

The Personal Property Securities Act 2009 (Cth)

The *Personal Property Securities Act 2009* (Cth) ("Act") creates a single national law governing security interests and similar transactions with respect to many different kinds of tangible and intangible property, other than real property. The scheme under the Act will commence on 30 January 2012.

PPSA Update

The Act:

- makes fundamental changes to the law relating to the creation, priority and enforcement of security interests over most forms of property other than land;
- covers a wide range of transactions, beyond what are commonly understood as "security interests;" and
- will replace much of the existing State and Federal law that regulates securities" with a single piece of Federal legislation that applies consistently across Australia.

The Act contains many rules relating to the creation, priority and enforcement of security interests, among many other things. While there are many specific rules, we set out below:

- some of the "general concepts" of the new law; and
- some of the practical considerations that businesses will need to consider now.

General Concepts

1. What sort of security interests and property are covered by the Act?

The Act covers *security interests in personal property*.

A *security interest* is an interest in relation to personal property provided for by a transaction that, in substance, secures payment or performance of an obligation without regard to the form of the transaction.

The Act generally takes a functional, 'substance over form,' approach to determine what constitutes a security interest. It does not matter who owns the relevant

Who does this affect?

Holders of tangible and intangible property (excluding land).

Article Highlights

- PPSA commences on 30 January 2012.
- Covers most forms of personal property including tangible (eg. cars, equipment, stock) and intangible property (shares, IP, contractual rights).
- A range of mining tenements, petroleum permits and licenses have been declared not to be personal property under PPSA.
- Make the most of delays to the Act's start date by ensuring your business is ready for the new law.

property. The application of the Act is determined by the nature of the property and the security interest.

The Act gives examples of arrangements that are security interests if they are interests in property and they secure payment or performance of an obligation. These include:

- a) charges (fixed, floating or both), chattel mortgages and pledges;
- b) conditional sale agreements (including an agreement to sell, subject to a retention of title);
- c) retention of title arrangements;
- d) consignments;
- e) hire purchase agreements;
- f) leases of goods; and
- g) "flawed asset arrangements" that secure an obligation (e.g. a bank taking security over a bank account or restrictions on the operation of account until obligation satisfied).

The list above is not exhaustive, but merely provides an example of the types of interests which might be "security interests" for the purposes of the Act.

Some transactions are deemed to be security interests, even though they do not secure anything, including transfers of accounts, documentation governing certain monetary obligations and security interests in goods or intellectual property and a lessor or bailor's interest in goods under a 'PPS lease'.

Personal property is defined in the Act to include most forms of personal property; other than land and certain statutory licences that are excluded. The definition encompasses tangible property (e.g. cars, boats, machinery, stock, equipment) and intangible property (e.g. shares, unit trusts, intellectual property, book debts and contractual rights).

In WA, a range of mining tenements, petroleum permits and licences have been declared not to be personal property for the purposes of the Act.

Personal property to which a security interest is "attached" is known under the Act as *collateral*.

2. Enforceability of Security Interests – "attachment" and "perfection"

There are special rules that apply to the attachment and perfection of security interests to certain collateral. However, a summary of the "general rules" of attachment and perfection is set out below:

A security interest is enforceable against a "grantor" (the person who owns or has an interest in the personal property) only if it has attached to collateral.

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Generally, a security interest “attaches” to collateral when:

- a) the grantor has rights in the collateral or the power to transfer rights to the secured party; and
- b) a person gives value for acquiring the security interest (or the grantor does an act by which the security interest arises), and in return, the person gains rights in the collateral.

A security interest is enforceable against “third parties” only when:

- a) it has attached to the collateral (as above); and
- b) either:
 - (i) the secured party is in possession of the collateral; or
 - (ii) the secured party controls the collateral; or
 - (iii) the *security agreement* (the document by which the security interest is created) covers the collateral.

In order for a *security agreement* to be enforceable against “third parties” it must be evidenced in writing and:

- a) be signed by the grantor;
- b) be adopted or accepted by the grantor by an act or omission; and
- c) the agreement must contain:
 - (i) a description of the collateral; or
 - (ii) a statement that a security interest is taken in all of the grantor’s present and after acquired property; or
 - (iii) a statement that a security interest is taken in all of the grantor’s present and after acquired property except specified items or classes of personal property.

If a security interest in collateral is *perfected*, it takes priority over another security interest that is unperfected when the security interest comes to be enforced.

A security interest is *perfected* if:

- a) the security interest is temporarily perfected, or otherwise perfected, by force of the Act; or
- b) the security interest is attached to collateral (as above) and is enforceable against third parties (as above) and either:



- (i) the secured party has *registered the security interest* on the Register of Personal Property Securities; or
- (ii) the secured party has *possession* of the collateral; or
- (iii) for certain types of collateral, the secured party has *control* of the collateral.

3. Priority between competing Security Interests

Despite many specific and detailed exceptions, the following general rules apply to competing security interests in the same collateral:

- a) A perfected security interest has priority over an unperfected security interests. This will be the case even where the party with the unperfected security interest has title to the relevant collateral.
- b) Perfection by control will ensure priority over perfection by other means. If two interests are perfected by control, priority is determined by the order of perfection if the perfection by control has been continuous.
- c) If two interests are perfected other than by control, the first party to perfect will have priority, but there are many exceptions.
- d) If there are two unperfected interests, then priority is determined by the order of attachment (i.e. first in time prevails).

4. Exception to Priority Rules ("PMSIs")

A significant exception to the general priority rules above is in relation to "purchase money security interests" ("PMSIs"). PMSIs are subject to a "super priority," which is not governed by the general "first in time rule."

Generally, a PMSI is a security interest that is given to a secured party who provided the credit used to purchase the collateral that is the subject of the PMSI. A common example of a PMSI is the security interest arising from a retention of title. There are many other examples, such as equipment leases and hire purchase agreements.

Since a perfected PMSI will beat most other competing security interests by way of its "super priority" status, where possible, security agreements should be drafted so that they are categorised as PMSIs (as that term is defined in the Act).

Another exception to the general priority rules arises where a secured party agrees to subordinate or postpone its security interest to any other interest in the collateral.

5. How are Security Interests Registered?

Under the Act a secured party may register its security interest on the Register of Personal Property Securities.



The Register of Personal Property Securities will enable secured parties to give notice of actual or prospective security interests that they hold in certain collateral.

The Act facilitates registration through an online register that is designed to provide for simple and timely registration of security interests (the establishment of this electronic register has proved problematic and was responsible for postponing the original proposed start date of 31 October 2011).

While registration may become a "procedural" step, as set out above it is a vital step in perfecting a security interest under the Act and its importance should not be overlooked.

Practical Considerations for Certain Businesses

Fixed and Floating Charges

The Corporations Law concept of a floating charge is abolished under the Act. Instead, a reference to a "floating charge" will be taken to be a reference to a security interest that has attached to a "circulating asset." This means that a "floating charge" will be a security interest that attaches to certain property in accordance with the terms of the security agreement and "current assets inventory, proceeds of inventory, currency and negotiable instruments". Company charges that were previously registered at ASIC will need to be registered on the Register of Personal Property Securities.

Joint Venturers

Joint venturers must check what security interests they have, or they have given, under a joint venture arrangement so that they can determine whether they need to do anything to protect their position and interest in the joint venture (e.g. consider cross-charges securing the performance of a joint venturer).

Subcontractors

If a person is or uses a subcontractor, they should check whether goods provided to or by it are subject to a security interest.

Sellers of Goods and Retention of Title

A seller of goods should review its standard terms and ensure that its security interests (if any) are enforceable under the Act.

- In particular, sellers of goods that rely on retention of title arrangements ("ROT") will no longer be able to rely solely on their title. The new law under the Act is in stark contrast with the current law and practice of suppliers who supply goods and rely on ROTs.
- An unperfected ROT will be defeated upon the grantor's insolvency. If a creditor fails to perfect its ROT, it could lose its secured status in an insolvency and the goods supplied by it could become assets that



are available for distribution to unsecured creditors.

- ROT arrangements in place now will continue to be enforceable, but after the end of the transitional period, a ROT arrangement will not be enforceable against a grantor unless the collateral is covered by a perfected security interest.

Lessors of Goods:

- Under the Act, a lessor of goods can no longer simply rely on retaining title in the leased goods. If a lessor allows others to possess its goods by way of lease, bailment or consignment, they should ensure that their security interest (if they have one) is protected under the Act (i.e. it is perfected).
- Even though a lessor retains title in the goods they let out on lease or hire, if they do not register their security interest their interest will be defeated by a registered security interest over the same collateral.
- For example, a company in possession of leased goods might grant a security interest to a bank which is registered over all of the assets of that company. If the company becomes insolvent, the lessor's claim will rank alongside unsecured creditors and the lessor may be unable to re-possess the goods.

Borrowers

A borrower should ensure that it does not inadvertently create a security interest recognised under the Act (in favour of another person) that breaches prohibitions in its existing loan agreements against creating such interests.

Administrators and Liquidators

If security interests granted by a company in liquidation or administration have not been perfected under the Act, the collateral the subject of the security interest will vest in the grantor company upon liquidation or administration, which is likely to benefit the administrator or liquidator. For example, consider a liquidator who is faced with an unregistered ROT.

Contracting Out

Many provisions of the Act can be contracted out of if the collateral is not used predominantly for personal, domestic or household property.

Confidentiality

Certain "interested parties" can request that a secured party provide copies of the security agreement that creates a security interest. If the security agreement contains a confidentiality clause (or a confidentiality agreement otherwise applies) the Act provides that secured party does not need to disclose the security agreement. However, this limitation does not apply to stop the right of access after a default by the debtor. This may be a particular concern if a person did not want an "interested party" to have an opportunity to see commercially sensitive



and confidential information.

Serial Numbered Goods

There are formalities surrounding the inclusion of serial numbers for serial-numbered goods when registering a security interest. If serial numbers from serial numbered collateral are wrong or omitted from registration, the consequence could be loss of priority or even extinguishment of a security interest. For example, if a buyer or lessee of personal property searches the PPSR immediately before the purchase of an item of personal property, and does not find a reference to the serial number of that property, then the buyer will take the property free of a security interest of another party.

What should be done now?

There is a range of things that businesses affected by the Act should be doing now. Businesses affected by the Act could make the most of further delays to the Act's start date by ensuring they are ready for the new law.

Generally speaking, organisations should be considering the impact of the Act on their operations, including doing the following:

- a) whether, and to what extent, the Act will "capture" security interests given or taken by the organisation;
- b) if required, taking advice as to whether there are any "security interests" that exist in contracts that are in use, or will be used, in the business of the organisation;
- c) reviewing contracts used by an organisation and determining the extent to which the Act affects those contracts and whether any contracts need to be amended. For example:
 - (i) it would be appropriate to ensure that contracts are broadly drafted to allow for the introduction of the scheme under the Act;
 - (ii) to the extent permitted by the Act, contracts could be amended to ensure that the parties contract out of certain provisions of the Act; and
 - (iii) one party to a contract may need to renegotiate the contract to overcome any adverse affect on that party's commercial position under the contract which arises due to the Act;
- d) an organisation should ensure that is has steps in place such that:
 - (i) someone takes responsibility for ensuring that the organisation is ready for the introduction of the Act;
 - (ii) the organisation's personnel can determine when the organisation has a

security interest;

- (iii) once security interests are identified, the organisation has procedures that ensure that the security interest is perfected in a timely manner (in relation to existing security interests, this should happen as soon possible after the Register becomes open, or at least during the “transitional period”); and
- (iv) procedures ensure that the security interest and its registration is properly maintained so as to preserve its security interest.

As above, the Act contains many rules relating to the creation, priority and enforcement of security interests, among many other things. This article only gives a general summary of the Act and its possible application, but the Act does contain many specific rules relating to certain forms of property or security interests.

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