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BUSINESS BULLETIN

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HAVE YOU OR A FAMILY MEMBER LENT MONEY TO YOUR COMPANY?

It is often the case that a related party, like a director or family member, has lent considerable sums of money to a company, but has not taken a security interest relating to their loan. The outcome in these cases can be heartbreaking, especially when a family member suffers a loss. Worse still, if the lender has mortgaged their own family home or property to raise the loan funds, the consequences can be devastating.

These loans are usually made with the best of intentions. Sometimes it is to meet Australian Tax Office (ATO) obligations, pay superannuation or provide a cash injection to a struggling business. In many cases, these loans are made because the bank will not provide further funding and the business is out of financing options. Often the related party ends up as the major lender, advancing more funds than the business's bank, however they have no security over the loan.

If you or your family lend money to your business, then it is vital to register the loan on the Personal Property Securities Register (PPSR). This can make an enormous difference to the outcome if the business is unable to continue. Banks and other lenders usually insist on registering an interest on the PPSR for a good reason. As a secured creditor, the lender is entitled to be repaid before any unsecured creditors (including the ATO). Further, this avoids any potential preference payment claims, as the secured lender has a clear right to be paid to the value of the secured assets in priority to unsecured creditors. This can make an enormous difference in an insolvency scenario.

KEY DATES

21 SEPTEMBER

August monthly Activity Statements - due for lodgement and payment

21 OCTOBER

September monthly Activity Statements - due for lodgement and payment

28 OCTOBER

July - September Superannuation Guarantee contributions due for payment

28 OCTOBER

Quarterly (July-September) Business Activity Statements due for lodgement and payment.

31 OCTOBER

Individual 2022/2023 income tax returns due for lodgement if not using a tax agent

There are two common types of security interests, as follows:

- **PMSI** - Purchase money security interest; and
- **AIIPAAP** - All present and after-acquired property.

A PMSI is a specific security interest over an asset. Often this can be over a specific piece of equipment, such as a motor vehicle. A PMSI can also be held over stock and other assets (other than real property).



An AIIPAAP applies to assets owned by a company, trust or other entity and can cover circulating assets, such as stock and debtors, as well as non-circulating or fixed assets. This type of security ranks behind a PMSI over the specific asset that is the subject of the PMSI.

A lender with a PMSI security over a specific asset has the absolute right to the proceeds from the sale of that asset up to the amount they are owed. Any surplus funds are then available for distribution according to the remaining security and priority positions.

Generally, when we talk about securing related party loans, we are talking about registering an AIIPAAP. A lender with an AIIPAAP has priority for the proceeds of the sale of any fixed assets once any PMSIs have been dealt with. Employee entitlements then have priority for the proceeds from the realisation of any circulating or floating assets, such as debtors. Once employee entitlements have been paid, the AIIPAAP holder is entitled to any remaining proceeds from circulating assets. Unsecured creditors are only paid after all security interests and employee entitlements have been paid in full.

A director or related party that has lent money to a company can improve their position greatly by taking an appropriate security interest. Achieving a higher priority for repayment in a liquidation scenario can greatly improve the chances of recovering the amount owed.

There are rules about the timing of registration and the effectiveness of a security interest. These can be complex, and it would be wise to seek expert advice given your individual circumstances.

Where a related party loan has been made to an entity, it is important to treat it similarly as would be the case with a non-related party loan including:

- A written loan agreement should be prepared, covering issues such as events of default, triggers for repayment, the interest rate to be applied and the method of calculating interest;
- A security interest is taken over the company and registered; and
- Evidence is maintained to show that the funds were received by the company and the source of those funds (such as bank statements from the lender and borrower).



Banks and other lenders charge interest on the outstanding balance of the loan until it is repaid. Related-party lenders often overlook their right to charge an appropriate interest rate (at a rate higher than a bank due to the risk involved) and could do themselves a disservice by only focusing on the loan principal. By including appropriate interest details in the loan agreement, the related party lender can properly address their position and recover all funds they are entitled to. Tax advice should be sought to ensure the charging of interest is appropriate from an Income tax perspective.

The costs involved in registering a security interest are modest in comparison to the benefit it can provide. In many ways, this is similar to an insurance premium to protect the related party lender from an unexpected adverse event, except it only needs to be paid once.



Best practice would see every related party lender register a security interest in relation to their loan at the earliest opportunity. Not doing so reduces the chances of loan recovery and may seriously disadvantage the related party lender.

Article supplied by de Jong Read Specialist Business Consultants who work with clients to arrange appropriate security interests and loan agreements.

For further information contact the team at info@djra.com.au or 1300 765 080.

NEW FINANCIAL YEAR CHANGES - EMPLOYERS TAKE NOTE

As an employer it is important that you are across changes that can impact you or your employees. With the dawn of a new financial year, it is a good time to look at the changes you should be aware of.

Fair Work Changes

Casual Employment Changes commencing 26 August 2024

A new definition of “casual employee” has been introduced to the Fair Work Act. Under this new definition, an employee is only a casual employee if:

- there isn't a firm advance commitment to continuing and indefinite work, taking into account a number of factors, including the real substance, practical reality and true nature of the employment relationship; and
- they're entitled to receive a casual loading or specific casual pay rate.



Whether there is a firm advance commitment to continuing and indefinite work, needs to be assessed on the real substance, practical reality and true nature of the employment relationship and other factors including:

- the employer can offer or not offer work to the employee (and whether this is happening)
- the employee can accept or reject work
- it's reasonably likely there will be future work available to the employee
- there are full-time or part-time employees performing the same kind of work
- the employee has a regular pattern of work.

Fair Work Australia offers the following example:

Example: Casual employee

- Josh starts as a bartender for a new summer pop-up restaurant.
- Josh gets a roster each week with the shifts he's being offered for the following week. He can then decide whether to accept those shifts or let his employer, Angela, know he can't work them.
- Josh also works varying shifts each week during summer, depending on when Angela needs him. Josh gets paid a casual loading of 25%. All the other employees at the pop-up restaurant are casual too.
- Angela isn't sure whether the restaurant will continue operating after summer.
- Josh is a casual employee because:
 - there's no firm advance commitment to continuing and indefinite work
 - he's earning a casual pay rate.

Employees who were employed casually before 26 August 2024 will stay casuals under the new definition unless they transition to full-time or part-time employment.

Casual Conversion – changes effective 26 August 2024

A new pathway will be introduced for eligible employees to change to either full-time or part-time employment. These new rules will replace the current rules.

Employees will be able to notify their employer of their intention to change to permanent employment if:

- they have been employed for at least 6 months (or 12 months if working for a small business)
- they believe they no longer meet the requirements of the new casual employee definition.



An employee cannot notify their employer of their intention to change to permanent employment if they are currently engaged in an ongoing dispute with their employer about casual conversion, or in the last 6 months their employer refused a previous notification.

An employer must respond in writing to the employee within 21 days either accepting or refusing the request. An employer must have reasonable grounds for rejecting a request which may be that the employee still meets the definition of a casual, or there are fair and reasonable operational grounds.

Independent Contractor Changes – effective 26 August 2024

The definition of a contractor from a Fair Work perspective is different to what it is from a tax, superannuation or a Work Cover perspective. There is a new definition added to the Fair Work Act to determine the meaning of an employee. To determine if a worker is an employee or contractor from a Fair Work perspective, the following must be considered:

- The real substance, practical reality and true nature of the working relationship.
- All parts of the working relationship between the parties. This includes the terms of the contract and how the contract is performed in practice.

This is a change from the existing test, which focuses mainly on the terms of a contract.

Right to disconnect – effective 26 August 24 (non-small business) 26 August 25 (small business)

Employees will have a new “right to disconnect” outside of work hours. This means employees will have the right to refuse contact from their employer or a third party (customer) outside of their working hours, unless that refusal is unreasonable. An employee can refuse to monitor, read or respond to contact from their employer outside of hours.

- The reason for the contact
- Whether the employee is compensated or paid extra for the contact
- The nature of the employee’s role and level of responsibility
- The employee’s personal circumstances, including family or caring responsibilities

All awards will be required to include a right to disconnect term by 26 August 2024.



Services Australia

Paid Parental Leave

For babies born or adopted after 1 July 2024, the Paid Parental Leave (PPL) scheme in Australia has been extended from 20 weeks to 22 weeks. This expansion is part of a gradual increase that will see the total PPL reach 26 weeks by July 2026. The changes aim to provide more support for working families, allowing parents to better manage their work and caregiving responsibilities.

The scheme now offers 110 days of paid leave, which can be shared between parents. This flexibility helps accommodate diverse family needs and promotes gender equality in caregiving. Additionally, from July 2025, superannuation contributions will be included in the PPL payments, adding approximately \$4,000 to the retirement savings of eligible parents (this is not yet law).