

## INFORMATION NOTES ON TRANSFER OF LAND TO SMSFs

The information contained in these notes is general in nature and is intended only to cover transactions involving the transfer of property from a superannuation fund member to the Fund as a superannuation contribution. Prior to transferring the property to a superannuation fund, the trustees of the Fund should have regard to the following (which is not an exclusive list of considerations):-

### TAXATION & DUTY ISSUES

#### Transfer Duty

Transfers of Victorian land are dutiable transactions under the Duties Act. If the property is purchased by the Fund, duty will be payable on the market value or sale price (which ever is higher) of the property.

The property transfer should be exempt from duty provided it is made as a superannuation contribution whereby:

- no consideration is paid by the Fund
- the person transferring the property is a member of the Fund
- the property is acquired by the Fund for that person.

Where all of the fund trustees are also the members contributing the property, a formal transfer is not required. However, it is still necessary for duty and superannuation purpose to prepare a Declaration of Trust and/or Statement of Change of Beneficial Ownership. The Declaration/Statement is exempt from duty on the same conditions as a transfer of land.

Should the property ever be transferred back to the member, member's spouse or dependants, duty will usually still not be payable even though the property transfer was duty exempt when acquired by the Fund. Where a property was purchased by the Fund, no duty should be payable should the property ever be transferred back to the member, member's spouse or dependants.

#### Goods & Services Tax

If the member transferring the property is not registered or required to be registered for GST, there are no GST implications for the Fund. If the member transferring the property is registered for GST, the Fund must also be registered for GST when it receives the property. GST will not be payable on a transfer of property made as a contribution to the Fund where both the member and the Fund are registered.

Regardless of the registration status of the member, the Fund may be required under the A New Tax System Law to register for GST, if not already registered. As a rule of thumb, if the rental from the property exceeds \$75,000.00 per annum, the Fund will be required to register.

If the property is sold to the Fund, and the member transferring the property is registered for GST, GST will be payable on the sale by the member unless an exemption is available. A "going concern" exemption may be available if the Fund is registered for GST and the property is sold subject to an existing written lease. You should discuss GST registration issues with your accountant.

#### Capital Gains Tax

The disposal of the property by the member to the Fund can have CGT implications for the member. It is expected that you will have sought and obtained advice on any CGT implications from your accountant or financial adviser prior to instructing the offices of MJHC Legal to transfer property to the Fund. You should not take any steps to transfer the property until you are aware of any CGT implications.

### SUPERANNUATION CONTRIBUTION

Whilst real estate can be transferred by a member to a superannuation fund as a contribution in specie, there are limits on the value of the property that can be transferred. It would be usual for real estate transfer of a property as a contribution in specie to be a 'non-concessional contribution'. This means that no tax deduction is available for making the contribution to the Fund. Also, a contribution may not be permitted or may be restricted depending on the value of the member's existing superannuation fund benefit.

Since 1 July 2017, a member is not able to make any non-concessional contributions if the combined balance of all of a member's superannuation funds exceeds \$1.6m. This is known as the general transfer balance cap. The member's total superannuation balance will determine whether or not the member can use all or only part of the non-concessional contributions cap and whether the member is able to utilise all or only part of the bring forward rule if the member is under 65 years.

The annual non-concessional contribution cap is presently \$100,000.00 (as at 2020/2021) for each member who must be under the age of 75 years. A couple, such as husband and wife, can make total non-contributions of up to \$200,000.00 in a given tax year. A member over 67 years but less than 75 years must also satisfy a 'work test' or have a superannuation balance of less than \$300,000.00.

If members are under 65 years, they are able to utilise what is known as the 'bring forward rule' of the non-concessional contributions cap. Using this 'bring forward rule', each member can contribute up to \$300,000.00. If the 'bring forward rule' is used, the member is not able to make any further non-concessional contributions in excess of that amount for the next 3 tax years. A couple can contribute up to \$600,000.00 using this 'bring forward rule'. The rule is not available to a member aged over 65 years.

There are significant taxation and other consequences if a member's contribution cap is exceeded. You must obtain advice from your accountant and financial advisors about the combined value of all your superannuation balances and how much you can contribute to your Fund before you take any steps to transfer any real estate.

## INVESTMENT RESTRICTIONS

The Trustees in making investment decisions and in particular acquiring the property must have regard to the following prohibitions on investments:

1. A Superannuation Fund cannot lend money to a member or relative of a member;
2. A Superannuation Fund cannot borrow (except in limited circumstances associated with the providing of a benefit to a member who is entitled upon a condition of a release and which is not applicable in this instance).
3. A Superannuation Fund cannot acquire assets from a member or relatives of a member except Stock Exchange listed securities and business premises (upon certain conditions).
4. The Trustees of a Superannuation Fund cannot give a charge or mortgage over the assets of a Superannuation Fund.
5. A Superannuation Fund cannot provide financial assistance to members or relatives of a member.

Items 1 & 2 are not applicable in this instance. Items 3, 4 and 5, however, need some further special consideration.

## ACQUISITION OF ASSETS FROM MEMBERS

This investment restriction will not apply to the Fund acquiring real estate which satisfies the definition of Business Real Property under SIS. This definition is satisfied where the property is predominately or wholly used in the course of business. This definition is still satisfied even where the business is operated from the property by the member or an associate of a member. The property will not be transferred unless the definition is satisfied.

## CHARGES AND ENCUMBRANCES

Prior to the Fund acquiring the property, it will be necessary for all mortgages and charges over the property to be discharged or removed. You will need to provide the title to the property together with any discharge of mortgage and/or withdrawal of caveat.

Once acquired by the Fund, the property can never be used as security for any loan, mortgage, guarantee or financial facility. You should consider whether you will ever need to offer the property as security for a loan at any time in the future before transferring the property to the Fund.

## FINANCIAL ASSISTANCE

The type of financial assistance which is prohibited under the SIS legislation is not defined. However, the ATO has indicated that it would cover transactions such as providing guarantees for the private loans of members or the charging of fund assets for the benefit of members.

## THE SOLE PURPOSE TEST

The Trustees of the Superannuation Fund must have regard to a number of superannuation covenants and operating standards. Firstly, the Trustees must ensure that the Fund is maintained for one of the core purposes (and ancillary purposes) which is known as the sole purpose test under the Superannuation Industry (Supervision) Act ("SIS Act"). Generally speaking, this means that decisions of the Trustees must be with the purpose of providing retirement benefits for the members and the dependants of the Fund. The test may be summarised as one in which the Trustees must constantly measure their actions against whether, at the end of the day, the principal motivation for undertaking the investment is the provision of a benefit to members or dependants on or after retirement.

It is therefore critical that the Trustees ensure that the members or dependants of a Fund are not acquiring a significant benefit during their working life. Where the Trustees of a Fund acquire a permitted asset from a member and subsequently rent to a third party, a member or members of the fund or the member's employer then, where the rental is undertaken on an arms length and commercial basis and is seen to be so, the acquisition is within the sole purpose test. That there may be seen to be an intermingling of interest is irrelevant for the sole purpose test. The Trustees must merely believe that they were pursuing one of the core purposes or a core and ancillary purpose being the provision of a retirement benefit etc to members and dependants of members.

Provided the investment by the Superannuation Fund has the purpose of providing retirement benefits to members, there is no reason why the Fund cannot enter into a commercial arms length agreement with any tenant (including a tenant who is associated in some way with the Fund).

## INVESTMENT STRATEGY

The property acquisition by the Superannuation Fund needs to form part of an overall Fund investment strategy. The requirement to have an investment strategy is a covenant of every superannuation fund and is an operating standard for self managed funds. It is therefore essential that an investment strategy be in place before Trustees make investment decisions. The Superannuation Fund Trustees must have regard to a number of factors in putting together an investment strategy for the Fund. These include:

- (a) diversity and flexibility in the investment or asset type;
- (b) risk associated with the investment;
- (c) capital and income growth; and
- (d) the need to be able to readily realise the investments having regard to the age and requirements of the members of the Fund.

Presumably, the Superannuation Fund already has a wide spread of investment. Nevertheless, there is no prohibition on the Fund investing in the property at the present time which initially may result in the Fund only holding a single asset investment provided the Fund Trustees have considered the above investment strategy factors. It may be desirable that the investment strategy for the Fund in question provide for a diversity of investments other than in the property. Providing action is taken to implement investment diversity for the Fund, there is no prohibition on the Superannuation Fund having an investment in just the property at this time.

## OTHER PROHIBITIONS

In addition to the Trustees responsibility to formulate and give effect to an investment strategy, the Trustees when making investments must abide by the rules on borrowings, arms length investments, in-house assets and purchase of assets from members. Every investment must both:

- (a) be in accordance with the investment strategy; and
- (b) not break any other SIS rules.

## IN-HOUSE ASSETS

At the end of each financial year, the in-house assets held by a Fund cannot exceed more than 5% of total Fund assets. An in-house asset is defined as a loan to or an investment in or a lease to a Fund member or a related party of the Fund. The in-house asset rules will not apply to the investment in the property as it is not a loan to or investment in a member or a related party. Business real property that is leased by a fund to a member or a related party on arms length and commercial terms exempted from the in-house asset rule.

The in-house asset rules will not apply in relation to the investment by the Superannuation Fund in the property as the asset of the Fund is not a loan or investment in an employer. Secondly, the Superannuation Fund which has been established is a members sponsored fund and does not fall within the definition of a "standard employer sponsor" which raises in-house asset consideration.

## OTHER ISSUES

### Co-Ownership

A Fund can be an owner of property in conjunction with other parties. However, as a co-owner, it is critical to ensure that co-owners are registered as tenants in common. In addition, the nature of co-ownership means that the investment restrictions that apply to Funds effectively apply to the other co-owner.

Where the Fund is not the sole owner of property, it is recommended that a form of Co-owners Agreement be in place between the Fund and the other owners(s). The Fund may have specific requirements which this firm can incorporate into such an Agreement. The form of Agreement typically used by this firm provides for:

- contribution of expenses and liabilities in proportion to ownership
- distribution of income in proportion to ownership
- acknowledgement by other owner that due to SMSF involvement certain restrictions will apply to the property
- the manner in which the parties will deal with the property in the event that either owner wishes to dispose of their property interest.

### Leases

Market rental needs to be paid by the tenant and it is recommended for audit and ATO purposes that the Fund have documented evidence of how the market rental is determined. The rental arrangements need to be no better nor no worse than that which would have been entered into with any other party who wishes to rent the property. Where the property is leased to the member or an associated of the member, the tenant should not receive any more favourable treatment merely because the tenant is related.

Rent received by a Fund which is more than it would have been expected to derive if it had been dealing with a tenant on an arms length basis is considered by the ATO to be non-arms length income (NALI). Any income considered by the ATO to be NALI loses concessional tax treatment and instead is taxed at the highest marginal rate. A Fund must have evidence of how it determined the market value of rent where a tenant is a Fund member or a related party if it is to avoid NALI treatment of rental income.

It is recommended for audit and ATO purposes, that a current written lease be in place between the Fund as owner and the tenant.