

A horizontal collage of legal-related images including a scale of justice, a computer keyboard, and a gavel. The text "JONES DAY COMMENTARY" is overlaid on the collage in white, with "JONES DAY" in a smaller font above "COMMENTARY".

JONES DAY
COMMENTARY

THE AUSTRALIAN PPSA IS COMING SOON— THINGS YOU NEED TO DO

The Personal Property Securities Act 2009 (Cth) (“PPSA”) will commence in Australia on February 1, 2012, or an earlier date determined by the Minister. If commencement by that date is not achievable, the Act may be amended such that the Minister can also determine a later registration commencement time. It will change many things.

You must identify if and how the PPSA will affect your company, bearing in mind that the basic concept is that a security interest in personal property must be registered.

IMPACT

The PPSA will require many documents that are not currently regarded as security interests of personal property (such as leases, sale agreements where title to goods is retained until payment is made, and agreements providing for personal property to be made available to the other party) to be registered.

If they are not registered, and an insolvency event occurs with respect to the party in possession of the personal property, then there is a loss of priority, and property may be vested in that party and available to be sold by a liquidator, receiver, or administrator of that party.

PERSONAL PROPERTY

“Personal property” under the PPSA is defined as any property other than land and prescribed excluded statutory rights. Personal property therefore includes all tangible and intangible assets such as motor vehicles, shares, equipment, stock, receivables, raw materials, work-in-progress, finished goods, plant and equipment, extracted minerals or petroleum, statutory licences, contractual rights, intellectual property rights, and confidential information.

Mining and petroleum tenements have been excluded, and their own statutory registration regime

continues to apply to dealings in those tenements, including granting security. But where a security interest is created over a tenement and other items that are personal property, such as a joint venture interest or a tenement and geological information, then the Act continues to apply to the security interest of the personal property item.

SECURITY INTEREST

A security interest is an interest in personal property provided for by a transaction that in substance secures payment of money or performance of an obligation (regardless of form or title to property). The transactions include fixed charges, floating charges, chattel mortgages, conditional sale agreements, hire purchase agreements, pledges, trust receipts, consignments, lease of goods, assignments, transfers of title, and flawed asset arrangements.

EXISTING DOCUMENTS

As part of the PPSA process, a migration time for existing registered security interests is intended to start one month before the registration commencement time (*i.e.*, January 1, 2012).

If you have the benefit of a charge over assets of an Australian company that is currently registered under the Corporations Act, that registration will be automatically transferred to the PPSA Register. You do not need to do anything for that charge.

Security interests over intellectual property currently registered under legislation such as the Patents Act 1990 (Cth) and the Trade Marks Act 1995 (Cth), recorded on the IP registers maintained by IP Australia, will not be migrated and need to be re-registered under the PPSA and refreshed every seven years. Existing registers will continue to record security interests, but following commencement of the PPSA, the PPS register will become the only relevant register.

Many other security interests currently registered in various registers will not be automatically migrated across and must be manually migrated across within two years by the secured party. Failure to do so within this time period will result in loss of security and/or loss of priority. Similarly, documents in force

that are treated as security interests of personal property but did not require registration previously must be registered within two years from PPSA commencement.

The documents currently in force to look for include joint venture agreements, product sale agreements where delivery of goods occurs in Australia before title transfers, services agreements where goods are provided to enable the services to be performed, consignment agreements, agreements for the lease or hire of goods for more than one year, and lease or bailment of serial-numbered goods (such as motor vehicles, aircraft, or watercraft) of more than 90 days.

FUTURE DOCUMENTS

PPSA provisions should start appearing in most documents mentioned above requiring compliance with the PPSA. You should develop a checklist of documents used in your business that will require registration and establish a system to ensure that the documents are registered.

A security interest must first validly “attach” to collateral in order to make it enforceable, often by way of contractual agreement whereby a grantor acquires rights in the collateral and either value has been given for the security or the grantor has performed an act through which the security interest arises. Following attachment, an interest should be “perfected” to protect against a third party’s competing claims, most commonly by way of registration on the Personal Property Securities Register (“PPS Register”), or otherwise by the secured party taking possession or control of the collateral.

REGISTRATION AND PRIORITY

Registration involves completing and lodging an application in the approved form, subsequent to which the PPS Registrar will enter that security interest onto the PPS Register. The application must consist of a financing statement, which contains the particulars of parties to the transaction, the collateral, and the security interest. On registration of the financing statement, the PPS Registrar issues a verification statement to the secured party. The PPS Register will be administered by the Personal Property Securities Service.

Perfection by registration has two main benefits for a secured party. First, it defines the priority status the security interest has relative to other security interests in the collateral. Second, it ensures their security interest survives the bankruptcy or insolvency of the grantor. The priority rules provide that:

- A perfected security interest takes priority over an unperfected security interest;
- Priority between two or more perfected security interests is determined in favor of an earlier perfected security interest over a later one; and
- Priority between two or more unperfected security interests is determined in favor of an earlier attached security interest over a later one.

The actual document creating a security interest will not be required to be lodged for registration. However, only an authorized person can access and search the PPS Register (e.g., credit providers and current and potential security holders, not the general public) for details of a registration or security interests registered against a particular grantor. Certain “interested persons” may also, upon request, be able to receive a copy of the security agreement from the grantor (the lodging party) within 10 business days of a request being made, and the lodging party must disclose such document unless the grantor and the secured party have contractually agreed not to make such a disclosure.

SUPER PRIORITY RIGHTS

A specific priority rule relating to “purchase money security interests” (“PMSI”) applies to overrule the default priority rule. A PMSI is defined to include “a security interest taken

in collateral, to the extent that it secures all or part of its purchase price” as well “the interest of a lessor or bailor of goods” under a PPS lease.

A PMSI holder will be entitled to any goods sold in priority to a prior registered security interest held by other secured parties, as long as the PMSI holder registers a financing statement on the PPS Register in accordance with the following timing rules:

- If the goods sold or leased will be held by the buyer or lessee as inventory, the seller or lessor is required to perfect its security interest by registration by the time the buyer or lessor obtains possession of the goods;
- If the goods are not held by the buyer or lessee as inventory (e.g., equipment or machinery), then the seller’s PMSI must be perfected by registration within 15 business days after the buyer obtains possession of the property.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at www.jonesday.com.

Tony J. Wassaf

Sydney
+61.2.8272.0527
twassaf@jonesday.com

Arv Sreedhar

Sydney
+61.2.8272.0718
asreedhar@jonesday.com