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Authors: Greg Whyte, Alexander Sloan

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Lovell and Radan

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Martin Lovell and Oliver Radan*

Registration of a financing statement on the Personal Property Securities Register is the most common way to perfect a security interest in personal property under the Personal Property Securities Act 2009 (Cth). This article explores common registration errors and how these issues have been considered and addressed in recent case law. It then considers the various mechanisms for correcting registration errors and proposed reforms to address some of the most critical issues identified by small businesses and other stakeholders.

1. Introduction

Registration of a financing statement on the Personal Property Securities Register (PPSR) is the most common way to perfect a security interest in personal property under the *Personal Property Securities Act 2009* (Cth) (*PPSA*).

The PPSR is an online noticeboard administered by the Australian Financial Security Authority (AFSA) which is intended to be simple to use, reduce the costs and complexities associated with providing secured finance and enhance the ability of businesses and consumers to use their assets as security.[1] However, the reality has proven quite different, with consistent feedback that small businesses in particular find the PPSR daunting and difficult to use. Even among professional advisers and major law firms there is a difference of opinion as to how to register common forms of security interests such as general security deeds, specific security deeds and retention of title arrangements.

Since the PPSR went “live” in January 2012 there have been various examples of registration errors under the *PPSA* considered by the courts. In many cases, PPSR registration errors have been seriously defective and resulted in security interests being held to be unperfected with severe consequences for secured parties in terms of priority and vesting upon insolvency.

This article explores common registration errors and how these issues have been considered and addressed in recent case law. It then considers the various mechanisms for correcting registration errors and proposed reforms to address some of

the most critical issues identified by small businesses and other stakeholders.

1. II. What Common Registration Errors Have Been Considered by Australian Courts?
2. Grantor Identifier

One of the most frequent and critical registration errors is a failure to correctly identify the grantor. The *Personal Property Securities Regulations 2010* (Cth) (*PPS Regulations*) set out a hierarchy of identifiers that must be used for the purposes of s 153(1) of the *PPSA* based on whether the grantor is an individual, body corporate, partner, trustee or body politic. Recent decisions have highlighted that these identifiers must be strictly adhered to in order for a registration to be effective.

1. The Re OneSteel Decision

The decision of Brereton J in the case of *Re OneSteel Manufacturing Pty Ltd*[2] illustrates the consequence of using the wrong identifier for a body corporate grantor – in particular, the Australian Business Number (ABN) rather than the Australian Company Number (ACN) of a company. The case involved the lease of crushing and screening equipment and parts to OneSteel by Alleasing. It was not disputed that the lease agreement constituted a "PPS Lease" for the purposes of the *PPSA*. Alleasing registered its interest in the equipment and parts on the PPSR on 17 October 2014 and 7 July 2015, respectively. At the time of registration, OneSteel was a body corporate that had an ACN. Accordingly, pursuant to s 153, Alleasing's financing statements needed to identify OneSteel by its ACN.[3] However, the financing statements lodged by Alleasing identified OneSteel by its ABN.[4]

On 7 April 2016, OneSteel appointed administrators. The administrators informed Alleasing that they considered Alleasing's registrations to be defective and ineffective because the registrations identified OneSteel by its ABN rather than its ACN. Accordingly, Alleasing's interest in the equipment and parts was "unperfected" and had vested in OneSteel immediately before the appointment of administrators, pursuant to s 267.[5] Alleasing subsequently lodged new financing statements and amended the original registrations to reference OneSteel's ACN after the company was in administration. Relevantly, the Court had to consider whether Alleasing's original registrations were defective and, if so, whether those defects were "seriously misleading" for the purposes of the *PPSA*.

Alleasing submitted that the requirement of s 153(1) was that a financing statement include the grantor's ACN and, because OneSteel's nine-digit ACN was included within its 11-digit ABN, this requirement was met and its original registrations complied with s 153(1). The Court disagreed, finding that a grantor's ABN and its ACN are two different identifiers, issued by different agencies and that, because a search by OneSteel's ACN alone would not reveal the registrations, the registrations were defective. The Court then considered whether the defects in the registrations rendered the registrations ineffective because either: (1) the defects were of a kind mentioned in s 165;[6] or (2) the defects were otherwise "seriously misleading".[7]

The key subsection considered in response to the first question was s 165(b). In combination with s 164(1)(b), this section provides that a defect in the registration will render the registration ineffective if no search of the PPSR by reference only to the grantor's details (as required to be included under s 153) is capable of disclosing the registration. Alleasing contended that no such defect existed because there were "combined grantor searches" that could be undertaken through certain third-party (business-to-government) platforms that would disclose registrations that reference a grantor's ABN, even if its ACN was entered as its identifier. The Court rejected this argument, finding that a direct search of the PPSR by reference to a grantor company's ABN (where that grantor is not a trustee of a trust that has an ABN)[8] is not authorised under s 171 and that such a search would not reveal registrations against the ACN of the grantor. Thus, the registrations were ineffective pursuant to ss 164(1)(b) and 165(b).

The Court also addressed the question of whether the registrations were "seriously misleading". Alleasing submitted that the defects in the registrations were not seriously misleading as the financing statements referred to OneSteel and the relevant collateral, and it relied on the New Zealand case of *Rabobank New Zealand Ltd v StockCo Ltd*[9] in which financing statements registered against farm operators and not the farming partnership were not seriously misleading as, to the outside world, the operators were the farmers. However, the Court disagreed, finding that, in the context of the PPSR (being a registry that only provides returns that exactly match what is entered), an error in the registration will be seriously misleading if such an error would prevent a registration being disclosed by a properly formatted search in the relevant searchable field.[10] Therefore, the error was seriously misleading and the registration was ineffective pursuant to s 164(1)(a).[11]

The decision in *Re OneSteel* is significant as it is one of the few judgments[12] that provides clear guidance that a registration is ineffective where it is made using the wrong identifier for the grantor.[13] It resolved some of the mixed messages that had been sent by registration service providers around the use of ABNs in the transition process, and saw a number of businesses conduct PPSR audits to correct registrations inadvertently made against company ABNs.

2. Trustee Identifiers

Registration defects are also common and easy to make when dealing with a grantor that is a trustee of a trust. This is a particularly confusing area as the *PPS Regulations* require the use of different grantor identifiers depending on whether the trust enterprise (not the trustee) has been assigned an ABN. For lawyers, who have no doubt been taught at law school to recognise that a trust is not a separate legal entity, it is somewhat counterintuitive to register against a "trust" by reference to trust identifiers, not against the trustee itself.

This requirement to use different identifiers for a grantor who is acting as trustee of a trust creates a number of potential risks for secured parties. Not only does the secured party need to do its own due diligence to confirm whether the trust has been allocated an ABN at the time of making its PPSR registration, it also needs to monitor and update its registration if the trustee obtains an ABN in the future.

In *Re Psyche Holdings Pty Ltd*,[14] the grantor, acting as trustee of a trust, granted a security interest under a general security deed. At the time the general security deed was executed, the trust did not have an ABN. As such, the secured party registered its interest by reference to the grantor company's ACN, in accordance with the *PPS Regulations*. Shortly thereafter the trust was assigned an ABN but, upon being made aware of this fact, the secured party failed to amend its registration within the required five business day period of temporary effectiveness provided for by s 166(2)(c). It was therefore necessary for the secured party to apply to the Court under s 588FM[15] of the *Corporations Act 2001* (Cth) to fix a later time for amending the registration in order the ensure that it did not lose the benefit of its security by virtue of the insolvency vesting mechanism in s 588FL of the *Corporations Act*.

Consultation Paper 4 of the review of the *PPSA* invited stakeholder feedback in response to the question of whether a security interest over trust assets should continue to be made against the ABN assigned to the trust undertaking, if it has one. This was a response to practical issues identified with the current process. For example: a secured party may not be able to tell whether the grantor holds property in its own right or as trustee of a trust with an ABN; a grantor may initially hold collateral in its own right, but then declare that it holds the collateral on trust and obtain an ABN for the trust; or a grantor may initially hold collateral on trust for a trust that does not have an ABN, but later obtains one (as was the case in *Re Psyche Holdings* above).[16] As a consequence, a searcher of the register cannot be certain of the basis on which a trustee body corporate, for example, holds particular assets just by searching the PPSR using that trustee body corporate's correct identifier.

The Final Report on the review of the *PPSA*[17] also acknowledges that requiring security interests in property of a trust with an ABN to be registered against that ABN has the effect of treating the trust as a separate legal entity, which is not the case at general law.[18] It recommends that registrations to perfect a security interest over trust assets should be made against the relevant details of the trustee.[19]

3. Individual Grantor Identifiers

Where an individual grantor is listed on a financing statement, the *PPS Regulations* provide that the grantor should be identified by their name.[20] Usually, this information is sourced from the grantor's current driver's licence. However, if the grantor's name is known to a secured party because of the operation of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (*AML-CTF Act*), the secured party must instead describe the grantor by the information known to it because of the operation of that Act.

In practice, there may be discrepancies between the information sourced through the *AML-CTF Act* and the information contained on an individual's driver's licence (and resulting identification details), which is not available to (or may not be consistent between) all types of secured parties. Accordingly, a search of an individual's identifier details by reference to the correct identifier ascertained by one party may not reveal existing security interests that have been registered against a different (but equally "correct") identifier that has been ascertained by another party.[21] While this has not yet been considered by the courts, it creates a real risk for new lenders conducting searches without access to AML/CTF information who may proceed with a transaction unaware of a prior ranking security interest (despite their best efforts to search and register against the correct individual grantor identifier).

1. Secured Party Identifier

The courts have taken a different approach to errors in the identification of the secured party as compared to errors in the identification of the grantor, given that a search of the PPSR will still disclose the existence of a security interest, despite an error in the description of the secured party.

In *Future Revelation Ltd v Medica Radiology and Nuclear Medicine Pty Ltd*,[22] Future Revelation was the assignee of various registrations that were originally made in favour of Suncorp pursuant to a finance agreement between it and Medica. The registrations identified the secured party, that is Suncorp, by its ABN, not its ACN.[23] The Court found that this defect in the registration was not a seriously misleading defect as a search by reference to the identity of the collateral or the grantor, as the case may be, would have disclosed the relevant security interest and that such a search would have

identified clearly enough the secured party.[24]

Although it is mandatory for a financing statement to include certain details of the secured party,[25] from a policy perspective, it stands to reason that a registration should not necessarily be rendered ineffective solely due to a secured party being incorrectly identified. The purpose of the PPSR is to act as an online noticeboard that enables a searcher to determine whether other persons have an interest in personal property, and an error in the details of the secured party will not necessarily prevent a search (against the grantor) revealing relevant interests.

Rein J's decision in *Re Club Capitol Pty Ltd*[26] also reflected a more lenient approach for defects related to the identification of the secured party. This case involved a motor vehicle dealer, which received finance from Firstmac. Firstmac lodged various financing statements on the PPSR to register its interests in the dealer's assets. However, various types of errors were eventually discovered in these registrations and Firstmac applied to the Court under s 588FM of the *Corporations Act* to fix a later time for registration in order to avoid the adverse operation of s 588FL. One such error involved the wrong Secured Party Group (SPG)[27] number being utilised, which resulted in the financing statements referring to the wrong secured party. The Court, in granting an extension of time, commented that anyone searching the PPSR would have been aware that an interest had been created in respect of the particular collateral even though they would not have known the correct identity of the secured party.[28]

1. Serial Numbers

There appears to be a continuing misconception in the business community around what constitutes serial-numbered property for *PPSA* purposes, when registration by serial number is required (rather than optional) and what identifier needs to be used for different types of serial-numbered property.

Certain classes of collateral must, when described as consumer property, be described by serial number.[29] These include aircraft and aircraft engines, motor vehicles, watercraft and some types of registered intangible property such as patents and trademarks. The effect of failing to describe such types of consumer property by serial number (or of describing the collateral by an incorrect serial number) is an ineffective registration (ie such registrations will not perfect the underlying security interest).[30]

In contrast, where the collateral is commercial property, including reference to the collateral's serial number is optional rather than mandatory (with the notable omission of aircraft in respect of which the inclusion of a serial number is mandatory). The primary benefit of including the optional serial number in addition to the grantor's details, is to reduce the risk of a third party taking-free of such security interest under Pt 2.5 of the *PPSA*. Businesses (and their lenders) need to consider what type of collateral, by value or type, it is prudent to register separately by serial number, taking into account the additional administrative burden and registration fees associated with doing so.

The confusion surrounding serial-numbered goods is only compounded by the different identifiers that must be included on the financing statement. To correctly describe a motor vehicle by serial number in a registration, the *PPS Regulations* provide that, if the vehicle has one, its vehicle identification number (VIN) is the correct identifier. Where no VIN exists, the chassis number should be used to describe the motor vehicle. However, where the collateral is watercraft, the hull identification number should only be used to describe the watercraft in a registration where it does not have an official number allocated to it by the Australian Maritime Safety Authority.[31]

1. Incorrect and Vexatious Registrations

Unlike some other registers of security interests,[32] the Australian PPSR does not require the consent of the grantor in order for a security interest to be registered against it. Although such a process promotes simplicity in the registration process, it also introduces the risk that data contained within the PPSR may be inaccurate – either intentionally or accidentally. Practically speaking, any person is able to register a financing statement against any other person without their consent and sometimes without their knowledge (whether or not it is legally authorised by the *PPSA*).[33]

One increasing issue, which has been encouraged by some unscrupulous advisors and online blogs, is that of a party intentionally registering a security interest against themselves (ie the grantor and secured party are listed as being the same person) as a form of "asset protection" in order to attempt to frustrate dealings by creditors with their property. This practice is relatively easy to detect where the grantor and secured party are the same entity on the face of the financing statement. However, it may not be so apparent when the grantor registers a security interest in its own property indirectly through another entity, but for the same purpose.

In *Macquarie Leasing Pty Ltd v DEQMO Pty Ltd*,[34] Macquarie repossessed a truck over which it held a security interest pursuant to a chattel mortgage with Elite Grains Pty Ltd. Macquarie arranged for the truck to be sold at auction but, before the sale was finalised, DEQMO registered a security interest in the truck on the PPSR, frustrating the sale.[35] DEQMO and Elite Grains shared the same director, Mr Culleton, and DEQMO's financing statement recorded that the

security interest in the truck was given by DEQMO to DEQMO. The Court responded to this, stating that a person or company cannot give a security interest to itself and ordered that the Registrar remove the registration from the PPSR and that DEQMO be restrained from registering or causing to be registered any financing statement claiming an interest in the truck. However, minutes before the judgment was handed down, two companies associated with DEQMO registered financing statements on the PPSR, claiming security interests in the truck. In subsequent proceedings,[36] the Court declared that these security interests were void and had no effect, again ordering the Registrar to remove the registrations pursuant to ss 182(4)(a) and 184(1)(e)(ii) and restraining any person or corporate entity related to DEQMO from registering or causing to be registered any financing statement claiming an interest in the truck without further order of the Court.

Despite the decisions in the two Macquarie cases above, a further security interest was registered on the PPSR by a non-existent corporate entity (according to its ACN) with the intent (and effect) of thwarting Macquarie's enforcement of its security interest over the truck. The Court, again, ordered for the removal of the registration in *Macquarie Leasing Pty Ltd v Registrar of the Personal Property Securities Register*.[37]

Similarly, in *Capital Finance Australia Ltd v Clough*,[38] Capital financed the purchase of a motor vehicle and registered its security interest on the PPSR. Following Clough's default under the financing agreement, Capital repossessed the vehicle and attempted to sell it at auction. Before the auction took place, however, Clough lodged a financing statement on the PPSR claiming a security interest in the vehicle. As a result of this, the sale at auction fell through. Clough claimed that her security interest had resulted from having paid part of the purchase price of the vehicle. However, the Court was satisfied that the evidence presented to it by Clough supporting this claim was fabricated and therefore ordered for the registration to be removed, and that no further financing statements be registered.

There have also been a number of other cases considering baseless or vexatious registrations.

In *Sandhurst Golf Estates Pty Ltd v Coppersmith Pty Ltd*,[39] Coppersmith registered security interests over shares in Sandhurst purportedly arising from an alleged breach of an agreement to transfer the shares to Coppersmith. Sandhurst sent amendment demands to Coppersmith for the removal of the registrations. However, two affiliates of the director of Coppersmith threatened to lodge new financing statements on the PPSR if the existing registrations were removed.

The Court found that the claimed interests in the shares, if any, were not registrable on the PPSR pursuant to s 150 as they did not arise from a transaction that was consensual (a key requirement in establishing a "security interest") and the rights of Coppersmith (if such rights were found by the Court to exist) did not secure payment or performance of an obligation as required by the *PPSA*.[40]

In *National Australia Bank Ltd v Garrett*,[41] Andrew Garrett sent an email to National Australia Bank (NAB) indicating that he intended to register a charge over NAB's property. Attached to this email was a security deed, drawn up by Garrett, which purportedly provided for a charge granted to Garrett (and a company controlled by Garrett) by NAB, arising from an undertaking as to damages that NAB had provided subject to proceedings between it and various companies associated with Garrett. NAB did not execute the security deed and, despite NAB's objections, the "Trustee for The Andrew Garrett Family Trust No 4" caused a financing statement to be registered on the PPSR claiming an interest in all present and after-acquired property of NAB. Garrett also procured himself to be the managing controller of NAB in respect of the assets subject to the security deed. The Court ordered the Registrar remove the registration pursuant to s 182(4)(a) of the *PPSA*, finding that an undertaking as to damages is not a security interest for the purposes of the *PPSA* and that NAB was (unsurprisingly) not bound by the unexecuted security deed.[42]

Garrett was known by the Registrar to be a vexatious litigant and, as Rares J described in separate proceedings in *Rubis v Garrett (No 2)*:

[Garrett] used the ease of obtaining registrations under the PPS Act, to evade the orders against him commencing litigation, by forcing persons in the position of the applicants to sue him to remove the false registrations of their purported grants to him of security interests.[43]

In this case, Garrett caused a registration to be made on the PPSR against 12 of the applicants to the proceeding on 7 September 2018, falsely recording that each of these applicants had granted Garrett an interest in all of their present and after-acquired property. Garrett later added more grantors to the registration, including the Federal Court of Australia. In total, 46 persons and bodies were falsely recorded on the registration as grantors during the period of 7 September 2018–19 October 2018. In support of the registration, Garrett relied in part on a document that he created and progressively added more parties to as grantors over time.

Rares J considered the registration to be obviously baseless and vexatious and ordered its removal under s 182(4). Rares J also commented that the Registrar has a public function under s 150(3)(c)(i)[44] which, in effect, provides that the Registrar has a duty to register a grantor on application only if it is satisfied that the application is not "frivolous, vexatious

… or contrary to the public interest". Rares J also noted the Registrar's power under s 184(1)(a) to register a financing change statement to remove data, including an entire registration, of its own initiative if it is satisfied that the application to register the data was frivolous, vexatious or that the retention of data in the PPSR is contrary to the public interest.

Following the decision in *Rubis v Garrett (No 2)*, the Registrar released Practice Statement Number 10, which outlines the process the Registrar has taken to prevent certain persons from making or amending registrations on the PPSR.[45] The decision in *Rubis v Garrett (No 2)* likely provided a stronger basis for the Registrar to take a more proactive approach in exercising powers under s 184(1)(a).[46] Since then, the published figures suggests that the Registrar has substantially increased the amount of registrations being removed on general grounds under s 184(1)(a). In the financial period from 2017–2018, the Registrar amended 21 registrations at its own initiative.[47] The following year, 167 registrations were amended under s 184(1)(a).[48]

It is also worth noting that the *PPSA* attempts to limit the circumstances in which a person can make a registration by way of inclusion of a civil penalty provision in s 151, which provides that a person must not apply to register a financing statement unless the person believes on reasonable grounds that the person described in the statement as the secured party is, or will become, a secured party in relation to the collateral. However given that, to date, there have been no examples of these penalties actually being imposed, many have questioned the usefulness of the provision.[49]

1. Overreaching Registrations

An overarching policy objective of the *PPSA* was to increase the efficiency of lending arrangements by providing greater certainty for both lenders and borrowers in a competitive market.[50] A problem associated with this is that a registration may not technically be "defective" by the operation of the *PPSA* but can nevertheless describe the collateral in such an overly broad manner that the registration causes problems for third-party purchasers dealing with the grantor, or for financiers of the grantor who suspect a breach of negative pledge covenants under their financing documents.

It has become increasingly common for the collateral class, "All present and after-acquired property – except" to be used to perfect security interests that relate to a more limited class of collateral than the registration collateral class would at first suggest. This is sometimes exacerbated by secured parties unhelpfully describing the collateral in the free text field of a financing statement as: "All present and after acquired property except any property which is not subject to a security agreement in favour of the secured party."

These types of registrations can be frustrating for a party searching the register as they reveal little on their face as to what collateral is claimed to be covered by the underlying security interest. They can also impede and indeed obstruct dealings by the grantor with its unencumbered property or its ability to raise funds. Even so, the "AllPAAP-except" collateral class has become the default class for overly cautious secured parties and similarly cautious legal advisers.

1. Failure to Comply with Time Limits

The complications in making a registration on the PPSR are compounded by the various time limits that may apply to different types of registrations (some of which are contained in the *PPSA* and some of which exist under the *Corporations Act*). These time limits not only include when a financing statement must be lodged in order to avoid a security interest vesting in the grantor on insolvency, but also when a registration must be amended if it becomes defective after initial registration,[51] when a purchase money security interest (PMSI) registration must be perfected in order to obtain super-priority,[52] and when notice must be given to a PMSI holder in respect of a non-PMSI over accounts in order to obtain priority.[53] Various cases have considered these time limits.

1. Vesting Rule – s 267 of the PPSA

Section 267 of the *PPSA* provides that an unperfected security interest will vest in the grantor in the event of bankruptcy (for an individual) or the winding up or entry into administration (for a company). This means that, if a security interest is to be perfected by registration, it must be lodged before any of those vesting events occur.

The application of s 267 is illustrated by the decision in *Re Maiden Civil (P&E) Pty Ltd*.[54] Maiden had leased three civil construction vehicles from QES and subsequently entered into a general security deed with a third-party financier (Fast), granting Fast an interest in all of Maiden's personal property. Fast registered its security interest on the PPSR but QES did not register its interest as the lessor of the vehicles, relying instead on its purported title to the vehicles. When Maiden subsequently went into administration, the Court found the leasing agreement between QES and Maiden was a "PPS Lease" for the purposes of the *PPSA*. This meant that QES's interest in the vehicles (as owner) was a deemed security interest requiring perfection under the *PPSA*. Given that QES had failed to register any effective financing statement in respect of that security interest, its security interest was unperfected and vested in Maiden upon Maiden entering administration pursuant to s 267(2).[55]

2. Section 588FL of the Corporations Act

There is also a similar (but not identical) vesting provision in s 588FL of the *Corporations Act*, which only applies to grantors that are companies and applies in addition to the vesting provision in s 267 of the *PPSA*.

Section 588FL provides that, subject to some exceptions, a security interest granted by a company that is covered by s 588FL(2) vests in the company immediately before the occurrence of: an order being made or a resolution being passed for the winding up of the company; an administrator being appointed to the company under s 436A, s 436B or s 436C; or the company executing a deed of company arrangement under Pt 5.3A. Section 588FL(2) provides that a particular security interest is covered by this vesting mechanism if, at the critical time, the security interest is enforceable against third parties, perfected by registration (and by no other means), and the registration time for the collateral is after the latest of either: six months before the critical time; or the time that is the end of 20 business days after the security agreement gave rise to the security interest came into force, or the time that is the critical time, whichever time is earlier.

There is a plethora of decisions revolving around applications under s 588FM of the *Corporations Act* to extend the time for registration under the *PPSA*.[56] That section replaced the now repealed s 266(4) of the *Corporations Act*, which provided that the court had discretion to extend the time for registration of a charge. The court will only grant an extension of time if the failure to make the registration was accidental, due to inadvertence, if it is not of such a nature as to prejudice the position of creditors or shareholders, or if it is otherwise just and equitable to do so.[57] This is perhaps the most highly litigated area relating to registrations on the PPSR but the courts have generally been open to exercising their discretion to fix a later time for registration, drawing extensively on case law under the preceding s 266(4),[58] interpreting the requirement that the failure to register be accidental or due to inadvertence very liberally. As illustrated below, many applications under s 588FM have been successful.

In *Re Barclays Bank plc*,[59] Black J granted an extension of time under s 588FM for Barclays when its lawyer (located in London) did not register its security interest within 20 business days of a security agreement coming into force, despite being instructed to do so by her Australian counterparts. In granting the extension, Black J gave consideration to the fact that this error occurred during the period of transition to the *PPSA* regime.

Similarly, in *Re Appleyard Capital Pty Ltd*[60] a Swedish company failed to register a financing statement in relation to a security interest that arose out of a loan agreement with an Australian company.[61] There was a term in the loan agreement that provided that the secured party would register a "full floating charge". However, upon delivery of the executed loan agreement, the director of the grantor company indicated that he had "taken care of" the security interest.[62] The Court ultimately granted relief to the secured party, subject to a condition reserving the right of insolvency administrators to apply to set aside the decision in the event of liquidation or administration of the grantor company within six months of the registration.[63]

3. Purchase Money Security Interest Priority

If a secured party wishes to obtain "super-priority" in respect of a PMSI, specific time limits must be complied with.

Under s 62, a perfected PMSI has priority over a perfected security interest that is granted by the same grantor in the same collateral, but that is not a PMSI. However, in order to obtain this so-called "super-priority", a PMSI must be registered as such either at the time the grantor obtains possession of the property (for inventory) or, for property that is not inventory, within 15 business days after the grantor obtains possession of the property.[64] If the property is not goods, the relevant timeframes apply from the time the PMSI attaches to the relevant property (instead of the time of possession). If time limits are not complied with, s 293 allows a court to extend those periods and effectively revive a registration's PMSI priority.[65]

In *Toll Energy and Marine Logistics Pty Ltd v Conlon Murphy Pty Ltd*,[66] an application was brought by Toll Energy under s 588FM of the *Corporations Act* and s 293 of the *PPSA* in order to fix a later time for two registrations in respect of non-inventory goods. The relevant security interests were not registered within 15 business days of the grantor taking possession of the collateral due to the secured party not having a *PPSA* process or protocol in place at the relevant time. In that case, the Court was satisfied that the failure to register in time was due to accident or inadvertence and that prejudice would not be suffered by other parties if the Court granted the application.

The time limit to register a PMSI is unique in that it is contingent on when the grantor obtains possession of the collateral, rather than when the underlying security agreement comes into force. The question of when a grantor obtains possession of collateral was considered in the recent decision of *Samwise Holdings Pty Ltd v Allied Distribution Finance Pty Ltd*.[67] That case involved the refinancing of an existing finance agreement between the grantor and a third party. The goods subject to the original finance agreement were held on bailment for the financier. When the agreement was refinanced by Allied, it duly registered its interest in the goods as a PMSI. Samwise held an earlier AllPAAP registration and argued that, since the grantor had possession of the goods before the refinancing (and therefore the subsequent PMSI registration), the

requirements of s 62(2)(b)(i) were not satisfied and therefore Allied did not enjoy super-priority as it did not hold a PMSI over the collateral. The Court distinguished between the grantor having possession of collateral *in its capacity as the grantor* and possession *simpliciter*, finding that the grantor only had possession as the grantor after the refinancing and therefore Allied's registration was within the time limit under s 62.[68]

III. Why Are These Errors Occurring So Frequently?

The majority of stakeholder feedback received in response to the various consultation papers preceding the Final Report suggested that there is a general lack of both awareness and understanding of the *PPSA*.[69] For instance, it can be difficult to appreciate that a party's ownership of collateral may not be sufficient to preserve their interest in that property in the event of a grantor's insolvency.[70]

The *PPSA* is overly complex, spanning over 320 pages and is far longer than its international equivalents. Some of the terminology and concepts are challenging to lay persons, business advisors and even lawyers, particularly those that have their roots in unfamiliar and incongruous overseas equivalents.

The PPSR is also far too complex to use, with feedback indicating that registering a financing statement is overly difficult and legalistic, leaving parties in the difficult situation of not knowing whether they have properly perfected their security interests. By way of example, the "additional details" that are required to be entered in some registrations include whether the collateral is inventory or whether the current assets are subject to control. Both "inventory" and "control" are defined in the *PPSA*; however, it is unrealistic to assume that a lay person will be able to understand the nuances and relevant of these terms, even if they were to make the effort to read the legislation itself.

1. IV. How Can Registration Errors Be Rectified?
2. Powers of the Registrar

The Registrar has various powers under the *PPSA* to refuse to accept an incorrect registration, correct registrations, remove registrations or data at its own initiative and to prevent certain parties from making or amending registrations. As noted above, there has been evidence of the Registrar more frequently using its power under s 184 to remove registrations on the Registrar's own initiative. However, the exact scope of the Registrar's powers to correct registration errors by removing data from the PPSR remain unclear despite some guidance in the cases of *SFS Projects Australia Pty Ltd v Registrar of Personal Property Securities*[71] and *Scottish Pacific (BFS) Pty Ltd v Registrar of Personal Property Securities*.[72]

In *SFS Projects Australia*, an assignor entered into a deed with Rothschild Capital to assign certain debts and security interests (which were registered on the PPSR) granted by a third party. This debt and the security interests were ultimately assigned to SFS Projects Australia. The deeds that facilitated the assignments provided that the assignor agreed to "transfer the registration on the register in respect of the Securities". Following the assignment to SFS Projects Australia, the assignor of the security interests registered a financing change statement in respect of each registration. Instead of amending the registrations to reflect the change in secured party, the financing change statements amended the original end times to the day on which the statements were registered, effectively ending the registrations so that they ceased to be effective.

This error was detected within an hour of the financing change statements being lodged and, the following day, the assignor sent forms to the Registrar, requesting that it restore the registrations and explaining the error. The AFSA replied to the requests, stating that the Registrar did not have the necessary power to restore the registrations, notwithstanding the fact that there was no dispute that the financing change statements were registered in error and that they did not reflect the intentions of the assignor. The Court considered whether the Registrar's power under s 186 may be exercised to restore to the PPSR the original end times.

The Registrar submitted that the purpose of s 186 is to restore data that had been removed in an incorrect exercise of the Registrar's powers to remove data and that, since the Registrar acted in accordance with a duty to register a financing change statement in accordance with the assignor's application, this was not an incorrect exercise of the Registrar's power.

The Court considered that the purpose of s 186 is to ensure that data that should be included in the PPSR but that has been incorrectly removed may be restored and that the word "incorrectly" does not necessarily isolate the section to errors on behalf of the Registrar. The Registrar may be satisfied that data has been removed incorrectly if an application to register a financing change statement has been submitted in error.

The Court's decision in *SFS Projects Australia* effectively broadened the scope of s 186 to extend to errors that were not necessarily the result of a mistake by the Registrar, but to any type of error that would result in the PPSR not including data that had been incorrectly removed. Following the decision, the Registrar published Practice Statement No 8, which

set out the approach it would be likely to take in any future exercise of its powers under s 186. The Practice Statement relevantly states:

[The Registrar] will be likely to exercise the discretion in section 186 to restore the missing data if the likelihood of a third party having relied upon the state of the PPSR after the data was removed, and thereby being disadvantaged by its restoration, is very low.[73]

In *Scottish Pacific*, a similar order was sought to that in the *SFS Projects Australia* case. Scottish Pacific (then called "Bibby Financial Services Australia") had intended to transfer its registrations to Rush Corporation and mistakenly lodged financing change statements ending the registrations. Scottish Pacific submitted that this was done in error but it only became aware of the error some eight months later.

Both Rush Corporation and Scottish Pacific made requests to the Registrar to restore the registrations under s 186. However, the Registrar refused to exercise its discretion to restore the data. The Registrar's decision was appealed to the Court under s 206(1)(b) of the *PPSA*.

The Court agreed that the decision in *SFS Projects Australia* should be followed insofar as a finding that the word "incorrectly", when used in s 186, encompasses the removal of data from the PPSR as a result of error by either the Registrar or a secured party. However, the Court disagreed with the finding in *SFS Projects Australia* that the Court has jurisdiction to review the Registrar's decision by an application under s 206. It determined that such decisions are of an administrative character under a Commonwealth Act and should therefore be dealt with either under the *Administrative Appeals Tribunal Act 1975* (Cth) or by judicial review.

1. Amendment Demand Process

Section 178 provides that a person with an interest in the collateral described in a registration may make a demand in writing to the secured party for it to register a financing change statement amending the registration (either to end effective registration altogether, or to omit particular collateral from the registration). The secured party then has five business days to amend the registration accordingly, after which time, if the registration has not been amended, the applicant can either apply to the court under s 182 (addressed below), or apply to the Registrar to have the registration amended by giving an amendment statement. If the administrative process is pursued, the Registrar must comply with the amendment demand unless it suspects on reasonable grounds that the demand is not authorised.

It is important to note that the amendment demand process does not provide the Registrar with a general remit to correct errors in a financing statement. The Registrar has limited administrative powers under this section and can only comply or refuse to comply with the amendment statement. It does not allow the Registrar to amend or correct registrations that are incorrect (eg where the PMSI box is incorrectly selected) or overreaching, where this test is not satisfied.

As the amendment demand process is an administrative process (as opposed to the judicial process provided for under s 182), an application may be made to the Administrative Appeals Tribunal (AAT) pursuant to s 191 for review of most decisions made by the Registrar or its delegate. As noted above, decisions to amend registrations in response to amendment demands under s 181 are not made on the "balance of probabilities" as a court would under s 182. To "suspect on reasonable grounds" that an amendment demanded is not authorised under s 178 of the *PPSA*, the Registrar, "need not be satisfied of the subject on the balance of probabilities or even feel 'certain'".[74] This lower standard of proof implicitly assigns the benefit of any doubt to the secured party in determining whether or not to remove a registration (or collateral from a registration) in accordance with an amendment demand.[75] This is exhibited in a number of cases where decisions of the Registrar under s 181 have been appealed.

In *Draper v Registrar of Personal Property Securities*,[76] Draper appealed to the AAT for a review of the Registrar's decision not to remove a registration, arguing, among other things, that the security agreement that gave rise to the security interest was affected by forgery. In upholding the Registrar's decision, the AAT held that there was insufficient evidence to support Draper's contentions and that even if the agreement had been forged, it is not necessary that a security agreement be signed or even reduced to writing in order to support a registration. It is sufficient that an agreement was entered into that is secured by the collateral.

In *Denbridge Pty Ltd v Registrar of Personal Property Securities*,[77] the Registrar's decision not to remove a registration was again upheld by the AAT.[78] There, a franchisee opted to terminate a franchise agreement with Eagle Boys. Under the franchise agreement, there was an obligation on behalf of the franchisee to pay the legal costs incurred by Eagle Boys. This obligation was secured through fixed and floating charges over the franchisee's assets. Eagle Boys incurred legal fees as a result of a dispute surrounding the termination of the franchise agreement. The franchisee applied to the Registrar to have the registration removed under the amendment demand process. The Registrar decided not to remove the registration because it considered that it had reasonable grounds to suspect that the amendment demand was not authorised, given it appeared that the collateral secured the franchisee's obligation to pay the legal fees of Eagle Boys. An

application was made to the AAT for a review of the decision. The AAT subsequently upheld the Registrar's decision, finding that there appeared to be outstanding legal fees that were secured under the fixed and floating charge provided for in the franchise agreement.

In *Cirillo v Registrar of Personal Property Securities*,[79] a grantor's purchase of a motor vehicle was financed by GE Personal Finance. The grantor then borrowed additional funds from GE Personal Finance and consolidated the additional loan, securing both loans against the vehicle. The debt was subsequently assigned to another financier. The grantor, utilising the amendment demand process, applied to the Registrar to have the registration removed. When the Registrar refused, the grantor applied to the AAT for a review of the decision, submitting, among other things, that GE Personal Finance was not authorised to assign the debt to another financier and that there were defects in the original loan documentation. However, many of the assertions made by the grantor were not supported by the documentary material that had been tendered into evidence. The AAT upheld the Registrar's decision, finding that the debt had been lawfully sold and there continued to be a debt owed, which was secured by the vehicle.

In *Davidson v Registrar of Personal Property Securities*,[80] a partner of a partnership entered into a security agreement on behalf of the partnership without the knowledge or permission of the second partner. A security interest was registered against the partnership on the PPSR. Once discovered, the second partner applied to the Registrar to have the registration removed. The Registrar refused to remove the registration as it believed that it had reasonable grounds to suspect that the amendment demand was not authorised. On appeal to the AAT, the AAT found that the first partner was in breach of his partnership agreement when he purported to enter into the agreement and he was not acting in the ordinary course of business when granting a security interest. As such, the AAT set aside the Registrar's decision and ordered it to register a financing change statement to end effective registration.

The amendment demand process takes, on average, two to three months to complete from start to finish and can be significantly longer if the dispute surrounding the registration involves complex legal issues.[81] Such a process may not be commercially viable in instances such as the removal of a security interest in connection with a business sale transaction or a refinancing.

1. Judicial Process Under the PPSA

As mentioned above, the *PPSA* provides two avenues for a person with an interest in collateral to seek removal of a registration if the collateral does not secure any obligation owed by a debtor to the secured party: the first is the administrative amendment demand process (described above); and the second is the judicial process. The judicial process provided for under s 182 may allow for a disputed registration to be resolved more promptly but comes with significant legal costs that often encourage parties to use the less expeditious administrative process.

The Registrar has complied with around 90% of amendment demands under the administrative amendment demand process.[82] However, there is growing concern over the strain that performing quasi-judicial duties is having on the Registrar's resources. On average, the Registrar processed just over two amendment demand applications per working day during the 2014–2015 financial period.[83] Today, that number has almost tripled, as displayed in Figure 1 below.[84] When the Final Report was released at the beginning of 2015, it addressed these concerns by recommending that the amendment demand process follow the corresponding approach taken in New Zealand.[85] This approach would reverse the onus of the amendment demand process, providing the grantor the opportunity to remove a registration unless a secured party produces a court order to the contrary within a specified time period.[86]

FIGURE 1 – Number of Amendment Demand Applications Processed By the Registrar Per Working Day

1. Manually Correcting Errors in Registrations

Where a secured party becomes aware of an error in its registration there are several options open to it to correct that error without requiring the involvement of the court or the Registrar.

Certain fields in a registration can be manually corrected after registration. For instance, a registration can be edited to discharge, renew and shorten the registration end date, to add or remove grantors, or to amend fields such as the free text field.[87] While there has not been extensive Australian judicial consideration of the impact of making changes in this way, in the Canadian *PPSA* jurisdiction decision of *Adelaide Capital Corp v Integrated Transportation Finance Inc*[88] the Ontario Court of Justice found that a general description of the collateral in the free text field effectively cured the error of not describing said collateral as inventory.

In some circumstances it may also be possible to make a new registration to replace a defective registration. However, this of course will not rectify issues such as loss of priority against prior registered interests or failure to comply with PMSI timeframes and will remain subject to the insolvency hardening period under s 588FL of the *Corporations Act*. This was illustrated in the *Re OneSteel* case[89] (discussed above) where the secured party unsuccessfully attempted to rectify its registration error by lodging new financing statements after the grantor was in liquidation.

If a new registration is made, the PPSR also gives a secured party the option to link a new registration with an earlier registration by including an "Earlier Registration Number" field. The purpose of this field is to allow for the possibility that a security interest might be perfected over time by more than one registration, and to give a searcher notice that the underlying security interest's priority may be higher than the registration time reflected on the financing statement.[90] However, the linking of registrations is purely an administrative feature included on the PPSR which has no legal authority or effect on priority as it is not contemplated by the Act itself.

1. Legislative Reform

Amending legislation is currently being drafted by the Attorney-General's Department to give effect to a number of recommendations for change. However, the extent to which such amendments will address the stakeholder feedback and recommendations that were made in the Final Report (referred to below) remains unclear.

1. Key Recommendations from the Final Report

The Final Report was a review of the operation of the *PPSA* considering the various effects the legislation has had on businesses, consumers and markets since its adoption. The Final Report was commissioned by the Attorney-General, George Brandis QC and authored by Bruce Whittaker. Almost 400 recommendations were put forward to be considered in the review of the *PPSA*, taking into account extensive stakeholder input. Some of the more significant recommendations which are relevant to the PPSR registration process are provided in Table 1.

TABLE 1 – Summary of Key Recommendations from the Final Report

Recommendation	Summary
Recommendation 86	That the Act be amended so that: • a registration does not need to indicate whether the collateral is consumer property or commercial property; • all registrations against individuals, or against serial-numbered property that may not identify the grantor because the grantor is an individual, must have a maximum term of seven years; and • a registration that is made against only serial-numbered property and that identifies the serial number may not identify the grantor, if the grantor is an individual.
Recommendation 87	That the definitions of "consumer property" and "commercial property" in s 10 of the Act be deleted.
Recommendation 91	That it be made clear that a registration that does not tick the PMSI box can nonetheless perfect a PMSI, but on the basis that the PMSI cannot benefit from the super-priority afforded by s 62.
Recommendation 92	That Item 4(c) of the table in s 153(1) and the functionality of the PPSR be amended to enable a registration to be made against a number of collateral classes at the same time, using a common free text field.

Recommendation 93	That the collateral classes on the PPSR be changed to the following six classes: (1) serial-numbered property (with appropriate sub-classes for the different types of serial-numbered property); (2) other goods; (3) accounts; (4) other intangible property; (5) all present and after-acquired property; and (6) all present and after-acquired property except.
Recommendation 101	That government explore whether the current definition of "motor vehicle" in reg 1.7 of the *PPS Regulations* could be amended so that a vehicle is a motor vehicle (and is only a motor vehicle for the purposes of the *PPSA* and the *PPS Regulations* if it has a vehicle identification number.
Recommendation 109	That Item 5 of the table in cl 1.3 of Sch 1 to the *PPS Regulations* be amended to provide that the identifying details for a body corporate that is not captured by any of Items 1–4 of the table be its name under the law under which it is incorporated.
Recommendation 110	That the *PPS Regulations* be amended so that a registration to perfect a security interest over trust assets should be made against the relevant details for the trustee, rather than the ABN or other identifying details for the trust.
Recommendation 112	If the *PPS Regulations* continue to require that registrations be made against a trust's ABN, that cl 1.5(1)(b) of Sch 1 to the *PPS Regulations* be amended to make it clear that it applies "to any trustee of a trust that is not a body corporate".
Recommendation 113	That government consider whether a registration should be able to be made against a scheme's Australian Registered Scheme Number if the security interest is granted by the scheme custodian, rather than the responsible entity.
Recommendation 115	That the *PPS Regulations* be amended to provide that a registration to perfect a security interest over assets of a partnership be made against the following grantor details: • the partnership's ABN, if it has one; • failing that, the partnership's registered name in its place of establishment; • if the partnership has no registered name in its place of establishment, the name of the partnership and the name of at least one of the partners; and • if the partnership has no name, the names of all partners.
Recommendation 124	That s 153(1) be amended to clarify that data entered on the PPSR will be a financing statement if the data populates the fields referred to in the table in that section, whether or not the data as so entered is accurate.
Recommendation 125	That s 164(1)(a) and (b) be amended to read: "(a) a defect mentioned in section 165; or (b) any other defect in any data relating to the registration, other than a defect of a kind prescribed by the regulations, if the defect is seriously misleading".

Recommendation 128	That s 151(1) be retained, and that the *PPSA* not be amended to require a registrant to obtain a person's consent before registering a financing statement against the person or their property.
Recommendation 130	That s 151(1) be amended to provide that a registrant must include a further description of the collateral in the free text field, using the information that is reasonably available to the registrant at the time the registration is made, but that the section not specify the level of detail that the further description needs to satisfy.
Recommendation 135	That the functionality of the PPSR allows a registration to be amended by removing a collateral class (if Recommendation 92 is adopted to allow a registration to be made against more than one collateral class), or by replacing a collateral class with a narrower one.
Recommendation 139	That the amendment demand process in Pt 5.6 of the *PPSA* be recast along the lines of the approach taken in New Zealand, under s 165 of the *Personal Property Securities Act 1999* (NZ).
Recommendation 145	That the *PPSA* and the *PPS Regulations* not be amended to provide that a security interest will only be continuously perfected by a series of registrations if those registrations are linked using the "Earlier Registration Number" field on the PPSR.
Recommendation 146	That the PPSR be amended to allow multiple registration numbers to be entered in the "Earlier Registration Number" field on the PPSR.
Recommendation 158	That the *PPSA* not be amended to give courts a power to rectify ineffective registrations.
Recommendation 159	That s 186 be amended to make it clear that it applies only to data that was removed from the PPSR by the Registrar.
Recommendation 163	That s 150(3)(c) and (d) be deleted.

1. International Case Law

International case law from jurisdictions that have adopted similar personal property security regimes has undoubtedly influenced Australian courts in interpreting provisions of the *PPSA*. However, notwithstanding the myriad of international decisions that predate the *PPSA*, Australian courts have proven willing to diverge from international authority.[91] This is, in part, attributable to differences in the wording of our legislation and the requirements for registration of a security interest on the Australian PPSR.

The Australian PPSR is an "exact match" searching system as opposed to the "close match" system used in some other jurisdictions, including most Canadian provinces.[92] As such, errors in a registration, no matter how minor, are more likely to render a registration defective in Australia (although, even in Canada, minor errors such as incorrectly spelling a grantor's name have still been found to be seriously misleading).[93] In New Zealand, a searcher of the New Zealand Register has a choice whether to conduct an "exact match" search or a "starts with" search. As such, in *Polymers International Ltd v Toon*,[94] a misspelling of the grantor's name did not render the registration defective.[95]

In all jurisdictions, an error in the identification of the grantor will usually render the registration ineffective.[96] However, the impact of an ineffective registration on the underlying security interest may vary. Under the *Personal Property Securities Act 1999* (NZ), for example, a lack of registration affects priority, not validity;[97] and unlike under s 267 of the Australian *PPSA*, unperfected security interests do not vest in the debtor on bankruptcy or liquidation.[98] Further, the administrative approach to having a registration removed differs between jurisdictions. Unlike Australia, in New Zealand if a secured party receives a demand to remove or amend a registration it must obtain a court order to the contrary within a specified time period to avoid its registration being removed or amended.[99]

1. Conclusion

There is now a significant body of Australian case law guiding our understanding and approach to registration errors on the PPSR and their consequences. Despite criticisms and requested changes from stakeholders the continued efforts of the AFSA and other organisations have seen growing levels of awareness and acceptance, including among small and medium sized enterprises which may have been underprepared when the PPSR initially came into operation on 30 January 2012.

With new amending legislation currently being drafted to tackle issues identified by stakeholders and the Final Report, there are likely to be substantive amendments both to the legislation and user interface for the PPSR. In this context, we can it is likely that the only constant in the personal property security law over the next few years will be continued change.

* Martin Lovell: Partner, Piper Alderman, LLM Hons (Cantab), LLB Hons (Flinders). Oliver Radan: Law Graduate, Piper Alderman, LLB (Adelaide).

[1] Bruce Whittaker, *Review of the Personal Property Securities Act 2009 – Final Report* (2015) 10–11.

[2] *Re OneSteel Manufacturing Pty Ltd* (2017) 93 NSWLR 611; [2017] NSWSC 21.

[3] *Personal Property Securities Act 2009* (Cth) s 153; *Personal Property Securities Regulations 2010* (Cth) Sch 1, Item 1.3.

[4] See also *Re Production Printing (Aust) Pty Ltd (in liq)* [2017] NSWSC 505, where a security interest was erroneously registered against a grantor's ABN and not its ACN.

[5] *Personal Property Securities Act 2009* (Cth) s 267(2).

[6] *Personal Property Securities Act 2009* (Cth) s 164(1)(b).

[7] *Personal Property Securities Act 2009* (Cth) s 164(1)(a).

[8] See *Re Amotran Pty Ltd* [2017] VSC 637, where a registration that identified a grantor company acting as a trustee of a trust by the company's ACN and not the trust's ABN was defective because it failed to identify the trust's ABN.

[9] *Rabobank New Zealand Ltd v StockCo Ltd* (2011) 13 TCLR 191.

[10] *Polymers International Ltd v Toon* [2013] NZHC 1897.

[11] See the discussion in Craig Wappett and Edmund Robinson, "PPSR Registration – Near Enough Is Not Good Enough!" (2017) 18(2) *Insolvency Law Bulletin* 28.

[12] In many other decisions, the courts have often sidestepped the need to directly address whether an error in a registration rendered a particular registration ineffective. Where the courts have discussed the ineffectiveness of registrations, they have still left the question open to interpretation. For example, in *Re Accolade Wines Australia Ltd* [2016] NSWSC 1023, where a secured party lodged financing statements that erroneously referred to a grantor company's ABN rather than its ACN, Brereton J only went so far as to note that it "seems that the initial registrations were ineffective". See also *Re David Brown Gear Industries Pty Ltd* [2017] NSWSC 907; *Re Mehajer Bros Pty Ltd* [2017] NSWSC 1852; *Re 4 in 1 Wyoming Pty Ltd* (2017) 120 ACSR 167; [2017] NSWSC 407.

[13] See *Re Production Printing (Aust) Pty Ltd (in liq)* [2017] NSWSC 505, [10], where the Court followed the decision in *Re OneSteel Manufacturing Pty Ltd* (2017) 93 NSWLR 611; [2017] NSWSC 21, finding: "A defect in a registration, where a financing statement contained only an ABN and not the ACN of a company that granted that security interest, was a 'seriously misleading defect' for the purposes of s 164(1)(a) of the *PPSA* and fell within ss 164(1)(b) and 165(b) of the *PPSA*."

[14] *Re Psyche Holdings Pty Ltd* [2018] NSWSC 1254.

[15] See below for a detailed discussion of the application of s 588FM of the *Corporations Act 2001* (Cth).

[16] Review of the Personal Property Securities Act 2009, *Consultation Paper 4 – The Register* (2014) 24.

[17] Whittaker, n 1.

[18] Whittaker, n 1, 196.

[19] Whittaker, n 1, 197.

[20] *Personal Property Securities Regulations 2009* (Cth) reg 1.2.

[21] See generally *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) Pt 2.

[22] *Future Revelation Ltd v Medica Radiology and Nuclear Medicine Pty Ltd* (2013) 283 FLR 122; [2013] NSWSC 1741.

[23] See also *IBM Global Financing Australia v Applied Business Technology Pty Ltd* [2018] NSWSC 1984, where the Court granted an extension of time under s 588FM of the *Corporations Act 2001* (Cth) and s 293 of the *Personal Property Securities Act 2009* (Cth) but considered that it was probably unnecessary to do so given the fact that the error on the financing statement only related to the identification of the secured party and not the grantor.

[24] See also *Re Transurban CCT Pty Ltd* [2014] NSWSC 1909.

[25] *Personal Property Securities Act 2009* (Cth) s 153.

[26] *Re Club Capitol Pty Ltd* [2018] NSWSC 398.

[27] A SPG is a system construct used by the PPSR to help secured parties manage their registrations. The SPG can have any combination of individual or organisation secured parties: see <https://www.ppsr.gov.au/create-and-manage-secured-party-group-spg>.

[28] See also *Greenlight Asset Pty Ltd v WBK Ricetti Pty Ltd* [2017] WASC 278, where the Court found that, since the defects in the registrations were in respect of the description of the secured party, not the grantor, it is very unlikely that unsecured creditors would have been unaware of the plaintiff's security interest.

[29] *Personal Property Securities Regulations 2009* (Cth) reg 2.2.

[30] *Personal Property Securities Act 2009* (Cth) ss 164(1)(b), 165(1)(a).

[31] *Personal Property Securities Regulations 2010* (Cth) reg 2.2(d).

[32] Such as New Zealand, for example.

[33] Whittaker, n 1, 214.

[34] *Macquarie Leasing Pty Ltd v DEQMO Pty Ltd* [2014] NSWSC 1466.

[35] DEQMO registered its security interest in the truck, describing itself as both the grantor and the secured party. The Court noted that a person or company cannot give a security interest to itself.

[36] *Macquarie Leasing Pty Ltd v Registrar of the Personal Property Securities Register* [2014] NSWSC 1677.

[37] *Macquarie Leasing Pty Ltd v Registrar of the Personal Property Securities Register* (2015) 17 BPR 33,883; [2015] NSWSC 94.

[38] *Capital Finance Australia Ltd v Clough* [2015] NSWSC 1327.

[39] *Sandhurst Golf Estates Pty Ltd v Coppersmith Pty Ltd* (2014) 285 FLR 267;[2014] VSC 217.

[40] See also *RG Murch Nominees Pty Ltd v Annesley* [2019] VSC 107, where no evidence of any consensual transaction was produced by Annesley that could have given rise to a claimed security interest in the property of RG Murch.

[41] *National Australia Bank Ltd v Garrett* (2016) 11 BFRA 382; [2016] FCA 714.

[42] See also *Treasury Wine Estates Vintners Ltd v Garrett* (2016) 340 ALR 259; [2016] FCA 715, where Garrett registered a security interest against Treasury Wine Estates Vintners Ltd and appointed himself as "controller" of the company pursuant to a purported security interest arising from a settlement deed where Treasury Wine Estates agreed to indemnify Garrett against certain costs.

[43] *Rubis v Garrett (No 2)* [2018] FCA 2011, [4].

[44] *Personal Property Securities Act 2009* (Cth) s 150(3)(c)(i).

[45] Australian Financial Security Authority, "Registrar of Personal Property Securities Practice Statement Number 10: Preventing Certain Persons from Making or Amending Registrations on PPSR" (19 December 2018) <https://www.ppsr.gov.au/registrars-practice-statement-no-10>.

[46] See also *Re PSI-Kinetix Pty Ltd* [2017] NSWSC 317, where two parties purported to appoint themselves as managing controllers of PSI-Kinetix pursuant to a disputed security agreement between PSI Kinetix and a company associated with the parties.

[47] Australian Financial Security Authority, "Annual Report 2017–18" (2018) 54 <afsa.gov.au/about-us/corporate-information/annual-reports>.

[48] Australian Financial Security Authority, "Annual Report 2018–19" (2019) 60 <afsa.gov.au/about-us/corporate-information/annual-reports>.

[49] Christopher Pearce, "A Broken Record: Amending and Removing Registrations on the PPSA" (2016) 25 APLJ 179.

[50] Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2009, 6960 (Robert McClelland, Attorney-General).

[51] See, eg, *Re Psyche Holdings Pty Ltd* [2018] NSWSC 1254; *Personal Property Securities Act 2009* (Cth) s 166(2)(c).

[52] *Personal Property Securities Act 2009* (Cth) s 62(3)(b).

[53] *Personal Property Securities Act 2009* (Cth) s 64(1)(b).

[54] *Re Maiden Civil (P&E) Pty Ltd* (2013) 277 FLR 337; [2013] NSWSC 852.

[55] Although this case was primarily with respect to the priority of each party's respective security interest under s 55, the Court found that QES had no further interest in the vehicles pursuant to s 267. See also *White v Spiers Earthworks Pty Ltd* (2014) 99 ACSR 214; [2014] WASC 139, where a failure to register a security interest resulted in the interest vesting in the grantor immediately before the appointment of administrators pursuant to s 267.

[56] There is no such mechanism under *Personal Property Securities Act 2009* (Cth) s 267 to extend the time for registration. See *Re OneSteel Manufacturing Pty Ltd* [2017] NSWSC 21.

[57] *Corporations Act 2001* (Cth) s 588FM.

[58] David Brown and Anthony Duggan, *Australian Personal Property Securities Law* (LexisNexis Butterworths, 2nd ed, 2013) 414.

[59] *Re Barclays Bank plc* (2012) 30 ACLC 12-044; [2012] NSWSC 1095.

[60] *Re Appleyard Capital Pty Ltd* (2014) 10 BFRA 1; [2014] NSWSC 782.

[61] See also *Re Black Opal IP Pty Ltd* [2013] NSWSC 1225; *Re Carpenter International Pty Ltd* (2016) 51 VR 190; [2016] VSC 118; *Re Quality Blended Liquor Pty Ltd* [2015] 2 Qd R 381; [2014] QSC 234; *NFT Specialized in Tower Cranes LLC v Machforce Pty Ltd (in liq)* [2017] WASC 95; *Caason Investments Pty Ltd v Ausroc Metals Ltd* [2016] WASC 267; *Re Korda* (2017) 35 ACLC 17-044; [2017] FCA 1144; *Re Enviro Pallets (NSW) Pty Ltd (in liq)* [2013] QSC 220; *Pozzebon (Trustee) v Australian Gaming and Entertainment Ltd* (2014) 225 FCR 305; [2014] FCA 1034; *Carrafa v Doka Formwork Pty Ltd* (2014) 104 ACSR 163; [2014] VSC 570, which all involve applications under s 588FM in respect of a *Personal Property Securities Act 2009* (Cth) security interest.

[62] See also *Re Cardinia Nominees Pty Ltd* [2013] NSWSC 32, where the security interest was registered five days late due to, inter alia, uncertainty as to which party was responsible for registration.

[63] This is known as a "Guardian condition".

[64] The Final Report suggests that *Personal Property Securities Act 2009* (Cth) ss 62 and 63 be amended to provide a uniform timeframe of 15 business days for a registration that perfects a PMSI for all types of collateral, including collateral that is inventory. See Whittaker, n 1, 336.

[65] The considerations that the court must take into account when deciding whether to grant an extension of time under *Personal Property Securities Act 2009* (Cth) s 293 are very similar to those that must be taken into account under *Corporations Act 2001* (Cth) s 588FM. Notably, however, under s 293, the court must consider whether the extension would prejudice any other parties, as opposed to only creditors and shareholders under s 588FM.

[66] *Toll Energy and Marine Logistics Pty Ltd v Conlon Murphy Pty Ltd* [2019] FCA 532.

[67] *Samwise Holdings Pty Ltd v Allied Distribution Finance Pty Ltd* (2018) 131 SASR 506; [2018] SASCFC 95.

[68] This line of reasoning was recently applied by the Supreme Court of New South Wales in *StockCo Agricapital Pty Ltd v Dairy Livestock Services Pty Ltd* [2020] NSWSC 318.

[69] See generally Whittaker, n 1, Ch 3.

[70] Whittaker, n 1, 27.

[71] *SFS Projects Australia Pty Ltd v Registrar of Personal Property Securities* (2014) 226 FCR 188; [2014] FCA 846.

[72] *Scottish Pacific (BFS) Pty Ltd v Registrar of Personal Property Securities* [2017] FCA 1378.

[73] Australian Financial Security Authority, "Personal Property Securities Registrar's Practice Statement No 8: Restoration of Data to the PPSR" (11 February 2016) <https://www.ppsr.gov.au/registrars-practice-statement-no-8>.

[74] *Davidson v Registrar of Personal Property Securities* [2015] AATA 549, [57].

[75] In *Wickham Hill Investment Pty Ltd v Ding* [2019] NSWSC 631, the Court held that the onus of establishing that no security interest exists is on the grantor seeking removal of a registration, following the approach taken in *National Australia Bank Ltd v Garrett* (2016) 11 BFRA 382; [2016] FCA 714 but not following the approach taken in *Macquarie Leasing Pty Ltd v DEQMO Pty Ltd* [2014] NSWSC 1466, *Capital Finance Australia Ltd v Clough* [2015] NSWSC 1327 and the New Zealand High Court in multiple cases. Thus establishing that the secured party does not have the onus of demonstrating that a security interest exists.

[76] *Draper v Registrar of Personal Property Securities* [2017] AATA 817.

[77] *Denbridge Pty Ltd v Registrar of Personal Property Securities* [2015] AATA 938.

[78] In fact, it is the only published decision of the AAT that has set aside a decision of the Registrar under s 178.

[79] *Cirillo v Registrar of Personal Property Securities* [2013] AATA 733.

[80] *Davidson v Registrar of Personal Property Securities* [2015] AATA 549.

[81] Australian Financial Security Authority, "Registrar of Personal Property Securities Practice Statement Number 4: Using the Amendment Demand Process" (21 May 2012).

[82] Australian Financial Security Authority, n 81.

[83] Australian Financial Security Authority, "Annual Report 2014–15" (2015) 51 <afsa.gov.au/about-us/corporate-information/annual-reports>.

[84] Australian Financial Security Authority, n 48, 60.

[85] Whittaker, n 1, 229.

[86] *Personal Property Securities Act 1999* (NZ) s 165.

[87] Australian Financial Security Authority, "What Can Be Amended" <https://www.ppsr.gov.au/what-can-be-amended>.

[88] *Adelaide Capital Corp v Integrated Transportation Finance Inc*, 16 OR (3d) 414 (1994). Note, however, that it is unclear whether Australian courts would follow this approach.

[89] *Re OneSteel Manufacturing Pty Ltd* (2017) 93 NSWLR 611; [2017] NSWSC 21.

[90] Whittaker, n 1, 233.

[91] See, eg, *Wickham Hill Investment Pty Ltd v Ding* [2019] NSWSC 631, where the Court went against the New Zealand case of *Toyota Finance New Zealand Ltd v Christie* [2009] NZHC 827, finding that the onus of proof was on the grantor to establish that no security interest exists in relation to an amendment demand.

[92] Whittaker, n 1, 203.

[93] See, eg, *Stevenson v GMAC Leasco Ltd* (2003) 227 DLR (4th) 154 (NBCA), where the grantor's name was misspelt on

the financing statement, rendering the registration seriously misleading. However, New Brunswick is one of the Canadian jurisdictions with an exact match retrieval and search system, similar to that in Australia.

[94] *Polymers International Ltd v Toon* [2013] NZHC 1897.

[95] However, the financing statement also omitted the company's incorporation number, which did render the registration defective.

[96] See, eg, *Fairbanx Corp v Royal Bank of Canada* (2010) 319 DLR (4th) 618 (ONCA).

[97] Michael Arthur, "10 Years of the Personal Property Securities Act in NZ: Lessons and Trends" (Paper presented at the *Personal Property Security Law Conference*, Adelaide Law School, February 2013) 19.

[98] Alice Tranter Wilson and Nicholas Mirzai, "The Relevance of Foreign Case Law in PPSA Discourse: The Power of Persuasive Precedent" (2014) 30(7) *Banking and Finance Law Bulletin* 151.

[99] There is a similar process under *Personal Property Securities Act 1993* (Sask) s 50.