Retention of Title Clauses and the Registration of Security Interests on the PPSR as a PMSI

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When a business sells goods there are many ways to structure payment. JHK acts for a number of clients who have agreed to supply goods to their customers on credit. This can often be commercially advantageous to our clients, but carries risk.

To manage that risk, we often advise our clients in such a position to consider Retention of Title clauses and the registration of security interests on the Personal Property Securities Register ("PPSR") as a Purchase Money Security Interest ("PMSI"). Belinda Pinnow of our office has previously written about how the PPSR can provide protection to creditors in the event of their debtor's insolvency. http://www.jhklegal.com.au/ppsr-protection-in-the-event-of-insolvency/

Please note that this article provides an overview only. Retention of Title clauses and the registration of security interests on the PPSR as a PMSI can be complex, and need to be tailored to individual circumstances. This article is not intended as a substitute for independent legal advice.

How Retention of Title Works

Retention of Title clauses provide that title in goods delivered to the customer remains with the supplier until they have been paid for in full. Commonly these clauses will:

- Prohibit the customer from dealing with the goods other than selling them in the ordinary course of business at market value. If the customer wrongfully sells or disposes of the goods, then they are required to hold the proceeds on trust for the Seller;

- Provide the supplier with certain rights over the goods, such as the right to recover possession at any time, including entering premises where the goods are believed to be stored.

- Address what happens if the customer converts, processes or mixes the goods with other goods.

In usual circumstances, the customer will provide security to the supplier in the form of a charge.

Including these clauses in a contract is **not** sufficient to secure your interest. For this, you need to register it on the PPSR as a PMSI. Care must be taken when preparing to contract to ensure that it has the appropriate clauses to allow for such registration.

What is the PPSR?

The PPSR is a national system that records security interests in personal property. For a small fee, anyone can search the register.

"Personal property" is a wide category and includes most assets of a business such as stock, equipment, and motor vehicles. It also extends to intangible property such as intellectual property ("IP") and debts owed to the business.

However, "personal property" does not include any interest in land or buildings, which under law are considered "real property".

Why is this important to register your interests on the PPSR?

If the customer enters liquidation or receivership, there is a very real risk that any goods in the possession of the customer (**whether they have been paid for or not**) could be seized by a liquidator or receiver and sold to pay other creditors.

As outlined in Belinda Pinnow's article, it is necessary to perfect security interests to obtain protection in the event of a debtor's insolvency, and PPSR registration is one element of this.

The cost of registering most interests on the PPSR is very modest compared to the protection it provides.

PPSR registrations can be technical. Minor mistakes can result in a registration being ineffective.

What is a PMSI?

Generally, the PPSR operates on a "first in, best dressed" principle, with earlier registered security interests prevailing over later ones.

PMSIs are an exception. Certain interests deemed to be PMSIs under the *Personal Property Securities Act 2009* ("PPSA") can obtain a "super priority" over other registered interests, even if registered afterwards. Retention of title is one way that a PMSI may arise.

It is important to note that there are strict timeframes to obtain this "super priority". Under Retention of Title arrangements, the applicable rule is that the PMSI must be registered before the customer obtains possession of the goods. Note that it is not necessary to make registrations each time goods are to be supplied – one registration can cover ongoing arrangements.

While powerful, PMSIs themselves can be trumped in some circumstances - such as when debt factoring financiers enter the picture under section 64 of the PPSA.

Conclusion

When selling goods on credit to customers, it is important to consider retention of title clauses and the registration of security interests on the PPSR as PMSI to protect your interests.

If you require any assistance with the drafting contracts for the sale of goods or the lodgement of security interests on the PPSR, please contact JHK Legal.