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**SHOULD REPAIRERS HAVE SOMETHING TO  
LIEN ON? AN ANALYSIS OF REFORM OPTIONS  
FOR THE COMMON LAW LIEN IN THE  
PERSONAL PROPERTY SECURITIES ACT 1999**

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## *Abstract*

*The repairer's lien is one of the last remaining at common law. Under the Personal Property Securities Act 1999, a repairer's lien over goods takes priority over any security interest in the same goods. Due to the advent of trading on credit terms, repairers are increasingly unable to rely on a lien as a means of security. Because of the nature of their work, ordinary security interests taken by repairers are likely to lose in any priority dispute.*

*This paper addresses two broad points within this issue. The first point considered is whether the repairer's interests should be protected, concluding that they should be afforded a super priority similar to the current scheme. The second point considered is the nature of reform that could be undertaken, concluding that a statutory lien should be inserted into the PPSA. This lien would generally subsist in credit trading environments whilst not adversely affecting the interest of other creditors.*

Key words: common law repairer's lien; Personal Property Securities Act 1999; priority.

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## *I Introduction*

A business is not always successful. The nature of a relatively free market means that businesses can and sometimes will fail, leaving an entrepreneur insolvent. The risk of insolvency is often borne by creditors. Creditors under the Personal Property Securities Act 1999 (PPSA) can take a security interest in the personal property of their debtors. This gives them recourse to the debtor's assets in the event of a default. The Act applies mechanically. Priority rules are clear but are not based on title.<sup>1</sup> Different classes of creditors are afforded different priorities based on the measures they have taken to advance their own position and interests. The common law lien is one such interest available to repairers under the Act.<sup>2</sup>

Broadly, a common law lien is a right to retain possession of goods pending satisfaction of a debt.<sup>3</sup> It has traditionally been a useful tool for repairers to secure payment of money owed. Increasingly situations arise where repairers are unable to rely on the common law lien as a means of security. This is because of the advent of trading on credit terms as a common commercial practice. Such practice conflicts with the mechanical rules of the PPSA. Conversely, repairers who do comply with the requirements for a lien under the Act enjoy a 'super priority', superior to that of any security interest. These two extremes provide interesting questions for consideration: on what basis should lienholders enjoy such a priority under the PPSA? What options are available to reformers seeking to reconcile the interests of an unpaid repairer with other creditors, whilst promoting commercial and legal practicality? It is often said that when the law fails to facilitate commerce it should be reformed to accommodate common commercial practices.<sup>4</sup> This paper will argue that a sensible balance can be struck by codifying the common law repairer's lien. The new statutory lien would continue to enjoy super priority. A statutory lien could facilitate

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<sup>1</sup> Linda Widdup *Personal Property Securities Act: A Conceptual Approach* (3<sup>rd</sup> ed, LexisNexis, Wellington, 2013) at 99.

<sup>2</sup> Personal Property Securities Act 1999, s 93.

<sup>3</sup> *Hammonds v Barclay* (1802) 2 East 227 at 235.

<sup>4</sup> *Commercial Factors Ltd v Maxwell Printing Ltd* [1994] 1 NZLR 724 (HC) at 727.

commerce whilst protecting the rights of repairers and preventing harm to competing security interest holders.

This paper will proceed in three broad stages. It will first describe the common law lien and explain its interaction with the Personal Property Securities Act 1999. Secondly, this paper will address the issues that exist within this interaction. Thirdly, It will analyse the viability of various reform options that could be employed to remedy the issues in the current scheme.

## *II Background to the Common Law Possessory Lien*

### *A Historical Beginning of the Common Law Possessory Lien*

To fully understand the common law possessory lien's interaction with the PPSA, it is necessary to appreciate the nature of a lien itself. A common law possessory lien is a right to retain possession of another's personal property pending satisfaction of a debt in relation to that property.<sup>5</sup> It is a pre-legal notion, often termed a 'self-help' remedy that existed before the advent of security interests and contract.<sup>6</sup> Possession is said to be at the "heart and soul" of the common law possessory lien.<sup>7</sup> It is a mere possessory right, developed to assist a person in achieving payment of the debt owed to them in relation to goods.<sup>8</sup>

The relationship between the lienholder and the owner of the property must fall into one of two categories for a lien to be recognised at common law. The first category is professions historically deemed by the common law to have a duty to the public (such as innkeepers and carriers).<sup>9</sup> These have largely been codified in New Zealand law.<sup>10</sup> The second category comprises those who improve the goods of others by their skill or labour.<sup>11</sup> The repairer's lien is in the latter category. The common law has allowed liens to develop consistent with

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<sup>5</sup> *Toll Logistics (NZ) Ltd v McKay* [2011] NZCA 188 at [16].

<sup>6</sup> *Tappenden v Artus* (1962) 2 QB 185 (CA) at 195 per Diplock LJ.

<sup>7</sup> *Bay Flight 2012 Ltd v Flight Care Ltd* [2012] NZHC 484 at [23].

<sup>8</sup> At [23].

<sup>9</sup> *Majeau Carrying Co Pty Ltd v Coastal Rutile Ltd* (1973) 129 CLR 48 at 54.

<sup>10</sup> See below at 9.

<sup>11</sup> *Majeau Carrying Co Pty Ltd v Coastal Rutile Ltd*, above n 9, at 54.

commercial practice. If a lien type arrangement is a custom in a commercial setting, then a court may recognise that arrangement and give it legal effect.<sup>12</sup>

Two further distinctions have emerged through time. The first is that between a particular lien and a general lien. A particular lien allows the lienholder to retain possession of goods in respect of debt arising in relation to those goods.<sup>13</sup> A general lien allows a lienholder to retain possession of goods in respect of all debts owed to the lienholder, regardless of whether they are owed in relation to those goods.<sup>14</sup> The common law repairer's lien is a particular lien.<sup>15</sup> The repairer may only retain a good in respect of the amount of the repairs they have completed on that good.

The second distinction is between an active and a passive lien. An active lien gives the lienholder a right of sale in certain circumstances (typically through statute or contract).<sup>16</sup> A passive lien confers no right of sale upon the lienholder.<sup>17</sup> The common law repairer's lien is a passive lien; it confers no more than a right of possession. In New Zealand, the Wages Protection and Contractors' Liens Act Repeal Act 1987 gives repairer's lienholders a right of sale.<sup>18</sup>

The categories of lien are theoretically open; any person who can prove that a lien exists through custom can establish that lien at law. However, concerned with commercial certainty, the courts are unlikely to accept the establishment of any new liens.<sup>19</sup> This is particularly true for general liens, the breadth of which give lienholders a distinct advantage as an otherwise unsecured party over other creditors in insolvency.<sup>20</sup>

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<sup>12</sup> *Toll Logistics (NZ) Ltd v McKay*, above n 5, at [14].

<sup>13</sup> At [16].

<sup>14</sup> At [16].

<sup>15</sup> *Leeward Holdings Ltd v Douglas* [1982] 2 NZLR 532 (HC) at 537.

<sup>16</sup> Roger Fenton and James Garrow *Garrow and Fenton's Law of Personal Property in New Zealand* (7<sup>th</sup> ed, LexisNexis, Wellington, 2010) vol 1 at 7.1.

<sup>17</sup> At 7.1

<sup>18</sup> Wages Protection and Contractors' Liens Act Repeal Act 1987, s 3.

<sup>19</sup> *Toll Logistics (NZ) Ltd v McKay*, above n 5, at [20].

<sup>20</sup> *Waitomo Wools (NZ) Ltd v Nelsons (NZ) Ltd* [1974] 1 NZLR 484 (CA) at 487-488.

This paper focuses on the common law repairer's lien. This is because the repairer's lien is one of the few common law liens still in existence. It is also the lien that the PPSA is most concerned with, as signalled by s 93.<sup>21</sup>

## ***B Characteristics of the Common Law Repairer's Lien***

The common law repairer's lien can arise in even the simplest transactions. To give a classic example: Anthea takes her car to Brenda, a mechanic, for repairs to its windscreen. Brenda repairs the windscreen. Absent any arrangements for payment in the future, Brenda then has a right to retain possession of the car until Anthea pays her for the repairs. The repairer's lien is in some ways intuitive. Credit terms aside, we would not ordinarily expect Brenda to give the car back to Anthea before being paid for the repairs. It does not take a stretch of the imagination to understand how the repairer's lien developed in a pre-legal setting, and then throughout the early common law.

### *1 Requirements for a common law repairer's lien*

Bailees for work completed upon goods have a lien over those goods for the labour and skill expended upon them.<sup>22</sup> It is largely accepted that there are three main requirements for any common law possessory lien to arise.<sup>23</sup> The first is that a debt must be due to the purported lienholder by the owner in respect of the repaired goods. The second is that the purported lienholder must have possession of the goods. The third is that the purported lienholder must have the right to continued possession of the goods.

A repairer's lien has an additional fourth requirement. Historically, the purported lienholder must have improved and not merely maintained the good for the lien to arise.<sup>24</sup> The improvements must have been carried out with the express or implied agreement of the owner of the goods, or their agent.<sup>25</sup> This is

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<sup>21</sup> See below at 11.

<sup>22</sup> *Bevan v Waters* (1828) 172 ER 529.

<sup>23</sup> Garrow and Fenton, above n 16, at 7.5.

<sup>24</sup> *Stockco Ltd v Walker* [2011] NZAR 669 (HC) at [14].

<sup>25</sup> *Falcke v Scottish Imperial Insurance Company* (1886) 34 Ch D 234 (CA) at 241.

to prevent opportunistic behaviour on the part of repairers. Repairers cannot officiously improve goods to get a lien, and then hold the owner to ransom.

There is debate among both judges and academics as to whether the historical distinction between maintenance and improvement is sustainable.<sup>26</sup> The main arguments for abolishing the distinction concern situations where the maintenance of the goods has involved time, skill, effort or money.<sup>27</sup> Thomas J recognised the practical difficulty of drawing a line between work on goods which brings about improvement and that which does not.<sup>28</sup> The authors of *Garrow and Fenton's Law of Personal Property in New Zealand* consider the distinction to be antiquated and "difficult to justify in a modern age".<sup>29</sup> Though in-depth discussion of the relative strengths of both sides of the debate is outside the scope of this paper, this writer agrees with the burgeoning tide of opinion in favour of abolishing the distinction.

This paper will continue to use the term 'repairer' for consistency in subsequent examples. This is because this lien typically arises in a repairs context. However the term will also be used to describe people who otherwise improve or maintain goods, such as storers.

## 2 *Extinguishment of lien*

A common law possessory lien such as the repairer's lien will be extinguished in three broad situations. The first situation is when the true owner tenders the debt owed. On tender of the amount owed, the lien is terminated.<sup>30</sup> If the lienholder subsequently retains the goods, they will ordinarily be liable in conversion.<sup>31</sup>

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<sup>26</sup> *Stockco Ltd v Walker*, above n 24, at [22]-[24].

<sup>27</sup> *AJ Hollander (New Zealand) Ltd v Owens Coolair Services Ltd* (1991) 3 NZBLC 102, 053 (HC) at 15.

<sup>28</sup> *Ermine Holdings Ltd v Benjamin* HC Auckland CP1144/90, 7 August 1990 at 6-7.

<sup>29</sup> *Garrow and Fenton*, above n 16, at 679.

<sup>30</sup> *Leeward Holdings Ltd v Douglas*, above n 15, at 537-538.

<sup>31</sup> At 537-538.



The second situation is when the lienholder does an act that is inconsistent with them holding a lien.<sup>32</sup> The lienholder can therefore agree to waive their right to a lien. The lienholder can also agree to accept a smaller amount in satisfaction of the debt.<sup>33</sup> As the common law lien is not a contractual right, there is no need for sufficient consideration to secure release of the goods.<sup>34</sup>

The third situation arises when the lienholder voluntarily relinquishes possession of the goods.<sup>35</sup> Actual or constructive delivery to the owner or the owner's agent of the goods constitutes a loss of possession.<sup>36</sup> However, an involuntary loss of possession or delivery procured through fraud may not extinguish the lien. The lien may be revived upon recovery of possession.<sup>37</sup>

### ***C Common Law Liens Distinguished from Statutory Liens***

Some common law liens have been codified by Parliament. A statutory lien is a lien that arises through statute. Examples of statutory liens in New Zealand include the unpaid seller's lien,<sup>38</sup> the innkeeper's lien,<sup>39</sup> and the carrier's lien.<sup>40</sup> The requirements for each statutory lien differ according to its particular empowering provision. However, the common law supplants any gaps left by the statute.<sup>41</sup>

## ***III Interaction Between the Repairer's Lien and the PPSA***

### ***A Enactment of the PPSA***

The Personal Property Securities Act 1999 (PPSA) came into force in New Zealand on 1 May 2002.<sup>42</sup> It aimed to completely reform the law of personal

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<sup>32</sup> Norman Palmer *Palmer on Bailment* (3<sup>rd</sup> ed, Sweet & Maxwell, London, 2009) at [15-074].

<sup>33</sup> *AJ Hollander (NZ) Ltd v Owens Coolair Services Ltd*, above n 27, at 15.

<sup>34</sup> Duncan Sheehan *The Principles of Personal Property Law* (Hart Publishing, Oxford, 2011) at 342.

<sup>35</sup> *United Plastics Ltd (in liq) v Reliance Electric (NZ) Ltd* [1977] 2 NZLR 125 (SC) at 127.

<sup>36</sup> *Bay Flight 2012 Ltd v Flight Care Ltd*, above n 7, at [24].

<sup>37</sup> *Leeward Holdings Ltd v Douglas*, above n 15, at 536.

<sup>38</sup> Sale of Goods Act 1908, s 42.

<sup>39</sup> Innkeeper's Act 1962, s 11.

<sup>40</sup> Carriage of Goods Act 1979, s 23.

<sup>41</sup> Garrow and Fenton, above n 16, at 7.8.

<sup>42</sup> Personal Property Securities Act Commencement Order 2002, cl 2.

property security in New Zealand, following similar developments in the United States<sup>43</sup> and Canada.<sup>44</sup> The Act created uniform rules for all security interests, displacing the piecemeal system that preceded it.<sup>45</sup> The Act also introduced concepts which have since become familiar to commercial lawyers; perfection by registration, and codified priority rules.<sup>46</sup>

A coherent personal property security scheme is crucial for the law to facilitate commerce.<sup>47</sup> A security interest under the PPSA gives a lender a right in a debtor's personal property.<sup>48</sup> Lenders will be more willing to give loans if the loans can be secured, as they have recourse to particular assets in the event the debtor becomes insolvent. Businesses can therefore start up and begin trading without a lot of initial capital.<sup>49</sup>

The Act aimed to increase efficiency in the provision of credit by lowering the transaction costs involved.<sup>50</sup> This was achieved first by introducing certainty in the form of codified priority rules, and secondly through an online registration system.

## ***B Priority Rules in the PPSA***

Priority is determined by the measures that creditors have taken to advance their position. Generally, this is determined by the 'first to file' rule.<sup>51</sup> The first in time to register their security will receive priority.<sup>52</sup> A 'perfected' security interest (achieved by registering a financing statement and taking possession/value)<sup>53</sup> takes priority over an 'unperfected' security interest.<sup>54</sup> Furthermore, purchase money creditors get priority over non-purchase money

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<sup>43</sup> NCCUSL and ALI *Uniform Commercial Code* (American Law Institute, 1951), art 9.

<sup>44</sup> The Personal Property Security Act RSS 1993 c 0-4.2.

<sup>45</sup> Law Commission *A Personal Property Securities Act for New Zealand* (NZLC R8, 1989) at 9.

<sup>46</sup> At 9.

<sup>47</sup> Thomas Gault (ed) *Gault on Commercial Law* (online looseleaf ed, Brookers) at [8A. 1.02].

<sup>48</sup> Cynthia Hawes *Butterworths Introduction to Commercial Law* (4<sup>th</sup> ed, LexisNexis, Wellington, 2014) at 35.1.

<sup>49</sup> Gault, above n 47, at [8A.1.03].

<sup>50</sup> Law Commission, above n 45, at 10.

<sup>51</sup> Widdup, above n 1, at 168.

<sup>52</sup> Personal Property Securities Act, s 66(a) and (b).

<sup>53</sup> Section 41(1).

<sup>54</sup> Section 66(a).

creditors.<sup>55</sup> Importantly for this paper, in certain circumstances a lienholder is entitled to the highest priority of all.<sup>56</sup>

Generally, liens are excluded from the Act under s 23(b). Section 93 is an exception to that rule:<sup>57</sup>

**93 Lien has priority over security interest relating to same goods**

A lien arising out of materials or services provided in respect of goods that are subject to a security interest in the same goods has priority over that security interest if—

- (a) the materials or services relating to the lien were provided in the ordinary course of business; and
- (b) the lien has not arisen under an Act that provides that the lien does not have the priority; and
- (c) the person who provided the materials or services did not, at the time the person provided those materials or services, know that the security agreement relating to the security interest contained a provision prohibiting the creation of a lien by the debtor.

If a lien complies with s 93 it will receive priority over any security interest. Section 93 is unique as it is the only section that provides rules for resolving priority disputes between security interests within the scope of the Act, and ‘non-consensual’ interests outside of its scope.<sup>58</sup> Though the lien is not a ‘security interest’ within the definition of the Act, it does share very similar characteristics. It is a right which in substance secures payment of a debt or performance of an obligation. However, that right does not come about consensually through a transaction. It is thus excluded as a security interest.<sup>59</sup>

#### *IV Credit Terms Inconsistent with Requirements of Lien*

Overall, the PPSA is a simple, smooth running machine. Linda Widdup in her recent textbook comments:<sup>60</sup>

Now that the unfamiliar concepts and strangeness have worn off, it is apparent that it is a well-knit piece of law, though not without its faults, which provides uniform rules that,

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<sup>55</sup> Sections 73 and 74.

<sup>56</sup> Section 93.

<sup>57</sup> Sections 23(b) and 93.

<sup>58</sup> Michael Gedye, Ronald Cuming and Roderick Wood *Personal Property Securities in New Zealand* (2002, Brookers, Wellington) at 338.

<sup>59</sup> Roderick Wood and Michael Wylie “Non-Consensual Security Interests in Personal Property” (1992) 30 *Alta L Rev* 1055 at 1064.

<sup>60</sup> Widdup, above n 1, at 4.

in comparison to pre-PPSA law, operate and provide answers consistently and predictably.

Despite this, it is submitted that the strict possessory requirements of the common law lien are problematic in a contemporary commercial environment. This is primarily due to the increased custom of businesses trading on credit terms, even in a repairs setting. A mechanic may complete repairs on a car, then invoice the owner of the car when he comes to collect it. The legal implications of this practice will be analysed below.

Trading on credit terms is inconsistent with liens arising and subsisting in practice. This was recognised as early as 1815, with Lord Ellenborough stating “To be sure, a lien is wholly inconsistent with a dealing on credit, and can only subsist where payment is to be made in ready money.”<sup>61</sup> The two crucial requirements of a lien that are incompatible with invoicing are the debt requirement, and the requirement of continuous possession. The reason for the incongruity of the lien and invoicing is easily understandable when the historical nature of the lien is considered. The lien was developed in merchant markets before the advent of contract and securities law. At that time, credit terms were not developed as they are today. A repairer would simply refuse to relinquish possession of the repaired goods and thus the lien was born.<sup>62</sup> Both incongruities will be addressed below.

### **A Debt Due?**

A debt must be due for a lien to arise.<sup>63</sup> Delivery of an invoice represents notice of a debt payable at a time in the future. However, a debt payable at a time in the future is accruing rather than due.<sup>64</sup> Therefore if a repairer invoices a customer for their work, the debt is merely accruing and no lien can exist. An invoice will specify when a debt is due, usually on the 20<sup>th</sup> of the next month.<sup>65</sup> Until this

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<sup>61</sup> *Raitt v Mitchell* (1815) 171 ER 47 (Assizes) at 49.

<sup>62</sup> Grant Gilmore *Security Interests In Personal Property* (Little, Brown and Company, Boston, 1965) at 874.

<sup>63</sup> *Raitt v Mitchell*, above n 61, at 48 per Lord Ellenborough.

<sup>64</sup> *Re Peter Austin Ltd* [1990] 2 NZLR 245 (HC) at 253-255.

<sup>65</sup> “Terms and Conditions of Trade” (2013) <[www.mycarmechnic.co.nz](http://www.mycarmechnic.co.nz)>.

date, the debt is merely accruing.<sup>66</sup> The debt can be paid, but it does not have to be.

If a repairer maintained possession of the repaired goods from the time of invoicing to the time the debt was due, they would be liable in conversion. Kós J remarked that this is a “curious result”.<sup>67</sup> Is the repairer liable in conversion for the time in which he maintained possession whilst the debt was accruing, but then not liable once his lien comes into existence upon the debt falling due? It is difficult to see why he would not be. If to avoid being liable in conversion the repairer releases the goods to their owner, he cannot ostensibly claim a lien when the debt falls due. He has already relinquished possession.

### ***B Continuous Possession?***

In a repairs context, trade is conducted on credit terms so that the owner can enjoy use of the repaired goods whilst they prepare to pay the debt owed. It would be rare for a repairer to issue an invoice and maintain possession of the goods. In light of the discussion above, the repairer would be liable in conversion if they did so. In a classic credit trading arrangement, the repaired goods are returned to the owner upon the invoice being sent. As possession has been surrendered the lien is extinguished. Even if the repairer subsequently repossessed the goods, the lien could not be revived as was the case in *Bay Flight 2012 Ltd v Flight Care Ltd*.<sup>68</sup>

The issue of continuous possession will usually arise concurrently with the debt issue. As the law stands, the repairer must balance his right to a lien with customer-friendly trading terms in the course of his business.

### ***V Should the Repairer’s Interests be Protected?***

Before discussing reform of the repairer’s lien, it is worth examining whether a

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<sup>66</sup> James Edwards and Roger Hermanson *Accounting Principles: A Business Perspective, Financial Accounting* (AOT, Georgia (US), 2011) at 162-164 and 169.

<sup>67</sup> *Bay Flight 2012 Ltd v Flight Care Ltd*, above n 7, at [22].

<sup>68</sup> At [31]-[34].

repairer's interests should be at all protected. This will largely depend on whether repairers can adequately protect their interests through other provisions in the PPSA. If so, then they do not require the protection of s 93, and repeal of that section is an appropriate course of action. In lieu of s 93, the common law repairer's lien would fall under s 23(b) and therefore be excluded from the PPSA. Repairers would be left to assess and minimise their own risk through the PPSA and contractual trading terms.

There are various methods through which repairers could attempt to protect themselves through a combination of contractual terms and the PPSA. It is routine for repairers to have terms and conditions of trade.<sup>69</sup> Through these terms and conditions repairers could take a contractual lien. A contractual lien is a consensual right that arises through contract to retain possession of goods pending the satisfaction of a debt.<sup>70</sup> A contractual lien is a security interest as defined by the PPSA, as it in substance secures payment.<sup>71</sup> Therefore its priority will be determined according to the rules in the Act.

The utility of any ordinary security interest in a repairs context is minimal. Repairers will often receive goods of reasonable value, for example cars or electronic equipment. Because of their value, these goods may be subject to security interests before the repairer works on them. In an insolvency situation, any security interest taken by the repairer will be dominated by existing security interests. This is because of the first to file rule in the PPSA; the existing security interests will likely have been registered before the repairer receives the goods. A repairer's contractual lien security interest would usually be good only against subsequent security interests. This may have a chilling effect on repairers improving goods which have security interests attached to them, as they will very rarely receive priority. Taken to the extreme, any person nearing insolvency would not be able to get repairs done on any of their goods that are subject to security interests. If repairing those goods was necessary for the business's revenue, and they were not able to get them repaired, then that business would

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<sup>69</sup> See "Terms and Conditions of Trade", above n 65; and "Terms & Conditions of Trade" (2014) <[www.mobilemechanic.co.nz](http://www.mobilemechanic.co.nz)>.

<sup>70</sup> *Waitomo Wools (NZ) Ltd v Nelsons (NZ) Ltd*, above n 20, at 487.

<sup>71</sup> *Toll Logistics (NZ) Ltd v McKay*, above n 5, at [4].

not be able to trade out of their debt. They may then become insolvent. This is not in the interests of commerce.

It is submitted that there are insufficient ways for a repairer to protect themselves under the Act. Other creditors may view the common law lien as a safety net which allows repairers as a distinct class of creditors to achieve a super priority, though they have done nothing to advance their own position. They may believe that the repairer's business should just become riskier. These qualms are likely quelled after considering the underlying policy reasons. Protecting repairers facilitates commerce, albeit in a very subtle manner. It is desirable that repairers are able to improve goods without fearing that they will not be paid. Due to the time that repairers usually come into contact with goods, it is unlikely that they could protect their interests through ordinary security interests. Therefore, their interests should be protected in other ways by the Act.

## *VI The Case for Codification*

It is submitted that legislative reform is desirable in light of the issues with the current legislative scheme outlined above. If reformed correctly, this niche area of personal property securities law could be aligned with commercial reality. The lien could be brought into the 21<sup>st</sup> century. Furthermore, codification would increase certainty for all parties involved. Even a complex statutory provision is preferable to the confused amalgam of statute and common law that currently exists.<sup>72</sup>

This section will first analyse why any change must come from Parliament and not the courts. This section will then discuss the various options for reform, considering whether a repairer's security interest or statutory lien is more desirable. It will lastly discuss the reasons for affording repairers a super-priority.

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<sup>72</sup> Graham McBain "Codifying Common Law Liens" (2007) 20(4) Commercial Law Quarterly: The Journal of the Commercial Law Association of Australia 3 at 8.

## **A *Incremental Change to Common Law Unfeasible***

The common law repairer's lien is an old concept. Any changes to the characteristics of the repairer's lien have been interpreted strictly by judges.<sup>73</sup> Recently, Randerson J speaking for the Court of Appeal on common law liens said:<sup>74</sup>

We think too that an expansive approach to the recognition of liens would be inconsistent with the intentions of Parliament in enacting the PPSA... Section 93 of the PPSA may be viewed as a limited exception to the broad intention to codify the law of security interests in personal property. While the existence of common law liens was accepted by s 93 as an exception to this general intention, anything other than a cautious approach to the recognition of common law liens is just not justified.

It is therefore unlikely that judges, even those in superior courts, would alter the common law lien to the extent necessary to solve the problems outlined above. The judicial recognition of the PPSA as a very intentional and clear statement on the various priorities of commercial transactions further reinforces the improbability of 'judicial activism'. Any judicial change to this area of law would introduce uncertainty and disharmony which is adverse to the purposes of the PPSA. Any change to the lien would need to be substantial to be effective. As such a judge would not be able to fit such reform within the scope of 'incremental change', lest she fear being labelled a judicial activist. It is therefore submitted that any change would have to come from the legislature.

## **B *A Deemed Security Interest for Repairers and would be Lienholders***

Repairers could be given a 'deemed' security interest. Repairers would receive a security interest over goods for work done on those goods and not paid for. This interest could be included under s 17(1)(b). Any person who fulfils the requirements of the section receives a security interest in that good, regardless of whether it ordinarily fits within the definition of s 17(1). An example of this

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<sup>73</sup> *Bay Flight 2012 Ltd v Flight Care Ltd*, above n 7, at [33]-[34].

<sup>74</sup> *Toll Logistics (NZ) Ltd v McKay*, above n 5, at [60].



type of interest is a lease for a term of more than one year.<sup>75</sup> Such a security interest could have super priority through a section akin to s 93. This would effectively give repairers a security interest where they would traditionally be able to claim a lien.

A repairer's security interest would solve both the issues of debt and continuous possession. A debt would be created, but it is unnecessary for it to be 'due' for the security interest to attach. Furthermore continuous possession of the goods is unnecessary for a security interest to be effective. The security interest would attach when the work was done, regardless of whether it was completed. However, issues arise concerning how the collateral is to be sold and the proceeds distributed following a priority dispute. A lien is straightforward in this respect. When the debt is tendered, the lien is extinguished. The lienholder receives the debt owed to him, and the competing security interest holder takes the goods.

The result under a security interest is more complex. In a priority dispute following a defaulted debt, the top ranked creditor has their debt satisfied first.<sup>76</sup> A repairer as the top ranked creditor would have the right to sell the repaired goods/collateral, satisfy their debt and then pay the surplus to the next ranked creditor.<sup>77</sup> The next ranked creditor may often be a purchase money security interest (PMSI) holder. It is conceivable that in some circumstances a PMSI holder would prefer to receive the goods back, not just their monetary value. A repairer's security interest does not guarantee that this would occur. It is therefore submitted that such a security interest is an option for reform, but may be too adverse to the interests of competing security interest holders to be viable.

### ***C A Statutory Lien?***

It is submitted that the best reform option for the common law lien in the PPSA is

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<sup>75</sup> *Rabobank New Zealand Ltd v McAnulty* [2011] NZCA 212 at [14]-[19].

<sup>76</sup> Personal Property Securities Act, s 116A.

<sup>77</sup> Section 117(1).

to introduce a new statutory lien. The proposed statutory lien would be contained in Part 8 of the PPSA as s 92A, as opposed to being in a separate Act.<sup>78</sup> This is because it is in a PPSA priority dispute where issues with liens mostly arise.

The repairer's lien's fundamental requirements need to be altered for it to become compatible with commercial reality. As outlined above, liens and credit terms are seemingly incompatible.<sup>79</sup> Whilst codification is theoretically achievable, a law reformer would need to consider whether the changes brought the interest outside that of a lien, and whether they make the law too complex and inaccessible.

### *1 Right of sale*

Many statutory liens in the New Zealand legal system are active liens. That is, in certain circumstances the lienholder is entitled to sell the goods. Sale provisions are generally consistent among the various statutory liens. The circumstances in which a lienholder can sell the goods usually include a time period that must elapse before a sale can occur. This is typically two months after the lien has arisen.<sup>80</sup> The statutory lienholder often must sell the goods by auction, advertise the sale in public notices, and give notice to the owner.<sup>81</sup> From the proceeds the lienholder is entitled to only the amount owed by the owner, plus the costs of sale.<sup>82</sup> Usually, the residual amount must be lodged with the registrar of the District Court, or paid to the owner.<sup>83</sup> A statutory repairer's lien should include a right of sale. This will be particularly relevant in a priority dispute.

A passive lien provides incentives for inefficient outcomes in a priority dispute. If the lienholder cannot sell the repaired goods at auction, then the competing security interest holder has an incentive to bargain with the lienholder to try and pay a lower price for the repairs than what they are worth. The security interest holder has a monopsony, and can attempt to refuse to pay the full amount. The lienholder has incentives to recoup their loss and accept a lower price from the

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<sup>78</sup> See Appendix I.

<sup>79</sup> See discussion above at 11-13.

<sup>80</sup> Innkeepers Act 1962, s 11(2); and Carriage of Goods Act 1979, s 23(5).

<sup>81</sup> Innkeepers Act, s 11(3); and Carriage of Goods Act, s 23(5).

<sup>82</sup> Innkeepers Act, s 11(4); and Carriage of Goods Act, s 23(6).

<sup>83</sup> Innkeepers Act, s 11(4); and Carriage of Goods Act, s 23(6).

security interest holder. A passive lien may theoretically lead to repairers being forced to accept less for their work.

An active lien encourages efficient bargaining in a priority dispute if the transaction costs of selling by auction are sufficiently low. Transaction costs can be lowered by allowing the lienholder to recover the costs of sale from the proceeds of sale. If bargaining between the lienholder and the holder of the security interest fails, the lienholder can sell at auction and recoup their costs. The lienholder will therefore not accept a price from the security interest holder lower than the cost of their repairs minus any perceived costs of taking the time to sell. Because the lienholder cannot receive more from an auction sale than he is owed, he has little incentive to hold out for one. It is a likely consequence that though a lien has a right of sale, sales will not often occur as both parties have an incentive to bargain and settle.<sup>84</sup>

It is submitted that any codified lien be an active lien, similar to those already in statute. An active lien protects the interests of the repairers whilst causing minimal harm to the interests of the security interest holder. The time gap between default and sale allows the holder to tender the amount for the repairs. Once the amount has been tendered, the lien is extinguished. The lienholder cannot then hold out and sell at auction. The new provision would have the residual proceeds of sale paid to the registrar of the District Court to hold for the person beneficially entitled to them, or some similar mechanism. It should also be noted that affording a statutory repairer's lien a right of sale effectively renders the Wages Protection and Contractors' Liens Act Repeal Act 1987 redundant.

## 2 *Solving the debt issue*

For a lien to arise in transactions conducted on credit terms, the debt requirement of the statutory lien would need to depart from the common law. The issue is that the debt must be due before the lien can arise, which substantially limits liens subsisting in such transactions. The obvious solution therefore is to remove the distinction between a debt accruing and a debt due.

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<sup>84</sup> Robert Cooter and Thomas Ulen *Law and Economics* (6<sup>th</sup> ed, Pearson, Essex, 2014) at 67-71.

The law could employ a simpler term such as a debt 'owed', which arguably encompasses debts both accruing and due.

There are sufficient reasons for a statutory repairer's lien to require only a debt owed, and not necessarily due. First, the distinction between a debt accruing and due is born out of strict accounting principles. It should be sufficient for a lien to arise if work has been completed (or partly completed), and the repairer can expect payment for that work. Secondly, the desirability of continuous security for repairers outweighs any arguments based purely on historical distinction. The law should adapt in light of evolving commercial practice, and something more than antiquity should be necessary to maintain the distinction. Lastly, it would solve the "curious consequences of the lien being suspended until the debt fell due."<sup>85</sup> The lienholder would no longer be liable in conversion until the debt was due.

Kós J in the recent case *Bay Flight 2012 Ltd v Flight Care Ltd* briefly considered the above points.<sup>86</sup> He merely outlined the problem and his comments were not extensive. In *Bay Flight*, work was done upon a plane in order to ready it for a photo shoot. An invoice for the work was sent, due on the 20<sup>th</sup> of the next month. The debt was merely accruing when a lien was argued to have arisen. Though the case did not turn on the point, Kós J proceeded on the basis that a lien existed despite the debt not yet being due.<sup>87</sup> Kós J's obiter could be considered tentative judicial approval of abolishing the distinction.

### 3 *Solving the issue of continuous possession*

For a statutory lien to subsist in transactions conducted on credit terms (in particular, invoicing), it will need to allow the repairer to relinquish possession of the goods without extinguishing his lien. At first glance this proposition seems to be antithetic to the nature of a lien, it being a possessory-based interest. However even in the common law, judges have carved out an exception to the otherwise strict rule. The most notable example is the exception in *Albemarle*

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<sup>85</sup> *Bay Flight 2012 Ltd v Flight Care Ltd*, above n 7, at [22].

<sup>86</sup> At [22].

<sup>87</sup> At [22].

*Supply Co Ltd v Hind & Co.*<sup>88</sup> This exception allows a lien to subsist despite a temporary loss of possession.

The *Albemarle* exception has in essence three limbs. The first limb is that the delivery of the repaired goods to the owner is for a specific purpose.<sup>89</sup> The second limb is that the goods be returned to the lienholder upon completion of that purpose.<sup>90</sup> The third limb, which has been labeled the “critical requirement”,<sup>91</sup> is agreement or acknowledgement by the true owner before redelivery that the lien not be extinguished.<sup>92</sup> Clear evidence of an agreement and express words have previously been required by the High Court.<sup>93</sup> It is submitted that this strict interpretation is too high a standard for non-lawyers to comply with. The exception may need to be relaxed in subsequent cases to be useful for lienholders.

It would not be palatable to the legal community for a codified repairer’s lien to simply state that possession is not necessary for a repairers’ lien to exist. The interest itself would cease to truly be a lien. A new statutory lien could be phrased to include essentially a presumption of the *Albemarle* exception. A presumption of the *Albemarle* exception is likely to be more acceptable to academics and members of the judiciary. This is especially likely if it is restricted to repairer’s liens. Because it is an established exception, a presumption may not be likely to cause excessive confusion, or viewed as too drastic a departure from principle.

If a rogue owner does not redeliver the goods to the repairer once the debt becomes due, the lien is ostensibly extinguished. A lien is a self-help remedy.<sup>94</sup> On orthodox principles if possession has been lawfully ceded, one cannot then go to court and argue for a lien. The statutory lien could give a right of seizure or repossession against the owner if they do not return the goods. This has been

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<sup>88</sup> *Albemarle Supply Co Ltd v Hind & Co* [1928] 1 KB 307 (CA) at 314.

<sup>89</sup> At 314.

<sup>90</sup> At 314.

<sup>91</sup> *Bay Flight 2012 Ltd v Flight Care Ltd*, above n 7, at [28].

<sup>92</sup> *Albemarle Supply Co Ltd v Hind & Co*, above n 88, at 314.

<sup>93</sup> *Bay Flight 2012 Ltd v Flight Care Ltd*, above n 7, at [31].

<sup>94</sup> *Tappenden v Artus*, above n 6, at 195.

done before in the Canadian Province of Alberta's Garage Keepers' Lien Act.<sup>95</sup> This protects the lienholder in the event that the goods are not returned. It also encourages owners to return the goods to avoid the inconvenience of seizure.

The owner of the goods may expressly disagree that the lien will subsist when they retake possession. If so, then the repairer has the option of retaining possession or returning the goods. If the repairer returns the goods, they will forfeit their lien and will have to rely on other provisions in the PPSA to secure their debt. Despite this, the *Albemarle* presumption would put repairers in a better position than the current scheme does.

#### *4 Lienholder's interaction with receiver or liquidator*

In the event of an insolvency and subsequent priority dispute, a receiver or liquidator may require possession of the repaired goods to properly distribute to creditors what they are owed. In this situation, the liquidator may not be immediately able to tender the debt owed to the lienholder and thus extinguish the lien. As the lienholder is not an otherwise secured party, ordinarily once they relinquish possession they are not entitled to any distributions upon winding up of the debtor's estate. It is desirable to avoid hindering the winding up process, and to ensure the lienholder is paid. To this end, a provision could be drafted allowing a lienholder to exchange possession of the goods for an 'acknowledgement of debt' from the liquidator or receiver. The PPSA could guarantee that such an acknowledgement receives super priority. A provision of this type would improve the statutory lien's interaction with the PPSA without compromising its possessory-based nature.

#### ***D The Appropriate Priority Ranking For a Lien***

A repairer's lien currently takes priority over any security interest. This paper has concluded that a repairer's lien should continue to exist, albeit codified. This section will analyse the nature of the repairer and the lien, considering what exactly should entitle the repairer's lien a super priority. In light of the analysis

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<sup>95</sup> Garage Keepers' Lien Act RSA 2000 c G-2, ss 8 and 9.

below, it is submitted that any reform should continue to afford super-priority to a repairer's lien.

The New Zealand Law Commission Report that prompted the introduction of the PPSA shines little light on this issue. On s 93, the Commission states:<sup>96</sup>

Under this section, such liens have priority over any perfected security interest in the vehicle arising, for example, under a hire purchase agreement. Research discloses no New Zealand statutes which provide for the subordination of such liens to perfected security interests. An anti-lien provision in the security agreement will change the priority result but only if the garage has actual knowledge of that provision before commencing work. Note that the rule applies only to a lien over goods. It would not apply to securities or instruments subject to the possessory lien of an accountant or solicitor.

The Law Commission has not explained why liens are superior to security interests; they have merely recognised that this is the status quo in New Zealand. This is an unsatisfying answer to an issue which may be of real consequence to financiers. The more recent Australian Law Reform Commission report is similarly vague:<sup>97</sup>

There are few situations where a purchaser will not have notice of a lien or other possessory security interest as the property will usually be in the possession of the security holder. For example, the subject property may be held by a repairer pursuant to a lien for the unpaid cost of repairs or by a vendor pursuant to a lien for the unpaid purchase price and a purchaser buys the property from the owner without notice of the lien. The lienholder's security is dependent on possession and not registration, and that possession is considered to be notice to the world of a possible competing interest. Therefore, the interest of the lienholder should prevail. Accordingly, the Commission recommends that a possessory security holder should prevail over a third party purchaser where possession was obtained before the purchase.

This passage does not address the situation where a lien is claimed over goods subject to an existing security interest. The Australian Law Commission's other discussion of the priority of liens is limited to whether a lien such as the

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<sup>96</sup> Law Commission, above n 45, at 127.

<sup>97</sup> The Australian Law Reform Commission *Personal Property Securities* (ALRC 64, 1993) at 9.10.

repairer's lien should be general or particular.<sup>98</sup>

### 1 *Comparison with a purchase money security interest*

Other interests afforded a 'super priority' should be examined to see if analogy can be drawn with a lien. The security interest given the highest priority in the PPSA is a purchase money security interest (PMSI).<sup>99</sup> The Law Commission gave reasons for affording a PMSI its super priority:<sup>100</sup>

By definition, a purchase money security interest is associated with a credit transaction which injects new value into the debtor's business... In recognition of this fact, the statute affords the purchase money security interest priority over pre-existing non purchase money security interests.

Liens and PMSIs are somewhat analogous. They are both intimately connected with a debt being created and secured over one particular piece of personal property. In regards to that property, the creditor is "augmenting the debtor's estate."<sup>101</sup> In a repairs context, this is the improvement to the debtor's goods. Therefore, other creditors are in no worse position than if the debtor had not entered into the purchase money/repair agreement.<sup>102</sup> The super priority of a PMSI or lien arguably prevents a debtor from becoming dominated by existing creditors.<sup>103</sup> If purchase money creditors or repairers were not entitled to a super priority, they would be wary of any preceding security interests which would ordinarily take priority. The debtor would not be able to increase his inventory/assets and his estate's growth would stultify. Therefore the priority afforded to both liens and PMSIs facilitates trade and commerce.

### 2 *Historical reasoning pre-PPSA*

Many authors on the PPSA offer little guidance on the reasons for the super priority afforded to the common law lien in priority disputes.<sup>104</sup> Grant Gilmore, whose writing formed the base of Article 9 of the Uniform Commercial Code,

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<sup>98</sup> At 8.3

<sup>99</sup> Personal Property Securities Act, ss 73-74.

<sup>100</sup> Law Commission, above n 45, at 127.

<sup>101</sup> Law Commission *Reform of Personal Property Security Law* (NZLC PP6, 1988) at 70.

<sup>102</sup> At 70.

<sup>103</sup> At 70.

<sup>104</sup> See generally Widdup *Personal Property Securities Act: A Conceptual Approach*, above n 1; Garrow and Fenton *Garrow and Fenton's Law of Personal Property in New Zealand* above n 16; Gedye, Cuming and Wood *Personal Property Securities in New Zealand*, above n 58; and Hawes *Butterworths Introduction to Commercial Law*, above n 48.



considered why a possessory lien such as the repairer's lien should maintain priority over other security interests, albeit in a pre-PPSA context.

Firstly, Gilmore noted that the lienholder increases the value of the goods subject to the existing security interest through the materials and skill expended.<sup>105</sup> The holder of the existing security interest would receive a windfall if he were entitled to claim the value of the improved property, while the lienholder remains unpaid.<sup>106</sup> Wood and Wylie put this another way:<sup>107</sup>

“...the lien claimant favoured by section 32 [the Canadian equivalent of section 93] is a person who has supplied materials or services that have increased or preserved the value of the collateral, over and above the value that might otherwise have been expected.”

This continues to be a strong argument under the PPSA. It is similar to the Law Commission's reasoning in giving PMSIs priority. If the dispute is between a lienholder and a PMSI holder, it is fair that the lienholder receives priority. The improvements increase the value of collateral subject to the PMSI; so giving the lien priority does no harm to the PMSI holder.

As the repairer's lien is particular, the security interest holder does not have to pay any more than the repairs on the goods in question were worth. The lienholder is paid what he is owed in respect of the goods, and the top-ranked security interest holder receives possession of them. Affording the lien a super priority is not the same as affording a security interest super priority. This is because when a lienholder wins a priority dispute he does not take all, as may be the case with a security interest, especially a PMSI.

Secondly, Gilmore proposed that a repairer could not reasonably be expected to search all public records to see if the goods were subject to a security interest before agreeing to work on them.<sup>108</sup> Repairers have not traditionally been concerned with making such searches. From a policy perspective, repairers should be able to work on goods without undertaking the time consuming and costly process of conducting register searches. This is especially so when

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<sup>105</sup> Gilmore, above n 62, at 872.

<sup>106</sup> At 878.

<sup>107</sup> Wood and Wylie, above n 59, at 1074.

<sup>108</sup> Gilmore, above n 62, at 874.

considering the ad hoc nature of the relationship with their clients. To require repairers to conduct searches to protect other creditors may stultify commercial dealings. For example, requiring a shoe repairer or a mechanic to complete a complex register search may be too much of a practical burden. However, this argument is dated. The new Personal Property Securities Register is an efficient online system for checking for security interests. There is sense in the argument that in today's commercial world pervaded by security interests, it is not unreasonable to require any creditor to make a search if they wish to protect their interests. This is especially so if the repairer is currently conducting trade in a way that offers no lien anyway. Gilmore's argument is therefore still persuasive to an extent, though significantly weaker under the PPSA.

### 3 *Nature of the lien*

Consideration of the consequences of giving the lien a lower priority is useful in analysing the issue. Gilmore advances that from its inception, a common law lien was likely "no more than a simple right to refuse surrender of the goods under the relevant debt was paid."<sup>109</sup> This right is considered absolute if the requirements of the lien are met. Considering the lien's possessory roots sheds light on why the lien maintains its super priority today. If any other security interest took priority over the lien in the PPSA, then the lien ceases to become an absolute right to refuse surrender of the goods in relation to the relevant debt. In short, it ceases to be in the nature of a lien.

If reform gave the lien a priority level equal to that of a PMSI, a repairer's lien would always lose against a PMSI that had been registered before the lien came into existence. The lien would however, win against any non-PMSI. In a repairs context, its priority would effectively rank below a PMSI, but above other security interests. This is because it is unlikely that goods already being repaired will subsequently become subject to a PMSI; they have already been purchased.

Any argument that a lien should not take priority because it likely secures a smaller amount compared to a competing security interest is bad. For example, a repairer may receive priority for the \$1000 he is owed for repair of a car worth

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<sup>109</sup> At 872.

\$60,000, whereas the financier who lent \$70,000 for the car ranks second. Whilst this may seem 'unfair' to some, the priority rules under the PPSA are not concerned with the monetary quantum of interests. The same result could be reached through a dispute between a perfected and unperfected security interest.<sup>110</sup>

It is well accepted that in some way the law is fascinated with possession.<sup>111</sup> Possession is rewarded by the PPSA in certain circumstances. For example, security interests are enforceable against third parties if the creditor possesses the collateral.<sup>112</sup> In lieu of registration, perfection of a security interest can occur if the creditor takes possession of the collateral. The PPSA therefore reflects the common law's obsession with possession. Consequently, it would not be inconsistent with the Act to reward a possessory-based interest such as a lien with super priority.

The lack of an improvement requirement in the proposed statutory lien does not undermine any arguments for super priority. Maintenance or storage can likely be viewed as a prevention of deterioration in the value of the goods. The same analysis as above can be employed to reason why a super priority should be afforded to storers. The competing security interest holder would receive a windfall if they collected the goods whilst the storer goes unpaid. Therefore, it is reasonable for the competing security interest holder to pay for the prevention of deterioration.

It is this writer's opinion that the lien does deserve its super priority for the aforementioned reasons. Though not explicitly discussed by law reformers or many academics it appears that the lien must have super priority if it is to be retained within the PPSA in any form. It would cease to truly be a lien if it did not.

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<sup>110</sup> Personal Property Securities Act, s 66.

<sup>111</sup> Alison Clarke and Paul Kohler *Property Law: Commentary and Materials* (Cambridge University Press, Cambridge, 2005) at 259-261.

<sup>112</sup> Personal Property Securities Act, s 36(1)(a).

## VII Conclusion

Codification of the repairer's interest relies heavily on the conclusion that repairers should be protected under the PPSA. It is submitted that a statutory lien is the best option for reform. This is because any security interest taken by the repairer will likely be ineffectual given the first to file rule prevalent in the PPSA's priority rules. The lien itself would be adapted to reflect commercial reality, whilst continuing to be an interest effectively grounded in possession. A right of sale would ensure that more efficient outcomes could be achieved. Furthermore, the proposed mechanism will enable a repairer's interest to succeed in a credit-trading situation without causing undue harm to the interests of competing creditors.

Section 93 should be retained in its current form. The repairer's lien would effectively continue to operate as it has since the advent of the PPSA. It would be extended to facilitate repairers trading on credit terms. The first change would allow a lien to arise in situations where a debt is owed, but is not strictly due. This means that a lien can subsist when an invoice is sent. The second change is the codification of the *Albemarle* exception. It will be presumed to exist unless proved otherwise. Together with a right of seizure upon non-payment, this change gives the lienholder clear enforceable rights, and allows for continuous possession similar to the common law and other jurisdictions. The third change allows a lienholder to exchange possession of the goods for an 'acknowledgment of debt' from a receiver or liquidator. This acknowledgment ensures the super priority of the lienholder's interest, whilst facilitating expeditious and efficient liquidation of an insolvent's assets.

This is a nuanced and complicated area of law concerning the interests of a select few small businesses. Though subtle, these changes would improve the law and the business dealings of those affected. One of the key purposes of the PPSA was to increase certainty in secured transactions. Despite introducing somewhat counter-intuitive concepts, such as the disregard of title, the PPSA has been largely successful in achieving this purpose. Codification of the law in this area is

could be viewed in the same way. The proposed lien does depart from the orthodoxy of hundreds of years of common law. However, the provision is clear and the underlying policy is sound. Consequently commerce should proceed unfettered, and more businesses should be able to succeed.

**Word Count:**

The text of this paper (excluding footnotes, bibliography and appendices) comprises 7971 words.

This draft provision is intended to provide one option for a statutory repairer's lien. It draws on existing statutory liens for structure and phrasing.

**92A    Repairer's lien**

- (1) Any person who expends labour, time, skill or money on goods at the request of its owner, is entitled to an active and particular lien over those goods which may be exercised in accordance with this section.
- (2) For the purposes of this section the lien arises when the debt is owed, regardless of whether the debt is accruing or due.
- (3) Every person claiming a lien over any goods under this section shall give notice of his claim to the owner of the goods, specifying the amount and particulars of his claim no later than one week after the lien arises.
- (4) A lienholder may relinquish possession of the goods to a receiver or liquidator in accordance with this subsection:
  - (a) A lienholder may release the goods back to a receiver or liquidator in exchange for an acknowledgement of debt if the acknowledgement is:
    - (i) Made in writing; and
    - (ii) Signed by the receiver or liquidator.
  - (b) An acknowledgement made in accordance with (a) ensures that the amount owed to the lienholder takes priority over any security interest in the event of an insolvency.
- (5) Delivery of the goods by the lienholder to the owner or his agent is presumed to:
  - (a) Be for a limited purpose; and
  - (b) Be on the basis that the goods are to be returned by the owner to the lienholder when the debt falls due; and
  - (c) Be on the basis that there was acknowledgement or agreement that the lien would subsist on return of the goods.
- (6) For the purposes of (5):
  - (a) Express evidence will be required to displace any presumption.

- (b) The lienholder may repossess the goods if they remain unpaid upon the debt falling due.
- (5) A lienholder is entitled to sell the goods if,
  - (a) 2 months has elapsed since the lienholder gave notice to the owner of the lien; and
  - (b) Full payment of the debt has not been tendered; and
  - (c) 1 weeks' notice of sale has been given to the owner; and
  - (d) The goods are sold by public auction.
- (6) For the purposes of subsection (5), proceeds of the sale are to be applied in the following order:
  - (a) In payment of the costs of sale;
  - (b) In payment of the amount due in relation to the lien;
  - (c) The surplus after the proceeds have been applied to purposes (a) and (b) is to be paid to the Registrar of the District Court nearest to the place of sale, to be held by the Registrar for the benefit of the person entitled to it.
- (7) Any interest in this section is excluded from the definition of a security interest under this Act.

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