Competing interests in leased collateral under the PPSA

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Introduction

One of the most controversial aspects of the Personal Property Securities Act 2009 (Cth) (**PPSA**) is the effect of the taking free, vesting and priority rules when personal property is leased and, either before or after the lease is entered into, the lessee and/or the lessor have granted or grant a security interest in favour of another person over collateral that includes the personal property the subject of the lease.

There are a number of variables that can affect the application of the taking free, vesting and priority rules. These include:

- whether the lease itself is a security interest and, if so, whether it has been perfected as a purchase money security interest (**PMSI**);
- whether the security interests granted by the lessor and the lessee are granted before or after the lease is entered into;
- whether the lessee 'takes free' of the security interest in favour of the lessor's secured party; and
- whether the lessee is insolvent when the security interests of the lessor's secured party and the lessee's secured party come into conflict.[1]

This paper examines the relevant provisions in the PPSA and provides an explanation of how they should be interpreted in the context of a couple of specific fact scenarios.[2] The paper concludes by looking at some of the recommendations of the recently concluded Review of the PPSA[3] (**Review**) that relate to these provisions.

Some basic principles

Under the general law a person can only give security over what they have; this is the principle of *nemo dat quod non habet*. If a person has possession of property but not under a transaction that gives rise to a security interest for the purposes of the PPSA, then they can only give security over that possessory interest in the property. In these circumstances, the general law principle of *nemo dat* continues to apply.[4]

If a transaction gives rise to an in-substance security interest pursuant to s 12(1) of the PPSA,[5] the PPSA treats the grantor as if it had ownership of the collateral, even if that is not the case at general law. In these circumstances *nemo dat* does not prevent the grantor from giving

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[1] The case authorities in New Zealand and Canada suggest the date security interests 'come into conflict' is the date priority should be determined; see *Gibbston Downs Wines Ltd v Perpetual Trust Ltd* [2013] NZCA 506;, *Strategic Finance Limited (in rec and in liq) v Bridgman* [2013] NZCA 356; *Sperry Corp v CIBC* (1985) 17 DLR (4th) 236.

[2] This paper does not analyse the PPSA provisions that apply when a lessee does not 'take free' of a security interest in favour of the lessor's secured party; note especially ss34 and 66-68, PPSA..

[3] B Whittaker, *Final Report of the Review of the Personal Property Securities Act 2009* (Final Report), February 2015.

[4] Section 254, PPSA

[5] That is, the transaction in substance secures payment or performance of an obligation (without regard to the form of the transaction or the identity of the person who has title to the property); s 12(1), PPSA. Note also s 273, PPSA.

security over the collateral to another person, or from selling or leasing it (whether subject to the security interest or free of it), because under the PPSA the grantor is treated as if it were the owner.[6]

The same position applies for a transaction that gives rise to a deemed security interest under s 12(3). Because the PPSA characterises such transactions as giving rise to a security interest (even though it does not in substance secure payment or performance of an obligation), the PPSA treats the grantor as if it were the owner of the collateral, even if that is not the case at general law, and allows the grantor to grant security over it to another secured party, or to sell or lease it (either subject to the deemed security interest, or free of it).[7]

These principles have so far been accepted by Australian courts[8] despite early suggestions that they might not be.[9] For example, in *Re Maiden Civil (P&E) Pty Ltd; Albarran v Queensland Excavation Services Pty Ltd*[10] a lessee under a PPS lease was found to have rights in the leased equipment to which a security interest could attach. These rights were not limited to possessory rights, but included proprietary rights. The court referred to a number of New Zealand and Canadian decisions and quoted the following paragraphs from the decision in *Graham v Portacon New Zealand Ltd:* [11]

> The rights of a lessee in leased goods referred to in s 40(3) of the Act [NZ PPSA] are not therefore confined to the lessee's possessory rights. *As against the lessee's secured creditors, the lessee has rights of ownership in the goods sufficient to permit a secured creditor to acquire the rights in priority to those of the lessor.* The conceptual basis for this is explained in an article by Bridge, Macdonald, Simmonds and Walsh, "Formalism, Functionalism and Understanding the Law of Secured Transactions" (1999) 44 McGill LJ 567 at pp 602-603. The authors reject the thesis that for the purpose of art 9 of the United States Uniform Commercial Code and the Canadian legislation, a creditor's interest in collateral attaches only to the debtor's possessory rights. (Emphasis added).

They go on to say:

> The internal logic of the Article 9 and PPSA priority regime is premised on a rejection of derivative title theory in favour of registration as the principal mechanism for ranking priority both among secured creditors and as between the secured creditor and the debtor's general creditors including the trustee in bankruptcy. To give effect to this intent, "rights in the collateral" must be understood as requiring a mere bare right to possession or a power to convey a greater interest than has the debtor, a point confirmed in PPSA jurisprudence and expressly stated in some of the more recent PPSAs. On this interpretation, ostensible ownership -- in the radical sense of bare possession or control of the collateral -- has effectively replaced derivative title for the purposes of determining the scope of the secured debtor's estate at the priority level. *Thus, by the very act of deeming a true lease to be a PPSA security interest, ownership in the leased assets is effectively vested in the lessee as against the lessee's secured creditors and trustee in bankruptcy.* (Emphasis added).

The court then concluded that:

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

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[6] R C C Cuming, C Walsh and R J Wood, *Personal Property Security Law*, 2nd ed, Irwin Law, Toronto, 2012 pp 124 and 256. For a contrary view see D Loxton, 'New bottle for old wine? The characterisation of PPSA security interests' (2012) 23 *JBFLP* 163, 174-5.

[7] Cuming, Walsh and Wood, ibid at 258-9.

[8] *Re Maiden Civil (P&E) Pty Ltd; Alberran v Queensland Excavation Services Pty Ltd* (2013) 277 FLR 337; *White v Spiers Earthworks Pty Ltd* [2014] WASC 139.

[9] S McCracken, 'Conceptualising the Rights of a Lessee under the Personal Property Securities Regime: The Challenge of "New Learning" for Australian Lawyers', (2011) 34(2) *UNSWLJ* 547-568 and Loxton, above n 6.

[10] (2013) 277 FLR 337.

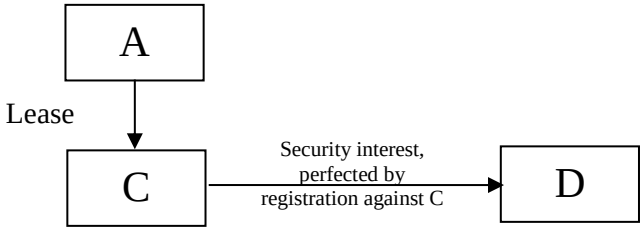
[11] [2004] 2 NZLR 528.

These principles are key to determining the correct outcomes in each of the fact scenarios considered below.[12]

The first fact scenario

The first fact scenario can be illustrated as follows:

Figure 1



In this scenario, A leases the collateral in favour of C. Either before or after the lease is entered into between A and C, C has granted security over all of its assets to D and D has perfected its security interest by registering against C.

The lease between A and C could be either:

- a lease or rental agreement that is not a security interest for the purposes of the PPSA because it does not secure payment or performance of an obligation or satisfy the requirements for being a PPS lease under section 13 of the PPSA, for example, a lease of power generating equipment for a fixed term of 9 months (**Non-security Lease**); or
- a lease that in-substance secures payment or performance of an obligation,[13] for example, a finance lease (**In-substance Security Lease**); or
- a lease that satisfies the criteria for a PPS lease under section 13 of the PPSA but which is not an In-substance Security Lease, for example, an operating lease of goods for a term of 18 months (**Deemed Security Lease**).

If the lease is a Non-security Lease, the PPSA does not apply to it and A does not need to perfect against C. While D's security interest can attach to C's possessory rights under the lease it will not attach to the whole of the leased asset. A can rely on *nemo dat* to enforce the lease against C and to maintain priority over D's security interest. A's interest is not affected by the vesting rule in section 267 of the PPSA.

If the lease is either an In-substance Security Lease or a Deemed Security Lease and A does not perfect its security interest, A's interest will vest in C pursuant to section 267 of the PPSA if C becomes insolvent.[14] In the event that either before or after the granting of the lease to C,

[12] The Review found that the approach to interpreting the PPSA that is based on these principles (referred to as the 'unitary model') is preferable to the alternative approach which acknowledges a lessee's ability to grant security in leased collateral but subject to the proviso that such an interest is defeasible by the superior rights of the true owner (referred to as the 'possession model'). While the Final Report details the operation of the unitary model in a variety of priority scenarios no such detail is provided for the possession model. As the Final Report itself acknowledges (at 5.1.2.2), the possession model introduces the serious risk that different security interests might be treated in different ways under the PPSA because of the form of the transactions that produced them, rather than their substance. Unfortunately, the Review has also recommended that the Government provide an opportunity for further submissions on the merits of the 'possession model'; Final Report at pp115-118 and annexure C (pp482-494).

[13] Section 12(1), PPSA.

[14] This assumes that if the lease is a Deemed Security Lease one or more of paragraphs (a) to (d) of section 13(1) applies; see s268(1)(a)(ii). Note that the Review has recommended that all Deemed Security Leases be excluded from the application of the vesting rule; Final Report, Recommendation 330.

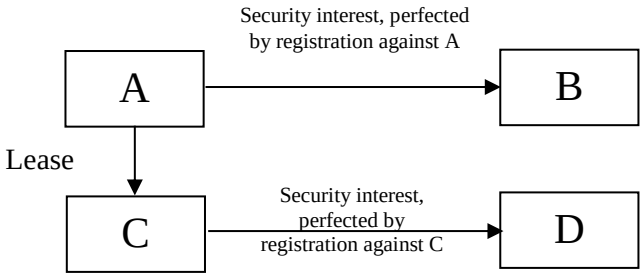
C has granted security over all of its assets to D and that security has been perfected, then D's security will attach to the leased asset (not merely C's rights of possession under the lease) and D will have priority over the unperfected security interest of A.[15] This will be the outcome even if C is not insolvent when A's unperfected security interest comes into conflict with D's perfected security interest. D would also have priority over A if A perfects after D and for some reason A is not entitled to the super priority of a PMSI.[16] If A does perfect its PMSI in accordance with sections 62 and 153 of the PPSA it will be entitled to priority over D even if D perfects prior to A. In this scenario the 'taking free' rules in Part 2.5 of the PPSA are not relevant as A has not granted security to any other person.

The Australian cases which have considered these issues to date are entirely consistent with the case law which has developed in Canada and New Zealand when interpreting their equivalent provisions.[17]

The second fact scenario

The second fact scenario can be illustrated as follows:

Figure 2



In this scenario, A owns collateral, and has given a perfected security interest over the collateral to B. A then leases the collateral in favour of C in the ordinary course of A's business of leasing goods of that kind.[18] Either before or after the lease is entered into between A and C, C has granted security over all of its assets to D and D has perfected its security interest.

The lease between A and C could be either a Non-security Lease, an In-substance Security Lease or a Deemed Security Lease.

When the lease in favour of C is a Non-security Lease the *nemo dat* principle remains in full effect. This means that the security interest granted by C in favour of D can only ever attach

[15] Section 55(3), PPSA and see also *Maiden Civil (P&E) Pty Ltd; Albarran v Queensland Excavation Services Pty Ltd* (2013) 277 FLR 337 and *White v Spiers Earthworks Pty Ltd* [2014] WASC 139. For further commentary refer to C Wappett, B Whittaker and S Edwards, *Personal Property Securities in Australia*, LexisNexis, Sydney, 2010 (looseleaf) at [PPSA.12.A], [PPSA.13.A] and [PPSA.19.A].

[16] Section 55(4), PPSA.

[17] The New Zealand PPSA does not include an insolvency vesting rule. The Canadian PPSAs do not have a vesting rule per se but they do provide that a security interest is 'not effective' against a trustee in bankruptcy or liquidator if the security interest is unperfected as at the date of bankruptcy or the winding up order, as applicable. These provisions have consistently been interpreted as giving a trustee in bankruptcy or liquidator of a lessee, under a lease that is a security interest for the purposes of the legislation, priority over the unperfected security interest of the lessor; *Re Giffen* (1998) 155 DLR (4th) 332; [1998] 1 SCR 91 ; *International Harvester Credit Corporation of Canada Ltd v Trustee of Bell's Dairy Ltd* (1986) 50 Sask R 177; 30 DLR (4th) 387; [1986] 6 WWR 161; (1986) 34 BLR 76 ; *Donaghy v CNS Vehicle Leasing* [1992] 6 WWR 70.

[18] Other provisions can apply when the 'take free' rules do not.

to C's right of possession under the lease and B, as the holder of security from A, can rely upon A's title to the leased asset to maintain priority over D.

When the lease in favour of C is an In-substance Security Lease or a Deemed Security Lease the rights of A, C and D as against each other are no different to the first fact scenario (see figure 1). The real controversy surrounds the effectiveness of B's security interest as against C, including if C becomes insolvent, and the priority of B's security interest as against D's security interest, whether or not C is insolvent.

While the vesting rule in s 267 does not affect B's security interest, because that section only applies to security interests granted by the insolvent company (in this case C),[19] it is the author's view that the vesting of A's unperfected security interest in C means B's perfected security interest should not be effective as against C's liquidator, administrator or trustee in bankruptcy.

As the lease is entered into in the ordinary course of A's business of leasing goods of that type, s 46 of the PPSA provides that the lessee, C, will 'take free' of the security interest granted by A to B. This means the security interest of B cannot be asserted against C but it remains effective with respect to the security interest of A.[20]

Prior to C's insolvency, B's security interest would be attached to A's security interest under the lease and B's security interest would be expected to reattach to the leased goods pursuant to s 37 upon expiry, rescission or termination of the lease or the lessor repossessing the leased goods in enforcing the lease.

Section 37 provides that:

> **Returned collateral – following sale or lease**
>
> **37**(1) **Reattachment of security interest** If a grantor or debtor sells or leases goods that are subject to a security interest, and the buyer or lessee takes the goods free of the security interest because of the operation of this Act, the security interest reattaches to the goods at a particular time (the ***repossession time***) if, at that time, the goods come into the possession of the grantor or debtor, or of a transferee of chattel paper created by the sale or lease, in any of the following circumstances:
>
> (a) in the case of a sale – the contract of sale is rescinded;
>
> (b) in the case of a lease – the lease expires or is rescinded;
>
> (c) the transferee seizes the goods in the exercise of a right in enforcing a security agreement;
>
> (d) the grantor or debtor repossesses the goods in the exercise of a right in enforcing the contract of sale or the lease;
>
> (e) any other circumstances prescribed by the regulations.
>
> Note: Section 76 deals with the priority of a security interest that reattaches under this section.

[19] Section 267(1)(b), PPSA.

[20] Cuming, Walsh and Wood above n 6 at pp 377 and 385; and A Duggan and D Brown, *Australian Personal Property Securities Law*, LexisNexis, Butterworths 2012, p 193 (n 1). These commentators refer to the lessor having a 'reversionary interest' but it may be more consistent with the unitary model, and the principles outlined above, to simply refer to the lessor's security interest.

(2) **Perfection of security interest** The perfection of the security interest, and the time of registration or perfection of the security interest, are to be determined as if the goods had not been sold or leased, if:

(a) the security interest reattaches to the goods under subsection (1); and

(b) the security interest was perfected by registration immediately before the time of the acquisition; and

(c) the registration is effective at the repossession time.

Should C become insolvent it is not entirely clear whether s 267 results in A's unperfected security interest vesting in C, subject to B's perfected security interest, or if s 267 effectively terminates B's security interest in relation to the leased asset. However, the latter interpretation is most likely correct because:

- once vesting occurs, A no longer has rights to which B's security interest can remain attached;
- C took the leased asset free of B's security interest in accordance with s 46 when the lease was entered into; and
- B's security interest cannot reattach to the leased asset under s 37 once vesting occurs.

Similarly, in any priority contest between D and B, D should win if A's security interest has vested under s 267 or if D would defeat A in a priority contest (irrespective of whether C is insolvent at the time of the priority contest). Section 76(3) provides that D's security interest (referred to in the section as the 'priority interest') will have priority over B's security interest if:

- B's security interest reattaches under s 37; and
- D's security interest became attached to the leased goods while they were in the possession of C; and
- D's security interest was perfected immediately before the repossession time referred to in s 37.

The section does not affect the priority of A's security interest. Accordingly, if A's security interest is perfected:

- it will prevail over D; and
- B will simply rely on its security from A.

If A's security interest is unperfected it is vulnerable to vesting if C becomes insolvent and to losing priority to D. B's security interest is exposed to the same risks if A fails to perfect its security interest.[21]

If B is unable to maintain its claim to the leased asset against C because the lease attracts one or more of the taking free rules, B's rights to the collateral cannot be any better that A's rights

[21] The Review has recommended certain amendments to ss 37 and 76(3), PPSA; see Final Report, Recommendations 216, 252 and 253. The implementation of Review Recommendation 216 – that s 37 of the PPSA be amended to make it clear that it only applies if the effect of a lessee taking goods free of a security interest was that the security interest ceased to be attached to the goods - needs to be consistent with the 'unitary model' and not upset the current priority outcomes achieved under the Act. To the extent Review Recommendation 216 is intended to clarify the operation of s 37 in relation to Non-security Leases it should not be controversial. However, if the recommendation is intended to prevent a lessee's secured party relying on the sheltering principle as against a lessor's secured party where the lease is either an In-substance Security Lease or a Deemed Security Lease and the lessor has not perfected its security interest as a PMSI, this would be inconsistent with the 'unitary model'.

to the collateral. B will be unable to assert a claim against C or anyone who has obtained a security interest in the collateral from C (such as D). This is known as the sheltering principle.

The leading Canadian text on personal property securities law says that the doctrine of sheltering should apply, in favour of a buyer's secured party, when a buyer takes free of a security interest granted by the seller.[22] There is no reason why the same outcome should not result when a lessee takes free of a security interest granted by the lessor. Drawing a distinction between a sale transaction that constitutes a security interest, on the one hand, and a lease that is a security interest, on the other, would be inconsistent with the principle that all security interests, regardless of their legal form, are subject to the same set of rules. The fact that A has title to the leased asset should not affect the application of the relevant provisions of the PPSA – A's security interest may be in the form of a lease but, for the purposes of the PPSA, it is no different to a sale that includes a retention of title clause; a sale that includes a security interest back to the seller to secure the purchase price; or any other form of security interest.[23] If the arrangement between A and C was a sale by A on retention of title terms or a sale by A with a security back to A for the purchase price, instead of an In-substance Security Lease or Deemed Security Lease, there is no question that A's failure to perfect its security interest would result in B's security being ineffective as against C's administrator, liquidator or trustee in bankruptcy or D. There is no conceptual basis for this outcome being different merely because of the legal form of A's unperfected security interest is a lease.

A contrary view is that if A fails to perfect its security interest under an In-Substance Security Lease or a Deemed Security Lease, B's perfected security interest should still prevail as against a liquidator, administrator or trustee in bankruptcy of C (assuming C becomes insolvent) and also prevail against D.[24] The decision of the British Columbia Court of Appeal in *Re Perimeter Transportation Ltd*[25] is sometimes relied upon to support this view. However, that decision was primarily based on the bankruptcy trustee of the lessee voluntarily returning leased buses to the lessor, which amounted to a disclaimer and termination of the lease. The lessor's secured party was therefore in a position to exercise its security over assets that had been returned to the lessor, even though the lessor had not perfected its security interest under the relevant lease. Had the bankruptcy trustee not returned the buses to the lessor the effectiveness of the lessor secured party's security against the bankruptcy trustee would have been directly tested.

At least one commentator has argued that B's security interest should remain effective in relation to the leased collateral, notwithstanding A's failure to perfect against C, only in the situation where the lease to C is a Deemed Security Lease rather than an In-substance Security Lease.[26] There is nothing in the PPSA to support such a distinction. On the contrary, subject to two limited exceptions, the PPSA treats In-substance Security Leases and Deemed Security Leases the same.[27]

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[22] Cuming, Walsh and Wood, above n 6 at p 437.

[23] Section 273, PPSA.

[24] See, for example, L Widdup, 'Operating leases as second-tier security interests: A continuing case for *nemo dat* under the Personal Property Securities Act 2009 (Cth)', (2013) 22 *APLJ* 114.

[25] 2010 BCCA 509

[26] Widdup, above n 24 at 125 (n 36).

[27] The only circumstances in which the PPSA draws a distinction between In-substance Security Leases and Deemed Security Leases are, first, as to the application of Chapter 4 (Enforcement) – Chapter 4 does not apply to Deemed Security Leases; see s 109(1)(c) and, second, as to the application of the vesting rule under section 267; see s 268(1)(a)(ii) – the vesting rule does not apply to a PPS lease if s13(1)(e) applies to that lease and none of paragraphs (a) to (d) of s13(1) applies to that lease. This last-mentioned exception will soon be removed as a consequence of the Personal Property Securities Amendment (Deregulatory Measures) Act 2015.

Drawing a distinction between In-substance Security Leases and Deemed Security Leases is not supported by the provisions of the PPSA and it may not even be supported by the facts of the *Perimeter* case. In that case the relevant lease was for a term of eight years and included options to purchase in favour of the lessee. The *Perimeter* decision certainly did not comment on the characterisation of the lease being either an In-substance Security Lease or a Deemed Security Lease but it is entirely possible it may have been the former.

The 'taking free' rules in part 2.5 of the PPSA only apply to allow a lessee to take free of a security interest that is in existence at the time the lease is entered into. If A grants its security in favour of B after A has entered into the lease with C, B can only ever have or obtain the rights that A has against C.[28] If A's security interest is flawed due to the fact that A has not perfected then B cannot obtain any better rights as against C or a secured party of C. It would be an extremely odd outcome if the timing of B's security interest (that is, whether B's security interest is taken before or after A enters into the lease with C) were to affect B's rights in respect of the leased asset and/or under the lease itself. If A fails to perfect its security interest against C, B should not be able to achieve better rights by having taken security from A before the lease is entered into.[29]

Another Canadian decision, *David Morris Fine Cars Ltd v North Sky Trading Inc*,[30] involved similar facts to *Perimeter*. In that case the court held the lessee (and therefore its bankruptcy trustee) took the leased vehicle free of the perfected security interest granted by the lessor after the lease had been entered into.[31] As in the *Perimeter* case, the lessor had failed to perfect its security interest under the lease. The decisions in both *North Sky* and *Perimeter* contain a number of flaws and gaps in their reasoning and neither is a wholly reliable precedent in respect of the issues under consideration in this paper.[32]

At a practical level, if B's security interest was to prevail against a liquidator, administrator or trustee in bankruptcy of C (assuming C becomes insolvent) or D, even though A fails to perfect is security interest against C, it could lead to a practice of lessors granting security in favour of related parties so that the related party could rely upon that security to ultimately recover leased assets even though the lessor does not bother to perfect against the lessee. Such a development would significantly erode the utility of the Personal Property Securities Register (**PPSR**).

Conclusion

While the PPSA is not intended to exclude or limit the operation of the general law to the extent that the general law is capable of operating concurrently with the PPSA, the *nemo dat* principle has no continuing relevance when collateral the subject of a security interest includes a lessor's unperfected interest under an In-substance Security Lease or Deemed Security Lease.

Drawing a distinction between title and non-title based security interests or between different forms of title based security interest to favour a lessor's secured party is clearly at odds with

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[28] In *Perimeter* the lease pre-dated the granting of security by the lessor. Accordingly, the taking free rule upon which the court focussed should have been irrelevant on the facts.

[29] Of course, whether B's security interest is taken before or after A enters into the lease with C is, and should be, relevant in determining priority outcomes if none of the taking free rules applies when C enters into the lease with A.

[30] (1994) 158 AR 117 (appeal dismissed by the Alberta Court of Appeal, 1996 ABCA 134).

[31] Because the lease pre-dated the security granted by the lessor the taking free rule should not have been relevant.

[32] See Widdup above n 24 and also A Duggan, 'Security Interests in Goods Held for Lease: The Double Perfection Requirement' (2011) 51 *CBLJ* 85.

the principle that the PPSA does not distinguish between security interests based on their legal form or who has ownership of the relevant collateral.[33]

The interpretation of the taking free, vesting and priority rules suggested in this paper may necessitate additional due diligence and risk mitigation techniques being employed by secured parties who take security from grantors who regularly lease assets pursuant to leases that are security interests. Nevertheless, it is the author's view that, on the whole, this is preferable to drawing a distinction between title and non-title based security interests and between various forms of title based security interests and facilitating and preserving the rights of secured parties whose relevant interests in collateral will, in most cases, not be discoverable by a PPSR search against a lessee.

Various recommendations made in the Review of the PPSA will, if implemented, reduce the risk for lessors and their financiers. These recommendations include:

- removing the '90 day rule' for leases of serial numbered goods from the 'PPS lease' definition;[34]
- amending the definition of 'PPS lease' so that leases for an indefinite term only become 'PPS leases' after the lessee has had uninterrupted possession or substantially uninterrupted possession for more than one year;[35]
- removing all Deemed Security Leases from the application of the insolvency vesting rule.[36]

The last of these recommendations would not eliminate the potential loss of priority that can occur if the lessor under a Deemed Security Lease fails to perfect its security interest as a PMSI, assuming that the implementation of this recommendation would be done in such a way as to not alter the current priority outcomes.[37]

Another recommendation of the Review is to provide an opportunity for further submissions to Government as to whether the PPSA should be recast to reflect the 'possession model' which acknowledges a lessee's ability to grant security in leased collateral , subject to the proviso that such an interest is defeasible by the superior rights of the true owner. [38] It is not clear what this means.[39] However, proponents of the 'possession model' seem to suggest that,

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[33] Sections 12(1) and 273, PPSA

[34] Final Report, Recommendation 19 – this will reduce the number of lease and hire arrangements that are Deemed Security Leases. This measure has already been enacted – see the Personal Property Securities Amendment (Deregulatory Measures) Act 2015. The amendments introduced by the Act will apply from a date to be proclaimed or 25 December 2015, whichever occurs first.

[35] Final Report, Recommendation 21 – this will also reduce the number of lease and hire arrangements that are Deemed Security Leases.

[36] Final Report, Recommendation 330. It is worth noting that unperfected Deemed Security Leases (along with unperfected In-substance Security Leases) are not effective as against a trustee in bankruptcy or liquidator under the Canadian PPSAs; see, for example, s. 20(2) Personal Property Security Act 1993 (Saskatchewan).

[37] Chapter 4 (Enforcement) of the PPSA does not apply to Deemed Security Leases and if Review Recommendation 330 is adopted nor will the insolvency vesting provisions. Despite this, the priority rules in the PPSA should continue to apply so that the interest of a lessor (and any person to whom it has granted security) under an unperfected Deemed Security Lease will be limited to any residual value remaining after the amounts owing to all other secured parties with a perfected security interest in the leased asset granted by the lessee have been satisfied; see Cuming, Walsh and Wood above n6 at 259.

[38] Final Report, Recommendation 51. See also Recommendations 170 and 171. The 'possession model' is suggested as a possible alternative to the 'unitary model' which reflects the basic principles outlined at the beginning of this paper.

[39] While the Final Report details the operation of the unitary model in a variety of priority scenarios no such detail is provided for the possession model. If a 'true owner' is not the holder of an unperfected security interest, its priority will be determined outside the PPSA priority regime. However, when the PPSA applies to an owner's title based security interest its rights are subject to the PPSA priority regime.

at least in some circumstances, a secured party (other than the lessor) who takes a security interest from a lessee should only be able to deal with the lessee's possessory interest in the leased asset.[40] Changing the PPSA to achieve such an outcome has the potential to seriously undermine the efficacy and coherence of the PPSA and PPSR.[41]

This recommendation also seems at odds with the general thrust of the Review's findings and the key premise that the recommendations of the Review should be seen as a 'package'.[42] Amending the Act to reflect the 'possession model' would be inconsistent with many of the Review's other recommendations and require a further review of the entire legislative scheme. For these reasons, it is the author's hope that Review Recommendations 51, 170 and 171 are not taken up by Government.

[40] See, for example, McCracken above n9 at p564.

[41] As the Final Report itself acknowledges (at 5.1.2.2), the possession model introduces the serious risk that different security interests might be treated in different ways under the PPSA because of the form of the transactions that produced them, rather than their substance.

[42] Final Report, section 10.1.1.