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AUSTRALIAN PERSONAL PROPERTY SECURITIES LAW

by Anthony Duggan and David Brown
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Almost two years ago, the long anticipated *Personal Property Securities Act 2009* (Cth) ('*PPSA*') finally became fully operative. With its expanded functional definition of what is now to be regarded as a security interest over personal property, its new process for making security interests effective and its changed priority and enforcement regimes, the *PPSA* radically alters the landscape of commercial law in Australia. The publication of this new book is thus warmly welcomed, not only for its timeliness but also for its extensive coverage and sophisticated analysis of the legislation.

The book opens with a useful introductory discussion of the nature of secured credit and the historical development of secured transactions law in Australia. By way of structure, it then adopts a highly practical transactional approach; with some further 14 chapters systematically examining the issues typically involved in analysing a secured transaction. As the authors observe in the Preface:

> Unlike the ordinary run of statutes, it is not possible to read the PPSA from cover to cover and come away with a working knowledge of what it is about. The PPSA has its own internal logic which requires mastery before its secrets can be unlocked.[1]

The early chapters (Chapters 2–6) move logically from consideration of the property over which a security interest can be taken, through the wide-ranging scope of the security interest, to the critical concepts of attachment, enforceability against third parties and perfection. These chapters focus clearly and carefully on the statutory criteria that must be satisfied if a secured party is to obtain the greatest extent of protection afforded by the *PPSA* against claims of third parties, with particular attention paid in a separate chapter (Chapter 6) to the registration process. Three subsequent chapters (Chapters 7–9) are devoted to thoroughly exploring the position of the secured party vis-à-vis other competing secured parties under the *PPSA*'s elaborate framework of priority rules. Dealings with the collateral by the grantor

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1 Anthony Duggan and David Brown, *Australian Personal Property Securities Law* (Lexis Nexis Butterworths, 2012) xviii.

and the ability of a buyer or lessee from the grantor to take the collateral free of a secured party's security interest are examined in close detail in Chapter 10, with Chapter 11 explaining how and when the secured party's security interest can attach to the proceeds of such dealings. The secured party's ability to realise the collateral on a default is the focus of Chapter 12. The remaining substantive chapters cover the impact of insolvency (Chapter 13), conflict of laws issues (Chapter 14) and transitional matters (Chapter 15). The book concludes by setting the Australian legislation in the context of international developments (Chapter 16) and by drawing up a very informative table (Chapter 17) setting out policy issues as well as drafting problems that the authors have identified in the *PPSA*, bearing in mind the review of the operation of the *PPSA* required to be completed within three years.[2]

The book has many strengths, not least of which is the clear and succinct style in which it is written. Importantly, it does not shy away from a detailed examination of the many technical rules governing security transactions that must be absorbed if the *PPSA*'s operation is to be properly understood. Indeed, the book succeeds admirably in making such rules readily comprehensible through, on the one hand, its explanation of the underlying policy which has shaped the particular rule and, on the other, the provision of carefully worked examples by which it illustrates the manner in which the rule may apply. In such a comprehensive work addressing many complex issues, it would be surprising if there were not on occasions specific propositions or conclusions with which one disagreed. Any such disagreement cannot, however, detract from the obvious breadth and depth of knowledge and scholarship that informs the analysis and discussion throughout the book. In his Foreword, Emeritus Professor Sir Roy Goode describes the work as one of 'astonishing erudition'.[3]

The book is without doubt a very important addition to the rapidly increasing literature on the Australian legislation and it is highly recommended for all interested in secured transactions. Legal practitioners should find that it provides much 'food for thought', especially in its reasoned views on the practical matters relating to registration, including the concern expressed over emerging local practice with respect to formulating collateral descriptions.[4] Those involved in consumer lending transactions will value the various discussions of the *PPSA*'s interrelationship with the National Credit Code. As a teaching tool, the book should become a standard text. Undergraduate students who are not yet experienced in commercial practice will welcome in particular the helpful descriptions of the commercial context in which transactions typically arise as well as the use in the examples of familiar collateral such as motor vehicles. This reviewer has had no hesitation in prescribing the book this year for courses on secured transactions law at both undergraduate and postgraduate level.

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2 *Personal Property Securities Act 2009* (Cth) s 343.

3 Sir Roy Goode, 'Foreword' in Anthony Duggan and David Brown, *Australian Personal Property Securities Law* (LexisNexis Butterworths, 2012) v, v.

4 Duggan and Brown, above n 1, 133.

Finally, one further noteworthy feature of the book, which is of great benefit to practitioner and student alike, is its use of comparative materials. Particularly in this early stage in the *PPSA*'s development, the inclusion of analysis of case law from Canada and New Zealand as well as direct comparisons with these jurisdictions' statutory provisions is of considerable interest. Although the extent to which Australian courts will explicitly refer to the position in other jurisdictions with comparable legislation remains unclear, familiarity with these materials brings significant insights as to possible legislative and judicial approaches to common issues. Moreover, and perhaps even more importantly, such comparative materials inevitably provoke discussion of the underlying legal concepts. The authors' position on the nature of a security interest arising under the *PPSA*, seemingly based on Canadian argumentation, provides just one example. They contend that the security interest should be understood as a statutory hypothecation.[5] Where the particular security interest arises under a general security agreement such a contention is uncontroversial. More problematic, however, is its application to a transaction in which title to property is reserved under a conditional sale arrangement or a finance lease. The concept of a unitary security interest undoubtedly requires a security interest to be subject to the same statutory rules, irrespective of how it arises; whether or not such a concept necessarily under Australian law requires each interest to be characterised in the same manner is less clear.

Such conceptual discussions, and others of a similar ilk raised by the authors, are not merely of academic interest. The *PPSA* is certainly one of the most critical pieces of legislation to be introduced into Australian commercial law for many decades. It is important, looking ahead, to ensure that its general concepts are fully considered and discussed if the legislation is to be successfully integrated into the Australian commercial law framework.

5 See, eg, Duggan and Brown, above n 1, 44–5.