

SMSFR 2009/1EC - Compendium

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Ruling Compendium – SMSFR 2009/1

A compendium of responses to the issues raised by external parties to SMSFR 2008/D3 – Self Managed Superannuation Funds: business real property for the purposes of the *Superannuation Industry (Supervision) Act 1993*

This compendium of comments has been edited to maintain the anonymity of entities that commented on the draft ruling.

Summary of issues raised and responses

Issue No.	Issue raised (Unless otherwise noted, references are to Examples and paragraphs in SMSFR 2008/D3)	Response (Unless otherwise noted, references are to Examples and paragraphs in SMSFR 2009/1)
1	<i>Primary production land – house leased to unrelated party</i> When a house on primary production land is rented to an unrelated party for private and domestic use is the real property able to be BRP?	<i>No change</i> There is no requirement that the dwelling referred to in subsection 66(6) is used by the related party. Private or domestic use is treated in the same way by the subsection regardless of whether the entity using the property for those purposes is related to the SMSF.
2	<i>Primary production land – crops</i> Where business real property is land which is used to grow crops, will the crops themselves (prior to harvest) be considered to be part of the BRP?	<i>Material added to clarify</i> New paragraphs 82 to 84 and Example 2 have been added to deal with annual crops. Example 1 considers a primary production business where the vines are considered to be part of the real property.
3	<i>Water rights</i> Are water rights attached to a farm business real property?	<i>No change</i> Water entitlements are not <i>business real property</i> as they are not an eligible interest in real property identified in paragraphs (a) to (c) of the definition. Example 10 deals with the case of a water licence.

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4	<p><i>Company title</i></p> <p>Where a property is held under company title and the sole business of the company is to hold title to the real property, the shareholders of the company commonly hold rights through their shares to a specific and identifiable part of the property to the exclusion of others.</p> <p>The rights received by virtue of shareholding provide exclusive possession to those premises and are in practice identical to rights conferred under strata title ownership, which is an interest the draft ruling specifically allows.</p>	<p><i>Material added to clarify</i></p> <p>Paragraphs 111 and 112 have been added to the Ruling explaining that a shareholder does not hold an eligible interest in real property identified in paragraphs (a) to (c) of the definition where a property is owned under company title. Accordingly, the current scope of the <i>business real property</i> definition does not accommodate property subject to company title. New Example 29 has also been added.</p>
5	<p><i>Barrister's chambers</i></p> <p>Does a barrister have an eligible interest in BRP where buying shares in the company that owns the building entitles the barrister by informal arrangement to occupy a particular room?</p>	<p><i>Material added to clarify</i></p> <p>See response to issue 4. Barrister's chambers are a specific example of company title.</p>
6	<p><i>Unit trusts</i></p> <p>If the entity in Example 20 had owned units in a unit trust which owned BRP, would the sale of the units to the SMSF be treated in the same way as the sale of shares in Example 20, i.e. sale of an interest in the capital of the unit trust rather than an interest in the underlying assets?</p>	<p><i>Material redrafted to clarify</i></p> <p>Paragraphs 106 to 108 apply to these interests and have been rewritten for clarity. New Example 28 has been added.</p>

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7	<p><i>Instalment warrant arrangements</i> Is Example 21 consistent with the ATO's approach more generally on instalment warrants?</p>	<p><i>No change</i> This Example is consistent with the Tax Office's published position on instalment warrants. Example 30 in the Ruling is concerned with an interest held by a related party of the SMSF under an instalment warrant arrangements which is then transferred to the SMSF. The Tax Office's published position on instalment warrants is concerned with where an SMSF enters into an instalment warrant arrangement where the underlying asset was not previously subject to such an arrangement.</p>
8	<p><i>Land development – display home</i> Could an example be included where a builder constructs a display home and sells it to his fund then leases it back, where the home is only used for display purposes.</p>	<p><i>Material added to clarify</i> New Example 37 covers this situation.</p>
9	<p><i>Land development – units for sale</i> A developer may have a parcel of residential units and not sell the entire parcel immediately after development e.g. one may be left unsold. If they keep this unit and rent it out for 12 months can the development still be business real property? Are residential premises that result from land development when sold off the plan or once completed business real property?</p>	<p><i>Material added to clarify</i> New Example 37 covers these situations.</p>
10	<p><i>Agency – business</i> Is a self contained residential unit in a hotel styled apartment complex owned by the member business real property given that the business is run by the management company not the member, and the member uses the unit occasionally?</p>	<p><i>Material added to clarify</i> New Example 20 has been added on this topic.</p>

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11	<p><i>Test applied at point in time</i></p> <p>Paragraph 211 (new paragraph 224) should clarify that the trustee must ensure the test is applied for the whole of the period. Auditors test IHA at a point in time. Where leases are short term likely to be tested by sample. A whole year test may be onerous and result in an increased burden for trustees.</p>	<p><i>No change</i></p> <p>Paragraphs 224 to 226 of the Ruling (211 to 213 in the draft Ruling) identify that the status of real property as <i>business real property</i> is required to be at a particular point in time depending on the requirement of the section. Nevertheless, it is necessary to adopt a 'wide lens' approach when viewing the circumstances surrounding the use of the property at that point in time. It is not strictly necessary (although in some circumstances it may be practically appropriate) for the use test to be applied throughout the income year for the purposes of the in-house asset rules.</p>
12	<p><i>Residential property</i></p> <p>It would be useful for trustees and their advisers if the Ruling included an example which addressed residential property owned by fund members being transferred into their SMSF.</p>	<p><i>No change</i></p> <p>The views in paragraphs 35, 167 and 189 to 192 of the Ruling together with Examples 13 and 14 in Appendix 2 deal with residential property cases and make it clear that the property must be used in a business (specifically a property investment business).</p>
13	<p><i>Vacant land</i></p> <p>It is not obvious in the Ruling if vacant land owned by members can be transferred into their SMSF.</p>	<p><i>Material added to clarify</i></p> <p>New Examples 8 and 9 have been added. In addition, the nature of the 'business use test' as set out at paragraphs 20 to 39 make it clear the land must be used in a business.</p>
14	<p><i>Company shares – Division 13.3A</i></p> <p>A footnote is needed for paragraphs 106 and 107 (new paragraphs 109 and 110) which would refer to Division 13.3A of the SISR.</p>	<p><i>Change made</i></p> <p>Footnote 53 identifies that Division 13.3A provides contextual support for the view adopted in relation to the position of shareholders where a company invests in business real property.</p>
15	<p><i>Division 13.3A</i></p> <p>If regulation 13.22 of the SISR is applied in the example at paragraph 285 (new paragraph 322) it may not be a breach, although this exemption would not apply if the property was geared.</p>	<p><i>Change made</i></p> <p>Footnote 103 (footnote 96 in the draft Ruling) has been expanded to highlight the potential for Division 13.3A of the SISR to apply to this scenario.</p>

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16	<i>Technical correction</i> It appears in Example 16 that Stuart employs 2 of his friends who are also members of his SMSF. This contravenes paragraph 17(1)(e) of the SISA.	<i>Change made</i> Example 23 has been adjusted to make it clear that the friends are employed by Stuart other than in his capacity as SMSF trustee and that his friends have separate SMSFs.
17	<i>Joint tenancy</i> The Ruling does not specifically say that joint tenants do not have the required interest in real property.	<i>Material added to clarify</i> Paragraphs 90 to 95 in the Ruling have been adjusted to make the position on joint tenancy clearer.
18	<i>Market value</i> When transferring a shop into an SMSF, what are the requirements for market value?	<i>No change</i> There is a requirement in the exception in paragraph 66(2)(b) that acquisitions of business real property from related parties be at market value. <i>Market valuation for tax purposes</i> NAT 72508 has been issued to provide guidance in determining the market value of an asset and is available on the ATO website www.ato.gov.au .