

ASSET ACQUISITION TRUST (SUPERANNUATION DEBT INSTALMENT TRUST)

A Regulated Superannuation Fund must not borrow money.

The intention of that restriction has been (and still is) to protect the Members of Superannuation Funds from the possibility of losing the benefits of contributions made to superannuation.

Recognising the need to protect Members of Superannuation Funds, but also the significant benefits by way of wealth creation that can be obtained through the use of borrowed monies, the Government has amended Section 67 of the Superannuation Industry (Supervision) Act 1993 by adding a new sub-section (4A).

In summary, the amendment provides that the Trustee of a Superannuation Fund (referred to in the Act as a Regulated Superannuation Fund) is no longer prohibited from borrowing money or maintaining a borrowing of money provided the money is borrowed under an arrangement which requires that :

- 1) the borrowed money is applied to acquiring an asset or replacement asset that the Superannuation Fund would otherwise be allowed to acquire;
- 2) the asset is held on trust by a third party Trustee for the Superannuation Fund;
- 3) the Trustee of the Superannuation Fund has a right to acquire legal ownership of the asset or replacement asset by making one or more payments to the Trustee; and
- 4) the rights of a Lender against the Superannuation Fund is limited to rights against the original or replacement asset.

What does all this mean?

A Superannuation Fund can now acquire assets and borrow money to do it provided the asset is held on trust by a third party Trustee (whose sole purpose is to allow the Superannuation Trustee to purchase an asset for the

Superannuation Fund) without being exposed to the usual risks associated with borrowing money.

The asset which can be acquired can be any asset which under the Superannuation Law a Trustee of a Superannuation Fund is permitted to purchase. For example real estate, listed securities, units in Unit Trusts and even works of art. The overriding requirement (limitation) is that the rights of the financial institution (Lender) against the Superannuation Fund Trustee for a default on the borrowing, or on the sum of the borrowings and charges relating to the borrowings, are limited to rights relating only to the original asset or a replacement asset (the value of the asset purchased with the borrowed monies).

How is such an arrangement structured?

- 1) The Trustee of the Superannuation Fund finds an asset that it wishes to purchase for the Superannuation Fund.
- 2) The Trustee of the Superannuation Fund must satisfy itself that the asset is a permitted purchase in accordance with the Superannuation Fund's own investment strategy and the SIS legislation – particular attention would need to be given to the fact that assets may not be purchased from Members or a relative of a Member (unless the asset is a listed security or business real estate). The purpose of acquiring the asset must be to satisfy the sole purpose test.
- 3) The Trustee of the Superannuation Fund arranges for the Trust to be established, and for an independent third party (preferably a Company) to be the Trustee of the new Trust (the Asset Acquisition Trust – sometimes referred to as the Debt Instalment Trust).
- 4) The Trustee of the AAT (as a Trustee for the Trustee of the Superannuation Fund) enters into a Contract to purchase the asset and at the same time enters into an arrangement with a Lender for the Lender to lend money to the AAT/Superannuation Fund to enable the AAT (its Trustee) to acquire the asset. Alternatively the legislation would permit the Superannuation Fund Trustee to borrow in its/their

own name with the Trustee of the Asset Acquisition Trust giving security over the asset to secure the borrowings.

The manner in which the borrowing is structured will depend upon the requirements of the Lender. Either way the Trustee of the Asset Acquisition Trust is at all times a Trustee but no more than a Trustee for the Superannuation Fund.

- 5) If there were a shortfall between the amount of money which the Lender would advance and the total cost of purchasing the asset, there appears to be no prohibition on the Trustee of the Superannuation Fund contributing the difference.
- 6) The Trustee of the AAT will be the legal owner of the asset, and the Superannuation Fund will be the equitable or beneficial owner of the asset.
- 7) The Trustee of the AAT repays the loan by the arranged installments and because he, she or it has no other source of income the Trustee of the Superannuation Fund pays the Trustee the same installments over the term of the loan. (or if the loan arrangement is between the Superannuation Fund and the Lender the Trustee of the Superannuation Fund pays the installments direct to the Lender)
- 8) If the whole arrangement goes belly up and the Trustee of the AAT is unable to repay the loan, then the Lender has no recourse to any of the assets of the Superannuation Fund, and they only have recourse (that is to sell) the asset that is owned by the AAT and which was purchased with the loan monies.
- 9) The Trustee of the Superannuation Fund may at any time pay sufficient monies to the Trustee of the AAT to enable the Trustee to repay in full the borrowed monies/or pay sufficient money to the Lender to repay in full the borrowed money so that the asset or replacement asset can at the written request of the Superannuation Fund Trustee be transferred with a clear Title to the Superannuation Fund.

11) It is interesting to note that the arrangement between the Trustee of the Superannuation Fund and the Trustee of the AAT must permit the Trustee of the Superannuation Fund to acquire the legal ownership of the assets but must not require it to acquire the asset.

That would seem to indicate that if the Trustee of the Superannuation Fund soured of the arrangement, and chose not to proceed with acquiring the asset, then that would be an end to the transaction and neither the Lender nor the Trustee of the AAT could have recourse to the Trustee of the Superannuation Fund.

'Incorporate Now' and its Solicitors have prepared an AAT which satisfies the requirements of Section 67(4A) which gives the Trustee of the AAT as much flexibility as it can reasonably have under such an arrangement, whilst at the same time securing the entitlement of the Superannuation Trustee to become the legal owner of the asset.

'Incorporate Now' can also provide the documentation to enable a loan arrangement to be put in place to permit the Superannuation Fund to borrow from a private Lender.