John H. Farrar · Vai Io Lo
GOH Bee Chen *Editors*

Scholarship, Practice and Education in Comparative Law

A Festschrift in Honour of Mary Hiscock

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Foreword

Mary Hiscock

American lawyers and especially American judges are internationally well known for not citing the law of other countries or principles of international law unless forced to do so. Indeed, in his confirmation hearing, our Chief Justice, John Roberts, was subject to questioning that prompted his disclaimer of ever resorting to 'foreign law'.[1] As a member of the International Association of Women Judges, I have attended programmes where Canadian judges in particular have chastised us for not being willing to make the few keystrokes necessary to call up the decisions of other courts, especially those of our neighbour to the North.

The University of Chicago Bureaucracy thus gave me the gift of a lifetime when, in my first year of law school in 1962–1963, it selected Mary Hiscock to be my roommate. We were housed in the run-down building that served as a dormitory for the University's graduate students. Our quarters consisted of two rooms in a deteriorating and crime-ridden neighbourhood more than a mile from the law school.

Because we were women, we were not permitted to live in the law school dormitory adjacent to the school or even to eat in its cafeteria. Those facilities were reserved for men. Mary and I were on our own to cook, to clean and to avoid physical assault while traipsing back and forth in subfreezing weather to get to class and home again to cook dinner. Together, we survived.

Mary was part of what was called the 'Commonwealth Fellows' programme, which brought in law graduates from Commonwealth (English-speaking, common law jurisdictions I believe) for a year of advanced classes at the Law School, culminating in a law degree from the school. Because law in Australia is an undergraduate course of study and in the United States is a graduate programme, we were about the same age, having both recently received our undergraduate degrees.

Mary's maturity, however, turned out to be on a level far above mine. Our rooms became a kind of makeshift South Chicago Consulate for visitors from Down Under

[1] Liptak, A. (11 April 2009). *New York Times.*, 'Ginsburg Shares'.

ranging from the Chief Justice of Tasmania to a young Melbourne couple about to be married but with fingers too swollen from their long journey to fit their rings. Mary made a pavlova for the hungry Chief Justice and a hasty visit to the drug store to fetch makeshift wedding bands for the grateful couple.

Mary saved my career that year when I collapsed with a fever of 105 the night before my first examination. Mary bundled me up and took me to the hospital emergency room and then contacted the law school to ask them to allow me to take the exams a few days late. When the school refused, she protested mightily and managed to convince the rather sexist advisor to the Commonwealth Fellows to intercede on my behalf. There was a condition, however. I had to take the exams when everyone else did, which meant I had to take three of the exams in the hospital.

That would not happen in American law schools today, but it was a different era. Without Mary's intercession, I would not have been able to continue the year, would have lost my scholarship and would never have become a lawyer. Years later, she explained to me that the school didn't want women and was 'out to get rid of me'. Mary would never have told me that at the time. I wish I could have heard what she said to the powers in law school back then. Her loyalty and determination have always been fearsome to behold.

That all happened during the era of President John F. Kennedy and in the year of the Cuban Missile Crisis. It was a dramatic time. Mary followed the crisis moment to moment on our tiny television while I huddled in the closet. Mary would not miss the President's historic visit to Chicago later that year, in the huge auditorium in Chicago's McCormick Place. She said she could not return to Australia without having seen him. The next November, I tearfully packaged a dozen newspapers describing the Kennedy assassination and sent them to Mary back in Melbourne where she, I am sure equally tearfully, received them with heartfelt appreciation.

Since then, I have made several visits to Australia, including one of some months, when Mary helped arrange for my husband to spend a leave of absence to teach at the University in Melbourne. We dined in hall with our young children, travelled throughout Australia and New Zealand and went to the horse races with Mary, creating in our children an utter adoration of Phar Lap. I think that trip played a big part in inspiring our older daughter, then 12, not only to love horses but to want to see the world. She has since travelled many continents, dedicating her career to the preservation of ancient Coptic religious documents.

Some years ago, I was asked to give a lecture in Canberra. My presentation managed to draw a local audience of approximately six, but Mary loyally came to Canberra and listened to the whole thing.

Determined, gutsy, loyal and brilliant, Mary has always seemed fearless. The only chink I have ever discerned in that armour appeared on one of her visits to my home in Arizona. With great pride, I took her to see one of the most spectacular sights in the world, the Grand Canyon, only to have her refuse to approach the edge. It never occurred to me that the courageous Mary Hiscock could be afraid of heights.

The cards, letters, photos and lecture summaries Mary has sent my husband and me over the years have traced the outline of a most distinguished international career, in fields I know little about. This substantial volume is an appropriate tribute to a world-class scholar. This little essay is intended as a salute to a world-class friend.

Thank you Mary.

Mary M. Schroeder
Senior Judge of United States Court of Appeals 9th Circuit
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Reference

Liptak, A. (2009, April 11). *New York Times*. 'Ginsburg Shares'.

Contents

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Chapter 1
Introduction: Comparative Dimensions of Law in Context

John H. Farrar and GOH Bee Chen

Abstract Emeritus Professor Mary Hiscock is a foremost Australian legal scholar in Comparative Law. She has, over the course of her long and distinguished academic career, positively contributed to scholarship, practice and education in Comparative Law. This edited volume brings together Australian and international legal scholars to honour her in this festschrift in celebration of her 80th birthday.

Keywords Comparative law · Festschrift

1.1 About Emeritus Professor Mary Hiscock

This *festschrift* is in honour of our friend, Mary Hiscock, on the milestone occasion celebrating her 80th birthday in October 2019. *Festschrift* has been described as 'a charming survivor of a more collegial academic age'.[1] That description could be applied to a number of us looking back on halcyon days where somehow things seemed better. As volume editors, our individual connections with Mary Hiscock as colleague and friend range from John's forty years, Vai's more than ten years and Bee Chen's almost thirty years.

Mary graduated in 1961 from Melbourne where she was taught by a very strong faculty, which included Zelman Cowen, Norval Morris, David Derham, Pat Donovan, Harold Ford, and Robin Sharwood, as full-time staff, and a number of

[1] Richetti, J. (2012). 'The Value of the *Festschrift*: A Dying Genre?'. *The Eighteenth Century*, *53*(2), 237.

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Victorian judges as part-timers. Mary was on the Editorial Board of the Melbourne University Law Review, which gave her close interaction with the staff.

Mary tutored until 1962 when she obtained Ford and Fulbright fellowships to study for a JD at the University of Chicago. There she was taught by a remarkable faculty which included Max Rheinstein[2], Soia Mentschikoff,[3] and Malcolm Sharp.[4] Classes in the JD electives were small, 12–15 in a class. It was whilst there that a special bond was forged between her and Judge Mary M Schroeder who has provided the book's Foreword. Mary returned and was appointed to the Turner Special Lectureship at Melbourne. Some members of the profession were not happy with this as she was not admitted as a barrister or solicitor. The students were, however, supportive, and she overcame the opposition. Young law teachers then had to teach many subjects, but she had strong support from good colleagues like Zelman Cowen and Frank Maher.

In the 1960s, Mary began her long involvement in professional matters, and was the Chair of the Women Lawyers Association in Victoria at the time of the first national Equal Pay Case. She also began to develop her major interests in Comparative Law and International Trade Law. On the retirement of Hans Leyser at Melbourne, she turned what had been a European-based course in Comparative Law into one that used Asian legal materials. She also began to work with the federal government and the Solicitor-General, Bob Ellicott, in the field of International Trade Law, and was a significant force in the introduction of the annual Attorney-General's International Trade Law Seminar. She represented Australia on several occasions at *UNCITRAL*.

Mary met her future husband, the late David Allan, in the mid-1960s, and they developed their shared interest in Asian contract and securities law, which led to a long and fruitful collaboration. Throughout the 1970s, the team included Derek Roebuck, a contributing author to this volume. Together, Mary and David became very well-known in East and Southeast Asia for their work, and they served as external examiners in Hong Kong and Malaysia. They co-authored many books on Comparative Law and one on the Law of Contract.

All was not well in the Melbourne Law School in the 1960s and Mary, after a bout of serious illness and some feelings of frustration, decided to seek her long-delayed admission as a barrister and solicitor. She served articles with Mallesons Stephen Jaques and found the experience challenging and invigorating. The Supreme Court abridged her articles, but this decision was challenged on appeal by the Board of Examiners. It became a leading case – a faint echo of the town-gown clashes of her appointment.

At the University of Melbourne, from 1977 to 1991, Mary was the Conciliator of Academic Staff Disputes, and from 1989 to 1990, she was the Deputy Dean of the

[2] Rheinstein brought to the study of law a wealth of European culture.

[3] Soia Mentschikoff, the widow of Karl Llewellyn, had an amazing intellect and strong views. She normally taught Commercial Transactions, but taught Mary International Law.

[4] Sharp was a brilliant contract lawyer who gave Mary, coming from an Australian Catholic background, her first introduction to a coherent secular worldview.

Faculty of Law. Mary continued to have strong international connections and served as President of the International Academy of Commercial and Consumer Law in 1999 and 2000. She also chaired the International Law Section of the Law Council of Australia from 1995–2002.

She was persuaded to accept the offer of a Chair of Law at Bond in 1993 when John became Dean, and she served as Associate Dean (Research and Graduate Studies) from 1994–1997. She made a strong contribution to the University, both in terms of teaching Contract Law and International Trade Law, and in serving on University Committees. She chaired the inaugural Research Committee. She chaired the Faculty Council for 3 years with distinction.

On Mary's arrival at Bond, Bee Chen became acquainted with Mary when she was the tutor in Contract Law with Mary as the Course Coordinator and Lecturer. They held weekly meetings to review the tutorial questions and go over student concerns, if any. For Bee Chen, Mary acted as a great mentor not just in the teaching of Contract Law, but in learning from Mary her thoroughness and her keen sense of intellect. When Bee Chen moved to become the Head of the Law School at Southern Cross University in 2006, she was deeply moved by the tremendous gift of the entire United Kingdom Law Reports from Mary to the Law School. Mary recounted to her that, in the early days, she and David had foregone many meals in order to save up to build their personal law library. This gift is enshrined as 'The David Allan Memorial Law Collection' in the Law School at the University's Lismore campus.

Mary retired from full-time teaching at Bond in 2002, and was made Emeritus Professor, but after David's death returned on a fractional appointment from 2007 until 2015.

During a long and distinguished career, she has supervised many international students and done much to advance their careers. She was one of Australia's first female law teachers and is its most distinguished scholar in Comparative Law, particularly in the field of Asian Law. Mary has been a comparative lawyer all her career. She has combined this with work in Contract and International Trade Law. Indeed, her knowledge has found a practical use in development, particularly in Asia. Her early work was for the Asia Development Bank and UNCITRAL. Later, she did valuable work in the Tim Fischer Centre for Global Trade and Finance, when Vai Io Lo was a Co-Director and the subsequent Director. Mary's involvement led to several international conferences and publications. She has been Visiting Professor in Europe and South East Asia a number of times.[5]

[5] Some of the above material is based on Farrar, J. (2003). 'Festschrift for David Allan and Mary Hiscock'. *Bond Law Review*, *15*(2).

1.2 About the Book

This book canvasses Comparative Dimensions of Law in Context, exploring comparative law in scholarship, practice and education.[6] As a preliminary observation, Mary taught International Contracts by requiring postgraduate students to negotiate and draft international sales contracts. She was thus practising Comparative Law in Context before it became fashionable. She adopted a global approach to law before Globalisation became a buzzword. It is therefore fitting that a number of Australian and international scholars have chosen to honour her in this present *festschrift* as a mark of their friendship and respect for her distinguished contribution. It is worth noting that contributing scholars hail from four continents: Asia, Europe, North America and Australia, demonstrating Mary's global outreach and influence.

This book is arranged in three parts. Part I examines the contribution of comparative law to legal scholarship. Part II discusses how comparative law can be employed to resolve issues arising from legal practice. Part III appraises comparative law in legal education. This arrangement is somewhat deliberate as Mary has made her mark in comparative law in all of these three areas.

Happy birthday, Mary!

References

Farrar, J. (2003). Festschrift for David Allan and Mary Hiscock. *Bond Law Review, 15*(2), 71–82.
Richetti, J. (2012). The value of the *Festschrift*: A dying genre? *The Eighteenth Century, 53*(2), 237.

[6] The volume editors wish to thank Mikayla Brier-Mills for her efficient research assistance and in particular, her formatting skills.

Part I
Scholarship

This Part (I) includes the following Chapters:

Chapter 2
Recent Developments in Australian PPSA Case Law and Their Relevance to Other PPSA Jurisdictions

Anthony Duggan

Abstract In this chapter, I discuss four recent Australian cases: the *Hamersley Iron* case; *In the Matter of OneSteel Manufacturing Pty Limited*; *Allied Distribution Finance Pty Ltd v. Samwise Holdings Pty Ltd;* and *Re Amerind Pty Ltd.* In the *Hamersley Iron* case, the main issue was whether the granting to A of a PPSA security interest in an account owing by B to C destroys mutuality between B and C so as to preclude B from asserting a right of set-off in C's liquidation. In the *OneSteel* case, the issue was whether the inclusion of the grantor's Australian Business Number (ABN) in the financing statement, rather than the Australian Company Number (ACN), as the statute requires, invalidates the registration. *Samwise* concerned the application of the purchase-money security interest (PMSI) priority rules in Australian PPSA, s.62 to a PMSI refinancer. In *Re Amerind,* the issue was whether, when parties contract for the supply of goods from time to time on title retention terms, there is: (1) a single security agreement which comes into effect once the requirements of offer and acceptance have been satisfied; or (2) a succession of separate security agreements which come into effect at the time of each new order or delivery. *Hamersley Iron* relied heavily on Canadian and New Zealand case law while in *OneSteel*, the court was influenced by New Zealand authority. By contrast, in *Samwise* there was no reference at first instance to any overseas authorities, even though the facts of the case were almost identical to the facts in the Nova Scotia Court of Appeal case, *Macphee Chevrolet Buick GMC Cadillac Ltd v. SWS Fuels Ltd.* The concern in *Re Amerind* was with an issue that is peculiar to Australian law and so there was no occasion for the courts to consider Canadian or New Zealand authorities. Nevertheless, all four cases raise interesting and novel points which make them instructive in other PPSA jurisdictions.

Keywords Contract formation · Floating charges and the PPSA · Insolvency set-off · Overseas case law · Personal property securities law

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2.1 Introduction

The Australian *Personal Property Securities Act* ('PPSA')[1] has been in force for just over six years and a significant body of local case law is slowly starting to emerge. The New Zealand *Personal Property Securities Act*[2] is based closely on the text of the Saskatchewan *Personal Property Security Act*.[3] The PPSA, while based to some extent on the Saskatchewan model, is different in a number of significant respects and, in the early days there was some concern that, given these differences, Australian courts might think it unsafe to rely on Canadian and New Zealand case law and secondary sources.[4] These concerns have not materialized and, in a recent case, *Hamersley Iron Pty Ltd v. Forge Group Power Pty Ltd (in liq.)*,[5] the trial judge noted that the policy underlying the PPSA is the same as in Canada and that the 'same broad structure and concepts are employed'. It is appropriate, therefore, for Australian courts to be guided by Canadian and New Zealand authorities, while remaining 'alive to the differences'.[6]

In this Chapter, I discuss four recent Australian cases: the *Hamersley Iron* case; *In the Matter of OneSteel Manufacturing Pty Limited*;[7] *Allied Distribution Finance Pty Ltd v. Samwise Holdings Pty Ltd;*[8] and *Re Amerind Pty Ltd.*[9]

In the *Hamersley Iron* case, the main issue was whether the granting of a PPSA security interest in an account owing by B to C destroys mutuality between B and C so as to preclude B from asserting a right of set-off in C's liquidation. In the *OneSteel* case, the issue was whether the inclusion of the grantor's Australian Business Number (ABN) in the financing statement, rather than the Australian Company Number (ACN), as the statute requires, invalidates the registration. *Samwise* concerned the application of the purchase-money security interest (PMSI) priority rules in PPSA, section 62 to a PMSI refinancer. In *Re Amerind,* the issue was whether, when parties contract for the supply of goods from time to time on title retention terms, there is:

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

[2] *Personal Property Securities Act* 1999 (N.Z.) ('New Zealand PPSA').

[3] *Personal Property Security Act 1993*, S.S. 1993, c.P-6.2 ('Saskatchewan PPSA').

[4] See Duggan, A. & Brown, D. (2016). *Australian Personal Property Securities Law* (2nd edition). Australia: LexisNexis Australia., xix.

[5] [2017] WASC 152 ('*Hamersley Iron*').

[6] Ibid., [89]. The trial judge's decision was reversed on appeal: *Hamersley Iron Pty Ltd v. Forge Group Power Pty Ltd (in liq.)* [2018] WASCA 163 ('*Hamersley Iron Appeal*'). But the appeal court made no comment on the appropriateness of relying on authorities from overseas jurisdictions and so the trial judge's remarks are still important.

[7] [2017] NSWSC 21 ('*OneSteel*').

[8] [2017] SASC 163.

[9] [2017] VSC 127 ('*Re Amerind*'). For a discussion of three earlier Australian cases - *Warehouse Sales Pty Ltd (in liq.) v. LG Electronics Australia Pty Ltd* [2014] VSC 644; *Re Renovation Boys Pty Ltd* [2014] NSWSC 340; and *Re Arcabi Pty Ltd* [2014] WASC 310 - see Duggan, A. (2015). 'The Trials and Tribulations of Personal Property Securities Law Reform in Australia'. *Saskatchewan Law Review, 78*(2)., 257, 280–286.

1. a single security agreement which comes into effect once the requirements of offer and acceptance have been satisfied; or
2. a succession of separate security agreements which come into effect at the time of each new order or delivery.

In *Re Amerind*, the question mattered because under section 588FL of the *Corporations Act*,[10] a security interest may be ineffective in the grantor's insolvency unless it was registered within one or other of three time frames, including '20 business days after the security agreement that gave rise to the security interest came into force'.[11] But *Re Amerind* is also at least indirectly relevant to the writing requirement in PPSA, section 20(2): if the court finds that there is a succession of separate security agreements which come into effect at the time of each new order or delivery, does section 20(2) require that each agreement must be separately documented?

In *Hamersley Iron*, the trial judge relied heavily on Canadian and New Zealand case law while in *OneSteel*, the court was influenced by New Zealand authority.[12] In *Samwise,* there was no reference at first instance to any overseas authorities, even though the facts of the case were almost identical to the facts in the Nova Scotia Court of Appeal case, *Macphee Chevrolet Buick GMC Cadillac Ltd v. SWS Fuels Ltd.*[13] This oversight was rectified on appeal.[14] The concern in *Re Amerind* was with an issue that is peculiar to Australian law, so there was no occasion for the courts to consider Canadian or New Zealand authorities. Nevertheless, all four cases raise interesting and novel points which make them instructive in other PPSA jurisdictions. Parts 2.2–2.5 below deal respectively with *Hamersley Iron*, *OneSteel*, *Samwise* and *Re Amerind.*

2.2 *Hamersley Iron*

2.2.1 Case Overview

The simplified facts were that Forge (the grantor) performed work for Hamersley (the account debtor) for which Hamersley owed Forge payment.[15] Forge gave the ANZ Bank a security interest in all its present and after-acquired personal property

[10] *Corporations Act* 2001 (Cth).

[11] The other two-time frames are: six months before the appointment of the insolvency administrator; and such later time as the court may fix under s 588FM.

[12] Specifically, *Polymers International Limited v. Interworld Plastics NZ Limited* [2013] NZHC 1897 and sources there cited.

[13] *MacPhee Chevrolet Buick GMC Cadillac Ltd v. SWS Fuels Ltd* [2011] NSCA 35 ('MacPhee').

[14] *Samwise Holdings Pty Ltd v. Allied Distribution Finance Pty Ltd* [2018] SASCFC 95 [106]–[133].

[15] The following is adapted in part from Duggan, A. (2017). 'Set-Off and the PPSA: A Note on Hamersley Iron Pty Ltd v. Forge Group Power Pty Ltd (in liq.)'. Companies and Securities Law Journal, 37., 74, 572.

including, specifically, Forge's accounts and chattel paper. Forge ended up in liquidation. Hamersley sought to set off amounts owing by Forge against its own obligations, relying on express set-off provisions in its contract with Forge.

Section 553C of the *Corporations Act* provides as follows:

> (1) Subject to subsection (2), where there have been mutual credits, mutual debts or other mutual dealings between an insolvent company that is being wound up and a person who wants to have a debt or claim admitted against the company:
>
> (a) an account is to be taken of what is due from the one party to the other in respect of those mutual dealings; and
> (b) the sum due from the one party is to be set off against any sum due from the other party; and
> (c) only the balance of the account is admissible to proof against the company, or is payable to the company, as the case may be.
>
> (2) A person is not entitled under this section to claim the benefit of a set-off if, at the time of giving credit to the company, or at the time of receiving credit from the company, the person had notice of the fact that the company was insolvent.

Mutuality means that the claims must be between the same parties and they must be held in the same capacity.[16] The transfer of an account destroys mutuality because, following the transfer, the account debtor's obligation becomes owing to the transferee, whereas its entitlement lies against the transferor.[17] Forge's liquidator argued that the creation of the security interest in the bank's favour destroyed mutuality and so, applying section 553C, Hamersley had no right of set-off.

> Section 80(1) of the PPSA provides:
>
> (1) The rights of a transferee of an account or chattel paper (*including a secured party or a receiver)* are subject to:
>
> (a) the terms of the contract between the account debtor and the transferor, and any equity, defence, remedy or claim arising in relation to the contract (including a defence by way of a right of set-off); and
> (b) any other equity, defence, remedy or claim of the account debtor against the transferor (including a defence by way of a right of set-off) that accrues before the [account debtor is notified of the transfer and required to pay the transferee].[18]

The bracketed words in the opening lines of the provision make it clear that, for the purposes of the section, a person holding a security interest is a transferee, even though the security agreement is not in form a transfer. PPSA, section 12(3) provides that the statute applies to the transfer of an account whether or not the transaction in substance secures payment or performance of an obligation. In other words, the statute applies to both security interests in accounts and outright transfers. In *Hamersley Iron*, the bank held a security interest and so it was not a transferee in the conventional sense. But both at trial and on appeal, the judgments proceeded on the

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[16] Derham, R. (2010). *Derham on the Law of Set-Off* (4th edition). Oxford: Oxford University Press.11.01.

[17] *Telford v. Holt* [1987] 2 SCR 193, [26]; *Hamersley Iron Appeal*, [290]–[291]; [394].

[18] Emphasis added. Section 80(2) provides that sub-section (1) does not apply if the account debtor agrees not to assert defences to claims arising out of the contract.

basis that section 80(1) was relevant and in doing so confirmed that the opening words of section 80(1) mean what they say.[19]

Hamersley argued that PPSA, section 80(1) had the effect of preserving its right of set-off. In the alternative, it argued that the bank's security interest was a floating charge, that in the absence of crystallization, the bank had no beneficial interest in the disputed accounts and that, therefore, the creation of the security interest did not destroy mutuality between Hamersley and Forge.

The trial judge rejected Hamersley's arguments, holding that *Corporations Act*, section 553C took precedence over PPSA, section 80(1) and that, under the PPSA, a security interest in circulating assets was a fixed security interest, rather than a floating charge, which gave the secured party a property right in the relevant assets as and when the grantor acquired them. The creation (attachment) of a PPSA security interest may not be a transfer (or assignment) in the conventional sense, but because it gives the secured party a proprietary interest, it is sufficient to destroy mutuality.

This decision was reversed on appeal. The court held that in deciding whether mutuality exists for the purposes of *Corporations Act*, section 553C, the fact that a third party has acquired rights in the disputed account is not determinative and the court must inquire into the substance of those rights. In this connection, 'the question is whether at the commencement of the liquidation, the debt sought to be used as a setoff by the creditor of an insolvent party would have been recovered 'for his own benefit', or vice versa'.[20] Where a third party acquires a security interest in the debt, the question turns on whether the grantor remains free to collect the debt and use the proceeds for its own benefit, or whether the proceeds are payable to the secured party.[21] On this basis, pre-PPSA, the granting of a fixed charge destroyed mutuality, but a floating charge did not. This is because, prior to crystallization, 'property which is subject to a floating charge may be used by the security grantor for its own benefit while property which is the subject of a fixed charge may not'.[22] In the present case, the bank's security agreement described the security interest as a 'charge', and the court interpreted this expression by reference to the provisions of PPSA, Part 9.5. Part 9.5 is headed 'References to charges and fixed and floating charges' and, in summary, it provides for the replacement of references in the Corporations Act and other legislation to a 'floating charge' with references to a 'circulating security interest'. The provisions go on to define a circulating security interest as a security interest in a circulating asset, or current asset. 'Current assets' includes accounts and inventory, but the secured party can avoid the circulating security interest characterization by asserting control over the collateral, for example, by requiring the grantor to pay over any collections to the secured party or to

[19] The point was taken as given in the trial judgment, but it was expressly addressed on appeal, the court relying on the bracketed words in the opening part of the provision and also the general statutory context: *Hamersley Iron Appeal*, [204]–[223].

[20] *Hamersley Iron Appeal*, [84].

[21] Ibid, [86].

[22] Ibid, [86].

pay the funds into a separate bank account controlled by the secured party.[23] In *Hamersley Iron,* the bank had not asserted control over the disputed accounts and the court, applying the Part 9.5 provisions, held that its security interest was a circulating security interest. As such, and in common with the pre-PPSA floating charge, the security interest did not destroy mutuality between Hamersley and Forge. On that basis, Hamersley was entitled to assert its statutory set-off rights.[24] The following discussion expands on this outline.

2.2.2 PPSA, section 338

PPSA, section 338 is the guide to Part 9.5. It provides as follows:

> This Part contains special rules dealing with references to charges and fixed and floating charges *in laws of the Commonwealth and in security agreements*.
>
> These rules are expected to have less relevance over time, as the scheme provided for by this Act provides an alternative to reliance on those techniques for security interest transactions' (emphasis added).

As this explanation makes clear, the purpose of the Part 9.5 provisions is a purely terminological one. The changes it implements are not substantive, but are consequential on the PPSA. The point is that, as discussed further below, the PPSA abolishes the floating charge concept and provides instead for a fixed security interest capable of attaching to a shifting mass of assets from time to time. This reform makes references to the floating charge in other laws redundant and Part 9.5 addresses the problem by substituting new terminology which is consistent with the PPSA but, at the same time preserves the parties' pre-PPSA entitlements under other laws. In summary, PPSA, Part 9.5 is not relevant to the PPSA itself but, rather, to the Commonwealth laws and security agreements section 338 refers to. This point is underscored by the Whittaker Report's recommendation that Part 9.5 should be moved to the *Corporations Act*, since the provisions are relevant mainly in that context.[25] It follows that in *Hamersley*, the appeal court was wrong to rely on Part 9.5. The provisions it should have applied are PPSA, section 18(2) read in conjunction with sections 19(2) and 32(1).

Section 18(2) provides for the taking of a security interest in after-acquired property, while section 19(2) provides for attachment of a security interest. It sets out various requirements for attachment, including a requirement that the grantor must have rights in the collateral. The combined effect of these provisions is that a security interest in circulating assets takes effect as a fixed security interest which

[23] This is a summary account only. For a fuller treatment of PPSA, Part 9.5., see Duggan, A. & Brown, D. (2016)., n 4. 13.20–13.27.

[24] *Hamersley Iron Appeal*, [101]–[132].

[25] Whittaker, B. (2015). *Review of the Personal Property Securities Act 2009: Final Report* (Commonwealth of Australia). 9.2.1.2. Retrieved from www.ag.gov.au

attaches to items of collateral as and when the grantor acquires them. Section 19(4) expressly acknowledges the application of sub-section (2) to floating charges. It follows that section 19 overrides floating charge language in a security agreement and so, despite what the parties might say, the security interest takes effect as a fixed security interest instead.[26]

Section 32(1) applies where there is a dealing in the collateral giving rise to proceeds. It provides that:

> (1) the security interest does not continue in the collateral if the secured party expressly or impliedly authorised the dealing; but
> (2) it extends to the proceeds.

This provision caters for cases where the collateral is circulating assets such as inventory or accounts, and it mimics the effect of pre-PPSA floating charges law. In summary, under the PPSA, a security interest in circulating assets takes effect as a fixed security interest subject to a contractual licence to deal with the collateral in the ordinary course of the grantor's business. Specifically, if the collateral is, say, accounts and the security agreement authorises the grantor to deal with the accounts in the ordinary course of business, the consequences are as follows:

1. the security interest attaches to each account as and when it is generated;
2. it ceases to attach to an account when the grantor collects;
3. it attaches instead to the collection proceeds;
4. if the grantor deals with the proceeds, the security interest ceases attaching to them and attaches instead to the proceeds of that dealing; and
5. the grantor's freedom to deal with the accounts and their proceeds continues unless and until the secured party withdraws its authority.

Applying these provisions to the facts of the *Hamersley Iron* case, the bank held a fixed security interest in the disputed accounts; the bank had not asserted control over the accounts and so, by implication, it had authorised the grantor to deal with the accounts and their proceeds in the ordinary course of business; this means, among other things, that the grantor was entitled to collect on the accounts for its own benefit and so the granting of the security interest did not destroy mutuality between Forge and Hamersley. In short, the appeal court reached the right conclusion, but for the wrong reason.[27]

By contrast, the trial judge correctly recognised the relevance of the attachment provisions in PPSA, section 19 and correctly concluded that despite the use of floating charge language in the bank's security agreement, its security interest was fixed, not floating. On the other hand, the trial judge's mistake was to overlook section 32(1) and its relevance to the mutuality issue. As indicated above, the appeal court made a variation of the same mistake.

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[26] For a fuller account, see Duggan, A. & Brown, D. (2016)., n 4. 4.45–4.55.

[27] The appeal court mentioned *PPSA*, s 32, but only in passing: [2018] WASCA 163, [135]; [136].

2.2.3 *PPSA, section 80(1) and* Corporations Act*, section 553C*

PPSA, section 80(1) derives from the Canadian PPSAs,[28] and the Canadian provisions derive, in turn, from old Article 9, section 318(1). The Official Comment on section 9-318(1) stated that the provision made 'no substantial change in prior law'.[29] Likewise, the corresponding Canadian provisions 'were not considered substantive changes' but, rather, they were 'intended to restate the current law about the defences available by an account debtor as against an assignee, [not] to make any substantive changes to the common law'.[30] It follows that section 80(1), in common with its North American predecessors, is intended simply to restate the common law rules relating to the enforceability of an account debtor's rights against a transferee of the account and not to enlarge or diminish either party's pre-PPSA rights.[31] According to Goode and Gullifer, at common law there are five principles governing the [account] debtor's defensive rights against an assignee:

> First principle: an assignee cannot stand in any better position than his assignor
> This is simply an application of the principle that nemo dat quod non habet: the assignor (C) cannot transfer greater rights than he himself possesses. One application of this principle is that either no money or a reduced amount of money may be due under the claim assigned, that is, the obligation owed by D to C… Another way of stating this first principle is that A takes a 'flawed asset', in that the reduction or extinguishment by a cross-claim on judgment is inherent in the claim, and that is the case whenever the cross-claim arises.
> Second principle: assignee takes subject to equities
> The second principle is broader than the first, and also stems from a different historical root. This is a 'rule of equity' that the assignee 'takes subject to equities'. This rule is often treated as synonymous with the first principle but it is in fact a distinct rule evolved by courts of equity to protect the debtor against injustice that might result from an assignment. It is therefore based on unconscionability rather than on the nemo dat principle, and can be qualified by countervailing principles in a way that the nemo dat principle cannot.
> Third principle: receipt of notice of assignment fixes eligibility for (independent) set-off
> … D cannot set off against A a cross-claim arising after D has received notice of the assignment. The reason for this principle is obvious: to allow D, by further

[28] See, e.g., *PPSA*, s 41(2) (Saskatchewan).

[29] A point noted in Gilmore, G. (1965). *Security Interests in Personal Property*. Boston: Little Brown & Company, Boston. 1089.

[30] *Commercial Factors of Seattle LP v. Canadian Imperial Bank of Commerce* (2010) ONSC 3516 [36], quoting Cameron, J. (2007) 'Ontario Personal Property Security Act: Reform in 2006'. Retrieved from: http:/www.torys.com/Publications/Documents/Publications%20PDFs/AR2007-5T.pdf

[31] See *Hamersley Iron Appeal* [2018] WASCA 163, [219]: 'the operation of s 80 … is, in broad terms, not dissimilar to the general law position'.