Systematising Security Interests

Personal Property Securities Act 1999

Introduction

The Personal Property Securities Act ("PPSA") was passed in October 1999, and is likely to come into force during the first quarter of 2001. The Personal Property Securities Regulations will take effect at the same time.

The PPSA will implement a number of changes to the law relating to security interests over personal property, including:

1. a common set of rules to establish priority of security interests in personal property;
2. a single procedure for the creation and registration of security interests in such property; and
3. a centralised, electronic Personal Property Securities Register.

Once the PPSA comes into force it will replace the Chattels Transfer Act 1924, the registration of charges provisions in the Industrial and Provident Societies Amendment Act 1952, the Companies (Registration of Charges) Act 1993, and the Motor Vehicle Securities Act 1989. It will not, however, affect security interests in land.

The Current Law

Under current law, there are a number of documentary and registration procedures and requirements for financing transactions involving security over personal property. Often, the question as to whether any registration requirement arises and, if so, which one applies depends on the nature of the debtor – whether the debtor is a company, a society, an individual, or some other type of corporate or non-corporate entity. The nature of the personal property over which security will be given (the collateral) needs to be considered; for example, if it is a motor vehicle, then the Motor Vehicle Securities Act applies. It is then necessary to determine what the nature of the security interest is. For example, leases and bailments are registrable under the Chattels Transfer Act, but if the security interest is a Romalpa clause, no registration requirements apply. If registration is required, there are further complications. For example, Chattels Transfer Act registration must be effected at the High Court, while company charges must be registered at the Companies Office at which the company is registered. No comprehensive national register exists, and priority rules vary between the different regimes. The criticism that has been levelled at the state of the law relating to secured transactions seems well justified. The purpose of the PPSA is

to systematise the current law, and to regulate the various types of security interests.

The Scope of the PPSA

1. Security Interests

All forms of personal property securities have a similar function: to give an interest in personal property to a person to whom an obligation is owed, so that person can look to the personal property as compensation in the event that the obligation is not performed. The PPSA looks beyond the form of a transaction to its substance, and will apply the same law to all security interests.[1]

Generally, the PPSA will apply to all transactions that involve security interests. "Security interest" is defined in section 17(1)(a) as:

> [A]n interest in personal property created or provided for by a transaction that in substance secures payment or performance of an obligation without regard to
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> (i) The form of the transaction; and
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> (ii) The identity of the person who has title to the collateral.

2. Substance Over Form

At the heart of the PPSA is a conceptual shift away from form. Instead, the focus is on the substance of a transaction – does it secure the payment or performance of an obligation? If so, it falls within the scope of the PPSA.

Traditional forms of transactions can therefore still be used but the PPSA will govern, despite the fact that the form of the agreement had a distinctive legal meaning and treatment under pre-PPSA law. So, while floating charges and Romalpa clauses might continue to exist, their use will not resurrect the notions of crystallisation and retention of title.

Title, as well as form, will be irrelevant. Therefore, title retention arrangements such as hire purchase agreements and agreements with Romalpa clauses will be regarded as security interests – the seller is taking an interest in the goods to secure payment. Such transactions will need to comply with the PPSA in order to establish priority over competing security interests in respect of the personal property subject to the transaction.

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1 Flynn et al, "Personal Property Securities Act – getting started" (March 2000) NZLS Seminar, 7.

3. Determining Whether the Transaction is a "Security Interest"

The PPSA does not name particular transactions that fall within its scope, so every transaction will need to be examined on its own merits. To avoid doubt, the PPSA does specify certain transactions that are covered:[2]

> [T]his Act applies to a fixed charge, floating charge, chattel mortgage, conditional sale agreement (including an agreement to sell subject to retention of title), hire purchase agreement, pledge, security trust deed, trust receipt, consignment, lease, an assignment, or a flawed asset arrangement, that secures payment or performance of an obligation.

Other than this, there is little guidance to help identify security interests. However, commentators have gleaned a "substance test" from section 17:[3]

1. the transaction must create an interest in personal property;
2. the interest must arise consensually from an agreement between the parties; and
3. the interest must secure the payment or performance of an obligation.

Certain property is specifically excluded from the scope of the PPSA. Section 23 lists a number of exceptions, including a lien, a transfer of an interest in an insurance policy, and interests in land.

4. Attachment and Perfection

(a) Attachment

Two of the key concepts in the PPSA are those of "attachment" and "perfection". "Attachment" is a key concept because a security interest will not come into existence until it attaches to a particular collateral. Section 40 provides that as between the debtor and the secured party, attachment occurs in respect of collateral when:

1. value is given by the secured party; and
2. the debtor has rights in the collateral.

Parties to a security agreement can agree that attachment occurs later than as provided by the general rule and, if so, such agreement will override the general rule.

Value will usually be a cash advance or provision of credit, but the concept is intended to be broader and is likely to include a binding commitment to give

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2 Section 17(3).
3 Flynn et al, supra note 1, 9.

credit in the future, and the provision of a loan to a third party where the party granting the security interest has done so to secure the third-party loan.[4]

The debtor will clearly have rights in the collateral where the debtor is currently the owner of the collateral but again, the concept is intended to be broader. Section 40(3) states that the debtor has rights in goods which are leased to him or her, consigned to him or her, or sold to him or her under a conditional sale agreement or Romalpa clause (no later than when the debtor obtains possession of the goods).

To illustrate the concept of attachment, the Act provides an example:

> Person A advances $5,000 to person B in return for a security interest in person B's car and person B has signed a written security agreement in respect of that car.

The concept of a floating charge, which floats over assets of the debtor but does not "crystallise" or attach until a certain event occurs, will effectively be abolished by section 40(4). This section states that the use of the term "floating charge" does not constitute an agreement that the security interest will attach at a later time than that specified under the general rule.

(b) Perfection

Under section 41, "perfection" of a security interest occurs when:

1. the security interest has attached; and
2. either a financing statement has been registered in respect of the security interest; or the secured party, or another party on the secured party's behalf, has possession of the collateral.[5]

The order in which these two requirements occur is irrelevant. So in practical terms, a financier will be able to register a financing statement in respect of a security interest before the interest has attached – that is, before making the advance – thus satisfying itself as to its priority position on the register before the actual advance takes place. In practice, it is likely that most financiers will register a financing statement and search the Register before making any advance; this will give the financier a higher degree of certainty as to its security position than exists under the current law.

In terms of perfection by registration, the security agreement itself will not need to be registered, as is currently required under the Chattels Transfer Act and the Companies (Registration of Charges) Act. Rather, a financing statement which sets out certain details about the debtor, the creditor, and the collateral will be filed electronically on the Register, and a party wishing to have further information about the terms of a new security agreement will need to obtain them from the debtor or, in some circumstances, from the secured party.

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4 Ibid 21.

5 Except where possession is a result of seizure or repossession: s 41(1)(b)(ii).

Perfection by possession may involve what, under existing law, would be characterised as a pledge but can also be extended to the "deemed possession" of collateral which does not have a physical existence, such as an investment security or a negotiable instrument.[6]

5. The First to File Wins

(a) The Rule

The basic rule of the PPSA is that the first secured party to register a financing statement complying with the PPSA requirements will take priority over any other security interest, while the priority of unperfected security interests will be generally determined by the order of attachment.[7] A number of specific rules deal with more unusual situations, but the vast majority of priority disputes will be solved simply according to which security interest was first registered. The key exceptions to the "first to file" rule will be situations involving purchase money security interests, buyers in the ordinary course of business with no actual knowledge of a security interest, and buyers of low value commercial goods without actual knowledge of a security interest.

(b) Purchase Money Security Interest

The PPSA gives a special priority status (or "super-priority") to the "Purchase Money Security Interest" ("PMSI"), essentially a security over goods acquired by a debtor pending payment of the purchase price. The definition also includes the interests of a third party financier who lends money to assist in the purchase of the collateral.[8]

A PMSI is defined in section 16 as being:

1. a security interest taken in collateral by a seller to the extent that it secures the obligation to pay all or part of the collateral's purchase price; or
2. a security interest taken in collateral by a person who gives value for the purpose of enabling the debtor to acquire rights in the collateral, to the extent that the value is applied to acquire those rights; or
3. the interest of a lessor of goods under a lease for a term of more than one year; or
4. the interest of a consignor who delivers goods to a consignee under a commercial consignment;

but does not include a transaction of sale and lease back to the seller.

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6 Section 18 provides an extended meaning of "possession" in respect of investment securities and negotiable instruments.

7 Section 66(b).

8 Section 16.

Examples given in the Act are those of a hire purchase agreement relating to the purchase of a television; or a loan by a bank for the purchase of a car where the loan is secured over the car, and the proceeds are applied towards the purchase.

Canadian courts have established that in order for a secured creditor to have a PMSI the creditor must establish two things:[9]

1. that the value was given for the purpose of enabling the debtor to acquire rights in the collateral; and
2. that the money was in fact used for the purpose of acquiring the collateral.

Section 73 provides that a holder of a PMSI is able to obtain priority over holders of other types of security interest in the same collateral given by the same debtor, provided that for collateral other than inventory or intangibles, the PMSI is perfected (that is, a financing statement is filed and notice given to other secured parties) within ten working days of the debtor taking possession of the collateral.

If the collateral is inventory, to achieve priority over non-PMSIs perfection of a PMSI must occur at the time the debtor takes possession of the collateral.[10] If the collateral is an intangible, perfection of a PMSI must occur within ten working days after the day on which the security interest in the intangible attached.[11]

6. The Personal Property Securities Register

To provide for the registration of security interests and to encourage the transparency of the system, the PPSA provides for the creation of an electronic register that will be accessible over the Internet.[12] The Personal Property Security Register ("PPSR") will be accessed by means of computer terminals, and will provide for on-line search and registration facilities in real time.[13] Therefore, registrations will be effective almost immediately, which should minimise the risk of searches failing to disclose security interests which have only recently been registered.

The information able to be ascertained from a search of the Register will include:[14]

1. the name and address of the debtor and, if the debtor is an individual, his or her date of birth;

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9 Flynn et al, supra note 1, 42-43.
10 Section 74.
11 Section 75.
12 Section 139(2)(a).
13 In this regard, the Register is similar in nature to the Motor Vehicle Securities Act Register.
14 Section 140.

2. if the debtor is an incorporated body, its official registration number;
3. the name and address of secured parties in favour of whom the debtor has executed security interests;
4. a description of the collateral affected by the security interest, including its serial number if it has one;
5. if the security interest was originally registered under the Companies Act 1993, the Chattels Transfer Act 1924, the Industrial and Provident Societies Act 1908 or the Motor Vehicle Securities Act 1989, the date of its initial registration under that prior law.

The user, by way of a "financing statement", will effect registration of a security interest electronically. While the exact form of the financing statement by which a security interest will be registered has yet to be prescribed by regulation, section 142 lists the information that must be contained in a financing statement in order for it to be registered. Fees for both searching and registration will be prescribed by regulation.

Conclusion

The PPSA introduces a conceptual shift that should improve the administration of personal property in New Zealand. The substance of the transaction, rather than its form, will determine the applicability of the Act. If the PPSA applies, the transaction will need to comply with a uniform set of rules including registration on the PPSR. All lenders should be able to rely on a single search of the Register to reveal all security interests granted by a debtor or affecting a particular asset. While the advent of the PPSA will no doubt create short term administrative and legal upheaval, it should in the long term, offer obvious commercial advantages to secured lenders and their debtors.

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In Search of Good Faith

The Employment Relations Act 2000

Introduction

The Labour-Alliance Coalition Government has swiftly applied itself to its pre-election promise to repeal the Employment Contracts Act 1991 ("ECA"). The Employment Relations Act 2000 ("the Act") sets out a new framework for industrial relations law in New Zealand. That new framework is represented in the explanatory note of the Employment Relations Bill 1999 ("ERB") as being "based on the understanding that employment is a human relationship involving issues of mutual trust, confidence and fair dealing, and is not simply a contractual, economic exchange".

The Act has certain objectives and guiding principles at its core. These are to:

1. recognise that the employment relationship must be built on good faith;
2. acknowledge the inherent inequality of bargaining power in employment relationships;
3. promote collective bargaining as a means of addressing inherent inequality; and
4. promote mediation as the primary problem-solving mechanism.

Accordingly, the Act differs greatly from the industrial law that represented the ECA era. This legislation note will focus primarily on two changes to the law. The first is the introduction of "good faith bargaining", and the second is the procedural change implementing the replacement of the Employment Tribunal with the new Employment Authority. There have been other changes which will not be considered here. These include the creation of the concept of "unfair contracts" in individual employment agreements, the encouragement of multi-union and multi-employer bargaining, changes to the status of fixed-term contracts and to independent contractors, and a return to reinstatement as the primary remedy for personal grievances.

Good faith

The principle of "good faith" lies at the heart of the new legislation. Section 4 of the Act contains a general duty to act in good faith, and there are core minimum requirements set out in section 32. However, the Act does not define "good faith". Section 4 provides that, without limiting the general obligation of good faith, parties must not do anything to mislead or deceive each other or do anything that is likely to mislead or deceive each other. It seems likely that this brace of terms has been imported from section 9 of the Fair

Trading Act 1986, where a considerable body of case law has accumulated as an aid to interpretation.

It should be noted that good faith does not require agreement between the parties. The Act expressly states that there is no requirement to agree on a matter for inclusion in an agreement, nor is there a requirement to enter into a collective agreement.[1] There is no requirement to meet to discuss proposals that have been considered and responded to,[2] although this depends on the process of bargaining and how it is defined by the parties.

There are a number of situations in which good faith applies. These include:[3]

1. where there is consultation between an employer and its employees, including any union, about the employees' collective employment interests. This includes the effect of changes to the employer's business on employees;
2. where there is a proposal by an employer that might impact upon its employees, including any proposal to contract out work that would otherwise be done by the employees, or to sell all or part of the employer's business;
3. where employees are made redundant;
4. where there is access to a workplace by a union;
5. where there are communications or contact between a union and an employer relating to any secret ballots;
6. where any matter arises in relation to a collective agreement while it is in force;
7. where there is bargaining for a collective agreement or a variation of a collective agreement, including matters relating to the initiation of bargaining.

This list is not exhaustive of what good faith represents, and sets out examples only.

The Act sets out minimum core good faith obligations which apply to bargaining for collective agreements.[4] Section 32 stipulates that the union and the employer must "at least do the following things":

1. use their best endeavours to agree to a process for conducting the bargaining in an effective and efficient manner;
2. meet for the purpose of bargaining;
3. consider and respond to proposals made;
4. recognise the role and authority of representatives;

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1 Section 33.
2 Section 32(2).
3 Section 4(4).
4 Section 32.

5. not bargain about matters relating to terms and conditions of employment with persons who have representatives or advocates, without agreement;
6. provide information, including financial information.

1. Collective Bargaining

(a) Arrangement About Process – Section 32(1)(a)

The process may include, inter alia, the frequency of meetings, the bargaining timeframe, the number of people, who will participate in the negotiations, and what a response to a proposal needs to contain. The process must be conducted in an "effective and efficient manner".[5] A party may refuse a certain process if it believes that the process could not be conducted in an efficient and effective manner. However, the outcome of this approach may be that a party who refuses a particular process is held to be in breach of good faith, and to have failed to use its best endeavours in a process which is considered to be effective and efficient.

(b) Meet – Section 32(1)(b)

The parties must meet from time to time for the purposes of the bargaining. This requirement includes that the meetings occur on a timely basis, as well as imposing an obligation not to avoid meetings. Presumably, requirements regarding frequency will be determined by the courts. It is submitted that at these meetings, the parties must have a fair opportunity to explain, justify, and discuss their proposals and demands.

(c) Consider and Respond to Proposals – Section 32(1)(c)

It is likely that proper consideration of proposals will include having an open mind, and examining the proposal for a reasonable amount of time. Obviously, the type of response required will depend on the type of proposal. Where a party wishes to reject a proposal, it will need to outline its reasons for rejecting the proposal in order to avoid breaching its good faith obligations. This will allow the other party to reconsider its proposal, and thereby facilitate a better understanding of one another's positions.

(d) Recognise the Representatives – Section 32(1)(d)(i)

Under the ECA, the employer was required to recognise the employees' bargaining agent. That requirement is maintained in the Act, but must now be read in conjunction with the additional overall obligations of good faith.

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5 Section 32(1)(a).

(e) Not Bargain With Other Party – Section 32(1)(d)(ii)

This section relates to "undermining" the parties' representatives or advocates. The provision prevents the employer or union directly or indirectly communicating with the other party about terms and conditions if that party has a representative, unless the employer and the union agree otherwise.

Arguably, this section only relates to communication concerning terms and conditions. The party could therefore communicate regarding other aspects of bargaining, such as process. This could include communication by the employer detailing the outcome of industrial action. However, such communication would have to be made in a non-coercive manner so as not to breach the general duty of good faith.

(f) Provide Information – Section 32(1)(e)

On the initial release of the ERB, this provision caused the greatest concern for employers. Originally, the employer was bound to provide information which might reasonably be expected to be relevant. This could have conceivably encompassed virtually any information. The concern was that confidential information could become available in the market place. It was also considered that the provision would implicate the stock-exchange rules.

The government has attempted to address these concerns by amending the provision. Now, parties are required to supply "information that is reasonably necessary to support or substantiate claims or responses to claims made for the purposes of the bargaining".[6] What is "reasonably necessary" will have to be determined by the courts. Presumably, unions will argue for a wide meaning which encompasses all information necessary for informed negotiations between the parties. This is, no doubt, the intention of the provision and therefore the concerns of employers remain.

Any request for information must be made pursuant to section 34. The request must be in writing, and must specify the nature of the information requested, the particular claim or response to a claim to which the information relates, and a reasonable time within which it is to be provided. A party may refuse to give information if the request does not meet one of the above requirements, or if the information is considered not to be necessary – which will depend on how "necessary" comes to be defined. Where a party wishes to object to the provision of information, that party must notify the other party and then meet with it to discuss the objection with a view to resolving the matter.

Concerns about the release of confidential information have been addressed by section 34(3). Information must be provided directly to the other party, unless the information is alleged to be confidential, in which case it must be provided to an independent reviewer to determine whether the information is actually confidential. This goes some way towards alleviating employers' concerns that confidential information would find its way into the market place. The

6 Section 32(1)(e).

independent reviewer will take on something akin to a judicial role. It will be interesting to see whether the role is an effective one, and whether the controversy over this section will lead to litigation. Many aspects of the independent reviewer's role remain uncertain. How will he or she be appointed if the parties do not agree? How will he or she be paid, or by who? What if one party disagrees with the decision of the independent reviewer? These questions may need to be answered by the Court early on in the collective bargaining process.

2. Codes of Good Faith

The Act allows for codes of good faith to be developed. The purpose of these codes is to provide guidance to employers and unions in the application of the duty of good faith contained in section 4. The duty in section 4 is wider than the minimum core obligations set out in section 32. The codes, therefore, may be outside the scope of those obligations. The codes may refer to all employers, specific employers, or may be particular to an industry.

A committee is to be appointed to develop the codes of good faith. The committee will then recommend a particular code to the Minister. The Minister does not have to approve a code recommended by the committee, and also has the power to approve a code not recommended by the committee.[7] The committee itself will comprise of at least one person who represents unions, at least one person who represents employers' organisations, and any other persons the Minister thinks fit.[8] There is no limit as to the number of other persons that the Minister may appoint, but the number of representatives from union and employer organisations must be equal. The Employment Court and the new Employment Relations Authority have the power to refer to the codes in order to determine issues of good faith.[9]

3. A Breach of Good Faith?

The constitution of a breach of good faith will depend on the development of the law, including the extent to which the Employment Relations Authority and the Employment Court have regard to the codes of good faith. Jurisprudence from overseas may be helpful in this regard. In particular, the Canadian cases on the good faith duty in the employment context should be considered. It would seem that avoiding set meetings, refusing to justify proposals, and deliberately seeking a breakdown in negotiations through inflammatory tactics would be considered breaches of the duty to bargain in good faith.

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7 Section 37.
8 Section 36(2).
9 Section 39.

Procedure

The Act raises new issues of procedure. The Employment Court remains,[10] as does the appeal process to the Court of Appeal.[11] However, the Employment Tribunal has been replaced by a mediation service and the Employment Relations Authority ("the Authority").[12] As was the case with members of the Employment Tribunal, the Authority members will be experienced in industrial relations, but will not necessarily have legal training.

Dismissal disputes are referred to the Authority only.[13] The common law action for wrongful dismissal has been removed.[14]

The Authority is to investigate employment problems in a speedy, informal, and non-adversarial way.[15] This represents a significant departure from the adversarial approach inherent in New Zealand's legal tradition. The Act gives no guidelines as to how the Authority is to act in its non-adversarial capacity. There is uncertainty as to whether witnesses will be used and, if so, who will be entitled to call and examine such witnesses. The process of collection of material before the Authority will be wholly at the discretion of the Authority member who determines the process of the entire proceeding. It is to be assumed that in its non-adversarial capacity, the Authority may investigate in much the same way as do magistrates in civil jurisdictions.[16] It is possible that a situation may arise in which different Authority members use completely different procedural processes.

The Authority has the power to make any order that the High Court may make,[17] including the granting of injunctions. The power to make orders is very open-ended and may be construed widely, and it is submitted that such a power may make it more difficult to judicially review an order made by the Authority. Review of the Authority is limited by section 184 to alleged instances of lack of jurisdiction. Presumably a breach of natural justice is to be pursued as an appeal.

Parties dissatisfied with an order of the Authority may apply to the Employment Court.[18] The Employment Court must then call for a report from the Authority member on whether the parties have acted in good faith, and whether they have in any way obstructed the Authority hearing. Unless the Appellant is shown by that report to have acted in good faith, there is no *de novo* hearing.

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11 Section 214.
12 Sections 144 and 156.
13 Section 161.
14 Section 113.
15 Section 157, see also s 174.
16 See ss 160 and 173.
17 Sections 161 and 162.
18 Sections 178 and 179.

Conclusion

There can be no doubt that the Act represents a fundamental change in New Zealand's industrial relations. Since the ERB's first reading the government has made some changes, driven by the initial response from the business sector. However, the core of good faith remains. This has been the driving force behind the legislation.

Counting the Industrial Relations Act 1973, the Industrial Relations Amendment Act 1977, the Labour Relations Act 1987, and the Employment Contracts Act 1991, the Employment Relations Act 2000 represents the fifth major overhaul of a basic statutory area in less than a generation. Such incessant restructuring promotes uncertainty, as well as expensive litigation. It is unfortunate that such a core building block of the political-legal system comes and goes, rises and falls, with every turn of the Parliamentary merry-go-round.

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