

PERSONAL PROPERTY SECURITIES: POSSIBILITIES, PROBLEMS AND PECULIARITIES

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I. INTRODUCTION

In a press release in March 2008, the Federal Government of Australia reaffirmed its intention to proceed with the long-awaited reform of personal property securities law in Australia. This was followed by the release of a draft Bill in May 2008, justified as follows:¹

- 1.1 The consultation draft Personal Property Securities Bill 2008 is a significant milestone towards achieving an efficient and effective national regulatory regime for Australian secured lending over personal property. The new law would replace 70-plus Commonwealth, State and Territory Acts administered by 30 government agencies with a single, national law supported by a single national online system for registering interests in personal property securities (PPS). A comprehensive national PPS scheme should promote more certain and consistent outcomes, reduce financing costs and encourage more diverse financing options. Complex and burdensome laws and administrative procedures would no longer stymie Australian businesses.

It is presently anticipated that the Bill will be introduced in the first half of 2009, with implementation of its provisions in May 2010.²

The intended regime echoes that of New Zealand by virtue of its *Personal Property Securities Act 1999* (NZ) (the 'PPSA'). The decision to follow New Zealand's lead on this important law reform initiative has been justified partly by the benefits of harmonisation of law between these two trading partners (unless there are good reasons to do otherwise).³ The provisions of the Canadian statutes (on which the New Zealand legislation is based) and those of the United States of America have also been taken into account in the shape and scope of the proposed regime.

By way of introduction to the following discussion, the regime established through the PPSA model provides for a uniform system of creation ('attachment') of 'security interests' in a relatively comprehensive, albeit not totally complete, range of personal property ('collateral'). These security interests may then be 'perfected' (the means whereby a creditor establishes priority of their claim to the collateral) either through registration (normally) or possession (in the case of documents of title and similar). Issues of priority amongst competing security interests are settled by reference to the relevant contract(s), context and default legislative provisions. The model also provides a process for enforcement⁴ and rules for dealing with such issues as accessions and commingled goods.

There is little doubt that the reform will be profound in its effects: it will effectively discard 100-plus years of law under which the provision and determination of rights, claims and protection have been linked to the form of the agreement pursuant to which the security was granted and/or the nature of the debtor and/or creditor. In addition, it will

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1 Australian Government, Attorney-General's Department, *Personal Property Securities Bill 2008, Commentary* (2008).

<[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(371CAD123B18948FF076D2F02E9A217C\)~PPS+Bill+commentary.pdf/\\$file/PPS+Bill+commentary.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(371CAD123B18948FF076D2F02E9A217C)~PPS+Bill+commentary.pdf/$file/PPS+Bill+commentary.pdf)> at 7 December 2008.

2 Email from the Personal Property Securities Branch, Legal Services and Personal Property Securities Division, Australian Government Attorney-General's Department to Philippa Wells, 15 October 2008.

3 For a discussion of some of the problems that arise where such harmonisation is lacking, see Juliet Taylor, 'Retention of Title and the Trans-Tasman Supply of Goods' (2006) 12 *New Zealand Business Law Quarterly* 71.

4 Which applies in its entirety unless the statute provides for exceptions, as is the case in New Zealand (where the arrangement is effected by a consumer credit contract or where the parties agree otherwise).

suspend the application of long-established legal principles, primarily that of *nemo dat quod non habet*. Instead, rights, claims and protection under the new regime will be driven by the security interest itself.

Given the fact that the *PPSA* model has been adopted as the basis of the Australian reform, it is both timely and relevant for Australia to look at that model and its function. As it is now more than five years since the model was fully implemented in New Zealand, it is also useful to review some of the aspects of the *PPSA* that raise potential issues for those using it or who are affected by its provisions.

This paper is not intended to be a full and comprehensive review of the entire *PPSA* or its application to business. Nor is it intended as a definitive statement of the law and its scope. Rather, it addresses two main areas. First, and by way of background and context, an overview of the New Zealand *PPSA* and its background is provided.⁵ Secondly, some particular provisions of the legislation (mainly those relating to perfection and enforcement) will be considered in terms of the questions that arise for businesses seeking to apply them. Although the focus remains on the New Zealand legislation, particular reference will, when deemed relevant and important, be made to where the Australian Bill differs from or reflects those provisions.

II. THE PERSONAL PROPERTY SECURITIES ACT 1999 (NZ)

A. Overview

Prior to the full implementation of the *PPSA* in 2002, the New Zealand ‘system’ of creating and determining priority of claims over personal property items was decidedly confusing, fragmented and messy. Consequently, in April 1989, the Law Commission proposed that New Zealand should follow the example of North American jurisdictions and utilise modern technology to better address the demands of present-day commerce. New Zealand lifted both terminology and application from the Canadian provinces’ legislation of the same name and general coverage, with the final *PPSA* being taken ‘almost verbatim’ from Saskatchewan’s.⁶

Although the *PPSA* was passed in 1999, the logistical difficulties involved in establishing a single register, educating users, advisors and affected alike, and re-registering of interests militated against hasty implementation. It was finally fully implemented in May 2002, with a further six months grace for all re-registrations to be completed. Geoff Brodie applauded the *PPSA* for its creation of

a unified, simplified, streamlined and accessible system of registering all security interests in personal property ... [doing] away with the myriad of formalistic distinctions that existed ... and to treat in like manner all transactions that in economic substance utilised personal property as collateral.⁷

That is not to say there has been no controversy. As indicated above, the balance of this paper explores aspects of some of those potentially, and actually, controversial areas.

B. Issues

1. Pre-eminence of Security Interest

A longstanding principle of property law is that of *nemo dat non quod habet* — you cannot give a better title to a transferee than that you as the transferor enjoy. Of course, there are exceptions to this principle, most specifically negotiable instruments and real estate subject to the Torrens registration system that has long operated in States of Australia, New

⁵ For deeper and broader discussion, see, eg, Geoff Brodie, ‘Personal Property Securities: A New Zealand Maritime Law Perspective’ (2008) 22 *Australian and New Zealand Maritime Law Journal* 22; Michael Gedye, ‘Fundamentals of the Personal Property Securities Act’ (2000) 6 *New Zealand Business Law Quarterly* 174.

⁶ Stuart Anderson, ‘Personal Property Securities New Zealand’, Book Review (2003) 10 *Otago Law Review* 445.

⁷ Brodie, above n 5, 23.

Zealand and other jurisdictions in the Commonwealth.⁸ However, the *PPSA* now provides that where personal property other than negotiable instruments is subject to a security interest, *nemo dat* may be overturned.

The outcomes of several cases illustrate this radical repositioning of title vis a vis personal property. Both those discussed here involve disputes between the holder of title and a third-party creditor as to who had the better claim over personal property in which a debtor/bailee had 'rights' sufficient to support a security interest. The first of these is *Graham v Portacom New Zealand Ltd.*⁹ Portacom was the owner of five portable buildings leased for an indefinite period to NDG Pine Ltd (that ended up in receivership). NDG had granted a debenture to a bank that was duly perfected. Prior to the *PPSA*, the fact that Portacom retained title would have meant the debenture holder (the bank) would have had no claim to the buildings. However, with the *PPSA*, the position changed radically. Despite NDG having no more than possession of the buildings, the receiver (acting on the debenture holder's behalf) had the ability to give a third-party purchaser of those buildings an indefeasible title. Because Portacom had failed to perfect a security interest, it lost out.

*New Zealand Bloodstock Ltd and Anor v Waller and Ors*¹⁰ involved a stallion named Generous. However, the Court of Appeal proved less than generous to the owner of the horse (Bloodstock). Briefly, S H Lock was a secured creditor of Glenmorgan Farm Ltd under a floating debenture over all present and future assets, originally created in 1999 and duly registered in accordance with the statutory companies' regime. A year later, Bloodstock entered an agreement with Glenmorgan whereby Glenmorgan would purchase the horse at residual value on the expiry of a lease period (July 2004, later extended to March 2005). Lock 'perfected' its security interest over the horse on the same day as the *PPSA* came into force (1 May 2002), despite the fact that at the time Lock had originally become a secured creditor, Glenmorgan did not even possess the horse let alone own it.

As in the case of the buildings in *Portacom*, Bloodstock's ownership of the horse was not in dispute. It had agreed to sell the horse to Glenmorgan but only on the expiration of the lease and only on the payment of specified sums (that Glenmorgan had failed to fully meet). Nevertheless, the majority of the Court of Appeal referred to the *PPSA*'s 'statutory altering of the proprietary rights of a lessor, and the crucial importance of registration',¹¹ as justifying Lock's superior right to the horse.

This 'ousting'¹² of the *nemo dat* principle in these two cases quite clearly caught lessors and other (mainly) owners of commercial personal property by surprise and provided timely warning of the importance of treating their title in the collateral as a security interest subject to the rules under the *PPSA*. As this is also the approach taken in the Australian draft legislation,¹³ there appears little reason to assume the outcome, implications or recommendations would be very different.

Many aspects of the *PPSA* have not as yet been subject to as much interpretation as has the above. Because their application remains uncertain, they are worth examining in more depth as to their potential implications. By way of reminder, they include: the exceptions to perfection protection; effects on security interests of personal property being incorporated into real property; the rights of competing claimants where the collateral has been repossessed by the first-ranking claimant; and the extent of, and justification for, the

8 First implemented in 1858 on the efforts of Robert Richard Torrens (a founding Member of South Australia's Parliament). Relevant Australian and New Zealand legislation includes the *Real Property Act 1925* (ACT); *Real Property Act 1900* (NSW); *Real Property Act 1886* (NT); *Land Title Act 1994* (Qld); *Real Property Act 1886* (SA); *Land Titles Act 1980* (Tas); *Transfer of Land Act 1958* (Vic); *Transfer of Land Act 1893* (WA); *Land Transfer Act 1952* (NZ).

9 [2004] 2 NZLR 528 (HC).

10 [2006] 3 NZLR 629.

11 [2006] 3 NZLR 629 (Court of Appeal), 649 (Baragwanath J).

12 Ibid 629, 649 (Baragwanath J). The importance of an owner registering a security interest was again highlighted in *Segard Masurel (NZ) Ltd v Nicol and Ors* [2008] NZHC 109 (Unreported, Cooper J, 12 February 2008) [38], a case involving wool provided to Feltex Carpets, subsequently placed in receivership, under a conditional sale agreement.

13 Personal Property Securities Bill 2008 (Cth) s 21: Meaning of Security Interest.

right of the parties to contract out of certain provisions, most particularly those providing for notice to the debtor.

2. *An Exception to Perfection Protection*

Part V of the *PPSA* provides that the buyer or lessee in certain circumstances will obtain title to goods free of a creditor's security interest in the collateral. These include where a *bona fide* third party for value acquires those goods in the ordinary course of business¹⁴ and where a security interest has not been perfected.¹⁵ However, the so-called 'garage sale' exception is most interesting as it provides that a person purchasing (or leasing) consumer goods for less than \$2000 in a private arrangement, and without knowledge of pre-existing security interest over those goods, takes free of any such interest.¹⁶ It could be, and has been, argued that in most cases this will be a relatively minor concern. However, it is also worth remembering that the retail price of many consumer goods may fall below \$2000. Therefore, despite the best efforts of retailers to protect their interests in such items, an unscrupulous purchaser could render their efforts pointless by purchasing and selling goods in a garage sale (or perhaps on a web-based trading site such as eBay or Trade Me) before disappearing.

Of course, potential purchasers faced with such largesse may well harbour suspicions as to the validity of the sale and the provenance of the items, but is that tantamount to knowledge? It should be noted that under the *PPSA* they must 'know or have knowledge of a fact'.¹⁷ It also details at some length who may be considered to have such knowledge and when, yet fails to expressly contemplate constructive knowledge. Hence it is arguable that a failure to enquire may not satisfy that requirement.

In the Australian draft legislation, the wording of the equivalent provision is somewhat different. Although at first glance it appears more liberal (covering personal property used predominantly for personal, domestic or household purposes up to a value of \$5000),¹⁸ reliance on it is subject to lack of 'knowledge'.¹⁹ This clause embraces 'recklessness' as defined in the *Criminal Code*,²⁰ and 'significant probability' of a particular state of affairs).²¹ This may serve to limit its scope.

3. *Security Interests Incorporated into Real Property*

The *PPSA* embraces security interests in personal property, including 'chattel paper, documents of title, goods, intangibles, investment securities, money, and negotiable instruments'.²² Problems can arise where that personalty loses its character,²³ most commonly on its becoming a fixture.

In *Whenuapai Joinery (1988) Ltd v Trust Bank Central Ltd*,²⁴ a case decided well before the *PPSA*, the joiner had supplied large numbers of custom-made window frames and other fittings to a client in the process of constructing a large and expensive house. The supply was subject to a Romalpa-type reservation of title clause. The joinery was never paid for and, very early one morning (accompanied by media representatives), a team

14 *Personal Property Securities Act 1999* (NZ) s 53.

15 *Personal Property Securities Act 1999* (NZ) s 52.

16 *Personal Property Securities Act 1999* (NZ) s 54.

17 *Personal Property Securities Act 1999* (NZ) s 19(1).

18 *Personal Property Securities Bill 2008* (Cth) s 83.

19 *Personal Property Securities Bill 2008* (Cth) s 41(2).

20 *Personal Property Securities Bill 2008* (Cth) s 41(2)(b).

21 *Personal Property Securities Bill 2008* (Cth) s 41(2)(c).

22 *Personal Property Securities Act 1999* (NZ) s 16.

23 As identified by Craig Wappett, Laurie Mayne and Tony Duggan, *Review of the Law on Personal Property Securities: An International Comparison of Personal Property Securities Legislation* (2006) 19, Australian Government, Attorney-General's Department

<[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)-PPS+-+ICP+-+International+Comparison+Paper+-+Final+-+Workshop+-+July+2006+-+Personal+Property+Securities1.pdf/\\$file/PPS+-+ICP+-+International+Comparison+Paper+-+Final+-+Workshop+-+July+2006+-+Personal+Property+Securities1.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)-PPS+-+ICP+-+International+Comparison+Paper+-+Final+-+Workshop+-+July+2006+-+Personal+Property+Securities1.pdf/$file/PPS+-+ICP+-+International+Comparison+Paper+-+Final+-+Workshop+-+July+2006+-+Personal+Property+Securities1.pdf)> at 7 December 2008.

24 [1994] 1 NZLR 406.

removed the items and bore them away. Trust Bank Central held a mortgage over the property. In the legal stoush that followed, the Court of Appeal held that the window frames and fittings had been ‘fixed’ to the house, thereby becoming incorporated into it from that point. Therefore, despite the fact they could be removed without damaging or threatening the integrity of the structure itself, the mortgagee had the better claim.

The *PPSA* preserves the distinction between personal and real property and, by analogy, the decision in *Whenuapai*. This legal situation raises some potential difficulties. Take, for example, the position of a tradesperson such as a plumber or electrician who is called by a householder to supply and install new appliances, fittings or wires/pipes. Almost inevitably, the supply of such items will be delivered on credit. Almost inevitably also, the goods will be subject to a reservation of title clause. If, as was the case in *Whenuapai*, the goods lose their character as personalty on affixation to real property, how effective is a reservation of title clause as against a mortgagee? If indeed it has no effect, what precautions (if any) can that tradesperson take to guard their security interest? Finally, assuming that at the time the householder called that tradesperson for assistance, he or she had already received a notice prescribed by s 119 of the *Property Law Act 2007*,²⁵ would a mortgagee subsequently exercising rights of possession and sale have any obligations towards that tradesperson?

Taking those questions in turn, a reservation of title clause is unlikely to be effective as against a mortgagee’s claim once the property subject to that clause has been affixed to real estate. The position will not be improved by registration of the supplier’s security interest (perfection) as it is the nature of the property, rather than the priority of competing claims, that is important in determining the rights of creditors to the property.

Therefore, and by way of response to the second question, the dilemma for the tradesperson remains — he or she could demand cash before any work is done (realistic in relation to a small job but potentially jeopardising any chance of securing larger contracts and any enduring relationship with clients) or trust that nothing will go amiss.

The third question is more complicated: the tradesperson would have an action against the mortgagor — after all, a contract has clearly been breached. Any recovery would of course depend on the financial position of the mortgagor after the surplus or deficit (if any) on settlement of the mortgage debt. The price received on mortgagee sale may reflect the improvements and/or maintenance on the house but it may still not exceed the amount owed to the mortgagee, particularly where these events take place in the context of a declining property market.

The position of the mortgagee is less certain. The mortgagee is under no contractual or similar obligation to consider the wellbeing of a trade creditor when exercising any rights of possession or sale in relation to the encumbered property. There remains, however, the question as to whether the out-of-pocket tradesperson might argue unjust enrichment as against the mortgagee if it could be demonstrated that, as a result of the price-enhancing benefits provided by the work completed and goods provided, the mortgagee has either gained more or lost less on the mortgagor’s default than he or she would otherwise.

In light of the above, it is interesting to note that the Australian draft legislation has incorporated some protection for claimants against personal property collateral when those claims conflict with the interests of claimants to the real estate.²⁶ Specifically, it spells out four exceptions to the ability of a holder of a security or other interest in real estate (eg, a purchaser) to claim the additional value of any personal property collateral that has become a fixture.²⁷ In summary, it appears to mean that where the security interest in the collateral

²⁵ A mandatory notice that spells out the default of the mortgagor under the mortgage, the time allowed to remedy the default and the consequences of not so doing (including possession by the mortgagee). Equivalent provisions under Australian law include *Land Titles Act 1925* (ACT) s 93; *Land Titles Act 1925* (NSW) s 93; *Law of Property Act 2000* (NT) s 89; *Property Law Act 1974* (Qld) s 84; *Law of Property Act 1836* (SA) s 55; *Land Titles Act 1980* (Tas) s 77; *Transfer of Land Act 1958* (Vic) s 76; *Transfer of Land Act 1893* (WA) s 106.

²⁶ Personal Property Securities Bill 2008 (Cth) ss 130-131.

²⁷ Personal Property Securities Bill 2008 (Cth) s 149.

is created prior to affixture, the secured party effectively retains priority.²⁸ In addition, such priority is maintained: where the interest was attached (with, or possibly prior to, perfection) *after* the collateral was affixed to the real estate; where a person subsequently acquiring the interest in the real estate has constructive or actual notice of that interest (from information contained on the land register); or when he or she has given consent.

An Australian tradesperson would thus appear potentially advantaged by comparison to his or her New Zealand counterpart. In particular, provided his or her security interest in the collateral was perfected prior to its affixture, he or she would also retain a right to claim against it.

4. Rights of Competing Claimants to Repossessed Collateral

Part IX of the *PPSA* provides a default process to be followed by ‘secured parties’ (who would normally have perfected their interests) seeking to exercise their rights against the security. Any such a party may take possession and sell the collateral where the debtor is in default or where the collateral is at risk.²⁹ In such an eventuality, the secured party who has thus taken possession must pay out any higher-ranking secured parties before satisfying his or her own debt.³⁰ Where the collateral is in the form of negotiable instruments or certain other choses in action, the highest-ranking secured party may apply it to satisfaction of the debt³¹ (note that in such cases the first secured party is highly likely to have possession of relevant documents to enable this to happen).

However, other provisions may be more controversial. First, a first-ranking secured party may propose to retain the collateral but before doing so must give notice to those ‘entitled’ to receive it,³² including:

- a) the debtor;
- b) any person who has registered a financing statement in respect of the collateral that is effective at the time the secured party took possession of the collateral; and
- c) any other person that has given the secured party notice that that person claims an interest in the collateral.³³

If any of those parties object to the proposal within 10 days, the collateral must be sold³⁴ (with the seller duty-bound to obtain the best possible price).³⁵ That makes sense. If, for example, those other claimants believe the return on sale of the collateral would exceed the valuation accorded by the first creditor, then it should be sold. Also, where retention of the collateral by the first-priority secured party would mean other interested parties were ‘adversely affected’, it is only fair if each or none were to have an equal chance to purchase it.

However, that is not the only possible outcome. Those listed in s 114 are also ‘entitled’ to redeem the collateral, with the only limitation being that the debtor’s right takes precedence over all others.³⁵ The *prima facie* implication of this provision is that the secured party with highest priority must surrender their right to retain where a lower-ranking secured party is willing to redeem — a position which could have rather odd consequences.

Suppose, for example, the collateral at issue is a licence to develop and exploit a potentially valuable invention. Leaving aside the debate over the extent to which, the

28 Personal Property Securities Bill 2008 (Cth) s 130(1).

29 *Personal Property Securities Act 1999* (NZ) s 109.

30 *Personal Property Securities Act 1999* (NZ) s 116A.

31 *Personal Property Securities Act 1999* (NZ) s 108.

32 *Personal Property Securities Act 1999* (NZ) s 120.

33 *Personal Property Securities Act 1999* (NZ) s 114(1).

34 *Personal Property Securities Act 1999* (NZ) s 121.

35 *Personal Property Securities Act 1999* (NZ) s 110.

35 *Personal Property Securities Act 1999* (NZ) s 132.

mechanism whereby, and the consequences where, intellectual property rights may be subject to a security interest,³⁶ this situation raises some potentially interesting issues.

Assume, for the sake of argument, that the inventor retains the patent rights but has entered into a cooperative joint venture (involving a licensing agreement) with a company (the debtor in this scenario) that specialises in developing new inventions for commercial launch. The debtor company agrees to bear all the costs and risks of development, a process predicted to take two years, in return for a high percentage of the commercial returns. Also, under the licence, the inventor has handed the patent documentation over to the company. To keep it interesting, there are several other competing parties holding security interests in some or all of the assets of the debtor company. These include: the holder of a security interest in all existing and after-acquired assets of the debtor (which, incidentally, replaces floating debentures under the *PPSA*); a yet-to-be-paid supplier of equipment and materials incorporated into a prototype of the invention, claiming under a purchase money security interest (PMSI); and another ‘junior’ creditor who has expressed interest in acquiring and/or developing the patent rights.

Several questions arise as to the rights and responsibilities of these various parties. First to be considered are those of the supplier of the equipment and materials. By virtue of the PMSI, this party has super priority over relevant collateral. In this instance, this creditor can either reclaim materials supplied (which have been changed by virtue of being incorporated into the prototype), or trace the claim through to the money obtained on disposal of that collateral. In this instance, however, the inventor would presumably either wish to destroy the prototype or protect it until such time as the work is completed on the invention. He or she would almost certainly not wish the prototype to be sold.

Could the holder of the PMSI then exercise his or her rights³⁷ to repossess and sell the collateral (in this instance, the prototype) on the grounds that it is at risk (defined as where ‘the secured party has reasonable grounds to believe that the collateral has been or will be destroyed, damaged, endangered, disassembled, removed, concealed, sold, or otherwise disposed of contrary to the provisions of the security agreement’)?³⁸

Secondly, what is the position of the inventor? There may never have been any intention on the part of either debtor or inventor that the patent be claimed by any creditor. However, unless such an intention is clearly negated, the ousting of *nemo dat* means the inventor’s rights under the patent may not be safe against all others involved. The right of redemption presumably requires that the inventor gets in before any other entitled person — as the *PPSA*, with the exception of providing that the debtor has the highest priority, makes no specific provision for the treatment or ranking of any other competing attempts to redeem³⁹ — and requires that he or she has adequate funds to do so. If these requirements are not met, the inventor in this position may have no means of preventing the patent documentation, or at least a licence to develop or exploit the invention, passing into the hands of a stranger.

The third set of rights and responsibilities are those of the other secured creditors, these being both the ‘senior’ first-ranking creditor with an interest in all present and after-acquired property (less that subject to the PMSI), and the ‘junior’. Several questions arise. First, could either of these creditors take possession of the documentation relating to the patent and sell it, or are their rights confined merely to those provided under the licence granted by the inventor to the debtor company? Secondly, what is the effect on the senior creditor’s position should the junior creditor (or another entitled person) exercise the right of redemption or demand that it be sold,⁴⁰ thereby preventing the senior creditor retaining

36 See, eg, the detailed exploration of some of the issues in Howard Knopf, ‘Security Interests in Intellectual Property: An International Comparative Approach’ (Paper presented to the 9th Annual Fordham Intellectual Property Law and Policy Conference, New York, 19-20 April 2001) <<http://www.ulcc.ca/en/cls/security-interests.pdf>> at 7 December 2008.

37 *Personal Property Securities Act 1999* (NZ) s 109.

38 *Personal Property Securities Act 1999* (NZ) s 109(2).

39 *Personal Property Securities Act 1999* (NZ) s 132.

40 *Personal Property Securities Act 1999* (NZ) s 121.

this potentially valuable collateral?⁴¹ Finally, if the commercial benefits of the patent have not yet been realised, how is it to be valued for the purposes of determining what a redeemer should pay and/or what the redeemer or retainer should pay to the other claimants, and/or the amount that should be expected on sale?

The Australian provisions are similar, although they grant the right of possession to any secured party, not just the highest ranking.⁴² This goes some way to ensuring that the interests of lower-ranking secured parties are not frustrated by a top-ranking creditor who is reluctant to act. However, the provisions regarding sale, possession and right of redemption are similar to those in the New Zealand *PPSA*, therefore potentially raising the same questions.

5. Contracting Out

The *PPSA* permits parties to contract out of certain rights on repossession that would otherwise be available under Part IX,⁴³ and s 126(1) (debtor's right to receive a verification statement on perfection), albeit with limits prescribed by s 12 (to protect the rights of third parties). These provisions have resulted in the widespread use, most noticeably on the internet, of so-called 'boiler-plate', standard-form terms and conditions in contracts covering the supply of a diverse range of goods, from kitchens to umbrellas, driveways to DVDs and CDs,⁴⁴ and flowers to computer parts and accessories.⁴⁵ What such statements of terms and conditions generally have in common is the exclusion of every right of the customer/debtor on repossession that is permitted (including the right to a statement of account,⁴⁶ recovery of surplus on sale,⁴⁷ receipt of a notice of intended sale,⁴⁸ objection to proposed retention,⁴⁹ objection or notice in respect of proposed or actual removal of an accession by the secured party,⁵⁰ and to redemption of the collateral).⁵¹

Although the policy decision underpinning these provisions was that parties to a commercial agreement should have freedom of contract, it is arguable that these so-called 'boiler-plate' provisions can tip the negotiating balance and outcome heavily in favour of the creditor, even where the collateral is disposed of post-default at little or no loss. In addition, because such exclusions are so ubiquitous, it is useful to briefly consider whether they are in accordance with the words and/or spirit of the *PPSA*.

First, Part IX does not apply to security interests over 'consumer goods' — in such an instance, the debtor has those rights spelt out in the *Credit (Repossession) Act 1997*. However, and despite the fact that many suppliers are providing what might reasonably be described as 'consumer goods' (and it can be inferred from the fact they refer to the *Consumer Guarantees Act 1991* in their terms and conditions that they contemplate the possibility transactions will be defined as involving such), there is frequently no specific allusion to the *Credit (Repossession) Act*. This failure potentially exposes the terms and

41 It is arguable that the rights of a creditor with a security interest are limited to realisation of the security and the repayment of their debt. However, if that is the case, why does the statute provide for the first-ranking creditor's repossession and retention of the collateral and the right of those other than the debtor to redeem? Why does it not specify that the collateral should, in all cases, be sold (other than those involving redemption by the debtor)?

42 Personal Property Securities Bill 2008 (Cth) s 168-190. However, s 174 provides that a higher-ranking creditor can demand possession.

43 *Personal Property Securities Act 1999* (NZ) s 107.

44 Silver & Ballard Online Store, *Terms and Conditions* <<http://www.sandb.co.nz/terms.cfm>> at 7 December 2008.

45 Ascent Technology, *Terms and Conditions* <<http://www.ascent.co.nz/Conditions.aspx>> at 7 December 2008.

46 *Personal Property Securities Act 1999* (NZ) s 116.

47 *Personal Property Securities Act 1999* (NZ) s 119.

48 *Personal Property Securities Act 1999* (NZ) s 120(2)

49 *Personal Property Securities Act 1999* (NZ) s 121.

50 *Personal Property Securities Act 1999* (NZ) ss 125-131.

51 *Personal Property Securities Act 1999* (NZ). Note that there would appear to be an inherent logical inconsistency between the wording of s 107(2)(f) and the rest of the section when other relevant provisions are taken into account. Section 107(2) refers to the ability of the parties to exclude debtor's rights (which in turn reflects the tenor of s 12, which specifies that any such contracting out cannot impinge on the rights of third parties). However, s 107(2)(f) purportedly allows parties to the security agreement (normally the debtor and creditor) to contract out of s 126 — a section that specifically provides that parties *other than the debtor* may seek reimbursement should their goods be damaged by removal of an accession.

conditions to legal challenge. In addition, it begs the question of whether including a summary of both sets of legal rights and limitations may lead to confusion and complication.

Secondly, it is to be noted that in addition to contracting out under Part IX, such terms and conditions commonly exclude a debtor's statutory right to receive a verification statement on perfection. Under the *PPSA*, such exclusion is permitted but only where the debtor has waived his or her right to such receipt *in writing*. Presumably this requirement goes some way to ensuring that the debtor, when excluding their legal right to important information, manifestly demonstrates their understanding of the implications of so doing. Given this presumption, it is interesting to briefly consider the different practices of internet-based suppliers.

For example, Outerspace Dezine puts it thus: '11.3: unless otherwise agreed to in writing by the Seller, the Buyer waives its right to receive a verification statement in accordance with section 148 of the *PPSA*.'⁵² Concrete Creations merely excludes the right, with the client being requested to accept all the terms and conditions (including this one) through clicking the appropriate button or by way of a signed hard copy returned to the company.⁵³ BeerNZ deems acceptance by the customer of a shipment of goods as also being acceptance of its terms and conditions (including the relevant waiver),⁵⁴ while furniture-maker McKenzie and Willis merely requires an applicant for its Gold Card to indicate that they have read the terms and conditions (which again includes the waiver).⁵⁵ The question remains: are these various strategies for incorporating this waiver into boiler-plate, standard-form contracts demonstrably and adequately tantamount to a waiver in writing on the part of the customer/client/debtor? That is yet to be determined.

The Australian draft contains similar provisions. It specifically provides⁵⁶ that parties to a security agreement that does not involve goods that are predominantly used for personal, domestic or household purposes may contract out of rights associated with accession,⁵⁷ the giving of notice of possession,⁵⁸ disposal of collateral,⁵⁹ a creditor's intention to retain collateral⁶⁰ and the right of redemption.⁶¹ As is the case in the *PPSA*, contracting out of these rights may not affect third parties (including all other secured parties) unless they have agreed otherwise.⁶² Finally, the right to contract out of the provision of a verification statement, while similar in terms of required process to that prescribed by the *PPSA*, is somewhat more limited in application, covering only collateral described as equipment or inventory (excluding consumer goods by default but potentially also excluding other non-consumer assets of a more permanent nature). However, and for similar reasons, a similar set of issues may nevertheless arise in relation to the boiler-plate type contractual terms and conditions discussed above.

III. CONCLUSION

There is little doubt that the *Personal Property Securities Act 1999* has introduced a uniform, easily accessible and real-time registration system to New Zealand for security interests in personal property. It has clearly been a great leap forward from the antiquated,

52 For example, Outerspace Dezine Limited, *Terms & Conditions for Outerspace Dezine Limited* <<http://www.outerspacedezine.co.nz/terms&c.htm>> at 7 December 2008.

Concrete Creative, *Terms & Conditions* <<http://www.concretecreative.co.nz/Resources/terms.pdf>> at 7 December 2008.

54 BeerNZ, *Trade Terms and Conditions*

<<http://www.beernz.co.nz/page.aspx?page=Terms%20and%20Conditions>> at 7 December 2008.

55 McKenzie and Willis, *McKenzie and Willis Gold Card*

<<http://www.mckenzieandwillis.co.nz/Gold%20Card>> at 7 December 2008.

56 Personal Property Securities Bill 2008 (Cth) s 163.

57 Personal Property Securities Bill 2008 (Cth) s 154-155.

58 Personal Property Securities Bill 2008 (Cth) s 169-170.

59 Personal Property Securities Bill 2008 (Cth) s 179.

60 Personal Property Securities Bill 2008 (Cth) s 181.

61 Personal Property Securities Bill 2008 (Cth) s 189.

62 Personal Property Securities Bill 2008 (Cth) s 163(2).

complicated and confusing systems that existed prior to its full implementation in 2002. However, there are still some peculiarities inherent in the *PPSA* that raise some interesting, and at times contradictory, possibilities and problems that have not yet been fully explored. Some of these issues have been addressed specifically in the Australian draft and others have not. The final outcome of the submissions and discussion of the draft legislation remains to be seen.