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PERSONAL PROPERTY SECURITIES REGISTER – HAVE YOU DEVELOPED A SYSTEM IN YOUR BUSINESS?

The Personal Property Securities Register (PPSR) was introduced over a two-year period, which finished on the 31 January 2014. The legislation is now fully operational throughout Australia.

During that transitional stage there were, at least, five major court cases that arose through disputes between the person who actually paid for an asset and the liquidator or receiver of their customer or the owner of a property on which their assets were stored. In each case, the liquidators or receivers were successful, because the courts are taking a very strict interpretation of what the law says. Ignorance is of no benefit and is not an excuse. Some businesses have lost millions of dollars' worth of assets because of uncertainty about this legislation or, indeed, complete lack of knowledge about this legislation.

Definition

The terminology 'personal property' can be misleading. Many people do not accept that 'personal property' is referring to 'business property'. It is and can be a very costly misunderstanding for business people.

The definition of 'personal property' is all forms of property, other than real estate. In saying that, 'personal property' under this legislation includes a vast range of business assets.

What Type Of Transactions Are Included?

They are quite numerous and can include:
- sale of goods on consignment;
- supplying of goods utilising hire purchase or lease agreements;
- supply of goods, including a 'Retention of Title' or 'Romalpa Clause' – you can still use them, but you need to have the clause updated to comply with this legislation;
- goods stored on someone else's property – this is a real problem area under this legislation;
- receivables or debtors that have been assigned;
- livestock on agistment;

- share farmers for security over a crop;
- tradesmen's plant and equipment, tools, etc, stored on someone else's property (eg a construction site);
- stock inventory that has been supplied by a supplier to a store;
- artist's works, sculptures, etc, which are left with a commercial art gallery, dealer, etc;
- intellectual property that has been used by other businesses; and
- loans to entities, both close entities and 'arm's length' entities.

The range of business activities that fall under the PPSR is very significant.

The Transition Period

Some people have stated that they believe this legislation has heralded the greatest upheaval of commercial law in Australia in the last 200 years. This is a very significant legislation, which unfortunately, neither the previous Labor government nor the Liberal government, have allocated sufficient money for a proper education program for small businesses around Australia, as to how this legislation will operate. One commentator said:

"The government spent millions of dollars educating the Australian business community on how GST would operate and GST couldn't send you broke. But very, very little money has been spent in educating the business community as to how the PPSR will operate and, unfortunately, this legislation can send you broke."

What Is The Problem?

Prior to the introduction of this legislation, the lessor, or the person making goods available for hire, or placing them at someone else's premises, owned the goods at all times. If the customer defaulted, or the property owner got into financial difficulty, the equipment owner simply repossessed their assets, since those assets did not form part of the insolvent estate.

However, the Personal Property Securities Act (PPSA) has changed all that. This legislation has been introduced based on New Zealand legislation, which was introduced in 2002. There has been some very significant court cases fought in New Zealand since that date.

This legislation was a consolidation of around 70 acts of Parliament, from Federal to State and Territory governments. It really made it a lot easier for banks and lenders (and probably motor vehicle dealers) to track assets down on the register.

But one of the fundamental problems that has occurred is that, if businesses do not recognise the need to seriously consider registering their security interest on the PPSR, then the business could lose ownership of the assets for which they have paid. That doesn't sound fair, but that's how the legislation works. 'Title is no longer king'.

There could be very unfortunate consequences for businesses if your interest is not registered. The business will effectively lose control of their assets, in the event of their customer's default, bankruptcy or insolvency. If this occurs, other parties, such as your customer's bank, the receiver, an appointed liquidator, or bankruptcy trustee, can then rank in front of the legitimate owner of the goods under this legislation. The liquidators, administrators, etc, will be able to deal with the business' goods as they wish. In effect, the business' goods will become available to satisfy the claims of the customer's bank and other secured creditors. The person who has paid for the asset can be reduced to an unsecured creditor.

Getting Your Business Ready

One of the quirks of this legislation is that registration is not mandatory, but is voluntary. Therefore, every business needs to determine a policy as to what transactions to register under the PPSR. If you issue an invoice for, say, $100, you wouldn't probably worry about registering that invoice on the PPSR.

Incidentally, the register is available 24/7. Simply visit the PPSR website to register for $7.40 each transaction. You need to be extremely accurate in the information you place on the register.

It's up to individual businesses to decide whether to 'self-insure' and not register, or to register for some or all of your customers.

Our suggestion is that you need to establish a minimum amount of an invoice. We believe a guiding thought should be: 'Would you be financially embarrassed if a customer did not pay an invoice for that amount of money?'

Depending on your business, that amount could be $1,000, $10,000, or $50,000. That's a personal choice and it's the amount of money that would cause you anxiety.

You might also like to consider individual customers, if you believe that some customers are very sound, whilst others are not as sound. Perhaps you can pick the ones that are not very sound. You need to think about it. What should determine that monetary sum? You need to implement a system in your business to make sure each invoice is examined at the time.

The other very important consideration is where your assets are being placed. Where were your assets last night? Because, under this legislation, if your assets have been at someone else's premises and, in the unfortunate event that a liquidator or receiver was appointed to the owner of that other premises 'last night', while your assets were there, you could potentially lose out very significantly under this legislation. Because the legislation assumes that, if the assets are of some significant value, then you would've registered them. This is the big message that, unfortunately, in our opinion, the government has not effectively communicated well in the business community.

We believe you will need assistance from two professional groups.

You will need assistance from a commercial solicitor to draft a 'Retention of Title' clause or a 'Romalpa Clause', which conforms to this new legislation. The legislation also requires you to have a 'Terms of Trade' agreement, which you ask your customer to sign. In actual practice, you might need more than one 'Terms of Trade' agreement, depending on who your customers are and your 'modus operandi' when you're dealing with those customers, as to the type of agreement you may need.

The other group of people who can assist you is accountants. We can assist you in designing an appropriate system and we can periodically review that system, to ensure your staff is abiding by the system, so you do not get a very bad shock one day and realise you have a couple of hundred thousand dollars' worth of equipment on someone else's property that had not been appropriately registered under this legislation.

We Can Assist

As an accountancy business offering business advisory services, we are able to assist you with designing an appropriate system to help you in your business.

We can assist in designing a PPSR system for a wide range of industries such as:

- Retail
- Restaurants
- Hospitality
- Trades
- Contractors

- Wholesalers
- Suppliers
- Livestock owners
- Farmers producing crops
- Equipment renters
- Ingredients suppliers
- Artists
- Sculptors

There is something a little different in each of those industries. There are a lot of other industries which have still got concerns or problems under this legislation.

If you have not already done so, we would suggest you consult your commercial solicitor at the earliest opportunity. Your solicitor will draft the documents for you and we will be able to assist you to implement appropriate systems.

If you would like to receive a complimentary copy of **'PPSR – Operational Issues in Risk Management'**, please contact us.

If you would like to have a discussion in relation to establishing an appropriate PPSA system for your business, please don't hesitate to contact us.