

# CAVEAT RECOVERIES & THE COMMERCIAL CREDIT AGREEMENT



Charging clauses in credit accounts were, even ten (10) years ago, considered exotic. However, today they are an essential legal protection and tool for any enterprise involved in supplying goods or services on credit.

A charging clause in a credit account and a guarantee grants the business an interest in their customer's land (known as an equitable charge) which, when a customer defaults, allows the business to lodge a caveat on the customer's property and commence proceedings as a secured creditor.

## **BENEFITS OF THE CHARGING CLAUSE**

By virtue of the equitable charge, you are a secured creditor, which means that in the event of insolvency (bankruptcy or liquidation) you are not an unsecured creditor merely seeking a dividend of cents in the dollar.

Rather, you are in priority to unsecured creditors (including the liquidator or bankruptcy trustee), which often results in a far greater return than if you did not have such a charging clause in your credit account or guarantee.

In addition, if a debtor is liquidated/bankrupted after you obtain payment from your security, the liquidator/trustee will not be able to claw the money back from you as an "unfair preference".

A suitably drafted credit account or guarantee may also enable you to recover your full legal costs and a substantial rate of interest.

## **THE CAVEAT**

This is a Titles Office document, which, when lodged over the property, prevents the customer from dealing with the land, e.g. transferring (or selling) the land or having a further mortgage registered on the title.

A caveat may be lodged in any State or Territory where the customer owns property.

In Queensland, a caveat will lapse after three (3) months unless proceedings are commenced to enforce the equitable charge and a Notice of Action is lodged in the Titles Office.

Other States, such as New South Wales and Victoria, do not have this time limit before the caveat lapses.

Upon lodging a caveat in Queensland, a notice is sent by the Titles Office to the registered owners (which will include the debtor and any other owners of the property, often a spouse). This in itself may create a powerful incentive for the payment of your account when the "innocent co-owner" opens their mail to find a caveat has been lodged on their property.

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## **COURT PROCEEDINGS**

If your customer fails to pay, despite the caveat and any other demands, then proceedings in the relevant Court (usually the Supreme or District Court) will enable you to obtain orders for the sale of the property and the appointment of a sale trustee to sell the property and distribute proceeds to secured creditors (including your business).

Where jurisdiction under the credit account is granted to a particular State, orders can be obtained for the sale of properties in other States or Territories.

If your business does not have these clauses in your terms of trade, we invite you to contact Robinson Locke Litigation Lawyers to discuss suitable amendments to your terms of trade.

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