

### Personal Property Securities Reform

by Robert Cunningham, Managing Partner

The Commonwealth and State governments have agreed on legislation to establish a radically new personal property securities regime. The new rules will affect everybody taking security over personal property.

The central legislation is the *Personal Property Securities Act 2009* (Cth) ("the Act") which was assented to on 14 December 2009.

Under this legislation, "personal property" is any property that is not land or fixtures on land. It could, for example, be a boat, a car, stock on sale of a business, a licence of intellectual property or a crop.

Currently, the rules relating to securities over personal property are diverse and complicated. Different rules apply for bills of sale, crop liens, hire purchase agreements, chattel lease agreements, stock mortgages, company charges and so on. The rules are further complicated because different legislation applies in different states.

The new legislation defines a "security interest" as an interest relating to personal property provided for by a transaction that, in substance, secures payment or performance of an obligation. It doesn't matter what form the transaction takes, as long as it contains these basic elements. Any arrangement that uses personal property to encourage a debtor to pay is likely to be subject to the Act.

The legislation creates a "Personal Property Security Register". Any security interest over personal property may be registered. Existing security interests registered as debentures, bills of sale, Register of Encumbered Vehicles (REVS) interests, etc will be transferred across to the new register.

Owners of security interests should register them. If they don't, they will lose priority to other security interest holders who do register their interests. The basic rule is that the first registered security interest has priority over all

other security interests in the same property.

A "purchase money security interest" may defeat an earlier registered security. For example, a security in the nature of a "floating charge" would lose priority to a later security registered over a particular item of personal property if the later security were a title retention agreement or hire purchase agreement.

Registered security holders can be defeated by innocent third party purchasers in certain circumstances. In those cases, the registered security holder is given replacement security over the proceeds of the sale of the property.

The remedies for security holders under the legislation are much simpler to exercise than the current maze of rights. For example, where personal property would be better sold with land, and first priority security is held over both, the personal property may be sold using the mortgagee sale mechanisms for land.

The new regime is expected to take effect from May 2011. Before then, all security documents should be checked to make sure they are registered and satisfy the requirements of the new legislation.

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