



# DISPUTE RESOLUTION & LITIGATION

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S O L I C I T O R S

## PERSONAL PROPERTY SECURITIES BILL 2008 (CTH) - WHAT CREDITORS NEED TO KNOW

**In May 2008 the Federal Government released for public comment a draft bill titled, "Personal Property Securities Bill" (PPS). Its purpose is to create a uniform system of laws for the registration and regulation of security interests. As a creditor taking security, you will need to be aware of your rights and obligations under the legislation to ensure your interests are secured.**

### WHAT DOES THE BILL APPLY TO?

The Bill defines personal property as, "any form of property that is not land or buildings." This means that both tangible and intangible items such as investment and negotiable interests and accounts can be secured.

### WHAT DOES THE BILL PROPOSE?

Some key concepts of the PPS Bill are:

- Personal Properties Security Register;
- Perfection of secured interests;
- Competing creditors - rules of priority;
- Enforcement by a creditor; and
- Acquisition of secured property by third parties.

### PERSONAL PROPERTIES SECURITY REGISTER

The PPS Bill proposes to create a single national electronic register of personal property securities. The records of the Register would operate as notice to other creditors as to the security interests which have already been recorded against a person's property.

The information required to register a creditor's security interests includes:

- Accurate and detailed description of the personal property (such as serial numbers and VIN numbers);
- Debtor's name and address; and
- Creditor's name and address.

Under the current proposal, the existing Registers of interests maintained by States and Territories will be overridden by the PPS Register.

### PERFECTION OF SECURITY INTERESTS

Perfection occurs when a security interest has attached to personal property and the secured creditor has either:

- taken possession or control of the property; or
- registered it on the PPS Register.

A creditor may continuously perfect their interest by alternating between the above methods. A creditor who has perfected their interest is in a stronger position than one who has not.

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Value
9,179.53
11,426.60
9,611.01
7,189.65

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### COMPETING CREDITORS - WHO TAKES PRIORITY?

The easiest way to demonstrate the PPS priority rules is to use examples:

**Scenario 1:** Debtor A grants security over its stock to Creditor A on 20 March 2008. On 20 May 2008, Debtor A grants a security interest over the same stock to Creditor B. Creditor B registers its interest on the PPS Register and Creditor A does not.

**Result:** Creditor B has a higher priority than Creditor A despite Creditor A's interest occurring first in time.

**Scenario 2:** Debtor A grants security over its stock to Creditor A and Creditor A registers its security. Debtor A then grants security over its stock to Creditor B for further funds. Creditor B also registers its interest.

**Result:** Creditor A has priority as it registered its interest before Creditor B.

### ENFORCEMENT BY A CREDITOR

A secured creditor can enforce its security by taking possession of the property and subsequent sale. The rights of possession and sale of the property is determined by the terms and conditions of the security agreement between the creditor and the debtor.

Where there are competing secured creditors, the higher ranking creditor is able to take possession of the property from either the debtor or the lower ranking creditor and sell the property. Any secured party is able to initiate the sale process, however, a higher ranking priority must be discharged first.

### ACQUISITION OF SECURITY INTEREST FREE PROPERTY

Under the PPS, acquisition of personal property security interest free will occur if the personal property:

- is purchased in the ordinary course of business;
- fails to have a perfected security interest;
- does not have a serial number and is predominately used for personal or domestic purposes and its purchase price value is below \$5,000.00;
- is a motor vehicle and is purchased from a motor vehicle dealer;
- is cash or an investment instrument;
- is temporarily unperfected.

Creditors should be wary of the above circumstances to ensure their interests are secured and cannot be acquired by third parties.

### SUMMARY

The PPS Bill provides a legislative framework which is consistent and comprehensive for creditors and which will bring Australia in line with current international business standards.

Although the PPS is still in draft form, negotiations are currently underway between the Federal and State governments to develop the PPS Register to implement the legislation in the near future.

If you wish to discuss further your secured interests and how the PPS will effect you, please contact Greg Young, Partner, Dispute Resolution & Litigation on 07 3228 5270.

BY KATRUSHA ZALUCKI  
**Solicitor, Dispute Resolution  
& Litigation Services**



# RECENT SUCCESSSES

## HOW TO CATCH A DEBTOR

In November 2006, a client instructed us to register their interstate judgment in Queensland and attend to the seizure of the Debtor's goods. This we did, however it proved unsuccessful. We then applied to the Court to have the Debtor attend an Enforcement Hearing in October 2007.

The Debtor failed to attend and we subsequently obtained a Warrant for the Debtor's Arrest. After various inquiries as to the location of the Debtor we located a new address for the Debtor and instructed the Court's Bailiff to attend at this address. The Debtor was ordered to attend Court the following day for examination. On the morning of the examination we were contacted by the Debtor to arrange full payment of the debt which was paid in full prior to the hearing time.

BY STEVEN HUTCHINS  
**Paralegal, Dispute Resolution  
& Litigation Services**

## LIQUIDATOR CLAIMS

Recently, we acted for a Defendant company which was being pursued by liquidators in respect of an alleged unfair preference payment. The liquidators claimed an approximate total of \$81,000 made up of \$11,000 (first payment) and \$70,000.00 (second payment).

Our client contended that the first payment was made outside the relation back period (namely, the last six months before the commencement of the company's liquidation), and the second payment did not come from the company in liquidation. The facts of the matter were complex.

We received instructions to apply to the Court to have the liquidator's claim struck out. This is a somewhat unusual step and quite difficult to succeed as we had to establish to a District Court Judge that the liquidator's claim was hopeless and doomed to failure. Despite this high standard of proof, we were successful and Judgment was entered for our client with costs.

The liquidator has since appealed the Judge's decision to the Court of Appeal which is pending. We will advise of the outcome of the appeal in our next edition of this newsletter.

**If you have concerns about liquidator claims or unfair preference payments, please contact Greg Young, Partner, Dispute Resolution & Litigation on 07 3228 5270.**

BY GREG YOUNG  
**Partner, Dispute Resolution  
& Litigation Services**

PLEASE NOTE: This newsletter is not legal advice and our comments are of a general nature only. This document is not to be relied on as substitution for proper detailed advice. If you would like to be removed from, or added to our mailing or emailing list, contact Melinda O'Brien on (07) 3221 4550 or marketing@macgillivrays.com.au