It has now been one year since 31 January 2019, which was effectively known as the ‘PPSA registration expiration date’ due to the sheer number of registrations on the Personal Properties Securities Register (PPSR) that were due to expire if registered around the commencement date in January 2012.

The registration expiration date was a good opportunity for secured parties to conduct a review of all existing registrations and consider whether they need to be renewed, discharged or allowed to lapse.

It was also a good reminder to secured parties to not adopt a ‘set and forget’ mentality after completing their renewals. This remains as true as ever.

This article will look at some of the common mistakes that occur in the registration process and steps that should be undertaken to avoid them.

1. **Clearly identify your security interest in your terms**

Before you even can think about lodging any registrations, you need to get your terms and conditions right. Generally, in the credit space, a security interest will arise by reason of:

1. a charge over all of the customer’s property (including after-acquired property) or specific property; or
2. a retention of title clause.

Other types of security that may require registration are leases, bailments and consignments provided certain elements under the PPSA are satisfied. These interests can be deemed under the legislation so if you are involved with those types of transactions, expert advice should be sought.

It is important that your terms are clearly drafted to ensure that the security that you think you are obtaining is accurately reflected in the wording of the terms. A properly completed registration cannot rectify defects in the underlying security agreement.

Your credit application (including your terms and conditions) should be regularly reviewed to ensure that you have the highest protection.

2. **Identify your customer**

The first step when considering whether to advance credit is to identify who you are actually dealing with. It is not uncommon for credit to be advanced to customers without proper consideration of who the actual legal entity is until it is necessary to take recovery action. If this occurs, it can then be up to your lawyers to figure out who to sue.

The key questions to be asked upon receipt of a credit application to assist with identification are as follows:
1. What is the type of entity – sole proprietor, partnership or company?
2. If a partnership, who are the partners and what is the ABN (if any)?
3. If a company, who are the directors and what is the ACN? Does it have an ARSN?
4. Is the applicant a trust? If yes, who is the trustee and what is the ABN (if any)? Should you get a copy of the trust deed?

The above not only assists with recovery action but is also critical to how the ‘grantor’ is identified in your PPSR registration.

Everybody has now heard the horror stories of failures to use the correct grantor identifier in a PPSR registration (by using an ABN instead of an ACN or vice versa), resulting in defective registrations and losses of assets worth millions of dollars.¹

Generally, the grantor is to be identified as shown in Table 1.

If an individual’s name is being used, consideration must be given to the type of document verifying the name as the Personal Property Securities Regulations identifies the priority of the specific source document that must be used (i.e. name on a licence, name on a passport).

If you are unsure, you should always seek advice from an expert.

### Ensure your terms are accepted and collateral described

In order for your security interest to be enforceable against third parties and perfected (in addition to registration), it must be:

1. in writing and either:
   - (a) signed by the grantor; or
   - (b) accepted by the grantor by conduct that reasonably appears to have been done with the intention of adopting the writing; and
2. the writing evidencing the agreement contains:
   - (a) a description of the collateral; or
   - (b) a statement that the security interest is taken in all-present and after acquired property (with or without exceptions).

It is important to note that a description of the collateral in the financing statement registered will not satisfy the above. The description needs to be in the actual security agreement.

This usually raises the issue of what the security agreement encompasses as it may include a number of documents (i.e. is it the credit agreement alone or are purchase orders and invoices included which will contain clear descriptions of the collateral). What encompasses the security agreement will be a matter of construction based on the wording of the documents and how they interrelate.

It is important that all of your documents ‘speak to one and other’ and do not seek to create inconsistent rights.

A failure to properly describe the collateral in your security agreement and registration can result in the security interest being unenforceable.

### PMSI or not?

A purchase money security interest (PMSI) is a security interest that:

1. secures part of a purchase price;
2. allows the grantor to obtain rights in the collateral (such as a retention of title); or
3. is an interest under a ‘PPS Lease’ or commercial consignment.

The benefit of a PMSI, if registered correctly and within the required timeframes (discussed below), is that the security interest in the specific

“if an individual’s name is being used, consideration must be given to the type of document verifying the name as the personal property securities regulations identifies the priority of the specific source document that must be used”

<table>
<thead>
<tr>
<th>Entity type</th>
<th>Grantor identifier (lowest value must be used if available)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trust with corporate trustee</td>
<td>1. ABN of the trust 2. If the trust has no ABN, the ACN of the corporate trustee</td>
</tr>
<tr>
<td>Trust with individual trustee</td>
<td>1. ABN of the trust 2. If the trust has no ABN, the name of the trust or trustee</td>
</tr>
<tr>
<td>Individual that is not the trustee of a trust</td>
<td>Individual’s surname and given names</td>
</tr>
<tr>
<td>Partnership</td>
<td>1. ABN of the partnership 2. If the partnership does not have an ABN, the surname and given names of the partners</td>
</tr>
<tr>
<td>Company that is not the trustee of a trust</td>
<td>1. ARSN 2. ACN 3. ARBN</td>
</tr>
</tbody>
</table>
collateral will be afforded a higher level of priority, commonly referred to as ‘super priority’.

As noted above, a retention of title is a common security interest arising in the credit space and is a PMSI, meaning that any registration relying on a retention of title clause should reflect that the interest is a PMSI.

A failure to register your security interest as a PMSI (if it in fact is a PMSI) can result in you losing the ‘super priority’ afforded.

5 Register within time

It is well-known that a failure to register a security interest prior to an administration of the grantor will result in your security interest vesting in the grantor. Put simply, if you don’t register, you will likely lose your security upon insolvency.

There are also specific time periods prescribed under the PPSA and Corporations Act 2001 (Cth) that have an effect on:
1. the priority between PMSIs and other security interests; and
2. the vesting of interests in external administrators if an insolvency event occurs (excluding an appointment of a receiver or manager);

The time limits prescribed are outlined in Table 2.

These time limits may be extended but only in limited circumstances.

The easiest way to avoid any issues arising is adopt a system where registrations are completed immediately upon the opening of an account and before any goods are supplied.

It should be noted that under the PPSA, a registration may be completed prior to the date the security agreement is made or before the security interest attaches to the property (generally when the grantor obtains possession of the collateral) so you can get in early and discharge if the agreement does not eventuate.

Summary
The PPSA is mechanical in nature and the failure to tick all of the boxes can lead to catastrophic outcomes.

Internal policies must be put in place to ensure registrations are completed correctly in the first instance and regular reviews are conducted to ensure any potential defects are either avoided or discovered before it is too late.

The above are some helpful tips to assist you avoid the traps that have caused so many losses to secured parties because they could not follow the requirements. However, these tips cannot be substituted for expert advice as the issues are usually not as straightforward as they seem.

The points should be used as signposts to assist you with identifying potential issues and then as a springboard to seek assistance when in doubt.

The costs in seeking assistance pale in comparison to the potential loss that may be suffered in the event of a failure or defect.

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FOOTNOTES:


TABLE 2

<table>
<thead>
<tr>
<th>Security type and collateral</th>
<th>Time to register within</th>
<th>Benefits/Consequences</th>
</tr>
</thead>
<tbody>
<tr>
<td>All</td>
<td>20 business days after the security agreement came into force (or 6 months before the appointment of an external administrator if this date is later)</td>
<td>If the registration is not completed within the time period and an external administrator is appointed, the security interest will vest in the grantor.</td>
</tr>
<tr>
<td>PMSI in goods* that are inventory**</td>
<td>Prior to the grantor obtaining possession of the goods</td>
<td>‘Super priority’ in the goods over other security interests</td>
</tr>
<tr>
<td>PMSI in property other than goods that are inventory</td>
<td>Prior to the grantor obtaining rights in the collateral</td>
<td></td>
</tr>
<tr>
<td>PMSI in goods that are not inventory</td>
<td>15 business days from to date the grantor obtains possession of the goods</td>
<td></td>
</tr>
<tr>
<td>PMSI in property other than goods that are not inventory</td>
<td>15 business days from the date the grantor obtains rights in the collateral</td>
<td></td>
</tr>
</tbody>
</table>

* ‘Goods’ are tangible property. It also includes crops, livestock, wool, minerals but does not include ‘Financial Property’. Property that is not ‘Goods’ includes intangible property

** ‘Inventory’ is property held by a business (with an ABN) for sale, lease, as raw materials or work in progress, for use as materials.