

The New Australian Personal Properties Security Act 2009 (Cth): An Overview of Business Impacts, Transitional Issues, and International Comparisons

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For more than twenty years, Australian politicians and academics have been discussing federal securities legislation that would unify the more than 70 individual laws of the states and territories. Based on aspects of Article 9 of the UCC as well as Canadian and New Zealand law, the Australian Personal Properties Security Act 2009 (Cth) (the “PPSA”), which covers all transactions that have the economic effect of creating security, went into effect on January 30, 2012. This paper provides an overview of the business impacts of the PPSA, looks at the advantages of the new Act and suggests amendments for improvement.

INTRODUCTION

For more than 20 years, Australian politicians and academics have been discussing a kind of legislation that would unify the many different kinds of rules overseeing personal properties securities in the five states and two territories of the country. Arrangements for security over personal property in Australia have combined aspects of common law with statutory overlays, both at the state and federal level. In the past few years, the discussion about a new Australian federal law intensified; legislation was codified in 2009 and the new Australian Personal Properties Security Act of 2009 (Cth) (the “PPSA”) went into effect on January 30, 2012 (<http://www.ag.gov.au/pps>). The new law is a federal law and will be in force throughout Australia, replacing more than 70 individual laws of the states and territories. The PPSA will cover all transactions that have the economic effect of creating security, as well as certain "deemed" security interests, including many leases. The main purpose of PPSA is to provide notice to prospective buyers regarding secured parties' rights in personal property (Young & Jones, 2011, p. 1). Under the new law, personal property is anything that can be owned, traded, or otherwise treated as property, except property that is land or related buildings and fixtures, water interests, and certain statutory licenses (Young & Jones, 2011, p.1).

Australia’s Inspiration for the PPSA: U.S., Canadian and New Zealand law

PPSA draws upon Article 9 of the Uniform Commercial Code (UCC) in the United States as well as adaptations of Article 9 in Canada and in that country’s provincial Personal Property Security Acts (Simmonds, 2002). However, the real impetus for Australian politicians to push forward with the new law was the efficacy created by the New Zealand Personal Properties Securities Act of 1999 (NZ), which took effect in 2002 (Hattaway, 2006). Hence, Australia will now join the United States, Canada and New

Zealand with a comprehensive system for recognizing, registering, and enforcing security interests over personal property (East, 2012).

The New Zealand PPSA established a single procedure for the registration of security interests in personal property and created a centralized electronic register (<http://www.ppsr.govt.nz/cms>). The New Zealand Personal Property Securities Register is an electronic register available to the public 24 hours a day, 365 days a year, which provides online searching, registration and maintenance of financing statements. It is a database that individuals can check at any time to see their position vis a vis their personal property--what goods are secured and to what goods another creditor can possibly obtain a better right. Registering a security on the New Zealand Personal Properties Security Register costs only \$3 (<http://www.ppsr.govt.nz/cms>). Both the Australian PPSA and the Australian PPS Register (PPSR), available as of January 30, 2012, are intended to mimic those of New Zealand and, thus, as emphasized by the Australian Attorney General's office, to harmonize Australian laws with New Zealand's in order to benefit and facilitate trans-Tasman business opportunities (<http://www.ag.gov.au/pps>).

Indeed, Australia and New Zealand are even considering a single PPSR as part of a broader trans-Tasman "harmonization programme" that is due to be completed by 2014 (Arthur & Foote, 2010). The development of a single register would allow any business or person doing business in both Australia and New Zealand to register only once in respect of trans-Tasman trade. The biggest problem facing the efficacy of the PPSA is failure to register; a single trans-Tasman PPSR would facilitate that learning curve (Arthur, Foote, 2010).

The law has worked well in New Zealand and the Australians decided to follow suit partly because New Zealand reported that the reforms codified in its new PPSA "resulted in increased certainty and confidence to the parties in commercial transactions where personal property is used as a security interest and clarity where competing security interest is an issue" (www.beehive.govt.nz/portfolio/attorney-general). The New Zealand Attorney General encouraged the Australians to harmonize their personal property security laws with those of New Zealand so that businesses would be operating under similar guidelines and operating procedures (<http://www.beehive.govt.nz/portfolio/attorney-general>). Likewise, such coordination of securities laws among Australia, Canada, and the United States will benefit any business conducting transactions within this international setting. Businesses that focus on credit management, financiers who operate in industries where goods and services are supplied without passing full ownership—such as manufacturing, retail, telecommunications, and transport—farmers, IT equipment suppliers, and software developers all will benefit from the new law as the centralized registration regime takes effect over the next 24 months of transition. A personal property security regime with cheap, easy online access will make doing business in Australia a smoother process.

The main case for the new PPSA is the goal of facilitating "cheaper, faster, easier, simpler and safer" transactions (Hattaway, 2006). As mentioned above, it incorporates some of the organizing ideas of Article 9 of the Uniform Commercial Code; specifically, the Australian PPSA constructs allow for functional treatment of secured transactions ("uniformity") and reasonable allowance for versatile design of such transactions ("flexibility"). The new law replaces the chaos of past secured transactions laws by providing for modernized, simplified, largely uniform, and much easier to apply rules for the creation, enforcement, and priority position of consensual security interests.

The Australian PPSA was to be launched and the PPSR available first in February, then May, then October 2011. The transitional issues, discussed below, that have arisen attest to why the Australian government took until the last moment—January 30, 2012-- to "go live" with the register. The Australian legislature would have had to amend the proposed Act if it had not launched by February 1, 2012 (PPSA, § 2) but that uncertainty has been replaced with an embrace of the new reality by attorneys, financial organizations, and international businesses. This author will suggest that the Australian government spend time and effort in improving self-help guidelines and tutorials for small businesses, both Australian and internationally, such that assistance from legal counsel is not necessary for individuals and small entities.

Because the world economy is based on credit—secured transactions keep the commercial world going--a basic understanding of the scope of the newly revised Article 9 of the UCC is crucial for any business executive in the United States. The new Australian PPSA and the New Zealand PPSA can help

international businesses understand the terms and scope of Article 9 of the UCC as well. However, marked differences among the different security law regimes in the United States, Canada, New Zealand, and Australia continue to create confusion and uncertainty, specifically those parts of the laws that deal with fixtures, intellectual property, and retention of title issues. Others have written analyses of these issues and have formulated suggested amendments to the new Australian PPSA which this paper will discuss and endorse (Bull, 2012).

Why Bother with Registering with the PPSA? Examples

Trade creditors, manufacturers, farmers, software developers, suppliers--anyone who enters into an arrangement involving a security or anyone who has an arrangement with a retention of title (ROT) clause--are advised to register with the PPSA in order to take priority ahead of a general security. The risks in not registering involve 1) becoming an unsecured creditor if the other party becomes insolvent; 2) losing priority of the security interest if another secured party gains priority by registering first; and 3) losing any right in the secured property because the secured property could be sold or leased to another party that would take the property free from the security interest (East, 2012).

Manufacturing and Supply Chain

For example, if a manufacturer of widgets, Widgets Ltd., provides widgets to Sam's Widgets-for-Sales Ltd., the manufacturer will register a security over the widgets that they supply. If Sam's has a line of credit with a bank, arranged many years ago, the bank will also have registered a general security over all of Sam's personal property (not over its real property or water rights) that Sam's owned at the time the line of credit was issued or has acquired since. If Sam's is unable to pay the bank for money owed on the line of credit, the bank will require that Sam's sell all its assets to pay the delinquent debt. Because Widgets Ltd. has a registered security over the widgets it supplied, the bank, or the bankruptcy trustee, cannot touch those widgets (Hattaway, 2006).

Credit managers are accustomed to the previous PPSA system based on retention of title (ROT). Widgets Ltd. most likely has good ROT clauses in its financing agreements and may feel comfortable that these contractual clauses provide protection because they make clear that the goods belong to the owner/manufacturer until the goods are paid for, and if the party to whom they were supplied defaults, the goods can be repossessed. Because ROTs are a security interest under the new PPSA, they must be registered with the PPSR so that Widgets Ltd. can take priority over a general security such as that held by the bank.

Banking and Finance

Lending transactions over property that belongs to an Australian entity or that is located in Australia also fall under the new PPSA registration requirements. Prior to January 30, 2012, a company or registered Australian body registered its security interests under the Corporations Act of 2001 (Cth) (Corporations Act) and also registered with various states under state-based legislation. Similarly, individuals registered security interests related to lending transactions with state registers under state-based legislation. These registrations varied depending on the nature of the assets tied to the lending. The new PPSA registration system supersedes the charge registration provisions previously in operation under the Corporations Act as were most state-based security registers, except lending transactions tied to land, water rights, and mining permits or leases. Security interests in land, tied to any lending transaction, continue to be registered under the applicable state or territory land registration system, parallel to the legal system in the United States and echoing Article 9 (Holland, 2012; PPSA §§ 150-178). Banks have also had to change the language in their loan security documents to reflect "general security agreements" and to embrace the new PPSA terminology, reviewed below.

However, certain interests relevant to the banking and finance industry are not embraced by the PPSA system, including an interest in collateral which is chattel paper, an investment instrument, a monetary obligation, or a negotiable instrument (Young & Jones, 2011, pp. 1-3).

Equipment Leases

Certain contractual arrangements are considered security interests under the PPSA. For example, a lease or bailment of goods for a term of more than one year or an indefinite period of time or for serial numbered goods, such as motor vehicles, watercraft, or aircraft, for a term of 90 days or more or for an indefinite period of time all are security interest in personal property under the PPSA and must be registered. If a customer retains uninterrupted possession of goods for any of these time periods, a personal property security lease arises. Thus, a lessor or bailor of goods with a personal property security lease needs to register on the PPSR; once that security interest lease is registered, the owner of the goods will have a super-priority interest in the goods (Reed, 2012).

Agribusiness

Tractors, crops, livestock, wool, plant breeders' rights—all farm-related personal property—are covered under the PPSA; hence, lenders, farmers, and ranchers need to be aware of the new single, national scheme that regulates interests relative to personal property that is given as security for payment or other obligations. Primary producers as well as suppliers will want to ensure to establish their security interests according to the new PPSR requirements. Some transactions that previously would not have been considered a security, such as a lease of a tractor, will now need to be registered with the PPSR. The lessor that owns that tractor will want to register its security in the tractor and train itself out of the old way of thinking: just because the lessor owns the tractor does not give it security if the farmer becomes insolvent. Likewise, a primary producer of a crop that has been accustomed to selling its goods on ROT terms—where the title does not pass until full payment is made—must register with the new PPSR. And farmers who supply their produce for processing who are in a bailment situation also now must be cognizant of the need to register their security interest with the PPSR. The new PPSA states that supplying goods on bailment terms for more than 90 days is a security interest and must be registered to retain a priority interest in case of insolvency (Dwyer, 2012).

The tractor lease and the ROT security interest are considered Purchase Money Security Interests (PMSI), discussed in detail below, and when registered will grant a super-priority over a non-PMSI perfected security interest. In fact, the new PPSA defines an “agri-PMSI” and carves out special rules for agribusiness (PPSA, § 62). If a farmer gives a security interest over his crops while they are growing, or within six months before planting, for example, to a fertilizer supplier, the fertilizer supplier's perfected security interest, registered with the PPSR, will be considered a perfected security interest in those crops and will take priority over any other security interest. The same rule applies to livestock; if a rancher, for example, borrows money to buy food for his cattle, the supplier of the food has a priority interest over all others. Again, a prior mortgage over the land that includes the crops or livestock will not be affected (Dwyer, 2012). The PPSA includes specific rules that apply to crops and livestock when a party is attempting to enforce its security interest by, for example, entering on land when the crops are growing. These rules are in step with the established rules of grantor's rights (Dwyer, 2012).

Commingled property, such as grain stored in silos, also commands special attention from the PPSA, which details how multiple holders of security interests hold priority (Dwyer, 2012). And as discussed above, farmers and ranchers will notice new loan security documents from their banks; no longer will they see “fixed and floating charges” over all assets; instead, the “general security agreement” will replace this language and the new PPSA language will be in place: the “grantor” grants a “security interest” over the “collateral” to the “secured property.” This language echoes that of the language of Article 9 and is reviewed below.

Information Technology

The new PPSA system will affect financing arrangements of information technology (IT) businesses as well as arrangements for the supply of goods and services by and to such businesses (PPSA, §§ 105, 106). An IT company that supplies computer hardware and IT equipment, or leases equipment, or develops software, for example, has been accustomed to including ROT clauses in its contracts. In a long-term lease or one in which the customer has not paid in full for the equipment, the IT company retains

title in the relevant property and thus has no need to register these arrangements in order to retain priority of interests over others with competing claims. Now, under the new PPSA system, the owner of that equipment is treated as a secured creditor and thus must register those interests with the PPSR. Such companies will want to redraft their contractual terms to make sure to include provisions that clarify the registration and enforcement of security interests. An IT business that receives a supply of goods must also understand that it may be subject to the registration of security interests against it by its suppliers. For example, a company supplies IT equipment to a customer on terms that reserve title in that equipment until payment is made in full; that IT company now needs to have registered the security interest in order to be able to reclaim that equipment if the customer becomes insolvent and is placed in liquidation, or it will lose its right to the equipment to another who holds a registered security over the assets of the customer.

Likewise, an IT company that develops custom-built software must be aware of the fact that under the PPSA certain intellectual property rights and transferable licenses, such as a license to use a patent or copyright, are “personal property” and constitute a security interest. In the case of a company that custom-builds software based on a financed situation, where the customer will not own the software until it has paid the developer in full, the IT developer has created an ROT situation, thus has created a security interest under the PPSA, and therefore needs to register that interest to retain priority in ownership in case of insolvency of the customer. However, a company that has a non-transferable software program license operates under a straight license situation and would not have to be concerned with the PPSA system (Hoyle, T. 2012; PPSA §§ 105, 106).

Fixtures

The PPSA has not helped clarify the confusing area of the application of a multitude of state and territorial laws that arise when there is a real property mortgagee and a fixture financier that both claim rights in the same fixture. The common law holds that a fixture, or chattel—say, the seats in an auditorium or the plumbing fixtures in a hotel—loses its identity upon becoming affixed to land and therefore becomes subject to any interest in the land (North Shore Gas Co Ltd v Cmr of Stamp Duties 1940; Lees & leech Pty Ltd v Cmr of Taxation, 1997, as examples; Bull, 2012). A supplier of fixtures, therefore, finds itself in a position where it is impossible to protect its interests in properties affixed to land. Section 36 of the Canadian Act includes specific priority rules that govern security interests in fixtures and competing interests in land (Personal Property Security Act, RSBC 1996, Section 36, c 359). The fixture provisions of the Canadian Act balance the interests of mortgagees and fixture financiers by changing the common law position that a mortgagee will have the best interest in any fixtures on the land. The Canadian Act defines fixtures as “not including building materials” and leaves to the common law to sort out whether goods, other than building materials, have become fixtures (PPSA, RSBC 1996, Section 2(1)(s); Section 2(1)(e)(iii) and (iv)).

When the Australian PPSA was being drafted, a fixture provision similar to the Canadian Act was intended. At the last moment, however, the drafters followed the lead of New Zealand, presumably in an effort to harmonize trans-Tasman business transactions and registrations, and did not include any provisions for fixtures in the PPSA. Thus, Australian suppliers of fixtures or fixture financiers still have no easy way to protect their security position in their goods (chattels) because state land-title legislation does not allow them any priority over the land mortgagee. Several commentaries have urged Australian legislators to consider an early amendment to the new PPSA in order to adopt an amended Canadian regime based on the benefits that it provides (Bull, 2012). A party who searches the title for land that includes affixed goods would want to be aware of the existence of the fixture and any related security interest. In Canada, such a party would see the registered fixtures notice on the title. One of the objectives of the new Australian PPSA was to provide transparency with a single national law and a single register that would apply to all personal property interests. However, the exclusion of land and fixtures from the scope of the PPSA leaves the determination of whether or not chattels supplied by fixture financiers to the reign of confusing and contradictory common law in the various states and territories (Bull, 2012).

Article 9 of the UCC of the United States: Basics of the Law of Secured Transactions

Article 9 of the UCC governs secured transactions in personal property. The Australian PPSA, like Article 9, applies only to personal property, not to land, water, mining leases, and certain statutory licenses (Young, Jones, 2011.) The world economy is based on credit, and secured transactions keep the commercial world going. The quantity of disputes in the United States is an indicator of the impact of Article 9 of the UCC: half of all UCC lawsuits involve Article 9 (www.law.cornell.edu.ucc.9/article9.htm).

The basic definitions of pivotal terms in Article of 9 of the UCC are common to the Australian PPSA as well. These common terms include the following:

- “Fixtures,” goods that have become attached to real estate;
- “Security interest,” an interest in personal property or fixtures that secures the performance of an obligation;
- “Secured party,” a person or company that holds a security interest;
- “Collateral,” property that is subject to a security interest;
- “Debtor,” a person who has original ownership interest in the collateral;
- “Obligor,” a person who must repay money or perform some other task to satisfy a debt;
- “Security agreement,” a contract in which the debtor gives a security interest to the secured party;
- “Default,” the failure of a debtor to pay money due on a loan or credit purchase;
- “Repossession,” which occurs when the secured party takes back collateral because the debtor has defaulted;
- “Perfection,” a series of steps that the secured party must take to protect its rights in the collateral against people other than the debtor;
- “Financing statement,” a document that the secured party files to give the general public notice that it has a secured interest in the collateral;
- “Record,” information written on paper or stored in an electronic or other medium;
- “Authenticate,” signing a document or using any symbol or encryption method that identifies the person and clearly indicates he or she is adopting the record as his or her own; and
- “Purchase Money Security Interest (PMSI),” a security interest that has a super-priority over other security interests in certain situations. A PMSI is attached to specific collateral that is being leased, purchased, or supplied on consignment or subject to retention of title (ROT) and extends to funds that have been lent to a grantor for the purpose of enabling the grantor to acquire the collateral (UCC Section 9-100, et. seq.; PPSA, § 1; Young & Jones, 2011, p. 1).

PMSI and Super Priority

Special priority rules arise in relation to PMSIs. The following interests are PMSIs:

- A security interest taken over collateral to the extent that the security interest secures all or part of the collateral’s purchase price; for example, in retention of title situations (PPSA, § 62);
- A security interest taken over collateral for the purpose of enabling the grantor to acquire rights in the collateral, to the extent that the value is applied to acquire those rights; for example, in a purchaser of a farmer’s crop for the purpose of producing a food product (PPSA, § 62);
- An interest of a lessor or bailor of goods under a PPS lease; for example, the lessor of the tractor to a farmer or the farmer bailing his livestock to a processing plant (PPSA, § 62); and
- An interest of a consignor who delivers goods to a consignee under commercial consignment (PPSA, § 14).

Control and Possession

However, even a PMSI does not have priority over a party that has “control and possession.” The Australian PPSA is similar to the revised Article 9 of the UCC in recognizing that the secured party has either “control or possession.” For deposit accounts, electronic chattel paper, and certain other collateral, the security interest attaches if the secured party has “control” (UCC §§ 9-104, 9-105, 9-106, 9-107; PPSA, § 4). “Control” means that the secured party has certain exclusive rights to dispose of the collateral. The Australian PPSA has adopted the same specific definitions as the revised Article 9 of the UCC (PPSA, §§ 24, 62, 153).

Both the PPSA and Article 9 allow for control over deposit accounts in a bank. The secured party has control if it is itself the bank holding the deposit or if the debtor has authorized the bank to dispose of funds according to the secured party’s instructions (UCC §§ 9-104; PPSA, § 62). A secured party has control of electronic chattel paper when it possesses the only authoritative copy of it, and the record(s) designate the secured party as the assignee (UCC §§ 9-105; PPSA, § 62). This means that the parties have agreed on an electronic method to verify the uniqueness of the record, so that any copies of the electronic original are clearly recognizable as reproductions. UCC §§ 9-106 and §§ 9-107 specify analogous methods of controlling investment properties and letter-of-credit rights, and, again, the Australian PPSA follows suit (PPSA, § 153).

Both the UCC and the Australian PPSA recognize that for most other forms of collateral, including goods, securities, and most other items, a security interest attaches if the secured party has “possession”; if a person loans a neighbor money and the neighbor gives the lender a Picasso painting as collateral, the lender has an attached security interest in the painting once it is in his or her possession. A writing to authenticate the transaction would be wise in both countries, but is not legally required. (PPSA, § 131).

The Australian Personal Property Securities National Register (PPSR): Comparison of Aspects

The revised Article 9 of the UCC has been adopted by all 50 states; the actual statutory versions of Article 9 that have been adopted state by state vary and each state has designated what state agency is the formal register office. In Colorado, for example, the office of the Secretary of State is the register. One big change in the revision of Article 9 is the acknowledgement of e-commerce; Article 9 is medium-neutral in that it permits security interests to be created and filed electronically or in any other form.

Australia followed the lead of New Zealand in providing for a national register of security interests over personal property. Holders of security interests “perfect” their security interests by registering a financing statement on the Personal Property Securities Register (PPSR). The PPSR is publicly searchable and contains basic details about the security interests, who they are held by, and who and what they are held over (PPSA, §§ 6, 152, 153). Security interests that are perfected take priority over other security interests subject to the specific priority rules in the PPSA (PPSA, § 153).

The Australian PPSR, therefore, is a national register, like that created by the New Zealand PPSA. The New Zealand PPSA, which rolled out in 2000, gives increased certainty and confidence to the parties in commercial transactions where personal property is used as a security interest and clarity where competing security interests are an issue (www.beehive.govt.nz/portfolio/attorney-general). It will be available 24/7, 365 days a year; registering a security interest in New Zealand costs \$3 and the Australians will price their register similarly (<http://www.ag.gov.au/pps>). The PPSR will be operated by the Insolvency and Trustee Service Australia (PPSA, § 4).

The PPSR will replace 40+ existing registers and most of these will be migrated to the PPSR. Because the new PPSR has replaced registers for company charges, bills of sale, ship mortgages, motor vehicle securities, crop liens, stock mortgages, intellectual property licenses, and other securities affecting tangible and intangible personal property, many businesses must learn new habits of securing their interests in their property.

For example, the Australian Securities and Investments Commission (ASIC) Register of Charges has closed, accepting or processing charges up to January 27, 2012. Before the PPSA came into effect, an Australian corporate entity would register its charges either by its Australian Company Number (ACN) or, in the absence of an ACN, would register using the Australian Business Number (ABN). Although the

intention was that all currently registered charges with the ASIC were to be transferred to the PPSR using the ACN, approximately 25,000 registrations did not migrate correctly, using the ABN instead (East, 2012). As a result, searching the PPSR using only the ACN does not provide an accurate result as to all the security interests registered against the relevant grantor (East, 2012). The Australian Bankers' Association has collaborated with the Australian Finance Conference to draft industry standard forms to assist with the new registration process and to amend registrations, and a plethora of Australian attorneys are making sure that businesses know that there is counsel available (Walsh & Kim, 2012). Indeed, the PPSA may prove to be an attorney's perpetual job act as businesses grapple with the changes and new requirements.

Similar to the migration from the ASIC to the PPSA, prior to January 30, 2012, security interests provided by a company or an Australian registered body were required to be registered under the Corporations Act 2001 (Cth) (Corporations Act) and, depending upon the nature of the assets of the security, would have required registration under various state-based legislation. Likewise, if a natural person wanted to register a security, other various state-based legislation came into play.

The Australian PPSA and Intellectual Property Rights

As in New Zealand and the United States, the new Australian PPSA directly impacts transactions involving intellectual property (IP). Anyone buying, selling, or licensing intellectual property assets in Australia or offering them as security, needs to know the details of the new PPSA. Patents, trademarks, designs, copyrights, and IP licenses are included. However, trade secrets or unregistered trademark rights ("know-how") are not included (PPSA, § 105). The single national register provides a means for perfecting the security interests and will replace the various IP registers throughout Australia.

In the past, security interests relating to IP were often recorded on the various IP registers; different registers exist for patents, trademarks and designs among the different states and territories. Recording an interest on these registers did not necessarily have the effect of defeating competing interests, such as a subsequent bona fide purchaser of the IP without notice of the interest (Simmonds, 2011). The new national register will allow priority holders of IP rights to defeat other third-party claims.

Some examples of relevant transactions involving intellectual property include purchase, sale, and loan transactions; partial assignment of copyright that involves an assignment as means of securing payment; transactions of physical assets closely related to IP rights such as equipment that contains embedded software or is covered by patents; patented pharmaceuticals; and the transfer of IP licenses (Simmonds, 2011). The new Australian PPSA provides that when a security interest is granted over an IP license, and the IP is sold to another person or entity, if the license is in place, the security interest will bind the new owner. If physical assets are being used as security, it is important, therefore, to confirm specifically whether or not the underlying IP rights are also being secured before registering the security interest (Simmonds, 2011). However, there is no intention to migrate intellectual property registers for trademarks, designs, and patents; the holders of these intellectual property rights interests will need to register them in the new PPSR and maintain them in the other registers as well (Simmonds, 2011).

Transition to the New PPSA

The new Australian PPSA was to have been rolled out by October 2011, then by February 1, 2012, and finally officially became available on January 30, 2012. The migration time for existing registered security interests will extend for a 24-month period until January 30, 2014 (<http://www.ag.gov.au/pps>). If one has charge over assets of an Australian company that is registered under the Corporations Act of Australia, they will be automatically transferred to the new PPSA (Hattaway, 2010). The security interests over IP that are registered with the various IP registers will need to be re-registered with the PPSA and will have to be refreshed every seven years (<http://www.ag.gov.au/pps>).

For a business or person doing business in Australia, it will be important that PPSA provisions are included in all documents. Developing a checklist of documents that require registration would be a smart move for businesses engaged in trans-Tasman transactions. Indeed, the key words will be: Attach, perfect, register!

Perfection by Registration: Benefits

Perfection of a security interest by registration has true benefits. Registration will define the priority status of the security interest relative to other security interests in the collateral. Registration will ensure that the security interest survives the bankruptcy or insolvency of a grantor. A perfected security interest will take priority over an unperfected security interest. The priority between two or more perfected security interests will be determined by which party has the earlier perfected security interests. Priority between two or more unperfected security interests will go to the one that attaches first. This parallels Article 9 of the UCC as well as the New Zealand PPSA.

A recent example provides a good illustration of why it is important to comply with the new PPSA regulations. An Australian company called WOW Sight and Sound is one of the first receiverships since January 30, 2012. Many large suppliers of WOW have been unable to reclaim goods supplied to WOW that were initially supplied on retention of title terms. WOW's receivers have only recognized ROT arrangements that were registered on the PPSR, and all other suppliers are considered unsecured creditors of the company and have been left with no recourse (Bull, 2012). WOW's receivers liquidated all stock and distributed the proceeds only to WOW's secured creditors and suppliers who had registered with the PPSA. The transitional provisions of the PPSA protect unregistered retention of title and consignment suppliers and leased goods for a 24-month transitional period, until 2014; however, these provisions do not protect arrangements entered on or after January 30, 2012 (Bull, 2012).

SUGGESTIONS: FIXTURE AMENDMENTS AND ONLINE SELF HELP GUIDELINES

The drafters of the new PPSA intended that the new regime would provide commercial certainty, fairness and justice in all areas involving personal property and secured creditors. However, as noted above, the choice to omit any provisions for fixtures does not further the purpose of providing commercial certainty. As it stands, a prior mortgagee will have priority over a subsequent registered fixture financier, which means that such secured creditors may be reluctant to finance the kind of property that will become fixtures on real property because they have no assurance of protecting their security interest in that property. One commentator, Amanda Bull of Thynne & Macartney of Brisbane, Australia, makes sound suggestions for early amendments to the PPSA to address the issue of fixtures, based on the problems that even the Canadian regime faces (Bull, 2012). Among her suggestions, the following are the best steps for the Australian drafters to adopt to provide a methodology for determining disputes between mortgagees of real property and fixture financiers: 1) The amendments should require that fixture financier's register their security interest on both the PPSR and the relevant land titles register to gain priority over a party that has an interest in the land; and 2) The amendments should provide that the land title system would prevail over the PPSA in order to resolve disputes over priority between a fixture financier and other registered encumbrances on the land titles register. Hence, the registrars of the relevant state-based land titles registers must also acknowledge a notation on titles for fixtures.

As Australian attorneys prepare to assist large and small businesses from around the globe to navigate the new PPSA regime, a continually upgraded, well maintained, robust "self-help" guide on the register website, coupled with a 24-hour customer service staff, would further the purpose of the drafters to provide a fast, efficient, and transparent system for international businesses and individuals. The Australian PPSA and PPSR could mimic any of the multitude of U.S. state and federal agency websites that are designed to assist individuals, businesses, and attorneys in complying with statutory regulations while furthering commercial endeavors.

CONCLUSION

The business and legal communities of Australia, New Zealand, Canada, and the United States, as well as global enterprises that do business in Australia, anticipate that the new PPSA will provide greater transparency; will create consistency and clarity when it comes to intellectual property rights used as secured interests; and will make transactions cheaper, faster, easier, simpler, and safer. Uniformity of

secured transactions will reach across Australia and across to New Zealand. A true sign of success will be to note a scarcity of case law developing over secured interests and collateral in the years to come, and to hear reports of the ease of understanding the system and registering with the PPSR from businesses around the world that have personal property interests in Australia.

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