TOWNSENDS BUSINESS & CORPORATE LAWYERS

PPSA and Retention of Title

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1. What is this guide about?

1.1 This guide reviews how the Personal Property Securities Act 2009 (Cth) or 'PPSA' impacts on the businesses which include a 'retention of title' clause in their terms of sale and what the parties must therefore do as a result.

1.2 Specifically this guide reviews whether a 'retention of title' clause creates a security interest and if so whether that security interest must be registered on the Personal Property Securities Register or 'PPSR'.

2. What is retention of title (ROT)?

2.1 If a supplier sells goods to a customer but does <u>NOT</u> receive full payment on delivery the parties may agree that:

(a) payment for the goods will be made later, and

(b) the supplier owns the goods until the customer pays for them.

2.2 Because the supplier retains the title in the goods until payment (even though the customer has possession of the goods) the arrangement is referred to as 'retention of title'.

3. How do you retain title?

3.1 The supplier retains title by having a ROT clause in its sale agreement or standard sales terms and conditions.

3.2 Specific legal advice should be sought on the wording of a ROT clause to ensure it is sufficient to create the security interest under the PPSA.

3.3 Townsends can provide such a clause or assess any existing clause you may be using.

4. How do you protect goods where you have retained title?

4.1 Under the PPSA the supplier has a security interest in the goods.

4.2 The security interest is called a Purchase Money Security Interest or 'PMSI'.

4.3 To protect its interest in the goods the supplier must:

(a) <u>ensure the customer signs an agreement containing an ROT clause and keeps a signed copy of it</u>; and

(b) register its security interest in the goods by registering on the PPSR.

4.4 Often ROT clauses are included in the standard terms of sale of a business and printed on the back of quotation forms or invoices. Unless specifically signed by the customer such clauses will not be capable of registration and will therefore lose all priority to other security interests created over the goods at any time.

5. How and when does the supplier register on the PPSR?

5.1 A supplier registers its security interest against the customer on the PPSR by completing a financing statement and lodging it with the PPSR.

5.2 To ensure maximum protection, if the goods are inventory the supplier must register its security interest before the customer takes possession of the goods.

5.3 Specific legal advice should be sought to ensure that the relevant form is properly completed, at least until PPSA requirements become familiar.

6. How much does it cost to register on the PPSR?

6.1 It costs $7.40 to register online a financing statement on PPSR for seven years and $130.00 to register online a financing statement with no end date.

7. What happens if the supplier has registered on the PPSR?

7.1 If the supplier registers its interest in the goods, they get a PMSI super-priority. This means the supplier takes priority over all other interests in the specific goods, even earlier general security interests.

7.2 If the supplier has registered its interest in the goods which the customer then holds, if the customer, as an individual, goes bankrupt, or, as a company, has a liquidator appointed, the goods do NOT vest in the customer's trustee in bankruptcy or liquidator. They vest in the supplier.

8. What happens if the supplier doesn't register on the PPSR?

8.1 If the supplier doesn't register the security interest, it cannot seize the goods on bankruptcy or liquidation of the customer and its only rights are as an unsecured creditor.

8.2 The supplier's interest in the goods will be defeated by any registered security interest which includes the goods. For example, where there is a registered security interest covering all of customer's personal property.

8.3 If the supplier has not registered within the required time, the supplier loses the benefit of the PMSI super-priority but still has a security interest and the default priority rules will apply - in that event, the earlier registered security interest takes priority.

9. How do you enforce an ROT?

9.1 The supplier would either:

(a) issue a notice to the customer demanding payment of amounts owing; or

(b) seize the goods if this is allowed under the ROT clause.

9.2 The supplier must seek and rely on legal advice for enforcing its security interest and other possible actions it could take.

10. Other information

10.1 If the supplier regularly supplies goods to the customer as set out in this guide, it does not have to register on the PPSR each time.

10.2 Providing it describes the goods accurately, a single registration of the supplier's interest in the goods sold to the customer and subject to a ROT will cover all supplies by the supplier to the customer of goods.

11. Transition arrangements

11.1 The supplier has two years to register its existing ROT arrangements in order to obtain the benefits of the PPSA.

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