SMSFR 2007/D2 - Superannuation: giving financial assistance using the resources of a self managed superannuation fund to a member or relative of a member that is prohibited for the purposes of paragraph 65(1)(b) of the Superannuation Industry (Supervision) Act 1993

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Draft Self Managed Superannuation Funds Ruling

Superannuation: giving financial assistance using the resources of a self managed superannuation fund to a member or relative of a member that is prohibited for the purposes of paragraph 65(1)(b) of the *Superannuation Industry (Supervision) Act 1993*

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Preamble

This publication is a draft for public comment. It represents the Commissioner's preliminary view about the way in which provisions of the Superannuation Industry (Supervision) Act 1993, or regulations under that Act, apply to superannuation funds that the Commissioner regulates: principally self managed superannuation funds.

Self Managed Superannuation Funds Rulings (whether draft or final) are not legally binding on the Commissioner. However, if the Commissioner later takes the view that the law applies less favourably to you than the final version of this ruling indicates, the fact that you acted in accordance with the final version of this ruling would be a relevant factor in your favour in the Commissioner's exercise of any discretion as to what action to take in response to a breach of that law. The Commissioner may, having regard to all the circumstances, decide that it is appropriate to take no action in response to the breach.

What this Ruling is about

1. This Ruling explains how paragraph 65(1)(b) of the *Superannuation Industry (Supervision) Act 1993* (SISA)[1] applies to trustees and investment managers of self managed superannuation funds (SMSFs).

2. Paragraph 65(1)(a) prohibits the lending of fund money to a member of the fund or a relative of a member of the fund. Paragraph 65(1)(b) prohibits using fund resources to provide any other financial assistance to a member of the fund or a relative of a member.

3. For the purposes of paragraph 65(1)(b), this Ruling explains:

- the meaning of 'any other financial assistance';

[1] All legislative references in this Ruling are to the SISA unless otherwise indicated.

- what constitutes 'using the resources of the fund'; and
- what constitutes the giving of financial assistance to 'a member of the fund or a relative of a member of the fund'.

4. This Ruling does not deal with the prohibition on the lending of the money of the SMSF to a member, or relative of a member, under paragraph 65(1)(a).

5. This Ruling also does not provide the Commissioner's views on how other SISA provisions apply to any of the arrangements discussed in this Ruling.[2]

Ruling

Financial assistance prohibited under paragraph 65(1)(b)

6. A trustee or investment manager of an SMSF contravenes paragraph 65(1)(b) if the trustee or investment manager uses the resources of the SMSF to give financial assistance (other than lending money of the SMSF)[3] to a member of the SMSF or relative of a member of the SMSF.

7. In the Commissioner's view, assistance is given to a member of an SMSF or a relative of a member of an SMSF if some aid or help or a benefit is given to that person whether or not such assistance was requested.[4]

8. For paragraph 65(1)(b) to apply, the assistance given must be financial in nature. The expression 'financial assistance' is not defined in the SISA. It has no technical meaning so should be understood in the sense in which it is used in ordinary commerce.[5] It extends beyond the provision of loans (as covered by paragraph 65(1)(a)) and beyond other kinds of disposition of money or property. Financial assistance can take the form of the giving of a security, charge or guarantee or the taking on of an obligation, or any other arrangement that, on an objective assessment of the purpose of the arrangement, is in substance a financial accommodation.[6]

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[2] Other provisions of the SISA that complement the prohibition of financial assistance in paragraph 65(1)(b) are outlined in paragraph 22 of this Ruling.
[3] This is prohibited by paragraph 65(1)(a).
[4] For further explanation see paragraphs 40 to 44 of this Ruling.
[5] *Charterhouse Investment Trust Ltd and others v. Tempest Diesels Ltd* [1986] BCLC 1 at 10. See also paragraph 37 of this Ruling.
[6] For further explanation see paragraphs 45 to 53 of this Ruling.

9. The assistance must be given 'using the resources of the fund' for paragraph 65(1)(b) to apply. It is the Commissioner's view that the resources of an SMSF are used if an arrangement relies on the assets of the SMSF, whether or not there is a positive, negative or nil effect on the net assets as a result of that arrangement. Thus, financial assistance using the resources of the SMSF can include any arrangement if the assets of the SMSF are converted into other assets, diverted, diminished or put at risk, or if there is any prejudice to the financial position of the SMSF.[7]

10. The assistance must be given to 'a member of the fund or a relative of a member of the fund' for paragraph 65(1)(b) to apply. This requirement does not limit the application of the paragraph to transactions directly between the SMSF and a member or relative of a member. Paragraph 65(1)(b) is also contravened if the SMSF enters into an arrangement whereby SMSF resources are used to give financial assistance to a member or a relative of a member through a third party or an interposed entity.[8]

Does an arrangement or transaction contravene paragraph 65(1)(b)?

Arrangements or transactions that by their nature contravene paragraph 65(1)(b)

11. Some arrangements or transactions by their nature contravene paragraph 65(1)(b).

12. In the Commissioner's view, the trustee or investment manager of an SMSF contravenes paragraph 65(1)(b) by doing any of the following:

(i) giving a gift using the resources of the SMSF to a member or a relative of a member;[9]

(ii) selling an SMSF asset to a member or relative of a member for less than its market value;[10]

(iii) purchasing an asset from a member or relative of a member for greater than its market value;[11]

(iv) acquiring services from a member or a relative of a member on non-arm's length terms – for example, paying for unnecessary services or paying an amount for services in excess of an arm's length amount;[12]

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[7] For further explanation see paragraphs 54 to 63 of this Ruling.
[8] For further explanation see paragraphs 64 to 72 of this Ruling.
[9] See paragraphs 78 to 82 and Example 1 of this Ruling.
[10] See paragraphs 83 to 86 and Example 2 of this Ruling.
[11] See paragraphs 87 to 91 and Example 3 of this Ruling.
[12] See paragraphs 92 to 97 and Example 4 of this Ruling.

(v) providing security or a charge over SMSF assets or giving a guarantee for the benefit of a member or a relative of a member;[13]

(vi) forgiving a debt of a member or a relative of a member, or releasing a member or a relative of a member from an obligation to the SMSF, including where the amount is not yet due and payable;[14] and

(vii) taking on a financial obligation of a member or a relative of a member.[15]

Arrangements or transactions that may or may not contravene paragraph 65(1)(b) depending on the circumstances

13. Other arrangements or transactions may or may not contravene paragraph 65(1)(b). This would depend on whether the purpose of the arrangement, assessed objectively in light of commercial reality and having regard to the facts of the particular case, is in substance to provide financial assistance to a member or relative of a member using the resources of the SMSF.

Factors that assist in determining whether paragraph 65(1)(b) is contravened

14. Factors that indicate that the purpose of an arrangement or transaction is in substance to provide financial assistance using the resources of an SMSF include:

- the arrangement or transaction exposes the SMSF to a credit risk, or exposes the SMSF to a financial risk, from a member or a relative of a member;
- the arrangement or transaction is on non-arm's length terms that are favourable to the member or relative of a member;
- the arrangement or transaction is not a usual or normal commercial arrangement in the context in which SMSFs operate;
- the arrangement or transaction is not consistent with the investment strategy of the SMSF;

[13] See paragraphs 98 to 111 and Examples 5 to 8 of this Ruling.
[14] See paragraphs 111 to 119 and Example 9 of this Ruling.
[15] See paragraphs 120 to 123 and Example 10 of this Ruling.

- under the arrangement or transaction an amount is paid by the SMSF, and later repaid to the SMSF, in amounts or in a manner that may be equated in a commercial sense with the repayment of a loan with interest; and
- the arrangement or transaction results in a diminution of the assets of the SMSF whether immediately or over a period of time.

15. Conversely, if an arrangement or transaction does not exhibit the above factors this indicates that paragraph 65(1)(b) has not been contravened.

16. The factors listed at paragraph 14 are not intended to be an exhaustive list. The weight to be given to the above factors will depend on the particular case. Moreover, the presence or absence of such factors should not be taken to mean that it is conclusive that paragraph 65(1)(b) has, or has not been contravened.

Circumstances that do not result in a contravention of paragraph 65(1)(b)

17. Arrangements where an SMSF invests on commercial terms in an unassociated entity do not result in a contravention of paragraph 65(1)(b) if that unassociated entity, independently of the SMSF and in its own right and from its own resources, gives financial assistance to a member or member's relative.[16]

18. An SMSF paying a pension or lump sum in accordance with the payment standards in Part 6 of the Superannuation Industry (Supervision) Regulations 1994 (SISR) as permitted by the sole purpose test in section 62 of the SISA also does not result in a contravention of paragraph 65(1)(b).[17]

Date of effect

19. It is proposed that when the final Ruling is issued, the Ruling will apply both before and after its date of issue. However, the Ruling does not apply to SMSF's to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling.

[16] See paragraphs 170 to 172 and Example 23 of this Ruling.
[17] See paragraphs 173 to 175 and Example 24 of this Ruling.

Funds to which the Ruling applies

20. This Ruling applies to SMSFs[18] and former SMSFs.[19] References in the Ruling to SMSFs extend to former SMSFs unless otherwise indicated.

Commissioner of Taxation
26 September 2007

[18] As defined in section 17A.
[19] A former SMSF is a fund that has ceased being a SMSF and has not appointed a registrable superannuation entity (RSE) licensee as trustee – see subsection 10(4).

Appendix 1 – Explanation

This Appendix is provided as information to help you understand how the Commissioner's preliminary view has been reached.

Background

21. Investment rules such as subsection 65(1) support the Government's retirement income policy objectives by ensuring that concessionally taxed superannuation is used only for retirement income purposes and not, for example, as a source of pre-retirement finance for members. This policy objective is reflected in the Regulation Impact Statement section of the Explanatory Memorandum to the Superannuation Legislation Amendment Bill (No. 4) 1999. This Bill amended Part 8 of SISA, which limits the extent to which a superannuation fund can invest in in-house assets, and section 66, which prohibits the acquisition of assets from members of a fund and their relatives. In relation to section 65, the Explanatory Memorandum explains:

> Superannuation funds are prohibited from lending or providing other financial assistance to members and relatives. This is to prevent the use of superannuation savings as a means of providing current day financial support to members.[20]

22. The prohibitions in section 65 are complemented by other rules in the SISA applying to financial dealings with members, their relatives and other related parties[21] of the SMSF. For example:

- a trustee is prohibited from maintaining an SMSF for any purpose other than for the provision of retirement and certain related benefits (referred to as the sole purpose test) – section 62. All of the activities of maintaining an SMSF are subject to this test;[22]
- subject to specific exceptions, an SMSF trustee or investment manager is prohibited from acquiring assets from related parties of the SMSF – section 66;
- subject to exceptions in relation to certain derivative contracts, an SMSF trustee cannot recognise or in any way sanction an assignment of a superannuation interest or a charge over or in relation to a member's benefits or an SMSF asset – regulations 13.12, 13.13 and 13.14 of the SISR;

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[20] See Regulation Impact Statement section of the Explanatory Memorandum, under the heading 'Problem Identification'.
[21] 'Related party' is defined in subsection 10(1).
[22] See SMSFR 2007/D1: Superannuation: the application of the sole purpose test in section 62 of the Superannuation Industry (Supervision) Act 1993 to the provision of benefits other than retirement, employment termination or death benefits.

- subject to specific exceptions, an SMSF trustee is prohibited from borrowing – section 67;
- all SMSF investments dealings must be at arm's length or must be conducted on arm's length terms and conditions – section 109; and
- subject to some transitional provisions and specific exceptions, an SMSF trustee is prohibited from acquiring or maintaining in-house assets[23] that have a total market value in excess of 5% of the total market value of SMSF assets – Part 8.

Contraventions – audit requirements and consequences

23. SMSF trustees and investment managers are required to appoint an approved auditor to audit the financial accounts and statements of the SMSF each year.[24] When conducting an audit, the approved auditor is also required to conduct a compliance audit to ensure the SMSF has complied with the SISA and SISR. There is an approved form for notifying the Tax Office of contraventions.[25]

24. Non-compliance with these rules may expose trustees or investment managers of SMSFs to penalties.[26] Contravention or involvement in a contravention attracts both civil and criminal consequences and places at risk the SMSF's status as a complying superannuation fund under the SISA.[27]

Legislative context

25. Paragraph 65(1)(b) provides that a trustee or investment manager of an SMSF must not:

> (b) give any other financial assistance using the resources of the fund to:
>
> (i) a member of the fund; or
>
> (ii) a relative of a member of the fund.

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[23] 'In-house assets' are defined in section 71 and are, subject to specific exceptions, assets that are a loan to or an investment in a related party of the SMSF, or investments in a related trust, or assets that are subject to a lease or lease arrangement with a related party of the SMSF.
[24] See section 113.
[25] See section 129.
[26] See subsection 65(5).
[27] See subsection 42A(5) in relation to SMSFs. The status of a fund as complying or non-complying for SISA purposes will also have consequences for the SMSF under the income tax law and other parts of the superannuation law. Also see generally Practice Statement Law Administration PS LA 2006/17, PS LA 2006/18 and PS LA 2006/19.

26. Subsection 10(3) expands the meaning of member for SMSF purposes as follows:

> Without limiting the meaning of the expression '**member**' in this Act, that expression, in relation to a self managed superannuation fund, includes a person:
>
> (a) who receives a pension from the SMSF; or
>
> (b) who has deferred his or her entitlement to receive a benefit from the SMSF.

27. Subsection 65(6) defines a relative, in relation to an individual, to mean:

> (a) a parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendant or adopted child of that individual or of his or her spouse; and
>
> (b) the spouse of that individual or of any other individual specified in paragraph (a).

28. Section 65 does not allow for any exceptions to the prohibition in paragraph 65(1)(b) that are applicable to SMSFs.[28]

Explanation

29. Paragraph 65(1)(a) prohibits SMSF trustees and investment managers from lending SMSF money to a member or a relative of a member. Paragraph 65(1)(b) extends this prohibition to the giving of any other financial assistance using SMSF resources to a member or a relative of a member.

30. The following issues, which are relevant to the application of paragraph 65(1)(b), are discussed below:

- The meaning of 'any other financial assistance', incorporating a discussion of:
  - the relevance of context and policy intent;
  - the relevance of cases that have considered the meaning of 'financial assistance' in the context of company law provisions;
  - the meaning of 'assistance'; and
  - the meaning of 'financial assistance'.
- When financial assistance is given 'using the resources of the fund'.

[28] Subsections 65(2) to (4) provide for some exceptions to the prohibition on lending to members or their relatives for specified superannuation funds. None of these exceptions apply to paragraph 65(1)(b) and they are therefore not discussed in this Ruling.

- When financial assistance is given 'to a member of the fund or a relative of a member of the fund'.

31. This is followed by examples illustrating the application of paragraph 65(1)(b) to particular arrangements or transactions.

The meaning of 'any other financial assistance'

32. The term 'financial assistance' is not defined in the SISA and therefore takes its ordinary meaning having regard to the context in which it appears in the SISA. Paragraph 65(1)(a) provides that the trustee or investment manager of an SMSF must not lend money of the SMSF to a member or a relative of a member. On the other hand, paragraph 65(1)(b) provides that the trustee or investment manager of an SMSF must not give any other financial assistance using the resources of the SMSF to a member of the SMSF or a relative of a member.

33. Thus, the reference to 'any other financial assistance' in paragraph 65(1)(b) refers to anything else that may be financial assistance, other than the lending of money as covered by paragraph 65(1)(a).

Relevance of context and policy intent

34. When interpreting the meaning of 'any other financial assistance' in paragraph 65(1)(b), the Commissioner adopts the contemporary approach to statutory interpretation, as expressed in *CIC Insurance Ltd v. Bankstown Football Club Ltd*:[29]

> …the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include things such as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy.

[29] (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ.

35. The Commissioner considers the intent of section 65 is 'to prevent the use of superannuation savings as a means of providing current day financial support to members'.[30] This is consistent with the Government's retirement income policy objectives as expressed, in the January 2005 discussion paper 'Review of the provision of pensions in small superannuation funds'.[31] The discussion paper also recognises the importance of regulatory measures given the absence of an arm's length separation between the roles of the trustee(s), fund manager and member(s).[32]

Relevance of cases determining whether there is financial assistance in the context of company law provisions

36. The courts have considered the meaning of the term 'financial assistance' in determining the application of company law provisions that either prohibit a company from giving financial assistance to a person for the purposes of, or in connection with, the purchase of its shares or limit the circumstances in which such assistance can be given.[33]

37. In the British case *Charterhouse Investment Trust Ltd and others v. Tempest Diesels Ltd*[34] (*Charterhouse Investment*), Hoffmann J made the following comment in relation to determining whether financial assistance has been given:

> The words [financial assistance] have no technical meaning and their frame of reference is in my judgment the language of ordinary commerce. One must examine the commercial realities of the transaction and decide whether it can properly be described as the giving of financial assistance by the company…

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[30] See paragraph 21 of this Ruling where we explain the intent of section 65 as expressed in the Explanatory Memorandum to the Superannuation Legislation Amendment Bill (No. 4) 1999.
[31] See section 3 'Retirement Income Policy Objectives' of the discussion paper. Available at www.treasury.gov.au.
[32] See section 4.1 'Introduction', section 4 'Key issues with pensions provided by small superannuation funds' of the discussion paper.
[33] See, for example, section 260A *Corporations Act 2001*. Similar prohibitions formerly resided in section 205 of the *Corporations Law* and in various State Companies Acts.
[34] [1986] BCLC 1 at 10.

38. The company law cases also illustrate preparedness by the Courts to take a contextual approach in the interpretation of the provision prohibiting the giving of financial assistance.[35]

39. Under paragraph 65(1)(b) 'financial assistance' takes its ordinary commercial meaning. Company law cases that consider the meaning of financial assistance in a similar commercial context are relevant in determining what is financial assistance for the purposes of paragraph 65(1)(b). The similarity between the two contexts is this:

- The company law prohibition[36] is intended to stop directors taking actions that may diminish the worth of a company, in favour of some shareholders, to the prejudice of the rights of the company's other shareholders and its creditors.[37]
- The SISA prohibition is to stop trustees of superannuation funds from taking actions that may diminish the worth of the fund, in favour of members who have not retired, to the prejudice of members' retirement savings.

The meaning of 'assistance'

40. The courts have considered the meaning of 'assistance' within the phrase 'financial assistance'.

[35] See for example, *Darvall v. North Sydney Brick & Tile Co Ltd* (1989) 16 NSWLR 260 where Kirby P (at 291) noted, in relation to the interpretation of section 129 of the *Companies (Acquisition of Shares) (New South Wales) Code* that the 'court should adopt that construction of the section which advances its apparent objectives' consistent with the modern approach to statutory construction adopted by the courts. See also *Burton v. Palmer* [1980] 2 NSWLR 878, Mahoney JA at 885-86.

[36] Although section 260A of the *Corporations Act 2001* (and the former Corporations Law) allows a company to financially assist a person to acquire its shares if certain requirements are met (for example it does not materially prejudice the interests of the company or its shareholders or its ability to pay its creditors), former provisions such as section 205 of the *Corporations Law* prohibited the giving of such assistance.

[37] See paragraph 12.75 of the Explanatory Memorandum to the Company Law Review Bill 1997 enacted as *Company Law Review Act 1998* which repealed section 205 and inserted sections 260A, 260B and 260C into the *Corporations Law*, since replaced by the *Corporations Act 2001*. It broadly gives the policy reason for provisions that prohibit the giving of financial assistance.

41. In *Burton v. Palmer*,[38] the court was required to consider whether a company gave financial assistance in connection with the purchase of its shares in breach of section 67 of the *Companies Act 1961 (NSW)*. The shareholder selling the shares made it a condition of the sale that the company pay an amount that was presently owed to the shareholder by the company. Mahoney JA did not consider that this amounted to financial assistance. His Honour considered the meaning of 'assistance' as used in the phrase 'financial assistance' and noted that it is necessary to ascertain the meaning of assistance from its context. While assistance might merely denote co-operation, Mahoney JA held that, in the context of section 67 of the *Companies Act 1961 (NSW)*, it had a meaning closer to the furnishing of something which is needed, or at least, wanted in order that the transaction be carried out.[39]

42. Nevertheless, financial assistance can be given to someone even though that person did not request it. In *Independent Steels Pty Ltd v. Ryan*,[40] it was held that financial assistance was given by a company to the purchaser of its shares, even though the arrangement was suggested by the company.

43. Further, in *Sterileair Pty Ltd v. Papallo*,[41] the Full Federal Court said that 'assistance' involves something in the nature of aid or help; it cannot exist in a vacuum but must be given to someone.

44. Based on these authorities, it is the Commissioner's view that assistance is given to a member or a relative of a member if there is some benefit, aid or help given to that person. For the purposes of paragraph 65(1)(b), it is not necessary to determine the purpose for which the financial assistance is given. Paragraph 65(1)(b) will be contravened if financial assistance is given to a member or a relative of a member using the resources of the SMSF irrespective of the purpose for which such assistance might be given or whether the member or member's relative sought such assistance.

The meaning of 'financial assistance'

45. Only assistance that is 'financial assistance' can contravene paragraph 65(1)(b).[42] As the phrase 'financial assistance' is not defined for the purposes of paragraph 65(1)(b) it takes its ordinary meaning. The term 'financial' qualifies the type of assistance such that paragraph 65(1)(b) refers to assistance 'relating to monetary receipts and expenditures; relating to money matters'.[43]

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[38] [1980] 2 NSWLR 878.
[39] [1980] 2 NSWLR 878 at 885-6.
[40] [1990] VR 247.
[41] (1998) 29 ACSR 461.
[42] See *Burton v. Palmer* [1980] 2 NSWLR 878 where Hutley J (at 880-1) acknowledged that while something may be of assistance it is necessary to determine whether it is financial assistance.
[43] *The Macquarie Dictionary*, 2005, 4th edition.

46. In *Milburn and Others v. Pivot Ltd*[44] (*Milburn),* Goldberg J, in considering the prohibition against the giving of financial assistance, stated that:

> …there is no exhaustive definition of 'financial assistance' for the purposes of s205 although the cases identify numerous examples of financial assistance (the purchase of an asset: *Belmont Finance Corporation v. William Furniture Ltd* (No 2) [1980] 1 All ER 393; the forgiving of a debt: *E H Dey Pty Ltd (In Liq) v. Dey* [1966] VR 464; giving security over a company's assets: *Firmin v. Gray & Co Pty Ltd* [1985] 1 Qd R 160; agreement to pay consultancy fees: *Independent Steels Pty Ltd v. Ryan* [1990] VR 247).

47. In the company law context, the courts have demonstrated the need to look at the substance of the transaction and not just to its form to determine if a company has provided financial assistance to an entity for the acquisition of its shares.

48. In *North Sydney-Apollo Printing Pty Ltd (Rec & Mgrs Apptd) v. Rowley*[45] (*North Sydney-Apollo Printing*), the Supreme Court of New South Wales was prepared to look behind the documents to determine the substance of the transaction.[46]

49. In *Burton v. Palmer*,[47] Mahoney JA noted that the form of the obligation or transaction is not conclusive.[48]

50. In *Milburn,*[49] Goldberg J noted that:

> The range and scope of financial transactions and instruments now available are such that it is important to look at the commercial substance of any particular transaction rather than its form to see whether s 205 [of the Corporations Law] has been breached.

51. In determining whether an arrangement entered into by a trustee or investment manager contravenes paragraph 65(1)(b), the Commissioner will similarly have regard to all the facts and circumstances of the particular arrangement and the policy intent of the provision and the SISA more broadly as explained at paragraph 35 of this Ruling.

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[44] (1997) 78 FCR 472 at 501;(1997) 149 ALR 439 at 466.
[45] (1976) 1 ACLR 392.
[46] In this case Holland J found that documents that purported to sell or transfer title to chattels of the company were really intended to provide additional security to the transferee for a loan that he had with a third party who was purchasing shares in the company. See also discussion of this case at paragraphs 100 to 102 of this Ruling.
[47] [1980] 2 NSWLR 878.
[48] In this case, Mahoney JA (at 885-6) indicated that a loan which is ostensibly to a third party may be financial assistance if it is part of a round robin of cheques in connection with the sale of shares.
[49] (1997) 78 FCR 472 at 501; (1997) 149 ALR 439 at 466.

52. In the context of the various company law provisions, the courts have either found, or indicated by way of obiter comment, the following to be financial assistance given by the company:

- the making of a gift;[50]
- giving a security, guarantee or indemnity over the company's assets;[51]
- the company taking on a financial obligation;[52]
- the company forgiving a debt or releasing a person from a financial obligation to the company;[53] and
- the company purchasing an asset from a person that it is not in the interests of the company to purchase.[54]

53. Such arrangements or transactions are discussed in more detail at paragraph 78 to 191 of this Ruling, including examples of how the principles established in relevant cases can be applied to SMSFs.

When financial assistance is given 'using the resources of the fund'

54. A further requirement for paragraph 65(1)(b) to apply is that the financial assistance must be given using the resources of the SMSF.

55. If the monetary or non-monetary assets of the SMSF are reduced as a result of giving financial assistance it is clear that the financial assistance is given using the resources of the SMSF.

56. However, a question arises as to whether financial assistance can be said to be given using the resources of the SMSF if there is no actual reduction in the assets of the SMSF.

57. The *Macquarie Dictionary* defines 'use' as 'to employ for some purpose; to expend or consume in use'.[55]

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[50] See, for example *Re VGM Holdings Ltd* [1942] 1 All ER 224; [1942] Ch 235.
[51] See, for example. *North Sydney-Apollo Printing* (1976) 1 ACLR 392.
[52] See, for example, *Burton v. Palmer* [1980] 2 NSWLR 878 at 881. See also paragraph 60 of this Ruling where an extract from the case is reproduced.
[53] See, for example, *EH Dey Pty Ltd (in liq) v. Dey* (1966) VR 464 (SC(Vic)).
[54] See, for example, *Belmont Finance Corp v. William Furniture Ltd & Ors* (No 2) (1980) 1 All ER 393.
[55] *The Macquarie Dictionary*, 2005, 4th edition.

58. The lending of money by an SMSF to a member or a relative of a member is prohibited by paragraph 65(1)(a) although it does not affect the balance sheet of the SMSF.[56] Whether the lending of money by an SMSF to a member or a relative of a member is on arm's length terms and conditions is irrelevant in determining a contravention of paragraph 65(1)(a).

59. Paragraph 65(1)(b) refers to 'any other financial assistance using the resources of the fund', which suggests that lending money would otherwise be financial assistance using the resources of the SMSF, despite the absence of a diminution of assets. From this it may be inferred that subsection 65(1), read as whole, does not require an actual reduction in the assets of the SMSF in order for financial assistance to be given using its resources. Further, it may be financial assistance using the resources of the SMSF even though on arm's length terms and conditions.

60. In the company law context, the courts have tended to take a broad view of when a company's resources are diminished. In *Burton v. Palmer*[57] Hutley JA notes that:

> …the assumption by a company of obligations, even if it is unlikely that they may have to be honoured, diminishes its resources.

61. Although in *Milburn*[58] Goldberg J considered that it was not easy to see how the giving of a guarantee by a company diminishes its resources except in a contingent sense, Goldberg J also expressed the view that there may be situations which arise where no diminution of resources occurs but there is nevertheless financial assistance given by the company.[59]

62. The Commissioner considers that the question of whether financial assistance is given using the resources of the SMSF must be determined taking into account the policy intent of the section 65.[60]

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[56] That is, a decrease in the cash asset of the SMSF is offset by a corresponding increase in an accounts receivable asset.
[57] [1980] 2 NSWLR 878 at 881.
[58] (1997) 149 ALR 439 at 468.
[59] See also *Dempster v. National Companies and Securities Commission* (1993) 10 ACSR 297 at 299 where the court indicates that while the diminution of resources may be relevant to the question of whether financial assistance is provided it is not decisive.
[60] See policy intent explained at paragraph 21 of this Ruling.

63. It is the Commissioner's view that financial assistance using the resources of the SMSF is given if the arrangement relies on the assets of the SMSF, whether or not there is a positive, negative or nil effect on the net assets as a result of that arrangement. Thus, financial assistance using the resources of the SMSF can include any arrangement where the assets of the SMSF are converted into other assets, diverted, diminished or put at risk, or where there is a prejudice to the financial position of the SMSF. It could also include the payment of a bona fide debt to a member of the SMSF or a relative of a member before its due date.[61]

When financial assistance is given 'to a member of the fund or relative of a member of the fund'

64. For paragraph 65(1)(b) to apply, there must be financial assistance given by the SMSF to a member of that SMSF or to a relative of a member of that SMSF.

65. For the purposes of the SISA, the meaning of a member of an SMSF is expanded[62] to include a person:

- who receives a pension from the SMSF; or
- who has deferred his or her entitlement to receive a benefit from the SMSF.

66. A relative of a member is defined[63] to mean:

- a spouse;
- a parent or grandparent (and the parent or grandparent's spouse);
- a brother or sister (and the brother or sister's spouse);
- an aunt or an uncle (and the aunt or uncle's spouse);
- a nephew or a niece (and the niece or nephew's spouse); or
- a lineal descendant or adopted child of the member, or of the member's spouse.

67. A question arises as to whether paragraph 65(1)(b) only applies if the financial assistance is given directly to the member or relative of a member, or whether it also applies if the financial assistance is given indirectly to the member or relative of a member.

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[61] See *Dempster v. National Companies and Securities Commission* (1993) 10 ACSR 297 at 349.
[62] See subsection 10(3), which is reproduced at paragraph 26 of this Ruling.
[63] See subsection 65(6), which is reproduced at paragraph 27 of this Ruling.

68. In the company law context, a broad approach was preferred by Austin J in *Law Society of New South Wales v. Milios.*[64] The case involved the application of section 260A of the *Corporations Law*, which prohibited a company from providing financial assistance to acquire shares except in prescribed circumstances. Section 260A replaced former section 205 of the *Corporations Law*, which had prohibited financial assistance given 'directly or indirectly'. These words were not used in section 260A of the former *Corporations Law* and having regard to the omission of these words Austin J in obiter stated:[65]

> Counsel for the receiver contended that the new law has substantially narrowed the scope of the statutory prohibition, by confining the degree of connection between the acquisition and the assistance which is necessary before the section applies.… In my view the broader approach is preferable, having regard to the legislative history of the section, the explanatory memorandum to which I have referred, and most importantly the public policy which the section seeks to implement, as articulated by the Greene Committee.

69. Paragraph 65(1)(b) is drafted in wide terms in that it refers to 'any other' financial assistance. In determining the potential breadth of the provision, the Commissioner considers it appropriate to have regard to the context in which the provision appears and the intent of Parliament both with respect to the provision and the SISA more broadly. As explained in paragraphs 21 and 35 of this Ruling, the policy intent of the SISA and provisions such as paragraph 65(1)(b) is to ensure that concessionally taxed superannuation is used only for retirement income purposes and not as a source of pre-retirement finance. Consistent with this policy intent, the Commissioner considers that the phrase 'any other' financial assistance in paragraph 65(1)(b) can include financial assistance that is given directly or indirectly to a member or a member's relative.

70. For example, a member or a member's relative might be provided with financial assistance by a third party on condition that the SMSF enter into an arrangement of some kind with that third party. This is essentially what occurred in *Darvall v. North Sydney Brick & Tile Co Ltd & Ors*[66] (*Darvall*). In this case, Darvall had made a takeover offer for shares in another company (Norbrik), which was considered too low by the directors of Norbik. As a means of giving shareholders an alternative to Darvall's take-over offer, Norbrik entered into an arrangement whereby a wholly owned subsidiary of Norbrik (Norwest) and a third party (Chase) would subscribe equal amounts as share capital in a joint venture company. Valuable land owned by Norbrik was to be sold to the joint venture company for development. The arrangement also involved Chase giving Norbrik's managing director a non-recourse loan to enable the managing director to make an offer for Norbrik's shares that was higher than Darvall's take-over offer.

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[64] (1999) 48 NSWLR 409.
[65] (1999) 48 NSWLR 409 at 414.
[66] (1987) 16 NSWLR 212.

71. Hodgson J found that Norbrik indirectly gave financial assistance to the managing director within the meaning of paragraph 129(1)(a) of the *Companies (Acquisition of Shares) (New South Wales) Code*. Hodgson J found that Chase gave financial assistance to the managing director for the acquisition of the shares in Norbrik and it only gave this assistance because Norbrik caused Norwest to enter into the joint venture agreement. It was financial assistance that diminished the resources of Norbrik as it was bound to part with the land in return for whatever benefits might flow under the joint venture agreement.[67]

72. The Commissioner considers that paragraph 65(1)(b) can apply if financial assistance is indirectly provided to a member or relative of a member through an interposed third party. Financial assistance is indirectly provided to a member or relative of a member using the resources of the fund if the SMSF enters into an arrangement that relies on, or is in substance conditional or dependent upon, the resources of the SMSF and as part of that arrangement financial assistance is provided by a third party to the member or relative of a member.

Consideration of particular arrangements or transactions

73. As the question of whether paragraph 65(1)(b) applies depends on the facts and circumstances of any particular transaction, it is not possible to exhaustively list all the ways in which a trustee or investment manager of an SMSF might give financial assistance using the resources of the SMSF to a member or a member's relative.

74. There are certain transactions that by their nature the Commissioner considers contravene paragraph 65(1)(b). We explain these transactions and provide examples at paragraphs 77 to 119 of this Ruling.

75. Other types of arrangements may or may not contravene paragraph 65(1)(b) depending upon whether the purpose of the arrangement, assessed objectively taking into account the facts of the particular case, is to provide a member or relative of a member with financial assistance using the resources of the SMSF. We explain the factors that assist in determining whether an arrangement contravenes paragraph 65(1)(b) and provide examples at paragraphs 120 to 169 of this Ruling.

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[67] (1987) 16 NSWLR 212 at 246. On appeal, Kirby P (who delivered the dissenting judgment) confirmed that the help given to the managing director by Norbrik in the purchase of the shares was 'indirect financial assistance': (1989) 16 NSWLR 260 at 297. The majority did not find it necessary to make a finding concerning section 129 in reaching a decision on the appeal case.

76. Transactions that by their nature do not contravene paragraph 65(1)(b) are explained at paragraphs 170 to 175 of this Ruling.

Arrangements or transactions that by their nature contravene paragraph 65(1)(b)

77. The Commissioner considers the following arrangements by their very nature contravene paragraph 65(1)(b):

- the SMSF giving a gift to a member or a relative of a member;
- the SMSF selling an asset for less than market value to a member or a relative of a member;
- the SMSF purchasing an asset for greater than its market value from a member or a relative of a member;
- the SMSF acquiring services on non-arm's length terms from a member or a relative of a member;
- the SMSF providing a security or charge over SMSF assets or giving a guarantee to secure a loan for a member or a relative of a member;
- the SMSF forgiving a debt, releasing an obligation or taking on an obligation of a member or a relative of a member.

Giving a gift

78. In general terms a gift is a voluntary transfer of money or property from one party to another with no return to the donor of a material advantage.[68]

79. In *Re VGM Holdings Ltd*[69] the issue was whether the word 'purchase'[70] covered the case where money provided by a company is used to assist a subscription for the company's own shares. In concluding that purchase did not include a subscription for the company's shares, Lord Greene MR made the following obiter comment concerning the meaning of 'financial assistance':[71]

> ..whether a company provides the money by way of gift or by way of loan, or by buying assets from the person who is purchasing the shares at a fraudulent undervalue, all those transactions, it seems to me, would fall within the phrase 'financial assistance'.

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[68] See for example, *Leary v. Federal Commissioner of Taxation* 80 ATC 4438; (1980) 11 ATR 145.
[69] [1942] 1 All ER 224; [1942] Ch 235.
[70] More specifically, section 45 of the *Companies Act 1929* (UK) prohibited a company from giving directly or indirectly, whether by means of loan, guarantee, the provision of security or otherwise, any financial assistance for the purposes of, or in connection with, a purchase by any person of shares in the company.
[71] [1942] 1 All ER 224; [1942] Ch 235 at 226.

80. On this basis, it is the Commissioner's view that paragraph 65(1)(b) is contravened if a trustee or investment manager of an SMSF gives a gift of money or any other asset of the SMSF to a member or relative of a member.

Example 1: giving a gift – financial assistance

81. *Mark is a trustee of an SMSF. The SMSF's portfolio of assets, accumulated in accordance with its investment strategy, includes works of art.*

82. *As trustee Mark gifts a work of art to his daughter for her 30th birthday. It does not matter that Mark's daughter neither requested nor needed the gift bestowed upon her. The gift of the work of art, being an SMSF asset, involves the giving of financial assistance using the resources of the SMSF to a relative of a member and thus contravenes paragraph 65(1)(b).*[72]

Selling an SMSF asset at less than market value

83. In the Commissioner's view paragraph 65(1)(b) is contravened if the SMSF sells an asset to a member or relative of a member at less than market value.

Example 2: selling an asset below market value – financial assistance

84. *Robert is a trustee and member of an SMSF. The SMSF's portfolio of assets includes a block of land located in an inner city suburb where land values have risen significantly in recent years.*

85. *Robert as trustee sells the asset to his son for $210,000. Two months prior to the sale, the block of land was independently valued at $300,000.*

86. *The sale of the land by Robert as trustee to his son for less than market value involves the giving of financial assistance using the resources of the SMSF to a relative of a member and thus contravenes paragraph 65(1)(b).*[73]

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[72] Trustees also need to consider the payment standards in Part 6 of the SISR and the sole purpose test in section 62 of the SISA.

[73] Trustees and investment managers also need to consider section 109, which concerns non-arm's length arrangements.

Purchasing an asset at greater than market value

87. The decision in *Belmont Finance Corp v. William Furniture Ltd & Ors*[74] (*Belmont Finance*) provides support for the view that the purchase by a company of property which it does not genuinely need or want may be financial assistance to the vendor for the purposes of acquiring shares in the company, including where the price paid is a fair one.[75] In that case the English Court of Appeal found that the sole purpose of the acquisition of shares by the company (Belmont Finance) in another company (Maximum) was to put the vendor of those shares in funds to enable the vendor to pay for shares in Belmont Finance without using the vendor's own resources.[76] Further the price paid by Belmont Finance to purchase the shares in Maximum was an inflated price and not a commercial transaction.

88. In the Commissioner's view, paragraph 65(1)(b) is contravened if a trustee or investment manager acquires an asset from a member or a member's relative at an inflated price.

Example 3: purchase of an asset by an SMSF at greater than market value – financial assistance

89. *Andrew is a member and trustee of an SMSF. Andrew needs to raise $10,000 for personal reasons. He owns an antique which has been independently appraised as having a market value of $8,000.*

90. *As trustee of the SMSF, Andrew agrees for the SMSF to purchase the antique at $10,000.*

91. *The purchase contravenes paragraph 65(1)(b). By purchasing the antique at $10,000 the SMSF is giving financial assistance to Andrew (a member) using the resources of the SMSF.*[77]

Acquiring services on non-arm's length terms

92. In *Independent Steels Pty Ltd v. Ryan*,[78] it was held that an arrangement to acquire services under a consultancy was also 'financial assistance' even though it was the company that suggested the proposed structure for the sale of the shares and not the purchaser.

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[74] [1980] 1 All ER 393.
[75] In the context of paragraph 65(1)(b), see Example 22 at paragraphs 167 to 169 of this Ruling.
[76] [1980] 1 All ER 393 at 403.
[77] Trustees and investment managers also need to consider the restrictions in section 66 on acquiring assets from related parties of the fund and the arm's length requirements in section 109.
[78] [1990] VR 247.

93. In the Commissioner's view, paragraph 65(1)(b) is contravened if a trustee or investment manager acquires services from a member or a relative of a member on non-arm's length terms. The trustee or investment manager might either acquire excessive services or may pay an inflated price for services. However, the acquisition of necessary services on arm's length terms is not financial assistance.

Example 4: acquiring services on arm's length terms – no financial assistance

94. *Sam is a member and trustee of an SMSF. Sam has a nephew, Peter, who is an accountant and specialises in providing accountancy services to SMSFs. Sam engages Peter to provide accountancy services to the SMSF. Peter provides the services for arm's length consideration and all the services provided by Peter are reasonably necessary to ensure good administration of the SMSF.*

95. *On the facts there is no contravention of paragraph 65(1)(b). Peter has not been remunerated in excess of an arm's length consideration and has not provided excessive services to the SMSF. Sam in employing the services of Peter has not provided Peter with financial assistance using the resources of the SMSF.*

96. *If it could be said that the amount charged by Peter for the services was not an arm's length amount or that the services provided by Peter were excessive this indicates that Sam is giving financial assistance to Peter (a relative of a member) using the resources of the SMSF.*

97. The Commissioner also notes that SMSF trustees cannot be remunerated for any trustee services[79] and that any excess or unnecessary remuneration for other services to an SMSF may contravene the rules dealing with arm's length transactions (section 109) or the sole purpose test (section 62).

Providing a security or charge over SMSF assets or giving a guarantee

98. The decision in *North Sydney-Apollo Printing*[80] supports the view that providing a security or charge over SMSF assets constitutes financial assistance.

[79] See section 17A.
[80] (1976) 1 ACLR 392, also discussed at paragraph 48 of this Ruling.

99. In that case, the court considered a company had provided financial assistance for the purposes of section 67 of the *Companies Act 1961* (NSW).[81] At issue was whether the sale of certain assets by some of the plaintiff companies to a person (Mr Rowley, a shareholder in the companies) were really intended to provide additional security for a loan that he had made to a third party (Mr Palasthy) to enable Mr Palasthy to purchase shares in the group of eight companies including North Sydney Apollo and North Sydney Printing. The sale of the assets was for a nominal amount. Holland J looked at the substance rather than the form of the transaction and held that no genuine sale or absolute transfer of title to the assets was intended. Rather the sale of the assets was intended to provide security to Mr Rowley for the repayment of the loan by Mr Palasthy.

100. It was argued that 'as section 67 applied only to the giving of any 'financial assistance' it should be limited to the giving of money or moneys worth which meant, in the case of 'security', a negotiable security'. However, Holland J found the argument untenable:[82]

> Apart from the breadth given to the prohibition by the words 'or otherwise', if a guarantee or security is called up the company may suffer a depletion of its assets by paying under a guarantee or by losing assets put up as security and, in either case, the result would be to provide financial assistance even though only indirectly. The giving of financial assistance for the prohibited purpose is a contravention whether given directly or indirectly.

Holland J therefore held that the companies had given financial assistance.[83]

101. Having regard to the policy intent of paragraph 65(1)(b),[84] it is the Commissioner's view that paragraph 65(1)(b) is contravened if a trustee or investment manager gives a security or charge or similar over the assets of the SMSF or gives a guarantee for the benefit of a member or a member's relative.

102. As explained at paragraph 64 of this Ruling it is the Commissioner's view that financial assistance can be given using the resources of the SMSF even though there is no actual reduction in the assets of the SMSF. By entering into such arrangements, the trustee or investment manager places the assets of the SMSF at risk. In the event that the security or charge crystallises or the trustee or investment manager is required to meet the obligations imposed on it under a guarantee, it will result in a reduction of the assets of the SMSF.

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[81] This provision prohibited financial assistance provided by a company for the purpose of, or in connection with, a purchase of the company's shares whether made directly or indirectly by any means.
[82] (1976) 1 ACLR 392 at 402.
[83] (1976) 1 ACLR 392 at 402.
[84] As explained at paragraph 21 of this Ruling.

Example 5: providing a charge over SMSF assets – financial assistance

103. *Laura is a member and trustee of an SMSF. Laura needs to borrow $50,000 for personal reasons. Laura does not have any assets to offer as security for the loan.*

104. *As trustee of the SMSF, Laura agrees to a charge over a commercial building that is owned by the SMSF as security for her personal loan. Agreeing to the charge over an SMSF asset is the giving of financial assistance to Laura (a member). It is given using the resources of the SMSF as the charge places SMSF assets at risk of being diminished as Laura may be unable to repay the loan. The giving of the charge over the SMSF asset therefore contravenes paragraph 65(1)(b).*[85]

Example 6: giving a guarantee – financial assistance

105. *Jason and Julie, a married couple, are trustees and members of JJ SMSF. Their son Alex wishes to take out a loan to purchase a property. The financial institution is not satisfied with the collateral that Alex offers for the loan, so Jason and Julie as trustees of JJ SMSF, provide the bank with a written guarantee that they will pay the debt if Alex defaults on his loan.*

106. *The guarantee given by Jason and Julie as trustees of JJ SMSF is the giving of financial assistance to a relative of a member of the SMSF. It is given using the resources of the SMSF as the guarantee places SMSF assets at risk of being diminished as Alex may be unable to repay the loan. The giving of the* guarantee *therefore contravenes paragraph 65(1)(b).*

Example 7: securing a loan from a third party for the family partnership – financial assistance

107. *Joan is a member and trustee of an SMSF. Joan and her sister Judy are equal partners in a partnership through which they operate a successful hair dressing salon. The hairdressing salon requires funds to purchase additional floor space so that it can expand. The bank is prepared to lend the partnership the necessary funds provided they are able to provide security for the loan. Joan as trustee of the SMSF provides the bank with a written guarantee for the amount of the loan. The bank subsequently loans the money to the partnership.*

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[85].Trustees should also consider regulation 13.14 of the SISR, which provides that subject to very limited exceptions (set out in regulations 13.15 and 13.15A), the trustee must not give a charge over, or in relation to, an asset of the fund.

108. *Joan as trustee of the SMSF has entered into a guarantee with the bank to secure the loan for the partnership. It is given using the resources of the SMSF as the guarantee places SMSF assets at risk of being diminished as the partnership may be unable to repay the loan. Joan as trustee has therefore provided financial assistance using the resources of the SMSF to herself (as a member) and her sister Judy (a relative of a member). The giving of the guarantee therefore contravenes paragraph 65(1)(b).*

Example 8: securing a loan from a family company - financial assistance

109. *Bill is a member and trustee of an SMSF. Bill and his wife Madalena are shareholders, along with other family members, in an engineering company. The company is willing to lend money to Bill and Madalena at an attractive interest rate provided that the company is provided with security for the loan. Bill as trustee of the SMSF provides the company with a charge over a block of land owned by the SMSF.*

110. *Bill as trustee has used the resources of the SMSF to secure the loan made by the company. The charge places the SMSF's assets at risk of being diminished as Bill and Madalena may be unable to repay the loan. Bill as trustee has therefore provided financial assistance using the resources of the SMSF to himself (a member) and his wife (a relative of a member). The giving of the charge over the SMSF asset therefore contravenes paragraph 65(1)(b).*[86]

Forgiving a debt, releasing an obligation or taking on an obligation

111. The decision in *EH Dey Pty Ltd (in liq) v. Dey*[87] supports the view that forgiveness of a debt or a release from an obligation is financial assistance.

[86] Trustees should also consider regulation 13.14 of the SISR, which provides that subject to very limited exceptions (set out in regulations 13.15 and 13.15A), the trustee must not give a charge over, or in relation to, an asset of the fund.
[87] [1966] VR 464.

112. In this case, the vendor (Dey) of shares in a company (EH Dey Pty Ltd) owed £5,492.12 to the company. Dey entered into a deed with the other shareholders of the company and the purchasers of the shares held by Dey that deemed the amount of £5,492.12 due to the company to be paid and the amount of £12,440.12 payable by the purchasers to Dey for the shares be reduced by £5,492.12. The company, which was not a party to the agreement, subsequently took action against Dey to recover the debt of £5,492.12. McInerney J held that the company had provided financial assistance in breach of section 45 of the *Company Act 1938* (Vic) and that the company was entitled to recover from Dey the amount of the debt.[88] In treating Dey as having paid the £5,492.12, the company affected its financial position.

113. It is the Commissioner's view that paragraph 65(1)(b) is contravened if a trustee or investment manager forgives a debt of a member or a relative of a member which is owed to the SMSF or releases a member or a relative of a member from a financial obligation to the SMSF.

Example 9: release from an obligation – financial assistance

114. *West SMSF owns a commercial property which was leased to a member of the SMSF at a fair market rate. Rent is payable in advance, although the trustee did not require rental payment for a particular month.*

115. *The trustee has effectively released the member from the obligation to pay the rent by failing to enforce the payment. The failure to require the payment of rent is the giving of financial assistance to the member using the resources of the SMSF. The trustee therefore contravenes paragraph 65(1)(b).*[89]

116. *Paragraph 65(1)(b) would also be contravened if the trustee forgave the member's debt before it became due and payable or if the rent is allowed to fall into arrears.*

117. It is the Commissioner view that the SMSF taking on an obligation of the member or a relative of the member is the giving of financial assistance using the resources of the SMSF and therefore contravenes paragraph 65(1)(b).

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[88] [1966] VR 464 at 470.

[89] Trustees and investment managers also need to consider section 109, which concerns non-arm's length arrangements.

Example 10: taking on an obligation – financial assistance

118. *Lucas is both a trustee and member of North SMSF. Lucas has a daughter attending a private school. Lucas, as trustee, arranges for the SMSF to meet the school fees for each term. The school fees are obligations Lucas has to meet in his individual capacity.*

119. *By arranging for the SMSF to meet the school fees, financial assistance is given to Lucas using the resources of the SMSF. Lucas, as trustee of the SMSF, therefore contravenes paragraph 65(1)(b).*[90]

Arrangements that may or may not contravene paragraph 65(1)(b) depending upon the circumstances

120. Arrangements other than those dealt with in the previous section may contravene paragraph 65(1)(b) where the purpose of the arrangement is to provide a member or relative of a member with financial assistance. Whether the purpose of an arrangement is to provide financial assistance to a member or relative of a member using the resources of the SMSF is assessed objectively in light of commercial reality and having regard to the facts of the particular case.

121. Factors that indicate that a financial arrangement or transaction between an SMSF and a member, or a relative of a member, may contravene paragraph 65(1)(b) include:

- the arrangement or transaction exposes the SMSF to a credit risk, or exposes the SMSF to the financial risk, of a member or a relative of a member;
- the arrangement or transaction is on non-arm's length terms that are favourable to the member or relative of a member;
- the arrangement or transaction is not a usual or normal commercial arrangement in the context in which SMSFs operate;
- the arrangement or transaction is inconsistent with the investment strategy of the SMSF;
- under the arrangement or transaction an amount is paid by the SMSF, and later repaid to the SMSF, in amounts or in a manner that may be equated in a commercial sense with the repayment of a loan with interest; and
- the arrangement or transaction results in a diminution of the assets of the SMSF whether immediately or over a period of time.

[90] Trustees also need to consider the sole purpose test in section 62.

122. Conversely if an arrangement or transaction does not exhibit the above factors this indicates that paragraph 65(1)(b) has not been contravened.

123. The factors are not intended to be an exhaustive list. The weight to be given to the above factors will depend on the particular case. Moreover, the presence or absence of such factors should not be taken to mean that it is conclusive that paragraph 65(1)(b) has, or has not been contravened.

Interaction of paragraphs 65(1)(a) and 65(1)(b)

124. Paragraph 65(1)(b) prohibits the giving of any financial assistance that is not the lending of money as prohibited by paragraph 65(1)(a).

125. The examples at paragraphs 133 to 169 of this Ruling are intended to illustrate how paragraph 65(1)(b) could apply to various arrangements assuming that paragraph 65(1)(a) does not apply to those arrangements. However, if a particular type of arrangement or transaction equates to the lending of money, then paragraph 65(1)(a) and not paragraph 65(1)(b) applies. This Ruling does not deal directly with whether any such arrangement may contravene paragraph 65(1)(a). To the extent that there could be doubt as to which of the two paragraphs applies in some cases, in practical terms the result is the same either way.

Determining whether an arrangement is in the nature of a financing arrangement

126. In the Commissioner's view an arrangement that is in substance a financing arrangement, although not the lending of money as prohibited by paragraph 65(1)(a), is prohibited by paragraph 65(1)(b).

127. An arrangement is in substance a financing arrangement if, on an objective consideration of all the facts and circumstances, it is reasonable to infer that the purpose of the arrangement is to provide the member or relative of the member with finance other than by way of lending money as prohibited by paragraph 65(1)(a).

128. An example of such an arrangement is provided by *Eastern Nitrogen Ltd v. Commissioner of Taxation*[91] (*Eastern Nitrogen*). In *Eastern Nitrogen* an ammonia plant was sold for $71.4m to financiers and leased-back from them. Although there was no option in the agreement for the lessee to repurchase the ammonia plant and no option to sell the plant in favour of the lessee, the plant was ultimately repurchased by the lessee at the expiration of a further lease period. The issue was whether the lease payments were deductible for income tax purposes or whether they were, at least in part, made on capital account. The overall arrangement was considered a financing arrangement although it did not involve a loan. Carr J said that:

> From a practical and business point of view, payment of the rent not only secured the use of the ammonia plant, the rent also paid for the use of the $71.4 million. This was clearly the main purpose of the whole arrangement – to provide financial accommodation, though not by way of loan, for the appellant's business.[92]
>
> The sale and interdependent lease-back provided a convenient alternative to raising funds by way of charging or mortgaging the ammonia plant.[93]

129. In the Commissioner's view an arrangement similar to that in *Eastern Nitrogen* (that is, where the SMSF is the 'financier') would likely contravene paragraph 65(1)(b). The Commissioner does not, however, consider that all leasing arrangements would contravene paragraph 65(1)(b). For example, if an asset is purchased from, and leased to, a member or relative of a member and is also regularly leased to other third parties during the assets life, this indicates that there is no financing arrangement between the SMSF and member or relative of a member and that the asset represents an investment by the SMSF.

130. An indication that the relevant asset is an investment and that there is no financing arrangement between the SMSF and a member or relative of a member is where the asset is purchased from a member of the SMSF or relative of a member and is leased or rented to the member or relative on a long term basis or for the life of the asset and on arm's length terms.[94]

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[91] [2001] FCA 366.
[92] [2001] FCA 366 at paragraph 58.
[93] [2001] FCA 366 at paragraph 60.
[94] That is, at a rate that an unrelated third party would be expected to pay for the use of the asset.

131. Although the SISA contemplates that an SMSF may acquire assets from a member or a relative of a member[95] and that the SMSF may also lease certain assets to a member or relative of a member[96] it is, in the Commissioner's view, still a requirement that the arrangement not contravene paragraph 65(1)(b). The Commissioner considers this approach consistent with the intent of subsection 65(7) which states that nothing in Part 8 (which is about in-house asset rules applying to regulated superannuation funds) limits the operation of section 65. The Explanatory Memorandum[97] explains that:

> The Bill amends the in-house asset rules in Part 8 (see item 27), extending their application to all related parties of a fund. Loans to related parties will be included as in-house assets of a fund. Item 9 ensures that, although members and relatives of members of a fund are related parties under Part 8, the lending of money or providing financial assistance to a member or a relative of a member of a fund remains prohibited under section 65.[98]

132. The following examples illustrate whether or not on the particular facts a financing arrangement has been entered into by the SMSF in contravention of paragraph 65(1)(b).

Examples concerning sale and repurchase

Example 11: sale and repurchase of an asset – financial assistance

133. *Angela is a member and trustee of an SMSF. Angela is in need of finance to fund the expansion of her printing business. She has made enquiries of lending institutions for this purpose but due to the risk involved with the expansion, acquiring finance through a lending institution will mean paying a higher rate of interest than Angela wants to pay.*

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[95] See subsection 66(2) – A trustee or investment manager of an SMSF can acquire business real property or listed securities at market value from a related party of the SMSF, which includes a member or a relative of a member.
See also subsection 66(2A) – A trustee or investment manager of an SMSF can acquire certain in-house assets (as defined in section 71) or certain assets specifically excluded from being in-house assets at market value from a related party of the SMSF which includes a member or a relative of a member..

[96] See the exception to the meaning of in-house asset in paragraph 71(1)(g) of Part 8.

[97] Accompanying the Senate Superannuation Legislation Amendment Bill (No. 4) 1999 enacted as *Superannuation Legislation Amendment Act (No. 4) 1999.*

[98] Schedule 1, under the headings 'Section 65: Loans to members and relatives', 'Item 9'.

134. *Angela has a block of land that qualifies as business real property which she sells to the SMSF for its market value.*[99] *The money raised by the sale is applied to the expansion of her business. The expansion of Angela's printing business is successful and Angela subsequently repurchases the land from the SMSF for an amount equal to what the SMSF paid Angela for the land along with an additional amount that it is reasonable to conclude compensates the SMSF for the use of the money.*

135. *The facts support an inference that the resources of the SMSF are being used to provide Angela with the necessary capital to finance the expansion of her printing business. The arrangement is similar in effect to the SMSF loaning the money to Angela and Angela granting the SMSF a charge over the block of land. The arrangement contravenes paragraph 65(1)(b).*

136. By way of contrast Example 12 illustrates a sale and repurchase arrangement that does not result in contravention of paragraph 65(1)(b).

Example 12: sale and purchase of an asset – no financial assistance

137. *Lofty is a sole member and a trustee of an SMSF. Lofty sells a commercial property that qualifies as business real property, which consists of a number of strata titled units leased to ongoing businesses, to the SMSF at market value.*[100] *Following the sale of the commercial property to the SMSF, Lofty, who carries on a business from one of the units, leases that unit at market value from the SMSF.*

138. *Some years later the SMSF admits another member and re-structures into a two member SMSF. The trustees review the investment strategy of the SMSF and decide that the SMSF should dispose of the commercial property asset. The SMSF notifies all of the tenants and offers each occupying tenant, including Lofty, the option to purchase their unit at market value. Those that do not purchase their unit will not have their lease renewed and their unit will be put on the market at that time. Lofty buys the unit that he has been leasing from the SMSF at market value and continues to run his business from the unit. There is nothing in the facts to suggest that the sale and repurchase of the unit by Lofty is to provide financial assistance to Lofty. On the facts there is no contravention of paragraph 65(1)(b).*

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[99] Trustees and investment managers also need to consider the restrictions in section 66 on acquiring assets from related parties of the SMSF. However, paragraph 66(2)(b) provides that a trustee or investment manager can acquire business real property at market value from a related party of the SMSF without contravening section 66.

[100] Trustees and investment managers also need to consider the restrictions in section 66 on acquiring assets from related parties of the SMSF. However, paragraph 66(2)(b) provides that a trustee or investment manager can acquire business real property at market value from a related party of the SMSF without contravening section 66.

Examples concerning leasing arrangements

Example 13: acquisition of equipment from third party and lease to family partnership – financial assistance

139. *Robert and Sue are members and trustees of an SMSF. Robert and Sue run a restaurant in partnership which is in need of renovation including the replacement of large capital items such as stoves, ovens and fridges. Robert and Sue as trustees of the SMSF arrange for the SMSF to purchase new stoves, ovens and fridges which they then lease from the SMSF for a period of time on arm's length terms.*[101] *At the expiration of the lease period the partnership purchase the stoves, ovens and fridges for the equipment's market value at that time. The rental and purchase consideration recoup the SMSF's capital outlay plus an additional amount that it is reasonable to conclude compensates the SMSF for the use of the money.*

140. *The facts support an inference that the resources of the SMSF are being used to provide Robert and Sue with the means of acquiring the necessary equipment for their renovation. Even though the lease payments and purchase price are at arm's length, the arrangement is similar in effect to the SMSF loaning the money to Robert and Sue and Robert and Sue granting the SMSF a charge over the assets. The arrangement contravenes paragraph 65(1)(b).*

Example 14: acquisition of assets from company and lease of assets to that company – financial assistance

141. *Jack and Jill are members and trustees of an SMSF. Jack and Jill are equal shareholders and directors in a company which carries on a primary production business of grain growing. Jack and Jill want to expand their operations into grape growing but are in need of capital to do so.*

142. *Jack and Jill are unable to secure finance from a financial institution and so Jack and Jill, as trustees of the SMSF, arrange for the SMSF to purchase a harvester and tractor from the company.*[102] *The company leases the harvester and tractor from the SMSF. The lease payments are on arm's length terms.*[103] *The company at a future date repurchases the tractor and harvester from the SMSF. The lease payments and reacquisition price recoup the SMSF's capital outlay plus an additional amount that it is reasonable to conclude compensates the SMSF for the use of the money.*

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[101] Trustees also need to consider the in-house asset rules in Part 8 including the 5% limit on the market value ratio of the SMSF.
[102] Trustees and investment managers also need to consider the restrictions in section 66 on acquiring assets from related parties of the SMSF.
[103] Trustees also need to consider the in-house asset rules in Part 8 including the 5% limit on the market value ratio of the SMSF.

143. *The arrangement is in substance a financing arrangement.*[104] *The facts support an inference that the resources of the SMSF are being used to provide the company, and indirectly Jack and Jill, who are the only shareholders of the company, with the necessary capital to finance the expansion into grape growing. Jack and Jill as trustees of the SMSF have used the resources of the SMSF to effect a financing arrangement for the benefit of the company and to ultimately advance their financial interests as shareholders in that company. Both the company and Jack and Jill have received financial assistance from the SMSF. The arrangement therefore contravenes paragraph 65(1)(b).*

144. By way of contrast Examples 15, 16 and 17 illustrate leasing arrangements that do not result in contravention of paragraph 65(1)(b).

Example 15: acquisition of works of art from third party and lease to member and others – not financial assistance

145. *Jeremy is a member and trustee of an SMSF. Jeremy has an art gallery. Having worked in the industry for a number of years Jeremy is aware of the potential for capital appreciation and high demand for leasing of particular types of works of art. Jeremy as trustee of the SMSF has certain works of art appraised and subsequently purchases those works of art. The SMSF advertises the works of art for lease. The works of art are at times leased by Jeremy as well as other galleries and businesses. The lease payments by Jeremy are on arm's length terms.*[105]

146. *It cannot be inferred from the particular facts that the investment by the SMSF was to provide Jeremy with financial assistance. Rather the facts support an inference that the SMSF has invested in works of art with the intention of making money from both the capital appreciation of the works of art and also leasing the works of art. The arrangement does not contravene paragraph 65(1)(b).*

Example 16: lease of commercial premises by SMSF to family member – not financial assistance

147. *John and Lyn are members and trustees of an SMSF. The SMSF has owned commercial premises for a number of years which it has rented out to a couple who have run a successful hair and beauty salon.*

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[104] It is similar to the arrangement in *Eastern Nitrogen Ltd v. Commissioner of Taxation* [2001] FCA 366 as discussed at paragraph 130 of this Ruling.

[105] Trustees also need to consider the in-house asset rules in Part 8 including the 5% limit on the market value ratio of the SMSF.

148. *The current tenants have decided to retire and will not renew their lease. John and Lyn's daughter Jane is a qualified hairdresser and has decided to start her own hairdressing business. The SMSF rents the commercial premises to Jane at a fair market rate.*[106]

149. *It cannot be inferred from the facts that the investment by the SMSF was to provide a member or relative of a member with the necessary finance to acquire the use of the commercial premises. The commercial premises have been owned for some time and there is nothing to suggest a connection between the acquisition of those premises and the later rental of the premises to John and Lyn's daughter. Rather the facts support an inference that the SMSF invested in the premises with the intention of making money from the premises through rental and to ultimately realise a capital gain as the premises appreciate in value. The arrangement does not contravene paragraph 65(1)(b).*

Example 17: lease of business real property by SMSF to members – not financial assistance

150. *Von and Bill are members and trustees of an SMSF. Von and Bill run a small market produce farm that is business real property. They sell the farm to the SMSF*[107] *and subsequently lease the farm from SMSF on arm's length terms to continue farming produce until their retirement. Upon their retirement the farm will either be sold by the SMSF or leased to someone else.*

151. *It cannot be inferred from the facts that the investment by the SMSF was to provide Von and Bill with financial assistance. Rather the facts support an inference that the SMSF has invested in the farm with the intention of making money from the farm through leasing it to the members and to realise a capital gain if the farm is sold upon the retirement of the members. The arrangement does not contravene paragraph 65(1)(b).*

Example concerning a credit arrangement

152. The Commissioner considers that any arrangement that results in an extension of credit to a member or a relative of a member is in substance a financing arrangement.

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[106] Trustees also need to consider the in-house asset rules in Part 8 including the 5% limit on the market value ratio of the SMSF. The SMSF's interest in the premises may be business real property.

[107] Trustees and investment managers also need to consider the restrictions in section 66 on acquiring assets from related parties of the SMSF. However, paragraph 66(2)(b) provides that a trustee or investment manager can acquire business real property at market value from a related party of the SMSF without contravening section 66.

Example 18 – extending of credit to a relative of a member – financial assistance

153. *Dale is a member and trustee of an SMSF. The SMSF has a ride on mower that has been used by the SMSF for keeping a block of land mowed in accordance with council requirements. The land has been sold to an unassociated entity for market value and the SMSF no longer has any use for the ride on mower. Dale's niece, who has moved onto a rural block, offers to buy it from the SMSF at market value although she is unable to pay the full amount up front. Dale, as trustee, agrees to sell the ride on mower to his niece and allows her to pick it up immediately and to pay it off in instalments over a period of time.*[108]

154. *Dale as trustee has extended credit to his niece (a relative of a member) and exposed the SMSF to a credit risk. The arrangement contravenes paragraph 65(1)(b).*

Examples concerning investment in a family business

Example 19: SMSF investment in family business – financial assistance

155. *John and Jenny are members and trustees of an SMSF. Their children James and Charlotte are in partnership and run a catering business. James and Charlotte want to expand their business but need capital to buy new equipment.*

156. *John and Jenny as trustees of the SMSF contribute an amount to the partnership that is equal to the amount required to purchase the new equipment. In return the SMSF acquires an equivalent percentage interest in the partnership.*[109] *The partnership's expansion is successful and within 2 years John and Jenny buy out the SMSF's interest in the partnership for an amount representing the initial investment in the partnership plus an additional amount that it is reasonable to conclude reflects the use of the money by the partnership taking into account the risk to which the SMSF was exposed.*

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[108] Trustees need to consider the arm's length requirements in section 109 and the in-house asset rules in Part 8 including the 5% limit on the market value ratio of the SMSF.

[109] Trustees need to consider the restrictions in section 66 on acquiring assets from a related party of the SMSF and the in-house asset rules in Part 8 including the 5% limit on the market value ratio of the SMSF.

157. *The facts indicate that the money was invested by the SMSF in the partnership to fund the expansion of the business. This is supported by the fact that the investment was subsequently repaid to the SMSF and represented a return of capital along with an additional amount for the use of that money. The arrangement exposed the SMSF to the financial risk of the relatives of the members and is similar in effect to the SMSF lending the money to the partnership. On the facts there is a contravention of paragraph 65(1)(b).*

Example 20: SMSF investment in new family company to establish business – financial assistance

158. *Les and Merle are members and trustees of an SMSF. Les and Merle are equal shareholders in a newly incorporated company. Upon incorporation the company is to carry on business as a furniture manufacturer. The company has found it difficult to secure finance to acquire the necessary capital equipment and premises.*

159. *Les and Merle as trustees of the SMSF lend $500,000 to the company at a commercial rate of interest with the capital to be repaid to the SMSF in 5 years.*[110] *The $500,000 is used by the company to acquire the equipment and premises.*

160. *The SMSF resources have been used to finance the establishment of the company's business and thus the SMSF has provided financial assistance to the company using SMSF resources.*

161. *However, financial assistance to the company also indirectly financially assists Les and Merle who are the only shareholders in the company and who stand to benefit financially from any assistance given to the company. Les and Merle as trustees have used the resources of the SMSF to finance the company's business and to ultimately advance their financial interests as shareholders in that company. The arrangement therefore contravenes paragraph 65(1)(b).*

162. By way of contrast Example 21 illustrates an investment in a family business that does not result in contravention of paragraph 65(1)(b).

[110] Trustees need to consider the in-house asset rules in Part 8 including the 5% limit on the market value ratio of the SMSF.

Example 21: SMSF investment in family company – no financial assistance

163. *Richard is a member and trustee of an SMSF. The SMSF has a 5% interest in a related company. Richard has a 60% interest in the company and Richard's wife Emily has a 35% interest. The company operates a panel beating business. The SMSF has held a 5% share of the company since the SMSF was established some five years earlier.*[111]

164. *The company's business is very profitable and Richard wants to expand and improve the business through the acquisition of new machinery. The company takes out a loan to purchase the new machinery and uses the assets of the company as security for the loan.*

165. *Richard, in his capacity as trustee of the SMSF, has not invested SMSF funds in the company so that SMSF funds are able to be used for the purchase of the machinery or securing the loan. The SMSF's original investment in the company was not part of, or connected with, the subsequent raising of finance. The arrangement does not contravene paragraph 65(1)(b).*

Example of an acquisition of an asset that is not a usual or normal commercial arrangement

166. An objective consideration of the facts of a particular case may support an inference that the acquisition of the asset by the SMSF was to provide financial assistance to a member, or a relative of a member, even though the asset was acquired by the SMSF at market value.[112]

Example 22: acquisition of a depreciating asset by SMSF at market value – financial assistance

167. *Simone is a member and trustee of an SMSF. Simone is in need of $5,000 to meet expenses of her business that she conducts as a sole trader. Simone has depreciating assets that are no longer used in her business and that she has been meaning to advertise for sale for some time.*

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[111] Trustees need to consider the restrictions in section 66 on acquiring assets from a related party of the SMSF and the application of the in-house asset rules in Part 8 including the 5% limit on the market value ratio of the SMSF.

[112] For the purchase of an asset by the SMSF at greater than market value see paragraphs 87 to 91 of this Ruling.

168. *Simone, as trustee of the SMSF, purchases the assets from the business at market value for $4,000. The assets are not used by the SMSF to earn any income and remain stored in a room at the back of Simone's business premises. Simone applies the $4,000 towards her business expenses. As trustee of the SMSF Simone has no plans for using the assets to generate income for the SMSF.*

169. *The arrangement does not reflect a usual commercial arrangement for an SMSF as the SMSF is earning no income from the assets and, as the assets are depreciating, will result in a diminution of the assets of the SMSF over a period of time. Thus the particular facts support the conclusion that by purchasing the depreciating assets for $4,000 the SMSF is giving financial assistance to Simone (a member) using the resources of the SMSF.*[113] *The arrangement contravenes paragraph 65(1)(b).*

Circumstances that do not result in a contravention of paragraph 65(1)(b)

Investing on commercial terms

170. If an SMSF invests on commercial terms in an unassociated entity and that unassociated entity, independently of the SMSF and in its own right and from its own resources, gives financial assistance to a member or a relative of a member the investment by the SMSF in that unassociated entity does not result in a contravention of paragraph 65(1)(b).

Example 23: investing on commercial terms – no financial assistance

171. *Craig is a member of the Manu SMSF. As part of the SMSFs investment strategy, the SMSF purchases shares in a large public company that owns and leases residential property. Craig subsequently rents a property owned by this company and enters into a lease agreement. Craig does not have to pay rent for a month as part of a promotion run by the company which is offered to all lessees.*

172. *As the company is an unassociated entity and the shares are purchased on commercial terms, there is no contravention of paragraph 65(1)(b).*

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[113] Trustees and investment managers also need to consider the restrictions in section 66 on acquiring assets from related parties of the fund and the arm's length requirements in section 109.

Payment of a benefit

173. If an SMSF pays a pension or lump sum in accordance with the payment standards in Part 6 of the SISR as permitted by the sole purpose test in section 62, a contravention of paragraph 65(1)(b) does not occur.

Example 24: payment of a benefit – no financial assistance

174. *James as a member of Black SMSF is entitled to a superannuation pension on retirement. The pension is payable for life and a reversionary pension will be paid to his wife Pamela in the event of his death. Pamela has not yet reached retirement age.*

175. *James dies and the pension commences to be payable to Pamela. Although the reverted pension is a pre-retirement benefit provided by the SMSF to Pamela, no contravention of paragraph 65(1)(b) occurs as the pension is a superannuation benefit paid in accordance with Part 6 of the SISR.*

Appendix 2 – Your comments

176. We invite you to comment on this draft Self Managed Superannuation Funds Ruling. Please forward your comments to the contact officer by the due date. (Note: the Tax Office prepares a compendium of comments for the consideration of the relevant Rulings Panel or relevant Tax officers. The Tax Office may use a version (names and identifying information removed) of the compendium in providing responses to persons providing comments. Please advise if you do not want your comments included in the latter version of the compendium.)

Due date:	**16 November 2007**
Contact officer:	**Nadia Alfonsi**
Email address:	**nadia.alfonsi@ato.gov.au**
Telephone:	**(02) 9374 8298**
Facsimile:	**(02) 9374 2693**
Address:	**Australian Taxation Office** **GPO Box 9990** **Sydney NSW 2000**

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References

Previous draft:

Not previously issued in draft form

Related Rulings/Determinations::

SMSFR 2007/D1

Subject references:

- financial assistance
- former SMSF
- member of an SMSF
- relative of a member of an SMSF
- SMSF
- superannuation
- using the resources of the fund

Legislative references:

- SISA 6
- SISA 6(1)(e)
- SISA 6(1)(e)(i)
- SISA 6(1)(f)
- SISA 10(1)
- SISA 10(3)
- SISA 10(4)
- SISA 17A
- SISA 42A(5)
- SISA 62
- SISA 65
- SISA 65(1)
- SISA 65(1)(a)
- SISA 65(1)(b)
- SISA 65(2)
- SISA 65(3)
- SISA 65(4)
- SISA 65(5)
- SISA 65(6)
- SISA 65(7)
- SISA 66
- SISA 66(2)
- SISA 66(2)(b)
- SISA 66(2A)
- SISA 67
- SISA 71
- SISA 71(1)(g)
- SISA 109
- SISA 113
- SISA 129
- SISA Part 7
- SISA Part 8
- Companies Act NSW 1961 67
- Corporations Act 2001 260A
- Corporations Law 205
- Corporations Law 260A
- Corporations Law 260B
- Corporations Law 260C
- Company Law Review Act 1998
- Companies Act 1929 (UK)
- Companies Act 1938 (Vic) 45
- Companies (Acquisition of Shares) (New South Wales) Code 129
- Companies (Acquisition of Shares) (New South Wales) Code 129(1)(a)
- SISR Part 6
- SISR 13.12
- SISR 13.13
- SISR 13.14
- SISR 13.15
- SISR 13.15A

Case references:

- Belmont Finance Corp v William Furniture Ltd & Ors (No 2) [1980] 1 All ER 393
- Burton v. Palmer [1980] 2 NSWLR 878
- Charterhouse Investment Trust Ltd and others v. Tempest Diesels Ltd [1986] BCLC 1
- CIC Insurance Ltd v. Bankstown Football Club Ltd (1997) 187 CLR 384
- Darvall v. North Sydney Brick & Tile Co Ltd (1989) 16 NSWLR 260
- Dempster v. National Companies and Securities Commission (1993) 9 WAR 215; (1993) 10 ACSR 297
- Eastern Nitrogen Ltd v. Commissioner of Taxation [2001] FCA 366; 2001 ATC 4164; 46 ATR 474
- EH Dey Pty Ltd (in liq) v Dey [1966] VR 464
- Firmin v. Gray & Co Pty Ltd [1985] 1 Qd R 160
- Independent Steels Pty Ltd v. Ryan [1990] VR 247
- Law Society of New South Wales v Milios (1999) 48 NSWLR 409; (1999) 18 ACLC 23; (1999) 33 ACSR 396; [1999] NSWSC 1272

- Leary v. Federal Commissioner of Taxation (1980) 32 ALR 221; 80 ATC 4438; (1980) 11 ATR 145
- Milburn and Others v. Pivot Ltd (1997) 78 FCR 472; (1997) 149 ALR 439; (1997) ACSR 237, (1997) 15 ACLC 1520
- North Sydney-Apollo Printing Pty Ltd (Rec & Mgrs Apptd) v. Rowley (North Sydney-Apollo Printing) (1976) 1 ACLR 392
- Re VGM Holdings Ltd [1942] Ch 235; [1942] Ch 235
- Sterileair Pty Ltd v. Papallo (1998) 29 ACSR 461

Other references:

- 'Review of the provision of pensions in small superannuation funds' – Discussion paper; Treasury, January 2005
- Explanatory Memorandum to the Company Law Review Bill 1997
- Explanatory Memorandum to the Superannuation Legislation Amendment Bill (No. 4) 1999
- Macquarie Dictionary 2005, 4th edition
- PS LA 2006/17
- PS LA 2006/18
- PS LA 2006/19

ATO references

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