

THE AUSTRALIAN PPSA AND THE CONFLICT OF LAWS

Anthony DUGGAN

The Personal Property Securities Act 2009 (Cth) (“PPSA”), which came into effect on 30 January 2012, is a wholesale reform of the law governing secured transactions in personal property and it represents a major step in the development of Australian commercial law. The PPSA is based in part on Canadian provincial legislation which, in turn, derives from Article 9 of the United States Uniform Commercial Code.¹ Article 9 is a model statute drafted by the National Conference of Commissioners on Uniform State Laws in collaboration with the American Law Institute and it has been adopted in all States. The result is that United States secured lending law, although primarily a State responsibility, is substantially uniform throughout the country. The same is true in Canada. All the common law provinces and territories have enacted personal property security statutes which, with the exception of the Ontario PPSA,² are based substantially on a model statute drafted by the Western Canada Personal Property Security Act Committee (now the Canadian Conference on Personal Property Security Law). The Ontario PPSA shares many common features with the Model Act, but there are quite a number of differences in the details.³

New Zealand enacted a personal property securities statute in 1999.⁴ The New Zealand PPSA closely follows the text of the Canadian Model PPSA, as enacted in the province of Saskatchewan.⁵ Australia has elected to take a more free-wheeling approach. The Australian PPSA takes the Canadian Model statute as its starting point, but it departs from the model in numerous significant respects in terms of both drafting and substance. In con-

¹ United States Uniform Commercial Code – Secured Transactions (Article 9).

² Personal Property Security Act, RSO 1990, c P-10 (‘Ontario PPSA’).

³ For a fuller account, see Ronald C C Cuming, Catherine Walsh and Roderick J Wood, *Personal Property Security Law* (Irwin Law, 2005) 8–11.

⁴ Personal Property Securities Act 1999 (NZ) (‘New Zealand PPSA’).

⁵ Personal Property Security Act, RSS 1993, c P-6.2 (‘Saskatchewan PPSA’).

trast to Article 9 and the Canadian PPSAs, the Australian PPSA is a federal statute. The Australian Commonwealth Parliament has limited powers under the Australian Constitution to enact commercial laws and residual legislative powers are vested in the States. It follows that the Commonwealth could not have enacted a comprehensive secured transactions statute without the co-operation of the States. However, the Australian Constitution provides for the referral of powers from the States to the Commonwealth and, acting pursuant to this provision, each State agreed to pass legislation referring its jurisdiction over PPSA matters to the Commonwealth.⁶ As part of the package, the States also agreed to the establishment of a national PPS register, to be run by the Commonwealth, and they undertook to repeal or amend their own secured transactions statutes and to dismantle the numerous specialist registers which had previously operated at the State level.

The Australian PPSA raises a host of interesting issues, particularly when it is read in comparison with Article 9 and the Canadian and New Zealand PPSAs. The topic I have chosen for this paper is the Australian PPSA's conflict of laws provisions. The conflict of laws provisions are interesting because, while they are based in part on similar provisions in the Canadian and New Zealand PPSAs and also in part on the UNCITRAL Legislative Guide to Secured Transactions,⁷ there are also some significant differences, some but not all of which reflect deliberate policy choices.⁸

Example 1. Grantor is a company incorporated in Jurisdiction A. Grantor carries on business in Jurisdiction A and Jurisdiction B. Grantor and SP enter into a security agreement in Jurisdiction A under which Grantor gives SP a security interest in factory equipment located in Jurisdiction B. Grantor subsequently sells and delivers the equipment to T in Jurisdiction B without SP's authority. T is unaware of SP's security interest. When SP learns about the sale, it claims the equipment from T.

The first issue in a case like this is to determine whether the dispute between SP and T is governed by the laws of Jurisdiction A or those of Jurisdiction B. The answer to the question may affect the outcome of the case if the rule in Jurisdiction A for dealing with disputes of this nature is different from the rule in Jurisdiction B. In Canada and the United States, conflict of laws issues may arise at the provincial or state level. Assume that in Example 1, Jurisdiction A is Saskatchewan and Jurisdiction B is Ontario. If Saskatchewan law applies, the outcome of the case will depend on whether SP

⁶ Australian Constitution, s.51(xxxvii).

⁷ (United Nations, NY, 2010), Chapter X, available at www.uncitral.org/pdf/English/texts/security-leg/c/09-82670_Ebook-Guide_09-04-10.

⁸ See generally, Parliament of the Commonwealth of Australia, Senate, Replacement Explanatory Memorandum on the Personal Property Securities Bill 2009 (Cth), Chapter 7.

perfected its security interest, in accordance with the Saskatchewan PPSA, by registering a financing statement in the Saskatchewan Personal Property Securities Register. On the other hand, if Ontario law applies, the outcome will depend on whether SP registered in Ontario.⁹ By contrast, the Australian PPSA is a federal statute and this forecloses the possibility of conflict of laws issues at the State level. Nevertheless, conflict of laws issues may still arise at the international level (assume, for instance, that in Example 1 Jurisdiction A is Australia and Jurisdiction B is New Zealand) and the Australian PPSA contains provisions addressing conflict of laws issues arising between Australia and other countries.

The main provisions are in PPSA, section 6, which defines the territorial reach of the statute and Part 7.2 (sections 233-241) (the conflict of laws provisions). Other relevant provisions include: section 39, which enacts special rules for the case where the collateral consists of goods or other tangible property and is moved from a foreign jurisdiction into Australia during the currency of the security agreement; section 40, which enacts special rules for the case where the collateral consists of intangible property or financial property and the grantor relocates to Australia or transfers the collateral to a person located in Australia; and section 77, which relates to the case where the applicable law is the law of a foreign jurisdiction which makes no provision for registration of security interests.

Part 2, below, discusses the territorial reach of the PPSA, as provided for in section 6, and the interaction between section 6 and the conflict of laws provisions in Part 7.2. Part 3 deals with the scope of the conflict of laws provisions in Part 7.2. Part 4 discusses the choice of law rules in Part 7.2 relating to security interests in goods and also the rules in section 39 relating to relocation of goods. Part 5 addresses the choice of law rules in Part 7.2 relating to security interests in intangible property and also the rules in section 40 relating to the relocation of the grantor. Part 6 deals with the choice of law rules in Part 7.2 relating to security interests in financial property. Part 7 discusses the choice of law rules in Part 7.2 relating to security interests in proceeds. Part 8 deals with choice of law issues relating to the enforcement of security interests. Part 9 concludes.

⁹ If Ontario law applies, T will take the equipment free of SP's security interest if SP's security interest is unperfected in Ontario: Ontario PPSA, s.20(1)(c); if Saskatchewan law applies, T will take the equipment free of SP's security interest if SP's security interest is unperfected in Saskatchewan: Saskatchewan PPSA, s.20(3). Compare Australian PPSA, s.43, discussed in Chapter 10, Part 2, above.