

Spring is here, the federal elections are over and the relentless pace of change continues.

The following technical update summarises a major change to the system of registration of interests in assets together with several recent statutory changes and cases on the conduct of liquidators and shadow directors.

Personal Property Securities ("PPS") Register

The new national PPS law and register are scheduled to commence from 1 May 2011. A two (2) year transition period starting from 1 May 2011 will be in place for existing security interests. The system will be similar to that introduced in New Zealand some years ago.

The PPS Register will replace a number of Federal and State based securities registers, such as ASIC's register of charges, Australian Register of Ships, REVS NSW, and many others. The PPS Register does not cover land, water rights and some other property. Security interests on the existing registers will be migrated to the PPS Register, which will be maintained by Insolvency and Trustee Service Australia.

Any party with any type of security interest will be required to register their interest on the PPS Register to ensure it receives its entitled priority. The registration of security interests thus supersedes ownership entitlements. Security interests include retention of title supply agreements, fixed and floating charges, leases, chattel mortgages, factoring agreements and more.

The PPS regime is particularly relevant to those involved in equipment hire, leasing & rentals and the supply of goods and services. It is important that your clients have their security documentation reviewed by their legal advisors to ensure that property rights are adequately protected and that any opportunity for enhancement of those rights is taken.

From an insolvency perspective, a Liquidator, Receiver etc may be entitled to deal with property free of any encumbrance if the security interest is not registered on the PPS. There are also changes to the rules governing the registration of security interests within a short period of time before the commencement of insolvency. Full details of these rules are outside the scope of this update and in any event the regulations have yet to be released.

As previously noted, there is a two (2) year transitional period beginning on 1 May 2011 where existing security interests may keep their priority despite not being registered. Every effort should be made to register security interests during the two (2) year transition period as failure to register will mean that, at the expiry of the transition period, the interest will not be recognised. A case in the High Court of New Zealand provides an example of the consequences of not registering; a portable building was leased to a company but the lease was not registered. The company had separately granted a fixed and floating charge over all its assets to a bank and the charge was registered. Receivers were appointed to the company and the Court found that the bank was entitled to the building under its charge as the lease was unregistered.

Finally, we note that no registration fees will be charged for registering an existing security interest during the transition period. Further information on the PPS Register is available at www.ppsr.gov.au.

Personal Bankruptcy Changes

Schedule 4, Part 1 of the Bankruptcy Act 1966 has been amended to increase the minimum debt to support a Bankruptcy Notice and Creditor's Petition from \$2,000 to \$5,000. The change came into effect from 11 August 2010.

Changes to Home Warranty Insurance Scheme

Readers with clients in the building and construction industry may be aware that the new Home Warranty Insurance arrangements for NSW commenced effective 1 July 2010. If a builder is unable to honour their commitments under a contract because of insolvency, death or disappearance, the home warranty insurance scheme is available to protect homeowners.

NSW Self Insurance Corporation (t/as NSW Home Warranty Insurance Fund) has taken over as the single home warranty insurer in NSW. QBE and Calliden Insurance Limited will continue to act as insurance agents of the fund. Vero will continue to act as an agent up until 30 September 2010. Those insured with Vero will need to seek alternative arrangements to ensure cover is maintained.

Sale/Lease of office space greater than 2,000 m² – Energy Efficiency Disclosure

From 1 November 2010, owners wishing to sell or lease office space greater than 2,000 m² will be required to obtain a Certified Building Energy Certificate (BEEC) which includes an energy efficiency rating in accordance with the National Australian Built Environment Rating System (NABERS). NABERS is a national initiative managed by the NSW Department of Environment, Climate Change and Water.

The NABERS rating must be disclosed on all advertising for the sale or lease of the space and the BEEC must be registered on the Building

Energy Efficiency Register. A BEEC is estimated to cost approximately \$6,000 and can be prepared by a registered assessor. Initial fines of up to \$110,000 together with daily ongoing fines may be imposed by a Court for non-compliance, and infringement notices of \$11,000 together with daily fines can be issued by the NSW Department of Environment, Climate Change and Water.

Recent Decisions

Independent Cement and Lime Pty Limited v Brick and Block Company Ltd (In Liquidation) (Receivers and Managers Appointed) [2010] FCA 352

A creditor, Independent Cement and Lime Pty Limited ("ICL") brought proceedings against the Liquidators of Brick and Block Company Ltd (In Liquidation) (Receivers and Managers Appointed). The alleged conduct of the Liquidators included a failure to investigate the company or assess potential insolvent trading claims, facilitating a 'phoenix arrangement' via a Deed of Company Arrangement and errors and omissions in the then Voluntary Administrators' Section 439A(4) report. The judge made orders that the Liquidators be removed and considered that the lack of confidence which ICL had in the Liquidators' abilities was not unreasonable. The significance of the decision is that insolvency practitioners are to act in the interests of all creditors and failure to carry out adequate investigations in a voluntary administration can result in the removal of the appointee by the Court.

Buzzle Operations Pty Ltd (In Liquidation) v Apple Computer Australia Pty Ltd [2010] NSWSC 233

An insolvent trading case brought by the Liquidator of Buzzle Operations Pty Ltd (In Liquidation) against Apple Computer Australia Pty Ltd has been dismissed. The Liquidator had argued that Apple was a 'shadow director'. A shadow director is an entity that is not validly appointed as a director but directs the company's actions.

The lengthy judgement discusses a number of cases, "particularly in the context of family-run companies, of a dominant family figure who is not appointed as a director (and who may be disqualified from acting as such) both acting from time to time as a director and instructing the other directors as to how they should act."

Buzzle was the result of the merger of a number of resellers of Apple products. Apple's consent to the merger was required and, for the merger to go ahead, Apple required Buzzle to meet certain conditions. The judgement shows that a party is not considered to have participated in the decision making of another merely by imposing conditions which must be met to receive its consent to a proposal. The Court found that Apple did not instruct Buzzle, but rather took part in negotiations at arm's length.

The judgement is particularly relevant to companies that impose conditions on third parties and/or request adherence to certain management practices.

One should seek legal advice if they feel the dealings between two independent parties may not be proceeding at arm's length. It should be noted that the Liquidator has appealed the decision.

Conclusion

The team at O'Brien Palmer is committed to assisting our contacts help their clients understand and navigate the complex realms of insolvency. As part of that commitment, we would be pleased to answer any of your questions regarding our services. We also offer a complimentary and obligation free initial consultation to establish the nature of the problem and the manner in which we can be of service.

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