

Practitioners' guide for drafting agreements under the *Personal Property Securities Act 2009* and *Regulations 2010* (Cth)

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<p>Terminology for security agreements generally</p>	<p>The <i>Personal Property Securities Act 2009</i> (Cth) (PPS Act) refers to 'security agreements' as the instruments by which security interests are created, arise or are provided for (sections 10 and 18).</p> <p>'Security interest' is given the following broad definition (section 12):</p> <p style="text-align: center;"><i>An interest in 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 title to the property).</i></p> <p>'Personal property' is any property which is not land nor statutory rights, entitlements or authorities.</p>
<p>Terminology for charge-like security agreements</p>	<p>A charge over collateral essentially provides a person with a right to seize and dispose of the collateral in the event that the debtor fails to pay or perform as promised. Security agreements creating an interest in the nature of a charge may need to be revised so as to use the new PPS Act terminology relating to charges.</p> <p>The terms 'charge', 'fixed charge' and 'floating charge' are no longer used (section 339). Instead:</p> <ol style="list-style-type: none"> 1 a 'charge' is now known as a 'security interest that has attached to personal property'; 2 a 'fixed charge' is now a 'security interest that has attached to personal property that is not a circulating asset'; and 3 a 'floating charge' is now a 'security interest that has attached to a circulating asset'. <p>A 'circulating asset' is essentially personal property which is subject to a security interest, which the grantor may transfer free of any security interest (section 340). 'Circulating assets' may include:</p> <ol style="list-style-type: none"> 1 any personal property where the secured party has given the grantor express or implied authority for any transfer of the personal property to be made, in the ordinary course of business, free of the security interest;

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	<ol style="list-style-type: none"> 2 accounts receivable arising as the proceeds of inventory; 3 accounts receivable arising due to granting a right or providing services in the ordinary course of business; 4 credit card receivables; 5 ADI accounts; 6 currency; 7 inventory; and 8 negotiable instruments.
Waiving notice requirements	<p>Secured parties are required under the PPS Act to provide grantors and other parties with certain notices. In most cases, such requirement may be waived with the consent of the would-be recipients of the notice (section 115).</p> <p>Where the waiving party is the grantor, the waiver may be effected by inserting appropriate clauses into the security agreement.</p> <p>If secured parties fail to obtain a waiver and fail to comply with a notice requirement, an award of damages could potentially be made against them (section 271).</p> <p>An overview of notice requirements which may be waived is set out below.</p> <p>Section 95 provides that if a secured party intends to remove an accession from goods, the following parties must be notified of such intention:</p> <ol style="list-style-type: none"> 1 grantors; and 2 secured parties with a security interest in the accession that has a higher priority. <p>Under sections 117 and 118, a secured party with a security interest in both land and personal property may elect for the security interest in personal property to be enforced in the same way as the interest in land would be enforced under land law. However, in order for such enforcement to occur, secured parties must give notice to the following:</p> <ol style="list-style-type: none"> 1 grantors; 2 secured parties with perfected security interests; and 3 persons who notify the secured party that they claim an interest in the personal property. <p>Section 121 requires secured parties intending to call on security consisting</p>

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	<p>of liquid assets (accounts, chattel papers, intellectual property and negotiable instruments) to give notice to higher ranking secured parties of such intention.</p> <p>Section 123 provides that seizure of collateral consisting of intangible property may only occur if notice is given to the grantor and, if applicable, the licensee or licensee's successor.</p> <p>Under sections 129 and 130, a secured party who intends to dispose of collateral must give grantors and higher ranking secured parties notice of such intention.</p> <p>Sections 134 and 135 provide that secured parties may retain the collateral once seized, but only if a notice is given to the grantors and any registered secured parties.</p> <p>Section 157 requires secured parties to provide grantors with notice whenever a security interest is registered or details on the PPS Register concerning a security interest are modified or updated. Unlike the other notice requirements, this requirement may only be waived where the collateral is 'commercial property' (i.e. not held by a natural person or held in the course or furtherance of an enterprise to which an ABN has been allocated).</p>
<p>Collateral in the possession or control of the grantor (including retention of title)</p>	<p>Grantors facing financial hardship may be tempted to dispose of (e.g. sell) collateral in their possession or control in order to raise funds to meet their financial obligations. Accordingly, security agreements should specify:</p> <ol style="list-style-type: none"> 1 whether grantors are authorised to dispose of the collateral; and 2 if an unauthorised disposition occurs, whether the security interest continues in the proceeds of the disposition. <p>Arrangements where collateral is in the possession or control of grantors may include the following:</p> <ol style="list-style-type: none"> 1 fixed and floating charges over the assets of the grantor's business; 2 sale of goods contracts with security in the goods sold (e.g. charges or retention of title); 3 hire purchase arrangements; 4 leases of goods; 5 guarantees providing security in personal property; 6 mortgages of land with assignments of rent or insurance proceeds;

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	<p>7 cross-charges in joint venture arrangements.</p> <p>Failure to specify the above may mean that the security interest is extinguished upon the collateral being disposed of (section 32).</p> <p>Security agreements might also need to state whether grantors may use the collateral (e.g. for machinery). If such use is permitted, clauses should be inserted to the effect that grantors must not cause or allow the collateral to be used in any way which would materially affect the marketability or realisable value of the collateral.</p>
<p>Personal property with serial numbers</p>	<p>The <i>Personal Property Security Regulations 2010</i> (Cth) (PPS Regulations) require or allow certain personal property to be described on the PPS Register by a serial number. Such property must be registered, and the serial number must be identified in the registration. Failure to do so could mean that the security interest is extinguished upon a person purchasing or leasing the property (section 44).</p> <p>As at March 2012, the PPS Regulations provide that the following types of personal property are required or permitted to be described by a serial number in a registration (schedule 1, clause 2.2):</p> <p>1 the following, if described as 'consumer property':</p> <ul style="list-style-type: none"> (a) aircraft; (b) designs, patents, plant breeders' rights, trade marks, or a licence over any of these property types; (c) motor vehicles; (d) watercraft; <p>2 aircraft engines, airframes, helicopters and small aircraft;</p> <p>3 the following, if described as 'commercial property':</p> <ul style="list-style-type: none"> (a) motor vehicles; (b) watercraft; (c) designs, patents, plant breeders' rights, trade marks, or a licence over any of these property types; <p>'Consumer property' is personal property held by a natural person and not held in the course or furtherance of carrying on an enterprise to which an ABN has been allocated (section 10). All other personal property is 'commercial property'.</p>

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Confidentiality	<p>Secured parties may wish to keep details about their security interests and agreements confidential. In order to do so, confidentiality agreements must be entered into with the debtor, either before the security agreement is executed, or as part of the security agreement.</p> <p>Failure to enter into confidentiality agreements may mean that on request by grantors, other secured parties, auditors or execution creditors, secured parties must provide the following (section 275):</p> <ol style="list-style-type: none"> 1 copies of security agreements; 2 statements setting out details of amounts secured, obligations secured, terms of payment or performance of obligation; 3 approvals or corrections of specified personal property indicating which items of personal property have security interests; and/or 4 approvals or corrections of amounts secured, obligations secured, terms of payment or performance of obligation. <p>However, even if a confidentiality agreement is made, the above information must be provided on request if:</p> <ol style="list-style-type: none"> 1 the debtor is in default under the security agreement; 2 the debtor authorises in writing the disclosure of the information; 3 the grantor requests the secured party to give the information to it (grantor); or 4 the request is made by an auditor of the grantor, if the grantor is a body corporate. <p>Accordingly, secured parties should insert clauses into security agreements to the effect that the grantors will not request the information referred to above or authorise the disclosure of such information without the prior written consent of the secured parties.</p>
Appointing receiver or receiver and manager	<p>Secured parties taking security interests from corporate grantors may consider inserting clauses in security agreements to the effect that a receiver or receiver and manager may be appointed to the grantor in the event of debtor default.</p>
Modifying enforcement provisions	<p>The PPS Act sets out rules for the enforcement of security interests. Many of these are 'default rules' in the sense that they can be contracted out of (section 115).</p> <p>Accordingly, secured parties may insert clauses into security agreements to the effect that they may choose to rely on the relevant provisions, but are not required to comply with any requirements imposed under such</p>

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	provisions. For example, as already discussed, the requirement for secured parties to provide certain notices may be waived. Furthermore, security agreements could set out alternative enforcement procedures to be taken by secured parties, which are more favourable to the latter than the procedures under the PPS Act.
Grantor co-operation	Secured parties may require grantors to co-operate with them in order to realise the full benefit of any security agreement. For example, access to the grantor's property may be needed in order to take possession of the collateral. For that reason, secured parties might consider inserting clauses into security agreements requiring grantors to comply with reasonable requests to do any act assisting the effectiveness, enforceability, perfection, etc. of security interests.