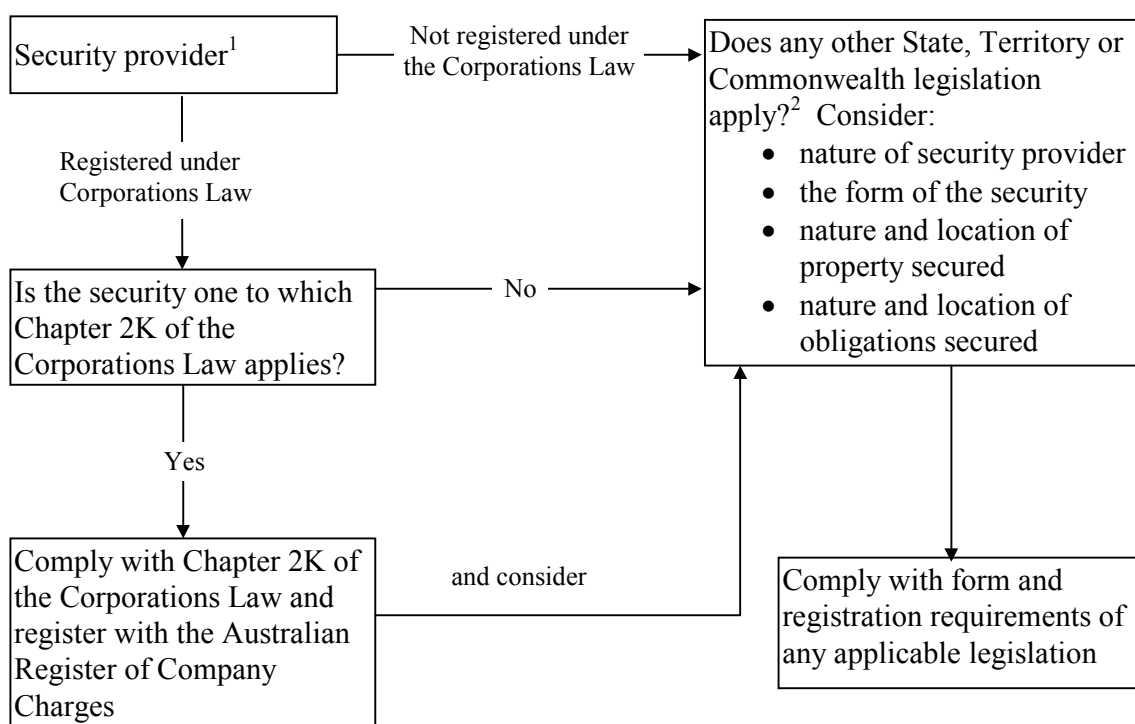


# A Comparison of Some Common Security Transactions under Existing Law and the Proposed PPSA - A Practitioner's Perspective

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## 1 Determining which legislation applies - an overview

### Existing law



- > form of registration will be dictated by who the security provider is, the nature of the secured property and where that property is located
- > must lodge security documents as well as registration forms

<sup>1</sup> ie chargor, mortgagor, lessee or hirer, as the case may be. “Security” is used in the broad sense to encompass charges, mortgages, liens, leases and hire-purchase arrangements.

<sup>2</sup> Examples: Bills of sale legislation  
Chattel securities/motor vehicle securities legislation  
Crop lien or stock mortgages legislation  
Trade mark, patents, designs legislation  
Hire purchase legislation  
Consumer Credit Code  
Shipping and aviation legislation  
Legislation establishing or regulating the entity granting the security  
Legislation creating or giving effect to the property being secured

- > cannot register security interest until after it is created - this leads to time delays and risk of a competing interest being registered first
- > necessary for lenders to have many different types of documentation.

### **PPSA**

The PPSA will apply to all securities, regardless of form or who the security provider may be.

- > cost savings from rationalisation of security documentation
- > one page financing statement (which can be lodged electronically), no need to lodge copies of security documents
- > can be filed before security interest arises - this saves time and risk of another competing registration being made between settlement and registration

## 2 Security<sup>3</sup> over motor vehicles (including most farm machinery) given by a company.

### Existing law

Form of transaction (ie mortgage, charge, lease, hire purchase etc) will determine registration requirements and priority issues.

Form requirements can vary from State to State and as between different types of security

Dual registration required for “charges” (within chapter 2K of the Corporations Law)

- Corporations Law
- Motor Vehicles/Chattel Securities Legislation

### PPSA

Registration under the Corporations Law requires the preparation and lodgment of Corporations Law forms 309 and 350 (minimum of 3 pages) as well as an original or certified copy of the charge (another 5 to 20 pages). Additional registration required under Motor Vehicles/Chattel Securities Legislation

- > increased use of paper
- > physical handling and lodgment of documents
- > security can only be registered after security document is signed and (in the case of the Corporations Law) physically lodged - minimum 24 hour delay
- > greater cost

Existing forms can be used but all “security interests” are subject to the same registration and priority regime.

Traditional securities, such as mortgages and charges, can be replaced by a simple “security agreement”

- > shorter, simpler documentation
- > minimal form requirements.

Single filing under the PPSA regulates priority as against other secured parties and third party purchasers.

Single page financing statement

- > can be filed electronically, even before security agreement is signed - no delays and no risk of competing security being registered ahead of you
- > single security database can be searched against debtor name and vehicle identification details
- > minimal use of paper - no requirement to lodge the security agreement itself
- > minimal physical handling of documents
- > lower cost

<sup>3</sup> “Security” in this context is used in its broadest economic sense to include a charge, mortgage, finance lease, hire purchase or any other interest that secures payment or performance of an obligation.

### 3 Charge over ADI deposits given by a company

#### Existing Law

If the chargee is an ADI and holder of the deposit, present Australian authority<sup>4</sup> indicates that no true security arises.

It is common practice for security to be drafted as a charge but including contractual set off and “flawed asset” provisions in the event that the “charge” is ineffective.

If the chargee is not the holder of the deposit then security can be taken.

Based on present authority, ADI deposits are not “book debts”<sup>5</sup>. Accordingly, a charge over such deposits cannot obtain the benefits of registration under Chapter 2K of the Corporations Law even though many such charges are in fact registered.

Because there is no applicable statutory regime for determining priorities, the common law priority rules will apply.

#### PPSA<sup>6</sup>

Law will expressly provide that an ADI may take a security interest in a deposit account maintained with that ADI. Set off rights also preserved

Single registration under PPSA irrespective of person giving security.

Priority rights clearly set out in PPSA

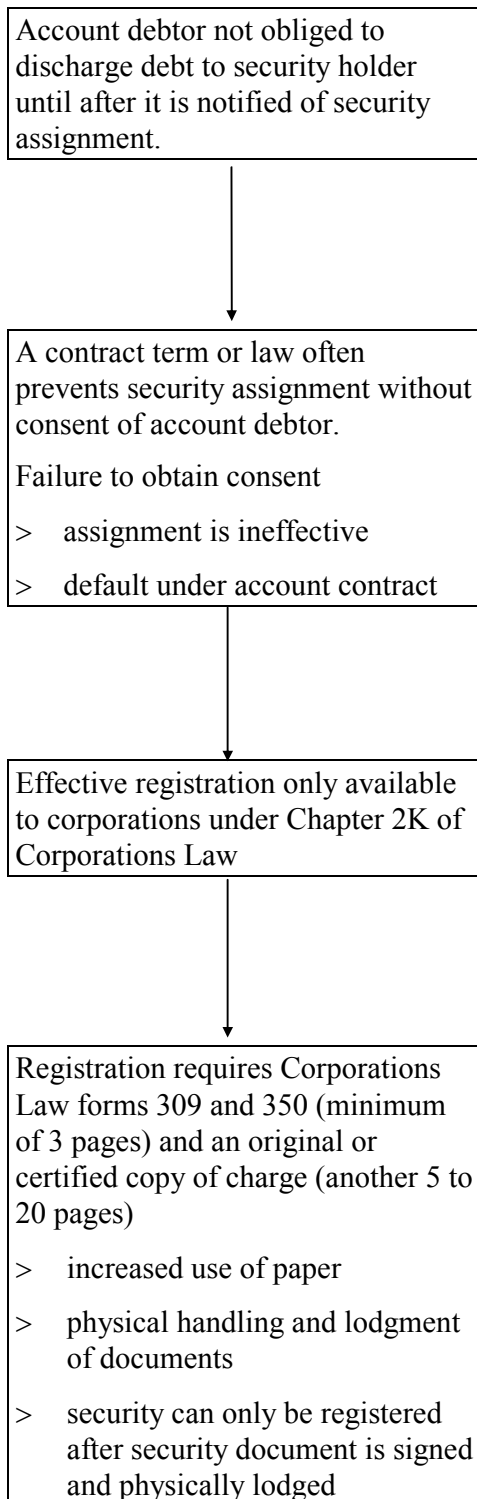
<sup>4</sup> **Broad v Commissioner of Stamp Duties** [1980] 2NSWL 40; **Wily v Rothschild** [1999] NSWSC 915

<sup>5</sup> **Re Old Inns of NSW Pty Ltd** (1994) 13 ACSR 141; **Re Brightlife Limited** [1987] Ch 200

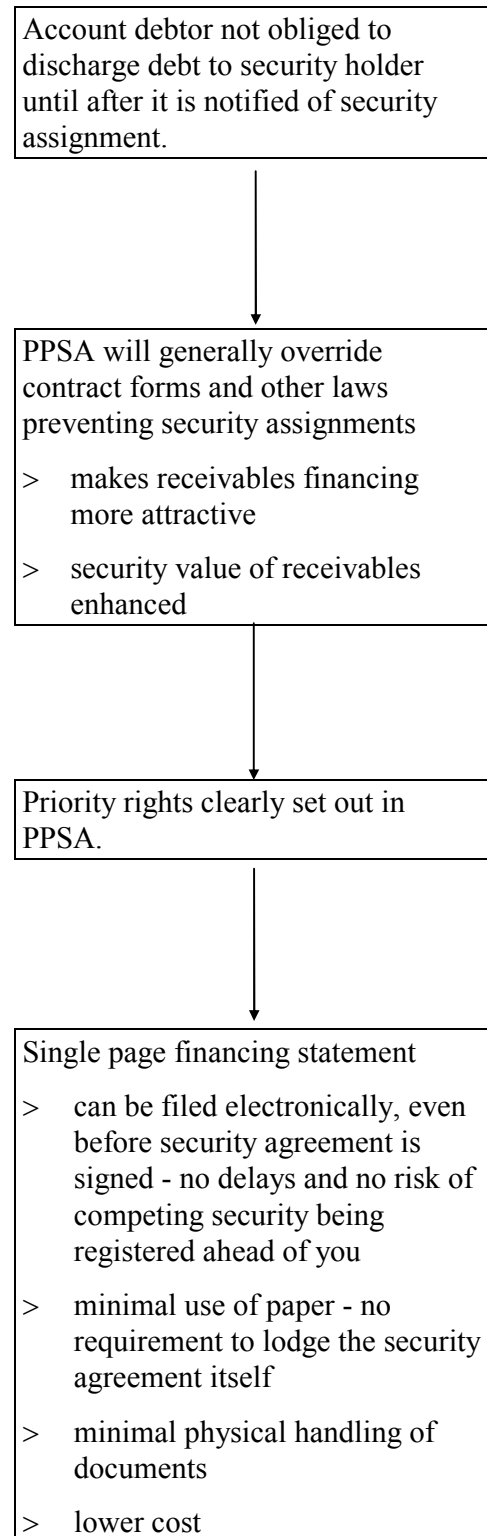
<sup>6</sup> Sections 42 and 43, draft PPSA

#### 4 Security assignment of receivables/book debts

##### Existing Law



##### PPSA<sup>7</sup>



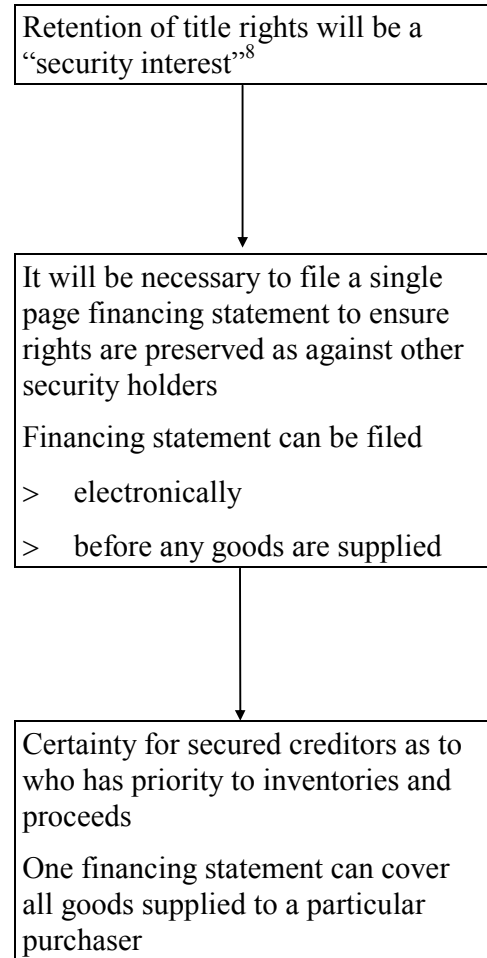
<sup>7</sup> Section 49, draft PPSA

## 5 Retention of title

### Existing Law



### PPSA



<sup>8</sup> Definition of “security interest” in schedule 1, draft PPSA

# **PERSONAL PROPERTY SECURITY REFORM**

## **WEIGHING UP THE BENEFITS**

**A comparison of some common security transactions under existing law and the proposed PPSA.**

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