

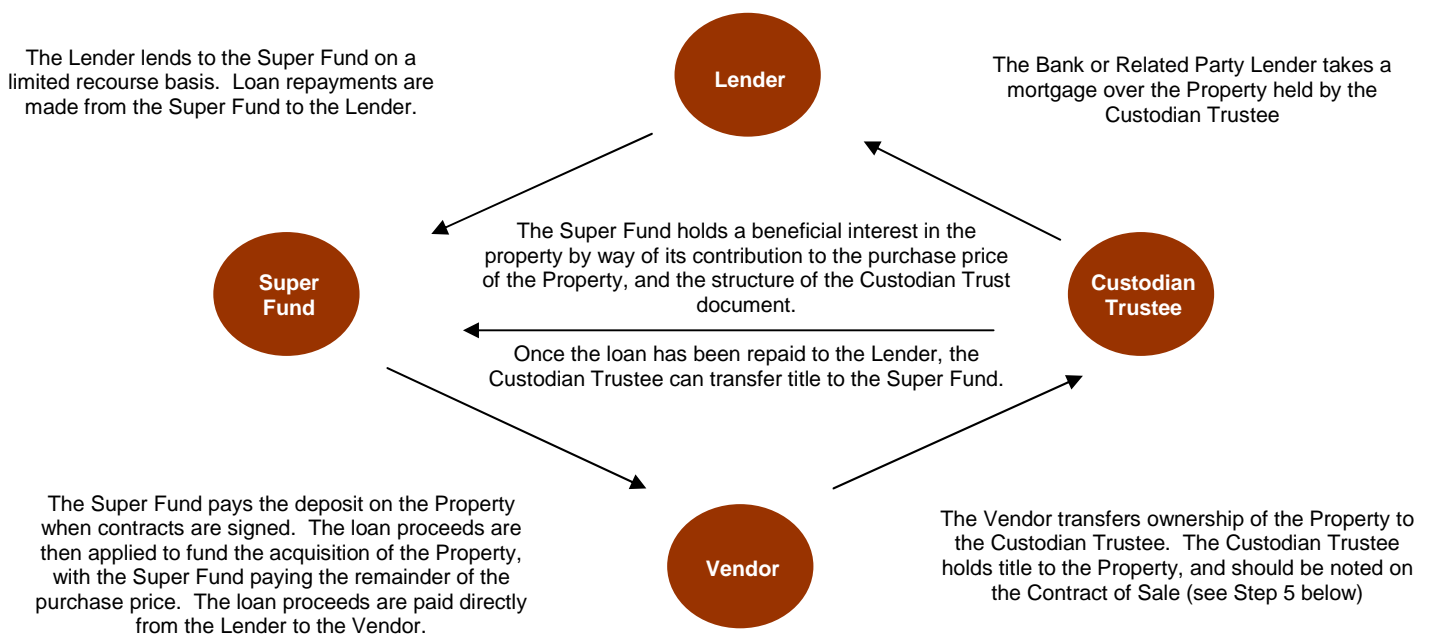
# SMSF Borrowing – Qs and As



Borrowing through your SMSF is not as difficult a process as you may think. As a marked leader in SMSF borrowing documentation, Topdocs has compiled a list of the most commonly asked questions regarding Complying SMSF Loans (sometimes called 'instalment warrants') to help financial advisers and trustees to disseminate the vast amount of information in the marketplace regarding SMSF borrowing.

## Q. Who are the parties to the Loan?

**A.** A Complying SMSF Loan has 4 parties - the Lender loaning the money to the Super Fund, the Super Fund itself, the Vendor selling the property to the Super Fund and the Custodian Trustee who will hold the Property on trust for the Super Fund. The role of each of these parties is outlined below:



## Q. What type of property can the Fund purchase via a Complying SMSF loan?

**A.** The property must be a property that the Super Fund could otherwise invest in if bought outright, and must comply with the in-house assets rule and sole purpose tests. So the Fund could purchase commercial or rural property from either a related party or non related party, or residential property from a non related party.

## Q. Who can Loan money to the Super Fund?

**A.** Both related parties and unrelated parties can lend money to the Super Fund via a SMSF Complying Loan. Topdocs can provide you with contact details for each of the major banks lending on SMSF Complying Loans, as well as finance broker contact details if required.

## Q. What is the procedure to commence a SMSF Loan?

**A.** In order to ensure your Fund complies with the SIS Legislation and ATO requirements, it is important to set up your SMSF Complying Loan correctly. Topdocs suggests the following steps when commencing a Complying SMSF Loan:

### Step 1 - Find the Property the Super Fund wishes to purchase

### Step 2- Obtain pre approval of the Loan

Some clients may however enter into contracts before pre approval of the Loan is made. Clients should consider Step 5 at this point if they are signing the contract before pre approval of the loan.

### **Step 3 - Determine who will act as Trustee of the Custodian Trust.**

The vehicle that holds the property on trust for the Super Fund is called a 'Custodian Trust' (sometimes known also as a 'bare trust'). The Custodian Trust must have a Trustee, and it is the Custodian Trustee that holds title to the property. The Trustee of the Custodian Trust must be a separate legal entity from the Trustee of the Super Fund. Topdocs recommends you use a Company to act as Trustee of the Custodian Trust.

### **Step 4 - Have the required documentation completed for the Fund to commence the borrowing.**

This documentation is required for the Fund to comply with the SIS Legislation and the Australian Tax Office requirements.

This documentation includes:

1. The Custodian Trust (also sometimes called a 'Bare Trust').
2. Establishing a company to act as Trustee of the Custodian Trust (if required)
3. Updating the Super Fund Trust Deed (if required)
4. Updating the Fund's Investment Strategy (if required)

### **Step 5 - Sign the contract in the name of the Custodian Trustee (or as required by your state revenue office)**

NOTE: the contract of sale can be signed before pre approval of the Loan, however it is preferable for the contract to be signed after the Custodian Trustee has been determined (or if a Company, established) so the Custodian Trustee can be noted on the contract. See 'Who signs the contract of sale' below.

### **Step 6 - Settle the property with the Custodian Trustee as the title holder.**

#### **Q. Who signs the contract of sale?**

**A.** The Trustee of the Custodian Trust is the entity that holds the title to the property on trust for the Super Fund. Therefore, it is the Custodian Trustee that should be noted as the purchaser of the property on the contract of sale, NOT the Super Fund or the Super Fund Trustee. Each state has different requirements regarding the manner in which the Custodian Trustee is noted on the contract. In some states, the name of the Custodian Trustee alone is sufficient, whereas other states require a greater amount of detail (for example, the name of the Custodian Trust and the Super Fund). As a 'belts and braces' approach to the contract, we recommend the purchaser on the contract be noted in the following manner:

[Custodian Trustee Name] ATF [Custodian Trust Name] ATF [Super Fund Trustee Name] ATF [Super Fund Name]

Whilst the above may seem long winded, it shows that the Custodian Trustee is holding the property on trust for the Super Fund.

We do however recommend you speak with your respective State Revenue Office to confirm how the purchaser name is noted the contract, as this may affect the stamp duty implications of the transaction.

#### **Q. What about double stamp duty?**

**A.** As long as the name of the purchaser on the contract of sale is correctly noted (see point above) and the Custodian Trust Deed you are using is correctly prepared, there should not be stamp duty applicable when the Custodian Trustee transfers title to the Super Fund. However you should speak to your respective State Revenue Office to confirm how best to sign the contract of sale as discussed above.

#### **Q. What about personal guarantees?**

**A.** Some of the major banks lending on SMSF Loans require personal guarantees, such as the NAB, Westpac and ANZ. Other banks, such as St George and Bendigo Bank do not require personal guarantees. Whilst section 67(4A) does not make any mention of guarantees, the ATO has voiced its concern over SMSF Complying Loan arrangements where 'a personal guarantees for the borrowing is given by a third party, particularly where the guarantee is given by a member or a related party of the Fund'. However there has not been any definitive rulings by the Tax Office regarding this matter.

Those banks that do require a personal guarantee have developed additional documentation and have stated that they are confident their loan documentation complies with the SIS legislation.

**Topdocs can assist you with every step in commencing a Complying SMSF Loan. Please contact Topdocs with any queries you may have regarding SMSF borrowing on 1300 659 242.**