

SMSF LAW

Specialising in Self Managed Super Funds



EQUITY PROTECT[®]

Family Estate and Asset Protection Planning

Your Legal Watchdog For Your Family Estate

Shane Ellis
Senior Consulting
Lawyer





Shane Ellis is the Managing Director of SMSF LAW EQUITYPROTECT. He is a Senior Consulting Lawyer specialising in SMSF ESTATES & LAW, FAMILY ESTATE PLANNING, Asset Protection Structuring & Firewalled Business Structures. He is the Gold Coast's only SPAA ACCREDITED SMSF SPECIALIST LAWYER & is one of only a few lawyers in Australia to hold this title. Shane also holds ASIC RG 146 SPECIALIST SELF MANAGED SUPERANNUATION FUND ACCREDITATION. He has won Best of the Gold Coast Awards for three consecutive years for quality of legal services. He speaks regularly to business and professional groups on SMSF Estate Planning; Asset Protection & Business Structures & regularly writes for the Queensland Law Society Magazine, Smsf Adviser Magazine, AIA Magazine, and other nationwide publications on patterns for success in business.

*Shane is available to assist you on
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(E) sellis@ellislaw.com.au*



SMSF
Professionals'
Association
of Australia

Specialist Advisor

Shane would love to speak to your clients on these matters and assist you with the growth of your business.

Liability Limited by a scheme approved under Professional Standards Legislation
Legal Practitioners employed by Shane Ellis Senior Consulting Lawyer (including SMSF Law) are members of the scheme.



MASSIVE TAX SAVINGS ARISE FROM CORRECT STRUCTURING NOW



- ✓ ***Setting up your estate correctly now, will very likely provide massive tax savings in the future. A proper Testamentary Trust Will (TTW) allows minors to receive income from your estate at adult tax rates. Without this, they receive a base income of only \$416.00.***

From a TTW they can receive adult tax rates making the first \$18,200-\$20,000 of income tax free!

- ✓ ***Proper estate planning for a Family Trust can mean “0” tax including Capital Gains Tax & no transfer stamp duty!***
- ✓ ***For SMSFs the tax office released a tax ruling in mid 2011 that created headlines in national newspapers announcing that death taxes were back. This ruling was finalised in 2013. Proper planning now can ensure that this tax does not arise for you.***



SELF MANAGED SUPERANNUATION FUNDS



SMSF returns raise eyebrows

19 June 2014

Staff Reporter, IFA

“Contrary to some perceptions”, SMSFs outperformed APRA-regulated funds between 2005 and 2012, new research by NAB has shown. A Rice Warner analysis of APRA and ATO statistics commissioned by NAB indicates that during the period from 2005 to 2012 SMSFs generated an average annual return of 7.7 per cent compared to the average 4.9 per cent return produced by the rest of the superannuation industry. Taking fees into account, SMSFs produced a return of 6.8 per cent over the eight years compared to 4.1 per cent for the rest of the superannuation industry. NAB’s David Gell said the analysis shows that not only have a million Australians chosen to manage their own retirement savings , “they’re actually doing a particularly good job of it”.

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TWO TAILS



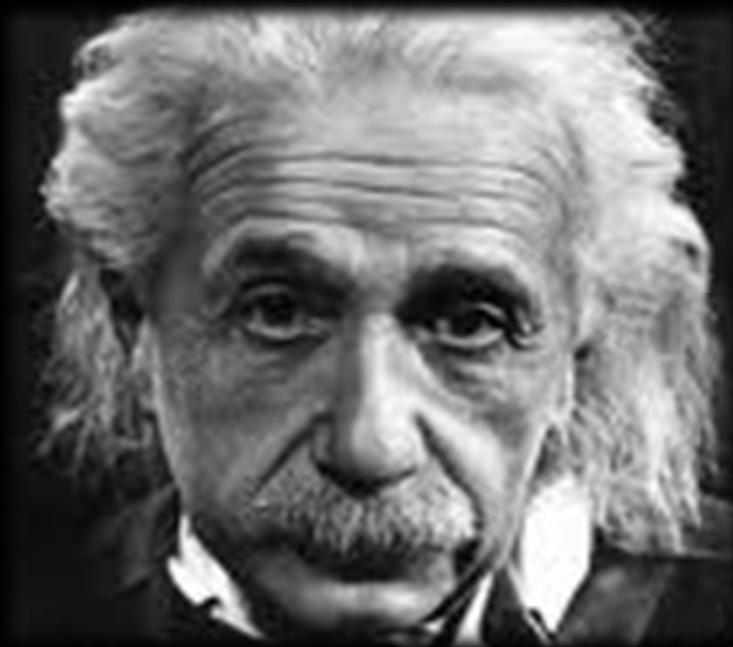
YOU'RE FLYING BY THE SEAT OF YOUR PANTS>>>YOU STINK!

S55(1)-SIS Act- a Trustee must not contravene a rule in the trust deed or other governing rules of the fund.

Every action must be checked against trust deed for compliance!

Fail to do so & fund may become non-complying.
= PENALTY TAXES
= FINES TO TRUSTEES OF UP TO \$10200!!!
= MAX IMPRISONMENT NO LONGER 5 YEARS



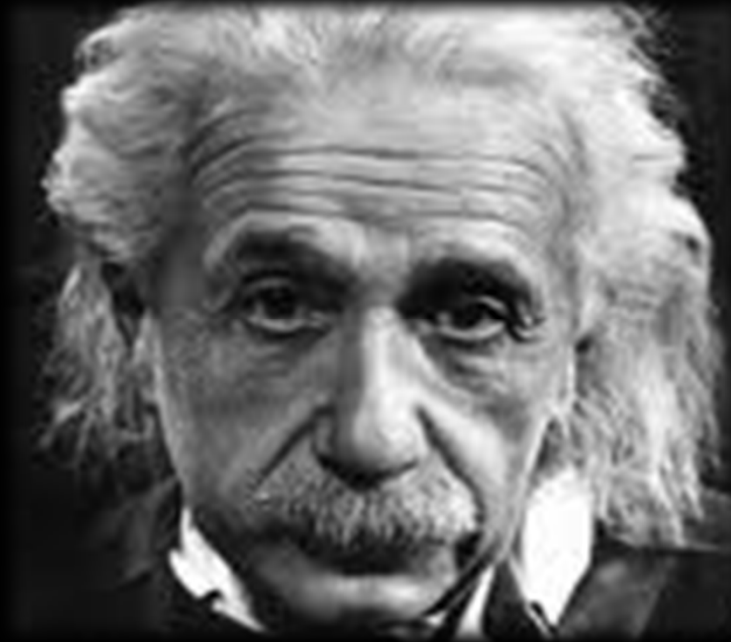


HEAD n TAIL

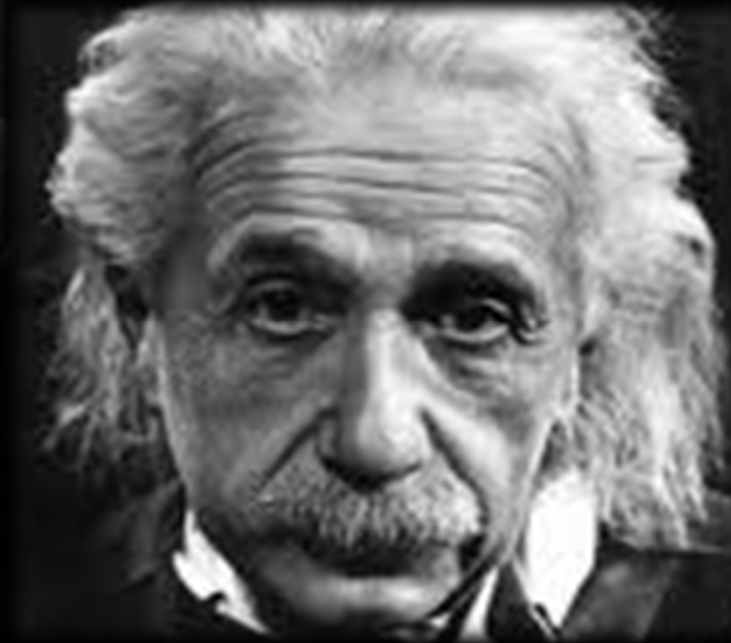


PLAYING 2 BOB EACH WAY > RUSSIAN ROULETTE



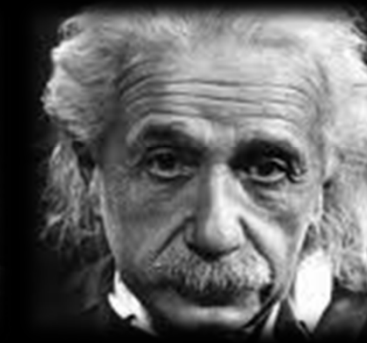
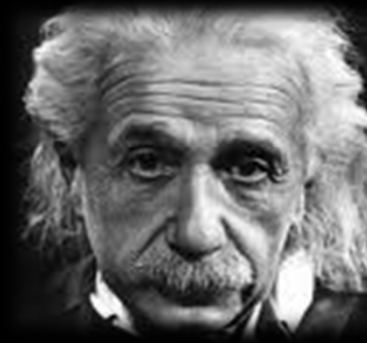
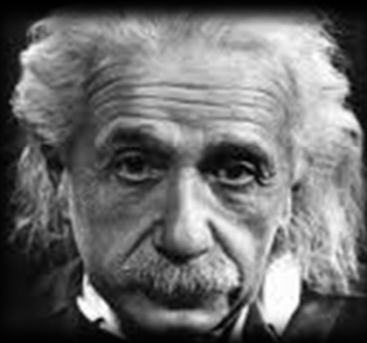
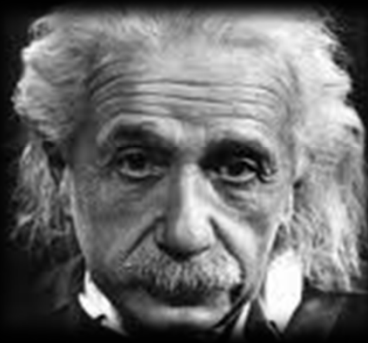
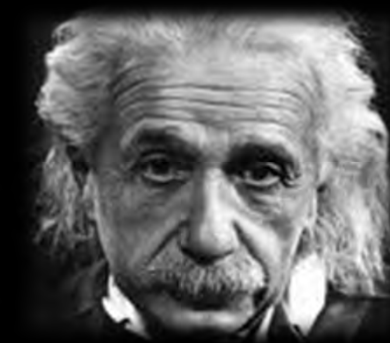
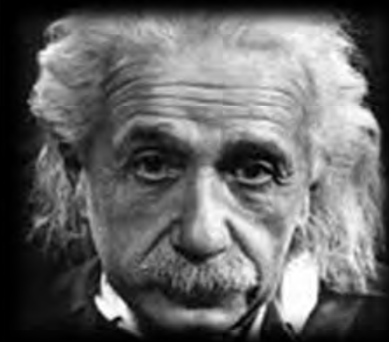
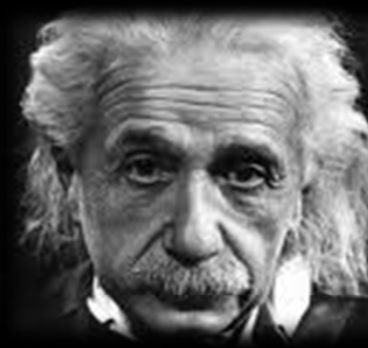
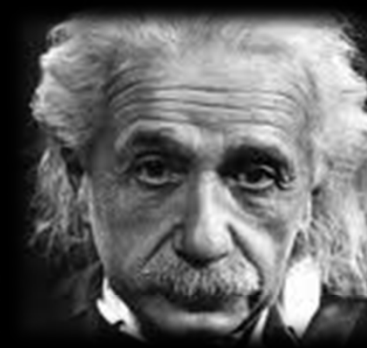
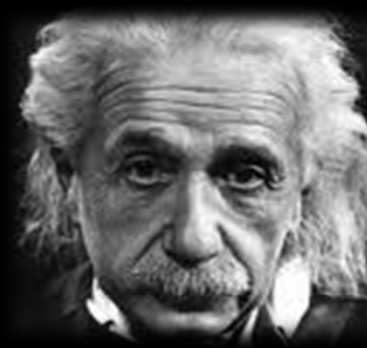
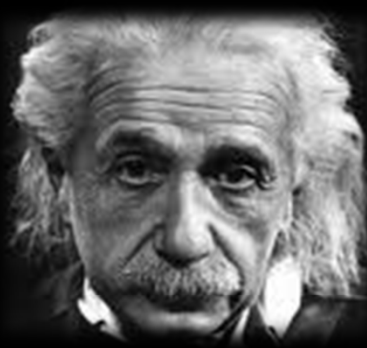
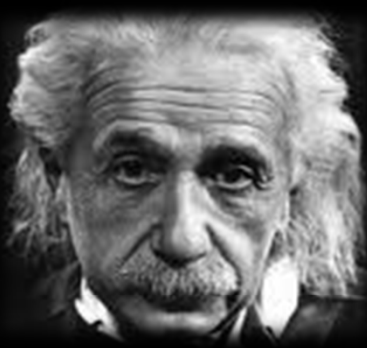


TWO HEADS



YOU ARE A WISE TRUSTEE>>>RIGHT





RIGHT



**YOU LEARN THE RULES
&
FOLLOW THE RULES**

YOUR SMSF DEED FROM

SMSF LAW

Specialising in Self Managed Super funds



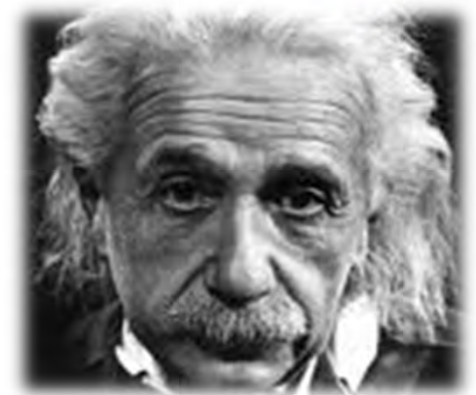
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Family Estate and Asset Protection Planning





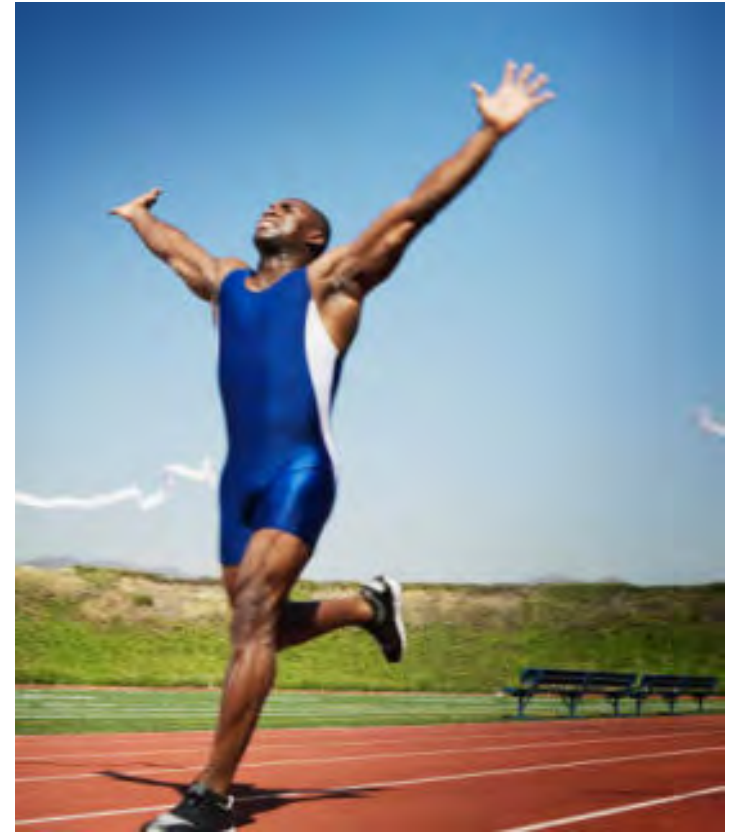
RIGHT



SMSF ADVANTAGES



OR



SOVEREIGNTY

SMSF ADVANTAGES



OR



WHO  **CARES**
ABOUT MINIMISING
YOUR TAX

MAXIMISE LEGAL
TAX MINIMISATION

SMSF ADVANTAGES



OR



INVESTMENT CHOICE

SMSF ADVANTAGES



OR



**STRONG TEAM
OF UP TO FOUR**

SMSF ADVANTAGES

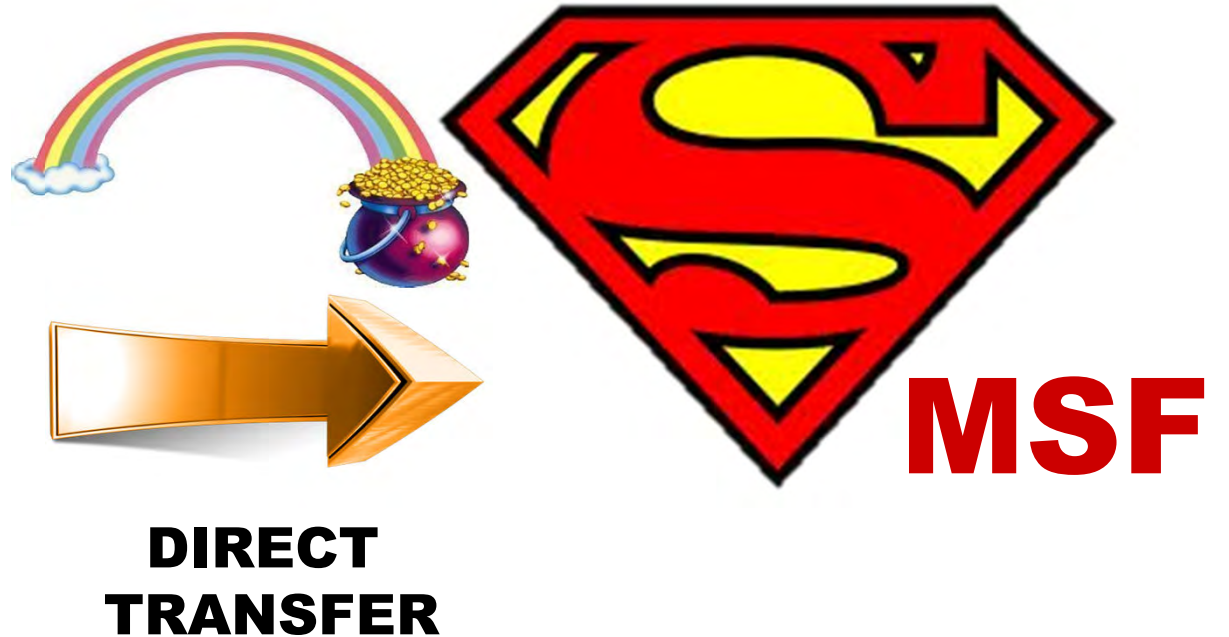


OR



**PENSION
ESTATE PLANNING
INSURANCE**

SMSF ADVANTAGES



SMSF ADVANTAGES



OR



YOUR OWN PREMISES



Your fund of fortune score card

			Your Answer	Correct Answer
Q1. What is a SMSF Deed?	A	The document detailing the governing rules of the SMSF.		
	B	An annoying document Accountant or Lawyers charge too much for.		
	C	The title to the SMSF.		
	D	Something done by good Samaritans.		
Notes:				
Q2. How do you amend a SMSF Deed?	A	Rule out the parts you don't want and interline in the new terms.		
	B	Just start a new SMSF and rollover to it.		
	C	By Deed of Amendment usually signed by the Trustees & Members of the SMSF.		
	D	You never have to amend your SMSF Deed.		
Notes:				
Q3. Can a SMSF run a Business?	A	If Auntie Julie allows it.		
	B	Definitely Not.		
	C	Yes, but must strictly comply with rules.		
	D	Yes, but ensure you don't tell anyone.		
Notes:				
Q4. How much can I pay into my SMSF?	A	9%		
	B	What my Accountant tells me to.		
	C	An amount up to the total of the concessional & non-concessional contributions caps.		
	D	As much as I want to.		
Notes:				

			Your Answer	Correct Answer
Q5. When my SMSF borrows, can it refurbish the asset it buys?	A	No! Definitely Not!		
	B	It can only repair the asset.		
	C	It can refurbish the asset from its own money.		
	D	Only if Mr Shortone approves of it.		
Notes:				
Q6. How long does a BDBN for a SMSF last once created?	A	It never lapses 'cause the ATO said so.		
	B	It depends on the SMSF Deed.		
	C	3 Years.		
	D	There's no such thing as a SMSF Will.		
Notes:				
Q7. Will the death of a member in pension phase trigger a taxable event in a SMSF?	A	No.		
	B	I need to phone a friend.		
	C	SMSF members cannot have a pension, only Industry/Retail Fund members can.		
	D	Yes.		
Notes:				
Q8. What should you do if you have a large taxable component within your SMSF and you are Diagnosed with terminal cancer & given 12 months to live? You will only be survived by children over 25 years of age.	A	Quickly join the SKI club.		
	B	Bring the kids into the fund so they can use the benefits when you die.		
	C	Have a couple of quick Scotches and do a SMSF Will		
	D	Withdraw your SMSF benefits and pay them into your general bank account.		
Notes:				
Q9. Can your Will cover your whole estate?	A	Oops I don't have a current Will		
	B	Of course, have a look at mine.		
	C	Er, no!		
	D	Only if a blue moon occurs in the same month the Will is created in.		
Notes:				

Your Legal Watchdog For Your Family Estate



Act now: book your appointment with Shane today for extra added bonuses!

Q1.

**HOW MUCH CAN A PERSON
PAY INTO THEIR SMSF?**

- A. 9.25%**
- B. What my accountant tells me to**
- C. An amount up to the total of the concessional & non-concessional contributions caps**
- D. As much as I want to**

Answer D

You can put as much as you want into your SMSF but it will have tax consequences.



But is there another way???



IT'S YOUR CHOICE WHERE TO INVEST

**OPTION 1- OUTSIDE SMSF ENVIRONMENT
BUT THIS MAY HAVE TAX CONSEQUENCES**



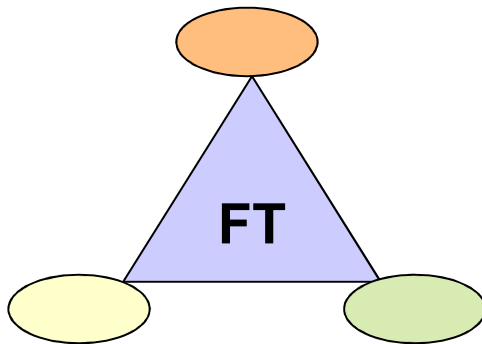
**OPTION 2- INSIDE SMSF ENVIRONMENT
FOR LOW OR NIL TAX CONSEQUENCES**



... FOR EXTRA LOW OR “NIL” TAX INCOME FOR THE SMSF MAKE RELATED PARTY LOANS TO YOUR SMSF

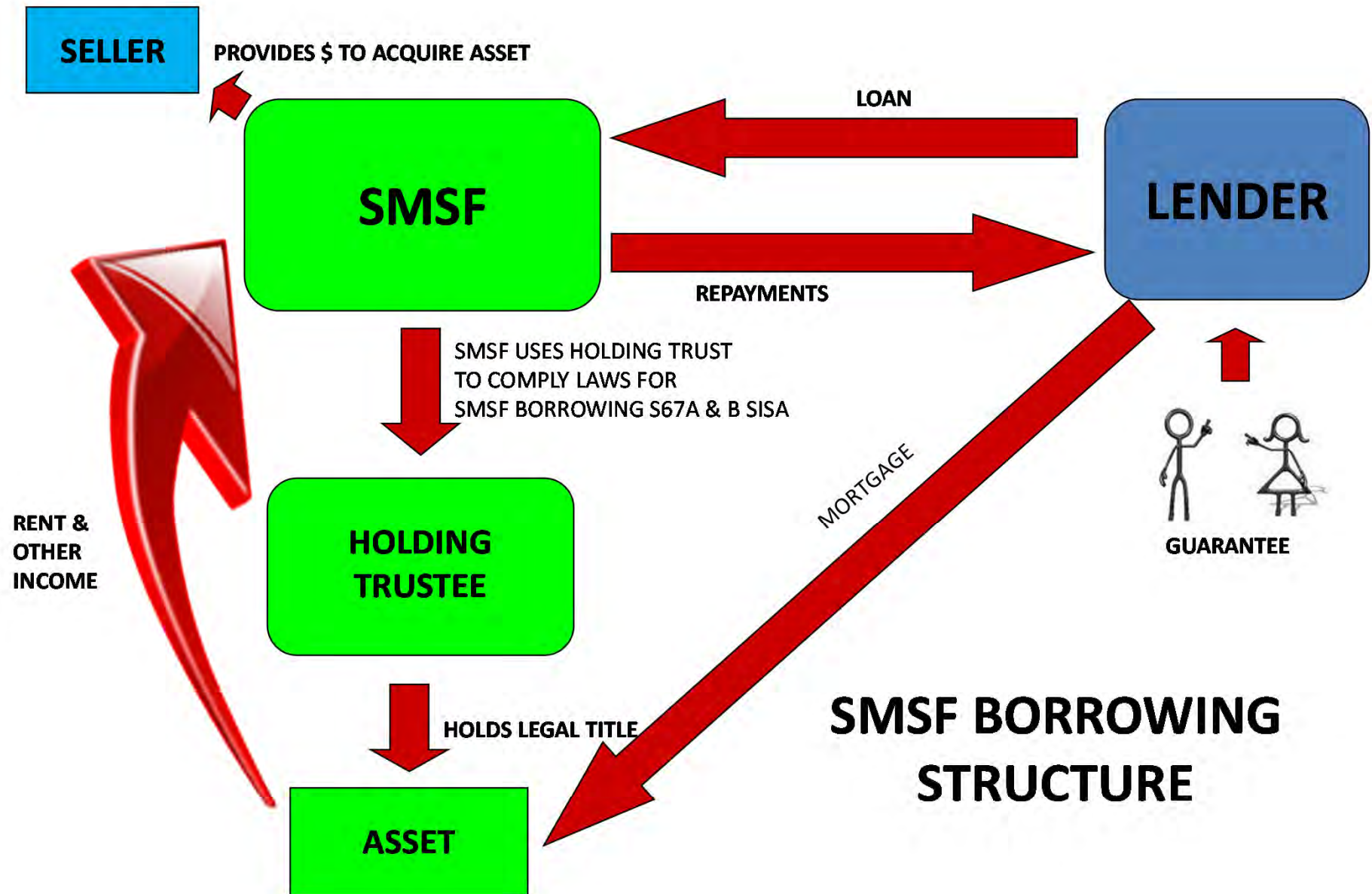


OR



TO BUY SINGLE ACQUIRABLE ASSETS

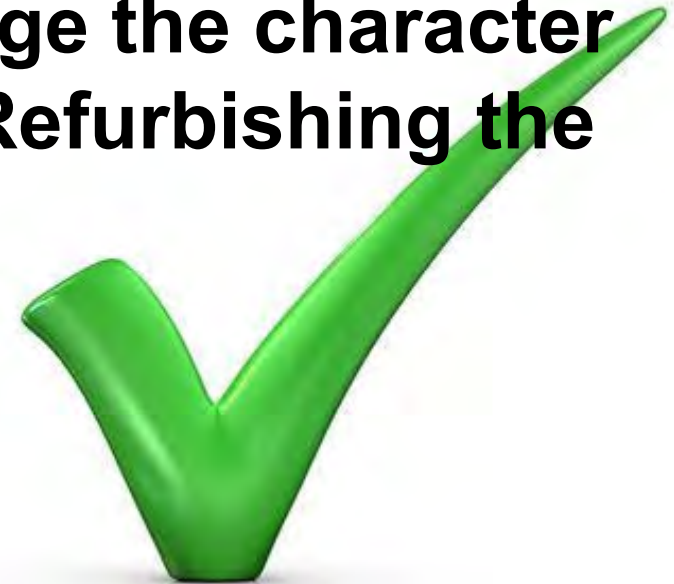




A SMSF Deed specifies the governing rules for the SMSF.

It needs to be up to date. The SMSF Borrowing Laws changed significantly mid 2011. If your Deed is older it is unlikely to comply with the new SISA SS67A & B

SMSFR2012/D1- You can now use the assets of the SMSF that are not subject to the LRB to fund improvements BUT you cannot change the character of the asset subject to the LRB e.g. Refurbishing the bathrooms is probably fine but bulldozing to build a unit block where the LRB is over a house will probably not comply.



- **NTLG Superannuation Technical minutes, June 2012**
- **7.4 Limited recourse borrowing arrangements - related party loans**
- **Issues raised**
- **If a related party lender offers a discounted rate of interest to an SMSF under a section 67A borrowing arrangement, would the discount be considered a contribution received by the SMSF?**

- ATO initial response
- If a related party lender offers a discounted rate of interest to an SMSF under a section 67A borrowing arrangement, **would the discount be considered a contribution** received by the SMSF?
- **No. The absence of a requirement to pay interest on money loaned to the trustee does not increase the capital of the fund.** A saving on an expense of an SMSF in the circumstances described is analogous to the circumstances outlined in examples 2 and 5 in Taxation Ruling TR 2010/1 Income tax: superannuation contributions. **The purpose of a person in offering a low interest loan to an SMSF does not fall for consideration if there has been no increase in the capital of the fund.**
- The outcome is different if, for example, interest incurred by the fund is paid by a third party, forgiven or reimbursed. In all of those circumstances the capital of the fund is increased as the interest liability has been met by a third party or forgiven or an amount has been reimbursed to the SMSF.

- NTLG Superannuation Technical minutes, June 2012
- 7.4 Limited recourse borrowing arrangements - related party loans
- Issues raised
- Can an SMSF enter into a borrowing arrangement under section 67A of the *Superannuation Industry (Supervision) Act 1993* (SISA) with a related party if a zero rate of interest is charged by the related party lender and only principal repayments, with no imputed interest, are made throughout the loan term in accordance with the loan agreement?

- **Note: The ATO initial response has been prepared on the basis that the arrangement is, in fact, a borrowing for the purposes of section 67A of the SISA**

- A borrowing, for the purposes of section 67A of the SISA, is an arrangement for the payment of an amount of money from one party to another where the parties intend that it will subsequently be repaid to the lender.

Although a borrowing arrangement will commonly involve an interest charge, the absence of interest will not, of itself, preclude an arrangement from being a borrowing. To determine whether a related party transaction does, in fact, amount to a borrowing, the ATO will consider any documentary evidence that is available together with any other evidence, for example whether any repayments of the amount borrowed are made.

Further information is available in SMSFR 2009/2 on the ATO's view of the meaning of a borrowing in the relevant context. It should also be noted that Taxation Ruling TR 2010/1 Income tax: superannuation contributions explains the circumstances in which the forgiveness of a loan may constitute a contribution by the lender to a superannuation fund.

Hmmm, what
about the
NALI provisions??



NALI PROVISIONS

LIMB A- INCOME FROM A NON-ARMS LENGTH SCHEME

LIMB B- INCOME IS MORE THAN MIGHT HAVE BEEN IF DEALING AT ARMS LENGTH

A related party loan is non-arms length

Usually “income” is the same not more when investing in a single acquirable asset under LRBA eg. Commercial rent or share dividend.

There is a saving on an expense because of NIL interest rate



ATO DEFINITIONS

Income

The amount of money earned from personal exertion and investments.

Expense

Money spent

**PBR 1012414213139 –ATO concluded NIL interest related party
LRBA not NALI**



The ATO Director of Tax & Regulatory Risks, Nathan Burgess said in a recent interview that the ATO is still debating the issue of Related Party Loans and NIL interest in their own four walls! He went on to say a more favourable than commercial rate of interest to the SMSF on the loan could be fine, and although it is arguable that a “0” rate of interest was ok at law, it is advisable to be careful. Recent ATO Private Binding Rulings have said NALI provisions will be triggered by a NIL interest rate which seems contrary to the NTLG ATO comments!!! The ATO has said they will likely issue a public ruling. Watch this space!



Accordingly in view of this change in the ATO's consideration of RPLs we recommend that:-

1. an interest rate be charged to the SMSF as determined via negotiation between the SMSF Trustee & the Lenders. The ATO has stated that this can be more favourable than commercial rates. (I note the "target cash rate" of money at present is 2.5% as determined by the Reserve Bank);
2. security be taken for the loans by way of guarantees from the SMSF member's in their own right (not as members or Directors of the trustee of the SMSF) together with PPSA charges over the Holding Trust assets.;
3. consideration of the Loan to Value ratios in the various loans be had.

**Q2. HOW MANY ACCUMULATION
ACCOUNTS CAN A MEMBER OF
A SMSF HAVE IN THAT
PARTICULAR SMSF?**

- A. None**
- B. As many as is required to segregate assets**
- C. One**
- D. It depends on what the SMSF Deed says**

Answer C

ONE

**Regulated by SISR Pt 7.
Contributions must be allocated to
members accounts within 28 days
after end of month they are received.**



**Q3. HOW MANY PENSION
ACCOUNTS CAN A MEMBER OF
A SMSF HAVE IN THAT
PARTICULAR SMSF?**

A. None

B. As many as is required with segregation of capital

C. One

D. It depends on what the SMSF Deed says

Answer B

**AS MANY AS IS REQUIRED
WITH SEGREGATION OF CAPITAL**

**Regulated by SISR R1.05(11A) & 1.06(9A)
with capital not to be added to
by contribution or roll over
& meet minimum payment rules**





MSF

**AUTO
REVERSIONARY
PENSIONS**

**Draft ruling TR2011/D3 WAS FINALISED ON 31st July 2013
IN TR2013/5 & states that pension exemptions cease upon
the death of a member UNLESS the pension is
specifically **auto**-reversionary. (“ARP”)**

**A SMSF Deed specifies the governing
rules for the SMSF.**

**It needs to be up to date and allow for
auto-reversionary pensions.**

**THIS HAS HUGE IMPLICATIONS WITH SMSF
ESTATE PLANNING!!! THE PENSION MUST
SPECIFICALLY STATE IT IS AN ARP.**

**Failure to comply with pension rules will
cause a pension to cease; as will
exhaustion of capital; commutation; &
death UNLESS THE PENSION IS an
ARP!!!**

**TR2013/5 is in fairly plain english.
Please choose to read it.**





BDBN

**100% TO
MY HUSBAND**

BDBN

**100% TO
MY WIFE**

BUT WHAT DID THE SMSF DEED SAY???

DEPENDANTS- S302-195 ITAA 1997



Spouse incl. same sex



**Disabled
Child**



**Kids up to 25 years
If financially dependant
Otherwise 18 years**



Ex- spouse



Interdependency



**Financial Dependants
Eg Malik & Faulls cases**

Malik's Case

Faull's Case

Noel-v-Cook

APRA Guideline No.I.C.2 stipulates:

“There is no need for one person to be wholly dependent upon another for that person to be a ‘dependant’ for the purposes of the payment standards. Financial dependency can be established where a person relies wholly or in part on another for his or her means of subsistence. *Nor must the recipient show a need for the money received from the deceased member in order to qualify as a dependant.* Moreover, since partial financial dependency can generally be sufficient to establish a relationship of dependence, it is possible for two persons to be dependent on each other for the purposes of the payment standards.”

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Dependency Declaration

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Family Estate and Asset Protection Planning

CONDITIONAL PENSIONS WITH GUARDIANS FOR YOUR PROTECTION>>>

- **MIXED BLOODLINES**
- **BLACK SHEEP IN THE FAMILY**



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Family Estate and Asset Protection Planning

**[BONUS
ROUND**

**Q4. CAN YOUR WILL COVER
YOUR WHOLE ESTATE?**

- A. Ooops, I don't have a current Will**
- B. Of course, have a look at mine**
- C. Er, no!**
- D. Only if a blue moon occurs in the same month the Will is created**

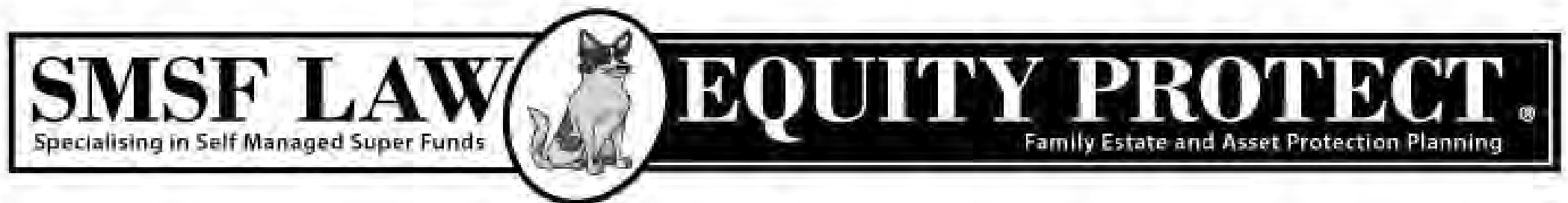
Answer C

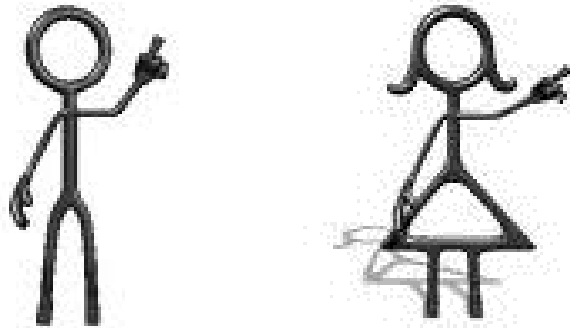
And this is the reason why >>>



ESTATE PLANNING FOR YOUR FAMILY'S PROTECTION IS

A **4** STEP APPROACH





TESTAMENTARY
TRUST

COMPANIES

TRUSTS

SURVIVORSHIP
CONTROL

INSURANCE

NOMINATED
BENEFICIARIES



MSF

DEPENDANTS

!!!!HAVE PROPER!!!!



MSF

**ESTATE
PLANNING**

**IT'S ALL ABOUT
THE QUALITY OF YOUR
SMSF DOCUMENTS**

YOUR TRUST DEED



.v-



**SMSF LAW
EQUITY PROTECT
DEED**



No Nomination

NON BINDING WISHES



KATZ CASE

MY WILL'S GOT IT COVERED



IOPPOLO'S CASE

BINDING NOMINATIONS

THE
MAGIC



MISSED
THE
MARK

DONOVAN'S CASE

**WHEN A BINDING NOMINATION
BITES YOU ON THE BUM**



WOOSTER'S CASE

DEATH BENEFIT RULE



MSF LAW EQUITY PROTECT



**PART OF RULES
OF FUND
&
BINDS TRUSTEES**



**SMSF LAW
EQUITYPROTECT
DEED**

RIGHT



MSF

WILL

Your Death Benefits-> Protected by SMSF Will



PROCRASTINATION

(I'll find a picture for you later)

***Procrastination is unfortunately
not just the thief of time but also
the robber of family wealth when
the unexpected arrives for the
unprepared!***

Shane Ellis



NOW,
IT'S
YOUR
CHOICE

IF YOU DON'T GIVE A HOOT ABOUT YOUR SMSF



DON'T DO ANYTHING MORE

BUT DOING NOTHING WITH A SMSF



IS VERY MUCH FRAUGHT WITH DANGER

IF YOU GIVE HALF A HOOT ABOUT YOUR SMSF



**DON'T FORGET TO SIGN UP FOR THE
“SUPERCHARGING YOUR SMSF” E-LETTER**

IF YOU GIVE A HOOT ABOUT YOUR SMSF



**GET ALONG TO OUR SUN, SURF
& SMSF SESSIONS**

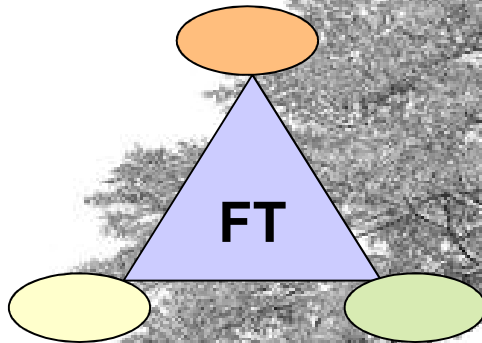




**EPAs
GUARDIANS**



ASSETS & LIFE INSURANCE



**TRUSTS
COMPANIES**



**SMSF WILL
A R PENSIONS**

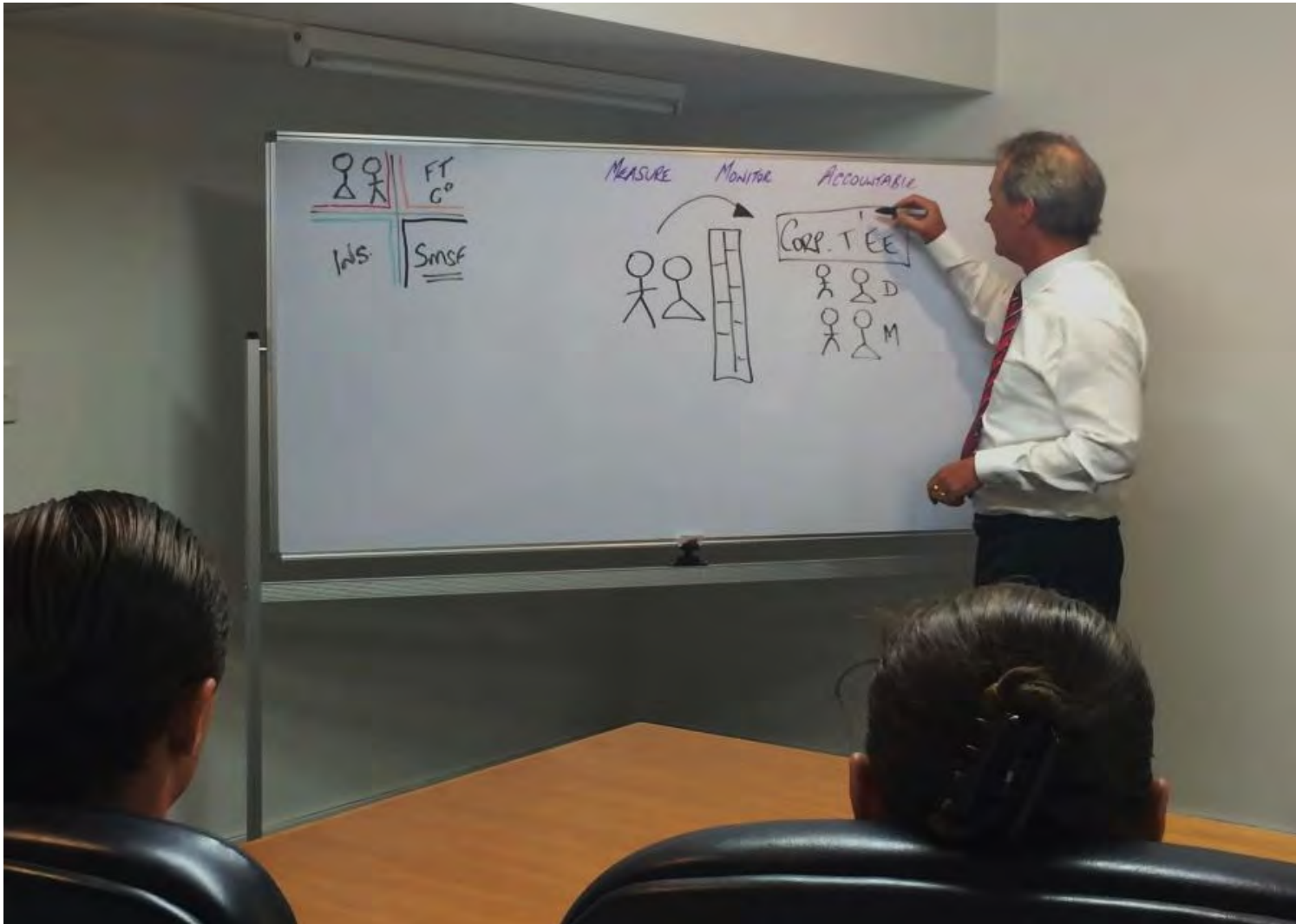


FEPP WORKS VIA STRUCTURES COMPLIMENTING EACH OTHER

IF YOU GIVE TWO HOOTS ABOUT YOUR SMSF



**BOOK A 1 ON 1 “SUPER”SESSION WITH SHANE
*NOW***



1 ON 1 “SUPERSESSION” WITH SHANE

RITE



ACT NOW!



Reduce Taxes



Protect your
assets



Ensure your Legacy
goes where you want it
to go!



SMSF Estate
Protection



sellis@ellislaw.com.au

1300 886 480



RITE



ACT NOW!



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SMSF Estate
Protection

Call J to Book Your Super Session *NOW*
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