

# The Insider

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## More Law, Less Justice?

### The Constitutional Right to Bear a PPS Interest

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The *Personal Property Securities Act* world was almost turned on its head by Justice Brereton's decision *In the matter of OneSteel Manufacturing Pty Limited (administrators appointed)* [2017] NSWSC 21 but not for the reason you might think.

The decision is a \$23 million reminder that to have an effective financing statement under the *Personal Property Securities Act 2009* (Cth) (**PPSA**) where the grantor is a body corporate that has an ACN, the financing statement is required to include the grantor's ACN and not ABN.

What may be less evident from the plethora of commentary on the decision is that the PPSA regime for regulating the competing security interests of a creditor and a company in external administration could have been toppled, if Alleasing Pty Limited (**Alleasing**) had persuaded the Court that the vesting provision of the PPSA was unconstitutional.

Such a decision may have caused widespread uncertainty for liquidators, creditors, insurers and companies alike – who gets first bite at the security interest cherry?

#### Fast Facts

Alleasing registered a financing statement on the Personal Property Securities Register in respect of leases it granted to OneSteel Manufacturing Pty Limited (**OneSteel**). The registrations used OneSteel's ABN, not its ACN as required by the PPSA.

OneSteel argued (and the Court agreed) that Alleasing's registrations were defective. The result was that the goods the subject of the defective registrations vested in OneSteel immediately before its external administration in accordance with section 267 of the PPSA.

#### Alleasing's Position

Alleasing submitted that section 267 of the PPSA enables an acquisition of property on other than just terms in breach of section 51(xxxi) of the *Commonwealth of Australia Constitution Act 1900* (Cth) (**the Constitution**). In that instance, OneSteel acquired (through the vesting provision of the PPSA) Alleasing's \$23 million property. Alleasing's right to its property was limited to that of an unsecured creditor, which, it contended, was neither just nor valuable consideration.

Alleasing argued that as the vesting provision was in conflict with the Constitution, it should be 'disapplied' by section 252B of the PPSA, which states that no provision of the PPSA will apply to the extent its operation would result in an acquisition of property otherwise than on just terms. This would have prevented Alleasing's property from vesting in OneSteel and enabled Alleasing to retain its priority status as secured creditor.

The Court held that such an outcome would unfairly elevate Alleasing to a status above its entitlement. The role of the PPSA in adjusting the competing interests of creditors would be undone.

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## Determination – All for one and one for OneSteel

In finding against Alleasing, the Court determined the PPSA vesting provision does not offend the Constitution for reasons including that the PPSA:

1. Does not effect an ‘acquisition’ of property; it provides an adjustment of competing rights, claims and obligations between owners of interests in personal property.
2. Is authorised by a different section of the Constitution to that relied upon by Alleasing.

## Is This What the Founding Fathers Intended?

If Alleasing’s argument had been successful:

1. The floodgates may have opened for future creditors to similarly seek to ‘disapply’ the PPSA vesting provisions based on the Constitution.
2. Assets that otherwise would vest in a company immediately prior to its external administration might no longer be available to creditors generally.
3. The PPS regime may be open to abuse, with creditors granting security interests at the eleventh hour in an attempt to safeguard assets from a circling body of creditors and an inquisitive liquidator.

The above scenarios may yet come to fruition. Despite initially appealing Justice Brereton’s decision, Alleasing and the Administrators of OneSteel settled the dispute. Whether section 267 is unconstitutional or not will need to be determined at the instigation of another unfortunate secured party.

For now, what is clear is that the vesting provision of the PPSA (constitutional or not) continues to apply and financing statements will need to be made on the grantor’s ACN not the ABN.

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