



Super  
Concepts

# SMSF Masterclass

**Part 2 – Related parties and investment structures**

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# But first...what you need to know



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# Today's Agenda.....

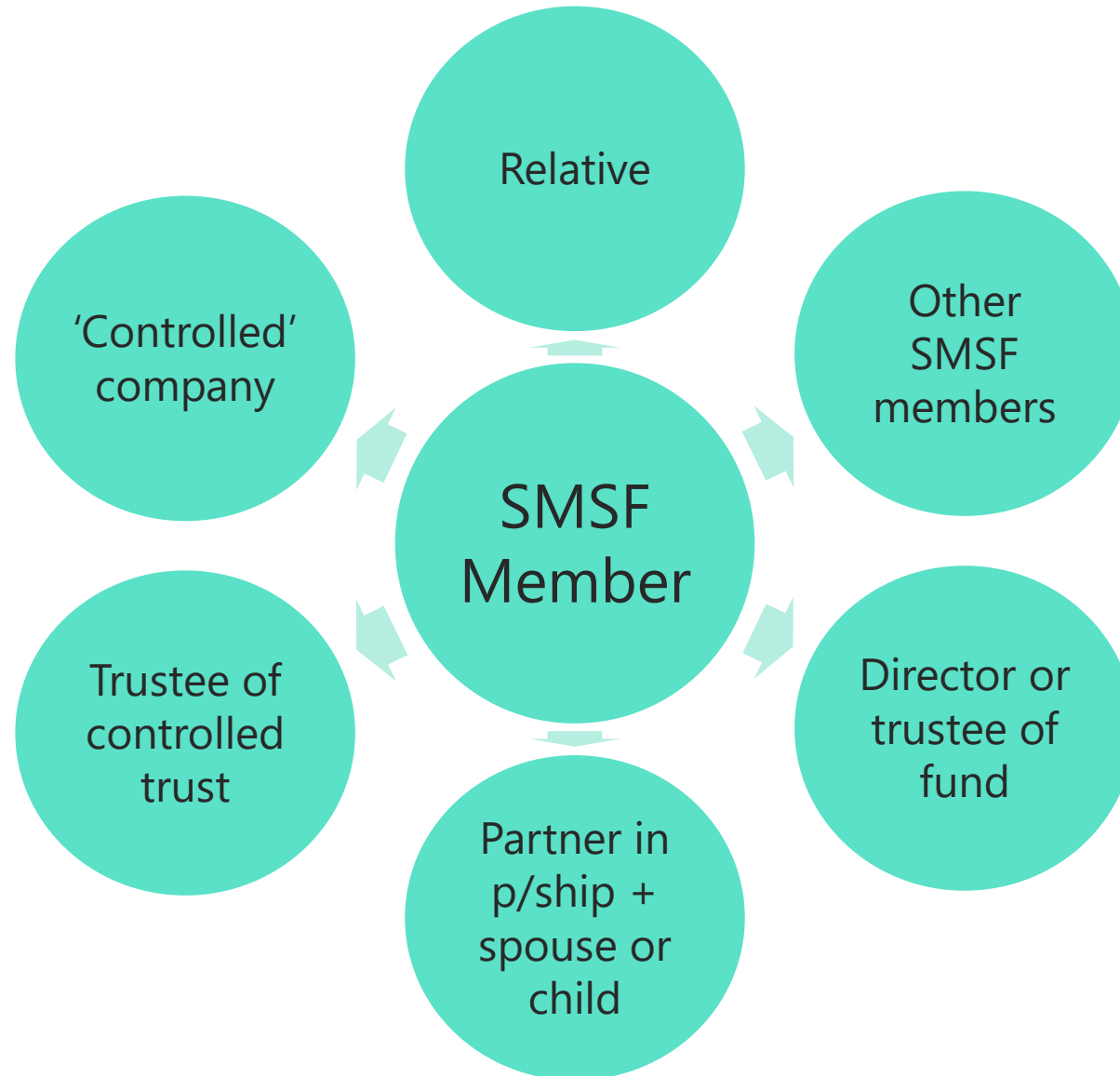
- What is a related party
- What is an in-house asset
- Investing in companies
- Investing in partnerships.

# Who is a related party?

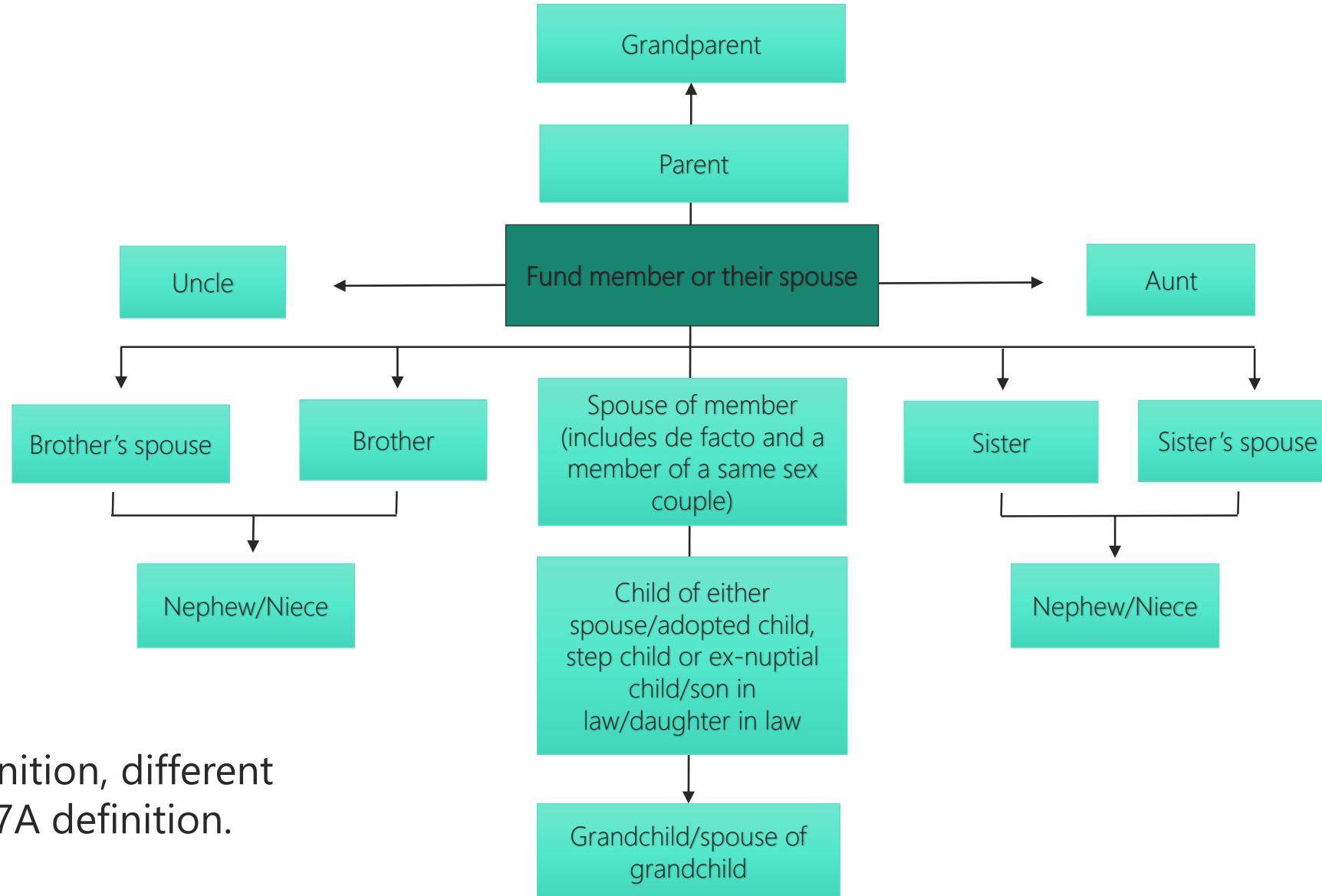
Related party of a superannuation fund includes

- Fund members, or
- Standard employer sponsors of the fund, or
- Associates of either members or standard employer sponsors of the fund.

# Part 8 Associate of Individuals – s.70B



# Who is a relative of a member?



s.10 definition, different from s.17A definition.

# Related entities - Company

To ascertain a company is related there are two tests, either

- Majority voting interest - if the fund and its associates are in a position to cast, or control the casting of, more than 50% of the maximum number of votes that can be cast at a general meeting of the company

OR

- Sufficient influence or control – if the company, or a majority of its directors, is accustomed or under an obligation (formal or informal), or might be reasonably expected, to act in accordance with the directions, instructions or wishes of the fund and its associates.

# Related entities - Trusts

To ascertain a company is related there are three tests, either

- Fixed entitlement to >50% of the capital or income.

OR

- Sufficient influence or control – if the trustee, is accustomed or under an obligation (formal or informal), or might be reasonably expected, to act in accordance with the directions, instructions or wishes of the fund and its associates.

OR

- Can appoint or remove a trustee or majority of trustees.



# Why it's important?

## s.66

- Can't acquire assets from related parties
- Exceptions
  - Listed security
  - BRP
  - Units in Widely held trusts
  - In-house assets
    - Or would be if not excluded

## In-house assets

- s.71: definition
- s.82 – s.83: limits

## Collectables

- s.62A & r13.18AA
  - Most not be stored in private residence of related party
  - Must not be used by related party
  - Must not be leased to related party
  - Qualified Independent valuation required if disposing to a related party

# In-house asset definition

- S.71: An in-house asset is
  - A loan to, or an investment in, a related party of the fund, or
  - An investment in a related trust of the fund, or
  - An asset of the fund, subject to a lease or lease arrangement between the trustee of the fund and a related party of the fund
- Also includes a list of exceptions
  - Assets specified in Regs not to be an IHA
  - Widely held trusts
  - LRBA.

# Acquiring investment in...

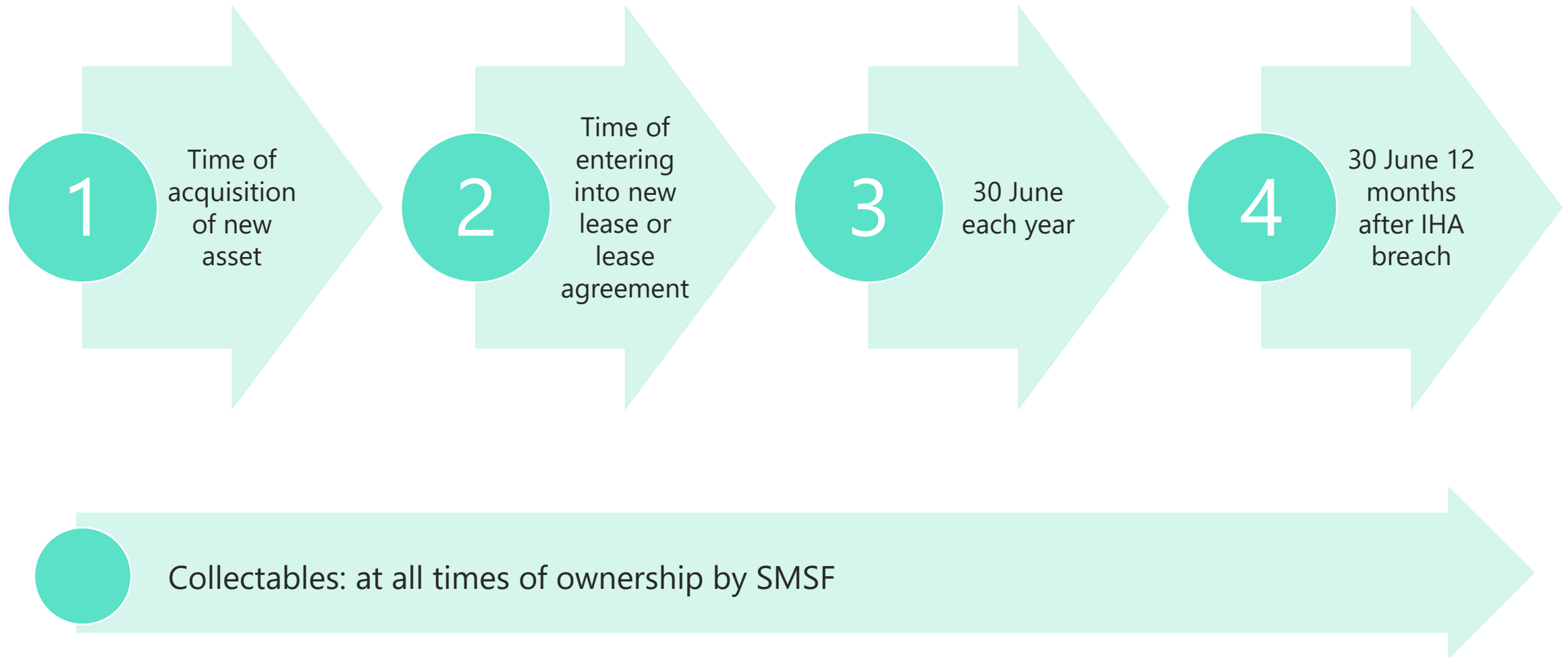
## Controlled entity

- Can acquire from RP
- In-house asset
  - Unless exempted

## Non-controlled entity

- Cannot acquire from related party
  - Unless listed securities/widely held trust
- Cannot rely on IHA 5% limit

# In-house asset test - when is it important?



# Case study 1 – investment options

- George & Jane are looking for a new investment for their SMSF (Jetson S/F)
- Their daughter, Judy, has recently opened a gallery & picture framing business through her company (Spaced Out Pty Ltd)
- George & Jane would like to give Judy a boost in her business
- George & Jane raise a series of questions with you.

# Case study 1 – investment options

- Can Jetson S/F lend money to Spaced Out?
- What about buying shares in the business?
- Could the fund acquire plant & equipment and lease it to the business?
- George & Jane also have a keen eye for art and wonder if the fund could acquire artwork (from 3<sup>rd</sup> parties) and lease them to Judy's business?
- Any other options to help Judy out, including lending directly to Judy to use the cash as she sees fit?

# Case study 1 – investment options

- Jetson S/F ends up buying a property and leasing it to Spaced Out
- The property consists of a;
  - Large open space ground floor, perfect for the gallery
  - Upstairs living quarters that will be used as an office space & storage
- After some time the business is not doing as well as hoped
  - The ground floor is re-configured to allow the office & storage to be relocated
- Upstairs is converted back to residential quarters and rented out to bring in some extra money.

# Case study 1 – investment options

- No longer being used wholly and exclusively for business purposes
- Level of IHA will depend on how lease is organised
  - Draft two new separate leases for each area
    - Areas leased to Spaced Out becomes an in-house asset; asset subject to a lease with a related party
  - Judy subleases
    - Whole property will be subject to IHA
- Written plan required to be collated and adhered to
- Removing the third party residential tenant will not rectify the situation
- The asset is now tainted.



# Case study 2 – employee share scheme

- Mary is a senior manager at an Engineering company
- The company offers an incentive based employee share scheme
- Mary has nominated her SMSF to receive the shares from this year's offer (as allowed for under the scheme)
- Separate to this, the company is also looking for new investors via a capital raising exercise
- Issues and considerations?

# Case study 2 – employee share scheme

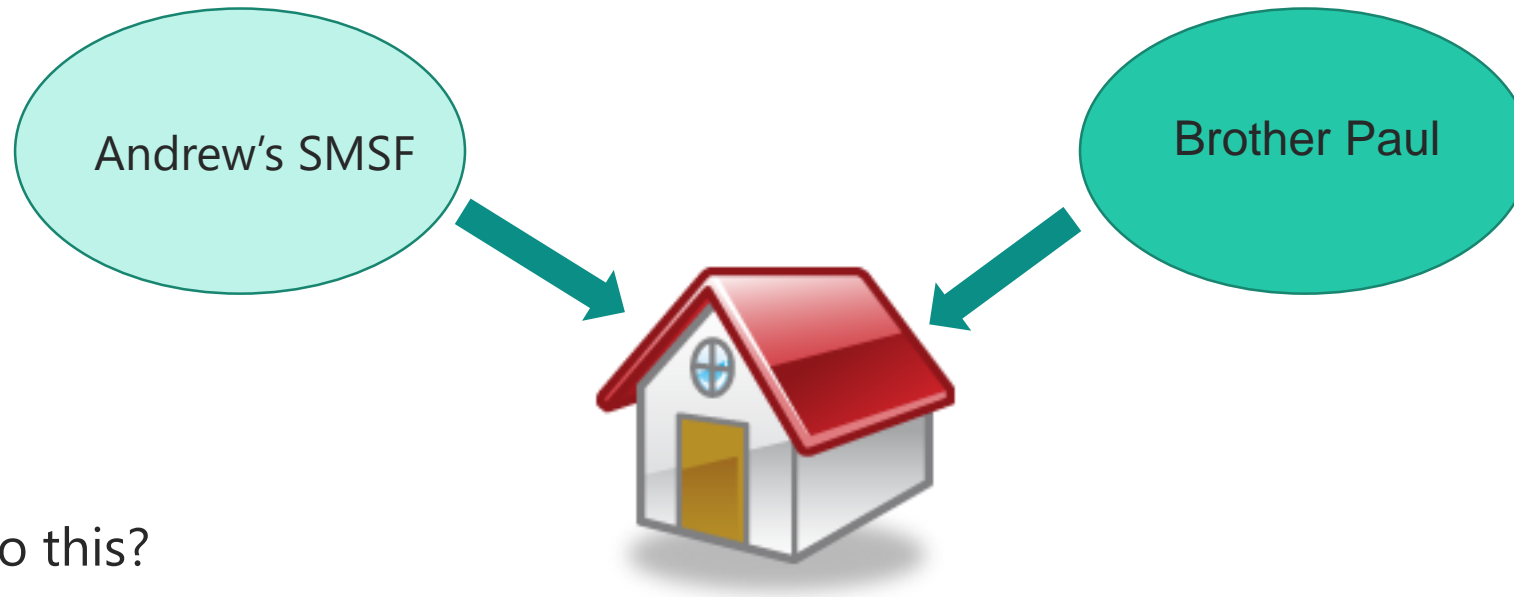
- ATO consider value of shares transferred under an ESS to be a personal contribution
- S.66 considerations
  - Listed or unlisted company
  - Acquisition at market value
- Contribution caps
- Capital raising offer more likely to be a direct investment in company
  - Acquired at market value?
- What if Mary controlled the company or it was listed?

# Investing in a company

- Advantages
  - Can retain income in company and pay dividends when suited
  - Franking credits refundable
- Disadvantages
  - SMSF may not receive regular flow of income
  - Taxation rate
  - Loss of CGT discount on disposal
  - If connected to business, risk of being available to creditors
  - Potential to tax law changes to franking credits
  - ATO scrutiny

# Case study 3 - partnership

Andrew and his brother Paul want to buy a house from a 3<sup>rd</sup> party using money from Andrew's SMSF and Paul personally



Can they do this?

Can Andrew's Fund acquire Paul's share of the house?

# Case study 3 - partnership

- Must be as tenants in common
- What name is going in title?
  - Identifying SMSF interest
- Tax law partnership
  - Joint receipt of income
- Each party to receive their share of income and pay their share of expenses
- Joint bank account
- Restriction on SMSF acquiring Paul's interest.

# Joint ventures

- Often used for property developments
- Proceeds received must reflect contribution made by parties
  - i.e. rental income or sales proceeds
- ATO expect SMSF would hold a proprietary interest in the real property being developed
  - Looking for an investment in the property and not in the related party.

# Joint venture examples

## SMSF owns land

- RP has cash
- Combine forces to develop property and sell for a profit
- Likely to be borrowing by SMSF
- Breach of s.67

## Individual owns land

- SMSF has cash
- Combine forces to develop property and sell for a profit
- Likely to be lending or providing financial assistance to member

# Investments in partnerships

- Advantages
  - Direct interest in the asset
  - SMSF can use its cash directly
  - Can develop existing asset (without borrowing)
  - Taxed at SMSF rate
- Disadvantages
  - SMSF cannot acquire residential property interest from related co-owner
  - Co-owner's actions can cause breach (e.g. inadvertent charging or financial accommodation)
  - Will generally be treated as a tax-law partnership which can have issues with tax, GST, duty and land tax
  - Duty if acquire co-owner interest.



# Next week

- Investing via trusts
- Consider an exit strategy
- Consider annual audit requirements
- Potential impacts of COVID 19.

Thank you