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PERSONAL PROPERTY SECURITIES ACT – A PRACTICAL GUIDE

This article provides a brief overview of some key provisions in the Personal Property Securities Act 2009 (Cth) (**PPSA**). In particular, it will cover:

- The definition of personal property under the PPSA;
- Examples of personal property;
- Questions to consider; and
- What business owners should do in response to the PPSA.

Personal property

One person must be able to transfer the ownership of the property to another person.

Section 10 of the PPSA sets out the legal definition of this term.

Certain property is excluded under the definition.

Security interest

A Security Interest enables a secured party to take an interest in personal property as security for a loan or other obligation, or enter into a transaction that involves the supply of secured finance.

How do you register a security interest?

Secured parties register a Financing Statement online, relating to their Security Interest. A Financing Statement is a notice of the Security Interest. There is no requirement to lodge a copy of the actual security interest agreement at the Registry. For further information, see the PPSR website: www.ppsr.gov.au.

Once you have logged in as a registered user, have the following details available:

- Identity of the secured party and the person granting the secured party the security interest (the grantor)
- Description of the collateral/proceeds secured
- The end date of the registered interest
- Subordination – where you have agreed to be ranked behind another secured party
- Description of the security interest eg. ‘security interest over circulating assets’, ‘purchase money security interest’ etc

What do the new words mean?

Secured Party – the party who takes the security interest

Personal Property – any form of property other than land or buildings and fixtures which form part of that land (not land)

Security Interest – interest in personal property that secures payment of performance of an obligation

Perfection – priority is obtained over unperfected security interests. Perfection is achieved by registration, possession or control.

Unperfected security interest – an unregistered security. Upon liquidation or bankruptcy, the security vests in the liquidator or bankruptcy trustee.

Grantor – the party who gives or grants the security interest over their property

Non Circulating and Circulating Assets – fixed and floating charges

Security agreement – financing agreement, mortgage, charge etc

What is collateral?

Collateral is personal property that is the subject of a security interest. Certain classes of collateral are prescribed in the PPS Regulations. The PPSR website provides further information on collateral classes: https://www.ppsr.gov.au/collateral-classes.

Each registration must only relate to a single collateral class.

What is a PMSI?

A Purchase Money Security Interest (PMSI) is a security interest in collateral created by a seller who secured the obligation to pay the purchase price or by a person who finances or provides the value to purchase the collateral.

A PMSI must be registered within the required time to ensure 'super-priority' status.

In what circumstances are businesses affected?

Business are affected if they:

- Sell stock on credit;
- Have asset protection arrangements involving one entity leasing assets from another related entity;
- Lease plant, equipment, motor vehicles or other assets;
- Have stock or other assets on consignment with third parties;
- Have partnership agreements, such as those with 'pre-emptive rights' for one partner to buy out the other at the time of death; and
- Enter into franchise agreements.

Title versus registration

Title itself does not equate to rights over property.

Failure to register an interest may result in your business having no claim to the asset, should an insolvency scenario arise.

How to remove/discharge a registered security interest

To discharge a registration, you will need:

- Registration number;
- Token or Secured Party Group number; and
- Access code.

No fee is payable for the discharge of registration.

Section 271 of the PPSA allows for the recovery of damages from wrongly registered Security Interests.

The PPSR website provides further information on the discharge of a registered security interest: www.ppsr.gov.au/discharging-registration.

Obtaining security interest documentation

The Security Interest Agreements are not retained by the Registry. A copy of the agreement in support of the security interest must be obtained from the Secured Party.

Does a new registration need to be lodged for each retention of title invoice?

No, you can have an all monies clause registration. However, the PMSI status must be set out in the initial Credit Account Application and/or each invoice ie. that retention of title remains with the seller until payment for all goods supplied has been made: see *Swan Services Pty Ltd (In Liq) v Central Cleaning Supplies (Aust) Pty Ltd* [2014] VSC 61.

Leases and the PPSA

A PPS lease includes a lease or bailment of personal property for a term of more than one year, or which may or actually does run for a term of more than one year (for consumer goods and items with serial numbers it is 90 days).

The interest of the lessor or bailor in personal property is deemed to be a security interest for the purposes of the PPSA.

A landlord incentive may be used to pay for a tenant's fitout and the lease may include a clause that the landlord retains ownership of the fitout until the end of the lease. This arrangement gives rise to a security interest capable of registration by the landlord.

If the landlord does not register its security interest, because the tenant has possession of the fitout, the tenant may grant a security interest over the fitout to a third party, which may defeat the landlord's interest.

For goods leased to a tenant, security deposits or any lease incentives, it is prudent for the landlord to register a security interest when the lease is entered into.

Registration should be considered where the lease allows the landlord to sell any property left behind by the tenant at the end of the lease and use the proceeds to either reduce the tenant's debt or use the proceeds in satisfaction of an obligation created by the security interest.

What should business owners do?

- When searching the PPSR, use the grantor company's ACN and ABN and the list of non-migrated charges provided by ASIC.
- Review your group structure, asset protection strategy and inter-entity arrangements. Register any 'security interests' on the PPSR.
- Prepare Security Interest Agreements.
- Review your business' governing documents (partnership agreements, succession agreements and company constitutions). Update them if necessary and have any 'security interests' created under them registered on the PPSR.

- Identify assets affected and transactions that need to be registered.

- Review the Terms and Conditions and Contract Documentation in relation to:

    - Retention of title clauses
    - Supply Agreements
    - Personal Guarantees
    - Charging clauses
    - Equipment hire leases or bailments
    - Partnership/Joint Venture Agreements
    - Other security interests.

- Security interests should be registered as soon as possible – it is permissible (when reasonable) to register an interest before a relevant agreement or transaction is completed.

- If an extension of time for registration is requested, the applicant should ensure that they can produce comprehensive evidence as to the grantor's continuing solvency and financial position, as well as evidence that no third party interests will be adversely affected.

- Check any security interest registered against your own business.

Please contact SRM Lawyers if you have any questions about the PPSA or its application to your business.

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