Legislative Instrument

Superannuation Industry (Supervision) In-house Asset Determination — Intermediary Limited Recourse Borrowing Arrangement Determination 2020

I, **Louise Clarke**, Deputy Commissioner of Taxation, Policy, Analysis and Legislation, Law Design and Practice, make this determination under paragraph 71(1)(f) of the *Superannuation Industry (Supervision) Act 1993.*

Louise Clarke
Deputy Commissioner of Taxation
Policy, Analysis and Legislation
Law Design and Practice
Date of making: 4/05/2020

1.   Name of instrument

This determination is the *Superannuation Industry (Supervision) In-house Asset Determination — Intermediary Limited Recourse Borrowing Arrangement Determination 2020*.

2.   Commencement

This instrument commences on 24 September 2007.

3.   Application

This instrument applies to the trustee(s) of a self managed superannuation fund (fund) who has entered into the Intermediary Limited Recourse Borrowing Arrangement (Intermediary LRBA) (as defined in 5(b) below).

4.   Determination

For the purposes of paragraph 71(1)(f) of the *Superannuation Industry (Supervision) Act 1993*, if at a time:

    (a)   an asset (the investment asset) of a fund is an investment in a related trust of the fund; and

    (b)   the related trust is one described in paragraph 67A(1)(b) in connection with the Intermediary LRBA under which the trustee of the fund is maintaining a borrowing that is covered by subsection 67A(1); and

    (c)   the only property of the related trust is the acquirable asset mentioned in paragraph 67A(1)(b);

the investment asset is not an in-house asset of the fund at the time unless the acquirable asset mentioned in paragraph 67A(1)(b) would be an in-house asset of the fund if it were an asset of the fund at the time.

5.   Definitions

(a)   Expressions used in this determination have the same meaning as in the *Superannuation Industry (Supervision) Act 1993* unless otherwise stated.

(b)   The Intermediary LRBA is an arrangement entered into by the parties which meets the following requirements:

> (1)   a holding trust is established with members of a fund being the only trustees or shareholders and directors of the corporate trustee (Holding Trustee);
>
> (2)   the trustee of the fund is a beneficiary of the holding trust;
>
> (3)   the Holding Trustee holds an acquirable asset (Asset) on trust for the trustee of the fund, who is beneficially entitled to the Asset;
>
> (4)   the Asset is a single acquirable asset (as referred to in subsection 67A(1)) that the trustee of the fund is allowed to acquire under the *Superannuation Industry (Supervision) Act 1993*;
>
> (5)   the Holding Trustee enters into a borrowing as principal with a lender with the borrowing secured by a mortgage over the Asset;
>
> (6)   the contract or deed of borrowing, referred to in paragraph (5), between the Holding Trustee and the lender may not limit the lenders right of recourse, under the contract or deed, to only the Asset in the event of default;
>
> (7)   the lender may require that personal guarantees are given as part of the Intermediary LRBA;
>
> (8)   the arrangement is established by a legally binding deed(s) under which the trustee of the fund and the Holding trustee agree, for:
>
>> (i)   the trustee of the fund to maintain all borrowing obligations entered into by the Holding Trustee in respect of the borrowing referred to in paragraph (5);
>>
>> (ii)   the trustee of the fund is absolutely entitled to any income derived from the Asset, less fees, costs, charges and expenses incidental to the acquisition, holding or management of the Asset;
>>
>> (iii)   the trustee of the fund has the right to acquire the legal title of the Asset on completion of the borrowing referred to in paragraph (5);
>>
>> (iv)   the rights of the Holding Trustee or any Guarantors against the trustee of the fund in connection with default on the borrowing referred to in paragraph (5) is limited to the Asset.
>
> (9)   the documentation referred to in paragraph (8) in connection to the borrowing referred to in paragraph (5), is disclosed to the lender at the time of the borrowing.