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**PPS: Specific Issues -  
Chaos In The Making.....**

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# PPS in Australia – specific issues

Aspects of taking security

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# Aspects of taking security

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- Meaning of “security interest”
- Creation of the interest in the “collateral”
- Taking steps to protect the interest from subsequent extinguishment or loss of priority

# Meaning of 'security interest'

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- Section 12(1):

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

# Meaning of 'security interest'

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- 'Functional' approach
- Ambiguity
  - an interest that is provided for by a transaction AND in substance secures payment, etc; or
  - an interest that is provided for by a transaction THAT in substance secures payment, etc.
- Uncertainty
  - Meaning of 'in substance'
  - Leases
  - ROT
  - Subjective

# Deemed security interests

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- Section 12(3): certain interests deemed to be security interests
- Principally:
  - the interest of a transferee of an 'account' or 'chattel paper';
  - the interest of a consignor under a commercial consignment; and
  - the interest of a lessor under a lease for more than 12 months
- Continued importance of general definition

# Creating security interests

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- Section 18 - 20
- Section 18: Effectiveness of security agreements
  - A security agreement is effective according to its terms.

# Creating security interests

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- **Section 19: Enforceability against the grantor**
- subsection 19(1): 'a security interest is enforceable against a grantor in respect of particular collateral only if the security interest has attached to the collateral'; and
- subsection 19(2): 'a security interest attaches to collateral when:
  - (a) the grantor has rights in the collateral, or the power to transfer rights in the collateral to the secured party; and
  - (b) either:
    - (i) value is given for the security interest; or
    - (ii) the grantor does an act by which the security interest arises.'



# Creating security interests

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- **Section 20: Enforceability against third parties**

A security interest is enforceable against a third party in respect of particular collateral only if:

- (a) the security interest is attached to the collateral; and
- (b) one of the following applies:
  - (i) the secured party possesses the collateral;
  - (ii) the secured party has perfected the security interest by control;
  - (iii) a security agreement that provides for the security interest covers the collateral in accordance with subsection (2).

# Formalities

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- **Section 20(2)**

A security agreement covers collateral in accordance with this subsection if:

(a) the security agreement is evidenced by writing that is:

(i) signed by the grantor (see subsection (3)); or

(ii) adopted or accepted by the grantor by an act specified in the writing that is done with the intention of adopting or accepting the writing; and

(b) the writing evidencing the agreement contains:

(i) a description of the particular collateral, subject to subsections (4) and (5);  
or

(ii) a statement that a security interest is taken in all of the grantor's present and after-acquired property; or

(iii) a statement that a security interest is taken in all of the grantor's present and after-acquired property except specified items or classes of personal property.

# Who is the 'grantor'?

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- (a) a person who owns the personal property, or has the interest in the personal property, to which a security interest is attached (whether or not the person owes payment or performance of an obligation secured by the security interest); or
- (b) a person who receives goods under a commercial consignment; or
- (c) a lessee under a PPS lease; or
- (d) a transferor of an account or chattel paper; or
- (e) a transferee of, or successor to, the interest of a person mentioned in paragraphs (a) to (d); or
- (f) in relation to a registration with respect to a security interest:
  - (i) a person registered in the registration as a grantor; or
  - (ii) a person mentioned in paragraphs (a) to (e).

# Correspondence to other PPS regimes – a code or not?

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- Overseas models constitute a code for the creation of security interests:
  - a security agreement is effective according to its terms;
  - such an agreement, or the interest created by it, is also effective against third parties, subject to the grantor having “rights” in the collateral
- Australian position unclear
- Definition of ‘security agreement’
- Section 257: Relationship between Australian laws  
Subsection 18(1) is subject to each of the following laws:
  - (a) a law of the Commonwealth (other than this Act);
  - (b) a law of a State or a Territory;
  - (c) the general law.

## *Nemo dat*: Just a flesh wound?

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- *Nemo dat* principles not applicable under overseas models
- Indications that the principle survives in the Australian bill
  - section 257: preservation of general law
  - definition of 'grantor'
  - section 112

# Perfecting security interests

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- Not defined in conceptual terms – just prescribed steps
- Importance of perfection
  - Extinguishment rules
  - Priority rules
  - Validity in bankruptcy / winding up
- Modes of perfection:
  - Registration
  - Possession
  - Control

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