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PERSONAL PROPERTY SECURITIES ACT:

WHAT IS A PMSI?

The *Personal Property Securities Act 2009* (Cth) commenced on 31 January 2012. There were changes that affect the way a number of loan arrangements are documented. One of them is a purchase money security interest (PMSI).

The Act brought in a lot of new definitions. Some of the relevant terms are:

- "security interest" means basically the granting by a person (the grantor) of an interest in personal property to another person which secures payment or performance of an obligation. A security interest can be created by way of a charge over a company (a fixed or floating charge), a hire purchase agreement, a consignment, a retention of title clause and many others.
- "collateral" means the personal property over which the security interest is given or attaches
- "personal property" is just about anything other than land.
- PMSI is a special type of security interest because it secures the purchase of the personal property, it can arise when goods are supplied under a retention of title clause, arises on leases of such things as motor vehicles or boats or in a consignment transaction.

Typical situations where a PMSI will arise

To understand when a PMSI arises, some examples would be:

⇒ You buy a new car. You get finance for the car from a bank. Instead of the bank registering security under the existing Motor Vehicle Security register, the bank will register a PMSI. The Motor Vehicle Security register is being "rolled into" the Personal Property Securities Register. So if you are buying the car privately, you will be able to search the Register to see if there is any existing security. Searches can be conducted online for a fee. The benefit is that it is a national register unlike the Motor Vehicle Security register which was State based.

⇒ You provide stock to someone on a monthly account and your trading terms include a retention of title clause. That means that although risk and possession of the stock passes to the buyer, the title to the stock does not pass until full payment is made. This creates a PMSI which can be registered to protect your interest as unpaid seller of the goods.

⇒ You lease a boat or a car for more than 3 months. Again a PMSI arises which can be registered.

⇒ You give someone goods to sell for you on consignment. You can register a PMSI to protect your interest.

Generally unless the collateral is a motor vehicle, a PMSI will not arise in property that the grantor

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intends to use for personal, domestic or household purposes. There are some other exceptions such as an interest that arises in a sale and lease back arrangement but for present purposes, we will concentrate on the more common examples.

Why register a PMSI

A PMSI is given “super priority”. That means that it can defeat other security interests in the collateral. This includes security interests created before the PMSI arises. That is unusual because normally with security priority it is the first in time that prevails or when there is registration then the first to be registered gets the priority. Of course there are situations where priority can be given to another party by way of a deed, but normally the first in time is the one who gets priority so the “lion’s share” of the money available.

But with a PMSI, so long as the registration requirements are complied with, the “super priority” arises. A practical example would be where company A grants a fixed and floating charge to its bank, Bankco. Company C then sells some stock to company A and the trading terms include a retention of title clause. Company C registers a PMSI in regard to the stock. Company A then becomes insolvent. The effect of the registration of the PMSI and the “super priority” is that Company C is entitled to the stock.

Compare this to the situation that existed previously where the stock would have been sold by the liquidator and Bankco would have been entitled to the proceeds.

The rationale is that in our example, Bankco should not benefit from assets that company C would not have supplied to company A if it had not been for the retention of title clause. Company A needed the stock for their business and company C provided that stock and therefore should be able to get it back if company A becomes insolvent.

Warning

But, if the stock is sold by company A, company C may not get the “super priority” over the sale proceeds if the retention of title clause was one that allowed the sale of the stock. Usually those clauses do allow the sale, because otherwise, how would company A get the money to pay company C except by the sale of the stock.

So there are limits to the benefits of a PMSI. But if you are company C providing stock worth a substantial amount that may take some time to sell, then a PMSI would give some piece of mind.

Benefit to Franchisors

If you provide stock to your franchisees on account then you need to check your trading terms to make sure that you have a retention of title clause. In that case, you can get the benefit of registration of a PMSI to secure your interest in the stock. You would probably not bother for stock worth only a few hundred dollars but in some cases, the value of stock provided can be considerable. In that case, you should be looking to protect yourself—just in case the unforeseen happens.