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## PPSA and Construction Projects

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### I INTRODUCTION

The *Personal Properties Securities Act 2009* (Cth) (PPSA) is an important new initiative affecting all Australian commercial law<sup>1</sup> through its regulation of security interests over personal property via an online register.<sup>2</sup> By the end of 2012, there were already over 7 million interests registered and over 1.5 million online searches conducted.<sup>3</sup> The register's commencement on 30 January 2012<sup>4</sup> has meant the PPSA has largely replaced the common law with regard to:<sup>5</sup>

- what constitutes a security interest;<sup>6</sup>
- the priorities between competing security interests;
- the enforcement of security interests; and
- the extinguishment of security interests.

It strongly affects the interests of principals, contractors, sub-contractors, financiers, architects, engineers and superintendents of most construction projects in numerous ways. The PPSA is largely based on New Zealand<sup>7</sup> and Canadian equivalents,<sup>8</sup> and Papua New Guinea has since enacted a similar regime. Nevertheless, this broad amendment of regulation has brought an inevitable unfamiliarity.

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<sup>1</sup> Kriss Will, 'Practicalities of PPS Act' (2012) 34(3) *Bulletin* 32, 32. See also Craig Wappett, *Essential Personal Property Securities in Australia*, (2012), xxvi; Brendan Edgeworth, Christopher Rossiter, Margaret Stone and Pamela O'Connor, *Sackville & Neave: Australian Property Law*, (2013), 1056.

<sup>2</sup> Mieke Dixon, Nigel Oram and Matthew Walsh, 'Personal Property Securities Act' (2012) 96 *Legal Briefing* 1, 1.

<sup>3</sup> Personal Property Securities Register, PPSR, *Statistics: October to December 2012*, (2012), <http://www.ppsr.gov.au/AbouttheRegister/Statistics/Pages/StatisticsOctobertoDecember2012.aspx>, viewed 2 April 2013.

<sup>4</sup> *Personal Property Securities Act 2009* (Cth) s 304; Anthony Duggan, 'A PPSA Registration Primer' (2011) 35(3) *Melbourne University Law Review* 865, 865; Brendan Edgeworth, Christopher Rossiter, Margaret Stone and Pamela O'Connor, *Sackville & Neave: Australian Property Law*, (2013), 1056.

<sup>5</sup> Naomi Moore and Jeffery Black, 'Australian Secured Creditor and Insolvency Law: Sweeping Changes Under New Personal Property Securities Regime' (2011) 1 *ABI Journal* 54, 54.

<sup>6</sup> John Stumbles, 'The 'PPSA': the Extended Reach of the Definition of the 'PPSA' Security Interest' (2011) 34(2) *The University of New South Wales Law Journal* 448, 449.

<sup>7</sup> Lang Thai, 'Charges Over Book Debts in the United Kingdom and Australia: the Way Forward' (2007) 4 *Macquarie Journal of Business Law* 267; Craig Wappett, *Essential Personal Property Securities in Australia*, (2012), xxvii; Berna Collier, Paul Von Nessen and Alan Collier, 'The PPSA: Continuing the Reconceptualization of Retention of Title (Romalpa) Security' (2011) 34(2) *University of New South Wales Law Journal* 567, 579.

<sup>8</sup> Anthony Duggan, 'A PPSA Registration Primer' (2011) 35(3) *Melbourne University Law Review* 865, 865; Craig Wappett, *Essential Personal Property Securities in Australia*, (2012), xxvii; Personal Property Securities Register, PPSR, *About PPS Reform*, (2012), <http://www.ppsr.gov.au/AbouttheRegister/AboutPPSreform/Pages/default.aspx>, viewed 2 April 2013.

This article will outline those rules of the PPSA that are of particular relevance to actors within construction projects. Attention will be paid to the definition of security interest, the priority rules between security interests and the insolvency provisions. The article will then examine common ways in which construction contracts create security interests in personal property for the purposes of the PPSA, and the consequences for relevant parties where registration is not executed. Focus will be placed on arrangements that are common to both standard form contracts and contracts drafted from scratch,<sup>9</sup> as well as small scale and larger scale construction projects alike, namely arrangements constituting:

- a) Romalpa clauses;
- b) payment for goods that remain offsite;
- c) step-in rights;
- d) temporary works;
- e) equipment leases; and
- f) retention money.

## II PPSA

In addition to broad questions that the PPSA presents the entire legal industry, many questions specific to construction contracts have been posed since a contract clause can create a security interest.<sup>10</sup>

First, the PPSA has posited new rules over what constitutes a security interest,<sup>11</sup> which this article would suggest may cause confusion amongst practitioners. The PPSA defines a security interest to be ‘an interest in personal property provided for by a transaction that, in substance, secures payment or performance of an obligation’.<sup>12</sup> Specific examples are provided.<sup>13</sup> Once a security interest is identified, the PPSA will apply to it provided the security interest is in relation to ‘personal property’ for the purposes of the PPSA<sup>14</sup> and none of the specified exceptions apply.<sup>15</sup>

Secondly, the PPSA has legislated new priority rules, which are technical, though formulaic. The imposition of such rules means the common law is inapplicable where the PPSA applies. The most important principle is that perfected interests take priority over unperfected

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<sup>9</sup> Both of these forms of contract are commonly used in construction projects: Lolita Mohyla, *Construction Law in Australia: Law and Project Delivery*, (1996), 15, 223.

<sup>10</sup> Mieke Dixon, Nigel Oram and Matthew Walsh, ‘Personal Property Securities Act’ (2012) 96 *Legal Briefing* 1, 2.

<sup>11</sup> See Jamie Glister, ‘The Role of Trusts in the PPSA’ (2011) 34(2) *The University of New South Wales Law Journal* 628, 628.

<sup>12</sup> *Personal Property Securities Act 2009* (Cth) s 12(1).

<sup>13</sup> *Personal Property Securities Act 2009* (Cth) ss 12(2)-(6).

<sup>14</sup> Craig Wappett, *Essential Personal Property Securities in Australia*, (2012), xxvii; Bruce Whittaker, ‘The Scope of ‘Rights in the Collateral’ in section 19(2) of the PPSA – can bare possession support attachment of a security interest’ (2011) *The University of New South Wales Law Journal* 524, 525.

<sup>15</sup> *Personal Property Securities Act 2009* (Cth) s 8(1).

interests.<sup>16</sup> An interest may be perfected by registration or possession.<sup>17</sup> Registration involves registering the interest on the online register, and ensures the holder priority over money raised when the buyer resells the collateral.<sup>18</sup> Possession is defined in section 24 of the PPSA. The right to possession can constitute a security interest,<sup>19</sup> and an interest can be perfected by possession<sup>20</sup> if that possession is enforceable against third parties.<sup>21</sup> However, possession is not enough to secure third party interests,<sup>22</sup> such as the security interests of a financier. Another important part of the PPSA involves the inclusion of a Purchase-Money Security Interest (*PMSI*), which is ‘a security interest taken in collateral, to the extent that it secures all or part of its purchase price’.<sup>23</sup> PMSIs generally receive priority over non-PMSI security interests irrelevant of time.<sup>24</sup> The PMSI definition excludes an interest in collateral whereby the grantor intends to use it for predominantly personal or domestic purposes,<sup>25</sup> unless<sup>26</sup> that collateral is a motor vehicle,<sup>27</sup> aircraft,<sup>28</sup> watercraft<sup>29</sup> or intangible property.<sup>30</sup> The PPSA, as a final measure to prioritise security interests, provides that where the interests are otherwise equal, the earliest in time will prevail.<sup>31</sup> The PPSA assists the knowledge of priorities of a case by allowing searches of the register to be conclusive.<sup>32</sup>

Thirdly, the PPSA regulates the effects that insolvency has on security interests.<sup>33</sup> Any provision that purports to exclude or modify the operation of a provision of an agreement that gives rise to the security interest upon insolvency or termination of the agreement will be void.<sup>34</sup> In many construction contracts, termination clauses upon insolvency are common,<sup>35</sup> however they should now be included and relied upon with care. The insolvency rules differs

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<sup>16</sup> *Personal Property Securities Act 2009* (Cth) s 55(3).

<sup>17</sup> *Personal Property Securities Act 2009* (Cth) s 21.

<sup>18</sup> *Personal Property Securities Act 2009* (Cth) s 62.

<sup>19</sup> *Gray v Royal Bank of Canada* (1997) 143 DLR (4<sup>th</sup>) 179; Bruce Whittaker, ‘The Scope of “Rights in the Collateral” in section 19(2) of the PPSA – Can Bare Possession Support Attachment of a Security Interest’ (2011) *The University of New South Wales Law Journal* 524, 544.

<sup>20</sup> *Personal Property Securities Act 2009* (Cth) s 21(2)(b). This is also the case in New Zealand: *Graham v Portacom New Zealand Ltd* [2004] 2 NZLR 528; *Waller v New Zealand Bloodstock Ltd* [2006] 3 NZLR 629.

<sup>21</sup> *Personal Property Securities Act 2009* (Cth) s 21(1)(b)(ii).

<sup>22</sup> As in New Zealand: *JS Brooksbank and Company (Australasia) Ltd v EXFTX Ltd (rec apptd & in liq)* [2009] NZCA 122; *Rabobank New Zealand Ltd v McAnulty (February Syndicate)* [2011] NZCA 212.

<sup>23</sup> *Personal Property Securities Act 2009* (Cth) s 14(1)(a).

<sup>24</sup> *Personal Property Securities Act 2009* (Cth) s 62(2).

<sup>25</sup> *Personal Property Securities Act 2009* (Cth) s 14(2)(c).

<sup>26</sup> *Personal Property Securities Act 2009* (Cth) s 14(2A)(c) states that collateral that the exception does not apply where the collateral is required by the regulations to have a serial number.

<sup>27</sup> *Personal Property Securities Regulations 2010* (Cth) reg 2.2(1)(a)(iii).

<sup>28</sup> *Personal Property Securities Regulations 2010* (Cth) reg 2.2(1)(a)(i).

<sup>29</sup> *Personal Property Securities Regulations 2010* (Cth) reg 2.2(1)(a)(iv).

<sup>30</sup> *Personal Property Securities Regulations 2010* (Cth) reg 2.2(1)(a)(ii).

<sup>31</sup> *Personal Property Securities Act 2009* (Cth) s 55(4).

<sup>32</sup> Robert Burrell and Michael Handler, ‘The “PPSA” and Registered Trademarks: When Bureaucratic Systems Collide’ (2011) 34(2) *The University of New South Wales Law Journal* 600, 600.

<sup>33</sup> John Stumbles, ‘The “PPSA”: the Extended Reach of the Definition of the “PPSA” Security Interest’ (2011) 34(2) *The University of New South Wales Law Journal* 448, 457.

<sup>34</sup> *Bankruptcy Act 1966* (Cth) s 301(1).

<sup>35</sup> Nicholas Dennys, Mark Raeside and Robert Clay, *Hudson’s Building and Engineering Contracts*, (2010), 1474.

depending on which party becomes insolvent. In the event that the grantor of a security interest becomes insolvent, the party possessing the interest cannot enforce interests that have not already been registered under the PPSA.<sup>36</sup> Therefore, unregistered interests may be effectively lost upon the insolvency of another party. The importance of registration was seen in *Carson, in the matter of Hastie Group Ltd (No 3)*.<sup>37</sup> In that case, interests that remained unregistered were lost due to the inability of the administrators to find those who had security in relevant personal property. Yates J ordered for the auction of the property,<sup>38</sup> thus the security holders lost their interest. This further highlights the need for parties to register registrable security interests when they arise.

A distinct scenario arises where it is the secured party that becomes insolvent. In such a situation, the insolvent party may still enforce its security interests, though the enforcement is to be within 14 days of appointing an administrator.<sup>39</sup> Where the interest is granted after the entity became insolvent, the interest is deemed to have arisen before the insolvency.<sup>40</sup> The fact that the PPSA's insolvency provisions are markedly different to the corresponding principles under the previous law<sup>41</sup> means that parties to construction projects may not immediately recognise the importance of immediate registration to preclude such loss of security interests, and they may fail to react to the relevant provisions upon the drafting of construction contracts.

### III SPECIFIC ISSUES FOR THE CONSTRUCTION INDUSTRY

The existence of numerous security interests within every construction project means the changes posited by the PPSA must be considered carefully. This article will now analyse the above principles of the PPSA with regard to six common scenarios of construction projects.

#### A *Romalpa* Clauses

Romalpa clauses, also known as retention of title clauses, provide that the seller is to retain legal title to a certain asset until the buyer pays in full.<sup>42</sup> They are a clear example of a clause

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<sup>36</sup> *Corporations Act 2001* (Cth) s 440B; *Autodom Ltd (Administrators Appointed) (Receivers and Managers Appointed) in the matter of Autodom Ltd (Administrators Appointed) (Receivers and Managers Appointed)* [2012] FCA 1393, [38] (McKerracher J).

<sup>37</sup> [2012] FCA 719

<sup>38</sup> [2012] FCA 719, [18] (Yates J). See also, *Carson, in the matter of Hastie Group Ltd (No 2)* [2012] FCA 717, [12] (Emmett J); *Carson, in the matter of Hastie Group Ltd* [2012] FCA 626, (Emmett J).

<sup>39</sup> *Corporations Act 2001* (Cth) s 441A.

<sup>40</sup> *Personal Property Securities Act 2009* (Cth) s 267(2).

<sup>41</sup> John Stumbles, 'The "PPSA": The Extended Reach of the Definition of the "PPSA" Security Interest' (2011) 34(2) *The University of New South Wales Law Journal* 448, 457.

<sup>42</sup> *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 2 All ER 552; Duncan Sheehan, *The Principles of Personal Property Law*, (2011), 296; Craig Wappett and David Allan, *Securities over Personal Property*, (1999), 16; Berna Collier, Paul Von Nessen and Alan Collier, 'The PPSA: Continuing the Reconceptualization of Retention of Title (Romalpa) Security' (2011) 34(2) *University of New South Wales Law Journal* 567, 569.

that creates security interests<sup>43</sup> provided that the property subject to the clause meets certain criteria. Property is ‘PPSA retention of title property’ if it is personal property, the possessor of the property does not have title to it, and a PPSA security interest is attached to it.<sup>44</sup> Other situations produce results similar to that of a Romalpa clause. For example, a subcontractor will have a lien on goods where value has been added, though consideration has not been paid.<sup>45</sup>

The PPSA does not apply to a security interest of a seller created by a negotiable bill of lading unless the parties demonstrate an intention to create an interest in the goods.<sup>46</sup> It must be suggested that a Romalpa clause would provide evidence of such an intention, thereby ensuring that the PPSA would apply to such a circumstance. In such a circumstance, it may be recommended that a seller incorporate a Romalpa clause.

It is common for construction contracts to contain a Romalpa clause. By way of example,<sup>47</sup> clause 42.4 Alternative 2 of AS2124-1992 provides:

The contractor may claim payment for unfixed plant or materials after establishing certain matters to the satisfaction of the Principal, including that ownership will pass to the Principal on payment and that the items are properly stored and labelled.

They will also be included in many contracts that are not based on standard form contracts as it is a way of ensuring interests in unpaid property are protected.<sup>48</sup>

Many parties to construction projects may not understand the interaction of such interests under the PPSA since basic Romalpa clauses could not be registered under the previous regime.<sup>49</sup> The PPSA changes the previous registration system,<sup>50</sup> and actually takes Romalpa clauses a step further. Romalpa clauses ensure that until the personal property in question is fixed to the construction project, they will remain the property of the contractor.<sup>51</sup> Once the collateral becomes part of the construction project, the PPSA refers to it as ‘an accession’.

<sup>43</sup> *Personal Property Securities Act 2009* (Cth) s 12(2)(d); John De Lacy, *The Reform of UK Personal Property Security Law: Comparative Perspectives*, (2010), 399; Kriss Will, ‘Practicalities of PPS Act’ (2012) 34(3) *Bulletin* 32, 32. It was defined as a security interest prior to the PPSA also: *General Motors Acceptance Corporation Australia v Southbank Traders Pty Ltd* (2007) 227 CLR 305; Jamie Glistler, ‘The role of trusts in the PPSA’ (2011) 34(2) *The University of New South Wales Law Journal* 628, 644.

<sup>44</sup> *Corporations Act 2001* (Cth) s 51F(1).

<sup>45</sup> *Groutco (Aust) Pty Ltd v Prince Constructions Pty Ltd* (1986) 3 BCL 372.

<sup>46</sup> *Personal Property Securities Act 2009* (Cth) s 8(1)(a).

<sup>47</sup> Clauses of similar effect can be found in AS4000-1997 clause 37.3, ABIC MW-1 2003 clause N4.2 point 3 and PC-1 1998 clause 12.10. AS2124 is a widely used contract in construction projects: Lolita Mohyla, *Construction Law in Australia: Law and Project Delivery*, (1996), 120.

<sup>48</sup> *North Western Shipping and Towage Company Pty Ltd v Commonwealth Bank of Australia Ltd & GL Machine and Steel Construction Pty Ltd (in liq)* (1993) 118 ALR 453.

<sup>49</sup> Anthony Duggan, ‘Romalpa Clauses Post-PPSA’ (2011) 33(4) *Sydney Law Review* 645, 646; John Stumbles, ‘The ‘PPSA’: the Extended Reach of the Definition of the ‘PPSA’ Security Interest’ (2011) 34(2) *The University of New South Wales Law Journal* 448, 449. See *Corporations Act 2001* (Cth) s 262 (repealed).

<sup>50</sup> John Stumbles, ‘The “PPSA”: the Extended Reach of the Definition of the “PPSA” Security Interest’ (2011) 34(2) *The University of New South Wales Law Journal* 448, 449.

<sup>51</sup> *R J Grills Pty Ltd v Dellios* [1988] VR 136, 139; Ian Bailey and Matthew Bell, *Understanding Australian Construction Contracts*, (2008), 135; S Pyman, ‘Effect of Building Services Authority Act 1991 in Queensland’ (1993) 9 *Building and Construction Law* 235.



Registered security interests continue into the project as the collateral becomes and an accession.<sup>52</sup> Interests in an accession will take a higher priority than the interests in the larger project.<sup>53</sup> This is a significant principle, as it gives Romalpa clauses more force and provides incentive for sellers to include Romalpa clauses in contracts. Also important to the priority rules is the fact that Romalpa clauses create PMSIs,<sup>54</sup> thereby granting the secured party a super-priority over other registered interests.<sup>55</sup>

If goods are provided that are not yet paid for, the interest must be registered in favour of person supplying the goods. Registration is important for numerous reasons:

- There is a risk that the clause may be construed as a charge that may be invalid against receivers and liquidators where it is not registered.<sup>56</sup>
- Registration also gives the holder priority over money raised when the buyer resells the collateral.<sup>57</sup>
- In addition to the need to register interests it is also important to register the interest immediately since first registered security interest has priority where they are otherwise equal.<sup>58</sup>

Insolvency is a key issue with regard to Romalpa clauses. If the contractor becomes insolvent before being paid, the contractor will retain title to the property.<sup>59</sup> This is reinforced by the PPSA. Upon the insolvency of the contractor, while the principal would lose priority to financiers, who may have a PMSI, it may prove important that the principal registers any interest so as to ensure it is then entitled to override any unregistered interests.

## **B Payment for Goods that Remain Offsite**

Security interests are created when a principal pays for goods that remain offsite, which is a common occurrence within the construction industry.<sup>60</sup> A buyer has a security interest over the goods<sup>61</sup> and may be entitled to take possession of them.<sup>62</sup> This situation is similar to that

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<sup>52</sup> *Personal Property Securities Act 2009* (Cth) s 88; Andrew Boxall, 'Personal Property Securities Act 2009 (Cth): Some Consequences for Buyers of Personal Property' (2011) 25(1) *Commercial Law Quarterly: The Journal of the Commercial Law Association of Australia* 15, 21.

<sup>53</sup> *Personal Property Securities Act 2009* (Cth) s 89.

<sup>54</sup> *Personal Property Securities Act 2009* (Cth) ss 14(1)(a), (b), (d); Del Cseti and Jason Harris, *Understanding Personal Property Securities Law*, (2010), 131.

<sup>55</sup> *Personal Property Securities Act 2009* (Cth) s 62(2)(b).

<sup>56</sup> See *Re Bond Worth* [1979] 3 All ER 919; *Clough Mill v Martin* [1984] 3 All ER 982; *Armour v Thyssen Edelstahlwerke* [1991] 2 AC 339.

<sup>57</sup> *Personal Property Securities Act 2009* (Cth) s 62.

<sup>58</sup> *Personal Property Securities Act 2009* (Cth) s 55(4).

<sup>59</sup> *Crafter v Singh* (1990) 2 ACSR 1; *Aristoc Industries Pty Ltd v R A Wenham (Builders) Pty Ltd* [1965] NSW 581.

<sup>60</sup> Sidney Levy, *Project Management in Construction, sixth edition*, (2012), 60; Lawrence Bennett, *The Management of Construction: A Project Life Cycle Approach*, (2003), 62.

<sup>61</sup> *Personal Property Securities Act 2009* (Cth) s 12(1). See also *Hewitt v Court* (1983) 149 CLR 639 (Wilson and Dawson JJ); Damien Cremean, Toby Schnookal and Michael Whitten, *Brooking on Building Contracts*, (2004), 261.

<sup>62</sup> *Otis Elevator Co Pty Ltd v Girvan (Qld) Pty Ltd* (1990) 9 Aust Cons LR 107, 109.

of a Romalpa clause since it is concerned with ensuring that the exchange of title occurs at the same time as the principle makes payment. The difference is that the primary interest is in favour of the principal rather than the contractor, as payment is before delivery rather than after. Accordingly, the clauses listed above that provide for retention of title security interests will also provide for an interest where payment is made for goods that remain offsite.<sup>63</sup>

It is important to register these security interests for several reasons. The primary reason being that if the contractor, or any other party, registers any security interest in the goods and the principal does not, then the contractor's interest will have priority.<sup>64</sup> Furthermore, it is important in this context for the principal to register their interest in the goods immediately so that they have priority where the interests are otherwise equal.<sup>65</sup> Other security interests that may have arisen, which will therefore be in competition, include where a financier has funded the purchase of those goods, thereby having a charge over them.<sup>66</sup>

### ***C Step in Rights***

'Step-in rights' are the rights created where a principal is able to dismiss a contractor from certain works in the event of a serious breach in order to complete the works themselves or by utilising another contractor.<sup>67</sup> Disputes surrounding the costs associated with step-in rights and the related rectification are a commonplace.<sup>68</sup> A provision that provides for step-in rights will be upheld.<sup>69</sup> Most construction contracts will contain a clause providing for step-in rights where certain breaches of contract occur.<sup>70</sup> By way of specific example,<sup>71</sup> clause 30.3 of AS 2124-1992 provides:

The superintendent may direct the contractor to remove material, demolish work, reconstruct or correct material or work where he or she discovers that the material or work is not in accordance with the Contract. This may include directions as to when such action is to be taken. If the contractor fails to comply with the direction within the time specified then, provided seven days' notice is given, the Principal may have the work carried out by others and any cost incurred will be a debt due from the Contractor to the Principal.

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<sup>63</sup> See AS2124-1992 clause 42.4; AS4000-1997 clause 37.3, ABIC MW-1 2003 clause E12 and PC-1 1998 clause 12.10.

<sup>64</sup> *Personal Property Securities Act 2009* (Cth) s 55(3).

<sup>65</sup> *Personal Property Securities Act 2009* (Cth) s 55.

<sup>66</sup> This would fit within the definition within *Personal Property Securities Act 2009* (Cth) s 12(1). It may also constitute a PMSI under *Personal Property Securities Act 2009* (Cth) s 14(1).

<sup>67</sup> Sidney Levy, *Project Management in Construction*, sixth edition, (2012), 63.

<sup>68</sup> See *Ruxley Electronics and Construction Ltc v Forsyth* [1993] 1 WLR 650; *Bellgrove v Eldridge* (1954) 90 CLR 613; *Hasell v Bagot, Shakes and Lewis* (1911) 13 CLR 374; *Alcoa Minerals of Jamaica Inc v Herbert Broderick* [2000] BLR 279; *Hoening v Issacs* [1952] 2 All ER 176.

<sup>69</sup> *Sacher v African Canvas and Jute Industries Ltd* [1952] 3 SALR 31; *Sumpter v Hedges* [1898] 1 QB 673; *Whitaker v Dunn* (1887) 3 TLR 602; *Munro v Butt* (1858) EL & BL 738.

<sup>70</sup> Nicholas Dennys, Mark Raeside and Robert Clay, *Hudson's Building and Engineering Contracts*, (2010), 722.

<sup>71</sup> See clauses of similar effect in AS 4000-1997 clause 29.3 and ABIC MW-1 2003 clause M14.

Many of Australia's larger law firms have expressed views that step-in rights create a security interest for the purposes of the PPSA.<sup>72</sup> The interest of the principal is within the definition of a PPSA security interest because it is used to secure performance from the contractor.<sup>73</sup> Therefore, such clauses are subject to the PPSA.

Where a principal has step-in rights in a construction contract, it would be prudent to register such interests so as to ensure priority. Without registration, priority is not ensured since the right to possession of the works, or any part of the works, may be overridden by the registered security interests of the contractor. Examples include those that may have arisen pursuant to any of the other sections of this article.

However, step-in rights are subject to several potential problems. As step-in rights do not secure the purchase price, they are not PMSIs.<sup>74</sup> Therefore, any PMSIs that are registered by other parties, such as those held by financiers, will take priority.<sup>75</sup> Furthermore, the rules regarding accessions mean that where a party has a secured right in a specific part of the works, it will take priority over the step-in rights.<sup>76</sup>

### **D Temporary Works**

In a construction project, the contractor has a responsibility to care for temporary works.<sup>77</sup> 'Temporary works' includes electrical facilities, utility services,<sup>78</sup> shoring, coffer dams, sheet piling, planking, strutting, scaffolding and supports, which are required for construction though do not remain on the final product.<sup>79</sup> It is commonplace for construction contracts to contain provisions that confirm liability and ownership of temporary facilities.<sup>80</sup>

The presence of temporary works creates a security interest for the purposes of the PPSA because the provision of temporary works is required to complete the works, and thus they act to secure payment from the principal. Whether mere possession can constitute a security interest is doubtful. Therefore, although the temporary works are affixed to the works, which are owned by the principal, the principal does not have a PPSA security interest, and neither

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<sup>72</sup> For example, see Allens: <http://www.allens.com.au/pubs/pps/fopps10aug10.htm>; Ashurst: [www.ashursts.com/doc.aspx?id\\_Content=6949](http://www.ashursts.com/doc.aspx?id_Content=6949); Maddocks: <http://www.maddocks.com.au/pps-reform/ppsa-for-construction-infrastructure>; Holding Redlich: <http://www.holdingredlich.com.au/construction-infrastructure/the-effect-of-the-personal-property-securities-act-2009-cth-on-the-construction-industry>;

<sup>73</sup> See the definition in *Personal Property Securities Act 2009* (Cth) s 12(1).

<sup>74</sup> *Personal Property Securities Act 2009* (Cth) s 14(1).

<sup>75</sup> *Personal Property Securities Act 2009* (Cth) s 62(2)(b).

<sup>76</sup> See *Personal Property Securities Act 2009* (Cth) s 89.

<sup>77</sup> Ian Bailey, *Construction Law in Australia, second edition*, (1998), 224; Greg Goldfayl, *Construction Contract Administration, second edition*, (2004), 25.

<sup>78</sup> Edward Fisk and Wayne Reynolds, *Construction Project Administration, eighth edition*, (2006), 197.

<sup>79</sup> Greg Goldfayl, *Construction Contract Administration, second edition*, (2004), 75.

<sup>80</sup> Edward Fisk and Wayne Reynolds, *Construction Project Administration, eighth edition*, (2006), 196.



does the principal's financier. Therefore, the general law applies, and the contractor's proprietary interest would take priority.<sup>81</sup>

The owner of any temporary works that are used in a construction project should register their interests to ensure their proprietary interest remains as priority in case another security interest does arise in an individual circumstance. This also ensures that the insolvency of the principal will not affect their right to the temporary works.

Security interests are also present in the situation where the temporary works are owned by a third party.<sup>82</sup> Where the third party has leased the temporary works to the contractor, it is recommended that the third party register their interests.<sup>83</sup> Such a case would fall under a lease arrangement, which is described below.

### ***E Equipment Leases***

It is common in construction contracts for a third party to lease equipment to a contractor of a project. In the case of such equipment lease, the PPSA expressly provides that the lessor has a security interest.<sup>84</sup> The PPSA provides that a security interest in relation to a lease arrangement is a PMSI,<sup>85</sup> provided it is not a sale and lease back to the seller,<sup>86</sup> thus taking priority over non-PMSI registered security interests.<sup>87</sup>

All leases provide a lessee with a registrable interest.<sup>88</sup> On the other hand, the lessor only has a registrable security interest if it is a Personal Property Securities Lease (*PPS lease*).<sup>89</sup> To be a PPS lease under the PPSA, the lease must be either:<sup>90</sup>

- for more than a year in temporal length;
- for an indefinite period of time;
- for less than a year though is automatically renewable;
- actually turns out to be more than a year; or

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<sup>81</sup> Robert Chambers, *An Introduction to Property Law in Australia, second edition*, (2008), 413. An earlier right to possession of the contractor will trump the later actual possession of the principal: *Gollan v Nugent* (1988) 166 CLR 18; *Flack v National Crime Authority* (1998) 156 ALR 501; *Costello v Derbyshire Constabulary* [2001] 3 All ER 150. The exception would be if the project lasted long enough that possession of the principal had been over 6 years: *Limitation Act 2005* (WA) s 13; *Limitation Act 1985* (ACT) s 11; *Limitation of Actions Act 1958* (Vic) s 5; *Limitation Act 1969* (NSW) s 14; *Limitation of Actions Act 1974* (Qld) s 10; *Limitations of Actions Act 1936* (SA) s 35; *Limitation Act 1974* (Tas) s 4. *Kallis Hire Pty Ltd v Consulere Design and Construction Pty Ltd* (1990) 10 Aust Cons LR 73.

<sup>82</sup> *Personal Property Securities Act 2009* (Cth) s 12(3)(c).

<sup>83</sup> *Personal Property Security Act 2009* (Cth) s 12(3)(c).

<sup>84</sup> *Personal Property Securities Act 2009* (Cth) s 14(1)(c).

<sup>85</sup> *Personal Property Securities Act 2009* (Cth) s 14(2)(a).

<sup>86</sup> *Personal Property Securities Act 2009* (Cth) s 62(2).

<sup>87</sup> *Personal Property Securities Act 2009* (Cth) s 12(2)(i).

<sup>88</sup> *Personal Property Securities Act 2009* (Cth) s 12(3)(c).

<sup>89</sup> *Personal Property Securities Act 2009* (Cth) s 12(3)(c).

<sup>90</sup> *Personal Property Securities Act 2009* (Cth) s 13(1); *Gibson v Stockco Ltd* [2011] NZCCLR29, [13] (White J); Del Cseti and Jason Harris, *Understanding Personal Property Securities Law*, (2010), 34.

- If the goods can be described by serial number then it is a term of 90 days that renders it registrable. However, for this element to be satisfied the lessor must be in the business of leasing goods.<sup>91</sup>

It appears that in most construction projects, though not all, the last requirement will apply, meaning that the lessor's interest is registrable. However, determining whether a lease arrangement will constitute a PPS lease must be determined on a case-by-case basis.

Further reasons for immediate registration exist. For example, title is not enough to secure one's interest, as a person with a registered possessory interest can override proprietary interests.<sup>92</sup> Furthermore, it has been specifically noted that unregistered lessor will not have priority over a registered charge holder.<sup>93</sup> Lastly, registration by the lessee ensures priority from the lessor's financiers.

### F *Retention Money*

Most construction contracts make provision for retention,<sup>94</sup> which allows the principal to hold money until certain obligations are fulfilled.<sup>95</sup> The right to retention money fulfils the PPSA definition of security interest since it secures performance of the contractual obligation.<sup>96</sup> Either or both parties to the construction contract may hold such rights.

Clauses providing for the retention of moneys are quite common in construction contracts. For example,<sup>97</sup> clause 42.11 of AS 2124-1992 provides:

Where either party fails to pay the other amounts due, the other may have recourse to retention moneys and if insufficient any security provided.

Both principal and contractor should register their interests in the retention money to ensure it is protected. Of larger concern is ensuring that they receive the money over creditors upon

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<sup>91</sup> *Personal Property Securities Act 2009* (Cth) s 13(2)(a); 'Ordinary course of business' has been defined in the context of the PPSA to require identification of the business of the seller, and whether the lease was in the ordinary course of that business: *Tubbs v Ruby 2005 Ltd* [2010] NZCA 353; *Autodom Ltd (Administrators Appointed) (Receivers and Managers Appointed) in the matter of Autodom Ltd (Administrators Appointed) (Receivers and Managers Appointed)* [2012] FCA 1393, [134] (McKerracher J).

<sup>92</sup> Sheelagh McCracken, 'Conceptualising the Rights of a Lessee Under the Personal Property Securities Regime: the Challenge of "New Learning" for Australian Lawyers' (2011) 34(2) *University of New South Wales Law Journal* 547, 548.

<sup>93</sup> Craig Wappett, Bruce Whittaker, Steve Edwards and Jacqueline Browning, *Personal Property Securities in Australia*, (2010), [4.3.50]. This principle is the same in other PPSA jurisdictions: *Graham v Portacom New Zealand Ltd* [2004] 2 NZLR 528; *Waller v New Zealand Bloodstock Ltd* [2006] 3 NZLR 629; *International Harvester Credit Corp of Canada Ltd v Touche Ross* (1986) 61 CBR (NS) 193; *Re Giffen* [1998] 1 SCR 91.

<sup>94</sup> Richard Lambeck and John Eschemuller, *Urban Construction Project Management*, (2009), 200; Thomas Uher and Philip Davenport, *Fundamentals of Building Contract Management*, (2009), 249.

<sup>95</sup> Greg Goldfayl, *Construction Contract Administration, second edition*, (2004), 223.

<sup>96</sup> See *Personal Property Securities Act 2009* (Cth) s 12(1).

<sup>97</sup> See clauses of similar effect in AS4000 1997 clause 5.1, ABIC MW-1 2003 clause C1 and PC-1 1998 clause 4.1.

insolvency of the other party. Both the contractor and financier will have PMSIs over the retention money, therefore the priority will be determined by the time of registration.<sup>98</sup> Where the interest in retention money is not registered under the PPSA, it may not be enforceable under the PPSA.<sup>99</sup> Therefore, it is highly recommended to register such an interest in a timely manner.

## IV CONCLUSION

This article has highlighted the important new rules provided by the PPSA through its definition of a security interest, provision of new priority rules, and the way in which it deals with securities upon insolvency of a party. However, the most important notion that this article has highlighted is that registration is vital in many situations commonly faced in construction contracts.

All of the following common construction project rights present security interests for the purposes of the PPSA that should be considered for registration:

- a) Romalpa clauses;
- b) payment for goods that remain offsite;
- c) step in rights;
- d) temporary works;
- e) equipment leases; and
- f) retention money.

The PPSA's largest effects are on the Romalpa clause.<sup>100</sup> However, this article has demonstrated that they can all cause heartache to parties who are not entirely aware of the PPSA regime and do not register their interests when they arise.



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<sup>98</sup> *Personal Property Securities Act 2009* (Cth) s 63(b).

<sup>99</sup> *Corporations Act 2001* (Cth) s 440B.

<sup>100</sup> Berna Collier, Paul Von Nessen and Alan Collier, 'The PPSA: Continuing the Reconceptualization of Retention of Title (Romalpa) Security' (2011) 34(2) *University of New South Wales Law Journal* 567, 567.