

Professional advisers be warned!

27 October 2016

If you provide accounting, legal or financial advice to your clients you need to make them aware of their rights and obligations under the *Personal Property Securities Act 2009 (PPSA)* and let them know of the risks that they run if they don't register their security interests on the PPSR. If you don't become pro active and simply let your clients carry on with a "she 'll be right" attitude, you may well end up as the one who is in the firing line if things go sour.

The issue was recently highlighted by Mr Nicholas Martin, a partner of PPB Advisory, one of Australia's leading advisory and insolvency firms. Mr Martin regularly advises companies and their advisers on a range of commercial issues including the implications of the PPSA. He stated:

"I am constantly amazed with the insolvency administrations in which I am involved at the absence of companies' PPSA protocols, the failure of companies to register their security interests and/or their failure to register them correctly, and on time. Unless they do so, they will not even get a seat at the table when we are called in after their customer goes into administration or is wound up. They will simply be an unsecured creditor in the administration.

Too many times I have heard the director of a company in external administration say: "My accountant and my lawyer didn't raise the issue of PPSA with me..." Clients don't know what they don't know. They rely on their professional advisers to ensure that their assets are protected as far as possible under the law.

Surely professional advisers are exposed to negligence claims when they have not properly advised their clients on their PPSA rights or have failed to register their security interests on the PPSR. Suing their own professional advisers may well become the next big area of litigation for disenfranchised directors who feel their advisers have not provided appropriate advice.

Businesses are still not investing in appropriate PPSA systems and protocols. Many of the companies that I see have not implemented PPSA systems, and have no means for managing their PPSA registrations and producing regular PPSR reports. Their advisers have not explained the consequences and the risks they run by not having appropriate systems in place. Not only are their assets not protected, but they may also be in breach of the loan facilities that they have with their bank.

Simply put, some advisers are compromising their clients by their failure to provide proper asset protection advice to the company and its directors - the very issue on which they have been engaged to advise. This may well compromise the value of a bank's security and, by extension, exposes director guarantees to the bank and trade creditors. The day is coming when Directors will (quite rightly in my view) decide to look to their advisers for compensation after they have lost assets that could have been protected had the appropriate protection mechanisms under the PPSA been put in place. "

The legal situation has repeatedly been made clear in a number of recent cases that have been brought before Australian Courts. In a decision of the Supreme Court of NSW earlier this year involving the winding up of the Forge Group Power (**Forge**) the Court ruled that the failure of the lessor (**GE International**) and the owners of the equipment (**APR Energy**) to register their interest in their property (four gas turbines worth \$64m) on the PPSR was fatal- the owners of the turbines lost their property to the receivers and managers of Forge and became unsecured creditors.

The Court ruled that the lease between GE and Forge was a PPS Lease that should have been registered on the PPSR. The failure to do so meant that the interests of GE International in the turbines vested

under s 267 (2) of the PPSA in Forge immediately before the appointment of voluntary administrators to the company. While this decision is on appeal, it highlights the need for owners of property to make sure that their ownership rights are clearly spelt out in their commercial documents and to ensure that their security interests are registered on the PPSR. It remains to be seen whether the advisers to GE and APR will be asked to bear some responsibility for the loss of the turbines.

I am also increasingly seeing situations where lenders and owners of equipment have failed to properly document inter company commercial arrangements between related parties and have not registered their various security interests on the PPSR. Accordingly, they are (like the owners of the turbines in the Forge case) running the risk of losing their property if the borrower or the operating company fails for any reason. The responsibility for this failure could ultimately rest with their professional advisers if they have not advised their clients on how they should secure their assets under the PPSA.

Where loans are involved it will be necessary to properly document the loan arrangements in a formal Loan Deed and prepare appropriate company minutes. In cases where equipment is owned by one company and is used by an operating entity it will be necessary to document the lease or rental arrangements in a formal Lease or Rental Agreement. Book entries are simply not good enough.

In both cases a General Security Agreement or a Specific Security Agreement should be entered into to secure the transaction and then a financing statement lodged to register the security interests on the PPSA. Where a bank is involved it may be necessary to obtain a letter of consent to the arrangement to ensure that there is no breach of any negative pledges that may have been provided under the bank's existing loan facilities. If these things are arranged, your client's security interests will receive priority ahead of other creditors (but usually behind their bank) in the event that for some reason the borrower or the operating entity gets in to financial difficulties.

In summary, therefore, if you provide accounting, legal or other commercial advice to your clients, it is important that you take the time to discuss PPSA issues with them and advise them to:

- (a) Up date their customer documents to ensure that they are PPSA compliant;
- (b) Put in place appropriate commercial documents to ensure that any inter company loans and internal equipment arrangements secure the loans and assets of the owners so they will if necessary stand up to a liquidator's scrutiny and
- (c) Put in place systems and procedures (through a third party specialist service provider if necessary) to ensure that their security interests are registered on the PPSR correctly and in a timely manner.

If you do these things your clients will reduce the risk of becoming simply an unsecured creditor if things go badly and you will reduce your own risk of being at the wrong end of a negligence claim.

If you would like any information or advice on any of the above matters or wish to discuss a client's particular needs, please call me on 0412578240 or email me at "philip@pslaw.com.au". All discussions will be undertaken on a strictly confidential basis.

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