

NEWSLETTER

OCTOBER 2011

Commercial Litigation Newsletter

Cornwalls' Litigation Team News

Welcome to our first Commercial Litigation newsletter.

The newsletter will be distributed quarterly, and will contain topical articles on legal issues and developments, as well as news of Cornwall Stodart's Commercial Litigation team.

This quarter we have included news on the thrice-delayed commencement of the *Personal Property Securities Act 2009*, as well as a discussion on current civil dispute resolution legislation. We also bring you information on proportionate liability and some successful matters our team has recently concluded.

Please don't hesitate to contact us if you would like more information on any topic, whether covered in this newsletter or not. We hope you find the newsletter informative and useful.

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*Click on image to view Wayne's profile

Cornwalls' Litigation Team Member Profile

Wayne Kelcey, Partner and Head of Commercial Litigation

Wayne has over 20 years' litigation experience and particular expertise in insolvency and property law.

He has acted in a vast range of complex commercial disputes, including shareholder, intellectual property and major construction litigation. Wayne has a well deserved reputation for creating 'out of the box' solutions to avoid costly court proceedings.

Wayne is sought by clients for his strategic approach and ability to quickly identify the commercial imperatives relevant to any dispute. He enjoys partnering with his clients to produce highly successful and commercial outcomes.

Before practising law, Wayne was a member of the Australian Federal Police. He also acted as a consultant with the Office of Strategic Crime Assessments and was engaged as a senior lecturer in the Faculty of Law and Management at La Trobe University. These roles have enhanced his skills as a legal practitioner.

Does your business use retention of title clauses? If so, read this

The *Personal Property Securities Act 2009* (PPSA) provides a new regime applicable to most categories of 'personal property'. This includes the supply by businesses of most goods, including stock and other goods supplied under retention of title (also known as 'ROT' or Romalpa) clauses.

In September 2011, the commencement of the PPSA was delayed until early 2012 (at the latest, 1 February 2012).

By the *Personal Property Securities Amendment (Registration Commencement) Bill 2011*, introduced to the House of Representatives on 12 October 2011, the Attorney General was provided with scope to delay the commencement date further should he wish to do so. No date has yet been provided by the Attorney General for the commencement of the PPSA.

While the PPSA has been delayed multiple times, relying on the continuation of such delays may give rise to risk. Not preparing your business for the early 2012 commencement date may



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preclude you from pursuing your contractual rights provided for in your terms and conditions and invoices.

Generally, the new regime under the PPSA will replace the existing rules concerning a suppliers' current rights and entitlements under ROT clauses. The PPSA requires that:

- all sales by ROT be registered; and
- all new ROT agreements and clauses comply with legislative requirements.

The new PPSA rules concerning ROT are complicated, however essentially:

- a. if your business supplies goods *before* the commencement date (early 2012) under a *pre-existing* ROT clause, that supply of goods *will*, in most instances, automatically be covered by the PPSA for up to 2 years;

- b. if your business supplies goods *on or after* the commencement date (early 2012), under a ROT clause dated *before* the commencement date, that supply of goods *will not* automatically be covered by the PPSA; and
- c. if your business supplies goods *on or after* the commencement date (early 2012), under a ROT clause dated *on or after* the commencement date, that supply of goods *will not* automatically be covered by the PPSA.

If your interest *is* automatically covered by the PPSA, you will still need to take steps to secure your rights within the next 2 years. Failure to do so will cause you to lose your entitlement.

If your interest *is not* automatically covered by the PPSA, you will need to take steps as soon as possible to secure your interest. If you do not do so, you run the risk of losing your rights.

Civil dispute resolution legislation

Over the last 12 months there have been significant legislative developments across state and federal jurisdictions that affect the way civil proceedings are conducted in Victorian and federal courts.

The Victorian Act and overarching obligations

The *Civil Procedure Act 2010* (Vic) (**Victorian Act**) commenced on 1 January 2011. It introduced a number of 'overarching obligations' that apply to all civil proceedings heard and issued in a Victorian court (that is, the Magistrates Court, the County Court and the Supreme Court). The Victorian Act requires all parties to the dispute (including expert witnesses and funders) to comply with – and also certify that they have read and understood – these obligations.

Overall, the Victorian Act seeks to ensure that parties conduct themselves appropriately by only pursuing claims and defences that have a proper basis, negotiating settlements where possible, avoiding delays and keeping costs to a minimum. By way of example, parties are under an obligation to disclose documents to the other side that are critical to the resolution of a proceeding at the 'earliest reasonable time' after they become aware of the document in their control.

There are consequences if parties do not act in accordance with the overarching obligations. For example, costs may be ordered against a party, or a claim or defence may be struck out by the court.

The Federal Act and 'genuine steps' requirement

The *Civil Dispute Resolution Act 2011* (Cth) (**Federal Act**) came into effect on 1 August 2011 and imposes obligations on prospective litigants to take genuine steps to resolve a dispute before proceedings are commenced in either the Federal Court or Federal Magistrates Court.

Unlike the Victorian Act, the Federal Act has a more limited purpose. It aims to 'ensure that, as far as possible, people take genuine steps to resolve disputes before certain civil proceedings are instituted'. If dispute resolution is unsuccessful and proceedings are issued, each party must file a 'genuine steps statement' to the effect that genuine steps have been taken to resolve the dispute.

While the Federal Act does not prescribe what genuine steps must be taken by parties (instead allowing parties to decide what steps are appropriate in the circumstances), it does provide examples of 'genuine steps' that could be taken by a party. Examples include



attempting to negotiate with the other party with a view to resolving some or all the issues in dispute, providing relevant information and documents to the other party to facilitate resolution of the dispute and considering whether the dispute could be resolved by an alternative dispute-resolution process.

Under the Federal Act, as is the case under the Victorian Act, the court is able to take into consideration what genuine steps were taken by the parties (and whether those steps were appropriate) when exercising its discretion to award costs.

The Victorian Act initially required parties to engage in 'pre-litigation requirements' (this has since been repealed).

However, while there is no legislative requirement to engage in pre-litigation requirements, we have found that in appropriate cases pre-litigation steps may be utilised to expedite the settlement of matters (without the need to issue proceedings) and to minimise costs. Indeed, our experience is that, by providing the other side with an evidence pack (which also contains an analysis of the evidence) relied on to support a claim as early as possible, meaningful settlement negotiations can be engaged in, often resulting in settlement prior to any proceedings being issued – or where proceedings have been issued, we have been able to obtain orders consenting to judgment without proceeding to a contested hearing.

Commercial Litigation Success Stories

A sleeping asset saved

'Our clients had an unusual situation in a members' voluntary liquidation. Shortly after lodging the necessary reports with ASIC to trigger deregistration of the entity, a sleeping asset (of unknown and contingent value) was discovered by their client, the company's holding entity. We met the client within a day, filed and served the application and supporting affidavit the following week, and two weeks later achieved the desired outcome with commendation by the court.'

Adrian Lasky, Partner, Commercial Litigation

Our client

Our client was a liquidator for a leading international accounting and insolvency firm. The company our client was liquidating was a subsidiary in a large group of entities.

Their ambition

Our client wanted a swift and commercial solution that would both achieve the desired outcome and enable them to retain a sleeping asset for their ultimate client. The process required two stages: first, obtaining the required extension of time from the court; and second, determining a commercial strategy for distributing the asset to the holding company.

The first task (extending the timeframe for deregistration) was subject to strict time restrictions. This meant that if the court application was not successful on the first return, there was limited time to address any concerns the court might have. There was no room for error. This stage was successfully achieved with the court granting

the application at the first return date, with a commendation on the quality of submissions provided to the court.

The second task (distributing the asset) was complicated by clauses in the primary agreement, which imposed preconditions on an assignment by the company of its interest. Included in these preconditions were significant notice periods, which time would have significantly delayed the disposition of the asset. It was further complicated by the fact that since the primary agreement (dated in the 1990s prior to the holding company's acquisition of the company), multiple assignments had occurred of various rights and duties between the parties. We structured a commercial outcome that facilitated the assignment of the asset as desired within 4 weeks of the date of the successful court application. This was many months faster than the timeframe provided in the assignment preconditions.

Enhancing their success

We were able to provide a swift resolution to a matter that concerned both our client and its ultimate client. The resolution saved an asset from being ultimately transferred to ASIC, and instead enabled the asset to be transferred to the holding company and remain to the benefit of the group. This enabled our client to achieve both its own objectives and those of one of its largest clients in a swift and commercial manner.

Behind the headlines

This matter included two facets: a court application and an asset transfer. Accordingly, the litigation and 'front-end' commercial members of our Reconstruction & Insolvency team worked together, focusing on their speciality, to achieve the outcome within a short timeframe. In this way, we were able to access the broad range of skills and experience available throughout the firm to achieve the desired result.

Team members: Adrian Lasky and John Hutchings, assisted by Katherine Payne and Dean Katz.

A complex administration

'In advising our clients on a complex administration of a registered managed investment scheme, our Reconstruction & Insolvency team successfully used the legislative framework of Part IV of the Corporations Act in a new and innovative way, in order to validate the appointment of our clients as administrators. In the meantime, we remained a crucial partner to our clients in the efficient and effective conduct of the administration.'

Paul Buitendag, Partner and Head of Reconstruction & Insolvency

Our clients

Our clients are the voluntary administrators over a company that is the responsible entity of a property trust engaged in real property investments with a particular focus on the retirement and aged care village industry.

Their ambition

The validity of our clients' appointment as administrators of the scheme had been questioned by a secured creditor shortly after appointment. In circumstances where substantial costs were being incurred (and continued to be incurred) in complying with their statutory obligations as administrators, our clients were understandably anxious to obtain focused and practical legal advice, and certainty in respect of their appointment, as soon as possible.

Within a week of receiving instructions, our Reconstruction & Insolvency team reviewed a range of company documents, and drafted an application and affidavit in support seeking an order that our clients' appointment was valid, or in the alternative should be validated using section 447A of the *Corporations Act 2001* (Cth). On 29 October 2010, his Honour Justice Sifris made orders validating the appointment of administrators from 18 October 2010 pursuant to section 447A, notwithstanding that the initial appointment was not valid.

That judgment was subsequently appealed by the secured creditor and ultimately was heard by their Honours Court of Appeal Justices Buchanan and Mandie, and his Honour Justice Almond on 6 June 2011. Their judgment was handed down on 21 September 2011, and while their Honours allowed the appeal on the basis that Justice Sifris had decided on the basis of factual material that was not before him, they

ultimately reached the same conclusion. Our clients' appointment as administrators was validated from 18 October 2010, and the conduct of the administration continues on that basis.

Enhancing their success

We were able to provide efficient and accurate advice on an issue that was crucial to our clients' commercial interests, and ultimately were successful in arguing that their appointment as administrators should be validated. As a result, our clients can continue the conduct of the administration confident in their standing as administrators.

Behind the headlines

While the appeal judgment was pending, our clients were under a continuing obligation to comply with the Act in investigating the assets and liabilities of the scheme. Our Reconstruction & Insolvency team provided a range of litigation and 'front-end' or commercial services to our clients, to assist in the efficient and effective running of a complex administration, which involved a range of stakeholders and interested parties.

Team members: John Hutchings, Paul Buitendag and Gid Meltzer, assisted by Alex Nicol and Dean Katz.

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