


# Heffron Super News



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## In this issue:

**How do you access concessional stamp duty rates when transferring property in to a SMSF?**

## Introduction

Since the NSW State Government's 1 July 2010 introduction of section 62A into the Duties Act, the attraction of transferring a SMSF member's business real property into their SMSF has never been greater. This newsletter acts as a guide to what is you need to do to put such a strategy in place.

## What is section 62A all about?

Section 62A gives a stamp duty concession on the eligible transfer of dutiable property from a SMSF member to their SMSF.

\$50 of duty applies to eligible transfers where there is no borrowing and \$500 where there is borrowing.

On a transfer of real property valued at \$500,000, this represents a stamp duty saving of approximately \$17,500 and of a

property valued at \$750,000, a stamp duty saving of approximately \$28,750.

## Is the nominal stamp duty concession only available on transfers of NSW property?

No - the nominal stamp duty concession is available in the same form as the NSW concession for the transfer of property located in WA.

A concession is also available in Victoria but the transfer must not be made for consideration.

Otherwise, the other states and territories do not offer a comparable stamp duty concession.

## Does the nominal stamp duty concession apply if the owner of the property outside the SMSF is not a person, human or individual?

No - the owner of the property outside the SMSF must be the member/s personally and it cannot be owned by a company, trust or relative of the SMSF

member (unless the relative is also a SMSF member).

## Does the nominal stamp duty concession apply to the transfers of all sorts of property?

No - the only real property that will be able to be purchased with access to concessional stamp duty is business real property.

This is because the concession only applies to an acquisition of an asset from a SMSF member.

As the SMSF member will be a related party, then the property must be business real property to avoid breaching section 66 of the Superannuation Industry (Supervision) Act 1993 (**SIS**).

Therefore:

- the real property must be used for the purpose of the conduct of a business; and
- if after the transfer to the SMSF that business is conducted by a related party, there must be an enforceable lease in place between the SMSF and the related party.

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In any event, it is best practice that there is always an enforceable lease in place.

Otherwise, the concession is available on any form of dutiable property. Listed shares and listed managed funds are not dutiable property and so their transfer would be exempt from stamp duty in any event.

Unlisted shares are dutiable property and so the concession could be used for the transfer of unlisted shares into a SMSF. However, whether the shares are listed, unlisted or it is listed managed funds, the transfer of those securities to the SMSF from a member would often breach the section 66 SIS prohibition on a SMSF acquiring assets from a related party and the stamp duty concession would not be able to be used for their transfer.

## Can the concession be used if the property is owned partly by a SMSF member and partly by a non-SMSF member?

Yes - but the concession will only be able to be used for that part of the property that is owned by a SMSF member.

## Is there a requirement as to the use of the property inside the SMSF in order to access the stamp duty concession?

Yes - the property must be used not just to provide retirement benefits but those benefits must be provided from that property exclusively for those SMSF members who transferred the property to the SMSF.

## Does the nominal stamp duty concession apply if the owner of the property outside the SMSF is/are the only member/s of the SMSF?

Yes - and no change is required to the SMSF trust deed but proof of the SMSF membership structure will need to be produced to the OSR.

## Does the nominal stamp duty concession apply if the owner of the property outside the SMSF is different to member/s of the SMSF?

Yes - but an irrevocable change is required to the SMSF trust deed to provide that the property can only be used for the provision of retirement benefits for the transferor member or members

and this will need to be produced to the OSR.

## Does the property need to be transferred to the SMSF trustee for the benefit of SMSF members inside the SMSF in the same proportion as it is owned by the same SMSF members outside the SMSF?

No - the property does not need to be transferred to the SMSF trustee for the benefit of SMSF members inside the SMSF in the same proportion as it is owned by the same SMSF members outside the SMSF.

Therefore, subject to managing the contribution caps and residual debt obligations that may arise in doing so, for example, husband and wife's fractional interest in a property may be 99/100 and 1/100 outside the SMSF but their respective SMSF benefits from the property inside the SMSF may be 1/100 and 99/100.

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## Can ownership of the property outside the SMSF be changed prior to transfer to the SMSF to both access the concession but to do so in the preferred manner?

Yes - if the strategy is to benefit both husband and wife from the property once it is transferred to the SMSF but only the husband is currently an owner of the property, husband could firstly transfer a fraction of the property to his wife, say a 1/10,000th share and then the transfer to the SMSF could take place with access to the nominal stamp duty concession.

Normal stamp duty would be payable on the 1/10,000th share which would require a registered valuer's valuation as evidence of value.

## Does the SMSF have to use cash to pay for the property?

No - the property can be paid for from any combination of cash reserves of the SMSF, borrowing by the SMSF and in specie contributions from the owner of the property outside the SMSF, whether of a concessional or non-concessional nature (subject to the contribution caps).

Any borrowing by the SMSF must comply with the normal

requirements of section 67A and 67B of SIS.

## Is a particular form of transfer documentation required to get access to the nominal stamp duty concession?

No - the transaction can be completed by way of the usual contract and transfer documentation used for recording the transfer of property in NSW or only a simply transfer can be used.

It is best to use a contract and transfer, as the contract can deal with some of the other issues that arise on such transfers and it creates a good audit trail of both the treatment and outcome of those issues, including for example:

- the release of any residual debt obligations that may arise from the transfer where benefit to the property inside the SMSF is in different proportions to property ownership proportions outside the SMSF
- rates, land tax, water and rental adjustments
- how the property is paid for (eg cash, loan, concessional and/or non concessional in specie contribution)

## Does the nominal stamp duty concession apply on all eligible transfers of property to a SMSF no matter when they happen?

No - the \$50 nominal stamp duty concession applies where there is no SMSF borrowing and no custodial ownership on any eligible transfer on and from 1 July 2010.

The \$500 nominal stamp duty concession applies where there is SMSF borrowing and custodial ownership on any eligible transfer on and from 1 January 2011.

If a transfer has already taken place and full stamp duty has otherwise been paid, assuming the transfer was completed, an application for a refund of stamp duty can be made for up to 5 years from the initial assessment of the duty paid.

## Will the GST rules apply to the property transfer?

Yes - and so before any transfer of property, the members should get advice from their tax adviser about any GST that may arise from the transfer of the property to the SMSF.

However, if the transfer of any business real property is made subject to an existing lease, the transfer would normally be GST

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free as the sale of a going concern.

## Will the CGT rules apply to the property transfer?

Yes - and so before any transfer of property, the members should get advice from their tax adviser about any CGT that may arise from the transfer of the property to the SMSF.

## Is a valuation required of the property and the rental?

Yes and No - If the stamp duty concession is available, a valuation is not required for stamp duty purposes.

However, to prove that the transfer of the property and its lease back are being made on arms length terms for the purpose of SIS, it is best that there is a registered valuation of both the market value of the property and the property's rental.

The market value of the rental should detail whether outgoings are payable by the tenant or not and if payable, what outgoings and what proportion of them

## Does the SMSF have to comply with other rules?

Yes - the SMSF will otherwise have to comply with all of the normal rules and requirements of SIS including for an appropriate

investment strategy to be in place before the transfer of the SMSF member's property to the SMSF.

## Is there anything else that needs to be done in putting in place the transfer of the property to the SMSF?

**YES** - don't forget to:

- ensure the SMSF is registered for GST effective at the time of transfer of the property, particularly if the GST free "going concern" concession is to apply or if the rental is more than \$75,000 pa
- ensure that the SMSF and the tenant of the property have all relevant insurances in place prior to the transfer of the property to the SMSF
- advise any existing third party arms length tenant of the new rental payment arrangements that are to apply after the transfer of the property
- complete the outgoings adjustments between the current SMSF member owner of the property and the SMSF
- ensure that the purchase price is paid in full as

required under and at the time of completion of the transaction

- any pre-existing mortgages over the property are discharged prior to the transfer of the property and that the transfer of ownership of the property is registered at the land titles office in the normal way

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