

# WILL THE CHANGES TO BORROWING ARRANGEMENTS BY SUPERANNUATION FUNDS AFFECT YOU OR YOUR CLIENTS?



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The Federal Government has made<sup>1</sup> a number of changes to superannuation law<sup>2</sup> for the purpose of reducing the risks for superannuation funds investing in limited recourse borrowing arrangements. The legislation provides further guidance to trustees of superannuation funds but will also prohibit or have the effect of limiting arrangements which were previously allowable.

Super fund trustees, advisers and super fund managers should review past and pending instalment warrant arrangements, then consider and if necessary seek advice as to the implications of the new law.

## **What will change?**

The concerns the legislature was seeking to address include:

- the use of personal guarantees to underwrite the lender's risk in the borrowing arrangement. (This will limit guarantor's recourse to the acquired asset.)
- the use of borrowing arrangements over multiple assets which have potential to allow the lender to choose which assets are sold in the event of a default on the loan.
- arrangements where the asset subject to the borrowing can be replaced at the discretion of the trustee or the lender.

## **What are "Acquirable Assets"?**

The types of assets which may be acquired under an instalment warrant type arrangement has been clarified and limited. The Act introduces a concept of "acquirable assets".<sup>3</sup> These include:

- an asset which neither the Superannuation Industry (Supervision) Act 1993 nor any other law prohibits the super fund trustee from acquiring; and
- a collection of identical assets that have the same market value (for example, a collection of ordinary shares in a single company) and the same rights.

## **What do not constitute "Acquirable Assets"?**

- money.
- a collection of shares in a single company that have different rights (for example, ordinary and preference shares).

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<sup>1</sup> Superannuation Industry (Supervision) Amendment Act 2010

<sup>2</sup> The Act replaces section 67(4A) with a new section 67A

<sup>3</sup> Section 10(1) definition to be inserted into the Superannuation Industry (Supervision) Act 1993

- a collection of units in a unit trust of different classes that have different rights attached to them or are potentially subject to differing trustee discretion.
- a collection of shares in different entities.
- a collection of buildings each under separate strata title, irrespective of whether the buildings are substantially the same at the time of acquisition.

Where a collection of items comprises the asset the whole collection must be acquired or disposed of at the same time and cannot be partially disposed of over time.

These provisions will not preclude superannuation funds from acquiring certain assets merely from bundling them into one borrowing transaction. This has potential to force trustees to enter into multiple borrowing arrangements where formerly one was possible.

### **Refinancing**

The new laws clarify that it is possible to refinance existing limited recourse borrowing arrangements<sup>4</sup>.

If a super fund trustee refinances a borrowing, or there are significant changes to the arrangement which could be considered to be a new arrangement being put in place then the amended law will apply to the arrangement. This means the trustees who have borrowed to acquire a bundle of assets such as a portfolio of shares may have difficulty in refinancing such an arrangement if the underlying assets would no longer fall within the definition of an acquirable asset.

A re-negotiation of a borrowing with the same lender that is simply a variation of a loan contract that continues to exist will not be subject to the laws. However, where the re-negotiation amounts to a rescission or replacement of the original contract this will be regarded as a refinancing and the amended legislation will apply to the arrangement.

### **What may the borrowed funds be used for?**

In addition to the price paid for the asset acquired, costs of acquiring the underlying asset can be included in the borrowing. This would include conveyancing costs, stamp duty, brokerage or loan establishment costs.

### **Changes to Replacement assets**

The amending Act contains a number of provisions relating to replacement assets and the explanatory memorandum gives specific examples. Where the nature of the underlying asset changes, careful consideration should be given as to whether the superannuation fund is able to maintain the borrowing. For example, draw downs to pay for capital improvements to real property were previously allowed as this enhanced the value of the asset to the superannuation fund and may create a replacement asset.

Under the changes a replacement by way of improvement of real property will not constitute a replacement asset.

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<sup>4</sup> 67A(1)(a)(ii) is inserted into the Superannuation Industry (Supervision) Act 1993

### Limited Recourse

The amendments extend the limited recourse nature of the borrowings by limiting the rights of the lender or any other person against the superannuation fund trustee for default on a borrowing to rights relating to the acquirable asset. In this way, a guarantor's rights against the superannuation fund trustee are limited as the rights of the lender are limited, so that no claim against the superannuation fund trustee should arise which could give rise to a claim for indemnity from fund assets.

**This broad summary has been provided for your general information. Clearly each situation will depend upon the relevant facts and circumstances. Should you require any particular advice please do not hesitate to contact Fiona Sonntag, Argyle Property Solutions.**



Fiona Sonntag is a Principal with Argyle Lawyers practicing in commercial and property areas with a specialty in superannuation borrowing arrangements.

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