Why Art Centres Need To Register On The Personal Property Securities Register – PPSA Registration

Indigenous community art centres (**Art Centres**) sell artwork in one of the following ways:

- directly by sales made to buyers (including galleries);
- by selling an artwork to or through a gallery with payment due at a later time or in instalments; and
- by placing artwork on consignment with galleries in Australia and overseas

These arrangements are impacted by the *Personal Property Securities Act 2009* (**PPSA**).

For more information on how the PPSA works you can read this fact sheet.

If you want more information you can look at:

- the PPS registry website at https://www.ppsr.gov.au/
- Australian government's fact sheet Indigenous artists and art centres: What does the PPS law mean for you?

In respect of consignments:

To protect your security interests [in artworks consigned for sale] your art centre should ensure that it has:

1. *a record of all the art you have provided to the art centre (this could be, for example, through an art cataloguing system such as 'Story, Art, Money');*
2. *a written consignment contract with the gallery or dealer that the art is being consigned to; and*
3. *registered a security interest on the PPS Register for each gallery and dealer.*

You can find the Register at https://transact.ppsr.gov.au/ppsr/Home

Note that registration is not mandatory, but it is advisable as it protects artists' security interests against other creditors.

It is important for Art Centres to consider how they are affected by this legislation and what they can do to protect their interests.

Types of sale of artwork arrangements

- *Direct sale:* Where Art Centres arrange direct sales of artwork to galleries and the galleries pay the Art Centre in full on delivery of the artwork, there is no problem under the PPSA.
- *Conditional Sale Agreement – Deferred Payment or Instalment Payment*: This situation arises where an Art Centre sells an artwork to or through a gallery with payment due at a later time or in instalments. Despite the gallery holding physical possession of the works, the Art Centre (or its artists) retains ownership until full payment is received (**Deferred Payment**).
- *Consignment Agreement:* This is the more common sales arrangement used by Art Centres, where the Art Centre will give the gallery possession of artwork for a specified period of time for the purpose of promoting and selling those works. Usually, if the artwork is not sold within that specified period, the terms of the consignment agreement require the unsold artworks to be returned to the Art Centre. If the artwork is sold, the Art Centre is paid the proceeds of sale less the gallery's commission on sale. With such arrangements, although the gallery has physical possession of the artwork while it arranges any sale, the Art Centre (or its artists) remains the owner of the artwork until sold (**Consignment**).

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If an Art Centre enters into a Consignment or Deferred Payment arrangement with a gallery and an artwork is delivered to that gallery, the Art Centre (or the artist) now needs to satisfy certain requirements under the PPSA to protect its rights to the artwork or there is a risk of losing those artworks in the event of the bankruptcy or insolvency of a gallery.

How does the PPSA affect these arrangements?

The risk to the Art Centres under a Consignment or Deferred Payment arrangement arises when the art gallery becomes insolvent or bankrupt while still holding unsold artworks or artworks for which it has not paid in full (or not paid for at all).

The question then arises as to whether the artwork belongs to the Art Centre and should be returned to the Art Centre, or the artwork is treated as an asset of the gallery and is therefore available to pay out creditors of the gallery, such as banks or other institutions that have lent money to the gallery in return for security over all of the gallery's assets, including the artwork.

Under PPSA, having legal ownership of artwork under these arrangements is no longer sufficient to protect the artwork from the gallery's other creditors or a liquidator/administrator.

If the Art Centre fails to take steps to "perfect" (ie protect) its security interests through registration in accordance with the PPSA, it faces the risk of ranking behind other creditors or being an unsecured creditor of the gallery.

This can result in an Art Centre losing the artwork to another creditor or a liquidator/administrator, even if the Art Centre has retained ownership of the work.

However, if the security interest in respect of the Consignment or Deferred Payment is validly registered on the PPS Register, the Art Centre is entitled to require the trustee in bankruptcy or the liquidator to return the artwork (or proceeds from the sale of the artwork) to the Art Centre rather than selling it or using the proceeds to satisfy the debts owed by the gallery to other creditors.

What can an Art Centre do?

Art Centres need to "perfect" their security interests in respect of the artwork.

The method of perfection that would generally apply to an Art Centre is registration on the Personal Property Securities Register (**PPSR**). Registration is not a simple process and to assist Art Centres, Arts Law offers advice and assistance to ensure that your registrations are effective.

The PPSA Registration Service provides Indigenous Art Centres with a low-cost service to assist with PPSR registrations so that Art Centres can take steps to better protect themselves against the risks associated with the insolvency or bankruptcy of art galleries.

If you wish to access this service, it is important that you read this Fact Sheet carefully.

A general overview of the information which an Art Centre will need to be aware of when seeking this service is set out below. Art Centre and Artists may wish to obtain specific legal advice on how they can protect their interests under the PPSA.

1. Who is eligible for PPSA Registration?

An Art Centre can make a PPSA registration if the Art Centre:

- consigns the artwork **on behalf of** an artist where the artist remains the owner of the artwork until sale; or
- sells the artwork on deferred or instalment payment terms under a Deferred Payment sale **as agent of** the member artist where the artist remains the owner of the artwork pending payment in full.

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If you are unclear about the nature of the specific arrangement between the Art Centre and its artists, contact Arts Law for further advice.

2. Security interests under the PPSA – Is the artwork being provided under a Deferred Payment Sale or Consignment by an Art Centre?

For security interests arising under the PPSA to be protected by registration, the Consignment or Deferred Payment sale must be evidenced by a **written agreement**, such as a formal contractor invoice that adequately describes the artwork.

Arts Law has developed a Consignment Agreement– Long Term – Art Centre and Gallery that is relevant for this purpose. Please contact us if you would like to organise a telephone legal advice session explaining the agreement.

If you have an existing consignment agreement and wish to know whether it is sufficient to protect you under the PPSA, you can get advice from the Arts Law document review service.

3. The registration process

Registrations under the PPSR require several key pieces of information along with an appropriate consignment agreement. If you do not provide the correct information, your registration may not be effective. The information required includes:

- the details of your Art Centre – i.e. its legal name and if the Art Centre is:
  - a company – its ACN;
  - a managed investment scheme – its ARSN
  - an entity operating in Australia but is not registered as an Australin company – its ARBN
  - a trustee of trust which has an ABN – the ABN of the trust
  - a partner of a partnership – its ABN
  - a body politic – its ABN
  - owned by a sole trader – the individual's full name and date of birth as it appears on their driver's licence.
- the details of the gallery to which artwork has been sent – i.e. its legal name and if the gallery is:
  - a company – its ACN;
  - a managed investment scheme – its ARSN
  - an entity operating in Australia but is not registered as an Australin company – its ARBN
  - a trustee of trust which has an ABN – the ABN of the trust
  - a partner of a partnership – its ABN
  - a body politic – its ABN
  - owned by a sole trader – the individual's full name and date of birth as it appears on their driver's licence.
- details of the agreement(s) entered into with that gallery, including the details of the parties to the agreement (usually the Art Centre and the gallery), the date of the agreement.

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It is imperative that this information is collected from the gallery directly. The gallery's details will appear on its constitution or articles of association, and it is preferable that a copy of this is requested to confirm these details. For individuals, it is preferable that a copy of their driver's licence or other identification is obtained to confirm their name and date of birth. If you are concerned about asking a gallery for this information, explain that you are asking purely to secure your interests under the PPSA.

If a **trust or partnership** is noted as the contracting party for a gallery, contact Arts Law and we can advise what information you will need to collect in order to confirm the registration.

Two separate registrations will be undertaken on the PPSR for each agreement noted in a registration form to ensure that all artwork provided under the agreement is adequately captured by the registrations. For information on how the registrations are completed, please see section 4 below.

Please contact Arts Law to provide these details in order to ensure that you have the correct details to make your registrations effective. If you are having difficulties completing the registration, please contact Arts Law.

4. How will the security interests be registered?

For each gallery the Art Centre deals with (whether the Art Centre is acting either on its own behalf or on behalf of the artist), two registrations will be undertaken to cover the artworks supplied to that gallery under a single Consignment Agreement or Deferred Payment sale agreement:

- a Purchase Money Security Interest (**PMSI**); and
- a standard security interest.

A PMSI registration is preferable and grants superior priority, however it will only be valid if certain requirements are met. For consignments, those requirements include that the registration needs to be claimed as a PMSI and occurs before any artworks are delivered to the gallery.

Arts Law does not investigate the underlying documents or the nature of the arrangements that have been entered into by Art Centres with galleries. Therefore, to mitigate the risk that a PMSI registration may not be effective, the second registration as a standard security interest is undertaken as a precaution (sometimes referred to as a "non-PMSI") registration.

5. Setting up a SPG

For the first registration request, the Art Centre will need to be set up as a Secured Party Group **SPG**) registration number.

Without a SPG number, it will not be possible to lodge the registrations on the PPSR in favour of the Art Centre. Dentons can set up the SPG for the Art Centre on the basis of the information provided to it by the Art Centre.

Once a SPG has been created, the Art Centre will receive its own unique SPG number which can be used for all future registration requests.

To set up a SPG, the Art Centre will need to nominate an address for service for the SPG. This is an email address where all correspondence in relation to the registered security interest will go. The first correspondence should contain a unique Access Code. Keep the Access Code safe and confidential. The Access Code enables changes to the SPG details and can be used for the discharge of registrations on the PPSR.

If you require assistance with completing a registration request, please contact Arts Law.

6. What happens after a registration request is submitted?

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Once a security interest is submitted and registered on behalf of the Art Centre, the PPSR will issue a Verification Statement and a Token. These will be sent to the email address for service nominated by the Art Centre on the registration form for the Art Centre's SPG.

7. What do I do with the Verification Statement?

Once a registration has been completed against a particular gallery, you will receive a Verification Statement confirming the details of the registration and noting the registration number assigned to that security interest.

There is an obligation on the Art Centre to notify the gallery against which the security interest was registered that a security interest has been registered on the PPSR, unless the written agreement between them contracts out of this requirement.

The Art Centre can meet this notification obligation by providing a copy of the Verification Statement to the owners of the gallery (called the 'grantors'). If there are multiple grantors (such as where a gallery is operated by a couple in partnership), we would suggest any information specific to one grantor should be removed or deleted before the Verification Statement is provided to other grantors.

Notification is not required if there is a term in the Art Centre's Consignment Agreement or Deferred Payment Agreement stating that the Art Centre is not required to provide such notification. Arts Law recommends seeking legal advice in relation to the wording of such a clause. The Arts Law template Consignment Agreement has a clause that says the Art Centre doesn't need to notify the gallery.

8. What do I do with the Token?

Keep it safe and confidential. The Token is a code which is used to amend, transfer or discharge the registration of the consignment with each gallery. Once a registration is discharged, it no longer exists on the PPSR and the discharge cannot be reversed.

If the registration is ended by mistake or accident, you can apply to have it reinstated by completing this form – Request to remove, restore or correct data.

9. What happens if I have multiple agreements or no formal agreement with a gallery?

If artworks are provided to a gallery under more than one agreement, separate registrations should be completed for **each** agreement to be sufficient to cover all of the artwork provided by the Art Centre to that particular gallery under those agreements.

To avoid the need for multiple registrations Art Centres should enter into a long term Consignment agreement or Deferred Payment agreement with the relevant gallery which governs the delivery and sale of artworks from time to time. Arts Law's Consignment Agreement – Long Term – Art Centre and Gallery is designed for this purpose

10. How much must I pay for the service?

Beyond your subscription as an arts organisation with Arts Law, neither Arts Law nor Dentons are charging for their services for the legal work involved in registering security interests for Art Centres on the PPSR. You will need to pay for the charges made by PPSR for registrations and searches. For each agreement in respect of which the Art Centre wishes to complete two registrations involving a gallery, there are three options at three different prices for registrations, including GST, of approximately:

- 7 years: $10.40
- 25 years: $33.80
- No end time: $124.90

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There is also the cost of the PPSR search itself, which is $5-10.

11. When should Art Centres register a security interest?

You should register your security interest as soon as possible, and ideally as soon as you enter into a Consignment or Deferred Payment arrangement with a gallery. It is best to include PPSR registration as a step in your exhibition planning schedule to ensure that registrations are made in time. Do not wait until you become aware that a gallery is in financial trouble as, by then, other security interest holders may have registered ahead of you. You will also be out of time to register and protect your interests.

If you have already consigned artworks to a gallery, it may not be too late to register your interests (unless the gallery is already bankrupt). Contact Arts Law for further advice.

12. What do I do if a gallery later asks me to discharge or release my security interest registered on the PPSR?

Where a gallery against which an Art Centre registered a security interest on the PPSR later requests the Art Centre to release or discharge that registered interest, the Art Centre should contact Arts Law or a law firm for legal advice as to the release or discharge.

Do not release or discharge your registered security interest without first seeking legal advice because once a registration is discharged from the PPSR, it is gone for good.

13. Does the PPSA Registration Service consider the priority of a security interest?

Dentons will not, without specific instructions, investigate or conduct searches to consider the priority of your security interests and confirm if there are any competing security interests registered by other secured parties on the PPSR in respect of the artworks.

If you require advice on the priority of any security interest that is registered on your behalf under the PPSA Registration Service, please contact Arts Law.

Need more help?

Contact Arts Law if you have questions about any of the topics discussed above via our legal query form.

Also visit the Arts Law website (artslaw.com.au) for more articles and information sheets.

Please note this fact sheet is only intended to provide a general overview of how the PPSA may impact Art Centres and what Art Centres can do to ensure they are better protected. It is not intended to be comprehensive or to constitute legal advice as each arrangement is unique. You may wish to seek legal advice to ensure your interests are adequately protected.

Disclaimer

The information in this information sheet is general. It does not constitute, and should be not relied on as, legal advice. The Arts Law Centre of Australia (Arts Law) recommends seeking advice from a qualified lawyer on the legal issues affecting you before acting on any legal matter.

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