

PPSA Implementation Guide for SMEs

The Federal Government has recently introduced a new Act (The Personal Property Securities Act 2009 (Cth) (“PPSA”) that affects the way businesses can now protect their property in the event of the default, bankruptcy or liquidation of one of their customers. The new laws particularly impact businesses that sell, lease or hire goods or equipment to their customers.

One of the problems of the PPSA is that it involves many new legal concepts and meanings that change the way businesses must now conduct themselves. The laws are complex and difficult to read and understand. We hope that this guide will help SMEs and their advisers to identify some of the more important issues that they should address as they begin the task of implementing effective PPSA arrangements into their businesses.

We have provided a brief explanation of the legal issues behind each of the 20 tips that we have suggested. We have particularly focused on providing information about practical issues such as how to complete a financing statement, timing issues under the PPSA and the need to bring trading and hire terms up to date. We have also dealt with a range of management issues such as the need to establish PPSA policies and procedures and the need to prepare appropriate reports if the PPSA arrangements are to operate effectively.

Please note, however, that the information contained in this guide is of a general nature. Each business is different and clients are encouraged to seek advice on how the PPSA should be applied to their own particular circumstances.

No	Tip	Explanation
1	Review whether your business deals with “personal property” as it is now defined in the PPSA. If it does, you may need to register your “security interests” in such property on the PPS Register.	<p>Under the PPSA personal property includes all property other than land and fixtures. It covers tangible property such as:</p> <ul style="list-style-type: none"> • Plant and equipment. • Inventory. • Motor vehicles. • Crops & livestock & farm equipment. <p>It also covers intangible property such as:</p> <ul style="list-style-type: none"> • Bank deposits. • Shares. • Book debts. • Contractual rights. <p>You will then need to determine if you hold “security interests” in personal property that involve transactions that in substance secure payment or performance of an obligation. Examples of such transactions include:</p> <ul style="list-style-type: none"> • Fixed and floating charges. • Chattel mortgages. • Conditional sale agreements. • Hire purchase & lease arrangements.

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		<p>The PPSA also covers transactions that were not previously thought of as involving security interests such as:</p> <ul style="list-style-type: none"> • Goods supplied on a retention of title basis. • Consignment arrangements. • Goods & equipment leased, hired or bailed under a PPS Lease - ie. a lease for a term of more than one year or for an indefinite period or in the case of serial numbered goods a lease for a period of more than 90 days. • Some IP rights including designs, trade marks & patents • Arrangements involving the transfer of accounts/ book debts/assignment of receivables.
2	Decide if you need to register all or some of your security interests.	<p>Not all security interests need to be registered. There are many issues that you should consider before deciding whether to register a particular security interest including:</p> <ul style="list-style-type: none"> • Is it one that fits within the definition of a “<i>security interest</i>”? eg. if goods are only sold on a cash basis or hired for say less than 1 year, you will not need to register the interest. • Whether it is likely that the asset will still be there or will be recoverable if the customer defaults. If not, there will be no need to register. • The amounts involved eg. if the transaction involves a relatively small amount, it may not be worth registering. • The bad debt experience. If it is particularly low, it may not be worth registering. • The historical default experience in a particular market sector or geographic area. If it is historically low, you may not bother registering. • The size & nature of the customer- eg. there may not be a high risk of default in some customers (such as a Government department or a “<i>blue chip</i>” company) that will make registration necessary.
3	Simplify the process of registering your security interests on the PPS Register by developing pro forma financing statements.	<p>Your security interests must be registered correctly to be enforceable against your customer or their liquidator or other third parties.</p> <p>By developing a pro forma financing statement where only the grantor (the Customer) details are different, you will lesson the chance that an error being made when you register your interest. You will also reduce the time that it takes to complete your financing statement.</p> <p>Eg of a pro forma financing statement: Where goods are supplied on a ROT basis, or goods or equipment is hired leased under a PPS lease, the financing statement may include the following information:</p> <ul style="list-style-type: none"> • Commercial property- less than 25 years end time. • Not transitional • Collateral class: “<i>other goods</i>”. • Collateral description: “<i>any goods supplied from time to time by the secured party to the grantor</i>”. • Duration of registration: 7 years. • PMSI: tick “<i>yes</i>”. • Inventory: In most situations tick “<i>yes</i>”. • Subject to control: In most situations: tick “<i>no</i>”. • Registration subordinate to other registrations: In most situations: tick “<i>no</i>”

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		<ul style="list-style-type: none"> • Proceeds to be claimed: Select: <i>“All present and after acquired property”</i>. • Notice identifier: Include your customer reference no.
4	In the <i>“Collateral Details”</i> section of your financing statement you must specify the correct collateral class.	In most situations where you are supplying goods on a ROT basis or hiring plant and equipment under a PPS lease, you may wish to select the class <i>“other goods”</i> .
5	In the <i>“Description of Collateral”</i> section of your financing statement you must clearly describe your collateral (ie the goods or equipment that you supply to your customers.)	<p>You may consider choosing the collateral description set out in no.3 above when goods or equipment are supplied on a ROT basis or under a PPS lease.</p> <p>However, you may wish to be more specific in the description of your collateral to avoid any uncertainty as to what goods or equipment are the subject to your security interest. This may avoid the possibility that an amendment demand may be made against you by the grantor or becoming involved in a dispute with a liquidator of your customer over precisely what goods or equipment form part of your security.</p> <p>Example of a more detailed collateral description for a hirer of plant & equipment:</p> <p><i>“All plant and equipment, machinery, and vehicles including but not limited to trucks, excavators, dozers, backhoes & loaders and any other goods (whether present or future) that are hired from time to time by the secured party to the grantor.”</i></p> <p>The PPS Register allows you to use up to 500 words when describing the collateral that is the subject of your security interest. If you wish, you can also include up to 5 attachments (including photos).</p>
6	Where possible, you should claim a <i>“PMSI”</i> when you complete your financing statement and you must make sure that you do so in time and that you comply with the other <i>“PMSI rules”</i> .	<p>A <i>“PMSI”</i> is a purchase money security interest. It is taken to secure payment of all or part of the purchase price. Eg. it can be claimed by a seller to secure the customer’s obligation to pay the purchase price under a ROT arrangement or by a lessor to pay lease obligations under a PPS lease.</p> <p>It provides a <i>“super priority”</i> over other security interests in the same collateral. It will enable a supplier of goods to defeat the claims of a bank who may hold a registered charge (now called a General Security Agreement or GSA) over a customer’s assets- even if that charge was registered first in time.</p> <p>A PMSI claimed over a particular item supplied will only secure payment of the price of that item. It will not secure payment of other goods that may have been supplied but have not been paid for.</p> <p>Therefore, a supplier may wish to consider registering both a PMSI against particular goods supplied and a non -PMSI to secure payment for other unpaid goods.</p> <p>There are also some important rules regarding PMSIs that must be observed such as:</p> <ul style="list-style-type: none"> • If a PMSI is claimed at a time when one does not exist, the financing statement will not be effective. • In the case of inventory (ie goods that are used or leased by the customer in the ordinary course of their business) to have PMSI priority the financing statement needs to be registered before the customer obtains possession of the goods.

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		<ul style="list-style-type: none"> To be effective, to claim a PMSI priority the financing statement must be registered within 15 business days of the earlier of possession or attachment (usually when the customer acknowledges the security interest by signing some letter/agreement or accepting the arrangement in some way- eg by an email or by noting "I agree" after receiving the trading/hire terms.
7	<p>You should consider whether you hold enforceable "transitional security interests" and, if so, whether you should register it.</p>	<p>A "transitional security interest" (TSI) is one where a security agreement (eg. a ROT arrangement or some lease arrangements) existed before 30 January 2012. It "continues in force" for 2 years. Priority commences from 30 January 2012.</p> <p>You can register your TSI (assuming you can prove your customer's acceptance of such interest) without paying a registration fee.</p> <p>However, you need to "perfect" your TSI (normally by registering on the PPS Register) as a regular security interest before 30 January 2014.</p> <p>Because of the possibility of changes in your customer terms after the date on which your TSI was created, and because of potential arguments that any transactions after 31 January 2012 constitute "new contracts" (and therefore should be registered), it is recommended that you register all of your security interests as non TSIs as soon as possible (don't wait until 30 January 2014).</p>
8	<p>You should check whether you are dealing in serial numbered goods as you must describe your property by those numbers in your financing statement.</p>	<p>When the property that is involved is "serial numbered property" as defined in the PPSA, the relevant numbers must be used in the description section of your financing statement.</p> <p>For the purposes of the PPSA serial numbered property includes motor vehicles, watercraft, aircraft and some IP rights. It does not include other property that carry serial numbers such a TVs, white goods & power tools.</p> <p>Property will be considered "a motor vehicle" if it develops more that 10 km/h or has a total power of more than 200 watts and has either a vehicle ID no., a chassis no. or a manufacturer's no. Equipment such as ride on lawn mowers and golf baggies fit within this description. Failure to register by serial number enables the buyer or hirer to sell or lease the goods free of your security interest.</p>
9	<p>You need to ensure that you accurately capture your customers' details.</p>	<p>To register your security interest on the PPS Register you need to correctly identify your customer in your financing statement. If you don't correctly describe your customer, your registration will not be effective. The following rules apply:</p> <ul style="list-style-type: none"> For companies- you must include its ACN. For trusts or partnerships- you must include its ABN. For foreign companies- you must use its ARBN. For individuals - you should start by using their driver's licence. <p>You also need to ensure that you spell your customers' trading name correctly and that you properly record their addresses.</p> <p>If you are not sure about the precise status of your customer from your existing records, you can</p>

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		undertake an ASIC search, request your customer to provide a warranty as to the information they have provided to you or you can ask them to provide a letter from their accountant to confirm the details.
10	You need to be able to monitor any changes in your customers' data after you have registered your security interest and you need to ensure that any changes are immediately noted on the PPS Register.	If you become aware of new information about your customer after you register your financing statement (eg their business trading name changes or their business is sold or restructured) you have 5 business days only to lodge a financing change statement. If you do not do so, you may lose priority to another secured party who has registered their interest before you.
11	You need to review your current customer documents to ensure that they are up to-date and contain clauses that properly protect you under the PPSA, the Australian Consumer Law and the Privacy Act.	<p>Many customer documents (such as trading and/or hire terms, credit application forms and guarantees) were drawn prior to the commencement of the PPSA and the recent changes introduced by the Australian Consumer Law and the Privacy Act.</p> <p>It is therefore desirable to review your current customer documents to ensure that they contain the latest clauses that will enable you to register and enforce your security interests and that you fully protect your business and limit your potential liability as far as the law allows.</p> <p>You should also take the opportunity to avail yourself of the right to exclude or impose certain obligations that are contained in the PPSA. Some of the matters you may wish to consider include:</p> <ul style="list-style-type: none"> • Your right to exclude the obligation to give certain notices to other parties when you take enforcement action. • Your right to exclude the obligation to give verification statements to your customers after your security interest has been registered. • Your right to impose certain confidentiality obligations on your customers and arrange your security agreements to exclude to certain commercially sensitive information such as those relating to pricing, margins and technical data.
12	You should take steps to ensure that your customers acknowledge the existence of your security interest and security agreement (that you can construct as part of your Trading Terms and Hire Terms). You should also take steps to put in place systems that will enable you to be able to quickly retrieve such consents when needed.	<p>There are a number of ways under the PPSA for a customer to indicate their acceptance of your security interest and security agreement under the PPSA - these include:</p> <ul style="list-style-type: none"> • By signing a document (such as a credit application form that refers to the Trading Terms/Hire Terms) that refer to your security interest and your security agreement. • By adopting or accepting them in some way- this may be by email, by fax or even electronically by noting "<i>I agree</i>". • By signing invoices or consignment notes that incorporate the necessary terms before they take possession of the goods. <p>There are legal and relationship reasons to have your customers acknowledge your security interests and to be transparent about your intention to register.</p> <p>Firstly, the PPSA requires you to do so. If you register your security interest without obtaining your customers' consent in one of the above ways and without having reasonable grounds for believing you have a security agreement in place with your customer,</p>

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		<p>you will be committing an offence under the PPSA.</p> <p>Secondly, you will run the risk of alienating your customers if they become aware of your registration without first informing them.</p> <p>It is important that the person who consents to the arrangements have ostensible authority to bind your customer (such as a Director or a secretary of the company). If they do not have the requisite authority, you may not be able to enforce your security interest when you need to.</p> <p>It is also suggested that the original document that contains your customer's consent to your security agreement be retained on file and scanned so that it can be easily retrieved electronically when required.</p>
13	<p>You should ensure that you register your security interests within the time limits specified in the PPSA.</p>	<p>You must register your security interest within 20 business days of making a security agreement or you will be at risk to an insolvency of your customer that occurs within 6 months of the registration.</p> <p>It is therefore important to complete and lodge your financing statement on the PPS Register as soon as possible after your customer provides their consent to your security agreement in one of the ways indicated above.</p> <p>(As indicated in point 6 above, different timing rules apply if you want to claim a PMSI).</p>
14	<p>You can alter the priority given to different security interests under the PPSA.</p>	<p>Parties can make a priority agreement between themselves that vary the statutory priorities for registrations that are set out in the PPSA.</p> <p>If the deal is important enough, a critical supplier to a business can negotiate with other secured parties (such as the business' bank) for priority eg. for a first charge over everything it supplies to that business to enable it to rank ahead of the GSA that the bank holds over the assets of the business.</p> <p>Accordingly, suppliers who want to seek such priority from their more important customers may consider putting in place a priority agreement with such customers.</p>
15	<p>Before putting in place a security agreement, you should check that you are not breaching any facility agreement or negative pledge that you have given to your bankers.</p>	<p>Under the terms of some financing facilities you may be required to obtain your bank's consent to the creation of some security interests or you may have given a negative pledge that will prevent you from entering into some other security arrangement relating to your assets. Accordingly, you should check the terms of your loan facilities and, where necessary, you may need to obtain a letter from your bank consenting to the proposed new security arrangements.</p> <p>Eg. You may now need to obtain your banker's consent to some transactions that you take in the usual course of your business such as hiring or leasing equipment or the factoring of your accounts. By not obtaining a letter of consent to such arrangements, you may technically be breaching the terms of your bank facility and thereby provide your bank with the opportunity to either cancel your facility or to impose a penalty on you.</p>

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16	<p>You should take steps to protect the core assets of your business by properly documenting and registering any inter-company security arrangements that exist in your business.</p>	<p>It is important to try and protect the core assets of your business as far as possible in order to give you some financial protection in the event of the default or insolvency of one of the companies in your group.</p> <p>Accordingly, if property is owned by one company and is leased or licensed to another one in your group or if there are loans between related entities or family or friends, you should ensure that these arrangements are properly documented and the parties' various rights and obligations are made clear. You should also ensure that the secured interests that are created are registered on the PPS Register.</p> <p>Before undertaking the above, you should obtain accounting and tax advice on the proposed arrangements and you should ensure that your financial records and dealings properly reflect the agreed arrangements. It may also be necessary to obtain your bank's written agreement to the proposed arrangements.</p>
17	<p>You should put in place policies and procedures to help you maintain and control your PPSA dealings.</p>	<p>To help you manage and control your PPSA dealings you will need to put in place many new policies and procedures. Some of the more important ones include:</p> <ul style="list-style-type: none"> • The retrieval of all PPSA related documents (such as credit app, trading terms, hire agreements) when required. • The management of access codes, token codes, and customer ID numbers on the PPS Register. • The accurate inputting of customer data when lodging financing statements. • The updating of customer records in the event of any change in key customer data. • The compliance with the various timing requirements specified in the PPSA. • The review of registrations when they are due to expire. • The discharge of expired/lapsed registrations. • The management of any communications that occur about security agreements or registrations. eg relating to the release of property or the variation of the terms of a security agreement. • The procedures that are to apply on the default or liquidation of one of your customers including the timely response to any correspondence from any administrator or liquidator. • The conduct of searches of the PPS Register. • The training of staff to make entries on the PPS Register and to manage on-going PPSA issues and disputes.
18	<p>You should develop systems that link your PPSA dealings with your customer relationship management (CRM) system and/or your accounting records and enable quick and accurate responses to enquiries.</p>	<p>You should not view your PPSA arrangements as a separate part of your business but as a part of your customer relationship system and as part of your company's overall financial and accounting arrangements.</p> <p>Accordingly, you need to integrate the PPSA arrangements you make with your customers with the other parts of your business. You should therefore review your current business systems to determine what computer and accounting changes need to be made.</p> <p>Your systems should be able to respond rapidly to enquiries made both internally from your managers and employees as well as from your customers, third</p>

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		<p>parties that have a legitimate interest in the security interests that you have registered as well as from insolvency practitioners.</p> <p>Failure to be able to respond quickly and clearly to requests for information on your security interests may result in the loss of your security interest. (as occurred in the recent Hasitie Group Ltd case).</p>
19	<p>You will need to be able to provide reports on your PPSA dealings for internal management purposes.t</p>	<p>To help you to effectively manage your business and your PPSA dealings you will need to put in place appropriate management reports. These reports should include:</p> <ul style="list-style-type: none"> • Details of registrations made in a particular period. • Details of any pending registrations. • Details of pending expiry/renewal dates. • Details of registrations removed. • Details of registrations by client or by group of clients. • Details of customers (and perhaps their debtor balances) against who financing statements have been lodged compared to customers that are not the subject of financing statements.
20	<p>You may need to be able to provide reports on your PPSA dealings to your bankers.</p>	<p>In order to protect their investment and to ensure that their credit risks are being minimized as much as possible, your bankers may require you to provide them with information on your PPSA registrations. These reports will help them to ascertain if you are securing your assets as well as you can.</p> <p>Examples of the type of reports that your bankers may request include:</p> <ul style="list-style-type: none"> • A report checking on whether you have registered your security interests in the correct name. It would identify the names and ACNs/ABNs of entities financed by your bank compared to the name and ACNs/ABNs that have been used when you register your security interests. • A report comparing advances made for the purchase of specific equipment against registrations made in relation to that equipment. This may be particularly relevant where the goods or equipment are subsequently supplied on a ROT basis or leased to a customer on a PPS Lease. The bank may wish to ensure that you have properly protected your security interest in such equipment after you have sold or leased it. • A report confirming that you had registered your interests in a timely manner. It would compare the dates of registrations as against the dates on which possession of goods or equipment were granted to your customers. If the registrations had not been made within the time limits specified in the PPSA, the registrations would be ineffective. • A report confirming that you have properly described the goods when you register them. This report would compare the description/serial number of the goods financed against those that were subsequently registered.

NOTE:

This guide has been prepared Philip Sheezel of PS Law (www.pslaw.com.au).

For further information any of the matters raised in this guide or for advice on any issues relating to the PPSA, contact Philip on 0412578240 or email him at: **philip@pslaw.com.au**.

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