

Guideline

Limited Recourse Borrowing Arrangements

Transfers from custodian trustees

Duties Act 2001

Introduction

Section 67 of the Commonwealth [Superannuation Industry \(Supervision\) Act 1993](#) (the SIS Act) contains a general prohibition against a trustee of a regulated superannuation fund from borrowing money or maintaining a borrowing of money except in limited circumstances.

Sections 67A and 67B became operative on 7 July 2010 and set out the conditions under which the trustee of a regulated superannuation fund (RSF) may undertake and maintain a limited recourse loan. Briefly, the conditions are:

- the loan is applied for the acquisition of a single *acquirable asset* including expenses incurred in connection with the borrowing or acquisition;
- the *acquirable asset* is held on trust for the RSF trustee;
- the RSF trustee has a right to acquire legal ownership for the *acquirable asset* by making one or more repayments after acquisition; and
- the lender's rights are only secured against the relevant *acquirable asset*.

Duty treatment

Typically, limited recourse borrowing arrangements have the following characteristics:

1. the RSF provides all the deposit monies and the balance of the purchase price for the land (the Property) from a combination of RSF assets and borrowings from a financial institution (the Lender);
2. a person other than the RSF trustee (the Custodian) acquires the Property using the money provided by the RSF trustee, and is registered as the legal freehold owner on title;
3. the Custodian executes a declaration/acknowledgement of trust that the Custodian holds the Property on a fixed trust or bare trust for the RSF;
4. the Custodian grants the Lender a limited recourse mortgage on the terms required by the Lender over the Property;
5. the Custodian retains legal title to the Property until the borrowing from the lender is fully discharged; and
6. the unencumbered title to the Property is transferred from the Custodian to the trustee of the RSF.

Three of the above steps constitute dutiable transactions under the *Duties Act 2001* (the Duties Act):

1. the initial transfer of the Property to the Custodian;
2. the declaration of trust made by the Custodian, whether this occurs before or after the transfer of the Property; and
3. the final transfer of the Property from the Custodian to the trustee of the RSF.

Whilst all matters submitted to the State Revenue Office for assessment are assessed on their facts, it is anticipated that any deed or document used to effect the type of arrangement that is described above will be assessed for duty on the following basis:

The initial transfer

The initial purchase of the Property by the Custodian on behalf of the RSF is a dutiable transaction in accordance with section 6(1)(a) of the Duties Act. As such, it will attract duty at *ad valorem* (according to value) rates at the time the Property is transferred to the Custodian.

The declaration of trust

The Custodian may declare that it is holding the Property on trust for the RSF trustee either before or after the Property has transferred to the Custodian. In this instance, section 6(1)(b)(ii) of the Duties Act charges duty on a declaration of trust based on the value of the dutiable property that is the subject of the declaration of trust. Accordingly, in the absence of an exemption or concession, duty would be payable on the declaration of trust made by the Custodian.

However, if it can be shown that the Custodian is merely holding the property for the RSF under a fixed or bare trust, the concession contained under section 39(1)(a) of the Duties Act may apply to the declaration of trust, in which case \$50 duty is payable.

In order for section 39(1)(a) of the Duties Act to apply, it must be shown that all monies for the purchase of the particular property have been provided (or will be provided) by the RSF (the 'real purchaser'), as this provides confirmation of the resulting trust relationship between the parties. The specific wording of the trust deed will also be relevant in making a determination.

Alternatively, if the transfer of the Property to the Custodian and the declaration of trust occurred contemporaneously, section 16(4) of the Duties Act may apply to exempt the declaration of trust from duty.

The final transfer

The final step of the arrangement is the ultimate transfer of the Property from the Custodian to the RSF which is likely to occur upon discharge of the borrowings. Depending on the particular facts of the arrangement, there are two possible exemptions which may apply:

- Section 46 provides a concessional rate of duty (\$50) for a transfer of dutiable property from a Custodian to the trustee of a RSF, so long as there is no change in beneficial ownership; or
- if the Commissioner has applied section 39(1)(a)(i) of the Duties Act to the declaration of trust, then section 39(1)(b) of the Act, which charges a concessional rate of duty (\$50), may apply to the transfer of the Property to the RSF.

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