



# SMSF Lending

(Establishment of Property Trust)

## Information for Laiki Bank (Australia) Limited

This “Information for Laiki Bank” forms part of the package gagens lawyers has developed to enable Laiki Bank to offer loans to superannuation funds as is now permitted under the recent changes to the Superannuation Industry (Supervision) Act (SIS Act).

**We provide the following services.**

**1. Establish a Property Trust for SMSFs**  
gagens lawyers will now act for SMSFs to establish a property trust to hold the legal title to the property (as is required by the SIS Act). Many lawyers for SMSFs are not fully aware of the requirements for establishing these Property Trusts. In addition, financial advisers require assistance with this step.

**Our service includes:**

- information kit for borrowers (ie SMSFs)
- information kit for borrower’s accountants / financial advisers / brokers
- information kit for borrower’s lawyers / conveyancers
- establishment (and stamping, where relevant) of a Property Trust Deed (plus supporting documents where necessary) for use by the SMSF in the purchases of real property funded by a loan from Laiki Bank
- an “Ownership Certificate”.

Our fees for this service are \$2,500 plus GST.

**gagens lawyers does NOT act for the SMSFs in the property conveyance or the borrowing from Laiki Bank. gagens lawyers role is limited to establishing a Property Trust. The SMSF’s lawyer will act on the conveyance in the usual way.**

**2. Laiki Bank Panel Lawyer**  
gagens lawyers has spent significant time working with Laiki Bank to develop a program under which Laiki Bank can offer loans to self-managed superannuation funds who wish to borrow money to buy real property. We are industry experts in this highly specialised area.

gagens lawyers fees to act for Laiki Bank as panel lawyer in these transactions are as follows:

- If gagens lawyers prepares the Property Trust Deed - \$2,000 plus GST made up of:
  - review of SMSF Trust Deed - \$500 plus GST
  - review Business Finance Agreement - \$400 plus GST
  - preparation of other transaction documents - \$800 plus GST (non complex)
  - reviewing executed documents once returned, attending settlement and arranging stamping and registration - \$300 plus GST.
- If gagens lawyers does not establish the Property Trust - \$2,500 plus GST made up of:
  - review of SMSF Trust Deed - \$500 plus GST
  - review of structure (including review of Property Trust Deed) - \$500 plus GST

- review Business Finance Agreement - \$400 plus GST
- preparation of other transaction documents - \$800 plus GST (non complex)
- reviewing executed documents once returned, attending settlement and arranging stamping and registration - \$300 plus GST.

We are keen to document as many deals as possible in order to recoup our significant investment in the development of Laiki Bank’s lending product. The following information may assist you to answer questions asked by your clients.

If one of your clients would like gagens lawyers to establish the Property Trust for their SMSF, please contact Phil Hustler [phustler@nsw.gagens.com.au](mailto:phustler@nsw.gagens.com.au) or (02) 9931 4952 or Angela Valdmanis at [avaldmanis@nsw.gagens.com.au](mailto:avaldmanis@nsw.gagens.com.au) or (02) 9931 4861.





## Overview of new product

Superannuation funds can now borrow money to purchase real estate. An investor can have just as much choice and control over investment properties inside as outside a superannuation fund.

Many Australians have significant money in superannuation, and more and more are establishing their own self managed superannuation funds (SMSFs). Many people would like to be able to include

direct investments in real estate in their superannuation fund's investment portfolio.

SMSFs want to gear their real estate investments in order to diversify risk, increase the yield on the investment, and because many funds do not have sufficient money to purchase real estate outright. Until recently, this has not been possible for most SMSF because of restrictions on superannuation funds borrowing

and charging their assets. However, the Superannuation Industry Supervision Act (SIS ACT) was amended in September 2007 to allow superannuation funds to borrow and charge their assets so long as a special structure is used.

## Features of the structure

- The SMSF can choose any kind of property including residential, commercial, retail, and holiday units.
- The SMSF can purchase real estate let for business purposes from a member or a related entity (ie this does not breach the "in house asset" rule under the SIS Act). However, investments in property other than "business real property" (eg a purchase of residential property) are only permitted if the purchase is from an arms-length vendor.
- The SIS Act requires that the property be held on trust for the SMSF and the SMSF must have the ability to acquire the legal interest in the property. Therefore, the legal owner of the real estate must be the Property Trustee.
- The establishment of the Property Trust is an integral and important step in

developing this structure. Likewise, the Property Trust Deed itself is a key document. Care is required to ensure there are no adverse GST, taxation or stamp duty consequences. gaders lawyers can assist SMSFs establish their own Property Trustee for these purposes.

- The beneficial owner of the real estate will be the SMSF.
- Laiki Bank has no recourse to the other assets of the SMSF, providing the SMSF with absolute protection for its other assets.
- Laiki Bank requires the loans to be personally guaranteed by the member/s of the SMSF and the Property Trustee. This is permitted under the SIS Act.
- SMSFs can deal with the property however and whenever they like, in the same way as individual or company

investors can deal with "normal" investment properties (eg: lease, renovate, repair, or sell), (subject to the terms of the relevant loan and mortgage).

- All rents are paid directly to the SMSF. Loan repayments are made to Laiki Bank in the ordinary way from the SMSF.
- The SMSF can pay out or reduce the mortgage at any time (subject to the terms of the relevant loan).
- When the mortgage is paid out in full, title to the property may be transferred to the SMSF or the Property Trustee can continue as registered proprietor.

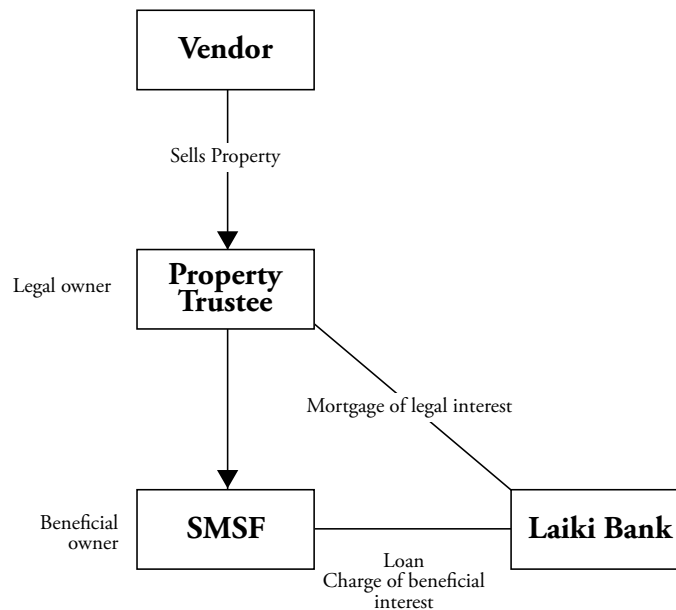




## Structure outline

- The Property Trustee will purchase the property and becomes the legal owner.
- The SMSF will obtain the beneficial interest in the property from the vendor.
- Laiki Bank lends to the SMSF. Laiki Bank has no recourse against the assets of the SMSF other than the security property.
- Laiki Bank may require a guarantee and possibly collateral security from members of the SMSF. Laiki Bank will also take a guarantee from the Property Trustee. Collateral security cannot be taken from the SMSF itself.
- Loan funds must only be used for the purchase of a property and there can be no redraws or further advances.

The structure is represented diagrammatically right.



## Commonly asked questions

### Q1 How does the SMSF purchase a property?

- the SMSF chooses the property it wishes to invest in, in the ordinary way. Residential property must be purchased from an arm's length vendor. Non residential property can be purchased for full value from related parties so long as the property is let for business purposes
- the SMSF obtains a loan approval. Laiki Bank follows its normal credit criteria and approval process
- the purchase MUST be in the name of the Property Trustee. gadens lawyers can assist with the establishment of the Property Trust for the SMSF
- the SMSF's own lawyer / conveyancer acts on the purchase in the ordinary way
- the SMSF pays the deposit, the balance purchase money (less the amount borrowed), the legal costs, and stamp duty in the ordinary way
- on completion of the purchase the Property Trustee mortgages the property to Laiki Bank
- SMSF then manages the asset in the same way as any person would with any other real estate investment.

### Q2 Can a member of the SMSF occupy the property?

No. If a member of the SMSF occupies the property the "in-house asset rule" (found in the SIS Act) would be breached.

However, the SMSF can buy a property that the members intend to live in after retirement. This is possible if the SMSF transfers the property to the individual member after retirement.





## Commonly asked questions (continued)

### **Q3 I thought superannuation funds could not borrow or charge their assets. Is this correct?**

That was correct, until amendments to the Superannuation Industry (Supervision) Act 1993 (SIS Act) made in September 2007.

Under the new section 67(4A) of the SIS Act, SMSFs can borrow providing the following conditions are satisfied.

- the borrowed funds are used to purchase an asset (e.g. real estate)
- the asset is held on trust for the SMSF by another entity (ie the Property Trustee)
- the SMSF must have the right to acquire legal ownership of the asset by making payment
- Laiki Bank's recourse against the SMSF must be limited to the underlying asset (ie the purchased property). Laiki Bank must not have a right of recourse against other assets of the fund.

### **Q4 What other restrictions apply?**

SMSFs must comply with all regulations applying to superannuation funds.

Some SMSFs may wish to acquire up to 100% of the fund's total assets in the form of real property. However, SMSFs must ensure that the level of investment in real property is in line with the fund's investment strategy, including diversification of assets, liquidity, and maximisation of member returns in the fund. It is therefore unlikely that an SMSF will be able to pursue such a strategy whilst maintaining its diversification requirements.

Where a fund invests a large amount of its assets real property, the trustee must ensure that the fund continues to meet all requirements, for instance they must ensure the fund has sufficient liquidity to meet its liabilities (such as pension payments).

The government has also made it clear that superannuation funds investing in these types of investments must have appropriate risk management measures in place and must understand the risks of investment.

### **Q5 Who pays what and when?**

As the beneficial owner of the property and the borrower of the loan, the SMSF is responsible for paying all the usual amounts that any investor would expect to if they had bought an investment property and borrowed money on it in their own name rather than in their superannuation fund. For example, the SMSF will be required to pay:

- council rates, water rates, and land tax (if any)
- interest and other loan repayments
- lender's fees
- repairs
- property management costs
- insurance premiums.

### **Q6 What about land tax?**

As the SMSF is the beneficial owner of the property, land tax is payable by the SMSF. The SMSF will only have to pay land tax if the total land values exceed the proscribed amount.

### **Q7 How can I transfer the property?**

The SMSF can direct the Property Trustee to sell to any third party, including a member of the SMSF in their own right (subject to paying out the mortgage loan and any other amounts which might be outstanding).

### **Q8 What happens when the loan is fully repaid? Can legal title be transferred from the Property Trustee to the SMSF? Would any stamp duty or GST be payable with respect to the transfer?**

When the loan is fully repaid, the SMSF is entitled to have the legal title transferred to it. Depending on how the trust structure is set up and administered, this transfer should be possible without incurring tax, GST, or stamp duty liabilities (other than nominal). Of course, this position may change because of future changes in the law.

### **Q9 Who can be the Property Trustee?**

The Property Trustee must be a separate entity from the SMSF Trustee. For example, if the trustees of the SMSF are the individual members, the Property Trustee must be a corporate entity. If the trustee of the SMSF is a company, the Property Trustee must be one or more individuals (we consider this is undesirable) or a different company.





## Commonly asked questions (continued)

gadens lawyers will act on the establishment of your Property Trust Deed where requested by the SMSF. We will ensure that the timing of the establishment of the Property Trustee and the stamping of the Trust Deed complies with the requirements in the relevant state or territory.

In order for gadens lawyers to establish the Property Trust, we require the following information:

- name, telephone number and address of person acting for SMSF (eg accountant or solicitor)
- name of the SMSF
- name, ACN (if a company) and address of SMSF Trustee
- name of the proposed Property Trust
- name, ACN (if a company) and address of the proposed Property Trustee - it is preferable that the Property Trustee is a corporation rather than an individual

- address of the property to be purchased
- name and address of Settlor of the Property Trust (Queensland only) – this person must be neither a beneficiary nor a trustee of the trust
- name of each member of the SMSF.

It is important that the SMSF Trustee itself is not the Property Trustee. Such an arrangement may breach the requirements of section 67(4A) of the SIS Act and result in the SMSF being non-compliant. It is also undesirable for an individual member of the SMSF to act as Property Trustee due to trust law issues regarding the merger of the interests of the trustee and the beneficiary.

### **Q10 What powers should the Property Trust Deed contain?**

The Property Trust Deed must provide the following powers to the Property Trustee.

- must be a bare trust
- Property Trustee must act as directed by the SMSF Trustee
- Property Trustee will transfer the property to the SMSF Trustee on repayment of any financial accommodation
- does not contemplate an instalment warrant arrangement (ie the loan from Laiki Bank must be made to the Superannuation Fund – not to the Property Trustee).





Call us on 1300 888 700

9.30am – 5.00pm Monday to Friday

Visit our website [www.laikibank.com.au](http://www.laikibank.com.au)

Email us at [lba\\_info@laiki.com](mailto:lba_info@laiki.com)

**Sydney – Australian Head Office & Branch**

219-223 Castlereagh Street  
Sydney NSW 2000

**Sydney – Marrickville**

Corner Marrickville and Victoria Roads  
Marrickville NSW 2204

**Sydney – Kogarah**

5 Belgrave Street  
Kogarah NSW 2217

**Sydney - Kingsford**

486 Anzac Parade  
Kingsford NSW 2032

**Sydney - Bankstown**

Corner East Terrace & South Terrace  
Bankstown NSW 2200

**Melbourne – Victorian State Office & Branch**

215 Spring Street  
Melbourne VIC 3000

**Melbourne – Oakleigh**

30 Portman Street  
Oakleigh VIC 3166

**Melbourne – Northcote**

Northcote Central Shopping Centre  
Corner High and Separation Streets  
Northcote VIC 3070

**Melbourne – Doncaster**

700 Doncaster Road  
Doncaster VIC 3108

**Adelaide – Mile End**

149 Henley Beach Road  
Mile End SA 5031

