# Briefing Note: September 2010

## Personal Property Securities Reform

### Possession has become nineteen-twentieths of the law

In May 2011, how security affecting property other than land is taken, prioritised, transferred, enforced and terminated in Australia will change - fundamentally.

More than 70 existing pieces of Commonwealth, State and Territory legislation will change and many legal doctrines significantly alter, requiring changes to process, policy and controls as well as the way many organisations do business.

While equipment financiers and the business and institutional banking sectors will be affected significantly, others outside financial services need to know how they are impacted. There will be some short term uncertainty but significant longer term opportunities. Are you ready?

| Key questions | Key observations |
|---|---|
| What does this mean for me? | • If you are affected, it is fundamental that your front, middle and back office business processes and controls – including IT - work effectively. For example, failing to escalate a customer's change of name appropriately or to key in the right data could result in loss of effective security. What are your credit, client maintenance and enforcement processes and policies? Are they still appropriate? Can you cope operationally?<br>• The reforms impact more than just financiers. Many goods consignments, leases and retention of title clauses are now caught, as well as joint venture arrangements. You may need to change the way you think about those arrangements.<br>• The reforms are not simple. The New Zealand experience with its regime shows that data integrity and knowledge gaps have left creditors unstuck, even 8 years after introduction. |
| What is personal property and what securities are caught? | Personal property covers every type of asset - tangible or intangible - other than land or fixtures. It is much more than just domestic or household property and will affect many business assets.<br>Any right or interest affecting personal property that secures payment or the performance of an obligation is caught. In addition to capturing traditional security interests (e.g. fixed and floating charges, chattel mortgages, bills of sale), the new laws also reclassify some common commercial arrangements as security interests, such as retention of title arrangements, goods consignments and security deposits.<br>While there are exceptions (such as set-off and water rights), careful analysis of a particular scenario may be required to ensure the exclusion applies. For many of those widely affected, exclusions simply mean that they need to maintain compliance with both old and new laws. |
| What are some basic concepts? | To effectively protect your priority position over certain assets (collateral) against third parties, you will need to "perfect" your security interest. To do this, you must ensure that the security interest:<br>• is "attached"<br>• is enforceable against third parties<br>• you "possess" or "control" the collateral or you register the security interest on the Personal Property Securities Register (PPSR).<br>How and when you can - or need to - perfect depends on the nature of the collateral and the type of security you are taking. Your security interest will be attached if:<br>• the person giving the security (grantor) has rights in the collateral (e.g. buys it) or can transfer it to you; and<br>• you have given value for the security or the grantor "does an act by which the security interest arises".<br>In addition to ensuring attachment occurs, to be enforceable against third parties, the agreement giving rise to the security interest must meet minimum requirements (such as being evidenced in writing), particularly if you do not intend to possess or control the collateral.<br>Given control often beats registration on PPSR, possession (and control) for some assets will become nineteen-twentieths of the law. |

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| How could this impact your business? | Practical issues and opportunities arising from the reforms include:<br>• ownership impacted: significantly, a creditor with a perfected “all assets” security over a debtor can dispose of certain assets leased or bailed to the debtor but owned by another person<br>• new super priority security interests: a person who finances acquisition of an asset can register a “purchase money security interest” which will take priority over other securities. New super priority agricultural security interests have also been introduced<br>• all assets security now available for individuals: a broadly equivalent security to a fixed and floating company charge will now be available over the personal or business assets of individuals<br>• new information required: what information is required to validly register a security interest will change<br>• hard-wired releases of security: collateral may be automatically released in certain circumstances (e.g. sale of inventory in the ordinary course of business)<br>• change in how notice of a security interest works: third parties will no longer be deemed to know when a charge exists over a company. The level of knowledge required for the existing creditor’s interests to be defeated on the part of a purchaser of collateral or a new creditor will also change<br>• new time limits imposed: introduces a range of statutory time limits as to, for example, how quickly a creditor needs to register their interest or change the details of their registration, as well as how long a registration can last (usually a maximum of 7 years for consumer property and 25 years for commercial property)<br>• introduces a new corporate knowledge test: a creditor can be fixed with knowledge of circumstances based on an employee’s job description or the role they fulfil practically<br>• more collateral due diligence: can require a creditor to undertake a detailed investigation of the nature, location and custodianship of personal property to ensure their specific security interest is registered or otherwise perfected correctly. |

## Conclusion

You need to act now to be ready by May 2011. While a transition period will apply until May 2013, this will only apply to pre-existing security interests and will not assist you in relation to your business as usual after May next year.

If you require advice on this topic, please contact your PricewaterhouseCoopers representative or alternatively:

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