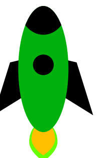
PROPERTY DEVELOPMENT USING VARIOUS STRUCTURES

With Grant Abbott

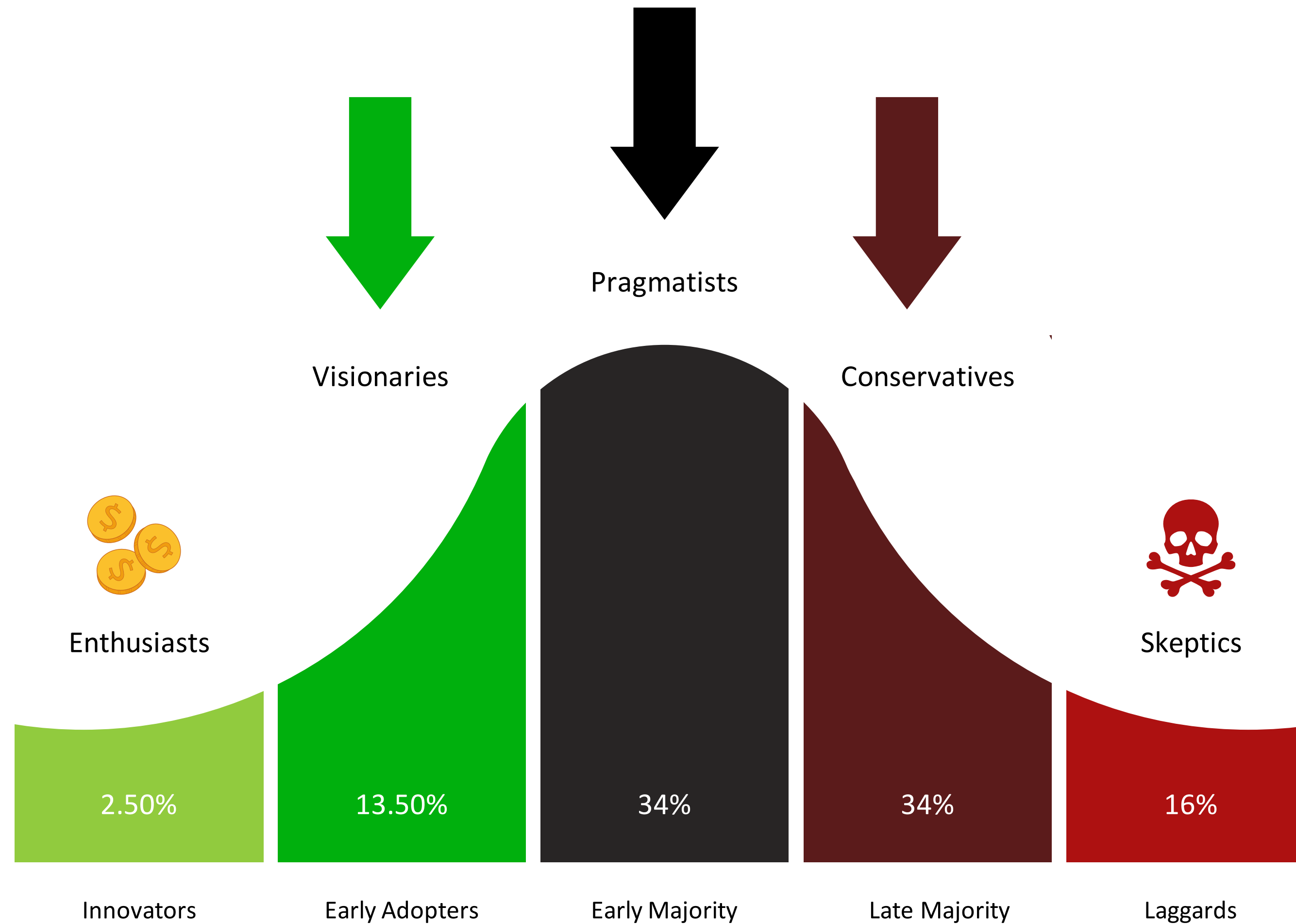
"I have been involved in the tax and super side of property and property development my whole career with my first foray being the development of Circular Quay in the 1980's. I started with big super but switched to SMSFs when I could see the power behind these mini-funds directly controlled by a family.

During that period at the private end of town syndication using small – less than 20 unitholder unit trusts were very popular. And of course, there were a lot of companies set up for small scale developments for single and multi-shareholder. But then came SMSFs and sucked capital out of the system and property development has never looked back.

Since that time, my partner at Abbott & Mourly, Tony Anamourlis and myself have been involved in more than $1Bn of property development transactions involving SMSF monies. It makes sense to 'build' wealth inside a fund to maximise retirement income. BUT there are a lot of catches, traps and ATO guidelines to watch out for but with more than $700Bn in SMSFs there is a lot of opportunity particularly in the syndication area."



NOT FOR THE FAINT HEARTED



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KEYS TO SUCCESS ARE…

- Know the structures
- Know the law
- Know your client's risk and limits
- Know what the ATO is looking for particularly for streaming of income into a concessional environment
- Know your Corporations Act if you are getting investors
- Know your financier –where is the ultimate risk in the development?
- Build from the ground up including the SMSFs, SUIT, investment strategies –the whole caboodle

THE CORE PROPERTY DEVELOPMENT VEHICLES

- **Discretionary Trust** – Good for families but need strong asset protection outside the trust in case the development fails
- **Unit Trusts** – Good but losses get locked up and there needs to be an end point and a unitholders agreement
- **Companies** – Generally a developer is in business so CGT does not apply. Good commercial vehicles the banks understand
- **SMSF** – They are not given the credit they deserve but with a strong property market and only so much equity flowing around there is a lot of forward momentum

KNOW THE CORPORATIONS ACT 2001

- An LRBA, investment strategy, an investment in property are not financial products plus the trustee of a SMSF is exempt from the licensing rules

- For other capital raisings, a SUIT is a managed investment scheme and a product disclosure statement is needed but not if meet one of the exemptions:

- Wholesale investor –SMSF has more than $2.5M

- Sophisticated investor - $250,000 annual income and $2.5M in assets

- The raise is from no more than 20 investors and for no more than $2M in any 12 month period

- Loan funds

SMSFRB 2020/1

Commissioner of Taxation

Property development can be a legitimate investment for SMSFs, and the Commissioner does not have any concern with SMSFs investing in property development where it complies with the Superannuation Industry (Supervision) Act 1993 (SISA) and Superannuation Industry (Supervision) Regulations 1994 (SISR).

However, these types of investments can cause concerns where they are used to inappropriately divert income into the superannuation environment, or if SMSF assets are used to fund property development ventures in a manner that is inappropriate for and sometimes detrimental to retirement purposes.

STRUCTURES- MOST COVERED IN SMSFRB 2020/1

- **SMSF directly** –is there a business and who cares but for me a lot of direct risk in an asset protection vehicle. Plus who has that money to plunge?
- **SMSF JV with Family Trust, Bucket Company, related entity or a third party**. Best to have the SMSF hold the property BUT watch out any charge –mortgage or caveat
- **SIS Reg 13.22C company or trust** –only in extreme, last ditch circumstances
- **Superannuation unrelated investment trust** –my go to, stick with what works but there will be dilution

KNOW THE LAW

- There is a whole range from section 62, section 84, section 66, section 67A, section 109 and section 54C
- There is also the Income Tax Assessment Act 1997 = section 295 –550 for non arm's length investment income –taxed at 45%, both income and capital gains
- ATO Guideline –SMSFRB 2020/1 is a great analysis
- Also one not well known but super important is the ATO case studies dealing with property development and income streaming

support@lightyeardocs.com.au

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