

Personal Properties Securities Act 2009 (Cth): Objectives and Emerging issues

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**Introduction**

1. The *Personal Properties Securities Act 2009 (Cth)* (“PPSA”) has fundamentally changed the law of personal property securities by providing a single comprehensive regime for the creation, registration and enforcement of securities in personal properties. The PPSA is a major reform and a significant piece of legislation. As the PPSA is now the single source of law governing security interests in personal property and, by and large, applies to all transactions that grant an interest in personal property to secure the payment or performance of an obligation, whether or not there is a security instrument in legal form (see the definition of “security interest” in s 12(1)), all commercial lawyers should have some familiarity with its provisions. Of course, and perhaps not surprisingly, the PPSA is not easy to read. Indeed, picking it up for the first time is an intimidating experience. It is very long, it is full of rules and it is replete with definitions that are central to the application of the PPSA. David Turner, who is also talking tonight, minced no words in a paper that he presented in 2013 on the PPSA by describing the drafting style as idiosyncratic, convoluted, repetitive, and prolix.<sup>2</sup>
2. The PPSA did not appear out of nowhere. The Act was the product of extensive consultation following the release by the Attorney-General’s Department of three discussion papers in November 2006, March 2007 and April 2007 and an exposure draft of the Act in May 2008. The objective was the rationalisation of more than 70 separate Acts which regulated personal property securities in Australia, with inconsistent priority rules and other anomalies and multiple registers for the various types of security interests. The PPSA replaces the myriad of piecemeal laws governing secured lending over personal property by providing, more or less, a common set of rules for all secured

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<sup>1</sup> A judge of the Federal Court of Australia. I would also like to acknowledge the contribution of my two associates, Michelle Jennings and Alexandra Whelan, who provided invaluable assistance in the preparation of the material.

<sup>2</sup> “Coming to Grips with the Personal Property Securities Act 2009” David C Turner

transactions and a single register. As noted on the Government's website,<sup>3</sup> the PPSA harmonizes the various Commonwealth, state and territory laws into a single national scheme dealing with security interests in personal property.

3. The PPSA is largely, but not entirely, modelled on the personal property securities regimes in Canada and New Zealand. The policies that underpin the PPSA are similar to the Canadian and New Zealand regimes, though I understand that there are some policy differences and, whilst some of the provisions are taken from the equivalent legislation in Canada and New Zealand, there are various drafting and stylistic differences, and consequently, some care needs to be taken when relying on Canadian and New Zealand jurisprudence. That is not to say that Canadian and New Zealand cases will not be helpful to provide some guidance on the intended meaning and application of the PPSA. I expect that those authorities will be useful in resolving some of the difficulties in construction of the legislation, particularly as the legislation is not new in either of those countries and both countries have a considerable body of appellate decisions to draw upon, but reference to those authorities will need to take account of the differences in the schemes where relevant.

#### **A high level conceptual overview of the PPSA**

4. It is not my intention to outline the PPSA in this seminar. I would need considerably more time than the 15 minutes allotted to me just to provide some cursory detail of the central features and basic concepts. If you are wanting detail, a great deal has already been written on the PPSA explaining how what the Act is about and there are some excellent books around, including "The PPS Guide" by Lionel Meehan who is also presenting tonight. That said, it is desirable to give a very short high level conceptual overview of what the Act is about to give some understanding to the content of this seminar.
5. Under the legislative framework of the PPSA, there is now a set of common rules for the regulation of all security interests in personal property, and a centralised registration

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<sup>3</sup> [www.ppsr.gov.au](http://www.ppsr.gov.au)

system. Conceptually, the new regime under the PPSA model is relatively straightforward, at least in relation to the rules for creating security interests and the priority rules for competing security interests. At the core of the PPSA is a statutory concept called the “security interest” which does not need to be a security instrument in legal form provided that it is “in substance”. A person who holds a “security interest” in “personal property” may “perfect” the security to preserve a position of priority should a dispute between competing security interests arise. A security interest is “perfected” if it has “attached” to “collateral”, it is enforceable against third parties and it has been registered or the secured party has control or possession of the collateral. Registration, I think, is intended to be the main form of “perfection”, serving as the means by which third parties can be put on notice of secured interests and providing a measure of protection for third parties who will be able to search the register before taking security interests. Under the priority rules, generally speaking, a security interest that is perfected takes priority over another security interest that is unperfected when the security interest comes to be enforced, irrespective of whether the perfecting party had notice of any earlier unperfected interest; priority between perfected interests is determined by order of registration or time of first perfection by control or possession; and priority between unperfected interests is determined on a first-in-time basis.

6. There is obviously a lot more to the PPSA but for present purposes the brief outline is enough to set the scene because it has introduced some of the key terms that appear in the PPSA, with which you need to become familiar and understand.

#### **Preliminary observations about the PPSA from a judicial perspective**

7. In contrast to the conceptual simplicity of the PPSA regime, is the length and complexity of the legislation itself. Whilst the PPSA is a well-structured Act and you discover as you work your way through the Act that each Part in the Act is introduced by a guide which provides a helpful overview to content, the PPSA cannot be picked up and read or understood easily. There are several reasons why.
8. First it is an entirely new regime governing personal property securities and so some familiarity with the overall scheme and policies behind the rules are required in order to

develop some insight into the statutory concepts on which the PPSA is based, some of which require conventional legal rules to be put entirely to one side. As Professor O'Donovan cautioned, the PPSA is not old wine in a new bottle. He said of the PPSA:

*It provides new and sometimes radical rules dealing with attachment, perfection, priority, enforcement and extinguishment of security interests.*<sup>4</sup>

9. This is a whole new system that to a large extent is informed by, and based on, the same or similar policies that underpin the Canadian and New Zealand legislation. David Turner, in the same article in which he criticised the drafting, wrote that:

*Experience across all PPSA jurisdictions indicates that the PPSA can only properly be understood by an appreciation of the policy behind the different rules and by use of examples.*<sup>5</sup>

10. Understanding why the concepts have been developed in the way in which they have should be useful and provide helpful background information but care should be taken that examination of the policy does not become an end in itself. At some point, the Courts will be called upon to construe the text. Although the Courts may be assisted in that task by having an appreciation as to the objectives behind the PPSA, the meaning of the text will not be not determined by some assumption about its intended purpose.
11. Secondly, the PPSA has its own statutory language, using terms and concepts foreign to the general law relating to personal property securities. Those terms and concepts need learning and their meaning understood. This is not a simple task, not the least because you first have to find them. Although there is a dictionary in s 10, many key terms are defined elsewhere in the Act and within some definitions you will find terms that have their own separate definitions, causing the use of multiple fingers to trace. However they do need to be found and read because as becomes quickly apparent, it should not be assumed that words bear their ordinary meaning as more often they do not. Careful attention needs to be paid to the defined sense of the terms.

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<sup>4</sup> Personal Property Securities Law in Australia, Thompson Reuters looseleaf service [1.500]

<sup>5</sup> "Coming to Grips with the Personal Property Securities Act 2009" David C Turner p 1

12. Thirdly, the Act is a prescriptive piece of legislation. Behind the conceptually simple structure are sets of complex rules and technicalities that underpin the application of the Act. No doubt the prescriptive nature of the PPSA is a consequence of the legislature's desire to provide certainty of outcome but they can also be a trap if insufficient regard is given to the statutory requirements.
13. Fourthly, there is the perennial problem of statutory construction – What do the words mean? How should they be construed? Experience tells that the more prescriptive, the more likely it is that there is ambiguity in the language and the intended scope of the provision. It is clear that those drafting the provisions hoped to provide some degree of precision about intended meaning by usefully providing many examples to designate the scope of provisions, and in particular, definitions. The use of examples does inform construction but may not necessarily be an answer in itself. Examples are not operative parts of the provision but an aid to construction. Examples are not intended to be exhaustive of what might fall within the definition so that they should not be read as determinative of what falls within the scope of the definition. Moreover, it is a well settled rule of construction that if the example is inconsistent with the substantive provision, the example will not prevail over the proper meaning and scope of the substantive provision. The same observation is to be made about the guides at the commencement of each Part. They are useful in order to ascertain meaning but the starting point must always be the text of the substantive provisions having regard to the context in which they appear and the general purpose and policy of the provision concerned.
14. With complex legislation of this kind it is inevitable that there will be many occasions when the resolution of issues will depend on the proper construction of provisions. For practitioners applying the PPSA, the challenge will be to put aside old learning, particularly until there is a sufficient body of case law to provide some certainty of understanding about the way in which the PPSA is to apply. The one thing that is certain is that PPSA is to be construed and applied according to its terms, not under the influence of the learning concerning the schemes that it has replaced. The challenge will also be

not to rely too heavily on the case law in other jurisdictions without an appreciation of potential differences in the legislative schemes.

### Emerging issues

15. As for emerging issues, from the judicial perspective it is difficult to get past the definition of “security interest” which I think is likely to be a fertile source of disputes before the Court. For the most part in the day to day application of the PPSA, it can be anticipated that there will be no real controversy over whether something is a security interest but where there is such a controversy, the definition of “security interest” is not without its problems.

16. “Security interest” is defined in 12(1) which provides:

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

17. There are several elements to a security interest:

- (a) there must be something that answers the description of “an interest in personal property”;
- (b) that interest must be “provided for by a transaction”;
- (c) that transaction must in substance, secure payment or the performance of an obligation.

18. I propose to throw some balls in the air about the elements but without providing any answers.

19. As to the first element, the terms “interest” and “personal property” are both defined terms. Probably the debate will not so much be whether something is “personal property”, but whether there is something that answers the description of “an interest in” such property. “Interest” is defined in s 10 of the PPSA to include a right in personal

property. It can be said with certainty that a right is an interest but beyond that, the definition begs the question. There may not be such an issue about whether legal or equitable interests and proprietary rights constitute an “interest” but what about mere contractual rights or expectancies? Further, is it an interest “in” personal property?

20. Whatever the interest is, it must be one that is provided for by a transaction. There is therefore a need to identify what constitutes the transaction for this purpose. Where the transaction is constituted by a written contract, identification will not be difficult. But what about where the terms of a contract are incomplete or partly or wholly oral? And what is meant by “provided for”?
  
21. Next, the transaction so identified must in substance, secure payment or the performance of an obligation. It is clear that the definition of a “security interest” under the PPSA is broader than what would readily be characterised as a security instrument at common law in that legal form is not determinative of the character of a security. There is a lot of case law in other jurisdictions on the “substance test” which appears in like terms in both the Canadian and the New Zealand legislation. The Courts in those countries have construed the definition to employ a functional approach to whether a transaction creates a security interest – that is, by looking to the effect of the transaction. But as the definition does direct attention to the substance rather than to the form of the transaction, issues will inevitably arise about whether a transaction comes within the scope of the definition, raising questions about the proper characterisation of the transaction. Where a transaction is evidenced in writing, is the legal form to be ignored in favour of a consideration of the business or commercial substance of the transaction. If legal form is largely irrelevant does that mean that the question of characterisation does not proceed as a straightforward analysis of the legal relationship? We await judicial consideration but whatever be the correct answer questions of characterisation are often likely to be difficult and different minds may reasonably reach different conclusions.

### **Australian cases**

22. There have been only a few cases to date on the PPSA and my associate Alexandra Whelan has helpfully prepared a summary of the reported cases, which is attached.
  
23. We made an attempt to find out what kinds cases are presently before this Court but unfortunately there does not appear to be a designated PPSA category so that information was not available readily.