

MARITIME CLAIM PRIORITIES UNDER THE *PERSONAL PROPERTY SECURITIES ACT 2009*

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1 The nature of maritime claims

Two thirds of the world is covered by water and the rest appears to be covered by mortgages and mortgage debentures. Some of these securities are maritime claims over goods and other forms of personal property in port and on the high seas. The purpose of this paper is to analyse the nature of maritime claims and suggest a hierarchy of priorities. There are three broad classes of maritime claims: mortgages or charges; maritime liens and statutory rights of action in rem.¹

1.1 Maritime liens

Maritime liens usually include claims for salvage, seafarers' wages, and damage done by a ship.² They encumber only maritime property such as the ship and its rigging, its cargo and freight. As these claims are vitally important to maritime commerce, they are given the highest priority.³ Maritime liens even rank ahead of registered and unregistered mortgages and statutory liens.⁴ Generally, maritime liens are payable in the inverse order of their attachment.⁵ However, they are not covered by the *Personal Properties Securities Act 2009* (Cth) ('PPSA 2009') because they arise by operation of law.⁶ Nevertheless, as we shall see, their priority is recognised in the *PPSA 2009*, s 73, and they can be enforced by an action in rem under s 15 of the *Admiralty Act 1988* (Cth). When an action in rem is commenced the holder of the maritime lien becomes a secured creditor retrospectively from the time of the events giving rise to the cause of action.⁷

1.2 Statutory rights in rem

By contrast, statutory rights in rem usually arise as a result of a contract relating to the supply of goods or services to a ship.⁸ They have a relatively low priority and can only be enforced against the ship directly if the ship still belongs to the person liable for the claim.⁹ A statutory right in rem is not a security interest when it arises but, on one view, it becomes a secured claim when proceedings are instituted by the issue of a writ.¹⁰ This converts the statutory claim into a security interest.¹¹

Australian courts have taken the view that an action in rem, at least prior to the unconditional appearance of a relevant person, is an action against the ship, not the owner or demise charterer of the ship.¹² When a relevant person enters an appearance the action proceeds as if it were an action in personam but it does not cease to be an

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¹ *Bankers Trust International Ltd v Todd Shipyards Corp (The 'Halycon Isle')* [1981] AC 221, 240.

² See *Harmer v Bell (The 'Bold Buccleugh')* (1851) 7 Moo PC 267; 13 ER 884 and *Admiralty Act 1988* (Cth) ss 4(3), 14, 15. Such claims can be enforced by an action in rem against the ship. But the provisions of the Act (other than s 34) do not create a new maritime lien or other charge: s 6.

³ Nigel Meeson, *Admiralty Jurisdiction and Practice* (LLP, 3rd ed, 2003) [6.43] n 22.

⁴ *Harmer v Bell (The 'Bold Buccleugh')* (1851) 7 Moo PC 267; 13 ER 884, 890.

⁵ *The Veritas* [1901] P 304.

⁶ See *PPSA 2009* s 8(1)(c); *Admiralty Comr's v Valverde (Owners)* [1938] AC 173, 186.

⁷ *Re Reo Grande Do Sul Steamship Co* (1887) 5 Ch. D 282; *The 'Monica S'* [1968] P 741.

⁸ See *Admiralty Act 1988* (Cth) s 4(3), dealing with general maritime claims. See also s 19.

⁹ *Admiralty Act 1988* (Cth) s 17. See also s 19 (right to proceed against surrogate ships) and s 18 (right to proceed against the ship where the person liable for the claim is the demise charterer of the ship).

¹⁰ *The Zafiro* [1960] P 1. See also *Admiralty Act 1988* (Cth) s 15 (a statutory lien arises when property is arrested in an action in rem) and *The Cella* (1888) 13 PD 82; *The 'Monica S'* [1968] P 741, 771.

¹¹ *Re Aro Co Ltd* [1980] 2 WLR 453. See also *The 'Pacific'* (1864) 167 ER 356 at 359; (1864) Browning and Lushington 243, 246 and *The 'Two Ellens'* (1872) LR 4 PC 161 at 170. Cf *Benson Brothers Shipbuilding Co (1960) Ltd v The 'Miss Donna'* [1978] 1 FC 379, where the Canadian Federal Court held that even the arrest of the ship did not convert the claimant into a secured creditor.

¹² *Aichhorn & Co KG v The Ship 'MV Talabot'* (1974) 132 CLR 449, 454-456; *Caltex Oil v The Dredge 'Willemstad'* (1976) 136 CLR 529, 538.

action in rem.¹³ It follows that in exceptional circumstances the Court would still have jurisdiction to order the arrest of the ship.¹⁴

Some overseas courts have taken a different view of the statutory right of action in rem as merely a procedural right. This view has led them to the conclusion that the arrest of the ship is merely procedural in that it simply facilitates the collection of debts from elusive defendants.¹⁵ On this view, an action in rem is, in reality, an action against the owner of the ship.¹⁶ The arrest of the ship should not, on this view, elevate the claimant to the position of a secured creditor.¹⁷ However, in Australia it appears to be generally accepted that a statutory right in rem becomes a secured claim on the issue of the writ.

It may well be that the statutory rights of action in rem will not be classified as a security interest under s 12 of *PPSA 2009* and will not require registration. Where property is arrested in an action in rem, the arrest enforces a statutory lien.¹⁸ On this basis the interest arises by operation of law and it should fall outside *PPSA 2009*.¹⁹

1.3 Bottomry bonds

Bottomry and respondentia bonds involve the creation of a security interest by act of the parties. Respondentia bonds are obsolete but bottomry bonds are hypothecations or charges of the keel or bottom of ships with or without freight or cargo in order to preserve the ship in cases of necessity or emergency.²⁰ As they arise from consensual transactions, bottomry bonds are security interests that are covered by *PPSA 2009*.²¹

1.4 Ship mortgages

There is no doubt that a ship mortgage is a security interest that requires registration under *PPSA 2009*, even though the ownership of the vessel is subject to separate registration requirements under the *Shipping Registration Act 1981*(Cth).²² Under the *Shipping Registration Act 1981* (Cth) it was not possible to register a mortgage of a ship under construction because it is not classified as a ship.²³ Under *PPSA 2009* it will be possible to register a security interest in a structure that is under construction because it will be classified as 'personal property'. Under the general law it was possible to create an equitable mortgage of a ship under construction by a deposit of the builder's certificate with the mortgagee.²⁴ This should not be necessary to create a *PPSA* security interest. It is simply necessary to satisfy the requirements of s 19.

A ship mortgage can be enforced as a proprietary maritime claim by an action in rem.²⁵

1.5 Other *PPSA* security interests

Maritime claims in relation to ships are not the only security interests that can arise in relation to shipping and international trade. Security interests can arise in relation to cargo and freight (as individual items or as commingled goods); rights under contracts such as charterparties; authorised deposit-taking institution ('ADI') accounts; negotiable instruments; negotiable documents of title; letters of credit; and accessions. Deemed security interests can arise in relation to the transfer of a right to an account or chattel paper and PPS leases.²⁶ But *PPSA 2009* does not generally apply to the interest of a seller who has shipped goods to a buyer under a negotiable bill of lading, or its equivalent, to the order of the seller or its agent, unless the parties have otherwise evidenced an intention to create or provide for a security interest in the goods.²⁷

¹³ *Caltex Oil v The Dredge 'Willemstad'* (1976) 136 CLR 529, 538; *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192, [60], [128]-[129].

¹⁴ *The 'Broadmayne'* [1916] P 64.

¹⁵ Jennifer Devlin, 'The UNCITRAL Model Law on Cross-Border Insolvency and its impact on maritime creditors' (2010) 21 *Journal of Banking and Finance Law and Practice* 95, 102.

¹⁶ *Republic of India v India Steamship Co (No 2) (The 'Indian Grace')* [1998] AC 878, 913.

¹⁷ *Benson Brothers Shipbuilding Co (1960) Ltd v The 'Miss Donna'* [1978] 1 FC 379, [21]-[22].

¹⁸ *Admiralty Act 1988* (Cth) s 15.

¹⁹ See *PPSA 2009* s 8(1)(c).

²⁰ Edward I Sykes, *The Law of Securities* (Lawbook, 4th ed, 1986) 26, 665-666.

²¹ *PPSA 2009* s 12.

²² *Shipping Registration Act 1981* (Cth) ss 12-14.

²³ *Shipping Registration Act 1981* (Cth) s 3(1) (definitions of 'registered' and 'ship').

²⁴ *Ex parte Hodgkin; Re Softley* (1875) LR 20 Eq 746, 756.

²⁵ See *Admiralty Act 1988* (Cth) ss 4(2)(a)(iii) and (iv), 16.

²⁶ *PPSA 2009* ss 12(3), 13; James O'Donovan, Lawbook, *Personal Property Securities Law in Australia*, vol 1 (at June 2009) [10.1010].

²⁷ *PPSA 2009* ss 8(1)(a), 8(2) or (3).

Against this background, we can analyse the priorities of maritime claims under *PPSA 2009*. However, before we attempt to devise a hierarchy table, it is important to note the following points.

2 Preliminary notes to table of hierarchy of priority

- 1) The hierarchy of priority does not apply where there is a voluntary subordination of a security interest.²⁸
- 2) The priority rules do not affect the priority of creditors who innocently receive payment of a debt through a debtor-initiated payment²⁹ or purchasers who innocently acquire negotiable instruments,³⁰ chattel paper³¹ or a negotiable document of title,³² in the ordinary course of their business of acquiring interests of that kind.
- 3) The hierarchy does not deal with the priority of constitutional security interests over non-constitutional interests.³³
- 4) There are special priority rules dealing with accessions³⁴ and commingled or processed goods,³⁵ and priorities in relation to crops and livestock.³⁶ The priority rules for accessions could, for example, cover the priority of a security interest in a crane attached to a ship. The priority rules for commingled goods will apply to security interests in bulk storage and export of commodities such as iron ore or grain.³⁷ On one view, the doctrine of intermixture only applies where there is a mixture of substances and the parts are no longer distinguishable.³⁸ But the better view is that the doctrine of intermixture applies where there is mere confusion of goods which leaves separation possible.³⁹ Where goods of one person are accidentally mixed with the goods of another, each person is a co-owner of the goods either as tenants-in-common⁴⁰ or in proportion to their contributions.⁴¹ On the other hand, where the goods were deliberately mixed due to the wrongful act of one party the mixture belongs to the other party.⁴²
- 5) The hierarchy of priority does not deal with the relative priorities of transferor granted-security interests and transferee-granted security interests.⁴³ The transferor-granted interest will have priority if it was perfected immediately prior to the transfer and was continuously perfected since the transfer.⁴⁴
- 6) A transfer of a security interest does not affect its priority.⁴⁵
- 7) Where a security agreement provides for future advances, *PPSA 2009* confers the same priority on all advances and obligations secured by the security agreement.⁴⁶ The Rule in *Hopkinson v Rolt* (1861) 9 HL Cas 514; 1861 WL 7196 does not apply.⁴⁷

²⁸ *PPSA 2009* s 61.

²⁹ *PPSA 2009* s 69.

³⁰ *PPSA 2009* s 70.

³¹ *PPSA 2009* s 71.

³² *PPSA 2009* s 72.

³³ *PPSA 2009* s 252.

³⁴ *PPSA 2009* s 88; O'Donovan, above n 26, [40.1010]-[40.1310].

³⁵ *PPSA 2009* ss 98-103; O'Donovan, above n 26, [40.1810]-[40.1860].

³⁶ *PPSA 2009* ss 83-86; O'Donovan, above n 26, [40.510]-[40.570].

³⁷ Under the general law there is a dichotomy of opinion as to whether the Roman law doctrine of *confusion* (as distinct from *commixtio*) can be applied to goods whose individual character is lost as a result of mixture.

³⁸ See *Smith v Torr* (1862) 3 F & F 505; Edward Tyler and Norman Palmer, *Crossley Vaines on Personal Property* (Butterworths, 5th ed, 1973) 432.

³⁹ Peter Birks, 'Mixtures' in Norman Palmer and Ewan McKendrick (eds), *Interests in Goods* (Informa, 2nd ed, 1998); *First National Bank of Rogers v Tribble* (1922) 244 SW 33; *Clafin & Co v Continental Jersey Works* (1890) 11 SE 721.

⁴⁰ See *Buckley v Gross* (1863) 122 ER 213.

⁴¹ *Spence v Union Marine Insurance Co* (1868) LR 3 CP 427; *Sandeman & Sons v Tyzack & Branfoot Steamship Co Ltd* [1913] AC 680; *Hill v Reglon Pry Ltd* [2007] NSWCA 295.

⁴² *Sandeman & Sons v Tyzack & Branfoot Steamship Co Ltd* [1913] AC 680.

⁴³ See *PPSA 2009* ss 67 and 68; O'Donovan, above n 26, [35.8010].

⁴⁴ *PPSA 2009* s 67.

⁴⁵ *PPSA 2009* s 60; O'Donovan, above n 26, [35.4510].

⁴⁶ *PPSA 2009* s 58.

⁴⁷ O'Donovan, above n 26, [35.5530].

- 8) Subject to certain conditions, a perfected security interest in the proceeds of original collateral has priority over any other interest in the proceeds, except a security interest in the proceeds as original collateral that is perfected by control.⁴⁸
- 9) Section 324 determines the priority between two transitional security interests to which Division 2 of Chapter 9 of *PPSA 2009* applies; section 326 determines the priority of transitional security interests to which Div 2 of Ch 9 of *PPSA 2009* does not apply. Section 323 determines the priority of migrated transitional security interests. Existing security interests generally retain the priorities they enjoyed before *PPSA 2009* came into effect.⁴⁹
- 10) The hierarchy of priority can be seen as a river, with the default priority rules as the mainstream and the specific priority rules as the tributaries. The specific priority rules govern priority contests between particular secured parties in respect of particular collateral. Outside these particular interests, the default priority rules apply.

3 The hierarchy of priority of security interests

It is difficult to compile a priority hierarchy for security interests in personal property because some of these security interests arise by operation of law under general law principles or by statutes other than *PPSA 2009*. Furthermore, in some cases a linear progression down the hierarchy of priority is not appropriate because the specific priority rules in *PPSA 2009* are confined to a narrow context involving a priority contest between only two claimants in relation to particular collateral. Nevertheless, a priority hierarchy may be useful in analysing both the specific priority rules and the default priority rules. With these qualifications in mind, the following table provides a rough ranking of security interests.

FIRST PRIORITY: *Other interests arising under a law relating to the provision of goods and services in the ordinary course of business and declared statutory interests.*

Section 73 of *PPSA 2009* recognises two different types of interest that take priority over a *PPSA* security interest.⁵⁰ The first type of interest is a non-consensual interest, or an interest that arises by operation of the general law, in relation to the provision of goods or services in the ordinary course of business by the person who provided the goods or services and acquired the interest, without actual knowledge that the acquisition constitutes a breach of the security agreement providing for the *PPSA* security interest. In the absence of any other statutory priority rule, this type of interest takes priority over the *PPSA* security interest.⁵¹ An example of this type of priority interest is a repairer's general law lien.⁵² While *PPSA 2009* does not generally apply to these types of interest because they arise by operation of law, s 73 determines the priority of these interests. On the other hand, if a salvage operator obtains a security interest in a ship *under an agreement* with the ship owner to secure payment of the salvor's fees for salvage services, the salvor's security interest is a *PPSA* security interest. If the ship is registered in a foreign jurisdiction, the priority of the salvor's security interest is determined by the law of that jurisdiction.⁵³ But if the ship is registered in Australia, the priority of the salvor's security interest is determined by *PPSA 2009*.

The second type of interest that takes priority over a *PPSA* security interest is an interest in collateral (the statutory interest) that arises under a law of the Commonwealth, a State or a Territory if:

- (a) that law declares that s 73(2) of *PPSA 2009* applies to statutory interests of that kind; and
- (b) the statutory interest arises after the declaration comes into effect.⁵⁴

The statutory interest might be an interest to which *PPSA 2009* would otherwise not apply, for example, to a charge arising by operation of law under domestic and international Proceeds of Crime legislation.⁵⁵

⁴⁸ *PPSA 2009* s 57 (2); O'Donovan, above n 26, [35.5510].

⁴⁹ *PPSA 2009* ss 322, 326; see also *Shipping Registration Act 1981* (Cth) ss 38-39; *Personal Property Securities (Consequential Amendments) Act 2009* (Cth) sch 3 Item 33(2); O'Donovan, above n 26, [12.1010].

⁵⁰ See generally O'Donovan, above n 26, [35.10010].

⁵¹ *PPSA 2009* s 73(1).

⁵² *PPSA 2009* ss 8(1)(b)-(c), (8)(2).

⁵³ *PPSA 2009* s 238(4).

⁵⁴ *PPSA 2009* 73(2).

For the purposes of s 73(2), as it applies as a law of the Commonwealth, the Minister may, by an instrument under s 73(4) make the necessary declaration, and the priority between the statutory interest and the *PPSA* security interest may be determined by that instrument.⁵⁶ However, security interests perfected by control will not prevail over transitional security interests that have been continuously perfected since the registration commencement time. The practical effect of s 73(2) is that if *legislation* provides for priority between a maritime lien and a *PPSA* security interest, the priority rule will only be effective if the legislation makes a s73(2) declaration.⁵⁷

Section 73 applies in relation to an interest in collateral only if the interest is created, arises or is provided for under the general law or a law of the Commonwealth, a State or a Territory at or after the registration commencement time, which is expected to be the first Monday in October 2011.⁵⁸

On the other hand, if the *general law* gives a maritime lien priority over *PPSA* security interests, the lien may retain priority over those interests by force of s 254(1) of *PPSA 2009*. This is because *PPSA 2009* is not intended to exclude or limit the operation of the general law or a law of the Commonwealth, a State or a Territory, to the extent that the law is capable of operating concurrently with *PPSA 2009*.⁵⁹ But s 254 does not apply to a law of a State or Territory, or the general law, to the extent that there is a direct inconsistency between *PPSA 2009* and that law.⁶⁰

SECOND PRIORITY: *Interests in certain property that are declared by PPSA 2009 to have priority over perfected PPSA security interests.*

These interests belong to the following persons, subject to certain conditions:

- (i) the holder of a negotiable document of title;⁶¹
- (ii) a purchaser of chattel paper;⁶²
- (iii) a creditor who receives a debtor-initiated payment,⁶³ and
- (iv) a person who acquires possession or control of a negotiable instrument.⁶⁴

These priorities recognise the demands of commerce. As these priority interests arise in different circumstances and relate to different items of property, it is unnecessary to rank these priority interests inter se. It is sufficient to note that they all rank above perfected *PPSA* security interests.

How does the relatively high priority given to a purchaser of chattel paper under s 71 square with the default priority rule in s 57(1)? Under s 57(1), security interests perfected by control have priority over security interests in the same collateral perfected by any other means. But s 57(1) only applies to security interests in controllable

⁵⁵ *PPSA 2009* s 8(2); *Proceeds of Crime Act 2002* (Cth) ss 130, 133, 142, 143, 169, 170, 302, 302C, 307; *Mutual Assistance in Criminal Matters Act 1987* (Cth) s 35J.

⁵⁶ *PPSA 2009* ss 73(3)-(4).

⁵⁷ See *Fisheries Management Act 1991* (Cth) ss 31FA, 46A; *Personal Property Securities (Consequential Amendments) Act 2009* (Cth) sch 1 items 7, 12; *Navigation Act 1912* (Cth) s 83(2) (lien for seamen's wages) as amended by *Personal Property Securities (Consequential Amendments) Act 2009* (Cth) sch 3 item 7; ss 83(2A)-(2B) of the *Navigation Act 1912* (Cth) (as to seamen's wages), ss 128(2A)-(2B) (recovery of injury expenses from owner), inserted by *Personal Property Securities (Consequential Amendments) Act 2009* (Cth) sch 3 item 9; ss 298 (2A)-(2B) of the *Navigation Act 1912* (Cth) (salvage), inserted by *Personal Property Securities (Consequential Amendments) Act 2009* (Cth) sch 3 item 10; s 60(3A) of the *Air Services Act 1995* (Cth); *Personal Property Securities (Consequential Amendments) Act 2009* (Cth) sch 5 item 3 (statutory lien on an aircraft); *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) s 453-10(5A), inserted by *Personal Property Securities (Consequential Amendments) Act 2009* (Cth) sch 5 item 21; *Insurance Act 1973* (Cth) s 62S(3) inserted by *Personal Property Securities (Consequential Amendments) Act 2009* (Cth) sch 5 item 24. Cf note 2 to *Wool International Act 1993* (Cth) s 22J(1) inserted by *Personal Property Securities (Consequential Amendments) Act 2009* (Cth) sch 5 item 39. It should be noted that the maritime lien in respect of damage done by a ship is not affected by the *Personal Property Securities (Consequential Amendments) Act 2009* (Cth).

⁵⁸ *PPSA 2009* s 306 (definition of 'registration commencement time'), s 312.

⁵⁹ *PPSA 2009* s 254(1).

⁶⁰ *PPSA 2009* s 254(3).

⁶¹ *PPSA 2009* s 72; O'Donovan, above n 26, [35.9510]. A document of title is a written description, identification or declaration of goods authorizing the holder (usually a bailee) to receive, hold and dispose of the document and the goods it covers. Examples include: bills of lading, warehouse receipts and delivery orders. A negotiable document of title is a document of title that actually stands for the goods it covers so that any transfer of the goods requires a surrender of the document. See Bryan A Garner (ed), *Black's Law Dictionary* (West Group, 8th ed, 2004) 520.

⁶² The term 'chattel paper' is discussed in O'Donovan, above n 26, [10.1010]. A charterparty would constitute 'chattel paper' within the definition of that term in s 10 of *PPSA 2009*.

⁶³ *Personal Property Securities Act 2009* (Cth) s 69; O'Donovan, above n 26, [35.8510].

⁶⁴ *Personal Property Securities Act 2009* (Cth) s 70; O'Donovan, above n 26, [35.9000].

property. The different forms of controllable property are listed in s 21(2)(c) and they do not include chattel paper. A purchaser of chattel paper in accordance with s 71 acquires a deemed security interest in the chattel paper under s 12(3). But this deemed security interest in the chattel paper will not rank behind a security interest in the chattel paper perfected by control because it is not possible to perfect a security interest in chattel paper by control. In short, there is no inconsistency between the priority given to the acquirer of chattel paper under s 71 and the default priority rule in s 57(1) because they deal with different types of collateral.

THIRD PRIORITY: *Security interests in 'controllable property' ⁶⁵ perfected by control.*⁶⁶

There are several forms of controllable property that are relevant to shipping and domestic and international trade:

- (a) ADI accounts;⁶⁷
- (b) negotiable instruments that are not evidenced by a certificate;⁶⁸ and
- (c) a right evidenced by a letter of credit stating that it must be presented on claiming payment or requiring performance of an obligation.⁶⁹

Documents of title to goods, bills of lading, through transport documents, combined transport documents and warehouse receipts which are negotiable (i.e. made out to bearer rather than to a specified person or company) are used as proxies for the goods they cover. In certain circumstances, the conditions surrounding such transactions may in substance secure an obligation of the buyer and therefore potentially fall within the scope of *PPSA 2009*. However, s 8(2)(a) excludes these documents from the operation of *PPSA 2009* unless the parties evidence an intention to create or provide for a security interest in the goods shipped or transported.⁷⁰ The reason for this exclusion of bills of lading from *PPSA 2009* is that it may be excessively onerous or commercially impractical to require registration of short term bills of lading.

FOURTH PRIORITY: *A non-PMSI (purchase money security interest) in an account as original collateral, subject to certain conditions (i.e. a factoring arrangement).*⁷¹

This priority is intended to assist borrowers raise finance by granting a security interest in their book debts.

FIFTH PRIORITY: *Subject to certain conditions, a PMSI in inventory or its proceeds.*⁷²

The super-priority given to PMSI's favours parties who facilitate the acquisition of collateral by lending the deposit or the full purchase price or supplying the collateral on credit. One of the conditions that must be satisfied to obtain priority under s 62(2) is that the grantor must obtain possession of the inventory that is goods. If goods are shipped by a common carrier to a person designated by the grantor, the grantor does not obtain possession of the goods until he, or a third party at his request, obtains actual possession of the goods or a document of title to the goods, whichever is earlier.⁷³

⁶⁵ See *PPSA 2009* s 21(2)(c) for the six different types of controllable property.

⁶⁶ *PPSA 2009* s 57. See also s 25(1)(a)(i) (in relation to ADI accounts) and s 75; O'Donovan, above n 26, [35.2010].

⁶⁷ *PPSA 2009* s 10 (definition of 'ADI accounts'). The test for obtaining control of an ADI account can be found in *PPSA 2009* s 25. Only the ADI in which the ADI account is held can perfect a security interest in the ADI account by control.

⁶⁸ *PPSA 2009* s 10 (definition of 'negotiable instrument'). The test for obtaining control of a negotiable instrument can be found in *PPSA 2009* s 29.

⁶⁹ The term 'letter of credit' is not defined in *PPSA 2009*. A letter of credit is an instrument under which the issuer, usually a bank, at its customer's request, agrees to honour a draft or other demand for payment by a third party (the beneficiary) provided that the draft or demand complies with certain specified conditions. The test for obtaining control of a letter of credit can be found in *PPSA 2009* s 28.

⁷⁰ See Attorney-General's Department, 'Review of the law on Personal Property Securities: Registration and Search Issues' (Discussion Paper No 1, November 2006) [103]; *PPSA 2009* s 8(2)(a) is modeled on Personal *Property Securities Act 1999* (NZ) s 23(a).

⁷¹ *PPSA 2009* ss 64(1)-(2); O'Donovan, above n 26, [35.5550].

⁷² *PPSA 2009* s 14 (definition of 'purchase money security interest') and s 62(2). See generally O'Donovan, above n 26, [35.400], [35.5550].

⁷³ *PPSA 2009* s 65.

SIXTH PRIORITY: *Subject to certain conditions, a PMSI in personal property, or its proceeds, other than inventory.*⁷⁴

It is clear that *all* of s 62 is subject to s 57 (perfection by control) and that a PMSI in inventory or its proceeds (s 62(2)) is subject to s 64 (non-PMSI accounts) and s 71 (chattel paper) but it is not clear that s 62(3) is subject to s 64 and s 71. The priority in s 62(3) could apply to a PMSI in a ship or in equipment provided for a ship, such as radar or GPS.

SEVENTH PRIORITY: *A PMSI in collateral or its proceeds granted to a seller, lessor or consignee has priority over any other PMSI granted by the same grantor in the same collateral, subject to certain conditions.*⁷⁵

In general, the PMSI of a supplier ranks ahead of the PMSI of a lender who advanced the deposit for the collateral.

EIGHTH PRIORITY: *There are specific priority rules governing the resolution of priority disputes between security interests:*

- (a) granted by a transferor and a transferee of the collateral;⁷⁶
- (b) arising under a foreign jurisdiction that has no register or public record of security interests;⁷⁷ and
- (c) arising upon the return of goods and the reattachment of a security interest as against the holders of a security interest in an account or chattel paper in relation to the goods.⁷⁸

These priority rules tend to recognise the priority of the holder of the original security interest, subject to certain conditions.

NINTH PRIORITY: *Under the default priority rules, the priority between perfected security interests that is not governed by a specific priority rule is determined by the order of the priority times for the respective security interests.*⁷⁹

The priority time for each security interest depends on whether it was perfected by control, registration possession, or a temporary perfection provision.⁸⁰

TENTH PRIORITY: *Under the default priority rules, perfected security interests take priority over unperfected security interests.*⁸¹

ELEVENTH PRIORITY: *Execution creditors take priority over unperfected security interests.*⁸²

TWELFTH PRIORITY: *Under the default priority rules, priority of unperfected security interests is determined by their order of attachment.*⁸³

4 PPSA security interests versus other security interests.

PPSA 2009 does not, in general, deal with the priorities of security interests that are not covered by the Act, for example, securities over water rights, fixtures and some statutory fishing licences. These security interests will generally enjoy the priority that they enjoyed under the general law before *PPSA 2009* came into effect.⁸⁴ As a

⁷⁴ *PPSA 2009* s 62(3); O'Donovan, above n 26, [35.400], [35.5550]. As to when the grantor obtains possession of goods shipped by a common carrier, see *PPSA 2009* s 65.

⁷⁵ *PPSA 2009* s 63. See generally, O'Donovan, above n 26, [35.5550].

⁷⁶ *PPSA 2009* ss 66-68 (generally the transferor-granted security interest prevails). See O'Donovan, above n 26, [35.8010].

⁷⁷ *PPSA 2009* s 77. See O'Donovan, above n 26, [35.10400].

⁷⁸ *PPSA 2009* s 76(2); O'Donovan, above n 26, [35.10400].

⁷⁹ *PPSA 2009* ss 55-56; O'Donovan, above n 26, [35.1010].

⁸⁰ *PPSA 2009* s 55(5).

⁸¹ *PPSA 2009* s 55(3); O'Donovan, above n 26, [35.1510].

⁸² *PPSA 2009* s 74; O'Donovan, above n 26, [35.1030].

⁸³ *PPSA 2009* s 55(2); O'Donovan, above n 26, [35.3510].

⁸⁴ But a constitutional security interest prevails over a non-constitutional security interest: *PPSA 2009* s 252; O'Donovan, above n 26, [35.5010]. Hence, a security interest granted by an individual over non-constitutional property to a constitutional corporation will have

general rule, the first in time principle will determine priorities between a *PPSA* security interest and a security interest that is not covered by *PPSA 2009*, all other things being equal. But if the holder of a security interest allows the grantor to act in such a way that it appears there is no prior ranking security interest in the collateral, then the prior security interest will not prevail.⁸⁵ While title is irrelevant under *PPSA 2009*, it may be necessary to consider whether the claimants have a legal interest in the collateral because a legal interest generally prevails over an equitable interest.

As registration of a security interest under *PPSA 2009* does not constitute constructive notice,⁸⁶ the holder of the *PPSA* security interest should not prevail just because it has registered its security interest. On the other hand, if it has registered its security interest it is in a strong position to argue that it has not by its conduct allowed the grantor to act as if the collateral is unencumbered.

5 Conclusions

The priority rules under *PPSA 2009* do not reflect traditional property law concepts such as the bona fide purchaser for value without notice principle or the nemo dat rule.⁸⁷ Indeed, in determining priorities under *PPSA 2009* title is irrelevant. The priority rules advance particular policies which are intended to maximise the grantor's borrowing capacity and facilitate the provision of credit and the raising of loan capital. By and large, the new regime recognises and supports maritime claims but there are some areas of uncertainty which will need to be monitored carefully because uncertainty is anathema to commerce and international trade.

priority over a security interest in the same property granted to an individual. Section 252 applies only where a State has not referred legislative power to the Commonwealth to enact *PPSA 2009*. As all States have agreed to refer the necessary legislative power to the Commonwealth, s 252 will be limited in operation in cases where a State ceases to be a referring State. However, *PPSA 2009* will not operate when both the secured party and the grantor are individuals and the constitution does not apply to the collateral: *PPSA 2009* s 249; Explanatory Memorandum, Personal Property Securities Bill 2009 [2.123].

⁸⁵ *Rice v Rice* (1853) 61 ER 646, 650. For a succinct statement of the priority rules under the general law see: Lexis Nexis, *Encyclopaedic Australian Legal Dictionary* (at 9 September 2004) 'Priority'; *Goldsbrough Mort & Co Ltd v Commonwealth Agricultural Service Engineers Ltd* [1930] SASR 201.

⁸⁶ *PPSA 2009* s 300.

⁸⁷ See generally '10 Keys to Understanding *PPSA 2009*' in O'Donovan, above n 26, ch 1.