



TriSuper Auditors

January 2022
Property & SMSF's

Presented by Joel Curry, Director

Before we begin....

Let's assume today that

- ▶ The Trust Deed allows it..
- ▶ The Investment strategy provides for it, and
- ▶ The sole purpose test has been considered.

What types of property can a SMSF Buy?

Generally, there are no restrictions on a SMSF purchasing any type of asset, including interests in all types of real property (remembering our prior assumptions)

- ▶ Residential, Commercial, Farm, Vacant, Desert Island, Nuclear Waste Dump...
- ▶ But.. There are some rules and restriction on what can then be done by the Fund.

HANG ON....

What if the vendor is a related party?



Actually, “Section” 66.....

SMSF’s are only allowed to purchase at market value, “*business real property*” from a related party.

What is Business Real Property (BRP)?

- ▶ Excludes all residential property?
- ▶ Vacant Land?
- ▶ Farmland?

What is BRP?

BRP = any freehold or leasehold interest in real property

AND

the real property is used wholly and exclusively in one or more businesses
(whether carried on by the entity or not),

- ▶ The second bit is the clincher...
- ▶ Note there is no mention of the style of property, just its use.

SO... ?

- ▶ What if residential style property used wholly and exclusively in a business?
- ▶ Is vacant land BRP?
- ▶ What about unleased commercial property?

Bedtime Reading...

SMSFR 2009/1 outlines ATO views on what constitutes BRP (with examples)

Residential Property

- ▶ Are you running a rental property operation business?
- ▶ Converted to run a Doctors Surgery?

Vacant Land

- ▶ Trading Stock v long term holding

Bedtime Reading...

Unleased Commercial property

- ▶ Temporary vacancy ?

Primary Production Land

- ▶ Can contain a residence provided it is not the dominant use of the property
- ▶ Fruit Trees form part of land
- ▶ Annual crops do not

More BRP considerations

TR 97/11 gives guidance on determining if you are running a business. Relevant for meeting BRP thresholds.

- ▶ Vacant Land v Property Developer
- ▶ Residential Property Business

- ▶ ATO considers companies have a lower threshold to meet than individuals.

What can a SMSF do with Property?

Again, no overarching rules but specific provisions place limits.

- ▶ Leasing property to related parties
 - ▶ in-house asset rules
 - ▶ Arm's Length Transactions
- ▶ Property Development
- ▶ Can a SMSF run a Business?

Leasing property to related parties

Property leased to related parties is counted against the in-house asset threshold unless:

- ▶ The Property is Business Real Property (same definition)
- ▶ Need to have a legally enforceable agreement in place
- ▶ Lease needs to be on market terms (section 109)
- ▶ Please obtain third party lease appraisal
- ▶ NALI

- ▶ Primary Production - residence allowed to be leased if not dominant purpose and under 2 hectares

Can a SMSF develop property?

Does this mean it is running a business and is this allowed?



Bad Feeling....

Again, there is no provision prohibiting a SMSF from directly running a business or developing property.

However, several specific provisions may place limits on activities.

- ▶ Prohibitions on borrowing
- ▶ Placing charges on assets
- ▶ Acquiring assets from members
- ▶ Arms Length Transactions (paying related employees)

What do we see?

We do come across SMSF's that do directly develop property.

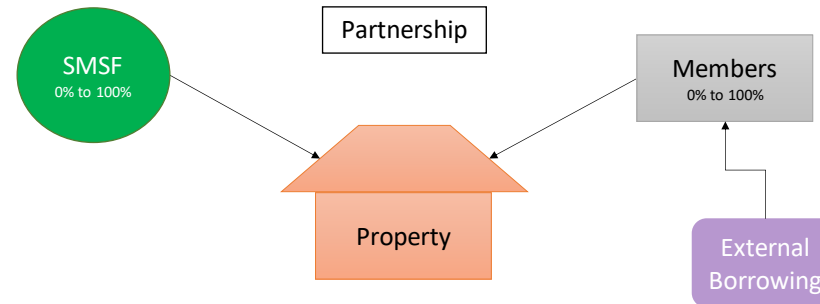
- ▶ Once off projects
- ▶ Turnkey style projects
- ▶ Small scale (i.e subdividing existing block)

- ▶ - Commonly SMSF's form unit trusts with other non-related parties to undertake developments as less SIS restrictions apply. (i.e borrowing allowed)

Common Property Holding Structures

SMSF and Related Party

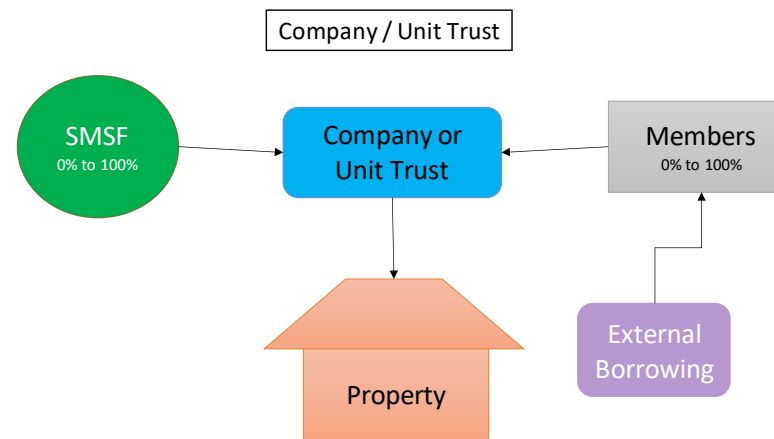
- ▶ Income tax at each entities tax rate
- ▶ Stamp duty payable on change in interests
- ▶ Borrowing not allowed on asset
- ▶ Restrictions on use as discussed above.



Common Property Holding Structures

SMSF and Related Party

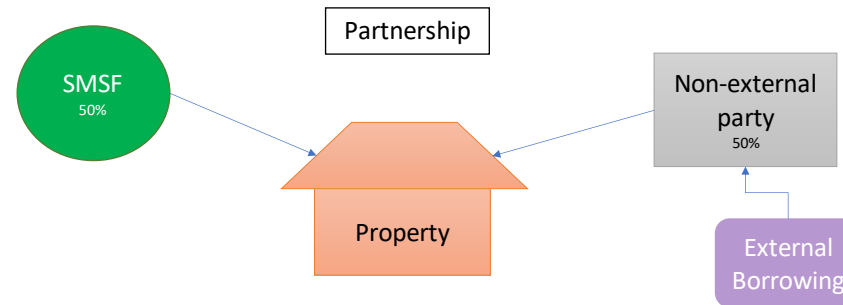
- ▶ Profits can be retained in case of Company
- ▶ Potentially stamp duty not payable on change in interest
- ▶ Borrowing not allowed on asset
- ▶ Reg 13.22c / 13.22d limitations apply
- ▶ Cannot run a business
- ▶ Company gets land tax threshold.



Common Property Holding Structures

SMSF and Non - Related Party

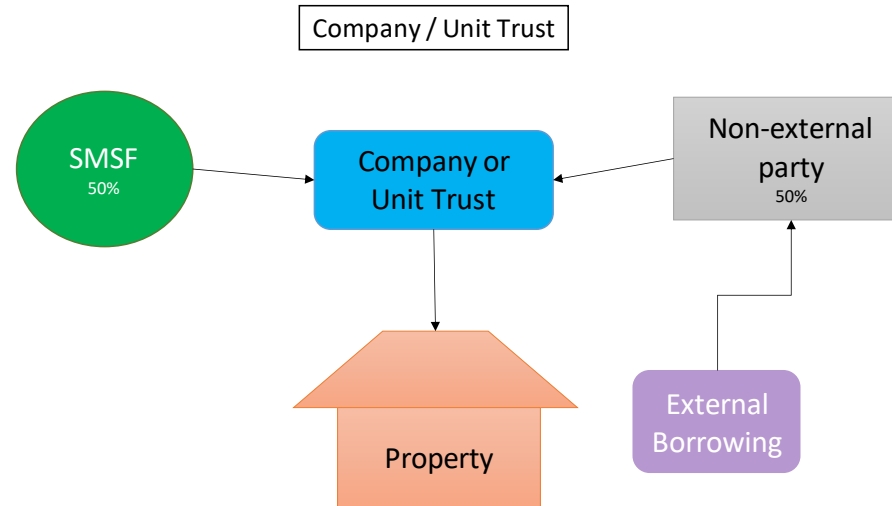
- ▶ Income tax at each entities tax rate
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- ▶ Borrowing not allowed on asset
- ▶ Restrictions on use



Common Property Holding Structures

SMSF and Non - Related Party

- ▶ Profits can be retained in case of Company
- ▶ Potentially stamp duty not payable on change in interest
- ▶ Borrowing allowed
- ▶ No restrictions
- ▶ Can run a business



SMSF Purchasing Life Interests in Property

- ▶ ATO does not like
- ▶ Allows a SMSF to purchase BRP from a related party at reduced value via a life interest
- ▶ SMSF receives 100% of income from property
- ▶ SMSF relinquishes ownership on death of person who gave the tenancy.

SMSF Purchasing Life Interests in Property

- ▶ Example - a 60 year old male owns a BRP valued at \$1M.
- ▶ Based on life expectancy factor of 0.65447 (government actuary table), the Fund could purchase a life interest in the BRP for \$654K.
- ▶ Still receive 100% of income, but relinquish title on death.
- ▶ High Risk
- ▶ Seek specialist advice

LRBA Tricky Bits

Related Party Borrowing

- ▶ Safe harbour guidelines
 - ▶ PCG 2016/5
 - ▶ What is Asset is not real property or listed equities?

LRBA Tricky Bits

Changing the nature of the asset

- ▶ Beware not to improve an asset to the extent that it becomes a different asset.
- ▶ Borrowing can be applied to repair an asset but not improve it.
- ▶ SMSFR 2012/1 gives detailed examples on repair v improvement and when an asset is improved to the extent it becomes a different asset.



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Q & A

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