

Legal briefing

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The Personal Property Securities Act

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This Legal briefing gives an overview of some common situations in which Commonwealth agencies may need to consider the *Personal Property Securities Act 2009* (Cth) (PPS Act).

Summary of considerations under the PPS Act

You may need to search the Personal Property Securities Register (PPSR) or ask for additional information from a third party to find out if an asset or company that is relevant to your agency's activities is the subject of any security interests.

You may need to consider whether a situation or transaction creates (or should create) a security interest in personal property – for example, a funding agreement or lease of personal property.

If you have a security interest, proceeds of crime order or other court order you need to decide whether to register the security interest or the personal property the subject of the court order. This decision needs you to weigh up the protection that comes with registration against other factors such as administrative and cost considerations.

If you want to perfect a security interest, for example by registering a security interest, it is best to ensure that transaction documents take this into account.

Perfecting a security interest properly, by registration or otherwise, means it is enforceable and has the highest priority position possible. This means that the monies or obligations that the security interest protects will be paid in priority to any 'lower' interests. It also means that the security interest may be enforceable against the purchaser of the secured personal property if it is sold and that if the other party is wound up or becomes bankrupt the personal property may not vest in the other party to the exclusion of your agency.

What is the PPS Act and the PPSR?

The PPS Act establishes a national system governing the use of personal property as security. The PPSR was established by the PPS Act and commenced operations on 30 January 2012. The PPSR is an electronic register that operates as a 'noticeboard' of security interests (not of asset ownership). Transaction or security documents are not registered.

What is personal property?

In brief, personal property means property other than land, buildings, fixtures to land or a right, and entitlement or authority granted by law and declared not to be personal property for the purposes of the PPS Act.

Personal property can be tangible or intangible property. Tangible property can include motor vehicles, aircraft, watercraft (including ships), office furniture, plant and machinery, artwork, crops, livestock and financial property. Financial property is itself a defined term and means chattel paper, currency, an investment instrument or a negotiable instrument (each of these terms has a specific definition). Intangible property can include licences, intellectual property rights and contract rights.

What is a security interest?

Under the PPS Act, a security interest is an interest in personal property that is provided for by a transaction that, in substance, secures payment or performance of an obligation. As long as the transaction does this, the agreement that creates a security interest does not have to be in a prescribed form and the security interest can arise without regard to the person who has title to the property.

Documents should be checked for security interests proposed to apply against the property of your agency.

Due diligence

Searching the PPSR

There are a number of situations where your agency will need to search the PPSR. This will include situations where:

- your agency is buying an asset other than personal property sold in the ordinary course of the seller's business of selling personal property of that kind
- funding is provided for personal property
- your agency would previously have searched the ASIC Register of Company Charges.

There are rules about searching and prescribed ways of searching. These are not discussed in this Legal briefing. If you would like more information, see the PPSR website.

You can search the PPSR directly through the PPSR website. AGS can also carry out searches of the PPSR.

When a SECURITY INTEREST can arise

Taking an interest over a company's property	Does your agency want to take what was previously referred to as a 'fixed and/or floating charge' for a company? Under the PPS Act, this is now referred to as taking a security interest and may be taken over particular personal property or for all present and after-acquired property of the company. To ensure any priority against other parties, such a security interest needs to be perfected, for example by registration on the PPSR.
Funding	<p>Does your agency provide funding to organisations or individuals for the purchase of personal property?</p> <p>Does your agency want to take a security interest in the personal property that is being purchased? For example, does your funding agreement include an 'assets' clause?</p> <p>Your agency may have what is referred to as a purchase money security interest – there are special rules about the registration of this security interest that you should know about or take legal advice on. These rules may impact on the priority and validity of the security interest.</p> <p>Your agency should ensure that the transaction documents comply with the requirements in the PPS Act.</p>

Leasing goods	<p>Does your agency lease goods?</p> <p>Some types of leases arrangements create security interests that can be registered on the PPSR, which are known as PPS leases.</p> <p>If your agency is regularly engaged in leasing goods you may have what is known as a PPS lease, and you should investigate if a security interest arises and can be registered on the PPSR. If a security interest arising from a PPS lease is not registered, your agency may lose rights on the goods even though it owns them.</p>
Does your agency enter into contracts that contain step-in rights or options?	<p>If so, does the contractor need to do anything or allow you to use anything in order to allow your agency to enforce its step-in rights? Is there any security interest in personal property granted to the agency by the contractor on these rights that needs to be brought under the PPS Act?</p>
Artwork	<p>Is your agency involved in loaning artwork or receiving loaned artwork?</p> <p>There are a number of situations where arrangements relating to artwork create the types of interests that can be registered under the PPS Act.</p>
Intellectual property	<p>Interests in registered intellectual property</p> <p>The term ‘intellectual property’ is a defined term in the PPS Act and means rights of designs, patents, trademarks and copyright among other things. If your agency was in the habit of recording mortgages and other security interests on the Patents, Trade Marks and Designs Registers, it is likely that these interests now need to be registered on the PPSR.</p> <p>Before purchasing any rights to intellectual property covered by the PPS Act, such as copyright, patents and designs, you should search the PPSR to check if there are security interests registered against it.</p> <p>Other interests in intellectual property</p> <p>If your agency owns intellectual property that is licensed to other parties, there may be some situations where a security interest will exist.</p>
Construction	<p>Is your agency involved in entering into contracts for the delivery of infrastructure or capital projects?</p> <p>In some cases a security interest over personal property will arise (for example, interests in performance security, supply of plant and equipment, insurance and step-in rights).</p>
Third-party interests in statutory fishing rights granted under section 31 of the <i>Fisheries Management Act 1991</i> (Cth)	<p>Since the PPSR commenced, the register maintained by the Australian Fisheries Management Authority to record third-party interests in statutory fishing rights is no longer in use. Your agency can now register the security interest on the PPSR.</p> <p>Further, before dealing with statutory fishing rights, your agency should undertake a search of the PPSR to ensure that there are no other recorded interests for them.</p>

Other situations where an interest in personal property may arise and can be registered

Court orders

Does your agency obtain orders that prevent or restrict a person dealing with personal property or orders for the sale or other disposal of personal property?

If so, the personal property which is the subject of the court order may be registered on the PPSR. Registration ensures that third parties are notified of your agency's interest.

Proceeds of crime law

The PPS Regulations allow personal property that is subject to a notice or an order, or is confiscated or forfeited under a provision of a proceeds of crime law, to be registered on the PPSR. 'Proceeds of crime law' means:

- the *Mutual Assistance in Criminal Matters Act 1987* (Cth)
- the *Proceeds of Crime Act 1987* (Cth)
- the *Proceeds of Crime Act 2002* (Cth)
- a law of a state or territory that is a corresponding law within the meaning given by s 338 of the *Proceeds of Crime Act 2002* (Cth).

Perfection by registration

If you have a security interest in personal property or another interest that can be registered, your agency needs to decide whether or not to register it.

The main reasons to register are that if registration does not occur:

- your agency may lose priority relative to other secured parties
- a third party may take the personal property free of your agency's security interest meaning your agency can no longer enforce its security interest
- in some circumstances, if the other party is wound up or becomes bankrupt, the personal property may vest in the other party to the exclusion of your agency.

Other considerations

There is administrative time and cost associated with registering a security interest and managing that interest. In many cases, there will also be legal costs associated with creating the interest and registering it in a legally effective way. Your agency may want to weigh up these things against the value of the personal property in which a security interest is being taken, whether there will be other secured parties, the identity of the other party, and the likelihood of it failing to comply with its obligations.

Documentation

If it is possible that you will need to register a security interest on the PPSR, it is preferable for the documentation relating to the interest to specifically provide for this and comply with the requirements of the PPS Act. In some cases it will be necessary for the other party to provide details about the asset. Further, there are some provisions in the PPS Act that can be contracted out of. In some cases it may be appropriate for the documentation to set out alternative arrangements.

Other situations where the PPS Act may be relevant to your agency

Have you received a document with a 'PPS clause' in it?	If so, you should read the document carefully and note any requirements placed on your agency. If the document asks that your agency contract out of some sections in the PPS Act (relating to the enforcement provisions in Ch 4 of the PPS Act) you should consider the effect of agreeing to this.
Has someone registered a security interest against the agency on the PPSR?	If so, there are processes for having security interests amended or discharged if there is no longer any obligation being secured or when security interests have been incorrectly registered on the PPSR against the agency.

Do you have questions or need to know more?

If so, you can contact any of AGS's specialists mentioned at the end of this Legal briefing for assistance.

The PPSR website also provides a range of informative fact sheets – see www.ppsr.gov.au.

The information in this Legal briefing is not legal advice and its contents should not be relied on when considering your agency's particular circumstances. It is not intended to cover all situations where the PPS Act applies and is only intended to provide general information. Before taking any action you should seek legal advice as to how and whether the PPS Act specifically applies to your circumstances.

More information

AGS has a large national team of lawyers with expertise in advising and assisting Government with all matters related to regulating Australia's offshore waters. For Government lawyers wanting further information, please contact any of our lawyers listed below.

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