

PPSR - Are you in danger? Protect your business before it's too late.

20 March 2014

In 2009 the Australian Government introduced new legislation that changed forever the way businesses need to go about protecting their core assets. No longer can businesses simply claim that they are “the owner” of the goods that they sell, lease or hire to their customers if they wish to claim them back when their customer becomes insolvent or is put into administration. Businesses will now only succeed in claim to recover their goods and to gain priority ahead of their customer’s bank if they have taken steps to protect themselves under the **Personal Property Securities Act (2009) (Cth) (“PPSA”)**.

In Australia most of the larger banks and financial institutions are “all over” the PPSA. Unfortunately, we are amazed that even though it is now over 2 years since the PPSA first commenced in January 2012, many small to medium sized businesses are still unaware that such a legislation exists and have failed to take advantage of the protection that the PPSA provides. A number of recent cases have shown that owners who fail to register their interests run the risk of losing their property to liquidators and receivers of their customers.

In June 2013, the NSW Supreme Court decided in **Maiden Civil (P & E) Pty Ltd** that a company (*QES*) that owned and leased certain Caterpillar earth moving equipment lost their equipment to the receiver of a company that had been appointed by the company’s financiers (*Fast Financial*). The court held that the financiers had “perfected” their interest in the equipment and their interest had priority ahead of the owners of the equipment who had failed to register their interest in the equipment.

In the March 2014, the Victorian Supreme Court (in **Central Cleaning Supplies v Elkerton**) upheld the claim of the liquidators of Swan Services that certain cleaning equipment had vested in them on the date of the liquidation as the owners and suppliers of the equipment (*Central Cleaning*) had failed to register their security interest in the equipment on the PPS Register.

The Court held that it was irrelevant that the owners of the cleaning equipment had obtained a completed credit application form from Swan Services that had stated that “the supply of goods was governed by Central Cleaning’s Standard Terms and Conditions as in force from time to time”. It was found that these terms did not include a term that title in the goods was retained until payment had been made for them. It was held that the credit application form was not a security agreement under the PPSA “because it does not provide for the granting of a security interest” and did not enjoy the benefit of the transitional provisions of the PPSA.

The Court noted that the ROT term was only contained in an invoice that Central Cleaning has supplied with the goods. This occurred only sent after the commencement time under the PPSA (ie after 30 January 2012). Accordingly, Central Cleaning’s security interest had not been “perfected” as it had not been registered on the PPS Register. By not registering their security interest in the equipment the Liquidators were able to reject Central Cleaning’s claim for the return of their equipment.

It is also becoming apparent that many businesses are making some fundamental mistakes when doing their own registrations. For example, they some times fail to properly describe their “collateral” or to correctly complete the various entries on the financing statement when lodging their registrations on the PPS Register. There are also occasions when owners fail to lodge their financing statements within the time limits required by the PPSA.

Recent cases and experience has highlighted three important lessons for businesses:

1. If owners want to protect themselves against losing their property that they supply to their customers on a retention of title basis, it is essential that they **get their trading and hire terms right**. The terms must spell out the necessary “security agreement” with their customers and the arrangements and rights relating to registration of security interests under the PPSA.

2. It is essential that owners **check the wording on their customer documents** such as their credit application forms, invoices, purchase orders and monthly statements to ensure that they are legally correct and are consistent with other contractual terms. Liquidators and administrators will seize on any inconsistency and uncertainty in any of the language of such documents to defeat an owners' legitimate claim for the return of their goods or a claim for priority ahead of another secured creditor.
3. Owners must **ensure that their financing statement are completed correctly and are lodged in a timely manner**. If they are not, their registrations will not be effective.

What to do next?

We strongly urge all business owners to review their current PPSA arrangements.

PS Law is there to help businesses through the PPSA maze and can help SME's protect themselves and their assets. It would be terrible to nurture and build a fully functional/ successful company and then have it taken away as a result of not covering all bases and not taking advantage of the protection that the PPSA can provide to your business.

Contact PS Law on

Philip@pslaw.com.au or call **0412578240** to obtain an obligations free review of your current trading and hire terms and to discuss your present PPSA needs.