



Précis Paper

Personal Property Securities Act

A discussion about the background to the Personal Property Securities Act 2009 (Cth), what may constitute a registrable interest and the process, pitfalls and tips involved in registering personal property.

Discussion Includes

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Personal Property Securities Act

1. In this edition of BenchTV, Rebecca Hegarty (Principal Lawyer, Head of Commercial Advice, Coleman Greig, Parramatta) and Malcolm Campbell (Principal Lawyer, Coleman Greig, Parramatta) discuss the background to the Personal Property Securities Act 2009 (Cth), what may constitute a registrable interest and the process, pitfalls and tips involved in registering personal property.

What is the Personal Property Securities Act 2009 (Cth)?

2. The Personal Property Securities Act 2009 (Cth) (PPSA) came into effect on the 30 January, 2012 and governs the giving and taking of security interests in personal property. It pulled together around 70 different registers that were operating in the states and territories beforehand including the ASIC register of charges. In effect, the register draws together other interests' people may have in pieces of personal property into one central space.
3. One of the main effects of introducing the Personal Property Securities Act 2009 (Cth) is that it opened up finance for businesses in particular to use types of property that were not previously considered as being accessible from a collateral point of view. It also turned people's minds to checking the register before getting involved in transactions.

Before the PPSA

4. Prior to the PPSA, the main registers that people would think of when entering into either a consumer style transaction, such as buying a secondhand car or commercial transactions were the Revs register and ASIC register of fixed and floating charges.
5. The type of person or entity that a creditor was dealing with or the type of personal property that they were dealing with, would determine which register they would check or register on to protect that interest.

Security Interests

6. The Act introduced new concepts and terminology. The main one underlying the Act is whether there is a 'security interest'. A party must have a security interest to be entitled to register. A security interest is something that secures payment or performance of an obligation. There are also deemed security interests such as a PPS lease, commercial consignment and the retention of title scenario.

7. Registering security interests on the PPS register, makes the security interest in the property visible to third parties. Previously, before the concept of security interests, people would not necessarily turn their minds to their documents; the underlying agreement, and would rely on their normal course of business where they would supply goods on credit and not as focus on the documentation.
8. It is now important to have a written agreement in place that really sets out exactly what the security interest is, so that there is no debate once it is registered because the underlying document is available.

The registry as a notification system

9. The key element of the PPS register is that it is merely a notification system, alerting third parties to a security interest over the particular personal property involved.

Access to documents

10. An interested party, such as the grantor themselves or another secured party, can request information or documentation relating to the underlying agreement from the secured party. They may seek information in relation to what is owed, what the collateral is or a copy of the agreement.
11. The secured party is obliged to provide that information, unless, for example, there is a confidentiality clause within the agreement. The class of what constitutes an interested party is narrow enough that it is not information which can be provided to just anyone.

Key points in relation to register

12. The security agreement is important particularly if a party wants the security interest that they are taking to be enforceable against third parties. It needs to be in writing, it needs to describe the collateral in some way and it needs to be accepted by the grantor.
13. A party must create a security interest through a security agreement and there must be an attachment, or connection between the granting of the interest and the collateral underlying the security interest.
14. Section 19 of the Personal Property Securities Act 2009 indicates that a PPS lease, commercial consignment or conditional sale are things which are possession based and that there will be attachment in relation to that collateral when a party has possession of those goods.

Perfection

15. The Act created a concept of perfection which means that a party must take an extra step to make their security interest known to third parties. There are a number of ways in which a party can perfect their security interest:
 - i. By a concept of control
 - ii. Possession of collateral, where possession has not been relinquished from the start and
 - iii. By registration on the PPS register
16. Perfection makes the security interest visible to third parties. If a third party does not know about the interest, they may take a security interest that will usurp the prior security interest in terms of priority as it was never made known to them.

Priority

17. Priority is generally determined by first in best dressed. If there are two competing security interests that have been perfected, the general rule of thumb is whoever is first, will take priority. If there are two competing unperfected interests, they will compete on the basis of first in time. If there is a perfected security interest and an unperfected security interest, the perfected security interest will take priority.

Purchase Money Security Interest

18. A PMSI is a Purchase Money Security Interest and within the Act, there are sections that slightly change the order of priority for example, this concept of a PMSI. An example of this is where the bank will go into a registration to protect their security interest over any present and after-acquired property of the customer.
19. A PMSI only covers certain types of security interests, however the effect of it is that if it can be claimed, even though the security interest may be registered later in time, it will have priority over the general non-PMSI interest. There are limited types of security interests that constitute a PMSI. Examples include a PPS lease, goods provided under commercial consignment, conditional sale such as a retention of title arrangement under which goods are sold.

Timing

20. Registration can occur at any time, however if a party wants to make sure that their registration will stand up in an insolvency scenario or if they want to be able to make sure that the registration stands up as a PMSI (if necessary), there are time limits that should be adhered to. In the insolvency scenario, you need to be registered or perfected before the customer goes into bankruptcy.

21. If dealing with a corporate entity, section 588FL of the Corporations Act 2001 (Cth) sets out the important timeframes within which a party would have had to have registered on the register.
22. The rule of thumb is that before you start dealing with the customer, before they have the goods, do the registration. The Act contemplates that if a party has a reasonable belief that a security interest will come into effect, they can do the registration at an earlier point of time. If the negotiations then fall over, it is the party's obligation to remove that interest on the register.
23. The time limits in relation to a PMSI will depend on whether the personal property is intangible or tangible or inventory or non-inventory. For example, for tangible property deemed to be inventory, the registration should have been done before the customer gets any goods. If it is not inventory, there is 15 business days to register.
24. Inventory is usually something that can be sold and be sold quickly. For inventory based security it is necessary to register it before it goes out the door. So long as the documentation is right in an inventory based retention of title security interest, the party will not need to register every supply.

Mistakes with registration

25. Sections 64 and 65 of the Personal Properties Securities Act 2009 (Cth) are specific in relation to the mistakes that can make your registration defective. The other important concept is if the mistake is a 'seriously misleading' mistake. There is no set definition of what is seriously misleading and it must be viewed objectively.
26. The case of Accolade Wines Australia Limited [2016] NSWSC 1023 involved a registration that was done using a corporate grantor's ABN as opposed to an ACN. They were not trustees of trusts and therefore their ABN and ACN were similar, but for the first few numbers. However, a searcher of the register should be entitled to put in the ACN and expect to find that registration based on ACN only. This could therefore, be misleading.
27. Future Revelation Ltd v Medica Radiology & Nuclear Medicine Ltd [2013] NSWSC 1741 was a case where the mistake in the ABN happened in relation to the secured party. It was not fatal in this case as a search of the register is not done by a search of the secured party.

BIOGRAPHY

Rebecca Hegarty

Principal Lawyer, Head of Commercial Advice, Coleman Greig – Parramatta

Rebecca's strong business acumen and comprehensive knowledge of the law and dispute resolution combined with Commercial Mediation qualifications enables her to see the bigger picture when working on an issue for our clients. As a result, she adopts a unique approach – one that is both commercially astute and highly pragmatic – to deliver the best outcome in a variety of situations.

From developing effective commercial policies and procedures, contract negotiations and commercial transactions, through to her particular knowledge of the Personal Property Securities Act (Cth) (PPSA) and expertise in insolvency issues, Rebecca is a trusted advisor to a wide range of Coleman Greig's clients. Whether acting on behalf of subsidiaries of multinationals, large commercial enterprises, SMEs, public companies or government agencies she is regularly called upon to advise directors on their duties, manage mergers and acquisitions, resolve high level commercial disputes, determine business structures and assist in dealing with Director Penalty Notices (DPN) and Creditor's Statutory Demands.

Malcolm Campbell

Principal Lawyer, Coleman Greig – Parramatta

With over 19 years' experience across business, commercial, workplace and estate planning law, Malcolm has successfully represented a diverse and growing list of businesses, associations and organisations and has developed a comprehensive understanding of the challenges faced by those operating within today's commercial landscape. His wide-reaching experience allows Malcolm to quickly develop a strong understanding of his client's needs, get to the core issues and put in place well thought out and effective strategies to help them achieve their objectives in a timely, effective and commercially sound manner. Through his utilisation of a down-to-earth, people-centric approach, Malcolm ensures that his clients receive practical 'real world' guidance and solutions, regardless of the matter at hand. With professional qualifications spanning a range of commercially-relevant areas including economics, law and corporate governance, Malcolm's clients regularly benefit from his eclectic knowledgebase.

REFERENCES

Legislation

Personal Properties and Securities Act 2009 (Cth)

Corporations Act 2001 (Cth)

Cases

Accolade Wines Australia Limited [2016] NSWSC 1023

Future Revelation Ltd v Medica Radiology & Nuclear Medicine Ltd [2013] NSWSC 1741