

**The Personal Property Securities Act:
Securities law isn't what it used to be!**

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Introduction¹

The Personal Property Securities Act 2009 (Cth) (**PPSA**) and the regulations (**PPS Regulations**) and the register to be established under them (**PPSR**) are intended to replace the myriad of existing Commonwealth, State and Territory laws and registers for company charges, bills of sale, ship mortgages motor vehicle securities, crop liens, stock mortgages and most other securities affecting tangible and intangible personal property rights.²

The PPSA will not only rationalise the number of laws and registers governing personal property securities, it will also introduce major substantive changes to the current law which will be particularly important for creditors, equipment lessors, consignors and other retention of title suppliers, purchasers of accounts receivable and insolvency practitioners, and have a significant effect on documentation, business processes and risk management.

The PPSA and PPSR are intended to apply from 31 October 2011.

Key features of the PPSA

The PPSA is modelled on the Personal Property Securities Act 1999 (New Zealand) (**NZ PPSA**) and similar legislation in Canada and the United States but with some significant differences and innovations in drafting styles and policy.

What the PPSA will cover

With limited exclusions, the PPSA will apply to all security interests in tangible and intangible personal property. Personal property is any kind of property other than land, fixtures, water rights or a right, entitlement or authority that is granted by a Commonwealth, State or Territory law and declared by that law not to be personal property for the purposes of the PPSA.

Certain licences will be deemed to be personal property and capable of being the subject of a security interest.

What is a security interest?

The PPSA adopts a functional approach to 'security interests'. This means any interest in personal property provided for by a transaction that in substance secures payment or performance of an obligation will be a security interest for the purposes of the legislation regardless of its form or who has title to the collateral (i.e. the secured property).³ The definition of security interest expressly includes a fixed charge, floating charge, chattel mortgage, conditional sale agreement (including an agreement to sell subject to retention of title), hire purchase agreement, pledge, trust receipt, consignment, lease of goods, assignment, transfer of title or flawed asset arrangement, that in substance secures payment or performance of an obligation.⁴

Given the broad functional definition of 'security interest' it might be argued that the PPSA could potentially include an interest that is not proprietary in nature. However, when the objectives of the legislation and its various provisions are considered it seems the better interpretation is that a security

¹ This paper draws on material published by the author in Chapter 1 of LexisNexis, Personal Property Securities in Australia.

² The Commonwealth has relied on a referral of powers from the States to enact the legislation.

³ s.12(1), PPSA.

⁴ s.12(2), PPSA.

interest involves the secured party having a proprietary right or interest in the relevant property that is exercisable against not only the grantor but also against third parties with subsequent interests in the property.⁵

Although not relevant for matters governed exclusively by the PPSA, a security interest under the PPSA is likely to be characterised as a legal interest when the rights of the secured party are in competition with another person whose interest in property the subject of the security interest arises outside the PPSA.⁶

While in most cases it will be obvious whether a transaction in substance secures payment or performance of an obligation there will be occasions when this is not clear.

Documents may include clauses that constitute security interests even though those clauses are only incidental to the primary purpose of the document. For example, a guarantee that includes a charging clause covering personal property becomes a security agreement and a subordination agreement or guarantee that includes turnover trust provisions becomes a security agreement if it secures payment or performance of an obligation. It is the charging or turnover trust provisions that change the characterisation of the transaction from unsecured to secured for PPSA purposes.⁷

Some examples of transactions outside the traditional charge or mortgage type of security that could give rise to a security interest under the PPSA include:

- a sale of goods on a retention of title basis;
- a payment retention clause under a construction contract;
- a suspense clause in a guarantee;
- a debt factoring facility;
- an escrow agreement;
- an agent's right under an agency agreement to retain the principal's property until the agent has been paid its fees and expenses;
- a security deposit under a supply agreement;
- a real property mortgage, if it mortgages property other than the land, water rights and any fixtures.

Deemed security interests

In addition to the broad functional definition, the PPSA will also deem certain interests or rights in relation to personal property to be security interests whether or not they secure payment or performance of an obligation (**Deemed Security Interests**).⁸ Deemed Security Interests will include:

⁵ RCC Cuming, C Walsh and RJ Wood, *Personal Property Security Law*, Irwin Law, Toronto 2005 ,page 85; L Widdup and L Mayne, *Personal Property Securities Act: A Conceptual Approach*, LexisNexis, Wellington 2002 at 2.31 to 2.40.

⁶ *Bank of Montreal v Innovation Credit Union* [2010] 3 SCR 3 and *Royal Bank of Canada v Radius Credit Union Ltd* [2010] 3 SCR 38.

⁷ A contractual subordination without any proprietary interest should not be a security interest; s.12(6), PPSA.

⁸ s.12(3), PPSA.

- the interest of a transferee under a transfer of accounts receivable or chattel paper (a new concept in Australia)⁹;
- the interest of a consignor who delivers goods to a consignee under a commercial consignment; and
- the interest of a lessor or bailor of goods under a PPS lease.

A '**PPS lease**' means a lease or bailment of tangible property:

- for a term of more than one year; or
- for an indefinite term (even if the lease or bailment is determinable by one or both of the parties within a year of entering into the lease or bailment); or
- for a term of up to one year that is automatically renewable, or that is renewable at the option of one of the parties, for one or more terms if the total of all the terms might exceed one year; or
- for a term of up to one year, in a case in which the lessee or bailee, with the consent of the lessor or bailor, retains uninterrupted (or substantially uninterrupted) possession of the leased or bailed property for a period of more than one year after the day the lessee or bailee first acquired possession of the property (but not until the lessee's or bailee's possession extends for more than one year); or
- for goods that may or must be described by serial number in accordance with the PPS Regulations, if the lease or bailment is:
 - for a term of 90 days or more; or
 - for a term of less than 90 days, but that is automatically renewable, or that is renewable at the option of one of the parties, for one or more terms if the total of all the terms might be 90 days or more; or
 - for a term of less than 90 days, in a case in which the lessee or bailee, with the consent of the lessor or bailor, retains uninterrupted (or substantially uninterrupted) possession of the leased or bailed property for a period of 90 days or more after the day the lessee or bailee first acquired possession of the property (but not until the lessee's or bailee's possession extends for 90 days or more).

A PPS lease will not include:

- a lease by a lessor who is not regularly engaged in the business of leasing goods; or
- a bailment by a bailor who is not regularly engaged in the business of bailing goods; or
- a lease of consumer property as part of a lease of land where the use of the property is incidental to the use and enjoyment of the land; or

⁹ Chattel paper is writing (including in electronic form) that evidences both a monetary obligation and either or both a security interest in or lease of specific tangible property or specific intellectual property. Chattel paper will include equipment leases, hire purchase agreements, chattel mortgages and possibly certain retention of title supply arrangements.

- a lease or bailment of personal property prescribed by the PPS Regulations for the purposes of the definition of PPS lease, regardless of the length of the term of the lease or bailment.

The definition of PPS lease only applies to a bailment if the bailee provides value.

Deeming all PPS leases to be security interests is an extension of the approach already existing under REV's (i.e. the State and Territory motor vehicle security legislation). It recognises that it is often difficult to determine if a lease is an operating lease (sometimes referred to as a 'true lease') or a finance lease because the rights and responsibilities relating to the leased property can be shared or allocated as between lessor and lessee in a multitude of ways. A bright line test is achieved by deeming all PPS leases to be security interests for the purposes of the PPSA.¹⁰

While not all transfers of accounts receivable are intended to secure payment or performance of an obligation, many do just this. The degree of recourse to a transferor varies considerably and this makes it difficult to easily determine which transfers are intended to function as a security and which are intended to achieve an outright sale. The PPSA addresses this difficulty by treating all transfers of accounts receivable as security interests unless they occur in connection with the sale of a business or debt collection services. This approach, which follows the approach taken in each of the overseas jurisdictions that has undertaken similar reforms, enables priority issues as between purchasers of receivables and inventory financiers (whose claims extend to the proceeds of inventory) to be dealt with in a comprehensive and transparent manner.

Deeming a transaction to be a security interest for the purposes of the PPSA should not of itself change its characterisation for other legal or accounting purposes. For example, a PPS lease will be a security interest under the PPSA but this does not necessarily change its tax or accounting treatment.

A security interest does not include a licence¹¹ or an interest of a kind prescribed by the PPS Regulations.

Interests that will not be covered by the PPSA

The PPSA will not apply to:

- the interest of a seller who has shipped goods to a purchaser under a negotiable bill of lading to the order of the seller or another person on behalf of the seller unless the parties have otherwise evidenced an intention to provide for a security interest;
- a lien, charge, or any other interest in personal property, that is created, arises or is provided for by:
 - a law of the Commonwealth (other than the PPSA), a State or Territory, unless the person who owns the property in which the interest is granted agrees to the interest; or
 - operation of the general law;
- any right of set-off or right of combination of accounts;

¹⁰ The Canadian PPSA legislation did not originally deem all leases for a term of more than one year to be security interests. However, the difficulty encountered by the courts in distinguishing between a 'true' lease and a financing/security lease forced the change: L Widdup and L Mayne at 3.6 and 3.7.

¹¹ A licence will not be a security interest but a licence will normally be personal property and capable of being subject to a security interest.

- any right held by a person, or any interest provided for by a transaction, under an approved netting arrangement, a market netting contract or a close-out netting contract as defined in section 5 of the Payment Systems and Netting Act 1998 (Cth);
- an interest provided for by any of the following transactions:
 - the creation or transfer of an interest in land;
 - the creation of an interest in a right to payment, or the creation or transfer of a right to payment, in connection with an interest in land, if the writing evidencing the creation or transfer specifically identifies that land;
 - a transfer of an unearned right to payment under a contract to a person who is to perform the transferor's obligations under the contract;
 - a transfer of present or future remuneration payable to an individual as an employee or a contractor;
 - a transfer of an interest or claim in, or under, a contract of annuity or policy of insurance, except a transfer of a right to an insurance payment or other payment as indemnity or compensation for loss of, or damage to, collateral (or proceeds of collateral);
 - a transfer of an account made solely to facilitate the collection of the account on behalf of the person making the transfer;
 - a transfer of an account, if the transferee's sole purpose in acquiring the account is to collect it;
 - a transfer of an account or negotiable instrument to satisfy (either wholly or partly) a pre-existing indebtedness;
 - a sale of an account or chattel paper as part of a sale of business, unless the seller remains in apparent control of the business after the sale;
 - a transfer of the beneficial interest in a monetary obligation where, after the transfer, the transferee holds the monetary obligation on trust for the transferor;
 - certain interests in property created under the Bankruptcy Act 1966 (Cth);
 - a trust over some or all of an amount provided by way of financial accommodation, where the person to whom the financial accommodation is provided is required to use the amount in accordance with a condition under which the financial accommodation is provided;
 - a right entitlement or authority, whether or not exclusive, that is granted by or under the general law or a law of the Commonwealth, a State or a Territory in relation to the control, use or flow of water;¹²
 - an interest in a fixture;
 - a security interest in personal property taken by a pawnbroker in certain circumstances;

¹² Also note s.8(5) in relation to the exclusion of water rights.

- an interest that a person has:
 - as a member of a superannuation fund (within the meaning of the Superannuation Industry (Supervision) Act 1993); or
 - as a member of an approved deposit fund (within the meaning of the Superannuation Industry (Supervision) Act 1993); or
 - as a holder of a retirement savings account (within the meaning of the Retirement Savings Accounts Act 1997); or
 - in an account kept under the Small Superannuation Accounts Act 1995 in the name of the person; or
 - as a holder of a superannuation annuity (within the meaning of the Income Tax Assessment Act 1997);
- a charge created by either of the following provisions:
 - section 6 of the Commonwealth Inscribed Stock Act 1911;
 - section 5 of the Loans Redemption and Conversion Act 1921;
- a particular right, licence or authority granted by or under a law of the Commonwealth, a State or a Territory, if, at the time when the right, licence or authority is granted, or at any time afterwards, a provision of that law declares that kind of right, licence or authority not to be personal property for the purposes of the PPSA¹³;
- an interest of a kind prescribed by the PPS Regulations.

Care needs to be exercised when considering the exclusions in s.8 PPSA. For example:

- while mere rights of set off will not be covered by the PPSA (s.8(1)(d)), a right of set off coupled with 'flawed asset' restrictions on the right to withdraw a deposited amount of money is likely to make the overall arrangement a security interest that is subject to the PPSA;¹⁴
- while a 'transfer' of an interest under a contract of insurance is excluded by s8(1)(f)(v), a security interest that is not a 'transfer' may be covered by the PPSA and a transfer of a right to an insurance payment as indemnity for loss or damage to collateral will also be covered by the PPSA;
- interests in licences and authorities covered by s.8(1)(K), PPSA may be excluded from the scope of the PPSA but property derived from having those licences or authorities can be subject to the PPSA. For example, most Commonwealth, State and Territory mineral and hydrocarbon licences and tenements will not be covered by the PPSA but minerals and hydrocarbons produced under those licences will be 'goods' caught by the PPSA.¹⁵

¹³ The Commonwealth, States and Territories have enacted, or are in the process of enacting, legislation which specifies which rights, licences and authorities are excluded from the PPSA.

¹⁴ See s.12(2)(l), PPSA and note the decision of the Canadian Supreme Court in *Caisse populaire Desjardins de l'Est de Drummond v Canada* [2009] 2 SCR 94.

¹⁵ For a detailed list of licences and authorities excluded from the application of the PPSA refer to chapter 4.11 in LexisNexis, Personal Property Securities in Australia.

Although not expressly excluded, a transfer of personal property on the basis that the transferee is obliged to re-transfer to the transferor equivalent or fungible property should not be regarded as a security interest for the purposes of the PPSA.¹⁶ While different views have been expressed on the issue, such a transaction should only be a security interest if the transferor is entitled to have the particular property re-transferred to it upon satisfaction of the secured obligations but not if the transferee merely has a contractual obligation to re-transfer similar or equivalent property.¹⁷

Form of security agreements

Subject to satisfying the basic requirements for attachment and perfection (refer below), parties are generally free to negotiate the terms of their security agreement without the need to satisfy prescriptive form requirements. However, other Commonwealth, State or Territory laws may still need to be satisfied:

- in respect of matters which go beyond mere form and registration requirements (for example, governmental or regulatory authority consents) and to the extent those laws can operate concurrently with the PPSA¹⁸; and
- to the extent the security agreement deals with property to which the PPSA does not apply (for example, an all asset security to the extent it covers interests in land, fixtures, water rights and other property to which the PPSA does not apply).

The PPSA will not mandate the use of particular forms of security documentation. However, the PPSA will enable many pre-PPSA forms to be rationalised and simplified, particularly in relation to non-Deemed Security Interests. This is because:

- a security interest can be created by simply stating that "A grants to B a security interest in specific collateral or all of A's present and future personal property and proceeds to secure relevant obligations";¹⁹
- the PPSA is applicable to individuals, companies and other legal entities so there is no need to have different forms for different types of grantor;
- the PPSA is much more comprehensive than most pre-PPSA laws in terms of the types of property covered by it. One form of security agreement could be used for specific security over a range of different types of personal property instead of the usual pre-PPSA practice of having different forms of security over different types of personal property due to the various form requirements under pre-PPSA law. For example, one form of specific security agreement could replace various forms of chattel mortgage, crop lien and stock mortgage;
- the PPSA includes detailed remedy provisions for non-Deemed Security Interests for creditors who wish to rely on these rather than providing for their own contractual remedies.²⁰

¹⁶ For example, securities lending transactions of the type considered in *Beconwood Securities Pty Ltd v Australia and New Zealand Banking Group Limited* [2008] FCA 594 should not be security interests.

¹⁷ A contrary view is expressed in D Craig, *Credit Derivatives, Netting and ISDA Documentation: Recent Developments in New Zealand*, paper delivered at the 20th annual conference of the Banking and Financial Services Law Association, Queenstown, New Zealand, 3 and 4 August 2003.

¹⁸ Part 7.4, PPSA.

¹⁹ Note this language will not be effective in relation to property which is not personal property for the purposes of the PPSA. This can be particularly relevant in the context of all assets securities.

²⁰ However, note the enforcement provisions in Ch 4 of the PPSA will not always apply. Refer to paragraphs 2.104 to 2.111 below.

While the PPSA makes it clear that a security agreement is any agreement that creates a security interest and a security interest is not constrained by pre-PPSA notions of legal form or title²¹ particular forms of transactions (eg. lease or hire purchase) may still be adopted for tax, accounting or other non-security legal reasons. In some circumstances it may still be appropriate to use traditional language such as 'retention of title' rather than use generic 'security interest' wording. For example, a supplier of inventory who takes security for the unpaid purchase price will most likely have a 'circulating security interest' in inventory for the purposes of Part 9.5, PPSA and the Corporations Act unless it retains title. This will be important as it determines the supplier's priority over preferred creditors such as employee entitlements. Similarly, receivables financing is still likely to be structured as an assignment to the financier for new value, rather than a loan with security over the receivables, due to the operation of Part 9.5, PPSA and the treatment of 'circulating security interests' under the Corporations Act.²²

The demise of the fixed and floating charge

The PPSA will not distinguish between 'fixed' and 'floating' security interests and there will be no ongoing relevance for related concepts such as 'crystallisation'²³. However, it is open to the secured party and the grantor to agree the circumstances in which collateral can be disposed of by the grantor.²⁴ In addition, the extinguishment rules (referred to below) will protect third party transferees where applicable. These rules apply even in the absence of provisions in a security agreement allowing certain property to be disposed of by the grantor in the ordinary course of business.

Under the PPSA all security interests are effectively 'fixed', to use the current parlance, but the terms of the relevant security agreement or the application of the extinguishment rules may enable a third party transferee to take free of the security interest. The extinguishment rules do not generally affect priority contests as between secured parties.

Because other legislation and security agreements may continue to refer to 'charges', 'fixed charges' or 'floating charges', the PPSA includes provisions which explain how these terms are to be interpreted in the new PPSA environment.²⁵ While documents that are drafted as charges and which include crystallisation provisions may still provide effective security they will be interpreted subject to the PPSA and it is expected these forms of documentation will quickly fade anyway.

Entities covered by the legislation

The PPSA will apply to security interests given by corporations and other legal entities (irrespective of whether those entities are registered or required to be registered in Australia) as well as individuals. It will also be possible to register security interests in respect of registered managed investment schemes, trusts, partnerships and bodies politic.²⁶

²¹ ss 10 and 12(1), definitions of 'security agreement' and 'security interest'.

²² Refer to chapter 4.2 in LexisNexis, Personal Property Securities in Australia.

²³ s.19, PPSA specifies when a security interest 'attaches' to collateral (see below for further commentary on the concept of attachment) and it expressly provides that any reference in a security agreement to a 'floating charge' does not alter the time of attachment. In other words, crystallisation provisions will no longer have any relevance.

²⁴ The agreement will not be able to prevent the grantor from transferring the collateral. The transfer would however give rise to a default. See s.79, PPSA.

²⁵ Part 9.5, PPSA.

²⁶ Trusts and partnerships are not legal entities as such but relationships between persons.

Categorisation of collateral

Under the PPSA collateral is categorised into:

- accounts;
- ADI accounts;
- chattel paper;
- commercial property;
- consumer property;
- crops;
- currency;
- documents of title;
- financial products;
- financial property;
- goods;
- intangible property;
- intellectual property;
- intellectual property licences;
- intermediated securities (including rights in an account to which interests in financial products may be credited or debited and which is controlled by an intermediary on behalf of the account holder and shares held on CHESS);
- inventory;
- investment instruments (e.g. non-CHESS shares and interests in managed investment schemes);
- motor vehicles;
- negotiable instruments.

These categories are not all mutually exclusive unlike the classes of property prescribed for registration purposes (referred to below).

Many of the provisions in the PPSA apply equally to any collateral in any circumstances. However, the different categories of collateral become relevant for the purposes of some specific perfection, priority, extinguishment and enforcement rules that apply to particular categories of collateral generally or in certain circumstances. The meaning of perfection and brief commentary on the priority, extinguishment and enforcement rules appear below.

The PPSR²⁷

The PPSR will be wholly electronic and, subject to maintenance requirements, accessible 24/7. It will also operate on the basis of notice rather than document registration.²⁸ The notice will be known as a 'financing statement' and it can be registered before any secured transaction takes place. One registration can also cover multiple security interests provided it is completed appropriately.

A person must not apply to register a financing statement, or a financing change statement, that describes collateral, unless the person believes on reasonable grounds that the person described in the statement as the secured party is, or will become, a secured party in relation to the collateral (otherwise than by virtue of the registration itself)²⁹.

The PPSR can be searched by reference to either the grantor's details and, in the case of serial numbered property, the unique serial number referable to that property (for example, the VIN for motor vehicles). Searching the grantor's details will disclose security interests registered against a particular grantor while searching against the serial number for serial numbered property will disclose any security interest claimed in respect of that property. The grantor's details will not be registered if the security interest relates to collateral that is serial numbered consumer property.

The 'details' required to be registered in respect of a grantor will be prescribed by the PPS Regulations.

Registrations for consumer property or property described by serial number may be made for up to 7 years and may be renewed for further periods of up to 7 years. Registrations for collateral other than consumer property or property described by serial number may be made for an indefinite term or for a term up to 25 years and may also be renewed.

It will not be mandatory to register security interests and there will be no time limit for registering an interest. However, failure to perfect³⁰ will generally result in the security interest vesting in the grantor on the insolvency of the grantor³¹ and the secured party may lose priority to other perfected security interests.³²

Interested persons (including the grantor or a person with another security interest in collateral) will be entitled to obtain from a secured party a copy of their security agreement and other relevant information within 10 business days after a request is received³³. Caution will need to be exercised when including clauses creating a security interest in documents that contain commercially sensitive information. While the PPSR is a notice rather than document filing register, secured parties can be required to provide a copy of a security agreement that provides for a security interest to certain interested persons: s.275 PPSA.³⁴ If a secured party receives such a request it must comply with that

²⁷ The PPSR will be operated and administered by the Insolvency Trustee Service Australia.

²⁸ The data required for an effective registration is identified in s.153, PPSA and PPS Regulations. The data does not include details of the secured obligations or liabilities.

²⁹ s.151, PPSA.

³⁰ The concept of perfection is explained below.

³¹ Where the grantor is a company the security interest will vest in the company on insolvency if the security interest is perfected by registration only and it has been registered for less than six months, unless it was registered within 20 business days after the relevant security agreement came into force; new s. 588FL, Corporations Act.

³² There are also particular timing requirements for perfecting purchase money security interests; s.62, PPSA.

³³ ss.275 and 277, PPSA.

³⁴ s 275(6) and (7) provide some protection for confidential information.

request unless the secured party and the grantor have agreed in writing that they would not disclose such information.³⁵

Collateral subject to a financing statement:

- must be described as either consumer property or commercial property³⁶;
- may or must be described by serial number, if allowed or required by the PPS Regulations;
- must belong to a single class prescribed by the PPS Regulations (but multiple registrations can be made through one application process)³⁷.

The PPS Regulations³⁸ will prescribe the following classes of property:

- agriculture;
- aircraft;
- all present and after-acquired property;
- all present and after-acquired property except;
- financial property;
- intangible property;
- motor vehicle;
- other goods; and
- watercraft.

Under the main classes sub-classifications have also been proposed:

- for agriculture:
 - crops; or
 - livestock;
- for intangibles:
 - accounts;
 - circuit layout;
 - copyright;

³⁵ Even if the secured party and grantor have agreed not to disclose, there are some situations where the secured party will need to disclose, despite this. See s.275(7), PPSA.

³⁶ 'Commercial property' is any personal property that is not consumer property and 'consumer property' is any personal property held by an individual, other than in the course or furtherance, to any degree, of carrying on an enterprise to which an ABN has been allocated; s.10, PPSA.

³⁷ s.153, PPSA.

³⁸ PPS Regulations, Schedule 1, Part 2.3.

- design;
- general intangible;
- patent;
- plant breeder's right; or
- trade mark;
- for financial:
 - chattel paper;
 - currency;
 - document of title;
 - intermediated security;
 - investment instrument; or
 - negotiable instrument; and
- for aircraft:
 - aircraft frame;
 - aircraft engine;
 - helicopter; or
 - small aircraft.

The classification of collateral will, to some extent, be relevant to determining priority between competing security interests.

When the security interest is a PPS lease or a commercial consignment, the relevant class is to be determined having regard to the property being leased or consigned.

These classes are defined so that no item of collateral can fall within more than one class; apart from 'all present and after acquired property' and 'all present and after acquired property except' specified property which necessarily embrace the other classes.

Registration by serial number is not mandatory for the perfection of a security interest in commercial property (other than aircraft that is an aircraft engine, airframe, helicopter or small aircraft)³⁹, but it can provide some added protection against a buyer or lessee of the property when the sale or lease occurs outside the ordinary course of business. Registration against the serial number of serial numbered collateral is mandatory where that collateral is of a type referred to below and it is also consumer property. Registration by serial number can occur even though the relevant security agreement does not identify the specific collateral by its serial number.

³⁹ Part 2.2(1)(b), Schedule 1, PPS Regs.

The following classes of collateral **may** or **must** (refer to previous paragraph) be described by serial number:

- aircraft,
- intangible property that is:
 - a design;
 - a patent;
 - a plant breeder's right;
 - a trade mark;
 - a licence over any of these types of intangible property;
- motor vehicles; and
- watercraft.

Different extinguishment rules apply for security interests over serial numbered property (refer below).

The PPSR is likely to allow a description of the collateral to include free text when:

- the description of the collateral may include a serial number, but the description does not include a serial number; or
- it is not possible for the description to include a serial number.

However, free text is not likely to be permitted when the collateral class is 'all present and after-acquired property'.

The inclusion of free text is likely to be mandatory when the collateral class is 'all present and after-acquired property except' something specified.

Attachment and perfection of security interests

Attachment

A security interest attaches to collateral when:

- the grantor has rights in the collateral or the power to transfer rights in the collateral to the secured party; and
- either value is given for the security interest or the grantor does an act by which the security interest arises⁴⁰.

Despite the general rule of attachment under section 19 of the PPSA, there are a some exceptions which must be taken into account:

- first, the grantor and secured party can agree that the security interest will attach to collateral at a later time⁴¹; and

⁴⁰ s.19, PPSA.

- second, a grantor will only have rights in goods which are leased or bailed to the grantor under a PPS lease, consigned to the grantor, or sold to the grantor under a conditional sale agreement (for example, a retention of title agreement) when the grantor has possession of the goods⁴².

Enforceability against third parties

A security interest will generally be enforceable against a third party in respect of particular collateral only if the security interest is attached to the collateral and:

- the secured party possesses the collateral;
- the secured party has perfected the security interest by control; or
- a security agreement is evidenced by writing that is:
 - signed by the grantor; or
 - adopted or accepted by the grantor by an act or omission that reasonably appears to be done with the intention of adopting or accepting the writing,

and contains:

- a description of the particular collateral; or
- a statement that a security interest is taken in all of the grantor's present and after-acquired property; or
- 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 property⁴³.

The PPSA contemplates that security agreements can be entered into electronically.

Security agreements do not necessarily need to be in one document signed by both parties, so long as the terms are evidenced in writing and signed, adopted or accepted by the grantor. The terms can take the form of an offer by either the grantor or secured party accepted by the other party. Parties might also use master agreements that set out terms and conditions to be incorporated into specific security agreements subsequently entered into from time to time. Whether the master agreement is itself a security agreement or a security agreement only arise upon execution of the further document identifying particular collateral will depend upon the terms of the relevant documentation. This can be important in terms of the timing requirements for registration under the priority and vesting rules and the status of security interests as transitional or non-transitional under the PPSA rules for transitional security interests.

Perfection

A security interest will generally be perfected in relation to collateral if it has attached, it is enforceable against a third party and:

- for any collateral, a registration is effective with respect to the collateral; or

⁴¹ s.19(3) of the PPSA.

⁴² s.19(5) of the PPSA.

⁴³ s.20, PPSA.

- for any collateral, the secured party has possession of the collateral (other than possession as a result of seizure or repossession)⁴⁴; or
- for the following kinds of collateral, the secured party has control of the collateral:
 - an ADI account⁴⁵;
 - an intermediated security;
 - an investment instrument;
 - a negotiable instrument that is not evidenced by a certificate;
 - a right evidenced by a letter of credit that states that the letter of credit must be presented on claiming payment or requiring the performance of an obligation;
 - satellites and other space objects.⁴⁶

Perfection by control will be particularly relevant for security interests in ADI accounts, investment instruments and intermediated securities.

Some security interests are deemed to be temporarily perfected for relatively short time periods and in limited circumstances pending perfection by the usual means (i.e. registration or possession or control). For example, if goods are brought into Australia and they are subject to a perfected security interest in the jurisdiction they come from, the security interest will be temporarily perfected for a short time after the goods enter Australia to enable the secured party to perfect under the PPSA. Priority is preserved during temporary perfection.

A secured party who perfects by registration is required to give notice of the registration verification statement to the grantor. The grantor can waive its right to receive this notice where the collateral is commercial property (s.157, PPSA).

Priority and extinguishment rules

The general priority rules

The following general priority rules will apply:

- a perfected security interest has priority over an unperfected security interest. This will be the case even where the party with the unperfected security interest has title to the relevant collateral (eg. a lessor or ROT supplier)⁴⁷ and even if the secured party took the perfected security interest with knowledge of the existence of the unperfected security interest;
- perfection by control will ensure priority over perfection by other means. If two interests are perfected by control, priority is determined by the order of perfection if the perfection by control has been continuous;

⁴⁴ Taking possession will be a particularly important perfection requirement for a secured party claiming a security interest in chattel paper; ss 71, 24(5), PPSA.

⁴⁵ The ADI is the only party that can perfect by control; s.25, PPSA.

⁴⁶ s.21, PPSA.

⁴⁷ *Graham v Portcom New Zealand Limited* [2004] 2 NZLR 528; *Waller v New Zealand Bloodstock Limited* [2006] 3 NZLR 629; *Rabobank New Zealand Limited v McAnulty* [2010] NZHC 1543; *International Harvester Credit Corp of Canada Ltd v Touche Ross* (1986) 61 CBR(NS) 193 and *Re Giffen* [1998] 1 SCR 91.

- if two interests are perfected other than by control, the first party to perfect will have priority;
- if there are two unperfected interests, then priority is determined by the order of attachment.

The party who has priority will usually have priority to the collateral and any proceeds. Priority will normally extend to future advances.

Purchase money security interests

The major exception to this is for purchase money security interests (**PMSIs**) which have a super priority. A purchase money security interest is:

- a security interest taken in collateral, to the extent that it secures all or part of its purchase price;
- a security interest taken in collateral by a person who gives value for the purpose of enabling the grantor to acquire rights in the collateral to the extent the value is applied to acquire those rights;
- the interest of a lessor or bailor of goods under a PPS lease;
- the interest of a consignor who delivers goods to a consignee under a commercial consignment⁴⁸.

A registration in respect of a security interest which is, or is to be, to any extent a PMSI, must indicate this to obtain the super priority benefit.⁴⁹ Also, the registration must be made within a prescribed timeframe to obtain the PMSI super priority.⁵⁰

Other special priority rules

Other special priority rules apply for:

- agricultural security interests including security interests in crops and livestock given for value and to enable the debtor to produce the crops or develop the livestock. The rules will also regulate the priority of a security interest in crops as against the interest of a lessor or mortgagee of the land where the crops are grown,⁵¹
- security interests in goods that become an accession to other goods;⁵²
- determining proportional priority entitlements where goods subject to different security interests are manufactured, processed, assembled or commingled and as a result the original property

⁴⁸ A PMSI does not include an interest acquired under a sale and lease back to the seller; an interest in collateral that is chattel paper, an investment instrument, an intermediated security, a monetary obligation or a negotiable instrument; or a security interest in collateral that the grantor intends to use predominantly for personal, domestic or household purposes (unless the collateral is serial numbered property); s.14, PPSA.

⁴⁹ ss.62(2)(c), 62(3)(c), 153(1), Table Item 7, PPSA. Also, if a registered financing statement indicates that a security interest is a PMSI to any extent and it is not, then the registration is ineffective (s.165(c), PPSA).

⁵⁰ s.62, PPSA. The applicable timeframes relate to when the grantor obtains 'possession' of the property. The Canadian case law suggests that possession in this context means possession *as a grantor in relation to a security interest*, not mere physical possession; *Associates Leasing (Canada) Ltd v Humboldt Flour Mills Inc* (1998) 14 PPSAC (2d) 174.

⁵¹ Part 3.2, PPSA.

⁵² Part 3.3, PPSA.

loses its identity in the product or mass but the security interests continue in that product or mass;⁵³

- intellectual property and intellectual property licences;⁵⁴
- accounts receivable⁵⁵, accounts with ADIs⁵⁶, negotiable instruments, chattel paper⁵⁷, negotiable documents of title and non-consensual liens arising by operation of law or equity⁵⁸.

The priority rules can be displaced by priority or subordination agreements between secured parties.

Priority of interests arising outside of the PPSA

The PPSA establishes specific priority rules in relation to personal property that is subject to a non-consensual security interest. These provisions deal with the determination of priority disputes regarding property affected by both a lien (or other non-consensual security interest) and a PPSA security interest (or a transitional security interest). The PPSA also provides for the use of a different priorities regime in relation to certain interests in collateral, where a law of the Commonwealth, a state or a territory declares an interest of the type in question to be of a kind to which different priority rules will apply: s 73(2).

Where it becomes necessary to establish the priority of security interests in personal property to which both a PPSA security interest and a non-consensual lien arises, the priority provisions of the PPSA contained in Div 6 of Pt 2.6 may apply. Essentially, these provisions provide that an interest in collateral taking the form of a non-consensual lien arising by way of operation of the general law (or pursuant to a law of the Commonwealth, a state or territory) will take priority over a security interest arising under the PPSA. However, there are important limitations to these provisions. The lien must arise from the supply of goods or services. The supply of the goods or services giving rise to the lien must take place in the ordinary course of the suppliers business, the holder of the benefit of the lien must have provided the goods or services giving rise to the lien, and no other law of the Commonwealth, state or a territory may provide for the determination of priority as between the lien and the security interest. Additionally, the holder of the benefit of the lien must have acquired the interest without actual knowledge that the acquisition constitutes a breach of the security agreement that provides for the earlier security interest.

Common law priority rules may still be relevant as between a PPSA security interest and certain consensual interests that are not security interests, or are excluded from the application of the PPSA under s.8.

Section 73(2) of the PPSA provides the Commonwealth, state and territory legislatures with the ability to declare certain interests in collateral to be interests of a kind whose priority will be determined in accordance with another Commonwealth, state or territory law. In order for this to be the case, the other statute must expressly state that the security interest in question is of a kind which s 73(2) of the PPSA applies. This provision may be utilised effectively only where the "other" interest has arisen after the declaration has occurred.

⁵³ Part 3.4, PPSA.

⁵⁴ Part 3.5, PPSA.

⁵⁵ Receivables financiers have a special priority that ranks ahead of PMSI holders in relation to the proceeds of the PMSI collateral; s.64, PPSA.

⁵⁶ s. 75, PPSA.

⁵⁷ s. 71, PPSA means a secured party needs to take possession of chattel paper to ensure it has priority over a subsequent transferee; s. 24(5), PPSA contemplates possession of an authoritative electronic record of chattel paper.

⁵⁸ s. 73, PPSA.

For example, the Personal Property Securities (Consequential Amendments) Act 2009 (Cth) specifies a number of amendments to be made to other Commonwealth legislation, which have the effect of declaring security interests arising under those Acts to be security interests to which s 73(2) of the PPSA will apply. The Mutual Assistance in Criminal Matters Act 1987 (Cth) is to be amended so as to render charges created pursuant to that Act to be dealt with according to its own priority provisions, while the Proceeds of Crime Act 2002 (Cth) is to be similarly amended. These amendments will have the effect of rendering the priority provisions of the PPSA inapplicable to the determination of the priority of charges and other security interests arising by way of these two items of Commonwealth legislation.

Securities that also attach to non-PPS property

If a security document takes security over both personal property under the PPSA and property that is outside the PPSA, the document will need to be flexible enough to cover both the PPS regime and securities under the general law. Among other things, this means that the security document will need to be modified to the extent necessary to ensure that it copes with the general law principles of tacking. This will be particularly an issue for corporate security documents, as the priority rules in the Corporations Act will no longer apply and the general law principles of tacking will be re-enlivened.

Extinguishment rules⁵⁹

There are a number of extinguishment rules in the PPSA benefiting third party transferees⁶⁰:

- *unperfected security interests* - a buyer or lessee of personal property, for value, takes free of an unperfected security interest, if the buyer or lessee is not a party to the transaction that provides for the security interest;
- *serial numbered property* - a buyer or lessee of personal property that may, or must, be described by serial number will take free of a security interest if the buyer or lessee does not hold the property as inventory or on behalf of a person who would hold the property as inventory, a search of the PPSR using only the correct serial number would not disclose the security interest, and the buyer or lessee is not a party to the transaction that provides for the security interest;
- *motor vehicles generally* - a buyer or lessee, for new value, of a motor vehicle takes the motor vehicle free of a security interest in the motor vehicle if that motor vehicle is of a kind that may, or must, be described by serial number, there is a time during the period between the start of the previous day and the time of the sale or lease when a search of the PPSR using only the serial number of the motor vehicle would not disclose the security interest, and the seller or lessor is the person who granted the security interest or (if the person who granted the security interest has lost the right to possess the motor vehicle, or is estopped from asserting an interest in the motor vehicle) another person who is in possession of the motor vehicle. However, this rule will not apply if the secured party is in possession of the motor vehicle immediately before the time of the sale or lease, or the motor vehicle is bought at a sale held by or on behalf of an execution creditor, or the buyer or lessee holds the motor vehicle as inventory, or the buyer or

⁵⁹ Part 2.5, PPSA. There are some specific exceptions to the extinguishment rules in respect of certain transitional security interests, for example, see s.44(3), PPSA.

⁶⁰ The extinguishment rules apply in situations where collateral is purchased or leased but not where the transferee's interest is itself a security interest except in ss.50 (investment instruments) and 51 (intermediated securities); s.42, PPSA. Where the transferee is a lessee the lessee 'takes free' of the relevant security interest but only for the duration of its lease.

lessee buys or leases the motor vehicle with actual or constructive knowledge of the security interest;

- *motor vehicles sold or leased by a prescribed person* - a buyer or lessee, for new value, of a motor vehicle takes the motor vehicle free of a security interest in the motor vehicle if that motor vehicle is of a kind that may, or must, be described by serial number and the seller or lessor is in a class of persons prescribed by the PPS Regulations for the purposes of this rule⁶¹. However, this rule will not apply if the secured party is in possession of the motor vehicle immediately before the time of the sale or lease, or the motor vehicle is bought at a sale held by or on behalf of an execution creditor, or the buyer or lessee holds the motor vehicle as inventory, or on behalf of a person who would hold the motor vehicle as inventory, or the buyer or lessee buys or leases the motor vehicle with actual or constructive knowledge that the sale or lease constitutes a breach of the security agreement that provides for the security interest;
- *ordinary course of business* - a buyer or lessee of personal property who buys or leases that property in the ordinary course of the seller's or lessor's business of dealing with property of that kind takes the property free of a security interest that is given by the seller or lessor if the buyer or lessee has no actual knowledge that the sale or lease constitutes a breach of the security agreement under which the security interest was created and, if the property may, or must, be described by serial number, the buyer or lessee does not hold the property as inventory or on behalf of a person who would hold the property as inventory⁶²;
- *personal, domestic or household property* - a buyer or lessee of personal property that is not required or allowed to be described by serial number and is acquired predominantly for personal, domestic or household purposes takes the property free of any security interest if the new value given for the buyer's or lessee's interest in the property does not exceed \$5,000 (or such greater amount prescribed by the regulations) and the buyer or lessee does not have actual or constructive knowledge that the sale or lease constitutes a breach of the security agreement that provides for the security interest;
- *currency* - a holder of currency takes the currency free of any security interest if the holder has no actual or constructive knowledge of the security interest;
- *investment instruments and intermediated securities*:
 - a buyer of an investment instrument or an intermediated security in the ordinary course of trading on a prescribed financial market takes the instrument or intermediated security free of a security interest;
 - a purchaser⁶³ of an investment instrument, other than a secured party, takes the instrument free of a security interest if the purchaser gives value for the instrument, the purchaser takes possession or control of the instrument and the purchaser does not have actual or constructive knowledge that the taking of the instrument constitutes a breach of the security agreement that provides for the security interest;

⁶¹ The prescribed class is sellers and lessors of motor vehicles who hold a licence to deal or trade in that kind of motor vehicle and the licence is issued by a licensing authority in that State or Territory where the sale or lease of the motor vehicle happens; PPS Regulations, Reg. 2.2.

⁶² This extinguishment rule is, in effect, a codification of the prior law which allowed floating charge property to be disposed of in the ordinary course of business of the chargor.

⁶³ 'Purchaser', in this context, means a person who takes the instrument by sale, lease, discount, assignment, negotiation, mortgage, pledge, lien, issue, reissue or any other consensual transaction that creates an interest in personal property.

- a transferee who takes an interest in an intermediated security takes the interest free of a security interest in the intermediated security if the transferee gives value for the interest (unless the interest acquired is itself a security interest), the credit of the interest in the financial product in relation to which the intermediated security arises is made in accordance with a consensual transaction and at the time the interest is taken, the person in whose name an intermediated security intermediary maintains the intermediated security account does not have actual or constructive knowledge that crediting the interest in the financial product to the account constitutes a breach of a security agreement that provides for a security interest in any intermediated security or financial product.

Another extinguishment rule applies in respect of temporarily perfected security interests and transitional security interests.⁶⁴

Registration does not constitute notice or impute actual or constructive knowledge of a security interest registration or its contents to other persons⁶⁵. However, where a transferor and transferee are associated entities certain presumptions about actual or constructive knowledge and value will apply.⁶⁶

The PPSA also contains rules regarding the actual or constructive knowledge of bodies corporate and other entities.⁶⁷

The extinguishment rules in the PPSA are not exhaustive, as the general law rules will continue to apply alongside the PPSA unless they are incapable of operating concurrently. This means, for example, that the "buyer in possession" and "seller in possession" provisions of sale of goods legislation will continue to apply.⁶⁸

Transfer of collateral

In addition to the extinguishment rules there are specific priority rules dealing with what happens when collateral that is the subject of a security interest is transferred in circumstances where none of the extinguishment rules apply and the transferee grants or has previously granted a competing security interest.

Although many of the priority and extinguishment rules in the PPSA are complex, they inject considerable certainty into an area of law which is currently confusing and uncertain.

Enforcement

Chapter 4 of the PPSA includes enforcement provisions dealing with seizure, disposal and retention of collateral. These provisions apply to security interests other than Deemed Security Interests. Many of these provisions can be excluded by agreement between the parties when the collateral is not used predominantly for personal, domestic or household purposes.⁶⁹

⁶⁴ s.52, PPSA.

⁶⁵ s.300, PPSA.

⁶⁶ s.299, PPSA.

⁶⁷ s.298, PPSA.

⁶⁸ See LexisNexis, Personal Property Securities in Australia, para [4.1.4900].

⁶⁹ s.115, PPSA. However, if parties to a security agreement contract out of a provision (other than s.142 relating to the redemption of collateral), the provision continues to apply to the extent it gives rights to, or imposes obligations on, persons who are not parties to the security agreement; s.115(2).

The enforcement provisions also do not apply to security interests in investment instruments that have been perfected by possession or control or to security interests in intermediated securities that have been perfected by control.⁷⁰ Some enforcement provisions will not apply in relation to collateral that is used predominantly for personal, domestic or household purposes.⁷¹

The enforcement provisions will not apply to property while a person is a receiver or receiver and manager of the property of a corporation but will apply while a person is a receiver or receiver and manager of property of an individual.⁷² Subject to contracting out when permitted, the PPSA enforcement provisions, other than section 131, will apply to controllers of the property of corporations who are not receivers or receivers and managers.⁷³

Security interests in 'liquid assets' such as accounts, chattel paper and negotiable instruments can be enforced by giving notice to the person who owes an amount to the grantor.⁷⁴

The requirements of the National Credit Code will continue to regulate the enforcement of security interests to which the Code applies. To avoid unnecessary duplication or overlapping processes the PPS Regulations provide that a specified provision of Chapter 4 of the PPSA is taken to have been complied with in specified circumstances if a specified provision of the National Credit Code has been complied with in those circumstances.⁷⁵

Insolvency

Subject to certain exceptions, an unperfected security interest held by a secured party will generally vest in the grantor on insolvency, effectively voiding the interest⁷⁶. While this more or less replicates the current position with respect to charge and mortgage type securities it is a fundamental shift for security interests where title remains with or is obtained by the secured party⁷⁷. A secured party who has title to collateral (e.g. a lessor or retention of title supplier) risks losing priority and their interest in the collateral if they do not register their security interest. There is an additional vesting rule where the grantor is a company; s.588FL, Corporations Act (see below).

A secured party whose security interest vests in the grantor on insolvency will be able to claim as an unsecured creditor.

⁷⁰ s.109(3), PPSA.

⁷¹ s.109(5), PPSA.

⁷² s.116, PPSA. Part 5.2 of the Corporations Act deals with the powers and duties of receivers and other controllers of the property of corporations.

⁷³ For example, a mortgagee in possession under a chattel mortgage. S.131 of the PPSA essentially mirrors s.420A in the Corporations Act by requiring a secured party to obtain market value when disposing collateral. Subject to s.115(2), (3), (5) and (6), s.115(7) enables such a controller to contract out any provisions of Part 4.3 of the PPSA. The provisions will continue to apply to the extent they give rights to, or impose obligations on, persons who are not parties to the security agreement.

⁷⁴ ss.120 and 121, PPSA.

⁷⁵ s.119, PPSA and PPS Reg. 4.1.

⁷⁶ Part 8.2, PPSA. The exceptions relate to a transfer of an account or chattel paper, a PPS lease for a term between 90 days and one year and commercial consignments which, in each case, do not secure payment or performance of an obligation, and certain turnover trusts.

⁷⁷ The position under the PPSA is different from the position in New Zealand, where unperfected security interests of all types remain valid as against a liquidator or bankruptcy trustee, and is closer to the approach taken in Canada and the United States.

Changes to and relationship with other legislation

Corporations Act

The Corporations Act will be amended when the PPSA begins to apply.⁷⁸

The Corporations Act will be aligned with the PPSA by:

- amending terminology in provisions dealing with charges to incorporate the 'functional approach' under the PPSA;
- introducing the concept of a 'PPSA security interest', a 'security interest' and a 'secured party';
- extending the concept of property of a company to include the 'retention of title property' under the PPSA in certain circumstances;
- repealing Chapter 2K, which deals with the registration and priority of company charges, while retaining, in the modified way, the effect of ss 266 and 267 (as new ss 588FL and 588FP) which provide that charges are void against an administrator or liquidator in certain circumstances; and
- changing references to floating charges to 'circulating security interests', while purporting to maintain existing rights such as employee preferences in s 561 (Priority of employees' claims over floating charges).

The amending legislation will also introduce transitional arrangements, for security interests existing before the operation of the new scheme, and insert relevant new definitions for compatibility with the PPSA.

Section 588FL of the Corporations Act effectively replaces the 45 day registration rule for company charges under pre-PPSA law with a 20 business day registration rule for security interests given by a company (including security interests where another party has title to the collateral, if that security interest secures payment or performance of an obligation (s.588FN)). The 20 business day period runs from when the relevant security agreement is entered into.

To the extent a security interest is a 'circulating security interest' (s.51C, Corporations Act) it will rank behind employee entitlements (s.561, Corporations Act). This is only relevant for the types of collateral that can be 'circulating assets' under s.340, PPSA. Secured parties may wish to retain or acquire title to these types of collateral so that the interest in the collateral will not be a 'circulating security interest' (as defined in s.51C). Alternatively, if the grantor has title to the collateral, the secured party can take steps to ensure it has 'control' of that collateral so that it is not a circulating asset under s.340, PPSA.⁷⁹

National Credit Code

Where collateral is used for consumer purposes and the National Credit Code applies to the relevant security interest, the PPSA and the National Credit Code will operate concurrently and a secured party will have to comply with both the requirements in the PPSA and in the Code.

⁷⁸ See Personal Property Securities (Corporations and Other Amendments) Act 2010 (Cth) and Personal Property Securities (Corporations and Other Amendments) Act 2011

⁷⁹ The concept of 'control' in Part 9.5 PPSA is different from perfection by control under Part 2.3, PPSA.

As noted above, the National Credit Code and the PPSA contain similar requirements for enforcement, but they also contain requirements not shared with the other. Where both the Code and the PPSA contain similar obligations relating to enforcement, PPS Regulation 4.1 provides that a secured party who has complied with certain provisions of the Code will be deemed to have complied with the corresponding obligations in the PPSA.

Other State, Territory and Commonwealth legislation

Some existing State and Territory securities laws may not be repealed from when the PPSA begins to apply due to transitional and other issues. However, most of the significant State and Territory securities laws will be repealed or cease to apply to new security interests from when the PPSA begins to apply.⁸⁰

The Personal Property Securities (Consequential Amendments) Act 2009 (Cth) will amend more than two dozen Commonwealth statutes relating to intellectual property, maritime law, fisheries and other matters (but not the Corporation Act):

- to ensure compatibility of that legislation with the PPSA;
- to facilitate implementation of the PPSA reforms including the transitional arrangements; and
- so that security interests in particular types of property are primarily dealt with under the PPSA.

Each of the States and Territories have also enacted their own consequential amendments legislation to:

- facilitate implementation of the PPSA reforms including the transitional arrangements;
- repeal pre-PPSA securities legislation;
- ensure other legislation is compatible with the PPSA;
- declaring certain interests to be statutory interests to which s.73(2) of the PPSA applies; and
- in some cases, to exclude certain property or interests from the application of the PPSA.

If a law of a State or Territory requires or enables a person to register a security interest, a failure to register under that law will not affect the validity, priority or enforceability of the security interest. Similarly, if a prescribed State or Territory law has the effect of requiring a security agreement to be in a particular form or to be witnessed or executed in a particular way, a failure to satisfy those requirements will not affect the validity, priority or enforceability of the security interest.⁸¹ To the extent a State or Territory law would otherwise restrict or affect attachment or perfection under the PPSA it will be inoperative.⁸²

Subject to the provisions mentioned in the previous paragraph, the PPSA is not intended to exclude the operation of Commonwealth, State or Territory laws or the general law, to the extent they are capable of operating concurrently with the PPSA.⁸³ A referring State may also exclude the application of the PPSA (or parts of it) to specified matters.⁸⁴ As a consequence, other Commonwealth, state and

⁸⁰ See LexisNexis, *Personal Property Securities in Australia* [1.3750].

⁸¹ PPS Regulations, Reg. 7.1.

⁸² Part 7.4, PPSA.

⁸³ s.254, PPSA; also note s. 245(2), PPSA.

⁸⁴ s.259, PPSA.

territory laws may still affect who can take security over personal property and the authorisations and consents that may be required for it.

If there is an inconsistency between the PPSA and any one of the Payment Systems and Netting Act 1998 (Cth), Cheques Act 1986 (Cth) or the Bills of Exchange Act 1909 (Cth), those other Acts will prevail: s.256.

Legislation other than the PPSA may also continue to apply to security interests in property that is not personal property for the purposes of the PPSA.

Continuing application of general law

The PPSA is a non-exhaustive codification of the law relating to personal property securities. It is not intended to exclude or limit the operation of the general law or, as discussed above, other Commonwealth, state or territory legislation to the extent the general law or other legislation is capable of operating concurrently with the PPSA: s.251(1). "General law" means the principles and rules of the common law and equity: s.10.

Apart from the specific PPSA requirements for attachment, most issues concerning the formation and validity of a security agreement will continue to be governed by the general law of contract and agency.

Other general law principles that continue to apply in conjunction with the PPSA include:

- the concept of sheltering under which a transferee from a transferor who took free of a security interest is entitled to shelter under the transferor's title as against the secured party;
- the right of a secured party to bring personal claims against third persons such as:
 - an action in conversion against a transferee from the grantor if there is an unauthorised disposal of collateral;
 - a restitutionary claim against a wrongdoer for the value of the proceeds obtained by the wrongdoer as a result of a disposal of collateral;
 - an action at common law to account for money had and received;
- the equitable doctrine of marshalling under which a higher ranking secured party can be required to enforce its security interest against collateral not subject to a lower ranking security interest before having recourse to the collateral that is subject to both security interests;
- the ability to bring an action in tort for the wrongful seizure of collateral;
- principles of estoppel may affect a person's ability to rely on the statutory rules in the PPSA. The general law principles of estoppel would supplement the statutory estoppels provided for in PPSA s 283;
- subrogation when a person other than the grantor satisfies the obligations secured by a security interest and is subrogated to the rights of the secured party.⁸⁵
- the "buyer in possession" and "seller in possession" rules in sale of goods legislation.

⁸⁵ Cuming, Walsh and Wood, pp 25, 26, 377, 538, 571 and 578-83; *Stiassney and Ors v Commissioner of Inland Revenue*, High Court of New Zealand, Auckland, 4 November 2010.

General law principles of tracing are relevant to tracing proceeds for the purposes of the PPSA but there are particular considerations when applying those principles in the PPSA context.⁸⁶

Transitional arrangements

Security interests taken after the registration commencement time for the PPSA will need be registered on the PPSR in order to be perfected by registration.

Certain existing security registrations (e.g. company charges and REVS securities) will be electronically migrated to the PPSR where possible. In addition, secured parties with existing registrations will have two years in which to re-register on the PPSR security interests that cannot be electronically migrated and to register interests that have not previously required any registration (e.g. leases or hire purchase agreements over goods other than motor vehicles and retention of title supply or consignment agreements).

Secured parties will need to carefully consider the priority issues surrounding the proposed transitional arrangements.

Interpreting the PPSA

The PPSA is fundamentally different to the pre-PPSA law. There is a danger that lawyers may seek to interpret the PPSA in light of their past experience and understanding of the pre-PPSA law instead of having proper regard to the purpose and objectives of the new legislation.

Section 15AA of the Acts Interpretation Act 1901 (Cth) relevantly provides:

"In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object."

Canada's leading commentators on their personal property securities legislation have noted that it is founded on certain legislative policies that should inform its interpretation.⁸⁷ These policies include:

- the advancement of commercial certainty and predictability. In this regard, the Supreme Court of British Columbia has observed:⁸⁸

"[W]hen interpreting commercial legislation of this nature and where it is consistent with the wording of the statute, the Court should try to achieve the objectives of simplicity and certainty. The Court ought to strive for interpretations that, where possible, recognize the importance to the business and financial community of being able to achieve compliance with regulatory requirements in as simple and in as certain a manner as is consistent with the intention of the Legislature as expressed in the language of the statute. In striving for simplicity, judicial interpretation should minimize to the extent possible the cost of regulatory compliance; achieving the equally important goal of certainty will similarly minimize the generation of post filing litigation challenging such compliance;"

⁸⁶ Cuming, Walsh and Wood, pp 466-78.

⁸⁷ Cuming, Walsh and Wood at pp 26-7.

⁸⁸ GE Capital Canada Acquisitions Ltd v Dix (1994) 8 PPSAC (2d) 197

- the preservation of internal coherence with the legislation, which requires that individual provisions in the legislation be interpreted not in isolation but in light of the implications of a particular reading on the logic or workability of other provisions. In this context, the Saskatchewan Court of Appeal has stated:⁸⁹

"The applicable canons of interpretation dictate that the section be interpreted contextually and be read in relation to the whole Act. Using this approach one quickly recognizes that the underlying concept of PPSA is a rejection of the system of 'transaction filing' and the adoption of the system of 'notice filing'."

The extensive use of "Guides" and "Notes" throughout Australia's PPSA should assist to promote this interpretative approach;⁹⁰

- promoting autonomy and flexibility in the relationship between the secured party and the grantor, so that constraints on freedom of contract should not be readily implied in the absence of clear legislative direction;
- fostering increased efficiency for all participants in, or affected by, a secured transaction so as to promote greater access to secured credit at lower cost. An important example is the rejection of the role of knowledge in ordering priority among competing secured parties. This policy has particular significance in the context of the PPSA registration system and the rules dealing with the adequacy of a registration, because it is in this context that the need to balance the interests of the secured party and the public becomes most prominent.

Regard for the purpose and objectives of the legislation will need to be at the forefront of any consideration of issues such as:

- the irrelevance of title under the PPSA⁹¹ – as has occurred in each jurisdiction that has introduced PPSA legislation, the courts are likely to be called upon to confirm that a contest between an unperfected title-based security interest and a perfected non-title-based security interest (for example, unregistered lessor under a PPS lease versus registered all assets charge holder), should be resolved in favour of the latter. Although this result may seem counter-intuitive for those of us raised on *nemo dat qui non habet*, it is, unequivocally, the correct outcome under the PPSA,⁹²
- the scope of the functional definition of security interest – while the emphasis must be on substance over form, a security interest is nevertheless a proprietary or possessory interest, it cannot be a mere personal or contractual right;
- the significance of the different categories of personal property in the context of the priority and extinguishment rules and the classifications and sub-classification system for registration purposes; and the time at which these categories/classes are to be determined;

⁸⁹ Agricultural Credit Corporation of Saskatchewan v Royal Bank of Canada [1994] 7 WWR 305

⁹⁰ In this regard note s.15AB of the Acts Interpretation Act 1901 (Cth).

⁹¹ Subject to the limited exceptions relating to 'circulating security interests' in 'circulating assets' under Part 9.5, PPSA and the relevant provisions in the Corporations Act as noted above.

⁹² For example, Graham v Portacom New Zealand Ltd [2004] 2 NZLR 528; and Waller v New Zealand Bloodstock Ltd [2006] 3 NZLR 629; International Harvester Credit Corp of Canada Ltd v Touche Ross (1986) 61 CBR (NS) 193; Re Giffen [1998] 1 SCR 91.

- whether a collateral description is 'seriously misleading' in the context of the specific registration requirements of the notice based registration system and the search functionality of the register;⁹³
- the irrelevance of concepts relating to floating charges and crystallisation to the extent security is taken over personal property to which the PPSA applies;⁹⁴
- the scope of ordinary course of business dealings (for extinguishment purposes) in the context of the PPSA.⁹⁵

Conclusion

The PPSA will rationalise and modernise an area of commercial law that has been crying out for reform for a long time. However, there could be a perception by some, at least initially, that the PPSA is long, prescriptive and complex. Several points can be made in relation to this:

- the PPSA will replace a multitude of statutes and registers and, to the extent they are inconsistent with the PPSA, many common law and equitable rules. In this context the PPSA is not particularly long or complex;
- the current law is complex, fragmented, dispersed and far less certain than the PPSA will be;
- the key PPSA provisions are relatively simple but there is considerable complexity around some of the more specific priority and extinguishment rules, although much less so than under the current law;
- the PPSA will have minimal and consistent formal requirements for security agreements and registration compared with the current law and these requirements are necessary to ensure the PPSR can operate effectively as a notice based register;
- overseas experience suggests that business and professional advisers will quickly adapt to the PPSA.⁹⁶

It has been observed, in relation to the NZ PPSA, that:

"The PPSA is a complicated, provocative, and yet fascinating scramble of legislation. Although it initially overwhelms many lawyers, the deeper one explores its secrets, the more one appreciates how innovative it is. Once the unfamiliar concepts and strangeness wear off, it is apparent that it is a well-knit piece of legislation, though not without its faults, that provides uniform rules that, in comparison to pre-PPSA law, operate and provide answers consistently and predictably."⁹⁷

⁹³ See Cuming, Walsh and Wood, pp269-276. Also, note the observations of the New Zealand Court of Appeal in *Simpson v NZ Associated Refrigerated Food Distributors Ltd* [2007] 2 NZLR 130.

⁹⁴ JS Ziegel, *Floating Charges and the OPPSA: A Basic Misunderstanding* (1994) 23 CBLJ 470.

⁹⁵ *Orix New Zealand Limited v Milne and T C Nicholls Limited v Johnson* [2007] 3 NZLR 637; *Gibson and Stiassny v StockCo Limited* [2010] NZHC 2318; and *Tubbs v Ruby 2005 Ltd* [2010] NZCA 353.

⁹⁶ See for example, JS Ziegel and D Denomme, *How Ontario Lawyers View the OPPSA: An Empirical Survey* (1992) 20 CBLJ 90.

⁹⁷ Widdup and Mayne, at 1.7.

This observation reflects a reasonably broad consensus among New Zealand, and also Canadian, lawyers regarding their experience with the PPSA. Our own experience is likely to be similar.

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