What is the Personal Property Securities Act – and why is it so important?

Australia's Personal Property Securities Act 2009 (Cth) (PPSA) is set to be overhauled, with final stakeholder feedback now received by the Federal Government (November 17, 2023). The proposed changes have been prepared in response to the 2015 Whittaker Review and are designed to simplify the personal property securities framework for easier understanding and use, and provide clearer, more accessible rules for the granting, validity and enforcement of security interests in personal property.

While the Government mulls over the feedback and decides next steps, let's unpack what the current legislation is all about.

The PPSA legislation relates to the regulation of personal property security interests in Australia. The national online register, which is managed by the Government, is called the Personal Properties Securities Register (PPSR), and individuals and organisations can use the PPSR to register and search for security interests in certain personal property (*see below* ***'What is covered?'***). A PPSR search can help to ensure you don't buy or lease property or goods that:

- are stolen
- have not been paid off
- have been written off

- have been used to secure a loan or debt.

It also protects businesses that sell on terms including consignment or retention of title, or the hiring, renting or leasing out of valuable goods, machinery, vehicles and equipment.

We often get asked if it's well used. Well, according to AFSA's latest annual report, in the 2022-23 financial year, use of the PPSR continued to grow, with more than 11.8 million searches.

How it began

The origins of the PPSA stem back to 1993, when the Australian Law Reform Commission instigated that securities legislation be overhauled and that the PPSA be implemented. However, it wasn't until 2009 that the Act came into being, with the aim of creating a uniform regime for securing finance using personal property. Prior to that there were some 70 different items of legislation in operation at a State and Federal government level, which determined the rights of creditors and debtors. With so many different pieces of legislation at play, this inevitably created inconsistencies in the creation and enforcement of security interests.

The PPSA codified the pre-existing rules of security interests and introduced the PPSR. The use of this registry has become important when enforcing security interests and prioritising competing interests between multiple creditors.

What is covered?

Generally, all property other than land is categorised as personal property with respect to the PPSA. This includes:

- tangible property such as equipment, artworks, cars, boats, and cash
- contracts
- accounts
- intellectual property
- shares
- financial property

Even agisting cattle on another property can be protected by way of a PPSR!

Protection under the PPSA

In order to secure rights to the property of a debtor, security interest(s) must be correctly

‘perfected’ to ensure protection in the event the debtor enters into external administration. Your entitlement to enforce your security interest on the debtor’s insolvency is contingent upon the validity of the perfected security interest.

How to perfect a security interest (and the impact of failing to do so)

Firstly, a perfected security interest is any secure interest in an asset that cannot be claimed by any other party. The interest is perfected by registering it on the PPSR.

When it comes to a corporate debtor, Section 588FL of the Corporations Act 2001 comes into play with respect to a secured creditor perfecting its security interest on the PPSR. A validly perfected security interest must satisfy one of the following criteria:

- Registration on the PPSR within 20 business days after the security agreement that gave rise to the security interest came into force; or
- Registration on the PPSR six months prior to the commencement of the insolvency

proceedings against the corporate debtor.

Even if registration has not yet occurred within 20 business days after the security agreement that gave rise to the security interest came into force, it's important that secured creditors register their security interest to start the clock ticking on the six-month period. That's in the event that the debtor enters into external administration post-six months from the registration date, so that secured creditors retain their right to the property subject to the security interest.

If a security interest is not perfected prior to the commencement of an external administration as outlined above, the security interest essentially becomes ineffective. This means your rights to the property subject to the security interest are foregone, and the unperfected security interest vests in the grantor (the debtor), upon the grantor's winding up or declaring bankruptcy etc.

Should a supplier elect not to register a security interest, then no protection is afforded to them. They effectively lose the asset and the asset vests in the Company.

What are your rights upon external administration?

Should your customer become insolvent, the PPSR works on a first come, first served basis. If someone has registered an interest before you, they will get paid first.

Voluntary Administration

Security interests may only be enforced in limited circumstances, generally where:

- the security interest is over the whole, or substantially the whole, of the property of the

company;

- enforcement action commences;

- before the commencement of the administration or within 13 business days after the

administration begins.

Deed of Company Arrangement (DOCA)

Security interests may be enforced, except where the secured creditor voted in favour of the DOCA and it prevents the secured creditor from taking enforcement action.

Liquidation

The liquidation of a company has a limited impact on perfected security interests and does not affect a secured party's right to enforce a security interest.

It's a complex legislation, particularly when it comes to understanding how you're impacted should a business go into administration. We are here to help. If you have any queries about the PPSA and PPSR, how the register works, and what protections it can provide in case of insolvency, please don't hesitate to contact a member of our team.

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