

ALERT: PERSONAL PROPERTY SECURITIES ACT 2009

Retention of Title Clauses

Banks, Financiers and Businesses have been waiting since May 2011 for the register (**PPS Register**) for the *Personal Property Securities Act 2009* (**PPSA**) to come into effect. The latest information from the Attorney-General is that the PPS Register will commence operation in early 2012.

Businesses with retention of title (**ROT**) clauses in their credit terms and conditions would be well advised to use the time prior to the commencement of the PPS Register to come to terms with the PPSA and what it will mean to the way that they do business, to review their documentation, and prepare themselves and their staff for the new regime.

The ROT clause is that provision in a supplier's terms and conditions that states that the customer/purchaser has possession of the property and the property is at the customer/purchaser's risk; however the customer/purchaser does not acquire title in the property until the full purchase price is paid. Until that time a standard ROT clause normally gives suppliers the right, on the customer/purchaser's default, to enter their premises and reclaim the property.

Until the introduction of the PPSA, there was a risk for suppliers that on their customer/purchaser becoming bankrupt or appointing a liquidator, the property the subject of the ROT clause was often disputed. Liquidators and trustees in bankruptcy would commonly attack the wording of the ROT clause.

When the PPS Register comes into operation, suppliers will have the opportunity to register their interest in the property on the PPS Register and the security will defeat all other security interests in the property.

The PPSA provides that a Purchase Money Security Interest (**PMSI**) arises when the supplier has advanced personal property and all or part of the purchase price remains

outstanding such as in a situation where the supplier has a ROT clause in its terms and conditions.

The good news for the supplier is that a PMSI has a 'super-priority' over other security interests except 'control' of the property, which is the highest level of security. The other good news is that where the supplier makes repeated supply of property to the same customer/purchaser, and the supply is made on the same terms, the supplier need only make a single registration on the PSS Register. However, it is vital that the supplier's interest in the property be 'perfected' on the PPS Register to ensure that the 'super-priority' is effective against third parties.

The PPSA gives suppliers 24 months from the commencement of operation of the PPS Register to make the transition to the new regime for its existing customer/purchasers.

If you have a ROT clause in your credit terms and conditions and need help, Valenti Lawyers will be pleased to assist you in reviewing your ROT clause and terms and conditions to ensure that they will meet the requirements of the PPSA.

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