

ORDER FORM – SMSF BORROWING DOCUMENTATION

IMPORTANT NOTE

A borrowing by the trustee of an SMSF is a sophisticated transaction and is subject to some risk.

The law on borrowings is relatively new and some issues related to superannuation compliance, taxation and stamp duty are yet to be clarified by the regulatory authorities.

The risk faced when an SMSF borrows is greater if the borrowing arrangement has not been properly implemented. Some common mistakes which, in practice, increase risk include the following:

- Contracts of sale have been signed or deposits have been paid before seeking expert advice.
- The conveyancer has not been properly briefed or does not understand the structure of the borrowing arrangement, including the State or Territory-specific stamp duty issues that arise in connection with an SMSF borrowing. These issues are more complex than a usual purchase of property. We recommend that trustees engage a conveyancing lawyer or specifically request a lawyer when approaching a conveyancing firm.
- The entity that holds title to the asset is more than a mere bare trustee (eg, it has active duties other than merely holding title to the property or it is a trustee of a discretionary, unit or other trust or a trading entity in its own right).
- If the borrowing is from a related entity (such as the trustee of a family trust, a related company or fund members), the parties do not have sufficient evidence to demonstrate that the loan is on arm's length terms.

The above is not an exhaustive list, but just some of the common risks that arise in practice.

Further, there is uncertainty regarding borrowing to acquire off-the-plan and other issues.

The laws permitting borrowings are subject to change, and accordingly, expert advice should be obtained if there is any doubt or if the documents provided by us are not implemented shortly after receipt.

NOTE TO ADVISERS, ACCOUNTANTS and OTHER AGENTS

Advisers, accountants or other agents of SMSF trustees who complete this order form on behalf of the trustees agree that DBA Lawyers may ask to contact the trustees to discuss any areas of concern. Alternatively, the agent undertakes to communicate our concerns to the trustees.

In particular, the covering letter provided with our borrowing documents will contain important information. Advisers, accountants or other agents should ensure that the trustees read this letter, in conjunction with the explanatory memo on SMSF borrowings, and contact us if they wish to discuss this information further.

PERSON ORDERING

Firm Ordering (if applicable)					
Person ordering					
Tick here <input type="checkbox"/> if we are to invoice the fund's trustee (otherwise, our invoice will be made out to the person ordering).					
Street address					
Postal address, if different					
Phone		Fax		Email	

By completing this order form, you confirm that you have read the 'Important Note' on page 1 of this order form.

TYPE OF PACKAGE

Please choose the type of package:	Standard*	Premium Service
Direct loan from a bank commercial lender	<input type="checkbox"/>	<input type="checkbox"/>
Related party loan	<input type="checkbox"/>	<input type="checkbox"/>

* DBA recommends the premium service due to the complex nature of SMSF borrowings. By ordering 'standard' documents from us, you confirm that you have read and agreed to the terms on page 5 of this order form.

ASSET TO BE ACQUIRED

The fund will acquire: real estate listed shares unlisted shares other

Description of asset: for real estate, please supply the property address and Certificate of Title information (eg, volume & folio reference(s)) or attach an extract of the title(s). If there is more than one title, a separate suite of documents is required for each title. Please note it is important we are provided with exact title details. If in any doubt, consult with the fund's conveyancer to confirm the title details. **If you do not provide at least volume and folio references, we may perform a title search and disburse the cost (approx \$20) to you.**

Is this asset being acquired from a related party of the fund? no yes unsure if 'related'

If real estate, please confirm fund is acquiring: 100% of the property (if less than 100%, please contact our office)

DETAILS OF THE SMSF (BORROWER)

Name of fund: _____

COMPANY OR INDIVIDUAL TRUSTEES

COMPANY TRUSTEE			
Company Name			
ACN	- -		
Registered Office			
Full names of all directors			
T1		T2	
T3		T4	

INDIVIDUAL TRUSTEES		
T1	Full Name	
	Street Address	
T2	Full Name	
	Street Address	
T3	Full Name	
	Street Address	
T4	Full Name	
	Street Address	

BARE TRUSTEE DETAILS

(aka 'security trustee', 'holding trustee', 'custodian'; this entity holds the asset on trust for the SMSF)

COMPANY BARE TRUSTEE			
Company Name			
ACN		- -	
Registered Office			
Full names of all directors			
BT1		T1? <input type="checkbox"/>	BT2
			T2? <input type="checkbox"/>
BT3		T3? <input type="checkbox"/>	BT4
			T4? <input type="checkbox"/>

INDIVIDUAL BARE TRUSTEES (Note that individual bare trustees are <u>not</u> recommended.)			
BT1	Full Name		T1? <input type="checkbox"/>
	Street Address		
BT2	Full Name		T2? <input type="checkbox"/>
	Street Address		
BT3	Full Name		T3? <input type="checkbox"/>
	Street Address		
BT4	Full Name		T4? <input type="checkbox"/>
	Street Address		

DETAILS OF LENDER

- Option 1:** bank or commercial lender, name of bank/institution: _____ (now proceed to page 5)
- Option 2:** related party (specify which below)
- trustee of a related trust name of trust: _____
(indicate the trustee below in company details or individuals as appropriate)
 - related company (fill out company details below)
 - SMSF member(s) (fill out individuals below)
 - other natural person(s) (fill out individuals below)

COMPANY DETAILS			
Company Name			
ACN		- -	
Registered Office			
Full names of all directors			
LT1		LT2	
LT3		LT4	

INDIVIDUAL(S) (IF APPLICABLE)			
LT1	Full Name		
	Street Address		
LT2	Full Name		
	Street Address		

**FOR DIRECT BANK LOANS, PLEASE PROCEED TO NEXT PAGE
FOR RELATED PARTY LOANS, PLEASE COMPLETE THE DETAILS BELOW**

DETAILS AND TERMS OF THE LOAN

Ideally a borrowing from a related party should be on arm's length terms. This is evidenced by benchmarking the terms to what is offered to SMSFs in the marketplace. Due to the special nature of limited recourse SMSF loans, banks often impose tighter restrictions such as a conservative loan-to-value ratio and premium interest rate (and for this reason, benchmarking the terms to the related party's own cost of finance is not necessarily appropriate). We recommend that the trustee collect and retain evidence from independent sources to be able to demonstrate that the loan reflects arm's length terms, in the event of audit.

Total purchase price of asset: \$ _____

Amount contributed by borrower: \$ _____ Amount lent by lender: \$ _____

Type of loan: principal and interest interest only

Interest rate is: fixed variable

Interest rate*: _____ % per annum Penalty interest rate: _____ (eg, + 2%) Term: _____ (eg, 7 years)

Repayments: monthly quarterly other: _____

* The interest rate must be certain and capable of being worked out by a third party. For example, it could be expressed as a percentage (eg, x %) or as a benchmark that is readily understood (eg, RBA cash target rate + x %).

Please use the 'additional instructions' below if you need to include further explanation about the loan terms.

Please proceed to next page.

ADDITIONAL DOCUMENTS

If you are ordering a **standard package**, please read our important note at the bottom of this page and return this order form to our office with a completed Costs Agreement.

If ordering our **premium service**, please return this order form with our Costs Agreement and arrange for the following to be forwarded to us:

- copy of the SMSF’s latest trust deed;
- if real estate:
 - copy of any sale contract that has already been drafted/completed;
 - copy of the certificate of title to the property (a copy might appear in the sale contract); and
 - the conveyancer’s contact details.

ADDITIONAL INSTRUCTIONS

STANDARD DOCUMENTS

DBA recommends the premium service due to the complex nature of SMSF borrowings and the stamp duty, tax and super compliance issues these arrangements can give rise to. Incorrect implementation could give rise to significant penalties and could increase the risk of additional duties and taxes being incurred. By ordering standard documents, you acknowledge that DBA has only been instructed to provide documents and not to be involved in implementation, such as liaising with the fund’s conveyancer or assisting any other parties involved in implementing the arrangement.

If our further assistance is required, we would be pleased to assist and in this case our attendances will be charged at our hourly rates. This also applies if any changes to documentation are later required as a result of incorrect or altered instructions. Our lawyers’ hourly rates are available on request.

Some key points to bear in mind during implementation are:

- It is the trustee’s responsibility to ensure their conveyancer is properly briefed and understands the structure of the arrangement. These arrangements are more complex than a usual property purchase and give rise to additional stamp duty issues, which the trustee should seek State or Territory-specific advice on. The signing of the sale contract and payment of any deposit often impacts the stamp duty position. Please refer to the ‘Important Note’ on page 1 of this order form.
- The fund’s trustee must ensure it has adequate power to borrow under the fund’s deed.
- The entity acting as bare trustee should not have any duties other than passively holding the property for the benefit of the fund’s trustee. Please note that under DBA’s documents the ‘bare trust’ will not be given a name, in order to be consistent with a true bare trust.
- All of the usual investment laws apply to an SMSF trustee when it borrows to buy an asset. These include the laws on acquisitions from related parties, in-house assets, etc.
- For a related party loan, the arrangement should be at arm’s length and the trustee should retain evidence to be able to demonstrate this in the event of an audit.

Please also refer to the SMSF Borrowing Memo which is provided with all DBA borrowing packages.

As a law firm, DBA is not licensed to provide financial product advice under the *Corporations Act 2001* (Cth).