

# *Personal Property Securities Act 2009* - Perfecting your PPSA clauses

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Linda  
Widdup

Lawyer and consultant  
[www.lindawiddup.com.au](http://www.lindawiddup.com.au)

# Outline

- The PPSA “security agreement”
- The “charging clause”
- Collateral descriptions
- General rules that affect drafting
- Fixed and floating charge language - circulating assets
- Dealings with collateral
- Contracting out of enforcement provisions
- Supply Agreements

# PPSA Drafting (general context)

## ■ Section 10

*security agreement means:*

- (a) an agreement or act by which a security interest is created, arises or is provided for; or*
- (b) writing evidencing such an agreement or act.*

## ■ Enforceability of security interest:

- Section 19 – enforceability against *grantor*
  - *No need for written security agreement*
- Section 20 – enforceability against *third parties*
  - *a security agreement must cover collateral*
  - *covers collateral if the security agreement is evidenced in writing*

# Charging clause - wording needed to create a security interest



Substance



Not form

# Drafting starting point: Section 12(1)

Interest

- an **interest** in personal property

Consensual

- provided for by a **transaction**,

Substance over form

- that in substance, **secures** payment or performance of an **obligation** (without regard to the **form** of the transaction....

Title

- or the identity of the person who holds **title** to the property).

- Charges
- Chattel mortgages
- Retention of title arrangements
- Finance leases
- Pledges

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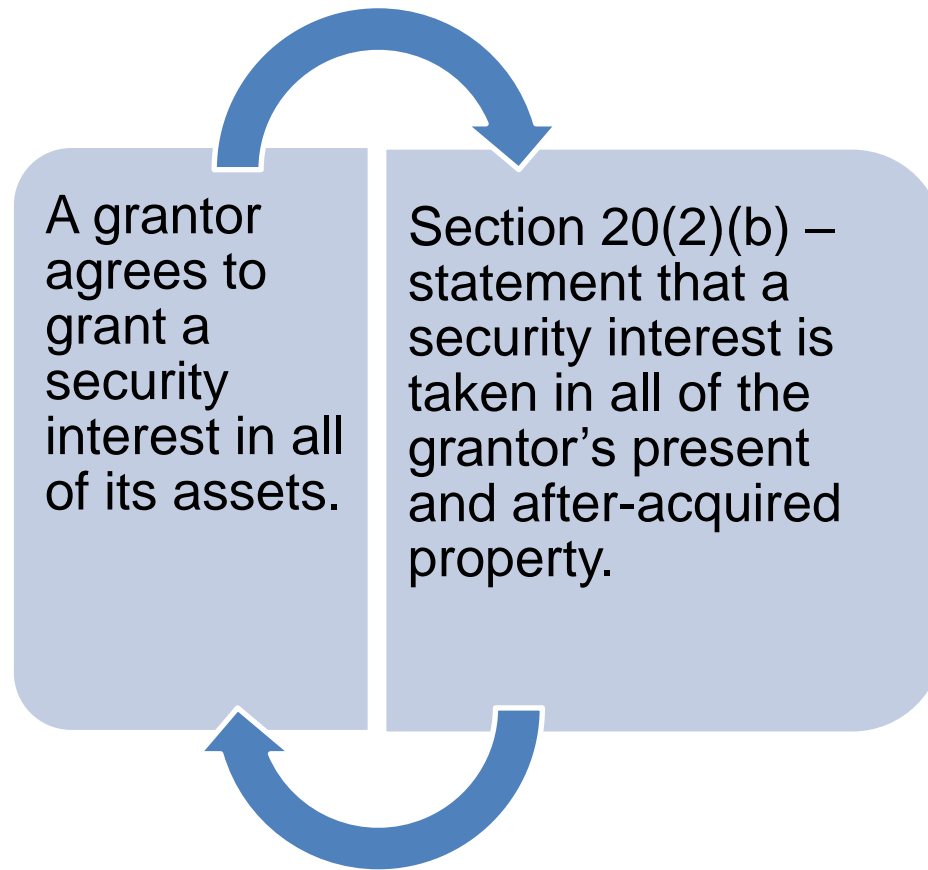
*Keon Pty Ltd as trustee for Keon Trust v Goldfields Equipment Pty Ltd (in liq) [2020] WASC 61*

- Keon wanted a declaration that it had a perfected security interest in the property of Goldfields.
- The “Secured Convertible Note” dated **2 Sept 2014**:
  - Within 7 days of issuing this Note the Company shall execute the Charge and use reasonable endeavours to register the Charge within 45 days of executing the Charge.*
- No definition of “Charge”.
- No “Charge” was ever executed.
- Held to be void for uncertainty-not enforceable.
- (Sadly, Court applied law as if PPSA didn’t exist....)

# Further practical example

- Security Deed **drafted specifically** to secure repayment obligations in a separate loan agreement.
- The “Security” Clause stated:
  - The Borrower shall **on the request** of the Lender provide such security for the Outstanding Money as the Lender may in its absolute discretion require.
- This clause is **not sufficient** to create a security interest.
- Back to s 12 – the clause does not *provide for an interest in personal property that, in substance, secures payment of performance of an obligation.*

# Descriptions of collateral General Security Agreement/Deed





# “Creation” or charging clause

- General clause

*The Grantor grants a security interest in the Collateral to the Secured Party to secure the payment and performance of the Obligations.*

*Collateral means all present and after-acquired property.*

- But some personal property is not subject to the PPSA

- Water rights
- Licences
- Property declared not to be personal property under other legislation

- So prior law applies

*This security interest is a **fixed charge** over Collateral that is not **PPS Property**.*

# Specific security – collateral descriptions

- Collateral description - Section 20(2)(b)(i)
  - “a description of the particular collateral”
  - “in the case of a particular item of personal property—a description that identifies the item, or that identifies a class to which the item belongs”
  - “in the case of a class of personal property—a description that identifies the class, including a description that identifies the class by identifying the larger class of personal property that wholly includes the class”
- What is a “class”?
  - Fruit is sufficient to identify apples
- *Stockco v Gibson* [2012] NZCA 330
  - 750 head                      Breed & Type: M/A Cows

# *Personal Property Securities Act 2009*

- Section 3 – Guide to this Act

This Act is a law about  
security interests in  
personal property.

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# Security agreements

- Section 18 – General rules about security agreements
- Section 18(1)
  - A security agreement is effective according to its terms.
- Promotes freedom of contract
- PPSA is a law about security interests, it is not a law about contracts.
- General law of contract continues to apply
  - *Levin v Rastkar* [2011] NZCA 210

## Section 18(1)

A security agreement is effective according to its terms.

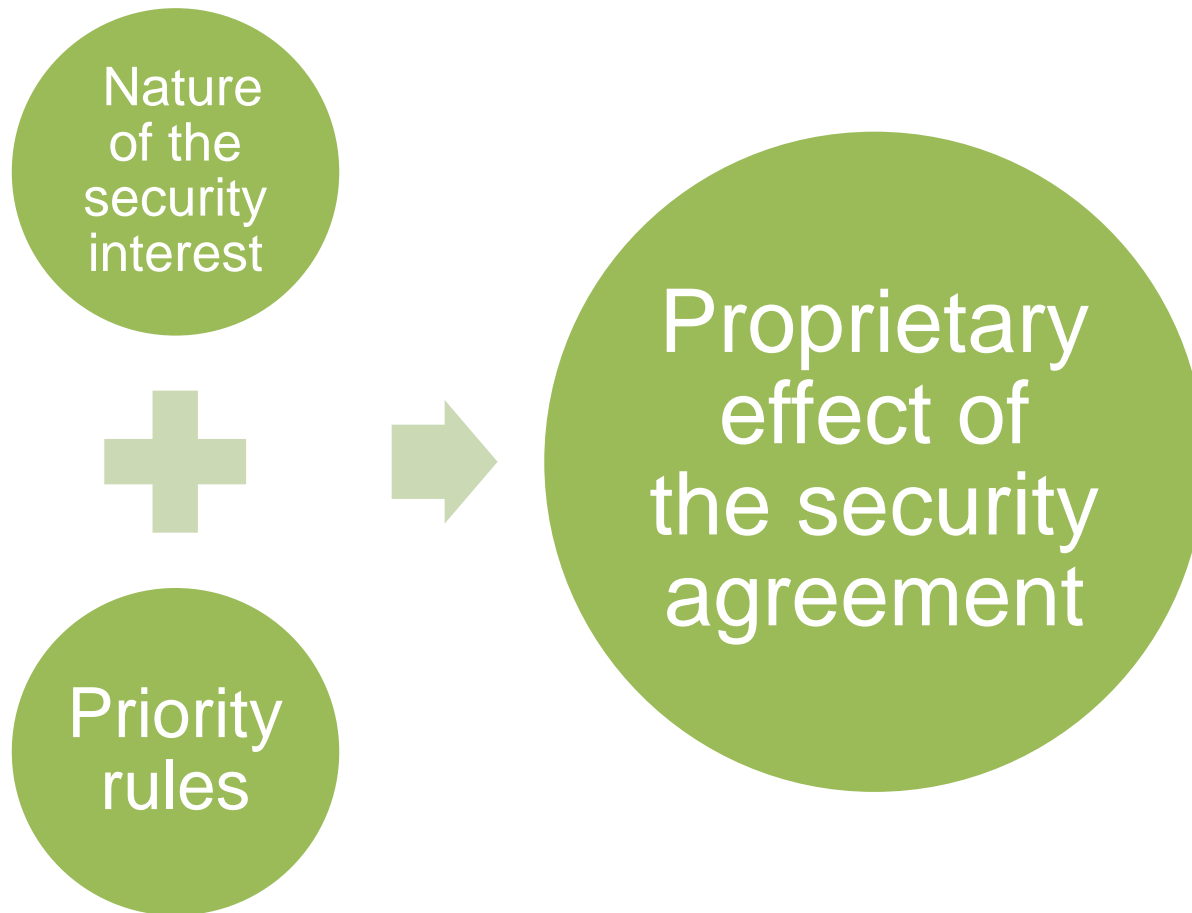
But we can't take this quite literally....

*Hamersley v Forge* [2018] WASCA 163 at [135].

Although the Court in *Hamersley did....*

Nothing in the PPSA denies the operation of the provisions of the GSA which entitle Forge to use payments received from Hamersley under the Contracts for its own benefit. To the contrary... s 18(1) of the PPSA provides that a security agreement such as the GSA is effective according to its terms.

# Can't contract around these...



# Section 257(2)

- Subsection 18(1) is subject to each of the following laws:
  - (a) a law of the Commonwealth (**other than this Act**);
  - (b) a law of a State or Territory;
  - (c) the general law
- It should be subject to the PPSA as well.
- Canadian PPSAs: *Subject to this Act and any other Act*, a security agreement is effective according to its terms.
- NZ PPSA: *Except as otherwise provided by this Act or any other Act or rule of law or equity*, a security agreement is effective according to its terms.



## Section 18(1) should operate like this:

- Parties cannot contract out of the PPSA altogether (despite a literal reading of ss18(1) and 257(2)...)
- PPSA applies to restrict the law of contract with respect to the proprietary effect of the security agreement.
- That is, the *security interest* (PPSA is, after all, a law about security interests s 3).
- The remaining contractual aspects of the security agreement are left to contract law.

## Section 18 cont'd ...

- Section 18(2)

*A security agreement may provide for security interests in after-acquired property.*

- Section 20- enforceable against 3<sup>rd</sup> parties requires:

*A statement that a security interest is taken in all of the grantor's present and after-acquired property.*

- *Waller v New Zealand Bloodstock* [2006] 3 NZLR 629 (CA)

- “all present and future assets as continuing security”

# Future advances

- Section 18(4)

*A security agreement may provide for future advances.*

- ‘all obligations’ clause – security interest secures current and future debts and obligations

- Grantors beware of assignment

- potential issue that clause can secure prior unsecured debt of the assignee

- *CPC Networks Corp v Eagle Eye Investments Inc*

2012 SKCA 118

# Subordination

- Section 61

*A secured party may (in a security agreement or otherwise) subordinate the secured party's security interest in collateral to any other interest in the collateral.*

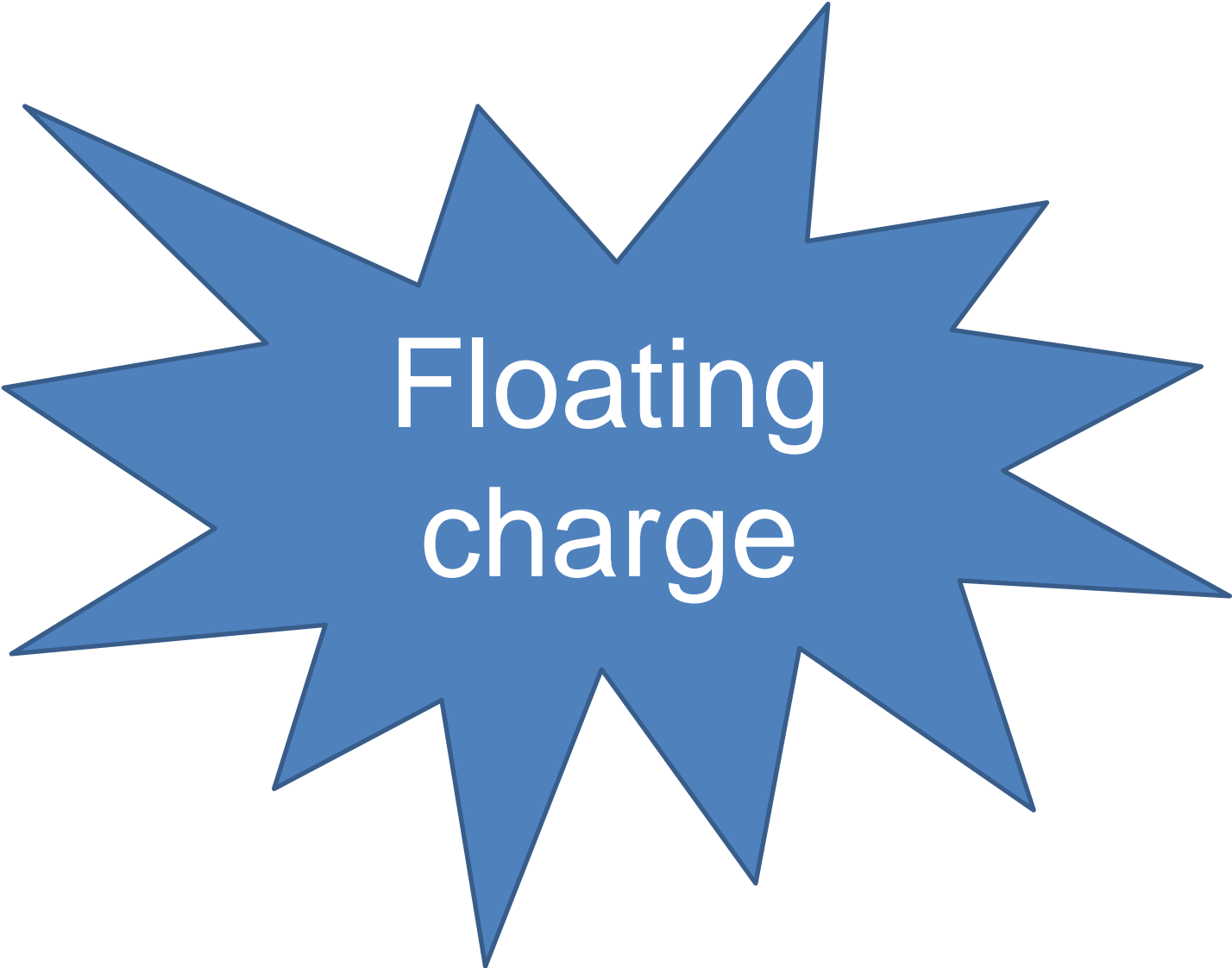
- Consider clause stating no intention to subordinate to a 3<sup>rd</sup> party interest

- *Canadian Imperial Bank of Commerce v John Deere Ltd*

2004 NLCA 47

- *Kubota Canada Ltd v Case Credit Ltd*

2005 ABCA 139



# Floating charge

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# Do we still need floating charge language?

- Part 9.5 – Charges and fixed and floating charges
- Reference to a charge, a fixed charge or a floating charge in a security agreement
- Charge = security interest in circulating assets *and* property that is not a circulating asset
- Fixed charge = security interest in property that is not a circulating asset
- Floating charge = security interest in a circulating asset

# Circulating assets...

- Nature of a fixed charge at general law
- Companies needed capital, but also to sell goods and collect accounts in the ordinary course of business.
- A charge over circulating assets was thought to be conceptually problematic.
- Floating charge developed - not a fixed security until crystallisation
- PPSA has no conceptual problem with a fixed security over circulating assets.

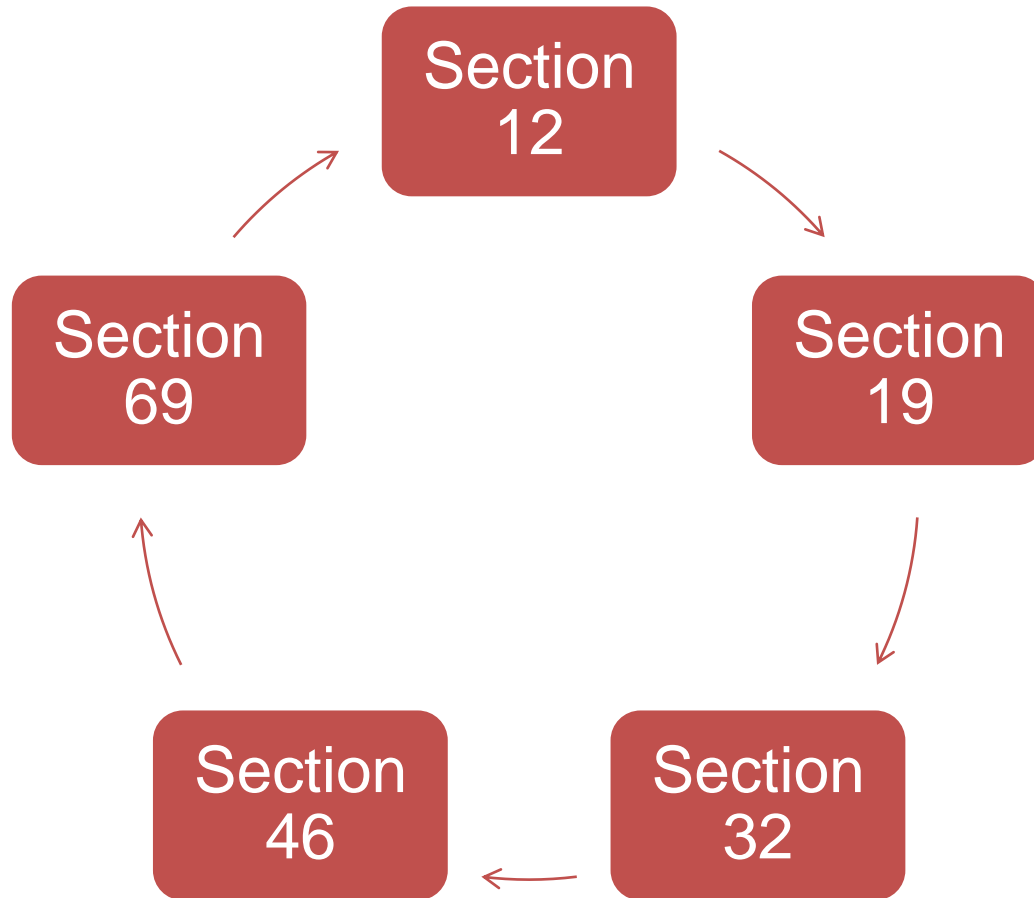
# The PPSA tries to bring an end to the floating charge...

The conversion brings to an abrupt end more than a hundred years of case law and a wealth of legal commentaries, and relegates to legal history, so far as personal property security is concerned, a security device which still serves as the daily work horse of English banking practice.

Professor Ziegel "The new provincial chattel security regimes" (1991) 70 Canadian Bar Review 681 at 712.



The floating charge is gone and not needed  
(for property subject to the PPSA)



# Courts are reticent

This is not to say that the effect of the PPSA is to abolish the distinction... for all purposes. I do not need to determine that question.

Gilmour J, *Langdon, in the matter of Forge* [2017] FCA 170 at [32].

..for the purposes of this case it is unnecessary to reach the conclusion that the PPSA abolishes the general law distinction between fixed and floating charges over personal property.

Tottle J, *Hamersley v Forge* [2017] WASC 152 at [337].

# Why do we need the concept of “circulating asset”

- Priority creditor regime under the Corps Act
- Pre-PPSA – assets subject to a **floating charge**
- Post-PPSA – **circulating assets** defined in s 340 PPSA
- Definition attempts to describe assets formerly subject to a floating charge.
- Inventory, accounts, ADI accounts, currency, negotiable instruments
- Other personal property if grantor has authority to transfer it in the ordinary course of business.

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# Corporations Act 2001 (Cth)

“PPSA security interest”

- a security interest within the meaning of the PPSA to which that Act applies.

“circulating security interest”

- (a) a PPSA security interest attached to a **circulating asset**
- (b) a **floating charge**

*Hamersley v Forge* [2018] WASCA 163 at [64], [131].

In other words,... a security interest that is a floating charge is treated the same way as a security interest attached to a circulating asset under the PPSA....

The fact of attachment does not affect the nature of the asset as a circulating asset...  
Alternatively, insofar as ...the GSA invokes the operation of the general law, ... the charge operates as a floating charge over Forge's claims.



*Langdon, in the matter of Forge Group Limited* [2017] FCA 170.

- Receivers applied for a tax refund
- A **circulating asset** for purposes of s 433 of the Corps Act?
- ANZ's security interest v priority creditors (employee entitlements)
- Court considered whether tax refund was a **circulating asset**
- Using terms **fixed** or **floating** will not avoid the operation of the PPSA **but...**

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*Langdon, in the matter of Forge Group Limited*  
[2017] FCA 170 at [81].

Still employed floating charge analysis....

Were it otherwise a **floating charge** would, in effect, **float** indefinitely even after the appointment of the Receivers. This would be to ignore the agreement between the secured party and the grantor of the assets, subject to a **floating charge**, could be dealt with only in the ordinary course of business.... Where there are assets the subject of a **floating charge** at the time the grantor was carrying on in the ordinary course of business these cannot be “scooped up.” However, upon the appointment of receivers, there is no longer a floating charge. **The Refund is captured by the fixed charge.**

# Dealings with Collateral

- **Restricted dealings**

- create other interests in Collateral
- dispose of Collateral

- **Permitted dealings**

- ordinary course of business dealings (circulating assets)
- consider carve-outs

- **Part 9.5 documentation issues**

- control of circulating assets
- control of inventory



# Contracting out of enforcement provisions

- Section 115
- parties may contract out of certain enforcement provisions
  - not if **personal, domestic or household** purpose collateral
  - no affect on **3<sup>rd</sup> party** rights and obligations
- approach adopted reflects pre-PPSA position
  - contract out of rights that grantor did not have under prior law

# Contracting out

- ss 95 and 96 – accessions
- ss 117 and 118 – mixed land and personal property
- s 120 and 121 – primarily affects 3<sup>rd</sup> party rights
- s 123 – right to seize collateral (!)
  - but also notice of seizure of intangibles s 123(2)
- ss 125, 126, 128, 129 – disposal rights of secured party
- s 130 – notice of disposal
- s 132(3)(d)(4) – post-disposal statement of account

# Grantor perspective

- s 134 – **foreclosure remedy** for secured party
- s 142 right to **redeem**
- s 143 right to **reinstate**
- In particular, Grantor should note:
  - s 134 – does secured party contract out of retention?
  - If not, grantor should not contract out of:
    - s 135 (notice of retention)
    - s 142 and 143 right to redeem or reinstate

# Supply agreements - standard PPSA clauses

- Does supply agreement create a 'security interest'?
- Retention of title = security interest
  - replace ROT language with security interest language **or**
  - leave as is (if relevant for tax, accounting or other purposes)
- Security interest

*The Purchaser grants to the Supplier a security interest over the **Goods**, any proceeds of the **Goods**, and any product or mass which the **Goods** may be or become part of.*

# Supply agreements

- Enforceability against 3<sup>rd</sup> parties (s 20)
- Security agreement must 'cover' collateral
  - in writing
  - signed or accepted by the grantor
  - a description of the collateral
- Best practice
  - include description and creation clause in standard t's and c's
  - provide t's and c's to customer before supplying (ideally in **credit application** if any)
  - have customer sign t's and c's/credit application
- Less satisfactory – printed terms on invoices

# Supply agreements

- **Collateral description** - Section 20(2)(b)(i)
- **Proceeds** – s 64 risk
  - Obligate the purchaser to pay proceeds to supplier when account arises from disposal of goods
- **Application of proceeds** – s 14(6)
  - Clause stating supplier can apply amounts received from the purchaser in any order
  - PMSI issue
- Consider contracting out of **enforcement provisions**
- **Verification statement** waiver

# Documentation issues – terms and conditions

- *Central Cleaning Supplies v Elkerton* [2015] VSCA 92
  - supplying goods on retention of title
  - credit application / terms and conditions / invoices
- *Citadel Financial v Elite Highrise* [2014] NSWSC 1926
  - agreement must be in “writing” and signed or adopted by grantor

## *Central Cleaning Supplies v Elkerton* [2015] VSCA 92

- No security interest in 2009 credit application, but invoices contained an ROT clause
- No registration on PPSR, but transitional so argued not fatal
- But invoices and delivery of goods occurred after PPSA commenced
- Did these supplies need to be registered?
- Lower court: **each invoice a separate contract**, therefore needed to be registered
- **Moral of the story**: ensure credit app contains ROT or security interest or clear incorporation terms for invoices
- Court of Appeal overturned - credit app not an agreement
- Agreement reached with first supply and invoice which occurred before PPSA came into force so no need to register



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Widdup

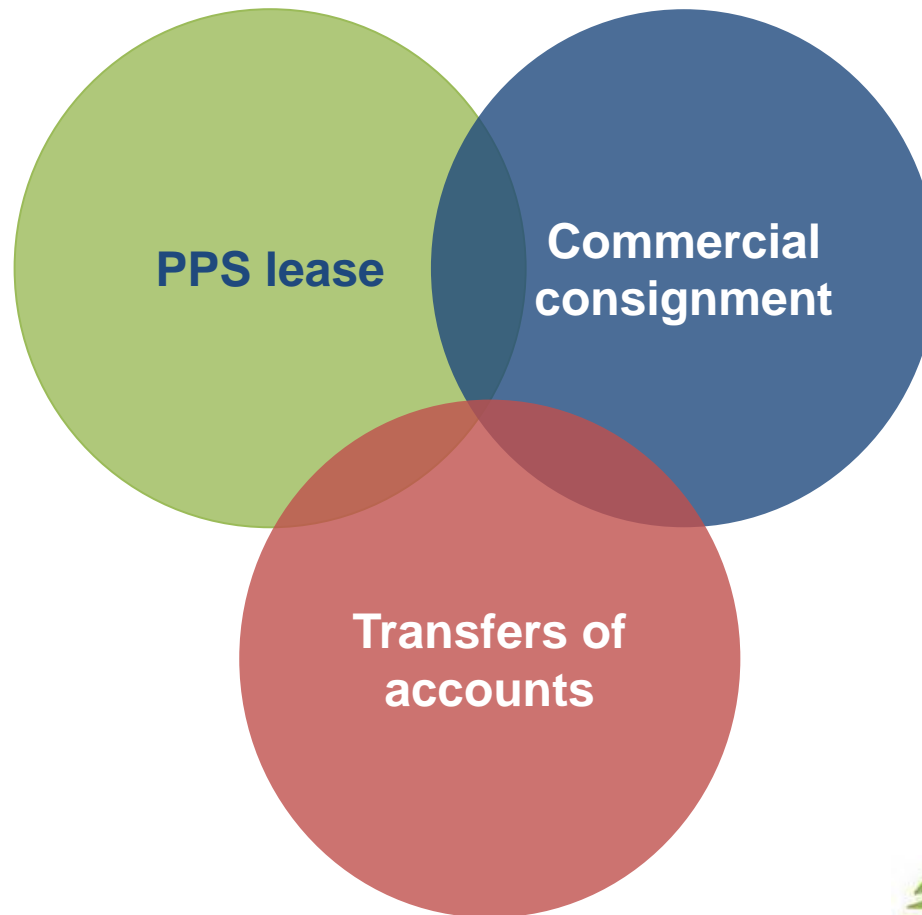


## *Citadel Financial Corp v Elite Highrises [2014] NSWSC 1926*

- Oral security agreement for sale of scaffolding
- Scaffolding delivered in Dec 2012
- Seller issued tax invoice in Aug 2013 with ROT
- Financing statement registered in Aug 2013
- But did the **unsigned** tax invoice satisfy PPSA?
- Was it **adopted** by emails passing between seller and buyer in June 2013
- Emails predated the “writing” / tax invoice so can’t have adopted the writing
- No enforceable security interest



# “Deemed” security interests



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# PPS lease

- A lease or bailment of goods for:
  - a term of more than two years
  - a term of up to two years that is renewable beyond two years
  - a term of up to two years, or an indefinite term, where the lessee or bailee retains possession of the goods beyond two years
- Attempts to draft around this, likely futile
- *Arcabi Pty Ltd, Re* [2014] WASC 310
  - True consignments v ROT
  - approach of administrators/liquidators

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# Section 21 - perfection

- Registration without satisfying writing requirements
- A security interest is perfected if all these happen/exist:
  - the security interest is attached (s 19);  
*(secured party gives value and grantor has rights in the collateral)*
  - the security interest is enforceable against a third party (s 20)  
*(writing requirement and collateral descriptions as discussed in previous slides)*
  - registration on the PPSR

# Pozzebon v Australian Gaming [2014] FCA 1034

- S 588FL Corps Act - applies to a security interest *“perfected by registration and no other means”*
- Secured party argued it was perfected by attachment and enforceability as well as perfection
- Collier J:

It is clear that ... attachment and enforceability (as described in s 21(1)(b)(i) and (ii)) are **mandatory prerequisites** to perfection of a security interest. Section 21(1)(b) specifically states that all of the elements therein must be satisfied, namely the security interest must be:

- attached to the collateral (s 21(1)(b)(i)), and
- enforceable against a third party (s 21(1)(b)(ii)), and
- section 21(2) applies (s 21(1)(b)(iii)).

# Questions?

Linda Widdup

[info@lindawiddup.com.au](mailto:info@lindawiddup.com.au)

+61 451 511 774

[www.lindawiddup.com.au](http://www.lindawiddup.com.au)

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