

CHEAT SHEET

Introduction

The PPSA provides for 'a priority regime, not a title regime' [37] (*Warehouse Sales Pty Ltd (in liq) v LG Electronics Australia Pty Ltd* [2014] VSC 644). In order to determine which party has priority under the PPSA with respect to the personal property in the facts, it's first necessary to establish that the PPSA is applicable to each party's interest.

1. Is the arrangement excluded from the PPSA? (s 8)

The agreement between <Insert party> and <insert party> is not excluded by s 8 of the PPSA.

OR

Under s 8 of the PPSA, <insert one of the following list>: are interests to which the Act does not apply.

- Statutory security interests (e.g. arising under tax laws) – s 8(1)(b)
- Security interests by operation of law (e.g. liens) – s 8(1)(c)
- Interests in land and fixtures – ss 8(1)(f)(i)-(ii), s8(1)(j)
 - *Forge Group Power P/L v General Electric* [2016] NSWSC 52
- Special purpose trusts (Quistclose trusts) – s 8(1)(h)
 - This does not mean all trusts are excluded but typical private trust most likely won't involve a security interest anyway although a trust may be set up as a security arrangement – e.g. in certain corporate finance transactions
- Commonwealth and state laws may exclude property from the PPSA – e.g. mining and fishing licenses

2. Does the arrangement involve an 'in substance' security interest? (s 12)

Under s 12(1) of the PPSA, a security interest is an interest in personal property provided for by a transaction / consensual dealing (*Dura* [2014]) that, in substance, secures the payment or performance of an obligation.

Personal property is defined under s 10 of the PPSA as meaning property, including a license, that is not land. The <insert collateral> between <Insert party> and <insert party> is a <chose in action / chose in possession> and thus classified as personal property under the Act.

In substance, <secured party's> rights <arising from the agreement / to interest in secured property> secures <insert party's> performance of their obligation, namely, <insert obligation e.g. to pay for the vehicles it supplies in full>. This is a <insert one of the following> and is therefore a security interest under s 12(2)(x) of the Act.

- (a) a fixed charge;
- (b) a floating charge;
- (c) a chattel mortgage;
- (d) a conditional sale agreement (including an agreement to sell subject to retention of title);
- (e) a hire purchase agreement;
- (f) a pledge;
- (g) a trust receipt;
- (h) a consignment (whether or not a commercial consignment);
- (i) a lease of goods (whether or not a PPS lease);
- (j) an assignment;
- (k) a transfer of title;
- (l) a flawed asset arrangement.

If not, does it involve a deemed security interest? (s 12(3)) e.g. PPS lease?

Section 12(3) provides that <insert one of the following>: ... is a security interest under the Act.

(a) the interest of a transferee under a transfer of an account or **chattel paper**;

Section 10 defines **chattel paper** as meaning one of more writings that evidence a monetary obligation and either or both of the following:

<a security interest in or lease of specific goods> and/or

<a security interest in specific intellectual property or a specific intellectual property licence>

(b) the interest of a consignor who delivers goods to a consignee under a **commercial consignment**;

Section 10 defines **commercial consignment** as meaning a consignment if the consignor retains an interest in goods that it delivers to the consignee for the purpose of sale, lease or other disposal and the consignor and the consignee both deal in goods of that kind in the ordinary course of business.

(c) the interest of a lessor or bailor of goods under a **PPS lease**

Pursuant to s 13(1), a **PPS lease** means a lease or bailment of goods:

(a) for a term of more than 2 years; or

(b) for a term of up to 2 years that is automatically renewable, or that is renewable at the option of one of the parties if the total of all terms might exceed 2 years; or

(c) for a term of up to 2 years, or a lease for an indefinite term, in a case in which the lessee or bailee, with the consent of the lessor/bailor, retains uninterrupted (or substantially uninterrupted) possession of the leased/bailed property for period of more than 2 years after the day the lessee/bailee first acquired possession of the property.

Pursuant to s 13(2), a **PPS lease** does not include:

(a) a lease by a lessor who is not regularly engaged in the business of leasing goods; or

(b) a bailment by a bailor who is not regularly engaged in the business of bailing goods; or

(c) a lease of consumer property as part of a lease of land where the use of the property is incidental to the use and enjoyment of land; or

(d) a lease or bailment of personal property prescribed by the regulations for the purposes of this definition, regardless of the length of the term of the lease or bailment.

As per the facts, [secured party] [obtained an interest in/consigned/leased/] [property] and as evidenced by _____ is a deemed security interest under s 12(3)(_).

Note: a PPS lease is also a PMSI. It's treated as a PMSI when it comes to a priority dispute (super priority).

Is the security interest in ALLPAP?

Regulation 1.6 of the PPSR provides that "all present and after-acquired property" (ALLPAP) refers to personal property that the grantor has an interest in at the registration time for the financing statement of a security interest as well as property acquired after that time.

Is the security interest in ALLPAP, except?

Regulation 1.6 of the PPSR provides that "all present and after-acquired property, except" (ALLPAPE) refers to personal property that the grantor has an interest in at the registration time for the financing statement of a security interest as well as property acquired after that time, excluding an item or class of personal property listed in the financing statement.

Is it a PMSI? (s 14)

Section 14(1) provides that a **purchase money security interest** (PMSI) means any of the following:

- (a) a security interest taken in collateral, to the extent that it secures all or part of its purchase price;
- (b) a security interest taken in collateral by a person who gives value for the purpose of enabling the grantor to acquire rights in the collateral, to the extent that the value is applied to acquire those rights;
- (c) the interest of a lessor or bailor of goods under a PPS lease;
- (d) the interest of a consignor who delivers goods to a consignee under a commercial consignment.

Section 14(2) provides that a **purchase money security interest** (PMSI) does not include:

- (a) an interest acquired under a transaction of sale and lease back to the seller; or
- (b) an interest in collateral (as original collateral) that is chattel paper, an investment instrument, an intermediated security, a monetary obligation or a negotiable instrument; or
- (c) a security interest in collateral that (at the time the interest attaches to the collateral) the grantor intends to use predominantly for personal, domestic or household purposes.

As per the facts, [secured party] obtained <insert one of s 14(1) options> which is a PMSI under s 14(1)().

3. If so, has the secured party 'perfected' their security interest? (ss 19 – 22)

Attachment of the security interest (s 19)

Under s 19(1), a security interest in collateral is only enforceable against a grantor if it has attached to the collateral.

Security interest paid for or created by grantor:

Attachment rule

S 19(2) provides that:

- (2) A security interest *attaches* to collateral when:
 - (a) the grantor has rights in the collateral, or the power to transfer rights in the collateral to the secured party; and
 - (b) either:
 - (i) value is given for the security interest; or
 - Note: 'value' is defined under s 10 to mean 'consideration that is sufficient to support a contract' and includes 'an antecedent debt or liability'.
 - (ii) the grantor does an act by which the security interest arises.
 - Interest will attach at the time of execution (*Royal Bank of Canada v Radius Credit Union Ltd*).

As per the facts, [grantor] acquired [property rights/power to transfer rights of _____] in the [collateral], as evidenced by [source of: control/possession/ownership] on [date]. Additionally, [secured party provided value for the SI in the form of _____/the grantor unilaterally created the security interest by _____]. The security interest has therefore attached to the [collateral] and is enforceable against [grantor].

Security interest deferred until later time:

Under s 19(3) if the parties to a security agreement have agreed to defer attachment until a later time, attachment will occur at that specified time. On the facts, [parties] agreed to defer attachment of [SI] to [collateral] until [time]. At that time, however, they will need to satisfy the **attachment rule** <see above s 19(2)>.

On the present facts, [parties] agreed to defer attachment of the SI to [collateral] until [date]. The question is whether they will satisfy attachment on that date.

The [grantor] acquired [property rights/power to transfer rights of _____] in the [collateral], as evidenced by [source of: control/possession/ownership] on [date]. Additionally, [secured party provided value for the SI

in the form of _____/the grantor unilaterally created the security interest by _____. The security interest has therefore attached to the [collateral] and is enforceable against [grantor].

If security interest is in goods leased, bailed, consigned or sold under conditional sale agreement

S 19(2) provides that:

- (2) A security interest *attaches* to collateral when:
 - (a) the grantor has rights in the collateral, or the power to transfer rights in the collateral to the secured party; and
 - (b) either:
 - (iii) value is given for the security interest; or
 - Note: 'value' is defined under s 10 to mean 'consideration that is sufficient to support a contract' and includes 'an antecedent debt or liability'.
 - (iv) the grantor does an act by which the security interest arises.
 - Interest will attach at the time of execution (*Royal Bank of Canada v Radius Credit Union Ltd*).

Additionally, s 19(5) states that a grantor acquires right in goods that are <leased or bailed to grantor under PPS lease, consigned to grantor, sold to grantor under conditional sale agreement/ROT agreement> when the grantor obtains possession of the goods.

On the present facts, [grantor] obtained possession of [goods] that were subject to a [PPS lease/consignment agreement/ROT agreement] on [date]. Additionally, [secured party provided value for the SI in the form of _____/the grantor unilaterally created the security interest by _____. The security interest has therefore attached to the [collateral] and is enforceable against [grantor].

E.g. *The facts indicate that Motosaurus purchased the Fords from Oceania who granted a security interest in the form of a PMSI on 10 April. Therefore, the security interest has attached to the Fords and is enforceable against Motosaurus.*

Enforceability against third parties (s 20)

For a secured party to enforce their security interest against third parties, they must comply with the general rule under s 20.

Section 20(1) provides that a security interest is enforceable against a third party if the security interest is attached to the collateral and if one of the following applies <see below>.

Section 20 Enforceability of security interests against third parties

General rule

- (1) A security interest is enforceable against a third party in respect of particular collateral only if:
 - (a) The security interest is attached to the collateral; and
 - (b) One of the following applies:
 - (i) the secured party possesses the collateral;
 - (ii) the secured party has perfected the security interest by control;
 - (iii) a security agreement that provides for the security interest covers the collateral in accordance with subsection (2).

Enforceable via possession

On the present facts, [secured party's] secured interest attached to [collateral] on [date] and came into his possession on [date]. [Secured party's] interest in [collateral] is therefore enforceable and will prevail against [third party].

Enforceable via control

<If collateral is>

- an ADI account
- an intermediated security

A: STRUCTURE AND HISTORY OF THE AUSTRALIAN CONSUMER LAW

- The **Australian Consumer Law (ACL)** is a comprehensive regime to provide protection to consumers. It was the key recommendation of the Productivity Commission's 2008 Review of Australia's Consumer Policy Framework. The ACL is a cooperative reform of the Australian Government and the States and Territories, through Council of Australian Governments (COAG).
- The ACL applies as a law of the Commonwealth under the *Competition and Consumer Act 2010* (Cth) ("the CCA"), comprising:
 - Schedule 2 of the CCA;
 - The provisions of Part XI of the CCA that relate to Schedule 2 and
 - Regulations under the CCA relating to the ACL.
- The ACL also applies as a law of each state and territory. In NSW that is under the *Fair Trading Act 1987* (NSW). As a result there is now one uniform Australian Consumer Law in all jurisdictions. The ACL commenced on 1 January 2011.

The ACL is comprehensive package of consumer protection provisions which includes:

- **General consumer protections:** (an overview of these covered in Topic 7)
 - prohibition against *misleading and deceptive conduct*
 - Prohibition against *unconscionable conduct*; and
 - a national *unfair contract terms law* covering standard form consumer and small business contracts allowing courts to declare them void.
 - **Specific consumer protections:**
 - Consumer guarantees (Topic 8)
 - Prohibitions against false or misleading representations and unfair practices such as pyramid selling, referral selling, harassment and coercion;
 - Protections for unsolicited consumer agreements and lay-by agreements.
 - **a national product safety regime** (Topic 8)
 - **penalties, enforcement powers and consumer redress options.**
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- The ACL applies nationally and in all States and Territories, and to all Australian businesses. For transactions that occurred prior to 1 January 2011, the previous national, State and Territory consumer laws continue to apply.
 - The ACL is administered by the ACCC and state and territory consumer protection agencies and is enforced by all Australian federal, state and territory courts and tribunals.
 - The *Australian Securities and Investments Commission Act 2001* (ASIC Act), provides for the same protections in relation to financial products and services as provided under the AC.
 - The ACL is not intended to cover the field: s 131C of the CCA provides that Part XI of the CCA "is not intended to exclude or limit the concurrent operation of any law, whether written nor unwritten, of a State or Territory."
 - As a result, the ACL exists alongside other legislation (and the common law). For eg: the *Sale of Goods Act* ("SOGA") implies conditions and warranties, and implied terms as to title and quality of goods into contracts for the sale of goods that continue to operate alongside the consumer guarantee provisions of the ACL. **The main differences** between the AAL and SOGA in relation to consumer guarantees:
 - Cover **different transactions**: SOGA applies to contracts for the sale of goods whereas ACL applies to contracts for the supply of both goods and services;
 - Impose **obligations on different persons**: the SOGA applies to sellers whereas the ACL also applies to manufacturers and suppliers;
 - Create **rights in favour of different persons**: the SOGA creates rights in favour of consumers and non-consumers whereas the ACL provides consumer guarantees only for consumers as defined.
 - In addition to the legislation protections under the ACL, *Fair Trading Act 1987* (NSW) and limited provisions of the *Sale of Goods Acts*, consumers can seek remedies under common law, or combinations of both common law and legislation to obtain redress.

- Further, consumers may have resource to particular industry legislation, e.g. banking law for disputes between themselves and a bank, or credit law if there is a dispute over a contract for credit provision.
- All courts and tribunals in Australia can hear disputes concerning the ACL.

Scope of the ACL

- Chapter 1 – Introduction: a single set of definitions and interpretive provisions about consumer law concepts.
- Chapter 2 – General protections, which create standards of business conduct in the market, including:
 - A general ban on misleading and deceptive conduct in trade or commerce;
 - A general ban on unconscionable conduct in trade or commerce and specific bans on unconscionable conduct in consumer and some business transactions; and
 - A provision that makes unfair contract terms in consumer contracts and small business contracts void.
- Chapter 3 – Specific protections which address identified forms of business conduct, including provisions:
 - Dealing with consumer transactions for goods or services
 - On the safety of consumer goods and product related services; and
 - On the liability of manufacturers for goods with safety defects
- Chapter 4 – Offences: criminal offences relating to certain matters covered in Chapter 3.
- Chapter 5 – Enforcement and Remedies

Regulations under the ACL

- Regulations made under the ACL are set out in Parts 6 and 7 of the *Competition and Consumer Regulations 2010* (Cth)
- The ACL Regulations give practical effect to the ACL provisions dealing with:
 - prescribed requirements for asserting a right to payment;
 - agreements that are not unsolicited consumer agreements;
 - requirements for warranties against defects and repair notices; and
 - reporting requirements for goods or product-related services associated with death, serious injury or serious illness.

Key Definition: Meaning of 'person' and 'consumer'

- 'person' defined in section 152AC of the *Competition and Consumer Act 2010*
- 'consumer' defined in section 3 of the ACL
 - A person is a consumer of goods or services if, and only if:
 - The amount paid or payable for the goods or services is \$40,000 or less or as prescribed by the regulations; or
 - The goods or services were of a kind ordinarily acquired for personal, domestic or household use or consumption; or
 - The goods are a commercial road vehicle
 - The goods are not acquired for resupply or manufacture.

The meaning of 'in trade or commerce' s 2

- ACL section 2 defines 'trade or commerce' as follows:
 - 'trade or commerce means:
 - (a) trade or commerce within Australia; or
 - (b) trade or commerce between Australia and places outside Australia;
 and includes any business or professional activity (whether or not carried on for profit).'
- This differs slightly from the definition of 'trade or commerce' in section 4 of the *Competition and Consumer Act* where 'trade or commerce' means 'trade or commerce within Australia or between Australia and places outside Australia.'

B: MISLEADING OR DECEPTIVE CONDUCT

Brief overview:

- The general prohibition against misleading and deceptive conduct and conduct likely to mislead or deceive under s 18(1) of the ACL derives from the former s 52 of the *Trade Practices Act 1974* (Cth).
- There is extensive case law on s 52 which remains relevant to the interpretation of s 18.
- The general prohibition against misleading and deceptive conduct and conduct likely to mislead or deceive establishes a norm of conduct for the market. A person who has suffered loss by conduct that breaches s 18 is entitled to damages under s 236 of the ACL.
- This Part provides an overview of the scope and operation of the prohibition. Note that it is also covered other subjects including Contracts, and Remedies.

Section 18 - Misleading or Deceptive Conduct

- *Section 18(1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive.*
- The broad reach of Section 18
 - The section has a broad reach. It can be relied upon not only by consumers, but also by commercial entities.
 - The general prohibition is complemented by prohibitions on specific kinds of conduct in ss 29-34 and 37 of the ACL.
 - As the ACL applies as a law of the Commonwealth and all states and territories, it means that corporations, unincorporated entities and individuals are all caught by the prohibition, as are government entities if carrying on business.

The “in trade or commerce” limitation

- To fall within the statutory prohibition, misleading or deceptive conduct must occur “*in trade or commerce*.”
- Although the concept is a complex one, in essence the conduct must be directed towards persons with whom the defendant has dealings of a commercial nature, such as consumers. In *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594, 614, Toohey J observed that “[t]he question is not whether the conduct engaged in was *in connection with* trade or commerce or in relation to trade or commerce. It must have been *in trade or commerce*.” (emphasis added)

The relevant audience

- To assess whether conduct is misleading or deceptive it is necessary to identify its likely effect on the audience to whom the conduct is directed.
- Conduct may be directed to the public at large or a section of the public, such as through advertisements in connection with mass marketing of products. The ordinary or reasonable member of the public is expected to take reasonable care of their own interests.
- Sometimes conduct is addressed to specific individuals or identified groups and then the conduct will be assessed by reference to the individual or identified group’s position and the nature of the parties, the character of the transaction and what each party knew about the other to determine the effect of the conduct.

What conduct may be misleading?

- Conduct will be misleading if it has the capacity to lead into or cause error in the sense of a person being led to believe that something that is in fact untrue or incorrect.
- The courts have not attempted to define the words misleading or deceptive any further. “[T]he question is whether in light of all the relevant circumstances constituted by acts, omissions, statements or silence, there has been conduct which is or is likely to be misleading or deceptive. Conduct answering that description may not always involve misrepresentation.” *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, 41 per Black CJ.
- Context is important: eg advertising puffery.

- Conduct need not be fraudulent, negligent or reckless to breach the section, and silence can breach the prohibition where there would be an expectation of disclosure.

Remedies for misleading and deceptive conduct

- A range of remedies are available for breach of s 18 under s 236 of the ACL. Under that section, a person who has suffered loss as a result of a contravention is entitled to damages to compensate them for the loss.
- Under s 237, the court is given power to grant any other orders it thinks appropriate to prevent loss or likely loss being suffered as a result of the contravention.
- S 243 provides a non-exhaustive list of the types of orders that can be made under s 237 such as declaring the contract void, varied, or the grant of a refund.
- To be entitled to a remedy the claimant must establish:
 - A contravention of s 18;
 - “loss or damage” has been or is likely to be suffered, and
 - the causal connection between the loss or damage suffered or likely to be suffered and the contravention.

C: UNCONSCIONABLE CONDUCT

Unconscionable conduct

- Unconscionable conduct deals with transactions between dominant and weaker parties.
- Overlaps with duress and undue influence.
- Unconscionable conduct is prohibited both in equity and, more recently, by statute.
- There are three key sections under the ACL relating to unconscionable conduct :
 - Unconscionable conduct under the ‘unwritten law’ (section 20);
 - Unconscionable conduct affecting consumers (section 21); and
 - Matters the court may have regard to for the purposes of section 21 (section 22).

Unconscionable conduct within the unwritten law – s 20

- Section 20(1) of the ACL states that ‘A person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time.’
- The purpose of this section is to:
 - Widen the range of remedies available to the victim of unconscionable dealing; and
 - Enable the ACCC to investigate unconscionable conduct and, if necessary, bring legal action on behalf of the person who has been treated unconscionably.
- Section 20 does not apply to:
 - Financial services
 - Conduct that is prohibited under section 21

Within the ‘unwritten law’

- Section 20 appears to refer to the equitable doctrine of unconscionable dealing as it has been interpreted in case law: see for example *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447.
- However, the words are general and the courts have not yet settled on what constitutes unconscionable conduct under the ‘unwritten law’ and it may go beyond the doctrine of unconscionable dealing to include other equitable doctrines (for example, equitable estoppel).
- However it only applies if the other ACL unconscionability provisions do not apply: s 20(2). As s 21 statutory unconscionability in the provision of goods and services is considered wider than unconscionability under the “unwritten law”, s 20 may have little work to do.

Unconscionable conduct in equity

- Equity intervenes where one party has taken advantage of a ‘special disability’ held by the other.
 - Most commonly, this special disability will be as a result of age, illiteracy, lack of education or a combination of factors.
- The resulting transaction must normally also be harsh and oppressive to the weaker party.