PPSA model clauses
General security agreement

16 May 2013

[1]

1 Security interest

The Grantor grants a security interest in the Collateral to the Secured Party to secure payment of the Secured Money.

This security interest is[2] [a transfer by way of security[3] of Collateral consisting of:

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[1] These clauses include footnotes setting out why they have been included from a PPSA perspective. They do not provide exhaustive guidance on all the issues which may arise when using these clauses.

[2] This clause assumes that the nature of the security interest should be characterised. While the characterisation is irrelevant for the purposes of the PPSA except in limited circumstances, it remains relevant outside the PPSA and provides useful guidance to courts and counsel in that context. For example:

- the PPSA may not apply to some security interests under the GSA because:
  - the collateral includes property which is not subject to the PPSA (such as land, water rights and property declared not to be personal property under other legislation); or
  - there is no requisite territorial nexus under s6;
  - the security interest is excluded under s8; or
- the validity or perfection of some security interests under the GSA may be governed by the laws of another jurisdiction as a result of the application of the governing law rules in Part 7.2.

In these circumstances, it is necessary to characterise the security interest.

A GSA will invariably cover PPSA and non-PPSA contexts so that the characterisation will always be required for the non-PPSA context. The clause is expressed generally to avoid unnecessary complexity.

[3] The secured party may prefer a transfer by way of security (or mortgage) in respect of Collateral that consists of accounts or chattel paper or Key Contracts for the following reasons:

- **Accounts or chattel paper**. The PPSA provides that a security interest provided for by a transfer of an account or chattel paper is not a circulating asset: s340(4A). Paragraph (a) is intended to enable the secured party to argue that it has a non-circulating security interest in contractual rights that constitute accounts or chattel paper under s340(4A) (such as debts) even if the secured party has not taken steps under Part 9.5 of the PPSA to control any relevant contractual rights (for example, by requiring all amounts received in payment of debts to be paid into a collection account and requiring the secured party to be a signatory to any withdrawals) and has not registered that it has taken control. It is unclear whether such an argument will succeed and if the secured party wants to be certain that it has a non-circulating security interest over the contractual rights such as debts, the secured party should take control and register that it has control.
- **Key Contracts**. It may be appropriate to include paragraph (b) if the transaction has a concept of "Key Contract" (or similar). The secured party may prefer a transfer by way of security (or mortgage) over contractual rights where the contract is material to the secured party. In these circumstances, the secured party may want to prevent the contract from being amended. Under the general law, a transfer of the contractual rights to the secured party will have the effect of preventing the grantor and counterparty from amending the contract whereas the granting of a charge or other security interest which does not involve any transfer may not: see *Brice v Bannister* (1878) 3 QBD 569.

(a) accounts and chattel paper (each as defined in the PPSA) which are not, or cease to be, Revolving Assets[4]; or

(b) a Key Contract.

To the extent any Collateral is not transferred, this security interest is] a charge.[5] If for any reason it is necessary to determine the nature of this charge, it is a floating charge over Revolving Assets and a fixed charge over all other Collateral.[6]

2 Collateral definition

[*Grantor is a company and NOT a trustee*]
Collateral means all the Grantor's present and after-acquired property. It includes anything in respect of which the Grantor has at any time a sufficient right, interest or power to grant a security interest.

[*Grantor is a company AND a trustee ONLY charging trust property*]
Collateral means all the Grantor's present and after-acquired property which is the subject of the Trust. It includes anything in respect of which the Grantor as trustee of the Trust has at any time a sufficient right, interest or power to grant a security interest.

[*Grantor is a company AND a trustee charging BOTH trust property and non-trust property*]
Collateral means all the Grantor's present and after-acquired property. It includes:

(a) anything in respect of which the Grantor has at any time a sufficient right, interest or power to grant a security interest; and

(b) the Trust Property.[7]

However, transfers by way of security (or mortgages) may raise other issues. For example, the underlying contract may prohibit the transfer or transferring contractual rights by way of security could result in the grantor losing the ability to rely on important rights of set-off.

4 If any contractual rights constituting accounts or chattel paper are Revolving Assets, the security does not operate by way of transfer because this would be inconsistent with the fact that the grantor is permitted to deal with Revolving Assets in accordance with clause 3.2(a) (Permitted Dealings).

5 This clause states that the security interest is a charge rather than a mortgage on the basis that there is very little difference between the two except in certain limited circumstances (for example, if the collateral consists of contractual rights, a secured party may prefer a transfer-based security for the reasons noted in footnote 3 (transfer by way of security)). There is also authority in Canada that a security interest arising under the PPSA in Canada "is correlative to a fixed charge": see *Bank of Montreal v Innovation Credit Union* 2010 SSC 47at [51].

6 This clause specifies whether the charge is fixed or floating so that the characterisation is clear if the GSA applies in a non-PPSA context for the reasons noted in footnote 5 (characterisation as a charge).

7 This definition purports to capture all of the trustee grantor's property (that is, all property it holds in its trustee and non-trustee capacity). **Care!** If the grantor is a trustee of more than one trust, paragraph (a) may also capture property subject to each trust of which the grantor is a trustee. If this is not the intention in your transaction, you should amend the definition accordingly.

Trust Property means, for a Trust[8], all the Grantor's present and after-acquired property which is the subject of the Trust. It includes anything in respect of which the Grantor as trustee of the Trust has at any time a sufficient right, interest or power to grant a security interest.

[***Grantor is a partnership granting security over partnership assets***]
Collateral means all the present and after-acquired property of the Partnership.[9] It includes anything in respect of which the Partnership has at any time a sufficient right, interest or power for the Grantor to grant a security interest [and each partner's interest in the Partnership].

3 Dealings with Collateral

3.1 Restricted dealings

The Grantor must not do, or agree to do, any of the following unless it is permitted to do so by clause 3.2 ("Permitted dealings") or another provision in a Transaction Document:

(a) create or allow another interest in any Collateral[10]; or

(b) dispose, or part with possession, of any Collateral.[11]

3.2 Permitted dealings

The Grantor may do any of the following in the ordinary course of the Grantor's ordinary business unless it is prohibited from doing so by another provision in a Transaction Document:

(a) create or allow another interest in, or dispose or part with possession of, any Collateral which is a Revolving Asset; or

(b) withdraw or transfer money from an account with a bank or other financial institution.

3.3 Revolving Assets

If a Control Event occurs in respect of any Collateral[12] then automatically:

(a) that Collateral is not (and immediately ceases to be) a Revolving Asset;

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8 You should insert a definition of "Trust". Consider whether future settled or declared trusts should be expressly covered.

9 You should insert a definition of "Partnership".

10 Consider whether you need to carve out any permitted security (for example, if another transaction document such as the facility agreement or security trust deed does not contain such a carve-out).

11 Consider whether you need to carve out any permitted disposals (for example, if another transaction document such as the facility agreement or security trust deed does not contain such a carve-out).

12 The term "Collateral" is used as opposed to "Revolving Asset" to cover "any collateral that would have been" a Revolving Asset (see definition of Control Event).

(b) any floating charge over that Collateral immediately operates as a fixed charge; [and]

(c) [if the Collateral is accounts or chattel paper (each as defined in the PPSA), it is transferred to the Secured Party by way of security;][13]and

(d) the Grantor may no longer deal with the Collateral under clause 3.2 ("Permitted dealings").

3.4 Conversion to Revolving Assets

If any Collateral is not, or ceases to be, a Revolving Asset, and becomes subject to a fixed charge or transfer under this clause 3, the Secured Party may give the Grantor a notice stating that, from a date specified in the notice, the Collateral specified in the notice is a Revolving Asset, or becomes subject to a floating charge or is transferred back to the Grantor. This may occur any number of times.

3.5 Inventory

Any inventory which is not, or ceases to be, a Revolving Asset is specifically appropriated to a security interest under this document. The Grantor may not remove it without obtaining the specific and express authority of the Secured Party to do so.[14]

4 Revolving assets definition

Revolving Asset means any Collateral:[15]

(a) which is:

(i) inventory;[16]

(ii) a negotiable instrument;[17]

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[13] This clause should be included if any accounts and chattel paper are to be transferred by way of security. It is intended to enable the secured party to argue that if a Control Event occurs in respect of any Collateral consisting of accounts and chattel paper, that Collateral is transferred to the secured party so the security interest in the collateral will not be a circulating asset by virtue of s340(4A). Although the issue is already covered by clause 1(a), it is also referred to here in order to reinforce that any accounts and chattel paper that are not transferred at the outset (because they are initially Revolving Assets) will be transferred if they later cease to be Revolving Assets (because of a Control Event).

[14] This clause tracks the language of s341(1) of the PPSA. Even if inventory is a Revolving Asset, this clause should be retained in case the inventory ceases to be a Revolving Asset under clause 3.3.

[15] Assets to be listed will depend on the transaction. If a non-circulating security interest, or fixed charge, is required over any of these assets, they should be deleted and appropriate control mechanics included.

[16] This does not incorporate the definition of "inventory" in the PPSA (either in s10 or s341(1B)). If you are asked to amend the definition to incorporate the PPSA definition, you should resist this or incorporate the definition in s341(1B). For the purposes of determining whether a security interest in inventory is circulating under Part 9.5 of the PPSA, inventory has "its ordinary meaning" and not the meaning in s10: see s341(1B).

[17] This does not incorporate the definition of "negotiable instrument" in the PPSA as the definition in the PPSA is broader than the general law definition.

(iii) machinery, plant, or equipment which is not inventory and has a value of less than [A$1,000] or its equivalent;

(iv) money (including money withdrawn or transferred to a third party from an account of the Grantor with a bank or other financial institution); and

(b) in relation to which no Control Event has occurred, subject to clause 3.4 ("Conversion to Revolving Assets").

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5 Control Event definition

Control Event means:

(a) in respect of any Collateral that is, or would have been, a Revolving Asset:

(i) the Grantor breaches, or attempts to breach clause 3.1 ("Restricted dealings") in respect of the Collateral or takes any step which would result in it doing so; or

(ii) a person takes a step (including signing a notice or direction) which may result in Taxes, or an amount owing to an authority, ranking ahead of the security interest in the Collateral under this document; or

(iii) [distress is levied or a judgment, order or Security is enforced [or a creditor takes any step to levy distress or enforce a judgment, order or Security], over the Collateral; or][19]

(iv) the Secured Party gives a notice to the Grantor that the Collateral is not a Revolving Asset. (However, the Secured Party may only give a notice if [the Secured Party reasonably considers that it is necessary to do so to protect its rights under this document or if][20] an Event of Default is continuing); or

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[18] This definition assumes that contractual rights (including debts) will **not** be revolving assets. As noted above, the transfer language in clauses 1(a) and 1(b) is intended to enable the secured party to argue that the secured party has a non-circulating security interest in any contractual rights that constitute accounts within the meaning of s340(5)(a) and (b) of the PPSA: see footnote 3 (transfer of account and chattel paper). However, if the secured party wants to be certain that it has a non-circulating security interest over such rights (or in a non-PPSA context, that a charge over such rights is to be fixed), the secured party should take control of those rights (for example, by requiring all amounts received in payment of the contractual rights to be paid into a collection account and requiring the secured party to be a signatory to any withdrawals) and register that it has control.

[19] Whether this clause should be included is a commercial issue. The termination of the grantor's ability to deal with collateral in these circumstances may not give the secured party a priority advantage in a PPSA context but it may give a priority advantage in a non-PPSA context (for example, fixing the charge may give it priority over a competing floating charge or enable the secured party to defeat a judgement or order in respect of the assets). If you include, consider whether permitted security interests should be carved out.

[20] Whether this language should be included is a commercial issue.

(b) in respect of all Collateral that is or would have been Revolving Assets:

(i) a voluntary administrator, liquidator or provisional liquidator is appointed in respect of the Grantor or the winding up of the Grantor begins; or

(ii) a receiver, receiver and manager or controller is appointed to any of the Grantor's property; or

(iii) something having a substantially similar effect to paragraph (i) or (ii) happens under any law.[21]

6 Statutory powers and notices

6.1 Exclusion of PPSA provisions

To the extent the law permits:

(a) for the purposes of sections 115(1) and 115(7) of the PPSA:

(i) the Secured Party need not comply with[22] sections 95, 118, 121(4), 125, 130, 132(3)(d) or 132(4); and

(ii) sections 142 and 143 are excluded;

(b) for the purposes of section 115(7) of the PPSA, the Secured Party need not comply with sections 132 and 137(3);

(c) [23][if the PPSA is amended after the date of this document to permit the Grantor and the Secured Party to agree to not comply with or to exclude other provisions of the PPSA, the Secured Party may notify the Grantor that any of these provisions is excluded, or that the Secured Party need not comply with any of these provisions, as notified to the Grantor by the Secured Party;] and

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[21] Some secured parties may prefer to provide that a Control Event occurs if the grantor becomes subject to a broader range of insolvency events (for example, by reference to a broader definition of Insolvency Event). If this is the case, you should amend the clause accordingly.

[22] This clause uses "*need not comply with*" rather than "*contract out of*" or "*exclude*" to address the risk that contracting out of an obligation to comply with a procedural requirement may lead to an argument that this prevents a secured party from relying on the remedy to which the procedural requirement relates. For example, the parties may contract out of the obligation of the secured party to give a notice of disposal of collateral under s130 or a notice of retention of collateral under s135. However, if the secured party wishes to dispose of collateral by purchasing it, or retaining it (ie rights that re afforded by the PPSA and are not otherwise available, or are heavily qualified, at general law), it may only do so if it has given a notice of disposal or notice of retention (as applicable) and no notice of objection is given to the secured party under s137(2). By stating that that the secured party may, but need not, comply with any relevant provisions, this ensures that if the secured party wishes to exercise a PPSA-only right, power or remedy which has related procedural requirements which must be complied with, the secured party has the freedom to elect to exercise the right, power or remedy and comply with the necessary procedural requirements.

[23] This clause is optional. If retained, it gives a secured party flexibility to exclude further provisions if the PPSA is later amended to permit the parties to contract out of other provisions. It is likely that the PPSA will be amended as a review of the operation of the PPSA must be undertaken by the Commonwealth within 3 years of the registration commencement time of 30 January 2012: s343(1).

(d) [the Grantor agrees not to exercise its rights to make any request of the Secured Party under section 275 of the PPSA, to authorise the disclosure of any information under that section or to waive any duty of confidence that would otherwise permit non-disclosure under that section.][24]

6.2 Exercise of rights by Secured Party

If the Secured Party exercises a right, power or remedy[25] in connection with this document, that exercise is taken not to be an exercise of a right, power or remedy under the PPSA unless the Secured Party states otherwise at the time of exercise. However, this clause does not apply to a right, power or remedy which can only be exercised under the PPSA.

6.3 No notice required unless mandatory

To the extent the law permits, the Grantor waives:

(a) its rights to receive any notice that is required by:

(i) any provision of the PPSA (including a notice of a verification statement);[26] or

(ii) any other law before a secured party or Receiver exercises a right, power or remedy; and

(b) any time period that must otherwise lapse under any law before a secured party or Receiver exercises a right, power or remedy.

If the law which requires a period of notice or a lapse of time cannot be excluded, but the law provides that the period of notice or lapse of time may be agreed, that period or lapse is one day or the minimum period the law allows to be agreed (whichever is the longer).

However, nothing in this clause prohibits the Secured Party or any Receiver from giving a notice under the PPSA or any other law.[27]

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[24] The intention of this clause is to prevent the secured party from having to provide information under s275 – not to restrict the grantor from making a request other than under that section or from disclosing the information itself. The clause restricts the waiver of duties of confidence as the existence of such a duty is itself a basis for non-disclosure under the section. This is to avoid the risk that a secured party will be estopped under s283 from denying the accuracy of any information provided.

If the grantor is concerned that the clause may have the effect of preventing the grantor from requesting information other than under s275, the following can be added after the first reference to s275:

"(but this does not limit the Grantor's rights to request information other than under section 275)"

[25] Firms may have their own preferred language to describe rights, powers and remedies.

[26] This clause refers to all PPSA notices because this enables the clause to be flexible enough to cover all notices under the PPSA including any further notice requirements which may be imposed if the PPSA is amended. However, the clause also expressly states that that grantor waives its rights to receive notices of verification statements to avoid any argument that the requirements of s157(3)(b) of the PPSA have not been satisfied.

[27] This is intended to make it clear that the obligation to give notices under s135 is not excluded by this clause. There is an argument that this clause could be read as excluding this obligation and if this is the case, this might compromise a secured party's ability to rely on the right to retain under s134 because the right to retain cannot be exercised unless the notice is given: s134(2)(a).

6.4 Appointment of nominee for registration[28]

For the purposes of section 153 of the PPSA, the Secured Party appoints the Grantor as its nominee, and authorises the Grantor to act on its behalf, in connection with a registration under the PPSA of any security interest in favour of the Grantor which is:

(a) evidenced or created by chattel paper [or a Key Contract];

(b) perfected by registration under the PPSA; and

(c) transferred to the Secured Party under this document.

This authority ceases when the registration is transferred to the Secured Party.

[28] This clause seeks to address the risk that the transfer of:

- chattel paper held by the grantor (eg as mortgagee under a goods mortgage or as lessor under a PPS lease); or
- a security interest in favour of the grantor arising under a Key Contract,

will un-perfect the underlying security interest evidenced by the chattel paper or arising under the Key Contract (ie the registration in respect of the goods mortgage or PPS lease or the security interest arising under the Key Contract will become defective because the grantor will no longer be the secured party in respect of that mortgage or PPS lease or other security interest).

The drafting of the clause tracks the language in s153 of the PPSA (see item 1(b) in the table) and simply refers to a nominee. It does not state that the nominee relationship is one of agency or trust as this is not required by the section. Section 153 does not specify the extent of authority that needs to be conferred on the nominee – this clause limits the authorisation to acting only in relation to the registration because an unlimited authority to act in relation to the security interest would expose the secured party to potential liability for the grantor's enforcement actions.