THE AUSTRALIAN PPSA FROM A CANADIAN PERSPECTIVE: SOME COMPARATIVE REFLECTIONS

ANTHONY DUGGAN*

The Australian Personal Property Securities Act 2009 *(Cth) is based in part on the Saskatchewan Personal Property Security Act, but it departs from the Saskatchewan model in numerous significant respects in terms of both drafting and substance. The differences fall into three main categories: (1) drafting differences; (2) substantive differences which are the result of mistakes on the part of the Australian law makers; and (3) substantive differences which reflect deliberate policy choices. For the most part, matters falling within categories (1) and (2) are unlikely to interest a Canadian observer, but matters falling within category (3) transcend the purely parochial and there is clearly room for an international dialogue at this level. This article focuses on selected aspects of the* Australian PPSA*, comparing them with the Canadian position and evaluating the alternatives. The article also addresses relevant aspects of Article 9 of the United States* Uniform Commercial Code*. The topics covered are as follows: (1) the Australian federal government's take-over of the PPSA legislative agenda; (2) the* Australian PPSA*'s approach to security interests in cash collateral as compared with the Canadian approach; and (3) selected registration issues.*

I INTRODUCTION

The Australian *Personal Property Securities Act*[1] was enacted in 2009 and came into effect on 30 January 2012.[2] New Zealand enacted a *Personal Property Securities Act* more than ten years earlier.[3] The *New Zealand PPSA* closely follows the text of the Saskatchewan *Personal Property Security*

* Hon. Frank H Iacobucci Chair, Faculty of Law, University of Toronto; Professorial Fellow, Melbourne Law School. This article is based on a paper presented at the 43rd Annual Workshop on Commercial and Consumer Law, held at McGill University, Montreal, 11–12 October 2013. The paper was addressed to a Canadian audience, but the comparisons cut both ways, so the discussion is equally relevant in Australia. My thanks to two anonymous referees for helpful comments. All errors are mine.

1 *Personal Property Securities Act 2009* (Cth) ('*Australian PPSA*').

2 Attorney-General (Cth), *Personal Property Securities (Migration Time and Registration Commencement Time) Determination,* 21 November 2011. There was a sequence of amendments to the principal Act in the meantime: *Personal Property Securities (Corporations and Other Amendments Act) 2010* (Cth); *Personal Property Securities (Corporations and Other Amendments) Act 2011* (Cth).

3 *Personal Property Securities Act 1999* (NZ) ('*New Zealand PPSA*').

Act,[4] but Australia has elected to take a more freewheeling approach. The *Australian PPSA* takes the Saskatchewan model as its starting point, but it departs from the model in a number of significant respects in terms of both drafting and substance. From an Australian stakeholder's perspective, it might have been more sensible if the legislators had resisted the temptation to innovate as, by and large, the New Zealand lawmakers did. The *Australian PPSA*'s departures from the Saskatchewan model create uncertainty, increase the risk of mistakes in the statute, and reduce the reliability of Canadian and New Zealand PPSA case law and literature as a guide to the meaning of certain provisions.[5]

On the other hand, from a comparative law perspective, the unique features of the *Australian PPSA* are a boon. Given the close similarity between the New Zealand and Canadian Personal Property Securities Acts, there is little in the New Zealand statute which would be thought-provoking to a Canadian observer (though there is a growing body of New Zealand case law which merits attention in other PPSA jurisdictions). The *Australian PPSA* is of greater interest precisely because of its departures from the Canadian model. The differences fall into three main categories: (1) drafting differences; (2) substantive differences which are the result of mistakes on the part of the Australian lawmakers; and (3) substantive differences which reflect deliberate policy choices. For the most part, matters falling within categories (1) and (2) are unlikely to be of much interest to a Canadian observer, but matters falling within category (3) transcend the purely parochial, and there is clearly room for an international dialogue at this level.

With these observations in mind, the following discussion focuses on selected aspects of the *Australian PPSA*, comparing them with the Canadian position and evaluating the alternatives. Part II deals with the Australian federal government's takeover of the PPSA legislative agenda; Part III discusses the *Australian PPSA*'s approach to security interests in cash collateral as compared with the Canadian approach; and Part IV deals with selected registration issues.

4 *Personal Property Security Act*, SS 1993, c P-6.2 ('*Saskatchewan PPSA*'). The *Saskatchewan PPSA* is based on a model statute drafted by the Western Canada Personal Property Security Act Committee (now the Canadian Conference on Personal Property Security Law). All the common law provinces and territories, with the exception of Ontario, have enacted substantially similar legislation: see, eg, *Saskatchewan PPSA*. The Ontario statute shares many common features with the model statute, but there are quite a number of differences in the details: *Personal Property Security Act*, RSO 1990, c P-10 ('*Ontario PPSA*').

5 See Anthony Duggan and Michael Gedye, 'Personal Property Security Law Reform in Australia and New Zealand: The Impetus for Change' (2009) 27 *Penn State International Law Review* 655, 674–6. For a non-exhaustive catalogue of errors in the *Australian PPSA*, see Anthony Duggan and David Brown, *Australian Personal Property Securities Law* (LexisNexis Butterworths, 2012) ch 17. The criticism in the text is an important one, but it should not be overstated. There are many similarities between the *Australian PPSA* and the other models, and the differences should not be used as an excuse for ignoring the Canadian and New Zealand literature altogether.

II THE AUSTRALIAN NATIONAL SCHEME

The *Australian PPSA* is a federal statute supported by a national Personal Property Securities Register (PPSR). This represents both its most distinctive feature and the Australian lawmakers' most significant achievement. As in Canada, the Australian federal government does not have the constitutional authority to legislate with respect to trade and commerce at large, and the relevant powers lie largely with the states. However, *Australian Constitution* s 51(xxxvii) provides for the referral of state legislative powers to the Commonwealth. There was a short period in the lead up to the enactment of the *Australian PPSA* during which the same political party was in power nationally and in all the states. The lawmakers took advantage of this narrow window of opportunity to persuade the states to refer their powers to facilitate the enactment of a federal statute. The scheme is supported by an agreement between the Commonwealth and the state governments,[6] and, acting pursuant to this agreement, each state has passed legislation referring its jurisdiction over PPSA matters to the Commonwealth.[7]

This outcome is in stark contrast to the position in Canada, where the PPSAs are provincial laws, with most provinces having their own separate register. The following simple example illustrates the significance of the difference.

> **Example 1.** Debtor is a company incorporated in Jurisdiction A. Its chief executive office is also located there. Debtor carries on business in Jurisdiction A and Jurisdiction B, and it owns equipment located in both jurisdictions. Debtor and SP enter into a security agreement in Jurisdiction A under which Debtor gives SP a security interest in all its present and after-acquired equipment. Debtor subsequently sells an item of equipment to T in Jurisdiction B. The sale is outside the ordinary course of Debtor's business and it takes place without SP's authority. T is unaware of SP's security interest. When SP learns of 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. Assume that Jurisdiction A is Saskatchewan and Jurisdiction B is Ontario. If Saskatchewan law applies, the outcome of the case will depend on whether SP perfected its security interest, in accordance with the *Saskatchewan PPSA*, by registering a financing statement in the Saskatchewan PPSR.[8] On the other hand, if Ontario law applies, the outcome will depend on whether SP registered in Ontario.[9] Assuming the disputed equipment is not mobile goods, the relevant conflict of laws rule is found in *Ontario PPSA* s 5(1) and *Saskatchewan PPSA* s 5(1.1). These sections provide that the perfection, effect of perfection and priority of a security interest

6 Council of Australian Governments, *Personal Property Securities Law Agreement* (2 October 2008) <https://www.coag.gov.au/sites/default/files/personal_property_securities_IGA.pdf>.

7 See, eg, *Personal Property Securities (Commonwealth Powers) Act 2009* (NSW).

8 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).

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).

in goods is governed by the law of the jurisdiction where the goods are situated at the relevant time. Applying this rule, Ontario law would govern and the case turns on whether SP registered in Ontario. Similarly, if the sale was of equipment in Jurisdiction A (Saskatchewan), Saskatchewan law would apply and the case would turn on whether SP registered in Saskatchewan. The implication for SP is that, to avoid exposure to the risk of third party claims of this nature, it should register a financing statement in both jurisdictions.

If the equipment is mobile goods,[10] the relevant conflicts rule is found in *Ontario PPSA* s 7(1) and *Saskatchewan PPSA* s 7(2), which refer to the laws of the jurisdiction where the debtor is located. On the facts of Example 1, Debtor's location turns on the location of its chief executive office and, since this is Saskatchewan, Saskatchewan law applies regardless of where the disputed goods are situated. The implication for SP is that, if the collateral is mobile goods, there is no need for multiple registrations. But there may be some uncertainty about whether the collateral is mobile goods. In that case, to be certain, SP should register in both jurisdictions. Correspondingly, a searcher who wishes to ascertain whether Debtor may have granted a security interest in its equipment should search in both jurisdictions. This is to guard against the risk that SP may have registered in only one jurisdiction, which turns out to be the correct one. If SP registers in only one jurisdiction and T searches in the other jurisdiction or does not conduct a search at all, T will presumably complete its transaction with Debtor in ignorance of SP's security interest and this may result in subsequent litigation to determine whether SP registered in the correct jurisdiction.

To summarise, federal systems where personal property security laws are enacted at the provincial or state level, with separate registers in each province or state, generate two related problems, both of which inflate the cost of credit: (1) a secured party may need to register multiple times to reduce the risk of competing third party claims, while a prospective third party claimant may need to search multiple times to avoid the risk of outstanding security interests; and (2) parties may end up in litigation over conflict of laws questions. Returning to Example 1, assume now that Jurisdiction A is the Australian State of Victoria and Jurisdiction B is the State of New South Wales. Given that the *Australian PPSA* is a federal statute and the register is a national one, there is only one place for SP to register and one place for T to search before completing its transaction with Debtor. In other words, the Australian system avoids the need for multiple registrations and searches. It also forecloses the possibility of conflict of laws litigation within Australia because: (1) since there is only one register, there can be no dispute about whether SP registered in the right place; and (2) since there is only one statute, there can be no dispute over the applicable substantive law. *Australian PPSA* pt 7.2 incorporates conflict of laws provisions based in part on the Canadian model but, for the reasons which have just been discussed, these are relevant only in the international context.

10 Mobile goods includes 'goods that are of a type that are normally used in more than one jurisdiction, if the goods are equipment or inventory leased or held for lease by a debtor to others': *Ontario PPSA,* s 7(1)(a)(ii); *Saskatchewan PPSA,* s 7(2)(a)(ii).

A by-product of enacting a federal PPSA is that it enabled the Australian lawmakers to dovetail the statute with other federal laws providing for registration of security interests in personal property, most notably the intellectual property statutes and the *Shipping Registration Act 1981* (Cth). The intellectual property statutes have been amended so that, while it remains possible to register a security interest in the relevant intellectual property registry, doing so no longer affects the rights of the registered owner to deal with the property. In other words, post-PPSA, disputes involving one or more security interests in intellectual property are subject exclusively to the PPSA priority rules. This then gives the secured party an incentive to register its security interest in the PPSR, even if it also registers in the relevant intellectual property register. On the other hand, the specialist intellectual property registration provisions continue to govern disputes between claims other than security interests, such as competing ownership claims or the claim of a licence-holder against a new owner following transfer of the underlying intellectual property right.[11] The *Shipping Registration Act 1981* (Cth) has been amended so that it no longer applies to ship mortgages, making the PPSR the sole register for security interests in ships.[12] The federal insolvency laws have also been amended in an effort to integrate the new PPSA regime.[13] In Canada, by contrast, the interaction between the provincial PPSAs and relevant federal laws remains problematic.[14]

What lessons might Canada draw from the Australian approach? It would be hard not to agree that the Australian approach is much better than the fragmented Canadian system. But the political obstacles to going down the same road in Canada are obvious — the dynamics of Canada's federal system are markedly different from those in Australia. Moreover, the provinces have already gone some way towards addressing the issue. In particular: (1) there is substantial uniformity between the PPSAs in the common law provinces, except Ontario, and uniform provincial laws are at least a proxy for a national regime; (2) more specifically, the PPSA choice of law rules are substantially uniform, and this largely avoids the risk of different dispute outcomes depending on the province in which the case happens to be litigated; and (3) the move to electronic registration systems has reduced the transaction costs of multiple registrations and searches.

Could more be done? Granted that national legislation is not achievable, it might still be feasible to establish a single national register, in support of the provincial statutes, and this would avoid the need for multiple registrations and searches. The project would require co-operation between the provinces in the design of the register and also agreement on a uniform set of provisions governing the

11 Explanatory Memorandum, Personal Property Securities (Consequential Amendments) Bill 2009 (Cth) 9–15 [6.1]–[6.50].

12 Ibid 20–23 [7.27]–[7.48].

13 See Duggan and Brown, above n 5, [13.19]–[13.32].

14 See, eg, Roderick J Wood, 'The Nature and Definition of Federal Security Interests' (2000) 34 *Canadian Business Law Journal* 65; Law Commission of Canada, *Leveraging Knowledge Assets: Reducing Uncertainty for Security Interests in Intellectual Property* (Ottawa: Law Commission of Canada, 2004); Roderick J Wood, 'The Definition of Secured Creditor in Insolvency Law' (2010) 25 *Banking and Finance Law Review* 341.

registration and search processes. Personal Property Security registration and search fees are currently a lucrative source of revenue for provincial governments, but the move to a national register could be made revenue neutral by setting the national registry fees at an appropriate level and striking an appropriate fee sharing arrangement between the participating provinces. If universal agreement on these matters seems unlikely, it might still be possible for the provinces to agree on a register-sharing arrangement. An alternative to a national register might be a system for data sharing between registers, under which information entered on a register in one province is automatically transmitted to other provincial registers. A system like this was adopted in Australia, pre-PPSA, to link the various state and territory registers of motor vehicle security interests.[15] On a somewhat different front, efforts could be renewed to bring the *Ontario PPSA* more closely into line with the other provincial PPSAs. Whatever costs might be involved in this move would almost certainly be outweighed by the benefits of achieving comprehensive uniformity. The difficulty of implementing these proposals should not be understated, but the obstacles are mostly political ones, and it is just possible that the Australian successes on this front might provide the inspiration for some action in Canada.

III SECURITY INTERESTS IN CASH COLLATERAL

Cash deposits are commonly used as collateral. For example, a bank may open a line of credit in a customer's favour on the basis that the customer, or a related party, deposits an agreed sum of money with the bank and gives the bank a security interest in the deposit to secure repayment of amounts outstanding from time to time under the line of credit.[16] But the use of cash collateral is also widespread outside the context of bank lending. For example, a utility company might require a customer to deposit a sum of money as security for the customer's obligations to pay its bills. Cash collateral may also be used to secure a party's obligations under a derivatives contract or a securities lending transaction.

Article 9 of the United States *Uniform Commercial Code*, as revised,[17] does not allow for perfection by registration of a security interest in a deposit account.[18] However, a secured party may perfect a security interest in a deposit account by

15 See Duggan and Brown, above n 5, 116 [6.11].

16 See, eg, *Caisse populaire Desjardins de l'Est de Drummond v Canada* [2009] 2 SCR 94 ('*Drummond*'). This type of transaction is commonly known as a 'charge back' arrangement. On the validity of charge backs, see *Re Bank of Credit and Commerce International SA [No 8]* [1998] AC 214, overruling *Re Charge Card Services Ltd* [1987] Ch 150. There is no Canadian authority directly on point, but *Drummond* proceeds on the assumption that charge backs are permissible.

17 *Uniform Commercial Code* art 9 (2010) ('*UCC*'). Article 9 was significantly revised in 1998.

18 Ibid § 9-312(b)(1). However, § 9-312(b) does not apply where a secured party holds a security interest in the deposit account as proceeds. Section 9-315(c) provides that a security interest in proceeds is a perfected security interest if the security interest in the original collateral was perfected. For example: SP holds a security interest in Debtor's inventory perfected by registration. Debtor sells inventory in the ordinary course of business and deposits the sale proceeds. SP's security interest extends to the deposit as proceeds of its original collateral and, applying § 9-315(c), the security interest, as it applies to the deposit, is perfected by the original registration.

taking control of the account.[19] In the case of a security interest taken by a secured party other than the deposit-taking institution itself (the bank), the secured party may obtain control either by becoming the bank's customer in respect of the deposit (account) or, alternatively, by entering into a control agreement under which the bank agrees to comply with the secured party's instructions directing disposition of the funds without the debtor's further consent. In the case of a security interest in the account taken by the bank itself, the security interest is automatically perfected by control; in other words, the bank obtains control simply by virtue of being the deposit-taking institution.[20] *UCC* § 9-327(1) provides that a security interest perfected by control has priority over a conflicting security interest held by a secured party that does not have control.[21] This rule applies even if the conflicting security interest is perfected by some other method and regardless of the order in which the conflicting security interests became perfected. Examples 2 and 3 below illustrate the application of these rules.

> **Example 2.** On Date 1, SP1 takes a security interest in all Debtor's present and after-acquired personal property and registers a financing statement. On Date 2, SP2 provides credit to Debtor on the security of a cash deposit and obtains control over the deposit on the same date. On Date 3, Debtor defaults against SP1 and SP2 and they both claim the deposit.

SP2 may be either the deposit-taking institution itself or a third party. This variable may affect the steps SP2 must take to obtain control on Date 2, but it does not affect the final outcome. Applying *UCC* § 9-312(b)(1), SP1's registration does not perfect its security interest in the deposit account and, since SP2's security interest is perfected by control, SP2 has priority over SP1. SP1 could have avoided this result by itself taking control of the account on Date 1 and parties in SP1's position can be expected to take this step if the account 'is an integral part of the credit decision'.[22] The official explanation for the rule, in its application to banks, is that it 'enables banks to extend credit to their depositors without the need to examine either the public record or their own records to determine whether another party might have a security interest in the deposit account'.[23] In other words, the purpose is to facilitate bank lending. The purpose of the rule in its

19 Ibid § 9-314.

20 Ibid § 9-104.

21 As a general rule, security interests perfected by control rank according to priority of time in obtaining control: ibid § 9-327(2). However, subject to § 9-327(4), a security interest held by the bank with which the deposit account is maintained has priority over a conflicting security interest held by another secured party: at § 9-327(3); and a security interest held by the bank with which the deposit account is maintained is subordinate to a security interest where the secured party has obtained control by becoming the bank's customer with respect to the account: at § 9-327(4).

22 American Law Institute and National Conference of Commissioners on Uniform State Laws, *Uniform Commercial Code: Official Text and Comments* (Thomson West, 2013), § 9-327: Official Comment [3]. To obtain priority over Bank, SP would need to obtain control of the account by becoming Bank's customer with respect to the account. That is, the account would have to be transferred into SP's name. The alternative way of obtaining control would be for SP to enter into a control agreement with Bank and Debtor, but this form of control will not give SP priority over Bank: *UCC* §§ 9-104 (a)(3), 9-327(3)–(4) (2010); see also above n 21.

23 American Law Institute and National Conference of Commissioners on Uniform State Laws, above n 22, § 9-327: Official Comment [4].

other applications is to facilitate transactions which depend on cash collateral, for example derivatives trading and securities lending. It does this by avoiding the need for parties to register and search in advance of the transaction and by enabling the party taking security to be sure of its priority position before committing itself to the transaction.

In Example 2, SP1 claimed the disputed account as part of its original collateral. But the result will be the same in cases where the claim is to the disputed account as proceeds, as in Example 3.

> **Example 3.** On Date 1, SP supplies Debtor with inventory on conditional sale terms and registers a financing statement. Debtor maintains an operating account with Bank. On Date 2, Bank opens a line of credit in Debtor's favour and takes a security interest in the account to secure repayment. On Date 3, Debtor having sold SP's inventory for cash, deposits the proceeds into the account. On Date 4, Debtor defaults against both SP and Bank. SP claims the Date 3 deposit as proceeds of the inventory while Bank claims the deposit as part of its original collateral.

Since SP is claiming the deposit as proceeds of its original collateral, *UCC* § 9-315(c) displaces § 9-312(b)(1), with the result that SP's Date 1 registration perfects its security interest in the deposit account.[24] However, Bank's security interest was automatically perfected by control and so, applying *UCC* § 9-327(1), Bank has priority over SP, even though Bank perfected its security interest later in time. According to the Official Comment, SP could avoid this outcome by requiring Debtor to deposit all inventory sale proceeds into a segregated account. But this precaution will not protect SP if Debtor breaches the agreement and pays the proceeds into the disputed account instead.[25]

The Canadian PPSAs currently make no provision for perfection by control of a security interest in a deposit account. A security interest in a deposit account may be perfected by registration and the ordinary first in time priority rule applies. The result is that in cases like Example 2, SP2 cannot obtain priority over SP1 except by negotiating a subordination agreement.[26] The same is true in cases like Example 3, and, given the special priority rules for purchase-money security interests, it would still be true even if Bank had taken and perfected its security interest ahead of SP.[27] Until recently, it was thought that banks and other deposit-taking institutions could avoid these outcomes by relying on the law of set-off as

24 See above n 18 and accompanying text.

25 American Law Institute and National Conference of Commissioners on Uniform State Laws, above n 22, § 9-327: Official Comment [4].

26 See, eg, *Ontario PPSA,* s 30(1).

27 A secured party holds a purchase-money security interest where, as in Example 3, the secured party provides finance to enable the debtor to acquire an item of property and takes a security interest in the item of property to secure repayment. See, eg, *Ontario PPA,* s 1(1) (definition of 'purchase-money security interest'). Subject to certain restrictions, a purchase-money security interest has priority over a prior perfected security interest in the same collateral (such as a security interest in all the debtor's present and after-acquired personal property): *Ontario PPSA,* s 33.

an alternative to claiming a security interest.[28] Banks have the right at common law to combine accounts, which is equivalent to a right of set-off. But a bank will not always be content to rely on the right of combination and it may insist on an express right of set-off in its agreement with the customer. The agreement may also include a promise by the customer to maintain (not to withdraw) the deposit so long as any amount is still owing to the bank under the loan agreement. This is commonly referred to as a 'flawed asset arrangement'. [29]

The bank's agreement with its customer may give the bank set-off rights in combination with a flawed asset arrangement and it may also, for good measure, give the bank a security interest in the relevant deposit account. This type of transaction is commonly referred to as a 'triple cocktail'. Historically, the law of set-off was distinct from the law of secured transactions and the conventional wisdom was that the triple cocktail allowed the bank to pick and choose its remedies depending on the circumstances. In particular, in a case like Example 3, a triple cocktail arrangement would allow Bank to avoid the application of the PPSA by relying on the first two ingredients of the arrangement rather than the third, and Bank's right of set-off would defeat SP unless SP had previously notified Bank of its security interest.[30] A right of set-off or combination combined with a flawed asset arrangement is functionally indistinguishable from a security interest in a deposit account. In both cases, the bank enforces its claim by helping itself to payment out of the deposit account. It follows that the difference between the various ingredients of the triple cocktail is a purely formal one and, in a legal regime which elevates substance over form, the distinction collapses.

The Supreme Court of Canada upturned the apple cart in *Drummond* by recognising the substantial equivalence of a contractual right of set-off exercisable against a flawed asset and a security interest.[31] The case involved a line of credit transaction between a credit union and its customer supported by a triple cocktail arrangement. The relevant terms were that: (1) the customer would deposit an agreed sum with the credit union; (2) the customer would maintain the deposit for a five year term; and (3) the credit union could set-off against the deposit any amount outstanding under the line of credit from time to time. The case was litigated in Quebec and the issue arose in the context of the federal *Income Tax*

28 See, eg, *Saskatchewan PPSA,* s 41(2), dealing with the competing claims of the assignee of an account (including a secured party holding a security interest in the account) and a party with set-off rights in the account.

29 See Duggan and Brown, above n 5, [3.14].

30 See Rory Derham, *Derham on the Law of Set-Off* (Oxford University Press, 4th ed, 2010), 829–30 [17.34] (legal and equitable set-off), 839–40 [17.54]–[17.57] (set-off agreement preceding notice), 842 [17.59] (set-off agreement after notice). In Example 3, the date before which SP must give notice is probably Date 2 (the date the line of credit is opened), but possibly Date 4 (the date Bank claims set-off).

31 [2009] 2 SCR 94.

Act.[32] Nevertheless, the decision has clear implications for the other provinces in the PPSA context because the PPSAs apply to 'every transaction without regard to its form … that in substance creates a security interest'.[33] On this basis, in a case like Example 3, assuming Bank's Date 2 agreement with Debtor involved a triple cocktail arrangement, it would make no difference whether Bank relied on its right of set-off or its security interest. Either way, the PPSA applies and Bank's claim is subordinate to SP's prior perfected security interest in the account.

Partly in response to *Drummond*, the Ontario Bar Association made a submission to the provincial government in February 2012 recommending new PPSA cash collateral provisions based on the *UCC* art 9 approach discussed above.[34] The government responded quickly with an announcement in its 2012 budget that it planned amending the PPSA 'to make it easier for businesses and financial institutions to provide or obtain a first-priority security interest in cash collateral'.[35] But the proposal subsequently encountered opposition on the ground that, in cases like Example 3 above, it would unfairly advantage banks and other deposit-taking institutions at the expense of inventory suppliers and accounts receivable financiers. In response to this concern, the government established an Expert Working Group (EWG) to provide further advice. An EWG sub-committee was set up to develop a compromise proposal, in other words, to identify a set of reforms that would facilitate the taking of security interests in cash collateral by deposit-taking institutions and others, while at the same time providing a measure of protection for inventory suppliers and accounts receivables financiers against loss of their proceeds claims. As a result of this process, there is now a compromise proposal on the table, but, at the time of writing, details had still not been made public and the government had not announced its intentions.

The Australian approach lies midway between the *UCC* art 9 and the Canadian PPSA approaches. The statute provides for perfection by control of a security interest in a deposit account (ADI account),[36] but only if the account is kept with an authorised deposit-taking institution (ADI).[37] Furthermore, only the ADI with which the account is maintained may perfect a security interest by control and

32 *Income Tax Act*, RSC 1985, c 1 ('*ITA*'). Section 227(4.1) of the *ITA* creates a deemed trust in favour of the Crown over property of an employer that has withheld income tax from payments to workers. The deemed trust secures the employer's obligation to remit the withheld amounts to the government. The deemed trust is expressed to have priority over any competing security interest. 'Security interest' is defined in s 224(1.3) to mean:

> any interest in … property that secures payment or performance of an obligation and includes an interest … created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for …

This provision is similar to the PPSA substance over form definition of security interest, hence the relevance of *Drummond* in the PPSA context.

33 See, eg, *Ontario PPSA,* s 2.

34 Ontario Bar Association, Submission to the Ontario Ministry of Consumer Services and Ministry of Finance, *Perfecting Security Interests in Cash Collateral,* 6 February 2012.

35 Ontario, Ministry of Finance, *2012 Ontario Budget: Budget Papers*, 55.

36 *Australian PPSA* ss 21(1), (2)(c)(i).

37 ADI has the same meaning as in the *Banking Act 1959* (Cth): *Australian PPSA* s 10 (definition of 'ADI'). ADIs, as defined in the *Banking Act*, include banks, credit unions, building societies and other authorised financial institutions.

it acquires control simply by virtue of being the ADI with which the account is kept.[38] A security interest in an ADI account held by a secured party other than the ADI itself may be perfected by registration.[39] However, a security interest perfected by control has priority over a competing security interest perfected by some other method.[40] The result is that 'a perfected security interest, held by an ADI, in an ADI account … has priority over any other perfected security interest in the ADI account'.[41] Applying these provisions to the facts of Example 3, Bank has priority over SP, even though SP was the first to perfect its security interest.[42] This is the same as the result under *UCC* § 9-327(1). *Australian PPSA* s 8(1)(d) provides that the statute does not apply to 'any right of set-off or combination of accounts'. But *Australian PPSA* s 12(2)(l) provides that, for the purposes of the statute, 'security interest' includes a flawed asset arrangement which in substance secures payment or performance of an obligation. These two provisions seem to send conflicting messages about the application of the statute to a *Drummond* scenario, where the transaction combines a flawed asset arrangement with contractual set-off rights, and in cases like this the courts will have to decide which provision takes precedence.[43] But the issue matters less in Australia than it does in Canada because even if the statute does apply, the deposit-taking institution will typically have priority anyway by virtue of the provisions discussed above. To protect itself against this outcome, SP must either require Debtor to deposit all sale proceeds in a segregated account or negotiate a subordination agreement with Bank. But both these measures increase SP's transaction costs and, in any event, they do not give SP watertight protection. The first measure will not protect SP if Debtor breaches the requirement and pays the sale proceeds into the disputed account instead; and the second measure depends on Bank's willingness to subordinate its security interest to SP.[44]

There is no provision in the Australian statute for perfection by control of a security interest in a cash deposit if the security interest is held by a party other than the deposit-taking institution itself. This means that in Example 2 above, assuming SP2 is a third party, the only way it can perfect its security interest

38 *Australian PPSA* s 25.

39 Ibid ss 21(1), (2)(a).

40 Ibid s 57(1).

41 Ibid s 75.

42 The Date 2 transaction between Bank and Debtor involves a charge back arrangement, but *Australian PPSA* ss 12(3A)–(4) validates charge backs and confirms the application of the statute to them. In a case like Example 3, the PPSA priority rules and the law of set-off both apply, with the result that Bank can rely on either. But, unlike set-off, the PPSA provisions give Bank priority even if Bank is aware on Date 2 of SP's security interest.

43 See Duggan and Brown, above n 5, [3.52]–[3.57].

44 Even though an ADI's security interest is perfected by control, it may still want to register a financing statement for the purpose of ensuring priority over preferred creditors. A security interest in circulating assets is subordinate to preferred claims: *Corporations Act 2001* (Cth) ss 433, 561; Duggan and Brown, above n 5 [13.21]. *Australian PPSA* s 340(2) provides that an asset is not a circulating asset if: (a) the secured party has registered a financing statement indicating that the secured party has control of the asset; and (b) the secured party does have control. Section 341A(1)(a)(i) provides that a secured party has control of an ADI account if the secured party is an ADI. In summary, to ensure priority against preferred creditors, it is not sufficient that the ADI has control over the ADI account; it must also register a financing statement indicating that it has control. However, this qualification does not affect cases like Example 3 in the text.

is by registering a financing statement and it will be subordinate to SP1's prior registered security interest. This is similar to the current position in Canada. In the Canadian debate over security interests in cash collateral, a (perhaps uneasy) consensus seems to be emerging that, while special priority rules might be needed to facilitate transactions which depend on cash collateral, any such reforms are potentially prejudicial to the proceeds claims of inventory and accounts financiers and so some protection for these parties should be built in. In the absence of any explanation on the public record, the thinking behind the Australian approach is harder to discern. The Australian approach strongly favours banks and other ADIs, but it is unclear why the same concessions were not extended to the derivatives industry, the securities industry and other industries where the use of cash collateral is widespread.[45] It is also unclear how much, if at all, the potential prejudice to inventory and accounts financiers figured in the development of the Australian ADI account provisions.

IV REGISTRATION ISSUES

The registration provisions in *Australian PPSA* ch 5 raise many interesting issues. The following discussion focuses on the registration requirements where the debtor (or 'grantor', to use the Australian terminology)[46] is an individual. The basic scheme is that where the collateral is serial numbered consumer property, for example a motor vehicle, the secured party must include the serial number in the financing statement,[47] but not the debtor's name ('grantor's details').[48] Where the collateral is serial numbered commercial property, for example, a truck, the financing statement must include the grantor's details and it may also include the serial number but the serial number is not mandatory.[49] Where the collateral is non-serial numbered consumer property, for example a sound system, or non-

45 *Australian PPSA* s 8(1)(d) provides that the statute does not apply to 'any right of set-off or combination of accounts'. Section 8(1)(e) provides that the statute does not apply to certain transactions referred to in s 5 of the *Payment Systems and Netting Act 1998* (Cth). These provisions, coupled with the fact that in many derivatives transactions, the counter-party is an ADI, may have been sufficient to address the derivatives industry's concerns. I am grateful to one of my anonymous referees for this observation.

46 *Australian PPSA* s 10 (definition of 'grantor').

47 Ibid s 153(1) item 4(b). 'Serial number' means a number as provided for in the regulations: s 10 (definition of 'serial number'). The regulations provide for description of the following types of property by serial number: aircraft; patents, trade marks and other types of intellectual property; motor vehicles; and watercraft: *Personal Property Securities Regulations 2010* (Cth) reg 5.5, sch 1 cl 2.2(1)(a). For motor vehicles, the serial number is typically the vehicle identification number (VIN).

48 *Australian PPSA* s 153(1) item 2(a). 'Consumer property' means personal property held by an individual other than personal property held to any degree for the purpose of carrying on a business: at s 10 (definition of 'consumer property')

49 Ibid s 153(1) item 2(c); *Personal Property Securities Regulations 2010* (Cth) reg 5.5, sch 1 cl 2.2(1)(b). 'Commercial property' means property other than consumer property: *Australian PPSA* s 10 (definition of 'commercial property'). As in Canada, the inclusion of the serial number is mandatory for consumer property but optional for equipment because it is common for a security interest to be taken in all the debtor's present and after-acquired equipment and at the time of registering its financing statement the secured party will have no way of knowing the serial numbers of its yet to be acquired equipment. This concern does not arise in consumer transactions because, as a general rule, the law prohibits security interests in after-acquired consumer property.

serial numbered commercial property, for example a printing press, the financing statement must include the grantor's details.[50] These requirements determine the options for register searches. Where the collateral is serial numbered consumer property, a searcher can only search the register against the collateral serial number and a debtor's name search is not possible. Conversely, where the collateral is non-serial numbered property, a searcher can only search the register against the debtor's name and serial number searching is not an option. Where the collateral is serial numbered commercial property, a searcher may search the register against the debtor's name or the collateral serial number. However, a searcher may want to conduct both types of search to guard against the risk that the secured party may not have included the serial number in the financing statement.

The corresponding requirements under the Canadian PPSAs are similar except that where the collateral is serial numbered consumer goods, such as a motor vehicle, the secured party must include in the financing statement both the debtor's name and the serial number. In most provinces, the statute provides that if the secured party omits or misstates either item, the registration is invalid.[51] There is no corresponding provision in the Ontario PPSA, where the statute states simply that a financing statement is invalid if it contains a materially misleading error.[52] In *Re Lambert*, the Ontario Court of Appeal interpreted this provision to mean that, while the omission or misstatement of the serial number would invalidate the financing statement even if the debtor's name was correctly stated, the converse proposition is not true.[53] In other words, the omission or misstatement of the debtor's name does not invalidate the financing statement if the serial number is correctly stated. The court's reasoning was that: (1) an error is materially misleading within the meaning of the statute only if it would be likely to mislead a reasonable searcher; (2) a reasonable searcher is a person who knows the ins and outs of the registration system; and (3) such a person would not rely on a debtor's name search alone and would conduct a serial number search as well to check for any security interest in the collateral that may have been created, not by the debtor, but by a predecessor in title.[54] The logical implication of the decision is that, in principle, a financing statement remains valid even if the secured party omits the debtor's name altogether, provided the serial number is correctly stated. In this respect, Ontario law approximates the Australian position.

In Canada, there has been quite an extensive policy debate on this issue which has been framed in terms of whether serial number searching should be seen as an alternative to debtor's name searching or merely a supplement.[55] One argument in support of the Ontario approach, as represented by *Re Lambert*, is that it may be difficult for register users to be sure of the debtor's correct name for registration

50 *Australian PPSA* s 153(1) items 2(b)–(c).

51 See, eg, *Saskatchewan PPSA,* s 43(7).

52 *Ontario PPSA,* s 46(4).

53 (1994) 20 OR (3d) 108, 124–5.

54 Ibid 120–2.

55 Ronald C C Cuming, Catherine Walsh and Roderick J Wood, *Personal Property Security Law* (Irwin Law, 2nd ed, 2012) 368.

and search purposes. A debtor may go by different names, for example the name on her birth certificate might be Gladys Mary O'Grady but she may call herself Mary O'Grady. Or the debtor might go by a nickname, for example Jack instead of John. Or if the debtor is married, she may use her maiden name for work purposes and her married name at home. In cases like this, which name should the secured party include in the financing statement? The question is important because, if the secured party writes one name in the financing statement and the searcher looks under another name, the search will not reveal the security interest. To address the problem, some of the Canadian provinces have prescribed by regulation a common set of debtor's name rules for the secured party and searcher to go by and these are discussed further below.[56] In the other jurisdictions the issue has been left to the courts. The proponents of the *Re Lambert* approach argue that: (1) verifying the debtor's correct name in accordance with the applicable legal rules is costly for register users; and (2) some register users may not be aware of the applicable legal rules.[57] One counter-argument is that not all searchers will have access to the collateral serial number, prospective execution creditors being the most obvious case in point.[58]

Interestingly enough, these considerations appear not to have featured in the shaping of the Australian approach, which instead was motivated primarily by privacy concerns. The objective was to keep an individual debtor's personal details off the register unless absolutely necessary.[59] The Australian approach can also be seen as a continuation of the approach taken in the pre-PPSA state laws governing registration of security interests in motor vehicles, which provided for registration and search against serial number, but not the debtor's name. In summary, consideration of the Australian approach suggests that at least one element may have been missing from the policy deliberations in both countries: the Australian lawmakers appear to have overlooked some searchers' needs, while privacy concerns have so far not featured prominently in the Canadian debate. On the other hand, it may simply be that privacy considerations loom larger in Australian public discourse than they do in Canada. In any event, while some Canadian commentators have argued that serial number searching is supplementary to debtor's name searching, the Australian comparison indicates that this is not necessarily true. There are competing policy considerations and there is room for different views as to where the trade-off between them should be struck.

As mentioned above, some of the Canadian provinces have adopted rules to assist in determining the debtor's correct name for registration and search purposes.

56 See also ibid 341–4.

57 See Jennifer E Babe, 'Vehicle Identification Numbers versus Debtor Names: We Can Improve Accuracy for PPSA and RDPRM Computer Databases' (2012) 27 *Banking and Finance Law Review* 585.

58 See Cuming, Walsh and Wood, above n 55, 368. See also Roderick J Wood, 'Registration Errors and Dual Search Criteria: *Gold Key Pontiac Buick (1984) Ltd v 464750 BC Ltd*' (2001) 35 *Canadian Business Law Journal* 146, 153–4; Roderick J Wood, 'Registration Errors under the OPPSA: *Lambert (Re)*' (1995) 24 *Canadian Business Law Journal* 444, 451–2; David L Denomme, 'Search Again? Names, Numbers and Reasonable Persons' (2001) 17 *Banking and Finance Law Review* 1, 28.

59 Replacement Explanatory Memorandum, Personal Property Securities Bill 2009 (Cth) [5.37].

In cascading order, the rules refer to the debtor's: (1) Canadian birth certificate; (2) Canadian passport; (3) current Canadian social insurance card; (4) current foreign passport; (5) Canadian citizenship certificate; (6) current Canadian visa; and (7) non-Canadian birth certificate.[60] Given that the debtor's Canadian birth certificate is the first item on the list, this is the test that will most commonly apply. The same is true in provinces which have not adopted these rules because the courts have held that the debtor's birth certificate is the primary point of reference for PPSA purposes.[61] Australia has dealt with the issue by regulation, following the approach described above. However, the main source document prescribed by the Australian regulations is not the debtor's birth certificate but their driver's licence.[62] The Australian provision is modelled on *UCC* § 9-503, as recently amended. The main argument in support of the driver's licence test over the birth certificate test is that consumers typically do not carry around their birth certificates when they go shopping. This means that under the birth certificate test, when a consumer purchases a large-ticket item on secured credit terms there may be a delay in completing the transaction while the consumer obtains a copy of their birth certificate to show the supplier; or the supplier may assume the risk that the name the consumer provides corresponds with the name as recorded on their birth certificate. By contrast, the driver's licence test facilitates immediate completion of the transaction and early delivery.[63]

The main disadvantage of the driver's licence test over the birth certificate test is that the debtor's name as recorded on their birth certificate is unlikely to change, whereas the debtor may change the name on their driver's licence and other documents. It follows that if a jurisdiction adopts the driver's licence test, it must also provide for the case where the debtor changes the name on their driver's licence between the date the secured party registers its financing statement and the date of the relevant register search. *Australian PPSA* s 166, provides for cases like this, in effect by giving the secured party a grace period to amend its financing statement after discovering the name change. The grace period runs for five years from the change or five days after the secured party obtains actual or constructive knowledge of the change, whichever is the earlier. In the meantime, the secured party's registration remains effective. This provision compromises the integrity of the register and it creates a trap for unwary searchers. To address this concern, the Australian Government has issued a fact sheet advising searchers to check the licence date of issue and, if it is relatively recent, to insist on seeing the previous licence.[64] But not all searchers will be aware of this advice and, in any event, the need to ask for the debtor's previous driver's licence undercuts the advantage of the driver's licence test relative to the birth certificate test. So, once again, there

60 See, eg, *Personal Property Security Regulation*, Alta Reg 95/2001, s 20(7).

61 See, eg, *Re Haasen* (1992) 8 OR (3rd) 489; *Canadian Imperial Bank of Commerce v Melnitzer* (1994) 6 PPSAC 5 (Ontario Court of Justice (General Division)), [168]–[176].

62 *Personal Property Securities Regulations 2010* (Cth) reg 5.5(1), sch 1 cl 1.2 item 3.

63 See Duggan and Brown, above n 5, [6.30].

64 Australian Financial Security Authority, *Searching the PPSR by Grantor — General Considerations*, Personal Property Securities Register <http://www.ppsr.gov.au/AsktheRegistrar/FactSheets/Documents/Searching%20the%20PPSR%20by%20grantor%20-%20general%20considerations.pdf>.

are competing policy considerations at stake — the birth certificate test maintains the integrity of the register but impedes consumer sales transactions, while the driver's licence test facilitates sales but compromises the integrity of the register. There may be room for different views about the relative costs and benefits of the two alternatives, but there is no indication on the public record that the Australian lawmakers consciously addressed the question. It has recently been suggested that the Canadian provinces should follow the Australian lead on this issue, but the suggestion does not factor in the attendant costs.[65]

IV CONCLUSION

The influence of *UCC* art 9 and the Canadian PPSAs continues to spread across the globe. In addition to the New Zealand and Australian developments, new secured transactions laws, based on the Canadian PPSA model, have been enacted in a number of common law jurisdictions, including Papua New Guinea, Tonga and several other Pacific Islands and also in Jersey, while in England and Wales there is an ongoing debate about the desirability of moving to the Article 9/PPSA model.[66] These developments open up exciting new possibilities for international information sharing and comparative scholarship and they provide the opportunity for countries to learn from each other's steps and missteps. This article has addressed selected differences between the Australian PPSA and its Canadian provincial counterparts with the aim of illustrating this point and in the hope of re-invigorating debate within both countries on some of the key issues in secured transactions law and law reform.

65 Babe, above n 57, 594–6.

66 See, eg, Duggan and Brown, above n 5, ch 16.