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Your Reference: Loan Agreement - SMSF
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Build this legal document at
<https://www.legalconsolidated.com.au/smf-lending-money/> – telephone us,
we can help you complete the questions.

Adj Professor, Dr Brett Davies – Partner

Friday, 12 March 2021

Tomislav Pty Ltd ACN
67 Neutral Drive
North Sydney NSW 20
Australia
Trustee for the Tomislav

Loan Agreement

Thank you for instructing us to prepare your attached Loan Agreement.

Please read your Loan Agreement. When you are happy that the Loan Agreement expresses your wishes, print out a copy of the agreement for each person and sign the agreement.

How to print your document

When you are satisfied that the document is according to your instructions please:

1. Download the PDF (Don't print directly from the browser.)
2. Print the PDF Printer settings: A4 paper
100% scale (turn off 'fit to page')
3. Print single sided (NOT duplex).
4. Once signed keep this covering letter with the document
(However, do not staple the covering letter to the document.)

Steps to sign your Loan Agreement

1. You, as the Lender, hand the unsigned Loan Agreement to the Borrower.
2. The Borrower signs first.
3. If there are Guarantors in the Loan Agreement, then, they sign next.
4. You, as the Lender, are last to sign the Loan Agreement.
5. Each person gets a copy of the fully signed Loan Agreement. (You may wish to email it to all parties, as this is evidence that all parties received a copy.)
6. Best practice is that you transfer the money to the Borrower after all parties have signed the Loan Agreement.

What is a Loan Agreement?

A Loan Agreement is an agreement between a Lender (e.g. you) and a Borrower (the person you are lending the money to). The Loan Agreement is a formal way of setting out the terms and conditions of the loan.

The Loan Agreement sets out the rights between the parties. This includes:

1. the amount lent (or to be lent over time) to the Borrower
2. how the amount is repaid by the Borrower to the Lender
3. interest payable by the Borrower (if any)

It is important that the Borrower fully understands the nature of what they are getting into. The consequences of not repaying are serious.

Lend the money now and get the Loan Agreement signed later?

You can sign the Loan Agreement months or years after you hand over the money. The Loan Agreement is still valid. However, the Loan Agreement is stronger and more enforceable if all the parties sign it before you hand over the money.

For example, in family law, parents pay money to their son and his wife without a Loan Agreement. If the son and his wife break up, the parents do not want the ex-wife to get any of the money that they lent. The parents argue that the money was not a gift, but a loan. If that is true the parents get 100% of the money back. The ex-daughter-in-law gets none of the money. To counter this the ex-wife argues that:

1. the money was not a loan, it was a gift, and
2. that the parents are now trying to turn the gift into a loan because their precious son has deserted her.

If, the parents had got the Loan Agreement signed before the money was handed over then their position is stronger.

Similar issues arise in ATO matters, bankruptcy and insolvency.

Best practice is to get your Loan Agreement signed first, and then hand over the money.

When does the loan start?

We do not put a start date into the Loan Agreement. Instead, you need to keep evidence that the loan was made. If there was a transfer of money via your bank account, then print out the receipt provided by your bank and keep the receipt with the Loan Agreement. If it is cash, then there should be an exchange of emails or a receipt to say that the Borrower received the cash. If you provided a personal or bank cheque, then keep a copy of the cheque or the bank records with the Loan Agreement.

If you lend more money, then also keep those new records as well.

Loans 'expire' every 6 years

Even with your Loan Agreement there is a risk that over time it stops working. In Australia each State and Territory has a Statute of Limitation. Your unsecured loan goes 'stale' or 'expires' if no repayments are paid or none are demanded. This is after a certain number of years.

The limitation periods for each State and Territory for unsecured loans are:

- **Australian Capital Territory:** 6 years
- **New South Wales:** 6 years

- **Queensland:** 6 years
- **South Australia:** 6 years
- **Tasmania:** 6 years
- **Victoria:** 6 years
- **Western Australia:** 6 years
- **Northern Territory:** 3 years

For all jurisdictions (except the Northern Territory) your Loan Agreement is 'barred' after 6 years under the Statute of Limitation. Have the Borrower pay \$1.00 just before the 6-year period to start the 6-year period again.

For the Northern Territory have the Borrower pay \$1.00 just before the 3-year period to start the 3-year period again.

There are other ways to freshen up the loan. Telephone us if you need help.

Professional lenders of money

There are two types of Lenders:

1. **Professional lenders:** banks such the Commonwealth Bank of Australia and ANZ, other lending institutions such as AMP; pawn brokers and shop owners providing laybys.
2. **Non-professional lenders:** other people such as mum and dad lending money to a child; a person lending money to a friend; a person or company lending money not as part of their business or as a one off transaction.

This Loan Agreement is for **non-professional lenders**. If you are a professional lender please contact us for a quote.

Who gets copies of the Loan Agreement?

Keep a fully signed original of the Loan Agreement for yourself. The Borrower also keeps a copy. Your financial professional should also keep a copy. If you have Guarantors, then each Guarantor must also get a fully signed copy of the Loan Agreement.

Keep records of any repayments with the Loan Agreement. If you lend more money keep evidence of this also with the Loan Agreement.

Keep the receipts and other documents with the Loan Agreement so it is all kept together and up-to-date.

Who should be my witness?

The witness to the Loan Agreement is a person over the age of 18 and who is of sound mind. They are not involved in the transaction in any way, such as a relative. The best person to use as a witness is a 'stranger'. Someone like a neighbour, accountant or financial planner. Your spouse and children should never witness your signature.

Is this a secured loan?

This document is for an unsecured loan agreement. This means that if the person who borrowed the money goes bankrupt, you stand in line with the other unsecured creditors.

However, the Loan Agreement does authorise you to lodge caveats, mortgages and other securities with the relevant regulator. We are happy to help you in this regard, if you require.

Can I forgive the debt?

At any time, you can forgive the debt. You forgive the debt via a document called a *Deed of Debt Forgiveness*. We can help you prepare that document.

What happens if the Lender dies?

You are owed money. You now die. Your rights under the Loan Agreement now go to your beneficiaries named in your Will. The debt is still owing. The person now owes the money to your Estate. The executors collect the debt just as you would have collected the debt.

Commonly, a Loan Agreement is from a dad (Lender) to a child (Borrower). Let's say your son owes the debt to you and your son is one of the beneficiaries. In your Will you leave everything to your three children. You now die. Your son's entitlement under the Will is reduced by the debt.

What happens if the Borrower dies?

The Borrower owes you money under the Loan Agreement. The Borrower dies. The debt does not die with the Borrower. The debt survives death. The executor of the Borrower's Will is obliged to pay off the debt. Instead of enforcing the Loan Agreement against the Borrower you now enforce the loan against the dead Borrower's estate.

Can I set up the Loan so that when the Lender dies the loan is automatically forgiven?

You don't do this in the Loan Agreement. If you wish to forgive a debt at the Lender's death, then put that as a specific gift in your Will.

However, why would you want to forgive the debt at death? Let's say you have 3 children. You lend them each \$100,000 each via three Loan Agreements. You and your spouse die, and you leave everything to the children equally. Well, the children just collapse the debt themselves. All is fair and equal.

But what if:

1. you lent a further \$250,000 to only one child. Then at death, you would expect that the child pays back the \$250,000 to make the gifting to all 3 children the same.
2. or instead, what if one of the children does the right thing and pays back the \$100,000. If you forgave all debts, then the child would have been given less than your other two children. It would be unfair.

Think long and hard about whether you want to forgive the debt at death. But if you do, then do it in your Will.

Can the Lender borrow money and then on-lend it to the Borrower? And claim a tax deduction?

QUESTION: My business entity needs some money. My business entity can borrow money from the bank. However, the bank will lend me the money at a

lower interest rate. Can I borrow the money and on-lend it to my business entity? Importantly, I want to claim a tax deduction for the interest that the bank charges me.

ANSWER: It is sad that the bank lends money to mum and dad with a home as collateral, cheaper than it lends money to your business entity. But there you have it.

It is common for you to borrow money from the bank with the bank using your family home as security. You then on-lend the money to your business entity.

Importantly: You can only claim the interest that the bank charges you if you make a 'profit' by on-lending the money.

Even a small 'profit' of 0.1% is enough. For example, you borrow money from the bank at 10%. You need to make a profit. So, you lend the money to your business entity with a small mark up. So, you may charge 10.1%. However, you never know what the bank is going to charge. It changes. Therefore, leave in the default wording 'as demanded by the Lender from time to time'.

What if the Lender borrows money from a Bank and on-lends it to the Borrower? Can the Lender claim a tax deduction?

Example:

1. The Borrower asks the Lender for some money.
2. The Lender does not have any money. But the Lender can redraw some money from their home mortgage. If you have real estate then banks lend money at a lower interest rate. If you have no property (that the bank can take a mortgage on) then the interest rate is higher. Home loan interest rates are low. Non-secured or business loans suffer a higher interest rate.
3. Therefore, the Lender may decide to borrow money from the bank at a low interest rate. The Lender then lends the money to the Borrower under this Loan Agreement you are building.
4. Can the Lender claim a tax deduction for the interest it pays to the bank?
5. The answer is:

No: if the Lender is not making a profit out of on-lending the money to the Borrower.

Yes: if the Lender is making a 'profit' by borrowing money from their bank and on-lending it to the Borrower.

Example: Dad wants to help his son

Young Johnny wants to borrow some money to buy a boat. The bank will charge a high interest rate. This is because Johnny has no property. Therefore, the bank cannot take a mortgage to secure the loan. However, Johnny's Dad does have a home and Dad borrows money from the bank at a low-interest rate.

Dad wants to claim a tax deduction on the interest he pays the bank.

Therefore, Dad charges, say, a 1/4 of per cent higher interest rate (0.25%). This is over and above what the bank charges. For example, the bank charges Dad 5% interest. And Dad charges Johnny 5.25%. Therefore, Dad makes a profit. Dad is making a profit out of his business venture. Dad can now generally claim the 5% interest off the tax (he also declares the income of 5.25%).

Example: Dad wants to lend money to his company

Dad operates a business. In this example, it is a company. The company approaches the bank for a loan. But the bank wants to charge the company a high interest rate. Instead, Dad can mortgage his family home or rental property that he owns. The loan is at a much lower interest rate.

The bank takes a mortgage over Dad's real estate. Dad borrows the money at a low interest rate. Dad now on-lends the money to his company via the Loan Agreement he is building on the website.

Silly Dad: Dad decides to lend the money to the company at a zero interest rate. That is silly. If Dad does that then he cannot claim the interest that the bank charges. Also, the company cannot claim any expenses in borrowing the money from Dad. This is because the interest rate was zero.

Smart Dad: Instead, Dad should on-lend the money to his company for a 'profit'. The profit does not need to be that high. Even a 1/4 or 1/2 a per cent interest rate over what the bank is charging him should be enough. For example, Dad borrows money from the bank at 10% interest. He then on-lends the money to his company for 10.25%. Dad makes a small profit. Dad now claims the bank interest off his tax. (He also claims the interest paid from the company as income.)

(Dad's company claims all interest it pays as an expense. But that is unimportant for the sake of this example.)

Example: Dad wants to lend money to his business

You may be borrowing money from the bank using the equity in your home as collateral. You may then lend the money to your family, family trust, company or business.

You want to claim a tax deduction for the money you borrowed from the bank. But you can only claim a tax deduction if you make a profit on the on-lending of the money. You need to charge just a little bit more than what you were charged by the bank. Therefore, if you are currently borrowing money from the bank at 6% then you need to loan that money to your business at a slightly higher rate of, say, 6.1%.

Example: you borrow money from the bank at 8%. You then loan it to your business or another person for 8%. That is wrong. You can't claim the interest that the bank is charging you because you didn't make a 'profit' from on-lending the money to the other entity.

Example: you borrow money from the bank at 7.25%. You then lend the money, through the Loan Agreement you are currently building to another person for 9%. Because you are making a 'profit' you can claim the interest the bank is charging you as an expense.

You are in the business of lending money for a profit. Therefore, your costs (such as the interest the bank charges you) are tax deductible.

Can I charge an excessive interest rate to move profit from one entity to another?

In a service trust, the doctor, engineer, or other professional hires the services of his family members and family trust to do jobs for the practice. The service trust does the bookkeeping, cleaning, providing staff etc... It can also lend money to the doctor for business purposes. The charges have to be fair and commercial. Similarly, be careful not to charge an interest rate that is over the fair market rate.

This, of course, only relates to a non-arm's length transaction. If you are dealing with a stranger (rather than a related party) then you can charge whatever rates the parties agree.

If you are lending to a related party (your family or an entity you control) then the interest rate has to be commercial. This is if you or the Borrower are claiming the interest rate as an expense.

What is a 'commercial' interest rate?

If you are lending without security then the rates charged by a credit card company may be commercial. If ANZ is charging 20.25% on unpaid credit card amounts, then that is a good argument that 20.25% is commercial for non-secured loans.

As the interest rate can change, by an exchange of emails, speak to your accountant as to what the accountant believes is commercial, based on your circumstances, for the time period.

Arm's length dealings

Obviously, if you are dealing with a non-related external third party (i.e. not your son or Family Trust) then this issue is not so important. This is because the ATO generally accepts a transaction when the parties are not related.

Related party 'at call' loans provided to your company Debt/Equity Rules

If you hand money to a company it is either a loan (good) or an injection of equity (generally bad). If you built this Loan Agreement for the Debt/Equity rules, only then is the following information relevant to you.

Background

The Debt/Equity tax rules started 1 July 2001. They bias financial interests in companies as equity, rather than debt.

It is generally better to treat money you put into your company as a 'loan' rather than an injection of 'equity'. If your loan is classified as equity rather than debt then:

1. any interest payable on the loan is not tax deductible (but potentially frankable as a dividend).
2. any repayment of the loan by your company is usually treated as the payment of a dividend.
3. the thin capitalisation rules that apply to disallow debt deductions may also be impacted by the debt/equity classification of 'at call' loans.

In other words, if the loan is deemed to be an injection of equity it is expensive and hard to get the money out of the company.

What are 'related party at-call' loans?

A 'related party at-call' loan is a financing arrangement. This is between a company and someone related or connected to your company. For example, the lender maybe you, your spouse, children, shareholder or a Family Trust. 'At call' means that the lender can demand back the money at any time. (In contrast a loan may be for a fixed period. E.g. you will pay me back the money in 5 years' time.)

Let's say you make a loan to your company – but there is nothing in writing. There is no written loan agreement. In your minutes and in your accounts, you classified the loan as a related party 'at-call' loan. But, sadly, this is not good enough.

Debt / Equity rules for 'at-call' loans

Consider this 'at call' loan:

Keith owns shares in his company. Keith lends \$100,000 to his company. He forgets to get a loan agreement. Sadly:

1. there is no written loan agreement
2. there is, therefore, nothing documenting the loan
3. there is no fixed repayment term for the loan

The arrangement between Keith and his company is that the loan is repaid when Keith demands repayment – 'at call'.

Sadly, under the Debt/Equity rules (subject to the *de minimis* exception) the ATO treats the loan as an injection of equity; and not as a loan.

Therefore:

1. any interest payable on the loan is not deductible to Keith's company.
2. where the loan is subsequently repaid to Keith, the repayment is often classified as a non-share dividend paid from his company. Therefore, Keith is assessed on the repayment of the loan.

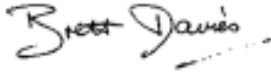
\$20 million turnover exception (*de minimis* exception)

The above rules do not apply to companies with an annual turnover of less than \$20 million (excluding GST). However, it is not worth the risk. Your accountant, for proper accounting standards and business practice, requires the attached Loan Agreement. This puts the matter beyond doubt.

Further, if in any year your company does achieve a \$20m plus turnover all loans are turned into equity, at that time.

This now concludes the matter. Thank you for your instructions.

Yours sincerely,



Adj Professor, Dr Brett Davies, CTA, AIAMA, BJuris, LLB, LLM, MBA, SJD
National Taxation Partner
LEGAL CONSOLIDATED BARRISTERS & SOLICITORS

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*Dr Brett Davies
Partner
Legal Consolidated Barristers & Solicitors*



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Adj Professor, Dr Brett Davies - Partner

Loan Agreement

Loan Agreement

This Loan Agreement is between:

Tomislav Pty Ltd ACN 616 016 541
67 Neutral Drive, North Sydney NSW 2060, Australia
Trustee for the Tomislav Horvat Super Fund
(Lender)

and

Tomislav Petar Horvat
128 Farrell Road, Port Melbourne VIC 3207, Australia
Trustee for the Tomislav And Marija Horvat Family Trust
Marija Horvat
128 Farrell Road, Port Melbourne VIC 3207, Australia
Trustee for the Tomislav And Marija Horvat Family Trust
(Borrower)

Tomislav Petar Horvat
128 Farrell Road, Port Melbourne VIC 3207, Australia
(Guarantor)

The parties agree as follows:

Background

- a) The Borrower wishes to borrow money from the Lender.
- b) The Lender is prepared to lend the money to the Borrower on these terms.
- c) The Borrower allows encumbrances, mortgages and caveats over any of the Borrower's assets and real estate.

1 Dictionary

These words mean:

- 1.1 **Amount Lent** \$50,000 plus any further amounts advanced from time to time
- 1.2 **Borrower** also includes executors, administrators, personal representatives, successors and assignees of the Borrower
- 1.3 **Consideration** is the Lender providing the Amount Lent and the Borrower paying the Repayment Amount
- 1.4 **Date of the Loan** the date that the Consideration was advanced on or the date the Loan Agreement was signed, whichever is the earlier or as agreed by an exchange of emails
- 1.5 **Instalment Amount** the Amount Lent payable as an instalment as agreed by the parties from time to time or on the Term of the Loan
- 1.6 **Instalment Dates** as advised by the Lender from time to time
- 1.7 **Interest or Interest Rate** as demanded by the Lender from time to time
- 1.8 **Lender** includes executors, administrators, personal representatives, successors and assignees of the Lender
- 1.9 **Loan Agreement** this loan agreement
- 1.10 **Mortgage** includes any security documents including a mortgage that refer to this Loan Agreement
- 1.11 **Repayment Amount** includes:

A Self-Managed Superannuation Loan Agreement is an agreement between a Lender (your SMSF) and a Borrower. This SMSF Loan Agreement is a formal way of setting out the terms and conditions of the loan.

The ATO cannot stop an SMSF lending money. This is assuming it is in the best interest of the SMSF to lend money. Your SMSF may even lend money to a 'related party'.

- 1.11.1 Amount Lent
- 1.11.2 Interest
- 1.11.3 all other moneys, costs, charges, damages and expenses owing to the Lender under this Loan Agreement and includes:
 - (a) all sums advanced by the Lender to protect any property
 - (b) all amounts expended by the Lender to cure or attempt to cure the Borrower's failure in its performance of the Borrower's obligations and covenants in this Loan Agreement
 - (c) all other moneys, interest, costs, charges, damages and expenses owing to the Lender for the time being under this Loan Agreement
 - (d) any further advances or credit accommodation
 - (e) where there is a Mortgage then this definition is increased so that it includes Secured Moneys as defined by that Mortgage

Your SMSF invests and seeks to grow wealth. Lending money can achieve this. But tick these boxes before you lend the money:

- 1.12 Security as that term is defined in the Loan Agreement
- 1.13 Term of the Loan payable on demand as demanded by the Lender plus any extension as stated by the Lender

Interpretation

- 1.14 If the Borrower comprises two or more persons, the terms on their part bind and are observed and performed by them jointly and each of them severally, and may be enforced against any one or any two or more of them. Each of them are liable for 100% of the Repayment Amount.
- 1.15 Headings are for convenience only and do not affect interpretation.
- 1.16 A reference to a 'person' includes a reference to: an individual; body corporate (wherever incorporated); body politic; association of persons (whether incorporated or unincorporated) partnership; trust; person in the capacity as a trustee; person in the capacity as the personal representative of a deceased estate and superannuation fund.
- 1.17 The plural includes the singular and vice versa and a reference to any gender includes every other gender.
- 1.18 A reference to this Loan Agreement includes a reference to any amendment, variation, supplemental deed or replacement from time to time.
- 1.19 A reference to any party to this Loan Agreement includes successors or assignees.
- 1.20 A reference to laws in this Loan Agreement refers to those laws as amended or replaced as consistent with the overall purpose of this Loan Agreement and not lead to an anomaly.
- 1.21 A reference to any statute, subordinate legislation or instrument includes statutes, subordinate legislation or instruments amending, modifying, correcting, re-writing, re-enacting or replacing them and a reference to a statute includes subordinate legislation and instruments made under that statute.

1. SMSF investment strategy. Does the Investment Strategy allow the SMSF to lend money?
<https://www.legalconsolidated.com.au/smsf-investment->

2 What Happens?

The Lender lends the Amount Lent to the Borrower. The Borrower pays the Repayment Amount to the Lender pursuant to the terms of this Loan Agreement.

3 What Happens if an Instalment Amount is delayed?

Irrespective of anything in this Loan Agreement, if the Instalment Amount is unpaid for 7 days after the relevant Instalment Date (whether formally demanded or not) then the Borrower is in default of the Loan Agreement.

4 Is there Security?

4.1 For the Consideration, the Lender is authorised to direct the Borrower to sign all documents required to charge and register all the Borrower's interest in:

- 4.1.1 land the Borrower owns or controls from time to time (this includes tenancies at will, equitable mortgages, mortgages, caveats and other encumbrances of any nature whatsoever); and
- 4.1.2 other assets, fixtures, choses in action and chattels owned or controlled by the Borrower, including by way of debentures, fixed & floating charge mortgages, equitable mortgages, caveats, Personal Property Security Register (PPSR) and share capital.

(collectively **Security**)

This Security is also for the repayment of the Repayment Amount and all interest on the Repayment Amount and costs incurred by the Lender because of the Borrower failing to observe and perform such promises under this Loan Agreement. Any Security is subject to the requirements of the law and is read down if it breaches any laws under the *Superannuation Industry (Supervision) Act 1993*.

4.2 The security created by this Loan Agreement has priority over every interest except a prior encumbrance.

Irrevocable Power of Attorney

4.3 For the Consideration, the Borrower provides an irrevocable power of attorney to sign all documents expedient or necessary to deal with and otherwise register any Security or security document or documents.

4.4 For the Consideration, the Borrower (and where more than one jointly and severally), irrevocably appoints the Lender (and where more than one jointly and severally) as the Borrower's true and lawful attorney to:

- 4.4.1 complete any blanks left in the Loan Agreement;
- 4.4.2 do, execute and perform any other deed, agreement, matter, act or thing which, in the Lender's opinion, ought to be done, executed or performed to perfect or to perform the transactions and any Security contemplated by the Loan Agreement; and
- 4.4.3 sign all documents expedient or necessary to deal with and otherwise register any Security or security document or documents

4.5 The Borrower declares that:

- 4.5.1 this irrevocable power of attorney is given for valuable consideration and is irrevocable without the Lender's prior written consent

2. SMSF Trust Deed. Does the SMSF Deed allow lending?

3. SMSF compliant Loan Deed: build and sign the SIS compliance Loan Deed BEFORE your super fund lends the money

- 4.5.2 the powers and authorities given under this irrevocable power of attorney remain in full force and effect until their revocation by written notice to the Borrower, given with the Lender's prior written consent
- 4.5.3 the Borrower ratifies and confirms whatever the Lender lawfully does, or causes to be done, under this irrevocable power of attorney
- 4.5.4 the Borrower indemnifies and keeps the Lender indemnified against all claims, demands, costs, damages, losses and expenses, howsoever arising, consequent upon the exercise of all or any of the powers and authorities contained in this irrevocable power of attorney

5 What other Costs and Charges Does the Borrower Pay?

- 5.1 The Borrower pays to the Lender all the Lender's costs and expenses (including, but not limited to, the instructions for, and the preparing, executing, transfer duty, stamp duty (if any) and registering of, this Loan Agreement and any discharge;
 - 5.1.1 the instructions for, and the preparing, executing, transfer duty, stamp duty (if any) and registering of, this Loan Agreement and any discharge;
 - 5.1.2 any exercise or attempted exercise of the Lender's powers; and
 - 5.1.3 any breach of the Borrower's promises under this Loan Agreement
- 5.2 The Borrower pays the Interest Rate to the Lender on all outstanding capital and expenses. The Lender calculates this from the date of demand for payment.
- 5.3 The Borrower pays all duties, stamp duty, registration fee, due diligence fees, ongoing registration fees and replacement registration fees payable for this Loan Agreement, transaction required and all filing and registration fees regarding this Loan Agreement, and any discharge and costs relating to the recovery of all or any part of the Repayment Amount.

It is possible for an SMSF to lend money to an unrelated third party. But, there are strict rules. Speak to your accountant before you do so:

- *Is lending money part of your SMSF's investment strategy?*

6 Where the Borrower is acting as a Trustee

- 6.1 When the Borrower is acting in the capacity of trustee, then the Borrower has the power in the capacity as trustee to:
 - 6.1.1 borrow and raise money from any person, on a full or non-recourse basis, with or without security, mortgage or charge, including via an overdraft
 - 6.1.2 provide any guarantee or indemnity for payment of money or for the performance of any person's contractual obligations
 - 6.1.3 mortgage, lien, pledge, charge, guarantee or otherwise provide the trust asset for security for any borrowing, raising, facility, guarantee, indemnity, lease or other contractual obligation, whether such contractual obligations relate to the trust or not
 - 6.1.4 provide the Security
 - 6.1.5 give and execute any mortgage, charge or other security over all or any part or parts of the assets of the trust fund as the Lender wishes, to secure the payment or the performance of any contract obligation under or in connection with any transaction including this Loan Agreement
- 6.2 The Borrower further warrants that:

- 6.2.1 the terms of the trust do not restrict the right of a Lender to have recourse to the assets of the trust to satisfy any liability to the Lender incurred by the Borrower as trustee.
- 6.2.2 any trust document authorises the Borrower (and while a company, its directors) to enter into transactions despite any conflict of interest that may arise on the part of the Borrower as trustee.
- 6.2.3 notwithstanding anything to the contrary, the Borrower may enter into any relationship (legal or otherwise) irrespective of whether there is a conflict of personal interest, with any person, including related parties (including the Borrower if the Borrower is a sole trustee) to do all things in such manner, on such terms (favourable, unfavourable or otherwise), whether there is a conflict of interest as the Borrower thinks fit.
- 6.2.4 the terms of the Loan Agreement do not restrict the right of the Lender to be fully indemnified out of the assets of the trust to satisfy any liability incurred by the Borrower arising out of any transactions including this Loan Agreement.
- 6.3 The Borrower:
- 6.3.1 is empowered to open and operate bank accounts
- 6.3.2 is empowered to enter into contracts personally with the trust
- 6.3.3 irrespective of the above the Borrower, whether acting as trustee or not, is always personally liable for the obligations, debts and the Amount Lent under this Loan Agreement

- Does the lending meet with the SMSF sole purpose test? SMSFs are for the sole purpose of providing benefits to members upon their retirement.
- Is the SMSF Loan on an 'arm's length basis'.

7 What happens if a Transaction is void?

If any claim is upheld, conceded or compromised that any transaction affecting in any way the Repayment Amount or the observance or performance of the Borrower's promises is void or voidable then the Lender becomes entitled against all the parties to all rights for the Repayment Amount or the observance of the other Borrower's promises as if that transaction had not taken place.

8 What are the other Terms of the Loan Agreement?

8.1 Continuing Security

This Loan Agreement is a continuing security until satisfaction of all terms of the Loan Agreement. This is notwithstanding any settlement of account or intervening payment.

8.2 Statutory Powers

The powers given under any statute (except to the extent inconsistent with the terms in this Loan Agreement) are in addition to the powers given under this Loan Agreement. The Lender may exercise such powers when the Lender becomes entitled to demand payment of any part of the Repayment Amount.

8.3 Not to Prejudice Other Securities

This Loan Agreement does not extinguish, merge, prejudice or affect any other security that the Lender may at any time hold for the Repayment Amount.

8.4 Where the Borrower is a Company

Where the Borrower is a company all current and future directors agree to be bound by this Loan Agreement jointly and severally as though they were the Borrower.

8.5 Notice Demand or Consent

8.5.1 any communication under this Loan Agreement is in writing and signed by the party giving it or via email. Except as otherwise provided the communication may be delivered or sent by registered post or via email.

8.5.2 communications by post are deemed received 48 hours after posting and immediately if sent by email.

8.6 Power to Remedy Default

If the Borrower defaults under this Loan Agreement then the Lender may do such things and pay all such moneys as in the absolute opinion of the Lender are desirable to secure the faithful performance of every promise in this Loan Agreement. This is to protect the Lender against the risk of loss or damage of such default by the Borrower. All moneys and payments made by the Lender under this clause are repayable by the Borrower to the Lender upon demand. Until so repaid the money is deemed part of the Repayment Amount and bears Interest as provided under the Loan Agreement.

8.7 Liability of Lender

The Lender is not answerable or accountable for any involuntary losses that occur in the exercise of any powers given under this Loan Agreement or any statute.

8.8 Third Parties

Where the Lender (or attorney) exercises any of the powers, given under this Loan Agreement or by statute, no purchaser or other person dealing with the Lender is concerned to inquire whether the Lender has authority or correctly exercised its powers. Such exercise of the power is unimpeachable.

8.9 Effect of Waiver

No consent or waiver by the Lender under this Agreement releases the Borrower from any part of this Loan Agreement. The Lender accepting any interest payment from the Borrower's default does not prejudice the Lender of any rights under this Loan Agreement.

8.10 Certificate by Lender States How Much is Owing

A certificate signed by the Lender (or by the Lender's solicitors, attorneys or officers) as to the amount of the Repayment Amount and Interest and any other act is prima facie evidence of the facts.

8.11 No Merger

Notwithstanding any judgment that the Lender may recover against the Borrower, the Lender holds such judgment collaterally with this Loan Agreement for the due payment of the Repayment Amount with interest and this Loan Agreement does not merge in such judgment.

8.12 Proper Law

- *Is the loan on a commercial basis?*
- *Are the interest rate and repayments reflecting what a normal unrelated lender requires?*
- *Is the SMSF loan in the best interest of the SMSF?*

This agreement is governed and construed according to the laws of the State or Territory in which the Lender resides in, as evidenced by the Lender's address in the Loan Agreement. Each party irrevocably submits unconditionally to that jurisdiction and of all courts competent to hear appeals for any legal action, suit or proceeding arising from the Loan Agreement.

8.13 Effect of Signing

This Loan Agreement is binding upon each person who has signed it notwithstanding that:

- 8.13.1 another party has failed to sign it;
- 8.13.2 part of the Loan Agreement is avoidable or unenforceable; or
- 8.13.3 the whole or part of the Loan Agreement is avoidable or unenforceable against another party.

8.14 Severability

If any part of this Loan Agreement becomes void or unenforceable then only that part is severed from this Loan Agreement. All parts that are not void remain in full force and remain unaffected by the severance.

8.15 Changing the Instalment Amount

The Instalment Amount may be varied from time to time by agreements between the parties evidenced by an exchange of emails or letters.

8.16 Changing the Instalment Dates

The Instalment Dates may be varied from time to time by agreements between the parties evidenced by an exchange of emails or letters.

8.17 Changing the Interest Rate

Unless stated otherwise, the Interest payable and Interest Rate may be varied from time to time by agreement between the parties evidenced by an exchange of emails or letters.

8.18 Allocating the Repayment Amount

The monies provided by the Borrower for the Repayment Amount are allocated as the Lender sees fit from time to time to either the repayment of capital, Interest or other amounts, whether currently payable or not.

8.19 Where there is more than one Lender

Unless there are minutes signed by all the Lenders to the contrary, the Amount Lent is provided equally by each of the Lenders.

9 Guarantee

In consideration of and to induce the Lender to enter in to the Loan Agreement, the Guarantor provides this guarantee (Guarantee):

- 9.1 unconditionally and absolutely guarantees to the Lender, the full and prompt payment and performance by the Borrower of all the Borrower's obligations under and pursuant to the Loan Agreement. This includes paying the Repayment Amount. It further includes the full and prompt payment of any and all costs and expenses of

There are additional rules when lending to a 'related party'. Your SMSFs cannot lend money to members or their 'relatives'. Section 65 prohibits your SMSF providing financial assistance, such as a loan, to members or your relatives.

- and incidental to the enforcement of this Guarantee, including, without limitation, reasonable lawyer and accounting fees.
- 9.2 agrees that the Lender, may from time to time, without notice to the Guarantor, which notice is waived by the Guarantor, extend, waive, renew or compromise the Repayment Amount, in whole or in part. This is without releasing, extinguishing or affecting in any manner whatsoever the liability of the Guarantor. The Guarantor consents to the above acts.
- 9.3 agrees that the Guarantee remains in full force and effect and is binding upon the Guarantor until the terms of the Loan Agreement are performed in full plus the Repayment Amount is paid in full.
- 9.4 agrees that so long as any portion of the Repayment Amount is due and owing or to become due and owing by the Borrower to the Lender, the Guarantor must not (without the prior written consent of the Lender) collect or seek to collect from the Borrower the claim, if any, by subrogation or otherwise, acquired by the Guarantor or through payment of any of the Repayment Amount.
- 9.5 agrees that the Guarantor will not seek to recover any monies from the Borrower until the terms of the Loan Agreement are performed in full plus the Repayment Amount is paid in full (unless the Lender has given its written prior consent).
- 9.6 agrees that the possession of the Guarantee by the Lender is conclusive evidence of due execution and delivery by the Guarantor.
- 9.7 agrees that the Guarantee is binding upon the legal representatives, heirs, assigns and assigns of the Guarantor, and inures to the benefit of the Lender, its successors, assigns and legal representatives.
- 9.8 agrees that the Guarantor may be joined in any action or proceeding against the Borrower under this Loan Agreement. Further, recovery may be had against the Guarantor in any such action or proceeding or in any independent action or proceeding against the Guarantor. This is if the Borrower fails to duly and punctually pay and perform any of the obligations under the Loan Agreement. This is without any requirement that the Lender first assert, prosecute or enforce any remedy or claim against the Borrower.
- 9.9 agrees that the Lender may start an action or proceeding against the Borrower without requiring or joining the Borrower to such an action.
- 9.10 agrees that this Guarantee is deemed a contract made under and pursuant to the laws in the State in which the Lender is situated, as evidenced by the Lender's address in the Loan Agreement. Where more than one Lender, then the first Lender's address and is governed by and construed under the laws of such State. Further, wherever possible, each provision of this Guarantee is interpreted in such manner as to be effective and valid under applicable law. But if any provision of this Guarantee is prohibited by or invalid under the applicable law, such provision is ineffective only to the extent of such prohibition or invalidity without invalidating the remainder of such provision or the remaining provisions of the Guarantee.
- 9.11 agrees that no failure on the part of Lender to exercise, and no delay in exercising, any right or remedy operates as or constitutes a waiver. Nor does any single or partial exercise of any right or remedy preclude any other or further exercise or the exercise of any other right or remedy granted or by any related document or by law.

A 'relative' of an SMSF member includes:

- a parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendant
- adopted child of the member or their spouse
- a spouse of any individual stated above

9.12 agrees that where there is more than one Guarantor, they are all liable jointly and severally. Each Guarantor is liable for 100% of the Repayment Amount.

The Guarantor agrees that:

9.13 the Guarantor is not presently insolvent or bankrupt and will not be rendered insolvent or bankrupt by virtue of the execution and delivery of this Guarantee;

9.14 the Guarantor has not executed or delivered this Guarantee with actual intent to hinder, delay or defraud the Guarantor's or Lender's creditors;

9.15 that the Lender has entered into the Loan Agreement in reliance on this Guarantee.

SIGNED as a Deed on the day of

EXECUTED for and on behalf of

Tomislav Pty Ltd

ACN 616 016 541

Trustee for the Tomislav Horvat Super Fund

Lender, by authority of its Directors in accordance with section 127 Corporations Act 2001 (Cth)

Signature of Director or Secretary

Signature of Director

In the movies, IOUs are often handwritten on a piece of paper. Sometimes instead of an SMSF Loan Agreement, someone does a 'minute'. Both approaches fail. Only a legally prepared Loan Agreement satisfies the ATO, Bankruptcy Courts and Family Court. Only a legally prepared Loan Agreement supports mortgages and debentures.

SIGNED, SEALED AND DELIVERED by

Tomislav Petar Horvat

Trustee for the Tomislav And Marija Horvat Family Trust

The Borrower acknowledges the warning to have this Loan Agreement explained by an independent lawyer. The Borrower by signing below declares and warrants to the Lender an understanding of the nature of this Loan Agreement and the financial nature of the loan. The Borrower acknowledges that Legal Consolidated acts only for the Lender.

Borrower:

Tomislav Petar Horvat

(Signature of witness)

(Name of witness)

SIGNED, SEALED AND DELIVERED by

Marija Horvat

Trustee for the Tomislav And Marija Horvat Family Trust

The Borrower acknowledges the warning to have this Loan Agreement explained by an independent lawyer. The Borrower by signing below declares and warrants to the Lender an understanding of the nature of this Loan Agreement and the financial nature of the loan. The Borrower acknowledges that Legal Consolidated acts only for the Lender.

Borrower:

Marija Horvat

(Signature of witness)

(Name of witness)

You can build this document here:
<https://www.legalconsolidated.com.au/smsf-lending-money/>

SIGNED, SEALED AND DELIVERED by

Tomislav Petar Horvat

The Guarantor acknowledges the warning to have this Loan Agreement explained by an independent lawyer. The Guarantor by signing below declares and warrants to the Lender an understanding of the nature of this Loan Agreement and the financial nature of the loan. The Guarantor acknowledges that Legal Consolidated acts only for the Lender.

Guarantor:

Tomislav Petar Horvat

(Signature of witness)

(Name of witness)