Introduction to the Personal Property Securities Register

Author:
Ben Sewell of Sewell & Kettle Lawyers
Date:
20 November 2012

Summary of paper

- A practical look at the PPS Registry
- Challenges in complying with the laws and access to the PPSR
- Risks and opportunities created for clients and advisors
- Important timeframes under the PPSR

A practical look at the PPS Registry

1. A big change in law

The Personal Property Security Act 2009 (Cth) (the PPSA) governs the validity, enforceability and priority of security interests in personal property. The PPSA commenced on 30 January 2012.

The first challenge may be educating your clients about the importance of the new law. Clients are often confused by the term ‘personal’ and assume that it relates to consumer and not business transactions.

The common law definition of personal property arises from one of the two classes into which English law divided property (the other being real property). An action for wrongful taking of property other than land was a personal claim for damages while land wrongfully taken could
be recovered by a real action for repossession. Personal property at common law embraces all forms of property other than interests in land such as chattels, choses in action and wills.

The definition in the PPSA of personal property is a negative and expansive definition [1]. The PPSA defines personal property as [all] property (including a licence) other than:

(a) land; or
(b) a right, entitlement or authority that is:

(i) granted by or under a law of the Commonwealth, a State or a Territory; and
(ii) declared by that law not to be personal property for the purposes of the PPSA.

The PPSA provides new rules for the identification, classification, priority and enforcement of personal property security interests. The definition of security interest places emphasis on “the substance” of the interest and not necessarily, the form of the security interest [2]. The
types of property that may become subject to a personal property security interest are widereaching and include four categories:

(a) Tangible property;
(b) Intangible property;
(c) All present and after-acquired property; and
(d) Financial property.

The PPSA provides examples of personal property security interests including: Fixed charges, floating charges, chattel mortgages, conditional sale agreements, hire purchase agreements, pledges, trust receipts and leases of goods [3]. The PPSA also lists a variety of interests that are not security interests subject to the new law including fixtures upon land, interests claimed by pawnbrokers and liens [4].

A Purchase Money Security Interest (PMSI) is a new security interest created by the PPSA that gives the secured party a 'super-priority' over other creditors. It is a security interest taken in collateral to the extent it secures all or part of the purchase price of the collateral [5].

2. The Personal Property Securities Register

The Personal Property Securities Register (PPSR) is a single online register that has replaced over 70 separate registers and it an be directly accessed at the website www.ppsr.gov.au. The replaced registers include the:

- Register of encumbered vehicles (REVs);
- Bills of sale registers; and
- ASIC register of company charges.

The consolidation of the various registers involved the migration of data into the PPSR. One of the major hiccups was the failure to migrate some registrations such as company charges (1.5 million were transferred) and as some company charges were not effectively migrated some secured parties may need to re-register on the PPSR.

The PPSR also presents a radical change from the concept of nemo dat quod non habet, meaning, no one can give what one does not have. In the context of security, this is the assumption that security cannot be given to multiple parties. Commercial practice generally
contradicts this proposition and the PPSR provides a mechanism for prioritising competing security interests in personal property by registration. The most important change, however, is that a registered security interest on the Register will have priority over the unregistered interest even if the unregistered was first in time [6].

Finally, because the PPSR is a public register it will change business processes and it will become a standard search conducted in a variety of business and consumer transactions. It may also increase the transparency of business transactions by providing a noticeboard of security interests registered against a business entity or natural person.

3. Using the PPSR

The PPSR website is straightforward to use and will be accessible to any user. It can be used by either a casual user (credit card) or you can apply for a 30 day account (payment terms).

PPSR searches and registrations are conducted on the same website and clients will be able to do their own registrations or instruct agents to register a security interest on their behalf. The PPSR website is operated by the Insolvency Trustees Services of Australia (ITSA) and ITSA has a call centre taking calls to assist users.

Many businesses have engaged agents to conduct 'mass uploads' rather than enter information on the website directly. These agents aggregate data on security interests and upload this information to the PPSR.

4. Noticeboard approach of the PPSR

Secured parties lodge a financing statement to register on the PPSR but the form of registration does not require full disclosure of a security interest. For some registers that were replaced by the PPSR the lodgement involves providing less information than what was
disclosed to the redundant register (such as the ASIC register of company charges). The 6 Section 55(3) PPSA rationale for the level of disclosure to the PPSR has been described as the "noticeboard" approach.

The information required to be provided by a secured party in a financing statement is:

(a) Details of the grantor (i.e. ACN for an Australian company, ABN for a trust, ARSN for a responsible entity of managed investment scheme or date of birth for an individual);
(b) Details of the secured party;
(c) Address for giving of notices to the secured party;
(d) Description of the collateral subject to the security interest;
(e) Duration of the registration [7].

5. PPSR: What is the registration process?

The process for registration of a security interest on the PPSR is:

(a) A secured party lodges a financing statement (online by secured party or upload through agent);
(b) The data is entered and then the Registrar returns a verification statement by email; and
(c) In addition to a verification statement, a token is sent to the secured party.

From the moment an interest is registered it is recorded on the Register and this means that the registration time of a security interest is precise to the second.

There is an option for a single secured party group so that groups of related users may register under the same account even if they represent separate legal entities. This is another example of substance over form and this makes it easier for corporate groups to comply with the PPSR.

From a practical point of view, law firms will need to consider how to manage the electronic service of documents from the PPSR. Firms are setting up email addresses specifically for the purposes of service and a generic email address can pool emails to ensure that staff churn and large inboxes don't result in notifications being missed. In one of the seminal PPSR cases, the Hastie Group litigation, most of the secured parties did not respond to urgent communications from an administrator and this may have resulted in a number of secured creditors losing their rights to collateral because of the urgency of selling equipment [8]. One approach may be for a law firm to create a generic email for the PPSR, i.e. ppsr@sklawyers.com.au.

There is also a requirement for the secured party to provide notice of the verification statement to the grantor unless that requirement has been waived in the security agreement or the property may be classified as commercial property [9].

For registration certain property may be described by a serial number including:

(a) Aircraft;
(b) Motor vehicles;
(c) Watercraft; and
(d) Intangible property such as a patent.

The PPSR has a low cost of registration because the pricing of registrations is on a costbasis to encourage use of the register. It is $3.70 to conduct a PPSR search and $7.40 for a seven year registration.

Challenges in complying with the laws and access to the PPSR

The seminar is delivered by listing takeaways of challenges, opportunities and timeframes that would be useful to participants of the seminar. These key points are listed below:

Challenge 1 – Explaining to clients why the PPSR is a revolutionary change

Firstly, the definition of a security interest is a now a functional definition that will expand the existing categories of personal property security interests. Secondly, title is 'no longer king' because security interests are perfected by registration and therefore unregistered interests, such as retention of title claims will be second in priority to registered security interests.

Finally, the fact that the PPSR is a public register will change business processes because credit providers will check the register and the increased transparency may reduce false wealth in the economy.

Challenge 2: A PPSR search isn't like a Google search

When checking the PPSR you must use precise spelling and reference details. In other words, there is no 'wildcard' search that you might find in other web search engines. You can conduct a PPSR search by grantor, serial number, unique financing statement reference or point-in-time reference (through the ITSA call centre). As such multiple searches may be necessary to ensure your search doesn't miss any grantor details. If it is a company you should search by ACN and ABN and if it is a natural person you should search by full name and any abbreviated names, e.g. Ben Sewell and Benjamin Sewell.

A person must have an authorised purpose for a search if the search is related to an individual grantor. An authorised purpose for searching will be if a person is considering extending credit or engaging in financial dealings [10]. You may also seek consent to search if
the search doesn't fit a category listed in the PPSA.

Challenge 3: Mastering the new terminology

The PPSA and PPSR have introduced a new terminology for lawyers to learn:

- **Personal Property** – is [all] property that is not land or property listed as an exclusion
- **Security Interest** – is defined in section 12 and is subject to an "in substance" test as opposed to a strict legal category test
- **Grantor** – person who grants the security
- **Secured Party** – a party who holds a security interest in collateral
- **Collateral** – personal property to which a security interest is attached
- **General Security Agreement** – is the new term for fixed and floating charges
- **Attachment** – refers to the successful creation of a security interest in property that can be enforced against that property (e.g. the contract)
- **Perfection** – is the essential step to ensure the security interest is enforceable against third parties and is usually effected by registration
- **PMSI** – is a new category of security interest in collateral that secures the unpaid purchase price

Challenge 4: Working out what isn't a security interest in personal property

Canada Trustco Mortgage Corp v Port O'Call Hotel Inc [11], a Canadian case, developed the following principles to identify a security interest in personal property:

1. A security interest is consensual/contractual;
2. A security interest secures payment or performance of an obligation;
3. A security interest relates to personal property; and
4. A security interest bestows some form of proprietary right.

A security interest for the purposes of the PPSA is "an interest in personal property provided by a transaction, that in substance, secures payment or performance of an obligation (without regard to the form of the transaction or the identity of the person who has title to the property)" [12]. Importantly, this does not define a 'security interest' as an interest in personal property presently recognised by the law. The categories of security interests in personal property are opened up by the PPSA and therefore the test of a security interest is functional and it has been described as an "in substance" test.

Challenge 5: Getting useful information from the PPSR (noticeboard approach)

The PPSR does not require disclosure of all information regarding the security interest or collateral that is registered on the PPSR. The strategy in the PPSR was to create a noticeboard on the internet portal.

The information that you can access through a PPSR search is limited to the following:

(a) Details of grantor and secured party;
(b) Serial number if applicable (e.g. VIN of motor vehicle);
(c) Collateral class and description (may be just "inventory"); and
(d) Term of security; but
(e) No copy of a contract or details of net indebtedness.

The information on the PPSR, if used for due diligence in a business transaction, may produce multiple registrations that will need to be interpreted with business acumen.

Risks and opportunities created for clients and advisors

Opportunity 1: Basic contract advice

The first opportunity under the new PPSR regime for private practice lawyers with SME clients is to offer those clients contract updates. Specifically, clients may need to register their security interests and therefore legal work will include updating business processes and
documentation.

Clients need to be aware that there are registration requirements for retention of title (ROT) claims. Registration of ROT is essential or commercial products supplied on credit will vest in an administrator or liquidator in an insolvency scenario [13].

When dealing with '$2 companies' it is now standard practice to require director's guarantees in contracts such as a credit application. With respect to debt collection, personal guarantees may be secured against directors' personal property and this may be extended through strategic registrations on the PPSR.

You may advise your clients to include representation and warranty provisions in contracts where financing statement information is required to provide some protection in the event the wrong serial number is registered. It may also provide a claim for damages in the event of misleading or inaccurate financing statement information being received.

One approach to take with your clients in providing contract improvement advice is to perform a gap analysis:

(a) What is the current business process and how is it documented?
(b) In what way will PPSR change the business practice?
(c) What gaps exist between what is currently being done and what needs to be done?
(d) What document changes are needed?
(e) What process changes are needed?

Opportunity 2: Financing advice

Under the old regime the financing of business was principally by way of fixed and floating charge. The 'General Security Agreement' is the new financing instrument for banks because the fixed and floating charge terminology was made redundant by the PPSA. A charge may also be taken over specific assets and this is now called a specific security agreement.

Banks are likely going to require SMEs to execute further updated documents in the short term and therefore this is an opportunity for lawyers to advise clients on changes to the law and documentation.

Opportunity 3: A new avenue for due diligence

Financiers are taking an interest in searches and registering PMSIs over inventory in order to trump other creditors. The PPSR has also changed the process of selling a business because PMSIs will need to be examined by a purchaser's solicitor. PPSR searches will also give suppliers the opportunity to evaluate the asset position and debt level of a customer with other suppliers.

Opportunity 4: Strategic registrations

The PPSR may be an opportunity for strategic registrations if an item falls outside the legal category of a fixture. Fixtures are specifically excluded from the PPSR by section 8 of the PPSA but the term 'fixtures' is not defined. In order to recommend a strategic registration, a lawyer may consider:

(a) Is there a personal property item that may not subject to a registered security interest?
(b) Can a contract be formed with the grantor to secure the property (i.e. attachment)?

Opportunity 5: Educating your clients about the need to register retention of title interests

Registration of an interest is required in an insolvency scenario and many SMEs are not aware that registration is required. If there is no registration (i.e. perfection) of the retention of title clause it will be lost in insolvency. This means that the property supplied under ROT arrangements may be used to pay liquidator's fees or priority creditor claims. Under the previous regime, the value would be paid to your client or the goods would be returned without the need to demonstrate a registered interest.

The ideal security under the PPSA to protect an ROT claim is a PMSI as it gives a creditor 'super-priority' over other creditors.

Opportunity 6: Educating clients about ticking "PMSI"

A valid PMSI means your client will have 'super-priority' being an interest in collateral ahead of other secured creditors (i.e. banks and other priority creditors). This will extend to book debts and proceeds arising out of sale of collateral.

However, be warned that if you 'tick' the PMSI box during the registration process and you do not have an agreement to grant a PMSI, you will lose your security [14]. The exception is in the case of fresh receivables finance after the PMSI and it has a priority to perfected PMSIs.

Opportunity 7: Obtaining information about other security interests

The PPSR provides a noticeboard of interests but your clients may be interested in more detailed information. The PPSR ‘noticeboard’ will only give your clients limited information when conducting searches. An “interested person”, however, may request further information from a secured party. Such information may be a copy of the security agreement and details of the debt owed by the grantor. This obligation to provide information to an interested party that may make such a request can be waived by a confidentiality agreement (i.e. term) between a grantor and a secured party.

An “interested person” (for the purposes of requesting further information about a registered security interest) is defined under section 275 of the PPSA as a person with another security interest in the collateral. This limits the right to require information to a scenario where there are multiple claims to collateral.

If you are drafting a contract that provides for personal property security interest you may include a confidentiality clause pursuant to this section to avoid this requirement.

Important timeframes under the PPSR

Key Timeframe 1: Transitional interests

A transitional interest is a security interest created before 30 January 2012 or out of an agreement dating to before 30 January 2012. Generally, transitional interests will be taken to be perfected for a period of 24 months from 30 January 2012 and this represents temporary perfection.

Key timeframe 2: Registering a PMSI

To register inventory it must be before the grantor obtains possession for tangible property or before attachment for intangible property. For non-inventory is must be registered within 15 days of the grantor obtaining possession or attachment.

Key timeframe 3: What constitutes a PPS lease?

A PPS Lease means a lease or bailment of goods. However, a PPS Lease does not include a lease by a lessor who is not regularly engaged in the business of leasing goods [15]. A PPS Lease will have a term of greater than one year or it will be goods described by serial number with a term of greater than 90 days.