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Personal Property Security Reform: Weighing up the Benefits

Craig Wappett

David Krasnostein

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Personal Property Security Reform: Weighing up the Benefits

Abstract
This article compares how both existing law and the proposed Personal Property Security Act would apply to some common security transactions. The transactions considered include security over motor vehicles (including farm machinery) given by a company, security assignment of ADI deposits, security over receivables/book debts, and retention of title.

Keywords
personal property security law, reform, Personal Property Security Act, PPSA

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

Craig Wappett – Partner, Mallesons Stephen Jaques; Deputy Chair, Personal Property Security Law Reform Committee of BFSLA

1 Determining which legislation applies - an overview

Existing law

Security provider\(^1\) - Not registered under the Corporations Law

Registered under Corporations Law

Is the security one to which Chapter 2K of the Corporations Law applies?

No

Yes

Comply with Chapter 2K of the Corporations Law and register with the Australian Register of Company Charges

Does any other State, Territory or Commonwealth legislation apply?\(^2\) Consider:

- nature of security provider
- the form of the security
- nature and location of property secured
- nature and location of obligations secured

Comply with form and registration requirements of any applicable legislation

> 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

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\(^1\) 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.

\(^2\) 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
Security 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

3 “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\(^4\) 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”\(^5\). 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\(^6\)

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

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\(^4\) Broad v Commissioner of Stamp Duties [1980] 2NSWR 40; Wily v Rothschild [1999] NSWSC 915

\(^5\) Re Old Inns of NSW Pty Ltd (1994) 13 ACSR 141; Re Brightlife Limited [1987] Ch 200

\(^6\) Sections 42 and 43, draft PPSA
## Security assignment of receivables/book debts

### Existing Law

- Account debtor not obliged to discharge debt to security holder until after it is notified of security assignment.

- A contract term or law often prevents security assignment without consent of account debtor.
  - Failure to obtain consent
    - assignment is ineffective
    - default under account contract

- Effective registration only available to corporations under Chapter 2K of Corporations Law

- Registration requires Corporations Law forms 309 and 350 (minimum of 3 pages) and an original or certified copy of charge (another 5 to 20 pages)
  - increased use of paper
  - physical handling and lodgment of documents
  - security can only be registered after security document is signed and physically lodged

### PPSA

- Account debtor not obliged to discharge debt to security holder until after it is notified of security assignment.

- PPSA will generally override contract forms and other laws preventing security assignments
  - makes receivables financing more attractive
  - security value of receivables enhanced

- Priority rights clearly set out in PPSA.

- 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
  - minimal use of paper - no requirement to lodge the security agreement itself
  - minimal physical handling of documents
  - lower cost

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7 Section 49, draft PPSA
Retention of title

Existing Law

Retention of title rights are not capable of registration unless they constitute a “charge” or “mortgage”

No need to register instrument unless it is a “charge” or “mortgage” in relation to goods supplied or proceeds or products arising from those goods

Regular ROT disputes in the context of receiverships and other insolvency proceedings

PPSA

Retention of title rights will be a “security interest”\(^8\)

It will be necessary to file a single page financing statement to ensure rights are preserved as against other security holders

Financing statement can be filed
  > electronically
  > before any goods are supplied

Certainty for secured creditors as to who has priority to inventories and proceeds
One financing statement can cover all goods supplied to a particular purchaser

\(^8\) 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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