

Episode 21: Summary

Episode name: PPSA: The Basics

Guest(s): Nicholas Mirzai & Jason Porter

What area(s) of law does this episode consider?

Nicholas talks about the operation of the *Personal Properties and Securities Act 2009* (PPSA) and Jason provides practical guidance on PPS considerations in an external administration.

Why is this topic relevant?

While the Personal Properties and Securities Register (PPSR) does not operate as a system of title by registration, instead working more like a 'noticeboard' for security interests, there are very real priority consequences for companies and individuals who fail to register or inaccurately register their interests. While the PPSA has been in place since 2012, it is an area that still hasn't been explored in great detail by case law.

What legislation is considered in this episode?

The main provisions of the PPSA that Nicholas talks about are:

- **Section 12:** Which defines what a security interest is: A **security interest** means an interest in personal property provided for by a transaction that, in substance, secures payment or performance of an obligation.
- **Section 14:** Provides the meaning of a purchase money security interest.
- **Section 20:** Enforceability of security interests against third parties (or attachment).
- **Section 21:** Provides for the main rule of perfection.
- The combined effect of section 20 and 21 determine the security interest to be perfected when:
 - The security interest is 'attached' to collateral and is enforceable against third parties AND
 - The secured party has either:
 - Registered interest on the PPSR
 - Taken possession of the collateral; or
 - With respect to the certain collateral, taken control of the collateral (if it is sub-s 21(2) property)

What cases are considered in this episode?

1. *Auburn Shopping Village Pty Ltd v Nelmeer Hoteliers Pty Ltd* [2017] NSWSC 1230 (14 September 2017) (Ward CJ In Eq).

In this case Nelmeer agreed to sell poker machine permits to Auburn with Auburn claiming that the agreement was that Nelmeer had to sell the permits without any encumbrances. Nelmeer's permits had PPSR registrations against them and as such Auburn repudiated the contract. However, the court upheld that PPSR registrations are *not* encumbrances.

2. *Allied Distribution Finance Pty Ltd v Samwise Holdings Pty Ltd* [2017] SASC 163.

The court in this case considered the principle in s62(2)(b)(i) of the PPSA of when a grantor 'obtains possession of the inventory' in order to determine out of Allied and Samwise who had priority over the motorcycles. The dispute arose from previous transactions whereby Commercial Distribution Finance Pty Ltd provided finance to Bill's Motorcycles, retaining ownership of the motorcycles and registering a PMSI. Bill Motorcycle's then granted an all assets security interest to Samwise. Allied later entered into a finance agreement with Bill's Motorcycle's and registered a PMSI and Commercial Distribution Finance Pty Ltd transferred the motorcycles to Allied. Ultimately the South Australia Supreme Court held that the possession referred to Allied taking possession in capacity as a grantor of the PSMI.

3. *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28 (28 April 1998) (Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ).

In this case the High Court established principles of statutory analysis in interpreting s 160(d) of the *Broadcasting Services Act 1992* (Cth) ('the Act') requiring the Australian Broadcasting Authority (ABA) to operate consistent with Australia's international obligations. Clause 9 of the ABA's standards stated that 55% of Australian programs had to broadcast 6am-12am. An existing trade agreement between Australia and New Zealand provided that both Australia and New Zealand would offer equal access, treatments to persons, and services of the other country, thereby constituting an international obligation for the purposes of s 160(d) of the Act. The High Court held that the ABA's standard was unlawful but *not* invalid.

4. *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27.

This is yet another case on statutory interpretation where the court appeared to favour a more literal approach by considering the words of the legislation itself. It reaffirmed that it is important to consider the mischief that the statute is designed to address in order to make a proper interpretation. The case concerned calculation of tax for Alcan according to s 41 of the *Taxation (Administration) Act* (NT) which defined what a lease is and expressly excludes 'an option to renew a lease.' The High Court held that the Court of Appeal of the Northern Territory erred in their calculation of tax as including the option to renew in the value of the leases.

5. *Central Cleaning Supplies (Aust) Pty Ltd v Elkerton* [2015] VSCA 92 (Maxwell P, Tate and Beach JJA).

Central Cleaning supplied cleaning equipment on retention of title terms to Swan Services. Central Cleaning and Swan Services had entered into a master agreement in the form of a credit application before the commencement of the PPSA. Goods were supplied after the commencement of the PPSA under separate purchase orders, and when delivered were accompanied by invoices containing the retention of title terms. Central Cleaning had not made a PPSA registration and therefore had to rely on the transitional provisions of the *Personal Property Securities Act 2009* (Cth) (PPSA). Swan Services went into liquidation (with Elkerton appointed as liquidator).

The Court of Appeal reversed the decision at first instance and held that although there had been no PPSA registration, Central Cleaning would be able to enforce its ROT terms as a security interest as they established the existence of a 'transitional

security interest' under s 308 of the PPSA – that is, that it was provided for by a security agreement made before the commencement of the PPSA.

6. *In the matter of Gelpack Enterprises Pty Ltd (in liquidation)* [2015] NSWSC 1558 (03 September 2015) (Brereton J).

Primaplas supplied resin to Gelpack for the production of plastic products. This was supplied on credit terms where retention of title applied. Upon liquidation of Gelpack, Primaplas, through its PMSI, sought an accounting of its stock on hand with the liquidators as well as proceeds of sale of its resin and products. Gelpack's finance manager submitted a credit application in 2007, stating that all future supplies would be subject to general terms and conditions of trade and Primaplas could change terms at any time, but would undertake reasonable efforts to notify the customer of the change. In August 2012, the plaintiff sent a generic letter to their customers, including the Company, attaching new T&Cs which included a ROT clause and the grant of security interest under the PPSA.

The Court held that:

- The 2007 credit application authorised the plaintiff to change its T&Cs whenever it chose to do so;
 - The August 2012 letter to Gelpack substituted the old terms and conditions for the new one;
 - Gelpack accepted the terms and conditions by continuing to place orders;
 - Implications of this are that T&Cs containing express grant of security interest do not need to be signed by the customer and may be adopted by conduct, in the form of the customer continuing to place orders and One PPSA registration can cover security interest created by multiple contracts such as repeated series of invoices
7. *Trenfield v HAG Import Corporation (Australia) Pty Ltd* [2018] QDC 107 (McGill SC, DCJ).

In 2011, prior to the PPSA commencement, Lineville signed a credit application with HAG stating that goods would be supplied on ROT terms. HAG registered its interest on the PPSR as 'transitional' according to s 308 of the PPSA. Lineville paid HAG for the goods then went into liquidation. Lineville's liquidator sought to recover those payments to HAG as preferential payments in respect of an unsecured debt. The Queensland District Court found that the credit application was not a contract for providing security interests and that the transitional registration was ineffective to perfect the security interest made after the goods were supplied (after PPSA commencement). However, the court also found that the payments were not preferential as they were not made for an unsecured debt.

What are the main points?

- The *Personal Property Securities Act 2009* came into force in 2012.
- A security interest is defined under section 12 of the PPSA. Which states: a **security interest** means an interest in personal property provided for by a transaction that, in substance, secures payment or performance of an obligation.
- The PPSA affects all security interests in personal property. Personal property covers almost all tangible and intangible property, other than real estate. Accordingly, if you are granting a mortgage over your real property, the PPSA will

not apply.

- The financing statement contains the particulars of the transaction, including a description of the parties and the collateral as well as the kind of security interest. Upon the registration of the financing statement the PPS Registrar issues a verification statement to the secured party. The verification statement can then be relied upon by the secured party to prove their registration.
- The concept of 'attachment' and 'perfection' are unique to the PPSA.
 - Attachment is a step towards perfecting a security interest and occurs when the grantor is able to grant rights to the secured party in the secured property. Usually once the grantor has possession of the secured property. Attachment is covered in section 20 of the PPSA.
 - Perfection takes place after attachment; it enables a secured party to achieve priority against any competing security interests registered afterwards. Perfection is usually obtained by registration, but it can also occur if the secured party has possession of the collateral, for example if you give a cash deposit to a bank. Most of the rules of perfection are covered by section 21 of the PPSA.
- Section 14 of the PPSA defines what is the purchase money security interest, or the PMSI. PMSI's are a special type of security interest under the PPSA. They take priority over prior registered security interests in most circumstances and must be registered within 15 days of possession passing to the grantor, that is when attachment takes place.
- Section 55 of the PPSA deals with the default priority rules for competing security interests. A security interest must be perfected to enjoy the priority described in section 55.
- Under s 588FL of the *Corporations Act 2001*, a security interest must be registered on the PPSR either within 20 business days after the security agreement giving rise to the security interest comes into force, or otherwise earlier than 6 months of the grantor entering liquidation or administration.

What are the practical takeaways?

- Register quickly, register early, if you mess it up register again!
- The process of registration: a grantor, which is usually the borrower, mortgagor, lessee or guarantor, grants a security interest in personal property (like a car, or a bank account or some shares) to a secured party. This party may be a supplier, manufacturer, lessor, lender or some other kind of creditor. The security interest will usually be contained in a document which creates obligations for both parties and secures payment or the performance of some other kind of obligation to the secured party. Then the security interest will 'attach' to the personal property once the grantor is able to grant rights in the secured property to the secured party.
- The PPSA does not apply to real property.
- Always check the underlying paperwork to ensure people have the interest that they have registered. Registration does not create an interest, the interest is created in the underlying documents.

Show notes

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[Alcan \(NT\) Alumina Pty Ltd v Commissioner of Territory Revenue \(2009\) 239 CLR 27](#)

[Central Cleaning Supplies \(Aust\) Pty Ltd v Elkerton \[2015\] VSCA 92](#)

[In the matter of Gelpack Enterprises Pty Ltd \(in liquidation\) \[2015\] NSWSC 1558](#)

[Trenfield v HAG Import Corporation \(Australia\) Pty Ltd \[2018\] QDC 107](#)