# Client Information Bulletin

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Chartered Accountants

## Personal Properties Securities Act 2009

The *Personal Properties Securities Act 2009* (Cwlth) came into effect on January 30, 2012.

The PPSA governs the registration of security interests in personal property (not land) and has changed the manner in which a supplier is able to assert a claim to assets it has sold, leased or lent to a third party.

In this regard, security interests in property, such as stock sold on credit terms under a traditional Retention of Title clause (ROT), or under bailment, now need to be registered on the Personal Properties Securities Register (PPSR), which is administered by the Insolvency and Trustee Service Australia (ITSA).

The failure of a supplier to register a security interest in their stock or other assets supplied under reservation of title arrangements, can lead to such assets being lost in the event of the appointment of an Administrator or Liquidator to the customer entity.

In order to have a valid registered security interest under the PPSA, such as a ROT claim, suppliers need to comply with the following registration timetables:

1. Where inventory is supplied, the interest MUST be registered prior to the supply of goods
2. Where non-inventory items are supplied, the interest MUST be registered no later than 15 days after control is given to the customer.

Failure to attend to the above may affect the priority claim of the supplier.

The transitional provisions under the PPSA are designed to facilitate a seamless changeover of laws. It gives suppliers automatic protection for 24 months from January 30, 2012 for supplies made prior to this date. It does this by:

- Deeming those interests to have been 'attached' and 'perfected' immediately prior to January 30, 2012; and
- Preserving the 'perfection' for 24 months.

Since the commencement of the PPSA, there have been three cases in Australia, dealing with the registration and enforcement of security interests in insolvency appointments. Two of these cases - WOW Sight and Sound and Super Butcher - both concluded that Personal Money Security Interests not registered on the PPS Register resulted in in a loss of priority for suppliers, who became unsecured creditors, despite the ROT clauses in their terms and conditions.

Below is a summary of the Super Butcher case:

- Super Butcher was a large independent meat retailer, which was placed into voluntary administration in April 2012, owing $8 million to creditors, including $600,000 to one pork supplier and more than $1 million to AusWide Wholesalers. Both companies failed to register security interests against Super Butcher.

  Despite the goods being supplied under ROT provisions, the failure to register their security interest on the PPS Register resulted in a loss of their priority to the goods to other unsecured creditors.

- The first case to be heard in the Courts in Australia was in relation to the $500 million collapse of Hastie Group Limited, which was placed into voluntary administration on May 28, 2012.

  At the time of the collapse, it held substantial plant and equipment and there were 995 PPS registrations against Hastie. However, most of the plant and equipment thought to be owned by third parties remained unclaimed (approx. 77%) despite the administrators writing to registered secured parties to ascertain their respective interests.

  The administrators successfully obtained Orders from the Court to sell the plant and equipment and disburse the proceeds despite the registered security interests.

  This case highlights the importance of responding to administrators/liquidator's requests to determine the ownership of personal property, otherwise risk losing a priority position regardless of the registered security interest. It is important to review existing commercial documents.

Businesses need to be proactive in ensuring they have appropriate systems in place with regards to:

- The documents that need to be completed to establish the right to a security interest
- Registration processes that should be followed to ensure that security interests are registered on the PPSR in a timely manner
- Monitoring their stock and asset movements
- Their debt collection and account management processes
- Ensuring that their contact details on the PPSR are correct and that responses are provided to Administrators/Liquidators when required.

The lack of appropriate systems and controls in place to deal with the PPSR can have serious consequences for a business.

Talk to our office if you have any concerns.

## Amendments to the Director Penalty Regime

From June 30, 2012, the obligations imposed on directors for their company report and remit Pay As You Go (PAYG) withholding tax have been tightened. The Director Penalty Regime has also been amended to impose obligations and personal liability on directors when reporting and remitting superannuation guarantee charge liabilities. This legislation has been enacted to protect the entitlements of employees.

### PAYG Withholding Tax

Under the previous director penalty regime, directors could be made personally liable for the outstanding PAYG withholding tax liabilities of the company. The Commissioner of Taxation was not, however, able to commence recovery proceedings against directors immediately. There was a clause that stated the Commission could only begin proceedings against a director 21 days after the date on which the director penalty notice had been issued.

During the 21 day period, the director could be discharged from personal liability in one of three ways:

- By causing the company to pay the outstanding PAYG withholding tax
- By organising a written agreement to pay, or
- By placing the company into liquidation or voluntary administration.

Under the amended director penalty regime, directors can still discharge personal liability through the means outlined above except in circumstances where the amounts owing have not been reported, and are more than three months late. These amounts must be paid in full to discharge any personal liability.

The due date in relation to PAYG withholding tax is the date on which the company is required to lodge its Business Activity Statement (BAS) and pay the amount detailed in the BAS.

For example, the due date for a June quarter BAS is 28 July. Therefore, any personal liability of a director, as a result of a penalty notice, which relates to the June quarter and remains unpaid after 28 October – more than 3 months after the due date – cannot be discharged by placing the company into voluntary administration or liquidation. The amount must be paid either by the company or the director personally.

### Superannuation Guarantee Charge

The Director penalty regime has now also been extended to cover a company's unpaid superannuation contributions.

Under the *Superannuation Guarantee (Administration) Act 1992* (Cwlth), the superannuation guarantee charge is not due and payable until:

1/ The employer conducts a self-assessment to complete and submit a superannuation guarantee statement, or

2/ The Commissioner of Taxation issues an assessment.

With this system, if a director fails to lodge a superannuation guarantee statement, they can delay, or even avoid payment.

New amendments to the superannuation guarantee charge mean contributions are due and payable on the day the superannuation guarantee statement is lodged by the employer (28 days after the superannuation must be paid for the relevant quarter) whether the statement has actually been lodged or not.

The Commissioner of Taxation is now able to issue an estimate of unpaid superannuation even where no statement has been lodged.

As mentioned above, the Commissioner of Taxation is required to issue a penalty notice to a director allowing notice of 21 days. Directors have the same options when dealing with a superannuation guarantee charge related penalty notice as they have with a PAYG withholding related penalty notice.

Any amount of superannuation guarantee charge which remains unreported and unremitted, three months after the debt was due and payable becomes a personal obligation of the director even if the company is placed into administration or wound up.

In these circumstances, the only way to eliminate the director's personal liability is to have the company pay the outstanding amount, or for the director to pay it themself.

The amendments also enable the Commissioner of Taxation to recover amounts due as a result of a penalty notice from an associate of the director. Pursuant to the *Income Tax Assessment Act 1936* (Cwlth), an associate of a natural person is defined to include a relative, a partner, a spouse or child of the partner, a trustee of a trust where the director (or an associate) is a beneficiary, or a company which is sufficiently influenced by (or a majority voting interest is held by) the director (or an associate).

Statutory defences are available to directors. These defences include not being involved in the management of the company due to illness, or that the directors took all reasonable steps to have the company pay its debt, or have the company placed into voluntary administration or liquidation. If these defences are established, they may be relied upon to eliminate or reduce the claim made by the Commissioner of Taxation in relation to a director penalty notice.

For further information about these amendments talk to our Principal – Michael Burhala CA.

## Transition to retirement pensions

A transition to retirement pension is a great way to supplement your income if you are moving from full-time employment to retirement. The benefit of this pension is that it allows you to supplement your income to maintain your lifestyle if you have chosen to reduce your working hours. It may also allow you to salary sacrifice to give your retirement savings a boost and also reduce your taxation liability.

Not all superannuation funds offer transition to retirement pensions so you will have to check with your superannuation fund to determine if it is provided. You can start a transition to retirement pension in a self-managed superannuation fund, subject to the provisions in the Trust Deed.

If you have reached your preservation age (refer to the table below) you can use a transition to retirement pension to access your superannuation as a non-commutable income stream while you are still working. Non-commutable means you cannot convert the pension into a lump sum until you satisfy a condition of release, such as retirement or reaching age 65. Do not confuse preservation age with a condition of release. You may have reached preservation age but not have met a condition of release.

Your preservation age is generally the date from which you can access your superannuation benefits and depends upon your date of birth.

| Date of birth | Preservation Age |
|---|---|
| Before 1 July 1960 | 55 |
| 1 July 1960 - 30 June 1961 | 56 |
| 1 July 1961 - 30 June 1962 | 57 |
| 1 July 1962 - 30 June 1963 | 58 |
| 1 July 1963 - 30 June 1964 | 59 |
| After 30 June 1964 | 60 |

You must also withdraw a minimum amount as a pension each year and not exceed the maximum of 10% of the account balance at 1 July. Remember, no lump sum withdrawals are allowed.

In terms of taxation of transition to retirement pensions, if you are under age 60, the taxable part of your pension will be taxed at your marginal rate, but you receive a 15% tax offset if your pension is paid from a taxed source.

However, once you reach 60, your pension is tax-free if paid from a taxed source.

You can identify the taxable part of your superannuation benefit by contacting your superannuation fund or by looking at your member statement. If you are operating a self-managed superannuation fund, we will be able to help you identify the taxable portion. Most people belong to a taxed superannuation fund. Some government superannuation funds may be untaxed and in this instance you will pay higher tax on pensions.

You cannot add more money to your transition to retirement pension but if you are eligible to contribute to your superannuation, you may be able to commence a new superannuation accumulation account.

A transition to retirement pension provides flexibility in the years leading up to retirement. They may supplement your income for reduced working hours, allow you to boost your superannuation retirement savings, and save you tax. However, there is a level of complexity that needs to be addressed. Our Principal, Michael Burhala CA, will be able to assist you in determining whether a transition to retirement pension is right for you.

## Protecting SMSFs and investors against fraud

In a post global financial crisis world, with low returns from investments and superannuation, many people are worried about their savings lasting through retirement. This has made investors even more vulnerable to fraud.

Organisers of these scams are targeting any person with relatively large amounts of money to invest such as retirees or people nearing retirement (many are often members of SMSFs).

There are a number of key steps investors can take to protect against fraud.

1. **Be wary of websites**

The websites associated with these scams are just as professional as any website developed by a bank or superannuation fund. They are used to make the organisers investment 'opportunity' appear legitimate.

2. **Hang up on cold calls**

Many of these organisers cold call potential victims and promise to send out documents regarding the 'opportunity' they are promoting. If the caller fails to answer simple questions about the company, such as who owns the company and its address, hang up.

3. **Do your own checks**

People are urged to do their own checks on a company before they deal with them. Companies offering investment products must have an AFSL number. AFS-licensed companies are registered with ASIC. If a company says it does not need an AFS, report them to ASIC.

4. **Seek professional advice**

Before entering into any investments or borrowing arrangement people should always seek independent professional advice from sources other than the individual or organiser promoting the investment.

5. **Protect your identity**

People should protect their personal information by not giving out personal, banking or credit card information. All unsolicited emails should be deleted and computers and mobile devices should have current anti-virus software installed.

6. **Look out for promotions by mail, door to door, or in shopping centres**

Be suspicious of offers that seem too good to be true, including promises to access your superannuation early. Don't provide your detailed personal and financial information and don't commit to something on the spot.

If you have elderly parents or similar, make sure that they are aware of the risks and have a trusted advisor which they can discuss any such offers.

## Christmas party benefits

The provision of a Christmas party to an employee may be a minor benefit and exempt from fringe benefits tax (FBT) if the cost of the party is less than $300 per employee and certain conditions are met.

The benefit provided to an associate of the employee (i.e. partners and families if they attend) may also be a minor benefit and exempt if the cost of the party for each associate of an employee is less than $300.

Furthermore, the minor benefits threshold of less than $300 applies to **each** benefit provided, not to the total value of all associated benefits, which means you may be able to provide a gift to an employee at the Christmas party without having to pay FBT as long as each benefit provided falls under the $300 threshold.

However, be aware that the cost of providing a Christmas party is only deductable to the extent it is subject to FBT. In other words if you fall into the above exemptions you cannot claim the party as an income tax deduction.



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