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Update Summary

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**PERSONAL PROPERTY SECURITIES LAW IN
AUSTRALIA
J O'Donovan**

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New and updated commentary has been provided by James O'Donovan:

The PPS Regime

Updated:

- Cryptocurrency combines a public key for identity, a private key for ownership, and a new key upon transfer to ensure stability and control: *Ruscoe v Cryptopia Ltd (In Liq)* [2020] NZHC 728; [2020] 2 NZLR 809. See [5.130].
- A security agreement is essential to the creation of a security interest: *iTrade Finance Inc v Bank of Montreal* [2011] 2 SCR 360; and *Dura Australia Constructions Pty Ltd v Hue Boutique Living Pty Ltd* (2014) 49 VR 86; 292 FLR 114; [2014] VSCA 326. See [5.160].

The Scope of the Act

Updated:

- Under PPSA 2009, "interest" in personal property is broadly defined to include rights to control, possess, and use, with transactions encompassing any property dealings. While hire purchase agreements can create security interests, contracts like boat building ones may not if they don't secure obligation performance, depending on the transaction's substance over form: *Gold Valley Iron Pty Ltd (in liq) v OPS Screening & Crushing Equipment Pty Ltd* [2022] WASCA 134; and *Reel Action Sports Fishing Pty Ltd v Marine Engineering Consultants Pty Ltd (in liq)* (2022) 13 QR 297; [2022] QSC 271. An agreement to seek consent orders from the court for the payment of funds into court, pending the outcome of an appeal, does not provide for the creation of an interest in property: *Laurus Group Pty Ltd (admin apptd) v Mitsui & Co (Australia) Ltd (No 2)* [2023] VSC 412. Where there was no consensual transaction by which an auctioneer gave the plaintiff an interest in a car to secure the transfer of the title or delivery, the plaintiff did not have a reasonable belief that it was a secured party when it lodged a financing statement under s 151: *Classics for a Cause Pty Ltd v Grays Ecommerce Group Ltd* [2023] NSWSC 967. See [10.110].
- Section 12(2) of PPSA 2009 specifies particular transactions that ordinarily provide for an interest in personal property: *Gold Valley Iron Pty Ltd (in liq) v OPS Screening & Crushing Equipment Pty Ltd* [2022] WASCA 134.

The example in s 12(2) relating to the transfer of title requires an analysis of the transaction to determine whether it is a security interest: *Reel Action Sports Fishing Pty Ltd v Marine Engineering Consultants Pty Ltd (in liq)* (2022) 13 QR 297; [2022] QSC 271.

A lease of goods and a transfer of title are examples given in s 12(2)(i) and (k) of PPSA 2009 of transactions that may give rise to a security interest, but

these transactions will not provide for a security interest unless they in substance to secure payment or performance of an obligation: *Highfields Australia Pty Ltd v Advanced Motor Dealers Group Pty Ltd (rec and mgr apptd)* [2023] NSWSC 1458.

See [10.510].

- Both PPSA 2009 s 340(5)(a) and the definition of an account in s 10 require a causal connection between the account (ie monetary obligation) and the “provision of services” in the ordinary course of a business of providing services of that kind: *Resilient Investment Group Pty Ltd v Barnett* (2023) 111 NSWLR 446; 377 FLR 340; [2023] NSWCA 118. See [10.1010].

New:

- An assignment of debts, without an express reference to the security interests in respect of these debts, does not extend to the security interests: *Native Bond Pty Ltd v Cant* [2016] VSC 206 at [29]-[31]; and *Ilend Capital Pty Ltd v Kingdom Towers Pty Ltd* [2022] NSWSC 989. See [10.2120].

The Personal Property Securities Register

Updated:

- A person can honestly believe that he is entitled to register security interests in personal property and yet not have reasonable grounds to believe that he has a security interest in the property within the meaning of s 151 of PPSA 2009: *Registrar of Personal Property Securities v Brookfield* [2024] FCA 29. See [15.1510].

Attachment and Enforceability

Updated:

- A security agreement is effective according to its terms but only to the extent of the debtor's interest in the collateral. If the debtor's interest in the collateral is already subject to a prior security interest, then the subsequent security interest is limited to the debtor's equity owned by the debtor. See [20.210].
- Attachment is a term of art affecting the state of rights of the immediate parties with respect to the collateral. Attachment establishes the time at which the rights of the secured party affect the rights of the grantor in the collateral. See [20.510].
- Perfection is a technical term referring to the bundle of rights that a secured party has against third parties, such as other secured parties, or trustees in bankruptcy. See [20.550].

- The right to trace is derived from the property of the original owner. It is not necessary for the claimant to have a vested beneficial interest in a trust or some analogous right as against a fiduciary. See [20.700].
- The security agreement will satisfy the requirement of s 20(2) if it contains a description of the particular collateral. See [20.5510].

Perfection

Updated:

- It is not strictly necessary for an external administrator to apply for an order fixing a later time for registration of a security interest granted by the administrator during the course of the administration. However, through an excess of caution, the court will generally be prepared to grant such an order “to the extent necessary” to fix a later time for the registration of a security interest under s 588FM for the purposes of s 588FL(2)(b)(iv): *Revroof Pty Ltd (Receivers and Managers Appointed) (Administrators Appointed) v Taminga Street Investments Pty Ltd* [2023] FCA 543; *Re Caydon Flemington Pty Ltd (recs and mgrs apptd) (in liq)* [2023] FCA 796 at [28]; *In the matter of Antqip Hire Pty Ltd (in liq)* [2021] NSWSC 1122; and *In the matter of Ellume Limited (Admins Apptd) v Evangayle Pty Ltd* [2022] FCA 1102. See [25.1940].

Enforcement

Updated:

- An equitable charge arising under a General Security Deed is a proprietary right which would entitle the chargee to realise the property subject to it and it would permit the chargee to draw upon equitable tracing rules, without having to rely on the separate existence of a fiduciary relationship between it and the charger: *RnD Funding Pty Ltd v Roncane Pty Ltd* (2023) 297 FCR 91; [2023] FCAFC 28.

In an appropriate case, liquidators can apply for directions that they are entitled to take possession of assets that are subject to PPSA security interests to enable the assets to be sold in an orderly fashion under the supervision of the court: *Re RM Rood Services Pty Ltd (in liq)* [2023] VSC 794.

See [45.5510].

Acquiring personal property free of security interests

Updated:

- For the purposes of s 46, a transaction will be a “sale” even if the buyer has paid half or all the price through a trade-in or other exchange of property. Moreover, there is no requirement that the buyer must have paid for the goods, the section will protect a buyer on credit: *Maginness v Tiny Town Project Ltd (in liq)* [2023] NZHC 494. See [52.1510].

Secured creditors and receivers

Updated:

- R&D Refunds are not circulating assets of the company at the appointment date for the purpose of PPSA 2009, s 340(1) and (5)(a): *Resilient Investment Group Pty Ltd v Barnett* (2023) 111 NSWLR 446; 377 FLR 340; [2023] NSWCA 118. See [54.570].

