

## THE *PPSA*: THE EXTENDED REACH OF THE DEFINITION OF THE *PPSA* SECURITY INTEREST

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### I THE *PPSA* AND THE RECONCEPTUALISATION OF THE SECURITY INTEREST

The *Personal Property Securities Act 2009* (Cth) (*'PPSA'*) has radically changed the definition of security interest, by abandoning the description of a security interest with reference to the form of the security, and in its place adopting a functional definition which focuses on the substance rather than the form of a particular arrangement. In discussions analysing the effect of the *PPSA*, an arrangement may be described as a security interest for the purposes of the *PPSA* or may be accorded a certain priority for the purposes of that Act. The use of this or similar qualifications, confining this functional approach to the definition of security interest just to the *PPSA*, could imply that the original characterisation of a security arrangement by reference to the form of a security continues to be relevant outside of the *PPSA*. The resolution of this issue is significant because of its relevance in construing existing statutes and agreements which may refer to traditional forms of security such as the mortgage or the charge. The issue is also significant because of its potential impact on the approach to be adopted in the drafting of statutes and agreements following the commencement of the *PPSA*. This article explores the extent to which the *PPSA* definition of security interest extends to existing statutes and agreements referring to the various forms of security instrument, and how provisions in those statutes and agreements may have a wider reach than was the case prior to the commencement of the Act.

Prior to the commencement of the *PPSA*, the nature of a security interest at common law or in equity depended on the form of the security instrument and on the nature of the charging clause in that instrument. Thus it was significant whether the security interest was by way of mortgage or charge and in the former case whether the mortgage was legal or equitable. Furthermore, the priority of a security holder and the other incidents arising as a consequence of the creation of the security, including remedies, depended very much on the nature of the title

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vested in the secured party and whether that title was legal or equitable. In some instances, it was also necessary to record the existence of the security interest on a public register to preserve priority, and to provide a mechanism for informing other creditors of the existence of the security interest and for ensuring that the security interest was effective on insolvency of the party providing the security. Examples of such registers include the Register of Charges created under Chapter 2K of the *Corporations Act 2001* ('*Corporations Act*') and its predecessors. Other examples include registers to record security interests in respect of other forms of personal property security derived from the 19th century bills of sale legislation. The law regarding the filing of security interests on public registers did not keep up with commercial developments; significant transactions which were the functional equivalents of security interests did not need to be recorded on a public register. Under the pre-existing law, suppliers of goods were not required to record publicly the existence of retention of title arrangements. Likewise, there was no requirement to record publicly certain types of trust arrangements which, although often serving the same purpose as a security, were regarded as juridically distinct from the charge and not a form of security interest.<sup>1</sup>

The existence of disparate and illogical technicality associated with the creation and recording of security interests over personal property, together with the gaps produced by that technicality, were common features of all personal property security systems based on the English common law. The unsatisfactory nature of this system was long recognised in the US and, since the 19th century, there had been pressure in that country to liberalise the technical restrictions associated with the taking of security over personal property. This liberalisation, which took place on an incremental basis, had the consequence of rendering the US system even more complex because of an approach based on the actual form of the security. This complexity was exacerbated by the fact that US law did not recognise the floating charge which, for the purpose of US bankruptcy law, was regarded as a form of fraud on creditors.<sup>2</sup> The pressure for reform came to a head in the 1940s when an expert group was commissioned to review and recommend reforms to the then existing system in the US. In conducting the review, the experts had the 'profound insight'<sup>3</sup> that traditional forms of security, and many other conventional legal relationships functioning as security but not legally

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1 See, eg. *Associated Alloys v ACN 001 452 106 Pty Ltd* (2000) 202 CLR 588, where an undertaking by a goods manufacturer to hold on trust for Alloys that portion of the sale proceeds of the goods equal to the original sale price of the steel used in the manufacture of the goods and supplied by Alloys to the manufacturer was held not to be a charge.

2 *Benedict v Ratner*, 268 US 353. At the time of this decision, US law did not provide for the recording of such interests on a public register.

3 Jacob S Ziegel, 'The New Provincial Chattel Security Law Regimes' (1991) 70 *Canadian Bar Review* 681, 685. Professor Ziegel opines that the 'distinctive feature of Article 9 is that it abolishes the pre-Code distinctions between the multiplicity of common law, equitable and statutory security devices': at 685. He also notes that in place thereof Article 9 uses the generic concept of a security interest leaving 'no justification for the retention of the old divisions and the large baggage of discrete rules and doctrines that accompanied them': at 686.

security interests, had common features and that the identification of these common features should be the starting point for rationalising the existing system. The product of this thinking was the definition of security interest in Article 9 of the *Uniform Commercial Code* (US) ('UCC').<sup>4</sup> The drafters also produced a new vocabulary to describe the parties to a secured transaction and this is also reflected in the Australian legislation. The person providing the security is described as the 'grantor'; the subject matter of the security is called the 'collateral' whilst the person holding the security is the 'secured party' and the person owing the debt or obligation is called the 'debtor'.

Article 9(1) of the *UCC*, the substance of which was adopted in Canada and New Zealand<sup>5</sup> and which is now reflected in section 12(1) of the *PPSA*, represents the synthesis of the factors which the US experts concluded were the hallmarks of a security interest. Section 12 is a key provision of the *PPSA* and provides in part as follows:

12(1) 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 of the identity of the person who has title to the property*) [emphasis added].

This functional definition expressly eschews any reference both to title and to the form of the security instrument, and requires the following matters to be satisfied. First, there needs to be an outstanding existing monetary or non-monetary obligation.<sup>6</sup> This was also a requirement for a security at general law; a security could secure both debts and the performance of other obligations, and to this extent, section 12 introduces no change in the law.<sup>7</sup>

Secondly, there must be an 'in substance security' to support the performance of that obligation. The reference to 'substance' reflects the legislative focus on the function of a particular arrangement rather than on its form. This means that for the purposes of the *PPSA*, all security interests are to be treated in the same fashion such that the distinction between, for example, an equitable charge and legal mortgage of personal property would be irrelevant as would be the distinction between a charge and a pledge. If an interest amounts to a 'security interest' for the purposes of the *PPSA*, then under that Act it is regarded as a security interest for all purposes. As the Supreme Court of Canada recently stated in the context of the Saskatchewan personal property security legislation, the functional approach to the definition of a security interest has 'the effect of extending the provisions of the *PPSA* to almost anything which serves the function of a security interest'.<sup>8</sup>

4 The history of the evolution of the original Article 9 definition of security interest is outlined in Chapter 9 of Grant Gilmore's seminal text, *Security Interests in Personal Property* (Little Brown, 1965).

5 The relevant provincial Canadian legislation is the *Personal Property Security Act, SS 1993*, c. P-6.2 upon which the New Zealand legislation, the *Personal Property Securities Act 1999* (NZ) was based.

6 *Ellingsen (Trustee of) v Hallmark Ford Sales Ltd* (2000) 190 DLR (4th) 47 (British Columbia Court of Appeal).

7 *Santley v Wilde* [1899] 2 Ch 474; *Waldron v Bird* [1974] VR 497; *Handvel Pty Ltd v Comptroller of Stamps (Vic)* (1985) 157 CLR 177.

8 *Bank of Montreal v Innovation Credit Union* [2010] 3 SCR 3, [18] ('*Innovation Credit Union*').

Thirdly, the security must amount to an ‘interest’ in the personal property. The word ‘interest’ is defined in section 10 of the *PPSA* to include ‘a right in personal property’ and would encompass a legal or equitable interest. However, having regard to the ‘examples’ of security interests in section 12(2) which would satisfy the definition of a security interest for the purposes of section 12(1), there is an argument that certain mere contractual rights may also suffice.<sup>9</sup> The examples listed in section 12(2) include both traditional security arrangements and other arrangements which until the commencement of the *PPSA* would not have been treated legally as security interests even though they may have served the same purpose as traditional security interests. In order to satisfy fully the interest requirement, the security interest or ‘collateral’ also has to be in respect of ‘personal property,’ a term which in part is defined in section 10 of the *PPSA* to ‘mean property (including a licence) other than ... land or ... a right, entitlement or authority that is’ granted by or under Commonwealth, state or territory law and ‘declared by that law not to be personal property for the purposes of’ the Act. To the extent not inconsistent with the *PPSA*, case law on the meaning of the word ‘property’ in other contexts would be of assistance in construing this provision.<sup>10</sup>

Finally, the interest must arise out of a transaction. Although not stated expressly, section 12 is only engaged if an anterior consensual security agreement results in the secured party obtaining an ‘interest’ in the secured property. The definition is not engaged if the security interest arises by operation of law.<sup>11</sup> Section 12(1) only applies if the transaction is captured by the general language of section 12(1) or the specific examples set out in section 12(2) and if the transaction ‘... in substance, secures payment or performance of an obligation’. For this reason, it is often said that sections 12(1) and 12(2) of the *PPSA* are engaged where there is an ‘in substance’ security interest, a term used to distinguish this form of security interest from the ‘deemed’ security interest referred to in section 12(3) of the *PPSA*. Although the provisions of the *PPSA* dealing with deemed security interests are significant, the principal focus of this article is on the in substance security interest arising under the *PPSA*.<sup>12</sup>

Whilst the first and final elements in the definition of security interest under the *PPSA* are also pre-requisites for the existence of a consensual security interest

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9 Compare the ‘interest’ of a bank where a customer has deposited money on a ‘flawed’ basis until the customer’s indebtedness to the bank has been satisfied.

10 Section 254 of the *PPSA* preserves common law and equity to the extent not inconsistent with the legislation. On the general law definition of property, see *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175; *Re Toohey*; *Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327. See also the Canadian decision of *Saulnier v Royal Bank of Canada* [2008] 3 SCR 166 favouring, with respect to a fishing licence, a broad commercial construction of the word ‘property’.

11 *Canadian Imperial Bank of Commerce v 64576 Manitoba Ltd* 79 (1991) 70 Man R (2d) 41 (Manitoba Court of Appeal). This conclusion was reached having regard to the legislation as a whole including the exceptions in the Manitoba equivalent of s 8 of the *PPSA*.

12 A deemed security interest encompasses the transfer of an account or chattel paper, the interest of a consignor under a commercial consignment and the interest of a lessor or bailor under a PPS Lease (as defined) whether or not such dealings secure an obligation. Unless otherwise indicated in the text, references to a *PPSA* security interest are only to the in substance *PPSA* security interest.

at general law, the second and third elements result in a wider range of arrangements being characterised as security interests under the *PPSA* than would be the case outside the statute. It is in this respect that the content of the traditional definition of security interest has been expanded and altered by the *PPSA*. Furthermore, the privileges and rights conferred by the *PPSA* on a secured party holding the security interest (often described as the incidents of the security interest) have also been altered as manifested by the new rules in the *PPSA* relating to the acquisition of collateral free of a security interest (the taking free rules), the new rules as to priority (the priority rules) and the remedies conferred on a secured party following the grantor's default (the rules relating to the enforcement of security interests including the right of the secured party to retain the collateral). The incidents of the security interest have also been altered in the event of the bankruptcy or insolvency of the grantor.

In construing section 12 of the *PPSA*, some commentators have viewed the matter as an issue as to whether section 12 creates a new species of security interest or whether in the alternative, section 12 of the *PPSA* merely purports to apply to a traditional security interest but changes the incidents of that security interest.<sup>13</sup> An implicit assumption underlying the latter view is that the traditional forms of security instrument should continue to be used before the provisions of the *PPSA* are engaged or, at the very least, that an *in rem* right must be conferred on the secured party before a security interest exists under the Act. Although this is a possible reading of section 12 of the *PPSA*, this analysis does not describe accurately the effect of the provision when read in the context of the *PPSA* as a whole. As indicated above, the *PPSA* may apply to a wider range of arrangements than just the traditional security arrangements, *a fortiori* if the reference to 'interest' in section 12 refers to rights which are less than proprietary in nature. Furthermore, such a view ignores the potential for section 12 to operate in cases where no traditional security instrument is used. That said, neither is it accurate to assert that the *PPSA* creates a new form of property. The *PPSA* does not operate in a vacuum plucking security interests out of the ether. Section 12 is only engaged if there is a consensual transaction having the in substance effect described in the provision, even though the range of arrangements now treated as security interests is wider than has traditionally been the case and even though the statute changes the incidents of those arrangements once they become subject to section 12. A proper understanding of section 12 of the *PPSA* is thus not necessarily advanced by analysing the matter from the viewpoint of either of the alternative analyses discussed above as if they were mutually exclusive interpretations as to how section 12 operates.

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13 See, eg, the analysis in C Wappett, S Edwards and B Whittaker, *Personal Property Securities in Australia* (LexisNexis Butterworths, 2010) [2.850]–[2.900].

## II THE JURIDICAL NATURE OF THE SECURITY INTEREST

In considering the effect of the Saskatchewan personal property security legislation, the Canadian Supreme Court, in a unanimous decision, recently made the following observations which are equally apposite to the Australian legislation:

The *PPSA* does not rely on either the common law notion of title or the equitable concepts of beneficial interest or equity of redemption to resolve priority disputes. Rather, for those interests that come within the scope of the Act, the *PPSA* provides a compendium of rules establishing priority rankings both as between different security interests as well as between security interests and other interests in the collateral, with no regard to the question of who actually has title to the collateral.<sup>14</sup>

The above comments demonstrate that, if the provisions of the *PPSA* are engaged, it becomes a matter of applying the relevant specific rules set out in the legislation (for example the priority rules) without regard to title. It is not surprising therefore that, until recently, there has been little commentary in Canada or New Zealand on the juridical nature of a security interest subject to the *PPSA*. The authors of the leading Canadian text on the Canadian personal property security legislation conclude that such a security interest ‘has most of the characteristics of an interest arising under a hypothecation agreement’,<sup>15</sup> and is akin to a hypothec under Roman law or an equitable charge,<sup>16</sup> but warn that the analogy with either the hypothec or charge is not complete because of the broad range of remedies conferred on the holder of a security interest subject to the personal property security legislation.

However, in the recent Canadian Supreme Court decision in *Innovation Credit Union*, it became necessary for the Court to address this issue. In that case, there was a priority dispute between a prior unperfected security interest regulated by the Saskatchewan *Personal Property Security Act 1993*,<sup>17</sup> and a subsequent security interest over the same collateral regulated by the Canadian *Bank Act*,<sup>18</sup> which was a federal rather than a provincial statute. The *Bank Act* contained its own special procedure specifically designed to enable banks to take security and, as it was federal legislation, survived the enactment of the Canadian personal property security legislation by the provincial legislatures. If each security interest had been regulated by the *Sask PPSA*, then a prior unperfected security interest would have ranked in priority after a subsequent perfected security interest. However, this legislation was inapplicable because of the separate federal statute. Furthermore, the *Bank Act* did not provide a basis for resolving the priority dispute.

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14 *Innovation Credit Union* [2010] 3 SCR 3, [19].

15 Ronald CC Cuming, Catherine Walsh and Roderick J Wood, *Personal Property Security Law* (Irwin Law, 2005) 61.

16 *Ibid* 60–1.

17 *Personal Property Security Act*, SS 1993, c P-6.2 (‘*Sask PPSA*’).

18 *Bank Act*, SC 1991, c 46 (‘*Bank Act*’).

As a consequence, the matter fell to be determined by general law principles. Because the prior security holder had failed to perfect its security interest, the bank argued that it should have the priority since it had complied fully with the requirements of the *Bank Act*. The Court held unanimously that the unperfected prior security interest under the *Sask PPSA* had priority over the subsequent *Bank Act* security. In reaching this conclusion, the Court made the following significant observations in relation to the conduct of Mr Buist, the grantor of the collateral:

Buist owned the property, but he had already given the Credit Union a *PPSA* security interest in the collateral in question. He could not convey to the Bank any greater interest than what he himself had left in the property.<sup>19</sup>

[I]t is clear that the *PPSA* security interest, just as the *Bank Act* security interest, is a statutorily created interest and, as such, an interest recognised at law.<sup>20</sup>

At the time the Bank took its *Bank Act* security interest, the Credit Union already held a *statutory interest in the same collateral which, in proprietary terms, is correlative to a fixed charge*. Therefore, the Bank could only take its interest subject to this prior interest.<sup>21</sup>

In Canada, it appears that the personal property security legislation does not operate in its own virtual world. A security interest subject to that legislation is not a chameleon having one set of characteristics solely for the purposes of the personal property security legislation and another set of characteristics for purposes outside the statute. Rather, the legislation has also wrought changes which are to be recognised generally, so that for the purposes of determining whether a person has a proprietary security interest in an asset, a security interest, once it becomes subject to the Canadian personal property security legislation, is to be characterised for all purposes as a legal (statutory) fixed charge.<sup>22</sup>

If the above analysis is accepted in Australia, the decision in *Innovation Credit Union* provides judicial confirmation that a security interest under the *PPSA* is a statutory (legal) interest operating in a way corresponding to a fixed charge. In turn, this raises the question whether these consequences have a broader application beyond the *PPSA* including those cases where there is a priority dispute over collateral in respect of which the rules in the *PPSA* do not provide a solution.

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19 *Innovation Credit Union* [2010] 3 SCR 3.

20 *Ibid* [42].

21 *Ibid* [51] (emphasis added).

22 In reaching this conclusion, the Court adopted the view of the leading commentators on the Canadian legislation and the substance of its earlier decision in *Royal Bank of Canada v Sparrow Electric Corp* [1997] 1 SCR 411. The recent decision of the Canadian Supreme Court in *i Trade Finance Inc v Bank of Montreal* [2011] SCC (26 (20 May 2011) confirms that a personal property security interest is properly characterised as a legal (statutory) charge when dealing with matters not directly governed by the statute (in this instance a competition between a personal property security interest and a trust). The conclusion is also consistent with the leading New Zealand commentary which describes the *PPSA* security interest as 'akin to a fixed charge and, because the security interest is provided for by statute, it is in effect equivalent to a statutory or legal charge': Michael Gedye, Roderick CC Cuming and Roderick J Wood *Personal Property Securities in New Zealand* (Thomson Brookers, 2002) 73.

It remains to be seen whether *Innovation Credit Union* will be followed in Australia. If an alternative view were to be adopted and if the provisions of the *PPSA* were only relevant in resolving disputes in relation to security interests wholly subject to the *PPSA*, then one may expect to see the ongoing use of the existing forms of security instrument and a dual system for determining claims over shared collateral over personal property depending on whether each or only one of the claims over the shared collateral is or is not subject to the *PPSA*. The alternative view also raises the unsatisfactory spectre that certain arrangements are to be regarded as security interests for one purpose but not for another. It is suggested that the latter approach would constitute an incoherent and illogical development in the law which is also inconsistent with the rationale behind the new legislation with its focus on a functional definition of security interest.

Fortunately, this issue has been resolved in Australia, at least to some extent, by specific and general legislative intervention discussed below, the aim of which, subject to certain qualifications, is to expressly incorporate the *PPSA* definition of security interest into other Commonwealth statutes and into the statutes of New South Wales, Queensland, and Western Australia. At the same time, state and territory legislatures have also attempted to qualify the extension into areas which they perceive to be subject to their exclusive economic control. Where the legislative intervention or qualification is incomplete, the *PPSA* security interest definition may still have an application in any event for the purposes of Commonwealth, state and territory legislation if, conformably with the *Innovation Credit Union* decision, the *PPSA* security interest is regarded as a form of legal charge. For similar reasons, there is also the possibility that the *PPSA* definition of security interest may extend generally to provisions in contractual arrangements regulating the granting of security interests.

Each of these matters is discussed further below. Parts 3 and 4 describe the extent to which this new definition of security interest may have a specific or general application outside the *PPSA* by reference to existing Commonwealth and state legislation. Part 5 considers the application of the *PPSA* definition of security interest to private contractual arrangements. Because the matters under consideration involve issues of construction, it will be seen that it is not possible to anticipate with completeness the reach of this extended application.

To varying degrees, the examples selected for the purposes of illustration demonstrate that the *PPSA* definition of security interest may have a more universal application than is apparent from just reading the *PPSA* itself. Such an extended application has implications for borrowers and lenders alike and some of these implications are also considered below. When considering the implications of the extended reach of the *PPSA* security interest definition, it is important not to forget the steps necessary to perfect a *PPSA* security interest under the Act, namely: attachment,<sup>23</sup> the need for the security interest to be enforceable against third parties and the steps necessary to achieve that status,<sup>24</sup>

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23 *PPSA* s 19.

24 *Ibid* s 20.



and compliance with the other steps necessary to achieve perfection.<sup>25</sup> Depending on the particular factual scenario, a failure to attend to any of these matters may have significant consequences. If attachment does not exist, then no effective security interest arises at all.

### III SPECIFIC APPLICATION OF THE *PPSA* SECURITY INTEREST DEFINITION IN OTHER COMMONWEALTH AND STATE LEGISLATION

#### A *Corporations Act*

Prior to its amendment by the *Personal Property Securities (Corporations and Other Amendments) Act 2010* (Cth), the *Corporations Act* recognised that a company was able to grant a charge (which included a mortgage), pledge or lien over all its assets. For a floating charge to be effective against a liquidator or an administrator of a company, it was necessary to register a notice of particulars of charge and a copy of the charge at the Australian Securities and Investments Commission.<sup>26</sup> Registration was not required for certain forms of fixed charge or for certain forms of security arising by way of a pledge or lien.<sup>27</sup> The drafters of the *PPSA* recognised that these references in the *Corporations Act* were based on the form of a security and that this was no longer appropriate or consistent with the *PPSA*.<sup>28</sup> As a consequence, the *Corporations Act* was amended to align its existing provisions, including its insolvency provisions, with the new concepts contained in the *PPSA*. As far as was possible, the drafters also aimed to minimise any substantive changes to the principles underlying Australia's existing corporate insolvency law.<sup>29</sup>

A new composite defined term, 'security interest', has been inserted into the *Corporations Act*,<sup>30</sup> encompassing both a *PPSA* security interest,<sup>31</sup> as well as a charge, lien or pledge not subject to the *PPSA*.<sup>32</sup> The retention of the reference to charge (which as mentioned earlier includes a mortgage), lien and pledge illustrates that there was not a total abandonment of references to the form of the

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25 Ibid s 21. Relevantly, this requires possession or control of the collateral or the filing of an appropriately drafted financing statement on the PPS Register. Note that only certain forms of collateral may be perfected by possession and control.

26 *Corporations Act* ch 2K prior to its repeal pursuant to the *Personal Property Securities (Corporations and Other Amendments) Act 2010* (Cth) sch 1 pt 2.

27 *Corporations Act* s 262(2).

28 Explanatory Memorandum, *Personal Property (Corporations and Other Amendments) Bill 2010* (Cth).

29 Note that further consequential amendments were made to the *Corporations Act* by the *Personal Property Securities (Corporations and Other Amendments) Act 2011*, but the further amendments are not relevant in relation to the provisions in the *Corporations Act* considered in the article.

30 *Corporations Act* s 51A. The term replaces former reference in the *Corporations Act* to 'charge', 'lien', 'pledge', 'mortgagee' and 'security'. However, the replacement is not complete. For example, the reference to 'security' in *Corporations Act* s 259B (the prohibition against a company taking security over shares in itself or in the company that controls it) remains unchanged.

31 Ibid s 51 ('a security interest within the meaning of the *PPSA* and to which that Act applies').

32 Ibid s 51A.

security. It was appreciated that the traditional forms of security instruments may still have a continuing relevance following the commencement of the *PPSA*, in that an Australian company was still able to grant a security by way of charge, lien or pledge over an asset, which was not personal property as defined in the *PPSA* or not otherwise subject to the Act.<sup>33</sup> Another new composite definition, ‘secured party’ was inserted. The latter expression refers to a secured party with a *PPSA* security interest under the *PPSA* as well as a person having the benefit of a charge, lien or pledge.<sup>34</sup>

These new definitions are mainly relevant for the purposes of the insolvency and administration provisions in the *Corporations Act*. However, care is required in construing them. In some instances, a reference is made to a *PPSA* security interest whilst in other cases, the broader term security interest is used. For example, a security interest in favour of a company officer and associated persons is void if it is enforced within six months of its creation.<sup>35</sup> In contrast, a *PPSA* security interest, as distinct from a security interest, perfected by the registration of a financing statement would vest in a liquidator or voluntary administrator of a company if the registration of the security interest had not been effected within a designated time period.<sup>36</sup> In the context of a corporate insolvency, it is thus important to appreciate that references in the *Corporations Act* to a *PPSA* security interest are references to a *PPSA* security interest only if that security interest is duly perfected in accordance with the *PPSA* and, if perfection is by means of the registration of a financing statement, perfected within the time stipulated in the *Corporations Act*.

The restrictions on the enforceability of a security interest during administration now extend to a *PPSA* security interest. Under the *Corporations Act* as amended by the *Personal Property Securities (Corporations and Other Amendments) Act 2010* (Cth), a person holding a security interest over the whole or substantially the whole of a company’s property is able to enforce a security interest within the 14 day decision period commencing on the date of the appointment of the administrator provided that the security interest, to the extent it is or includes a *PPSA* security interest, is duly perfected.<sup>37</sup> Under the voluntary administration provisions of the *Corporations Act* prior to these latest amendments, a lessor was unable to seek distress for rent or take possession of

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33 The *PPSA* only applies to property, which is also personal property and not otherwise subject to the exclusions in *PPSA* s 8.

34 *Corporations Act* s 51B. This term replaces former references in the *Corporations Act* to ‘chargee’, ‘lienee’, ‘pledgee’, ‘mortgagee’ and ‘holder of charge’.

35 *Ibid* s 588FP.

36 *Ibid* s 588FL(2) stipulates the following time periods: the earlier of 20 business days after the security agreement giving rise to the security interest and the date of the commencement of the liquidation or administration or no later than 6 months before the commencement of the liquidation or liquidation.

Certain forms of deemed *PPSA* security interest are not subject to the vesting rules. See *Corporations Act* s 588FN (for security interests unaffected by s 588FL).

37 *Ibid* ss 441A, 441AA.

the leased property without the administrator's consent or leave of the court.<sup>38</sup> The amended *Corporations Act* confirms that these restrictions continue to apply in an administration, but in recognition that the rights of such a lessor may now constitute a security interest, the *Corporations Act* provisions have been expanded to restrict the enforcement of that security interest.<sup>39</sup>

By way of an additional exception to the restrictions on enforcing a security during administration, an authorised deposit-taking institution was able to enforce property subject to a banker's lien or pledge.<sup>40</sup> This latter exception has been expanded and now covers not just property subject to a lien or pledge but also other property subject to a possessory security interest held by an authorised deposit-taking institution. A possessory security interest includes not only a traditional lien or pledge but also a *PPSA* security interest perfected by possession or control and, by way of example, would now include a security interest over certificated shares where the secured party is given possession of the share certificate.<sup>41</sup>

Sections 433 and 561 of the *Corporations Act* formerly provided that the holder of a floating charge over a company's assets must first apply the enforcement proceeds to pay out certain preferred claims such as claims for unsatisfied employee entitlements. To complete the alignment of the *PPSA* with the *Corporations Act* and as an illustration of the desire, as far as possible, not to alter existing insolvency law, the *Corporations Act* contains a new definition of circulating security interest<sup>42</sup> which covers both a *PPSA* security interest over a circulating asset and a floating charge. For these purposes, a circulating asset is in substance an asset which an owner may deal with in the ordinary course of its business free of any security interest.<sup>43</sup> The references in sections 433 and 561 to floating charge have now been replaced by the broader reference to a circulating security interest, with the result that each section now applies to proceeds derived from the enforcement of a floating charge as well as a *PPSA* security interest attached to a circulating asset.

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38 *Corporations Act* ss 440BB, 440C prior to their amendment by the *Personal Property Securities (Corporations and Other Amendments) Act 2010* (Cth).

39 *Corporations Act* s 440B. Enforcement of property rights by a lessor where the lessor's rights do not constitute a *PPSA* security interest is now regulated separately. See *Corporations Act* ss 441EB, 441J.

40 *Corporations Act* s 440J prior to its amendment by the *Personal Property Securities (Corporations and Other Amendments) Act 2010* (Cth). The exception also applied to operators of clearing and settlement systems.

41 *Corporations Act* s 440 JA when read with the definition of security in s 92. The method of perfecting a security interest over certain property thus impacts considerably on enforceability in administration and is a consequence of the *PPSA* permitting perfection of a security interest over certificated shares by possession of share certificates. It is unlikely that the drafter fully appreciated this anomalous result which does represent a change in the existing law and creates an additional privilege for authorised deposit-taking institutions over and above the privilege given to them in relation to a security interest over a bank deposit.

42 *Ibid* s 51C. This section refers in turn to the definition of circulating asset in *PPSA* s 340.

43 *PPSA* s 340.

### **B Bankruptcy Act 1966 (Cth)**

The above summary demonstrates that the extension of the *PPSA* security interest definition into the *Corporations Act* is significant and substantial especially in the area of corporate insolvency law. Consequential amendments have also been made to the *Bankruptcy Act 1966* (Cth) (*'Bankruptcy Act'*). Prior to the amendments contained in the *Personal Property Securities (Consequential Amendments) Act 2009* (Cth), the *Bankruptcy Act* defined a secured creditor as 'person holding a mortgage, charge or lien on property of the debtor as a security for a debt due to him or her from the debtor'.<sup>44</sup> For these purposes, a 'debt' included a liability.<sup>45</sup> The *Personal Property Securities (Consequential Amendments) Act 2009* (Cth) amended the *Bankruptcy Act* by expanding the definition of secured creditor to include a person whose debt is secured by a perfected *PPSA* security interest in accordance with the *PPSA*.<sup>46</sup> The result is a composite definition of secured creditor similar to that discussed above in relation to the *Corporations Act* which recognises that a bankrupt may have granted a security over property subject to the *PPSA* as well as over property not subject to that Act. Again, in the context of a *PPSA* security interest and consistently with the amendments to the *Corporations Act*, the amendments illustrate the importance of the need to perfect a *PPSA* security interest in the context of insolvency and bankruptcy. If the *PPSA* security interest is perfected prior to the commencement of the bankruptcy, the security interest of the secured party remains unaffected by the bankruptcy of the grantor and the secured party is accorded the same rights under the *Bankruptcy Act* as any other secured creditor of the bankrupt holding a security interest not subject to the *PPSA*.<sup>47</sup> In contrast to the requirements contained in the *Corporations Act*, there are no equivalent provisions in the *Bankruptcy Act* requiring that perfection of a *PPSA* security interest be effected within a given time following the creation of the security interest if perfection is by way of the filing of a financing statement.

The changes to corporate insolvency law and individual bankruptcy law are complex but necessary if Australia is to avoid difficulties which have arisen in Canada where Canadian insolvency legislation has not been modified to accommodate the new definition of security interest created by the provincial personal property security legislation.<sup>48</sup>

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44 *Bankruptcy Act 1966* s 5(1).

45 *Ibid.*

46 *Ibid* s 5(1) as so amended when read with the other new defined terms, '*PPSA* secured party', '*PPSA* security interest' and the amended definition of 'secured creditor'.

47 The *Bankruptcy Act* contains numerous references to the rights of a secured creditor. See, eg, ss 44 (secured creditor treated as a creditor only to the extent that the amount of the debt exceeds the value of the security), 90 (regarding the secured creditor's right of proof where the security does not cover the whole of the debt or is surrendered by the secured creditor).

48 See, eg, J S Ziegel, 'Conditional Sales and Superpriority Crown Claims under the ITA s. 227' (2003) 8 *CBR* (4th) 161; Roderick J Wood, 'The Definition of Secured Creditor in Insolvency Law' (2010) 25 *Banking and Finance Law Review* 341.

### C Other Commonwealth Legislation

As a result of the passing of the *PPSA*, consequential amendments were also made to a large number of other existing Commonwealth statutes.<sup>49</sup> Although the amendments differed in detail, they followed a consistent pattern. First, Commonwealth statutes which contained their own regime for the registration of personal property security interests over matters within Commonwealth power were amended so that following the registration commencement time of the *PPSA*, but subject to applicable transitional provisions, those registers ceased to have any legal effect. The aim was to ensure that those security interests were henceforth perfected by the filing of a financing statement on the PPS Register created pursuant to the *PPSA* and were otherwise subject to that Act.<sup>50</sup> Next, provisions in Commonwealth statutes which enabled the Commonwealth to seize or detain property for unpaid levies and fines prevailed over and were not to be frustrated by any enforcement rights of a secured party over that property pursuant to Chapter 4 of the *PPSA*.<sup>51</sup> Finally, amendments were made to Commonwealth statutes to ensure that the priority regime in those statutes accorded to collateral arising from charges or liens recognised by Commonwealth statutes or created by them ('statutory security interests') continued to apply and that for this purpose the *PPSA* was inapplicable. In order to achieve this outcome, the drafters took advantage of section 73(2) of the *PPSA* which permits Commonwealth law to determine the priority of a statutory security interest over collateral if that law declares that section 73(2) applies to

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- 49 The amendments were made by the *Personal Property Securities (Consequential Amendments) Act 2009* (Cth) and the *Personal Property Securities (Corporations and Other Amendments) Act 2010* (Cth) and amended the following Commonwealth statutes in addition to the *Corporations Act* and *Bankruptcy Act*: *Admiralty Act 1988* (Cth); *Air Services Act 1995* (Cth); *Commonwealth Inscribed Stock Act 1911* (Cth); *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth); *Designs Act 2003* (Cth); *Fisheries Management Act 1991* (Cth); *Health Insurance Act 1973* (Cth); *Insurance Act 1973* (Cth); *Marine Navigation Levy Collection Act 1989* (Cth); *Marine Navigation (Regulatory Functions) Levy Collection Act 1991* (Cth); *Mutual Assistance in Criminal Matters Act 1987* (Cth); *Navigation Act 1912* (Cth); *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth); *Patents Act 1990* (Cth); *Plant Breeder's Rights Act 1994* (Cth); *Privacy Act 1988* (Cth); *Proceeds of Crime Act 2002* (Cth); *Protection of the Sea (Civil Liability) Act 1981* (Cth); *Protection of the Sea (Harmful Anti-fouling System) Act 2006* (Cth); *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth); *Protection of the Sea (Shipping Levy Collection Act) 1981* (Cth); *Quarantine Act 1908* (Cth); *Shipping Registration Act 1981* (Cth); *Torres Strait Fisheries Act 1984* (Cth); *Trade Marks Act 1995* (Cth); *Quarantine Act 1908* (Cth); *Wool International Act 1993* (Cth).
- 50 Examples in this category include the amendments made to: *Designs Act 2003* (Cth), *Patents Act 1995* (Cth), *Trade Marks Act 1995* (Cth) (security interests may still be registered under these Acts but have no effect on the rights of the registered owner of the design, patent or trade mark); see also amendments to *Shipping Registration Act 1981* (Cth) (removing the ability to register ship mortgages and caveats on the Australian Register of Ships).
- 51 Examples in this category include amendments made to: *Marine Navigation Levy Collection Act 1989* (Cth), *Marine Navigation (Regulatory Functions) Levy Collection Act 1991* (Cth), and *Protection of the Sea (Shipping Levy Collection) Act 1981* (Cth).

the statutory security interest and the statutory security interest arises after the declaration comes into effect.<sup>52</sup>

Although these amendments are significant in their recognition of the *PPSA* security interest definition, they do not all expressly incorporate the *PPSA* security interest definition into the other Commonwealth legislation. The second and third categories of amendments described above recognise that, as a third party, the Commonwealth may be subject to a *PPSA* security interest in any event. To avoid this outcome, the amending provisions disapply the enforcement and priority provisions of the *PPSA* in relation to Commonwealth statutory security interests but implicitly recognise their continued operation in cases not involving Commonwealth statutory security interests. In the alternative, the Commonwealth has taken advantage of the mechanism in section 73 of the *PPSA* so as to ensure the continued application of the priority rules set out in the Commonwealth statute. In this respect, the reach of the potential application of the *PPSA* definition of security interest into other Commonwealth legislation is acknowledged but qualified.

#### **D State and Territory Legislation**

The referral of power to the Commonwealth by each state for the purposes of the *PPSA* is subject to certain express qualifications which may be found not only in the referral legislation itself,<sup>53</sup> but also in consequential Acts passed by each applicable state and territory legislature.<sup>54</sup> Although the consequential Acts are not identical, they each follow a consistent structure. They each contain provisions addressing the continuation or termination of existing personal property security registers maintained by the states and territories including, where applicable, consequential provisions relating to the migration of the securities recorded on these registers to the new PPS Register created under the *PPSA*. As indicative of the desire of a state or territory to retain exclusive control over significant property rights, certain statutory rights, licences or authorities granted or held pursuant to a State or Territory Act are declared not to be

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52 Examples in this category include: *Air Service Act 1995* (Cth) (lien for unpaid navigation fees); *Navigation Act 1912* (liens for unpaid wages of seamen and charges for attending sick or injured seamen and lien over wreck for damage to land); *Insurance Act 1973* (priority of statutory charge of a judicial manager of an insurance company for remuneration and allowances).

53 *Personal Property Securities (Commonwealth Powers) Act 2009* (NSW); *Personal Property Securities (Commonwealth Powers) Act 2009* (Qld); *Personal Property Securities (Commonwealth Powers) Act 2009* (SA); *Personal Property Securities (Commonwealth Powers) Act 2010* (Tas); *Personal Property Securities (Commonwealth Powers) Act 2009* (Vic); *Personal Property Securities (Commonwealth Laws) Bill 2011* (WA). At the time of writing, the Western Australian Bill has yet to be proclaimed.

54 *Personal Property Securities Act 2010* (ACT); *Personal Properties Securities Legislation Amendment Act 2010* (NSW); *Personal Property Securities (National Uniform Legislation) Implementation Act 2010* (NT); *Personal Property Securities (Ancillary Provisions) Act 2010* (Qld); *Statute Amendment (Personal Property Securities) Act 2011* (SA); *Personal Property Securities (National Uniform Legislation) Implementation Act 2011* (Tas); *Personal Property Securities (Statute Law Revision and Implementation) Act 2010* (Vic); *Personal Property Securities (Consequential Repeals and Amendments) Bill 2011* (WA). At the time of writing, the Western Australian Bill has yet to be proclaimed.

personal property for the purposes of the *PPSA*.<sup>55</sup> Although the range of excluded property varies significantly between each state or territory,<sup>56</sup> all states (except Tasmania) together with the Northern Territory have expressly declared that mining rights and licences together with fishing licences are not to be regarded as personal property for the purposes of the *PPSA*.<sup>57</sup>

Where a local statute contains its own priority regime for security interests arising under that statute, each consequential Act, adopting an approach similar to that used in the Commonwealth consequential legislation referred to earlier, contains an express declaration, as contemplated by section 73(2) of the *PPSA*, that the particular priority regime in the relevant local statute continues to apply, rather than the priority rules in the *PPSA*.<sup>58</sup> In making such declarations, the consequential statutes contain an express or implied recognition that, but for the disapplication of the *PPSA* under section 73(2), the security interest would be a *PPSA* security interest regulated by that Act including its priority regime. However, in some instances, the disapplication may have been incomplete.<sup>59</sup>

In addition, cross references in state or territory Acts to security interests arising under those laws are replaced by references to the *PPSA* and, where appropriate, by recognition of the rights of a secured party holding a security interest under the *PPSA*.<sup>60</sup> The state referral legislation also restricts the exercise of an enforcement right under Chapter 4 of the *PPSA* so as to avoid conflict with

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55 In making such declarations, the drafters of the consequential legislation relied on the provisions of s 8(1)(k), which contemplates the making of such declarations in relation to any right, licence or authority granted by a state or territory law; or in the alternative, relied upon paragraph (d) of the definition of licence in *PPSA* s 10 pursuant to which a licence, right or authority granted by or under a state or territory law may be declared not to be personal property for the purposes of the *PPSA*.

56 The range of excluded items is broad and includes interests in the following areas: fishing, mining, energy, petroleum and electricity, gaming, water supply, local government approvals, environment, liquor, tobacco and transport and roads.

57 See, eg, *Personal Properties Securities Legislation Amendment Act 2010* (NSW) sch 1 amending the *Mining Act 1992* (NSW) (excluding exploration licence, assessment lease, mineral claim, mining licence and an opal prospecting licence) and *Fisheries Management Act 1994* (NSW) (excluding amongst other matters, commercial fishing licence, fishing boat licence, share and charter fishing boat licence). In some states the exclusions are wide ranging. For example, in Queensland the *Personal Property (Ancillary Provisions) Act 2010* (Qld) excludes at least 17 Queensland licences and other statutory authorities from the application of the *PPSA*.

58 A common exception relates to statutory liens. See, eg, *Statute Amendment (Personal Property Securities) Act 2011* (SA) pt 27 (worker's liens); *Personal Property Securities (Ancillary Provisions) Act 2010* (Qld) pt 36 (storage liens). See also *Personal Property Securities Legislation Amendment Act 2010* (NSW) sch 1, which retains the priority regime in the *Building and Construction Industry Security of Payment Act* (NSW) and the *Confiscation of Proceeds of Crime Act 1989* (NSW).

59 See, eg, *Local Government Act 1989* (Vic) sch 9 cl 2, which contains a priority regime for securities over personal property granted by local councils (which would be Australian entities under *PPSA* s 10 (definition of 'Australian entity')) potentially inconsistent with the priority regime under the *PPSA*. Such secured borrowings would not appear to be excluded by *PPSA* s 8(1)(b).

60 See, eg, *Personal Property Securities (Ancillary Provisions) Act 2010* (Qld) ch 4 which inserts provisions into various Queensland statutes expressly recognising the rights of holders of *PPSA* security interests.

any provisions in the local statute regulating transfers and other dealings with rights conferred by state statutes.<sup>61</sup>

It will be seen from the above analysis that the main concern of the state and territory legislatures has been to exclude the reach of the *PPSA* from areas of economic significance to them. The examples considered demonstrate the importance of considering the local statute when dealing with personal property arising out of a right conferred by a state or territory law. Apart from those areas, the states and territories have recognised the potential reach of the *PPSA* definition of security interest in other areas and have adopted an approach similar to that utilised by the Commonwealth in its consequential legislation in limiting the application of the *PPSA* especially in areas where a local statute has its own priority and enforcement regime. The limitation has not necessarily been complete. Because of the breadth of the definition of personal property in the *PPSA* and the breadth of the definition of a *PPSA* security interest, there are still many non-excluded areas where the latter Act, including its broad definition of security interest may have a potential application to a Commonwealth, state or territory law. These issues are discussed below.

#### **IV GENERAL APPLICATION OF THE *PPSA* SECURITY INTEREST DEFINITION IN OTHER COMMONWEALTH AND STATE AND TERRITORY LEGISLATION**

##### **A General Application of the *PPSA* Security Interest Definition to Commonwealth Law and to the Law of Queensland, New South Wales and Western Australia by Express Statutory Enactment**

The amendments to the Corporations Act and to other Commonwealth legislation made by the *Personal Property Securities (Consequential Amendments) Act 2009* (Cth) and the *Personal Property Securities (Corporations and Other Amendments) Act 2010* (Cth) do not cover all Commonwealth statutes which refer to a mortgage, charge or encumbrance. The *PPSA* definition of security interest also extends to other Commonwealth statutes that have not been singled out for separate amendment by virtue of the operation of general language contained in section 339 of the *PPSA*. Section 339 provides that if the reference in the Commonwealth legislation is to:

- (a) a charge, then the reference shall be read as if it were a reference to a *PPSA* security interest which has attached to personal property which is either a circulating asset or a non-circulating asset;

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61 See, eg, the *Personal Property Securities (Commonwealth Powers) Act 2009* (NSW) s 4 (definition of ‘referred PPS matters’) and s 23A (enforcement of a *PPSA* security interest restricted if it is inconsistent with State law) but note the potential conflict may still exist. See, eg, the potential conflict between *PPSA* s 140 (distribution of proceeds on enforcement) and *Goods Act 1958* (Vic) s 121 (hirer’s rights under a hire purchase agreement to surplus on sale by owner).



- (b) a fixed charge, then the reference is taken to be a reference to a *PPSA* security interest that has attached to personal property is not a circulating asset;
- (c) a floating charge, then the reference is taken to be a reference to a *PPSA* security interest which has attached to personal property which is a circulating asset.

According to the Replacement Explanatory Memorandum to the Personal Property Securities Bill 2009, the reason for the provision is as follows:

The Bill would implement a functional approach to security interests, and apply to all security transactions that in effect secure payment or the performance of an obligation – including fixed and floating charge. As a result, transactions that are currently structured as fixed charges or floating charges would become security interests under the Bill.

Some statutes currently refer to fixed charges, floating charges or charges and the Bill would maintain the effect of the existing provisions so that parties would not be able to avoid existing provisions governing fixed and floating charges. Similarly, some security agreements may refer to fixed or floating charges.

The Bill would provide that in any Commonwealth law or security agreement, a reference to a charge would be taken to be a reference to a security interest that has attached to a circulating asset or personal property that is not a circulating asset.<sup>62</sup>

However, the alteration made to Commonwealth statutes as a consequence of the operation of section 339 is subject to four limitations. First, the reference to charge in the other statute is altered only to the extent that the original statutory reference is to an attached charge over personal property. That is, the original reference must contemplate that the grantor has rights in personal property and that either value is provided or some act is done resulting in the creation of the security interest over that personal property. Secondly, the reference in the other statute requires that the grantor must have title to the personal property to which the charge is attached. Relevantly, the interpretative provision will not operate, for example, in relation to *PPSA* security interests arising by way of a conditional sale agreement, hire purchase agreement or lease. Thirdly the charge described in the other statute must otherwise have been subject to the *PPSA*. In other words, the charge must constitute a security interest within section 12 of the *PPSA* and not fall within any of the exceptions in section 8 of that Act. Finally, and although not stated expressly, there is also the implicit requirement that the reference to charge in the other Commonwealth statute must secure a debt or other obligation. That is, section 339 would not alter a reference in other Commonwealth statutes in the unlikely event that the reference included a deemed security interest, a conclusion confirmed by the earlier quoted passage from the Replacement Explanatory Memorandum. The latter conclusion is reinforced by section 339(2)(b) of the *PPSA* which states the provision is inapplicable to references in other Commonwealth legislation to any charge that

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62 Replacement Explanatory Memorandum, Personal Property Securities Bill 2009 (Cth) 128, [9.56]–[9.58].

is a perfected security interest arising by way of a transfer of an account or chattel paper.

Accordingly, if a Commonwealth statute contains a reference to a charge (or to a fixed charge or to a floating charge), then if section 339 of the *PPSA* is engaged, that provision could be avoided by structuring the arrangement as a *PPSA* security interest and then arguing that such a *PPSA* security interest is not a ‘charge’ for the purposes of the original provision. In addition, the replacement of the word ‘charge’ with a reference to security interest has also broadened the operation of the relevant provisions in a Commonwealth statute to incorporate the additional types of in substance security arrangements described in section 12 of the *PPSA* such as a pledge or flawed asset arrangement. Furthermore, section 339 also applies to Commonwealth regulations since section 10 of the *PPSA* states expressly that a law of the Commonwealth means a Commonwealth Act and an instrument made under a Commonwealth Act.

One example of the potential operation of section 339 may be found in the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (*‘SIS Regulations’*). Section 31(1) of the *Superannuation Industry Supervision Act 1993* (Cth) contemplates that the ‘regulations may prescribe standards applicable to the operation of regulated superannuation funds’. For present purposes, regulations 13.11 and 13.14 of *SIS Regulations* are relevant and they provide in part as follows:

13.11 ‘charge’ includes a mortgage, lien or other encumbrance.

13.14 For the purposes of subsections 31(1) ... of the Act, it is a standard applicable to the operation of regulated superannuation funds ... that, subject to regulations 13.15 and 13.15A, the trustee of a fund *must not give a charge* over, or in relation to, an asset of the fund [emphasis added].

Subject to the four limitations set out above, section 339 of the *PPSA* has the effect of deleting the word ‘charge’ in regulation 13.14 and replacing it with a reference to an in substance security interest, the definition of which would be found in section 12 of the *PPSA*. As indicated in the Replacement Explanatory Memorandum for the Personal Property Securities Bill 2009 (Cth),<sup>63</sup> this amendment means that a trustee of a regulated superannuation fund would be unable to avoid the operation of regulation 13.14 by granting a security interest (as distinct from a charge) over the assets of the fund. Given the broad definition of security interest in the *PPSA*, it also means that the prohibition on the conduct of the trustee of the fund has been broadened beyond a mortgage, lien or other encumbrance so as to encompass, for example, a flawed asset arrangement. There are many other Commonwealth statutes which contain a reference to a charge

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63 Ibid.

which section 339 will alter to security interest,<sup>64</sup> and in the absence of a note in the other legislation, it is easy to overlook the application of section 339.<sup>65</sup>

Nevertheless, section 339 of the *PPSA* operates only with respect to the future and does not have a retroactive operation. Section 318(a) of the *PPSA* has the effect that section 339 is only to be engaged in relation to ‘a security interest (other than a transactional security interest) arising at or after the registration commencement time’.<sup>66</sup> The express exclusion of a transactional security interest also means that section 339 is not engaged in relation to a security interest which arises at or after the registration commencement time but pursuant to a security agreement in existence immediately before the registration commencement time.<sup>67</sup>

New South Wales, Queensland and Western Australia have enacted provisions which in substance mirror section 339 of the *PPSA*.<sup>68</sup> As with section 339, the equivalent provisions in New South Wales and Queensland apply only to security interests arising after the registration commencement time. The equivalent provisions in Western Australia do not contain an express statement to this effect but clearer language would be required in order for the Western Australian provision to have a retroactive operation. Curiously, and unlike the equivalent Commonwealth provision, none of the state provisions exempts transactional security interests arising after the registration commencement date. These provisions are thus very important for the purposes of construing legislation in those States (for example, stamp duty legislation in New South Wales) and are likely to be overlooked.

### **B Extended Application of the *PPSA* Security Interest Definition Apart from Express Statutory Enactment - Commonwealth, State and Territory Law**

The *PPSA* security interest definition would be wholly inapplicable if the state or territory referral or consequential legislation excludes the operation of the

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64 See, eg, *Competition and Consumer Act 2010* (Cth) sch 2 (*Australian Consumer Law*) cl 53 (guarantee that goods supplied are free from ‘any security, charge or encumbrance’); *Air Navigation Act 1920* (Cth) s 27A (registration of a ‘mortgage, charge or other encumbrance over’ an aircraft and its components); *Customs Act 1901* (Cth) s 243J (pecuniary penalty subject to every ‘charge or encumbrance’ over the property); *Social Security Act 1991* (Cth) s 1121 (effect of ‘charge or encumbrance’ on value of assets for the purposes of the assets tests definitions); *Income Tax Assessment Act 1997* (Cth) s 106.60 (enforcement of a ‘security, charge or encumbrance’ by a security holder).

65 See, eg, *Competition and Consumer Act 2010* (Cth) sch 2 (*Australian Consumer Law*) cl 53, which does contain an express cross reference to *PPSA* s 339.

66 *PPSA* s 306 defines ‘registration commencement time’ as either the ‘first day of the month that is 26 months after the month in which the *PPSA* receives Royal Assent or an earlier time determined by the Minister. No such time has been determined by the Minister at the time of writing.

67 This result flows from the definitions of ‘transitional security agreement’ and ‘transactional security interest’ contained in ss 307 and 308 respectively of the *PPSA*.

68 *Personal Property Securities (Commonwealth Powers) Act 2009* (NSW) sch 1 cl 22A (as amended by the *Personal Property Securities Legislation Amendment Act 2010* (NSW)); *Personal Property Securities (Ancillary Provisions) Act 2010* (Qld) s 5; *Personal Property Securities (Commonwealth Laws) Bill 2011* (WA) cl 16. At the time of writing, the WA Bill has yet to be proclaimed.

*PPSA* altogether. For that purpose, it is necessary to have regard to both the express exceptions in section 8 of the *PPSA* and to the particular exceptions in the state and territory consequential legislation discussed above. Apart from these exceptions, the issue remains as to whether the juridical characterisation of a *PPSA* security interest as a form of legal (statutory) charge has a potential impact on Commonwealth, state or territory statutes which operate generally with respect to charges or encumbrances over personal property.

Section 339 only applies where Commonwealth law uses the words, ‘charge’, ‘fixed charge’ or ‘floating charge’. The mirror provisions in New South Wales, Queensland and Western Australia are to the same effect. Some Commonwealth, state and territory statutes regulate the granting of security over personal property but do not necessarily use the word ‘charge’ or any of the above mentioned variants thereon. For example, the definition of ‘mortgage’ in section 204 of the *National Credit Code* (which is part of the *National Consumer Credit Protection Act 2009* (Cth)) defines a ‘mortgage’ to include ‘any interest in, or power over, property securing obligations of a debtor or guarantor’. Would such a reference include a legal (statutory) charge in the nature of a *PPSA* security interest?

Another area in which this issue may be relevant is in state and territory general property statutes which contain provisions relating to mortgages over both real and personal property. Most states and both territories define ‘mortgage’ as including a ‘charge’.<sup>69</sup> In a state which has not adopted provisions mirroring section 339, does the reference to ‘charge’ include a *PPSA* security interest over personal property? This question is relevant if, for example, a holder of a *PPSA* security interest is forced to rely upon one of the statutory rights or remedies conferred on mortgagees by a general property statute. However, given the breadth of the remedies conferred on a secured party under Chapter 4 of the *PPSA*, the question is unlikely to arise in practice if the *PPSA* is otherwise applicable. Whilst the answer to this question is ultimately a matter of construction of each statutory provision, an argument may be made that the characterisation of a security interest subject to the *PPSA* as a form of legal charge may also constitute it a charge for these purposes.

Similar construction issues may arise under other state and territory statutes which do not use the word ‘charge’ at all. For example, the *Trustee Act 1925* (NSW) defines a mortgage to include ‘every estate and interest regarded in equity as merely a security for money’.<sup>70</sup> The issue may also arise where the statute uses the expression ‘mortgage or encumbrance’ rather than the word ‘charge’ and whether a *PPSA* security interest is an encumbrance for these purposes.

Each of these examples illustrates the potential significance of the characterisation of a *PPSA* security interest as a form of legal charge and the application of that characterisation in construing existing statutes. They also illustrate that, apart from express statutory enactment, provisions referable to

69 See, eg. definitions of ‘mortgage’ in *Conveyancing Act 1919* (NSW) s 7; *Property Law Act 1958* (Vic) s 18; *Property Law Act 1974* (Qld) sch 6; *Property Law Act 1969* (WA) s 7; *Civil Law (Property) Act 2006* (ACT) s 3; *Law of Property Act 2000* (NT) s 4.

70 *Trustee Act 1925* (NSW) s 5 (definition of ‘mortgage’).

mortgages, charges and encumbrances in Commonwealth, state and territory law may in the future<sup>71</sup> cover a wider range of transactions than would have been the case prior to the commencement of the *PPSA*.<sup>72</sup>

In all these cases it becomes necessary to have regard to the general principle of statutory interpretation that ‘an Act is deemed to be always speaking’<sup>73</sup> or, in other words, that the words in an Act are ‘to be interpreted in accordance with their *current* meaning’.<sup>74</sup> This approach contrasts with the earlier approach that statutes are to be construed in accordance with their meaning as at the enactment date. That rule, in its fullest extent, has been abandoned, except perhaps in the construction of ambiguous language used in very old statutes where the language itself may have had a rather different meaning. If the reference in a statute is generic and not limited, the ‘always speaking’ principle is usually applied.<sup>75</sup>

## V THE APPLICATION OF THE *PPSA* DEFINITION OF SECURITY INTEREST TO CONTRACTUAL ARRANGEMENTS

Unlike a statute, there is no principle to the effect that expressions used in a private agreement are always speaking. In describing the interpretation of contracts and as a manifestation of the objective theory of contract, it has been said that: ‘Interpretation is the ascertainment of the meaning which the document would convey taking account of the background knowledge of the parties and assuming they were acting reasonably’.<sup>76</sup> Many agreements that are not themselves security agreements prohibit borrowers from charging, mortgaging or otherwise encumbering their assets. Typically, one may find these clauses in unsecured loan facilities as part of a negative pledge undertaking or, where the facility is secured, in the actual instrument of mortgage or charge itself.

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71 In accordance with the usual assumption, it is not suggested that the ‘always speaking’ principle has a retrospective operation. See further D C Pearce and R S Geddes *Statutory Interpretation in Australia* (LexisNexis Butterworths, 7<sup>th</sup> ed, 2011) 247.

72 See, eg, *Aboriginal Lands Act 1970* (Vic) s 11 (restrictions on powers to borrow money on the security of a ‘mortgage charge or other assurance of any real or personal property’).

73 See further Pearce and Geddes above n 71, 335.

74 *Ibid* 124–5 (emphasis added).

75 *Lake Macquarie Shire Council v Aberdare County Council* (1970) 123 CLR 327 references to ‘gas’ in the *Local Government Act 1919* (NSW) included liquid petroleum gas even though only coal gas had been in contemplation when the provisions were enacted, per Barwick CJ and Menzies J, with Windeyer J doubting.

76 Justice Dyson Heydon, ‘Comment on Lord Hoffmann’s “Interpretation of Contract”’ (Paper presented at the 27th Annual Banking & Financial Services Law & Practice Conference, Queenstown New Zealand 14–16 August 2010) 12.

In these agreements the definition of mortgage or charge is often expanded to include any form of encumbrance<sup>77</sup> and to that extent, may cover many of the matters which would be captured by the in substance security interest definition contained in section 12 of the *PPSA*. Often, however, this extension is not so comprehensive as to cover all of the matters which would constitute an in substance security interest under the *PPSA*. If, for example, the applicable provision merely prohibited the granting of a charge, would this prohibition extend to the granting of other in substance security interests which would fall within section 12 of the *PPSA* especially if one treats any security arrangement subject to section 12 of the *PPSA* as a form of legal charge? Does it make a difference if the provision refers to both a charge and an encumbrance? Does it make a difference if the relevant agreement was made before or after the commencement of the *PPSA*?

The answers for each of these questions in specific cases involve construing the particular agreements as a whole with reference to the surrounding circumstances. Nevertheless, in construing a pre-*PPSA* agreement, it may be possible to argue in relation to agreements entered into prior to the commencement of the *PPSA*, that such a prohibition could not extend to the other matters covered by section 12 of the *PPSA* since those provisions could not have been part of the background knowledge of the parties at the time they entered into the agreement. Even then, however, the answer may differ depending on how close the date of the agreement is to the commencement date of the *PPSA*. With respect to agreements entered into after the commencement of the *PPSA*, it is suggested that such arguments may be more difficult to sustain. In due course, one may see arguments to the effect that provisions in agreements, as distinct from security agreements, restricting the granting of charges, extend to *PPSA* security interests, on the basis that this would be an implied term of the agreement,<sup>78</sup> perhaps implied as a matter of law rather than as a matter of fact in specific cases.

For security agreements (in contrast to agreements generally) to which the *PPSA* applies, these construction questions have also been answered in part by section 339 of the *PPSA*, when read with section 318(b) of the Act. The joint effect of each of these provisions is that, in a security agreement made at or after the registration commencement time,<sup>79</sup> a reference to a charge, fixed charge or floating charge over personal property is replaced by a reference to an attached *PPSA* security interest over personal property to which the grantor of the security has title. The *PPSA* defines a security agreement as:

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77 Compare the definition of 'security' in the Asia Pacific Loan Market Association ('APLMA') Syndicated Facility Agreement which defines 'security' as a 'mortgage, charge, pledge, lien or other security interest securing any obligation of any person or any other agreement, notice or arrangement having a similar effect'.

78 For a discussion of the incorporation of implied terms into commercial agreements, see *Castlemaine Tooheys Ltd v Carlton & United Breweries Ltd* (1987) 10 NSWLR 468; *Skywest Holdings Pty Ltd v Howick Investments Pty Ltd* [1990] ACTSC (21 December 1990) (Miles CJ).

79 For an explanation of the 'registration commencement time', see *PPSA* s 306.

- (a) an agreement or an act by which a security interest is created, arises or is provided for; or
- (b) writing evidencing such an agreement or act.<sup>80</sup>

As a consequence, any reference in a post-*PPSA* oral or written security agreement restricting the granting of any charge (or any fixed charge or floating charge) may extend to prohibiting the granting of an in substance *PPSA* security interest over personal property to which the grantor has title. The extension is potentially very significant, especially given that a *PPSA* security interest includes flawed asset arrangements. A breach of such a provision, when read with section 339 of the *PPSA*, could constitute or trigger a potential default under the security agreement, in circumstances where the breach may not necessarily be apparent from merely reading the security agreement itself. In turn, that breach could trigger cross default clauses in other agreements generally, even though those other agreements may themselves not be security agreements for the purposes of the *PPSA*.

To avoid such unintended breaches, provisions in post-*PPSA* security agreements restricting the granting of further security interests should use the new vocabulary of the *PPSA* including its new definition of security interest. Section 339 is a very unusual provision and appears to be incapable of being excluded by contract. Its impact on private law security agreements has not been generally appreciated.

## VI CONCLUSION

The potential reach and impact of the in substance definition of a *PPSA* security interest is very wide ranging not just in relation to Commonwealth, state and territory legislation but also in relation to private security agreements and agreements generally. The clear aim of the Commonwealth Parliament is to ensure that its functional definition of an in substance security interest has a universal application.<sup>81</sup> It may well be that the reach of this definition is far more extensive than may have been originally contemplated. Furthermore, the consequences of such an extension may not all have been fully identified. For these reasons, statements that a security arrangement is a security interest for the purposes only of the *PPSA* appear inaccurate and misleading.

However, this extended application of the *PPSA* security interest definition occurs by different routes. In some cases, it has been seen that the extension occurs as a consequence of specific statutory enactment, whilst in other instances it may occur generally either by virtue of the operation of section 339 of the *PPSA* (or its equivalent provision in some states) or by virtue of the characterisation of a *PPSA* security interest as a form of legal (statutory) charge. The result is that, in a wide variety of circumstances, the definition of the *PPSA*

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<sup>80</sup> *PPSA* s 10.

<sup>81</sup> Replacement Explanatory Memorandum, above n 62, 128.

in substance security interest supplants the various types of security interest based on form.

Apart from specific exclusionary Commonwealth, state and territory legislation, which continues to define a security interest in terms of the form of the security instrument, there is very little continued relevance in Australia for the form which a particular security instrument over personal property takes. The extension of the in substance *PPSA* security interest definition beyond the *PPSA* may have the consequence of restricting entry into transactions which have hitherto not been regarded as security arrangements. Unanticipated breaches of private agreements may also arise. An appreciation of the breadth of the impact of the *PPSA* security interest definition is essential for construing statutes and existing private agreements as well as in the drafting of future statutes and private agreements dealing with these issues.