



# Anderson Rice Lawyers

## Quarterly Newsletter

Autumn 2011 Edition

### CIVIL PROCEDURE ACT 2010 (VIC)

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### Removal of the Pre-litigation Requirements proposed

Since the previous coverage of the *Civil Procedure Act 2010* (VIC) (“CP Act”) in our 2010 winter and 2011 summer newsletters, the newly elected coalition government has introduced on 8 February 2011 the *Civil Procedure and Legal Profession Amendment Bill 2011* (“CPLPA Bill”) to, *inter alia*, remove section 43 mandatory pre-litigation requirements which would have otherwise come into effect from 1 July 2011.

The main reasons for this proposal are, per the *Explanatory Memorandum* (“Ex Memo”), to ensure the general community has access to judicial assistance without unnecessary costs and/or undue delay.

This is not to say that pre-litigation requirements have no practical relevance anymore:

- A more restrictive note appears at paragraph 2 at page 1 of the Ex Memo: the “Bill will ... end mandatory pre-litigation procedures for *debt recovery* and other *inappropriate* proceedings by removing the pre-

litigation requirements for the *Civil Procedure Act 2010*” [emphasis added].

- Paragraph 4 also noted that the “courts will retain their power to consider a party’s use of mandatory or voluntary pre-litigation process. Further, the Bill will allow rules of court to be made for or with respect to any mandatory or voluntary pre-litigation processes in relation to specified civil proceedings or specified classes of civil proceedings.”

Where “appropriate”, pre-litigation co-operation (such as roundtable conference and/or limited discovery) may remain necessary prior to institute a proceeding.

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## SUPERANNUATION ENTITLEMENTS

### IN FAMILY LAW – TAGGED & SPLIT

Many Family Law clients are unaware of their options and can often "undervalue" the superannuation entitlements available in negotiating "a fair just and equitable settlement"

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The days when superannuation entitlements were "sacred" and safe from being the subject of Court Orders pursuant to the *Family Law Act 1975* (C'th) ("Act") are well and truly over.

It is almost a decade ago when, on 28 December 2002, laws came into operation detailing how superannuation is to be treated when a marriage or a domestic relationship breaks down. The underlying "theme" of the various laws is that superannuation benefits are treated as if they are property of the parties to the marriage, and are available to be divided between the parties in the same way as other property is divided.

The Family Court of Australia ("Court") is a Federal Court. The Court has many "powers" embedded in the Act which gives the Court the power to deal with superannuation. The Court retains its wide discretion when it comes to applying the rules in order to achieve a "fair outcome". The superannuation trustee has therefore needed to "move with the times".

The Court is able to make what are known as "*Flagging Orders*" or "*Splitting Orders*". Such Orders have the effect of dividing the funds between the member spouse and non member spouse.

- A *Flagging Order* effectively directs a trustee not to make a splittable payment without the leave of the Court. Such an order is only obtainable where the Court is satisfied that a splittable payment will soon become payable.
- The *Splitting Order* is the most common order. A Splitting Order will, in most cases, have the effect of dividing the superannuation entitlements between spouses after separation in accordance with the terms of the Orders. Once a split occurs, a new superannuation entitlement is created which is known as an "interest". This new interest becomes "the property" of the other party who can then access it in accordance with their own retirement qualifications.

The superannuation trustee must comply with the Orders and directions of the Court provided that Orders are drafted carefully and in accordance with all the complex rules and regulations relevant to "flagging" or "splitting".

Many Family Law clients are unaware of their options and can often "undervalue" the superannuation entitlements that are available in negotiating "a fair just and equitable settlement".

# OCTOBER 2011

## Personal Properties Securities Act 2009

The *Personal Properties Securities Act 2009* ("PPSA") comes into force from October this year, resulting in significant changes to the way in which security interests in personal property can be created, transferred and enforced.

A personal security interest ("PSI") is an interest in relation to personal property that, in substance, secures a payment or performance of an obligation. Examples include charges, liens, pledges and mortgages, where the collateral (or "secured item") is any form of property, other than land, water rights or fixtures which form part of that land. This includes tangibles such as cars, boats, machinery, crops; as well as intangibles such as shares, intellectual property and contract rights.

This Act has as its centrepiece a single on-line register ("PPS Register") to be administered by the Insolvency and Trustee Service Australia ("ITSA") on which PSIs can be registered. The company charge system administered by ASIC under the Corporations Act will eventually be replaced, with charges becoming registrable PSIs on the PPS Register.

### OPERATION OF THE PPSA

Under the PPSA, secured parties are required to register their security interest on the PPS Register. Doing so amounts to effective notice against the world of the secured party's claim in respect of the secured item.

Provided that the security interest has "attached" against the secured item, the registered security interest will be enforceable against third parties. For "attachment" to occur there must be

(a) a valid security agreement under the Act;

AND

(b) at least one of the following must also apply:

(i) the secured party has possession of the secured item;

OR

(ii) the secured party has "perfected" the security interest (either by registration or exercising control over the secured item);

OR

(iii) the security agreement is signed by the grantor and contains a description of the secured item.

Whilst "perfection" of the security interest is not essential for enforcement of the interest, an unperfected security interest will be subject to the security interests of others whose interest is of a higher priority in respect of the same secured item.

The ranking below sets out the order of priorities:

1. Perfected security interests perfected by control
2. Perfected security interests perfected by any other means
3. Unperfected security interests

The remedies available to the secured party against the grantor upon default under a valid security agreement include the right to seize and dispose of the secured item in accordance with the agreement and enforcement provisions of the Act.

### SOME PRACTICAL IMPLICATIONS

In particular, the changes resulting from commencement of the PPSA will affect - suppliers of goods;

- companies who utilise charges and chattel mortgages as security;
- banks and other finance providers (as well as borrowers); and
- manufacturers and suppliers of inventory and equipment under leases and hire/purchase agreements, by consignment, or conditional sale.

The PPSA will have impact significantly on suppliers of equipment in the building and construction industry who utilise retention of title ("ROT") arrangements (e.g., Romalpa, commercial consignment etc.). From October, ROT will become a registrable PSI under the Act. This means that suppliers will need to ensure that their terms and conditions are PPSA compliant and that they take steps to register their interest in the goods they are supplying to minimise the risk of being defeated in a priorities dispute.

### TRANSITIONAL PROVISIONS

A registrable PSI already registered under an existing Commonwealth or State regime created prior to the "registration commencement date" specified in the Act - being a date yet to be determined in February 2012 - will generally be moved across and recorded automatically on the PPS Register. These PSIs are deemed to have been registered before the registration commencement time and will enjoy "temporary perfection", for a period of 24 months from that time. However, upon the expiration of this period they will lose their "temporary perfection" and be deemed to be an unperfected security interest for the purposes of a priorities dispute, meaning from that time they will be vulnerable to the superior interests of others.

# Employment Contracts

## and the National Employment System

*The terms of employment are not limited to those expressly agreed and contained in the contract of employment*

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A contract of employment is a special type of a contract with specific rules that can modify legal and legislative assumptions governing employment relationships. At its simplest, the terms of a contract of employment are for an employee to supply labour and for the employer to pay salary and other remuneration for that labour. So long as such an arrangement exists there is in fact a contract of employment between the parties even where nothing is recorded in writing.

The terms of employment are not limited to those expressly agreed and contained in the contract of employment. The terms of employment can arise from other sources such as:

- Statutes (such as Federal *Fair Work Act 2009* (“FWA”) and the Victorian *Occupational Health and Safety Act 2004*).
- Enterprise agreements and other industrial instruments such as modern awards.
- Terms that may need to be implied to ensure that the contract of employment can operate efficiently.

The factual circumstances could become complex as we effectively have two systems operating in Australia:

- The national employment system which includes FWA, the National Employment Standards (“NES”) and modern awards; and

- Common law which operates in areas where the national employment system, for whatever reason, does not apply. Normally the national employment system establishes minimum terms and conditions for payment of wages and conditions and common law applies where the individual's salary is higher than the salary specified by the appropriate modern award or where conditions are higher or not covered by the NES.

It is fundamental that the contract of employment is clear, unambiguous and in writing. We recommend at least the following topics be covered:

- a position description
- performance appraisal
- suspension of employees
- grievance or disciplinary processes
- termination
- confidential information and restraint of trade
- a reference to the employer's policy and procedures manual.

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