Introduction

(a) General

[1.01] Subject matter of the book. The subject matter of this book is the rules governing the voluntary inter vivos assignment of contractual rights.1 Such transactions involve the transfer of a contractual right from the owner (assignor) to the transferee (assignee). The person bound to perform the correlative obligation is either (in the case of a debt) the debtor or (in the case of some other contractual performance obligation) the obligor. Assignments of contractual rights form an important area of commercial practice. Despite this, in terms of legal publications, the assignment of contractual rights is an area that until recently had received little attention2 and was described as ‘undeveloped’.3

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1 Often this is referred to as assigning the benefit of a contract. Statements can be found that seek to distinguish the assignment of the ‘benefit’ of a contract from the assignment of rights under a contract, e.g. Yeandle v Wynn Realisations Ltd (1995) 47 Con LR 1. However, under the property model of assignment (see [3.19]) this distinction cannot be maintained. Only contractual rights may be assigned, and for the most part these flow from contractual terms. The class of contractual rights and duties that do not flow from the terms of a contract is small: see E Peden, Good Faith in the Performance of Contracts (Sydney, Butterworths, 2003) para 1.5. References to the assignment of the ‘benefit’ of a contract should be taken to refer to an assignment of all the rights under a contract rather than any specific rights under a contract.

2 This is despite statements such as, ‘modern capitalism begins with the assignment and negotiability of contracts’: see JR Commons, Legal Foundations of Capitalism (New York, Macmillan, 1924) at 253. It has also been said: ‘If we were asked—Who made the discovery which has most deeply affected the fortunes of the human race? We think, after full consideration, we might safely answer—The man who first discovered that a Debt is a Saleable Commodity’: see H Dunning Macleod, The Theory and Practice of Banking, 5th edn (London, Longmans, Green, Reader & Dyer, 1892) i, at 200. Clearly these statements were made prior to the general financial crisis that began in 2008 and only hold true to the extent that there is trading in good debts. There have been a number of publications dealing with the more general topic of the assignment of choses in action: see generally WR Warren, The Law Relating to Choses in Action (London, Sweet & Maxwell, 1899); FCT Tudsbery, The Nature, Requisites and Operation of Equitable Assignments (London, Sweet & Maxwell, 1912); OR Marshall, The Assignment of Choses in Action (London, Pitman & Sons Ltd, 1950); JG Starke, Assignment of Choses in Action in Australia (Sydney, Butterworths, 1972). See also J Barr Ames, Lectures on Legal History (Cambridge, Mass, Harvard University Press, 1913) at 210; SJ Bailey, ‘Assignments of Debts in England from the Twelfth to the Twentieth Century’ (1931) 47 LQR 516, (1932) 48 LQR 248, 547; WS Holdsworth, ‘The History of the Treatment of Choses in Action by the Common Law’ (1920) 33 Harv L Rev 997 (reprinted with minor amendments in WS Holdsworth, A History of English Law, 2nd edn (London, Methuen, Sweet & Maxwell, 1937) vii, at 515). Textbooks have also considered in some detail the position of a trustee where a beneficiary assigns its interest: see generally B Marks, Alienation of Income, 2nd edn (Sydney, CCH Australia, 1982) para 224. In addition, there are a number of specialist works that have dealt with receivables financing and the alienation of income: see F Oditah, Legal Aspects of Receivables Financing (London, Sweet & Maxwell, 1991); FR Salinger, Nigel Davidson, Simon Mills and Noel Ruddy, Salinger on Factoring, 4th edn (London, Sweet & Maxwell, 2005); PM Biscoe, Credit Factoring (London, Butterworths, 1975); B Marks, Alienation of Income, 2nd edn (Sydney, CCH Australia, 1982). See also LW Melville, Precedents on Industrial Property and
In the result, the assignment of contractual rights is made up of a number of rules which overlap, make little sense as statements in their own right and appear to lack any general underlying and unifying principle. These rules are as follows:

1. An assignor can assign no greater right than it has nor can an assignee obtain a right greater than that held by the assignor.
2. Only non-personal contractual rights may be assigned.
3. It is not possible by assignment to increase or vary the obligations or burdens of an obligor.
4. It is possible to assign only rights and not obligations.
5. After receiving notice of an assignment, the obligor may not do anything to diminish the rights of the assignee.
6. An assignee can be in no better position than the assignor was prior to the assignment.
7. An obligor should be no worse off by virtue of an assignment.
8. An assignee takes subject to the equities.

[1.02] Objects and themes of the book. This book seeks to explain the existence, meaning and operation of these rules in Anglo-Australian law by proving two points. First, that most of these rules can be explained by reference to what is termed (in this book) ‘the principle of transfer’. Case law dictates that an assignment involves a transfer of rights. This prompts an investigation into the legal concept of transfer. It is shown that the principal effect of a legal transfer flows from the fact that it is governed by the nemo dat rule. This rule forms the basis of ‘the principle of transfer’. The principle of transfer holds the key to understanding the rules governing the assignment of contractual rights as it is the fundamental principle governing such assignments. Most of the ‘rules’ are merely different ways of expressing this principle. The reason for having different expressions of the one principle is that each rule attempts to express the operation of the principle of transfer at different stages of an assignment. Therefore, the principle of transfer explains the existence, meaning and operation of these rules. In short, an assignment does not merely involve a transfer; assignment is transfer.

Secondly, in investigating the case law to show its compliance with the principle of transfer, it will be seen that there are some deviations. It is suggested that those deviations are explicable by recognising that a formal legal relationship exists between the assignee and obligor which is policed by equity to prevent unconscionable conduct. The content of rules 5 and 8, to the extent that they focus on the obligor/assignee relationship rather than the assignor/assignee relationship, are explicable on this basis rather than the principle of transfer.


4 Despite this emphasis use is made of instructive cases from a number of jurisdictions.
3 The explanatory nature of this book by no means exhausts the issues that face the law of assignment. For example, the current law, reflecting the history of this area, views assignment as involving the transfer of a proprietary right. Whether this fixation with property rights should continue is questionable, see Pacific Brands Sport and Leisure Pty Ltd v Underworks Pty Ltd [2006] FCAFC 40, (2006) 230 ALR 56 and see M Leeming, ‘Commentary on
Application of theme to the rules governing the assignment of contractual rights. The conclusions that are reached in the book as regards the application of the principle of transfer to the rules governing the assignment of contractual rights are as follows.

Rule 1: An assignor can assign no greater right than it has nor can an assignee obtain a right greater than that held by the assignor. This rule is a clear adoption of the nemo dat rule which is the hallmark of all legal transfers. As an assignment involves a transfer, the principle of transfer dictates the existence of this rule and provides the meaning of this rule.

Rule 2: Only non-personal contractual rights may be assigned. The personal rights rule on its face would appear to be the most difficult rule to explain by reference to the principle of transfer. However, it is suggested that because contractual rights owe their existence to the intention of the parties then it must follow that that intention moulds the character of contractual rights not only as personal rights but also as choses in action. This point makes it clear why the principle of transfer would dictate the existence of a rule that gave such prominence to party intention and autonomy. That is, if the parties rob a chose in action of its inherent assignability, then to allow the assignment of that right would be to allow the assignment of a right greater than and different from the one vested in the assignor, which would breach the principle of transfer.

The same reasoning explains both the efficacy of contractual provisions prohibiting assignment and provisions that make rights assignable that would otherwise be construed as personal.

Rule 3: It is not possible by assignment to increase or vary the obligations or burdens of an obligor. Like rule 1 above, this rule is a clear adoption of the nemo dat rule. If the assignor cannot assign a right different from or greater than the one vested in him or her, then the effect of that assignment must be that the correlative obligation of the obligor is also not capable of variation by reason of the assignment. It may be noted that ‘variation’ here concerns variations of legal obligations rather than factual changes to performance. So long as the obligor is being asked to perform for the assignee the same legal obligation as that promised to the assignor, then the obligor cannot complain that there has been a variation to its obligation. It is accepted that there may be some increased inconvenience in fact by reason of an assignment.

This rule is also used to state the conclusion (or sub-rule) that the assignee can recover by way of damages for breach of contract no more than the assignor could have recovered. It is suggested that the principle of transfer dictates that the assignee should recover for its
own personal loss. Nevertheless, generally, the potential loss of the assignor should operate as a cap on liability, because the right to performance does not change its character when assigned but remains a right to an obligation promised to the assignor. This impacts on the value of the right vested in the assignee, and this result is dictated by the principle of transfer.

Rule 4: *It is possible to assign only rights and not obligations.* When dealing in choses in action, it is only possible to transfer something one owns. At the time when a contract is formed a party does not own an obligation that it owes to the other party. To recognise the assignment of a chose in action which the assignor does not own would be at odds with the *nemo dat* rule. The principle of transfer cannot recognise the transfer of such obligations and therefore there is necessarily a rule governing the assignment of contractual rights that such obligations cannot be assigned. There is still a debate whether a party to a contract can take from the other party an assignment of the right to the performance of the obligation that the first party owes that second party, and whether such an assignment would result in an extinction of the obligation or allow for the first party to deal further with the ‘right’ to the obligation it owes the second party. In any case, because the character of a contractual right as a chose in action is shaped by the intention of the parties to the contract, it is theoretically possible to make an obligation an intrinsic part of a right. In such a case, the principle of transfer would dictate that any transferee taking the right must also accept the obligation. If this were not the case, a right greater than and different from, that vested in the assignor would have been transferred, which is at odds with the principle of transfer.

Rule 5: *After receiving notice of an assignment, the obligor may not do anything to diminish the rights of the assignee.* It is suggested in Chapter 8 that this rule is not a rule dictated by the principle of transfer. This rule is concerned with the obligor/assignee relationship which is not the relationship under which the transfer takes place. The ‘transfer relationship’ is that of the assignor/assignee.

In practice, this rule has been used in Anglo-Australian law to prohibit the assignor and obligor from varying the contract after notice of the assignment. It is suggested that the principle of transfer would not prohibit such variations. Thus, in taking the assignment of a contractual right, the assignee must accept that that right in its nature as a chose in action may be varied by the obligor and assignor, because this power is vested in the parties to a contract. Such an act may put the assignor in breach of contract with the assignee, but that alone does not call into question the inherent power of the assignor to agree to such variations in its capacity as party to the contract with the obligor. It follows that the rule can be explained only by recognising a formal legal relationship between the obligor and assignee which allows the assignee to resist such variations to the contract when the obligor’s agreement to the variation amounts to unconscionable conduct.

Rule 6: *An assignee can be in no better position than the assignor was prior to the assignment.* The notion that an assignee can be in no better position than the assignor is a clear adoption of the *nemo dat* rule as recognised in rule 1 above. However, rule 6 is more often referred to when the question being asked concerns the extent of performance the assignee can demand from the obligor.

Rule 7: *An obligor should be no worse off by virtue of an assignment.* This rule is often used to express the reason why the damages awarded to an assignee for breach of contract by the
obligor cannot exceed those which would have been awarded to the assignor. This is clearly a result dictated by the principle of transfer, as the discussion of rule 3 above shows.

Rule 8: An assignee takes subject to the equities. It is suggested in Chapter 8 that although the origins of this rule probably lie in the early procedure adopted for enforcing assignments, the rule is also dictated by the principle of transfer. That is, the nemo dat rule demands that an assignee take subject to all the inherent weaknesses or flaws in the subject right. Thus, in the case of a contractual right, the assignee must take subject to such things as the obligor’s right to terminate the contract for breach or repudiation by the assignor or to rescind the contract by virtue of some misrepresentation, duress, undue influence or unconscionable conduct on the part of the assignor. In addition, the principle of transfer dictates that the assignee takes subject to substantive defences the obligor has against the assignor such as a right to substantive equitable set-off.

It is also suggested in Chapter 8 that part of the operation of the subject to equities rule can be explained by recognising a formal legal relationship between the obligor and assignee which is policed to prevent unconscionable conduct. This would then explain why the assignee would be subject to such things as statutory set-offs, payments to the assignor and releases given by the assignor where these arise or occur prior to the obligor receiving notice of the assignment.

(b) Structure of the Book

[1.04] Order of the book. The book is divided into four parts. This first part introduces the subject matter of the book, its objects and theme, and provides a brief history of the subject. Part 2 investigates the meaning of ‘assignment’ and the nature of equitable and legal assignments. This part explains the legal concept of transfer. The major propositions flowing from this part are that it is sensible to speak of a transfer in the context of assignment only if the assignee becomes the owner of the subject right and such a transfer is governed by the nemo dat rule.

Part 3 is concerned with the process of assigning contractual rights and investigates the rules most relevant to this aspect of an assignment. It will show that the existence, meaning and operation of these rules is explicable by the principle of transfer. This part also addresses the formalities of an assignment.

Part 4 is concerned with the relationships between the assignor, assignee and obligor and investigates the rules most relevant to these relationships. It will be shown that the existence, meaning and operation of these rules yields to the principle of transfer. However, in this part it is also necessary to introduce the notion of a formal relationship existing between the assignee and obligor to explain some of the content of the rules.

Although the object of this book is to investigate the rules governing the assignment of contractual rights, the rules are not dealt with in separate chapters. Such a structure would result in repetition as the rules overlap. As noted above, each of the rules reflects a different stage of an assignment. An assignment may be broken down into the following steps, (1) assignability, (2) formalities, and (3) position of the assignor, assignee and obligor as regards enforcement and remedies. The approach of the book is to deal with the rules within
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the context of such a transaction. Generally, rules 1, 2 and 4 (and to some extent rule 3) are concerned with assignability. Rules 5, 6, 7 and 8 (and again to some extent rule 3) concern the position of the parties. Of course, the formalities for an assignment cannot be explained by reference to the rules governing the assignment of contractual rights, but are nevertheless important to any such transaction and are discussed in Chapter 7.

(c) Some Limitations

[1.05] Main limits of the book. The abovementioned object of this book sets some important limitations. First, this book attempts to explain the law of assignment of contractual rights and therefore seeks to work within the case law. That is, the aim is to explain as many of the important authorities as possible while keeping suggestions that leading cases should be overruled to a minimum. Secondly, because the methodology is analytical, the current property model of assignment is adopted without question. The concern is how contractual rights are integrated within that system.

[1.06] Other limitations. The focus of this book is on the assignment of contractual rights to receive performance. Although such performance often involves the payment of money, the book is not a complete statement of the law governing the assignment of debts. A debt does not require a contract for its existence, and many debts arise outside contract. Moreover, debts, whether accruing under a contract or not, have always been considered to be a distinct chose in action.

In addition, because this is a book dealing with general principles of law and because of its focus on assignment of contractual rights, there is no discussion of other legal or commercial matters that may have to be addressed in the planning of such transactions. For example, there is no discussion of the various legal and commercial issues that arise in determining the form of a financing of receivables or the best structure to be adopted in a securitisation. Such matters are dealt with in specialised works on such topics. In addition, whether or not an assignment should be set aside upon the bankruptcy or insolvency of the assignor is left to specialised works.

6 It is unlikely that this model will be jettisoned at any time soon, and it is adopted in the United Nations Convention on Assignment of Receivables in International Trade: see Uncitral, Analytical Commentary on the Draft Convention on Assignment of Receivables in International Trade, A/CN. 9/489, 13 Mar 2001, paras 85, 127.

7 The book does not deal with the involuntary assignments that occur by operation of law upon death, bankruptcy and the replacement of trustees: these are dealt with in standard works on these topics. In addition to these, it may be noted that many contractual rights, particularly debts, may be assigned by force of statute: see generally Deputy Commissioner of Taxation v Lanstel Pty Ltd (1996) 22 ACSR 314; Clyne v Deputy Commissioner of Taxation (1981) 150 CLR 1 at 26–7 per Brennan J; Zucks v Jackson McDonald (1996) 132 FLR 317.

Some Limitations

In relation to assignments by way of security, because the book is limited to the issue of assignment, it is not concerned with that stage of a security transaction that deals with the perfection of security interests and the priority of security interests. In addition, because this book is principally concerned with assignments of rights to performance, the language of the book tends to be language that describes an outright assignment rather than an assignment by way of security. Basically this results in references being made to ‘assignors’, ‘assignees’ and ‘transfer’ rather than ‘mortgagors’, ‘mortgagees’ and ‘attachment’. However, under the Personal Property Securities Act 2009 (Cth), certain outright assignments are deemed ‘security interests’ and brought within the regulation of the legislation for the purposes of dealing with priority. It is therefore necessary to consider some aspects of this legislation throughout the text.