

Personal Property Securities

Registrar's Practice Statement

No. 3

Investigations, Civil Penalties and Enforceable Undertakings

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This document gives general information only - it does not constitute legal advice and is not a substitute for independent legal advice. While the Registrar makes every reasonable attempt to update this practice statement regularly, it cannot guarantee the currency or accuracy of the information in this document as the law can change frequently. We encourage you to seek independent legal advice if you have any specific concerns or questions.

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Background and Purpose

The Personal Property Securities Register (**PPSR**) is a publicly accessible online register which contains records of claimed security interests in personal property and prescribed personal property. The Registrar of Personal Property Securities (**Registrar**) is responsible for establishing and maintaining the PPSR.

The *Personal Property Securities Act 2009* (Cth) (**PPS Act**) contains four civil penalty provisions. These are set out in sections 151(1), 151(2), 172(3) and 195A(4).

If the Registrar considers a civil penalty provision in the PPS Act has been contravened it may apply to the Court for an order for the payment of a pecuniary penalty. In some circumstances the Registrar might choose to accept an enforceable undertaking from a person relating to compliance with a civil penalty provision as an alternative to seeking a civil penalty order.

The PPS Act permits the Registrar to conduct investigations into any matter for the purpose of performing his or her functions under the Act. This includes, but is not limited to, any suspected contravention of a civil penalty provision. To assist in the conduct of an investigation the Registrar may, by written notice, require a person to give any information that the Registrar believes is relevant to such an investigation. Failing to comply with the notice also contravenes a civil penalty provision.

This practice statement provides guidance as to how the Registrar will exercise his or her powers in relation to investigations, civil penalty provisions and enforceable undertakings under the PPS Act, and related matters.

Legislative History

Part 6.3 of the PPS Act (as commenced in 2009) contained a stand-alone regime for civil penalty proceedings and enforceable undertakings in relation to PPS matters.

On 31 March 2018 the PPS Act was amended to substitute that regime with the standard regulatory powers in Parts 4 (Civil Penalty Provisions) and 6 (Enforceable Undertakings) of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) (**Regulatory Powers Act**).¹

The relevant Regulatory Powers Act provisions and this version of the practice statement (Version 1.3) apply to contraventions of PPS Act civil penalty provisions and enforceable undertakings given on or after 31 March 2018. The previous regulatory regime and Version 1.2 of the practice statement continue to apply to contraventions which occurred, and undertakings given, prior to that date.²

¹ Amendments to the PPS Act were effected by the *Regulatory Powers (Standardisation Reform) Act 2017*

² See the application and savings provisions in Part 2 of Schedule 12 of the *Regulatory Powers (Standardisation Reform) Act 2017*

Investigations

Section 195A(1) of the PPS Act provides that the Registrar may conduct an investigation into any matter for the purpose of performing his or her functions. There are several ways in which it may come to the Registrar's attention that a matter may require investigation. This includes through the administrative or judicial processes following an amendment demand, or through a Request to remove, restore or correct data which is submitted to the Registrar.

Further, members of the public may refer matters to the Registrar for possible investigation if they consider a contravention of the PPS Act has occurred or is threatened. The procedure for referring a matter to the Registrar is set out below.

The Registrar may use a range of methods to investigate a PPS Act matter. For example, under section 172(2) of the PPS Act the Registrar is authorised to search the PPSR for any purpose that relates to the administration of the PPS Act. The Registrar is also empowered to issue a written notice under section 195A requiring a person to provide information to the Registrar.

195A Notices

If the Registrar believes on reasonable grounds that a person has information that is relevant to an investigation of a matter under the PPS Act, he or she may issue a written notice under section 195A(2) of the PPS Act (**195A Notice**) requiring the person to provide information specified in the notice.

Failure to comply with a 195A Notice may result in the Registrar applying to the Court for a civil penalty order. The provision of false or misleading information in response to a 195A Notice may result in a criminal prosecution pursuant to section 137.1 of the *Criminal Code Act 1995* (Cth) (**the Criminal Code**). Matters arising as a result of investigations may also be referred to other law enforcement agencies, such as the Australian Federal Police.

In circumstances where a 195A Notice is to be given to a secured party in respect of a PPSR registration, the Registrar will address the notice to the address for service specified in the registration and give it to the secured party by either:

1. leaving it at the address;
2. sending it by pre-paid post; or
3. sending it by fax or by email³.

Where there is more than one secured party, the Registrar may give a 195A Notice to each secured party.

Legal professional privilege

It is the Registrar's view that section 195A does not require a person to disclose information that would be protected by legal professional privilege. If you wish to make a claim of legal professional privilege regarding information requested under a 195A notice the Registrar may ask you to provide particulars of each communication over which legal professional

³ See section 287 of the PPS Act.

privilege is claimed, such as the nature of the legal professional privilege claimed, the form of the communication, who made the communication, who received it and the date of the communication, for the purposes of assessing those claims.

If you think this privilege might apply to information you are requested to produce in response to a 195A notice, we strongly recommend you seek independent legal advice.

Civil Penalty Provisions

Under the PPS Act, the Registrar is an authorised applicant in relation to the civil penalty provisions in the PPS Act. That is, the Registrar may apply to a relevant court for an order that a person who is alleged to have contravened a civil penalty provision pay the Commonwealth a pecuniary penalty.

Relevant courts are the Federal Court of Australia, the Federal Circuit Court and State or Territory courts that have jurisdiction under the PPS Act.⁴

The PPS Act contains four civil penalty provisions:

1. Section 151(1) – Making a registration on the PPSR without believing on reasonable grounds that the person described as the secured party is, or will become, a secured party in relation to the collateral.
2. Section 151(2) – Failing to apply to remove a registration from the PPSR within the prescribed time if:
 - i) the person described as the secured party has never been a secured party in relation to the collateral, and
 - ii) there are not, or are no longer, any reasonable grounds for believing the person is, or will be, a secured party in relation to the collateral.
3. Section 172(3) – Searching the PPSR without an authorised purpose, or using data obtained from an unauthorised search.
4. Section 195A(4) – Failing to comply with a 195A Notice.

Each civil penalty provision of the PPS Act is enforceable under the framework contained in Part 4 of the Regulatory Powers Act.

Civil Penalty Orders for contraventions of civil penalty provisions

If the Court is satisfied that a contravention has taken place, it may order the payment of a pecuniary penalty of an amount the Court determines to be appropriate.

A pecuniary penalty is a debt payable to the Commonwealth of Australia, and the Commonwealth may actively enforce a civil penalty order as a judgment debt.

Determining the pecuniary penalty

In determining the amount of the pecuniary penalty, the Court must take into account all relevant matters, including:

- The nature and extent of the contravention;
- The nature and extent of any loss or damage suffered because of the contravention;
- The circumstances in which the contravention took place, and
- Whether the person has previously been found by a court to have engaged in any similar conduct.

The maximum civil penalty payable for each contravention is as follows:

⁴ PPS Act, section 221(3)

Provision	Maximum Civil penalty per contravention (by individual)	Maximum Civil penalty per contravention (by Body Corporate)
Section 151(1) – Applying to make a registration on the PPSR without believing on reasonable grounds that the person described as the secured party is, or will become, a secured party in relation to the collateral.	50 penalty units	250 penalty units
Section 151(2) – Failing to apply to remove a registration from the PPSR within the prescribed time if: <ul style="list-style-type: none"> i) the person described as the secured party has never been a secured party in relation to the collateral, and ii) there are not, or are no longer, any reasonable grounds for believing the person is, or will be, a secured party in relation to the collateral. 	50 penalty units	250 penalty units
Section 172(3) – Searching the PPSR without an authorised purpose, or using data obtained from an unauthorised search.	50 penalty units	250 penalty units
Section 195A(4) - Failing to comply with a Registrar's investigation notice (195A Notice) issued pursuant to section 195A(2) of the PPS Act	50 penalty units	250 penalty units

The monetary value of one penalty unit is subject to change from time to time. You can find the current penalty unit amount [here](#).

Contraventions of section 151(1)

Circumstances that might indicate that a registration has been made in contravention of section 151(1) could include (but are not restricted to) situations where:

- the secured party is unable to provide any evidence that would support the making of the registration over the particular collateral – for example, there is no record of any prior contact between the grantor and the secured party and no security agreement;
- the evidence produced by the secured party is manifestly irrelevant to the registration;
- the secured party makes new registrations over the same collateral after removal of previous registrations by the Court or the Registrar;

- the registration is self-evidently absurd such as a registration over “Australia” or against grantors with whom it is clear that the registrant could have no commercial relationship of any kind (such as “the Queen”), or
- it appears to the Registrar that the secured party has made the registration with the intention to cause nuisance or harm to the grantor, or to prevent dealings with the collateral.

Ancillary contraventions of civil penalty provisions

A person who:

- attempts to contravene a civil penalty provision;
- aids, abets, counsels or procures a contravention;
- induces (by threats, promises or otherwise) a contravention;
- is in any way directly or indirectly knowingly concerned in, or party to, a contravention; or
- conspires with others to effect a contravention,

is also taken to have contravened the provision⁵ and may be subject to civil penalty proceedings or other enforcement action.

Contraventions by employees, officers or agents of bodies corporate

Where an employee, officer or agent of a body corporate is acting within the actual or apparent scope of his or her employment, a contravention or an element of a contravention committed by that person must also be attributed to the body corporate.⁶

Continuing contraventions

Some civil penalty provisions require an act or thing to be done within a particular timeframe or by a particular time (such as the 5 business day timeframe for removing a registration in section 151(3) which applies to the civil penalty provision in section 151(2)). If the act or thing is not done, the obligation continues until the act or thing is done (even if the specified time period has expired).

In that event, a separate civil penalty contravention is deemed to have occurred on each day that the act or thing is not done (including the day on which a civil penalty order is made).⁷

⁵ Regulatory Powers Act, Section 92

⁶ Regulatory Powers Act, Section 97

⁷ Regulatory Powers Act, Section 93

Criminal proceedings in connection with PPS-related conduct

Some conduct related to use of the PPSR may constitute an offence under the Commonwealth Criminal Code⁸. For example, it is an offence under section 137.1 of the Code to knowingly make false or misleading statements or omissions to a Commonwealth official, and under section 136.1 it is an offence to knowingly or recklessly make false or misleading statements or omissions on a Commonwealth application. Other criminal offences such as fraud might also apply in some circumstances connected with the use of the PPSR.

If the Registrar considers that a criminal offence may have been committed, the matter may be investigated under the Commonwealth Fraud Control Framework and/or referred to the Australian Federal Police, the Commonwealth Director of Public Prosecutions or other appropriate law enforcement agency.

Division 3 of Part 4 of the Regulatory Powers Act addresses the interaction between criminal and civil penalty proceedings in relation to the same conduct.

⁸ *Criminal Code Act 1995 (Cth)*

Enforceable Undertakings

The combined effect of the Regulatory Powers Act and the PPS Act is that the Registrar may accept a written undertaking that a person will take, or refrain from taking, specified action. Section 222 of the PPS Act provides that each civil penalty provision of the PPS Act is enforceable under Part 6 of the Regulatory Powers Act. It follows that each civil penalty provision of the PPS Act can be the subject of a written undertaking given and accepted under section 114 of the Regulatory Powers Act.

When might an enforceable undertaking be appropriate?

Offering an enforceable undertaking to the Registrar might be appropriate in circumstances where:

1. in the Registrar's view, a contravention of a civil penalty provision of the PPS Act has occurred or is likely to have occurred;
2. the facts of the alleged contravention have been acknowledged by the person; and
3. the Registrar considers it is appropriate in all circumstances to resolve the matter through an enforceable undertaking.

This may include considerations such as:

- the nature and seriousness of the breach;
- the apparent good faith of the person involved;
- whether the conduct was deliberate, inadvertent or reckless (for example, where the person has made repeated groundless registrations);
- whether the conduct has caused detriment to others and the nature, extent and seriousness of that detriment (for example, where there is evidence which suggests a secured party has made the registration to cause nuisance or harm);
- whether the person has been the subject of prior compliance or enforcement action, and the outcome of that enforcement action (for example, previous warning notices or previous decisions to remove data under section 184);
- the person's compliance history;
- the educative and deterrent effect of taking action via an enforceable undertaking;
- what, if any, action has been taken by the person involved to address the conduct of concern; and
- whether the person has cooperated with the Registrar.

Elements of an enforceable undertaking

An enforceable undertaking must be expressed to be an undertaking under section 114 of the Regulatory Powers Act, and must be in the following form:

- a) an undertaking to take specified action in order to comply with a civil penalty provision; and/or
- b) an undertaking to refrain from taking specified action, to comply with a civil penalty provision; and/or
- c) an undertaking to take specified future action directed toward ensuring the person will not engage in contravening conduct in the future.

Some terms that might be included in an enforceable undertaking could include:

- a) an acknowledgement that the undertaking is given freely;
- b) an undertaking that the person will pay their own costs for compliance with the undertaking;
- c) an undertaking to provide all documents and information requested by the Registrar for the purpose of assessing their compliance with the undertaking, and/or
- d) an undertaking that a specific officer from a company or group of companies will be responsible for overseeing compliance.

The Registrar will only consider accepting an undertaking if it:

- a) provides an acknowledgment or admission that the particular conduct constitutes or is likely to constitute a breach the PPS Act;
- b) includes a positive commitment not to engage in the conduct again;
- c) acknowledges that:
 - i) the Registrar will make the undertaking publicly available including by placing it on the Registrar's website;
 - ii) the Registrar will make public reference to the undertaking from time to time, including in news media statements and in PPS-related publications, and
 - iii) the undertaking in no way derogates from the rights and remedies available to the Registrar, the Commonwealth or any other person arising from the conduct.

The Registrar will not accept an enforceable undertaking:

- a) instead of commencing criminal proceedings against the party; or
- b) if the undertaking:
 - i) imposes any obligations on the Registrar;
 - ii) does not detail the misconduct that gave rise to the enforceable undertaking;
 - iii) contains any confidentiality clause;
 - iv) denies that the conduct breached the PPS Act;
 - v) contains any clause denying responsibility, including that the contravention was inadvertent or that the undertaking is not an admission for third party purposes;
 - vi) seeks to minimize the consequences of the conduct;
 - vii) contains any clause that suggests defences for possible non-compliance with the enforceable undertaking, or
 - viii) contains any clause whereby the Registrar agrees not to institute proceedings in the future.

Process for entering into an enforceable undertaking

A person who wishes to offer to enter into an enforceable undertaking should first discuss it with the Registrar (through the Registrar's office). While in appropriate circumstances the Registrar might canvass the possibility of an enforceable undertaking as a potential option during the course of an investigation, it is the responsibility of the person involved to offer the Registrar an undertaking. The Registrar cannot compel a person to offer an enforceable undertaking, and similarly the Registrar cannot be forced to accept one.

Once an enforceable undertaking has been offered to the Registrar, the decision to either accept or reject the undertaking will be made by the Registrar. A decision to accept or reject

the offer of an enforceable undertaking remains at the absolute discretion of the Registrar.

It is important to note that each undertaking is considered in the context of all the surrounding circumstances and the acceptance in one case does not create a precedent for acceptance in similar factual scenarios in the future.

An undertaking will take effect once it is formally accepted by the Registrar. After it is accepted, the undertaking will be published on the Registrar's website and may be referred to by the Registrar in media releases and other publications.

Withdrawing or varying an enforceable undertaking

Once an enforceable undertaking has been entered into, the person who has given the undertaking may withdraw or vary the undertaking, but only with the Registrar's permission. The Registrar also has the discretion to cancel the undertaking.

Breach of enforceable undertakings

An enforceable undertaking is enforceable by a relevant Court.⁹ Under section 115(2) of the Regulatory Powers Act, if a Court is satisfied that a person has breached an enforceable undertaking, it can make orders related to the breach of the undertaking. These may include ordering the person comply with the undertaking, ordering the person pay any money to the Commonwealth which was gained as a result of the breach, and/or ordering the person to pay compensation to a party harmed by the breach.

⁹ Relevant Courts are the Federal Court, the Federal Circuit Court, or a State or Territory Court with jurisdiction in relation to the PPS Act – see section 222(3) of the PPS Act.

Recovery of Court Ordered Costs

In general, the Registrar will actively pursue the recovery of court costs awarded in the Registrar's favour as a result of proceedings in respect of contraventions of the PPS Act, including the enforcement of civil penalty orders or enforceable undertakings.

Reporting misuse of the PPSR

If a member of the public considers that there is a matter that should be investigated, they can refer it to the Registrar for possible investigation. To refer a matter to the Registrar, please use the form at <https://www.ppsr.gov.au/suspected-misuse-ppsr>.

Further information

Enquiries about any of the matters discussed in this practice statement may be directed via email to enquiries@ppsr.gov.au.