

Mining

August
2014

FOREIGN INVESTMENT IN AUSTRALIA'S MINING SECTOR – FREQUENTLY ASKED QUESTIONS (4): PERSONAL PROPERTY SECURITIES LEGISLATION

This is a version of an Article that first appeared in the Asia Miner, March/April 2014 issue and is reproduced with permission. www.asiaminer.com



This is the fourth in a series of seven articles being prepared by HFW which aim to answer frequently asked questions concerning foreign investment in Australia's mining sector. In this article, we will look at the impact of the Personal Property Securities Act 2009 (Cth) (the PPSA) on the mining sector.

The PPSA which came into effect on 30 January 2012 establishes a single national law governing the creation, priority and enforcement of security interests over personal property.

The PPSA represents a fundamental shift in the traditional understanding of the law governing personal property in Australia and interests not previously treated as security interests are now subject to the new regime. The introduction of the PPSA has had far-reaching consequences for all entities and industries conducting business in Australia, including stakeholders in the resources industry.

Personal property

Personal property includes many different kinds of tangible and intangible property, other than real property and certain statutory licences. Examples include motor vehicles, plant and equipment, business inventory, intellectual property and company shares.

Mining tenements and associated water rights, while technically falling within the definition of personal property, have been declared by most State and Territory legislation not to be personal property for the purposes of the PPSA. Minerals extracted under mining tenements, however, are personal property subject to the PPSA.

Security interests

The PPSA regulates the taking of security interests in personal property. A security interest means an interest in personal property provided for by a transaction that, in substance, secures payment or the performance of an obligation (without regard to the form of the transaction or



the identity of the person who has title to the property). The PPSA has also deemed certain interests to be security interests even though they would not traditionally have been considered security interests – for instance, the interests of a supplier of goods on a retention of title basis and the interests of a lessor or bailor of goods can be deemed to be security interests under the PPSA.

Set out below are examples of some common arrangements arising out of the mining activities that may be security interests under the PPSA:

- **Joint venture agreements:** default and dilution provisions which are commonly incorporated in resource joint venture agreements can give rise to security interests where they secure the payment of money or the performance of an obligation (eg unpaid contributions by the defaulting joint venturer).

A security interest means an interest in personal property provided for by a transaction that, in substance, secures payment or the performance of an obligation (without regard to the form of the transaction or the identity of the person who has title to the property).

For example, if a default provision provides that a joint venture participant who fails to make a cash call must compulsorily transfer all or part of its joint venture interest or off-take rights to the non-defaulting participants, this may give rise to a security interest which will need to be protected.

- **Cross charges:** for the purpose of securing payment of called sums and other obligations under a joint venture agreement, joint venture partners in the mining sector often enter into a cross charge under which each joint venturer charges certain property in favour of the other joint venturers. To the extent that this property relates to personal property, provisions of the PPSA should be taken into consideration and appropriate action taken by the chargee(s).
- **Equipment leases:** any bailment or lease of mining equipment or other goods may also constitute a security interest which the lessor or bailor must protect.
- **Commingling of goods:** the PPSA has changed the way in which security interests are treated for goods that have become an unidentifiable part of a larger product (e.g., iron ore in a stockpile). The PPSA provides that a security interest continues if the goods are manufactured, processed, assembled or commingled. Provided that a secured party has taken steps to attach and perfect its security interest in the original goods, the secured party potentially has rights to receive a proportion of the sale proceeds of the finished product. The proportion that the secured party would ultimately receive depends on the value and ratio of the goods when compared to the other goods that make up the finished product.

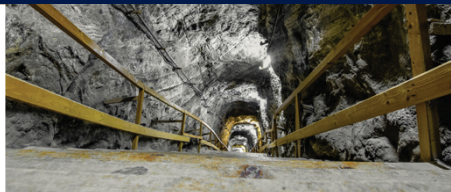
...if a default provision provides that a joint venture participant who fails to make a cash call must compulsorily transfer all or part of its joint venture interest or off-take rights to the non-defaulting participants, this may give rise to a security interest which will need to be protected.

Holders of security interests must perfect their interest

Secured parties must take steps to perfect their security interests to maximise the chance of effective enforcement. It is important to note that in the event of insolvency, subject to only a few exceptions, an unperfected security interest will vest in the party that has granted the security interest (the “Grantor”). In these circumstances the secured creditor will lose its security and become unsecured.

Generally perfection can be achieved when a secured party:

- Has possession of the collateral (personal property that is the subject of a security interest); or
- Has control of the collateral; or
- Has a documented security interest, and has taken extra steps to protect the interest by registration on the Australian PPS register.



A perfected security interest takes priority over an unperfected security interest. Between perfected security interests, perfection by control has the highest priority than other forms of perfection. The next level of priority among perfected security interests is given (subject to certain rules) to a class of security interests known as purchase money security interests or PMSI's.

Priority

The PPSA establishes a complete and complex set of rules for determining priority between competing security interests. A perfected security interest takes priority over an unperfected security interest. Between perfected security interests, perfection by control has the highest priority than other forms of perfection. The next level of priority among perfected security interests is given (subject to certain rules) to a class of security interests known as purchase money security interests or PMSI's. Speaking generally, PMSI's include the interests of financiers, the interests of certain lessors/bailors of equipment and the interests of suppliers who have supplied goods on a retention of title basis. Priority between perfected security interests that are not PMSI's is determined on a first-in-time basis.

It is important to be aware that ownership of an asset can be irrelevant in determining priority disputes.

While the PPSA was introduced to streamline the law in Australia relating to security interest in personal property, it has given rise to new complexities and practical considerations that cannot be ignored when undertaking business in Australia.

For more information, please contact: [Aaron Jordan](#), Partner, on +61 3 8601 4500 or aaron.jordan@hfw.com, or [Connie Chen](#), Special Counsel, on +61 2 9320 4616 or connie.chen@hfw.com or your usual contact at HFW.

Previous articles in this series can be found at:

- **Australian's foreign investment notification regime** - <http://www.hfw.com/investment-in-Australias-mining-sector-November-2013>;
- **Business structure** - [http://www.hfw.com/Foreign-investment-in-Australias-mining-sector-\(2\)-December-2013](http://www.hfw.com/Foreign-investment-in-Australias-mining-sector-(2)-December-2013); and
- **Exploration and mining rights** - <http://www.hfw.com/Foreign-investment-in-Australias-mining-sector-April-2014>.

Lawyers for international commerce

hfw.com

© 2014 Holman Fenwick Willan LLP. All rights reserved

Whilst every care has been taken to ensure the accuracy of this information at the time of publication, the information is intended as guidance only. It should not be considered as legal advice.

Holman Fenwick Willan LLP is the Data Controller for any data that it holds about you. To correct your personal details or change your mailing preferences please contact Craig Martin on +44 (0)20 7264 8109 or email craig.martin@hfw.com

São Paulo London Paris Brussels Geneva Piraeus Dubai Shanghai Hong Kong Singapore Melbourne Sydney Perth