

Personal Property Securities Act

The **Personal Properties Securities Act 2009 (Cth) (PPSA)** regulates transactions involving consensual security interests over personal property (s3)

Parties:

- Secured party: Enjoys the security interest (s10)
- Grantor: Gives the security interest (s10)

Act does not apply to:

- Real property (s8(1)(b))
- Interests in fixtures (**Forge**)
F (lessee) leased turbines from GE – GE did not register PPS interest – turbines were personal property and b/c money owing for repaying turbine, was a security interest – F went into liquidation – GE had security
 - Fixture per CL notion: Tangible personal property **affixed** to real property so that it becomes part of real property.
- Liens, charges, or other interests that are created/arise by operation of law (s8(1)(c))
 - Payments into court arising out of compliance with court order – *created by operation of law (Dura v Hue Boutique)*
Ct ordered to put \$1mil in trust in name of H and solicitor – d took loan secured by account – H had equitable charge and not security interest – req to put \$1 mil was not consensual b/c compelled
- Various statutory rights

Is there 'personal property'?

- Personal property is **collateral** if it is, or is anticipated to be, the subject of a security interest. (s10;s161)
- Personal property includes licenses (s9), and tangible and intangible property *inc motor vehicle, household goods, business inventory, IP, company shares* or if is anticipated to be subject to security interest. (s3)

Is there a security interest?

State: A security interest is an interest which in substance, secures payment or performance of an obligation (s12(1)). Transaction must be consensual (*Dura v Hue Boutique*)

- However, note: a functional approach is adopted that focuses on the **substance** of transaction rather the particular form (*J Stumbles*)
- The substance of a security interest may be hard to tell at times (*Barclays Bank v Quistclose*)
- **Examples of security interests:** chattel mortgage, conditional sale agreement, hire-purchase agreement, lease of goods, pledge, trust receipt, consignment, fixed charge, floating charge, assignment, transfer of title that secures payment or performance of obligation (**Inc Romalpa clause**) (s12(2))
 - *Re Gelpack Enterprises*: Sale of resins – initial K had ROT clause and right to unilaterally change T&Cs – 2012 P (seller) registered sec interest and sent new terms – OM of G (buyer) signed new terms – held P varied terms OR OM had authority OR placed new orders (Ratification)
 - *Re Arcabi (in liq)*: Business of storage and sale of rare coins on behalf of investors – receivers argued PPSA didn't apply – not all consignments subject to PPSA
- **NOT** a security interest: License or interest prescribed by regulations (s12(5))

Deemed security interests:

Security interest extends to three classes of transactions (s12(3)), even if transaction does not secure payment or performance of obligation:

Transfers of accounts and chattel paper	Transfers of accounts <ul style="list-style-type: none"> • Receivables for goods or services supplied Chattel paper <ul style="list-style-type: none"> • Documentation re: certain monetary obligations and security interests in goods or intellectual property • Consignor's interest in a commercial consignment • Lessor or bailor's interest in goods under a 'PPS lease' • Re Arcabi
Commercial Consignment of Goods	Commercial consignment – Consignor and consignee both deal in goods of that kind in the ordinary course of business (<i>Re Arcabi</i>) Does not include where consignee is generally known to creditors of the consignee to be selling or leasing goods for others
PPS Lease	PPS Lease (s13): A lease or bailment of goods for 2+ years or indefinite term. (eg. <i>Carrafa</i>) Leased formwork for pouring of concrete slabs – D registered security interest before receiving all equipment – interest only held over equipment possessed at time of registration – legislative objective: stop sec interests being granted fraudulently without knowledge of imminent administration <ul style="list-style-type: none"> • Excludes: Arrangement where lessor/bailor is not regularly engaged in the business of leasing or bailing goods + bailee is paying bailor

Is the security interest enforceable against the grantor?

A security interest is enforceable against grantor in respect of **collateral** if the security interest has attached to the collateral (**s19(1)**)

Types of collateral: goods/financial property/intermediate securities (shares)/intangible property (bank account)

Attachment

For attachment to have occurred, the following two requirements must be satisfied:

- The grantor has rights in the collateral or has power to transfer rights in collateral to secured party (**s19(2)(a)**); **and**
- **EITHER (s19(2)(b)):**
 - Value given for security interest or
 - Grantor does an act by which security interest arises

Attachment – PPS Lease

Lessee will have rights in goods under PPS lease when lessee obtains possession of the goods (attachment takes place on delivery)

- **S20(2)** Security interest under lease generally enforceable against 3P if security interest has attached to the goods; and
- **(a)** Security agreement evidenced by writing; and
 - Signed by lessee or adopted or accepted by lessee by act done with the intention of adopting/accepting writing
 - Includes conduct that reasonably appears to have been done with that requisite intention (**Gelpack**) Continued buy resin under new T&Cs
- **(b)** Contains description of goods

Is the security interest enforceable against 3Ps?

A security interest will only be enforceable against a 3P if the following requirements under **s20** are made out:

(1)(a) the security interest is attached to collateral

See above

(1)(b) secured party registers/possesses/controls collateral

A secured party can perfect their security interest and gain priority over other security interests through registering, possessing or controlling the collateral.

The secured party must **either**:

Possess the collateral	If PPS lease, lessee has rights when lessee obtains possession of goods. (i.e attachment on delivery)
Perfect the security interest by control	<p>S21(1) Security interest will be perfected when attachment has occurred, interest is enforceable against grantor and one of (s21(2)):</p> <ul style="list-style-type: none"> • (b) Secured party has possession of collateral (other than by seizure/repossession); OR • (c) If bank account/investment instrument, if secured party has control of it; OR • (a) Security interest registered with Personal Properties Securities Register: NOTE: Registration will become effective once description in the Financing Statement becomes available to search on the online register. (<i>Duration of 25 years or indefinite</i>) <p>Registration of the financing statement includes:</p> <ul style="list-style-type: none"> • The secured party's details (Onesteel) Registration of ABN rather than ACN seriously misleading – search of register of ACN won't reveal original registrations • The grantor's details • Description of the collateral • Indication of whether security interest is PMSI <p>Example (Re Maiden): QES (lessor) leased 3 construction vehicles to M (lessee). M took out loan with F (lender). M gives F security interest over M's property including vehicles. F registers security on PPSR. QES did not register. M went into liquidation. F had priority to exercise its security first as it registered its interest.</p>
Security agreement covers collateral (common for PPS lease)	<p>A security agreement will cover collateral if, per s20(2):</p> <ul style="list-style-type: none"> • (a) It is written and signed by grantor or adopted by act/omission of grantor that reasonably appears to be done with intention of accepting the written agreement (Gelpack); and • (b) describes the particular collateral

Does the security interest have priority?

General priority rules:

- **General rule: Perfected security interest has priority over unperfected security interest (s55(3))**
- **Priority between unperfected security interests** – Determined by order of attachment. The first unperfected security interest to be attached takes priority over later ones (s 54;55(2))
- **Priority between perfected security interests:** Priority depends on time perfection occurred, first in time gets priority (s54; s55(4);(5))
 - If party gets control, as “super-priority” over security interests in same collateral perfected by registration or possession (s57(1))
 - Arguable that a registered security interest, even absent writing requirement, will enjoy priority (*Duggan and Brown*)
 - Exception: Later perfected security interest is purchase money security interest (PMSI) (ss62-64)
 - Eg: Retention of title arrangement, hire purchase and lease finance arrangements, bailment agreements, transfers of accounts receivables, factoring arrangements.
- **Priority by possession:** First in time to fulfil has priority (s55(5))

Super priorities (PMSI) – Div 3, Part 2.6

The **Purchase Money Security Interests (PMSI)** provisions expand the scope of security interest and when correctly registered and used by secured party, vests in party a ‘super priority’ over a perfected non-PMSI interest.

- PMSI is only available for (s14)
 - Retention of title arrangements
 - Hire purchase and lease finance arrangements
 - Bailments agreements
 - Transfers of account receivables
 - Consignor of goods under **commercial consignment**

A perfected PMSI will have priority over a perfected non-PMSI interest if (s62):

Step 1: Is the collateral inventory?		
STEP 2: Registration within time constraints	Collateral is tangible goods	Collateral is not tangible goods
Collateral is inventory	SI must be registered when grantor obtains possession of collateral	SI must be registered before PMSI attaches, or is created, over inventory
Collateral is not inventory	SI must be registered within 15 business days of grantor obtaining possession	SI must be registered within 15 business days of the time of attachment or creation or PMSI
STEP 3: The interest was indicated as PMSI at registration on financing statement.		
STEP 4: If all elements are made out, PMSI will have priority over a PPSI – if the interest was not registered within the time constraints then it will not have the ‘super-priority’		

- Even if security interest perfected, 3P may be able to acquire collateral free of security interest (s44-47; *Warehouse Sales*)
- Inventory means personal property that in the course of furtherance, to any degree, of an enterprise to which an ABN allocated (s10)
 - (a) is held by person for sale or lease
 - (b) held by person to be provided under K for services
 - (c) is held by person as raw materials or work in progress
 - (d) is held, used or consumed by person, as materials

Extinguishment rules (Part 2.5)

- Extinguishment rules benefit third party transferees of goods
- Distinguish between goods that may or may not be described by serial number and goods which are not.

Register

Chapter 5 – Creates the Personal Property Securities Register (PPSR). Wholly electronic and continuously accessible and will operate on the basis of notice rather than document registration.

- ‘Red flag’ register – Draws attention to security interest without giving too many details
- Simple form of registration – Decide how to describe collateral and which category to file interest

Bankruptcy

The **Bankruptcy Act 1986 (Cth)** governs the law of bankruptcy in Australia.

Insolvency

- A person is **solvent** if they can pay their debts as and when they become due and payable (**s5(2)**)
- A person who is not solvent is insolvent (**s5(3)**)
- Two possible tests to determine if person is solvent
 - **Cash flow test**
 - Generally applied (**Sandell v Porter**)
 - Consider cash in hand and moneys debtor can procure by realisation (sale/mortgage/pledge of assets) within a relatively short time, relative to the nature and amount of debts and to the circumstances, including nature of business, and debtor (**Sandell v Porter**)
 - **Balance sheet test**

Bankruptcy on creditor's petition – Involuntary

Process

One or more creditors may petition to the court to make a sequestration order against the estate of the debtor, whereupon the debtor becomes bankrupt (**s43(2)**).

Process of creditor's petition	
Act of bankruptcy	An act of bankruptcy must be committed by D within 6 months before presentation of petition
Creditor's petition	s44 Creditor's petition shall not be presented against a debtor unless (a) amount owing is \$5,000, or where 2> creditors, the amount owing to them aggregates to \$5,000 (b) the debt is a liquidated sum or payable immediately or at certain time in future (c) act of bankruptcy within 6 months before presentation of petition
Sequestration order	S43 Debtor has committed act of bankruptcy and at time <u>when act of bankruptcy committed</u> , the debtor: <ul style="list-style-type: none">• was personally present or ordinarily resident in Aus;• had a dwelling house or business in Australia• was carrying on business in Australia• was member of partnership/firm carrying on business in Australia.

Act of bankruptcy

The debtor must have committed an **act of bankruptcy** within **six months** (**s44(1)(c)**) before the presentation of the petition.

Acts of bankruptcy include:

- D transfers property for the benefit of creditors (**s40(1)(a)**)
- If in Australia or elsewhere, D: (**s40(1)(b)**)
 - Makes a conveyance, transfer, settlement, disposition of property
 - Creates a charge on property
 - Makes a payment that would, if bankrupt, be void against trustee
- D engages in conduct with intent to defeat or delay creditors (**s40(1)(c)**)
 - (i) depart or remain out of Aus
 - (ii) depart from dwelling house or usual place of business
 - (iii) otherwise absent themselves
 - (iv) begin to keep house (shut themselves away)
 - Delay without intent not sufficient (**Barton v Deputy CoT**)
Co director left overseas without notice or fwd address - > 12 mo later no return – order for seq of B's estate – act of bankruptcy was leaving w/ intent to defeat/delay crs
- D presents debtor's petition (**s40(1)(daa)**)
- D presents declaration under s54A (**s40(1)(da)**)

The most common act is the failure to comply with a **bankruptcy notice (BN)** (**s41;s40(g)**).

Applying for bankruptcy notice
<p>Creditor may apply to OR to issue a BN against debtor if it has obtained (s41(1)):</p> <ul style="list-style-type: none"> • A final judgment/final order for an amount of at least \$5,000 (a) <ul style="list-style-type: none"> ◦ Petition based on insufficient debt will be dismissed, not adjourned (<i>Re Laycock</i>) • Amount is a liquidated sum (s44(1)(b)) that is ascertained or capable of being ascertained by a mere calculation (<i>Re Ahearn</i>) Statement “damages at large” non-specific and not for liquidated amount; OR • Sum is payable immediately or at some certain future time (s44(1)(b)(i))
Act of bankruptcy if:
<p>Notice served on D (s40(1)(g))</p> <ul style="list-style-type: none"> • Notice in prescribed form (s41(2)) • Judgment or order must not have been stayed (s41(3)(b)) and must have been obtained in the past 6 yrs (s41(3)(c)(i)) • Ct may grant extension of time under where D is applying to set aside notice or judgment (s33(1)(c);s41(6A)) and if application bona fide (s41(6C)(b)) <p>Form of bankruptcy notice</p> <ul style="list-style-type: none"> • Notice must relate to the judgment debt: Debtor must give notice to creditor that sum in notice exceeds amount due (s41(5)), may render notice invalid for overstating amount due (<i>Re Williams</i>) or may allow creditor to amend notice to reduce amount shown on notice (<i>Emerson</i>) • Extension of time: Ct may extend time to give notice to creditor if debtor made mistake and overstatement by creditor is deliberate (<i>Re Wilhemsen</i>). Ct exercised its discretion in favour of app where requisite notice given 3 days late because of an oversight by applicant's solicitor <ul style="list-style-type: none"> ◦ Notice may be invalid for incorrect calculation of dates (<i>Re Clubb – did not account for leap year</i>) ◦ Notice may be invalid if debtor gives notice disputing validity of notice on grounds of misstatement (<i>Walsh v DCT</i>). ◦ Notice valid if sum owing in notice is incorrect because it has since been reduced by payments made after its issues, but before its services (<i>Walsh v DCT</i>) • Abuse of process: Notice cannot be an abuse of process to pressure Debtor to pay (<i>Brunninghausen</i>) Debtor owed guarantor under judgment – offered to put security by way of mortgage – cr's solicitors did not respond, lodged bankruptcy proceedings against debtor – cr held engaged in abuse of process to pressure debtor to pay up quickly • Strict compliance with act: If there is defect in notice, error determined by whether defect is of a kind that would reasonably mislead debtor (<i>Re Wong</i>) date of final judgment incorrect – defect of a kind that would reasonably mislead debtor <p>D has 21 days from service to apply to court and have notice satisfied. The Court may grant extension of time under s33(1)(c) or s41(6A) where D applying to set aside notice or judgment (if application bona fide (s41(6C)(b))</p> <p>CONC: Debtor, by failing to comply with notice within [time specified], committed an act of bankruptcy within 6 months of [date of presentation of petition]. (s40(1)(g)).</p>

Creditor's petition

s44 Creditor's petition shall not be presented against a debtor unless:

- (a) amount owing is **\$5,000**, or where 2+ creditors, the amount owing to them aggregates to \$5,000
- (b) the debt is a liquidated sum or payable immediately or at certain time in future (**see above**)
- (c) act of bankruptcy within **6 months** before presentation of petition

Secured creditors can present a creditor's petition if the debt owing to them exceeds the value of their security (**s44(2)**) or if they surrender their security (**s44(3)**)

- They must particularise their security (**s44(4)**) – If they fail to do so due to “oversight” or “clerical error”, Ct will allow amendment (*Finn and Amoco*)
- Upon request in writing by the trustee within 3 months of making of sequestration order, must surrender security (**s44(5)**), failing which they are held in contempt (**s44(6)**)

Sequestration Order

The Federal Court and Federal Magistrates Court has concurrent jurisdiction (**s27 Federal Courts Act**) to make a sequestration order. This jurisdiction is enlivened if **the conditions under s43 are satisfied**.

- Debtor has committed **act of bankruptcy**
- At time **when act of bankruptcy committed**, the debtor:
 - was personally present or ordinarily resident in AUs;
 - had a dwelling house or business in Australia
 - was carrying on business in Australia
 - was member of partnership/firm carrying on business in Australia.

If the conditions are satisfied, the Ct may, on petition by C, make a sequestration order against estate of debtor.