



## Latest developments in the Personal Properties Securities Act (Cth)

A recent decision in the Supreme Court of New South Wales has brought to light issues concerning registration of security interests which arose prior to the start of the Personal Properties Securities Act on 30 January 2012. In 2010 civil construction company, Maiden Civil Pty Limited, leased excavators from their owner Queensland Excavation Services Pty Limited (QES). In March 2012, Maiden Civil entered into a loan agreement with Fast Financial Solutions Pty Limited ("FFS") and granted FFS security over all of its present and future property, including the excavators supplied and owned by QES. FFS subsequently registered its security interest on the Personal Property Securities Register (PPSR).

Prior to the end of the lease and still owing money to QES, Maiden Civil went into liquidation thereby defaulting on its loan from FFS and causing FFS to appoint Receivers and Managers to Maiden Civil who took possession of the excavators. In response, QES commenced proceedings against the Receivers requiring them to deliver the excavators to them on the basis that they were the legal owners of that equipment.

In its judgment the Supreme Court held that the lease of the excavators by QES to Maiden Civil was a "PPS Lease" and as such QES should have registered its security interest on the PPSR and its failure to do so meant QES's security interest was unperfected. As a result of QES's failure FFS's perfected security interest had priority over QES's unperfected security interest. This occurred despite QES being the legal owner of the excavators.

QES argued that as its security interest arose prior to 30 January 2012 it was a "transitional security interest" and was

therefore perfected under the PPSA provisions. However, perfection of a transitional security interest does not occur if under the previous security legislation QES would have been required to register its lease. Because QES had not registered the lease under the previous legislation QES's security interest under the PPSA remained unperfected.

This case serves as a reminder that the two year transitional provisions of the PPSA ends on 30 January 2014 meaning that any interests which arose prior to 30 January 2012 should be registered immediately to avoid any problems with temporary perfection.

Confused? That is OK, we're not. If you have any queries or wish to discuss any issues arising about the PPSA please contact Esplins.

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## Enforcement of Foreign Judgments

Not all court judgments obtained by a judgment creditor in a foreign court against a judgment debtor residing or located in Australia are enforceable in Australia.

In Australia there is no automatic system of recognition of foreign judgments. For a foreign judgment to be enforced in Australia it must be recognised as enforceable by the Foreign Judgments Act and registered in the relevant Supreme Court, or if the judgment cannot be registered in the Supreme Court the judgment, providing certain requirements are satisfied, may be enforceable under common law operating in Australia.

To register a foreign judgment in a relevant Supreme Court a judgment creditor must apply to the Supreme Court with a request to register the foreign judgment. For the Court to effect registration, a judgment and a foreign court which issued the judgment must satisfy certain requirements. Some of these requirements are: a foreign court must be one of the courts listed in the relevant Foreign Judgments Act (usually a court of higher jurisdiction), the foreign court must have jurisdiction to decide a type of a dispute and a particular case in which the judgment was issued, a judgment creditor should show that a judgment debtor was properly served with proceedings in which the judgment was issued and defended the proceedings and the judgment was not appealed or set aside in an original court. A judgment debtor may apply to the Supreme Court to set

aside an application for registration of a foreign judgment or to set aside registration. If all requirements for the registration are not satisfied the Supreme Court will set aside the judgment and the judgment creditor will not be able to enforce the judgment in Australia under the Foreign Judgments Acts.

To enforce a foreign judgment under common law a judgment creditor must start a new court action in an Australian court against a judgment debtor for recovery of an amount of the foreign judgment as a debt. To proceed with such action the judgment debtor must show to the court, among other things, that a foreign court had jurisdiction to decide a case.

The presence or absence of jurisdiction of a foreign court is decided by Australian courts in accordance with understanding of "jurisdiction" in the Australian law. Australian courts will generally recognise jurisdiction of a foreign court if:

- in case of a judgment given in a personal action, a judgment debtor voluntarily and expressly submitted to the jurisdiction of a foreign court; or
- in case of a judgment given in relation to immovable property or movable property, where such property is situated in a country of that foreign court.

Enforcing foreign judgments is costly and time consuming.

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## Misleading and deceptive conduct on online advertising

The decision of the High Court in *Google Inc. v Australian Competition and Consumer Commission* [2013] HCA 1 earlier this year confirms that advertising on the internet will be treated in the same way as other printed advertising, for example on billboards or newspapers, for the purposes of assessing misleading and deceptive conduct.

In this decision the ACCC alleged that Google engaged in misleading and deceptive conduct in breach of the old section 52 of the Trade Practices Act 1974 (now found under section 18 of the Australian Consumer Law) by publishing sponsored links and providing the advertisers with the means to assign misleading keywords.

Sponsored links are paid advertisements that are often displayed either at the top or the right hand side of the search results page. The advertiser specifies the websites to be included in the sponsored link, the headline, text to be used and the search terms that will cause the sponsored link to be displayed.

The misleading and deceptive conduct that Google allegedly engaged in was that the sponsored links falsely represented an association between competing companies. An example used in the case was a search "Harvey World Travel" also produced advertisements for "STA Travel", a competitor company. This happened because STA Travel chose the words "Harvey World" as a trigger for its advertisements. Google has no control over the advertiser's choice of the search terms that will cause the sponsored link to be displayed.

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## Strata Plans - The Requirement to Approve Legal Fees

As a consequence of the recent Supreme Court decision in *The Owners – Strata Plan No. 70798 -v- Bakkante Constructions Pty Ltd* [2013] NSWSC 848, the executive committees of strata plans must ensure that approval has been properly obtained when the cost of litigation unexpectedly increases. Even if an approval is obtained, the approval may be ineffective if the case expands and the legal fees to be incurred increase above the original estimate.

The owners corporation started the legal action in the Consumer, Trader and Tenancy Tribunal (“CTTT”) against a builder in relation to building defects. The claim was subsequently amended to increase the number of defects claimed against the builder. This had the effect of increasing the compensation claim from about \$147,000 to \$1.4 million and the case was transferred to the Supreme Court.

The chairman of the executive committee made the decision to proceed with the CTTT litigation without gaining the approval of the executive committee or lot owners at a general meeting. Under section 80D of the Strata Act and the regulations, the executive committee is entitled to commit the strata plan to litigation if the estimated cost does not exceed \$1,000 for each lot in the strata scheme or \$12,500 whichever is the lesser. As the estimated legal fees in the CTTT was less than the allowable section 80D amount, the executive committee could have approved commencement of the CTTT proceedings. However, on transfer to the Supreme Court, the legal fees would have been well in excess of \$12,500.

As a result of the legal action being commenced without approval of either the executive committee or a general meeting

of members, one of the owners applied for the entire legal action brought by the owners corporation against the builder to be dismissed. He was successful.

The Court held that there was no resolution of either the executive committee or owners at a general meeting to authorise the commencement of the CTTT legal action. This meant that the exemption to section 80D could not apply because there was simply no decision by either the executive committee or lot owners to take legal action.

Regarding the increase in costs caused by the transfer to the Supreme Court, the Court said:

“...the reasonably estimated cost of taking action by commencing proceedings cannot be artificially minimised by requesting the solicitor to provide a costs estimate up to some arbitrary point, such as the filing of points of claim, the filing of points of defence or the service of experts’ reports. Litigation does not work like that. Once proceedings are commenced, they continue until dismissed or discontinued or judgment is obtained. In the usual case, the reasonably estimated cost of taking the action will be the estimate of the costs that the owners corporation will incur in the proceedings until their final resolution and determination.

The Supreme Court decision in this case puts executive committees on notice that they cannot authorise minor stages of legal action, where the total cost of the action will exceed the statutory threshold of \$1,000 per lot or \$12,500 (whichever is less) without general meeting approval. Executive committees cannot approve fee estimates from lawyers for piecemeal components of significant litigation by for instance approving stage 1 where they expect that stage 2 will take the total cost in excess of \$12,500.

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### *Misleading and deceptive conduct on online advertising continued*

The Court found that Google did not engage in misleading and deceptive conduct through the sponsored links as Google did not create or produce them. Google also did not endorse or adopt the representations which it displayed on behalf of its advertisers. Instead, Google acted as a mere conduit, an intermediary publisher, who passed on the advertisements without approving them.

This decision confirms that advertisers will be held liable for misleading and deceptive conduct for online advertising. As such, online advertisements must still comply with the Australian Consumer Law, which includes, among other things, a prohibition against misleading or deceptive conduct.

This decision further highlights that website administrators can avoid liability for misleading or deceptive conduct for online advertisements appearing on their websites as long as it can be shown that the administrators were not involved in the creation or production of the advertisement and that they have not adopted or have taken to endorse its contents.

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## Benefits of sole purpose corporate trustees of SMSFs

The most recent statistics from the ATO show that as of 30 June 2012 three quarters of self-managed superannuation funds (SMSFs) have trustees who are natural persons. The remaining quarter of funds have a company as its trustee. It may appear cheaper and easier to set up a SMSF with natural persons as the trustees, but in the long term a corporate trustee may save money and prevent difficulties.

### Change in trustees

Each member of a SMSF must also be a trustee of the fund or a director of the fund's corporate trustee.

In the case of natural person trustees, this means every time the membership of the SMSF changes - and this includes the death of a member - a change in the trusteeship of the SMSF will also occur. The change in trusteeship of a SMSF will generally require a deed of appointment or retirement as appropriate.

If the trustee of a SMSF is a company, each member of the fund must also be a director of that company (but there is no

requirement regarding who must or can be the shareholders of the trustee company). Changing the directors of the trustee company will not change the trusteeship of the SMSF and can be done simply with a minute of a shareholder meeting and a form notifying ASIC of the change.

From an administrative point of view, each time the trusteeship of a fund changes, the trustees must generally notify all relevant bodies - such as banks - so that the names of the accounts held by the fund can be appropriately changed. Some banks may require a new bank account to be opened in the names of the new trustees.

In respect of real property owned by the fund, this involves changing the title deed of the property. Most states charge no or a nominal fee for this change (currently \$50 in New South Wales) but the trustees of the fund bear the burden to convince the Chief Commissioner of State Revenue (or equivalent) that the transfer fits within the exemption, otherwise ad valorem duty is payable.

### Single member funds

A single member SMSF must have two natural person trustees (with restrictions on the relationship between the trustees) or a corporate trustee. The single member can be the sole director of the corporate trustee,

meaning that the member/director can have entire control over the running of his/her SMSF and not need to rely on another trustee.

### Succession planning

Trustees who are natural persons will inevitably die and in the case of funds with only two members, will leave the fund in a position of non-compliance. A corporate trustee will only 'die' when it is wound up and provides stability when a member of the fund passes away.

### Can an existing company be used as the corporate trustee?

There is no restriction on using a company you already control as your SMSF trustee. It is, however, preferable to use a company which has the sole purpose of acting as the fund's trustee in order to keep the SMSF's assets separate from the company's other assets. ASIC reduces the registration and annual fees for companies which have the sole purpose of being the trustee of a SMSF. The fees associated with registering and running a corporate trustee are worthwhile to ensure your SMSF is more flexible.

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