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## Personal Property Securities Law: a question of protection.

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# PERSONAL PROPERTY SECURITIES

*regime under the Personal Property Securities Act 2009*

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*Note: in this paper we have used upper case to distinguish certain concepts and terminology peculiar to this regime.*

# 1. OVERVIEW AND BACKGROUND

This paper is pitched as an introduction to those who are not familiar with the Personal Property Securities Law and also as an overview and general update for lawyers and accountants, and company directors who have an understanding of the PPSA and Regulations.

The Personal Property Securities Act (Cth) 2009 [the Act] was introduced after a few false starts on 30 January 2012. A transition period ended on 30 January 2014. **PP3**

In this paper we will try to distil the essential elements of the legislation and how the regime works.

The PPS Act and Regulations [the PPS Law] relates to Security Interests in *personal property*. As a general principle, where possession was previously 9/10 of the law, **possession** is now 10/10 of the law, unless you have protected those Security Interests by perfecting them under the PPS Law. So the take away from this paper is “Get Protected” if for any reason you lose possession of your goods.

As you may or may not be aware, before 30 January 2012, the regulation of security over personal property in Australia comprised a grand landscape more than 70 statutes and other legislation and registers. Some of these included: **PP4**

- a. The Bills of Sale Act [NSW]
- b. The ASIC register of company charges
- c. REVS register for motor vehicles in NSW [register of encumbered vehicles] [NSW]
- d. The Fisheries Registers [Cth]
- e. Australian Register of Ships [Cth]
- f. Bills of Sale from 2000 and interests in goods registered under the Security Interests in Goods Act 2005 registered at the Department of Lands in NSW
- g. Registers of Co-operative Charges in NSW
- h. Stock mortgages registered under the Liens on Crops and Wool and Stock Mortgages Act 1989 [NSW]
- i. Retention of Titles clauses [Romalpa clauses] in sale of goods contracts

The purpose of the new regime was to repeal existing security arrangements in the states and territories and introduce new rules which will seek to:

1. Regulate how Security Interests in goods are created and enforced Australia-wide; and
2. Determine priorities between competing Security Interests in goods;

The PPS Law applies to any person or entity [the “Secured Party” or grantee] wanting to assert title [a Security Interest] in goods [the Collateral] over the person or entity who has possession of those goods [the Grantor].

The PPS Law does not apply to interests in land, or improvements on land including fixtures. We see the PPS Law applying to the following types of businesses: **PP5 and 6**

- a. Leasing companies – who deal with the leasing of motor vehicles who previously subscribed to the REVS registers to record their interests. These businesses have been required to review their documents, procedures and credit policies to ensure their IT systems communicate with the PPS Register.
- b. Where a business leases or bails their goods [including serially numbered goods since 1 October 2015] to others for an indefinite period or a total period of a year or more
- c. Banks and financial institutions - who lend funds and take security over personal property
- d. Manufacturers and wholesale suppliers - who sell their products on retention of title terms. Under the PPS Law a ROT arrangement is treated as a “Security Interest”, where the Buyer is treated for PPS purposes as if it were the owner of the goods and the Supplier is like a secured lender who will need to register their interest in the goods. All such suppliers have been required to review their terms and conditions to comply with the PPS Law. The PPS Law does give suppliers new level of protection in securing their interest in the portion of goods which have been delivered but are yet unpaid, which is aligned to the old Retention of Title, but to attain this level of protection [referred to as a PMSI] the supplier must comply with the requirements of the PPS Law.  
A transition period for old ROT clauses to continue in effect without complying with the Act ended on 30 January 2014.
- e. Insolvency practitioners - where the receiver, liquidator or administrator will have to be aware of and investigate the Personal Property Securities Register [PPSR] and look at the security documents behind a registration of a Security Interest to ascertain whether or not they will have any entitlement to take possession or control of an item.
- f. Any person previously holding a company charge over a company’s assets [a fixed and/or floating charge] will need to now register their interest on the PPS Register as opposed to the ASIC Register. All company charges previously on the ASIC Register were “migrated” to the PPSR as at 30 January 2012.
- g. Where a business, including a sole trader, consigns goods to a third party, and effectively loses possession or control of their goods, the owner of the goods will need to comply with the PPS Law including registering their interest in their own goods on the PPS Register.
- h. Where a party may want to raise finance using their stock or other goods as collateral for a loan.

The new regime has drawn on the experience of similar reforms in New Zealand [from May 2001], the U.S. and Canada.

Before we move on, the following two NZ cases are a good illustration of where a failure to register a Security Interest under the New Zealand law had serious consequences for the non-compliant parties. **PP7**

In the case of *Graham and Gibson v. Portacom New Zealand [2004] 2 NZLR 528* Portacom leased portable buildings to NDG Pine Ltd under a standard hiring agreement. Portacom did not register its Security Interest in its buildings on the PPS Register

NDG registered a debenture over its property to HSBC Bank (HSBC registered their security interest over all the buildings) in May 2002 and in June 2003 HSBC appointed a receiver to NDG.

The Court held that the Receiver for HSBC had the right to sell Portacom's buildings, because HSBC's registered Security Interest had priority over any claim of Portacom even though Portacom claimed they were the owners of the buildings under the hire agreement.

## PP8

In the case of *Waller [as Receiver of Glen Morgan Farm Pty Ltd.] v. New Zealand Bloodstock Limited [2005] 2NZLR 549* a secured creditor S.H. Lock had a debenture over Glen Morgan Farm Ltd. The debenture was registered by Lock on the NZ PPS Register on 1 May 2001 [the first day the NZ Act came into force] Glen Morgan had previously entered into an agreement with NZ Bloodstock and a related entity to purchase a stallion named "Generous" This and subsequent agreements were **not** registered on the NZ PPS Register. Glen Morgan took possession of the stallion in August 2001. NZ Bloodstock re-possessed the stallion because Glen Morgan failed to comply with payment terms for the purchase. Meanwhile Waller was appointed as Receiver of Glen Morgan on behalf of S. H. Lock and succeeded in arguing that the Receiver was entitled to the stallion and the proceeds of the stud fees earned by Glen Morgan as lessee/purchaser of the stallion whilst in Glen Morgan's possession. The principles adopted in the previous *Portacom* case were followed in granting priority to the holder of the Security Interest registered by S.H. Lock. The case does describe a comprehensive analysis of a more complex fact situation in this area. The amount allowed to be retained by the Receiver was about \$2 million.

The legal argument in this case focused on traditional principles of ownership and legal title of an owner/lessor as opposed to the registration scheme imposed by the Act. The Court held that on this point the new priority rules set out in the Personal Property Securities Act were "a reflection of the extent to which the registration regime introduced by the Act **has altered** long established priority principles grounded in notions of legal title" [Allan, J [98]

## 2. CONCEPTS AND MEANINGS AND THE PROCESS

PP9, 10,11

We shall now consider some concepts and definitions included in the Act.

The Act deals with *tangible* and *intangible* property. Tangible property is of course motor vehicles, debtors, machinery, crops, livestock, and the like. Intangible properties are licences, intellectual property, investment instruments

[s.6] Personal property is any interest other than land or buildings or fixtures which form part of that land [s.10]

- a. any form of property being tangible goods or financial property owned by any legal person or entity located in Australia or where the Grantor is an Australian entity; or
- b. in the case of intangible goods
  - (i) the Grantor is an Australian entity; or
  - (ii) it relates to an account payable in Australia [assignment provisions]
  - (iii) the intangible property is created or arises from or is provided for by a law of Australia or a state/territory of Australia [e.g. intellectual property]

In order to get a grip on this new regime we need to understand that some new concepts are to be introduced and we need to address the relevant definitions of the concepts contained in the Act.

## DEFINITIONS and TERMINOLOGY

Section 10 of the Act contains a Dictionary of some terms however it is not comprehensive and other definitions occur throughout the Act as the terms are required to be defined. The definitions of some key terms are found in the following sections:

Term	Section in the Act	The simplified definition
"after-acquired property"	s.10	Personal property acquired by the Grantor after a security agreement is made
All Present and After Acquired Property [AIPAP]	s.43, 55, 62,267 [Item 4 of Financing Statement]	Formerly referred to as the subject of a fixed and floating charge.
"attachment"	s.10 and s.19	The creation of security over the Collateral for value.
"circulating asset"	s.10 and s340	What was previously described as floating assets, being assets used or transferred in the ordinary course of business.
"Collateral"	s.10	The "secured" property
"financial property"	s.10	includes currency, negotiable instrument, document of title, investment instrument
"goods"	s.10	personal property that is tangible including crops, livestock, minerals that have been extracted, and satellites
"Grantor"	s.10	The person providing the security, previously referred to as the borrower, mortgagor, charger
"intellectual property"	s.10	Includes the following " <i>rights</i> " including the right to be a party to proceedings in relation to such a right:

		-rights to do things under the Designs Act, Patents Act, Trademarks Act, Copyright Act, Plant Breeders Act, Circuit Layout Act
"intellectual property licence"	s.10	An authority or licence to exercise right comprising intellectual property.
"Inventory"	s.10	personal property [tangible or intangible] that, in the course of an enterprise [the enterprise must have an ABN] is held by a person for sale, lease, or to be used in work in progress
"non circulating asset"	s.340	What was previously described as a fixed asset, and prohibited from dealing with without the consent of the Secured Party.
"perfected" [Security Interest]	s.10 and s.21	The Security Interest being enforceable against third parties and conferring priority.
"PPS Lease"	s.10 and s.13	<p>A lease or bailment of goods for an indefinite term, or for more than 1 year including where options on the lease create a total term of more than 1 year. A PPS Lease grants a PMSI to the lessor or bailor of goods where properly registered [s.14(1)(c)]</p> <p>PPS Lease does NOT include:  -a lease where the lessor is not in the business of leasing/bailment of goods and other exceptions in s.13(2)</p>
"Purchase Money Security Interest"(PMSI)	s.10 and s.14	A Security Interest which secures all or part of the "purchase price". A PMSI provides a 'super priority' over other forms of security and is typically used in the supply of stock or other non circulating assets. Often referred to, in pre-PPS Law terms, as a "ROT" interest. A PMSI does not include an interest in Collateral that is intended to be used by the Grantor predominantly for personal, domestic or household purposes.
"Security Agreement"	s.20	Must be in writing and signed by the Grantor to be enforceable against a third party for example a financing agreement, mortgage or a charge.
"Secured Party"	s.10	The party receiving the secured interest, the party losing possession and control for example the

		financier, mortgagee, charge, lender, retention of title supplier, a lessor.
"Security Interest"	s.9, s.10 and s.12	an interest in personal property provided for by a transaction <u>that secures payment, or the performance of an obligation</u> ; and those transactions that may <u>give rise</u> to a Security Interest but do not actually secure payment or the performance of an obligation for e.g transfers of accounts, consignments of goods, bailments [called PPS leases]

The types of interests to which the Act does NOT apply [s. 8]:

## PP12

- a. Consumer transactions for goods predominantly used for personal domestic or household property for a new value of \$5,000 or less [subject to the provisions of s.47 of the PPS Act] and which are goods which the PPS Regs provide are not required to be described by serial number in a PPS Registration [like a car]
- b. where a seller ships goods to a buyer pursuant to an order of the seller under a negotiable bill of lading UNLESS there is evidence that the parties intend to create a Security Interest in the goods
- c. a lien/ charge or other interest in personal property that is created by another law [Commonwealth or state] unless the owner agrees to the Security Interest
- d. a lien/charge or other interest in personal property created by general law for example in equity, although the priorities may not always be supported under general legal principles.
- e. An interest provided for by :
  - (i) Creating or transferring an interest in land
  - (ii) Creating an interest in a right of payment in connection with an interest in land, where the land is identified
  - (iii) The transfer of a right to payment under a contract where the transferor must perform obligations under the contract
  - (iv) A transfer of remuneration to an individual employee or contractor
  - (v) Policies of insurance
- f. Interests in property created under the Bankruptcy Act
- g. Where there is a trust created in respect of a financial accommodation where the trust has conditions for use
- h. Water rights under a law
- i. Fixtures on land
- j. A "statutory right" where that relevant law declares that right is excluded under the Act

A schedule of qualified exceptions of those excluded interests in 8(1) are contained in s. 8(2) and (3)

## THE "SECURITY INTEREST"

The "Security Interest" is the essence of the Act and the regime.



There is a dedicated definition in s.9 of the Act which states:

**A Security Interest is an interest in personal property provided for by a transaction that secures payment, or the performance of an obligation ;**

BUT THE Act also applies to those transactions that may give rise to a Security Interest but do not actually secure payment or the performance of an obligation for e.g transfers of accounts, consignments of goods, bailments [called PPS leases]

BUT THERE IS MORE

The extended meaning of **Security Interest** is contained in s. 12. Sub Section 12(2) contains some helpful examples of Security Interests: fixed and floating charges, chattel mortgages [Bill of Sale], conditional sale agreement [like a ROT], hire purchase agreements, pledge, TRUST RECEIPT, consignment, lease of goods, an assignment, a transfer of title.

Sub Section 12(3) provides that the **Security Interest** 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 :*

- (a) The interest of a transferee under a transfer of an account or chattel paper. A chattel paper is documentary evidence of a monetary obligation.
- (b) The interest of a consignor who delivers goods to a consignee under a commercial contract
- (c) The interest of a lessor or bailor of goods for value [s.13(3)] under a PPS lease.

s.13 describes the meaning of the PPS Lease. A PPS Lease is a lease or bailment of goods [including serially numbered goods from 1.10.15] for more than 1 year, OR an indefinite term [even if capable of being terminated within a year] OR for a term of up to 1 year that is renewable to make it exceed 1 year OR for up to 1 year where the lessor/ bailor [owner] consents to the lessee/bailee having substantially uninterrupted possession of the goods for more than 1 year, but the PPS lease will only kick in once the 1 year has passed.

Sub Sections 12(5) and (6) provide what the **Security Interest** does not include interests which are licences and other things described in the Regulations from time to time. For this reason I understand that an Intellectual Property Licence is not subject to the Act, however the Intellectual Property, the subject of the licence can be the subject of a Security Interest so we do include PPSA clauses in licences for intellectual property for the Security Interests in the actual IP.

## **PURCHASE MONEY SECURITY INTERESTS [PMSI's]**

## **PP13, 14**

A Secured Party can have a Purchase Money Security Interest in some types of Collateral which is a Security Interest in the "proceeds of sale" of the Collateral [s.14]. PMSI's are not able to be attached to all Collateral in all circumstances.

A Purchase Money Security Interest [PMSI] in Collateral is created by:

- a Secured Party [a seller] who secures an obligation from the purchaser [the Grantor] to pay the purchase price
- a person [Secured Party] who provides the funds to the Borrower [the Grantor of the Security Interest] to purchase the Collateral
- the interest of a lessor or bailor [as the Secured Party parting with possession of goods] under a PPS Lease of Collateral; and
- the interest of a consignor [as a Secured Party] who delivers property [to a Grantor] under a commercial consignment
- where a former Retention of Title arrangement occurs and the Collateral passes possession to a Buyer who then on-sells the Collateral to a consumer, but the Buyer [Grantor] may still owe money to the Secured Party [the Seller] so the Secured Party can claim a Security Interest in the proceeds of the sale of the Collateral to the extent that the money is owed to the Secured Party.

If a Secured Party has a properly Perfected PMSI, then the bonus under the PPS Law is that the Secured Party can claim a “super priority” over other claimants [including a liquidator or other person in possession of the goods] in respect of rights to the Collateral so secured.

A PMSI cannot be registered or claimed in the case of the prescribed exceptions [s.14(a)-(c)]:

- Sale and lease-back of goods to the Seller
- Collateral that comprises a monetary obligation, chattel paper or negotiable instrument; or
- A Security Interest that at the time of attachment to the Collateral, was intended to be used by the Grantor predominately for personal, domestic or household use [except where the Collateral is identifiable with a serial number under the PPS Regs].

In a ROT scenario, suppliers who supply goods [Collateral] to customers and the terms of the supply include a Security Agreement granting a Security Interest to the Seller in the goods that are not paid for, as well as a PMSI [in the proceeds of the sale of the goods], must be aware that once the goods are paid for there can be no further interest in the goods or any PMSI.

To “perfect” a PMSI the following is essential:

1. a written security Agreement granting the Security Interest and PMSI and which identifies the Collateral
2. the registration on the PPSR in EACH Collateral Class and sub class of the Security Interest OR actual possession of the Collateral
3. the registration on the PPSR must state the Security Interest is a PMSI
4. the registration must be made within the prescribed time frames in s.62 of the Act to achieve a “super priority”

On the PPSRegister [see below] Collateral must be described as either:

- “Consumer Property” which is property held by an individual and is not, to any degree, personal property used in the carrying out of an enterprise to which an ABN has been allocated. The Grantor’s details are not required for Consumer Property [to protect privacy] on the Financing Statement [see below the PPSR”]; or
- “Commercial Property” where the Grantor’s details are required on the Financing Statement.

Consumer property that is purchased or leased “for new value” and is less than \$5,000 [or such other amount prescribed by the PPS Regs.] and when it was acquired or leased is intended to be used for personal, domestic or household use, then those goods are EXEMPT from the Act unless they are serially numbered goods or the purchaser/lessee knew the goods were the subject of a Security Agreement.[s.47]

Certain Collateral [goods] must be described a serial number to identify that Collateral for registration purposes on the PPSR. Intellectual property that has a Registration Number

Section 17 is the Guide to section 2.2 of the Act which is entitled “Security Interests: General Principles”. It states that a Security Interest is only effective IF it is “attached” to *Collateral*. This section provides as follows

*A Security Interest is only enforceable against a third party if it is attached to the Collateral [i.e. the goods]*

*And*

*The Secured Party [i.e the quasi mortgagee] has Perfected its Security Interest by*

- possessing or controlling the Collateral OR*
- entering into a written Security Agreement describing the Collateral.*

The time of the attachment to the goods [Collateral] is provided in s.19 of the Act and includes:

- a. The time the Grantor pays for the goods [Collateral] or is otherwise allowed to assert title to grant a Security Interest under the security agreement; or
- b. A later time which is stipulated in the security agreement [s.19(3)]; or
- c. In the case of lease or consignment or bailment of the goods [a “PPS Lease”] or when goods pass title under a retention of title type arrangement- the Security Interest attaches to the goods when the Grantor takes possession of the goods.

s.19(4) interestingly states that a reference to what was previously referred to as a “floating charge” in an agreement does not mean that the attachment will occur later than under the general rules for Attachment. Further, the terminology of a “floating charge” has been replaced by the terminology :

- a security interest over all present and after acquired property [AIPAP], or

-a security interest over all present and after acquired property, except ....[whatever]

The Collateral associated with such a Security Interest is referred to as “Circulating [floating] and Non-Circulating [fixed] assets”.

The Circulating Asset is defined and prescribed in s.340. In a winding up of a company a properly created Security Interest over a Circulating Asset will still have a priority over the interests of unsecured creditors.

In summary a Circulating Asset is personal property including inventory or the proceeds of inventory or an account that arises from granting a right over something, for example the previously referred to “floating charge” is a Security Interest that attaches to personal property that is a Circulating Asset.

The previously referred to “fixed charge” is a Security Interest that attaches to personal property that is a Non-Circulating asset and those types of Security Interests will have to be properly described and registered to create a perfected interest.

Perfection of an AllPAP therefore requires:

1. a written Security Agreement granting the security Interest in all present and after acquired property [or subject to the stated exceptions]; and
2. registration as such OR control or actual possession of the said Collateral.

## THE SECURITY AGREEMENT

## PP21

In most cases you would be well advised to have a Security Agreement between the Grantor and the Secured Party before you apply to register a Security Interest on the Personal Property Securities Register. This is advisable where you want to enforce your Security Interest against a third party further down the track. Before 30 January 2012 these agreements would be described as Deeds of Charge, Retention of Title clauses on a Tax Invoice, and other types of security documents to document a Security Interest in personal property.

Section 20(2) talks about written Security Agreements as follows:

s.20(2)(b)(i) of the Act states that a Security Agreement is to contain a description of the particular Collateral, subject to subsections (4) and (5).

Section 161 of the Act authorizes the registration of a Financing Statement [of which we shall describe later] that describes personal property before or after a Security Agreement is made covering the property, or a Security Interest has attached to the property.

Section 10 [the definition section of the PPS Act] defines a Security Agreement as

- (a) an agreement *or act* by which a Security Interest is created, arises or is provided for; or
- (b) writing evidencing such an agreement or act [this is a requirement to “Perfect” a Security Interest]

The parties will be:

1. the Grantor [s.10] and under s.6(1)(b) the PPSA will apply if the Grantor is an Australian entity. and
2. the Secured Party.[s.10]

The agreement can either describe the Collateral, or state that the Security Interest is taken in “all of the Grantor’s present and after acquired property” or the same with exceptions regarding specific items or classes of items.

The Security Agreement must be consented to by all parties with an interest in the Security. In the case of *Dura (Australia) Constructions Pty. Ltd. [“Dura”] v Hue Boutique Living Pty. Ltd. [“Hue”] & Ors [2014] Vic SCA 326*, the company Dura was required to pay \$1mil. into an account as security for a judgement debt obtained against Dura by Hue, whilst Dura prepared to appeal the decision. After the deposit was made, Dura was granted a loan by its parent company who secured the loan with a Security Agreement for All Present and After Acquired Property, and this was registered on the PPSR.

Dura lost its appeal against Hue, and Dura had to pay to Hue the \$1mil. Dura went into liquidation. The parent company sought a priority interest in the \$1mil. in the security deposit because the parent company had perfected its security interest in Dura’s all present and after acquired property, and Hue had not perfected [registered] any security interest on the PPSR.

The Court of Appeal held that the language of the Act indicates that any Security Agreement must be “consensual” between the Grantor and the Secured Party. In this case the deposit of the \$1mil. into the Deposit Account by the solicitors for Hue and Dura did NOT amount to a consensual Security Agreement under 12 of the Act, therefore the priority provisions of s.267 did not apply to this case and Hue were entitled to take the \$1mil. over the parent company.

This is warning to Secured Parties and Grantors to ensure their Collateral is not the subject of deed poll [a unilateral deed] or other charge or lien created by some other Act, common law or equity.

So, we would advise, on a general basis that the Security Agreement:

1. Be in writing
2. Describe the parties
3. Contain a statement that the Grantor agrees to the registration of the Security Interest on the PPSR
4. Contain information consistent with the Financing Statement [the document you will lodge with the PPS Register]
5. Describe the Collateral accurately and where required include serial numbers. Consider whether the Collateral comprises goods, or should this extend to the proceeds of sale of the goods [for example where you have a retention of title over goods which are co-mingled or sold and not recoverable in their original form] As mentioned previously, there is provision in the Act for “after acquired property”. The Act is careful to point out that if you describe “consumer property” or “equipment” or “inventory” then that alone is not sufficient, and you have to add more particulars by referring to the item specifically

or its class. The classes are described in the Act and Regulations. You can use “Inventory” on the proviso it only refers to inventory that is actually “held” or “leased” by the Grantor as inventory when it is “attached” under the Attachment Rule.

6. You may consider including enforcement costs and registration costs in the Security Agreement
7. The Security Agreement is signed by the parties [s20(3)] who have the authority to do so.

The Security Agreement may be incorporated into existing documents such as leases, loan applications, credit applications, terms and conditions on quotations or invoices.

It is advisable to get the Security Agreement right and not to rely on old Terms and Conditions that have been a part of Tax Invoices and Purchase Orders and Quotes pre-30 January 2012.

In the case of *Crossmark Asia v Retail Ventures* [2013] NSWSC 55 the Court examined the terms of the pro forma tax invoices’ terms and conditions issued by Crossmark to Retail Ventures. In this case Retail Ventures were attempting to set aside the “Security Agreements” which Crossmark wanted to uphold to affirm their Security Interests in the Collateral. The Court determined that a “reasonable bystander” would accept that the Tax Invoices constituted an acceptable Security Agreement between the parties on which Crossmark could rely to deliver the goods.

## PERFECTION

Perfection of a Security Interest is governed by s.21 of the Act.

A *perfected* Security Interest has priority over an *unperfected* Security Interest [s.21 of the Act].

The perfected Security Interest which has been continuously perfected for the longest period of time has the highest priority.

Perfection is achieved by taking the next step after the Security Agreement has been entered into, and attachment has occurred, by either:

- (a) The Security Interest is perfected under the Act [by registering the Security Interest on the Personal Property Securities Register [the PPSR]]; or
- (b) The Security Interest is *attached* to the Collateral and the Secured Party has possession of the Collateral or other factors listed in s.21(2) apply.

In the case of a bailee in the possession of goods:

- (a) the Security Interest is perfected by registration, or possession by the bailee [Grantor] on behalf of the Secured Party, or
- (b) the bailee issues a document of title in the goods in the name of the Secured Party.

Where a negotiable document of title applies to goods in transit then you can have Temporary Perfection.

### (a) Registration on the Personal Property Security Register [the PPSR]

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Personal Property Securities Act

10 January 2017

Disclaimer: This paper and presentation are provided as a general overview only of the subject matter and are not intended to be relied upon as a substitute for professional or specialist advice.

The PPSR is conducted under AFSA [the Australian Financial Securities Authority]. The PPSR is not a register of documents as is the case with the Australian Securities & Investments Commission register. No documents are lodged on the PPSR. The actual Security Agreement creating the Security Interest does not need to be lodged nor does the amount of the liability need to be disclosed in the registration. Rather, a “Financing Statement” is registered on the PPSR.

The process of registration of a Security Interest on the PPSR is done electronically by logging into the website at: [ppsr.gov.au](http://ppsr.gov.au)

The Secured Party will need to register as an Account Holder and complete a Financing Statement.

The website has some good tutorials to assist in the registration process, and there is a Help Line.

## THE FINANCING STATEMENT **PP22**

The Financing Statement is the document to be lodged to register a Security Interest. [s.153(1) of the Act]. The Financing Statement is also found in Schedule 1 Part 1 of the Personal Property Securities Regulations [PPSRegs]

ITEMS 1 and 2 relate to the details of the Secured Party and the Grantor. The extent of the details required is prescribed in the PPS Regs-Schedule. If you are registering either of these Items by a Trustee there are special provisions to be noted in completing these Items [Reg.1.5 of Schedule 1 of the PPSRegs]. In completing Items 1 and 2 you are required to provide a “source” of the identity of the Secured Party or Grantor and the Financing Statement includes a reference to whether or not these persons or entities were on the previous registers [ASIC, REVS etc] which were transferred to the PPSR [a Transitional Register]. The date of birth of an individual or sole trader is required [Reg 1.24 of Schedule 1 of the PPSRegs]

ITEM 4 relates to the description of the personal property [Collateral and proceeds]. The matters to consider when describing the personal property and the relevant class according to the PPS Regs [[Attachment 2](#)] [refer to s.10 of the Act to obtain the considerations to be made in describing property]. You must identify whether the Collateral is “consumer” or “commercial” property. Any item of property that has a serial number [motor vehicles/plant/etc] must contain that serial number.

-You need to register a new Financing Statement for each “Class” of Collateral for each Secured Party. However you can include 2 or more “registrations” in a single “Application”

ITEM 5 Details the “end time” for the registration (i.e. the date when the registration will expire – no later than 7 years after the date of registration for a registration of a Security Interest in consumer property or property



described by a serial number and up to 25 years or an indefinite end time for a registration of a Security Interest in commercial property if so nominated. If you elect the longer period then higher registration fees apply.

ITEM 6 –talks about subordination of security interests which is explained at s.61 of the Act. Essentially this is an optional item on the Financing Statement and will only usually apply if the parties agree to terms of the subordination of the Secured Party's interests in the Security Agreement.

-ITEM 7 of the Financing Statement deals with registration of a Purchase Money Security Interest [a "PMSI"] in respect of the Collateral you are registering in Item 4. We advise to register as a PMSI and do a separate registration for a non PMSI for the same Collateral to ensure the registrations are effected as both.

Not all classes of Collateral are able to have a PMSI registered with the actual Security Interest in the Collateral. You need to refer to the prescribed classes of collateral in section 14(2) of the Act to check which classes of Collateral can be registered with a PMSI in Item 7. Section 14(2) (c) excludes a PMSI being registered for :

"Collateral that (at the time the interest attaches to the Collateral) the Grantor intends to use the Collateral predominately for personal, domestic or household purposes." The exception here is collateral that is required to be described by serial number by the PPSRegs for example motor vehicles.

The other classes of collateral which can't be registered as PMSI's include a monetary obligation, investment instrument or a negotiable instrument.

ITEM 8 –Any other matter prescribed by the Regulations. This Item refers to Reg 4.1 in Schedule 1 of the PPS Regs including whether the Collateral is:

- commercial property;
- is, or contains, "Inventory";
- is in the control of the Secured Party
- and whether other characteristics apply to the Collateral under the previous schemes of company charges.

In the case of the *Hastie Group [no.3][2012] FCA 719*, the Administrators of the company sought directions from the Court regarding numerous registrations on the PPSR against the Hastie company's name in respect of collateral in the possession of the administrator. The administrator had made considerable efforts to locate the Secured Parties but could not locate around 3,684 such Secured Parties and had trouble identifying certain items of collateral. The Court ordered that the administrator take possession of the "abandoned" collateral and deal with it. The case highlights the need to correctly and accurately identify collateral and the parties in the Financing Statements,

Registrations for consumer property or serial numbered goods generally last for a period of 7 years [by default] if you want to extend the period there is a higher Registration Fee. For commercial property the default registration period is 25 years unless you specify a shorter period on registration.



Defects in the Financing Statement can render the registration [and “Perfection”] void. There is a provision in the Act [s.164(1)(a)] that provides that registration that describes Collateral will be ineffective if it is a “seriously misleading defect in any data relating to the registration”.

The importance of registration of a Security Interest on the PPSR was highlighted in the very scary decision of the NSW Supreme Court in ***Forge Group Power Pty Limited (in Liquidation)(Receivers and Managers Appointed) vs General Electric International Inc. [2016] NSWSC 52 PP23***

In this case, General Electric (“GE”) leased turbines valued at \$50 million to Forge Group. Shortly afterwards Forge Group was placed into Voluntary Administration and it became apparent to the Administrators that GE had not registered its security interest in the turbines on the PPSR, with the result being that the turbines “vested” in the company and were able to be included as company assets for the purposes of the Administration. GE tried to argue that the turbines should not be included in the Administration for two reasons:

1. The turbines were “fixtures” on the land on which they were located for the purposes of the Personal Property Securities Act 2009 (Cth) (“PPSA”) and were not subject to the operation of the Act; and
2. GE was not regularly engaged in the business of leasing goods for the purposes of the PPSA which meant that a “PPS Lease” had not come into existence and the lease did not fall within the ambit of the PPSA.

In upholding the rights of the Administrator to retain the turbines the court held that:

1. Although the turbines were “affixed” to the land for the purposes of section 10 of the PPSA it could reasonably be construed that they were not intended to remain in place permanently (as “fixtures” on the land) and could be demobilised and moved without causing damage to the land which meant, therefore, that the turbines were not “fixtures”; and
2. At the time that GE entered into the Lease of the turbines it could be reasonably asserted that leasing goods was a proper component of GE’s business worldwide and locally, which would satisfy the requirement of section 13(2) of the PPSA.

*The moral to this story*

It is *imperative* that you:

1. properly register and secure your interest in any of your goods or items which leave your possession and
2. you enter into a written security agreement which contains terms that you will be paid for your goods or receive them back at a later date.

Registration is relatively simple and cost effective and will provide you with the peace of mind that in the event of a liquidation or administration you will be entitled to the return of your goods or their proper value if they have been “on-sold”.

## THE VERIFICATION STATEMENT

Care will need to be taken when registering the details of a Security Interest in the Financing Statement on the PPS Register, as any defective notification (due to an error as set out in s. 165 or the provision of misleading data related to the registration) may invalidate the registration. It is the Secured Party's responsibility to ensure that the information registered on the PPSR is accurate and complete.

Once the Financing Statement is completed and the relevant Fees paid [see Attachment 2 Schedule of Fees] a Verification Statement will issue.

The Verification Statement will be automatically sent to the registrant's address for service showing details of the registration and the registration time. There is an option for the Secured Party not to serve the Verification Statement on the Grantor if the Collateral is commercial property and the Security Agreement contains a term that the service of the Verification Statement will be waived. [s.155-157].

### **(b) Possession & Control**

Part 2.3 of the Act [ss.23-29] is entitled Possession and Control of personal property. A Grantor and a Secured Party cannot both have possession AND control of the Collateral. There are special rules relating to "common carriers" in s.24(3) where it states:

A Grantor [or debtor] of a Security Interest to whom goods are transported by a common carrier will acquire possession of those goods only when the EARLIER of the following events occurs:

- (a) The Grantor[debtor] actually acquires possession [no surprises there!] or
- (b) The Grantor [debtor] acquires possession of a document of title to the goods

"Control" is effective to perfect a Security Interest in the case of bank and investment accounts and the like.

### **(d) Temporary Perfection [Sections 35 of the PPS Act] and other references in the Act**

Temporary perfection of the Security Interest is available in a limited set of circumstances where the Security holder [e.g. a bailee] hands back the Security Interest to the Grantor [bailor] or owner of the goods for a reason. This perfection is limited to 5 business days [s.35] or a longer period if the goods are being relocated to Australia [s.39]. Some examples where temporary perfection may occur is in the case of storing, or processing or packing, shipping, loading goods and unloading goods. Once the time frame is up, then you will need to perfect the Security Interest by registration or other provision under the Act.

## **PRIORITIES [s.55] PP24**

Where a debtor defaults on a Security Agreement, and there are a number of competing Security Interests, here are default rules which apply to the priorities between Security Interests [s.55]. Generally

-a Perfected Security Interest will have priority over an Unperfected Security Interest; and

-between competing Perfected Security Interests the first in time to be perfected will have priority [subject to s.57 [where Security Interests perfected by “Control” in some circumstances [s.21(2)(c) and Part 2.3] have priority over other Perfected Security Interests regardless of timing; and

-between competing unperfected Security Interests the first in time to be created will have priority

In respect of PMSI's a perfected PMSI granted to a seller, lessor or consignee takes priority over a perfected PMSI granted to others

There are a number of factors that can affect the priorities in competing Security Interests, some of which make sense to the writer and others which are less clear [s.63].

In general the priorities that apply are as follows:

### PPSR – Priorities

<u>FIRST PRIORITY</u>	<u>SECOND PRIORITY</u>
Security Interest perfected by *Control	PMSI that has been properly perfected
A PMSI Perfected Security Interest [s.62(1)]	A Non PMSI properly perfected to another type of Secured Party
A Security Interest Perfected first in time [s.55(2)]	A Security Interest Perfected later in time *except where a financier has advanced funds for livestock or crops.
Perfected Security Interest	Unperfected Security Interest [s.55(3)]
Perfected Security Interest currently perfected	Perfected Security Interest currently perfected at a later registration time or the secured party takes possession later in time [s.55(5)]subject to Continuous Perfection [s.55(6)]

- An Unperfected Security Interest vests in the Grantor [usually the person in possession] on an insolvency
- \*Perfection by Control [s.21(2)(c)] can only apply to the following Collateral: an ADI account, negotiable instruments, satellites and space objects, investment instruments and entitlements.

The priority of Security Interests can be altered by agreement of the Secured Party in the Security Agreement [s.61]

## PMSI's and Priority PP25

PMSI's provide the Secured Party with a "super-priority" in the Collateral that is secured if the PMSI is Perfected within the time frames for PMSI's as follows [s.62]:

Type of Collateral	Time frame to register the PMSI on the PPSR	Requirements
<b>INVENTORY s.62</b>		
Inventory which are "goods" [or the proceeds of inventory]	Before the Grantor takes possession	Item 7 on the Financing Statement states that the Security Interest is a PMSI
Inventory which are not "Goods"	The time the PMSI Attaches to the Inventory [commencement of the Security Agreement]	Item 7 on the Financing Statement states that the Security Interest is a PMSI s.62(2)b)(i)
<b>NON INVENTORY [s.62]</b>		
For "Goods"	Before the end of 15 Business Days taken from the day the Grantor [or person at the request of the Grantor] takes possession of the "Goods"	Item 7 on the Financing Statement states that the Security Interest is a PMSI
For other types of property	Before the end of 15 Business Days taken from the time the PMSI Attaches to the property [commencement of the Security Agreement]	Item 7 on the Financing Statement states that the Security Interest is a PMSI s.62(3)(c)

### SOME COMMON ISSUES WHICH MAY LEAD TO A DISPUTE

- Registration defects
  - No registration at all.
  - Ticking the "transitional" box for non-transitional security interests (not as relevant since 30.1.14 - end of transitional period)
  - Ticking (or not ticking) the PMSI box and the impact of s 165
  - Timing restrictions and ineffective registrations – s 62, s 588FL
  - Getting the critical identifier incorrect (VIN, ACN, ABN)
  - Deemed security interests
  - Failure to recognise that the PPSA might apply – indefinite lease and bailment arrangements
  - Not specifying an end time
  - Incomplete drafting
  - The Financing Statement in s.153 Item 1 requires "Data" details 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

In 2016 Forum Law were asked to advise on a case where the “Secured Party” on the Financing Statement was a related entity to the party who was the Grantor named in a written Security Agreement. The relationship between the Grantor and the party on the PPSR was that they each had the same parent company. Forum Law asked for evidence of the “nomination” by the Grantor in the Security Agreement addressed to the party in the PPSR registration of the Security Interest. No such evidence was forthcoming. Unfortunately Forum Law were not able to identify a definition of the words “person nominated by” so as to identify the requirements for the act of “nomination”, other than a passing comment by a judge to the effect that there was no such assistance known to him of any definition. The parties have reached a stalemate and we expect we may need to seek judicial advice or reach a compromise with the other party to allow our client, a liquidator to proceed with the sale of commercial vehicles.

## INSOLVENCY ISSUES

Section 267 of the Act deals with the vesting of Unperfected Security Interests in goods, in the Grantor [the party in possession], upon a winding up/administration or bankruptcy, except in certain circumstances as follows:

-the goods were acquired for new value from the Secured Party or a Receiver by a purchaser without notice of the impending insolvency [s.267(3)]

-the Security Interests in the Goods are unaffected by s.267. An example of such a case is where the goods are the subject of a PPS Lease, or the conditions of a Security Interest in an account which involves a subordinated debt applies [s.268(2)]

The moral of this story is to ensure that Security Interests are registered on the PPSR to ensure Perfection and to enforce the security against third parties in an insolvency situation.

This is advisable in the case of goods supplied under the previous ROT process. Now it is critical for suppliers to not only have a written Security Agreement in their T & C's but the Supplier must register the Security Interests on the PPSR at the earliest possible time as referred to above in the section **PMSI's**, to ensure the maximum protection in the event of the insolvency of the Grantor [the person who has possession of the Collateral/goods and the proceeds of sale of those goods]

In addition to the timing of the Perfection of a PMSI, there are further rules to secure a priority over an external administrator in a winding up of a company under s.588FL of the Corporations Act 2001(Cth). These rules are similar in their concept to the old registration of charges on the ASIC Register.

Under s.588L other Security Interests [other than PMSI's] that are not registered on the PPSR within a certain time vest in the company being wound up or in administration. So if you wish to assert a priority over a liquidator/administrator you need to ensure that your Security Interest has been registered on the PPSR:

- at least 6 months before the “critical time” [the date of commencement of the external administration];

Or at a later time if that later time:

- is within 20 business days after the relevant Security Agreement came into force and that later time is BEFORE the commencement of the winding up.

The time can be extended at the discretion of the Court if the failure to register the Security Interest on the PPSR was “accidental or due to inadvertence” but such a move is not to be relied upon [Barclays Bank PLC[2012]NSWSC1095.

In the case of *Relux Commercial Pty. Ltd.[in liq] & Anor v. Doka Formwork Pty. Ltd.[2014]VSC570*, the court was required to determine whether Collateral [rented formwork] which was the subject of a Security Agreement in favour of Doka, had been registered on the PPSR within the required time to ensure that Doka had priority over the Administrators of Relux.

The external administration of Relux commenced on 7 April 2014 with the appointment of Administrators, who were subsequently appointed as liquidators.

Doka delivered Collateral to Relux prior to 21 January 2014, 26 February 2014 and 14 March 2014 pursuant a Security Agreement incorporated into the Tax Invoice Terms and Conditions.

Doka registered a Security Interest on the PPSR in the Collateral on 20 February 2014 and it covered a number of Security Interests granted by Relux to Doka.

The Court found that:

- in respect of the Collateral delivered before 21 January 2014, this Collateral vested in the Liquidators of Relux, because there was no registration on the PPSR of these Security Interests within 20 business days [1month] of the Security Agreements [Tax Invoices] coming into force.

- in respect of the Collateral delivered on 26 February and 14 March 2014, this Collateral vested in Doka because the PPSR registration on 20 February, occurred within 20 business days of the said Security Agreements [the Tax Invoices in this case] and before the appointment date of 7 April. [s.588FL(4)(a)].

A more recent case is that of *Hussain v CSR Building Products Limited [in the matter of FPJ Group Pty Ltd (in Liq)] [2016] FCA 392* In that case the liquidators of the FPJ Group [a building supply company] sought to recover preference payments from CSR under 588FA(1)(b) of the Corporations Act. Preference payments claimed by a liquidator only related to unsecured debts. CSR claimed the debts were the subject of a “Security Agreement” under the former Retention of Title clause in the agreement between CSR and FPJ. The payments totalling \$153,000 were made in the period between January 2014 and June 2014 and therefore the transition period had ended and FPJ would have been required to also register their security interest on the PPSR to Perfect their Security Interest and claim their priority to the Payments over the Liquidator. This aspect of the proceedings was not conclusive in the judgement as the matter was decided on other grounds. In this case the court referred to s.51A of the Corporations Act which refers to the PPS Law and in particular s.12(2)(d) which states that a “Security Interest” includes an

*“interest in relation to personal property provided by any of the following transactions, if the transaction, in substance secures a payment or performance of an obligation.....*

*(d) a conditional sale agreement (including an agreement to sell subject to a retention of title)...*

and as a “Security Interest” the Court decided the payments were the subject of a secured debt, and not an unsecured debt, as it required to be established by a liquidator before the liquidator can make a claim for unfair payments to a creditor. In our view this decision is to be relied upon with caution, as comments by other judges in other cases put this decision in question.

Liquidators will need to be mindful of whether they are required or are able to disclaim Contracts under s.568 of the Corporations Act with references to ss. 513AA and ss 51 CA, 51A CA, 51E CA and 51F CA of that Act. The High Court of Australia in the case of *Wilmott Growers Group v Willmott Forests* [in liquidation] canvassed the relevance of the disclaimer of Contracts in the context of PPS leases over the trees held by the Growers in this case. Our understanding of this aspect of the case is that, as the trees were the subject of a PPS Lease secured in favour of the Growers as the Secured Party, and perfected by possession or control of the trees, then the Liquidator did not “own” the trees and did not need to disclaim any contract. [s.51F CA].

## SEARCHING THE PPSR

### Quirks with the PPSR

The PPSR continues to puzzle and frustrate users and in August 2016 substantial changes were made to the Register to make it more user friendly. These changes were identified in the Whittaker Report which made the recommendations to AFSA.

Any person with a genuine purpose for searching personal property securities may search the PPSR: s.172. Persons who carry out a search on the PPSR in relation to an *individual* must make a declaration that they are undertaking a search for an authorised purpose.

Searching the Register is a prudent practice in performing any due diligence in the buying or selling of assets.

Users of the PPSR will be able to search the PPS Register by entering their search criteria on the website. The search criteria are contained in section 171 of the Act. This comprises:

- a Grantor’s details in relation to Commercial Property, not Consumer Property [for Privacy reasons]
- a serial number or registration [for Intellectual property that is registered] or chassis number by which Collateral may be described in the PPS Register
- the time of the search of the PPS Register
- an earlier nominated time, subject to the consent of the Registrar
- any other criteria prescribed by the Regulations





## Personal Property Securities Register

If you want to search the PPSR to check out the status of goods [tangible or intangible] or of the assets of a company or an individual then refer to the PPSR website pages at

<http://www.ppsr.gov.au/AsktheRegistrar/Whocansearch>

<http://www.ppsr.gov.au/ForBusiness/ForBusinessSearching>

You can use the tutorial to assist you with your search. You will need to create an account to pay for the search.

In practice the preferred search criteria are as follows:

- a company should be searched by name, A.C.N. and A.B.N.
- a partnership should be searched by names and A.B.N.
- an individual should be searched by full name and date of birth
- other entities [foreign companies and trusts] by A.B.N., ARBN and their name
- Managed Investment Schemes by ARSN [Australian Registered Scheme Number]
- search any serially numbered goods by their number [VIN or other number] and IP by the registration number if relevant.
- Search by Registration number if available
- Search by the registration number of a company charge previously registered on ASIC database.
- Financiers who register AIPAPS on the PPSR will often also register serially numbered goods separately to assert a PMSI.

### ASSIGNMENT OF SECURITY INTERESTS AND RELEASING A SECURITY INTEREST

When an asset sale occurs and those assets include Security Interests then the Purchaser should ensure that the Vendor registers a Financing Change Statement on the PPSR to reflect the transfer of the Security Interest from the Vendor to the Purchaser. A Verification Statement of the new details will issue from the PPSR to both the Vendor and the Purchaser and the parties must notify the Grantor of the changes [s.156] [except in the case where Collateral is Commercial Property and the Grantor has waived its right to receive any Verification Statement].

To release the registered Security Interest you will need to obtain a written release from the Secured Party, or a written approval or correction under s.275 of the Act. The release must be registered using a Financing Change Statement by the Secured Party. If the Secured Party does not register the Financing Change Statement then the Grantor can serve an "Amendment Demand" under s.178 of the Act on the Secured Party. If the Secured Party fails to comply within 5 days of the demand the Grantor, the Grantor can ask the Registrar to lodge the necessary Financing Change Statement, upon the Registrar being satisfied that the Grantor is entitled to make such a request.



The Australian Banking Association and Australian Finance Conference have published a model Form of Release and Undertaking to facilitate discharges of security interests [see [www.bankers.asn.au](http://www.bankers.asn.au)]. This undertaking is intended to ensure that the secured party will lodge a Financing Change Statement within the 10 business days after the discharge request by the Grantor.

## **ENFORCEMENT**

Chapter 4 of the Act sets out the provisions for enforcement of Security Interests and provides Secured parties with remedies additional to those included in Security Agreement, at common, and in equity.

This chapter distinguishes between Collateral used predominantly for personal, domestic and household purposes and other Collateral for enforcement purposes and there are prohibitions on contracting out of enforcement provisions for these types of Collateral except in the case of repossession and other types of enforcement. [s.115].

Generally reasonableness and honesty are to prevail in the enforcement of Security Interests [s.111] and the chapter does not apply to Receivers.

Some common remedies available to enforce Security Interests which may be included in Security Agreements include taking possession, subject to competing security interests [s.124].

## **SOME PARTICULAR APPLICATIONS OF THE ACT**

### **A. Tenant's and Landlord's fit outs in leased premises**

Where a Landlord may lose possession or control of their fit out or fittings [The Act does not apply to "Fixtures" attached to real property] due to the occupation of premises by a Tenant, the Landlord may consider seeking a Security Interest in that property

Where a Tenant may lose possession of their fit-out if they are locked out or become insolvent and thereby default under the Lease. The Tenant wish to seek to secure their interest in the goods by including a clause in their lease [the Security Agreement] and perfecting that interest on the PPSR.

### **B. Construction Contracts**

Where a sub contractor provides machinery or plant or temporary works [scaffolding] on a building site for a period of time, they may wish to enter into a security agreement and register their interest in their goods to achieve a priority interest over the occupier of the Site or a liquidator, in the case of a liquidation of the occupier/head contractor.

If your client is the principal on site then your client may insert a clause into their contract with the sub contractor to take over the sub contractor's plant and equipment with a security interest in the event that the sub contractor defaults in their obligations on the job.

The lease of equipment and portable cabins on a construction site will give rise to a PPS Lease, if the lease term could exceed one year. The lessor of the equipment will be entitled to notify their interest on the PPS Register.

A principal's take-out rights in construction contracts may give rise to a security interest in personal property that ought to be registered by the principal against the contractor.

ROT provisions may apply to Goods and Services not yet paid for.

In relation to security deposits under a building contract, ensure the security deposit is in an ADI [Authorised Deposit Institution] and there is a Priority deed in place between the builder and the Bank to ensure the Builder has control over the Deposit [if the Owner also has a facility with the Bank which may give the Owner control over the deposit]

An important exception in building cases is where a principal of head contractor cannot assert a priority Security Interest over the Collateral of a sub contractor who may have defaulted on a sub contract. Under s.21(2)(b) Possession of Collateral will not perfect title to Goods which have been "re-possessed" due to such a default.[the NZ case of *McCloy v. Manukau Institute of Technology* [2013]NZHC 936.

### **C. Agricultural Security Interests**

Part 3.2 of the Act deals specifically with the granting of a security interest in favour of a Secured Party [for example a financier] over the crops and livestock and the proceeds of sale of this Collateral from the Grantor.

Security Interests in crops and livestock and proceeds Agriculture is defined in Regulation 1.6 of the PPS Regulations and in s.10 of the Act and includes:

Crops means crops that are not harvested, Livestock includes live animals and products of livestock

Chapter 3, Part 3.2 at s.83 of the PPSA talks about the relationship between the Security Interest in crops and the land on which they are growing, and the capacity for the Security Interest to attach to the crops while growing, and to products of livestock before they become proceeds, and the priority to be given over other priority Security Interests.

### **D. When dealing with a company**

When entering into an agreement to secure obligations from a company, in lieu of the old "Company Charge" you would seek to enter into a Security Agreement for all present and after acquired property and the proceeds of the same, and perfect the security interest by registration of the PPSR.

### **E. Intellectual property**

Intellectual property is specifically dealt with in Part 3.5 of the Act [ss.104 -106]. A security interest can be granted in the Intellectual property and in IP Licences. Many items of IP will be registered under the Registration number, such as Patents, Registered Designs and Registered Trademarks. IP often forms part of all present and after acquired property for the purposes of a "company charge" type Security

Interest. The granting of a Security Interest in IP Licences can be confusing, as the Act excludes “licences” from being the Collateral for a Security Interest. A Grantor, however, can grant a Security Interest in an Intellectual Property Licence where that licence forms part of All Present and After Acquired Property as security for a loan or advance by a Financier [as the Secured Party]. We do not believe that you can grant a Security Interest in the “Licence” [or the right to use] of Intellectual Property. You can grant a Security Interest in the Intellectual Property, itself, and you can grant a Security Interest over the “assignment” of Intellectual Property, which may be able to be construed as a “licence to use” the Intellectual Property. On this basis it may be prudent to try and characterise the Security Interest in Intellectual Property carefully in a Security Agreement so it is captured under the Act and the Security Holder is protected.[s.12(5) and (6)]

## **F. Accessions**

Accessions are described in s.10 as “goods installed in or affixed to other goods, unless both the accession and the other goods are required or permitted by the regulations to be described by serial number” Sections 89-96 of the Act deal with priority of Security Interests in these “attachments” to goods. Except where the main part of the Collateral has a serial number AND the accession [or attachment] has a serial number [for example a car and a chassis] THEN you have to perfect your Security Interest in any accession. For example if you have bull dozer and then you buy tyres and sell them together, then any person who has a Security Interest in the tyres will lose any entitlement to the tyres, UNLESS they have registered or perfected their Security Interest in the tyres.

## **G. Commingled Goods**

Part 3.4 of the Act deals with processed or commingled goods, where “goods become an unidentifiable part of a larger product or mass”. A Security Interest in the original goods continues in the product or mass.

Perfection of such a Security Interest is to be treated as perfection of the Security Interest in the product or mass. The priority of the Security Interest in such a case is limited to the value of the goods on the day on which they became part of the product or mass.

## **CONCLUSIONS**

## **PP 25**

For company directors and officers the takeaway from this talk is to ensure your company has processes in place to ensure that all security interests are perfected by a written security agreement and registration. The timing of registrations and agreements can be critical if the company wishes to assert a PMSI and priority over goods as well as the proceeds of sales of the goods. [s.55(3), 267]. This assurance is particularly relevant if a debtor appoints an external administrator.

For accountants and lawyers who are already probably well versed in this regime you will continue to advise your clients of their exposure to losing their rights to goods if they are not properly covered when they lose possession of goods. Lawyers, of course will continue to advise clients and draft clauses and

review clauses in agreements to cover the risk and exposure of their clients. The essential 2 step process as a general rule, is the security agreement in writing, and registration on the PPSR with alarm bells for the timing of these steps if you or your client wish to assert a super priority with a PMSI.

## Fees for using the PPSR [uplifted from the PPSR website]

The [Personal Property Securities \(Fees\) Determination 2015](#) was made under subsection 190 (1) of the *Personal Property Securities Act 2009* by the Attorney-General and registered on the Federal Register of Legislative Instruments on 13 May 2015.

### ***Current fees from 1 July 2015***

Services may be available online or via the [National Service Centre](#). Select services may only be available online or through the [National Service Centre](#). Some services have no fee. See details below.

Current fees from 1 July 2015		
Activity	Online Service fee	Contact Centre Service fee
Search		
Search by serial number (motor vehicle, watercraft , aircraft, intellectual property)	\$3.40	\$3.40
Search by grantor (Individual person or an Organisation)	\$3.40	\$3.40

Search by PPSR registration number	\$3.40	\$3.40
Ordinal search of the register	\$3.40	\$10.60
Point-in-time search of the register	n/a	\$10.60
<b>Certificates and results and verification statements</b>		
Issue a search certificate <a href="#">note 1</a>	no fee	no fee
Reissue a search certificate	\$3.40	\$10.60
Develop a special-purpose report for account holders (\$ per hour)	n/a	\$300.00
Reissue a copy of a verification statement	\$3.40	\$10.60
<b>Register a financing statement</b>		
Register a financing statement where the duration is seven years or less	\$6.80	n/a

Register a financing statement where the duration is more than seven years but less than or equal to 25 years	\$34.00	n/a
Register a financing statement that has no stated end time	\$119.00	n/a
Register a financing statement with respect to a transitional security interest	<a href="#">See Note 2</a>	n/a
<b>Attachments</b>		
Attach a document to a financing statement	\$3.40	n/a
<b>Amend a financing statement</b>		
Minor amendment to a financing statement or a change of free text description of collateral (where change of details does not extend the end date or result in an additional grantor)	\$3.40	n/a
Amend a financing statement where the duration is seven years or less to extend the end date or add a grantor	\$6.80	n/a
Amend a financing statement where the duration is more than seven years but less than or equal to 25 years to extend the end date or add a grantor	\$34.00	n/a

Amend a financing statement that has no stated end time (e.g. additional grantor)	\$119.00	n/a
Change the end time of a registered financing statement to an earlier time	no fee	n/a
Remove grantor (where the registration has more than one grantor) from financing statement	no fee	n/a
<b>Discharge a financing statement</b>		
Discharge a financing statement	no fee	n/a
<b>Manage secured party groups</b>		
Establish a secured party group or amend details	no fee	n/a
Transfer single, multiple or all registrations to another secured party group	no fee	n/a
Change address for service for a secured party group	no fee	n/a
<b>Maintenance fees</b>		

Maintain the effectiveness of a registration	n/a	\$4.00
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*The above fees are not subject to GST.*

**Note 1:** *The fee for a search allows drill down on each returned registration. The fee also includes the issue of search certificates.*

**Note 2:** *The PPS Act provided a 24 month transitional period to register pre-existing security interests at no cost. The transitional period ended at the end of January 2014. Normal registration fees apply for transitional registrations as from 1 July 2015.*

The PPSR operates on a cost recovery basis in accordance with Australian Government policy and incorporates the provision of services online, by phone and by hardcopy (mail and fax). Fees for the services provided are determined by the Attorney-General and are based on a [Cost Recovery Implementation Statement \(CRIS\)](#), which is prepared in consultation with stakeholders.

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**Forum Law** is a legal practice in Leichhardt in Sydney's inner west. We practise in all areas of business, commercial and property law including insolvency, and building and construction law. We advise and assist in preparing and reviewing commercial transactions, dispute resolution and litigation. We focus on individual attention to clients and we offer options for legal counsel retainers for small to medium businesses. We invite you to visit our website at [www.forumlaw.com.au](http://www.forumlaw.com.au)

Forum Law also offers services in mediation. We have 2 mediators on staff who are well qualified to provide a commercial and cost effective dispute resolution process to assist clients of professional services and individuals and businesses directly. Please contact Annette or Karen to discuss your requirements.