

## ATO RECEIVABLES POLICY

### PART B The collection of taxation debts

## Chapter 29 SECURITIES

*The policy in this chapter is to be followed by ATO staff. We have made every effort to ensure it is technically accurate, but in the interests of clarity it has been written in 'plain English' and should not be read or interpreted like legislation. If you feel that something in the chapter is wrong or misleading, please advise the ATO.*

**Date of effect:** 4 November 2010

**Key legislation:** Subdivision 255-D in Schedule 1 to the *Taxation Administration Act 1953* (TAA).

### PURPOSE

1. This chapter discusses the circumstances in which the ATO will require a taxpayer to provide security in relation to an existing or future liability.
2. The first part of this chapter examines securities in general: the circumstances in which the ATO may require a security, the kinds of security which the ATO considers acceptable; and how the security arrangement may be executed. It examines general considerations that may be taken into account when security is offered voluntarily by a taxpayer, including cases in which it is provided as a pre-condition to agreeing to defer the time for payment of a debt, agreeing to permit payment of a debt by instalments or agreeing to issue a departure authorisation certificate.
3. The second part of this chapter examines the provision of securities under a formal requirement by the Commissioner pursuant to Subdivision 255-D in Schedule 1 to the TAA and the way in which the provisions under this Subdivision will be administered by the ATO. While some of the considerations outlined in the first part of the policy relating generally to securities are also relevant to the exercise of the power under Subdivision 255-D, there are specific requirements in this legislation that are considered in this part of the chapter.

*(Please note: the policy does not apply to licensing securities obtained in relation to the Excise Act 1901.)*

### INTRODUCTION

4. Security involves a transaction where a creditor is given rights that can be exercised against some property of the taxpayer or a third party in the event the taxpayer does not pay. The advantages of obtaining a security are:
  - it reinforces the ATO's prospects of ultimate recovery of the debt (that is, the risk of non-payment is mitigated)

- it provides an incentive for a taxpayer to ensure that all possible steps are taken to finalise any review and appeal processes, and any other arrangements for the payment of tax
  - it allows taxpayers to retain a disputed amount pending completion of the review process
  - it prevents taxpayers from divesting themselves of assets while a debt remains outstanding
  - it protects the ATO position during court disputes.
5. In some cases, it may be appropriate for the ATO to obtain the best security available in order to make certain its position as creditor, or more importantly, to secure the process of debt collection. The ATO may seek to obtain security in cases where:
- a taxpayer requests the ATO defer the time for payment of a debt. (See Chapter 9 'Deferring the time for payment')
  - a taxpayer is seeking to pay a debt by instalments
  - the ATO has reason to believe the taxpayer intends to carry on business for a limited period only (see the discussion of Subdivision 255-D below )
  - the taxpayer admits they are temporarily unable to pay the taxation debts
  - a debt is subject to dispute and an arrangement has been made with the ATO in accordance with Chapter 28 'Recovering disputed debts'
  - the taxpayer appears to be dissipating assets
  - the taxpayer wishes to leave Australia but is not in a position to pay the debt before leaving
  - the taxpayer is seeking a departure authorisation certificate from ATO
  - there is any other indication that the revenue may be at risk.
6. Securities may take any number of forms, for example, a mortgage over land, a charge over a company's assets (which may be fixed or floating) or a guarantee by a third party. Basically, securities may be given over any type of property unless excluded by statute. (An example of statutory exclusion is the prohibition of a charge over superannuation benefits covered by Superannuation Industry (Supervision) Regulations 1994 subregulation 13.13.) Depending on the circumstances of the case it will not always be desirable or practical to take some forms of security. (See paragraph 18 below which identifies the securities the Commissioner prefers.)
7. The Commissioner maintains a register of all securities received and issues a receipt for each security as required by Financial Management and Accountability Regulations 1997 regulation 20.

### **Securities under Subdivision 255-D in Schedule 1 to the TAA**

8. The Commissioner can require security from a taxpayer under Subdivision 255-D in Schedule 1 to the TAA in situations where:

- the Commissioner has reason to believe that the taxpayer is carrying on an enterprise in Australia and intends to carry on that enterprise for a limited time only, or
  - the Commissioner reasonably believes that the requirement is otherwise appropriate, having regard to all relevant circumstances.
9. Security can be requested at any time that the Commissioner reasonably believes is appropriate and as often as the Commissioner reasonably believes is appropriate. The security can be required for either an existing or future tax-related liability.

### ***Requirement to give notice***

10. When requesting a taxpayer to give security for an existing or future tax liability under section 255-100 in Schedule 1 to the TAA, the Commissioner is required to give notice in writing to the taxpayer ('security notice').
11. The security notice must be served on the taxpayer and must:
- state that the taxpayer is required to give the security to the Commissioner
  - explain why the Commissioner requires the security
  - set out the amount of the security
  - describe the means by which the taxpayer is required to give the security under subsection 255-100(2) of Schedule 1 to the TAA
  - specify the time by which the taxpayer is required to give the security
  - explain how the taxpayer may have the Commissioner's decision to require security reviewed.
12. A taxpayer from whom security is requested has right of review under the *Administrative Decisions Judicial Review Act 1977*.
13. Failure by a taxpayer to provide security as requested by the Commissioner is a criminal offence.

### **POLICY**

14. Where a security is offered, the taxpayer should be advised that:
- The security is to be located in Australia, be of ascertainable value and be over property in a form acceptable to the Commissioner (see paragraphs 18 to 19 below).
  - The security is to be supported by an agreement or deed which should set out the purpose of taking security, when and what triggers default (for example, a breach of a payment arrangement). The terms of the deed may include but are not limited to the following:
    - (i) All costs in maintaining the security property including rates, taxes and other charges are payable by the person offering the security.
    - (ii) Any property must be insured at the taxpayer's expense showing the Commonwealth's interest in the property (including the nature of that interest, for example as a mortgagee) for the full insurable value on a replacement and reinstatement basis. If the property is owned by the Owners Corporation – a strata title - the property must be insured by

the Owners' Corporation. We may also require the taxpayer to obtain mortgagee insurance in respect of the mortgage.

- (iii) The agreement or deed will provide for the Commissioner to realise the security should default occur.
  - (iv) The Commissioner's costs in taking the security (including solicitor's fees, valuation costs (if any) and registration and stamping fees) are to be met by the taxpayer at the time of the taking of the security.
  - (v) The Commissioner's costs in realising the security in the event of default are to be met by the taxpayer.
- Additional charges for late payment will continue to accrue, unless the taxpayer's circumstances qualify for remission under normal remission guidelines: see Chapter 93 'General interest charge'
15. A security is normally for a current debt but a security arrangement may be entered into to meet future debts that may arise for example, from non-payment of a business activity statement or other liabilities. The amount reflected in the security should be for a specific amount (so there is no uncertainty in law) and is to include the tax debt plus estimated additional charges for late payment, until the debt is fully paid.
16. In some cases, the ATO will require a taxpayer to provide 'adequate' security as a pre-condition to agreeing to defer the time for payment of a tax debt, agreeing to permit payment of a tax debt by instalments or agreeing to issue a departure authorisation certificate. The ATO will determine what is 'adequate' having regard to the particular circumstances.
17. In deciding whether to take or require security the ATO may have regard to (but is not limited to) the following considerations:
- the quantum of the debt
  - the nature of the security being offered. This includes the location of the property or asset, the expectation it can be readily and easily realised if default occurs, the taxpayer's equity in the security, the value of the security and how the value has been determined (that is, the basis of any valuation)
  - if third party security is offered, whether the third party is solvent and if it is fair and reasonable to take the security
  - the value of security compared to the amount of the tax debt outstanding or the amount expected to be outstanding when any outstanding objection or appeal is finally determined)
  - the period of time the debt has been outstanding
  - the taxpayer's past compliance history
  - the taxpayer's ability to pay, based on available information (either supplied by the taxpayer or otherwise available to the ATO)
  - the level of the taxpayer's other liabilities
  - arrangements made by the taxpayer's other creditors to secure their debts.

### **Types of security**

18. The most common securities are:

- (i) a registered first mortgage from the taxpayer or a third party, over freehold property
- (ii) a registered second or subsequent mortgage from the taxpayer or a third party, over freehold property where there is sufficient equity in the property to secure the tax debt whilst ceding priority to the first or prior mortgagees
- (iii) an unconditional bank guarantee from an Australian bank acceptable to the Commissioner (Unconditional means the bank pays the ATO upon demand.)
- (iv) personal guarantees (supported by a registered mortgage over freehold property)
- (v) a fixed and floating charge over a company's assets.

The preferred securities are those shown at (i), (ii) and (iii) above.

19. Securities can be provided by the taxpayer alone, in combination with others or by a third party alone. An agreement by the taxpayer, either to do something or not to do something (for example, not to dissipate assets), sometimes called a negative pledge is *not* a security.

### **Default by taxpayer**

20. If a taxpayer defaults on the agreement, the ATO will take appropriate action. This may include:
- allowing the agreement to continue (the costs incurred to vary the existing documentation, including the ATO's solicitor's costs, will be borne by the taxpayer)
  - advising the taxpayer to pay the tax covered by the security otherwise action will be taken to enforce the security
  - enforcing the security.

### **Securities under Subdivision 255-D in Schedule 1 to the TAA**

21. The ATO must consider all relevant matters and act reasonably, and comply with the general principles of administrative law, in deciding:
- whether, and how often, to request security
  - how much security to require a taxpayer to provide
  - what kind of security to accept
  - how much time is given to the taxpayer to comply with the demand for security.
22. The Commissioner's decisions in exercising his powers under Subdivision 255-D in Schedule 1 to the TAA are administrative in nature and reviewable by the Federal Court of Australia under the *Administrative Decisions (Judicial Review) Act 1977*.

### ***Deciding whether to request security***

#### ***Temporary enterprise***

23. Security may be requested from a taxpayer if there is reason to believe that the taxpayer is establishing or carrying on an enterprise in Australia for a limited time only.

24. A security notice may be issued in such cases to secure the payment of tax debts which have been or which may be incurred by the taxpayer in conducting that enterprise.
25. Before issuing a security notice, it is necessary to consider all the relevant facts and circumstances of the case in question in order to determine if there are grounds to support a belief that:
- the taxpayer is establishing or carrying on an enterprise, and
  - the taxpayer intends to carry on the enterprise for a limited time.
26. Without limiting the matters that can be considered, it may be relevant in deciding if the taxpayer intends to carry on the enterprise for a limited time to consider:
- the nature of the enterprise
  - any previous enterprises in which the taxpayer, or a related entity of the taxpayer, has been involved
  - whether the taxpayer is a non-resident
  - any evidence which may indicate that the taxpayer intends to leave Australia without returning
  - the amount of any current tax-related liability or the expected amount of any future tax-related liability
  - the taxpayer's ability to pay, based on available information
  - the taxpayer's assets in Australia.
27. In deciding whether to request security under this provision regard must be had to the relevant facts and circumstances of each taxpayer. The ATO may have regard to (but is not limited to) the following considerations:
- the nature of the enterprise
  - the expected duration of the enterprise
  - the nature and amount of any current tax-related liability, and/or the nature and amount of any future tax-related liability expected to be, incurred by the taxpayer in carrying on the enterprise
  - the taxpayer's ability to pay its current tax-related liability or the expected amount of any future tax-related liability, based on available information
  - the period of time any tax-related liability has been outstanding
  - the compliance and payment history of the taxpayer, both in respect of the current enterprise, as well as any previous enterprises in which it has been involved
  - the level of the taxpayer's other liabilities.

*Where otherwise appropriate*

28. The Commissioner is empowered to request security from a taxpayer where he reasonably believes, having regard to all relevant circumstances, that the provision of security is otherwise appropriate.
29. In deciding whether and how often to request security under this provision, the ATO will take into account relevant facts and circumstances.
30. Relevant factors may include the following:
- the amount of any current tax-related liability or the expected amount of any future tax-related liability
  - the period of time the debt has been outstanding

- the taxpayer's ability to pay its current tax-related liability or the expected amount of any future tax-related liability, based on available information
- the level of the taxpayer's other liabilities
- the impact of arrangements made by the taxpayer's other creditors to secure their debts, if known.

(Some of these factors were already mentioned in paragraph 17 of this chapter.)

31. Additional care should be exercised in circumstances where no tax-related liability exists at the time when the issuing of a security notice is being considered. Generally, a notice should not be issued in such circumstances unless there are reasonable grounds to believe both that a future liability will arise against that entity, and that there is a risk that this liability will not be satisfied in the absence of the security.

32. In addition, the ATO will have regard to the following considerations, where relevant:

- *The taxpayer's payment history*

The ATO may consider the history of tax debts accrued by the taxpayer or by the businesses or activities in which they were involved; the nature and extent of those debts; and the manner in which they arose. For example, security may be requested if it is evident that the taxpayer has a history of consistent non-compliance with paying previous liabilities. It may also be relevant to consider the nature of the business or activity in which the taxpayer is currently engaged.

- *The payment history of directors of a corporate taxpayer, and trustees of trusts*

In the case of companies it may also be relevant to have regard to the current and previous conduct of those individuals who control the company's activities (for example, the directors of the company, or the directors of other companies which have effective control over the relevant entity).

For example, this may be a relevant consideration where the individuals who control the company have a history of involvement in 'phoenix' arrangements. In such situations the conduct and the compliance history of the directors of both dissolved and newly-established companies, and of the controlling companies of these entities, may be relevant considerations in deciding whether to issue a notice.

Similarly, where relevant, the ATO will consider the compliance history of trustees (and of directors of corporate trustees):

- in their capacity as trustees of the particular trust
- in their capacity as trustees of other trusts, both current and previous, and
- in their non-trustee capacity,

in deciding to issue a security notice.

- *Where the Commissioner is granting the taxpayer the benefit of a payment arrangement*

The ATO may require a taxpayer to provide security as a precondition of entering into a payment arrangement for the payment of liabilities by instalments. It is expected that this will not require the issue of a security notice.

The ATO may nonetheless issue a security notice in connection with an existing payment arrangement. For example, it may be appropriate to issue a security notice in the following situations:

- The payment arrangement had been entered into without the provision of security, but it is now considered on reasonable grounds that the relevant risk of default has increased. This could occur where the ATO has reasonable grounds to believe that asset dissipation by the taxpayer has occurred or is likely to occur.
- Security which had been provided with the payment arrangement is considered on reasonable grounds to no longer be of sufficient value to meet the outstanding debt. This may be, for example, due to a fall in the value of the security originally provided.
- *Where there is evidence of asset dissipation.*

On the facts in a particular case there is evidence that the taxpayer's assets are being dissipated.

### ***Amount of security required***

33. In deciding how much security to require from a taxpayer, the ATO will consider all relevant facts and circumstances pertaining to the matter in question, including the following:

- *The amount of the current tax-related liability, or the expected amount of the future tax-related liability*

The ATO may require security to the value of the existing or anticipated tax-related liabilities, or to the value of a portion of those liabilities. Generally, regard should be had to the taxpayer's ability to provide that security.

Where there is both an existing tax-related liability as well as an anticipated tax-related liability security may be required from the taxpayer that equals the amount of both the current and expected liabilities. This may be the case, for example, where there are reasonable grounds to believe that an anticipated tax-related liability is unlikely to be met by the taxpayer at the time in which it becomes due and payable.

The extent to which future tax liabilities of an entity may be anticipated by the ATO will depend on the relevant circumstances of each case, including (but not limited to) the following:

- the nature of the business or activity in which the taxpayer is engaged;
- the size of the taxpayer's business
- the number of employees in the business
- the type of tax debt incurred, or expected to be incurred
- the nature and extent of the debts incurred by the businesses or activities in which the taxpayer was previously engaged and the taxpayer's tax compliance and payment history.

The ATO may, for example, have a reasonable basis upon which to expect that the entity will incur an income tax debt in a particular amount for the current income year; or a pay as you go withholding debt for several periods in an income year. An estimation of this liability may be based on information relating to the taxpayer's business.

In anticipating tax liabilities likely to be incurred by the taxpayer, the ATO may consider the likely changes either in the general economic environment or in circumstances relevant to the conduct and operation of the taxpayer's business.. Accordingly, it may not always be possible to anticipate amounts of future tax-related liabilities with the necessary degree of precision, particularly over a long



period of time. The longer the period of time during in respect of which the liabilities are to be anticipated the greater the chance that unforeseeable events may occur that will materially affect the conduct and operations of the taxpayer's business.

Note in this regard that the ATO may request further security as often as it reasonably believes is appropriate. Therefore the ATO may choose to issue a security notice covering tax debts that can reasonably be expected to be incurred over a particular period, and issue a subsequent notice in respect of that period, or a subsequent period, for further liabilities that have become reasonably predictable.

The ATO may not consider it practical or desirable to adopt the approach of issuing multiple security notices in succession covering short periods of immediately foreseeable liability, particularly where there appears to be evidence of a significant risk of asset dissipation. (Refer also to the subheading 'Other considerations' below.)

By contrast, the ATO may consider it appropriate to request security only for a portion of the existing or anticipated liability, notwithstanding that the quantum of the full debt amount may be established or reasonably ascertainable. Again this decision will be made on all relevant facts and considerations in respect of the particular matter.

- *Other considerations*

There may be a range of other factors relevant to a decision of how much security to require from an entity. The ATO may take account of any relevant information available to it when making a decision in this regard.

For example, the ATO may in appropriate instances require a larger amount of security from the taxpayer than in other circumstances where there is: evidence of a real risk of asset dissipation; evidence of a rapidly escalating debt; or evidence of both.

### ***What kind of security to accept***

34. Paragraphs 18-19 of this chapter describe the types of security that are acceptable to the ATO.
35. A security notice issued to a taxpayer may prescribe a specific type or types of security that must be provided by the taxpayer in satisfaction of the request. The ATO will have regard to the taxpayer's circumstances in determining what security is sought. The ATO will not require a taxpayer to provide a type of security that cannot reasonably be expected to be provided by that taxpayer. In most cases, the ATO will prescribe a range of security types in the notice issued to the taxpayer, so as to allow the taxpayer some flexibility in satisfying the request.
36. However there may be cases in which the security notice requires a particular type of security from a taxpayer. This may be necessary, for example, where there is evidence of asset dissipation.
37. In order to satisfy the security notice requirements, the taxpayer must provide security of the kind and in the amount specified by the ATO. The ATO may reject an offer of security that does not meet these requirements. Note that the taxpayer may be liable for an offence for failure to comply with the notice if an acceptable security is not provided within the timeframe stipulated in the notice.

38. Regard should be had to any equity that the debtor, or the third party, has in the various assets over which the security is being sought.

#### ***Time allowed for the provision of security***

39. A security notice issued to the taxpayer must prescribe the time by which the taxpayer is required to provide the security.
40. The ATO will prescribe a reasonable amount of time for the taxpayer to comply with the notice. The amount of time considered reasonable for the satisfaction of the notice will vary from case to case, and depends on the circumstances pertaining to each matter.
41. In this respect, the ATO must have regard to all relevant circumstances in prescribing the time within which the notice requirements must be met.
42. This may include consideration of the following factors:
- the risk of asset dissipation
  - the amount of security required from the taxpayer
  - the type of tax liabilities covered by the security
  - the type of security to be provided by the taxpayer
  - whether the asset is owned directly or indirectly by the taxpayer.
43. Security is 'provided' once all the transactions necessary to give the Commissioner rights that can be exercised against the taxpayer's property have been completed.
44. In some cases, the security required by the ATO may need to be supported by an executed agreement or deed or various other documents (for example, a registered mortgage).
45. Security will only be considered to have been 'provided' by the due date in the notice if all such necessary documents have been executed and all necessary processes concluded by the required date.
46. The taxpayer will be liable for penalties for failure to provide the required security by the due date. However, the Commissioner may extend the time for compliance with the notice provided that the taxpayer has requested an extension of time from the Commissioner within the period nominated in the notice. The time should only be extended in those cases where it is considered reasonable to do so after having considered all relevant facts and circumstances

#### ***Failure to provide security***

47. A taxpayer will commit an offence if they fail to provide security to the ATO as required in the notice.
48. The penalty for this offence is 100 penalty units in the case of individuals and may be as high as 500 penalty units for corporate entities.

#### ***Default by the taxpayer***

49. The general legal principles that apply to security arrangements govern the ATO's ability to exercise rights over the security. The exercise of the ATO's rights depends on the specific situation, taking into account factors such as the nature of the liabilities covered by the security and the reason why the security was requested and the precise wording of the agreement or deed under which the security is provided.

50. The security required by the security notice is not a tax or a withholding obligation. The enforcement of the security is not subject to the general collection and recovery rules that apply to tax-related liabilities. For example, a failure to comply with the security notice will not itself attract GIC. That is, the general interest charge is not imposed separately on the amount of the security required under the security notice, instead, GIC, where applicable, will be applied to the particular outstanding tax-related liabilities in respect of which a security notice is issued.

## TERMS USED

**Guarantee** – a binding agreement to satisfy the obligation of another person, if the latter fails to do so.

**Security** – could be generally described as a possession such that the holder of the security holds, as against the grantor (the taxpayer), a right to resort to some property or some fund for the satisfaction of some demand, after which the balance of the property or fund belongs to the grantor.

**Tax-related liability or liability** – is a term used to define any pecuniary liability to the Commonwealth arising directly under a taxation law (including a liability the amount of which is not yet due and payable). It thus encompasses all types of taxes, penalties, additional charges for late payment, (including amounts previously defined under the ITAA 1936 as 'tax' and under the *Superannuation Guarantee Administration Act 1992* as 'superannuation guarantee charge'). A table which lists the tax-related liabilities is found in section 250-10 of Schedule 1 to the TAA.

### Chapter 29 - Archived versions

Version 4 – July 2006 (will link to chapter 29 pdf)
Version 5 – August 2008 (will link to chapter 29 pdf)