

PERSONAL PROPERTY SECURITIES ACT

ANDREW NICHOLSON



The Personal Property Securities Act ('PPSA') commenced on 30 January 2012. Businesses who ignore the Act will do so at their own peril.

What has changed?

The first some businesses may hear about the PPSA is when their assets are being seized and sold by a liquidator appointed to one of their

customers, or when they can't secure finance due to interests entered against them on the Personal Property Securities Register ('PPSR').

The PPSA creates new security interests (not previously recognised), which are capable of registration. Leases, licences, financing transactions and even supply agreements (where title does not pass until payment in full) may all be caught. The Act has broad scope as it applies to most forms of personal property (but not land or fixtures) including intangible assets such as trademarks and other forms of intellectual property.

Imagine a business which leases portable sheds to customers. A customer grants a fixed and floating charge or debenture to its financier. The financier registers the charge under the PPSA. The customer subsequently has receivers appointed by the financier. The receivers take possession of and sell the sheds. Sound far-fetched? In fact that exact scenario happened when similar legislation was introduced in New Zealand and is possible under the PPSA.

In the above example the owner had a security interest in the lease of the sheds, which is capable of registration. However, the financier's security prevailed over the owner who had not taken any steps to 'perfect' their security interest by registration. The case is a warning to owners (and others who have security interests) that they cannot rely on ownership (or their previous rights) or otherwise ignore the Act. Security interests have changed under the new Act and can defeat an owner's rights if steps are not taken to preserve ownership (by registering an interest).

Overview of the PPSA

The PPSA is designed to create a one-stop shop for the registration of security interests in personal property to

consolidate the many forms of registration which currently exist. Businesses should also be in a better position to obtain finance based on the value of their personal property and should have greater certainty in an insolvency situation.

Some of the more common transactions that will be caught under PPSA (and there will be many as the Act is wide ranging) include:

- Vendor finance, hire purchase and lease purchase agreements.
- Agreements for security over assets (including company charges).
- Leases of goods.
- Retention of title (where ownership is retained until payment in full) arrangements.
- Assignment of accounts and debt factoring.
- Some agreements in relation to intellectual property.

How to prepare

Businesses should be taking the following steps now, to ensure compliance with the Act and to protect their position:

- Review your agreements and have them re-drafted where necessary.
- Assess the cost benefit of registering security interests for your various transactions and determine which interests you will register.
- Identify which assets will be affected and which agreements will be regarded as security interests.
- Consider your existing contracts and securities. Identify steps which need to be taken to protect your interests, including by registration.
- Educate staff and establish policies regarding contracts and registration.
- Establish a register of your security interests and be in a position to respond to requests for information.

We have prepared a checklist and a more detailed summary of the new Act, which are **available on request** from contactus@mullinslaw.com.au.



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DOES YOUR FAMILY TRUST DEED NEED REVIEWING?

MICHAEL KLATT



Following the High Court case of Commissioner of Taxation -v- Phillip Bamford and Ors (2010) HCA10, the Commonwealth Government amended the tax legislation to allow various types of income generated on trust property, e.g., dividends and capital gains to be streamed to different beneficiaries provided that

the Trust Deed allows for this to occur.

Generally, Trust Deeds contain provisions allowing the Trust Deed to be amended, but sometimes there are restrictions as to the amendments that may occur.

Some older Family Trust Deeds do not even contain a definition of "income" and others have an insufficient definition of income. The definition of income should allow the trustee of the Trust to determine what is income and the trustee of the Trust should be entitled to rely upon ordinary trust law concepts when determining what the income of the trust is. The Trust Deed should, however, also contain a default definition of income that provides that if the trustee of the Trust does not otherwise determine

what is income of the Trust in any particular year, then the definition of income contained in the tax legislation will apply.

The Trust Deed should also have very flexible powers enabling a trustee to stream different types of income; otherwise adverse tax consequences may result to beneficiaries of the Trust.

A full review of the relevant Trust Deed would also consider whether the trustee's powers are wide enough to include sufficient borrowing and delegation powers, including the power to appoint an Attorney for the Trust.

Consideration should also be given to the succession provisions in the Trust Deed. Who controls the Trust following the death of the primary beneficiary? Are those provisions appropriate? Are those provisions consistent with the primary beneficiary's Will and other estate planning documents?

The review should be carried out by specialist trust lawyers to ensure that a resettlement of the Trust does not occur resulting in significant adverse tax consequences for the Trust. Our Private Client section regularly reviews and amends Family Trust Deeds.

CHANGES AHEAD FOR THE SKILLED MIGRATION PROGRAM

TONY HOGARTH



Currently there are three main ways skilled overseas workers can gain permanent residence in Australia. These are through the General Skilled Migration Visa, Business Skills Entry and the Employer Sponsored categories. In July 2012, changes will be made to the Skilled Migration program by the

Department of Immigration and Citizenship (DIAC).

To date, the General Skilled Migration Visa program has been the largest entry program for skilled overseas workers to migrate to Australia as permanent residents. Skills are assessed in a nominated occupation and age, English language ability, recent employment in the particular occupation or completion of at least two years study in Australia are some of the pre-requisites for this visa subclass. A points test needs to be met. This program has enabled many overseas students studying in Australia to become permanent residents here.

Employer sponsored visas pursuant to the Employer Nomination Scheme (ENS) and Regional Sponsored Migration Scheme (RSMS) are also well supported. ENS and RSMS visas allow Australian employers to nominate highly skilled workers for permanent residence. These visas are similar, although there are slightly different criteria to be met for eligibility, depending upon whether the employer is located in cities or in regional parts of Australia. Many workers on 457 visas apply for these visas. Factors taken into account include skill, work experience, age, a vocational level of English is required and applicants must meet health and character (security) checks.

It's a two phase process. Firstly, the employer nominates the employee and once the Nomination Application is approved, the Employee's Application is separately considered. Both applications can be lodged at the same time. Employers must satisfy DIAC that they have a satisfactory record of compliance with Australian migration laws, do not have any adverse information against the business and the nominee will be employed on a salary and under working conditions that accord with Australian employment laws. The position must be for at least three years and, in the case of RSMS visas, for at least two years. A Nomination approval is valid for six months and the employee must lodge their visa application within that period (if it wasn't lodged with the Nomination application by their employer). Skills of the applicant are then assessed by DIAC case officers and provided all criteria can be met, the visa should be granted.

On 1 July, DIAC is introducing a new program called "SkillsSelect". This will apply to people who are looking for visas under the Independent Skilled Migration stream, State or Territory Sponsored Skilled Migration program, Family Sponsored Skilled Migration and Business Skills. From July 2012, those persons must lodge an Expression of Interest (EOI) and be "invited" to apply for a visa. Invitations will be sent to the highest ranking EOI's. At this stage, the detail of how this new program will operate has not yet been published. Further information about the SkillsSelect system is scheduled to be released in April 2012. For ENS, RSMS and 457 visas, the EOI process is not compulsory but will be a way for employers to "locate and contact" skilled workers. There is currently little detail available about how SkillsSelect will work.

If you have any visa issues you wish to consider please contact Tony Hogarth on 3224 0369 to discuss.

DANGERS IN ENGAGING INDEPENDENT CONTRACTORS

PAT MULLINS



Due to difficult economic times and the need for flexibility, some companies have turned to engaging independent contractors as a solution to increase workplace productivity.

However, caution should be taken whenever considering engaging contractors. Companies should

ensure that contractors they engage are truly contractors and not employees.

The Fair Work Ombudsman has recently made it clear that sham contracting arrangements will not be tolerated. Treating and paying workers as contractors when they are in truth employees can attract significant penalties. In the decision of *Fair Work Ombudsman v Contracting Plus Pty Ltd & Anor* (2011) FMCA 191 the Fair Work Ombudsman ('FWO') sought penalties and successfully prosecuted a company for sham contracting arrangements (and underpayments) and the company was fined \$214,500.

In another recent Federal Magistrates Court of Australia decision *Fair Work Ombudsman v Centennial Financial Services* (2011) FMCA 459 the FWO was successful in obtaining a judgement which resulted in penalties against the company director and the company's HR manager.

A more significant problem may arise when a person treated as a contractor is injured at work. Where the "contractor" is in truth an employee, the person will also be a "worker" for the purposes of Workers' Compensation

provisions. If the person is not covered by the company's workers' compensation policy, then there may be horrendous financial consequences.

Whenever a principal engages a contractor, compliance with the *Independent Contractors Act 2006* (Cth) ('IC Act') will need to be considered. The IC Act encourages independent contracting, however, it also provides for

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Courts to intervene if a party considers the contract to be unfair. The Courts have the power to review contracts for services and make decisions to vary contracts (or "rip them up") if they are deemed to be unfair. Breaches of the IC Act can also result in penalties.

If a company is seeking a flexible workforce, companies should consider employing workers on a part time or casual basis. Not only will an employer have exclusivity and an element of control over an employee, there are obligations which will bind an employee as opposed to a contractor.

TRANSFERRING FROM AN INCORPORATED ASSOCIATION TO A COMPANY - MADE EASIER

AMBER VARIO



Amendments made to the *Associations Incorporation Act 1981* (Qld) ('Act') now allow incorporated associations to transition to a company limited by guarantee under the *Corporations Act 2001* (Cth). This relief commenced on 6 December 2011.

Prior to this, if an incorporated association in Queensland wanted to transfer to a corporate structure, it was required to go through the process of registering a company with the Australian Securities and Investment Commission ('ASIC'), then propose and pass resolutions within the incorporated association and transfer all of its assets to the company and then formally wind up the association. The process was drawn out, tedious and often expensive.

The transition does not create a new entity, and, as such, it is not necessary to formally wind up the incorporated association. Further, there is no need to formally transfer any contracts or property, thereby minimising costs. Overall it is a much more simple and cost effective process.

In order to corporatise, an incorporated association will need to propose and pass a special resolution of its members (that is, 75% of its members will need to consent to the transfer). An application must then be made to the Office of Fair Trading for approval to transition. The

original certificate of incorporation must be handed to the Office of Fair Trading with the application. If the original certificate of incorporation is unable to be found, a statutory declaration to that effect must be submitted.

In the event that the Office of Fair Trading does not grant approval, the transfer cannot proceed. If approval is granted, an application for the transfer of incorporation to a company limited by guarantee can be made to the ASIC.

If you are considering corporatising your Not For Profit association, you should consider this process.



Consider Employee Entitlements When Buying a Business

JONATHAN MAMARIL

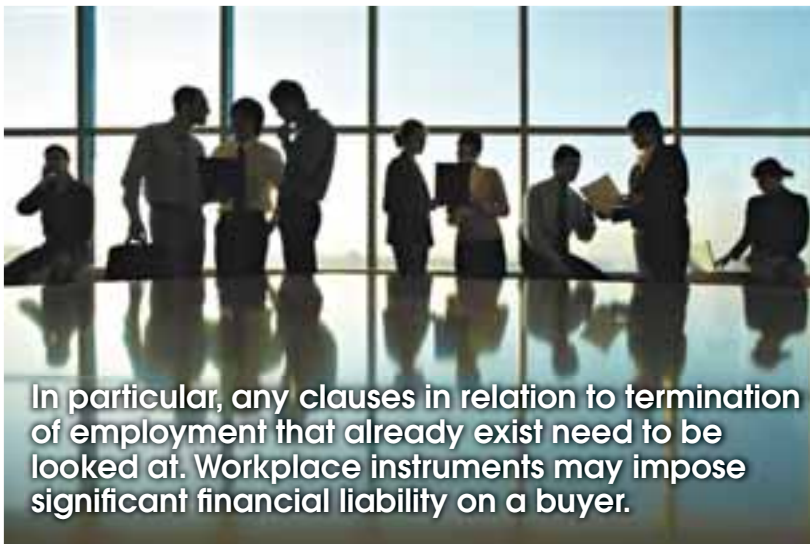


In the purchase of a business there are many issues that need to be traversed and these issues commonly centre on asset acquisition, financial performance or potential financial performance.

Time and time again employee entitlements are overlooked. When a buyer purchases a business the buyer wants a seamless transition for the business and the services that are undertaken and provided.

This usually means for transferring employees that for all intents and purposes, not much will change. However, the potential liability for a buyer in respect of employee entitlements can be significant and erode the bottom line.

A buyer should include in their due diligence the potential liability for employee entitlements and check for any existing industrial agreements, employment contracts and policies. In particular, any clauses in relation to termination of employment that already exist need to be looked at. Workplace instruments may impose significant financial liability on a buyer. Buyers should arm themselves with the relevant information during the due diligence process so that a fully informed decision to purchase can be made.



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A buyer should also ensure in the sale of business agreement that the payment of redundancy entitlements and other employee entitlements such as accrued annual leave, personal leave or long service leave entitlements are taken into account and that the sale price reflects where these burdens fall.

If the buyer is a non-associated entity of the seller, the buyer also has a choice of recognising a transferring employee's continuous service or not recognising the period of continuous service. If service is not recognised the employee will need to be made aware of this in writing.

Buyers should always consider the potential liability for employee entitlements in business sale transactions. Avoid leaving negotiations on how employee entitlements are to be paid to the "last minute" of purchase negotiations or dismissing the issue as irrelevant.

To do otherwise may invite future problems with Fair Work Australia or the Courts where there is no option but to incur a heavy financial burden.



DAVID WILLIAMS
EDITORIAL

Welcome to the commencement of another year, which no doubt will be as challenging as previous years but hopefully we will be closer to a recovery. The decision of the RBA to put rates on hold was a disappointment and again highlights the reliance of the RBA on mining data and not what makes up the rest of the economy.

Over the Christmas/New Year period I was fortunate enough to be able to take some time off and travel overseas. My travels took me to Mexico and the United States of America, and both have cemented in my mind that business conditions in Australia are not too bad.

The issue of the lack of confidence is a universal trait in relation to business conditions, but underlying this business sentiment is a feeling that in the USA particularly, the country is re-engineering how it operates business. Once the confidence element returns to the American psyche, I could see significant economic improvement occurring reasonably rapidly out of the States.

The burden of Europe and the US Presidential elections are certainly casting a wide shadow, but at the same time there seems to be a conscious thought process about getting on with business, and the real concern is the lack of confidence of the consumer.

We are seeing an increased interest from clients in regards to the sales of businesses but the common denominator is the whole sale process is occurring slowly. The sellers are getting reasonable prices for their businesses in the current market but sellers need to be patient when undertaking the sales process, and to disconnect the sale process from how they operate the business.

I see 2012 will be very much a continuation of the previous few years with some increased activity post the end of this financial year. The important factor that all of our businesses rely upon is that we need our customers to regain confidence to do something.

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