

The PPSA one year on

12 February 2013

Some “war stories”

It is one year since the Personal Property Securities Act 2009 (Cth) (*“the PPSA”*) became operational. The PPSA’s impact on business has now become clearer. The SME market has been slow to implement the new Act into their businesses. Anecdotal evidence suggests that as few as 10% of SMEs are even aware of what the PPSA is. Even fewer SMEs have actually taken steps to register their security interests on the PPS Register in the goods that they supply or hire to their customers. It appears that for whatever reasons the PPSA message has not got through to SMEs and their advisers- or if it has, it has not been acted on.

Accordingly, it is fair to say that the majority of SMEs remain financially exposed and at risk of losing their property if one of their customers goes broke or is put into liquidation or administration because they have not introduced the PPSA into their businesses.

Evidence supporting the above views can be seen from a number of recent cases. When the Administrator of the collapsed Hastie Group of companies recently advertised in local newspapers and wrote to creditors to advise them to make claims, 77% of the Group’s assets remained unclaimed. This means that over three quarters of the Group’s creditors had not registered their security interests in the goods that they had supplied to the Hastie Group.

Further, nearly 80% of creditors that the Administrators wrote to obtain details of their security interests either failed to respond, only responded in general terms or failed to respond in a timely way. Many of those that responded failed to specifically identify and describe the goods that were the subject of their registrations. So even though they had sought to register their interests in their goods on the PPS Register, they had not done so in sufficient detail to enable the Administrator to properly process and deal with their claims.

There have been many other cases where the business owners have not been able to succeed on their claim for the return of their goods after a customer has gone into liquidation because they have been unable to prove to the Liquidator’s satisfaction the existence of their security interests. While the Act only requires customers to have *“adopted or accepted”* the terms of the security agreement (which can be contained in trading terms), proving such adoption or acceptance is not always easy.

For example, in a recent case in which we were involved, the owner of certain building products had sent new trading terms that contained the necessary PPSA clauses. Unfortunately, the customer went into liquidation before our client was able to secure the client’s consent to the terms. If he had been a little more diligent and had changed his trading terms sooner and had sought to secure his client’s agreement to them -even a few months before he sought to do so-he would not have lost the \$10,000 worth of building supplies that he had sent to his customer. He is now likely to receive nothing as an unsecured creditor of his client.

Another problem for SMEs is that many of them have worked on the assumption that they have had plenty of time to get things in order. They had assumed the two year period from 30 January 2012 (*“the commencement date”* under the PPSA) in which they could in theory claim a *“transitional security interest”* in goods that they supplied to their customers would protect them. Unfortunately, experience has shown that such claims are difficult to maintain against determined Administrators and Liquidators.

For example, in a recent case that we were involved in, we were unable to persuade a Liquidator of our client's customer that the water tank that our client had been under continuous hire from a date prior to the commencement date until the date that the company collapsed in March 2012. Because the tank had been relocated after the commencement date, the Liquidator maintained that a new hire contract had been entered into after that date and the owner should have registered a new security interest. We argued (unsuccessfully) that there had been no new contract and that the tank had continued to be hired under its original contract. Such a claim was difficult to prove and regrettably the Liquidator rejected the claimed transitional security interest and the owner lost his \$20,000 water tank. (To add salt into the wounds, the owner then had to negotiate a deal with the Liquidator to buy back his own water tank!).

The expensive lessons from the above cases are clear- SME owners need to urgently update their trading or hire terms, get their customers to "accept or adopt" them and then register their security interests on the PPS Register. They also need to put in place appropriate PPSA policies and procedures to deal with PPSA issues in a timely and proper manner. Failure to take these steps may result in the loss of their property and unnecessary financial loss. It is not that hard to implement the necessary PPSA reforms into your business. By doing so you will significantly reduce the risk of doing business in these difficult financial times. The time to act is now!



Philip Sheezel
PS Law

NOTE:

This article has been prepared Philip Sheezel of PS Law (www.pslaw.com.au). For further information any of the matters raised in this article or for advice on any issues relating to the PPSA, contact Philip on 0412578240 or email: philip@pslaw.com.au. This article may not be reproduced or copied without the express authorization of the author.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances. We specifically exclude any legal liability for any incorrect or inaccurate information that is contained in the Guide.

PS Law.