

PROPERTY TITLE VERIFICATION

With the current economic environment, and the downfall of such organisations as Opes Prime and Westpoint, ensuring the title of your assets is of utmost importance. An area of concern that has been identified by Landgate is that residential and commercial properties held in Family Trusts, Unit Trusts and Superannuation Funds have not been registered correctly, potentially exposing these properties to creditors, and resulting in non-compliance.

Property is unable to be registered in the name of trusts and SMSFs directly, and thus they are registered in a trustee capacity as the legal owner. For example: Bob Smith as trustee for the Smith Family Superannuation Fund would be registered on the title as Bob Smith. In order to ensure the ultimate beneficial owner is identified correctly and the trust or SMSFs ownership is indefeasible, Landgate requires that a declaration of trust or caveat is registered on the title.

If a declaration of trust or caveat was not registered on the property, the following issues could occur:

- A mortgage could be created over the property, which would breach the Superannuation Legislation and result in a non-complying fund;
- There would be no clear separation of assets for the SMSF, which would also breach the Superannuation Legislation;

- A property may be incorrectly accounted for from a tax point of view
- A property may be sold and the proceeds deposited in an incorrect account;
- If the trustee was subject to a creditor or Family Law action, the property could form part of the assets available.

For example:

Bob Smith holds a property on trust for the Smith Family Superannuation Fund. On the title it simply says Bob Smith is the owner. Without a declaration of trust or caveat, it is not known that the SMSF is actually the owner.

If Bob wanted to raise funds to settle a gambling debt and a title search was performed, the lender would be able to see that he owned this property, and thus lend money against it. The property would then have a charge over it, which breaches the superannuation legislation.

What Needs to be Done

To ensure that your Trust or SMSF has an indefeasible right to property it may own, you should ensure that there is a caveat or declaration of trust attached to the title. We note that auditors of SMSFs and the ATO are likely to increase their searches on property, looking for indications of ultimate beneficial owners, and request that Trustees put in place a declaration of trust.