

## FOREWORD: PERSONAL PROPERTY SECURITY LAW: LOCAL AND GLOBAL PERSPECTIVES

I have great pleasure in introducing this special section of the *Adelaide Law Review*. In February 2012, the *Personal Property Securities Act 2009* (Cth) ('PPSA') came into operation in Australia.<sup>1</sup> It was said by many to be the most crucial commercial law reform in Australia in the last 25 years.<sup>2</sup> The PPSA established as its central plank a national register of security interests in personal property based on an economic or 'functional' concept of a single security interest. It was the culmination of prolonged negotiation between Commonwealth and state governments, and drew heavily on similar legislation in North America and New Zealand. In fact, many of the provisions of the Australian legislation are identical, or substantially similar, to those in New Zealand, which themselves drew on Western Canadian models.<sup>3</sup>

The legislation involves a paradigm shift from previous concepts and approaches to notification of security interests, scattered as they were throughout hundreds of pieces of Commonwealth and state legislation, as well as rules of common law and equity. In order to ease the process of absorption of the new concepts and framework in Australia, it is necessary for us to acknowledge and be informed by the experience and precedent in the growing spread of jurisdictions which have adopted this type of system. This spread commenced in the United States during the 1950s (in art 9 of their Uniform Commercial Code),<sup>4</sup> then found its way to the Canadian provinces from the 1980s onwards and to New Zealand in 2002. More recently, various Pacific Islands have enacted Personal Property Securities Acts,<sup>5</sup> and there are a number of influential international and European initiatives.<sup>6</sup>

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<sup>1</sup> The operative provisions of the 2009 Act, and in particular the launch of the Personal Property Securities Register, were effective from midnight on 30 January 2012.

<sup>2</sup> For example, see A Duggan, 'A PPSA Registration Primer' (2011) 35 *Melbourne University Law Review* 865, 866.

<sup>3</sup> See *Personal Property Securities Act 1999* (NZ) and, for example, *Personal Property Security Act 1993*, SS 1993, c.P-62 (Saskatchewan).

<sup>4</sup> Uniform Commercial Code art 9 (Secured Transactions).

<sup>5</sup> For example, *Personal Property Security Act 2012* (Papua New Guinea), *Secured Transactions Act 2012* (Palau).

<sup>6</sup> The most important general ones are the UNCITRAL Legislative Guide on Secured Transactions Law, 2010, European Bank for Reconstruction and Development Model Law on Secured Transactions (2004).

The commencement of the *PPSA* in 2012 created the need for affected Australian professionals to be rapidly informed of these global strands from which the 2009 legislation was sourced. In February 2013, I organised the first ever international conference on this system on behalf of the Adelaide Law School, ‘Personal Property Security Law: Local and Global Perspectives’. The articles in this special section of the *Adelaide Law Review* are an edited selection of the papers from that conference.

The selected articles reflect the dual local and global theme. Firstly, the authors comprise two Australians, a US academic, a European scholar and the pre-eminent English authority on security interests in personal property. Secondly, of the range of papers, one covers an international approach, another a European prognosis, whilst all of the papers adopt a comparative approach. It can be confidently predicted that this new area of legislation will lead to a significant place for Canadian and New Zealand jurisprudence in our courts’ judgments, more so than in any other area of Australian law to date.

Turning to the specific papers, the section commences with a version of the Keynote Address by Sir Roy Goode, CBE, QC, Emeritus Professor, St John’s College, Oxford. Sir Roy is renowned for his long-standing contribution to commercial and insolvency law and is a proponent of the US art 9-based system, despite being based in the UK where, notwithstanding the sterling efforts of himself (over 40 years) and more recently, the Law Commission of England and Wales,<sup>7</sup> and many others, no such legislation has yet been introduced. In this particular paper, Sir Roy focuses on a successful international achievement in which he has played a leading role, the inception of the Cape Town Convention on Security Interests in Mobile Goods (that is, goods which commonly travel across jurisdictional borders),<sup>8</sup> and in particular the Convention’s Aircraft Protocol. Sir Roy explains the legal and commercial problems that led to the need for an international solution, and the political and drafting challenges of achieving this, particularly in both common law and civil code jurisdictions. In 2013, after the conference was held, Australia passed enabling legislation for the Convention and Aircraft Protocol to be ratified and effective here, so this is no matter of mere academic interest.

As stated above, the *PPSA* in Australia has heralded a new way of thinking and talking about security interests. Though the system is designed to promote a simpler, more comprehensive and efficient solution to the complexities that went before it, in the short-term, as Sheelagh McCracken, Professor of Finance Law at the University of Sydney demonstrates so thoroughly, there is a whole new ‘lexicon’ to comprehend, though it seems from her study that the lexicon is not entirely new and is not entirely a complete dictionary. McCracken’s article shows us that the legislation not only forces us to rethink or adapt existing concepts, some of which have been ingrained in commercial law and its documentation for a century, but presents an ongoing challenge to academics, practitioners and the judiciary to interpret the new terms in their statutory context.

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<sup>7</sup> Law Commission of England and Wales, *Company Security Interests*, 2005 Law Com No. 296.

<sup>8</sup> Convention on International Interests in Mobile Equipment, 2006 (UNIDROIT).

David Turner, Barrister and Adjunct Lecturer at Monash University, examines a specific aspect of the Australian legislation in its comparative context. The *PPSA* is designed to promote efficiency and commercial certainty, and not to disrupt commercial transactions or priorities. This is not just a question of individual transactions, but of upholding general confidence in commercial markets and the flow of everyday transactions. Therefore payments by cash or cheque, commercial bills or ordinary payments of debts should be able to occur swiftly without the need to search for them on the Register, and not be at risk of being unwound later because someone is claiming a security interest which the recipient did not know about or search. Nevertheless as Turner shows, the Australian legislation needs to be road-tested against similar provisions in other jurisdictions with personal property security legislation, as it appears to have departed from these in important detail. One theme running through the papers is the relative advantages and disadvantages of importing overseas provisions verbatim.

Professor Patrick Quirk, Ave Maria Law School, Florida, examines an important form of collateral for banks and other credit providers, namely bank deposits. Whilst we may be tempted to think of personal property as tangible items, bank accounts into and out of which the proceeds of commercial and consumer activity largely flow are one of the most important sources of collateral against which security can be taken, and the *PPSA*, in common with the US art 9, facilitates the concept of perfection by 'control'. This approach is not followed in Canada and New Zealand at present. This gives banks and financiers, particularly those at which the account is held, a significant commercial advantage over others who take and register security over that form of collateral. Given that the *PPSA* has adapted this concept from the US, Quirk's insight into the revised art 9 provisions will be most instructive as we in Australia grapple with the complexities of this new concept of control in its application to financial collateral.

Lastly, Professor Tibor Tajti, from the Central European University, provides a thorough and provocative analysis of the difficulties of adopting this type of system in Europe, given the existing variety of commercial credit and, in particular, the different cultural heritage of civil code and common law systems.

Taken together, these essays show that Australia is now part of a growing global family of jurisdictions which have adopted this system, and that whilst there are specifically local twists, and plenty of areas for clarification and debate, we would be unwise to attempt to meet the challenges of this new mindset without recognition that the personal property securities wheel has largely been invented by our North American and New Zealand forebears. It can be confidently predicted that Canadian and New Zealand jurisprudence will be utilised in our courts in this area, far more than has ever happened in Australia in any other field, and also that in time we will need to similarly pass our new-found experience on to Australia's commercial partners, and in regional and international fora. This selection puts down the marker that the *PPSA* is here to stay, in Australia and increasingly wider afield, and its impact on domestic and international finance law is far-reaching.

