



## **New Super Fund Borrowing Rules clarified by ATO**

The ATO has recently published several directions or decisions in order to clarify their approach to the implementation of the new borrowing rules (which commenced in July 2010).

These will not affect the majority of such arrangements, but will impact on some of the less common transactions. A summary of some of these guidance notes follows:

- Where the asset acquired for the purposes of the arrangement includes land, the land cannot be subdivided while the loan remains outstanding. The ATO have indicated that their view is that subdivided land is not the same asset as the original unsubdivided land. As such, the subdivided land will be considered to be a replacement asset. Under the amended borrowing rules, replacement assets of real property are not permitted.
- The lender in the arrangement can be a related party. However, the ATO has stated that, if that is the case, the terms of the loan must be commercial arms-length and cannot be more favourable to the related party than would be available on that basis. Therefore, trustees need to be satisfied that all of the terms of the loan comply. This would include interest rates and security.
- The ATO has said that joint borrowings are not permitted because the asset being acquired by the super fund will be different to the asset held in the custodian trust. This position arose out of a particular case before the AAT in which 2 funds jointly borrowed funds and placed a property into a single bare trust. We agree with the proposition stated by the ATO in that respect. However, the ATO now appear to be taking the view that any joint acquisition will be disallowed. For example, where 2 separate superannuation funds acquire a single property as tenants in common and borrow separately to acquire each of their respective interests, this should not contravene the new rules. While, in practice, it would be difficult to achieve this (since the lenders to each superannuation fund are unlikely to fund a partial interest, particularly given the limited recourse nature of the loans), it should still be possible. The ATO thinks otherwise.
- Where the super fund acquires a property off the plan, the ATO considers this to be a capital improvement to the asset which is not permitted. What is contracted for is a part of the land set aside for the development on which a building will be built and in which a specific unit is acquired at completion.
- Split properties also cause some difficulty. It is common in unit complexes to have a parking space or storage unit attached to the main unit, but the parking space or storage unit is held on a separate title from the main unit. As such, the ATO considers these to be separate assets and funds would require separate loans for the main unit and for the parking space or storage unit. Similarly,

separate custodian trusts must be used. This is so even though the main trust and the parking space or storage unit cannot be sold or dealt with separately.

Please call us toll-free on 1-800-773-477 should you have any queries.