

The money or the box – reforming a perplexing PPSA

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As credit managers will know, since January 2012 Australia has had a complex new law about security interests – the *Personal Property Securities Act 2009 (Cth) (PPSA)*. The PPSA has put in place a whole new landscape for retention of title sellers and other owners who seek to recover their goods in the insolvency of the customer.

If a PPSA registration is not made to the letter of the law, then title to the goods supplied can be lost under the vesting and priority rules in the PPSA. The effect on the hire industry has been particularly dramatic as hires can be deemed to be ‘security interests’.

The Whittaker Report

A review of the PPSA was tabled in Federal Parliament in March 2015. However to date nothing has been adopted.

What is clear from the Report is that the PPSA is excessively complex. There are many questions in the registration process which have little meaning in practice but which, if wrongly answered, could render the registration invalid and expose businesses to loss of ownership of goods in the insolvency of their customers. In our view little effort was made to make the system accessible, simple or intuitive. The legislation itself is also loaded with exceptions and special rules.

The Report finds that all this has meant the PPSA has not delivered the benefits it was intended to.

The Report proposes (amongst many other things) a substantial simplification of the register. It recommends removing or simplifying many of the inputs to a typical PPSA registration. It recommends removing:

- The box that indicates whether the interest is a ‘purchase money security interest’ (PMSI). More about that below.
- The question whether the collateral is consumer property or commercial property.
- The question whether the security interest is subordinated.
- The question whether proceeds are claimed. This is a confusing question and no-one ever answers ‘no’ to it except by mistake.
- The question whether the collateral is inventory. Another misconceived question which for highly technical reasons we won’t go into here.
- The requirement to register against the ABN of certain corporate customers acting as trustees of trusts. Creditors will not have to negotiate the difficult issue of whether they have been dealing with a trust or not.

What about hire?

The hire industry is undoubtedly the victim not the beneficiary of the PPSA. The industry continues to advocate for the PPSA to be amended to exclude hire, so as to prevent more losses of hired equipment in customer insolvencies. The Whittaker



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recommendations fall far short of what the industry wanted. The Report recommends that indefinite hire or lease no longer be a deemed security interest and that a uniform period of one year's actual hire be the entry point to the PPSA. However this still cuts across the hire industry where certain kinds of goods (site sheds, vehicles, formwork, generators etc) can sometimes be deployed for more than a year especially on larger projects.

So even if the Report is adopted, hire businesses will still stand to lose the ownership of capital assets that they hire out with these assets being made available to banks. In fact the Report specifically recommends preserving the right of the banks to claim hired assets. If the customer is a large one this can be (and has been) fatal to hire businesses.

How would PPSA's casualties fare under a post-Whittaker PPSA?

From a review of the decided Court cases in Australia and some of our own files we have compiled a short list of PPSA mishaps and asked how suppliers would fare if the PPSA were amended as the Whittaker Report proposes.

The Maiden Civil case – NSW Supreme Court

In this case a company (QES) hired two caterpillar excavators to a construction business (Maiden Civil) which became insolvent. The excavators were successfully claimed by the receiver appointed by a lender to Maiden Civil (Fast Finance) even though the excavators were never actually property of Maiden Civil.

QES suffered the loss of its excavators because the hires were of motor vehicles for more than 90 days and QES made no registration against Maiden Civil. The 90 day period was changed to one year by legislation in 1 October 2015. But the same result would obtain under the

Whittaker recommendations if the hires were for more than a year.

The Doka Formwork case – Victorian Supreme Court

Doka was a formwork hire business that lost about \$1million in formwork in the insolvency of a builder customer. Doka was caught by PPSA because it had the formwork out on indefinite hire. Under Whittaker it would only be caught once the one year threshold is crossed.

Doka actually had made a registration but it was one day late. Doka fell foul of a rule in the Corporations Act (section 588FL) that applies in parallel to PPSA. The rule in 588FL applies if no registration is made within 20 business days of the security agreement.

Whittaker recommends that section 588FL be repealed. Cold comfort.

Spiers Earthworks – West Australian Supreme Court

Spiers lost valuable plant and equipment which it had sold on a 'rent to buy' basis as part of a business sale. The hirer/purchaser became insolvent and the equipment was taken by the hirer/purchaser's bank.

The security interest was security 'in substance' – not time dependent. As with retention of title there needed to be a registration under PPSA. The Whittaker Report would not change this outcome.

Retention of title supplier A – the money or the box

This new client of ours had resolved to tackle PPSA registration without specialist advice. It supplied several million dollars' worth of its product to a business which became insolvent having paid for virtually none of it. The client made a registration but didn't tick the PMSI ('purchase money security interest') box. A bank took an 'all assets' security for a refinancing of the customer. The bank made its registration before the client's. The

bank has claimed priority over the product supplied – essentially because the PMSI box wasn't ticked.

The Whittaker Report recommends the PMSI box be abolished. as the Report finds it was never necessary in the first place. The PMSI box has been a source of many other PPSA mishaps especially in the hire industry where it is often not appreciated that a hire of goods is deemed by the law to be a PMSI.

Retention of title supplier B

This hire company client of ours had agreed equipment hire terms with Company X and had made a good registration against Company X. However a few months into the hire, there was a 'business restructure and transfer' in the customer group. Our client was asked to stop invoicing Company X and to invoice related company Y instead. Not thinking too much about PPSA, the client obliged.

Company Y then became insolvent and its liquidator claimed that the client was a supplier to Company Y against which it had not made a registration. This case will turn on its facts but in this kind of case if there was truly a new contract for supply on retention of title to Company Y there needs to be a registration against Company Y.

Conclusion

If and when the Whittaker recommendations are adopted they will bring a welcome simplification to the register. They will not do much for those who are oblivious to PPSA or not very attentive to the complexities and pitfalls that will remain.

Some businesses will look back and wonder why they were caught by rules that were never needed in the first place. ♦

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