

## The Shipping Industry and the New Personal Property Securities Regime

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### What Is It?

The *Personal Properties Securities Act 2009* (Cth) (“PPSA”) establishes a new system for the registration and preservation of security interests in any personal property (other than land).

Current systems of registration primarily apply only to limited classes of assets (e.g. ships, motor vehicles) or types of security interests (e.g. corporate charges, mortgages). The PPSA makes it possible to register a security interest in any personal property, including tangible and intangible property (e.g. including intellectual property rights or the rights of a lessor under a lease).

The PPSA will apply to all security interests over property located in Australia or if the grantor of the interest is an Australian entity.

The failure to register a security interest over any personal property could result in another registered security interest taking priority, another person acquiring an interest in the property free of any unregistered security interest or the interests of creditors taking priority over any unregistered security interest in the event that the organisation granting the interest becomes insolvent.

### What Interests Are Covered?

The PPSA permits the registration of any ‘security interest’. A security interest arises under:

- a) any transaction that in substance secures the payment or performance of an obligation; or
- b) as deemed by the PPSA.

The PPSA security interest covers traditional security transactions, such as fixed and floating charges, mortgages, hire purchase agreements and retention of title arrangements. However, the PPSA also extends the concept of a security interest to non-traditional transactions which, under ordinary principles, would not be thought to create any security interest at all, even where these do not in substance secure the payment or performance of an obligation. An example is the 'PPS Lease'.

A PPS Lease will be recognised as a security interest required to be registered, even if it does not secure the payment or performance of any obligation. A PPS Lease arises where:

- a) there is any lease or bailment of general property for more than 12 months or for an indeterminate period of time (i.e. with no fixed end date); or
- b) there is any lease or bailment of any property which is described by a serial number (e.g. watercraft that has either a hull identification number or an official number within the meaning of the Shipping Registration Regulations 1981) for more than 90 days or for an indeterminate period of time (i.e. with no fixed end date); and
- c) the lessor or bailor is regularly engaged in the business of leasing or bailing goods; and
- d) the bailee provides value for the bailment.

The residual interest of a seller of goods shipped under a negotiable bill of lading made out to the order of the seller is expressly excluded from the requirement for registration. This is not the case for non-negotiable bills of lading which are made out to a designated person or company. An unpaid seller of goods under a non-negotiable bill of lading may therefore have to register its residual interest in order to preserve its rights in relation to the goods.

Security interests which are created by statute or common law (e.g. warehouseman's, repairer's and salvor's common law salvage liens) are also expressly excluded from the requirement for registration and are generally accorded priority over PPSA security interests.

Annexed as an appendix to this Newsflash is a summary of some of the interests that parties in the shipping and logistics sector may need to register in order to obtain protection under the PPSA.

## Priority of Interests

The first registered interest will generally take priority over any unregistered or later registered interests – even where the unregistered or later registered interest would have been considered a superior interest at law prior to the PPSA coming into force.

The exceptions to this general rule include (a) where the person with the security interest in any property is also in possession of it, in which case possession will in most instances grant superior priority and protection and (b) where the security interest arises under statute or common law (as discussed above).

As a result, in practice the PPSA makes it essential for any person having an interest in any item of personal property (whether an ownership interest or even merely an interest in the possession of the property e.g. a lessee's interest) but who does not also have physical possession of the property to register its interest.

A security interest must be registered by completing and lodging a financing statement. Particular care must be taken in completing the financing statement, as any errors in the description of the property or the security interest may result in the registration being ineffective.

## Commencement

At present, the PPSA regime is scheduled to commence on 30 January 2012.

There is a "migration period" for all existing security interests created prior to the commencement of the PPSA regime and already registered on one of the numerous existing registers. The migration period began on 21 November 2011 and during this period, those existing security interests will be transferred to the PPS Register before commencement of the PPSA regime on 30 January 2012. Existing security interests will be 'temporarily perfected' for a transitional period of 24 months. At the end of that 24 month transitional period, if such interests have not been re-perfected by being updated with relevant collateral classes and additional information, they will be removed from the PPS Register.

New security interests which fall under the PPSA regime will need to be registered as soon as possible after the commencement of the new regime to ensure such security interests are perfected and accorded protection. Registration lasts between seven years and an

indefinite end time, depending on the nature of the property over which the interest is secured. It is important to ensure that registrations are renewed before expiry, to maintain protection.

## How can we assist?

We can assist by:

- a) reviewing existing security and commercial arrangements to determine which security interests (if any) require registration;
- b) registering existing and new security interests under the PPSA;
- c) drafting PPSA-effective security agreements and preparing amendments to existing documentation to address the commencement of the PPSA;
- d) negotiating security agreements on behalf grantors or secured parties; and
- e) advising on the adequacy of priority arrangements and enforcement proceedings.

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If you have any queries or require further information, please contact:

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## Appendix

### Examples of interests that parties in the shipping and logistics sector may need to register in order to obtain protection under the PPSA

#### Financing Banks

- a) Will need to register any mortgage over a ship, offshore installation or other equipment, including whilst under construction – This will also extend to vessels not presently caught by the Shipping Registration Act and not required to be registered (e.g. vessels under 24 metres in length, Government ships, fishing vessels and pleasure craft).

#### Ship Owners/Operators

- a) Will need to register their ownership interest in any ship – Existing registrations under the Australian Register of Ships will be migrated to the PPS register. This will also extend to vessels not presently caught by the Shipping Registration Act and not required to be registered (e.g. vessels under 24 metres in length, Government ships, fishing vessels and pleasure craft);
- b) May need to register any interest in sub-freight/hire arising under a charterparty;
- c) May need to register any interest in bunkers transferred at the commencement of the charterparty;
- d) May need to register their interest in any assignment of insurance or insurance proceeds under a charterparty (ie where Charterers are required to effect certain insurances in respect of the vessel or her operations);
- e) May need to register any contractual lien over goods or documents of title (e.g. for non-payment of freight).

## Charterers and Sub-Charterers

- a) May need to register their interest (both as charterer in possession *vis a vis* the owners and as disponent owners *vis a vis* any sub-charter) in the chartered ship (i.e. including any liens over sub-freight/hire, goods or documents of title, as discussed above under “Ship Owners/Operators”);
- b) May need to register their interest in any assignment of insurance or insurance proceeds under a charterparty (ie where Owners are required to maintain insurances in respect of the vessel, which are also to be for the benefit of Charterers);
- c) May need to register any interest in bunkers taken over at the commencement of the charterparty.

## Shipping Lines

- a) As above for Ship Owners/Operators ;
- b) May need to register their interest in all shipping containers owned or leased from container leasing companies and released to Merchants - Under common contractual arrangements for the release of containers, this bailment or implied hire is for an indeterminate period and/or a period of more than 90 days and thereby constitutes a ‘PPS Lease’. However, in practice and for reasons of time and cost, registration of each container is unlikely to be feasible. Shipping Lines may seek to amend their container terms and conditions to try and avoid the release of shipping containers from falling within the definition of a PPS Lease and, therefore, the need for registration.

## Bunker Suppliers

- a) May need to register their interest as owner of the bunkers prior to payment – i.e. under the usual retention of title until payment clauses contained in most bunker supply terms and conditions.



## Stevedores

- a) May need to register any contractual lien over goods arising from the provision of services, other than warehousing services - Common law or statutory liens for warehousing services may not require registration as the PPSA generally gives first priority to such interests.

## Container Leasing Companies

- a) May need to register their interest in all shipping containers leased to shipping lines – However, in practice and for reasons of time and cost, this is unlikely to be feasible.

## Offshore Equipment Suppliers/Hirers

- a) Suppliers may need to register their ownership of any equipment leased to companies conducting offshore operations i.e. compressors, cranes, welding units, diving spreads;
- b) Hirers may need to register their possessory interest in the equipment for the period of the hire.

## Freight Forwarders

- a) May need to register any contractual liens over goods or documents of title.

## Salvors

- a) May need to register any lien over any ship obtained by the provision of salvage services under an agreement with the shipowner - Common law or statutory liens may not require registration as the PPSA generally gives first priority to such interests.

## Barge Owners

- a) May need to register their ownership of any barge chartered or hired to another person.