



## Briefing paper

June 2016

# Introduction to Australia's Personal Property Securities Act

## 1. Introduction

### 1.1 What is the PPSA?

The Personal Property Securities Act 2009 (Cth) (the **PPSA**) is an Australian Commonwealth law for security interests in personal property.

### 1.2 What does the PPSA do?

The PPSA has uniform rules for:

- creating valid and enforceable security interests;
- governing priority between competing security interests;
- when a security interest will be enforceable on the grantor's insolvency;
- establishing when personal property is acquired free of a security interest; and
- enforcement of security interests.

### 1.3 Overseas precedent

The PPSA is modelled on a similar law in New Zealand,<sup>1</sup> which in turn is based on the personal property security law of Saskatchewan<sup>2</sup> and other Canadian provinces, whose laws closely follow

Article 9 of the Uniform Commercial Code of the United States (**Article 9**).

### 1.4 Personal property affected

Personal property affected includes but is not limited to motor vehicles, aircraft and ships, contractual rights, business inventory, intellectual property, livestock, financial property such as investments, and company shares. But some limited types of personal property are specifically excluded from the law. The PPSA also does not affect land, fixtures and certain specifically exempted property (such as water rights).<sup>3</sup>

The PPSA affects leases, commercial consignments, retention of title arrangements, receivables financing, and similar arrangements, as well as mortgages and charges, and applies to security interests given by companies or individuals.

Regulations have been made under the PPSA. The Personal Property Security Regulations 2010 (Cth) (the **PPS Regulations**).

A single national online register, the Personal Property Securities Register (the **PPSR**) operates for all personal property security interest registrations. The PPSR replaced numerous registers at a Commonwealth, State and Territory level.

The main provisions of the PPSA commenced in January 2012.

<sup>1</sup> Personal Property Securities Act 1999 (NZ).

<sup>2</sup> Personal Property Securities Act 1993 (S).

<sup>3</sup> PPSA s. 8.

## 2. Terminology

The PPSA swept away much of the traditional language relating to security interests and introduced new terminology, based on Article 9. The key terms are:

- security interest;
- grantor;
- collateral;
- attachment; and
- perfection.

### 2.1 Security interest

A security interest for the purposes of the PPSA is an interest in personal property provided for by a transaction that, in substance, secures payment or performance of an obligation. The form of the transaction and who has title to the property are irrelevant to whether or not the interest is a security interest.<sup>4</sup>

Some examples of a security interest given in the PPSA are a fixed charge, a floating charge, a chattel mortgage, a conditional sale agreement (including an agreement to sell subject to retention of title), a hire purchase agreement, and a pledge. Other examples given are a trust receipt, a consignment (whether or not a commercial consignment), a lease of goods (whether or not a PPS lease - about which see further below), an assignment, a transfer of title, and a flawed asset arrangement.<sup>5</sup> Note that these are only security interests if they meet the test of securing payment or performance of an obligation.

A security interest for the purposes of the PPSA also includes the following interests in relation to personal property, whether or not the transaction concerned, in substance, secures payment or performance of an obligation:

- the interest of a transferee under a transfer of an account or chattel paper;<sup>6</sup>
- the interest of a consignor who delivers goods to a consignee under a commercial consignment;<sup>7</sup> and
- the interest of a lessor or bailor of goods under a PPS lease.

A PPS lease is essentially a lease of goods for a period of one year or an indefinite term.<sup>8</sup>

<sup>4</sup> PPSA s.12(1).

<sup>5</sup> PPSA s.12(2).

<sup>6</sup> PPSA s.12(3)(a).

<sup>7</sup> PPSA s.12(3)(b).

### 2.2 Purchase Money Security Interests

Another important term in the PPSA is a special type of security interest called a purchase money security interest (**PMSI**). PMSIs include:

- a security interest taken in collateral, to the extent that it secures all or part of its purchase price;
- a security interest taken in collateral by a person who gives value for the purpose of enabling the grantor to acquire rights in the collateral, to the extent that the value is applied to acquire those rights;
- the interest of a lessor or bailor of goods under a PPS lease; and
- the interest of a consignor who delivers goods to a consignee under a commercial consignment.<sup>9</sup>

However PMSIs do not include:

- an interest required under transaction of sale and lease back to the seller; or
- an interest in collateral (as original collateral) that is chattel paper, an investment instrument, an investment entitlement, a monetary obligation or a negotiable instrument; or
- a security interest in collateral that when it attaches, the grantor intends to use predominantly for personal, domestic or household purposes (except collateral of a kind that is required or permitted to be described by a serial number, such as a motor vehicle).<sup>10</sup>

### 2.3 Grantor

The grantor under the PPSA is the person who has the interest in the personal property to which a security interest is attached.<sup>11</sup> The grantor may be the person who owes payment or performance of an obligation secured by the security interest, or someone else (e.g. a guarantor).

A grantor can also be a person who receives goods under a commercial consignment, a lessee under a PPS lease, or a transferor of an account or chattel paper.

If someone is a transferee of, or successor to, the interest of any of the above, that person is also considered to be a grantor under the PPSA.

<sup>8</sup> PPSA s.12(3)(c).

<sup>9</sup> PPSA s. 14(1).

<sup>10</sup> PPSA s. 14(2).

<sup>11</sup> PPSA s. 10.

## 2.4 Collateral

Collateral is personal property to which a security interest is attached. In relation to a registration with respect to a security interest, it includes personal property described by the registration, whether or not a security interest is attached to the property.<sup>12</sup>

## 2.5 Attachment

A security interest attaches to collateral when the grantor has rights in the collateral, or the power to transfer rights in the collateral to the secured party, and either value is given for the security interest or the grantor does an act by which the security interest arises.<sup>13</sup>

## 2.6 Perfected

A security interest in particular collateral is perfected if the security interest is attached to the collateral and is enforceable against a third party and one of the following has occurred:

- registration (on the PPSR) - for any type of collateral;
- possession of the collateral (other than possession as a result of seizure or repossession) - for any type of collateral; or
- control of the collateral - for an ADI account in relation to which the ADI is the secured party, an intermediated security, an investment instrument, a negotiable instrument that is not evidenced by a certificate, 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, and for satellites and other space objects.<sup>14</sup>

Some security interests can therefore be perfected without registration on the PPSR.

A security interest may also be temporarily perfected by force of the PPSA in certain cases.<sup>15</sup> In those cases it is not necessary that the security interest has attached or that the security interest is enforceable against a third party.

## 3. Registration of security interests

### 3.1 PPSR

The PPSR is the national online register established for all security interest registrations.<sup>16</sup>

The website for the PPSR is <http://www.ppsr.gov.au>

Registration is done by filing a financing statement.<sup>17</sup>

Filing can be done electronically. It is not necessary to file a copy of the document creating the security interest.

### 3.2 Class of property

When you register a security you are required to identify the class of property. The following are the classes of property prescribed in the PPS Regulations:<sup>18</sup>

- agriculture;
- aircraft;
- all present and after-acquired property;
- all present and after-acquired property except (as specified);
- financial;
- intangible;
- motor vehicle;
- other goods; and
- watercraft.

### 3.3 Searches of the register

The PPSR is searchable for a proper purpose. The various purposes are prescribed in the PPSA.<sup>19</sup> They include searches by the grantor and the secured party, and searches by proposed purchasers, lenders and investors, and their advisers.

Serial numbered goods such as motor vehicles are searchable by the serial number.<sup>20</sup>

For consumer property (property for a personal, domestic or household purpose), details of the grantor are not identified where the property is

<sup>12</sup> PPSA s.10.

<sup>13</sup> PPSA s.19(2).

<sup>14</sup> PPSA s. 21.

<sup>15</sup> PPSA s. 21(1).

<sup>16</sup> PPSA s. 147.

<sup>17</sup> PPSA s. 150.

<sup>18</sup> PPS Regulations Sch. 1 r.2.3

<sup>19</sup> PPSA s. 172.

<sup>20</sup> PPSA s.171(1)(b).

described by a serial number (e.g. a motor vehicle).<sup>21</sup>

## 4. General rules

### 4.1 When a security interest will be enforceable against the grantor

A security interest is enforceable against a grantor in respect of particular collateral only if the security interest has attached to the collateral.<sup>22</sup>

If the parties to a security agreement have agreed that a security interest attaches at a later time, the security interest attaches at the time specified in the agreement.<sup>23</sup>

### 4.2 When a security interest will be enforceable against a third party

The general rule is that a security interest is enforceable against a third party in respect of particular collateral only if the security interest is attached to the collateral, and:

- the secured party possesses the collateral; or
- the secured party has perfected the security interest by control; or
- a security agreement that provides for the security interest covers the collateral and meets the requirements for security agreements.<sup>24</sup>

### 4.3 Priority rules

Where there are no specific priority rules for a situation, the default priority rules are:

- The priority between unperfected security interests in the same collateral is to be determined according to the order of attachment of the security interests.<sup>25</sup>
- A perfected security interest in collateral has priority over an unperfected security interest in the same collateral.<sup>26</sup>
- Priority between two or more perfected security interests in collateral is to be determined by when the priority time for each security interest occurs.<sup>27</sup>

- A security interest currently perfected by control has priority over a security interest in the same collateral currently perfected by another means.<sup>28</sup>

### 4.4 Super priorities

A purchase money security interest (**PMSI**) has a "super priority".

A PMSI will have priority over a perfected security interest that is not a PMSI in some cases. Where the PMSI is in inventory or its proceeds and is perfected by registration, it will have priority from when (for goods) the grantor comes into possession,<sup>29</sup> or otherwise when the security interest attaches.<sup>30</sup> For other property, the PMSI will have priority if the PMSI is registered within 15 business days after (for goods) the grantor comes into possession,<sup>31</sup> or otherwise when the security interest attaches.<sup>32</sup> The registration must state that it is a PMSI.<sup>33</sup> Any PMSI is subject to security interests perfected by control.<sup>34</sup>

### 4.5 When a buyer of property will take it free of a security interest

The main rule is that a buyer or lessee of personal property, for value, takes its free of an unperfected security interest.<sup>35</sup> However this does not apply if the unperfected security interest was created or provided for by a transaction to which the buyer or lessee was a party.<sup>36</sup>

There are in addition special rules for:

- serial number goods where the serial number is incorrect or missing in the PPSR;<sup>37</sup>
- motor vehicles;<sup>38</sup>
- property acquired in the ordinary course of business;<sup>39</sup>
- personal, domestic or household property;<sup>40</sup>
- currency, investment instruments, investment entitlements;<sup>41</sup> and
- temporarily perfected security interests.<sup>42</sup>

<sup>21</sup> PPSA s. 153.

<sup>22</sup> PPSA s.19(1).

<sup>23</sup> PPSA s.19(3).

<sup>24</sup> PPSA s. 20(1).

<sup>25</sup> PPSA s. 55(2).

<sup>26</sup> PPSA s. 55(3).

<sup>27</sup> PPSA s. 55(4).

<sup>28</sup> PPSA s. 57(1).

<sup>29</sup> PPSA s. 62(2)(b)(i).

<sup>30</sup> PPSA s. 62(2)(b)(ii).

<sup>31</sup> PPSA s. 62(3)(b)(i).

<sup>32</sup> PPSA s. 62(3)(b)(ii).

<sup>33</sup> PPSA ss. 62( 2)(c), 62(3)(c).

<sup>34</sup> PPSA s. 57.

<sup>35</sup> PPSA s. 43(1).

<sup>36</sup> PPSA s. 43(2).

<sup>37</sup> PPSA s. 44.

<sup>38</sup> PPSA s. 45.

<sup>39</sup> PPSA s. 46.

<sup>40</sup> PPSA s. 47.

<sup>41</sup> PPSA ss. 48-51.

<sup>42</sup> PPSA s. 52.

## 5. Enforcement

### 5.1 Generally

Chapter 4 of the PPSA covers enforcement. It provides that all rights, duties and obligations with regard to enforcement of security interests must be exercised and discharged honestly and in a commercially reasonable manner.<sup>43</sup>

However the PPSA does not codify the law regarding enforcement. Parties are free to negotiate their own terms. The parties can contract out of a number of provisions in Chapter 4 if the collateral is not used predominantly for personal, domestic or household purposes.<sup>44</sup>

Chapter 4 of the PPSA does not apply to:

- interests which are deemed to be security interests but which do not in fact secure payment or performance of an obligation (e.g. a PPS lease);
- security interests in goods located outside Australia; or
- property of a business while a receiver or controller appointed under Part 5.2 of the Corporations Act 2001 is in control of it.<sup>45</sup>

The PPSA does not affect rights and obligations arising under the National Credit Code (**NCC**). Where the PPSA and NCC apply concurrently, provisions of the PPSA will be taken to be complied with if corresponding provisions of the NCC have been complied with.<sup>46</sup>

The PPSA does not specify events of default: they are as set out in security agreement.<sup>47</sup>

### 5.2 Commencing enforcement action

Any secured party can commence enforcement action regardless of priority, but if a secured party seizes collateral subject to a higher priority security interest where the secured party was entitled to seize the collateral, the higher priority secured party can require the other secured party to hand over possession.<sup>48</sup>

Judgment is not required for exercising rights of execution, and the judgment and the execution process does not extinguish the security interest.<sup>49</sup>

A secured party has the option of enforcing as if personal property were land - the land laws of the States and Territories are incorporated into the

PPSA for this purpose. This remedy not available if the NCC applies to the security interest or for collateral used predominantly for personal, domestic or household purposes. The secured party must act reasonably when deciding whether to exercise this option.<sup>50</sup>

### 5.3 Liquid assets

With accounts, chattel paper or negotiable instruments, a secured party can realise the collateral by collection from a third party by giving notice, and the third party must then make payment directly to the secured party. If there is a higher priority secured party, it must be given notice of intention, and the higher priority secured party then has the option of giving notice to the third party itself.<sup>51</sup>

### 5.4 Seizure

The secured party may seize collateral by any method permitted by law. Unless the method for seizure of intangible property has been agreed, it may be seized by giving a notice stating that the giving of notice constitutes seizure. Seizure does not affect the security interest. If collateral cannot be readily moved from grantor's premises or adequate storage facilities not readily available, the secured party may seize the collateral by giving notice taking apparent possession.<sup>52</sup>

### 5.5 Disposal

Collateral may be disposed of by a private or public sale (including auction or closed tender), by a lease (if the security agreement permits it, and the collateral is not used predominantly for personal domestic or household purposes), or (if collateral is intellectual property) by licence - subject to the terms of the licence and any applicable laws.<sup>53</sup>

The secured party may itself purchase collateral by public sale if it is not used predominantly for personal, domestic or household purposes, at least market value is paid, and it has given notice of intention to the grantor and any higher priority secured party, and has not been given notice of objection.<sup>54</sup>

Where the secured party disposes of collateral other than by purchasing it, it has a duty to exercise reasonable care to obtain at least market value (if there is market value) or otherwise to obtain best price reasonably obtainable in the circumstances.<sup>55</sup>

<sup>43</sup> PPSA s. 111.

<sup>44</sup> PPSA s. 115.

<sup>45</sup> PPSA ss.109, 116.

<sup>46</sup> PPSA s. 119, PPS Regulations r.4.1.

<sup>47</sup> PPSA s. 110.

<sup>48</sup> PPSA ss. 123, 127.

<sup>49</sup> PPSA s. 113.

<sup>50</sup> PPSA s. 118.

<sup>51</sup> PPSA ss. 120, 121.

<sup>52</sup> PPSA ss.123-127.

<sup>53</sup> PPSA s. 128.

<sup>54</sup> PPSA s. 129.

<sup>55</sup> PPSA s. 131.

After disposing of collateral, or every 6 months if disposal is delayed, the secured party must provide a statement of account on request.<sup>56</sup>

A person acquiring collateral on disposal receives it free of interests of the grantor, the secured party, and lower ranking secured parties, but subject to higher ranked securities.<sup>57</sup>

## 5.6 Retaining collateral

A secured party may retain seized collateral if it is not used predominantly for personal, domestic or household purposes, and it has given notice of intention to the grantor and certain other secured parties and has not been given a notice of objection.<sup>58</sup>

A secured party can take steps to have title transferred to itself and takes the collateral free of the interests of the grantor and any lower ranking secured parties.<sup>59</sup>

## 5.7 Notice requirements

The usual notice requirements are as follows:

- Before a secured party initiates enforcement action under incorporated land laws it must give notice to the grantor, other secured parties who hold perfected security interests, and persons who have given written notice that they claim an interest in the collateral.<sup>60</sup>
- Before a secured party initiates enforcement action in relation to liquid assets it must give notice to the grantor and higher priority secured parties.<sup>61</sup>
- Before a secured party disposes of collateral it must give notice to the grantor and higher priority secured parties.<sup>62</sup>
- After a secured party has seized and disposed of collateral, or keeps the collateral for disposal at a later date, it must on request give a statement of account to the grantor and any other secured party.<sup>63</sup>
- A secured party who intends to retain collateral must give notice to the grantor and certain other secured parties.<sup>64</sup>

The PPSA sets out some exceptions to these general requirements.<sup>65</sup>

## 5.8 Proceeds

Proceeds received by the secured party who enforces against the collateral must be applied in the order prescribed in the PPSA.<sup>66</sup>

## 5.9 Redemption

Until collateral is disposed of, any other secured party or the grantor may redeem the collateral by paying the secured creditor the amount required to discharge the secured obligations, or by performing the obligations, and by paying the enforcement expenses. The grantor's right to do so takes priority.<sup>67</sup>

## 5.10 Reinstatement

Until collateral is disposed of or retained, a person may reinstate the security agreement by paying any amount in arrears (ignoring accelerated amounts) and enforcement expenses and remedying any other default. But this can only be done once in relation to any security agreement.<sup>68</sup>

# 6. Transition

## 6.1 Introduction

The PPSA applies from the registration commencement time<sup>69</sup> (30 January 2012) in relation to the following interests:

- a security agreement made at or after the registration commencement time;
- a security interest (other than a transitional security interest) arising at or after the registration commencement time;
- a transitional security agreement, which was a security agreement in force immediately before the registration commencement time, and that continues in force at and after that time;<sup>70</sup>
- a transitional security interest (whether arising before, at or after the registration commencement time). A transitional security interest is a security interest provided under a transitional security agreement - in the case where the interest arises before the registration commencement time, where the PPSA would have applied in relation to the security interest;<sup>71</sup>

<sup>56</sup> PPSA s. 132.

<sup>57</sup> PPSA s. 133.

<sup>58</sup> PPSA s. 134.

<sup>59</sup> PPSA s. 136.

<sup>60</sup> PPSA s. 118.

<sup>61</sup> PPSA s. 121.

<sup>62</sup> PPSA s. 130.

<sup>63</sup> PPSA s. 132.

<sup>64</sup> PPSA s. 135.

<sup>65</sup> PPSA s. 144.

<sup>66</sup> PPSA s. 140.

<sup>67</sup> PPSA s. 143.

<sup>68</sup> PPSA s. 143.

<sup>69</sup> PPSA s. 306.

<sup>70</sup> PPSA s. 307.

<sup>71</sup> PPSA s. 308.

- an interest in personal property (other than a security interest) arising at or after the registration commencement time;
- personal property of a kind prescribed by the regulations; and
- personal property, if data in relation to the property is given to the Registrar.<sup>72</sup>

## 6.2 Provisions that do not apply to transitional security interests

Several parts of the PPSA apply only in relation to interests that arise after the registration commencement time and do not apply to transitional interests. These include:

- transitional security interests are only enforceable against third parties if they would have been enforceable before the registration commencement time;<sup>73</sup>
- security interests in intellectual property licences that are created before the registration commencement time are not binding on successors-in-title;<sup>74</sup>
- the enforcement provisions do not apply to security agreements made before the registration commencement time;<sup>75</sup> and
- provisions relating to fixed charges and floating charges and how they work under the PPSA do not apply to security interests created by security agreements made prior to the registration commencement time.<sup>76</sup>

## 6.3 Migrated transitional security interests and deemed registration

Migrated security interests are interests that were registered on 'transitional registers'. The registered data in relation to the interests was migrated to the PPSR.<sup>77</sup> These interests were deemed to be registered on the PPSR from immediately before the registration commencement time until the earlier of:

- the time when the interest stops being continuously perfected under the PPSA; and
- the end-time of the registration.<sup>78</sup>

Existing registrations in most existing State, Territory and Commonwealth security interest registers were migrated to the PPSR as transitional security interests.

By being deemed to be registered from immediately before the registration commencement time,

<sup>72</sup> PPSA ss. 310, 148(c), 330-331.

<sup>73</sup> PPSA s. 311.

<sup>74</sup> PPSA s. 313.

<sup>75</sup> PPSA s. 314.

<sup>76</sup> PPSA s. 318.

migrated security interests have priority over new security interests registered at or after the registration commencement time.

However, if the application of the transitional priority scheme would result in an acquisition of property other than on just terms,<sup>79</sup> priority will be determined as if the PPSA had not been enacted.

## 6.4 Non-migrated security interests and temporary perfection

A non-migrated security interest is any transitional security interest which is not a migrated security interest: interests on any existing registers not migrated, and interests covered by the PPSA but not currently regulated.

Apart from certain interests excluded by the regulations, non-migrated security interests were temporarily perfected by the PPSA for a period starting immediately before the registration commencement time and ending at the end of the earlier of the following times:

- the time when the security interest ceased to be continuously perfected otherwise than by temporary perfection; or
- the end of the month that was 24 months after the registration commencement time.<sup>80</sup>

Secured parties had 24 months to consider whether existing non-migrated security interests should be registered.<sup>81</sup> For example failure by a lessor or retention of title supplier to register their security interest within the 24 months may have resulted in a loss of priority to other security interests, or loss of the security interest on the sale of the collateral or the insolvency of the grantor.

Section 320 of the PPSA contains a guide to how the PPSA applies to the determination of priorities involving transitional security interests:

Item	The following security interest:	has priority over ...
1	a perfected transitional security interest	an unperfected security interest (whether transitional or not)
2	a perfected transitional security interest	a perfected security interest that is not a transitional security interest
3	an unperfected transitional security interest	an unperfected security interest that is not a transitional security interest
4	a perfected security interest (whether transitional or not)	an unperfected transitional security interest

<sup>77</sup> PPSA s. 332.

<sup>78</sup> PPSA s. 333.

<sup>79</sup> PPSA s. 252B.

<sup>80</sup> PPSA s. 322.

<sup>81</sup> PPSA s. 322.

## 6.5 Priority protection for certain transitional security interests

The transitional provisions set up a transitional priority scheme which will apply in bankruptcy or insolvency<sup>82</sup> or in a priority dispute between migrated security interests. A transitional security interest will be taken to have attached to the collateral immediately before the registration commencement time.<sup>83</sup>

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<sup>82</sup> PPSA s. 324.

<sup>83</sup> PPSA s. 321.