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PPSA: What is actually covered?

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Almost 2 years have passed since the introduction of the PPSA.¹ The legislation remains as enacted other than minor amendments consequential upon changes to cross-referenced legislation. Similarly, the Regulations² have remained largely unchanged since enactment.

With the second anniversary approaching, the transition period for migrated security interests is coming to an end. For the well prepared, this will be of no consequence. However for the unprepared, or the unknowing, there may be some undesirable outcomes lurking in the future.

This paper will address a number of topics as we review what is actually covered by the PPSA. Whilst it is not a treatise on the detailed operation of the PPSA, it will discuss the basic operational concepts of the PPSA. It will also utilise a recent landmark case to illustrate the meaning of the “PPSA lease” and will draw some observations on actions required prior to the end of the transition period.

1. PPSA – the basics

The introduction of the PPSA in 2012 brought a new statutory regime to deal with legal contests concerning personal property. Replacing over 70 laws previously in operation around the country, it was aimed at simplifying the law and practice regarding personal property securities. With that simplification came the promise of increased certainty with the expectation of reduced costs.

The PPSA is modelled upon legislation from New Zealand, Canada and the US. It also reflects the work of the United Nations Commission on International Trade Law and the International Institute for the Unification of Private Law.³ Whilst the concepts are largely similar, the PPSA is essentially an amalgam of the law of those countries with a number of unique Australian provisions.

The PPSA is a law that addresses security interests in personal property. Sections 12 and 10 of the PPSA define “security interest” and “personal property” respectively. Sections 6 and 7 address the necessity of a “connection with Australia” and the application of the PPSA in external territories.

A list of interests to which the PPSA does not apply, or only applies in certain circumstances, is set out in section 8. Some examples include the interest of a seller shipping goods under a negotiable bill of lading and non-consensual charges and liens created under Commonwealth, State or Territory law. As the section contains a number of conditional exclusions it is not appropriate to attempt to paraphrase those provisions and a full reproduction of the section would be required. Readers are respectfully referred to section 8 of the PPSA.

A security interest is created through a transaction where personal property is used to secure payment or performance of an obligation. Neither the identity of the person who holds title to the personal property nor the form of the transaction has bearing upon the creation of a security interest.

Personal property is property (including licences) other than land. Certain rights conferred by government are excluded by definition and other rights may be declared not to be personal property.

Part 2 of the PPSA sets out the critical elements that connect a security interest with personal property: attachment⁴; enforceability against third parties⁵; and perfection.⁶

¹ *Personal Property Security Act 2009* (Cth) – Note: footnotes refer to this Act unless otherwise stated

² *Personal Property Security Regulations 2010* (Cth) (“Regulations”)

³ Explanatory Memorandum to the Personal Property Securities Bill 2009, p10

⁴ Section 19

⁵ Section 20

⁶ Sections 21 and 22

Generally, attachment occurs when the grantor of the security interest has rights in the relevant personal property and either value is given for the security interest or the grantor acts such that the security interest is created. Once attachment occurs, the personal property to which the security interest has attached becomes “collateral” and the security interest becomes enforceable against the grantor.⁷

To be enforceable against third parties, a security interest must have attached to collateral and one of three other criteria has been satisfied. The secured party must possess the collateral; the secured party must have “perfected” the security interest by “control”; or there is a written security agreement relating to the collateral (with some qualifying requirements).⁸

For a security interest to be perfected, in the main it must: have attached to collateral; be enforceable against third parties; and be registered under the PPSA on the PPSR.⁹ Other methods of perfection can occur including through possession of the collateral by the secured party in some circumstances¹⁰ and for some forms of personal property, the secured party has “control”.¹¹ Control of collateral can only occur in relation to limited forms of personal property such as, for example, ADI accounts.

Upon perfection, a security interest acquires a time-of-perfection based priority based upon the type of security interest and method of perfection.¹² Whilst the rules for determining priority are somewhat involved, it is reasonable to say that this is the fundamental element of the PPSA. The legislation provides the mechanism for determining the relative priority of competing security interests giving increased certainty, provided one follows the rules!

2. The PPS lease

Section 13 defines the “PPS lease” – a lease or bailment of goods, subject to a number of conditions and exclusions.

2.1. Conditions

The conditions distinguish between goods that “may or must” be described by serial number under the Regulations and other goods.

For goods that “may or must” be described by serial number, a PPS lease will exist if the lease or bailment is for a term of:

- 90 days or more;
- less than 90 days, but is either renewable automatically or at the option of 1 party and the cumulative total of all terms has the potential to exceed 90 days; or
- less than 90 days, but the lessee or bailee retains (with consent) at least substantially uninterrupted possession for a period of more than 90 days (and the PPS lease comes into existence when that 90 day period of possession is reached).

For other goods, a PPS lease will exist where the term of lease or bailment is for a term:

- of 1 year or more;
- which is indefinite, even if either party can terminate the lease or bailment within 1 year;
- which is either renewable automatically or at the option of 1 party and the cumulative total of all terms has the potential to exceed 1 year; or
- of less than 1 year, but the lessee or bailee retains (with consent) at least substantially uninterrupted possession for a period of more than 1 year (and the PPS lease comes into existence when that 1 year period of possession is reached).

Where the goods are bailed and any of the conditions above are met, a PPS lease will only exist if the bailee provides value for the bailment.

⁷ Sections 10 and 19

⁸ Section 20(2)

⁹ Personal Property Security Register – Chapter 5

¹⁰ Section 24

¹¹ Section 21

¹² Chapter 2 Part 2.6

2.2. Exclusions

A PPS lease will not exist where:

- the lessor or bailor is not regularly engaged in the business of respectively leasing or bailing goods;
- the goods are consumer property¹³ as part of a lease of land where the use of that property is incidental to the use and enjoyment of the land; or
- a lease or bailment of property prescribed by regulation regardless of the term (currently a lease or bailment which is part of a pooling arrangement, as defined in the Regulations, is prescribed).

2.3. Goods which “may or must” be described by serial number

A “financing statement” consists of the data set out in section 153 of the PPSA necessary to make a PPSR registration in relation to a security interest. Amongst other things, it includes data regarding the secured party, grantor and the collateral.

Item 4 of the table in section 153 addresses the collateral and proceeds, with sub-paragraph (b) referring to collateral that “may or must be described by serial number, if allowed or required by the regulations”.

Paragraph 2.2 of Schedule 1 of the Regulations provides that certain classes of collateral must be described by serial number if it is consumer property and may be described by serial number if commercial property. The classes of collateral are:

- motor vehicles;
- aircraft;
- certain registrable intellectual property rights; and
- watercraft.

Motor vehicles are defined in Regulation 1.7 and include property and equipment that is capable of being towed behind a motor vehicle.

It is important to understand the implications of the phrase “may be described by serial number” when considering the registration of commercial property in the classes above.

Section 44 of the PPSA provides that subject to some particular conditions, a buyer or lessee may take personal property free of a security interest. This will occur if:

- that property “may, or must, be described by serial number”; and
- searching the PPSR immediately before the transaction using serial number only would not disclose a perfected security interest.

This means that where commercial property of the above classes has been registered on the PPSR, but the registrant has elected not to use the serial number (as detailed and in the order of priority specified in the Regulations¹⁴), or if the serial number is incorrectly entered (for example by typographical error) the security interest will not be discoverable in accordance with section 44. The security interest and its priority may then be at risk.

It is also observed that the search functionality of the PPSR is limited to the grantor (individual or organisational) and serial number of the classes of collateral above. Accordingly, typographical errors in registration or searching can result in an inability to locate financing statements.

2.4. PPS lease – Re Maiden – background

The definition of a PPS lease does not include a requirement for the lease or bailment to be in writing. In the absence of a duly documented arrangement between parties, their conduct may be

¹³ Section 10: personal property held by an individual, other than personal property held in the course or furtherance, to any degree, of carrying on an enterprise to which an ABN has been allocated – personal property which is not consumer property is commercial property

¹⁴ Regulations Schedule 1, paragraph 2.2(3)

relied upon and sufficient to demonstrate the existence of a PPS lease. Such was one of the outcomes of the recent PPSA landmark judgment in *Re Maiden*.¹⁵

Between 2010 and May 2012, Maiden Civil (P&E) Pty Ltd (“Maiden”) operated a civil construction business in the Northern Territory and, in conducting that business, used 3 Caterpillar vehicles it had leased from Queensland Excavation Services Pty Ltd (“QES”). The vehicles, a model 930 articulated wheel loader (“930”), a model 330 tracked 30 tonne excavator (“930”) and a model 320 tracked 20 tonne excavator (“920”) all carried Maiden livery.

Each of the 3 vehicles had been purchased by QES in Queensland in May and August 2010. QES had paid the deposits, Esanda financed the balance of the 320 purchase price and Westpac the balance for the 930 and 330. At about the same time as the deposits were paid, Maiden paid QES amounts more or less corresponding to the deposits.

Maiden took possession of the 3 vehicles shortly after their purchase by QES and proceeded to use them in its business.

QES periodically invoiced Maiden and Maiden paid amounts to QES corresponding to the ongoing Esanda and Westpac finance charges, plus 10%. In March 2011 Maiden paid QES an amount that was used by QES to discharge the finance on the 320. After that time QES did not invoice Maiden for any amount in relation to the 320, but continued to invoice amounts in relation to the 930 and 330.

On 31 May 2012, Maiden entered into a loan agreement and general security deed with Fast Financial Services Pty Ltd (“Fast”) for a short-term loan in the order of \$200,000 (after fees). The general security deed was an agreement to secure the payment of monies or performance of an obligation, was in writing and described the secured collateral (including a list of Maiden’s assets including the 320, 930 and 330).

The documents evidenced a transaction to secure both payment and performance of obligations resulting in the creation of a security interest. Fast provided the funds under the loan agreement at which time the security interest attached to the collateral and the security interest became enforceable by Fast against Maiden.

As there was a written security agreement relating to collateral (which included the 320, 930 and 320) that was attached to that collateral, the security agreement became enforceable against 3rd parties.

Fast registered a financing statement in the PPSR, perfecting its security interest.

In July 2012 Fast became aware of a number of events of default by Maiden under the general security deed. On 27 July 2012 Fast appointed Albarran and Pleash as receivers and managers and on 27 August 2012 Maiden entered voluntary administration. Albarran and Pleash claimed a ranking security interest over the 320, 930 and 330, which QES disputed (asserting that it was the true owner of the 3 vehicles). A third party claim asserting a lien over the 320 was also in dispute.

The Court found in favour of Fast, determining the existence of a PPS lease, that Maiden was entitled to grant a security interest over the 3 vehicles, that Fast had a valid security interest, that QES was not protected under a transitional security interest registration and could only claim an unperfected security interest in any of the vehicles. The Fast security interest was the highest ranking. Accordingly, as the PPSA operates to determine disputes on the basis of the relative priority of competing security interests, not title to goods, the Fast claim succeeded. The third party lien claim was not supported on the evidence and accordingly there was no security interest to be considered.

2.5. PPS lease – *Re Maiden* – discussion

A number of crucial issues are dealt with in *Re Maiden*. The PPS lease specific issues will be addressed in this section.

¹⁵ *Re Maiden Civil (P&E) Pty Ltd; Albarran and Pleash (as receivers and managers of Maiden Civil (P&E) Pty Ltd) v Queensland Excavation Services Pty Ltd* [2013] NSWSC 852 (*Re Maiden*)

The first is the absence of a requirement for a PPS lease to be in writing. In *Re Maiden*, Justice Brereton was required to address a factual scenario where no written agreement existed between QES and Maiden in relation to the supply or payment for the 3 vehicles.

The facts demonstrated that the directors of the 2 companies had a long-standing relationship, the principal of QES having at one time owned 42% of the shares in Maiden and for a period during 2010 Maiden employed him. Around that time, he had purchased 2 motor vehicles for Maiden, with Maiden paying him for the deposit and later, through him, the ongoing finance charges. The arrangement arose through the inability of Maiden to successfully fund the purchases. Those motor vehicles became Maiden's property once the financing had been completed.

A draft agreement relating to the sale of the QES director's Maiden shares bore the QES director's signature. It contained an acknowledgement of an arrangement under which QES held equipment purchased on behalf of Maiden using third party finance serviced by Maiden with an undertaking to transfer ownership to Maiden.

The evidence supported a conclusion that Maiden had been entitled to uninterrupted possession of the 3 vehicles for a period of greater than 1 year. That was sufficient to satisfy the requirements of Section 13(e), the vehicles each being goods that may be described by serial number.

The second issue is in relation to the exclusion under section 13(2). The monies paid to QES during the arrangement were QES's only income during the period. Further, it was clear on the evidence that it was QES's intention that the 3 vehicles would be used for short-term hire. Accordingly, the Court found that the exclusion under section 13(2)(a) had not been proven to apply¹⁶ and that a PPS lease validly existed.

The critical observations from this part of the case and the application of the PPSA are that:

- PPS leases need not be in writing;
- the conduct of the parties can be sufficient to establish the basis for a PPS lease; and
- the person propounding the application of an exclusion under section 13(2) must, on the facts, establish that it applies.

3. Perfection by registration

As discussed above, for a security interest to be perfected, it must have attached to collateral and be enforceable against third parties.¹⁷ Generally, perfection by registration can occur at any time. However there are a number of exceptions and some specific provisions regarding particular types of security interests and collateral.

3.1. Purchase money security interests ("PMSI")

A PMSI is¹⁸:

- a security interest in collateral to the extent that it secures all or part of the purchase price;
- a security interest in collateral by a person who gives value to enable the grantor to gain rights to the collateral, but only to the extent that the value is used to gain those rights;
- the interest of a lessor or bailee under a PPSA lease; or
- the interest of a consignor delivering goods to a consignee under a commercial consignment.¹⁹

A PMSI can have a "super priority" (discussed in item 5 below) and the requirements for perfection by registration vary depending on whether or not the relevant collateral is "inventory".

3.2. Inventory

¹⁶ The Court determined that it had not been established that QES was not regularly engaged in the business of leasing goods

¹⁷ Sections 19 to 22 inclusive

¹⁸ Section 14

¹⁹ Section 10 – definition of commercial consignment

Inventory is defined as a special class of personal property.²⁰ It is personal property that in the course or furtherance, to any degree, of an enterprise to which an ABN has been allocated:

- is held by a person for sale or lease;
- has been leased by the person as lessor;
- is held, or has been provided to the person, under a contract for services,
- is held as raw materials or as work in progress; or
- is held or consumed as materials.

3.3. Temporary perfection

The PPSA allows for temporary perfection in certain circumstances.²¹ The general intent is to enable the secured party a reasonable time in which to perfect the security interest after it has attached.

3.4. Proceeds

The PPSA permits the attachment of a security interest to the proceeds of the sale of certain identifiable or traceable personal property.²² This can occur irrespective of the existence of any fiduciary relationship between the relevant parties but is subject to a number of conditions and exceptions that are not discussed in detail in this paper.

It is imperative that if proceeds are to be secured, the PPSR financing statement must contain the details required under Section 153(1) table item 4(d) and paragraph 2.4 of Regulations Schedule 1. A short term temporary perfection mechanism can apply as discussed at item 4.3.

3.5. Registration requirements

It is an offence to register a financing statement, or a change to a financing statement, unless a person believes on reasonable grounds that the grantor will become a secured party in relation the relevant collateral.²³ Section 151 also sets out obligations to apply to amend registrations and the penalties where those obligations are not met.

A finance statement may be registered whether or not the property, or the person with rights in the personal property, is located within Australia.²⁴

The details that must be recorded in a financing statement are set out in Section 153 and, more specifically, in Schedule 1 of the Regulations. Additionally, for personal property of the type prescribed in Regulation 5.3 (in accordance with section 148(c)) the requirements of Section 154 and Schedule 2 of the Regulations must be complied with.

Importantly, the Regulations set out the order of priority in which certain details must be used in registrations. A failure to use the correct details can lead to a defective registration, which may in turn result in a loss of priority.

It is crucial to be aware of situations where a grantor company is trading in its capacity as a trustee, rather than under its own ACN. In that circumstance, the registration must be made in the trustee ABN, not the company ACN.²⁵ It also follows that when searching the PPSR, care needs to be taken to ensure that the correct trading entity is searched, as a search on the ACN in that situation will not reveal a valid registration under the ABN.

Other errors can arise in both registration and searching and include, for example, where typographical errors are made; the hierarchy of serial numbers is not followed for serial numbered goods; and inventory is involved but the relevant ABN is not used.

²⁰ Section 10

²¹ Sections 22, 33, 34, 39 and 40

²² Sections 31 and 32

²³ Section 151

²⁴ Sections 152 but also see Sections 6 and 235

²⁵ Regulations Schedule a paragraphs 1.3(1)(b) and 1.5(1)(a) associated tables

Changes in individual grantor's names can also cause searching and subsequent financing statement registration issues and should be carefully considered.

4. Registration time periods

The priority determination mechanisms of the PPSA rely to a large extent on the time of perfection of security interests. One of the main methods of perfecting a security interest is by registration of a financing statement on the PPSR.

Generally a security interest can be perfected by registration at any time. However, there are special rules for some particular types of security interests and particular types of collateral. Many of those special rules have specific time constraints. Some of these are discussed below.

4.1. PMSI – inventory

It is common practice for businesses to provide goods to customers on credit. In many instances, those goods are to be held by the customer as inventory. The agreement between the parties usually obliges the customer to pay for the goods on certain terms. Properly constructed documentation should lead to the creation of a PMSI at the time of supply of the goods.

However, for a PMSI in goods that are inventory to be effective, it is necessary for the security interest to have been registered prior to the grantor taking possession of the goods.²⁶ This is an exception to the attachment rule.

Registration is generally permissible prior to attachment, but always subject to the provisions of Section 151 regarding belief (see item 3.5 above).

For other inventory, the registration must have been completed by the time the security interest attaches to the inventory.²⁷

4.2. PMSI – personal property other than inventory

A PMSI can be created in respect of personal property other than inventory, for example where finance is provided for the purchase of a motor vehicle. In that instance perfection by registration can be effected up to the end of the period of 15 business days after the day the grantor takes possession or the day the interest attaches to the collateral.²⁸ The 15 business day period also applies where the PMSI relates to personal property that is neither inventory nor goods.²⁹

4.3. Proceeds

As identified in item 3.4, a security interest can attach to the proceeds of certain collateral. The registration requirements provide for the identification of proceeds in the financing statement. However, Section 33(2) also allows for a period of temporary perfection of a security interest in proceeds.

If the security interest in original collateral has been perfected in accordance with Section 33(1), but the interest in proceeds was not so perfected, a 5 business day period of temporary perfection will operate. That period commences on the day the security interest in the original collateral attaches to the proceeds. If the security interest in the proceeds is not separately perfected within that period, the temporary perfection will end and the security interest will become unperfected.³⁰

4.4. Temporary perfection after transfer

If a perfected security interest in collateral exists and the collateral is transferred, the original security interests will remain temporarily perfected. The period of temporary perfection can be up

²⁶ Section 62(2)

²⁷ Section 62(3)

²⁸ Section 63(c)

²⁹ Section 63(d)

³⁰ Section 33(3)

to 24 months in certain circumstances, but this can be drastically shortened if another security interest attaches to the collateral.³¹

4.5. Other time periods

Sections 35, 36 and 38 through 40 inclusive also provide for temporary perfection periods for, respectively: collateral returned from a bailee; the return of collateral comprising negotiable instruments and investment instruments; returned accounts and chattel paper; relocation of collateral or grantors to Australia; and the relocation of intangible or financial property.

5. Security interest priority

The PPSA provides for the determination of contests between competing security interest based upon their relative priority. Generally, priority is determined by ranking and, if there are 2 security interests of equal ranking, the one perfected first in time will prevail.³²

5.1. Default priority rules

Section 55 sets out the default rules in relation to competing security interests in particular collateral:

- where each is an unperfected security interest – the first in time to have attached;
- where one is perfected and the other unperfected – the perfected interest; and
- where each is perfected – the order of the priority time, being the earliest of:
 - the PPSR registration time;
 - the secured party first perfects by taking possession or control (where applicable); or
 - temporary perfection (or otherwise) under the PPSA.

5.2. Perfection by control

A security interest in collateral perfected by control will take priority over security interests perfected by other means. For competing security interests perfected by control, priority rests with the first in time to have been perfected by control.³³ The priority of a security interest perfected by control under Section 57 takes precedence over all other security interests, no matter how they are perfected.

5.3. PMSI

Subordinate only to the control priority under Section 57 is the “super priority” of a PMSI.³⁴ Providing the perfection requirements of Section 63 are met, the “super priority” may operate to give the PMSI ranking priority over earlier registered security interests in the same collateral. However, as identified above the time period for perfection by registration is critical for a PMSI to have proper effect.

If the time registration requirements for a PMSI are not satisfied, but the other general financing statement registration requirements are satisfied, the security interest will be valid, but the “super priority” of the PMSI will not be available. In that situation, the security interest will rank alongside other security interests and will gain priority based on the time of perfection.

³¹ Section 34(c)(i) – 5 business days after transfer with consent of the original secured party; Section 34(c)(ii) – 5 business days after the original secured party gains actual or constructive knowledge of the new grantor sufficient to effect a new registration

³² Chapter 2 Part 2.6

³³ Section 57

³⁴ Section 62

5.4. Other priority rules

A number of other rules are set out in Chapter 2 Parts 2.2 and 2.7 addressing aspects including the effects of the transfer of collateral, breaks in the chain of perfection and other more detailed issues. Chapter 3 contains specific rules for certain security interests, including agricultural interests, accessions to personal property, goods that have become comingled or consumed through processing and intellectual property.

5.5. Transitional provisions

The PPSA replaced myriad State, Territory and Commonwealth laws when introduced. Prior to commencement of the PPSA there was a wide range of “security interests” that could apply to property. Some of those security interests were capable of being registered under the various relevant laws, but many had no registration platform or mechanism.

The PPSA includes a set of transitional provisions that address these pre-existing security interests, whether registered or not.³⁵ Regarded as transitional security interests, they may attract temporary perfection under Section 322(1) for a period of up to 24 months.³⁶

That 24 month period of temporary perfection ends as of 1 February 2014. Unless action has been taken to perfect transitional security interests under an appropriate section of the PPSA, the perfection of each will then lapse to become an unperfected security interest. In that event, even though the security interest may have been long standing and still relevant, it will become subordinate in priority to any perfected security interest, irrespective of time of perfection.

An exception to the temporary perfection applies to a subset of the pool of transitional security interests. In creating the PPSR, a large volume of existing registration information was migrated across from a range of government databases. Those databases included ASIC and the various State and Territory security interest registers including, for example, those relating to motor vehicles. Migration took effect immediately prior to the commencement of the PPSA and the migrated security interests were perfected upon migration.³⁷ The 24 month temporary perfection period does not apply to those security interests.

5.6. Priority – Re Maiden

Two aspects of the priority rules are illustrated in *Re Maiden*. One relates to the transitional provisions and the second to the application of the priority rules.

The 3 vehicles were all found to be “motor vehicles” that were capable of being registered under the Northern Territory registration Act³⁸ prior to the implementation of the PPSA. Had they been registered,³⁹ the relevant security interests would have migrated across to the PPSR to become perfected as of 31 January 2012 in accordance with Section 322(2)(a).

None of the 3 vehicles had been registered under the relevant Northern Territory Act (or any other Act). Regulation 9.2 provides that in accordance with Section 322(3), a transitional security interest will not exist where an interest was registrable, but not registered, on a relevant register prior to commencement of the PPSA. This meant that not only was there no migrated security interest when there could have been, but also that there was no temporarily perfected transitional security interest. It followed that any interest QES may have had in any of the 3 vehicles under the PPSA was, at best, an unperfected security interest.

As discussed above, the arrangement between Maiden and QES was a PPS lease, giving Maiden the right to grant an interest in the vehicles to its financier, Fast. Fast had perfected its security interest by registration.

³⁵ Chapter 9

³⁶ Section 322(2) – unless perfected earlier in accordance with the PPSA

³⁷ Section 322(2)(a) and Chapter 9 Part 9.4 Division 6

³⁸ *Northern Territory of Australia Registration of Interests in Motor Vehicles and Other Goods Act 2008*

³⁹ Section 330

The contest as to the rights in the 3 vehicles was one of priority between security interests, not one of title or “ownership”. It was a contest between, at best, an unperfected security interest (QES) and a perfected security interest (Fast). The perfected security interest of Fast had higher priority resulting in the contest being determined in its favour.

A number of other significant issues arise out of the decision in *Re Maiden* including in relation to the position of receivers. However, they are outside the scope of this paper.

6. PPSA security interests and fixed charges

6.1. Fixed and floating charges

Prior to the PPSA, it was common for companies to grant fixed charges and floating charges (or a combination of both) over their assets. ASIC maintained a register of those charges.

A fixed charge generally relates to all of the relevant company’s assets (or specifically identified assets) whilst the floating charge “floats” over a company’s assets, “crystallising” under certain circumstances. The intent of a fixed charge is to prevent dealings with assets without the consent of the secured party. The floating charge permits movement in and out of assets in the general course of business and is generally applied to trading stock and book debts, for example.

Whilst the introduction of the PPSA did not render fixed and floating charges ineffective or no longer useable,⁴⁰ it did bring change.

6.2. PPSA security interests

Under the PPSA, a security interest can have effect over specific, identified assets or over “all present and after acquired property” (with or without specific named asset exceptions).⁴¹ Further, under the transitional provisions, floating charges are taken to be interests in “circulating assets” such as inventory and currency, for example.⁴² Fixed charges are taken to apply to property that is not a circulating asset.⁴³ These provisions apply whether or not the transaction document was effected before or after the commencement of the PPSA, but the expectation is that the terminology and concepts will fall out of use over time, with the more specific PPSA mechanisms taking their place.⁴⁴

6.3. Migrated ASIC registrations

When the ASIC register information was migrated, all charges (fixed, floating or both) were registered as charges over “all present and after acquired property”. Section 337 provides a 5 year period during which migration defects can be rectified and if not rectified in that period, the registration is liable to become ineffective in accordance with section 164.

For secured parties, this 5 year window is important. If, for example, the original ASIC registered charge related to specific fixed assets only, the migration as an “all present and after acquired property” may not correctly reflect the provisions of the relevant security agreement. The registration may be at risk.

Similarly, if a pre-PPSA ASIC registered floating charge was intended to be of effect in relation to limited assets, the migrated registration will be inaccurate.

6.4. Describing collateral

Another significant issue arises under the PPSA when making “blanket” registrations over personal property.

⁴⁰ Section 12(2)

⁴¹ Section 20(2)(b)

⁴² Section 340

⁴³ Section 339

⁴⁴ Section 338

A finance agreement may authorise registration of a financing statement that covers “all present and after acquired property”. If that finance agreement is intended to give security over goods that may, or must, be registered by reference to serial number care must be taken when registering.

A single registration nominating “all present and after acquired property” would be effective, but not, for example in relation to any motor vehicles. Without a specific, separate registration for each motor vehicle, they will not be searchable by serial number on the PPSR. In that instance, although the singular “all present and after acquired property” registration would be valid, the provisions of Chapter 2 Part 2.5 will have effect and it is possible that a buyer could take the motor vehicle free of the security interest.

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