

Now you can take the shirt off their back.
A discussion of the *Personal Property Securities Act 2009 (Cth)*

This paper is intended for educational and information purposes only and is not intended to be relied upon partly or solely as advice.

1. Introduction

a. A brief overview

The *Personal Property Securities Act 2009 (Cth)* (“**the PPSA**”) commenced on 30 January 2012. For the purposes of this paper, I will refer to *the Personal Property Securities Regulations 2010 (Cth)* as the **PPS Regulations**, the Personal Property Securities Regime as the **PPS Regime** and the Personal Property Securities Register as the **PPS Register**.

Please note that this paper does not deal with every aspect of the PPSA and is not intended to be exhaustive. The paper only addresses those issues that I believe will commonly occur in day-to-day practice as a legal practitioner. Hopefully, this paper will also go some way to providing the answer to my question, can you take the shirt off someone's back?

From 30 January 2012, the PPS Register became the national source of registered security interests with respect to personal property.

The Explanatory Memorandum to the *Personal Property Securities Bill 2009 (Cth)*, amongst other things, states the following:

The Bill would establish a single national law governing security interests in personal property. This would result in more certain, consistent, simpler and cheaper arrangements for personal property securities for the benefit of all parties.

Personal Property Security Reform would address the complexity of

over 70 Commonwealth, State and Territory laws, common law rules and rules of equity governing personal property securities. It would provide a modern and efficient personal property securities regulatory system which is essential for any modern financial system.

The PPS Regime has replaced the existing state schemes for the purposes of registering security of many types of personal property. The PPS Register registers security interests in certain types of personal property.

It is important to note that the PPS Regime **does not** intrude on the States' security regime with respect to the registration of interests regarding real property. Unlike the Torrens Title system of registration, the PPS Register **does not**:

- i. Record ownership of personal property; and
- ii. Does not guarantee title of personal property.

Does the PPSA sound the death knell of the rule in *nemo dat quod non habet*? Sufficed to say, a person who has possession of personal property (subject to the various exceptions in the PPSA) can pass good title to a purchaser unless the *secured party* has registered with the PPS Register their *security interest* in the goods or has *perfected* their security interest.

By passing various pieces of legislation, the States have referred constitutional power to the Commonwealth in order for the Commonwealth to pass and enact the PPSA.¹

- i. New South Wales - *Personal Property Securities (Commonwealth Powers) Act 2009* (NSW)
- ii. Queensland - *Personal Property Securities (Commonwealth Powers) Act 2009* (Qld)
- iii. South Australia - *Personal Property Securities*

¹ Section 51(xxxvii) of *The Constitution*

- (Commonwealth Powers) Act 2009 (SA)*
- iv. Victoria - *Personal Property Securities (Commonwealth Powers) Act 2009 (Vic)*
- v. Tasmania - *Personal Property Securities (Commonwealth Powers) Act 2010 (Tas)*
- vi. Western Australia – *Personal Property Securities (Commonwealth Powers) Act 2011 (WA)*

b. What types of personal property are covered by the PPSA?

Broadly speaking, there are two classes of personal property covered by the PPSA:

- i. Tangible property; and
- ii. Intangible property.

Tangible Property

The term “tangible property” is undefined in the PPSA but Section 10 of the PPSA defines the term “goods” to mean “personal property that is tangible property ... but does not include financial property or an intermediated security.”

Tangible property includes the following:

- i. The shirt off someone’s back;
- ii. Aircraft;
- iii. Machinery;
- iv. Motor vehicles;
- v. Office furniture;
- vi. Artwork;
- vii. Currency;
- viii. Inventory and stock;
- ix. Crops;

- x. Wool;
- xi. Space objects and satellites;
- xii. Livestock.

Intangible Property

Section 10 of the PPSA defines the term “intangible property” as:

personal property (including a licence) that is not any of the following:

- (a) financial property;*
- (b) goods;*
- (c) an intermediated security*

I will provide a further analysis of items of personal property in this paper.

2. PPSA – What did it replace?

The PPSA replaced the following registers²:

Australian Government registers

Australian Register of Ships (mortgages only)

ASIC - Register of Company Charges (including provisional charges)

Fisheries Register

New South Wales registers

Register of Encumbered Vehicles (REVS NSW)

Security Interest of Goods Register:

stock mortgages originally registered under the *Liens on Crops and Wool and Stock Mortgages Act 1989* (NSW)

² <http://www.ppsa.gov.au>

Bills of Sale from 1 January 2000
current crop mortgages and all other interests registered under the
Security Interests in Goods Act 2005 (NSW)

Register of Co-operative Charges

Queensland registers

Register of Encumbered Vehicles (REVS Qld)
Bills of Sale Register (including Register of Liens on Crops of Sugar Cane)
Register of Co-operative Charges

South Australian registers

Vehicle Securities Register

The following registers maintained by the General Registry Office:

Bills of Sale Register
Stock Mortgages and Wool Liens Register
Liens on Fruit Register
Register of Co-operative Charges

Tasmanian registers

Register of Vehicle Security Interests
Register of Bills of Sale, Stock, Wool and Crop Mortgages, and Co-operative
Charges

Victorian registers

Vehicle Securities Register (VSR)
Register of Liens on Wool and Stock Mortgages (stock mortgages only)
Register of Co-operative Charges

Western Australian registers

Register of Encumbered Vehicles (REVS WA)

Bills of Sale Register

Australian Capital Territory registers

Register of Encumbered Vehicles (REVS ACT - from REVS NSW)

General Register of Deeds and Instruments

Register of Co-operative Charges

Northern Territory registers

Register of Interests in Motor Vehicles and Other Goods (REVS NT - from REVS NSW)

Lands Titles Registration and General Registry Office (Bills of Sale and stock mortgages)

The Register is a national electronic notice board of security interests.

The Register is available for use by secured parties to register its security interest in collateral and to search the register.

A registrar is appointed to establish and maintain the Registry.

The Register is computer-based, publicly accessible, updated in real time and accessed through the internet.

3. Property and the PPSA

The starting point is to define a security interest.

Section 12 of the PPSA provides as follows:

(1) *A security interest means an interest in 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 or the identity of the person who has title to the property).*

Note: For the application of this Act to interests, see section 8.

- (2) *For example, a security interest includes an interest in personal property provided by any of the following transactions, if the transaction, in substance, secures payment or performance of an obligation:*
- (a) a fixed charge;*
 - (b) a floating charge;*
 - (c) a chattel mortgage;*
 - (d) a conditional sale agreement (including an agreement to sell subject to retention of title);*
 - (e) a hire purchase agreement;*
 - (f) a pledge;*
 - (g) a trust receipt;*
 - (h) a consignment (whether or not a commercial consignment);*
 - (i) a lease of goods (whether or not a PPS lease);*
 - (j) an assignment;*
 - (k) a transfer of title;*
 - (l) a flawed asset arrangement.*
- (3) *A security interest also includes the following interests, whether or not the transaction concerned, in substance, secures payment or performance of an obligation:*
- (a) the interest of a transferee under a transfer of an*

- account or chattel paper;*
 - (b) the interest of a consignor who delivers goods to a consignee under a commercial consignment;*
 - (c) the interest of a lessor or bailor of goods under a PPS lease.*
- (3A) A person who owes payment or performance of an obligation to another person may take a security interest in the other person's right to require the payment or the performance of the obligation.*
- (4) Without limiting subsection (3A):*
 - (a) an account debtor, in relation to an account or chattel paper, may take a security interest in the account or chattel paper; and*
 - (b) an ADI may take a security interest in an ADI account that is kept with the ADI.*
- (5) A security interest does not include:*
 - (a) a licence; or*
 - (b) an interest of a kind prescribed by the regulations for the purposes of this section.*
- (6) A security interest is not created only by an agreement or undertaking to do either of the following:*
 - (a) to postpone or subordinate a person's right to payment or performance of all or any part of a debtor's obligation to another person's right to payment or performance of all or any part of another of the debtor's obligations;*
 - (b) to postpone or subordinate all or any part of a secured party's rights under a security agreement to all or any part of another secured party's rights under another security agreement with the same grantor.*

Once one has appreciated the definition of a *security interest*, the next burning question is what personal property is covered by the PPSA?

The immediate thought that springs to mind is everything.³ However, this is not the case. The first obvious exclusion from the PPSA is real estate. Section 8 of the PPSA contains a rather lengthy list of exclusions (and exceptions to the exclusions). Some examples of property excluded by the PPSA include the following:

- A lien, charge, or any other interest in property, that is created, arises or as provided for:
 - Under a law of the Commonwealth (other than the PPSA), a state or a territorial, unless the person who owns the property in which the interest is granted agrees to the interest; or
 - By operation of the general law.
- Any right of set-off all right of combination of accounts.
- Any rights or interests held by a person under or any interest provided for by any transaction defined in section 5 of the *Payment Systems and Netting Act 1998* (Cth).
- In interest provided for a transfer of present or future remuneration (including wages, salary, commission, allowances or bonuses) payable to an individual as an employee or a contractor.
- Water licences.
- Subject to the exception in subsection 8(6) of the PPSA, a security interest in personal property taken by a pawnbroker. It appears that the pawnbroker exception was designed by the drafters of the PPSA to avoid conflict with section 47.

³ In addition, consider Reg 1.5 of the PPS Regulations.

Main rule

- (1) *A buyer or lessee of personal property, for new value, that the buyer or lessee intends (at the time of purchase or lease) to use predominantly for personal, domestic or household purposes takes the personal property free of a security interest in the property if the market value (worked out at the time each part of the total new value is given) of the total new value given for the personal property is not more than:*
- (a) *\$5,000; or*
 - (b) *if a greater amount has been prescribed by regulations for the purposes of this subsection—that amount.*

Exceptions

- (2) *Subsection (1) does not apply if:*
- (a) *the personal property is of a kind that the regulations provide may, or must, be described by serial number in a registration; or*
 - (b) *the buyer or lessee buys or leases the personal property with actual or constructive knowledge that the sale or lease constitutes a breach of the security agreement that provides for the security interest; or*
 - (c) *at the time the contract or agreement providing for the sale or lease is entered into, the buyer or lessee believes, and it is actually the case, that the market value of the personal property is more than:*
 - (i) *\$5,000; or*
 - (ii) *if a greater amount has been prescribed by regulations for the purposes of this paragraph—that amount.*

- An interest that a person has as a member of superannuation funds.
- Mining tenement licences.

- A Quistclose trust arrangement.
- Liquor licenses (in Queensland, Northern Territory, Western Australia and the ACT).
- Gaming licences (in Victoria, Queensland, Northern Territory).
- Fishing licences (in New South Wales, Victoria, Western Australia and the Northern Territory).
- Pearling licenses (in Western Australia).
- Forestry licences (in Queensland).
- Energy generation, transmission and retail licenses (in Victoria, Queensland, South Australia, Western Australia and the Northern Territory).

Section 10 of the PPSA says the following in relation to fixtures:

fixtures means goods, other than crops, that are affixed to land.

Having regard to section 8 of the PPSA, interests in fixtures are excluded.

In addition, the following falls outside of the PPSA:

- The beneficiary of a trust that holds personal property does not have security interest, as the obligation lies on the trustee to hold the said property for the beneficiary.
- A priority agreement is not a security interest.

You should also have regard to Regulation 1.4 of the PPS Regulations.

4. Perfection and Securities

The glossary to the Explanatory Memorandum explains perfection as:

A security interest could be perfected by registration, possession, control or temporary perfection and perfection would always confer priority over unperfected security interests in the collateral.

Perfection is relevant in order to determine priorities between competing claims.

How does one achieve perfection?

The first step to achieve perfection is by attaching one's security interest to collateral.

The Explanatory Memorandum defines *attachment* as follows:⁴

The creation of a security interest in personal property which could be enforced against that property.

Subsection 19(1) of the PPSA states:

A security interest is enforceable against a grantor in respect of particular collateral only if the security interest has attached to the collateral.

Section 19 of the PPSA sets out the rights of the secured party against grantors which arise from the attachment of a security interest to collateral.

⁴ Explanatory Memorandum p 6.

Underpinning the attachment rule contained in subsection 19(2) of the PPSA is time. Time will determine when you achieve perfection. Subsection 19(3) of the PPSA allows parties by agreement to denote a later time for the attachment of the security interest. This might occur in circumstances where the parties agree that attachment will occur once certain goods are manufactured.

Subsection 19(4) of the PPSA appears to define the time that collateral attaches where there is agreement that a security interest by a floating charge will be in accordance with subsection 19(2) of the PPSA.

Subsection 19(5) of the PPSA essentially states that a grantor has rights in relation to goods that are leased, bailed, consigned or sold to the grantor under a conditional sale agreement from the time the grantor obtains possession of the goods.

Section 10 of the PPSA defines collateral as follows:

- (a) personal property to which a security interest is attached; and
- (b) in relation to a registration with respect to a security interest—includes personal property described by the registration (whether or not a security interest is attached to the property).

If you are in the position that you have a security interest in collateral, then you can proceed to drafting a security agreement. Should you have a security agreement in writing? The short answer is yes. Consider Section 20(1) of the PPSA:

- (1) *A security interest is enforceable against a third party in respect of particular collateral only if:*
 - (a) *the security interest is attached to the collateral; and*
 - (b) *one of the following applies:*
 - (i) *the secured party possesses the collateral;*
 - (ii) *the secured party has perfected the security interest by*

- control;*
- (iii) a security agreement that provides for the security interest covers the collateral in accordance with subsection (2).*

In brief, if you want to enforce security interest against a third party, the security interest must be attached to collateral and (subject to further discussion below) must be in writing.

There are several methods in which perfection may be achieved. Section 21 of the PPSA contains the main rule of perfection.

- (1) A security interest in particular collateral is **perfected** if:*
 - (a) the security interest is temporarily perfected, or otherwise perfected, by force of this Act; or*
 - (b) all of the following apply:*
 - (i) the security interest is attached to the collateral;*
 - (ii) the security interest is enforceable against a third party;*
 - (iii) subsection (2) applies.*
- (2) This subsection applies if:*
 - (a) for any collateral, a registration is effective with respect to the collateral; or*
 - (b) for any collateral, the secured party has possession of the collateral (other than possession as a result of seizure or repossession); or*
 - (c) for the following kinds of collateral, the secured party has control of the collateral:*
 - (i) an ADI account;*
 - (ii) an intermediated security;*
 - (iii) an investment instrument;*
 - (iv) a negotiable instrument that is not evidenced by a certificate;*
 - (v) a right evidenced by a letter of credit that states that the letter of credit must be presented on claiming*

payment or requiring the performance of an obligation;

(vi) satellites and other space objects.

Note: For what constitutes possession and control of collateral, see Part 2.3.

(3) A security interest may be perfected regardless of the order in which attachment and any step mentioned in subsection (2) occur.

(4) A single registration may perfect one or more security interests.

In gleaning from section 20 of the PPSA, there are three methods of perfection:

- i Registration;
- ii Possession; and
- iii Control.

There is a fourth method of perfection, namely, temporary perfection.

Control

As you can see, perfection by control is limited to the collateral listed at subparagraph 20(2)(c) of the PPSA.

The PPS Regime is guided by legislation. In circumstances one must look at the statutory definition of control. Section 10 of the PPSA defines control as having “the meaning given by Part 2.3”. In fairness to the drafter, the definition has a note which says:

Control has an extended meaning in section 341 (control of inventories and accounts in relation to fixed and floating charges).

The drafter of the term “control” points you to Part 2.3 of the PPSA. Specifically, you need to look at sections 25 to 29 of the PPSA. In short, those sections do not define the term control but rather explain to the reader the

circumstances under which a person has control. Unfortunately, whoever drafted Part 2.3 of the PPSA has not explained the interaction between control and satellites and space objects.

Section 25 of the PPSA determines control with respect to an ADI account.

A secured party has control of an ADI account for the purposes of section 21 (perfection--main rule) if, and only if, the secured party is the ADI.

Section 26 of the PPSA determines control with respect to an intermediated security. Relevantly, subsection 26(2) states the following:

(2) A secured party has control of an intermediated security if:

(a) one of the following conditions is satisfied:

(i) there is an agreement in force between the grantor, the secured party and the intermediary who maintains the securities account;

(ii) there is an agreement in force between the grantor and the intermediary;

(iii) there is an agreement in force between the grantor and the secured party, and notice of the agreement is given to the intermediary; and

(b) the agreement has the effect that:

(i) the intermediary must not comply with instructions given by the grantor in relation to the intermediated security without seeking the consent of the secured party (or a person who has agreed to act on the instructions of the secured party); or

(ii) the intermediary must comply, or must comply in one or more specified circumstances, with instructions

(including instructions to debit the account) given by the secured party in relation to the intermediated security without seeking the consent of the grantor (or any person who has agreed to act on the instructions of the grantor).

Section 15 of the PPSA defines intermediated security as “the rights of a person in whose name an intermediary maintains a securities account.”

Section 27 of the PPSA determines control with respect to investment instruments. The relevant extracts from section 27 of the PPSA are below:

Control of any investment instrument

(2) A person, other than the debtor or grantor, has control of an investment instrument (whether or not the instrument is evidenced by a certificate) if the issuer of the instrument registers the person as the registered owner of the instrument.

Control of investment instruments evidenced by certificates

(3) A person (the controller) has control of an investment instrument that is evidenced by a certificate if:

(a) the controller has possession of the instrument; and

(b) the controller (or a person who has agreed to act on the instructions of the controller) is able to:

(i) transfer the instrument to the controller, or to another person; or

(ii) otherwise deal with the instrument.

Control of investment instruments not evidenced by certificates

(4) A person has control of an investment instrument that is not evidenced by a certificate if:

(a) there is an agreement in force between the person and the grantor; and

(b) the agreement has the effect that the person (or a person who has agreed to act on the instructions of the first person) is able to initiate or control sending instructions by which the investment instrument could be transferred or otherwise dealt with.

(5) A person (the controller) has control of an investment instrument that is not evidenced by a certificate if:

(a) either:

(i) the issuer of the instrument registers another person (who is not the grantor or debtor) as the registered owner of the investment instrument on behalf of the controller; or

(ii) the registered owner (who is not the grantor or debtor) of the investment instrument acknowledges in writing that he, she or it holds the investment instrument on behalf of the controller; and

(b) there is an agreement in force under which the controller (or a person who has agreed to act on the instructions of the controller) is able to initiate or control the sending of some or all electronic messages or other electronic communications by which the investment instrument could be transferred or otherwise dealt with.

(6) For the purposes of this section, a person has control of an

investment instrument even if the registered owner of the investment instrument (who might be the grantor) retains the right:

- (a) to make substitutions for the instrument; or*
- (b) to originate instructions to the issuer; or*
- (c) to otherwise deal with the instrument.*

Section 28 of the PPSA deals with control of a letter of credit and relevantly says that:

A secured party does not have control of a right evidenced by letter of credit, to the extent of any right to payment or performance of an obligation by the issuer or a nominated person, unless the issuer or nominated person has consented to assigning the proceeds of the letter of credit to the secured party.

Section 29 of the PPSA deals with negotiable instruments that are not evidenced by a certificate. Negotiable instruments include:

- a bill of exchange (*Bills of Exchange Act 1909*); or
- a cheque (*Cheques Act 1986*); or
- a promissory note (Section 89 of the *Bills of Exchange Act 1909*).

Section 29 of the PPSA states:

*(1) A secured party has **control** of a negotiable instrument that is not evidenced by a certificate if, and only if:*

- (a) the instrument is able to be transferred in accordance with the operating rules of a clearing and settlement facility; and*
- (b) there is an agreement in force under which the secured party (or a person who has agreed to act on the instructions of the secured party) controls the sending of some or all electronic messages or other electronic communications by which the*

instrument could be transferred.

*(2) For the purposes of subsection (1), a secured party has **control** of a negotiable instrument even if the registered owner (who might be the grantor) retains the right:*

- (a) to make substitutions for the instrument; or*
- (b) to originate instructions to the issuer; or*
- (c) to otherwise deal with the instrument.*

Possession

Subsections 24(1) and (2) of the PPSA state the following:

*(1) A secured party cannot have **possession** of personal property if the property is in the actual or apparent possession of the grantor or debtor, or another person on behalf of the grantor or debtor.*

*(2) A grantor or debtor cannot have **possession** of personal property if the property is in the actual or apparent possession of the secured party, or another person on behalf of the secured party.*

An example of perfection by possession would be a bank physically holding a piece of art as collateral. If the bank were to return the collateral to the grantor for a short period of time, irrespective of the purpose, the bank would lose its perfection during that time.

You should also consider section 126 of the PPSA, which deals with apparent possession of collateral:

- (1) If:*
- (a) collateral cannot be readily moved from a grantor's premises;*
- or*

(b) an adequate storage facilities are readily available for collateral;

A secured party may seize the collateral under section 123 by taking apparent possession of the collateral.

Temporary Perfection

Temporary perfection addresses those situations where there is a transitional aspect to the achievement of perfection or whether perfection is appropriate.

Section 34 of the PPSA deals with temporary perfection in circumstances where collateral is transferred.

Section 35 of PPSA is particularly relevant to contemporary perfection in circumstances where goods are returned to the grantor or the debtor by a bailor. Please note that subsection 35(2) of the PPSA only allows for temporary perfection to be valid for five business days. In the circumstances, one would need to perfect the security interest using an alternate method otherwise the security interest will become unperfected.

Section 36 of the PPSA deals with returned collateral comprising of negotiable instruments and investment instruments with respect to temporary perfection.

Section 39 of the PPSA deals with temporary perfection after the relocation of collateral or a grantor to Australia. Section 40 of the PPSA deals with the relocation of intangible and financial property.

Registration

Of all the methods of perfection, it is anticipated that perfection by registration will be by far the most prevalent form of perfection.

Chapter 5 of the PPSA provides for the establishment and maintenance of the PPS Register. I will not go into detail in this regard.

Part 5.3 of the PPSA is the legislative framework surrounding the registration of a security interest. You need to lodge a *financing statement* with the PPS Register in order to register a security interest. What is a financing statement? Section 10 of the PPSA defines a financing statement as data registered (or that is to be registered) pursuant to an application for registration under subsection 150(1):

- (1) A person may apply to the Registrar to register a financing statement with respect to:*
- (a) a security interest; or*
 - (b) personal property prescribed by regulations made for the purposes of paragraph 148(c).*

Registration occurs when:

- application is in an approved form;
- registration fee is paid;
- secured party believes on reasonable grounds that it holds a security interest in personal property;
- registration is not prohibited by the Act.

Registration can last for up to 25 years.

Civil penalties apply when registration occurs on which there was no foundation for the registration.

Subsection 153(1) of the PPSA specifies the elements of a financing statement:

- (1) A financing statement with respect to a security interest (including such a financing statement as amended by the registration of a financing change statement) consists of data that complies with the following table:*

Financing statements with respect to security interests

| Item | Data about: | Details of data |
|-------------|-----------------------------|---|
| 1 | The secured party | The details prescribed by the regulations, in relation to each secured party, of: (a) the secured party; or (b) a person nominated by the secured party who has authority to act on behalf of the secured party. |
| 2 | The grantor | Whichever of the following is applicable: (a) if the collateral is consumer property, and is required by the regulations to be described by serial number—no grantor’s details; (b) if the collateral is consumer property, and is not required by the regulations to be described by serial number—the grantor’s name and date of birth, as evidenced in accordance with the regulations, and no other details; (c) in any other case—the grantor’s details as prescribed by the regulations. |
| 3 | Giving of notices | The following: (a) an address (including an email address or fax number) for the giving of notices to the secured party (or secured parties) relating to the registration; (b) details of any identifier provided for the giving of notices to the secured party (or secured parties). Note: For identifiers, see section 289. |
| 4 | The collateral and proceeds | A collateral description in accordance with all of the following rules: (a) the collateral must be described as one of the following: (i) consumer property; (ii) commercial property; (b) the collateral may or must be described by serial number, if allowed or required by the regulations; (c) the collateral must belong to a single class of collateral |

prescribed by the regulations;

(d) any description of proceeds must comply with the regulations.

Note: 2 or more types of collateral that belong to different classes prescribed by the regulations must be described in separate registrations. However, 2 or more registrations can be effected through a single application.

| | | |
|---|-------------------------------|--|
| 5 | The end time for registration | <p>For all the collateral described in the statement, the following data:</p> <p>(a) for collateral other than consumer property or property described by a serial number:</p> <ul style="list-style-type: none">(i) no stated end time; or(ii) an end time for the registration no later than the time (the default time) that is the end of the day 25 years after the registration time; or(iii) if the registration is amended to include or change (but not omit) an end time—an amended end time for the registration no later than the time (the default time) that is the end of the day 25 years after the amendment time for that amendment; <p>(b) for consumer property, or property described by a serial number:</p> <ul style="list-style-type: none">(i) an end time for the registration no later than the time (the default time) that is the end of the day 7 years after the registration time; or(ii) if the registration is amended to change the end time—an amended end time for the registration no later than the time (the default time) that is the end of the day 7 years after the amendment time for that amendment. |
| 6 | Subordination | An indication of whether the security interest is (or is to be) subordinated to any other security interest. However, this |

indication need not be included.

| | | |
|---|--|---|
| 7 | Security interest | An indication of whether the security interest is, or is to be, a purchase money security interest (to any extent) if the security interest is in respect of a class of collateral prescribed by the regulations for the purposes of this item. |
| 8 | Any matter prescribed by the regulations | Details of the matter prescribed by the regulations, whether or not the matter also comes under any of the other items in this table. |

However, you will also need to make reference to Schedule 1 of the PPS Regulations as to additional requirements, which you need to satisfy. Part 1 of Schedule 1 of the PPS Regulations is quite lengthy, so I have attempted to summarise the salient details. As you can see, items 1 and 2 of the table make reference to the secured party and the grantor. Part 1 refers to the following persons or entities:

- individual secured party or grantor - 1.2
- body corporate secured party or grantor - 1.3
- secured party or grantor is a partner - 1.4
- secured party or grantor is a trustee - 1.5
- body politic secured party or grantor - 1.6

It is the responsibility of the secured party to ensure that the information provided on the PPS register is accurate complete.

Failure to register means that you are an unsecured creditor.

When registering a security interest, it is important to ensure that the personal property is described properly – description must include the key attributes of the property. If not, it is ineffective.

Motor vehicles, aircrafts, watercrafts, and registered trademarks need to be registered by their serial number. If serial number is incorrect or missing, then registration is ineffective.

Civil penalties apply when registration occurs in circumstances where there was no foundation for the registration.

5. Priorities

Pursuant to Section 8 of the PPSA, liens, charges and other interests in personal property created or arising or provided for under general law or Commonwealth law, are not bound by the PPSA. Liens will continue to operate under existing law pertaining to enforcement of these types of security interests and the respective rights and obligations of the parties will remain unchanged.

The PPSA establishes specific priority rules in relation to personal property to which a non-consensual security interests (lien) pertains. Where it becomes necessary to establish priority of security interest in personal property to which both a PPSA security interest and a non-consensual lien arises, the provisions of the PPSA contained in Division 6 Part 2.6 will apply. Essentially, these provisions provide that an interest in collateral taking the form of a non-consensual lien arising by way of operation of the general law, will take priority over a security interest arising under the PPSA. However, there are important limitations to these provisions. These limitations include:

1. the supply of the goods or services giving rise to the lien must take place in the ordinary course of the supplier's business;
2. the holder of the benefit of the lien must have provided the goods or services giving rise to the lien;
3. no other law of the Commonwealth, State or a Territory may provide for the determination of priority as between the lien and the security interest;
4. the holder of the benefit of the lien must have acquired the interest without actual knowledge that the acquisition constitutes a breach of the security agreement that provides for the earlier security interest.

It has been recommended that in order to prevent liens taking priority over a security interest:

1. secured creditors should ensure that their written security agreements prohibit the creation of liens over the secured property and, where commercial practical, give notice of such prohibition to any third parties that commonly take possession of assets for improvements from the debtor; and
2. where an owner passes possession of goods to another party in order for that party to work on or improve the goods, the owner may prevent a lien from arising by ensuring that the obligation to pay for the improvements arising after the goods are returned.

In reality the above legislation has not changed the existing law. A secured creditor's position is really only protected if not only the security agreement prohibits the creating of liens but also, that there is a capability for the secured creditor to put a potential holder of a lien on notice that its security agreement contains a prohibition.

An example where a security holder may obtain the benefit of the legislation is where, say a secured financier of a tractor provides which is provided to a dealer prohibits the creation of liens and then also gives notice of that prohibition to a series of tractor repairers that it is aware that the dealer may utilise. In such a case, where the repairer being on notice, the repairer could not successfully claim its repairer's lien against the financier.

In the situation where all that the secured party can do is to stipulate as a condition that its customer cannot create liens, then there is little advantage in so doing. If notwithstanding the condition, the customer created the lien it may constitute a breach under the relevant security agreement but would give no rights against the party claiming the lien.

An item of personal property can secure payments or obligations owed to more than one secured party. When more than one secured party becomes entitled to the collateral under their security agreement, the priority rules

determine the order in which proceeds of the collateral realised are to be distributed.

The priority rules only apply if two or more security interests are attached to the same collateral.

Rule 1

A perfected security interest has priority over an unperfected security interest.

Rule 2

Where 2 or more security interests are perfected, priority determined on first in time basis to have perfection.

Rule 3

A security interest perfected by control has priority over a security interest perfected by another means.

Only an ADI account, investment entitlement, investment instrument, negotiable instruments, letters of credit and satellites and other space objects can be registered by control.

A security interest is perfected by control when secured party has control of the collateral.

Rule 4

Priority between unperfected security interests is determined by the chronological order of attachment of the security interest.

Notwithstanding the priority rules, there are other considerations one must have.

Accession

Goods will be an accession if they are installed in or affixed to other goods without losing their separate identity, unless they are both serial numbered property.

A security interest in goods that becomes an accession, will usually have priority over a claim made by a person with an interest in the whole, if the security interest was attached at the time the goods became an accession.

If both items are described by serial numbers, then they continue to be separately identifiable items of property (separate items of property).

There is a default priority rule – a security interest in goods that becomes an accession will have priority over a claim made by a person with an interest in the whole if the security interest was attached at the time.

If the security interest over an accession is unperfected, then a person with an interest in the whole may take priority over the security interest if:

- Acquires interest after accession; or
- Person is assignee after accession

Commingling

Where goods are subject to a security interest are so manufactured, processed, assembled or commingled that their identity is lost in the product or mass.

A security interest in commingled goods that lose their identity in a product or mass will continue in the product or mass.

Security interest in commingled property is limited to the value of the goods on the day which they became part of the product or mass.

6. Taking Free

Generally speaking, a security agreement is effective according to its terms and continues in the collateral dealt with by the grantor unless the secured party expressly or implied authorised a dealing giving rise to proceeds.

However, there are some circumstances where an entity can acquire property free from the pre-existing security interest. These include:

- where the pre-existing security interest is unperfected.
- Transactions in the ordinary course of business - that is, a person who acquires an interest in personal property in the ordinary course of the vendor's business of dealing with property of that kind would acquire the interest free of any security interest granted by the vendor.
- Transferee has no knowledge of the pre-existing security interest.

Transferee is deemed to have knowledge if:

- they have actual knowledge of security interest; or
- they would have had actual knowledge if they made enquiries that would ordinarily have been made by an honest and prudent person.
- A person who buys or leases personal property that they intend to use predominantly for personal, domestic or household purposes would take the goods free of any security interest (also value is less than \$5,000).

Taking Motor Vehicles

Motor vehicles fall into a special category.

Registrations for motor vehicles need to include the serial number. If the serial number is missing or incomplete, the security interest will not be effective.

If the motor vehicle is being purchased or leased from a licensed dealer, then:

- The vehicle is taken free of any security agreement;
- Purchaser or lessee is not required to search the PPSR

- The licensing arrangements should adequately protect the secured parties with interests in the vehicle. This is usually done through a bailment arrangement.

7. Enforcement

If a debtor is in default under a security agreement, a secured party is entitled to seize its security. See section 123 of the PPSA.

Once the secured party has seized the collateral, by any means permitted by law, it is able to:

- sell the collateral;
- retain the collateral;
- self-purchase its collateral.

If collateral is sold it must be at market value or best price in the circumstances.

If collateral is self-purchased, it must be at a public sale at market price. A debtor or other interest party is entitled to lodge an objection to a self-purchase.

Prior to servicing the collateral, the secured party is required to give notice to grantor and other secured parties.

A secured party can enforce its security interest even if another secured party has a higher-ranking security interest. A higher-ranking party has certain rights over lower-ranking secured parties, including demanding possession of the seized collateral, but not if there is no default under its security agreement.

The parties to a security agreement that provides for a security interest in collateral that is not used predominantly for personal, domestic or household purposes may contract out of a number of the enforcement provisions.

However, these provisions would continue to apply to parties who are not parties to the contract.

Where collateral is used for consumer purposes the Act and the Consumer Credit Code operate concurrently and a secured party would need to comply with both.

The Code applies only to credit intended to be provided wholly or predominantly for personal, domestic or household use.

Where both the Act and the Code apply, and the secured party has complied with the Code, he will be deemed to have complied with the Act.

Where a secured party has collateral that is a liquid asset such as debts due from a third party, accounts, chattel papers, the secured party can realise the collateral directly from the third party.

The Act provides that proceeds from enforcement to be distributed to highest ranking creditor first. A grantor can also redeem property by paying the entire amount due.

8. Insolvency

There are different types of insolvency procedures, namely:

- Liquidation
- Voluntary Administration
- A Deed of Company Arrangement
- A Scheme of Arrangement
- Receivership

Prior to the PPSA, generally, the rights to the assets held by an insolvent company were determined by the party who could establish superior title. A typical dispute between liquidators and creditors involved suppliers who make a claim pursuant to a retention of title clause in their agreements to supply goods. With the introduction of the PPSA, retention of title provisions ought

now become security interests if they secured payment or performance of a contractual obligation.

You need to consider who has priority under the PPS Regime as opposed to identifying the true owner.

In the PPSA world, what happens if you supply goods under a contract containing a retention of title clause, but you fail to perfect the security and the buyer of the goods becomes insolvent? Consider the effect of Sections 267 and 267A of the PPSA – unperfected security interests will vest in the grantor once it becomes insolvent. In the circumstances, it is imperative that a supplier of goods will need to perfect their security interest as soon as possible – well before the appointment of an insolvency practitioner to the purchaser.

Liquidation

Sections 471B and 500 of the *Corporations Act 2001* (Cth) provides the liquidator with the protection of a stay over claims against the company in liquidation and the property unless the creditor has an enforceable security over the property of the company.

If the creditor has failed to perfect its security interest, sections 465, 489F and 513AA of the *Corporations Act 2001* (Cth) those items of personal property that ought to have been the subject collateral of a perfected security interest will vest in the company. This is notwithstanding the liquidator's statutory power to take control of property of the company (Section 474 of the *Corporations Act 2001* (Cth)).

The PPS regime has altered the manner in which void "charges" are dealt with. You should have particular reference to Divisions 2A and 2B of Part 5.7B of the *Corporations Act 2001* (Cth). It is important to note the following:

- The registration time for collateral is 6 months prior to the critical time;

- The period of registration of a security interest is 20 business days after the security agreement that gave rise to the security interest came into force;
- The title of a person who acquires the interest for value and without notice of the liquidation, voluntary administration deed administration is not affected;
- The court may extend the time for registration;

There are exceptions to the ramifications arising from the failure to effect on time in accordance with section 588FL of the *Corporations Act 2001* (Cth):

- the transfer of an account or chattel paper;
- certain PPS leases;
- commercial consignments;
- subordination agreements;
- the transfer of collateral subject to existing PPSA security interests.

Insofar as priorities are concerned, section 561 of the *Corporations Act 2001* (Cth) now confers on priority of employee statutory entitlements to circulating security interests - which are either a floating charge or a security interest over circulating assets.

Receivership

Section 419 of the *Corporations Act 2001* (Cth) is amended such that receivers are liable for a “lease of goods that gives rise to a PPSA security interest in the goods.” Section 419A of the *Corporations Act 2001* (Cth) makes receivers personally liable for the costs of meeting the lease under a pre-existing agreement concerning the use of property by the company with property owned by someone else as owner or lessor. Notwithstanding, the receiver may avoid personal liability with a serve a notice within 7 days of their appointment that has the effect of disclaiming the property.

Voluntary Administration

Unlike a situation in which a liquidator is appointed, section 440B of the *Corporations Act 2001* (Cth) creates a stay upon the appointment of administrator which prevents the owner or lessor of property from recovering said property without leave of the court or the administrator's consent. In addition, section 435B of the *Corporations Act 2001* (Cth) includes as property of the company any PPSA retention of title property of the company. This is quite different from a situation whereby the company goes into liquidation.

Critically, there are three restrictions that you should be aware of this respect to those security holders whose security interests have become unwitting participants in a voluntary administration:

1. Other than a lessor, the owner of property used by the company in administration is precluded from taking possession of the property or taking steps to recover it or enforcing their security interest. This also includes suppliers who have retention of title clauses in their security agreements which would otherwise constitute a security interest under Sections 12 or 13 of the PPSA.
2. A lessor, whose contractual arrangements would be a security interest under sections 12 or 13 of the PPSA, is precluded from taking possession of the property, recovering the property or enforcing their security interest.
3. They secured party cannot otherwise sell their property or otherwise enforce their security interest.

Since the PPSA has come into force, section 339 of the PPSA has redefined fixed and floating charges.

1. The starting point is to consider the definition of a circulating asset section 340 of the PPSA.
2. Subsection 339(3) of the PPSA says that references to charges over property is taken to be a reference to a security interest that has attached to a circulating asset or personal property that is not a circulating asset.

3. Subsection 339(4) of the PPSA says that a reference to a fixed charge over property is taken to be a reference to a security interest that has attached to personal property that is not a circulating asset.
4. Subsection 339(5) of the PPSA says that a reference to a floating charge over property is taken to be a reference to a security interest that has attached to a circulating asset.

It should be noted that there is nothing to stop an administrator from making an application to the court pursuant to section 441D of the *Corporations Act 2001* (Cth) to limit the enforcement of a security interest.

Sections 441EB to 441J of the *Corporations Act 2001* (Cth) deal with property which is not subject to a security interest.

Section 437A of the *Corporations Act 2001* (Cth) provides the voluntary administrator with various powers including the carrying on of the business of the company but the exercise of such powers are subject to the powers of a secured party who has perfected their security interest.

Similarly, as with receivers, the amendments to the *Corporations Act 2001* (Cth) arising from the PPSA have rendered voluntary administrators liable for leasing costs under lease is that a security interest under section 12 of the PPSA. The voluntary administrator, like the receiver, can serve a notice of disclaimer on the lessor within five business days of their appointment.

Deed of Company Arrangement

Deed of company arrangement are binding on all unsecured creditors, directors and shareholders of the relevant company in administration. An owner or lessor of PPSA retention of title property of the company will be a secured creditor of the company (Section 444D of the *Corporations Act 2001* (Cth)).

Scheme of Arrangement

Unlike the other forms of insolvency, the appointment of the scheme administrator will not cause security interest to vest in the company.

9. Conclusion

This paper is not intended to be an exhaustive coverage of the PPSA but rather a “brief” overview of certain parts of the PPS regime which I believe will occur on a regular basis during legal practice. I have not addressed issues such as purchase money security interests, intellectual property, livestock and crops, the interaction between the PPS regime and consumer credit legislation, PPS leasing and the transition period between February 2012 and February 2014.

Can you take the shirt off someone's back? Yes.

Simply put:

- i the shirt is collateral;
- ii security interest can attach to the shirt;
- iii one can enter into a security agreement offering the shirt as collateral;
- iv the secured party can identify and describe the shirt;
- v the secured party can register a financial statement PPS registry registering their secured interest;
- vi if there is a default, and assuming the security interest in the shirt is perfected, the secured party may seize the collateral by any method permitted by law pursuant to section 123 at the PPSA.

Luke Fermanis

Edmund Barton Chambers

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