

THE IMPACT OF THE PERSONAL PROPERTY SECURITIES ACT ON ASSIGNMENTS OF ACCOUNTS

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This article explores the regulation of 'deemed' security interests over personal property by the Personal Property Securities Act 2009 (Cth). A deemed security interest arises 'whether or not the transaction concerned, in substance, secures payment or the performance of an obligation'. The transfer of an 'account' is one type of deemed security interest. In this article, the author examines the impact of the PPSA on absolute transfers of accounts. Whilst the PPSA has by and large replaced the technical complexities of common law priority rules with rules which accord more with the commercial expectations of the parties, the common law rules are still important in some situations. This is especially so where the priority rule dispute is between a prior unperfected legal transfer of an account and a subsequent perfected transfer of the account. The examples of potential priority disputes discussed in this paper emphasise the importance of perfecting security interests and the impact that giving notice to the account debtors can have in preventing the value of the account from being diluted through set off and other claims arising between the transferor and the account debtor after the transfer.

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I INTRODUCTION

The *Personal Property Securities Act 2009* (Cth) ('*PPSA*') regulates both 'in substance' security interests and what have become known as 'deemed' security interests over personal property. An in substance security interest is 'an interest in personal property provided for by a transaction that, in substance, secures payment or performance of an obligation (without regard to the form of the transaction or the identity of the person who has title to the property).'¹ Section 12(2) of the *PPSA* lists 12 transactions as examples of in substance security interests, including the fixed charge and floating charge as well as an assignment and a transfer of title. The *PPSA* security interest also extends to other arrangements designed to secure the performance of an obligation but which, prior to the introduction of the *PPSA*, had not been traditionally regarded as security interests. Included in this category of security interest are conditional sale agreements and agreements to sell subject to retention of title arrangements.²

In contrast, the deemed security interest arises 'whether or not the transaction concerned, in substance, secures payment or the performance of an obligation'.³ The transfer of an 'account' is one species of deemed security interest.⁴ The drafters of the equivalent provisions in Article 9 of the original United States *Uniform Commercial Code* ('*UCC*'), from which s 12 of the *PPSA* is ultimately derived, intended that both security interests over accounts and absolute transfers of accounts be treated as security interests regulated by a common statute. In their view, a third party investigating dealings with

¹ *PPSA* s 12(1).

² The full list from *PPSA* s 12(2) is as follows: fixed charge, floating charge, chattel mortgage, conditional sale (including an agreement to sell subject to retention of title), hire purchase agreement, pledge, trust receipt, consignment, lease of goods, assignment, transfer of title and flawed asset arrangement.

³ *PPSA* s 12(3).

⁴ *Ibid* s 12(3)(a).

accounts would be unable to determine, without further inquiry, whether those dealings were by way of security or by way of an absolute disposition.⁵ A common treatment for each type of transaction eliminated the need for such a detailed investigation.

They also desired to create a mechanism for the public recording of dealings with accounts so that third parties could readily determine the existence of any prior interests over them. In the absence of any public recording of the transaction, a transferor could still represent that they owned the accounts, notwithstanding a prior dealing with that property.⁶ These same rationales continued to inform the drafting of Revised Article 9 published in 1999 by the National Conference of Commissioners on Uniform State Law and the American Law Institute ('Revised Article 9').⁷

In this article, the author explores the impact of the *PPSA* on absolute transfers of accounts (as distinct from transfers of accounts by way of security).⁸ The *PPSA* does not operate in a legal vacuum; its provisions are only engaged if there is an applicable transaction at general law, in this instance a 'transfer'. Thus, in order to provide a reference point for the discussion, Part II summarises the pre-*PPSA* law regulating transfers of legal choses in action of which an account is but one species. Because a transfer of an account is also a security interest for *PPSA* purposes, Part III considers the *PPSA*'s formal requirements relating to transfers of accounts in order to render them, in addition, fully effective security interests for *PPSA* purposes. Parts IV to VIII then consider the impact of the *PPSA*'s new priority rules in so far as they relate to successive transfers of accounts. Part IX contains some final observations.

The commercial relevance of these changes should not be underestimated. In a service economy, accounts constitute significant assets in the balance

⁵ UCC § 9-102(1)(b) cmt 14 (1994) ('UCC Comment 14'). See UCC § 9-109(a)(3) (2012), which incorporates 'Revised Article 9': see below n 8.

⁶ The incorporation of accounts into the definition of security interest was also intended to overcome the US Supreme Court decision in *Benedict v Ratner*, 268 US 353 (1925) which held that the equivalent of a floating charge over receivables was, where the security provider had unfettered freedom to deal with the proceeds of the receivables, a fraud on creditors and an unlawful preference. At the time of this decision, there was no mechanism under New York law for the public recording of such dealings. See also Grant Gilmore, *Security Interests in Personal Property* (Little, Brown and Company, 1965) vol 1, chs 6, 8.

⁷ This was the most recent significant amendment to Article 9 of the UCC. The sections of Revised Article 9 discussed in this article appear in the 2012 version of the UCC.

⁸ Although the article focuses on absolute transfers of accounts, many of its observations apply equally to transfers of accounts by way of security and to transfers of chattel paper, but note that the *PPSA* also has specific provisions dealing with chattel paper: see, eg, s 71.

sheets of many large corporations. Dealings with accounts, or book debts or receivables as they are known by some market participants, are important financing tools for firms and companies, whether the dealings are by way of the factoring of debts, securitisation of mortgaged debts, or the trading in the distressed debt of entities in financial difficulties. In varying ways, each of the participants in these commercial arrangements needs to consider whether it will be necessary to alter their traditional practices because of the PPSA.

II TRANSFERS OF ACCOUNTS UNDER PRE-PPSA LAW

Prior to the *Supreme Court of Judicature Act 1873* ('*Judicature Act*'),⁹ it was not possible to transfer a legal chose in action at law,¹⁰ even though long before that time, an assignment of a legal chose in action was recognised in equity.¹¹ In theory, this impediment was significant because the equitable owner was unable to sue on the chose in action at law. In practice, however, this difficulty was overcome by the equitable transferee obtaining from the transferor a power of attorney permitting the transferee to use the transferor's name in any enforcement proceedings. Even in the absence of a power of attorney, the transferee was still able to enforce the chose in action by joining the transferor in the action and seeking orders compelling the transferor to permit its name to be used therein, subject to the transferee indemnifying the transferor in respect of any associated costs or liabilities.¹²

Section 25(6) of the *Judicature Act* and its counterparts in the Australian states and territories¹³ recognise that a transfer of a debt or other legal chose in action complying with the statutory provisions is effective at law.¹⁴ Alt-

⁹ (Imp) 36 & 37 Vict, c 66.

¹⁰ In practice, there were some significant exceptions to this prohibition, including the law relating to negotiable instruments.

¹¹ See, eg, *Taliby v Official Receiver* (1888) 13 App Cas 523; *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1, 3 (Atkinson J).

¹² For an historical discussion of these and other modes of bypassing the restrictions on the assignment of legal assignment of choses in action, see *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9, 27 (Windeyer J).

¹³ *Civil Law (Property) Act 2006* (ACT) s 205; *Conveyancing Act 1919* (NSW) s 12; *Law of Property Act 2000* (NT) s 182; *Property Law Act 1974* (Qld) s 199; *Law of Property Act 1936* (SA) s 15; *Conveyancing and Law of Property Act 1884* (Tas) s 86; *Property Law Act 1958* (Vic) s 134; *Property Law Act 1969* (WA) s 20. In England, the provision may now be found in the *Law of Property Act 1925*, 15 Geo 5, c 20, s 136.

¹⁴ For example, *Conveyancing Act 1919 (No 6)* (NSW) s 12, provides in part as follows:

Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice

though not identical, the current Australian manifestations of this provision enable the transferee to sue upon a debt or other legal chose in action in its own name provided the following conditions in the subsection are satisfied:

- a) the subject matter of the transfer is a debt or other legal chose in action;
- b) the transfer is absolute and not by way of charge only;
- c) the transfer is in writing under the hand of the assignor; and
- d) the account debtor is given express written notice of the transfer.¹⁵

III TRANSFERS OF ACCOUNTS UNDER THE *PPSA*

This Part considers whether the relevant transaction by way of transfer of an account engages the *PPSA* and if so, what additional steps, if any, are required under the *PPSA* in order to ensure that the transfer is also an effective *PPSA* security interest if the transferee wishes to enforce its security interest against competing third parties claiming a competing interest over the account. It will be seen that in most cases the *PPSA* replicates many of the formal requirements of the pre-*PPSA* law. To that extent, the *PPSA* should not significantly alter many of the traditional practices used in relation to dealings with accounts. However, in a few cases, the *PPSA* imposes some additional requirements which will need to be satisfied in order for the transferee to obtain maximum protection under the statute as a security interest and avoid loss of priority. The following analysis assumes that the *PPSA* is applicable and that the requisite Australian nexus exists. Relevantly, the nexus exists if the transferor is an Australian entity or if the account is payable in Australia.¹⁶

in writing has been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor ...

¹⁵ The *Judicature Act* and its Australian counterparts use the word 'assignment' rather than the word 'transfer'. In deference to the language used in the *PPSA*, the writer uses the word 'transfer' and variants thereon. It is also suggested that the word 'transfer' describes more precisely the essence of a 'true assignment' as it involves the 'actual transfer of the right to performance': Greg Tolhurst, *The Assignment of Contractual Rights* (Hart Publishing, 2006) 39.

¹⁶ *PPSA* s 6(2)(c).

The analysis also assumes that none of the specific exceptions in s 8 of the *PPSA* applies.¹⁷

A Subject Matter: Section 12(3) of the PPSA Only Applies to Transfers of Debts and Choses in Action Which Are 'Accounts'

The *PPSA* defines an account as follows:

account means a monetary obligation (whether or not earned by performance, and, if payable in Australia, whether or not the person who owes the money is located in Australia) that arises from:

- (a) disposing of property (whether by sale, transfer, assignment, lease, licence or in any other way); or
- (b) granting a right, or providing services, in the ordinary course of a business of granting rights or providing services of that kind (whether or not the account debtor is the person to whom the right is granted or the services are provided);

but does not include any of the following:

- (a) an ADI account;
- (b) chattel paper;
- (c) an intermediated security;
- (d) an investment instrument;
- (e) a negotiable instrument.¹⁸

Prior to the operation of the *PPSA*, a charge over a 'book debt' was a registrable charge under former ch 2K of the *Corporations Act 2001* (Cth).¹⁹ That Act defined a book debt as a debt 'due or to become due ... on account of or

¹⁷ In relation to accounts, s 8(1)(f) of the *PPSA* excludes

an interest provided for by any of the following transactions: ... (vi) a transfer of an account made solely to facilitate the collection of the account on behalf of the person making the transfer; (vii) without limiting subparagraph (vi), a transfer of an account, if the transferee's sole purpose in acquiring the account is to collect it; (viii) a transfer of an account ... to satisfy (either wholly or partly) a pre-existing indebtedness; (ix) a sale of an account ... as part of a sale of a business, unless the seller remains in apparent control (within the ordinary meaning of the that term) of the business after the sale.

¹⁸ *PPSA* s 10 (definition of 'account').

¹⁹ *Corporations Act 2001* (Cth) s 262(1)(f), as repealed by *Personal Property Securities (Corporations and Other Amendments) Act 2010* (Cth) sch 1 item 18.

in connection with a profession, trade or business'.²⁰ The definition also extended to a future book debt.²¹ The word 'account' is wider than the older expression 'book debt.' At general law, a book debt was a debt

which in the ordinary course of business would be represented by entries in the books, such that the owner of the business can tell from them what moneys are to become payable, when they should be paid, and to what extent they are paid.²²

In recognition of the current age of electronic recording, the definition in the *PPSA* does not include this requirement.²³

The definition of 'account' in the *PPSA* owes its origins to the definitions of 'account' and 'account receivable' which may be found respectively in the progenitor legislation in Saskatchewan²⁴ and New Zealand.²⁵ Each of these definitions owes its ultimate origin to the definition of account in UCC § 9-106 (1962), and which may now be found in UCC § 9-102(a)(2) (2012). The New Zealand and Saskatchewan counterpart definitions refer simply to a monetary obligation. One New Zealand commentator has opined that the New Zealand definition of 'account receivable' is intended to have a wide operation and that "book debts" are a subset of, but not synonymous with, "accounts receivable".²⁶ The *PPSA* definition of account also refers to a monetary obligation. However, it qualifies this reference by linking the monetary obligation to the disposal of property or to the granting of a right or the provision of services in the ordinary course of business.²⁷ In this respect, the Australian definition is thus narrower than its offshore counterparts.²⁸

²⁰ Ibid s 262(4), as repealed by *Personal Property Securities (Corporations and Other Amendments) Act 2010* (Cth) sch 1 item 18.

²¹ Ibid.

²² William James Gough, *Company Charges* (Butterworths, 2nd ed, 1996) 678, citing *Re WF LeCornu Ltd Liquidator v Federal Traders Ltd* [1931] SASR 425, 440 (Piper J).

²³ Jacob S Ziegel and David L Denomme, *The Ontario Personal Property Security Act Commentary and Analysis* (Butterworths, 2nd ed, 2000) 7.

²⁴ *Personal Property Security Act 1993*, SS 1993, c P-6.2, s 2(1)(b) ('Saskatchewan PPSA').

²⁵ *Personal Property Securities Act 1999*, (NZ) s 16(1) (definition of 'account receivable') ('PPSA (NZ)').

²⁶ Mike Gedye, 'What is an "Account Receivable"?' (2009) 15 *New Zealand Business Law Quarterly* 168, 170-1.

²⁷ *PPSA* s 10 (definition of 'account').

²⁸ The definition may have been adopted as a consequence of the New Zealand decision in *Commissioner of Inland Revenue v Northshore Taverns Ltd (in liq)* (2009) 10 NZCLC 264, 436 [35] (Hole AJ) which limited the New Zealand definition of 'account receivable' to what

The example at the end of the definition states that ‘a credit card receivable is covered by paragraph (b)’ of the definition and this intention is confirmed by the Replacement Explanatory Memorandum.²⁹ It is arguable that a loan or the provision of financial accommodation does not constitute the provision of a service. In other contexts, existing case law confirms this conclusion.³⁰ Most forms of financial accommodation are accompanied or preceded by an agreement recording the facility’s terms which, subject to the terms of the agreement, result in the recipient of the facility having a right to receive the accommodation. If these circumstances subsist and unless one of the express qualifications to the definition applies, the monetary obligation derives ultimately from an anterior right thereby satisfying the words, ‘granting a right’ at the commencement of para (b) of the definition of account.

Although the definition applies to any ‘monetary obligation’ and encompasses most forms of legal chose in action which are ordinarily transferred or traded, the important exclusions in paras (c) to (g) of the Australian definition should not be overlooked.³¹ These exclusions further narrow the definition of account when compared with its New Zealand and Canadian counterparts. An ADI account is not an account.³² Furthermore, an account does not include an investment instrument, which is defined to include, amongst other matters, a ‘debenture’, which in turn is defined by reference to the definition of debenture in s 9 of the *Corporations Act 2001* (Cth). Relevantly, s 9 defines a debenture of a ‘body’ as a ‘chose in action that includes an undertaking by the

had been traditionally regarded as a book debt. Cf the subsequent New Zealand decisions: *Burns v Commissioner of Inland Revenue* [2011] NZHC 1363 [95] (10 August 2011) (Gendall AsJ); *Strategic Finance Ltd (in rec and in liq) v Bridgman* [2013] NZCA 357 (27 March 2013) [52] (White J for Arnold, Stevens and White JJ) which favoured a broad definition.

²⁹ For discussion of the word ‘account’, see Replacement Explanatory Memorandum, Personal Property Securities Bill 2009 (Cth) 6 (definition of ‘account’).

³⁰ Before 2007, in the context of the personal liability of a voluntary administrators, ‘services’ did not include the lending of money by a financier for services rendered: *Corporations Act 2001* (Cth) s 443A. Section 443A was amended in 2007 to address this issue by expressly stating that a voluntary administrator is personally liable for the repayment of money borrowed: see *Corporations Amendment (Insolvency) Act 2007* sch 4 item 60. See *Re Ansett Australia Ltd [No 1]* (2001) 115 FCR 376, 388 [45] (Goldberg J); *Re Spyglass Management Group Pty Ltd (admin apptd)* (2004) 51 ASCR 432, 433–4 [4] (Finkelstein J); *Re Carter; SFM Australasia Pty Ltd (admin apptd)* [2009] FCA 360 (16 April 2009).

³¹ PPSA s 10 (definition of ‘account’). The following forms of personal property are specifically excluded from the definition: an ADI account, chattel paper, an intermediated security, an investment instrument and a negotiable instrument.

³² PPSA s 10 defines ADI (an authorised deposit-taking institution under the *Banking Act 1959* (Cth)) and ADI account (an account with an ADI payable on demand or at an agreed future date).

body to repay as a debt money deposited with or lent to the body.’ However, this definition is not engaged if the loan is made as part of a lender’s ordinary business of lending money in circumstances where the borrower’s business does not include borrowing money and providing finance.³³ Thus, an apparently straightforward question as to whether a debt of a body corporate is an account for *PPSA* purposes does not necessarily produce an easy response and may result in a series of complex factual inquiries.³⁴

Care also needs to be exercised in identifying whether the subject matter of the dealing is an account or chattel paper. Chattel paper is a new concept under Australian law. The *PPSA* defines ‘chattel paper’ as

one or more writings that evidence a monetary obligation’ and either or both of the following:

- (a) a security interest in, or lease of, specific goods ... or an intellectual property licence ...
- (b) a security interest in specific intellectual property ...³⁵

The above definition is a relevant consideration if the subject matter of the transfer is lease receivables. As will be seen below, a transferee of lease receivables risks losing priority over those receivables to a person acquiring an interest in chattel paper.³⁶

Thus, the defined term ‘account’ is a subset of that category of relationships known as a legal chose in action. Furthermore, there is no indication in the definition excluding an account which is an equitable chose in action, such as

³³ The exclusion, in the definition of debenture in s 9 of the *Corporations Act 2001* (Cth), stipulates that a debenture does not include:

- (a) an undertaking to repay money deposited with or lent to the body by a person if:
 - (i) the person deposits or lends the money in the ordinary course of a business carried on by the person; and
 - (ii) the body receives the money in the ordinary course of carrying on a business that neither comprises nor forms part of a business of borrowing money and providing finance.

³⁴ The qualified application of the *PPSA* to loans may be compared with the broad definition of payment intangibles in Revised Article 9. Section 9-102(61) defines a ‘payment intangible’ to mean ‘a general intangible under which the account debtor’s principal obligation is a monetary obligation.’ Under § 9-309(3), a sale of a payment intangible is perfected when attachment takes place and without the need to file a financing statement. The failure to file may cause problems if the court construes the definition of payment intangible narrowly and a buyer fails to perfect by registration of a financing statement. See also Steven L Schwarcz, ‘Automatic Perfection of Sales of Payment Intangibles: A Trap for the Unwary’ (2007) 68 *Ohio State Law Journal* 273.

³⁵ *PPSA* s 10 (definition of ‘chattel paper’).

³⁶ *Ibid* s 71(2).

the pure equitable claim of a partner under a partnership.³⁷ Although the definition of 'account' in the *PPSA* extends beyond the traditional definition of 'book debt', the definition and its exclusions make it clear that the word 'account' does not extend to all forms of debts or other legal choses in action. If the definition is not engaged, then the *PPSA* is inapplicable to the absolute transfer. By way of contrast, these qualifications are inapplicable where a grantor grants an in substance security interest within s 12(1) of the *PPSA* which applies to any form of personal property unless one of the exclusions in s 8 is engaged.

B *The 'Transfer' of the Account: PPSA Applies to Legal and Equitable Transfers and Agreements to Transfer*

1 *Transfer and Assignment*

Section 12(3) of the *PPSA* is only engaged if there is a 'transfer' rather than the 'assignment' of the account whereas the statutory provisions based upon the *Judicature Act* refer to an 'assignment' of property. The *Personal Property Securities Act 1999* (NZ) also refers to a 'transfer' of an account as an example of a deemed security interest,³⁸ as do the equivalent Canadian provisions, albeit in a slightly different form.³⁹ One may speculate that the original Canadian drafter used the word 'transfer' to emphasise the unqualified nature of the assignment.⁴⁰ Is this difference in language significant? The *PPSA* uses the word 'assignment'⁴¹ in a narrower range of circumstances than those

³⁷ Australian dicta indicate that the counterpart to s 25(6) of the *Judicature Act* applies to equitable as well as legal choses in action: see *Federal Commissioner of Taxation v Everett* (1980) 143 CLR 440, 447 (Barwick CJ, Stephen, Mason and Wilson JJ).

³⁸ *PPSA* (NZ) s 17(1)(b).

³⁹ See, eg, *Ontario Personal Property Security Act*, RSO 1990, c P-10, s 1(1) ('*Ontario PPSA*') (definition of 'security interest'), 'the interest of a transferee of an account' and in s 2(1)(qq)(ii)(A) of the *Saskatchewan PPSA*, which states 'a transferee pursuant to a transfer of an account'.

⁴⁰ The definition of 'Security Interest' in UCC § 1-201(35) (2012) refers to a 'buyer of accounts' as if to further reinforce this point.

⁴¹ In the definition of 'account', the word assignment is used as one method for the disposal of property, where the disposal generates a payment obligation: *PPSA* s 10(a) (definition of 'account'). In *PPSA* s 12(2) the list of transactions treated as security interests includes those that may arise by 'assignment' and those which may arise by a 'transfer of title'. Section 262(3) states that an assignment of a security interest includes the creation of a security interest.

where it uses the word ‘transfer’⁴² but there appears to be no legal significance in the choice between ‘assignment’ and ‘transfer’, save that the word ‘transfer’ is used consistently in relation to an ‘account’. In any event, apart from emphasis, the different usage of the words may not be significant because the word is capable of wide import and ‘[i]n its day-to-day use (and in part as a legal concept) it is employed to describe the situation where a person parts with something in circumstances where the transferee obtains the exact same thing as that once held by the transferor.’⁴³

2 *Absolute and Not by Way of Charge*

The *Judicature Act* and its Australian equivalents do not apply to a charge but do apply to a transfer either absolute or by way of security.⁴⁴ Likewise, s 12(3)(a) of the *PPSA* is engaged only in relation to an absolute transfer of an account and does not extend to a charge over an account.⁴⁵

3 *Equitable Interests in Accounts and Equitable Transfers of Accounts*

If the *Judicature Act* or its Australian equivalents are not complied with, the dealing may create an equitable interest in an account. Thus, a transferee obtains an equitable interest in the account where the transfer is for value and in writing but where no notice of the transfer is given to the account debtor. Likewise, a voluntary assignment of an account is effective in equity where the transferor has done all that he or she has to do personally to effect the transfer and render it beyond recall.⁴⁶ In the case of a transfer of an account, this requirement is satisfied if the transferor executes a proper transfer instrument.

⁴² Without listing all the places where the word ‘transfer’ appears, relevant usage in the *PPSA*, of the word for present purposes occurs in relation to the exclusions in ss 8, 10 (definition of ‘account’ para (a)), 12(1) (‘Meaning of security interest’), 80 (‘Rights on Transfer of Account or Chattel Paper — Rights of Transferee and Account Debtor’), 81 (‘Rights on Transfer of Account or Chattel Paper — Contractual Restrictions and Prohibitions on Transfer’). The term is also used in s 10 (definition of ‘grantor’ para (d)): ‘a transferor of an account or chattel paper’.

⁴³ Tollhurst, above n 15, 36 (citations omitted).

⁴⁴ The transferor would have an equity of redemption if the transfer was by way of security. It is a question of construction as to whether a transfer or charge is created. See *Tancred v Delagoa Bay and East Africa Railway Co* (1889) 23 QBD 239, 241 (Denman J); *Durham Brothers v Robertson* [1898] 1 QB 765, 771 (Chitty LJ).

⁴⁵ If the transfer or charge was by way of an in substance security, then the transaction would be a security interest either under *PPSA* ss 12(2)(j) (as an assignment), 12(2)(k) (a transfer of title), or 12(2)(a) (a fixed charge).

⁴⁶ *Corin v Patton* (1990) 169 CLR 540, 559 (Mason CJ, Deane J), 564 (Brennan J), 582 (Deane J).

An equitable interest in an account may also arise if the arrangement is structured as an agreement for value to transfer, as distinct from an actual transfer, of an existing account. Moreover, a transfer for value of part of an account is also recognised in equity because it is not possible to transfer an ascertained part of a legal chose in action at law.⁴⁷

The Australian statutory provisions based on the *Judicature Act* also extend to the assignment of a future debt or chose in action.⁴⁸ If there is a purported transfer of a future debt or chose in action and the consideration for the transfer of the account has been paid or executed, then the transfer is regarded as a present agreement to transfer the future account. The transfer will be effective in equity once the transferor acquires the account satisfying the description in the transfer.⁴⁹ The same principle also applies if there is an agreement for value to transfer a future account as distinct from a purported transfer of a future account.⁵⁰ Additionally, the statutory provisions provide a statutory benchmark for determining what is sufficient for effecting a voluntary transfer of in equity of a legal chose in action.

For the purposes of the *PPSA*, the question is whether the reference to the word transfer in s 12(3)(a) of that Act encompasses both legal and equitable transfers of accounts, including agreements for value to transfer accounts. The question has a practical significance because of the wide variety of circumstances in which an equitable interest in an account may arise. For example, transfers of accounts forming part of a commercial securitisation are usually equitable rather than legal in nature.⁵¹ Section 254(1) of the *PPSA* states that the Act is intended to operate concurrently with other Commonwealth, state

⁴⁷ *Re Steel Wing Co Ltd* [1921] 1 Ch 349, 355, 357 (Lawrence J); *Williams v Atlantic Assurance Co Ltd* [1933] 1 KB 81, 100 (Greer LJ); *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9, 29 (Windeyer J). The assignment of an unascertained part of a chose in action is not an absolute assignment: see *Jones v Humphreys* [1902] 1 KB 10, 13 (Lord Alverstone CJ), 14 (Darling and Channell JJ).

⁴⁸ *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9, 21 (Windeyer J).

⁴⁹ *Tailby v Official Receiver* (1888) 13 App Cas 523, 531 (Lord Herschell), 533 (Lord Watson), 543 (Lord Macnaghten).

⁵⁰ *Holroyd v Marshall* (1862) 10 HLC 191, 212 (Lord Westbury LC). See also R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 4th ed, 2002) 249 [6.245].

⁵¹ This arises because transfers of accounts are often documented not as actual transfers of accounts but as agreements for value to transfer the accounts evidenced by a written offer which is accepted by conduct. In securitisations the transfers are also equitable because the account debtor is not normally notified of the transfer although notification may be given if an account debtor defaults.

or territory law as well as the general law.⁵² The general law ‘means the principles and rules of the common law and equity’.⁵³ The *PPSA* also adopts a ‘functional’ approach to the definition of a security interest. A transaction is treated as an in substance security interest under s 12(1) of the *PPSA* ‘without regard to the form of the transaction or the identity of the person who has title to the property.’ This approach in s 12(1) of the *PPSA* extends to s 12(3), which begins by stating that a security interest (referring back to s 12(1)) ‘also includes’ the other transactions elaborated in the balance of s 12(3). It is suggested that the reference to ‘transferee’ in s 12(3)(a) extends to equitable transfers of accounts and that this is consistent with the overall scheme of the legislation. If s 12(3)(a) only captured legal transfers of accounts, a significant number of dealings with accounts would fall outside the legislation because of the form of the dealing, rather than their substance, an outcome which would be contrary to its overall policy.⁵⁴ This conclusion is also confirmed by the reference in the definition of account to ‘whether or not earned by performance’.⁵⁵ This phrase is intended to make it clear

that the definition covers the assignment of future as well as present debts and of payment entitlements contingent on the account creditor meeting continuing obligations under the contract creating the entitlements.⁵⁶

Finally, the definition of security agreement in the *PPSA* provides further support for this conclusion.

Nevertheless, the word ‘transfer’ may still be subject to some limitations. For instance, would the word ‘transfer’ include a declaration of trust over an account? When the owner of an account declares a trust over the account, the orthodox view is that the owner impresses the account with a new equitable interest in favour of the named beneficiary, as distinct from transferring an equitable interest in the account to the beneficiary.⁵⁷ Thus, in the absence of

⁵² Section 254(1) of the *PPSA* provides as follows:

This Act is not intended to exclude or limit the operation of any of the following laws (a **concurrent law**), to the extent that the law is capable of operating concurrently with this Act: (a) a law of the Commonwealth (other than this Act); (b) a law of a State or Territory; (c) the general law.

⁵³ *PPSA* s 10 (definition of ‘general law’).

⁵⁴ This conclusion is further reinforced by the definition of security agreement discussed below.

⁵⁵ *PPSA* s 10 (definition of ‘account’).

⁵⁶ Ziegel and Denomme, above n 23, 7–8, commenting on the definition of ‘account’ in s 1(1) of the *Ontario PPSA*.

⁵⁷ Meagher, Heydon and Leeming, above n 50, 303–4 [7.200]–[7.215].

express language to that effect,⁵⁸ there is an argument that the word ‘transfer’ in s 12(3)(a) of the *PPSA* does not include the creation of a new interest by way of declaration of trust,⁵⁹ even though in other circumstances a trust may give rise to an in substance security interest, such as where the trust is intended to secure a coexisting debt obligation.⁶⁰ Although it is undesirable for the *PPSA* to extend to all trust arrangements, it is hard to justify this particular lacuna in the legislation, which is intended to look to the substance of an arrangement. This is because, in cases of an equitable transfer of an account or an agreement for value to transfer an account (to which, as indicated earlier, s 12(3)(a) does extend), the transferor holds the transferred property on trust for the transferee, at least where the consideration is executed.⁶¹ The authors of a leading Canadian personal property security text say that this type of trust is a security interest since ‘[c]onceptually, there is a notional transfer of the equitable interest from the creditor to the creditor as trustee.’⁶²

It should be emphasised that the writer is not denying that once a transaction constitutes a security interest within the statute, the form of the transaction is irrelevant and that all such security interests are accorded the same attributes,⁶³ irrespective of whether at general law the security interest vested in the transferee is legal or equitable.⁶⁴ However, in order to capture a declaration of trust, the court would need to give the word ‘transfer’ an extended meaning, notwithstanding the more specific references to ‘an assignment’ and to a ‘transfer of title’ in s 12(2) of the statute. In the absence of clearer language, a court may reluctantly refuse to make such an extension.

⁵⁸ Compare, for example, the definition of ‘disposition’ in s 7 of the *Conveyancing Act 1919* (NSW), which expressly includes a declaration of trust.

⁵⁹ See, eg, *Re Skybridge Holidays Inc* (1999) 173 DLR (4th) 333.

⁶⁰ *Stiassny v North Shore City Council* [2009] 1 NZLR 342, 350 [31] (William Young P).

⁶¹ The better view is that the trust is a form of constructive trust: see Tolhurst, above n 15, 339 [7.17]. However, note in the context of real property, the reservations as to the trust analysis in *Chang v Registrar of Titles* (1976) 137 CLR 177, 189–90 (Jacobs J).

⁶² Ronald C C Cumming, Catherine Walsh and Roderick J Wood, *Personal Property Security Law* (Irwin Law, 2nd ed, 2012) 157.

⁶³ However, a deemed security interest by way of a transfer of an account does not attract the enforcement attributes accorded an in substance security interest: *PPSA* s 109(1)(a). Furthermore, an unperfected deemed security interest by way of a transfer of an account is not subject to vesting in the event of bankruptcy, administration or liquidation: s 268(1)(a)(i).

⁶⁴ *Bank of Montreal v Innovation Credit Union* [2010] 3 SCR 3, 13–14 [18]–[19], 25 [42] (Charron J for McLachlin CJ and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ).

C Writing

Section 25(6) of the *Judicature Act* and its Australian counterparts require that the transfer be in writing ‘under the hand of the assignor’. These provisions do not stipulate the actual form of the writing nor require the use of certain words.⁶⁵ Even if writing is used, the transaction must evidence an intention to transfer the chose in action or debt and identify sufficiently the property that is the subject of the assignment and the assignee.

In order for an absolute transfer of an account to be fully effective against competing third parties as a *PPSA* security interest, as distinct from effectiveness at general law, the interest of the transferee must attach, be enforceable against third parties, and be perfected.⁶⁶ The attachment requirement is satisfied if the transferor has rights in the account or the power to transfer the account. In addition, either value must be given for the transfer or the transferor must do ‘an act by which the security interest arises’.⁶⁷ In order for the transfer to be binding on third parties, the transfer must also be evidenced in writing.⁶⁸ For *PPSA* purposes, an entirely oral transfer of an account is only effective as a security interest between the parties and does not bind third parties. Furthermore, the writing must satisfy the more specific, prescriptive requirements contained in the statute,⁶⁹ unlike the more flexible descriptive requirements found in the pre-*PPSA* regime.⁷⁰

The pre-*PPSA* statutory requirements stipulate that, to be effective at law, there must be an actual written transfer of the chose in action or debt; an

⁶⁵ See, eg, *Re Westerton; Public Trustee v Gray* [1919] 2 Ch 104 where a document stating:

Dear Mrs Gray, — You have been very kind to me, and I desire to make some return by giving you the amount of 500*l* now on deposit at the London County and Westminster Bank, as per receipt enclosed. Yours gratefully, H G Westerton Feb 27, 1915

was found to satisfy the requirements of s 25(6) of the *Judicature Act*. Notwithstanding that the statutory provision refers to ‘by writing under the hand of the assignor’. The better view is that an agent of the assignor may execute the document: see Tolhurst, above n 15, 363. But see Marcus Smith, *The Law of Assignment: The Creation and Transfer of Choses in Action* (Oxford University Press, 2007) 277.

⁶⁶ *PPSA* ss 19–20. For dealings with accounts, perfection is by the registration of a financing statement, a process discussed further below.

⁶⁷ *Ibid* s 19(2)(b)(ii).

⁶⁸ *Ibid* s 20. As an alternative to satisfying the requirement as to writing, s 20(1)(b)(iii) does contemplate the secured party obtaining possession or control of the collateral. But as an account is a form of chose in action, possession is not possible and an account is not a form of property which may be controlled: see s 21(2)(c), which does not include an account as a kind of property which may be controlled.

⁶⁹ *PPSA* s 20(2)(b).

⁷⁰ See above Part II.

agreement to transfer would not satisfy this requirement.⁷¹ In contrast, the *PPSA* only stipulates that for *PPSA* purposes, there must be a 'security agreement', 'evidenced' by writing which is either signed by the transferor or adopted or accepted⁷² by the transferor. The term 'security agreement' is very wide and, in contrast with the pre-*PPSA* requirements, would be satisfied even though there is no actual instrument of transfer.⁷³ However, unlike the pre-*PPSA* law, the writing requirement is more specific.⁷⁴

Thus, for the purposes of the *PPSA*, a purely oral agreement for value to transfer an account to a transferee, whilst effective in equity between the transferor and transferee, would not bind third parties who also claim an interest in the account, unless the *PPSA*'s specific writing requirements are satisfied.⁷⁵

A written offer signed or adopted by the transferor and satisfying the *PPSA*'s requirements as to description evidences a security agreement formed on the acceptance of the offer. Even though a security agreement formed by conduct is partly oral and partly written, the *PPSA* does not require all of the security agreement to be in writing⁷⁶ so long as the written offer satisfies the mandatory requirements in s 20(2) of the statute. Further support for this conclusion may be found by analogy to case law which has considered the

⁷¹ *Ibid.*

⁷² *PPSA* s 20(2)(a). In using the alternatives of 'signed', 'adopted' or 'accepted', the *PPSA* has followed in substance the more flexible approach found in the *PPSA* (NZ) s 36(1)(b) and UCC § 9-203(b)(3)(A) (2012), which require the agreement to be 'authenticated'. See UCC § 9-102(a)(7) (2012) for the broad definition of 'authenticate'. This contrasts with the Canadian personal property statutes which require that the security agreement to be 'signed': see, eg, *Ontario PPSA* s 11(2)(a); *Saskatchewan PPSA* s 10(1)(b). Non-compliance with the Canadian requirement for a signature has generated significant case law in Canada: see Cuming, Walsh and Wood, above n 62, 269.

⁷³ A security agreement includes an agreement or act whereby a security agreement is created or writing evidencing such an agreement. Note also the wide definition of 'writing': *PPSA* s 10 (definition of 'writing'). A security agreement also includes an act whereby a security interest is created but this is not relevant for dealings with accounts which under the statute are incapable of being possessed or controlled: see ss 20–21(2).

⁷⁴ There are three alternatives: (1) a description of the particular account; (2) a statement that the transfer covers all of the transferor's present and after-acquired property; or (3) a statement that the transfer covers all of the transferor's present and after-acquired property subject to certain exceptions: *PPSA* s 20(2)(b). In practice, these requirements are not difficult to satisfy.

⁷⁵ *Dunphy v Sleepyhead Manufacturing Co Ltd* [2007] 3 NZLR 602 (a liquidator was not treated as a third party for purposes of the *PPSA* (NZ)). Note that for in substance security interests, the New Zealand legislation does not have the equivalent of *PPSA* s 267.

⁷⁶ See also *Re Kodiak Energy Service Ltd* (1996) 9 PPSAC (3d) 1.

writing requirements of the *Statute of Frauds*⁷⁷ to the effect that a signed offer, subsequently accepted by conduct, is a sufficient memorandum of an agreement required to be evidenced in writing.⁷⁸ Thus, securitisations effected by a written offer accepted by conduct would be sufficient for PPSA purposes.

D Notice: the PPSA's Additional Requirements

1 The Content of the Notice

Under the general law, a notice to the account debtor after the transfer completes the transaction at law and informs the account debtor of the identity of the person to whom it should pay the account in order to obtain a proper discharge.⁷⁹ Notices may also be given of an equitable transfer of an account and may require the account debtor to interplead to avoid any risk paying the incorrect owner.⁸⁰ The notice is effective upon its receipt by the account debtor.⁸¹

Although the general law provisions permitting statutory assignments do not prescribe a particular form of notice, the notice must still be drafted in such a way that the account debtor is able to identify the person to whom it is to make future payments. In determining the adequacy of notice given to an account debtor, regard is given to the surrounding circumstances, including the knowledge of the account debtor.⁸² As a minimum requirement, a notice given under the general law must identify the property the subject of the transfer, state that the property has been transferred, and name the transferee.⁸³ The notice is invalid if it misstates the amount due or the date of the

⁷⁷ 29 Car 2, c 3 (1677). See generally *O'Young v Walter Reid & Co Ltd* (1932) 47 CLR 497; *Reuss v Picksley* (1866) LR 1 Ex 342. These authorities should be treated with some care as the significance of the writing requirement differs for each statute. Under the PPSA, a failure to satisfy the writing requirements does not affect the transaction as between the parties but is only relevant for enforceability against third parties: ss 19–20. Under the *Statute of Frauds* a failure to satisfy the evidentiary writing requirements affects the dealing as between the parties.

⁷⁸ This conclusion is reinforced by the definition of a security agreement in s 10 of the PPSA, which is defined as either the actual agreement whereby the security interest is created or writing evidencing such an agreement.

⁷⁹ *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1, 4 (Atkinson J).

⁸⁰ See R M Goode, 'The Effect of a Fixed Charge on a Debt' [1984] *Journal of Business Law* 172.

⁸¹ *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1, 6 (Atkinson J); *Walker v Bradford Old Bank Ltd* (1884) 12 QBD 511, 517 (Williams and Smith JJ).

⁸² *Smith v Owners of the SS Zigurds* [1934] AC 209, 212–13 (Lord Atkin).

⁸³ See *Denney v Conklin* [1913] 3 KB 177, 180 (Aitken J):

assignment.⁸⁴ It is unclear whether a notice given under the pre-PPSA law should contain a direction to the account debtor to pay the debt to the transferee, but it appears that this is not essential.⁸⁵

Under the PPSA, an account debtor may continue to make payments to the transferor of the account until it receives a notice that:

- (i) states the amount payable or to become payable under the contract has been transferred; and
- (ii) states that payment is to be made to the transferee; and
- (iii) identifies the contract (whether specifically or by class) under which the amount payable is to become payable.⁸⁶

Thus under the PPSA, the notice must state that future payments are to be made to the transferee. Apart from this requirement, the PPSA restates the position at general law.⁸⁷ A similar provision appears in Saskatchewan but is not found in the New Zealand legislation.⁸⁸ The counterpart US provision is found in UCC § 9-406(a). The requirement that the notice contains a provision directing that payments are to be made to the transferee is not difficult to satisfy. However, notices of transfers of accounts given prior to the commencement of the PPSA, which do not contain a direction requiring that payment be made to the transferee, may prove to be ineffective for PPSA purposes.⁸⁹

In a manner similar to the general law, the PPSA notice requirement is not satisfied if it incorrectly describes or fails to properly identify the subject

The letter in question gives express notice to the defendant of the deed of arrangement, which as I have said is an absolute assignment. It may be that the section is not complied with unless the notice further proceeds to bring to the notice of the debtor with reasonable certainty the fact that the deed does assign the debt due from the debtor so as to bind the debt in his hands and prevent him from paying the debt to the original creditor.

See also Tolhurst, above n 15, 364–7 [7.38].

⁸⁴ *WF Harrison & Co Ltd v Burke* [1956] 1 WLR 419, 421 (Denning LJ); *Stanley v English Fibres Industries Ltd* (1899) 68 LJQB 839, 840 (Ridley J).

⁸⁵ Louise Gullifer (ed), *Goode on Legal Problems of Credit and Security* (Sweet & Maxwell, 4th ed, 2008) 104 [3.14] n 51, citing *Van Lynn Developments Ltd v Pelias Construction Co Ltd* [1969] 1 QB 607, 615 (Widgery LJ).

⁸⁶ PPSA s 80(7)(a).

⁸⁷ See, eg, *Brice v Bannister* (1878) 3 QBD 569.

⁸⁸ *Saskatchewan PPSA* s 41(7). In the *Ontario PPSA*, the requirement appears to be implicit: see s 40(2). In New Zealand, s 130 of the *Property Law Act 1952* (NZ) remains the only provision dealing with notice to the account debtor.

⁸⁹ This is a possible example of the retroactive operation of the PPSA in circumstances where the PPSA prevails over existing law where each is incapable of operating concurrently: s 254(3).

matter of the transfer.⁹⁰ In the US, courts have construed the equivalent provisions strictly in favour of the account debtor.⁹¹ It has also been suggested that the notice ‘must be given at such a time and place and be so phrased as to be intelligible to the obligor’.⁹²

Under the general law, the notice of transfer may be given by either the transferor or the transferee.⁹³ Under the *PPSA*, the identity of the giver of the notice is significant. If the notice is given by the transferee, as distinct from the transferor, the account debtor is entitled to require proof of the transfer.⁹⁴ If the proof is not provided within five business days of the request, the account debtor may continue to make payments on the due date to the transferor.⁹⁵ In making payment to a transferee of an account, an account debtor is only discharged if it has received a notice of transfer which satisfies the particular requirements of the statute. A payment pursuant to a defective notice would not discharge the account debtor.⁹⁶ In these circumstances, a notice from the transferor is to be preferred. The principle purpose of the s 80(7) notice is to direct the payment of the moneys to the transferee rather than to complete any transfer at law. In practice, it is likely that one notice will be given to complete the transfer at law as well as to obtain the benefit of s 80(7) of the *PPSA*.

⁹⁰ *PPSA* s 80(7). See UCC § 9-406(b)(1) (2012), the progenitor of s 80(7) stipulates reasonable identification. It is suggested that identification depends in part on the circumstances of the account debtor and that a large corporation or government may be justified in asking for an intelligible notice which facilitates the identification of the account: see Ziegel and Denomme, above n 23, 331–2.

⁹¹ See Ziegel and Denomme, above n 23, 331–2 n 19 for the relevant US authorities. Unlike the *PPSA*, the US provision requires the notice to ‘reasonably identify’ the account. However, it is suggested that the absence of these words in the Act does not alter the substantive test in the statute.

⁹² *Ibid* 332, citing *Warrington v Dawson*, 798 F 2d 1533 (5th Cir, 1986) at n 20 — a US case where notice was found to be inadequate when given to a crop duster while on a tractor in the middle of a field. In this respect, the principles are reminiscent of cases considering notices under s 12 or its equivalent when the circumstances in which the notice is given are taken into account: see, eg, *Smith v Owners of the SS Ziguards* [1934] AC 209.

⁹³ See *Walker v Bradford Old Bank Ltd* (1884) 12 QBD 511, 517 (Williams and Smith JJ).

⁹⁴ *PPSA* s 80(7)(b). Conformably with the pre-*PPSA* law, note the recognition in the *PPSA* that either the transferor or the transferee may give the notice.

⁹⁵ *Ibid*.

⁹⁶ The latter circumstance is also an example where the *PPSA* prevails over the statutory provisions based on the *Judicature Act* since the respective provisions are not capable of operating concurrently: *PPSA* s 254. Cases may arise where the notice may satisfy the pre-*PPSA* statutory requirements but not those of the *PPSA*.

2 *The Notice and Existing 'Equities' between Transferor and Account Debtor*

In a manner substantially replicating the general law, a legal or equitable transfer of an account is subject to any contract between the transferor and the account debtor and to any 'equity, defence, remedy or claim' or rights of set off, which the account debtor may have against the transferor, including any defences, claims or rights of set off accruing up until the time when a payment to the transferor no longer discharges the account debtor; that is, until the account debtor receives a properly drafted notice of transfer.⁹⁷ Since the PPSA preserves the concurrent operation of the general law, it is likely that the transferee's rights are, in any event, subject to any rights of set off arising after receipt of a valid notice, but inextricably linked or arising out of dealings between the account debtor or the transferor prior to receipt of an effective s 80(7) notice.⁹⁸ This provision is subject to any agreement by the account debtor not to assert any defence or claim,⁹⁹ again replicating the general law position.¹⁰⁰

3 *Modification of Contract after Notice*

At general law, it is not possible for the transferor and account debtor to modify the contract between them relating to the account after the receipt of the notice of transfer.¹⁰¹ Section 80(3) of the PPSA now permits the transferor and the account debtor to modify any contract relating to the transferred account even after receipt of a notice of transfer, unless the account debtor has agreed with the transferee not to do so.¹⁰² Modification is only permitted if the right to payment 'has not been fully earned by performance'.¹⁰³ If a permitted

⁹⁷ PPSA ss 80(1)–(8).

⁹⁸ *Newfoundland v Newfoundland Railway Co* (1888) 13 App Cas 199, 212–13 (Lord Hobhouse for Lords Hobhouse, Fitzgerald, Sir Barnes Peacock and Sir Richard Couch); *Business Computers Ltd v Anglo-African Leasing Ltd* [1977] 1 WLR 578, 584–5 (Templeman J).

⁹⁹ PPSA s 80(2).

¹⁰⁰ *Hong Kong and Shanghai Banking Corporation v Kloeckner & Co AG* [1990] 2 QB 514, 521 (Hirst J).

¹⁰¹ *Brice v Bannister* (1878) 3 QBD 569, 581 (Bramwell LJ).

¹⁰² PPSA s 80(3) states that any modification is only effective against the transferee if:

- (a) the account debtor and the transferor have acted honestly in modifying or substituting the contract; and
- (b) the manner in which the modification or the substitution is made is commercially reasonable; and
- (c) the modification or substitution does not have a material adverse effect on: (i) the transferee's rights under the contract; or (ii) the transferor's ability to perform the contract.

modification is made, the transferee succeeds to 'rights that correspond to the rights of the transferor under the contract as modified or substituted.'¹⁰⁴

4 *Ongoing Significance of Notice to the Account Debtor: Enforcement*

Notice to the account debtor of the transfer of a presently existing account completes the transfer at law. Apart from preventing the generation of fresh set offs between the transferor and account debtor, notice to the account debtor of an absolute transfer of an account also remains relevant for recovery purposes. A legal or equitable transferee of an account by way of an in substance security obtains the benefit of the enforcement regime in ch 4 of the *PPSA*, even though a notice of the transfer may not have been given to the account debtor to complete the transfer at law.¹⁰⁵ In contrast, a deemed security interest by way of the absolute transfer of an account is expressly excluded from the ch 4 enforcement regime,¹⁰⁶ with the consequence that, as under the general law, a written notice must be given to the account debtor before the transferee is able to deal with the account at law. Moreover, where the ownership interest in the account derives from an agreement as distinct from a transfer, the equitable owner of the account also needs to execute an actual transfer of the account unless it intends to enforce in the transferor's name. In this respect, the *PPSA* has not modified the pre-*PPSA* law.

¹⁰³ Ibid s 80(4)(a).

¹⁰⁴ Ibid s 80(5).

¹⁰⁵ Chapter 4 of the *PPSA* contains the enforcement provisions for in substance security interests, including in substance security interests over accounts. Under ch 4, notice to the account debtor constitutes an enforcement mechanism over the account. Section 120 of the *PPSA* envisages recovery under an in substance security interest over accounts and chattel paper by giving notice to the account debtor. However, in contrast to the pre-*PPSA* law, s 120 applies equally to legal transfers as well as equitable transfers by way of an agreement to transfer and in this respect is consistent with the *PPSA*'s approach of ignoring any differences between legal and equitable rights. In this sense, the *PPSA* permits the direct enforcement at law of an in substance security interest over an account which would be regarded as equitable at general law.

¹⁰⁶ *PPSA* s 109(1)(a). This provision also excludes deemed security interests over chattel paper. These examples are salutary reminders of the need to be alert to those provisions of the *PPSA* which are inapplicable to deemed security interests.

IV THE NEW PRIORITY RULES

A *Are the Taking Free Rules Relevant Where There Are Successive Absolute Transfers of Accounts?*

This preliminary inquiry is necessary because if a transferee of an account acquires the account free of any existing security interest, no priority issue arises. Part 2.5 of the *PPSA* sets out the circumstances in which a buyer or lessee of personal property takes free of any existing security interest. Section 42(b) states that pt 2.5 of the *PPSA* 'does not apply to the acquisition of an interest in personal property free of a security interest if the interest that is taken is itself a security interest'.¹⁰⁷ By way of exception to this rule, a second transferee takes free of an existing security interest where the subsequent security interest is over an investment instrument or an intermediated security¹⁰⁸ or where the first transferor 'expressly or impliedly authorised' the subsequent transfer of the account in accordance with s 32(1)(a)(i) of the *PPSA*. Thus, the *PPSA*'s new priority rules operate on transfers of accounts and their impact is significant.

B *Transfers of Accounts and the Pre-PPSA Priority Rules*

To provide a context for the discussion, a brief summary of the priority position under the pre-*PPSA* law is provided. First, a priority dispute between a prior legal transferee of an account and a subsequent equitable transferee does not usually arise. This outcome is an application of the rule that a person is unable to pass to the transferee a title better than that which the transferor possesses (*nemo dat quod non habet*). However, there are at least four circumstances where the subsequent equitable transferee may prevail because of the conduct of the prior legal transferee.¹⁰⁹

¹⁰⁷ This appears to be a uniquely Australian provision; there appears to be no equivalent provision in the *Ontario PPSA*, the *Saskatchewan PPSA* or the *PPSA (NZ)*. However, the principle is probably implicit in those jurisdictions as, in most instances, their taking free rules would not be engaged in the context of dealings with accounts in any event.

¹⁰⁸ *PPSA* ss 42(b), 50-1. There are rough but not identical equivalents for these exceptions in overseas jurisdictions: see, eg, *PPSA (NZ)* s 28(4).

¹⁰⁹ Meagher, Heydon and Leeming, above n 50, 336-7 [8.220] where the authors identify the following four circumstances: (a) where the legal owner himself creates the subsequent interest; (b) the legal owner fraudulently 'connives' in the creation of the subsequent interest; (c) failure by the legal owner to get in any relevant title documents; (d) where legal owner gives a third party authority to deal with the property and the third party exceeds that authority.

Where there are successive equitable transfers of an account, the priority of the claims of the successive transferees to the account is determined by the order of the transfers (*'qui prior est tempore potior est jure'*).

In relation to successive transfers of a chose in action such as an account, the first in time principle is subject to a specific exception flowing from the rule in *Dearle v Hall*.¹¹⁰ Under that rule, priority is determined not by the order in which the successive transfers are made, but by the order in which notice of the transfer is given to the account debtor. By way of qualification, a transferee for value of an account who has actual or constructive notice of an earlier transfer when they acquire the account or provide the consideration for the transfer will not obtain priority by giving a prior notice to the account debtor.¹¹¹ If a transferee wishes to ensure that it has a legal interest in an account, the transfer of the account must satisfy the writing and notice requirements discussed earlier. The giving of a notice for these purposes would ordinarily also satisfy the notice requirement for the priority rule in *Dearle v Hall*.

C Replacement of the Rule in *Dearle v Hall*

The actual application of the pre-PPSA priority rules in relation to successive transfers of accounts has proven to be excessively complex and technical. It has been said that the rule in *'Dearle v Hall* is not only harsh and inconvenient to the receivables financier, but also hard to justify, and in need of reform.¹¹² Although not its main focus, the PPSA has replaced the rule in *Dearle v Hall* with the following default priority rules:¹¹³

- 1 Priority between two *unperfected* security interests is determined by the order of attachment of the security interests.¹¹⁴ As mentioned earlier, at-

¹¹⁰ (1828) 3 Russ 1; 38 ER 475.

¹¹¹ Under pre-PPSA law, a notice in respect of a charge over a book debt, as distinct from an absolute assignment of a book debt, had to be lodged at the Australian Securities and Investments Commission in order for it to be valid against a liquidator or an administrator of the chargor: see *Corporations Act 2001* (Cth) ss 262(1)(f), 266 as repealed by *Personal Property Securities (Corporations and Other Amendments) Act 2010* (Cth) sch 1 item 18. As a consequence of *Corporations Act 2001* (Cth) s 130(2), registration of a charge may have constituted notice to a subsequent charge of the book debts with the result that the qualification to the rule in *Dearle v Hall* may have applied. Note the preservation of s 130(2) for pre-PPSA registrable charges: *Corporations Act 2001* (Cth) s 1501B.

¹¹² Fidelis Oditah, *Legal Aspects of Receivables Financing* (Sweet & Maxwell, 1991) 142 [6.6].

¹¹³ Note that a subordination agreement may alter the application of the default rules: PPSA s 61.

¹¹⁴ PPSA s 55(2).

tachment occurs when the grantor has rights in the collateral (or the power to transfer rights in the collateral) and value is given for the transfer or the transferor does an act whereby the security interest arises such as the execution of a document transferring an account to the transferee.¹¹⁵

- 2 A *perfected* security interest over an account has priority over an *unperfected* security interest in the same account.¹¹⁶ It is only possible to perfect a transfer of an account by the registration of an appropriately drafted financing statement.¹¹⁷
- 3 Priority between two *perfected* security interests over an account is determined by the order in which the *priority time* for each security interest occurs.¹¹⁸

Thus, the priority between two transferees of an account is no longer determined by the order in which notice of a transfer is given to an account debtor but by the rules set out above.¹¹⁹ These rules create an incentive to perfect a transfer by filing a financing statement relating to the transfer as early as possible. The same rules apply irrespective of whether the interest of the transferee is legal or equitable.¹²⁰ Furthermore, priority is not affected by any notice which a second transferee of an account may have of a prior security interest over the account.¹²¹

¹¹⁵ Ibid s 19(2)(b).

¹¹⁶ Ibid s 55(3).

¹¹⁷ Although s 21 of the PPSA permits the perfection of security interests over certain types of collateral by possession or control, it is only possible to perfect a transfer of an account by registration of a financing statement. It is not possible to possess an account, furthermore, perfection of a security interest over accounts by control is not permitted: ss 21(2)(c), 24.

¹¹⁸ PPSA ss 55(4)–(5). As it is only possible to perfect a security interest over an account by registration of a financing statement on the Personal Property Securities Register ('PPS Register'), the priority time for the security interest over the account is the registration time for the financing statement. The registration time is the when a description of the collateral becomes available for search on the PPS Register: s 160.

¹¹⁹ However, as indicated earlier in the text, notice to the account debtor is still relevant for payment, the equities to which the transfer is subject and for enforcement purposes.

¹²⁰ Under s 12(1) of the PPSA, the existence of a security interest (which includes deemed security interests under PPSA s 12(3)) is determined 'without regard to the form of the transaction or the identity of the person who has title to the property'. For further discussion, see above Part III.

¹²¹ See *Re Smith*, 326 F Supp 1311, 1313 (Larson J) (D Minn, 1971) and note the following comment in relation to the equivalent priority provision under the UCC:

This provision nowhere makes lack of knowledge (good faith) a requirement for obtaining priority. The statute on its face provides for a race to the filing office with actual

V QUALIFICATIONS TO THE NEW PRIORITY RULES

There are, nevertheless, some significant qualifications to the application of the *PPSA*'s default priority rules.

1 *Prior In Substance Perfected Security Interest Over All Present and After-Acquired Property*

If a transferor has given a general in substance security interest (perfected by the registration of a financing statement) over all its present and after-acquired property in favour of a financier, then that financier will have prior ranking security interest over all those assets, including all present and future accounts, with a priority time dating from the registration time of its original financing statement. This occurs because a single registration of a financing statement may perfect one or more security interests.¹²² Unless the holder of the prior general security interest has expressly or impliedly authorised or expressly or impliedly agreed to the disposal of the account, in which case the subsequent transferee of the account will take free of the prior security interest,¹²³ the subsequent transferee should obtain an express release of the accounts from the prior security agreement.

2 *The Purchase Money Security Interests and Accounts Being Proceeds of Inventory*

Subject to compliance with certain procedural requirements,¹²⁴ the *PPSA* confers an overriding priority on, amongst others, suppliers of goods who take security over those goods to secure their purchase price. This security interest is known as a 'purchase money security interest' ('PMSI').¹²⁵ If those

knowledge of a prior unperfected security interest apparently being irrelevant if one perfects first by filing.

For an equivalent conclusion under the Canadian legislation ('*Ontario PPSA*'), see *Robert Simpson Co Ltd v Shadlock* (1981) 31 OR (2d) 612, 616–17 (Gray J).

¹²² *PPSA* s 21(4).

¹²³ *Ibid* s 32(1)(a).

¹²⁴ *PPSA* ss 62–3 require perfection to be completed within certain time periods in order to obtain purchase money security interest priority.

¹²⁵ *PPSA* s 14 defines a purchase money security interest as:

(a) a security interest taken in collateral, to the extent that it secures all or part of its purchase price; (b) a security interest taken in collateral by a person who gives value 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; (c) the interest of a lessor or bailor of goods under a *PPS* lease; (d) the interest of a consignor who delivers goods to a consignee under a commercial consignment.

goods are then purchased by third parties, the security interest of the PMSI holder extends¹²⁶ to the amounts owing by those third parties; those amounts are accounts for *PPSA* purposes. Accordingly, any subsequent transferee wishing to acquire those accounts may be confronted with the prospect that the accounts are already subject to another form of prior ranking security interest held by an original supplier of goods.

To address this issue, s 64 of the *PPSA* introduces a new rule permitting a subsequent transferee of an account as original collateral to obtain priority over a perfected PMSI in the account granted by the transferor of that account as proceeds of inventory.¹²⁷ The holder of the security interest over the accounts, as original collateral, only achieves the priority conferred by s 64 if it gives notice in the required form to the PMSI holder within the time limits specified by the section.¹²⁸ In that case, the original PMSI then extends to the value provided by the accounts financier. The priority conferred under s 64 only extends to accounts being proceeds of inventory, not accounts derived from other sources. The writer understands that in practice, it has been difficult to satisfy the timing requirements contemplated by s 64 so as to achieve the priority contemplated by that provision.

The Replacement Explanatory Memorandum to the Personal Property Securities Bill 2009¹²⁹ indicates that an accounts financier complying with the procedures in s 64 of the *PPSA* takes free of any existing security interest in the accounts as proceeds of inventory. However, the actual language of the provision states more accurately that the accounts financier has ‘priority’ over the PMSI holder.¹³⁰

¹²⁶ The amounts owing are proceeds under *PPSA* s 31, and the security interest automatically extends to proceeds unless any relevant security agreement otherwise provides: s 32(1)(b).

¹²⁷ Under *PPSA* s 32(1)(b), an existing security interest over collateral extends to proceeds unless the security agreement provides otherwise.

¹²⁸ Under *PPSA* s 64(1), the accounts financier has priority if it registers its security interest before the earlier of the perfection time or the registration of the PMSI. Alternatively, the accounts financier has priority if it gives notice to any existing registered security holder holding a PMSI in inventory at least 15 business days before the earlier of the day the accounts financier registers its security interest against the transferor or its priority interest attaches to the account.

¹²⁹ See the example in the Replacement Explanatory Memorandum, Personal Property Securities Bill 2009 (Cth) 43 [2.149].

¹³⁰ This conclusion is consistent with the discussion earlier in the text that the taking free rules do not apply to transfers of accounts unless *PPSA* s 32(1)(a) is applicable.

3 *Chattel Paper*

The *PPSA* makes a clear distinction between an account and chattel paper, but it is possible that an account could be embodied in chattel paper.¹³¹ For example, a written personal property security lease of goods is chattel paper. It evidences the lessor's security interest in the leased property as well as the lessee's obligation to pay lease rental. It is possible for a lessor to deal with both items of property or just with the account. In the latter case, the subject of the transaction would be an account. In the former case, the subject of the transaction would be chattel paper. Where the subject of the dealing is chattel paper, s 71 of the *PPSA* gives priority to the holder of the chattel paper over any perfected security interest in the chattel paper (which would include an account) and any security interest attaching to proceeds of inventory as original collateral (which could also include an account). The priority given to a subsequent holder of chattel paper under s 71 will not arise if the subsequent holder of the chattel paper had actual or constructive notice of the existing perfected security interest.¹³² Accordingly, a transferee of an account evidenced by chattel paper may well consider taking actual possession of the chattel paper to avoid the risk of a loss of priority under this new provision. The possibility of the loss of priority pursuant to s 71 of the *PPSA* is not widely appreciated by debt traders who do not fully value the distinction between an account and chattel paper for *PPSA* purposes and the implication of not obtaining the chattel paper as a term of the transfer irrespective of whether the subject matter of the assignment is an account or chattel paper.

4 *Execution Creditors*

Under s 74 of the *PPSA*, the interest of an execution creditor in collateral has priority over any unperfected security interest in the collateral if the latter is unperfected at the time the execution creditor takes steps to enforce its rights.

¹³¹ Under *PPSA* s 10, 'chattel paper' is relevantly defined as meaning

one or more writings that evidence a monetary obligation and either or both of the following: (a) a security interest in, or a lease of, specific goods, or specific goods and accessions to the specific goods ...; (b) a security interest in specific intellectual property or a specific intellectual property licence ...

¹³² See also *PPSA* s 300: 'A person does not have actual or constructive knowledge, about the existence or contents of a registration merely because data in the registration is available for search in the register'.

5 Declared Statutory Interests

Section 73 of the *PPSA* contemplates that other Commonwealth, state or territory law may exclude the *PPSA*'s priority rules. Although unlikely, it is possible that a security interest in an account may be subject to a specific alternative priority regime as permitted by the statute.

6 Employee Entitlements

Under the *Corporations Act 2001* (Cth), prior to its amendment following the commencement of the *PPSA*, a party holding a charge over an account held that security interest subject to the claims of preferred creditors where the grantor of the security interest went into receivership but only to the extent that the charge operated as a floating charge.¹³³ A similar principle applied in liquidation.¹³⁴ Although the *PPSA* renders irrelevant the differences between a fixed and floating charge,¹³⁵ the *PPSA* and *Corporations Act 2001* (Cth) now contain provisions aimed at permitting the continuance of the pre-*PPSA* priority given to preferred creditors on receivership and liquidation.¹³⁶ Even though claims for employee entitlements had traditionally extended to floating security interests over accounts, they were always inapplicable to absolute transfers of accounts. The *PPSA* does not alter this position in relation to absolute transfers of accounts or chattel paper.¹³⁷

7 Proceeds and ADI Accounts

A security interest over an account extends to the account proceeds.¹³⁸ In order to maintain its priority, the transferee should insist that the account proceeds are paid into a special account so that they remain identifiable.¹³⁹ Furthermore, if the account proceeds are remitted to an ADI account in the

¹³³ *Corporations Act 2001* (Cth) s 433, later amended by the *Personal Property Securities (Corporations and Other Amendments) Act 2010* (Cth) sch 1 item 87.

¹³⁴ *Corporations Act 2001* (Cth) s 561, later amended by the *Personal Property Securities (Corporations and Other Amendments) Act 2010* (Cth) sch 1 items 93, 94.

¹³⁵ *PPSA* ss 12, 19(2), 19(4).

¹³⁶ The *Corporations Act 2001* (Cth) continues the priority by use of the concept of circulating security interest and circulating asset: see, eg, ss 51C, 433, 561, as amended by the *Personal Property Securities (Corporations and Other Amendments) Act 2010* (Cth) when read with the very specific 'control' provisions in *PPSA* ss 340–41A.

¹³⁷ *PPSA* s 340(4A).

¹³⁸ *Ibid* s 32.

¹³⁹ *Ibid* s 31. Cf *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)* (2000) 202 CLR 588, 612–13 [53]–[54] (Gaudron, McHugh, Gummow and Hayne JJ), where it was found that the proceeds were not identifiable.

name of the account transferor, the transferee should require that the bank to which the account proceeds are remitted does not have a security interest over the account together with the ability to exercise the special priority over the account which the *PPSA* confers on banks.¹⁴⁰ Alternatively, the transferee should insist that the ADI executes a priority agreement which vests priority in the transferee over the account proceeds.

VI APPLICATION OF THE *PPSA*'S NEW PRIORITY RULES TO ACCOUNTS

The application of the *PPSA*'s new priority rules produces an outcome that is more rational than that which occurred under the pre-*PPSA* law. If successive transfers of an account are unperfected, priority is now determined by the order in which the interests in the account are created. In contrast, if transfer of an account is perfected by the public registration of a financing statement on the PPS Register, priority is given to the perfected party, or in the case of successive dealings, to the first party to perfect. The examples discussed below illustrate the obvious proposition that the early perfection by the registration of a financing statement is essential to preserve a transferee's interest in an assigned account and how perfection by registration (a procedure unavailable under the pre-*PPSA* law) supplants any priority formerly derived from giving notice to the account debtor. Under the *PPSA*, notice to the account debtor is now only relevant for determining the identity of the person to whom the account debtor is to make payment in order to obtain a good discharge.

A Prior Unperfected Equitable Transfer with No Notice to Account Debtor/Subsequent Unperfected Equitable Transfer with No Notice to Account Debtor

Under the *PPSA*, a prior unperfected equitable transfer of an account ranks ahead of a subsequent unperfected equitable transfer of an account. Although the equitable rule to the effect that where the equities are equal the first in time prevails is rendered irrelevant by the statute, the result under the *PPSA* is the same as it would have been under the pre-*PPSA* law, where neither transferee gives notice to the account debtor. This result occurs

¹⁴⁰ *PPSA* ss 25, 75 result in the ADI having priority over the account proceeds. These provisions do not appear in the New Zealand or Canadian legislation.

because s 55(2) of the PPSA states that priority is determined by the order of attachment.

B Prior Unperfected Equitable Transfer with Notice to Account Debtor/Subsequent Unperfected Legal Transfer with Notice to Account Debtor

Under the pre-PPSA law, the priority position is controversial. One view gives the prior transferee priority; this conclusion is based on a view that a subsequent transfer made according to the statutory provisions based on the *Judicature Act* is 'subject to the equities'. Relying on these words, it is argued that 'the doctrine of the bona fide purchaser of the legal estate does not apply to choses in action.'¹⁴¹ In this situation, the rule in *Dearle v Hall* is said to trump the legal interest of the subsequent transferee for value of the account without notice of the previous transfer.

Those favouring priority for the first transferee also argue that, despite authority to the contrary,¹⁴² the statutory provisions based on s 25(6) of the *Judicature Act* are procedural in nature, in the sense that they permit the transferee of the account to sue the account debtor in its own name, but that for priority purposes such transfers are treated as if they are equitable.¹⁴³ Others argue¹⁴⁴ that the rule flows indirectly from dicta in *Federal Commissioner of Taxation v Everett*,¹⁴⁵ to the effect that statutory provisions based on

¹⁴¹ Meagher, Heydon and Leeming, above n 50, 326 [8.130]. Cf Oditah, above n 112, 155–7 [6.15].

¹⁴² See, eg, *Read v Brown* (1888) 22 QBD 128, 131–2 where Lord Esher MR said:

It is said that [the statutory regime] only affects procedure ... [T]he words mean what they say; they transfer the legal right to the debt as well as the legal remedies for its recovery. The debt is transferred to the assignee and becomes as though it had been his from the beginning; it is no longer to be the debt of the assignor at all, who cannot sue for it, the right to sue being taken from him; the assignee becomes the assignee of a legal debt and is not merely an assignee in equity, and the debt being his, he can sue for it, and sue in his own name.

¹⁴³ *Harding Carpets Ltd v Royal Bank of Canada* [1980] 4 WWR 149, 160 (Morse J); *E Pfeiffer Weinkellerei-Weineinkauf GmbH & Co v Arbuthnot Factors Ltd* [1988] 1 WLR 150, 163–3 (Phillips J); *Compaq Computer Ltd v Abercorn Group Ltd* [1991] BCC 484, 502 (Mummery J). For a critique of this analysis, see Tollhurst, above n 15, ch 5, who favours the substantive view as does Oditah, see above n 112, 158–9 [6.16]. The procedural argument may be relevant for the other priority issues: see below Part VII.

¹⁴⁴ See Meagher, Heydon and Leeming, above n 50, 326 [8.130] where the various arguments are summarised.

¹⁴⁵ (1980) 143 CLR 440, 447 (Barwick CJ, Stephen, Mason and Wilson JJ).

the *Judicature Act* apply to equitable as well as legal choses in action. If the provision applies to equitable choses in action, then it is said that

there must be something to be said for the view that the same rules should govern priorities as between all assignments, statutory (including 'legal') or otherwise, of property which may be assigned under the section.¹⁴⁶

In contrast, those who consider that primacy should be accorded to the subsequent legal transferee without notice rely upon the *tabula in naufragio* doctrine and contrary dicta.¹⁴⁷

Fortunately, the *PPSA* now renders these debates irrelevant. Pursuant to s 55 of the *PPSA*, the time of attachment determines priority. Under s 55(2), the first transferee has priority. However, the account debtor may still be discharged by payment to the party giving notice of transfer.¹⁴⁸ In those circumstances, the first transferee would have to pursue the second transferee if the latter had received payment from the account debtor to which it was not entitled to priority.

C Prior Unperfected Equitable Transfer with Notice to Account Debtor/Subsequent Perfected Equitable Transfer with No Notice to Account Debtor

Under the pre-*PPSA* law, there was no concept of perfection by registration and the prior transferee prevails because it was the first party to give notice to the account debtor. Under the *PPSA*, the second transferee is perfected and prevails. However, in contrast to the immediately preceding example, this time it would be necessary for the second transferee to pursue the first transferee if the account debtor paid the first transferee.

¹⁴⁶ Meagher, Heydon and Leeming, above n 50, 326 [8.130].

¹⁴⁷ Oditah, above n 112, 161–2 [6.18], citing *Ward v Duncombe* [1893] AC 369, 392 (Lord Macnaghten), *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1, 19 (Viscount Finlay), *Ellerman Lines Ltd v Lancaster Maritime Co Ltd* [1980] 2 Lloyd's Rep 497, 503 (Goff J).

¹⁴⁸ *PPSA* ss 80(7)–(8).

D *Prior Perfected Equitable Transfer with No Notice to Account Debtor/Subsequent Unperfected Equitable Transfer with Notice to Account Debtor*

Under the pre-PPSA law, there was no concept of perfection by registration and the subsequent transferee prevails. Under the PPSA, a prior equitable transfer of an account perfected by registration ranks ahead of any subsequent unperfected equitable transfer of the account, even where the second transferee gives prior notice of the equitable transfer to the account debtor.¹⁴⁹ In the latter case, the first transferee would have to pursue the second transferee to assert its priority over any account proceeds improperly held by it.

VII THE NEW PRIORITY RULES AND THE *NEMO DAT* RULE:
PRIOR UNPERFECTED ‘LEGAL’ TRANSFER/SUBSEQUENT
PERFECTED TRANSFER UNDER THE PPSA

Part IV contains a brief discussion of the circumstances where, at general law, a prior legal transferee of an account may lose priority to a subsequent transferee.¹⁵⁰ Apart from these cases, the *nemo dat* rule applies. If the transferor has done all that is necessary at law to transfer the account, then it has no further property interest with which it may deal.¹⁵¹ The first transferee has title and no priority dispute arises. However, in the context of transfers of accounts subject to the Canadian personal property security legislation and Revised Article 9 in the US, this conventional analysis has now changed. In Canada, priority is determined by the order of the registration of the financing statement.¹⁵² In the US, priority is given to the party who first files its financing statement or who otherwise perfects its security interest.¹⁵³ In each of these countries, the reasons for this outcome, which to an Australian lawyer on first analysis appear surprising, differ and are the subject of on-going debate.

¹⁴⁹ Ibid s 55(3).

¹⁵⁰ See above n 109 for a description of the circumstances.

¹⁵¹ This argument rejects the view that the *Judicature Act* and the equivalent Australian provisions only have a procedural operation. See generally above nn 142–143.

¹⁵² *Ontario PPSA* s 30; *Saskatchewan PPSA* s 35(1)(a)(ii). See also *PPSA (NZ)* ss 66, 68.

¹⁵³ UCC § 9-322(a)(1) (2012) contains a rule which gives priority to the first party to file or perfect. In contrast, under s 55 of the PPSA, priority is determined by the registration time for the financing statement, except where perfection is by possession or control. The position is similar in New Zealand: see *Healy Holmberg Trading Partnership v Grant* [2012] 3 NZLR 614, 627 [56] (O’Regan P for O’Regan P, Stevens and White JJ).

Although the *PPSA* adopts the same concepts as those used in Canada and the US, it is not identical to the equivalent North American legislation. Accordingly, before adopting any of the reasoning used in those jurisdictions, caution is required. Subject to this caveat, the issue is whether the *PPSA* produces the same result in Australia. In contrast to the specific instances where, for the purposes of attachment, the *PPSA* treats a party as having ‘rights in goods’ for certain purposes even though it does not have title to the goods,¹⁵⁴ the statute does not expressly state that a transferor of an account retains an interest in the transferred property where an earlier transfer of the account is unperfected. As the *PPSA* does not address this issue explicitly, much of the debate focuses on whether the legislation produces this result by implication, and whether under the statute the transferor continues in some circumstances to have ‘the power to transfer rights in the collateral’¹⁵⁵ sufficient to enable the attachment of a further security interest in the same collateral in favour of another party. Where a prior unperfected legal transfer of an account is followed by a perfected transfer of the same account, is there a basis for asserting that the priority accorded to the second transferee is a statutory exception to the *nemo dat* rule implicit in or flowing inherently from the priority rules in the *PPSA*? Alternatively, does the *PPSA*, in its re-characterisation of the transaction as a security interest, have the consequence that the transferor retains some form of interest in the account?

A *The Canadian Experience*

Canadian authority suggests that a subsequent perfected security interest over an account has priority over the prior unperfected statutory legal transfer of the same account. In *Fairbanx Corp v Royal Bank of Canada* (*‘Fairbanx’*),¹⁵⁶ a company called Friction Tecnology [sic] transferred its receivables to Fairbanx

¹⁵⁴ *PPSA* s 19(5), which deems lessees under PPS leases, together with bailees and consignees, to have rights in goods upon obtaining possession of same. There is a debate as to whether the equivalent NZ provision creates these rights or whether it is merely a timing provision. See obiter comments favouring the timing argument in *Rabobank New Zealand Ltd v McAnulty* [2010] NZHC 1534 (23 August 2010) [45] (Gendall AsJ). On appeal, the issue was not addressed: *Rabobank New Zealand Ltd v McAnulty* [2011] 3 NZLR 193, 197 [13] (O’Regan P for O’Regan P, Chambers and Harrison JJ). Cf *Re Giffen* (1998) 155 DLR (4th) 332, 345–6 [32] (Iacobucci J for L’Heureux-Dubé, Sopinka, Gonthier, Cory, Iacobucci and Major JJ) favouring the creation argument.

¹⁵⁵ Under s 19(2)(a) of the *PPSA*, a security interest attaches to collateral when ‘the grantor has rights in the collateral, or the power to transfer rights in the collateral to the secured party.’

¹⁵⁶ (2009) 57 CBR (5th) 310, affd *Fairbanx Corp v Royal Bank of Canada* (2010) 262 OAC 251.

pursuant to s 53(1) of the Ontario *Conveyancing and Law of Property Act* ('CLPA'),¹⁵⁷ which is the Ontario equivalent of s 25(6) of the *Judicature Act*. Fairbanx gave notice of the transfer to the relevant account debtors which each of them acknowledged. It also attempted to perfect its security interest by registration of a financing statement on the Ontario PPS Register but remained unperfected because of a defect in its financing statement.¹⁵⁸ Subsequently, Friction granted a further in substance security interest to Royal Bank over the same property. Because of the defective financing statement, the bank had no knowledge of Fairbanx's earlier security interest and nor did it give any notice to the account debtors. However, the bank did properly perfect its security interest with the result that on default it ranked ahead of Fairbanx's unperfected security interest, even though at general law Fairbanx was the prior legal transferee of the receivables.

At first instance, three grounds were given for this conclusion. First, s 53(1) of the CLPA was construed as having a procedural operation but did not necessarily affect priorities.¹⁵⁹ For reasons set out earlier,¹⁶⁰ it is unlikely that an Australian court would adopt this reasoning. Secondly, the Court relied on the words in s 53(1) of the CLPA which stated that a transferee took subject to the equities that would have been entitled to priority as 'if this section had not been enacted'¹⁶¹ and concluded as follows:

While the PPSA was enacted after the provisions of the CLPA, and thus, could not have specifically been envisaged by the legislators, it is nonetheless a limiting provision. Moreover, the words in the section refer to 'if this section had

¹⁵⁷ RSO 1990, c C-34.

¹⁵⁸ In a striking illustration of an erroneous perfection by registration, the secured party's financing statement described the grantor as 'Friction Technology Consultants Inc' when its actual name was 'Friction Tecnology Consultants Inc'. The purported perfection was through the registration of a financing statement which referred to a separate general security agreement over the transferor's receivables: see *Fairbanx Corp v Royal Bank of Canada* (2009) 57 CBR (5th) 310, [1] (Thorburn J).

¹⁵⁹ 'It is not clear that the purpose of [s 53] is to address the issue of priority. Rather it seems to address the legal rights acquired by equitable assignment and notice': *Fairbanx Corp v Royal Bank of Canada* (2009) 57 CBR (5th) 310, [63] (Thorburn J). No cases were cited in support of this construction but see *Dearle v Hall* (1828) 3 Russ 1; 38 ER 475 as support for the procedural theory.

¹⁶⁰ See Part VI above.

¹⁶¹ The equivalent phrase in s 12 of the *Conveyancing Act 1919* (NSW) is 'if this Act had not passed'.

not been enacted' not when this section was enacted. It is clear that if this section had not been enacted, the terms in the *PPSA* would prevail.¹⁶²

The Court was also of the view that 'one set of priority rules will cover the major methods of inventory and receivables financing.'¹⁶³ The Ontario Court of Appeal¹⁶⁴ affirmed the decision but on the more straightforward basis, namely, that the *Ontario Personal Property Security Act*¹⁶⁵ prevailed over the *CLPA* in the event of a conflict.¹⁶⁶ In Australia, s 254(1) of the *PPSA* has the same effect and overrides any state legislation if each set of provisions is incapable of operating concurrently.¹⁶⁷ The reasoning avoids any discussion of the issue as to whether, for the purposes of the legislation, a transferor retains any interest in a transferred account or the ability to deal further with the account where a prior transfer of the account by the transferor remains unperfected.

A leading text on the Canadian personal property security legislation addresses this issue as follows:

the legislative intention behind extending the scope of the Act to absolute transfers of accounts is to avoid third-party deception. The mechanism through which this is accomplished is to deem the transfer to be a security agreement providing for a deemed security interest. It follows that the account transferor is deemed to have rights in the account after transfer to the extent this is necessary to support the conclusion that an attached security interest exists. Similar reasoning applies to the sales of chattel paper.¹⁶⁸

¹⁶² *Fairbanx Corp v Royal Bank of Canada* (2009) 57 CBR (5th) 310, [67] (Thorburn J).

¹⁶³ *Ibid* [68]. In reaching this conclusion the Court relied on the views in Richard H McLaren, *The 2010 Annotated Ontario Personal Property Security Act* (Thomson Reuters, 2010) 50.

¹⁶⁴ *Fairbanx Corp v Royal Bank of Canada* (2010) 262 OAC 251.

¹⁶⁵ RSO 1990, c C-34.

¹⁶⁶ *Fairbanx Corp v Royal Bank of Canada* (2010) 262 OAC 251, [13] (Feldman JA for Doherty, Feldman and Cronk JJA). Section 73 of the *Ontario PPSA* relevantly provides that 'where there is conflict between a provision of this Act and a provision of any general or special Act, ... the provision of this Act prevails.'

¹⁶⁷ *PPSA* s 254(1) relevantly provides that: 'This Act is not intended to exclude or limit the operation of any of the following laws ... to the extent that the law is capable of operating concurrently with this Act: ... (b) a law of a State or Territory'.

¹⁶⁸ Cuming, Walsh and Wood, above n 62, 156–7. Compare the statutory deeming provisions in s 19(5) of the *PPSA* to the effect that a grantor has rights in goods that are leased under a PPS lease or bailed or consigned to the grantor. A similar provision is found in s 11(2) of the *Ontario PPSA* and in s 12(2) of the *Saskatchewan PPSA*.

In reaching this conclusion, the authors do not refer to the actual language of the statute. Rather, they rely ‘inferentially’ on case law which, in construing the Canadian bankruptcy legislation ‘concluded that there is no requirement that the transferor of an account have a property interest after the transfer in order for the trustee in bankruptcy to defeat the transferee’s interest.’¹⁶⁹ Under the *PPSA*,¹⁷⁰ only unperfected in substance security interests, but not unperfected deemed security interests,¹⁷¹ ‘vest’ in the grantor on bankruptcy, liquidation or administration of the grantor of the security interest. Because s 267 of the *PPSA* states that, subject to certain exceptions, unperfected security interests ‘vest’ in the trustee in bankruptcy or liquidator, it is unnecessary to apply this type of reasoning in Australian bankruptcies or liquidations; the *PPSA* expressly gives the liquidator or trustee in bankruptcy the title to deal with the unperfected secured property without any need to resort to implication. By contrast, in Canada both in substance and deemed unperfected security interests, are said to be ‘not effective’ against the bankruptcy administrator on the bankruptcy (which includes liquidation) of the grantor of the security interest.¹⁷² As a consequence, it became necessary for the Canadian courts to identify the existence of an anterior interest which remained with the grantor of an unperfected security interest and to which the insolvency administrator would succeed on the transferor’s insolvency or bankruptcy. Once identified, this interest would then prevail over any unperfected in substance or deemed security interest in the same collateral.

The advantage of the Canadian approach is its simplicity. Once the legislation is engaged, then for that purpose, all that a transferee of an account has is a security interest. As a consequence, for the purposes of applying the *PPSA* but only for that purpose, the grantor is treated as having some form of interest which is sufficient to enable attachment under the *PPSA* and the creation of further security interests, irrespective of and seemingly disregarding the form of the underlying transaction. In Australia, this issue will be approached as a matter of statutory construction. In this author’s opinion, the

¹⁶⁹ Cuming, Walsh and Wood, above n 62, 157 n 165, citing *Agent’s Equity Inc v Hope* (1996) 40 CBR (3d) 310; *TCE Capital Corp v Kolenc (trustees of)* (1999) 172 DLR (4th) 186. Section 20(1)(b) of the *Ontario PPSA* provides that until perfected, a security interest ‘in collateral is not effective against ... a trustee in bankruptcy’.

¹⁷⁰ Specifically, ss 267–8.

¹⁷¹ By way of exception, unperfected PPS leases will vest save for unperfected short term PPS leases over serial numbered collateral: see *PPSA* ss 13(1), 268(1)(a)(ii).

¹⁷² See, eg, *Ontario PPSA* s 20(1)(b); *Saskatchewan PPSA* s 20(2).

issue will be largely determined by the language of the statute.¹⁷³ For these reasons, it is unlikely that an Australian court would adopt the reasoning of the Canadian commentators.

B *The United States Experience*

Unlike the *PPSA*, § 9-318(a) expressly states that a transferor retains no interest in an account once it has been sold.¹⁷⁴ Notwithstanding this provision, Official Comment 5 to UCC § 9-109 (which, in part, is the equivalent of *PPSA* s 12) addresses the question of how a transferor of an account is able to further deal with an account after having already legally transferred the account to another. The Comment concludes that this ‘is so for the simple reason that Sections 9-318(b), 9-317, and 9-322 make it so’.¹⁷⁵ Sections 9-317 and 9-322 are discussed further below.

UCC § 9-318(b) ‘deem[s]’ a transferor who has sold an account to have ‘rights and title’ to any account or chattel paper ‘identical to those the debtor sold’ for so long as the buyer’s security interest over the account is unperfected.¹⁷⁶ The Official Comment 3 to § 9-318(b) states that the provision, which was introduced by the 1999 amendments to Article 9 of the UCC, merely renders ‘explicit’ that which was ‘implicit, and equally obvious’ prior to the introduction of the new provision.¹⁷⁷

Prior to 1999, the arguments used to support the same conclusion were not based on a close textual analysis of the relevant provisions in the UCC but on the general policy considerations underlying the treatment of transfers of

¹⁷³ This is consistent with the current High Court’s approach to statutory construction: see *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 293 ALR 257, 268–9 [39].

¹⁷⁴ UCC § 9-318(a) (2012). Section 9-318(a) in part provides: ‘a debtor that has sold an account ... does not retain a legal or equitable interest in the collateral sold.’ The provision was introduced to overcome the decision in *Octagon Gas Systems Inc v Rimmer*, 995 F 2d 948 (10th Cir, 1993), which ruled that receivables which had been sold still formed part of the bankrupt assignor’s estate because the UCC treated the sale as security interest. The definition of ‘account’ in UCC § 9-102(2) (2012) is not identical with the *PPSA* definition of ‘account’ in s 10, but each definition shares common elements.

¹⁷⁵ UCC § 9-109 (2012) cmt 5.

¹⁷⁶ Section 9-318(b) in part provides:

For the purposes of determining the rights of creditors of, and purchasers for value of an account ... from, a debtor that has sold an account ... while the buyer’s security interest is unperfected, the debtor is deemed to have rights and title to the account ... identical to those the debtor sold.

¹⁷⁷ UCC § 9-318(b) (2012) cmt 3.

accounts as deemed security interests.¹⁷⁸ It was argued that the UCC's policy placed primacy on perfection of a security interest by the public registration of a financing statement, in lieu of a priority rule based on notice to the account debtor.¹⁷⁹ Any priority accorded to an unperfected security interest over a subsequent security interest in the same property, duly perfected by registration, was said to be inconsistent with this policy aim. The implication was also justified because it was consistent with the UCC's aim to abolish the distinction between an in substance security interest or a deemed security interest over accounts. Finally, it was said that the implication was consistent with another aim of the legislation, namely, the 'Code's overriding purpose of defeating secured parties who rely on secret interests, for the unrecorded absolute assignment is no less hidden from view than the unrecorded collateral transfer.'¹⁸⁰

Nevertheless, the justification for the implication was characterised by 'analytical confusion'.¹⁸¹ Some commentators concluded that the transferor did retain some form of security interest where the transfer of the account was unperfected, yet they struggled to identify precisely the actual nature of the retained interest and how it arose.¹⁸² Other commentators¹⁸³ concluded that

¹⁷⁸ 'Since outright sales of accounts are covered by Article 9 it is hard to escape the inference that a debtor, having "sold" nearly everything, still has some property right, however remote': James J White and Robert S Summers, *Uniform Commercial Code* (West Publishing, 4th ed, 1995) 747, quoted in Michael G Bridge et al, 'Formalism, Functionalism and Understanding the Law of Secured Transactions' (1999) 44 *McGill Law Journal* 567, 585-6 n 59. Given § 9-318(b) of the Revised Article 9, this comment appears not to have been included in the 6th edition (2006) of White and Summers.

¹⁷⁹ For this and the succeeding arguments mentioned, see Dan T Coenen, 'Priorities in Accounts: The Crazy Quilt of Current Law and a Proposal for Reform' (1992) 45 *Vanderbilt Law Review* 1061, 1078-9.

¹⁸⁰ *Ibid* 1079.

¹⁸¹ Bridge et al, above n 178, 585.

¹⁸² One argument was that under Article 9 of the UCC prior to the 1999 amendments, the phrase 'rights in the collateral' necessary for attachment, as quoted in Bridge et al, above n 178, 586 n 59,

is sufficiently innocuous to include the debtor's 'contingent' power under Article 9 and the PPSAs [referring to the Canadian personal property security legislation] to defeat a buyer-assignee's interest by making a second assignment, ie 'contingent on the second assignee filing first'.

Cf *PPSA* s 19(2)(a). *UCC* § 9-203(b)(2) (2012) now clarifies this issue and provides that, subject to satisfying the other conditions for attachment, attachment may occur where the 'debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party' (emphasis added). See also s 19(2)(a) of the *PPSA* which is to the same effect.

the interest arose by dint of the fact that the UCC described the absolute transfer of an account as a security interest, using an argument not unlike that favoured by some Canadian commentators.¹⁸⁴

At the same time, if the transferor became bankrupt, the transferees, particularly those acquiring accounts as part of a securitisation, would adopt an inconsistent position and ‘wish to claim that they are merely “purchasers” and that the debtor has “sold” its entire interest. Therefore, they argue, there is no interest left to become property of the bankruptcy estate ... and therefore the trustee has no power to administer or otherwise mess around with assets that have been securitized.’¹⁸⁵

Sections 9-318(a) and 9-318(b) of the were introduced in an attempt to clarify these issues. Section 9-318(a), which reflects the *nemo dat* principle and restates the position at general law, was introduced in response to a suggestion that the bankruptcy trustee retained some interest in the transferred receivable.¹⁸⁶ In referring expressly to the retained rights of the transferor § 9-318(b) is an express qualification to that principle. The *PPSA* does not contain equivalent provisions.

However, for the purposes of attachment, Revised Article 9 also contains another implicit exception where the debtor (the equivalent of the ‘grantor’ in the *PPSA*) has power to deal with the property. In particular, in commenting on the current US provisions, Professors Harris and Mooney observe as follows:

The fact that a person lacks a ‘legal or equitable interest’ under section 9-318(a) or ‘rights in collateral’ under section 9-203(b)(2) does not prevent that person from having the ‘power’ to create a security interest in the collateral.¹⁸⁷

¹⁸³ Coenen, above n 179, 1079.

¹⁸⁴ See, eg, Cuming, Walsh and Wood, above n 62.

¹⁸⁵ James J White and Robert S Summers, *Uniform Commercial Code* (West Publishing, 6th ed, 2006) vol 4, 56.

¹⁸⁶ See generally *Octagon Gas Systems Inc v Rimmer*, 995 F 2d 948 (10th Cir, 1993). In referring to this decision, White and Summers note that this decision ‘made the securitization industry apoplectic’: *ibid* 57. UCC Comment 14, stated that the decision in the case was incorrect: above n 5. Ultimately, this led to the inclusion of new § 9-318 in Revised Article 9. White and Summers further observe that these amendments as well as Comment 5 to §9-109 and Comment 2 to §9-318 ‘seek to suppress the logical contradiction inherent in the idea that the seller of an intangible (where the buyer has not perfected its interest) retains the power to convey good title to a purchaser (see § 9-318(b)) while concurrently suggesting the seller retains no “legal or equitable interest in the collateral sold”’: *ibid* 57 (citations omitted).

¹⁸⁷ Steven L Harris and Charles W Mooney, ‘Using First Principles of UCC Article 9 to Solve Statutory Puzzles in Receivables Financing’ (2011) 46 *Gonzaga Law Review* 297, 304. As the

As with s 19(2)(a) of the *PPSA*, § 9-203(b)(2) of the *UCC* contemplates that attachment may occur where the ‘debtor [the ‘grantor’ under the *PPSA*] has rights in the collateral or the power to transfer rights in the collateral to the secured party.’ The source of the power to transfer property is ‘inherent in the Article 9 priority rules’¹⁸⁸ and may be found expressly or by implication throughout the legislation. For power sourced by implication, the Official Commentary to *UCC* § 9-109 (2012) refers to § 9-317 and § 9-322. Section 9-317 is the US counterpart of *PPSA* s 43 and states that a buyer of personal property takes free of an unperfected security interest over the property. Section 9-322 is the counterpart of s 55 of the *PPSA* and provides that a perfected security interest ranks ahead of an unperfected security interest in the same property. The Official Commentary also identifies other sources of power in § 9-330, which is the US equivalent of s 71 of the *PPSA*, giving priority to holders of chattel paper; and in § 9-331, which is the US equivalent to s 70 of the *PPSA*, giving priority to holders of negotiable instruments. The US priority provisions

constitute exceptions to *nemo dat* to the extent they award priority to a later-in-time interest over a pre-existing interest. One cannot understand and properly apply Article 9’s priority rules ... without recognizing that those rules can create the power to transfer rights in collateral.¹⁸⁹

C *The Australian Position under the PPSA*

In terms of actual outcome, the decision in *Fairbanx* is consistent with the directive in s 55 of the *PPSA* and the policy reasons underlying the treatment of absolute transfers of accounts as deemed security interests. In the absence of clear language addressing the issue,¹⁹⁰ the question is whether the Australian legislation produces the same result and, if so, how one reaches such a conclusion in a conceptually consistent and principled manner, a task which,

authors state at 304 n 28, this view in substance adopts reasoning similar to that of Coenen, above n 179, save that, *UCC* § 9-203(b)(2) (2012) now contains express language to the effect that the power of a debtor to transfer rights in the collateral is sufficient for the purposes of attachment under the statute.

¹⁸⁸ Harris and Mooney, above n 187, 304 n 28.

¹⁸⁹ *Ibid* 302 (citations omitted).

¹⁹⁰ Cf the express exceptions in state and territory sales of goods legislation: see, eg, *Sale of Goods Act 1923 (No 1)* (NSW) ss 26(1) (which deals with the sale of goods by a non-owner where the owner is precluded by conduct from denying the seller’s authority to sell), 28(1) (concerning the rights of the seller in possession after sale to sell), 28(2) (concerning the rights of the buyer in possession to sell after sale).

as demonstrated by the above discussion, has proven to be difficult with similar provisions in Canada and the US.

Accordingly, what arguments are available under Australian law to justify the loss of priority by the holder of the unperfected legal interest? Arguments to the effect that the grantor retains a form of interest because s 25(6) of the *Judicature Act* and its equivalent Australian provisions are procedural in nature face difficulties because the procedural characterisation of that section has not been universally accepted in the case law.¹⁹¹ Arguments similar to those used in *Fairbanx* giving priority to the subsequent perfected transferee on the basis that any transferee takes 'subject to the equities' as if the *Judicature Act* and its Australian counterparts had not been enacted to some extent beg the question, in that they assume the grantor has sufficient interest or power to further deal with an account in the first place. Arguments based on inconsistency between the *PPSA* and other applicable legislation face similar problems.

At the same time, in its drafting of the *PPSA*, the legislature has manifested a clear policy intention of imposing new priority rules for both in substance and deemed security interests. In relation to each type of security interest, s 55 of the *PPSA* states that a perfected security interest is to have priority over an unperfected security interest. The word 'priority' is unambiguous and must be accorded a substantive meaning. If the *PPSA* applies, the granting of priority to a prior unperfected legal transfer of an account over a subsequent perfected transfer of that account on the basis of the *nemo dat* principle ignores this statutory directive. Such a construction is inconsistent with the *PPSA*'s policy of treating absolute transfers of accounts and transfers of accounts by way of security in the same fashion and would create a significant gap in the *PPSA*'s priority regime.

A construction which renders the *PPSA*'s priority rules applicable in these circumstances is thus desirable. One principled route for achieving this is to accept that, in treating the absolute legal transfer as a species of a deemed security interest, the *PPSA* has given that transaction new attributes which, by operation of law, prevail over any inconsistent state or territory law.¹⁹² One attribute is that for the purposes of the *PPSA*, the transferee's interest is treated as a security interest; another attribute is that the transferee's interest in the account is susceptible to a loss of priority unless the transferee duly perfects

¹⁹¹ See generally above nn 142–3.

¹⁹² This is a result of s 264 of the *PPSA*, which causes the *PPSA*'s attachment and perfection rules to prevail, and s 254(3) where concurrent operation of state or territory law are excluded to the extent of a 'direct inconsistency'.

that interest. A further consequential attribute (again for *PPSA* purposes) is that the transferor of an account continues to have a contingent power to deal further with the transferred account. In the context of transfers of accounts under the *PPSA*, the transferor has the inherent power under the Act to establish subsequently prior ranking claims over an account where a prior legal absolute transfer of the account at law remains unperfected. This right is an ineluctable consequence of the *PPSA*'s new priority regime. In accordance with s 19(2)(a) of the *PPSA*, that inherent power is sufficient to enable attachment to occur under the statute in relation to subsequent dealings with the account provided the other conditions precedent for attachment under s 19 are satisfied.¹⁹³

This construction draws on the substance of the reasoning adopted by US commentators, disregarding for this purpose § 9-318 in respect of which, as mentioned earlier, there is no Australian equivalent and posits that attachment can occur where the transferor has the express or implicit power to deal with collateral.¹⁹⁴ The construction is also consistent with the *PPSA*'s underlying policy and overseas history which recommends the common treatment of in substance and deemed security interests over accounts and thereby gives full operation to the *PPSA*'s new priority regime. Whilst the outcome is also consistent with the outcome favoured by the leading Canadian commentators,¹⁹⁵ it avoids any language to the effect that the transferor retains a deemed interest in an unperfected transferred account. In any event, this difference may merely be one of language if, drawing upon the actual words of s 19(2) of the *PPSA*, a 'deemed interest' is defined as the power to create further interests over an account where a prior dealing with the account remains unperfected. The *PPSA* has thus created, by implication, a significant new exception to the *nemo dat* rule, despite the absence of specific language in the statute to this effect.¹⁹⁶

¹⁹³ See *PPSA* s 19(2)(a).

¹⁹⁴ However, the Canadian legislation (see, eg, *Ontario PPSA* s 11(2); *Saskatchewan PPSA* s 12(1)(b)) also enables attachment to occur if the grantor has power to transfer rights in the collateral. However, there does not appear to be an equivalent extension in the *PPSA* (NZ).

¹⁹⁵ Cuming, Walsh and Wood, above n 62, 156. For an Australian commentary which has adopted this Canadian reasoning, as distinct from the US reasoning, see Anthony Duggan and David Brown, *Australian Personal Property Securities Law* (LexisNexis Butterworths, 2012) 81–2.

¹⁹⁶ As mentioned earlier in the text, the *PPSA* also appears to contain other inherent exceptions to the *nemo dat* rule: see, eg, *PPSA* ss 43, 70–1.

VIII THE DOUBLE GRANTOR PROBLEM

The above priority examples assume that there is a common grantor (transferor) of the security interest. Do the *PPSA*'s priority rules apply where there is no common grantor? In practice, this issue arises regularly in the solvent debt trading market as well as in the distressed debt trading market where an account debtor is insolvent. Assuming the debt is an account for *PPSA* purposes, the following example illustrates the potential pitfalls and emphasises once again the importance of perfection of the original and all successive transfers of the same debt. The example also illustrates that not all of the *PPSA*'s provisions that apply generally to security interests necessarily apply to deemed security interests. The example is as follows:

D owes a debt to A. A transfers the debt to B. B does not perfect the transfer by registration of a financing statement against A but gives notice of the transfer to D. A then purports to transfer the debt to C who perfects by registration of a financing statement against A. C also gives the appropriate notice to the account debtor D. C then transfers the debt to E who perfects by registering a financing statement against C. E also gives notice of the transfer to D, the account debtor. Which of B or E has the prior claim to the debt?

At general law, B holds a legal interest in the debt. At general law, E has no interest at all in the debt and B wins in any priority dispute. Does the outcome differ if the *PPSA* applies?

As a preliminary matter, it is assumed that A has the ability to transfer the account to C, notwithstanding the prior legal but unperfected transfer to B. The relevant arguments are discussed in Part VII above. There are two sections in the *PPSA* indicating that its priority rules may potentially apply, even where a priority dispute arises, as in this case, where the respective transferors of the account (A and C) are not identical.¹⁹⁷ Unlike the *PMSI*

¹⁹⁷ New Zealand commentators have concluded that the 'better view' is that the *PPSA* (NZ) applies in this situation: see Michael Gedye, Ronald C C Cuming and Roderick J Wood, *Personal Property Securities in New Zealand* (Brookers, 2002) 326–7. In Canada, a similar conclusion has been expressed in relation to the Saskatchewan and Manitoba legislation (see Ronald C C Cuming and Roderick J Wood, *Saskatchewan and Manitoba Personal Property Security Acts Handbook* (Carswell, 1994) 286), and in relation to the British Columbia legislation (see Ronald C C Cuming and Roderick J Wood, *British Columbia Personal Property Security Act Handbook* (Carswell, 4th ed, 1998) 263). However, a contrary view appears to be taken in Ontario: see Ziegel and Denomme, above n 23, 253–4. The different conclusions may arise because of differences in the Ontario legislation and the legislation in the other Canadian provinces and New Zealand.

priority rules,¹⁹⁸ which only apply where there is a ‘common grantor,’ ss 66–8 of the *PPSA* contain no such requirement and may assist in resolving the priority problem. Failing that, the default priority rules in s 55 (which also does not require a common grantor) may apply. Each set of provisions will be addressed in turn.

First, s 66 appears to be satisfied. For the purposes of this provision, B holds a transferor-granted interest and C is a further transferee from A; C then creates a transferee-granted interest in favour of E.

Under s 67 of the *PPSA*, B in the above example has priority over C and any security interest granted by C to E, only if B was duly perfected before and continuously after the transfer to C. If B becomes unperfected,¹⁹⁹ s 68 of the *PPSA* enables B to gain a partial priority over any security interest granted by C, provided B was perfected immediately before the subsequent transfer. Since in the above example, B was never perfected in the first place, the provisions may thus be ignored.

However, there are other more fundamental reasons why ss 66–8 may be inapplicable. Sections 67 and 68 are only engaged where there is a transfer of collateral. Contrary to the assumption in the previous paragraph, it is arguable that for *PPSA* purposes, a subsequent transfer by C to E of the debt which it acquired from A is more accurately characterised as the *creation* of a new security interest from C in favour of E. It is not the *transfer of collateral subject to an existing security interest*.²⁰⁰

Furthermore, ss 66–8 may be inapplicable on the basis that the provisions only apply to in substance rather than deemed security interests. Section 68(2)(d) refers to the transferee-granted interest securing the ‘performance of an advance made, or an obligation incurred’, whereas the dealings in the above example are deemed security interests. If this is correct, s 55(3) determines the priority position. Applying this provision, C and E are perfected and rank ahead of B who is unperfected.

If C has given notice of the transfer of the debt to D, then at general law the better view appears to be that it becomes the owner of the debt and A disappears from the picture.²⁰¹ However, if in the above example, C fails to give notice of the transfer to D, then A is said to hold the debt on constructive

¹⁹⁸ *PPSA* ss 62–3.

¹⁹⁹ Usually this would be due to a failure to comply with s 34 of the *PPSA*.

²⁰⁰ A consequence of this view is that s 34 of the *PPSA* is also inapplicable.

²⁰¹ See generally the discussion in Part VI and above nn 142–3.

trust for C by operation of law.²⁰² Accordingly, when on these facts C transfers its right title and interest in the debt to E, C is transferring to E not only its equitable interest in the debt but also C's rights against A as beneficiary under the constructive trust in respect of which A is the trustee. It is submitted that C's rights as beneficiary against A do not constitute an account for *PPSA* purposes. On these amended facts, any monetary obligations which A owes to C derive from A's trusteeship arising by operation of law, not from one of the circumstances particularised in sub-paras (a) and (b) of the definition of 'account'. Whilst for *PPSA* purposes the transfer by C to E of C's rights as beneficiary may constitute the transfer of intangible property, they do not separately constitute the transfer of an account and as a result trigger no separate perfection requirement under the legislation.

In addition, if the transfer from C to E is regarded as the transfer of a security interest, s 60 of the *PPSA* may be engaged.²⁰³ Under that section, a transferred security interest has the same priority immediately after the transfer as it had immediately before the transfer. When in the above example, C transfers the debt to E, is C transferring a debt as well as transferring a security interest? Alternatively, in the dealing between C and E, is the *PPSA* characterisation of A's transaction with C to be ignored in relation to C's further dealing in the same property with E?

As stated earlier, the further dealing in the debt between C and E is more accurately characterised solely as a new transfer of the debt. Although, in order to ensure ongoing priority for *PPSA* purposes, E should ensure that the transfer between A and C is duly perfected, the *PPSA*'s characterisation of C's acquisition and holding of the debt from A as a security interest is not a relevant consideration in characterising the separate dealing in the debt between C and E. On completion at law of the transfer from A to C, E does not also obtain separate rights against A as the anterior owner of the debt.²⁰⁴ Furthermore, the dealing is not like the transfer by a secured party of an in substance security interest where s 60 of the *PPSA* is clearly engaged and where the transferee of the security interest does succeed to the rights of the

²⁰² See also the discussion in Part III, concerning the reservations about the complete application of the trust analysis: above n 61.

²⁰³ Curiously, the *PPSA* contains no provision requiring the transferee of a security interest to file a notice recording the transfer on the PPS Register. Cf *Corporations Act 2001* (Cth) s 268, later repealed by the *Personal Property Securities (Corporations and Other Amendments) Act 2010* (Cth), where in these circumstances a filing recording the assignment of what is now known as an in substance security interest was required.

²⁰⁴ However, as mentioned earlier in the text, E may succeed to C's rights against A where the assignment to C is only equitable.

transferor against the original grantor of the security. On this view, it would be incorrect to amend the original registered financing statement recording the transfer between A and C by substituting E for C. The original registration between A and C remains an accurate record of the dealing and assists in evidencing the chain of title to the assigned debt.

The answers to these questions illustrate that in construing some sections in the *PPSA*, the *PPSA*'s definition of security interest is to be read down, so as to apply only to in substance security interests and that, in its original manifestation in the *UCC* and now in the *PPSA*, the unqualified extension of the definition of security interest in these statutes so as to encompass deemed security interests had not been completely thought through.

IX CONCLUDING OBSERVATIONS

The *PPSA* has significantly altered the law relating to transfers of accounts. The *PPSA* has re-characterised the absolute transfer as a security interest. In doing so, the *PPSA* created a new set of priority rules, irrespective of whether the transfer is legal or equitable at general law and irrespective of whether or not notice of the transfer is given to the account debtor. The technical complexities of the rule in *Dearle v Hall*²⁰⁵ have been replaced by new priority rules which accord more with the commercial expectations of the parties and to that extent are to be welcomed. Where a security interest is unperfected, the application of the new priority rules may give rise to some surprises and conceptual difficulties, especially where the priority dispute is between a prior unperfected legal transfer of an account and a subsequent perfected transfer of the account.

The examples of the potential priority disputes discussed in this article emphasise the importance of perfecting the security interest by the expeditious filing of a financing statement; they also illustrate that a transferee asserting priority to an account is affected neither by notice of a prior dealing with the account nor by the first person to give notice of the transfer to the account debtor. Notice to the account debtor remains relevant to prevent the value of the account from being diluted through set off and other claims arising between the transferor and the account debtor after the transfer.²⁰⁶ In

²⁰⁵ For an analysis of the technical problems, see Meagher, Heydon and Leeming, above n 50, 332–6. The rule has been subject to criticism, see, eg, *Ward v Duncombe* [1893] AC 369, 393 (Lord Macnaghten): 'I am inclined to think that the rule in *Dearle v Hall* has on the whole produced at least as much injustice as it has prevented' (citations omitted).

²⁰⁶ See *PPSA* ss 80(1)–(8).

the case of deemed security interests over accounts, the giving of notice to the account debtor is necessary in order for the transferee to be able to enforce its rights at law since the enforcement provisions in ch 4 of the *PPSA* do not apply to deemed security interests involving transfer of accounts.²⁰⁷ The analysis illustrates the importance for a subsequent transferee of an account in searching the PPS Register so as to ensure that prior transfers of the account have been duly perfected by registration of the appropriate financing statement.

The challenge in construing the *PPSA* is to identify those places where one adopts the new approach mandated by the legislation in disregard of the general law and those places where the general law remains relevant. The above discussion provides examples of this tension. The general law remains relevant in order to determine that the *PPSA* applies in the first place. Once engaged, the *PPSA* takes over; yet even then, the general law appears to retain some significance as seen in the priority problem discussed in Part VII above. The tension is exacerbated by the application of the *PPSA* to in substance and deemed security interests, in circumstances where the application of the legislation to a deemed security interest has not been sufficiently considered. Doubtless, future case law will resolve at least some of these difficulties of construction.

²⁰⁷ *Ibid* s 109(1)(a).