

Introduction

The Personal Property Securities Act 2009 (Cth) (**PPSA**) was passed in December 2009 and was originally expected to commence in May 2011 but was deferred to 10 October 2011, then 31 October 2011 and currently it is anticipated to commence sometime early in 2012.

The PPSA is being heralded as the most significant change to the law in Australia since the introduction of GST. It will affect the way security is taken over almost every form of property other than land and will also affect transactions which are currently not regarded as securities. For example, personal property under the PPSA includes many different kinds of tangible property (for example crops, livestock, wool, space objects) and intangible property (chattel paper, currency, document of title, investment instrument and negotiable instrument, intellectual property, accounts, ADI accounts).

The PPSA will impact on (among other things):

- Goods sold on retention of title arrangements;
- Hire purchase and lease arrangements;
- Commercial consignments;
- Transfers of accounts (by way of absolute assignments); and
- Charging clauses in other commercial documents.

The PPSA is intended to codify the law relating to personal property securities thereby making the law simpler and easier to understand. Currently, there are more than 70 separate Acts which regulate personal property securities in Australia giving rise to multiple registration requirements, inconsistent priority rules, and cross-border anomalies. The PPSA will be supported by a single online register (the **PPS Register**) which the government has decided will be operated by the Insolvency and Trustee Service Australia (ITSA). The PPS Register will replace a number of existing registers including the charges register at ASIC, and State and Territory registration systems for motor vehicle and boat encumbrances and for bills of sale. Some security interests registered on existing registers will be migrated to the PPS Register.

The PPSA applies a substance over form approach in that it applies to all security interests in personal property which secure payment or performance of an obligation regardless of the form of the transaction, the legal personality of the grantor (i.e. individual or company) or the jurisdiction in which the property or parties are located or in which the transaction occurs. Security interests given by individuals which were not formerly registrable will now become registrable and subject to a statutory priority and enforcement regime thereby giving greater certainty to the secured party and promoting investment in new classes of assets.

Some important points to know

Enforcing a security interest against third parties

A security interest is only enforceable against a third party if it has attached to collateral and either the secured party (1) possesses the collateral; (2) has **perfected** the security interest by controlling the collateral; or (3) has entered into a written security agreement that describes the collateral.

Perfection means the process which gives the holder of the security interest the best priority over other claimants to the collateral in accordance with the priority rules in the PPSA (see below).

A security interest is perfected if:

- (a) it has attached to collateral; and
- (b) it is enforceable against third parties; and
- (c) certain extra steps have been taken to protect the interest.

The extra steps which are required are:

- (a) registration of the security interest; or
- (b) the secured party takes possession of the collateral; or
- (c) the secured party takes control of the collateral in the case of certain financial assets (for example an ADI account, an investment instrument)

Priority between security interests

If a security interest in collateral is perfected, it takes priority over another security interest that is unperfected when the security interest comes to be enforced.

The secured party whose security interest has the highest priority is entitled to enforce that interest ahead of secured parties with security interests that have a lower priority.

Timing

If the grantor is a company the secured party must perfect security interest (including registration) within 20 business days after security agreement made. If the secured party registers outside this time, they risk the security interest being held to be invalid if liquidator or administrator appointed to the company in the following six months.

What is the impact of PPSA?

The PPSA will make some everyday contractual clauses unenforceable against third parties unless they are registered on the PPS register. Furthermore it is crucial to realise that under the PPSA, ownership is largely irrelevant – ownership will not protect a supplier or lessor who has not taken the proper steps to protect their interests under the PPSA. Perfection under the PPSA is the key. For example if the grantor becomes insolvent (winding up, administration or bankruptcy), an unperfected security interest will vest in the grantor, even if the secured party has title to the collateral, for example under a lease or hire purchase arrangement.

Examples of possible risks of not being PPSA compliant

Example 1 – retention of title clauses

X sells goods and reserves title until payment (eg. under a retention of title clause) and accordingly X has a “security interest”. X has to “perfect” that security interest to protect it.

The Buyer of those goods has also given security over all of its present and future property to a bank. The bank will therefore also have a security interest in the equipment or goods supplied by X to the buyer. If the bank’s interest predates X’s interest, the bank could have priority over X, even though X still owns the goods.

However, provided that X registers a “financing statement” on the PPS register in the manner and within the time prescribed by the PPSA, X will have a Purchase Money Security Interest (PMSI), which confers a super priority on X. X gets a superior claim over the interests of all other parties in relation to the price payable for goods supplied by X.

If X doesn’t perfect its security interest and in circumstances of insolvency or administration of the Buyer, X may cease to be a secured creditor (or have security by way of ownership of the asset) and end up being only an unsecured creditor of the Buyer.

Example 2 – Equipment Leases (for a term of more than a year)

X decides to lease some equipment to a client who could not afford to buy it. The equipment was worth \$500,000. The client (the lessee) went into receivership and X seeks to get the equipment back. The receivers inform X that X had not registered a financing statement.

Had the lessee not granted security interests to other parties e.g. banks, who had perfected their security interests by registering financing statements, X may have been able to recover the equipment. However, there were secured parties with registered financing statements so X lost out. Had X registered a financing statement within the time prescribed by the PPSA, X would most likely have been in a secure position.

Does the PPSA affect your business?

| | YES | NO |
|--|--------------------------|--------------------------|
| In the course of your business: | | |
| • Do you take fixed and floating charges? | <input type="checkbox"/> | <input type="checkbox"/> |
| • Do you supply goods on credit, either on retention of title terms or on the basis of receiving some form of security over the goods? | <input type="checkbox"/> | <input type="checkbox"/> |
| • Do you include charging clauses or other clauses in your standard documents or other documents which are intended to give you some form of security over non-real estate assets? | <input type="checkbox"/> | <input type="checkbox"/> |

| | YES | NO |
|--|--------------------------|--------------------------|
| • Do you supply credit or vendor finance secured by non-real estate assets? | <input type="checkbox"/> | <input type="checkbox"/> |
| • Do you lease goods or equipment or bail them out as part of your business for a term of: | <input type="checkbox"/> | <input type="checkbox"/> |
| ○ 12 months or over or where, if renewed, will be over 12 months; | | |
| ○ for an indefinite term; | | |
| ○ for serial numbered goods, 90 days and over or where, if renewed will be over 90 days? | | |
| • Do you accept pledges? | <input type="checkbox"/> | <input type="checkbox"/> |
| • Do you take personal guarantees in which the guarantor charges their title in personal property to you? | <input type="checkbox"/> | <input type="checkbox"/> |
| • Do any of your customers factor their debts? | <input type="checkbox"/> | <input type="checkbox"/> |
| • Are you party to any commercial consignment arrangements? | <input type="checkbox"/> | <input type="checkbox"/> |
| • Do you provide hire-purchase finance? | <input type="checkbox"/> | <input type="checkbox"/> |
| • Has your financier amended your facility documents to include PPSA covenants? | <input type="checkbox"/> | <input type="checkbox"/> |
| • Do you carry out credit checks or checks of registers e.g. bills of sales, REVs, ASIC charges and other current registers? | <input type="checkbox"/> | <input type="checkbox"/> |
| • Do you licence intellectual property and take security for the licensee's obligations to you? | <input type="checkbox"/> | <input type="checkbox"/> |
| • Do you acquire debts or are you involved in receivables financing? | <input type="checkbox"/> | <input type="checkbox"/> |
| • Do you provide floor plan arrangements to dealers of your goods? | <input type="checkbox"/> | <input type="checkbox"/> |
| • Do you take control of any bank accounts of your customers or other persons as security for obligations owing to you? | <input type="checkbox"/> | <input type="checkbox"/> |
| • Do you currently take any form of security over non-real estate assets from other parties to secure the performance of any of their obligations to you, e.g. under franchise arrangements, shareholder agreements or joint ventures? | <input type="checkbox"/> | <input type="checkbox"/> |
| • Do you have goods or assets located at other people's premises? | <input type="checkbox"/> | <input type="checkbox"/> |
| • Do you give security over personal property to another? | <input type="checkbox"/> | <input type="checkbox"/> |

If you answered **YES** to any of the above the PPSA will likely apply to your business and you will need to get ready for its commencement.

Is your business ready?

It is necessary that you understand how the PPSA impacts on your business and what you need to do to ensure that your security arrangements remain enforceable. You also need to consider any PPSA covenants which may have been included in your recent financing and banking documents and ensure that you minimise any risk of defaulting under such documents by not complying with the PPSA.

You should begin preparing for the PPSA regime in order to protect your interests and minimise disruption to your business once the PPSA takes effect. Preparations should include, where applicable:

1. Review existing contracts to identify security interests that will need to be registered once the PPSA becomes effective.
2. Identify existing security interests which are already recorded on an existing register.
3. Identify those registered security interests (on other existing registers) which will be migrated automatically at the start of the PPSA to the PPS Register.
4. Review your standard contract terms to ensure that your security interest is enforceable against your customers.
5. Review your standard contract terms to ensure that your security interest is enforceable against third parties. Specially you need to ensure that you have entered into a complying “security agreement” with your customer as this will ensure that your security interest is enforceable against third parties, including other lenders and suppliers. A security agreement would generally comply with the requirements of the PPSA if it is in writing, it has been signed by the customer, and it contains a description of the particular goods.
6. Review your standard contract terms to:
 - a. allow you to recoup costs or fees relating to registration;
 - b. ensure that any ***purchase money security interests*** (PMSI) or “super priority” is preserved;
 - c. tailor enforcement procedures to suit your business;
 - d. reduce your compliance obligations and liabilities (such as the provision of notices) under the Act;
 - e. ensure that confidentiality provisions are clearly stipulated as confidential.
7. Where necessary, preparing new policies as to requirements for transactions and documentation.
8. Preparing new policies in relation to due diligence of the affairs of parties with whom you deal.
9. Educating staff as to how the PPSA works.

10. Educating staff in how to conduct PPSA registration and searches.
11. Identifying the transactions that will need to be registered.
12. Identifying the assets affected.
13. Register any security interests (which are not automatically migrated to the PPS Register) on the PPS Register once it commences. Registration will occur by registering a “financing statement” containing information such as secured party details, grantor details (i.e. details of your customer), a description of the goods, and an address for the giving of notices.

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