# *SMSFR 2012/1EC - Compendium*

# Ruling Compendium – SMSFR 2012/1

This is a compendium of responses to the issues raised by external parties to draft *SMSF 2011/D1 – Self Managed Superannuation Funds: limited recourse borrowing arrangements – application of key concepts*

This compendium of comments has been edited to maintain the anonymity of entities that commented on the draft Ruling.

All legislative references in this compendium are to the *Superannuation Industry (Supervision) Act 1993* (SISA) unless otherwise indicated.

**Summary of issues raised and responses**

| Issue No. | Issue raised<br>(Unless otherwise noted, references are to Examples and paragraphs in SMSFR 2011/D1) | Tax Office Response/Action taken<br>(Unless otherwise noted, references are to Examples and paragraphs in SMSFR 2012/1) |
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| 1. | <u>*Different approaches to determining what is a single acquirable asset*</u><br>*Usage* – The term 'single acquirable asset' should be interpreted from a 'usage perspective' and not from a 'title perspective'. There are many revenue instances, especially in property matters, where multiple titles (often abutting) have been regarded as a single property for the revenue purpose. A usage basis is consistent with the SISA approach to leasing obligations with respect to business real property matters. For example a single farming business being conducted over multiple titles should be viewed as a 'single acquirable asset'. The term 'asset' should not be read as a 'legal title' but rather based on the primary or fundamental use of the property. For example a farmland operated over multiple titles should be viewed as a 'collection of identical assets'. Alternatively recommended that 'multiple titles' be viewed as a 'collection of assets' and hence a 'single acquirable asset' where the asset is used as one asset.<br>*Decision making process* – Should look at single acquirable assets not in terms of physicality or legal title but rather should take into consideration the decision making process and the rationale of the investment decision. A limited recourse borrowing arrangement is a single acquirable investment product no matter how many parts it is made up of. Should categorise the limited recourse borrowing arrangement as a single investment asset, an investment 'product' no different from a share title. That single asset may be made up of various components, but as long as it is a single investment where each component is an integral part of the whole, then it is a single acquirable asset. | <u>*No change to the approach in the Ruling*</u><br>The view in the Ruling (that is to look at both the proprietary rights and the object of the proprietary rights in determining if there is one asset) reflects an approach considered open on the words of the law and is an approach that has support from case law (see *White v. Director of Public Prosecutions (WA)* [2011] HCA 20 and *McCaughey v. Commr of Stamp Duties* (1945) 46 SR (NSW) 192 as discussed at paragraphs 110 and 111 of the Ruling).<br>As explained at paragraphs 149 and 150 of the Ruling, determining what is a single acquirable asset according to usage or investment decision rationale is not preferred as it is considered that these approaches do not give adequate weight to either the meaning of a 'single' acquirable asset or the mischief that sections 67A and 67B were introduced to address. See also paragraph 90 of the Ruling as to the mischief sections 67A and 67B were intended to address.<br>It is not considered possible on the words of the law to view multiple titles to real property as a collection of assets meeting the requirements of subsection 67A(3) as each parcel of land is unique rather than being identical to another and may have a different market value. As explained at [1.250] of *Australian Real Property Law in relation to contractual remedies* (Bradbrook, MacCallum, Moore & Gratton (2011, 5th edition, Thomson Reuters):<br>On the other hand, because *each parcel of land is regarded as unique*, any contract for the sale of an interest in land is viewed as appropriate for the remedy of specific performance. |

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| | *Support for the approach taken in the Ruling*<br>The approach taken in this Ruling with defining a single acquirable asset is a more practical one and takes into consideration a more principle based commercial view, giving attention to the asset's underlying substance and economic reality as opposed to simply its legal form. Appears that the view in the Ruling is aligned with the intent of the law, as set out in the Explanatory Memorandum to the legislation. | |
| 2. | *Law of a State or Territory*<br>*Clarification required* – what is a 'law of a State or Territory' for the purposes of determining whether two or more assets are prohibited by a 'law of a State or Territory' from being dealt with separately as there are various ways in which a requirement that separate assets not be dealt with separately might exist. For example, an agreement that is registered on the certificate of title; or it might be specified in the planning requirements.<br>*Enforcement of a contract* – if a contract, which is enforceable under Commonwealth or State Law, requires two assets to be sold as one, does this result in the asset being treated as a single asset for the limited recourse borrowing arrangement provisions. The draft Ruling draws a distinction between commercial agreements and any law which requires the assets to be sold together. However, the terms of a commercial contract are themselves enforceable under law.<br>*Alternative approach* – apply a look through approach whereby the assessment of the security (a stapled security) as being either a single asset or a security comprising multiple assets would depend on the existence of multiple proprietary rights if the commercial contract was removed.<br>*Example 6 paragraph 54* – refers to the 'laws of the State in which the apartment is located'. It is understood that the treatment of car parks for strata-titling purposes differ, not only across the States of Australia, but also within local council areas as well. Suggest deleting the last sentence in paragraph 54 and amending paragraph 55 to read 'Provided that the two titles cannot be assigned or transferred separately, for example due to local or state laws, the apartment together with the car park is a single acquirable asset.' | *Further clarification added to the Ruling*<br>See paragraph 13 (last bullet point), Example 1 (paragraphs 47 and 48) and Example 5 (paragraphs 60 and 61) of the Ruling which confirm the view in the draft Ruling that contractually binding assets together would not mean that those assets satisfy as a single acquirable asset. The requirement that such assets are dealt with together arises under the terms of the contract rather than under a State or Territory law.<br>In relation to assets required by a law of the State or Territory to be dealt with together see paragraph 12 (second bullet point) and Example 4 (paragraphs 58 and 59) along with footnote 33, which illustrates the situation intended to be covered.<br>The suggested change to what was Example 6 of the draft Ruling has not been adopted as it suggests that a state or local law is only an example of two assets being required to be dealt with separately and in this sense is broader than what is intended.<br>If a situation arises that is not covered by the explanation in the Ruling further specific advice can be sought from the ATO. |

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| 3. | *Contractual tying together of assets*<br>The 'tying together' of assets may arise under contract rather than by application of a law and it will not be possible for the assets to be dealt with separately, although the Ruling suggests that they should nonetheless be treated as separate assets for borrowing purposes. This is likely to mean that such assets cannot be acquired by an SMSF using borrowings.<br>*Stapled securities* – if a security is contractually bound to one or more other securities to form a single saleable unit (for example, a stapled security), is it a single asset or two assets for the purposes of the limited recourse borrowing arrangement provisions?<br>*Policy considerations* – There is no policy reason why this class [that is assets tied together under contract] of possible investments should be restricted in this way. Paragraph 67A(2)(b) provides that an asset is an acquirable asset if neither the SISA nor any other law prohibits the trustee from acquiring the asset. Parliament appears to have intended that there be no restriction on the types of assets that could be acquired using borrowings, save for those set out in the SISA and Regulations (and in any other laws). An interpretation which imposes additional restrictions on the types of assets that can be acquired would therefore seem to be inconsistent with Parliament's intentions. | *No change to the approach in the Ruling*<br>The view in the final Ruling confirms the view in the draft Ruling that contractual tying together of assets is not of itself sufficient to satisfy as a 'single' acquirable asset. See also comments at 2.<br>It is recognised that this means that some assets, which could previously have been acquired under the former subsection 67(4A), can no longer be acquired under the current limited recourse borrowing arrangement provisions. The policy intention concerning removing the ability to pool assets under a limited recourse borrowing arrangement is discussed at paragraph 90 of the Ruling.<br>Discussion on securities, and in particular stapled securities, has not been added to the final Ruling as the topic was not specifically covered in the draft Ruling and so has not had the benefit of consultation. However, specific advice can be sought from the ATO if required. |
| 4. | *Circularity*<br>There is circularity in the Commissioner's position that two or more proprietary rights may make up a 'single acquirable asset' if the object of the two or more proprietary rights is 'distinctly identifiable as a single asset'. | *Paragraph amended*<br>The view in paragraph 11 of the final Ruling confirms the view in the draft Ruling that it is appropriate to consider both the proprietary rights and the object of those proprietary rights in determining if something is a 'single' acquirable asset. This paragraph has been amended although it still conveys the same intent. |
| 5. | *Temporary or demountable physical characteristics*<br>Requires additional scenarios and explanation to demonstrate how the term 'single acquirable asset' should be applied if a physical characteristic is temporary or demountable rather than of a more permanent nature. For example.<br>• agricultural crops planted over multiple rural titles;<br>• shed constructed across two titles but without water or electricity | *Further clarification added to the Ruling*<br>Additional explanation and examples have been added to the Ruling (paragraphs 12 and 13 and Example 3, paragraphs 52 to 57) to make it clear that a physical characteristic that is of a temporary nature would not be sufficient to regard the asset as a single acquirable asset. |

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| | connected;<br>• a demountable constructed over multiple titles;<br>• irrigation system across two legal titles.<br>Presumes intention of the draft Ruling to ensure only permanent physical characteristics are used to define an asset as a single asset and refers to the views expressed in SMSFR 2009/1 (regarding the indicators of a permanent structure) as relevant for inclusion or cross referencing. | |
| 6. | *House and land package issues*<br>If building a house on land fails the single acquirable asset test wouldn't the purchase of a house and land package also fail the test?<br>As a house can potentially be sold separately from the land on which it is attached, perhaps the concept of whether the asset can be sold separately in determining the existence of a single acquirable asset should not apply to a building constructed on land.<br>What is the outcome if the supply of land with a dwelling to be constructed occurs by way of two contracts that are executed simultaneously and are not separable? For practical purposes (that is to reduce the stamp duty and for the builders cash flow position) there are two steps and two contracts but unlike in the situation covered by Example 8 (*Purchase of land and construction of house using borrowings*) it is for the one agreed outcome – there being a contract to acquire a finished product where everything is bundled. This situation, which involves entering into a contract with a builder/developer/agent for the supply of a completed dwelling, is different to that of Example 8 where the single acquirable asset is the land and which involves two separate and distinct steps: one step to acquire the land and one step to construct. | *Further clarification added to the Ruling*<br>An explanation dealing with property development has been added to the Ruling (see paragraphs 38 to 41).<br>Examples have also been added or altered: Example 6 (paragraphs 62 and 63); Example 7 (paragraphs 64 and 65) Example 9 (paragraphs 68 to 70); Example 10 (paragraphs 71 and 72) and Example 11 (paragraphs 73 and 74).<br>As most assets (that is not just real property assets) can generally be separated, altered or reduced to different component parts following acquisition, the approach in the Ruling is pragmatic in determining if there is a single acquirable asset at the time of the acquisition. If it eventuates that the asset is subsequently altered to such an extent that it is no longer the same asset, or it is altered to allow it to be sold piecemeal, this will likely mean that the borrowing no longer satisfies the limited recourse borrowing arrangement provisions (see Example 11). |
| 7. | *Securities*<br>The terms 'single acquirable asset' and 'replacement asset' do not work in regards to assets which are 'securities'. With regard to securities the examples in the Explanatory Memorandum (such as 'a collection of ordinary shares in X Ltd') are unhelpful and SMSFR 2011/D1 does not assist. | *No change to the scope of the Ruling*<br>Discussion on securities has not been added to the final Ruling as the topic was not specifically covered in the draft Ruling and so has not had the benefit of consultation.<br>However, specific advice can be sought from the ATO if required. |

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| 8. | *The application to rural properties of the single acquirable asset approach taken*<br>Under the Ruling the outcome differs depending on whether the shed is constructed within one legal title or across multiple legal titles. It is difficult to explain why two identical rural properties (or any commercial property for that matter) should be treated differently just because a shed or physical object is constructed across the legal titles in one property and not in the other.<br>Requiring a property to be treated as two separate acquirable assets in these situations is impractical and would require a lender to assign a value to each component of the land which comprises a separate legal title. Although the legal form is two separate titles, the economic reality and the practicalities are that the two titles are not treated separately.<br>Could overcome this by referring to the economic reality of the asset and applying the concept of an economic entity as opposed to a simple legal form when defining the boundaries of an asset. This test could be applied in addition to the legal form and substance test referred to in the draft Ruling. In other words, if an object comprising separate legal titles represented a single economic entity, or there exists a physical or legal barrier which prevents the object being dealt with as separate assets, the object should be considered a single asset for the purposes of the limited recourse borrowing arrangement provisions.<br>Many practical difficulties in taking this approach, for example, if all water rights for a farm were attached to a particular title or there were sheds or other infrastructure on one title that were required for the farm to operate as a whole across all titles it would seem more consistent with the position set out in paragraphs 11 to 13 of the Ruling if the farm were taken to be a 'single acquirable asset'. | *No change to the approach in the Ruling*<br>The view in the Ruling remains unchanged in terms of considering both the proprietary rights and the object of those proprietary rights to determine if there is a single acquirable asset for the purposes of undertaking a limited recourse borrowing arrangement.<br>See also comments at 1. |
| 9. | *Comments on Example 3 – rural property*<br>The example is too narrow and interpretation should be on a 'usage basis' and not a form of 'title basis'. It is not pragmatic or economic to consider that a farm conducted over multiple titles be sold off separately. Many of the farming community will not be able to utilize the limited recourse borrowing arrangement or be in current perceived breach, thereby putting them at a | *No change in approach however, further clarification added to the Ruling*<br>The view in the Ruling remains unchanged in terms of considering both the proprietary rights and the object of those proprietary rights to determine if there is a single acquirable asset. See also comments at 1.<br>However, there is further clarification as to factors to consider in determining if it is reasonable to conclude that there is a single acquirable asset (see |

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| | disadvantage to city investors. 'Multiple titles' for rural properties should be viewed on a usage basis as a single acquirable asset (which is the way these are commonly advertised for sale) or as a 'collection of assets'.<br>Both Example 2 (factory over more than one title) and Example 3 relate to business real property (BRP). All BRP should be treated in a consistent and similar manner notwithstanding the number of titles involved because the single acquirable asset is the business that includes the real property involved.<br>Farms are not conducted according to title boundaries and therefore, similar to factories, a paddock being cultivated or used for other primary production purposes will usually extend beyond title boundary lines. Usually there would be an obstacle in a practical sense to selling off one title as boundary lines would have to be surveyed and fencing put in place, etcetera. Considered the same protections would be achieved if the application of Example 11 was extended to cover any selling off of part of the asset acquired pursuant to a borrowing.<br>Retaining Example 3 could lead to the following:<br>• Farm outbuildings built over more than one title – would they be treated in the same manner as factories built over more than one title and therefore cause the titles involved to be a single acquirable asset?<br>• What about haystacks? If they are constructed over more than one title at the time of acquisition, would that cause the titles involved to be a single acquirable asset?<br>• If the farm house is on a separate title – would this cease to be subject to subsection 66(6)?<br>Moving rural land into an SMSF using a limited recourse borrowing arrangement with rent payments from a related party is seen as a good investment strategy. Suggested that interpretation be changed:<br>• A discrete rural block with a single or no building entitlement, on or part of a single rate notice, operated by a single business entity, with a single trafficable access road from a public road – or just a 'block of land'.<br>There are in any case limitations placed on subdivision and development | paragraphs 12 and 13).<br>Example 3 (paragraphs 52 to 57) has also been changed to provide further guidance in this regard.<br>There is no basis in the limited recourse borrowing arrangement provisions for determining what a single acquirable asset is by reference to whether the asset is business real property. This approach has therefore not been adopted.<br>A discussion of subsection 66(6) is outside the scope of this Ruling. SMSF Ruling *SMSFR 2009/1 Self Managed Superannuation Funds: business real property for the purposes of the Superannuation Industry (Supervision) Act 1993* discusses subsection 66(6). However, specific advice can be sought from the ATO if required as the answer to the question concerning the farm house may turn on the specific facts.<br>See also comments at 5. |

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| | through the limitations placed on changing the nature of the asset (paragraphs 31 to 37) and restrictions on funding improvements (paragraphs 25 to 27 and 30).<br>Surely it is within the intention of the law to be able to purchase, lease and eventually sell a single block of rural land on more than one title.<br>In many rural areas, parcels of land can be made up of land on a number of titles. In practical terms, some of the smaller titles are unsaleable and could only ever be sold as a parcel. However because they are actually separate titles, limited recourse borrowing arrangements would be prohibited for such assets. | |
| 10. | *Comments on Example 4 (now Example 7) – off-the-plan*<br>The example appears to treat the trustee's 'right to purchase' the apartment once completed as being a separate asset to the apartment (the object) purchased. Such an analysis is incorrect.<br>Proceeding with the purchase would require the SMSF acquiring the right to purchase from the fund member and (not being subject of an exemption) would result in the SMSF breaching section 66. Accordingly, the inclusion of this example may mislead or cause confusion.<br>Specifically at which point does the bare trustee need to exist, given that there is only a single sale contract at the original purchase (not on completion)? Presumably this needs to be in the name of the bare trustee at this time and not at the date of commencing the borrowing which is on completion.<br>Requires greater clarification on whether borrowing to fund the deposit to secure the acquisition of an 'off the plan' apartment would satisfy the requirements in section 67A.<br>The draft Ruling does not address the main issue encountered, that is can the SMSF purchase a 'right' to acquire an apartment 'off the plan', or whether the 'right' to purchase the apartment is a different asset to the actual property. | *Further clarification added to the Ruling*<br>An explanation dealing with property development has been added to the Ruling (see paragraphs 38 to 41). Examples have also been added.<br>Example 7 (previously Example 4) (paragraphs 64 and 65) has been altered to reflect that borrowings under a single limited recourse borrowing arrangement can be applied for the acquisition of an off-the-plan apartment, with the borrowing funding both the deposit and settlement payments. Section 66 would not apply on the basis that the off-the-plan apartment is acquired from a party unrelated to the SMSF. See also paragraph 46 of the Ruling, which notes this as an assumption in relation to all examples.<br>Example 6 (paragraphs 62 and 63) is a new example to illustrate the outcome of the acquisition of an existing house under the one contract where a deposit is paid on signing and the balance is paid at settlement.<br>Example 10 (paragraphs 71 and 72) is also new and concerns a contract for the acquisition of a yet to be constructed house on land.<br>Concerning the need for the trustee of a holding trust to exist, this question goes to the structuring of the arrangement and is considered out of scope for the purposes of this Ruling. |
| 11. | *Comments on Example 7 (now Example 5) – apartment and furnishings*<br>Paragraph 56 mentions that '(t)he vendor is an entity associated with the accommodation provider'. Is this relevant to the conclusion? | *Further clarification added to the Ruling*<br>What was paragraph 56 of Example 7 of the draft Ruling (now paragraph 60 of Example 5) has been altered to delete the sentence about the vendor being an associate of the accommodation provider as the conclusion does |

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| | In paragraph 56, it is stated that '(t)he purchaser of the apartment is required by the vendor to also purchase a furnishing package'. However, apartment investors may be required to separately purchase furnishing packages when they acquire their apartment. Would the conclusion in paragraph 57 differ if the furnishings were purchased with the apartment in the one contract of sale.<br>It may be a requirement under the lease with the tenant that would necessitate the apartment purchaser to acquire a furnishings package as opposed to a requirement of the vendor.<br>Under accounting standards the apartment and furnishings would be treated as one asset (for example, AASB 140 paragraph 50(b) states that if an office is leased on a furnished basis, the fair value of the office as an investment property includes the fair value of the furnishings because the rental income relates to the furnished office).<br>Could the following scenario be a single acquirable asset?<br>• There is one contract of sale and one purchase price covering both the apartment and the furnishings.<br>• The asset is sold subject to a commercial lease, which provides the tenant with use of both the apartment and furnishings.<br>• The rent payable by the tenant is a single fixed monthly amount for the tenant's use of both the apartment and the furnishings (that is, there is no apportionment).<br>• Under the terms of the lease the SMSF trustee would not be able to sell the apartment without the furnishings (and vice versa).<br>• The SMSF trustee would have ownership of the apartment and furnishings. However, the tenant is responsible for maintenance, repair and replacement of the furnishings. If an item needed to be replaced, the replacement item would be the property of the tenant. (This would not therefore give rise to any replacement asset issues for the SMSF trustee.)<br>• The explanatory memorandum to section 67A states that when land is purchased under a section 67A borrowing arrangement, furnishings cannot be acquired under the same borrowing. It suggests that these be purchased under a separate borrowing (or outright). | not turn on this. The example has also been extended to cover further matters as outlined in the comments.<br>If the furniture package is acquired along with the apartment under the one contract of sale this would not satisfy as the acquisition of a single acquirable asset for limited recourse borrowing arrangement purposes (see also final bullet point at paragraph 13). It does not matter whether it is a requirement of the vendor, or because of a lease to a tenant, that the purchaser of the apartment also acquires the furniture package (see footnote 34).<br>See also comments at 1 concerning alternative approaches to determining what is a single acquirable asset. |

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| | Not disputed that they are multiple items, however, argues they are all part of a single investment asset. That is a furnished serviced apartment. The fund is not buying a physical asset per se. It is buying an investment asset, one made up of many parts but one total asset. It is incorrect for the ATO to try and deconstruct that investment decision into different parts when the fund considers them to be one investment decision. | |
| 12. | *Comments on Example 12 (now Example 11) – house built over two titles*<br>Initial scenario indicates the ATO willingness (in a common sense approach) to accept that usage is an appropriate approach to the determination of a single acquirable asset. The physical attributes of the two titles with one building meant that it was a single acquirable asset notwithstanding the two titles. Recommended that asset continues to be treated as a single asset. | *Further clarification added to the Ruling*<br>The view in Example 11 (paragraphs 73 and 74) is not based on usage. The view in the Ruling is concerned with whether it is reasonable to conclude that there is a single asset even though there may be more than one bundle of proprietary rights. Further guidance has been added to the Ruling to assist in determining whether such a conclusion is reasonable – see paragraphs 12 and 13. See also the examples footnoted to paragraphs 12 and 13 that highlight various aspects of the factors set out in those paragraphs.<br>Example 11 recognises the possibility that although it is reasonable to treat something as a single acquirable asset at the time when it is acquired, it is a possibility that subsequent alterations may mean that the asset is no longer that single acquirable asset.<br>See also comments at 6. |
| 13. | *What is a repair as distinguished from an improvement*<br>The examples provided in the Ruling are helpful but leave open many questions. For example the destroyed part of the kitchen is restored with new and improved appliances and superior bench tops and cabinets; or an existing leaking pool is replaced with a new non-leaking but superior pool; determining the extent to which the cost of a restoration might be apportioned to repairs and maintenance. Suggests more useful and practical guidance on these matters can be provided.<br>*More guidance as to when TR 97/23 is relevant* – the Ruling indicates that the views in TR 97/23, are not decisive in the superannuation borrowing context. However, the Ruling also quotes and apparently adopts parts of TR 97/23. Further and more detailed guidance is required as to what parts of TR 97/23 would not be applicable in the superannuation borrowing context.<br>*Acquiring a run down house* – the Ruling states that acquiring a house with broken glass and replacing the broken glass would be a repair, whereas | *Further clarification and examples added to the Ruling*<br>Additional examples have been added and others altered to assist in clarifying what is a repair as distinguished from an improvement (see paragraphs 20 to 24; 122 to 133; and items 1 to 7 of Table 1 (paragraph 25).<br>Whether something is a repair or an improvement is, however, a question of fact and degree. While the Ruling provides guidance on this matter it may be necessary for SMSF trustees to seek specific advice from the ATO if it is a question of degree.<br>*Taxation Ruling TR 97/23 Income tax: deductions for repairs* is only referenced in the final Ruling in relation to the general explanation as to what is a repair (see paragraphs 125 and 126 and footnotes 64 and 65). To avoid possible confusion no further reference is made to TR 97/23 as in the income tax context the distinction between repairs and improvements is concerned with determining whether expenditure is on revenue or capital account. For limited recourse borrowing arrangement purposes the relevant |

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| | conducting a substantial renovation of a run down house would be an improvement. Anticipates that there will be a large number of situations which fall somewhere in between these two examples. Accordingly, clarification of where the line to be drawn would be beneficial<br>*Original materials no longer available for repair* – further clarity is needed around the situations where repair or maintenance is required out of necessity and the original materials that were used to construct the acquirable asset are no longer available.<br>Support for:<br>• consideration of the repair or improvement concepts adopted from TR 97/23 in developing the meanings of maintaining and repairing described in paragraphs 20, 21 and 22.<br>• for paragraphs 48 to 52 of TR 97/23 as a sensible view to include in the definition of repair in which the use of a more modern material can still qualify as a repair depending on how it affects the functional efficiency of the asset. Should be examples included relating to repairs and improvements of assets using borrowings to address the above mentioned situation. | asset is the entire asset that is held on trust (for example the house and the land) rather than some part of that asset being the relevant entirety. |
| 14. | *Functional efficiency*<br>When looking at functional efficiency, the ATO needs to regard the asset as an investment asset and not the physical parts being repaired or replaced.<br>The following points are made:<br>• renters of such properties will expect a particular style, fit and finish for the rent they pay.<br>• expectations change over time and this necessitates actions to maintain that property at a suitable standard for renters of such properties.<br>• to not make such changes would lead to deterioration in the investment value of the asset and on the return on investment that can be achieved.<br>• if changes to the bathroom or kitchen in the rental property are designed to move the investment from one type of investment return to a higher investment return, it could be argued such changes would | *Further clarification and examples added to the Ruling*<br>Although similar in intent to the draft Ruling the view explained in the final Ruling is that something is a repair if the work on the asset restores the function of the asset to what it was at the time when it was acquired and uses similar or modern equivalent materials.<br>However, it is an improvement if the state or function of the asset is significantly altered for the better through substantial alterations or additions. This is to be determined objectively and not with reference to the actual use of the asset. Reference has not been made to functional efficiency in the final Ruling to avoid any confusion with that concept as used in TR 97/23 in relation to repairs or improvements in an income tax context.<br>The use of superior materials will not necessarily mean an improvement is made as it is a question of fact and degree having regard to the entire asset that is held on trust.<br>Explanation and examples have been added or clarified, (see paragraphs 20 to 24; 122 to 133; and items 1 to 7 of Table 1 at paragraph 25). While the |

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| | amount to an improvement on the investment asset and as such would not be permissible under the rules.<br>• improvements therefore would be defined as any changes to the investment asset that are designed to change the investment value of the asset, not its physical attributes.<br>*Paragraph 25* – states that an 'asset is improved if the functional efficiency of the asset or the value of the asset is substantially increased through the addition of new and substantial features or rights...' While broadly agreeing with this definition, notes that the removal of substantial features can also result in improved functional efficiency and value of the acquirable asset. As such, this paragraph should be reworded to say that: '...an asset is improved if the functional efficiency of the asset or the value of the asset is substantially increased through the major alteration of or addition of new and substantial features or rights...'<br>*Paragraph 26* – 'minor or trifling increases in functional efficiency or value as compared with the acquirable asset as a whole will not amount to an improvement. While agreeing with this, the examples contained in paragraph 58 to 61 do not highlight any situations where the increase in the functional efficiency or value of the asset is a minor or trifling one. Suggests the addition of an example of what constitutes a minor or trifling increase in order to provide further clarity. | Ruling provides guidance it may be necessary for SMSF trustees to seek specific advice from the ATO if it is a question of degree.<br>See also comments at 13. |
| 15. | *Approach in the Ruling in relation to improvements to real property*<br>The view that it is appropriate to look at both the object and the proprietary rights to determine if something is a single acquirable asset is not agreed with in the context of improvements to real property changing the object of the rights and therefore the asset acquired. This view is not adhered to for example for farmland where one must look more to the proprietary rights (see Example 3 of the Ruling).<br>The view and analysis that improvements may be made to an asset from non-borrowed monies provided that the improvements do not result in the acquirable asset becoming a different asset are disagreed with.<br>The reference to 'property' in the context of 'land' is to all of the trustee's powers in relation to the land and fixtures and not to the object of the trustee's property interest. Thus, for the purposes of subsection 67A(1) the | *No change to the approach in the Ruling*<br>The view in the Ruling is to look at both the proprietary rights and the object of the proprietary rights in determining if there is a single acquirable asset. This approach is applied consistently in the Ruling in determining if an asset is repaired or improved or whether the character of an asset has changed to such an extent that it results in a different asset being held on trust under a limited recourse borrowing arrangement. Thus while an alternative view focussing solely on legal rights is recognised in the Ruling (Appendix 3, paragraphs 146 to 151) it is not the preferred view.<br>The further examples that have been added to the Ruling may assist in alleviating some concern as to the types of changes/improvements to real property that do not result in it being regarded as a different asset. See Table 2 (paragraph 35), Example 9 (paragraphs 68 to 70) and Examples 11 |

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| | trustee's asset is its powers, or bundle of rights, in connection with the land, not the land and fixtures themselves. It is considered that real property may be improved by the expenditure of monies (other than from borrowings) without causing the real property to become a different asset. The trustee's powers in connection with the land remain the same notwithstanding an improvement to the object of the trustee's property – being the land and fixtures.<br>The view expressed in the Ruling is wrong at law; it will have a deleterious impact on members and their retirement savings where real property has been acquired by a trustee via a limited recourse loan facility.<br>In effect, the Commissioner's position will hamper any improvements to the property, which over time could see a significant diminution in its value. It is often necessary, for example, at the expiry of a lease of property, for certain capital improvements to be carried out in order to re-lease the property. Because the Commissioner's view, if correct, would be likely to have an adverse impact on the retirement savings of affected superannuation fund members, and this would be inconsistent with the Government's retirement incomes policy, the entity commenting suggests that Parliament cannot have intended the legislation to be interpreted in this way.<br>The Ruling anticipates that certain improvements to land may be permitted provided that they do not '*fundamentally alter the character of the asset or the proprietary rights held under the LRBA*'. Not aware of any established legal principle, of anything contained in the SISA and Regulations, or of any policy consideration relied on by the Commissioner in developing this formulation. The basis for the Commissioner's view should be clearly explained, so that this can be the subject of consultation.<br>There is a concern that these aspects of the Commissioner's views may arise from a mistaken understanding of the meanings of the terms 'asset' and 'property' as used in the SISA. There is also concern about the practical application of this approach.<br><br><u>*Support for the approach taken in the Ruling*</u><br>With regards to the term 'different asset', support for the interpretation that an asset is different if the character of the asset as a whole has fundamentally changed, taking into account both the physical object and the | to 15 (paragraphs 73 to 84). |

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| | attributes of the proprietary rights. | |
| 16. | *Partial involuntary resumptions*<br>Partial involuntary resumptions example required covering situation where a road authority resumes a portion of the frontage of a property to widen a road, which causes the existing property title to be cancelled and a new title to be issued.<br>Assumed that the Commissioner would consider the new title to constitute a replacement asset and the SMSF would need to unwind the arrangement. | *Further clarification added to the Ruling*<br>Item 8 of Table 2 (paragraph 35) of the Ruling has been added to address this specific circumstance.<br>Additionally, paragraphs 36, 37 and 143 to 145 have been added to explain that alterations (or additions) to an asset made by other than the SMSF trustee can result in a different asset.<br>Whether a change to a single acquirable asset results in a different asset is a question of fact and degree and is determined on the facts of each case by reference to the legal and physical characteristics of the asset when the limited recourse borrowing arrangement was entered into.<br>As item 8 indicates it is necessary to look at both the proprietary rights as well as the object of those proprietary rights to determine if it is a different asset that is held on trust. In the circumstances of item 8 it is concluded that it is not a different asset. |
| 17. | *Tenant's changes to a single acquirable asset*<br>While noting that the Commissioner appears to be less inclined to treat unsolicited tenant improvements as creating a replacement asset, some clarification of the Commissioner's views here would be helpful. | *Further clarification added to the Ruling*<br>This issue is now addressed in the Ruling at paragraphs 36, 37 and 143 to 145.<br>Essentially whether or not there is a different asset is not determined by whoever made the alteration or addition. However, alterations or additions made by a tenant do not result in a different asset if they do not fundamentally change the character of the asset (for example such as an office fit out) or, if adding fixtures does fundamentally change the character of the asset, the fixtures remain the property of the tenant. |
| 18. | *Improvements resulting in a different asset*<br>Comparatively little guidance is provided in relation to the equally significant distinction between permissible improvements and improvements which result in a different asset being created.<br>Paragraph 60 confirms that extensions (such as the addition of a bathroom) would be improvements rather than repairs, but does not provide any guidance as to whether they would result in the creation of a different asset.<br>Table 1 in paragraph 27 sets out a number of examples of what will constitute repair, maintenance or improvement. In respect of each of the | *Further clarification added to the Ruling*<br>In relation to rebuilding a house and whether it is an improvement or a repair, see item 4 of Table 1 (paragraph 25).<br>As to whether a change to an asset results in a different asset see Table 2 (paragraph 35). Further, item 10 of Table 2 states that the improvements included in Table 1 do not result in a different asset.<br>However, if an SMSF trustee has a concern with a particular situation specific advice can be sought from the ATO. |

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| | improvement examples, it would be useful to understand if the ATO would consider that a different asset had also been created.<br>Assumed that rebuilding a house which was completely destroyed by fire would also be a repair; however this is not made clear by the Ruling. | |
| 19. | *Table 2*<br>Examples are primarily at the extremes and do not deal with a number of more relevant scenarios.<br>Do not agree with the interpretation that a change in the usage of an asset is sufficient to deem the asset a 'new asset'. | *Further clarification added to the Ruling*<br>Additional examples have been added to Table 2 (paragraph 35) relating to whether or not improvements result in the single acquirable asset becoming a different asset.<br>However, if an SMSF trustee has a concern with a particular situation specific advice can be sought from the ATO. |
| 20. | *Request for additional examples – partial change in character of asset*<br>Requires additional scenarios to demonstrate, in a wider variety of circumstances, the extent to which a partial change to the asset's character or purpose would constitute a new asset. For example:<br>• The re-construction of a residential house damaged by a natural disaster but with the addition of a new shed/garage which will be used for commercial purposes.<br>• The conversion of a bedroom in a residential house to a home office. | *Additional example added/example modified*<br>See items 4, 5 and 6 of Table 2 (paragraph 35).<br>If an SMSF trustee has a concern with a particular situation, such as the addition of a shed for commercial purposes, specific advice can be sought from the ATO. |
| 21. | *Item 1, Table 2 (subdividing a block)*<br>The asset has not changed and that it is simply a change of titles. It is the reverse of the situation where a farm is bought under multiple titles and then amalgamated. Similarly in this scenario there is no change in the asset, only in the title. Indeed the physical postal address may not change. | *No change to the approach in the Ruling*<br>A change made to an asset that in effect allows what was a part of one asset to be sold separately, as is the case with a subdivision, results in multiple assets being held in place of the one asset. Rather than a single acquirable asset held on trust, multiple assets are now held on trust under the limited recourse borrowing arrangement. See item 1 of Table 2 (paragraph 35). |
| 22. | *Item 2, Table 2 (building house on a block)*<br>• What if there had been a small house on the block and 'other funds' were used to conduct significant extensions or to erect a new house, it is not clear whether this would simply be an improvement or would create a different asset.<br>• A cattle farm (currently with no building/dwelling erected) that is used as part of a genuine primary production business is acquired under a limited recourse borrowing arrangement. The SMSF trustees are | *Further clarification added to the Ruling*<br>To assist in clarifying the approach further examples have been added to the Ruling. See items 7 and 9 of Table 2 (paragraph 35). See Example 13 (paragraphs 78 to 80) and Example 14 (paragraphs 81 and 82).<br>If an SMSF trustee has a concern with a particular situation specific advice can be sought from the ATO. |

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| | required to build a shed on the farm to house livestock as a result of recent extreme temperatures or as a consequence of a binding order to do so, perhaps from the Environment Protection Agency. Will the asset be deemed to be an improved asset or a new asset?<br>• As above, however, the SMSF trustees decide to build a homestead on the farm which will be used for domestic purposes – for example a farmer's residence/dwelling. Will the asset be deemed to be an improved asset or a new asset? | |
| 23. | *Item 3, Table 2 (replace house with strata titled units)*<br>Refers to a house being demolished and replaced by three strata titled units. This is clearly a different asset. However, the Ruling does not provide any guidance as to whether demolishing the house and replacing it with a comparable new house would be a permissible improvement or a different asset. | *Further clarification added to the Ruling*<br>To assist in clarifying the approach further examples have been added to the Ruling. See items 4 and 5 of Table 1 (paragraph 25).<br>See also items 3, 6 and 10 of Table 2 (paragraph 35). |
| 24. | *Item 4, Table 2 (rezoned and house renovated to commercial premises)*<br>Not considered that a renovation or a change of use from residential to commercial makes an asset a new asset. For example the front part of a house is converted to a Doctor's office. The extent of the renovations is a dividing wall. The house is a commercial property (in part) and has been subject to a renovation, however, is not a different asset. The building is still a building on land that was always the land. The ATO is raising greater difficulties; what extent of renovation is problematic? Rezoning is beyond the control of the trustee. Permitted use and actual use are two different things.<br>The Commissioner should clarify whether it is the rezoning of the property from residential to commercial that has caused the asset to become a 'different asset', or whether it is the renovation to commercial premises in combination with the rezoning that has caused the asset to become a 'different asset'. | *Further clarification added to the Ruling*<br>See item 4 as compared with item 5 of Table 2 (paragraph 35).<br>The reference to 'rezoning' has been removed from item 4 as this would not of itself determine the issue.<br>Whether or not the conversion of a residential house to commercial premises results in a different asset will be a question of fact and degree. Item 4 has been altered so that the changes to the building are of such an extent to clearly result in there being a different asset.<br>In regard to the doctor's office scenario raised in the comment, it is expected that to set up a doctor's premises changes of some significance would be required (for example a waiting room, facilities, car parking, access ramps and so on) and thus it may be similar to the situation considered at item 4 rather than item 5.<br>However, if such changes to an asset held under a limited recourse borrowing arrangement are in contemplation specific advice can be sought from the ATO, including any concerns as to the consequences of rezoning an asset along with making other changes to the asset. |
| 25. | *Item 5, Table 2; Example 13 (replace a four bedroom house with a four bedroom house)* | *Further clarification added to the Ruling*<br>See item 4 of Table 1 (paragraph 25) so far as whether rebuilding a |

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| | Needs to consider if a two or five bedroom house or a four bedroom house plus study would be a different asset for the purposes of the limited recourse borrowing arrangement rules. Furthermore, in the context of the distinction between improvements and a different asset, it is not clear what relevance it is that the original house was destroyed by fire.<br>What if a three bedroom house were reconstructed – appears likely that this is a fundamentally different house and therefore is a different asset. Envisaged significant difficulties in determining when improvements have fundamentally altered the character of an asset as no clearly articulated legal principle that underlies the notion of 'fundamental alteration of character'; difficult for advisers to apply the Ruling in circumstances that differ from those given in the 'Examples' contained in the Ruling. View is that the destruction and rebuilding of a house or other building affixed to land has no bearing on the 'property' that is owned by the fund.<br>A three-bedroom home with single garage is acquired under a limited recourse borrowing arrangement. The SMSF trustee(s) subsequently decides to voluntarily demolish this home and re-construct a brand new three bedroom home with single garage. Will the asset be deemed to be an improved asset or is it simply a replacement of an asset that already existed? Is the answer affected by the later discovery after purchase of asbestos? | residential house destroyed by fire is an improvement. A house might also be destroyed for reasons other than fire, see paragraph 141. See also item 5 of Table 1 concerning renovation or demolition of a residential house.<br>See item 10 of Table 2 (paragraph 35) which states that examples of improvements included in Table 1 do not result in a different asset.<br>See item 6 of Table 2 which also states that rebuilding another residential house, whether of the same size or larger, following a fire does not result in a different asset. (Building a smaller house would similarly not result in a different asset). |

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| 26. | *Request for a new example – building extension*<br>Request for the inclusion of a 'different asset' example (paragraph 35 Table 2) in relation to building extensions. For example:<br>• A superfund purchases a commercial property for $2 million under an LRBA, which is then leased to a tenant who runs a car washing business. Two years later, at the request of the tenant, the SMSF decides to build an extension on to some spare land at the back of the building to expand the facility. The builder quotes a cost of $500,000 for concreting, roofing and plumbing works, but the expansion will enable the landlord to collect higher rent. The extension will be fully funded via cash in the fund. The property will still be on the same title, will look the same from the street, and it will still be used for the exact same purpose. The only difference is that the building has been expanded at the back to allow for more wash bays. | *Further clarification added to the Ruling*<br>See Example 15 (paragraphs 83 and 84). |
| 27. | *Jointly or partly owned assets*<br>The draft Ruling does not provide an explanation regarding assets that are jointly owned. It does not cover the scenario of a limited recourse borrowing arrangement involving the purchase of a 50% interest in a commercial property from members of an SMSF where the SMSF already holds the other 50% interest in the property.<br>Under the limited recourse borrowing arrangement scenario the commercial property, which is on a single title, will be held in a bare trust which has a corporate trustee. On the basis of the Ruling the property would be a single acquirable asset as it is on a single title.<br>Can the SMSF transfer all of the property to the bare trust for borrowing? Alternatively, can the bare trust hold the 50% (interest acquired from the members) as it relates to a commercial property which, being on one title, is a single acquirable asset? | *No change to the Ruling*<br>This involves a number of issues outside the application of the key concepts dealt with in this Ruling and therefore is not covered.<br>The issues raised include:<br>• whether the arrangement contemplates the entire asset being held on trust under the limited recourse borrowing arrangement; and<br>• whether a lender has any recourse against the interest in the asset the SMSF already owns.<br>The publication *Limited recourse borrowing arrangements by self-managed super funds – questions and answers,* which is available on the ATO website, addresses the following:<br>*Is an SMSF trustee allowed to put an existing fund asset into a limited recourse borrowing arrangement?*<br>No. The money borrowed must be used to acquire a new asset (or replacement asset). This means, for example, that investments under shareholder application or cash extraction arrangements are not allowed. The giving of a charge over an existing asset of the fund, as would generally occur under such arrangements, would result in a contravention of the super law. |

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| | | If there is a particular arrangement in contemplation specific advice can be sought from the ATO on the facts of that arrangement. |
| 28. | *Comments on Example 15 (now Example 12) – replacement of equipment arising from insurance claim*<br>Comments consider that this example incorrectly concludes that an item of equipment replaced in the case of an insurance claim is a replacement asset. It is considered that this is anomalous given the outcome under Example 15 in relation to a house that is destroyed by fire and replaced.<br>The position indicated in Example 15 where a cash payment is made by the insurer also appears to be incorrect and needs to be clarified.<br>The distinction between this example and that of the house rebuilt after fire in Example 13 appears to be that the house is restored (even if totally rebuilt), but the item of equipment is 'replaced in its entirety'. The difference is not understood between the two situations, as in both cases the 'physical' asset is entirely new. This aspect requires clarification.<br>The asset is not the physical thing. It is the income generating potential of that asset. Where one physical thing is replaced by the same type of physical thing, but maintains the same income generating potential, then from an investment point of view it is the same asset.<br>There is inconsistent treatment regarding the use of insurance proceeds on the loss of an acquirable asset. If the asset is real property, the draft Ruling accepts that the insurance proceeds can be used to build a similar type of building on the (now vacant) land (Example 13). In contrast, if the asset is personal property (for example machinery), the insurance proceeds cannot be used to replace that asset (Example 15).<br>The Commissioner's rationale for this distinction appears to be that in the case of real property, even if all the improvements on the property are destroyed, the land still remains and therefore the rebuilt house is not a replacement asset. Whilst the Commissioner may be correct in this regard upon a strict legal view, there is concern regarding the inconsistent result this sets from a practical perspective. | *Further clarification added to the Ruling*<br>Example 12 (paragraphs 75 to 77) is not considered incorrect and footnote 35 has been added to clarify the difference between this example and the example of a house being rebuilt (item 6 of Table 2 (paragraph 35). Additionally the statement in relation to cash being paid by the insurer has been clarified. That is, cash cannot be held on trust under the limited recourse borrowing arrangement as the replacement acquirable asset.<br>See further in the publication *Limited recourse borrowing arrangements by self-managed super funds – questions and answers* which is available on the ATO website.<br>See also comments at 15. |

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| 29. | *Date of effect*<br>There is concern about the proposed effective date of the Ruling being 7 July 2010 (being the commencement of the new limited recourse borrowing arrangement provisions). There has been considerable uncertainty in the industry regarding the matters that are the subject of the Ruling since the introduction of sections 67A and 67B.<br>In particular, the industry was not, prior to the expression of the ATO's view in the period immediately prior to the workshop held on 8 November 2010, aware of any doubts as to the ability of a self managed superannuation fund trustee to apply the fund's own money to improve geared property.<br>Accordingly, the Committee considers it would be harsh and unjust to give the Ruling retrospective application. The preferred approach would be to give the ruling prospective application only. | *No change*<br>Having a date of effect of 7 July 2010 ensures that the ATO view concerning an SMSF being able to use accumulated funds to effect improvements applies from that date. An initial ATO view on this point was that such funds could not be used to improve an asset. Thus, the ATO perceives the approach taken to the date of effect to be more favourable to SMSFs than would otherwise be the case. |
| 30. | *Funding of improvements*<br>As to what constitutes 'other funds', the Ruling simply states in a footnote that 'If the source of funds is the SMSF the other provisions of the SISA must nonetheless be complied with'. Assumes that SMSFs can use their own accumulated funds to make improvements to assets which are the subject of limited recourse borrowing arrangements but Ruling needs to make this clear.<br>Assist if the Ruling also explained (either by direct reference or by cross reference) the circumstances under which borrowed funds provided by a related party tenant, or a non-related tenant would constitute a contribution. In this regard reference could be made to paragraph 137 of TR 2010/1.<br>*Support for the approach taken in the Ruling*<br>Supports the move to allow money from SMSF resources other than borrowings to improve the asset as long as the improvement does not result in the acquirable asset becoming a different asset. | *Further clarification added to the Ruling*<br>It has been clarified (see paragraph 30 and footnote 23) that an SMSF can use money from SMSF accumulated funds to make improvements to an asset held under a limited recourse borrowing arrangement as long as the improvements do not result in a different asset being held on trust. The other provisions of the SISA must also be complied with.<br>The matter of when and how a contribution is made to a fund is dealt with in *Taxation Ruling TR 2010/1 Income tax: superannuation contributions* and thus reference should be made to that Ruling. Issues as to whether or not something is a superannuation contribution are out of scope for the purposes of this Ruling. |
| 31. | *Paragraphs 28, 131 and 132*<br>The Ruling could provide further express clarification that separate draw downs for effecting repairs under a limited recourse borrowing arrangement is authorised, in addition to the information set out under paragraphs 28, 131 and 132 of the Ruling. | *Further minor clarification added to the Ruling*<br>Paragraph 28 of the final Ruling explains that subsequent draw downs under a limited recourse borrowing arrangement give rise to additional borrowings and includes footnote 20 referring the reader to paragraph 65 of *Self Managed Superannuation Fund Ruling SMSFR 2009/2 Self Managed* |

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| | In particular, suggested that further clarification should be included that each drawdown may give rise to a separate borrowing (as per the Commissioner's views expressed in SMSFR 2009/2). | *Superannuation Funds: the meaning of 'borrow money' or 'maintain an existing borrowing of money' for the purposes of section 67 of the Superannuation Industry (Supervision) Act 1993*. A cross reference at footnote 20 has been added to also refer to paragraph 93 of SMSFR 2009/2. |
| 32. | *In-house asset rules*<br>Application of the in-house asset rules if an asset remains in a holding trust once the limited recourse borrowing has been repaid should be addressed in the Ruling. The Commissioner's view that the acquirable asset must be transferred upon repayment of the limited recourse loan gives rise to a number of practical difficulties. The Commissioner should allow the title to remain in the holding trust/custodian's name without incurring unnecessary costs of a re-transfer provided that the SMSF trustee can evidence its beneficial ownership in the property by way of a bare trust, instrument or caveat.<br>These are not discussed and this implies that it is the Commissioner's view that an asset that remains in a holding trust following repayment of a limited recourse loan will breach the in-house asset rules. This view is rejected. | *No change to the scope of the Ruling*<br>As indicated at paragraph 4 of the Ruling, a discussion of the application of the in-house asset rules is out of scope for this Ruling.<br>The publication *Limited recourse borrowing arrangements by self-managed super funds – questions and answers*, which is available on the ATO website, includes a question concerning whether the holding trust trustee can continue to hold property for an investor after the borrowing has ended. |
| 33. | *CGT consequences of an acquirable asset becoming a 'different asset''*<br>*Clarification required* – if an acquirable asset is fundamentally changed such that it results in a 'different asset', there may be any other consequences, and in particular, whether a CGT event C1 occurs.<br>*Paragraph 142* – the Commissioner uses an example of land with a hayshed, where the hayshed is destroyed in a cyclone and a house is subsequently constructed in its place. Should it also be inferred from that example that the original asset has been lost or destroyed, therefore triggering a CGT event C1. If so, the Ruling should expand on any broader implications this might give rise to outside the limited recourse borrowing arrangement context. Should clarify whether any action by a taxpayer outside the context of a limited recourse borrowing arrangement, which would otherwise give rise to a 'different asset' under SMSFR 2011/D1, will be taken to have triggered a CGT event C1. | *No change to the scope of the Ruling*<br>The CGT consequences of an acquirable asset becoming a 'different asset are out of scope for this Ruling.<br>However, guidance is provided in relation to CGT on the ATO website.<br>Below is a link to the Australian Taxation Office's 'Involuntary disposal of a CGT asset' page.<br>http://www.ato.gov.au/content/37148.htm<br>If required, further specific advice can be sought from the ATO. |
| 34. | *Location of examples in Ruling*<br>In recent Rulings the Commissioner's practice has been to include the examples in the main section of the ruling rather than as an appendix. | *No change to the format of the Ruling*<br>Some examples are included in the Ruling section (see Tables 1 and 2 at paragraphs 25 and 35). However, additional examples that further illustrate |

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| | Is there any particular reason why the examples are included in the appendix and not in the main section of the draft Ruling? | the principles discussed in the Ruling, although not adding new principles, are included in Appendix 1.<br>In relation to the preamble on page 1 of the Ruling, the location of examples does not affect the weight the Commissioner would give to the fact that an SMSF trustee has acted in accordance with Ruling.<br>See also *Law Administration Practice Statement PS LA 2009/5: Provision of advice and guidance by the Australian Taxation Office (ATO) in relation to the application of the Superannuation Industry (Supervision) Act 1993 and the Superannuation Industry (Supervision) Regulations 1994 to Self Managed Superannuation Funds.* |
| 35. | *Section 66*<br>The Ruling should also alert trustees and practitioners to potential breaches of section 66 of the SISA in situations where the improvements or repairs are carried out by a related party builder using goods and materials supplied by the related party. | *No change to the scope of the Ruling*<br>Paragraph 105 of the Ruling highlights that section 66 is a relevant consideration when entering into a limited recourse borrowing arrangement. However, the application of section 66 is discussed in *Self Managed Superannuation Fund Ruling SMSFR 2010/1 Self Managed Superannuation Funds: the application of subsection 66(1) of the Superannuation Industry (Supervision) Act 1993 to the acquisition of an asset by a self managed superannuation fund from a related party*. Reference to SMSFR 2010/1 is included in the Ruling. It is not within the scope of this Ruling to further discuss section 66.<br>Paragraph 46 of the Ruling also sets out the general assumptions that apply with regard to the examples given.<br>See also the minutes of the National Tax Liaison Group Superannuation Technical Sub-group meeting on 8 December 2010 where an ATO response to a similar issue was provided. These minutes are available on the ATO website. |

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| 36. | <u>*Suggested securities examples*</u><br>A share purchase order is issued to buy 20,000 shares under a LRBA. Part of the order may be filled on the day the order is placed. However, the remainder of the order is only filled several days later. *Will these shares be considered a 'collection of assets'?*<br>A share purchase order is issued to buy $20,000 of shares under a limited recourse borrowing arrangement on market. This may result in different shares being acquired at different prices. *Will these shares be considered a 'collection of assets'?* | <u>*No change to the scope of the Ruling*</u><br>Discussion on securities has not been added to the final Ruling as the topic was not specifically covered in the draft Ruling and so has not had the benefit of consultation.<br>However, if required, specific advice can be sought from the ATO. |