

ENFORCEMENT OF SECURITY INTERESTS UNDER THE *PERSONAL PROPERTY SECURITIES ACT 2009*

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General rules

Following default by a debtor, secured parties, taking into account priority rules, will seek to enforce their security interests. Chapter 4 of the *Personal Property Securities Act 2009* (Cth) ('PPSA') provides general enforcement rules dealing with seizure, disposal or retention of collateral, and steps to be taken after a security interest in collateral has been enforced.

At the outset, s 109 of the PPSA identifies security interests to which the enforcement provisions do *not* apply. In this regard, security interests that are 'deemed security interests' for the purposes of the PPSA, but which do not secure the payment or performance of an obligation, are outside the scope of security interest enforcement remedies under the PPSA. In addition, a security interest in an investment instrument that has been perfected by taking possession or control, or investment entitlement by taking control, are outside the scope of the enforcement provisions. This would, for example, allow the secured party to deal with the collateral in the official market, without having to comply with enforcement procedures under the PPSA.

Finally, a number of specific enforcement provisions are identified under s 109(5) of the PPSA as not being applicable to collateral that is used predominantly for personal, domestic or household purposes. The distinction between a security interest over collateral used for consumer purposes, as opposed to other purposes, is important under the enforcement provisions. For example, contracting out of enforcement provisions will be significantly curtailed where collateral is used predominantly for consumer purposes, ensuring that consumers have full protection of enforcement provisions. Note the distinction between 'consumer property' as defined in s 10 PPSA¹ and goods used for consumer purposes under the enforcement provisions.²

Where collateral is used for consumer purposes, the PPSA and the National Credit Code will operate concurrently, and, accordingly, a secured party may well need to comply with requirements under both the PPSA and the National Credit Code.

Whether the National Credit Code will apply depends on the dominant purpose of the credit. In contrast, the PPSA is concerned with whether a security interest is attached to collateral that is used predominantly for consumer purposes. Accordingly, there will be overlap when both the credit is provided for consumer purposes, and is secured against collateral intended for consumer purposes. To assist in resolving the overlap problem when the National Credit Code and the PPSA both apply and contain similar obligations, the PPS Regulations may provide that a secured party who has complied with the relevant provision of the Code would be deemed to have complied with corresponding obligations in the PPSA (see s 119(2)).

In addition, in the context of consumer/non-consumer purposes, the PPSA provides that where collateral is not used for consumer purposes, the parties to the security agreement may contract out of specified enforcement provisions listed in s 115 PPSA.

Example:

A bank provides a loan to a grantor to finance the purchase of business assets secured against his luxury yacht. The grantor uses the yacht for personal use 90 per cent of the time and charters the yacht for business functions for 10 per cent of the time. The grantor defaults on the loan and the bank initiates enforcement action. As a result of the grantor's use of the yacht predominantly for personal, household or domestic purposes, the bank is unable to vary or contract out of most of the enforcement provisions, regardless of the fact that the

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¹ *Personal Property Securities Act 2009* (Cth) s 10 (definition of '*consumer property*' means personal property held by an individual, other than personal property held in the course or furtherance, to any degree, of carrying on an enterprise to which an ABN has been allocated).

² *Personal Property Securities Act 2009* (Cth) s 109(5) identifies several provisions that do not apply in relation to collateral used by a grantor predominantly for 'personal, domestic or household purposes'.

loan was obtained to meet business needs.

Finally, in the context of general rules relating to enforcement action under the PPSA, the PPSA introduces a general standard of conduct in s 111 under which the enforcement actions are required to be exercised honestly and in a commercially reasonable manner. This general duty co-exists with more specific obligations contained in enforcement provisions, such as that applying under s 131 of the PPSA - where the secured party disposing of collateral has a duty to obtain market value, otherwise, to obtain the best price in the circumstances.

Seizure and disposal, or retention of collateral

Following default by a debtor under a security agreement, the PPSA provides the secured party with the right to seize the collateral by any method permitted by law (see s 123(1) PPSA).

Following seizure, the PPSA deals with disposal of collateral (see s 125 PPSA) and identifies three forms of disposal:

- Sale to a third party (s 128(2));
- Sale or retention where the collateral is purchased or retained by the secured party (ss 129 and 134); and
- Lease or licence (in respect of intellectual property) to a third party (s 128(2)).

Example:

A manufacturer sells new office furniture and leases new and used office furniture, mostly to small to medium sized businesses. A customer (the grantor) has entered into a conditional sale agreement with the manufacturer to buy office furniture with the purchase price payable by instalments over a period of nine months. The sale agreement provides that the office furniture will continue to be owned by the manufacturer until the last instalment has been paid with the manufacturer able to dispose of the office furniture either through sale or through a lease arrangement in the event of default. If the office furniture is leased it must be leased for a minimum of three months. Following default by the buyer/grantor, the manufacturer seizes the desks and chairs under the PPSA and leases them according to the terms in the sale agreement.

When disposing of collateral to third parties, the secured party owes a duty to exercise all reasonable care to:

- Obtain at least market value for the collateral; or
- If there is no market value, to obtain the best price that is reasonably obtainable (see s 131).

This is the same duty on sale required of a controller of corporation property under s 420A of the *Corporations Act 2001* (Cth) ('Corporations Act').

Purchase or retention of collateral by the secured party is subject to a number of conditions – for example, a secured party would only be able to purchase or retain the collateral if there is no objection to the purchase or retention (s 137 PPSA).

Rules applying after enforcement

The PPSA provides for a number of steps to be taken after a security interest in the collateral has been enforced, including:

- The order of distribution of proceeds (s 140);
- Taking necessary steps to give effect to transfer of title to the collateral (s 141);
- The grantor may redeem the collateral or another secured creditor may reinstate the security agreement before the secured party disposes of the collateral (ss 142 and 143).

Specific issues regarding enforcement

The rules generally applicable to enforcement of security interests under the PPSA will also apply to security interests in ships and to the other forms of security interest typically found in ship finance. It is important to note, however, that the enforcement provisions of ch 4 of the PPSA will often not apply to security interests in ship finance transactions. This is because the exclusions from ch 4 include, among other things:

- (a) Property in the hands of a receiver or controller (s 116), which is likely to be the case with any enforcement of a security interest granted by a company;
- (b) Goods located outside Australia (s 109(2)); and
- (c) Rights given to a secured party under the terms of the relevant security agreement (s 110).

However, in certain circumstances, parties with security interests under the PPSA can enforce such interests directly against the ship in rem under the *Admiralty Act 1988* (Cth) ('Admiralty Act') if they can be characterised as a maritime lien, proprietary claim or maritime claim under the Admiralty Act.

While the Admiralty Act is specifically concerned with conferring jurisdiction on the courts in respect of maritime liens, proprietary maritime claims and general maritime claims, a court may give all legal and equitable relief properly available to a party regardless of whether the proceedings are in rem or in personam.³ The PPSA does not derogate in any way from the rights and remedies that the debtor, grantor or secured party in relation to a security agreement may have apart from the PPSA in relation to default by the debtor under the security agreement (s 110). It follows that a claim brought in the Federal Court under the PPSA may also be within the Court's admiralty jurisdiction if the claim may be also characterised (for the purposes of the Admiralty Act) as a maritime lien, a proprietary maritime claim or a general maritime claim.

Whether a claim brought under the PPSA may also be characterised as a maritime lien, a proprietary maritime claim or a general maritime claim will be a matter for the Federal Court in determining the extent of the admiralty jurisdiction in accordance with the Admiralty Act. However, for the purposes of the PPSA, a security interest also includes the interest of a bareboat charterer who obtains possession and control over a ship without owning the ship under a charterparty for a term of 90 days or more (ss 12(3)(c) and 13(1)(e)). For the purposes of the PPSA, a bareboat charter of a ship for a term of 90 days or more would be a security interest. As a proprietary maritime claim under the Admiralty Act includes a claim relating to possession of a ship (s 4(2)(a)(i)), if the claim concerning the charterparty related to possession of the ship, then the court may have jurisdiction to commence proceedings as an action in rem against the ship in exercise of the court's admiralty jurisdiction.

A time charterparty for 90 days or more would not be a security interest for the purposes of the PPSA, as the ownership and possession of the ship remains with the owner - a time charterer only obtains the right to exploit the earning capacity of the ship for an agreed period of time in exchange for periodic payments of hire.⁴ Accordingly, a time charterparty is not a PPS lease within the meaning of s 13 of the PPSA.

The PPSA confers jurisdiction on the Federal Court and a number of other courts, in relation to:

- (a) Matters arising under the PPSA authorising an application to be made to the court;
- (b) Matters otherwise relating to the PPSA (other than a matter arising under the *Administrative Decisions (Judicial Review) Act 1977* (Cth));
- (c) Matters otherwise arising in relation to a security agreement or a security interest (ss 206(1) and 207).

The conferral of this jurisdiction does not affect any other jurisdiction of any court (s 206(5)). The PPSA determines, in proceedings in an Australian court, the law of the jurisdiction that governs the validity, perfection and effect of perfection or non perfection of the security interest. The PPSA does not affect the law that governs contractual obligations, including any obligations that arise under a security agreement (s 234). The validity of a security interest in goods of a kind that are normally used in more than one jurisdiction is governed by the law of the jurisdiction in which the grantor is located when the security interest attaches to the goods under that law (s 238(3)).

³ Re *The Conoco Britannia* [1972] 2 QB 543, 554 per Brandon J.

⁴ *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd (The 'Hill Harmony')* [2001] 1 Lloyd's Rep 147, 156 (Lord Hobhouse).

It follows that, in proceedings in an Australian court the validity of a security interest in a ship is governed by the law of Australia, and therefore the PPSA, when the grantor is a company incorporated under the Corporations Act. However, when the grantor is incorporated in another jurisdiction, the validity of a security interest in the ship will be governed by the law of that other jurisdiction.

Payment of the value of the ship into court pursuant to r 51 of the *Admiralty Rules 1988* (Cth) ('Admiralty Rules') to release the ship from arrest will not create a security interest as there is no 'interest in personal property'. Similarly, complying with security requirements of a court order pursuant to r 52 of the Admiralty Rules will not create a security interest as there is no 'transaction'.