



# SMSF Association National Conference 2019

Related parties – who are they? Who *aren't* they? Why do we care?

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**SMSF**  
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## 1. Introduction : why do we care about related parties?

### 1.1. Various rules imposed on transactions between trustee(s) of a superannuation fund and a related party of the fund

The concept of a “related party” is relevant for all superannuation funds, including self managed superannuation funds (“SMSFs”) as the Superannuation Industry (Supervision) Act 1993 (“SISA”) and associated Regulations (“SISR”) impose various rules on transactions between the trustee(s) of a superannuation fund and a related party of the fund.

### 1.2. Rules imposed?

Some of the rules imposed on transactions between the trustee(s) of a superannuation fund and a related party of the fund are outlined below.

#### 1.2.1 The acquisition of an asset from a related party (or a member) is prohibited altogether unless an exception applies to the asset

The acquisition of an asset from a related party (or a member) is prohibited altogether [SISA s.66(1)] unless an exception applies to the asset.

Common exceptions to this prohibition on acquisition include where the asset is:

- a *listed security* (eg an asset listed on an approved stock exchange (within the meaning of the ITAA 1997) [SISA s.66(2)(a)],
- *business real property* of the related party but only in cases where the acquiring fund is an SMSF or a small APRA fund (“SAF”) (ie the acquiring fund has fewer than 5 members) [SISA s.66(2)(b)],
- an *in-house asset* (within the meaning of SISA s.71(1)) of the fund [SISA s.66(2A)(a)(i)]. Note that while a fund *can* acquire an in-house asset from a related party because of this exception, the fund cannot acquire an in-house asset if doing so would result in the aggregate of the fund’s in-house assets exceeding 5% of the market value of the fund’s assets at that time [SISA s.83],
- specifically excluded from being an in-house asset because the asset is an investment in an “ungeared” company or trust that satisfies the conditions in SISR Division 13.3A – often referred to as an *investment in a “13.22C” trust or company* [SISA s.66(2A)(a)(iv), SISA s.71(1)(j)],
- an investment in a *widely held unit trust* [SISA s.66(2A)(a)(iv), SISA s.71(1)(h)]. A unit trust is “widely held” if the top 19 unitholders own less than 75% of the units, or are entitled to less than 75% of the trust’s income [SISA s.71(1A)],
- transferred directly from another regulated superannuation fund because of reasons directly connected with the *breakdown of a relationship* between spouses (or former spouses) and the asset represents all or part of the member’s own interests or entitlements payable from the transferring fund [SISA s.66(2B)], or

- the asset is an asset of a kind which the Regulator, by legislative instrument, determines may be acquired from a related party [SISA s.66(2)(d)]

and, the asset is acquired at market value.

### 1.2.2 Investments “in” related parties / loans to / assets leased to related parties subject to 5% limit

While a superannuation fund is permitted to:

- lend to and invest in a related party of the fund (although note that loans or financial assistance to members or to relatives of members is generally prohibited [SISA s.65]),
- invest in a related trust of the fund (discussed further below), or
- lease an asset of the fund to a related party of the fund

the **fund’s investment / asset will be an in-house asset unless an exception applies to the asset** [SISA s.71 (1)].

The SISA imposes a **5% limit on the total amount of in-house assets** a superannuation fund can hold and this limit is applied at:

- as outlined above, the time the in-house asset is acquired [SISA s.83]. If this limit is exceeded at the time an in-house asset is acquired, the fund will have illegally acquired the asset (or such portion of the asset that exceeds the 5% limit), and
- each 30 June [SISA s.82]. If this limit is exceeded at 30 June of a particular year (ie year 1), the fund will be required to take action to dispose of the “excess” amount by the *following* 30 June (ie year 2) [SISA s.83] – failure to take the required action by 30 June of year 2 will result in a contravention of the in-house asset provisions at that time.

Assets that are commonly excluded from being an in-house asset of an SMSF include:

- investments in “13.22C” trusts or companies,
- business real property leased to a related party (ie real property subject to a lease, or lease arrangement enforceable by legal proceedings [SISA s.71 (1)(g)]), and
- certain assets held by the fund prior to 11 August 1999, or certain new assets acquired after that date but prior to 1 July 2009 under transitional rules [SISA s.71 (A) – (F)].

### 1.2.3 Collectables

The SISA and SISR impose rules on SMSFs that hold “**collectables**” [SISA s.62A. SISR 13.18AA(1)], ie assets including artwork, jewellery, antiques, artefacts, coins or medallions or bank notes, postage stamps or first day covers, rare folios, manuscripts or books, memorabilia, wine or spirits, cars, recreational boats, memberships of sporting or social clubs, or any asset of a kind ordinarily used or kept mainly for personal use or enjoyment (not including land).

In the context of transactions between a trustee of an SMSF and related parties, a collectable must not be:

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- leased (including a lease arrangement) to a related party [SISR 13.18AA(2)],
- stored in the private residence of a related party [SISR 13.18AA(3)],
- used by a related party [SISR 13.18AA(6)].

In addition, any collectable sold to a related party must be done at a market value determined by a qualified independent valuer.

## 2. What is a related party of a superannuation fund?

A related party, of a superannuation fund, means any of the following [SISA s.10(1)]:

- a member of the fund,
- a standard employer-sponsor of the fund (see Section 4), or
- a Part 8 associate of an entity referred to above.

The Part 8 associates of a member are explored further in Section 3 and will include [SISA s.70B]:

- the relatives of the member,
- if the superannuation fund is an SMSF or a SAF, the *other* member(s) of that SMSF / SAF,
- if the superannuation fund is a single member SMSF, all directors of the corporate trustee or all individual trustees,
- if a member is a partner in a partnership, the member's partner (and their spouse or child if the partner is an individual) and the partnership itself,
- a trust, where the member and / or their Part 8 associates "control" the trust, and
- a company, where the member and / or their Part 8 associates "control" the company.

Standard employer-sponsors, and the Part 8 associates of a standard employer-sponsor, are explored in Section 4. Note, however, that it is not common for an SMSF to have a standard employer-sponsor and, if no standard employer-sponsor exists for a superannuation fund, the related parties of a superannuation fund will be limited to the member(s) of that fund and the Part 8 associates of the member(s).

### 3. Part 8 associates of a member?

The Part 8 associates of a member of a superannuation fund will include the following [SIS s.70B].

#### 3.1 Relatives of each member [SIS s.70B(a)]

The relatives of each member of a superannuation fund will be a Part 8 associate of the relevant member and therefore a related party of the fund. The relatives of a member for this purpose are specifically defined as [SISA s.10(1)]:

- a parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendant or adopted child **of the member**,
- a parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendant or adopted child **of the member's spouse**, or
- a spouse of the member or of any individual referred to in the above paragraphs.

Points to note:

- a spouse for this purpose includes de facto and same sex spouse, but *not* a former spouse [SISA s.10(1)],
- a lineal descendant means any relative in the direct line of descent, ie children, grandchildren, great-grandchildren etc , and
- if one person is the child of another person, ie they are:
  - an adopted child, a stepchild or an ex-nuptial child of the person,
  - a child of the person's spouse, or
  - a child of the person within the meaning of the Family Law Act 1975

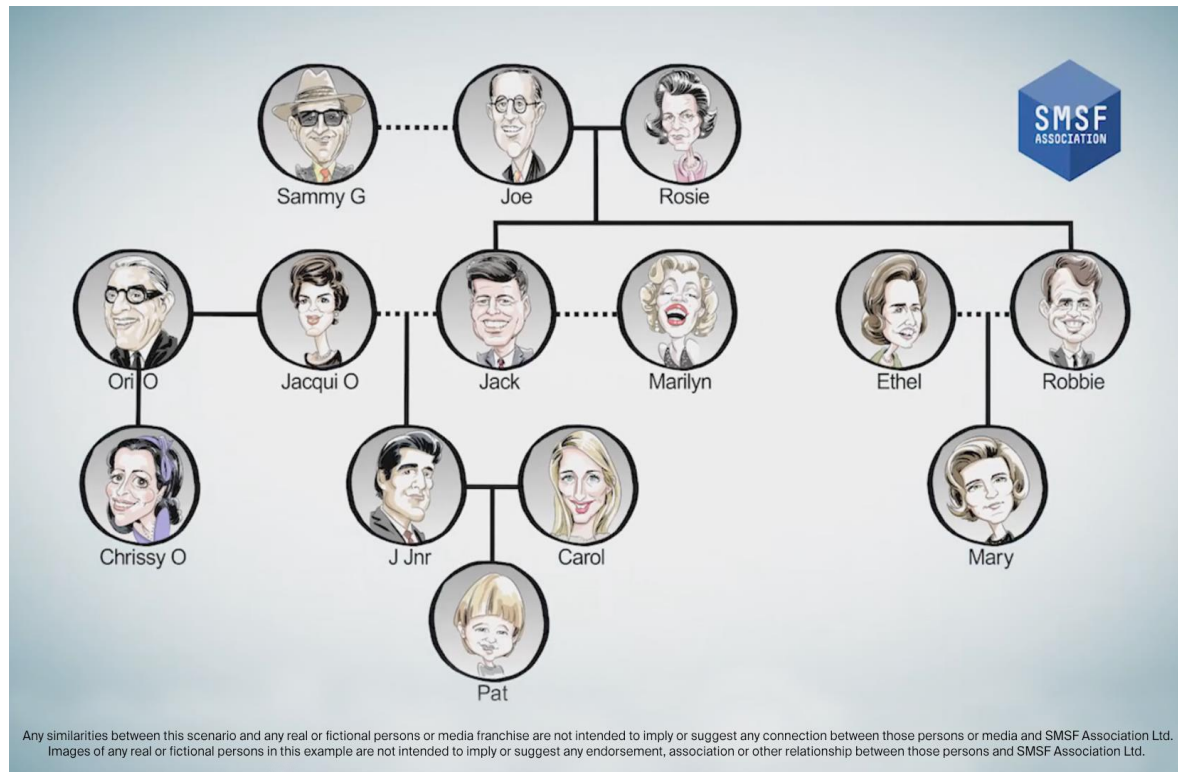
relationships are to be traced to, from or through that first person in the same way as if they were the natural child of the other person. This means, for example, that a "step" relative (eg a step sibling) or a "de facto" relative (eg, a "sibling" or "niece" of a de facto relationship) is a relative for this purpose [SISA s.10(5)]. Treading through this area can be tricky with mixed families, so care should be taken.



Given that a member's relatives for Part 8 associate / related party purposes are the prescribed list of individuals as outlined above, it's important not to extend beyond that prescribed list and include, say, individuals that would ordinarily be considered a relative in a familial context.

To clarify, only the relatives of a *member* as defined above are considered to be a Part 8 associate of the member, and thereby a related party of the fund.

*Using the family tree below, consider the following examples*



Note that:

- Joe and Rosie are married and they have two sons, Jack and Robbie,
- Jack is legally married to Jacqui O, but they have been separated for many years. Jack has been living in a de facto relationship with Marilyn for 20 years while Jacqui O has been living in a de facto relationship with Ori O for 12 years,
- Jack and Jacqui O have a son J Jr. J Jr is married to Carol and they have a son Pat,
- Ori O has a daughter, Chrissy O,
- Robbie is a widow (he was married to Ethel, who died 15 years ago). He has a daughter, Mary, and
- Sammy G has no familial relationships with anyone in the family.

**Example 1 :** Jacqui O is the *sole* member of her SMSF. Her “relatives” for Part 8 associate purposes include:

- a parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendant or adopted child of hers. In Jacqui O’s case, J Jr and Pat are her lineal descendants, and Mary is her niece (ie the child of her brother-in-law),
- a parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendant or adopted child of her spouse. Jacqui O has 2 two spouses – Jack to whom she is legally married, and Ori O her de facto spouse. This means that Jacqui O’s relatives for Part 8 associate purposes include:

- Joe and Rosie (Jack's parents),
- Robbie (Jack's brother),
- Mary (the child of Jack's brother – her niece), and
- Chrissy O (Ori O's lineal descendant),
- a spouse of hers, or of any individual referred to above. This means that both of Jacqui O's spouses, Jack and Ori O, are relatives for Part 8 associate purposes, as is Carol (J Jr's spouse).

In addition, while of no additional utility in this example, because of the "tracing" rules outlined earlier [SISA s.10(5)], Chrissy O (the child of Jacqui O's de facto spouse) is also considered Jacqui O's natural child for these purposes – Chrissy O would therefore be considered a lineal descendant of Jacqui O's for Part 8 associate purposes.



At this point you have identified all of Jacqui O's relatives for Part 8 associate purposes.

Note that while Marilyn is a relative of Jack's (his de facto spouse), she is *not* a relative of Jacqui O's.

All of Jacqui O's relatives (as outlined above) are her Part 8 associates, and they are each a related party of her SMSF.

**Example 2 :** Ori O is the *sole* member of his SMSF. His "relatives" for Part 8 associate purposes include:

- a parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendant or adopted child of his. In Ori O's case, Chrissy O is his lineal descendant,
- a parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendant or adopted child of his spouse. Jacqui O's lineal descendants are J Jr and Pat, and
- a spouse of his, or of any individual referred to above. This means that Ori O's spouse Jacqui O is a relative for Part 8 associate purposes, as is Carol (J Jr's spouse).

In addition, while of no additional utility in this example, because of the "tracing" rules outlined earlier [SISA s.10(5)], J Jr (the child of Ori O's de facto spouse) is also considered Ori O's natural child for this purpose – J Jr would therefore be considered a lineal descendant of Ori O's for Part 8 associate purposes.



At this point you have identified all of Ori O's relatives for Part 8 associate purposes.

Note that while Jacqui O's relatives (in example 1) include members of Jack's family because he is her spouse, they are not included as Ori O's relatives because Jack is not Ori O's spouse.

All of Ori O's relatives (as outlined above) are his Part 8 associates, and they are each a related party of his SMSF.

If Jacqui O and Ori O were members of the *same* SMSF, each of their relatives for Part 8 associate purposes (combined) would be a related party of the SMSF. This means that everyone except Marilyn would be a related party to that SMSF.

**Example 3 :** Jacqui O and Jack are the members of an SMSF. The relatives of the members for Part 8 associate purposes include:

- a parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendant or adopted child of each member. This means that the member's relatives for Part 8 associate purposes include:
  - Joe and Rosie (Jack's parents),
  - Robbie (Jack's brother),
  - Mary (Jack's niece), and
  - J Jr and Pat (Jacqui O and Jack's lineal descendants),
- a parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendant or adopted child of each member's spouse. This means that the member's relatives for Part 8 associate purposes includes Chrissy O (as she is the lineal descendant of Jacqui's de facto spouse), and
- a spouse of each member, or of any individual referred to above. This means that Ori O (Jacqui O's de facto spouse) and Marilyn (Jack's de facto spouse) are also relatives for Part 8 associate purposes, as is Carol (J Jr's spouse).

In this example, everyone in the family tree diagram above (with the exception of Sammy G) is a relative of one, or both, of the members of the SMSF for Part 8 associate purposes and they are each a related party of the SMSF.

**Example 4 :** J Jr is the sole member of his SMSF. J Jr's "relatives" for Part 8 associate purposes include:

- a parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendant or adopted child of his. In J Jr's case, this includes:
  - Jacqui O and Jack (parents),
  - Joe and Rosie (grandparents),
  - Robbie (uncle), and
  - Pat (lineal descendant),
- a parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendant or adopted child of his spouse. Aside from Pat (her lineal descendant), Carol does not have any of these, and
- a spouse of his, or of any individual referred to above. This means that J Jr's spouse Carol is a relative for Part 8 associate purposes, as is Ori O (Jacqui O's de facto spouse), Marilyn (Jack's de facto spouse).

In addition, because of the "tracing" outlined earlier [SISA s.10(5)], Chrissy O is also a relative of J Jr's for Part 8 associate purposes. To recap, Chrissy O is the child of Jacqui O's de facto spouse and relationships traced to, from or through Chrissy are done in the same way as if she was Jacqui O's natural child. This means that Chrissy O is the sister of J Jr for Part 8 associate purposes.

As all of the individuals above are a relative of J Jr's for Part 8 associate purposes, they are each a related party of his SMSF.

Note, however, that Mary (J Jr's cousin) is *not* J Jr's relative for Part 8 associate purposes and is therefore not a related party of his SMSF.

**Example 5** : Robbie is the sole member of his SMSF. Robbie's "relatives" for Part 8 associate purposes include:

- a parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendant or adopted child of his. In Robbie's case, this includes:
  - Joe and Rosie (parents),
  - Jack (brother),
  - J Jr (nephew), and
  - Mary (lineal descendant),
- a parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendant or adopted child of his spouse. Robbie does not have a spouse (as Ethel has already died) so this limb does not capture anyone, and
- a spouse of his, or of any individual referred to above. This means that both of Jack's spouses (Marilyn his de facto spouse and Jacqui O to whom he is married) is a relative of Robbie's for Part 8 associate purposes, as is Carol (the spouse of his nephew).

In addition, because of the "tracing" outlined earlier [SISA s.10(5)], Chrissy O is also a relative of Robbie's for Part 8 associate purposes. This is because Chrissy O (ie the child of Jacqui O's de facto spouse) is considered to be Jacqui O's natural child, and as Jacqui O and Jack are married, Chrissy O is Robbie's niece (ie the child of his brother's wife, or of his sister-in-law) for the purposes of Part 8 associates.

As all of the individuals above are a relative of Robbie's for Part 8 associate purposes, they are each a related party of his SMSF.



Note that for Part 8 associate purposes:

- while Ori O is a relative of Jacqui O's (ie her de facto spouse), he is *not* Robbie's relative, and likewise
- Pat (Robbie's great or grand nephew - ie his brother Jack's grandson) is *not* Robbie's relative.

This means neither Ori O nor Pat are Part 8 associates of Robbie's and are therefore not a related party of Robbie's SMSF.

Importantly, the "tracing" outlined above only applies to treat a person as the natural child of another. It does not extend to any other relationships.

### 3.2 Other members of an SMSF or SAF [SISA s.70B(b)]

Each member of an SMSF or SAF will be a Part 8 associate of any other member of that SMSF / SAF.

### Consider the following example

Joe is the member of 2 SMSFs:

- JR Super Fund of which Joe and his wife Rosie are the members, and
- Prez Property Super Fund of which Joe and his good friend Sammy G are the members.

Because they are each a member of the same SMSF, Joe is a Part 8 associate of Sammy G's and vice versa.

When considering the related parties of the *other* SMSF of which Joe is a member (ie JR Super Fund), because Sammy G is a Part 8 associate of Joe's, he will be a related party of the JR Super Fund.

### 3.3 Single member SMSFs : all directors of the corporate trustee / all individual trustees [SISA s.70B(b)]

For **single** member SMSFs:

- in cases where the SMSF has a corporate trustee, each director of the corporate trustee, or
- in cases where the SMSF's trustees are individuals, those individuals

will be a Part 8 associate of the member and therefore a related party of the fund.

Note that a director or individual trustee acting in that role *in place* of the member of a *single* member SMSF would be a Part 8 associate of the member and thereby a related party of the SMSF. A director or individual trustee acting *in place* of the member could arise in a number of cases, for example:

- the member has granted an Enduring Power of Attorney to an individual and that individual acts in place of the member [SISA s.17A(3)(b)(ii)],
- the legal personal representative of a member under a legal disability acts in place of the member [SISA s.17A(3)(b)(i)], or
- the parent or guardian of a minor member, where the minor member does not have a legal personal representative, acts in place of the member [SISA s.17A(3)(c)].

In contrast, a director or individual trustee acting in that role *in place* of the member of a *multiple* member SMSF would *not* be a Part 8 associate of the member, and therefore *not* a related party of the SMSF. While this difference appears counter intuitive, it is simply a result of the definition of Part 8 associates of a member.

Remember not to extend too far!

Say J Jr was the sole member of an SMSF, and the SMSF had 2 directors of the corporate trustee or 2 individual trustees – where J Jr is one of the directors / individual trustees, together with Will (his life coach and friend). While each of J Jr's (the member) relatives would be a Part 8 associate of his and thereby a related party of the SMSF, the relatives of Will - the "other" director / individual trustee - would *not* be a Part 8 associate of the member, and therefore not a related party of the SMSF.



Likewise, the relatives of any director or individual trustee that is acting in place of a member would *not* be a Part 8 associate of the member / related party of the SMSF.

### 3.4 Member is a partner in a partnership : the member's partner (and their spouse or child if the partner is an individual) and the partnership [SISA s.70B(c), SISA s.70B(d)]

If a member of a superannuation fund is a partner in a partnership:

- the member's partner,
- the spouse [SISA s.10] or child [SISA s.10] of the member's partner (should that partner be an individual), and
- the partnership itself

will each be a Part 8 associate of the member and therefore a related party of the fund.

"Partnership" for this purpose [SISA s.70E(4), ITAA 1997 s.995-1(1)] includes an association of persons:

- carrying on business as partners, or
- in receipt of ordinary **income** or statutory **income** jointly

and specifically *excludes* a company or a limited partnership (ie a partnership where the liability of at least one partner is limited).

The latter limb means that if a member of a superannuation fund receives income jointly with another individual or entity, that other individual or entity will be a partner of the member for the purposes of Part 8 associates. This could arise in cases where the member owns an income producing investment asset (eg real property, shares etc) as joint tenants or as tenants in common with another individual or entity.

Points to note:

- Not everyone "described" as a "partner" is actually a partner!

It is not uncommon for directors of a company through which a business is run to describe their co-directors as "partner". As mentioned above a company is specifically excluded from being a partnership, and directors of the company cannot be considered partners in a partnership.

Similarly, sometimes shareholders of a company describe their co-shareholders as "partner". Simply being shareholders in a company does not cause the shareholders to be partners in a partnership. The same applies for unitholders in a unit trust.

- In some cases, joint venturers are considered partners and in other cases they are not!

Unlike partners that are in receipt of **income** jointly, joint venturers share in the **product or output** of the activity (and also the costs), but not profits. As such, one party to a joint venture would *not* be considered a Part 8 associate of another party to the joint venture.

Note, however, that the devil will be in the detail. The agreement between the parties should be examined to ascertain whether income / profit is being received jointly or whether product or output will be shared amongst the parties – this will determine whether the parties involved are partners (and thereby Part 8 associates of each other) or not.

### 3.5 Trust controlled by a member and / or the member's Part 8 associates [SISA s.70B(e)]

If a member of a superannuation fund and / or their Part 8 associates “controls” a trust, the trustee of the trust (in the capacity of trustee of that trust), will be a Part 8 associate of the member, and will be a related party of the superannuation fund.

When ascertaining whether a member and / or their Part 8 associates “controls” a trust, the member together with their Part 8 associates will be considered as a “group”.

A trust will be controlled by a group if [SISA 70E(2)]:

- the group has a fixed entitlement to more than 50% of the capital or income of the trust,
- the trustee of the trust, or a majority of the trustees of the trust, is accustomed or under an obligation (whether formal or informal), or might reasonably be expected, to act in accordance with the directions, instructions or wishes of the group, or
- the group is able to remove or appoint the trustee, or a majority of the trustees, of the trust (note the trust deed of the trust would generally prescribe who has the power to remove or appoint the trustee (or a majority of the trustees). If the trust deed of the unit trust does not prescribe who has these powers, the powers would be prescribed by the trustee act of the relevant state).

Trusts that are controlled by a member and their Part 8 associates are known as “**related trusts**” [SISA s.10(1)].

#### Consider the following example

The unitholders of a unit trust are as follows:

- 1/3<sup>rd</sup> Joe and Rosie’s SMSF (they are each members and individual trustees of the SMSF),
- 1/3<sup>rd</sup> Sammy G’s SMSF,
- 1/3<sup>rd</sup> Ori O personally.

The trust deed for the unit trust states that unit holders unanimously have the power to remove or appoint the trustee of the unit trust.

The unit trust has a corporate trustee. Joe, Sammy G and Ori O are all directors of the corporate trustee and they each have equal voting rights. In addition, Joe, Sammy G and Ori O are the shareholders of the company (and again, they each have equal voting rights).

If Jacqui O was the sole member of an SMSF, her relevant Part 8 associates would include:

- the trustees of Joe and Rosie's SMSF (in their capacity as trustee of the SMSF – remember an SMSF is a trust) – this is because Joe and Rosie are relatives of Jacqui O for Part 8 associate purposes, and they control their SMSF (a trust), and
- Ori O (her spouse) – also a relative for Part 8 associate purposes.

As the above “group” holds 2/3<sup>rd</sup> of the units of the unit trust, Jacqui O and her Part 8 associates control the unit trust and the trustee of that unit trust (in the capacity as trustee of the unit trust) will also be a Part 8 associate of Jacqui O's – essentially the unit trust will be a Part 8 associate of Jacqui O's, and thereby the unit trust will be a related trust (ie a related party) of her SMSF. This means that:

- Jacqui O's SMSF would be prohibited from acquiring assets *from* the unit trust, unless an exception applied to the asset,
- Jacqui O's SMSF *could* acquire units *in* the unit trust, however unless an exception applies, any units acquired by or held by Jacqui O's SMSF would be an in-house asset and subject to the 5% limits as outlined earlier. Note also that any units in the unit trust acquired by Jacqui O's SMSF *could* be acquired from a related party,
- Jacqui O's SMSF would be prohibited from leasing an asset to the unit trust, unless the asset was business real property, and
- any “collectable” owned by Jacqui O's SMSF could not be leased to the unit trust, used by the unit trust, or acquired by the unit trust (unless the market value of the collectable had been determined by a qualified independent valuer).

The same result would arise if J Jr was the member of his own SMSF. His relevant Part 8 associates would include:

- the trustees of Joe and Rosie's SMSF (in their capacity as trustee of the SMSF) – this is because Joe and Rosie are relatives of J Jr for Part 8 associate purposes, and they control their SMSF (a trust), and
- Ori O (the spouse of his parent – and also Ori O's lineal descendant under the “tracing” rules outlined above).

As the above “group” holds 2/3<sup>rd</sup> of the units of the unit trust, J Jr and his Part 8 associates control the unit trust and the trustee of that unit trust (in the capacity as trustee of the unit trust) will also be a Part 8 associate of J Jr's – essentially the unit trust will be a Part 8 associate of J Jr's, and thereby the unit trust will be a related trust (ie a related party) of his SMSF.

### Extending the example

In contrast, from the perspective of Joe and Rosie's SMSF (JR Super Fund), the Part 8 associates of Joe and Rosie would include:

- each of their relatives, ie:
  - a parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendant or adopted child of each of them. In each case their lineal descendants include Jack (child), J Jr (grandchild) and Pat (great-grandchild), together with Robbie (child) and Mary (grandchild),
  - a parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendant or adopted child of each of their spouses – ie the same as above, and
  - each of their spouses (ie each other) or of any individual referred to above. This means that both of Jack spouses, Jacqui O and Marilyn, are relatives for Part 8 associate purposes, as is Carol (J Jr's spouse),
- the *other* members of their SMSF (ie Rosie is the other member in Joe's case – and vice versa),
- if either member is a partner in a partnership, the partner (and the partner's spouse or child if the partner is an individual) and the partnership itself (neither member is a partner in a partnership),
- a trust, where the member and / or their Part 8 associates "control" the trust – this includes the SMSF, and
- a company, where the member and / or their Part 8 associates "control" the company – this includes "Better than Gold Financial Services" because 50% of the shares are owned by Joe and the other 50% are owned by Jack (a Part 8 associate).

As the above "group":

- only holds 1/3<sup>rd</sup> of the units of the unit trust (ie not more than 50% of the capital or income of the trust),
- does not have the power to remove or appoint the trustee of the unit trust, and
- does not appear to be directing or instructing the trustee of the unit trust (either formally or informally),

Joe, Rosie and their Part 8 associates do *not* control the unit trust and the trustee of that unit trust (in the capacity as trustee of the unit trust) will *not* be a Part 8 associate of theirs – the unit trust will therefore *not* be a Part 8 associate of theirs, and thereby *not* a related trust of their SMSF. This means that, in the context of Joe and Rosie's SMSF:

- it would *not* be prohibited from acquiring *assets from* the unit trust,
- it would, however, be prohibited from acquiring units in the unit trust from a related party (although note that no units are currently held by a related party at the moment in any event),
- any investment in the unit trust by the SMSF would *not* be an in-house asset and therefore *not* subject to the 5% limits as outlined earlier, and
- assets of the SMSF could be leased to the unit trust.

### Extending the example further

Say Joe and Sammy G personally owned some investment properties as tenants in common. This would make Sammy G a partner of Joe's for Part 8 associate purposes – and vice versa.

The “group” for Joe and Rosie’s SMSF would then hold 2/3<sup>rd</sup> of the units of the unit trust, and Joe and Rosie and their Part 8 associates would control the unit trust – essentially the unit trust would then be a Part 8 associate of theirs, and thereby a related trust of their SMSF.

### 3.6 Company “controlled by” a member and / or the member’s Part 8 associates [SISA s.70B(f)]

If a member of a superannuation fund and / or their Part 8 associates “sufficiently influences” or “holds a majority voting interest in” a company, the company will be a Part 8 associate of the member, and will be a related party of the superannuation fund.

In addition, in cases where a company is the *trustee* of a trust, if the corporate trustee itself is a Part 8 associate of the member, the *trust* will also be a Part 8 associate of the member and thereby a related party of the superannuation fund.

Note the following:

- a company is “sufficiently influenced” by an entity or entities if the company, or a majority of its directors, is accustomed or under an obligation (whether formal or informal), or might reasonably be expected, to act in accordance with the directions, instructions or wishes of the entity or entities [SISA s.70E(1)], and
- an entity or entities hold a majority voting interest in a company if the entity or entities are in a position to cast, or control the casting of, more than 50% of the maximum number of votes that might be cast at a general meeting of the company.

Once again, when ascertaining whether a member and / or their Part 8 associates “sufficiently influences” or “holds a majority voting interest in” a company, the member together with their Part 8 associates will be considered as a “group”.

#### Consider the following example

Joe and Jack are the directors of “Better than Gold Financial Services” - a company through which they run their finance business. The shares are owned 50 / 50 by Joe and Jack.

From the perspective of, say:

- Joe and Rosie’s SMSF, the company will be a Part 8 associate of Joe and Rosie, and therefore a related party of their SMSF because either:
  - the company is sufficiently influenced by Joe and his Part 8 associates (ie Jack is a relative of Joe’s and is therefore a Part 8 associate), or
  - Joe and Jack hold majority voting interest in the company,
- Jack’s SMSF (of which he and Marilyn are the members), the company will be a Part 8 associate of Jack, and therefore a related party of his SMSF because either:
  - the company is sufficiently influenced by Jack and his Part 8 associates (ie Joe is a relative of Jack’s and is therefore a Part 8 associate), or

- Jack and Joe hold majority voting interest in the company,
- Ori O's SMSF – of which he is the sole member - the company will *not* be a Part 8 associate of Ori O. This is because the group comprised of Ori O and his Part 8 associates are limited to:
  - his lineal descendants Chrissy O, together with J J Jr and Pat (the latter two due to the “tracing” outlined above),
  - the relatives of his spouse Jacqui O (ie her lineal descendants J Jr and Pat), and
  - his spouse Jacqui O, and the spouse of anyone referred to above (ie J Jr's spouse Carol).

Given the family structure outlined in the diagram earlier, with the exception of:

- Ori O's SMSF (where he is the sole member), or
- Pat's SMSF (if he was the only family member of that SMSF)

the company would be a related party of any SMSF where a family member was a member of that SMSF – this is because *both* Joe and Jack are Part 8 associates of everyone else!

### Consider another example

Jack is the sole member of his SMSF.

Jack and Ori O are the directors and shareholders (50% each) of a company called “Abacus”.

Jack, together with Abacus, own all the shares in a company called “Beta” as follows:

- 50% : Jack personally, and
- 50% : Abacus.

Jack, Ori and Ian (an independent CEO) are the directors of Beta, and each have equal voting rights.

Prime facie, Jack is entitled to 75% of the capital and income of Beta, ie:

- 50% from his own personal direct shareholding, and
- 25% indirectly from his 50% ownership interest in Abacus

and it may therefore *feel* like he “controls” Beta, and it would therefore be a Part 8 associate of his, and thereby a related party of his SMSF.

Remember not to extend too far. In this case, don't chase the money!

In order for Beta to be a Part 8 associate of Jack's, he and / or his Part 8 associates (ie, his “group”) would need to either:

- sufficiently influence Beta, or
- hold a majority voting interest in Beta (ie more than 50% of the maximum number of votes that might be cast at a general meeting of the company).

Jack is one of three directors of Beta, and neither of the other directors (ie Ori O or Ian) are a Part 8 associate of his. In the absence of anything to the contrary, he will not be in a position to sufficiently influence Beta.



While Jack may ultimately be entitled to 75% of the income and capital of Beta through his direct and indirect shareholdings, he and his Part 8 associates (which do *not* include Ori O nor Abacus) are only able to cast 50% of the votes at a general meeting of Beta. Consequently, Jack and his Part 8 associates do not hold a majority voting interest in Beta.

As Jack and his Part 8 associates do not sufficiently influence, nor have a majority voting interest in Beta, it will not be a Part 8 associate of Jack's.

## 4. Standard employer-sponsor of a fund?

### 4.1 What is a standard employer-sponsor?

An employer is a “standard employer-sponsor” of a fund, and thereby a related party of a fund, if the employer makes contributions to the fund because of an arrangement between the employer and the trustee(s) – **not** an arrangement between the employer and the member(s) - of the fund [SISA s.16(2)].

While an employer *is* an “employer-sponsor” of a fund if it contributes to a fund for the benefit of an employee [SISA s.16(1)], importantly it would **not** be a “**standard** employer-sponsor” of a fund if it contributes to the fund only because of an arrangement with the employee /member [SMSFR 2009/4 para 137].

**Note that it is not common for an SMSF to have a standard employer-sponsor.**

#### Consider the following example

Better Than Gold Financial Services (“BTGFS”) employs numerous people including Harry. As an employee of BTGFS, Harry has an arrangement with BTGFS for it to contribute to his nominated superannuation fund (an SMSF).

As BTGFS makes superannuation contributions to Harry’s SMSF, it *would* be an employer-sponsor of his SMSF [SISA s.16(1)].

However, as BTGFS has no association with Harry’s SMSF other than through the contribution arrangement it has with him as an *employee*, BTGFS is not a “**standard** employer-sponsor” of his SMSF. This means that BTGFS would **not** be a related party of Harry’s SMSF.

### 4.2 Part 8 associates of a standard employer-sponsor

If a superannuation fund has a standard employer-sponsor, the Part 8 associates of the standard employer-sponsor will depend on the structure of the employer, ie whether the employer is:

- an individual – ie a sole trader, or an individual trustee of a trust that is the standard employer-sponsor,
- a Company, or
- a Partnership.

#### 4.2.1 Standard employer-sponsor is an individual

In cases where the standard employer-sponsor is an individual (ie a sole trader, or an individual trustee of a trust) the same rules apply as for a member of a superannuation fund, ie the Part 8 associates of that individual will include:

- the relatives of the individual,
- if the individual is a partner in a partnership, the individual's partner (and the spouse or child of the partner if the partner is also an individual) and the partnership itself,
- a trust, where the individual and / or their Part 8 associates "control" the trust, and
- a company, where the individual and / or their Part 8 associates "control" the company.

#### 4.2.2 Standard employer-sponsor is a company

In cases where the standard employer-sponsor is a company, the Part 8 associates of the company will include [SISA s.70C, SMSFR 2009/4]:

- a partner of the company or a partnership in which the company is a partner, or the spouse or a child of an individual partner,
- a trustee of a trust (in the capacity of trustee of that trust), where the company controls the trust,
- another entity (the controlling entity) where the company is sufficiently influenced by, or a majority voting interest in the company is held by, the controlling entity, a Part 8 associate of the controlling entity or two or more of these entities,
- a Part 8 associate of the controlling entity, and
- another company (the controlled company) which is sufficiently influenced by, or in which a majority voting interest is held by, the company, a Part 8 associate of the company, or two or more of these entities.

#### 4.2.3 Standard employer-sponsor is a partnership

In cases where the standard employer-sponsor is a partnership, the Part 8 associates of the partnership will include [SISA s.70D, SMSFR 2009/4] a partner in the partnership and any Part 8 associates of those partners.

## 5. Regulator's powers in relation to in-house assets

Notwithstanding that a related party of a superannuation is specifically defined [SISA s.10(1)] as outlined in Sections 3 and 4 above, ie:

- a member of the fund,
- a standard employer-sponsor of the fund, or
- a Part 8 associate of an entity referred to above

the Regulator (ie the ATO in the case of SMSFs) has power to make a determination to treat an asset, ie

- a loan to,
- an investment in, or
- an asset subject to a lease or lease arrangement with

a party that is *not* a related party of the fund (and therefore *not* an in-house asset by definition) as though it *is* an in-house asset [SISA s.71(4)] to which the 5% limits would apply at the time of acquisition and each 30 June thereafter. This effectively means the Regulator has power to treat a party that is *not* a related party as though it *is* a related party for the purpose of the in-house asset provisions.

The ATO recently applied this power to an SMSF (ie Aussiegolfa Pty Ltd as trustee for The Benson Family Superannuation Fund). Ultimately, however, the Federal Court [Aussiegolfa Pty Ltd (Trustee) v Commissioner of Taxation [2017] FCA 1525] found that the asset *was* an in-house asset by definition and consequently the Regulator did *not* have the power to apply this provision (SISA s.71(4)) to the SMSF – remember the Regulator only has power to deem an asset to be an in-house asset in cases where the asset is **not** an in-house asset by definition. The Court mentioned, however, that if the asset had not been an in-house asset by definition then the Regulator's determination to deem it an in-house asset would have stood.

Since the Aussiegolfa case, the SMSF Regulator has issued a decision impact statement which states it will continue to consider issuing a determination under [per SISA s.71(4)] as appropriate in circumstances where an SMSF trustee enters into an arrangement to acquire an asset that would otherwise be an in-house asset [per SISA s.71] if directly held by the SMSF.

## 6. Anti Avoidance

The SISA contains various anti-avoidance provisions in relation to schemes designed to:

- avoid the prohibition on acquiring assets from members or related parties (apart from assets where an exception applies) [SISA s.66(3)]. This means the trustee of a superannuation fund must not enter into or carry out a scheme designed to avoid the prohibition, or
- artificially reduce the value of a superannuation fund's in-house assets, ie
  - a loan to,
  - an investment in, or
  - an asset of the fund leased to

a related party of fund, in order to avoid the application of the 5% limit at the time the asset is acquired or each 30 June thereafter [SISA s.85].

Importantly, note that these provisions apply to any person involved in the scheme – which could include advisers, accountants etc – not just the trustee of the superannuation fund.

## 7. Conclusion

Given the various rules that apply to transactions between trustee(s) of a superannuation fund and a related party of the fund, ie:

- the acquisition of an asset from a related party (or a member) is prohibited altogether unless an exception applies to the asset,
- investments “in” / loans to / assets leased to related parties are subject to a 5% limit, and
- any collectable must not be leased to (including a lease arrangement) / stored in the private residence of / used by a related party (and any collectable sold to a related party must be done at a market value determined by a qualified independent valuer)

it is critical to understand the related parties of an SMSF.

Sometimes, identifying the related parties of an SMSF is often quite complex given the familial, business and financial arrangements our SMSF members have with other parties – and in some cases it seems to be never ending. It is important, therefore, to simply apply the rules and, in particular, know when to stop!