

Australian Cases

1 The PPSA has been considered judicially in Australia. In summary, the cases have concerned competing priority claims in relation to leased motor vehicles; retention of title clauses and the transitional provisions; and orders under the *Corporations Act 2001* (Cth) regarding the vesting of PPSA security interests if collateral is not registered within time. The PPSA has also been referred to judicially in the context of the interpretation and application of other legal principles.

Competing priority claims in relation to leased motor vehicle

2 Many of the cases have involved leased motor vehicles and competing priority claims.
3 *Albarran v Queensland Excavation Services Pty Ltd* [2013] NSWSC 852 concerned motor vehicles leased (without written leases) by QES to a company, Maiden. Maiden took possession of the vehicles and, by deed, granted Fast a security interest in the vehicles and perfected its security interest. Pursuant to the deed, Fast, in July 2012, appointed receivers, who in turn claimed possession of the vehicles under the deed.

4 It was accepted that Fast had a perfected security interest in the vehicles under the PPSA (at [21]). After considering the definition of “security interests” under the PPSA, his Honour also concluded that the leases of the vehicles by QES to Maiden were PPS leases within the meaning of the PPSA and as such, QES had a security interest in the vehicles (at [24]).

5 Accordingly, the key issue in the case was the priority between Fast’s security interest and QES’s security interest under the PPSA. Fast submitted that, as it had perfected its interest, it took priority over the interest of QES. QES submitted that its security interest took priority as a “transitional security interest”, which was “perfected by force of the Act immediately before the registration commencement time” (at [42]). Ultimately Brereton J was of the view that the transitional security interest argument did not avail QES (see at [42]-[68]).

6 QES also argued that the receivers had no enforceable right to possession as Maiden no longer had a right to possession having repudiated the lease by denying QES’s title and failing to pay rent (at [69]). Brereton J noted that, pursuant to s 267(2) of the PPSA, any

security interest granted by a corporation that is unperfected at the commencement of its administration or winding up vests in the corporation (at [70]) and, accordingly, QES's unperfected security interests had vested in Maiden (at [72]). Brereton J noted that, under the PPSA, Maiden did not have mere rights to possession but also had proprietary rights to the extent that it was able to grant security interests to third parties (at [73]).

7 In reaching his decision, his Honour relied considerably upon New Zealand and Canadian cases, observing (at [32]):

The Commonwealth Parliament, in enacting legislation that was modelled on the New Zealand and Canadian legislation, should be taken to have intended the same approach, which was by then well-established in Canada and New Zealand, to apply.

8 His Honour concluded that Maiden was the true owner of one vehicle while QES was the true owner of two vehicles; all vehicles were, however, subject to Fast's security interest, which was enforceable against third parties and perfected by registration (at [86]-[87]). QES had a security interest in two vehicles as lessor under a PPS lease but as it did not register its security interests and was not able to avail itself of the transitional provisions, its interest was unperfected and, pursuant to s 55(3) of the PPSA, Fast's perfected security interest took priority (at [89]-[90]).

9 The case of *Auto Moto Corporation Pty Ltd v SMP Solutions Pty Ltd* [2013] NSWSC 1403 also concerned an alleged security interest in a motor vehicle. The plaintiff claimed it had a security interest (for the purposes of the PPSA) in the vehicle pursuant to a loan agreement and sought orders that the defendant deliver up the vehicle and that the registrar of the PPSR remove all interests of the defendant in the vehicle. Stevenson J considered that the plaintiff's claim failed at the threshold, finding that the defendant acquired good title to the vehicle from the party authorised by the owner of the vehicle and that the person said to have granted the security interest on behalf of the owner had no authority to do so and that no loan was ever made (at [28], [30], [35]). Accordingly, it was not necessary for his Honour to consider the proper construction of the PPSA.

10 The AAT case of *Cirillo v Registrar Of Personal Property Securities* [2013] AATA 733 considered a motor vehicle lease. The purchaser's (Mr Cirillo's) debt to the financier was secured by the vehicle, with such security interest being first registered on the NSW Register

of Encumbered Vehicles and then migrated to the PPSR. Mr Crillo applied to the registrar of the PPSR to remove the registration from the register and the registrar determined not to do so. The AAT made some broad observations about the introduction of the PPSA, noting (at [6]):

The Personal Property Securities Act 2009 (the Act) commenced operation on 15 December 2009. The Act established a single national law governing security interests in personal property and was aimed to address the complexity of the regime it replaced, comprising over 70 Commonwealth, State and Territory laws, common law rules and rules of equity governing personal property securities. It was intended to provide a "modern and efficient personal property securities regulatory system which is essential for any modern financial system" [Personal Property Securities Bill 2009 (Cth) Replacement Explanatory Memorandum, p 11.]. The Act also established the PPSR, which is maintained by the Registrar. As alluded to above, the PPSR ultimately commenced on 30 January 2012, when data from pre-existing registers (including REVS) was migrated to the newly created PPSR.

11 The AAT rejected Mr Crillo's arguments, finding that the documents established that the vehicle continued to secure an obligation owned by Mr Crillo to the financier (at [23]) and that the amendment to the PPSR sought by Mr Crillo was not authorised under s 178 of the PPSA. Accordingly, the AAT affirming the registrar's decision (at [32]).

12 In *Nco Finance Australia Pty Ltd v Australian Pacific Airports (Melbourne) Pty Ltd* [2013] FCCA 2274 the applicant sought orders for the delivery up of a vehicle in the possession of the respondent or, in the alternative, permission to enter the respondent's Long Term Car Park at the Melbourne Airport for the purpose of taking possession of the vehicle. The financier of the loan to purchase the car had assigned its debt to the applicant. The respondent had possession of the vehicle and asserted a competing claim for the right to possess it until outstanding parking fees had been paid.

13 O'Dwyer J considered new scheme imposed by the PPSA, observing:

[10] *The Personal Property Security Act 2009 (Cth) ("the PPSA") was enacted to ensure consistency and uniformity throughout Australia concerning all transactions, in the broad, that serve to secure the purchase price or amount lent by a financier for the acquisition of goods by a debtor. Prior to its enactment, there existed different State based legislative regimes to effect the same general purpose. To effect consistency and uniformity, the PPSA introduced the concept of a "security interest" to be applied Australia wide.*

[11] *The PPSA provides for a single unified registration system and a comprehensive set of priority rules that apply to all security interests based upon the time of registration, known as "the priority time". The party*

claiming a security interest is, under the PPSA, required to register the security interest on the Personal Property Securities Register ("the PPSR") to ensure the start of its priority time.

[12] *To transition to the PPSA regime, the PPSA provided a mechanism to protect earlier perfected security interests subsisting under the then relevant various State legislative regimes.*

14 O'Dwyer J was satisfied that the agreement entered into by the purchaser of the vehicle and the financier was a "transaction" that was not excluded as one set out in s 8 of the PPSA and that the vehicle was "personal property" under the PPSA (at [14]). O'Dwyer J was satisfied that the applicant had a security interest enforceable against third parties, including the respondent and noted that the applicant's security interest was registered on the relevant register and then migrated to the PPSR (at [15]-[17]).

15 The respondent claimed a security interest arise out of its terms and conditions of use; it had not registered its interest but relied upon the transitional provisions (at [18]). O'Dwyer J found that the terms and conditions constituted a "transaction" under the PPSA and created a "possessory lien", which was a security interest enforceable against third parties provided it was perfected (at [22]). O'Dwyer J accepted that the leaving of the vehicle in the respondent's possession under a bailment for fee under the particular terms amounted to perfection of the security interest (at [24]).

16 O'Dwyer J noted that the PPSA governs priorities as between security interests but that, in the present case, both security interests arose under pre-existing legislative regimes and, accordingly, both were perfected on the day immediately preceding the commencement of the PPSA (at [25]). The PPSA provided the solution under s 323 which provided, in effect, that the interests would have the priority between themselves that they had immediately before the registration commencement time and as if the PPSA had not been enacted (at [31]). Accordingly and on the basis of the *Chattel Securities Act 1987*, the respondent had a superior security interest as it had a "repairer's lien", notwithstanding the applicant's earlier registration of their interest (at [38]-[39]).

Retention of title clauses

17 *Central Cleaning Supplies (Aust) Pty Ltd v Elkerton* [2014] VSC 61 concerned cleaning equipment and products supplied by Central Cleaning to Swan Services pursuant to a Credit

Agreement (entered into in September 2009). When supplying equipment, Central Cleaning included a retention of title “conditions of sale” clause was recorded on each invoice (at [1]). Swan Services went into liquidation. Central Cleaning claimed the return of the cleaning equipment on the grounds it had a perfected transitional security interest under the PPSA in the equipment supplied pursuant to unpaid invoices (at [2], [21], [41]). (Central Cleaning had not registered its interests on the PPSR.) The liquidators claimed that the equipment had vested in Swan Services. (at [2]) Ferguson J found that Central Cleaning did not have a perfected transitional security interest under the PPSA and confirmed the liquidator’s decision that the equipment had vested in the company (at [3]).

18 Ferguson J discussed the former operation retention of title clauses, noting that, the PPSA “has altered the position in some respects” (at [5]). Her Honour observed that such arrangements must now be “perfected”, through registration on the PPSR, in order for the supplied to maintain its entitlement to reclaim the goods (at [5]-[6]). Her Honour noted that the transitional provisions enable the automatic perfection of “transitional security interests” (at [6]). Ultimately, Ferguson J found that the retention of title clause formed part of each sale as a separate contract (each invoice) but was not, however, incorporated into the Credit Application agreement (at [33]). As it were only the separate and distinct contracts that provided for the security interests and these contacts came into being after 30 January 2012, the transitional provisions did not perfect them (at [34], [41]).

Associated orders under the *Corporations Act 2001 (Cth)*

19 In *Re Apex Gold Pty Ltd ACN 124 893 778* [2013] NSWSC 881 the plaintiff sought and the Court granted an order under s 588FM(1) of the *Corporations Act 2001 (Cth)* fixing as 26 March 2013 the registration time for security interests granted by Apex Gold to the plaintiff on (or about) 2 January 2013 in collateral, being all of the present and after-acquired property referred to in registration number 201303260070407 in the PPSR established under the PPSA (subject to various conditions).

20 Similar such orders were sought and considered in *Re Cardinia Nominees Pty Ltd* [2013] NSWSC 32, *Re Barclays Bank plc* [2012] NSWSC 1095 and *Re Black Opal IP Pty Ltd (subject to Deed Of Company Arrangement)* [2013] NSWSC 1225.

Consideration of the PPSA in the context of other areas of law

- 21 *Grant v YYH Holdings Pty Ltd* [2012] NSWCA 360 concerned an action in detinue and conversation for the return of 16 Awassi sheep and all sheep bred from such sheep or using their genetics (at [1]). McColl J had to consider the issue of “unity of property” in the context of the property in the progeny. McColl J considered each of the different approaches advocated by Counsel and concluded that the progeny and mother do not form a single aggregate entity. Her Honour noted that this preferred approach was supported by the new PPSA legislation, which expressly provided a definition for “accession” that related only to goods and a definition for “livestock” that included only the unborn young.
- 22 *In Re Cancer Care Institute of Australia Pty Ltd (Administrator Appointed)* [2013] NSWSC 37 the administrator of CCIA and CCIA sought declarations regarding title to certain property. Cortez (the first defendant) owned a property referred to as the premises, which was, in turn, subject to a first ranking mortgage and a second ranking mortgage (to the second and third defendants respectively). CCIA purchased equipment from Varian, which was subsequently installed at the premises owned by Cortez. Varian held a “purchase money security interest” in the equipment, which it registered on the PPSR. Cortez and Suncorp Metway claimed that the equipment was a fixture in the premises such that title passed to Cortez and was subject to the mortgages over the premises. Black J found that the equipment had not become a fixture to the premises for a number of reasons, including the fact that both CCIA and Varian proceeded on the basis that CCIA was able to give effective security over the equipment, which would be inconsistent with any objective intention of CCIA that they would become part of the premises and therefore the property of Cortez (at [33]).
- 23 *In Industrial Progress Corporation Pty Ltd v Wilson* [2013] WASC 225, Beech J ordered the extension of the operation of caveats over two parcels of land. Contrary to the submissions of the first defendants, Beech J accepted that the plaintiff’s claim to the interest claimed in the caveats had or may have substance. Beech J noted that the first defendants had emphasised that the plaintiff’s interest was a security interest under the PPSA, the plaintiff had failed to register and thereby perfect its interest. The first defendants submitted that such a failure involved a breach of the plaintiff’s duty to perfect securities and that they, as guarantors, were entitled to be credited, in reduction of their liability, to the extent that

that breach diminished the value of the security (at [26]). Beech J did not consider it necessary to deal with all of the first defendants' contentions, observing (at [27]):

For at least two reasons, I am satisfied that there is a serious question to be tried notwithstanding the first defendants' contentions based on the PPSA. First, it is at least seriously arguable that the rights of the plaintiff under condition 4 are temporarily perfected for 24 months by operation of the transitional provisions of the PPSA. That means there is no breach. Secondly, in the alternative, assuming, as the first defendants assert, breaches on the part of the plaintiff of the equitable duty to perfect its security, it is by no means clear that such breach would reduce the amount of the debt owed by the first defendants under the guarantee to nil. In this respect, the first defendants as guarantors bear the onus of proof.