

# PERSONAL PROPERTY SECURITIES ACT 2009

## GENERAL OVERVIEW

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The information in this document is general information only and cannot be relied upon as a substitute for professional advice. You should seek specific advice relevant to your own circumstances from appropriately qualified persons.

## INTRODUCTION

1. The new PPSA system is being introduced in January 2012 and is designed to provide a single national register of security interests over personal property.
2. The PPSA has 343 sections running over 315 pages.
3. We therefore hope to provide you with a general outline of the PPSA and work through a few common transactions to give you a general guide on how the regime will be applied.
4. The PPSA applies whether the transaction involves individuals or companies and will therefore have a broad reaching effect on many different business transactions.
5. A similar regime is in place in New Zealand and Canada.
6. An essential part of the PPSA is the creation of a register called the PPSR. The PPSR will replace a myriad of existing National and State based registers.
7. The PPSR will act as a noticeboard listing the security interests over personal property held by companies and individuals.
8. It will provide some information on whom the security has been granted to and the property covered.
9. You will not however be able to obtain a copy of the security agreements from the PPSR as it is simply a noticeboard of the security information. This is different to the current situation with company charges where you can search the ASIC database and obtain a copy of the company charge.
10. The PPSR will be searchable provided the search is for a purpose permitted under the PPSA.
11. For example, a person can search the PPSR to “*establish whether to provide credit to, or obtain a guarantee or an indemnity from, a person named in the search application*”.
12. The existing registers that will migrate onto the PPSR include:
  - Commonwealth
    - ASIC - Register of Company Charges (including provisional charges)
    - Australian Register of Ships (mortgages only)
    - Fisheries Register
  - New South Wales
    - Register of Encumbered Vehicles (REVS NSW)
    - Security Interest in Goods Register:

- stock mortgages originally registered under the Liens on Crops and Wool and Stock Mortgages Act 1989
- Bills of Sale from 1 January 2000
- current crop mortgages and all other interests registered under the Security Interests in Goods Act 2005
- Register of Co-operative Charges

### **KEY TERMS**

13. The Key terms of the PPSA are:
- a. Personal Property (section 10)
  - b. Security Interest (section 12)
  - c. Attachment (section 19)
  - d. Perfection (section 21)
14. You need to have Personal Property.
15. A security interest created over that personal property.
16. The Security Interest needs to Attach to the Personal Property.
17. And to ensure the Security Interest has priority and enforceability you need to have Perfection.

### **WHAT IS A “SECURITY INTEREST” OVER “PERSONAL PROPERTY”?**

18. “Personal property” is personal property other than land and some Federal and State statutory licences. Statutory licences may be excluded from PPSA by the relevant state government as not falling within the PPSA, such as exploratory rights under the Mining Act (NSW).
19. Personal property includes tangibles such as cars, art, machinery and crops as well as intangibles such as intellectual property rights or accounts owed.
20. A “security interest” arises when a secured party takes an interest:
- a. to secure payment or
  - b. the performance of an obligation or
  - c. enters into a transaction that involves the supply of secured finance.

### **PURCHASE MONEY SECURITY INTEREST “PMSI”**

21. Is a particular type of security interest that is dealt with under specific rules in the PPSA.
22. A PMSI is essentially a security interest:

- a. that secures all or part of the purchase price of specific personal property (eg – ROT);
- b. of a lessor or bailor of goods under a PPS lease (long term lease of goods over 1 year or over 90 days if the goods are registrable by serial number); or
- c. of a consignee under a commercial consignment.

#### **TYPICAL TRANSACTIONS COVERED BY NEW LEGISLATION**

- taking fixed and floating charges (eg – an interest over business assets)
- long term and finance leases of goods (eg – finance over the office photocopier)
- chattel mortgages (eg – purchase of motor vehicle subject to finance)
- conditional sale agreement (eg – sale of goods subject to retention of title)
- goods sold on consignment, and
- factoring (eg - purchasing of invoices from a business at a percentage discount)

#### **ATTACHMENT**

23. The security interest must “attach” to personal property for it to be enforceable.
24. A security interest attaches to personal property when:
- a. The grantor (the buyer/lessee or mortgagor) has rights in the property or the power to transfer rights; and
  - b. either:
    - i. value is given for the security interest; or
    - ii. the grantor does an act by which the security interest arises.

Examples - In a business finance, when the loan agreement is signed and the borrowed funds are made available the security interest attaches to the business assets offered as security.

In a sale of goods subject to ROT, the security interest attaches to the property when the goods are delivered.

#### **PERFECTION**

25. The main rule on perfection is that a security interest is perfected if:
- a. it is attached to the property; and
    - i. the security interest is registered on the PPSR; or
    - ii. the secured party has possession of the property; or
    - iii. the secured party has control of the property.
26. In the majority of cases the security interest will be perfected by registration on the PPSR, as control and possession of the goods is usually handed over to the buyer/lessee/mortgagor hence the need for security.

27. Unless the security interest is registered on the PPSR it will not be enforceable against a third party.
28. This is due to the fact that no third parties will have knowledge of the security interest if it is not registered on the PPSR as it will not appear on a search of the PPSR.
29. It is therefore vitally important that the security interest is perfected to ensure notice and enforcement rights against third parties, for example against liquidators.

#### **PRIORITY**

30. The PPSA contains default priority rules between security interests determined on notice and timing.
31. The default rules provide that:
  - a perfected security interest takes priority over an unperfected security interest;
  - priority between two or more perfected security interests is determined in favour of an earlier perfected security interest over a later one; and
  - priority between two or more unperfected security interests is determined in favour of an earlier attached security interest over a later one.
32. These rules operate on a default basis and are subject to more specific priority rules throughout the PPSA (including super priority for PMSIs).
33. Generally, a PMSI has priority over a general security interest even if registered later in time.
34. The reasoning for the PMSI super priority is that the property purchased with the PMSI money would not have been purchased without that money and therefore would not have been available to the holder of a general security interest.
35. For example, if a financier loans money to a business for working capital and then the business buys a new vehicle on finance with a second financier, the vehicle would not be available to the first financier as the vehicle could not have been purchased other than with the PMSI money.
36. If it was not the case, then the first financier would get an unfair benefit by taking possession of the new vehicle if the business defaults on the first finance.

## **ENFORCEMENT OF SECURITY**

37. The PPSA contains rights and remedies of enforcement of security interests on the default under a security agreement. Security agreements do not need to include these remedies and may instead rely upon the provisions in the PPSA.
38. In summary, the secured party may:
- a. issue a notice and demand payment;
  - b. seize the personal property subject of the security interest;
  - c. dispose of the personal property subject of the security interest; or
  - d. retain the personal property subject of the security interest;
- the above actions being subject to competing security interests over the property.
39. The competing security interests are those with higher priority as discussed earlier, such as PMSIs, and earlier registered general security interests.
40. What does a secured party do once the personal property has been seized?

## **PROCEEDS FOLLOWING ENFORCEMENT**

41. The general rules on distributing proceeds are set out in the following order, top to bottom:
- a. persons holding an interest (outside of PPSA) with a higher priority to property;
  - b. reimbursement of reasonable expenses incurred in enforcement of the security interest;
  - c. higher priority security interests;
  - d. lower priority security interests; then
  - e. any remaining proceeds to the defaulting party.

For more information, please contact:

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