PPSA in Commercial Transactions

PPSA and extensions of time to register: what you need to know

Introduction

Security interests in personal property are governed by the *Personal Property Securities Act 2009* (Cth) (PPSA). These interests must be perfected in order for them to be enforceable against competing claims by third parties. To ensure a security interest does not vest in a corporate grantor under s 267 of the PPSA, generally a security interest over collateral must be registered within the 20-business day time frame provided by s 588FL of the *Corporations Act 2001* (Cth) (the Act).

Section 588FM of the Act grants the court power to extend time for registration of the security interest. To enliven the court's discretionary power under the section, the court must be satisfied that:

(a) the failure to register the collateral earlier

  (i) was accidental or due to inadvertence or some other sufficient cause; or

  (ii) is not of such a nature as to prejudice the position of creditors or shareholders; or

(b) on other grounds, it is just and equitable to grant relief.

Recent cases indicate that the court does not always grant extensions of time for parties who failed to register their security interest in time.

What works?

Inadvertence and delay

In *Re Appleyard Capital Pty Ltd* [2014] NSWSC 782, by written agreement dated 9 February 2013, 123 Sweden agreed to lend $320,000 to Appleyard. The loan was advanced on 14 February 2013.

Appleyard as grantor had agreed to register the security interest in favour of 123 Sweden as grantee within 30 days of the written agreement. Appleyard later told 123 Sweden that the registration of the security interest had been effected on 7 May 2013.

But in March 2014, 123 Sweden discovered that the security interest had never been registered. It then received advice as to the need for registration, and 123 Sweden eventually registered the security interest on 29 April 2014. It was discovered that three third-party security interests had been registered against the grantor: one was registered before the time that the subject security interest was required to be registered under s 588FL, and the other two were registered after that time.

Appleyard was experiencing financial problems and 123 Sweden applied for an order to extend the registration time. Brereton J noted in summarising some dicta on the point that inadvertence under s 588FM(2)(a)(i) includes failure to advert to or understand the requirement for registration within the specified period, an innocent error in the sense of failure to register through ignorance of the legal requirement to do so, or of the consequences of not doing so.

Inadvertence was made out and Brereton J made the order.

In *Re Accolade Wines Australia Ltd* [2016] NSWSC 1023, the plaintiffs incorrectly registered security interests against its customers' ABNs instead of their ACNs. They wanted to remedy this issue. They re-registered the security interests and applied to the court *ex parte* for an order extending the 20 business day requirement referred to in s 588FL(2)(b)(iv). They also sought an order under s 293(1)(a) that the 15 business days registration time frame for their PMSI registrations be extended.

The plaintiffs provided evidence that the registrations had been carried out by employees using the platform of a third party service provider, which did not notify the employees of the need to register against their customers ACNs, nor the consequences of registering against an ABN.

The court noted that "inadvertence will readily be found where an error of a secured creditor in not attending to registration of its security within time is innocent and does not result from any disregard of its statutory obligations." The order was granted.

In *Re Black Opal IP Pty Ltd* [2013] NSWSC 1225, the registration of the security interest was made a year late as a result of solicitor inadvertence. Despite the long period of delay, the court granted an extension of time. The Court took into account the fact that the grantor of the security interest had consented to the application but this was not a critical factor.

Solvency of Grantor and 'Guardian' Orders

Brereton J in the *Appleyard* case noted the Australian authorities which establish that the interests of unsecured creditors are a relevant consideration when considering extension of time applications. He observed [at 25] that where the Court is not satisfied that there is no risk that unsecured creditors could be adversely affected, the unsecured creditors are entitled to be heard against the making of the order, though this may be sufficiently achieved by imposing a term reserving leave to apply to set it aside in the event of a liquidation or administration. This type of order is commonly called a "guardianship order", after the case *Re Guardianship Securities Ltd* [1984] 1 NSWLR 95.

Brereton J in the *Appleyard* case noted at [32] that there was "a high degree of likelihood that Appleyard is insolvent and will go into liquidation or administration within six months." He granted an extension noting that the order did not affect the priority of the other registered security interests. His Honour also noted the application was ex parte and that Appleyard had not been given notice of the application. Accordingly, whilst the application was successful, the order was subject to a guardian order , which allowed a liquidator or administrator to apply to discharge the order if Appleyard was liquidated or fell into administration within 6 months.

In the *Accolade Wines Australia* case, whilst all grantors appeared to be financially secure, the Court noted that orders made under s 293(1) extending the period for registration of the plaintiffs' PMSIs would result in the 'AllPAP' holders (some of which were granted before and some of which were granted after the date on which the plaintiffs made their initial registrations) losing their priority in respect to the particular collateral which was the subject to the Plaintiffs' PMSIs. Accordingly, the court made the orders subject to a guardian condition that all grantors and AllPAP grantees be joined in the proceedings and be given 28 days to contest the order. The court reserved the right of insolvency administrators to apply to discharge the orders if insolvency occurred within 6 months.

In *Re Barclays Bank PLC* [2012] NSWSC 1095, Barclays applied for an extension of time to register the security interest under s588FM of the Act. The court granted the order for the following reasons:

1. Barclay's application for an extension of time was not opposed by the grantor;
2. There was little likelihood that other creditors would be prejudiced if the order was granted;

3. The grantor had given security to Barclays and no other entity, and was in a "strong financial position" between the end of the 20 business day registration period and the date of registration of the relevant security interest;
4. The delay of 2 months was not a relatively long period of time; and
5. The financial strength of the grantor meant that it was highly unlikely to become insolvent or be placed in administration.

The Court did not make any guardianship order due to the financial strength of the grantor.

Applications after the critical time

In *KJ Renfrey Nominees Pty Ltd v OneSteel Manufacturing Pty Ltd* [2017] FCA 325, OneSteel granted Renfrey a security interest. Administrators were appointed to Onesteel and it was discovered that the registration of the security interest had incorrectly identified OneSteel's parent company, Arrium Ltd, as the grantor. The security interest vested in OneSteel under s 267 of the PPSA. However, as part of a commercial settlement of a dispute, a new agreement was entered into by which OneSteel (through its Administrators) granted a new security interest to Renfrey which was then registered on the PPSR. Although registration was successfully effected, the parties sought a court order for extension of time since s 588FL(4)(b) of the Act would have otherwise caused the new security interest to vest in Renfrey.

The court held that s 588FL extended to security interests that had been perfected after the "critical time" (being in this case the commencement of OneSteel's voluntary administration).

Applying for an injunction

In *Re Southern Engineering Services Pty Ltd* [2014] NSWSC 1882, South Engineering was the grantor of security interests and was placed in administration and subsequently went into liquidation.

The owners of the collateral (goods) applied for an injunction to prevent the liquidator from taking the goods and selling them in a fire sale before the hearing of the application for extension of time had taken place. The court granted an injunction noting that a sale of the goods in the circumstances of the liquidation may well result in a diminished return when compared to that which the plaintiff would be able to generate through a more orderly sale process.

The court emphasised that prejudice suffered by unsecured creditors including employees was of "slight significance" and that the more important consideration was whether it can be shown that the absence of the registration from the register has resulted in others acting to their detriment.

Interests of unsecured and secured creditors

In *Re Transurban CCT Pty Limited* [2014] NSWSC 1909, Brereton J noted that the interests of unsecured creditors are a relevant consideration since if the order is made, they will be deprived of the benefit of having the security vest in the company and it will instead be preserved for the benefit of the secured creditor.

But his Honour said: "The mere fact that if the extension is granted unsecured creditors will be deprived of the benefit of the security interest vesting in the company and thus receive less dividend is no objection to making an order." Brereton J surmised that it is relevant to consider the financial position of the company. If the company is shown to be financially secure and that it is unlikely that a "critical day" will arise in the foreseeable future, then that is likely to be the end of the matter. But if the court cannot be satisfied that there is no risk to unsecured creditors, then they are entitled to be heard against the making of the order although that may be sufficiently achieved by suspending the operation of the order or by imposing a term reserving leave to apply to set it aside in the event of liquidation or administration. The type of prejudice that is of particular relevance, Brereton J said, is prejudice attributable to delay in registration, rather than prejudice from making the order (the latter prejudice being inevitable).

Brereton J explained that the period of delay in effecting registration is relevant primarily because the shorter the delay the less likely that failure to register within time will have had any impact. He concluded that the significance of the passage of time is mainly related to the possibility of competing interests having arisen, in particular through others having dealt with the company on the footing that the collateral was unencumbered.

What does not work?

There have also been instances where the court has refused to grant an extension of time. *Re Kaizen Global Investments Ltd* [2017] FCA 431, *Re OneSteel Manufacturing Pty Ltd* [2017] NSWSC 21 and *Re Production Printing (Aust) Pty Ltd* [2017] NSWSC 505 are three such examples.

In *Re Kaizen Global Investments Ltd* [2017] FCA 431, Kaizen, a company based in the United Arab Emirates agreed to advance $5m to the first defendant, ANB, an Australian Company. However, Kaizen was unaware of the requirement to register its security interest on the PPSR and consequently did not do so. Three months later, Kaizen became aware of the need to register in order to perfect its security interest, yet still delayed registration for another 33 days. A week later, ANB went into administration and subsequently passed into liquidation. Kaizen applied for an extension of time under s588FM as the delay in registration of the security interest meant that the security interest would vest in ANB.

Kaizen was an overseas company (incorporated in the United Arab Emirates) and the court was satisfied that its failure to register was due to inadvertence. However, the court refused to grant an extension of time as Kaizen delayed registration by more than three months (which the court held to be a significant delay) and then did not register as soon as practicable after learning of this requirement.

In the matter of *OneSteel Manufacturing Pty Ltd (administrators appointed)* [2017] NSWSC 21, Alleasing entered into a lease agreement with OneSteel. Alleasing registered its security interest, however it was against OneSteel's ABN instead of its ACN. Onesteel went into administration. Alleasing sought an order pursuant to s 588FM to fix a later time for registration of the security interest. The court held that the registrations were defective under s165(b) of the PPSA and therefore ineffective pursuant to s164(1)(b) as they could not have been discovered by a search against the ACN. The fact that the administrators had discovered them by a search against the ABN was not relevant. The court refused to extend time for registration as the security interest was never registered at the 'critical time.'

The case was affirmed in *Re Production Printing (Aust) Pty Ltd (in liq)* [2017] NSWSC 505. Similar to the *OneSteel* case, HP Financial Services registered their security interest in a rental and financing agreement against Production Printing's ABN instead of its ACN. Production Printing was placed in voluntary administration seven months later and the administrator informed HP Financial Services that the registration was defective. HP contended that under s 166 of the PPSA, its registration had been perfected temporarily. The Court refused to grant an extension, concluding that s 166 did not apply to defective registrations which had never been perfected. The Court held that s166 only applies in circumstances where registrations had been made effectively at first but were rendered defective at a later time.

Conclusion

The pendulum may have begun to swing against the hitherto unfettered use of "inadvertence" if the *Kaizen Global Investments* case is anything to go by.

In order to reduce costs and delays, applicants for extensions of time need to avoid ex parte applications as the cases make it clear that the company should always be served with the application.

Finally, where s 267 of the PPSA appears to apply, liquidators should make enquiries of the relevant secured creditor and determine whether there were any orders extending time for registration and also whether those orders were subject to a guardianship order.

If the extension order was subject to a guardianship order, then liquidators need to carefully consider whether they should apply to the Court to have the extension order vacated, in order to assist in maximising the return to unsecured creditors.

Dealing with priority issues

***Allied Distribution Finance Pty Ltd v Samwise Holdings Pty Limited [2017]* SASC 163.**

This case dealt with ownership and possession. Clients and practitioners alike can still grapple with these concepts because we find it hard to come to terms with the fact that the PPSA operates independently of ownership.

Bill's Motorcycles sold motorbikes to end users. CDF provided floorplan finance to Bill's Motorcycles for over 40 motor bikes. CDF registered its security interest.

It owned each bike until sold by Bill's Motorcycles to an end owner. It was a bailment arrangement. Bill's Motorcycles subsequently granted an Allpap to Samwise Holdings which registered its interest. Bill's Motorcycles then entered into a bailment agreement with ADF to provide separate floorplan finance. ADF registered its security interest.

ADF then acquired ownership of the 40 motorbikes previously owned by CDF but which were in possession on Bill's Motorcycles. Bill's Motorcycles defaulted and ADF issued default notices.

ADF claimed its security interest took priority over Samwise Holdings' security interest by virtue of s 62.

Section 62 (2)(b)(i) says a PMSI in inventory has priority if it is perfected by registration at the time the grantor obtains possession of the inventory.

Is the reference to the "grantor obtaining possession of the inventory" a reference to the grantor obtaining possession of the inventory as a *grantor of the PMSI* with the grantor obtaining possession simpliciter? Or is it a reference to the grantor obtaining possession *in fact* – whenever that took place?

Samwise Holdings contended that the grantor (Bills Motorcycles) did not obtain possession immediately before granting the security interest to ADF because Bill's Motorcycles held possession as bailee from CDF: Bill's Motorcycles had had possession for some time beforehand.

Samwise Holdings contended that Bill's Motorcycles held possession in fact since the time CDF entered into the finance arrangement with CDF: It maintained that s 62 (2)(b)(i) was not made out. But at [46] the Court said:

"Historically many financing transactions have been structured as having a legal form that preserves ownership in the financier such as hire purchase, bailment or finance leases, when the hirer, bailee or lessee would otherwise be the owner and the financier would hold the security interest".

The Court went on to explain that the general purpose of the Act is to treat such transactions as if the property were owned by the person having possession of the goods and the financier holding the security interest in the property for the purpose of determining priority as between competing security interests in the property.

The court explained that the Act does not deem the property to be owned by the person having possession and hence the financier retains legal ownership of the property and can enforce rights at general law against the person having possession and against strangers (persons other than those having competing security interests in the property). The court held for CDF.

***Aristocrat Technologies Australia Pty Ltd Allam* [2017] FLA 812.**

In December 2015, after protracted High Court litigation, the High Court issued a certificate of taxation, of costs (a document issued after taxation of costs been completed) in favour of Allam against Aristocrat Technologies (Aristocrat) in the sum of $100,000.

Aristocrat had costs ordered against Allam in the process of being taxed, in the process of being taxed, in the sum of around $700,000. Mr Allam's solicitors asserted a lien over the proceeds which would be obtained after enforcing the certificate of taxation.

Could Aristocrat set off the unliquidated amount of the costs orders it has against Mr Allam against the liquidated amount of the costs certificate Mr Allam had against Aristocrat? The court said that the stream cannot rise higher than the source and held for Aristocrat and the set off prevailed.

It held that the PPSA does not generally apply to liens as they arise by operation of law and in this case, the lien was more akin to a change arising by operation of the general law : s 8(1)(c).

***Auluaulu International (PVT) Ltd & Anor v G.S. Logistics Pty Ltd* [2017] VCC 1204.**

Auluaulu agreed with Watersun Swimwear Pty Ltd (an Australian company) to sell swimwear to it. Auluaulu separately agreed for swimwear to be manufactured by Linea Aqua PVT Limited (Linea) in Sri Lanka. Watersun asked Logistics (a freight forwarding company) to ship the swimwear to Australia.

Linea made the swimwear and then shipped it to Australia. Its contract with Watersun gave it a lien over the goods. Auluaulu paid Linea for the swimwear but Watersun did not pay Auluaulu. Neither did Watersun pay Logistics.

Logistics was holding onto the swimwear at the docks under its contractual lien with Watersun. Auluaulu claimed it was the rightful owner of the goods which Logistics ignored and Logistics sold the goods to recover what was owing to it by Watersun.

Auluaulu sued Logistics in conversion.

The court applied the Victorian Goods Act 1958 and held that the title to the swimwear had passed from Linea to Auluaulu to Watersun.

Logistics' contractual lien included a contractual right of sale and it was therefore in the nature of a pledge which was a security interest being caught by s 12 (2) (f) of the PPSA. The security was perfected by possession under section 22 of the PPSA when Logistics took possession of the swimwear.

Logistics was entitled to sell the swimwear and the Auluaulu conversion claim failed.

***Bernard v Bernard* [2017] FCCA 2197.**

This case related to family law property dispute. Equipment was initially owned by the wife and then it was transferred to a trustee company controlled by the husband. The equipment was hired to the second company which subsequently passed into liquidation.

The liquidators for the second company claimed that the hiring arrangement give rise to a security interest. They alleged that the security interest had not been registered and that as the second company had possession of the equipment on the date of the liquidation, the security interest (which extended to the proceeds of sale of the equipment) vested in the second company pursuant to s 267 (2) of the PPSA.

However quoting the Court at [93]: "The difficulty for the liquidator is that they made absolutely no effort to establish that [as at the date of liquidation} the equipment was in the possession of [the second company]".

The liquidator's claim failed and as a result the proceeds were available for distribution between the parties to the marriage.

***Frigger v Banning (No 3)* [2017] FCA 221.**

You can't have or maintain a security interest in a judgment, particularly where the judgment has been overturned, because the judgment then cease to exist and attachment as required by s19 becomes impossible.

Also you can't have a security interest in a cost order. Costs orders are personal rights entitling the "beneficiary" of the costs order to apply for taxation. They are not personal property as contemplated by the PPSA.

***HUGHES v PLUTON RESOURCES LTD* [2017] WASCA 213**

Pluton entered administration and the DOCA created a fund of money to be used for certain purposes. The DOCA terminated and some money remained in it. During the DOCA, Pluton had granted an Alpap security interest to GNR. GNR receivers alleged that the Alpap security extended to the residue left in the fund.

It was argued that the fund arose by operation of law and therefore it was not consensual.
But the court held that whether the collateral (in this case, the fund) came into existence by operation of law, is not the point.

Section 8 (1) (c) mandates that the correct question in whether the security interest arose by operation of law. GNR's security interest was created consensually not by operation of law. It had been perfected and applied to all Pluton's assets including the residue in the DOCA fund.

In ***P TWIN HOLDINGS PTY LTD as Trustee for the P TWIN TRUST v SG OLD PTY LTD* [2017] WADC 77**.
Foxrov Pty Ltd borrowed money from PTwin to purchase equipment and agreed to grant security over the equipment. Registration of the PMSI took place after the 15 business day from the date possession and also after Foxrov on sold the equipment, meaning that the purchaser of the equipment took free of the security as perfection is required to gain priority over third parties rights.

***Prentice v Pitt [2015]* NSW SC 262.**

Nicole bought a property with her parents Mr and Mrs Pitt, the interests being 50% to Nicole and 50% to Mr and Mrs Pitt.

Mr and Mrs Pitt contributed their half share in cash. Nicole borrowed hers and the bank required a mortgage over the whole of the property. Nicole's parents agreed to these terms and Nicole and her parents entered into a deed by which Nicole agreed that if the property was to be sold, the mortgage was to be discharged from her half share.

Nicole's estate was sequestrated. Her trustee said that she intended to payout the mortgage from the proceeds of sale and keep half of that which remained , remitting the other half to Mr & Mrs Pitt.
Unsurprisingly, the court upheld the deed.

The Court considered the application of the PPSA and considered the Pitts may have had a charge arising under the deed but presumably because it was never perfected the security interest would have vested in Prentice. The charge presumably would have been a charge over the sale proceeds to secure the promise to apply them in discharge of the mortgage debt.

But the exception under s 8 (I) (f) (i) of the PPSA may have applied: the creation of an interest in a right to payment (of the sale proceeds)… in connection with an interest in land."

Simjanovska v Sentumar Pty Ltd trading as Storage King Rockdale **[2017] FCA 736**
Clear thinking is important .

Ms Simjanovska signed a storage agreement with Storage King Rockdale. She stored items (personal effects) with Storage King Rockdale in accordance with the agreement. Storage King Rockdale alleged she fell into payment arrears. Clause 6 allowed Storage King Rockdale to auction the items after notice had been given.

Storage King gave the notice. Ms Simjanovska applied for an injunction preventing Storage King Rockdale from selling the items until the Court determines the dispute.

However, Storage King Rockdale had given her the opportunity to remove her items without the charge on many occasions and she failed to do so. Her application for an injunction failed. She then argued that Storage King Rockdale failed to issue proper notices for the intended auctioning and other disposal of the items and in breach of section 130 of the PPSA.

However, the Court said that such an argument had no merit because Storage King Rockdale was not claiming a security interest over any of the property.

West Tankers Pty Ltd v Scottish Pacific Business Finance Limited **[2017] NSWSC 621.**
West Tankers supplied diesel fuel. Scottish Pacific was a financier.

They both claimed to be entitled to $184,000 which had been paid into Court by the McConnell Dowell OHL Joint Venture (McConnell Dowell).

West Tankers had supplied fuel to Ealwin but Ealwin failed to pay. Ealwin in turn supplied fuel to McConnell Dowell to the value of $184,000 under an invoice discounting facility "completely and unconditionally".

Ealwin assigned the receivable to Allianz. Allianz assigned them to GE and GE assigned them to Scottish Pacific.

West Tankers invoked the procedures under the *Building and Construction Industry Security of Payment Act 1999* (NSW) in respect to the money owed to it by Ealwin. West Tankers subsequently obtained an adjudication determination and a subsequent adjudication certificate which was filed as a judgment debt in the District Court and a debt certificate was issued under section 7 of the *Contractors Debts Act 1987* (NSW).

A notice of claim was then served by West Tankers on McConnell Dowell.

Under section 8 (1) of the *Contractors Debts Act 1987* (NSW), service of the notice of claim on McConnell Dowell operated to assign to West Tankers the obligation of the joint venture (McConnell Dowell) to pay the money owed to Ealwin.

Faced with competing claims by Ealwin and Scottish Pacific, McConnell Dowell paid the money into court. The debt owed by McConnell Dowell was assigned to Allianz and later to GE. GE was the assignee of the debt on and from 31 March 2016. The subsequent assignment to Scottish Pacific is immaterial as far as timing is concerned.

However, the notice of claim was served and its assignment operated on and from 5 May 2016.
The Court said that once the debt had been assigned to Allianz, there was nothing on which the assignment under the security of payment legislation could operate.

The priority provisions of the PPSA were not discussed. Even though the PPSA deals with the "transfer of accounts", no issue was raised.

What if the PPSR is incorrect?

***Davidson and Registrar of Personal Property Securities* [2015] AATA 549.**

Mr Davidson and Ms Burge were in partnership.

There was an alleged leasing agreement between the partnership and Davidsons Blinds & Shutters Pty Ltd. Ms Burge said the agreement was executed by Mr Davidson at a time when the partnership had come to an end.

Under the alleged agreement, Blinds & Shutters sub-let equipment, the web-site and IP from the partnership under the partnership was wound up. It also purchased existing stock from the partnership.

In addition, Blinds and Shutters were paid for the installation of products as well as the administration fee covering costs in relation to the agreement.

Subsequently, Mr Davidson signed an agreement authorising Blinds and Shutters to register the leased plant, stock and equipment as security in PPS Register against the money owed to them.
Ms Burge did not sign the authority and on 13 November 2013 sent an Amendment Demand requesting that Blinds & Shutters register financing change to end the registration claiming no collateral secured any obligation.

Furthermore, Ms Burge then initiated the administrative process under sections 179-181 of the PPSA. An application was then made to the AAT under s 191 of the PPSA, appealing the decision of the Registrar under s181 of the PPS. In her submissions, Ms Burge stated that Mr Davidson was well aware the partnership had dissolved before Mr Davidson signed the lease agreement. The partnership's ABN registration had ceased by that time.

Much evidence was brought in relation to the existence of the partnership at the time the agreement was signed and whether Mr Davidson had the right to sign it on behalf of Ms Burge.

Despite Mr Davidson's arguments that Ms Burge was not available so "he was left with making the best decisions he could on behalf of the partnership", it was found that the agreement with Blinds & Shutters was not authorised by the partnership agreement and not binding under the Victorian Partnership Act 1958 when signed by a single partner. The Tribunal concluded that Mr Davidson was not therefore acting in the ordinary course of business in purporting to grant the security interest to Blinds& Shutters. The tribunal accordingly did not suspect that the amendment was not authorised. It directed that the Registrar make the amendment to end the registration.

***Denbride Pty Ltd and Registrar of Personal Property Securities* [2015] AATA 938**

In 2009 Eagle Boys as franchisor entered into a franchise agreement with Denbride Pty Ltd to own and operate an Eagle Boys branded outlet in Woodford. The obligations under the five years agreement (with an option to renew for another five years) were secured by fixed and floating charges over Denbride's assets.

They were registered on the ASIC register and subsequently transferred to the PPSR.

Denbride decided not to exercise the option to renew and informed Eagle Boys that no monies were owed and therefore "We have fulfilled our Franchise agreement".

In light of the above, Denbride argued that all their obligations had concluded and demanded that Eagle Boys agree to amend the registration accordingly. Eagle Boys disagreed. The central issue was whether the amendment was authorised under section 178 of the *PPSA Act 2009 (Cth)*.

It was found that Eagle Boys had been incurring ongoing legal costs and other fees in relation to correspondence with Denbride regarding an option to purchase. These legal fees were a debt which, according to the franchise agreement, had to be paid for by Debride.

Denbride disputed the fees (which could, in theory, have given rise to a claim in relation to unconscionability and unfair contract terms).

But these issues, if agitated, were to be done so in another forum: the Registrar declined to make the amendment because under s 181 of the PPSA, he suspected on reasonable grounds that the amendment was not authorised. The AAT confirmed the Registrar's decision.

***Draper and Registrar of Personal Property Securities* [2017] AATA 817**

Mr & Mr Draper entered into a loan arrangement with ANZ in order to enable Mr Draper to purchase a car. Registration of the security interest in the vehicle was made on the PPSR. The Applicant alleged a forgery in relation to their signatures in the contract and alleged that Esanda was not ANZ and could not be a party to the agreement.

Nevertheless the AAT found that the Applicant had agreed to the terms of the agreement by taking possession of the vehicle and making several repayments.

The issue was whether the request to remove reference to the security interest was authorised under section 178 of *PPS Act* and whether this case fell within section 181, where an amendment demand should be refused by the Registrar if there is suspicion, on reasonable grounds, that the amendment demand is not authorised.

The AAT found that there was a loan contract dated 18 January 2012 in existence and it had not been forged and that the loan thereunder was perfected by registration under the PPSR.

The collateral continued to secure the debt owed by the Applicant and so the amendment demand seeking removal of the registration from the PPS Register was refused.

***SFS Projects Australia Pty Ltd v Registrar of Personal Property Securities* [2014] FCA 846**

After security interests were assigned to assignees (SFS), the Assignor accidentally registered releases instead of the actual amendments to reflect the assignments.

There was no dispute as to the fact that security interests existed, were properly assigned were not discharged or that the financing change statements filed did not reflect the assignor's intentions containing information error to the detriment of the applicant.

Did the Registrar have power under section 186 of the *PPSA* to restore data to the register which was incorrectly removed as an error on the part of the person making the application? The Court noted that the error changed the "end times" to the date of the amendment.

The Court concluded that the Registrar is empowered under s 186 to register a financing change statement if data is "incorrectly removed" and this expression includes "removed by way of error".

***SFS Projects Australia Pty Ltd v Registrar of Personal Property Securities (No 2*) [2014] FCA 987**

In this case, SFS Projects Australia Pty sought further orders pursuant to 186 of the *PPS Act* that the Registrar register a financing change statement to make it clear that the end dates for the registration should be restored in such a manner as to indicate that the registration had never been removed. This was so ordered.

***Scottish Pacific (BFS) Pty Ltd v Registrar of Personal Property Securities* [2017] FCA 1378**

Phoenix Shutdown Service Pty Ltd (Phoenix) granted security to Scottish Pacific, which in turn, registered appropriate financing statements.

Phoenix transferred the security interests and registrations to Rush Corporation Pty Ltd (Rush) Rush sought to amend the end times but Rush ended up discharging those security interests accidentally – as was the problem in the SFS case above. Phoenix went into liquidation and several months later Rush applied for restoration of the registrations under s 186 of the *PPS Act.*

The Court recognised that the financing change statements lodged by Scottish Pacific with the Registrar of Personal Property Securities in relation to the security interests granted Phoenix resulted in a discharge of the registrations instead of a transfer of the registration to Rush.

The Court agreed that as a result of the registration of the financing change statements filed by Scottish Pacific, the registrations were "incorrectly removed" from the PPSR.

However, the Court concluded that it did not have jurisdiction in this matter and that the earlier decision in *SFS Projects Australia Pty Ltd v Registrar of Personal Property Securities* [2014] FCA 846 was "plainly wrong", since the interpretation would give jurisdiction to Courts over decisions of an administrative character, which is contrary to the intention of Parliament.

The Court concluded that section 186 of *the PPS Act* operated to give the Registrar power to restore data incorrectly removed. Since this matter related to the Registrar's discretion, it should have been the subject of an application under the Administrative Appeals Tribunal Act 1975, not an application under PPSA s 206 (1) (b).

***In the matter of OneSteel Manufacturing Pty Limited (administrators appointed)* [2017] NSWSC 21**

Alleasing Pty Limited (Alleasing) was in the business of asset financing and leasing.

Alleasing entered into a master lease agreement with OneSteel Manufacturing (OneSteel). In 2014, Alleasing registered a financing statement in relation to a lease by OneSteel of a crusher and subsequently, in 2015, amended it.

However all registrations were under One Steel's ABN, not ACN.

BGC Contracting Pty Ltd held a security interest registered in 2014 over "all present and after acquired personal property" of OneSteel. OneSteel went into administration.

Since the registrations were made against the ABN of OneSteel, they could not be discovered by searches against One Steel's ABN.

The Court noted that a search by reference only to OneSteel's ABN could not reveal the original registrations and concluded, by reference to section 164 (i)(b) and 165 (b), that the original registrations were defective.

Moreover, although the Alleasing administrators managed to discover the original registrations by a search against the ABN*,* "the capacity or potential to mislead is crucial" the Court said. It concluded that Alleasing's interests had vested in OneSteel.

Additionally, Alleasing applied to fix a later time for registration under s588FM *of the Corporations Act*. The Court confirmed that an order under s 588FM *of the Corporations Act* provides relief from the consequences of failure to register within time. But that was not the case here, as the registration had not occurred at all.

An order made under s588FM may therefore potentially only save a security interest from vesting under s588FL *of the Corporations Act* but not from vesting under s 267 of the *PPS Act* (which is the case here), the Court said.

<u>Collateral description-how important is it?</u>

There are other issues in relation to the registration process and financing statements in particular, but we will focus on collateral description.

Errors can render a registration ineffective under the PPSA or they can lead to outcomes different to what is sought.

The Court cannot rectify registration errors per se, although it can order an extension of time to register.

If a registration is ineffective regarding particular collateral, it is not ineffective regarding other collateral correctly described.

The validity of the security agreement is not affected by an ineffective registration, it is just that the security interest is unperfected and unenforceable against third parties.

In the financing statement, there needs to be a description of the collateral and the proceeds.

You need to consider whether or not the collateral is or includes "inventory" (as defined in section 10).

Is the collateral subject to "control"?

Is the collateral covered by a transitional security interest? Or a migrated security interest?

<u>Fatal Defects</u>

Where collateral must be described be a serial number and the serial number is incorrect or missing – s165 (a).

You state the security interest is transitional when it is not – s337A.

You describe a security interest as a PMSI when it isn't – s165 (c).

You make an error in the grantor details -s 165 (b).

<u>Potentially fatal defects</u>

Collateral description is wrong, including stating it is or is not inventory or subject to control when the reverse is true.

<u>The question is</u>

Does the defect result in the registration not being disclosed in a search? If so - it is seriously misleading and void.

In Australia you can search by grantor details and also by serial number so defects in other fields may not be fatal.

Collateral Classes

See the table in section 153, item 4 (c): The collateral must belong to a single class of collateral prescribed by the regulations.

The Register sets out the 4 classes of property - tangible property, general property, intangible property and financial property.

Each of those has sub - categories.

But the Regulations (which the Register is meant to reflect) – set out those categories in a different fashion - which can cause confusion.

See for example clause 2.3 of Part 2 of Schedule 1 of the Regulations.

The description must identify an item of personal property or a class of personal property to which the item belongs.

For example, a description which identifies collateral as fruit is sufficient to identify collateral that is apples.

In addition, there is a free text field which does not have to be completed but it is a good idea to do so.

Describing the collateral by using the wrong collateral class is fatal and errors in the free text could be fatal.

Specific types of collateral -issues

"Allpap" and "allpap except" collateral classes.

These generally reflect the former fixed and floating charge registrations of old.

"All present and after acquired property of the grantor except any property which is not subject to, or has been released from, the security agreement in favour of the secured party".

"Serially numbered goods": motor vehicles, water craft, aircraft, intellectual property must be described by serial number if consumer property. And they may be described by serial number if commercial property.

PMSI

You can't hold PMSIs for all collateral classes, neither for "Allpap" nor "Allpap except" registrations. It is fatal to register a non-PMSI as a PMSI but what about the reverse – registering a PMSI as a non-PMSI? Not tested yet by the Courts.

If you register the PMSI outside the PMSI time frames in s62 and 63, it loses its super priority. Does this then cause the registration to be "seriously misleading"?

This has not been tested by the courts.

Moving forwards

Good news-the March 2015 Whittaker Review suggests over 400 changes to the Act and the Regulations, including making the register easier to manage by, for example, removing numerous fields including the control, inventory and PMSI fields.

Any questions?