Update: A Performance Review for the PPSA

04/07/2015

Key Points

- The Report provides an overall review of the PPS Act since its inception;
- The PPS Act is criticised for its complexity and confusion; and
- There is a low level of awareness and understanding of the Act amongst businesses.

Introduction

Here at PLN, we are all about looking after our clients and for a lot of our clients, this means ensuring that their business interests are properly protected including correct registration of security interests. In Statutory Review of the PPSA: State of Play we looked into the *Personal Property Securities Act 2009* (the **Act**) and the complexity of this piece of legislation which was introduced to create a single national regime for secured finance using personal property. The Act replaced more than 70 statues and general law rules but unfortunately did not come without complexities of its own!

A 10 month review of the Act was conducted as per the requirement under the Act. The review sought the views of stakeholders from industry organisations, individual businesses, law firms and law societies, government organisations representing business, consumer and privacy interests and members of the academic legal community.[1]

The review received 88 submissions and a further 83 responses to the consultations papers from these stakeholders. The *Review of the Personal Property Securities Act 2009 Final Report* (**Report**)[2] was delivered to the Attorney-General and the Parliamentary Secretary to the Prime Minister on 27 February 2015. The Report was tabled before Federal Parliament on 18 March 2015. The Report is 530 pages in length and contains 394 recommendations, but we've got you covered with the main things you need to know here!

So what is it all about?

The Report looks at:

1. the effect of the reforms introduced by the Act;
2. the level of awareness and understanding of the Act;
3. the incidence and causes of non-compliance with the Act;
4. opportunities for minimising regulatory and administrative burdens including cost; and
5. opportunities for further efficiencies.

In looking at these matters, the Report also considers:

6. the scope and definitions of personal property;
7. the desirability of introducing thresholds;
8. the interaction of the Act with other legislation; and
9. other relevant matters.

We will be looking into the first three (3) issues raised above with the biggest impact on businesses.

The effects of the reforms introduced by the Act

The Report confirms that the Act has improved the consistency of Australian secured transactions law. A single set of rules have replaced various Commonwealth, State and Territory statues and general law. This has eliminated some confusion and complexity but considerable work is still required![3]

The Report looks into the effect of the reforms on costs and the availability of finance. Based on the submissions and anecdotal evidence, it concludes that the anticipated costs saving benefits are yet to be realised. It was expected that financiers, no longer having to maintain documentation in each jurisdiction, would be able to pass this benefit onto customers. Borrowers would also benefit from using a wider range of assets as security. However, it appears only larger financiers are saving costs through document standardisation and many continue to struggle with costs as they try to make sense of the Act and what is expected of them, six years later.[4]

The Report also looks at the effects of the reforms for consumers as borrowers and as searchers of the Register. At the date of the Report, there was no data available to help determine how the Act has impacted a consumer's ability to use their assets as security or to raise cost-effective finance.[5] Fortunately data was available regarding the way that users of the Register are searching for encumbrances over motor vehicles. In summary the Report concludes:

"The reforms implemented by the Act offer significantly enhanced functionality to users searching for encumbrances over motor vehicles. Apart from that, however, the consumer experience of the Register appears to be hampered by the same factors as those that hamper small business users".

The level of awareness and understanding of the Act

The Report identified that many businesses were not prepared for the Act or aware of the impact that it could have on their operations when it commenced in January 2012.[6] Unfortunately, and despite the Government conducting a range of education and awareness-raising activities including media campaigns, presentations at industry conferences and providing fact sheets, almost all of the first-round submissions made the comment that small businesses were still "either entirely unaware of the existence of the Act, or did not understand the extent to which the Act can impact on their business activities".[7]

Further to this, it was clear from the submissions that even for those businesses aware of the Act they have found it challenging and unnecessarily complex. This was true across a wide range of industries and sectors including rural, retail, building and construction and importing/wholesale businesses.

Businesses find the Register daunting – full of jargon, and unfamiliar concepts. When registering a financing statement, the Register asks them to answer questions that they cannot readily understand. Often they cannot even understand why the question is being asked. This leaves a registrant in the very unsatisfactory position of not knowing whether they have answered the questions accurately, or whether (despite their efforts) their registration is incorrect, leaving them unperfected and exposed.[8]

We find this concerning! To be effective, registration of a security interest must satisfy the requirements set out under the Act and the Regulations. If businesses (and/or individuals) do not understand what is being asked of them as a secured party, and consequently do not perfect their security interests, they are at risk of losing assets or losing their priority to other businesses!

The incidence and causes of non-compliance with the Act;

The review looked at the incidence and, where applicable, causes of non-compliance with the requirements of the Act particularly among small businesses. The Act (for the most part) does not oblige secured parties, grantors or others to conform to specified behavioural standards.[9] Generally,

an act or omission inconsistent with the Act will not trigger a breach. Rather, a person who fails to comply with the Act may suffer financial consequences i.e. loss of their security interest! The incidence of non-compliance with the Act has been and continues to be significant.[10]

The review considered non-compliance in a broader sense by commenting on the causes of failures by a secured party, grantor or third party to follow the Act. Besides the lack of awareness and understanding, three additional factors are listed as causes of non-compliance:

1. The Act has adopted concepts and terminology from overseas models which may not be suitable in the Australian context. For example the term "chattel paper" has been used in the Act. This term was used in Article 9 of the *United States Uniform Commercial Code*. It has also been a key feature of Canadian secured financing since the 1990s. However, the Report is of the view that the term may not be suitable for Australia given the uncertainty surrounding its use and because it was "considered much more of a hindrance in commercial transactions than a benefit."[11] The Report recommended that the definition and all references to chattel paper be removed from the Act.

2. The Act is almost too helpful – Along with its length, the Report also criticises developers for trying to produce a "best of breed" piece of legislation, by picking the best bits of models elsewhere and adding in the necessary detail in order to make sense of it.[12] As a result the Act limited flexibility and forced changes to operating practices.

3. The Act is too far removed from the realities of the Australian marketplace.[13] It appears that whilst the business and legal community were involved during the consultation period, their views were not sufficiently incorporated into the final product. This has "created confusion and uncertainty, rather than clarity and certainty."[14] For example, the Report notes that the Register needs to be simplified – there are too many decision points for users that are unclear and difficult to answer. Whilst we want to ensure security interests are properly registered, we want the process itself to be simple and efficient and easily understood by all business owners.

We would have to agree with these three points – how can businesses comply with an Act that is not designed uniquely for Australia and which can't be clearly understood. This is particularly concerning for overseas companies who need to register their security interests and protect their assets.

What happens now?

The Report recommends the Government engage private-sector input in the drafting of the Bill for the amending legislation, and seek further public consultation on any draft Bill.[15]

However, as noted in the Report:

"Making major changes to legislation of this complexity is itself a complex task. Care will need to be taken to ensure that the changes do not inadvertently upset existing rights, to ensure that the amended Act is internally consistent, and to ensure that the detail of the drafting is effective to respond to the concerns that it is designed to address".[16]

How can we help??

Understanding your rights under the PPSA is imperative. We can help you sift through the complexities of the legislation to ensure your interests are properly registered.

[1] Whittaker B Review of the Personal Property Securities Act 2009 Final Report (2015), 3.
[2] Ibid.
[3] Ibid, 31.
[4] Ibid, 33.
[5] Ibid, 33.
[6] Ibid, 25.
[7] Ibid, 25.

[8] Ibid, 28.
[9] Ibid 29.
[10] Ibid 30.
[11] Ibid 69.
[12] Ibid 31.
[13] Ibid.
[14] Ibid.
[15] Ibid 468.
[16] Ibid, 4.