

## **ALERT: PERSONAL PROPERTY SECURITIES ACT 2009 - IMPORTANT INFORMATION WHICH WILL SOON AFFECT ALL BUSINESSES IN AUSTRALIA**

### **Introducing the Personal Property Securities Act 2009 – Perfect or Perish**

The *Personal Property Securities Act 2009* (**PPSA**) is expected to be implemented on 1 February 2012. It will affect all moveable property and goods used in business activities and sales.

On that date the electronic noticeboard for the registration of security interests will become active. Approximately a month before that date, all of the security interests registered (charges) over company assets at the Australian Securities and Investment Commission (**ASIC**) and the Register of Encumbered Vehicles (**REVS**) will migrate across to the Personal Property Securities Register (**PPS Register**). The secured parties of those migrated security interests will have a period of 2 years of **temporary perfection**, during which time they can subscribe to the new system. However, during that period a purchaser could acquire secured property free of a security interest, so it would be prudent to move quickly to obtain **perfection** of an existing secured interest.

From the date of the implementation of the PPS Register, banks and financial institutions providing loans to secured Grantors for the purchase of consumer and commercial property (excluding real estate), will register their interests by completing a **financing statement** and registering it on the PPS Register. A financing statement is a document registered on the PPS Register to notify a security interest. The agreement behind the interest is not registered as for example a mortgage over land would be.

Owners and managers (including sole traders) of even the smallest business, would be unwise to think that PPSA reform will not affect them and they ignore its implementation at their risk. Commonly, businesses will have applications for credit with terms and conditions that contain retention of title (**ROT**) clauses. Those clauses provide that, until goods (called **collateral** in the PPSA 2009), have been fully paid for, the supplier retains ownership of the goods. There are special rules under the PPSA 2009 for goods that are mixed with other goods or materials (**commingled**) or goods that are added to other property (**accession**).

In these uncertain financial times unfortunately many businesses go into receivership or voluntary liquidation. In those circumstances, there is often a fight between all of the security holders; banks, financial institutions, lessors and suppliers of goods and materials etc. The supplier has often been at the bottom of the heap as an unsecured creditor. The PPSA 2009 changes all that. The holder of a **perfected** security interest, as an unpaid seller of goods through a ROT clause would be entitled to register a **Purchase Money Security Interest (PMSI)**. PMSI's are given 'super-priority'.

A PMSI can be registered over commercial property. However, a PMSI can only be registered over consumer property intended to be used for personal, domestic or household purposes if the goods have a serial number.

The classification of the different types of property is critical to the use of the PPS Register. Property will be divided into commercial and consumer property, intangible and tangible property. Tangible property includes motor vehicles, aircraft, watercraft, machinery, office furniture, currency, artworks, inventory and stock, goods, crops and livestock (including fish). There are special provisions for tangible property with serial numbers such as motor vehicles, watercraft, aircraft and intellectual property. Financial property is dealt with separately under the PPSA.

The PPS Register is an 'exact' match system, which means that accuracy in the preparation of the financing statements and their registration will be critical. Errors will result in a defective security interest and could result in a loss of priority and loss of the property.

Accuracy of the description of the secured party is vital, as the register is partly (except for property described by serial numbers) indexed by the grantor details. People searching the register may not find security interests if the grantor is described incorrectly or misspelt. For this reason the PPSA 2009 sets out identifier rules to apply when identifying a secured party. This involves taking the information from current driving licences, proof of identity or current proof of age cards, passports and birth certificates for individuals or sole traders and by the ACN or ARBN for companies and by constitutions for bodies corporate. There are also provisions to be followed for the description of partnerships and trusts.

## First Steps

Prior to the PPS Register coming into operation, a business should ensure that it has accurate and up-to-date information on all of its customers. Some long-term customers will have commenced their relationship some time ago and their details may have changed. For example, has a sole trader taken on a partner or incorporated and now has an ACN. Is it now operating through a trust? It is suggested that you include a provision in your security agreement or terms and conditions to cover these issues.

All terms of trade documentation should be reviewed. You may wish to review your documentation.

There are some parts of the PPSA 2009 that you can contract out of, mostly relating to giving notice to the grantor and other secured parties and providing a copy of the **verification statement** to the grantor. The registrar gives the verification statement to the secured party on the registration of a financing statement and the secured party is obliged to provide a copy to the grantor.

Is your organisation able to vary your security agreements unilaterally, or are you required to give notice to the secured party?

Who, in your organisation will be responsible for the completion and registration of the financing statement? Have they sufficient training to complete the financing statement online?

If you believe that the PPSA 2009 will apply to your business and you would like some advice as to the new system or a review of your terms and conditions:

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