

Enforcement of Securities under the Personal Property Securities Act 2009

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Introduction

- Chapter 4 of the PPSA deals with enforcement of security agreements to which the PPSA applies.
- This is a broad overview.
- See www.ag.gov.au for more information- in particular the Explanatory Memorandum to the Act and the Commentary on the Personal Property Securities Bill released in May 2008.

- Essentially Chapter 4 gives secured parties a number of enforcement rights and remedies which they would not, or may not, otherwise have under the terms of their security agreements and other legislation.
- It distinguishes between collateral used predominantly for personal, domestic or household purposes and other collateral. This distinction has a bearing upon the extent to which parties can contract out of parts of Chapter 4 and upon which remedies are available to a secured party under the Act.

Its object is to ensure that when enforcement action is taken all parties who may be affected have an opportunity to appropriately protect their interests. Those parties are:

- The secured party who is taking enforcement action;
- Any other secured parties;
- The grantor or owner of the collateral;
- The debtor, where the debtor is not the grantor; and
- Other interested parties.

- All rights, duties and obligations that arise under Chapter 4 must be exercised and discharged honestly and in a commercially reasonable manner.
- Chapter 4 does not codify the law in relation to the enforcement of security agreements

Exclusions from Chapter 4

- Interests which are deemed to be security interests but which do not in fact secure the payment or performance of an obligation.
- Security interests in goods that are located outside Australia.
- Property of a business while a receiver or controller appointed under Part 5.2 of the Corporations Act 2001 is in control of it.

Partial exclusions from Chapter 4

- Only a few of the sections in Chapter 4 apply in relation to a person who has perfected a security interest in an investment instrument or an investment entitlement by taking possession or control.

Chapter 4 is not a code

- Chapter 4 does not derogate from the rights, remedies and obligations which a debtor, grantor and secured party have against each other under the terms of the security agreement or under other laws.
- The parties to a security agreement remain free to negotiate their own contractual terms (subject to any other laws such as the NCC).

Contracting out

- Parties can contract out of a number of the provisions in Chapter 4 if the collateral is not used predominantly for personal, domestic or household purposes.
- If the collateral *is* used predominantly for personal, domestic or household purposes, they can only contract out of section 126 which deals with *apparent* possession of collateral.
- But if the parties contract out of a provision of the Act, it will nevertheless apply to the extent that it gives rights to, or imposes obligations upon, persons who are not parties to the security agreement, such as other secured parties or, if the grantor is not the debtor, the debtor.

Application of the NCC

- The Act does not affect rights and obligations arising under the NCC, where the NCC applies.
- But where both the Act and the NCC apply concurrently many of the provisions of the Act will be taken to have been complied with if corresponding provisions of the NCC have been complied with.

Multiple security interests

- If there are multiple secured parties any of them can commence enforcement action, regardless of their priority ranking.
- However, if a secured party seizes collateral which is subject to a higher priority security interest, and the higher priority secured party was entitled to seize the collateral, the higher priority secured party can require the secured party which seized the collateral to hand over possession. In such circumstances the higher priority secured party will be liable for the reasonable expenses of the secured party which seized the collateral

Default triggers statutory rights

- A secured party's statutory rights and remedies become operative upon a debtor's default under a security agreement .
- The Act does not specify events of default; they are as specified in the security agreement

Effect of judgments

- A secured creditor does not need to obtain a judgment against the debtor before exercising its rights of execution against the collateral.
- Neither the obtaining of a judgment nor the issuing of execution processes in respect of a judgment extinguishes a security interest .

Interests in personal property and land

- Sometimes commercial security agreements apply to both personal property and land.
- Under the Act the secured party has the option of proceeding with enforcement of such a security agreement as if the personal property were land – ie to initiate one enforcement proceeding in relation to both the personal property and the land.
- The Act achieves this by incorporating the land laws of the States and Territories into the Act, with such modifications as are necessary to facilitate their application to personal property

- This remedy is not available if the NCC applies to the security interest or if the collateral is used predominantly for personal, domestic or household purposes

In deciding whether to exercise this option the secured party must act reasonably and only take into account:

- The respective values of the personal property and the land;
- The nature of any connection between the personal property and the land;
- Whether the land and the personal property are both located in the same State or Territory; and
- Such other matters as are relevant to efficient enforcement of the secured party's interests.

- The land laws of a State or Territory in any way, nor does the Act expand or derogate from State and Territory jurisdiction, but State Courts will have jurisdiction to hear matters involving the exercise of relevant rights.
- If a secured creditor elects to use this option, then only a few sections of Chapter 4 apply. The secured creditor enforces the security agreement as it would under the applicable land laws.

Security interests in liquid assets

- The Act give particular enforcement rights in relation a security interest in a liquid asset.
- Liquid assets are debts due to a debtor by a third party. There are significant exclusions.
- The secured party can give the third party a notice and the third party must then make payment direct to the secured party.
- If there's a higher priority secured party it must be given prior notice and then has the option of giving notice to the third party itself

Enforcement by seizure

- A secured party may seize collateral by any method permitted by law.
- Unless a particular method for the seizure of intangible property has been agreed, such property may be seized by giving a notice stating that the giving of the notice constitutes seizure .
- A secured party who has perfected a security interest in collateral by possession or control may seize the collateral by giving notice to the grantor and, if the collateral is a licence, the licensor or its successor.
- If collateral cannot be readily moved, or adequate storage facilities are not readily available, a secured party may seize the collateral by giving notice taking apparent possession

- Once the secured party has seized collateral it must either dispose of it or take action to retain it.
- Subject to the security agreement it has a 'reasonable period' to determine what it will do.

Disposal of seized collateral

- A secured party may dispose of seized collateral (subject to giving appropriate notice) by:
 - Private or public sale (including auction or closed tender);
 - Lease, if the security agreement permits it, and provided that the collateral is not used predominantly for personal, domestic or household purposes; or
 - If the collateral is intellectual property, by licence.
- The power to dispose of a licence is subject to the terms of the licence and any applicable laws

Purchase by secured party

A secured party may itself purchase the collateral by public sale if:

- the collateral is not used predominantly for personal, domestic or household purposes;
- it pays at least the market value; and
- it has given notice of its intentions to the grantor and any higher priority secured party and has not been given a notice of objection.

If the secured party disposes of the collateral other than by purchasing it, it has a duty to exercise all reasonable care to:

- Obtain at least the market value of the collateral, if there is a market value; or
- Obtain the best price that is reasonably obtainable in the circumstances.

- After disposing of the collateral, or every 6 months if disposal is delayed, the secured party has an obligation to provide a statement of account on request.
- If collateral has been disposed of under these provisions the acquiring party receives the collateral free of the interests of the grantor, the secured party and any lower ranking secured parties. Any higher ranked secured party retains their security interest in the collateral.

Enforcement by retaining the collateral

A secured party who has seized collateral may retain it provided that:

- the collateral is not used predominantly for personal, domestic or household purposes; and
- it has given notice of its intentions to the grantor and certain other secured parties and has not been given a notice of objection.

- Such a secured party can take steps to have the title to the collateral pass to it (it does not pass by operation of law).
- It takes the collateral free of the interests of the grantor and any lower ranking secured parties.
- Its own security interest is extinguished and it has no further claim against the grantor for outstanding obligations.

Notice requirements

The usual notice requirements are:

- Before a secured party initiates enforcement action under incorporated land laws it must give notice to the grantor, other secured parties who hold perfected security interests and persons who have given written notice that they claim an interest in the collateral.
- Before a secured party initiates enforcement action in relation to liquid assets it must give notice to the grantor and higher priority secured parties.

Notice requirements

- Before a secured party disposes of collateral it must give notice to the grantor and higher priority secured parties.
- After a secured party has seized and disposed of collateral, or keeps the collateral for disposal at a later date, it must on request give a statement of account to the grantor and any other secured party.
- A secured party who intends to retain collateral must give notice to the grantor and certain other secured parties.

But a notice does not have to be given if:

- The secured party has failed to locate the person to whom notice is to be given, having made reasonable attempts to do so;
- The person to whom notice is to be given has waived the requirement in writing (note, a grantor can only do this after the debtor has defaulted); or
- A Court waives the requirement for some other reason, on an ex parte application.

Also, a notice of intended disposal of collateral does not have to be given if the secured creditor believes on reasonable grounds that:

- the secured party was induced to enter into the security agreement by fraud on the part of the debtor or the grantor;
- the collateral might perish within 10 business days of seizure;
- there will be a material decline in the value of the collateral if it is not disposed of immediately; or
- the expense of preserving the collateral is disproportionately large in relation to its value

Or if:

- The collateral is foreign currency; or
- The collateral is to be disposed of in accordance with the operating rules of a clearing and settlement facility

Distribution of proceeds

Proceeds received by the secured party who enforces against the collateral must be applied in the following order:

- To obligations to persons holding interests (other than security interests) in the collateral that have a higher priority to the interest of the secured party in their order of priority;
- To reasonable enforcement expenses;
- To obligations to higher priority secured parties in their order of priority;

- To obligations to the enforcing secured party;
- To obligations to lower priority secured parties in their order of priority; and
- To the grantor.

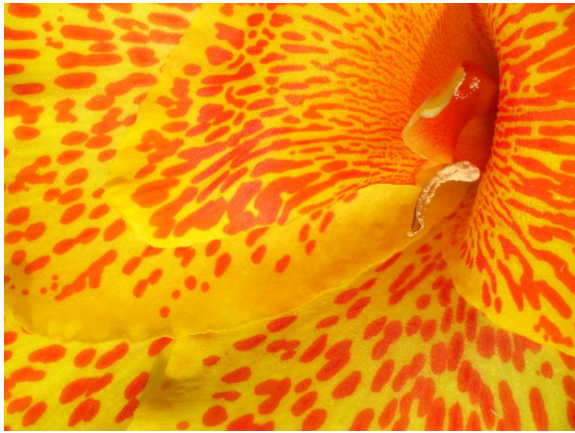
- A secured party is not liable in respect of an application of proceeds if it applied the proceeds honestly and in a commercially reasonable manner.

Right to redeem collateral

- Until collateral is disposed of, any other secured party or the grantor may redeem the collateral by paying the secured creditor the amount required to discharge the secured obligations, or by performing the obligations, and by paying the enforcement expenses.
- The grantor's right to do so takes priority.

Reinstatement of the security agreement

- Until collateral is disposed of or retained, a person may reinstate the security agreement by paying any amount in arrears (ignoring accelerated amounts) and enforcement expenses and remedying any other default.
- But this can only be done once in relation to any security agreement .



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