

Australian Personal Property Securities Act in effect from 30 January 2012

Extensive changes to personal property securities laws and the implementation of the new Personal Property Securities Register (PPSR) in Australia began on 30 January 2012.

The changes will have a major impact on an extensive range of services and businesses across a number of sectors and will redefine the scope of what constitutes a registrable security interest in Australia.

The changes in Australia to the current law and practice relating to security interests over personal property (ie, most property other than land) and similar transactions will affect a wide range of services and businesses in a broad range of sectors, in particular the banking and finance sectors.

As part of a personal property securities reform package, the Personal Property Securities Act 2009 (Cth) (PPSA) establishes a national system for the registration of security interests in personal property, whether given by a company or a natural person, together with new rules for the creation, priority and enforcement of security interests in personal property.

The new, centralised PPSR will replace many of the existing Commonwealth and State based registration regimes and registers, including the existing regime under the Corporations Act 2001 (Cth) (Corporations Act) for registration of charges with the Australian Securities and Investments Commission (ASIC).

Application of the new regime

The PPSA applies to a security interest in goods or financial property if:

- the goods are, or financial property is, located in Australia; or
- if the grantor is: an individual located in Australia; a company or registrable Australian body (within the meaning of the Corporations Act); a corporation sole established under Australian law; or a State, Territory or Australian government authority or agency.

Scope of registrable interests

Importantly, the PPSA makes registrable as security interests certain transactions that are currently not registrable. In addition to conventional securities such as mortgages, charges and pledges, the concept of "security interest" under the PPSA now also encompasses:

- transactions that, in substance, secure payment or performance of an obligation, irrespective of form. This would include hire

Contacts

Scott Bache
Partner, Sydney

T: +612 8922 8024
E: scott.bache
@cliffordchance.com

Dale Rayner
Special Counsel, Sydney

T: +612 8922 8046
E: dale.rayner
@cliffordchance.com

Mark Pistilli
Partner, Sydney

T: +612 8922 8001
E: mark.pistilli
@cliffordchance.com

Amelia Horvath
Senior Associate, Sydney

T: +612 8922 8023
E: amelia.horvath
@cliffordchance.com

purchase agreements, finance leases, conditional sale arrangements (including an agreement to sell subject to retention of title), goods leases, trust receipts and transfers of title; and

- certain other transactions (whether or not they in substance secure payment or performance of an obligation) including a transferee's interest under a transfer of an account (such as a transfer of a receivable) or chattel paper, commercial consignments and certain lease and bailment arrangements relating to goods.

It is expected that many of the arrangements included within this broader concept of security interest under the PPSA will be not be the subject of stand-alone documentation and will instead be contained within broader security or commercial documentation.

Additional changes

The new PPSA regime has a number of additional complexities that will affect a range of commercial arrangements and businesses, including:

- cross-border rules for companies with assets both within and outside Australia;

- uncertainty over the treatment of protection mechanisms used in the joint venture context (such as pre-emptive rights);
- specific rules affecting intellectual property;
- variations to the manner in which security interests are perfected, the operation of priorities and enforcement; and
- new disclosure requirements, which are likely to affect the manner in which commercial parties document their transactions.

The impact of the new regime in these and other areas has yet to be tested.

Commencement and transitional arrangements

These changes and new PPSR came into force on 30 January 2012, at which time security interests registered on certain other State, Territory and Commonwealth registers (including the ASIC charges register) were migrated to the PPSR.

Security interests that were not migrated to the PPSR will receive temporary perfection for two years after the PPSR came into force.

The PPSA will have a retrospective effect on security interests and

security agreements arising before that time by operation of transitional provisions.

Security interests that are not registered on existing registers, not automatically migrated or that were not previously registrable (but are now registrable due to the expanded definition of security interests under the PPSA) will need to be registered on the PPSR.

Action points

Legal, compliance and other staff involved in security arrangements in Australia should be aware of this development and should:

- consider reviewing existing documentation to ascertain Australian security interests capable of registration on the PPSR (but not automatically migrated to) the register;
- ensure relevant security interests are registered within the transitional period to ensure perfection and priority; and
- ensure new documentation relating to security interests in Australia is updated to adequately reflect the introduction of the PPSA.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

Clifford Chance, Level 16, No. 1 O'Connell Street, Sydney, NSW 2000, Australia

© Clifford Chance 2012

Clifford Chance is a law firm with liability limited by a scheme approved under Professional Standards legislation

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

www.cliffordchance.com

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh* ■ Rome ■ São Paulo ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C

*Clifford Chance has a co-operation agreement with Al-Jadaan & Partners Law Firm in Riyadh.