



PPSA Bulletin No. 3

Personal Property Securities Act 2009 (Cth)

Issues for law firms

March 2012

IMPORTANT ...



**The PPSR has
commenced**



**Law firms need to be aware of
some specific issues**

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LEGAL PRACTITIONERS' LIABILITY COMMITTEE

Problems with the migration of some ASIC company charges

After the commencement of the PPS Register on 30 January 2012, it was discovered that when the existing company charges on the ASIC Register of Company Charges were migrated onto the PPS Register, a significant number of those registrations (namely 994,337 registrations with 390,671 distinct ABN's) were migrated with the company's ABN rather than the expected ACN. As a result, a PPS search of a grantor company using its ACN, would not necessarily return all of the existing company charges that had been registered on the ASIC Register.

An announcement was published on the government website - <http://www.ppsr.gov.au> recommending that whenever searching the PPS Register by a grantor company, three

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When searching companies on the PPS Register, practitioners should search by ACN, ABN and company name

separate searches should be conducted, using the ABN, ACN, and then the name. The announcement also provided instructions on how such searches could be effected using the current web interface.

Subsequently, there has been a further announcement outlining a proposal to change the grantor details in each registration migrated from ASIC with an ABN, to an ACN. In a Stakeholder Update published at 5pm on 23 February 2012, the Commonwealth Attorney General's department has indicated that the *"Indicative timing for implementation of the [proposed solution] is mid March with the process to be completed by the end of March"*.

Until that solution is completed, practitioners should ideally conduct three PPS searches of a grantor company, one using the ABN, one using the ACN and a third using the organisation name.

Furthermore, businesses who have previously taken company charges and registered them on ASIC, should check that their security interests have been correctly migrated using the ACN of the grantor company. If not, such business may consider what steps they might take to protect their interests pending the implementation of the proposed solution.

As we suggested in our PPSA Bulletin No.2, *"businesses should not simply assume that all existing security interests will be fully and effectively migrated"*.

What replaces the old ASIC Form 312?

Many practitioners who have acted for purchasers or vendors in the sale of business, a sale of assets, or even a sale of land will be familiar with the need for some vendors to provide the purchaser with an executed ASIC Form 312 "Notification of discharge or release of property from a charge" at settlement and for the purchaser to subsequently lodge that form with ASIC. Now that the PPSR has commenced, the ASIC Form 312 is defunct. What should purchasers now obtain from vendors?

Instead of the old Form 312, a purchaser or incoming financier will now be looking to the vendor to provide a "Release and Undertaking to Amend Registration" from each and every secured party that has a registered security interest over the property being purchased.

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The old ASIC Form 312 has been replaced by a "Release and Undertaking to Amend Registration"

The Australian Banker's Association (ABA) and the Australian Finance Conference (AFC) have jointly developed various model documents, including a "Priority Deed" and a "Release and Undertaking to Amend Registration". The model documents together with a document that explains their status, specifies conditions of use and sets out a suggested protocol, are all currently available on ABA's website - <http://www.bankers.asn.au/Submissions/Personal-Property-Securities/Personal-Property-Securities-Information-and-Protocols>, and the AFA's website - www.afc.asn.au/afc_info/publications.html.

Unlike the old Form 312, it will not be necessary, or even possible, for the purchaser to register the release and undertaking document. Rather it is now the outgoing secured party (or outgoing financier) who will have the responsibility (by virtue of the undertaking it has given) to register a financing change statement on the PPS Register within 10 business days. The purchaser just needs to check in due course that the registration has been correctly amended. If not, the purchaser could resolve the problem by using the "Amendment Demand" process described in our PPS Bulletin No.2.

The role of law firms in registering and maintaining financing statements

Every law firm needs to consider what role it wishes to play in the administration of security interests. In other words, will the firm be registering financing statements on behalf of their clients or not?

Some firms may have previously undertaken the process of registering company charges on behalf of their clients by lodging a Form 309 with ASIC. That process no longer exists. To do the same job, it is necessary to register one or more financing statements on the PPS Register.

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Every firm needs to ask itself "*what role will we take in registering and maintaining financing statements?*"

However this new process is a lot more complicated and risky because:

- There are a lot more options to consider when registering a financing statement (e.g. choosing the class of collateral, choosing between commercial or consumer property, choosing between PMSI or non PMSI, choosing between inventory or non-inventory, choosing between transitional or non-transitional, choosing whether to register by serial number, and choosing whether and how to use the free-text field);
- The consequences of making clerical errors when inputting data for searches or registrations are potentially far more severe;
- It may be necessary to register more than one financing statement (e.g. if the collateral belongs to more than one collateral class, if the security interest is both a PMSI and a non-PMSI (e.g. an "all-monies" ROT clause), or if the grantor is a trustee company with an ACN that operates a trading trust with its own ABN).
- There are a myriad of new obligations and responsibilities on secured parties, each with their own specific timeframes, some (but not all) of which can be contracted out of, and/or affected by confidentiality agreements. These include:
 - Giving a verification statement to the grantor;
 - Responding to 'amendment demands' and 'requests for information';
 - Giving a notice to other secured parties in various circumstances;
 - Registering a financing change statement when a security interest becomes unperfected or is discharged or a grantor's name changes;
 - Making sure all of the collateral is covered by the registration and making new registrations when required; and
 - Renewing registrations after 7 years or 25 years.

If the firm decides to both register and maintain financing statements on behalf of their clients, the firm will need to invest in business processes and filing or I.T. systems to

keep track of what financing statements have been registered for which clients. Amongst other things the law firm will need to:

- Set up an account either directly with the PPS Register or through one of the information brokers;
- Set up one or more Secured Party Groups (SPGs) on the PPS Register;
- Securely store reference numbers, tokens (or passwords) for each registration and SPG;
- Track all activities (searches, registrations, amendments, notices etc) for billing purposes;
- Have a calendar or diary system to provide alerts when registrations need to be renewed; and
- Ensure the client has the final responsibility for confirming the accuracy of financing statements lodged on its behalf or in relation to its assets.

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Firms that decide to register and/or maintain financing statements need to invest in the training of relevant staff.

Furthermore, will the law firm take responsibility for complying with all of the on-going obligations and responsibilities of secured parties? If so, the firm will need a sophisticated system to track exactly which obligations have been contracted out of for each specific security interest, and be able to respond to notices promptly (including the seeking of instructions as and when necessary). If the firm will not take this responsibility, it will be important to make that clear to the client, ensure that the client's address (rather than the law firm's address) is used for the address for service in the registration, make the client aware that only the client (and not the firm) will receive notices, and provide the client with the necessary tokens and registration numbers.

Most importantly, the firm will obviously need to invest in training the relevant staff in the new processes and systems, and particularly the various choices that need to be made when registering a financing statement.

Alternatively, there are several 'information brokers', consultants, specialist lawyers and software vendors who are offering a variety of products and services to assist law firms. For example, we are aware that the following service providers offer compliance and registration services, as well as consultancy services and workshops. This may not be an exhaustive list.

Name	Telephone	Email
EDX Australia Pty Ltd	(03) 9866 4559	kim.powell@edxppsr.com.au
GlobalX Information	1300 885 662	david.favretto@globalx.com.au
Veda Advantage	1300 921 621	amal.clarke@vedaadvantage.com

It is recommended that firms meet with at least two providers, either from the above list or any other they may locate through their own enquiries, in order to make their own assessment to decide which provider to use.

A third alternative is that a firm may well decide that taking on the responsibility of registering and maintaining financing statements is simply too risky or onerous.

In such cases it is very important that the firm makes sure that the client is aware that the firm will not be providing such services. The firm should make sure they have written confirmation that their retainer is limited and does not include the physical act of registering a financing statement, and/or searching the register. The firm might then also refer the client to one of the information brokers or the government website - www.ppsr.gov.au.

Obviously any particular law firm could adopt a combination of options, or use a different approach depending upon the particular client or matter in question. However, it is worthwhile for each and every firm to consider these options and make a firm-wide policy decision as to how the firm will deal with such issues.

Law firms acting in commercial transactions

Practitioner's acting in commercial transactions may need to consider many issues including:

- Whether particular property is or is not covered by the Act;
- Whether a transaction gives rise to one or more security interests either through the "in substance" test, or one of the deeming provisions;
- What searches are necessary and how the results of searches should be interpreted;
- What registrations are necessary and the possible consequences of not registering.

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"An opinion should not generally be provided as to title or priority in respect of personal property"

Practitioners providing opinions about the operation of the PPS Act should take care to specify all assumptions and include appropriate qualifications.

Some leading commentators¹ have suggested that

“An opinion should not generally be provided as to title or priority in respect of personal property”

This is because:

“The PPS Register is not a title register and as there are only limited registers of ownership of personal property (such as those for ships, trade marks, patents and designs), it is virtually impossible to state with certainty that an item of personal property is owned by a particular Grantor.”

“Although the PPSA includes a detailed (though not exhaustive) priority regime, it is very difficult to give a meaningful opinion as to priority of interests in collateral. Any opinion would need to be subject to extensive qualifications and assumptions which would make the exercise somewhat counterproductive.”

Whilst advice on priorities may be relatively simple in some situations (such as in the context of a liquidation), practitioners should still have careful regard to relevant assumptions and carve-outs in their advice.

In some cases a firm may decide that they are currently not adequately equipped to provide specific advice about the new PPS regime. Notwithstanding such a decision, it is still important for such a firm to:

- Make the client aware that they are not advising on any PPS aspects;
- Document that limited retainer in writing; and
- Advise the client that it is important for them to get specialist advice about the PPS system.

A firm might look back and consider how they handled the GST when it was introduced. Did the firm acquire the experience and expertise to be able to handle the GST aspects of every transaction? Did the firm build up contacts (accountants, other lawyers) to whom they could sub-contract any tricky GST issues? Or did the firm simply exclude the GST aspects from their retainer?

¹ See the LexisNexis publication entitled “*Personal Property Securities in Australia*” paragraphs [7.350] to [7.600]. Similar opinions were expressed by the panelists at a Legalwise seminar in Melbourne on 17 August 2011.