RESOLVING PRIORITY COMPETITIONS BETWEEN *PPSA* SECURITY INTERESTS AND NON-PPS INTERESTS

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This article examines competitions between security interests under the Personal Property Securities Act 2009 (Cth) ('PPSA') and property interests outside the statutory regime ('non-PPS interests'). Part II examines the statutory priority rules which govern such competitions. It considers their scope, how they should be construed, and the extent to which they may require amendment in order to align with their policy rationales. Part III then examines those competitions which fall outside the statutory priority rules, and are thus determined by the general law. In particular, it considers whether all security interests must be characterised as legal interests for the purposes of such competitions, both as a question of statutory construction and from a policy perspective. It concludes that, for the limited purposes of competitions with non-PPS interests which remain governed by the general law, a PPSA security interest should retain its general law legal or equitable character.

I INTRODUCTION

Where two conflicting interests are claimed in the same property, priority competitions determine which claim prevails.[1] While the loser might be entitled to some residuary, it is not uncommon for the winner's claim to fully extinguish the value of the property. This may leave the loser with only a personal claim, which will often be worthless in priority competitions involving security interests since such claims will commonly be against insolvent individuals or companies.

The *Personal Property Securities Act 2009* (Cth) ('*PPSA*' or '*Act*') introduced a priority regime, to resolve such competitions over personal property, which is fundamentally different to that of the general law.[2] The *Act* adopts a functional

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1 Cf Edward I Sykes and Sally Walker, *The Law of Securities: An Account of the Law Pertaining to Securities over Real and Personal Property under the Laws of Australian Jurisdictions* (Law Book, 5th ed, 1993) 28–31, distinguishing priority competitions from problems of 'dependent or independent title'. For the purposes of this article, all such competitions are categorised as priority competitions.

2 Where this article undertakes international comparative analysis, it is primarily by reference to Canadian, New Zealand and United States law. This is because the *Personal Property Securities Act 2009* (Cth) ('*PPSA*' or '*Act*'), like its New Zealand counterpart, is based upon Canadian legislation – which was

definition of its key concept, the 'security interest'.[3] Generally speaking, where two interests constitute 'security interests', the regime of the *PPSA* comprehensively determines priority based upon notions of 'attachment', 'perfection', and the registration time of 'financing statements'.[4] This regime expressly disregards the 'form' of the transaction giving rise to a security interest,[5] and clearly contemplates that a secured party may prevail in a priority competition notwithstanding that it had notice of a prior security interest.[6] By contrast, the general law determines priority competitions based upon the time of creation of each interest, the legal or equitable nature of each interest (which turns upon the 'form' of the interests), and whether the subsequent interest-holder had notice of the prior interest.[7]

Due to the extensive coverage of the *PPSA*, the incompatibility between its regime for resolving priority disputes and that of the general law is in many scenarios unproblematic. However, as stated by one leading Canadian commentator:

> Although the idea of a fully comprehensive system of priority rules that would resolve all potential disputes is wonderfully appealing, it is a fantasy. It is simply not practicable for the statute to attempt to resolve every competition that might

itself modelled upon United States law: Explanatory Memorandum, Personal Property Securities Bill 2009 (Cth) 10 ('Explanatory Memorandum'); Anthony Duggan and David Brown, *Australian Personal Property Securities Law* (LexisNexis Butterworths, 2nd ed, 2016) 17–24 [1.36]–[1.51]; David Brown, 'Australian Secured Transactions Law Reform' in Louise Gullifer and Orkun Akseli (eds), *Secured Transactions Law Reform: Principles, Policies and Practice* (Bloomsbury Publishing, 2016) 145. See also Peter Winship, 'An Historical Overview of *UCC* Article 9' in Louise Gullifer and Orkun Akseli (eds), *Secured Transactions Law Reform: Principles, Policies and Practice* (Bloomsbury Publishing, 2016) 21; Catherine Walsh, 'Transplanting Article 9: The Canadian *PPSA* Experience' in Louise Gullifer and Orkun Akseli (eds), *Secured Transactions Law Reform: Principles, Policies and Practice* (Bloomsbury Publishing, 2016) 49, particularly at 49–58; Ronald CC Cuming, Catherine Walsh and Roderick J Wood, *Personal Property Security Law* (Irwin Law, 2nd ed, 2012) 5–6, 83–9. The Canadian *PPSA*s are substantially uniform, with the exception of Ontario: Walsh (n 2) 54–5; Duggan and Brown (n 2) 19 n 50. As such, where referencing Canadian provisions, only the acts in Saskatchewan (on behalf of the uniform provinces) and/or Ontario are cited.

3 *PPSA 2009* (Cth) s 12(1). Note also that some interests are 'deemed' to be security interests, irrespective of whether they have a security function: s 12(3). See further Duggan and Brown (n 2) 71–7 [3.24]–[3.32] (which includes discussion of the rationales for such 'deemed security interests').

4 See *PPSA 2009* (Cth) ss 55–61 (general priority rules), 62–5 (priority of purchase money security interest ('PMSIs')), 66–8 (priority of security interests in transferred collateral), 69–72, 75–7, 85–6 (priority of security interests in particular types of property and/or of particular persons), 89–91 (priority of security interests in accessions), 102–3 (priority of security interests in processed or comingled goods). Note that even where all competing interests are security interests, the possibility of circular priority remains: see Bruce Whittaker, 'Review of the *Personal Property Securities Act 2009*' (Final Report, 27 February 2015) 313–15 [7.7.6] ('Whittaker Report'): this report contains the results of the statutory review of the *Act*. As at the date of writing, its recommendations remain under review; note also the general discussion concerning circular priority in Jacob S Ziegel and David L Denomme, *The Ontario Personal Property Security Act Commentary and Analysis* (Butterworths, 2nd ed, 2000) 264–7.

5 Note *PPSA 2009* (Cth) ss 12(1), 273.

6 Ibid s 55 (which makes no reference to knowledge of other security interests). See also *Robert Simpson Co Ltd v Shadlock* (1981) 31 OR (2d) 612 (Ontario High Court of Justice) affirming this to be the case with respect to the analogous regime in Ontario.

7 See below Part III(B)(1).

> come about. There are too many different kinds of property interests that can bump against a security interest.[8]

Such interests include those which fall outside of the *PPSA*'s definition of a 'security interest',[9] and also those which fall within this definition but are nonetheless expressly excluded by the *Act*.[10]

This article seeks to answer two questions. First, what are the rules governing a priority competition between one 'security interest' as defined by the *PPSA*,[11] and another property interest which falls outside of the statutory regime (a 'non-PPS interest')?[12] Secondly, how can the *Act* be construed such that these rules lead to desirable policy outcomes? Some of these rules can be found within the *Act* itself, which contains express provisions to resolve these competitions; however, these statutory priority rules are not comprehensive.[13] Consequently, while some competitions between security interests and non-PPS interests are governed by the *Act*, others turn upon the general law priority rules.[14]

Part II examines the statutory priority rules which govern competitions with non-PPS interests.[15] It considers the scope of these rules, how they should be construed, and the extent to which they may require amendment. Part III then examines those competitions with non-PPS interests which fall outside the statutory priority rules, and are thus governed by the general law.[16] In particular, it considers whether all security interests must be characterised as legal interests, which is crucial to how competitions governed by the general law priority rules are resolved. Both Parts apply the rules to competitions with those non-PPS interests most likely to be affected, and consider whether they generate preferable policy outcomes by reference to the position prior to the introduction of the *Act*.

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8 Roderick J Wood, 'Supplementing *PPSA* Priorities: The Use and Abuse of Common Law and Equitable Principles' (2014) 56(1) *Canadian Business Law Journal* 31, 35.

9 *PPSA 2009* (Cth) s 12.

10 Ibid s 8. But note that other provisions of the *Act*, including section 73 which governs priority competitions between security interests and certain non-PPS interests, still apply to these excluded interests: at s 8(2). Note also that interests in some property, primarily being property relating to areas of significant economic interest to state and territory governments, are excluded from the *Act* by state and territory legislation: see John GH Stumbles, 'The *PPSA*: The Extended Reach of the Definition of the *PPSA* Security Interest' (2011) 34(2) *University of New South Wales Law Journal* 448, 461–3 (and citations therein) ('The Extended Reach').

11 *PPSA 2009* (Cth) s 12.

12 'Non-PPS interest' is preferred over 'non-consensual security interests': see, eg, Roderick J Wood and Michael I Wylie, 'Non-consensual Security Interests in Personal Property' (1992) 30(4) *Alberta Law Review* 1055. This is because some non-PPS interests are consensual: eg, an execution creditor's interest.

13 These rules are contained in *PPSA 2009* (Cth) ss 73–4. See below Part II.

14 *PPSA 2009* (Cth) s 254; Explanatory Memorandum, Personal Property Securities (Consequential Amendments) Bill 2009 (Cth) 33 [8.73] ('Explanatory Memorandum: Consequential Amendments'.

15 *PPSA 2009* (Cth) ss 73–4.

16 Ibid s 254; Explanatory Memorandum: Consequential Amendments (n 14) 33 [8.73].

II COMPETITIONS GOVERNED BY THE *ACT*

This Part examines the statutory priority rules which govern competitions between a security interest and a non-PPS interest.[17] Section A examines these rules, and considers how they should be interpreted. Section B then applies one of the most significant rules to those non-PPS interests it is most likely to affect.[18] It argues that, in some cases, this will lead to outcomes which contradict the general law policy underlying the very existence of those non-PPS interests, and that the policy underlying the *PPSA* does not require this.

In examining these statutory priority rules, this Part also seeks to define their limits, such that those competitions which fall outside of their scope (and thus remain governed by the general law) can be ascertained.[19]

A Examining Statutory Priority Rules

The *PPSA* contains five priority rules governing competitions between security interests and non-PPS interests, summarised in Table 1 below. These rules promote policy objectives particular to the rules in question, and also create certainty as to how these competitions should be resolved. The rules contained in subsections (1) and (2) of section 73 appear to be the most significant. The bulk of the following analysis concerns the former, which is more likely to create controversy.[20]

17 *PPSA 2009* (Cth) ss 73–4.

18 Being the rule contained in *PPSA 2009* (Cth) s 73(1).

19 Ibid s 254; Explanatory Memorandum: Consequential Amendments (n 14) 33 [8.73].

20 See below Parts II(A)(5)–(B).

Table 1

Section	Type of Non-PPS Interest	Rule
73(1)	Any non-PPS interest satisfying all the criteria in (a)–(e).[21]	The non-PPS interest prevails.
73(2)	Any non-PPS interest arising under another statute, *if* that statute provides a rule determining priority.[22]	The rule contained in the statute applies.
73(6)	Any non-PPS interest in a right to payment in connection with an interest in land.	The non-PPS interest prevails.
73(7)[23]	Any non-PPS interest arising by operation of the general law, *if* a legislative instrument provides a rule determining priority.	The rule contained in the legislative instrument applies.
74	An execution creditor's interest (ordinarily a writ of execution or garnishee order).[24]	If the competing security interest is *not* perfected before a certain time in the execution process:[25] the execution creditor's interest prevails.

1 Competitions with Statutory Interests

It is not uncommon for a security interest to come into competition with a non-PPS interest arising under another statute (a 'statutory interest'). Indeed, this is particularly likely because statutory interests often contain security functions, but are expressly excluded from the *PPSA*'s regime.[26] For example, such competitions have arisen in overseas PPS jurisdictions with statutory trusts covering unremitted payroll deductions,[27] statutory charges for unpaid customs duties,[28] and statutory interests with security functions arising under separate legislative regimes.[29] Leaving a court to resolve these problems without legislative guidance can be particularly problematic, as competitions with statutory interests often represent 'a clash between conflicting legislative objectives'.[30]

21 See below Part II(A)(5)(a).

22 Such a rule may also be contained in a legislative instrument: *PPSA 2009* (Cth) s 73(3)(a). Note also ss 73(4) (Minister may make a legislative instrument), 73(5) (this priority rule is subject to sub-s (1)).

23 Note also *PPSA 2009* (Cth) ss 73(8) (Minister may make a legislative instrument), 73(9) (this priority rule is subject to that in sub-s (1)).

24 See below Part II(A)(4).

25 See *PPSA 2009* (Cth) s 74(4); also Matthew Broderick, David Morrison and Emma Ramage, 'Commercial Litigation under the *Personal Property Securities Act 2009* (Cth): Part I' (2015) 33(6) *Company and Securities Law Journal* 372, 374–6.

26 *PPSA 2009* (Cth) ss 8(1)(b), (k).

27 *Royal Bank of Canada v Sparrow Electric* [1997] 1 SCR 411 ('*Sparrow Electric*').

28 *Fisk v A-G (NZ)* [2016] NZAR 551.

29 *Bank of Montreal v Innovation Credit Union* [2010] 3 SCR 3 ('*Innovation Credit*'); *Royal Bank of Canada v Radius Credit Union* [2010] 3 SCR 38 ('*Radius Credit*'). Particular complications arose in these cases due to the provincial nature of the security interest, and the federal nature of the competing statutory interest.

30 *Sparrow Electric* [1997] 1 SCR 411, 436–7 [22] (Gonthier J). In this case, the conflict was between ensuring the Crown was paid debts which were unlawfully misappropriated by a debtor, and protecting the fiscal integrity of secured creditors: see 435–6 [19]–[21] (Gonthier J).

In order to address this issue, section 73(2) allows for a priority rule to be created for each statutory interest which might come into conflict with a security interest.[31] This provision has been extensively used by both state and Commonwealth legislatures,[32] and should be very significant in preventing the controversies which have arisen in overseas cases.[33] This has been facilitated by the *Act*'s federal status, by contrast to Canada where each common law province has its own *PPSA* and thus legislative solutions to such issues have been more difficult to enact.[34] Although some interests will inevitably fall through the cracks,[35] these efforts by Australian legislatures should ensure that most competitions between security interests and other statutory interests are determined by section 73(2). This fosters certainty, and prevents the need for courts to make difficult and controversial decisions.

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31 Note that, even if section 73(2) is not enlivened, section 73(1) might still apply: *Commonwealth Bank of Australia v MTC Diesel Pty Ltd* [2019] VCC 639, [128]–[132] (Burchell JR).

32 See, eg, *Building and Construction Industry Security of Payment Act 1999* (NSW) s 11(7); *Confiscation of Proceeds of Crime Act 1989* (NSW) ss 48(6), 83(6); *Criminal Assets Recovery Act 1900* (NSW) ss 31(5), 52G(7); *Storage Liens Act 1935* (NSW) s 3(3); *Road Safety Act 1986* (Vic) ss 84ZQD(2), 84ZS(2), 84ZX(3); *Confiscation Act 1997* (Vic) s 41(5); *Port Management Act 1995* (Vic) s 88V(5); *Marine Safety Act 2010* (Vic) s 219F(5); *Fines Reform Act 2014* (Vic) s 135(2); *Building Industry Fairness (Security of Payment) Act 2017* (Qld) s 59(1)(a); *Burials Assistance Act 1965* (Qld) s 4A(4A); *Criminal Proceeds Confiscation Act 2002* (Qld) ss 88(2)(d), 89O(2)(d), 196(2A), 220(3), 237(2A), 256(3); *Disposal of Uncollected Goods Act 1967* (Qld) ss 4A(1)(a), 20(3A); *Forestry Act 1959* (Qld) s 54B(5)(a); *Legal Aid Queensland Act 1997* (Qld) s 39(7); *Public Trustee Act 1978* (Qld) s 17A(4); *Second-hand Dealers and Pawnbrokers Act 2003* (Qld) s 64(1A)(a); *State Penalties Enforcement Act 1999* (Qld) ss 63(8)(a), (10)(a); *Storage Liens Act 1973* (Qld) s 4A(1)(a); *Criminal Assets Confiscation Act 2005* (SA) s 11A; *Worker's Liens Act 1893* (SA) s 9C; *Bulk Handling Act 1967* (WA) ss 34D(4), 35(2A), 51(3); *Criminal Property Confiscation Act 2000* (WA) s 125(2); *Growers Charge Act 1940* (WA) s 3(2); *Jetties Act 1926* (WA) s 8A(5A); *Public Trustee Act 1941* (WA) s 63(2); *Warehousemen's Liens Act 1952* (WA) s 4(2); *Western Australian Marine Act 1982* (WA) s 71(4A); *Criminal Code 2002* (ACT) s 377(7); *Public Trustee and Guardian Act 1985* (ACT) s 72(2); *Road Transport (Safety and Traffic Management) Regulation 2017* (ACT) reg 8(7); *Confiscation of Criminal Assets Act 2003* (ACT) s 94(4)(c); *Navigation Act 2012* (Cth) s 241(4); *Proceeds of Crime Act 2002* (Cth) ss 142(4), 169(4), 179SA(4), 302C(2), 307(3A); *Biosecurity Act 2015* (Cth) ss 599(2), 605(2); *Insurance Act 1973* (Cth) s 62S(3); *Mutual Assistance in Criminal Matters Act 1987* (Cth) s 35J(4); *Air Services Act 1995* (Cth) s 60(3A); *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) ss 453-10(5A), 511-1(5A); *Fisheries Management Act 1991* (Cth) ss 31FA(3), 46A(3); note also *Personal Property Securities (Priority of Statutory Interests) Instrument 2011* (Cth); *Corporations Act 2001* (Cth) s 443F(1); *Bankruptcy Act 1966* (Cth) s 189AC(2).

33 See below Part III(A)(2).

34 See John GH Stumbles, 'Personal Property Security Law in Australia and Canada: A Comparison' (2011) 51(3) *Canadian Business Law Journal* 425, 426; Duggan and Brown (n 2) 23–24 [1.51], 429 [14.1]; Anthony Duggan, 'The Trials and Tribulations of Personal Property Security Law Reform in Australia' (2015) 78(1) *Saskatchewan Law Review* 257 ('Trials and Tribulations'); Anthony Duggan, 'The Australian *PPSA* from a Canadian Perspective: Some Comparative Reflections' (2014) 40(1) *Monash University Law Review* 59, 63 ('The Australian *PPSA* from a Canadian Perspective'). See also Cuming, Walsh and Wood (n 2) 76–81; Ziegel and Denomme (n 4) 265–6; Roderick J Wood, '*Bank Act – PPSA* Interaction: Still Waiting for Solutions' (2012) 52(2) *Canadian Business Law Journal* 248; Stephen DA Clark, '2012 Amendments to Canada's *Bank Act*: Bill S-5: *Financial System Review Act*' (2012) 52(3) *Canadian Business Law Journal* 372.

35 For example, *Bankruptcy Act 1966* (Cth) ss 139ZN, 139ZR; *Taxation Administration Act 1953* (Cth) s 260-5, discussed in John Stumbles, '*PPSA* Aus: Security Interests and Notices under s 260-5 of the *Taxation Administration Act 1953* (Cth)' in Shelley Griffiths, Sheelagh McCracken and Ann Wardrop (eds), *Exploring Tensions in Finance Law: Trans-Tasman Insights* (Thomson Reuters, 2014) 199.

2 Competitions with Interests in a Right to Payment in Land

Section 73(6) confers priority upon interests in a right to payment connected with land. It should be interpreted widely, due to both its general language, and the desirability of minimising overlap between land registration regimes and the *PPSA*.[36]

3 Competitions with Interests Specified by Legislative Instruments

Section 73(7) allows for legislative instruments to determine priority in competitions between security interests and non-PPS interests arising at general law. As at the date of writing, no such instruments have been made.

4 Competitions with Execution Creditors' Interests

An execution creditor's interest arises from the execution of a judgment against a debtor. It will typically be in one of two forms: a writ of execution, under which the sheriff seizes a judgment debtor's property and distributes it (or its proceeds) to the execution creditor, or a garnishee order, under which a debt owed to the judgment debtor is paid directly to the execution creditor.[37] Although an execution creditor's interest is not technically a 'proprietary' interest,[38] it will prevail over such an interest at general law if certain events (seizure or issuance of a garnishee order absolute) occur prior to the attachment of the proprietary interest.[39]

A competition might arise between a security interest and an execution creditor's interest in two cases: where an execution creditor claims against property subject to an existing security interest, or where a secured party takes a security interest in property which an execution creditor is attempting to enforce against.

Section 74 provides priority to execution creditors' interests over *unperfected* security interests, and thus applies to some (but not all) competitions between

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36 *PPSA 2009* (Cth) s 8(1)(f)(ii); see also *Marac Finance Ltd v Greer* [2012] 2 NZLR 497, 505 [29], 506 [38], 509 [50] (Chambers J, O'Regan P and Stevens J); *Blue Water Resort Ltd v Marac Finance Ltd* (High Court of New Zealand, Christiansen AsJ, 20 August 2008) [28]–[31]; *United Dominions Investments Ltd v Morguard Trust Co* (1986) 5 PPSAC 203, [12] (Brownridge, Tallis and Wakeling JJA) (Saskatchewan Court of Appeal).

37 See Sykes and Walker (n 1) 23–6.

38 On the meaning of a 'proprietary' interest, note JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2015) 106–8 [4-005]–[4-015].

39 For example, in a competition with a floating charge (prior to the introduction of the *PPSA 2009* (Cth)), the execution creditor's interest would prevail if seizure or making of a garnishee order absolute occurred before crystallisation: *Evans v Rival Granite Quarries Ltd* [1910] 2 KB 979, 999 (Buckley LJ) ('*Evans v Rival*'); *Commonwealth Trading Bank of Australia v Austral Lighting Pty Ltd* [1984] 2 Qd R 507, 510–12 (Connolly J) ('*Austral Lighting*'); *Blacktown Concrete Services Pty Ltd v Ultra Refurbishing & Construction Pty Ltd (in liq)* (1998) 43 NSWLR 484, 497, 499 (Santow J) ('*Blacktown Concrete*'); *Dodrill v Bank of Queensland Ltd* [2010] QSC 371, [16] (de Jersey CJ) ('*Dodrill*'). But the floating charge would prevail if crystallisation occurred first: *Robson v Smith* [1895] 2 Ch 118, 124–6 (Romer J); *Robinson v Burnell's Vienna Bakery Co Ltd* [1904] 2 KB 624, 626–7 (Channell J); *Evans v Rival* [1910] 2 KB 979, 988 (Vaughan Williams LJ), 995–6 (Fletcher Moulton LJ), 1002 (Buckley LJ); *Relwood Pty Ltd v Manning Homes Pty Ltd [No 2]* [1992] 2 Qd R 197, 201–2 (McPherson SPJ), 204 (Derrington J) ('*Relwood v Manning*'); *Blacktown Concrete* (1998) 43 NSWLR 484, 499 (Santow J).

security interests and execution creditors' interest. The rationale for this statutory priority rule is twofold: it protects execution creditors from incurring enforcement costs only to lose out against undiscoverable (unperfected) security interests, and encourages secured parties to perfect their interests.[40]

Although this statutory priority rule may appear to improve the position of execution creditors, it might be more readily understood as an attempt to balance the detriment flowing from the 'fixed' nature of security interests. Pursuant to section 74, execution creditors can now prevail against *unperfected* security interests that attach prior to execution or the issuance of a garnishee order absolute.[41] Further, execution creditors have also been conferred with a power to obtain information concerning existing security interests.[42] However, because *PPSA* security interests are 'fixed' in nature (meaning that they attach to collateral even if at general law they would be characterised as an uncrystallised floating charge),[43] an execution creditor's interest will no longer prevail against a *perfected* security interest which would still have been 'floating' or 'hovering' over the collateral if not for the *PPSA*. Additionally, even where an execution creditor does enjoy priority under section 74, their rights remain vulnerable to the consequences

40 Broderick, Morrison and Ramage (n 25) 372; Nicholas Mirzai and Jason Harris, *The Annotated Personal Property Securities Act 2009 (Cth)* (Wolters Kluwer, 3rd ed, 2018) 322–3 [74.5].

41 *PPSA 2009* (Cth) ss 74(1), (4). Note that the time at which the security interest must be unperfected in order for the execution creditor's interest to have priority is the time of seizure or when a garnishee order absolute is made: see Broderick, Morrison and Ramage (n 25) 374–6.

42 *PPSA 2009* (Cth) ss 275(1), (9)(d); also see Matthew Broderick, '*PPSA* and Construction Law' (2013) 29 *Building and Construction Law Journal* 298, 305–6; Broderick, Morrison and Ramage (n 25) 381–2. But query the extent to which this will actually allow execution creditors to make more informed decisions concerning enforcement, since the ability to make requests for information is only enlivened if they have 'an interest in the collateral' – ie, once they have already incurred the enforcement costs of obtaining the relevant order: *PPSA 2009* (Cth) s 275(9)(d); Whittaker Report (n 4) 447–8 [9.3.1.2], 448 [9.3.1.2.3] (Recommendation 368).

43 See Sheelagh McCracken, 'The Floating Charge under the *PPSA*: The Current State of Play' (2019) 47(6) *Australian Business Law Review* 418; Linda Widdup, 'Function, Form, Fixed, Floating and Forge: Filtering Out Pre-*PPSA* Concepts in a Post-*PPSA* World' (2019) 47(6) *Australian Business Law Review* 405. See also *Hamersley Iron Pty Ltd v Forge Group Power Pty Ltd (in liq) (recs & mgrs apptd)* (2017) 52 WAR 90, 156 [313]–[314] (Tottle J) ('*Hamersley WASC*'); *Sparrow Electric* [1997] 1 SCR 411, 455–6 [54] (La Forest, Gonthier and Cory JJ); *Credit Suisse Canada v 1133 Yonge Street Holdings Ltd* (1998) 41 OR (3d) 632 (Ontario Court of Appeal); *Canadian Imperial Bank of Commerce v Otto Timm Enterprises Ltd* (1995) 26 OR (3d) 724 (Ontario Court of Appeal); *Innovation Credit* [2010] 3 SCR 3, 29 [48] (Charron J for the Court); *Radius Credit* [2010] 3 SCR 38, 56–7 [31] (Charron J for the Court); Whittaker Report (n 4) 432 [9.2.1.1.1]; Duggan and Brown (n 2) 125–6; Anthony Duggan, 'Some Canadian *PPSA* Cases and Their Implications for Australia and New Zealand' (2010) 38 *Australian Business Law Review* 161, 173 ('Some Canadian *PPSA* Cases'); Sheelagh McCracken, 'The Personal Property Security: Identifying Some Essential Attributes' (2014) 30 *Law in Context* 146, 153–7 ('Identifying Some Essential Attributes'); Diccon Loxton, 'New Bottle for Old Wine? The Characterisation of *PPSA* Security Interests' (2012) 23(3) *Journal of Banking and Finance Law and Practice* 163, 179–80; Cuming, Walsh and Wood (n 2) 513–14; Linda Widdup, *Personal Property Securities Act: A Conceptual Approach* (LexisNexis Butterworths, 3rd ed, 2013) 293 [22.5]; Ziegel and Denomme (n 4) 121, 128; Barry Allan, *The Law of Secured Credit* (Thomson Reuters, 2016) 201–2, 388; Explanatory Memorandum (n 2) 10; but note *Hamersley Iron Pty Ltd v Forge Group Power Pty Ltd (in liq) (recs and mgrs apptd)* (2018) 53 WAR 325, 363 [139] (Murphy, Mitchell JJA and Allanson J) ('*Hamersley WASCA*').

of the grantor's insolvency.[44] As such, while it is undoubtedly true that the 'status of an execution creditor is elevated under s[ection] 74',[45] it is difficult to say whether execution creditors are truly better off than they were prior to the *Act*. In particular, it might be argued that any priority benefits flowing to execution creditors rely upon the laxness of secured parties in perfecting their security interests; and if this laxness becomes rarer as the commercial community becomes more familiar with the *Act*, execution creditors may well be worse off under the *PPSA*, despite the effects of section 74.[46]

5 Competitions with 'Commercial Liens'

Section 73(1) introduces a statutory priority rule whose purpose, it appears, is to maintain the priority of the common law repairer's lien. This is due to the continued efficacy of the policy underlying such liens: namely, to prevent secured parties from enjoying unintended windfalls, and to incentivise grantors to keep collateral in good repair.[47] However, the drafting of the provision gives rise to a number of ambiguities, which may lead to interpretations that undermine the provision's purpose. Additionally, unlike its overseas counterparts, section 73(1) has also been drafted such that its scope is significantly wider than its rationale demands: ie, it is not limited to interests in goods.[48] It will be argued that this not only fails to further the provision's purpose, but that it may lead to unintended and undesirable consequences.

This section considers each of the requirements of the statutory priority rule in section 73(1). It advances interpretations which best align the priority rule with its purpose, and draws attention to drafting issues that cannot be circumnavigated through interpretation. It then considers the provision's rationale in more depth, and whether a purposive interpretation that seeks to generally widen (or narrow) its scope might be appropriate.

(a) Requirements of the Priority Rule

Section 73(1) confers priority on non-PPS interests which meet five requirements.

First, the non-PPS interest must arise non-consensually under statute, or 'by operation of the general law'.[49] It is contended that the latter phrase should be read to mean *automatically and non-consensually*, as opposed to a reading that includes consensual general law interests (ie, property rights created by contract). This

44 *Corporations Act 2001* (Cth) ss 569–70; *Bankruptcy Act 1966* (Cth) ss 118–119A, 122; discussed in Broderick, Morrison and Ramage (n 25) 382.

45 Broderick (n 42) 306.

46 Cf Broderick, Morrison and Ramage (n 25) 387.

47 Duggan and Brown (n 2) 84–85 [3.46]–[3.47]; this is discussed in detail in Part II(A)(5)(b) below.

48 Contrast *PPSA 2009* (Cth) s 73(1) to *Personal Property Security Act*, S 1993, c P-6.2 (Saskatchewan) s 32 ('*PPSA* (Sask)'); *Personal Property Security Act*, RSO 1990, C P.10 (Ontario) ('*PPSA* (Ont)') s 31; *Personal Property Securities Act 1999* (NZ) s 93 ('*PPSA* (NZ)'); *Uniform Commercial Code 2012*, UCC § 9–333 (2012) ('*UCC*').

49 *PPSA 2009* (Cth) s 73(1)(a). See also s 8(1)(b).

would best reflect a reading of the *Act* as a whole,[50] because other uses of the phrase 'by operation of law' also appear to refer to non-consensual interests,[51] whereas provisions referring to consensual general law interests use different terminology.[52] It would also be consistent with the restriction of the provision's application to non-consensual statutory interests.[53] This construction would also align with the ordinary meaning of 'by operation of law',[54] and be consistent with its judicial usage to describe a number of different interests which arise irrespective of the parties' intentions.[55] Furthermore, this construction would prevent the priority rule from applying to interests which initially arise by operation of the general law, but are subsequently superseded by consensual interests and thus constitute a security interest.[56] This would ensure that both section 73(1), and the priority rules applicable to competing security interests,[57] could not apply to the same interest. Finally, such an interpretation would also mean that the only general law interests caught within the provision would be 'liens',[58] which would be consistent with its overseas counterparts (which are expressly drafted as such).[59] Although the Supreme Court of Victoria recently held that a consensual (contractual) lien fell within this provision because it arose 'by contract under the operation of the

50 See *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 320 (Mason and Wilson JJ) ('*Cooper Brookes*'); *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309, 315 (Mason J); *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 389 [24] (French CJ and Hayne J).

51 See *PPSA 2009* (Cth) ss 8(1)(c), 79(1)(b), 245(2)(c)(ii). See also *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd* (2014) 292 FLR 114, 153 [127] (Santamaria JA).

52 See, eg, *PPSA 2009* (Cth) s 110.

53 Ibid s 73(1)(b).

54 On 'ordinary meaning' see: *Acts Interpretation Act 1901* (Cth) s 15AB; *Cooper Brookes* (1981) 147 CLR 297, 319–21 (Mason and Wilson JJ); *Saraswati v The Queen* (1991) 172 CLR 1, 22 (McHugh J); *Minister for Immigration and Citizenship v SZJGV* (2009) 238 CLR 642, 649 [5] (French CJ and Bell J).

55 See, eg, the use of the phrase in: *Re Leith's Estate; Chambers v Davidson* (1866) LR 1 PC 296, 305 (Lord Westbury) (describing the creation of a repairer's lien); *Bowmaker Ltd v Wycombe Motors Ltd* [1946] 1 KB 505, 509 (Lord Goddard CJ) (describing the creation of a repairer's lien), cited in JR Peden, 'Comment: Common Law Liens: An Anglo-Australian Conflict' (1968) 6(1) *Sydney Law Review* 39, 40 n 5. See also *Stewart v Atco Controls Pty Ltd (in liq)* (2014) 252 CLR 307, 318 [14] (Crennan, Kiefel, Bell, Gageler and Keane JJ) (describing the creation of an equitable lien); *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269, 290 [48] (Gummow, Hayne, Heydon, Kiefel and Bell JJ) (describing the creation of constructive trusts), 296–7 [77] (Gummow, Hayne, Heydon, Kiefel and Bell JJ) (describing the merger of two estates in property held by the same person); *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)* (2000) 202 CLR 588, 622–3 [82] (Kirby J) (distinguishing a charge created by contract from one arising by operation of law); *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226, 247 [50] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) ('*Buckle*') (distinguishing a security interest created consensually to one created by operation of law). Note also the use of 'by operation of law' to describe a common law doctrine operating irrespective of consent in *A-G (NT) v Emmerson* (2014) 253 CLR 393, 452 [134] (Gageler J) (describing the operation of forfeiture at common law following criminal offences).

56 *PPSA 2009* (Cth) s 12(1).

57 Ibid pt 2.6.

58 At least within the wider meaning of the term, which encompasses hypothecations arising by operation of law rather than only possessory interests: see *Ex parte Patience; Makinson v The Minister* (1940) 40 SR (NSW) 96, 100–1 (Jordan CJ) ('*Ex parte Patience*'); discussed in *Firth v Centrelink (formerly known as the Department of Social Security)* (2002) 55 NSWLR 451, 467 [42] (Campbell J) ('*Firth v Centrelink*').

59 *PPSA* (Sask) s 32; *PPSA* (Ont) s 31; *PPSA* (NZ) s 93; *UCC* § 9-333.

general law',[60] it is respectfully submitted that this should not be considered a binding authority as to the interpretation of the phrase 'by operation of the general law' because the parties did not contest the issue and consequently it was not considered in detail in the judgment.[61]

Secondly, the interest must arise 'in relation to providing goods or services in the ordinary course of business';[62] or, to adopt a phrase coined by leading Canadian commentators, it must be a 'commercial lien'.[63] Unlike the taking free rule in section 46, whose expanded statutory wording expressly requires consideration of the seller's/lessor's modus operandi,[64] the phrase used in section 73(1)(b) simply uses the words 'in the ordinary course of business'. As such, while caution must be exercised in applying precedents concerning the phrase 'in the ordinary course of business' to the taking free rule,[65] this should not be a concern with respect to the statutory priority rule. Consequently Ontarian case law,[66] and voidable transactions jurisprudence,[67] may be of assistance in interpreting section 73(1)(b).

Thirdly, the interest must be held by the person that provided the goods or services.[68] The reason for this requirement is not readily apparent; and while it might be explainable as part of the drafters' attempt to codify the elements of a common law possessory lien in section 73(1),[69] the extension of the provision to interests other than in goods (and thus to certain non-possessory liens) undermines this explanation. As such, section 73(1) appears to confer priority to liens only so long as they are not assigned, notwithstanding that there is no basis for such a distinction.

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60 *Tasman Logistics Services Pty Ltd v Seaco Global Australia Pty Ltd* [2020] VSC 100, [115] (Garde J) ('*Tasman Logistics v Seaco*').

61 Ibid [114]–[115]. Whether the contractual lien fell within section 73(1)(a) was dealt with in one sentence, presumably because the provision's application was not contested: 'As to [s 73(1)](a)], Tasman's interest arises by contract under the operation of the general law, and is modified by the provisions of the [*Australian Consumer Law and Fair Trading Act 2012* (Vic)]': at [115].

62 *PPSA 2009* (Cth) s 73(1)(b).

63 Cuming, Walsh and Wood (n 2) 510.

64 '[I]n the ordinary course of the seller's or lessor's business *of selling or leasing personal property of that kind*': *PPSA 2009* (Cth) s 46(1) (emphasis added); see generally Mike Gedye, 'A Hoary Chestnut Resurrected: The Meaning of "Ordinary Course of Business" in Secured Transactions Law' (2013) 37(1) *Melbourne University Law Review* 1.

65 See Gedye (n 64) 22.

66 See *Fairline Boats Ltd v Leger* (1980) 1 PPSAC 218, [12]–[17] (Linden J) (Supreme Court of Ontario); *Ford Motor Credit Co of Canada Ltd v Centre Motors of Brampton Ltd* (1982) 38 OR (2d) 516, [6], [25] (Potts J) (Ontario High Court of Justice); *Agricultural Commodity Corp v Schaus Feedlots Inc* (2001) 2 PPSAC (3d) 270, [14] (Donelly J) (Ontario Superior Court of Justice); *GE Canada Equipment Financing GP v ING Insurance Co of Canada* (2009) 94 OR (3d) 321, [66] (Cronk, Juriansz and MacFarland JJA) (Ontario Court of Appeal).

67 See, eg, *Robertson v Grigg* (1932) 47 CLR 257, 267 (Gavan Duffy CJ and Starke J), 273 (Evatt J); *Downs Distributing Co Pty Ltd v Associated Blue Star Stores Pty Ltd (in liq)* (1948) 76 CLR 463, 476–7 (Rich J), 479–80 (Williams J); *Taylor v White* (1964) 110 CLR 129, 136 (Dixon CJ), 140–2 (Kitto J), 151–3 (Taylor J), 159 (Menzies J), 161 (Windeyer J).

68 *PPSA 2009* (Cth) s 73(1)(c).

69 See, eg, Explanatory Memorandum: Consequential Amendments (n 14) 33 [8.72]–[8.73]. The relevant element of the possessory lien being its non-transferability: see Graham McBain, 'Codifying Common Law Liens' (2006) 20(4) *Commercial Law Quarterly* 3, 4.

Fourthly, no other law must determine priority.[70]

Fifthly, the interest must be acquired without 'actual knowledge' that its acquisition breached the terms of an existing security agreement.[71]

Finally, some observations should be made concerning these five requirements considered as a whole. The first three requirements appear to attempt to codify the elements of a common law possessory lien:[72] as per subsections (1)–(3) of section 73, such liens arise by operation of law, in relation to the provision of goods or services, and are held by the person that provided those goods or services.[73] This aligns the priority rule with the equivalent overseas provisions, which state that they apply to a 'lien', in goods, arising out of the provision of goods or services.[74] Although these overseas definitions might also cover some equitable liens, this is relatively inconsequential because they are limited to interests in goods. However, the Australian provision is not so limited,[75] which undermines its apparent attempt to codify the elements of a possessory lien; in other words, the wider drafting of section 73(1) covers a number of equitable liens in property which would be characterised as a chose in action at general law, and thus which do not fall within the scope of its overseas counterparts.[76] No explanation for this is apparent.[77]

(b) A Purposive Construction of Section 73(1)?

The primary rationale of section 73(1) appears to be to maintain the priority of the repairer's lien,[78] so as to protect the interests of parties who maintain or improve collateral.[79] This ensures that secured parties do not gain an unintended windfall

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70 *PPSA 2009* (Cth) s 73(1)(d).

71 Ibid s 73(1)(e); regarding actual knowledge, see ss 296(g), 298–9; Explanatory Memorandum (n 2) 115–16 [8.34]–[8.37]. Note the possibility for a circular priority situation to arise out of this requirement: Whittaker Report (n 4) 313–14 [7.7.6.1]. Although Whittaker suggests that the interest conferred priority by section 73(1) should probably prevail in such circumstances, no recommendation is made to effect this.

72 For a more detailed explanation of such liens, see below Part II(B)(1).

73 Although *possession* of the goods over which such liens are held can be transferred without destroying the lien, the *lien itself* cannot be transferred: *Dicas v Stockley* (1836) 7 Car & P 587; 173 ER 258, 260 (Littledale J); *Albermarle Supply Co Ltd v Hind & Co* [1928] 1 KB 307, 314 (Lord Hanworth MR), 318 (Scrutton LJ) ('*Albermarle Supply*'); *Caldwell v Sumpters* [1972] Ch 478, 495–6 (Salmon LJ), 497 (Stamp LJ) ('*Caldwell v Sumpters*'); *Bentley v Gaisford* [1997] 1 All ER 842, 846 (Sir Richard Scott V-C), 854 (Roch LJ), 857 (Henry LJ) ('*Bentley v Gaisford*'); *Re Ly; Ex parte Dixon v Ly* (1995) 62 FCR 432 ('*Re Ly; Ex parte Dixon v Ly*'); *White v Bini* [2003] FCA 669, [3]–[4] (Finkelstein J) ('*White v Bini*'); *Bechara v Atie* [2005] NSWCA 268, [48] (McColl JA, Ipp JA agreeing at [1], Tobias JA agreeing at [2]) ('*Bechara v Atie*'); *Magnamain Investments Pty Ltd v Baker Johnson Lawyers* [2008] QSC 245, [18]–[22] (Daubney J) ('*Magnamain Investments*').

74 *PPSA* (Sask) s 32; *PPSA* (Ont) s 31; *PPSA* (NZ) s 93; *UCC* § 9-333.

75 'An interest (the *priority interest*) in *collateral* has priority over a security *in the collateral* if …': *PPSA 2009* (Cth) s 73(1) (emphasis added).

76 Eg, solicitor's fruits of the action liens and trustee's liens over property that would be characterised as a chose in action at general law: see below Parts II(B)(3)–(4).

77 No explanation is contained in Explanatory Memorandum (n 2) 46 [2.162].

78 See McBain (n 69) particularly at 4–8; see also *Majeau Carrying Co Pty Ltd v Coastal Rutile Ltd* (1973) 129 CLR 48 ('*Majeau*').

79 Duggan and Brown (n 2) 84–5 [3.46]–[3.47]. See also *Craddock Trucking Ltd v Leclair* (1995) 28 Alta LR (3d), [8] (Master Breitkreuz) (Alberta Court of Queen's Bench); *United States v Crittenden*, 563 F 2d 679, 687 (Goldberg J) (5th Cir, 1977).

by benefiting from an increase in the value of their security without paying for the costs of improving it.[80] This may also increase economic efficiency, by incentivising grantors to maximise the value of their security.[81] Further to this, the United States-equivalent of section 73(1) is also said to protect small businesses, which do not have the resources to bargain for formal security (or may be unaware of the consequences of not doing so).[82] This reasoning also rings true in an Australian context, where the lack of community awareness surrounding the *PPSA* has been particularly detrimental to small businesses.[83]

However, section 73(1) has been drafted such that it applies to a number of interests other than the repairer's lien. Most significantly, as noted above, the statutory priority rule applies to interests other than those in goods, such that it covers some equitable liens in choses in action.[84] Additionally, the provision might apply to general possessory liens,[85] which do not usually correspond to services improving the collateral's value.[86]

Consequently, it is submitted that the policy rationale for section 73(1) cannot support any general purposive construction of the provision so as to give it a wider, or narrower, scope of operation. While an expansive interpretation might be more likely to confer priority upon repairer's liens, it would also inappropriately confer priority upon other liens. By the same token, a narrow interpretation would minimise the risk of inappropriately conferring priority upon those other liens, but might also exclude legitimate repairer's liens.

Based upon *Toll Logistics (NZ) Ltd v McKay* ('*McKay*'),[87] it has been suggested that the New Zealand-equivalent of section 73(1)[88] is interpreted narrowly;[89] however, it is respectfully submitted that *McKay* cannot stand for such a proposition. This is because the New Zealand Court of Appeal's decision focused upon the policy that new general liens should be recognised only in extremely narrow circumstances, which is a separate question to how narrowly the priority rule applying to them should be construed.[90] Furthermore, although the Court suggested the priority rule should be read narrowly because it is 'a limited exception to the broad intention to codify the law of security interests in personal property',[91] this might just as easily be turned on its head in that section 73(1) is better viewed *as a priority rule itself*;[92] particularly since both the Australian and

80 Duggan and Brown (n 2) 84–85 [3.46]–[3.47].
81 Ibid 85 [3.47].
82 *United States v Crittenden*, 563 F 2d 679, 687 (Goldberg J) (5th Cir, 1977), quoting *Citizens Co-Op Gin v United States*, 427 F 2d 692, 698 (Goldberg J) (5th Cir, 1970).
83 Whittaker Report (n 4) 25–8 [3.1.1]–[3.1.2.2].
84 See below Parts II(B)(3)–(4).
85 See below Part II(B)(1) below.
86 See also McBain (n 69) 9–14; cf GE Dal Pont, *Lawyers' Professional Responsibility* (Lawbook, 6th ed, 2017) 520–1 (whose arguments only extend to the solicitor's lien).
87 [2011] 2 NZLR 601 ('*McKay*').
88 *PPSA* (NZ) s 93.
89 Mirzai and Harris (n 40) 320.
90 *McKay* [2011] 2 NZLR 601, 607–17 [16]–[63] (Arnold, Randerson and Harrison JJ).
91 Ibid 616 [60].
92 This would be consistent with the description of section 73 as creating 'a priority regime between, in effect, security interests under the *PPSA* and non-consensual interests arising under the general law, or

New Zealand provisions are located within parts of the legislation containing other priority rules.[93]

B Applying the Most Complex Statutory Priority Rule: Section 73(1)

This section examines which non-PPS interests are conferred priority by section 73(1), and evaluates the policy rationales (or lack thereof) for any changes brought about by reference to the previous position at general law. While the other statutory rules are also significant, particularly section 73(2) (competitions with statutory interests) given its extensive use by Australian legislatures,[94] the application of these rules should be less complex.[95] Although it is assumed for the purposes of the following discussion, whether a non-PPS interest arises 'in relation to providing goods or services in the ordinary course of business' will depend upon the facts of each individual case.[96]

1 Common Law Possessory Liens

Section 73(1) applies to a possessory lien, which is a common law right whereby a person (the 'lienee') may retain possession of goods until a debt is paid.[97] This is because such liens arise by operation of general law, in relation to the provision of goods or services, in favour of the person who provided those goods or services.[98]

There are two categories of possessory liens: particular liens (goods can be retained as security for debts *relating to the retained property*) and general liens (goods can be retained as security for *all* the lienor's indebtedness).[99] Particular liens arise so as to prevent owners gaining an unintended windfall where a lienee 'improves' goods,[100] or as a form of compensation for lienees who have a legal obligation imposed upon them to accept all offers for their goods/services due to their occupation (although these are relatively rare today).[101] General liens are recognised by the common law because they arise from 'custom'.[102] Unlike most general law security interests, the possessory lien is a 'passive' right: the lienee can retain the goods but has no power of sale,[103] unless one is conferred by statute.[104] Although some authority suggests that a possessory lien might extend to

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Commonwealth, or State law': *Hamersley WASCA* (2018) 53 WAR 325, 386 [227] (Murphy, Mitchell JJA and Allanson J). As noted in above n 12, 'non-PPS interest' is preferred to 'non-consensual interest'.

93 *PPSA 2009* (Cth) pt 2.6 s 73(1); *PPSA* (NZ) pt 8 s 93.

94 See above Part II(A)(1).

95 At least in the sense that section 73(1) has a number of requirements that must be met for it to be enlivened.

96 *PPSA 2009* (Cth) s 73(1)(b).

97 See *Hammonds v Barclay* (1802) 2 East 227; 102 ER 356, 359 (Grose J); McBain (n 69) 3–4, quoting Roy Goode, *Hire-Purchase Law and Practice* (2nd ed , Butterworths, 1970) 688. See also *Dixon v Barton* [2011] NSWSC 1525, [179] (Ward J).

98 *PPSA 2009* (Cth) s 73(1)(a)–(c).

99 See generally Sykes and Walker (n 1) 737–40; McBain (n 69).

100 The repairer's lien: see McBain (n 69) 4–8; *Majeau* (1973) 129 CLR 48.

101 See *Stapley v Towing Masters Pty Ltd* [2009] NSWCA 382, [89]–[100] (Campbell JA).

102 For example, the solicitor's lien. See *Majeau* (1973) 129 CLR 48 particularly at 54–5, 60–1 (Stephen J).

103 *Dinmore Meatworks Pty Ltd v Kerr* (1962) 108 CLR 628, 632 (Kitto, Windeyer and Owen JJ).

104 See Sykes and Walker (n 1) 743–5.

a chose in action,[105] the preferable view is that this is contrary to the very nature of a possessory lien – ie, that the property must have a physical manifestation.[106]

A possessory lienee must hold 'the interest' to benefit from the priority rule; however, this should not require them to maintain physical possession of the collateral, provided they still have legal possession.[107] Where a lienee retains legal possession but disposes of physical possession, there is nothing in the text of section 73(1) to suggest that the statutory priority rule should not continue to apply to the surviving lien, because the *interest* remains held by the lienee.[108] Although some United States authority suggests otherwise,[109] these decisions are based upon an alternatively worded provision which strongly emphasises 'possession',[110] and their interpretation of this to require 'physical possession' finds no justification in the language of section 73(1).

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105 See, eg, *Skinner v Trustee of the Property of Reed* [1967] Ch 1194, 1200 (Cross J); *Tibmor Pty Ltd v Nashlyn Pty Ltd* [1987] 1 Qd R 610, 612–13 (Moynihan J); *Thompson Brindal v McLachlan* [1999] SASC 189, [21] (Nyland J); *Re Victoria Station Corporation Pty Ltd (admins apptd)* (2018) 56 VR 26, 45 [100] (Robson J). See also *Re a Barrister and Solicitor* (1979) 40 FLR 26, 39 (Blackburn CJ, Connor and Davies JJ); *Johns v Law Society of New South Wales* [1982] 2 NSWLR 1, 18–19 (Hope JA); *Gilshenan & Luton v Federal Commissioner of Taxation* (1983) 74 FLR 398 (Andrew SPJ), 402–3; *Re Jalmoon Pty Ltd* [1986] 2 Qd R 264, 267 (Thomas J); *Kirk v Commissioner of Australian Federal Police* (1988) 19 FCR 530, 554–5 (Davies J); *Philippa Power & Associates v Primrose Couper Cronin Rudkin* [1997] 2 Qd R 266, 273 (Macrossan CJ and White J), 276 (Derrington J); *Magnamain Investments* [2008] QSC 245, [9]–[11] (Daubney J); *Re Mamounia Pty Ltd (in liq)* [2018] VSC 65.

106 *Galacoast Pty Ltd v McLeod* [2008] QSC 103, [24]–[26] (Skoien AJ), quoting FMB Reynolds, *Bowstead on Agency* (Sweet & Maxwell, 15th ed, 1985) 258; *Nickelby Pty Ltd v Holden* (Supreme Court of New South Wales, Young J, 31 March 1994) 6, discussed in *Active Property Marketing Services (Aust) Pty Ltd v Joelco Pty Ltd* (2007) Q ConvR 54-673, [23] (Wilson J); *WFM Motors Pty Ltd v Maydwell* (1994) 6 BPR 13381, 13386 (Young J); *Shand v MJ Atkinson Ltd (in liq)* [1966] NZLR 551, 559–60 (Turner J). Note however that the lien can extend to a chose in action embedded in a document, such as a negotiable instrument: *National Australia Bank Ltd v KDS Construction Services Pty Ltd* (1987) 163 CLR 668, 678–9 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ). Regarding solicitor's liens: see below Part II(B)(2).

107 *PPSA 2009* (Cth) s 73(1)(c); note McBain (n 69) 4.

108 *Dicas v Stockley* (1836) 7 Car & P 587; 173 ER 258, 260 (Littledale J); *Albermarle Supply* [1928] 1 KB 307, 314 (Lord Hanworth MR), 318 (Scrutton LJ); *Caldwell v Sumpters* [1972] Ch 478, 495–6 (Salmon LJ), 497 (Stamp LJ); *Bentley v Gaisford* [1997] 1 All ER 842, 846 (Sir Richard Scott V-C), 854 (Roch LJ), 857 (Henry LJ); *Re Ly; Ex parte Dixon v Ly* (1995) 62 FCR 432 (Beazley J); *White v Bini* [2003] FCA 669, [3]–[4] (Finkelstein J); *Bechara v Atie* [2005] NSWCA 268, [48] (Ipp, Tobias and McColl JJA); *Magnamain Investments* [2008] QSC 245, [18]–[22] (Daubney J).

109 *United States v Crittenden* 563 F 2d 679, 691 (Goldberg J) (5th Cir, 1977); *Re Glenn*, 20 BR 98, 100, but note 101 (Kelley J) (Tenn, 1982); distinguished in *Bellamy's Inc v Genoa National Bank; Re Borden*, 361 BR 489, 496–7 (8th Cir, 2007) (Kressel CJ, Schermer and Venters JJ); *M & I Western State Bank v Wilson*, 172 Wis 2d 357, 368–9 (Nettesheim PJ, Anderson and Snyder JJ) (Wis Ct App, 1992).

110 *UCC* § 9-333:

> (a) ["Possessory lien."]:
>
> In this section, "possessory lien" means an interest, other than a security interest or an agricultural lien:
>
> (1) which secures payment or performance of an obligation for services or materials furnished with respect to goods by a person in the ordinary course of the person's business;
>
> (2) which is created by statute or rule of law in favor of the person; and
>
> (3) whose effectiveness depends on the person's possession of the goods.
>
> (b) [Priority of possessory lien.]
>
> A possessory lien on goods has priority over a security interest in the goods unless the lien is created by a statute that expressly provides otherwise.

Section 73(1) will ordinarily make little to no difference to the previous position at general law.[111] Since the possessory lien is a common law interest, a bona fide lienee without notice already enjoyed priority over prior equitable interests;[112] and since a possessory lien can only be created with the 'authority' of the owner, it also already enjoyed priority over prior legal interests.[113]

However, where possessory liens are superseded by contractual interests conferring further rights upon the lienee,[114] the *Act* is likely to have significant consequences. As such interests no longer arise 'by operation of the general law', they constitute a security interest *and* fall outside section 73(1).[115] Viewed in the context of the *Act*, this is a logical result: a consensual interest should be a security interest, and thus should be subject to the ordinary *PPSA* priority rules.[116] However, somewhat counterintuitively, this also means that a lienee who obtains consent for their lien may be worse off than one who does not.[117] This may incentivise lienees to avoid mentioning the possessory lien in their contracts altogether, or at the very least to avoid contracting for further powers which are inconsistent with their common law lien (eg, a power of sale).[118] Ultimately, while discouraging lienees from defining the scope of their lien is undesirable, this appears to be an inevitable consequence of the scheme of the *Act*.

2 Solicitor's Liens

The solicitor's common law general lien ('solicitor's lien') falls within section 73(1). This lien shares most of its features with other possessory liens,[119] and will thus fall within the statutory priority rule for the same reasons. However, it does bear several unique attributes: for instance, it must be forfeited where a solicitor discharges their client or commits misconduct due to their duties as an officer of

111 Assuming possessory liens are limited to tangible property: see above nn 105–6.

112 See Sykes and Walker (n 1) 825–8, disapproving *Mercantile Credits Ltd v Jarden Morgan Australia Ltd* [1991] 1 Qd R 407 ('*Mercantile Credits*').

113 See generally Peden (n 55); *Green v All Motors Ltd* [1917] 1 KB 625, 630–1 (Swinfen Eady LJ), 632 (Bankes LJ), 633 (Scrutton LJ); *Albermarle Supply* [1928] 1 KB 307, 318; *Australian Guarantee Corp Ltd v Western Underwriters Insurance Ltd* [1988] 2 QD 119, 123 (Macrossan J); also Sykes and Walker (n 1) 825–8; *Fisher v Automobile Finance Company of Australia Ltd* (1928) 41 CLR 167, 175–6 (Isaacs J), 178 (Higgins J) ('*Fisher v Automobile*'); *Mercantile Credits* [1991] 1 Qd R 407.

114 *Seka Pty Ltd (in prov liq) v Fabric Dyeworks (Aust) Pty Ltd* (1991) 28 FCR 574, 576–7 (Pincus J); *Osborne Computer Corporation Pty Ltd v AirRoad Distribution Pty Ltd* (1995) 37 NSWLR 382, 389 (Rolfe J) ('*Osborne Computer*'); Sykes and Walker (n 1) 738.

115 *PPSA 2009* (Cth) ss 8(1)(c), 12(1), 73(1)(a)(ii); discussed in Allan (n 43) 338–9. See, eg, *NCO Finance Aust Pty Ltd v Australian Pacific Airports (Melbourne) Pty Ltd* [2013] FCCA 2274; *Cansearch Resources Ltd v Regent Resources Ltd* (2017) 283 ACWS (3d) 192, [41]–[42] (Campbell J) (Alberta Court of Queen's Bench).

116 *PPSA 2009* (Cth) ss 12(1), (2)(f).

117 Note Broderick, Morrison and Ramage (n 25) 387; but see *Australian Receivables Ltd v Tekitu Pty Ltd (deed admin apptd)* (2012) 260 FLR 243, 278 [143] (Ward J) ('*Tekitu*').

118 *Osborne Computer* (1995) 37 NSWLR 382. This represents another previously unimportant drafting consideration which the *Act* has made significant: see Nuncio D'Angelo and Helena Busljeta, 'The Trustee's Lien or Charge over Trust Assets: A *PPSA* Security Interest or Not?' (2011) 22(4) *Journal of Banking and Finance Law and Practice* 251, 268.

119 See, eg, *Coshott v Parker* [2018] FCA 596, [8] (Lee J), referred to with apparent approval in *Coshott v Parker* (2019) 268 FCR 288, 291 [18] (Gleeson, Thomas and Thawley JJ).

the court,[120] and it cannot be exercised over wills.[121] Additionally, the lien can be exercised over money held in trust accounts (by virtue of statute).[122]

While the impact of section 73(1) on the solicitor's lien is substantially similar to its impact on other possessory liens,[123] its application to this interest does create one unfortunate outcome. Where the solicitor's lien covers money in trust accounts, the priority conferred appears to contradict the publicity function underlying the *PPSA*, because third parties who wish to take security in the account will not be notified of the solicitor's existing interest through a search of the registry.[124] Nonetheless, as section 73(1) applies to interests other than in goods, this issue can only be resolved through statutory amendment.

3 Fruits of the Action Liens

Section 73(1) has significant priority consequences for the solicitor's fruits of the action lien. This lien is an interest held over monies, recovered on behalf of a client, as security for the solicitor's proper costs and disbursements.[125] It is of a fundamentally different nature to the solicitor's general lien: it arises in equity rather than at common law, and is of an 'active character' – ie, it is enforceable by a court order declaring a charge over the property.[126] Additionally, the lien does

120 *Robins v Goldingham* (1872) LR 13 Eq 440, 442 (Malins V-C); *Bolger v Bolger* (1985) 82 FLR 46, 49–50 (Buckley J); *Rafferty v Time 2000 West Pty Ltd [No 3]* (2008) 257 ALR 503, 511–12 [35]–[39] (Besanko J), citing *Helsop v Metcalf* (1837) 3 My & Cr 181; 40 ER 894, 896–7 (Lord Cottenham LC); *Bechara v Atie* [2005] NSWCA 268, [50] (McColl JA, Ipp JA agreeing at [1], Tobias JA agreeing at [2]).

121 *Balch v Symes* (1823) Turn & R 87; 37 ER 1028, 1030 (Lord Eldon LC).

122 *Legal Profession Act 2006* (ACT) s 229(1)(a); *Legal Profession Uniform Law 2014* (NSW) s 144(2)(a); *Legal Profession Act 2006* (NT) s 254(1)(a); *Legal Profession Act 2007* (Qld) s 258(1)(b); *Legal Practitioners Act 1981* (SA) sch 2 cl 22(1)(a); *Legal Profession Act 2007* (Tas) s 252(1)(a); *Legal Profession Uniform Law 2014* (Vic) s 144(2)(a); *Legal Profession Act 2008* (WA) s 225(1)(a); cited in Dal Pont (n 86) 525 n 36.

123 In particular, the same analysis concerning the ousting of the lien by contract applies: see above Part II(B)(1). To the extent the lien constitutes a statutory interest rather than one arising by operation of law, it is nonetheless covered by the statutory priority rule: *PPSA 2009* (Cth) s 73(1)(a)(i).

124 On the publicity function generally, see: Whittaker Report (n 4) 39–41 [4.1.2]; Duggan and Brown (n 2) 133–4 [5.4]–[5.7]; Cuming, Walsh and Wood (n 2) 8–9; cf *Innovation Credit* [2010] 3 SCR 3, 31 [55] (Charron J for the Court), quoting Jackson JA at first instance at [31]; but note the alternative argument, that perfection has a broader function than publicity: Sheelagh McCracken, John Stumbles and GJ Tolhurst, 'Title Transfer Collateral Arrangements under the *Personal Property Securities Act 2009* (Cth): Paper II Arrangements as Security Interests' (2015) 33(1) *Journal of Contract Law* 20, 29–30; Sheelagh McCracken, 'Getting to Grips with the Reforms to Personal Property Securities Law' (2011) 25(3) *Commercial Law Quarterly* 3, 6; *Graham v Portacom New Zealand Ltd* [2004] 2 NZLR 528, 532 [12] (Rodney Hansen J) ('*Graham v Portacom*'); *Innovation Credit* [2010] 3 SCR 3, 31 [19], 31 [21] (Charron J for the Court). This broader view of the function of perfection may be particularly appealing in Australia: note *PPSA 2009* (Cth) ss 25, 57(1) (ADI has control and thus super priority in ADI accounts), 300 (registration does not provide constructive notice).

125 *Welsh v Hole* (1779) 1 Dougl 238; 99 ER 155, 155–6 (Lord Mansfield); *Firth v Centrelink* (2002) 55 NSWLR 451, 462 [33] (Campbell J).

126 See *Bozon v Bolland* (1839) 4 My & Cr 354; 41 ER 138, 139 (Lord Cottenham LC); *Haymes v Cooper* (1864) 33 Beav 431; 55 ER 435, 436 (Romilly MR); *Ex parte Patience* (n 58) 100–2 (Jordan CJ); *Re a Barrister and Solicitor* (1979) 40 FLR 26, 39–40 (Blackburn CJ, Connor and Davies JJ); *Akki Pty Ltd v Martin Hall Pty Ltd [No 2]* (1994) 35 NSWLR 470, 473–4 (Windeyer J); *Twigg v Keady* (1996) 135 FLR 257, 269 (Fogarty J), 268–70 (Finn J), 289–90 (Kay J); *Firth v Centrelink* (2002) 55 NSWLR 451, particularly at 462–5 [33], [35] (Campbell J); *Tekitu* (2012) 260 FLR 243, 266–7 [86], [89]–[90] (Ward

not rely upon any form of possession or control for its existence.[127] It falls within the statutory priority rule since it arises by operation of law, in relation to the provision of legal services, in favour of the lawyers who provided the services.

The consequences of section 73(1) on this interest are observable in two circumstances. First, the lien now has priority over a secured party, of the solicitor's client, holding an interest in all present and future property; whereas at general law, priority would either turn upon who first gave notice of their claim,[128] or the solicitor would usually have ranked second as the holder of a subsequently acquired equitable interest.[129] Secondly, where a secured party holds a security interest in money, and that money is subsequently paid to the solicitor's client (in circumstances giving rise to the lien), the solicitor now has priority; whereas, at general law, priority either would turn upon who first gave notice of their claim, or the solicitor would usually have ranked second as the holder of a subsequently acquired equitable interest.[130] There does not appear to be any policy basis for these outcomes elevating the priority status of solicitors, particularly since the competing secured parties are unable to take any steps to protect their interests. However, as this outcome arises by virtue of section 73(1) applying to interests in property other than goods, it can only be resolved through statutory amendment.

4 Trustee's Liens

Section 73(1) confers priority upon the trustee's lien, which secures a trustee's right to indemnification for expenses properly incurred under a trust.[131] The lien is a proprietary right which has been described as a chose in action;[132] and as such, it

J). See also *Abdul-Karim v Attorney-General's Department* [1999] NSWSC 79, [26], [29]–[32] (Young J); *Karam v Palmone Shoes Pty Ltd [No 4]* [2016] VSC 261, particularly at [30], [33], [41]–[46] (Forrest J).

127 See, eg, *Firth v Centrelink* (2002) 55 NSWLR 451, 463–5 [35] (Campbell J).

128 *Dearle v Hall* (1828) 3 Russ 1; 38 ER 475.

129 It is unclear whether the rule in *Dearle v Hall* applies, or if the bona fide purchaser for value without notice rule applies, in such circumstances: noted by Campbell J (as he then was) in *Firth v Centrelink* (2002) 55 NSWLR 451, 464 [35](i) (who expressly noted the matter did not need to be resolved in that case). In support of the bona fide purchaser for value without notice rule applying, see: *Twigg v Keady* (1996) 135 FLR 257, 259 (Fogarty J), 261–70 (Finn J), cited in Dal Pont (n 86) 540.

130 See above n 129.

131 *Stott v Milne* (1884) 25 Ch D 710, 715 (Lindley LJ); *Jennings v Mather* [1902] 1 KB 1, 5 (Collins MR), 6 (Stirling LJ), 8 (Matthew LJ); *Savage v Union Bank of Australia Ltd* (1906) 3 CLR 1170, 1186–8 (Griffith CJ), 1191–3 (Barton J), 1196–7 (O'Connor J); *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319, 324 (Latham CJ), 335–6 (Dixon J) ('*Vacuum Oil*'); *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360, 367 (Stephen, Mason, Aickin and Wilson JJ) ('*Octavo Investments*'); *Re Enhill Pty Ltd* [1983] VR 561, 563–4 (Young CJ), 567 (Lush J) ('*Re Enhill*'); *Kemtron Industries Pty Ltd v Commissioner of Stamp Duties (Qld)* (1984) 15 ATR 627, 633 (McPherson J) ('*Kemtron Industries*'); *Buckle* (1998) 192 CLR 226, 245–7 [47]–[51] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Hayman v Equity Trustees Ltd* (2003) 8 VR 557, 569 [62] (Kellem J); *Federal Commissioner of Taxation v Bruton Holdings Pty Ltd (in liq)* (2008) 173 FCR 472, 485–6 [36] (Ryan, Mansfield and Dowsett JJ); *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* (2019) 93 ALJR 807, 819–20 [30]–[33] (Kiefel CJ, Keane and Edelman JJ), 828–30 [81]–[84] (Bell, Gageler and Nettle JJ), 838–41 [128]–[140] (Gordon J) ('*Carter Holt*'). See also D'Angelo and Busljeta (n 118) 255–8 (and citations therein).

132 *Octavo Investments* (1979) 144 CLR 360, 369–70 (Stephen, Mason, Aickin and Wilson JJ); *Re Enhill* [1983] VR 561, 569 (Lush J).

survives the termination of the trustee's office,[133] and is assignable.[134] Such liens fall within the statutory priority rule as they arise by operation of law, in relation to the provision of trustee services, in favour of the trustees who provide such services.

Whether a trustee's lien arises 'by operation of the general law' in some cases may turn upon an unsettled question of general law:[135] can the trustee's lien be ousted by the terms of a trust deed, or is it an inseparable incident of the trustee's office?[136] If it can be ousted by the trust deed, trustees (like possessory lienees) may be incentivised to avoid defining the scope of their lien in the trust deed.[137] Alternatively, if the lien cannot be ousted, a question arises as to whether trust deeds that confer wider powers than the equitable lien result in the lien no longer arising 'by operation' of the general law.[138] If this is the case, it is submitted that the bundle of rights constituting the general law trustee's lien should still be viewed as arising 'by operation of the general law', because if the equitable bundle of rights is viewed as so fundamental to the office of trustee that it cannot be ousted by the trust deed, it would be contradictory to assert that the bundle of rights could nonetheless be supplanted by it.

Where a trustee assigns their lien, the assignee will not enjoy the benefits of section 73(1), since the lien will no longer be held by the person that provided the goods or services giving rise to it.[139] No policy basis for this outcome is readily apparent, and indeed there appears to be no good reason why a trustee's lien should be conferred priority only if it is not assigned. This appears to be another unintended outcome arising from the statutory priority rule's application to interests other than those in goods; if the rule was so limited, trustees' liens would not enjoy priority over property such as bank accounts and shares, and thus the status quo would be largely unaffected.[140]

Trustees also appear to have gained an unintended windfall due to section 73(1), albeit one of lesser consequence than that gained by solicitors. Due to its equitable nature the trustee's lien would have been vulnerable to subsequent legal

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133 *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd* (2008) 74 NSWLR 550, 554 [19] (Brereton J) ('*Lemery Holdings*'); JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (8th ed, LexisNexis Butterworths, 2016) 513 [21-04].

134 Heydon and Leeming (n 133) 513 [21-04]; citing *Custom Creditor Corporation Ltd v Ravi Nominees Pty Ltd* (1992) 8 WAR 42.

135 *PPSA 2009* (Cth) s 73(1)(a)(ii).

136 See *Clark v Commissioner of Taxation* (2009) 77 ATR 460, 490–1 [119] (Greenwood J); *Moyes v J & L Developments Pty Ltd [No 2]* [2007] SASC 261, [38]–[40] (Debelle J); *Jessup v Queensland Housing Commissioner* [2002] 2 Qd R 270, 275 [14] (McPherson JA); *JA Pty Ltd v Jonco Holdings Pty Ltd* (2000) 33 ACSR 691, 713–14 [86]–[87] (Santow J); *Kemtron Industries* (1984) 15 ATR 627, 634 (McPherson J). Cf *RWG Management Ltd v Commissioner for Corporate Affairs* [1985] VR 385, 394–5 (Brooking J) ('*RWG Management*'). See also *Buckle* (1998) 192 CLR 226, 246–7 [50] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Carter Holt* (2019) 93 ALJR 807, 819 [30] (Kiefel CJ, Keane and Edelman JJ).

137 See D'Angelo and Busljeta (n 118) 258–9.

138 See ibid 266–8; also *RWG Management* [1985] VR 385, 394 (Brooking J).

139 *PPSA 2009* (Cth) s 73(1)(c).

140 Such property would constitute 'financial property' or 'intermediated security', and thus section 73(1) would not apply to interests in it if the provision was limited to interests in goods: ibid ss 10, 15.

interests at general law,[141] but section 73(1) now confers it with priority over *all* security interests – notwithstanding secured parties' inability to ascertain the existence of the lien, or to take steps to protect themselves. However, because in most cases the competing security interest will have been granted by the trustee itself, it will usually be unable to enjoy the benefits of the priority rule.[142] Interestingly, although the statutory review of the *Act* notes that a majority of submissions were of the view that a trustee's lien should rank behind a perfected security interest, no recommendation was made to exclude it from section 73(1).[143]

5 Maritime Liens (Salvage & Seafarer's)

Section 73(1) applies to some maritime liens – specifically, the salvage and seafarers' liens, which arise by operation of general law, in relation to the provision of either salvage or crew services, and are held by the provider of those services.[144] Due to the paramount importance attributed to the claims of salvagers and

141 The trustee's lien has been described as a 'first charge' on the trust assets: see, eg, *Re Exhall Coal Co Ltd* (1866) 35 Beav 449; 55 ER 970, 971–2 (Lord Romilly MR) ('*Re Exhall Coal*'); *Octavo Investments* (1979) 144 CLR 360, 367 (Stephen, Mason, Aickin and Wilson JJ); *Buckle* (1998) 192 CLR 226, 246 [49] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ). However, the lien has also been repeatedly described as equitable in nature, and the High Court has recently affirmed the description of the trustee's right of indemnity (which gives rise to the lien) as a beneficial interest enforceable by a court of equity: see, eg, *Lemery Holdings* (2008) 74 NSWLR 550, 553 [16] (Brereton J), citing *Octavo Investments* (1979) 144 CLR 360, 367, 370 (Stephen, Mason, Aickin and Wilson JJ) and *Buckle* (1998) 192 CLR 226, 246 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Carter Holt* (2019) 93 ALJR 807, 819 [32] (Kiefel CJ, Keane and Edelman), 829 [83] (Bell, Gageler and Nettle JJ), 429 [132] (Gordon J). In light of this, the preferable view is that the lien is an equitable interest constituting a first charge *over the interests of beneficiaries*, but not necessarily subsequent legal interest-holders: '[the trustees have] a lien for assets which takes priority over … *the assets of beneficiaries or others who stand in [their] situation*': *Vacuum Oil* (1945) 72 CLR 319, 335 (Dixon J) (emphasis added); 'this liability to repay and to indemnify him is the first charge on the property … anyone taking a charge upon or mortgage of the mine *from the cestui que trust* is bound': *Re Exhall Coal* (1866) 35 Beav 449; 55 ER 970, 971–2 (Lord Romilly MR) (emphasis added). Regarding when the trustee's equitable lien arises: see D'Angelo and Busljeta (n 118) 256–7, citing *Xebec Pty Ltd (in liq) v Enthe Pty Ltd* (1987) 18 ATR 893, 897 (Derrington J); *Trim Perfect Australia (in liq) v Albrook Constructions Pty Ltd* [2006] NSWSC 153, [20] (Austin J); *Zen Ridgeway Pty Ltd v Adams* [2009] QSC 117, [10] (Wilson J); *Re Dalewon Pty Ltd (in liq)* (2010) 79 ACSR 530, 533 [8] (McMurdo J); see also *Southern Wine Corporation (in liq) v Frankland River Olive Co Ltd* (2005) 31 WAR 162, 169 [30] (McLure JA); *Lemery Holdings* (2008) 74 NSWLR 550, 554 [19] (Brereton J).

142 *PPSA 2009* (Cth) s 73(1)(e).

143 Whittaker Report (n 4) 342–3 [7.8.1]. Although Whittaker suggests that the registration of financing statements against trustees (rather than against the trust's ABN) will solve a related issue whereby secured parties holding unperfected security interests might take advantage of section 73(1) in order to gain priority over secured parties holding perfected security interests, it is respectfully submitted that this does not resolve the separate question of whether a trustee's lien should have priority over a perfected security interest: at 194–7 [6.7.4.1], 342–3 [7.8.1].

144 *PPSA 2009* (Cth) ss 73(1)(a)–(c). See below Part III(B)(4); *The Sam Hawk* (2016) 246 FCR 337, 377–8 [144]–[146] (Allsop CJ and Edelman J); Martin Davies and Anthony Dickey, *Shipping Law* (Thomson Reuters, 4th ed, 2016) 154 [8.360]; Michael White, *Australian Maritime Law* (Federation Press, 3rd ed, 2014) 333; James O'Donovan, 'Maritime Claim Priorities under the *Personal Property Securities Act 2009*' (2011) 25 *Australian and New Zealand Maritime Law Journal* 118, 121. Note also *Navigation Act 2012* (Cth) ss 241(2)–(4). Note that, for a professional salvager, the provision of salvage services would probably be in the ordinary course of business per *PPSA 2009* (Cth) s 73(1)(b).

sailors,[145] maritime liens already enjoy priority over all other interests at general law,[146] and thus section 73(1) does not alter the status quo outcome.

6 Unpaid Vendor's Liens

Section 73(1) applies to the unpaid vendor's lien in goods, which arises where title has passed under a sale of property but payment has not yet been made. The lien arises under statute,[147] and allows a vendor to stop delivery if the buyer (or their agent) has not yet taken possession and/or to retain possession until payment is made.[148] It falls within the statutory priority rule as it arises automatically by operation of statute, in relation to the provision of the goods, in favour of the provider. If the unpaid vendor's lien is ousted by contract,[149] any new contractual lien will constitute a security interest and will fall outside section 73(1).[150]

Section 73(1) should have almost no impact on the outcome of competitions with statutory unpaid vendor's liens. This is because the lien in goods is already conferred with priority over creditors of the buyer,[151] and hence the status quo outcome should remain unchanged.[152]

C Conclusions on the Statutory Priority Rules

It appears that four of the five priority rules governing competitions with non-PPS interests should be relatively uncontroversial. Of those rules, section 73(2) (competitions with statutory interests) is likely to be particularly significant, since

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145 As well as those whose ships suffer damage in collisions, although their maritime liens do not fall within section 73(1): see below Part III(B)(4).

146 *The Tervaete* [1922] P 259, 270 (Scrutton LJ); *The Tolten* [1946] P 135, 150 (Scott LJ); *The Halycon Isle* [1981] AC 221, 233 (Lord Diplock), 244–5 (Lords Salmon and Scarman); *Patrick Stevedores No 2 Pty Ltd v Proceeds of Sale of Vessel MV Skulptor Konenkov* (1997) 75 FCR 47, 50–1 (Sheppard J) ('*Patrick Stevedores No 2*'); *The Sam Hawk* (2016) 246 FCR 337, 356 [61]–[63], 359–60 [79], 364–5 [99] (Allsop CJ and Edelman J). See also White (n 144) 111–12; Justice William Waung, 'Frank Stuart Dethridge Memorial Address 2004: Maritime Law of Priorities: Equity, Justice and Certainty' (2005) 19 *Maritime Law Association of Australia and New Zealand Journal* 9, 12.

147 *Sale of Goods Act 1954* (ACT) s 43; *Sale of Goods Act 1923* (NSW) s 42; *Sale of Goods Act 1972* (NT) s 42; *Sale of Goods Act 1896* (Qld) s 41; *Sale of Goods Act 1895* (SA) s 39; *Sale of Goods Act 1896* (Tas) s 44; *Goods Act 1958* (Vic) s 46; *Sale of Goods Act 1895* (WA) s 39. As to the possibility of an equitable lien over goods, see Justice JC Campbell, 'Some Historical and Policy Aspects of the Law of Equitable Liens' (2009) 83(2) *Australian Law Journal* 97, 107–10. The existence of the statutory lien likely renders this issue otiose: at 109–10.

148 See generally Allan (n 43) 359–75; Sykes and Walker (n 1) 741–2.

149 *Barclays Bank plc v Estates & Commercial Ltd* [1997] 1 WLR 415, 420–2 (Millett LJ); *CBFC Ltd v Corporate Consulting (Australia) Pty Ltd* [2010] QSC 395, [32]–[33] (Boddice J); *Sale of Goods Act 1923* (NSW) s 57; *Sale of Goods Act 1972* (NT) s 57; *Sale of Goods Act 1896* (Qld) s 56; *Sale of Goods Act 1895* (SA) s 54; *Sale of Goods Act 1896* (Tas) s 59; *Goods Act 1958* (Vic) s 61; *Sale of Goods Act 1895* (WA) s 54. See also Allan (n 43) 368.

150 As with the common law possessory lien: see above Part II(B)(1). But note that the contractual lien in such cases would be a PMSI capable of enjoying the relevant priority benefits so long as an appropriate registration was made on time: *PPSA 2009* (Cth) ss 14(1), 62–3.

151 *Sale of Goods Act 1954* (ACT) s 50(1); *Sale of Goods Act 1923* (NSW) s 49; *Sale of Goods Act 1972* (NT) s 49(1); *Sale of Goods Act 1896* (Qld) s 48(1); *Sale of Goods Act 1895* (SA) s 46; *Sale of Goods Act 1896* (Tas) s 51; *Goods Act 1958* (Vic) s 53; *Sale of Goods Act 1895* (WA) s 46.

152 But note section 73(1) will be enlivened in a competition between a vendor exercising their statutory lien, and a secured party who acquired a security interest *prior* to the vendor acquiring the goods themselves.

its widespread implementation on both a state and federal level should provide a mechanism for resolving disputes between security interests and statutory non-PPS interests.[153] Additionally, although section 74 (competitions with execution creditors' interests) may be of less benefit to execution creditors than it may first appear, any detriment suffered by such parties is ultimately an inevitable consequence of the 'fixed' nature of the security interest.

The priority rule contained in section 73(1), however, may create unintended and unprincipled consequences. This flows from the drafting of the provision so as to attempt to codify the elements of a common law possessory lien, which opens the provision up to interpretations contrary to its purpose.[154] Additionally, the priority rule's application to non-PPS interests in both goods *and* choses in action significantly widens its scope by reference to its overseas counterparts,[155] and may lead to entirely unprincipled outcomes. Although these consequences cannot be avoided through interpretation due to the drafting of section 73(1), it is submitted that these issues might be resolved through two relatively simple statutory amendments. First, replacing subsections (a)–(c) with words to the effect of the following would reduce the potential for unnecessary litigation: 'the priority interest is a possessory lien arising in the ordinary course of business'. Secondly, and perhaps even more significantly, limiting the provision so as to apply only to non-PPS interests *in goods* would substantially re-align the priority rule with its policy rationale of protecting repairer's liens. This could be achieved by simply replacing the word 'collateral' in the first line of section 73(1) with 'goods'. It is submitted that even if only the latter of these proposed amendments is implemented, this would substantially ameliorate the potential for section 73(1) to create unprincipled outcomes.

A number of general law interests which are not covered by the statutory priority rules discussed above might also come into conflict with a security interest. These include general law property interests which are not 'liens', and liens that do not arise in the ordinary course of business.[156] These competitions fall to be determined by the general law priority rules, which are addressed in Part III.

III COMPETITIONS GOVERNED BY THE GENERAL LAW

This Part examines those competitions with non-PPS interests which fall outside the statutory priority rules, and are thus governed by the general law priority rules.[157] Since general law competitions turn heavily upon the legal or equitable nature of the competing interests, the following question becomes paramount: are all security interests legal in nature, or could a security interest

153 See, eg, *Sparrow Electric* [1997] 1 SCR 411; *Innovation Credit* [2010] 3 SCR 3; *Radius Credit* [2010] 3 SCR 38; *Fisk v A-G (NZ)* [2016] NZAR 551.

154 See above Part II(A)(5). See, eg, *Tasman Logistics v Seaco* [2020] VSC 100, [115] (Garde J), discussed in Part II(A)(5)(a) above.

155 *PPSA* (Sask) s 32; *PPSA* (Ont) s 31; *PPSA* (NZ) s 93; *UCC* § 9-333.

156 *PPSA 2009* (Cth) s 73(1)(b).

157 Ibid s 254; Explanatory Memorandum: Consequential Amendments (n 14) 33 [8.73].

which is equitable at general law retain that characterisation? With respect to the latter option, the general law nature of the security interest would only be effective for the limited purpose of competitions with non-PPS interests falling outside sections 73–4: where two security interests come into conflict, or where the statutory priority rules apply to a competition with a non-PPS interest, it is unequivocally clear that the *Act* determines which interest prevails, and it does not distinguish between legal or equitable interests.

Section A examines whether all security interests are legal, or whether they retain their general law legal or equitable characterisation, as a question of statutory interpretation. This includes consideration of the text, context and purpose of the *Act*, and the overseas case law and its applicability in an Australian context. It also examines how this issue is affected by the two conceptual models of the security interest which have been advanced in the Australian literature thus far. Section B then applies both options to those non-PPS interests most likely to come into conflict with a security interest, and considers which is most likely to lead to desirable policy outcomes.

A Examining the Juridical Nature of the Security Interest

1 Text, Context and Purpose

Whether all security interests are legal in nature, or retain their general law legal or equitable characterisation, is a question of statutory interpretation; it must be resolved by reference to the text, context, and purpose of the *PPSA*.

(a) Text

The provision defining the security interest is silent as to its general law juridical nature.[158] As such, the operative provision is section 254:

> 254 Concurrent operation – general rule
>
> (1) This *Act* is not intended to exclude or limit the operation of any of the following laws (a *concurrent law*), to the extent that the law is *capable of operating concurrently* with this *Act*:
>
> (a) a law of the Commonwealth (other than this *Act*);
>
> (b) a law of a State or Territory;
>
> (c) the general law.
>
> …
>
> (3) To avoid doubt, this section does not apply to a law of a State or Territory, or the general law, to the extent that there is a *direct inconsistency* between this *Act* and that law.[159]

It is worth noting that the wording of subsections (1) and (3) appear to impose a more stringent test than the ordinary Australian principles of statutory interpretation with respect to preserving the general law,[160] and also than their

158 *PPSA 2009* (Cth) s 12.

159 Ibid s 254 (emphasis added).

160 *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J), quoting J Anwyl Theobald, *On the Interpretation of Statutes by the Late Sir Peter Benson Maxwell* (Sweet & Maxwell, 4th ed, 1905) 122; also *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625, 635–6 (Mason CJ,

overseas counterparts which either contain no analogous provision,[161] or a less strongly worded one.[162]

Consequent to section 254(1)(c), it is contended that the general law *nature* of the security interest should be preserved, because it is 'capable of operating concurrently' with the *Act*. No particular provision of the *Act* unequivocally renders the security interest incapable of retaining its general law nature. Where a competition arises between two security interests, or a competition with a non-PPS interest falls within the statutory priority rules in sections 73–4, the text of the *PPSA* is undoubtedly inconsistent with the general law priority rules;[163] and such competitions are thus determined in accordance with the statutory rules, irrespective of the legal or equitable nature of the interests in question. However, where a competition with a non-PPS interest falls outside these statutory priority rules, no 'direct inconsistency' is created such that the security interest cannot retain its general law legal or equitable character – at least for the limited purpose of those competitions.[164]

Although section 273 of the *Act* might be said to weigh against this conclusion, textual analysis of the provision says otherwise: 'The fact that title to collateral is in a secured party rather than a grantor does not affect the application of any provision of this *Act* relating to rights, duties, obligations and remedies'.[165]

The wording of this section is focused upon 'the application of any provision of this *Act*'. Since there are no provisions that preclude the security interest retaining its general law legal or equitable character for the limited purposes outlined above, this wording is insufficient to conclude that all security interests must be legal. As such, this provision may form part of a contextual or purposive constructive argument to this effect, but its text is insufficient to resolve the issue in and of itself.

(b) Context and Purpose

Although some contextual and purposive arguments suggest the security interest is 'incapable' of retaining its general law legal or equitable nature, it is submitted that these are insufficient to meet the high bar imposed by section 254.

The most significant argument in this vein concerns the 'unitary nature' of the security interest. On this argument, since the *Act* does away with the consequences of the 'form' of security, all security interests should have the same characteristics

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Deane, Dawson, Toohey and Gaudron JJ); see also *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2011] 2 AC 15, 29–32 [27]–[34] (Lord Dyson JSC).

161 *PPSA* (NZ); note Michael Gedye, Ronald CC Cuming and Roderick J Wood, *Personal Property Securities in New Zealand* (Thomson Brookers, 2002) 289.

162 *PPSA* (Sask) s 65(2); *UCC* § 1-103(b); cf *PPSA* (Ont) s 72: 'Except in so far as they are inconsistent *with the express provisions* of this *Act* …' (emphasis added). It is submitted that this is less stringent than the word 'capable'.

163 *PPSA 2009* (Cth) pt 2.6 (competitions between two security interests), ss 73–4 (competitions between a security interest and a non-PPS interest).

164 Ibid s 254(3).

165 Ibid s 273.

and thus should all be treated as legal interests.[166] However, it has also been argued that the 'unitary' function of the *Act* can be more narrowly interpreted: the *Act*'s functional approach might only require that all security interests be subject to the same statutory rules (where they apply) – which does not mean that every such interest must be treated identically for all purposes.[167] On this view, a security interest might retain its general law legal or equitable character, but this would only come into play when a competition falls outside the statutory rules. It should be emphasised that this would not cause the security interest to be 'a chameleon having one set of characteristics solely for the purposes of the personal property security legislation and another set of characteristics for the purposes outside the statute',[168] because the security interest would *always* retain its general law legal or equitable characterisation – albeit that this characterisation would be rendered meaningless for intra-*Act* competitions.[169] Nor would it create 'a dual system for determining claims over shared collateral over personal property depending on whether each or only one of the claims over the shared collateral is or is not subject to the *PPSA*',[170] because the fact that certain competitions with non-PPS interests are determined by the general law means that such a dual system already exists – and as such, the security interest retaining its general law characterisation would simply affect which rules in that system apply. Finally, to the extent that this might be said to preserve the 'form' of a security interest for purposes outside the *Act*, this is also not contrary to the unitary regime, because the general law

166 See *Innovation Credit* [2010] 3 SCR 3, 25 [42] (Charron J for the Court), quoted in *Stiassny v Commissioner of Inland Revenue* [2013] 1 NZLR 453, 477 [51] (Blanchard J for the Court). For more general discussion concerning the 'unitary' nature of the security interest, see, eg, *Waller v New Zealand Bloodstock Ltd* [2006] 3 NZLR 629, 633 [13] (Robertson and Baragwanath JJ) ('*Waller v Bloodstock*'); *Lewis v LG Electronics Australia Pty Ltd* (2014) 291 FLR 407, 412 [30] (Sifris J) ('*Lewis v LG*'); *Hamersley WASC* (2017) 52 WAR 90, 109 [79] (Tottle J); Whittaker Report (n 4) 39 [4.1.1]; Mirzai and Harris (n 40) xxxiii, 45, 57–9 [12.5.1.2]; Cuming, Walsh and Wood (n 2) 116–17; Ronald CC Cuming, Catherine Walsh and Roderick J Wood, 'Secured Transactions Law in Canada: Significant Achievements, Unfinished Business and Ongoing Challenges' (2011) 50(1) *Canadian Business Law Journal* 156, 166; Gedye, Cuming and Wood (n 161) 4–5, 20–1.

167 See, eg, Diccon Loxton, Sheelagh McCracken and Andrew Boxall, '*PPSA* Models: A Minimalist Approach' (2018) 32(1) *Commercial Law Quarterly* 3, 4–5 [2.1] ('A Minimalist Approach') (in the context of whether grantors are deemed owners for the purposes of attachment); Sheelagh McCracken, John Stumbles and GJ Tolhurst, 'Title Transfer Collateral Arrangements under the *Personal Property Securities Act 2009* (Cth): Paper I Setting the Scene' (2015) 33(1) *Journal of Contract Law* 1, 8 n 31 (in the context of whether all security interests are charges). Note that this more limited view of the unitary nature of the security interest might not necessarily be exclusive to the 'minimalist model': see Adam Waldman, 'Conceptual Models of the *PPSA* Security Interest: Moving Beyond the Unitary/Minimalist Dichotomy' (2020) 31(3) *Journal of Banking and Finance Law and Practice* 231, 246–52, 255–6.

168 *Hamersley WASC* (2017) 52 WAR 90, 165 [360] (Tottle J), quoting Stumbles, 'The Extended Reach' (n 10) 454 (in the context of holding that a security interest cannot retain the 'floating' characteristic of a floating charge, because this would cause it to be a 'proprietary interest' for some purposes but not others). Note that there is no inconsistency with all security interests being 'fixed', but nonetheless retaining their general law legal or equitable character: a security interest remaining 'floating' for some purposes but being 'fixed' for others is incompatible with the wording of section 19, because this would cause the interest not be 'attached to the collateral' for some purposes; a security interest retaining its legal/equitable nature is compatible with the wording of the *Act*, albeit that the consequences are rendered redundant for those competitions governed by the statutory priority rules.

169 And those governed by sections 73–4.

170 Stumbles, 'The Extended Reach' (n 10) 455.

characterisation of a security interest is indisputably relevant in determining other issues not governed by the *Act* such as taxation;[171] in fact, even in the Canadian context where the wider view of the unitary regime is orthodox, the 'form' of a security interest may remain relevant for the purposes of federal statutes which refer to particular types of property interests.[172]

Another argument that might be advanced against the retention of the security interest's general law legal or equitable nature concerns international coherency. On this argument, Australia should construe all security interests as legal interests because Canada did so,[173] and because various advantages flow from maintaining international coherency between PPS jurisdictions.[174] However, Australian principles of statutory interpretation characterise precedents as mere contextual aids,[175] particularly if the precedent in question does not concern exactly the same statute.[176]

It might also be argued that all security interests should be legal in nature as this aligns with the *PPSA*'s purpose of fostering simplicity.[177] However, it is difficult to see how such an argument, which might be characterised as purposive, could overcome the stringent test imposed by section 254.

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171 Noted in Loxton (n 43) 178.

172 Discussed in Roderick J Wood, 'The Definition of Secured Creditor in Insolvency Law' (2010) 25(3) *Banking and Finance Law Review* 341; Roderick J Wood, 'The Structure of Secured Priorities in Insolvency Law' (2011) 27(1) *Banking and Finance Law Review* 25.

173 See below Part III(A)(2); discussing *Innovation Credit* [2010] 3 SCR 3; *Radius Credit* [2010] 3 SCR 38.

174 Arguments in this vein, although not specifically concerning the general law nature of the security interest, are advanced in: Duggan, 'Trials and Tribulations' (n 34) 280; Duggan, 'The Australian *PPSA* from a Canadian Perspective' (n 34) 60; Duggan, 'Some Canadian *PPSA* Cases' (n 43) 173; Craig Wappett and Anthony Duggan, 'Rights in Collateral under the *PPSA*: Rebutting the Minimalist Approach' (2019) 30(3) *Journal of Banking and Finance Law and Practice* 169, 181.

175 *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259, 270 [30]–[31] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) ('*Walker Corporation*'); *Marshall v Director-General, Department of Transport* (2001) 205 CLR 603, 632–3 [62] (McHugh J) ('*Marshall v Director-General*'); *Ogden Industries Pty Ltd v Lucas* [1970] AC 113, 127 (Lord Upjohn); *Damjanovic & Sons Pty Ltd v Commonwealth* (1968) 117 CLR 390, 408–10 (Windeyer J); Justice John Middleton, 'Statutory Interpretation: Mostly Common Sense?' (2016) 40(2) *Melbourne University Law Review* 626, 632; Sir Anthony Mason, 'Legislative and Judicial Law-Making: Can We Locate an Identifiable Boundary?' (2003) 24(1) *Adelaide Law Review* 15, 23–5; cf *Wilson v Anderson* (2002) 213 CLR 401, 420 [15] (Gleeson CJ); *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 452 (Brennan J); Perry Herzfeld, Thomas Prince and Stephen Tully, *Interpretation and Use of Legal Sources: The Laws of Australia* (Thomson Reuters, 2013) 641–2; Stephen Gageler, 'Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process' (2011) 37(2) *Monash University Law Review* 1.

176 *Hamersley WASC* (2017) 52 WAR 90, 109 [84] (Tottle J); *Walker Corporation* (2008) 233 CLR 259, 270 [30]–[31] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Marshall v Director-General* (2001) 205 CLR 603, 632–3 [62] (McHugh J).

177 On simplicity and the *PPSA* more generally, see *Samwise Holdings Pty Ltd v Allied Distribution Finance Pty Ltd* (2018) 341 FLR 321, 326 [37] (Doyle J); *Power Rental Op Co Australia, LLC v Forge Group Power Pty Ltd (in liq) (recs and mgrs apptd)* (2017) 93 NSWLR 765, 784 [83] (Bathurst CJ, Beazley P and Ward JA); *Lewis v LG* (2014) 291 FLR 407, 412 [29] (Sifris J); *Agricultural Credit Corporation of Saskatchewan v Pettyjohn* (1991) 79 DLR (4d) 22, [52] (Sherstobitoff and Vancise JJA) (Saskatchewan Court of Appeal); *Healy Holmberg Trading Partnership v Grant* [2012] 3 NZLR 614, 627 [58] (O'Regan P, Stevens and White JJ); Anthony Duggan, 'Dropped Hs and the *PPSA*: Lessons from the *Fairbanx* Case' (2011) 34(2) *University of New South Wales Law Journal* 734, 745; Whittaker Report (n 4) 55–6 [4.3.1.2]; Mirzai and Harris (n 40) xxv.

Consequently, no clear and persuasive contextual or purposive interpretation is available, and it is submitted that the conclusion reached through a textual analysis is preferable: the security interest can retain its general law legal or equitable character.

2 The Canadian Authorities

In two joint decisions, the Supreme Court of Canada held that all security interests must be legal in nature. *Bank of Montreal v Innovation Credit Union* [2010] 3 SCR 3 and *Royal Bank of Canada v Radius Credit Union* [2010] 3 SCR 38 each concerned a competition between a prior security interest, and a subsequently acquired statutory interest arising under the Canadian *Bank Act*, SC 1991, c 46 ('*Bank Act*'). In both cases the security interests were unperfected at the relevant time, but appropriate registrations were made in respect of the *Bank Act* interests.[178] The Supreme Court of Canada held that the earlier security interests had priority, notwithstanding their unperfected status, by resorting to the general law priority principles. In doing so, the Court held that the security interest must be a legal interest, and its two key reasons for this conclusion can be found in the following paragraph:

> Two characteristics of the *PPSA* are relevant for the present case. First, it is clear that *PPSA* security interest, just as the *Bank Act* security interest, is a *statutorily created interest and, as such, an interest recognised at law*. While some of the historical forms of security created equitable rather than legal interests, *the effect of the PPSA's functional approach, which covers all of these antecedent security interests, is to treat them all equally as* '*security interests*' under the *PPSA*.[179]

This paragraph appears to contain two reasons for the conclusion that all security interests must be legal in nature. The first reason relies upon a simple application of first principles: a security interest is a statutory interest, and thus would be enforced by a pre-fusion common law court, and thus must be a legal interest.[180] However, in an Australian context, this conclusion might be undermined by section 254(1), which states that the general law must be preserved to the extent that it is 'capable of operating concurrently with this *Act*'.[181] Given Parliament's unlimited legislative power,[182] a statutory instruction can override this first principles argument; and it is submitted that, since the security interest can retain its general law characterisation without creating a 'direct inconsistency' with the provisions of the *Act*,[183] the preferable construction is that its general law

178 *Bank Act*, SC 1991, c 46 ('*Bank Act*'). The security interest arose under the *PPSA* (Sask) in both cases.

179 *Innovation Credit* [2010] 3 SCR 3 [42] (Charron J for the Court) (emphasis added), affirmed in *i Trade Finance Inc v Bank of Montreal* [2011] 2 SCR 360, [61] (Deschamps J) ('*i Trade*'). Note also that the second sentence of this extract was quoted by the Supreme Court of New Zealand in *Stiassny v Commissioner of Inland Revenue* [2013] 1 NZLR 453, 477 [51] (Blanchard J for the Court) (in the context of whether a provision conferring priority upon a creditor who already received payment was applicable).

180 Similar arguments have been advanced in an Australian context: see Loxton (n 43) 180–1, citing *Supreme Court of Judicature Act 1873*, 36 & 37 Vict, c 66 and *Supreme Court of Judicature Act 1875*, 38 & 39 Vict, c 77; McCracken, 'Identifying Some Essential Attributes' (n 43) 164–5.

181 Discussed in Part III(A)(1)(a) above.

182 Subject of course to constitutional limits.

183 See above Part III(A)(1)(a).

character is preserved.[184] Interestingly, although the Supreme Court of Canada remarked that construing the security interest as a legal interest might generate 'commercially absurd results',[185] no analogous argument was considered[186] – perhaps simply because no such submissions were made to the Court, with the arguments instead focusing upon reading in a 'first-to-register' principle between the provincial *Personal Property Security Act*, SS 1993, c P-6.2, and the federal *Bank Act*.[187]

The Supreme Court of Canada's second reason relies upon the 'unitary nature' argument discussed above.[188] For the reasons advanced there concerning the alternative, more limited interpretation of this 'unitary nature', it is submitted that this is insufficient to overcome the test imposed by section 254. Consequently, it is submitted that the Canadian authorities' reasoning is not convincing in an Australian context.

3 Compatibility with the Existing Models of the Security Interest

The Australian literature thus-far contains two models conceptualising the security interest: the 'unitary' model and the 'minimalist' model.[189] It is expected that a preference for one of these models will be added into the Explanatory Memorandum for the *PPSA*, when amendments are made consequent to the statutory review of the *Act*.[190] Without intending to wade into the debate concerning which model should be adopted, or indeed whether this is an appropriate method of resolving the issues the models give rise to at all, this section seeks to examine

184 *PPSA 2009* (Cth) s 254(3).

185 *Innovation Credit* [2010] 3 SCR 3, 8–9 [4]. In the circumstances, the Court was referring to an outcome where an unperfected interest for which no registration had been made (the security interest) attained priority over an interest for which registration had been made (the *Bank Act* interest).

186 Note *PPSA* (Sask) s 65(2); also *PPSA* (Ont) s 72. This argument might be more compelling in an Australian context, due to the more stringently worded Australian provision: *PPSA 2009* (Cth) s 254(1), (3) (discussed in Part III(A)(1)(a) above).

187 *Innovation Credit* [2010] 3 SCR 3, 26–9 [44]–[49], 30–4 [52]–[61] (Charron J for the Court); *Radius Credit* [2001] 3 SCR 38 43–4 [4]–[6] (Charron J for the Court). Contrast to *Fisk v A-G (NZ)* [2016] NZAR 551, where the New Zealand High Court resolved a competition between a security interest and a statutory charge under the *Customs and Excise Act 1996* (NZ) by construing that legislation intended to impliedly grant priority to the charge, and thus avoided confronting the juridical nature of the security interest altogether.

188 See Part III(A)(1)(b).

189 These are also known as the 'recharacterisation' and 'possession' models respectively. This nomenclature is adopted with the intention of not expressing a preference for either model: note Loxton, McCracken and Boxall, 'A Minimalist Approach' (n 167) 4–5 [2.1]; Wappett and Duggan (n 174) 170. Note also the companion papers to 'A Minimalist Approach': Diccon Loxton, Sheelagh McCracken and Andrew Boxall, 'Chains of Leases: Aligning *PPSA* Models with Commercial Expectations' (2018) 32(2) *Commercial Law Quarterly* 3; Diccon Loxton, Sheelagh McCracken and Andrew Boxall, '*PPSA* Models: Easy as ABCD?' (2018) 32(3) *Commercial Law Quarterly* 52. See also, in response to Wappett and Duggan (n 174): Diccon Loxton, Sheelagh McCracken and Andrew Boxall, 'Securities and Mortgages: Rights in the Collateral under the *PPSA*: A Minimalist Response' (2020) 30(4) *Journal of Banking and Finance Law and Practice* 355 ('A Minimalist Response').

190 Whittaker Report (n 4) 118 [5.1.2.3]; noted in Loxton, McCracken and Boxall, 'A Minimalist Approach' (n 167) 3 [1.1]; Wappett and Duggan (n 174) 169; Loxton, McCracken and Boxall, 'A Minimalist Response' (n 189).

the compatibility of each model with the proposition that the security interest might retain its general law legal or equitable character.[191]

(a) Unitary Model

Under the unitary model, non-owner grantors are deemed to be owners such that they have sufficient 'rights in the collateral' to grant a security interest that can attach to the whole of the property,[192] whereas at general law they would be limited by the principle that a person cannot grant a greater interest than they have.[193] Following from this, some take the view that secured parties' remaining interests are characterised as charges.[194] On such a view of this model, all security interests must be of the same juridical nature, because it would be inconsistent to say that all such interests are charges whilst also saying that their legal or equitable nature depends upon their general law form. As such, all security interests must be legal, because characterising all security interests as equitable would have significant unintended consequences.[195]

However, the unitary model is also open to an alternative view under which the security interest is capable of retaining its general law juridical nature. On this alternative view, a non-owner grantor is still deemed to be an owner, but the secured party's interest is conceptualised in accordance with its general law nature rather than (necessarily) as a charge.[196] Because this does not require all security interests to be charges, if this view of the model is accepted then all security interests might be legal in nature *or* they might retain their general law legal or equitable nature.

(b) Minimalist Model

Under the minimalist model, a non-owner grantor with legal possession of goods may hold sufficient 'rights in the collateral' for attachment to occur over the

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191 Elsewhere the writer has argued that the models need not be viewed as dichotomy, and that the proposed solution of expressing a preference for one of the models in the Explanatory Memorandum is inappropriate: see Waldman (n 167).

192 *PPSA 2009* (Cth) s 19(2).

193 See Wappett and Duggan (n 174) 170–1; Whittaker Report (n 4) 115–18 [5.1.2]; 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) 34(2) *University of New South Wales Law Journal* 524, particularly at 543–5 ('The Scope of Rights in the Collateral'). See also *Re Giffen* [1998] 1 SCR 91, [36]–[37] (Iacobucci J); *Graham v Portacom* [2004] 2 NZLR 528, 534 [19], 537 [28] (Rodney Hansen J); *Waller v Bloodstock* [2006] 3 NZLR 629, 649 [74]–[76] (Baragwanath J), 651–4 [85]–[92] (William Young J).

194 Wappett and Duggan (n 174) 174; Gedye, Cuming and Wood (n 160) 73–4; *Innovation Credit* [2010] 3 SCR 3, 25–6 [43], 28–9 [47]–[48] (Charron J for the Court); *Radius Credit* [2010] 3 SCR 38, 56–7 [31] (Charron J for the Court); *Sparrow Electric* [1997] 1 SCR 411, 455 [53]–[54] (Gonthier J). This can be seen to flow from the view that the grantor's rights constitute ownership: since the secured party is left with a hypothecary interest, it *must* be a charge, which is the form of the hypothecation in common law systems.

195 For example, consider a competition between a security interest that is a legal interest at general law, and a non-PPS interest, that falls outside of *PPSA 2009* (Cth) sections 73–4. In this competition, there is no policy reason to characterise the security interest as equitable and thus weaken its priority prospects.

196 See further Waldman (n 167) 246–52, 255–6.

whole of the property,[197] without the need to deem the grantor an owner. This is because, as a question of statutory construction, 'possession' falls within the meaning of 'rights in the collateral' (noting particularly that a 'proprietary right' is not limited to one of ownership at general law),[198] and also because section 19(5) says so with respect to certain transactions. Consequently, not all security interests must be characterised as charges; and thus it is possible that all security interests might be legal in nature *or* that they might retain their general law legal or equitable character.

(c) Some Further Remarks on the Models

The above analysis might be seen to affect the preferability of the existing models of the security interest in two ways. On the one hand, on the first view of the unitary model discussed above, certainty is created with respect to how the security interest is characterised: it is legal in nature. This might weigh in favour of this view of the unitary model. On the other hand, under the minimalist model and the alternative view of the unitary model discussed above, it remains possible that the security interest might retain its general law legal or equitable nature. Since this appears to be preferable as a question of interpretation,[199] and with respect to the policy outcomes likely to be generated in competitions where the issue is pertinent,[200] this might be seen to weigh in favour of the minimalist model or this alternative view of the unitary model.

B Applying Both Options to Competitions with Non-PPS Interests

This section applies both options concerning the juridical nature of the security interest to competitions with those non-PPS interests most likely to be affected by the issue. It considers which option is most likely to lead to desirable policy outcomes, and whether this is consistent with the conclusion drawn above when the issue was approached as a question of statutory interpretation.

1 Overview of the General Law Priority Rules

Before examining those competitions between security interests and non-PPS interests that are governed by the general law, a brief review of the general law priority rules is warranted.[201]

In a competition between two equitable interests: the first in time wins, *unless* it is not the 'better equity'.[202] Although it has been said that whether an equity is

197 *PPSA 2009* (Cth) s 19(2).

198 Loxton, McCracken and Boxall, 'A Minimalist Approach' (n 167) 7–13, particularly at [3.2]; Loxton, McCracken and Boxall, 'A Minimalist Response' (n 189) 356–7. For instance, even wrongful possession may confer an 'estate' or 'interest' in property: *Wheeler v Baldwin* (1934) 52 CLR 609, 632–3 (Dixon J). See also Heydon, Leeming and Turner (n 38) [4-005]–[4-015]; *Yanner v Eaton* (1999) 201 CLR 351, 365–7 [17]–[20] (Gleeson CJ, Gaudron, Kirby and Hayne JJ), 388–9 [85]–[86] (Gummow J); *Re Celtic Extraction* [2001] Ch 475, 486–7 [26] (Morritt LJ).

199 See above Part III(A)(1).

200 See below Part III(B).

201 See generally Sykes and Walker (n 1) 382–407, 800; Heydon, Leeming and Turner (n 38) ch 8.

202 *Heid v Reliance Finance Corporation Pty Ltd* (1983) 154 CLR 326, 333–5 (Gibbs CJ), 339, 341 (Mason and Deane JJ); *Latec Investments v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265, 276 (Kitto J);

'inferior' is a question incapable of exhaustive definition,[203] this does not mean it is a discretionary or even an uncertain question, because principles of general application (and of specific application to particular equitable interests) are capable of articulation.[204] In a competition between a prior equitable interest and a subsequent legal interest: the subsequent legal interest wins, *unless* it was acquired other than as a bona fide purchaser for value without notice.[205] In a competition between a prior legal interest and a subsequent equitable interest: the prior legal interest wins, *unless* the legal interest-holder's conduct led to the creation of the equitable interest.

Different rules apply to competitions between interests in certain choses in action such as debts. Where a competition arises between two successive equitable assignees, priority is determined by the order in which notice to the fundholder was provided, in accordance with the rule in *Dearle v Hall*.[206] It is unsettled whether a competition between a legal and an equitable interest in a chose in action is determined by the rule in *Dearle v Hall*, or by the ordinary general law priority rules.[207] If the former is correct, then priority competitions between a security interest and a non-PPS interest in a debt will be unaffected by whether all security interests are characterised as legal interests, because either way the rule in *Dearle v Hall* will apply. If the latter is correct, then the ordinary general law priority rules will apply to competitions between a legal and equitable interest in a chose in action, and the general analysis contained below will be equally applicable to such competitions. Additionally, it bears mentioning that irrespective of whether all security interests are characterised as legal interests the rule in *Dearle v Hall* is significantly curtailed, because assignments of debts which fall within the definition of 'accounts' will typically be security interests under section

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Abigail v Lapin (1934) 51 CLR 58, 63 (Lord Wright); *Barry v Heider* (1914) 19 CLR 197, 210–11 (Griffith CJ), 216–17 (Isaacs J).

203 For example, *Lapin v Abigail* (1930) 44 CLR 166, 185–6 (Isaacs J).

204 See generally Heydon, Leeming and Turner (n 38) 329–35 [8-030]–[8-085]. The rigidity of equitable principle in Australia may further mitigate this concern: Andrew Butler and Tim Miller, 'Thoughts on Equity in New Zealand and New South Wales' in Jamie Glister and Pauline Ridge (eds), *Fault Lines in Equity* (Hart Publishing, 2012) 237; Joshua Getzler, 'Am I My Beneficiary's Keeper? Fusion and Loss-Based Fiduciary Remedies' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook, 2005) 243 n 11.

205 See Heydon, Leeming and Turner (n 38) 352–61 [8-240]–[8-300] (and cases cited therein).

206 *Dearle v Hall* (1828) 3 Russ 1; 38 ER 475. See generally ibid 338–49 [8-100]–[8-210]; John De Lacy, 'Reflections on the Ambit of the Rule in *Dearle v Hall* and the Priority of Personal Property Assignments: Part One' (1999) 28(1) *Anglo-American Law Review* 87, 87–91.

207 For a brief summary of both views and their rationales, see John GH Stumbles, 'The Impact of the *Personal Property Securities Act* on Assignments of Accounts' (2013) 37(2) *Melbourne University Law Review* 415, 445–6 ('Assignments of Accounts'). More generally, see *E Pfeiffer Weinkellerei-Weineinkauf GmbH & Co v Arbuthnot Factors Ltd* [1988] 1 WLR 150, 162–3 (Phillips J); De Lacy (n 206) 88 n 5; cf Fidelis Oditah, 'Priorities: Equitable versus Legal Assignments of Book Debts' (1989) 9(4) *Oxford Journal of Legal Studies* 513; Heydon, Leeming and Turner (n 38) 341 [8-130], citing *Federal Commissioner of Taxation v Everett* (1980) 143 CLR 440, particularly at 447–8 (Barwick CJ, Stephen, Mason and Wilson JJ). The relevant Australian statutory provisions are: *Civil Law (Property) Act 2006* (ACT) s 205; *Conveyancing Act 1919* (NSW) s 12; *Property Law Act 1974* (Qld) s 199; *Law of Property Act 1936* (SA) s 15; *Conveyancing and Law of Property Act 1884* (Tas) s 86; *Property Law Act 1958* (Vic) s 134; *Property Law Act 1969* (WA) s 20.

12(3)(a),[208] such that competitions between two such interests will be governed by the *PPSA*'s priority rules.[209]

2 Beneficial Interests under Trusts v Security Interests

Competitions with beneficial interests under trusts will be significantly impacted by whether all security interests are characterised as legal in nature.[210] Of particular note are competitions involving security interests in all of a grantor's present and after-acquired property ('AllPAAPs'), which have become particularly prevalent due to the advantages to financiers flowing from their 'fixed' nature under the *Act*. As these interests would be characterised as floating charges at general law, they will be equitable in nature if the security interest retains its general law characterisation.

In competitions between prior security interests and subsequent beneficial interests, such as in example 1 below, the general law nature of the security interest is of lesser importance:

> Example 1
>
> A grants an AllPAAP to C. A then declares that it holds property which is subject to the AllPAAP on trust for B.

In this example, C will ordinarily prevail irrespective of whether its security interest is legal or equitable, because its interest was the first in time.[211]

However, the juridical nature of the security interest attains significance in competitions between prior beneficial interests under trusts and subsequently created security interests. Such competitions might arise, for instance, in circumstances involving fraudulent trustees under express trusts (example 2), or in circumstances involving constructive trusts (example 3):

> Example 2
>
> A holds property on trust for B. In breach of trust, A grants an AllPAAP to C.
>
> Example 3
>
> B obtains court orders that A holds property on constructive trust for them. A then grants an AllPAAP to C.[212]

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208 See Stumbles 'Assignments of Accounts' (n 207), particularly at 437–47.

209 *PPSA 2009* (Cth) pt 2.6. The effect of the *Act* in curtailing the operation of this rule has also been noted in the Canadian context: see Ronald CC Cuming, 'Equity and the *PPSA*: Strange Bedfellows?' (2014) 55(2) *Canadian Business Law Journal* 179, 191. However, note also that the rule in *Dearle v Hall* (1828) 3 Russ 1; 38 ER 475 will continue where the competing interests are not in an 'account': *PPSA 2009* (Cth) s 10.

210 Assuming the beneficial interest does not itself perform a security function, such that it becomes a security interest: see *PPSA 2009* (Cth) s 12(2)(g); Jamie Glister, 'The Role of Trusts in the *PPSA*' (2011) 34(2) *University of New South Wales Law Journal* 628; *Re Skybridge Holidays Inc* (1998) 13 PPSAC (2d) 387, [7]–[8] (MacKenzie J) (British Columbia Supreme Court); *Graff v Trustee of Bitz Estate* (1991) 86 DLR (4d) 184 (Saskatchewan Court of Queen's Bench); *Stiassny v North Shore City Council* [2009] 1 NZLR 342, particularly at 349 [29]–[31] (William Young P for the Court). For a detailed analysis of competitions between equitable interests under trusts and security interests in the Canadian context, see Cuming (n 209) 191–9.

211 See above Part III(B)(1).

212 See, eg, *i Trade* [2011] 2 SCR 360. Note that, in this case, the Court did not consider the possibility that the security interest was not legal in nature: see particularly at [61] (Deschamps J for the Court).

If the security interest is equitable in nature, the beneficiary's earlier interest will ordinarily prevail (B wins), because a beneficiary's interest will not be 'prejudiced' merely because they allowed their trustee to retain possession of trust property or other indicia of title.[213] However, if the security interest is legal in nature, the secured party will ordinarily prevail (C wins) as a bona fide purchaser for value without notice.

While characterising the security interest as a legal interest will obviously be advantageous for secured parties by reference to the previous position at general law, the real question is: does the general law's preferencing beneficiaries create a desirable policy outcome? On the one hand, the traditional justification for protecting beneficiaries, that they should not be punished for 'not watching' their trustee,[214] is somewhat unconvincing – because no one else is capable of protecting their interest (for instance, by retaining indicia of title such as share certificates).[215] As such, characterising all security interests as legal interests would foster certainty by conferring priority upon them where the secured party does not have notice of a (potentially undiscoverable) beneficial interest – albeit at the expense of the beneficiary. On the other hand however, the traditional argument mitigating the concern of 'hidden' beneficial interests still rings true: a secured party can protect themselves by simply acquiring a legal interest, rather than an equitable one.[216] As such, if the security interest retains its general law legal or equitable nature, beneficiaries would be less likely to lose out in circumstances where they could not take any further steps to protect themselves – albeit at the expense of some certainty.

It might also be argued that, if the security interest retains its general law legal or equitable nature, secured parties would be more vulnerable to hidden beneficial interests because some security interests, such as AllPAAPs, would be incapable of conversion to legal interests (eg, there is no legal interest-equivalent to the floating charge). However, this assumes that such interests *should* enjoy the greater priority benefits of being a legal interest; and, contrary to this, it is submitted that a secured party holding an AllPAAP *should not* be able to obtain the protection available to legal interest-holders, in the same way that floating chargees *could not* obtain such protection prior to the *Act* – and in the same way that secured parties holding AllPAAPs *cannot* obtain protection against purchase money security interests under the *Act* (in respect of non-purchase money collateral).[217] Although

213 *Shropshire Union Railways & Canal Co v The Queen* (1875) LR 7 HL 496, 507–8 (Lord Cairns LC) ('*Shropshire Union*'); *Bradley v Riches* [1878] 9 Ch D 189, 192–3 (Fry J); *Carritt v Real & Personal Advance Co* (1889) 42 Ch D 263, 270–3 (Chitty J) ('*Carritt*'); *Hill v Peters* [1918] 2 Ch 273, 279 (Eve J); *Koorootang Nominees Pty Ltd v ANZ Banking Group Ltd* [1998] 3 VR 16, 108–9, 111–12 (Hansen J).

214 *Bradley v Riches* [1878] 9 Ch D 189, 192–3 (Fry J); *Hill v Peters* [1918] 2 Ch 273, 278 (Eve J).

215 Note *Carritt* (1889) 42 Ch D 263, 269–70 (Chitty J).

216 See particularly *Shropshire Union* (1875) LR 7 HL 496, 505–6 (Lord Cairns LC).

217 See *PPSA 2009* (Cth) ss 14, 62–5. To the extent the AllPAAP secures purchase money obligations or purchase money collateral, it is itself a PMSI: see ss 14(3)–(4). If the security interest retains its general law nature, it would be necessary to take a separate security interest in order to enjoy the protection of having a legal interest over such purchase money collateral. This would facilitate further flexibility in how security is granted; and if the parties do agree to separate security interests being granted in each piece of property capable of being subject to a legal interest, this would be less onerous than it may first appear: security documentation can simply state that a security interest is granted over all the grantor's

the consequences of this might appear severe, in actuality secured parties would simply be presented with a choice: take a separate (legal) interest in property, or risk losing a priority competition with a trust beneficiary. Secured parties would be able to protect themselves by taking separate legal interests so long as the property in question is capable of being subject to a legal interest; however, they would be unable to claim legal interests in property that can only be subject to a floating charge at general law, and thus would not gain the unintended windfall that would occur if every AllPAAP was a legal interest.

Interestingly, Canadian commentators have recognised the desirability of avoiding secured parties gaining such an unintended windfall at the expense of trust beneficiaries. In the Canadian context, where the Supreme Court has held that the security interest is a legal interest,[218] commentators have suggested that these windfalls could be avoided by not applying the bona fide purchaser for value rule to competitions between prior beneficial interests under trusts and subsequently created security interests.[219] In the Australian context, where the question of the security interest's juridical nature remains open, characterising the security interest according to its general law nature would achieve the same result – without the need to distort the application of the general law priority rules.

Consequently, in the context of competitions with beneficial interests under trusts, it appears preferable that security interests retain their general law legal or equitable character.

3 Equitable Liens v Security Interests

Characterising all security interests as legal interests could also have significant priority consequences for competitions with equitable liens. Such competitions might arise between a security interest and a remedial lien imposed as an alternative to a constructive trust:[220]

> Example 4
>
> A grants a security interest in goods to C. B then obtains orders that A must pay them equitable compensation, and 'elects' to secure this through a lien over the goods.[221]

Such competitions also might involve an equitable lien which falls outside section 73 in a given case,[222] such as the trustee's lien or solicitor's fruits of the action lien.[223] If the scope of section 73(1) is reduced by statutory amendment,[224]

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present and after-acquired property (the AllPAAP) *and* separate security interests are granted over each piece of property capable of being subject to a specified legal interest (the separate security interests).

218 *Innovation Credit* [2010] 3 SCR 3, 16 [42] (Charron J for the Court); affirmed in *i Trade* [2011] 2 SCR 360, 384 [61] (Deschamps J).

219 See, eg, Cuming, Walsh and Wood (n 2) 515–16; Cuming (n 209) 196.

220 *Re Hallett's Estate; Knatchbull v Hallett* (1880) 13 Ch D 696, 709 (Jessel MR) ('*Re Hallett's Estate*'); *Giumelli v Giumelli* (1999) 196 CLR 101, particularly at 113–14 [10], 119 [31] (Gleeson CJ, McHugh, Gummow and Callinan JJ).

221 *Re Hallett's Estate* (1880) 13 Ch D 696, 709 (Jessel MR).

222 For example, because they are not 'commercial liens' pursuant to *PPSA 2009* (Cth) s 73(1)(b): Cuming, Walsh and Wood (n 2) 510.

223 See above Parts II(B)(3)–(4).

224 As proposed above in Part II(C).

any competition involving these interests would be determinable by the general law:

> Example 5
>
> A grants an AllPAAP to C. B then acquires a solicitor's lien over a bank account held by A which is subject to the AllPAAP.

As many of these interests will be in choses in action, competitions involving them are likely to turn upon the unsettled question: are all competitions between interests in choses in action resolved pursuant to the rule in *Dearle v Hall* where one is legal and the other is equitable?[225] If this is the case, the juridical nature of the security interest will make no difference to the resolution of such competitions. If such competitions remain subject to the ordinary general law priority rules, the general analysis will apply equally to these competitions.

As with beneficial interests under trusts, the juridical nature of the security interest is of lesser importance if the competition involves a prior security interest and a subsequent equitable lien, such as in examples 4 and 5. In these cases, the security interest will either prevail due to its being earlier in time (C wins), or the rule in *Dearle v Hall* will apply irrespective of the security interest's juridical nature (B or C wins depending on who gives notice first).

However, the juridical nature attains significance where the security interest arises after the creation of the equitable lien, such as in examples 6 and 7:

> Example 6
>
> B obtains orders that A must pay them equitable compensation, and 'elects' to secure this through a lien over goods.[226] A then grants a security interest in the goods to C.
>
> Example 7
>
> B holds a solicitor's lien over a bank account held by A. A then grants an AllPAAP to C.

With respect to competitions other than in choses in action (example 6), if the security interest retains its general law nature then prior equitable lienees will prevail over secured parties holding subsequent equitable security interests (B wins). However, if all security interests are legal in nature, then secured parties will prevail as bona fide purchasers for value without notice (C wins). With respect to competitions in choses in action (example 7), if the security interest retains its general law nature then the rule in *Dearle v Hall* will apply where the security interest is equitable (B or C wins depending on who gives notice first). However, if all security interests are legal in nature, secured parties might prevail pursuant to the bona fide purchaser for value rule (C wins).[227]

With respect to which of these options leads to desirable policy outcomes, the analysis is substantially the same as that concerning beneficial interests under trusts. Ultimately, competitions between a security interest and a beneficial interest under a trust or an equitable lien lead to the same question: does the potentially hidden nature of the equitable interest justify granting a windfall to secured parties

225 Discussed in Part III(B)(1) above.

226 *Re Hallett's Estate* (1880) 13 Ch D 696, 709 (Jessel MR).

227 Depending on the unsettled question concerning the application of the rule in *Dearle v Hall* (1828) 3 Russ 1; 38 ER 475.

holding AllPAAPs? For the reasons presented above, it is submitted that it does not.

4 Maritime Liens & Actions In Rem v Security Interests

Although competitions with certain maritime interests (namely the maritime damages lien and the statutory lien arising from the action in rem) may be governed by the general law priority rules, these competitions will be unaffected by whether all security interests are characterised as legal interests.[228]

The maritime lien is a hypothecary interest, arising by operation of law, which is enforceable in proceedings instituted directly against a ship itself.[229] There are three types of maritime liens: the damage lien (secures damage caused by a ship's negligence), the salvage lien (secures the costs of salvaging a ship), and the seafarer's lien (secures crew members' wages).[230] A defining feature of this lien is its priority status over almost all other interests, irrespective of whether they are legal or equitable or when they were created, which reflects the importance attributed to the limited wrongs which give rise to such a lien.[231]

The maritime action in rem is a statutory proprietary interest in a ship, also in the nature of a hypothecation.[232] The action can only be commenced against the ship if the proceedings concern that particular *res* (or a 'surrogate'), and if its owner would be personally liable if an action was commenced directly against them. From the time the action is commenced, the applicant is effectively entitled to an 'arrest warrant' over the ship 'as security' for their claim.[233] This interest's priority is determinable based upon the date of attachment, irrespective of the legal

228 Salvagers' and seafarers' maritime liens might also be governed by the general law if they fall outside of *PPSA 2009* (Cth) s 73(1), eg because they did not arise in the ordinary course of business.

229 *Admiralty Act 1988* (Cth) s 15; *The Dowthorpe* (1843) 2 W Rob 73; 166 ER 682, 684–5 (Lushington J); *Harmer v Bell* (1851) 7 Moo PC 267; 13 ER 884, 890–1 (Sir John Jervis) ('*The Bold Buccleugh*'); *The Sam Hawk* (2016) 246 FCR 337, 352–3 [48]–[49], 377–8 [144]–[145] (Allsop CJ and Edelman J). See generally Davies and Dickey (n 144) ch 8, particularly at 134–5 [8.20]; White (n 144) 49–50; Damien J Cremean, *Admiralty Jurisdiction: Law and Practice in Australia, New Zealand and Hong Kong* (Federation Press, 4th ed, 2015) 152.

230 See *The Sam Hawk* (2016) 246 FCR 337, 357 [70] (Allsop CJ and Edelman J). See also Gregory Nell, 'The Arrest of Ships: Some Legal Issues' (2009) 23(1) *Australian and New Zealand Maritime Law Journal* 39, 52–3, discussing *The Global Peace* (2006) 154 FCR 439, particularly at 470–1 [131] (Allsop J); *Rail Equipment Leasing Pty Ltd v CV Scheepvaartonderneming Emmagracht* [2008] NSWSC 850 (Rein J); O'Donovan (n 144) 118.

231 *The Tervaete* [1922] P 259, 270 (Scrutton LJ); *The Tolten* [1946] P 135, 150 (Scott LJ); *The Halycon Isle* [1981] AC 221, 233 (Lord Diplock), 244–5 (Lords Salmon and Scarman); *Patrick Stevedores No 2* (1997) 75 FCR 47, 50–1 (Sheppard J); *The Sam Hawk* (2016) 246 FCR 337, 356 [61]–[63], 359–60 [79], 364–5 [99] (Allsop CJ and Edelman J); also White (n 144) 111–12; Waung (n 146) 12.

232 *Admiralty Act 1988* (Cth) ss 4(3), 16–18, 24; *The Zafiro* [1959] 3 WLR 123, 131–3 (Hewson J); *Re Aro Co Ltd* [1980] Ch 196, 205–7 (Brightman LJ). See generally Sarah C Derrington, 'The Interaction Between Admiralty and Insolvency Law' (2009) 23(1) *Australian and New Zealand Maritime Law Journal* 30. See also Nell (n 230); Davies and Dickey (n 144) 166–8 [8.620]–[8.650]; Cremean (n 229) 149–50; O'Donovan (n 144) 118–19.

233 *The Cella* (1888) 13 PD 82, 87 (Lord Esher MR), 88 (Fry LJ), 88 (Lopes LJ); *The MV Cape Moreton* (2005) 143 FCR 43, 58 [53]–[54], 65 [92] (Ryan and Allsop JJ); *Comandate Marine Corporation v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45, 64 [59], 75–79 [105]–[118] (Allsop J) ('*Comandate Marine*').

or equitable nature of the competing interest.[234] Since their outcomes are unaffected either way, competitions between maritime interests and security interests shed no light on which option concerning the juridical nature of the security interest will lead to preferable policy outcomes.

5 Execution Creditors' Interests v Security Interests

Although competitions between *perfected* security interests and execution creditors' interests remain governed by the general law,[235] the priority outcomes of such competitions are unaffected by the juridical nature of the security interest. This is because execution creditors' interests prevail over any proprietary interest created after the date of seizure or issuance of a garnishee order absolute,[236] and are subject to any proprietary interest created prior to this time,[237] irrespective of its juridical nature. Consequently, the outcomes of these competitions are unaffected by the legal or equitable nature of the security interest, and they do not affect which option is preferable from a policy perspective.

C Conclusions on the Juridical Nature of the Security Interest

As a question of statutory construction, it is submitted that it is preferable to characterise the security interest as retaining its general law legal or equitable nature. This is the conclusion reached by examining the text, context and purpose of the *Act*, and although the position is different in Canada there are convincing reasons why this should nonetheless be the case in an Australian context. This conclusion is compatible with the minimalist model of the security interest, and with some views of the unitary model.

The same conclusion is reached when the question is approached from a policy perspective: characterising the security interest according to its general law legal or equitable character is either preferable (competitions with beneficial interests under trusts and equitable liens), or makes no difference (competitions with maritime interests and execution creditors' interests). Although competitions might arise with some other interests, these also do not affect this conclusion: in

234 Davies and Dickey (n 144) 168 [8.650]; *The Pacific* (1864) Br & Lush 247; 167 ER 356, 358 (Lushington J); *C & CJ Northcote v Owners of the Henrich Björn* (1886) 11 App Cas 270, 277 (Lord Watson); *The Two Ellens* (1871) LR 3 AE 345, 356, 360 (Phillimore J); *The Cella* (1888) 13 PD 82, 88 (Fry LJ), 88 (Lopes LJ). Alternatively, it has been suggested that interest's priority *always* ranks below proprietary interests: *The Colorado* [1923] P 102, 107 (Bankes LJ); *Patrick Stevedores No 2* (1997) 75 FCR 47, 50–1 (Sheppard J); note also *Comandate Marine* (2006) 157 FCR 45, 79 [118] (Allsop J). Irrespective of which approach is correct, priority will be unaffected by whether the security interest is characterised as legal or equitable.

235 *PPSA 2009* (Cth) section 74(1) confers priority upon execution creditors over *unperfected* security interests, but is silent as to priority between execution creditors and *perfected* security interests.

236 *Hall v Richards* (1961) 108 CLR 84, 91–92 (Kitto J); *Re Warner* (1973) 21 FLR 395, 399–400 (Wallace J); *Clyne v Deputy Commissioner of Taxation* (1981) 150 CLR 1, 27 (Brennan J); *Relwood v Manning* [1992] 2 Qd R 197, 201 (McPherson SPJ); *Blacktown Concrete* (1998) 43 NSWLR 484, 496–9 (Santow J).

237 *Evans v Rival* [1910] 2 KB 979, 999 (Buckley LJ); *Austral Lighting* [1984] 2 Qd R 507, 510–12 (Connolly J); *Blacktown Concrete* (1998) 43 NSWLR 484, 495–9 (Santow J); *Dodrill* [2010] QSC 371, [16] (de Jersey CJ).

particular, with respect to competitions with statutory interests,[238] the extensive usage of section 73(2) in the Australian context means that such competitions will rarely, if ever, turn upon the juridical nature of the security interest;[239] and the same can be said of competitions with possessory liens, which will ordinarily fall within section 73(1).[240] As such, policy considerations lean towards the security interest retaining its general law legal or equitable character.

IV CONCLUSION

The *PPSA* has an enormous impact on all priority competitions between security interests and non-PPS interests. Sometimes this is because the *Act* expressly resolves the competition through its statutory priority rules; but even where the competition is determined by the general law, the *PPSA* (and how it is construed) significantly affects the ultimate outcome. In a security context, such outcomes will often determine whether a party is able to satisfy its claim against property, or is left with nothing more than a personal claim against an insolvent individual or company.

With respect to the express priority rules examined in Part II, two observations are merited. First, their wide scope should reduce the categories of competitions which remain governed by the general law. Secondly, however, this appears to create unintended and unprincipled consequences. It is submitted that amending section 73(1) as proposed, and in particular such that it only applies to non-PPS interests *in goods*, would substantially re-align these statutory priority rules with their policy rationale; and to the extent this would widen the gap for the general law to intervene, it is further submitted that this is still a preferable outcome – particularly if the subsequent conclusion that security interests should retain their general law juridical nature is adopted.

Part III examined whether all security interests should be characterised as legal interests, or whether they might retain their general law legal or equitable character, for the limited purposes of those competitions with non-PPS interests that fall outside the statutory priority rules. It examined the issue both as a question of statutory interpretation, and from a policy perspective with respect to those competitions most likely to be affected; and both of those approaches led to the conclusion that it is preferable that the security interest retains its general law legal or equitable character. Although this is contrary to overseas constructional choices, and undoubtedly goes against orthodox thinking developed in other PPS jurisdictions, it is submitted that this is not a reason, in and of itself, to reject these conclusions. Rather, this conclusion highlights the importance of developing a critical understanding of how the Australian *Act* should function in an Australian context; and while overseas learning should be taken advantage of to the greatest extent possible, interpretive issues should also be subject to lively debate and

238 For example, *Innovation Credit* [2010] 3 SCR 3; *Radius Credit* [2010] 3 SCR 38; discussed in Part III(A)(2) above.

239 See above Part II(A)(1).

240 See above Part II(B)(1).

critical consideration rather than passive acceptance of foreign interpretive choices.[241] While the debate concerning the juridical nature of the security interest may be far from settled, this article has argued that there are strong reasons for characterising it according to its general law legal or equitable nature, which will only affect competitions with non-PPS interests that are governed by the general law priority rules.

241 Courts must not 'slavishly follow judicial decisions of the courts of another jurisdiction in respect of similar or even identical legislation': *Marshall v Director-General* (2001) 205 CLR 603, 632–3 [62] (McHugh J), quoted in *Walker Corporation* (2008) 233 CLR 259, 270 [31] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan CJ); note also *Hamersley WASC* (2017) 52 WAR 90, 109 [84] (Tottle J).