



Saving your securities:

Living with the Personal Property Securities Act

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Agenda

1. Introduction: Background, purpose of legislation, new concepts and terminology
2. Failure to recognise a “security interest”
3. Failure to recognise a need to perfect
4. Botching the financing statement
5. Failure to promptly perfect
6. Failure to advise on PPS implications generally
7. Inadequate advice to ROT suppliers
8. Inadequate advice where lease/bailment of goods
9. Failure to search the PPSR
10. Failure to obtain releases
11. Lodging the wrong forms with PPSR
12. Contributors to stuff ups, lapses and near misses

1. PPSA: Background

- A fundamental re-write of the law relating to the characterisation of what is a security interest in personal property and the rights that attach to such security interests
- Applies to companies and individuals, partnerships and trusts
- Commenced 30 January 2012
- Introduction of a national register – *Personal Property Securities Register*
- Model: UCC enacted in US in 1953, Canada thereafter and NZ in 1999

2. Purpose of PPS legislation

Aims

- Simplify, centralise and re-write Australian laws regarding the nature and enforcement of security interests
- Minimise uncertainty and avoid artificial distinctions (form of security, type of debtor)
- Reduce complexity (multiple registrations, inconsistent rules etc)

Method

- Single national PPS register (all debtors, all security interests, all types of personal property) with Web Interface and electronic filing of financing statements (not security agreements)
 - Managed by ITSA (bankruptcy service), not ASIC
 - Easily searched and cheap to register (\$7.50)
- Comprehensive notice registration system for security interest (not a document registry)
- Comprehensive and uniform national laws on security interests in personal property and certain deemed security interests

3. PPSA: New concepts and terminology

Key concepts/terminology requires a fresh mindset

- Substance over form
- New types of security interests
- ‘Priority trumps property’ – ownership is now largely irrelevant
- A new statutory priority regime
- Extinguishment: how assets can be transferred free of security interests
- Compliance is not mandatory, but...

3. PPSA: New concepts

- Personal property
- Security interest
- PPS lease
- PMSI
- Attachment
- Perfection

3. PPSA: New Concepts

- **Personal property**

- Tangible assets like goods, equipment, motor vehicles, aircraft, crops, livestock
- Intangible assets
 - Credit balance in bank accounts (ADI accounts)
 - Claims to payment (accounts)
 - IP (trade marks)
 - Investment entitlements (shares, units, debt securities)
 - Investment accounts
- But excluding
 - Land/fixtures (cf wind turbines considered in **Forge case**)
 - Certain rights granted under statute



3. PPSA: New Concepts

- **Security interest**
 - An interest in personal property that **in substance** secures payment or performance of an obligation – *without regard to the form of the transaction or the identity of the person who has title to the property*
- Automatically applies to proceeds of collateral
- Key aspects
 - ‘True security’ vs ‘deemed security interest’
 - Functional vs formal
 - *Interest* in ‘personal property’ (proprietary or possessory, not contractual)
 - Requires consensual transaction
 - No distinction between legal or equitable securities
 - Ownership irrelevant to definition (relevant to other things)

3. PPSA: New Concepts

- **Purchase money security interest (PMSI)**
 - Security interest taken in personal property to extent it secures all or part of the purchase price
 - The interests of a lessor or bailor of goods under a **PPS Lease**
 - The interests of a vendor under a retention of title arrangement (**ROT**)
- Certain “deemed security interests” irrespective of whether they secure payment or performance
 - Consignor under a commercial consignment
 - Right of a transferee in a transfer of an **account** (ie book debt) or ‘**chattel paper**’ (new concept ie lease, HP)
 - **PPS Lease/Bailment** - Lease/bailment for a period of more than 1 year or indefinite (including tooling agreements)

3. PPSA: New Concepts

- **Attachment**

- Means to make the security interest enforceable against the grantor

- **Perfection**

- Means to make security interest enforceable against 3rd parties/insolvency
- Perfection achieved by:
 - Registration of **financing statement*****
 - **Control** (limited to certain financial assets)
 - **Possession** of collateral

4. Failure to recognise a security interest

- Traditional security interest: charges/mortgages over personal property/charging clauses in guarantees (to extent they apply to personal property)
- ROT or commercial consignments - Consider distribution agreement, agency agreements, franchise agreements
- Rights to use/sell/appropriate property owned by third parties
 - Building contracts
 - Step-in rights
 - Contractual liens
 - Security deposits
 - Retention sums in segregated accounts
 - End of term obligations in leases
- PPS lease – lease/bailment for more than 1 year or indefinite
 - Eg bailment agreements, floor plan finance, tooling agreements, agistment contracts, some warehousing arrangements

5. Failure to recognise need to perfect

- Step 1: Recognise you have a security interest
- Step 2: Recognise need to perfect
 - Perfection is not mandatory, but, lose benefit of security when you need it most
 - Risk subordination as against an execution creditor
 - No enforcement in insolvency (**s267**, some exceptions) – 20 business days' grace period (vs 45 days) or 6 mth invalidity risk (**CA s588FL**)
 - Interest is extinguished to a transferee for value (even one who knows of existence of interest)
 - Priority time goes to the earliest perfection (ie, control, possession or registration) – so register early!
 - Trade/credit insurance may not pay out if security interest is not perfected

6. Botching the financing statement

- a) Who to perfect against?
 - Who is the customer/counterparty?
 - Just your customer? Your customer's counterparty? ...cf the sublessor problem
- b) Grantor details
 - ACN for companies (not ABN!)
 - ABN for trustee of a trust with an ABN (not ACN of trustee company!)
 - ABN for partnership with an ABN
 - Full name and birth date for sole trader (not ABN!)
- c) PMSI status – for RoT supplies, asset finance and PPS lease
 - Must check the PMSI box on financing statement

6. Botching the financing statement

d) Single vs multiple registrations

- Historically, transitional vs non-transitional
- PMSI v non-PMSI
- All asset vs serial numbered goods
 - SNGs = aircraft, motor vehicles and watercraft
 - Motor vehicles definition includes trailers and equipment designed to be towed more than 10 kph
 - “Consumer goods” – **must** register by serial number (privacy and security)
 - “Commercial goods” – **may** register by serial number **or** grantor

7. Failing to promptly perfect

- Need to perfect within time:
 - As against a corporation, 20 business days of execution of security agreement or security is “green” for 6 months: CA s588FL
 - For PMSI in inventory – before grantor takes possession
 - For PMSI in non-inventory – within 15 business days of grantor taking possession
- Re s588FL, ability to obtain court order extending time for registration: CA s588FM
- Normal court order enables liquidator or creditors to set aside if prejudice
- No power to extend time for registration of PMSI

8. Failure to give advice on PPS related risks and obligations

- Failing to appreciate security interests in documents
- Need for security agreement to be in writing, signed by right party (or otherwise accepted) vs oral security agreements
- How to mitigate or avoid inconsistent contractual documents (“battle of the forms”)
- Perfection by registration of financing statement
- Consequences of failure to perfect and priority issues
- Considerations in deciding who to perfect against
 - Credit risk (which can quickly change) vs sovereign risk
 - Value of assets at risk
 - Strategic value of assets (ie tooling)
 - Aggregated risks (livestock agents acting as *del credere* agents)

8. Failure to give advice on PPS related risks and obligations (continued)

- Key information needed for registration against company, trust, partnership and individual and need to change “take on” processes
- Whether necessary or desirable to engage with PPSA impact on on-supply of goods:
 - register directly against subpurchaser/lessee/bailor
 - require proof of perfection by intermediate lessor or purchaser
- Contracting out of certain rights of grantors

9. Inadequate advice to suppliers relying on ROT

- ROT: previously had title to goods supplied. Under PPSA, **now** has a security interest
- **Now** needs to register a financing statement
- **Now** has PMSI protection (for unpaid purchase price, including any interest and reasonable enforcement) and “super priority” if financing statement is registered in time and PMSI status is claimed: **s165(c)**
- **Now** must handback value of “equity of redemption” (ie surplus), potentially on asset by asset basis (no superpriority for cross-collateralisation)
- Terms should expressly secure right to interest



10. Inadequate advice where a lease/bailing of goods

- Under PPSA, lessor/bailor **now** has a security interest – title is no protection (sale vs maintenance)
- **Now** needs to register a financing statement
- **Now** has PMSI protection and ‘super priority’ if financing statement is registered in time
- **Now** PPSA extinguishment rules mean assets are (effectively) “floating charge assets”
- Where goods on-leased or on-bailed, need to consider:
 - registration strategy
 - whether to take security interest in sublease

11. Failing to search the register (or search properly)

- Recognising when you should be searching
 - Sale and purchase of business or business assets
 - Security interests in personal property
 - Priority issues regarding interests in land (interests in proceeds)
- PPSR is not comprehensive
 - Security interests perfected by control or possession
 - Temporary perfection
 - Non-personal property/excluded property
 - Interest under general law (liens) or statute
 - PPSR has non-integrated records (ACN, ABN, name)

12. Failure to secure releases of security interests

- Sale of business
- General “take free” rule in s46 (sale or lease in ordinary course of business of seller or lessor)
 - Transaction frequently outside ordinary course of business of the seller
 - Only extinguishes security interests where seller is grantor (ie not security interests arising from prior deals with related parties)

13. Lodging the wrong forms with PPSR

- Assignment of securities vs release/discharge of securities
- Registrar's discretion to correct the register: PPSA s 186
- **SFS Projects Australia Pty Ltd v Registrar of Personal Property Securities** (2014) 226 FCR 188 – power available where mistake by third party
- Impact on third parties a concern so:
 - Immediately make new registration (so third parties on notice)
 - Move promptly

14. Contributing factors to stuff ups, lapses and near misses

- Failure by practitioners to “read in”
- Absence of up to date checklists
- Inadequate supervision or communication with staff intersecting with register
- Resignations, annual leave or sick leave and poor handover practices
- Use of registration agents and inadequate supervision
- Last minute changes in proposed parties – Co to trustee, or individual to SPV (\$2)
- Conflicts of interests (acting for both shareholders, or shareholders and corporate vehicle)
- When removing an interest, double check instructions – ideally verbal instructions from person with carriage of whole matter



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