Equity, Statute, and the Law of Secured Transactions

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Abstract

This thesis seeks to improve our understanding of interactions between statute and the common law. It also seeks to improve our understanding of the law of secured transactions over personal property, by determining whether we can better understand the *Personal Property Securities Act 2009* (Cth) ('PPSA') through examining its relationship with equity.

First, the thesis identifies a framework for understanding interactions between statute and the common law. That framework entails identifying the policies underlying statute as a question of statutory construction, and then using those policies to determine the appropriateness of interpreting statute by reference to the common law *or* of applying or developing the common law by reference to statute. This reflects how courts already deal with such questions, and can elucidate our understanding of them. It also considers how the application of the framework may differ when considering interactions between statute and the different components of the common law – ie, equity and the common law.

The thesis then uses the relationship between equity and the PPSA as a case study for the application of the framework. This demonstrates the usefulness of the framework at a higher level of abstraction, by showing that it can inform interactions between a given statute and a broad component of the common law. It also improves our understanding of the PPSA in and of itself. To do this, the thesis applies the framework to resolve broad questions concerning the interpretation of the PPSA by reference to equity, and the operation of equity in its context; and more specific questions concerning the relationship between the PPSA and two equitable doctrines and remedies, tracing and subrogation.

As a whole, the thesis both improves our understanding of interactions between statute and the common law, and shows that we can better understand the PPSA through examining its relationship with equity.

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Thank you Sheelagh McCracken, for inspiring my interest in the PPSA through your teaching and Honours supervision, and for your feedback on an earlier draft of this thesis; David Brown, for your feedback on an earlier draft of this thesis; Justice William Gummow, for your feedback on an earlier draft of what is now Part II of this thesis; Matthew Conaglen, for our informal chats which helped me work through several difficult points concerning equity; Greg Tolhurst, for helping me work through several points concerning debts and assignments; and Michael Gvozdenovic, for your many insights on the relationship between statute and the common law. Thanks also to Natalie Silver, Nicole Graham and Penelope Crossley for your personal and professional support over the last four years. Finally, thanks to my friends for your encouragement over the course of this thesis, and especially to Sarah Graham and Zoe Lavergne, for continuing to support me even after making the mistake of asking what my thesis was *really* about, at a dinner party, at 11pm.

This thesis is dedicated to the late Professor John Stumbles, who was one of my PhD supervisors prior to his having to withdraw due to illness. John was brilliant, blunt, and humble, and always brought a sense of humour to our meetings. He was incredibly generous in his feedback – once, after I provided him with a 30,000-word draft Chapter, he remarked to me that he had read it twice, before proceeding to give incredibly detailed and insightful comments. John shaped how I think about law, including most importantly to view cases as the resolution of real disputes in their full context rather than as collections of judicial statements, and inspired me to hold my work to a higher standard.

ORIGINALITY, AUTHORSHIP & SCHOLARSHIPS

Chapter Two of this thesis contains material published in Adam Waldman and Michael Gvozdenovic, 'Development of the Common Law by Analogy to Statute' (2023) 97(12) *Australian Law Journal* 912. I was responsible for approximately 75% of that article. I had read most of the relevant materials in preparing what is now Chapter Two, but Michael subsequently drew my attention to several additional Australian cases, and to the relevant United States cases and some of the more recent literature from that jurisdiction. After reviewing those materials, I have in turn incorporated some of them into the Chapter itself. I was responsible for writing the first draft of two of the three substantive Parts, and the introduction and conclusion. I was also primarily responsible for editing.

The following articles were written since the beginning of my PhD candidature, but do not contain material from within the thesis itself:

- Adam Waldman, 'Commercial Landlords & Uncollected Goods' (2022) 30(2) *Australian Property Law Journal* 86.
- Adam Waldman, 'Unperfected PPSA Security Interests in Insolvency Part I: The Commercial Significance & Costs of the Vesting Provisions' (2024) 34(3) *Journal of Banking and Finance Law and Practice* 195.
- Adam Waldman, 'Unperfected PPSA Security Interests in Insolvency Part II: The Policy Objectives of the Vesting Provisions' (2024) 34(4) *Journal of Banking and Finance Law and Practice* (forthcoming).

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The content of this thesis is my own work. All assistance received has been acknowledged. This thesis has not been submitted for any degree or other purposes.

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Adam Waldman

As lead supervisor for this thesis, I confirm that, to the best of my knowledge, the authorship attribution statement above is correct.

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Jason Harris

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PART I: INTRODUCTION

CHAPTER ONE: INTRODUCTION

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I Statute & the Common Law

We live in an 'age of statutes'.[1] In the last 50 years, Australian statutes have expanded into many areas that were formerly the sole domain of the common law and equity.[2] This has caused a former Chief Justice of Australia to remark that there are now few, if any, legal problems that can be advised upon by practitioners or resolved by courts without reference to statute.[3]

However, until recently, lawyers across the common law world have viewed statutes with antipathy. This can be traced back to the early great common lawyers such as Coke,[4] and was also observable in the Court of Chancery, which viewed itself as not strictly bound by statutory commands.[5] As recently as the 20th century, it has been suggested that the typical common lawyer's attitude towards statutes is that they are an 'alien intruder in the house of the common law',[6] 'unscientific and popular',[7] and an 'unwelcome visitor into a territory dominated by case law'.[8] In the Australian context, such attitudes were expressed by jurists as distinguished as Sir Owen Dixon,[9] a revered former Chief Justice of Australia. They also

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[1] This term was coined by Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press, 1982).

[2] Noted in Paul Finn, 'Statutes and the Common Law' (1992) 22(1) *University of Western Australia Law Review* 7, 11; Joachim Dietrich and Thomas Middleton, 'Statutory Remedies and Equitable Remedies' (2006) 28(2) *Australian Bar Review* 136, 136–7; Stephen McLeish, 'Challenges to the Survival of the Common Law' (2014) 38(2) *Melbourne University Law Review* 818, 826.

[3] Chief Justice Robert French AC, 'Statutory Interpretation in Australia: Launch of 8th Edition' (Speech, Australian National University, 24 October 2014) 4. Similarly, see Stephen Gageler, 'Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process' (2011) 37(2) *Monash University Law Review* 1, 1.

[4] See Jack Beatson, 'Has the Common Law a Future?' (1997) 56 *Cambridge Law Journal* 291, 299, discussing *Harbert's Case* (1584) 3 Co Rep 13b.

[5] See Daniel Farinha, 'Fraud and Formality: Relief in Equity from Acts of Parliament' (2018) 12(3) *Journal of Equity* 297, particularly at 299–306.

[6] Harlan F Stone, 'The Common Law in the United States' (1936) 50(1) *Harvard Law Review* 4, 15.

[7] William Herbert Page, 'Statutes as Common Law Principles' (1944) (4) *Wisconsin Law Review* 175, 176.

[8] Andrew Burrows, 'The Relationship Between Common Law and Statute in the Law of Obligations' (2012) 128 *Law Quarterly Review* 232, 232.

[9] See Sir Owen Dixon, 'Science and Judicial Proceedings' in Susan Crennan and William Gummow (eds), *Jesting Pilate And Other Papers and Addresses by the Rt Hon Sir Owen Dixon* (Federation Press, 3rd ed, 2019) 124, 125; William Gummow, 'Sir Owen Dixon Today' in Susan Crennan and William Gummow (eds), *Jesting*

filtered through into legal education via the lack of emphasis placed upon statutory interpretation.[10] Today, they are reflected in the undeniable observation that '[c]ases are fun; statutes are perceived to be dull, dry and difficult'.[11] This is only exacerbated by their ever-growing length and complexity,[12] which seems to be a trend across the common law world and led one American commentator to remark that we are 'choking on statutes'.[13]

Likely due to this, our understanding of the relationship between statute and the common law remains at an early stage. Although this topic attracted interest in the United States of America as early as 1908,[14] prior to the last decade only a handful of commentators on Australian and English law sought to examine how statutory and judicial developments influence each other.[15] Consequently, the literature across the common law world has, thus-

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Pilate And Other Papers and Addresses by the Rt Hon Sir Owen Dixon (Federation Press, 3rd ed, 2019) 48, 55–6.

[10] See W M C Gummow, 'Legal Education' (1988) 11(3) *Sydney Law Review* 439, 439–40.

[11] Burrows (n 8) 232.

[12] Note J D Heydon, 'Equity and Statute' in P G Turner (ed), *Equity and Administration* (Cambridge University Press, 2016) 211, 211. See also Grant Gilmore, *The Ages of American Law* (Yale University Press, 1977) 95–6.

[13] Calabresi (n 1) Ch 1.

[14] Roscoe Pound, 'Common Law and Legislation' (1908) 21(6) *Harvard Law Review* 383. Other early American academic contributions included James McCauley Landis, 'Statutes and the Sources of Law' (1965) 2(1) *Harvard Journal on Legislation* 7 (first published in 1934); Stone (n 6); Page (n 7); Roger J Traynor, 'Statutes Revolving in Common-Law Orbits' (1968) 17 *Catholic University Law Review* 401.

[15] The early Australian and English contributions were P S Atiyah, 'Common Law and Statute Law' (1985) 48(1) *Modern Law Review* 1; Finn, 'Statutes and the Common Law' (n 2); Beatson (n 4); W M C Gummow, *Change and Continuity: Statute, Equity and Federalism* (Oxford University Press, 1999) Lecture One; Jack Beatson, 'The Role of Statute in the Development of Common Law Doctrine' (2001) 117 *Law Quarterly Review* 247 ('The Role of Statute'); Paul Finn, 'Statutes and the Common Law: the Continuing Story' in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press, 2005) 52 ('The Continuing Story'). More recently, see Gageler (n 3); Burrows (n 8); Mark Leeming, 'Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room' (2013) 37(3) *University of New South Wales Law Journal* 1002; Elise Bant, 'Statute and the Common Law: Interaction and Influence in Light of the Principle of Coherence' (2015) 38(1) *University of New South Wales Law Journal* 367, 369; Anthony Mason, 'A Judicial Perspective on the Development of Common Law Doctrine in the Light of Statute Law' in Andrew Robertson and Michael Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Hart Publishing, 2016) 119 ('A Judicial Perspective'); Sir Anthony Mason, 'The Interaction of Statute Law and Common Law' (2016) 90 *Australian Law Journal* 324; Andrew Burrows, *Thinking About Statutes: Interpretation, Interaction, Improvement* (Cambridge University Press, 2018); Michelle Gordon, 'Analogical

far, focused on showing that statute and the common law can affect each other's content in the first place,[16] and on examining particular areas where these bodies of law are likely to interact.[17] This raises the first and broader research question of this thesis, which is: how can we better understand interactions between statute and the common law?

To answer this question, this thesis will identify a 'framework' for understanding *all* instances where statute and the common law interact, and will demonstrate its usefulness at several levels of abstraction. This framework entails two steps. First, courts identify the underlying policies of a statute, which is a question of statutory construction. Secondly, those policies are used to determine whether it is appropriate for that statute and the common law to influence each other. This might occur either via the interpretation of statute by reference to the common law, or via the converse process of applying or developing the common law by reference to statute.

This framework builds upon the recognition, by courts and commentators across the common law world, that statutes contain underlying objectives that have been used by courts to determine how statutes should interact with the common law.[18] This itself builds upon the acceptance of purposive interpretation, which recognises the existence and importance of such underlying statutory objectives in the first place.[19] However, although it might seem to follow from the above that all cases involving interactions between statute and the common law should entail courts first identifying the underlying objectives of statute, and then using

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Reasoning by Reference to Statute: What is the Judicial Function?' (2019) 42(1) *University of New South Wales Law Journal* 4; Elise Bant and Jeannie Marie Paterson, 'Estoppel, Misleading Conduct and Equitable Fraud' (2019) 13 *Journal of Equity* 183; Mark Leeming, *Common Law, Equity and Statute: A Complex Entangled System* (Federation Press, 2023).

[16] See particularly n 15 above.

[17] Eg, see Pam Stewart and Anita Stuhmcke, 'The Rise of the Common Law in Statutory Interpretation of Tort Law Reform Legislation: Oil and Water or a Milky Pond?' (2013) 21 *Torts Law Journal* 126; Rosemary Teele Langford, 'General Law and Statutory Directors' Duties: Unmixed Oil and Water or Integrated Parts of the Whole Law' (2015) 131(4) *Law Quarterly Review* 635; Bant and Paterson (n 15); Elise Bant and Jeannie Marie Paterson, 'Evolution and Revolution: The Remedial Smorgasbord for Misleading Conduct in Australia' (2020) 14(1) *FIU Law Review* 25.

[18] See, eg, nn 15 above, 21–7 below. See further Sections II–III of Chapter Two, which examines various Australian examples where this has occurred.

[19] Note Beatson (n 4) 311–2; Beatson, 'The Role of Statute' (n 15) 260–4 (drawing links between purposive interpretation and the development of the common law by reference to statute).

those objectives to determine how the statute in question interacts with the common law,[20] this two-step process has not previously been explicitly identified as such. The first novel contribution of this thesis is thus to identify this process, which it terms the 'framework' for understanding interactions between statute and the common law, and to show that it is consistent with, and can help us to better understand, how Australian courts determine such interactions.

Various terms have been used by courts and commentators to describe the underlying objectives of statutes, which courts have in turn used to shape their interactions with the common law. These include 'principles',[21] 'purposes',[22] 'themes',[23] 'substantive' aspects,[24] 'standards'[25], 'values'[26] and 'policies'.[27] This thesis uses the term 'policies'. This is consistent with its usage by the High Court of Australia in the course of resolving a variety of legal issues involving statutes, including interpretation,[28] illegality,[29] judicial review,[30] and

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[20] It is in this sense that we described the framework as 'identified by commentators' in Adam Waldman and Michael Gvozdenovic, 'Development of the Common Law by Analogy to Statute' (2023) 97(12) *Australian Law Journal* 912, 926.

[21] Pound (n 14) 385, 389–90, 406–7; Landis (n 14) 15; Page (n 7) 211; Atiyah (n 15) 8; Beatson (n 4) 311–12; *Moragne v States Marine Lines*, 398 US 375, 392 (1970) (Supreme Court of the United States) ('*Moragne*').

[22] Finn, 'Statutes and the Common Law' (n 2) 7.

[23] Ibid 23–4.

[24] Gordon (n 15)

[25] Pound (n 14) 211; *Clinkscales v Carver*, 22 Cal 2d 72, 75 (1943) (Supreme Court of California).

[26] Landis (n 14) 22; Finn, 'Statutes and the Common Law' (n 2) 14; Mason, 'A Judicial Perspective' (n 15) 120, 122.

[27] Landis (n 14) 22; Ellen Ash Peters, 'Common Law Judging in a Statutory World: An Address' (1982) 43(4) *University of Pittsburgh Law Review* 995, 998; Finn, 'Statutes and the Common Law' (n 2) 7; Finn, 'The Continuing Story' (n 15) 62; Mason, 'A Judicial Perspective' (n 15) 119–20, 131; *Gooch v Oregon S L R Co*, 258 US 22, 24 (1922) (Supreme Court of the United States); *Moragne* (n 21) 390–2.

[28] See, eg, *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390, 397 (Dixon CJ), 401–2 (Kitto J); *Brayson Motors Pty Ltd (in liq) v Commissioner of Taxation (Cth)* (1985) 156 CLR 651, 657–8; *Saraswati v The Queen* (1991) 172 CLR 1, 22; *Australian Securities and Investments Commission v Lanepoint Enterprises Pty Ltd (receivers and managers appointed)* (2011) 244 CLR 1, 13–14 [27], 15 [32]; *R v A2* (2019) 269 CLR 507, 522 [37].

[29] See, eg, *Brooks v Burns Philp Trustee Co Ltd* (1969) 121 CLR 432, 456; *Nelson v Nelson* (1995) 184 CLR 538, 559, 571 (Deane and Gummow JJ), 593 (Toohey J, dissenting), 608, 613 (McHugh J).

[30] See, eg, *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180, 204 [71].

the constitutional validity of legislation.[31] It is also generally accepted that the precise content of a 'policy' is variable and open to debate, which is desirable since it emphasises the need for caution in construing statutory policies and determining how far their consequences go.

It should also be noted that this thesis largely uses the term 'common law' to refer to all judge-made law. However, at times it also uses the term in its narrower sense, as referring only to those principles developed in the courts of common law prior to the *Judicature Acts 1873–75* (UK). The intended usage will only be specified where it is unclear from the surrounding context.

The other novel contribution of this thesis, as it pertains to statute and the common law, is to demonstrate that the above-described framework is significantly more useful than might otherwise be appreciated. This is because the framework can be used on a case-by-case basis, and can also be applied to interactions between statute and the common law at higher levels of abstraction. For example, it can be used to map out interactions between a given statute and a body of the common law as a whole, or between a given statute and a particular common law claim. To show this, the thesis applies the framework to a case study: the relationship between a given statute as a whole, the *Personal Property Securities Act 2009* (Cth) ('PPSA'), and a large component of the common law, equity.

[31] See, eg, *Clubb v Edwards* (2019) 267 CLR 171, 321 [431].

II The PPSA & Equity

The PPSA governs the effectiveness and priority of 'security interests' in personal property.[32] It came into full force on 30 January 2012, and replaced a patchwork of laws across various Australian jurisdictions with a single national framework governing the law of secured transactions over personal property.[33] This included the implementation of a national register that functions as a notice board for claims to hold security interests.[34] The PPSA is based on statutes originating in the United States, Canada and New Zealand.[35] Whether it applies primarily depends on the function of transactions rather than the way in which those transactions are structured.[36] This focus on 'substance over form' radically changes how this area of law is conceptualised,[37] and represents 'a paradigm shift from established principles of secured transactions law'.[38]

There are three reasons why the relationship between equity and the PPSA is a particularly appropriate case study for showing the usefulness of the above-described framework. First, the PPSA has enacted a statutory regime which determines the vast majority of questions concerning the enforceability and priority of personal property securities. This raises the question of whether there is room for its supplementation by equity at all.

Secondly, this statutory regime is built upon a different conceptual foundation than the previous Australian laws of secured transactions which it replaced. Assuming it leaves at least some room for equity, this conceptually distinct approach raises novel questions concerning both the interpretation of the PPSA by reference to equity *and* the application or development

[32] Note PPSA ss 3 (guide to this Act), 12 (meaning of security interest).

[33] Replacement Explanatory Memorandum, Personal Property Securities Bill 2009, 11–12 ('Replacement Explanatory Memorandum').

[34] See PPSA Ch 5.

[35] Replacement Explanatory Memorandum (n 33) 11. See further Chapter Four below.

[36] PPSA s 12(1). See further Bruce Whittaker, *Review of the Personal Property Securities Act 2009: Final Report* (Final Report, February 2015) 3 [1.1], 10–12 [2.1.2] ('Whittaker Report'); *Samwise Holdings Pty Ltd v Allied Distribution Finance Pty Ltd* (2018) 131 SASR 506, 511 [37].

[37] John G H 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, 448; cited in *Power Rental Op Co Australia, LLC v Forge Group Power Pty Ltd (in liq) (recs & mgrs apptd)* (2017) 93 NSWLR 765, 774 [41].

[38] *Lewis v LG Electronics Australia Pty Ltd* (2014) 291 FLR 407, 412 [27].

of equity in its context. Thus, it provides an opportunity to demonstrate the usefulness of the framework to both such types of interactions within the same case study.

Thirdly, there is very little existing analysis as to the role of equity in the law of secured transactions over personal property following the implementation of the PPSA. The PPSA does provide that it is not intended to limit or exclude equity to the extent that it ‘remain[s] capable of operating concurrently’ with the statute.[39] But this does not determine whether equity remains so capable, either as a whole or in any given case. By contrast, our understanding of the role of equity in the context of land law is more advanced, including because courts and commentators have had significantly more time in which to consider such questions against the ‘title by registration’ system implemented by the Torrens title statutes.[40] Consequently, this thesis focuses only upon the role of equity in the law of secured transactions over personal property.

A review of the case law reveals that the Australian jurisprudence concerning the PPSA remains at an early stage.[41] Although the statute has been in force for over a decade, many of the cases thus-far have focused on the initial and central question enlivening the jurisdiction of the PPSA, which is whether or not there is a ‘security interest’.[42] Furthermore,

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[39] PPSA s 254. Note also s 10 (‘general law’).

[40] These are enacted at a state level: eg, *Real Property Act 1900* (NSW).

[41] The High Court has yet to hear a case concerning the operation of the PPSA. *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* (2019) 268 CLR 524 concerned the definition of the ‘circulating security interest’ under PPSA s 340, but it was ultimately about the treatment of property in insolvency rather than the operation of the PPSA. Consistently with this, it has been recommended that the provision concerning circulating security interests be relocated to the *Corporations Act 2001* (Cth), as it has ‘no consequences for the operation of the [PPSA] itself’: Whittaker Report (n 36) 434 [9.2.1.2] (Recommendation 357).

[42] See, eg, *Re Maiden Civil (P&E) Pty Ltd; Albarran v Queensland Excavation Services Pty Ltd* (2013) 277 FLR 337; *Sandhurst Golf Estates Pty Ltd v Coppersmith Pty Ltd* (2014) 285 FLR 267; *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd* (2014) 49 VR 86; *Re Arcabi Pty Ltd (recs & mgers apptd) (in liq); Ex parte Theobald & Herbert* (2014) 288 FLR 236; *White v Spiers Earthworks Pty Ltd* (2014) 99 ACSR 214; *Forge Group Power Pty Ltd (in liq) v General Electric International Inc* (2016) 305 FLR 101; *Re Elite Sydney Pty Ltd* (2016) 320 FLR 227; *Re Welldog Pty Ltd; Bredenkamp* [2017] FCA 1065; *AAD Services Pty Ltd v ALD Wholesale Pty Ltd* [2019] VSC 564; *Bellaire Pty Ltd v Roselink Enterprises Pty Ltd ATF The Ice Nemesis Unit Trust (No 2)* [2020] WASC 390; *Re Vector Resources Limited* [2021] FCA 112; *Re Bowery Bar (in liq)* [2021] NSWSC 697; *Re Holdco Pty Ltd (admins apptd) (No 2)* (2021) 381 ALR 418; *Gold Valley Iron Pty Ltd v*

many of the other cases pertain to what might be thought of as technical aspects of the PPSA.[43] As such, although there have been cases on other issues concerning the PPSA, many issues concerning its operation are yet to be subject to judicial consideration, especially when it comes to interactions with equity.[44]

The literature concerning the PPSA also contains relatively little analysis of its relationship with equity as a whole.[45] The three comprehensive Australian texts concerning the PPSA, two of which are structured as annotated copies of the Act, contain limited analysis of how it might interact with equitable doctrines and remedies.[46] Similarly, few of the articles concerning the PPSA consider this in depth. This is partly because many of those articles

OPS Screening & Crushing Equipment Pty Ltd [2022] WASCA 134; *Mega v WW Property Development Pty Ltd* [2022] VSC 607; *Allianz Australia Insurance Ltd v Probuild Constructions (Aust) Pty Ltd* [2023] NSWCA 56; *Laurus Group Pty Ltd (admins appt) as Trustee for The Laurus Group Unit Trust v Mitsui & Co (Australia) Ltd* [2023] VSC 412. See further Section II of Chapter Four.

[43] Eg, whether extensions of time are available under *Corporations Act 2001* (Cth) s 588FM: see, eg, *Re Appleyard Capital Pty Ltd; 123 Sweden AB v Appleyard Capital Pty Ltd* (2014) 101 ACSR 629; *Re Accolade Wines Australia Ltd* [2016] NSWSC 1023; *BMW Australia Finance Limited v @Civic Park Medical Centre Pty Ltd* [2019] FCA 999; *Bluewaters Power 1 Pty Ltd v The Griffin Coal Mining Company Pty Ltd* [2019] WASC 438; *Re 100% Plumbing Maintenance Pty Ltd* [2021] NSWSC 103; *Tesoriero v Cao Holdings Pty Ltd, Re Cao Holdings Pty Ltd* [2024] FCA 623.

[44] But see *Re O'Keeffe Heneghan Pty Ltd* [2018] NSWSC 1958; *Re Matcove Pty Ltd* [2020] NSWSC 625, [75]–[82]; *Sutherland v Compton Lot Ten Pty Ltd* [2023] NSWSC 1472, [73]–[86] (all of which are discussed in Chapter Six).

[45] Cf articles which have considered particular aspects of equity in the context of the statute: Jamie Glister, 'The Role of Trusts in the PPSA' (2011) 34(2) *University of New South Wales Law Journal* 628; Nicholas Mirzai, 'The Persistence of Equitable Doctrines with Respect to the Law Relating to Personal Property Securities: Assessing the Impact of the *Personal Property Securities Act 2009* (Cth)' (2013) 24 *Journal of Banking and Finance Law and Practice* 3; W M C Gummow and J G H Stumbles, 'Faulty Refinancing: Subrogation, Torrens and the PPSA' (2015) 89 *Australian Law Journal* 565; Christopher Pearce, 'The Problem of Perfection: Can Equity Provide a Solution?' (2018) 27(1) *Australian Property Law Journal* 26; 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.

[46] Anthony Duggan, *Australian Personal Property Securities Law* (LexisNexis, 3rd ed, 2021); Nicholas Mirzai and Jason Harris, *The Annotated Personal Property Securities Act 2009* (Cth) (Wolters Kluwer, 4th ed, 2020); Craig Wappett, *Essential Personal Property Securities Law in Australia* (LexisNexis Butterworths, 4th ed, 2019).

have focused on more fundamental issues such as the scope of the security interest,[47] or the nature of the security interest by reference to the requirements for 'attachment' under the PPSA.[48] Additionally, in the literature covering other issues regarding the PPSA,[49] there is little analysis of its relationship with equity. Interestingly, much the same is true even in the overseas jurisdictions on whose statutes the PPSA is modelled. There have been surprisingly few Canadian cases concerning interactions between their statutes and equity,[50] and only in

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[47] See, eg, Stumbles (n 37); Diccon Loxton, 'One Flaw Over the Cuckoo's Nest: Making Sense of the "Flawed Asset Arrangement" Example, Security Interest Definition and Set-Off Exclusion in the PPSA' (2011) 34(2) *University of New South Wales Law Journal* 472; Anthony Duggan, 'Romalpa Agreements Post-PPSA' (2011) 33(4) *Sydney Law Review* 645; GJ Tolhurst, Tony Coburn and Alan Peckham, 'Security Interests at the Margins' (2012) 40(4) *Australian Business Law Review* 241; Cheyne Clarke, 'The Threshold Requirements of the PPSA: Does s 12 Require an Interest In Rem in Order to Create a Security Interest?' (2016) 27(1) *Journal of Banking and Finance Law and Practice* 6.

[48] Eg, Sheelagh McCracken, 'Conceptualising the Rights of a Lessee under the Personal Property Securities Regime: The Challenge of "New Learning" for Australian Lawyers' (2011) 34(2) *University of New South Wales Law Journal* 547. See further the articles cited in Section III(A)(1) of Chapter Four (concerning the unitary and minimalist models of the security interest).

[49] See, eg, Anthony Duggan, 'Some Canadian PPSA Cases and Their Implications for Australia and New Zealand' (2010) 38 *Australian Business Law Review* 161; John G H Stumbles, 'The Impact of the *Personal Property Securities Act* on Assignments of Accounts' (2013) 37(2) *Melbourne University Law Review* 315; 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; Andrew Boxall and Diccon Loxton, 'Commodity Transactions and Part 3.4 of the Personal Property Securities Act 2009: An Anomalous Outcome' (2013) 27(2) *Commercial Law Quarterly* 3; Sheelagh McCracken, 'When is a "Buyer" a "Buyer"? Solving Riddles When New Legislation Confronts Established Concepts' in Shelley Griffiths, Sheelagh McCracken and Ann Wardrop, *Exploring Tensions in Finance Law: Trans-Tasman Insights* (Thomson Reuters, 2014) 175; David Brown, 'The Use of Overseas Case Law in the Australian PPSA' (2019) 47(6) *Australian Business Law Review* 461.

[50] But see *Kimwoo Enterprises Ltd v Roynat Inc* (1985) 15 DLR (4th) 751 (Manitoba Court of Appeal); *Canadian Imperial Bank of Commerce v Valley Credit Union Ltd* (1989) 63 DLR (4th) 632 (Manitoba Court of Appeal); *Frankel v Canadian Imperial Bank of Commerce* (1997) 47 CBR (3d) 244 (Ontario Court of Justice); *Furmanek v Community Futures Development Corp of Howe Sound* (1998) 162 DLR (4th) 501 (British Columbia Court of Appeal); *Ellingsen (Trustee of) v Hallmark Ford Sales Ltd* (2000) 190 DLR (4th) 47 (British Columbia Court of Appeal); *Cox v Crystal Graphite Corp* [2006] 26 CBR (5th) 139, [30]–[36] (British Columbia Supreme Court); *Robie Financial Inc v PricewaterhouseCoopers Inc (Trustee of)* [2009] 285 NSR (2d) 329, [40]–[45] (Nova Scotia Supreme Court); *J R Investments Ltd v Moncton Flying Club Estate* [2011] 188 PPSAC (3d) 223, [30]–[32] (New Brunswick Court of Queen's Bench); *J R Investments Ltd v Moncton Flying Club*

recent years have Canadian commentators considered the more general issues that such interactions raise.[51]

For the Australian law of secured transactions over personal property to operate as efficiently as possible, it will be necessary to address such issues. This raises the second and narrower research question of this thesis, which is: can we better understand the PPSA through examining its relationship with equity? This research question arises from the use of the relationship between equity and the PPSA as a case study to demonstrate the effectiveness of the framework for better understanding interactions between statute and the common law. As such, it is complementary to how the thesis will answer the first and broader research question.

Estate [2011] 188 PPSAC (3d) 223, [24]–[28] (New Brunswick Court of Queen's Bench); *i Trade Finance Inc v Bank of Montreal* [2011] 2 SCR 360 (Supreme Court of Canada); *KBA Canada Inc v Supreme Graphics Ltd* [2014] BCJ No 544, [40]–[42] (British Columbia Court of Appeal). See further Chapter Six. Note also *Agricultural Credit Corporation of Saskatchewan v Pettyjohn* [1991] 79 DLR (4th) 22 (Saskatchewan Court of Appeal); *Re N'Amerix Logistix Inc* (2001) 57 OR (3d) 248 (Ontario Superior Court of Justice) (which are respectively considered in Chapters Seven and Nine).

[51] See Ronald CC Cuming, 'Equity and the PPSA: Strange Bedfellows?' (2014) 55(2) *Canadian Business Law Journal* 179; Roderick J Wood, 'Supplementing PPSA Priorities: The Use and Abuse of Common Law and Equitable Principles' (2014) 56(1) *Canadian Business Law Journal* 31.

III Objectives, Methodology and Structure of this Thesis

A *Objectives*

This thesis seeks to answer two questions:

1. How can we better understand interactions between statute and the common law?; and
2. Can we better understand the PPSA through examining its relationship with equity?

These each raise further, subsidiary questions. Those arising from the first research question include (1) is it possible to apply or develop the common law by reference to statute at all and, if so, how can we understand when it is appropriate to do so; (2) how we can better understand when to interpret statutes by reference to the common law; and (3) do the differences between equity and the common law affect these processes, and, if so, how.

Subsidiary questions which arise from the second research question include (1) what are the underlying policy objectives of the PPSA, and what do these tell us about its operation more generally; (2) do these leave any room at all for the operation of equity in its context, and for its interpretation by reference to equity; and, if so, (3) how might some particular equitable doctrines and remedies either operate around it, or inform its interpretation. Finally, the second research question also raises the broader question of (4) should we view the PPSA as operating in its own unique statutory world due to the policy objectives embedded within its reconceptualisation of the law of secured transactions; or, alternatively, should we view the PPSA as just another statute, which is capable of being affected by the more general Australian principles of commercial law against which it operates.

B *Methodology*

To answer these questions, this thesis adopts a primarily doctrinal research methodology. This is because the above-described questions concern our understanding of the current state of the law, and how this in turn should affect its future development. As such, they are susceptible to resolution through critical analysis of authoritative texts through the use of reason, logic and argument.[52] Such texts include cases and statutes.

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[52] Christopher McCrudden, 'Legal Research and the Social Sciences' (2006) 122 *Law Quarterly Review* 632, 633. See further Terry Hutchinson, *Researching and Writing in Law* (Lawbook Co, 4th ed, 2018) Chapter 3; Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law'

This thesis also uses elements of comparative legal research.[53] In particular, the analysis concerning the relationship between statute and the common law draws on legal sources from American and English law, those being the jurisdictions where several key ideas were first developed. The analysis concerning the PPSA draws on legal sources from New Zealand, Canada and, to a lesser extent, the United States of America. This is because those are the jurisdictions on whose statutes the Australian Act was based. However, it should be noted that the objective of this thesis is not to undertake a comparative study. Rather, such analysis is utilised to inform the Australian position, especially in light of the limited case law concerning the PPSA.

Additionally, this thesis uses elements of historical legal research.[54] In particular, the analysis of the PPSA at times necessitates examining the historical development of the laws of secured transactions in Australia and England. This sheds light on the problems which the PPSA is aimed at addressing, and thus on its underlying policy objectives.

C *Structure*

This thesis comprises five Parts.

Part I contains this introductory Chapter.

Part II pertains only to the first research question, concerning statute and the common law. It identifies a framework for understanding interactions between these two bodies of law. It also demonstrates that this framework is consistent with, and can help us to better understand, how Australian courts resolve such interactions in any given case. Finally, it examines how the differences between equity and the common law might affect their interactions with statute. It concludes that statute may be more likely to interact with equity than the common law, and that such interactions may at times be more nuanced. Thus, the framework may be particularly valuable in the context of equity and statute.

(2015) 8(3) *Erasmus Law Review* 130, 131–2; Council of Australian Law Deans, *Statement on the Nature of Legal Research* (2005) 3.

[53] See generally Marieke Oderkerk, 'The Need for a Methodological Framework for Comparative Legal Research: Sense and Nonsense of "Methodological Pluralism" in Comparative Law' (2015) 79 *Journal of Comparative and International Private Law* 589.

[54] See generally David Ibbetson, 'Historical Research in Law' in Mark Tushnet and Peter Cane (ed), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2005).

Parts III and IV then apply the framework to the relationship between equity and the PPSA. Thus, they pertain to both the research questions of the thesis. **Part III** concerns the relationship between the PPSA and equity as a whole. It first provides an overview of the PPSA, and explains why we should not view the Act as a 'code'. It then applies the first step of the framework to the PPSA by identifying its underlying policies, and critically examining their proper scope and significance. Finally, it applies the second step of the framework to the PPSA, by using these policies to determine whether there is room for equity to continue operating in its context at all, and whether it is ever appropriate to interpret provisions of the PPSA by reference to equity.

Part IV then applies the framework to the relationship between the PPSA and two equitable doctrines and remedies, tracing and subrogation. These are chosen as further examples within the case study because they raise questions of both interpretation and the application or development of equity by reference to statute. They are also likely to be important in the context of the PPSA, as indicated by their consideration by commentators in this context, and to benefit from separate analysis to that earlier in the thesis concerning the relationship between equity and the PPSA as a whole, unlike some other equitable doctrines and remedies for which the key points are already addressed by that more general analysis. This Part first examines whether the provision concerning 'proceeds' in the PPSA should be interpreted by reference to equitable tracing. It then examines whether a secured party holding a security interest under the PPSA can claim against traceable substitutes in equity. Finally, it examines whether equitable subrogation remains available in the context of the PPSA.

Together, these latter Parts of the thesis demonstrate the usefulness of the framework to better understanding interactions between a given statute and the common law, both in the abstract and in relation to particular common law claims. This shows the usefulness of the framework at a higher level of abstraction than that already demonstrated in Part II of the thesis, and thus answers the first research question. It also improves our understanding of the PPSA by examining its relationship with equity, both as a whole and in relation to some particular doctrines and remedies. Consequently, these Parts show that it is possible to better understand the PPSA through such analysis, which answers the second research question.

Part V concludes, and suggests avenues for future research.

PART II: A FRAMEWORK FOR UNDERSTANDING STATUTE & THE COMMON LAW

CHAPTER TWO: STATUTE & THE COMMON LAW – GENERALLY

TABLE OF CONTENTS

INTRODUCTION

There are significant gaps in our understanding of how statute and the common law influence each other in Australian law. This is partly because, in any given case, a court can usually resolve the questions in front of it without addressing such broader issues. For example, as will be seen below, cases that apply or develop the common law by reference to statute often employ such reasoning without identifying that they are doing so, or discussing why it is appropriate more generally. At least historically, there has also been a lack of academic interest in this topic.[1]

In the last several decades, however, a body of literature has begun to emerge across the common law world which examines the relationship between statute and the common law. The examination of this relationship in Australian law has grown over the last decade in particular,[2] including due to sustained contributions by leading scholars and judges such as Bant, Paterson, and Leeming.[3] For the most part, this literature has focused on showing that

[1] As discussed in Section I of Chapter One.

[2] Prior to this, the leading English and Australian contributions were P S Atiyah, 'Common Law and Statute Law' (1985) 48(1) *Modern Law Review* 1; Paul Finn, 'Statutes and the Common Law' (1992) 22(1) *University of Western Australia Law Review* 7; Jack Beatson, 'Has the Common Law a Future?' (1997) 56 *Cambridge Law Journal* 291; W M C Gummow, *Change and Continuity: Statute, Equity and Federalism* (Oxford University Press, 1999); Jack Beatson, 'The Role of Statute in the Development of Common Law Doctrine' (2001) 117 *Law Quarterly Review* 247 ('The Role of Statute'); Paul Finn, 'Statutes and the Common Law: the Continuing Story' in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press, 2005) 52.

[3] See, eg, Mark Leeming, 'Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room' (2013) 37(3) *University of New South Wales Law Journal* 1002 ('Theories and Principles'); Elise Bant, 'Statute and the Common Law: Interaction and Influence in Light of the Principle of Coherence' (2015) 38(1) *University of New South Wales Law Journal* 367; Mark Leeming, 'Equity: Ageless in the Age of Statutes' (2015) 9(2) *Journal of Equity* 108; Elise Bant and Jeannie Marie Paterson, 'Estoppel, Misleading Conduct and Equitable Fraud' (2019) 13 *Journal of Equity* 183; Jeannie Marie Paterson and Elise Bant, 'Intuitive Synthesis and Fidelity to Purpose? Judicial Interpretation of the Discretionary Power to Award Civil Penalties under the Australian Consumer Law' in Prue Vines and Scott Donald (eds), *Statutory Interpretation in Private Law* (Federation Press, 2019) 154; Mark Leeming, *The Statutory Foundations of Negligence* (Federation Press, 2019); Elise Bant and Jeannie Marie Paterson, 'Evolution and Revolution: The Remedial Smorgasbord for Misleading Conduct in Australia' (2020) 14(1) *FIU Law Review* 25 ('Evolution and Revolution'); Mark Leeming, *Common Law, Equity and Statute: A Complex Entangled System* (Federation Press, 2023) ('*Common Law, Equity and Statute*').

statute and the common law can affect each other's content, and on examining particular areas where these bodies of law are likely to interact.[4]

Part II of this thesis, which comprises this and the following Chapter, builds upon this by exploring *how* such interactions work in *any given case*. This Chapter explores interactions between statute and the common law, used in the broader sense to describe all judge-made law. In doing so, it builds upon the existing literature by explicitly identifying a framework for understanding such interactions, and demonstrating its applicability and usefulness in Australian law on a case-by-case basis. The following Chapter then explores how the differences between equity and the common law, used there in the narrower sense of those principles developed in the courts of common law prior to the *Judicature Acts 1873–75* (UK), may affect their respective relationships with statute.

Section I of this Chapter commences by identifying three key points from the existing literature which show that statute and the common law must be capable of influencing each other, and demonstrating that they are applicable to Australian law. The rest of the Chapter then turns to the two mechanisms by which statute and the common law influence each other. These are the application or development of the common law by reference to statute, and the interpretation of statute by reference to the common law.

Section II explores the application or development of the common law by reference to statute. It shows that this form of judicial reasoning must be legitimate in Australian law. It further shows that the Australian cases can be understood through a two-step framework. This entails first discerning the underlying policies of statute as a question of statutory construction, and then applying those policies to determine the appropriateness of statute and the common law influencing each other's content.

Section III explores the interpretation of statute by reference to the common law. It identifies the principles of statutory construction which are used to facilitate such interpretive choices. It then shows that the way in which courts use these principles can also be understood through the above-described two-step framework.

Finally, Section IV elaborates on how this framework operates. It also explains why the framework delineates between the application or development of the common law on the

[4] See nn 15, 17 of Chapter One.

one hand and interpretation on the other, but treats the application of the common law and the development of the common law as a single process.

I Why Statute & the Common Law can Influence Each Other

Historically, statute and the common law were thought of as 'oil and water'.[5] But as statutes have become increasingly important across the common law world, a body of literature has emerged which shows that this cannot be correct. This was first articulated in Pound's seminal paper of 1908,[6] the ideas of which were subsequently built upon by American commentators,[7] and in the late 20th century were further developed and applied in the English and Australian contexts.[8] This Section shows that three key points from this body of literature apply to Australian law just as powerfully as they do the laws of other common law jurisdictions. This does away with any objections to the analysis that follows on the basis that statute and the common law are like 'oil and water'.

The first point is that the way in which statutes are given meaning is heavily influenced by the common law. The principles of statutory interpretation are themselves common law principles, which have in turn been subjected to statutory modifications and partial codification in Australia.[9] The process of interpreting statutes is also a product of the common law in the more abstract sense that courts resolve questions of interpretation just like other legal issues – ie, against the context of the facts of the case, the totality of the surrounding law, and the doctrine of precedent.[10] This has a particularly strong influence where statute adopts open-textured language that comes to be strongly informed by a body of case law over time.[11] A significant Australian example of this is the statutory prohibition on

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[5] See Beatson, 'Has the Common Law a Future? (n 2) 300, 308.

[6] Roscoe Pound, 'Common Law and Legislation' (1908) 21(6) *Harvard Law Review* 383.

[7] See particularly James McCauley Landis, 'Statutes and the Sources of Law' (1965) 2(1) *Harvard Journal on Legislation* 7 (first published in 1934); Harlan F Stone, 'The Common Law in the United States' (1936) 50(1) *Harvard Law Review* 4; William Herbert Page, 'Statutes as Common Law Principles' (1944) (4) *Wisconsin Law Review* 175; Roger J Traynor, 'Statutes Revolving in Common-Law Orbits' (1968) 17 *Catholic University Law Review* 401; Ellen Ash Peters, 'Common Law Judging in a Statutory World: An Address' (1982) 43(4) *University of Pittsburgh Law Review* 995.

[8] See particularly nn 2–3 above.

[9] Noted in Stephen Gageler, 'Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process' (2011) 37(2) *Monash University Law Review* 1, 12.

[10] See generally ibid; also Beatson, 'Has the Common Law a Future? (n 2) 302.

[11] For various examples, see Atiyah (n 2) 3; Beatson, 'Has the Common Law a Future? (n 2) 302–3; Gummow (n 2) 6–9; Andrew Burrows, 'The Relationship Between Common Law and Statute in the Law of Obligations' (2012) 128 *Law Quarterly Review* 232.

‘misleading or deceptive conduct’ that is ‘in trade or commerce’.[12] As put by now-Chief Justice Gageler of the High Court, at the time of its enactment in 1975 no one could have realistically stated that the body of law that has developed around this prohibition was ‘nascent and discoverable in those words’.[13] This demonstrates that the line between statute and the common law is blurrier than it first appears, which in turn suggests that the two must be capable of influencing each other.

The second point is that much of what is characterised as common law actually had its ‘origin in statute or as glosses on statute or as responses to statute’.[14] Oft-cited examples which now form part of Australian law include the existence of the criminal law of conspiracy, which can be traced back to English statutes enacted in the 13th–14th centuries;[15] the equitable doctrine of part performance, which developed in response to the *Statute of Frauds 1677* (Imp);[16] and the application of limitation periods in equity by analogy to statutes of limitation, even where those statutes are not actually enlivened.[17] Such bodies of law further erode the line between statute and the common law, and thus further undermine the argument that the two are incapable of influencing each other.

The third point is that statutes cannot be viewed in isolation from the common law because they rely on its infrastructure.[18] For example, statutes commonly adopt terminology

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[12] *Australian Consumer Law* s 18 (formerly *Trade Practices Act 1974* (Cth) s 52).

[13] Gageler (n 9) 10.

[14] *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, 60 [19] (‘*Esso v FCT*’). See further Gummow (n 2) 2; Burrows (n 11) 235; Leeming, ‘Theories and Principles’ (n 3); Leeming, *Common Law, Equity and Statute* (n 3), particularly Chapter 4.

[15] See *Peters v The Queen* (1998) 192 CLR 493, 514–5 [52]–[53] (McHugh J). Similarly, see *Gammage v R* (1969) 122 CLR 444, 462 (identifying the statutory origin of the distinction between manslaughter and murder).

[16] See *Esso v FCT* (n 14) 60 [19]; Gummow (n 2) 2; Leeming, ‘Theories and Principles’ (n 3) 1008–10; J D Heydon, ‘Equity and Statute’ in P G Turner (ed), *Equity and Administration* (Cambridge University Press, 2016) 211, 241–5.

[17] *See Esso v FCT* (n 14) 60 [19]; Gummow (n 2) 2; Beatson, ‘The Role of Statute’ (n 2) 252; Burrows (n 11) 250–1; Leeming, ‘Equity: Ageless in the Age of Statutes’ (n 3) 124; Heydon (n 16) 255; Sir Anthony Mason, ‘The Interaction of Statute Law and Common Law’ (2016) 90 *Australian Law Journal* 324, 341–2 (‘Statute Law and Common Law’); Michelle Gordon, ‘Analogical Reasoning by Reference to Statute: What is the Judicial Function?’ (2019) 42(1) *University of New South Wales Law Journal* 4, 17.

[18] See Gageler (n 9) 11; Atiyah (n 2) 1–3; Mark Leeming, ‘Equity and Statute: A Commentary’ in P G Turner (ed), *Equity and Administration* (Cambridge University Press, 2016) 248, 251 (‘A Commentary’).

from the common law and are thus informed by its content.[19] A notable Australian example is the statutory prohibition on unconscionable conduct,[20] which is not limited to its equitable counterpart but is nonetheless informed by it.[21] Statutes also sometimes make specific changes to the common law,[22] such as in the *Trustee Act 1925* (NSW) (and its counterparts); or codify the common law,[23] such as in the *Sale of Goods Act 1923* (NSW) (and its counterparts); or preserve the common law,[24] such as in s 4M of the *Trade Practices Act 1974* (Cth) (now repealed).[25] Furthermore, as put by Burrows, statutes also rely on the infrastructure of the common law in a more general sense:[26]

> [O]n close examination [it] is uncontroversial and obvious, that at least the vast majority of statutes in the law of obligations can only work if some of the common law survives. … No doubt those drafting statutes are all too well aware of the necessity of "reading into" a statute the background common law. It would make the task of drafting almost impossible if no assumptions as to that background could be made.

Consequently, statute and the common law must be capable of influencing each other. Accepting this, it is now possible to turn to the processes by which this occurs.

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[19] See Gummow (n 2) 7–8; Anthony Mason, 'A Judicial Perspective on the Development of Common Law Doctrine in the Light of Statute Law' in Andrew Robertson and Michael Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Hart Publishing, 2016) 119, 127–8 ('A Judicial Perspective').

[20] *Australian Consumer Law* s 21; *Australian Securities and Investments Commission Act 2001* (Cth) s 21CB.

[21] See *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, 265–276 [259]–[306], particularly at 271 [284]; James Allsop, 'Statutes and Equity' (Kenneth Sutton Lecture, 12 November 2019); Marcel Delany, 'Statutory Unconscionable Conduct: The Search for Rational Criteria' (2020) 14 *Journal of Equity* 206.

[22] See Beatson, 'The Role of Statute' (n 2) 252; Heydon (n 16) 214; Leeming, 'Equity: Ageless in the Age of Statutes' (n 3) 121; Leeming, *Common Law, Equity and Statute* (n 3) 121–2.

[23] Discussed in Atiyah (n 2) 16–19.

[24] See Burrows (n 11) 235–6.

[25] See Mason, 'A Judicial Perspective' (n 19) 128, discussing *Peters (WA) Ltd v Petersville Ltd* (2001) 205 CLR 126, 141 [33] ('*Peters v Petersville*'). Similarly, see *Personal Property Securities Act 2009* (Cth) s 254 ('PPSA'), which is examined in Part III of this thesis.

[26] Burrows (n 11) 234. Similarly, see Andrew Burrows, *Thinking About Statutes: Interpretation, Interaction, Improvement* (Cambridge University Press, 2018) 57–8; Atiyah (n 2) 1–3; Leeming, 'A Commentary' (n 18) 251.

II Applying or Developing the Common Law by Reference to Statute

The idea that the common law might develop by reference to statute was first suggested over 100 years ago, in the American context, by Pound.[27] But although the conceptual objection to this based on the notion of 'oil and water' cannot be sustained, and although various Australian examples of such reasoning have already been identified, Australian courts have not yet explicitly affirmed the legitimacy of so applying or developing the common law.

This Section explores whether it is legitimate to apply or develop the common law by reference to statute, and, if it is, how we can better understand when this should occur. To do so, it more closely and comprehensively examines the Australian jurisprudence concerning such reasoning than has occurred to date.[28] This reveals that the High Court of Australia has applied or developed the common law by reference to statute in cases spanning both decades and different areas of law. Thus, such reasoning must already be legitimate in Australian law. It also reveals that the way in which such reasoning has been employed can be understood via a two-step framework.

As identified in the previous Chapter, it has been observed that statutes contain underlying policies which courts across the common law world have drawn upon, in various contexts, to determine how statutes interact with the common law.[29] It follows from this that all such cases should be determined by what this thesis terms the 'framework' for understanding interactions between statute and the common law. This entails courts first identifying the underlying policies of statute, and then using those policies to determine how the statute in question interacts with the common law. However, this two-step framework has not previously been explicitly identified as such. Despite this, as will be seen below, the way in which the High Court has applied or developed the common law by reference to statute thus-far is consistent with, and can sometimes be better understood via, this framework. This immediately shows the value of explicitly identifying the framework. It also sheds light on how the framework operates in the abstract, which is explored further later in the Chapter.[30]

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[27] Pound (n 6).

[28] Cf Mason, 'Statute Law and Common Law' (n 17) 331–8; Gordon (n 17); Leeming, *Common Law, Equity and Statute* (n 3) 124–6.

[29] See, eg, nn 15, 21–7 of Chapter One.

[30] See further Section IV below.

Sub-section A examines the discussion by the High Court of the legitimacy of applying or developing the common law by reference to statute. It pertains solely to its legitimacy in Australian law. Sub-section B examines several cases where the High Court has actually so applied or developed the common law, albeit without explicitly recognising that it was doing so.[31] It pertains to both the legitimacy of such reasoning, and how we can better understand when it is employed.

A *Cases* Discussing *Applying or Developing the Common Law by Reference to Statute*

1 *Explicit Discussion by the High Court*

(a) Ratio Decidendi

Only two High Court cases have explicitly discussed the legitimacy of applying or developing the common law by reference to statute in a manner that was essential to their outcomes.[32] The first was *Lamb v Cotogno*, which was decided in 1987.[33] It concerned whether exemplary damages remained available where the *Motor Vehicles Act 1942* (NSW) shifted liability for such damages from the defendant, a negligent driver, to a compulsory third party insurer. In considering the defendant's primary argument that exemplary damages were incompatible with the new regime introduced by the statute, the Court focused upon Lord Diplock's statement in *Erven Warnink BV v J Townend & Sons (Hull) Ltd* ('*Erven Warnink*'):[34]

[31] Cf *Harriton v Stephens* (2006) 226 CLR 52, 96 [140] (Kirby J, dissenting) ('If the courts are, in fact, relying on legislative policy as a reason for altering the course of the common law of torts, that reliance should be disclosed. Without such disclosure, the appropriateness of such reliance could never properly be considered and contested').

[32] To determine that these are the only such cases, keyword searches of the Commonwealth Law Reports were undertaken, in addition to a review of all the High Court cases cited in the literature concerning the relationship between statute and the common law. Relatedly, an additional possible such case is *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 ('*Osmond*'). But since *Osmond* (n 32) concerned whether a duty to give reasons attached to a decision made under statute, it should be viewed as a case of statutory interpretation. Furthermore, central to the reasoning in *Osmond* (n 32) was the assumption that there was a common law of New South Wales rather than a single common law of Australia, which cannot be correct following *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563.

[33] (1987) 164 CLR 1 ('*Lamb v Cotogno*').

[34] [1979] AC 731, 743 ('*Erven Warnink*').

> Where over a period of years there can be discerned a steady trend in legislation which reflects the view of successive Parliaments as to what the public interest demands in a particular field of law, development of the common law in that part of the same field which has been left to it ought to proceed upon a parallel rather than a diverging course.

Applying this statement, the Court determined that there was ‘no principle or trend to be discerned’ in the relevant statute, and thus that exemplary damages at common law remained available.[35]

Importantly, although the Court expressed scepticism at developing the common law by reference to statute in the following passage, it did not reject the legitimacy of such reasoning altogether:[36]

> *Even if it were possible* for a court to go beyond what a statute actually enacts and to draw from it some principle to be applied by way of analogy in fashioning the common law, it would not assist the defendant's argument in this case. Such an approach was first suggested by Pound in 1907, but it has never really gained general acceptance, at all events in that simple form …

Additionally, its application of Lord Diplock's above-quoted statement should not be read as requiring ‘a steady trend in legislation which reflects the view of successive Parliaments’ as a condition precedent to developing the common law by reference to statute. This would be inconsistent with the other High Court cases that have so applied or developed the common law, which are examined below.[37] It would also be inconsistent with how Lord Diplock used those words himself – ie, to support the expansion of the availability of the tort of passing off by reference to ‘the increasing recognition by Parliament of the need for more rigorous standards of commercial honesty’, rather than to impose any limitation on the availability of such reasoning.[38] Thus, while such a trend might provide a stronger case for applying or developing the common law by reference to statute, it should not be viewed as a necessary prerequisite to doing so.[39]

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[35] *Lamb v Cotogno* (n 33) 11.

[36] Ibid 12.

[37] See Section II(B) below.

[38] *Erven Warnink* (n 34) 743.

[39] As argued in Mason, ‘A Judicial Perspective’ (n 19) 129; Mason, ‘Statute Law and Common Law’ (n 17) 327. This would also be consistent with the approach adopted in the United States: see *National City Bank v Republic of China*, 348 US 356, 360 (1955) (Supreme Court of the United States).

The second case is *Esso Australia Resources Ltd v Federal Commissioner of Taxation* ('*Esso v FCT*'), which was decided in 1999.[40] It relevantly concerned whether the adoption of a different statutory test for legal professional privilege under the uniform *Evidence Acts*, which at the time had only been enacted by the Commonwealth and New South Wales, should have led to the reformulation of the common law test for legal professional privilege. The joint majority judgment concluded that developing the common law by reference to statutes which were only enacted in two jurisdictions would be inconsistent with Australia's federal constitutional system, under which '[t]here is but one common law in Australia which is declared by this Court as the final court of appeal'.[41] Nonetheless, it did ultimately determine that the common law test should be re-formulated in accordance with the statutes, for different reasons.

Like in *Lamb v Cotogno*, the joint majority judgment in *Esso v FCT* left open the legitimacy of applying or developing the common law by reference to statute.[42] Furthermore, by contrast to the earlier case, its tenor was noticeably less sceptical of such reasoning. Its consideration commenced with the observation that much of the common law originated in statute,[43] was longer and less dismissive than the above-quoted passage from *Lamb v Cotogno*,[44] and concluded with the following comment:[45]

> … Cooke P [of the New Zealand Court of Appeal], speaking in a unitary system, observed that '[t]he analogy of a statute may properly influence the development of the common law'. However, whatever may be involved in this doctrine of analogy, as to which it is unnecessary now to venture any further opinion, the situation in the present litigation cannot provide an occasion for its application.

Importantly, *Esso v FCT* should not be read as imposing a requirement that a statute must be in force across every Australian jurisdiction for the common law to be capable of

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[40] *Esso v FCT* (n 14).

[41] Ibid 61–2 [23] (Gleeson CJ, Gaudron and Gummow JJ). Note also *Baker v The Queen* (2012) 245 CLR 632, 666–8 [113]–[119] (Heydon J). But see Mason, 'A Judicial Perspective' (n 19) 129–30; Mason, 'Statute Law and Common Law' (n 17) 327; also D St L Kelly, 'The *Osmond* Case: Common Law and Statute Law' (1986) 60 *Australian Law Journal* 513, 519–20 (predating ibid but criticising the same point).

[42] *Esso v FCT* (n 14) 63 [28] (Gleeson CJ, Gaudron and Gummow JJ) (McHugh J agreeing regarding this at 73–4 [64], but dissenting on other grounds). Cf 99 [144] (Callinan J, rejecting the legitimacy of such reasoning), 83 [91] (Kirby J, dissenting on other grounds, approving the legitimacy of such reasoning).

[43] Ibid 60 [19].

[44] Ibid 60–3 [20]–[28].

[45] Ibid 62–3 [25]–[28] (citations omitted).

developing by reference to it. This would be inconsistent with *Delehunt v Carmody*, where the High Court altered the equitable presumption of co-ownership of property by reference to a New South Wales statute without any discussion of its consistency with the legislation of other Australian jurisdictions.[46] It would also be inconsistent with a subsequent passage in *Esso v FCT* itself, where the joint majority judgment cited the statutory recognition by the Commonwealth and New South Wales Parliaments of the dominant purpose test as one of several reasons for reformulating the common law test, notwithstanding its earlier analysis suggesting that those statutes could not be taken into account.[47] Consequently, the common law should not be incapable of applying or developing by reference to a statute which is only in force in some Australian jurisdictions, albeit that this might be a reason to exercise caution or to afford lesser weight to such a statute for this purpose.[48]

(b) Obiter Dicta

Three further cases, decided after *Lamb v Cotogno* and *Esso v FCT*, contain comments which explicitly support the legitimacy of applying or developing the common law by reference to statute.[49] Space precludes a thorough examination of these comments, but only limited weight can be placed upon them anyway since each was only *obiter dicta*. Nonetheless, they are worth noting in that they continue a trend whereby the High Court has moved away from its initial scepticism towards the legitimacy of such reasoning.

2 *Implicit Support by the High Court*

Further to this, two separate lines of authority provide implicit support for the legitimacy of applying or developing the common law by reference to statute. The first are

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[46] (1986) 161 CLR 464, 471–3. Such reasoning might be explicable on the basis that it was not yet recognised that there is only one common law of Australia. But unless this means that *Delehunt v Carmody* (n 46) is no longer good law, which has not been argued, then this case must be inconsistent with such a precondition to developing the common law by reference to statute.

[47] *Esso v FCT* (n 14) 71–2 [56].

[48] Similarly, see Kelly (n 41) 519. This would also be consistent with the approach adopted in the United States: see *Am Exp Lines v Alvez*, 446 US 274, 284–5 (1980) (Supreme Court of the United States) (developing the federal common law by reference to statutes enacted in most, but not all, American jurisdictions).

[49] *Peters v Petersville* (n 25) 141 [33], quoting *Moorgate Tobacco Company Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414, 445; *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, 299–300 [83] (‘*Gifford*’); *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 230 [170].

the recent High Court cases emphasising the importance of 'coherence'.[50] This is because applying or developing the common law by reference to statute is likely to foster greater coherence between these two bodies of law.[51] Indeed, as will be seen below, both of the leading cases concerning coherence are in fact examples of such reasoning.[52]

The second concerns what might be thought of as 'sub-principles' of this form of reasoning. These are established legal principles which entail applying the common law by reference to statute in specific and recurring contexts. For example, they include those principles recognising that a contract or trust that is (indirectly) contrary to statute may be void,[53] or that a common law duty of care may be owed by a statutory body.[54] Here, the focus on the relevant sub-principle may overshadow that such principles are also instances of applying or developing the common law by reference to statute. Thus, they further support its legitimacy.

B *Cases* Applying or Developing *the Common Law by Reference to Statute*

Establishing that the judicial discussion of applying or developing the common law by reference to statute leaves its legitimacy open, this sub-section turns to examining eight cases where the High Court has so applied or developed the common law.[55] Some of these cases

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[50] *Miller v Miller* (2011) 242 CLR 446, 454 [15]; *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 513 [23] ('*Equuscorp*').

[51] Similarly, see *Pittmore Pty Ltd v Chan* [2020] NSWCA 34, [195] (Leeming JA). Also note the links drawn between coherence, and developing the common law by reference to statute, in Bant (n 3); Bant and Paterson, 'Estoppel, Misleading Conduct and Equitable Fraud' (n 3); Bant and Paterson, 'Evolution and Revolution' (n 3); Langford (n 4).

[52] See Section II(B) below.

[53] See, eg, *Nelson v Nelson* (1995) 184 CLR 538, particularly at 549–68 (Deane and Gummow JJ), 604–13, 617 (McHugh J).

[54] See, eg, *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 18–19 [25]–[27] (Gaudron J), 29–30 [61]–[62], 34–52 [79]–[102] (McHugh J), 58–61 [159]–[166] (Gummow J, dissenting), 76–9 [213]–[218] (Kirby J), 96–7 [270]–[273] (Hayne J, dissenting) ('*Crimmins*').

[55] Further examples which are not discussed in the body text below in the interests of space include *Cohen v Cohen* (1929) 42 CLR 91, 99–100 (applying limitation periods to certain equitable remedies by analogy to the *Statute of Limitations 1623* (Imp) and its modern counterparts); ibid 49–50 [127]–[128] (McHugh J), 86 [234] (Kirby J) (drawing on one of the statutory policies within the *Stevedoring Industry Act 1956* (Cth) in support of finding a duty of care owed by the statutory body created by that Act to a waterside worker); *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390, 407–9 [41] (drawing on the statutory policy

have been identified in existing commentaries concerning statute and the common law, and others are identified below as examples of such reasoning for the first time.[56] This shows that such reasoning must already be legitimate in Australian law. Furthermore, in examining these cases, this sub-section demonstrates that their reasoning falls within the two-step framework which is implicit within the existing literature concerning statute and the common law. This entails first discerning the underlying policies of statute as a question of construction, and then using those policies to determine the appropriateness of statute and the common law influencing each other's content. As will be seen below, this framework is not only consistent with the reasoning in these cases, but can help us to better understand them.

In ***R v L***, in the course of rejecting that marriage gave rise to irrevocable consent to sexual intercourse at common law, Mason CJ, Deane and Toohey JJ stated:[57]

> [E]ven if the respondent could … support the proposition that is crucial to his case, namely, that by reason of marriage there is an irrevocable consent to sexual intercourse, this Court would be justified in refusing to accept a notion that is so out of keeping with the view society now takes of the relationship between the parties to a marriage. *The notion is out of keeping also with recent changes in the criminal law of this country made by statute, which draw no distinction between a wife and other women in defining the offence of rape.* It is unnecessary for the Court to do more than to say that, if it was ever the common law that by marriage a wife gave irrevocable consent to sexual intercourse by her husband, it is no longer the common law.

This example of developing the common law by reference to statute falls comfortably within the above-described framework. Their Honours can be seen to discern a statutory policy within the criminal law statutes of each Australian jurisdiction, which extended beyond the direct effect of their words.[58] This policy was that there is no distinction between extra-marital rape, and intra-marital rape. That policy was in turn applied to develop the common law, ie, as a reason in favour of recognising that marital rape is a crime at common law.

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underlying three statutes, read together, in refusing to recognise a common law duty of care from a publican to a customer who suffered a fatal motorcycle accident after becoming heavily intoxicated at a hotel) ('*CAL No 14*').

[56] Those which had not yet been identified in this context at the time of writing are *Nelson v Nelson* (n 53); *Smethurst v Commissioner of Police (Cth)* (2020) 272 CLR 177 ('*Smethurst*').

[57] (1991) 174 CLR 379, 390 (emphasis added) ('*R v L*'). Similarly, see *PGA v The Queen* (2012) 245 CLR 355.

[58] The relevant statutes are cited in *R v L* (n 57) 390 n 58 (save for the South Australian statute which was discussed in the case more generally).

In ***Vadasz v Pioneer Concrete (SA) Pty Ltd*** (‘*Vadasz*’), in the course of granting partial rescission to a guarantor who was misled to believe that his guarantee only covered future debts, the Court stated:[59]

> The appellant [being the guarantor] is "seeking the assistance of a court of equity and he who seeks equity must do equity". The Court must look at what is practically just for both parties, not only the appellant. To enforce the guarantee [only] to the extent of future indebtedness is to do no more than hold the appellant to what he was prepared to undertake independently of any misrepresentation. … A similar approach was taken by the Court of Appeal in New South Wales to proceedings under the *Contracts Review Act 1980* (NSW) in setting aside an "unjust" contract. There a guarantee was enforced against the guarantor to the extent that she believed she had agreed to.

Here again the Court developed the common law by reference to statute, albeit that its reasoning for doing so was briefer than in *R v L*. Viewed through the framework, it can be seen to discern a statutory policy, which is to prioritise doing ‘practical justice’ in granting relief to a party to a misrepresentation. It then applied that policy to develop the common law, ie, as a reason in favour of expanding the equitable remedy of rescission to include partial rescission. In this case, the framework is not only consistent with the Court’s reasoning, but also helps to further explain it in light of its brevity. Furthermore, to the extent that such a policy seems overly broad or vague, this could be a basis to either criticise or refine such reasoning for the purposes of resolving the further questions which the availability of partial rescission raises.[60]

Building upon the use of the framework to critically examine judicial reasoning, ***Smethurst v Commissioner of Police (Cth)*** (‘*Smethurst*’) demonstrates how it can be used to better understand key differences between judgments in a given case.[61] *Smethurst* relevantly concerned the availability of an injunction prohibiting the use of, or requiring the destruction of, data that was unlawfully seized from a journalist by the Australian Federal Police under an invalid search warrant. In determining that such an injunction was not available, the joint majority judgment can be seen to have identified a statutory policy within s 138 of the *Evidence Act 1995* (Cth). This was that unlawfully obtained evidence is capable of being

[59] (1995) 184 CLR 102, 115–16 (‘*Vadasz*’).

[60] See further Dominic O’Sullivan, ‘Partial Rescission for Misrepresentation in Australia’ (1997) 13 *Law Quarterly Review* 16; Andrew Robertson, ‘Partial Rescission, Causation and Benefit’ (2001) 17 *Journal of Contract Law* 163.

[61] *Smethurst* (n 56).

used in certain circumstances. It then incorporated that policy into its application of the common law, ie, as a further reason to refuse an equitable injunction that might otherwise have prevented the disclosure of criminality, notwithstanding that the relevant evidence was unlawfully obtained.[62]

By contrast, Edelman J (dissenting) can be seen to have identified a statutory policy in Pt IAA of the *Crimes Act 1914* (Cth), which regulates the lawful seizure of evidence under search warrants. This was to protect individual rights and freedoms, including privacy.[63] He then applied that policy to support his contrary view as to how the common law should have applied, ie, as a reason in favour of the inadequacy of damages and thus in favour of the availability of an injunction.[64] Here, the framework is not only consistent with these judgments, but also reveals that each applied the common law by reference to statute in quite different ways – ie, by reference to different statutes, in support of different outcomes. This helps us to better understand at least one difference between their reasoning, which may in turn foster critical evaluation of a contentious case decided by a bare majority of the High Court.

Another example where the framework helps to understand the outcome, and to critically evaluate the ongoing persuasiveness of its reasoning, is ***Calverley v Green***.[65] There, in the course of rejecting that the presumption of advancement should be expanded to apply from a de facto husband to his de facto wife, Mason and Brennan JJ stated:[66]

> The provisions of ss 79 and 80 of the *Family Law Act 1975* (Cth) now furnish a further ground for not applying the special [equitable] rules governing the title to property in the case of spouses in order to resolve property disputes between parties who have cohabited but who have not married. On dissolution of a marriage, ss 79 and 80 confer a discretionary power upon the Family Court of Australia to alter the property interests of the parties to the marriage if it is just and equitable to do so. On the termination of an association between a man and a woman who are not married to each other, no discretionary power may be exercised and the jurisdiction of the courts of equity is simply to declare the proprietary rights of the parties …

[62] Ibid 221–3 [99]–[104].

[63] Ibid 281 [263].

[64] Ibid 281–2 [263]–[264].

[65] (1984) 155 CLR 242.

[66] Ibid 260–1 (Mason and Brennan JJ).

Such reasoning can be viewed as identifying a statutory policy, being that special rules should apply to the resolution of property disputes between married couples, and then applying it as a reason against developing the common law, ie, as a reason against expanding the equitable presumption of advancement to de facto couples.[67] Viewed as such, it becomes apparent that this reasoning no longer holds force following the amendments to the *Family Law Act 1975* (Cth) to include de facto couples in its provisions concerning the division of property.[68] Following such amendments, the statute can no longer be characterised as containing a policy of delineating between spouses based on whether or not they are married.

Nelson v Nelson demonstrates the applicability and usefulness of the framework to understanding highly fact-specific applications of the common law by reference to statute.[69] It concerned the assertion of ownership over a property by Mrs Nelson, who had purchased the property in her children's names so that she could later obtain access to a statutory subsidy to purchase a new home for which she was only eligible if she did not own any other properties. In determining that this illegal purpose did not prevent Mrs Nelson from enforcing a resulting trust in her favour, but that it did necessitate only granting relief on terms that she repay the value of the subsidy to the government, both the majority judgments applied the common law by reference to statute. First, they can be seen to have discerned a statutory policy underlying the statutory subsidy scheme, being that falsely claiming eligibility to a housing subsidy was contrary to the legislation but did not necessarily require the property rights to be wholly denied for deterrence purposes.[70] Then, they applied that policy to determine that the trust was contrary to the scheme of the statute, but that this was capable of being remedied in a less drastic manner than declaring it wholly unenforceable – ie, as a reason in favour of recognising the trust only if Mrs Nelson repaid the value of the subsidy.[71]

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[67] Similarly, see *Brown v Brown* (1993) 31 NSWLR 582, 599 (Kirby P, dissenting on other grounds); *Nelson v Nelson* (n 53) 601 (McHugh J) (which both identified that the *Family Law Act 1975* (Cth) imposes an obligation on mothers to make financial contributions towards the welfare of their children, and then applied that as a reason in favour of expanding the presumption of advancement to apply from a mother to child).

[68] Pt V Div 2. Similarly, see *Bosanac v Commissioner of Taxation* (2022) 275 CLR 37, 52 [17] (Kiefel CJ and Gleeson J); Cora Fabbri, '*Bosanac v Federal Commissioner of Taxation*: The Future of the Presumptions of Resulting Trust and Advancement' (2024) 46(1) *Sydney Law Review* 103, 110–12.

[69] *Nelson v Nelson* (n 53).

[70] Ibid 568–71 (Deane and Gummow JJ), 615–16 (McHugh J), construing the *Defence Service Homes Act 1918* (Cth) and *Crimes Act 1914* (Cth) (read together).

[71] *Nelson v Nelson* (n 53) 571–3 (Deane and Gummow JJ), 616–18 (McHugh J).

Where each of the cases examined thus-far concerned *expanding* the availability of the common law by reference to statute, the following two cases demonstrate the usefulness of the framework to understanding interactions where statute might *curtail* the common law. These are better viewed as cases concerning the application or development of the common law than as cases of statutory interpretation. This is because they concern indirect inconsistencies between the two bodies of law,[72] such that the statute itself may be merely one of several factors in determining whether the common law claim is available.[73]

Miller v Miller concerned whether a duty of care was owed by the driver of a stolen car to a passenger who was complicit in its theft, but who had pleaded with the driver to be let out of the vehicle (to no avail) prior to its being crashed.[74] Viewed through the lens of the framework, the majority can be seen to have discerned a policy of deterring reckless and dangerous driving from the *Criminal Code Act Compilation Act 1913* (WA).[75] They then applied this policy to determine that a duty of care was still available, ie, because once the passenger asked to be let out of the car she was no longer participating in its illegal use,[76] such that there was no longer any inconsistency between the recognition of a common law duty of care and the statutory policy of deterring reckless and dangerous driving.[77]

Equuscorp Pty Ltd v Haxton ('*Equuscorp*') relevantly concerned whether a statute requiring the registration of prospectuses in respect of certain investments ousted the availability of a claim for money had and received, in circumstances where payments had been made under loan agreements that were rendered void due to failure to comply with the statute.[78] The majority judgments can be seen to have first discerned a statutory policy of protecting innocent investors.[79] They then applied this policy to determine whether the common law remained available, ie, as a determinative reason against the availability of

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[72] A similar distinction is drawn in the context of illegality in ibid 551–2 (Deane and Gummow JJ), 611 (McHugh J).

[73] See, eg, *CAL No 14* (n 55) 407–9 [41] (inconsistency with statutory policy was only one of several reasons why it was inappropriate to impose a duty of care in the circumstances).

[74] *Miller v Miller* (n 50).

[75] Ibid 473–82 [75]–[101], particularly at 481–2 [101].

[76] Ibid 483 [106].

[77] Note particularly ibid 482 [104].

[78] *Equuscorp* (n 50).

[79] Ibid 512–13 [21]–[22] (French CJ, Crennan and Kiefel JJ), 535–6 [91]–[93] (Gummow and Bell JJ).

claims for money had and received since such claims would otherwise ‘stultify the statutory policy’.[80]

The final case demonstrates the usefulness of the framework to understanding cases where a statute does not contain a sufficiently clear policy by reference to which the common law can apply or develop. As outlined above, in ***Lamb v Cotogno*** the Court refused to curtail the availability of exemplary damages in circumstances where liability for such damages had been shifted from a driver to a compulsory third party insurer by the *Motor Vehicles Act 1942* (NSW).[81] Although this could be attributed to the Court’s emphasis on the absence of a steady trend in legislation reflecting the view of successive parliaments,[82] it can also be understood through the following passage:[83]

> But in this case there is no principle or trend to be discerned in the *Motor Vehicles (Third Party Insurance) Act* or any other legislation concerning the measure of damages to be applied in cases of compulsory insurance.

Considered against the framework, the above passage can be seen to discern that there was no relevant statutory policy at all that affected the question for resolution in that case. This in turn explains why the common law was unaffected by the statute.

[80] Ibid 543–4 [111] (Gummow and Bell JJ); also 523 [46] (French CJ, Crennan and Kiefel JJ).

[81] *Lamb v Cotogno* (n 33).

[82] See further Section II(A)(1)(a) above, discussing *Erven Warnink* (n 34) 743 (Lord Diplock).

[83] *Lamb v Cotogno* (n 33) 12.

III Interpreting Statute by Reference to the Common Law

Establishing that courts can apply or develop the common law by reference to statute in Australian law, and that this can be understood through the above-described framework, this Section turns to the converse process of interpreting statute by reference to the common law. It is uncontroversial that statutes can be so interpreted. As put in *Conway v The Queen*:[84]

> When a statute enters a field that has been governed by the common law, the pre-existing common law almost invariably gives guidance as to the statute's meaning and purpose. That is because the meaning of legislation usually depends on a background of concepts, principles, practices and circumstances that the drafters "took for granted or understood, without conscious advertence, by reason of their common language or culture".

There are several different principles of statutory interpretation which could explain this. These include the presumptions concerning terms with an established legal meaning,[85] statutory interferences with fundamental common law principles,[86] and statutory interferences with other common law principles.[87] They also include the emphasis within modern statutory interpretation on context,[88] which is used 'in its widest sense' and includes 'the existing state of the law'.[89] The use of this interpretive principle has received little attention as a method of

[84] (2002) 209 CLR 303, 207–8 [5] ('*Conway*').

[85] See *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566, particularly at 585–6 [45] (concerning a statutory 'trust'); *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249 (concerning 'pawn' and 'pledge') ('*Palgo*'); *Aubrey v The Queen* (2017) 260 CLR 305, 323–4 [34] (concerning the word 'inflict').

[86] See *Potter v Minahan* (1908) 7 CLR 277, 304; *Coco v The Queen* (1994) 179 CLR 427, 436–8; *Daniels Corporation International Pty Ltd v Australian Competition & Consumer Commission* (2002) 213 CLR 543, 553 [11] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), 562–3 [43] (McHugh J), 584 [112] (Kirby J); *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 [19]. See further Perry Herzfeld and Thomas Prince, *Interpretation* (Thomson Reuters, 2nd edition, 2020) 195–208 [9.50]–[9.140]; D Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th ed, 2019) Chapter 5.

[87] See *Gifford* (n 49) 284–5 [36]–[37]; *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 328–9 [19] (Gleeson CJ), 357–8 [118] (McHugh J); also *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625, 635–6, citing *Smorgon v Australia and New Zealand Banking Group Ltd* (1976) 134 CLR 475, 487. As observed in Herzfeld and Prince (n 86) 209 [9.160], modern cases tend to treat this as a weak presumption that is only of assistance if the other arguments are fairly evenly balanced.

[88] See generally Jeffrey Barnes, 'Contextualism: The Modern Approach to Statutory Interpretation' (2018) 41(4) *University of New South Wales Law Journal* 1083.

[89] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 ('*CIC Insurance*').

construing statutes by reference to the common law.[90] But it seems to be the best explanation for the various judicial comments that such interpretations are legitimate.[91] It would also explain why many of the cases that so interpret statutes do not refer to any of the more specific interpretive presumptions, including even where the relevant statute adopts terminology with an established meaning at common law.[92]

However, these principles of statutory interpretation are insufficient, in and of themselves, to explain how courts determine whether to interpret statutes by reference to the common law. This is because they provide minimal guidance as to when the relevant interpretive presumptions should be rebutted, or when the context of a statute might not justify interpreting it by reference to a common law principle which otherwise seems analogous to it. This is where the framework for understanding interactions between statute and the common law has a role to play.

By examining four Australian examples where statutes have been interpreted by reference to the common law, this Section will show that the framework is consistent with, and can help us to better understand, how courts apply these interpretive principles in such cases. This builds upon the existing literature which specifically concerns interpreting statutes by reference to the common law, which has largely focused on more specific examples where statutes should, or should not, be so interpreted.[93]

Before proceeding further, it must be noted that the framework is not strictly necessary in all such cases. This is because some statutes explicitly state their relationship with an analogous common law principle, and are thus capable of being interpreted solely

[90] A notable exception is Pam Stewart and Anita Stuhmcke, 'The Rise of the Common Law in Statutory Interpretation of Tort Law Reform Legislation: Oil and Water or a Milky Pond?' (2013) 21 *Torts Law Journal* 126.

[91] Eg, *Henville v Walker* (2001) 206 CLR 459, 470 [18] (Gleeson CJ), 501–2 [130] (McHugh J); *Conway* (n 84) 207–8 [5] (quoted above); *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388, 407 [44].

[92] Eg, see the cases concerning the interpretation of 'statutory injunctions', which are discussed in the body text below.

[93] Eg, John Duns, 'Judicial Interpretation of the Injunction and other Personal Orders Under the Trade Practices Act' (1989) 17 *Australian Business Law Review* 48; Dietrich and Middleton (n 4); Bant and Paterson, 'Evolution and Revolution' (n 3); Langford (n 4).

through textual analysis.[94] However, such statutes are rare, and even then the framework may still have a role to play given that context must be considered at the 'first stage and not at some later stage' when construing a statute.[95] It should also be noted that some statutes contain provisions which expressly preserve the common law, to the extent that it is consistent with the statute (or some variation thereof).[96] But save to the extent that they suggest the relevant statute should not be treated as a 'code',[97] such provisions, on their face, are only aimed at affecting the operation of the common law in the context of that statute. Thus, they should not directly affect how the statute is interpreted, albeit that this may be somewhat moot to the extent that courts tend to interpret statutes by reference to analogous common law principles anyway.

Turning to the Australian examples, the first example demonstrates that the framework is consistent with how courts determine that a statutory provision *should* be interpreted by reference to its common law counterpart. It concerns the interpretation of statutory orders under the *Australian Consumer Law* to undo a transaction.[98] Several cases have held that such orders, which are analogous to equitable rescission, are determined at least in part by reference to whether their equitable counterpart would be available.[99] This is because:[100]

> [O]ne of the circumstances that will be considered by the court, amongst others, is the object behind s 87(2)(a) and (ba) of the [*Trade Practices*] Act.[101] That object mirrors the approach of equity in the case of equitable fraud or unconscionability. The granting of equitable relief in those circumstances is not

[94] Eg, *Australian Consumer Law* s 20(1) (prohibiting unconscionable conduct 'within the meaning of the unwritten law').

[95] *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 368 [14]. Similarly, see *Project Blue Sky Inc v Australian Broadcasting Authority* (1988) 194 CLR 355, 381 [69]; *CIC Insurance* (n 89) 408.

[96] Eg, *Sale of Goods Act 1923* (NSW) s 4(2); *Trade Practices Act 1974* (Cth) s 4M (now repealed); PPSA s 254.

[97] Cf *Re Wait* [1927] 1 Ch 606, 635–6 (concerning the counterpart to the *Sale of Goods Act 1923* (NSW)).

[98] *Australian Consumer Law* ss 237–9, 243, noting particularly sub-s 243(a).

[99] *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 39 FCR 546, 564–5 (Lockhart J), 568 (Burchett J) ('*Henjo*'); *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, 48 ('*Demagogue*'); *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 505 [24] (Gaudron J), 535–6 [116]–[117] (Gummow J) ('*Marks*').

[100] *Demagogue* (n 99) 48 (citations omitted). Similarly, see *Marks* (n 99) 535–6 [116]–[117].

[101] See now s 243(a) and (c) of the *Australian Consumer Law*.

> "to extend sympathetic benevolence to a victim of undeserved misfortune" but "one which denies to those who have acted unconscientiously the fruits of their wrongdoing".

Consistently with the framework, the above reasoning can be seen to first identify the policy underlying the availability of the statutory remedy, being to prevent a wrongdoer from benefiting from its own wrongdoing. This is then applied to determine that the statute should be interpreted by reference to its equitable counterpart, ie, because the underlying objective of the statutory remedy is identical to that underlying equitable rescission.

The second example demonstrates that the framework is consistent with how courts determine that a statutory provision *should not* be interpreted by reference to its common law counterpart. It concerns the interpretation of the statutory prohibition on misleading or deceptive conduct under s 18 of the *Australian Consumer Law*. Unlike analogous claims in tort or contract, this statutory prohibition is not limited by the principles concerning exclusion clauses at common law, which instead merely form part of the overall inquiry as to whether the conduct was misleading or deceptive under the statute.[102] This is because:[103]

> Section 52 [of the *Trade Practices Act*] is a section in the consumer protection provisions of an Act concerned to protect the public from misleading or deceptive conduct and unfair trade practices which may result in contravention of the Act.[104] … Parliament passed the Act to stamp out unfair or improper conduct in trade or in commerce; it would be contrary to public policy for special conditions such as those with which this contract was concerned to deny or prohibit a statutory remedy for offending conduct under the Act.

This reasoning too can be seen to first identify a statutory policy, here concerning consumer protection. It then applies this as a reason against interpreting the provision by reference to the common law principles concerning exclusion clauses, ie, because the ability to exclude liability via contract would be detrimental to consumers.

The third example concerns the constructional choices made by the High Court in *Palgo Holdings Pty Ltd v Gowans*.[105] That case concerned whether a lender who took mortgages over goods as security for short-term loans, and also commonly took possession of those goods, was in breach of a statutory prohibition of carrying on an unlicensed business of lending money against 'pawned goods'. In determining that the lender was not in breach of

[102] See *Campbell v BackOffice Investments Pty Ltd* (2009) 238 CLR 304, 348 [130].

[103] *Henjo* (n 99) 561.

[104] See now s 18 of the *Australian Consumer Law*.

[105] *Palgo* (n 85).

this statutory prohibition, the majority started with the presumption that words with an established legal meaning such as ‘pawn’ are to be interpreted by reference to that meaning.[106] Consistently with the framework, they then identified an underlying statutory policy concerning the need to regulate security over chattels, and applied this policy to determine that the statutory prohibition did not extend beyond pawns/pledges as understood at common law, because other security interests (such as mortgages and charges) were already regulated by other statutes.[107] Thus, they concluded that the presumption was not rebutted.

By contrast, Kirby J (dissenting) also acknowledged the presumption concerning words with an established legal meaning, but placed greater emphasis on the importance of purposive and contextual interpretation.[108] Also consistently with the framework, he identified a broader statutory policy within the legislation, which more heavily emphasised the purpose of protecting ‘third party interests such as those of consumers, the police, victims of theft of pawnable goods and the public generally’.[109] Applying this led him to the contrary conclusion, that the lender was engaged in a business of lending against ‘pawned goods’.[110]

Here, the framework is consistent with both judgments, and also helps to elucidate the fundamental difference between them. This was not ultimately about whether the presumption concerning words with an established legal meaning, or the notion of contextual and purposive analysis, was more important. Rather, it was about what the proper scope of the underlying statutory policy was. This in turn demonstrates how the framework can help facilitate more constructive debate about whether a statute should be interpreted by reference to the common law. Furthermore, in the context of giving meaning to statutes, this might also help guide debate concerning statutory amendments.[111]

The final example concerns the interpretation of s 80 of the *Trade Practices Act 1974* (Cth) (now repealed),[112] and s 1324 of the *Corporations Act 2001* (Cth), in the context of

[106] Ibid 261 [24]–[25].

[107] Ibid 261–3 [27]–[31].

[108] Ibid 264–6 [34]–[41].

[109] Ibid 277–81 [84]–[99], quote at 280–1 [96].

[110] Ibid 282–5 [103]–[113].

[111] Note that the statute considered in ibid was subsequently amended to give effect to Kirby J’s view of its underlying policy: *Pawnbrokers and Second-hand Dealers Amendment Act 2005* (NSW).

[112] See now *Australian Consumer Law* s 232; *Competition and Consumer Act 2010* (Cth) s 80.

claims for interim relief. Each of these provisions concern 'statutory injunctions' – ie, orders to perform or not to perform an action, that can usually be granted in broadly prescribed circumstances conferring courts with significant discretion. When it comes to such provisions, courts have emphasised that the word 'injunction' must be given meaning as a question of statutory construction.[113] But despite this, when determining the availability of orders for interim relief under these statutory provisions, courts have applied the same two-part test that is used to decide the availability of interim relief in equity.[114]

The explanation for this in the authorities has been somewhat brief. It is that, since the statutory orders operate in similar circumstances to their equitable counterparts, they give rise to the same considerations and thus should be interpreted by reference to equity.[115] Respectfully, this reasoning is clearer when viewed through the framework. Put in those terms, the cases can be seen to first discern a statutory policy, which is the need to consider the strength of the case and the balance of convenience when granting interim relief due to the absence of an opportunity to hear and evaluate the evidence in full. They then apply this to the interpretation of these provisions, ie, by determining that it is appropriate to incorporate the equitable test since this policy is exactly the same as that underlying interim relief in equity.

The framework also helps explain the cases where these provisions are interpreted other than strictly in accordance with their equitable counterparts. For example, in an application under the *Trade Practices Act 1974* (Cth) seeking interim relief to prevent a Victorian statutory corporation from undercutting prices in a manner alleged to amount to

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[113] *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380, 394 [29]; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 240–1 [89].

[114] As to which see *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618, 622–3; *Australian Broadcasting Corp v O'Neill* (2006) 227 CLR 57, 68–9 [19] (Gleeson CJ and Crennan J), 81–4 [65]–[72] (Gummow and Hayne JJ).

[115] Concerning *Trade Practices Act 1974* (Cth) s 80, see: *World Series Cricket Pty Ltd v Parish* (1977) 16 ALR 181, 185 (Bowen CJ), 199 (Brennan J) ('*World Series*'); *Commercial Bank of Australia Ltd v Insurance Brokers Association of Australia* (1977) 16 ALR 161, 168 (Bowen CJ); *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248, 256–7 (Lockhart J), 266 (Gummow J). Concerning *Corporations Act 2001* (Cth) s 1324, see: *Australian Securities and Investments Commission v Mauer-Swisse Securities Ltd* (2002) 42 ACSR 605, 613–4 [36]; *Australian Securities and Investments Commission v Triton Underwriting Insurance Agency* (2003) 48 ASCR 249, 256 [25]; *Re Idyllic Solutions Pty Ltd* (2013) 93 ACSR 421, 442 [67]; *CME Properties (Australia) Pty Ltd v Prime Capital Securities Pty Ltd* [2016] WASC 231, [11]–[13].

anti-competitive conduct, less weight was placed on an offer to make an undertaking as to damages because the statutory power could take into account the public interest and thus the potential harm that anti-competitive conduct would cause to third parties.[116] Similarly, in an application under the *Corporations Act 2001* (Cth) seeking interim relief to disqualify a director from carrying on a financial services business without holding the relevant licence, the public interest underlying the provision meant that it was possible to take into account the need to safeguard the public and the objects of personal and general deterrence.[117]

This in turn helps to defend such cases from criticisms concerning the indeterminacy of the 'public interest' upon which they rely.[118] This is because each can be viewed as first discerning a relevant underlying policy, being, respectively, to protect the public from anti-competitive conduct, and to protect the public from investment opportunities made by potentially untrustworthy parties. They can then be seen to apply those policies in determining the availability of relief under the statute, ie, by placing less weight on an undertaking as to damages due to the potential harm to the public, and by placing more weight on the risk to the public in considering the availability of relief from the outset. Thus, the framework casts light on why statutory injunctions are interpreted by reference to equity in the first place, and also on how to determine when it is appropriate to consider factors outside the scope of the equitable remedy when interpreting them.

[116] *Victorian Egg Marketing Board v Parkwood Eggs Pty Ltd* (1978) 20 ALR 129, 149. For other cases where the public interest merited treating the availability of interim relief under this statute differently to equity, see *World Series* (n 115) 189–90 (Bowen CJ), 204 (Brennan J); *Ricegrowers' Co-operative Ltd v Howling Success Australia Pty Ltd* [1987] ATPR 40-778, 48,494; *Geoff Penney (NSW) Pty Ltd v Skyjack Computer and Office Supplies Pty Ltd* [1987] ATPR 40-815, 48,485; *Epic Games Inc v Apple Inc* (2021) 286 FCR 105, 123–9 [86]–[122].

[117] *Australian Securities and Investments Commission v Monarch FX Group Pty Ltd* (2014) 103 ACSR 453, 474 [105]. For another case where the public interest merited treating the availability of interim relief under this statute differently to equity, see *Australian Securities and Investments Commission v Mayfair Wealth Partners Pty Ltd* [2020] FCA 494, [66]–[68], [74].

[118] Cf Duns (n 93) 54–6.

IV A Framework for Understanding Interactions Between Statute & the Common Law

The above analysis explored the application or development of the common law by reference to statute, and the interpretation of statute by reference to the common law. In doing so, it demonstrated that both such processes are consistent with, and can be better understood via, a two-step framework for understanding interactions between statute and the common law. As identified above, this framework is implicit within the recognition by courts and commentators, across the common law world, that statutes contain underlying policies which courts have used to determine their interactions with the common law. Having explicitly identified this framework, and demonstrated its applicability in the Australian context, this final substantive Section elaborates on how the framework operates in the abstract. This entails tying together various points which have been identified in the literature concerning the relationship between statute and the common law, and several novel points which emerge from the above analysis of the Australian cases. This Section also explains why the application or development of the common law is treated compendiously within the framework, by contrast to the separate process of interpretation.

A *Step One: Discerning Statutory Policies*

The most important point concerning the first step of the framework, which entails discerning the underlying policies of statute, is that these policies are identified through orthodox principles of statutory interpretation. This is consistent with the recognition of purposive and contextual constructive methodologies.[119] The analysis must thus start from the text of the statute itself, albeit that extrinsic materials such as explanatory memoranda and the views of commentators might be taken into account.

The other points that arise from the above analysis concern the nature of the underlying statutory policies themselves. One is that not every statute will contain policies which are sufficiently clear and discernible to affect interactions with the common law.[120] In such cases, either the common law will be incapable of application or development by reference to the relevant statute,[121] or there will be no reason to rebut whichever interpretive

[119] Similarly, see Beatson, 'Has the Common Law a Future? (n 2) 311–2; Beatson, 'The Role of Statute' (n 2) 260–4.

[120] As noted in Gordon (n 17) 8.

[121] Eg, *Lamb v Cotogno* (n 33) (discussed in Section II(A)(1)(a) and (B) above).

principle incorporates the common law into its interpretation.[122] By contrast, sometimes several statutes read together will contain discernible policies. These might be drawn upon, collectively, to shape the application or development of the common law.[123] Additionally, sometimes statutory policies may support conflicting outcomes.[124] Although Atiyah suggests that this raises constitutional concerns since it requires courts to make evaluative choices between statutory policies,[125] it is contended that these can be largely ameliorated by exercising caution in determining the scope and significance of such policies.[126] This reflects that 'no legislation pursues its purposes at all costs'.[127]

Finally, although categorisations such as social and economic policies might be drawn,[128] ultimately the meaning, scope and significance of any statutory policy will depend upon a close consideration of the statute(s) at hand. This reflects that statutes are highly variable in form, function and complexity.[129] Such breadth does not undermine the usefulness of the framework. Rather, it ensures that it is sufficiently flexible to be applied to any interaction between statute and the common law. Furthermore, to the extent that this may encourage debate about what a statutory policy actually requires, that is precisely the purpose of the framework: to facilitate constructive analysis of exactly what statutes are trying to do, and thus minimise the risk of glossing over *why* certain interactions are said to be consistent or inconsistent with those objectives.

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[122] See Section III above.

[123] Eg, *R v L* (n 57); *Nelson v Nelson* (n 53) (both discussed in Section II(B) above).

[124] Eg, *Smethurst* (n 56) (discussed in Section II(B) above); *Palgo* (n 85) (discussed in Section III above).

[125] Atiyah (n 2) 27–8.

[126] Similarly, see *Burragubba v Queensland* (2015) 236 FCR 160, 165 [21]. See further Mason, 'A Judicial Perspective' (n 19) 131 (noting that courts are frequently required to make choices based upon policy considerations anyway); Kelly (n 41) 521–2 (suggesting this is of lesser concern in light of Australia's constitutional law, by contrast to that of English law).

[127] *Rodriguez v United States*, 480 US 522, 525–6 (1987) (The Court) (Supreme Court of the United States of America).

[128] Eg, Mason, 'A Judicial Perspective' (n 19) 131.

[129] Noted in Allsop (n 21) 2 (noting differences in form and function); Gordon (n 17) 8 (noting differences in form and complexity). See further Leeming, 'Equity: Ageless in the Age of Statutes' (n 3) 114–6, 121; Leeming, *Common Law, Equity and Statute* (n 3) Chapter 3.

B *Step Two: Applying the Policies*

The second step in the framework is to use the policies which have been discerned to determine whether it is appropriate to apply or develop the common law by reference to statute *or* to interpret statute by reference to the common law. This step delineates between these two processes because they utilise different methods for resolving interactions between statute and the common law – one being the same methods of legal reasoning which are ordinarily used by courts to apply or develop the common law, and the other being the principles of statutory construction.

However, this second step of the framework does not delineate between the *application* of the common law by reference to statute, and the *development* of the common law by reference to statute. This is because such processes are inherently entwined, such that there is little value in attempting to further delineate between them. As put by Raz, a precedent 'is constantly subject to potential (though modest) revision on all occasions on which its application is litigated'.[130] Thus, while some cases might clearly entail either applying or developing the common law, others will fall somewhere in the middle.

Consider the cases discussed above concerning the application or development of the common law by reference to statute.[131] Some clearly entail developing the common law, such as *Vadasz* which recognised the availability of partial rescission in equity.[132] But others fit less neatly into one category or the other. For example, the determination in *Equuscorp* that claims for money had and received were unavailable due to the failure to comply with statutory requirements pertaining to certain investments could be viewed as an application of the common law in that particular context.[133] But it could also be viewed as having developed the common law to the extent that it precludes such claims in future cases where parties fail to comply with the same statutory requirements. The same is true even of *Nelson v Nelson,* which at first glance seems clearly to be a case which applied rather than developed the common law due to the fact-sensitive way in which the trust in favour of Mrs Nelson was

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[130] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979) 195; quoted in Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press, 2008) 105.

[131] Section II(B) above.

[132] *Vadasz* (n 59).

[133] *Equuscorp* (n 50).

recognised.[134] But even that case has the potential to influence future cases where parties seek equitable relief despite failing to comply with statutory requirements, such that it could be characterised as having developed the common law in relation to such relief.[135]

The same can be said of the case study that will be used later in this thesis to further demonstrate the usefulness of the framework, which is the relationship between equity and the *Personal Property Securities Act 2009* (Cth) ('PPSA'). As will be seen, for equity to continue to operate in the context of the PPSA, it will sometimes be necessary for it to adapt to the underlying statutory policies of the statute. This might be described as equity applying in the context of the PPSA, or as equity developing by reference to the PPSA, or perhaps even as both. For the reasons described above, such processes will be treated compendiously as *applying or developing* the common law by reference to statute.

1 *Applying or Developing the Common Law by Reference to Statute*

The cases considered above reveal that statute may affect the application or development of the common law in several different ways.[136] Statutory policies can be applied in the course of narrowing the availability of a common law claim,[137] or expanding the availability of such a claim,[138] or otherwise shaping the precise terms of such a claim in the case at hand.[139] It has been suggested that the curtailment of the common law by reference to statute should be viewed as 'the converse process' to its development by reference to statute.[140] Respectfully however, this is better viewed within the process of its application or development, as regardless of whether the common law is curtailed or expanded it can be said to have been shaped by the content of statute. In other cases, even where a sufficiently clear statutory policy is discernible within the first step of the framework, the content of that policy may not have any bearing on the content of a common

[134] *Nelson v Nelson* (n 53).

[135] See, eg, *Birney v Birney* [2024] NSWSC 591, [115]–[117].

[136] Save where the footnotes indicate otherwise, the cases cited in this sub-section were all examined in Section II(B) above.

[137] Eg, *Equuscorp* (n 50). Other examples include *Cohen v Cohen* (n 55); *CAL No 14* (n 55) 407–9 [41] (see further n 55 above).

[138] Eg, *R v L* (n 57). Another example is *Crimmins* (n 54) 49–50 [127]–[128] (McHugh J), 86 [234] (Kirby J) (see further n 55 above).

[139] Eg, *Nelson v Nelson* (n 53); *Vadasz* (n 59).

[140] *Gifford* (n 49) 299–300 [83] (cited in Section II(A)(1)(b) above).

law claim.[141] Furthermore, a statutory policy may wholly determine a question concerning the application or development of the common law,[142] or it might just be one of several reasons leading to a particular outcome.[143]

Another point that should be mentioned arises from the literature concerning statute and the common law. It is that the impact of the application of statutory policies might also be easily discernible, or more subtle. As to the former, the above analysis identified a variety of cases where statutory policies directly affected the outcome of common law claims.[144] As to the latter, one example is the manner in which the underlying policies of the *Australian Consumer Law* have subtly increased the standards of commercial conduct required by a variety of common law doctrines.[145]

2 *Interpreting Statute by Reference to the Common Law*

There is less to be said about the second step of the framework, in the abstract, as it applies to interpreting statute by reference to the common law. This is because many such cases raise binary questions as to whether or not such interpretations are appropriate.[146] But this is not always the case, as in some instances the application of the underlying statutory policies explains why a statute is partly, but not wholly, interpreted by reference to its common law counterpart.[147]

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[141] Eg, *Miller v Miller* (n 50).

[142] Eg, *Nelson v Nelson* (n 53); *Equuscorp* (n 50).

[143] Eg, *Vadasz* (n 59); *Smethurst* (n 56).

[144] See Section II(B) above.

[145] See Bant (n 3) 387–91; Bant and Paterson, 'Estoppel, Misleading Conduct and Equitable Fraud' (n 3).

[146] Eg, see the first three examples considered in Section III above.

[147] Eg, see the fourth example concerning statutory injunctions in Section III above.

CONCLUSION

This Chapter explored the relationship between statute and the common law. It commenced by demonstrating that, contrary to the historical view that they are like 'oil and water', these two bodies of law are capable of influencing each other. It then turned to examining the processes by which this can occur.

The first such process is the application or development of the common law by reference to statute. This Chapter showed that Australian law accepts the legitimacy of so applying or developing the common law. It also showed that such reasoning can be understood via a two-step framework, which is implicit within the recognition by courts and commentators that statutes contain underlying policies which can affect their interactions with the common law. This framework entails first discerning the underlying policies of statute as a question of construction, and then using those policies to determine the appropriateness of statute and the common law affecting each other's content. The Chapter then examined the converse process of interpreting statute by reference to the common law. It identified the methods of statutory interpretation which facilitate this, and showed that their application can be better understood via the same two-step framework. Finally, it elaborated upon this framework. Taken as a whole, this shows the usefulness of this framework to better understanding all interactions between statute and the common law on a case-by-case basis.

To answer the first research question of this thesis, which concerns how we can better understand interactions between statute and the common law as a whole, it will be necessary to show the usefulness of this framework at a higher level of abstraction than on a case-by-case basis. To do so, this thesis will apply the framework to the relationship between equity and the PPSA as a case study. However, before doing so, it is necessary to address a further issue. This is whether, and if so how, the differences between equity and the common law may affect their interactions with statute.

CHAPTER THREE: STATUTE & THE COMMON LAW – EQUITY VS COMMON LAW

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INTRODUCTION

In the literature concerning the relationship between statute and the common law, equity and the common law have typically been assimilated.[1] This is unobjectionable to the extent it reflects that both equity and the common law are judge-made law, and are thus created differently to statute. Indeed, this is why it is possible to identify a framework which applies to all interactions between these bodies of law. However, to fully understand this framework, it is necessary to consider the differences between equity and the common law as they pertain to statute, since such differences may in turn affect how the framework applies. This Chapter does so by identifying and exploring three unique features of equity which may affect its interactions with statute. These are its use of the notion of conscience, which is considered in Section I; its use of the maxims of equity, which is considered in Section II; and the nature of its remedies, which is considered in Section III.

Some of these features have been identified as relevant to the relationship between statute and equity in the existing literature.[2] However, this Chapter explores their impact at greater length than has occurred thus-far. This leads to the conclusion that statute may be more likely to interact with equity than the common law, and that such interactions may at times be more nuanced. Consistently with this, many of the interactions examined in the previous Chapter concerned equity, including several where the interactions were especially complex due to equity moulding its application to the statute,[3] or statute being interpreted partly but not wholly by reference to equity.[4] It follows that, when choosing a case study to demonstrate the usefulness of the framework at a higher level of abstraction, it will be more valuable to pick one involving interactions between statute and equity.

Importantly, this Chapter does not explore every aspect of the relationship between statute and equity. This would necessitate historical analysis of the Court of Chancery's

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[1] A highly notable exception is Mark Leeming, 'Equity: Ageless in the Age of Statutes' (2015) 9(2) *Journal of Equity* 108. See also J D Heydon, 'Equity and Statute' in P G Turner (ed), *Equity and Administration* (Cambridge University Press, 2016) 211; James Allsop, 'Statutes and Equity' (Kenneth Sutton Lecture, 12 November 2019); Elise Bant and Jeannie Marie Paterson, 'Estoppel, Misleading Conduct and Equitable Fraud' (2019) 13 *Journal of Equity* 183; Mark Leeming, *Common Law, Equity and Statute: A Complex Entangled System* (Federation Press, 2023) ('*Common Law, Equity and Statute*').

[2] Note particularly Leeming, 'Equity: Ageless in the Age of Statutes' (n 1) 119, 124–6.

[3] *Nelson v Nelson* (1995) 184 CLR 538, discussed in Section II(B) of Chapter Two.

[4] See the discussion of statutory injunctions in Section III of Chapter Two.

attitude towards statutes,[5] and of the notion of the 'equity of the statute'.[6] It could also necessitate adopting positions regarding broader debates such as whether there should be any role for conscience in equitable jurisprudence,[7] whether judicial reasoning is different in equity than at common law,[8] and whether equity can still be meaningfully characterised as a 'supplementary' body of law.[9] But doing so is unnecessary to sufficiently understand the operation of the framework, and thus to answer the first research question of this thesis.

[5] Eg, on equity defying statute via the exceptions to the *Statute of Frauds 1677* (Imp), see Daniel Farinha, 'Fraud and Formality: Relief in Equity from Acts of Parliament' (2018) 12(3) *Journal of Equity* 297.

[6] See W M C Gummow, *Change and Continuity: Statute, Equity and Federalism* (Oxford University Press, 1999) 18–23; *Burragubba v Queensland* (2015) 236 FCR 160, 163–4 [15]–[17] (Edelman J).

[7] Compare, eg, Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26(1) *University of Western Australia Law Review* 1, particularly at 16–17, 22–3, 63–4; Peter Birks, 'Annual Miegunyah Lecture: Equity, Conscience and Unjust Enrichment' (1999) 23(1) *Melbourne University Law Review* 1, 20–2; Rohan Havelock, 'Conscience and Unconscionability in Modern Equity' (2015) 9(1) *Journal of Equity* 1 to *Muschinski v Dodds* (1985) 160 CLR 583, 615–16, 621 ('*Muschinski*'); *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 227 [45] ('*ABC v Lenah Game Meats*'); *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560, 596 [76] ('*AFSL v Hills*'); Mark Leeming, 'The Role of Equity in 21st Century Commercial Disputes: Meeting the Needs of Any Sophisticated Legal System' (2019) 47(2) *Australian Bar Review* 137, 152–4.

[8] Compare, eg, *The Juliana* (1822) 165 ER 1560, 1567, quoted in *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113, 119 (The Court); Leeming, *Common Law, Equity and Statute* (n 1) 181–4, 197–203 to George W Keeton and Lionel Astor Sheridan, *Equity* (Professional Books, 2nd ed, 1976) 2 ('Equity as a source of law is dead. The creativeness of the judges persists').

[9] See Alfred Henry Chayton and William Joseph Whittaker (eds), Frederic William Maitland, *Equity also, the forms of Action at Common Law: Two Courses of Lectures* (Cambridge University Press, 1913) 19; Leeming, 'Equity: Ageless in the Age of Statutes' (n 1) 124; Leeming, *Common Law, Equity and Statute* (n 1) 188–93.

I Conscience in Equity

The first unique feature of equity which is relevant to its relationship with statute is the notion of 'conscience' or 'unconscientiousness'.[10] The latter term is used in this Chapter instead of 'unconscionability', in accordance with the preference expressed for it in several High Court judgments.[11] This Section demonstrates that this notion can be used to facilitate interactions with statute by examining four examples where it has been so used. These pertain to both the application or development of equity by reference to statute, and the interpretation of statute by reference to equity.

First, however, it must be acknowledged that the meaning of conscience in equity is notoriously indeterminate. The High Court has suggested that unconscientiousness is incapable of definition.[12] But it has also emphasised, in a range of judgments spanning much of the equitable jurisdiction, that it entails something more than just a subjective moral evaluation of conduct.[13] Furthermore, it has suggested that characterising conduct as unconscientious is merely a statement of conclusion,[14] although this cannot always be the case given its more substantive usage in several leading authorities which drew upon it to

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[10] These are used interchangeably: note *Commonwealth v Verwayen* (1990) 170 CLR 394, 440–1 (defining unconscientiousness as conduct which is contrary to conscience) ('*Verwayen*').

[11] See ibid 446; *ABC v Lenah Game Meats* (n 7) 244–5 [98]; *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315, 324 [21] ('*Tanwar*').

[12] Eg, *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 419–20 ('*Waltons v Maher*'); *Verwayen* (n 10) 440–1. See also *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, 426 [122].

[13] Eg, *Muschinski* (n 7) 616, 621; *Baumgartner v Baumgartner* (1987) 164 CLR 137, 148; *Stern v McArthur* (1988) 165 CLR 489, 513–4; *ABC v Lenah Game Meats* (n 7) 259 [138]; *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 72 [41] ('*ACCC v C G Berbatis*'); *Tanwar* (n 11) 324–5 [22] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ), 343–4 [86] (Kirby J); *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269, 301 [94]; *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 517–8 [32]; *AFSL v Hills* (n 7) 596 [76]; *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, 590 [148]. See also Kenneth Hayne, 'Letting Justice be Done without the Heavens Falling' (2001) 27(1) *Monash University Law Review* 12, 16; Patrick A Keane, 'The Conscience of Equity' (2010) 84(2) *Australian Law Journal* 92, 98.

[14] *Garcia v National Australia Bank Ltd* (1999) 194 CLR 395, 409–10 [34]; *ABC v Lenah Game Meats* (n 7) 227 [45]; *ACCC v C G Berbatis* (n 13) 72 [41].

develop equitable doctrines and remedies.[15] It is unnecessary to resolve the question of exactly what equitable conscience means for the purposes of this thesis. This is because it is sufficient to show that this notion *can* be used to facilitate interactions between statute and equity, even if it is unclear what exactly it entails.

Turning to the substantive analysis, *Tasita Pty Ltd v Sovereign State of Papua New Guinea* (‘*Tasita*’) demonstrates that conscience can be used to incorporate statutory norms into the application of equity.[16] *Tasita* arose out of representations made by the Consul-General of Papua New Guinea, to a tenant of premises in Sydney, that the tenant could terminate its lease without penalty. Papua New Guinea later resiled on those representations, following which the tenant sought relief in misleading or deceptive conduct under statute or, alternatively, in equitable estoppel. Young J held that the statutory claim in misleading or deceptive conduct was unavailable because it only applied to a ‘person’, which did not cover a sovereign state.[17] However, he continued on to determine that the policy enshrined in the statutory prohibition was relevant to establishing equitable estoppel:[18]

> If one reasons by analogy, one can see that there is a general principle in the law of Australia that a person is not to benefit from dealings in trade or commerce which are misleading. This policy is reflected in the *Trade Practices Act 1974* (Cth) and in the *Fair Trading Act 1987* and even though neither of those statutes are applicable in the instant case, equity courts in modern times have not been slow to pick up the general policy of the law in what is sometimes referred to as the “equity of a Statute”. … [This] still applies in that *courts of equity do mould their application of principles of unconscionability and other doctrines depending on changes in statute law*.

Consequently, since the statutory prohibition would have been breached if Papua New Guinea had been a ‘person’ under the statute, he held that ‘equity will ensure that that person [Papua New Guinea] *does not obtain an unconscionable benefit* through that misrepresentation’, and thus that equitable estoppel was made out.[19]

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[15] Eg, *Waltons v Maher* (n 12) 405–7 (Mason CJ and Wilson J), 426–8 (Brennan J) (drawing upon notions of conscience in recognising promissory estoppel); *Muschinski* (n 7) 619–22 (drawing upon notions of conscience in recognising the joint endeavour constructive trust).

[16] (1994) 34 NSWLR 691 (‘*Tasita*’). For another such example, see *Minister for Lands and Forests v McPherson* (1991) 22 NSWLR 687, 699–700.

[17] *Tasita* (n 16) 700–1.

[18] Ibid 701–2.

[19] Ibid 702 (emphasis added).

Another case which demonstrates that equitable conscience can be used to incorporate statutory norms into the application of equity, in a broader sense than was the case in *Tasita*, is *EK Nominees Pty Ltd v Woolworths Ltd* (‘*EK Nominees*’).[20] In that case, a prospective tenant backed out of an unfinalised lease after the site-owner had incurred significant expenditure in preparing the property for the lease, and was held to be liable in equitable estoppel for the site-owner’s wasted expenditure. Bant and Paterson emphasise that the plaintiffs pleaded both in misleading or deceptive conduct under statute and in equitable estoppel, and contrast the outcome of *EK Nominees* to that of a similar English case where liability in equity was not established, to demonstrate that the Australian case reflects the incorporation of higher standards of commercial dealing enshrined in the *Australian Consumer Law* into equitable estoppel via the notion of ‘reasonable reliance’.[21] Accepting this, it is equally arguable that such heightened statutory standards of commercial dealing were incorporated into equitable estoppel through the use of unconscientiousness, which featured heavily in the Court’s reasoning alongside its analysis of reasonable reliance.[22] This further demonstrates how unconscientiousness can be used as an additional tool, available only in equity, to shape its application by reference to statute.

Equitable conscience can also be used to facilitate the interpretation of statute by reference to equity. *Demagogue Pty Ltd v Ramensky* concerned whether purchasers of land were entitled to statutory orders undoing the purchase due to their being misled about the existence of a driveway providing access to the land.[23] The issue was that the *Trade Practices Act 1974* (Cth) s 87(1A) required the purchasers to have suffered ‘loss or damage’, and it was unclear in the circumstances whether they would have suffered such a loss at common law. In interpreting these words in a manner entitling the plaintiffs to undo the transaction, Gummow J stated:[24]

> It may well be that in a given case the contract is not financially disadvantageous to the complainant. But, at least in Australia, if a contract is rescinded in equity for some vitiating factor in its formation, it

[20] [2006] NSWSC 1172 (‘*EK Nominees*’).

[21] Bant and Paterson (n 1), particularly at 197–9.

[22] See particularly *EK Nominees* (n 20) [261], [268]. This does not undermine Bant and Paterson’s analysis in ibid, as the influence of statute might have been incorporated into equity through *both* reasonable reliance and unconscientiousness.

[23] (1992) 39 FCR 31.

[24] Ibid 43 (emphasis added).

> is not sufficient for the defendant to show that the transaction to which the complainant was improperly induced to assent, after all, contained terms which, viewed objectively, were not manifestly disadvantageous so that, the complainant should freely have accepted them. *The complainant is entitled to say that but for the unconscientious conduct of the defendant he or she would not have entered into any transaction with the defendant.*

Here, Gummow J can be seen to use the notion of unconscientiousness to tie together the policies underlying the statutory orders and equitable rescission, and to thus use that notion in the course of explaining why the statute should be interpreted by reference to equity.

Similarly, *Paciocco v Australia and New Zealand Banking Group Ltd* relevantly concerned whether certain credit card fees were contrary to the statutory prohibition on conduct that is ‘in all the circumstances unconscionable’.[25] In determining that they were not, Allsop CJ emphasised the legitimacy of interpreting the statutory prohibition by reference to the norms enshrined within equitable unconscientiousness.[26] He then considered the evidence concerning the credit card fees against a number of those norms, and determined that the fees were not unconscionable under the statute.[27] Here again, notions of unconscientiousness can be seen to influence the interpretation of statute, notwithstanding that the relevant provision explicitly provided that the statutory prohibition was wider than its equitable counterpart.[28]

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[25] *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 (‘*Paciocco* FCAFC’); affirmed in *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525 (which only concerned the issue of penalties).

[26] *Paciocco* FCAFC (n 25) 266–71 [263]–[284].

[27] Ibid 281–2 [325]–[337], particularly at 282 [336].

[28] Cf *Australian Securities and Investments Commission Act 2001* (Cth) s 12CB (which was the subject of ibid) to s 12CA (prohibiting unconscionable conduct ‘within the meaning of the written law’). Similarly, cf *Australian Consumer Law* s 21 to s 20.

II Maxims of Equity

Another unique characteristic of equity which can facilitate interactions with statute is its use of the maxims of equity, each of which reflect 'a summary statement of a broad theme which underlies equitable concepts and principles'.[29] This Section identifies several examples where these maxims have facilitated interactions between statute and equity, and thus demonstrates another way in which such interactions may differ from those between statute and the common law.

A *Equity Follows the Law*

'Equity follows the law' is perhaps the most important maxim in this context. A notable example where this facilitated equity developing by reference to statute is *Delehunt v Carmody*, which concerned whether a property purchased by a de facto couple, via equal contributions to the purchase price, was owned by them in equity as joint tenants or tenants in common.[30] The complicating factor was that, although historically the presumption both in equity and at law was one of joint tenancy, the position at law had been altered by s 26 of the *Conveyancing Act 1919* (NSW) to a presumption of tenancy in common. In determining that this also altered the equitable presumption, Gibbs CJ emphasised that the historical basis of the equitable presumption was that equity follows the law, and thus that the alteration of the legal presumption must have also altered the equitable presumption.[31]

Another example is *Cohen v Cohen*, which is commonly cited in Australia for the applicability of statutory limitation periods in equity even where the wording of the statute does not directly apply to the equitable claim.[32] The facts relevantly concerned whether certain equitable remedies that were not covered by the modern counterparts to the *Statute of Limitations 1623* (Imp) were nonetheless limitation-barred. In determining that some of those claims were, Dixon J stated: '[t]he *Statute of Limitations*, by its terms, does not operate directly upon equitable remedies. But such remedies are barred in Courts of equity by

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[29] *Corin v Patton* (1990) 169 CLR 540, 557 (Mason CJ and McHugh J). See further J D Heydon, M J Leeming and P G Turner, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (LexisNexis Butterworths, 5th ed, 2015) 69 [3-005] (and citations therein).

[30] (1986) 161 CLR 464.

[31] Ibid 471–3.

[32] (1929) 42 CLR 91.

analogy to the statute'.[33] Such application of the statute by analogy has been explained as an instance where 'equity gives effect to the maxim that it follows the law'.[34] Thus, both of these cases demonstrate how this maxim can facilitate the application or development of equity by reference to statute.

Finally, although equity follows the law, this does not mean that it does so 'slavishly or always',[35] as if it did then equitable relief would never be available.[36] This gives rise to a further consideration concerning interactions between statute and equity. This is that, in cases where equity is capable of following a legal principle embedded in a statute, it will be necessary to determine whether or not it is appropriate to apply the maxim that 'equity follows the law'. As with any other interaction between statute and the common law, the framework should be used to guide such cases; and indeed, as was argued in the previous Chapter with respect to interactions with statute more generally, so using the framework may help to explain why equity follows the law in some cases but not others.

B *Other Maxims of Equity*

The above analysis also applies to other maxims of equity which can facilitate interactions with statute. One such example, concerning the maxim 'he who seeks equity must do equity', is *Vadasz v Pioneer Concrete (SA) Pty Ltd* ('*Vadasz*').[37] In *Vadasz*, the Court drew upon that maxim to tie together the equitable remedy of rescission and its statutory counterpart under the *Contracts Review Act 1980* (NSW), and thus to recognise the availability of partial rescission in equity.[38]

Another example concerns how a liquidator's equitable lien should apply to the proceeds of an insolvent corporate trustee's right of exoneration, in circumstances where the trustee acts on behalf of more than one trust (or where it acts both on behalf of a trust and in its own capacity). Here, several cases have suggested that the liquidators might first attempt

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[33] Ibid 99–100 (Dixon J).

[34] *Gerace v Auzhair Supplies Ltd* (2014) 87 NSWLR 435, 456 [71]. See also Heydon, Leeming and Turner (n 29) 73 [3-035].

[35] *Graf v Hope Building Corp* (1920) 254 NY 1, 9 (Cardozo J), quoted in Heydon, Leeming and Turner (n 29) 74 [3-040].

[36] As noted in Heydon, Leeming and Turner (n 29) 74 [3-040].

[37] (1995) 184 CLR 102 ('*Vadasz*').

[38] Ibid 115–16.

to apportion their expenses to each of the trusts (or to the trust and the corporation acting in its own capacity), but that if this is not possible such expenses could be apportioned equally between them in accordance with the maxim 'equity is equality'.[39] Although such reasoning is *obiter dicta*, it nonetheless demonstrates how other maxims might facilitate the application or development of equity by reference to statute.

[39] See *Re Suco Gold Pty Ltd (in liq)* (1983) 33 SASR 99, 110; *Jones v Matrix Partners Pty Ltd, Re Killarnee Civil & Concrete Contractors Pty Ltd (in liq)* (2018) 260 FCR 310, 337–8 [105]–[107]; *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* (2019) 268 CLR 524, 586–7 [163]–[165].

III Nature of Remedies in Equity

The final unique characteristic of equity which is relevant to its relationship with statute pertains to its remedies. This Section examines four aspects which are unique to equitable remedies which can facilitate interactions with statute. These are the breadth of such remedies; the flexibility of one of the most important equitable remedies, the injunction; the ability to grant equitable remedies on terms; and the ability to grant proprietary remedies over property in which the plaintiff did not previously hold an interest.

A *Breadth of Equitable Remedies*

It has been observed that '[t]he whole of the law of remedies is – save for the important exception of damages – essentially equitable'.[40] This is the first unique feature of equitable remedies which facilitates interactions with statute.[41] The examples which most clearly demonstrate this with respect to the interpretation of statutes by reference to equity, being how equitable rescission and equitable injunctions have shaped the meaning of analogous statutory provisions such as in the *Australian Consumer Law* and the *Corporations Act 2001* (Cth), were already examined in the previous Chapter.[42] Furthermore, these statutory remedies can be seen to have in turn exercised a 'gravitational influence' on the further development of their equitable counterparts.[43] An example of this is *Vadasz*, also already examined above, where the High Court cited the availability of orders under the *Contracts Review Act 1980* (NSW) as one of several reasons in favour of recognising the remedy of partial rescission in equity.[44] These examples show how the breadth of the remedies available in equity can facilitate interactions with statute.

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[40] Leeming, 'Equity: Ageless in the Age of Statutes' (n 1) 127, citing David Wright, *Remedies* (Federation Press, 2nd ed, 2014) 2.

[41] Similarly, see Leeming, 'Equity: Ageless in the Age of Statutes' (n 1) 127.

[42] See Section III of Chapter Two.

[43] See generally Elise Bant and Jeannie Marie Paterson, 'Evolution and Revolution: The Remedial Smorgasbord for Misleading Conduct in Australia' (2020) 14(1) *FIU Law Review* 25.

[44] *Vadasz* (n 37) 115–16, cited as an example of this in ibid 29.

B *Flexibility of the Equitable Injunction*

The flexibility of the equitable injunction can facilitate interactions between statute and equity, which can be seen through the various ways in which this remedy has been developed to apply in aid of statute.

Equitable injunctions can be sought by individuals in aid of statutory rights that have been conferred upon them expressly or impliedly.[45] For example, an equitable injunction has been granted on this basis to prohibit the Postmaster-General from refusing postal services to a specified recipient contrary to the *Post and Telegraph Act 1901-1971* (Cth).[46] Similarly, equitable injunctions can be sought to prevent breaches of general statutory prohibitions by either the Attorney General,[47] or by individuals with a special interest in the subject matter of the action.[48] For example, an equitable injunction has been granted on this basis to Gournditchjmara plaintiffs to prohibit a company from undertaking works that would destroy Aboriginal stone tools contrary to the *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic).[49]

The equitable injunction can also prevent the enforcement of a statute which is alleged to be unconstitutional, albeit that it is only so available in very rare circumstances.[50] While on its face this appears to be equity acting in defiance of statute, it can also be viewed as equity acting in aid of the Constitution – and thus, in a broader sense, in aid of statute. For example, in an unreported judgment prior to the full hearing of *The Australian Communist*

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45 *King v Goussetis* (1986) 5 NSWLR 89, particularly at 93. See further Heydon, Leeming and Turner (n 29) 728–30 [21-170].

46 *Bradley v Commonwealth* (1973) 128 CLR 557. For further examples, see *Della-Vedova v State Energy Commission (WA)* (1990) 2 WAR 561; *John Fairfax Ltd v Australian Postal Commission* [1977] 2 NSWLR 124; *John Fairfax & Sons Ltd v Australian Telecommunications Commission* [1977] 2 NSWLR 400.

47 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 258–9 [28]–[30] (Gaudron, Gummow and Kirby JJ), 280 [93] (McHugh J) ('*Bateman's Bay v ACBF*'). See further Heydon, Leeming and Turner (n 29) 730–4 [21-175]–[21-180].

48 *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, 35–6 (Gibbs CJ), 44 (Stephen J), 49–56 (Aickin J), 64–7 (Brennan J) ('*Onus v Alcoa*'); *Bateman's Bay v ACBF* (n 47) 267 [50] (Gaudron, Gummow and Kirby JJ), 281–3 [96]–[101] (McHugh J). See further Heydon, Leeming and Turner (n 29) 734–8 [21-185]–[21-190].

49 *Onus v Alcoa* (n 48). For further examples, see *King v Goussetis* (n 45); *Bateman's Bay v ACBF* (n 47).

50 See *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148, 153–6 (Mason ACJ). See further Heydon, Leeming and Turner (n 29) 769 [21-385].

Party v Commonwealth,[51] Dixon J granted an injunction restraining the Commonwealth from exercising certain powers under the *Communist Party Dissolution Act 1950* (Cth) until its constitutionality was determined by the Full Court.[52] Each of these examples demonstrates how the inherent flexibility of the equitable injunction can facilitate interactions with statute.

C *Ability to Grant Equitable Remedies on Terms*

The ability to grant equitable remedies on terms can also facilitate interactions with statutes. Such interactions are particularly interesting because this characteristic of equitable remedies not only facilitates interactions with statute in the first place, but also raises further questions concerning exactly how such remedies should be adapted to statute.

This can be seen in the High Court cases where specific performance has been granted subject to the satisfaction of statutory requirements. In *McWilliam v McWilliams Wines Pty Ltd*, a contract for the sale of Crown lands was entered into in circumstances where statute only allowed the land to be dealt with subject to the consent of a public authority, and specific performance was granted on terms that the vendor do all things necessary to obtain such consent.[53] Similarly, in *Dougan v Ley*, a contract for the sale of a taxi-cab and the associated licence was entered into in circumstances where there was a statutory prohibition on transfers unless the transferee was determined to be a fit and proper person, and the remedy of specific performance was granted on terms that the purchasers obtain such a determination.[54]

A more complex example of this is *Nelson v Nelson*, in which a presumed resulting trust over land was recognised on terms requiring the beneficiary to repay the value of a statutory subsidy to which she was not entitled.[55] In granting equitable relief on these terms, Deane and Gummow JJ emphasised the importance of both the inherent flexibility of

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[51] (1951) 83 CLR 1.

[52] *The Australian Communist Party v Commonwealth* (High Court of Australia, Dixon J, 21 October 1950). Thanks to Justice William Gummow for providing a copy of the orders, dated 21 October 1950, and the accompanying three-page reasons for judgment, dated 2 November 1950. Soft copy available upon request.

[53] (1964) 114 CLR 656, particularly at 661 (McTiernan and Taylor JJ), 662–3 (Menzies J). Similarly, see *Brown v Heffer* (1967) 116 CLR 344, 350.

[54] (1946) 71 CLR 142, 151–2 (Dixon J) (McTiernan J agreeing), 154 (Williams J).

[55] *Nelson v Nelson* (n 3), particularly at 571–3 (Deane and Gummow JJ), 617–18 (McHugh J).

equitable remedies, and the ability to grant them on terms, in facilitating a more nuanced relationship between statute and equity:[56]

> *The range and flexibility of equitable remedies assist in achieving an appropriate result in the particular case* … equity has not subscribed to any absolute proposition that the consequence of illegality, particularly where what is involved is contravention of public policy manifested by statute, is that neither side may obtain any relief, so that the matter lies where it falls. Rather, in various instances equity has taken the view that it may intervene, albeit with the attachment of conditions, lest there be "no redress at all against the fraud nor any body to ask it".

D *Ability to Grant Proprietary Remedies*

The ability of equity to grant proprietary remedies may also give rise to unique considerations in the context of statute. This is particularly so where the relevant statute establishes a regime for regulating interests in certain types of property, such as under the Torrens title statutes or the *Personal Property Securities Act 2009* (Cth) ('PPSA').

The ability to grant such remedies is not unique to equity. For example, an action for possession of land is available at common law,[57] and in limited circumstances the common law can also require restitution *in specie* of personal property such as in a claim for detinue.[58] But equitable proprietary remedies are available in response to a greater variety of claims. These include estoppel,[59] breach of fiduciary duties,[60] claims entitling a party to an equitable lien,[61] and subrogation.[62] Furthermore, they may be available over property in which the claimant did not previously hold an interest, which is the case for each of the above examples, and is even more apparent in the equitable claim to traceable proceeds.[63] Finally, the fact that all equitable remedies are discretionary, which may enable them to be more

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[56] Ibid 559 (emphasis added).

[57] This is now enshrined in statute: eg, *Civil Procedure Act 2005* (NSW) s 20. See further Brendan Edgeworth, *Butt's Land Law* (Lawbook Co, 7th ed, 2017) 55 [1.290].

[58] See David Rolph et al, *Balkin & Davis Law of Torts* (LexisNexis, 6th ed, 2021) 150 [4.60].

[59] Eg, *Giumelli v Giumelli* (1999) 196 CLR 101; *Sidhu v Van Dyke* (2014) 251 CLR 505.

[60] Eg, *Attorney-General (Hong Kong) v Reid* [1994] 1 AC 324; *Chan v Zacharia* (1984) 154 CLR 178.

[61] Eg, *Hewett v Court* (1983) 149 CLR 639.

[62] See Chapter Nine.

[63] See Chapter Eight.

flexibly applied,[64] may further complicate how they should interact with statutory property regimes aimed at fostering certainty over property rights.[65]

[64] See *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1, 9, 16.

[65] Assuming that they do contain such policies: eg, in the context of the PPSA, see Section III of Chapter Five.

CONCLUSION

This Chapter explored how three unique characteristics of equity can affect its interactions with statute. This goes some way towards explaining the observation in the leading Australian equity text that:[66]

> Equity is well placed to accommodate statutory change. … equitable doctrines and remedies readily lend themselves to dealing with property or rights or liabilities arising under statute (consider equitable assignments and priorities, contribution and marshalling), and, for reasons which may be worthy of closer analysis than has occurred to date, statute often invokes equitable notions.

It follows that the framework for understanding interactions between statute and the common law may be particularly valuable when applied to interactions with equity. This is because such interactions may be more likely to arise due to the additional tools available in equity to facilitate them. It is also because such interactions may raise further questions in a given case, such as whether a potentially relevant maxim of equity should be drawn upon, or whether it is appropriate to grant equitable proprietary relief over property which is affected by a statutory regime. This in turn is why the case study that follows in this thesis pertains to the relationship between a particular statute and equity.

As will be recalled, this thesis seeks to answer two questions, which are:

1. How can we better understand interactions between statute and the common law?; and
2. Can we better understand the PPSA through examining its relationship with equity?

Part II of the thesis has identified a framework for understanding interactions between statute and the common law, explored how it works, and demonstrated that it is useful to understanding such interactions in any given case. But to sufficiently answer the first research question of this thesis, it will be necessary to show that this framework can also be used to understand interactions between a given statute as a whole and the common law.

The rest of this thesis does this by using the relationship between equity and the PPSA as a case study for the application of the framework for understanding interactions between statute and the common law. Part III considers interactions between equity and the PPSA as a whole. Part IV then considers interactions between the PPSA and two equitable doctrines and remedies, tracing and subrogation. Considered alongside the analysis thus-far, this will demonstrate the usefulness of the framework at various levels of abstraction, and thus answer

[66] Heydon, Leeming and Turner (n 29) xxiii.

the first research question of this thesis. It will also show that our understanding of the PPSA can be improved by exploring its relationship with equity, and thus answer the second research question of this thesis.

PART III: APPLYING THE FRAMEWORK TO EQUITY & THE PPSA – GENERALLY

CHAPTER FOUR: OVERVIEW OF THE PPSA

TABLE OF CONTENTS

INTRODUCTION

This Chapter marks the beginning of Part III of this thesis, which applies the framework for understanding interactions between statute and the common law to the relationship between equity and the *Personal Property Securities Act 2009* (Cth) ('PPSA' or 'Act') as a whole. As outlined in the introductory Chapter, the PPSA governs the effectiveness and priority of 'security interests' in personal property.[1] Whether it applies depends primarily on the function of transactions, rather than the way in which those transactions are structured.[2] When it does apply, a central feature of its operation is the Personal Property Securities Register ('PPSR'), which is a national register that operates as a notice board for claims to hold security interests.[3]

The broader reason for examining the relationship between equity and the PPSA is to demonstrate that the framework identified earlier in this thesis can be applied to interactions between a given statute and a large component of the common law. This is necessary to answer the first research question of this thesis, which is: how can we better understand interactions between statute and the common law? The narrower reason for doing so is to improve our understanding of the PPSA itself. This is necessary to answer the second research question of this thesis, which is: can we better understand the PPSA through examining its relationship with equity?

This Chapter provides an overview of the PPSA. It is largely descriptive, but also seeks to emphasise that the PPSA is not a 'code'.[4] Unlike the statutes which have historically been described as such, which restated major principles of the common law, the PPSA implements a new regime governing the law of secured transactions over personal property.[5]

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[1] See Section II in Chapter One.

[2] See further Section II below.

[3] See further Section III(C)(1) below.

[4] Cf the use of such language in Ronald CC Cuming, 'Equity and the PPSA: Strange Bedfellows?' (2014) 55(2) *Canadian Business Law Journal* 179, 205; Roderick J Wood, 'The Codification of Commercial Law' (2016) 79(2) *Saskatchewan Law Review* 179; Magda Raczynska, 'Equity in Codified Secured Transactions Law' in Ben McFarlane and Steven Elliot KC (eds), *Equity Today: 150 Years after the Judicature Reforms* (Hart Publishing, 2023) 279.

[5] Similarly, see Wood (n 4) 193 (recognising that the Canadian counterparts to the PPSA have 'a fundamentally different objective than the Victorian commercial codes').

This new regime reconceptualises how this area of law works, and continues to rely on underlying common law principles, many of which are equitable in nature, which are not restated within the Act itself.

This is supported by s 254 of the PPSA, which provides as follows (emphasis added):

> (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*.[6]
>
> …
>
> (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.

But while this provision is important, it is not the be-all and end-all concerning the relationship between the PPSA and the common law. Pursuant to its wording, s 254 is only directly concerned with whether the application or development of the common law is curtailed by reference to the Act. By contrast, the point which emerges from this Chapter is of greater generality. It is that the principles of the common law, including those of equity, are not only important to the extent that they continue to operate in its context, but are also essential to interpreting the PPSA.

Consider, for example, the lexicon adopted by the PPSA.[7] In some instances, the Act introduces new terminology such as 'grantor', which refers to the party whose property is subject to a security interest,[8] and 'secured party', which refers to the secured creditor.[9] It

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[6] The 'general law' is defined as 'the principles and rules of the common law and equity': PPSA s 10.

[7] See generally Sheelagh McCracken, 'Personal Property Securities Legislation: Analysing the New Lexicon' (2014) 35(1) *Adelaide Law Review* 71 ('Analysing the New Lexicon'). Similarly, see Grant Gilmore, *Security Interests in Personal Property* (Little, Brown and Company, 1965) 301–5 § 301.

[8] PPSA s 10 ('grantor'). Cf *Personal Property Security Act,* SS 1993, c P-6.2 s 2(1)(m) ('PPSA (Saskatchewan)'); *Personal Property Security Act*, RSO 1990, C P.10 s 1(1) ('PPSA (Ontario)'); *Personal Property Securities Act 1999* (New Zealand) s 16 ('PPSA (NZ)') (each of which instead use the term 'debtor').

[9] PPSA s 10 ('secured party').

also changes the meaning of familiar terminology such as ‘security interest’, which has a wider meaning under the Act than at common law,[10] and ‘intangible property’, which has a narrower meaning than at common law.[11] However, in other instances, it uses familiar terminology in the sense of its previously established legal meaning. Examples include when it lists property interests that may constitute PPSA security interests,[12] and when it uses the term ‘fixture’.[13] Such language can only be understood by reference to the common law. As will be seen below, a myriad of further such instances where the Act can only be understood by reference to the common law are revealed when its operation is examined.

Section I provides an overview of the origins of the PPSA in overseas statutes, and of the ongoing statutory review process in relation to the Australian Act. The rest of the Chapter concerns how the PPSA operates.[14] Section II examines the ‘security interest’, which is the central concept enlivening its operation. Section III examines the rules governing the effectiveness of security interests. Section IV examines the priority rules contained within the PPSA for competitions with security interests. Section V examines the rules concerning the reach of security interests. Finally, Section VI examines the provisions concerning the remedies of secured parties who hold security interests.

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[10] Ibid s 12. See further Section II below.

[11] Ibid s 10 (‘intangible property’).

[12] Ibid s 12(2).

[13] Ibid s 8(1)(j); *Power Rental Op Co Australia, LLC v Forge Group Power Pty Ltd (in liq) (recs & mgrs apptd)* (2017) 93 NSWLR 765, 787–9 [94]–[105].

[14] It adopts the structure of Sheelagh McCracken et al, *Everett and McCracken’s Banking and Financial Institutions Law* (Thomson Reuters, 9th ed, 2017) Chapter 12.

I Background to the PPSA

A *Overseas Origins of the PPSA*

The PPSA is based on similar statutes in New Zealand, Canada, and the United States.[15] The New Zealand legislation was closely modelled on earlier Canadian statutes,[16] which were themselves based on Article 9 of the *Uniform Commercial Code* (US).[17] It is uncontroversial that courts may draw upon the jurisprudence of these jurisdictions when resolving issues arising under the Australian Act.[18] But in doing so, Australian courts must remain alive to possible differences between the overseas statutes and the PPSA.[19]

There are more such differences between the Australian Act and its American counterpart than its New Zealand and Canadian counterparts.[20] This reflects a more general divergence between the commercial laws of the United States on the one hand, and those of Australia, New Zealand and Canada on the other. Such divergences are largely attributable to the latter jurisdictions' greater tendency to follow English law.[21] For example, the

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[15] Replacement Explanatory Memorandum, Personal Property Securities Bill 2009, 11. The New Zealand and Canadian statutes are cited at n 8, and the United States' counterpart is *Uniform Commercial Code 2012*, Art 9.

[16] Michael Gedye, Ronald CC Cuming and Roderick J Wood, *Personal Property Securities in New Zealand* (Thomson Brookers, 2002) 1.

[17] 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.

[18] *Re Maiden Civil (P&E) Pty Ltd; Albarran v Queensland Excavation Services Pty Ltd* (2013) 277 FLR 337, 348 [32] ('*Re Maiden Civil*'); *Future Revelation Ltd v Medica Radiology & Nuclear Medicine Pty Ltd* (2013) 283 FLR 122, 123 [5] ('*Future Revelation*'); *Re Holdco Pty Ltd (admins apptd) (No 2)* (2021) 381 ALR 418, 460 [127]. See further David Brown, 'The Use of Overseas Case Law in the Australian PPSA' (2019) 47(6) *Australian Business Law Review* 461.

[19] *Lewis v LG Electronics Australia Pty Ltd* (2014) 291 FLR 407, 412 [34] ('*Lewis v LG*'); *Samwise Holdings Pty Ltd v Allied Distribution Finance Pty Ltd* (2018) 131 SASR 506, 511–12 [39] ('*Samwise Holdings*'); *Wickham Hill Investment Pty Ltd v Ding* [2019] NSWSC 631, [146].

[20] This can be traced back to the differences between the Canadian and United States statutes: see Walsh (n 17), particularly at 58–93; Ronald CC Cuming, Catherine Walsh and Roderick J Wood, *Personal Property Security Law* (Irwin Law, 3rd ed, 2022) 83–8.

[21] Only in the 1960s was it even recognised that the common law of Australia was different to that of England: *Parker v The Queen* (1963) 111 CLR 610, 632–3; *Skelton v Collins* (1966) 155 CLR 94, 135–6.

implementation of Article 9 in the United States was driven in part by the need to ameliorate the extraordinary complexity of its laws pertaining to non-possessory securities over personal property.[22] This was much less of an issue in Australia, New Zealand and Canada due to the recognition of security interests in after-acquired property in English law.[23] Importantly, these divergences are not merely historical,[24] and pertain not just to these jurisdictions' personal property securities statutes but also to other components of their commercial laws – including, of course, their equitable jurisprudence. Consequently, in analysing the Australian Act, including its relationship with equity, this thesis will draw less upon Article 9 of the *Uniform Commercial Code* (US) than it will the Canadian and New Zealand statutes.

Unlike in New Zealand and Australia, each Canadian common law province has its own statute.[25] These fall within one of two groups: the largely uniform statutes which originated in Saskatchewan, and the Ontario statute which differs from them in several respects.[26] Save where a difference between the statutes in the largely uniform provinces is material, this thesis will only refer to the Saskatchewan and Ontario statutes.

B *Statutory Review of the PPSA*

From 2013–15, a Statutory Review of the PPSA was conducted by Mr Bruce Whittaker.[27] In February 2015 the Final Report (the 'Whittaker Report') was published.[28] It made 394 Recommendations for improvement. In September 2023 the Government published its response.[29] It proposed accepting most of the Whittaker Report recommendations, and also

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[22] See generally Gilmore (n 7) Chapters 2–8, 354–65 §§ 11.6–11.7.

[23] *Holroyd v Marshall* (1862) 10 HL Cas 191; 11 ER 999.

[24] Eg, for a contemporary example which is broadly related to that in the body text, see Cuming, Walsh and Wood (n 20) 83–4.

[25] See further Anthony Duggan, 'The Australian PPSA from a Canadian Perspective: Some Comparative Reflections' (2014) 40(1) *Monash University Law Review* 59, 61–4.

[26] Cuming, Walsh and Wood (n 20) 59–72.

[27] As required by PPSA s 343.

[28] Bruce Whittaker, *Review of the Personal Property Securities Act 2009: Final Report* (Final Report, February 2015) ('Whittaker Report').

[29] See Australian Government, *Public Consultation on the Government's response to the statutory review of the Personal Property Securities Act 2009* (22 September 2023) <https://consultations.ag.gov.au/legal-system/government-response-to-pps-review/>.

implementing some further changes which were either rejected by, or not considered in, the Whittaker Report. Further submissions on this were invited within an eight-week consultation period.

This consultation period has now closed, and it is expected that the Government will respond to the submissions made to it in due course. No time frame has been provided for this, and it is unclear whether there will be further consultation prior to the implementation of these reforms. It is also unclear how the transitional period for any amendments will operate, albeit that the Government has stated it ‘is anticipated to extend over a minimum period of 24 months from the date of commencement of the Amendment Bill’.[30] As such, many of the proposed amendments look likely to remain in flux for a substantial period of time, and even those which are uncontroversial may not be in force for years to come. Consequently, this thesis will deal with the PPSA as it currently operates, while identifying key proposed amendments as necessary. Since the thesis is focused on the broader relationship between equity and the Act, and since many of the proposed amendments do not significantly alter its underlying policies more generally, the vast majority of the analysis in this thesis will remain current notwithstanding the amendments.

[30] Australian Government, ‘Consultation Paper’ (n 29) 23.

II The Security Interest

The security interest is defined in s 12 of the PPSA and is the 'central concept' enlivening its operation.[31] This term is much broader than its meaning at common law,[32] and thus the scope of the Act is greater than it first appears. There are two types of security interests: in-substance security interests,[33] and deemed security interests.[34] Although the reconceptualisation of the law of secured transactions over personal property contained within the PPSA is embedded within this provision, it will be seen that common law concepts remain fundamental to its operation.

A *In-Substance Security Interests*

The in-substance security interest is defined as follows:[35]

> A ***security interest*** means an interest in personal property provided for by a transaction that, in substance, secures payment or performance of an obligation (without regard to the form of the transaction or the identity of the person who has title to the property).

This can be broken down into four elements.[36]

First, the interest must be 'provided for by a transaction', and thus must arise consensually.[37] As such, it does not capture interests arising by operation of law such as an

[31] *Hamersley Iron Pty Ltd v Forge Group Power Pty Ltd (in liq) (recs & mgrs apptd)* (2017) 52 WAR 90, 111 [93] ('*Hamersley* WASC'). Similarly, see *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd* (2014) 49 VR 86, 119 [97] ('*Dura*'); *JS Brooksbank v EXFTX Ltd (in rec & in liq)* [2009] NZCA 122, [45]; Whittaker Report (n 28) 42 [4.2.1].

[32] McCracken, 'Analysing the New Lexicon' (n 7) 85–6.

[33] PPSA s 12(1).

[34] Ibid s 12(3).

[35] Ibid s 12(1) (original emphasis).

[36] The following draws from Adam Waldman, 'Commercial Landlords & Uncollected Goods' (2022) 30(2) *Australian Property Law Journal* 86, 93–4. Cf the different formulation in John 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, 450–1.

[37] *Dura* (n 31) 123–8 [110]–[126].

equitable lien created by a court order,[38] a solicitor's fruits of the action lien,[39] or a maritime lien.[40]

Secondly, the interest must be in 'personal property'. This captures all property other than land or specified statutory rights.[41]

Thirdly, there must be 'an interest in personal property'. It is unclear whether these words are intended to capture rights that do not amount to a 'property interest' as understood at common law,[42] particularly given the broad definition of the word 'interest' within the Act.[43] However, most Australian commentators are of the view that these words import the requirement for such an interest, and thus that mere personal rights will not suffice.[44] This in

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[38] Eg, ibid; *Mega v WW Property Development Pty Ltd* [2022] VSC 607; *Laurus Group Pty Ltd (admins appt) as Trustee for The Laurus Group Unit Trust v Mitsui & Co (Australia) Ltd* [2023] VSC 412.

[39] *Aristocrat Technologies Australia Pty Ltd v Allam* [2017] FCA 812, [9] (in *obiter dicta*).

[40] Eg, *Board of Directors of Rizzo-Bottiglierie-De Carlini Armatori SpA v Rizzo-Bottiglieri-De Carlini Armatori SpA* [2018] FCA 153, [56] (in *obiter dicta*).

[41] PPSA s 10 ('personal property', 'land'). Note that 'fixtures' are separated out from land in s 10, but are nonetheless excluded in s 8(1)(j).

[42] See *Caisse Populaire Desjardins de L'Est de Drummond v Canada* [2009] 2 SCR 94 (Rothstein J, for McLachlin CJ, Binnie, Fish, Charron and Rothstein JJ) (characterising a flawed asset arrangement as a 'security interest' under taxation legislation containing a similar definition to the Canadian personal property securities statutes); cf (Deschamps J, for LeBel and Deschamps JJ, dissenting) (arguing that such an arrangement merely created contractual rights which were insufficient) (Supreme Court of Canada). See also *McCloy v Manukau Institute of Technology* [2013] NZLR 390 (holding that step-in rights constituted a security interest without discussing whether there was a property interest). But note that the latter may be explicable on the basis that the power of sale contained within the step-in rights meant that they constituted an equitable charge: as to which see *Re Cosslett (Contractors) Ltd* [1998] Ch D 495, particularly at 505 (Evans LJ), 508–9 (Millett LJ), approved in *Smith (Administrator of Cosslett (Contractors) Ltd) v Bridgend County Borough Council* [2002] 1 AC 336, 352–3 [41]–[44].

[43] PPSA s 10 ('interest').

[44] Whittaker Report (n 28) 43–5 [4.2.2]; Nicholas Mirzai and Jason Harris, *The Annotated Personal Property Securities Act 2009* (Cth) (Wolters Kluwer, 4th ed, 2020) 165 [12.5.1.2]; Diccon Loxton, 'One Flaw Over the Cuckoo's Nest: Making Sense of the "Flawed Asset Arrangement" Example, Security Interest Definition and Set-Off Exclusion in the PPSA' (2011) 34(2) *University of New South Wales Law Journal* 472, particularly at

turn suggests that these words can only be understood by reference to the common law, including by reference to those property interests which are equitable in nature.[45] Australian case law further supports this construction of the words 'an interest in personal property', albeit only in *obiter dicta* since the contrary view is yet to be argued.[46] The Government response to the Whittaker Report also accepted a proposal to delete the definition of 'interest' from the Act to clarify that this is correct.[47] As such, this thesis will treat this phrase as requiring the existence of a recognised property interest as understood at common law.

Fourthly, the transaction must 'secure payment or performance of an obligation'. This is objectively determined based upon the commercial substance of the transaction, rather than

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485, 493–4, 522; Cheyne Clarke, 'The Threshold Requirements of the PPSA: Does s 12 Require an Interest In Rem in Order to Create a Security Interest?' (2016) 27(1) *Journal of Banking and Finance Law and Practice* 6, particularly at 9–16. But see GJ Tolhurst, Tony Coburn and Alan Peckham, 'Security Interests at the Margins' (2012) 40(4) *Australian Business Law Review* 241; Anthony Duggan, *Australian Personal Property Securities Law* (LexisNexis, 3rd ed, 2021) 94–7 [3.56]–[3.59].

[45] Similarly, see Cuming (n 4) 181–4.

[46] *National Australia Bank Ltd v Garrett* (2016) 340 ALR 532, 544–5 [42]–[44] (suggesting an undertaking to the court is not a chose in action and thus cannot constitute a security interest); *Treasury Wine Estates Vintners Ltd v Garrett* (2016) 340 ALR 259, 264 [21] (suggesting an indemnity was merely contractual and thus could not constitute a security interest); *Rubis v Garrett (No 2)* [2018] FCA 2011, [54]–[56] (suggesting that a mere equity 'was incapable as a matter of law of creating any legal, equitable or security interest in the property of any of the applicants') ('*Rubis*'); *Re Bowery Bar (in liq)* [2021] NSWSC 697, [22]–[24], [34] (a contractual mechanism did not create a security interest including because the purported grantor had no relevant property rights to grant an interest in, and because the secured party's rights were merely contractual in nature) ('*Re Bowery Bar*'); *Allianz Australia Insurance Ltd v Probuild Constructions (Aust) Pty Ltd* [2023] NSWCA 56, [50] (suggesting that if a declaration of a sub-trust caused the sub-trustee to fall out of the picture 'it would be difficult to see how the PPSA could apply', presumably because the sub-trustee would no longer hold any property rights that could thus constitute a security interest) ('*Allianz v Probuild*'). But see *Gold Valley Iron Pty Ltd v OPS Screening & Crushing Equipment Pty Ltd* [2022] WASCA 134, [251]–[252] (declining to resolve the issue because it was not necessary for the outcome of that case); *AWE Perth Pty Ltd v Clough Projects Australia Pty Ltd* [2023] WASC 203, [26] (noting that the issue was left open in the previous case).

[47] Australian Government, 'Explanatory Memorandum (Sch 1 – Ch 4)' (n 29) 4–5 [26]–[27], item 4; Whittaker Report (n 28) 43–5 [4.2.2] (Recommendation 2).

the way in which it is structured.[48] Importantly, this means that whether the parties subjectively intend for the relevant interest to be caught by the Act is not determinative of whether it is characterised as a security interest. Thus, parties cannot avoid a consensual interest in personal property from being caught by the Act by simply restructuring their transactions, nor can they 'contract out' of the Act applying to such an interest.

Finally, s 12(2) contains a list of interests which can constitute in-substance security interests. It includes interests which demonstrate the wide scope of s 12(1), such as retention of title arrangements,[49] hire-purchase agreements,[50] and finance leases.[51] It is not exhaustive,[52] and thus other property interests such as beneficial interests under trusts can constitute in-substance security interests if they secure payment or performance of an obligation.[53] The Government has proposed relocating this list from the Act itself to the Explanatory Memorandum.[54] However, it does not appear that this would affect its legal significance, because it already begins with the words '[f]or example'.

B *Deemed Security Interests*

In addition to the in-substance security interest, s 12(3) contains three interests which are characterised as security interests irrespective of whether they secure payment or performance of an obligation. These are known as 'deemed security interests'. As with the in-substance security interest, the subjective intention of the parties is not determinative of whether an interest is characterised as a deemed security interest.

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[48] *White v Spiers Earthworks Pty Ltd* (2014) 99 ACSR 214, 218 [19] ('*White v Spiers*'); *Dalian Huarui Heavy Industry Company Ltd v Clyde & Co Australia (a firm)* [2020] WASC 132, [215] ('*Dalian*'); *Re Bowery Bar* (n 46) [27]. But see *Allianz v Probuild* (n 46) [66].

[49] PPSA s 12(2)(d).

[50] Ibid s 12(2)(e).

[51] Ibid s 12(2)(i).

[52] *Allianz v Probuild* (n 46) [53]. See also *Reel Action Sports Fishing Pty Ltd v Marine Engineering Consultants Pty Ltd (in liq)* [2022] QSC 271, [75].

[53] See, eg, *Allianz v Probuild* (n 46) (albeit that the trust in that case did not have a security function); *Skybridge Holidays Inc (Trustee of) v British Columbia (Registrar of Travel Services)* (1999) 173 DLR (4th) 333 (British Columbia Court of Appeal); *North Shore City Council v Stiassny* [2009] 1 NZLR 342.

[54] Australian Government, 'Explanatory Memorandum (Sch 1 – Ch 4)' (n 29) 4 [31]–[33], item 7. Cf Whittaker Report (n 28) 45 [4.2.3.1] (Recommendation 3).

The first type of deemed security interest is the interest of a transferee of an 'account'.[55] This captures the interest of an assignee of certain monetary obligations,[56] arising from either disposing of property, or of granting rights or providing services in the ordinary course of a business of doing so.[57] Whether there has been a 'transfer' turns on the existing principles for determining this – ie, under other statutes or in equity.[58] This provision also extends to the interest of a transferee of 'chattel paper'.[59] However, this will not be considered in this thesis due to both its limited practical importance in Australia,[60] and the high likelihood that the proposed amendment to remove it from the PPSA altogether will be passed.[61]

The second type of deemed security interest is the interest of a consignor under a 'commercial consignment'.[62] This captures certain consignments where both parties deal in goods of the relevant kind in the ordinary course of business, and in which the consignee is not known to be dealing in the goods of others.[63] The term 'consignment' is not defined by the PPSA, and is thus interpreted by reference to its meaning at common law.[64]

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[55] PPSA ss 12(3)(a), 10 ('account'). See further John G H Stumbles, 'The Impact of the *Personal Property Securities Act* on Assignments of Accounts' (2013) 37(2) *Melbourne University Law Review* 415.

[56] See, eg, *Resilient Investment Group Pty Ltd v Barnet and Hodkinson as liquidators of Spitfire Corporation Ltd (in liq)* [2023] NSWCA 118, [49]–[124] (Gleeson JA) (Brereton JA agreeing) (holding that there was no such monetary obligation); cf [199] (White JA)

[57] See, eg, ibid [125]–[152]; *Hamersley Iron Pty Ltd v Forge Group Power Pty Ltd (in liq) (recs & mgrs apptd)* (2018) 53 WAR 325, 378–9 [198] ('*Hamersley* WASCA').

[58] Eg, the Australian counterparts to the *Law of Property Act 1925* (UK) s 136, such as *Conveyancing Act 1919* (NSW) s 12; or the rules allowing for equitable assignments of choses in action, such as per *Corin v Patton* (1990) 169 CLR 540.

[59] PPSA s 10 ('chattel paper').

[60] Whittaker Report (n 28) 67–70 [4.3.3].

[61] Australian Government, 'Explanatory Memorandum (Sch 1 – Ch 4)' (n 29) 13 [91]–[93], item 28.

[62] PPSA ss 12(3)(b), 10 ('commercial consignment').

[63] See, eg, *Re Arcabi Pty Ltd (recs & mgers apptd) (in liq); Ex parte Theobald & Herbert* (2014) 288 FLR 236, 247–9 [50]–[59] (holding that there were no commercial consignments).

[64] See ibid 244–5 [31]–[32].

The third type of deemed security interest is the interest of a lessor or bailor under a ‘PPS lease’.[65] This captures certain leases or bailments of goods where the term exceeds two years,[66] and the lessor or bailor is regularly engaged in the business of leasing or bailing goods.[67] Neither leases nor bailments are defined in the Act, and thus these terms are given meaning by reference to the common law.[68]

C *Exclusions*

In addition to falling within s 12(1) or (3), for an interest to be characterised as a security interest it must not fall within the list of exclusions in s 8(1).[69] Some of these exclusions simply clarify the scope of the in-substance security interest. For example, non-consensual statutory and common law interests are excluded by s 8(1)(b)–(c) consistently with the requirement that the interest is ‘provided for by a transaction’, and rights of set-off are excluded by s 8(1)(d) consistently with the requirement that there be ‘an interest in personal property’. Such exclusions expressly draw upon common law terms such as liens, charges, and set-off. Other exclusions reflect discrete policy choices.[70] For example, certain transfers of accounts are excluded by s 8(1)(f)(vi)–(ix) because they are unlikely to raise the policy concerns leading to such interests being deemed security interests,[71] and interests in superannuation funds are excluded by s 8(1)(jb) because using such funds as collateral would be contrary to the government’s retirement income policy.[72]

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[65] PPSA ss 12(3)(c), 13.

[66] Including options, and also leases or bailments for indefinite terms once the lessee/bailee retains uninterrupted possession for more than two years: ibid s 13(1).

[67] Regarding the latter requirement, see *Forge Group Power Pty Ltd (in liq) v General Electric International Inc* (2016) 305 FLR 101, 111–12 [46]–[53].

[68] Eg, *Re Welldog Pty Ltd; Bredenkamp* [2017] FCA 1065, [39]–[66] (‘*Re Welldog*’). But note the proposed deletion of references to ‘bailments’: Australian Government, ‘Explanatory Memorandum (Sch 1 – Ch 4)’ (n 29) 10 [71].

[69] Note the proposed amendment to split s 8(1) into two provisions: Australian Government, ‘Explanatory Memorandum (Sch 1 – Ch 4)’ (n 29) 1 [4]–[5], item 2; 4–5, [38]–[42], item 9; 6–7, [43]–[56], item 10.

[70] Similarly, see Gilmore (n 7) 312–16 § 10.7.

[71] Mirzai and Harris (n 44) 138 [8.5.10].

[72] Explanatory Memorandum, Personal Property Securities (Corporations and Other Amendments) Bill 2010, Sch 2, [9.20].

III Effectiveness of the Security Interest

A *Attachment*

For a security interest to be enforceable against the grantor it must have 'attached' to the collateral.[73] This requires that the grantor has 'rights in the collateral',[74] and that value was given for the security interest or that the grantor did an act by which the interest arises.[75] The Act also provides that a security interest can attach to after-acquired property without specific appropriation by the grantor,[76] which mirrors the equitable rule to this effect.[77] These requirements are often uncontroversial. However, they raise two issues of broader significance to the operation of the Act.

1 *Conceptual Models of the Security Interest*

The first such issue arises from the requirement that the grantor has 'rights in the collateral'.[78] This raises the question of whether, and if so why, a security interest can attach where it arises from a lease or bailment. Although a grantor's (lessee's/bailee's) rights are less than ownership in such a case, it is accepted that the grantor has 'rights in the collateral' to satisfy the attachment requirement.[79] However, there are two explanations for why this is

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[73] PPSA s 19(1). Cf PPSA (Saskatchewan) (n 8) s 12; PPSA (Ontario) (n 8) s 11; PPSA (NZ) (n 8) s 40 (which do not split attachment and enforceability against third parties in the same manner as the Australian Act).

[74] PPSA s 19(2)(a). It is also sufficient if the grantor has 'the power to transfer rights in the collateral to the secured party'. But note the proposed amendment to delete these words since it is unclear what their function is in the Australian context: Australian Government, 'Explanatory Memorandum (Sch 2 – Ch 5)' (n 29) 5 [37], item 7; Whittaker Report (n 28) 119–20 [5.1.3] (Recommendation 53).

[75] PPSA s 19(2)(b). The latter wording seems to contemplate the creation of a security interest by way of deed: Duggan (n 44) 114 [4.13].

[76] PPSA s 18(3).

[77] *Holroyd v Marshall* (n 23) 211 (Lord Westbury LC) (Lord Wensleydale agreeing), 220 (Lord Chelmsford) (HL), 1007, 1010 (ER).

[78] PPSA s 19(2)(a).

[79] Where the security interest arises from a PPS lease or a retention of title arrangement, this is explicitly provided for in ibid s 19(5).

the case. These have in turn given rise to two conceptions of the security interest, known as the ‘unitary model’ and the ‘minimalist model’.[80]

Under the unitary model, a grantor (lessee/bailee) that holds possession of collateral pursuant to a security interest is deemed to be the owner of that collateral to explain why it has sufficient ‘rights in the collateral’ to grant a security interest that attaches to more than just its possessory interest.[81] By contrast, under the minimalist model, a grantor (lessee/bailee) that has legal possession of collateral has sufficient ‘rights in the collateral’ for a security interest to attach to that collateral without the need for any deeming of ownership,[82] because its possessory rights are proprietary in nature and are thus ‘rights in the collateral’.[83]

These different explanations will rarely directly affect the outcome of a dispute. However, they may have flow-on consequences for other issues concerning the Act.[84] These include whether transactions where an ownership interest is characterised as a security interest are ‘transfers’, which may in turn affect the operation of other statutory provisions;[85]

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[80] The minimalist model was originally termed the ‘possession model’: Whittaker Report (n 28) 117 [5.1.2.2]. It has also been suggested that the unitary model should be termed the ‘recharacterisation model’: Diccon Loxton, Sheelagh McCracken and Andrew Boxall, ‘PPSA: A Minimalist Approach’ (2018) 32(1) *Commercial Law Quarterly* 3 (‘A Minimalist Approach’). This thesis adopts the terminology preferred by the proponents of each model.

[81] Whittaker Report (n 28) 116 [5.1.2.2]; 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, 170. This follows judicial comments in Canada, which have also been quoted in New Zealand: *Re Giffen* [1988] 1 SCR 91, [36] (Supreme Court of Canada); *Graham v Portacom New Zealand Ltd* (2004) 2 NZLR 528, 534 [19] (‘*Graham v Portacom*’); *Waller v New Zealand Bloodstock Ltd* [2006] 3 NZLR 629, 653 [90].

[82] Loxton, McCracken and Boxall, ‘A Minimalist Approach’ (n 80) 5–6 [2.3].

[83] Ibid 9–13 [3.3]. The minimalist model is also capable of operating in a more restricted matter so that there are only sufficient ‘rights in the collateral’ where the grantor’s possession arises under a security interest: at 6 [2.4].

[84] See further 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, 241–58 (‘Conceptual Models’).

[85] Particularly in the context of chains of leases: see Diccon Loxton, Sheelagh McCracken and Andrew Boxall, ‘Chains of Leases: Aligning PPSA Models with Commercial Expectations’ (2018) 32(2) *Commercial Law Quarterly* 3.

whether transferors of accounts have sufficient rights to grant subsequent security interests in the same account;[86] and whether all security interests must be characterised as charges.[87]

The Government response to the Whittaker Report does not resolve the question of which model is correct. On the one hand, two passages in the Explanatory Memorandum adopt language which is more consistent with the unitary model.[88] But on the other hand, a proposed amendment to the text of s 19(5) provides that the grantor will have 'rights in the collateral' if 'a security interest in goods is granted in circumstances in which the secured party has title to the goods at common law'.[89] This seems to do away with any possible need for deeming, and is thus more consistent with the minimalist model.

Rather than trying to discern what these proposed amendments mean, and in turn what their consequences might be, this thesis adopts a position that has been argued elsewhere. That position is that the unitary and minimalist models should not be extrapolated beyond the core issue they were formulated in response to – ie, why a grantor that is a bailee/lessee has sufficient 'rights in the collateral' for a security interest to attach to the collateral.[90] Viewed as such, each of the potential further consequences of the models, including those which pertain to interactions between equity and the PPSA, can instead be resolved as discrete questions based on their individual merits.[91] It follows that there is no need to decide which model is correct in the vast majority of cases, including for the purposes of this thesis.

Finally, it should be noted that this whole issue is intrinsically tied to underlying common law concepts. The very question that gives rise to these models is what common law rights are sufficient to constitute 'rights in the collateral' under s 19(2)(a). The unitary model says that the common law notion of ownership is necessary, whereas the minimalist model says that the common law notion of legal possession also suffices.

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[86] Whittaker Report (n 28) 117 [5.1.2.2]; Wappett and Duggan (n 81) 172–3; Loxton, McCracken and Boxall, 'A Minimalist Approach' (n 80) 21 [4.5](c).

[87] See Waldman, 'Conceptual Models' (n 84) 248–51, 256–8.

[88] Australian Government, 'Explanatory Memorandum (Sch 2 – Ch 5)' (n 29) 6 [45]; Australian Government, 'Explanatory Memorandum (Sch 3 – Ch 7)' (n 29) 11 [105].

[89] Australian Government, 'Draft Compilation of the Personal Property Securities Act' (n 29) s 19(5).

[90] Waldman, 'Conceptual Models' (n 84).

[91] Ibid 259.

2 *All Security Interests as Fixed Interests*

The second broader issue, which only needs to be briefly noted for the purposes of this thesis, concerns the directive that the security interest 'attaches to collateral' when the criteria in s 19(2) are met. Due to this, floating charges no longer retain their 'floating' or 'hovering' characteristic.[92]

B *Enforceability Against Third Parties*

For a security interest to be enforceable against third parties, two requirements must be satisfied. First, the security interest must be attached to the collateral.[93] Secondly, there must either be a security agreement which meets specified formalities,[94] or the secured party must have possession or control of the collateral.[95] It should be noted that the PPSA does not determine the validity of security agreements in and of themselves, which thus continue to turn on common law and statutory principles.[96]

C *Perfection*

Perfecting a security interest confers it with 'the optimal level of protection' available under the Act.[97] Not perfecting a security interest does not cause it to become ineffective in and of itself,[98] and indeed the Act does not explicitly require a secured party to perfect its security interest.[99] However, an unperfected security interest is exposed to the risk of vesting

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[92] *Hamersley* WASC (n 31) 161 [346], noting that this component of the reasoning was not overturned in *Hamersley* WASCA (n 57) 362 [136]; *Royal Bank of Canada v Sparrow Electric Corp* [1997] 1 SCR 411, [54]–[55] (Supreme Court of Canada); *Stiassny v Commissioner of Inland Revenue* [2013] 1 NZLR 453, 477–8 [53]. See further 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.

[93] PPSA s 20(1)(a).

[94] Ibid s 20(1)(b)(iii)–(5).

[95] Ibid s 20(1)(b)(i)–(ii).

[96] Ibid ss 10 ('security agreement'), 18(1). Note also *Central Cleaning Supplies (Australia) Pty Ltd v Elkerton* (2015) 321 ALR 181, 185 [17]–[19].

[97] *Hamersley* WASC (n 31) 113 [108]; *Graham v Portacom* (n 81) 17 [12].

[98] See PPSA s 21.

[99] Cf *Corporations Act 2001* (Cth) Ch 2K s 263 (repealed).

in the grantor in insolvency,[100] and is more likely to lose out to a competing interest in a competition that is governed by the Act.[101]

If the requirements for attachment and enforceability against third parties are satisfied,[102] a secured party can perfect its security interest in three ways: registration, possession, or control.[103] The PPSA also at times confers a security interest with temporary perfection,[104] such as where the collateral has been transferred to a third party who has not taken free of the security interest.[105]

1 *Registration*

Registration is the most important method of perfection.[106] This is because it does not deprive the grantor of the use of the collateral, and also because it can be used to perfect a security interest irrespective of the nature of the collateral.[107] To make a registration, a registrant must apply to lodge a financing statement containing specified information,[108] including details regarding the grantor and the collateral.[109] Since only a financing statement is registered, a copy of the security agreement does not need to be included within the registration.[110]

The requirements for a registration to perfect a security interest are highly prescriptive.[111] This seeks to ensure that a single search against the grantor or the collateral,

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[100] PPSA s 267.

[101] Ibid Pts 2.5 (taking free), 2.6 (priority).

[102] Ibid s 21(1)(b)(i)–(ii).

[103] Ibid s 21(1)(b), (2). Note that this is regardless of the order in which attachment and the perfecting step occur: s 21(3).

[104] Ibid s 21(a). The temporary perfection rules are contained in ss 22, 33(2), 34–6, 38–40.

[105] Ibid s 34.

[106] See Duggan (n 44) 150 [5.21].

[107] The latter point is noted in McCracken et al (n 14) 505 [12.210].

[108] PPSA s 150.

[109] Ibid ss 153–4.

[110] Cf *Corporations Act 2001* (Cth) s 263(1)(c) (repealed).

[111] PPSA ss 164–5. See further Martin Lovell and Oliver Radan, 'Registration Errors under the PPSA: A Case Law Inventory and Analysis' (2019) 47(6) *Australian Business Law Review* 442, 442–52; Mirzai and Harris (n 44) 641–2 [164.5.3]–[164.5.4].

via any of the search parameters, identifies the registration.[112] Even minor errors can render a registration ineffective, such as listing a grantor's ABN instead of its ACN.[113] Some registrations also need to be made within prescribed time limits to claim super-priority for certain security interests,[114] or to avoid the risk of a security interest vesting in a corporate grantor's insolvency.[115] These timing requirements are marginally less strict in that courts have discretionary powers to grant extensions of time for them.[116]

The PPSR is a system of notice-based filing.[117] Registrations can be made so long as the registrant believes on reasonable grounds that it is or will become a secured party,[118] and the Act explicitly contemplates registrations being made prior to entry into a security agreement.[119] The Registrar does not verify the legitimacy of financing statements, and is obliged to register them whenever there is a properly submitted application.[120] In practice, this involves a computer system making the financing statement publicly available without any vetting by a human.[121] Thus, when baseless registrations were lodged against, among others, the Law Societies of both New South Wales and South Australia, and the New South Wales Department of Justice, they appeared on the PPSR until their subsequent removal.[122]

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[112] *Future Revelation* (n 18) 123–4 [6]; *Re OneSteel Manufacturing Pty Ltd (admins apptd)* (2017) 93 NSWLR 611, 621–3 [31]–[41], particularly at 623 [39] ('*Re OneSteel*').

[113] Eg, *Re OneSteel* (n 112); *Rose Guerin and Partners Pty Ltd (in liq) v Princes Square W24NY Pty Ltd* [2021] FCA 483, [50]–[68].

[114] Eg, PPSA ss 62–3.

[115] *Corporations Act 2001* (Cth) s 588FL.

[116] PPSA s 293(1)(a)–(c); ibid s 588FM.

[117] See *Auburn Shopping Village Pty Ltd v Nelmeer Hoteliers Pty Ltd* (2017) 324 FLR 378, 392–3 [64]–[66]. See further Mirzai and Harris (n 44) 16–17; Duggan (n 44) 177–8 [6.11]–[6.13]; McCracken et al (n 14) 506 [12.210]; Gilmore (n 7) 466–70 § 15.2; United Nations Commission on International Trade Law, *UNCITRAL Legislative Guide on Secured Transactions* (14 December 2007) 151–2 [10]–[14].

[118] PPSA s 151(1).

[119] Ibid s 161(a).

[120] Ibid s 150(3).

[121] *Curo Capital Pty Ltd v Registrar of Personal Property Securities* [2020] FCA 1515, [29]. Note also *SFS Project Australia Pty Ltd v Registrar of Personal Property Securities* (2014) 226 FCR 188, 191 [22].

[122] See *Rubis* (n 46). The making of such registrations probably breached PPSA s 151(1): note *Rubis* (n 46) [50].

A financing statement will remain on the PPSR until it lapses,[123] is removed by the registrant,[124] is removed by the Registrar (on very limited grounds),[125] or is removed pursuant to the amendment demand process.[126] This process first entails serving a written 'amendment demand' on the registrant requiring the amendment or removal of the registration.[127] If that is not complied with within five business days, it then entails either seeking to have the Registrar amend or remove the registration,[128] which is designed for uncontroversial cases where the Registrar has no reason to suspect on reasonable grounds that the amendment is not authorised;[129] or seeking to have a court amend or remove the registration,[130] which is designed for more controversial cases which require closer consideration of whether the amendment is authorised.

2 *Possession*

A secured party can also perfect its security interest by taking possession of the collateral.[131] The Act continues to rely on the common law meaning of possession, but narrows this meaning such that a secured party cannot have possession of collateral that is in the actual or apparent possession of the grantor.[132] It also expands its meaning at common law such that a secured party can possess some choses in action, if they are evidenced by physical certificates, by taking possession of those certificates.[133] Although one case has held

[123] PPSA s 153(1) item 5.

[124] Ibid ss 10 ('financing change statement'), 153.

[125] Ibid ss 184–5.

[126] Ibid Pt 5.6.

[127] Ibid s 177.

[128] Ibid ss 179–81.

[129] Note ibid s 181(1).

[130] Ibid s 182.

[131] Ibid s 21(2)(b). But possession by way of seizure or repossession will not suffice: s 21(2)(b). Eg, *Knauf Plasterboard Pty Ltd v Plasterboard West Pty Ltd* (2017) 254 FCR 559, 583–601 [110]–[182] ('*Knauf*').

[132] PPSA s 24(1).

[133] Ibid ss 21(4), (6), 10 ('investment instrument', 'negotiable instrument'). But note the proposed amendments to remove the ability to do this, such that such security interests will have to either be perfected by registration (or by control under other amended rules): Australian Government, 'Explanatory Memorandum (Sch 2 – Ch 5)' (n 29) 10 [84]–[89], item 19.

that a secured party could have possession of a bank account,[134] this is almost certainly incorrect as it is not possible at common law, and does not fall within the above-described alterations to the meaning of possession under the Act.[135]

3 *Control*

Finally, a secured party can perfect its security interest by taking control of the collateral.[136] It is only possible to have control over specified and limited types of collateral,[137] which in turn determines the precise requirements for control.[138]

D *Vesting*

The 'vesting provisions' are contained in s 267 of the PPSA, and s 588FL of the *Corporations Act 2001* (Cth).[139]

Section 267 of the PPSA provides that a security interest 'vests in the grantor' if it is unperfected at the time of one of several specified events indicating the grantor's insolvency.[140] It does not apply to deemed security interests arising from transfers of accounts

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[134] *Dalian* (n 48), particularly at [226]–[229].

[135] Sheelagh McCracken, 'If I "Hold", do I Therefore "Possess"? Perfection by Possession under the *Personal Property Securities Act 2009* (Cth)' (2020) 34(4) *Commercial Law Quarterly* 3. See also Mirzai and Harris (n 44) 289–90 [24.5.1].

[136] PPSA s 21(2)(c).

[137] Ibid ss 21(2)(c), 10 ('ADI account', 'investment instrument', 'negotiable instrument'), 15 ('intermediated security'). Note the proposed amendment to remove several further such types of collateral from s 21 because the Act does not specify how to take control of them: Australian Government, 'Explanatory Memorandum (Sch 2 – Ch 5)' (n 29) 8–9 [68]–[75], item 15; Whittaker Report (n 28) 145–6 [5.3.10] (Recommendation 77).

[138] PPSA ss 25–9. Note the proposed amendments to clarify and simplify these rules: see particularly Australian Government, 'Explanatory Memorandum (Sch 2 – Ch 5)' (n 29) 7–9 [63]–[75], item 15; 10–12 [90]–[104], item 20. Note also the proposed amendments to simplify the definitions of the types of collateral which can be subject to control: Australian Government, 'Explanatory Memorandum (Sch 2 – Ch 5)' (n 29) 2 [9]–[13], 2–3 [16]–[21], item 5; 3–4 [23]–[30], item 6.

[139] See further Adam Waldman, 'Unperfected PPSA Security Interests in Insolvency Part I: The Commercial Significance & Costs of the Vesting Provisions' (2024) 34(3) *Journal of Banking and Finance Law and Practice* 195 ('Unperfected PPSA Security Interests I'); Adam Waldman, 'Unperfected PPSA Security Interests in Insolvency Part II: The Policy Objectives of the Vesting Provisions' (2024) 34(4) *Journal of Banking and Finance Law and Practice* (forthcoming) ('Unperfected PPSA Security Interests II').

[140] These events are contained in PPSA sub-s 267(1)(a).

or commercial consignments, but does apply to deemed security interests arising from PPS leases.[141] The Government response to the Whittaker Report has proposed excluding these interests from its scope as well, such that s 267 would not apply to any deemed security interests (unless they were also in-substance security interests).[142]

Section 588FL of the *Corporations Act 2001* (Cth) provides that, if the grantor is a company, a security interest which is perfected by registration and by no other means 'vests in the company' if the registration time is outside of one of several specified time periods in relation to the grantor's insolvency.[143] Similarly to s 267, this provision currently does not apply to deemed security interests arising from transfers of accounts or commercial consignments, but does apply to deemed security interests arising from PPS leases.[144] The Whittaker Report recommended deleting this provision,[145] but this was rejected in the Government response.[146]

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141 Ibid s 268(1)(a).

142 Australian Government, 'Explanatory Memorandum (Sch 4 – Ch 8)' (n 29) 36 [256]–[258].

143 These events are contained in *Corporations Act 2001* (Cth) s 588FL(2)(a).

144 While the Government response to the Whittaker Report (n 28) does not propose excluding security interests arising from PPS leases which do not secure payment or performance of an obligation from this provision, this is presumably an error which will be rectified such that there is consistency between s 267 of the PPSA and s 588FL of the *Corporations Act 2001* (Cth): noted in Waldman, 'Unperfected PPSA Security Interests I' (n 139) 199.

145 Whittaker Report (n 28) 438–9 [9.2.2.1] (Recommendation 362).

146 Australian Government, 'Recommendations Index' (n 29) 48. For criticism of this, see Waldman, 'Unperfected PPSA Security Interests II' (n 139) Part III.

IV Priority of the Security Interest

The PPSA contains rules that determine priority competitions between multiple security interests, and between security interests and interests outside the scope of the Act ('non-PPS interests').[147] These rules do not cover competitions between secured parties and buyers or lessees. Such competitions were sometimes characterised as 'priority competitions' at common law,[148] but are provided for in the 'taking free' rules of the Act.[149]

A *Default Rules*

The default rules determine competitions between competing security interests that are not otherwise provided for in the Act.[150] They provide that perfected security interests prevail over unperfected security interests,[151] competitions between unperfected security interests are determined by which attached first,[152] and competitions between perfected security interests are determined by the earliest of the date of registration, or the date of perfection where the security interest was first perfected by possession, control, or otherwise by force of the Act.[153] In Canada, in the rare instance where the above-described rules do not generate an outcome, they have been supplemented by the equitable priority rule from *Re Lind*.[154]

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[147] PPSA Pt 2.6.

[148] 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) 28–33 (characterising them as problems of 'dependent or independent title').

[149] PPSA Pt 2.5. See further Section V(A) below. Cf PPSA (Saskatchewan) (n 8) Pt III; PPSA (Ontario) (n 8) Pt III (which do not split priority and taking free into different Parts within the statutes).

[150] PPSA s 55. Note the proposed amendment to clarify the time at which such competitions are resolved: Australian Government, 'Explanatory Memorandum (Sch 3 – Ch 7)' (n 29) 22 [230], item 55. Cf *Sperry Inc v Canadian Imperial Bank of Commerce* (1985) 17 DLR (4th) 236, [35] (Ontario Court of Appeal).

[151] PPSA s 55(3).

[152] Ibid s 55(2).

[153] Ibid s 55(4)–(5). But note that once the security interest is perfected, it must remain continuously perfected for the original date of perfection or registration to remain determinative of this priority: ss 55(6), 56. Note also that registrations can be made prior to the creation of the security interest: ss 150–1.

[154] [1915] 2 Ch 345, applied in *Royal Bank of Canada v Radius Credit Union Ltd* [2010] 3 SCR 38 (Supreme Court of Canada). Note the proposed amendment to effectively insert this rule into the Act itself: Australian Government, 'Explanatory Memorandum (Sch 2 – Ch 5)' (n 29) 21 [217]–[218], item 54.

B *Super-Priority Rules*

The Act contains priority rules which confer three types of security interests with 'super priority'.

First, security interests perfected by control have ultimate super-priority over security interests which are perfected by other means.[155]

Secondly, security interests which are characterised as purchase money security interests ('PMSIs'), and which are perfected in accordance with certain procedural requirements, have priority over security interests that are not PMSIs.[156] Security interests will be so characterised if they secure the purchase price of the collateral or are taken by a person who gives value for the purpose of enabling the grantor to acquire rights in the collateral (to the extent that such value is so applied),[157] or if they arise from a PPS lease or commercial consignment.[158]

Thirdly, security interests which are granted in crops to enable them to be produced or in livestock to enable them to be fed or developed, and which are perfected in accordance with certain procedural requirements, have priority over some other security interests.[159]

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155 PPSA s 57.

156 Ibid ss 62, 55. As to the procedural requirements, see sub-ss 62(2)–(3). Note the proposed amendments which remove the need to indicate that the security interest is a PMSI in the registration: Australian Government, 'Explanatory Memorandum (Sch 3 – Ch 7)' (n 29) 24–5 [260]–[269], item 62. With respect to the meaning of 'possession' in this provision, see *Samwise Holdings* (n 19) 517–31 [66]–[134]. Note the proposed amendment to clarify the meaning of 'possession' consistently with that case: Australian Government, 'Explanatory Memorandum (Sch 3 – Ch 7)' (n 29) 4 [40]–[41], item 9; 26 [270]–[272], item 62.

157 PPSA s 14(1)(a)–(b). See, eg, *Samwise Holdings* (n 19); *StockCo Agricapital Pty Ltd v Dairy Livestock Services Pty Ltd* [2020] NSWSC 318 ('*StockCo v Dairy*'); *StockCo Agricapital Pty Ltd v Tucki Hills Pty Ltd* (2022) 405 ALR 453, 456 [20].

158 PPSA s 14(1)(c)–(d). Note the proposed amendment to provide that all security interests which arise from leases are PMSIs: Australian Government, 'Explanatory Memorandum (Sch 3 – Ch 7)' (n 29) 4–5 [42]–[43], item 10.

159 PPSA ss 85–6. Note that s 86 does not confer priority over PMSIs: *StockCo v Dairy* (n 157) [143]–[144].

C *Other Priority Rules*

The PPSA contains additional priority rules governing competitions between security interests in transferred collateral,[160] returned goods,[161] and certain collateral governed by the laws of other jurisdictions.[162]

The PPSA also contains non-exhaustive rules which govern competitions between security interests and non-PPS interests.[163] These include competitions with certain commercial liens that arise by operation of the common law or statute,[164] interests in relation to rights to payment in connection with land,[165] and execution creditors' interests.[166] Where none of these rules apply, competitions between security interests and non-PPS interests are resolved by the common law priority rules, many of which are equitable in nature.[167]

D *Subordination Agreements*

The PPSA confirms that secured parties can agree to change the priority of their security interests.[168] It further provides that such agreements are enforceable by third parties.[169] Otherwise, however, the enforceability and construction of such agreements remains determinable by the common law and other relevant statutes.

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[160] PPSA ss 66–8.

[161] Ibid s 76.

[162] Ibid s 77.

[163] Ibid ss 73–4. See further Adam Waldman, 'Resolving Priority Competitions Between PPSA Security Interests and Non-PPS Interests' (2021) 44(2) *University of New South Wales Law Journal* 811, 814–32 ('Resolving Priority Competitions').

[164] PPSA s 73(1).

[165] Ibid s 73(6).

[166] Ibid s 74.

[167] See Waldman, 'Resolving Priority Competitions' (n 163) 832–48.

[168] PPSA s 61. Note the proposed amendment to refer to such agreements as 'priority agreements' rather than 'subordination agreements', which better reflects existing Australian terminology: Australian Government, 'Explanatory Memorandum (Sch 3 – Ch 7)' (n 29) 23–4 [243]–[246], item 61; Whittaker Report (n 28) 315 [7.7.7] (Recommendation 228).

[169] PPSA s 61(2)(b).

V REACH OF THE SECURITY INTEREST

A *Taking Free*

Where collateral has been bought or leased by a third party, the taking free rules of the Act determine whether a security interest continues in it.[170] The term 'buyer', as used in these provisions, is not defined in the PPSA. Australian courts have interpreted this word by reference to its meaning in the sale of goods statutes.[171]

Before turning to these rules, it must be noted that where the sale or lease has given rise to 'proceeds' (which will ordinarily be the purchase price or the rent),[172] the security interest will not continue in the collateral if the secured party authorised the disposal or otherwise agreed that such a dealing would extinguish its security interest.[173] If it does not so continue, there will be no security interest for a buyer or lessee to take free of.[174]

If the security interest continues in the collateral, the PPSA contains several rules providing when the buyer or lessee 'takes free' of the security interest.[175] The most significant taking free rules provide that a buyer or lessee will take free of a security interest

[170] Ibid Pt 2.5.

[171] Eg, *Lewis v LG* (n 19), particularly at 416 [47], 418–20 [64]–[73]; *Re Renovation Boys Pty Ltd* [2014] NSWSC 340 (applying the sale of goods legislation without discussion) ('*Re Renovation*'); *Re Plantation Outdoor Kitchens Pty Ltd* [2019] NSWSC 925 (applying the sale of goods legislation without discussion) ('*Re Plantation*'); *Huntermotive Pty Ltd v Khan* (2022) 367 FLR 473, 479–80 [30]. See further Sheelagh McCracken, 'When is a "Buyer" a "Buyer"? Solving Riddles When New Legislation Confronts Established Concepts' in Shelley Griffiths, Sheelagh McCracken and Ann Wardrop (eds), *Exploring Tensions in Finance Law: Trans-Tasman Insights* (Thomson Reuters, 2014) 175. Similarly in New Zealand, see *Orix New Zealand Ltd v Milne* [2007] 3 NZLR 637, 646 [49], 647 [53]; *Maginness v Tiny Town Projects Ltd (in liq)* [2023] NZHC 494, [76]–[88].

[172] PPSA s 31.

[173] Ibid s 32(1)(a). Note the proposed amendment to change the wording 'continues in' to 'remains attached to': Australian Government, 'Explanatory Memorandum (Sch 3 – Ch 7)' (n 29) 8–9 [79]–[83], item 19.

[174] Cf *Lewis v LG* (n 19) 418 [62]–[63] (not applying these rules sequentially).

[175] PPSA ss 43–52. Note the proposed amendments to these rules to rationalise the requirements of 'value' and 'knowledge': Australian Government, 'Recommendations Index' (n 29) 26–7.

that is unperfected,[176] a security interest that is temporarily perfected,[177] and a security interest where the property is sold in the ordinary course of the seller's or lessor's business of selling or leasing personal property of that kind.[178] Also of note are the rules which provide that a creditor who receives repayment of a debt via certain methods will take free of any security interest in the property used to effect that payment.[179] The other taking free rules are more narrowly concerned with particular types of property,[180] or with low-value goods which are purchased for personal, domestic or household purposes.[181]

B *Proceeds*

The reach of a security interest may also extend to the 'proceeds' of collateral. Proceeds are defined under the Act as 'identifiable or traceable personal property' arising from several widely drawn categories.[182] Their scope is narrower than the understanding of

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[176] PPSA s 43.

[177] Ibid s 52. Note the proposed amendment to remove the limitations whereby this taking free rule only applies to some types of collateral: Australian Government, 'Explanatory Memorandum (Sch 3 – Ch 7)' (n 29) 20 [204]–[205], item 50; Whittaker Report (n 28) 295–6 [7.6.11.1] (Recommendation 205).

[178] PPSA s 46. On the scope of this rule, see *Lewis v LG* (n 19) 421–4 [78]–[98]; 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, particularly at 12–35; Mirzai and Harris (n 44) 370–4 [46.5.2]; Duggan (n 44) 317–23 [10.26]–[10.35]. For Australian examples see *Lewis v LG* (n 19); *Re Renovation* (n 171); *Re Plantation* (n 171); *Metal Manufactures Pty Ltd v WesTrac Pty Ltd* [2024] NSWSC 144, [46]–[66].

[179] PPSA ss 69–70, 72. Note the proposed amendment to re-frame these as taking free rules rather than priority rules, which better reflects their function: Australian Government, 'Explanatory Memorandum (Sch 3 – Ch 7)' (n 29) 16 [169]–[172], 17 [174]–[177], 18 [183]–[186], item 47; Whittaker Report (n 28) 297–8 [7.6.12.1], 300–1 [7.6.13.3], 302 [7.6.15.2] (Recommendations 208, 212, 214).

[180] PPSA ss 44 (property that must be described by serial number), 45 (motor vehicles), 48 (currency), 49 (investment instruments or intermediated securities), 50 (investment instruments), 51 (intermediated securities). Note the proposed amendments which combine ss 50–1 into a new s 50: Australian Government, 'Explanatory Memorandum (Sch 3 – Ch 7)' (n 29) 19–20 [194]–[202], item 49.

[181] PPSA s 47.

[182] Ibid s 31(1), (4)–(6).

that term in equity, as the grantor must have an interest in personal property for it to constitute proceeds.[183]

The PPSA provides for the effectiveness and priority of security interests in proceeds. Security interests generally attach automatically to proceeds of the original collateral,[184] and if they were perfected by registration against the original collateral then they remain perfected by that same registration in specified circumstances.[185] If the security interest in proceeds does not remain perfected, it is afforded a brief period of temporary perfection.[186] Priority and taking free competitions are determined by applying the same rules described above, subject to limitations preventing double recovery by the secured party.[187]

C *Accessions & Processed and Commingled Goods*

The reach of a security interest may also continue in goods where they have been affixed to other property ('accessions'),[188] or in a mass or product in which the collateral has become an unidentifiable part ('processed or commingled goods').[189]

1 *Accessions*

A security interest in an accession to other goods ('the whole') continues in the accession.[190] A perfected security interest in an accession generally prevails over a security

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[183] Ibid s 31(3)(a)(i). See further Chapters Seven and Eight. Note the proposed amendment to clarify that the grantor referred to in this section is the original grantor of the collateral: Australian Government, 'Explanatory Memorandum (Sch 3 – Ch 7)' (n 29) 8 [72]–[77], item 18.

[184] PPSA s 32(1)(b).

[185] Ibid s 33(1). Note that the Government rejected a recommendation to amend the Act to provide that a security interest over collateral that is perfected by registration is automatically perfected over any proceeds of that collateral: Australian Government, 'Recommendations Index' (n 29) 26. It also rejected a recommendation to clarify that, if the above-described recommendation was not adopted, any financing statement registered against the grantor that describes the proceeds should be sufficient to perfect the security interest, even if it was not the same financing statement covering the collateral which gave rise to the proceeds: Australian Government, 'Recommendations Index' (n 29) 26.

[186] PPSA s 33(2).

[187] Ibid s 32(2).

[188] Ibid s 10 ('accessions'), Pt 3.3.

[189] Ibid Pt 3.4.

[190] Ibid s 88.

interest in the whole,[191] the rationale being that credit advanced over the whole would not have taken into account the value of the accession.[192] There are exceptions to this where the security interest in the accession was not perfected or had not attached prior to affixation,[193] which reflect that the failure to perfect the security interest in the accession may have rendered it undiscoverable to a competing secured party that advanced credit over the whole.[194] The Act also regulates the removal of accessions,[195] and when a party with an interest in the whole can retain an accession.[196]

2 *Processed and Commingled Goods*

A security interest in collateral that loses its identity by becoming part of a larger product or mass continues in that product or mass,[197] and for the purposes of priority it retains its perfected status if it was perfected prior to this occurring.[198] In competitions over the product or mass between such continuing security interests,[199] perfected security interests prevail over unperfected security interests,[200] and perfected PMSIs prevail over other security interests.[201] Otherwise, competing security interests are entitled to a *pro rata* share in the product or mass.[202]

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[191] Ibid s 89.

[192] McCracken et al (n 14) 517 [13.370]; Duggan (n 44) 287 [9.9].

[193] PPSA ss 90–1.

[194] McCracken et al (n 14) 517–18 [13.370]; Duggan (n 44) 287–90 [9.10]–[9.14].

[195] PPSA ss 92–5, 97.

[196] Ibid s 96.

[197] Ibid s 99(1).

[198] Ibid s 100.

[199] Competitions between security interests taken directly over the mass are governed by the ordinary priority rules: ibid.

[200] Ibid s 102(1).

[201] Ibid s 103. Note also the limitations contained in ss 101, 102(4).

[202] Ibid s 102(2)–(3).

These rules have been criticised as being targeted primarily at processed goods rather than commingled goods.[203] The Government response to the Whittaker Report accepted a recommendation to create separate rules for commingled goods.[204]

D *Agricultural Interests*

The PPSA provides that a perfected security interest in crops can prevail over a subsequently acquired interest over the land on which those crops are growing.[205] It also provides that a security interest can attach to crops while they are growing, and to the products of livestock before they become proceeds.[206]

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[203] Andrew Boxall and Diccon Loxton, 'Commodity Transactions and Part 3.4 of the Personal Property Securities Act 2009: An Anomalous Outcome' (2013) 27(2) *Commercial Law Quarterly* 3.

[204] Australian Government, 'Explanatory Memorandum (Sch 3 – Ch 7)' (n 29) 34–7 [351]–[389], item 86.

[205] PPSA s 84(2). See further Duggan (n 44) 298–9 [9.34]–[9.35].

[206] PPSA s 84A.

VI Remedies of the Security Interest

Chapter 4 of the PPSA contains statutory remedies for the enforcement of security interests.[207] This ordinarily involves the secured party first seizing the collateral,[208] and then either disposing of it or retaining it.[209] Disposal can be to a third party by way of sale, lease or licence,[210] or to the secured party itself by way of purchase.[211] A secured party exercising the statutory remedies must do so honestly and in a commercially reasonable manner.[212]

Such remedies appear to be modelled on the equitable remedies of a mortgagee.[213] For example, a grantor's right to redeem collateral prior to disposal under the Act mirrors the rights it would have in equity under the remedy of foreclosure.[214] Similarly, the way in which a secured party must distribute the proceeds of collateral under the Act mirrors the requirements in equity following the enforcement of a mortgage or charge, in the sense that the secured party cannot retain any surplus following the satisfaction of the secured obligation.[215]

The statutory remedies regime is more limited than it may first appear. It does not apply to deemed security interests that do not secure payment or performance of an

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[207] Note the proposed amendments to entirely re-structure this Chapter, which entails re-numbering all its sections: Australian Government, 'Explanatory Memorandum (Sch 4 – Ch 8)' (n 29) 1 [1]–[6].

[208] PPSA ss 123–4. Seizure can occur regardless of whether the property is tangible. Note the proposed amendment to clarify that s 123 applies to all intangible property, rather than only the more narrowly defined 'intangible property' in the Act: Australian Government, 'Explanatory Memorandum (Sch 4 – Ch 8)' (n 29) 10 [80]–[83]. There is also an alternative, expedited enforcement process for security interests in limited types of collateral: s 120.

[209] PPSA ss 128, 134. Following seizure, disposal or retention must occur: s 125.

[210] Ibid s 128(2). Collateral can only be disposed of by way of lease if provided for by the security agreement: sub-s (2)(b). Only intellectual property can be disposed of by way of license: sub-s (2)(c).

[211] Ibid s 129.

[212] Ibid s 111(1).

[213] As noted in Duggan (n 44) 395 [12.6].

[214] PPSA s 141(1). On foreclosure, see Sykes and Walker (n 148) 130–1; McCracken et al (n 14) 556–7 [13.570].

[215] PPSA s 140(2). Similarly, see Duggan (n 44) 425 [12.62].

obligation,[216] as it is premised on the existence of a secured obligation.[217] Parties can contract out of many of the statutory remedies,[218] albeit that this is only enforceable against those parties.[219] Perhaps most importantly, the regime does not apply when there is a corporate grantor and receivers have been appointed.[220] This very commonly occurs when secured parties are enforcing their security interests.[221]

Finally, it must be noted that the statutory remedies are not exhaustive, as the parties' remedies under the security agreement are expressly preserved.[222] These may in turn depend upon the underlying form of the security interest at common law, and other aspects of the common law and other statutes which govern the exercise of such remedies.

[216] PPSA s 109.

[217] As put in Duggan (n 44) 395–6 [12.7].

[218] PPSA s 115(1).

[219] Ibid s 115(2).

[220] Ibid s 116. The Government has invited further consultation on whether this should remain the case: Australian Government, 'Consultation Paper' (n 29) 21.

[221] See, eg, *Re Maiden Civil* (n 18); *White v Spiers* (n 48); *Citadel Financial Corporation Pty Ltd v Elite Highrise Services Pty Ltd (No 3)* [2014] NSWSC 1926; *Re Welldog* (n 68); *Knauf* (n 131); *Hughes v Pluton Resources Ltd* (2017) 52 WAR 456; *Hamersley* WASCA (n 57); *Re O'Keeffe Heneghan Pty Ltd* [2018] NSWSC 1958; *Gas Sensing Technology Corporation v ProX Pty Ltd* (2019) 134 ACSR 334; *RnD Funding Pty Limited v Goldus Pty Limited* [2021] FCA 1096; *Boulos Holdings Pty Ltd v Edwin Davey Pty Ltd* [2021] NSWSC 689; *Diversa Pty Ltd v Taiping Trustees Ltd* (2022) 401 ALR 161; *Francis (Trustee), Re Fotios (Bankrupt) v Helios Corporation Pty Ltd* [2022] FCA 199.

[222] PPSA s 110.

CONCLUSION

This Chapter provided an overview of the operation of the PPSA. In doing so, it emphasised the essential ongoing role of the more general principles of commercial law, including those contained in the common law, in giving meaning to the Act. As put by Gilmore in the opening pages of his book on the history and operation of the United States counterpart to the PPSA:[223]

> The particular shape and structure which Article 9 assumed can only be understood in the light of the state law from which it issued. … Even on its own terms, then, [Article 9 of the Uniform Commercial] Code does not purport to contain all the law there is. … The Code, like the earlier Uniform Acts which it supersedes, is frequently written in a sort of shorthand. The key which unlocks its cipher is the pre-Code law.

The above overview has shown that this is equally true in the Australian context. Such principles remain fundamental to understanding when a security interest exists, and to giving meaning to the provisions which regulate the effectiveness and reach of such security interests. They also continue to supplement the operation of the priority rules of the Act, and the provisions concerning the remedies of secured parties. This paves the way for the following Chapter, which approaches the Act just like any other statute when discerning its underlying policies, in accordance with the first step of the framework for understanding interactions between statute and the common law.

[223] Gilmore (n 7) vii–viii.

CHAPTER FIVE: POLICIES OF THE PPSA

TABLE OF CONTENTS

INTRODUCTION

The following two Chapters examine the relationship between equity and the *Personal Property Securities Act 2009* (Cth) ('PPSA' or 'Act') as a whole, via the framework for understanding interactions between statute and the common law. This demonstrates that the framework can be used to better understand interactions between a given statute and a broad component of the common law, in accordance with the first research question of this thesis concerning such interactions more generally. It also improves our understanding of the PPSA by examining its relationship with equity, in accordance with the second research question of this thesis concerning the Act itself.

This Chapter applies the first step of the framework to the PPSA by identifying and critically examining its underlying policies. It approaches this as a question of statutory construction, and does not treat the Act differently from any other statute when doing so because, as established in the previous Chapter, the PPSA is not a 'code'. It identifies nine possible underlying policies of the PPSA, which are:

1. To apply the statutory rules of the Act to security interests based upon their function rather than their common law form – ie, to promote 'substance over form';
2. To encourage the publicisation of claims to hold security interests in personal property – ie, the 'publicity function';
3. To promote certainty and simplicity;
4. To minimise detriment to secured parties;
5. To minimise detriment to consumers;
6. To protect privacy;
7. To prevent fraud;
8. To improve the rules that regulate debts which are characterised as accounts; and
9. To encourage certain types of finance.

Courts and commentators sometimes reference other possible policies of the Act, which are not included in the above list. For example, references are sometimes made to promoting 'commercial realities' (or variants thereof).[1] But since such purported policies are

[1] Eg, *Agricultural Credit Corporation of Saskatchewan v Pettyjohn* [1991] 79 DLR (4th) 22, [52] (Saskatchewan Court of Appeal) ('*Pettyjohn*'); Ronald CC Cuming, 'Judicial Development of Personal Property Security Law: The Contribution of the Saskatchewan Court of Appeal' (1999) 62(1) *Saskatchewan Law Review*

not evident in the text of the Act itself, interpreted in light of its context and purpose, they are not discussed in this Chapter.

Similarly, references are also sometimes made to broader objectives such as creating an efficient personal property securities law,[2] facilitating the use of personal property as collateral,[3] and enhancing the ability of businesses and consumers to access cost-effective finance.[4] Statements such as these describe what might be seen as the overall objective of the PPSA, which is to create a 'good' personal property securities law – ie, one that efficiently regulates secured finance, and thus reduces costs and increases access to finance as a whole. But they do not shed light on *how* the Act seeks to achieve this overall objective, and are thus incapable of informing exactly how questions concerning its operation should be resolved. Consequently, although such statements are accurate in a general sense, they should not be viewed as discrete policy objectives in and of themselves.

Sections I to III consider those possible policies which are most commonly raised by courts and commentators when analysing the PPSA. These are the promotion of substance over form, the publicity function, and the promotion of certainty and simplicity. The remaining Sections then consider the additional policies which are discernible within the Act, but are less commonly discussed by courts and commentators. These are significant because they are not all clearly concerned with facilitating secured finance, and because they inform the scope of the broader policies of the PPSA.

19, 30; Nicholas Mirzai, 'The Persistence of Equitable Doctrines with Respect to the Law Relating to Personal Property Securities: Assessing the Impact of the *Personal Property Securities Act 2009* (Cth)' (2013) 24 *Journal of Banking and Finance Law and Practice* 3, 14.

[2] Replacement Explanatory Memorandum, Personal Property Securities Bill 2009, 11 ('Replacement Explanatory Memorandum'); *Gold Valley Iron Pty Ltd v OPS Screening & Crushing Equipment Pty Ltd* [2022] WASCA 134, [96].

[3] *Saulnier v Royal Bank of Canada* [2008] 3 SCR 166, 179 [19] (Supreme Court of Canada) ('*Saulnier*').

[4] Bruce Whittaker, *Review of the Personal Property Securities Act 2009: Final Report* (Final Report, February 2015) 11 [2.1.2] ('Whittaker Report')

I Substance Over Form

The core policy underlying the PPSA is its 'substance over form' approach to the regulation of secured transactions involving personal property.[5]

A *Basis of the Policy*

This policy is contained in those provisions of the Act which define security interests, and also in those provisions which further delineate between different types of security interests, irrespective of their form at common law. Most important is s 12(1), which defines security interests based upon their function and 'without regard to the form of the transaction or the identity of the person who has title to the property'. Also relevant is s 14, which characterises some security interests as purchase money security interests ('PMSIs'), and ss 84–6, which characterise some security interests as relating to agriculture. These also apply based upon the function of the relevant security interest. This policy is then achieved by *all* the other provisions which govern the effectiveness, priority and reach of security interests, since their application does not explicitly delineate between security interests based upon how they would be characterised at common law.

Several other provisions contain the policy of promoting substance over form, albeit to a lesser extent than those mentioned above. One is s 273, which confirms that the application of the PPSA is not affected by whether the secured party holds title to collateral. Chapter 4 of the Act also contains this policy by conferring all security interests with a uniform set of statutory remedies. However, this is qualified by the express statutory preservation of the remedies of the parties to a security agreement, which turn on how the parties have structured their transaction.[6] It is also qualified by the limitations as to when the statutory remedies are available.[7] Another significant provision is s 140, which provides that a secured party cannot retain property in surplus of the relevant secured obligation.[8] This applies even if the security interest would not have been so limited at common law, such as under a retention of title arrangement where the owner could have simply repossessed the

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[5] Note ibid 39 [4.1.1] (describing this as the 'main organising principle' of the Act).

[6] PPSA s 110.

[7] Ibid ss 109(1), 115–16.

[8] This applies irrespective of whether the statutory remedies were exercised: ibid s 140(1). It cannot be contracted out of: s 115(1).

supplied goods on default.[9] But this is also qualified by the fact that it can be avoided by the appointment of receivers if the grantor is a corporation.[10]

By contrast to the previous laws which were replaced by the PPSA, the promotion of substance over form represents a radical reconceptualisation of the law of secured transactions.[11] But while the significance of this policy cannot be overstated, that does not obviate the need to closely examine its proper scope.

B *Scope of the Policy*

When we closely examine the proper scope of the policy of promoting substance over form, it becomes clear that it does not necessitate doing away with the consequences of ‘form’ altogether.[12]

Common law ‘form’ remains relevant to the PPSA at the very outset in determining whether the Act applies. This is because the words ‘an interest in personal property’ in s 12(1) require the existence of a property interest as understood at common law.[13] Similarly, some of the deemed security interests in s 12(3) apply based upon the existence of specified common law property interests such as leases, bailments and consignments.[14] Several of the exclusions in s 8 also apply based upon forms of property interests at common law including

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[9] Bruce Whittaker, ‘Retention of Title Clauses under the Personal Property Securities Act 2009 (Cth)’ (2010) 21(4) *Journal of Banking and Finance Law and Practice* 273, 287. See further Michael G Bridge et al, ‘Formalism, Functionalism, and Understanding the Law of Secured Transactions’ (1999) 44(3) *McGill Law Journal* 567, 590–1. The same is true of other property interests, such as other bailments, or trusts, which can be characterised as security interests but would not necessarily be limited to the value of the secured obligation at common law.

[10] PPSA s 116.

[11] John G H 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, 448–9 (‘The Extended Reach’); Whittaker Report (n 4) 3 [1.1]; also *Samwise Holdings Pty Ltd v Allied Distribution Finance Pty Ltd* (2018) 131 SASR 506, 511 [37] (‘*Samwise Holdings*’); *Forge Group Power Pty Ltd (in liq) v General Electric International Inc* (2016) 305 FLR 101, 102–3 [5] (‘*Forge*’).

[12] Similarly, see Bridge et al (n 9).

[13] See Section II(A) of Chapter Four.

[14] PPSA ss 12(3)(b)–(c), 13(1), 10 (‘commercial consignment’).

liens, charges, and trusts.[15] As put by Stumbles: ‘The PPSA does not operate in a vacuum plucking security interests out of the ether’.[16]

Once the PPSA applies, notions of common law ‘form’ remain relevant to its operation, albeit indirectly. For example, whether a security interest is a PMSI that can benefit from super-priority may depend upon whether it arises from a PPS lease or a commercial consignment,[17] which in turn depend upon the existence of a lease, bailment or consignment as understood at common law;[18] and whether one PMSI has priority over another may turn on similar considerations.[19] Furthermore, whether a grantor has ‘rights in the collateral’ which are sufficient for attachment requires examination of the nature and scope of those rights as understood at common law.[20] Under the minimalist model, this is because legal possession may be required; and under the unitary model, this is because ownership may be required (and grantors are deemed to have such rights in some circumstances).[21] Form also remains relevant to the remedies available to a secured party, because the common law nature of a security interest will affect its remedies outside of the Act.[22]

Even the notion of ‘title’ at common law remains relevant to the operation of the PPSA in some instances.[23] For example, notwithstanding s 273, title remains relevant to

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[15] Ibid s 8(1)(b)–(c), (h).

[16] Stumbles, ‘The Extended Reach’ (n 11) 452. Similarly see Sheelagh McCracken et al, *Everett and McCracken’s Banking and Financial Institutions Law* (Thomson Reuters, 9th ed, 2017) 480 [12.001].

[17] PPSA s 14(c)–(d).

[18] Ibid ss 13(1), 10 (‘commercial consignment’).

[19] Ibid s 63.

[20] Ibid s 19(2)(a).

[21] See Section III(A)(1) of Chapter Four. Note that the proposed amendment to s 19(5) would do away with the need to determine which view is correct for such purposes but, in doing so, would explicitly reference common law ‘form’ in the text of that provision: see Australian Government, ‘Draft Compilation of the Personal Property Securities Act’, *Public Consultation on the Government's response to the statutory review of the Personal Property Securities Act 2009* (22 September 2023) s 19(5) <https://consultations.ag.gov.au/legal-system/government-response-to-pps-review/>.

[22] PPSA s 110. See, eg, *Sutherland v Compton Lot Ten Pty Ltd* [2023] NSWSC 1472 (secured party attempted to exercise the remedy of foreclosure arising from its security interest, which was characterised as an equitable mortgage at [74]).

[23] See 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, particularly at 171–9.

determining what bundle of rights a security interest is comprised of, and thus what it is that 'vests' in the grantor when the vesting provisions are enlivened.[24] Title also remains determinative of competitions between an owner whose interest is not caught by the Act, and a secured party whose security interest only attaches to a grantor's possessory rights.[25]

This is not to suggest that the provisions of the Act can simply be ignored where they are inconsistent with the common law. But the above analysis does demonstrate that there is an important distinction between the *significance* of the policy of promoting substance over form, and the *scope* of this policy. Recognising this, it cannot be that the scope of this policy entails doing away with all the consequences of form. Rather, it only requires the application of the rules of the PPSA to all security interests, irrespective of what their form would be at common law.[26]

Importantly, this conclusion is drawn as a question of construction of the Australian Act. Although it is beyond the scope of this thesis to determine whether it is also true of its overseas counterparts, there may be meaningful differences between them and the PPSA with respect to this. For example, the statutory remedies under the Canadian statutes are exhaustive, and thus do away with at least one sense in which the common law characterisation of a security interest remains meaningful in Australian law.[27]

Consistently with this, there is a noticeable difference in the jurisprudence of Australian and Canadian courts concerning the proper scope of the policy of promoting substance over form. For example, where the Supreme Court of Canada has approached the requirement that there be 'an interest in personal property' more loosely including due to this

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[24] PPSA s 267; *Corporations Act 2001* (Cth) s 588FL.

[25] Eg, *Gray v Royal Bank of Canada* (1997) 143 DLR (4th) 179 (British Columbia Supreme Court). See further Struan Scott, 'The PPSA: The Continued Relevance of Conventional Legal Principles in Determining the Existence of a Security Interest' (2009) 15(3) *New Zealand Business Law Quarterly* 205.

[26] Similarly, see Diccon Loxton, Sheelagh McCracken and Andrew Boxall, 'PPSA: A Minimalist Approach' (2018) 32(1) *Commercial Law Quarterly* 3, 4 [2.1](a).

[27] Compare PPSA s 110 to *Personal Property Security Act*, SS 1993, c P-6.2, Part V ('PPSA (Saskatchewan)'); *Personal Property Security Act*, RSO 1990, C P.10, Part V ('PPSA (Ontario)'). The position under the *Personal Property Securities Act 1999* (New Zealand) ('PPSA (NZ)') is more complicated: see Michael Gedye, Ronald CC Cuming and Roderick J Wood, *Personal Property Securities in New Zealand* (Thomson Brookers, 2002) 378–87 [105]–[106].

policy,[28] Australian courts have thus-far interpreted these words in s 12(1) more narrowly – ie, as requiring the existence of a recognised property interest at common law.[29] Similarly, at least some Canadian authority suggests that whether a party is a 'buyer', under their counterparts to the taking free rules of the PPSA, has a unique meaning due to the policy of substance over form.[30] By contrast, Australian courts have interpreted this word by reference to the sale of goods statutes.[31]

Such differences are also observable in how courts have responded to broad arguments by reference to the policy of substance over form in Australia as opposed to Canada. In Australia, such arguments have been treated with scepticism. For example, in determining that an agreement to use a statutory licence associated with a physical taxi licence plate was not a PPS lease because the licence was not 'goods' under the Act, the Supreme Court of New South Wales rejected an argument that it would 'prefer the form of the arrangement over its substance' to divorce the licence from the physical plate itself.[32] In Canada by contrast, courts have been more receptive to such arguments. For example, the Saskatchewan Court of Appeal has held that the phrase 'traceable personal property' within the definition of 'proceeds' extends beyond the requirements of tracing in equity, including because 'the connection which [the traditional equitable] approach establishes is essentially an arbitrary one, focusing upon the form rather than the substance of the relevant transactions';[33] and the Supreme Court of Canada has cited the substance over form approach as a reason in favour of characterising all security interests as legal interests, which affects

[28] *Caisse Populaire Desjardins de L'Est de Drummond v Canada* [2009] 2 SCR 94, particularly at [41]–[42] (citing the policy of substance over form in suggesting that an agreement for 'contractual set-off' might fall within the Alberta counterpart to the PPSA) (Supreme Court of Canada).

[29] See Section II(A) of Chapter Four.

[30] *Spittlehouse v Northshore Marine Inc* (1994) 18 OR (3rd) 60 (Ontario Court of Appeal). But see *Royal Bank of Canada v 216200 Alberta Ltd* [1987] 1 WWR 545 (Saskatchewan Court of Appeal) (applying sale of goods legislation); Ronald CC Cuming, Catherine Walsh and Roderick J Wood, *Personal Property Security Law* (Irwin Law, 3rd ed, 2022) 432–6. See also *Calidon Financial Services Inc – Calidon Equipment Leasing v Magnes* [2021] 11 WWR 507, particularly at [42]–[82] (Saskatchewan Court of Appeal) (suggesting that sale of goods legislation applied, but subsequently concluding that a purported 'buyer' took free of a security interest despite a clause in the contract of sale which prevented title from passing).

[31] As outlined in Section V(A) of Chapter Four.

[32] *Re Elite Sydney Pty Ltd* (2016) 320 FLR 227, 234–5 [31]–[32].

[33] *Pettyjohn* (n 1) [71].

competitions with interests outside the Act (‘non-PPS interests’) that are not determined by the statutory priority rules.[34]

This is not to suggest that the reasoning of Canadian courts with respect to the scope of this policy is defective, or even that such conclusions are undesirable in the Australian context.[35] However, it does reflect an appreciation by Australian courts that, under the Australian statute, the policy of promoting substance over form only entails recognising a range of property interests as security interests, and then applying the rules of the PPSA to all such security interests irrespective of their common law ‘form’.

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[34] *Bank of Montreal v Innovation Credit Union* [2010] 3 SCR 3, 25 [42] (Supreme Court of Canada) (‘*Innovation Credit*’).

[35] With respect to *Pettyjohn* (n 1), see further Chapter Seven. With respect to ibid, compare Adam Waldman, ‘Resolving Priority Competitions Between PPSA Security Interests and Non-PPS Interests’ (2021) 44(2) *University of New South Wales Law Journal* 811, particularly at 837–8 (‘Resolving Priority Competitions’) to Magda Raczynska, ‘Equity in Codified Secured Transactions Law’ in Ben McFarlane and Steven Elliot KC (eds), *Equity Today: 150 Years after the Judicature Reforms* (Hart Publishing, 2023) 279, 292–8.

II Publicity Function

The second essential policy underlying the PPSA is the encouragement of the publicisation of claims to hold security interests in personal property, including by making registrations on the Personal Property Securities Register ('PPSR').[36] This is known as the 'publicity function'. Similarly to the policy of promoting substance over form, the publicity function is commonly cited as the core objective of the PPSA.[37] As such, it is particularly important to determine exactly what it entails.

A *Basis of the Policy*

The publicity function is contained within the rules of the Act for perfecting security interests by possession and registration.[38] This is because each of these methods of perfection provide a form of notice that the registrant or possessor may hold a security interest in the collateral. This is furthered by the narrowed meaning of possession under the Act, which provides that a secured party cannot have possession of collateral that is in the actual or apparent possession of the grantor.[39] It is also furthered by the rules which seek to ensure that a registration is only effective to perfect a security interest if it is capable of being disclosed by a single search of the PPSR.[40]

The rules in the Act concerning the consequences of non-perfection further advance the publicity function by incentivising secured parties to perfect their security interests, and thus to publicise their claims to hold security interests. These consequences include the risk

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[36] See generally Whittaker Report (n 4) 39–41 [4.1.2]; Anthony Duggan, *Australian Personal Property Securities Law* (LexisNexis, 3rd ed, 2021) 141–2 [5.4]–[5.7]; *Knauf Plasterboard Pty Ltd v Plasterboard West Pty Ltd* (2017) 254 FCR 559, 598 [172], 599 [175] ('*Knauf*'); *Curo Capital Pty Ltd v Registrar of Personal Property Securities* [2020] FCA 1515, [26] ('*Curo Capital*').

[37] Eg, *Rubis v Garrett (No 2)* [2018] FCA 2011, [6]; *Allianz Australia Insurance Ltd v Probuild Constructions (Aust) Pty Ltd* [2023] NSWCA 56, [157]. See also Whittaker Report (n 4) 39 [4.1.2]; Australian Law Reform Commission, *Personal Property Securities* (Report No 64, 27 May 1993) 43 [5.2].

[38] Perfection is sometimes described as being aimed at achieving this function: *Knauf* (n 36) 598 [172]; Whittaker Report (n 4) 41 [4.1.2]; Duggan (n 36) 141–2 [5.4]–[5.7]; Nicholas Mirzai and Jason Harris, *The Annotated Personal Property Securities Act 2009* (Cth) (Wolters Kluwer, 4th ed, 2020) 291 [24.5.2].

[39] PPSA s 24(1).

[40] The content of such rules is prescribed in PPSA ss 148, 153. Defects can render registrations ineffective: ss 164–5; discussed in *Future Revelation Ltd v Medica Radiology & Nuclear Medicine Pty Ltd* (2013) 283 FLR 122, 123–4 [6].

of buyers or lessees taking free of an unperfected or temporarily perfected security interest,[41] the risk of losing priority to other secured parties,[42] and the risk of an unperfected security interest vesting in the grantor in insolvency.[43]

B *Scope of the Policy*

As with the policy of promoting substance over form, the scope of the publicity function is narrower than it may first appear. This can be seen by posing two questions: what is publicised, and who is it publicised for?

1 *What is Publicised?*

The publicity function aims to publicise *claims* to hold security interests rather than the existence of security interests. As to registration, the PPSR is a notice board of financing statements, rather than a register of security interests.[44] Registrations can be made prior to even entering into a security agreement,[45] and a single registration can perfect multiple security interests arising from multiple security agreements.[46] Unlike some of the registers which were replaced by the PPSR, registrations do not have to contain a copy of the security agreement,[47] and the Registrar does not verify the legitimacy of registrations.[48] There is also no requirement to actively discharge registrations where the relevant security interest no longer exists.[49] Consequently, a registration only indicates that a person claims to hold a security interest, for the purpose of putting the searcher on notice of the need to make further

[41] PPSA ss 43, 52. Note Duggan (n 36) 303 [10.5] (linking s 43 to the publicity function); Whittaker Report (n 4) 295 [6.6.11.1.1] (linking s 52 to the publicity function).

[42] PPSA s 55. Note Mirzai and Harris (n 38) 396 [55.5.3], 399–400 [55.5.4] (linking s 55 to the publicity function).

[43] PPSA s 267. Note Duggan (n 36) 446 [13.3] (linking s 267 to the publicity function). But see Adam Waldman, 'Unperfected PPSA Security Interests in Insolvency Part II: The Policy Objectives of the Vesting Provisions' (2024) 34(4) *Journal of Banking and Finance Law and Practice* (forthcoming) Part II(B)(2) ('Unperfected PPSA Security Interests II').

[44] See further Section III(C)(1) of Chapter Four.

[45] PPSA s 161.

[46] Ibid s 21(4).

[47] Cf *Corporations Act 2001* (Cth) s 263(1)(c) (repealed).

[48] Note PPSA s 150(3); *Curo Capital* (n 36) [29].

[49] Cf PPSA s 167 (which only applies to limited registrations over limited types of collateral); Australian Law Reform Commission (n 37) 139 [13.18], 173 (Appendix A: Draft Legislation, s 282(1)) (recommending that a secured party be obliged to discharge a registration within 14 days of a security interest being discharged).

inquiries.[50] As to possession, this method of perfection similarly only publicises that a security interest *might* exist rather than that it *does* exist, which in turn also necessitates further inquiries by an interested party.

The early case law concerning the PPSA did not reflect an appreciation of this, especially with respect to the operation of the PPSR as a notice board. For example, one case suggested that the removal of a PPSR registration was necessary for clear title in collateral to pass to a buyer.[51] Another case, in determining the availability of an injunction to prevent future PPSR registrations, drew an analogy to the Torrens Title land registration system, notwithstanding the vastly different legal consequences of registrations under that system by contrast to the PPSR.[52]

More recent cases, however, reflect a more nuanced understanding of the proper scope of PPSR registrations, and thus of the publicity function. They have described PPSR registrations as representing claims to hold security interests that require verification,[53] and have emphasised that registrations do not have the effect of 'creating' security interests.[54] This more developed understanding of the proper scope of the publicity function has also directly affected the outcomes of cases. For example, it has been held that:

- a PPSR registration did not affect a vendor's ability to pass good title to poker machine permits, and thus its existence did not constitute a breach of the contract which justified the purchaser refusing to complete the sale;[55]

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[50] Similarly, see Grant Gilmore, *Security Interests in Personal Property* (Little, Brown & Company, 1965) 470 § 15.2. Note also that although the Act contains provisions to facilitate such inquiries, they are only available to specified parties who already hold property interests in the collateral: PPSA Pt 8.4.

[51] *Macquarie Leasing Pty Ltd v DEQMO Pty Ltd* [2014] NSWSC 1466, [9] (taking this into account in determining that the matter was 'one of urgency' that merited being heard in the Duty List). Cf *Capital Finance Australia Ltd v Clough* [2015] NSWSC 1327, [8] (suggesting that a vehicle in the possession of an auctioneer could not '*practically* be sold' until the removal of the registration) (emphasis added).

[52] *Sandhurst Golf Estates Pty Ltd v Coppersmith Pty Ltd* (2014) 285 FLR 267, 283–5 [109]–[117].

[53] *Auburn Shopping Village Pty Ltd v Nelmeer Hoteliers Pty Ltd* (2017) 324 FLR 378, 392–3 [64]–[66] ('*Auburn Shopping*'); *Curo Capital* (n 36) [26]. Similarly, see *Tedesco v LVT Capital Pty Ltd as trustee for the LVT Capital Discretionary Trust* [2024] FCA 601, [44].

[54] *Auburn Shopping* (n 53) 393 [66]; *Diversa Pty Ltd v Taiping Trustees Ltd* (2022) 401 ALR 161, 193 [202] ('*Diversa*'); *Chelliah v NSW Police* [2018] NSWSC 557, [85] ('*Chelliah*').

[55] *Auburn Shopping* (n 53) 397–8 [82]–[87].

- a PPSR registration did not confer a purchaser of a stolen car with any greater rights than the possessory ones which he otherwise acquired from the fraudster, and was thus not an obstacle to the car being returned to its true owner;[56]
- a PPSR registration did not, in and of itself, evidence that the parties were bound by contractual terms containing a retention of title clause;[57]
- a PPSR registration did not, in and of itself, evidence the existence of a debt;[58] and
- a contractual provision allowing for a PPSR registration was not an acknowledgement of the existence of a security interest, but rather merely allowed the plaintiff to 'hedge its bets' in case such an interest did exist.[59]

This demonstrates some of the practical consequences that may flow from an understanding, or misunderstanding, of what it is that is publicised pursuant to the publicity function of the Act.

2 *Who is it Publicised For?*

The second question is whether the publicisation of claims to hold security interests aims to protect all parties who deal with grantors, including unsecured creditors and prospective unsecured creditors, or whether it only aims to protect parties who have or intend to acquire property interests in collateral.[60] Since the publicity function is embedded in the rules concerning perfection by way of possession and registration, whether this policy objective includes protecting unsecured creditors depends on the underlying purpose of perfection itself.

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[56] *Chelliah* (n 54) [83]–[86].

[57] *Samios Plumbing Pty Ltd v John R Keith (QLD) Pty Ltd* [2019] QDC 237, [46].

[58] *A40 Construction and Maintenance Group Pty Ltd v Smith* [2022] VSC 72, [28].

[59] *Reel Action Sports Fishing Pty Ltd v Marine Engineering Consultants Pty Ltd (in liq)* [2022] QSC 271, [86]–[87]. Cf *Ellingsen (Trustee of) v Hallmark Ford Sales Ltd* (2000) 190 DLR (4th) 47, [46] (McEachern CJBC, dissenting) (British Columbia Court of Appeal) ('*Ellingsen*') (suggesting that a PPSR registration evidenced the existence of a security interest).

[60] See *Innovation Credit Union v Bank of Montreal* (2009) 14 PPSAC (3d) 149, [31] (Saskatchewan Court of Appeal); quoted on appeal in *Innovation Credit* (n 34) [55].

As identified by McCracken, Stumbles and Tolhurst, perfection under the PPSA has at least three major functions:[61]

> • it determines (or is generally a critical factor in determining) priority between secured parties under PPSA Pt 2.6.
> • it protects a secured party from a buyer or lessee taking free of a security interest over particular collateral under PPSA s 43;
> • it protects a secured party from having its security interest vest in the grantor on insolvency under PPSA s 267.

The first two functions only affect parties who have competing property interests in the collateral. Thus, only the function of providing protection against the vesting provisions could justify the assertion that perfection, and thus that the publicity function, is aimed at protecting unsecured creditors in addition to parties who have or wish to acquire property interests. This in turn depends on whether the vesting provisions in s 267 of the PPSA and s 588FL of the *Corporations Act 2001* (Cth) are intended to protect unsecured creditors, or are only aimed at protecting parties who have or wish to acquire property interests in collateral.

As argued elsewhere, the vesting provisions are not aimed at protecting unsecured creditors.[62] It is true that their main historical predecessors, which were the provisions requiring the registration of company charges, were intended to protect such creditors.[63] But from the very outset, those provisions were an ineffective mechanism for protecting unsecured creditors.[64] This was because, even if an unsecured creditor advanced credit to a company on the basis of a search of the company charges register, that company was still free to subsequently encumber any and all of its personal property.[65] This is equally true under the PPSA.[66] Furthermore, any protection provided to unsecured creditors by the need to perfect a PPSA security interest is even further reduced due to the limits of what is actually publicised

[61] 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.

[62] Waldman, 'Unperfected PPSA Security Interests II' (n 43) Part II(B)(1).

[63] W J Gough, *Company Charges* (Butterworths, 2nd ed, 1996) 447–8.

[64] Note *Agnew v Commissioner of Inland Revenue* [2001] 2 AC 710, 718–19 [10]; *Smith (Administrator of Cosslett (Contractors) Ltd) v Bridgend County Borough Council* [2002] 1 AC 336, 348 [19].

[65] *Re Cardiff Workmen's Cottage Co Ltd* [1906] 2 Ch 627, 630.

[66] As noted in Whittaker Report (n 4) 405 [8.7.2.1]. Similarly, see Gedye, Cuming and Wood (n 27) 8; Michael Arthur, 'The Australian PPSA' [2010] *New Zealand Law Journal* 393, 394.

under its notice-based filing system, by contrast to the document-based filing system which existed for company charges.[67] Thus, as a question of statutory construction, the vesting provisions are not aimed at protecting unsecured creditors.[68] Rather, similarly to how their predecessors came to be viewed as fulfilling other policy objectives,[69] the best explanation for the vesting provisions is that they provide protection against the fraudulent assertion of security interests.[70] It follows that the purposes of perfection, and thus the purposes of the publicity function embedded within the rules for perfecting security interests, do not include protecting unsecured creditors. Thus, the publicity function is only aimed at protecting parties who have or wish to acquire property interests in collateral.

This could lead to the argument that this policy should not be termed the 'publicity function' at all, but rather something narrower which reflects its proper scope – such as the 'perfection function'. But, as put in the Final Report to the Statutory Review of the PPSA (the 'Whittaker Report'):[71]

> [T]he causal chain is the other way around – if a secured party wants its security interest to be able to prevail over competing interests in the collateral, then it must advertise the existence of its security interest by taking an appropriate perfecting step …

Consequently, although this thesis contends that the scope of this policy is only aimed at protecting parties who have or wish to acquire property interests in collateral, it will continue to refer to it as the publicity function of the Act.

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[67] See Section II(B)(1) above.

[68] Although these provisions may be beneficial to unsecured creditors, such benefits are better characterised as incidental benefits than as the results of a mechanism which is aimed at protecting them against undiscoverable security interests.

[69] Being (1) to protect other secured creditors: Gough (n 63) 447; and (2) to facilitate the assessment of creditworthiness of companies: Gough (n 63) 448–50; A L Diamond, *A Review of Security Interests in Property* (Her Majesty's Stationary Office, 1989) 98 [21.2].

[70] This objective is identified in Whittaker Report (n 4) 405 [8.7.1.1]; Mike Gedye, 'The New Zealand Perspective' in Louise Gullifer and Orkun Akseli (eds), *Secured Transactions Law Reform: Principles, Policies and Practice* (Hart Publishing, 2016) 115, 131; Gedye, Cuming and Wood (n 27) 9. See further Waldman, 'Unperfected PPSA Security Interests II' (n 43) Part III (arguing that this is the best explanation for the vesting provisions, albeit an insufficiently powerful one to justify retaining them).

[71] Whittaker Report (n 4) 41 [4.1.2].

C *Significance of the Policy*

Separately to the limitations concerning its scope, the very significance of the publicity function is also more limited than it may at first appear to be. One reason for this is the ability to perfect a security interest by way of control. This method of perfection is not necessarily intended to affect the publicity function, and is instead aimed at achieving an entirely different policy objective of the Act.[72] But in seeking to do so, it undermines the extent to which the PPSA can otherwise be said to be aimed at publicising all claims to hold security interests.[73] This is because, although its precise requirements depend on the nature of the collateral,[74] control generally requires that a secured party be able to transfer the collateral without the cooperation of the grantor.[75] Since there may be nothing which publicly indicates this, a secured party with control may enjoy the benefits of perfection without publicising its claim to hold a security interest.[76] This is to some extent mitigated by the fact that the PPSA only provides for control over limited types of collateral.[77] But that must also be weighed against the powerful consequences of control, which confer a security interest not only with perfection, but also with ultimate super-priority.[78] Furthermore, the scope of control under the Australian Act is wider than its overseas counterparts, which either do not provide for control at all (in New Zealand),[79] or do not provide for control over certain bank accounts (in Canada).[80]

For example, a bank that holds a security interest covering a depositor's account will have control over that account simply by virtue of its being the ADI (short for authorised deposit-taking institution).[81] This does not publicise its claim to hold a security interest in the

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[72] See Section IX below.

[73] Cf Australian Law Reform Commission (n 37) Chapter 6 (recommending that a security interest only be capable of perfection by registration or possession).

[74] PPSA ss 25–9.

[75] Duggan (n 36) 140 [5.2].

[76] See Whittaker Report (n 4) 129–30 [5.3.3]. Cf *Knauf* (n 36) 598 [172] (suggesting that every method of perfection is 'directed to the objective of a secured party giving public notice of its security interest').

[77] PPSA ss 21(1)(c), 25 (ADI accounts), 26 (intermediated securities), 27 (investment instruments), 28 (letters of credit), 29 (negotiable instruments).

[78] Ibid s 57.

[79] PPSA (NZ) (n 27).

[80] Compare PPSA s 25 to PPSA (Saskatchewan) (n 27); PPSA (Ontario) (n 27).

[81] PPSA ss 25, 10 ('ADI').

account. Nonetheless, it both perfects the bank's security interest, and confers it with ultimate super-priority.[82] Similarly, in some circumstances a secured party can obtain control over collateral that is characterised as an intermediated security, investment instrument or negotiable instrument by entering into certain agreements with the grantor.[83] These agreements will not ordinarily be publicly available, but will nonetheless confer the secured party's security interest with both perfection and ultimate super-priority.[84]

Interestingly, this tension between control and the publicity function is recognised in the Government response to the Whittaker Report.[85] However, it suggests that some of the proposed amendments will minimise this.[86] Respectfully, it is difficult to see how this is the case, since the proposed amended provisions still turn on facts which are not discernible to a third party via publicly available inquiries.[87] Rather, this method of perfection is inherently limiting of the publicity function, such that the only way to minimise this is to minimise the ability to obtain control at all.

The significance of the publicity function is also limited by the temporary perfection rules which confer potentially undiscoverable security interests with perfection for limited periods of time. This is inherent to the tension between the publicity function and the policy objective underlying those provisions.[88]

Such limitations emphasise the need to be cautious of overstating not only the scope, but also the significance, of the publicity function of the PPSA. Importantly, this policy does not entail creating a register which third parties can *exhaustively* rely upon to determine priority outcomes ahead of time.[89] Rather, the PPSR is merely a notice-filing register, within a publicity function that is only aimed at putting on notice parties who have or wish to

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[82] Ibid ss 21(1)(c) (perfection), 57, 75 (priority).

[83] Ibid ss 26(2), (3A) (intermediated securities), 27(4), (5)(b) (investment instruments), 29(1)(b) (negotiable instruments).

[84] Ibid ss 21(1)(c), 57, 75.

[85] Eg, Australian Government, 'Explanatory Memorandum (Sch 2 – Ch 5)' (n 21) 10–11 [93]–[94].

[86] Ibid 11 [96]–[97].

[87] Australian Government, 'Draft Compilation of the Personal Property Securities Act' (n 21) s 26.

[88] See Section IV below.

[89] Cf Linda Widdup, 'Registration Errors, Priority Rules and the Policy Behind the PPSA: In Pursuit of Certainty or Fairness?' (2017) 44 *Australian Business Law Review* 175 (emphasising the 'integrity' of the PPSR notwithstanding its limitations).

acquire property interests in collateral so that they can make further inquiries. It is also subject to various exceptions such that it cannot even be relied upon by such parties, for such purposes, with absolute certainty.

III PROMOTING CERTAINTY & SIMPLICITY?

The PPSA is aimed at making personal property securities law more certain and simpler. This objective is described in the Explanatory Memorandum.[90] Similarly, many of the Australian cases concerning the PPSA reference its objective of increasing certainty and simplicity.[91] But this disguises that such references might mean one of two quite different things.

On the one hand, the statutory regime of the PPSA might be intended to be certain and simple in and of itself. If this is correct, it would support interpreting the Act by reference to such notions, as well as incorporating them into questions concerning the application or development of the common law in its context. This is how Canadian courts have treated the promotion of certainty and simplicity in their statutes. For example, the purpose of 'simplify[ing] the law governing commercial transactions' has been drawn upon as a reason in favour of tracing under the Saskatchewan statute being wider than its equitable counterpart.[92] More generally, in determining whether there is room for equity in the context of their statutes, Canadian courts have tended to start with the proposition that their statutes are aimed at fostering certainty and simplicity, and have then considered whether equitable intervention would undermine this.[93] This reflects the view that certainty and simplicity are discrete objectives of their statutes, embedded within their design and separate to their other policy objectives. Consequently, this will be referred to as a discrete policy of promoting certainty and simplicity.

On the other hand, this statutory objective might have a narrower meaning, whereby the PPSA is intended to make personal property securities law more certain and simpler *by rationalising the law*. If so, the above references to certainty and simplicity should be viewed

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[90] Replacement Explanatory Memorandum (n 2) 11 (quoted in the body text below).

[91] Eg, *Power Rental Op Co Australia, LLC v Forge Group Power Pty Ltd (in liq) (recs & mgrs apptd)* (2017) 93 NSWLR 765, 784 [83] ('*Power Rental*'); *Auburn Shopping* (n 53) 392 [63]; *Samwise Holdings* (n 11) 511 [37]; *Re Holdco Pty Ltd (admins apptd) (No 2)* (2021) 381 ALR 418, 460 [126].

[92] *Pettyjohn* (n 1) [72].

[93] Eg, *Furmanek v Community Futures Development Corp of Howe Sound* (1998) 162 DLR (4th) 501, [18], [21] (British Columbia Court of Appeal); *Cox v Crystal Graphite Corp* [2006] 26 CBR (5th) 139, [33] (British Columbia Supreme Court) (both considering estoppel against commercial certainty and determining that it remained available); *Ellingsen* (n 59) (considering unjust enrichment against commercial certainty and determining that it was not available).

as an intended consequence of the wide coverage of the PPSA and its policy of promoting substance over form, rather than as a discrete policy in and of itself. On this view, the PPSA can be described as aiming to promote certainty and simplicity because it replaces a patchwork of 'complex and fragmented' rules contained within over 70 statutes across various Australian jurisdictions with a single statute.[94] Similarly, it can be described as aiming to promote certainty and simplicity because it adopts a functional approach to the regulation of transactions over personal property, which does away with the need for potentially complex disputes based upon common law form.[95] But unlike the broader view described above, this does not entail also claiming that *the PPSA itself* is intended to be certain and simple. It follows that, if this is correct, the Canadian approach of giving primacy to such notions when interpreting their statutes, or determining the application or development of the common law in their context, would be inappropriate under the Australian Act.

The various descriptions of the Australian Act as being aimed at promoting certainty and simplicity are consistent with both the broader and narrower views described above. For example, consider the way in which this objective is described in the Explanatory Memorandum in the course of providing an overview of the Act:[96]

> The Bill would establish a single national law governing security interests in personal property. This would result in more certain, consistent, simpler and cheaper arrangements for personal property securities for the benefit of all parties.

This could mean that the PPSA is intended to be certain and simple in and of itself. However, read together, these two sentences could also mean that it is the *establishment* of the Act which will create certainty and simplicity, as opposed to its *content being certain and simple*. Such a construction is supported by the following sentence, which emphasises that the Act would reduce the complexity of 'over 70 Commonwealth, State and Territory laws, common

[94] Whittaker Report (n 4) 10 [2.1.2].

[95] Cf, eg, *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)* (2000) 202 CLR 588 (distinguishing a trust from a charge for the purposes of determining whether statutory registration requirements for company charges applied).

[96] Replacement Explanatory Memorandum (n 2) 11.

law rules and rules of equity [currently] governing personal property securities'.[97] Thus, this passage sheds little light on whether the Act contains a discrete policy of promoting certainty and simplicity. The same can be said of the Australian judicial descriptions of the PPSA as being aimed at promoting certainty and simplicity. Closely examined, these too might be referring to a discrete policy of promoting certainty and simplicity, or alternatively as simply describing the intended effect of implementing a statute with wide coverage that rationalises the law of secured transactions over personal property.[98]

Which of these views is correct is ultimately a question of statutory construction of the Australian Act. Turning then to its text, at the risk of stating the obvious, the PPSA is not simple. Rather, it is a highly complex piece of legislation. It often draws technical distinctions between different types of collateral or security interests,[99] and then applies different rules based upon those distinctions.[100] For example, it provides that subsequently perfected security interests which are characterised as PMSIs may enjoy priority over earlier perfected security interests,[101] which can lead to disputes as to whether a security interest should be so characterised;[102] and then imposes further technical requirements for PMSIs to

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[97] Ibid. Similarly, see the statements concerning certainty in the Second Reading Speech which is quoted in Widdup (n 89) 175; and in Australian Law Reform Commission (n 37), particularly at 19–24 [2.31]–[2.41], 41 [4.6].

[98] See n 91 above.

[99] Eg, PPSA ss 10 ('goods', 'financial property', 'intangible property', 'investment instrument', 'negotiable instrument', 'account', 'ADI account'), 14 ('purchase money security interest'), 15 ('intermediated security').

[100] Eg, ibid ss 21(1)(c) (perfection by control), 25 (control of ADI account), 26 (control of intermediated securities), 27 (control of investment instruments), 29 (control of negotiable instruments that are not evidenced by a certificate), 49 (taking investment instrument or intermediated security free of security interest in the ordinary course of trading), 50 (taking investment instrument free of security interest), 51 (taking intermediated security free of security interest), 62–5 (competitions involving PMSIs), 70 (priority of person who acquires a negotiable instrument or an interest in a negotiable instrument), 75 (priority of security interests held by ADIs), 120–1 (enforcement of security interests in liquid assets), 238 (governing laws – goods), 239 (governing laws – intangible property), 240 (governing laws – financial property and rights evidenced by letters of credit).

[101] Ibid s 14.

[102] Eg, in the Canadian context, see *Pettyjohn* (n 1) (whether a security interest was a PMSI when funds to purchase the collateral were only advanced after the purchase was made); *Unisource Canada Inc v Laurentian Bank of Canada* (2000) 47 OR (3d) 616 (Ontario Court of Appeal) (whether a security interest was a PMSI when funds were advanced to refinance an existing PMSI).

obtain such super-priority,[103] which can lead to further disputes concerning whether these requirements have been satisfied.[104] Provisions such as these are aimed at achieving other policy objectives.[105] But in seeking to achieve them, they add complexity to the determination of priority outcomes under the Act, in a manner that seems contrary to a policy of creating a statutory regime that can be described as simple.

As to certainty, the main claim that the PPSA has a discrete policy objective of fostering certainty is rooted in its priority rules. These are ‘objective’ in the sense that they are drafted without reference to ‘notice’.[106] In theory, this should allow a secured party ‘to assess priorities with less cost and greater certainty’.[107] But other features of the priority regime of the PPSA, being the ability to obtain perfection by control and temporary perfection, undermine this because they impede a prospective secured creditor’s ability to predict a priority outcome ahead of time based on publicly available information.[108] Similarly to the provisions considered above, these are aimed at achieving other policy objectives.[109] But in doing so, they undermine the extent to which the Act can be described as containing a priority regime which is aimed at fostering certainty in and of itself. Additionally, by contrast to the priority rules, many of the taking free rules which govern competitions between secured parties and buyers or lessees turn on the knowledge of the buyer or lessee.[110] Consequently, the claim that it is easier to predict priority outcomes on this basis could only be true of those disputes which do not enliven these rules.

Furthermore, the mere fact that the PPSA seeks to minimise one source of uncertainty via its priority rules is insufficient to indicate a discrete policy of promoting certainty.

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[103] PPSA ss 62–3.

[104] See, eg, *Samwise Holdings* (n 11) (whether ‘possession’ under s 62 meant physical possession or possession in the grantor’s capacity as grantor); *StockCo Agricapital Pty Ltd v Dairy Livestock Services Pty Ltd* [2020] NSWSC 318 (whether the security interests of competing secured parties were PMSIs and, if so, whether those that were had super-priority). Further complexity is also caused by the ability to grant extensions of time in relation to such priority under PPSA s 293.

[105] Eg, with respect to PMSIs, see Section IX below.

[106] See further Section II(B) of Chapter Six (arguing that notice should not be read into the priority rules).

[107] See Cuming, Walsh and Wood (n 30) 470.

[108] See Section II(C) above. Cf *Saulnier* (n 3) 179 [19] (‘The PPSA … [is designed] to enable lenders to predict accurately the priority of their claims’).

[109] See Sections IV and IX below.

[110] PPSA ss 45(2)(d), (4)(d), 46(2)(b), 47(2)(b), 48, 50(2), 51(2), 52(2), 70(2)(b), 72(b).

Something more is required, as otherwise every statute which increased certainty in any way could be said to contain such a policy, notwithstanding that certainty is patently more important to some statutes than others. This is evident when the priority rules of the PPSA are compared to those governing priority between registered interests under the Torrens Title land registration system. Under that system, which is one of title by registration rather than one under which the register is a mere notice board, a party can rely on registration with much greater certainty because the doctrine of indefeasibility means that his title will only be impeached due to his own conduct,[111] subject only to specified exceptions.[112] This is only possible because the 'uniqueness, stability and value of real property make it feasible to utilise the superior title-based form of register for all interests in land'.[113] But the contrast between such a system and that of the PPSA nonetheless demonstrates why the latter cannot be said to contain a discrete policy of promoting certainty via its priority rules.[114]

The last factor that must be considered in determining what it means to say that the PPSA aims to promote certainty and simplicity is its length and prescriptiveness – which, unlike the above-described features, is unique to the Australian Act.[115] As summed up in the Whittaker Report:[116]

> [T]he architects of the Act may have tried too hard to be helpful. The Act is far longer than its Canadian and New Zealand counterparts, even allowing for the additional provisions that were included to accommodate constitutional and other machinery requirements. The developers of the Act appear to have endeavoured to produce a "best of breed" piece of personal property securities legislation, by picking out the best elements of the offshore models and then adding additional detail in an effort to explain more clearly exactly what is required. … [T]his had the effect of creating very specific and detailed operational requirements.

This adds complexity to the PPSA in two senses. First, some processes which are comparatively simpler in overseas jurisdictions are more complex under the Australian Act.

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[111] See *Frazer v Walker* [1967] 1 AC 569, 579–81, 585; *Breskvar v Wall* (1971) 126 CLR 376, 384–6 (Barwick CJ) (Owen J agreeing), 392 (McTiernan J), 396–7 (Menzies J).

[112] See *Real Property Act 1900* (NSW) s 42(1)(a1)–(d) (and its other Australian counterparts).

[113] Gedye (n 70) 129.

[114] A similar point is made in ibid 129–30.

[115] Complexity arising from prescriptiveness is not unique to the PPSA: see, eg, Australian Law Reform Commission, *Confronting Complexity: Reforming Corporations and Financial Services Legislation* (Report No 141, 30 November 2023).

[116] Whittaker Report (n 4) 31 [3.2.3].

For example, the amendment demand process for removing or amending PPSR registrations under the New Zealand and Canadian statutes simply requires the debtor to give a 'written demand' or 'written notice' to the secured party.[117] By contrast, the process under the Australian Act is highly prescriptive, and includes a requirement (at one stage) to use an approved form containing prescribed statements. A secured party must thus carefully review this, lest it be guilty of a criminal offence for making a false or misleading statement.[118] If such a demand is not complied with, the New Zealand and Canadian statutes provide for a single, judicial process where a dispute arises.[119] By contrast, the Australian Act provides for alternative pathways under which the party making the amendment demand can pursue either an administrative process via the Registrar, or a judicial process via the courts.[120] This may be desirable as a question of policy because it limits the workload of courts in relation to amendment demands. But it is also more complicated than its overseas counterparts.

Secondly, the length and prescriptiveness of the Australian Act increases the opportunity for disputes as to how particular words, phrases and/or whole provisions should be interpreted.[121] For example, the term 'fixtures' is not defined in the New Zealand statute but is under the Australian Act,[122] which in turn gave rise to a dispute concerning whether it bore its common law meaning in the Australian context.[123] Another example concerns s 73(1) of the Act, which confers priority upon certain non-PPS interests over PPSA security interests. The overseas counterparts to this provision simply use the word 'lien' to describe the relevant non-PPS interest, in accordance with their objectives of capturing possessory liens.[124] But the Australian provision was drafted in a manner that attempts to codify the

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[117] PPSA (Saskatchewan) (n 27) s 50 ('written demand'); PPSA (Ontario) (n 27) s 56 ('written notice'); PPSA (NZ) (n 27) ss 161–9 ('written demand').

[118] PPSA Pt 5.6; *Personal Property Securities Regulations 2010* (Cth) reg 5.9; *Criminal Code Act 1995* (Cth) Sch 1 Pt 7.4.

[119] PPSA (Saskatchewan) (n 27) s 50(7); PPSA (Ontario) (n 27) s 56(5); PPSA (NZ) (n 27) ss 165, 167.

[120] PPSA ss 179–82.

[121] See Anthony Duggan, 'The Trials and Tribulations of Personal Property Security Law Reform in Australia' (2015) 78 *Saskatchewan Law Review* 257, 260–1.

[122] Cf PPSA (NZ) (n 27) to PPSA s 10 ('fixtures'). Similarly, the Canadian statutes only define 'fixtures' so as to exclude 'building materials': see further Cuming, Walsh and Wood (n 30) 648–9.

[123] *Power Rental* (n 91).

[124] PPSA (Saskatchewan) (n 27) s 32; PPSA (Ontario) (n 27) s 31; PPSA (NZ) (n 27) s 93.

elements of a possessory lien, rather than just using that term itself.[125] One of these elements is that the non-PPS interest must arise 'by operation of the general law',[126] which has raised the question of whether this phrase may encompass contractual interests on the basis that they are given force by the common law.[127]

Further such examples abound, but the broader point is that the observably more prolix manner in which the PPSA has been drafted by contrast to its overseas counterparts cannot be separated from its substantive operation. If the intention was to create a statutory regime that is certain and simple in and of itself, the Act surely would have been drafted differently. This is reinforced when the PPSA is considered against the recent definition of statutory complexity by the Australian Law Reform Commission: 'legislative complexity should be characterised as the ease (or lack thereof) with which users can navigate and understand a legislative text'.[128] Alternatively, the above points could be viewed as showing that the Act has failed to implement a statutory regime that is certain and simple, as opposed to showing that it was never designed to implement such a regime in the first place. But even if this is the case, the principles of statutory construction require the 'intention' of the statute to be determined objectively and by reference to its text, rather than by reference to what its proponents may have subjectively intended.[129]

As such, it is difficult to overcome the view that, objectively construed, complexity is inherent to the design and operation of the Act. This is not necessarily undesirable in and of itself. As observed in the Whittaker Report, there is an inherent tension between certainty and simplicity on the one hand, and the complexity of commercial life on the other.[130] But it does

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[125] See Waldman, 'Resolving Priority Competitions' (n 35) 822 (identifying the issue), 832 (arguing that the provision should be amended).

[126] PPSA s 73(1)(a)(ii).

[127] Two decisions have suggested that this is the case: *Tasman Logistics Services Pty Ltd v Seaco Global Australia Pty Ltd* (2020) 60 VR 252, 273 [115]; *Diversa* (n 54) 200 [241]. Cf Waldman, 'Resolving Priority Competitions' (n 35) 819–21.

[128] Australian Law Reform Commission (n 115) 249 [10.48].

[129] See D Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th ed, 2019) 35–7 [2.3]–[2.4] (and citations therein).

[130] Whittaker Report (n 4) 479. Similarly, see Stephen Bottomley, 'The Complexity of Corporate Law' (2022) 44(3) *Sydney Law Review* 415, 419–20.

demonstrate that the PPSA largely opts for detail and nuance, and the pursuit of other policy objectives, at the expense of certainty and simplicity.

This is not to deny that the Act seeks to promote certainty and simplicity in the more general sense described above – ie, as a function of its wide coverage and rationalisation of the law of secured transactions over personal property. Furthermore, as put by the Supreme Court of British Columbia in the context of interpreting its counterpart to the PPSA: 'when interpreting commercial legislation of this nature and where it is consistent with the wording of the statute, courts should try to achieve the objectives of simplicity and certainty'.[131] However, certainty and simplicity should not be elevated to the same status as the other discrete policy objectives of the PPSA when it comes to resolving questions of interpretation, or the application or development of the common law in its context. Thus, the PPSA does not contain a discrete policy of promoting certainty and simplicity.

[131] *GE Capital Canada Acquisitions Inc v Dix Performance* [1995] 2 WWR 738, [14] (British Columbia Supreme Court); quoted in Duggan (n 36) 127 [4.34].

IV Minimising Detriment to Secured Parties

Having considered the three policies of the PPSA which are most commonly raised by courts and commentators, and concluded that the third is not in fact a discrete policy at all, it is now possible to turn to the other policies underlying the Act. This Section concerns the minimisation of detriment to secured parties. Although this has not been identified as a discrete policy by commentators, it merits discussion not just because of what it entails, but also because of how it relates to, and limits, the publicity function.

This policy is contained in the provisions which seek to minimise detriment to secured parties due to conduct beyond their control. This can be seen in the temporary perfection rules which provide secured parties with 'grace periods' when their security interests become unperfected due to the conduct of others.[132] For example, where collateral subject to a security interest is transferred to a third party who does not take free of the security interest, that security interest is conferred with a period of temporary perfection.[133] This policy can also be seen in the rules concerning proceeds when collateral is dealt with without a secured party's authorisation, which seek to further minimise exposure to dealings which may be beyond a secured party's control. These provide that a security interest automatically attaches to proceeds,[134] is perfected by the same registration covering the original collateral in certain circumstances,[135] and has its priority determined by the time of the registration covering the original collateral or the time at which the security interest in the original collateral was perfected.[136]

This policy is also contained in the provisions which seek to mitigate the harshness inherent to the strict operation of the PPSR. The Act confers some defective registrations with temporary effectiveness,[137] and provides that where an error is attributable to the Registrar the incorrectly removed registration or error or omission can be corrected by the

[132] Mirzai and Harris (n 38) 275 [21.5.2]; Duggan (n 36) 156–8 [5.38]–[5.40].

[133] PPSA s 34.

[134] Ibid s 32(1)(b).

[135] Ibid s 33(1).

[136] Ibid s 32(5).

[137] Ibid s 166.

Registrar.[138] It also provides that a secured party can seek an extension of time in relation to a PMSI if it fails to make a registration in time to enjoy super-priority,[139] and that it can seek an extension of time in relation to vesting under the *Corporations Act 2001* (Cth) if it fails to make a registration in time to avoid s 588FL.[140]

The significance of the policy of minimising detriment to secured parties largely pertains to how it limits the publicity function. The temporary perfection provisions minimise detriment to secured parties at the expense of the publicity function, because they allow a secured party with a potentially undiscoverable security interest to enjoy the benefits of perfection. This is mitigated by the limited time during which security interests are conferred with temporary perfection,[141] and also by the fact that such perfection does not undermine the protection conferred by the publicity function on buyers or lessees as they will ordinarily take free of temporarily perfected security interests.[142] But a degree of inconsistency with the publicity function is nonetheless inherent to the very nature of this method of minimising detriment to secured parties.[143] The same is true of the rules concerning proceeds, as their effect is that a prospective secured party, or a buyer or lessee, may lose out to a secured party whose security interest is perfected in proceeds by a registration against the original collateral and is thus not discoverable by a PPSR search against the proceeds themselves.[144]

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[138] Ibid ss 186, 188. With respect to s 186, see further *SFS Project Australia Pty Ltd v Registrar of Personal Property Securities* (2014) 226 FCR 188, 196–8 [67]–[75]. But note the proposed amendment which would effectively overturn this case: Australian Government, 'Explanatory Memorandum (Sch 5 – Ch 6)' (n 21) 29 [269]–[278], items 47–8.

[139] PPSA s 293(1)(b)–(c).

[140] *Corporations Act 2001* (Cth) s 588FM.

[141] Eg, PPSA ss 34(1)(a)–(c), 35(2), 36(2). But note the proposed amendments to extend the temporary perfection period from 5 to 10 business days: Australian Government, 'Explanatory Memorandum (Sch 2 – Ch 5)' (n 21) 12–13 [105]–[116], items 21–25; 13–14 [118]–[128], items 27–32.

[142] PPSA s 52.

[143] This is recognised in Duggan (n 36) 343 [10.71]; Whittaker Report (n 4) 149 [5.3.12.2.1].

[144] As noted in Duggan (n 36) 386 [11.39]. Although a search against the grantor would reveal such a registration, a registration which described collateral so narrowly that it did not include the proceeds would still be sufficient to perfect the security interest so long as it ticked the 'proceeds' box and described the proceeds as 'all present and after-acquired property': PPSA s 153 item 4; *Personal Property Securities Regulations 2010* (Cth) Sch 1 reg 2.4. It is likely that the vast majority of registrations do so, including because the registration process pre-populates these data fields as such (as noted in Whittaker Report (n 4) 273 [7.4.6.1.1]) and because

The same can be said of the rules which seek to mitigate the harshness inherent to the strict operation of the PPSR. Each of the above-described provisions which confer some defective registrations with temporary effectiveness, provide the Registrar with powers to amend ineffective registrations, and allow for secured parties to seek extensions of time, may mislead a searcher of the PPSR that relied on the results at the time of its search. Indeed, courts have explicitly confirmed that extensions of time concerning PMSIs can alter priority outcomes to the detriment of parties whose PPSR searches did not disclose a registration claiming PMSI status at the relevant time.[145] Such consequences, in seeking to minimise detriment to secured parties, are inherently limiting of the publicity function.

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there are no adverse consequences to describing the scope of the security interest overly widely in this sense (this not being a defect in registration under PPSA ss 164–5). Consequently, for a searcher to discern whether collateral is subject to a perfected security interest in proceeds, it would need to make inquiries of every single registration which ticked the proceeds box and described the proceeds as per the above. This will usually be sufficiently impractical that it undermines the benefit of such requirements, and thus of the publicity function in this sense. See further Whittaker Report (n 4) 273–5 [7.4.6] (Recommendation 180) (recommending for this reason that proceeds simply be automatically perfected if the security interest in the original collateral was perfected); Australian Government, 'Recommendations Index' (n 21) 26 (rejecting this recommendation).

145 *Re Accolade Wines Australia Ltd* [2016] NSWSC 1023, [27]–[29]; *BMW Australia Finance Limited v @Civic Park Medical Centre Pty Ltd* [2019] FCA 999, [10]. The same is not true for extensions of time under *Corporations Act 2001* (Cth) s 588FM, as it does not directly affect priority: as noted in *AWE Perth Pty Ltd v Clough Projects Australia Pty Ltd* [2023] WASC 203, [39].

V Minimising Detriment to Consumers

The PPSA contains a policy of minimising detriment to consumers.[146]

This can be seen in the provisions which avoid characterising consumers' property interests as deemed security interests, and thus seek to prevent consumers from having to take steps under the Act to protect the effectiveness of those interests. These include the requirement within the definition of a commercial consignment that both parties must deal in goods of that kind in the ordinary course of business,[147] which seeks to exclude consignments by consumers or to consumers;[148] and the requirement within the definition of a PPS lease that excludes leases or bailments where the lessor or bailor is not regularly engaged in the business of leasing or bailing goods,[149] which similarly seeks to exclude leases or bailments by consumers.[150] PPS leases also exclude certain leases of goods that are incidental to leases of land where the goods are used by individuals for non-business purposes,[151] which appears to be aimed at excluding leases of goods that are incidental to residential leases.[152]

This can also be seen in the taking free rule which applies to purchases or leases of collateral where the buyer or lessee intends to use the property predominately for personal, domestic or household purposes and it is purchased or leased for no more than $5,000.[153] This protects consumers by ensuring that they do not need to search the PPSR before making low-value purchases.[154]

Similarly, this policy is observable in the provisions which affect purchases or leases of serial numbered property. The Act requires PPSR registrations against certain types of collateral, including collateral that consumers might be expected to more regularly transact

[146] Note Australian Law Reform Commission (n 37) 142–8 (Chapter 14: Consumer Transactions and Privacy Considerations).

[147] PPSA s 10 ('commercial consignment', sub-s (c)).

[148] See *Re Arcabi Pty Ltd (recs & mgers apptd) (in liq); Ex parte Theobald & Herbert* (2014) 288 FLR 236, 248 [52].

[149] PPSA s 13(2)(a)–(b).

[150] See *Forge* (n 11) 111–12 [46]–[53].

[151] PPSA ss 13(2)(c), 10 ('consumer property').

[152] Cf leases of goods which are incidental to a commercial lease, which will not ordinarily fall within this exclusion because the goods will not be consumer property per PPSA s 10.

[153] PPSA s 47. See, eg, *Re Renovation Boys Pty Ltd* [2014] NSWSC 340, [25]–[28].

[154] Replacement Explanatory Memorandum (n 2) 34 [2.95].

with such as motor vehicles and watercraft, to contain a serial number where the relevant property is consumer property.[155] Failing to include that serial number will render the registration ineffective,[156] such that a buyer or lessee of the collateral will take free of the security interest pursuant to the taking free rule concerning unperfected security interests.[157] Furthermore, in circumstances where a registration omits a serial number but the security interest is nonetheless perfected by possession or control, a buyer or lessee may nonetheless take free of the security interest pursuant to the taking free rule concerning property that may be described by serial number.[158] These provisions protect consumers by ensuring that buyers or lessees of such property only need to search the PPSR against the serial number of the property.

This policy can also be seen in those provisions which seek to protect consumers whose property is subject to security interests. The Act prohibits a grantor from waiving verification statements in relation to registration events over consumer property,[159] which seeks to protect consumer-grantors from waiving this requirement to their detriment.[160] It also prohibits a secured party from requiring a grantor to pay for compliance with an amendment demand in relation to collateral that is used for personal, domestic or household purposes,[161] which seeks to protect consumers from the imposition of hidden loan fees in relation to amendment demands.[162] Several provisions within Chapter 4 of the Act, concerning the statutory remedies, also seek to protect consumer-grantors. The Act prohibits parties from contracting out of the statutory remedies where the collateral is used predominately for personal, domestic or household purposes.[163] This seeks to protect consumers by ensuring that the statutory notice provisions cannot be contracted out of.[164] The Act also explicitly

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155 PPSA ss 153 item 4, 10 ('consumer property'); *Personal Property Securities Regulations 2010* (Cth) reg 2.2(1)(a).

156 PPSA ss 164(1)(b), 165(a).

157 Ibid s 43.

158 Ibid s 44.

159 Ibid s 157(3).

160 Replacement Explanatory Memorandum (n 2) 85 [5.59].

161 PPSA s 178(3).

162 Replacement Explanatory Memorandum (n 2) 94 [5.111].

163 PPSA s 115(1).

164 Replacement Explanatory Memorandum (n 2) 61 [4.16].

provides that its statutory remedies operate concurrently with the National Credit Code.[165] This seeks to ensure that secured parties must comply with the requirements of both Chapter 4 of the PPSA, and the National Credit Code, when enforcing security interests in property used by consumers.[166]

Finally, this policy is also observable in the provisions which impose additional requirements concerning PPSR registrations against consumers. Where the collateral is consumer property, a registration covering serial numbered property must only contain the serial number,[167] which seeks to protect the privacy of consumers by preventing disclosure of their personal information on the PPSR.[168] The Act also imposes a shorter maximum length on registrations over consumer property,[169] and requires secured parties to actively discharge registrations covering collateral that is used for personal, domestic or household purposes where the relevant security interest has become unperfected.[170] Both these requirements seek to protect consumers from being subject to unnecessarily long registrations.[171]

The significance of the policy of minimising detriment to consumers also in large part relates to its interaction with the broader policies of the Act. This is because it reflects a legislative choice in favour of protecting vulnerable parties (consumers) at the expense of minimising costs and/or uncertainty for business (secured parties). As such, it both limits the policy of minimising detriment to secured parties which was identified above, and further suggests that there is no discrete policy of promoting certainty and simplicity within the Act.

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[165] PPSA s 119(1).

[166] Replacement Explanatory Memorandum (n 2) 62–6 [4.25]–[4.32] (including Table 9), particularly at 62 [4.25].

[167] PPSA ss 153 item 2, 10 ('consumer property').

[168] Replacement Explanatory Memorandum (n 2) 81 [5.37]; Whittaker Report (n 4) 160 [6.2.1.1.1].

[169] PPSA s 153 item 5.

[170] Ibid s 167. Failure to comply with this may result in liability for damages: s 271(1).

[171] With respect to ibid s 153 item 3, see Whittaker Report (n 4) 160–1 [6.2.1.1.1]. With respect to s 167, see Replacement Explanatory Memorandum (n 2) 88–9 [5.78].

VI Protecting Privacy

The PPSA contains a policy of protecting privacy.

This can be seen in the above-described provisions which limit the information contained in PPSR registrations against individuals in certain circumstances.[172] It can also be seen in the limitations imposed by the Act upon searches of the PPSR against grantors who are individuals. Such searches can only be made for specified purposes such as to disclose security interests, or to establish whether to provide credit or to invest with that individual or an associate.[173] Failure to comply with this requirement may give rise to liability for damages,[174] and may also result in civil penalty proceedings.[175] The Act further provides that parties will be in breach of the *Privacy Act 1988* (Cth) if they conduct unauthorised searches of the PPSR which provide personal information about an individual, or if they make unauthorised use of such information.[176] This can lead to complaint proceedings which may result in declarations requiring the payment of compensation, and in civil penalties in serious or repeated cases.[177] These too seek to protect the privacy of individuals, including from information brokers.[178]

This policy can also be seen in the provision which allows for the imposition of restrictions on the use of data obtained via PPSR searches.[179] This was inserted to prevent information agents from on-selling old search results to third parties.[180] Unlike the above-described provisions, which only affect registrations or searches against individuals, this provision may protect the privacy of all parties against whom registrations are made.[181]

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[172] PPSA s 153 items 2, 5; Replacement Explanatory Memorandum (n 2) 81 [5.37]. See further Section V above.

[173] PPSA s 172(1)–(2).

[174] Ibid s 271; and note also s 172(6).

[175] Ibid s 172(3).

[176] Ibid s 173.

[177] *Privacy Act 1988* (Cth) ss 13 (interferences with privacy), 13G (serious and repeated interferences with privacy), 36 (complaints), 52 (determination of the Commissioner).

[178] Replacement Explanatory Memorandum (n 2) 91–3 [5.92]–[5.99], particularly at 92 [5.93].

[179] PPSA s 176B.

[180] Explanatory Memorandum, Personal Property Securities (Corporations and Other Amendments) Bill 2010, 12 [60]–[62] ('Explanatory Memorandum (Corporations and Other Amendments)').

[181] The same might also be said of PPSA s 176C, which allows for the regulation of third party data providers: as noted in ibid 12 [65].

Finally, the policy of protecting privacy is also contained in the design of the PPSR as a notice-based filing system.[182] Such a system does not require a secured party to register a security agreement, and thus protects it from having to disclose any commercially sensitive provisions or information therein.[183] Furthermore, the Act limits who is entitled to make requests for further information following PPSR searches.[184] This protects privacy by preventing such requests being made for purposes other than determining whether to purchase, lease, or take security in the collateral.[185]

The importance of the policy of protecting privacy is, in part, that it is inherently limiting of the publicity function. This is because it limits the contents and searchability of the PPSR.[186] In this sense, the publicity function under the Australian Act may be more limited than its North American counterparts, which contain less expansive privacy protection provisions than the Australian Act.[187]

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[182] See Section II(B)(1) above.

[183] Cf *Corporations Act 2001* (Cth) s 263(1)(c) (repealed). Note also PPSA ss 275(6) (allowing the parties to enter into confidentiality agreements to prevent disclosure of information following requests under the Act), 278(2) (allowing a party to approach the court for an exemption to respond to a request, which could conceivably include because of privacy concerns).

[184] PPSA s 275(9).

[185] Duggan (n 36) 169–70 [5.62]

[186] Note ibid 179 [6.16]. Cf United Nations Commission on International Trade Law, *UNCITRAL Legislative Guide on Secured Transactions* (14 December 2007) 155 [27]–[28] (recommending that such registers 'be fully public') ('UNCITRAL Legislative Guide').

[187] As identified in Duggan (n 36), comparing PPSA and PPSA (NZ) (n 27) to the Canadians statutes and *Uniform Commercial Code 2012*, Art 9.

VII PREVENTING FRAUD

The PPSA contains a policy of preventing fraud.

This is observable in s 20 of the Act, which governs when a security interest is enforceable against third parties. For a security interest to be so enforceable, this provision requires either that there be a sufficient written description of the collateral that is signed or otherwise accepted by the grantor, or that the secured party have possession or control of the collateral. This seeks to ensure that a secured party can only enforce its security interest against third parties if it is able to corroborate the genuineness of that interest, and thus seeks to prevent the fraudulent assertion of non-existent security interests.[188] Such a purpose explains why the writing requirements to satisfy this provision are drawn so broadly.[189] For example, these requirements have been satisfied by a reply containing an email signature to an earlier emailed order,[190] the sending of a cheque in response to an emailed settlement offer that included retention of title terms,[191] and the acceptance of possession of goods following the prior receipt of an invoice containing terms and conditions including a retention of title clause.[192] This also explains why possession of collateral also suffices, despite this not providing anything more than notice of the possible existence of a security interest.[193]

This policy is also contained within the vesting provisions.[194] This is because they require a secured party to perfect its security interest, and thus to take steps which verify its legitimacy, within certain time periods in relation to the event of insolvency of the grantor.[195]

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[188] Whittaker Report (n 4) 124 [5.2.2.1]; Duggan (n 36) 120–2 [4.26]–[4.27]. The United States counterpart to this provision was intended to have the same purpose: see Gilmore (n 50) 345–6 § 11.4.

[189] Compare PPSA s 20(2)(a) to PPSA (Saskatchewan) (n 27) s 10(1)(d); PPSA (Ontario) (n 27) s 11(2)(a); PPSA (NZ) (n 27) s 36(1)(b).

[190] *Relux Commercial Pty Ltd (in liq) v Doka Formwork Pty Ltd* (2014) 104 ACSR 163, 172 [47].

[191] *Citadel Financial Corporation Pty Ltd v Elite Highrise Services Pty Ltd (No 3)* [2014] NSWSC 1926, [22]–[23].

[192] *Central Cleaning Supplies (Australia) Pty Ltd v Elkerton* (2015) 321 ALR 181. Although this case concerned transitional security interests, its reasoning is applicable to the writing requirements in PPSA s 20.

[193] PPSA s 20(1)(b)(i). It is difficult to explain, however, why control is sufficient: see Duggan (n 36) 121 [4.26].

[194] PPSA s 267; *Corporations Act 2001* (Cth) s 588FL.

[195] Whittaker Report (n 4) 405 [8.7.1.1]; Gedye (n 70) 131; Gedye, Cuming and Wood (n 27) 9.

Indeed, this was the reason provided in the Government response to the Whittaker Report for rejecting the recommendation to delete s 588FL of the *Corporations Act 2001* (Cth).[196]

Finally, this policy is observable in the provisions which allow PPSR registrations other than in respect of security interests. Such registrations can be made over impounded motor vehicles which were used in the commission of crimes, personal property which has been seized pursuant to proceeds of crime legislation, and personal property which is subject to an order of a court or tribunal (including orders restricting dealings with it and orders to sell it).[197] Although such registrations cannot prevent fraudulent transactions with such property by actually interfering with the passage of title,[198] they may provide notice to prospective purchasers who search the PPSR as part of their due diligence. As such, they further suggest the existence of an independent policy of preventing fraud.

Unlike the narrower policies contained in the Act which have been identified thus-far, this policy is not inherently limiting of the broader policies most commonly associated with the Act. Rather, its significance at a higher level of abstraction is that it further demonstrates the diverse array of policy objectives which the PPSA seeks to achieve, not all of which are squarely aimed at facilitating secured finance.

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[196] Australian Government, ‘Recommendations Index’ (n 21) 48. Note also Explanatory Memorandum (Corporations and Other Amendments) (n 180) 13 [6.2]. But see Waldman, ‘Unperfected PPSA Security Interests II’ (n 43) Part III (arguing that although this is the best explanation for the vesting provisions, it is insufficient to justify retaining them).

[197] PPSA s 148(c); *Personal Property Securities Regulations 2010* (Cth) reg 5.3(1)(a)–(c).

[198] Similarly, see *Chelliah* (n 54) [74]–[86].

VIII Improving the Rules that Regulate Debts which are Characterised as Accounts

The PPSA characterises the interest of a transferee of an account as a deemed security interest.[199] Some of the reasons for doing so are directly related to secured transactions law, including that transfers of accounts often form part of broader transactions which functionally use personal property as security and thus should be regulated by the Act.[200] But the Act also contains several further provisions which are more generally concerned with improving the rules that apply to accounts, and which extend beyond matters specific to secured transactions law. This suggests that the Act contains an additional policy of improving the rules that regulate debts which are characterised as accounts.

The first provision which suggests the existence of such a policy is that which governs when an account debtor must make payments to the transferee of her account, rather than to the original creditor.[201] This is already provided for by statutory provisions outside of the Act which govern the legal assignment of choses in action.[202] But s 80(7) of the PPSA imposes the further requirement that the notice to the debtor must explicitly state that future payments must be made to the transferee, and also allows the debtor to require proof where a party other than the transferor of the account provides such notice.[203] This provides further protection to the account debtor against the risk of making double payments,[204] and is thus a more general reform aimed at protecting debtors rather than one directly pertaining to secured transactions law. Put another way, this provision is concerned with the contractual rights between the parties rather than the treatment of the debt as collateral.

The second provision suggesting the existence of such a policy is that which allows for the enforceability of contractual modifications to the terms of an account against the

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[199] PPSA ss 12(3)(a), 10 (‘account’).

[200] Whittaker Report (n 4) 56 [4.3.1.2], 58–9 [4.3.2.1.1].

[201] PPSA s 80(7). Note the proposed amendments which re-locate and modify this sub-section to a new s 81B, particularly sub-ss (3)–(6): Australian Government, ‘Explanatory Memorandum (Sch 3 – Ch 7)’ (n 21) 32 [322]–[324], item 75.

[202] *Conveyancing Act 1919* (NSW) s 12 (and its other Australian counterparts), which derives from *Judicature Act 1873* (UK) s 25(6).

[203] As noted in John G H Stumbles, ‘The Impact of the *Personal Property Securities Act* on Assignments of Accounts’ (2013) 37(2) *Melbourne University Law Review* 415, 432–4 (‘Assignments of Accounts’).

[204] Duggan (n 36) 439–40 [12.84]. Similarly, see Gilmore (n 50) 393 § 12.8.

transferee of that account, even though those modifications were agreed to only by the debtor and the transferor.[205] This alters the position at common law whereby an assignor and debtor cannot modify the contract concerning a debt following its assignment.[206] Although the purpose of this provision has not been clearly expressed,[207] it also appears to be aimed at protecting account debtors since they are the only parties who might benefit from such contractual amendments being made enforceable against the transferee.[208] This is also more generally concerned with protecting debtors than with the treatment of accounts as collateral. Indeed, as put by the Whittaker Report, this 'might be thought to stray beyond the Act's primary objective [pertaining to secured transactions], in that the Act could achieve that objective perfectly well without including the section (as it deals with a related but distinct topic).'[209]

The third provision suggesting the existence of such a policy is that which renders certain contractual prohibitions on assignments ineffective at preventing an account from being transferred.[210] This changes the position at common law, under which a contractual prohibition on assignment prevents a chose in action from being assigned.[211] This might be explained as being directly concerned with secured transactions law because it removes the need for a financier to review the relevant contract to determine whether a debt is assignable, which may in turn reduce the costs of taking security over that debt.[212] However, it can also be explained as part of an international trend of altering the law to allow for the assignment

[205] PPSA s 80(3). Note the proposed amendments which re-locate this to a new s 81A(3), and slightly modify its operation: see Australian Government, 'Explanatory Memorandum (Sch 3 – Ch 7)' (n 21) 31 [320], item 75.
[206] Stumbles, 'Assignments of Accounts' (n 203) 435; citing *Brice v Bannister* (1878) 3 QBD 569, 581.
[207] Replacement Explanatory Memorandum (n 2) 50–1 [2.178]–[2.180]. See further Whittaker Report (n 4) 355 [7.11.2.1].
[208] The provision does not benefit the account transferor, who no longer has an interest in the account; or the account transferee, which could agree to amendments with the debtor itself.
[209] Whittaker Report (n 4) 355 [7.11.2.1].
[210] PPSA s 81. Note the proposed amendment which re-phrases this provision but retains a similar meaning: Australian Government, 'Explanatory Memorandum (Sch 3 – Ch 7)' (n 21) 31 [313]–[319], item 75. Note also the proposed amendments to expand the scope of this provision: Australian Government, 'Explanatory Memorandum (Sch 3 – Ch 7)' (n 21) 31 [315], [318], item 75.
[211] *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, 108 (Lord Browne-Wilkinson).
[212] See Replacement Explanatory Memorandum (n 2) 52 [2.184]; UNCITRAL Legislative Guide (n 186) 92–3 [106]–[110].

of debts irrespective of contractual prohibitions on doing so.[213] As put by the Whittaker Report, it could 'be asked whether this is an appropriate provision to include in a secured transactions law, as it deals with matters of general contracts law, not just security.'[214]

The final indication of this policy is broader than those mentioned above, because it arises from one of the rationales which has been cited as a reason for characterising transfers of accounts as deemed security interests in the first place. This rationale is that doing so causes competitions over accounts which have been successively transferred to be governed by the priority rules of the PPSA, rather than by the much-maligned rule in *Dearle v Hall*.[215] If this is in fact a rationale for characterising such interests as security interests,[216] it further suggests the existence of a policy of improving the rules that regulate debts which are characterised as accounts.

As with the policy of preventing fraud, the existence of this policy is interesting because it appears to be a discrete objective of the Act which is not necessarily part of its broader focus on secured finance. From the perspective of identifying areas in need of law reform, the existence of this policy also raises the further question of why these rules apply only to debts which are characterised as accounts. If a reason for this cannot be clearly articulated, this suggests that the rules should either be amended to apply to all debts (if they are viewed as desirable), or deleted from the PPSA altogether (if they are not).[217]

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[213] See Whittaker Report (n 4) 356 [7.11.3.1].

[214] Ibid 356 [7.11.3.1].

[215] (1828) 3 Russ 1; 38 ER 475. See ibid 56 [4.3.1.2], 59 [4.3.2.1.1]; Stumbles, 'Assignments of Accounts' (n 203) 444, 461; Bridge et al (n 9) 580–7.

[216] Cf Replacement Explanatory Memorandum (n 2) 18–19 [2.8] (which largely recites the effect of s 12(3)(a) without explaining its rationale).

[217] See Whittaker Report (n 4) 356 [7.11.3.1]. Similarly, see Gilmore (n 50) 392 § 12.8 (observing that there is no clear reason why the US counterpart to PPSA s 81 should not apply to all debts).

IX ENCOURAGING CERTAIN TYPES OF FINANCE

The PPSA contains a discrete policy of encouraging three particular types of finance.[218]

The first type of finance which this policy seeks to encourage is that which is used to facilitate the purchase of fresh collateral by a grantor. This is contained within the provisions which characterise some security interests as PMSIs, and confer super-priority upon them in certain circumstances.[219] In theory, this leaves prior secured parties no worse off, as PMSIs increase the pool of assets owned by the grantor and are limited in their PMSI-status to those assets.[220] Consistently with this, certain PMSIs are conferred with priority over others where they are more directly linked to acquiring fresh collateral.[221]

The second type of finance is that relating to agriculture, being in particular finance to produce crops or to feed and develop livestock. This is contained within the provisions which extend and/or clarify the reach of security interests covering crops and livestock,[222] and also those which confer some such security interests with super-priority.[223] These provisions appear to be aimed at facilitating such finance.

The third type of finance is that provided by banks to their depositors. This is contained within the provision which provides that a secured party who is an ADI has control over an ADI account held with it,[224] the effect of which is to confer that secured party with ultimate super-priority.[225] This has been explained on the basis that it encourages banks to

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[218] This is separate to what might be described as the broader objective of the PPSA of encouraging all secured finance. For the reasons discussed in the Introduction above, this broader objective should not be viewed as a discrete policy.

[219] PPSA ss 14, 62–3.

[220] See Australian Law Reform Commission (n 37) 74–7 [7.2]–[7.6]; Duggan (n 36) 252–4 [8.4]–[8.7]; Mirzai and Harris (n 38) 226–7 [14.5.1]; *Samwise Holdings* (n 11) 518–20 [76]–[77]. This also explains why a security interest which is obtained in refinancing an existing PMSI can itself be characterised as a PMSI – ie, because it facilitates the grantor's ongoing access to finance which was, originally, used to acquire fresh collateral.

[221] PPSA s 63.

[222] Ibid ss 84–84A.

[223] Ibid ss 85–6.

[224] Ibid s 25.

[225] Ibid ss 57, 75.

extend credit to their depositors.[226] Another possible explanation might be that such priority seeks to provide additional protection to banks due to their particular importance to the stability of the Australian financial system as a whole.

This policy is significant for two reasons. First, it explains why the priority rules of the Act are more complicated than they could otherwise be. Thus, it provides one reason why the PPSA has been designed in such a way that it cannot be said to contain a discrete policy of promoting certainty and simplicity. Secondly, it explains one circumstance where perfection via control is available under the Act. As such, it provides one reason why the PPSA allows for perfection by way of control in the first place, notwithstanding that this is inherently limiting of the publicity function.

[226] Duggan (n 36) 237 [7.21].

Conclusion

This Chapter identified the underlying policies of the PPSA, and critically examined their proper scope and significance, in accordance with the first step of the framework for understanding interactions between statute and the common law. In doing so, it treated the PPSA just like any other statute, in accordance with the conclusion from the previous Chapter that it is not a 'code'. The following Chapter uses these policies to determine whether equity can continue to operate in the context of the PPSA, and whether it is ever appropriate to interpret the PPSA by reference to equity, in accordance with the second step of the framework. Before doing so, however, it is useful to highlight three takeaways from the analysis thus-far.

First, the most commonly cited policies of the PPSA are more limited in both scope and significance than they may at first appear to be. As to the policy of promoting substance over form, this policy only requires recognising a range of property interests as security interests, and then applying the rules of the PPSA to all such security interests irrespective of how they would be characterised at common law. Consequently, it does not require doing away with *all* the consequences of 'form' whatsoever. Thus, we should treat broad assertions by reference to this policy with caution due to the risk that they overstate what it actually entails.[227] As to the publicity function, this only requires the publicisation of *claims* to hold security interests in collateral, for the benefit of parties who have or wish to acquire property interests in that collateral. This policy is less significant than it may at first appear to be, because in some circumstances secured parties can avoid publicising their claims to hold security interests while still enjoying the benefits of perfection. As such, we should be very cautious of drawing parallels between the PPSA and the Torrens Title statutes, and at times even between the PPSA and Ch 2K of the *Corporations Act 2001* (Cth). As to the promotion of certainty and simplicity, this is not a discrete policy of the PPSA at all. This is partly due to inherent design features of the PPSA, and also partly due to differences between the drafting of the Australian Act and its overseas counterparts. Thus, while the Act is intended to promote certainty and simplicity in the more general sense that it replaces a multitude of previous laws with a single new law that rationalises the law of secured transactions over

[227] Cf statements suggesting the need to 'put aside old learning': eg, *Waller v New Zealand Bloodstock Ltd* [2006] 3 NZLR 629, 634 [18]. But also note, within the following paragraph at 634 [19]: 'The starting point … [is] that "[t]he meaning of [the] enactment must be ascertained from its text and in light of its purpose"'.

personal property, it does not contain a discrete policy which merits elevating such notions to the same level as its other, actual policy objectives.

Secondly, the PPSA contains several policies which are less commonly discussed than the promotion of substance over form, the publicity function, and the promotion of certainty and simplicity. This is important because these policies help to explain the restricted significance of the broader policies of the Act. For example, the policies of minimising detriment to secured parties and of protecting privacy help explain the inherent limitations of the publicity function. Similarly, the very existence of so many additional policies within the Act further complicates its operation, and thus reinforces the conclusion that it does not contain a discrete policy of promoting certainty and simplicity.

Thirdly, and perhaps most importantly, this Chapter has shown that the PPSA does not create an entirely coherent and self-contained system the slightest interference with which may upset its intended operation. Rather, it contains what might be described as a 'mishmash' of policies, many of which are inherently limiting of each other. Consistently with the analysis in the previous Chapter, which showed that the PPSA is not a 'code', this suggests that there is no need for the degree of reverence which is sometimes attributed to it. Although it is undoubtedly an important statute which brought about significant change to the law by reconceptualising the treatment of personal property securities, it is, at the end of the day, just another statute which should be treated like any other when it comes to determining its operation.

CHAPTER SIX: EQUITY & THE PPSA

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INTRODUCTION

The previous Chapter identified and critically examined the underlying policies of the *Personal Property Securities Act 2009* (Cth) ('PPSA' or 'Act'), in accordance with the first step of the framework for understanding interactions between statute and the common law. This Chapter applies those policies to address several broad questions concerning the relationship between equity and the PPSA, in accordance with the second step of the framework. Section I considers the operation of equity in the context of the PPSA, which is an example of the common law applying or developing by reference to statute. Section II then considers the interpretation of the PPSA by reference to equity, which is an example of the interpretation of statute by reference to the common law. Following such analysis, this Part of the thesis will have demonstrated the usefulness of the framework to understanding interactions between a given statute and a broad component of the common law, and will have improved our understanding of the PPSA by examining its relationship with equity.

Before proceeding further, it is useful to reiterate two points from earlier Chapters. First, s 254 of the PPSA is only directly concerned with the application or development of the common law in the context of the Act.[1] It follows that, save to the extent that this provision reinforces that the PPSA is not a 'code', there is no need to consider it when addressing the converse process of interpreting the Act by reference to the common law. Secondly, it is not possible to delineate clearly between *applying* or *developing* the common law by reference to statute.[2] Consequently, these processes are considered together in the analysis that follows, which seeks to show that the framework can help us to better understand the composite process of *applying or developing* the common law by reference to statute.

[1] See Section III of Chapter Two (concerning such provisions generally), and the Introduction to Chapter Four (concerning PPSA s 254).

[2] See Section IV(B) of Chapter Two.

I Operation of Equity in the Context of the PPSA

It has thus-far been assumed that there is at least some room for equity to operate in the context of the PPSA.[3] In Australia, without addressing this broader question, courts have considered claims in the context of the Act in relation to injunctions,[4] breaches of fiduciary duty and constructive trusts,[5] clogs on the equity of redemption,[6] and the remedy of foreclosure under an equitable mortgage.[7] Similarly, New Zealand courts have considered claims in the context of its statute on the basis of mistaken payment,[8] the improper appointment of receivers,[9] and equitable liens;[10] and Canadian courts have considered claims

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[3] Cf the Canadian context: Roderick J Wood, 'Supplementing PPSA Priorities: The Use and Abuse of Common Law and Equitable Principles' (2014) 56(1) *Canadian Business Law Journal* 31; Ronald CC Cuming, 'Equity and the PPSA: Strange Bedfellows?' (2014) 55(2) *Canadian Business Law Journal* 179.

[4] *Sandhurst Golf Estates Pty Ltd v Coppersmith Pty Ltd* (2014) 285 FLR 267; *Macquarie Leasing Pty Ltd v DEQMO Pty Ltd* [2014] NSWSC 1466; *Capital Finance Australia Ltd v Clough* [2015] NSWSC 1327; *National Australia Bank Ltd v Garrett* (2016) 340 ALR 532; *Treasury Wine Estates Vintners Ltd v Garrett* (2016) 340 ALR 259; *Rubis v Garrett (No 2)* [2018] FCA 2011; *Wickham Hill Investment Pty Ltd v Ding* [2019] NSWSC 631. But these cases might alternatively be understood as using the language of injunctions in the course of making statutory orders under PPSA s 182(4).

[5] *Re O'Keeffe Heneghan Pty Ltd* [2018] NSWSC 1958 ('*Re O'Keeffe*').

[6] *Re Matcove Pty Ltd* [2020] NSWSC 625, [75]–[82] ('*Re Matcove*').

[7] *Sutherland v Compton Lot Ten Pty Ltd* [2023] NSWSC 1472, [73]–[86] ('*Sutherland*').

[8] *Stiassny v Commissioner of Inland Revenue* [2013] 1 NZLR 453, 480–3 [61]–[69].

[9] *Fatupaito v Harris* [2019] NZAR 192 ('*Fatupaito*').

[10] *Maginness v Tiny Town Projects Ltd (in liq)* [2023] NZHC 494 ('*Maginness*'); *Francis (as liquidators of Podular Housing Systems Ltd (in liq)) v Gross* [2023] 2 NZLR 762 ('*Podular Housing*').

in the context of their statutes on the basis of equitable estoppel,[11] unjust enrichment,[12] breach of fiduciary duty,[13] knowing assistance,[14] and subrogation.[15]

There is, of course, nothing wrong with the notion that equitable doctrines and remedies might be available in the context of the PPSA.[16] But this raises three broader questions. First, can equity continue to operate in the context of the PPSA at all? Secondly, if so, can it continue to operate in the particular context of the priority regime of the PPSA? Thirdly, if so, can we identify any limitations concerning how equity should operate in the context of the Act? This Section addresses each of these questions in turn.

The starting point for whether equity is excluded or limited in the context of the PPSA is s 254. This provides that equity must be 'capable of operating concurrently' with the Act to avoid its curtailment.[17] Such wording sets a higher threshold for the ousting of equity than

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[11] *Furmanek v Community Futures Development Corp of Howe Sound* (1998) 162 DLR (4th) 501 (British Columbia Court of Appeal) ('*Furmanek*'); *Cox v Crystal Graphite Corp* [2006] 26 CBR (5th) 139, [30]–[36] (British Columbia Supreme Court ('*Cox*'); *Robie Financial Inc v PricewaterhouseCoopers Inc (Trustee of)* [2009] 285 NSR (2d) 329, [40]–[45] (Nova Scotia Supreme Court).

[12] *Kimwoo Enterprises Ltd v Roynat Inc* (1985) 15 DLR (4th) 751 (Manitoba Court of Appeal); *Frankel v Canadian Imperial Bank of Commerce* (1997) 47 CBR (3d) 244 (Ontario Court of Justice); *Ellingsen (Trustee of) v Hallmark Ford Sales Ltd* (2000) 190 DLR (4th) 47 (British Columbia Court of Appeal); *J R Investments Ltd v Moncton Flying Club Estate* [2011] 188 PPSAC (3d) 223, [30]–[32] (New Brunswick Court of Queen's Bench) ('*J R Investments*'); *KBA Canada Inc v Supreme Graphics Ltd* [2014] BCJ No 544, [40]–[42] (British Columbia Court of Appeal) ('*KBA Canada*'). See further Wood (n 3) 53–5; Ronald CC Cuming, Catherine Walsh and Roderick J Wood, *Personal Property Security Law* (Irwin Law, 3rd ed, 2022) 544.

[13] *J R Investments* (n 12) [24]–[28].

[14] *Canadian Imperial Bank of Commerce v Valley Credit Union Ltd* (1989) 63 DLR (4th) 632 (Manitoba Court of Appeal) ('*Valley Credit*').

[15] *Re N'Amerix Logistix Inc* (2001) 57 OR (3d) 248 (Ontario Superior Court of Justice). See further Chapter Nine.

[16] Cf *Registrar of Personal Property Securities v Brookfield* [2024] FCA 29, [48] ('There is no doubt that remedial constructive trusts or remedial equitable charges that may be imposed by a court of equity are not within the regime created by the PPSA'). But this was referring to such equitable interests not being security interests themselves, as opposed to their more general availability in the context of the Act.

[17] PPSA s 254(1). Note also sub-s (3): 'To avoid doubt, this section does not apply to … the general law, to the extent that there is a direct inconsistency between this Act and that law'.

both the common law,[18] and its overseas counterparts.[19] Importantly however, while it frames the *question* of whether equity is capable of concurrent operation in the context of the PPSA, it does not *answer* that question in and of itself.[20] This is where the framework for understanding interactions between statute and the common law comes into play. It provides guidance on how to answer this question, in a manner that reflects how courts ordinarily determine interactions between statute and the common law.

Before turning to the three questions outlined above, it should be noted that in some instances it will be clear from the text of the Act that equity cannot continue to operate. In such instances, the issue can simply be resolved as a question of statutory interpretation. For example, where a party has priority under the priority or taking free rules of the PPSA, this plainly cannot be overridden by the mere fact that the common law priority rules would lead to a different outcome.[21] Similarly, where the Act expressly provides for the attachment of a security interest under s 19(2) inconsistently with the 'floating' aspect of a floating charge, this plainly cannot be overridden by equitable rules for determining priority competitions involving such interests.[22] But most questions concerning interactions between equity and the PPSA will concern *indirect* inconsistencies, where it is not immediately clear whether the equitable doctrine or remedy remains capable of concurrent operation.[23] It is these more difficult interactions which necessitate the analysis undertaken below.

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[18] Cf *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, 284–5 [36]–[37] (McHugh J); *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 328–9 [19] (Gleeson CJ), 357–8 [118] (McHugh J). See further Perry Herzfeld and Thomas Prince, *Interpretation* (Thomson Reuters, 2nd ed, 2020) 209 [9.160].

[19] Cf *Personal Property Security Act*, SS 1993, c P-6.2 s 65(2); *Personal Property Security Act*, RSO 1990, C P.10 s 72; *Personal Property Securities Act 1999* (New Zealand) ('PPSA (NZ)') (the latter of which contains no such counterpart at all). This point has been made previously in Adam Waldman, 'Resolving Priority Competitions Between PPSA Security Interests and Non-PPS Interests' (2021) 44(2) *University of New South Wales Law Journal* 811, 833–4.

[20] Similarly, see Cuming (n 3) 180.

[21] Note *KBA Canada* (n 12) [23]–[32].

[22] Note particularly Sheelagh McCracken, 'The Floating Charge under the PPSA: The Current State of Play' (2019) 47(6) *Australian Business Law Review* 418, 429–33.

[23] Such indirect inconsistencies are questions of the application or development of equity by reference to statute, rather than the interpretation of statute by reference to equity, because they turn upon the equitable doctrine or remedy itself: see Section II(B) of Chapter Two.

A *Can Equity Operate in the Context of the PPSA At All?*

The first question is whether equity is capable of concurrent operation with the PPSA at all. To clarify, 'equity' in this sense refers to the whole range of doctrines and remedies which might in any way apply in a manner that interacts with the Act. These include those which may affect a security agreement, such as misrepresentation, unconscionable conduct, undue influence, and the law in relation to penalties; and those which may supplement the PPSA in more unique ways, such as injunctions. They also include those equitable doctrines and remedies which may affect priority or taking free competitions, although these also raise further issues which are addressed in more detail below.[24]

There are several indications in the text of the Act indicating that, at least to some extent, equity remains capable of operating concurrently with the PPSA. One is that the Act relies on common law principles to determine the validity of security agreements,[25] including the various equitable doctrines and remedies which allow contracts to be set aside or rectified.[26] Similarly, the Act relies on the continued existence of common law property interests, including those which are equitable in nature, to determine whether there is a 'property interest' which can constitute an in-substance security interest.[27] Another indication is that the Act preserves the rights and remedies that parties have under security agreements,[28] some of which may be equitable in nature.[29] A further indication is contained within the non-exhaustive priority rules of the PPSA for competitions with interests outside the scope of the Act ('non-PPS interests').[30] It is uncontroversial that the legislative intention

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[24] See Section I(B) below.

[25] PPSA s 18(1).

[26] Similarly, see *Capital Securities XV Pty Ltd (in liq) v Calleja* [2020] NSWSC 301 (security agreement set aside on the basis of unconscionable conduct and misleading or deceptive conduct under the *Australian Securities and Investments Commission Act 2001* (Cth)).

[27] PPSA s 12(1). See further Section II(A) of Chapter Four.

[28] Ibid s 110.

[29] See, eg, *Sutherland* (n 7) [73]–[86] (secured party attempted to exercise the remedy of foreclosure under an equitable mortgage which was a security interest); *Fatupaito* (n 9) (secured party's power to appoint receivers under a security agreement was not exercised in good faith as required both by equity, and the PPSA (NZ) (n 19)).

[30] PPSA ss 73–4.

is for the common law priority rules, many of which are equitable, to fill the gap which arises when those statutory priority rules do not apply.[31]

The question then becomes whether this conclusion is so contrary to any of the policies of the PPSA that it must be incorrect. Arguments to this effect could be made on the basis of the three most commonly raised policies with respect to the Act, being the promotion of substance over form, the publicity function, and the promotion of certainty and simplicity.

As to the policy of promoting substance over form, perhaps the most obvious argument concerns the general 'vibe' associated with that policy. This argument is that equitable intervention would risk undermining substance over form because equitable doctrines and remedies require the application of formalistic and thus 'arbitrary' rules.[32] But such an argument fails to appreciate that the policy of promoting substance over form is just like any other policy underlying any other statute, in that its scope has discernible limitations. When it is appreciated that this policy does not require doing away with all the consequences of common law 'form' whatsoever,[33] it is difficult to see how it can sustain such a broad argument.

A more specific argument could be that, because some equitable doctrines and remedies turn on the common law form of security interests, the continued operation of equity could undermine the policy of promoting substance over form by requiring us to delineate between such interests based on their form. For example, in one Australian case it was argued that a grantor was entitled to redeem collateral pursuant to his equity of redemption under a mortgage, which was characterised as a security interest under the PPSA.[34] In another, it was argued that a secured party was entitled to exercise the remedy of foreclosure under an equitable mortgage, which was also characterised as a security interest.[35]

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[31] Explanatory Memorandum, Personal Property Securities (Consequential Amendments) Bill 2009, 33 [8.73]. See further Waldman (n 19) 832–48.

[32] See, eg, *Agricultural Credit Corporation of Saskatchewan v Pettyjohn* [1991] 79 DLR (4th) 22, [71] (Saskatchewan Court of Appeal) (albeit that this concerned a question of interpretation rather than of the operation of equity in the context of statute). See further Chapter Seven.

[33] See Section I(B) of Chapter Five.

[34] *Re Matcove* (n 6) [75]–[82].

[35] *Sutherland* (n 7) [73]–[86]. Note particularly [74] (characterising the security interest as an equitable mortgage) and [87] (suggesting that 'there is no reason to think that it [the PPSA] would have affected the result').

Although both such arguments were rejected on the facts, their very consideration seems to implicitly accept a continuing distinction between security interests based upon their common law characterisation.

But to suggest that this is inconsistent with the policy of promoting substance over form is again to overstate its proper scope. This is because the continued availability of equitable doctrines such as those associated with clogs on the equity of redemption, or with equitable mortgages more generally, do not prevent the uniform application of the rules *of the PPSA* to all security interests.[36] Furthermore, even if further consideration of these particular doctrines and remedies led to the conclusion that they should no longer be available in the context of the Act, many other equitable doctrines and remedies are available irrespective of the form of the property interest in question. For example, the availability of equitable estoppel does not turn on whether the claimant holds one form of property interest as opposed to another, and indeed is sometimes available even where the representation does not concern a property interest at all. As such, the policy of promoting substance over form does not make equity incapable of operating concurrently with the PPSA.

With respect to both the publicity function and the notions of certainty and simplicity, most of the arguments which could be raised to this effect pertain to the priority regime of the Act, and are thus examined below.[37] However, two more general points should be addressed. The first is that equity may cause a party to obtain equitable proprietary rights, which thus operate to the detriment of unsecured creditors. This could in turn be inconsistent with the publicity function, since such rights would not constitute security interests and would thus not need to be publicised such as via a PPSR registration.[38] But this is unconvincing because it overstates the proper scope of the publicity function, which is only aimed at protecting parties who have or wish to acquire property interests in collateral.[39] The second point is that allowing some room for equity, even outside the context of the priority regime of the Act, could be said to undermine the extent to which its operation is certain and simple. But since the Australian Act does not contain a discrete policy of promoting certainty and simplicity,[40]

[36] See Section I(B) of Chapter Five.

[37] See Section I(B) below.

[38] For an argument to this effect concerning marshalling, see Cuming (n 3) 206–7.

[39] See Section II(B)(2) of Chapter Five.

[40] See Section III of Chapter Five.

this is no more convincing than it is in other contexts where it has been broadly asserted that equity would somehow be fatal to commercial certainty.[41]

The final objection which must be addressed is that the PPSA establishes a sufficiently comprehensive statutory regime such that any disruption to it by equity may risk undermining its policy objectives. But this fails to appreciate that the PPSA contains a ‘mishmash of policies’, many of which are inherently limiting of each other.[42] It also erroneously hints at the notion that the PPSA should be viewed as a ‘code’.[43]

As such, equity remains capable of operating concurrently with the PPSA as a whole. Of course, it will be necessary for courts to be cognisant of the risk that the application of an equitable doctrine or remedy may undermine a specified policy objective of the Act in any given case. But the same is true of any other interaction between equity and statute.

B *Can Equity Operate in the Context of the PPSA Priority Regime?*

The statutory priority regime for competitions between a security interest and another property interest is almost comprehensive,[44] and has been described as a ‘code’ for resolving competitions between multiple security interests.[45] Furthermore, as put by Wood in the Canadian context:[46]

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[41] As to which, see, eg, Geoffrey A Kennedy, ‘Equity in a Commercial Context’ in P D Finn (ed), *Equity and Commercial Relationships* (The Law Book Company, 1987) 1, 5–8; Peter J Millett, ‘Equity’s Place in the Law of Commerce’ (1998) 114 *Law Quarterly Review* 214, 216–7; Mark Leeming, ‘The Role of Equity in 21st Century Commercial Disputes: Meeting the Needs of Any Sophisticated Legal System’ (2019) 47(2) *Australian Bar Review* 137, particularly at 154–5.

[42] See the Conclusion of Chapter Five.

[43] See Chapter Four.

[44] See, eg, *NCO Finance Australia Pty Ltd v Australian Pacific Airports (Melbourne) Pty Ltd* [2013] FCCA 2274, [11]; *BMP & Daughters Investment Corp v 941242 Ontario Ltd* (1992) 11 OR (3d) 81, [9] (Ontario Court (General Division)) (‘*BMP*’); *KBA Canada* (n 12) [22], [42]. Similarly, see Grant Gilmore, *Security Interests in Personal Property* (Little, Brown & Company, 1965) 893 § 34.1.

[45] *Forge Group Power Pty Ltd (in liq) v General Electric International Inc* (2016) 305 FLR 101, 102–3 [5], quoted in *Re Welldog Pty Ltd; Bredenkamp* [2017] FCA 1065, [10].

[46] Wood (n 3) 33. But note that under pre-PPSA law many competitions were not exclusively governed by the common law: see, eg, *Corporations Act 2001* (Cth) Ch 2K.

> The Act's approach to priorities represents a significant departure from the common law approach, and it is therefore an area where the continuing relevance of the common law and equity is more hotly contested.

Thus, it is necessary to address whether the above conclusion that equity is capable of operating concurrently with the Act extends to disputes which would otherwise be determined by its statutory priority regime.

Before doing so, two points of clarification are necessary. First, the 'priority regime' of the Act will be used, in a more general sense than it is used in the Act, to describe any competition between a secured party and/or other secured parties and buyers or lessees.[47] Secondly, 'equity' in this context only pertains to those doctrines and remedies which may affect outcomes which would otherwise be determined by the priority regime of the Act.[48] This does not include those doctrines and remedies which are likely only to affect disputes between secured parties and grantors. For example, relevant equitable doctrines and remedies which may affect the interests of third parties include equitable estoppel,[49] breach of fiduciary

[47] Cf PPSA Pts 2.5–2.6 (distinguishing 'taking free' rules from 'priority' rules). Note this also includes disputes which are resolved on the basis that a security interest is unenforceable or has vested in the grantor: see PPSA ss 20, 267; *Corporations Act 2001* (Cth) s 588FL. Such disputes are not technically priority competitions, but in competitions with other property interests these provisions have a similar effect and should thus be considered alongside the priority and taking free rules themselves when determining whether there is room for equity. Competitions with non-PPS interests are not considered in this analysis because they are already regulated by the common law if the priority rules in ss 73–4 do not apply: see Waldman (n 19). As such, it should be less controversial that there is room for equity to operate in such competitions.

[48] Unlike in Section I(A) above, where 'equity' referred to any equitable doctrine or remedy which might interact with the PPSA in any way.

[49] Eg, can a secured party who does not have priority *or* a buyer who does not take free of a security interest claim that another secured party is estopped from enforcing its security interest? See, eg, *Furmanek* (n 11); *Cox* (n 11).

duty,[50] knowing assistance,[51] constructive trusts,[52] marshalling,[53] equitable claims to traceable substitutes,[54] and subrogation.[55]

Turning to the substantive issue, the first argument that equity is incapable of operating concurrently with the priority regime of the PPSA is that equitable doctrines and remedies may undermine the 'high level of predictability of outcome' embedded in the priority regime of the Act.[56] The case that is most commonly raised in support of this is *KBA Canada Inc v Supreme Graphics Ltd* ('*KBA Canada*'), where the British Columbia Court of Appeal rejected a claim in unjust enrichment which would have altered a priority outcome generated by that jurisdiction's personal property securities statute.[57] In doing so, Groberman JA (Low and Neilson JJA agreeing) drew upon the 'statutory purpose of replacing those complex and convoluted principles [of equity and common law] with simple rules that

[50] Eg, where two secured parties owe each other fiduciary duties, can one claim that the other is in breach of those duties by asserting priority under the Act? See, eg, *J R Investments* (n 12) [24]–[28] (although the claim failed in that case as the parties did not owe each other fiduciary duties).

[51] Eg, where one secured party holds a security interest arising under a trust and another party knowingly assists in the breach of that trust by purchasing the collateral, can the secured party claim against the buyer for knowing assistance? See, eg, *Valley Credit* (n 14) (albeit that the claim failed due to failure to sufficiently establish knowledge).

[52] Eg, where two secured parties undertake a joint endeavour which fails without attributable blame, can one claim that it is unconscionable for the other to retain the benefits of property per *Muschinski v Dodds* (1985) 160 CLR 583, 620 (Deane J) ('*Muschinski*') by asserting priority under the Act?

[53] Eg, where a higher-ranking secured party with a security interest over multiple items of collateral enforces its security interest in a way that is detrimental to a lower-ranking secured party with a security interest in only one of those items of collateral, can the lower-ranking secured party make use of marshalling to enforce its security interest against one of the other items of collateral? Compare Cuming (n 3) 203–13 to Wood (n 3) 66–70.

[54] Eg, can a secured party claim against a traceable substitute in equity (separately to its claim against 'proceeds' under the Act) that is subject to another property interest? See further Chapter Eight

[55] Eg, can a claimant subrogate to a security interest, and thus enjoy the priority benefits of that security interest as against other parties? See further Chapter Nine.

[56] See Cuming (n 3) 206.

[57] *KBA Canada* (n 12). This has been discussed in the Australian context with respect to the operation of equity in Nicholas Mirzai and Jason Harris, *The Annotated Personal Property Securities Act 2009* (Cth) (Wolters Kluwer, 4th ed, 2020) 763–4 [254.5]; Craig Wappett, *Essential Personal Property Securities Law in Australia* (LexisNexis, 4th ed, 2019) 342 [PPSA.254.A].

provide certainty and predictability', and the 'overriding statutory goals of certainty and predictability in personal property financing'.[58]

Such statements could suggest that there is no room for equity in the context of the statutory priority regime of the PPSA at all. However, it is necessary to bear in mind that the above-quoted passages were made in the course of overturning a judgment in which the statutory priority rules were simply overridden, on the basis of a purported equitable jurisdiction which was said to be incorporated into the priority rules via the counterpart to s 254.[59] Recognising that there is no legal basis for this is, of course, entirely different to suggesting that there is no room for equity at all. Furthermore, although *KBA Canada* may at its highest suggest that there is no room for Canadian equitable jurisprudence relating to unjust enrichment in the context of its counterparts to the PPSA,[60] this is of limited relevance in the Australian context anyway given the unavailability of a constructive trust solely on the basis of unjust enrichment in Australian law.[61] Finally, the judgment also explicitly recognised the possibility of equitable estoppel in the context of the relevant counterpart to the PPSA.[62] This shows that Groberman JA did not mean to suggest that there was no room whatsoever for equity in that context. Thus, considered against the Australian Act which, unlike its Canadian counterparts, does not contain a discrete policy of promoting certainty and simplicity,[63] neither *KBA Canada* nor the more general arguments which can be made by reference to it support the conclusion that there is no room for equity in the context of the priority regime of the PPSA.

Another argument in a similar vein is that equity should not be capable of operating concurrently with the priority regime of the PPSA because of the possibility that erroneous equitable jurisprudence will undermine the certainty embedded in the statutory priority rules. For example, before it was overturned on appeal, the primary judgment in *KBA Canada*

[58] *KBA Canada* (n 12) [24], [32].

[59] Note ibid [1].

[60] Ibid [40]–[42].

[61] *Muschinski* (n 52) 617 (Deane J); *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 156 [150]–[151].

[62] *KBA Canada* (n 12) [43].

[63] See Section III of Chapter Five.

created significant uncertainty.[64] More recently, two New Zealand judgments which recognised equitable liens in favour of buyers of collateral with priority over existing security interests, notwithstanding that the buyers could not prevail under the statute itself because they did not fall within the taking free rules, have created uncertainty in that jurisdiction.[65] These judgments have been criticised on the basis of the interaction between such equitable liens and the priority regime of the New Zealand statute.[66] But they could also be criticised for their lack of analysis concerning the controversial issue of whether an equitable purchaser's lien remains available over goods notwithstanding the sale of goods statutes,[67] and for failing to explain why, even if such a lien is available, it should have priority over an existing property interest contrary to the ordinary application of the common law priority rules.[68]

However, the argument that equity should not be available in the context of the priority regime of the Act due to the possibility of such uncertainty is unconvincing. This is because the priority rules of the PPSA are insufficient, in and of themselves, to indicate a policy whereby parties can predict the outcome of a priority dispute ahead of time with a very high degree of certainty. Thus, there is no reason why the risk of erroneous equitable jurisprudence should be of greater concern in the context of the Act than in any other context.

The other main argument that equity is incapable of concurrent operation with the priority regime of the Act is rooted in the publicity function. This argument is that equity's

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[64] See Roderick J Wood, 'Equity, Unjust Enrichment and PPSA Priorities: *KBA Canada v 3s Printers Inc*' (2012) 53(3) *Canadian Business Law Journal* 452.

[65] *Maginness* (n 10); *Podular Housing* (n 10).

[66] See Steve Flynn, 'Equitable Liens and Priority' (2023) 33(4) *Journal of Banking and Finance Law and Practice* 219 (only focusing on the priority of such liens rather than their existence: at 220).

[67] Compare *Re Wait* [1927] 1 Ch 606, 635–6 to 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) 750–1; I J Hardingham, 'Equitable Liens for the Recovery of Purchase Money' (1985) 15(1) *Melbourne University Law Review* 65, 73–8.

[68] Where the other property interest is equitable, see: *Heid v Reliance Finance Corporation Pty Ltd* (1983) 154 CLR 326, 333–5 (Gibbs CJ), 339, 341 (Mason and Deane JJ); *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265, 276 ('*Latec Investments*'). Where the other property interest is legal, see J D Heydon, M J Leeming and P G Turner, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (LexisNexis Butterworths, 5th ed, 2015) 350–1 [8-220]. As to whether a PPSA security interest must necessarily be a legal interest, see Waldman (n 19) 832–48.

ability to grant proprietary remedies could detrimentally affect third parties who have or wish to acquire security interests, but are unable to discover the existence of competing equitable interests in the relevant collateral due to the absence of any PPSR registration.[69] However, such an argument cannot be accepted because the ability to discover competing property interests in collateral via the publicity function is already limited to accommodate other policy objectives of the Act.[70] For example, a third party may already be unable to identify a competing security interest in collateral because it is perfected by control, or because it is temporarily perfected. Similarly, a third party may be unable to identify a competing claim to collateral because it constitutes a non-PPS interest. Viewed as such, it is difficult to see why the imposition of an equitable proprietary remedy, in circumstances where one would otherwise be available on orthodox principles, would so undermine the publicity function such that equity should be incapable of operating concurrently with the Act for this reason.

This conclusion is reinforced by the fact that a third party who already has a security interest, or who subsequently acquires a security interest, may have priority over any competing equitable property interest anyway under the common law priority rules.[71] Additionally, the risk of unfair detriment to third parties who are not protected from such interests by the publicity function is further ameliorated by the fact that equitable remedies are discretionary. Thus, a court can refuse to grant a proprietary remedy if doing so would be detrimental to an innocent third party,[72] or can alter the terms of such a remedy so that the property interest only arises from a particular date for the purpose of minimising detriment to

[69] The equitable interest will not be ‘provided for by a transaction’, and will thus not be a security interest under PPSA s 12(1). Examples of such interests include institutional constructive trusts, remedial constructive trusts which are imposed as a remedy to doctrines such as estoppel, breach of fiduciary duty or knowing assistance, and the property rights arising from the equitable claim to traceable substitutes.

[70] See Section II(C) of Chapter Five.

[71] If the third party is a buyer or lessee, it is likely to prevail over an equitable interest-holder under the bona fide purchaser for value rule without notice rule. If it is another secured party, the relevant rule will depend on whether the security interest is a legal interest, as to which see Waldman (n 19) 832–48.

[72] Eg, *Sidhu v Van Dyke* (2014) 251 CLR 505, particularly at 519 [40] (dismissing an appeal where the lower court declined a proprietary remedy for equitable estoppel against a husband, because this would have been detrimental to his wife who co-owned the property); *Giumelli v Giumelli* (1999) 196 CLR 101, particularly at 125 [49]–[51] (refusing a proprietary remedy for equitable estoppel against the claimant’s parents, because this might have caused injustice to the claimant’s brother who had moved onto the property and made improvements to it, and was not party to the proceedings).

third parties who acquired competing property interests prior to judgment.[73] Consequently, while this argument highlights the need for courts to remain cognisant of the risks of imposing equitable proprietary relief to the detriment of third parties in the context of the PPSA, it does not show that the publicity function is inconsistent with the application of equitable proprietary remedies to such an extent that they are entirely incapable of operating concurrently with the priority regime of the Act.

Another possible argument against equity being capable of operating concurrently with the PPSA is that a claim in equity by a secured party whose security interest is unenforceable against third parties, or whose security interest has vested in the grantor, could undermine the policy of preventing fraud.[74] This is because it could effectively allow a secured party to circumnavigate the statutory provisions aimed at preventing the fraudulent assertion of non-existent security interests, by simply claiming in equity where the requirements of those provisions are not satisfied. However, this obscures that in such circumstances the secured party's rights will be enforceable by virtue of equity rather than the PPSA, and that in the vast majority of circumstances such a secured party will only be entitled to a personal remedy. Furthermore, even in the rare cases where the secured party is entitled to a proprietary remedy, which could in turn detrimentally affect third parties or unsecured creditors who would otherwise have been protected by the Act from the fraudulent assertion of property rights, the need to first establish an entitlement to such a remedy to the satisfaction of a court makes the likelihood that the whole claim is fraudulent low. As such, this policy is not sufficient to conclude that equity is incapable of concurrent operation with the priority regime of the Act.

Moving away from the broader policy objectives of the Act, a more specific objection to equity intervening in disputes governed by the priority regime of the PPSA is that this

[73] Eg, *Muschinski* (n 52) 623 (Deane J). Note that although this case and those cited in n 72 both concerned interests in land, the discretion may also affect proprietary relief over personal property: see, eg, *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 564 (outlining several discretionary reasons which may have merited the trial judge denying proprietary relief over the shares of a company which represented the profits of a breach of fiduciary duty); *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296, 438–42 [662]–[682] (denying proprietary relief in cheques on the basis of a claim in knowing receipt, because doing so would have allowed the beneficiary under the putative constructive trust to trace into mining tenements and assert proprietary claims in them contrary to discretionary considerations).

[74] See Section VII of Chapter Five.

could increase the risk of circular priority. For example, a circular priority problem could arise where there are three secured parties with competing security interests in collateral, and the third-ranking secured party is able to establish a claim in equity entitling it to proprietary relief against the first-ranking secured party. But this is not a sufficient objection to the availability of equity in this context, because there is already a risk that the rules of the PPSA themselves will create circular priority problems.[75] Indeed, the Act contains a provision to resolve such problems,[76] although the Government has accepted a recommendation to repeal it on the basis that it is ineffective at doing so.[77] Further to this, the inherent flexibility of equitable remedies may allow equity to simply avoid this issue on the basis that the risk of circular priority under the Act is a sufficient reason to only impose personal remedies, or indeed to deny relief altogether if necessary. As such, this risk is insufficient to show that equity cannot operate concurrently with the priority regime of the Act, albeit that it highlights another consideration which courts should bear in mind when determining whether to grant equitable relief in its context.

Finally, it is necessary to address a more general objection to the operation of equity in the context of the priority regime of the PPSA. This objection is that it would be inappropriate to grant equitable relief to a secured party who failed to take steps to protect its security interest under the Act.[78] Respectfully however, this objection obscures the real issue, which is *why* the Act requires a secured party to take such steps in the first place. For the reasons outlined above, the mere fact that equity may lead to a different outcome than that otherwise generated by the priority regime of the PPSA does not demonstrate that it is actually contrary to any of the underlying policy objectives which that priority regime seeks to achieve.

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[75] See Bruce Whittaker, *Review of the Personal Property Securities Act 2009: Final Report* (Final Report, February 2015) 314 [7.7.6.1] (‘Whittaker Report’); Anthony Duggan, *Australian Personal Property Securities Law* (LexisNexis, 3rd ed, 2021) 242–4 [7.34]–[7.37]. In the United States context, see Gilmore (n 44) Chapter 39.

[76] PPSA s 59.

[77] Australian Government, ‘Explanatory Memorandum (Sch 3 – Ch 7)’, *Public Consultation on the Government's response to the statutory review of the Personal Property Securities Act 2009* (22 September 2023) 23 [241]–[242], item 60 <https://consultations.ag.gov.au/legal-system/government-response-to-pps-review/>; Whittaker Report (n 75) 313–15 [7.7.6] (Recommendation 228).

[78] Eg, in the context of marshalling, see Cuming (n 3) 208.

As such, equity remains capable of concurrent operation with the PPSA both more generally, and in the context of disputes which are governed by its priority regime

C *Should the Operation of Equity be Limited in the Context of the PPSA?*

Establishing that there is room for the continued operation of equity in the context of the PPSA raises the further question of whether any limitations on its operation can be articulated in the abstract. Although this will often require assessment on a case-by-case basis, two points can still be made.

First, the analysis in this and the previous Chapter can provide guidance in any given case. This is because such analysis helps frame the question, which is whether a particular equitable doctrine or remedy would undermine one or more of the policies of the PPSA to the extent that it is not capable of operating concurrently with the Act in the case at hand. This is also because the previous Chapter already identified and critically examined the proper scope and significance of the main policies of the Act, which saves the need to do so again from scratch in any given case.

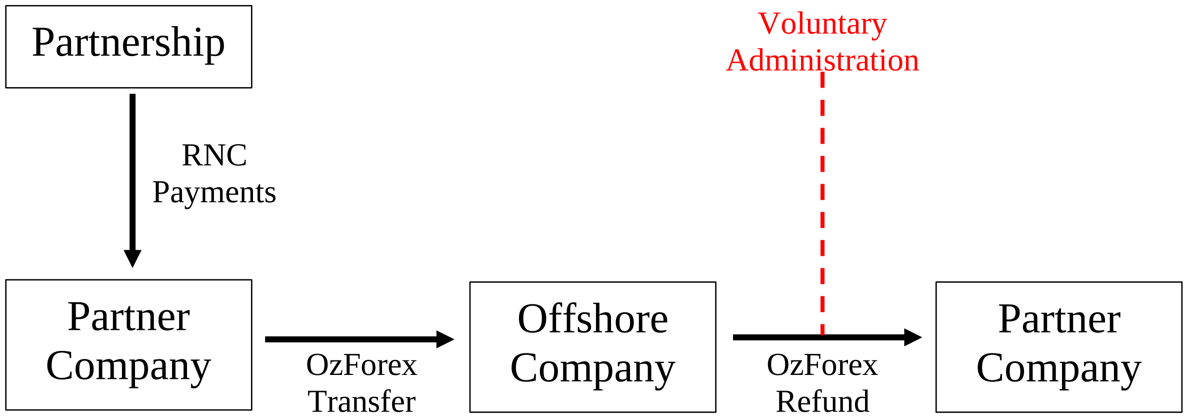
The second point concerns *how* equity might operate in cases where it is available in the context of the Act. The question here is whether equity can directly affect the operation of the Act by causing a security interest to be treated as if it is actually perfected in circumstances where it is not; or, alternatively, whether equity should only be capable of imposing personal and/or proprietary equitable remedies, which do not directly affect the treatment of a security interest itself under the Act. Admittedly this is a somewhat odd question, but it requires consideration following the case of *Re O'Keeffe Heneghan Pty Ltd* ('*Re O'Keeffe*').[79]

Re O'Keeffe concerned a priority competition arising from security interests granted by a partnership of three companies. Those security interests were granted to the Commonwealth Bank of Australia ('CBA'), and IFG Networks Australia Pty Ltd ('IFG'). The relevant collateral was a bank account held by the partnership with CBA, whose security interest in that bank account was thus initially perfected by control under PPSA s 25.[80] Funds from that bank account were then transferred to another bank account held by one of the partner-companies (the 'RNC Payments'). They were in turn transferred again to an offshore

[79] *Re O'Keeffe* (n 5).

[80] Ibid [24]–[29].

company (the 'OzForex Transfer'). The partner-company then went into voluntary administration, following which the funds were returned from the offshore company to an account controlled by the administrators (the 'OzForex Refund').[81] This is represented in the diagram below:



The issue was which of CBA's and IFG's security interests had priority in the ultimate account, as the proceeds of the original bank account held with CBA by the partnership.[82] IFG first successfully argued that the RNC Payments were made in breach of the partner-companies' and their directors' fiduciary duties to the partnership,[83] and that the appropriate remedy was to impose a constructive trust over the ultimate account in favour of the partnership.[84] IFG then argued that its security interest had priority in that account because CBA had not made a PPSR registration against the partnership.[85] However, the Court held that since it *could* make an order that the funds be repaid to the original partnership account held with CBA, consequent to the constructive trust in favour of the partnership, CBA in fact had control of the account itself per s 25 of the Act, and thus had super-priority

[81] It is unclear whether this was a separate account maintained by the administrators, or the same account from which the partner-company made the OzForex Transfer: ibid.

[82] The ultimate account was 'proceeds' because it was 'identifiable or traceable personal property' which 'derived directly or indirectly from a dealing' with the original account: PPSA s 31(1)(a). Similarly, see ibid [31]–[32].

[83] *Re O'Keeffe* (n 5) [12].

[84] Ibid [13]–[16]. Another basis for the constructive trust was knowing receipt: [12]. The payments may also have been voidable under *Conveyancing Act 1919* (NSW) s 37A (voluntary alienation to defraud creditors), but there was no need to consider this because of the above: at [17]–[19].

[85] *Re O'Keeffe* (n 5) [25], [31].

per s 57.[86] Setting aside the question of whether it was appropriate to impose a remedial constructive trust in such circumstances,[87] the significance of this case is that it suggests that equity can directly affect the operation of the Act by causing a security interest to be treated as perfected.[88]

Respectfully, it is contended that equity should not be capable of directly affecting the status of a security interest under the PPSA, and that this is the second limitation which can be articulated in the abstract with respect to its concurrent operation with the Act. Such orders risk undermining several policy objectives of the PPSA. One is the publicity function, as such orders could cause a security interest to be treated as if it was perfected under the Act itself notwithstanding the absence of the publicisation of a claim to hold such an interest, in a manner that does not fulfil one of the other policy objectives which limit the publicity function such as those underlying perfection by control or temporary perfection. This is different to recognising an equitable property interest itself in the context of the priority regime of the Act, which it was argued is acceptable above.[89] This is because orders which directly affect the status of a security interest under the Act could lead to drastically different priority consequences, as was the case in *Re O'Keeffe*, by comparison to the imposition of a new equitable property interest which would be determined by the common law priority rules and would thus ordinarily rank behind previously existing security interests. Furthermore,

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[86] Ibid [37].

[87] The only argument advanced against the imposition of such a trust was that it may have detrimentally affected CBA's priority, which was not accepted because the constructive trust did not have such an effect: ibid [15]. For discussion as to the outcome which the Act may have generated if no constructive trust was imposed, see Linda Widdup, 'Constructive Trusts, Proceeds and the Priority Rules in the *Personal Property Securities Act 2009* (Cth)' (2019) 30(2) *Journal of Banking and Finance Law and Practice* 141, 143–4. But note that her analysis suggests that if no claim against the ultimate account as proceeds was possible, the security interests would have 'continue[d] in the collateral' under s 32(1)(a). Respectfully however, since the 'transfer' of money between bank accounts held with different banks does not involve actually transferring the same collateral (as would be the case if cash was handed from one party to another), it is difficult to see how the security interest could so 'continue in the collateral'. Rather, it would be necessary to trace into the ultimate account, and claim against it either as proceeds under the Act or in equity: as to which see further Chapters Seven and Eight.

[88] Ie, because the account was held on constructive trust it was said to be in the control of CBA where it would not otherwise have been: *Re O'Keeffe* (n 5) [37]. Curiously, although IFG contended that such a constructive trust existed and CBA contended that it did not, the result of its imposition was that CBA obtained priority: as noted in Widdup (n 87) 141.

[89] See Section I(B) above.

even if a new equitable interest ranked ahead of a security interest in a given case, the court would retain a discretion to postpone such priority if appropriate – such as to protect innocent third parties.[90]

Such orders could also undermine the policy of preventing fraud, by allowing a secured party to enforce a security interest without having taken the necessary steps to verify the legitimacy of that security interest. This too is different to the imposition of an ordinary equitable proprietary remedy in such circumstances, which it was argued is acceptable above.[91] This is because an order which causes a security interest to be perfected under the Act itself would result in that security interest being enforceable (by virtue of the Act) rather than in the creation of a new equitable property interest (by virtue of equity).

Furthermore, such orders could undermine the proper scope of the policy of encouraging certain types of finance. *Re O'Keeffe* is itself an example of this, in that it allowed a secured party to enjoy the priority benefits of control despite its not actually having control of the ultimate account under the Act. It thus extended the scope of a policy which has already been described as a 'generous concession in favour of the banking industry' even further.[92] Consequently, such orders are not capable of concurrent operation with the Act. Rather, equitable relief in the context of the Act should only be granted in the form of ordinary personal or proprietary equitable remedies. Establishing this, it is now possible to turn to the converse process by which equity and the PPSA might influence each other, which is the interpretation of the Act by reference to equity.

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[90] Eg, *Muschinski* (n 52) 623 (Deane J).

[91] See Section I(B) above.

[92] Duggan (n 75) 237 [7.21].

II Interpreting the PPSA by Reference to Equity

It is undoubtedly the case that some provisions of the PPSA must be interpreted by reference to equity. For example, the requirement in s 12(1) that there be 'an interest in personal property' cannot be made sense of without the existence of equitable property rights.[93] But it is less clear whether the Act should also be interpreted by reference to equity where alternative constructional choices which lead to commercially sensible outcomes are available. This Section addresses this by first considering the broad question of whether the policies of the Act are consistent with its interpretation by reference to equity generally. It then considers the narrower question of whether, if so, we should read the equitable doctrine of notice into the priority rules of the Act.

A *Should the PPSA Ever be Interpreted by Reference to Equity?*

The starting point in determining whether provisions of the PPSA should be interpreted by reference to analogous equitable doctrines and remedies is to recognise that this is facilitated by the ordinary application of the principles of statutory interpretation. One relevant principle is the presumption that, where a statute adopts language with an established legal meaning at common law, it is intended to bear that meaning.[94] An example of such a provision in the PPSA is s 31, which defines proceeds by reference to whether they arise from 'traceable' personal property.[95] Another relevant principle is that which emphasises the primacy of context, pursuant to which courts tend to interpret statutes by reference to analogous common law concepts even where they do not adopt terms with established legal meanings.[96] Thus, for example, where s 111 imposes a duty to exercise statutory remedies honestly and in a commercially reasonable manner, its content might be guided by that of analogous equitable doctrines such as estoppel in appropriate cases.

The question is then whether any of the underlying policies of the PPSA are contrary to this starting point. For the same reasons as above, the argument that equity may be contrary to the policy of promoting substance over form on the basis that it may risk importing 'arbitrary' notions into the Act overstates the scope of this policy.[97] Similarly, the

[93] Similarly, see Cuming (n 3) 181–7.

[94] See Section III of Chapter Two (and citations therein).

[95] See further Chapter Seven.

[96] See Section III of Chapter Two (and citations therein).

[97] See Section I(A) above.

argument that interpreting the Act by reference to equity may undermine commercial certainty fails to appreciate that there is no discrete policy within the Act of promoting certainty and simplicity.[98] Furthermore, even if this was not the case, such an argument would be unconvincing because interpreting the PPSA by reference to equity is likely to facilitate, rather than undermine, commercial certainty. This is because such interpretive choices will incorporate established principles into the operation of the statute, whereas refusing to do so will necessitate developing and refining novel principles from scratch.[99]

This of course remains subject to the fact that any such interpretation will need to be determined on a case-by-case basis. Thus, the operation of a statutory provision must actually be analogous to an equitable doctrine or remedy for equity to usefully provide guidance, and the provision in question must not contain a discernible and discrete policy objective which might be undermined by such an interpretation. But so long as those requirements are satisfied, there is no reason why the PPSA should not be interpreted by reference to equity, just like any other statute in such circumstances.

B *Should the Equitable Doctrine of Notice be Read Into the PPSA Priority Rules?*

Establishing the appropriateness of interpreting the PPSA by reference to equity raises the more specific question of whether the equitable doctrine of notice should be read into the priority rules of the Act. Several Canadian cases have held that this is not possible under their counterparts to the PPSA.[100] However, some of the reasoning employed in those cases is open to criticism for suggesting that the statutes are a 'code',[101] or for making vague assertions concerning the 'obvious purposes of the legislation' and 'underlying philosophy of the PPSA' without identifying exactly what those notions entail and thus why they are inconsistent with notice being read into the statutory priority rules.[102] Similarly, the possibility that the

[98] See Section I(B) above.

[99] Eg, with respect to interpreting 'proceeds' by reference to tracing, see further Section II(B)(2) of Chapter Seven.

[100] *National Trailer Convoy of Canada Ltd v Bank of Montreal* (1980) 1 PPSAC 87 (Ontario Supreme Court) ('*National Trailer*'); *The Robert Simpson Company Ltd v Shadlock* (1981) 119 DLR (3d) 417 (Ontario Supreme Court) ('*Robert Simpson*'); *BMP* (n 44); *Strongco Inc v HE Carson & Sons Ltd (receivers and managers of)* (1999) 217 NBR (2d) 73 (New Brunswick Court of Queen's Bench) ('*Strongco*'), affirmed in [2000] 189 DLR (4th) 236 (New Brunswick Court of Appeal).

[101] *National Trailer* (n 100) [31].

[102] *Robert Simpson* (n 100) [16]–[17]; *BMP* (n 44) [14].

equitable doctrine of notice might be read into the Act has been considered by reference to the notion that certainty is embedded within the statutory priority rules.[103] This too is inapplicable in the Australian context, since the Australian Act does not contain a discrete policy of promoting certainty and simplicity.[104] Thus, it is worth examining this question afresh and from an Australian perspective.

Two points require clarification before proceeding further. First, the phrase 'equitable doctrine of notice' will be used to refer to the common law priority rules whereby a party who obtains a property interest, with notice of the existence of a prior equitable interest, is unable to assert priority over that prior equitable interest.[105] Secondly, this question will be treated as one of statutory interpretation rather than one concerning the application of equity by reference to statute. This is because the equitable doctrine of notice can be viewed as a priority rule in and of itself, the operation of which may directly, rather than indirectly, contradict the outcomes otherwise generated by the priority regime of the PPSA. Consequently, to incorporate it into the statute, it would have to be read in as a question of statutory construction.[106]

The starting point is thus that the absence of the explicit incorporation of the equitable doctrine of notice into the text of the priority rules is a powerful reason against such a construction.[107] This is reinforced by the fact that the drafters would have known of this doctrine such that its omission was unlikely to be accidental, including because notice was explicitly referenced in the most important predecessor to the PPSA.[108] Furthermore, the United Nations Commission on International Trade Law, whose work was drawn upon in

[103] See Gilmore (n 44) 901–2 § 34.2 (summarising such an argument without adopting a position).

[104] See Section III of Chapter Five.

[105] If the subsequent interest is equitable, this will be because the subsequent interest will no longer be the 'better equity': *Latec Investments* (n 68) 276. If the subsequent interest is legal, this will be because the interest-holder will not be a bona fide purchaser for value without notice: see Heydon, Leeming and Turner (n 68) 350–1 [8-220].

[106] See further Section II(B) of Chapter Two.

[107] Similarly, see *Robert Simpson* (n 100) [15]. This is consistent with the importance of textualism to the Australian principles of statutory interpretation: see, eg, *Federal Commissioner of Taxation v Consolidated Media Holdings* (2012) 250 CLR 503, 519 [39].

[108] See *Corporations Act 2001* (Cth) Ch 2K s 280 (repealed). This point has been made in the Canadian context: *National Trailer* (n 100) [32]; *Robert Simpson* (n 100) [16]–[17].

drafting the PPSA,[109] clearly envisaged that the priority rules of statutes such as the PPSA would not turn on actual notice.[110] However, it could still be argued that the equitable doctrine of notice is sufficiently necessary that it meets the high bar for being read into the statute. This is ultimately a question of contextual or purposive construction reflecting 'a judgment of matters of degree'.[111] Here again, the framework can provide guidance on *how* to resolve this question of contextual and purposive interpretation.

It could be argued that the publicity function weighs in favour of reading this doctrine into the statutory priority rules. This is because doing so would operate to the detriment of a party that acquires a property interest with the knowledge that a security interest already exists. This would be consistent with this policy's objective of protecting innocent third parties from losing out to competing secured parties with unperfected, and thus potentially undiscoverable, security interests.[112] However, this argument fails to account for the deliberate limitations of the publicity function.[113]

The most important such limitation is contained in s 300, which provides that a person does not have notice of the content of a financing statement merely because it is available via a search of the PPSR. If the equitable doctrine of notice was read into the priority rules of the Act, the effect of this provision would be, perversely, to disincentivise prospective secured parties from undertaking PPSR searches in case they acquired knowledge which prejudiced their priority position. Furthermore, it would also disincentivise such parties from making further inquiries following the discovery of a PPSR registration, in case this too caused them to acquire notice which prejudiced their priority. By contrast, no such perverse incentive arises if the doctrine of equitable notice is not read into the Act.

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[109] Replacement Explanatory Memorandum, Personal Property Securities Bill 2009, 11.

[110] United Nations Commission on International Trade Law, *UNCITRAL Legislative Guide on Secured Transactions* (14 December 2007) 150 [5], 218–19 [125]–[127].

[111] *Taylor v Owners – Strata Plan No 11565* (2014) 253 CLR 531, 548 [37]–[38] (quote at [38]) (French CJ, Crennan and Bell JJ), 556–7 [65]–[66] (Gageler and Keane JJ, dissenting). See further D Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th ed, 2019) 73–7 [2.52]–[2.56].

[112] Such an argument was advanced in *National Trailer* (n 100) [31]. See also Gilmore (n 44) 902 § 34.2 (summarising a similar argument without adopting a position).

[113] Cf *National Trailer* (n 100) [31], rejecting this argument on the basis that 'the Legislature intended to provide a code whereby secured interests in personal property could be determined and enforced'. As argued in Chapter Four, the PPSA is not a code.

More generally, reading in equitable notice to the priority rules of the Act would risk upsetting the balance between the publicity function on the one hand, and several other policies of the Act which are inherently limiting of it on the other hand. For example, doing so might preclude a secured party whose security interest was temporarily perfected, pursuant to the policy of minimising detriment to secured parties, from re-perfecting that security interest to obtain priority over a new security interest of which it had notice.[114] It also might preclude a secured party whose security interest would otherwise have super-priority, pursuant to the policy of encouraging certain types of finance, from enjoying priority over a prior secured party whose security interest it had notice of before satisfying the statutory requirements for super-priority.[115]

Relatedly, the very existence of the policy of encouraging certain types of finance further suggests that it would be inappropriate to read the equitable doctrine of notice into the priority rules of the Act. This is because doing so would undermine the extent to which the provisions of the Act facilitate the financing of the purchase of fresh collateral by grantors,[116] of crops and livestock,[117] and of depositors generally by their banks.[118] These objectives of the Act further suggest that its priority rules are intended to be 'objective', in the sense that they apply irrespective of notice.[119]

As such, the equitable doctrine of notice should not be read into the priority rules of the PPSA. This is consistent with the conclusion of the Canadian decisions on this point, notwithstanding that some of their reasoning is inapplicable to the Australian Act.

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[114] See Section IV of Chapter Five. This assumes that the doctrine would operate in such circumstances, notwithstanding that the secured party with the temporarily perfected security interest would presumably have acquired its security interest earlier in time and without notice of the other security interest. Such questions do not arise under the common law priority rules, which do not delineate between the creation of a property interest and the 'perfection' of that interest.

[115] See Section IX of Chapter Five.

[116] PPSA ss 14, 62–3.

[117] Ibid ss 84–6.

[118] Ibid ss 25, 57, 75.

[119] Similarly, albeit by reference to the default rules rather than the super-priority rules, see *BMP* (n 44) [9]; *Strongco* (n 100) [13]–[14].

CONCLUSION

The previous Chapter identified and critically examined the underlying policies of the PPSA, in accordance with the first step of the framework for understanding the relationship between statute and the common law. This Chapter built upon this by applying those policies to map out the relationship between equity and the PPSA in the abstract, in accordance with the second step of the framework.

As to the application or development of equity, it established that equity as a whole remains capable of operating concurrently with the PPSA. This is true both generally, and in the context of its priority regime. Although this conclusion may seem obvious or intuitive, it is undesirable to simply assume its correctness. Thus, by fully articulating why this is correct, this Chapter provides a principled basis for Australian courts to continue considering the application or development of particular equitable doctrines and remedies in the context of the PPSA. It also considered the limitations on the operation of equity in this context. This will require determination on a case-by-case basis, but the above analysis emphasised that this will always entail determining whether equitable intervention is incapable of operating concurrently with any of the policies of the Act. This can in turn be guided by the identification and critical examination of those policies in the previous Chapter. It also concluded that, if equitable relief is available, this should take the form of a personal or proprietary equitable remedy, rather than an order which directly affects the status of a security interest under the Act.

As to the interpretation of the Act, it established that it is appropriate to interpret the PPSA by reference to equity where a provision operates analogously to an equitable doctrine or remedy, albeit that this too will require analysis on a case-by-case basis. It also showed that the equitable doctrine of notice should not be read into the priority rules of the PPSA.

As will be recalled, this thesis seeks to answer two questions, which are:

1. How can we better understand interactions between statute and the common law?; and
2. Can we better understand the PPSA through examining its relationship with equity?

Part III of the thesis has applied the framework for understanding interactions between statute and the common law to the relationship between equity and the PPSA as a whole. In doing so, it has demonstrated the usefulness of the framework to understanding interactions between a given statute, and a broad component of the common law, in accordance with the first research question of this thesis. It has also improved our understanding of the PPSA itself by examining its relationship with equity, in accordance with the second research question.

To completely answer these questions, however, it is necessary to show that the framework can also be used to better understand interactions between a given statute and a particular common law claim. Furthermore, it is necessary to show that we can better understand the PPSA by examining its relationship not only with equity as a whole, but also with some of its doctrines and remedies. The following Part of the thesis does this by applying the framework to the more specific relationships between the PPSA, and two equitable doctrines and remedies: tracing, and subrogation.

PART IV: APPLYING THE FRAMEWORK TO EQUITY & THE PPSA – PARTICULAR DOCTRINES & REMEDIES

CHAPTER SEVEN: TRACING & THE PPSA – INTERPRETING PROCEEDS

TABLE OF CONTENTS

INTRODUCTION

This is the first Chapter within the fourth Part of this thesis. Part II explored the relationship between statute, the common law and equity. It identified a framework for better understanding interactions between statutes and the common law, and demonstrated that it is useful on a case-by-case basis. That framework entails first identifying the policies underlying statute, and then using those policies to determine whether the common law can apply or develop by reference to statute *or* whether statute should be interpreted by reference to the common law. Part III applied this framework to the relationship between equity and the *Personal Property Securities Act 2009* (Cth) ('PPSA' or 'Act') in the abstract. This demonstrated the usefulness of the framework to understanding interactions between a given statute and a broad component of the common law. It also improved our understanding of the PPSA through examining its relationship with equity as a whole.

This Part IV further demonstrates the usefulness of the framework by applying it to the relationship between the PPSA and two equitable doctrines and remedies: tracing, and subrogation. These have been selected because they are more commonly raised in the general texts on personal property securities law than many other equitable doctrines and remedies, which indicates that they are likely to be important in the context of the Act.[1] They are also worth examining separately because their operation in that context raises additional questions to those already addressed in the previous Chapter. By contrast, that analysis is already sufficient, in and of itself, to answer many of the questions that some equitable doctrines and remedies raise in relation to the PPSA.[2] Finally, the questions raised by tracing and subrogation pertain to both interpretation, which is examined in this Chapter, and the application or development of equity, which is examined in the following two Chapters.

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[1] Eg, tracing is commonly raised in the context of proceeds: eg, Anthony Duggan, *Australian Personal Property Securities Law* (LexisNexis, 3rd ed, 2021) Chapter 11; Nicholas Mirzai and Jason Harris, *The Annotated Personal Property Securities Act 2009* (Cth) (Wolters Kluwer, 4th ed, 2020) 311–17 [31.5.2]–[31.5.3]; Ronald CC Cuming, Catherine Walsh and Roderick J Wood, *Personal Property Security Law* (Irwin Law, 3rd ed, 2022) Chapter 11; Michael Gedye, Ronald CC Cuming and Roderick J Wood, *Personal Property Securities in New Zealand* (Thomson Brookers, 2002) 181–91 [45.6]–[45.12]. Subrogation is commonly raised when discussing other principles relevant to priority and/or purchase money security interests: eg, Duggan (n 1) 267 [8.31]; Cuming, Walsh and Wood (n 1) 542–4; Gedye, Cuming and Wood (n 1) 89 [17.4.6], 289–90 [73.4].

[2] Eg, Section I of Chapter Six explains why equitable estoppel should remain available in the context of the PPSA, and provides guidance as to how courts should determine the remedy.

The following two Chapters concern tracing and the PPSA. This Chapter commences by examining how the statutory claim to proceeds under the Act differs from its equitable counterpart. It then examines whether 'proceeds' under the PPSA should be interpreted by reference to the rules of equitable tracing. Building upon this, the following Chapter examines whether a secured party can claim against a traceable substitute in equity, separately to its statutory claim to proceeds under the Act.

Before proceeding further, however, it is necessary to outline the general approach taken to tracing in this thesis, and to address the terminology which it will use. As to the general approach, one of the difficulties with exploring the relationship between tracing and the PPSA is that significant parts of the law of tracing remain unsettled. Notwithstanding its ancient origins,[3] there is debate concerning issues as fundamental as what rights are required for a party to be able to claim against traceable substitutes in the first place,[4] and whether tracing at law and tracing in equity are different.[5] There is also debate concerning more specific issues, such as whether it is possible to 'backwards trace' from the payment of a debt

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[3] The oldest known tracing case was from 1457: Lionel Smith, 'Philosophical Foundations of Proprietary Remedies' in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press, 2009) 281, 299–300, discussing *Bale v Marchall* (1457) 10 SS 143.1

[4] See, eg, Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press, rev ed, 1989) 377–85; Peter Birks, 'Overview: Tracing, Claiming and Defences' in Peter Birks (ed), *Laundering and Tracing* (Clarendon Press, 1995) 289, 311–15 ('Overview'); Lionel D Smith, *The Law of Tracing* (Clarendon Press, 1997) 299–302 (a proprietary base); Aruna Nair, *Claims to Traceable Proceeds: Law, Equity, and the Control of Assets* (Oxford University Press, 2018) Chapter 6 (a relationship where one party controls assets, has a power to vary the claimant's rights, and has breached a duty concerning the exercise of that power); Mohammud Jaamae Hafeez-Baig and Jordan English, *The Law of Tracing* (Federation Press, 2021) Chapter 5 (an equitable property interest *or* a legal property interest coupled with 'stewardship duties').

[5] See, eg, *Taylor v Plumer* (1815) 3 M & S 562, 575; 105 ER 721, 726; *Re Diplock* [1948] 1 Ch 465, 518–19 (suggesting that it is not possible to trace through a mixed fund at law, and thus that tracing is different at law and in equity); *Foskett v McKeown* [2001] 1 AC 102, 128–9 (Lord Millett) (Lord Hoffmann agreeing); Smith, *The Law of Tracing* (n 4) 277 (suggesting that tracing is a process that is neither legal nor equitable); Mohammud Jaamae Hafeez-Baig and Jordan English, 'Common Law Tracing: The Emperor's New Clothes?' (2018) 12 *Journal of Equity* 26 ('Common Law Tracing'); Hafeez-Baig and English (n 4) Chapter 3 (suggesting that tracing is exclusively equitable). See further Section II(D) below.

into the asset acquired with the borrowed funds.[6] This unsettled state of the law reflects that proprietary claims to traceable substitutes have 'not been very common',[7] including in Australia where there have been few High Court judgments on the topic.[8] Relatedly, academic interest in this area has only expanded significantly in the last 30 years or so. The first holistic account which sought to comprehensively examine and explain tracing, Lionel Smith's seminal monograph *The Law of Tracing*, was published in 1997;[9] and it took until 2016 for further and competing holistic accounts of tracing to emerge.[10]

This creates difficulties for this thesis, as some of these unsettled questions concerning tracing affect how it interacts with the PPSA. Rather than treating one of the holistic accounts of tracing as correct, this thesis instead analyses the issues in a manner that is consistent with as many of them as possible. This ensures that the correctness of its analysis does not depend on judicial acceptance of any one explanation of tracing, which is appropriate since Australian courts have been afforded relatively few opportunities to delineate between them. This is possible because, as they pertain to the PPSA, in most cases each of the explanations of tracing leads to the same outcome.

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[6] See *Brazil v Durant International Corp* [2016] AC 297, 311–13 [32]–[41]; Lionel D Smith, 'Tracing into the Payment of a Debt' (1995) 54 *Cambridge Law Journal* 290; Smith, *The Law of Tracing* (n 4) 146–52; James Penner, 'Value, Property, and Unjust Enrichment: Trusts of Traceable Proceeds' in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press, 2009) 306, 318–22 ('Value, Property, and Unjust Enrichment'); Matthew Conaglen, 'Difficulties with Tracing Backwards' (2011) 127 *Law Quarterly Review* 432; J C Campbell, '*Republic of Brazil v Durant* and the Equities Justifying Tracing' (2016) 42 *Australian Bar Review* 32; Nair (n 4) 146–54 [4.27]–[4.47]; James Penner, '"Sort of" Backwards Tracing' in Paul S Davies and James Penner (eds), *Equity, Trusts and Commerce* (Hart Publishing, 2019) 123, 123–40; Hafeez-Baig and English (n 4) 234–64 [7.96]–[7.178]. See also James Penner, 'Tracing and Payment Systems' in Sinéad Agnew and Marcus Smith (eds), *Law at the Cutting Edge: Essays in Honour of Sarah Worthington* (Hart Publishing, forthcoming) (arguing, contrary to his previous view, that backwards tracing is narrower in scope than previously thought, and thus less important than would otherwise be the case).

[7] As observed in Birks, *An Introduction to the Law of Restitution* (n 4) 359.

[8] *Brady v Stapleton* (1952) 88 CLR 322; *Scott v Scott* (1962) 109 CLR 649.

[9] Smith, *The Law of Tracing* (n 4).

[10] Nair (n 4); Hafeez-Baig and English (n 4). See also Tatiana Cutts, 'Tracing, Value and Transactions' (2016) 79(3) *Modern Law Review* 381; Magda Raczynska, *The Law of Tracing in Commercial Transactions* (Oxford University Press, 2018).

As to terminology, first, the distinctions popularised by Birks and Smith between following, tracing, and claiming are adopted.[11] As such, 'following' refers to the process of identifying the same asset in the hands of different parties; 'tracing' refers to the process of identifying one asset as a substitute for another; and 'claiming' refers to the equitable proprietary claim to a substitute asset which arises from the unauthorised disposition of the original asset.[12] Secondly, use of the term 'proceeds' in its more general sense is avoided, because the PPSA has adopted this term and conferred it with a particular statutory meaning which differs from its broader usage at common law.[13] As such, 'traceable substitutes' is used in its place.[14] Thirdly, the distinction proposed by Raczynska between proceeds and fruits is adopted,[15] albeit that the word 'substitutes' is used instead of 'proceeds' for the reason outlined above. As such, a 'substitute' refers to property derived from an exchange of the original asset, and a 'fruit' refers to new property occurring naturally from the original asset.

Finally, as there are very few ultimate appellate authorities in Australia concerning the law of tracing, this Chapter assumes that the law of tracing in England and Australia is largely uniform and thus that the authorities can be treated interchangeably.[16] This is consistent with the practice of Australian courts.

[11] Birks, 'Overview' (n 4) 290–5; Smith, *The Law of Tracing* (n 4) 6–14; adopted in *Foskett v McKeown* (n 5) 109 (Lord Browne-Wilkinson), 113 (Lord Steyn, dissenting), 127–9 (Lord Millett) (Lord Hoffmann agreeing). Cf Hafeez-Baig and English (n 4) 5 [1.12]–[1.15] (arguing that tracing should not be separated from claiming).

[12] On the significance of whether the disposition was authorised, see generally Raczynska (n 10).

[13] As noted in Sheelagh McCracken, 'Personal Property Securities Legislation: Analysing the New Lexicon' (2014) 35(1) *Adelaide Law Review* 71, 78–9.

[14] Cf PPSA s 140(1) ('This section applies if any … proceeds (within the ordinary meaning of that term) …').

[15] Raczynska (n 10) 118–31 [3.10]–[3.38]. Note that her further distinction of 'products' from these terms has been omitted, since issues pertaining to products do not arise in this Chapter.

[16] But see Section II(D)(3) below (considering an argument pertaining specifically to Australian law).

I Comparing PPSA Proceeds to Equitable Tracing

The PPSA provides that a security interest extends to ‘proceeds’.[17] These are defined as ‘identifiable or traceable personal property’ arising from several categories,[18] the most widely drawn of which is ‘personal property that is derived directly or indirectly from a dealing with the collateral (or proceeds of the collateral)’.[19] Security interests automatically attach to proceeds unless the security agreement provides otherwise,[20] and are perfected by the same registration covering the original collateral in certain circumstances.[21]

This Section considers the five key differences between the statutory claim to proceeds under the PPSA, and the equitable claim to traceable substitutes. Cognisance of these differences is essential to understanding the relationship between tracing and the PPSA. Pointing out these differences at the very outset of the analysis may also help to avoid the intuitive tendency to improperly aggregate the statutory claim to proceeds with its equitable counterpart, which can lead to overlooking limitations in the Act which may be counterintuitive to equity lawyers.[22]

First, the statutory definition of ‘proceeds’ does not delineate between authorised and unauthorised dealings with the original collateral.[23] A secured party’s statutory claim to proceeds covers both cases where the grantor disposed of the original collateral in breach of the security agreement, and cases where the grantor disposed of the original collateral in a manner authorised by the security agreement.[24] By contrast, the equitable claim to traceable substitutes only arises from unauthorised dealings with the original property.[25] To clarify, this

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[17] See further Section V(B) of Chapter Four, which includes citations describing the proposed reforms to the Act in relation to proceeds.

[18] PPSA s 31(1), (4)–(6).

[19] Ibid s 31(1)(a).

[20] Ibid s 32(1)(b).

[21] Ibid s 33(1). If the security interest is not perfected by the original registration, it will be afforded a brief period of temporary perfection: s 33(2).

[22] Eg, *Metal Manufactures Pty Ltd v WesTrac Pty Ltd* [2024] NSWSC 144 (a payment to a party other than the grantor was held to be proceeds, notwithstanding the requirement in ibid s 31(3)(a) that ‘the grantor has an interest in the proceeds’).

[23] PPSA s 31(1).

[24] But note that such authorisation will affect the secured party’s rights in the original collateral: see ibid ss 32(1)(a)(i), 34.

[25] In the context of security, see Raczynska (n 10) 147–64 [4.16]–[4.53].

is not to suggest that the equitable tracing rules are incapable of determining whether property arising from an authorised disposition is 'proceeds'.[26] Rather, the point is that the subsequent equitable claim to traceable substitutes only arises from unauthorised dispositions, unlike the statutory claim under the PPSA which is available either way.

Secondly, the statutory right to claim against proceeds is automatically conferred upon a secured party, unless the security agreement provides otherwise.[27] By contrast, under pre-PPSA law it was necessary to explicitly bargain for such rights such as via a proceeds clause in the security agreement.[28] Thus, under the PPSA, it is necessary to 'opt out' of, rather than 'opt in' to, the security interest extending to proceeds of the original collateral. Furthermore, the statutory claim to proceeds also automatically extends to fruits of the original collateral, unless the security agreement provides otherwise.[29] Some such fruits would not ordinarily have been covered prior to the Act, such as share dividends,[30] and insurance payments for damage to or loss of the original collateral.[31]

The impact of this can be demonstrated by considering the seminal case of *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd*.[32] That case concerned whether the implied power of sale conferred on a retention of title purchaser by contract required it to hold any payments for the vendor in equity. This was a question of construction of the agreement between the parties. If this was required by the agreement, a new equitable interest in those payments would arise at the time they were received by the retention of title purchaser. By contrast, under the PPSA, the question would instead be whether the payments were 'proceeds'. This would turn on whether they were 'identifiable or traceable' and whether they 'derived directly or indirectly from a dealing with the collateral', rather than on the terms of the security agreement.[33] If so, the same security interest covering the original collateral

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[26] Although note that wrongdoing affects how the equitable tracing rules apply: see Section II(C)(2) below.

[27] PPSA s 32(1)(b).

[28] See generally Raczynska (n 10) Chapter 4.

[29] PPSA s 31(1)(b)–(e), (4)–(6).

[30] Ibid s 31(1)(e); as noted in Sheelagh McCracken et al, *Everett and McCracken's Banking and Financial Institutions Law* (Thomson Reuters, 9th ed, 2017) 521 [13.390]. Cf Louise Gullifer (ed), Roy Goode and Louise Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security* (Sweet & Maxwell, 7th ed, 2023) 52 [1-65].

[31] PPSA s 31(1)(b). Cf Goode and Gullifer (n 30) 52 [1-65].

[32] [1976] 2 All ER 552.

[33] PPSA s 31(1)(a).

would automatically attach to the payments at the time they were received by the retention of title purchaser, unless the security agreement provided otherwise.

Thirdly, the statutory claim to proceeds allows for 'double recovery' in cases of unauthorised dispositions.[34] A secured party can enforce its security interest against both original collateral and its proceeds, albeit that the secured obligation is limited to the market value of the original collateral immediately before the disposition occurred.[35] By contrast, in equity, claiming against a traceable substitute precludes claiming against the original property.[36]

Fourthly, the statutory claim to proceeds only covers personal property.[37] By contrast, in equity it is possible to trace from rights in personal property to rights in land (and various combinations thereof).[38]

Fifthly, property will only constitute proceeds if 'the grantor has an interest in the proceeds'.[39] Thus, where a grantor disposes of collateral to a third party who in turn himself sells it, the substitute received by the third party will not be proceeds under the Act. By contrast, it is possible to trace into substitutes held by third parties in equity, and the claim to such substitutes is limited by the bona fide purchaser for value without notice rule.[40]

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[34] Where the disposal of the original collateral is authorised, the secured party will be unable to claim against both the original collateral and proceeds because its security interest will no longer continue in the collateral: ibid s 32(1)(a)(i).

[35] Ibid s 32(1)–(2).

[36] Smith, *The Law of Tracing* (n 4) 206–8. Smith describes the claimant's ability to elect to claim against a particular substitute as 'ratification', but this should not be conflated with the meaning of this term in agency law: see Nair (n 4) 113 [3.75]; also Lionel Smith, 'Tracing' in Andrew Burrows and Lord Roger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford University Press, 2006) 119, 133 ('the cases support the idea that this is an election and not a true ratification'.) Cf *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 573 (Lord Goff of Chieveley) ('"tracing" … involves a decision by the owner of the original property to assert his title to the product in place of his original property. This is sometimes referred to as ratification. I myself would not so describe it').

[37] PPSA s 31(1). Note also s 10 ('personal property').

[38] Eg, *Scott v Scott* (n 8) (beneficiaries under a will traced from land to the proceeds of its wrongful sale to the land subsequently purchased, in part, with those proceeds of sale).

[39] PPSA s 31(3)(a)(i).

[40] *Foskett v McKeown* (n 5) 109 (Lord Browne-Wilkinson), 127 (Lord Millett) (Lord Hoffmann agreeing).

Establishing these differences, it is now possible to turn to the main question which this Chapter seeks to address. This is: should we interpret proceeds under the Act by reference to the rules of equitable tracing?

II Interpreting PPSA Proceeds by Reference to Equitable Tracing

To be proceeds under the PPSA, property must be 'identifiable or traceable'.[41] The question of how these words should be interpreted has not yet arisen for determination by Australian courts. In Canada, however, this issue was addressed by the Saskatchewan Court of Appeal in *Agricultural Credit Corporation of Saskatchewan v Pettyjohn* ('*Pettyjohn*').[42] It developed a novel principle for determining whether property is 'identifiable or traceable' under the Saskatchewan counterpart to the PPSA.

Pettyjohn concerned a security interest over 120 head of cattle held by the Agricultural Credit Corporation of Saskatchewan ('Credit Corporation'), which financed the acquisition of the cattle by Mr and Mrs Pettyjohn.[43] Subsequently, the Pettyjohns decided to farm a different breed of cattle known as Watusi cattle. Thus, in breach of their security agreement with the Credit Corporation, they sold all their existing cattle – comprising the 120 which were subject to the security interest, and a further 133 which were not. They used most of the proceeds of sale to pay off an overdraft held with the Bank of Montreal,[44] and then drew on that same overdraft to purchase 66 Watusi cattle. The relevant question for the Court was whether the Watusi cattle were 'identifiable or traceable personal property', and thus claimable as proceeds.[45]

In determining that they were, Sherstobitoff JA (Vancise and Wakeling JJA agreeing on this point) held that 'certain changes in the concept of tracing will be required in the context of the PPSA'.[46] This was because interpreting proceeds by reference to equitable tracing was said to be contrary to the policies of promoting substance over form,[47] and

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41 PPSA s 31(1) (emphasis added).

42 [1991] 79 DLR (4th) 22 (Saskatchewan Court of Appeal) ('*Pettyjohn*'). The relevant provision was *Personal Property Security Act*, SS 1979-80, c P-6.1 s 2(ee). See now *Personal Property Security Act,* SS 1993, c P-6.2 s 2(hh); PPSA s 31(1)(a) (both containing identical wording to that quoted in the body text).

43 The Credit Corporation was initially known as 'FarmStart': *Pettyjohn* (n 42) [2].

44 Precise details as to where the funds were deposited are not provided in ibid: see [21]–[25]. But since the 'line of credit … [was] always negative', all the funds deposited into the account must have been used to pay off the overdraft.

45 Much of the case also concerned whether the security interest was a purchase money security interest: ibid [36]–[54]. This is beyond the scope of this Chapter

46 Ibid [59].

47 Ibid [71].

simplifying the law of secured transactions.[48] Consequently, Sherstobitoff JA proposed a novel 'functional equivalence test' for interpreting the words 'identifiable or traceable':[49]

> The appropriate principle of tracing in such a case is that where a set of chattels is replaced by another of like function in the affairs of the debtor, it shall be open to the court to find that the proceeds from the first were used to acquire the second, whatever the formalities of the transactions in question. It should be noted in passing that the formalities of the transactions will have some bearing, however, on whether the transactions can be characterized as a "replacement."

Applying this, he concluded that '[t]here is no doubt in this case that the Watusi cattle did replace the previous cattle of the Pettyjohns',[50] and further determined that the Credit Corporation could claim 50% of the Watusi cattle as proceeds since this represented the approximate amount of the total herd of cattle covered by its security interest.[51]

Canadian jurisprudence on this issue remains relatively undeveloped following *Pettyjohn*.[52] There only appear to be two other reported Canadian cases where the functional equivalence test has been applied to generate an outcome which would have been unavailable under the equitable tracing rules.[53] Furthermore, while there is consensus among Canadian commentators that the rules of equitable tracing should be altered in the context of their counterparts to the PPSA, mixed views have been expressed concerning the functional equivalence test itself.[54]

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[48] Ibid [72].

[49] Ibid [75].

[50] Ibid.

[51] Ibid [77]–[85] (Sherstobitoff JA) (Vancise JA agreeing). Cf [96]–[100] (Wakeling JA, dissenting) (holding that the Credit Corporation should have been able to trace into all the Watusi cattle because no competing proprietary claims were advanced).

[52] As noted in Gedye, Cuming and Wood (n 1) 184 [45.10] ('Even in Canada those [novel statutory tracing] rules are in a formative stage').

[53] *Re River Industries Ltd* [1992] 6 WWR 256 (British Columbia Supreme Court) ('*River Industries*'); *SDMA Insurance Corp v Manning Mercury Sales Ltd* [2000] 11 WWR 353 (Saskatchewan Court of Queen's Bench) ('*SDMA Insurance*'). See further Section II(B)(2) below.

[54] Eg, compare Cuming, Walsh and Wood (n 1) 634–5; Jacob S Ziegel, David L Denomme and Anthony Duggan, *The Ontario Personal Property Security Act* (LexisNexis, 3rd ed, 2020) 229–31 to Ronald CC Cuming, 'Judicial Development of Personal Property Security Law: The Contribution of the Saskatchewan Court of Appeal' (1999) 62(1) *Saskatchewan Law Review* 19, 29–30 ('Judicial Development').

This Section considers these questions in the Australian context. In particular, it focuses on whether proceeds under the PPSA should be interpreted by reference to the equitable tracing rules, or whether they should instead be interpreted as requiring a set of bespoke rules fitted to the statute like in Canada.

A *Text of the PPSA*

The starting point is the text of s 31(1). On its face, the phrase 'identifiable or traceable' suggests that proceeds should be interpreted by reference to the rules of equitable tracing, because the word 'traceable' invokes the presumption that words with an established legal meaning should be interpreted as such.[55]

Although this presumption could be displaced by the coupling of 'traceable' with 'identifiable', this would be contrary to the legislative history of the provision. The phrase 'identifiable or traceable' derives from the United States counterpart to the PPSA, which originally provided that a security interest only attached to 'identifiable proceeds'.[56] This gave rise to debate concerning whether property arising from mixed substitutions was 'identifiable',[57] which the Canadian drafters sought to pre-emptively address by adding the words 'or traceable' to their statutes.[58] This was then transposed into the Australian Act.[59] Thus the inclusion of the word 'traceable' in the Canadian statutes, and in turn in the Australian Act, appears to have been expressly intended to pick up the equitable tracing rules which allow for tracing through mixed substitutions.

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[55] See Section III of Chapter Two.

[56] Grant Gilmore, *Security Interests in Personal Property* (Little, Brown & Company, 1965) 735–6 § 27.4. But see now *Uniform Commercial Code 2012* § 9-315(b)(2) (proceeds can be identified 'by a method of tracing, including application of equitable principles, that is permitted under law other than this article').

[57] See, eg, Richard L Barnes, 'Tracing Commingled Proceeds: The Metamorphosis of Equity Principles into UCC Doctrine' (1990) 51(2) *University of Pittsburgh Law Review* 281.

[58] Jacob S Ziegel and Ronald CC Cuming, 'The Modernisation of Canadian Personal Property Security Law' (1981) 31 *University of Toronto Law Journal* 249, 278; W M Waters, 'Trusts in the Setting of Business, Commerce and Bankruptcy' (1983) 21(3) *Alberta Law Review* 395, 431–2.

[59] No explanation concerning this phrase is contained in Replacement Explanatory Memorandum, Personal Property Securities Bill 2009: see particularly 9, 24 [2.45], [2.47].

Consequently, the text of the Act suggests that proceeds should be interpreted by reference to equitable tracing. But, of course, this is subject to whether such an interpretation is contrary to the policies underlying the PPSA.

B *Policies of the PPSA*

1 *Substance over Form*

It could be argued that the rules of equitable tracing are inconsistent with the policy of promoting substance over form. This was one of the bases for declining to interpret proceeds by reference to equitable tracing in *Pettyjohn*, which described the equitable approach to tracing as 'essentially an arbitrary one, focusing on the form rather than the substance of the relevant transactions',[60] and contrasted this to the functional equivalence test which it stated does not turn on 'the form in which the transactions take place'.[61] Such reasoning has been largely endorsed by commentators,[62] and even those who criticise the functional equivalence test seem to accept that the policy of promoting substance over form requires at least some deviation from the equitable tracing rules.[63]

Respectfully however, there is no inconsistency between this policy and the equitable tracing rules. This is because equitable tracing is a 'process of identifying assets', which is separate to any proprietary claim to the substitute asset.[64] As put by Birks:[65]

> The exercise of plotting the path of an asset's value between two points in time either can be or cannot be done. In this respect … it is rather like finding keys. You either can find them or you cannot. Anyone can have a go at tracing. If you have a go, you may or may not succeed in locating the value of one asset in another. If you do succeed, it does not follow that you can make any claim.

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[60] *Pettyjohn* (n 42) [71].

[61] Ibid [72].

[62] Eg, Ziegel, Denomme and Duggan (n 54) 229–30; Duggan (n 1) 375–6 [11.21]–[11.22] (both describing *Pettyjohn* (n 42) as 'having some intuitive appeal in the PPSA context', but subsequently criticising the functional equivalence test); Gedye, Cuming and Wood (n 1) 172 [45.7].

[63] Eg, Cuming, Walsh and Wood (n 1) 624–5; Ronald CC Cuming, 'Protecting Interests in Proceeds: Equity and Canadian Personal Property Security Acts' in Waters (ed), *Equity, Fiduciaries and Trusts* (Carswell, 1993) 423, 430–1 ('Protecting Interests in Proceeds'); Cuming, 'Judicial Development' (n 54) 29–30; Linda Widdup, *Personal Property Securities Act: A Conceptual Approach* (LexisNexis, 3rd ed, 2013) 252 [18.31].

[64] *Foskett v McKeown* (n 5) 109 (Lord Browne-Wilkinson), 127 (Lord Millett) (Lord Hoffmann agreeing); adopting the analysis of Smith, *The Law of Tracing* (n 4) particularly at 10–14.

[65] Birks, 'Overview' (n 4) 291.

This process is consistent with the policy of promoting substance over form, which requires the application of the rules of the PPSA to all security interests regardless of their common law characterisation.[66] This is because the equitable rules for identifying substitute assets do not draw distinctions based on the form of the common law property interest of the party undertaking the tracing process. The form of that property interest could be relevant to the subsequent proprietary *claim* against the traceable substitute.[67] But even if it is, this claim comes after and is separate to the tracing *process*, which merely identifies whether the asset is a substitute in the first place.[68] It follows that interpreting the words 'identifiable or traceable' by reference to equitable tracing, ie, by reference to the equitable process for identifying substitute assets, does not undermine the policy of promoting substance over form.

The reasoning in *Pettyjohn* obscures this point by using the word 'form' in a different sense to its usage within the policy of promoting substance over form. It is true that, as put in *Pettyjohn*, equitable tracing draws distinctions based on the 'form … of the relevant transactions'.[69] This is because equitable tracing focuses on transactional links between assets, and can thus be said to focus on the 'form' of each transaction connecting the original asset to its ultimate substitute. For example, the rules of tracing may delineate between when an original asset is directly applied to purchase a new asset on the one hand, and when an original asset is applied to pay off a debt which was incurred to purchase a new asset on the other hand.[70] Such a distinction could fairly be described as 'formalistic'. But this has nothing to do with the policy of the PPSA of promoting substance over form because, properly understood, this policy is only relevantly concerned with applying the rules of the PPSA to all security interests irrespective of their common law 'form'.[71] Put another way, the focus on 'form' in the equitable tracing rules concerns *transactional links*, which is entirely separate to

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[66] See Section I(B) of Chapter Five.

[67] But see Section I(A) of Chapter Eight.

[68] See Charles Mitchell, Paul Mitchell and Stephen Waterson (eds), *Goff & Jones on Unjust Enrichment* (Sweet & Maxwell, 10th ed, 2022) 217 n 29, quoting *Ultraframe (UK) Ltd v Fielding* [2006] FSR 17, [1464].

[69] *Pettyjohn* (n 42) [71].

[70] Only the latter would require 'backwards tracing', as to which see n 6 above. But note it has been argued that backwards tracing is more prevalent than is otherwise appreciated: see Smith, 'Tracing into the Payment of a Debt' (n 6) 292; Penner, 'Value, Property, and Unjust Enrichment' (n 6) 318–22; Penner, '"Sort of" Backwards Tracing' (n 6) 123–40; cf Penner, 'Tracing and Payment Systems' (n 6).

[71] See Section I(B) of Chapter Five.

the nature of a common law *property interest* which is characterised as a security interest and is the proper focus of this policy of the Act.

Thus, the above-described reasoning in *Pettyjohn* must be viewed as a discrete argument that the PPSA should not be interpreted by reference to equitable tracing because it is formalistic and thus 'arbitrary'.[72] Such an argument may be meritorious in and of itself, notwithstanding that it is not actually about the policy of promoting substance over form. But it is contended that there are two flaws with this argument, such that it should not be accepted. First, it fails to appreciate that, although the PPSA adopts a functional approach to the law of secured transactions, this does not do away with 'formalism' altogether. Indeed, even notions of title remain indirectly relevant to the operation of statutes such as the PPSA.[73] Thus, the mere fact that equitable tracing can be described as formalistic in a general sense does not mean that it is inconsistent with the Act.

Secondly, this argument relies on the assertion that the equitable tracing rules are 'arbitrary' because they are formalistic.[74] This obscures that the equitable tracing rules are rooted in legal norms concerning when substitutions *should* make a difference to a claimant's rights,[75] and thus cannot accurately be described as arbitrary. This is not to deny that the rules can be complex, or that their application can turn on fine distinctions. But this is true of many other areas of law as well, and is insufficient to show that they are not fit for purpose, including in the context of the PPSA.

As such, there is no inconsistency between interpreting proceeds by reference to equitable tracing and the policy of promoting substance over form. Furthermore, the separate argument contained in *Pettyjohn* against such an interpretation should be rejected.

2 *Simplicity*

In Canada, it has been argued that the objective of simplifying the law of secured transactions is a further reason against interpreting proceeds by reference to the equitable

[72] *Pettyjohn* (n 42) [71].

[73] See generally Michael G Bridge et al, 'Formalism, Functionalism, and Understanding the Law of Secured Transactions' (1999) 44(3) *McGill Law Journal* 567. See further Section I(B) of Chapter Five.

[74] *Pettyjohn* (n 42) [71]. Similarly see Widdup (n 63) 255–6 [18.42] ('many of the traditional principles … apply arbitrarily').

[75] See Nair (n 4) Chapters 2–3; Hafeez-Baig and English (n 4) Chapter 2.

tracing rules.[76] Since there is no discrete policy of promoting simplicity under the Australian Act, this argument is inapplicable to the PPSA.[77] However, it is nonetheless worth interrogating because, although promoting simplicity is not a policy of the Act and thus should not be equated with its other actual policies, all statutes should be interpreted to achieve simplicity and certainty 'if it is consistent with the wording of the statute'.[78]

Contrary to this argument, interpreting proceeds by reference to the equitable tracing rules would be both simpler and more certain than interpreting them by reference to a set of novel tracing rules. This is because, if the statutory tracing rules are not equivalent to those in equity, it becomes necessary to figure out exactly what they entail, which in turn fosters uncertainty. As put by Duggan:[79]

> In the *Pettyjohn* case, if the debtors had exchanged the cattle for horses, would the court still have allowed the tracing claim? What if the exchange was for a new item of farm equipment? These kinds of questions invite litigation and threaten the stability of property rights.

Such uncertainty is further demonstrated by considering each of the two Canadian cases following *Pettyjohn* which applied the functional equivalence test to determine that property was 'identifiable or traceable' in circumstances where it was not a traceable substitute in equity. In the first such case, *Re River Industries Ltd* ('*River Industries*'), a debtor sold collateral and mixed the purchase price with its other property, and later sold all its assets to a third party.[80] Notwithstanding the lack of evidence of transactional links between the original collateral and the ultimate purchase price paid for all the business assets, the British Columbia Supreme Court held that the purchase price was 'proceeds' of the original collateral under the functional equivalence test. This suggests that the statutory tracing rules do not require the same evidence of transactional links between original

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[76] *Pettyjohn* (n 42) [72]. Similarly, see Waters (n 58) 432 ('the tracing remedy in Anglo-Canadian law provides rough and ready solutions. Surely precise attuned regulation is the whole object of the PPSA legislation'); Cuming, 'Protecting Interests in Proceeds' (n 63) 433 ('Statutory tracing of proceeds is part of the policy to bring personal property security law in line with the needs of modern business financing and to remove the conceptual confusion, administrative complexity and lack of predictability that characterised prior law').

[77] See Section III of Chapter Five.

[78] *GE Capital Canada Acquisitions Inc v Dix Performance* [1995] 2 WWR 738, [14] (British Columbia Supreme Court).

[79] Duggan (n 1) 376–7 [11.22]; Ziegel, Denomme and Duggan (n 54) 231 [25.4.5]. See also Cuming, Walsh and Wood (n 1) 634–6 (also criticising this test).

[80] *River Industries* (n 53).

collateral and proceeds, but gives little further guidance as to what extent such evidence remains necessary.

In the second case, *SDMA Insurance Corp v Manning Mercury Sales Ltd*, a debtor granted a security interest in his van to a secured party, and subsequently sold the van to a third party ('Manning Mercury').[81] Later, Manning Mercury paid money into court under the *Motor Dealers Act*, RSS 1978, c M-22, and the secured party was held to have a claim against the funds paid into court under that statute. Notwithstanding the lack of transactional links between the van and the funds paid into court by Manning Mercury, the Saskatchewan Court of Queen's Bench held that there was a close and substantial connection between the van and those funds such that they were 'proceeds'.[82] The connection between the original collateral and the ultimate proceeds in this case is even more tenuous than in *Pettyjohn* and *River Industries*, and thus creates even further uncertainty concerning the proper scope of the functional equivalence test by contrast to the equitable tracing rules.

This criticism can also be made, albeit less forcefully, of the more moderate arguments by some overseas commentators that proceeds under the Canadian and New Zealand counterparts to the PPSA should be interpreted by reference to the equitable rules subject to specified modifications of those rules.[83] These arguments raise the same questions concerning when and how the equitable tracing rules should be modified, albeit that to the extent that they do not discard the equitable tracing rules entirely they are less uncertain in and of themselves than the functional equivalence test.

Another reason why interpreting proceeds by reference to a set of novel tracing rules would foster complexity concerns the overlap between those rules and the equitable tracing rules. Unless the statutory rules were identical to the equitable tracing rules, the two sets of rules could conflict with each other in cases involving mixed funds of collateral (or proceeds) on the one hand, and property interests outside the scope of the PPSA on the other hand. Furthermore, where a secured party traces for the purpose of asserting both a proprietary claim to proceeds under the Act and a personal claim against recipients such as for knowing

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[81] *SDMA Insurance* (n 53).

[82] It further held that this affected the secured party's priority in those funds as against another secured party of Manning Mercury: ibid [19], [23]. This is not considered further as it does not pertain to the PPSA more generally.

[83] See Section II(C) below, addressing each such argument in turn.

receipt, the existence of parallel tracing rules would foster complexity by requiring that secured party to rely on different tracing rules for the proprietary and personal claims.[84]

These issues demonstrate that the notion of simplicity, although it is not a discrete policy of the PPSA in and of itself, weighs in favour of interpreting proceeds by reference to the equitable tracing rules. It is simpler and more certain to give meaning to the Act by reference to a set of rules which have been developed over hundreds of years, even if some aspects of those rules remain unsettled, than it is to attempt to re-invent the wheel by creating a set of novel tracing rules. Doing otherwise not only risks creating significant uncertainty in the process of figuring out what the alternative statutory tracing rules are, but also risks ultimately creating a set of rules which are equally complex to those developed in equity – albeit in different ways.

3 *Other General Arguments*

Before proceeding to the more specific arguments which have been made as to why proceeds should not be interpreted by reference to equitable tracing, three broader arguments raised in the Canadian and New Zealand contexts must be addressed.

The first group of arguments are those which emphasise that there are differences between the underlying policies of equitable tracing and statutory tracing, such that the latter requires a set of novel rules.[85] The difficulty with such arguments is that, while they purport to be rooted in the broader policies of the Act, they do not identify exactly *what* statutory policy (or policies) are inconsistent with equitable tracing. Consequently, they are

[84] Alternatively, it could be argued that the novel statutory tracing rules would be determinative of its personal claims. But this would be difficult to reconcile with the text of PPSA ss 32–3, which only provides for the statutory proprietary claim to proceeds.

[85] Cuming, 'Protecting Interests in Proceeds' (n 63) 455 ('the policy basis for tracing in equity does not apply to statutory tracing'); Gedye, Cuming and Wood (n 1) 184 [45.9] (there is a 'different public policy basis underlying the two sets of rules'); Widdup (n 63) 250 [18.22] (adapted rules would 'serve the policies of the PPSA'); *Pettyjohn* (n 42) [72] (the functional equivalence test is 'in keeping with the spirit of both the PPSA and the equitable tracing remedy'); *Flexi-Coil Ltd v Kindersley District Credit Union Ltd* (1993) 107 DLR (4th) 129, [26] (Saskatchewan Court of Appeal) ('*Flexi-Coil*') ('the courts, in resolving disputes which invoke the right to trace, should use the common law and equitable rules as their base but, as far as possible, seek to found solutions on the statute and its underlying policy').

insufficiently specific to demonstrate why interpreting proceeds by reference to equitable tracing would be contrary to the PPSA.

The second group of arguments are that unique statutory tracing rules are necessary to reflect ‘commercial realities’, or to ensure ‘commercially sensible outcomes’.[86] However, a policy concerning commercial reality is not evident in the text of the Act, and thus arguments by reference to it should be treated with caution. Furthermore, it is far from clear exactly what the notion of commercial reality entails, let alone why it would be better facilitated by interpreting proceeds by reference to an undeveloped set of statutory tracing rules rather than those of equity. As such, these arguments should be rejected.

The third group of arguments is that *sui generis* tracing rules are necessary due to deficiencies with the rules of equitable tracing themselves.[87] Such arguments rest on the assumption that equitable tracing is discretionary, uncertain, or somehow otherwise antithetical to commerce. However, this fails to reflect that tracing turns on transactional links, which are determined according to settled rules – and not by the discretion of the judge who must apply them.[88] Due to this, these arguments too are insufficient to demonstrate that proceeds under the PPSA should not be interpreted by reference to the equitable tracing rules.

C *More Specific Arguments*

Establishing that interpreting proceeds by reference to equitable tracing is consistent with the policies of the PPSA, it is now possible to turn to the more specific arguments contained in the commentaries and overseas cases. These more specific arguments all suggest that proceeds should be interpreted largely by reference to equitable tracing, but subject to

[86] Cuming, ‘Judicial Development’ (n 54) 30 (‘The Court [in *Pettyjohn* (n 42)] made it clear that the approach was to be viewed as consistent with the underlying goal of the *Personal Property Security Act* – to reflect commercial realities’); Nicholas Mirzai, ‘The Persistence of Equitable Doctrines with Respect to the Law Relating to Personal Property Securities: Assessing the Impact of the *Personal Property Securities Act 2009* (Cth)’ (2013) 24 *Journal of Banking and Finance Law and Practice* 3, 14 (‘there is scope to argue that the PPSA does away with jurisprudence that conflicts with commercially sensible outcomes’); Gedye, Cuming and Wood (n 1) 184 [45.9] (‘The creation of predictable, *commercially realistic* rules should be the primary goal in the formulation of PPSA tracing rules’) (emphasis added).

[87] Eg, Waters (n 58) 432 (describing tracing as providing ‘rough and ready solutions’); Mirzai and Harris (n 1) 312 [31.5.4] (describing tracing as being aimed at promoting ‘fairness or equality’, which is inappropriate in the context of the Act).

[88] Note *Foskett v McKeown* (n 5) 109 (Lord Browne-Wilkinson).

modifications where there are clashes between specific policies of the Act and the equitable tracing rules. The following addresses each such argument in turn, and critically evaluates whether they do necessitate interpreting proceeds other than by reference to the entirety of the equitable tracing rules, including by reference to the underlying policies of the Act.

1 *Should Proceeds be Limited by the Bona Fide Purchaser for Value Rule?*

It has been argued that the bona fide purchaser for value rule is inconsistent with the statutory claim to proceeds, and that it must thus be excluded from any interpretation of proceeds by reference to the rules of equitable tracing.[89] However, likely due to this argument having been made before the distinction between tracing and claiming was popularised, it does not identify that the bona fide purchaser for value rule concerns claiming rather than tracing.[90] It follows that the rules of equitable tracing simply do not include the bona fide purchaser for value rule, and thus that interpreting proceeds by reference to equity will not incorporate that rule into the Act.[91] Consequently, there is no inconsistency, and thus no need to modify the equitable tracing rules to avoid this outcome.

2 *Is Subordinating Wrongdoers Contrary to a 'Mechanical Approach'?*

Another argument that proceeds should not be interpreted by reference to the entirety of equitable tracing concerns the rule in *Re Oatway*.[92] This rule provides that where a wrongdoer mixes traceable property with his own, and then applies part of the mixture to acquire a substitute before dissipating the rest of the mixture, the wrongdoer is treated as having dissipated his own property first.[93] Together with the converse rule in *Re Hallett's Estate*,[94] this means that a wrongdoer who mixes traceable property with his own and later

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[89] Ziegel and Cuming (n 58) 280. Note *Toronto-Dominion Bank v Co-Pac Ltd* (1999) 15 PPSAC (2d) 52, [29]–[30] (Ontario Court of Appeal) ('*Toronto-Dominion v Co-Pac*') (suggesting the bona fide purchaser for value rule was incorporated into the interpretation of proceeds, but was not satisfied on the facts). But see *Flexi-Coil* (n 85) [26]; Lionel Smith, 'Tracing the Proceeds of Collateral under the PPSA: *Flexi-Coil Ltd v Kindersley District Credit Union Ltd*' (1995) 25(3) *Canadian Business Law Journal* 460, 465 (describing the rejection of the rule in *Flexi-Coil* (n 85) as 'clearly the appropriate decision').

[90] Smith, *The Law of Tracing* (n 4) 386–96.

[91] As noted in Cuming, Walsh and Wood (n 1) 624–5.

[92] [1903] 2 Ch 356.

[93] Ibid 360–1.

[94] (1880) 13 Ch D 696, 727–30.

dissipates part of the mixture will always dissipate his own property first.[95] By contrast, where the relevant party is not a wrongdoer, the rules of tracing still apply, albeit in a different manner.[96]

Some commentators have argued that this rule from *Re Oatway* is inconsistent with the policies of the overseas counterparts to the PPSA, and should thus not be incorporated into the interpretation of proceeds by reference to the equitable tracing rules.[97] This is because, they argue, the international counterparts to the Act should adopt a 'mechanical approach that does not depend on fault' when determining whose property was dissipated from a mixture.[98] If this is correct, they further suggest, a grantor who mixes collateral with his own property and subsequently dissipates part of the mixture will always have dissipated the unencumbered property first.[99]

It is unclear whether this argument is targeted at the nature of tracing, or the underlying rationale of tracing. If the argument is that the nature of tracing should be more 'mechanical', it fails to appreciate that tracing will be 'mechanical' regardless of whether the rule in *Re Oatway* is incorporated into the statute or not. This is because the rules for identifying substitute assets apply in a fixed manner which cannot be overridden based on abstract notions of justice or morality – and this is the case regardless of whether those rules take wrongdoing into account, which they do in equity, or whether they ignore wrongdoing altogether, as per the above-described argument.

If the argument is that the underlying rationale of tracing under the PPSA should ignore fault and that this would make it more 'mechanical', this fails to appreciate that the rules of tracing, along with all other legal rules, must be rooted in underlying norms. Tracing

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[95] Nair (n 4) 159 [4.61].

[96] The relevant rule in such cases is presumably *pari passu*, incorporating the rolling charge approach where relevant, since this applies to other mixtures of the property of multiple innocent parties: *Keefe v Law Society (NSW)* (1999) 44 NSWLR 451, 460–1; *Caron v Jahani (No 2)* (2020) 102 NSWLR 537.

[97] Cuming, 'Protecting Interests in Proceeds' (n 63) 442; Gedye, Cuming and Wood (n 1) 186 [45.10].

[98] Gedye, Cuming and Wood (n 1) 186 [45.10]. Similarly, see Cuming, 'Protecting Interests in Proceeds' (n 63) 434 (suggesting competing claims should not be assessed 'in the context of a "good guys-bad guys" approach'), 442 ('[w]here statutory tracing is involved, the morality of the debtor is not an important issue').

[99] Alternatively, the *pari passu* rule might apply regardless of whether the disposition is unauthorised: see n 96 above. But either way, this would not address the arguments advanced below as to why statutory tracing should continue to delineate based upon wrongdoing.

cannot be explained as a mechanical process whereby a claimant traces 'value' from one asset to another in a manner entirely divorced from normative judgments.[100] Rather, the rules of tracing are rooted in norms recognising that in some circumstances a claimant *should* be entitled to property rights in traceable substitutes (which are themselves encompassed in the metaphor of 'tracing value').[101] Thus, the above-described argument that proceeds should be interpreted by reference to equitable tracing, but without the rule in *Re Oatway*, would not make tracing less normative and thus more 'mechanical'. Rather, it would simply alter the norms underlying tracing such that they no longer draw distinctions based upon whether withdrawals from a mixed fund are wrongful.

Recognising this, the difficulty with this argument is that there is no convincing reason why the tracing rules should ignore wrongdoing just because the claimant is a secured party under the PPSA, as opposed to a beneficiary under a trust.[102] In both cases the wrongdoing trustee/grantor is applying property rights, which they have control over but do not have full beneficial ownership rights in, in a manner that causes detriment to the beneficiary/secured party. In both cases, subordinating the interest of the wrongdoing trustee/grantor ensures that the beneficiary/secured party is not worse off due to the trustee/grantor's wrongdoing.

By contrast, if this principle of subordinating wrongdoers is not incorporated into the statutory tracing rules, those rules would create more arbitrary results than would be the case in equity because they would depend solely on the order of withdrawals by wrongdoing grantors rather than on the fact of the wrongdoing itself. This is demonstrated by the fact that the same argument described above, which is made in support of abandoning the rule in *Re Oatway*, could equally lead to the conclusion that the PPSA should abandon the converse rule in *Re Hallett's Estate*; or that the PPSA should abandon both of the above-described rules and instead replace them with the first-in first-out rule from *Devaynes v Noble (Clayton's Case)*.[103] Each of these options would have the same effect of altering the norms underlying tracing to ignore wrongdoing. None of them would be any more or less 'mechanical' than the equitable tracing rules themselves.

[100] Cutts (n 10).

[101] See Nair (n 4) Chapter 2.

[102] Assuming that the latter's interest is not itself a security interest under PPSA s 12(1).

[103] (1816) 1 Mer 572, 608; 35 ER 781, 793.

Consequently, the interpretation of proceeds by reference to equity should not exclude the rule in *Re Oatway*.

3 *Is Subordinating Wrongdoers Unfairly Detrimental to Unsecured Creditors?*

Another argument against interpreting proceeds in a manner that incorporates the tracing rules which subordinate the interests of wrongdoers is that statutory tracing issues almost always arise in the grantor's insolvency, such that the effect of subordinating the interest of a wrongdoing grantor actually just subordinates the interests of innocent unsecured creditors claiming through that grantor.[104] However, unsecured creditors' claims in the grantor's insolvency are always made through the grantor,[105] and thus this argument is better viewed as a criticism of the nature of property rights in insolvency than as an argument which has particular force in the context of the PPSA.[106] Indeed, it has been pointed out that the same criticism could be levelled at the rules of equitable tracing themselves outside the context of the Act.[107] Consequently, this argument should be rejected.

4 *Does Subordinating Wrongdoers Fail to Reflect that Secured Parties Acquiesce in Breaches?*

It has been suggested that the equitable tracing rules which subordinate the interests of wrongdoers may be inappropriate in the context of the PPSA due to the frequency with which security agreements require grantors to segregate proceeds, only for secured parties to knowingly acquiesce in the grantor breaching that requirement.[108] This is because subordinating wrongdoing grantors in such circumstances allows a secured party to knowingly acquiesce in the grantor wrongfully mixing proceeds with other property, but then

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[104] Cuming, Walsh and Wood (n 1) 631–2 (describing this argument without adopting a view). A similar argument is made in Waters (n 58) 433–4, albeit as a reason against secured parties being able to trace through mixtures at all. The same counter-arguments contained in the body text apply to this.

[105] See Cuming, 'Protecting Interests in Proceeds' (n 63) 438–40.

[106] Relatedly, the PPSA does not specifically aim to protect unsecured creditors, since its publicity function is aimed only at parties who have (or later acquire) interests in collateral: see Section II(B)(2) of Chapter Five.

[107] Cuming, Walsh and Wood (n 1) 631–2 (describing this counter-argument without adopting a view).

[108] Ibid 631; Cuming, 'Protecting Interests in Proceeds' (n 63) 455 (both raising the issue without expressing a view).

to be protected from the detriment this may cause since the equitable tracing rules will subordinate the grantor's interest in any traceable substitute to that of the secured party.[109]

However, interpreting proceeds in a manner that excludes the tracing rules which subordinate the interests of wrongdoers is unnecessary to address this problem, because the grantor is already sufficiently protected by its personal rights against the secured party. For example, such a grantor could argue that the secured party is estopped from claiming the traceable substitute as proceeds in such circumstances. Although it has been suggested that this may entail making difficult findings of fact,[110] the same is true of any other personal claims which may arise in the context of the Act. Furthermore, the PPSA does not contain a discrete policy of promoting certainty and simplicity which might otherwise have required curtailing such rights.[111] As such, this issue should be left to the common law rights between the secured party and the grantor, and thus does not provide a reason for interpreting proceeds other than by reference to the whole of the equitable tracing rules.

5 *Should the Lowest Intermediate Balance Rule Not Apply in the Ordinary Course of Business?*

It should be briefly noted that one Canadian case has suggested that when interpreting proceeds by reference to the equitable tracing rules, the lowest intermediate balance rule should not apply if the grantor made the relevant deposits and withdrawals in the ordinary course of business.[112] No reasons were provided for this, and the Court instead simply stated: 'We are of the view that the rule is not applicable' in such circumstances.[113] Consequently,

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[109] See, eg, *Canadian Imperial Bank of Commerce v Marathon Realty Co Ltd* [1987] 5 WWR 236, [18]–[23] (Saskatchewan Court of Appeal) (rejecting an argument that a secured party's acquiescence in the grantor's mixing proceeds of sale of collateral with other funds prevented the secured party from claiming the mixed fund as proceeds, albeit that no specified ground such as estoppel was pleaded).

[110] Cuming, Walsh and Wood (n 1) 631; Cuming, 'Protecting Interests in Proceeds' (n 63) 455 (including at 455 n 125).

[111] See Section III of Chapter Five.

[112] *General Motors Acceptance Corp of Canada Ltd v Bank of Nova Scotia* (1986) 55 OR (2d) 438, [15] (Ontario Court of Appeal).

[113] Ibid.

this does not demonstrate why proceeds should be interpreted so as to exclude the lowest intermediate balance rule in circumstances where it would otherwise apply in equity.[114]

It follows that the words 'identifiable or traceable' within s 31(1) should be interpreted to incorporate the entirety of the existing rules of tracing into the Act. However, this does give rise to one further question, the answer to which has been assumed up until this point. This is whether, if proceeds are to be interpreted by reference to the existing tracing rules, such rules must necessarily be those in equity as opposed to those at common law.

D *A Further Question: Tracing in Equity* or *at Law?*

It is commonly assumed that if proceeds are to be interpreted by reference to the rules of tracing, those rules must be those of equity rather than those of the common law.[115] This is almost certainly correct, but it is nonetheless important to explain why. However, this is complicated by the ongoing debate concerning whether there is a distinction between tracing in equity and at law. There are three different views within this debate. These are:

1. That there are different tracing rules in equity and at law;
2. That there is a single set of tracing rules, which are neither legal nor equitable in nature; and
3. That there is a single set of tracing rules, which are equitable in nature.

Regardless of which of these views is correct, proceeds under the PPSA should be interpreted by reference to the equitable rules (or by reference to the unitary tracing rules if they are neither legal nor equitable in nature, which amounts to the same thing).

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[114] This is not to deny that exceptions to this rule may exist in equity: see n 6 (concerning whether 'backwards tracing' is possible). But any such exceptions should apply in the same way in the context of the PPSA as they do in equity.

[115] Eg, Mirzai and Harris (n 1) 311 [31.5.2]; Cuming, 'Protecting Interests in Proceeds' (n 63) 430; Gedye, Cuming and Wood (n 1) 182–3 [45.7]; Widdup (n 63) 248 [18.16]. Alternatively, some commentators and courts have simply not delineated between the two: eg, Duggan (n 1) 372 [11.16]; Cuming, Walsh and Wood (n 1) 624; Ziegel, Denomme and Duggan (n 54) 229 [25.4.5]; *Transamerica Commercial Finance Corp, Canada v Royal Bank of Canada* (1990) 70 DLR (4th) 627, [25] (Saskatchewan Court of Appeal); *Flexi-Coil* (n 85) [26]; *Toronto-Dominion v Co-Pac* (n 89) [25].

1 *If Tracing in Equity and at Law are Different*

If there is a difference between tracing in equity and at law, then there are two indications within the PPSA which suggest that proceeds should be interpreted by reference to equity. The first arises from the legislative history of the words 'or traceable' in the definition of proceeds.[116] As described above, these words were inserted into the Canadian statutes to clarify that it was possible to trace through a mixed fund.[117] However, the orthodox view is that it is not possible to trace through a mixed fund at common law.[118] Consequently, the legislative history of these words suggests that the provision should be interpreted by reference to the equitable tracing rules, if they are different to those of the common law.

The second indication suggesting the provision should be interpreted by reference to equity is based on contextual interpretation. The reason to trace into a substitute under the Act, and thus to characterise that substitute as 'proceeds', is so that a secured party can assert its security interest in the proceeds – ie, so that it can assert a proprietary claim to the substitute. This claim more closely resembles the equitable claim to traceable substitutes, which is proprietary,[119] than it does the claims at law, which are personal in nature.[120]

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[116] PPSA s 31(1).

[117] See Section II(A) above.

[118] *Taylor v Plumer* (n 5) 575 (M & S), 726 (ER); *Re Diplock* (n 5) 518–19. But see Michael Scott, 'The Right to Trace at Common Law' (1966) 7(4) *University of Western Australia Law Review* 463, 470–7; Salman Khurshid and Paul Matthews, 'Tracing Confusion' (1979) 95 *Law Quarterly Review* 78; Lionel Smith, 'Tracing in *Taylor v Plumer*: Equity in the Court of King's Bench' (1995) *Lloyd's Maritime and Commercial Law Quarterly* 240, particularly at 265–6 ('Tracing in *Taylor v Plumer*'); Smith, *The Law of Tracing* (n 4) 162–74.

[119] This is not to suggest that a party cannot trace in equity to make a personal claim, or to exercise the remedy of subrogation: *Boscawen v Bajwa* [1996] 1 WLR 328, 334–5 (which itself was an example of tracing for the purposes of subrogation).

[120] See Scott (n 118) 466–70. The exception to this is the claim in detinue under which a claimant can seek an order for delivery up of a chattel *in specie*: David Rolph et al, *Balkin & Davis Law of Torts* (LexisNexis, 6th ed, 2021) 150 [4.60]. But even in detinue the defendant was able, as of right, to pay the value of the chattel to the claimant instead of making specific restitution – at least prior to the statutory intervention which sought to confer powers on common law courts which were previously only available in equity: see Scott (n 118) 467; Roy Goode, 'The Right to Trace and its Impact in Commercial Transactions: I' (1976) 92(3) *Law Quarterly Review* 360, 377. Even following such statutory intervention, the grant of specific relief remains discretionary: *McKeown v Cavalier Yachts Pty Ltd* (1988) 13 NSWLR 303, 307–8.

Finally, it should be noted that although this conclusion could be viewed as requiring the existence of a fiduciary duty between the secured party and grantor,[121] the definition of proceeds explicitly provides that this is not necessary.[122] Thus, if there is a distinction between tracing in equity and at law, proceeds should be interpreted by reference to equity.

2 *If Tracing is a Unitary Process*

The second possibility is that there is a unitary process of tracing which is not 'inherently legal or equitable' in nature.[123] This view emphasises that tracing is an 'exercise which allows us to say that one asset stands in the place of another',[124] and thus that the process itself should neither be dependent on the existence of a fiduciary relationship nor limited by any inability to trace through a mixed fund.[125] If this is correct, then proceeds must simply be interpreted by reference to the rules of tracing. This is much the same as saying that proceeds should be interpreted by reference to the equitable rules of tracing, save that on this view those rules are not uniquely equitable.

3 *If Tracing is Only Equitable*

The third possibility is that there is no such thing as tracing at common law at all. This view builds upon the revised understanding of the seminal case of *Taylor v Plumer*,[126] which Khurshid and Matthews have shown was actually a case about tracing in equity rather than tracing at law.[127] Following from this, it has been argued that Australian courts never interpreted this case as being about common law tracing, nor affirmed it other than in *obiter*

[121] But note this may not be a requirement to trace and claim in equity anyway: see *RnD Funding Pty Ltd v Roncane Pty Ltd* (2023) 297 FCR 91, 103–18 [56]–[113]; Smith, *The Law of Tracing* (n 4) 341–3; Nair (n 4) 172–3 [6.17]–[6.20]; Hafeez-Baig and English (n 4) 140–56 [5.65]–[5.114]. Note also the dicta to this effect in *Woodson (Sales) Pty Ltd v Woodson (Aust) Pty Ltd* (1996) 7 BPR 14,685, 14,707; *Hurt v Freedman* [2002] NSWSC 264, [223]; *Commonwealth Bank of Australia v Saleh* [2007] NSWSC 903, [29]–[30].

[122] PPSA s 31(2).

[123] *Foskett v McKeown* (n 5) 128 (Lord Millett) (Lord Hoffmann agreeing).

[124] Smith, *The Law of Tracing* (n 4) 277. See also Birks, 'Overview' (n 4) 295–7.

[125] Smith, *The Law of Tracing* (n 4), particularly at 120–30, 162–74, 277–9; *Foskett v McKeown* (n 5) 128–9 (Lord Millett) (Lord Hoffmann agreeing); and as to the mixed funds point, see also Smith, 'Tracing in *Taylor v Plumer*' (n 118). Similarly, see Nair (n 4) Chapter 8 (arguing that equitable tracing and claiming is available to claimants who hold legal title as well as equitable rights).

[126] *Taylor v Plumer* (n 5).

[127] Khurshid and Matthews (n 118). See further Smith, 'Tracing in *Taylor v Plumer*' (n 118).

dicta, such that Australian law never adopted the fallacy that common law tracing exists but is more limited than its equitable counterpart.[128] If this is correct, then proceeds must simply be interpreted by reference to the equitable tracing rules. This too is the same as the above view that proceeds should be interpreted by reference to equitable tracing, save for the fact that on this view there is no alternative since the equitable tracing rules are the only tracing rules.

[128] Hafeez-Baig and English, 'Common Law Tracing' (n 5); Hafeez-Baig and English (n 4) Chapter 3.

CONCLUSION

This Chapter applied the second step of the framework for understanding interactions between statute and the common law to the question of how we should interpret the words 'identifiable or traceable' in the statutory definition of proceeds under the PPSA. It showed that these words should be interpreted by reference to the rules of equitable tracing. This improved our understanding of the PPSA by examining its relationship with a particular equitable doctrine. More generally, it demonstrated the usefulness of the framework to addressing questions concerning the relationship between a given statute and a particular common law claim. The following Chapter builds upon this by using the framework to address another question concerning the relationship between tracing and the PPSA. This is whether the equitable claim to traceable substitutes remains available in the context of the Act, separately to the statutory claim to proceeds.

CHAPTER EIGHT: TRACING & THE PPSA – EQUITABLE CLAIMS TO TRACEABLE SUBSTITUTES

TABLE OF CONTENTS

Introduction

This is the second Chapter concerning the relationship between tracing and the *Personal Property Securities Act 2009* (Cth) ('PPSA' or 'Act'). Chapter Seven established that proceeds under the PPSA should be interpreted by reference to the rules of equitable tracing. This Chapter builds upon this by addressing whether a secured party can claim against traceable substitutes in equity, separately to its statutory claim to proceeds under the Act.

In many cases, whether this is possible will be a moot point. This is because the secured party will be able to assert its statutory claim to proceeds, which will be just as good as any equitable claim to those proceeds.[1] However, in some cases a traceable substitute will not be proceeds under the Act, and will thus not be subject to the secured party's statutory claim. This is because the definition of proceeds requires the grantor to have 'an interest in the proceeds',[2] and also requires that the proceeds are themselves 'personal property'.[3] In such circumstances, the availability of the secured party's equitable claim becomes important.

This is demonstrated by the following three examples in which a traceable substitute in equity would not constitute proceeds under the Act.[4] First, where a grantor transfers funds from its bank account subject to a security interest to a third party's bank account, in which case the third party's account will not be proceeds because the grantor will not have an interest in it.[5] Secondly, where a grantor makes an unauthorised transfer of collateral to a

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[1] Note the ability to recover against both original collateral and its proceeds: PPSA s 32(1)–(2).

[2] Ibid s 31(3)(a)(i). Subsection (3)(a)(ii) provides that it is also sufficient if 'the grantor has the power to transfer rights in the proceeds to the secured party'. But note the proposed amendment to delete these words: Australian Government, 'Explanatory Memorandum (Sch 3 – Ch 7)', *Public Consultation on the Government's response to the statutory review of the Personal Property Securities Act 2009* (22 September 2023) 7 [71], item 17 <https://consultations.ag.gov.au/legal-system/government-response-to-pps-review/>.

[3] PPSA s 31(1).

[4] Each of the examples also applies to cases where the 'collateral' is itself 'proceeds' under the Act.

[5] Although a security interest 'continues in the collateral' under PPSA s 32(1)(a), the bank account of the transferee is a different chose in action to the bank account of the transferor, and thus the security interest cannot 'continue' in it. There is debate concerning why tracing is available in such circumstances, but there is little doubt that it is so available: see, eg, Lionel D Smith, *The Law of Tracing* (Clarendon Press, 1997) 249–55 (explaining this as a case of tracing in transit); James Edelman, 'Understanding Tracing Rules' (2016) 16(2) *Queensland University of Technology Law Review* 1, particularly at 8 (explaining this within the argument that

third party, and the third party then exchanges the collateral for a substitute, in which case the substitute will not be proceeds because the grantor will not have an interest in it. Thirdly, where a grantor applies collateral towards the purchase price of land, in which case the land will not be proceeds because it is not personal property.

The first two examples are particularly important as they can be easily exploited by unscrupulous grantors – ie, by those grantors simply transferring property to related third parties.[6] For example, in *Toronto-Dominion Bank v Co-Pac Ltd*, the vice president of a debtor-company caused the company to transfer $33,000 from a bank account subject to a security interest into his own bank account, and then transferred the same amount from his account to his daughter's bank account.[7] The secured party successfully claimed against the daughter's account as proceeds, but this was only possible because the Ontario counterpart to the PPSA does not require the debtor to have an interest in property for it to be characterised as proceeds.[8] By contrast, under the Australian Act the daughter's account would not be 'proceeds', and thus the secured party's ability to seek proprietary relief would turn on whether it was able to claim against that account as a traceable substitute in equity.

The question of whether this equitable claim remains available in the context of the PPSA, or its international counterparts, does not appear to have been subject to any detailed consideration thus-far.[9] This is despite the fact that it was directly relevant to a recent

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tracing is based in causation); James Penner, 'Tracing and Payment Systems' in Sinéad Agnew and Marcus Smith (eds), *Law at the Cutting Edge: Essays in Honour of Sarah Worthington* (Hart Publishing, forthcoming) (explaining this on the basis of contract and agency law); Tatiana Cutts, 'Dummy Asset Tracing' (2019) 135(1) *Law Quarterly Review* 140 (explaining this as a case of converting bank money by artifice into a notional 'dummy asset' and then following that asset). Note that although Cutts further argues that the underlying basis for tracing into the bank accounts of innocent third parties is insufficiently robust, it is possible to adopt her explanation without this subsequent argument: see, eg, Mohammud Jaamae Hafeez-Baig and Jordan English, *The Law of Tracing* (Federation Press, 2021) 22–27 [1.63]–[1.79].

[6] Assuming the related third parties have not themselves granted security interests to the same secured party.

[7] (1999) 15 PPSAC (2d) 52 (Ontario Court of Appeal).

[8] *Personal Property Security Act*, RSO 1990, C P.10 s 1(1) ('proceeds') ('PPSA (Ontario)'). Such a limitation is contained in all the other Canadian statutes except for that of Yukon: Ronald CC Cuming, Catherine Walsh and Roderick J Wood, *Personal Property Security Law* (Irwin Law, 3rd ed, 2022) 617.

[9] It has only been possible to identify passing references to this issue in the cases and commentaries: Michael Gedye, Ronald CC Cuming and Roderick J Wood, *Personal Property Securities in New Zealand* (Thomson Brookers, 2002) 180 [45.5]; Roger Fenton, *Garrow & Fenton's Law of Personal Property in New Zealand Volume 2: Personal Property Securities* (LexisNexis, 7th ed, 2010) 503 [12.10].

decision of the Full Court of the Federal Court of Australia, *RnD Funding Pty Ltd v Roncane Pty Ltd* (‘*RnD Funding*’).[10]

In *RnD Funding*, a grantor-company made a gratuitous transfer of $520,000, from a bank account subject to a security interest, to the bank account of a related company. The related company then used those funds to purchase shares, and in turn transferred those shares to another related company. The Court held that the secured party could claim against the shares as a traceable substitute in equity. This was crucial to the secured party’s success, since no statutory claim was available as the shares were not proceeds, the grantor-company itself not having any interest in them.[11] However, in so holding that this equitable claim was available, the Court did not discuss the PPSA at all.[12] This is perhaps due to the absence of any argument concerning the Act at first instance or on appeal.[13] Thus, it is necessary to address the continued availability of the equitable claim from first principles.

As per the more general analysis as to whether there is room for equity in the context of the PPSA,[14] the starting point is that the equitable claim to traceable substitutes remains available unless it is not ‘capable of operating concurrently’ with the Act.[15] Consequently, the questions which need to be addressed are as follows. First, is this equitable claim contrary to any of the general policies of the PPSA? This is considered in Section I. Secondly, if not, would the continued operation of equitable tracing and claiming nonetheless create more specific clashes which would undermine the policies of the PPSA, including due to the possibility that the equitable and statutory claims would be concurrently available in some cases? This is considered in Section II.

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[10] (2023) 297 FCR 91 (‘*RnD Funding*’).

[11] PPSA s 31(3)(a)(i).

[12] This is despite the security agreement adopting terminology from the Act: *RnD Funding* (n 10) 95 [15], quoting clause 4.8 of the General Security Deed.

[13] The whole consideration of the impact of the PPSA on the tracing issue in the first instance judgment was as follows: ‘It may be noted that we are not here concerned with the priorities afforded by the *Personal Property Securities Act* in respect of security interests attaching to circulating and non-circulating assets. Therefore, the rules described in that legislation are not relevant. Rather, we are concerned with general law principles as to the process of tracing the proceeds of proprietary interests’: *Goldus Pty Ltd (subject to a Deed of Company Arrangement) v Cummins (No 4)* (2021) 157 ACSR 118, 179 [310].

[14] See Section I of Chapter Six.

[15] PPSA s 254(1).

I Broader Policies of the PPSA

There are two broader policies of the PPSA which could be inconsistent with the continued availability of equitable claims to traceable substitutes in its context. These are the promotion of substance over form, and the publicity function. Although promoting certainty and simplicity could also be relevant, there is no need to address this because it is not a discrete policy of the Act.[16]

A *Substance over Form*

It could be argued that the equitable claim to traceable substitutes requires us to delineate between different common law 'forms' of security interests under the PPSA, and is thus contrary to the policy of promoting substance over form. However, as is demonstrated below, a secured party's equitable claim to traceable substitutes does not turn on the common law characterisation of its security interest. Consequently, this argument falls away.

Even if this was wrong, this argument could still be rejected because it overstates the policy of substance over form. Since this only requires recognising a range of property interests as security interests, and then applying the rules of the PPSA to all such security interests irrespective of their common law 'form',[17] it would not be undermined by the equitable claim to traceable substitutes even if that claim did require us to so delineate between security interests. However, it is worth examining why the equitable claim does not require this in the first place. This is because, in addition to doing away with the above argument at the very outset, it also sheds light on *when* a secured party will be able to claim against a traceable substitute in equity.

1 *Common Law Form & Equitable Claims to Traceable Substitutes under the PPSA*

The 'unitary model' of the security interest could suggest that the equitable claim to traceable substitutes remains available. This is because all security interests are characterised as charges under that model,[18] and it is accepted that chargees are entitled to claim against

[16] Cf Section II(B)(2) of Chapter Seven, which addressed this separately due to its being drawn upon by overseas courts and commentators to justify not interpreting proceeds by reference to equity.

[17] See Section I(B) of Chapter Five.

[18] See Section III(A)(1) of Chapter Four.

traceable substitutes in equity.[19] However, as argued elsewhere, even if this model of the security interest is correct, its consequences should be limited to explaining why a grantor that is a bailee/lessee has sufficient 'rights in the collateral' for a security interest to attach.[20] Thus, the security interest should be viewed as retaining its common law 'form' for the other limited purposes where this matters.[21] Consequently, to determine whether a secured party is able to claim against a traceable substitute in equity, it is necessary to consider each possible common law characterisation of the security interest.

The starting point for doing so is that a security interest under the PPSA must constitute an in-substance and/or a deemed security interest.[22] With respect to the in-substance security interest under s 12(1) of the Act, the requirement that there is 'an interest in personal property' means that the secured party must always hold a recognised property interest as that term is understood at common law.[23] Furthermore, the requirement that the interest is 'provided for by a transaction' means that such an interest must be one that is created consensually rather than one that is created automatically by operation of law.[24] Taken together, these propositions mean that there are only a limited number of possible property interests which can be characterised as in-substance security interests. Similarly, there are a limited number of interests which can be characterised as deemed security interests, because each type of deemed security interest requires the existence of a specified common law property interest.[25]

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[19] *RnD Funding* (n 10) 122 [129]; *Buhr v Barclays Bank* [2001] EWCA Civ 1223, [26]–[29] ('*Buhr*'). Although *Buhr* (n 19) is criticised in Magda Raczynska, *The Law of Tracing in Commercial Transactions* (Oxford University Press, 2018) Chapter 6, she does not dispute that an equitable mortgagee or chargee can claim against traceable substitutes arising from unauthorised dispositions.

[20] 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.

[21] For one such example, see Adam Waldman, 'Resolving Priority Competitions Between PPSA Security Interests and Non-PPS Interests' (2021) 44(2) *University of New South Wales Law Journal* 811, 832–48.

[22] PPSA s 12(1), (3).

[23] See Section II(A) of Chapter Four.

[24] *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd* (2014) 49 VR 86, 123–8 [110]–[126] ('*Dura*').

[25] Note that the interest of a transferee of an account under PPSA s 12(3)(a), being legal or equitable ownership of a chose in action, is not an interest *in rem* in the sense that it is not enforceable against the whole world. But it is nonetheless possible to trace from such an interest: see Smith, *The Law of Tracing* (n 5) 363–5.

It follows that the types of common law property interests which can constitute security interests, and can thus raise the question of whether a secured party can trace and claim against substitutes in equity, can be divided into the following four categories:[26]

1. Where the secured party holds equitable rights in the collateral – ie, the interest of an equitable mortgagee, an equitable chargee, or a beneficiary under a trust;[27]
2. Where the secured party is an assignee of a debt, either in equity or at law;
3. Where the secured party is a bailor – ie, the interest of a retention of title vendor, a hirer under a hire purchase arrangement, a lessor, a consignor, or any other bailor whose interest is characterised as a security interest; and
4. Where the secured party does not fall into the above categories – ie, the interest of a pledgee, or a legal mortgagee who is not also a bailor (and thus does not fall into the third category above).[28]

It will be shown below that it is possible to claim against traceable substitutes in equity from the interests in each of these four categories. Consequently, it is possible to claim against a traceable substitute in equity from every possible common law property interest which can be characterised as a security interest under the PPSA. Thus, the equitable claim does not require us to delineate between security interests based on their common law 'form'.

[26] The first and last categories can only be in-substance security interests, whereas the second and third categories can be in-substance or deemed security interests. Cf *Kirkalocka Gold SPV Ltd v Zenith Pacific (KLK) Pty Ltd* [2024] FCA 428, [75]–[77] (a putative grantor had an option to purchase goods but did not have possession of them, and it was held that this constituted a security interest). Respectfully, even if such rights can constitute a security interest, that security interest cannot attach to the collateral until the grantor obtains possession. This is because, prior to this time, the grantor would not have 'rights in the collateral' under s 19(2)(a) (including under sub-s (5)). This point was, perhaps wrongly, conceded: at [80]–[81]. Thus, until possession is obtained, any such security interest will not constitute a property interest from which a secured party can trace; and once possession is obtained, there will be a bailment such that the security interest will fall within the third category.

[27] The interest of an equitable assignee of a debt could also fall within this category, but is dealt with separately since the analysis as to tracing may be different.

[28] This will be the case where the security interest would be characterised as a legal mortgage, and the collateral is either a chose in action *or* a chose in possession in the possession of the secured party.

As to the first category, where the secured party holds equitable property rights, it is uncontroversial that it can claim against traceable substitutes.[29]

As to the second category, where the secured party is an assignee of a debt, it is necessary to distinguish between equitable and legal assignments. In the case of an equitable assignment, once a debt is discharged by payment to the assignor, that payment is held in equity for the benefit of the assignee.[30] If the assignor then misappropriates that payment in breach of its agreement with the assignee, such as by making an unauthorised transfer of the payment to a third party, the assignee should be able to trace and claim just like any other holder of an equitable interest in property that has been misappropriated by the legal owner.[31] In the case of a legal assignment, the debt will only be discharged by payment to the assignee.[32] As such, the issue of claiming against traceable substitutes of the debt simply does not arise, because the debt will remain on foot until the assignee is paid such that no substitute for it can arise at all.[33]

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[29] For trusts, see, eg: *Re Oatway* [1903] 2 Ch 356, 359–60; *Scott v Scott* (1962) 109 CLR 649, 660–2. For mortgages and charges, see: *RnD Funding* (n 10) 122 [129]; *Buhr* (n 19) [26]–[29].

[30] *G E Crane Sales Pty Ltd v Commissioner of Taxation (Cth)* (1971) 126 CLR 177, 183 (Menzies J).

[31] It is unsettled whether the equitable assignee of a debt is a trust beneficiary: compare Gregory J Tolhurst, *The Assignment of Contractual Rights* (Bloomsbury, 2nd ed, 2016) 67–8 [4.07] to James Edelman and Steven Elliott, 'Two Conceptions of Equitable Assignment' (2015) 131 *Law Quarterly Review* 228. But even if there is no trust over the debt itself, 'equity will of course require an assignor to hold the fruits of any assignment on trust for the benefit of the assignee': Tolhurst (n 31) 68 [4.07]. Consequently, this should not affect the rights of an equitable assignee to claim against a traceable substitute in equity if the property subject to its equitable interest is misappropriated.

[32] See Tolhurst (n 31) 391 [8.06] (and citations therein).

[33] The ability to make multiple legal assignments of a debt which is characterised as an account under the PPSA may raise further complications: see John G H Stumbles, 'The Impact of the *Personal Property Securities Act* on Assignments of Accounts' (2013) 37(2) *Melbourne University Law Review* 415, 447–57. But note that it may have already been possible to make multiple such assignments under pre-PPSA law, depending upon the unsettled question of whether the statutory assignment of a debt has substantive or merely procedural effect: see Tolhurst (n 31) 101–12 [5.04]–[5.27] (summarising both views, and arguing in favour of the former). This is not dealt with in this Chapter due to its limited practical importance. Such a case could only arise if (1) a grantor made multiple legal transfers of an account, (2) the debtor paid one of the transferees without coordinating with the other transferee, notwithstanding that she would have known of both the transfers since notice is required for each to have been assigned at law under s 12 of the *Conveyancing Act 1919* (NSW) (and its counterparts), and (3) the transferee which was not paid sought to claim against the payment in the hands of the other transferee as a traceable substitute.

As to the third category, where the secured party holds legal property rights as a bailor, there is insufficient authority to say with certainty whether such a secured party can claim in equity against a traceable substitute arising from the wrongful disposition of the collateral by the bailee.[34] The lack of case law on this point is perhaps because there was less of a need to trace and claim in equity under pre-PPSA law where a bailee sold goods without authorisation, as the bailor's rights in the original goods would ordinarily have prevailed due to the limited availability of the exceptions to the principle of *nemo dat quod non habet*.[35] But cases where the bailor's rights in the original collateral do not prevail are more likely to arise under the PPSA because of the relatively wider availability of the taking free rules, which apply equally to the security interests of bailors as they do to other security interests.[36] Thus, to determine whether claims to traceable substitutes in equity are available to such parties, it is necessary to turn to the academic accounts of when it is possible to claim against traceable substitutes in equity more generally.

As to the fourth category, where the secured party is a pledgee or a legal mortgagee who is not also a bailor, it is also unsettled whether it is possible to claim against traceable substitutes in equity from such interests. The reason for this is likely the same as that in the above category – ie, the circumstances which could preclude the pledgee or mortgagee from asserting a first-ranking claim to the original collateral were very limited under pre-PPSA law,[37] and thus there would rarely have been any need to attempt to trace and claim in equity against a substitute.[38] Thus, whether it is possible to claim against traceable substitutes in

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[34] But see *Re Hallett's Estate* (1880) 13 Ch D 696, 709–10 (suggesting that it is so possible). As to why this should not be explained on the basis of the existence of a fiduciary duty, see Smith, *The Law of Tracing* (n 5) 123–6; Hafeez-Baig and English (n 5) 141–4 [5.68]–[5.76].

[35] Eg, *Sale of Goods Act 1923* (NSW) ss 26(1) (estoppel), 28(1) (seller in possession) 28(2) (buyer in possession); *Factors (Mercantile Agents) Act 1923* (NSW) s 5 (mercantile agents).

[36] PPSA Pt 2.5.

[37] Under pre-PPSA law, the exception for sales by mercantile agents could apply (eg, *Factors (Mercantile Agents) Act 1923* (NSW) s 5), but the other exceptions within the sale of goods statutes could not because those statutes exclude contracts intended to operate by way of pledge or mortgage (eg, *Sale of Goods Act 1923* (NSW) s 4(4)).

[38] As to the pledge, there are some cases concerning disputes between a pledgee who released actual possession to the pledgor for a limited purpose, and a subsequent pledgee to whom the pledgor then made a subsequent pledge: *Mercantile Bank of India Ltd v Central Bank of India Ltd* [1938] AC 287; *Lloyds Bank Ltd v Bank of America National Trust and Savings Association* [1938] 2 KB 147; both cited in Sheelagh McCracken et al,

equity from such interests also requires further consideration of the right to so claim more generally.

2 *Limited Importance of Common Law Form to Equitable Claims to Traceable Substitutes under the PPSA*

Commentators have provided several different views as to the nature of the underlying rights which are required for a party to claim against a traceable substitute in equity. By examining each of these views, we can determine whether it is possible to so claim from the property interests under the third and fourth categories above – ie, whether it is possible to claim against traceable substitutes in equity from bailments, pledges and legal mortgages. The below analysis demonstrates that, under each of these views except for one, this is possible. It further demonstrates that the one view under which this might not be possible is deficient in its applicability to several property interests which have a security function. Consequently, that view should not be accepted in this context anyway. Thus, it shows that the ability of a secured party to claim against traceable substitutes in equity does not turn on the common law form of its security interest. This is a more complicated method of proving this point than if the analysis simply adopted one of these views as correct. But it also ensures that the conclusion ultimately drawn does not depend on the correctness of any particular view, in circumstances where Australian courts have had limited opportunities to consider them in depth.

The leading view as to when tracing is available, originally propounded by Smith and Birks, is that a claimant must hold pre-existing property rights in an asset to claim against its traceable substitute in equity.[39] On this view, such claims are possible from both legal and equitable property interests in the original asset.[40] Where the original interest is equitable, this is because claims to traceable substitutes are said not to be limited by the need for fiduciary

Everett and McCracken's Banking and Financial Institutions Law (Thomson Reuters, 9th ed, 2017) 564–5 [13.770]. But in neither case did the original pledgee seek to trace and claim in equity against the substitute for the pledged goods.

[39] Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press, rev ed, 1989) 377–85; Peter Birks, 'Overview: Tracing, Claiming and Defences' in Peter Birks (ed), *Laundering and Tracing* (Clarendon Press, 1995) 289, 311–15 ('Overview'); Smith, *The Law of Tracing* (n 5) 299–302; adopted in *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296, 417 [560]; *Wurth Australia Pty Ltd v Burgess* [2012] WASC 504, [42]; *Chickabo Pty Ltd v Zphere Pty Ltd (No 2)* [2019] VSC 580, [114] n 81.

[40] Smith, *The Law of Tracing* (n 5) 339–51.

duties;[41] and where the original interest is legal, this is because claiming against substitutes in equity is said to be justified either by the equitable jurisdiction over fraud or by the inadequacy of legal remedies in such circumstances.[42] If this is correct, a secured party's claim to traceable substitutes in equity will not turn on the common law form of its security interest, and will be available regardless of which of the four above-described categories it falls within.

Another view, more recently proposed by Nair, is that the equitable claim to traceable substitutes requires a relationship of control of assets.[43] Such a relationship is one where a party has a legal power to vary the rights of the claimant in relation to an asset, owes a duty not to exercise that power in certain circumstances, and is able to validly exercise the power even in breach of the duty.[44] These requirements will be satisfied by any security interest, as the grantor will always have the power to vary the secured party's rights in collateral by virtue of the taking free and priority rules of the Act,[45] will owe a duty to the secured party not to exercise that power in breach of the security agreement, and will be able to validly do so due to those statutory rules even where the relevant dealing is in breach of that duty. This view too does not delineate between different common law characterisations of the original property interest. Thus, if it is correct, a secured party's claim to traceable substitutes in equity will again not turn on the common law form of its security interest, and will be available regardless of which of the four above-described categories it falls within.

A third view, put forth by Hafeez-Baig and English, is that to trace and claim in equity a claimant must either have a pre-existing equitable property interest *or* a pre-existing legal property interest in circumstances where another party owes 'stewardship duties' to the claimant in respect of the property.[46] Respectfully, this view cannot be applied to determine

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[41] Ibid 341–3.

[42] Ibid 345–6. Similarly, see *Re Hallett's Estate* (n 34) 709–10. Cf Birks, 'Overview' (n 39) 297–300 (arguing that the legal and equitable claims to traceable substitutes must be fused to address this, as opposed to the equitable claim simply being available in such circumstances).

[43] Aruna Nair, *Claims to Traceable Proceeds: Law, Equity, and the Control of Assets* (Oxford University Press, 2018) Chapter 6.

[44] Ibid 199–200 [6.84].

[45] PPSA Pts 2.5–2.6. This accords with Nair's definition of a 'power' as 'an objective capacity, however arising, to vary the vested rights of another person by one's own voluntary act': ibid 180–94 [6.38]–[6.73] (quote at 194 [6.73]).

[46] See Hafeez-Baig and English (n 5) Chapter 5.

whether tracing is available from security interests which would have been characterised as legal interests at common law, due to its reliance on 'stewardship duties'. This term was adopted from an article by Mitchell, who uses it, in a different context, to describe circumstances where 'one person controls property that she must administer and apply for the benefit of another, to whom she must account for what she does with the property'.[47] In that article the term is used for two purposes, both unrelated to tracing.[48]

Hafeez-Baig and English adopt this term to explain why judicial references to 'fiduciary duties' being a pre-requisite to tracing should instead be understood as referring to 'stewardship duties'.[49] Although they suggest that the term should not be treated 'as a legal term of art',[50] their view nonetheless seems to elevate stewardship duties to a test which determines when the equitable claim to traceable substitutes is available from a legal interest.[51] This may in turn require the determination of whether such duties exist in relationships against which they do not comfortably fit, such as whether a mortgagor owes stewardship duties to a mortgagee. Consequently, if this view of tracing is correct, this requirement should be limited to those relationships against which stewardship duties more naturally fit, and should thus not apply to security interests under the PPSA which would be characterised as legal interests at common law. Thus, even if this view of tracing is correct, the equitable claim to traceable substitutes from such security interests should instead be determined in accordance with one of the other views of when tracing is available. It follows that it must be possible to claim against traceable substitutes in equity from any security interest, regardless of how it would be characterised at common law.

3 *Conclusions on Common Law Form & Equitable Claims to Traceable Substitutes under the PPSA*

The equitable claim to traceable substitutes is not incapable of operating concurrently with the policy of promoting substance over form. This is because any interest which can be characterised as a security interest under the PPSA will be sufficient for a secured party to

[47] Charles Mitchell, 'Stewardship of Property and Liability to Account' (2014) (3) *The Conveyancer and Property Lawyer* 215; quoted in ibid 129 [5.36].

[48] Mitchell (n 47), particularly at 216–27.

[49] Hafeez-Baig and English (n 5) 129–34 [5.35]–[5.48].

[50] Ibid 129 [5.36].

[51] Cf Mitchell (n 47), who similarly states at 215 that '"[s]tewardship" is not a legal term of art', but does not proceed to use it as a test.

advance a claim against traceable substitutes in equity, regardless of its common law form. Thus, in any given case where a secured party wishes to do so, there is no need to even determine how its security interest would be characterised at common law, as the answer will not affect its ability to make such a claim in equity.

B *Publicity Function*

The other broad policy of the PPSA which it could be argued is inconsistent with equitable claims to traceable substitutes by secured parties is the publicity function.[52] The starting point for this argument is that a security interest will only be enforceable against proceeds in the grantor's insolvency if it is perfected,[53] which in turn requires that it is covered by a registration on the Personal Property Securities Register ('PPSR').[54] Such a registration should always be discoverable by a PPSR search against the grantor because, for property to be proceeds, the grantor must itself have an interest in it.[55] Thus, any party contemplating obtaining a property interest in proceeds should always be able to discover the existing secured party's claim to those proceeds via a PPSR search.[56] However, if a secured party were able to claim against a traceable substitute in the hands of a third party, such a claim would not be discoverable by a PPSR search against that third party. This, it could be argued, would undermine the publicity function by allowing the secured party to advance an undiscoverable claim on the basis of its security interest which could prevail against a competing property interest in the same substitute.[57]

The difficulty with this argument is that it overstates the significance of the publicity function as it pertains to proceeds. For a financing statement to cover proceeds, it must either

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[52] See Section II of Chapter Five.

[53] PPSA s 267.

[54] Ibid s 33(1).

[55] Ibid s 31(3)(a)(i). Note Ronald CC Cuming, 'Protecting Interests in Proceeds: Equity and Canadian Personal Property Security Acts' in Waters (ed), *Equity, Fiduciaries and Trusts* (Carswell, 1993) 423, 426–7 (linking this to the publicity function).

[56] Unless the PPSR search is conducted during the five business day period of temporary perfection conferred upon some security interests in proceeds: PPSA s 33(2).

[57] Note that this concern only arises with respect to equitable claims to substitutes in the hands of third parties. If the secured party sought to trace and claim in equity against the grantor itself, sufficient notification would be provided by the PPSR registration against that grantor.

already cover the proceeds in its description of original collateral,[58] or alternatively the registrant must have ticked the 'proceeds box' and described the proceeds by item *or* by class *or* as all present and after-acquired property.[59] There are no statutory consequences for always ticking the proceeds box and describing the proceeds as all present and after-acquired property,[60] and when registering through the official Government website these options are in fact pre-populated as such.[61] As put in the Final Report to the Statutory Review of the PPSA (the 'Whittaker Report'), this is because:[62]

> At the time a secured party registers its financing statement, it is unlikely to know what the nature of any proceeds might be that the grantor might receive in the future from a dealing with the collateral. The default option removes that uncertainty for the secured party, and ensures that the security interest can be perfected over proceeds, whatever form they take.

This ability to so describe the proceeds as all present and after-acquired property substantially reduces the extent to which registrations do, in fact, publicise claims to proceeds.[63] Bearing in mind the limited scope of the publicity function, which only seeks to provide notice that a registrant might have a security interest,[64] all that a PPSR search of a grantor which discloses one or more such financing statements tells the searcher is that it needs to make further inquiries of *every* such registrant to determine whether any of their security interests do cover particular property on the basis that it is proceeds. Such inquiries will be impractical in many cases. Indeed, the limited effectiveness of this mechanism for publicising claims to proceeds is why the Whittaker Report recommended amending the Act

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[58] PPSA s 33(1)(b)–(c).

[59] Ibid ss 33(1)(a), 153 item 4; *Personal Property Securities Regulations 2010* (Cth) reg 5.5(1) sch 1 cl 2.4.

[60] Although the grantor itself could object to this.

[61] See Australian Government, 'Additional details and other registration requirements', *Australian Financial Security Authority* < https://www.ppsr.gov.au/registering/you-create-registration/additional-details>.

[62] Bruce Whittaker, *Review of the Personal Property Securities Act 2009: Final Report* (Final Report, February 2015) 274 [7.4.6.1.1] ('Whittaker Report').

[63] As noted in ibid 274 [7.4.6.1.1]; Anthony Duggan, *Australian Personal Property Securities Law* (LexisNexis, 3rd ed, 2021) 386 [11.39]. See also Jacob S Ziegel and David L Denomme, *The Ontario Personal Property Security Act* (Butterworths, 2nd ed, 2000) 215 [25.5] (noting that if the PPSA (Ontario) (n 8) was amended such that registrations had to indicate that they covered proceeds to perfect a security interest in proceeds, as is the case under most of the other Canadian statutes and the Australian Act, such an amendment 'would accomplish little if it is not accompanied by a requirement to specify the types of proceeds being claimed').

[64] See Section II(B)(1) of Chapter Five.

so that a security interest in proceeds is automatically perfected by a registration covering the original collateral, without the need for any further requirements.[65]

Consequently, the above-described argument that the equitable claim to traceable substitutes would undermine the publicity function to such an extent that it must be incapable of operating concurrently with the PPSA should be rejected.

[65] Whittaker Report (n 62) 273–5 [7.4.6.1] (Recommendation 180). This was rejected in the Government response on the basis that '[i]t is important that secured parties continue to meaningfully engage with the PPS Register and ensure their registrations correctly align with the terms of any security agreement': Australian Government, 'Recommendations Index' (n 2) 26. However, this fails to appreciate that the status quo already does not further this objective, because regardless of the scope of the security agreement a secured party will need to select the 'all present and after-acquired property' option to maximise its protection against unauthorised dispositions by the grantor.

II Specific Potential Inconsistencies with the PPSA

Although a secured party being able to claim against traceable substitutes in equity is not inconsistent with the broader policies of the PPSA, such claims could still lead to more specific inconsistencies with the Act, including in circumstances where both the equitable and statutory claims are available in respect of the same property. This Section II examines five such possible inconsistencies, and determines whether, in each case, the equitable claim is incapable of operating concurrently with any of the policies of the Act. Where inconsistencies do arise, it also determines whether equity can adapt in such circumstances to remain capable of operating concurrently with the PPSA, or whether the inconsistency can only be ameliorated by the equitable claim to traceable substitutes being entirely unavailable to secured parties under the Act.

A *Can a Secured Party Trace and Claim to Avoid Unenforceability or Vesting?*

The first possible inconsistency concerns whether a secured party can claim against a traceable substitute in equity to avoid the consequences of its security interest being unenforceable against third parties, or having vested in the grantor in insolvency.[66] However, a secured party should not be able to claim against traceable substitutes in equity in such circumstances at all, such that any possible inconsistency falls away.

This is because, where a security interest is unenforceable against third parties and such a party has a competing claim to a traceable substitute, or where the security interest has vested in the grantor in insolvency, the underlying reasons for allowing the equitable claim to traceable substitutes fall away. There are several possible underlying reasons for why the equitable claim to traceable substitutes is available, but the above proposition is true regardless of which is correct.

If tracing seeks to vindicate property rights,[67] this rationale falls away where those very property rights are either unenforceable or have been lost to the secured party altogether,

[66] PPSA ss 20, 267; *Corporations Act 2001* (Cth) s 588FL.

[67] See, eg, *Foskett v McKeown* [2001] 1 AC 102, 108–9 (Lord Browne-Wilkinson), 127–8 (Lord Millett) (Lord Hoffmann agreeing); R B Grantham and C E F Rickett, 'Property and Unjust Enrichment: Categorical Truths or Unnecessary Complexity' (1997) (5) *New Zealand Law Review* 668, 680–4; Ross Grantham and Charles Rickett, 'Tracing and Property Rights: The Categorical Truth' (2000) 63 *Modern Law Review* 905; Graham Virgo, 'Vindicating Vindication: *Foskett v McKeown* Reviewed' in A Hudson (ed), *New Perspectives on*

because in such circumstances there is no longer any enforceable property right for the equitable claim to vindicate. If tracing seeks to prevent unjust enrichment,[68] this rationale falls away where the claimant's property rights are unenforceable or have been lost due to vesting, because in such circumstances the claimant can no longer be said to have been deprived of those rights, which is a necessary element for the defendant to have been unjustly enriched.[69] If tracing seeks to compensate a claimant for the wrongful alteration of her rights in an asset due to her vulnerability to the defendant's control over that asset,[70] this rationale falls away where the claimant's rights in that asset are unenforceable or have been lost due to vesting because in such circumstances the asset can no longer be meaningfully described as the claimant's, and thus she can no longer be described as vulnerable to the defendant's control of it. Finally, if tracing seeks to impose a duty of next best compliance on a defendant who can no longer comply with his original obligation to the claimant in respect of her property,[71] this rationale falls away where the claimant's property rights are unenforceable or

Property Law, Obligations and Restitution (Routledge Cavendish, 2004) 203, particularly at 211–19; Peter Millett, 'Proprietary Restitution' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook Co, 2008) 309, particularly at 311–22; James Penner, 'Value, Property, and Unjust Enrichment: Trusts of Traceable Proceeds' in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press, 2009) 306; Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 3rd ed, 2015) 12–17. Note also Lionel Smith, 'Unravelling Proprietary Restitution' (2004) 40 *Canadian Business Law Journal* 317, 326–31 (adopting 'a middle view, although it is perhaps closer to [vindicating property rights] than [unjust enrichment]').

[68] See, eg, Peter Birks, 'Property, Unjust Enrichment, and Tracing' (2001) 54 *Current Legal Problems* 231; Robert Chambers, 'Tracing and Unjust Enrichment' in M McInnes and S Pitel (eds), *Understanding Unjust Enrichment* (Hart Publishing, 2004) 263, particularly at 246–79; Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd ed, 2011) 118–19, 121–2, 167–91; Edelman (n 5) 15–18.

[69] Birks, *An Introduction to the Law of Restitution* (n 39) 20–1; Burrows (n 68) 27. But note Birks subsequently resiled from the view that unjust enrichment requires deprivation: Peter Birks, *Unjust Enrichment* (Oxford University Press, 2nd ed, 2005) 79–82; discussed in Lionel Smith, 'Tracing' in Andrew Burrows and Lord Roger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford University Press, 2006) 119, 124–6.

[70] Nair (n 43) Chapter 3.

[71] Hafeez-Baig and English (n 5) Chapter 2, particularly at 57–63 [2.44]–[2.65].

have been lost due to vesting because the absence of any enforceable rights in the property renders moot the defendant's obligation in respect of that same property.[72]

Even if the above is incorrect, a secured party should be unable to claim against a traceable substitute in equity in such circumstances because such a claim would undermine the policy of preventing fraud. As established earlier in this thesis, the provisions concerning both unenforceability against third parties and vesting should be understood as containing this policy – ie, as seeking to prevent the fraudulent assertion of security interests by requiring secured parties to verify the legitimacy of their property interests.[73] This policy would be undermined if a secured party was unable to meet the requirements of those provisions, and was thus unable to verify the legitimacy of its security interest as required by the Act, but was nonetheless able to simply circumnavigate those requirements by claiming against a traceable substitute in equity. Importantly, this is different to those equitable doctrines and remedies which are established based on the conduct of the defendant, which it was previously argued would not undermine such policies.[74] This is because the availability of those doctrines and remedies is not based solely on the existence of the security interest itself, such that they will only be available if the claimant sufficiently evidences the facts required to enliven them to the satisfaction of a court. The same is not true of the equitable claim to traceable substitutes, which arises solely on the basis of the unauthorised disposition of the collateral, and thus assumes the legitimacy of that interest itself. Thus, even if equitable claims to traceable substitutes were still available in the above-described circumstances, they would be incapable of operating concurrently with the Act due to this policy.

Finally, by way of clarification, such limitations on the equitable claim to traceable substitutes should not extend to a case where the security interest is unenforceable against third parties but has not vested in the grantor,[75] and where there are either no competing claims by third parties *or* where any such competing claims do not exhaust the value of the traceable substitute. This is because the underlying rationale for equitable tracing and claiming will remain available in such a case, to the extent that there is any residual value left

[72] The defendant's personal obligations to the claimant may continue in such circumstances. But if the claimant's property rights are either unenforceable or have vested in the grantor, such obligations can no longer be *in respect of that property*.

[73] See Section VII of Chapter Five.

[74] See Section I(A) of Chapter Six.

[75] Ie, if the grantor remains solvent such that none of the events of insolvency under PPSA s 267(1)(a) occur.

in the traceable substitute following the enforcement of claims against it by third parties. Furthermore, the scope of the policy of preventing fraud will not extend to such a case, as the provisions containing this policy would not apply to the original collateral or proceeds in such circumstances. This is because the vesting provisions would not be enlivened at all, and the provision concerning enforceability against third parties would not prevent the security interest from being enforced against collateral once all the claims of third parties were exhausted.[76] Thus, to the extent that these provisions would not apply in such limited circumstances, the policy of preventing fraud contained within them should also not extend to such circumstances. Of course, it is unlikely that cases will commonly arise where a security interest is unenforceable against third parties *and* the grantor remains solvent such that the vesting provisions are not enlivened *and* any claims by third parties do not exhaust the value of the traceable substitute *and* the secured party wishes to claim against that traceable substitute in equity. But where they do, the secured party should still be able to claim against the traceable substitute in equity following the exhaustion of any third parties' claims.

B *Can a Secured Party Trace and Claim to Avoid Statutory Priority Outcomes?*

The second possible inconsistency concerns whether a secured party can claim against a traceable substitute in equity where a statutory claim against that same substitute as proceeds is also available. The issue here is whether, by doing so, the secured party could achieve a better priority outcome than that which would be generated by the priority rules of the PPSA. However, as will be shown below, the priority outcome in such circumstances should be the same as that generated by the direct application of the statutory priority rules. As such, this potential inconsistency falls away.

To explain why this is the case, consider the following example representing a priority competition between two claimants to the same traceable substitute, where their property interests in the original collateral overlapped:

> SP1 has a first-ranking security interest and SP2 has a second-ranking security interest in the same collateral. In breach of her obligations to both secured parties, the grantor sells the collateral. Both secured parties make a proprietary claim to the proceeds of sale.

[76] The security interest would remain 'enforceable against a grantor' under PPSA s 19(1) in such circumstances so long as it remained attached to the collateral.

Under the PPSA, both security interests would automatically attach to the proceeds, and their priority in those proceeds would be the same as in the original collateral.[77] Consequently, the first-ranking secured party would have priority in the proceeds.

In equity, it is unsettled how this priority competition in the traceable substitute would be resolved.[78] One possible answer is that, since both interests in the traceable substitute arise at the same time, the dispute between them should be resolved by analogy to the priority rule for competing interests in after-acquired property – ie, the interest which was provided for by the earlier security agreement should prevail.[79] If this is correct, whether SP1 or SP2 has priority in the traceable substitute in equity would depend on who entered into a security agreement with the grantor first. Such an outcome could clash with the application of the statutory priority rules to their security interests. However, this is an undesirable priority rule for such disputes because it does not reflect that their claims to the traceable substitute arise from previously existing property interests in the original collateral. By contrast, competing claims in after-acquired property are by their nature concerned with new property interests, which cannot come into existence until the assignor acquires an interest in the property. Furthermore, adopting this priority rule would lead to the unprincipled conclusion that an unauthorised disposal by the grantor could alter the priority outcome as between SP1 and SP2 in a traceable substitute by contrast to their priority in the original collateral, notwithstanding that such a disposal may be in breach of the grantor's security agreements with both secured parties.

The alternative and better answer to this question is thus that the priority of the security interests in the original property, as against each other, should be carried forward into the new equitable interests in the traceable substitute. This is analogous to the rule that where

[77] Ibid ss 32(1)(b), (5).

[78] For debate as to when the equitable property interest in a traceable substitute arises, compare Smith, *The Law of Tracing* (n 5) 322–6; Louise Gullifer (ed), Roy Goode and Louise Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security* (Sweet & Maxwell, 7th ed, 2023) 53–4 [1-67] (at the time of substitution) to Birks, 'Overview' (n 39) 307–11; Chambers (n 68) 302–5; David Fox, 'Overreaching' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Hart Publishing, 2002) 95, 100–2 (at the time the claimant elects to enforce). But while this determines priority between an equitable interest in a traceable substitute and another interest in that same substitute where the latter is acquired following the time of substitution, it does not affect the issue in the body text.

[79] *Re Lind* [1915] 2 Ch 345, particularly at 358 (Swinfen Eady LJ), 363–4 (Phillimore LJ), 370 (Bankes LJ).

a trustee makes an authorised exchange of trust property, the beneficiary's interest is transposed to the substitute received in the exchange.[80] While this rule only applies to authorised dispositions of property,[81] it is also appropriate for resolving priority competitions between competing equitable claims to traceable substitutes arising from previously existing and overlapping interests in the same asset. This better reflects that the equitable claims to the traceable substitute only arise from the property interests in the original asset in the first place.[82] It also avoids the unprincipled conclusion that the priority of two interests in a traceable substitute may differ from their priority in the original collateral merely because there was an unauthorised disposal of that original collateral by the grantor.

As such, where multiple secured parties claim against a traceable substitute in equity on the basis of their security interests, the priority of their equitable interests in the substitute, as against each other, will be the same as their statutory priority in the original collateral. Thus, priority will be determined by the rules of the PPSA. To the extent that this entails equity incorporating a statutory rule into the application of its own doctrines and remedies, this is entirely orthodox. For instance, whether equity will complete an imperfect gift requires consideration of any relevant statutory rules for transferring or assigning legal title, in order to determine whether the donor did all that he and only he could do to complete the gift and put it beyond his recall.[83] Similarly in this instance, since the above-described priority rule turns on which property interest had priority in the original collateral, it is necessary for equity to follow the law and thus to determine which security interest would have had priority under the PPSA.

[80] *Re Brown* (1866) 32 Ch D 597, 601 ('Beyond question everything which the trustees sold when converted into money would be impressed with the trusts …'). See further Charles Harpum, 'Overreaching, Trustees' Powers and The Reform of the 1925 Legislation' (1990) 49(2) *Cambridge Law Journal* 277, 277–82.

[81] See generally Fox (n 78).

[82] Note W J Gough, *Company Charges* (Butterworths, 1978) 10 (the same point does not appear in the second edition), citing E L G Tyler, *Fisher and Lightwood's Law of Mortgage* (Butterworths, 8th ed, 1969) 387 ('Generally, the proceeds of the sale of the incumbered property are bound by the same equities and claims as bind the property itself').

[83] *Corin v Patton* (1990) 169 CLR 540, 558–9 (Mason CJ and McHugh J), 582 (Deane J).

One difficulty with this is the possibility that a traceable substitute would not be proceeds under the PPSA at all, such that the statutory priority rules would not apply to it.[84] In such a case, it is contended that priority should be determined based on which security interest would have had priority in the original collateral or its proceeds immediately prior to the disposition which put it beyond the reach of the Act.[85] This would be most in keeping with the underlying rationale of the equitable priority rule itself, and would thus be preferable to setting aside the statute entirely and trying to resolve the competition based solely on the common law priority rules.

Consequently, it will not be possible for a second-ranking secured party to improve its priority in proceeds against a first-ranking secured party by claiming against those proceeds as a substitute in equity. This is because:

- If the first-ranking and second-ranking secured parties both directly claim against the proceeds pursuant to their security interests under the Act: the first-ranking secured party will prevail under the statutory priority rules.
- If the first-ranking and second-ranking secured parties both claim against the proceeds as a traceable substitute in equity: the first-ranking secured party will still prevail because the equitable priority rule will turn on the priority of the security interests in the original collateral, and thus on the PPSA priority rules themselves.
- If the first-ranking secured party claims directly against the proceeds pursuant to its security interest under the Act, and the second-ranking secured party claims against those same proceeds as a substitute in equity: the first-ranking secured party will still prevail because the competition will be between the first-ranking secured party's security interest, and the second-ranking secured party's new equitable interest which arises via its tracing claim. It will thus turn on the common law priority rules,[86] which

[84] Eg, SP1 has a first-ranking security interest and SP2 has a second-ranking security interest in the same collateral. In breach of his obligations to both secured parties, the grantor transfers the collateral to a related party, who then sells the collateral. Both secured parties claim in equity against the proceeds of sale in the hands of the related party as a traceable substitute.

[85] Eg, in the example in n 84, priority would be determined at the time when the related party sold the collateral, and thus SP1 would prevail.

[86] Neither PPSA ss 73–4 will apply in such circumstances.

will themselves (as above) turn on the priority of the security interests in the original collateral, and thus on the PPSA priority rules.

C *Can a Secured Party Trace and Claim to Avoid Statutory Taking Free Outcomes?*

The third possible inconsistency concerns whether a secured party can claim against a traceable substitute in equity in the hands of a buyer or lessee, in circumstances where that buyer or lessee took free of the security interest under the Act.[87] However, this will not be possible if the proposed amendments to the taking free rules which rationalise the knowledge requirements are passed,[88] which seems likely given the absence of any objections to this proposal in the Whittaker Report.[89] If this occurs, for a buyer or lessee to take free of a security interest she must not have knowledge of the security interest or, alternatively, of the breach of the security agreement.[90] If this is the case, the buyer or lessee will be a bona fide purchaser for value against whom a secured party cannot trace and claim in equity anyway.[91] Thus, any possible inconsistency between equity and the PPSA with respect to this issue falls away.

D *Can a Secured Party Trace and Claim to Avoid Statutory Limitations on Remedies?*

The fourth possible inconsistency concerns whether a secured party can claim against a traceable substitute in equity, and then elect to acquire equitable ownership rights rather than an equitable interest in the nature of a security (ie, an equitable lien).[92] If this was possible, the equitable claim to traceable substitutes could allow the secured party to obtain a better remedy than that which is provided for by the Act. This could only arise in cases where the security interest would not be characterised at common law as a traditional security interest such as a mortgage or charge, in which case the secured party would only be able to

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[87] Eg, a grantor makes an unauthorised exchange of collateral in return for proceeds, and then sells the proceeds to a buyer who takes free of the security interest in the proceeds. The secured party seeks to claim in equity against the proceeds on the basis that, although the buyer took free of the security interest, he was not a bona fide purchaser for value without notice and thus cannot defeat the equitable tracing claim.

[88] See Australian Government, 'Recommendations Index' (n 2) 26–7.

[89] Whittaker Report (n 62) 280–3 [7.6.2] (Recommendation 188).

[90] Australian Government, 'Draft Compilation of the Personal Property Securities Act' (n 2) ss 43–52.

[91] Note that to be a buyer or lessee and thus fall within the taking free rules, value must have been provided.

[92] The term 'equitable lien' is used, rather than 'equitable charge', to delineate that this interest arises by operation of law. Thus, it cannot be a security interest under s 12(1): *Dura* (n 24) 123–8 [110]–[126].

claim an equitable lien anyway.[93] There are two possible reasons which explain why this issue does not demonstrate that the equitable claim to traceable substitutes is incapable of operating concurrently with the Act.

One possibility is that a secured party who claims against a substitute in equity may simply be unable to elect to take an ownership interest in that substitute rather than a lien, in which case this issue simply falls away. This could flow from s 140 of the PPSA, which provides that any proceeds of sale generated from the enforcement of a security interest must be distributed in the nature of a traditional security interest. It could be argued that the equitable claim to traceable substitutes should limit itself by analogy to this provision, and thus also only allow the secured party to acquire a property interest in the nature of a lien. This is because s 140 could be viewed as effecting a statutory alteration of the nature of the underlying security interest, which is the basis of the secured party's tracing claim. Such an argument would be particularly powerful if the provision which allows for s 140 to be circumnavigated by appointing receivers is removed from the Act.[94] If correct, this would do away with any possible inconsistency concerning the equitable claim to traceable substitutes.

Alternatively, it could be that a secured party claiming against a traceable substitute in equity can still elect to take an ownership interest, assuming that the common law nature of its security interest would allow it to do so, but that this is simply unobjectionable under the Act. This would reflect that the above-described limitation on how a security interest must be enforced under the statute can already be avoided by appointing receivers,[95] which seems to happen in the vast majority of cases.[96] Consequently, it could be that s 140 is already of such limited significance that it is not meaningfully undermined by a secured party being able to circumnavigate its application not only by appointing receivers, but also by claiming against a traceable substitute in equity rather than directly enforcing its security interest in proceeds. Either way, this issue does not demonstrate that claims to traceable substitutes in equity are incapable of operating concurrently with the Act.

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[93] Smith, *The Law of Tracing* (n 5) 347–51; adopted in *RnD Funding* (n 10) 121 [127].

[94] PPSA s 116. The Government has invited further consultation on this: Australian Government, 'Consultation Paper' (n 2) 22.

[95] PPSA ss 140, 116.

[96] See Section V of Chapter Four.

E *Can a Secured Party Trace and Claim to Avoid the Statutory Limitation that the Grantor Must Have an Interest in Proceeds?*

The fifth possible inconsistency concerns whether a secured party could use the equitable claim to undermine the underlying policies of the limitation in the Act that the grantor must have an interest in property for it to be proceeds.[97] Of course, the mere fact that the equitable claim may circumnavigate this requirement does not mean that its doing so would undermine the policy objectives embedded within this provision. Rather, it is necessary to identify what the objectives of this provision actually are, and to then determine whether the equitable claim would undermine them.

One possible objective of this limitation concerning proceeds could be to preserve the publicity function of the PPSA. However, it has already been demonstrated above that this policy cannot justify limiting the equitable claim to traceable substitutes in its context.[98]

Another possible objective of this limitation concerning proceeds could be to prevent the geometric multiplication of claims by secured parties.[99] The concern here is that, if a secured party's statutory claims are not limited to property in which the grantor has an interest, this could lead to 'an astonishing number of proceeds claims'.[100] However, this limitation on proceeds is unnecessary to address this concern, because a secured party claiming against both original collateral and proceeds under the Act is already limited to the value of the secured obligation.[101] It has also been queried how often such a concern would arise in practice.[102] As such, it is contended that this is not the objective underlying this limitation concerning proceeds. Furthermore, even if this is wrong and this is in fact an objective of this limitation concerning proceeds, the equitable tracing claim would not undermine this objective because an equitable claimant must elect between enforcing against the original property or its substitute.[103] Thus, even if this is a policy objective of the

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[97] PPSA s 31(3)(a)(i).

[98] See Section I(B) above.

[99] Duggan (n 63) 370–1 [11.3]; Jacob S Ziegel, David L Denomme and Anthony Duggan, *The Ontario Personal Property Security Act* (LexisNexis, 3rd ed, 2020) 228 [25.4.4]; Cuming, Walsh and Wood (n 8) 620.

[100] Roderick J Wood, 'Accounts, Proceeds and Conversion: *Bank of Nova Scotia v IPS Invoice Payment System Corporations* (2011) 26(2) *Banking and Finance Law Review* 359, 366.

[101] PPSA s 32(2).

[102] Whittaker Report (n 62) 266 [7.4.1.1.1].

[103] See Smith, *The Law of Tracing* (n 5) 206–8.

provision, it does not justify the view that equitable claims to traceable substitutes are incapable of operating concurrently with the Act.

A more convincing explanation for the provision limiting proceeds to property in which the grantor has an interest is to protect innocent third parties from the increased strength of a secured party's statutory claim to substitutes pursuant to its security interest.[104] This statutory claim is more powerful than the equitable claim to traceable substitutes because, under the PPSA, a buyer or lessee of personal property will only prevail over a security interest if they fall within one of the taking free rules, which are more limited than the bona fide purchaser for value without notice rule.[105] However, there is no inconsistency between this objective and the equitable claim, because the equitable claim remains limited by the bona fide purchaser for value without notice rule. It follows that it does not necessitate the further protection against third parties which, on this explanation, is aimed at balancing out the greater difficulty of defeating the statutory claim to proceeds. As such, a secured party remaining able to trace and claim in equity does not infringe this underlying rationale for why proceeds are limited to property in which the grantor has an interest.

The final possible objective of this limitation is to further reflect that a grantor can only grant an interest over property that she has rights in,[106] which is enshrined within the requirements for attachment under the Act.[107] This explains this limitation as it pertains to proceeds which arise from authorised dispositions, because security interests in such proceeds

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[104] Duggan (n 63) 370–1 [11.13]; Ziegel, Denomme and Duggan (n 99) 228–9; Cuming, Walsh and Wood (n 8) 620; Wood (n 100) 366–7. But see Ziegel and Denomme (n 63) 197–8 [25.4.4] (arguing that the concern of prejudice to third parties is 'exaggerated').

[105] In particular, the taking free rule in PPSA s 46(1) is limited to security interests 'given by the seller or the lessor'. For examples demonstrating why the limitation that the grantor must have an interest in the proceeds is necessary due to this, see Duggan (n 63) 370–1 [11.13]; Law Reform Commission of Saskatchewan, *Tentative Proposals for a New Personal Property Security Act* (December 1990) 33. But see Ziegel and Denomme (n 63) 197–8 [25.4.4] (using a similar example to argue that imposing such a limitation errs too far towards limiting the secured party's rights).

[106] Nicholas Mirzai and Jason Harris, *The Annotated Personal Property Securities Act 2009* (Cth) (Wolters Kluwer, 4th ed, 2020) 321 [31.5.9]; Matthew Broderick, 'Tracing under the PPSA' (2014) 32 *Company and Securities Law Journal* 379, 381; Law Reform Commission of Saskatchewan (n 105) 33; Cuming (n 55) 426; Linda Widdup, *Personal Property Securities Act: A Conceptual Approach* (LexisNexis, 3rd ed, 2013) 241 [18.5].

[107] PPSA s 19(2)(a).

only attach if the parties have agreed to this.[108] Thus, where the grantor disposes of collateral in a manner authorised by the security agreement, this limitation ensures that she cannot grant rights in the proceeds of that disposition if she does not herself have an interest in them. However, this underlying objective of this limitation cannot extend to claims against proceeds arising from unauthorised dispositions. This is because the underlying rationale for conferring a secured party with rights to proceeds of collateral which was wrongfully disposed of is not the agreement between the parties, but is rather to achieve one of the above-described objectives – eg, vindicating its property rights in the original collateral, or preventing unjust enrichment, etc.[109] Since the equitable claim to traceable substitutes only arises from unauthorised dispositions, it thus cannot be viewed as undermining this policy objective underlying the limitation of statutory proceeds to property in which the grantor has an interest. Consequently, this cannot justify the view that the claim to traceable substitutes is incapable of operating concurrently with the Act.

[108] Albeit that such agreement is presumed by the Act: ibid s 32(1)(b).

[109] See Section II(A) above.

Conclusion

This Chapter examined the equitable claim to traceable substitutes in the context of the PPSA. It showed that a secured party should be able to claim against a traceable substitute in equity where collateral is wrongfully disposed of by the grantor. Such a claim will not turn on the common law characterisation of the security interest, because any property interest which can constitute a security interest will be sufficient to ground the equitable claim. It will also not allow a competing secured party to obtain a better priority outcome than that available to it under its statutory claim to proceeds under the Act, if that statutory claim is concurrently available. Furthermore, the equitable claim only needs to be curtailed in this context where the security interest has vested in the grantor's insolvency, or where the security interest is unenforceable against a third party (to the extent that any third party advances a competing claim to the traceable substitute).

As a whole, this shows that the ability of a secured party to claim against traceable substitutes in equity is actually far less complex than it may first appear. Where both the equitable claim to a traceable substitute and the statutory claim to proceeds is available in respect of the same property, the outcome for the secured party will rarely, if ever, differ based upon which claim is advanced. But where the statutory claim is unavailable, the equitable claim may plug an otherwise potentially significant gap which could be exploited by unscrupulous grantors. Indeed, the continued availability of equitable tracing and claiming, coupled with the limitations on statutory claims to proceeds, may strike an appropriate balance between two issues: the need to protect innocent third parties from overly strong claims by secured parties, and the need to protect secured parties from unauthorised dispositions by grantors. This is because the statutory claim is more difficult to defeat but narrower in scope, whereas the equitable claim is easier to defeat but wider in scope. Finally, the continued availability of the equitable claim is consistent with the outcome of *RnD Funding*, notwithstanding the absence of analysis concerning the PPSA in that case.[110]

More generally, this and the previous Chapter have further demonstrated the usefulness of the framework for understanding interactions between statute and the common law. Where Part III did this by using the framework to explore the relationship between equity and the PPSA as a whole, the Chapters in Part IV thus-far have done so by using it to explore the relationship between a particular equitable doctrine and the Act. They have done

[110] *RnD Funding* (n 10), discussed in the Introduction above.

so in relation to both directions of influence between statute and the common law – ie, by addressing a question of statutory interpretation by reference to equity in the previous Chapter, and a question of applying or developing equity by reference to statute in this Chapter. The following Chapter further demonstrates the usefulness of the framework at this level of abstraction by applying it to the relationship between the PPSA and equitable subrogation.

CHAPTER NINE: SUBROGATION & THE PPSA

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INTRODUCTION

Equitable subrogation is a remedy by which a claimant effectively acquires another's rights against a third party.[1] As put in the leading Australian equity text:[2]

> There is no all-embracing theory that explains when subrogation will be permitted; the equity arises from the conduct of the parties on well-settled principles and in defined circumstances which make it unconscionable for the defendant to deny the plaintiff's right.

This final substantive Chapter applies the framework for understanding interactions between statute and the common law to the relationship between equitable subrogation and the *Personal Property Securities Act 2009* (Cth) ('PPSA' or 'Act'). Like the previous Chapter, it concerns a question of the application or development of equity by reference to statute. As a whole, it both further demonstrates the usefulness of the framework, in accordance with the first research question of this thesis, and further improves our understanding of the PPSA through examining its relationship with equity, in accordance with the second research question of this thesis.

Section I addresses an unsettled question concerning the nature of equitable subrogation generally, which must be resolved to determine its operation in the context of the PPSA. The following Sections then address the two major questions concerning equitable subrogation in that context. The first is whether it is ever possible to subrogate to a security interest under the Act. This is considered in Section II. The second is whether a secured party whose security interest was neither voidable nor void *ab initio* can subrogate to another interest. For example, a secured party may wish to do so where its security interest was validly granted but later vested in the grantor's insolvency, or where another security interest to which it wishes to subrogate has higher priority than its own security interest. This is considered in Section III.

For the purposes of this Chapter, references to 'subrogation' do not include an insurer's rights to subrogate to the claims of an insured. It is unsettled whether these rights are part of the equitable remedy, or whether they are better viewed as a creature of contract

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[1] Charles Mitchell and Stephen Watterson, *Subrogation: Law and Practice* (Oxford University Press, 2007) 3 [1.01].

[2] J D Heydon, M J Leeming and P G Turner, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (LexisNexis Butterworths, 5th ed, 2015) 366 [9-020]. Similarly, see *Orakpo v Manson Investments Ltd* [1978] AC 95, 110 (Lord Salmon) ('*Orakpo*').

law.[3] Either way, since this category of subrogation is unlikely to interact with the PPSA in a manner necessitating analysis, and is not relevant to the unsettled question concerning the nature of subrogation which must be addressed prior to undertaking such analysis, it is not considered in this Chapter.

[3] Compare Heydon, Leeming and Turner (n 2) Chapter 9; Peter W Young, Clyde Croft and Megan Louise Smith, *On Equity* (Lawbook Co, 2009) 865–76 [12.670]–[12.810]; John Glover and Andrew Roberts, 'Subrogation' in Patrick Parkinson (ed), *The Principles of Equity* (Lawbook Co, 2nd ed, 2003) 555 (all including coverage of subrogation by insurers) to *Orakpo* (n 2) 104 (Lord Diplock); *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, 231–2 (Lord Hoffmann) ('*Banque Financière*'); Mitchell and Watterson (n 1) 4–6 [1.04]–[1.08]. Note also *Highland v Exception Holdings Pty Ltd* (2006) 24 ACLC 1576, 1589–90 [91] ('*Highland*') (suggesting subrogation by insurers is contractual).

I THE NATURE OF EQUITABLE SUBROGATION TO PROPERTY INTERESTS – GENERALLY

Before considering the relationship between subrogation and the PPSA, it is necessary to resolve an unsettled question concerning equitable subrogation more generally. This is whether the validity and priority of a claimant's interest arising via subrogation is the same as the interest to which she is subrogated for all purposes; or whether it is the same as the interest to which she is subrogated only for some purposes.

On the first view, either the interest to which a claimant is subrogated is literally 'kept alive' for her benefit,[4] or the claimant obtains a new interest which has the characteristics of the original interest for all purposes.[5] These explanations are mutually exclusive, but both result in the claimant's interest having the validity and priority of the original interest for all purposes. Consequently, where a priority competition with the original interest would have turned on whether it was 'perfected' under a statutory priority regime,[6] the claimant's interest will continue to be affected by whether or not the statutory requirements to perfect the original interest remain satisfied.[7]

On the second view, the interest to which a claimant is subrogated is extinguished, and she obtains a new equitable interest.[8] As against competing interests which existed at the time of the subrogation-justifying facts, the new equitable interest has the priority of the original interest at that time. Consequently, where a priority competition with the original interest would have been determined by a statutory priority regime, the claimant's new

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[4] W M C Gummow and J G H Stumbles, 'Faulty Refinancing: Subrogation, Torrens and the PPSA' (2015) 89 *Australian Law Journal* 565 (who could be seen to accept this at 567–8, but also describe the language of keeping the interest alive as a 'metaphor' at 568).

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

[6] Perfection is used here to describe the steps required to obtain optimal protection under any such statute, rather than in the more technical sense in which that term is used in the PPSA. For similar usage, see Louise Gullifer (ed), Roy Goode and Louise Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security* (Sweet & Maxwell, 7th ed, 2023) 85–8 [2-16].

[7] To subrogate to a registered mortgage over Torrens title land, the mortgage would need to remain registered so that there is something to subrogate to. Similarly, to subrogate to a security interest under the PPSA which was perfected by registration *and* to continue to enjoy the benefits of perfection, a valid registration would ordinarily need to remain on the Personal Property Securities Register.

[8] Mitchell and Watterson (n 1) 5 [1.05], 24–5 [3.15], 230–6 [8.90]–[8.106]; *Day v Tiuta International Ltd* [2014] EWCA Civ 1246, [43] ('*Day v Tiuta*').

interest will only be affected by whether or not the statutory requirements to perfect the original interest were satisfied at the time of the subrogation-justifying facts.[9] As against interests which arise after that time, the priority of the new interest will be determined just like any other new equitable interest.[10]

Which of these views is correct will determine if a claimant's interest arising via subrogation is affected by whether or not the statutory mechanism for perfecting a security interest under the PPSA remains satisfied after the relevant obligation is performed. Thus, it is necessary to resolve this question to determine whether, and if so why, the equitable remedy is capable of operating concurrently with the Act. This Section shows that the second of the above-described views of subrogation is correct. This paves the way for the subsequent analysis of subrogation, so understood, in the context of the PPSA.

A *Old Interest Kept Alive or New Interest?*

Many of the cases describe subrogation as causing the original interest to be 'kept alive'.[11] If this language is taken literally, the first view of subrogation, under which the claimant is treated as if she obtained the original interest for all purposes, must be correct.

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[9] To subrogate to a registered mortgage over Torrens title land, the mortgage would only need to have been registered at the time the secured debt was paid. Similarly, to subrogate to a security interest under the PPSA which was perfected by registration *and* to continue to enjoy the benefits of perfection, the registration would only need to be valid at the time the relevant obligation was performed.

[10] The priority of the new equitable interest might be that of a 'mere equity', or alternatively of a 'full equitable interest': cf *Halifax plc v Omar* [2002] EWCA Civ 121, [84] to Stephen Watterson, 'Modelling Subrogation as an "Equitable Remedy"' (2016) 2(2) *Canadian Journal of Comparative and Contemporary Law* 609, particularly at 629–64. It is unnecessary to resolve this for the purposes of this Chapter, which will continue to refer to the interest as an 'equitable interest' since this term can accommodate either alternative: see Heydon, Leeming and Turner (n 2) 132 [4-210]; also *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265, 284–5 (Taylor J).

[11] *Chetwynd v Allen* [1899] 1 Ch 353, 357 ('*Chetwynd*'); *Butler v Rice* [1910] 2 Ch 277, 282–3 ('*Butler*'); *Ghana Commercial Bank v Chandiram* [1960] AC 732, 745 ('*Ghana Bank*'); *Cochrane v Cochrane* (1985) 3 NSWLR 403, 405 ('*Cochrane*'); *State Bank of New South Wales v Geeport Developments Pty Ltd* (1991) 5 BPR 11,947, 11,954 ('*Geeport*'); *Highland* (n 3) 1590 [92]; *Gandel Metals Pty Ltd v Centennial Mining Ltd (No 2)* [2020] FCA 633, [51] ('*Gandel Metals*'); also *Porter v Latec Finance (Qld) Pty Ltd* (1964) 111 CLR 177, 202 (Windeyer J, dissenting on the facts).

Alternatively however, such language may merely be a metaphor for how the new interest created by subrogation operates.[12] If so, both views will remain open.

1 *First Principles*

Where a claimant is subrogated to an equitable property interest, it is possible to explain subrogation as literally keeping the original interest alive. Thus in *Butler v Rice*, where Mr Butler was unable to obtain an equitable mortgage over land due to the borrower failing to disclose that the land was actually owned by his wife, who refused to execute the mortgage, the availability of subrogation to an earlier discharged equitable mortgage could be explained on the basis that it was literally kept alive for Mr Butler's benefit.[13] Similarly in *Nottingham Permanent Building Society v Thurstan*, where the Society loaned funds to a minor which were used to purchase land and its mortgage over that land was rendered void by statute, the availability of subrogation to the seller's unpaid vendor's lien over the land could be explained on the basis that it was literally kept alive for the Society's benefit.[14]

But this literal explanation of the interest being kept alive cannot be correct where the claimant is subrogated to a legal property interest. Consider *Chetwynd v Allen*, where Mr Mynors loaned funds to Mr Chetwynd including £1,000 which was used to pay off a legal mortgage, in circumstances entitling him to subrogate to that mortgage.[15] It cannot be that equity literally kept the legal mortgage alive for the benefit of Mr Mynors, because, recognising that the legal mortgage would be extinguished upon the reconveyance of title, this would require equity to directly create new legal rights.[16] Consistently with this, the language of Romer J in describing the operation of subrogation in that case was that the legal mortgage was 'kept alive *in equity*'.[17]

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[12] This was accepted in *Banque Financière* (n 3) 236 (Lord Hoffmann); *Menelaou v Bank of Cyprus UK Ltd* [2016] AC 176, 194 [43] (Lord Clarke JSC), 203–4 [90] (Lord Neuberger PSC) (Lord Kerr and Lord Wilson JJSC agreeing with both), cf 210 [116]–[117] (Lord Carnwath JSC).

[13] *Butler* (n 11).

[14] [1903] AC 6 ('*Nottingham Permanent Building Society*').

[15] *Chetwynd* (n 11).

[16] In such circumstances, an equitable right to compel the creation of a new legal interest could arise: see Gummow and Stumbles (n 4) 570 (discussing this in the context of Torrens title land). But even if such a right arose, the claimant's interest could only be equitable until the new legal interest was created.

[17] *Chetwynd* (n 11) 357 (emphasis added).

This could suggest that subrogation works one way where the claimant is subrogated to an equitable interest, and another where she is subrogated to a legal interest. But this is undesirable in principle, and finds no support in the authorities or commentaries. Thus, analysed from first principles, the language of the interest being 'kept alive' must be a metaphor for the creation of a new interest.

2 *Australian Authorities*

The Australian authorities largely support this conclusion, albeit only in *obiter dicta*. Several cases have explicitly stated that the original interest being 'kept alive' is a metaphor,[18] or that subrogation involves equity reviving extinguished rights (from which it follows that those rights are not literally kept alive).[19] Two cases concerning subrogation to registered mortgages over Torrens title land also described the claimants' interests as equitable.[20] This further supports this conclusion because, if the original mortgages were literally kept alive, the claimants' interests as registered mortgagees would have been legal in nature. There is only one case to the contrary, where a claimant's interest arising via subrogation to a registered Torrens title mortgage was described as 'the existing mortgage interest and not a new equitable interest in the land'.[21] But this must be weighed against the above-described cases, and the conceptual objection raised above. Consequently, subrogation to a property interest creates a new interest.

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[18] *Austin v Royal* (1999) 47 NSWLR 27, 31 [19], quoting *Banque Financière* (n 3) 236 (Lord Hoffmann); *Gertsch v Atsas* (1999) 10 BPR 18,431, 18,436 [21] ('*Gertsch*'); *Taleb v National Australia Bank Ltd* (2011) 82 NSWLR 489, 508 [69] ('*Taleb*'); *Aged Care Services Pty Ltd v Kanning Services Pty Ltd* (2013) 86 NSWLR 174, 183 [53] ('*Aged Care Services* NSWCA'); *Gandel Metals* (n 11) [86]. See also James Edelman and Elise Bant, *Unjust Enrichment* (Hart Publishing, 2nd ed, 2016) 114–15.

[19] *Cook v Italiano Family Fruit Co Ltd (In Liquidation)* (2010) 190 FCR 474, 498 [106] ('*Cook v Italiano*'), quoted and approved in *Re Dalma No 1 Pty Ltd (in liq)* (2013) 269 FLR 80, 87 [21]; *Saraceni v Mentha (No 2)* [2012] WASC 336, [238]; *Lowbeer v De Varda* (2018) 264 FCR 228, 237 [43]. Cf *Re Sara Properties Pty Ltd (in liq)* [1982] 2 NSWLR 277, which is criticised in *Cook v Italiano* (n 19) 498 [106] (Finkelstein J); Heydon, Leeming and Turner (n 2) 394 [9-375].

[20] *Aquilina Holdings Pty Ltd v Lynndell Pty Ltd* [2008] QSC 57, [68]; *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269, 282 [12] ('*Bofinger*').

[21] *Geeport* (n 11) 11,954.

B *Nature of the New Interest?*

Since subrogation to a property interest creates a new interest, it is necessary to address the nature of that new interest to determine which view is correct.

1 *First Principles*

The most powerful reason in favour of the correctness of the second view is that it better reflects the underlying rationale of equitable subrogation, and is more consistent with the way in which priority competitions are ordinarily resolved where that rationale is not enlivened. In Australian law, the rationale of subrogation is to prevent unconscionability.[22] But this is more complicated than it first appears, as the notion of unconscionability in this context encompasses two separate rationales. One explains the availability of subrogation to property interests as against debtors, and the other as against third parties.

As against debtors, subrogation seeks to prevent a debtor from unconscionably enjoying the benefits of his secured debt having been paid off while denying the burden of the property interest which secured that debt.[23] This sheds no light on which view of subrogation is correct, because either way the claimant will enjoy the benefits of the property interest to which she is subrogated against the debtor.

As against third parties, subrogation seeks to prevent a competing interest-holder who did not enjoy priority over an existing secured creditor from obtaining such priority merely because the claimant paid off the secured debt.[24] Cast in the language of conscience, it would be unconscionable for such an interest-holder to enjoy a windfall at the expense of the claimant. Here, the second view better achieves this both in competitions with existing interests that are governed by a statutory priority regime, and in competitions with subsequent interests.[25]

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[22] *Raffle v AGC (Advances) Ltd* (1989) 5 BPR 11,992, 11,994; *Cochrane* (n 11) 405; *Challenger Managed Investments Ltd v Direct Money Corporation Pty Ltd* (2003) 12 BPR 22,257, 22,269–70 [50] (‘*Challenger*’); *Bofinger* (n 20) 299–302 [85]–[98].

[23] *Aldrich v Cooper* (1803) 8 Ves 382, 389; 32 ER 402, 405 (Lord Eldon LC), quoted in *Australasian Conference Association Ltd v Mainline Constructions Pty Ltd* (1978) 141 CLR 335, 348; *Bofinger* (n 20) 280–1 [8].

[24] *Drew v Lockett* (1864) 32 Beav 499, 505–6; 55 ER 196, 198; *Bofinger* (n 20) 281–2 [9]–[10]; *Bowesco Pty Ltd v Westpoint Management Ltd* (2015) 109 ACSR 1, 12 [78].

[25] The different views are unlikely to affect the outcomes of competitions with existing interests at common law.

(a) Competitions with Existing Interests

Many or perhaps even most priority competitions with interests arising via subrogation will concern either Torrens title land,[26] or personal property subject to a security interest under the PPSA. Thus, it is appropriate to consider which view of subrogation better achieves its rationale in the context of these statutes.[27]

Starting with the Torrens title statutes, if the rationale for allowing a claimant to subrogate to a mortgage is to prevent a competing interest-holder from enjoying a windfall benefit where his interest ranked behind the original mortgage at the time the secured debt was paid off, it is difficult to see why it is necessary for the mortgage to remain registered after that time.[28] This supports the second view of subrogation, under which the claimant's interest is unaffected by whether the mortgage remains registered after the time at which the secured debt is discharged. By contrast, on the first view, the claimant will only be able to subrogate to the original mortgage if it remains registered after this time. This is notwithstanding that the competing interest-holder will enjoy a windfall irrespective of this, since his interest was going to rank behind that mortgage anyway.

Under the PPSA, the logic is much the same, albeit that the mechanisms are different as the Act does not create a system of title by registration. Here again, since the rationale for allowing a claimant to subrogate to a security interest is to prevent a competing interest-holder from enjoying a windfall benefit where his interest ranked behind the security interest at the time the relevant obligation was performed, it is unnecessary that the statutory mechanisms for perfection remain satisfied after that time. For the same reasons as above, this weighs in favour of the second view.

(b) Competitions with Subsequent Interests

Turning to competitions with interests arising after the time of the subrogation-justifying facts, it is necessary to emphasise that the above-described rationale does not extend to such competitions. Subrogation only seeks to prevent *existing interest-holders* from

[26] Note that Torrens title statutes cover more than 99% of land in Australia: Brendan Edgeworth, *Butt's Land Law* (Lawbook Co, 7th ed, 2017) 801 [12.20].

[27] To the extent this entails statute affecting the application or development of equity, this is entirely legitimate: see Section II of Chapter Two.

[28] As to the possibility that the competing interest-holder might rely on the de-registration to make further advances, see Section I(B)(3) below.

enjoying windfall benefits as against the claimant. Thus, it does not necessitate the claimant's interest enjoying the same priority as the extinguished interest *as against subsequent interest-holders*. Consequently, such priority competitions should be resolved in the manner which best reflects how competitions with new equitable interests are ordinarily resolved.

This too weighs in favour of the second view of subrogation. In such competitions, the second view treats the claimant's interest just like any other new equitable interest. Consequently, her priority is determined according to the common law or any relevant statutory priority rules. By contrast, under the first view, the priority of the claimant's interest as against a subsequent interest-holder may be either stronger or weaker than would ordinarily be the case.

For example, on the first view, in a competition at common law between a claimant who is subrogated to a legal interest and a subsequent interest-holder, the claimant will enjoy the priority benefits of holding a legal interest. Similarly, in a competition between a claimant who is subrogated to a Torrens title mortgage which remains registered and a subsequent interest-holder, the claimant will enjoy the priority benefits of indefeasibility. This is despite the fact that the claimant's interest in both such examples is actually a new equitable interest, and the underlying rationale of subrogation does not necessitate her enjoying any stronger priority than would ordinarily be afforded to such an interest-holder. It is also possible to come up with examples to the contrary, such as a competition between a claimant who is subrogated to a Torrens title mortgage which has been de-registered and a subsequent interest. On the first view, the claimant will be left with no interest at all, notwithstanding that subrogation operates to create a new equitable interest and that its underlying rationale does not necessitate treating the claimant as being any worse off merely because the mortgage was subsequently de-registered.

Thus, approached from first principles, the second view of subrogation to property interests must be correct. It better reflects the proper scope of the underlying rationale of subrogation in cases where priority is governed by the most important Australian statutory priority regimes, and where the competing interest already exists at the time of the subrogation-justifying facts. It also better reflects how Australian law ordinarily resolves priority competitions with subsequent interests, which fall outside the scope of the underlying rationale of subrogation.

2 *Australian Authorities*

The Australian authorities shed little light on which view of subrogation is correct. On the one hand, several first instance decisions have suggested that an ongoing registration is necessary to subrogate to a Torrens title mortgage.[29] This is only correct on the first view, and thus weighs in its favour. On the other hand, another first instance decision assumed that subrogation to a Torrens title mortgage was possible despite its being discharged, which weighs in favour of the second view.[30] Furthermore, the High Court has suggested that the interest of a claimant who is subrogated to a Torrens title mortgage would support a caveat over the land.[31] This too supports the second view, because on the first view either the mortgage will remain registered, in which case the claimant will be protected by that registration without the need to lodge a caveat, or it will have been de-registered, in which case the claimant will be unable to subrogate at all.[32]

As a whole, these conflicting judicial comments suggest that the question of which view is correct remains open. This is especially so given they are all *obiter dicta*, as in each of the above-described cases either the Torrens title mortgage to which the claimant was subrogated remained registered,[33] or subrogation was unavailable at all such that the mortgage being de-registered was immaterial to the outcome of the case.[34] Thus, they do not stand in the way of the correctness of the second view, in accordance with the above analysis.

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[29] *Challenger* (n 22) 22,270 [51]; *Taleb* (n 18) 508 [70]. See also *Aged Care Services v Macedonian Aged Care* (2012) 17 BPR 33,961, 33,971 [83] ('*Aged Care Services* NSWSC'), discussed in Gummow and Stumbles (n 4) 569–70. This was affirmed on appeal, without any reference to the relevant comment, in *Aged Care Services* NSWCA (n 18).

[30] *Grego v D Club Pty Ltd* [2011] WASC 55, [21] ('*Grego*').

[31] *Bofinger* (n 20) 282 [12].

[32] Alternatively, this passage could be referring to the claimant lodging a caveat to prevent the mortgagee from discharging the mortgage. This would be consistent with either view. However, such a caveat would not provide ongoing protection to the caveator, because if a lapsing notice was served the court would need to remove the caveat pursuant to the express directive that where a mortgage is discharged the mortgagee 'shall execute a discharge in the approved form': *Real Property Act 1900* (NSW) s 65(1). Thus, the interpretation of the passage in favour of the second view is preferable.

[33] *Challenger* (n 22); *Taleb* (n 18); *Bofinger* (n 20).

[34] *Aged Care Services* NSWSC (n 29); *Grego* (n 30).

3 *Further Advances by Competing Interest-Holders*

A possible objection to the second view of subrogation concerns the issue of further advances by competing interest-holders. Consider the following example:

> A senior secured creditor and a junior secured creditor hold interests in the same property. Both interests are perfected by a registration under the relevant statutory priority regime. The claimant becomes entitled to subrogate to the first-ranking interest, following which the registration in respect of that interest is discharged. Subsequently, on the assumption that the first-ranking interest no longer exists, the junior secured creditor makes further advances.

On the first view of subrogation, there is no risk to the junior secured creditor concerning such further advances. This is because, on this view, the claimant is either unable to subrogate at all, or, if she is, her new interest loses its priority once the registration is discharged.

By contrast, on the second view, there is a risk that the junior secured creditor could rely on the absence of a registration to make further advances to his detriment.[35] However, the second view is actually equally capable of accommodating this risk. This is because it recognises that the priority of the claimant's interest arising via subrogation does not extend to further advances. In England this occurs via the change of position defence,[36] but, even if that defence does not apply to subrogation in Australian law,[37] the same outcome can be reached through the inherent flexibility of subrogation as an equitable remedy.[38] This is consistent with authority which pre-dates the adoption of unjust enrichment as the basis of subrogation in English law.[39] It also appropriately reflects the proper scope of the underlying rationale of subrogation in Australian law, since the junior secured creditor in such circumstances would not unconscionably enjoy a windfall over the claimant to the extent that

[35] Wood (n 5) 61–2.

[36] Mitchell and Watterson (n 1) 161 [7.69].

[37] Cf *Gertsch* (n 18) 18,436 [21]–[22] (applying the defence to a subrogation claim, but also suggesting that subrogation is based in unjust enrichment); K Mason, J W Carter and G J Tolhurst, *Mason & Carter's Restitution Law in Australia* (LexisNexis Butterworths, 3rd ed, 2016) 868 [2410] (suggesting the defence is not limited to unjust enrichment claims, and that it extends to subrogation).

[38] Australian law may be more flexible than English law in this sense, as indicated by its acceptance of the remedial constructive trust: see, eg, *Muschinski v Dodds* (1985) 160 CLR 583, 613–5; *Giumelli v Giumelli* (1999) 196 CLR 101, 112 [3]–[4], 113–14 [10].

[39] See Mitchell and Watterson (n 1) 161–2 [7.71]–[7.72], discussing *Redman v Rymer* (1889) 60 LT 385.

the former made further advances due to his belief that the higher-ranking interest no longer existed.

As such, this issue is adequately addressed on either view of subrogation.

4 *Circular Priority*

Another possible objection to the second view of subrogation is that it is more likely to create circular priority problems.[40] This is because, unlike on the first view, the priority of the claimant's interest is determined differently against interests which existed at the time of the subrogation-justifying facts and those created after that time. However, relatively little weight should be placed on this point for three reasons.

First, circular priority problems are not unique to the above-described circumstances and thus can also arise on the first view of subrogation.[41] Secondly, such problems are unlikely to arise frequently. There does not appear to be even one Australian case thus-far concerning a competition between an interest arising via subrogation and an interest which was created after the time of the subrogation-justifying facts, let alone a case where this occurred *and* another interest arose in such a way as to create a circular priority problem. Thus, it would be inappropriate for such cases to have an outsized influence on how subrogation to property interests works in all other circumstances. Thirdly, even where such a case does arise, circular priority problems are not insoluble. Since the most important point in resolving them is to ensure commercial certainty by resolving every such problem in the same manner,[42] an appropriate solution could be to simply defer the priority of the interest arising via subrogation in all such cases. Consequently, although the risk of circular priority problems weighs in favour of the first view, this should be afforded relatively little weight.

Consequently, the second view of subrogation must be correct. It better reflects the underlying rationale of subrogation in Australian law, and does not unnecessarily interfere with the ordinary way in which priority competitions are resolved where that rationale is not enlivened. The authorities and the issue of further advances are equivocal as to which view is correct, and the issue of circular priority should be given only minimal weight. This makes it possible to turn to the relationship between subrogation, so understood, and the PPSA.

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[40] Wood (n 5) 62.

[41] As acknowledged in ibid.

[42] Mitchell and Watterson (n 1) 250 [8.144].

II SUBROGATION TO A PPSA SECURITY INTEREST

The rest of this Chapter examines the relationship between subrogation and the PPSA. This Section II determines whether a claimant can subrogate to a security interest under the PPSA. Section III then determines whether a secured party who obtains a security interest that is neither voidable nor void *ab initio* can subrogate to another interest.

Four categories of subrogation are particularly likely to interact with the PPSA. First, where a claimant advances funds with the intention of obtaining security, which are used to discharge an existing security to which the claimant becomes entitled to subrogate.[43] Secondly, where a claimant advances funds with the intention of obtaining security, which are used to purchase property such that the claimant becomes entitled to subrogate to the seller's unpaid vendor's lien.[44] Thirdly, where a third party wrongfully uses a claimant's funds to discharge an existing security, and the claimant becomes entitled to subrogate to that security.[45] Fourthly, where a claimant is a surety who pays off the secured debt, and becomes entitled to subrogate to any securities formerly held by the creditor.[46] The analysis that follows is not limited to these categories of subrogation, but it will be primarily relevant to them. For example, consider the category of subrogation whereby a creditor can subrogate to a trustee's lien.[47] Although this is likely to interact with the PPSA, the issue in such claims will ordinarily pertain to the priority of that lien as against competing security interests, and will thus be resolved just like other competitions with interests outside the scope of the Act ('non-PPS interests').[48]

[43] *Butler* (n 11) 282–3; *Ghana Bank* (n 11) 745–6.

[44] *Nottingham Permanent Building Society* (n 14); *Evandale Estates Pty Limited v Keck* [1963] VR 647, 649–52; *Horvath v Commonwealth Bank of Australia* [1999] 1 VR 643, 652–3 [19] ('*Horvath*').

[45] *Boscawen v Bajwa* [1996] 1 WLR 328, 339–40 ('*Boscawen*'); affirmed in *Cook v Italiano* (n 19) 493–6 [84]–[93]. Alternatively, this may entitle the claimant to claim based on 'backwards tracing': as to which see Chapter Eight.

[46] *Gedye v Matson* (1858) 25 Beav 310, 312; 53 ER 655, 656; *Bofinger* (n 20) 279 [4]. This was partly codified in the *Mercantile Law Amendment Act 1856* (Imp) s 5, which is enacted in each Australian jurisdiction at a State level: eg, *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) s 3. It is generally accepted that this does not affect the scope of the equitable remedy: see *Bofinger* (n 20) 288 [37]; Heydon, Leeming and Turner (n 2) 388 [9-305]; Glover and Roberts (n 3) 559 [1505].

[47] *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360, 367.

[48] See Adam Waldman, 'Resolving Priority Competitions Between PPSA Security Interests and Non-PPS Interests' (2021) 44(2) *University of New South Wales Law Journal* 811, particularly at 828–30.

The starting point is that subrogation will remain available unless it is incapable of operating concurrently with the PPSA.[49] The text of the Act sheds little light on this. The only seemingly relevant provision is s 53, which provides that where a transferee of personal property takes free of a security interest, the secured party is subrogated to the rights of the transferor. But it is difficult to discern anything from this concerning equitable subrogation.[50] As such, the question becomes whether equitable subrogation to a security interest is incapable of operating concurrently with the underlying policies of the Act.

Before proceeding to address these policies in turn, it is necessary to note several points. The first is that the overseas authorities are of little assistance in resolving this issue. This is because the only reported Canadian case to have allowed subrogation to a security interest contained little examination of why this was possible;[51] and the only New Zealand case to have allowed subrogation to a security interest assumed, without discussion, that it was possible.[52]

The second is that, if subrogation to a security interest under the PPSA is possible, the above conclusion concerning the nature of the equitable remedy does away with several issues that could have otherwise been problematic in the context of the Act. This is because, so long as the extinguished security interest to which a claimant is subrogated was perfected at the time the relevant obligation was performed, the claimant's new interest will have the benefits of perfection as against existing interests, and will have the priority of a new equitable interest as against subsequent interests. Thus, there is no need to deal with issues such as whether a claimant can maintain a registration on the Personal Property Securities

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[49] PPSA s 254.

[50] Also note Bruce Whittaker, *Review of the Personal Property Securities Act 2009: Final Report* (Final Report, February 2015), 302 [7.6.16] (Recommendation 215) ('Whittaker Report') (recommending this provision be deleted); Australian Government, 'Explanatory Memorandum (Sch 3 – Ch 7)', *Public Consultation on the Government's response to the statutory review of the Personal Property Securities Act 2009* (22 September 2023) 20–1 [211]–[214], item 52 <https://consultations.ag.gov.au/legal-system/government-response-to-pps-review/> (accepting this recommendation).

[51] *Re N'Amerix Logistix Inc* (2001) 57 OR (3d) 248, particularly at [23], [25] (largely emphasising the counterpart to PPSA s 254), [33] (emphasising that subrogation had been applied in priority disputes governed by a previous statute which was analogous to the Ontario counterpart to the PPSA) (Ontario Superior Court of Justice) ('*Re N'Amerix*').

[52] *The Vintage Aviator Ltd v DeMarco (including as trustee of Airtight Trust (a bankrupt))* [2021] NZHC 3096, particularly at [183]–[221].

Register ('PPSR') covering the original security interest after it is discharged,[53] or whether she can make a new registration covering her new interest arising via subrogation.[54]

Finally, it must be noted that, where a claimant advances funds in the ordinary course of a business of doing so and those funds are used in a manner entitling her to be subrogated to a security interest, her new equitable interest arising via subrogation may be conferred with statutory priority over a competing security interest by s 73(1) of the PPSA. This will create unprincipled outcomes in cases where the competing security interest would have ranked above the extinguished security interest to which the claimant is subrogated. However, this is an inevitable consequence of this provision being drafted in an overly wide manner that exceeds its underlying policy rationale of protecting the priority of possessory liens.[55] Nonetheless, having identified this issue, it is possible to set it aside for the purposes of the below analysis. This is because in many cases the provision will simply not apply. Furthermore, where it does apply, it is difficult to see its application being so significant that it could be said to make subrogation incapable of operating concurrently with the Act at all.[56]

A *Substance over Form*

The policy of substance over form raises two issues concerning subrogation to security interests under the PPSA.

1 *Mortgages and Charges Only?*

The first is that the case law entitling a claimant to subrogate to securities only recognises the availability of subrogation to mortgages and charges. If these are the only property interests to which a claimant can subrogate, it could be argued that the remedy requires delineating between different forms of security interests under the Act, inconsistently

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[53] If this was necessary, such a claimant would be vulnerable to the registration being removed pursuant to an amendment demand under Pt 5.6 of the PPSA, since the registration would not secure an obligation 'owed … *to the secured party*': s 178(1) item 1 (emphasis added).

[54] If this was necessary, it would be insufficient for such a claimant to make a new registration, or to have the original registration transferred to her, because the registration would need to be in the former secured party's name. Cf Linda Widdup, *Personal Property Securities Act: A Conceptual Approach* (LexisNexis, 3rd ed, 2013) 389 [29.15] (suggesting a financing change statement should be lodged reflecting that the claimant is the secured party, without addressing this point).

[55] See Waldman (n 48) 822.

[56] Rather, this further highlights the need to amend the provision: see ibid 832.

with the policy of promoting substance over form. On the other hand, if subrogation to securities is not limited only to mortgages and charges, this objection simply falls away.

Starting with the authorities, the possibility that a claimant might subrogate to securities in other forms remains open, because there are no cases which have rejected subrogation on the basis that the relevant security was not a mortgage or a charge.[57] Viewed as such, the fact that all the cases do concern such interests may just reflect that, historically, they were the most likely to be litigated.

Approaching the issue from first principles, the underlying rationale of subrogation is to prevent debtors and/or competing third parties from unconscionably denying that the claimant holds an interest.[58] This applies regardless of whether that interest is a mortgage, charge, or another interest with a security function. Consistently with this, many cases describe the basis of subrogation to securities in terms that eschew reference to any particular form of interest.[59] Additionally, since it is possible to subrogate to purely personal rights as well as mortgages and charges, it is difficult to see why subrogation to other forms of property interests should be precluded where it would achieve the remedy's underlying rationale.

For example, a line of Australian cases has recently recognised that a secured creditor can subrogate to the priority claim of an employee in insolvency, where that claim was discharged with the proceeds of the secured assets.[60] It would be unprincipled to allow subrogation to this personal claim, and to a mortgage or a charge, but not to another interest which has the same function of securing an obligation. Indeed, the primary reason for

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[57] Cf *Li v F Vitale & Sons Pty Ltd* [2014] VSC 326, [20] (noting a submission that a claimant was unable to subrogate to a security interest arising from a retention of title arrangement, but not addressing this since it was unnecessary to do so to resolve that case); also Gummow and Stumbles (n 4) 577 (contemplating that a claimant might be entitled to subrogate to a security interest arising from a retention of title arrangement or a flawed asset arrangement).

[58] See Section I(B)(1) above.

[59] *Boscawen* (n 45) 338–41 (the creditor's 'security'); *Highland* (n 3) 1590 [92] (the creditor's 'mortgage *and security arrangements*') (emphasis added); *Day v Tiuta* (n 8) [43] (the creditor's 'security interest'); *Aged Care Services* NSWCA (n 18) 183 [51]–[53] (the creditor's 'security', and only using the language of 'mortgage' in an example of a third party paying off a debt secured by that particular interest).

[60] See *Re ExDvD Ltd (in liq)* (2014) 223 FCR 409, 422–4 [63]–[79] ('*Re ExDvD*'); affirmed and applied in *Re 7 Steel Distribution Pty Ltd (in liq)* [2015] FCA 742, particularly at [28]–[29]; *Re Force Corp Pty Ltd (in liq)* (2020) 149 ACSR 451, particularly at 469 [67]–[68].

recognising the availability of subrogation by such secured creditors, being that their circumstances are analogous to those of a claimant who would be entitled to subrogate to a mortgage or charge on orthodox principles,[61] applies even more powerfully to a claimant who wishes to subrogate to a different property interest with the same function. This further supports the availability of subrogation to securities other than those in the form of mortgages or charges.

As such, subrogation to securities is not limited only to those which are mortgages and charges. This does away with the above objection concerning the policy of promoting substance over form.

2 *In-Substance Security Interests Only?*

Another possible objection arising from the policy of substance over form concerns deemed security interests. One of the reasons for deeming some interests to be security interests in the first place is to avoid determining whether, in any given case, they secure payment or performance of an obligation.[62] This in turn facilitates the characterisation of all consensually arising interests in personal property with security functions as security interests, in accordance with the policy of promoting substance over form. However, if it is only possible to subrogate to in-substance security interests, this could require us to delineate between security interests based on whether or not they have a security function, which could in turn undermine this policy.

However, even if a claimant can only subrogate to an in-substance security interest, this would not be incapable of operating concurrently with this policy. This is because the PPSA already necessitates delineating between in-substance and deemed security interests for various purposes. For example, it may be necessary to do so to determine if a security interest is excluded from the remedies Chapter of the Act,[63] or from the vesting provisions.[64] Thus, even if it is necessary to also delineate between such security interests to determine if

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[61] *Re ExDvD* (n 60) 424 [77]–[78].

[62] Anthony Duggan, *Australian Personal Property Securities Law* (LexisNexis, 3rd ed, 2021) 80 [3.33], 82 [3.35]; Whittaker Report (n 50) 56 [4.3.1.2].

[63] PPSA s 109(1).

[64] Ibid s 268(1)(a); *Corporations Act 2001* (Cth) s 588FN(1).

subrogation is available, it is difficult to see why this would be any more objectionable than the above-described circumstances where the Act itself necessitates doing so.

As such, subrogation is not incapable of operating concurrently with the policy of promoting substance over form.

B *Publicity Function*

It could be argued that allowing subrogation to security interests would undermine the ability to rely on the PPSR, and thus the publicity function of the Act.[65] This concern may be especially powerful since, if subrogation to a security interest is possible, a claimant will be able to subrogate to such an interest and enjoy the full benefits of perfection even if a PPSR registration is discharged following the subrogation-justifying facts.[66]

The difficulty with such an argument, however, is that it overstates the certainty with which a secured party can rely on the PPSR in the first place.[67] A competing security interest with priority may be undiscoverable because it is perfected by control,[68] or temporarily perfected at the time of the search.[69] It may also be functionally undiscoverable due to the breadth with which a security interest can be perfected over proceeds.[70] As such, the mere fact that an interest arising via subrogation would be undiscoverable via a PPSR search is insufficient to show that it undermines the publicity function as a whole.

More specifically, as against competing security interests which existed at the time of the subrogation-justifying facts, it is unproblematic to confer the interest arising via subrogation with priority – even if the discoverable means of perfection such as a PPSR registration is not maintained after that time. This is because, for the claimant to obtain such priority, the extinguished security interest to which she is subrogated must have already had priority over the competing security interest.[71] Thus, that extinguished security interest must

[65] See Wood (n 5) 61–2; Jacob S Ziegel, David L Denomme and Anthony Duggan, *The Ontario Personal Property Security Act* (LexisNexis, 3rd ed, 2020) 287; also Michael Gedye, Ronald CC Cuming and Roderick J Wood, *Personal Property Securities in New Zealand* (Thomson Brookers, 2002) 289 n 72.

[66] See Section I above.

[67] See Section II(C) of Chapter Five.

[68] PPSA ss 25–9.

[69] Ibid ss 22, 33(2), 34–6, 38–40.

[70] See Section IV of Chapter Five.

[71] Subject to the issue concerning PPSA s 73(1) identified in the introduction to Section II above.

have obtained priority in a manner that either furthered the publicity function, such as via an earlier PPSR registration,[72] or that furthered one of the policies which confer priority on specified security interests to encourage certain types of finance, such as via control.[73] Consequently, allowing the claimant to obtain such priority cannot undermine the publicity function itself. Relatedly, even if the competing secured party made further advances in reliance on the absence of a discoverable means of perfection, this would not create an issue because the equitable remedy would not extend to such advances.[74]

As against competing security interests arising after the time of the subrogation-justifying facts, subrogation is also unproblematic. This is because, in competitions with such interests, the priority of the claimant's new interest will be determined in the same manner as any other equitable non-PPS interest. Thus, since such an interest cannot be perfected under the Act, it cannot be said to undermine the publicity function any more than other non-PPS interests which come into competition with security interests.

As such, subrogation is capable of operating concurrently with the publicity function.

C *Preventing Fraud*

Two issues arise concerning the interaction between equitable subrogation and the provisions concerning the enforceability of security interests against third parties,[75] and the vesting of security interests in insolvency.[76] Since these provisions are best explained on the basis of the policy of preventing fraud,[77] the issues concerning them pertain to this policy.

1 *Subrogation to a Security Interest where the Grantor Later Becomes Insolvent?*

The first issue, which concerns whether subrogation would undermine the policy of preventing fraud contained in the vesting provisions, arises from what was determined above to be the correct view of subrogation to property interests.[78] To address this, three separate scenarios must be analysed.

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[72] See Section II(A) of Chapter Five.

[73] See Section IX of Chapter Five.

[74] See Section I(B)(3) above.

[75] PPSA s 20.

[76] Ibid s 267; *Corporations Act 2001* (Cth) s 588FL.

[77] See Section VII of Chapter Five.

[78] See Section I above.

(a) Scenario 1

The first is where the claimant becomes entitled to subrogate to a *perfected* security interest, and the grantor subsequently becomes insolvent, by which time the statutory mechanism for perfecting the security interest is no longer satisfied. For example:

> On Day 1, the claimant becomes entitled to subrogate to a security interest which is perfected by registration. On Day 2, the financing statement is de-registered. On Day 3, the grantor becomes insolvent.

The question here is whether subrogation would undermine s 267 of the Act. It is contended that it would not. As to any direct inconsistency, it must be borne in mind that subrogation creates a *new* equitable interest in favour of the claimant.[79] Consequently, in the above-described circumstances, even though the original security interest vests in the grantor pursuant to the vesting provision, it need not necessarily follow that the claimant's new equitable interest arising via subrogation also vests.

Thus, the issue is whether there is any indirect inconsistency between the continued availability of subrogation and the underlying policy of s 267. The starting point is to note that, as discussed in an earlier Chapter, the vesting provisions are best understood as seeking to prevent fraud.[80] Following from this, in the above-described circumstances, the fact that the security interest to which the claimant is subrogated was perfected at the time of the subrogation-justifying facts should be sufficient to verify its legitimacy in accordance with the statutory policy of preventing fraud. Thus, even where the statutory mechanism for perfection later lapses, allowing the claimant to enforce her new interest in equity would not undermine this policy and would thus not undermine s 267.

(b) Scenario 2

The second scenario is where the claimant becomes entitled to subrogate to an *unperfected* security interest, and the grantor subsequently becomes insolvent.[81] For example:

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[79] See Section I above.

[80] See Section II(B)(2) of Chapter Five; Adam Waldman, 'Unperfected PPSA Security Interests in Insolvency Part II: The Policy Objectives of the Vesting Provisions' (2024) 34(4) *Journal of Banking and Finance Law and Practice* (forthcoming) Part III ('Unperfected PPSA Security Interests II').

[81] There is no need to address subrogation to an unperfected security interest which already vested under PPSA s 267, as in such circumstances there is nothing left to subrogate to.

> On Day 1, the claimant becomes entitled to subrogate to an unperfected security interest. On Day 2, the grantor becomes insolvent.

The question here is again whether allowing subrogation would undermine s 267. Here, subrogation would undermine the provision.[82] This is because it would confer the claimant with a new interest which is enforceable in insolvency, notwithstanding that the security interest to which she is subrogated would have remained vulnerable to vesting under s 267 due to its legitimacy not having been sufficiently verified in accordance with the underlying policy objective of that provision.

However, this does not necessitate subrogation being entirely unavailable in the context of the PPSA. Rather, this concern will be sufficiently addressed so long as subrogation to a security interest is unavailable in the above-described circumstances – ie, where the security interest is unperfected at the time of the subrogation-justifying facts, and the grantor subsequently becomes insolvent. This is because subrogation is only incapable of operating concurrently with the policy of preventing fraud *in such circumstances*.

(c) Scenario 3

The third scenario is where the claimant becomes entitled to subrogate to a *perfected* security interest, and the grantor subsequently becomes insolvent in circumstances such that the security interest vests under s 588FL of the *Corporations Act 2001* (Cth). For example:

> On Day 1, the claimant becomes entitled to subrogate to a security interest which is perfected by registration and by no other means. That registration was made more than 20 business days after the date of the security agreement. On Day 2, which is within six months of the date of the security agreement, the grantor becomes insolvent.

Here, for the same reasons as in the second scenario above, subrogation should be unavailable *in such circumstances* because it would undermine the policy of preventing fraud embedded in s 588FL. It should also be mentioned that, if this provision is deleted pursuant to the ongoing law reform process concerning the Act, the issue arising under this scenario will fall away, such that subrogation should be available in such circumstances.

2 *Subrogation by a Secured Party who Fails to Protect its Security Interest?*

The second issue that could arise is whether a claimant can subrogate to an extinguished security interest in circumstances where the claimant has herself obtained a

[82] Similarly, see Wood (n 5) 61.

security interest which is unenforceable against third parties or has vested in the grantor. However, as argued in Section III below, such a claimant should be unable to subrogate in the first place. Consequently, any possible inconsistency with the policy of preventing fraud falls away.

As such, due to the policy of preventing fraud, a claimant will be unable to subrogate to a security interest which was unperfected at the time of the subrogation-justifying facts where the grantor subsequently becomes insolvent, or to a security interest which was perfected at the time of the subrogation-justifying facts where the grantor subsequently becomes insolvent *and* the extinguished security interest would have vested under s 588FL of the *Corporations Act 2001* (Cth). Otherwise however, subrogation remains capable of operating concurrently with this policy. Since none of the other policies of the Act are inconsistent with subrogation, it follows that it is possible to subrogate to a security interest under the PPSA, save in the above-described circumstances.

III Subrogation by a Secured Party with a Security Interest

This Section addresses whether a claimant who holds a security interest which is neither voidable nor void *ab initio* is able to subrogate, either to another security interest or to an unpaid vendor's lien.[83] Such a claimant may wish to do so to avoid the consequences of her own security interest being unperfected, or to enjoy the higher priority that an interest arising via subrogation might confer her with. The only reported Canadian case concerning subrogation to a security interest arose from such circumstances.

In *Re N'Amerix Logistix Inc* ('*Re N'Amerix*'), a debtor company sold some of its accounts receivable to the claimant and also granted it an in-substance security interest, and then used the proceeds of sale to pay off a secured debt held by the Bank of Nova Scotia.[84] When the debtor company later became bankrupt, the claimant discovered that it had failed to properly perfect its security interest, because its financing statement recorded the debtor's name as 'N'Amerix Logist*ics*' rather than 'N'Amerix Logis*tix*'. As such, to avoid the consequences of its own security interest being unenforceable against the trustee in bankruptcy, it sought to subrogate to the Bank of Nova Scotia's extinguished security interest.

The Ontario Superior Court of Justice held that the claimant could subrogate in such circumstances. The Court's reasoning as to the general availability of subrogation to a security interest is not of present concern, the above analysis having already demonstrated that this is possible in the Australian context.[85] What is of interest, however, is the conclusion that the claimant had a right to subrogate in the first place.

This is because a claimant is generally unable to subrogate where she obtains all that she bargained for.[86] This principle is also reflected in the distinction which is sometimes

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[83] If so, this raises further questions concerning subrogation to unpaid vendor's liens over personal property: see Gummow and Stumbles (n 4) 578.

[84] *Re N'Amerix* (n 51).

[85] See Section II above.

[86] *Capital Finance Co Ltd v Stokes* [1969] 1 Ch 261, 279 ('*Capital v Stokes*'), adopted in the context of subrogation in *Burston Finance Ltd v Speirway Ltd (in liq)* [1974] 1 WLR 1648, 1656–8 ('*Burston Finance*'); *Cheltenham & Gloucester plc v Appleyard* [2004] EWCA Civ 291, [38] ('*Appleyard*'). It has been observed that 'this issue has not been specifically addressed by other commentators who have analysed this area': Gummow and Stumbles (n 4) 576 n 65. But the principle has been accepted and applied in Australia: *Highland* (n 3) 1592–3 [106], 1594 [111]–[113]; *Aged Care Services* NSWCA (n 18) 184–5 [59], 186–9 [76]–[86]. See further

drawn between securities which are voidable or void *ab initio*, and those which are initially valid and only later become unenforceable.[87] Thus, under pre-PPSA law, claimants who obtained company charges which were subsequently rendered void were unable to subrogate to other interests which were traceably discharged with their funds, because they received all they bargained for upon obtaining the valid company charge.[88] By contrast, claimants who obtained interests which were rendered void from the outset,[89] or who never obtained interests at all,[90] were able to subrogate to other interests which were traceably discharged with their funds.

Re N'Amerix contains no discussion of this principle.[91] But the availability of subrogation in that case nonetheless raises the question of whether the remedy *should* be more widely available in the context of the PPSA, such that a claimant who obtains a security interest which is neither voidable nor void *ab initio* is able to subrogate to another interest. Four possible reasons for this have been articulated by Gummow and Stumbles, who are the only commentators to have addressed the issue thus-far.[92]

First, they suggest that the principle, that a claimant can only subrogate where she does not obtain all she bargained for, may be inconsistent with another principle, being that a claimant's own negligence does not preclude subrogation.[93] Respectfully however, such principles are consistent, because the word 'negligence' in the latter refers to the claimant's

Gandel Metals (n 11) [117]–[118]; Gareth Tilley, 'Restitution and the Law of Subrogation in England and Australia' (2005) 79(8) *Australian Law Journal* 518, 523.

87 *Capital v Stokes* (n 86) 281.

88 *Burston Finance* (n 86); *Highland* (n 3).

89 *Nottingham Permanent Building Society* (n 14). Note also *Horvath* (n 44) 652–3 [19]–[20] (if the mortgage had been void in that case, subrogation would have been available).

90 *Butler* (n 11).

91 The same is true of *French Lumber Co v Commercial Realty & Finance Co*, 195 NE 2d 507 (Mass, 1964) (Supreme Judicial Court of Massachusetts); *Kaplan v Walker*, 395 A 2d 897 (NJ, 1987) (Superior Court of New Jersey, Appellate Division) (both allowing subrogation in similar circumstances). To the extent the latter relied on the principle concerning the claimant's negligence (at 901), see the analysis in the body text below.

92 Gummow and Stumbles (n 4) 574–6.

93 Ibid 576, quoting *Appleyard* (n 86) [39]. On the latter principle more generally, see *Capital v Stokes* (n 86) 282; *Burston Finance* (n 86) 1657; *Banque Financière* (n 3) 227 (Lord Steyn), 242–3 (Lord Hutton); *Highland* (n 3) 1594 [113]. Cf Tilley (n 86) 522; Nicholas Lehm, 'Unwinding the Common Thread: When is it Unconscientious to Deny Subrogation Rights?' (2024) 98 *Australian Law Journal* 505, 521–3.

carelessness which causes her to obtain less than she bargained for in the first place.[94] Put another way, the latter principle is that the claimant's negligence *in failing to obtain the security she bargained for* does not preclude subrogation. Thus, any inconsistency falls away.

The argument that these principles are inconsistent is not inherently linked to the Act, and would thus seemingly affect all subrogation cases. Consider together *Nottingham Permanent Building Society v Thurstan*, where the claimant 'negligently' failed to verify that the mortgagor was not a minor but was still able to subrogate,[95] and *Burston Finance Ltd v Speirway Ltd (in liq)* ('*Burston Finance*'), where the claimant 'negligently' failed to register its company charge and was unable to subrogate.[96] These cases are reconcilable on the proposed understanding of the principle concerning negligence, because the mortgagee's security being rendered void by statute in the former meant that it never obtained all that it bargained for, whereas the chargee obtaining a valid charge in the latter meant that it did. But if the principles are inconsistent, such that a claimant can subrogate even where she obtains all she bargained for, then subrogation should have been available in both cases and thus *Burston Finance* must be wrong.[97] This reinforces the correctness of the proposed understanding of the principle concerning negligence, which preserves the reasoning and outcomes of the existing authorities.

Secondly, Gummow and Stumbles suggest that the rationale of subrogation, of preventing a debtor from unconscionably denying the existence of a security interest against a subrogating claimant, is equally applicable where the claimant's own security interest is only unenforceable due to an oversight.[98] However, such a claimant is capable of protecting herself by perfecting her security interest. By contrast, where the claimant does not obtain all she bargained for because the security interest is void or voidable from the outset, she will be unable to protect herself by perfecting her security interest and will thus be in greater need of the equitable remedy. Consequently, there is a meaningful difference between the two sets of

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[94] Similarly, see *Australia and New Zealand Banking Group Ltd v Whitehall* [2020] NSWSC 489, [57] ('*ANZ v Whitehall*'). This case was overturned on a different issue: *Woodman v Australian and New Zealand Banking Group Ltd* [2021] NSWCA 230.

[95] *Nottingham Permanent Building Society* (n 14).

[96] *Burston Finance* (n 86). This was cited and applied in *Highland* (n 3) 1592–4 [106]–[113]; and see further *ANZ v Whitehall* (n 94) [49]–[52].

[97] The same would be true of *Highland* (n 3).

[98] Gummow and Stumbles (n 4) 576.

circumstances, which justifies subrogation being available only where the claimant does not obtain all she bargained for.

Thirdly, Gummow and Stumbles suggest that by drafting a security agreement to require the provision of a *duly perfected* security interest as a condition of the loan, a claimant who obtains an unperfected security interest might be able to argue that she did not obtain all she bargained for. But the difficulty with this is that some of the steps required to perfect a security interest can only be done by the secured party (or by another party on its behalf), such that the grantor does not actually have the power to provide a *perfected* security interest. For example, a grantor cannot take possession or control of collateral for a secured party,[99] and can only register a financing statement on behalf of a secured party.[100] The parties can, of course, shift contractual responsibility for such matters however they like. But it is difficult to see why equity should take cognisance of that for the purposes of subrogation.

Consistently with this, the statutory consequences for not obtaining perfection fall upon the secured party rather than the grantor. It is the secured party that is left vulnerable to having its security interest vest in the grantor's insolvency,[101] or to having lower priority against another secured party,[102] or to having a buyer or lessee take free of its security interest,[103] or to having lower priority against an interest-holder with a non-PPS interest.[104] This reflects that the policies underlying the incentives to perfect a security interest pertain to secured parties – ie, to ensuring that they verify the legitimacy of their security interests to prevent fraud,[105] and that they publicise the existence of their security interests for the benefit of competing parties who have or wish to acquire property interests in the same collateral.[106]

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99 PPSA s 24(1).

100 Eg, if this is provided for in the security agreement. Alternatively, a security agreement might provide that a grantor must do everything within its control to assist the secured party in obtaining perfection.

101 PPSA s 267.

102 Ibid s 55(2)–(3).

103 Ibid ss 43–52, 69–72.

104 Ibid s 74.

105 See Section VII of Chapter Five.

106 See Section II(A) of Chapter Five.

Consequently, a secured party should be unable to argue that it did not obtain all it bargained for merely because it shifted contractual responsibility for such matters onto the grantor.[107]

Finally, Gummow and Stumbles suggest that the cases concerning unregistered company charges might be distinguished on the basis that the statutory consequences of not perfecting a security interest under the PPSA are more significant.[108] Respectfully however, the differences between such consequences are less significant than this makes them out to be. Under both statutory regimes, the ultimate consequence of not obtaining statutory perfection is that the interest is effectively lost to the secured creditor in insolvency.[109] Furthermore, although it is true that only the PPSA *directly* regulates all priority and taking free competitions,[110] the statutory regime for company charges still *indirectly* regulated all such competitions because registrations constituted constructive notice which in turn affected even those competitions which were not directly determined by the statutory priority rules.[111] This suggestion should therefore be rejected.

Thus, the equitable remedy of subrogation should be unavailable to a claimant who obtains a security interest that is neither voidable nor void *ab initio*. This does not render subrogation irrelevant in the context of the Act, as it will remain important where it would ordinarily be available on orthodox principles.[112] But it does suggest that caution is necessary

[107] Similarly, it should be insufficient for the security agreement to require the provision of a security interest which is *enforceable against third parties* as a condition of the loan. Although the writing requirements in PPSA s 20(2) could be satisfied by the grantor alone, the point concerning the consequences of failing to satisfy the statutory requirements apply equally to this provision.

[108] Gummow and Stumbles (n 4) 576.

[109] Compare *Corporations Act 2001* (Cth) s 267(1) (now repealed) ('the charge… [is], and [is] taken always to have been, void') to PPSA s 267(2) ('[t]he security interest … vests in the grantor').

[110] As emphasised in Gummow and Stumbles (n 4) 576.

[111] See Waldman, 'Unperfected PPSA Security Interests II' (n 80) Part II(B)(2). Similarly in English law today, see Goode and Gullifer (n 6) 95–8 [2-25]–[2-31], 184–6 [5-14]–[5-16].

[112] As to which, see the four sets of circumstances outlined in the introduction to Section II above.

when examining the overseas authorities on this point, not because of differences in their statutes, but rather because of differences in their equitable jurisprudence. It also suggests that caution is necessary in assuming that subrogation will be available to a secured party who wishes to subrogate to a security interest with super-priority, such as to a purchase money security interest.[113]

[113] Eg, subrogation is discussed in this context in Duggan (n 62) 267 [8.31]; Gedye, Cuming and Wood (n 65) 289–90 [73.4]; Roger Fenton, *Garrow & Fenton's Law of Personal Property in New Zealand Volume 2: Personal Property Securities* (LexisNexis, 7th ed, 2010) 601 [15.9.1]; Anthony Duggan, 'Romalpa Agreements Post-PPSA' (2011) 33(4) *Sydney Law Review* 645, 663–4.

CONCLUSION

This Chapter applied the framework for better understanding interactions between statute and the common law to the relationship between equitable subrogation and the PPSA.

Section I determined the nature of subrogation to property interests, which was a necessary prerequisite to considering the relationship between the equitable remedy and the PPSA. It showed that a claimant who is subrogated to a property interest obtains a new equitable interest. As against existing interests, this new equitable interest has the priority of the original interest at the time of the subrogation-justifying facts; and as against interests arising after that time, it has the same priority as any other new equitable interest.

The rest of the Chapter then addressed the relationship between subrogation, so understood, and the PPSA. Section II determined that it is possible to subrogate to a security interest under the Act. This is the case regardless of what the form of the security interest would be at common law. However, subrogation will be unavailable in two sets of circumstances. The first is where a claimant seeks to subrogate to an unperfected security interest, and the grantor subsequently becomes insolvent. The second is where a claimant seeks to subrogate to a perfected security interest, and the grantor subsequently becomes insolvent in circumstances where the extinguished security interest would have vested under s 588FL of the *Corporations Act 2001* (Cth). Section III then determined that a claimant who is a secured party under the PPSA does not have a wider ability to subrogate than would otherwise be the case on orthodox equitable principles. Thus, where a claimant obtains a security interest which is neither voidable nor void *ab initio*, she will be unable to subrogate to another interest. This will be the case even if her own security interest vested in the grantor's insolvency, or if the interest to which she wishes to subrogate has higher priority than her own security interest.

More generally, this Chapter has further demonstrated the usefulness of the framework for understanding interactions between statute and the common law. It has also further improved our understanding of the PPSA by examining its relationship with equity. As is outlined in the following conclusory Chapter, this thesis has now, when viewed as a whole, answered the research questions which it set out to address.

PART V: CONCLUSION

CHAPTER TEN: CONCLUSION

TABLE OF CONTENTS

INTRODUCTION

This thesis sought to answer two questions:

1. How can we better understand interactions between statute and the common law?; and
2. Can we better understand the *Personal Property Securities Act 2009* (Cth) ('PPSA' or 'Act') through examining its relationship with equity?

To answer the first question, it identified a framework for understanding interactions between statute and the common law, demonstrated its usefulness at several levels of abstraction, and applied it to the relationship between equity and the PPSA. In doing so, it also answered the second research question. This final Chapter considers how the thesis has answered these research questions, and how this in turn answers the further sub-questions raised in Chapter One. It then considers how future research might build upon the key findings of this thesis.

I RESEARCH QUESTIONS OF THIS THESIS

A *Questions Concerning Statute & the Common Law*

Part II of this thesis identified a framework for understanding interactions between statute and the common law, and demonstrated its usefulness on a case-by-case basis. In doing so, it answered the three sub-questions concerning statute, the common law, and equity more generally. These are:

1. Is it possible to apply or develop the common law by reference to statute at all and, if so, how can we understand when it is appropriate to do so?;
2. How can we better understand when to interpret statutes by reference to the common law?; and
3. Do the differences between equity and the common law affect these processes and, if so, how?

Chapter Two concerned the relationship between statute and the common law. It commenced by showing that these two bodies of law can influence each other. It then examined the processes by which this occurs.

First, it examined the application or development of the common law by reference to statute. It showed that this is a legitimate form of judicial reasoning in Australian law. It also showed that the instances where the High Court has so applied or developed the common law can be understood through a two-step framework. This entails first discerning the underlying policies of statute as a question of statutory construction, and then using those policies to determine how statute and the common law interact. Such a framework is implicit within the recognition, by courts and commentators across the common law world, that statutes contain underlying policies that have been used by courts to determine how statutes should interact with the common law. However, the framework has not previously been identified in these terms. This answers the first sub-question above, which is: is it possible to apply or develop the common law by reference to statute at all and, if so, how can we understand when it is appropriate to do so?

Next, it identified the interpretive techniques which facilitate interpreting statutes by reference to the common law. The most important such techniques are the presumption concerning words with an established legal meaning, and the notion of contextual interpretation. However, these are incapable of explaining, in and of themselves, *when* the presumption should be departed from, or *why* the context of a statute justifies interpreting it by reference to the common law. It then demonstrated that the same framework described above can guide how such questions are resolved. This answers the second sub-question above, which is: how can we better understand when to interpret statutes by reference to the common law?

Finally, the Chapter elaborated upon how the framework for understanding interactions between statute and the common law operates in the abstract.

Chapter Three concerned how the differences between equity and the common law, understood in its narrower sense, affect their relationships with statute. It identified three unique features of equity, and showed that they can facilitate interactions with statute. These are the use of notions of equitable conscience, the maxims of equity, and the nature of equitable remedies. Equity's ability to use these features to facilitate interactions with statute suggests that interactions between it and statute are more likely to arise than those between the common law and statute. They also suggest that equity may be more capable of adaptation to statute – or, put another way, that equity may be capable of more nuanced interactions with statute. This answers the third sub-question above, which is: do the differences between equity and the common law affect these processes and, if so, how?

B *Questions Concerning the PPSA*

Parts III–IV demonstrated the usefulness of the framework for understanding interactions between statute and the common law at higher levels of abstraction. They showed that the framework can be used not just on a case-by-case basis, but also to understand interactions between a given statute and a broad component of the common law. In doing so, they also improved our understanding of the PPSA by examining its relationship with equity. This in turn answered the four sub-questions concerning that statute, which are:

1. What are the underlying policy objectives of the PPSA, and what do these tell us about its operation more generally?;
2. Do these policy objectives leave any room for the operation of equity in the context of the PPSA, and for the interpretation of the PPSA by reference to equity?;
3. If so, how might some particular equitable doctrines and remedies operate around the PPSA, or inform its interpretation?; and

4. Should we view the PPSA as operating in its own unique statutory world, or, alternatively, as a statute which should be informed by the more general Australian principles of commercial law?

Part III used the relationship between equity and the PPSA, as a whole, as a case study for the application of the above-described framework. This demonstrated its usefulness to understanding interactions between a given statute, and a broad component of the common law.

Chapter Four provided an overview of the PPSA. It was largely descriptive, but also revealed an essential point that was built upon in the subsequent Chapters. This is that the PPSA should not be viewed as a 'code'.

Chapter Five identified the underlying policies of the PPSA, and critically examined their proper scope and significance, in accordance with the first step of the framework. It first considered the two most commonly cited policies of the PPSA, which are the promotion of substance over form and the publicity function. It emphasised that, while these are undoubtedly essential to the statute, it is also essential to remain cognisant of their proper scope and significance. It then considered the promotion of certainty and simplicity, and concluded that this is not a discrete policy of the PPSA at all. Finally, it identified and examined six further policies of the PPSA. These are the minimisation of detriment to secured parties, the minimisation of detriment to consumers, the protection of privacy, the prevention of fraud, the improvement of the rules that regulate debts which are characterised as accounts, and the encouragement of certain types of finance.

The existence of these additional policies, many of which reflect discrete objectives of sufficient importance to the legislature that they were included in the PPSA at the expense of its broader policy objectives, helps explain why those broader policies are more limited than they may first appear. Their existence also reinforces the conclusion that the PPSA does not contain a discrete policy of promoting certainty and simplicity. This in turn suggests that the PPSA does not create an entirely coherent and self-contained system, the slightest interference with which might upset its intended operation. Rather, it contains a 'mishmash' of policies, many of which are inherently limiting of each other. This answers the first sub-question above, which is: what are the underlying policy objectives of the PPSA, and what do these tell us about its operation more generally?

Chapter Six applied these policies to address several broader questions concerning the relationship between equity and the PPSA, in accordance with the second step of the framework. It determined that equity continues to operate in the context of the PPSA, including in competitions which are governed by its priority regime. However, the nature of relief in such cases should be restricted to ordinary personal and proprietary equitable remedies, as opposed to orders which directly affect the status of a security interest under the PPSA itself. The Chapter then determined that it may be appropriate to interpret the PPSA by reference to equity in some cases, but that the equitable doctrine of notice should not be read into the statutory priority rules. This answers the second sub-question above, which is: do these policy objectives leave any room for the operation of equity in the context of the PPSA, and for the interpretation of the PPSA by reference to equity?

Part IV used the relationships between tracing and subrogation on the one hand, and the PPSA on the other, as case studies for the application of the framework. This showed the usefulness of the framework to understanding interactions between a given statute and a particular common law claim.

Chapters Seven and Eight applied the framework to the relationship between tracing and the PPSA. **Chapter Seven** determined that 'proceeds' under the PPSA should be interpreted by reference to equitable tracing. This is contrary to the overseas case law and the views of some commentators. But, considered against the underlying policies of the PPSA, it is the preferable construction of the Australian Act. Building upon this, **Chapter Eight** determined that the equitable claim to traceable substitutes should remain available to a secured party whose interest is characterised as a security interest. This has not previously been subject to any detailed consideration in the case law or commentaries.

Chapter Nine determined that equitable subrogation should remain available in the context of the PPSA. This is consistent with the underlying policies of the statute, and with the overseas case law. However, contrary to that overseas case law, it further concluded that a secured party whose security interest was neither void nor voidable from the outset should be unable to subrogate to another interest. Equitable subrogation would not ordinarily be available in such circumstances, and the underlying policies of the PPSA, properly construed, do not merit expanding its availability. Considered as a whole, this **Part IV** answered the third sub-question above, which is: how might some particular equitable doctrines and remedies operate around the PPSA, or inform its interpretation?

Finally, **Parts III–IV**, considered together, showed how the PPSA should be affected by the more general principles of Australian commercial law which continue to operate around it, including equity. Although the PPSA reconceptualised the law of secured transactions, these Parts demonstrated that we should be careful of viewing the statute in a vacuum – or, put another way, as if it operated in its own unique statutory world. Relatedly, it is essential that we remain cognisant of the fact that the PPSA is not a code, of the proper scope of its underlying policies, and of how the principles of Australian commercial law, including equity, may differ from those of other jurisdictions with similar statutes. This answers the fourth sub-question above, which is: should we view the PPSA as operating in its own unique statutory world, or, alternatively, as a statute which should be informed by the more general Australian principles of commercial law?

II Future Research

The key findings of this thesis raise further questions concerning both the relationship between statute and the common law, and the PPSA.

A *Future Research Concerning Statute & the Common Law*

As to the former, one avenue for future research would be to explore what the framework can tell us about the processes by which statute and the common law influence each other. Since the common law can be applied or developed by reference to statute, and since this can be understood via a framework which is also applicable to the process of interpreting statutes by reference to the common law, it might be asked whether these should be viewed as discrete processes at all. This may in turn affect how we view the proper limits of judicial reasoning in the context of statutes. It may also influence narrower questions, such as whether precedent operates differently when it comes to interpreting a statute as opposed to applying or developing the common law.[1]

Another avenue for further research would be to engage in comparative analysis. It would be valuable to explore whether the inclination of Australian courts towards interpreting statutes by reference to the common law reflects Australian judicial culture, or whether it is equally pervasive in other common law jurisdictions. Either way, this would raise further questions concerning the desirability of such an approach, both in Australia and elsewhere.

Finally, there is room for further exploration of how the differences between equity and the common law, understood in its narrower sense, might affect their respective relationships with statute. A research project focused solely on this might benefit from historical analysis concerning the distinction between equity and the common law, and engagement with the broader debates concerning whether, and if so how, equity remains different from the common law today. It might also benefit from comparative analysis, especially with jurisdictions where there has been a greater degree of substantive fusion between equity and the common law than in Australia.

[1] See Andrew Burrows, 'The Relationship Between Common Law and Statute in the Law of Obligations' (2012) 128 *Law Quarterly Review* 232, 241–2.

B *Future Research Concerning the PPSA*

Turning to the PPSA, the findings of this thesis might be built upon by further research concerning its relationship with the common law. There is room to explore how other equitable doctrines and remedies, besides tracing and subrogation, might interact with the PPSA. It would also be valuable to explore interactions between the PPSA and those common law principles, in the narrower sense, which are likely to be particularly important to its operation. These include the torts concerning interference with goods.[2]

The analysis of the policies of the PPSA in this thesis might also be built upon by considering how it should inform the interpretation of the Act more generally. Such analysis might also be used to inform how the Act should be amended, which remains topical given the ongoing statutory review process.

Finally, another avenue for future research would be to engage in comparative analysis with other jurisdictions with personal property securities statutes. One of the key takeaways from this thesis is the need to be cognisant of the proper scope and limitations of the policies underlying the Australian Act. But it was beyond its scope to closely examine the policies of the international counterparts to the PPSA. For example, this thesis did not consider whether the Canadian judicial assertions that their statutes contain discrete policies of promoting certainty and simplicity are, in fact, justified as a question of construction. Such analysis might benefit both Australia, and those other jurisdictions, by highlighting areas where their statutes might differ from one another. This may in turn highlight how those statutes should be amended to build upon each other's successes, and to learn from each other's mistakes.

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[2] In the Canadian context, see, eg, Roderick J Wood, 'Accounts, Proceeds and Conversion: *Bank of Nova Scotia v IPS Invoice Payment System Corporations* (2011) 26(2) *Banking and Finance Law Review* 359, particularly at 369–70.

CONCLUSION

This thesis sought to answer two questions:

1. How can we better understand interactions between statute and the common law?; and
2. Can we better understand the PPSA through examining its relationship with equity?

The answer to the first question is that we can better understand interactions between statute and the common law through a two-step framework. This framework entails first discerning the underlying policies of statute as a question of statutory construction, and then using those policies to determine whether it is appropriate to apply or develop the common law by reference to statute *or* to interpret statute by reference to the common law. It can be applied to individual cases, or at higher levels of abstraction to map out interactions between a given statute and components of the common law.

The answer to the second question is that we can better understand the PPSA through examining its relationship with equity. Such examination can shed light on both the operation of equity in the context of the PPSA, and the interpretation of the PPSA by reference to equity.

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