

The SOTHERTONS REPORT



DECEMBER 2011

Welcome to the final issue of The Sothertons Report for 2011.

It has been a tumultuous year with the global economic crisis now focusing on Europe while in Australia we continue to be buffeted by the fallout. Let's hope the coming year sees some stability in world markets.

In Australia we have also had an interesting year economically where much of the economy has been buoyed by the mining industry. However, across a diverse range of industries the stories emerging are still of difficult times. Banks have not yet freed up or made it any easier for businesses to borrow funds and when funding is made available the security required is often significantly greater than was sought in the past. Property prices across many locations have fallen significantly, placing further pressure on borrowers.

Concurrently, the Federal Government saw fit to introduce the Carbon Tax. With its proposed introduction in this coming year there are some commentators who suggest that there will be a further burden placed on the community. Despite Government protestations to the contrary, public sentiment is being influenced in the negative by both sides of politics and the popular media.

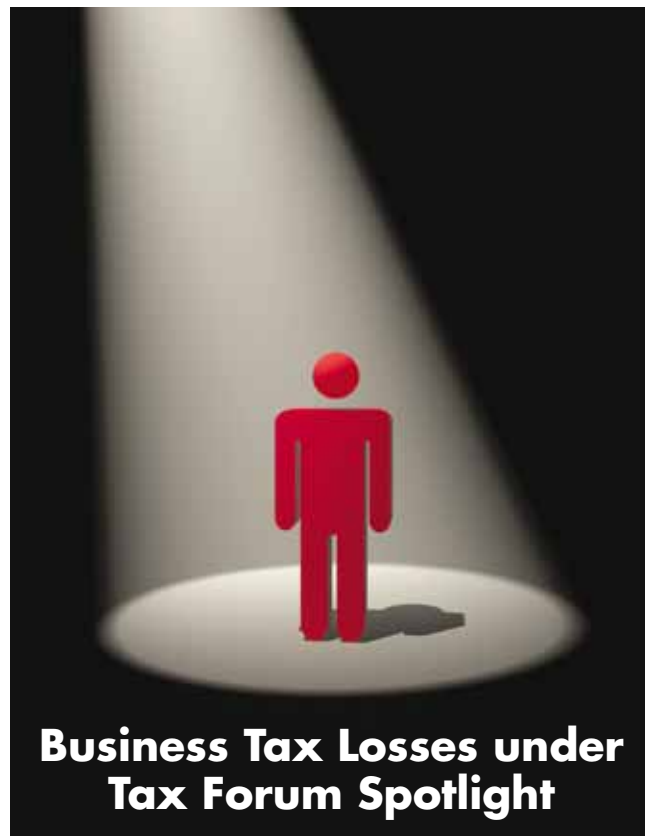
The Australian Taxation Office has over the last twelve months taken a far more aggressive stance than they have in previous years when it comes to collecting outstanding revenue, adding significant angst in the marketplace.

New taxation laws continue to flow unabated adding to an already cumbersome and complex system despite the Federal Government making noises that it wants to implement major overhauling of the system. It is highly likely we are all in for much more of the same in the coming twelve months. This issue of the Report continues to report on taxation and superannuation changes as they affect our clients.

Finally I take this opportunity of wishing our clients and suppliers compliments of the season and hope that the coming year will be a successful one for you all. The Partners & Directors all look forward to continuing to assist and work together with you through the current economic climate. Until next year. ■

SEASONS GREETINGS

Sothertons would like to wish all our clients and suppliers
a safe and enjoyable festive season.



Business Tax Losses under Tax Forum Spotlight

The treatment of business tax losses will be reviewed by a business tax reform working group announced by the Treasurer at the Tax Forum held in October 2011.

It is understood the first priority of the working group is to identify options for losses and how the Government would fund them.

"We need to consider things like loss carry back, uplifting losses, and what happens to the value of losses when businesses change composition or ownership," said Treasurer Wayne Swan.

It is expected that the working group will deliver its initial report before the end of this year and a final report to the Government by March 2012, before the next budget. ■

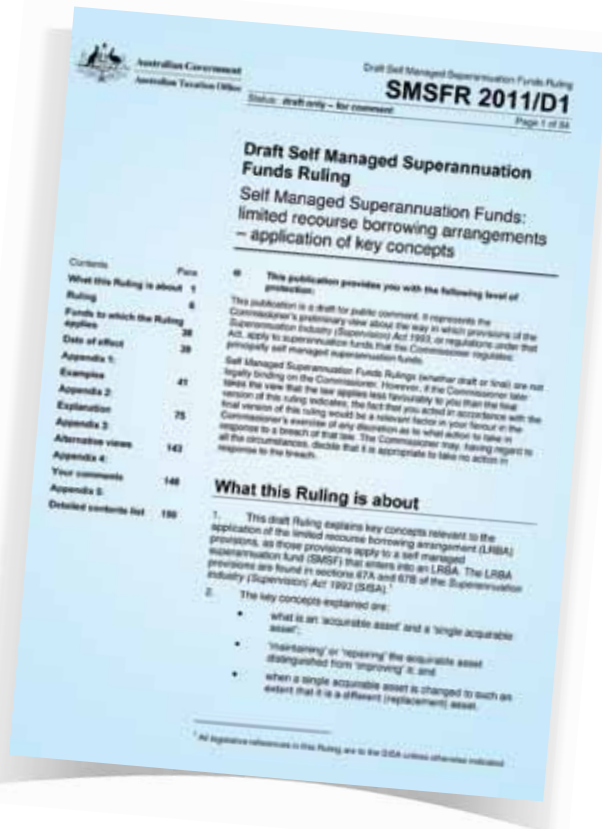
Tax Office views on SMSFs, real property and borrowing rules

The Australian Tax Office (ATO) has recently issued a draft ruling which concerns self-managed superannuation funds (SMSFs), real property and the application of certain borrowing rules under the superannuation law.

The draft ruling outlines where money borrowed under a limited recourse borrowing arrangement (LRBA) can be applied in maintaining or repairing (but not improving) a single acquirable asset.



While the draft ruling provides some welcome clarification on the ATO's views on key aspects of the LRBA provisions, it only covers a few pieces of the LRBA puzzle. The rules can be complex and the penalties can be severe for getting it wrong. If you have any questions, please contact your Sothertons director / partner for further information. ■



Congratulations to two of our IGAF / Polaris Members in the USA

We are pleased to report and offer our congratulations to the partners and staff of two of our associated IGAF / Polaris firm members in the United States, namely **Kolb+Co**, based in Milwaukee, Wisconsin and **Petrinovich Pugh & Company LLP** based in San Jose, California who have been voted in the top 100 Public Accounting firms to work for.

The winners were announced at Accounting Today's 2nd Annual Growth & Profitability Summit held in Las Vegas in late October.



Kolb+Co.
Beyond the Bottom Line™

PP&CO

PETRINOVICH PUGH & CO LLP
Certified Public Accountants and Consultants

The nominees were evaluated based on workplace policies, workplace practices, philosophy, systems, demographics and an employee survey. ■

David Lissauer



Standard Deduction for Work Expenses Next Year

Public consultation has closed on the Government's draft legislation which proposes to provide individual taxpayers with a standard tax deduction to cover work-related expenses and the cost of managing their tax affairs.

The standard deduction proposed is \$500 for 2012–2013, increasing to \$1,000 for 2013–2014 and thereafter.

Taxpayers whose claims exceed the proposed standard deduction will still be allowed to make those claims provided receipts are kept. However, the Government has noted the deduction is dependent on the implementation of the mining tax legislation (which is yet to be introduced). ■

Tax Law Changes to Tackle Phoenix Activities



The Government has recently introduced legislation in Parliament which aims to deter company directors from engaging in phoenix activities.

Phoenix activities involve the deliberate liquidation of a company to avoid paying tax liabilities and employee superannuation. The business then "rises" again and continues operations controlled by the same person, but under another corporate entity and free of debts. The legislation also aims to encourage director compliance with tax and superannuation obligations.

The proposed tax law changes will make directors personally liable for their company's failure to pay employees' superannuation guarantee amounts. The changes will also allow the ATO to pursue directors without issuing a "director penalty notice" where the company's pay as you go (PAYG) withholding or superannuation guarantee liability remains unpaid and unreported three months after the due date.

In addition, the Government proposes to deny directors (and their associates) entitlement to PAYG withholding credits (through the imposition of a new tax) where the company they are involved in has failed to remit PAYG withholding amounts.



It is proposed that the changes commence once the legislation is formally enacted. However, there are special transitional provisions which can cover amounts that are due to the ATO or a superannuation fund at the time the legislation enters into force. Directors should ensure their company's tax risk management policies and systems are up-to-date. If you have any questions, please contact your Sothertons director / partner for further information. ■

Small Business Depreciation Rule Changes on the Horizon

The Government has sought comments on draft legislation which proposes to make various tax law changes concerning the small business depreciation rules that apply to small business entities.

The changes are subject to the passage of the mining tax legislation as well as the carbon tax legislation in Parliament. However, should these taxes be successfully implemented, the proposed changes could improve cash flow and reduce compliance costs for small businesses. The proposed changes include increasing the instant asset write-off threshold from **\$1,000 to \$6,500**, and simplifying the current depreciation pooling arrangements to allow small businesses to depreciate some assets more quickly. The changes are proposed to apply from the 2012–2013 income year. ■

Super Guarantee Charge is a Valid Tax, says High Court

A market research company has been unsuccessful in its constitutional challenge in the High Court against the validity of the superannuation guarantee charge. The High Court unanimously held the charge to be valid tax. In doing so, the High Court also affirmed an earlier Tribunal's finding that market research interviewers were *employees* of the company for superannuation guarantee purposes, and not independent contractors. ■



The Model WHS Legislation – Current State of Play

What is the latest?

On the 26th September 2011 the Model Workplace Health and Safety (WHS) Regulations were released by Safe Work Australia, with the intention of a national start date of 1st January, 2012. Since then, there has been discussion amongst some states of an extension to the proposed timeframe.

Victoria & Western Australia

Following recent announcements, the Victorian and West Australian governments are considering deferral of the implementation of the harmonised workplace health and safety laws. In fact Victoria has requested a 12 month deferral of the legislation.

In principle, the Victorian Government supports national harmonisation of OHS legislation; however it is seeking further analysis of the proposed changes for Victorian workplaces. Once this further analysis is completed, it will then realise Victoria's position in relation to national WHS harmonisation.

Whilst there is still discussion within WA regarding the implementation of the national WHS legislation, the WA mining industry will continue to be regulated by the Resources Safety Division (RSD) of the Department of Mines and Petroleum. It is noted that WorkSafe WA has been liaising with the RSD, with the intention for the mining safety laws to adopt the requirements of the model WHS Act and Regulations.

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The Model WHS Legislation – Current State of Play

Other Jurisdictions

The following provides a summary of the current state of play for other jurisdictions as it stands to date:

South Australia:

It appears SA will adopt the legislation with a number of proposed amendments.

New South Wales, Queensland & Canberra:

These states & territory have accepted the Regulations and are prepared to start 1 January, 2012.

Northern Territory, Tasmania & Commonwealth:

Still awaiting a formal position announcement on the status of adoption of the WHS laws.

Key Features of the WHS Regulations

One of the key objectives of nationalising health and safety laws is to streamline and reduce regulatory inconsistencies across jurisdictions. In establishing a common regulatory approach, there will inevitably be additional compliance and regulatory requirements in some jurisdictions and a change in approach in others.

Regardless of your organisation's geographical operation and risk profile, you will need to understand the WHS Regulations and its impact.

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Draft Codes of Practice

Safe Work Australia has also produced a series of draft Codes of Practice which provide an example of how to comply with each of the WHS Regulations health and safety topics.

Some of the key highlights of the new WHS Regulations include:

- The removal of a height threshold when managing the risk of falls.
- Managing the risk of remote or isolated work.
- Managing the risk of falling objects.

The new WHS Regulations provide several categories under which all other health and safety related matters now reside.

The major categories are as follows:

- Representation & Participation
- General Risk & Workplace Management
- Hazardous Work
- Plant & Structures
- Construction Work
- Hazardous Chemicals
- Asbestos
- Major Hazard Facilities

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Key Changes Following Public Consultation

Safe Work Australia considered the extensive public response to the Draft Model WHS Regulations and commissioned the publication, **'Decision Regulation Impact Statement for National Harmonisation of Work Health and Safety Regulations and Codes of Practice, September 2011'** to highlight their impact.

Some of the key changes* that have now been included or reintroduced into the final WHS Regulations following public consultation are as follows:

- Inserting generic management of risk principles including hierarchy of controls.
- Removing annual notification / fees for registration of items of plant.
- Simplifying the process of becoming a major hazardous facility and developing a safety case.
- Changing procedures for the election of HSRs (Workplace Health and Safety Representatives).
- Reintroducing audiometric testing for exposure to hazardous noise.
- Introduce upstream duties in noise and manual handling tasks.
- Not requiring documentation of administrative control measures for risk of falls from two metres.
- Revising the hazardous chemicals regulations to rely on the Global Harmonised System of Classification and Labelling of Chemicals.
- Introducing new regulations dealing specifically with asbestos-related workers other than removal workers and clarifying requirements relating to naturally occurring asbestos.
- Giving powers to the regulator to have competency for high-risk work licences reassessed where the regulator doubts a worker's competency.
- Taking a risk-based approach to requiring RCDs (Residual Current Devices) and their use in 'hostile operating environments'.
- Removing the requirement for notification of certain prescribed excavation work.
- Increasing the principal contractor duties threshold from **\$200,000 to \$250,000.**
- Realigning the definition of 'confined space' to the relevant Australian Standard by removing the requirement that a space have a restricted means of entry and exit.

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What Should You Do Now?

It is evident that with the introduction of the WHS Act and Regulations, organisations will now have to revisit how they manage health and safety in their workplace to ensure compliance with the new regulations. This will involve the following key actions:

Clarify Roles & Responsibilities

- Clarify, document and communicate duties, roles and responsibilities within your business or undertaking and with other persons conducting a business or undertaking (PCBUs) where applicable.
- Identify all workers (i.e. volunteers, work experience students, etc.).
- Identify all officers and commence educating and informing them in relation to their obligations.

Review Your WHS Governance Structure

- Are you testing the effectiveness and integrity of risk controls?
- Have you established KPIs and how to measure and report against these?
- How do you socialise the information gathered from governance activities?
- How does the information from the above feedback drive improvement?

Review Your OHS Management System & Current Projects

- Does it adequately manage risk?
- Does it adequately address key legal obligations?
- Identify changes that may impact existing contracts / projects including those commencing before 2012.

Develop an Implementation Project Plan

- Undertake a gap analysis of your existing systems against the WHS Act and Regulations.
- Establish a project plan of all the changes that you need to implement in light of the new WHS Act and Regulations and monitor progress against that plan. ■

** Key changes extracted from Safe Work Australia publication, Decision Regulation Impact Statement for National Harmonisation of Work Health and Safety Regulations and Codes of Practice, 12 September 2011*

Noel Arnold & Associates is one of Australia's largest Risk Management and OH&S Consultants. www.noel-arnold.com.au



Partnership Not Ended – So Director Still Liable, says Court

A businessman has been unsuccessful in appealing to the NSW Court of Appeal against an earlier District Court decision which had held that, as a director of a company, he was liable to pay monies to the ATO that were withheld from employees' wages. Under the tax law, a director of a company may face a tax penalty if amounts withheld from employees' wages are not paid to the ATO.

Broadly, a company of which the businessman was a director was part of a partnership operating a café / bar restaurant with another partner. However, the Court heard the relationship between the partners had deteriorated. The director argued the partnership had terminated, so therefore there could be no withholding by his company. However, the Court found it was the director's involvement in the management of the partnership that had actually ended, not the partnership itself. ■

Dutch Retiree Took Reasonable Care, finds Tribunal

In a recent decision, the Administrative Appeals Tribunal held that a retiree had not failed to take reasonable care when he omitted foreign early retirement fund payments from the Netherlands from his 2003 to 2006 income tax returns.

Among various factors, the Tribunal accepted the retiree's evidence that he had sought and received oral advice from the ATO in 2002 which was contrary to later advice contained in a "private binding ruling" issue by the ATO in 2005. The Tribunal also took into account in making its findings that the retiree had limited English and did not understand and was confused by the ruling. ■

Working in Australia – What You Need to Know...

Knowing about Australia's workplace laws is especially important for people of non-English speaking background, where these laws may be different in their home country.

The national Fair Work system covers the majority of workplaces in Australia. It includes laws about the pay and conditions workers are entitled to receive, and how people should expect to be treated at work. The Fair Work system also provides a safety net of ten basic minimum entitlements, called the National Employment Standards (NES), for all workers.

The Fair Work Ombudsman (FWO), an independent statutory authority, has legislative responsibility to educate people working in Australia about their workplace rights and obligations.

Press releases have been translated into a large number of languages and a series of materials have been translated to help people better understand their workplace rights and entitlements including a short video "Working in Australia" (in 14 languages) and a new brochure "Working in Australia – What You Need to Know" (in 12 languages). These are available via the Ombudsman's website.

We remind all clients that, in the interest of their own work place transparency, they should let their employees know of the availability of the brochure, videos and other FWO resources through your own website.

If clients would like printed copies of the translated brochure or poster we ask that you email: communications@fwo.gov.au specifying quantities, languages and delivery address.



Small Business Benchmarks Under Microscope

The Inspector-General of Taxation, Ali Noroozi, has advised that he will review the Australian Tax Office's use of small business performance benchmarks.

The benchmarks produced by the Australian Tax Office (ATO) are used to identify taxpayers who may not be declaring all of their income and who may be involved in the cash economy. Mr Noroozi said he will investigate whether the benchmarks are an appropriate tool for identifying underreporting of income.

There has been growing concern among tax advisers about the use of benchmarks. The Inspector-General said he will also consider whether the ATO's expectations of small business in relation to record keeping are clearly communicated and reasonable. The investigation is expected to commence later this year. ■



Uncertainty with Private Rulings System

In a recent case, the Full Federal Court unanimously affirmed assessments issued by the Commissioner to a taxpayer, a sports club, even though the assessments were inconsistent with a private ruling issued to the club.

In 2004 the club had received a private ruling stating it was exempt from income tax for the 2003 to 2010 income years. However, the Commissioner in 2006 claimed the facts of the club's situation had changed and withdrew the ruling. The club claimed it should be afforded protection under the tax law. However, the Court disagreed.

TIP According to some commentators, the court's decision could cause taxpayers to lose confidence in the private rulings system. If you have any questions, please contact our office. ■



The Government's controversial carbon tax scheme has passed Parliament and will commence on 1 July 2012.

From that date, the country's biggest polluters will be required to pay \$23 for each tonne of carbon pollution released into the atmosphere. As part of the scheme, tax cuts to assist households and support measures for businesses to assist them in adapting to the new carbon tax will also be implemented.

TIP *Although the carbon tax scheme will not commence until next year, businesses should consider putting some serious thought into how they may be affected, both directly and indirectly, by the scheme. Please contact our office for any assistance. ■*

Taxpayer Entitled to Prompt GST Refund, says Court

An exporter of mobile phone goods has been successful before the Federal Court in a case concerning GST refunds. The Federal Court ordered that the Commissioner comply with the GST and tax law and immediately pay the exporter the net amount notified in its GST returns for various tax periods covering January to May 2011.

The ATO had alleged that the refunds claimed were unsubstantiated and were fraudulent. It refused to pay the amounts until an audit had concluded. However, the Court did not agree that in the circumstances the law allowed the withholding of a payment pending an investigation by the Commissioner. The Full Federal Court later also dismissed the Commissioner's appeal against the decision. ■

CGT Test Includes Commission Liability After CGT Event

In a recent decision, the majority of the Full Federal Court held that for the purposes of accessing the small business capital gains tax (CGT) concessions, a real estate agent's commission incurred on the sale of a hotel business could be included as a liability for the purposes of the maximum net asset value test. This was the case even though the taxpayer was invoiced for the commission after entering the contract of disposal.

TIP *Small businesses can access a range of tax concessions to reduce CGT on the sale of certain assets if certain conditions are met. One of the conditions is that the taxpayer must satisfy the "maximum net asset value" test. To pass the test, the net value of all the CGT assets of the taxpayer (including affiliates and connected entities) must not exceed \$6 million.*

Debts owed to the taxpayer are included as CGT assets for the purpose of the test. The rules can be complex: please contact our office for more information. ■

Personal Services Income Rules Apply, finds Tribunal

The Administrative Appeals Tribunal has recently held that the personal services income (PSI) rules applied to an IT professional to include in his assessable income amounts derived by his company through the provision of his IT expertise to a small number of clients from the same company group. The Tribunal also held the company was not a "personal services business".

TIP *Many consultants and contractors operate as a sole trader or through a company, partnership or trust. In many cases, the income received for the work they do may be classified as PSI if certain tests are not passed. However, the PSI rules do not apply to individuals or interposed entities carrying on a "personal services business". It should be noted that the PSI rules remain a tax compliance risk area for the ATO. Please contact our office for any assistance. ■*

Tax Changes for Small Businesses Introduced

The Government has introduced legislation into Parliament which proposes to increase the small business instant asset write-off threshold from \$1,000 to \$6,500, and create a single depreciation pool to write-off assets at a rate of 30% (15% in the first year).

The changes are proposed to commence from the 2012-2013 year; however, their formal enactment would first require the commencement of the Government's carbon tax scheme (which will start on 1 July 2012) and the proposed Minerals Resource Rent Tax (MRRT).

The changes also propose to allow an immediate write-off of up to \$5,000 for motor vehicles from the 2012-2013 income year. The Assistant Treasurer, Bill Shorten, said under the changes small businesses would benefit from improved cash flow and reduced compliance costs. ■

Superannuation Guarantee to be Increased to 12%

Legislation has been introduced into Parliament which proposes to increase the superannuation guarantee (SG) rate from 9% to 12%, phasing in from 1 July 2013. The Government also announced that it would abolish the age limit for which employers no longer need to provide superannuation guarantee.

TIP *If the SG age limit is to be abolished, then from 1 July 2013, employers will be required to make SG contributions for employees regardless of an employee's age. ■*





History of the Sydney to Hobart Yacht Race...

The Sydney to Hobart Yacht Race is hosted by the Cruising Yacht Club of Australia, starting in Sydney, Australia on Boxing Day and finishing in Hobart. The race distance is approximately 630 nautical miles (1,170 km).

The race is run in co-operation with the Royal Yacht Club of Tasmania, and is widely considered to be one of the most difficult yacht races in the world.

The race was initially planned to be a cruise by Peter Luke and some friends who had formed a club for those who enjoyed cruising as opposed to racing, however when a visiting British Royal Navy Officer, Captain John Illingworth, suggested it be made a race, the event was born.

The Sydney to Hobart Yacht Race has grown over the decades, since the inaugural race in 1945, to become one of the top three offshore yacht races in the world and it now attracts maxi yachts from all around the globe.

The 2004 race marked the 60th running of the event. The current race record was set in 2005 by Wild Oats XI, which crossed the line in a time of 1 day, 18 hours, 40 minutes and 10 seconds.

The longest surviving skipper from the inaugural race, Peter Luke, who contributed to the formation of the Cruising Yacht Club of Australia and the establishment of the Sydney to Hobart Yacht Race, died on 23 September 2007 aged 92, the last of the original sailors who pioneered this event. His yacht, Wayfarer, still holds the record for the slowest elapsed time. ■



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