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PERSONAL PROPERTY SECURITIES LEGISLATION: ANALYSING THE NEW LEXICON

ABSTRACT

Grant Gilmore, co-draftsperson of art 9 of the United States Uniform Commercial Code, from which Australia's *Personal Property Securities Act 2009* (Cth) is partly derived, likened approaching art 9 to mastering a foreign language. More recently, the Supreme Court of Canada observed, in the context of a discussion of the meaning of 'property' under equivalent legislation: 'For particular purposes Parliament can and does create its own lexicon.' Focusing primarily on the 'Dictionary' contained in the *Personal Property Securities Act 2009* (Cth), this article analyses some of the new definitions and vocabulary. It also examines terms whose meanings are only partly defined or simply assumed, terms which appear to lack a statutory definition, and terms whose previously accepted meaning appears to have changed. The underlying theme is that the *Personal Property Securities Act's* operation cannot properly be understood without a close knowledge of the language in which the legislation is couched. Finally, the article also briefly explores how the language shapes the manner in which the legislative concepts are intellectualised.

I INTRODUCTION

In university seminars on statutory interpretation throughout common law jurisdictions, one literary quote is often discussed by way of introduction to the subject — the observation by Humpty Dumpty to Alice in *Through the Looking Glass*: 'When I use a word ... it means just what I choose it to mean ... neither more nor less.'¹ From this, commentators typically draw the clearly accurate proposition that statutes may choose to give a word a meaning different from its ordinary meaning. Perhaps less frequently encountered in such discussions, but nonetheless potentially apposite, is a rather more philosophical quote from Wittgenstein's *Tractatus*

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¹ Lewis Carroll, *Through the Looking Glass*, The Online Literature Library <<http://www.literature.org/authors/carroll-lewis/through-the-looking-glass/chapter-06.html>>.

Logico-Philosophicus: ‘Whereof one cannot speak, thereof one must be silent’.² Removed entirely from its original context and placed in the rather more prosaic setting of statutory interpretation (and in the process no doubt thereby distorted), such an aphorism resonates with those grappling with new legislative frameworks. It suggests that without a knowledge and understanding of the words used by a statute to frame its concepts, it becomes impossible to discuss those concepts. In no other modern commercial law statute in Australia has this become more evident than in the *Personal Property Securities Act 2009 (Cth)* (*PPSA*), which is the focus of this article.

Much of the language found in the *PPSA* is sourced from equivalent personal property securities (‘PPS’) legislation in other countries. Those countries include New Zealand and Canada as well as the US, whose art 9 of the Uniform Commercial Code is the legislation from which Australian, Canadian and New Zealand legislation is ultimately derived. At first encounter, some of the language can seem strange and even sound quite alien. The terms ‘chattel paper’ and ‘account’ are two examples that spring to mind. ‘Chattel paper’ is entirely new to Australian lawyers (as it was indeed in the 1950s to American lawyers).³ ‘Account’, in the technical sense of a particular kind of debt, may be a more readily comprehensible term, although its precise scope has caused some discussion in New Zealand in its form of ‘account receivable’.⁴ In Australia, ‘account’, based seemingly on Canadian usage, nonetheless sounds awkward to those more accustomed to confronting it in the context of a bank account. Furthermore, and somewhat confusingly, the term is also used in that latter sense in the *PPSA* when it occurs in the phrase ‘ADI account’. The statutory definition of ‘ADI account’ in s 10 of the *PPSA* actually commences with the words ‘an account, within the *ordinary meaning* of that term’ (emphasis added).

Professor Grant Gilmore, a co-draftsperson of the original art 9, emphasised in his seminal text, *Security Interests in Personal Property*, the deliberate decision to break from the past and adopt new vocabulary.⁵ Indeed, he likened learning the vocabulary to mastering a foreign language, stressing the desirability of being able to think directly in that language.⁶ He set a test, completion of which he suggested would demonstrate proficiency.⁷ It consisted of reading the following passage in which defined terms were placed in quotation marks, without having to refer to the dictionary:

² Ludwig Wittgenstein, *Tractatus Logico-Philosophicus*, Project Gutenberg, 90 [7] <<http://www.gutenberg.org/files/5740/5740-pdf.pdf>>.

³ See text below.

⁴ See, eg, Mike Gedye, ‘What is an “Account Receivable”?’ (2009) 15 *New Zealand Business Law Quarterly* 170; *Strategic Finance Ltd (in rec & liq) v Bridgman* [2013] NZCA 357 (*‘Strategic Finance’*).

⁵ Grant Gilmore, *Security Interests in Personal Property* (Little, Brown & Co, first published 1965, 1999 ed) vol 1, 301–2.

⁶ *Ibid* 302.

⁷ *Ibid*.

A 'secured party' and a 'debtor', by entering into a 'security agreement' create a 'security interest' in 'collateral'. The 'collateral' may consist of 'goods' (ie 'consumer goods', 'equipment', 'farm products' or 'inventory'), 'documents', 'instruments', 'general intangibles', 'chattel paper', 'accounts', or 'contract rights'.⁸

Gilmore's analogy with the learning of a foreign language is telling. In the learning of any new language, tension inevitably arises. On the one hand, acquisition of the new language enables learners to converse with those already fluent in the language. On the other hand, it creates a potential barrier between the learners and those with whom they previously conversed. Unfamiliar with the new language, the latter are unable to participate in the new conversation.

A parallel can readily be drawn with the development of recent PPS-style legislation in an increasing number of jurisdictions, which is resulting in enhanced communication across borders and in intensified discussion of the potential for harmonisation of secured transactions law globally.⁹ Nonetheless, the developing global language comes at some cost to those within a specific jurisdiction who are familiar only with the old language, at least in the early stages of the development. It is therefore perhaps no coincidence that initial litigation in both New Zealand and Australia has concerned lessors who failed to appreciate that the legal title to their property was categorised by the new legislation as a 'security interest' (or, in some cases, the consequences of that categorisation) and hence did not take the appropriate steps to protect that interest against a loss of priority.¹⁰

Furthermore, just as the words and expressions in one shared language can vary from country to country, so too may PPS terms vary. Words do not necessarily command the same acceptance across all jurisdictions. First, the precise content of the terms may differ from jurisdiction to jurisdiction. The term 'PPS lease' in Australia, whose meaning includes 'a term of more than one year',¹¹ corresponds

⁸ Ibid. The equivalent under the *PPSA* would read slightly differently: A 'secured party' and a 'grantor', by entering into a 'security agreement' create a 'security interest' in 'collateral'. The 'collateral' may consist of 'goods', 'financial property', an 'intermediated security' or 'intangible property'.

⁹ See, eg, United Nations Commission on International Trade Law, *UNCITRAL Legislative Guide on Secured Transactions* (2010). For an analysis of arguments for and against harmonisation, see, eg, Gerard McCormack, *Secured Credit and The Harmonisation of Law: The UNCITRAL Experience* (Edward Elgar, 2011) ch 2, 3.

¹⁰ For early New Zealand cases, see *Graham v Portacom New Zealand Ltd* [2004] 2 NZLR 528 ('*Graham*'); *Waller v New Zealand Bloodstock Ltd* [2006] 3 NZLR 629 ('*Waller*'). See also *Rabobank New Zealand Ltd v McAnulty* [2011] 3 NZLR 192 ('*Rabobank*'). In Australia, the consequences are even more severe as failure to take protective action through perfecting the security interest would also generally lead to a vesting of the security interest in the grantor on insolvency (*PPSA* s 267, subject to s 268). For the first Australian example, which was the first substantive case on the *PPSA*, see *Re Maiden Civil (P&E) Pty Ltd; Albarran v Queensland Excavation Services Pty Ltd* (2013) 277 FLR 337 ('*Maiden Civil*').

¹¹ *PPSA* s 13(1)(a).

only in part to the more common ‘lease for a term of more than one year’ found in New Zealand and Canadian statutes.¹² Second, there is a risk that courts may interpret a term differently. For example, there is differing judicial debate over the meaning of the phrase ‘regularly engaged [in the business of leasing goods]’ in the context of determining whether a lessor’s interest under a lease is to be classified as a deemed security interest — both nationally within Canada, as between provinces, and internationally, as between Canada and New Zealand.¹³ Differences in interpretation may be frowned upon and criticised for detracting from any move towards harmonisation; yet if individual PPS legislation is to be successfully bedded down in a specific jurisdiction, it has to accommodate local interpretation.

This topic of language in PPS-style legislation is obviously substantial and it is not my intention to try to address all issues. Rather, as the first in what might hopefully become an occasional series, this article focuses at a general level on the ‘lexicon’ of the *PPSA*,¹⁴ attempting to give some direction to those grappling with it. It is an underlying theme of the article that the lexicon impacts significantly on how the *PPSA* is understood to operate and hence how security arrangements are structured. At a conceptual level, language shapes how we think about the security; at a practical level, it determines how the rules apply.

The use of the term ‘lexicon’ in this context is deliberate. It comes from an observation by the Supreme Court of Canada in the case of *Saulnier v Royal Bank of Canada*.¹⁵ The Court had to consider whether a number of fishing licences held by Mr Saulnier amounted to property and hence fell within the scope of a general security agreement held by his bank over his property. Mr Saulnier contended that the licences were rather a ‘privilege’.¹⁶ In holding that the licences were personal property for the purposes of the Nova Scotian PPS legislation¹⁷ (and indeed also for federal bankruptcy legislation),¹⁸ the Court made it clear that the fact that the licences might not amount to property at common law was not decisive.¹⁹ Hence the Court observed:

¹² *Personal Property Securities Act 1999* (NZ) s 16. For examples of Canadian statutes, see, eg, the Ontario statute: *Personal Property Security Act*, RSO 1990, c P-10, s 1; and the Saskatchewan statute: *Personal Property Security Act*, SS 1993, c P-6.2, s 2. (The Personal Property Securities Amendment (Deregulatory Measures) Bill 2014 proposes to amend the current definition of PPS lease by repealing *PPSA* s 13(1)(e), thereby reducing although not eliminating differences.)

¹³ For a discussion of cases see, eg, *Rabobank* [2011] 3 NZLR 192 [32]–[48].

¹⁴ While this article does refer from time to time to the language of other PPS legislation, it does not purport to analyse that language in detail.

¹⁵ [2008] 3 SCR 166 (‘*Saulnier*’).

¹⁶ *Ibid* [2].

¹⁷ *Personal Property Security Act*, SNS 1995–96, c 13.

¹⁸ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.

¹⁹ *Saulnier* [2008] 3 SCR 166, [16].

‘Because a fishing licence may not qualify as ‘property’ for the general purposes of the common law does not mean that it is also excluded from the reach of the statutes. For particular purposes Parliament can and does create its own lexicon.’²⁰

This article is divided into five parts. While Part II briefly considers the use and limitations of the legislative Dictionary in the *PPSA*, Part III puts forward a working draft of a Table of Fundamental Terms encountered in the *PPSA*, many of which are defined in the *PPSA* but some of which are not. Part IV outlines several examples of how the manner in which the language is introduced or used in the *PPSA* may shape the legal concepts and, more generally, conceptual thinking. The article concludes in Part V.

II THE LEGISLATIVE ‘DICTIONARY’

Many, but certainly not all,²¹ of the key terms in the *PPSA* are set out, or at least signposted, in s 10 of the *PPSA*, which is headed ‘The Dictionary’. The term ‘Dictionary’ appears peculiar to the *PPSA*, although it is itself located in a part of the legislation which bears the more general heading ‘Definitions’.²² In other PPS jurisdictions, the equivalent terms are found in provisions with headings such as ‘Interpretation’, as in the Saskatchewan²³ and New Zealand legislation,²⁴ or ‘Definitions and Interpretation’, as in the Ontario²⁵ and British Columbian legislation.²⁶

The use of a dictionary is a not uncommon drafting technique that has been adopted by Australian parliamentary draftspeople since at least the 1980s. It can be found in other commercial legislation such as the *Corporations Act 2001* (Cth) and the *Life Insurance Act 1995* (Cth).²⁷ Thus, while there may be no particular *legal* significance as such in its use in the *PPSA*, the description may nonetheless be important at a *practical* level. For example, our common collective understanding of how a dictionary is generally used may well colour our approach to the statutory Dictionary.

There are at least two assumptions commonly made with regard to using a dictionary that could prove unhelpful if made in the context of the *PPSA*. The first assumption is that it is only necessary to consult a dictionary in relation to a particular term

²⁰ Ibid.

²¹ See Part III C in text below.

²² *PPSA* ch 1 pt 1.3.

²³ *Personal Property Security Act*, SS 1993, c P-6.2, s 2.

²⁴ *Personal Property Securities Act 1999* (NZ) s 16.

²⁵ *Personal Property Security Act*, RSO 1990, c P-10, s 1.

²⁶ *Personal Property Security Act*, RSBC 1996, c 359, s 1.

²⁷ See *Corporations Act 2001* (Cth) s 9 and *Life Insurance Act 1995* (Cth) s 8. Cf *Competition and Consumer Act 2010* (Cth) s 4, which is headed ‘Interpretation’.

— where, for example, the meaning of a particular word is unknown or unclear. Readers generally consider it unnecessary to read a dictionary from beginning to end. The second assumption is that a dictionary is complete. Readers assume that if they were to read a dictionary from beginning to end, they would come across all necessary words.

In the case of the *PPSA* Dictionary, neither assumption holds true. It is critical to read the Dictionary in full to find out which terms used in the *PPSA* are actually defined. Otherwise, a definition may be missed. It is true that some terms are obvious and that a reader would have an expectation that they would be defined. That might be because the term is one that tends to vary from statute to statute. For example, terms such as ‘business day’ or ‘writing’ are likely to send a reader straight to the Dictionary to confirm the meaning in the new context. A reader will also clearly have an expectation that a new term, such as ‘chattel paper’, would be defined. Other terms are, however, less obvious, particularly when they draw on pre-*PPSA* terms in common usage. Would a reader, for example, necessarily immediately check the meaning of ‘intangible property’ or ‘negotiable instrument’? Yet the *PPSA* gives both terms new meanings.

It is thus clearly important to know that a particular term is included in the Dictionary. It is nonetheless equally important to know that a particular term is not defined. Even only a passing familiarity with the Dictionary soon reveals that a number of key terms are missing. ‘Rights in the collateral’ is a prominent, albeit only one, example.²⁸ It is a fundamental principle that a grantor must have such rights (or at least the power to transfer such rights to the secured party) for the security interest to attach to the property.²⁹ Yet the lack of a definition means that it is not clear what constitutes such rights.³⁰ Terms that are not defined may provoke uncertainty.

While this article focuses on the Dictionary and other key terms used in the *PPSA* but not defined, it should be noted that the *PPSA* is not the only source of terms used in discussion in this field. In Australia, the *Corporations Act* introduces further definitions for use under that legislation. They become relevant to security interests given by a corporate grantor that subsequently goes into administration or liquidation. The *Acts Interpretation Act 1901* (Cth) also impacts, although interestingly s 11 of the *PPSA* confines its application to its provisions as in force at the date of Royal Assent (14 December 2009).

²⁸ It is found in s 19 of the *PPSA* in the context of when attachment occurs, rendering a security interest enforceable against the grantor.

²⁹ *PPSA* s 19(2).

³⁰ See, eg, Bruce Whittaker, ‘The Scope of “Rights in the Collateral” in Section 19(2) of the *PPSA* – Can Bare Possession Support Attachment of a Security Interest?’ (2011) 34(2) *University of New South Wales Law Journal* 524; Sheelagh McCracken, ‘Conceptualising the Rights of a Lessee under the Personal Property Securities Regime: the Challenge of “New Learning” for Australian Lawyers’ (2011) 34(2) *University of New South Wales Law Journal* 547.

Furthermore, the experience of other jurisdictions, especially in Canada, suggests that both the judiciary and the academic community may introduce new terminology in their discussion of concepts. The typical distinction that is drawn between an ‘in substance’ security interest and a ‘deemed’ security interest under PPS-style legislation does not, for example, reflect the express language of the legislation. Nor is there to be found in the legislation any reference to lessees having ‘implied’ or ‘deemed’ ownership when they have possession of property under certain leases for a term of more than one year.³¹ It is not clear who was first responsible for this terminology, but certainly references to such security interests and such ownership can now be found in both cases and commentary. They have been picked up not only by New Zealand courts and commentators but also by their Australian counterparts.³²

It can also be expected that practitioners drafting security documentation may themselves introduce new language or adapt statutory language for their particular purposes. Already it is not uncommon to find Australian practitioners referring to ‘collateral’ as a synonym for property to be secured,³³ even though the *PPSA* gives that term a rather narrower meaning, being generally ‘personal property to which a security interest is attached’.³⁴ Reference to the ‘registration of security interests’ is also common.³⁵ Technically, however, it is financing statements that are ‘registered’ and security interests that are ‘perfected by registration’.

One final point on the Dictionary: the meaning given to words in the Dictionary will inevitably be impacted by the judicial approach to interpretation of the *PPSA*. This was evident in *Saulnier*. In construing the term ‘personal property’ beyond the traditional common law meaning of that term, the Supreme Court of Canada was strongly influenced by its perception of the scope of the legislation:

‘Our concern is exclusively with the extended definitions of “personal property” in the context of a statute that seeks to facilitate financing by borrowers and the protection of creditors.’³⁶

³¹ This assumes satisfaction of other conditions that a lease must satisfy in order to be so classified.

³² *Maiden Civil* (2013) 277 FLR 337 [26]–[32] and references therein.

³³ See, eg, ‘Collateral Definition’ in ‘*PPSA* Model Clauses for a General Security Agreement’ dated 16 May 2013, prepared by Allens Linklaters, Ashurst, Herbert Smith Freehills, King & Wood Mallesons and Norton Rose Fulbright, available on their respective websites.

³⁴ *PPSA* s 10. At the date of agreement, the security interest may attach to existing property of the grantor if, for example, the grantor has ownership of the property and does an act by which the security interest arises: at s 19(2). It cannot, however, attach to future property in which the grantor does not yet have rights.

³⁵ Such usage now appears in some early judgments. See, eg, *Re Cardinia Nominees Pty Ltd* [2013] NSWSC 32 [8]; *Maiden Civil* (2013) 277 FLR 337 [41].

³⁶ *Saulnier* [2008] 3 SCR 166, [51].

It is still too early to assess how Australian courts will approach the *PPSA*, both in terms of the primacy that they may give to the actual text of the statute and the extent to which they may be willing to look at material from other PPS jurisdictions as an extrinsic aid to interpretation.³⁷ This appears to have been a recurring, and at times controversial, issue in New Zealand.³⁸ There is no reason to doubt that it will also be an issue in Australia.

III A WORKING TABLE OF FUNDAMENTAL TERMS

This article commences preparation of a Table of Fundamental Terms ('Table') and uses as its starting point the Dictionary contained in s 10, which is located in div 2 of pt 1.3 of the *PPSA*. The Guide to pt 1.3 on Definitions indicates that the Dictionary is an exhaustive list of *defined* terms,³⁹ either defining a term itself or furnishing a signpost to a provision where it is defined. However, as noted in Part II of this article, the Dictionary is not an exhaustive list of *legislative* terms. There are, as Columns 3 and 4 of the Table indicate, a considerable number of undefined legislative terms.

While the initial division between those terms that are defined and those that are not is objectively ascertainable and easy to make, it is not always simple for the purposes of the Table to determine whether the language in which a particular term is couched is best explained as old language introducing a new concept or as new language introducing a new concept. The term 'proceeds' is one such example. The term has an existing meaning outside the *PPSA*, but is used in such a novel way

³⁷ In *Maiden Civil* (2013) 277 FLR 337 [32], Brereton J observed: 'The Commonwealth Parliament, in enacting legislation that was modelled on the New Zealand and Canadian legislation, should be taken to have intended the same approach, which was by then well-established in Canada and New Zealand, to apply.' See Bruce Whittaker, 'Dealings in Collateral under the *Personal Property Securities Act 2009* (Cth) — In Search of a "Harmonious Whole"' (2013) 24 *Journal of Banking and Finance Law and Practice* 203; Sheelagh McCracken, 'Construing the Personal Property Securities Act 2009 (Cth): Interpretation or Interpolation?' (2014) 27(4) *Commercial Law Quarterly* 3. See also Roger Giles and Kevin Lindgren, '*PPSA*: What Will the Courts Make of it All?' (Papers presented at the 29th Annual Conference of the Banking and Financial Services Law Association, Queenstown, New Zealand, 5 August 2011). For discussion of current debate in Australia by the judiciary writing extra-curially, see, eg, Justice Keith Mason, 'The Intent of Legislators: How Judges Discern It and What They Do If They Find It' (2006) 27 *Australian Bar Review* 253; Justice James Spigelman, 'The Intolerable Wrestle: Developments in Statutory Interpretation' (2010) 84 *Australian Law Journal* 822; Justice Nye Perram, 'Context and Complexity: Some Reflections by a New Judge' [2010] *Federal Judicial Scholarship* 19. See generally D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 7th ed, 2011).

³⁸ Mike Gedye, 'The Development of New Zealand's Secured Transactions Jurisprudence' (2011) 34(2) *University of New South Wales Law Journal* 696.

³⁹ *PPSA* s 9.

under the *PPSA* that it may be better to think of it as new language introducing a new concept.⁴⁰

Although the listing of particular terms in the Table should be treated as having some flexibility and although some terms may arguably fall within several categories, the purpose of the Table is to attempt to give an overall sense of what are new terms and what are old terms and whether those terms reflect a new concept or an old concept. ‘Old’ in this context refers to general usage pre-*PPSA*.

An initial important point clearly emerges from the first working version of the Table: the Table strongly suggests that some common statements made about the impact of the *PPSA* are open to challenge. It is often said, for example, that the old terminology relating to secured transactions law has been replaced. Certainly, in the US, Gilmore indicated that art 9 used ‘its own terminology’ and pointed to the Comment to the then art 9-105, which referred to the selection of terms without any ‘common law or statutory roots’.⁴¹ Whatever the position may have been in the US and indeed whatever it may be elsewhere, the statement that old terminology is replaced is only partly true in relation to the *PPSA*.

In the case of both defined and undefined terms, new language has certainly been introduced not only for new concepts but also for some old concepts. Nonetheless, old language is very much still in evidence. In some instances that old language is expressly defined to take on a new meaning for the purposes of the legislation; in other instances it is left undefined. The problem is that while that old language does not grate on the ear, as Gilmore conceded the new unfamiliar language might,⁴² it does lull us into — dare one say — ‘a false sense of security’. The old familiar language is certainly less alarming. It is, however, a potential cause of confusion, both when a term is given a specific but unexpected new meaning (the proverbial *faux ami*) and when a term is left undefined, with it being unclear whether the term is to bear the old meaning or some new meaning. *Saulnier*, acknowledging in Canada the possibility of a wider meaning of ‘property’ than that attributed by the common law, is a case in point.⁴³

The role played by these old language terms raises again the debate as to whether it is better to approach the *PPSA* with knowledge of the previous law, or not. The manner in which terms are used suggests that it is critical to know that the language used in the *PPSA* may have other meanings, and not just in situations where the *PPSA* is not operative. It is also critical to appreciate that established pre-*PPSA* meanings may, but not necessarily will, influence the interpretation of undefined terms and that the *PPSA*’s undefined terms cannot necessarily be construed as if the previous meaning did not exist.

⁴⁰ Ibid s 31.

⁴¹ Gilmore, above n 5, 301–2.

⁴² Ibid 301.

⁴³ See text in Part I above.

*A Working Table of Fundamental Terms*⁴⁴

1 *Use of New Language*

Column 1	Column 2	Column 3	Column 4
<i>Defined Terms</i>		<i>Undefined Terms</i>	
<i>New language for new concepts</i>	<i>New language for old concepts</i>	<i>New language for new concepts</i>	<i>New language for old concepts</i>
Chattel paper	Account	Enforceable against third parties	Disposal of collateral
Circulating asset	Account debtor [in part – excluding chattel paper]	Flawed asset arrangement [?]	Redeem collateral
Collateral	Intermediated security		Retention of collateral
Continuously perfected ⁴⁵	Investment instrument	Honestly and in a commercially reasonable manner	
Control			
Effective registration			
Financial property			
Financing (change) statement		Regular engagement [?]	
New value		Reinstatement of security agreement	
PPS lease		Rights in collateral	
Proceeds [?]			
Purchase money security interest		Seizure	
Serial number		Taking free	
Verification statement		Temporary perfection	
		Vests in the grantor	

⁴⁴ See Appendix 1 for other terms contained in the Dictionary but not placed in the Table. The notation ‘[?]’ indicates some uncertainty as to the term’s correct place in the Table.

⁴⁵ This is a new phrase, although the term ‘perfection’ is an example of old language used for a new concept.

2 *Use of Old Language*

Column 1	Column 2	Column 3	Column 4
<i>Defined Terms</i>		<i>Undefined Terms</i>	
<i>Old language for new concepts</i> Accession After-acquired property Attaches Commingled Document of title Financial product Fixtures [?] Goods Grantor Intangible property Intellectual property (IP licence) Intermediary [?] Inventory Land Licence Livestock Negotiable instrument Perfected Personal property Possession Secured party Security agreement Security interest Writing [?]	<i>Old language for old concepts</i> General law Interest Value	<i>Old language for new concepts</i> Ordinary course of business Registration ⁴⁶ Subordination Traceable [?] Transfer ⁴⁷	<i>Old language for old concepts</i> Assignment Bailment Buyer [?] Charge Conditional Sale Hire Purchase Lease Mortgage Pledge Possession ⁴⁸ Retention of title Set-off Subrogation [?] Trust receipt [?]

⁴⁶ Registration under the PPSA involves registration of a financing statement as distinct from registration of the security interest.

⁴⁷ See Whittaker, above n 36.

⁴⁸ See PPSA s 24. ‘Possession’ is placed in both Column 1 as a defined term representing old language for new concepts and Column 4 as an undefined term representing old language for old concepts. This is because the PPSA states that possession has ‘a meaning affected by section 24’: at s 10.

While the Table uses the headings ‘defined terms’ and ‘undefined terms’, the *PPSA* appears to draw a further distinction between ‘definitions’ and ‘concepts’. Such a distinction is not reflected in the Table. The *PPSA* does, however, describe those concepts in the Guide to pt 1.3 as merely ‘longer definitions’.⁴⁹ There are four such concepts: security interest,⁵⁰ PPS lease,⁵¹ purchase money security interest⁵² and intermediated security.⁵³ This distinction appears unique to the *PPSA* but it does not appear to impact on the classification adopted in the Table.

Finally, it should be noted that the amount of detail in the defined terms varies across the terms. It is often de rigueur in seminars for the definition of ‘fish’ to be examined. ‘Fish’ means:

any of the following, while alive:

- (a) marine, estuarine or freshwater fish, or other aquatic animal life, at any stage of their life history;
- (b) oysters and other aquatic molluscs, crustaceans, echinoderms, beachworms and other aquatic polychaetes;

but does not include any fish prescribed by the regulations for the purposes of this definition.⁵⁴

In light of the ambiguity of some other key terms, such as ‘rights in the collateral’, and in the absence of any attempt at definition, the level of detail given to ‘fish’ seems initially surprising. It has been explained, anecdotally at least, as reflecting issues that have arisen in the past with regard to financing fish farming.

B Defined Terms

1 New Language for New Concepts

It is inevitable that there should be new language for new concepts. This new language is typically (but not exclusively)⁵⁵ found in three contexts: in several of the arrangements amounting to a security interest, in the property over which the security interest arises and in some of the mechanisms for making the security interest effective.

⁴⁹ *PPSA* s 9.

⁵⁰ *Ibid* s 12.

⁵¹ *Ibid* s 13.

⁵² *Ibid* s 14.

⁵³ *Ibid* s 15.

⁵⁴ *Ibid* s 10.

⁵⁵ See, eg, *PPSA* ch 2 pt 2.5. ‘New value’ occurs in the context of the operation of the ‘taking free’ rules.

(a) *Arrangements*

Although most of the arrangements in s 12(2) of the *PPSA* are couched in old language and represent old concepts,⁵⁶ prominent examples of new concepts in new language are the ‘PPS lease’ and the ‘purchase money security interest’. A ‘PPS lease’ includes an operating lease of a particular duration and kind.⁵⁷ A lessor’s interest under such a lease is deemed to be a security interest.⁵⁸ A ‘purchase money security interest’ arises in specified circumstances⁵⁹ and has the potential, assuming procedural requirements are complied with,⁶⁰ to confer what is often described as ‘super priority’ on its holder.

(b) *Property*

Perhaps the most obvious example is that of ‘chattel paper’. Gilmore noted that this was a ‘novel term coined by the Code draftsmen to describe a species of property which had previously managed to exist without a name’, giving by way of example a conditional sale contract.⁶¹ ‘Collateral’ is another new term, having a limited and somewhat circular meaning, being described as ‘personal property to which a security interest is attached’.⁶² ‘Financial property’ is a new category of property, although it excludes some property which might commercially have been expected to be included, such as debts.⁶³ A ‘circulating asset’ is the description now given to property that formerly was likely to be the subject-matter of a floating charge, such as debts and inventory. Although the process of determining whether a specific asset is covered by the term can prove difficult, the underlying rationale for its inclusion is clear: to equate secured parties having security interests in these assets with holders of floating charges pre-*PPSA*, thereby precluding them from avoiding other existing statutory provisions that impacted chargees under a floating charge.⁶⁴

(c) *Mechanisms for Making a Security Interest Effective*

The vocabulary includes a number of terms relevant to the perfection of the security interest. For example, ‘control’ and ‘effective registration’ are methods of perfection, the latter involving the use of a ‘financing statement’ (or a ‘financing change statement’, depending on the circumstances).

⁵⁶ See Part III B 3(b) below.

⁵⁷ *PPSA* s 13.

⁵⁸ *Ibid* s 12(3).

⁵⁹ *Ibid* s 14.

⁶⁰ *Ibid* ss 62–3.

⁶¹ Gilmore, above n 5, 378. See generally Anthony Duggan, ‘Chattel Paper’ (2013) 41 *Australian Business Law Review* 214.

⁶² *PPSA* s 19(1).

⁶³ Debts (some of which may be ‘accounts’) are ‘intangible property’: see below.

⁶⁴ Replacement Explanatory Memorandum, Personal Property Securities Bill 2009 (Cth) ‘Chapter 9 — Transitional Provisions’ [56]– [67].

2 *New Language for Old Concepts*

Far less prevalent has been the introduction of new language for old concepts. It can be found in relation to property. A share, for example, may be either an ‘intermediated security’ or an ‘investment instrument’, depending on whether or not it is held through an appropriately licensed central securities depository or traded through an authorised clearing and settlement facility.⁶⁵ If it is so held or traded, it falls within the former category.

One concept that seems initially quite difficult to come to grips with, and which frequently does seem to grate on the ear, is ‘account’ (and hence ‘account debtor’). ‘Account’ refers to certain types of debt and is more expansive than the old concept of a ‘book debt’.⁶⁶ The New Zealand term ‘account receivable’ is perhaps more appealing,⁶⁷ although that may simply be attributable to the phrase being already familiar to us through its common commercial usage.

3 *Old Language for New or Modified Concepts*

Typically, the old language has been used to describe some types and categories of, and interests in, property, the security interest itself and the parties to it, some of the mechanisms to make the security interest effective and the reach of the security interest.

(a) *Property*

‘Personal property’ is defined in such a way that it includes ‘fixtures’,⁶⁸ which were traditionally part of real property at common law, and certain types of ‘licences’, which might not necessarily have been property at common law. ‘Document of title’ is given a more limited meaning than traditionally would be recognised. It does not, for example, include a share certificate. By contrast, ‘negotiable instrument’ is defined more broadly to include electronic writing transferable by assignment and a specified type of letter of credit. ‘Inventory’, not itself a legal term, appears

⁶⁵ *PPSA* s 15(1) defines an intermediated security as ‘the rights of a person in whose name an intermediary maintains a securities account’. Section 15(2)(b) defines an intermediary to include ‘a person who operates a clearing and settlement facility under an Australian CS facility licence’, thus capturing scripless shares traded through the Australian Securities Exchange’s Clearing House Electronic Subregister System (‘CHESS’).

⁶⁶ See Gedye, above n 4, discussing the equivalent New Zealand term ‘account receivable’, which is defined more broadly than the Australian term. See also *Strategic Finance* [2013] NZCA 357.

⁶⁷ See *Personal Property Securities Act 1999* (NZ) s 16. Although, as noted in above n 66, the term is defined differently.

⁶⁸ Although an interest in a fixture is currently excluded from the scope of the legislation (*PPSA* s 8(1)(j)), ‘fixtures’ are nonetheless defined in the legislation as ‘goods, other than crops, that are affixed to land’: at s 10. ‘Land’ specifically excludes ‘fixtures’ under s 10.

to be wider than its generally understood commercial sense. Interestingly, the *PPSA*, in the context of determining whether assets are circulating assets, distinguishes between the Dictionary meaning in s 10 and what s 341(1B) describes as ‘its ordinary meaning’.

As far as categories of property are concerned,⁶⁹ the meaning given to the term ‘intangible property’ is of particular note. At common law, such a term would be understood to refer to all property that does not have a physical manifestation (viz, a chose in action). In contrast, s 10 of the *PPSA* defines it as a residual category of personal property excluding not only ‘goods’ but also ‘financial property’ and ‘an intermediated security’, both of which would generally be intangibles at common law. ‘Goods’ is also a term that initially appears more suited to classification as ‘old language for old concepts’ rather than for new concepts. The term has traditionally been used in a range of statutes, generally to refer to choses in possession although its precise meaning may differ from statute to statute.⁷⁰ Section 10 of the *PPSA* certainly defines it as meaning ‘tangible property’. Its meaning is nonetheless extended through, for example, its express inclusion of ‘livestock’, which covers unborn animals. Both intangible property and goods would potentially fall within the scope of ‘after-acquired property’. While not surprising in its reference to property acquired by the grantor after the date of the security agreement, the term is explicitly limited to personal property.⁷¹

Also altered, albeit only partially, is the property interest of ‘possession’, whose meaning is stated in s 10 to be ‘affected’ by s 24. On the one hand, the meaning is narrowed through the exclusion of some forms of constructive possession;⁷² on the other hand, the meaning is extended through recognition of possession of chattel paper evidenced by an electronic record⁷³ and possession of shares through possession of the certificates.⁷⁴

(b) *Security Interest*

Traditionally at common law the term ‘security interest’ is used generically to include consensual arrangements such as the mortgage, charge and pledge as well as interests arising by operation of law, such as the common law lien. Under the *PPSA*,

⁶⁹ See text below.

⁷⁰ See, eg, *Sale of Goods Act 1923* (NSW) s 5 where it excludes money; *Competition and Consumer Act 2010* (Cth) s 4 where it includes gas and electricity.

⁷¹ In *Strategic Finance* [2013] NZCA 357 [25], the New Zealand Court of Appeal applied the equivalent definition under s 16 of the *Personal Property Securities Act 1999* (NZ) to the general security agreement. Such an application, in the absence of an express incorporation of the statutory term into a document, would be regarded in Australia as controversial.

⁷² See *PPSA* ss 24(1)–(2). The secured party is precluded from having possession where the debtor or grantor (or their agent) has actual or apparent possession, and vice versa.

⁷³ *Ibid* s 24(5).

⁷⁴ *Ibid* s 24(6).

of course, the definition in s 12(1) limits its scope to consensual transactions while at the same time extending its scope to include functionally equivalent arrangements. In s 12(3) it even includes interests arising under certain transactions that do not in substance secure payment or performance of an obligation. These changes have led to the nomenclature for parties becoming more neutral, being the ‘secured party’ and the ‘grantor’,⁷⁵ terms that initially seem to sit uneasily together where the transaction involves a reservation of title.⁷⁶

(c) *Effectiveness of Security Interest*

‘Attachment’ and ‘perfection’ are terms that were in common usage pre-PPSA. ‘Attachment’ was, for example, used to describe the crystallisation of a floating charge into a fixed charge, with the charge said to attach to the assets on the crystallising event. ‘Perfection’ was used in the context of precluding a registrable security interest granted by a company from being challenged by an administrator or liquidator for lack of registration. Now both terms have become more technical. ‘Attachment’ occurs when the grantor has rights in the collateral (or power to transfer rights) and either value is given or the grantor does an act by which the security interest arises.⁷⁷ Therefore, it is the moment at which the security interest becomes enforceable against the grantor.⁷⁸ ‘Perfection’ represents a status, being the ‘optimal level of protection’ available to a secured party, while also indicating a means by which that very status can be achieved.⁷⁹ Hence, it is said that the secured party may perfect by taking possession or control (where such methods are available on the facts) or by making an effective registration.⁸⁰ The status is relevant in terms of not only precluding the security interest from being vested in the grantor upon insolvency,⁸¹ but also of determining priority,⁸² and of narrowing the circumstances in which a third party may take free of the security interest.⁸³

⁷⁵ Ibid s 10. A ‘grantor’ may, but need not necessarily, be the ‘debtor’. Under New Zealand and Canadian legislation, the term ‘debtor’ is used to refer to both the person who owes the obligation as well as the person who owns (or has another sufficient interest in) the property. See, eg, *Personal Property Securities Act 1999* (NZ) s 16; *Personal Property Security Act*, SS 1993, c P-6.2, s 2; *Personal Property Security Act*, RSO 1990, c P-10, s 1.

⁷⁶ See Gilmore, above n 5, 302–3, for a description of how the terms ‘secured party’ and ‘debtor’ in art 9 of the US Uniform Commercial Code were selected, having initially started their statutory life as ‘financier’ and ‘borrower’.

⁷⁷ PPSA s 19(2).

⁷⁸ Ibid s 19(1).

⁷⁹ *Graham* [2004] 2 NZLR 528, 532 [12].

⁸⁰ PPSA s 21.

⁸¹ Ibid s 267, but subject to s 268.

⁸² Ibid s 55.

⁸³ Ibid ss 43 and 52.

(d) *Reach of the Security Interest*

The terms ‘accession’ and ‘commingling’ are used in the *PPSA* in the context of a security interest continuing in circumstances where the goods to which it is attached are installed in other goods or so mixed with other goods that their identity becomes lost. The *PPSA* provides rules for determining when the security interest continues despite the mixing and for working out the priority position. This is a very different sense to the way in which those terms are used at common law where they occur in the context of determining whether ownership has been involuntarily transferred. It has been pointed out by Canadian commentators that many cases in which the doctrine of accession was successfully raised at common law would now be dealt with under the heading of ‘commingling’.⁸⁴

4 *Old Language for Old Concepts*

Old language is of course also used for defining old and familiar concepts. ‘General law’ is now a common term that is found in statute to refer to the principles of common law and equity. ‘Value’ is familiar as meaning consideration sufficient to support a contract and its extension in s 10 of the *PPSA* to an antecedent debt or liability echoes its usage in other statutes, such as the *Bills of Exchange Act 1909* (Cth).

C *Undefined Terms*

As discussed, the Dictionary is an exhaustive list of defined terms but not of all the legal terms used in the legislation. It is interesting to note what the legislature has chosen not to define. Where the legislation does not give a definition, a question immediately arises as to meaning. In such discussion, it should not be forgotten that the *PPSA* acknowledges that it is not an exclusive code. Section 254 emphasises that general law and statute operate concurrently with the *PPSA* to the extent that they are capable of so doing. While judicial and academic admonishments abound, emphasising the need to take care not to import pre-*PPSA* concepts into construction of the *PPSA*, the *PPSA* itself clearly does so in its continuing use of old language for old concepts.

1 *New Language for New and Old Concepts*

These new terms are spread throughout the *PPSA* and are not always easy to classify. Reference has already been made to the uncertainties provoked by ‘rights in collateral’. Ambiguities proliferate in the ‘flawed asset arrangement’:⁸⁵ while poten-

⁸⁴ See Ronald C C Cumming, Catherine Walsh and Roderick J Wood, *Personal Property Security Law* (Irwin Law, 2nd ed, 2012) 602. See also Andrew Boxall and Diccon Loxton, ‘Commodity Transactions and Part 3.4 of the Personal Property Securities Act 2009: An Anomalous Outcome’ (2013) 27(2) *Commercial Law Quarterly* 3.

⁸⁵ For a discussion of such arrangements, see generally Diccon Loxton, ‘One Flaw Over the Cuckoo’s Nest — Making Sense of the “Flawed Asset Arrangement” Example, Security Interest Definition and Set-Off Exclusion in the *PPSA*’ (2011) 34(2) *University of New South Wales Law Journal* 472.

tially another new concept,⁸⁶ it can be argued to be new language for an old concept. The outcome depends on how restricted a meaning is given to it. To the extent that it is construed to mean simply a deposit made with a bank that the depositor agrees not to withdraw until performance of a specified obligation (either of the depositor or a third party), the arrangement may be viewed as a pre-PPSA concept, although it was not a term of art. If the arrangement requires additional restrictions, such as an obligation to maintain the deposit for a certain period and an obligation not to encumber it,⁸⁷ it takes on the appearance of a new concept.

A clearer example of a new term for a new concept is that of ‘taking free’,⁸⁸ which alludes to a series of statutory rules under which a third party may take property unencumbered by a security interest. These ‘taking free rules’ are sometimes characterised as ‘extinguishment rules’, an additional label that itself risks confusion insofar as it implies that the security interest is necessarily terminated when in fact it may, for example, attach to the proceeds.⁸⁹ The concept of ‘enforceability against third parties’ is more limited than the wording might initially suggest,⁹⁰ containing criteria directed essentially at corroborating the existence of the security interest by requiring a secured party to have possession or control of the collateral or a security agreement in the requisite form with the requisite coverage.⁹¹

In the context of remedies, further terminology has been introduced to describe a new standard of conduct for their exercise,⁹² as well as the process by which a default in a security agreement may be cured.⁹³ New language is used both to describe and to expand old remedial concepts. The two major remedies are ‘disposal of collateral’⁹⁴ and ‘retention of collateral’.⁹⁵ Disposal covers the notion of sale but also includes, in certain circumstances, leasing and licensing. Retention embraces the notion of foreclosure in the sense of enabling a secured party to retain the property as its own. It moves away, however, from the technical operation of foreclosure as the extinction of the equity of redemption and makes retention a general remedy, rather than a remedy that was only available at common law to the mortgagee.⁹⁶ Also expanded

⁸⁶ PPSA s 12(2)(1).

⁸⁷ See *Caisse Populaire Desjardins de l'Est de Drummond v Canada* [2009] 2 SCR 94.

⁸⁸ PPSA ch 2 pt 2.5.

⁸⁹ *Ibid* s 32.

⁹⁰ Andrew Boxall, ‘Personal Property Securities Act 2009 (Cth): Some Consequences for Buyers of Personal Property’ (2011) 25(1) *Commercial Law Quarterly* 15, 15–16.

⁹¹ PPSA s 20.

⁹² *Ibid* s 111. ‘Honestly and in a commercially reasonable manner’.

⁹³ *Ibid* s 143. ‘Reinstatement of a security agreement’.

⁹⁴ *Ibid* s 128.

⁹⁵ *Ibid* s 134.

⁹⁶ It was only under the common law or equitable mortgage that title (legal or equitable, respectively) was transferred. See generally Sheelagh McCracken et al, *Everett & McCracken's Banking and Financial Institutions Law* (LawBook Co, 8th ed, 2013) 568–70.

is the notion of ‘redeeming collateral’.⁹⁷ Previously the term ‘redeem’ was typically only used in respect of a mortgagor’s equity of redemption.⁹⁸

2 *Old Language for New and Old Concepts*

The use of old language to describe new concepts is exemplified by the term ‘subordination’. ‘Subordination’ is used to encompass the ranking of secured debt rather than confined to its more usual meaning of ranking unsecured debt.⁹⁹ Pre-PPSA ranking of secured debt tended to attract the language of ‘priority’, although commercially the term was probably used more loosely. More technical is the term ‘ordinary course of business’, which is used in the PPSA in the context of a buyer or lessee taking free of a security interest when personal property is sold or leased ‘in the ordinary course of the seller’s or lessor’s business of selling or leasing personal property of that kind.’¹⁰⁰ Although the phrase ‘ordinary course of business’ is reminiscent of language used in the context of a floating charge, the qualification introduced by the reference to the seller’s or lessor’s business indicates that it is more limited in scope.¹⁰¹

Not surprisingly, however, it is in relation to the old concepts that the old language is most commonly found. In particular, it is used in relation to the old forms of arrangements that have been embraced by the new statutory term ‘security interest’. These include the old security interests, such as the ‘mortgage’, the ‘charge’ and the ‘pledge’. They also include those arrangements that were regarded as functionally equivalent to security, such as ‘conditional sale’, ‘retention of title’, ‘hire purchase’, ‘(finance) lease’ and ‘assignments by way of security’. Most of these arrangements are straightforward, with the terms being well understood. One perhaps more complex term is the ‘trust receipt’. It is not clear whether this bears the rather limited meaning that it has developed under Anglo-Australian law,¹⁰² or whether it reflects a broader American usage.¹⁰³

Ambiguity in old terms is also found elsewhere in the PPSA. ‘Set-off’ is a classic example. A right of ‘set-off’ is expressly excluded under s 8 of the PPSA. Yet, under Australian law at least, the meaning of ‘set-off’ is unclear. To the extent that it means a discharge from a personal obligation, its exclusion is logical. Where it is used to mean an appropriation of property, the position is more difficult. For example, where a contractual arrangement provides for an appropriation of property under the guise

⁹⁷ PPSA s 142.

⁹⁸ It has admittedly been used in a more general sense. See, eg, *Re Bank of Credit and Commerce International SA (No 8)* [1998] AC 214, 227.

⁹⁹ See, eg, PPSA ss 61 and 12(6)(b), although it refers to ‘unsecured debt’ in s 12(6)(a) and s 268(2).

¹⁰⁰ *Ibid* s 46.

¹⁰¹ See generally Mike Gedy, ‘A Hoary Chestnut Resurrected: The Meaning of “Ordinary Course of Business” in Secured Transactions Law’ (2013) 37 *Melbourne University Law Review* 1.

¹⁰² See *Re David Allester Ltd* [1922] 2 Ch 211; McCracken et al, above n 96, 576–8.

¹⁰³ See, eg, Gilmore, above n 5, ch 4.

of a ‘set-off’, it may be argued that the arrangement is in fact a charge under s 12(2), or (depending on the circumstances) a flawed asset arrangement under s 12(2), or simply a security interest under s 12(1), given that the appropriation amounts in any such case to an interest in property.¹⁰⁴

Two other old, undefined terms that have been discussed in other PPS jurisdictions, both in case law and academic commentaries, are ‘possession’¹⁰⁵ and ‘buyer’. Each term appears controversial. When the legislation enables ‘possession of goods’ on the part of the grantor under specified transactions such as a lease for a term of more than one year to amount to ‘rights in the collateral’ for the purpose of attachment of the security interest,¹⁰⁶ must ‘possession’ be understood in terms of possession amounting to implied or deemed ownership?¹⁰⁷ When the legislation enables a ‘buyer’ to take free of a security interest,¹⁰⁸ is the buyer a person who has agreed to buy the property or a person to whom title to the property has passed under sale of goods legislation?¹⁰⁹ The answer to this latter question is critical where the grantor becomes insolvent after entry into the contract of sale but prior to transfer of title.

IV SHAPING CONCEPTS AND CONCEPTUAL THINKING

In its manner of introducing and using language, the *PPSA* encourages, if not on occasions even forces, the reader to consider (and indeed reconsider) both the legal concepts themselves and the way in which they are intellectualised.

¹⁰⁴ See generally Sheelagh McCracken, *The Banker’s Remedy of Set-Off* (Bloomsbury Professional, 3rd ed, 2010). ‘Set-off’ is seemingly not expressly excluded in Canadian legislation: see, eg, *Personal Property Security Act*, RSO 1990, c P-10, s 4; *Personal Property Security Act*, SS 1993, c P-6.2, s 4. Canadian commentators have concluded that it is not included on the basis that it does not give rise to a property interest: Cumming, Walsh and Wood, above n 84, 148. It is expressly excluded in New Zealand: *Personal Property Securities Act 1999* (NZ) s 23. See Mike Gedye, Ronald C C Cumming and Roderick J Wood, *Personal Property Securities in New Zealand* (Thomson Brookers, 2002) 88–9, 107, where this is explained on the basis of avoidance of doubt.

¹⁰⁵ Although s 10 of the *PPSA* provides that possession has a meaning impacted by s 24, s 24 does not address this particular issue.

¹⁰⁶ *PPSA* s 19.

¹⁰⁷ See, eg, *Graham* [2004] 2 NZLR 528; *Waller* [2006] 3 NZLR 629; *Rabobank* [2011] 3 NZLR 192; *Maiden Civil* (2013) 277 FLR 337. See generally Sheelagh McCracken, ‘Conceptualising the Rights of a Lessee under the Personal Property Securities Regime: the Challenge of “New Learning” for Australian Lawyers’ (2011) 34 (2) *University of New South Wales Law Journal* 547; McCracken, above n 37.

¹⁰⁸ *PPSA* ch 2 pt 2.5.

¹⁰⁹ Cf *Royal Bank of Canada v 216200 Alberta Ltd* (1987) 51 Sask R 146; *Spittlehouse v Northshore Marine Inc* [1994] 18 OR (3d) 60. For the position in New Zealand, see *Orix New Zealand Ltd v Milne* [2007] 3 NZLR 637 [49]. See Sheelagh McCracken, ‘When is a “Buyer” a “Buyer”? Solving Riddles When New Legislation Confronts Established Concepts’ in Shelley Griffiths, Sheelagh McCracken and Ann Wardrop, *Exploring Tensions in Finance Law: Trans-Tasman Insights* (Brookers, 2014).

Under the *PPSA*, the general understanding of a security interest has clearly changed, given in particular its focus on functionality. The words we use to explain its operation, and accordingly the manner in which we now think about it, have also changed.

Pre-*PPSA*, an analysis of security transactions would have typically provoked the following major questions under Australian law:

- What is the nature of the security interest?
- Is the security interest valid?
- Is the security interest registrable and, if so, has it been registered?
- What is the priority of the security interest?
- What are the remedies conferred by the security interest?

Now the focus has shifted to:¹¹⁰

- Does a security interest exist?
- Is the security interest effective?
 - Is it attached?
 - Is it enforceable against third parties?
 - Is it perfected?
- What is the priority of the security interest?
- What is the reach of the security interest?
 - Does the security interest continue in some manner by reason of an accession, commingling or proceeds?
 - Does a third party take free of the security interest?
- What are the remedies conferred by ch 4 or by the security agreement?

At a conceptual level, the broad definition of ‘security interest’ leaves open the question of whether there is simply one type of security interest. It is commonly said

¹¹⁰ See Sheelagh McCracken, ‘Getting to Grips with the Reforms to Personal Property Securities Law’ (2011) 25(3) *Commercial Law Quarterly* 3.

that the statutory security interest is a unitary interest,¹¹¹ but commentators seem divided as to what that means. Does it simply mean that each transaction falling within the definition should be treated in the same way (except as provided otherwise by the statute) or does it mean that it is always to be analysed as a charge (or an encumbrance on title)? The latter approach seems too narrow. I argue elsewhere that the security interest should be seen as having a content that changes according to the nature of the particular transaction.¹¹² Sometimes the security interest is a charge or encumbrance, at other times it amounts to title or possession. Recognition that its content may differ according to the transaction does not preclude acceptance that it is subject to the same statutory regime.

Considerably less controversial is the proposition that the *PPSA* classification of personal property emerges from the s 10 definitions. Section 10 offers new words for thinking about property,¹¹³ not only in terms of the individual items of property, but also in terms of how different types of personal property fit together. Under the *PPSA*, personal property is divided into four categories: goods, financial property, intermediated security¹¹⁴ and intangible property. Financial property is itself further subdivided into five sub-categories: chattel paper, currency, document of title, investment instrument and negotiable instrument.

The s 10 definitions also indicate that this scheme is not the only possible basis for classification or for thinking about the personal property. Cutting across the principal classification are further classifications, such as distinctions between consumer property and commercial property, property as original collateral and as proceeds of that original collateral, inventory and non-inventory, and circulating and non-circulating assets.

Interestingly, none of these statutory classifications reflect the traditional division between choses in possession and choses in action. Yet that classification may still on occasions be relevant. One example arises where a transaction purports to involve

¹¹¹ See references in *ibid*.

¹¹² Sheelagh McCracken, 'The Personal Property Security Interest: Identifying Some Essential Attributes' (2014) 30 *Law in Context* 1, 146. For a view that the unitary characterisation is unnecessary, see Diccon Loxton, 'New Bottle for Old Wine? The Characterisation of *PPSA* Security Interests' (2012) 23 *Journal of Banking and Finance Law and Practice* 163. Cf Anthony Duggan and David Brown, *Personal Property Securities Law* (LexisNexis, 2012) 7.

¹¹³ Acceptance of a broader notion of 'property' in the case of the particular fishing licences in *Saulnier* (see Part I above) prompts, for example, a different conception of the term and its scope. Should property, by way of further example, include domain names or email accounts for the purpose of the *PPSA*? This is a question still unresolved at common law in Australia. See Lim Yee Fen, 'Is An Email Account "Property"?' (2011) 1 *Property Law Review* 59.

¹¹⁴ Confusingly, the regulations provide for an intermediated security to be treated as financial property for the purposes of item 4 of the table set out in s 153 of the *PPSA* relating to the content of financing statements. See *Personal Property Securities Regulations 2010* (Cth) sch 1 pt 2 cl 2.1.

a transfer of possession by way of security. Historically, a problem arises under Australian common law where a particular form of security, namely a pledge, is sought over assets such as a bank deposit or shares. A pledge requires physical possession of the property. Accordingly, the property to be secured must have a physical manifestation. A deposit is simply a debt that is a chose in action; it has no physical manifestation and cannot be possessed. Similarly, shares have no physical manifestation, even when evidenced in share certificates. An attempt to argue that there is a pledge over shares and, for that reason, a security interest, must be incorrect.¹¹⁵ Rather, the argument should be that rights are given over the shares and that such rights amount to either a mortgage or charge over shares under s 12(2) and hence a security interest under s 12(1) or, more simply, that the rights amount to an interest in property that secures payment or performance of an obligation and hence are a security interest under s 12(1).

V CONCLUSION

At a practical level, the ‘moral’ of this article has been essentially twofold. Before analysing any question relating to security interests, it is incumbent on a person approaching the *PPSA* to read the Dictionary in *PPSA* s 10 from beginning to end and to refrain from making any assumptions as to what terms might be found. While it might be said that a lawyer, and indeed a law student, will adopt such an approach as a matter of course, anecdotal evidence of dealings with the *PPSA* to date suggests that the meaning of particular words is often presumed and that the Dictionary is not as frequently consulted as might be anticipated. This is a matter of some concern, particularly when the making of either of the two common assumptions as to when and how to use a dictionary can prove unfortunate in the context of the *PPSA*.

The Table, which this article has started to develop, highlights not just the defined terms but also the undefined terms. In doing so, the Table makes clear that while reading the Dictionary is a necessary first step in coming to grips with the *PPSA* lexicon, it is by no means the only step. The undefined terms used in the legislation are also important. Their potential ambiguities should be identified. This is evident where the terms use the old language for new concepts which, in the manner of *faux amis* in any foreign language, may produce unexpected outcomes. Interestingly, the UNCITRAL *Legislative Guide on Secured Transactions* strongly recommends States proposing to enact a secured transactions law on the basis of the Guide to fully define ‘terms and concepts [that] do not already form part of national law’.¹¹⁶ Ambiguities in old language describing old concepts should, however, also be resolved. Such issues of definition are issues that could usefully be referred for the review of the *PPSA*.¹¹⁷

¹¹⁵ Cf *i Trade Finance Inc v Bank of Montreal* [2011] 2 SCR 360.

¹¹⁶ UNCITRAL, *Legislative Guide on Secured Transactions*, United Nations (New York, 2010) 5 [16].

¹¹⁷ *PPSA* s 343 requires a review to be undertaken and completed within three years of the registration commencement date of 30 January 2012. The Attorney-General announced the review on 4 April 2014: <http://www.ag.gov.au/Consultations/Pages/>

At a more conceptual level, the lexicon of the *PPSA* plays a significant part in causing practitioners and academics, let alone judges, to think more deeply about *PPSA* concepts. Much of the language, both old and new, challenges all to articulate the scope of the concepts as precisely and fully as possible.

APPENDIX 1

Terms set out in the Dictionary that have not been included in the Table of Fundamental Terms

A	F	registered data conditions
ABN	Family Court	Registrar
ADI	Federal Circuit Court	registration
ADI account	Federal Court	commencement time
advance	fish	registration event
agency	foreign jurisdiction	registration time
amendment demand (notice; time)	future advance	relevant superior court
approved form	I	S
Australia	insolvency	securities account
Australian entity	J	State Family Court
B	jurisdiction	superior Court
bankruptcy	L	T
business day	land law	take
C	law	term deposit
carrying on an enterprise	located	third party data
civil penalty provision	lower court	third party data
clearing and settlement	M	conditions
facility	matter	this Act
commercial consignment	migrated security interest	time of execution
commercial property	modification	transfer matter
company	motor vehicle	transferring court
constitutional corporation	N	transitional register
constructive knowledge	National Credit Code	transitional security
consumer property	non-referring State	agreement
crops	notice of objection	transitional security
currency	P	interest
D	penalty unit	W
debtor	PPS matter	water source
defect	predominantly	wool
deputy registrar	present liability	
description	provides	
E	R	
enterprise	receiving court	
evidential burden	referred PPS matter	
execution creditor	referring State	
expenses	register	
express amendment		

