submitted that the 'single acquirable asset' (i.e. the powers with respect to the land and any fixtures) will not change when comparing a pre-developed and a post-developed property, with the result that an improvement to land will not cause a change in a real property interest (i.e. the powers with respect to land and interest).

3.16 That is, an improvement to land (however substantial), will not cause a replacement of the property initially acquired. As a result, the 'replacement asset' provisions contained in section 67B of the SIS Act do not need to be considered.

3.17 Whilst, paragraph 67A(1)(a)(i) of the SIS Act prohibits a Trustee of a Fund does not allows fund to borrow to improve an asset. However, sections 67A and 67B of the SIS Act does not prohibit the use of other resources of a fund to improve an asset of the fund.

3.18 I understand that the Trustee of the Fund wishes to borrow to acquire both the land, and the subsequent improvements on the land. As a result, I recommend that the Trustee of the Fund exchange on the Contract for Sale of Land (**'Contract'**) with respect to the Property. The Contract should provide that settlement does not occur until the land has been developed. Further, so as to ensure that the assets of the Fund are not subject to undue risk (or charged), it should be ensured that any deposit paid by the Trustee of the Fund remains that of the Fund, with any interest derived on the deposit to be that of the Fund.

3.19 Further, the borrowings by the Fund (pursuant to section 67A of the SIS Act) should happen at exchange. That is, the Trustee of the Fund should not borrow to (for example) pay for the deposit of the property.

3.20 The exchange of a Contract does not affect a transfer of the land. Smithers J in *Acorn Computers Ltd v MCS Microcomputer Systems Pty Ltd* (1984) 6 FCR 277 considered that an agreement to purchase assets does not result in a 'transfer', but a 'creation' of an equitable interest in the asset subject to the agreement. The equitable interest is enforceable as against the transferee – being the recipient of valuable consideration.

3.21 It was further held that '*… a contract for sale of legal property (here the estate in fee simple), capable of specific performance, does not transfer that legal property and that, insofar as such a contract results in the purchaser having equitable rights or interests, these rights or interests in equity are not transferred by the contract but are simply created thereby and arise in the purchaser*'.

3.23 This explains why (for example), the *Duties Act 1997* (NSW) subjects to duty both a transfer of dutiable property (see paragraph 8(1)(a) of the *Duties Act 1997* (NSW), and an agreement for the sale or transfer of dutiable property (see paragraph 8(1)(b)(i) of the *Duties Act 1997* (NSW)).

3.24 Ormiston JA in *Coles Myer Ltd v Commissioner of State Revenue* [1998] 4 VR 72 discussed the elements of a 'transfer', by observing that '*… there are two parties to every transfer, the transferor who disposes of all rights in the transferred property and the transferee who receives or acquires them so as thereafter to have the power to exercise effectively the*

same rights in the future…'. Further, for an '*… instrument to be properly characterised as a 'transfer' one must be able to find that the property has passed from transferor to transferee so that the property is vested in the transferee who for all practical purposes is then capable of exercising the same rights as were capable of being exercised by the transferor before the transfer was executed.*'

3.25 However, after exchange of the Contract, although there is no transfer of the property, a purchaser will have an 'equitable interest' in the property. It was observed in *Trust Company of Australia Ltd (as trustee for the Clayton 3 Trust) v Commissioner of State Revenue* [2007] VSC 451, after consideration of various authorities, that none of the authorities '*… support the proposition that, in the case of a contract for sale of land, there is any transfer of an equitable fee simple in the land from the vendor to the purchaser…*'. Rather, it was observed that the authorities '*… are consistent with the proposition that, after the payment of purchase money, the purchaser has an equitable interest in the land which, even if it may be described as an equitable estate in fee simple, is one that has arisen as a result of the transaction but is not an estate or interest that is transferred by the vendor to the purchaser*'.

3.26 As a result, the exchange of a Contract (which is when the property is undeveloped) will not cause a transfer of the property to the Trustee of the Fund. Rather, upon exchange, the Trustee of the Fund acquires (and not by transfer) equitable rights in the property. However, it is only upon transfer / settlement, will the Trustee of the Fund have the property transferred to it (i.e. when the property is developed / improved), which is when the Trustee will enter into the section 67A of the SIS Act arrangement, and when the property is to be subjected to a charge.

3.27 That is, the exchange of a Contract, and the later borrowing / charging of the (improved) property will not cause a breach of section 67A of the SIS Act or (for example) the prohibition against a trustee of a superannuation from charging an existing asset of a fund pursuant to Regulation 13.14 of the *Superannuation Industry (Supervision) Regulations 1993* (Cth). This is because the rights which are created at exchange of contracts differ from the transfer of property which occurs upon settlement.

4 In house asset issue – repayment of the borrowings

4.1 The Commissioner in the Commissioner's Q & A considers the situation where a borrowing pursuant to section 67A of the SIS Act is repaid, and the 'holding trust trustee' continues to hold the property subject to a section 67A of the SIS Act arrangement (without the

borrowings). The specific question posed is: '*Can the holding trustee continue to hold the property for the investor after the borrowing has ended?*'.

4.2 The Commissioner answers the question posed by observing that:

> *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.*

4.3 The Commissioner continues by outlining the consequences if the in house asset provisions are enlivened:

> There is a contravention of the super law if:
>
> - the asset is not transferred to the SMSF or the interest in the holding trust does not otherwise end once the borrowing comes to an end
> - the interest in the holding trust becomes an in-house asset of the SMSF and this causes the SMSF to exceed the permitted 5% level of in-house assets.

4.4 The 'basic definition' of the term 'in-house asset' is contained in subsection 71(1) of the SIS Act, which relevantly provides that:

> *For the purposes of this Part,* ***an in-house asset of a superannuation fund is an asset of the fund*** *that is a loan to, or an investment in, a related party of the fund,* ***an investment in a related trust****, or an asset of the fund subject to a lease or lease arrangement between a trustee of the fund and a related party of the fund …* [emphasis added]

4.5 I consider that the better view is that the trust contemplated by paragraph 67A(1)(b) of the SIS Act does not meet the definition of an 'in-house asset' as contemplated by subsection 71(1) of the SIS Act, as it is not a relationship whereby the Trustee of the Fund borrow so as to finance '*… an investment in a related trust …*' (as contemplated by paragraph 71(1) of the SIS Act. Rather, the borrowing is an investment in the 'acquirable asset', which (because of the requirement of paragraph 67A(1)(b) of the SIS Act) is subject to a trust relationship.

4.6 That is, the '*… asset of a superannuation fund …*' for the purposes of subsection 71(1) of the SIS Act is the 'acquirable asset', and not the trust relationship.

4.7 As a result, arguably the 'basic definition' as contained in subsection 71(1) of the SIS Act is not enlivened for the purposes of the trust relationship established pursuant to section 67A of the SIS Act relationships. As a result, the carve-out from the definition of in-house asset provided for in subsection 71(8) of the SIS Act is not relevant for the purposes of the trust relationship upon the repayment of any loan pursuant to section 67A of the SIS Act.

4.8 Further, subsection 71(8) of the SIS Act does not cause a 'trust' contemplated by paragraph 67A(1)(b) of the SIS Act to be an in-house asset, nor does it deal with the trust relationship. It is concerned with 'looking-through' the trust relationship established pursuant to paragraph 67(1)9b) of the SIS Act.

4.9 Subsection 71(8) of the SIS Act provides that:

> ***Limit on when investments in related trusts are in-house assets***
>
> *(8) If, at a time:*
>
> *(a) an asset (the investment asset) of a superannuation fund is an investment in a related trust of the fund; and*
>
> *(b) the related trust is one described in paragraph 67A(1)(b) in connection with a borrowing, by the trustee of the fund, that is covered by subsection 67A(1); and*
>
> *(c) the only property of the related trust is the acquirable asset mentioned in that paragraph;*
>
> *The investment asset is an in-house asset of the fund at the time only if the acquirable asset mentioned in that paragraph would be an in-house asset of the fund if it were an asset of the fund at the time.*

4.10 That is, section 71(8) of the SIS Act is enlived to deem the in-house asset restrictions to apply if the 'acquirable asset' (i.e. that which is acquired subsection to the section 67A of the SIS Act arrangement) is itself an in-house asset.

4.11 Specifically, the provision is concerned with the underlying asset, not the arrangement under which the arrangement is acquired.

(a) Self-managed superannuation funds not prohibited from holding assets subject to a custodian arrangement

4.12 For completeness, it should be noted that trustees of self-managed superannuation funds are not prohibited from holding assets held subject to the fund to be held by a custodian. That is, the legal title of the fund's assets may be held by an entity other than the trustee of the fund.

4.13 The 'covenant' contained in paragraph 52(2)(d) of the SIS Act provides that trustees of superannuation funds are:

> *(d) to keep the money and other assets of the entity separate from any money and assets, respectively:*
>
> *(i) that are held by the trustee personally; or*
>
> *(ii) that are money or assets, as the case may be, of a standard employer-sponsored, or an associate of a standard employer-sponsor, of the entity …*

4.14 Paragraph 52(2)(d) of the SIS Act does not provide that a trustee of a superannuation fund must hold legal title to superannuation fund assets. Rather, paragraph 52(2)(d) of the SIS Act provides that the trustee must not mix its assets with those held subject to the fund (which is also an obligation of trusts at equity generally).

4.15 Further, section 123 of the SIS Act does not prohibit a trustee of a self-managed superannuation fund from appointing a custodian, by providing that:

> *(1) A person must not intentionally be the custodian of a superannuation entity (other than a self managed superannuation fund) unless:*
>
> *(a) the person is a body corporate; and*
>
> *(b) any of the following subparagraphs applies:*
>
> *(i) the value of the net tangible assets of the body corporate is not less than the amount prescribed by the regulations;*
>
> *(ii) a trustee of the entity is entitled to the benefit, in respect of the due performance of the body corporate's duties as custodian of the entity, of an approved guarantee of an*

amount that is not less than the amount prescribed by the regulations;

(iii) both the conditions specified in subsection (1A) are satisfied.

4.16 That is, I consider that a 'acquirable asset' which is purchased subject to section 67A of the SIS Act may continue to be held subject to a 'custodian' / bare trust arrangement after the borrowings are repaid.

5 The type of trust required for the purposes of a section 67A of the SIS Act arrangement

5.1 It should be noted that the Commissioner has not expressed a view as the 'type' of trust that should hold an asset pursuant to a section 67A of the SIS Act arrangement. Indeed, It should be noted that the Commissioner in the Commissioner's Q&A considers the following question: *'Does the super law specify the type of trust that must be used as the holding trust in a limited recourse borrowing arrangement?'.*

5.1 In answering the question posed, the Commissioner states that:

> *No. The law specifies only that the SMSF trustee must have a beneficial interest in the asset being held in the holding trust and the right to acquire legal ownership of that asset after making one or more payments. In addition, for the special in-house asset rule to apply, the asset must be the only property of the holding trust.*
>
> *More complex trusts are unlikely to satisfy the requirement that the SMSF trustee has the necessary interest in a particular asset of the holding trust. For example, a discretionary trust could not be used, nor could the SMSF trustee be one of a number of unit holders in a unit trust.*

5.2 By referring to 'more complex trusts', it is assumed that the Commissioner prefers 'bare' trusts, under which the trustee (i.e. the entity holding the asset) does not have active duties to perform.

5.3 Indeed, it is noted that the Commissioner in the Commissioner's Q&A considers that discretionary trusts and unit trusts (which may have a number of unit holders) should not be used.

5.4 As a result, it is considered that a 'bare trust' / custodian / nominee arrangement should be used when applying section 67A of the SIS Act.

(a) What is a bare trust?

5.5 The Commissioner outlined his views with respect to the passing of property held subject to bare trusts in draft Goods and Services Tax Ruling GSTR 2008/3 entitled *Goods and services tax: GST and bare trusts* ('**the GST Ruling**'). In doing so, the Commissioner defined the 'bare trust' relationship. The Commissioner at paragraph 1 of the GST Ruling outlines the situations in which the GST Ruling applies:

> *'This Ruling explains how the …* [GST Act] *… applies to supplies of real property involving bare trusts and similar trusts where the trustee has limited active duties and acts solely at the direction of the beneficiary or beneficiaries'.*

5.6 The Commissioner at paragraphs 5 and 6 of the GST Ruling explains when the GST Ruling Does not apply, by stating at paragraph 5 of the GST Ruling that*: 'This Ruling does not deal with transactions in relation to trust property where the activities of the trust amount to the trust carrying on an enterprise involving the trust property'*. Further, the Commissioner at paragraph 6 of the GST Ruling observes that the GST Ruling '*does not deal with managed investment schemes*'.

5.7 The Commissioner at paragraph 11 of the GST Ruling explains what he considers a 'bare trust' to be:

> *'An entity (B) that carries on an enterprise may, for reasons of convenience or anonymity, arrange for real property which is to be used in its enterprise to be acquired by another entity (T) to hold on trust for B –* ***that is, subject to an obligation to transfer legal title to the asset to B, or to a third party if B so directs, and with no other active duties to perform'*** [emphasis added].

5.8 The Commissioner at paragraph 12 of the GST Ruling observes that the types of trusts dealt with in the GST Ruling may not be strict bare trust relationships:

> *'Alternatively, the trust may not strictly be a bare trust, because the trustee has minor active duties to perform, but nevertheless the trustee is required to act at the direction of the beneficiary in dealing with title to the trust property. Where this draft Ruling refers to 'bare trusts' it should also be taken to refer to trusts of this kind which may not strictly fall within accepted definitions of bare trusts but share similar features. The key point is that the trustee only acts at the direction of the beneficiary in respect of the relevant dealings in the trust property and has no independent role in respect of the trust property.'*

5.9 That is, the Commissioner seems to indicate that a 'bare trust' relationship is one in which a trustee has no active duties to perform. The New South Wales Supreme Court in *Corumo*

Holdings Pty Ltd v C Itoh Ltd (1991) 24 NSWLR 370 at 398 considered that as a matter of strict logic, almost no situation can be postulated where a trustee in some circumstances does not have active duties to perform by (for example) being immediately bound to transfer trust property to an absolutely entitled beneficiary. Meagher JA in *Corumo Holdings* observed that:

> *'The question is whether that trust is a 'bare trust' … A 'bare trust' is one in which the trustee has no active duties to perform and is usually contrasted with a trust where there are such active duties. … the precise nuances of the phrase …* [bare trust] *… must depend on the context in which it is found. As a matter of strict logic a person in Mr Stapleton's position …* [i.e. the 'bare trustee'] *… would theoretically have been in a position where he had an active independent duty to perform in some circumstances, for example if he found himself so situated that he had to vote at a formal meeting and C Itoh had declined to instruct him how to exercise his vote.* ***But, as a matter of strict logic, almost no situation can be postulated where a trustee cannot in some circumstances have active duties to perform. The applicants would have the phrase confined to situations where the trustee was immediately bound to transfer the share to his beneficiary. But this, in my view, is too narrow a construction, and would result in reading down the phrase so that it applied only to situations which almost never occur****.'* [emphasis added]

5.10 Further, Meagher JA submitted that a bare trust relationship occurs when a *'… trustee is no more than a nominee or cipher, in a common-sense commercial view*'. Gummow J in *Re Helen Kaye Herdegen and Kenneth John Herdegen v Commissioner of Taxation* [1988] FCA 419 observed that:

> *'What is meant in these situations by saying that the trustee holds the property without any duties to perform other than to convey the property to the beneficiary or as the beneficiary directs? … 'It is of course true that* ***so long as a trustee holds property on trust he always retains his legal duties, namely, to exercise reasonable care over the property, either by maintaining it or by investing it; he cannot divest himself of these duties.*** *The reference, however, is to duties which the settlor has enumerated. For example, the settlor may have required that the beneficiary be maintained until he reaches the age of majority, when he is entitled to call for capital and income. The trustee is then bare or naked of these active duties decreed by the settlor. If the trustee possesses his legal duties only for the purpose of guarding the property, prior to the conveyance to the beneficiary, these duties are said to be passive'.* [emphasis added]

5.11 That is, there may be some duties, which may indeed be 'active' duties imposed on a trustee of a bare trust relationship. It has been held that even if a beneficiary is absolutely entitled to trust property, the beneficiary may not give directions to a trustee with respect to the administration of the trust. For example, in *re Brockbank. Ward v Bates* [1948] 1 Ch 206, the Court held that beneficiaries who are absolutely entitled to trust property are not entitled to control the exercise by their trustee of their fiduciary power to appoint new trustees:

> *'The two alternative grounds of relief claimed are sought to be justified by the following argument: It is said that where all the beneficiaries concur, they may force a trustee to retire, compel his removal and direct the trustees, having the power to nominate their successors, to appoint as such successors such person or person or corporation as may be indicated by the beneficiaries, and it is suggested that the trustees have no option but to comply. I do not follow this. The power of nominating a new trustee is a discretionary power, and, in my opinion is no longer exercisable and, indeed, can no longer exist if it has become one of which the exercise can be dictated by others. But then it is said that the beneficiaries can direct the trustees to transfer the trust property either to themselves absolutely, or to any other person or persons or corporation, upon trusts identical with or corresponding to the trusts of the testators will. I agree …'.*

5.12 Whilst the active duty test is important in determining whether a bare trust relationship exists, it is also important to determine whether the trustee has an interest with respect to the assets held subject to the trust relationship. Gummow J in *Herdegen v Federal Commissioner of Taxation* 88 ATC 4995 at 5003 observed that:

> *'Today the **usually accepted meaning of 'bare' trust is a trust under which the trustee or trustees hold property without any interest therein**, other than that existing by reason of the office and the legal title as trustee, and without any duty or further duty to perform, except to convey it upon demand to the beneficiary or beneficiaries or as directed by them, for example, on sale to a third party. The beneficiaries may of course hold the equitable interest upon a sub-trust for others or himself and others … The term is usually used in relation to trusts created by express declaration. But it has been said that the assignor under an agreement for value for assignment of so-called 'future' property becomes, on acquisition of the title to the property, trustee of that property for the assignee … and this trust would answer the description of a bare trust. Also, the term 'bare trust' may be used fairly to describe the position occupied by a person holding the title to property under a resulting trust*

flowing from the provision by the beneficiary of the purchase money for the property.' [emphasis added]

5.13 However, we note Gummow J's observations in *Herdegen's case*, being that 'bare' trustees are:

'… those trustees who have no interest in the trust assets other than that existing by reason of the office and legal title as trustee and who never have had active duties to perform or who have ceased to have those duties, such that in either case the property awaits transfer to the beneficiaries or at their direction.

It may be, in a given case, that a trustee is entitled either by statutory provision or the terms of a trust instrument or court order, to charge fees and to have a lien or charge upon the trust assets for those fees. The trustee may also in a given case have a lien upon the trust assets for costs properly incurred in performance of the obligation to safeguard the trust property. It is unnecessary in the present case to decide whether the existence of such a lien or charge in the circumstances described would take a trustee outside what would otherwise be the category of "bare" trustee …'.

5.14 As a result, any asset held subject to a 'typical' Warrant arrangement is held subject to a 'bare trust' relationship. The Security Trustee does not have any active duties with respect to the assets pursuant to the trust arrangement. Rather, any duties that the Security Trustee may have with respect to any assets held subject to a Warrant are pursuant to contractual arrangements with respect to the borrowings.

6 Goods and services tax implications in the context of section 67A of the SIS Act

6.1 Regard needs to be given to the application of the GST-free sale of going concern exemption contained in Subdivision 38-J of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (**'the GST Act'**) in relation to (for example) a commercial property (**'Property'**) which may be purchased by a trustee for a self-managed superannuation fund (**'the Fund'**) pursuant to section 67A of the SIS Act.

6.2 The GST-free sale of going concern exemption may be preferred as the acquisition of the Property will attract stamp duty on the GST inclusive price. Further, there is a timing issue with respect to any GST paid, as compared to when they may be able to claim associated input tax credits.

6.3 The two issues that need to be considered include:

6.3.1 the availability of the GST-free sale of going concern exemption with respect to the acquisition of the Property; and

6.3.2 ensuring that the contract for sale of land contains the right parties in the correct capacities.

(a) The availability of the GST-free sale of going concern exemption

6.4 The GST-free going concern exemption is contained in Subdivision 38-J of the GST Act. Specifically, section 38-325 of the GST Act provides that:

> *(1) The * supply of a going concern is **GST-free** if:*
>
> *(a) the supply is for * consideration; and*
>
> *(b) the * recipient is * registered or * required to be registered; and*
>
> *(c) the supplier and the recipient have agreed in writing that the supply is of a going concern.*
>
> *(2) A **supply of a going concern** is a supply under an arrangement under which:*
>
> *(a) the supplier supplies to the * recipient all of the things that are necessary for the continued operation of an * enterprise; and*
>
> *(b) the supplier carries on, or will carry on, the enterprise until the day of the supply (whether or not as a part of a larger enterprise carried on by the supplier).*

6.5 That is, in order for a supply of a going concern to be GST-free under section 38-325 of the GST Act:

6.5.1 the recipient of the supply (i.e. the 'purchaser') must be registered (or required to be registered) – for the reasons explained at **paragraph 6.8** below, it is the Fund that is the recipient of the supply;

(a) the supply must be for consideration;

(b) both parties have agreed in writing that the supply is of a going concern; and

6.5.2 the vendor must supply all things necessary for the continued operation of the enterprise.

6.6 The term 'enterprise' is defined in paragraph 9-20(1)(c) of the GST Act to include '*... an activity, or series of activities, done ... on a regular or continuous basis, in the form of a lease, licence or other grant of an interest in property ...*'.

6.7 That is, the vendor (as the supplier of the Property) may be carrying on an enterprise of leasing or licensing the property. If the vendor supplies all things that are necessary for the continued operation of that leasing / licensing enterprise, and if the vendor continues to carry on the leasing / licensing enterprise until after settlement, then the supply will prima facie qualify as a GST-free sale of going concern.

(b) The 'Recipient' being the trustee of the Fund is to be registered

6.8 Whilst, pursuant to a section 67A of the SIS Act arrangement the 'purchaser' or 'recipient' to the supply of the Property will be the trustee of the Fund, the registered proprietor of the Property will be the bare trustee (**'the Nominee'**). This is required for the purposes of subsection 67A and 67B of the SIS Act.

6.9 It is the trustee of the Fund that will be registered for GST, not Nominees (i.e. the proposed registered proprietor of the Property). As a result, an issue to consider is given that the proposed registered proprietor of the property (being Nominees) is not registered for GST, how the GST-free going concern exemption provision contained in the GST Act will apply.

6.10 In particular, the issue that needs to be considered is the application of paragraph 38-325(1)(b) of the GST Act, being that in order for our client to avail itself of the GST-free going concern exemption, the recipient of the supply (being the property subject to a lease) '*... is registered or required to be registered ...*'.

6.11 That is, critical is determining who the recipient of the supply is. This is important from both a GST perspective, and also a New South Wales stamp duty perspective - in particular for the purposes of the apparent purchaser concession contained in section 55 of the *Duties Act 1997* (NSW). For current purposes, it will be the 'real purchaser' who will also be the 'recipient' of the supply from a GST perspective.

(c) Who is 'required to be registered'?

6.12 The relationship as between Nominees and the trustee of the Fund with respect to the Property is a 'bare trust'. Further, section 23-5 of the GST Act provides who is 'required to be registered':

> *You are **required to be registered** under this Act if:*
>
> *(a) you are * carrying on an * enterprise; and*
>
> *(b) your * GST turnover meets the * registration turnover threshold.*

6.13 Example 23 of MT 2006/1 entitled *The New Tax System: the meaning of entity carrying on an enterprise for the purposes of entitlement to an Australian Business Number* gives the following example in which the Commissioner of Taxation (**'the Commissioner'**) considers that an enterprise is not carried out:

> *'B trust is a holding entity for three companies. The trustee passively holds all shares, is not involved in the running of the companies and provides no services to the group. There are no headquarters of the group but each company provides its own business premises. The trustee for B trust distributes any dividends received to the unit holders. The trustee's activities are not done in the form of a business and it does not carry on an enterprise.'*

6.14 That is, if Nominees is a bare trustee, it will not be carrying on an enterprise and will therefore not be required to be registered for the purposes of section 23-5 of the GST Act. As a result, and strictly speaking, it will not be Nominees that is the 'recipient' for the purposes of section 32-325 of the GST Act. Rather, it will be the trustee of the Fund which will be the 'recipient'.

6.15 The view that a passive holding vehicle does not carry on an enterprise was confirmed by the European Court of Justice in interpreting the European value added tax provisions in Polystar *Investments BV v Inspector der Invoerrecten en Accijzen, Arnhem (Case C-60-90)* [1993] BVC 88[2] and *Wellcomne Trust Limited v Commrs of Customs & Excise* [1996] 2 CMLR 909.

[2] At paragraph 9, the European Court of Justice was asked to consider '*… whether a holding company whose activities are concerned solely with the holding of shares in subsidiary companies may be classified as a taxable person for purposes of value added tax …*'. The Court at paragraph 13 held that '*It does not follow … that the mere acquisition and holding of shares in a company is to be regarded as an economic activity … conferring on the holder the status of a taxable person. The mere acquisition of financial holdings does not amount to the exploitation of property for the purposes of obtaining income there from on a continuing basis because any dividend yield by that holding is merely the result of ownership of property*'. We note that in a bare trust relationship under a subsection 67(4A) of the *Superannuation Industry (Supervision) Act 1993* (Cth) arrangement, the bare trustee has no right to equivalent of the 'dividend yield' referred to by the ECJ in *Polystar*.

(d) The Commissioner of Taxation's view regarding bare trusts and GST-free sale of going concerns

6.16 The Commissioner outlined its views with respect to bare trustees dealing with real property in Goods and Services Tax Ruling GSTR 2008/3 entitled *Dealings in real property by bare trustees* ('**the Ruling**'). In doing so, the Commissioner defined 'bare trust' relationships. The Commissioner at paragraph 1 of the Ruling outlines the situations in which the Ruling applies:

> *This Ruling explains how the ...* [GST Act] *... applies to supplies of real property involving bare trusts and similar trusts where the trustee has limited active duties and acts solely at the direction of the beneficiary or beneficiaries.*

6.17 The Commissioner at paragraphs 5 and 6 of the Ruling explains when the Ruling does not apply, by stating at paragraph 5 of the Ruling that*: 'This Ruling does not deal with transactions in relation to trust property where the activities of the trust amount to the trust carrying on an enterprise involving the trust property'*.

6.18 I note that typically, the relationship as between Nominees and the trustee of the Fund with respect to the Property is a bare trust relationship.

6.19 The Ruling considers that the bare trustee (i.e. Nominees) will satisfy the requirements of section 38-325 of the GST Act if the bare trustee (i.e. Nominees) makes the 'agreement' contemplated in paragraph 38-325(1)(c) of the GST Act. Specifically, paragraphs 82 and 83 of the Ruling provides that:

> *82. For a supply to be GST-free as a supply of a going concern, the supplier and the recipient must agree that the supply is a supply of a going concern.*
>
> *83. In accordance with the principles discussed in this Ruling, a supply or acquisition* ***may be made in the course of an enterprise carried on by the beneficiary****, such that the beneficiary is liable for any GST or entitled to any input tax credit, notwithstanding that title to the relevant property is conveyed by or to a bare trustee for the beneficiary.* ***In those circumstances, if the trustee agrees in writing that the supply is a supply of a going concern, it does so on behalf of the beneficiary. The requirement for the supplier or recipient, as***

the case may be, to agree to the supply being a supply of a going concern is satisfied in those circumstances. [emphasis added]

6.20 Notwithstanding that the Commissioner accepts that Nominees may make the going concern agreement contemplated in section 32-325 of the GST Act, it may be prudent to have the trustee of the Fund also party to the contract of sale of land (maybe causing the parties to enter into a deed) so as to ensure that section 32-325 of the GST Act is satisfied.

6.21 As a result of the above, I consider that the following form of wording be included in the contract of sale of land:

SPECIAL CONDITIONS

xx. OTHER MATTERS

*xx.1 Both the purchaser and the seller acknowledge and agree [insert name of trustee of the superannuation fund] in its capacities as trustees of the [insert name of SMSF] ('**the Fund'**) are parties to the Contract.*

xx.2 The parties, including the purchaser, the seller and the Fund agree, that each supply under the Contract is a supply of a going concern for goods and services tax purposes.

*xx.3 The parties, including the Fund, agree that **clause xx.2** constitutes an agreement regarding the supply of a GST-free going concern for the purposes of section 38-325 of the A New Tax System (Goods and Services Tax) Act 1999 (Cth).*

xx.4 The Fund and the seller warrant that they are registered or required to be registered for goods and services tax.

xx.5 Each party, including the purchaser and the Fund, acknowledges and agrees that:

xx.5.1 the purchaser is the 'apparent purchaser'; and

xx.5.2 the Fund is the 'real purchaser,

for the purposes of section 55 of the Duties Act 1997 (NSW).

(e) Registration of the trustee of the Fund

6.22 For the reasons discussed above, it needs to be ensured that it is the trustee of the Fund (in that capacity) that is registered for GST purposes.

7 New South Wales stamp duty implications

7.1 The apparent purchaser arrangements provided for in section 55 of the Duties Act 1997 (NSW) (**'the Duties Act'**) need to be considered in the context of an 'acquirable asset' being NSW land.

7.2 Section 55 of the NSW Duties Act provides that:

'Duty of $10 is chargeable in respect of:

(a) a declaration of trust made by an apparent purchaser in respect of identifiable dutiable property:

(i) vested in the apparent purchaser upon trust for the real purchaser who provided the money for the purchase of the dutiable property, or

(ii) to be vested in the apparent purchaser upon trust for the real purchaser, if the Chief Commissioner is satisfied that the money for the purchase of the dutiable property has been or will be provided by the real purchaser, or

(b) a transfer of dutiable property from an apparent purchaser to the real purchaser if:

(i) the dutiable property is property, or part of property, vested in the apparent purchaser upon trust for the real purchaser, and

(ii) the purchaser provided the money for the purchase of the dutiable property and for any improvements made to the dutiable property after the purchase.'

7.3 Subsection 55(1A) of the NSW Duties Act provides that for the purposes of subsection 55(1) of the NSW Duties Act, *'… money provided by a person other than the real purchaser is taken to have been provided by the real purchaser if the Chief Commissioner is satisfied*

that the money was provided as a loan and has been or will be repaid by the real purchaser'.

7.4 Revenue Ruling No. DUT 30 entitled 'Property Vested in an Apparent Purchaser' also deals with the concession contained in section 55 of the NSW Duties Act. All other States and Territories except Queensland and South Australia provides for similar exemptions.

8 Platinum Investments – implications for section 67A of the SIS Act arrangements with respect to NSW real property

8.1 On 10 March 2011, the New South Wales Court of Appeal handed down its decision in *Chief Commissioner of State Revenue v Platinum Investment Management Ltd*,[i] which was concerned with the scope of declarations of trust in the context of the NSW stamp duties regime, and the availability of the apparent purchaser nominal duty concession.

8.2 The decision impacts on advisers dealing with NSW dutiable property. Indeed, as a result of the decision, the drafting of common transaction documents will need to be reconsidered.

8.3 The decision dealt with:

8.3.1 whether a dutiable declaration of trust can be made with respect to property not in existence at the time that the declaration is made;

8.3.2 what the "dutiable value" of a declaration of trust over future property is; and

8.3.3 whether the apparent purchaser concession contained in s 55 of the Duties Act can apply if there is a declaration of trust over future property.

(a) Background

8.4 On 4 April 2007, by deed, Mr and Mrs Clifford (Clifford), who were shareholders in McRae Pty Ltd (McRae) sold their shares in McRae (the sale shares) to Queens Hill Pty Ltd (Queens Hill). As consideration for the disposal of the sale shares, the new shares in Queens Hill (the consideration shares) would be allotted to Clifford. However, the deed provided that the consideration shares were not to be held by Clifford, but by Platinum Investment Management Ltd (on behalf of Clifford), which was described as a "nominee".

8.5 As both McRae and Queens Hill were companies registered in the state of New South Wales, both the consideration shares and the sale shares were "dutiable property" (s 11 *Duties Act 2007* (NSW) (Duties Act)).

8.6 While completion of the agreement took place on 4 April 2007, it was not until 6 April 2007 that the consideration shares were issued to Clifford, and held by Platinum Investment. It was on 4 April 2007 that the parties to the deed became contractually bound, with the result that Clifford could compel the allotment of the consideration shares via a specific performance action.

8.7 The Chief Commissioner of State Revenue assessed the deed as both a transfer of the sale shares, as well as a declaration of trust with respect to the consideration shares. That is, the deed was subject to ad valorem duty twice.

(b) Was there a declaration of trust over future property

8.8 An issue was whether the deed, which provided that the consideration shares would be held by a nominee of the sellers of the sale shares, was a "declaration of trust", notwithstanding that, when the "declaration" was made, the consideration shares were not in existence.

8.9 Section 8(1)(b)(ii) of the Duties Act provides that "This Chapter charges duty on … the following transactions … a declaration of trust over dutiable property". The term "declaration of trust" is in turn defined in s 8(3) of the Duties Act as being "… any declaration (other than by a will or testamentary instrument) that any identified property vested or to be vested in the person making the declaration is or is to be held in trust for the person or person, or the purpose or purposes, mentioned in the declaration …". Further, s 9 of the Duties Act charges duty on declarations with respect to "the property vested or to be vested in the declarant".

8.10 The majority (Handley AJA and Campbell JA, with Macfarlan JA dissenting) held that there could be a declaration of trust over future property. In particular, the majority considered that the words of terms such as "to be vested" and "to be held in trust" imported an element of futurity with respect to declarations of trust. As a result, a declaration of trust could occur with respect to property not in existence at the time of the declaration. It was further held that the term "identifiable property", for the purposes of the declaration head of duty, does not require that property to be in existence at the time of the declaration, but that the property is "identifiable" at the time of the declaration.

8.11 Campbell JA considered that, because the words "vested or to be vested" are contained in the definition of "declaration of trust" in s 8(3) of the Duties Act, "the definition could be satisfied if the property in relation to which the trust is declared is not then vested in the person making the declaration, provided that the property in question is to be vested, at some stage in the future, in the person making the declaration".[ii]

8.12 Handley AJA observed that:[iii]

> *"The Act brings to charge declarations of trust relating to property not yet vested which is to be vested in the declarant provided it is identified. The identified property must exist before it can be vested in the declarant. The question is whether it must also exist when the declaration is made."*

8.13 Handley AJA differentiated the requirements for the two limbs contained in the declaration head of duty in s 8(3) of the Duties Act:[iv]

> *"The first limb of the definition ('vested … in the person making the declaration') can only apply to property in existence when the instrument is first executed. The second limb ('to be vested') can only apply to property in existence when vesting occurs."*

8.14 It was observed that, in relation to the second limb, "the property to be vested must be identified when the instrument is first executed, but there is no requirement in terms that it then be in existence".

8.15 As a result, the majority considered that notwithstanding that the consideration shares were not in existence when the declaration in the deed was made, the consideration shares were "identified property", and therefore subject to the declaration head of duty.

(c) Determining the "dutiable value" of the declaration

8.16 On the basis that the declaration over the consideration shares was subject to ad valorem duty, the court considered what the "dutiable value" of the declaration was. It was held that the[v]

> *"...Sale Shares provided consideration for the declaration of trust ... The value of the Consideration Shares has not been determined, but the highest value supported by the evidence … was less than the value of the consideration. Accordingly duty was properly calculated on the consideration."*

(d) Whether the "apparent purchaser" duty concession applied

8.17 If the declaration within the deed was subject to duty, the next issue to be considered was whether the declaration was subject to nominal duty under apparent/real purchaser orivision of s 55 of the Duties Act.

8.18 The court considered that s 55 of the Duties Act did not apply. In coming to that view, Handley AJA applied the High Court's decision in *Commissioner of Stamp Duties (NSW) v Pendal Nominees Pty Ltd*[vi] (Pendal Nominees). In particular, his Honour accepted the

reasoning that if a declaration is made before there is an "apparent purchaser", the concession cannot apply.

8.19 However, the apparent purchaser concession, as contained in s 55 of the Duties Act relevant for the purposes of *Platinum Investment*, differs from the concession that was contained in the former para (1) of the item of Declaration of Trust in the Second Schedule of the *SDA 1920* (NSW) (SDA) as considered in *Pendal Nominees*.

8.20 The apparent purchaser concession under the former SDA provided that "Any instrument declaring that a person in whom property is vested as the apparent purchaser thereof holds the same in trust for the person or persons who have actually paid the purchase money thereof"'. That is, the former concession as contained in the SDA is similar to that contained in s 55(1)(a)(i) of the Duties Act, that is, in order for the concession to apply, there needs to be identified dutiable property that "is vested" (ie presently vested), and that the real purchaser has (ie past tense) "provided the money for the purchase of dutiable property".

8.21 However, since the High Court's decision in *Pendal Nominees*, the apparent purchaser concession has been expanded by s 55(1)(a)(ii) of the Duties Act which (relevantly) provided that "Duty of $10 is chargeable in respect of … a declaration of trust made by an apparent purchaser in respect of identified dutiable property … to be vested in the apparent purchaser upon trust for the real purchaser, if the Chief Commissioner is satisfied that the money for the purchase of the dutiable property has or will be provided by the real purchaser". That is, unlike the concession in existence during *Pendal Nominees*, the concession applies if identified dutiable property is "to be vested" (ie future tense) and if the money for the purchase of the dutiable property "will be provided by the real purchaser".

8.22 It is submitted that the issue in *Pendal Nominees* was the disjoint in the SDA when comparing the declaration head of duty (which charged duty on property "vested" or "to be vested") with the apparent purchaser concession (which only applied to property that "is vested" in an apparent purchaser). Paragraph 55(1)(a)(ii) of the Duties Act uses future tense terms, such as "to be vested" and "will be provided", as does the declaration head of duty. However, the former apparent purchaser concession only uses the past tense, such as "is vested" and "who have actually paid".

8.23 It is respectfully submitted that, for the same reasons that the majority of the Court of Appeal in *Platinum Investment* held that the term "to be vested" in the declaration head of duty allows future property to be subject to duty, then too should the term "… to be vested

…" should allow a "future" apparent purchaser (and "future" real purchaser) to avail themselves of the concession within section 55 of the Duties Act.

(e) Comment

8.24 Since the introduction of subsection 12(3) of the Duties Act, which makes it clear that "future" identifiable "dutiable property" may be subject to NSW duty, the decision will only have precedent value with respect to the "dutiable value" of a declarations and the application of the apparent purchaser concession.

8.25 The implication of the decision in the context of the apparent purchaser concession is that a declaration of trust relating to dutiable property that is *to be vested* in a "'future" apparent purchaser will be subject to duty (as a declaration) with no ability to obtain the apparent purchaser concession.

8.26 For example, if X wishes to acquire real property in NSW (and will provide all of the purchase price for the acquisition of the property), with the registered proprietor of the property to be Y (ie the property is to be held on trust by Y for X), then a declaration made by Y will be subject to duty as a declaration (with no relief under the apparent purchaser concession) if the declaration is made *before* exchange on the contract to purchase the property. That is, NSW duty will be charged twice — once on the transfer of the property to X (to be held by Y), and a second time on the declaration of trust by Y over the property made before the exchange of contract for the property. However, if X declares that it holds the item of real property on trust for Y *after* exchange (and if Y provides all of the purchase price for the purchase of the property), the declaration should be subject to concessional duty pursuant to s 55 of the Duties Act.

8.27 In my experience, the OSR has accepted that the apparent purchaser concession applies if a declaration of trust is executed before property is vested in an apparent purchaser (eg before a contract for the purchase of property is exchanged in the name of an apparent purchaser), provided it has been shown that the purchase price has been, or will be, provided by the real purchaser.

8.28 One would expect a change in the practice of the OSR following the decision in *Platinum Investment*. It is submitted that the decision will have great impact on those involved in commercial and property transactions concerning NSW dutiable property. Some circumstances which may cause the principles relating to the apparent purchaser concession as enunciated in *Platinum Investment* to give rise to hazards for advisers and their clients include:

8.28.1 arrangements, such as that illustrated in *Platinum Investment*, whereby NSW dutiable property is to be held by a custodian or a nominee;

8.28.2 an acknowledgement/declaration by an adviser (usually a solicitor) given to a client that a contract to acquire a property entered into if the adviser successfully bids at an auction for a property will be for the benefit of the client; and

8.28.3 declarations of trust over NSW dutiable property which may be entered into for the purposes of acquiring an asset by a trustee of a superannuation fund pursuant to ss 67A and 67B of the SIS Act.

8.29 That is, careful consideration will need to be given to the timing of declarations of trust.

9 Refinancing strategy

9.1 Section 67A of the SIS Act only allows a superannuation fund to borrow to acquire an asset. Further, Regulation 13.14 of the SIS Regulations prohibit subjecting an existing asset of a superannuation fund from being charged.

9.2 As a result, an existing asset of an existing superannuation fund cannot be subject to a section 67A of the SIS Act arrangement.

9.3 It should be noted that section 67A of the SIS Act does not have any anti-avoidance provisions.

9.4 Provided that the asset is 'business real property', a strategy that may be used to unlock value in an asset held subject to a self-managed superannuation fund is to transfer it from one fund to another.

9.5 Consider the following example:

9.5.1 An item of real property (which meets the definition of 'business real property' for the purposes of subsection 66(5) of the SIS Act) is held (as tenants in common) by an individual and a trustee of a self-managed superannuation fund (**'Transferor Fund'**).

9.5.2 The individual wishes to transfer the part of the property that it holds into a superannuation fund. Further, the individual wishes to gear up a superannuation fund (using third-party finance) so as to have the fund borrow to acquire that part held by the individual.

9.5.3 As the borrowing is sourced from a third-party financier, the financier requires a mortgage over (usually the whole) of the property. The borrowings will be used to acquire the property, from both the individual and the Transferor Fund (that is, both receive consideration from the 'purchaser').

9.6 In the event that the existing superannuation fund acquires the part of the property that is held by the individual, then the placing of a mortgage over the whole of the property would cause the superannuation fund to breach Regulation 13.14 of the SIS Regulation.

9.7 Regard may be given to establishing a new superannuation fund (**'Transferee Fund'**), and having the whole of the property acquired by the new superannuation fund from the existing superannuation fund and the individual.

9.8 The transfer from the individual and the existing superannuation fund will cause CGT event A1 (section 104-10 of the *Income Tax Assessment Act 1997* (Cth)) to apply. That is (and for example) there is no CGT roll-over as between superannuation fund.

(a) Section 61 of the Duties Act - the transfer from the existing superannuation fund to the new superannuation fund

9.10 Subsection 61(1) of the Duties Act provides that:

> *This section applies to a relevant transfer that occurs in connection with a person:*
>
> *(a)* ***ceasing to be a member of, or otherwise ceasing to be entitled to benefits*** *in respect of, a superannuation fund that is a complying superannuation fund or was a complying superannuation fund within the period of 12 months before the transfer was made, and*
>
> (b) *becoming a member of, or* ***otherwise becoming entitled to benefits in respect of, another superannuation fund*** *that is also a complying superannuation fund or will, in the opinion of the trustees of both funds concerned, be a complying superannuation fund within 12 months after the transfer is made.* [emphasis added]

9.11 That is, a 'relevant transfer' is occurring ***in connection with*** the members of the Transferor Fund and the Transferee Fund:

9.11.1 ceasing to be a member of, or otherwise ceasing to be entitled to benefits in the Transferor Fund; and

9.11.2 becoming entitled to benefits in the Transferee Fund (referable to the transfer of the property into the Transferor Fund).

9.12 That is, it is submitted that there is a relevant 'connection' as required by subsection 61(1) of the Duties Act.

9.13 Whilst the Transferor Fund will be obtaining consideration for the 'transfer' of its interest in the property (for the reasons discussed below), it is submitted that given the intention that the consideration being rolled over from the Transferor Fund to the Transferee Fund, with the Transferor Fund then being wound-up, the 'in connection with' test contained in section 61(1) of the Duties Act will still apply.

9.14 That is, given that there is a 'transfer' from the Transferor Fund to the Transferee fund, which is in connection with the wind-up of the Transferor Fund (which will cause its members to cease to be members, or otherwise cease to be entitled to benefits in that fund), and will result in the members becoming entitled to benefits (referable to the property formerly held by the Transferor Fund) in the Transferee Fund – it is unclear how subsection 61(1) of the Duties Act is not satisfied?

i. Whether there is a 'relevant transfer'

9.15 An issue that may arise is that the property transferred from the Transferor Fund to the Transferee Fund will be held by a 'Bare Trustee' (pursuant to paragraph 67A(1)(b) of the SIS Act) (the **'Security Trustee'**).

9.16 Relevantly, paragraph 61(1A)(a) of the Duties Act provides that: '*For the purposes of this section, each of the following is a **'relevant transfer' … a transfer of**, or an agreement to transfer, **dutiable property, from a trustee of a superannuation fund**, or a custodian of the trustee, to the trustee of another superannuation fund, or **to a custodian of the trustee of another superannuation fund***.' [emphasis added]

9.17 In order to obtain the concession in subsection 62A(3) of the Duties Act, the Chief Commissioner has been satisfied that the 'Security Trustee' is a '*… custodian of the trustee of a self managed superannuation fund …*' as provided for in that subsection.

9.18 I consider that the Security Trustee contemplated in the Security Trust Deed will meet the definition of 'custodian' as provided for in paragraph 61(1A)(a) of the Duties Act.

ii. The provision of consideration and the availability of the section 61 of the Duties Act concession

9.19 There is nothing in section 61 of the Duties Act which causes a 'relevant transfer' to not be subsection to the concession contained in that section if consideration is provided by the Transferor Fund to the Transferee Fund.

9.20 Subsection 61A(1) of the Duties Act refers to 'relevant transfers', which are defined in each of the paragraphs in subsection 61(1A) of the Duties Act as including 'transfers'. It is submitted that a 'transfer' of Property for the purposes of section 61 of the Duties Act will be an 'acquisition' for the purposes of section 66 of the SIS Act.

9.21 That is, if Transferor Fund is a 'related party' of the Transferee Fund (see subsection 66(1) of the SIS Act, and the definition of the term 'related party' as contained in subsection 10(1) of the SIS Act, and in turn the definition of 'Part 8 associate' as contained in Subdivision B of Part 8 of the SIS Act), then the Transferee Fund can only acquire the property from the Transferor Fund if (and amongst other things) the Transferor Fund '*… is a superannuation fund with fewer than 5 members – the asset is business real property of the related party* ***acquired at market value*** *…*'. [emphasis added]

9.22 That is, the Transferor Fund needs to acquire the property 'at market value'. So as to meet this condition, and if the Transferor Fund does not have the cash to acquire the property, then it may need to borrow to acquire the property pursuant to section 67A of the SIS Act.

9.23 There is nothing in section 61 of the Duties Act which prohibits a 'relevant transfer' to be accompanied by consideration. That is, it is submitted that it is irrelevant for the purposes of section 61 of the Duties Act whether a 'relevant transfer' / 'transfer' is accompanied by consideration.

iii. Whether the transfer is '*… in the course of a fund's investment activities …*'

9.24 I note that Revenue Ruling No SD 218, entitled *Transfer of Assets Between Superannuation Fund* (**'the Ruling'**), which provides the Chief Commissioner's view with respect to the corresponding provision to section 61 of the Duties Act in the (repealed) *Stamp Duty Act 1920* (NSW).

9.25 In particular, reference has been made to the following comment in the Ruling:

> *The concession does not extend to the acquisition of assets in the course of a fund's investment activities, even though the investment may be acquired from another complying fund.*

9.26 It is unclear as what the Commissioner considers ***is*** an acquisition '*… in the course of a fund's investment activities …*', and when an acquisition ***is not*** '*… in the course of the fund's investment activities …*'.

9.27 Indeed, if an acquisition is not '*… in the course of the fund's investment activities …*', then the question of why the asset is being acquired and indeed held at all, given the prudential framework that superannuation funds need to comply with? For example, if an asset is not held / acquired for investment purposes – then will that holding / acquisition breach (for example) the sole purpose test contained in section 62 of the SIS Act? Further, any investment by a superannuation fund must comply with the fund's 'investment strategy' (see section 52 of the SIS Act).

9.28 That is, if it is the Chief Commissioner's view that a transfer that meets section 61A of the Duties Act should not be '*… in the course of a fund's investment activities …*', then, given the nature of superannuation funds (and indeed the regulatory regime that they must comply with) – for what other purposes will an asset be held subject to a superannuation fund regime?

9.29 In any event, it is submitted that whether or not the transfer is '*… in the course of the fund's investment activities …*' is not a relevant consideration as provided in section 61 of the Duties Act. Rather, there is a requirement of a 'connection with' a person '*… ceasing to be a member of, or otherwise ceasing to be entitled to benefits …*' in respect of the Transferor Fund, and '*… becoming a member of, or otherwise becoming entitled to benefits in respect of …*' the Transferee Fund.

(b) Section 62A of the Duties Act – the transfer from the individual to the Transferee Fund

9.30 The transfer from the individual to the Transferee Fund (of part of the property) should be subject to nominal duty pursuant to section 62A of the Duties Act. Under the proposed transaction, the whole of a property (subsection to section 67A of the SIS Act) is to be transferred from an individual to the Transferee Fund Section 67A of the SIS Act requires that the legal title of the property is to be held on trust so that the Transferee Fund acquires a beneficial interest in the property. As a result, and pursuant to section 67A of the SIS Act the registered proprietor of the property (and therefore the 'transferee' disclosed on any transfer document) will be a bare trustee.

9.31 Notwithstanding that a bare trustee will be the registered proprietor of the Property (and, it is submitted the 'apparent purchaser' pursuant to section 55 of the Duties Act – see **paragraph 7**), the property will be transferred (pursuant to section 67A of the SIS Act and

the any documentation) the trustee of the Transferee Fund as the 'real purchaser' of the property. As a result, it is submitted that the transfer should be subject to nominal duty pursuant to section 62A of the Duties Act, either pursuant to subsection 62A(1) or subsection 62A(3) of the Duties Act. Specifically, subsection 62A(3) of the Duties Act provides that:

> *Duty of $500 is chargeable on a transfer of, or an agreement to transfer, dutiable property from a person (the transferor) to the custodian of the trustee of a self managed superannuation fund but only if:*
>
> *(a) the transferor is the only member of the superannuation fund, or*
>
> *(b) the property is to be used solely for the purpose of providing a retirement benefit to the transferor.*

9.32 Subsection 62A(1) of the Duties Act provides that:

> *Duty of $50 is chargeable on a transfer of, or an agreement to transfer, dutiable property from a person (the **transferor**) to the trustee of a self managed superannuation fund but only if:*
>
> *(a) the transferor is the only member of the superannuation fund or the property is to be held by the trustee solely for the benefit of the transferor, and*
>
> *(b) the property is to be used solely for the purpose of providing a retirement benefit to the transferor.*

9.33 That is, subsections 62A(1) and (3) of the Duties Act provides that nominal duty will be charged on the transfer of the property from the individual (as the vendor) to the bare trustee (as bare trustee for the trustee of the Transferee Fund) pursuant to subsection 62A(3) of the Duties Act), but only if:

9.33.1 either:

(a) the individual is the only member of the superannuation fund; or

(b) the property will be held by the trustee of the Transferee Fund (via a bare trustee as custodian) for the benefit of the individuals; and

9.33.2 the property is to be used solely for the purpose of providing a retirement benefit of the individual.

9.34 Subsection 62A(2) of the Duties Act provides the circumstances under which the property will be held by the bare trustee (as trustee for the trustee of the Transferee Fund) '*... solely for the benefit of the transferor ...*' (i.e. the individual / vendor) as required by paragraphs 62A(1)(a) of the Duties Act, by providing that:

> *Property held by the trustee of a superannuation fund is held solely for the benefit of the transferor if:*
>
> *(a) the property is held specifically for the benefit of the transferor, as a member of the superannuation fund, and*
>
> *(b) the property (or proceeds of the sale) cannot be pooled with property held for another member of the superannuation fund, and*
>
> *(c) no other member of the superannuation fund can obtain an interest in the property (or the proceeds of sale of the property).*

9.35 Further, the conditions contained in subsection 62A(2) of the Duties Act will also need to be satisfied, being that the property will be held solely for the benefit of the individual (i.e. the vendor) as:

9.35.1 the Property is to be held specifically for the benefit of the individual / vendors (i.e. the transferor of the Property) as members of the Fund; and

9.35.2 the Property (or the proceeds of any sale of the Property) cannot be pooled with any other property held for any other member of the Fund; and

9.35.3 no other member of the Fund can obtain an interest in the Property (or the proceeds of sale of the Property).

9.36 It should be noted that in order to comply with section 62A of the Duties Act, the following style of clause will need to be contained in the Transferee Fund deed:

> *xx.A Upon the transfer of [insert name of property] (**'the Property'**) from [insert details of individual] (**'the Transferor'**) to the Fund, the Property will be held subject to the Fund and solely for the benefit of the Transferor. Specifically:*
>
> *xxA.1 the Property will be held specifically for the benefit of the Transferor, in the Transferor's capacity as a Member of the Fund;*
>
> *xxA.2 the Property (or the proceeds of sale of the Property) will not, and cannot be pooled with property held for any other Member(s) of the*

Fund apart from the Transferor (in the Transferor's capacity as member of the Fund); and

xxA.3 no other Member of the Fund, apart from the Transferor (in the Transferor's capacity as member of the Fund) can obtain an interest in the Property, or any proceeds from the sale of the Property.

*This **clause xxA** is not capable of being amended and is irrevocable.*

i. Acquisition of an 'acquirable asset'

9.37 The issue that needs to be considered is the application of subsection 62A(3) of the Duties Act, is whether an acquisition of the interest in the property from the Individual (given that the property is held jointly with the Transferor Trust) is an 'acquirable asset' as defined in section 67A of the SIS Act.

9.38 It should be noted that the Transferee Fund is acquiring the whole of the property (from two different vendors, given that the property is jointly held). That is, the Transferee Fund is acquiring ***the whole of the property*** (albeit from two different vendors) pursuant to a section 67A of the SIS Act.

9.39 That is, when the interest in the Property of both the Transferor Fund and the Individuals is merged, then that will be one asset.

9.40 Section 67A of the SIS Act provides that the borrowing must be for a 'single acquirable asset', not that the asset must be purchased from a single vendor. I have had an example where the Chief Commissioner of State Revenue (NSW) consider that a superannuation fund (pursuant to section 67A of the SIS Act) can never acquire a property held by two or more vendors.

9.41 It is submitted that the Transferee Fund is borrowing to acquire the whole of the property, as defined by it's relevant folio reference. It is irrelevant as to how many contracts / transfers are entered into. What is relevant is that there is a single borrowing that effects an acquisition of a 'single acquirable asset'.

ii. Whether part of a property is an 'acquirable asset'

9.42 The term 'acquirable asset' is defined in subsection 67A(2) of the SIS Act. The term 'asset' is in turn defined in subsection 10(1) of the SIS Act as '*… means any form of property and, to avoid doubt, includes money (whether Australian currency or currency of another country) …*'. I further note that the Commissioner of Taxation in SMSFR 2011/D1, SMSFR 2010/1 and SMSFR 2009/4.

9.43 An interest (as a joint holder) in property will meet the definition of 'asset' as contained in the SIS Act.

iii. Relevance of acquirable asset for the purposes of section 62A of the Duties Act

9.44 In any event, I consider that the definition of 'acquirable asset' is relevant for the purposes of section 62A of the Duties Act. It is submitted that if the legislature required an asset to be an 'acquirable asset' as defined in section 67A of the SIS Act, then it should have made it clear in the terms of section 62A of the Duties Act.

9.45 Further, I have been involved in transactions where the Chief Commissioner of State Revenue attempted to rely on subsection 62A(4) of the Duties Act to deny the application of subsection 62A(3) of the Duties Act.

9.46 However, I consider that the Chief Commissioner does not have the power to determine whether a superannuation fund is complying or not, or whether a transaction will cause a fund to not be complying. That is a question for the Commissioner of Taxation.

9.47 Indeed, it is submitted that whether section 67A of the SIS Act is satisfied is a question for the auditor of the superannuation fund, and the 'Regulator' and not the Chief Commissioner. It is the auditor that is responsible for the determination of whether the transaction complies with the SIS Act (as provided by the regulatory regime), and not the Chief Commissioner (who I note is not a 'Regulator' as defined in subsection 10(1) of the SIS Act, and has no powers to determine whether there is a contravention of the SIS Act).

9.48 Even if a contravention report is lodged, then (practically and typically), a rectification proposal is put to the Commissioner of Taxation. In my experience, the Commissioner of Taxation does not automatically cause superannuation funds to be non-complying if there is a breach of the SIS Act or SIS Regulations.

9.49 In that context, I query whether the Chief Commissioner has any power to consider that section 67A of the SIS Act will be breached (i.e. the Chief Commissioner is not responsible for the prudential regulation of the Transferor Fund), and determining that the Transferor Fund will be non-complying?

9.50 Indeed, the terms of subsection 62A(4) of the Duties Act provides that the concession contained in subsection 62A(3) of the Duties Act will not apply if '*… as a result of the transfer, the superannuation fund will cease to be a complying superannuation fund*'. That is, subsection 62A(4) of the Duties Act requires a certain event to occur – being that the transfer results in the Transferor Fund not being a complying fund. The subsection does not provide (amongst other things) that the Chief Commissioner assume, or that the

9.51 That is, there is an argument that the Chief Commissioner, by taking into account its view with respect to the application of the SIS Act and the SIS Regulations is taking into account irrelevant considerations in applying section 62A of the Duties Act, and that the basis of the Chief Commissioner's view on the application of section 62A of the Duties Act being incorrect.

References

[i] [2011] NSWCA 48.

[ii] *Platinum Investment* at [9].

[iii] *Platinum Investment* at [59].

[iv] *Platinum Investment* at [86].

[v] *Platinum Investment* at [111].

[vi] [1989] HCA 19.