THE PERSONAL PROPERTY SECURITIES REGISTER'S (PPSR) ROLE IN SAVING FIRMS FROM THE ZOMBIE COMPANY APOCALYPSE

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Introduction:

The Personal Property Securities Register (PPSR) will be instrumental in protecting business's interests when they are exposed to the tsunami of insolvent firms that is expected to occur in 2021. But unless they properly secure their interests in their assets and stock through the PPSR they risk losing ownership of them if their customers become insolvent.

Now's the time to:

- Review contracts and ensure a PPSA clause is included and the wording is correct.
- Seek advice about the correct PPSR registration process.
- This will help ensure your business and your interest in your assets are protected against the upcoming spate of insolvencies.

State of play

"Federal government support during the pandemic is keeping many businesses afloat. But there is a limit as to how long that support can continue. Lockdowns, loss of jobs and lack of spending are leading to a tidal wave of zombie companies and insolvencies once the temporary safe harbour from insolvency rules end on 31 December 2020," says Patrick Coghlan, CEO of CreditorWatch.

Statistics from the Australian Financial Security Authority (AFSA) show that at 30 June 2020, there were more than 10 million registrations on the PPSR. AFSA deputy chief executive Gavin McCosker stresses how important it is for businesses to avail themselves of this tool.

"The Australian government's PPSR is one way to help businesses get their invoices paid, or their goods back, if their customer can't pay – it's a really important tool for trade creditors. An invoice or contract, along with an effective PPSR registration, can put a business ahead of banks, other lenders and outstanding tax debts, if your customer goes out of business," he says.

Although The Personal Property Securities Act 2009 (PPSA) has been in effect since 2012, many businesses don't understand its benefits. The PPSA provides a scheme for prioritising security interests in personal property, while the PPSR provides a mechanism for registering notice of those interests. A security interest is an interest in an asset that secures payment of a debt or enforcement of an obligation.

The PPSR is a government-run, national noticeboard where individuals and companies can register their interest or ownership in any personal property they sell, lend, lease or hire to others and where the full price of the asset has not yet been paid. Personal property is any asset that is not real estate and can be moved. This includes goods, machinery, equipment, shares and even intellectual property like trademarks.

For businesses, it is essential to understand a security interest must first be created, which is only achieved via terms and conditions of sale or other contracts. The second step is to notify everyone else of the security interest via the PPSR by lodging a correct financing statement. It is essential to make sure the contract clauses which create a security interest are appropriate and that the manner of registration complies with the PPSA.

How does the PPSR work?

The ability to register on the PPSR is important for any business that sells stock, goods or equipment on credit or consignment or provides extended payment terms. If a customer takes delivery of stock on credit, and later goes into liquidation, and the supplying business has not properly created a security interest in those goods by registering on the PPSR, the supplier will lose ownership of the stock even if they have retention of title clauses in their contracts.

In this case, possession is more effective than ownership. The liquidator will claim the stock for the benefit of unsecured creditors rather than returning the stock to the supplier. The business will not have the sole benefit of its property, instead joining a conga line of other unsecured creditors in the external administration.

The PPSR can also be used to defend an unfair preference claim made by a liquidator. Under the unfair preference regime, companies that receive funds from a business in the six months prior to it going into liquidation are often called to pay back part or all of these funds. But if the business has registered an interest in its personal property on the PPSR, it is classed as a secured creditor, which puts it in a better position to hold on to the money it has received.

Getting the details right

Father and daughter team Terry Ledlin and Natalie Ledlin from Ledlin Lawyers are PPSA experts and say it's essential to follow the correct procedures when creating a security interest. In particular, it's important to include the correct wording in the terms and conditions.

"A PPSA clause needs to be specifically worded. The Act is technical and prescriptive. Simply referring to the PPSA in your contract does not mean a security interest has been created. You also need an effective retention of title clause. That's where a lot of people go wrong," says Natalie.

"They do not review their contracts and simply register their security interest, assuming that their clauses protect them. But when their customer goes into liquidation and it comes time to enforce their security interests and claim their assets back, they find the liquidator rejects the claim because it hasn't been properly created in the first place. The right wording and method of registration on the PPSR will depend on the nature of the business and the type of personal property that needs to be protected," she adds.

The message to asset owners is to take the time now to review their contracts and not only ensure that they have a PPSA clause, but also that the wording in the clause is correct. Businesses should also take advice about the correct registration process on the PPSR. That's the best way to ensure your interest in your assets is safeguarded and your business is in the best possible position to ride the wave of predicted insolvencies. This might also protect you from becoming a zombie company too.

What the numbers say

Worryingly, businesses are not making use of the PPSR in the way they should, according to ASFA data:

- In April 2020, the number of new PPSR registrations were at their lowest recorded level since the PPSR started in January 2012.

- The April 2020 figure of 120,512 monthly registrations is 21 per cent less than April 2019.
- There were 155,856 new registrations in May 2020, then 190,012 in June 2020. Overall, new registrations fell 10 per cent in June quarter 2020 compared to June quarter 2019.
- The number of new registrations in 2019–20 dropped to just under four million – a fall of four per cent compared to the previous year. The most common registrations are for motor vehicles, making up almost half of the total current registrations.
- Searches of the PPSR have marginally increased throughout the 2019–20 financial year, from 9.62 million in 2018–19 to 9.95 million. Similar to registrations, the number of monthly searches dropped eight per cent in April 2020 compared to April 2019, but recovered with a new record of more than 945,000 searches in June 2020.
- At 30 June 2020, there were over 10 million current registrations on the PPSR.

It is hoped these numbers will rise as awareness of the PPSR also increases.

In practice

Here are some examples of how the PPSR works, based on the Australian Financial Security Authority's case studies.

Case study 1: Wheel of fortune

This company manufactures wheels and supplies them to customers on a retention of title basis. One of its customers fits wheels to motorised scooters for elderly and disabled people. The customer holds a stock of wheels in its warehouse and recently sold 30 scooters with wheels to a local hospital.

But the customer hits hard times and owes the company for all wheels it has in stock and the wheels fitted to scooters sold to the hospital.
Because the company has a contract and a retention of title clause and has registered a purchase money security interest (PMSI) on the PPSR before delivering its wheels, it can claim ownership over the wheels until they've been fully paid.

Case study 2: Cold comfort

An ice-cream delivery company buys an old ambulance to add to its fleet and takes it to a vehicle workshop for a respray.

The workshop's terms and conditions retain title to goods it supplies for its work until invoices have been paid. The workshop registers a security interest on the PPSR before respraying the ambulance.

The ice-cream delivery company goes into liquidation before paying for the paintwork. The liquidator sells its vehicles and the workshop can claim the value of its paint from the proceeds of the ambulance's sale.

ASFA has recently updated the PPSR website with a range of resources to help businesses during COVID-19. Here are some useful links:

- Trying to get your invoices paid?
- Your customer has gone broke and an insolvency practitioner has been appointed – what happens now?
- Your customer has defaulted on your security agreement – what happens now?

- For more information about how the PPSR can help your business during COVID-19, visit ppsr.gov.au/covid19.