

# ALERT

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## Australian importing and exporting – does the PPSA apply?

Both importers and exporters of goods need to be aware of how the new *Personal Property Securities Act 2009* (**PPSA**) may affect their businesses and the structure of their agreements.

The PPSA provisions regarding importing and exporting of goods are complex. This article provides an outline of some key PPSA matters to consider in international trade.

### When might the PPSA apply?

The PPSA is broad in its application. Generally speaking, it impacts many arrangements by which rights are taken by one entity over assets in the possession of another, or by which assets owned by one entity enter the possession of another.

The PPSA focuses on the substance of the transaction, not its form. As such, the numbers of ways in which the PPSA may apply to international trade agreements are restricted only by the number of different trading agreement structures available. Some of the most common arrangements that may attract the PPSA include:

- retention of title clauses which provide that the exporter retains its rights in the goods sold until that exporter receives payment in full (either for that specific debt or for all debts owing to it by the importer);
- rights of an international lease of goods;
- security interests in the goods taken by an importer who makes an up front payment in respect of those goods;
- rights granted by an exporter to a financier in the debt owed to it by the importer and/or the letter of credit (eg receivables financing);
- rights granted by an importer to a financier in shipping documents (eg to the bank that provides the necessary letter of credit);
- general security agreements (previously, 'fixed and floating charges') or other rights granted by either party to a financier or creditor over that party's assets.



The manner in which the PPSA requirements will apply will differ according to, among other things, the type of asset (eg goods / accounts receivable / shipping documents) and which country's law applies to the arrangement.

## The trading agreement: which country's law applies?

The PPSA is an unforgiving legislation: if it applies to your arrangement and you do not take advantage of the available protection mechanisms, you may jeopardise your rights.

Determining whether the PPSA applies to different aspects of an international trading relationship is not a simple task. Broadly speaking the PPSA provides two options:

1. in some circumstances, the parties are free to select Australian law (and therefore the PPSA) as the governing

law of the agreement. These circumstances include consideration of the type of asset involved (eg goods / accounts receivable / shipping documents);

2. if those circumstances do *not* apply, or the parties have *not* selected Australian law, default rules are provided to determine whether the PPSA applies to an assessment of the following:
  - a. whether the security provisions of the trading agreement are valid; and
  - b. whether an entitlement to goods is effective (by means of 'perfection') as against third parties or an insolvent grantor.

The default rules are complex and involve consideration of matters including where the goods were located at the time that:

- the 'grantor' obtained rights in the goods (or the security interest otherwise attached to the goods); and
- the priority dispute (and/or other 'relevant questions') arose between the secured party and the company or another creditor.

Specific provisions govern how to determine where the goods are 'located' at any given time.

## Temporary protection

If the PPSA does apply, it provides specific mechanisms to afford automatic protection to a secured party for a short period

of time upon the arrival of goods in Australia. This period is the earliest expiration time of 56 days from when the goods physically arrive in Australia, or 5 business days from when the secured party has actual knowledge that the goods have arrived in Australia.

Like many aspects of the PPSA, whether or not this temporary perfection applies to a specific situation depends on a variety of circumstances. These include whether:

- the goods are being imported from a country that operates under a similar personal property securities regime to the PPSA (currently, New Zealand, Canada, the USA or France);
- the exporting country has a different system for notice, or other public registration or recording, of interests; and
- the interest was enforceable against third parties under the exporting country's law.

Of significant importance is whether or not the secured party complied with the other country's regime, if applicable. It is therefore important that you ensure you have adequately protected your rights in both Australia and the point of origin of the goods.

\* \* \*

The PPSA has created many additional factors to be considered in negotiating, structuring and entering international trade agreements. The law regarding these factors is complex and as yet untested in Australia.



We recommend that all Australian entities engaging in international trade:

- consider whether the PPSA applies to their arrangements;
- clearly state which country's law applies to each security agreement and, for the sake of prudence, consider how the default priority rules may apply to their situation; and
- familiarise themselves with the necessary steps to protecting their rights, both within and outside of Australia.

For the sake of ongoing relationships, you may also wish to bring the potential application of the PPSA to the attention of your trading partner and recommend that they seek independent legal advice on its effect.

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