



Global CEO Survey – the importance of Human Resources

PwC's 11th Annual Global CEO survey, launched earlier this year contains a number of key messages for Human Resources professionals.

Getting and keeping good people

Talent attraction, retention and development is one of the greatest headaches for CEOs. In a competitive and uncertain environment, the right talent can mean the difference between a business failing and thriving. Businesses must be able to identify the right talent with the agility needed to drive value and challenging conditions. 62% of CEOs believe they need to change the current talent strategy.

Change management

Managing people through change is a major challenge for many organisations and one of the focal areas for development is middle and senior management. In an environment of constant change (90% of CEOs have made up to 8 major current changes in the way their businesses operate in the last 3 years) the ability to mobilise people to deliver change is essential. CEOs say they are confident their leadership teams are competent to drive change but they do not see these efforts reflected in results. A considerable part of the blame for failing to realise the benefits of major change programs is attributed to middle and senior management. 50% of CEOs say that a lack of motivation on the part of middle

management is a major obstacle and 48% say that lack of change management skills and experience at more senior levels is also a serious barrier.

Human resources capability

Is the HR function up to the job? The ability to compete for talent is critical and the sort of skills that come with experience are particularly hard to find. CEOs are concerned that few Human Resources function are seen to be sufficiently effective in this regard. Only 43% of CEOs believe their HR teams are equipped to handle any change required to compete for talent. 39% of CEOs were unable to answer this question at all, perhaps indicating a perception that HR is a service delivery function not a driver of strategy.

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Mergers and acquisitions – people issues

Are people issues a barrier to successful mergers and acquisitions? 75% of CEOs believe their main sources of competitive advantage are the ability to adapt to change, first rate customer service and access to key talent. When engaging in M&A activity, poor management of HR becomes a source of anxiety for 34% of CEOs and 30% of CEOs are concerned about conflicting workforce expectations. More than 50% of CEOs heading large companies worry about handling cultural conflicts and capturing full value of the deals they undertake.

- HR needs to have the right skills in the business to ensure it is competitive, they also need to look at the demands of the “millennial generation” to understand whether their current incentive program is relevant for tomorrow’s world, and

- people need to be put at the centre of change in order to “manage change through people” – strategies and objectives are delivered by people not by systems or processes; this means that people are central to any change management program; often, unfortunately, the right people are engaged too late in the process and, at management level, not fully brought into the vision early enough.

Key messages

The key messages for full Human Resources professionals from PwC’s latest CEO survey include the following:

- there is a need to revisit your organisation’s people strategy to better understand the human impact on the organisation through more sophisticated measurement and valuation techniques
- there is a need for a new approach to talent attraction and retention

What are the next steps?

Key action points for HR professionals to consider arising from the CEO survey include:

- demonstrating the link between people and value
- articulating the impact HR policies and procedures have on overall business strategy and demonstrating, in financial terms, how the people strategy supports the business



- taking responsibility for effectively measuring the return on investment delivered by the people strategy, and
- being seen as more than a business partner and more as a key enabler and “steward” of the organisation’s key people.

By taking these steps the HR function can work more closely with their CEO to demonstrate effectively the value it adds to the business. By working together more closely with senior

management to address people challenges HR professionals will be better positioned to become a trusted advisor and better able to assist business leadership to understand the impact of people issues on the organisation’s overall results.

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Relaxation of class order relief for company groups

Recent changes implemented by the Australian Securities and Investments Commission (ASIC) have relaxed some requirements for corporate groups to lodge consolidated financial documents, particularly the need to have a three-year history of compliance with their financial reporting obligations.

The *Corporations Act 2001* (Cth) (the Act) requires the following entities to prepare a financial report and a director's report:

- public companies
- large proprietary companies
- registered schemes
- listed entities and other disclosing entities
- holders of an Australian financial services licence
- registered foreign companies, and
- small proprietary companies that are controlled by a foreign company that is not registered in Australia.

Many large corporate groups presently take advantage provided by ASIC under *ASIC Class Order 98/1418* (the

Class Order), relieving them from the need to prepare separate financial reports for each of the companies in the group. In effect, only consolidated financial reports need to be prepared, significantly reducing the accounting, auditing and other compliance costs for the group.

Effect of the Class Order

Under the Class Order, public companies, large proprietary companies and small proprietary companies controlled by foreign companies can be relieved from the need to lodge separate financial reports under the Act if they are wholly owned by another company (the Holding Company) that lodges consolidated financial reports, subject to certain conditions and requirements being met. The principal condition is that the companies seeking to be relieved of their financial reporting obligations and the Holding Company must enter into a Deed of Cross Guarantee (the Deed). The Deed provides that each company that is party to the Deed, including the

Holding Company, would guarantee the debts owed by each of the other companies in certain circumstances. Corporate groups seeking to take advantage of the Class Order should consider the potential effect of the Deed on group structuring arrangements.

Registered schemes, certain disclosing entities, Australian financial services licensees and registered foreign companies cannot rely on the Class Order for relief from their financial reporting obligations.

Previously, it is necessary for ASIC to approve new Deeds of Cross Guarantee. As from 1 July 2004, ASIC adopted a self-assessment approach to the process, requiring the Deed when lodged with ASIC to be accompanied by a certificate by a lawyer (and sometimes from an auditor) certifying that the Deed and other documents lodged comply with the Class Order.

Once the Deed is in place, all of the companies that are party to the Deed would meet their financial reporting obligations provided that the Holding Company lodges consolidated financial reports with ASIC and certain other procedural requirements are met.

March 2008 Changes to the Class Order

On 31 March 2008, ASIC announced a number of changes to the Class Order.

Before that time, a company needed to have satisfied its financial reporting obligations under the Act and the financial reports (if audited) needed to be unqualified for three years before the first financial year that it seeks to rely on the Class Order for relief. These requirements have been removed so that corporate groups can now seek relief under the Class Order even though the group members seeking to take advantage of it may not have met these requirements in the previous three years.

In the past, each company relying on the Class Order for relief must lodge a Form 389 with ASIC within four weeks after the end of the relevant financial year. ASIC had traditionally taken a very strict view to this procedural requirement, ruling that a company that failed to lodge a Form 389 within time would not be able to rely on the Class Order for relief in that financial year or in the following three years, due to the requirement for a three-year history of compliance before relief under the Class Order was available. This requirement has now

been removed so that a form will only be required if a company did not want to be subject to relief under the Class Order for a particular financial year or if the corporate group changed its Holding Company.

Conclusion

For corporate groups that have previously not been able to obtain relief under the Class Order, the relaxed requirements by ASIC may now enable them to be relieved from the need to prepare and lodge separate financial reports for each group company. There is a need to act quickly if a company group wants to rely on the Class Order for the current financial year ending 30 June 2008, as the Deed and other documents must be lodged with ASIC prior to that date to do so.

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Personal property securities bill – major reforms ahead

The concept of fixed and floating charges is set to disappear as a consequence of extensive reform of the laws regulating the registration of interests in personal property securities. Business should ensure that they have Board level awareness of the implications of the changes and begin preparing for the likely commencement date in early 2010.

The consultation draft of the Personal Properties Securities Bill, 2008 (the Bill), was released on 16 May, 2008, by the Commonwealth Attorney-General Robert McClelland.

It introduces a functional approach to secured transactions premised on the notion that a security interest in ‘personal property’ arises where property is used to secure payment or the performance of an obligation regardless of the legal form of the obligation.

Personal property is defined by the bill to be any form of property other than land and includes a licence.

The abolition of the distinction between fixed and floating charges is just one of many changes as the current laws

are to be replaced by generic rules concerning attachment, perfection and enforceability of security interests as well as new priority rules that deal with enforcement situations involving competing interests.

The reforms will establish national comprehensive rules governing security interests in personal property.

Central to the reforms will be a clear set of rules for ordering priorities between competing secured interests in personal property, and the creation of a single national personal property securities register.

- Establishment of a single National Personal Property Securities Regime.
- Businesses that take security over personal property will need to implement new procedures and IT infrastructure that comply with the new legislation and interface with a new national register.
- More forms of personal property should be able to be offered as security.

Introduction of a national system

The Bill represents the continuation of a comprehensive reform process which began in April 2006 with an options paper released by the Standing Committee of Attorneys-General. The Bill brings an end to inconsistent and duplicate laws and registers which presently govern personal securities. The new law will replace more than 70 Commonwealth, State and Territory Acts administered by 30 government agencies with a single national law supported by a single national online system for registering interests in personal property securities.

The Bill establishes rules for creating valid security interests as well comprehensive and coherent rules governing the priority of competing security interests (including where property or security interests are transferred). It applies to all security interests in personal property that secure payment or the performance of an obligation regardless of the form of the transaction, the legal personality of the grantor, or the jurisdiction in which the property or parties are located or in which the transaction occurred.

The Bill also sets out rules for determining priority among competing interests in personal property. It also establishes a single national online register of personal property securities (the PPS Register). The new registration system will help prospective purchasers and lenders to determine whether personal property may be subject to a security interest and would facilitate the resolution of priority disputes.

Benefits of reform

Presently there are significant limitations on the use of personal property as security and the rules for registering an interest in personal property, and whether an interest can be registered at all, vary widely. The Commonwealth, States and Territories all have separate personal property schemes with separate registers and legislation relating to those registers. The current requirements for registering a security interest in personal property vary depending on the type of personal property, where it is located and whether the property belongs to an individual or a corporation. The introduction of a National Personal Property Securities Register will bring all of this information together in the

one, definitive register of personal property securities.

In undertaking this reform, a number of models have been drawn on including similar reform in New Zealand in the early 2000s, the work of organisations such as the United Nations Commission of International Trade Law and the International Institute for the Unification of Private Law. There are also similar legislative regimes in Canada and the United States. As a result of the reforms Australia will be closely aligned with Canada, USA and NZ in its regulation of PPS.

What is a Personal Property Security

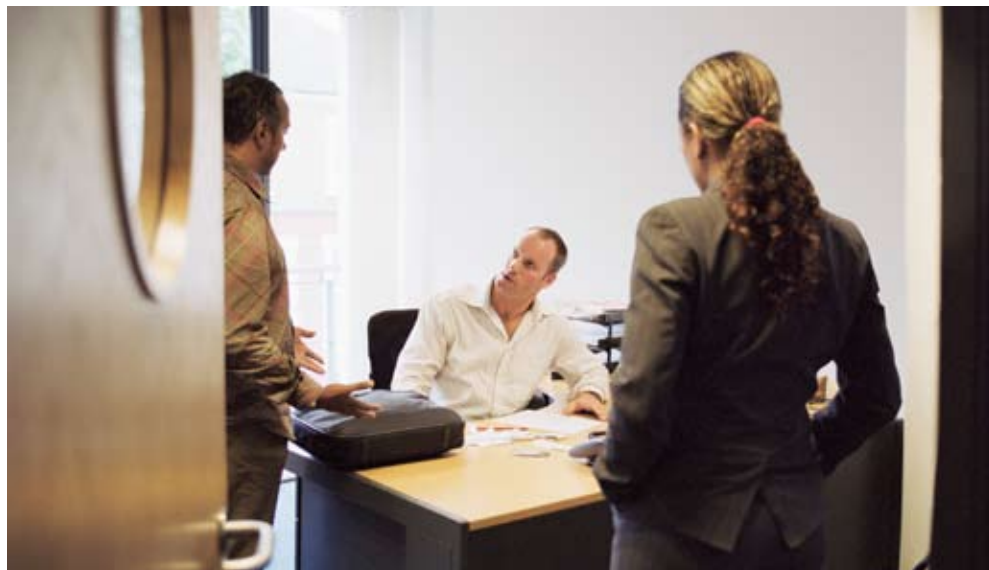
Personal property is any form of property other than land or buildings and fixtures which are legally treated as forming part of land. Personal property can include tangibles (eg cars, boats, machinery, crops) and intangibles (eg shares, intellectual property, receivables and contract rights).

Personal property securities are interests in personal property that are created or evidenced by an agreement that secures payment or performance of an obligation.



The Bill proposes the establishment of a national PPS Register (PPSR); an Australia wide database of security agreements involving personal property as collateral. Such register contains details of the lender, borrower and identifying information about the collateral. The single, national register will replace more than 40 registers operated by, or on behalf of, the Commonwealth, States and Territories.

The PPSR will be the definitive place where records of security interests in personal property (property other than land or buildings) are held. It will be



computer based, publicly accessible and updatable in real time. The PPSR will primarily be accessed through the internet and B2G connections, but also provide for IVR, SMS, call centre and physical lodgement channels.

Why reform Personal Property Securities?

In Australia today, there are significant limitations on the use of personal property as security due to complexities and gaps in the arrangements for registering security interests.

PPS reform has the capacity to minimize the inconsistencies and

complexities that currently exist in the laws around Australia and in the practices of the businesses involved with personal property securities. The development of a consistent national approach should enable business to reduce the costs associated with taking and enforcing security interests in personal property.

Comprehensive PPS reform has the potential to make secured lending more cost effective and attractive to lenders, while access to and the cost of finance for businesses may be aided by a clear and low cost system for determining PPS interests.

Importantly a clearer system operating under uniform laws throughout Australia and on a single electronic register where priority is easily determined and security interests relatively easily enforced should limit the incidence of legal disputes. Similar reforms in New Zealand have virtually eliminated disputes arising from priority of interest claims.

Business impact

It is anticipated that the design, development and implementation activities for the national PPS regime will take 12 to 18 months from the introduction of the Bill while the national register will not be comprehensive for 24 months following the implementation of the Act.

Financial institutions, legal firms and other business will need to do a great deal of work to prepare for the new system. This will include new policies, procedures IT systems and standard documentation to enable interaction with the new legislation and register.

Access Economics in a report for the Australian Attorney-General's Department (The Costs and Benefits of Personal Property Securities (PPS) Reform 6 July 2006), noted that while

the reforms are designed to reduce compliance and transaction costs; the magnitude of transition costs for the banking sector as Australia adopts the new regulatory regime (e.g. devising new lending policies, credit risk assessment models, computer systems, procedural manuals and processes, and redesigning forms and retraining staff) could be in the order of \$A50 to 100 million dollars.

Next steps

The release of the draft bill is an important step in this key business law reform. The Attorney-General's Department is accepting submissions on the Bill until 18 August, 2008. PwC Legal will monitor future developments in this area and keep our clients advised in future editions of *LegalTalk*.

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The implementation and impact of the Cross-Border Insolvency Act on liquidators and creditors

Introduction

The United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency (the Model Law) has introduced the new *Cross-Border Insolvency Act 2008* (Cth) (the Act), which commenced on 26 May 2008. This Act confers new legal rights upon foreign creditors and foreign liquidators over property of a debtor where the property is situated in Australia. The purpose of the Act will be to provide for better cooperation between domestic and foreign courts and other governmental authorities between countries relating to matters of cross-border insolvency.

Summary of the procedure under the Act

Section 12 of the Act allows a foreign creditor or liquidator to bring proceedings in a court in Australia to commence a winding up of Australian assets. In order to have the foreign proceeding recognised, a foreign creditor or liquidator merely

has to apply to an Australian court. The application must be accompanied by evidence of the existence of the foreign claim and arrangements for the appointment of a foreign representative (Article 15 of the Model Law). In addition the application must be accompanied by a statement by the foreign representative identifying all proceedings under the *Bankruptcy Act 1966* (Cth), any appointment of a receiver or controller in relation to the debtor's property and any other proceedings known to the foreign representative (Section 13 of the Act). Once the application for recognition is approved by an Australian court, the foreign proceeding may be brought against the Australian assets of the debtor and the foreign creditor or liquidator will be granted access to participate in the Australian proceedings, subject to the interests of public policy.

However, for foreign creditors and liquidators to have the foreign proceeding considered as the main proceeding, the Australian court will



have to be satisfied that the foreign main proceeding arises where the debtor has its centre of main interests (COMI). In most instances, the COMI will refer to the debtor's registered office in the absence of any proof to the contrary. Foreign non-main proceedings are also not excluded by the Act for recognition and enforcement, as long as the debtor has an establishment, in other words, an economic activity within that country.

Impact of the Act on foreign creditors and liquidators

In view of the advances in technology and international transactions, more multi-national companies and businesses have started to invest in assets and property in various countries. Irrespective of this global phenomenon, Australia did not provide the same legal rights to foreign creditors and liquidators in all countries

by either not recognising certain foreign creditors or by restricting the priority and securities of foreign creditors over a debtor's Australian assets. The impact of the Act is to do away with these restrictions by providing the same legal rights to foreign creditors and liquidators as local creditors over the assets of the debtor in Australia. This is irrespective of whether the debtor is an insolvent individual or company.

Apart from the recognition of foreign proceedings, the Act will provide for the same ranking and priority of foreign claims as local claims brought within the same class. The only exception would be that the claims of foreign creditors may not be ranked below unsecured claims of other creditors. This will effectively align any foreign claim with a local claim brought within the same class. The provision of equal rights to foreign and local creditors effectively simplifies the insolvency process and provides for the distribution of more assets to all creditors in the insolvent estate.

The only current entities that are excluded from the operation of the Act will be deposit-taking institutions such as financial institutions and insurance companies under the *Banking Act 1959* (Cth) and the *Insurance Act 1973* (Cth).

In relation to these entities, foreign creditors and liquidators may still apply to Australian courts for any special insolvency arrangements.

Impact of the Act on local creditors and liquidators

Although the Act will provide the same rights to foreign claims as to local claims, local creditors may still have some protection against foreign claims in those instances where the local creditor has a security over the Australian assets.

Finally, the Act does not have any reciprocity provision to the extent that Australian creditors and liquidators could exercise the same legal rights against a debtor's assets situated in the foreign creditor's country. Therefore, Australian creditors and liquidators may still have difficulty enforcing security and/or priority over foreign assets where the foreign country has not adopted the Model Law and imposes certain restrictions. However, more countries are now starting to recognise the growing trend in cross-border trading amongst individuals and corporations hence the need for better cooperation in cross-border insolvencies. Inevitably, more countries will adopt the Model Law in the near future ultimately

allowing for mutual recognition of Australian creditors and liquidators amongst other countries.

In addition to Australia, countries such as the United Kingdom, the United States, New Zealand, Poland, Romania, Serbia, South Africa, Mexico, Columbia, Montenegro, Eritrea and Japan have already adopted the Model Law.

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