

Corporate Update

Personal Property Securities Act 2009

October 2011

Introduction

Are your priorities in order? The PPSA is coming and your mining Joint Venture Agreements will be affected.

Your Joint Venture agreement (JVA) has a strict confidentiality clause, contains various mechanisms to protect you in the event your joint venture partner becomes insolvent or defaults and you have a registered cross-charge. Your position is as secure as it can be, right? Wrong.

The Personal Property Securities Act 2009 (Cth) (PPSA), which is expected to commence in January 2012 and will apply retrospectively, will impact both your existing and future JVAs. Those joint venture partners who are not PPSA ready run the risk of 'losing' valuable rights under this new regime.

What is the PPSA?

The PPSA is a new national regime which replaces over 70 Commonwealth, State and Territory laws to create a comprehensive set of codified rules governing the creation, priority, enforcement and extinguishment of 'security interests' over 'personal property' in Australia.

'Security interests' created by JVAs

'Security interest' is broadly defined under the PPSA, therefore not only will traditional security interests, such as cross charges over joint venture interests, fall within the scope of the PPSA, but other contractual rights commonly included in JVAs may now constitute 'security interests'.

These potentially include:

- **Default rights:** rights granted to one joint venture partner exercisable upon default of the other such as:
 - forfeiture, dilution and compulsory sale rights; and
 - rights to withhold from a defaulting joint venturer that joint venturer's share of product until any default is satisfied; and
- **Power of attorney rights:** rights granted under very broad powers of attorney that enable each joint venturer partner to act in any circumstances on behalf of the other joint venture partner(s).

Confidentiality: your JVAs could be viewed by third parties

The PPSA also raises new confidentiality concerns for joint venturer partners. If a JVA does create a security interest, whilst the JVA itself does not need to be registered under the new regime (only certain details of the document and the security interest are required to be recorded), under certain circumstances a third party is entitled to access the JVA which could result in the disclosure of commercially sensitive information that was intended to be kept confidential.

Consequences if the JVA creates a 'security interest'

If the JVA creates a 'security interest' then the person who holds that interest will need to 'perfect' it in a timely manner (this is usually achieved via registration of the interest on the new register, the 'Personal Property Securities Register').

Failure to perfect, or delay in perfecting, can result in severe consequences, including:

- **Loss of priority:** another security interest over the same personal property may take priority over your interest (as a general rule, a 'perfected' security interest has priority over an 'unperfected' security interest).
- **Insolvency risks:** subject to some exceptions, an 'unperfected' security interest will 'vest' in the grantor (in this analysis, your joint venture partner) on insolvency. This means you effectively lose your security and become an unsecured creditor.
- **Extinguishment:** another person may acquire an interest in the personal property free of your security interest.

What should you be doing now to prepare for the commencement of the PPSA?

You should be preparing for the introduction of the regime now in order to protect your interests and to make the transition as disruption free on your business operations as possible. This includes:

Reviewing your existing JVAs to determine whether they create any security interests and if so, what steps need to be taken to protect these interests.

Drafting your new JVAs, cross-charges and priority deeds to reflect the new security concepts, language and priority rules being introduced by the PPSA.

Training your staff on the implication of the PPSA and preparing new internal guidelines (if necessary) as to the requirements for transactions and documentation.

How Squire Sanders can help?

If you require further information or you would like us to assist you in assessing the impact of the new PPSA regime on your business operations contact Duncan Maclean for more information:

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