

NEW PROTECTION FROM BAD DEBT

Businesses have much to gain by preparing for personal property security reform.

The start of the personal property security reform has been delayed from the previously announced date of 31 October. At the time of writing, it is not clear when the new registration start date will be; currently 1 February 2012 is the latest possible date. However, on 12 October 2011 the *Personal Property Securities Amendment (Registration Commencement) Bill 2011* was introduced into the Australian Parliament. This Bill, if passed, would enable the federal Attorney-General to determine a start date later than 1 February 2012.

In addition to the concepts outlined in this column in August, practitioners need to be aware of the following important new mechanisms.

Request for information

This enables certain interested parties to request that a secured party provide additional information about its security interest. The secured party is obliged to respond to such a request within 10 business days. If the secured party fails or refuses to respond, or provides an incomplete or incorrect response, the requestor may apply for a court order to force the secured party to respond. Presumably such an order would often be accompanied by an order for costs. If the secured party does not comply with a court order, the court may then make an order extinguishing the security interest.

Amendment demand

This mechanism enables certain interested parties to make a demand that a "secured party" amend a registered "financing statement". This mechanism is somewhat analogous to s89A and s90(3) of the *Transfer of Land Act 1958* which allow the registered proprietor of land to insist that a caveator either withdraw the caveat or issue legal proceedings to substantiate the caveator's claim. A secured party will need to respond to an amendment demand within five business days, by either making the amendment sought, or providing a justification why the amendment need not be made. If there is no

response or an insufficient response, the PPS registrar or a court is empowered to make the amendment sought.

What businesses need to do to prepare

Every business that supplies goods or credit needs to consider the impact of the *Personal Property Securities Act (PPSA)* on its operations. Businesses that ignore the *PPSA* face a real risk of suffering significant losses in the future. Conversely, businesses that make the necessary adjustments to their documentation and business processes will enjoy new protection from the risk of bad debts.

For example, up until now many suppliers of goods in the building and construction industry have found that a retention of title clause provided little benefit. However, a retention of title clause will become much more valuable because, under the PPS regime, it will be possible for a building subcontractor to trace its security interest into the proceeds of the goods supplied, i.e. the subcontractor will obtain a security interest in the book debt owed from the owner to the principal builder.

To gain the full benefit of the *PPSA*, a supplier of goods will ideally:

- ensure that their terms of trade contain a "retention of title" or Romalpa clause, and consider whether to add additional clauses to contract out of some of the notification requirements where that is permitted by the *PPSA*;
- obtain written acceptance from every customer to their terms of trade, and establish the appropriate filing or document management system so that they can retrieve such written acceptance as and when required to do so;
- obtain accurate details from customers (ABN, ACN, name and date of birth) that can be used to register an effective financing statement. It may be necessary to ask certain customers for identification (such as their driver's licence) to validate the accuracy of the information provided;

- obtain the super priority of a perfected purchase money security interest (PMSI), by registering a financing statement within the tight timeframes specified under the *PPSA*;
- put systems in place so that the business can trace an unpaid invoice to the particular goods supplied. This is important because if a customer goes into liquidation and the supplier wishes to enforce the security interest, then the supplier will need to identify the precise goods that were supplied pursuant to any unpaid invoices; and
- put systems and business processes into place to be able to respond to any requests for information or amendment demands in relation to their financing statements within the tight timeframes required by the *PPSA*.

Businesses that lease goods or provide goods on bailment will need to review their terms of trade. If the terms do not limit the lease or bailment to less than 12 months, or the business does not ensure the goods are returned within 12 months, then it will be deemed to be a PPS lease. The business should then consider the costs/benefits of registering its security interest, or whether it is possible and desirable to alter both the terms of its leases or bailments (e.g. ensuring that the lease is less than 12 months) and its business processes (e.g. ensuring goods are in fact returned within 12 months) to take the arrangements outside the operation of the *PPSA*.

Finally, it might be advisable for a business to monitor what financing statements are being registered against it, and seek discharge or amendment of such financing statements where appropriate. The failure of a business to do this might render it more difficult, time consuming and costly for the business to raise finance or sell assets. This is because any potential financier or purchaser of assets may insist on the discharge or release of registered financing statements. ●