



# Atradius question and answer sheet – ROT, PPSR and PMSI's

Atradius Australia has developed this question and answer sheet to assist you with any questions you may have in regards to ROT, PPSR and PMSI's.

The information provided is for information only and should not be considered as advice in relation to your policy or otherwise. It should not be construed as providing legal advice and should not be relied upon as legal advice. You must always seek specific legal advice for your particular circumstances from a lawyer authorised to provide advice on this matter.

If you have any further questions please find our contact details and some helpful links in regards to ROT, PPSR and PMSI's on our website [www.atradius.com.au](http://www.atradius.com.au)

## **What is the difference between an All Monies and Simple ROT clause?**

Atradius has always advised its customers to include an All Monies clause in their terms and conditions to ensure the best return. Under a Simple ROT clause, the seller only retains title to the assets identified on a specific invoice which also remain unpaid. Therefore you not only have to identify the asset from the invoice but also that it remains unpaid. Our experience is that this can prove difficult if you wish to retain title under a Simple ROT clause.

Under an All Monies clause, it relates all assets that remain in the possession of the buyer providing you can identify them as yours. You do not need to determine whether an invoice has been paid or not; this is where the term "All Monies" is derived. This generally means if you can identify your stock on the floor, and have an All Monies ROT clause, you are entitled to retain title to all of that stock, up to the value of your unpaid invoices or stock, whichever is the lower.

## **When does the registration of a Security Interest need to be in place?**

You need to ensure that any registration is in place prior to supply for the super priority rights relating to the PMSI to be applicable. Our advice would be to register during the negotiation stage to ensure that the registration is in place from initial supply.

We would also advise that any registration is undertaken no later than 20 days from entering into the agreement for it to become effective. Please Refer to 20 Business Days rule below.

## **20 business days rule**

The corporations act states that security must be registered within 20 days of entering into the agreement, otherwise it can be voided. This is not noted in the PPSA but only in the Corporations act so it provides another argument for the insolvency practitioner to dispute the validity of the Security Interest.

Our view is that "Security Interests" are now incorporated into the Corporations Act and you should register them like you would any other form of Security Interest. Therefore we would recommend registering inside 20 days of entering into the agreement. If you miss the 20 days deadline, your registration only becomes effective 6 months prior to insolvency. If you miss the 20 day deadline you will have to wait 6 months before your security is effective.

## **Can a Buyer request that that you release or remove your Security Interest?**

If the registration is valid the buyer cannot make you remove it. If they wish to challenge the authenticity of the agreement, they can issue an amendment notice and request you provide a copy of credit app/terms to evidence their interest. If it is defective then they can request you remove it, or report you and you may incur a fine for incorrect registration.

We recommend you make sure that they have the relevant documents signed (credit app, etc) in support of each registration. Should you wish to remove the registration for commercial reasons, we strongly recommend you contact Atradius to ensure that your insurance cover remains unaffected.

## **Do you need permission to register your Security Interest?**

You do not need permission to register but you do need to let the buyer know you have registered your security interest over their goods. The exception is where the buyer has waived their rights to notification. Suppliers can include a note in their terms of trade, usually under a PPSA section, confirming that the customer waives their rights to notification and if signed, the supplier would not need to advise of registration.

## **What happens if the registration is not valid?**

If someone attaches a dubious registration (i.e. tries to register a Security Interest where there is no contractual basis for doing so), you or your buyer can issue an amendment notice to remove the registration. If ignored, you can contact the PPSR registrar to issue a notice to remove the registration. Parties who incorrectly register security interests where there is not contractual basis for doing so can be fined.

## **If a buyer deletes or strikes out certain terms and conditions (in some cases the ROT clause), do you need to notify Atradius and does this affect our insurance?**

For certain higher risk buyers, Atradius will insist on an enforceable registered PMSI as a condition of cover. If this condition is not met or deleted then this is likely to result in cover not being afforded under the policy.

Our advice is consult with us should there be any changes requested or notifications which may affect your contractual rights in respect of goods insured under the policy.

## How do I complete a Proof of Debt in an Insolvency situation where I have a PMSI?

There has certainly been an impact in practice following the introduction of the PPSA; to vote in insolvent administrations, you need to be an unsecured supplier and if you register as an unsecured supplier, without advising of your Security Interest, you may jeopardise your "Secured" position by registering and voting as an unsecured creditor!

Atradius recommends when you are completing a Proof of Debt "POD" and have a registered PMSI for voting purposes, you partially disclose or estimate the value of your security on the POD form submitted to the administrator. This can be difficult when you don't know or have stock valuations in possession of the buyer at the date of appointment.

How do you achieve this? Our recommended rule of thumb would be to use the value of last month's supply to the buyer as the value of your security (presumably unsold and still in the possession of the buyer). Examples are provided in the tables below: -

Total Outstanding	\$150,000	\$100,000	\$250,000
Last Month's Supply	\$75,000	\$100,000	\$0
Secured Claim	\$75,000	\$80,000*	\$50,000*
Unsecured Claim	\$75,000	\$20,000*	\$200,000*
Total Claim	\$150,000	\$100,000	\$250,000

Also state that this may be subject to change and could be amended at a later date when further details are known. The security relates to how much stock is held at the date of the IP's appointment rather than the claim for outstanding debt.

\* Until the administrator has confirmed your stock in their possession, we recommend always leaving a portion of your claim either unsecured or secured to ensure you do not compromise your claim at a later date.

## What is the transitional period?

The transitional period is the 2 years from 30 January 2012 until 30 January 2014 in which you can rely on previous legislation and documentation (ROT agreements entered into prior to 30 January 2012) to enforce your ROT rights. From 31 January 2014 you will no longer be able to rely on any unregistered agreements, transitional or otherwise, and will need to ensure that your security interest is registered.

Atradius has witnessed a number of arguments raised by administrators in respect of transitional agreements and whether they are transitional or not or should've been registered. The net result is that these claims have reduced settlement amounts on ROT claims. Atradius therefore recommends you register any transitional arrangements you may have as soon as possible.

## What do I need to do to ensure correct registration of my Security Interest on the PPSR?

- Tick yes to 'transitional' if you have a transitional interest (i.e. trading documents in place prior to 30 January 2012). Refer to transitional period above with respect to ticking non-transitional as the transitional period comes to an end
- Tick yes to 'PMSI', therefore creating a super-priority over all other Security Interests in those goods (in most cases)
- Ensure that collateral security is identified as over 'other goods' if you are not a secured creditor in the original sense (a bank with a general security agreement)
- Ensure you tick 'Proceeds' so that you can retain any identified proceeds from the sale of your goods.

## If the supplier has registered their PMSI interest, does it need to be supported by a signed credit agreement?

Whilst the PMSI does not need to be supported by a signed agreement (Credit Application, Terms of Trade etc..) it makes for a stronger case if it is. The terms on the back of an invoice can be used if the supplier has received acceptance of these terms by their customer. Issuing written advice confirming the terms on an invoice is a good idea in addition to acknowledgement from the customer. There has not yet been a court case testing invoice terms only.

Atradius recommends you entering into formal agreements with your buyers if you have not done already as it increases recovery prospects.

## What is a Proceeds Claim?

Historically suppliers/lawyers had to put the Insolvency Practitioner on notice regarding the need to put proceeds from sale of their stock in a separate account and approach the court if they did not obtain this undertaking. The PPSA provides legislation to allow the supplier to pursue the proceeds from sale of their goods in addition to taking back stock, irrespective of whether proceeds are in your terms and conditions.

In order to benefit from statutory rights and the potential recovery opportunity, you must tick the 'Proceeds' box when registering your PMSI on the PPSR.

## What happens if I receive a Section 64 notification from a buyer's financier?

If your Credit Limit is conditioned subject to you having an enforceable PMSI, Atradius recommends you notify us immediately as the availability of the proceeds from sales may have formed part of the Credit Limit decision-making process. If any circumstances change, we would require notification

## Is there any change to Preference Claims under the new legislation?

Liquidators can pursue "preferential payments" received by unsecured creditors up to 6 months from the Relation Back Day (usually the date of insolvency).

Preference actions only apply to unsecured creditors. There is strong argument that the PPSA legislation has changed the position of those creditors with a registered PMSI to that of secured creditors and therefore outside the scope of preference actions. This has not been tested in a court in Australia, but there is significant support on this from other jurisdictions where PPSA type rules apply.

If nothing else, and until this argument has a judicial hearing, the argument provides another defence to preference actions and may result in reduced settlement amounts after negotiation should you wish to avoid court.

## Contact Us

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