

PPSA and Goods on Consignment

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This commentary was prepared on 23 January 2012.

Document provided by

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1. What is this guide about?

- 1.1 This guide reviews whether a consignment arrangement is governed by the Personal Property Securities Act 2009 (Cth) (or 'PPSA') and what the parties must therefore do as a result.
- 1.2 In a consignment arrangement, the supplier of goods supplies the goods to a merchant, generally a retailer, who sells the goods to a third party, the customer. For example a motor vehicle manufacturer supplies motor vehicles to a motor dealer on consignment for the dealer to sell to the customer.
- 1.3 Dealing with consignment arrangements is somewhat complicated under the PPSA.

2. What is 'personal property'?

- 2.1 Personal property is effectively all property other than interests in land, and includes goods, plant and equipment, shares, intellectual property such as trademarks and copyright, negotiable instruments, debts, as well as many other kinds of property.
- 2.2 Some types of security interests in personal property are not covered by the PPSA; for example liens.

3. Is property on consignment covered by the PPSA?

- 3.1 A consignment generally includes some the following features.
 - (a) Title in the goods remains with the supplier.
 - (b) Title passes directly from the supplier to the retail purchaser without passing through the retailer.
 - (c) The retailer is not required to pay for the goods until they are sold to a third party.
 - (d) The supplier may demand that the goods be returned by the retailer at any time.
 - (e) The retailer holds the proceeds of any sale on trust for the supplier.
 - (f) It is apparent from the retailer's dealings with others that the goods belong not to it but to the supplier.
- 3.2 A consignment may be a true consignment or a security interest.
- 3.3 Under the PPSA, section 12(2) provides that, if it secures payment or performance of an obligation, a consignment, whether or not it is a commercial consignment, is a security interest (and therefore caught by the PPSA).
- 3.4 Under section 12(3)(b) of the PPSA, a security interest includes the interest of a supplier who delivers goods to a merchant under a commercial consignment. A commercial consignment is thus always caught by the PPSA.

- 3.5 Under the PPSA, a commercial consignment is a consignment where:
- (a) the supplier retains an interest in the goods that they deliver to the retailer;
 - (b) the supplier delivers the goods to the retailer for sale, lease or other disposal; and
 - (c) the supplier and the retailer both deal in goods of that kind in the ordinary course of business.
- 3.6 Under the PPSA, commercial consignments do NOT include arrangements where goods are delivered to an auctioneer for sale or to a merchant whose creditors know is selling or leasing the goods of others.
- 3.7 In summary, consignments will always be caught by the PPSA if:
- (a) goods are delivered by the supplier to the retailer for sale or lease by the retailer;
 - (b) the supplier retains an interest in the goods; and
 - (c) both the supplier and the retailer deal in those goods in the ordinary course of their business.
- 3.8 In all other cases, you should obtain legal advice to ascertain your situation, so you can ensure you protect your rights in goods you supply on consignment under PPSA.

4. What do you register on PPSR?

- 4.1 The interest of the supplier who delivers goods to the retailer under a commercial consignment is called a "Purchase Money Security Interest" or PMSI under PPSA.
- 4.2 To ensure maximum protection, the supplier should register its interest as a supplier under its commercial consignment as a PMSI on the Personal Property Securities Register (PPSR). In doing so the supplier would get a super-priority over other registered security interests.
- 4.3 This means that, once it has registered its PMSI, the supplier's PMSI defeats all other registered security interests in the goods supplied by the supplier to the retailer under a commercial consignment for sale, lease or other disposal, even if those registered security interests were created and registered before the supplier's PMSI.

5. How and when do you register on the PPSR?

- 5.1 The supplier registers on the PPSR by properly completing a financing statement and lodging it with the PPSR within the required times.
- 5.2 To obtain the maximum protection for a commercial consignment and a super-priority as a PMSI for goods which are NOT inventory, the supplier must register the commercial consignment within 15 business days of the retailer obtaining possession of the goods which are the subject of the commercial consignment.
- 5.3 To obtain the maximum protection for a commercial consignment and a super-priority as a PMSI for goods which are inventory, the supplier must register the commercial consignment before the retailer obtains possession of the goods which are the subject of the commercial consignment.

5.4 You may need to obtain legal advice on what constitutes inventory. Generally, goods held by the retailer under a commercial consignment will be inventory under the PPSA, as the goods are to be sold, leased or otherwise disposed of by the retailer.

6. How much does it cost to register on the PPSR?

6.1 It costs \$7.40 to register online a financing statement on PPSR for seven years and \$130.00 to register online a financing statement with no end date.

7. What happens if you register on the PPSR within the required time?

7.1 If the supplier registers its commercial consignment as a PMSI within 15 business days of the retailer getting possession of the goods or, where the goods are inventory, before the retailer gets possession of the goods, the supplier will get a super-priority for its PMSI.

8. What happens if you don't register on the PPSR or don't register within the required time?

8.1 If the supplier doesn't register its commercial consignment on the PPSR within the required time, the supplier loses its priority against registered PMSIs but its PMSI is still validly created and will have priority in accordance with the default priority rules.

8.2 The default priority rules are generally as follows:

- (a) a perfected security interest takes priority over an unperfected security interest;
- (b) if there are two or more perfected securities, the earlier or first perfected security wins out over the second or later perfected security; and
- (c) if there are two or more unperfected security interests, again the first or earlier unperfected security interest wins out over the second or later unperfected security interest.

8.3 These rules of priority are subject to more specific rules about priority in PPSA and PMSI super-priority.

9. How do you enforce your security interest?

9.1 The supplier can enforce its PMSI by seizing the goods it supplied to the retailer either from the retailer or from any party who has the goods and has a lower priority than the supplier.

9.2 Once the supplier has obtained possession of the goods, it can either keep them or dispose of them under a power of sale.

9.3 The enforcement provisions in the PPSA do not replace, but rather complement, other rights and remedies available. These additional rights may be contained in statute law, common law or equity.

- 9.4 If the goods are NOT used predominantly for personal, domestic or household purposes (ie they are used for business purposes) the parties may contract out of most of the enforcement provisions of the PPSA. This would mean that, in commercial consignments, the supplier and the retailer could contract out of most enforcement provisions of PPSA.
- 9.5 The enforcement provisions do NOT apply where a receiver or controller has been appointed to deal with property under Part 5.2 of the Corporations Act (Cth).
- 9.6 Suppliers and retailers should always seek and rely on specific legal advice before they take or defend any enforcement action.

10. Other information

- 10.1 The supplier has a transition period of 24 months after the registration commencement date (RCD) ie the date of commencement of the PPSA, currently 30 January 2012, to register its interest in the commercial consignment with the retailer on the PPSR.
- 10.2 The supplier's commercial consignment must be dated before the RCD, in order to be covered by, and take advantage of, the transition period, even if the supply of the goods occurs after the RCD.
- 10.3 If the commercial consignment is dated after the RCD, the supplier must register its interest in accordance with clause 5.1 above.

11. Transition arrangements

The PPSA does NOT require the supplier to register each commercial consignment with the retailer. A single registration may cover subsequent security interests in property that is supplied under later agreements.

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