

FOREWORD

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Firstly, I would like to congratulate the *University of New South Wales Law Journal* for celebrating its 35th year in 2011. This authoritative, enduring and topical journal has made a significant contribution to academic debate over the years. The 2011 Thematic Edition of the *University of New South Wales Law Journal*, which takes its theme from the *Personal Property Securities Act 2009* ('PPSA'), continues this trend.

There has been significant intellectual effort from the authors of the articles in this edition to explain what the changes to the law on personal property securities will mean. As the Attorney-General, I am responsible for the PPSA and I am determined to ensure that business and consumers are prepared for the PPSA when it commences. The contents of this Thematic will unquestionably assist in that regard.

As the articles show, the PPSA significantly reforms personal property securities law. Under the PPSA a security interest is essentially defined as an interest in personal property that is provided for by a transaction that secures either payment or the performance of an obligation. In that context, this definition focuses on the function of an agreement

The concept of a 'security interest' and specifically, the 'in substance' test may seem relatively straightforward. But John Stumbles provides a thorough analysis of what these deceptively simple words mean. In doing so, he illustrates an important point; whilst most of personal property security reform is found in the PPSA and attendant regulations, to get the whole picture it is necessary to have regard to the significant changes made to other Commonwealth and State and Territory laws, the most notable being to the *Corporations Act 2001* (Cth). Diccon Loxton's article examining the application of the 'functional approach' to flawed asset arrangements identifies issues of potential debate as the reforms are implemented.

It will also be interesting to follow the development of personal property securities law and its interaction with other Australian law following the introduction of the PPSA. Jamie Glister's contribution explores the interaction of trusts and the PPSA whilst Robert Burrell and Michael Handler look at the impact of the new regime on trade marks.

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There are also valuable contributions on long held principles such as John Tarrant's examination of the fundamental question of what constitutes a property right and Justice Collier, Paul von Nessen and Alan Collier discussing the modification of the principle of *nemo dat quod non habet* in the context of retention of title clauses. In a similar vein, Sheelagh McCracken and Bruce Whittaker both examine the significance that possession plays under the *PPSA*.

To create the personal property securities regime, national cooperation was required. The Council of Australian Governments promoted this outcome as a part of its work to create a seamless national economy. National legislation was ultimately supported by referrals of power from the States.

As a result, the *PPSA* will be a single source of law on the creation, enforcement and priority of security interests and provides for the establishment of a single publically accessible electronic system for the registering of and searching for security interests in personal property. Registrations on a number of existing registers will be migrated to the new Personal Property Securities Register (PPS Register) before it begins operating so that it will become the single new register. Rebecca Hope examines the migration of transitional security interests from currently existing Commonwealth and State and Territory registers. This process is unique to the *PPSA*, and, as is examined in the article, has presented legislative and technical challenges.

Foreign experiences with personal property security laws could assist in the development of this jurisprudence in Australia. Anthony Duggan and Mike Gedye examine the Canadian and New Zealand equivalents of the *PPSA* respectively and highlight the significant conceptual change this reform will institute. As both authors acknowledge, although the Australian statute differs in some important respects from its international counterparts, Australian courts will be able to draw on the experiences of these jurisdictions in developing this new area of law.

Anyone who has picked up a copy of the *PPSA* will recognise that it is a substantial and detailed Act. For those working in the area of finance for example, much of this detail will quickly become familiar. However, it is important that those less familiar with the *PPSA*, particularly consumers and small to medium enterprises, have a more streamlined experience of the *PPSA*. A large part of achieving this outcome has been work on the development of the new PPS Register.

The PPS Register has been designed to be used by anyone. It takes users through a series of steps designed to guide them towards the issues they need to consider and the data they need to provide when making registrations or performing searches. It also provides help text, frequently asked questions, workflow overviews and confirmation pages along the way.

The *PPSA* goes to great lengths to manage transition to the new scheme so that existing business practices have time to adapt to the new system. However, developing the interface between the old laws and registers and the new single register necessarily involves compromises. There is a need to balance the interests of existing secured parties against those who are trying to determine whether particular property is subject to a security interest. It also demands

decisions about how to treat migrated registrations, which were not lodged with the *PPSA*'s requirements in mind, without disturbing existing rights.

I do note that parts of this Thematic are critical of some of the policy decisions that have been made as part of implementing the reforms and working towards a smooth transition. This is to be expected in the context of academic discourse and it reflects the high standards of legal analysis that this Journal provides.

However, what readers should take from these articles and their conclusions is a better understanding of the law on personal property securities under the *PPSA*. With these insights readers will be better placed to take advantage of the opportunities provided by the *PPSA*. I also anticipate that the efficiencies that will come from this microeconomic and legal harmonisation reform will be of great benefit to Australia.