

Introduction

The *Personal Property Securities Act 2009* (the “Act”) will affect all established forms of secured finance including fixed and floating charges, chattel mortgages, finance leases, margin loans, and the factoring of book debts.

The provisions of the Act commenced on 30 January 2012.

The Act will also affect other transactions including:

- transfers of an “account” (e.g. any financial obligation to pay);
- leases of personal property (for a term of more than one (1) year); and
- commercial consignments, including e.g. “retention of title” arrangements.

What is personal property?

Personal property includes:

- “tangibles” such as goods, crops, livestock, motor vehicles, paintings, machinery; and
- “intangibles” such as licenses, intellectual property and some investment “instruments”.

N.B. Land is specifically excluded from this reform, as well as fixtures and water rights. The laws governing registering a mortgage or caveat remain the same.

What is personal property security?

Ensuring that an obligation to pay or perform something and/or your interest in personal property is protected.

Why the need for reform?

The reform will replace over 40 registers – Australia wide – into one (1) single national register, aiming to simplify the existing law, reduce legal disputes and provide uniform rules for all security interests in personal property.

What is the Personal Property Security (PPS) Register?

The PPS Register will be a single, national online register. It will enable searches for security interests relating to all personal property, 24 hours a day, 7 days a week.

Anyone will be able to register an interest in personal property on the PPS Register, over the internet (www.ppsr.gov.au). Generally, the person who makes a 'registration' will be the secured party or its agent.

Existing information on existing comparable registers will already have been migrated to the PPS register.

Those wishing to register need to provide a description of the property so that it can be readily identified in a PPS search. They also provide information about the person who is or has granted the security interest, as well as the security or "collateral".

A verification statement will then issue to the secured party who must, in turn, provide it to the grantor.

Transition

Existing security interests, created prior to 30 January 2012, will still be effective for 24 months. Within this timeframe, any existing unregistered security interest must be recorded on the PPS register, or it will become be an "unperfected" security interest.

For all **new** security interests, created on and from 30 January 2012, the details **must** be registered in order to "perfect" that security.

How do the priorities work?

If the grantor defaults, a secured party will be able to seize the relevant "collateral". The secured party can then deal with the collateral as it sees fit, which may include the sale of that property.

Retentions of Title

Retentions of title are now deemed to be a 'security interest' under the Act. Suppliers can no longer rely on existing retention of title clauses/provisions to protect their interests in those goods, and therefore they **should** (MUST?) register their interest with the PPS Register. Failure to do so will mean that the supplier **will** lose the right to take possession of the goods.

Super Priority

A Purchase Money Security Interest (PMSI) can be registered by a secured party, and that will (normally) take priority over any other perfected security interest.

A PMSI also attaches to the sale proceeds of the collateral, or when mixed with other products or property.

PMSI's are usually used to secure priority interests for debt financiers, commercial consignments and lease/bailment arrangements.

We recommend clients take the following steps, as a minimum...

- review your trading activities to determine whether or not you need to register any security interest over any personal property (particularly if your business relates to sale of goods on consignment, lease or hiring out goods);
- review, with a view to amend your trade agreements, to ensure that you have a right or ability to effect registration to cover or enforce existing and new claims for retention of title and that the description of goods is accurate and clear;
- be in touch with your financiers to prepare for the transition. You may be required to execute new security agreements – ensure that all details are correct;
- review any and every asset protection measures, that are already in place and, where necessary, 'perfect' them [e.g. all intercompany loan accounts and any assets (including licences or intellectual property) with related entities, that are currently secured by an existing fixed and floating charge];
- review existing internal procedures to ensure that the registration of security interests always take place (and consider investing in software that allows you to upload a PMSI at the time a credit application is accepted);
- train your administrative staff with respect to this new legislation; **and**
- above all, when in doubt, **register** your security interest over personal property.

You will **always** have a better standing when dealing with disputes where you have a “perfected” security interest.

If you have any questions or if you wish to discuss any of the matters set out in this brochure, then please do not hesitate to telephone or contact
Dougal Geddes on (02) 9232 8033.

You may also care to review some other articles which are produced by
Foulsham & Geddes and which are available on our website:
www.fglaw.com.au

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