

BEWARE OF TRAPS IN NEW REFORM

All practitioners need to be aware of personal properties securities reform that is scheduled to commence in October 2011

There has been such a flurry of significant legislative reform recently that practitioners could be excused if they are finding it difficult to keep up.

However, the *Personal Properties Securities Act 2009* (Cth) deserves a special mention and special attention. This is because of all the recent reforms, personal properties securities reform (PPSR) stands out as the one that has the most obvious potential to lead to more claims being made against practitioners.

Start date

Until recently, the start date of the PPSR was to be May 2011. However, on 13 February 2011 the Council of Australian Governments (COAG) endorsed a recommendation that the commencement date be deferred to October 2011.

Accordingly, over the next six months the LPLC plans to publish a series of articles and bulletins designed to assist practitioners to understand the new regime and the extra risks it poses for practitioners.

This article is the first of this series and is focused on why it is so important for all practitioners to be aware of the PPSR.

What does PPSR do?

In very rough terms, it could be said that the PPSR has a similar impact upon interests in personal property, as the Torrens system has had upon interests in real property. While the analogy may not hold up to detailed scrutiny, it is nevertheless a useful comparison if merely to emphasise the importance of practitioners gaining an understanding of the new regime.

In essence, the PPSR creates a new set of rules governing the priority of competing interests in personal property. These new rules rely on new concepts of attachment and perfection rather than traditional notions of legal title.

The PPSR creates a new national register for security interests in personal property. This will replace a number of existing commonwealth, state and territory registers, including most notably Australian Securities and Investments Commission's register of company charges and the Victorian Vehicles

Security Register. The new national register will allow the registration of security interests in any sort of personal property. This means that security interests in anything from artwork to contractual rights will be able to be registered for the first time.

Why has it been introduced?

The aim of the PPSR is to "improve the ability of individuals and businesses, particularly small-to-medium size businesses, to use all their property in raising capital".¹

An Access Economics report on the costs and benefits of PPSR from 6 July 2006 concluded that the reforms had the potential to reduce borrowing rates for a loan secured with personal property (as opposed to an unsecured loan) in the order of three to four percentage points.²

The legislation itself provides examples of typical transactions that currently involve security interests, including finance or long-term leases, hire-purchase agreements, title retention (Rompala) clauses and the delivery of goods on consignment.

Considering the broad aims of the PPSR, the ability to more effectively secure transactions by taking securities over personal property, and the reduced cost of borrowing, it is reasonable to anticipate significant growth in transactions that are secured by personal property.

Why does it pose the greatest risk to practitioners?

With this projected increase in transactions that are secured using personal property, and the radical shift in rules governing priority, there is scope for mistakes to be made by many people.

It is hoped that practitioners in Victoria will be able to adjust their thinking through education, rather than through some of the more painful experiences in other jurisdictions. For example, in New Zealand there were two separate cases in which the owner of five portable buildings and the owner of a stallion worth approximately \$2 million both

lost their interests ostensibly because of a failure to register.

These cases and the disastrous outcomes for the parties involved might seem harsh to the uninitiated. However, they have been described as indicative of "a general failure by members of the business community [in NZ] to appreciate the potential ramifications of the PPSA".³

Unless practitioners take the time now to understand how this new system works, there is potential for claims to arise in a similar way to the claims that the LPLC has received in relation to real property. That is, an alleged failure to correctly register a security interest, to correctly conduct a timely search of the PPSR, or to properly advise about the opportunity and/or effectiveness of taking a security interest over personal property.

These are simple errors that are easy and cheap to avoid with training of staff and new procedures.

Further Information

If you are looking for further information, a good place to start would be the government PPSR website www.ppsr.gov.au, which contains a vast amount of information including FAQs, and guides and information sheets for "Secured Parties", "Grantors" and "Buyers".

Or have a look back at the excellent cover story for the April 2009 *LIJ*, "Personal property securities wake-up call", written by Andrew Maynes.⁴

The LPLC will be writing further *LIJ* articles on the topic, and we will include seminars in our "Country Run" in May and our annual risk management intensives in July and August. ●

This column is provided by the Legal Practitioners' Liability Committee. For further information ph 9672 3800 or visit www.lplc.com.au.

1. <http://bit.ly/ejumGE>.

2. Available for download from the federal Attorney-General website, www.ag.gov.au.

3. Article by Richard North, "The New Zealand Personal Property Securities Act; growing pains" [2005] *CanterLawRw* 5.

4. (2009) 83(04) *LIJ*, p.34.