



MLC TechConnect

Guide to limited recourse borrowing arrangements

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Guide to limited recourse borrowing arrangements

This guide outlines how SMSFs can use a limited recourse borrowing arrangement (LRBA) to acquire certain assets in the fund and some key issues to consider.

Introduction

An LRBA can provide an opportunity for a fund to acquire assets it would otherwise not be able to afford, provided the SMSF's trust deed and investment strategy permit borrowing within the fund. If a client wishes to enter into an LRBA within their SMSF, there are a number of immediate and longer term considerations, including:

- is the arrangement sustainable or manageable if circumstances change?
- what assets can be acquired?
- what can and cannot be done with assets subject to an LRBA?
- the ability of the fund to make loan repayments and meet other continuing liabilities of the fund
- issues which may arise in respect of the payment of death benefits or upon a member wishing to roll out of the fund
- the impact of LRBA repayments where an asset subject to lending supports both accumulation and pension interests, and
- the borrowing arrangement terms, particularly when the LRBA is established with a related party.

When executed correctly, an LRBA can be a very useful tool from both an acquisition and investment perspective. However, when adequate consideration is not given:

- serious breaches of SIS can occur, which may render an SMSF non-complying or subject trustees to administration penalties of up to 60 penalty units¹, or
- the fund may be forced to sell the asset.

This guide covers LRBAs commenced from 7 July 2010 and outlines:

- the steps to establishing an LRBA
- key issues to consider before entering into an LRBA, and
- frequently asked questions.

This guide assumes an understanding of the general rules and concepts relating to superannuation, as these relate to SMSFs.

Borrowing in an SMSF

A regulated superannuation fund is prohibited from borrowing money, or maintaining a borrowing of money, except where it is used²:

- for the acquisition of a single acquirable asset, where the rights and recourse of the lender are limited to the asset subject to the loan (and a range of other conditions)
- to pay a member or to meet an outstanding surcharge liability and the borrowing does not exceed 90 days and 10% of the value of the fund's assets, or
- to cover settlement of securities transactions which weren't foreseen at the time of the transaction and the borrowing does not exceed seven days and 10% of the value of the fund's assets.

SMSFR 2009/2 clarifies the meaning of the terms 'borrowing', 'money' and 'maintaining an existing borrowing' and what circumstances may result in a breach of the borrowing restrictions.

¹ \$313 per penalty unit from 1 July 2023 with legislation pending to increase to \$330 from 1 July 2024

² SISA 67

What is 'borrowing'?

Borrowing is an arrangement with two main characteristics:

1. a temporary transfer of money from one entity (the lender) to another (the borrower), and
2. an intention or requirement for the borrower to repay the amount to the lender.

Advice tip

It is not necessary that the money actually be repaid for the loan to be considered a borrowing. For example, the borrower could fulfil their obligation through the transfer of an asset. It is still a borrowing of money even if the money is not completely repaid to the lender.

The question of whether a borrowing arrangement has been entered into depends on the specific circumstances. An objective analysis of any documentation and the actions of the parties is required when determining if a borrowing exists.

What is 'money'?

Section 67 of the SIS Act prohibits the borrowing of money only but not any other type of assets. 'Money' is defined as any generally accepted medium of exchange of goods, services or the payment of debts that gives the holder complete liquidity. This includes foreign currency but excludes items where the market value exceeds their face value eg collectable banknotes and coins³.

Maintaining existing borrowing

The SIS prohibition also applies to the maintenance of an existing borrowing of money, for example, an SMSF acquired an encumbered asset and becomes liable for the outstanding debt.

This is different to a situation where an asset against which there is a borrowing is acquired by an SMSF which uses borrowings itself to fund the purchase of the asset. The drawdown of the new limited recourse loan and discharge of the existing loan occurs simultaneously at settlement (see FAQs below).

Limited recourse borrowing arrangement

An LRBA is an exception to the general prohibition on borrowing within SMSFs. When funds are borrowed via an LRBA, certain conditions must be met, including:

- the asset (or any replacement) must be one which the superannuation fund trustee is permitted to acquire and hold directly
- the money is applied for the 'acquisition' of a 'single acquirable asset'
- the acquirable asset is held on trust so that the superannuation fund receives a beneficial interest in the asset
- the SMSF trustee has the right (but not the obligation) to acquire legal ownership of the asset by making repayments
- the rights of the lender or any other person in connection with the borrowing is limited in recourse to the particular asset under the LRBA, and
- the asset is not to be subject to any other charge (except the LRBA itself).

A 'holding trust' is established and is the legal owner of the asset subject to the LRBA.

What is a 'single acquirable asset'?

An acquirable asset is any asset, other than money (see above), that a trustee of an SMSF is not prohibited from acquiring. The asset being acquired must be distinctly identifiable as a single asset except where a collection of assets is allowed (for example, a parcel of shares in the same company or units in a managed fund, which are identical and have the same market value at any one time). See Appendix 3 for further examples of assets considered to be a 'single acquirable asset'.

³ [SMSFR 2012/1](#)

The ATO has identified⁴ that it is necessary to consider the legal form and substance of the asset acquired, for example two or more blocks of land may constitute a single object of property even though separate properties are acquired. Factors that indicate a single acquirable asset include:

- the existence of a unifying physical object (eg a fixture attached to the land) that is permanent in nature, not easily removed and significant in value relative to the value of the asset
- whether the two assets must be dealt with together under a State or Territory law.

Factors which are insufficient alone, to conclude that a single asset is being acquired include:

- physical object situated across two or more titles, where the object is not significant in value relative to the value of the land or temporary in nature or removed or relocated easily, therefore not preventing the titles being dealt with separately
- a business conducted on two or more titles
- assets are being acquired under a single contract eg because the vendor wants to deal with the assets as a package.

Farmland with multiple titles where the only physical structures are fencing and irrigation systems will not qualify as a single acquirable asset, even if only one business is conducted on the land. An example of multiple farming titles qualifying as a single acquirable asset is a piggery conducted in a large shed over multiple small titles.

Example 1 – Factory complex on more than one title

An SMSF trustee wants to enter into an LRBA to acquire a factory that straddles three separate titles. The factory adds considerably to the value of the land and is therefore a unifying physical object. The factory is a single acquirable asset. If the factory was derelict and not significant in value relative to the value of the land, it would not be a unifying physical object. In this case, the factory would not be a single acquirable asset.

Example 2 - Apartment with separate car park

An SMSF trustee wants to enter into an LRBA to purchase an apartment with a separate car park. The apartment and car park are on separate titles. The State law in which the apartment is located does not allow the two titles to be disposed of separately. As the two titles cannot be assigned or transferred separately, the apartment and car park are considered a single acquirable asset.

Example 3 – Property and furniture acquired under single contract

An SMSF trustee enters into an LRBA to purchase a residential apartment. The vendor will only sell the apartment furnished. The apartment without the furniture is a single acquirable asset and could be funded under an LRBA. The apartment and furnishings, even if purchased together under a single contract, is not a single acquirable asset and could not be funded under an LRBA. The SMSF could acquire the apartment using an LRBA if the SMSF can use available cash to acquire the furnishings under a separate conditional contract.

Establishing an LRBA

The information in this section covers the rules relating to LRBAs and repayments, where the LRBA is facilitated by an unrelated party or commercial lender. Where a loan is provided by a related party, different rules apply. See 'Related party loans' below.

Borrowing the funds and buying the asset

Once the purchase price of the asset has been determined and the amount required to be borrowed has been identified, the SMSF trustee can obtain a loan from a financial institution or another third party lender.

⁴ [SMSFR 2012/1](#)

The amount required to be borrowed may include:

- expenses incurred in connection with the borrowing or acquisition eg conveyancing fees, stamp duty, brokerage or loan establishment costs, and
- expenses incurred in maintaining or repairing the acquirable asset (but not improving the asset).

The loan should be established in the name of the super fund and the client should seek legal guidance in relation to the exact wording on any contract of sale, as it may depend on the asset purchased and relevant State/Territory.

Advice tip

From a practical perspective, each asset subject to an LRBA requires its own holding trust, so that at any given time, a holding trust has legal ownership of only one single acquirable asset. Multiple holding trusts in an SMSF may each have the same trustee entity (eg the same corporate entity), however, the trustee of any holding trust should not be the same trustee entity as the trustee for the SMSF itself. This does not prohibit individuals acting as trustee directors or individual trustees for the SMSF also being directors of a company which is appointed as a corporate trustee of a holding trust. A corporate trustee has less administrative difficulties when there is a change of trustee due to death, divorce and bankruptcy. Commercial lenders generally require a corporate trustee of the SMSF and the holding trust as part of the loan agreement.

Depending on the circumstances, some lenders may require additional security. Legislation prohibits a fund asset being used as security⁵ (except for the borrowing to which the asset is subject under an LRBA). Consequently, the lender may require the directors/trustees in their personal capacity to provide additional security using their personal assets. Any personal guarantee provided by individuals in their own right must clearly state the lender has no recourse to SMSF assets under guarantee⁶.

Loan repayments

Loan repayments are made by the SMSF, using the SMSF's funds (this may include any rental income, income received from the asset subject to the LRBA or other fund assets, or using contributions made to the fund on behalf of fund members).

Before entering into an LRBA, it is important to consider the cashflow position of the fund and its ability to make loan repayments and meet liabilities. It is a trustee obligation to ensure the fund has sufficient liquidity to meet obligations as they arise⁷. For additional information on loans, refer to section headed 'The loan' below.

Advice tip

In many cases, contributions by members are required to provide liquidity in the fund and support the LRBA. Consideration must be given to situations where the contributions may cease to be made (for example, due to disability or cessation of employment).

Income from the asset subject to the LRBA

Income generated by an asset subject to an LRBA flows through to the SMSF as the beneficial owner of the asset and forms part of the assessable income of the fund⁸.

⁵ SIS Reg 13.14

⁶ [ATO ID 2010/170](#)

⁷ SIS s52B(f)

⁸ If the asset is either partially or fully supporting a pension interest, the ECPI provisions may apply.

Expenses relating to asset subject to LRBA

Equally, expenses relating to the maintenance, upkeep and running costs of an asset subject to an LRBA are expenses met by the SMSF and not the holding trust. Normal rules around deductibility of expenses for an SMSF apply⁹.

Transferring legal ownership to the fund

When the loan has been fully repaid, the SMSF has the right to obtain legal ownership of the asset from the holding trust. Legal ownership can be transferred into the name of the trustee of the SMSF. However, it is not compulsory for ownership to be immediately transferred to the SMSF. A delay in the transfer of ownership will not be breach of the LRBA rules.

GST

If the asset purchased using an LRBA is a commercial property with a GST turnover greater than \$75,000, it is the SMSF that must register for GST, not the holding trustee. This is despite the asset being purchased in the name of the holding trust trustee.

Stamp duty

Stamp duty may apply when the holding trust acquires the assets. Some states provide concessions or exemptions where the property is acquired from a member subject to certain requirements. You should contact the office of state revenue for further information in relation to any exemptions or concessions that may apply.

The transfer of an asset from the holding trust to the fund will not usually attract stamp duty, however, failing to follow the correct procedures and order of transactions, when the property was acquired by the holding trust, can result in stamp duty applying again at the time of transfer. It is important to ensure adequate advice is obtained when acquiring the property and establishing the holding trust.

Advice tip

The legal advice obtained for the LRBA should ensure that when ownership passes, no CGT event and no stamp duty issues will arise. If the transfer of an asset from the holding trust to the SMSF will incur stamp duty, consider leaving the asset in the holding trust. Property held in the holding trust after the loan is repaid is not an in-house asset. For additional information, see [SPR 2014/1](#).

The loan

Related party loans

While there are restrictions in relation to SMSFs providing loans to some related parties (specifically members and relatives of members), a related party is able to loan money to their SMSF via an LRBA¹⁰, rather than the lending being facilitated by a financial institution. Any related party LRBA needs to be conducted at arm's length¹¹ (ie on commercial terms).

Advice tip

Tax determination [TD 2016/16](#) states that if lending arrangements supporting an LRBA are not on commercial terms, the income (including capital gains) derived by the SMSF from these investments would be classified as non-arm's length income¹² (NALI) which is taxed at 45%.

⁹ [TR 93/17](#)

¹⁰ While an SMSF generally cannot acquire assets from a related party, SIS s66(5) excludes 'money' from the definition of an 'asset' for the purposes of s66 which prohibits the acquisition of assets from related parties.

¹¹ SIS s109

¹² ITAA97 s295-550

The ATO has provided guidance in [PCG 2016/5](#) which set out 'safe harbour' terms under which an SMSF trustee may structure LRBAs so that they are considered by the ATO to be on arm's-length terms, ensuring the fund remains eligible for the concessional tax treatment afforded to complying superannuation funds. For further information on the specific loan characteristics for these types of arrangements, please refer to Appendix 4.

If a related party loan does not meet all of the safe harbour' terms, the SMSF trustee need to be able to demonstrate that the loan was entered into and maintained on terms consistent with an arm's length commercial loan. This may be demonstrated by maintaining evidence that shows that the related party loan replicates the terms of a commercial loan that is available in the same circumstances. Trustees should seek legal advice to assist in preparing appropriate documentation that contains the necessary terms and complies with all the legislative requirements.

Refinancing

Existing LRBAs can be refinanced. This is beneficial if it allows the trustee to minimise the risk of default where the fund is temporarily unable to make a repayment (eg due to the fund's obligations to make benefit payments). This also allows funds to move to new arrangements with more suitable terms and conditions as circumstances change. Care must be taken if refinancing a pre 7 July 2010 LRBA, as the terms of the previous rules were more generous than the current rules. Specialist advice should be sought.

Other considerations

Improving and repairing assets

Assets owned by an SMSF which are not subject to an LRBA, can be modified without limitation¹³. However, when an asset is subject to an LRBA, there are restrictions on what can be done to the asset while the LRBA remains in place and the source of funds which may be used to finance any changes made to the asset (including both repairs and improvements).

Improvements

While certain improvements to assets subject to an LRBA are allowed, an improvement cannot alter the asset to such an extent that the fundamental nature (or character) of the asset is changed¹⁴ (rendering the asset subject to the LRBA a different asset)¹⁵. For example, constructing a dwelling on vacant land, where the land is subject to an LRBA, would change the fundamental nature of the asset (being vacant land) resulting in a different asset. Refer to Appendix 5 for an explanation of key terminology and examples.

Improvements which do not alter the character of the asset are possible. Examples of these types of improvements include the renovation of the kitchen and bathrooms, the conversion of a carport to a garage or the building of a swimming pool for residential rental properties. All these improvements add value to the property but do not change the fundamental nature of the property as a residential rental property.

Certain restrictions apply to funding improvements. While an asset subject to an LRBA can be improved as discussed in the previous paragraph, the improvements cannot be completed with any borrowed funds¹⁶ and must be financed via other means including using cash already within the SMSF, or members making contributions to the fund to provide resources to carry out the improvements¹⁷. Therefore, it is critical that the SMSF trustee can clearly demonstrate that they have not used borrowed money to fund improvements.

¹³ The trustee must ensure that actions are in line with the fund rules and investment strategy of the fund.

¹⁴ [SMSFR 2012/1](#)

¹⁵ Because the rights of the lender are limited to the rights relating to the single acquirable asset (or a replacement in limited instances), the asset cannot be changed to such an extent that the asset which is the subject of the LRBA no longer exists.

¹⁶ SIS s67A(1)(a)(i)

¹⁷ If members in their personal capacity pay expenses on behalf of the fund (including repairs or improvements to assets) without immediate reimbursement, they will be deemed to have made a contribution to the fund. 'Immediate' is not further defined and therefore should be read based on its ordinary meaning.

Repairs

Assets subject to an LRBA can be repaired and such repairs can be financed using funds from the initial LRBA¹⁸, or from other assets of the SMSF. However, a fund could not enter a new LRBA to repair fund assets already owned by the SMSF, because the purpose of this new LRBA would not be to 'acquire a single acquirable asset'.

In determining whether an asset is subject to an improvement, repair, or maintenance, it should be compared to its form and substance at the time of acquisition (by the SMSF). Appendix 5 compares repairs vs maintenance.

Need for insurance

Trustees are required to consider insurance as a part of their investment strategy. Further consideration should be made in light of an LRBA strategy. SMSFs can face liquidity issues if a member dies or becomes incapacitated. This may occur if the fund does not have sufficient liquidity to pay a lump sum death benefit, lump sums under permanent incapacity, as well as service or pay-out an LRBA.

Death benefits in the SMSF have to be paid as a lump sum death benefit where a death benefit pension cannot be paid (eg if the beneficiary cannot commence a death benefit pension or will exceed their transfer balance cap).

Personally held (non-super) insurance may allow contributions (subject to caps) into the SMSF to assist with liquidity or provide sufficient funds to acquire the asset from the SMSF.

Advice tip

Insurance proceeds received on behalf of a deceased member must be added to that member's account. This will increase the death benefit payable. Advisers should consider the implications if a member of the fund dies. In some cases, SMSFs may not be able to pay a death benefit pension and have difficulty paying a lump sum death benefit if a significant portion of the fund is held in a single asset which can be further complicated if an LRBA exists.

Transfer balance cap

A credit to a member's transfer balance account arises where a repayment of an LRBA using accumulation phase assets, increases the value of the member's super interest supporting a retirement phase super income stream. This applies to new LRBAs entered into from 1 July 2017. Refinancing of outstanding borrowings arising from contracts entered into before 1 July 2017 and contracts entered into before 1 July 2017 but completed after that date, are not affected.

The transfer balance credit arises at the time of repayment and is equal to the amount by which the member's super income stream increases in value because of the payment. The credit ensures that the transfer balance captures the shift of value that occurs where liabilities arising from the LRBA which supports a retirement phase super income stream, are paid using accumulation phase assets. A transfer balance credit will not arise where the LRBA does not support a retirement phase super income stream or repayments are sourced solely from assets supporting a retirement phase interest.

¹⁸ SIS s67A(1)(a)(i)

Advice tip

A breach of the transfer balance cap occurs where a transfer balance credit arises because of a loan repayment and the individual has fully utilised their transfer balance cap.

Consequently, affected SMSF trustees will need to identify the source of repayments to determine whether a transfer balance credit arises requiring reporting to the ATO.

For issues arising out of the debits and credits against a member's transfer balance account please refer to our [Guide to the transfer balance cap](#).

Example 4 – LRBA entered into after 1 July 2017

Greg's SMSF purchases a commercial property for \$1,000,000. Greg's SMSF has assets valued at \$800,000. The property purchase is funded using \$500,000 of cash in Greg's accumulation account, with the additional \$500,000 borrowed through an LRBA.

Greg commences an account based pension with \$500,000 from his accumulation balance. The commercial property is segregated to pension phase. Under the transfer balance cap rules, Greg receives a credit of \$500,000 to his transfer balance account.

The SMSF makes monthly repayments on the loan of \$10,000. Half of the monthly repayment is sourced from the rental income from the commercial property. The additional \$5,000 monthly repayment is funded from cash held in Greg's remaining accumulation interest.

Greg receives an additional credit to his transfer balance account of \$5,000 at the time of each LRBA repayment. This reflects the increase in the value of the superannuation interest supporting his superannuation income stream.

Alternatively, if the full monthly repayment of \$10,000 was sourced from the rental income, no additional credits would be applied to Greg's transfer balance account.

LRBAs and total super balance

A member's share of the outstanding balance of an LRBA is included in a member's total superannuation balance (TSB) if:

- the LRBA is entered by the fund on or after 1 July 2018, the LRBA is entered into by the fund before July 2018 and is refinanced on or after that date, unless the following apply:
 - the new LRBA is secured by the same asset or assets as the old LRBA
 - the refinanced amount is the same or less than the existing LRBA.
- a member has satisfied a condition of release with a nil cashing restriction or the LRBA has a related party loan.

Conditions of release with a nil cashing restriction for this purpose are retirement (permanent retirement or cessation of a gainful employment arrangement on or after age 60), terminal illness, permanent incapacity and reaching age 65.

This will be tested at the time the LRBA is entered into and on an ongoing basis. This means that if a member has a related party LRBA, or will soon meet a condition of release with a nil cashing restriction and wishes to make NCCs in the future, they may need to unwind the LRBA.

Investment strategy issues

Before establishing an LRBA, the trustee should ensure the arrangement is consistent with the fund's investment strategy. When doing this, the general SIS covenants¹⁹ require that the trustee consider the whole circumstances of the fund, which include but are not limited to:

- the potential risk and returns from investments
- the benefits of diversification
- the fund's liquidity and cash flow needs, and
- the fund's ability to discharge its existing and prospective liabilities.

While it's usually possible to meet some of these requirements when using an LRBA to acquire a property, it can be more difficult to meet all of them at the one time. For example, the need to consider the benefits of diversification does not prevent an SMSF from investing all of the fund's money in a single property, so long as the investment strategy:

- acknowledges the lack of diversification and the risks associated with this, and
- addresses what the fund plans to do to deal with the lack of asset diversity.

However, it can be hard to diversify over time if, the property represents the main or only investment in the fund and earnings and future contributions will be used substantially or wholly to service the debt and meet other cash flow needs. Also, you can't sell a portion of the property to fund a cash flow shortfall and cash flow problems can easily arise if the property is untenanted.

Replacement of LRBA assets

Advice tip

Generally, where an asset that is subject to an LRBA is sold, the loan will need to be repaid.

The legislation prescribes the circumstances in which an asset can be replaced. Replacement assets are limited to replacement shares in companies or unit trusts because of specified circumstances including takeovers, mergers, demergers, restructures or schemes of arrangement. Cash is not an eligible replacement asset under any circumstances and would therefore preclude a takeover on a share plus cash basis from qualifying as a replacement asset.

With regards to real property, most insurance policies insist on the replacement or reconstruction of the property in the event of a claim, rather than a cash settlement. The following examples demonstrate when a replacement is seen as being covered under the original LRBA:

Example 5 – Reconstruction due to flooding

A four bedroom house was severely damaged by flood and the council required it to be demolished. The insurance policy states that the proceeds go towards the reconstruction of a residential house on the land. A similar four bedroom house is built thus restoring the single acquirable asset of the LRBA.

Example 6: Replacement of asset following an insurance claim

An SMSF enters into an LRBA to acquire a machine. The machine is destroyed by fire and the insurance company provides a replacement machine. The replacement machine is not one of the allowable replacement assets under the LRBA rules and the LRBA fails to meet the legislative requirements.

¹⁹ SIS section 52

Advice issues

Using an LRBA to acquire property in super will not suit all SMSF members. Consider the following key advice issues.

Are alternative sources of finance and investment available?

Could borrowing and investing in individual, non-super trusts or a company be an option?

Does the SMSF have the capacity to fund the LRBA?

The fund must have sufficient cashflow to meet loan repayments, other property related expenses and all general liabilities of the fund. Can the fund still meet these liabilities if the property is untenanted for a period of time. If required, can additional funds be injected into the SMSF (eg rollovers, contributions or adding new members).

Will the asset be positively or negatively geared?

It's important to assess the starting tax position and whether this is likely to change for a significant part of the anticipated holding period.

What marginal (or other) tax rate would be payable if property was purchased outside super?

As a general rule, borrowing in super can be more tax-effective if the investment is positively geared and the tax rate of the alternative investment vehicle is greater than 15%. Conversely, there may be tax benefits if negatively geared investments are held outside super when the tax rate of the alternative investment vehicle is more than 15%. However, if investing outside of super consider what happens if the investment moves from negatively to positively geared and any tax payable on any capital gains when the asset is disposed (including if the alternative investment vehicle is eligible for the small business CGT concessions to reduce or remove any capital gains upon disposal of the asset).

Is buying property in super suitable for (and reflected in) the fund's investment strategy and risk profile of the members?

Consider issues such as diversification and liquidity. While the fund could use earnings from the property or new contributions to meet expenses and add other investments over time, the issues and proposed solutions should ideally be addressed and documented in the fund's investment strategy that is consistent with the member(s) risk profile.

Can the arrangement continue after the death of a member? In the event of death, is there:

- the ability to pay a super death benefit pension and meet the ongoing pension payments?
- sufficient liquidity to pay a lump sum death benefit?
- sufficient liquidity to meet the ongoing loan repayments and other fund expenses?
- the capacity for the members to acquire the property from the SMSF?

If not, a forced sale of the property may be required.

Appendix 1: Alternatives to LRBAs to purchase property

Alternatives to LRBAs to purchase property include purchasing property within an unrelated unit trust or a 13.22C unit trust. These are commonly used to allow the SMSF to invest in property with other investors.

Unrelated unit trust

An SMSF can invest in an unrelated unit trust, which can borrow to acquire the property. The trust must be a fixed unit trust, with all income and capital payments fixed. Non-SMSF investors can also own units in the unit trust. However, care should be taken to ensure that the unit trust remains unrelated.

The unrelated unit trust is not subject to the restrictions associated with LRBAs or 13.22C unit trusts.

Potential issues

Investment within the unrelated unit trust must comply with the trust deed and investment strategy of the SMSF. Under the investment strategy of the SMSF, consideration must be given to diversification and the potential investment returns. As trust losses cannot be distributed to unit holders, a negatively geared unrelated unit trust may not be appropriate.

Care should be taken to ensure that the unit trust remains unrelated when adding new investors or the SMSF increasing their unit holding.

Consider what will happen if an investor wants to leave the unrelated unit trust? Including where the SMSF must leave the unrelated unit trust in the event of death, permanent incapacity or relationship breakdown. Units owned by related parties cannot be later acquired by the SMSF, as they are not one of the exceptions to the prohibition of acquisition of assets from related parties.

Consider the establishment and running costs of the unrelated unit trust.

13.22C unit trusts

A 13.22C unit trust creates an investment opportunity for related parties which may have greater flexibility than an LRBA. Benefits may include:

- the related party can borrow to acquire their units in the unit trust, and
- an SMSF can acquire more trust units over time from a related party.

Potential issues

The unit trust must continue to comply with the restrictions of a 13.22C unit trust. Failure to meet these requirements may result in the trust becoming an in-house asset and may require the units in the 13.22C unit trust to be disposed by the SMSF.

Consider the establishment and running costs of the 13.22C unit trust.

A holding in a 13.22C trust that is not owned by an SMSF may be offered as security for a loan and potentially available to creditors. SMSF trustees who co-invest in such a trust need to consider the risks involved, which could be considerable if the SMSF is a minority unit holder and the trust came to be directly controlled by creditors.

Appendix 2: FAQs

Can the trustee of the SMSF also be used as the trustee of the holding trust?

No. The trustee of the holding trust cannot be the same trustee as the SMSF. However, this does not prohibit individual trustees of an SMSF from being directors of a company as the corporate trustee of a holding trust.

An SMSF has an existing LRBA and wants to establish a second LRBA to acquire another asset. Can the new holding trust have the same trustee as the first?

Yes. Multiple holding trusts in a single SMSF may all use the same trustee entity.

My client has found a property they wish to buy within a super fund, however, they have not yet established the SMSF. Is there a way that they can purchase the property personally on behalf of the fund and later transfer ownership to the SMSF?

There are a number of issues here. If the property is purchased by a member and subsequently transferred to the fund:








- Additional stamp duty may be payable.
- SMSFs are prohibited from acquiring an asset from a related party unless exempted. Is it an asset that can be acquired from a related party (eg BRP)?
- Any deposit paid by the client to enter the contract will be treated as a contribution to the fund if not 'immediately reimbursed'²⁰. If the fund is not established, the client cannot be 'immediately reimbursed' and the amount is considered a contribution to the fund.
- Members will not be able to recover these amounts from the fund when funds do become available.
- If the contract is entered in to, a deposit is paid and the client forfeits their deposit and rescinds before completion (once the SMSF is established and has funds available), there could be stamp duty implications. There is also a risk that the asset will be sold to another party.
- In some States it may be possible to use 'and/or nominee' on the contract of sale allowing the property purchased to be owned by the SMSF. Clients should seek professional conveyancing advice as to whether this is achievable in their State and any process/documentation required to avoid double stamp duty applying.

An SMSF wants to use an LRBA to purchase a commercial property from a member of the fund. The property is currently mortgaged. Can the SMSF acquire the property?

Yes. Commercial property that satisfies the business real property definition can be acquired from a related party. At settlement, the sale proceeds will be used to extinguish the existing debt and the LRBA will be used by the SMSF to acquire the property.

²⁰ 'Immediately reimbursed' is not further defined in the Ruling and therefore should be taken to have its ordinary meaning. What is considered 'immediate' will depend on the facts and circumstances.

Appendix 3: Single acquirable assets

Asset subject to an LRBA ²¹	Is asset a single acquirable asset?
House built on land already owned by the SMSF	 <p>Where the land is already owned by the SMSF, the fund cannot enter into an LRBA for the construction of a house on the land. This is because the house built on land is not an asset which can be dealt with separately to the land.</p>
Apartment with a separate car park, both registered under the same strata plan (either on one title, or across two separate titles)	 <p>If both the car park and apartment must be transferred together to allow the transfer of title to be registered, this requires the two separate assets to be dealt with together and therefore the apartment and car park can be considered a single acquirable asset.</p> <p>If the car park and the apartment are on separate titles and ownership can be transferred separately, they are not a single acquirable asset.</p>
Off-the-plan real property	 <p>Provided the contract is entered into for the acquisition of a completed property, this satisfies the single acquirable asset definition and both the deposit and balance payable at settlement can be funded under a single LRBA.</p>
Two adjacent vacant blocks of land	 <p>Regardless of a vendor's willingness to sell the blocks separately, because there are no physical or legal restrictions on the two blocks being sold separately, they are not considered to be a single acquirable asset. The fund could purchase both blocks, but would need to do so via two separate LRBAs.</p>
Two adjacent blocks of land, with a structure straddling both	 <p>Is the structure or unifying physical object straddling both titles significant in terms of the value it adds to the asset? If so, then the multiple lots upon which the structure is built and the structure itself, are considered to be a single acquirable asset. An example would be an operational factory complex²².</p>
Residential premises	 <p>The asset being acquired is a residential property and the land on the title. The two assets must be dealt with together from a legal and practical perspective. Therefore, the single acquirable asset requirement is met.</p>
Serviced apartment with furnishings	 <p>The apartment on its own is a single acquirable asset. The furniture, even if purchased as a package, could not be considered to be a single acquirable asset, as the package would presumably consist of multiple items and therefore could not be financed via an LRBA.</p>

²¹ See [SMSFR 2012/1](#) for original examples.

²² If the unifying object is not of significant value (an abandoned warehouse or tin shed), it will not be considered to be a single acquirable asset.

Appendix 4: Safe harbour terms for related party loans

The ATO has provided guidance in [PCG 2016/5](#) which set out 'safe harbour' terms under which SMSF trustees may structure LRBAs so that they are considered by the ATO to be on arm's-length terms. If a related party loan does not meet all of the safe harbour' terms, the SMSF trustee will need to demonstrate that the loan was entered into and maintained on terms consistent with an arm's length commercial loan.

Feature	Real property	Parcel of shares
Interest rate	Reserve Bank of Australia Indicator Lending Rates for banks providing standard variable housing loans for investors. Current and past rates are available on the ATO website . For 2024/25, the rate is 9.35% For 2023/24, the rate is 8.85% For 2022/23, the rate is 5.35%.	Reserve Bank of Australia Indicator Lending rates for banks providing standard variable housing loans for investors + 2 percentage points. Current and past rates are available on the ATO website . For 2024/25 the rate is 11.35% For 2023/24 the rate is 10.85% For 2022/23 the rate is 7.35%.
Variable rate	Vary annually based on latest published rate on the ATO website .	
Loan term – variable rate	15 years maximum If re-financing, the maximum loan term is 15 years less the duration of any previous related party LRBAs relating to the asset	7 years maximum If re-financing, the maximum loan term is 7 years less the duration of any previous related party LRBAs relating to the parcel of shares
Fixed rate	Interest rate may be fixed at the beginning of the term for a maximum of 5 years	Interest rate may be fixed at the beginning of the term for a maximum of 3 years
Loan term – fixed rate	5 years maximum on fixed rate and must then convert to variable rate. The total loan term cannot exceed 15 years.	3 years maximum on fixed rate and must then convert to variable rate. The total loan term cannot exceed 7 years.
Maximum loan to market valuation ratio (LVR)	70%	50%
Security	A registered mortgage over the property is required	Registered charge / mortgage / security over assets required
Personal guarantee	Not required	
Nature of repayments	Principal and interest	
Frequency of repayments	Monthly	
Loan agreement	A written and executed loan agreement is required	

The ATO has also provided a [Q&A](#) that adds some detail.

Appendix 5: Repairs, maintenance and improvements

Key terminology

To understand some of the key terms in this guide, there are two references upon which we can look to for guidance.

[SMSFR 2012/1](#), which considers some of the key concepts applicable to LRBAs, provides that the terms 'improvement', 'repair' and 'maintenance' should take on their 'ordinary meanings'. Some brief commentary is provided, which elaborates on these 'ordinary meanings'²³.

[TR 97/23](#) may also provide some guidance on the ordinary meanings of some of these key concepts, however, this ruling was written to explain the circumstances in which expenditure incurred for repairs is an allowable deduction and doesn't consider the implications for LRBAs.

Repairs

The word 'repair' ordinarily means the remedying or making good defects, damage or deterioration of property such as to restore the original functionality of the asset. It contemplates the continued existence of the property and, for the most part, is occasional and partial.

If a repair occurs to prevent or anticipate further defects, damage or deterioration, it is only a repair if it's done in conjunction with remedying or making good the defects, damage or deterioration. A repair merely replaces a part of something or corrects something that is already there and has become worn out or dilapidated.

It involves restoration of the efficiency of function without changing the property's character and may include restoration to its former appearance, form, state or condition.

Works can fairly be described as repairs if they are done to make good damage or deterioration that has occurred by ordinary wear and tear, by accidental or deliberate damage or by the operation of natural causes during the passage of time.

A repair sometimes improves to some extent the condition the property was in immediately before the repair. However, a minor and incidental degree of improvement, addition or alteration may be done to a property and still be considered a repair.

Maintenance

Work done partly to remedy or make good defects, damage or deterioration does not cease to be a repair if it is also done partly (or even largely) to prevent or anticipate them in their very early stages. Repairs are not confined to situations where the defect, damage or deterioration has already become serious.

Some kinds of maintenance work are considered repairs, such as painting a plant or business premises to rectify existing deterioration and prevent further deterioration. However, other kinds of maintenance work, such as oiling, brushing or cleaning something that is otherwise in good working condition and only requires attention to prevent the possibility of deterioration in the future aren't considered repairs.

Improvements

While a repair restores the efficiency of function of the property without changing its character, an 'improvement' provides a greater efficiency of function in the property, usually in some existing function. To distinguish between a repair and an improvement to property, you therefore need to consider the effect the work has on its efficiency of function. This is the determinative test.

An improvement involves bringing a thing or structure into a more valuable or desirable form, state or condition than a mere repair would do. Some factors that point to an improvement include whether the work will extend the property's income producing ability, significantly enhance its saleability or market value or extend the property's expected life.

Use of different materials is not a determinative test, however replacement or substantial reconstruction of the entirety, as distinct from the subsidiary parts of the whole is an improvement.

²³ [SMSFR 2012/1](#), paragraphs 17-25

As discussed earlier, some improvements can be carried out while an LRBA is in place and others cannot. An improvement which results in a change in the character of the asset (for example, conversion of a residential property to a commercial property) is not permissible. On the other hand, renovation of the kitchen and bathrooms in a residential property does not change the character of the property as a residential property and so are acceptable. In all circumstances, borrowed money cannot be used to fund the improvement.

If a prospective property requires renovations or improvements, these could be negotiated with the seller prior to entering into the LRBA, otherwise the improvements cannot be done if it changes the character of the asset. SMSF trustees should exercise care when spending money on a property acquired using an LRBA.

Examples: Improvements vs different assets

Situation ²⁴	Different asset	Not a different asset
Residential house and land	A three bedroom house is significantly damaged in a fire and is demolished. Rather than rebuilding a house, two townhouses are built in its place.	A three bedroom house is significantly damaged in a fire and is demolished. Using insurance proceeds and additional cash from the SMSF, a five bedroom home is built in its place. Although the asset has been improved, the nature of the asset has not been fundamentally changed (ie it continues to be a residential property).
Residential house and land	A residential house is converted into a dental surgery and receives a complete fit out to enable it to be a fully functioning surgery. The asset has been changed from a residential property to commercial premises and therefore the fundamental nature of the asset has changed.	One bedroom of a house is converted into a home office. This does not change the fundamental nature of the asset from being a residential house.
Residential house and land		A granny flat is built in the backyard of a property upon which there is a three bedroom house. After the construction of the granny flat, the asset remains to be a residential property. While the granny flat is an improvement to the asset, the fundamental nature of the asset has not changed.
Vacant land on a single title	A block is subdivided resulting in multiple titles. This has changed the fundamental nature of the asset, as there are now multiple assets at law, with no impediments preventing them being dealt with separately.	

Fire damages a residential property	<p>The part of the kitchen that is damaged is restored using newly purchased appliances, which are modern equivalents of what was there prior to the fire.</p> <p>In the event that superior replacement goods are used (such as appliances, or other materials) consideration will need to be given as to whether the asset as a whole is 'significantly improved'. An addition which is 'minor or trifling' is not an improvement.</p>	Work is undertaken after the fire and the kitchen is made considerably larger via an extension; or the kitchen is repaired and a new external kitchen was added to the entertainment area of the house.
A cyclone damages the roof of a four bedroom, single level dwelling	The roof is replaced with modern day equivalent materials, restoring the dwelling to its former state. In the event that superior materials are used, it is a question of degree in determining as to whether it significantly improves the state or function of the asset as a whole.	A second story is added to the house at the time of replacing the roof.
A two bedroom 'cottage style' residential property is rented out for a number of years and suffers wear and tear	The kitchen has suffered a lot of wear and tear and the decision is made to replace the kitchen. The design of the kitchen is improved and modern equivalent, rather than superior, materials and appliances are used.	The entire house is knocked down and a five bedroom double storey home is built in its place.

See [SMSFR 2012/1](#) for original examples.