



Key PPSA concepts for Businesses

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Written by JHK Legal Senior Associate Belinda Pinnow

In Australia, security over personal property is managed by the provisions of the *Personal Property Securities Act 2009* (Cth) (**PPSA**). The PPSA provides the framework for registration of legal rights known as “security interests” in various types of personal property on a national register, the Personal Property Securities Register (**PPSR**). All kinds of entities including individuals, partnerships, companies and trusts may provide security interests to another party.



This purpose of this article is to provide an overview of the key PPSA concepts that businesses and anyone transacting on a regular basis need to be aware of. It covers:

1. The notion of Personal property and what it encompasses;
2. What a security interest is;
3. How someone gives or receives a security interest;
4. Some of the key terms used in the PPSA;
5. When someone holding a security interest can (generally) enforce it.

1. What is personal property?

'Personal property' is any property that is not 'real property' (being land or interests in land such as a lease). Personal property includes tangible items (items you can pick up, such as a book) and intangible items (items that exist but do not have a physical form, such as a website).

General examples of personal property include motor vehicles, household goods, inventory, and intellectual property. In dealing with personal property, it is important to note that the PPSA does not apply to 'fixtures'. A item of personal property will become a fixture if it is attached to the land and is unable to be easily moved. As a result, it will not have a security interest apply to it.

By way of simple explanation:

- A block of land or the house built on that land is not personal property and the PPSA does not apply.
- The car parked in the driveway of the house is personal property and the PPSA does apply.
- The BBQ out the back of the house is personal property and the PPSA applies. However, the owner of the house decides to cement the BBQ into the ground, which on completion, makes it a fixture. The PPSA will then **not apply** to the BBQ after it is cemented as it has become attached to the land.

2. Security Interests – what are they?

A 'security interest' is an interest in personal property arising out of a transaction which secures the payment or performance of an obligation. There are many examples of security interests – hire purchase agreements, leases of goods (such as motor vehicle leases), retention of title clauses (where a seller owns the goods until the goods are paid for even if they have been delivered) and where a person grants another person/entity a security interest as evidence of their intention to pay – or put another way, provides security for the future performance of their promise.

The PPSA also provides automatic (or deemed) security interests where the transactions are: transfers of account and chattel papers; the commercial consignment of goods and in certain cases, leases and bailments.

These automatic security interests occur irrespective of obligations to be performed or money to be paid.

So how does this work practically?

- Jane decides to enter into a contract with John.
- John agrees to supply Jane office supplies with weekly delivery of the ordered office supplies but Jane has fourteen days to pay the invoices.
- John includes a clause in his contract that provides him with a “security interest” in Jane’s personal property.
- Jane fails to pay a \$5,000.00 invoice issued.
- John can rely on this security interest to seek payment of that money from Jane’s personal property, for example, by the sale of furniture. **NB.** This example doesn’t explain the whole process and as we go along you will see that there are other steps John must do but it does show how security interests arise in commercial settings.

3. Key definitions:

The person providing the security interest as security for their obligation(s) is called the “Grantor”. The person who receives the legal rights in the personal property (the security interest) is called the “Secured Party”.

4.A security interest is granted – now what?

Merely giving the security interest is not enough to afford protection to the secured party – the secured party must be able to enforce it against the personal property by showing that the security interest has *attached*.

The secured party (remember, the person receiving the rights) must show:

1. the grantor has rights in the personal property (for example, is the owner) or has the power to transfer rights in the personal property to the secured party (for example, a trustee of a trust owning the personal property);
2. value has been given for the security interest (for example, the secured party has provided the grantor with a loan) **or** the grantor does an act by which the security interest arises (one of the deemed security interests we mentioned above).

If the secured party can establish these two requirements, then it has an enforceable security interest as against the grantor's personal property.

However, without registering its interest on the PPSR the secured party may lose its rank among the secured creditors entitled to have access to the grantor's personal property. It is imperative that on establishing a security interest, that it is registered to:

1. **establish the secured party's position among other creditors (preferably first ranking if there are no other registered interests) to access the personal property; and**
2. **enforce the personal property against the interests of third parties (discussed next).**

5. Enforcement of Security Interest against third parties

The secured party must then seek to show that the security interest is enforceable against a third party who now has possession or ownership.

A simple example of where this might happen is if a painting has formed part of the secured personal property.

The grantor gives or sells the painting to their friend. The secured party cannot seek the personal property from the grantor and instead must now show it has the right to seek it from the third party friend.

For a security interest to be enforced against a third party, the secured party must show:

1. the secured party has possession of the property; **or**
2. the secured party has perfected the security interest by control (this involves showing that the secured party has done everything it is capable of doing to secure its interest in the personal property – generally by registration on the Personal Property Securities Register or if the secured party has control or possession of the personal property).

In addition, the secured party must also show that there was a security agreement (that is an agreement for the transaction), evidenced in writing between the grantor and the secured party that is:

- signed or adopted by the grantor (by act or omission); **and**
- which contains a description of the collateral or a statement that a security interest is taken in all of the grantor's present and after-acquired property.

So, taking the above example of the painting:

- unless the painting was *specifically* mentioned in the agreement between the secured party and the grantor as being part of the personal property (or the agreement secured all present and after acquired property of the grantor), the secured party is unable to obtain the painting from the third party.
- if it was included in the agreement, the secured party could require the third party to surrender the painting.

The PPSA is a complex piece of legislation and it is noted that this article is written by way of general comment and any reader wishing to act on information contained in this article should first approach their legal professional advisor for properly considered professional advice which takes into account the reader's specific situation.