

Personal Property Securities

Registrar's Practice Statement No. 7

Judicial Proceedings Sections 218 and 219

Version 1.3

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Background and Purpose

The *Personal Property Securities Act 2009* (Cth) (**PPS Act**) establishes a single national law governing security interests in personal property, designed to create a more certain, consistent, simpler and cheaper arrangements for personal property securities for the benefit of all parties.

The PPS Act allows the Registrar of Personal Property Securities (the **Registrar**) to intervene in judicial proceedings or commence or carry out proceedings in a person's name for the recovery of damages, if the proceedings are with respect to a "PPS matter".

This Registrar's practice statement explains how a person seeking the Registrar's intervention in, or initiation of judicial proceedings should apply and sets out the circumstances in which the Registrar will exercise the discretion to intervene in or initiate judicial proceedings. Although, this practice statement provides general guidance for the benefit of litigants and their advisers, each application will be reviewed on a case by case basis on its merits.

For information regarding the Registrar's approach to litigation in respect of contraventions of the civil penalty provisions see *Registrar's Practice Statement No. 3 – Regulation and Enforcement Policy*.

Judicial Proceedings with respect to a PPS Matter

Sections 218 and 219 of the PPS Act permit the Registrar, on behalf of the Commonwealth, to:

1. intervene in judicial proceedings with respect to a PPS matter; or
2. commence or carry out proceedings in a person's name for the recovery of damages with respect to a PPS matter, if the Registrar considers it is in the public interest.

PPS matter is defined in sub-section 206(1) of the PPS Act as a matter:

1. arising under a provision of the PPS Act which authorises an application to be made to a court; or
2. otherwise arising in relation to the PPS Act, other than a matter in respect of which the Federal Court or the Federal Magistrates Court has jurisdiction under the *Administrative Decisions (Judicial Review) Act 1977*; or
3. otherwise arising in relation to a security agreement or a security interest.

A proceeding may give rise to questions of law, such as the construction of the PPS Act or the general law relating to a security agreement or security interest, which makes the proceedings "*with respect to a PPS matter*". The Registrar may consider that the matter is of sufficient importance to warrant intervention in, or initiation of, judicial proceedings.

Intervening in Judicial Proceedings

The Registrar may decide to apply to court to intervene in proceedings:

1. in response to a request made by a party to the proceedings; or
2. at the Registrar's own initiative.

Application

A party who seeks to have the Registrar intervene in proceedings should apply in writing addressing all matters that are relevant to the Registrar's decision, including at a minimum:

1. a copy of all pleadings filed in the proceedings;
2. legal advice prepared by a solicitor or counsel which addresses the following:
 - a. the likelihood of success in those proceedings;
 - b. the reason(s) the proceedings are in respect of a PPS matter; and
 - c. the matters in which the Registrar's intervention could assist the court; and
3. a summary of the matters which would recommend the Registrar's intervention, in view of the matters stated below under the heading "Policy Considerations".

An application, which addresses the relevant matters should be sent to:

The Registrar of Personal Property Securities
Australian Financial Security Authority
GPO Box 821
Canberra ACT 2600

Attention: Legal & Governance

Alternatively, it may be sent via email to servlegdoc@afsa.gov.au.

Basis upon which the Registrar Intervenes

The Registrar will exercise the discretion to intervene on the following basis:

1. The Registrar will bear the Registrar's own costs in relation to intervention. To the extent that certain costs can be shared with another party, if the Registrar sees a community of interest (e.g. experts' fees, consultants' reports) the Registrar may consider a cost sharing arrangement.
2. The Registrar will appear through a legal adviser and will not agree to be represented as an intervening party by any other party to the proceedings.
3. If the Registrar supports submissions being made by another party to the proceedings, the Registrar may agree to exchange information with that other party. However, the Registrar will not provide information that would otherwise constitute a breach of the *Privacy Act 1988* (Cth). Any information provided by the Registrar to another party to the proceedings will be on a confidential basis and subject to the other party agreeing that the Registrar is entitled to exercise an overriding discretion as to whether the information is put before the court by the Registrar as an intervening party.

4. If the Registrar has conducted an investigation in relation to matters arising in the proceedings, the Registrar will consider favourably a request to provide to other parties to the proceedings a copy the 195A Notice and the response to that notice. The Registrar considers that, notwithstanding an intervention under section 218 may be on foot, the Registrar is entitled to continue an investigation conducted under section 195A of the PPS Act. However, the Registrar will generally prefer to intervene in civil proceedings only after the completion of an investigation, in order that the Registrar may put all relevant information disclosed by reason of that investigation before the court.

Beginning or Carrying on Judicial Proceedings

The Registrar may, on behalf of the Commonwealth, cause proceedings to be commenced and carried on in another person's name:

1. in response to a request made by the person in whose name the proceedings are to be commenced or carried on; or
2. at the Registrar's own initiative.

Conditions Precedent

The Registrar may bring or carry on proceedings, on behalf of the Commonwealth and in the name of a person, by way of initiating proceedings, defending or seeking to be joined to existing proceedings.

The Registrar will not bring or carry out proceedings in the name of a person, unless following four conditions are satisfied:

1. the Registrar has received written legal advice that there are reasonable grounds for starting the proceedings;
2. the proceedings are for the recovery of damages with respect to a PPS matter; and
3. the person in whose name the proceedings are to be commenced:
 - 3.1. has provided written consent to the Registrar bringing or commencing proceedings in that person's name; or
 - 3.2. is a constitutional corporation; and
4. the Registrar considers it is in the public interest to begin or carry on proceedings.

Application

Any person who seeks to have the Registrar initiate proceedings in the person's name should apply in writing to the Registrar, addressing all matters relevant to the Registrar's decision, including at a minimum:

1. a copy of all draft pleadings; and
2. legal advice prepared by a solicitor or counsel which addresses the following:
 - 2.1. the likelihood of success in those proceedings; and
 - 2.2. the reason(s) the proceedings are for the recovery of damages with respect to a PPS matter; and
 - 2.3. the grounds that demonstrate it is in the public interest for the Registrar to initiate the proceedings.

In addition to the matters stated above, every application must include a summary of the matters which would recommend that the Registrar begin and carry on the proceedings with reference to the matters stated below under the heading "Policy Considerations".

An application, which addresses the relevant matters should be sent to:

The Registrar of Personal Property Securities
Australian Financial Security Authority
GPO Box 821
Canberra ACT 2600

Attention: Legal & Governance

Alternatively, it may be sent via email to servlegdoc@afsa.gov.au.

Approach

In general, the Registrar will not begin or carry on proceedings for the recovery of damages in the name of a person if the nature of the dispute is purely a private matter. The Registrar considers that the private plaintiff is best placed to assess the costs and benefits of litigation. However, the Registrar will consider bringing proceedings in the following circumstances:

1. the potential plaintiff(s) is not in a financial position to bring proceedings; and
2. the Registrar considers that it is in the public interest to commence proceedings having regard to the general matters beneath the heading "Policy Considerations" below.

Basis upon which the Registrar Begins or Carries on Proceedings

The Registrar does not regard section 219 as a method by which the Registrar may fund litigation that could be brought by a private party who has sufficient funding. The Registrar will exercise its right to begin and carry on proceedings only if the Registrar and the person in whose name the proceedings are to be brought or carried out enter into a litigation funding agreement, in which:

1. the person agrees to assign all rights to conduct the matter to the Registrar;
2. the person agrees to repay the Registrar any costs or fees incurred by the Registrar in the course of the litigation, if:
 - a. the litigation results in the named party receiving damages; and
 - b. the Registrar so requests the fees and/or costs to be repaid; but
 - c. only to the extent that the fees and costs are less than the damages awarded.

Policy Considerations

In general, the Registrar will not intervene in, or bring and carry on proceedings of a purely private nature where relevant parties are able to make submissions on all relevant facts to the court. Generally, the Registrar will consider intervening or commencing proceedings only in the following circumstances:

1. Construction of the PPS Act

The Registrar is responsible for the maintenance of the Personal Property Securities Register (**PPSR**) and for the enforcement of the civil penalty provisions under the PPS Act. It may be desirable that judicial interpretation of the PPS Act and the law regarding security agreements and security interests more generally occur with the benefit of submissions from the Registrar. The Registrar will consider engaging in proceedings which may significantly affect the interpretation or application of the PPS Act or the law regarding security agreements and security interests.

2. Matter of general significance

A proceeding may result in an outcome at law, which affects public confidence in security interests in personal property. If the Registrar considers that such a result is likely to significantly lessen public confidence in personal property security interests in Australia, the Registrar may intervene in or initiate proceedings.

Recovery of Court Ordered Costs

Please note, in general, the Registrar will actively pursue the recovery of court ordered costs awarded in the Registrar's favour as a result of any litigation.

Further information

Enquiries about any information contained in this practice statement may be directed via email to enquiries@ppsr.gov.au.