SMSFR 2008/1 - Self Managed Superannuation Funds: 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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Self Managed Superannuation Funds Ruling

Self Managed Superannuation Funds: 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*

Preamble

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 this ruling indicates, the fact that you acted in accordance with 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. This Ruling does not provide the Commissioner's views on how other SISA and Superannuation Industry (Supervision) Regulations 1994 (SISR) provisions apply to any of the arrangements discussed in this Ruling.[2]

[1] All legislative references in this Ruling are to the SISA unless otherwise indicated.
[2] Other provisions of the SISA and SISR that complement the prohibition of financial assistance in paragraph 65(1)(b) are outlined in paragraph 30 of this Ruling.

3. Paragraph 65(1)(a) prohibits the lending of fund money to a member, 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, or a relative of a member, of the fund. This Ruling does not explain the prohibition in paragraph 65(1)(a) on lending money of the SMSF to a member, or relative of a member.

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

- the meaning of 'any other financial assistance';
- when financial assistance is given 'using the resources of the fund'; and
- when financial assistance is given to 'a member of the fund or a relative of a member of the fund'.

Ruling

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

5. 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 any other financial assistance (that is, other than lending money as prohibited by paragraph 65(1)(a)) to a member, or relative of a member, of the SMSF.

6. In the Commissioner's view, assistance is given to a member, 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.[3]

7. The assistance given must be financial in nature. The term 'financial assistance' is not defined in the SISA. It has no technical meaning and therefore takes its ordinary meaning having regard to the context in which it is appears. Financial assistance 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 guarantee, indemnity, security or charge or the taking on of an obligation, or any other arrangement that, on an objective assessment is in substance to provide financial assistance to a member or relative of a member using the resources of the SMSF.[4]

[3] For further explanation see paragraphs 46 to 51 of this Ruling.
[4] For further explanation see paragraphs 52 to 60 of this Ruling.

8. The financial assistance must be given 'using the resources of the fund'. It is the Commissioner's view that the resources of an SMSF are used if an arrangement or transaction 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 or transaction. Therefore, financial assistance using the resources of the SMSF can include any arrangement or transaction whereby the assets of the SMSF are converted into other assets, diverted, diminished or put at risk, or there is prejudice to the financial position of the SMSF.[5]

9. Additionally, financial assistance must be given to 'a member of the fund or a relative of a member of the fund'. For the avoidance of doubt, if an arrangement or transaction concerns a partnership, financial assistance is given to a member or relative if a member or relative is a partner in that partnership.[6] If the arrangement or transaction concerns a sole trader, financial assistance is given to a member or relative if the member or relative is the sole trader.

10. The requirement that financial assistance must be given to 'a member of the fund or a relative of a member of the fund' does not limit the application of the paragraph to transactions directly between the SMSF and a member or relative of a member. In the Commissioner's view paragraph 65(1)(b) encompasses financial assistance that is given indirectly by an SMSF to a member or relative of a member. Financial assistance can be indirectly given by an SMSF to a member or relative of a member if the SMSF enters into an arrangement with some other entity whereby SMSF resources are used to give financial assistance to a member or a relative of a member through that other entity.[7]

Arrangements or transactions that 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).

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[5] For further explanation see paragraphs 61 to 71 of this Ruling.

[6] This is because a partnership is generally not a separate legal entity from its partners. However, this does not apply if the partnership has been incorporated with legal personality separate from that of the partners. See, for example, section 72 *Partnership Act 1891* (Qld); section 84, *Partnership Act 1958* (Vic); section 53 *Partnership Act 1892* (NSW); section 52 *Partnership Act* (NT); section 54 *Partnership Act 1963* (ACT); section 51 *Partnership Act 1891* (SA). In that case it is necessary to consider if financial assistance is given indirectly to the member or relative of a member through the entity.

[7] For further explanation see paragraphs 76 to 79 of this Ruling.

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

(i) giving a gift of an SMSF asset to a member or relative of a member;[8]

(ii) selling an SMSF asset for less than its market value to a member or relative of a member;[9]

(iii) purchasing an asset for greater than its market value from a member or relative of a member;[10]

(iv) acquiring services in excess of what the SMSF requires from a member or relative of a member;[11]

(v) paying an inflated price for services acquired from a member or relative of a member;[12]

(vi) forgiving a debt owed to the SMSF by a member or relative of a member;[13]

(vii) releasing a member or relative of a member from a financial obligation owed to the SMSF, including where the amount is not yet due and payable;[14]

(viii) delaying recovery action for a debt owed to the SMSF by a member or relative of a member;[15]

(ix) satisfying, or taking on, a financial obligation of a member or relative of a member;[16]

(x) giving a guarantee[17] or an indemnity[18] for the benefit of a member or relative of a member;[19]

(xi) giving a security[20] or charge[21] over SMSF assets for the benefit of a member or relative of a member.[22]

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[8] See paragraphs 87 to 91 (including Example 1) of this Ruling.
[9] See paragraphs 92 to 96 (including Example 2) of this Ruling.
[10] See paragraphs 97 to 102 (including Example 3) of this Ruling.
[11] See paragraphs 103 to 108 (including Example 4) of this Ruling.
[12] See paragraphs 103 to 108 (including Example 4) of this Ruling.
[13] See paragraphs 109 to 116 (including Example 5) of this Ruling.
[14] See paragraphs 109 to 116 (including Example 5) of this Ruling.
[15] See paragraphs 111 to 115 (including Example 5) of this Ruling.
[16] See paragraphs 117 to 121 (including Example 6) of this Ruling.
[17] See Glossary at paragraph 223 of this Ruling.
[18] See Glossary at paragraph 223 of this Ruling.
[19] See paragraphs 122 to 134 (including Examples 7 and 8) of this Ruling.
[20] See Glossary at paragraph 223 of this Ruling.
[21] See Glossary at paragraph 223 of this Ruling.
[22] See paragraphs 122 to 134 (including Examples 7 and 8) of this Ruling.

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

13. Other arrangements or transactions may or may not contravene paragraph 65(1)(b).[23]

14. Whether the arrangement or transaction contravenes paragraph 65(1)(b) depends on whether the arrangement or transaction, assessed objectively in light of commercial reality and having regard to the facts of the particular case, is in substance a financing arrangement providing 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

15. Factors that indicate that an arrangement or transaction is in substance a financing arrangement providing financial assistance to a member or a relative of a member 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, of a member or relative of a member;
- the arrangement or transaction is on non-arm's length terms that are favourable to a 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;
- 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 with the repayment of a loan whether with or without an interest component;
- the arrangement or transaction results in a diminution of the assets of the SMSF whether immediately or over a period of time.

16. Conversely, if an arrangement or transaction does not exhibit the above factors this indicates that paragraph 65(1)(b) has not been contravened. However, the factors are not intended to be an exhaustive list. The weight to be given to the 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.

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[23] See paragraphs 135 to 186 (including Examples 9 to 19) of this Ruling.

17. Trustees or investment managers must also consider whether other SISA or SISR provisions apply to the arrangement or transaction, for example:

- the sole purpose test in section 62;
- the investment strategy requirements in section 52 and regulation 4.09 of the SISR;
- the restriction on acquiring assets from a related party in section 66;
- the provisions concerning in-house asset limits in Part 8, in particular sections 71, 82 and 83;
- the arm's length requirements in section 109.

An SMSF indirectly giving financial assistance to a member or relative of a member using SMSF resources

18. In the Commissioner's view paragraph 65(1)(b) is contravened if an SMSF indirectly provides financial assistance to a member or relative of a member through another entity.[24]

19. Another entity can give financial assistance to a member or relative of a member in any of the ways that an SMSF can give financial assistance to a member or relative (see paragraphs 12 to 16 of this Ruling).

20. There is a sufficient connection between the financial assistance given by another entity to a member or relative of a member and using the resources of an SMSF to give that financial assistance if:

- the financial assistance would not have been given by the entity had the SMSF not entered into an arrangement with that entity that relies on SMSF resources;
- the entity is in effect passing on financial assistance given to it by the SMSF. This also includes money or assets flowing from the SMSF through a chain of related entities to the member or a relative of a member of the SMSF; or
- there is something else to indicate that financial assistance given by the entity relied upon, or was in some way conditional or dependent upon, SMSF resources.

21. For example, financial assistance is indirectly given to a member or relative of a member of an SMSF if the SMSF agrees to sell an asset (at market value) to another entity and as part of that arrangement, the other entity releases the member or relative from a financial obligation owed to it by the member or relative.

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[24] See paragraphs 187 to 216 (including Examples 20 to 24) of this Ruling.

22. Financial assistance is also indirectly given to a member or relative of a member of an SMSF if, for example, the SMSF transfers an asset to another entity and the other entity transfers the asset to the member or relative.

Arrangements or transactions that do not contravene paragraph 65(1)(b)

23. Paragraph 65(1)(b) is not contravened if an SMSF invests on commercial terms in an unrelated entity and that unrelated entity, independently of the SMSF and in its own right and from its own resources, gives financial assistance to a member or relative of a member.[25]

24. Paragraph 65(1)(b) is also not contravened 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.[26]

Funds to which the Ruling applies

25. This Ruling applies to SMSFs[27] and former SMSFs[28]. References in the Ruling to SMSFs extend to former SMSFs unless otherwise indicated.

Date of effect

26. This Ruling applies both before and after its date of issue. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling.

Commissioner of Taxation
16 July 2008

[25] See paragraphs 217 to 219 (including Example 25) of this Ruling.
[26] See paragraphs 220 to 222 (including Example 26) of this Ruling.
[27] As defined in section 17A.
[28] A former SMSF is a fund that has ceased being an SMSF and has not appointed a registrable superannuation entity (RSE) licensee as trustee – see subsection 10(4).

Appendix 1 – Summary of examples

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

27. The table below summarises examples included in the Explanation section of the Ruling contained in Appendix 2. They are included to illustrate the application of paragraph 65(1)(b) to a given factual situation. Reference should be made to the example in the Explanation section to fully understand the paragraph 65(1)(b) outcome.

28. Other provisions of the SISA and SISR, as indicated in the last column of the table below, may also apply to the facts given in an example. These other provisions are mentioned as a guide only. There may also be additional provisions that apply that have not been mentioned.

Example No.	Example topic	Is paragraph 65(1)(b) contravened?	Other provisions that may apply to the Example
Arrangements or transactions that by their nature contravene paragraph 65(1)(b) – paragraphs 86 to 134 of this Ruling			
1 (paragraphs 89 and 90)	An SMSF trustee gives a gift to a relative of a member of the SMSF.	Yes	Section 62 SISA Part 6 SISR
2 (paragraphs 93 to 95)	An SMSF trustee sells an SMSF asset to a relative of a member of the SMSF for less than the asset's market value.	Yes	Sections 62 and 109 SISA
3 (paragraphs 99 to 101)	An SMSF trustee purchases an asset from a member of the SMSF for greater than the asset's market value.	Yes	Section 52 SISA and regulation 4.09 SISR Section 62 SISA Subsection 66(1), paragraph 66(2)(b), SISA Section 109 SISA

Example No.	Example topic	Is paragraph 65(1)(b) contravened?	Other provisions that may apply to the Example
4 (paragraphs 105 to 107)	An SMSF trustee acquires necessary services for arm's length consideration from a relative of a member of the SMSF.	No	Section 62 SISA Section 109 SISA (if excess services or remuneration)
	Alternatively, an SMSF trustee acquires unnecessary services or the consideration for the services is excessive.	Yes	
5 (paragraphs 112 to 115)	An SMSF trustee does not require a monthly rental payment from a member of the SMSF.	Yes	Section 62 SISA Part 8 and paragraph 71(1)(g) SISA Section 109 SISA
	An SMSF trustee forgives a debt before it becomes due and payable or delays taking recovery action.	Yes	
	A member fails to pay rent in advance and the trustee pursues payment of the rent in a manner consistent with pursuing a third party for payment.	No	
6 (paragraphs 119 and 120)	An SMSF trustee sells an SMSF asset and uses the proceeds of the sale to satisfy an obligation of a member of the SMSF.	Yes	Section 62 SISA Part 6 SISR

Example No.	Example topic	Is paragraph 65(1)(b) contravened?	Other provisions that may apply to the Example
7 (paragraphs 126 to 129)	An SMSF trustee gives a guarantee to secure a loan for a partnership of which the partners are a member and a relative of a member of the SMSF. Alternatively the SMSF trustee gives the bank a security or a charge over an SMSF asset(s) to secure the loan.	Yes Yes	Section 62 SISA Regulation 13.14 SISR (if it is a charge)
8 (paragraphs 131 to 133)	An SMSF trustee gives an indemnity to another entity for a business arrangement between that other entity and a member of the SMSF.	Yes	Section 62 SISA
Arrangements or transactions that may or may not contravene paragraph 65(1)(b) depending upon the circumstances – paragraphs 135 to 186 of this Ruling			
9 (paragraphs 149 to 152)	An SMSF trustee purchases a property from a member of the SMSF and later resells the property to the member. The arrangement provides the member with finance to expand their business.	Yes	Section 52 SISA and regulation 4.09 SISR Section 62 SISA Subsection 66(1), paragraph 66(2)(b) SISA
10 (paragraphs 153 to 158)	An SMSF trustee purchases shares from a member to provide the member with funds to start a new business. At the time the shares are somewhat illiquid. The SMSF later resells the shares to the member when the shares start to increase in value.	Yes	Section 52 SISA and regulation 4.09 SISR Section 62 SISA Subsection 66(1) SISA Section 109 SISA

Example No.	Example topic	Is paragraph 65(1)(b) contravened?	Other provisions that may apply to the Example
11 (paragraphs 160 to 162)	SMSF trustees sell a unit in a commercial property to a member of the SMSF due to a restructure of the SMSF and a review of its investment strategy. The unit is being leased by the member. Other units in the commercial property will either be sold to the tenants or to other entities. Years earlier the member had sold the commercial property to the SMSF.	No	Section 62 SISA Subsection 66(1), paragraph 66(2)(b) SISA Part 8 and paragraph 71(1)(g) SISA
12 (paragraphs 163 to 165)	SMSF trustees purchase equipment from a third party and lease the equipment to a family partnership, which purchases the equipment at the end of the lease term.	Yes	Section 52 SISA and regulation 4.09 SISR Section 62 SISA Part 8 SISA
13 (paragraphs 167 and 168)	An SMSF trustee purchases works of art based on an independent favourable appraisal from an expert. The works of art are leased to an art gallery owned by a member (sole trader) and to other third parties.	No	Section 52 SISA and regulation 4.09 SISR Section 62 SISA Part 8 SISA
14 (paragraphs 169 to 171)	SMSF trustees lease a commercial property to a family member at market rent and on the same terms and conditions as applied to previous unrelated tenants who had leased it for a number of years.	No	Section 62 SISA Part 8 and paragraph 71(1)(g) SISA

Example No.	Example topic	Is paragraph 65(1)(b) contravened?	Other provisions that may apply to the Example
15 (paragraphs 172 to 174)	SMSF trustees lease a residential property to a family member at market rent and on the same terms and conditions as applied to previous unrelated tenants who have leased the residential property over the years it has been owned by the SMSF.	No	Section 62 SISA Part 8 SISA
16 (paragraphs 175 and 176)	SMSF trustees purchase a farm from SMSF members and subsequently lease the property to the members to continue farming until their retirement. Upon their retirement the farm will be leased to unrelated entities or sold. It cannot be inferred from the facts that the investment is to provide the members with financial assistance.	No	Section 62 SISA Subsections 66(1), paragraph 66(2)(b) SISA Part 8 and paragraph 71(1)(g) SISA
17 (paragraphs 178 and 179)	An SMSF trustee sells a block of land to a relative of a member of the SMSF and allows the relative to pay for the land in instalments over a period of time.	Yes	Section 62 SISA Part 8 SISA Section 109 SISA

Example No.	Example topic	Is paragraph 65(1)(b) contravened?	Other provisions that may apply to the Example
18 (paragraphs 180 to 182)	SMSF trustees invest SMSF funds in a partnership thereby becoming partners along with relatives of members of the SMSF who are partners. The funds invested are used to expand the partnership business. At a future date the SMSF trustees' share of the partnership is bought out by the other partners for an amount that represents repayment of the initial investment plus the use of the money.	Yes	Section 52 SISA and regulation 4.09 SISR Section 62 SISA Subsection 66(1) SISA Part 8 SISA
19 (paragraphs 184 to 186)	An SMSF trustee purchases depreciating assets from a member at market value. The assets are in storage and are not used by the SMSF to generate any income. The member uses the money to meet expenses.	Yes	Section 52 SISA and regulation 4.09 SISR Section 62 SISA Subsection 66(1) SISA
An SMSF indirectly giving financial assistance to a member or relative of a member using SMSF resources – paragraphs 187 to 216 of this Ruling			
20 (paragraphs 196 to 200)	SMSF trustees lend money to a family company to facilitate a loan from that company to members of the SMSF. Alternatively, the loan is made by the SMSF to an unrelated company to facilitate a loan to members of the SMSF.	Yes Yes	Section 52 SISA and regulation 4.09 SISR Section 62 SISA Part 8 SISA Subsection 71(2) SISA (if the company is unrelated)

Example No.	Example topic	Is paragraph 65(1)(b) contravened?	Other provisions that may apply to the Example
21 (paragraphs 201 to 204)	SMSF trustees gift listed shares to a trustee of a family discretionary trust, which in turn are distributed to beneficiaries who are members of the SMSF. Once the dividend from the shares is paid the members plan to transfer the shares for no consideration to the SMSF.	Yes	Section 62 SISA Subsection 66(1), paragraph 66(2)(a) SISA Section 109 SISA Part 6 SISR Regulation 7.04 SISR
22 (paragraphs 205 to 207)	SMSF trustees invest in an unrelated company to enable members of the SMSF to purchase supplies from that company at cost price for their own private purposes.	Yes	Section 52 SISA and regulation 4.09 SISR Section 62 SISA
23 (paragraphs 208 to 210)	SMSF trustees acquire assets from a related company and subsequently lease those assets to the company. The company uses the sale proceeds to make a loan to SMSF members who are carrying on a business in partnership. The company at a future date reacquires the assets from the SMSF. The lease payments and reacquisition price recoup the SMSF's capital outlay.	Yes	Section 52 SISA and regulation 4.09 SISR Section 62 SISA Subsection 66(1) SISA Part 8 SISA

Example No.	Example topic	Is paragraph 65(1)(b) contravened?	Other provisions that may apply to the Example
24 (paragraphs 214 to 216)	SMSF trustees lend money to a newly incorporated family company (which has SMSF members as shareholders) to establish the business. Alternatively, loan funds are also used to satisfy a debt owed by the members to a third party.	No Yes	Section 52 SISA and regulation 4.09 SISR Section 62 SISA Part 8 SISA
Arrangements or transactions that do not contravene paragraph 65(1)(b) – paragraphs 217 to 222 of this Ruling			
25 (paragraphs 218 and 219)	An SMSF trustee invests in a large public company on commercial terms. The public company independent of this investment leases an asset to a member and offers one month free rent to all lessees.	No	Section 52 SISA and regulation 4.09 SISR
26 (paragraphs 221 and 222)	An SMSF trustee commences to pay a pension to the wife of a member upon the member's death. The payment is in accordance with Part 6 of the SISR.	No	

Appendix 2 – Explanation

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

Background

29. 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, 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.[29]

30. The prohibitions in section 65 are complemented by other rules in the SISA and the SISR that apply to financial dealings with members, relatives of members and other related parties[30] 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;[31]
- subject to specific exceptions, an SMSF trustee or investment manager is prohibited from acquiring assets from related parties of the SMSF – section 66;

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[29] See Regulation Impact Statement section of the Explanatory Memorandum, under the heading 'Problem Identification'.
[30] 'Related party' is defined in subsection 10(1).
[31] See SMSFR 2008/2: Self Managed Superannuation Funds: 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 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;
- subject to specific exceptions, an SMSF trustee is prohibited from borrowing or maintaining an existing borrowing of money – section 67;
- all SMSF investment dealings must be at arm's length or must be conducted on arm's length terms and conditions – section 109; and
- subject to transitional provisions and specific exceptions, an SMSF trustee is prohibited from acquiring or maintaining in-house assets[32] that have a total market value in excess of 5% of the total market value of all SMSF assets – Part 8, in particular Division 3 of that Part.

Contraventions – audit requirements and consequences

31. SMSF trustees are required to appoint an approved auditor to audit the financial accounts and statements of the SMSF each year.[33] 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[34] for notifying the Tax Office of contraventions.[35]

32. Non-compliance with section 65 may expose trustees or investment managers of SMSFs to penalties.[36] 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.[37]

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[32] 'In-house asset' is defined in section 71 and, subject to specific exceptions, is a loan to or an investment in a related party of the SMSF, or an investment in a related trust, or an asset that is subject to a lease or lease arrangement with a related party of the SMSF. An asset of an SMSF that is used and enjoyed by a related party of the SMSF, even under an informal arrangement with no payments involved, is an in-house asset of the SMSF unless an exemption applies.

[33] See section 35C.

[34] See section 11A.

[35] Section 129 requires an auditor of an SMSF to report contraventions immediately after forming the opinion that it is likely that a contravention may have occurred, may be occurring or may occur in relation to the SMSF.

[36] See subsection 65(5).

[37] 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 Law Administration Practice Statements PS LA 2006/17, PS LA 2006/18 and PS LA 2006/19.

Legislative context

33. 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.

34. 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 fund; or
>
> (b) who has deferred his or her entitlement to receive a benefit from the fund.

35. 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;
>
> (b) the spouse of that individual or of any other individual specified in paragraph (a).

36. Section 65 does not allow for any exceptions to the prohibition in paragraph 65(1)(b) that are applicable.[38]

Explanation

37. 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.

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

- The meaning of 'any other financial assistance'. This incorporates a discussion of:
  - the relevance of context and policy intent;

[38] Subsections 65(2) to (4) provide for some exceptions to the prohibition on lending to members or their relatives for specified superannuation funds. These exceptions are not relevant and therefore are not discussed in this Ruling.

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

The meaning of 'any other financial assistance'

39. 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.

40. Therefore, 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

41. 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*:[39]

> …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.

[39] (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ.

42. 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'.[40] 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'.[41] 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).[42]

Relevance of cases that have considered the meaning of 'financial assistance' in the context of company law provisions

43. 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.[43]

44. In the United Kingdom case *Charterhouse Investment Trust Ltd and others v. Tempest Diesels Ltd*[44] 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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[40] See paragraph 29 of this Ruling where the intent of section 65 as expressed in the Explanatory Memorandum to the Superannuation Legislation Amendment Bill (No. 4) 1999 is explained. See also the comments of Logan J of the Federal Court (at paragraphs 25, 42 and 43) in *Deputy Commissioner of Taxation (Superannuation) v. Fitzgeralds* [2007] FCA 1602; [2007] ATC 5105 which concerned penalties for contravention of sections 62 and 65.

[41] See section 3 'Retirement Income Policy Objectives' of the discussion paper. Available at www.treasury.gov.au.

[42] See section 4.1 'Introduction', of section 4 'Key issues with pensions provided by small superannuation funds' of the discussion paper.

[43] 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.

[44] [1986] BCLC 1 at 10 (Chancery Division).

45. 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[45] 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.[46]
- The SISA prohibition is to stop trustees or investment managers of superannuation funds from taking actions that may diminish the worth of the fund in favour of members or relatives who have not retired or met some other condition of release, to the prejudice of members' retirement savings.

The meaning of 'assistance'

46. In the company law context the Courts have considered the meaning of 'assistance' within the phrase 'financial assistance'.

47. In *Burton v. Palmer*[47] (*Burton*) Mahoney JA 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' may denote merely co-operation, Mahoney JA considered that in the context of a provision[48] that prohibited a company giving financial assistance for the purchase of its shares, 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; it did not mean something which is merely co-operation.

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[45] 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.

[46] See paragraphs 12.75 and 12.76 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*. The explanation broadly indicates the policy reasons for provisions that prohibit or limit the giving of financial assistance.

[47] [1980] 2 NSWLR 878 at 885-6 (Supreme Court of New South Wales, Court of Appeal). Mahoney JA held that a company agreeing to pay an amount presently owed to a shareholder who is selling shares in the company was not financial assistance even if the agreement was made to satisfy a condition imposed by the shareholder. Hutley and Samuels JJA agreed with Mahoney JA that the appeal should be dismissed, although Hutley JA provided separate reasons.

[48] Section 67, *Companies Act 1961* (NSW).

48. Financial assistance can, however, be given to someone even though that person did not request it. In *Independent Steels Pty Ltd v. Ryan*[49] (*Independent Steels*) it was held that financial assistance was given to a purchaser of shares in a company, even though the arrangement giving rise to the assistance was suggested by the vendors of the shares. Fullagar J explains that:[50]

> …it is correct to say that in a sense, "financial assistance" must be "something wanted or needed by the purchaser for the purchase"…

Fullagar J further explains:

> …it matters not that the purchaser might have been so wealthy or the contingency so remote in the purchaser's eyes that the purchaser did not "need" or "want" the assistance, and it matters not that the purchaser may have allowed the inclusion of the critical clause at the request of the vendors.

49. In *Sterileair Pty Ltd v. Papallo*,[51] the Full Federal Court said that:

> "[a]ssistance" involves something in the nature of aid or help. It cannot exist in a vacuum; it must be given to someone.

50. 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.

51. To apply paragraph 65(1)(b), it is not necessary to determine the purpose for which the financial assistance is given. Paragraph 65(1)(b) is 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 relative sought such assistance.

The meaning of 'financial assistance'

52. Only assistance that is 'financial assistance' can contravene paragraph 65(1)(b).[52] 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'.[53]

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[49] [1990] VR 247 (Supreme Court of Victoria, Appeal division). This case is also mentioned at paragraph 104 of this Ruling.
[50] *Independent Steels* [1990] VR 247 at 254.
[51] (1998) 29 ACSR 461 at 466.
[52] See *Burton* [1980] 2 NSWLR 878 where Hutley JA (at 880) acknowledged that while something may be of assistance it is necessary to determine whether it is financial assistance.
[53] *The Macquarie Dictionary*, 2005, 4th edition.

53. In the company law context, the Courts have taken a contextual approach in the interpretation of the provision prohibiting the giving of financial assistance.[54] The Courts have also 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.

54. In *North Sydney-Apollo Printing Pty Ltd (Rec & Mgrs Apptd) v. Rowley*[55] (*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. The Court also made it clear that financial assistance is not limited to money or moneys worth such as a negotiable security.

55. In *Burton*[56] Mahoney JA similarly noted that the form of the obligation or transaction is not conclusive.

56. In *Milburn and Others v. Pivot Ltd*[57] (*Milburn)* Goldberg J noted that:

> The proscription against the giving of financial assistance has been contained in companies' legislation for many years …However, there is no exhaustive definition of "financial assistance" for the purposes of s205 [of the *Corporations Law*] although the cases identify numerous examples of financial assistance…
>
> 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 s205 has been breached.

57. In the context of various company law provisions prohibiting the giving of financial assistance, the Courts have either found, or indicated by way of obiter comment, that a company can give financial assistance:

- by making a gift;[58]
- by purchasing an asset at greater than market value;[59]
- by acquiring services;[60]

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[54] 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 '[t]he Court should adopt that construction of the section which advances its apparent objectives' as, among other reasons, that is 'the modern approach adopted by the courts to the function of statutory construction'. See also *Burton* [1980] 2 NSWLR 878, Mahoney JA at 886.

[55] (1976) 1 ACLR 392. See also discussion of this case at paragraphs 123 and 124 of this Ruling.

[56] [1980] 2 NSWLR 878 at 890. Mahoney JA 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.

[57] (1997) 78 FCR 472 at 501;(1997) 149 ALR 439 at 466 (Federal Court).

[58] See, for example, *Re VGM Holdings Ltd* [1942] 1 All ER 224; [1942] Ch 235.

[59] See, for example, *Belmont Finance Corp v. William Furniture Ltd & Ors* (No 2) (1980) 1 All ER 393.

- by forgiving a debt or releasing a person from a financial obligation;[61]
- by giving a guarantee or a security over assets;[62] or
- through a third party giving financial assistance to a person because of an arrangement between that third party and the company.[63]

58. In determining whether an arrangement or transaction entered into by a trustee or investment manager of an SMSF is the giving of financial assistance, the Commissioner will have regard to all the facts and circumstances of the particular case, the substance of the arrangement or transaction rather than its form, and the policy intent of the provision and the SISA more broadly as explained at paragraphs 29 and 42 of this Ruling.

59. Arrangements or transactions that the Commissioner considers are, by their very nature, financial assistance are discussed at paragraphs 86 to 134 of this Ruling.

60. Certain other arrangements or transactions that may or may not be financial assistance, depending on the particular circumstances, are discussed at paragraphs 135 to 186 of this Ruling.

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

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

62. 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.

63. 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.

64. The *Macquarie Dictionary* defines 'use' as 'to employ for some purpose; to expend or consume in use'.[64]

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[60] See, for example, *Independent Steels Pty Ltd v. Ryan* [1990] VR 247.
[61] See, for example, *EH Dey Pty Ltd (in liq) v. Dey* [1966] VR 464.
[62] See, for example, *North Sydney-Apollo Printing* (1976) 1 ACLR 392.
[63] See, for example, *Darvall v. North Sydney Brick & Tile Co Ltd & Ors* (1987) 16 NSWLR 212.
[64] *The Macquarie Dictionary*, 2005, 4th edition.

65. 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.[65] Further, that 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 that there is a contravention of paragraph 65(1)(a).

66. 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.[66] 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.

67. In the company law context, the courts have tended to take a broad view of when a company's resources are diminished. In *Burton*[67] Hutley JA noted that:

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

68. Although in *Milburn*[68] 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 still nevertheless financial assistance given by the company'.

69. In *Dempster v. National Companies and Securities Commission*[69] (*Dempster*) the Court indicated that while the diminution of resources may be relevant to the question of whether financial assistance is provided this is not decisive.

70. 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 section 65.[70]

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[65] That is, a decrease in the cash asset of the SMSF is offset by a corresponding increase in an accounts receivable asset.
[66] That is, a decrease in the cash asset of the SMSF is offset by a corresponding increase in an accounts receivable asset.
[67] [1980] 2 NSWLR 878 at 881.
[68] (1997) 149 ALR 439 at 468.
[69] (1993) 10 ACSR 297 at 353 (Supreme Court of Western Australia, Full Court).
[70] See policy intent explained at paragraphs 29 and 42 of this Ruling.

71. It is therefore 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. Therefore, 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.[71]

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

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

73. For the purposes of the SISA, the meaning of 'member'[72] in relation to an SMSF is expanded 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.

74. A 'relative'[73] of a member is defined to mean:

- a parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendent, or adopted child of the member;
- a parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendent, or adopted child of the member's spouse; or
- the member's spouse or the spouse of any person mentioned above.

[71] See *Dempster* (1993) 10 ACSR 297 at 349.
[72] See subsection 10(3), which is reproduced at paragraph 34 of this Ruling.
[73] See subsection 65(6), which is reproduced at paragraph 35 of this Ruling.

75. For the avoidance of doubt, if an arrangement or transaction concerns a partnership, financial assistance is given to a member or relative if a member or relative is a partner in that partnership.[74] If the arrangement or transaction concerns a sole trader, financial assistance is given to a member or relative if the member or relative is the sole trader.

Indirect financial assistance

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

77. In *Law Society of New South Wales v. Milios,*[75] an issue arose as to whether section 260A, which replaced section 205, of the former *Corporations Law*, had substantially narrowed the scope of the statutory prohibition concerning financial assistance as certain words had been omitted from the redrafted provision. In determining that the scope of the provision had not been narrowed Austin J in obiter stated:

> 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.[76]

78. In determining the potential breadth of paragraph 65(1)(b) the Commissioner considers it appropriate to have regard to the words of the provision, the context in which the provision appears and the intent of Parliament both with respect to the provision and the SISA more broadly. Paragraph 65(1)(b) is drafted in wide terms in that it refers to 'any other' financial assistance. Further, 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, for example, as a source of pre-retirement finance.[77]

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[74] This is because a partnership is generally not a separate legal entity from its partners. However, this does not apply if the partnership has been incorporated with legal personality separate from that of the partners. See, for example, section 72 *Partnership Act 1891* (Qld); section 84, *Partnership Act 1958* (Vic); section 53 *Partnership Act 1892* (NSW); section 52 *Partnership Act* (NT); section 54 *Partnership Act 1963* (ACT); section 51 *Partnership Act 1891* (SA). In that case it is necessary to consider if financial assistance is given indirectly to the member or relative of a member through the entity.

[75] (1999) 48 NSWLR 409 (Supreme Court of New South Wales, Equity Division).

[76] (1999) 48 NSWLR 409 at 414.

[77] See paragraphs 29 and 42 of this Ruling.

79. Consistent with the wide drafting of the provision, and the policy intent, the Commissioner considers that paragraph 65(1)(b) prohibits financial assistance that is given indirectly to a member, or relative of a member, of an SMSF using SMSF resources.[78]

Consideration of particular arrangements or transactions

80. The question of whether paragraph 65(1)(b) applies depends on the facts and circumstances of the particular transaction. It is therefore 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 relative of a member.

81. There are certain arrangements or transactions that the Commissioner considers by their nature give financial assistance to a member or relative of a member using SMSF resources and therefore contravene paragraph 65(1)(b). These arrangements or transactions are explained at paragraphs 86 to 134 of this Ruling.

82. Other types of arrangements or transactions may or may not contravene paragraph 65(1)(b) depending upon whether the arrangement or transaction, assessed objectively having regard to the facts of the particular case, is in substance a financing arrangement, providing a member or relative of a member with financial assistance using the resources of the SMSF. Arrangements or transactions that may contravene paragraph 65(1)(b), including indicative factors, are explained at paragraphs 135 to 186 of this Ruling.

83. An SMSF indirectly giving financial assistance to a member or relative of a member using SMSF resources is explained at paragraphs 187 to 216 of this Ruling.

84. Transactions that by their nature do not contravene paragraph 65(1)(b) are explained at paragraphs 217 to 222 of this Ruling.

❗ Cautionary note on examples and related footnotes

85. The examples included in the explanation that follows are for the purposes of illustrating the application of paragraph 65(1)(b) to the particular facts of the arrangement or transaction. Other provisions of the SISA and SISR, as noted in either the text of the Ruling or in footnotes, may also apply to the facts given in an example. These other provisions are mentioned as a guide only. There may also be additional provisions that apply that have not been mentioned.

[78] See further paragraphs 187 to 216 of this Ruling.

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

86. The Commissioner considers that a trustee or investment manager contravenes paragraph 65(1)(b) by doing any of the following, as the very nature of the arrangement or transaction provides financial assistance to a member or relative of a member using SMSF resources:

(i) giving a gift of an SMSF asset to a member or relative of a member;[79]

(ii) selling an SMSF asset for less than its market value to a member or relative of a member;[80]

(iii) purchasing an asset for greater than its market value from a member or relative of a member;[81]

(iv) acquiring services in excess of what the SMSF requires from a member or relative of a member;[82]

(v) paying an inflated price for services acquired from a member or relative of a member;[83]

(vi) forgiving a debt owed to the SMSF by a member or relative of a member;[84]

(vii) releasing a member or relative of a member from a financial obligation owed to the SMSF, including where the amount is not yet due and payable;[85]

(viii) delaying recovery action for a debt owed to the SMSF by a member or relative of a member;[86]

(ix) satisfying, or taking on, a financial obligation of a member or relative of a member;[87]

(x) giving a guarantee[88] or an indemnity[89] for the benefit of a member or relative of a member;[90]

(xi) giving a security[91] or charge[92] over SMSF assets for the benefit of a member or relative of a member.[93]

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[79] See paragraphs 87 to 91 (including Example 1) of this Ruling.
[80] See paragraphs 92 to 96 (including Example 2) of this Ruling.
[81] See paragraphs 97 to 102 (including Example 3) of this Ruling.
[82] See paragraphs 103 to 108 (including Example 4) of this Ruling.
[83] See paragraphs 103 to 108 (including Example 4) of this Ruling.
[84] See paragraphs 109 to 116 (including Example 5) of this Ruling.
[85] See paragraphs 109 to 116 (including Example 5) of this Ruling.
[86] See paragraph 111 to 115 (including Example 5) of this Ruling.
[87] See paragraphs 117 to 121 (including Example 6) of this Ruling.
[88] See Glossary at paragraph 223 of this Ruling.
[89] See Glossary at paragraph 223 of this Ruling.
[90] See paragraphs 122 to 134 (including Examples 7 and 8) of this Ruling.
[91] See Glossary at paragraph 223 of this Ruling.
[92] See Glossary at paragraph 223 of this Ruling.
[93] See paragraphs 122 to 134 (including Examples 7 and 8) of this Ruling.

Giving a gift

87. 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[94] of money or any other asset[95] of the SMSF to a member or relative of a member.

88. In the United Kingdom company law case *Re VGM Holdings Ltd,*[96] Lord Greene MR made the following obiter comment concerning the meaning of 'financial assistance':

> ..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 overvalue, all those transactions, it seems to me, would fall within the phrase "financial assistance".

Example 1 – giving a gift – financial assistance

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

90. *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).*

91. Other relevant considerations include the sole purpose test in section 62 and the payment standards in Part 6 of the SISR.

Selling an SMSF asset for less than market value

92. It is the Commissioner's view that paragraph 65(1)(b) is contravened if a trustee or investment manager of an SMSF sells an SMSF asset to a member or relative of a member for less than its market value.

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[94] 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: see, for example, *FCT v. McPhail* (1968) 117 CLR 111 at 116 per Owen J.

[95] The comments of Holland J (at 402) in *North Sydney-Apollo Printing* (1976) 1 ACLR 392 lend support to the view that gifting an asset (other than money) can be financial assistance. Holland J found the argument that financial assistance should be limited to the giving of money or moneys worth untenable. See the extract from this case at paragraph 124 of this Ruling.

[96] [1942] Ch 235 at 240; [1942] 1 All ER 224 at 226 (Court of Appeal).

Example 2 – selling an asset for less than market value – financial assistance

93. *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.*

94. *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.*

95. *The sale of the land by Robert as trustee, to his son for less than market value, is the giving of financial assistance to a relative of a member using the resources of the SMSF and therefore contravenes paragraph 65(1)(b).*

96. Other relevant considerations include the sole purpose test in section 62 and the arm's length requirements in section 109.

Purchasing an asset for greater than market value

97. It is the Commissioner's view that paragraph 65(1)(b) is contravened if a trustee or investment manager purchases an asset from a member or relative of a member at an inflated price.

98. In the United Kingdom case *Belmont Finance Corp v. William Furniture Ltd & Ors (No 2)*[97] (*Belmont Finance*) the Court found that the sole purpose of the acquisition of shares by a company (Belmont Finance) in another company (Maximum) was to put the vendor of the shares in Maximum in funds to enable the vendor to pay for shares in Belmont Finance without using the vendor's own resources. That the price paid by Belmont Finance to purchase the shares in Maximum was an inflated price reinforced that it was not a commercial transaction in its own right for the benefit of Belmont Finance. That the purchase of an asset at overvalue is financial assistance is also supported by the comments of Lord Greene MR in *Re VGM Holdings Ltd.*[98]

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

99. *Andrew is a member and trustee of an SMSF. Andrew needs to raise $100,000 for personal reasons. He owns block of land that qualifies as business real property and has been independently appraised as having a market value of $80,000.*

100. *As trustee of the SMSF, Andrew agrees for the SMSF to purchase the land for $100,000.*

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[97] [1980] 1 All ER 393 at 403 (Court of Appeal). See also paragraph 183 of this Ruling.
[98] [1942] 1 All ER 224 at 226. See also paragraph 88 of this Ruling.

101. *The purchase of the land by Andrew as trustee of the SMSF for greater than its market value is the giving of financial assistance to himself (a member) and therefore contravenes paragraph 65(1)(b).*

102. Other relevant considerations include the investment strategy requirements in section 52 and regulation 4.09 of the SISR, the sole purpose test in section 62, the restriction on acquiring assets from a related party in subsection 66(1), the exception to that restriction in paragraph 66(2)(b) for business real property acquisitions and the arm's length requirements in section 109.

Acquiring services on non-arm's length terms that are favourable to a member or relative of a member

103. It is the Commissioner's view that paragraph 65(1)(b) is contravened if a trustee or investment manager acquires services from a member or relative of a member on non-arm's length terms that are favourable to the member or relative. 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.

104. *Independent Steels*[99] illustrates (in the company law context) that expressing an amount to be paid as a retainer for services will not avoid a finding that the substance of the transaction is to give financial assistance for the acquisition of shares.

Example 4 – acquiring services on arm's length terms – not financial assistance

105. *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.*

106. *On the facts there is no contravention of paragraph 65(1)(b). Peter has not been remunerated in excess of 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.*

107. *If, however, the amount charged by Peter for the services was greater than an arm's length amount, or the services provided by Peter were excessive, Sam as trustee would be giving financial assistance to Peter (a relative of a member) using the resources of the SMSF and would therefore contravene paragraph 65(1)(b).*

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[99] [1990] VR 247. See also paragraph 48 of this Ruling.

108. The Commissioner also notes that an individual trustee, or a director of a body corporate trustee, of an SMSF cannot be remunerated for any services performed in relation to the SMSF.[100] Other relevant considerations for excess services provided to an SMSF, or for excess remuneration paid by an SMSF, include the sole purpose test in section 62 and the arm's length requirements in section 109.

Forgiveness of a debt or release from an obligation

109. 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 relative of a member which is owed to the SMSF or releases a member or relative from a financial obligation to the SMSF.

110. In *EH Dey Pty Ltd (in liq) v. Dey*[101] a vendor (Dey) of shares in a company (EH Dey Pty Ltd) owed £5,492 12s to the company. Dey entered into a deed with the other shareholders of the company and the purchasers of the shares in the company with the effect that the amount of £5,49212s due to the company by Dey was deemed to be paid and the amount of £12,440 12s payable by the purchasers for the shares in the company was reduced by £5,492 12s. The company, which was not a party to the agreement, subsequently took action against Dey to recover the debt of £5,492 12s. 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.[102]

Delay in taking recovery action

111. If a trustee or investment manager delays in taking recovery action for a debt owed by a member or relative of a member, financial assistance is given to that member or relative. In determining whether there has been a delay it is appropriate to consider usual commercial practice for collecting a debt of that type from an arm's length party. Conversely, if the trustee or investment manager pursues a member or relative for a debt in accordance with usual commercial practice for a debt of that type, this indicates that the trustee or investment manager has not given the member or relative financial assistance even though there is an amount outstanding.

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[100] See section 17A.
[101] [1966] VR 464 (Supreme Court of Victoria).
[102] [1966] VR 464 at 470.

Example 5 – release from an obligation – financial assistance

112. *West SMSF owns a property. The property qualifies as business real property and is leased to a member of the SMSF at a fair market rate. Rent is payable monthly in advance, although the trustee did not require a rental payment for a particular month.*

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

114. *Paragraph 65(1)(b) is also contravened if the trustee forgives the member's debt before it becomes due and payable or delays taking recovery action and the delay is inconsistent with usual commercial practice for collecting outstanding rental payments.*

115. *However, paragraph 65(1)(b) is not contravened if the member has failed to pay the rent in advance and the trustee is pursuing payment of the rent in a manner consistent with pursuing the payment of rent if the property were leased to an unrelated third party.*

116. Other relevant considerations include the sole purpose test in section 62, the in-house asset rules in Part 8 including the 5% limit on the market value ratio of the SMSF's in-house assets and the exception in paragraph 71(1)(g) and the arm's length requirements in section 109.

Satisfying or taking on an obligation

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

118. In *Deputy Commissioner of Taxation (Superannuation) v. Fitzgeralds,*[103] the Court was satisfied that the trustees of an SMSF (Mr and Mrs Fitzgeralds) contravened sections 62 and 65. Property of the SMSF was sold and from this an amount was paid to Mr Fitzgeralds (a member of the SMSF); and an amount was paid to a liquidator in satisfaction of a claim made by the liquidator against Mr Fitzgeralds. Two additional amounts were also paid by the SMSF to Mr Fitzgeralds, neither of which were authorised by the rules that govern the SMSF.

[103] [2007] FCA 1602, paragraph 15 (Federal Court).

Example 6 – satisfying an obligation – financial assistance

119. *Lucas is a trustee and member of an SMSF. Lucas is a sole trader who runs a tiling business. Lucas enters into a two year arrangement to purchase a new van for his business. The arrangement requires Lucas to pay a monthly amount and $10,000 residual payment at the end of the term of the arrangement to retain the van. At the end of the arrangement Lucas does not have the cash to pay the $10,000 residual payment and risks losing the van.*

120. *The SMSF owns listed shares with a market value of $10,000. Lucas, as trustee, sells these shares and uses the funds to pay the debt he owes in his personal capacity. By selling assets of the SMSF and using the proceeds of the sale to satisfy Lucas' debt financial assistance is given to a member using the resources of the SMSF. Lucas, as trustee of the SMSF, therefore contravenes paragraph 65(1)(b).*

121. Other relevant considerations include the sole purpose test in section 62 and the payment standards in Part 6 of the SISR.

Giving a guarantee or an indemnity, or a security or charge over SMSF assets, for the benefit of a member or relative of a member

122. It is the Commissioner's view that paragraph 65(1)(b) is contravened if a trustee or investment manager gives a guarantee[104] or an indemnity,[105] or a security[106] or charge[107] over SMSF assets, to a third party for the benefit of a member or relative of a member. This is in addition to regulations 13.13 and 13.14 of the SISR which respectively, and subject to very limited exception,[108] expressly prohibit a trustee from giving a charge over or in relation to a member's benefits or a fund asset.

123. In *North Sydney-Apollo Printing*[109], a case concerning section 67 of the *Companies Act 1961* (NSW),[110] the Court found that transactions that purported to sell or transfer title to chattels of related companies for a nominal amount were really intended to provide additional security to the transferee for a loan advanced jointly by the transferee and his brother to a third party who was purchasing shares in those companies. It was therefore held that the companies had provided financial assistance.

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[104] See Glossary at paragraph 223 of this Ruling.
[105] See Glossary at paragraph 223 of this Ruling.
[106] See Glossary at paragraph 223 of this Ruling.
[107] See Glossary at paragraph 223 of this Ruling.
[108] See regulation 13.15, and also regulation 13.15A for the purposes of regulation 13.14 of the SISR.
[109] (1976) 1 ACLR 392.
[110] Section 67 provides, so far as is material that '…no Company shall, whether directly or indirectly and whether by means of a loan guarantee or the provision of security or otherwise, give any financial assistance for the purpose of or in connection with a purchase... made or to be made by any person of... any shares in the company....'.

124. It was argued that

> …as s. 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, the Court found the argument untenable:

> 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.[111]

125. As explained at paragraph 71 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 a security or charge crystallises, or the trustee or investment manager is required to meet the obligations imposed on it under a guarantee or an indemnity, it will result in a reduction of the assets of the SMSF.

Example 7 – giving a guarantee – financial assistance

126. *Laura is a member and trustee of an SMSF. Laura and her sister Grace are equal partners in a partnership through which they operate a successful shoe store. The shoe store requires funds to purchase additional floor space so that it can expand. The bank is prepared to lend the partnership the necessary funds if the partners can provide security for the loan.*

127. *Laura 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 (that is, the partners).*

128. *Laura as trustee of the SMSF has given a guarantee to the bank to secure the loan. It is given using the resources of the SMSF as the guarantee places SMSF assets at risk of being diminished as the partners may be unable to repay the loan. Laura as trustee has therefore provided financial assistance to the partners, namely herself (a member) and her sister Grace (a relative of a member) using the resources of the SMSF. The giving of the guarantee therefore contravenes paragraph 65(1)(b).*

[111] (1976) 1 ACLR 392 at 402.

129. *Paragraph 65(1)(b) is also contravened if instead of giving the bank a guarantee, Laura as trustee of the SMSF provides the bank with a security or a charge over an asset(s) of the SMSF to secure the loan. Regulation 13.14 of the SISR also prohibits Laura as trustee of the SMSF giving a charge over an SMSF asset.*

130. Another relevant consideration is the sole purpose test in section 62.

Example 8 – giving an indemnity – financial assistance

131. *Linden is a member and trustee of an SMSF. Linden (acting in his own right) enters into a business arrangement with another unrelated entity. The other entity requires an indemnity from Linden for certain losses it may suffer as a result of the business arrangement. Linden as trustee of the SMSF enters into an agreement to indemnify the other entity against any such losses.*

132. *The indemnity is given using the resources of the SMSF as the indemnity places SMSF assets at risk of being diminished as the other entity may suffer losses covered by the indemnity.*

133. *Linden as trustee has therefore provided financial assistance for the benefit of himself (a member) using the resources of the SMSF. The giving of the indemnity therefore contravenes paragraph 65(1)(b).*

134. Another relevant consideration is the sole purpose test in section 62.

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

135. In addition to the arrangements or transactions mentioned in the previous section other arrangements or transactions may also contravene paragraph 65(1)(b).

136. Whether an arrangement or transaction contravenes paragraph 65(1)(b) depends on whether the arrangement or transaction, assessed objectively in light of commercial reality and having regard to the facts of the particular case, in substance provides financial assistance to a member or relative of a member using the resources of the SMSF.

137. Factors that indicate that an arrangement or transaction is in substance a financing arrangement providing financial assistance to a member or a relative of a member using the resources of an SMSF include:

- the arrangement or transaction exposes the SMSF to a credit risk, or exposes the SMSF to the financial risk, of a member or relative of a member;

- the arrangement or transaction is on non-arm's length terms that are favourable to a 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 with the repayment of a loan whether with or without an interest component;
- the arrangement or transaction results in a diminution of the assets of the SMSF whether immediately or over a period of time.

138. Conversely, if an arrangement or transaction does not exhibit any of the above factors this indicates that paragraph 65(1)(b) has not been contravened. However, the factors are not intended to be an exhaustive list. The weight to be given to the 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.

139. Trustees or investment managers must also consider whether other SISA or SISR provisions apply to the arrangement or transaction, for example:

- the sole purpose test in section 62;
- the investment strategy requirements in section 52 and regulation 4.09 of the SISR;
- the restriction on acquiring assets from a related party in section 66;
- the provisions concerning in-house assets limits in Part 8, in particular sections 71, 82 and 83;
- the arm's length requirements in section 109.

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

140. 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).

141. Examples 9 to 19 (from paragraphs 149 to 186 of this Ruling) illustrate whether paragraph 65(1)(b) applies to various arrangements (and if paragraph 65(1)(b) applies to an arrangement it assumes that paragraph 65(1)(a) does not apply). 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 for an SMSF.

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

142. 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).

143. 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 arrangement is to provide a member or relative of a member with finance other than by way of lending money as prohibited by paragraph 65(1)(a).

144. An example of such an arrangement is provided by *Eastern Nitrogen Ltd v. Commissioner of Taxation*[112] (*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.[113]
>
> The sale and interdependent lease-back provided a convenient alternative to raising funds by way of charging or mortgaging the ammonia plant.[114]

[112] [2001] FCA 366 (Full Federal Court).
[113] [2001] FCA 366 at paragraph 58.
[114] [2001] FCA 366 at paragraph 60.

145. 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 in accordance with an SMSF's investment strategy 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 life of the asset, this indicates that there is no financing arrangement between the SMSF and the member or relative and that the asset represents an investment by the SMSF.[115]

146. Another 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 if the asset is purchased from the member or relative 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.[116]

147. Although the SISA contemplates that an SMSF may acquire[117] certain assets from a member or relative of a member and that the SMSF may also lease[118] certain assets to a member or relative 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[119] 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.[120]

148. 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).

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[115] Trustees and investment managers also need to consider the sole purpose test in section 62 and the in-house asset rules in Part 8 including the 5% limit on the market value ratio of the SMSF's in-house assets.

[116] That is, at a rate that an unrelated third party would be expected to pay for the use of the asset.

[117] Section 66 restricts the assets that a trustee or investment manager can acquire from a related party of the SMSF.

[118] For example, if the leasing of the asset is within the 5% in-house asset limit or the exception in paragraph 71(1)(g) applies.

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

[120] See Schedule 1 of the Explanatory Memorandum, under the headings 'Section 65: Loans to members and relatives', 'Item 9'.

Examples concerning sale and repurchase

Example 9 – sale and repurchase of an asset to fund business expansion – financial assistance

149. *Angela is a member and trustee of an SMSF. Angela, a sole trader in a printing business, is in need of finance to fund the expansion of that business. Angela owns a property that qualifies as business real property, which she could sell to raise the necessary funds. However, Angela does not want to sell the property to a third party as the property market is predicted to boom again in the near future. Instead, Angela sells the property to her SMSF at market value with the intention of repurchasing the property in the future.*[121]

150. *The money raised by the sale is applied to the expansion of Angela's printing business. The expansion of Angela's printing business is successful and as planned Angela subsequently repurchases the property from the SMSF for an amount equal to its market value at that later time.*

151. *Angela carried out an arrangement which provided her with the finance to expand her business and at the same time the ability to repurchase the property so that Angela could ultimately benefit from its continuing increase in value. These facts taken together 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 lending the money to Angela and Angela granting the SMSF a charge over the property.*

152. *As SMSF resources have been used to provide finance for Angela's business expansion the arrangement contravenes paragraph 65(1)(b) even though there is no detriment to the balance sheet of the SMSF.*

Example 10 – converting an illiquid asset into cash to fund a new business venture – financial assistance

153. *Kate is a member and trustee of an SMSF. Kate (as a sole trader) wants to start up a tanning business but is in need of cash to do so. She has made enquiries of lending institutions for this purpose but due to the risk involved, acquiring finance through a lending institution will mean paying a higher rate of interest than Kate can afford to pay.*

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[121] Trustees and investment managers also need to consider: the investment strategy requirements in section 52 and regulation 4.09 of the SISR; the sole purpose test in section 62; the restriction in subsection 66(1) on acquiring assets from a related party of the SMSF and the exception in paragraph 66(2)(b) for business real property acquisitions.

154. *Kate has a significant number of shares in an entity that she wants to sell to raise finance for her tanning business. However, Kate is having trouble selling the shares. Kate cannot afford to wait any longer as she requires the funds urgently. Kate therefore sells the shares to the SMSF.*[122]

155. *Investment in the shares is high risk due to the activities carried on by the entity in which the shares are held. Further, the acquisition of the shares by the SMSF is not in accordance with the SMSF's investment strategy.*[123]

156. *Kate uses the funds from the sale of the shares in setting up her tanning business. During the time that the SMSF has held the shares, they have started to increase in value. Kate therefore decides to reacquire the shares from the SMSF at slightly more than what the SMSF paid Kate for the shares.*

157. *Kate has used the resources of the SMSF to liquidate assets (shares) that were somewhat illiquid in order to finance her tanning business and in doing so has exposed the SMSF to the financial risk of holding the shares; a risk which Kate would otherwise have had to bear. The facts taken together support an inference that the resources of the SMSF were used to provide Kate with the necessary capital to finance her new business venture. The arrangement is similar in effect to the SMSF loaning the money to Kate and Kate giving the SMSF a charge over the shares.*

158. *As SMSF resources have been used to provide finance to Kate to start her new business the arrangement contravenes paragraph 65(1)(b).*

159. By way of contrast the following example illustrates a sale and repurchase situation that does not result in contravention of paragraph 65(1)(b).

Example 11 – sale and purchase of an asset – not financial assistance

160. *Lofty is a sole member and a trustee of an SMSF. Lofty sells a commercial property that qualifies as business real property to the SMSF at market value.*[124] *The commercial property consists of a number of strata titled units leased to ongoing businesses. 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.*

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[122] Trustees and investment managers also need to consider: the sole purpose test in section 62; the restriction in subsection 66(1) on acquiring assets from a related party of the SMSF; and the arm's length requirements in section 109.

[123] Trustees also need to consider the investment strategy requirements in section 52 and regulation 4.09 of the SISR.

[124] Trustees and investment managers also need to consider the restriction in subsection 66(1) on acquiring assets from a related party of the SMSF and the exception in paragraph 66(2)(b) for business real property acquisitions.

161. *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.*

162. *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 subsequent repurchase of the unit by Lofty was an arrangement providing financial assistance to Lofty. On the facts there is no contravention of paragraph 65(1)(b).*[125]

Examples concerning leasing arrangements

Example 12 – acquisition of equipment from third party and lease to family partnership – financial assistance

163. *Robert and Sue are members and trustees of an SMSF. Robert and Sue are in partnership and run a restaurant. The restaurant is in need of renovation including replacement of large capital items namely stoves, ovens and fridges. Robert and Sue do not have the funds to purchase the equipment outright.*

164. *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.*[126] *At the expiration of the lease period the partnership purchases 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.*

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[125] Trustees and investment managers also need to consider: the sole purpose test in section 62; and the in-house asset rules in Part 8 including the 5% limit on the market value ratio of the SMSF's in-house assets and the exception from the meaning of in-house asset in paragraph 71(1)(g).

[126] Trustees and investment managers also need to consider: the investment strategy requirements in section 52 and regulation 4.09 of the SISR; the sole purpose test in section 62; and the in-house asset rules in Part 8 including the 5% limit on the market value ratio of the SMSF's in-house assets.

165. *The facts support an inference that the resources of the SMSF are being used to provide Robert and Sue (as partners in the partnership) with the means of acquiring the necessary equipment for the renovation. That is, the arrangement is providing financial assistance, though not by way of loan, to SMSF members. Even though the lease payments and purchase price are at arm's length, the arrangement is similar in effect to the SMSF lending the money to Robert and Sue to buy the equipment and Robert and Sue granting the SMSF a charge over that equipment. The arrangement therefore contravenes paragraph 65(1)(b).*

166. By way of contrast the following examples illustrate leasing arrangements that do not result in contravention of paragraph 65(1)(b). Although these examples do not contravene paragraph 65(1)(b), it is necessary to consider whether any other provisions, such as the provisions listed at paragraph 139 of this Ruling, apply. In particular, when leasing a property to a related party, trustees need to be aware of the exception from the meaning of an in-house asset in paragraph 71(1)(g). If a property leased to a related party of the SMSF does not meet this exception, (and no other exception in subsection 71(1) applies), the property will be an in-house asset of the SMSF and subject to the 5% limit that applies to in-house assets.

Example 13 – acquisition of works of art from third party and lease to member's business and others – not financial assistance

167. *Jeremy is a member and trustee of an SMSF. Jeremy (a sole trader) has a commercial 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 independently appraised by an expert and, as the appraisal is favourable, 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's gallery as well as other galleries and businesses. The lease payments by Jeremy are on arm's length terms.*[127]

168. *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).*

[127] Trustees and investment managers also need to consider: the investment strategy requirements in section 52 and regulation 4.09 of the SISR; the sole purpose test in section 62; and the in-house asset rules in Part 8 including the 5% limit on the market value ratio of the SMSFs in-house assets.

Example 14 – lease of commercial property by SMSF to family member – not financial assistance

169. *John and Lyn are members and trustees of an SMSF. The SMSF has a commercial property that qualifies as business real property. It has owned the property for a number of years during which time it has been leased to Sally and Chris, who are unrelated third parties running a successful hair and beauty salon.*

170. *Sally and Chris 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. John and Lyn as trustees lease the property to Jane at a fair market rate and on the same terms and conditions as applied when Sally and Chris were tenants.*[128]

171. *It cannot be inferred from the facts that financial assistance is being given to Jane (a relative of a member). The property has been owned for some time by the SMSF and there is nothing to suggest that it has been acquired as a way of providing finance to Jane for its acquisition or use. Further, it is not being leased to Jane at a reduced rental or on better terms and conditions than would apply to other third party lessees. Rather the facts support an inference that the SMSF invested in the property with the intention of making money from the property through rental and to realise a capital gain if the property appreciates in value and is later sold. The arrangement does not contravene paragraph 65(1)(b).*

Example 15 – lease of residential property by SMSF to family member – not financial assistance

172. *Amanda and Robert are members and trustees of an SMSF. The SMSF owns a residential property that it acquired from an unrelated party some time ago. Since it was acquired the residential property has been leased through a real estate agent to various tenants, all unrelated third parties.*

173. *Amanda and Robert's son Jack is returning from working overseas and will require a place to live for a period of time. The real estate agent leases the property to Jack at market rent and on the same terms and conditions as applied to other arm's length tenants. (The residential property is most likely an in-house asset of the SMSF and therefore subject to the provisions in Part 8, including the 5% limit on the market value ratio of the SMSF's in-house assets.)*[129]

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[128] Trustees and investment managers also need to consider: the sole purpose test in section 62; the in-house asset rules in Part 8 including the 5% limit on the market value ratio of the SMSF's in-house assets; and the exception from the meaning of in-house asset in paragraph 71(1)(g).

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

174. *It cannot be inferred from the facts that the SMSF is giving financial assistance to Jack (a relative of a member). The property has been owned for some time and there is nothing to suggest that it has been acquired as a way of providing finance to Jack for its acquisition or use. Further, it is not being leased to Jack at a reduced rental or on better terms and conditions than would apply to other third party lessees. Rather the facts support an inference that the SMSF invested in the property with the intention of making money from the property through rental and to realise a capital gain if the property appreciates in value and is later sold. The arrangement does not contravene paragraph 65(1)(b).*

Example 16 – lease of primary production property by SMSF to members – not financial assistance

175. *Von and Bill are members and trustees of an SMSF. Von and Bill run a small market produce farm that qualifies as business real property. They sell the farm to the SMSF and subsequently lease the farm from the SMSF on arm's length terms to continue farming produce until their retirement.*[130] *Upon their retirement the farm will either be sold by the SMSF or leased to someone else.*

176. *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 (or to others) and to realise a capital gain if the farm is eventually sold to someone else. The arrangement does not contravene paragraph 65(1)(b).*

Example concerning a credit arrangement

177. 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.

[130] Trustees and investment managers also need to consider: the sole purpose test in section 62; the restriction in subsection 66(1) on acquiring assets from related parties of the SMSF and the exception in paragraph 66(2)(b) for business real property acquisitions; and the in-house asset rules in Part 8 including the 5% limit on the market value ratio of the SMSF's in-house assets and the exception from the meaning of in-house asset in paragraph 71(1)(g).

Example 17 – extending credit to a relative of a member – financial assistance

178. *Dale is a member and trustee of an SMSF. The SMSF has a block of land that is to be disposed of in accordance with the SMSF's investment strategy. The land has been for sale for some time with no suitable offers. Dale's niece 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 block of land to his niece and allows her take possession and pay it off in instalments over a period of time.*[131]

179. *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).*

Example concerning investment in a family business

Example 18 – SMSF investment in family business – financial assistance

180. *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 the business but need $200,000 to buy new equipment.*

181. *John and Jenny as trustees of the SMSF invest $200,000 of SMSF funds in the partnership thereby becoming partners (as trustees) along with James and Charlotte.*[132] *The expansion of the catering business is successful and within 2 years James and Charlotte buy out the trustee partners for an amount representing the initial $200,000 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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[131] Trustees and investment managers also need to consider: the sole purpose test in section 62; the in-house asset rules in Part 8 including the 5% limit on the market value ratio of the SMSF's in-house assets; and the arm's length requirements in section 109.

[132] Trustees and investment managers also need to consider: the investment strategy requirements in section 52 and regulation 4.09 of the SISR; the sole purpose test in section 62; the restriction in subsection 66(1) 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's in-house assets.

182. *The facts indicate that SMSF money was invested in the partnership to fund the expansion of the catering 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, which would be a contravention of paragraph 65(1)(a). On the facts there is a contravention of paragraph 65(1)(b).*

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

183. 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.[133] As Buckley LJ found in *Belmont Finance*[134] (a United Kingdom company law case also discussed at paragraph 98 of this Ruling) the purchase by a company of property that it does not genuinely need or want can be financial assistance for the purposes of acquiring shares in the company even if the price paid by the company is a fair one.

Example 19 – acquisition of a depreciating asset by SMSF at market value – financial assistance

184. *Simone is a member and a 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.*

185. *Simone, as trustee of the SMSF, purchases the assets at market value for $4,000.*[135] *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.*

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[133] For the purchase of an asset by the SMSF at greater than market value see paragraphs 97 to 102 (including Example 3) of this Ruling.
[134] [1980] 1 All ER 393 at 403.
[135] Trustees and investment managers also need to consider: the investment strategy requirements in section 52 and regulation 4.09 of the SISR; the sole purpose test in section 62; and the restriction in subsection 66(1) on acquiring assets from related parties of the fund.

186. *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. Therefore 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. On the facts there is a contravention of paragraph 65(1)(b).*

An SMSF indirectly giving financial assistance to a member or relative of a member using SMSF resources

187. As explained at paragraph 79 of this Ruling, the Commissioner considers that the phrase 'any other financial assistance' in paragraph 65(1)(b) can include financial assistance that is given indirectly to a member or relative of a member. In this section consideration is given to how financial assistance can be provided indirectly by an SMSF to a member or a relative of a member. The circumstances considered in this section are indicative and not exhaustive.

188. A member, or a relative of a member, of an SMSF 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*[136] (*Darvall*). In this case, a minority shareholder (Darvall) made a takeover offer for shares in a company (Norbrik), which was considered too low by the company's directors. As a means of giving shareholders an alternative to Darvall's take-over offer Norbrik entered into an arrangement with a third party (Chase). Under the arrangement Chase made non-recourse finance available to Norbrik's managing director thereby enabling the managing director to make a higher offer for Norbrik's shares. As part of that arrangement Norbrik caused a wholly owned subsidiary (Norwest) to enter into a joint venture with Chase and sold valuable land owned by Norbrik to the joint venture for development.

[136] (1987) 16 NSWLR 212 (Supreme Court of New South Wales, Equity Division).

189. Hodgson J found that Norbrik indirectly gave financial assistance to the managing director within the meaning of paragraph 129(1)(a) of the *Companies (New South Wales) Code*.[137] Chase gave that assistance because Norbrik caused Norwest to enter into the joint venture agreement. There was a diminution of Norbrik's resources as it was bound to part with the land in return for whatever benefits might flow under the joint venture agreement.[138]

190. The Commissioner considers that paragraph 65(1)(b) applies if the SMSF enters into an arrangement with another entity and the arrangement 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 that other entity to the member or relative of the member.

191. The Commissioner considers that paragraph 65(1)(b) also applies if another entity (for example, a company or trustee of a trust) receives financial assistance from an SMSF and in effect passes on that financial assistance to a member or relative of a member of the SMSF.

192. To determine in a particular case whether financial assistance is indirectly provided to a member or relative of a member all the facts and circumstances of the case must be considered. It must be shown that there is financial assistance given to a member, or relative of a member by an entity and that there is a sufficient connection between that financial assistance and using SMSF resources to effect that financial assistance.

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[137] Following additional submissions Hodgson J found (at 251-2) that Norwest also appeared to be in breach of paragraph 129(1)(a) as it indirectly gave financial assistance in connection with the acquisition by the managing director of shares in Norbrik.

[138] *Darvall* (1987) 16 NSWLR 212 at 246-7. In the appeal case *Darvall v. North Sydney Brick & Tile Co Ltd & Ors* (1989) 16 NSWLR 260 at 297 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'. The majority did not find it necessary to make a finding concerning section 129 in reaching a decision on the appeal case.

193. An entity can give financial assistance to a member, or a relative of a member, in any of the ways that an SMSF gives financial assistance to a member or a relative. For example, an entity may give financial assistance to a member or a relative by giving a gift[139] to the member or relative or by entering into a financing arrangement[140] with that member or relative. Additionally, an entity may give financial assistance to the member or relative by lending money to that member or relative. As explained at paragraph 66 of this Ruling, the phrasing of paragraph 65(1)(b) suggests that lending money would otherwise be financial assistance but for the fact that it is specifically covered by paragraph 65(1)(a). Therefore, if an entity lends money to a member or relative and it is not covered by paragraph 65(1)(a) as the money is not lent by the SMSF to the member or relative it may be covered by paragraph 65(1)(b) if there is a sufficient connection between the entity lending money and using the resources of the SMSF.

194. There is a sufficient connection between the financial assistance given by another entity to a member or relative of a member and using the resources of an SMSF to give that financial assistance if:

- the financial assistance would not have been given by the entity had the SMSF not entered into an arrangement with that entity that relies on SMSF resources (for example, an arrangement similar to the *Darvall* case);
- the entity is in effect passing on financial assistance given to it by the SMSF. This also includes money or assets flowing from the SMSF through a chain of related entities to the member or a relative of a member of the SMSF; or
- there is something else to indicate that financial assistance given by the entity relied upon, or was in some way conditional or dependent upon, SMSF resources.

195. Examples 20 to 23 (paragraphs 196 to 210 of this Ruling) illustrate how financial assistance could be indirectly given to a member or a relative of a member using the resources of the SMSF.

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[139] See paragraph 86 of this Ruling, for a summary of other ways in which an SMSF provides financial assistance to a member or a relative a member.
[140] See paragraphs 135 to 186 of this Ruling.

Example 20 – loan to family company to facilitate loan from family company to members – financial assistance

196. *Gwen and Marg are members and trustees of an SMSF. They are also equal shareholders in CleanPipes Pty Ltd which runs the family plumbing business.*

197. *As trustees of the SMSF, Gwen and Marg arrange for the SMSF to lend $250,000 to CleanPipes Pty Ltd at a commercial rate of interest with the capital to be repaid to the SMSF in 5 years.*[141]

198. *Shortly afterwards CleanPipes Pty Ltd provides financial assistance to Gwen and Marg by lending them $250,000 at a commercial rate of interest. Gwen and Marg apply the borrowed funds towards the purchase of an investment property.*

199. *Taking into account the fact that Gwen and Marg control both the SMSF and the company and that soon after the loan was made by the SMSF to the company, the company made a loan of the same amount to Gwen and Marg, it is reasonable to infer that SMSF resources have been used to fund the loan to Gwen and Marg. Therefore, financial assistance using SMSF resources has been indirectly provided to members of the SMSF. The arrangement therefore contravenes paragraph 65(1)(b).*

200. *Even if CleanPipes Pty Ltd were an unrelated company*[142] *this arrangement would still contravene paragraph 65(1)(b) as it relies on, or is dependent upon, the resources of the SMSF to indirectly provide Gwen and Marg with financial assistance.*

Example 21 – gift to discretionary trust – trust distributes gift to beneficiaries who are also SMSF members – financial assistance

201. *Jennifer and Nicholas are trustees and members of the SMSF. Jennifer and Nicholas are also beneficiaries of a family discretionary trust. The trustee of the family discretionary trust is John, a family friend.*

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[141] Trustees and investment managers also need to consider: the investment strategy requirements in section 52 and regulation 4.09 of the SISR; the sole purpose test in section 62; and the in-house asset rules in Part 8 including the 5% limit on the market value ratio of the SMSF's in-house assets.

[142] If CleanPipes Pty Ltd is an unrelated entity subsection 71(2) is a relevant consideration as to whether the loan to CleanPipes Pty Ltd is an in-house asset of the SMSF.

202. *The SMSF has shares in a listed company, which are soon to yield a large dividend payment. Jennifer and Nicholas are in need of cash and so, as trustees of the SMSF, they gift the shares to John as trustee of the family discretionary trust.*[143] *John as trustee of the family discretionary trust distributes the shares equally between the family discretionary trust beneficiaries, Jennifer and Nicholas. As soon as the dividend is paid by the company Jennifer and Nicholas intend to transfer the shares to the SMSF for no consideration.*[144]

203. *Jennifer and Nicholas, as trustees of the SMSF, have given financial assistance (gift of shares) to John, as trustee of the family discretionary trust. John, as trustee of the family discretionary trust, has in turn passed on this financial assistance to Jennifer and Nicholas (as individuals). Clearly the financial assistance could not have been given by John as trustee of the family discretionary trust to Jennifer and Nicholas if the SMSF had not given the financial assistance to John in his capacity as trustee of the family discretionary trust.*

204. *Therefore, financial assistance using SMSF resources has been indirectly provided to members of the SMSF. The arrangement therefore contravenes paragraph 65(1)(b).*

Example 22 – investment in an unrelated company as part of an arrangement to benefit members – financial assistance

205. *Paul and Nicole are planning to undertake major renovations to their residential property and receive a quote from an unrelated company, Building Supplies Co, for all the materials needed for their renovations.*

206. *In order to reduce the cost of their renovations, Paul and Nicole as trustees of their SMSF enter into an arrangement with Building Supplies Co whereby they will invest $100,000 in Building Supplies Co and as part of that arrangement they will pay cost price for any building materials they purchase from the company. This results in a significant monetary benefit (financial assistance) for Paul and Nicole when compared to the prices previously quoted by Building Supplies Co.*[145]

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[143] Trustees and investment managers also need to consider: the sole purpose test in section 62; the arm's length requirements in section 109; and the payment standards in Part 6 of the SISR.

[144] Trustees and investment managers also need to consider: the restriction in subsection 66(1) on acquiring assets from a related party of the SMSF and the exception in paragraph 66(2)(a) for listed shares; and the contribution standards in regulation 7.04 of the SISR.

[145] Trustees and investment managers also need to consider: the investment strategy requirements in section 52 and regulation 4.09 of the SISR; and the sole purpose test in section 62.

207. *It is reasonable to infer from the facts that Building Supplies Co would not have given Paul and Nicole the favourable deal had the SMSF not invested in the company. Therefore, financial assistance using SMSF resources has been indirectly provided to members of the SMSF. The arrangement therefore contravenes paragraph 65(1)(b).*

Example 23 – acquisition of assets from company and lease of assets to that company – loan by company to partners – financial assistance

208. *Roger and Dawn are members and trustees of an SMSF. Roger and Dawn are equal partners in a primary production (grain growing) partnership. They are also equal shareholders and directors in a company that owns many of the assets used to carry on the primary production business. The company leases the assets to the primary production partnership (that is, Roger and Dawn as the partners). Roger and Dawn want to expand their partnership operations into grape growing but are in need of capital to do so.*

209. *Roger and Dawn are unable to secure finance from a financial institution and so Roger and Dawn, as trustees of the SMSF, arrange for the SMSF to purchase a harvester and tractor from the company. The company leases the harvester and tractor from the SMSF and in turn continues to lease it to the primary production partnership. The lease payments between all entities are on arm's length terms.*[146] *The company then lends the proceeds of the sale to Roger and Dawn who use the funds to diversify and expand the primary production partnership business. The company at a future date repurchases the tractor and harvester from the SMSF at market value. The lease payments and reacquisition price recoup the SMSF's capital outlay.*

210. *Roger and Dawn, as trustees of the SMSF, have entered into an arrangement with the company to ensure that the company has the necessary funds to be able to make a loan to Roger and Dawn as partners in the primary production partnership. The arrangement is in substance a financing arrangement that relies on the resources of the SMSF to indirectly provide financial assistance to Roger and Dawn (as partners in the primary production business) through the company. The arrangement therefore contravenes paragraph 65(1)(b).*

211. However, financial assistance is not indirectly given to members or relatives of members of an SMSF that are shareholders in a company merely because the SMSF gives financial assistance to that company. The totality of the facts and circumstances need to be taken into account and considered in light of the matters identified at paragraphs 190 to 194 of this Ruling to determine whether financial assistance is indirectly given.

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[146] Trustees and investment managers also need to consider: the investment strategy requirements in section 52 and regulation 4.09 of the SISR; the sole purpose test in section 62; the restriction in subsection 66(1) 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's in-house assets as the leased assets are in-house assets of the SMSF.

212. Although an SMSF giving financial assistance to a company may not contravene paragraph 65(1)(b), the trustee or investment manager also needs to consider:

- the sole purpose test in section 62;
- the investment strategy requirements in section 52 and regulation 4.09 of the SISR;
- the restriction on acquiring assets from a related party in section 66;
- the provisions concerning the in-house asset limits in Part 8, in particular sections 71, 82 and 83;
- the arm's length requirements in section 109.

213. The following example illustrates that mere investment in a related family company by an SMSF is not financial assistance to a member or relative of a member that is a shareholder unless there are other factors to indicate that the member or relative is financially assisted.

Example 24 – investment in new family company to establish business – not financial assistance

214. *Les and Merle are members and trustees of an SMSF. Les and Merle are equal shareholders in a newly incorporated company. The company, a related party of the SMSF, is to carry on business as a furniture manufacturer.*

215. *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. The $500,000 is used by the company to acquire the equipment and premises. (The loan is an in-house asset of the SMSF and therefore subject to the provisions in Part 8, including the 5% limit on the market value ratio of the SMSF's in-house assets.)*[147]

216. *SMSF funds have been used to finance the establishment of the company's business and therefore the SMSF has provided financial assistance to the company using SMSF resources. However, the mere fact that Les and Merle are shareholders of the company is not sufficient to reach the conclusion that Les and Merle are indirectly provided with financial assistance. If there were other factors present, for example, the company used part of the $500,000 to satisfy a debt owed to a third party by Les and Merle, then financial assistance using SMSF resources would be indirectly provided to Les and Merle and would therefore contravene paragraph 65(1)(b).*

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[147] Trustees and investment managers also need to consider: the investment strategy requirements in section 52 and regulation 4.09 of the SISR; and the sole purpose test in section 62.

Arrangements or transactions that do not contravene paragraph 65(1)(b)

Investing on commercial terms

217. If an SMSF invests on commercial terms in an unrelated entity and that unrelated 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 unrelated entity does not result in a contravention of paragraph 65(1)(b).

Example 25 – investing on commercial terms – not financial assistance

218. *Craig is a member of an SMSF. As part of the SMSF's investment strategy,*[148] *the trustee of 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.*

219. *As the company is an unrelated entity, the shares are purchased on commercial terms, and on the facts there is no connection between the investment by the SMSF in the company and the benefit to Craig, there is no contravention of paragraph 65(1)(b).*

Payment of a benefit

220. 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 26 – payment of a benefit – not financial assistance

221. *James is a member of an SMSF and 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.*

222. *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.*

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[148] See the investment strategy requirements in section 52 and regulation 4.09 of the SISR.

Appendix 3 – Glossary

223. The following is a glossary for this Ruling:

Guarantee

A guarantee generally involves a promise given by one party (the guarantor) to answer for the debt, default or miscarriage of another party. See Encyclopaedic Australian Legal Dictionary (LexisNexis, Butterworths).

For example, a trustee of an SMSF guarantees to a third party that it will repay a debt owed by a member or a relative of a member to that third party if the member or relative defaults.

Indemnity

An indemnity may involve a promise by one party to pay another party a sum of money to compensate that other party for liability, loss or expense that the other party incurs or suffers. See Encyclopaedic Australian Legal Dictionary (LexisNexis, Butterworths).

For example, a trustee of an SMSF agrees to indemnify a third party for any liability, loss or expense that the third party may suffer through a dealing it has with a member or relative of a member.

Security

An asset offered by a borrower to a lender as collateral. If the borrower defaults on the repayment of the loan, the lender has the right to sell the asset and retain the proceeds up to the amount owing. It is also known as a 'charge'. See Encyclopaedic Australian Legal Dictionary (LexisNexis, Butterworths).

For example, the trustee of an SMSF offers an SMSF asset as security for a loan made by a third party to the member or a relative of a member.

Charge

A charge over land or property gives the lender (the chargee) certain rights to take possession of, or receive payment out of the proceeds of the sale of, the charged property. A charge may be fixed on specific property, or it may float over all property, or property of a certain type, crystallising on exercise of the chargee's rights under the charge. See Encyclopaedic Australian Legal Dictionary (LexisNexis, Butterworths).

Appendix 4 – Detailed contents list

224. The following is a detailed contents list for this Ruling:

References

Previous draft:

SMSFR 2007/D2

Related Rulings/Determinations:

SMSFR 2008/2

Subject references:

- former SMSF
- SMSF
- SMSF acquisition of assets
- SMSF arms length acquisitions
- SMSF charge over assets
- SMSF financial assistance
- SMSF loans
- SMSF related parties
- superannuation

Legislative references:

- SISA
- SISA 10(1)
- SISA 10(3)
- SISA 10(4)
- SISA 11A
- SISA 17A
- SISA 35C
- SISA 42A(5)
- SISA 52
- SISA 62
- SISA 65
- SISA 65(1)
- SISA 65(1)(a)
- SISA 65(1)(b)
- SISA 65(2)
- SISA 65(4)
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- SISA 65(6)
- SISA 65(7)
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- SISA 66(1)
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- SISA 66(2)(a)
- SISA 66(2)(b)
- SISA 66(2A)
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- SISA 82
- SISA 83
- SISA 109
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- Companies Act 1961 (NSW) 67
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- Company Law Review Act 1998
- Companies (Acquisition of Shares) (New South Wales) Code 129
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- Partnership Act 1891 (Qld) 72
- Partnership Act 1958 (Vic) 84
- Partnership Act 1892 (NSW) 53
- Partnership Act (NT) 52
- Partnership Act 1963 (ACT) 54
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- Superannuation Legislation Amendment Act (No. 4) 1999
- SISR 4.09
- SISR Pt 6
- SISR 7.04
- 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 (1987) 16 NSWLR 212
- Darvall v. North Sydney Brick & Tile Co Ltd (1989) 16 NSWLR 260
- Dempster v. National Companies and Securities Commission (1993) WAR 215; (1993) 10 ACSR 297

- Deputy Commissioner of Taxation (Superannuation) v. Fitzgeralds [2007] FCA 1602; [2007] ATC 5105
- Eastern Nitrogen Ltd v. Commissioner of Taxation [2001] FCA 366
- EH Dey Pty Ltd (in liq) v Dey [1966] VR 464
- FCT v. McPhail (1968) 117 CLR 111
- 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
- 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] 1 All ER 224
- 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
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