




**VENTURE INTO SMSF
PROPERTY DEVELOPMENT**

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#NC2020



Tim Miller
Education Manager, SuperGuardian



Tim Miller is one of Australia's leading SMSF educators and presenters with over 23 years' experience in the Superannuation industry. His experience has been gained through providing legislative and compliance support to thousands of Trustees, Accountants and Financial Planners since joining the SMSF sector in 1999. In addition to servicing the needs of SMSF clients, his practical and personable approach to compliance has made him a regular presenter on the SMSF circuit. Tim regularly presents at the major SMSF conferences and events, contributes to various trade and general publications and is the author of one of the subjects of the SMSF Association Graduate Certificate delivered through the University of Adelaide and Kaplan, this subject also forms part of the CA ANZ SMSF specialist program. Tim is an SMSF Association Specialist Advisor.



Learning Outcomes

At the end of the session attendees will:

- Understand who is a **related party** in connection with a property development
- Identify the **key legislative provisions** that apply to property development for SMSFs
- Distinguish between transactions that are allowable from those that are not

Princely Housing Pty Ltd



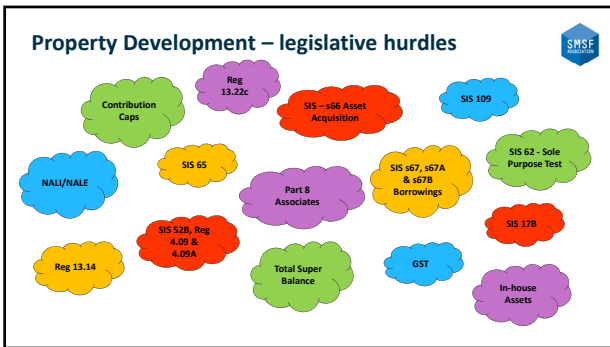
WILLIAM

- William is Site Manager, Shareholder & Director
- Catherine is Shareholder & Director





CATHERINE



Property development in an SMSF

Considerations

Property development within an SMSF:

- does it constitute carrying on a business in an SMSF?
 - what related party issues might arise – who is a related party
 - are all transactions on an arm's length basis?
 - Related party issues (December 2010 and 2011 NTLG)
 - no financial detriment to the SMSF v Contribution ruling v NALI/NALE
 - are there any borrowings?
 - Trading Trust considerations(13.22c)
 - will it breach the sole purpose test?

Carrying on a business



- SMSFR 2009/1 – references the following regarding carrying on a business
 - the keeping of business records separate to personal records;
 - the size of the operation and the extent of capital investment involved;
 - whether activities are conducted continuously and systematically rather than on an ad hoc basis;
 - the engagement of employees;
 - a purpose and intention to carry on business;
 - a level of repetition and regularity of activities constituting the business;
 - whether activities are carried on in a similar manner to other like businesses;
 - whether activities are planned, organised and carried on in businesslike manner;
 - the scale and permanency of operations; and
 - the existence of a business plan.

Carrying on a business



- What would attract the ATO's attention (not necessarily result in breach)
 - Employing family members
 - Business relates to hobbies or pastimes
 - **Business has links to associated trading entities**
 - Indications that fund assets are available for private use
- Other factors that would be taken into consideration
 - Fund investment strategy
 - Any borrowing arrangement
 - Providing financial assistance to members or relatives
 - Related party acquisitions
 - Dealing at arm's length

Property development in an SMSF

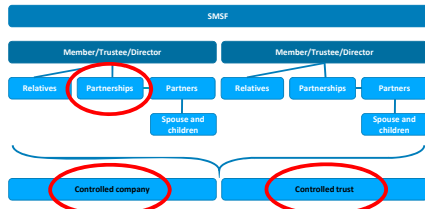


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Part 8 Associates – who is a related party?



Part 8 Associates – who is a relative?



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- Acquisition of assets from related parties (building material)
- Trustee remuneration issues – SIS 17B

Arm's length dealings

SIS 109 requirements



Investments of superannuation entity to be made and maintained on arm's length basis

- (1) **A trustee of a superannuation entity must not invest in that capacity unless**
- (a) **the trustee and the other party to the relevant transaction are dealing with each other at arm's length** in respect of the transaction; or
- (b) both:
- (i) **the trustee and the other party to the relevant transaction are not dealing with each other at arm's length** in respect of the transaction; and
- (ii) **the terms and conditions of the transaction are no more favourable to the other party** than those which it is reasonable to expect would apply if the trustee were dealing with the other party at arm's length in the same circumstances.

(1A) If:

- (a) a trustee of a superannuation entity invests in that capacity; and
- (b) **at any time during the term of the investment the trustee is required to deal in respect of the investment with another party that is not at arm's length with the trustee;**
- the trustee must deal with the other party in the same manner as if the other party were at arm's length with the trustee.**

Arm's length dealings

17B Trustee remuneration



Definition of self managed superannuation fund--remuneration of trustees etc.

Paragraphs 17A(1)(f) & (17A(1)(g)) and (2)(c) & ((2)(d)) do not apply to remuneration for any duties or services performed by a trustee of a fund (or a director of a body corporate that is a trustee of a fund), if:

- (a) the trustee (director) performs the duties or services other than in the capacity of trustee (director, in connection with the body corporate's capacity of trustee); and
- (b) the trustee (director) is appropriately qualified, and holds all necessary licences, to perform the duties or services; and
- (c) the trustee (director) performs the duties or services in the ordinary course of a business, carried on by the trustee (director), of performing similar duties or services for the public; and
- (d) the remuneration is no more favourable to the trustee (director) than that which it is reasonable to expect would apply if the trustee (director) were dealing with the relevant other party at arm's length in the same circumstances.

Trustee Remuneration



SIS 17B - Remuneration of SMSF Trustees can occur if:

- Relates to duties or services other than in capacity of trustee
- Trustee appropriately qualified and licensed to perform duties/services
- Performs in ordinary course of business
- No more favourable than an arm's length transaction

Consider - **TR 2010/1** – If no liability is raised in the Fund and no payment made then this is not considered a contribution.....however.....

Trustee Remuneration



What if appropriately qualified & don't charge?

- Is this a contribution?

If undercharging is a contribution then is the contribution the difference between market rate & amount actually charged?

- Who will determine this?

Consider this (in addition to Sole Purpose Test):

- **Overcharging** may breach s17B, s65 and s109
- **Undercharging** may create unwanted tax issues s295-550 (ITAA97)

Non-arm's length expenses

LCR 2019/D3



- Applicable to all income from 1 July 2018
- s295-550(1) - An amount of income is non-arm's length income of a complying super fund if, as a result of a scheme the parties to which were not dealing with each other at arm's length in relation to the scheme, one or more of the following applies:
 - (b) in gaining or producing the income, the entity incurs a loss, outgoing or expenditure of an amount that is less than the amount of a loss, outgoing or expenditure that the entity might have been expected to incur if those parties had been dealing with each other at arm's length in relation to the scheme;
 - (c) in gaining or producing the income, the entity does not incur a loss, outgoing or expenditure that the entity might have been expected to incur if those parties had been dealing with each other at arm's length in relation to the scheme.
- Similar rules apply under s295-550(5) as beneficiary of a fixed trust



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Snapshot of significant issues

Sole Purpose Test, 13.22c and other considerations



- Development via Unit Trust – very difficult to suggest that any property development via a 13.22c Trust isn't carrying on a business **BUT** a recent AAT case (FLZY) suggests that if real estate is purchased for non-sale purpose i.e. to derive rent then any gain would be capital in nature.
- All SMSF assets are of course treated as CGT assets for tax purposes



Snapshot of significant issues

Sole Purpose Test, 13.22c and other considerations



- **Polley & Anor v Zollo & Ors [2019] SADC 76**
- Neil Polley entered into a Joint Venture with Alessandro Zollo to develop disability housing
- Neil Polley was to provide the funding (via SMSF)
- Alessandro Zollo was to provide "building expertise"
- Joint venture established under SA Disability Housing Pty Ltd



Snapshot of significant issues

Sole Purpose Test, 13.22c and other considerations



- **Polley & Anor v Zollo & Ors [2019] SADC 76**
- Some issues with the joint venture
 - Mr Zollo was disqualified from building
 - Money was used from SMSF interest free
 - Some properties were transferred to SMSF trustee on title not JV Co
 - Mr Zollo undertook non-arm's length dealings
 - **BUYER BEWARE**



Snapshot of significant issues

ATO Super Scheme Smart

- **SMSF & Property Development**
- Eddy & Michael (business partners) + Paul (Eddy's mate) & a property developer
 - Set up a unit trust
 - 3 x SMSFs to invest in trust
 - Subscribe for 100 \$1 units each
 - Each borrow \$4m against other assets and on lend to trust
 - Trust engages Paul's business to develop property. Paul provides services at cost.



Princely Housing Pty Ltd

- William is Site Manager, Shareholder & Director
- Catherine is Shareholder & Director



WILLIAM



CATHERINE

Developing a property with Will & Kate

- It is possible for Will and Kate to develop property via an SMSF
- If they are to engage their own company to undertake the work then all transactions would need to be undertaken on a commercial basis to avoid contribution and NALI issues
- Ideally the work would be undertaken by the SMSF directly not via a related trust
- Any decision to develop property would need to be allowable under the Trust Deed but also considered as part of the funds investment strategy
- None of the above guarantees that the ATO will accept the transaction.

Disclaimer



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