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A User's Guide to Australian Secured Transactions Law Reform

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Abstract

[extract] Talking about law reform, before we have a bill, let alone before reform has been enacted, has the appearance of hubris of the rankest sort. Talking about secured transactions law reform looks even worse. After all, it has been talked about for a long time. And there are many who consider a sufficient case has not been made for it. I look at the matter another way. For me, the persistence of the discussion of the case for reform suggests there is ground for a concern that will not go away.

Now we have new draft legislation, for a Personal Property Security Act for Australia . It might be enacted as uniform state law, or as federal law under a suitable new referral of legislative power.

Keywords

personal property security law, reform, Personal Property Security Act, PPSA

A User's Guide to Australian Secured Transactions Law Reform^{*}

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What Reform?

Talking about law reform, before we have a bill, let alone before reform has been enacted, has the appearance of hubris of the rankest sort. Talking about secured transactions law reform looks even worse. After all, it has been talked about for a long time. And there are many who consider a sufficient case has not been made for it. I look at the matter another way. For me, the persistence of the discussion of the case for reform¹ suggests there is ground for a concern that will not go away.

Now we have new draft legislation, for a *Personal Property Security Act* for Australia². It might be enacted as uniform state law, or as federal law under a suitable new referral of legislative power. It addresses the case for reform in the following ways:

- (1) *A Uniformity Principle*: The draft legislation seeks to bring greater order to the chaos of secured transactions law that we have at present, by providing for modernised, simplified, largely uniform and much easier to apply rules for the creation, enforcement and priority position of consensual security interests. It would replace both the current legislative jungle of state³ and federal law⁴ and the varied and difficult to apply common law⁵. It does involve bringing under the legislation a number of transactions that our law largely – but not entirely – does not deal with as secured transactions. The major example in practice

^{*} This paper is a modified and updated version of one originally delivered at the Seminar “Round-up of Current Law”, Financial Services Committee (Perth) of the Business Law Section, Law Council of Australia, 9 November 2001.

¹ Even judicially: see my matching paper to this one, “A User’s Guide to *Associated Alloys Pty Ltd v Metropolitan Engineering and Fabrications Pty Ltd*” (2001) for the seminar referred to in the previous note.

² This is the product of the work of the Banking and Financial Services Law Association Personal Property Securities Committee, of which I am a member. Copies are now freely available.

³ Including the *Bills of Sale Act* 1899 (WA), the *Hire Purchase Act* 1957 (WA), and the *Chattel Securities Act* 1987 (WA).

⁴ At least *Corporations Act* 2001 (Cth) Part 2K, and probably also a range of other federal statutes, including the *Air Navigation Act* 1920 (Cth), the *Designs Act* 1906 (Cth), the *Life Insurance Act* 1995 (Cth), the *Patents Act* 1990, and the *Trade Marks Act* 1995. However, mortgages under the *Shipping Registration Act* 1981 (Cth) will not be covered.

⁵ Most notably, the rule in *Dearle v Hall*, which appears to have few friends.

will be the retention of title transactions of the Romalpa sort⁶. But there are compensations.

- (2) *A Flexibility Principle*: The draft legislation seeks to make the life of the drafter of secured transactions easier by making the enforceable effect of commercially realistic arrangements easier to predict. This should be of special interest to lawyers left uncertain about the effect of fixed and floating charge arrangements over such things as book debts⁷ and attempts to extend retention of title clauses into manufactured products and proceeds⁸.

Further, the draft legislation is firmly based on a successful model that has already been translated into the *Personal Property Security Act* 1999 (NZ)⁹. This model is the Canadian (provincial) Personal Property Security legislation, and particularly the latest forms of that legislation¹⁰. This model in turn gives direct access to a sizeable body of case-law and commentary, including case-law and commentary on forms of Article 9 of the Uniform Commercial Code in the US, on which the *Canadian Acts* themselves are based¹¹. This North American model is influencing international conventions on secured financing law¹².

⁶ For their regulation as a secured transaction notwithstanding their form, see the *Chattel Securities Act* 1987 (WA), and, when they are not used as a inventory financing devices, the *Hire Purchase Act* 1957 (WA). For similar suggestions in a common law context (none yet acted on), see *Esanda Finance Corp Ltd v Plessnig* (1989) 63 ALJR 238, at 246 per Brennan J (on the protection of something akin to an equity of redemption).

⁷ Thus, it is unclear whether or not the common law in Australia is as stated for common law New Zealand in *Agnew v The Commissioner of Inland Revenue*, decided 5 June 2001, <http://www.privacy-council.org.uk/judicial-committee/2001/rfjudgments/agnewj-1.d> (PC NZ). See on this Nash, L and Collier, B "Fixed Charges over Book Debts after *Agnew v Commissioner of Inland Revenue*" (2001) 9 *Insolvency Law Journal* 116.

⁸ On those difficulties, see the paper in note 1 above.

⁹ Accessible at <http://www.knowledge-basket.co.nz/> (accessed 7 November 2001): click on Databases, then on GP Legislation (in force).

¹⁰ In particular, the *Personal Property Security Act* RSBC 1996, C 359 as amended, accessible at http://www.qp.gov.bc.ca/statreg/stat/P/96359_01.htm (accessed 7 November 2001); the *Personal Property Security Act* S.S. Ch P-6.2 (Saskatchewan) as amended, accessible at <http://www.qp.gov.sk.ca/publications/index.cfm?fuseaction=details&c=1885&id=2> (accessed 7 November 2001); and the *Personal Property Security Act* S.N.B. Ch P-7.1 (New Brunswick) as amended, accessible at <http://www.gov.nb.ca/acts/acts/p-07-1.htm> (accessed 7 November 2001).

¹¹ For the principal source on Canadian law, see McLaren, R, *Secured Transactions In Personal Property In Canada*, 2nd ed, looseleaf (Toronto : Carswell, 1989 -). The US parent recently underwent a round of changes: for a useful critical conspectus of the changes from a Canadian standpoint, see Cuming, R and Walsh, C, "Revised Article 9 of the Uniform Commercial Code: Implications for the Canadian Personal Property Security Acts" (2001) 16 *Banking and Finance Law Review* 339. This article is an excellent illustration of the sort of process that

What Would the Reform Look Like?

I will take the draft Australian legislation, and the corresponding provisions of the *Personal Property Security Acts* of Saskatchewan and of New Zealand, to give the flavour of this sort of law. This helps one appreciate the simplicity, coherence and comprehensiveness of the proposed legislation.

Scope of the Legislation

It applies to any transaction that in substance, regardless of its form, creates a security interest¹³. Such transactions are called security agreements. This includes such things as conditional sale agreements. There is also an extension to assignments of book debts, but only for the purposes of the priority rules.

Effect of security agreements

Generally, they are to take effect according to their terms, subject to contrary specified law¹⁴. Thus, the old precedents may continue to be used. But major issues in drafting are specifically addressed. Thus, security interests extend to identifiable proceeds without the need for a fiduciary relationship¹⁵. Security interests may extend to after-acquired property without specific appropriation by the debtor¹⁶, and they may secure further advances¹⁷, if the security agreement so provides. Security interests in raw materials that lose their identity upon incorporation into a product or mass continue in the product or mass in the same proportions as the obligations they secure¹⁸.

Enforcement of security agreements

The secured creditor has the rights and remedies provided for in the legislation as well

must be undertaken to adapt the undoubtedly successful US model to another common law jurisdiction. Note that some of the US modifications are reflected in the draft Australian legislation.

¹² See Cuming, R, "'Hot Issues" in the Development of the (Draft) Convention on International Interests in Mobile Equipment and the (Draft) Aircraft Equipment Protocol" (2000) 34 *International Lawyer* 1093.

¹³ Draft Aust. PPSA, note 2 above, s 8; Sask PPSA, note 10 above, s 3; and NZPPSA, note 9, s 17.

¹⁴ Draft Aust. PPSA, note 2 above, s 14; Sask PPSA, note 10 above, s 9 (1); and NZPPSA, note 9, s 35. There are some differences in the degree of specification here.

¹⁵ Draft Aust. PPSA, note 2 above, s 33; Sask PPSA, note 10 above, s 28; and NZPPSA, note 9, s 45.

¹⁶ Draft Aust. PPSA, note 2 above, s 18; Sask PPSA, note 10 above, s 13; and NZPPSA, note 9, ss 43, 44.

¹⁷ Draft Aust. PPSA, note 2 above, s 19; Sask. PPSA, note 10 above, s 14; and NZPPSA, note 9, ss 71 and 72.

¹⁸ Draft Aust. PPSA, note 2 above, s 45; Sask PPSA, note 10 above, s 39; and NZPPSA, note 9, ss 82 and 85.

as any provided for in the security agreement. Those rights and remedies are principally to take possession as the collateral permits¹⁹; to sell in a commercially reasonable manner²⁰; or to foreclose²¹. There are, however, provisions to protect the interests of the debtor in respect of any equity it has left in the collateral²².

Priority of security interests under security agreements:

The base priority rule as between competing secured parties is the first to register or take possession, which applies unless another priority rule governs²³. A security interest in any collateral may be registered²⁴, and registration is by the filing of a notice of the security interest in a single computerised registry²⁵. There are special priority rules for such matters as purchase money security interests, to protect such as the supplier of goods on Romalpa terms, but generally speaking only on the basis that such supplier has registered²⁶. Security interests that have been registered are good against purchasers of the collateral subject to exceptions such as for purchasers of inventory²⁷. The location or character of title, whether legal or equitable, is irrelevant to any of these rules. So too is notice. And in any event registration is not notice²⁸.

¹⁹ See Draft Aust. PPSA, note 2 above, s 63; Sask PPSA, note 10 above, s 58; and NZPPSA, note 9, s 109.

²⁰ Draft Aust. PPSA, note 2 above, s 64 read with s 70; Sask PPSA, note 10 above, s 58; and NZPPSA, note 9, s 109. There is some variation in the language here, and there are notice provisions and the like.

²¹ Draft Aust. PPSA, note 2 above, s 66; Sask PPSA, note 10 above, s 61; and NZPPSA, note 9, s 120. There are provisions for notice of course to permit other parties to intervene.

²² Draft Aust. PPSA, note 2 above, s 65; Sask PPSA, note 10 above, s 60; and NZPPSA, note 9, s 117.

²³ Draft Aust. PPSA, note 2 above, s 40; Sask PPSA, note 10 above, s 35; and NZPPSA, note 9, s 66.

²⁴ See Draft Aust. PPSA, note 2 above, s 30; Sask PPSA, note 10 above, s 25; and NZPPSA, note 9, s 141.

²⁵ Draft Aust. PPSA, note 2 above, s 49; Sask PPSA, note 10 above, s 43; and NZPPSA, note 9, s 142.

²⁶ Draft Aust. PPSA, note 2 above, s 39; Sask PPSA, note 10 above, s 34; and NZPPSA, note 9, ss 73 and 74.

²⁷ Draft Aust. PPSA, note 2 above, s 35; Sask PPSA, note 10 above, ss 20 and 30; and NZPPSA, note 9, ss 52 and 53.

²⁸ Draft Aust. PPSA, note 2 above, s 53; Sask PPSA, note 10 above, s 47; and NZPPSA, note 9, s 20.

Where to from here?

Once the simplicity, coherence and comprehensiveness of the model is appreciated, the case for reform for a lawyer is fairly easy to argue. However, that does not clinch the matter²⁹. What is necessary to complete the case is the demonstration of the commercial benefits of the proposed reform.

Here New Zealand has done Australian an enormous favour. The coming into force of the New Zealand legislation will give us a demonstration of how the system works, for the benefit of both lenders and borrowers that have operations on both sides of the Tasman.

The benefit is of course, as has been argued for some time, reform that would permit us practical solutions to problems in the structuring, conclusion, administration and effectiveness of secured financing arrangements that are “cheaper, faster, easier, simpler, safer”.

²⁹ For an extended discussion of the limitations of such a case, notwithstanding its undoubted appeal, see Michael G. Bridge, Roderick A. Macdonald, Ralph L. Simmonds and Catherine Walsh, “Formalism, Functionalism and Understanding the Law of Secured Transactions” (1999) 44 *McGill L J* 567.