

# PPSA WHERE ARE WE AND SUCCESS STORIES (AND TALES OF CAUTION)

GTA ADVISORY & COMPLIANCE WORKSHOP  
PROGRAM

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- PPSA - Brief recap
- Where are we 4.5 years on?
- Recurring issues and things to look out for
- Success stories (and tales of caution)

- Commenced 2012
- Legislation that regulates taking of security over personal property modelled on similar regimes in US, Canada and NZ
- Rationale:
  - Reduce complexity by replacing numerous Commonwealth and State laws and registers dealing with security interests in personal property (i.e company charges, crop liens, motor vehicle securities) with one law and one register
  - Set up one stop shop for priority and enforcement rules in relation to personal property



- **Who is affected by the PPSA?**

*"Every business that supplies goods (by sale or lease) or finance needs to consider the impact of the PPSA upon its operations.*

*Businesses that ignore the PPSA face a real risk of suffering significant losses in the future in ways that have not occurred in the past. Conversely, businesses that make the necessary adjustments to their documentation and business processes will enjoy significantly new protection from bad debts that simply has not existed in the past."*



**Legal Practitioners' Liability Committee, PPSA Bulletin No.2 20 March 2012**

- Regulates ‘**security interests**’ in ‘**personal property**’
- **Personal property** = most property other than land
- **Security Interest (section 12 PPSA)**
  - *Interest in personal property that, in substance, secures payment or performance of an obligation (without regard to the form of the transaction or identity of the person who has title in the property). Includes:*
    - Charge over assets
    - Retention of title
  - *PPSA also **deems** certain arrangements to be ‘security interests’ even if they don’t secure payment or performance of an obligation*
    - Beware the ‘PPS Lease’
- PPSA sets out regime for determining priority of competing security interests

- **Implications of having a security interest:**
  - Allows holder to take enforcement action against secured assets
  - Under PPSA if you have a security interest you must 'perfect' it
  - If you have a security interest and you fail to perfect it:
    - You may lose a priority battle with other security holders who do register;
    - If your counterparty becomes insolvent you will lose your security interest
- **Major development:** No longer enough to retaining an interest in goods through contractual terms –you must 'perfect'
- **Perfection by Registration:** Lodge a "financing statement" on the PPS Register – don't have to lodge actual "security agreement"
- Inexpensive/quick once you know what you are doing



# Where are we? What's happened?

- Extensive review “Whittaker Report” presented to Parliament in March 2015
- 530 pages, 171 submissions, 394 recommendations
- Conclusion  PPSA works as it was designed to BUT  –
  - Recognised the need to increase awareness of PPSA and the PPS Register in the SME sector
  - Criticised the complexity of the registration process
  - Recommended legislative amendments to refine certain concepts
- Limited response from government to date
- Published useful plain English PPSA guide for SME sector “Are You in Business”

# Where are we? What's happened?

- PPSA has impacted industry significantly including grain industry
- Majority of stakeholders have adjusted:
  - Updated contractual terms to respond to PPSA issues
  - Registering security interests on PPS Register
  - Implemented internal compliance systems
- Some remain ambivalent/confused and query the need to adopt new practices



- Approximately 70 Court cases have considered PPSA related matters
- PPSA is working as intended
- Hear about failures not success stories
- Recurring issues for stakeholders in the grain industry:
  - Grain sale contracts – retention of title
  - Grain storage agreements – can they be they PPS Leases?
  - The importance of meeting registration time limits
  - The importance of making accurate registrations

- PPSA is only relevant to sale contracts where selling on deferred payment terms
- Where selling on deferred payment terms a prudent seller will typically include a retention of title (ROT) clause in its sale contract
- Very good EG - GTA No. 2 Track Contract
  - *Risk in any goods supplied by the Seller to the Buyer shall pass to the Buyer when they leave the possession of the Seller however title shall not pass until payment in full has been received by the Seller. Until full payment is received the Buyer ...holds the goods as bailee only... and the Buyer holds the proceeds of any on-sale of the goods as trustee for and on behalf of the Seller....*
- Selling on ROT gives rise to a security interest under PPSA

- If fail to register ROT security interest and customer becomes insolvent security interest will be lost and cannot claim back goods
- Upon registering ROT security interest a PMSI will arise – security interest having ‘super priority’
- Principles being upheld by liquidators and Courts

- *Steel Tigers Pty Ltd Re [2014] NSWSC 1748*

- Steel Tigers sold vehicles on ROT terms.
- Steel Tigers perfected its PMSI by registration on PPS Register
- Customer failed to pay and went into liquidation
- Steel Tigers obtained order from Court for seizure of vehicles from customer



- *Central Cleaning Supplies (Aust) Pty Ltd v Elkerton [2014] VSC 61*

- *CCS supplied cleaning products to a customer on ROT terms.*
- *CCS failed to register its PMSI on the PPS Register*
- *Customer failed to pay and went into liquidation*
- *Court confirmed security interest did not survive - liquidator could retain goods*



- **Practical Tips**
- To achieve best position when selling goods on a deferred payment basis:
  - Always do so on ROT terms (see GTA example)
  - Make sure ROT arrangements are properly documented
  - Register security interest on PPS Register within time limit (prior to supplying goods) noting it is only necessary to register once in relation to each customer



## ■ **BUT BE AWARE**

- Registration does not provide bullet proof protection
- If a defaulting customer on-sells grain it will be virtually impossible for ROT seller to get back grain
- Seller can claim 'proceeds' of on-sale still held by defaulting customer
- Proceeds claim can be defeated where a bank is involved (bank will have superior claim to cash held in an account of defaulting customer it controls)
- Not always about obtaining bullet proof protection but best possible security position having regard to the priority rules

## ■ **What is a PPS Lease?**

- Lease or bailment of goods for a term of more than one year or for an indefinite period = PPS Lease
- Interest of lessor/bailor under a PPS Lease is a *deemed* security interest
- Failure to register means if holder of goods becomes insolvent the security interest will be lost and lessor/bailor cannot claim back goods
- If register will have a PMSI (which gives lessor/bailor 'super' priority)

## ■ **Who is affected?**

- Potentially anyone who loans or provides their own goods to third parties – including grain traders who store grain with bulk handlers

## ■ **Exceptions to PPS Lease**

- Certain arrangements are not caught i.e where:
  1. goods are handed over by someone who is not regularly engaged in the business of bailing/leasing goods; or
  2. the holder of the goods does not provide value.



- Has had major implications for equipment lease and hire companies
- Numerous examples of equipment lease and hire companies losing their equipment as a consequence of failing to register PPS Leases (*Forge Group Power Pty Ltd (In Liquidation) (Receivers and Managers Appointed) v General Electric International Inc* [2016])



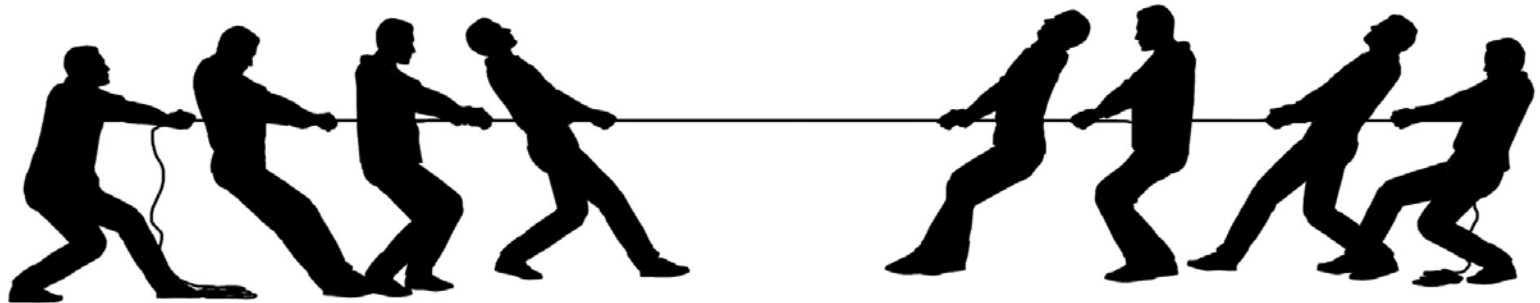
- **Relevance to Grain Traders?**
- There is confusion in the market place about whether grain storage agreements can amount to PPS Leases
  - Grain storage arrangements are considered ‘bailments’
  - Storage agreements often provide for terms that can exceed 1 year or are indefinite
  - There is uncertainty as to whether either of the 2 ‘exceptions apply. To fall outside PPSA need to be able to say:
    - Grain traders are not ‘*in the business of bailing grain*’ or
    - Grain handlers do not ‘*provide value*’

- *Acarbi Gold Pty Ltd, Re [2014] WASC 310*
  - Arcabi was an antique dealer who stored rare coins for customers (a bailment arrangement)
  - Arrangements were capable of extending beyond 1 year
  - Customers had not taken any steps to register any security interests on PPS Register
  - Arcabi went into receivership.
  - Receiver sought direction from Court – could it claim and sell the coins?



- **Held:** No PPS Lease. Coins returned to customers.
- **Reasoning:** 1st exception applied - customers not '*in the business of bailing coins*'
  - Requires bailing goods to be the core business of the bailor, not “merely an incident” of the bailor’s business.*
  - Customers not in the business of profiting from bailment rather they profit from trading in coins*
- **Considered 2<sup>nd</sup> exception:** Did Acarbi “provide value”?
- Suggested to provide ‘value’ need to do more than simply agree to keep the asset safe and dry. Did not reach conclusive view.

- Parallels can be drawn between coin storage arrangements described in Acarbi and typical grain storage arrangements
- Still uncertainty post Acarbi liquidators (rightly or wrongly) continue to assert grain storage arrangements can amount to PPS Leases



- **Practical tips when storing grain:**

- In order to minimise risk and avoid potential (expensive) arguments with liquidators in the event of the insolvency of a bulk handler:
  - Either negotiate storage agreements so they are expressed to be for a term that can not exceed 1 year OR
  - Register on PPS Register in respect of each storage agreement having a term that could exceed 1 year
- Be aware that grain handlers often seek to prohibit registrations being made against them in terms of trade:

*“Neither the Client nor any Co-owner will create, or consent to any security interest over any Stored Grain...”*

- **Failure to act quickly can weaken priority position**
  - Can lose PMSI status if fail to register your interest within strict time limits:
    - ROT seller- register before supplying goods
    - PPS Lease – register before handing over goods
  - For normal (non-PMSI) security interests ‘first in time’ has priority so delays in registration can allow others to jump in front
- **Can lose security interest completely if:**
  - Before registration counterparty becomes insolvent
  - Where counterparty is a company (1) you fail to register within 20 business days after security interest arises and (2) counterparty becomes insolvent within 6 months of the date you register – **s588FL Corporations Act 2001**

- A number of cases have enforced the 20 business day rule (*Relux Commercial Pty Ltd (in liq) & Anor v Doka Formwork Pty Ltd* [2014] VSC 570)
- If register outside 20 business day deadline s588FM permits application to be made to Court to cure defect
- Numerous successful applications to Court in respect of late lodgements (some very late > 12 months)
- Court's approach:
  - Typically cure defect but reserve right of insolvency administrator to apply to set order aside if insolvency occurs within 6 months of order
  - Registration does not interfere with priority regime



- **Practical Registration Tips:**

- To avoid timing mishaps implement system of registering on receipt of credit application from new customer or at the time of entering into long term storage agreement (in either case prior to handing over goods)

# Importance of Avoiding defects in Registration

- Integrity of PPS Register relies on accurate information being uploaded
- As noted in Whittaker Report registration process can be confusing
- Need to be across PPSA terminology such as:
  - Grantor
  - Collateral Type
  - Collateral Class
  - Proceeds
  - Inventory
  - Purchase Money Security Interest



# Importance of Avoiding Defects in Registration

- Registration can be ineffective because of a defect if:
  - Defect is seriously misleading
  - Is a defects set out in s 165 PPSA



# Importance of Avoiding Defects in Registration

Error	Likely Consequence
Claim a PMSI when there is none	Registration will be ineffective
Fail to claim a PMSI when the security interest is a PMSI	Super priority of the PMSI will be lost and priority will be determined by other rules (most often the first to register)
Registration of PMSIs outside of specified time limits	The super priority of the PMSI will be lost and priority will be determined by other rules (most often the first to register)
Registration of security interest more than 20 business days after the security agreement was created	Registration will be set aside if the grantor becomes insolvent within six months of the date of registration
Error in the serial number of a serial numbered good (most often a motor vehicle)	Registration will be ineffective
Selection of incorrect collateral class	Registration may be ineffective if a serial numbered good has been registered under the wrong collateral class
Failure to identify grantor in the required manner (eg – using company name or ABN instead of the required ACN and/or the treatment of trading trusts)	Registration will be ineffective

- *Interleasing (Australia) Limited v Tieman Industries Pty Ltd (in liq) [2015] FCA 1120*
  - *Touched on importance of correct registration*
  - *If dealing with trust and trust has ABN should register against trust ABN not company ABN/ACN*
  - *If security is over collateral held in company's own capacity as well as capacity as trustee there should be 2 registrations*

- **Practical Registration Tips:**
  - Make sure you have correct details of counterparty
  - If in doubt about the form of registration:
    - seek advice and then implement system moving forward
    - (or if this is not possible) consider taking out more than 1 registration

- PPSA is here to stay
- Be aware of the risks
- Have systems in place to effectively deal with PPSA issues



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