

# The Personal Property Securities Act 2009

## – A new start for securing interests in personal property

### Introduction

Commonwealth and state based systems for registering security interests in personal property have for a long time been less than satisfactory.

The need to register a security interest and the process for doing so has been determined by many factors including the identity of the personal property (eg motor vehicle, equipment or agricultural crops), the type of security taken (eg bill of sale, charge or pledge) and the jurisdiction in which the security was to be taken.

Compounding these problems was the existence of a plethora of Acts and Registers dealing with the taking of security interests in personal property.

The *Personal Property Securities Act 2009* (PPSA), designed to be a national 'umbrella' Act concerning the taking of security over personal property, will effect a *revolutionary change* to the way customers, manufacturers and suppliers, banks and financiers and insolvency practitioners 'do business'. Who owns the 'title' to personal property will no longer be relevant.

The PPSA contemplates the movement of personal property across borders and provides various rules for dealing with that contingency.

The PPSA is scheduled to start in **May 2011**. The consequences of failing to understand the changes that the PPSA will bring and be prepared for its commencement will be dramatic.

### What is Personal Property?

Personal property includes any property other than land, certain rights and entitlements granted by law or as specifically excluded by the PPSA.

This means that tangible and intangible property will be 'personal property' under the PPSA. Examples include motor vehicles, ships, aircraft, equipment, intellectual property, licences and book debts.

### What is a Security Interest in Personal Property?

A security interest is an *'interest...in personal property...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)'*.

Examples of a personal property security include a fixed and floating charge, a hire purchase agreement, a lease of goods, a chattel mortgage and a flawed asset arrangement. The PPSA also includes transfers of account or chattel paper, commercial consignments and the interest of a lessor or bailee under a PPS lease as a security interest.

Retention of title arrangements and the factoring of book debts will be security interests under the PPSA and will need to be 'protected' as required by the PPSA if they are to remain legally effective.

### Understanding PPSA Terminology

The PPSA introduces new terminology and concepts, some of which are self evident and some of which are not:

**Grantor:** the person who owns or has an interest in the personal property and who gave or granted the security interest

**Secured Party:** the person who holds the security interest

**Security Agreement:** a written agreement in the terms required by the PPSA by which a security interest is created

**Collateral:** the personal property to which a security interest is attached

**Attachment:** the step by which a security interest attaches to collateral on the giving of value for the security interest or on the grantor doing an act by which the security interest arises

**Perfection:** refers to the process required to ensure the security interest is enforceable against third parties and in an insolvency situation; perfection is determined by specific rules about when a security holder has either *possession* (in the case of tangible items) or *control* (of intangible items)

**Purchase Money Security Interest (PMSI):** known as a 'super priority', this refers to a security interest taken in collateral to the *extent* that it secures all or part of the purchase price or value given to acquire rights in the collateral

### Fixed and Floating Charges

The use of the term 'fixed and floating charge' should disappear in time. The PPSA defines personal property subject to a fixed charge as a 'circulating asset' and personal property subject to a floating charge as a 'non circulating asset'. A fixed and floating charge will become known as a (general or specific) security agreement.

The provisions of the *Corporations Act 2001* that deal with the validity and enforceability of a fixed and floating charge created within certain time periods prior to insolvency will be amended, as will a number of other insolvency provisions of the Act that will affect creditors. Employee entitlements in the liquidation of a grantor will retain priority over a floating charge where there is a deficiency.

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### Accessions, Processed and Commingled Goods

Goods that are installed in or affixed to other goods or which are manufactured, processed, assembled or commingled and as a result lose their identity in the product or mass, present unique problems. The PPSA provides rules to determine the existence and priority of the security interests in such items.

### The PPS Register

The PPSA creates a new register known as the PPS Register. This will be the only register for the recording of security interests in personal property. Certain existing registers, such as the ASIC Register of Charges, will be 'migrated' to the PPS Register and form part of it.

The PPS Register will operate 24/7, 365 days a year and be accessible to everyone. Entries and amendments to entries on the Register will be made by a 'financing statement' and a 'financing change statement'. Entries into the Register will need to be correct and comply with the PPSA Regulations to avoid any risk that an entry is rendered 'defective'. The Register will confirm entries by issuing a verification statement to the lodging party. Fees and charges will apply for searching the register and for posting entries on the Register.

### Protecting Your Security Interest

To be truly effective, a security interest must be effective against the competing claims of third parties or creditors in an insolvency situation.

To achieve that position, the holder of a security interest must have a security agreement and must *perfect* that interest. This can only be achieved by *registering* the security interest on the PPS Register or by having possession or *control* of the *collateral*, as those terms are defined in the PPSA.

A security interest perfected by *control* can take priority over a security interest perfected by registration; this is an exception to the 'principal rule' that perfection is best achieved by registration.

### Priority Rules

The PPSA provides general and specific rules to determine the priority between competing interests.

For example:

- a perfected security interest overrides an unperfected security interest;

- where all security interests are perfected by registration, the first to be registered has priority; and
- where all security interests are unperfected, the first to achieve attachment has priority.

Parties will be able to change the order of priority by entering into subordination agreements.

### Enforcement

The PPSA provides a prescriptive regime regarding the enforcement of a security interest when a grantor defaults. The regime only applies to personal property located in Australia. The PPSA permits 'contracting out' of the enforcement regime where the personal property is used predominantly for personal, domestic or household purposes.

Where the Consumer Credit Code also applies to the personal property, compliance with the enforcement provisions of either the Code or the PPSA will be sufficient.

### Transition

The PPSA provides various transitional rules, the most significant of which is to allow a 24 month window for security interests that did not previously require registration, to become registered within that time, in order not to lose their existing 'priority'.

**NOTE:** This information Sheet is a general guide only and is not to be used as a substitute for considered legal advice on particular facts and circumstances.



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