

Related Party Acquisitions

Summary

The Superannuation Industry (Supervision) Act (SIS Act) places a number of investment restrictions on the trustees of superannuation funds. One of these restrictions is the general prohibition on funds intentionally acquiring assets from a related party of the fund.

This restriction is of particular importance to trustees of self-managed superannuation funds (SMSFs) and if breached may result in significant penalties to both the trustees and fund.

General rule

Section 66 of the SIS Act prohibits a trustee or investment manager of a regulated superannuation fund from intentionally acquiring an asset from a related party of the fund.

‘Acquire’ has a wide meaning and applies to both members and other related parties selling assets to the fund and members making in-specie contributions of assets to the fund.

Who is a related party?

A related party is defined in the SIS Act as:

- A member of the fund
- A standard employer-sponsor of the fund
- A Part 8 associate of a member or standard employer-sponsor of the fund

A standard employer-sponsor of the fund is an employer that contributes to the fund under an agreement between the employer and the superannuation fund. Such agreements would be a rare occurrence as most agreements would be between the employer and the members of the fund. Agreements between the employer and the members of the fund are specifically excluded from the definition of standard employer-sponsor.

The legislation casts a wide net over associates of individuals, companies and partnerships to include them as related parties of the fund. In general terms, an associate would include a trustee, a relative of the member or trustee, or any entities, which they ‘control’ either individually or

as a group. An entity includes any individual, company, partnership or trust.

Control of a company occurs where an entity has sufficient influence over a company and/or holds a majority voting interest in the company.

Control of a trust generally occurs where a related party has a fixed entitlement to more than 50% of the capital or income of the trust or can appoint or remove a trustee of the trust. It may also occur where the trustee, or the majority of trustees, is accustomed to or under a formal or informal obligation to act in accordance with the directions, instructions or wishes of a group in relation to a related entity.

Exceptions to the general rule

There are number of exceptions to the general rule and these include the acquisition of:

- Business real property acquired at market value
- Listed securities acquired at market value
- In-house assets acquired at market value where the acquisition of the asset would not result in the level of in-house assets in the fund exceeding 5% of the fund’s assets
- A life insurance policy (other than a policy acquired from a member or relative)
- Units in a widely held unit trust.

‘Market value’ is an amount that a willing buyer of the asset could reasonably be expected to pay to acquire the asset if:

- The dealings were at arm’s length;
- The sale was appropriately marketed; and
- The buyer and seller acted knowledgeably and prudentially in relation to the sale.

Business real property

Business real property is real estate which is used wholly and exclusively for business purposes. It does not matter who is running the business as the focus is on the actual use of the property. If the sole use of the property is to operate one or more businesses then it will meet the definition of business real property.

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The business can be run by a member of the fund, a related party or any other party.

If any part of the property is used for residential purposes it is not regarded as business real property in most cases. There are two exceptions to this rule:

1. where the property is used for primary production purposes and the area used for domestic purposes does not exceed two hectares; or
2. the use of part of the property for residential purposes forms an integral part of the business

Listed securities

A listed security includes any bond, debenture, share, unit, option or right or any other security listed on an approved stock exchange.

In-house assets

An in-house asset of a superannuation fund is:

- a loan to, or an investment in, a related party of the fund
- an investment in a related trust of the fund
- an asset of the fund subject to a lease or lease arrangement between the trustee of the fund and a related party

It does not include:

- a life insurance policy issued by a life insurance company (other than a policy acquired from a member of the fund or from a relative of a member)
- a deposit with a bank or building society
- an investment in a widely held unit trust

Widely held unit trust

A widely held unit trust is:

- a unit trust in which entities have fixed entitlements to all of the income and capital of the trust; and
- not a unit trust in which fewer than 20 entities between them have:
 - fixed entitlements to 75% or more of the income of the trust; or
 - fixed entitlements to 75% or more of the capital of the trust.

Avoidance schemes

To prevent members from circumventing the acquisition rules, there are anti-avoidance provisions in place. These provisions prohibit a person from intentionally entering into a scheme or arrangement where the likely result would be the fund acquiring an asset that would ordinarily breach the acquisition rules.