



Legal briefing

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PERSONAL PROPERTY SECURITIES ACT

The *Personal Property Securities Act 2009* (Cth) (PPS Act) establishes a new national system regulating security interests over personal property and replaces previous schemes that dealt with personal property securities. This means there is one national online register: the Personal Property Securities Register (PPS Register). The PPS Register is the only register dealing with security interests in personal property.

The new PPS Register commenced operations on 30 January 2012.¹ If you work in a Commonwealth agency and you deal with personal property, you need to have an understanding of and be able to work within the new PPS regime.

The PPS Act has a large impact on banks and other private sector credit providers and equally on Commonwealth agencies whose activities include the taking of security over personal property.

Overview

The new PPS Register has been introduced to:

- determine priority between competing security interests in the same property
- reduce costs involved in assessing a person's ability to repay monies and giving greater certainty about which assets can be used as security (in turn, this will allow borrowers to offer more as security)
- protect the interests of a third party in a personal property purchased by that party who had no knowledge of existing security interests
- protect security holders from the loss or subordination of their interests to potential purchasers or other lenders
- provide clearer rules for the operation of security interests in personal property
- provide greater certainty and improved outcomes in insolvency.²



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What is personal property?

Personal property is any form of tangible or intangible property *other* than:

- land³ which includes the buildings and other improvements permanently attached to the land
- a right, entitlement, licence or authority (statutory right) that has been declared by a law not to be personal property for the purposes of the PPS Act.⁴

Tangible property (also referred to as ‘goods’) includes motor vehicles, aircraft, watercraft, office furniture, machinery, artworks, crops, livestock, minerals, wool, satellites and other space objects, accessions⁵ and commingled goods.⁶ It also includes financial property that is defined to mean chattel paper, currency, a document of title, an investment instrument and a negotiable instrument.⁷

Intangible property includes licences, intellectual property rights and contract rights.

Section 8 of the PPS Act lists those things not covered by the PPS Act.

What is a personal property security interest?

A security interest is an interest in personal property that arises from a transaction that, in substance, secures payment or performance of an obligation. A security interest can be created regardless of the form of transaction, the identity of the person who has title to the property,⁸ the legal personality of the person giving the security interest or the location of the parties or the secured property.

This means that it is not essential to have a specific form of document such as a mortgage or a charge for a security interest to be created that is registrable under the PPS Act. A security could be created by a clause in a general document so long as it evidences an intention to create a security interest over personal property. While the PPS Act does not prescribe the form of the transaction or document to be used, it is likely that most Commonwealth agencies will continue to make security agreements in writing, signed by both parties. It will be important for agreements to be ‘*readily accessible so as to be useable for subsequent reference*’.⁹

A security interest is an interest in personal property that arises from a transaction that ... secures payment or performance of an obligation.

Deemed security interests

There are certain interests regarded as security interests under the PPS Act even though they do not secure payment or performance of an obligation. These so-called deemed security interests include:

- the interest of a transferee of a monetary obligation arising from a disposal of property or the granting of a right or provision of services in the ordinary course of business (subject to certain exceptions)
- the interest of a consignor of goods under a commercial consignment¹⁰
- the interest of a lessor or bailor of goods under a PPS lease.¹¹

WHAT YOU NEED TO KNOW IF YOU WANT TO TAKE A SECURITY INTEREST

To take a security interest in personal property, the things described below must either exist or happen.

What needs to exist

Secured party

Under the PPS Act a *secured party* is a person who holds a security interest for itself or for another person, or both. A secured party may also be a person holding a security interest as trustee or a person whose name appears as the secured party in a registration document of a security interest.¹²

Debtor

To be able to take a security interest there needs to be a debtor. In the PPS Act a debtor is a person who owes payment or agrees to perform an obligation that is secured by a security interest in personal property. The debtor need not be the grantor of the security interest.

Grantor

There also needs to be a grantor, who may or may not be the same person as the debtor. A grantor is a person who has an interest in the personal property to which a security interest is attached (see discussion below about what attachment is) whether or not the person owes payment or performance of an obligation secured by the security interest. A grantor can also be a person who receives goods under a commercial consignment, a lessee under a PPS lease or the transferor of an account.¹³ The grantor does not need to be the owner of the property. It is possible for a person or organisation to be the grantor for more than one registered interest.

Collateral

There also needs to be collateral. Collateral is the personal property to which a security interest is attached. It also includes personal property described by a registration of a security interest even if the security interest is not yet attached to the personal property.¹⁴

Security agreement

Finally, there needs to be a security agreement. A security agreement is any agreement or act creating or giving rise to a security interest or the written evidence of such an agreement.

What needs to happen

Attachment

The first step is for the security interests to *attach* to the personal property. The term 'attachment' is used to describe the successful creation of a security interest in personal property. A security interest is only effective if it has attached to the personal property.¹⁵ At this point a proprietary right is created, allowing an effective and enforceable security interest in the personal property against the grantor of the interest. The onus of proving attachment lies with the person claiming that the security interest has attached to the personal property.

... a debtor is a person who owes payment or agrees to perform an obligation that is secured by a security interest in personal property.

A security agreement is any agreement or act creating or giving rise to a security interest or the written evidence of such an agreement.

A security interest attaches to personal property when the grantor has rights in the personal property or the power to transfer rights in the personal property to the secured party¹⁶ and either:

- value¹⁷ is given for the security interest
- the grantor does something by which the security interest arises (eg by entering into a security agreement) (PPS Act, s 19(2)).

Attachment will normally occur when a security agreement is entered into. However, parties to a security agreement can agree to defer the attachment of a security interest to a later time as specified in the security agreement (PPS Act, s 19(3)).

Attachment will normally occur when a security agreement is entered into.

Perfection

Once attachment to the security interest is achieved, the security interest needs to be 'perfected'. Perfection of the secured party's security interest, insofar as a secured party is concerned, ensures the best possible position under the PPS regime. Commonwealth agencies taking security interests would generally want to ensure that perfection occurs (although this should be considered on a case-by-case basis).

A security interest is perfected if it has *attached* to the collateral and the secured party has either:

- registered the security interest on the PPS Register
- taken *possession or control* of the personal property.

Perfection puts a potential secured party on notice of the existence of a prior higher-ranking security interest. It is possible for a security interest to be perfected in more ways than one at the same time. Perfection of a security interest can occur before or after attachment.¹⁸

Perfection by possession

Perfection can occur if the secured party has possession (not arising out of a seizure or repossession) of the collateral.¹⁹ A secured party cannot have possession of personal property if the property is in the actual or apparent possession of the grantor or debtor or another person on behalf of the grantor or debtor.²⁰

Once attachment to the security interest is achieved, the security interest would need to be 'perfected'.

Perfection by control

Perfection by control can occur for prescribed types of personal property. Perfection by control can occur over an account kept by a person with an authorised deposit-taking institution, an intermediated security, an investment instrument, negotiable instruments that are not evidenced by a certificate, certain letters of credit and satellites and other space objects.²¹ The way in which a person has control over these types of personal property is set out in the PPS Act (see PPS Act, ss 25–29).

Temporary perfection

A security interest may also be 'temporarily perfected' in a limited range of circumstances. In brief, these circumstances are:

- if the security interest in the original collateral is perfected but a security interest in the proceeds is not perfected:²² in this circumstance the security interest in the proceeds is temporarily perfected from the period when the security interest in the collateral attaches to the

proceeds until 5 business days later. The security interest in the proceeds becomes unperfected at the end of the 5 business days unless another form of perfection occurs²³

- when collateral is transferred: the period of temporary perfection varies and, unless otherwise perfected, the security interest will become unperfected at the end of the prescribed period²⁴
- when goods are returned to a grantor or debtor by a bailor for certain reasons: the period of temporary perfection is 5 business days.²⁵

Perfection by registration and the PPS Register

The PPS Register forms the central part of the PPS reform. It replaces the numerous registers that were operated by or on behalf of the Commonwealth, States and Territories.

Perfection by registration occurs through the registering of a financing statement on the PPS Register. This statement can be lodged electronically and security agreements do not need to be registered. The PPS Act together with the *Personal Property Securities Regulations 2010 (PPS Regulations)* set out what information is to be provided in the financing statement. It will need to include information such as the secured party's details, the grantor's details, a description of the collateral subject to a security interest, an address to send notices, the period of registration and any other matter prescribed by regulations. The description of the collateral must make it readily identifiable by any other person searching the PPS Register.²⁶

It is important to note that the PPS Regulations set out how secured parties and grantors are to be identified in the PPS Register, with a strict hierarchy of identifiers. In addition, the PPS Regulations also set out what types of personal property may or must be described by serial number, and what serial numbers must be used. If these rules are not followed by parties registering on the PPS Register, the registration may be defective (discussed below).

Financing statements can be registered by applying to the Registrar of Personal Property Securities with respect to a security interest or personal property prescribed by the regulations.²⁷ The approved form has to be used and the registration fee paid, and the Registrar has to be satisfied that the application is not frivolous, vexatious or offensive or contrary to the public interest or in contravention of s 151 of the PPS Act. The effect of s 151 is that the person registering the financing statement must have reasonable grounds for believing that the person described as secured party is or will become a secured party in relation to the collateral (otherwise than by virtue of the registration itself).

A security interest in personal property may be registered before the security agreement covering the property is made or a security interest attaches to the property.²⁸ If the security interest does not arise, an application must be made to register a financing change statement to amend the registration to end its effect.²⁹ It will usually be the secured party or a person undertaking this action on its behalf who carries out the registration.

The PPS Register is an online notice board publicly accessible 24 hours a day and updated in real time. Commonwealth agencies that are considering providing funding or purchasing personal property are able to search the PPS Register (as long as the search is permitted by the PPS Act). Section 172(2) of the PPS Act contains a table that sets out which persons may access the

The PPS Register will be an online notice board publicly accessible 24 hours a day and updated in real time.

PPS Register to search for data and for what purpose. This section should be referred to before a search is carried out to ensure that it is permitted. By way of example:

- a secured party in relation to a registration may perform a search for a purpose that relates to a security interest attached to the collateral that is described in the registration (item 2)
- a person may perform a search to disclose whether or not personal property is described in a registration if the property is to be purchased or dealt with by the person (item 6 para a)
- a person may perform a search to establish whether to provide credit to, or obtain a guarantee or an indemnity from a person (item 7)
- a government entity (within the meaning of the *A New Tax System (Australian Business Number) Act 1999* (Cth)) may perform a search that relates to the exercise of a power, or the performance of a function of that entity (unless the purpose is covered by another purpose listed in the table)
- a creditor may perform a search if the search is for a purpose that relates to the enforcement of the creditor's rights (item 17).

If the PPS Register is searched for a purpose not permitted by s 172(2) a civil penalty may apply.

The security interest starts to be registered in a registration when the description becomes available for search in the PPS Register in relation to the secured party.³⁰ Registration is effective until the earliest of the following times:

- the registration reaches the end time for registration³¹
- when the collateral description is omitted from the registration
- when the description of the collateral in the registration stops being available for search.³²

Registration does not effect a transfer of ownership; it merely notifies others of the interest in the collateral described on the PPS Register.

Defective registration

If registration is defective then a security interest will be unperfected. This will impact on the priority of the security interest against other security interests in the same collateral.

Holders of registered security interests must ensure that the registration is complete and accurate (and includes correct descriptions of the collateral) otherwise the registration will be ineffective. Similarly, the details of the registration must be kept updated, meaning that grantor and debtor records need to be updated regularly. It is important to guard against defective registrations to ensure that the security interests of agencies and departments will not be affected.

Registrations will be considered defective and therefore ineffective if there is a:

- seriously misleading defect in any data relating to the registration³³
- defect mentioned in s 165.

If registration is defective then a security interest will be unperfected.

Section 165 sets out the circumstances when a defect in registration that describes particular collateral exists. These are:

- if the collateral is required to be described by serial number and searching the PPS Register using that serial number would not disclose the registration
- if the collateral is not required to be described by serial number and a search of the PPS Register using the grantor's details would not disclose the registration
- if the registration indicates the security interest is a purchase money security interest (PMSI) but the security interest is not a PMSI³⁴
- circumstances in relation to data related to registration as prescribed by the PPS Regulations.³⁵

Another way to take a security interest is to obtain a purchase money security interest (PMSI).

Setting up a PPSR account

If an agency wishes to search the PPS Register it will need to set up its own account. An agency can set up an account online via <https://transact.ppsr.gov.au/ppsr/CreateAccountCustomerLanding>. Agencies can also access the PPS Register as a casual user (i.e. no account required and transactions paid for via credit card at the time of access). AGS has its own account and can conduct searches on behalf of agencies.

If an agency wishes to register or maintain security interests (or have this done on its behalf – which AGS can do), it needs to set up a Secured Party Group (SPG) or have one set up for it. An account is not needed to create a SPG. A SPG can be created online via <https://transact.ppsr.gov.au/ppsr/CreateSecuredPartyGroup>. Once created, the agency will be given a SPG Number and Access Code. These numbers are used to manage and view the agency's security interests as well as update the agency's address for service if required.

Fee remission

The Registrar of Personal Property Securities may consider establishing an account with fee remission for an agency if satisfied that access to the PPS Register is required for, or would facilitate:

- the enforcement of the criminal law or a law imposing a penalty
- the protection of the public revenue
- the exercise of powers or the performance of functions in relation to consumer protection
- the exercise of the powers or the performance of functions in relation to the regulation of insolvency or bankruptcy
- the exercise of the powers or the performance of functions of that body in relation to licenses
- the decommissioning or other transitional activities associated with a transitional register (under the *Personal Property Securities Act 2009*)
- the exercise of the powers or the performance of functions in relation to intelligence or security and
- the exercise of comparable powers or performance of comparable functions that the Registrar is satisfied are of such a nature as to warrant the remission of fees.

Agencies that would like to be considered for an account with a fee remission arrangement may apply to the Registrar using the form 'Application for government agency account for security interests with concessional fees' available at:

http://forms.business.gov.au/eForms03/getForm?formName=ITSA_PPS27GovAgen_v1211.pdf#zoom=100

However, before applying for fee remission, agencies should also review the 'Registrar's Practice Statement No 1 – Access to the PPS Register by government agencies'³⁶ as fee remission accounts are subject to additional terms and conditions involving restrictions, monitoring and review.

Corporations and PPS retention of the property

There are some specific rules in relation to corporations.

Section 51F of the *Corporations Act 2001* (Cth) refers to 'PPSA retention of title property'. Such property is personal property used, occupied by or in possession of the corporation over which the corporation does not have title. If a company is wound up, an administrator is appointed, a deed of company arrangement is executed or in the event of bankruptcy, and the security interest is unperfected, then the security interest held by the secured party vests in the grantor (corporation) immediately before the winding-up, administration or bankruptcy.³⁷ For example, if goods are involved, the goods vest in the company in liquidation and become part of the pool of assets available for distribution to the creditors. The supplier just becomes an unsecured creditor³⁸ because of the defective registration.

A new section in the *Corporations Act*³⁹ provides that the collateral will vest in the company upon liquidation or administration, if the security interest granted by a company is not perfected:

- within 20 business days after the security agreement came into force
- in the 6 months before the commencement of the administration or liquidation of the company.

PURCHASE MONEY SECURITY INTEREST

Another way to take a security interest is to obtain a purchase money security interest (PMSI). Provided certain requirements under the PPS Act are met, a PMSI will have priority over other security interests, even if they are perfected earlier in time (discussed in more detail below).

A PMSI arises when:

- a security interest is taken in collateral that is sold but not fully paid for to secure all or part of the purchase price⁴⁰
- a security interest is taken in collateral by a person who lent the money to another person to acquire the collateral
- a person owns goods and leases them or bails them under a PPS lease⁴¹
- a consignor who delivers goods to a consignee under a commercial consignment.⁴²

This covers what is now called a retention-of-title arrangement, which is now re-characterised as a PMSI. A retention-of-title arrangement is a form of 'title-based security'.⁴³ The seller reserves title or holds title in the goods being sold / sale proceeds / other property into which the goods are mixed. This occurs until the purchase price for the goods is paid or the payment of any other monies owing is also made. There are no registration requirements.

Under the PPS Act, sellers will now become secured parties, considered to have a security interest in the personal property provided for by a transaction that in substance secures payment or performance of an obligation without regard to the form of the transaction *or the identity of the person who has the title to the property*.⁴⁴ Section 273 of the PPS Act provides:

The fact that title to collateral is in a secured party rather than a grantor does not affect the application of any provision of [the PPS Act] relating to rights, duties, obligations and remedies.

The effect is that the buyer is treated as the owner of the goods and the seller can no longer seize the goods, as the seller is no longer considered the owner of the goods – only as a person with a security interest in the goods.

Even though the buyer does not own the goods, it can give security over them to third parties.

A PMSI does not include:

- an interest acquired under a transaction of sale and leaseback to the seller
- an interest in collateral that is chattel paper, an investment instrument, an intermediated security, a monetary obligation or a negotiable instrument
- a security interest in collateral that the grantor intends to use predominantly for personal, domestic or household purposes unless the collateral is of a kind required or permitted by the regulations to be described by serial number.⁴⁵

Priority for purchase money security interests

There are special priority rules for PMSIs (priority rules are discussed in the next section). When a PMSI is granted in collateral or its proceeds, it has priority over a perfected security interest that is granted in the same collateral but which is not a PMSI.⁴⁶

To ensure a PMSI has 'super-priority' over other security interests, the requirements s 62 of the PPS Act must be complied with. If collateral is inventory:

- the PMSI has to be in the inventory or its proceeds⁴⁷
- the PMSI is perfected by registration:
 - if the inventory is goods at the time the grantor (or a person on its behalf) takes possession
 - for any other kind of inventory – at the time the PMSI attaches to the inventory
- the registration perfecting the PMSI states the interest is a PMSI.⁴⁸

There are special priority rules for PMSIs.

If the collateral is personal property other than inventory:

- the PMSI has to be in personal property or its proceeds
- the PMSI is perfected by registration before the end of 15 business days after:
 - for goods – the day the grantor (or a person on its behalf) obtains possession of the property
 - for any other property – the day the interest attaches to the property
- the registration perfecting the PMSI states the interest is a PMSI.⁴⁹

A perfected security interest has priority over an unperfected security interest in the same collateral ...

If there is more than one PMSI in collateral, the PMSI in collateral or its proceeds granted by a grantor given to a seller, lessor or consignee of the collateral has priority.⁵⁰ However, if PMSIs are not granted to a seller, lessor or consignee then the default rules in the PPS Act apply. This means that the first-perfected PMSI will have priority.⁵¹

PMSIs can be 'trumped' if there is a non-PMSI in an account as original collateral and a PMSI in the account as proceeds of inventory (ie factoring or receivables financing). This is subject to the requirements in s 64 of the PPS Act being met.

PRIORITY RULES

Part 2.6 of the PPS Act establishes general priority rules to determine the order of priority between secured parties who hold a security interest in the same personal property. Once priority is determined, each secured party will enforce its rights in the same personal property in that order.

Generally, priority will be on a first-to-register basis. However, for personal property that is frequently traded (such as investment property, including shares and quoted securities), registration may not be practicable. In these cases, priority will be determined on the basis of possession or control of that personal property.

To determine priority under the PPS Act, the following matters are considered:

- whether or not perfection of the security interest has occurred
- how perfection occurred
- the nature of the security interest itself.

There are default priority rules and specific priority rules in the PPS Act (discussed above in relation to PMSIs).

Default priority rules

The default priority rules will apply only if there is no other way to determine priority between competing security interests in the same collateral.⁵² These rules are as follows:

- A *perfected* security interest has priority over an *unperfected* security interest in the same collateral, even if the unperfected security interest is first in time.

- A security interest *perfected by control* has priority over a security interest perfected by any other means.
 - If there are 2 security interests perfected by control, priority is determined by the *order of perfection*.
 - If there are 2 security interests perfected by means other than control, the security interest that is first in time has priority.
- If there are 2 unperfected security interests then priority is determined by the *order of attachment*.

Specific priority rules

The PPS Act also contains specific priority rules for:

- agricultural interests (crops and livestock)⁵³
- accessions⁵⁴
- processed or commingled goods⁵⁵
- security interests in transferred collateral⁵⁶
- payments received by a creditor from a debtor, negotiable instruments, chattel papers, negotiable documents of title⁵⁷
- proceeds and further advances⁵⁸

amongst other things.⁵⁹

This discussion about priorities does not address the detail of the priority rules. You may need specific advice about the circumstances you face.

These types of personal property also raise particular extinguishment and enforcement issues that are outside the scope of this note.

A secured party may (in a security agreement or otherwise) subordinate its security interest in collateral to any other interest in collateral. Any such subordination is effective according to its terms between the parties and may be enforced by a third party if that person is for whom the benefit of the subordination is intended.⁶⁰

... enforcement rights are in addition to and do not derogate from any rights and remedies the parties to a security agreement may have under statute, at law and in equity.

ENFORCING SECURITY INTERESTS

Chapter 4 of the PPS Act contains methods of enforcement of security interests in personal property on default by the debtor.

These enforcement rights are in addition to and do not derogate from any rights and remedies the parties to a security agreement may have under statute, at law and in equity.⁶¹ Consistent with this:

- the PPS Act operates concurrently with the Consumer Credit Code, meaning that secured parties will have to comply with both the obligations under the PPS Act and the Code. Where the obligations under the Code and the PPS Act are similar, however, compliance with the Code is compliance with the PPS Act⁶²
- secured parties' rights are generally limited to the extent of the grantor's rights to deal with the personal property.⁶³

Where a secured party has security over both land and personal property, the security interest can be enforced against the personal property as if it were land. The PPS Act enforcement provisions would only apply to regulate the distribution of proceeds from the disposal of the security interest.⁶⁴

A secured party can enforce, whatever their priority ranking. However, a higher-ranked secured party may protect its interests by taking over enforcement proceedings and obtaining possession of collateral from a lower-ranked enforcing party.⁶⁵

Generally, the enforcement provisions provide for:

- seizing the secured property
- disposing of or retaining the collateral
- distributing the proceeds.

Special rules apply to certain types of security (ie crops and livestock)⁶⁶ and the enforcement of liquid assets.

Limitation on use of enforcement provisions

The enforcement provisions do not apply where:

- the transaction is deemed to be a security interest (ie a transfer of an account, chattel paper, PPS or commercial consignment lease that does not secure payment or performance)
- goods are located outside Australia
- a party has perfected its security interest in an investment instrument or investment entitlement by taking possession or control (enforcement would not be necessary, as the secured party could deal with the security as provided for in the security agreement). Obligations relating to the distribution of proceeds still remain
- in part, the collateral is used by a grantor predominantly for personal, domestic or household purposes (ie consumer purposes)⁶⁷
- a receiver or receiver and manager has been appointed to the property.⁶⁸

The parties are also able to contract out of most of the enforcement provisions, except where the collateral is used for consumer purposes.⁶⁹

An important limitation on the use of the enforcement provisions is that the secured party must exercise its rights, duties and obligations honestly and in a commercially reasonable manner.⁷⁰ The term 'honestly' is known in Australian law; however, the term 'in a commercially reasonable manner' is not. The Senate committee considering the PPS reforms considered that the provision would temper overly aggressive behaviour and would not increase costs or inappropriately undermine the ability of parties to contractually agree on what constitutes 'in a commercially reasonable manner' in their circumstances.⁷¹

Where a secured party has security over both land and personal property, the security interest can be enforced against the personal property as if it were land.

An important limitation on the use of the enforcement provisions is that the secured creditor must exercise its rights, duties and obligations honestly and in a commercially reasonable manner.

Enforcement of liquid assets

The PPS Act allows the secured party to recover security in the form of a liquid asset (such as a book debt, account or negotiable instrument) directly from a third party by issuing a notice to the third party requiring the payment of any amounts owed to the grantor on the collateral.⁷²

Before the secured party issues a notice to the third party, they must give notice to any higher-priority secured party. Within 5 business days after the issue of the notice to the third party, the secured party must also give notice to the grantor.⁷³

Seizing the collateral

Intangible property is seized by:

- the secured party giving notice to either the grantor or, where the intangible property is a licence, the licensor (or the licensor's successor) stating that the notice constitutes seizure
- a method of seizure being agreed to by the parties.⁷⁴

Where a secured party has perfected a security interest in collateral by possession or control, the secured party may seize the collateral by giving notice to the grantor or, where the collateral is a licence, to the licensor (or the licensor's successor).

If physical removal of the collateral is not possible, a secured party may seize the collateral by taking 'apparent possession' of the collateral. Where a secured party takes apparent possession, the collateral may be disposed of on the grantor's premises (subject to certain limitations).⁷⁵

Where a secured party seizes collateral, they must, within a reasonable period of time (or another period as agreed under the security agreement), either dispose of or take action to retain the collateral.⁷⁶

Disposal of collateral

A secured party may dispose of the whole or part of the collateral that has been seized by:

- private or public sale
- lease, if the security agreement so provides
- licence, if the collateral is intellectual property.⁷⁷

The secured party may purchase the collateral only if:

- the secured party has given notice in accordance with s 130 of the PPS Act (to the extent this section has not been contracted out of under PPS Act, s 115) and no notice of objection has been received
- the purchase is by public sale
- the secured party pays at least the market value at the time of the purchase.

Except in specified circumstances, before disposal, the secured party must give notice to the grantor and any other secured party with a security interest in the collateral that has a higher priority.⁷⁸

Where a secured party seizes collateral, they must, within a reasonable period of time...either dispose of or retain the collateral.

The secured party will owe a duty to any other person with a security interest and to the grantor⁷⁹ to exercise all reasonable care:

- to obtain at least the market value if the collateral has a market value at the time of the disposal
- to obtain the best price that is reasonably obtainable at the time of disposal, having regard to the circumstances existing at that time, if it does not have a market value.

On the written request of a person with a security interest or the grantor, the secured party who has disposed of the collateral must give a statement of account detailing (amongst other things) receipts and payments in relation to the disposal.⁸⁰

The secured party is also required to give a statement of account after every 6-month period for which the collateral has not been disposed of.⁸¹

On disposal, the collateral is taken free of the interests of the secured parties and the grantor.⁸²

Retaining the collateral

A secured party may retain collateral only if it has given notice to the grantor and other secured parties of its intention to do so.

If no notice of objection is received then, after the period stated in the notice (at least 10 business days), the secured party can take steps to pass the title to the collateral to the secured party free from any encumbrances.⁸³

If a notice of objection is received from another secured party and, if required, the secured party provides proof of the person's interest, the first secured party must sell or lease the collateral in accordance with s 128 (rather than retain it).

Rules applying after enforcement

Any personal property or proceeds received as a result of enforcing a security interest are applied in the following order:

- obligations to persons holding interests (other than security interests) in the collateral that have a higher priority than the interest of the secured party (in order of priority)
- the secured party's reasonable expenses of enforcement, but only to the extent that the expenses are secured by the security interest
- obligations to persons holding higher security interests (in order of priority)
- obligations to the secured party that are secured by the security interest
- obligations to persons with lower priority interests (in order of priority)
- to the grantor.⁸⁴

The secured party will not be liable in relation to the distribution of proceeds under the Act if the secured party applied the proceeds honestly and in a commercially reasonable manner.⁸⁵

A secured party may retain collateral only if it has given notice ... of its intention to do so.

The grantor or a person with a security interest in the collateral may redeem the collateral before disposal by paying out or performing the debtor's obligations and by paying any expenses of enforcement that are secured by the security interest.⁸⁶

A person may reinstate the security agreement by paying out the arrears and the expenses of enforcement that are secured by the security interest. The security agreement may only be reinstated once during the life of the agreement.⁸⁷

FLOATING CHARGES

A fixed charge restricts the debtor from dealing with charged assets (for example, items of inventory) when they come into existence. A floating charge, on the other hand, has the advantage that it hovers over the debtor's assets, and only descends upon and charges the assets when a crystallisation event occurs. This allows the debtor to deal with its assets in the ordinary course of business prior to the time that the floating charge crystallises. The flexibility of the combined fixed and floating charge led to it becoming one of the most common forms of security over personal property.

The PPS Act does not abolish fixed and floating charges, but it renders the distinction between them largely irrelevant or obsolete. These are important changes for those taking security over personal property.

Under the PPS Act, a security agreement may provide for security interests in 'after-acquired property', and such a security interest may attach without specific appropriation by the grantor.⁸⁸ The term 'after-acquired property' is defined to mean personal property acquired by the grantor after a security agreement is made.⁸⁹

The PPS Regulations prescribe classes of collateral to be described on financing statements used to register security interests on the PPS Register. One of the prescribed classes of collateral is 'all present and after acquired property'.⁹⁰ This term is defined in the PPS Regulations to include personal property as at the registration time for the financing statement and personal property *after* the registration time.

A security interest in 'all present and after acquired property' (colloquially known as an 'all PAPS' security interest) equates to a fixed and floating charge. However, the concept of 'crystallisation' of a floating charge is not relevant to the attachment or enforcement of an all PAPS security interest under the PPS Act.

Part 9.5 of the PPS Act contains special rules dealing with references to charges and to fixed and floating charges in laws of the Commonwealth and in security agreements. Section 338, the guide to Part 9.5, states that the Part 9.5 rules are expected to have less relevance over time, as the PPS Act scheme provides an alternative to reliance on fixed and floating charges. Key provisions in Part 9.5 provide that a reference in a law of the Commonwealth, or in a security agreement to:⁹¹

- a charge is taken to be a reference to a security interest that has attached to a 'circulating asset', or to personal property that is not a 'circulating asset'
- a fixed charge is taken to be a reference to a security interest that has attached to personal property that is not a 'circulating asset'
- a floating charge is taken to be a reference to a security interest that has attached to a 'circulating asset'.

The PPS Act provides a detailed definition of a ‘circulating asset’, which includes inventory, an account that is the proceeds of inventory, and an ‘ADI account’ (an account with an authorised deposit-taking institution, within the meaning that term has in the *Banking Act 1959*)⁹². These are assets that have typically been the subject of floating charges.

Consequential amendments to the priority provisions in the Corporations Act

It has long been recognised that floating charges have the potential to produce harsh outcomes for unsecured creditors in insolvencies. Were it not for legislative intervention, if a debtor went into an insolvent administration and the debtor’s lender held a fixed and floating charge over all the debtor’s assets, the debtor’s unsecured creditors (including employees owed wages and other entitlements), would be likely to receive no dividend from the administration.

Priority provisions in corporations legislation have for many years required the interests of employees and other creditors to have a higher priority than interests under floating charges.⁹³ The changes introduced by the PPS Act in relation to floating charges have also required consequential amendments to the Corporations Act provisions dealing with priorities.

Generally, where the *Corporations Act 2001* previously used the term ‘floating charge’, it now uses the term ‘circulating security interest’. The term ‘circulating security interest’ is defined in the *Corporations Act 2001* as either:

- a ‘PPSA security interest’ that has attached to a ‘circulating asset’ within the meaning of the PPS Act, where the grantor has title to the asset
- a floating charge.

THE PPS ACT AND STATUTORY GARNISHEE NOTICES

There is authority that some statutory garnishee notices operate to create statutory charges in favour of the Commonwealth. There are provisions in the PPS Act relating to statutory charges, including the priority between a statutory charge and a security interest regulated by the PPS Act.

Garnishee notices

Under a number of Commonwealth acts, the Commonwealth can collect debts due to it by issuing garnishee notices.⁹⁴ Typically, under these acts, if a debt is owed to the Commonwealth by a person (the debtor), the Commonwealth⁹⁵ may serve a notice (a garnishee notice) on a third party:

- who owes money to the debtor
- who holds or may come to hold money for the debtor
- who holds or may come to hold money for another person for payment to the debtor
- who has authority from another person to pay money to the debtor.

... some statutory garnishee notices operate to create statutory charges in favour of the Commonwealth.

A garnishee notice usually requires the third party to pay to the Commonwealth either:⁹⁶

- the amount specified in the notice (this will be not more than the amount that is due to the Commonwealth or that is due from the third party to the debtor)
- specified amounts or a specified percentage of amounts that from time to time become due from the third party to the debtor.

Do garnishee notices create a statutory charge?

The garnishee provisions in Commonwealth acts typically do not expressly provide that a garnishee notice creates a statutory charge over amounts that are due to the debtor from the third party. However, there is authority that garnishee notices under tax legislation do create such a statutory charge, notwithstanding the absence of an express provision to that effect.

In *Clyne v Deputy Commissioner of Taxation* (1981) 150 CLR 1, the Deputy Commissioner conceded that a garnishee notice under former s 218 of the *Income Tax Assessment Act 1936*⁹⁷ did not create a statutory charge, but the High Court questioned whether that concession was correctly made.⁹⁸ In later cases, the Full Federal Court held that:⁹⁹

- service of a notice under s 218 created an interest in the nature of a statutory charge in favour of the Commonwealth over:
 - amounts then due and payable by the third party to the debtor
 - amounts that, though due at the time of service of the notice, do not become payable until a future date
 - amounts that come into existence after the date of service of the notice
- to the extent the Commonwealth holds a statutory charge over an amount due by the third party to the debtor, the Commonwealth is a secured creditor of the debtor.

More recently, the High Court in the *Bruton Holdings* case emphasised the similarity between the operation of a garnishee notice under s 260-5 of Sch 1 to the *Taxation Administration Act 1953* and the operation of garnishee orders made by courts for the attachment of debts due to a judgment debtor.¹⁰⁰

The question whether garnishee notices under Commonwealth acts other than tax acts create statutory charges does not appear to have been the subject of consideration by the courts.¹⁰¹ Whether a statutory charge is created by a garnishee notice will turn on the proper construction of the relevant legislative provisions authorising the issue of the notice. However, many of the garnishee provisions in other Commonwealth acts:

- appear to have been originally modelled on former s 218 of the *Income Tax Assessment Act 1936* (Cth)
- follow a similar form to that used in s 260-5 of Sch 1 to the *Taxation Administration Act 1953* (Cth), the provision which replaced former s 218.

It follows that the cases decided in relation to the operation of garnishee notices under tax acts may be applicable to the operation of garnishee notices under a number of other acts. This in turn may support the conclusion that a garnishee notice issued under an act other than a tax act operates to create a statutory charge over amounts due to the debtor from the third party.

The PPS Act does not apply to ... a charge that is created, arises or is provided for under a law of the Commonwealth.

The operation of the PPS Act in relation to statutory charges

There are 2 key provisions of the PPS Act that are relevant for present purposes:¹⁰²

- The PPS Act does not apply to, among other things, a charge that is created, arises or is provided for under a law of the Commonwealth (unless the person who owns the property in which the interest is granted agrees to the interest) (PPS Act, s 8(1)(b)).
- An Act that creates a statutory charge will govern the priority between the statutory charge and a security interest regulated by the PPS Act if:
 - the Act that creates the statutory charge declares that s 73(2) applies to the statutory charge
 - the statutory charge is created after that declaration comes into effect (PPS Act, s 73(2)).

An example of the application of s 73(2) of the PPS Act can be seen in Part 4-4 of the *Proceeds of Crime Act 2002* (Cth) (POC Act). Part 4-4 of the POC Act provides for charges over restrained property to secure amounts payable to the Commonwealth. Subsection 302C(2) of the POC Act¹⁰³ provides as follows:

- (2) Subsection 73(2) of the *Personal Property Securities Act 2009* applies to the Commonwealth's charge (to the extent, if any, to which that Act applies in relation to the property charged).

Note 1: The effect of this subsection is that the priority between the Commonwealth's charge and a security interest in the property to which the *Personal Property Securities Act 2009* applies is to be determined in accordance with this Act rather than the *Personal Property Securities Act 2009*.

Note 2: Subsection 73(2) of the *Personal Property Securities Act 2009* applies to Commonwealth charges created by section 302A after the commencement of subsection (2) (which is at the registration commencement time within the meaning of the *Personal Property Securities Act 2009*).

The concept of crystallisation of a floating charge will not be relevant under the PPS Act.

Interaction under the PPS Act between a charge created by a statutory garnishee notice and a floating charge

Prior to the PPS Act, when a floating charge crystallised, it became a fixed charge. Assuming that a garnishee notice created a statutory charge, if the notice was given before a fixed charge is given or crystallisation of a floating charge, the Commonwealth's interests under the notice would defeat or take priority over the interests of the chargor holding the fixed charge or floating charge.¹⁰⁴

As noted above, the concept of crystallisation of a floating charge is not relevant under the PPS Act.

As to the time at which the relevant changes took effect, pursuant to s 318 of the PPS Act, the provisions in Part 9.5 of the PPS Act (which includes s 339 of the PPS Act) apply:

- in the case of a reference to a charge, fixed charge or floating charge in a law of the Commonwealth: in relation to a security interest arising at or after the 'registration commencement time' of the PPS Act.
- in the case of a reference to a charge, fixed charge or floating charge in a security agreement: in relation to a security agreement made at or after the 'registration commencement time' of the PPS Act.¹⁰⁵

The practical effect of the changes outlined above is that if, after 30 January 2012, the Commonwealth gives a garnishee notice and the date the notice is given is before the date that a floating charge would have crystallised under the previous law, the Commonwealth's interests would prevail, but under the PPS Act the interests of the holder of the floating charge may defeat the Commonwealth's interests if the requirements of s 19 (regarding attachment) are met.

TRANSITIONAL ISSUES

Previously, when parties considered securing their position in an item of personal property they had to consider the type of security and the possibility of registering their security in the different jurisdictions. The PPS Act and the PPS Register remove the need for this.

Figure 1 lists the registers that have been migrated to the PPS Register.

Security interests that existed prior to 30 January 2012 will generally fall into 2 categories: transitional security interests and migrated security interests.

Essentially, *migrated security interests* are *transitional security interests* that were registered on a *transitional register*, and which have been migrated to the PPS Register.

Transitional security interests that have not been migrated, either because they were on a register from which data has not been migrated, or because they were not registered or registrable, will be temporarily perfected for a period of 24 months after the *registration commencement time*.

Migrated security interests were perfected immediately before the *registration commencement time*. *Transitional security interests* are perfected until the end of the month which coincides with the expiry of 24 months after the *registration commencement time* or until they are earlier perfected by other means (eg by registration).¹⁰⁶

The meaning of the words in italics follows:

- A *transitional security interest* is a security interest provided for by a transitional security agreement that was entered into before the registration commencement time. The security interest can be established either before or after the registration commencement time.¹⁰⁷
- A *transitional security agreement* is a security agreement in force immediately before the registration commencement time, and that continues in force at and after that time.¹⁰⁸
- The *registration commencement time* is 30 January 2012.¹⁰⁹

Figure 1: Registers to be migrated to PPS Register

Commonwealth

- Australian Register of Ships (mortgages only)
- ASIC – Register of Company Charges (including provisional charges)
- Fisheries Register

New South Wales

- Register of Encumbered Vehicles (REVS NSW)
- Security Interest of Goods Register:
 - stock mortgages originally registered under the *Liens on Crops and Wool and Stock Mortgages Act 1989*
 - Bills of Sale from 1 January 2000
 - current crop mortgages and all other interests registered under the *Security Interests in Goods Act 2005*
- Register of Co-operative Charges

Queensland

- Register of Encumbered Vehicles (REVS Qld)
- Bills of Sale Register (including Register of Liens on Crops of Sugar Cane)
- Register of Co-operative Charges

South Australia

- Vehicle Securities Register
- The following registers maintained by the General Registry Office:
 - Bills of Sale Register
 - Stock Mortgages and Wool Liens Register
 - Liens on Fruit Register
- Register of Co-operative Charges

Tasmania

- Register of Vehicle Security Interests
- Register of Bills of Sale, Stock, Wool and Crop Mortgages and Co-operative Charges

Victoria

- Vehicle Securities Register
- Register of Liens on Wool and Stock Mortgages (stock mortgages only)
- Register of Co-operative Charges

Western Australia

- Register of Encumbered Vehicles (REVS WA)
- Bills of Sale Register

Australian Capital Territory

- Register of Encumbered Vehicles (REVS ACT – from REVS NSW)
- General Register of Deeds and Instruments
- Register of Co-operative Charges

Northern Territory

- Register of Interests in Motor Vehicles and Other Goods (REVS NT – from REVS NSW)
- Lands Titles Registration and General Registry Office (Bills of Sale and stock mortgages)

Source: PPS Register website, accessed 7 December 2011.

- A *migrated security interest* is such if the conditions in s 332 of the PPS Act are met. An interest in personal property is a migrated security interest if it is a transitional security interest in the property, the data in the previous applicable register is migrated and the registration on the previous applicable register was valid and duly authorised by law.¹¹⁰
- A *transitional register* – a register maintained under a law of the Commonwealth, a State or Territory.

A transitional security interest is only perfected for 24 months from the registration commencement time. If action is not taken within that 24-month period by secured parties then the deemed perfection will lapse and there will be an unperfected security interest.¹¹¹ It would be prudent for agencies to review their transitional security interests and determine whether registration should occur within this 24-month transitional period.

The PPS Register replaces a number of registers. As part of the decommissioning process security interest records in previously existing registers may no longer be available.

The PPS Act also prescribes how secured parties, grantors and collateral are to be described on the PPS Register. Therefore information relating to migrated security interest may not be presented in the prescribed manner. This difference in description may result in an agency's security interests being 'lost'. To cater for these situations there will be a 'Find and Claim' process to enable agencies as secured parties to 'find and claim' their migrated secured party groups. This means that these registrations when 'located' can be transferred to a SPG.¹¹²

This note does not address all the requirements surrounding the migration of the data.

The provisions of the PPS Act regarding attachment, perfection and the priority of transitional security interests are not discussed in any detail in this note.¹¹³ To give a brief outline of the priorities applying when transitional security interests are involved, the table from s 320 of the PPS Act is reproduced below.

Priorities involving transitional security interests

Item	The following security interest:	has priority over ...	because of ...
1	a perfected transitional security interest ¹¹⁴	an unperfected security interest (whether transitional or not)	subsection 55(3).
2	a perfected transitional security interest	a perfected security interest that is not a transitional security interest	subsection 55(5) and section 322.
3	an unperfected transitional security interest	an unperfected security interest that is not a transitional security interest	subsection 55(2) and section 321.
4	a perfected security interest (whether transitional or not)	an unperfected transitional security interest	subsection 55(3).

A transitional security interest is only effective for 24 months from the registration commencement time.

It would be prudent for agencies to review their transitional security interests and determine whether registration should occur within this 24-month transitional period.

WHAT IF I AM ACQUIRING PERSONAL PROPERTY?

The ordinary position is that, if there is a sale of personal property, any security interests in it remain. When purchasing personal property, the first thing that should be done is a search of the PPS Register to determine if there is a pre-existing security interest in the collateral. The detail of the interest will not be readily available because the security agreements are not registered (but more information can be requested of a secured party). Further perfection may have occurred other than by way of registration, so inquiries should be made as far as possible.

The PPS Act has a concept of taking personal property free of security interests.

Sections 43–52 of the PPS Act sets out the rules for when personal property may be bought or leased free of a security interest. Some of these rules apply to:

- unperfected security interests
- serial number defects
- motor vehicles
- personal, domestic or household property.¹¹⁵

Unperfected security interests

If there is an unperfected security interest and a buyer gives value¹¹⁶ then the buyer can acquire the collateral free of the unperfected security interest. The exception is if the buyer was a party to the transaction that first created the security interest.¹¹⁷ From the perspective of taking security interests in collateral, this shows the importance of perfecting collateral, the easiest way being registration.

Serial number defects

If a buyer acquires personal property that is supposed to be described by serial number¹¹⁸ but a search of the PPS Register immediately before the purchase using the serial number does not disclose a registration that perfected a security interest then the buyer will acquire the property free of the security interest.¹¹⁹ This rule will not apply if the buyer is a party to the transaction that created the security interest.¹²⁰ This shows the importance of ensuring that the registered financing statements contain accurate information.

Motor vehicles

Special rules apply to taking motor vehicles free of security interests. If the buyer buys a car from a licensed motor vehicle dealer, the buyer automatically acquires the vehicle free of any security interest.¹²¹

The rule about when a buyer or lessee takes a motor vehicle free of a security interest does not apply if the buyer or lessee buys or leases the motor vehicle with actual or constructive knowledge of the security interest. The PPS Act contains definitions of when a person is deemed to have actual or constructive knowledge of a circumstance.¹²² Buyers are expected to make the reasonable inquiries that an honest and prudent person would make in a similar situation or knowing the similar information.

Personal, domestic or household property used predominantly for these purposes

If the personal property is purchased for new value (value and new value are defined in s 10 PPS Act), buyers can purchase it free of any security interest if the market value is no more than \$5,000. This does not apply if the property may or must be described by a serial number, the buyer knows with actual or constructive knowledge that the sale is a breach of a security agreement or the buyer believes the market value of the property is more than \$5,000.¹²³

WHAT SHOULD AGENCIES DO?

There are some things that Commonwealth agencies can do to be able to work within the PPS regime. This discussion is not intended to be exhaustive or particular to any situation and appropriate advice should be taken to deal with the particular circumstances.

The steps that Commonwealth agencies may consider taking should include:

Staff training and internal processes

- Train staff who deal with taking security interests to make sure they are familiar with the new terminology and the new rules introduced by the PPS Act.
- Ensure staff are aware of:
 - what is required in financing statements
 - when registrations are required.
- Train staff on when it is appropriate to search and how to search the PPS Register. Policies and procedures may have to be drafted to facilitate this.

Update internal procedures

- Update internal policies to reflect the fact that a broader range of personal property may be offered as security.
- Procedures for assessment of prospective grantors of security interests may need to be updated.
- Ensure there are systems in place to ensure grantor and debtor details are kept updated, including name and type of entity.

Commonwealth agencies can ... prepare for the PPS Act.

Update internal procedures (cont.)

- Ensure there is a process to receive notices so that receipt of notices is not affected by staff turnover.
- Determine who will be responsible for ensuring perfection of a security interest – in particular, for registering financing statements and consider the next required steps arising from the decision.
- Consider whether enforcement procedures need to be amended.
- Ensure there is a system to remove registrations at the end of the registration period as required.

Check current securities

- Undertake an audit of the current securities held and determine if the agreement will expire shortly.
- If not, determine whether:
 - a security interest will still exist under the PPS regime
 - the security interest has been migrated
 - action is required during the transitional period.

Check new security agreements

- Is a security interest created?
- Will it be registrable?
- Does it include an obligation on the grantor or debtor to provide all information necessary to enable registration of a security interest on the PPS Register?
- Does it properly describe collateral and is that description consistent with the description of the collateral as it appears on the financing statement?
- Who is to pay any registration and enforcement costs?
- Are there any enforcement provisions that the agency should contract out of under s 115 of the PPS Act?
- Consider confidentiality provisions in security agreements given the obligation to disclose security agreements to interested parties (as specified).
- What priority will the interest have and will any subordination agreements be required?

AGS can assist with advice, training, procedures, transitional arrangements and documents.

Notes

- 1 See Personal Property Securities (Migration Time and Registration Commencement Time) Determination, dated 21 November 2011.
- 2 Australian Attorney-General's Department, *Review of the law on Personal Property Securities – Discussion Paper 3: Possessory Security Interests* (April 2007), pp 2–3.
- 3 Meaning 'all estates and interests in land, whether freehold, leasehold or chattel, but does not include fixtures': PPS Act, s 10.
- 4 See PPS Act, ss 8 and 10.
- 5 Accession to other goods means goods 'that are installed in, or affixed to, the other goods, unless both the accession and the other goods are required or permitted by regulations to be described by serial number': see PPS Act, s 10.
- 6 Defined in s 10 of the PPS Act as including goods 'that are mixed with goods of the same kind'. It can refer to goods that have been mixed with the same type of goods or goods that have been mixed with other goods and it is impossible to separate them.
- 7 Each of which is separately defined, see PPS Act, s 10.
- 8 PPS Act, s 12.
- 9 See the definition of 'writing' in the PPS Act, s 10.
Having written security agreements is mentioned in relation to the enforceability of security interests against third parties. Section 20(1) provides the general rule as to when a security interest is enforceable against a third party in respect of collateral and under s 20(2) a security agreement covers collateral when, amongst other things, the security agreement is in writing signed by the grantor. The methods of 'signing writing' are set out in s 20(3) of the PPS Act.
- 10 'Commercial consignment' is defined in PPS Act, s 10.
- 11 'PPS lease' is defined in s 13 of the PPS Act.
- 12 PPS Act, s 10.
- 13 The grantor can also be a transferee of or successor to the interest of the previously mentioned persons: PPS Act, s 10.
- 14 Section 161 of the PPS Act authorises the registration of a financing statement that describes personal property before or after a security agreement is made covering the property, or a security interest has attached to the property.
- 15 Section 19(1) of the PPS Act, provides that a security interest is enforceable against a grantor only if the security interest has attached to the collateral.
- 16 Section 19(5) of the PPS Act provides that a grantor has rights in relation to goods that are leased, bailed, consigned or sold under a conditional sale agreement from the time the grantor obtains possession.
- 17 'Value' is any consideration that is sufficient to support a contract, including an earlier debt or liability (PPS Act, s 10).
- 18 PPS Act, s 21(3).
- 19 PPS Act, s 21(2)(b).
- 20 PPS Act, s 24(1). The same applies in the reverse situation (PPS Act, s 24(2)) ie a grantor or debtor cannot have possession of personal property if the property is in the actual or apparent possession of the secured party or another person on behalf of the secured party.
- 21 PPS Act, s 21(2)(c).
- 22 In accordance with s 33(1) of the PPS Act eg by a registration describing the proceeds.
- 23 See PPS Act, s 33.
- 24 See PPS Act, s 34.
- 25 See PPS Act, s 35. Other circumstances in which temporary perfection can occur are set out in ss 36–39 of the PPS Act.
- 26 The information to be contained in the financing statement is set out in s 153. If a person wants to obtain more information about a security interest, this must be requested of the secured party. If the secured party does not comply with such a request an order may be sought from the Federal Court obliging it to do so: see PPS Act, ss 275–283.
- 27 For the purposes of s 148(c) of the PPS Act. See PPS Act, s 150. Personal property has been prescribed to include personal property that is subject to an order of a court that prevents or restricts a person dealing with the personal property, enforces another court order, or orders the sale or disposal of all or part of the personal property: see PPS Regulations, reg 5.3(1).
- 28 PPS Act, s 161.
- 29 PPS Act, ss 151(2) and (3).
- 30 PPS Act, s 160(1).
- 31 Registrants will have the choice of nominating a period of registration, failing which the PPS Register system will assign default periods of registration: 7 years for consumer property and serial numbered goods and 25 years for other types of personal property. Registration periods can be extended.
- 32 PPS Act, s 163.
- 33 Paragraph 5.74 of the Personal Property Securities Bill (2009) Explanatory Memorandum states that parties need to objectively consider whether certain errors are seriously misleading. Examination of Canadian and New Zealand case law will assist in determining what seriously misleading means. Section 164(2) provides that 'in order to establish that a defect is seriously misleading, it is not necessary to prove that any person was actually misled by it'.
- 34 See the discussion about PMSIs under the heading 'Purchase money security interest and priorities'.
- 35 Section 166 of the PPS Act provides that despite some defects, a registration may be temporarily perfected for a specified period to enable the secured party to remedy the defect.
- 36 See http://www.ppsr.gov.au/Information_resource/Pages/PPSRegistrar%E2%80%99sPracticeStatements.aspx (accessed 10 January 2012).
- 37 See PPS Act, s 267(1) and (2).
- 38 There are some security interests to which the vesting rule does not apply eg a PPS lease under certain conditions (see PPS Act, s 268 generally and s 268(1)(a)(ii)).
- 39 *Corporations Act 2001* (Cth), s 588FL. See *Personal Property Securities (Corporations and Other Amendments) Act 2010* (Cth), Pt 9 of Sch 1.
- 40 A reference to purchase price or value includes a reference to credit charges and interest payable (PPS Act, s 14(8)).
- 41 A PPS lease is defined in s 13 of the PPS Act.
- 42 See PPS Act, s 14.
- 43 They are also referred to as reservation-in-title clauses or Romalpa clauses from a United Kingdom Court of Appeal case: *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676.
- 44 Section 12(1). This is made clearer by s 12(2)(d), which gives the example that a security interest includes an interest in relation to personal property provided by a conditional sale agreement which includes an agreement to sell subject to retention of title if this agreement or transaction in substance secures payment or performance of an obligation.

- 45 See PPS Act, ss 14(2) and 14(2A). Where the goods that are leased or bailed have serial numbers, a PMSI can be registered. For collateral that is not serial numbered and is for personal, domestic or household purposes, a PMSI cannot be registered. Section 14(3)–(4) deals with mixed securities ie a PMSI only applies to the obligations it secures.
- 46 See PPS Act, s 62(1).
- 47 Section 31 of the PPS Act defines ‘proceeds’. Item 4 of the table in s 153(1) sets out that the description of proceeds must comply with the regulations. For this, see reg 2.4 of Sch 1 of the PPS Regulations.
- 48 See PPS Act, s 62(2).
- 49 PPS Act, s 62(3).
- 50 PPS Act, s 63.
- 51 See PPS Act, s 55. A perfected PMSI in processed or commingled goods has priority (PPS Act, s 103).
- 52 See PPS Act, s 55.
- 53 See PPS Act, ss 31(4)–(6) and 83–85.
- 54 See PPS Act, ss 88–90.
- 55 See PPS Act, Ch 3.
- 56 See PPS Act, ss 66–68 and 79.
- 57 See PPS Act, ss 69–72.
- 58 PPS Act, ss 32 and 58.
- 59 See PPS Act, ss 73–77.
- 60 PPS Act, s 61. In a financing statement it is optional to indicate whether the security interest is or is to be subordinated to any other security interest: PPS Act, s 153.
- 61 PPS Act, s 110.
- 62 *Personal Property Securities Regulations 2010* (Cth), reg 4.1.
- 63 See PPS Act, s 112.
- 64 PPS Act, ss 117–118. Note that there are limitations on the exercise of this right where there are secured creditors with higher priority and notice obligations.
- 65 PPS Act, s 127.
- 66 PPS Act, ss 138A–C.
- 67 PPS Act, s 109.
- 68 PPS Act, s 116.
- 69 PPS Act, s 115.
- 70 PPS Act, s 111.
- 71 Standing Committee on Legal and Constitution Affairs, Exposure draft of the Personal Property Securities Bill 2008, pp 42–43.
- 72 PPS Act, s 120.
- 73 PPS Act, s 121.
- 74 PPS Act, s 123.
- 75 PPS Act, s 126.
- 76 PPS Act, s 125.
- 77 PPS Act, s 128.
- 78 PPS Act, s 130.
- 79 PPS Act, s 420A.
- 80 PPS Act, s 132 (to the extent this section has not been contracted out of under PPS Act, s 115).
- 81 PPS Act, s 132.
- 82 PPS Act, s 133.
- 83 PPS Act, s 136.
- 84 PPS Act, s 140.
- 85 PPS Act, s 140.
- 86 PPS Act, s 142.
- 87 PPS Act, s 143.
- 88 PPS Act, s 18(2) and s 18(3).
- 89 PPS Act, s 10.
- 90 PPS Regulations, Sch 1, cl 2.3(1)(c).
- 91 PPS Act, s 339.
- 92 PPS Act, s 340.
- 93 The current provision is s 433 of the Corporations Act 2001 (Cth).
- 94 Examples include: *Taxation Administration Act 1953*, Sch 1, s 260–5; *Child Support (Registration and Collection) Act 1988*, s 72A; *Social Security Act 1991*, s 1233; *Migration Act 1958*, s 264; *Paid Parental Leave Act 2010*, s 184; and *Medical Indemnity Act 2002*, s 42.
- 95 Including a person or statutory office holder authorised by the relevant provisions to issue the notice.
- 96 Or to the relevant person or statutory office holder who issued the notice.
- 97 Section 218 is one of the predecessor provisions to s 260–5 of Sch 1 to the *Taxation Administration Act 1953*.
- 98 Per Mason J, with whom Aickin and Wilson JJ agreed, at pp 17–18.
- 99 *Commissioner of Taxation v Donnelly* (1989) 25 FCR 432; and *Macquarie Health Corp Ltd v Commissioner of Taxation* (1999) 96 FCR 238.
- 100 *Bruton Holdings Pty Ltd (in liq) v Commissioner of Taxation* (2009) 239 CLR 346 at [14]–[15].
- 101 The issue was argued in relation to a garnishee notice under s 1233 of the *Social Security Act 1991* in *Firth v Centrelink* (2002) 55 NSWLR 451; however, the court did not find it necessary to decide the point.
- 102 In addition, PPS Act, s 8(1)(l) provides that the PPS Act does not apply to an interest of a kind prescribed by the regulations. PPS Regulations, reg 1.4(1) provides that the PPS Act does not apply to a right or interest in personal property mentioned in s 260–5 of Sch 1 to the *Taxation Administration Act 1953*. There are no regulations to similar effect applying to interests under garnishee provisions of other Commonwealth acts.
- 103 Inserted by the *Personal Properties Securities (Corporations and Other Amendments) Act 2010* (Cth).
- 104 See the review of the authorities in *Re Octaviar (No 8)* [2009] QSC 202 at [44]–[48].
- 105 The ‘registration commencement time’ is provided for in s 306 of the PPS Act and is 30 January 2012.
- 106 PPS Act, s 319.
- 107 PPS Act, s 308.
- 108 PPS Act, s 307.
- 109 See Personal Property Securities (Migration Time and Registration Commencement Time) Determination, dated 21 November 2011.
- 110 PPS Act, s 332.
- 111 See PPS Act, s 322.
- 112 See PPSR Fact Sheet titled ‘How to apply for Find and Claim’ accessed 10 January 2012.
- 113 See PPS Act, ss 320–324.

- 114 Reference to a perfected transitional security interest is taken to be a reference to a transitional security interest that has been continuously perfected, at the time the priority comes to be determined, since immediately before the registration commencement time (PPS Act, s 320(3)).
- 115 The other rules relate to temporarily perfected security interests, takings in the ordinary course of business currency, taking investment instruments or intermediated securities in the ordinary course of trading, investment instruments and intermediated securities. If a transferee takes personal property (or an accession) free of a security interest by the operation of this Part, the secured party's rights are subrogated to the rights of the transferor.
- 116 As defined in PPS Act, s 10.
- 117 See PPS Act, s 43.
- 118 As set out in the PPS Regulations, Sch 1, reg 2.2.
- 119 See PPS Act, s 44.
- 120 PPS Act, s 44(2).
- 121 See PPS Act, s 45.
- 122 See PPS Act, ss 297 and 298.
- 123 See PPS Act, s 47.

This briefing follows on from Commercial Notes 29.

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Mieke Dixon advises Commonwealth agencies on the provision of funding and loans, property acquisitions and disposals, leasing, and tenders. Mieke is AGS's National Client Service Manager for Defence Housing Australia and in 2009–10 completed a Master of Laws at the KU Leuven in Belgium. Before joining AGS in 2006, Mieke was an associate to the Honourable Justice RD Nicholson AO of the Federal Court.

Nigel Oram has a strong background in litigation, in particular insolvency and commercial litigation. Nigel has extensively acted for and advised insolvency practitioners on corporate insolvency and bankruptcy disputes. Nigel was previously employed by the Australian Taxation Office undertaking debt recovery and insolvency litigation. Nigel has broad experience in conducting commercial litigation which includes conducting contractual disputes on behalf of Commonwealth agencies relating to leases, maintenance contracts, building and construction contracts, and large procurements.

Matthew Walsh is the Team Leader of the Tax Team (Northern Region) in AGS Dispute Resolution. Based in our Sydney office, Matthew has gained extensive experience in all aspects of the team's work for the Australian Taxation Office. He has handled a broad range of tax litigation and advice matters that have involved a wide range of issues, including competing priorities between statutory charges and floating charges, challenges to garnishee notices in proceedings under the Administrative Decisions (Judicial Review) Act 1977 (Cth) and s 39B of the Judiciary Act 1903 (Cth), and the wide range of commercial issues that arise in tax appeal proceedings. He has an interest in both tax debt recovery and insolvency matters and tax technical matters.

Lee-Sai Choo is a Team Leader in AGS Commercial. He has a specialist property and commercial law practice and has assisted Commonwealth agencies with probity advice, commercial arbitration, real property acquisitions and disposals, leasing, tenders, auctions and major asset disposals.

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