DGL ACCOUNTANTS

How can I contribute business real property ('BRP') to superannuation?

Some of the key issues to consider when deciding whether to proceed with an in-specie contribution of BRP to your SMSF include:

- ## Business real property

If the property is being acquired by the SMSF trustee from a related party, such as a fund member or a related entity, the property must be BRP under s 66(2)(b) of the *Superannuation Industry (Supervision) Act 1993* (Cth) ('SISA'). 'Business real property' is defined in s 66(5) of the SISA to include 'any freehold or leasehold interest of the entity in real property' that is used wholly or exclusively in one or more businesses. We recommend that you review the ATO's detailed ruling on BRP; namely SMSFR 2009/1.

Further, there should not be a mortgage, lien or other encumbrance over the property, as this will constitute a 'charge' for the purposes of reg 13.14 of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) ('SISR').

- ## Eligibility to contribute to superannuation

You must be eligible to make a contribution to superannuation. The work test requires any member age 65 or more to be gainfully employed for at least 40 hours in 30 consecutive days in the income year in which the contribution will be made in order to be eligible to make a contribution to the fund.

From age 75, members are restricted to mandated employer contributions being made to superannuation on their behalf or non-concessional contributions received by the fund trustee within 28 days after the end of the month in which the member reaches age 75 (subject to having been gainfully employed on at least a part-time basis (ie, 10 hours per week), in the financial year in which the contribution was made).

'Gainfully employed' includes being self-employed for gain or reward in any business, trade, profession, vocation, calling, occupation or employment.' Gain or reward takes its ordinary meaning and includes receiving remuneration such as wages, business income, bonuses and commission for personal exertion. It does not include the passive receipt of income, such as rent or dividends.

- ## Contribution caps

To avoid excess contributions, you must ensure that the in specie contribution of the property does not exceed your contribution caps.

The contribution caps for FY2017 are as follows:

Age 49* or more	CONCESSIONAL CAP	NON-CONCESSIONAL CAP
Under age 49	$30,000	$180,000
Age 49 or more	$35,000	$180,000

* *Age on 30 June 2016.*

Please note that you may also have a non-concessional contribution ('NCC') cap amount that is subject to the proposals in the May 2016 Federal Budget. An NCC is broadly an after tax contribution which is not deductible. An NCC is also not assessable to a super fund.

If you are eligible to access the small business capital gains tax ('CGT') concessions in FY2017, the maximum CGT cap is $1,415,000. A contribution that qualifies under the CGT small business concessions under division 152 of the *Income Tax Assessment Act 1997* (Cth) ('ITAA 1997') is not subject to the limits that apply to NCCs.

- ## Taxation considerations

You should also consider whether there are any taxation issues that should be taken into account, for example, whether the in specie contribution of the property will trigger a capital gain or loss on the disposal, whether there are any applicable stamp duty exemptions in respect of the transfer and whether GST applies.

- ## Fund deed

We recommend that you review the SMSF's governing rules to ensure that the trustee has express power to hold, invest in and lease real property. Further, the governing rules must also permit the SMSF trustee to accept in specie contributions from members.

- ## Investment strategy

We recommend that you consider updating the SMSF's investment strategy to ensure it takes into account the impact of owning a relatively illiquid asset. In particular, you may wish to review the asset classes and relevant percentages to ensure they are consistent with the SMSF's assets and investment profile and accounts for the proportion of the SMSF's assets that are invested in real property. You may also wish to consider the impact on the SMSF's cash flow, risk and liabilities as well as the SMSF's trustee's ability to pay benefits to members and/or members' dependants in accordance with s 52B of the *Superannuation Industry (Supervision) Act 1993* (Cth) ('SISA').

The SMSF trustee should also consider taking out appropriate insurance if the SMSF will be holding real property as part of its investment strategy in the event that a person is injured in connection with the property. Importantly, any compensation required to be paid from the SMSF trustee to the injured party is unlikely to be limited to the value of the property. This strategy should be made after obtaining advice from a licensed financial adviser and documented in the SMSF's investment strategy.

- ## Lease agreement

A written lease agreement on arm's length terms must be in place between the SMSF trustee and the tenant, for example, the rent, review period and duration of the lease must be consistent with current market practices for comparable premises in light of the business being conducted.