
CREDIT ISSUES

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INSOLVENCY AND THE PERSONAL PROPERTY SECURITIES ACT

Introduction

The *Personal Property Securities Act 2009* (Cth) ("*PPSA*") came into law on 30 January 2012. The *PPSA* sets out an Australia wide regulatory scheme governing security interests in personal property. Personal property includes many different types of tangible and intangible assets. It does not include land, buildings, fixtures and most statutory licences.

Prior to the introduction of the *PPSA*, there were more than 70 Acts which regulated personal property securities in Australia. There were a number of different registries. The most significant of those were the register of company charges formerly maintained by the Australian Securities and Investments Commission ("*ASIC*") pursuant to the *Corporations Act 2001* (Cth) ("*Corporations Act*") and the former State and Territory registers of encumbered motor vehicles.

Arguably the introduction of the *PPSA* is the most significant change to Australian business, since the introduction of the GST in 2000. Unlike the introduction of the GST, the introduction of the *PPSA* was not accompanied by widespread

community discussion.

The *PPSA* is complex and comprises more than 300 pages. Much of the terminology is new and unfamiliar. For example:

- (a) a grantor is defined as a person who has the interest in the personal property to which a security interest is attached; and,
- (b) collateral is defined as personal property over which a security interest has attached.

Further, there have been consequential amendments to the *Corporations Act*, particularly regarding the registration of security interests.

The *PPSA* is a law about security interests in personal property. A security interest is defined as an interest in personal property arising from a transaction which secures the payment or performance of an obligation. Importantly, the form of the transaction and the identity of the person who has title to the property do not affect whether an interest is a security interest.

Central to the operation of the *PPSA* is

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a new national register known as the Personal Property Securities Register (“PPSR”). The PPSR is an internet based, one stop shop for registration of security interests. The PPSR is maintained by the Australian Financial Security Authority (“AFSA”) (formerly the Insolvency and Trustee Service Australia). According to AFSA, as at 30 June 2013, there were 7.4M registrations on the PPSR.

Any supplier of goods or services on credit, which includes a term of retention of title (“ROT”), will need to register its interest on the PPSR.

Further, lessors of plant and equipment and suppliers of goods on consignment will need to register their interests.

This list is not exhaustive.

Effects of insolvency under the PPSA

Prior to the introduction of the *PPSA*, there was no registration of ROT. Many suppliers of goods sought to protect their positions in insolvency, by inserting ROT clauses into their terms of trade, stating that the title in goods supplied was not transferred, until payment was received. Often ROT clauses stated that the title to all goods supplied did not transfer to the purchaser, until all monies outstanding were paid. Such clauses were known as all monies clauses.

Following the introduction of the *PPSA* suppliers with ROT clauses can obtain a super priority in the event of insolvency, if registration on the PPSR as a Purchase Money Security Interest (“PMSI”) is completed before the goods are supplied. Pursuant to Section 14(3) of the *PPSA* a security interest will only be a PMSI to the

extent it secures unpaid amounts.

Therefore, ROT creditors will not have recourse to all previously supplied goods. This is a significant change to the law that existed prior to 30 January 2012.

If the interest is not perfected by registration, pursuant to Section 267 of the *PPSA*, the unperfected security interest will vest in the grantor, immediately before the grantor enters liquidation or voluntary administration, or bankruptcy. Section 267 does not apply to provisional liquidations, receiverships or controlling trusteeships.

Section 267A of the *PPSA* states that security interests granted in between the commencement of the external administration and the relevant Court order or conduct which triggers the external administration, will vest in the grantor, if the security interests are not perfected, by the time of the external administration. Section 268 provides certain limited exceptions to the vesting rules. In particular, PPS leases and commercial consignments are excluded from the vesting rules.

If a creditor has an unperfected security interest, then the creditor’s claim may be that of an ordinary unsecured creditor. Accordingly, the creditor may not be entitled to realise its collateral and will rank *pari passu*, along with other ordinary unsecured creditors’ claims.

Pursuant to the amendments to the *Corporations Act*, a secured creditor is now defined to include a party which has a security interest pursuant to the *PPSA*. Therefore, successful registration of a security interest on the PPSR may enable a creditor to defeat a claim from a Liquidator for an unfair

preference pursuant to Section 588FA of the *Corporations Act*.

Priorities

One of the most important aspects of the *PPSA*, are the priority rules that govern various security interests. The rules are as follows:

- (a) in certain circumstances, a security interest perfected by control has priority over all other security interests in the same collateral, such as in respect of bank accounts;
- (b) a perfected interest has priority over an unperfected interest;
- (c) the priority between perfected interests themselves, and unperfected interests amongst themselves, is determined on a first in time basis; and
- (d) PMSIs have a super priority over the other security interests.

Accessions and co-mingled goods

The *PPSA* permits security interests to be taken in accessions, for example a gear box installed into a truck, following its repair.

The *PPSA* provides for the continuation of security interests in goods that become part of processed,

manufactured or co-mingled goods, for example wheat delivered to a silo. In some circumstances, security interests may be traced into trade debts.

Transitional provisions expire in 4 months

The transitional provisions established rules regarding the attachment, perfection and priority of security interests, which provided protection in relation to pre-existing rights under retention of title clauses, consignment arrangements and PPS leases, which for the two year transitional period were not registered on the PPSR.

Those creditors relying upon the transitional provisions have until 30 January 2014 to perfect their security interests. If they do not perfect their security interests, they risk having unperfected security interests.

In our experience, many creditors are unaware of the *PPSA*. Many have not revised their terms of trade and have not set up appropriate arrangements to ensure that requests for information from insolvency practitioners, regarding security interests are dealt with in a timely manner. Such creditors are in danger of losing protection, once the transitional provisions expire. The clock is now ticking.

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