



Personal Property Securities Act 2009

OVERVIEW

The law of personal property security in Australia was significantly reformed by the *Personal Property Securities Act 2009* (Cth) (PPSA) which commenced from 30 January 2012.

The PPSA has changed the legal landscape for secured transactions in a fundamental way and anyone doing business in Australia needs to be aware of the implications of these changes.

Despite its name, the PPSA does not just affect transactions which give rise to traditional security interests in personal property; it also affects many transactions which were not previously thought to be security arrangements by expressly providing that they give rise to actual or deemed security interests. In particular, suppliers (particularly suppliers using retention of title terms or consignment arrangements), lessors and bailors of goods need to be aware that the PPSA can override their general law ownership rights in the goods.

The PPSA is based on the equivalent personal property securities legislation adopted in New Zealand and Canada.

One aim of the PPSA is to create a single registry for security interests (PPS Register) that applies regardless of the legal personality of the entity that creates the security interest (called the "grantor"), be it a natural person, company, trust or partnership. This overview focuses on corporate grantors.

Another aim of the PPSA is to try to overcome the so-called "evil of apparent ownership" which can arise when a person or entity is in possession of goods owned by another.

An express intention in the approach taken by the PPSA is to look to the substance of a transaction rather than its strict legal form in order to determine whether a transaction is a security interest. The intention is that it should not be possible to structure a transaction which is in substance a security arrangement as another type of transaction so to avoid the effect of the legislation.

Key change: "Security interests" in goods – extended beyond the traditional concepts

Under the PPSA, as a general rule, any arrangement which has the effect of "in substance" securing a payment or performance of an obligation is considered to be a **security interest** and is registrable on the PPS Register. Certain transactions are considered to be a security interest under the PPSA despite them not traditionally being considered a form of "security" at general law. In addition, certain transactions which do not purport to secure a payment or performance of an obligation will be deemed to create a security interest under the PPSA.

Relevantly, the definition of "security interest" under the PPSA includes the following types of transactions:

- each of the following transactions if they in substance secure payment or performance of an obligation:
 - a fixed or floating charge
 - a chattel mortgage
 - a pledge
 - a conditional sale of goods (including an agreement to sell subject to retention of title terms)
 - a hire purchase agreement
 - a consignment
 - a lease of goods
 - an assignment
 - a transfer of title;
- the interest of a consignor who delivers goods to a consignee under a **commercial consignment** of goods (regardless of whether in substance the interest secures payment or performance of an obligation); and ¹
- the interest of a lessor or bailor of goods under a **PPS lease**. A PPS lease is a lease or bailment of goods which does not purport to secure a payment or performance of an obligation and the term of the lease or bailment is for:
 - an indefinite term; or
 - more than two years (whether or not the initial term is for less than two years and incorporates options to extend and "holding over").

For example, in the case of an equipment lease with a term of more than two years, even though the terms of the lease state that title to the equipment remains with the lessor, the legislation expressly deems the lease to create a security interest in the form of a PPS lease.

Creation and protection of security interests in personal property

The PPSA has introduced new concepts in the creation and protection of security interests in personal property which include the requirement of "perfection".

Perfection

To ensure the security interest obtains the appropriate priority over competing security interests in the same personal property, and is enforceable in any subsequent administration or liquidation of a corporate grantor, the security interest must be perfected.

¹ A "commercial consignment" is one in which both consignor and consignee deal in goods of that kind in the ordinary course of business but does not include goods delivered to auctioneers for the purpose of sale or goods delivered to a consignee for sale, lease or other disposal if the consignee is generally known to its creditors to be selling or leasing goods of others.

A security interest will be relevantly perfected if **all** of the following apply:

- it has **attached** to the collateral. A security interest will attach to personal property when the grantor has rights in the collateral and the secured party has given value or the grantor does an act by which the security interest arises (such as signing a security agreement² or handing over the share certificates for security over shares);
- it is **enforceable against third parties** - this requires in addition to attachment that the secured party is either in possession or control of the personal property **or** that the security agreement has been reduced to writing and either signed by the grantor or otherwise adopted by the grantor; and
- it is the **subject of a registration on the PPS Register** or the secured party has **possession** (other than by seizure) or **control** (if it is a type of personal property than can be relevantly controlled) of the relevant personal property.

There is no requirement under the PPSA as to the order in which all of the steps required to complete perfection occur.

If a security interest is perfected by registration on the PPS Register, a single registration can perfect more than one security interest (as long as it is captured by the registration type and description). The secured party can also choose the period of registration. To maintain a security interest on the PPS Register, and hence maintain its perfection and priority, the registration of a security interest may be extended. Given the importance of perfection in relation to maintaining priority, secured parties should ensure that appropriate procedures and systems are implemented to monitor the registration times of each security interest.

Secured parties should also be aware that a registration on the PPS Register will not be effective in certain circumstances. These include where the registration is found to be defective or seriously misleading. For example, certain errors in the grantor's details will render the registration ineffective as will registering a security interest as a PMSI (a type of security interest discussed below) if it is not in fact a PMSI or registering a security interest as transitional if it is not. It is therefore not only critical that a security interest is registered but that it is registered correctly and, for the reasons discussed below, in a timely fashion.

Priority of security interests in the same property

The PPSA has introduced rules regarding the priority of competing security interests in the same property. Importantly for owners of goods, priority does not depend on title or ownership of the goods and is determined by application of these rules.

The general principles under the PPSA are that:

- the default rule is that in a priority context between two perfected security interests, the first in time will have priority;
- for perfected security interests, the priority time is determined by time of registration of the security unless the security is perfected by control or possession, in which case the priority time is determined by the time of control or possession;
- unperfected security interests will always rank behind perfected security interests, even where the security interest which is perfected is created second and the holder of that security has knowledge of the other security created earlier;

² A "security agreement" is an agreement or act by which a security interest is created, arises or is provided for or writing evidencing such an agreement or act.

- if the corporate grantor goes into voluntary administration or liquidation, unperfected security interests will vest in the grantor and no longer be enforceable.³ In these circumstances, a general law owner of goods will lose all of its rights to the goods and be left with an unsecured claim against the grantor; and
- there are also rules which may allow for the tracing of the security interest in personal property into the proceeds of sale or into processed or co-mingled goods.

Certain types of transactions can also give rise to a particular type of security interest called a “*purchase money security interest*” (PMSI). If a PMSI arises and the secured party complies with certain registration requirements regarding the PMSI, the secured party has the ability to obtain first priority over particular personal property. The types of transactions that can give rise to a PMSI include PPS leases, commercial consignments and conditional sale agreements (including an agreement to sell subject to retention of title terms) as well as particular types of financing arrangements with the express purpose of purchasing the property in question (such as vendor financing) if certain criteria are met.

How should secured parties protect themselves?

Given the broad reach of the PPSA and the significant detrimental consequences of failing to properly perfect security interests that arise, in order to obtain the best protection available under the PPSA, secured parties should:

- review all contractual arrangements and consider whether they give rise to a security interest under the PPSA;
- ensure that the contractual arrangements have been reduced to writing which has been signed by the grantor or have otherwise been adopted or accepted by the grantor in some way; and
- register the security interests which arise under those arrangements on the PPS Register correctly (and within the relevant timeframes required by the PPSA to obtain PMSI priority where applicable, or under the *Corporations Act 2001* (Cth) to avoid vesting).

³ The Corporations Act 2001 (Cth) also requires perfection by registration to occur within 20 business days of the security agreement being entered into. If the secured party does register but fails to do so within that timeframe, the security interest can also vest in certain circumstances if the grantor goes into voluntary administration or liquidation.

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