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UPDATE ON PERSONAL PROPERTY SECURITIES ACT 1999

The Personal Property Securities Act 1999 (PPSA) came into force on 1 May 2002.

What is the PPSA?

The PPSA is new legislation that reforms the law relating to security interests (e.g. loans, etc) in personal property. Many people would be aware that it has been possible for car buyers to check online whether money is owed on a particular vehicle, but until now a comprehensive register for recording finance on items such as whiteware and furniture was not available. That has now changed with the PPSA.

In the Act, personal property is defined as almost all property other than land. From 1 May 2002 all security interests taken in personal property will be subject to the PPSA.

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Generally security interests will need to be registered to ensure that they have priority over other security interests on a particular piece of personal property. While registration is not compulsory under the PPSA, registration will generally ensure priority over subsequently registered security interests.

Law Changes under the PPSA

The PPSA replaces the *Chattels Transfer Act 1924*, the *Companies (Registration of Charges) Act 1993* and the *Motor Vehicles Securities Act 1989*. The significant difference between the PPSA and the previous law is that the form of security taken is no longer relevant and the same rules will apply to all types of security arrangements. Some security interests that were not able to be registered under the previous law will now be subject to the PPSA, for example, hire purchase agreements, retention of title clauses in supply agreements, and finance and operating leases for a term of more than one year. Registration of these types of agreements and leases will be necessary to ensure the priority of security interests.

Personal Property Securities Register

At the heart of the new legislation is a searchable register called the

Personal Property Securities Register (PPSR) which commenced operation on 1 May 2002. The PPSR is a form of electronic notice

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board recording specific details of security interests held in respect of personal property. You can access the register online at www.ppsr.govt.nz

The PPSR will replace *The Motor Vehicle Securities Register*; *The Chattels Registers at the High Court*; and *The Register of company charges at the Companies Office*. These “existing registers” closed for registration on 30 April 2002. Where possible, secured parties on the existing registers have been contacted by the Ministry of Economic Development to explain how the new PPSR will affect them.

Secured parties will now register security interests in the PPSR with a standard financing statement. Registering a financing statement in the PPSR is one way of perfecting a security interest. Perfection will be critical to protecting the priority of security interests. The general rule under the PPSA is that the first to register a financing statement has priority.

The Transition Period

The wide definition of personal property under the PPSA means that not all affected securities, for example mortgages of shares, are currently registered in an existing register. It is important for holders of security interests to identify those security interests which were not able to be registered previously and to register those interests with the PPSR during a six month transitional period expiring on 31 October 2002. Retailers and other creditors have until October to finish transferring to the PPSA details of finance outstanding on property they have previously sold. Records which aren’t transferred by then will be wiped.

Consumers and businesses will still be responsible for honouring any

outstanding payments in such circumstances, but suppliers would lose their priority with other creditors if the items were seized to pay other debts. Because prior security interests are not deemed to be “perfected” until the end of the transitional period, searching will need to be conducted over the old registers and new PPSR for the duration of the transitional period to get a complete picture of all security interests. From the end of the transitional period the PPSR will be the only register to search.

Retention of Title Clauses

Registration of retention of title provisions in contracts for the sale of goods will be greatly affected by the PPSA. Provided the interest is registered in time, it will have priority for any amounts owing for the purchase price of the secured property. This priority will prevail over other creditors with security interests in the same property irrespective of when those interests were given or registered.

Searching the PPSR

Basically the register will allow anyone to check if someone has debts recorded by entering the name and date of birth or address of the relevant person, or by specific collateral details such as vehicle registration, VIN and chassis numbers. However, according to the Ministry of Economic Development under the PPSA it is illegal to carry out online searches of the register without good reason. Therefore people who check on friends and neighbours out of interest could breach the Privacy Act. You are given some protection due to the fact that people wanting to search have to register their details with the Companies Office to obtain a User ID and Password.

Key Points for Holders of Security Interests

- The PPSA affects a wider range of transactions than existing law e.g. retention of title clauses.

- Make sure that your terms of trade and loan documentation is altered in line with the PPSA.
- Ensure that you have all the necessary information to register prior and new security interests.
- Register new security interests in the PPSR.
- Ensure that all prior security interests are registered in the PPSR before 31 October 2002.
- The maximum registration period for a financing statement is 5 years.
- Search existing registers and the PPSR during the transitional period.

Key Points for Debtors

- Information on all security relating to personal property except land will now be stored in one place - the PPSR.
- Subject to privacy restrictions, the PPSR can be searched by debtor name and other details such as vehicle registration numbers.
- People should search the PPSR before purchasing goods that may be subject to a security interest.
- Secured parties must supply debtors with a copy of a verification statement, unless the debtor waives in writing their right to receive one.
- Debtors can use the debtor PIN contained in the verification statement to demand corrections to a financing statement.

In Summary

The PPSA is a new law that commenced on 1 May 2002 and affects a wide variety of financial transactions. If you think that you might be affected by the law change or your business needs to alter its terms of trade in line with the PPSA, please contact us, we’re only too happy to assist.

PROPERTY (RELATIONSHIPS) ACT 1976

Changes in Law on Death of Spouse/Partner

Introduction

The amendment to the Property (Relationships) Act 1976 (the Act) has introduced fundamental changes to the division of property when a spouse or partner dies. Up until 1 February 2002 the previous Matrimonial Property Act 1976 did not apply when a partner died.

Under that Act's provisions, a surviving partner wanting to make a claim with respect to relationship property was required to rely on the Matrimonial Property Act 1963 - legislation which did not assume equal sharing.

New Property (Relationships) Act

From 1 February 2002 the Act, covering both married couples and de facto (including same sex) partners, covers the death of a partner.

Basically partners will now have the right to share relationship property as if the relationship had ended during the deceased's lifetime.

The surviving partner now has a choice between:

- A division of relationship property under the Act (this is called option A), or
- Inheriting from the deceased partner under the provisions of the deceased's will or under the law set out in the Administration Act when a person dies without a will (option B).

The surviving partner must make a decision as to which option to take within six months of the date of death of the deceased partner or, if a grant of administration of the estate is required, within six months of that grant or within six months of the date of death of the partner, whichever is the later.



Where a surviving partner does not make a choice within that period, the division of property is decided under the will of the deceased partner or by intestacy. If a surviving partner chooses to apply for distribution under the Property Relationship Act, that person will not be entitled to receive property in terms of the will of the deceased partner unless the deceased has stated clearly in his or her will that the surviving partner can receive property under both.

Under the Act a presumption is made that property of a deceased partner is property that both the deceased partner and surviving partner have an interest in - called relationship property.

Relationship of Short Duration

If the relationship was a de facto one of short duration (less than three years) the Family Court cannot make a distribution under the Act. There are however two exceptions to this rule:

- Where there is a child from the relationship; or
- The surviving partner has made a substantial contribution to the property.

Effect of Property Sharing Agreements

The estate of the deceased partner is bound by any property relating agreement entered into by the partners during their lifetime.

An agreement can be challenged by a surviving partner following death but that partner would have to show

a serious injustice before the agreement was set aside.

If you are interested in drawing up an agreement to ensure your property ends up where it's meant to, please contact us.

COMMONLY ASKED EMPLOYMENT QUESTIONS



Overpayments

If an employer overpays an employee, can the overpaid amount be deducted from subsequent wages?

Under the Wages Protection Act 1983, it is unlawful to make deductions from wages except in the following circumstances:-

- With the employee's consent; or
- At the employee's request; or
- Under s (6) of the Act where "it was not reasonably practical for that employer to avoid making that overpayment" and the specified notice is given.

The overpayment must have been made because the employee was absent from work without the employer's authority, on strike, locked out, or suspended. Notice must be given to the employee and the overpayment must be recovered not later than two months after notice has been given.

In all other circumstances, if the employee has been overpaid it is unlawful to recover that overpayment without the employee's consent. The overpayment cannot be offset against another entitlement.

Minimum Wages

What is the minimum wage?

On 18 March 2002, the minimum wage rates were increased. The changes are:-

- The adult (all persons aged 18 years and over) minimum rate

has increased from \$7.70 to \$8.00 per hour.

- The youth minimum wage rate (all persons aged 16 and 17 years) has increased from \$5.40 to \$6.40 per hour.

Written Employment Agreements

Do employees employed since the Employment Relations Act came into force (October 2000) have to have a written employment agreement?

It is a requirement that all employees have a written employment agreement. Just recently the Employment Relations Authority imposed a penalty of \$500 on an employer for failing to provide a written employment agreement.

The Act sets out the minimum matters which must be covered in the agreement. For an individual agreement these are:-

- The name of the employer and the employee;
- A brief description of the work to be carried out;
- An indication of where the work will be carried out;
- An indication of the hours the employee will work;
- The wages or salary the employee will receive;
- A plain language explanation of the dispute resolution services available if there is an employment relationship problem and a reference to the 90 day period for submitting a personal grievance.

Employee Involvement in Health and Safety

Will employees be able to have more of a say in health and safety matters at my workplace once the Health and Safety in Employment Bill comes into force?

The Bill will come into force on 2 September 2002. One of the main aims of the Bill is to promote employee participation in workplace safety.

A system for involving employees:-

- will be required if there are fewer than 30 employees in your workplace and one or more employees requires it;
- will be compulsory if there are 30 or more employees in your workplace.

What that system will be is up for negotiation. The employer may establish a health and safety committee, or health and safety representatives may be elected.

PROBLEMS WITH PROTECTORS

The use of trusts in New Zealand in recent years has been extended to purposes which were not anticipated when the rules relating to trusts were established. These uses have led to changes to the structure of trusts as in the appointment of a protector. Unfortunately in this area, the law has yet to catch up with reality as there is a question mark over whether the same duties and obligations which apply to trustees apply to protectors.

Role of a Protector

The role of a protector is to direct and control the trustees in the exercise of their discretions. In effect power is divested from the trustees to a third person who then either has similar powers to those exercised by trustees or powers to veto the exercise of trustees' powers. In New Zealand a protector in a typical 'family trust' may be appointed instead of an independent trustee who is often a professional accountant or lawyer. That protector provides the element of independence which professional advisors deem appropriate.

The advantage of having an independent protector rather than an

independent trustee is predominantly an administrative one. The trustees can deal with the day-to-day business of the Trust and need only consult the protector on the matters which, in terms of the Trust Deed, require his or her involvement.

Protectors are common in trusts settled in off-shore jurisdictions. They are viewed as a necessity where the jurisdiction in which the trust is settled will not allow the settlor to be appointed as a trustee. In order to maintain an 'oversight' the settlor appoints a protector to ensure the management of the trust reflects the settlor's intentions.

While in off-shore jurisdictions there is specific legislation regulating protectors, in New Zealand we are left to rely on a handful of court decisions and the Trustee Act 1956. The law relating to the obligations and duties, and especially fiduciary duties, of trustees is well established but it is not clear whether or not those same duties and obligations apply to a protector and if so to what degree and in what circumstances.

New Zealand Law Relating to a Protector

In a recent discussion paper the Law Commission held the reassuring view that the present law is 'sufficiently robust' to solve most but not all of the obvious problems. For example, if the settlor of a trust retained too much control over the discretion to be exercised by the trustees by appointing himself or herself in the role of protector, under current law that trust may fail.

Furthermore if a protector was given a power to dispose of property not his own or to manage trust assets, a court would treat that protector as it would any other person (typically a trustee) who had that power and that person would be subject to the same fiduciary obligations as a trustee.

The Law Commission paper invites comment firstly, on its suggestion that a trustee be allowed to challenge the advice of a protector



by making an application to court and secondly, with respect to an amendment to the law which would provide that a protector cannot escape liability for his or her actions even if such a provision exists in the trust instrument.

Conclusion

The development of the law relating to trusts is on-going although reform may follow the event. Legal advisors will eagerly await the outcome of the Law Commission's recommendations and any legislative amendments arising from them which may result in the duties and obligations of protectors being more clearly defined.

If you have any questions on newsletter items please contact us, we're only too happy to help.