

Energy & Resources Alert

Impact of the new personal property securities regime

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Under the *Personal Property Securities Act 2009* (Cth) (**PPSA**), a new personal property securities regime will commence in October 2011. This new personal property securities regime is expected to have a significant impact on energy and resources projects and standard contractual arrangements.

What is a security interest in or over personal property?

Under the PPSA, personal property is any property other than land and certain statutory rights or entitlements that are expressly declared by legislation not to be personal property.

A security interest in or over personal property will arise when a right in relation to personal property is provided for by a transaction, that in substance secures payment or performance of an obligation.

What kind of projects and contractual arrangements will be caught by the PPSA?

The PPSA is expected to catch a number of projects and contractual arrangements. For illustrative purposes these may include:

- **Joint venture agreements** – security interests may be created under a cross-charge or default provision. For example, a security interest is likely to exist where an agreement provides for dilution of a defaulting party's interests under the agreement to the benefit of a non-defaulting party.
- **Farm in and farm out agreements** – may create security interests under retention of title provisions. For example, a security interest is likely to exist where a farmor attempts to secure performance of a farmee by including a provision retaining title to a product until completion of a works schedule.
- **Supply contracts** – may also create security interests under retention of title provisions. For example, a security interest is likely to exist where a party makes provision to retain title in a product, plant or equipment until payment under a contract has been received.

How will the PPSA affect these projects and contractual arrangements?

Under the PPSA, security interests in or over personal property, may be defeated or unenforceable where the security interest has not been 'perfected' and another party has 'perfected' a security interest over the same personal property. For a security interest to be 'perfected' it will need to be registered on the Personal Property Securities Register (**PPS Register**).

The issue of confidentiality around commercially sensitive projects and contractual arrangements has been a heated topic of debate. In order to secure 'perfection', documents containing provisions in relation to security interests (for

example joint venture agreements or supply contracts) will be notified to the PPS Register. This means that certain third parties may be able to obtain commercially sensitive project arrangements. In order to keep commercially sensitive project arrangements confidential, parties will need to consider whether provisions relating to security interests should be extracted from the main document (for example a joint venture agreement) and drafted in a side security agreement for registration.

Will mining and petroleum tenements also be affected by the PPSA?

Although land is generally not affected by the PPSA, unless legislation otherwise expressly exempts them, mining and petroleum tenements are personal property for the purposes of the PPSA. If mining and petroleum tenements are personal property, then security interests over mining and petroleum tenements will need to be registered on the PPS register.

It is expected that all States and Territories will have enacted legislation declaring most mining and petroleum tenements to not be considered personal property under the PPSA by the proposed introduction of the new regime in October 2011.

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