

A yellow forklift is positioned in a large, brightly lit warehouse. The forklift is facing right, and its mast is raised. In the background, there are various warehouse structures, including beams and other equipment, slightly out of focus. The lighting is bright, coming from overhead industrial lights.

PPSA

Crops and the PPSA

In addition to the mainstream security, perfection, priority and extinguishment rules, the PPSA contains a number of specific enforcement and priority rules in relation to security interests over crops.

Part 3.2 (ss 85–86) of the PPSA creates a separate set of priority rules for agricultural interests. Such priority is not granted by virtue of the security interest being a purchase money security interest (PMSI) or anything like it. It arises by fulfilment of the requirements of the PPSA.

In particular the PPSA:

- (a) creates a special priority rule for competing perfected security interests in the same collateral that is a crop (s 85); and
- (b) creates a special priority rule for competing perfected security interests in the same collateral that is stock: s 86.

The priority created by these provisions is not contingent on any particular designation as an agricultural interest on registration. So long as the relevant criteria are met so as to give rise to perfection of the security interest, the priority follows as a consequence. Therefore if registration describes the class of collateral as a security interest over all present and after-acquired property, the financing statement may contain no specific reference to an agricultural interest. This is in contrast to a PMSI that requires notification on the register to acquire the respective priority.

Competing perfected security interests in the same collateral that is a crop

A perfected security interest in crops has priority (priority interest) over any other security interest in the same crops and granted by the same grantor if, as set out in s 85 of the PPSA:

- (a) the priority interest is granted for value; and
- (b) the priority interest is granted to enable the crops to be produced; and
- (c) either:
 - (i) the security agreement providing for the

priority interest is made while the crops are growing; or

- (ii) the crops are planted during the period of six months after the day the security agreement providing for the priority interest is made.

What enables crops to be produced is undefined. Does the supplier of fertiliser taking a security interest in the crop to secure payment fall within the definition, when fertiliser might be seen as resulting in a better yield from the crop but not necessarily “enabling” it to be grown? What about the financier that provides funds to harvest the crop?

Unlike s 86, the PPSA does not specify an order as to priority as between a purchase money security interest (PMSI) under s 62 or s 63 of the PPSA and the priority under s 85. The section also does not address the issue of competing security interests in the same crops where both are created for value and are both granted to enable the crops to be produced.

In reliance on the interpretative assumption that an express reference to one matter indicates that other

Example 1 - Competing perfected security interests

Farmer B borrows money from Bank A and provides Bank A with a perfected security interest in his crops. The money is used for general farming purposes not specifically related to producing the crops.

Farmer B then purchases fertiliser from AgSupplies Co on terms that grant AgSupplies Co a security interest in the fertiliser (a PMSI) and the crops securing the unpaid purchase price of the fertiliser. The interest of AgSupplies Co in the crops would have priority over Bank A's security interest in the crops as the fertiliser was applied for the express purpose of enabling the crops to be produced.

matters are excluded, it is suggested that the priority granted with respect to specific collateral in the form of crops under s 85 would take priority over any perfected PMSI under s 62 or s 63 of the PPSA whether created before or after the s 85 interest. This view is strengthened when regard is had to the express limitation in s 86 that the priority granted under that section does not defeat a PMSI, whenever created. This contention, however, is far from being beyond doubt particularly when regard is had to Explanatory Memorandum which, as noted above, states:

"While an 'agricultural PMSI' shares many characteristics with PMSIs, they would have a lower priority than a PMSI in the same property."

As to competing s 85 interests over the same collateral, as a creation of statute that is intended to "cover the field", it is unfortunate that no indication is given as to the order of priority in such circumstances. Thus the supplier of seed might take a security interest in the crop and the supplier of water or fertiliser might also take a security interest in the crop. If these matters fall for determination by the courts, it is suggested that s 55 of the PPSA will prevail as to the determination of priorities. In particular, s 55(1) expressly states that the section is to govern the order of priorities where the PPSA provides no other way of determining that priority.

Financiers providing funding for particular crops will need to be attentive to the existence of prior ranking security interests expressed to be over all present and

after-acquired collateral. Such a preexisting interest can potentially attract priority under s 85 and, if the general law rules are applied, being perfected and first in time is likely to prevail over any subsequent s 85 interest. To avoid these issues a second-in-time financier may well seek a priority agreement with the first in time financier to circumvent any contest between themselves.

Commingling

Issues as to commingling will commonly arise in relation to crops and their deposit into silos with crops of third parties. The general rules with respect to commingling of goods (PPSA ss 98–103) over which a security interest is held will apply to agricultural interests.

Example 3 - Security interests, commingling and priority

Financier A lends money to Wheat Farmer A to grow a wheat crop. Financier A takes a perfected security interest in the wheat.

The wheat is harvested and Farmer A delivers it to silo, operated by a grain storage, handling and marketing company. The grain is received into the silo and commingled with other grain from other growers in the district. For all practical purposes, the grain is indistinguishable from grain supplied by others.

The security interest in Farmer A's grain continues in the grain pool. However any priority that Farmer A's security interest has in the grain pool is limited to the value of the grain on the day on which the grain was received and commingled with other grower's grain.

Financier B also lent money to Wheat Farmer B to grow a wheat crop and took a perfected security interest in Wheat Farmer B's wheat. Wheat Farmer B delivered its grain to silo on the same day as Wheat Farmer A, such that each farmer's grain became part of the same grain pool.

The security interest in Farmer B's grain also continues in the grain pool and is also limited to the value of the grain on the day on which the grain was received and commingled with other grower's grain.

On the day that the grain was delivered, Farmer A's grain was worth \$1000 and Farmer B's grain was worth \$1500. Because of an oversupply in grain, the combined value of the grain is worth \$2000. On enforcement of their security interests, Financier A is entitled to recover \$800 (\$2000 x 1000/2500) and Financier B is entitled to recover \$1200 (\$2000 x 1500/2500).

Example 2 - Section 85 and being subordinated by notice through registration

Supplier A of seed to grantor is provided a security interest over any future crop. That interest is registered two months prior to the sowing of the crop and attaches to the crop when it is sown. Shortly after sowing the crop, Supplier B provides fertiliser and is provided a security interest over the same crop.

Applying s 85 does not provide an answer to which creditor would take priority in the event the proceeds from the crop were insufficient to meet both claims in full.

Applying the general law principles Supplier B, being second in time and having notice via the registration of Supplier A's interest, would, it is suggested, be subordinated to Supplier A's claim.

Application of general enforcement rules

The general enforcement rules contained within Ch 4 of the PPSA will apply with respect to the enforcement of a security interest over collateral that is an agricultural interest. To these standard provisions have been added two substantive provisions with remedies particular to the getting in of interests in crops or stock: ss 138B and 138C.

Caution should also be exercised as to the potential limitation contained within s 116 of the PPSA that seeks to limit the enforcement remedies within Ch 4 to cases where the grantor is an individual.

Seizure and disposal of crops

Chapter 4 of the PPSA (s 138B) provides the following remedies in the enforcement of a security interest over crops:

- “(a) take possession of the crops or the proceeds; or (b) cut, gather or harvest the crops or the proceeds;” (s138B(1)); and
- (c) right of disposition or retention of the collateral; and
- (d) right to enter the land on which the crops are growing (noting there is no limitation in that the land need not belong to the grantor but limiting such rights to those of the grantor).

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Please note: This fact sheet provides general information about PPS reform and does not constitute legal advice. You should seek legal or other professional advice to consider the application of the PPS Act to your individual circumstances.



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Part 3.2 Agricultural Interests – PPSA

Guide to this Part - Section 83

This Part includes rules on 3 topics:

- a. the relationship between a security interest in crops and interests in the land on which the crops are growing; and
- b. the capacity for a security interest to attach to crops while they are growing, and to the products of livestock, before the crops or products become proceeds (for example, the wool on a sheep's back before it is shorn); and
- c. the priority to be given to security interests in crops (and proceeds) granted to enable the crops to be produced, and security interests in livestock (and proceeds) granted to enable the livestock to be fed and developed.

Other provisions of this Act that deal with agricultural interests are subsections 31(4), (5) and (6) (meaning of proceeds of crops and livestock) and Division 6 of Part 4.3 (enforcement of security interests in crops and livestock).

Relationship between security interest in crops and interest in land

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- 1. Effect of security interest in crops on lessor or mortgagee of land A security interest in crops does not prejudicially affect the rights of a lessor or mortgagee of land on which the crops are growing if:
 - a. those rights existed at the time the security interest was created; and
 - b. the lessor or mortgagee has not consented in writing to the creation of the security interest.
- 2. Effect of sale etc of land on perfected security interest in crops Subject to subsection (1), a perfected security interest in crops is not prejudicially affected by a subsequent sale, lease or mortgage of, or other encumbrance on, the land on which the crops are growing.

Attachment of security interests to crops while they are growing and to the products of livestock

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- 1. Security interest in crops while they are growing To avoid doubt, a security interest may attach to crops while they are growing.
- 2. Security interest in the products of livestock To avoid doubt, a security interest may attach to the products of livestock before they become proceeds (for example, the wool on a sheep's back before the sheep is shorn).

Note 1:

Livestock includes the products of livestock before they become proceeds (see section 10).

Note 2:

For what are the proceeds of crops and livestock, see subsections 31(4), (5) and (6).

Priority of crops

85 A perfected security interest (the priority interest) that is granted by a grantor in crops or the proceeds of crops has priority over any other security interest that is granted by the same grantor in the same crops or proceeds if:

- a. the priority interest is granted for value; and
- b. the priority interest is granted to enable the crops to be produced; and
- c. either:
 - i. the security agreement providing for the priority interest is made while the crops are growing; or
 - ii. the crops are planted during the period of 6 months after the day the security agreement providing for the priority interest is made.