HANG ON TO YOUR STUFF, THE PPS IS COMING

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If the words 'Personal Property Securities' make your eyes glaze over, wake up! It's absolutely vital that you understand how this new legislation affects you, your business and your ownership of goods, vehicles and equipment, because you will need to rethink some aspects of your business.

The driver for change is the new Personal Property Securities (PPS) regime due to commence on January 30, 2012. If you are involved in supplying or leasing anything to anyone, you have just enough time to consider how the implementation of the new single register of all 'security interests' will affect your ownership rights.

What is the PPS regime?

The new PPS regime replaces all previous state and territory laws regarding security held over personal property with one national online system, the PPS Register. This register will be available to the public and provides a rule-based system for determining who has the best claim on personal property. It changes the game for a whole range of things we call property — goods, vehicles, equipment, intellectual property, contractual rights and more. It will change the way your bank deals with you and secures money it lends to your business.

If your business involves the supply of goods or lease of equipment, it is likely that your standard terms and conditions contain a retention of title clause. This states that ownership of the goods does not pass until payment has been made. If the purchaser becomes insolvent, you can then claim back your goods from the liquidator.

Under the PPS, these clauses are now deemed a "security interest" which must be registered on the PPS Register for your rights to the goods to be protected in the event of insolvency or against third parties. While not a guarantee that you will be able to recover your goods or equipment, the registration of your "security interest" will give you priority over other businesses when claiming the goods back or recovering the proceeds of sale. It is vital that you register your interest in the goods before they are delivered to the customer or lessee. The PPS will also affect a wide range of other circumstances involving personal property. Consider these scenarios.

If a customer goes into liquidation?

Supply & Co includes the following retention of title clause in its standard terms and conditions: "Title to the goods that are the subject of this agreement will not pass to the purchaser until payment in full for those goods has been received".

On January 30, Supply & Co enters into an agreement with Building & Co to sell 1,000 bags of sand, which it delivers five days later, but fails to register its security interest in the sand on the PPS Register. Ten days after delivery, Building & Co goes into liquidation without paying Supply & Co the money owed for the sand. Supply & Co writes to the liquidator, seeking to collect the sand it has delivered. The liquidator responds that it has no record of Supply & Co's security interest, therefore the sand will be sold and the proceeds put towards payment of creditors generally. Supply & Co has become a mere unsecured creditor in the liquidation.

If a receiver is appointed?

Light Hire Pty Ltd owns and leases portable buildings. On February 1, it leases three portable buildings to Greenfields Developments for an indefinite period, but doesn't register its interest in the buildings on the PPS Register. Greenfields Developments has granted security over all of its assets to Finance Pty Ltd to secure funding for its housing development works.

On February 28, Greenfields Developments defaults on its loan arrangements and Finance Pty Ltd appoints a receiver, which takes control of Light Hire's portable buildings and sells them to satisfy the debt owed by Greenfields Developments to Finance Pty Ltd.

Despite Light Hire's legal ownership of the portable buildings, without a registered security interest it can't prevent the receiver from selling them and keeping the proceeds.

How to to get ready for the PPS

1. Identify any provision in your standard terms and conditions or contracts that relates to personal property rights and determine whether it needs to be amended to protect you under the PPS. This could be any kind of provision relating to any type of personal property, even intangibles like contract rights or intellectual property.
2. Appoint someone internally to be responsible for registering new security interests before delivery to the purchaser or lessee, including any new retention of title agreements which are entered into after the PPS comes into force. The role should include identifying any existing security interests that need to be registered and developing a standard procedure for registering all security interests. You have two years to register any existing retention of title arrangement once the PPS comes into force.
3. Keep an internal register of all security interests so that everyone in your business has access to this information and knowledge is not lost when people leave. mb

For information and advice on how the PPS will affect your business, contact Lindsay Prehn at ljp@cbp.com.au or Nick Crennan at edc@cbp.com.au.

Business names used in this story are examples only. My Business does not intend to suggest that any entity with these names is involved in any circumstances that would require the PPS.