

# Why businesses need to urgently start registering their security interests

24 September 2013

*The Personal Property Securities Act 2009 (Cth) (PPSA) has changed the landscape of how businesses should go about protecting some of their key assets. In particular, it has provided businesses with a way to improve their chances of recovering the stock and equipment that they have supplied, hired or consigned to their customers who subsequently become insolvent or who are forced into liquidation or administration.*

Here are some of the reasons why businesses should immediately start registering their security interests in their personal assets on the PPS Register:

## 1. To gain priority ahead of unregistered parties

A recent landmark NSW Supreme Court case<sup>1</sup> has confirmed that even if you are the “owner” of the property, if you have not registered your interest you will lose out to a party who holds a registered security interest in that property. In that case, the financiers of some Caterpillar equipment who had registered their security interest in the equipment they had financed was held to have priority ahead of the unregistered interests of the owners of the equipment who had entered a PPSA lease to another party.

## 2. To defeat third party purchasers

Under the PPSA a person in possession of property who does not “own” it (eg a lessee under a PPS Lease or a purchaser of a motor vehicle under a finance arrangement) is treated as a grantor of a security interest. If the security interest is not registered that person in possession can pass ownership to property to a third party free of that security interest, and thereby defeat the rights of the “owner”. Accordingly, it is absolutely imperative for the owner to “perfect” their interest in their goods by registering their interest on the PPS Register before they part with possession of their property. If they do not do so, they will lose their property if the person who is in possession of it disposes of it.<sup>2</sup>

## 3. To gain better recovery rights

The PPSA provides owners of goods a number of remedies that were not previously available to them. For example, they can trace the proceeds of the sale of their goods even where the funds have become mixed with other funds in the customer’s bank account. Owners can also maintain their security interest in products that they have supplied to their customers even where these products have been co-mingled, mixed or process with other goods. The PPSA, therefore, now provides owners of property greater recovery rights than they previously enjoyed. However, to enjoy those rights, they must have registered their security interests on the PPS Register.

## 4. The PPSA transitional arrangements are coming to an end

Many businesses have worked on the assumption that they were protected under the transitional security arrangements that were introduced under the PPSA. These transitional arrangements covered goods and equipment supplied or leased before 30 January 2012.

On the 30 January 2014 these temporary protection arrangements will come to an end. Owners will no longer be able to claim protection under the transitional arrangement rules and all security interests (whenever they were created) will need to be registered. If they are not, owners will not be protected. Owners therefore have only 4 months left to get all of their security interests registered on the PPS Register.

1. Maiden Civil (P & E) Pty Ltd (2013) NSWSC 852

2. They may still lose their property even if it is registered if:

a) the property was serial numbers property and was not registered by serial number and  
b) was sold by their customer to a purchaser in the ordinary course of the customer’s business.

## 5. Your Bank may soon require you to do so

There is increasing anecdotal evidence that the major Banks are now requiring many of their customers to become PPSA compliant as a condition of establishing or renewing their bank facilities. Accordingly, in addition to requiring customers to provide a General Security Agreement (GSA) (equivalent to the old Mortgage Debenture or fixed and floating charge) to secure their lending, many Banks are now requiring their customers to also register their security interests over the goods and equipment that they supply to their customers. The Banks see this as a means of better protecting their funding to their customers. If the Bank's customer's assets are better protected, the Bank's financial risk is also reduced.

We are also hearing an increasing number of cases where Banks are including as part of their loan facility arrangements, the requirement that their customers provide them with regular PPSR reports. Some of the details that are being required include:

- Details of registrations made in a particular period,
- Details of registrations made over specified collateral that has been funded by the Bank,
- Details of the dates registrations made as compared to dates when possession of the collateral was provided to the customer's customer and
- Details of all expiration and renewal dates of all registrations that have been made.

In some cases we also understand that the Banks have indicated that different lending rates will apply depending on whether their customer has implemented PPSR arrangements or not.

## 6. Commercial Considerations

The registration of security interests provides businesses with a relatively low cost means to reduce their financial risks and to increase the chances of recovering their assets in the event of a customer's bankruptcy or liquidation.

Another direct benefit registration provides is that it forces businesses to review their existing customer documentation such as their trading and hire terms, their credit application forms and their personal guarantees. Up to date customer documents play an important part in helping to better protect a businesses from the many legal risks that they face on a daily basis. They also improve their enforcement rights from defaulting customers and will also help to better protect them from any legal claims that may be made against them.

Becoming PPSA compliant will also require businesses to implement new policies and procedures and reporting protocols with respect to the goods and equipment that they supply or hire to their customers. This will result in the better control and management of their key business assets- again reducing their financial risks of doing business.

## Conclusion

Registration of security interests is now accepted widely as part of best practice management. It provides an opportunity for businesses to better protect themselves in these difficult financial times and provides owners with some very useful risk management strategies at a relatively low cost.



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Dated: 24 September 2013

Philip has over 40 years experience in commercial law advising some of Australia's leading companies.

If you think that the assets of your business may be at risk, call Philip today on 0412 578 240 for a no obligation appraisal.

## NOTE:

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