

## Legal title is no longer enough!

The Personal Property Securities Legislation came into effect in January 2012 but there is still much confusion amongst business owners as to what it means and what they need to do.

### What is the Act?

The Personal Property Securities Act (PPSA) provides legislation as to how security interests will be dealt with across Australia.

The Personal Property Securities Register (PPSR) is a national online register on which all security interests in personal property can be registered. It replaces the old Commonwealth, State and Territory laws for personal property security.

### What is Personal Property?

Personal Property includes all property other than land and fixtures such as:

- Tangible assets such as goods, crops and livestock, motor vehicles, paintings, machinery, shares and debtors
- Intangible assets such as licenses, intellectual property, contractual rights and trademarks

Land, water rights, gaming rights and certain liens are excluded.

### Use of the PPSR

The PPSR allows consumers and businesses to conduct online searches to determine if there is a security interest against personal property.

If businesses fail to register their interest they may lose title to their asset in an insolvency event.

The PPSR has rendered 'title' to personal property irrelevant when dealing with security interests under the PPSA. Parties will not be able to rely on the argument 'but I own those goods'.

### What is a security interest?

This is any interest in personal property created by a transaction that secures payment or performance of an obligation.

These include: interests created by **leases; hire purchase agreements; retention of title agreements.**

### Enforcing a Security Interest

For a security interest to be enforceable there must be attachment. This occurs if the grantor has rights to personal property and accepts money or does some other act that creates a security interest.

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## Perfection

Perfection creates a priority interest for a secured party enforceable against a third party. Perfection of a security interest gives it priority over unperfected security interests in the collateral. A security interest may be perfected by registration of a financing statement, possession, or control.

## How priority works

Generally when someone like a bank enters into a loan agreement you will sign an agreement granting them a security interest over present and future property. The bank would then perfect this interest by registering it on the PPSR.

Other parties may also register their interest over the same personal property. In the case of liquidation priority rules are used to decide who gets what.

## Priority Rules

Perfected security interests have priority over unperfected security interests

Where there are two perfected security interests, the first perfected interest has priority

Where there are two unperfected security interests, the first security interest to have 'attached' to the personal property will have priority

## Purchase Money Security Interest (PMSI)

A PMSI has the highest priority (when perfected) over all the interests in the same personal property. A PMSI is obtained through assistance provided by the secured party to the grantor to enable the purchase or acquisition of rights in personal property.

This interest is available to lenders that provide funds to purchase an asset, or a similar arrangement such as leasing goods.

## Does the Legislation affect you?

Do you:

- Sell goods on credit
- Provide credit facilities in any form, including to related parties
- Make loans or advances of funds to anyone including related parties
- Have goods or assets located at other people's premises
- Rent, lease or hire goods or assets to others, including to related parties
- Supply goods on retention of title terms
- Supply goods on consignment and where these goods are stored elsewhere
- Grant licenses to other parties to use any of your products, trademarks or intellectual property
- Plan to enter into and pay a deposit for a conditional sale or purchase contract



- Intend to take security over certain assets
- Have guarantors with charging clauses in your favour
- Have assets or funds held on trust by other parties

If you answered yes to any of the above then the PPSA legislation probably applies to you.

### Issues to consider

- How should your goods be described?
- What are the risks of not registering?
- Is adopting security under the PPSA of commercial benefit?
- Can you obtain a written agreement? A written security arrangement will be the best means of meeting the criteria for perfecting a security interest!
- Will your security have priority over others with security?

### If you decide to register

1. Obtain consent from the debtor (or other party) in possession of the goods or assets to register your security interest.
2. Access the PPSR website to register a financing statement or amend security interest records as required at [www.ppsr.gov.au](http://www.ppsr.gov.au)
3. Implement systems to ensure that security interests are reviewed regularly and updated as required.

### What you should do

1. Register your interest within the specified timeframes. For stock, this is when the grantor receives possession of the items, for other assets it's within 15 business days. Note: If there is a General Security Interest (GSI) over the property then there is no point in registering your interest after the deadline as the chargor's interest will have been deemed to have been perfected.
2. If you have a PMSI priority, ensure you register this to ensure maximum entitlement. If you do not have a PMSI interest do not register your interest as one as this will render your registration as ineffective.
3. Review any old agreements such as sale and leaseback arrangements. These no longer have a PMSI priority and registering one as such will render your registration as invalid.
4. When entering your security interests you must accurately describe your collateral. Failure to do so, even if it is a genuine error, will render your registration ineffective. A few seconds to double check your registration could make a huge difference!
5. If unsure seek legal advice on your particular circumstances
6. Regularly check the PPSR to ensure the information lodged is correct, if it isn't request for any errors to be corrected.

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7. Spend some time putting in place systems and training your staff on how to correctly register your security interests.
8. Review with your accountant any asset protection measures that you may have in place.
9. Review any existing trade agreements to ensure you have the right or ability to lodge a security interest to cover retention of title.
10. A perfected security interest is stronger than an unperfected one, so if in doubt about registering your interest it may be better to err on the side of caution and register.

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### Case Study

*Graham and Gibson v Portacom New Zealand Ltd [2004] 2 NZLR 528* highlights the serious consequences for businesses who fail to shift to the new PPS law.

In this case, Portacom leased portable buildings to NDG Pine Ltd under the standard terms and conditions of hire. Portacom did not register the lease on the PPS Register.

NDG granted a debenture to HSBC in 2002 which covered NDG Pine's property generally. The debenture was registered on the PPS Register in May 2002. In June 2003, NDG went into receivership.

The court held that the HSBC's registered security interest had a priority over Portacom's, thus giving the Receivers the right to sell the property notwithstanding Portacom's retention of ownership.

*Original source – Critical Point (August 2011)*

### Glossary of key terms

**Grantor:** The party who gave or granted the security interest. This applies to a borrower or a customer who receives goods that are subject to a retention of title.

**Secured Party:** The party that holds the security interest, such as a financier or a supplier who holds a retention of title over property.

**Security Agreement:** An agreement in writing by which a security interest is created, arises or is provided for.

**Security Interest:** Interest in personal property that secures the payment or performance of an obligation.

For further information

<http://www.ppsr.gov.au/Help>

Or contact our office on 5382 3001.

