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The impact of the Personal Property Securities Act on retention of title suppliers

This is the first of a series of articles that will examine the impact of the Personal Property Securities Act 2009 on specific business sectors. In this article Corporate Lawyer, Llon Riley deals with the impact of the PPSA on retention of title suppliers. The series will follow with the impact of the PPSA on other business sectors including equipment lessors and financiers.

With less than 12 months before the *Personal Property Securities Act 2009* (Cth) (**PPSA**) is scheduled to apply it is vital for retention of title (**ROT**) suppliers to prepare for and understand the impact that the PPSA will have on their current practices of preserving and protecting their security interests in the goods they supply to purchasers. If ROT suppliers do not take heed of the provisions of the PPSA they risk losing their interests, including title, in the goods they supply and having their interest in the goods rank behind those of other creditors.

What is the PPSA and what does it govern?

The PPSA creates one national regime for security interests over personal property. The national regime will be made up of the PPSA, including the regulations, and the Personal Property Securities Register (**PPS Register**). The PPSA also introduces substantive changes to the current laws that govern security interests and the methods used to protect those interests.

The PPSA governs security interests in tangible and intangible personal property. Personal property is any kind of property other than land, fixtures, water rights and certain licenses and authorities granted under Commonwealth, State or Territory laws. Common examples of personal property include motor vehicles, equipment, consumer goods, business inventory, trade debts, intellectual property and company shares.

A security interest includes a ROT agreement (ie. an agreement where a supplier sells goods to another and, to secure the payment of the purchase price, the supplier retains title in the goods).

Current methods of protecting ROT suppliers interests

Under the current laws, ROT suppliers protect their interest in the goods they supply by retaining their title in the goods until such time as the purchaser pays the purchase price in full. The ROT supplier will also likely claim an interest in the proceeds of any sale of those goods. ROT terms are usually detailed in documents such as invoices, letters or the ROT supplier's standard terms and conditions.

Specific provisions of the PPSA which will apply to ROT suppliers

However, the new provisions of the PPSA will mean that the current practices used by ROT suppliers will no longer be adequate to protect their title and interests in the goods they supply.

ROT agreements must be in writing and signed or adopted by the purchaser

A ROT agreement must be in writing (ie. the ROT terms need to be documented in an agreement or document of some kind) and that writing must be signed or adopted by the purchaser. The writing must also contain an adequate description of the goods supplied to the purchaser. Whether a good's description is adequate will depend on the nature of the goods supplied and the frequency of that supply.

If the ROT agreement is not in writing and the purchaser has not indicated its acceptance of those terms, the ROT agreement will <u>NOT</u> be enforceable against a third party.

Registration

A security interest registration will need to be made for ROT agreements. If the security interest under a ROT agreement is properly registered on the PPS Register it will obtain a special priority to the extent of the goods supplied and in relation to their purchase price over all other security interests in that property, even those registered beforehand.

It should be noted that the PPS Register is not a document register but rather a notice based register of interests. A physical or electronic copy of the ROT agreement will not be lodged with the PPS Register. One registration can cover multiple supplies to the same purchaser.

One consequence of failing to register or improperly registering a ROT interest is that the ROT supplier may only have a claim against the purchaser as an unsecured creditor. Others consequences for unregistered ROT interests are detailed below.

Title in goods the subject of an unregistered ROT agreement will vest with or transfer to the purchaser on insolvency or bankruptcy

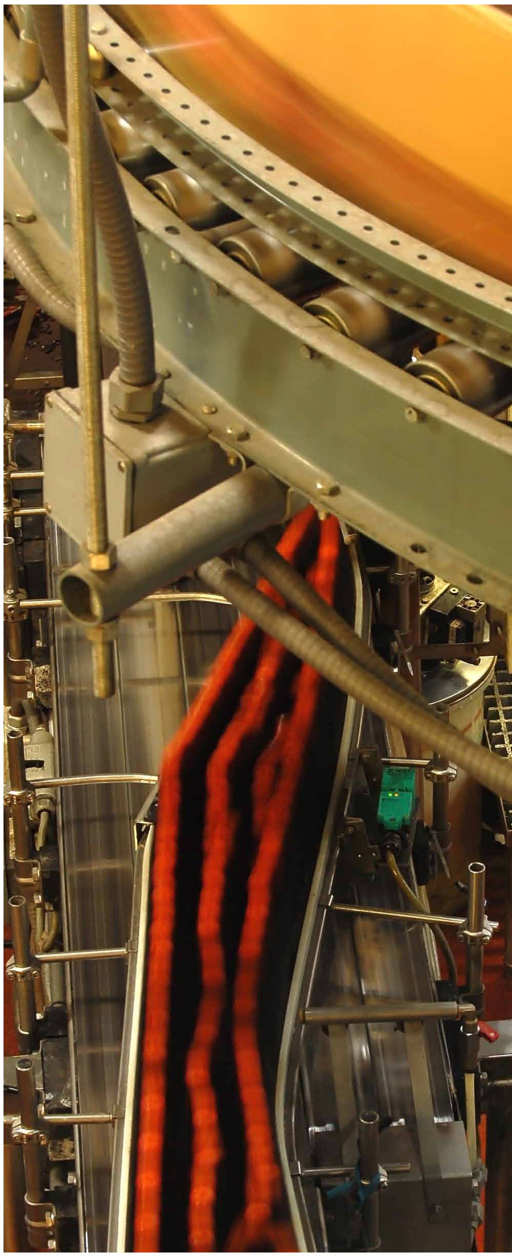
If a ROT interest is not registered on the PPS Register and the purchaser goes into liquidation, is wound up or is declared bankrupt, the ROT supplier's title in the goods supplied will automatically transfer to the purchaser and those goods will be available to satisfy the claims of other creditors.

This provision of the PPSA is in stark contrast with the current law and practice of ROT suppliers. Under the current laws, if a purchaser goes into liquidation or is declared bankrupt goods subject to a ROT agreement will remain the property of the ROT supplier due to the fact that title and ownership are sufficient to preserve the ROT suppliers interest in the goods.

If ROT suppliers ignore the consequences of this vesting provision of the PPSA, there is a very real risk of them losing their title in the goods they supply.

Priority of unregistered ROT agreements

Even though a ROT supplier retains title in the goods they supply, under the PPSA an unregistered ROT interest will be subordinate to a registered security agreement. This means that another entity that claims a security interest in the goods and has registered that interest - for example, a bank who has an all assets charge over the purchaser's property - will have priority over a ROT supplier's unregistered ROT interest. If the other entity enforces their security interest in the goods the ROT supplier may lose its title and interests in the goods.



Play fair! New rules for consumer contracts

The Australian Consumer Law introduces new unfair contract provisions which will have a significant impact on the relationship between business and consumer. Corporate Partner, Mark Poczman and Dispute Resolution Senior Associate, Bill Fragos explain.

From 1 July 2010 amendments to the *Trade Practices Act 1974* (Cth) (**TPA**) and the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) will give consumers the right to challenge unfair terms in standard form contracts.

This will be followed by similar provisions being incorporated into related legislation around Australia by the end of 2010. Suppliers of goods and services to consumers need to understand how these changes will affect their dealings with their customers.

Unfair terms in standard form consumer contracts

The consumer contracts covered by the legislation will be those formed or varied on or after 1 July 2010.

A term within a *consumer contract* will be **void** if its is contained in a *standard form contract* and the term is *unfair*. A consumer contract is one involving the supply of goods and services, or a sale or grant of an interest in land, to an individual (*wholly or predominantly for personal domestic or household use or consumption)*.

Clearly, there may be difficulty in determining the purpose of the relevant supply. In many instances goods or services will be sought for mixed domestic and business purposes (for example internet service provider contracts may be entered into by individuals for both business and private use). Accordingly, it is likely that many suppliers will need to review their standard form contracts with consumers on the working assumption that they are consumer contracts, as defined, or alternatively have two different standard form contracts.

Business to business transactions are not covered by these legislative changes.

Standard form contracts

The term *standard form contract* is not defined in the legislation. Broadly speaking, a standard form contract will ordinarily be one that has been prepared by a party to a contract and is not subject to negotiation (i.e. a “take it or leave it” contract). There is a rebuttable presumption that a contract is a standard form contract.

Exemptions

Certain types of contracts are exempted from the unfair contracts regime. For example, various shipping contracts and contracts which are corporate constitutions will not be subject to the new amendments.

Shipping contracts are excluded because they are already subject to a comprehensive national and international legal framework. Corporate constitutions are excluded because companies have a choice regarding the rules that govern their internal management. Insurance contracts are currently excluded from the new unfair contracts regime by the *Insurance Contracts Act 1984* (Cth). An options paper has been recently released to inform the Government’s consideration of options for dealing with unfair terms in insurance contracts. However, private health insurance contracts will be subject to the new unfair contracts regime.

Also, certain terms are not covered by the changes: terms which define the main subject matter of the contract, or set the upfront price payable under the contract, or terms required by another law.

Unfairness

A term in a consumer contract will be unfair if it would cause a *significant imbalance* in the parties' rights and obligations arising under the contract, is not reasonably necessary in order to protect the *legitimate interests* of the party who would be advantaged by the term, and would cause *detriment* (whether financial or otherwise) to a party if it were to be applied or relied on.

The legislation includes a list of examples of the kinds of terms that may be unfair, (known as the "grey list"). The grey list particularly focuses on terms which are one-sided, limit a party's liability or limit the other party's ability to take proceedings on the contract.

Consequences

An unfair term in a standard form consumer contract is void. That said, the remainder of the contract will continue to bind the parties if it is capable of operating without the unfair term. Businesses will need to consider the possible effects of a term being declared void and should carefully draft severance clauses in their contracts to cater for this.

A Court can make a declaration that a term is unfair. This can be done on application of the aggrieved consumer or of the relevant regulatory authority (the Australian Competition and Consumer Commission (**ACCC**), the Australian Securities and Investment Commission (**ASIC**) or State and Territory regulators). A declaration that a term is unfair is not of itself a contravention. If a Court makes such an order and a party seeks to rely on the unfair term the Court may make further orders against that party, including for the provision of redress to consumers not party to the Court action.

Further changes – increased enforcement powers given to regulatory authorities

The changes to the TPA and the ASIC Act increase the enforcement options and remedies available to ACCC and ASIC. The changes, which took effect from 15 April 2010, include powers exercisable without the need for Court orders including, controversially, infringement (penalty) notices in the event of breaches of certain provisions of the TPA (and the ASIC Act) and public warning notices (so called "naming and shaming" notices).

Payback for Bullies

The Melbourne Magistrate's Court has sent a strong message against bullying in the workplace after convicting and fining a company and four individuals responsible for workplace bullying that ultimately led to the suicide of 19-year-old Brodie Panlock in 2006. Employment Relations Partner, Stephanie Vass, and Associate, Justin Le Blond examine the case.

Bullying is not defined by statute as an offence, nor is there a general legislative prohibition of workplace harassment. Nevertheless, employers who do not take precautions to ensure the physical and psychological wellbeing of employees can be found liable for any injuries suffered. The Guidance Note on the *Prevention of Bullying and Violence at Work* prepared WorkSafe Victoria describes the act of bullying as "repeated, unreasonable behaviour directed toward an employee, or group of employees, that creates a risk to health and safety."

Workplace bullying is evidenced by sustained unreasonable behaviour rather than an isolated incident. The types of behaviour indicative of workplace bullying include, but are not limited to, verbal abuse, exclusion, intimidation, unfair rostering, deliberately withholding information and assigning impossible or meaningless tasks.

Prolonged workplace bullying creates a culture of hostility that not only impacts negatively on the welfare of employees but also the productivity rates and resources of the workplace. Employers can be held vicariously liable for the actions of employees or agents who engage in bullying behaviour if it occurs within the scope of their employment. In order to avoid liability for workplace bullying, an employer must prove that all reasonable steps were taken to prevent it. Ignorance of the harassment committed by employees is not a defence. Because there is no discrete act dealing with bullying, complaints of bullying at this point in time are actioned by employees in various courts and tribunals by claiming breaches of the relevant health and safety legislation in each state.

MAP Foundation, trading as Cafe Vamp in Hawthorn, was fined $220,000 and the four individual defendants a total of $115,000 for breaches of the *Occupational Health and Safety Act 2004* (**OHS Act**) which Magistrate Lauritsen described as "persistent and vicious." The four defendants, comprising the director of MAP Foundation, the cafe manager and two former employees pleaded guilty to the offences and received discounted penalties for exhibiting remorse.

The culture of Cafe Vamp in this case was rife with harassment. According to Coroner Peter White, Ms Panlock was treated in an "extremely aggressive and intimidating matter" and was subject to both physical and emotional bullying between 2005 and her suicide in September 2006. Stan Krpan, acting executive director of WorkSafe Victoria said "the offending in this case was of the most serious nature… the culpability was high, the culture at this workplace was vicious and was not acceptable."

He went on to say "failing to set and maintain standards in this area can destroy employment relationships and irretrievably undermine individuals and the business." As the case of Ms Panlock demonstrates, by the time the issue has been raised retrospectively it may already be too late for the victims of workplace bullying.

MAP Foundation was found to be in breach of section 21(2a) of the OHS Act, which requires an employer to provide for or maintain plant or systems of work that are, so far as is reasonably foreseeable, a safe working environment for employees. Its director Marc Da Cruz was also found liable under this section, as well as sections 21(2e) and 144. Section 21(2e) required Mr Da Cruz to provide information, instruction training or supervision to employees as is necessary to ensure workplace safety and employee health, while section 144 extended his liability as an officer of the offending body corporate. He was fined a total of $30,000.

The manager of Cafe Vamp Nicholas Smallwood and former employees Rhys MacAlpine and Gabriel Toomey were found to have breached section 25 of the OHS Act. Under the section, employees are required to take reasonable care for the safety of persons who may be affected by their acts or omissions at a workplace. They were fined $45,000, $30,000 and $10,000 respectively.

This recent decision emphasises the need for employers to take all necessary steps to ensure workplace bullying does not occur or otherwise face prosecution, substantial penalties and public ridicule. Employers are reminded to promptly address any claims of workplace bullying or harassment if and when it arises. This case demonstrates the importance of taking complaints of bullying seriously and implementing processes to ensure bullying does not occur. Prevention must be at the forefront of an employer's mind at all times.

A new era of disclosure for managed investment schemes

In February 2008, the Federal Government announced that a "Financial Services Working Group" would be formed to look at the issues surrounding financial services' advice and disclosure, aiming to develop short, standard and easy to understand superannuation and managed investment scheme product disclosure statement documents. Corporate Senior Associate, Craig Yeung and Lawyer, Kylie Barrie examine the outcome of that review.

On 21 December 2009, the Hon Chris Bowen MP released for public consultation draft regulations and an example PDS for superannuation and managed investment product disclosure. However, while the draft regulations were released for both Managed Investment Scheme (**MIS**) and superannuation products, this article will only focus on the changes for MISs.

The original purpose of the *Financial Services Reform Act* was to enable flexibility in the financial services regime to encourage the industry to develop. It was thought better protection would be given to investors if we had a single regulatory regime with a focus on licensing and disclosure.

Australia currently has a "principles-based" disclosure regime, meaning that investors are provided with all of the relevant information necessary to enable them to make an informed investment decision. It was originally thought that a principles-based disclosure regime would be the most flexible and effective way to regulate the financial markets.

The *Corporations Act* requires that the issue of a financial product must include "all information that might reasonably be expected to have a material influence on the decision, of a reasonable person, as a retail client, whether to acquire the product". While the *Corporations Act* does provide some guidance concerning the information that must be included in a product disclosure statement (**PDS**), the above provision leaves the issuer to determine and decide on the level of disclosure required to be included. Accordingly, what is often produced is a lengthy disclosure document that investors ignore.

The new regime will be introduced via the new regulations to the *Corporations Act* with one of the major changes being the move away from the principles-based disclosure regime. For example, the proposed regulations prescribe that the PDS must not exceed:

- six A4 pages, or
- twelve A5 pages, or
- eighteen DL pages, or
- if in any other format, as long as it fits into six A4 pages,

while the current regime does not prescribe any length for a PDS.

Further, the regulations state that the PDS must include a contents page and be made up of a number of sections which must be numbered, ordered and titled. The prescribed sections include the following:

- a brief summary about the responsible entity, the investment manager and the MIS
- an overview of how the MIS covered by the PDS works
- information about the benefits and any related services offered by the issuer
- the risks associated with investing in the MIS
- a summary description of the investment options offered by the MIS
- the main fees and costs associated with the MIS
- a warning that investing in a MIS is likely to have tax consequences and that consumers are strongly advised to seek professional tax advice
- information on how to invest in the MIS, and
- information on how to make a complaint.

The Financial Services Working Group (**Working Group**) has announced that the regulations are only to apply to a straightforward MIS and a MIS that invests at least 80% of its assets in "financial assets". While "financial assets" are not defined in the *Corporations Act*, ASIC's standard licensing conditions provide that financial asset means:

- cash
- cheques
- orders for payment of money
- bills of exchange
- promissory notes
- securities
- deposit products, and
- interests in MIS (including where the MIS invests in direct real property or mortgages),

but does not include a derivative.

MISs that are not caught by the regulations will continue to have the current disclosure regime apply to them.

The consultation period closed on 26 February 2010. It is proposed that the regulations will take effect in the first half of 2010.

Consultation Paper 133 Agribusiness managed investment schemes - Improving disclosure for retail investors

ASIC is currently seeking stakeholder feedback on Consultation Paper 133 Agribusiness managed investment schemes: Improving disclosure for retail investors, issued on 8 April 2010. Corporate Associate, Aaron Chan examines the paper.

Consultation Paper 133 Agribusiness managed investment schemes: Improving disclosure for retail investors (**CP 133**) sets out ASIC's proposal to improve the disclosure provided in relation to managed investment schemes (**MIS**) set up in the agribusiness sector by introducing "disclosure benchmarks" which will need to be dealt with in Product Disclosure Statements (**PDS**) and ongoing disclosure provided by issuers of interests in an agribusiness MIS.

While the agribusiness MIS is not required to meet the benchmarks, under the proposal contained in CP 133, reference to the benchmarks and the degree of compliance with the benchmarks will need to be included as part of the disclosure made by the responsible entity of the agribusiness MIS. In the event that the agribusiness MIS fails to meet any of the benchmarks identified by ASIC, the reasons behind this non-compliance will need to be disclosed.

The disclosure benchmarks identified in CP 133 are intended to cover aspects of agribusiness MIS which ASIC has identified as key risks generally associated with agribusiness MIS. These include benchmarks relating to the fee structures and financing arrangements adopted for the MIS, as well as the arrangements relating to the ownership of land and water resources needed for the MIS and the involvement of the responsible entity (and its group companies) in providing services to, or owning interests in, the MIS.

CP 133 also foreshadows the requirement for responsible entities to disclose the adequacy of the mechanisms in the scheme documents and contractual arrangements to facilitate the replacement of the responsible entity and whether or not there are any poison pill clauses that may be triggered in the event of any such replacement.

ASIC is of the view that the disclosure required in relation to these benchmarks falls within the current general disclosure obligations of agribusiness MIS operators, and that CP 133 will require consistent disclosure by agribusiness MIS operators and assist retail investors in making informed investment decisions about potential investments in agribusiness MIS.

The consultation paper contains feedback questions and ASIC is seeking responses from stakeholders in the agribusiness MIS industry in relation to the appropriateness, adequacy and reasonableness of the proposals contained in CP 133. Any written submissions on CP 133 need to be submitted to ASIC by 31 May 2010.

At present, ASIC anticipates that any benchmark disclosure requirements contained in the finalised regulatory guide will not only apply to any PDS issued by an agribusiness MIS on or after 30 September 2010, but also to any PDS issued before, but still in use on, that date. It is anticipated that the benchmark disclosure requirements will also apply to any ongoing disclosure that the responsible entities of agribusiness MIS makes to investors.

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