

5 June 2014

PPSA Review Secretariat  
Commercial and Administrative Law Branch  
Attorney-General's Department  
3-5 National Circuit  
BARTON ACT 2600

**RE: STATUTORY REVIEW PPSA**

The Self Storage Association of Australasia represents some 1200 individual self storage businesses. Some of these are owned by corporate entities, many by individuals or couples - colloquially known as 'mum and dad' style enterprises. A large proportion of members we represent are small businesses. The Association has consolidated feedback from its members on the impact of the PPSA and PPSR on their business, and makes this submission on their behalf.

***What is self storage? How is it unique?***

In self storage, a person (known as a "storer") stores their goods in a space licenced to them by the facility operator. The facility operator does not have access to the storer's space, nor does the facility operator know what is being stored. One of the terms and conditions of the storage agreement is that if the storer does not pay for storage fees, the space may be forcefully accessed, the goods seized under contractual lien, and the goods then sold. A strict process of notification is followed by Association members before the space is accessed and the goods sold. It is not until the storer has defaulted on the storage agreement and the facility operator has cut the lock and forced entry into the space that the facility operator is able to ascertain what is being stored.

Unlike other businesses, self storage facility operators do not have the opportunity to check whether items placed into storage have a PPSR listing against them until the storer goes into default. In self storage, the storer may come and go with a variety of goods throughout storage period, moving items into the space and out again without the approval, verification or knowledge of the facility operator. For example, items moved in at the start of the storage period may not be there a month later. On the other hand, goods moved in months or years after the storage agreement was signed may in fact, unbeknownst to the facility operator, have a PPSR interest registered against them.

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At present, it is only on default and immediately prior to the facility operator seizing possession of the goods under contractual lien, that the facility operator undertakes a search to ascertain whether the goods in the space are subject to a PPSR listing. This is because most storers do *not* default on their storage agreement, and hence it is not relevant whether or not the goods in the space are covered by a PPSR registered interest. Given an opportunity, most facility operators would not allow storers to store items covered by a PPSR listing. This is because negotiating with PPSR security interest holders is time consuming and complex, and the amount of the outstanding debt for storage is usually relatively low. In short, having to negotiate over goods with a PPSR listing is a lot of hassle for no reward.

*“In other industries where goods are offered as security for credit or items are left in the care of others (ie traditional warehousing) the business owner has the ability to accept or reject the items after undertaking a search of the PPSR. We [self storage facility operators] do not have the ability to make such a decision as the relationship is ongoing and the items placed into storage by the storer may vary from month to month or even day to day and are unknown to us [the self storage facility operator]. The only person who can access the storer’s space and the only person who knows what is in the space is the storer themselves.”*

The value of goods left in a defaulting storer’s space is generally very low. On average, when a facility operator is forced to seize and sells a defaulting storer’s goods they make less than a few hundred dollars from the sale. In the majority of instances, they do not make enough to recover outstanding storage fees or the cost of enforcing the agreement and selling the goods. This is despite the fact that the debt being enforced is usually well under \$1500. Speaking generally, both the debt being pursued and the value of goods in self storage are both of low commercial value.

***What members currently do – a disproportionate administrative burden and cost relative to benefit***

Members of the Association undertake a search of the PPSR for **each and every storer** who defaults. In more than 95% of instances where a search is done, there is no security interest listing against the storer. In the event that there is a registered interest, more often than not the goods listed are not in the space.

*“I have only ever had one out of hundreds of PPSR checks that has come up with anything. The customer worked as a Stone Mason and it was for equipment used to cut the stone. The goods in the unit were clothes and personal items so they were not affected.”*

And

*“Very few searches have resulted in identifying anyone with an interest in*

*the property which leads me to believe that not many people are registering their interest.”*

Although the cost of undertaking the search can be added to the debt owed by the storer, and hence in theory may be recouped through the sale of the defaulting storer’s goods, most default sales of goods recoup so little funds that the ability to recover the search cost is a theoretical benefit only.

***More clarity needed around transitional security interests and/or interests with minimal detail and third party right to challenge a listing***

Further, when there is a listing against goods within the space the listing is often one that has either:

- migrated from a previously existing register (transitional), and the contact details for the security holder are scant,
- and/or
- is so broad that it captures all items such as one relating to collateral class “All present and after-acquired property - No exceptions”

Our members have found that security interests are often poorly recorded, providing limited contact details for the interest holder. This is particularly the case where the interest has been migrated from another register. This lack of detail makes it very difficult for the facility operator to contact the security holder and discuss whether they intend to claim or enforce their interest.

The general broadness of many listings is also debatable, particularly given the nature and value of the items in storage. Other than trying to negotiate with the (often uncooperative) registered security interest holder directly, there is no way of cost effective way to challenging the breadth of the listing or compelling clarification from the interest holder as to the nature of the listing.

*“...[often the] storage unit contains very little – maybe a small amount of furniture or personal items of low or no commercial value (NCV). There would be a PPSR listing in place for “any and all goods/belongings” often as part of a many year old business transaction. We’ve been forced to find the financier and attempt to get them to remove it...[in most cases] we’ve been successful by sharing the NCV inventory and photos but it has unnecessarily delayed the process – usually significantly.”*

Our members have undertaken searches returning listings that are more than 15 years old and are against ‘all present and after acquired property’. We have had one listing that is more than 24 years old. Complex transitional listing rules aside, there appears to be no

automated sunset on listings, or indeed no need for an interest holder to reregister or confirm their listing – the listing simply sits on the PPSR indefinitely.

Most small businesses – certainly most of our members – do not have the financial resources to pursue legal avenues and dispute a listing.

- 1. Any listing that does not meet a set identification standard – full name and current contact details or security interest holder – should be void.**
- 2. There should be a means of requesting clarification or challenging broad security interests, particularly when those interests are greater than 5 years old.**
- 3. A third party impacted by a listing has limited grounds and no affordable means through which to challenge a listing. There should be an inexpensive and swift process whereby a PPSR listing that is limited in identifying information, more than a certain age, or very broad can be challenged and the security interest holder must respond to the Register or the challenger within a set period of time.**

#### *Specific concerns about cost and value – inconsistent listing practices by security holders*

Members have expressed concern about the cost of undertaking a search, particularly where in almost all instances searches are usually taken with no positive result (no listing is found). Further, members complain that the disclaimer on the certificate issued clearly states that the information may not be correct. Where facility operators are relying on the search to ensure they are not attempting to sell goods that are covered by a security interest, the validity of the document should be absolute.

*“The first time I did it, the fee was \$3.50. The last time I did it, the fee was over \$20.00. Given that this is only 2 years old, that is a huge price increase and there may come a time where we need to do this more frequently, thus increasing costs further...My other issue is that there is a disclaimer on the printed documentation that says it may not be correct – so I’m wondering why we are paying such an amount to get information that at best, could be a little vague.”*

Other members have raised concerns about the value of doing the search given that many relevant commercial industries do not know of the existence of the PPSR:

*“I find it a waste of time and an additional cost that is highly likely not going to be recovered. The PPSR website is a typical government web site and complicated to use...I have spoken to rental businesses like radio rentals... as they quite commonly call in regards to storer’s which are their clients and may have goods of theirs in storage, These companies are the most likely interested party with White goods, Electrical and Cabinets the*

*common goods stored in storage units and when asked about PPSR they quite often don't know it exists."*

- 1. In our industry, the cost relative to discovery of relevant information is too high. Many storers default on very small storage fee amounts and for storage of very low value item.**
- 2. Further, the certificate should be absolute – our members should be entitled to rely on the certificate, and the disclaimer should be removed.**

### *Inconsistent listing practices and the question of perfecting possession*

Perhaps of greater concern are instances where facility operators are contacted by finance companies enquiring about whether or not a storer or particular goods are in storage, yet no corresponding security interest is listed on the PPSR. On occasion this has occurred *after* the facility operator has seized the goods to enforce their contractual lien. The Association has had previous legal advice that when the facility operator seizes goods in enforcement of its contractual lien, from that moment forward the facility operator has a superior interest in the goods as against any subsequent PPSR registration. However, the Association and in particular our small business facility operators do not have the resources to take legal action when this position is challenged.

In one instance a facility operator was contacted by a finance company regarding an item over which the finance company claimed they had an interest. The facility operator noted verbally over the phone to the finance company that there was no listing against that storer or that item on the PPSR. The finance company then registered their interest and sent a copy of the PPSR listing through to the facility operator. Although it would appear that the facility owner had priority as they had already taken possession of the item by enforcing their contractual lien following default by the storer, like most small businesses, this business did not have the resources to run a legislative interpretation argument about priority and perfection of possession, and the finance company claimed and removed the goods.

Where a PPSR listing is made by a finance company *after* they have made an enquiry to the self storage facility operator, this is a clear attempt to inhibit the facility operator from enforcing their contractual lien. A facility operator should be able to rely on a search undertaken when it first seizes the goods and, where that search produces no listing, enforced its contractual lien without needing to continually check for subsequent responsive listings made *after* possession has been effected by the facility operator.

Another member shared this experience:

*"We had an instance where a vehicle was unencumbered (not listed on the PPSR). The storer was well aware they were overdue. Two days after completing the PPSR check with the all clear - Grays online were making preparations for the sale and*

*did their own check. It had been listed (we believe erroneously) to attempt to prevent us moving to sale. In that instance we ended up doing a deal with the storer.”*

- 1. This is a problem with the constructed concept of ‘possession being perfected’. Most small businesses do not have the resources to instigate legal proceedings against an erroneous listing or to challenge the priority of a listing made *after* the facility operator has taken possession of an item under a contractual lien.**

#### *Double charge – stability of website*

We have had members complain about the stability of the website and the not infrequent double charge incurred because the system has crashed before the search identification has been recorded, causing the business to have to undertake and pay for another search.

*“There have been times when the search has been completed twice and paid for twice as the website has crashed before the certificate or reference number has been produced. This means we are charged but do not receive the information we have paid for. When followed up using the help line no-one had a solution to this and we had to wear it.”*

- 3. The website needs greater stability or a reimbursement capacity in the event it crashes before the certificate or reference number is produced.**

#### *Motor Vehicles*

Consistent with PPSA requirements, the Association advises facility operator members to undertake a specific serial number and/or VIN search for cars, boats and aircraft in the event that a storer defaults on their storage agreement and discovers these items are in the space. The PPSR has been of great benefit to facility operators who previously had to undertake searches across a number of registers to ascertain whether or not the item was stolen or had any encumbrances.

However, a number of members have been ‘caught’ by lack of clarity in the PPSA. In a number of instances vehicles in storage have had security interests registered against them by finance companies that have not enforced their interest, but also refused to lift the listing.

*“... a vehicle financier... claimed their finance agreement was up to date and would not cooperate.*

i. After writing back and forth over several months (including continuing to try and gain a response or payment from the storer) [the financier] continued to refuse to remove the security on the PPSR.

ii. Eventually after 11 months (and the balance [on storage fees] had blown out to >\$5000 – (excess of the value of the vehicle) we began the process of getting the PPSR removed.

iii. The only saving grace in this instance was that I checked the PPSR one last time to discover they had recently removed it! We then proceeded immediately to sale.”

- 1. In relation to motor vehicles, the consolidation of information from multiple registers onto a single register is a fantastic accomplishment of the PPSA.**
- 2. There needs to be a time limit for an interest holder to enforce the interest or the interest should lose priority or become invalid (see below).**

#### *No time limit on security interest holder to claim or disclaim*

Further, there is no time limit on the interest holder determining whether they intend to enforce their security interest. Contrast this position with that under liquidation and bankruptcy legislation for example. This has resulted in our facility operators being forced to continue to store goods for which they are unable to accrue charges until such time as the security interest holder decides to claim the item and enforce their interest. We have members who have retained items for up to 12 months under these circumstances (see above in particular re: cars).

*“...we experienced a few frustrating issues with the PPSR mainly around non response from those that listed the security on the register...Either we contacted them and received no response...[or]...If we contacted them they may not cooperate.”*

- 1. There needs to be the ability to force a security interest holder to claim or enforce their interest within a set period of time. If they fail to claim they should be deemed to have relinquished their interest so the items may be sold or disposed of.**

#### *Nature of items stored – exemption for self storage operators*

In self storage, most items stored are household goods, and almost without exception the goods are second hand. Under the PPSA specific exceptions apply to second hand goods under \$5000 in value. The Association would like to see an exemption for self storage operators along the same lines as the one currently extended to pawnbrokers. Currently pawnbrokers need not undertake a search of the PPSR unless they accept goods more than \$5000 in value.

Of all industries, pawnbrokers appears to be one where self storage has some parallel – that is, where relatively low value goods are being left with a third person. Indeed, if anything, pawnbrokers are in a stronger position than self storage facility operators as pawnbrokers know what the goods are and have them consistently in their possession from the moment they are deposited.

*...[pawnbrokers] are indemnified and exempt from having to comply with the PPSR which I have no idea why, but it would be great if we were too.*

Member have pointed out the inconsistency in the legislation that affords protection to a purchaser of second hand goods of a household nature under a market value of \$5000, whilst still requiring the self storage facility operator seller to undertake the search prior to offering the goods for sale.

- 1. Self storage facility operators should be extended a similar exemption to pawnbrokers under the PPSA whereby there is no need to undertake a PPSR search prior to selling goods upon default of the storer where those goods are less than \$5000 in value.**
- 2. Further, where goods are sold by a self storage operator upon default by the storer and a security interest *does* exist over those goods sold, the purchaser should be protected and enjoy unencumbered ownership as they currently do for other second hand goods purchases.**

We thank you for the opportunity to make submission on the impact the PPSA and PPSR have on our small business members. We make this submission on behalf of our members, and rely on their feedback for this purpose.

Regards

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