



PPSA and PPSR – 7 years on and the regime is still causing headaches for business

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While it may have seemed like an ordinary day for most, 30 January 2019 marked a significant milestone for many commercial and insolvency lawyers, being 7 years since the Personal Property Securities Register (PPSR) went live.

The 7th anniversary of the commencement of the PPSR is vital because many seven-year PPSR registrations will have expired or will soon start to expire. Once a registration lapses, it cannot be extended—only current registrations can be amended or renewed.

This risk, together with a recent decision of the New South Wales Supreme Court, reminds us that while the PPSR has been around for some time now, the PPSR and the

obligations of secured parties under the Personal Property Securities Act 2009 (Cth) (PPSA) is still causing headaches for many businesses.

CREATING THE SECURITY INTEREST - TERMS AND CONDITIONS OF TRADE

Terms and conditions of trade are the most common tool used by suppliers to (amongst other things) establish:

- security in goods provided on credit;
- security of payment for goods and services by establishing a security interest in all of the assets of the customer,
- and ensuring these security interests are enforceable against both the customer and other secured parties (together with registration of that interest on the PPSR).

In practice, we see many businesses terms and conditions of trade fall short of what is required under the PPSA to establish a security interest in personal property because they lack:

- evidence that the terms and conditions of trade purporting to create the security interest have been accepted by the grantor of the security interest (i.e. the document is not signed by the customer, the customer has not been provided with the terms and conditions);
- an agreement that a charge is created over the relevant personal property (i.e. personal property supplied to the customer, all of the personal property of the customer, proceeds of a sale of personal property or all of the above).

Further, we see terms and conditions of trade that do not exclude certain administrative obligations on secured parties under the PPSA.

Other issues of note with terms and conditions of trade include:

- whether the grantor is prompted to provide sufficient information to allow the secured party to register a security interest on the PPSR;
- having personal and corporate guarantors agree to charge their assets, in addition to securing the performance of the grantor's obligations under the terms and conditions of trade.

REGISTRATION OF SECURITY INTERESTS ON THE PPSR

Why register a security interest on the PPSR?

Secured parties that validly register their security interest in the personal property on the PPSR enjoy two key benefits:

- registration establishes the priority of the secured party's interest against other secured parties that have an interest in the property; and
- registration ensures that the security interest survives the bankruptcy or insolvency of the grantor.

To enjoy these benefits, a secured party must ensure that their registration complies with the form and timing requirements set out in PPSA, the Personal Property Securities Regulations 2010 (Cth) (Regulations) and the Corporations Act 2001 (Cth) (Corporations Act).

Failure to comply with the form requirements specified in the PPSA and the Regulations

The PPSA and the Regulations set out a number of form requirements that must be satisfied in respect of security interests registered on the PPSR. Failure to meet these form requirements may mean that registration on the PPSR is ineffective.

Common errors with registrations on the PPSR that may cause them to be ineffective include:

- failure to describe the personal property as required under the PPSA and Regulations – in particular, the property required to be described by its serial number (i.e. motor vehicles, aircraft, watercraft);

- failure to describe the relevant grantor regarding the relevant identification details for that class of grantor as prescribed by the Regulations;
- where the registration states that the security interest is a purchase money security interest (PMSI) and the relevant security interest is not a PMSI; or
- a seriously misleading defect in any data relating to the registration.

Failure to register on the PPSR on time

Registering a security interest in personal property on the PPSR within the times required by the PPSA and the Corporations Act is essential for two reasons:

- to protect the priority of the security interest afforded by registration; and
- to ensure that the secured party's security interest does not vest in the grantor on the grantor's bankruptcy or insolvency.

Strict time limits apply and vary depending on the type of personal property the secured party is taking security in. Failure to register on time can have catastrophic consequences, including loss of property and becoming an unsecured creditor on the insolvency of the customer.

What can be done if a registration does not satisfy the form requirements or is registered out of time?

There are a number of options available if a registration does not meet the form requirements or is registered out of time, including:

- amend the registration;
- register a new security interest without a defect;
- make an application to the Court under the Corporations Act for an extension of time to register the security interest; or
- make an application to a Court under the PPSA for an extension of time to register a

PMSI (the Court will only grant this where they believe it is just an equitable to do so).

Not all of the above options are available in respect of all form defects and registrations out of time. Whether an options remedy is available and appropriate will depend on the circumstances of each case.

THE PPSA, PPSR AND ASSET SALES

The PPSA has also established a regime that gives purchasers of personal property comfort that they are acquiring the relevant assets free of all security interests. The regime differs based on the type of asset being acquired; however, a common themes required for a purchaser to obtain this comfort include:

- the purchaser provides value for the relevant asset; and
- the purchaser has, on the day before settlement, made the appropriate investigations of the PPSR to ensure that the relevant property is not subject to a security granted by the seller (or releases are provided of any security interests).

The regime effects:

- purchasing personal property from persons other than in the ordinary course of business (e.g. purchasing a used excavator from a civil works business);
- business sales (i.e. sale of the assets used in the conduct of a business);
- share sales (shares are personal property for the purpose of the PPSA);
- real property transactions where personal property is also being sold as part of the transaction.

Failure to take the necessary steps to satisfy yourself that you are taking assets free of a security interest may result in a purchaser taking the asset subject to a security interest.

HOW CAN MCINNES WILSON LAWYERS HELP?

- **Training on obligations, and compliance with those obligations, under the PPSA, Regulations and Corporations Act to ensure that a secured party obtains a security interest in personal property, including how to register a security interest on the**

PPSR.

- Drafting or amending terms and conditions of trade to ensure that they create a security interest, and avoid administrative obligations, under the PPSA.
- Conducting a review of existing security interests and advising on their compliance with the PPSA, Regulations and the Corporations Act.
- Amending registrations on the PPSR.
- Making an application to a Court for an extension of time to register a security interest (whether that application is made pursuant to the Corporations Act or the PPSA).
- Assisting with all aspects of asset sales, acting for purchaser or sellers, to ensure that assets are transferred free of security interests.

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