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The *Personal Property Securities Act 2009* – Get moving

The *Personal Property Securities Act 2009* (**PPSA**) and the Personal Property Securities Register (**PPS Register**) commenced operation on 30 January 2012.

After several delays to the PPSA's commencement, anyone would be forgiven for ignoring the many articles and alerts we have distributed and published on our website. Now the PPSA and PPS Register are here – and it's time to get moving.

The PPSA creates a new national scheme for security interests over personal property and governs the PPS Register. The new scheme affects almost every area of business. For the Australian financial sector and commerce generally, it's one of the most significant legislative reforms seen for years.

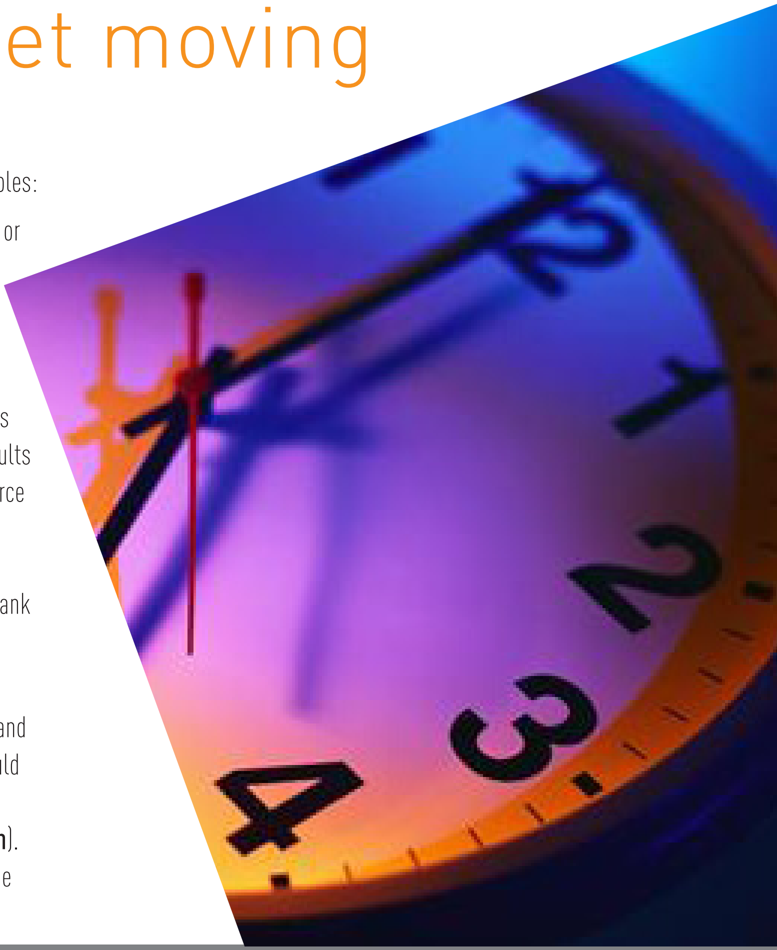
Almost every business that supplies goods (by sale or lease) or finance is affected. Businesses that ignore the PPSA and fail to register security interests on the PPS Register face a real risk of suffering significant losses in ways that have not occurred in the past. Conversely, businesses that make necessary adjustments will enjoy new protections (for example, from bad debts) that did not exist in the past.

What are the consequences of inaction?

Perhaps the point is best illustrated by a couple of simple examples:

Example 1: You are a lessor of equipment, for an undefined term or for a term longer than 1 year, and you lease that equipment to ABC Pty Ltd. You fail to register your lease (which is a security interest for the purpose of the Act). ABC Pty Ltd then grants an all-asset security (previously known as a fixed and floating charge) to the bank to secure finance. The bank registers its all-asset security on the PPS Register. ABC Pty Ltd then defaults on its repayments to the bank and the bank takes action to enforce its security. Previously, you would have been able to maintain your rights over the leased equipment because ownership in the equipment never transfers to ABC Pty Ltd. Under the PPSA, the bank will take priority over you.

Example 2: You sell goods to ABC Pty Ltd on a retention of title (**ROT**) basis. Under the PPSA, the concept of 'title' is redundant and replaced by the concept of a security interest. Previously you could have relied on your ROT contractual arrangement if ABC Pty Ltd went into administration or liquidation (**external administration**). Under the PPSA, if you do not register your security interest in the



goods and ABC Pty Ltd goes into external administration, the administrator or liquidator will be entitled to sell your goods and apply the proceeds in the external administration. You will lose your entitlement to both the goods and the proceeds from the sale and your interest will be subordinated to any registered security interest. You will only receive a distribution rateably as an unsecured creditor. Such distributions are rarely significant. On the other hand, you are entitled to register your ROT arrangement as a purchase money security interest (**PMSI**) which, if registered correctly, has super priority over other existing security interests. As a result, you are more likely to recover a portion of your debt.

Ok you've got my attention, now what?

There are a number of things you need to do immediately to transition your business into the PPSA regime. These include conducting a thorough review of your terms of trade, registering on the online PPS Register financing statements over goods supplied within tight timeframes under the Act (in order to obtain a super priority position against competing security interest holders) and putting in place business processes to establish appropriate filing and document management systems that can trace unpaid invoices to particular goods supplied.

Time to get familiar with key terms and principles

Below are a number of key PPSA principles and terms with which you must become acquainted.

Who is affected?

The PPSA has broad scope and affects many industries, from finance to retail, manufacturing, wholesale and distribution, building and construction, transport, mining, agricultural and farming. It has far reaching consequences for many commercial transactions such as:

- the supply of goods on a retention of title or consignment basis;
- hire-purchase or finance lease arrangements;
- the leasing of equipment or other goods;
- joint venture and shareholders agreements (that include step-in rights or dilution on default clauses);
- receivables financing; and
- the provision of credit or finance secured by personal property.

What is a 'security interest' under the PPSA?

The concept of a 'security interest' in personal property extends further than arrangements that we are familiar with as giving rise to a security interest, such as charges or chattel mortgages. The PPSA looks to the substance of a transaction involving personal property and whether or not it secures the payment or performance of an obligation. This is why arrangements such as conditional sale agreements, retention of title arrangements, leases of personal property and hire purchase arrangements are now caught by the PPSA.

What is personal property?

Personal property is almost any kind of tangible or intangible property other than land and real property; for example: cars, boats, aircraft, inventory, plant and equipment, intellectual property, livestock, crops, art, accounts receivable and company shares. It includes property used in business as well as that used domestically.

Priority

The PPSA dictates priority as between competing creditors. The principle rule is that the first in time to be 'perfected' (a new term under the PPSA which usually means registration on the PPS Register) will have the highest priority over other creditors' interests. The principle rule is subject to special priority given to 'purchase money security interests' (known as PMSIs) and in other specific circumstances such as receivables financing.

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The PPS Register

They say cash is king. So too is the PPS Register.

A key feature of the PPSA is the establishment of the online PPS Register, as a single, national register for all security interests in personal property. The Register (which is available 24 hours a day) acts as a noticeboard for all previously registered security interests and for newly registered security interests post 30 January 2012.

In order to protect security interests in personal property, the PPSA establishes a procedure for 'perfecting' your security interest (typically by way of registration on the PPS Register, or by possession, or in limited circumstances, by control). Perfection of a security interest is critical where:

- the grantor of the security interest (generally the borrower or debtor) becomes bankrupt or insolvent; or
- the grantor of the security interest on-sells the goods to a third party (for example, sale of stock to the public); or
- the grantor of the security interest grants another creditor a security interest over the goods (for example, giving a bank a charge over all of the debtor's assets) and that other creditor registers (or otherwise perfects) their security interest.

What is the transitional period and what does it cover?

The PPSA provides a two year transitional period for rights and agreements that existed prior to 30 January 2012. In most instances, agreements entered into before 30 January 2012 will have protection under the PPSA until 30 January 2014. It is important to note that you are still required to register your agreement on the PPS Register before 30 January 2014 (if the agreement has not ended by then) otherwise you risk losing your rights.

A key exception to the above is the supply of goods to existing or new customers after 30 January 2012. Even though the supply may be governed by pre-30 January 2012 Terms of Trade / Supply Agreement, **new supply on or after 30 January 2012 will need to be registered before the supply is made**. This is a common confusion regarding the two year transitional period. If you do not register supplies made after 30 January 2012 and the debtor company goes into external administration, you risk losing your rights.

You do not need to register each time you make a supply. The PPS Register allows for ongoing arrangements with a customer to be covered in a single registration.

Goods supplied before 30 January 2012 (for example goods supplied on a ROT or consignment basis), will enjoy the protection of the 2 year transitional period. However, this should not be confused with goods supplied or leased after 30 January 2012 to an existing customer.

Existing security interests previously registered on one of the numerous state or national registers (for example the ASIC Register of Company Charges, 'REVS' and Bills of Sale registers) should have been automatically migrated across to the PPS Register on 30 January 2012, although there have already been a number of hiccups in the system. We recommend that you check the Register to confirm that security interests which you are expecting to be automatically migrated, have in fact done so. If your security interest should have been registered on one of the previous registers prior to 30 January 2012, but was not, please contact us.

How can we help?

We can assist by:

- reviewing your business arrangements and documentation to determine the extent to which the PPSA affects you;
- advising on the practical implications of the PPSA on your business;
- drafting amendments required to your documentation (included general terms of sale, general terms of hire,

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security deeds etc) to protect your security interests under the PPSA;

- advising on implementing new procedures that should be adopted by your business; eg regarding registration and amending registrations of the PPS Register; and
- advising on recovering stock (for example, repossession under retention of title terms) and responding to receivers, administrators and liquidators under the new regime.

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