

Borrowing Agreement Deed (Instalment Warrant) – Third Party Bank Lender

By completing this form, you will provide all the information we need in order to arrange for a borrowing structure to be legally documented within a self managed superannuation fund where funding is provided by a third party bank. As part of the service, we:

- review the Trust Deed to investigate whether any changes are required in order for the self managed superannuation fund to enter in to the Borrowing Agreement Deed; and
- arrange for a Borrowing Agreement Deed to be documented between the trustee of the self managed superannuation fund (“SMSF”) and the bare trust trustee (“Custodian”) – *the SMSF and the Custodian must not be the same entity – refer to **Guide** on page 6.*

This Borrowing Agreement Deed will not be suitable for a loan from a related party to the self managed superannuation fund. If funds are provided by a related party to the self managed superannuation fund you will need to refer to the “Borrowing Agreement Service (Instalment Warrant) – Related Party Lender” form.

We have also provided instructions in the Guide outlining the steps that need to be taken when establishing and again when winding up the Borrowing Agreement Deed so as to ensure nominal stamp duty is applicable.

Please refer to the Guide prior to completing this form.

The **cost** (inc. GST) of this documentation service is as follows (please see payment options below):

Borrowing Agreement Deed	\$1,650
SMSF Trust Deed Amendment if requested	\$440 - <i>please complete our “Trust Deed Amendment Service” form</i>

Please note that Heffron will arrange for the legal documentation of the Borrowing Agreement to be done by Sydney Business Lawyers. Where legal advice or guidance is required in respect to implementing the borrowing arrangement, additional costs will apply. Additional costs may also apply where purchasing real property in Queensland. (refer to the *Stamp Duty* section in the Guide).

Note that this is a documentation service only. We strongly recommend that you seek **advice** on the benefits of entering in to a borrowing structure from a person who holds an Australian Financial Services Licence and who has expertise in the area of borrowing. Consideration of the relevant parties’ personal circumstances including liability for taxation or asset protection and the self managed superannuation fund’s investment strategy has not been undertaken by Heffron or Sydney Business Lawyers and this should be undertaken by you prior to entering in to a borrowing structure.

If you would like further information concerning the recent legislative amendment in relation to borrowing by superannuation funds – please contact our office and we will be happy to send you our recent edition of Heffron Super News which outlines these changes.

Confirmation and Acceptance of Terms

I confirm that the information on this form is correct and I have completed the payment details below. *Please note that payment must accompany all requests* (an invoice will be provided in due course).

Name:

Signature:

Invoice in the name of:

Payment Details

- Please find a cheque attached
- A Direct Debit agreement is in place in the name of:.....

Account Holder's Signature:

- Please charge the following credit card:
 - MasterCard Visa **Amount:**

Cardholder's full name:

Card Number: _ _ _ _ / _ _ _ _ / _ _ _ _ / _ _ _ _ Expiry Date: _ _ / _ _

Cardholder's Signature:

Documents to Attach

- Full copy of the Fund's current Trust Deed.

Section A: Contact Details

Person Ordering the Service – documents (soft copy PDF) will be forwarded to this person. If you would prefer the documents to be sent to you in the mail please leave the Email section blank.

Name:

Name of Firm:

Postal Address:

Contact Number: Fax:

Email:

Section B: Self Managed Superannuation Fund Trustee's Details ("SMSF")

Name of SMSF:

Please Indicate Trustee Type

- Corporate Trustee:
- Company Directors:

ACN: TFN:

Address of Registered Office:

.....

Will the Trustee be signing under seal? Yes No

The signing requirements will be dictated by the Company's Constitution.

- Individual Trustees:

Trustee's Street Address:

.....

Section C: Custodian’s Details (“Custodian”)

Please Indicate Entity Type

- Individual
- Company
- Trust
- Other

Name of Entity*:

* this will be the name that the Asset will be held in on trust for the SMSF.

Trustee Details (if applicable):

Company Director(s) Details (if applicable).....

ACN: TFN:

Date of Incorporation

Will the Entity be signing under seal? Yes No

Entity’s Street Address:

.....

Section D: Borrowing Agreement Deed Details

Please complete the following table:

Governing Law* (please nominate which state you would like the Borrowing Agreement Deed to be governed by)	
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* If the Asset purchased is real property, the Borrowing Agreement Deed will be governed in the state in which the property is located.

Name of Third Party Bank:

Contact Person:

Contact Number: Fax:

Email:

Section E: Details of the Asset to be Purchased

Provide details of the Asset or Assets which the SMSF will purchase using the loan amount and as permitted under section 67(4A) of the *Superannuation Industry (Supervision) Act 1993*. Please be advised that neither Heffron nor Sydney Business Lawyers is liable for or accepts liability for compliance with the requirements of section 67(4A) of the *Superannuation Industry (Supervision) Act 1993*.

The Custodian will hold the Asset on trust for the SMSF and the SMSF will hold a beneficial interest in the Asset. Neither Heffron nor Sydney Business Lawyers is responsible to check the accuracy of the Asset’s information as provided below.

If the Asset is to be real property you will need to provide below the folio identifier reference and street address. If the Asset is to be a range of securities (ie shares or managed funds) note that below and reference to a “parcel of securities as agreed between the SMSF and the Custodian” will be included in the Borrowing Agreement Deed.

Details:

Real Property Street Address

.....

Real Property Folio Identifier.....

Section F: Declaration

All trustees (or directors of the trustee company) of the SMSF and all trustees or directors of the Custodian must sign this declaration to authorise Heffron to arrange for the Borrowing Agreement Deed to be documented on their behalf.

Authorisation to Proceed

We the trustee(s) or director(s)/secretary of the corporate trustee of the self managed superannuation fund and the Custodian hereby authorise Heffron to arrange for a Borrowing Agreement Deed to be legally documented for us with the information provided to them for this purpose. We confirm that the information provided is accurate and complete.

We understand that Heffron nor Sydney Business Lawyers have reviewed my/our circumstances to determine whether or not borrowing is appropriate and they have simply documented a Borrowing Agreement Deed in accordance with our instructions or instructions from our adviser(s).

Privacy

We understand that the collection of information on this form by Heffron will be made available to Sydney Business Lawyers so as to enable them to legally document the Borrowing Agreement Deed.

Execution

SMSF:

Name (Trustee/Director 1):

Signature:

Name (Trustee/Director 2):

Signature:

Name (Trustee/Director 3):

Signature:

Name (Trustee/Director 4):

Signature:

Custodian:

Name (Trustee/Director 1):

Signature:

Name (Trustee/Director 2):

Signature:

Borrowing Agreement Deed (Instalment Warrant) –Third Party Lender - Guide

What borrowing arrangements is this documentation service suitable for?

This documentation service is suitable for a loan directly from an unrelated third party lender/bank to a SMSF. However, the third party lender/bank will normally need to approve the documentation before it will lend on the basis of it.

Nature of borrowing arrangements - custodian

The documentation will be prepared on the basis that a third party lender/bank will lend money to the SMSF on arms length terms and a related party custodian will purchase an asset to hold on bare trust for the SMSF. The SMSF can contribute to the purchase price from its own funds and must fund purchase costs from its own funds.

The asset purchased will be mortgaged/charged to the unrelated third party lender/bank. Our service is merely to supply the instalment warrant/borrowing agreement deed documentation to you. It does not include the provision of a mortgage or charge over the asset, which will normally be put in place by the third party lender/bank. Our fees do not include acting for you on the unrelated third party lender/bank documentation. If you require assistance with that, we will need to agree on and advise you of our fees before we start that work.

Your trust deed

It is important that your trust deed permits this form of borrowing arrangement. If it does not, the trust deed must be amended **before** the borrowing is entered into.

Sections 67(4) and 71(8) of the SIS Act

We note that all arrangements under the borrowing structure must be in compliance with sections 67(4A) and 71(8) of the SIS Act. We do not accept liability and are not liable for ensuring that the proposed arrangements are in compliance with these provisions.

If the unrelated third party lender/bank requires any personal guarantees or other security to support the loan, it is very important that the guarantor(s)/security provider sign a waiver of their rights against the SMSF trustee in the case where the unrelated third party lender/bank ever enforces the guarantee security. If the guarantor(s)/security provider don't sign the waiver, the instalment warrant/borrowing agreement deed may breach section 67(4A) of the SIS Act and may result in unwanted tax consequences.

Investment strategy

All superannuation funds must have an investment strategy. If you have not already done so, you need to prepare, adopt, and continually review your fund's investment strategy.

The strategy must permit the proposed investment under the borrowing structure. If your investment strategy does not, you will need to modify it accordingly.

Identity of the SMSF and custodian

Remember that the trustee of the SMSF and the custodian can't be the same party. If they are, there will not be a valid trust. It is acceptable for an individual member of the SMSF to also be the custodian. The actual structure of the custodian should be approved by the third party bank prior to exchanging the contract to purchase the asset as they may require a corporate structure.

The name of custodian should appear as the purchaser of the asset and not the SMSF trustee.

Non recourse loan

The loan from the third party lender/bank and any security provided to support it must only be non-recourse. That is, the SMSF's liability under the borrowing agreement deed and security must be limited to the SMSF's interest in the asset.

Loan amount

The loan amount will be repayable as required by the third party lender/bank. Please refer to the loan agreement as established by the third party bank for further details.

Borrowing costs, including stamp duty

The SMSF cannot borrow acquisition costs to complete the purchase. Therefore, the SMSF will have to fund costs such as stamp duty from its own funds.

Interest

The standard interest rate payable under the loan will stipulated in the loan agreement as established by the third party bank.

Please refer to the loan agreement as established by the third party bank for further details.

Term

The loan term will stipulated in the loan agreement as established by the third party bank. Please refer to the loan agreement as established by the third party bank for further details.

Asset Protection

We note that we will not be giving asset protection advice in preparing the documentation.

Financial advice

We note that we will not be giving financial advice to you about the benefits or otherwise of entering into the borrowing agreement deed. Neither are we permitted to give such advice, which can only be given by someone who holds a financial services licence and has expertise in this area.

Tax

We note that we will not be giving taxation advice in preparing the documentation. However, until clarified by the ATO, we draw your attention to the capital protected borrowing provisions of Division 247 and the arms length income provisions of Subdivision 295H (295.550) of the ITAA 1997.

If the unrelated third party lender/bank requires any personal guarantees to support the loan, it is very important that the guarantor(s) sign a waiver of their rights against the SMSF trustee in the case where the unrelated third party lender/bank ever enforces the guarantee. If they don't, the borrowing agreement may breach sections 67(4A) of the SIS Act. We understand that the custodian will not need to apply for a TFN and the SMSF's TFN should be used as the entity receiving the income.

GST

You should seek advice as to whether there are any GST implications arising from the purchase and use of the asset to be purchased with the loan. If GST registration is required while the custodian holds the assets, it will be the SMSF trustee that needs to be registered (refer to GSTR 2008/3).

Stamp duty

Nominal stamp duty is normally payable in NSW, Queensland, Tasmania, ACT and Victoria when the asset is eventually transferred from the custodian to the trustee of the SMSF, if the SMSF can prove that it has paid the purchase price in full from its own funds. In Queensland, special requirements for the nominal stamp duty concession mean that the borrowing agreement and a special authority must be signed before the contract to purchase the asset is signed. The position in the Northern Territory and South Australia has not been clarified and it is our understanding that Western Australia will be exempt as there is no change in underlying beneficial ownership that arises from the transfer. The position for WA, the Northern Territory and South Australia should be confirmed before exchanging a contract to purchase a property located there.

The third party bank lender may require the instalment warrant / borrowing agreement to be stamped before drawing down the loan. If so the relevant Revenue Office will need to be satisfied in the same way that all purchase money will be supplied by the SMSF and from the third party bank's loan.

If a charge/mortgage is granted over the asset to be purchased under the borrowing agreement deed, stamp duty would normally be payable on that charge/mortgage in NSW. Mortgage duty has been abolished in Victoria, South Australia, Western Australia, Queensland, Tasmania and the ACT.

In NSW, Tasmania, ACT and Victoria, interest will be charged on unpaid stamp duty from the date 3 months after first execution of any document that is liable for stamp duty. In the ACT it is 90 days. In the Northern Territory it is 60 days and Queensland it is 30 days.

Stamp duty will not normally be payable in any state or territory on the purchase of listed securities. However, ad valorem stamp duty will normally be payable in each of those states on any purchase of land.

Therefore, to prove that the SMSF paid the purchase price in full from its own funds, you will need to supply the original executed borrowing agreement deed, a settlement statement clearly setting out the purchase price of the asset and a copy of all bank statements (and if applicable, loan documents) clearly showing the movement of funds from the SMSF and lender to the seller of the asset to pay the purchase price. It will not be sufficient for you to simply claim the exemption. Instead, you will have to prove you are entitled to it.

The ATO's view on instalment warrant/borrowing agreements

On 4 April 2008, the ATO published its views on instalment warrant/borrowing agreements and the publication can be located at:

<http://www.ato.gov.au/print.asp?doc=/content/00132054.htm>

Please note that at this stage, the ATO is undecided about whether or not a **third party guarantee** as security for a borrowing will satisfy the instalment warrant/borrowing agreement rules, particularly where the guarantee is from a SMSF member or related party.

The ATO has now clarified its position on the **capitalisation of interest** under an instalment warrant/borrowing agreement, which is permitted if the interest relates to the borrowing for the purchase of the asset under the agreement.

In its publication, the ATO makes it clear that a **unit trust** will not be an appropriate structure for a instalment warrant/borrowing agreement. Under a unit trust, the SMSF will not have the required interest in the asset.

Questions about:

- whether or not the acquired asset must be the only asset of the trust;
- multiple draw downs under a single loan facility
- structuring of agreements to create absolute entitlement for CGT purposes; and
- arrangements that permit re-financing,

have also been raised by the ATO for further consideration.

We also note the previous comments about capital protected borrowing provisions of Division 247 and the non-arms length income provisions of Subdivision 295H (295.550) of ITAA 1997.

Until the ATO concludes its position on these things, care should be taken to ensure compliance by the proposed arrangements under the instalment warrant/borrowing agreement and prior to entering such an arrangement to otherwise satisfy yourself about the potential taxation implications arising from them.

It appears from ATO announcements that it will take a narrow view in respect of what would constitute a replacement asset for the purposes of section 67(4A). Therefore, care should be taken when selling an asset or assets which are purchased using the loan. The ATO has stated that its interpretation of the definition of a replacement asset requires one borrowing structure to end and a new one to be commenced if there is to be a different underlying asset.