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I. SECURITY INTEREST AND PPSA

A. Is the arrangement a security interest?

I. Traditional security interest

A mortgage/charge is a traditional security interest under PPSA.

- Legal mortgage
- Equitable mortgage
- Equitable charge
- Torrens title mortgage
- Pledge
- Lien

II. 'In substance' security interest

The arrangement may be an 'in-substance' security interests as defined by s12(1) of PPSA.

(a) Identify personal property

- (i) *the builder has done sufficient work to have economically earned the payment of the full first instalment, and so the payment is in an economic sense personal property of the builder.*
- (ii) *A is a company and a legal person who can own property. The assets are its personal property.*
- (iii) *B is a company which is legal person can own property. The refrigerator is its personal property.*
- (iv) *Seller is a company and a legal person who can own property. The products are the seller's personal property.*

(b) Identify why X has an interest in that personal property

X then has an interest in that personal property as

- (i) **fixed and floating charge**
X has fixed and floating charge over A's assets to secure A to repay the loan.
- (ii) **Conditional sale agreement** (e.g. agreement to sell subject to retention of title)
Seller delivers possession of the goods but retains the title until buyer pays purchase price. So after goods are delivered, the seller still has an interest in the goods to secure the payment of purchase price.
- (iii) **Hire purchase agreement**
The financier (or supplier) hires goods to the customer for a series of instalments and grants the customer an option or obligation to purchase the goods by paying the final instalment. It's a hire-purchase agreement under s12(2) of PPSA. Possession sits with the hirer and the financier retains the title to secure the full payment.
- (iv) **Lease of goods e.g. finance lease**
The lessee has the possession of the property and is obliged to pay rent in multiple instalments to repay the full purchase value. It's a lease of goods under s12(2)(i) of PPSA. The lessor retains title to secure the full payment. (deemed to be PPS lease if more than 2 years)

(v) **Transfer of title**

X transferred the shares to secure Y's performance of its obligation. It is an absolute transfer which has a security purpose and is included by s12(2)(k) of PPSA.

(vi) **Flawed asset arrangement** – e.g. bank account, hold backs in construction contract

- *Bank account- the money in bank account is the personal property of the client and the flaw is the bank's right to withhold the money to secure the other obligations of the client.*
- *It seems to be a flawed asset arrangement under PPSA s12(2)(1) to contractually adjust rights so that they don't have to be performed in certain circumstances. A now owes an independent debt to the builder to secure the full performance of the builder's obligation.*

III. Deemed security interests

The arrangement may be a deemed security interests as defined by s12(3) of PPSA.

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

It's a sale of debt which falls within the definition of PPSA 'account' (a monetary obligation arising from disposal of property/providing service or right in the ordinary course of business) and therefore is deemed to be security interest under s12(3)(a).

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

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

The lease in question is a lease (or bailment) with term of more than 2 years or terms of less than two years or indefinite term but the period of possession has gone beyond 2 years. Additionally, the bailee/lessee provides value – rent. It's a PPS lease which is deemed to be security interest under s12(3)(c) of PPSA.

B. How can it be perfected?

For a security interest to be perfected in respect of particular collateral, there must be (a) attachment to specific item of collateral – PPSA s19(2)(a); (b) enforceable right against third parties – PPSA s20; (c) registration on the PPSA register – s21(2)(a) or possession – s21(2)(b) or control – s21(2)(c).

(a) The arrangement already satisfies the requirement of **attachment** and **enforceability** as

- *Has **procession or control** of the property (actually already sufficient three requirements, but with registration is better)*
- *A (grantor) **owns the property** under PPS lease, consignment, or conditional sale including ROT) or power to transfer rights to X (secured party) so meet the requirement of attachment.*
- *A (grantor) signed a written agreement by which **security interest arises and specifies the collateral** (particular one or all)*

(b) It should be **perfected by registration** on the PPSA as soon as it can under s21 of PPSA.

(c) Possession or control

- *It is not amendable to perfection by control or possession.*

- Alternatively, it can be perfected by **possession** as the collateral is physical item/negotiable document of title/non-negotiable document of title issued to secured party (e.g. possession of Bill of Lading or receipt for items shipped) which can be possessed under s21(2)(b)
- Alternatively, it can be perfected by **control** as
 - it is an **ADI Account** (automatically perfected if secured party is the ADI – s25; need to register if taking ADI security over other ADI accounts)
 - it is an **intermediated security** under PPSA s26 (e.g. ASX shares held through CHESS)
 - it is an **investment instrument** under PPSA s27 (e.g. shares, bonds etc if the secured party is the legal owner or have possession of the certificates)

(d) consequence of failing to perfect

Failure to perfect **does not invalidate** the security interest, and so it still may be useful (particularly before insolvency), but the **3 bad consequences** will usually undermine its usefulness considerably

- **Third party can acquire the collateral free of security interest (taking free rule)**
 - **Permitted dealing**: a third party can acquire an interest in secured collateral free of the secured party's security interest in that collateral under s32 of PPSA if secured party expressly or impliedly authorised the dealing or agreed the dealing would extinguish the security interest.
 - **Prohibited dealing**: even though the dealing is not permitted, a third party (generally a purchaser or lessee) takes its interest in collateral free of the secured party's interest if
 - ✓ the buyer or lessee pays **for value** and the security interest is **unperfected** (s43);
 - ✓ the secured collateral is a **serial numbered property** and a **search** by reference to the serial number immediately before sale/lease would not disclose the security interest (s44)
 - ✓ the secured collateral is a **motor vehicle** and the seller or lessor is a licenced motor dealer (s 45(3)) or at any time between the start of the previous day and the sale / lease a search by reference to the serial number shows no result – private sales (s 45(2))
 - ✓ the secured collateral is sold or leased **in the ordinary course of seller/lessor's business of selling or leasing property of that kind** (s46)'
 - ✓ the buyer or lessee for new value intends to **use property predominantly for personal, domestic or household purposes**, and the new value given is not more than \$5,000.00 (s47)
 - ✓ if the secured collateral is **currency** and the third party has no actual or constructive notice of the security interest (s48)
 - **taking subject to a security interest**: if the transaction is not permitted under s32 but the collateral is transferred under a perfected security interest, the security interest is temporarily perfected in relation to the transferee for the **shorter of** (s34)
 - ✓ **24 months**; or

- ✓ End time of registration; or
- ✓ If transferee has granted a prior security interest that would attach to the collateral, 5 business days after original security holder gets the knowledge necessary to perfect by registration

As a **consequence**,

- ✓ If secured party doesn't find out about transfer – loses security interest after two years
- ✓ If secured party does find out, and transferee has given prior security to someone else – extremely common – secured party only has 5 business days to register
- ✓ Still have security interest in proceeds (but undermine value of security interest)

To avoid the consequence, the secured party should make a new registration against the third party.

- The security interest may lose priority to another security interest

Security interests	Priority rules
Unperfected vs unperfected	Determined by order of attachment (s 55(2))
Perfected vs unperfected	A perfected security interest defeats an unperfected security interest (s 55(3))
Perfected vs perfected	In order of priority time : first registration wins against all other registrations (s 55(5)). But registration priority loses priority to: <ul style="list-style-type: none"> 1. Perfection by control (s 57) 2. ADI accounts security interest in favor of account bank 3. PMSI's Some other super priorities
PMSI vs non-PMSI	A PMSI usually defeats a non-PMSI (ss 62-64)

- Security interest vests in the grantor if **the grantor becomes insolvent and the security interest is unperfected** at the time– s267

- If an insolvency occurs – winding up, administration, deed of company arrangement, personal bankruptcy
- Registration time requirements
 - ✓ If not a Corporations Act company
 - No general timing requirements
 - If you delay, other people may register ahead and get priority, grantor may become insolvent and you vest
 - PMSI has time limits to register to get PMSI priority
 - ✓ If a **Corporations Act company**
 - CA S.588FL(2)(b) require the registration time is within 20 business days after the security agreement giving rise to the security interest came into force; or at least 6 months before the date of commencement of winding up (or administration if that came earlier). Otherwise it will be vested as well.