Personal Property Securities Act

An Update on Key Developments for Business Owners

1. Background and Key Principals

The *Personal Property Securities Act 2009 (Cth)* ("*the PPSA*") came into effect on 30 January 2012.

As its name suggests, the PPSA governs the way in which securities over personal property are construed in the eyes of the law, and most importantly, how they will be prioritised should the party granting the security default in their obligations to the secured party.

The PPSA broadened the scope of what we generally used to consider a security (i.e. a mortgage, charge, lien, etc.) by creating the notion of a "Security Interest". A "Security Interest" extends to other relationships such as hire purchase agreements, a lease of goods, the purchase of goods on consignment, or the hire of goods subject to retention of title. Section 12 of the PPSA lists legal relationships that are expressly included or excluded from the definition of a "Security Interest".

To explain the PPSA as succinctly as possible:

1. A Security Interest will arise where someone ("*the Grantor*") has provided personal property ("*the Collateral*") to secure the payment or performance of their obligations to another party ("*the Secured Party*").

2. In order to become a secured creditor of the Grantor in relation to the Collateral, the Secured Party needs to take steps to "Perfect" their interest in the Collateral by either registering their interest on the Personal Property Securities Register ("*the PPSR*") or by maintaining possession or control of the Collateral.

3. If the Secured Party wishes to register their security interest on the PPSR but does not have possession or control of the Collateral, their interest in the Collateral needs to be evidenced by an agreement between the Grantor and Secured Party which grants the Security Interest ("*a Security Agreement*").

4. If the Secured Party does not perfect their interest in the Collateral, they will not be able to enforce their security interest against third parties – they will in effect become an unsecured creditor of the Grantor and their interest in the Collateral will be superseded by the secured creditors of the Grantor.

5. Where there is a dispute as to who has a higher priority in interest to the Collateral a series of new "priority rules" apply.

In summary, the concept of "ownership" in personal property is now obsolete. All that really matters is "perfecting" your security interest, either by registration, possession, or control. Without a registration on the PPSR, possession is now ten tenths of the law.

2. New Terminology

The following terms are used throughout the PPSA:

"Personal Property"	Property which is not land, statutory rights, entitlements or authorities.
"Security Interest"	An interest in Personal Property provided for by a transaction that, in substance, secures payment or performance of an obligation.
"Debtor"	A person who owes payment or performance of an obligation that is secured by a Security Interest.
"Grantor"	A person who grants the Security Interest.
"Secured Party"	The party who enjoys the benefit of the Security Interest.
"Security Agreement"	An agreement creating a Security Interest, or the writing evidencing such an agreement.
"Collateral"	Personal Property over which there exists a Security Interest.
"Attachment"	A Security Interest being created and becoming enforceable against the Grantor.
"Perfection"	The holder of a Security Interest gaining the highest priority over other interest holders. Can be done by registration on the PPSR, by possession, or by control.
"PMSI"	A "Purchase Money Security Interest". A security interest in Collateral that secures the assistance provided by the Secured Party to the Grantor to enable their purchase or acquisition of rights in the Collateral. May have a "Super-Priority" status over other Security Interests.
"Commercial Property"	Personal Property other than Consumer Property.
"Consumer Property"	Personal Property held by an individual, other than Personal Property held in the course or furtherance, to any degree, of carrying on an enterprise to which an ABN has been allocated.
"Circulating Asset"	Personal Property which is subject to a Security Interest which the Grantor may transfer free of any Security Interest. Formerly known as a "Floating Charge".
"PPS Lease"	A lease or bailment of goods which creates, for the benefit of the lessor or bailor, A PMSI. It must be for: (a) an indefinite period; (b) a term of one year or more for most goods; or (c) a term of 90 days or more for motor vehicles, boats or aircraft.

3. Priority Rules

Priority Rules

The priority rules for Security Interests can be summarised as follows:

1. A perfected security interest takes priority over an unperfected security interest.

2. Priority between two or more perfected security interests is determined in favour of an earlier perfected security interest over a later one.

3. Priority between two or more unperfected security interests is determined in favour of an earlier attached security interest over a later one.

4. A "super-priority" can be obtained over collateral, which will defeat all other security interests in that collateral (including security interests created and registered before the PMSI), provided the PMSI is registered within the time frames set out in the above paragraphs.

Perfection

The word "perfection" insofar as it relates to security interests is virtually interchangeable with "registration". Whilst it is possible to perfect an interest by possession or control in some circumstances, the priority rules become far more complex and the evidentiary onus is very high. Registration is the key.

Registration of a security interest on the PPSR has two main benefits. Firstly, it defines the priority of the security interest (as discussed in further detail below). Secondly, it ensures the security interest survives the bankruptcy or insolvency of the grantor and greatly assists recovery of the collateral.

Registration of PMSI's

There are specific rules relating to the timing of registration of PMSI's. If a PMSI is registered within the requisite timeframes, a "super-priority" will be achieved. The timeframes can be summarised as follows:

	Where collateral is tangible property	*Where collateral is intangible property*
Where collateral is inventory	The security interest must be registered before the grantor takes possession of the collateral.	The security interest must be registered before the PMSI attaches to, or is created over, the inventory.
Where collateral is not inventory	The security interest must be registered within 15 business days of the grantor taking possession of the collateral.	The security interest must be registered within 15 business days of the grantor taking possession of the collateral, or the creation of the PMSI.

"*Inventory*" in this context is defined as personal property "that, in the course or furtherance, to any degree, of an enterprise to which an ABN has been allocated:

(a) Is held by the person for sale or lease, or has been leased by the person as lessor; or
(b) Is held by the person to be provided under a contract for services, or has been so provided; or
(c) Is held by the person as raw materials or as work in progress; or
(d) Is held, used or consumed by the person, as materials."

Example of a PMSI at Work

A restaurant owner takes a loan from CBA and grants a General Security Interest over all of its present and after acquired property to CBA, which CBA registers on the PPSR.

The restaurant owner subsequently leases some catering equipment from Silver Chef Rentals and grants a PMSI over the equipment pursuant to the retention of title clause of the equipment lease, which Silver Chef registers on the PPSR in time.

If the restaurant owner becomes insolvent, the PMSI will defeat CBA's claim in the leased equipment.

If the restaurant owner becomes insolvent before Silver Chef registers their interest or Silver Chef fail to register their interest within 15 days of the restaurant owner taking possession of the equipment, CBA's claim in the leased equipment will defeat Silver Chef's. Furthermore, if the assets held by the restaurant owner are only enough to discharge their loan from CBA, Silver Chef will lose the catering equipment with no further recourse against the restaurant owner or CBA.

Transitional Security Interests

A "Transitional Security Interest" is a Security Interest which was already in existence prior to the commencement of the PPSR. A transitioned Security Interest is deemed to have "attached" to the Collateral in question immediately prior to the commencement of the PPSR.

Transitional Security Interests are deemed to have been perfected and are temporarily protected until 30 January 2014. This gives the Secured Party 24 months to register their Security Interest on the PPSR. If the Secured Party does not register within this period, their interest will no longer be perfected and their interest will be subordinate to perfected interests.

Where at least one transitional security interest is involved, there are general and specific priority rules.

The general principles are as follows:

Item/section	Security Interest	Has priority over:
Section 55(3)	A perfected transitional security interest	An unperfected security interest (whether transitional or not)

Sections 55(5), 322 and 322A	A perfected transitional security interest	A perfected security interest that is not a transitional security interest
Section 55(2) and 321	An unperfected transitional security interest	An unperfected security interest that is not a transitional security interest
Section 55(3)	A perfected security interest (whether transitional or not)	An unperfected transitional security interest
Section 322A	A perfected transitional security interest	A security interest that is perfected by control

Where there are multiple Transitioned Security Interests which have been perfected during the transitional period, a priority dispute will be determined by the pre-PPS Act law under which they were originally created (See Section 323 of the PPSA).

Expiry of the Transitional Period

On 30 January 2014, the Transitional Period will expire and all interests which were secured before the PPSA regime but have not been registered since will no longer retain the benefit of being "perfected".

What should you do?

1. Identify the agreements you have with third parties that rely on you taking security over their assets or over the assets you are leasing/licensing to them.

2. Conduct a search over these entities to determine whether or not you have an existing security interest registered under the old regime prior to 30 January 2012.

3. If the interest was registered under the old regime prior to 30 January 2012, you need to register your security interest before 30 January 2014 in order to preserve its priority over other later registered security interests.

4. If the security interest was not registered under the old regime prior to 30 January 2012, register it now.

4. The Register

Collateral Categories and Classes

The following categories and classes of collateral are prescribed in the PPS Regulations:

CATEGORY	**CLASS**	**DESCRIPTION**
TANGIBLE	*Agriculture*	Includes crops and livestock. "Crops" in this context means crops which have not yet been harvested and includes the product of agriculture or aquaculture and trees.
	Aircraft	Includes a machine or craft that can travel in air and has a nationality and registration mark, an aircraft engine, an airframe, or a helicopter.
	Motor Vehicles	A car, truck, motor bike, tractor, trailer, or caravan which has a vehicle identification number, a chassis number, or a manufacturer's number.
	Other Goods	Tangible Personal Property. Includes crops, livestock, wool, extracted minerals, satellites and other space objects. Does not include agriculture, aircraft, motor vehicles and watercraft.
	Watercraft	A boat or vessel (other than a seaplane) that is used, or intended to be used, in navigation by water or for any other purpose on water, that has a hull identification number and an official number issued by the Registrar of Ships.
INTANGIBLE PROPERTY		Personal Property which is not financial property, goods or an intermediated security. Usually just Intellectual Property.
GENERAL	*All Present and After Acquired Property (without exceptions)*	All Personal Property over which the Grantor has an interest at the time registration is made on the PPSR, and all Personal Property acquired after the registration is made on the PPSR.
	All Present and After Acquired Property (with exceptions)	All Present and After Acquired Property except for an item or class of Personal Property stated in the registration to be exempt.
FINANCIAL PROPERTY		Chattel paper, currency, documents of title, investment instruments, negotiable instruments, and investment entitlements.

Each registration must only refer to a single collateral class.

5. Key Cases

Graham v Portacom New Zealand Ltd [2004] 2 NZLR 528

Portacom leased portable buildings to Graham for an indefinite term. This was found to amount to the equivalent of a "PPS Lease" under the New Zealand equivalent legislation and Portacom was treated as having a security interest in the buildings. The court found that Graham was able to grant a further security interest to a bank in the portable buildings despite not owning them (given they were nonetheless in their possession). At the time the Graham went into receivership, Portacom had not registered its security interest, but the bank had. Portacom's failure to register its security interest meant that the bank's registered security interest over the same property took priority. Portacom lost the buildings which were valued at approximately $200,000.00.

Waller v New Zealand Bloodstock Ltd [2006] 3 NZLR 629

A racehorse had been leased by NZ Bloodstock to Waller for a term of more than one year. The interest of NZ Bloodstock was deemed to be a security interest under the New Zealand PPS Act and was therefore registrable, however NZ Bloodstock had not registered its security interest at the time Waller went into receivership. The court relied on *Graham v Portacom* to find that a financier, who had a registered security interest over all of Graham's present and future property including the horse, took priority over the unregistered security interest of NZ Bloodstock. NZ Bloodstock lost the multimillion dollar valued racehorse.

Cancer Care Institute of Australia Pty Ltd [2013] NSWSC37

The Court was requested to consider whether two linear accelerators (used in specialist cancer care and valued at almost $9 Million) which were bolted on to base plates cemented into depression in the floor of a building, were "fixtures" under common law and therefore part of the land. Given the PPSA does not apply to land, if the linear accelerators were fixtures, they formed part of the land and any registered PPSA security interests would not apply to them. The mortgagee of the land argued that they were fixtures and therefore the subject of a priority to the registered mortgagee over the land. The Court did accept that it was a relatively straightforward task to remove the linear accelerator if required, and that they were not fixtures. It was ordered that the property be delivered up to the administrator.

Maiden Civil (P&E) Pty Ltd & Ors v Queensland Excavation Services Pty Ltd & Ors [2013] NSWSC 852

QES acquired three caterpillar excavators and leased them to Maiden by an oral agreement. Maiden sought finance from Fast Financial Solutions Pty Ltd ("Fast") in exchange for granting a security interest to Fast over all of its present and after acquired property. Maiden defaulted in its repayment of the loan from Fast. Fast appointed receivers and managers to Maiden's assets. The Court applied the judgements of Portacom and New Zealand Bloodstock. Fast got the excavators, valued in the hundreds of thousands. QES got nothing.

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