



PPSA BULLETIN 2

Personal Property Securities Act 2009 ('PPSA')

Start Date

As indicated in our PPSA Bulletin 1, introduction of the PPSA is being further delayed, probably until after 1/2/2012.

Fees

Final fees have still not been set, but we expect search fees of approximately \$3.70 per search (- + if you are affected by the PPSA you may be searching very regularly!)

Application

The PPSA adopts a functional approach to security interests so that (with a few exceptions) any rights or interest in relation to collateral provided for by a transaction that in substance secures payment for performance and obligations are deemed a 'security interest' for the purposes of the PPSA (regardless of the form of security interest, or who has title to the collateral).

This approach will have a major impact on the determination of priority disputes, because it expands the arrangements currently recognised as a security interests under the current BOS (bill of sale) regimes operated by the Australian states.

The change is evident from the definition of '**personal property**' in the PPSA:

'Personal Property' means property (including a licence) other than:

- (a) *land; or*
- (b) *a right to entitlement or authority that is:*
 - (i) *granted by or under a law of the Commonwealth a state or a territory; and*
 - (ii) *declared by that law not to be personal property for the purposes of this Act.*

This definition is significantly broader than its BOS regime counterpart, and includes any situation where a secured party takes an interest in personal property that secures a payment or performance of an obligation (without regard to the form of the transaction or to the identity of the person who has title to the property).

The expanded definitions of 'security interests' and 'security agreement' in the PPSA result in a greater number of interests being recognised as security interests over personal property.

However simply recognising an interest as a security interest is not enough to afford that secured party a priority interest in the collateral.

The secured party **must** also take steps to attach and perfect its security interest in the collateral.

Attachment, enforceability and perfection

These are the 3 central concepts of the PPSA.

They establish the existence of security interests and the rights and priorities of secured parties claiming rights in the same collateral.

Step 1: Attachment

Attachment is the time when the security interest comes into existence.

A security interest will attach under the PPSA when either:

- a secured party is given value for the security interest, or
- the debtor does an act by which the security interest arises and the debtor has rights in the collateral or the power to transfer rights on the collateral (Section 19).

When a security interest is attached to collateral the security interest becomes enforceable against a debtor, **but not against third parties, or on insolvency.**

Step 2: Enforceability

Enforceability is the second stage towards perfection.

Section 20 of the PPSA provides that in order for a security interest to be enforceable over collateral it must attach to the collateral and either:

- be perfected by possession or control, or
- be in writing and signed or adopted by the debtor.

Satisfying these rules ensures the security interest is enforceable against the debtor and third parties, **but still not in insolvency.**

Step 3: Perfection

Perfection is the final step secured parties are required to undertake to obtain premium protection against competing third parties, and in insolvency.

The basic philosophy of perfection is that it ensures a security interest becomes visible to those who might deal with the debtor and (but for the notification of the security interest on the Personal Properties Securities Register [the PPSR]) might have a false impression of the debtor's asset position).

The third parties of most concern are those holding competing security interests, and purchasers of the collateral, who may take free of any other interests (Part 2.5 of the PPSA).

Perfection can occur in 4 ways:

- possession (over tangible goods) Section 21(2)(b) - but not by seizure or repossession;
- control (over property that can be 'controlled' [Section 21(20)(c)];
- registration on the PPSR [Section 21(2)(a)];
- temporary perfection (for 5 days - in very limited circumstances) - [Section 21(1)(a)];

In the majority of the cases a security interest will be perfected by registration.

If that is the case a written and signed security agreement describing the collateral is required to avoid other creditors being disadvantaged by any misrepresentation as to the scope of the collateral covered by the security agreement [Section 20(2)].

Which of the above steps a security party takes towards perfection will impact on that party's priority position under the codified rules contained in the PPSA.

General priority rules

The default priority rules adopt a 'first in time' approach - Section 55(2).

The rules generally operate to make the first registered security interest prevail over subsequent security interests, and are generally simpler than the equivalent rules under the BOS regime.

The default priority rules are:

- a perfected interest will have priority over any unperfected interest, even where the party with the unprotected interest has title to the goods [Section 53(3)].
- if there are 2 unperfected security interests in the same collateral, priority is determined by the order of attachment [Section 55(2)];
- if there are 2 perfected interests in the same collateral, priority is determined by the order in which the priority time occurs;
- perfection by control has the highest level of priority;
- the first party to register its interest on the PPSR will have priority over collateral that is not able to be controlled (Section 57) which means that the time of priority may not be the time perfection actually occurs, but rather the time the financing statement is registered, so that there may be situations where a later perfected interest might take priority - as long as it is registered first on the PPSR.

However there are a number of exceptions to the default priority rule, including the rules relating to transitional security interests in Part 9.5 Division 2 [for 2 years after the Commencement Date].

These rules provide that a perfected transitional security interest will have priority over any other security interest, and an unperfected transitional security interest will have priority over any other unperfected security interest.

In our next bulletin we will touch on the exceptions to the default priority rules set out above, and in particular 'purchase money security interests' (PMSIs), 'retention of title' (ROT) arrangements and 'personal property security leases' (PPS leases) and the effect on collateral which has affixed to land.

More information

If you are interested in receiving further bulletins on this subject [or any of the other subjects on which we circulate notes from time to time] or to access previous bulletins, and you are not already on our electronic mailing list, please click on the following link to our website and we can include you on our mailing list for our regular Newsletter or for bulletins on subject matters of interest to you.

<http://www.garlandwaddington.com.au>

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A handwritten signature in black ink, appearing to be 'G. Waddington', located below the printed name.