

# WHETHER AUSTRALIAN SECURED TRANSACTIONS LAWS WILL TRANSITION FROM THE ENGLISH SYSTEM TO THE PERSONAL PROPERTY SECURITIES ACT?

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*“Security is still today, at least in Australia and in the UK, the security of the sewing machine age.”<sup>1</sup>*

## INTRODUCTION

Australia stands on the brink of a personal property law reform that will shake several hundred years of case law, and shift the bedrock of statutory security over personal property. Reform of Australian personal property law has been moot for many years, sometimes deeply frozen, and now revived. This revival appears likely to result in comprehensive reforms at both state and federal levels.

Like the partial reforms in British commercial law at the end of the nineteenth century,<sup>2</sup> these reforms will be far less encompassing than the revolutionary American Uniform

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1. David Allan, *Personal Property Security - A Long Long Trail A-Winding*, 11 BOND L. REV. 178, 181 (1999).

2. See generally MAURICE EUGEN LANG, CODIFICATION IN THE BRITISH EMPIRE AND AMERICA 40–58 (1924). “[T]he United States codification movement has assumed much greater proportions than in England, and has, moreover, met with a certain measure of success.” *Id.* at 99.

Commercial Code (“UCC”).<sup>3</sup> Nevertheless, they will herald a new era of the law of personal property, introduce new concepts into Australian law, and bring Australia in line with many other countries that have embarked on a similar adventure.

This article explores the reform’s history and describes the present state of the system, as well as its uncertainties. Major proposals are analyzed, including the essential move from form-based to substance-based collateral classification, the fate of the floating charge, and special issues relating to agriculture, intellectual property, governing law, and enforcement.

While the overall reform is judged favorably, codification and subsequent modification does not always result in undeniable improvements in the law.<sup>4</sup> Legislators, judges, and lawyers alike must guard against code-generated inflexibility and confusion. By way of example, and as one commentator noted in the context of changes to § 2-209 of the UCC:

Apparently without reliable empirical evidence of actual business practices, or even educated predictions on how the

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3. See generally Allen R. Kamp, *Uptown Act: A History of the Uniform Commercial Code: 1940–49*, 51 SMU L. REV. 275 (1998); Allen R. Kamp, *Downtown Code: A History of the Uniform Commercial Code 1949–1954*, 49 BUFF. L. REV. 359 (2001); Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798 (1958); Soia Mentschikoff, *Highlights of the Uniform Commercial Code*, 27 MOD. L. REV. 167, 167 (1964) (“The Code is the most ambitious codification ever undertaken in the Anglo-American legal world and is the result of twenty years of effort by literally hundreds of American lawyers and businessmen.”).

4. See, e.g., Symposium, *Commercial Calamities*, 68 OHIO ST. L.J. 1 (2007) (devoted in part to “Commercial Calamities” arising out of the UCC, including: Larry T. Gavin, *Commercial Calamities: An Introduction and Sermon*, 68 OHIO ST. L.J. 1 (2007); Jean Braucher, *Under the Surrounding Circumstances: Amended Article 2’s Redundant (or Worse) Electronic Commerce Provisions*, 68 OHIO ST. L.J. 115 (2007); Neil B. Cohen, *The Calamitous Law of Notes*, 68 OHIO ST. L.J. 161 (2007); Gregory E. Maggs, *A Complaint About Payment Law Under the U.C.C.: What You See Is Often Not What You Get*, 68 OHIO ST. L.J. 201 (2007); Charles W. Mooney, Jr., *The Consumer Compromise in Revised U.C.C. Article 9: The Shame of It All*, 68 OHIO ST. L.J. 215 (2007); Thomas E. Plank, *Assignment of Receivables Under Article 9: Structural Incoherence and Wasteful Filing*, 68 OHIO ST. L.J. 231 (2007); Steven L. Schwarcz, *Automatic Perfection of Sales of Payment Intangibles: A Trap for the Unwary*, 68 OHIO ST. L.J. 273 (2007); Robert K. Rasmussen, *Creating a Calamity*, 68 OHIO ST. L.J. 319 (2007); Robert A. Hillman, *How To Create a Commercial Calamity*, 68 OHIO ST. L. J. 335 (2007); Amelia H. Boss, *The Future of the Uniform Commercial Code Process in an Increasingly International World*, 68 OHIO ST. L.J. 349 (2007); Larry T. Garvin, *The Strange Death of Academic Commercial Law*, 68 OHIO ST. L.J. 403 (2007)).

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rule changes would affect business, the drafters decided to reverse two long-standing common-law rules, elevate the waiver principle to statutory status, and broaden the reach of the statute of frauds, all in the name of simplify[ing], clarify[ing], and moderniz[ing] the law of contract modification. . . . What seems apparent is that the package of reforms as written has through obfuscation dramatically increased the cost side of the ledger.<sup>5</sup>

The simplicity, clarity, and workability of a reformed personal property scheme for Australia will require careful judgment over time to ensure that the promised benefits are, in fact, delivered and maintained for the commercial players, consumers, and governments who advocated for it and rely upon its success.

Part I of this article explores Australia's long journey toward personal property securities reform. The benefits of changes in fundamental securities concepts will be considered in Part II. Part III analyzes special reform issues affecting existing Australian law and commercial practices. Finally, Part IV considers issues that may arise in enforcing reform legislation.

#### I. AUSTRALIA'S SLOW TRANSITION FROM THE SECURITY OF THE SEWING MACHINE AGE TO THE PERSONAL PROPERTY SECURITIES ACT

Australia's journey toward securities reform has been long and difficult. While the inefficient complexities of the present system have created many securities issues, Australia has been slow to change. This is due in part to Australian banks' reluctance to embrace the reform in the securities system. By overcoming years of resistance to change, Australia has finally arrived at the gateway to securities reform with the enactment of the Personal Property Securities Act ("PPSA"). While change in the securities system may pose many issues, the promising budget created for reform legislation indicates Australia's willingness to move forward and adapt to the change.

##### A. *Australia's Present Securities System*

Australian securities reform advocate, Professor David Allan, often stated that reform would offer something

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5. Hillman, *supra* note 4, at 342 (internal quotations omitted).

“[c]heaper, [f]aster, [s]impler, [e]asier, [and] [s]afer” than the existing system.<sup>6</sup> Certainly, those from North American jurisdictions find the present Australian personal property securities system somewhat arcane and complicated, while some Australian-based academics look upon the North American systems with envy.<sup>7</sup>

Australia enjoys the advantage of a single uniform common law across the entire continent.<sup>8</sup> Despite this, differing and multiple State laws create a patchwork of legislation covering personal property. There are currently at least seventy different pieces of legislation governing personal property securities (“PPS”) in Australia.<sup>9</sup>

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6. David E. Allan, *Uniform Personal Property Security Legislation for Australia – Introduction to the Workshop on Personal Property Security Law Reform*, 14 BOND L. REV. 1, 7 (2002), available at <http://epublications.bond.edu.au/blr/vol14/iss1/>.

7. See Ralph Simmonds, ‘Getting article 9’: *An Introduction to a Panel’s Papers on Secured Transactions in Australasia*, in PERSPECTIVES ON COMMERCIAL LAW 77–78 (Agasha Mugasha ed., 1999). Simmonds states that:

Article 9’s great appeal is its apparent simplicity and conceptual elegance, which make it (relatively) easy to teach, and (one hopes) easy to learn. The vocabulary and the grammar of this seemingly comprehensive treatment of secured transactions law, for teacher and student alike, are an attractive, modern-sounding alternative to the seemingly chaotic arcana of current law, with its difficult scheme of legal and equitable interests (not omitting ‘mere equities’), and hideous statutory overlays of different sorts.

*Id.* at 77.

8. *Lange v. Austl. Broad. Corp.* (1997) 189 C.L.R. 520, 563 (“There is but one common law in Australia which is declared by this Court as the final court of appeal.”); see also G.W.C. Ross, *The Constitutional Law of Federalism in the United States and Australia*, 29 VA. L. REV. 1028, 1036–37 (1943) (comparing the common law in Australia and the United States in 1943); Murray Gleeson, High Court Judge & Chief Justice of Australia, Speech “The National Judiciary” at The Sydney Institute (June 9, 2004), available at [http://www.hcourt.gov.au/speeches/cj/cj\\_9june04.html#3](http://www.hcourt.gov.au/speeches/cj/cj_9june04.html#3).

9. See Appendix 1; see also AUSTRALIAN ATTORNEY-GENERAL’S DEPARTMENT, PERSONAL PROPERTY SECURITIES REFORM, DISCUSSION PAPER, REGULATIONS TO BE MADE UNDER THE PERSONAL PROPERTY SECURITIES ACT para. 7 (Aug. 2008) [hereinafter PPS DISCUSSION PAPER–REGULATIONS]. The Northern Territory and the Australian Capital Territory, which includes the Jervis Bay Territory—a mostly military installation—both have individual legislatures with a high level of autonomy that falls short of full Statehood. There are technically seven more Territories, but these are external to the mainland of Australia. These Territories include: Ashmore and Cartier Islands, Australian Antarctic Territory, Norfolk Island, Christmas Island, Cocos (Keeling) Islands, Coral Sea Islands Territory, Heard and McDonald Islands. Papua and New Guinea was a Territory from 1949 until 1972. Some of

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These various forms of legislation range in scope and importance, and have quite diverse legislative histories. For example, the various Hire Purchase Acts were based on English legislation of the nineteenth century designed to govern common law contracts of hire with purchase options.<sup>10</sup> By way of contrast, the various Motor Vehicles Securities Acts<sup>11</sup> and the Consumer Credit Code<sup>12</sup> apply modern concepts of consumer protection to credit contract formation and administration.<sup>13</sup> A prime example of the complexity in the existing system is the numerous Bills of Sale Acts.<sup>14</sup> These acts provide for chattel mortgages and registration systems which have been said to be “exacting, cumbrous[,] . . . expensive[,] . . . [and] impos[e] senseless shackles on many bona fide transactions.”<sup>15</sup>

Compounding this are at least thirty government agencies

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these would not be included in the reach of the PPSA—such as Norfolk Island, which has an established Companies Act—while others would be covered by the new law, such as Christmas Island and the Cocos Keeling Islands, where the law of Western Australia is applied. See PPS DISCUSSION PAPER—REGULATIONS para. 18.

10. See Andrea Beatty et al., *Product Regulation, in AUSTRALIAN FINANCE LAW* 40–41 (4th ed. 1999). Hire Purchase Acts do not create “hire purchase”—a creature of the common law. Rather, they seek to regulate the “security” created by contractual arrangements by protecting consumers from abuses such as repossession for minor breaches, etc. Hire purchase is not strictly “security” since it is not possible to take security over something you already own. Most of this legislation has been repealed or greatly reduced in scope. *Id.*

11. See Motor Vehicles Securities Act, 1984 (Tas.); Motor Vehicles & Boats Securities Act, 1986 (Queensl.).

12. Uniform Consumer Credit Code (Austl.), available at <http://www.creditcode.gov.au>. This uniform system is maintained via a form of template legislation, copied in all States. The Uniform Consumer Credit Code is based on principles of truth-in lending which allows borrowers to make informed choices when purchasing credit. It is proposed that the PPSA and the Consumer Credit Code would operate concurrently. According to Personal Property Securities Discussion Paper, “Where both the Code and the Bill contain parallel obligations, regulations would be prescribed pursuant to § 167 to provide that compliance with specific obligations in the Code would be deemed compliance with comparable obligations in the Bill.” PPS DISCUSSION PAPER—REGULATIONS, *supra* note 9, at para. 114.

13. The Consumer Credit Code began operation in all Australian States, except Tasmania, in November 1996. See Uniform Consumer Credit Code (Austl.), available at <http://www.creditcode.gov.au>.

14. *Simpson v. Wood* (1852) 21 L.J. Ex (N.S.) 152, 153 (Parke B). A bill of sale is a “bill to denote a sale.”

15. Edward I. Sykes & Sally Walker, *LAW OF SECURITIES* 533 (5th ed. 1993); see also Craig Wappett, *Personal Property Securities: The Case for Reform, in AUSTRALIAN FINANCE LAW* 493–98 (4th ed. 1999).

overseeing the various registration requirements for personal property security and perhaps more than forty individual registers of security interests.<sup>16</sup> Sometimes multiple registries will lay claim to a single transaction, thereby multiplying transaction costs.<sup>17</sup> Competing interests on different registers can create extremely complicated priority problems for lenders and their advisors. The perennial difficulty in deciding where inherently moveable collateral, such as motor vehicles, should be registered also creates issues.<sup>18</sup> Further, some types of collateral are completely unique—*sui generis*—and have corresponding registration supported by one-of-a-kind State legislation.<sup>19</sup>

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16. PPS DISCUSSION PAPER—REGULATIONS, *supra* note 9, at para. 7. These agencies are supported at both Federal and State government levels. For example, the register of company charges and the register of trademarks are both federal, and the various Bills of Sale Acts and Motor Vehicles Securities Acts are both State. Some estimate that there are more than 40 actual registers maintained by various Commonwealth, State, and Territory agencies. *Id.*

17. AUSTRALIAN ATTORNEY-GENERAL'S DEPARTMENT, REVIEW OF THE LAW ON PERSONAL PROPERTY SECURITIES, DISCUSSION PAPER 2, EXTINGUISHMENT, PRIORITIES, CONFLICT OF LAWS, ENFORCEMENT, INSOLVENCY para. 4 (Mar. 2007) [hereinafter PPS DISCUSSION PAPER 2—EXTINGUISHMENT] (“Some interests are required to be registered on more than one register to gain protection whole for others there is no available register at all.”); *see also id.* at para. 7 (“Clear priority rules would reduce compliance costs for lenders. Comparable reforms in New Zealand reduced the number of different loan contracts from 32 to two for one major bank, and allowed it to process most transactions internally instead of relying on external solicitors [attorneys].”).

18. Compare to the United States, which must accommodate 50 different sovereign States, and thus 50 different, competing jurisdictions for filing purposes. This problem has been greatly reduced by recent revisions of the Uniform Commercial Code providing for filing at the “location” of the *debtor*. *See* U.C.C. § 9-301(1) (2000) (emphasis added). The former rule tied filing to the location of the *collateral* for goods.

19. *See* James Poppo, *Personal Property Securities Reform*, LEXISNEXIS 17TH ANN. CREDIT LAW CONF. 1, 1 (Sept. 19–21, 2007), available at <http://cs.anu.edu.au/~James.Poppo/publications/papers/clc17/clc17.pdf>.

Examples of such legislation include the South Australian Liens on Fruit Act of 1923, which provides the lienee with the right to harvest and sell the fruit in the event of default by the fruit grower. *See id.* at 1 n.4; *see also* George S. Knowles, *Commonwealth of Australia – Review of Legislation*, 16 J. COMP. LEGIS. & INT'L L. 56, 79 (1934). The Liens on Fruit Act also gives priority charges to the Crown when an orchard is held under an agreement for sale and purchase from the Crown, and to any water authority when water rates are due on the orchard. Knowles, *supra* note 19, at 79. This Act was of special concern to World War I soldier settlers who had little or no legal interest in their holdings but were able to convince non-government financiers to provide advances. These financiers were simply ensuring their security and lobbied for the government to pass suitable legislation. *See* Robert Garran, *Australasia*

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Considering Australia's geographic size, the multiplicity of registration requirements remains an egregious example of administrative overload for a country of just over 21 million people,<sup>20</sup> with a GDP of around \$1 trillion.<sup>21</sup> Access Economics, an economic consulting firm, offered the following example of registration costs savings flowing from the reform of the present system:

To give a rough idea of the possible reduction in registration costs, it currently costs between \$12 and \$15 to register a security interest on the Register for Encumbered Vehicles (REVS) depending on the state of registration, while to register a charge with the Australian Securities and Investment Commission currently costs \$135. These fees contrast sharply this [sic] to the situation in New Zealand where a single electronic registry is available for all securities. This has resulted in significant reductions in direct costs . . . .<sup>22</sup>

Access Economics also contends that the New Zealand reform resulted in a decline in fees and costs for professional services for searching the register, a decline in the costs of preparing borrowing documentation, and fewer costly legal disputes.<sup>23</sup> However, the prediction of fewer legal disputes cannot be guaranteed.<sup>24</sup> Additionally, the costs of transition

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*Review of Legislation, 1923*, 7 J. COMP. LEGIS. & INT'L L. 64, 88 (1925).

20. Australian Bureau of Statistics, Australian Demographic Statistics, Sept. 2008, Key Figures, <http://www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0/>.

21. Australian Department of Foreign Affairs and Trade, About Australia, A Global Economy, [http://www.dfat.gov.au/facts/global\\_economy.html](http://www.dfat.gov.au/facts/global_economy.html) (last visited April 16, 2009).

22. ACCESS ECONOMICS PTY LTD., THE COSTS AND BENEFITS OF PERSONAL PROPERTY SECURITIES (PPS) REFORM 2-3 (July 6, 2006), available at <http://www.ag.gov.au> (search PPS Access Economics; then follow "PPS + Access + Economics + Report + Final + Personal + Property + Securities" hyperlink).

23. *See id.*

24. There can be many variables that influence litigation levels and access to justice at any given time. For example, in the context of standing to sue, the Australian Law Reform Commission has noted:

Standing, however, is only one element in access to justice. The right to commence proceedings will be of little value if the legal system is too costly, too slow or too complex to deliver an effective remedy. It will be oppressive if the legal system does not prevent or quickly restrain abuse of process or claims that have no substance. The laws of standing therefore need to be assessed in the context of a range of factors that contribute to the fairness and effectiveness of the legal system, including the laws concerning justiciability and hypothetical

from existing multiple registries to a newer, single electronic registry remains unclear—as does the required lead-time necessary for optimal transition.<sup>25</sup>

Despite the clear benefits of reform of the present system, Australia has been slow to enact reform legislation. There can be no single cause of such slow progress, but a list of factors would arguably include the lack of business and government enthusiasm, ignorance of what the reform would mean, and the loss of momentum in favor of other projects, such as tax and consumer credit reform.<sup>26</sup>

*B. The Suppressed Evolution of the Personal Property Securities System in Australia*

The history of the Australian personal property securities reform goes back to the 1960s and into the 1970s<sup>27</sup> when the Law Council of Australia<sup>28</sup> took up the reform cause after the publication of the Molomby Committee Report on Fair Consumer Credit Laws.<sup>29</sup> This report recommended “the encouragement of legal forms [for chattel security] which are

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questions, the powers available to the courts to manage litigation, alternative methods of resolving disputes and the rules on costs.

AUSTRALIAN LAW REFORM COMMISSION, REPORT NO. 78, BEYOND THE DOOR-KEEPER: STANDING TO SUE FOR PUBLIC REMEDIES para. 2.5–2.6 (1996), available at <http://www.alrc.gov.au/publications/finalreps.htm>.

25. See ACCESS ECONOMICS PTY LTD., *supra* note 22, at 3.

26. Delivering the 1988 Fullagar Memorial Lecture, Professor Roy Goode offered the following reasons for avoiding codification:

I suspect that the predominant reason is the resistance of those concerned—primarily lawyers and businessmen—to any kind of change. . . . Other reasons for the lack of interest in codification are inertia, preoccupations with what are considered to be more pressing matters (there are *always* more pressing matters than law reform), an unwillingness to commit adequate human and financial resources to the project and, perhaps, a view that the modern practitioner’s textbook adequately serves the function of a code.

Roy Goode, *The Codification of Commercial Law*, 14 MONASH U. L. REV. 135, 138–39 (1988).

27. See Allan, *supra* note 1, at 182–83; see also Popple, *supra* note 19, at 2.

28. The Law Council of Australia is the peak national representative body of the Australian legal profession, and represents about 56,000 legal practitioners nationwide. See Law Council of Australia, About the LCA, <http://www.lawcouncil.asn.au/> (last visited April 16, 2009) (follow the “About the Law Council” link; then follow the “Our History” link).

29. The Law Council of Australia, Committee on Fair Consumer Credit Laws, Report of the Molomby Committee (1971–1972).

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simple and correspond with the commercial substance of consumer credit transactions.”<sup>30</sup> The Molomby Committee recommended two major enactments to deal with consumer aspects of credit sales and loans: a Chattel Securities Act and a Credit Act.<sup>31</sup>

In 1993, the Australian Law Reform Commission opined that the law was “fragmented, lack[ed] a consistent central policy, and concentrate[d] unduly on matters of form rather than substance.”<sup>32</sup> They concluded that the system had an adverse effect on lending, increased costs, and identified “an obvious need for reform of Australian personal property security laws . . . .”<sup>33</sup> A year earlier, the Queensland Law Reform Commission<sup>34</sup> advocated a similar revolution by noting that “although . . . there would be some pain inflicted by the change [to a new system], it is pain of a transitional nature.”<sup>35</sup> These calls went unheeded.

For a long time Australia, particularly Australian banks, were firmly against all-purpose reform of personal property security law. The Australian Bankers’ Association, a key player in personal property securities, offered three major reasons for its reticence in supporting the reform. First, the onset of “reform fatigue” in the 1990s prevented support by weakening

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30. J. D. Feltham, *Fair Consumer Credit Laws: Report to the Attorney-General for the State of Victoria by a Committee of the Law Council of Australia*, 36 MOD. L. REV. 174, 175 (1973).

31. *Id.* at 175–76; see also The Law Council of Australia, Committee on Fair Consumer Credit Laws, Report of the Molomby Committee (1971–1972).

32. AUSTRALIAN LAW REFORM COMMISSION, PERSONAL PROPERTY SECURITIES, REPORT NO. 64 (INTERIM) para. 2.38 (1993) [hereinafter REPORT 64], *available at* <http://www.austlii.edu.au/au/other/alrc/publications/reports/64/64.pdf>. For a discussion of the Australian Law Reform Commission draft Bill see Di Everett, *Personal Property Securities: A Case Study for Reform*, in PERSPECTIVES ON COMMERCIAL LAW 91, 99 (Agasha Mugasha ed., 1999).

33. REPORT 64, *supra* note 32, at para. 2.41.

34. See Queensland Law Reform Commission, About Us, <http://www qlrc.qld.gov.au/aboutus.htm> (last visited April 16, 2009) (“The Queensland Law Reform Commission is an independent statutory body funded by the Queensland Government. It makes recommendations on areas of law in need of reform, and submits reports to the Attorney-General which are required to be tabled in Parliament.”).

35. A.J. Duggan & S.W. Begg, *Personal Property Securities Law: A Blueprint for Reform* 69 (Queensland Law Reform Commission, Working Paper No. 39, 1992), *available at* <http://www qlrc.qld.gov.au/wpapers/wp39.pdf>.

the will of those who would bear the burden of reform and who had already been through bank deregulation and credit reform.<sup>36</sup> Second, “despite the fragmented system of state and territory based personal property security registers and statutes, banks found the system workable.”<sup>37</sup> Thirdly, the banks were concerned that, “as the traditional working capital providers to business[,] they would be disadvantaged competitively . . . [by the] credit risk [of] the proposed purchase money security interest priority.”<sup>38</sup>

In the commercial world, theory rarely trumps practice or profit. “The goal [of reform of personal property securities laws] is not to achieve a magnificent conceptual framework to be admired by philosophers[,] but rather to facilitate credit availability in the real world.”<sup>39</sup> Australian banks finally became convinced of the viability of the reform around 2005.<sup>40</sup>

Overcoming the first of the Australian Bankers’ Association’s contentions of reform fatigue, merely took time. Overcoming the other arguments, that the system was working satisfactorily and that banks would encounter competition, took a combination of many factors. These factors included a more globalized banking industry and the Australian financial system’s exposure to world markets following the Campbell Inquiry, which began the deregulation process.<sup>41</sup> This substantial

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36. AUSTRALIAN BANKERS’ ASSOCIATION INC., PERSONAL PROPERTY SECURITIES (PPS) REFORM 1 (2006), *available at* <http://www.ag.gov.au/> (search Ian Gilbert; click on the PDF titled Ian+Gilbert).

37. *Id.*

38. *Id.* Similar reforms in other countries were not without their critics. See, e.g., Frederick K. Beutel, *The Proposed Uniform [?] Commercial Code Should not be Adopted*, 61 YALE L.J. 334 (1952).

39. Harry C. Sigman, *The Case for Worldwide Reform of the Law Governing Secured Transactions in Movable Property*, in NEW DEVELOPMENTS IN INTERNATIONAL COMMERCIAL AND CONSUMER LAW 230 (Jacob S. Ziegel ed., 1996).

40. See David Allan, *Personal Property Security – The Australian Quest for Reform*, in PERSPECTIVES ON COMMERCIAL LAW 79, 81 (Agasha Mugasha ed., 1999). Allan noted that:

The one thing on which there is complete agreement from all parties involved is that reform cannot proceed without total industry support.

The problem, therefore, is how to persuade the banks that what is now proposed will make financing easier, cheaper and safer. The answer is that persuasion and progress will have to proceed for a while gently.

*Id.*

41. See COMMONWEALTH OF AUSTRALIA, AUSTRALIAN FINANCIAL SYSTEM:

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deregulation was a catalyst for the heavy losses suffered by banks during the 1990s that resulted in the emergence of a more sophisticated banking sector with more diligent supervision.<sup>42</sup> It also led to greater competition and creativity in serving customers' needs for credit over new classes of assets.<sup>43</sup>

Some argue that modernization of secured transactions law is inevitable because markets create a need for lower costs and regulators are "imposing both standards of capitalization and transparency of information regarding the lenders' assets."<sup>44</sup> Capital adequacy and risk management now work to protect investors and customers. Australia is not immune from this trend; Australian regulators have worked diligently to implement new global capital adequacy regimes.<sup>45</sup>

Despite the opening up of markets, Australia still operates under a so-called "four pillars" policy, which prevents mergers amongst Australia's four largest banks.<sup>46</sup> This prohibition on merger is arguably the most economically efficient structure for

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FINAL REPORT OF THE COMMITTEE OF INQUIRY INTO THE AUSTRALIAN FINANCIAL SYSTEM, CAMPBELL INQUIRY (1981); *see also* COMMONWEALTH OF AUSTRALIA, COMMITTEE ON FINANCE AND PUBLIC ADMINISTRATION, A POCKET FULL OF CHANGE – BANKING AND DEREGULATION, MARTIN REPORT (Nov. 1991); COMMONWEALTH OF AUSTRALIA, FINANCIAL SYSTEM INQUIRY FINAL REPORT 561 (Mar. 1997), *available at* <http://fsi.treasury.gov.au/content/FinalReport.asp>. In 1996, the Australian Treasurer announced another inquiry to provide a "stocktake" of the results of deregulation. This was released in March 1997 as the Wallis Inquiry.

42. *See* Marianne Gizycki & Philip Lowe, *The Australian Financial System in the 1990s*, RESERVE BANK OF AUSTL. ANN. CONF. 202–03 (July 2000), *available at* <http://www.rba.gov.au/PublicationsAndResearch/Conferences/2000/GizyckiLowe.pdf>.

43. *Id.* at 193–98.

44. Boris Kozolchik & John M. Wilson, *The Organization of American States' Model Inter-American Law on Secured Transactions*, 36 UCC L.J. art. 2, 5 (2003).

45. *See generally* AUSTRALIAN PRUDENTIAL REGULATION AUTHORITY (APRA), ANNUAL REPORT 5 (2007), *available at* <http://www.apra.gov.au/AboutAPRA/upload/2007-Annual-Report-full.pdf>. APRA is responsible for supervising 54 banks, 14 building societies, 148 credit unions, and 7 specialist institutions—a total of 231 entities referred to as "authorized deposit-taking institutions" (ADIs). *Id.* at 31. APRA supervises institutions that hold a total of \$3 trillion in assets for 21 million Australian depositors, policyholders and superannuation fund (pension scheme) members.

46. The four banks are: Australia and New Zealand Banking Group ("ANZ"), Commonwealth Bank of Australia ("CBA"), National Australia Bank ("NAB"), Westpac Banking Corporation ("Westpac").

a market the size and type of Australia.<sup>47</sup> The “four pillar” structure may have also contributed to Australia’s comparative resistance to the worst of the sub-prime mortgage crisis.<sup>48</sup> Australian banks were simply not large enough to engage in the worst excesses of debt collateralization and, thus, did not ruin their balance sheets through direct exposure to subprime lending. On the other hand, they are still large enough to benefit from regulatory and legal reform that increases harmonization across States and lowers transaction costs. This reform may include personal property security reform.

*C. Personal Property Securities Act: The Arrival of Securities Reform in Australia*

The Australian banks became convinced of the viability of personal property security reform around 2005. In 2008, the first draft of the PPSA was available.<sup>49</sup> The Australian Government’s Attorney-General’s Department has maintained a comprehensive website since 2006 which allows the reform and consultation process for Personal Property Security Reform to be more easily observed.<sup>50</sup> The website provides access to Consultation Draft Bill and associated Commentary. The website also provides three substantial and very informative Discussion Papers and an Options Paper issued by the Standing

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47. See generally Su Wu, *Bank Mergers and Acquisitions – An Evaluation of the ‘Four Pillars’ Policy in Australia*, 47 AUSTL. ECON. PAPERS 141, 141–55 (2008).

48. See Nick Sherry, Senator, Speech at the Australian Institute of Credit Management National Conference (Oct. 17, 2008). Senator Sherry stated:

Australia’s ‘four pillars’ are among the world’s 20 AA-rated banks. This is due to three factors — the strength of our regulatory system . . . the integrity of their balance sheets . . . and their minimal direct exposure to sub-prime. The exposure of our banks to sub-prime accounts for less than one per cent of Australian total mortgages. In contrast, the exposure of US banks to sub-prime is about 15 per cent. So the circumstances of our banking and financial system are fundamentally different to those in the United States.

*Id.*

49. Technically the PPSA is still a Bill. A Bill precedes an Act in the Australian legislative system.

50. See Australian Government Attorney-General’s Department, Legal Services and Personal Property Security Division, Consultations, Reforms, and Reviews, [http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews\\_personalpropertysecuritiesreform\\_Personalpropertysecurities](http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_personalpropertysecuritiesreform_Personalpropertysecurities) (last visited April 17, 2009).

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Committee of Attorneys-General for Australia.<sup>51</sup> An analysis of the costs and benefits of Personal Property Securities Reform, information from a policy development seminar, and an International Comparison Paper are also provided.<sup>52</sup> The website also provides a copy of the so-called “Bond Bill” that has been published in a special issue of the *Bond Law Review*.<sup>53</sup> Taken together, there are several thousands of pages of material available that may be of substantial benefit once the legislation is enacted.

A large law firm responded publicly to the Options Paper and three Discussion Papers.<sup>54</sup> Other firms are now contributing to the debate, have issued client alerts, and have submitted recommendations on the reform.<sup>55</sup> Valuable academic literature also exists.<sup>56</sup>

Currently, there is no proposal to write Official Comments for the PPSA in the tradition of those drafted for the American UCC. Such commentary would be beneficial in educating lawyers and assisting judges in interpreting the new system. While the UCC Official Comments are not binding, they do provide a single reference point for tracing legislative history.

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51. *Id.*

52. *Id.*

53. *Id.*; see also David Allan AM & Craig Wappett, *Personal Property Security Bill (The Bond Bill)*, 14 BOND L. REV. 132 (2002), available at [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(427A90835BD17F8C477D6585272A27DB\)~The+Bond+Bill.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(427A90835BD17F8C477D6585272A27DB)~The+Bond+Bill.pdf).

54. See John Canning, *It's Time to Start Thinking About Personal Property Security Reform*, MALLESONS STEPHEN JAQUES NEWS & PUBLICATIONS, May 9, 2007, <http://www.mallesons.com/publications/2007/May/8918593W.htm>. John Canning is a partner at Mallesons, Stephen, Jaques, and authored the firm's response to SCAG Options Paper and Discussion Papers 1, 2 and 3. *Id.*

55. See, e.g., Banking and Finance Update, *Personal Property Securities (PPS) Law Reform – Navigating Through the Maze*, DLA PHILLIPS FOX NEWS & PUBLICATIONS, Aug. 22, 2008, [http://www.dlaphillipsfox.com/content/upload/files/Banking\\_&\\_Finance\\_Update\\_-\\_August\\_2008\\_\(L\).pdf](http://www.dlaphillipsfox.com/content/upload/files/Banking_&_Finance_Update_-_August_2008_(L).pdf); *Summary of the Personal Property Securities Bill 2008*, CORRS CHAMBERS WESTGARTH RES. & PUBLICATIONS, May 2008, [http://www.corrs.com.au/corrs/website/web.nsf/Content/Pub\\_Personal\\_Properties\\_Securities\\_Bill\\_180708/\\$FILE/Summary\\_of\\_Personal\\_Property\\_Securities\\_Bill\\_2008.pdf](http://www.corrs.com.au/corrs/website/web.nsf/Content/Pub_Personal_Properties_Securities_Bill_180708/$FILE/Summary_of_Personal_Property_Securities_Bill_2008.pdf).

56. See, e.g., Ralph Simmonds, *The PPSA Cometh to Australia? An Introduction to the Current State of Play*, 9 E LAW: MURDOCH U. ELEC. J. L. 3 (Sept. 2002), available at <http://www.murdoch.edu.au/elaw/issues/v9n3/simmonds93.html>; Ralph Simmonds, *Some Notes on the Reform of Personal Property Security Law in Australia*, in SECURITIES OVER PERSONALITY 192 (Michael Gillooly ed., 1994).

They also help ensure that the reader has found the “pertinent language of the statute, as a double-check on a tentative construction, and as a secondary aid where the language of the statute is ambiguous.”<sup>57</sup>

While it is unusual to enact an underlying purpose and policy clause for Australian Acts of Parliament, such a clause could be useful. Merely stating that the new law’s purpose is to simplify, clarify, and modernize the law governing secured transactions and to make them uniform across Australia could be beneficial in ensuing statutory interpretation.<sup>58</sup> The PPSA is a remedial law requiring generous interpretation.<sup>59</sup>

#### *D. Financing Reform: The Budget for New Securities Legislation*

Major reforms require considerable funding initiatives and are often long in gestation. At first, both money and interest were slow to coalesce behind Australian personal property securities reform initiatives, but have since resulted in a generous budget.

The Australian federal budget of May 2007 allocates \$113.3 million to the Australian Federal Attorney-General to implement proposals for a new scheme of personal property securities law over the following five years.<sup>60</sup> This generous

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57. Robert Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, 1966 WIS. L. REV. 597, 604 (1966) (quoting HONNOLD, SALES AND SALES FINANCING 19 (2d ed. 1962)).

58. Compare with U.C.C. § 1-103(a) (2001):

[The Uniform Commercial Code] must be liberally construed and applied to promote its underlying purposes and policies, which are: (1) to simplify, clarify, and modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and (3) to make uniform the law among the various jurisdictions.

59. Cf. Mentschikoff, *supra* note 3, at 171 (rejecting the “conveyancing approach” to drafting in favor of the UCC’s first canon of construction that “This Act shall be liberally construed and applied to promote its underlying purposes and policies.”); Julian B. McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. PA. L. REV. 795, 798–801, 853–854 (1978) (discussing the underlying purposes and goals of the Uniform Commercial Code).

60. Media Release, Australian Attorney-General’s Department, Personal Property Securities Reform (May 8, 2007) (on file with author), available at [http://www.ag.gov.au/www/agd/agd.nsf/Page/PublicationsBudgetsBudget\\_2007](http://www.ag.gov.au/www/agd/agd.nsf/Page/PublicationsBudgetsBudget_2007) (click on the link for “Media Releases”; follow hyperlink to “Personal Property Securities Reform”).

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allocation includes funds to finalize new legislation, set up an electronic national registry, and educate debtors, creditors, and third parties about the new system.<sup>61</sup> According to the Council of Australian Governments the investment is designed “to harmonize personal property securities law and develop a single national online register of personal property securities.”<sup>62</sup> The plan is ambitious and represents many years of patient agitation on the part of law reformers, taking cues from foreign jurisdictions where such codifications have been implemented over the past sixty years.<sup>63</sup>

The Federal Government’s so-called “cost recovery principles” will be applied to the register.<sup>64</sup> The innovation will be “offset by approximately \$62.9 million over three years in revenue collected from the users of the register, particularly insurance companies, banks and other credit providers.”<sup>65</sup> According to government sources, “[a] small policy unit within the Attorney-General’s Department will provide advice to

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61. *See id.*; *see also* AUSTRALIAN GOVERNMENT, BUDGET MEASURES 2007–2008, BUDGET PAPER NO. 2, PART 2: ATTORNEY-GENERAL’S EXPENSE MEASURES 79, *available at* <http://www.budget.gov.au/2007-08/bp2/download/bp2.pdf> [hereinafter BUDGET PAPER NO. 2].

62. BUDGET PAPER NO. 2, *supra* note 61, at 79.

63. *See generally* CRAIG WAPPETT ET AL., REVIEW OF THE LAW ON PERSONAL PROPERTY SECURITIES: AN INTERNATIONAL COMPARISON OF PERSONAL PROPERTY SECURITIES LEGISLATION (July 2006), *available at* <http://www.ag.gov.au/> (search “International Comparison July 2006”; follow “PPS + International + Comparison + Paper + July + 2006” hyperlink).

64. *See* STANDING COMMITTEE OF ATTORNEYS-GENERAL, REVIEW OF THE LAW ON PERSONAL PROPERTY SECURITIES, OPTIONS PAPER para. 88 (Apr. 2006) [hereinafter OPTIONS PAPER], *available at* <http://www.ag.gov.au/> (click the “All Topics A–Z” hyperlink on the homepage; click on “Personal property securities” link; follow the link to “PPS Downloads” on the “Related Links” section; follow the hyperlink for “SCAG options paper – April 2006”).  
Defining cost recovery as:

The personal property security system exists to protect creditors, and to facilitate borrowing by lenders, and they should therefore, in principle, bear the costs of the system. The system should also seek to minimise the costs that it imposes on people who are not parties to a securities transaction. The cost of administering the system should be borne to a large extent, and to the extent practicable, by the parties to securities transactions, most likely through fees for placing securities on the register. People searching the register could be required to pay an amount intended to discourage frivolous searches, and also to recover the cost of their own search.

*Id.*

65. BUDGET PAPER NO. 2, *supra* note 61, at 79.

Government and will not be cost-recovered.”<sup>66</sup> However, money allocated by one government can be moved elsewhere or revoked by a subsequent government. Thus, it was important to observe if the personal property laws would survive a change of government.

In the 2007 general election, Australia voted to replace the Liberal-National Coalition Government with a Labor Government. Personal Property Security Reform was not a major issue in that election and so, as befits the Westminster system of government, there was no guarantee that the new government would continue with the proposed reforms. However, fears that the reform would stagnate were unfounded. Thus, while the May 2007 press release and budget were issued by the then Liberal-National Coalition Government,<sup>67</sup> subsequent speeches by the incoming Attorney-General, Robert McClelland, a member of the Australian Labor Party (the Rudd government), indicated that the project would not be abandoned.<sup>68</sup> Indeed, it was to go forward as “an excellent example of the benefits that can be realized by cooperation between Commonwealth, State, and Territory governments.”<sup>69</sup>

At the beginning of 2008, all Australian States, as well as the federal government, were controlled by the Australian Labor Party.<sup>70</sup> This increased the likelihood that legislation would be passed in a cooperative fashion.<sup>71</sup> On May 16, 2008, a Personal Property Securities Bill Consultation Draft (the “Draft Bill”) was released for public consultation.<sup>72</sup> The Draft Bill

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66. *Id.*

67. The “Howard government” was led by John Howard M.P. as Prime Minister. Howard lost the election of 2007 to Kevin Rudd M.P.

68. See Robert McClelland, Australian Attorney-General, Remarks to the Institute for Factors and Discounters (Mar. 6, 2008), available at [http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Speeches\\_2008\\_6March2008-IFDAnnualLuncheon](http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Speeches_2008_6March2008-IFDAnnualLuncheon).

69. *Id.* at para. 22.

70. See Australian Government Website, About Australia, System of Government, available at [http://www.dfat.gov.au/facts/sys\\_gov.pdf](http://www.dfat.gov.au/facts/sys_gov.pdf) (last visited April 19, 2009).

71. See COMMONWEALTH OF AUSTRALIA, CONST. § 109. Under the Australian Constitution, the federal government can pass effective legislation over the objection of the States.

72. See Personal Property Securities Bill 2008, Consultation Draft, available at <http://www.ag.gov.au/> (search “Consultation Draft”; follow the “PPS+Bill+consultation+draft” hyperlink).

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draws on reforms in New Zealand,<sup>73</sup> Canada, the United States, and work by the United Nations Commission on International Trade Law (“UNCITRAL”) and the International Institute for the Unification of Private Law (“UNIDROIT”).

A final version of the legislation is expected in early 2010, depending on legislative timetables, possible amendments, and transitional arrangements.<sup>74</sup> As discussed in the following section, the release of the Draft Bill for public consultation may prove beneficial in analyzing and changing legislation before and after it is enacted.

While it has been a long time coming, comprehensive reform of personal property law is now politically possible, prepared, and, to some extent, paid for.

## II. CHANGES IN FUNDAMENTAL SECURITIES CONCEPTS: THE BENEFIT TO AUSTRALIA’S SECURITIES SYSTEM

There are many novel concepts in any new and supposedly comprehensive reform proposal. Recent Australian law reform includes the introduction of the Corporations Act of 2001,<sup>75</sup> the Uniform Consumer Credit Code,<sup>76</sup> and the introduction of the

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73. See generally JOHN H. FARRAR & MARK A. O’REGAN, REFORM OF PERSONAL PROPERTY SECURITY LAW: A REPORT TO THE LAW COMMISSION (1988). For commentary on the New Zealand move, see generally John Farrar, *New Zealand Considers a Personal Property Security Act*, 16 CAN. BUS. L.J. 328 (1990). Professor Farrar notes:

It is understood that the Australians are divided in their views on the wisdom of a PPSA. On the whole, Australia is not a very progressive law reform jurisdiction and it may be felt that after decades of tinkering with their own state legislation they do not wish to countenance further change for the moment. Given the unsatisfactory state of Australian and New Zealand personal property security law, this would be most unfortunate.

*Id.* at 332.

74. See Angela Flannery & Greta Burkett, *Personal Property Securities Law Reforms: An Update*, 18 J. BANKING & FIN. L. & PRAC. 143, 143–144 (2007). Transitional arrangements have been estimated to last up to 2 years. *Id.* at 143. This will give secured parties time to migrate from present registers, such as the company charge register maintained by the Australian Securities and Investments Commission (ASIC), to the new PPSA register. *Id.* at 143.

75. Corporations Act, 2001 (Austl.).

76. Uniform Consumer Credit Code (Austl.), available at <http://www.creditcode.gov.au>.

The Code is the culmination of more than 30 years of attempts to reform and modernise consumer credit law and to apply a uniform

National Goods and Services Tax.<sup>77</sup> Introduction of the national tax was an especially burdensome process for business, banks, and consumers alike.<sup>78</sup> In fact, the Australian Bankers' Association claimed "regulation reform fatigue" as one reason why it had not previously supported PPS law reform.<sup>79</sup> Despite the best of intentions and careful drafting,<sup>80</sup> the initial "shock of the new" can result in strong reactions against apparently imported concepts and systems.

After a period of settling, Australia will almost certainly find its new scheme workable and more efficient than the present system. In 2002, New Zealand's move to a new personal property security regime was relatively smooth.<sup>81</sup> Historical

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approach to credit transactions across Australia. The Explanatory Notes to the *Consumer Credit (Queensland) Act* say that the Code – 'is based on the principle of truth in lending which will allow the borrower to make informed choices when purchasing credit.' This objective of 'truth in lending' was first sought to be achieved by United States legislation enacted in the 1970s. The state credit laws which preceded the enactment of the Code were based on a similar goal. 'Truth in lending' protects individual consumers, by ensuring that they receive accurate information before they enter into a credit contract, but it has other objectives as well. According to Duggan and Lanyon's leading text, *Consumer Credit Law*, it is also intended to stimulate competition in the credit market by giving consumers who are 'shopping around' for credit, a standardised basis on which they can make comparisons between products and to 'encourage restraint in the use of consumer credit by alerting consumers to the full cost of credit transactions.'

Austrl. Fin. Direct Ltd v. Dir. of Consumer Affairs Victoria (2006) VSCA 245 para. 165–68 (Nov. 20 2006); see also *Consumer Credit Act, 1994 (Queensland)*, available at [http://www.austlii.edu.au/au/legis/qld/consol\\_act/cca1994276/](http://www.austlii.edu.au/au/legis/qld/consol_act/cca1994276/).

77. A New Tax System (Goods and Services Tax) Act, 1999.

78. See Joanna Tovia, *For the Love of Accounting*, SYDNEY DAILY TELEGRAPH, Sept. 27, 2005, at 26.

79. AUSTRALIAN BANKERS' ASSOCIATION INC., *supra* note 36, at 1.

80. See generally Robert B. Ferguson, *Legal Ideology and Commercial Interests: The Social Origins of the Commercial Law Codes*, 4 BRIT. J. L. & SOC'Y 18, 19–24 (1977) (describing the careful drafting and commentary of Mackenzie Chalmers, a lawyer that took the initiative in drafting the original bills of exchange, sale of goods, and marine insurance codes for England during the late nineteenth century).

81. See *The PPSR – A Year in Review*, PERSONAL PROPERTY SECURITIES NEWSLETTER, (N.Z. Ministry of Econ. Dev., Wellington, N.Z.), Jan. 5, 2003, at 1.

Following a Law Commission report recommending reform, NZ introduced its version of a Canadian personal property securities regime on 1 May 2002. Twelve months later commentary in the

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reflections on the American move to Article 9 of the UCC in the 1960s are also instructive and somewhat comforting:

Although the draftsmen of article 9 thought that they were starting anew, it is now evident that what they did was to isolate the essential elements (often not explicitly recognized as such) of the heretofore separate chattel security systems, and then proceed to build a more nearly rational security system by combining these elements in different ways to create the many different kinds of security interests demanded by present day commercial life.<sup>82</sup>

Nevertheless, Article 9's greatest contribution has been described as "obliterate[ing] many of the sharp lines that distinguish between the kinds of security interests created under each of the separate security devices."<sup>83</sup>

Likewise, Australia is providing "new" wineskins for "old" wine. Old forms of security, such as the pledge, bill of sale, and charge, will still function after the adoption of the PPSA. However, they will also be subject to a new and comprehensive regime for attachment, perfection, priorities, and enforcement.

While changes to fundamental securities concepts may be unfamiliar to those navigating Australia's new securities system, making the mental leap to the PPSA will certainly have many benefits. In particular, PPSA changes to fundamental securities concepts promote uniformity and efficiency. These changes include categorization of collateral based on function, uniform codified priority rules, and the creation of a single filing system. Furthermore, a shift in thought about whom the new system will serve will also have its benefits. In particular, a new system that

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industry speaks favourably on what was a smooth commencement and orderly transition to a Personal Property Securities regime on 1 November 2002.

*Id.*

82. Peter F. Coogan, *Relationship of Article 9 of the Uniform Commercial Code to Pre-Code Chattel Security Law*, 51 VA. L. REV. 853, 854 (1965).

83. *See id.* at 856. Coogan also notes that:

Article 9 largely preserves the essentials of pre-code law, including most of the distinctions between those separate bodies of law which are based on a difference in the business needs served. Differences based on historical accident are almost entirely abolished. Article 9 produces a significant unification of the different kinds of secured transaction, without abolishing real distinctions based on differences in function.

*Id.* at 863.

considers the role of the consumer satisfies consumer interests not acknowledged under the old system.

*A. Collateral Categorization Based on Function*

The change in collateral categories is extensive and far-reaching. No longer will security arrangements be categorized according to well-known collateral types (e.g. wool, motor cars, boats), transactional forms (e.g. a bill of sale), jurisdiction (e.g. Queensland, Tasmania or other States), or the legal personality of the parties (e.g. companies granting charges over corporate assets).<sup>84</sup> In keeping with Canadian, New Zealand, and American approaches, a new set of collateral definitions will be introduced and a purely functional approach will be taken.<sup>85</sup> Thus, if the transaction *functions* as a security, then in principle it will be covered by the legislation, and like transactions will be treated alike.<sup>86</sup> This approach has been foreshadowed in recent High Court interpretation of some existing chattel securities legislation,<sup>87</sup> but has not been the norm across the many jurisdictions and collateral types in use until now.<sup>88</sup>

While some of the present legislation actually requires registration under threat of penalty,<sup>89</sup> the new scheme springs

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84. See OPTIONS PAPER, *supra* note 64, at para. 8.

85. See generally AUSTRALIAN ATTORNEY-GENERAL'S DEPARTMENT, REVIEW OF THE LAW ON PERSONAL PROPERTY SECURITIES, DISCUSSION PAPER 1, REGISTRATION AND SEARCH ISSUES 78–85 (Nov. 2006) (attachment B) [hereinafter PPS DISCUSSION PAPER 1– REGISTRATION], available at <http://www.ag.gov.au/> (click the “All Topics A–Z” hyperlink on the homepage; follow the “Personal property securities” hyperlink; click “PPS Downloads” on the “Related Links” section; follow “Personal property securities discussion paper 1 – registration and search issues” hyperlink).

86. The ad hoc growth of the present system has led to like transactions receiving different treatment, leading to confusion and inconsistency.

87. See *Gen. Motors Acceptance Corp. Austl. v. Southbank Traders Pty Ltd.* (2007) 234 A.L.R. 608 (interpreting the Chattel Securities Act (1987) of the State of Victoria in a purposive, *functional* way, rather than a *formal* way), available at <http://www.austlii.edu.au/>.

88. The different collateral types used in the present system are reflected in the diverse legislation set out in Appendix 1.

89. For example, the Bills of Sale Act of Western Australia provides that an unregistered bill “shall be deemed fraudulent and void” as against various parties, including a trustee in bankruptcy. Bills of Sale Act, 1899, § 25 (W.A.), available at [http://www.austlii.edu.au/au/legis/wa/consol\\_act/bosa1899122/s25.html](http://www.austlii.edu.au/au/legis/wa/consol_act/bosa1899122/s25.html). This reflects the origins of the legislation in mid-nineteenth century England where the mischief of fraudulent and secret conveyances of personal property was a

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from a different mind-set—it will be voluntary.<sup>90</sup> It will apply to all types of property, excluding land,<sup>91</sup> and will enable security interests to be taken over by property types that previously lay beyond the scope of any register or State statute.<sup>92</sup> In addition, it will recognize some transactions not currently recognized by law as “security interests,” such as, commercial consignments and personal property leases.<sup>93</sup> There is no indication that this will affect treatment of these transactions for other purposes, such as accounting standards or taxation.<sup>94</sup>

The new forms of collateral description are contained in Clause 19 of the Consultation Draft, which contains about seventeen pages of definitions.<sup>95</sup> Space does not permit a proper analysis of every new definition.<sup>96</sup> Australian lawyers will be

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social evil that required a serious legal response. GREGORY BURTON, AUSTRALIAN FINANCIAL TRANSACTIONS LAW 407 (1991). Burton notes:

In mid-nineteenth century England, as the height of the first Industrial Revolution was reached, it was perceived that the problems [of secret liens] reached their most acute form in relation to proprietary securities created over tangible personal property, since title was secretly transferred while the goods or chattels were left in the possession of the debtor for all the world to see and be misled.

BURTON, *supra* note 89, at 407. The Australian colonies copied these laws with little or no variation. *Id.* In addition, the Bills of Sale Act mandates that every bill of sale be executed and registered in duplicate, thereby burdening the registry with unnecessary storage and indexing issues. *See* Bills of Sale Act, 1899, § 8 (W.A.).

90. PPS DISCUSSION PAPER 1—REGISTRATION, *supra* note 85, at para. 33.

91. Personal Property Securities Bill 2008, Consultation Draft, § 19 (“Personal property means property (including a licence) other than land.”).

92. For example, book debts owed by a partnership are currently only registrable in Queensland, while under the new system they will be registrable anywhere in Australia. Popple, *supra* note 19, at 2; *see also* U.C.C. § 9-101 cmt. (1962) (“The Article’s flexibility and simplified formalities should make it possible for new forms of secured financing, as they develop, to fit comfortable under its provisions, thus avoiding the necessity, . . . of . . . passing new statutes and tinkering with the old ones to allow legitimate business transactions to go forward.”).

93. *See* Personal Property Securities Bill 2008, Consultation Draft, § 21.

94. Popple, *supra* note 19, at 4.

95. *See* Personal Property Securities Bill 2008, Consultation Draft, § 19.

96. It is important to note the peculiar dangers of large-scale definitional overhaul in any area of knowledge. Good definitions will simplify and, hopefully, give the reader less to think about in each of its components. According to the rules of logic, a good definition must be “*in itself* clearer and more familiar than the thing defined[.]” RICHARD F. CLARKE, LOGIC 217 (1901). Great care must be taken to ensure that the reader won’t be misled by a defective definition that merely repeats the original idea and offers nothing

required to learn a lot of new language in the course of this reform, and hopefully, previously acquired concepts will mesh well with the conscious knowledge needed to make use of the new collateral types and the “new language” of the PPSA. Comprehensive codes always test the courts’ ability to interpret legislation—courts must reevaluate old ideas, while making the new concepts function within reasonable bounds.<sup>97</sup>

The majority of definitions follow Canadian, New Zealand, and American definitional models to a greater or lesser degree. An example of the novelty of terms may be offered by the concept of “chattel paper.”<sup>98</sup> Australian law does not currently use the term “chattel paper” to describe any type of collateral subject to a security interest. A case search using that term performed on the Australasian Legal Information Institute (“AustLII”) database reveals zero matches for any Australian court or tribunal.<sup>99</sup> The term is essentially unknown in Australian law.<sup>100</sup> Chattel paper is defined in the Draft Bill as

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simpler in its place. Any definitional redecoration in the field of commercial law must be sensitive to the practical realities of commercial life, as it exists in a particular time and place.

The most important drafting concept rests on the belief that relative certainty and uniformity of construction depend on the court’s perception of the situation represented by the rule and the reason the rule was adopted, and that proper construction follows the reason and is limited or extended by it. The attempt, therefore, has been [under the UCC] to draft rules so that both the situation being covered and its reason tend to appear on the face of the language, and to keep the language reasonably open-ended. For example, all definition sections say ‘in this Act (Article) unless the context otherwise requires,’ thus allowing the court to limit or extend definitions in accordance with the reason of the rule in which they appear.

Mentschikoff, *supra* note 3, at 170.

97. See RUPERT CROSS AND J.W. HARRIS, PRECEDENT IN ENGLISH LAW 228 (4th ed. 1991) (explaining the ineffectiveness of directing courts to ignore the past completely: “Several of the codifiers of the past have prohibited courts from considering the law as it stood before the introduction of their code. Provisions of this nature have turned out to be fruitless.”).

98. Personal Property Securities Bill 2008, Consultation Draft, § 28.

99. See Australasian Legal Information Institute Database (AustLII), <http://www.austlii.edu.au> (last visited April 16, 2009). AustLII is a popular Australian online free-access resource for legal information; it receives over 500,000 hits per day and is a joint effort of the University of Technology Sydney (UTS) and University of New South Wales, Sydney (UNSW) Law Faculties.

100. AUSTRALIAN ATTORNEY-GENERAL’S DEPARTMENT, REVIEW OF THE LAW ON PERSONAL PROPERTY SECURITIES, DISCUSSION PAPER 3, POSSESSORY

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follows:

**Chattel paper** means one or more writings that evidence:

- (a) a monetary obligation; and
- (b) either or both of the following:
  - (i) a security interest in, or lease of, specific tangible property, or specific tangible property and accessions to the specific tangible property (even if the description of the tangible property (and accessions) is taken to include a description of intellectual property, or an intellectual property licence, under section 30);
  - (ii) a security interest in specific intellectual property or a specific intellectual property licence;

but does not include a document of title, a negotiable instrument or an investment instrument.<sup>101</sup>

According to the Australian Attorney-General's Discussion Paper 3 ("DP3"), the term "chattel paper" would likely include, but would not be limited to, the following pre-existing Australian security phenomena: (i) lease agreements; (ii) hire purchase agreements; (iii) some contracts that include retention of title clauses, also known as *Romalpa* Clauses;<sup>102</sup> and (iv)

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SECURITY INTERESTS para. 112 (Apr. 2007) [hereinafter PPS DISCUSSION PAPER 3—SECURITY INTERESTS], available at <http://www.ag.gov.au/> (click the "All Topics A–Z" hyperlink on the homepage; follow the "Personal property securities" hyperlink; click "PPS Downloads" on the "Related Links" section; follow "Personal Property Securities Discussion Paper 3 – Possessory Security Interests" hyperlink) (noting that "Australian law does not currently include a concept along the lines of 'chattel paper' created by the personal property securities legislation of other jurisdictions.").

101. Personal Property Securities Bill 2008, Consultation Draft, § 28. Schedule 1 to the earlier Bond Bill defines it to mean "one or more writings that evidence both a monetary obligation and a security interest in, or a lease of, specific goods or specific goods and accessions."

102. A *Romalpa* Clause is a provision in a contract for the sale of goods in which the seller retains title to the goods until certain obligations are met by the buyer, usually in the form of payment of money. The term "*Romalpa* Clause" originates from the seminal case *Aluminium Industrie Vaassen BV v. Romalpa Aluminium Ltd* [1976] 1 W.L.R. 676 (Eng.). In *Romalpa*, the supplier of the goods inserted a clause in the contract which stated: "the ownership of the material to be delivered by AIV will only be transferred to the purchaser when he has met all that is owing to AIV . . . ." For further discussion on *Romalpa* Clauses, see Victor C.S. Yeo, *Visiting an Old Friend – the "Romalpa" Clause*, 9 SING. ACAD. L.J. 250 (1997); Denis S. K. Ong, *Romalpa Clauses and the Issues Concerning (i) The Meaning of 'the Proceeds' Received by the Buyer; (ii) The Buyer's Credit Period; and (iii) The*

equitable mortgages of specific goods.<sup>103</sup>

Using *Romalpa* Clauses as an example, parties would no longer find it necessary to conceptually split their collateral into a “debt” on the one hand and a “title” to goods on the other hand.<sup>104</sup> As DP3 explains, the new system would mean that the different priority rules for “debt” and “title” transactions would be unified.<sup>105</sup> This conceptual “unification” of what was previously a split between title and debt is also evident in the context of a lease.<sup>106</sup> This conceptual unification will require adjustments to priority concepts as well.<sup>107</sup> The fact that title is no longer “sovereign” in the kingdom of security will require some rethinking by those who are accustomed to and comfortable with the present regime.

*Romalpa* Clauses will also stray into the area covered by the definition of a purchase money security interest.<sup>108</sup> Prominent New Zealand commentators are already noting the impact of this in their jurisdiction and the area is likely to provide fertile ground for new case law.<sup>109</sup>

DP3 asks whether an innocent purchaser of chattel paper who takes possession for new value and in the ordinary course of business should take priority over a prior perfected security

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*Charge/Trust Dichotomy in Relation to ‘the Proceeds,’* 12(2) BOND L. REV. 148 (2000).

103. PPS DISCUSSION PAPER 3–SECURITY INTERESTS, *supra* note 100, at para. 117.

104. See Sharon Cowan et al, *Will English Romalpa Clauses Become Registrable Securities*, 54 CAMBRIDGE L.J. 43, 43–44 (1995).

105. See PPS DISCUSSION PAPER 3–SECURITY INTERESTS, *supra* note 100, at para. 119.

106. See *id.* at para. 120 (“To take another example, a lease includes both the lessee’s obligations to make the payments under the lease (and other obligations, such as to keep the goods insured) (chose in action), and also the lessor’s title to the goods. A transfer of the lease by the lessor involves a transfer of the chose in action and the title to the goods.”).

107. See *id.* at para. 124–26.

108. See Personal Property Securities Bill 2008, Commentary, para. 6.56 (“A security interest that secures an obligation to the seller to pay the purchase price would be a purchase money security interest (section 24(1)(a)). Some examples would be property sold on a retention of title basis, or under a commercial consignment.”).

109. See, e.g., Duncan Webb, *Review: Commercial Law*, 2006 N.Z. L. REV. 337, 343 (2006) (“The *Romalpa* clause in its new guise as a purchase money security interest under the Personal Property Securities Act 1999 (‘the PPSA’) seems likely to continue to provide a steady flow of cases.”).

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interest.<sup>110</sup> This is the rule in New Zealand,<sup>111</sup> Saskatchewan,<sup>112</sup> and Ontario.<sup>113</sup> The implications for accounts financing are not especially clear: if a debt can be both part of chattel paper and part of an account receivable, then characterization of the collateral as an account or chattel paper may be unclear and require clarification.<sup>114</sup>

Further implications extend to the base priority rules between competing accounts receivable financiers and chattel paper financiers.<sup>115</sup> This is discussed in detail in DP3, where it is readily acknowledged that:

Assigning priorities among the various financiers involves difficult policy choices that may depend on matters that are peculiar to the jurisdiction in question. For example, giving priority to inventory suppliers would tend to promote that form of finance over, for example, inventory financier or factors. Alternatively, giving priority to a purchaser of chattel

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110. See PPS DISCUSSION PAPER 3–SECURITY INTERESTS, *supra* note 100, at 66 (attachment B). “Innocent purchaser” bears similarities to the US “bona fide purchaser.”

A purchaser is a person who obtains an interest in personal property. The interest may be any interest in the property – including title to the property or a security interest in the property. The person may obtain the interest in any way, and not merely by way of contract. The interest may be obtained by sale, lease, discount, assignment, negotiation, mortgage, pledge, lien, issue, reissue, gift or any other consensual transaction that creates an interest in personal property.

*Id.* at para. 248 (attachment A).

111. Personal Property Security Act, 1999, § 98 (N.Z.).

112. Personal Property Security Act, S.S. c P.6.2 § 98 (1993) (Sask.).

113. Personal Property Security Act, RSO § 28 (3) (1990) c P.10 (Ont.).

114. For example, the prominent Australian commercial law firm, Mallesons, Stephen, and Jaques has commented:

[I]t has been pointed out that under the NZ PPSA it is sometimes difficult to determine whether collateral is chattel paper or evidence of an account receivable (for example, a retention of title clause on an invoice). Given that different priority rules apply, this uncertainty could have an adverse impact on the parties to a security agreement if they incorrectly characterise the collateral. It may be worth attempting to clarify such matters in any PPS legislation introduced here.

Mallesons Stephen Jaques, *Comments on Discussion Paper 3: Possessory Security Interests*, MALLESONS STEPHEN JAQUES NEWS & PUBLICATIONS, Aug. 23, 2007, at para 4.5(a), available at [http://www.mallesons.com/publications/2007/Aug/PPS\\_Comments.pdf](http://www.mallesons.com/publications/2007/Aug/PPS_Comments.pdf).

115. PPS DISCUSSION PAPER 3–SECURITY INTERESTS, *supra* note 100, at para. 131.

paper would tend to promote the development of markets for accounts receivable and the securitisation of accounts receivable.<sup>116</sup>

Space does not permit an analysis of every new collateral type and contending priority problems. Australian courts will undoubtedly come to terms with these developments over time.

### *B. Uniform Codified Priority Rules*

Codified priority rules are to be compared with those of the common law and equity that have grown up over time. Once codified, such rules are arguably more stable, transparent, and comprehensible than a mix of common law and equitable rules that are not uniformly modified by statute and depend on a slew of variables. These variables include, but are not limited to: (i) the nature of the interest claimed; (ii) necessary choices between different bodies of law; (iii) time of creation; (iv) competition between registration systems or their absence; and (v) the consequences of a failure to register when required.<sup>117</sup>

The default priority rules proposed in DP2 and found in the Draft Bill are similar to those found in both the New Zealand scheme and in preceding codifications, such as Canada, dating back to the original Article 9:

- (a) A perfected security interest would always have priority over an unperfected security interest in the same collateral (section 92(2)).<sup>118</sup>
- (b) Priority among other perfected security interests would be determined by the first in time principle. The security interests would rank on a first in time basis in the order of their priority time . . . .<sup>119</sup>
- (c) Priority between unperfected security interests would be determined by the order of the attachment of the security

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116. *Id.* at para. 154.

117. SIMON FISHER, COMMERCIAL AND PERSONAL PROPERTY LAW 711 (1997).

118. Personal Property Securities Bill 2008, Commentary, para. 6.9.

119. *Id.* at para. 6.21; *see also* PPS DISCUSSION PAPER 2—EXTINGUISHMENT, *supra* note 17, at para. 121 (citing New Zealand's Personal Property Security Act, 1999, § 66) (“Priority between perfected interests is determined by reference to whichever of the following occurs first: registration of a financing statement, the secured party taking possession of the collateral or temporary perfection of the security interest.”).

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interest . . . .<sup>120</sup>

Interestingly, various exceptions and modifications exist for future advances, purchase money security interests, accessions, commingled goods and crops, and execution creditors.<sup>121</sup>

The unification of the entire system of priority rules will be an advance over the present system and will significantly simplify their application. Under the present system, priority rules can be as various as the different forms of security. There is also the possibility of conflicts between separate priority systems, thus compounding an already intricate state of affairs. There will also be improvement in the case of company charges governed by the Corporations Act, which presently only concerns corporate property to the exclusion of property held by other business organizations, such as a partnership.

### C. *The Transition to One Filing System*

Australia has sought a workable level of uniformity in issues affecting trade and commerce among the States since federation. For example, the lack of a uniform railway gauge<sup>122</sup> was one factor leading towards the 1901 national federation and break from the U.K.<sup>123</sup>

Both State and Federal Governments have already moved toward the adoption of a national electronic conveyance system for real property titles, planned for introduction by 2010.<sup>124</sup> The

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120. Personal Property Securities Bill 2008, Commentary, para. 6.35.

121. PPS DISCUSSION PAPER 2–EXTINGUISHMENT, *supra* note 17, at para. 127; *see also* Personal Property Securities Bill 2008, Commentary, para. 6.51 (future advances); Personal Property Securities Bill 2008, Commentary, para. 8.21–8.23 (accessions); Personal Property Securities Bill 2008, Commentary, para. 8.37–8.38 (commingled goods).

122. Railway gauge refers to the distance between the rails on a line.

123. *See* AUSTRALIAN GOVERNMENT, DEPARTMENT OF INFRASTRUCTURE, TRANSPORT, REGIONAL DEVELOPMENT AND LOCAL GOVERNMENT, A HISTORY OF AUSTRALIAN ROAD AND RAIL 1, *available at* [http://www.auslink.gov.au/publications/reports/pdf/history\\_of\\_road\\_and\\_rail.pdf](http://www.auslink.gov.au/publications/reports/pdf/history_of_road_and_rail.pdf); *see also* Victor S. Clark, *Australian Economic Problems I. The Railways*, 22 Q. J. ECON. 399, 400 (1908).

124. Media Release, Lindsay Tanner, Minister for Finance & Deregulation, A National Electronic Conveyancing System (Jul. 2, 2008) (on file with author), *available at* [http://www.pm.gov.au/media/Release/2008/media\\_release\\_0339.cfm](http://www.pm.gov.au/media/Release/2008/media_release_0339.cfm) (describing the present system as an “antiquated system of paper-shuffling”); *see also* Michael Pelly, *Attorneys Race to put big Issues on the Fast Track*, THE AUSTRALIAN, July 17, 2008, at 1,

advantages of a single online filing system for personal property covering an entire continent are clear and, one would hope, irresistible. There are currently many filing systems in Australia.<sup>125</sup> The adoption of the PPSA will mean there will be only one. In addition, electronic registration will overcome timing difficulties encountered with paper filing<sup>126</sup> and considerably reduce costs over time.<sup>127</sup> A request for tender (RFT) to build the systems integration services for the national PPS register was released on May 16, 2008.<sup>128</sup>

According to the Draft Bill, the duration of registration will be seven years for consumer property and serial numbered goods, and twenty-five years or longer for equipment property and inventory.<sup>129</sup> This represents an interesting compromise between a register that is burdened by unnecessary or expired registrations, and one that compels registrants to take more responsibility for their collateral by imposing re-registration requirements after expiration.

The Draft Bill provides details for the content of

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<http://www.theaustralian.news.com.au/story/0,,24037832-17044,00.html> (“[Robert McClelland, Attorney General] said he would ‘urge the states and territories to do all they can to make such a system a reality.’”).

125. Filing systems are as varied as the forms of security. For examples, see Appendix 1.

126. See Craig Wappett et al., *supra* note 63, at 34–35. Paper filing systems in the United States have not been an unqualified success. As one author has noted:

The complicated filing rules that have historically applied in the United States can lead to incorrect filings (or allegedly incorrect filings) which in turn lead to the difficult and important question as to the consequences of filing in the wrong location. Similarly, a complicated filing regime will increase the cost and complexity of searching. The result is that in the United States, the art 9 system has not achieved its potential as a simple and economical system for the registration and searching of security interests.

Michael Gedye, *The Long Road to Personal Property Security Law Reform in New Zealand*, in PERSPECTIVES ON COMMERCIAL LAW 111, 124 (Agasha Mugasha ed., 1999).

127. See ACCESS ECONOMICS PTY. LTD., *supra* note 22, at 1–3.

128. See STANDING COMMITTEE OF ATTORNEYS-GENERAL, SUMMARY OF DECISIONS 5 (July 2008), available at <http://www.nswbar.asn.au/circulars/july/coag1.pdf>. The Standing Committee of Attorneys-General (SCAG) is made up of the Attorneys-General of the Commonwealth, the Australian States and Territories, and the Attorney-General of New Zealand.

129. Personal Property Securities Bill 2008, Consultation Draft, § 195(6).

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registration data.<sup>130</sup> This section includes data about the secured party, the grantor, the giving of notices, the collateral and proceeds, the registration time, the end time for registration, subordination, amendments, and other matters prescribed by regulations.<sup>131</sup> It is unclear exactly what search logic would be employed in creating the new register—exact match, fuzzy match, or some combination of these. Some favor one that “would allow for typographical errors but otherwise function as an exact match system.”<sup>132</sup>

Searching may be made by reference to the details of a secured party or a grantor, an Australian Business Number (“ABN”), a serial number, or any criteria prescribed by regulation.<sup>133</sup> In addition, the Draft Bill contains a table listing twenty-one persons who may search the PPS Register and the purpose for which they may search the register.<sup>134</sup> For example, a “secured party” may search “a purpose that relates to a security interest attached to collateral described in the registration.”<sup>135</sup> Searching beyond the authorized purpose may render a party liable for damages.<sup>136</sup> The details of grantors, serial numbers, or ABN’s will be critical, because inaccuracies will result in misinformation and confusion.<sup>137</sup>

Australian authorities would do well to study the better-known “disasters” of other jurisdictions and attempt to avoid similar mistakes. Indeed, an entire issue of the *Ohio State Law Journal* has been devoted to commercial calamities associated with recent amendments and interpretations of the UCC, including calamities springing from filing system failures.<sup>138</sup> One scholar’s precious and pithy advice for lawmakers is that “[d]rafters should not try to accommodate conflicting positions

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130. *See id.*

131. *Id.*

132. Popple, *supra* note 19, at 5.

133. Personal Property Securities Bill 2008, Consultation Draft, § 228.

134. *Id.* § 229.

135. *Id.* § 229(2).

136. *Id.* § 240 (declaring the right to recover damages for any loss or damage that was reasonably foreseeable by a person failing to discharge an obligation imposed by the legislation); *see also* Personal Property Securities Act, 1999, § 173 (N.Z.) (limiting the purposes for which one may search the register).

137. *See* Personal Property Securities Bill 2008, Consultation Draft, § 202–203.

138. *See supra* note 4.

when the result is confusion. Further, drafters should try to collect evidence of real-world transactions and the likely effects of proposed rules. Finally, drafters should not introduce broad standards that lead in opposite directions or in no clear direction.”<sup>139</sup> Recent changes to the American filing system under the Revised Article 9 would also be instructive for those organizing the new system in Australia.<sup>140</sup>

There can be no substitute for understanding the true underlying purposes of this reform of the filing system. It must function efficiently for the benefit of filers, searchers, and those who are concerned with administering the filing system.

*D. The New Securities System & Satisfaction of Consumer Interests*

A number of areas of securities reform initiatives have considered consumer interests. First, the establishment of a single register for consumers wishing to check encumbrances over second-hand motor vehicles has gained some support.<sup>141</sup> Multiple registers are inconvenient for consumers with limited resources and expertise, or who merely wish to make an efficient purchase.

Second, concerns about the consumer’s dilemma regarding

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139. Hillman, *supra* note 4, at 348.

140. See Harry C. Sigman, *The Filing System Under Revised Article 9*, 73 AM. BANKR. L.J. 61, 61 (1999) (“The filing system is the heart of Article 9. Revised Article 9 makes many changes to that system primarily aimed at simplifying it for both users and filing offices, and making administration of the filing offices far more uniform and transparent in practice than it is currently.”). Professor Sigman also noted:

Article 9’s filing provisions have been significantly rewritten. Under Revised Article 9, for most transactions, filing should be as simple as child’s play. The new provisions are intended to place virtually all filings in a single statewide office, facilitate electronic filing, foster nationwide utilization of well-designed user-friendly uniform paper forms, and make filing office practices more efficient, transparent, and uniform.

Harry C. Sigman, *Symposium: Twenty Questions About Filing Under Revised Article 9: The Rules of the Game Under New Part 5*, 74 CHI.-KENT L. REV. 861, 861 (1999).

141. See Letter from Nicole Rich, Director Policy & Campaigns, Consumer Action Law Centre, to Australian Attorney General’s Department, Office of Legal Services Coordination, Personal Property Securities Review (Feb. 9, 2007), *available at* [http://www.consumeraction.org.au/downloads/PPSReviewSubmissiontoDPI\\_Final.pdf](http://www.consumeraction.org.au/downloads/PPSReviewSubmissiontoDPI_Final.pdf).

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asset-based lending have also been raised.<sup>142</sup> Often consumer-borrowers are faced with a stark choice between an asset-based loan or no loan.<sup>143</sup> This is because some lenders are not concerned about creditworthiness and focus solely on valuable assets against which they may foreclose in the event of non-payment.<sup>144</sup> Thus, any claim that a new regime would inevitably lower lending costs for borrowers due to increased efficiency is not entirely accurate.

There are other problems as well. In the words of one consumer advocacy group:

Such asset-based lending is not only unfair and exploitative, it is also maladministration of a loan and, in the case of consumer credit, grounds to reopen a loan contract under section 70(2)(1) of the Consumer Credit Code (**Code**), if the credit provider 'knew, or could have ascertained by reasonable inquiry of the debtor at the time, that the debtor could not pay in accordance with its terms or not without substantial hardship'.<sup>145</sup>

There is also an argument that the more efficient lending and enforcement systems proposed under the PPSA would only lead to more efficient means of generating exploitative loans and enforcement against borrowers who default.<sup>146</sup> This may also encourage the use of "blackmail securities" over general household goods, whereby lenders threaten repossession to generate pressure to pay without any real intention of enforcement.<sup>147</sup>

Third, consumers will receive protection not afforded to commercial players who may contract out of many of the Bill's provisions relating to enforcement. If collateral is used predominantly for personal, domestic or household purposes,<sup>148</sup>

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142. *See id.* at 2.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* For a discussion in the US context see Heather Lauren Hughes, *Creditors' Imagined Communities and the Unfettered Expansion of Secured Lending*, 83 *DENV. U. L. REV.* 425, 426–429 (2005).

147. *See* Letter from Nicole Rich, *supra* note 141, at 2.

148. Personal Property Securities Bill 2008, Consultation Draft, § 163(3). This is to be contrasted with the term "consumer property" as defined in section 19: "Consumer property means personal property held by an individual, other than personal property held in the course or furtherance, to

then the following remedies are not available against such a user: (a) remedies available under incorporated provisions of the State and Territory land law;<sup>149</sup> (b) the collection and application of liquid collateral;<sup>150</sup> (c) disposal of collateral by lease to a third party;<sup>151</sup> (d) disposal by sale where the collateral is acquired by the enforcing secured party;<sup>152</sup> and (e) retention of the collateral by the enforcing secured party.<sup>153</sup>

Finally, the issue of privacy of credit information must be mentioned as it applies to consumers and business. Like most developed economies, the credit reporting industry in Australia plays an important, often pivotal role in the lending and financial industries.<sup>154</sup> Some argue that any centralized PPS register could be used as a kind of “credit report” without the legal protections afforded to consumers who are subject to the established rules for credit reporting.<sup>155</sup>

One suggested solution is the use of serial number only registration in the case of consumer borrowers.<sup>156</sup> The Australian Law Reform Commission recently published a very large report of a comprehensive inquiry into Australian privacy law.<sup>157</sup> The report deals with consumer credit reporting and

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any degree, of carrying on an enterprise to which an ABN has been allocated.” *Id.* § 19. An ABN is an Australian Business Number. The latter definition of consumer property is narrower in scope than that in section 163 and is more consistent with other consumer protection laws such as the Consumer Credit Code (CCC). Thus, the consumer protection provision of the CCC and the PPSA would be similar. *See also* Personal Property Securities Bill 2008, Commentary, para. 9.11.

149. *See* Personal Property Securities Bill 2008, Consultation Draft, § 158(4)(a).

150. *See id.* § 158(4)(b).

151. *See id.* § 158(4)(c).

152. *See id.* § 158(4)(d).

153. *See id.* § 158(4)(e).

154. *See* Website of Veda Advantage, Credit Reporting, [http://www.vedaadvantage.com/credit\\_reporting/credit\\_reporting\\_default.aspx?bustype=&cookie=true](http://www.vedaadvantage.com/credit_reporting/credit_reporting_default.aspx?bustype=&cookie=true) (last visited April 19, 2009). Veda Advantage, claims that with “unique data sets on 14 million Australians and 2 million New Zealanders our credit reporting solutions are essential for your [i.e. lenders’] decision making.” *Id.*

155. Letter from Nicole Rich, *supra* note 141, at 4.

156. *Id.* (“[A]ll registrations of motor vehicles should be required to be by serial number where the debtor is an individual rather than a business, due to serious privacy considerations.”).

157. *See* AUSTRALIAN LAW REFORM COMMISSION, FOR YOUR INFORMATION: AUSTRALIAN PRIVACY LAW AND PRACTICE, REPORT 108 (May

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suggests reforms, including an expansion of the particular types of personal information that can be included in a credit report.<sup>158</sup>

The use of unique identifiers such as serial numbers, debtor names, addresses, dates of birth, the accuracy of debtor information, and other issues will have to be considered in the wake of this report. This will likely impinge on the form and administration of any national PPS register in the future. So too will the recommendation that federal law provide a new statutory cause of action for “serious invasion of privacy.”<sup>159</sup>

Representatives of the credit reporting industry argue persuasively that legal constraints on data collection and access under the present system leads to poor risk assessment by lenders and bad outcomes for borrowers who should never have been given credit in the first place.<sup>160</sup> In addition, they argue that Australia is out of step with most other Organization for Economic Co-operation and Development (“OECD”)<sup>161</sup>

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2008) [hereinafter AUSTRALIAN PRIVACY LAW AND PRACTICE], available at <http://www.austlii.edu.au/au/other/alrc/publications/reports/108/>.

158. See *id.*; see also Media Release, Australian Law Reform Commission, Australia must Rewrite Privacy Laws for the Information Age (Aug. 11, 2008) (“More comprehensive credit reporting: in addition to the limited types of ‘negative’ information currently permitted, it is recommended that some additional categories of ‘positive’ information should be allowed to be added to an individual’s credit file, in order to facilitate better risk management practices by credit suppliers and lenders.”).

159. Thus far Australian common law has not entertained such a cause of action. AUSTRALIAN PRIVACY LAW AND PRACTICE, *supra* note 157, at para. 32.13 (“[T]he ALRC recommends establishing a statutory cause of action for serious invasions of privacy.”); see also *Austl. Broad. Corp. v. Lenah Game Meats Pty Ltd.* (2001) 208 C.L.R. 199 (Austl.).

160. Veda Advantage, Australia’s largest credit reporting agency, has lobbied for more comprehensive data collection:

Currently, credit reports carry data that gives financial providers only 11% of the picture required to identify and predict credit risk. The ALRC proposed changes will only add 22% of the total. The ALRC’s additional data recommendation—account status and payment history fields—would contribute 64%, significantly improving the industry’s ability to predict and prevent credit defaults.

Veda Advantage Corporate Website, *Veda Advantage Recognises Need for Further Credit Reform*, August 29, 2008, [http://www.vedadvantage.com/latest\\_news/need-for-credit-reform.aspx](http://www.vedadvantage.com/latest_news/need-for-credit-reform.aspx); see also *Credit reporting “needs reform”*, THE AGE, June 26, 2008, at 1, <http://news.theage.com.au/business/credit-reporting-system-needs-reform-20080626-2xaf.html>.

161. The OECD collects data, monitors trends, analyzes economic developments, and researches changes in trade, environment, agriculture,

countries in this regard.<sup>162</sup> Privacy and consumer advocates remain concerned about increased data collection and the need for relevant safeguards.<sup>163</sup>

### III. SPECIAL REFORM ISSUES AFFECTING EXISTING AUSTRALIAN LAW AND COMMERCIAL PRACTICES

Given Australia's commercial and economic history, a number of special reform issues deserve close attention for their effect on existing laws and commercial practices. The floating charge, agriculture and fixtures, intellectual property, and governing laws are among the reform issues affecting Australia's existing system in special ways.

#### A. *Sinking Fortunes of the Floating Charge?*

Maritime references abound in the law. As Justice K.M. Hayne of the High Court of Australia noted: "Boards of directors are said to be 'rearranging the deck-chairs'; CEO's are said to 'jump ship'; companies 'sink'; shareholders 'mutiny.'"<sup>164</sup> The "floating" charge provides us with one more example of these maritime references.

Fixed and floating charges are contract-based securities that are a staple in Australian finance law.<sup>165</sup> The Australian Securities and Investment Commission register of charges is the first port of call for potential creditors looking to see if company assets are encumbered or subject to a security interest.<sup>166</sup> In

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technology, and taxation. For information regarding the OECD, see OECD website at <http://www.oecd.org>.

162. New Zealand and France are the only OECD countries with credit reporting systems comparable to Australia's negative reporting. See Tom Reilly, *Telling Banks All About You*, THE SUNDAY AGE, June 26, 2008, at 22.

163. See Consumers' Federation of Australia, Credit Reporting, <http://www.consumersfederation.org.au/creditreporting.htm> (last visited April 20, 2009).

164. K.M. Hayne, Justice of the High Court of Australia, Speech at the opening of the Centre for Commercial Law at Australian National University (May 12, 1999), available at [http://www.hcourt.gov.au/speeches/haynej/haynej\\_anucen.htm](http://www.hcourt.gov.au/speeches/haynej/haynej_anucen.htm).

165. See John Chandler, *The Modern Floating Charge*, in SECURITIES OVER PERSONALTY 1 (Michael Gillooly ed., 1994) (discussing the modern floating charge and the legal dilemmas it creates).

166. See generally Australian Securities & Investments Commission Homepage, For Companies, Change of Details, Charges, <http://www.asic.gov.au/asic/asic.nsf/byheadline/Charges?openDocument> (last visited April 21, 2009).

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Australia, Justice Stephen took up this very common security device and gave this description of its operation in *United Builders Party v. Mutual Acceptance*:

Ordinarily, a floating charge is a charge granted over the whole of a company's undertaking or over a class of its assets, such as stock-in-trade or book debts. While the company continues to carry on business, the property so charged will necessarily be subject to change. Unless the charge is permitted to float over the changing mass of charged assets, rather than to fasten upon them once and for all when created, the company will be unable to carry on its business. It is this intention of the parties, that despite the charge, the company should still continue to carry on its business, which, once made manifest, leads to the conclusion that the charge is a floating charge . . . .<sup>167</sup>

The floating charge is unknown in the American legal system, but the "floating lien" is a reasonable approximation.<sup>168</sup> The above definition makes clear that a floating charge will not immediately "fasten" to assets. The Draft Bill takes account of this by providing that "[t]he fact that a security interest may be described as a 'floating charge' does not mean that the parties have agreed to postpone attachment unless they specifically agree to do so . . . ."<sup>169</sup>

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A charge is an agreement or a mortgage taken over a company's assets, undertaking or goodwill. Any person with an interest in the charge i.e. the chargor (the borrower) or the chargee (the lender), can register the charge [with ASIC]. The details of the charge need to be registered with us within 45 days of its creation.

*Id.*

167. *United Builders Proprietary Ltd. v. Mutual Acceptance Ltd.* (1980) 144 C.L.R. 673, 681–82.

168. See U.C.C. § 9-204 cmt. 2 (1998) ("This section adopts the principal of a 'continuing general lien' or 'floating lien.'"); see also W.J. GOUGH, *COMPANY CHARGES* 437–38 (2 ed. 1996) (noting that the floating charge is one differentiating feature between American credit techniques and English and Australian techniques); Peter F. Coogan, *Article 9 of the Uniform Commercial Code: Priorities Among Secured Creditors and the "Floating Lien,"* 72 HARV. L. REV. 838, 839 n.2 (1959) ("The floating lien alleged is quite different from the 'floating charge' or 'floating security' created under English and Canadian law."). For developments in Canada see Catherine Walsh, *The Floating Charge is Dead; Long Live the Floating Charge – A Canadian Perspective on the Reform of Personal Property Securities Law*, in PERSPECTIVES ON COMMERCIAL LAW 129 (Agasha Mugasha ed., 1999).

169. Personal Properties Securities Bill 2008, Commentary, para. 3.31.

This area of law is currently very complicated, both in its initial structure for effectiveness and in its effects upon bankruptcy or reorganization of a debtor's business. As one commentary notes:

Australian businesses currently rely on a mix of statute, common law and equitable principles when granting security over their personal property by way of a 'charge'—being a 'fixed' or 'floating' charge or a combination of both. A charge is an encumbrance over property that does not involve any actual assignment of that property. However, in the event of debtor default, the charge allows financiers to have recourse to the charged property to satisfy outstanding loan obligations.<sup>170</sup>

The charge may be compared with the mortgage, which typically affords the holder greater rights in the event of default. For example, a chargee holding an interest over receivables does not have the same advantages as a mortgagee would with respect to the same debtor.<sup>171</sup>

Once a creditor has decided to use a charge to secure their interest, they must then choose between various combinations of fixed, floating, fixed and floating, and, in some cases, the so-called "feather-weight" charge.<sup>172</sup> There are various weaknesses associated with each of these charges, which can lead to difficulties in assessing the risk connected with a loan.<sup>173</sup> In a

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170. *Id.* at para. 11.93.

171. Robyn Sanders & Deborah Overstead, *Receiveables and Asset Sales Financing*, in AUSTRALIAN FINANCE LAW 299 (4th ed. 1999) (citing *Tancred v. Delagoa Bay & East Africa Ry. Co* (1899) 23 Q.B.D. 239, 242).

172. *See id.* at 298–303. The featherweight floating charge is an additional form of a security "where the primary security is over specific assets of the chargor company[.]" such as "a fixed charge over the book debts of the chargor, rather than over the whole of the assets and undertaking of the chargor." *Id.* at 302.

173. Commenting on the British situation, one scholar noted:

At the very least, a secured creditor would wish to be able to tell how much collateral it had been offered in order to carry out a *risk assessment* on the loan. However, the creation of subsequent fixed charges and the accumulation of new preferential claims can dilute the floating charge holder's security, as can the debtor's ability to alienate the collateral free of the charge. So the floating charge holder cannot even know which assets it has security over, and how much they are worth! No wonder this has been described as a 'key weakness' of this device.

Riz Mokal, *The Floating Charge – An Elegy*, in COMMERCIAL LAW AND COMMERCIAL PRACTICE 480 (2003). For a detailed discussion of a floating

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recent survey of English and American law on the effect of reorganization proceedings on security interests, a commentator describes the fixed and floating charge phenomena, and their differences, as follows:

A fixed charge is one which attaches as soon as the charge has been created, or the debtor has acquired rights in the asset to be charged, whichever is the later. The effect of this is that the debtor cannot dispose of the asset free from the charge without the chargee's consent except by satisfying the indebtedness secured by the charge. The floating charge, by contrast, is one which hovers over a designated class of assets in which the debtor has or will in the future acquire an interest. The debtor has liberty to deal with any of the assets free from the charge so long as it remains floating. When an event occurs which causes the charge to crystallize, it attaches as a fixed security to all the assets then comprised in the relevant class and to any assets of the specified description subsequently acquired by the debtor.<sup>174</sup>

Australian law follows a very similar path. Under the new regime, the distinction between fixed and floating charges will become irrelevant, whereas at present the designation as one or the other can have important effects in bankruptcy and reorganization.<sup>175</sup> The New Zealand reform also did away with the age-old distinction between fixed and floating—without major apparent disturbance in the giving and taking of security.<sup>176</sup>

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charge security, see Eilis Ferran, *Floating Charges – The Nature of the Security*, 47 CAMBRIDGE L.J. 213 (1988).

174. Nick Segal, *The Effect of Reorganization Proceedings on Security Interests: The Position Under English and U.S. Law*, 32 BROOK. J. INT'L L. 927, 936–937 (2007); see also Chandler, *supra* note 165, at 2 (setting out seven characteristics of a “modern” floating charge).

175. An option paper issued by the Australian Standing Committee of Attorneys-General noted:

Personal property securities legislation removes the distinction between a fixed and floating charge. The rationale for doing so is that the nature of a security interest is irrelevant under the functional approach. As outlined above, under the functional approach the nature of a security interest is determined only by whether it functions to secure a payment or the performance of an obligation.

PPS DISCUSSION PAPER 2–EXTINGUISHMENT, *supra* note 17, at para. 357; see also *id.* at para. 358–60.

176. See *Agnew v. Commissioner of Inland Revenue* [2001] UKPC 28, para. 2 (appeal taken from N.Z.) (“A curiosity of the case is that the distinction between fixed and floating charges, which is of great commercial importance in

### B. Agriculture & Fixtures

Agriculture is a major part of Australian life and history. Economists have foreseen agriculture as a particular pocket of the Australian economy that would benefit from PPS reform, as was the case in New Zealand.<sup>177</sup> The Draft Bill provides special rules for “priorities, extinguishment and enforcement for security interests in agricultural products, fixtures, accessions and commingled goods.”<sup>178</sup>

As is currently the case, security interests in crops will be recognized both while they are growing and after they have been cut or separated from the soil.<sup>179</sup> Crops are broadly defined in the Draft Bill, and specifically include wheat, tobacco, sugar cane, oranges, and trees.<sup>180</sup>

An interesting aspect of the new scheme is the introduction of what could be labeled an “agricultural purchase money security interest,” (“A-PMSI”), the essence of which would help farmers to source additional funds to produce crops or livestock. For example “GrantA, a farmer, borrows money from BankA and provides BankA with a security interest in his crops. GrantA uses the money to buy fertiliser to help the crops grow. BankA’s security interest in those crops would have priority over any other security interests in the crops.”<sup>181</sup>

Seeds, planting, or harvesting costs might also be financed by such a security arrangement. This is akin to an inventory financier being given a PMSI in inventory. There is a six month limit on such interests.<sup>182</sup> Another staple of the law of personal property is that relating to the doctrine fixtures, to which we now turn.

Australian law on fixtures is presently complex and uncertain. The general rule—that what is affixed to the land becomes part of it<sup>183</sup>—is often difficult to apply. As one commentator noted:

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the United Kingdom, seems likely to disappear for the law of New Zealand when the Personal Property Securities Act 1999 comes into force.”).

177. ACCESS ECONOMICS PTY LTD., *supra* note 22, at 2.

178. Personal Property Securities Bill 2008, Commentary, para 8.1.

179. Personal Property Securities Bill 2008, Consultation Draft, § 119.

180. *Id.* § 19.

181. Personal Property Securities Bill 2008, Commentary, para. 8.6.

182. Personal Property Securities Bill 2008, Consultation Draft, § 123(c)(ii).

183. In Latin, *quicquid plantatur solo, solo credit.*

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[a] grantee's interest in chattels subject to a bill of sale are, to say the least, precarious when the chattels are attached to mortgaged land so as to become fixtures . . . . Reform is needed to enable ordinary commercial activities to be carried out without regard to an outdated and archaic principle such as the doctrine of fixtures.<sup>184</sup>

This uncertainty also leads to increased costs, multiple registrations, and possible side-agreements. The Draft Bill would help clarify this important area of the law.<sup>185</sup> It will give priority to the interest in land, unless one of the following four exceptions is met: (i) when the security interest attached to the fixture before the fixture is affixed to the land; (ii) where the PPS Register or the relevant Land Titles Register contains information that would put any land purchaser on notice; (iii) when the security interest attaches to the fixture after the fixture is affixed and an interest in land exists before the fixture has been perfected; (iv) when the security interest is granted over an existing fixture.<sup>186</sup> The UCC's initial attempts at clarifying the American law of fixtures was not uniformly acclaimed,<sup>187</sup> and Australian reformers need to be patient if this area is to reach a level of acceptable success.

Closely related to fixtures comes the issue of accessions. A priority scheme over accessions<sup>188</sup> is established whereby any security interest in tangible property<sup>189</sup> that becomes an

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184. Amanda Stickley, *Competition Between Mortgagees and Grantees to Fixtures*, 6 AUSTL. PROP. L.J. 1, 58, 61 (1998). For further discussion on the law of fixtures, see Ross Abbs, *The Law of Fixtures: Informed Principle or Independent Predilection*, 11 AUSTL. PROP. L.J. 31 and Nigel Ward, *The Race for Possession: The Rights of Retention of Title Suppliers of Fixtures*, 26 AUSTL. BUS. L. REV. 184 (1998).

185. Personal Property Securities Bill 2008, Commentary, para. 8.10–8.11.

186. *See id.* at para. 8.17–8.20.

187. Peter F. Coogan, *Security Interests in Fixtures Under the Uniform Commercial Code*, 75 HARV. L. REV. 1319, 1319 (1962) (noting that “despite the Code’s encouragement of the use of fixture collateral, its adoption in its present form will not result in any high degree of simplicity, clarity, or uniformity in the law governing security interests in fixtures.”).

188. In the context of personal property, an accession is something that attaches to another piece of personal property and becomes legally one with it, such as improvements on a vehicle. In Australia, the doctrine of accession can also refer to alterations in a real estate boundary as a result of imperceptible accretion. *See generally* Goldsworthy Mining Ltd. v Fed. Comm’r of Taxation (1973) 128 C.L.R. 199.

189. Tangible property is defined as: “goods, including the following: (a) crops; (b) livestock; (c) trees that are personal property; (d) wool; (e)

accession to other tangible property continues in the accession.<sup>190</sup> The default priority rule provides that the security interest in the accession prevails over the interest in the improved property.<sup>191</sup> There are a number of exceptions to the accessions scheme, the most important of which relates to property identified with a serial number.<sup>192</sup> Serial numbered property,<sup>193</sup> like motor vehicles, takes priority over the accession and the security interest in the improved property prevails.<sup>194</sup> Accessions are also subject to additional rules for enforcement.<sup>195</sup>

### C. Intellectual Property

Intellectual property (“IP”) is personal property.<sup>196</sup> IP is the most important asset of many businesses.<sup>197</sup> Physical possession is not an option for those wishing to take security and the true owner(s) can be difficult to identify.<sup>198</sup> Valuation can also be quite difficult because of the many unique circumstances which can surround its exploitation.<sup>199</sup>

Australian law provides for typical intellectual property rights, such as copyright,<sup>200</sup> patents,<sup>201</sup> trademarks,<sup>202</sup> industrial

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hydrocarbons or minerals that are personal property; (f) satellites and other space objects . . . .” Personal Property Securities Bill 2008, Consultation Draft, § 19.

190. *Id.* § 132 (“A security interest in tangible property that becomes an accession to other tangible property (the *improved property*) continues in the accession.”).

191. Personal Property Securities Bill 2008, Commentary, para. 8.28.

192. *See* Personal Property Securities Bill 2008, Consultation Draft, § 105.

193. For a definition of serial numbered property, see § 19.

194. *Id.* § 142(f). A person with an interest in improved property may be prevented from asserting priority under § 149.

195. *Id.* § 153.

196. *See* John Swinson, *Security Interests in Intellectual Property in Australia*, 14 BOND L. REV. 86, 87 (2002), available at <http://epublications.bond.edu.au/blr/vol14/iss1/9>.

197. *Id.* at 86.

198. *Id.* at 86–87.

199. *See* GORDON V. SMITH & RUSSELL L. PARR, VALUATION OF INTELLECTUAL PROPERTY AND INTANGIBLE ASSETS 163–173 (3d. ed. 2000) (discussing valuation techniques).

200. Copyright Act, 1968 (Austl.).

201. Patents Act, 1990 (Austl.).

202. Trade Marks Act, 1995 (Austl.); *see also* J. Lipton, *Security Interests in Trade Marks and Associated Business Goodwill*, 10 AUSTL. INTELL. PROP J. 157 (1999).

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designs,<sup>203</sup> and trade secrets.<sup>204</sup> Less common forms are also available, such as plant breeder's rights<sup>205</sup> and rights in integrated circuits.<sup>206</sup>

As discussed, personal property is broadly defined under the Draft Bill to mean "property . . . other than land."<sup>207</sup> This broad definition specifically includes licenses.<sup>208</sup> Thus, intellectual property would come within the broad purview of the new law.

However, a license of intellectual property is not an interest that could be *registered* under the PPS Register.<sup>209</sup> The Draft Bill includes: (i) intellectual property within the definition of chattel paper;<sup>210</sup> (ii) intellectual property related to tangible property within security agreements;<sup>211</sup> and (iii) special rules for the acquisition of intellectual property rights free of security interests.

The Draft Bill also provides that if a security interest is granted in an intellectual property license and the intellectual property itself is later transferred, then the original security agreement binds every successor in title to the licensor of the intellectual property.<sup>212</sup> Further detailed discussion of security over intellectual property lies beyond the scope of this article.

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203. Designs Act, 2003 (Austl.).

204. Trade secrets are protected by the Common Law. *See* Austl. Broad. Corp. v. Lenah Game Meats Pty Ltd. (2001) 208 C.L.R. 199; *see also* ROBERT DEAN, THE LAW OF TRADE SECRETS (1990). The Common Law also enforces confidentially agreements and protects against passing off trade marks.

205. Plant Breeder's Rights Act, 1994 (Austl.); *see also* Media Release, Bob Baldwin, Minister for Industry, Tourism and Resources, Celebrating 20 years of Plant Breeder's Rights (Mar. 13 2007), *available at* <http://www.ipaustralia.gov.au/pdfs/news/CMR07-100.pdf> ("Australia has the largest spread of registered varieties of any country in the world.").

206. Circuit Layouts Act, 1989 (Austl.).

207. Personal Property Securities Bill 2008, Consultation Draft, § 19.

208. *Id.*

209. The legislation specifically provides that some interests in personal property are not security interests, such as licences. The Bill therefore makes it clear that a licence of intellectual property is not a security interest that could be registered on the PPS Register. *See id.* § 21(4).

210. *Id.* § 28. Thus, a writing that evidences a monetary obligation and a security interest in specific intellectual property or in a specific intellectual property license will rise to satisfy the definition of chattel paper.

211. *Id.* § 30(2).

212. *Id.* § 118(1) (Similar rules apply to security interests in intellectual property sub-licences).

The special reforms that will affect existing Australian personal property law and commercial practices will be very important to the success of the new scheme. In specialist legal areas, any codification must guard against abruptly cutting off the past while still removing the old and “sterile distinctions and refinements serving no useful purpose . . . . The problem is where to strike the balance between preserving the old and replacing it with the new.”<sup>213</sup>

#### IV. ENFORCEMENT OF THE PERSONAL PROPERTY SECURITIES ACT

Enforcement of the PPSA may pose several potential challenges. Among these enforcement issues is the determination of governing law in securities cases. Vague definitions may also create issues in determining transactional parties’ rights and duties. On a more fundamental level, the ability of the Commonwealth to enact all provisions of the PPSA depends on states’ referral of power to the central government.

##### *A. How Governing Law Will Be Determined*

In general terms, the location of the collateral of a security interest itself (“collateral location rule”) and location of the grantor (“grantor location rule”) are the two key concepts in determining the governing law.<sup>214</sup> The former deals with collateral inside Australia and the latter with collateral that is outside Australia. There are separate rules designed to provide certainty in the areas of intellectual property, bank accounts, investment instruments, investment entitlements, and non-negotiable documents of title.<sup>215</sup>

The collateral location rule specifies that Australian law will apply to tangible property located in Australia where there is a security interest.<sup>216</sup> It would also apply to the following property types: (i) chattel papers for which an authoritative copy of electronic record is located in Australia,<sup>217</sup> (ii) investment instruments not evidenced by a certificate whose issuer is located

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213. Goode, *supra* note 26, at 143.

214. See Personal Property Securities Bill 2008, Consultation Draft, §§ 43–44.

215. See *id.* § 45.

216. *Id.* § 45(2)(a).

217. *Id.* § 45(2)(b).

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in Australia,<sup>218</sup> and (iii) currency and negotiable instruments of which papers, documents, or currency are located in Australia.<sup>219</sup> The law of Australia also applies to security interests in intellectual property or an intellectual property license,<sup>220</sup> unless the intellectual property or license is granted under the law of another country—in which case the law of that other country will apply.<sup>221</sup>

The grantor location rule deals with situations where the collateral is located outside of Australia. In such cases, one looks to the law of the location of the grantor at the time the security interest attached to the collateral.<sup>222</sup>

Special provisions are made for governing law in the case of minerals. For example, the Draft Bill provides that if the minehead or wellhead is located in Australia, then Australian law applies, even if the grantor is elsewhere.<sup>223</sup> DP2 raised the question of whether “a security interest in extracted minerals created before the minerals are extracted [should] be governed by the law of the place where the minehead is located?”<sup>224</sup> This has been answered in the Draft Bill in the affirmative.<sup>225</sup> A similar rule applies to the sale of an account<sup>226</sup> that arises from the sale of minerals.

The collateral location rule and grantor location rule both operate in relation to a limited number of issues. These issues include the rights, obligations, and duties of the parties to the security agreement, as well as validity, attachment, perfection, and priority.<sup>227</sup> Basic jurisdictional issues in a particular matter

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218. *Id.* § 45(2)(c).

219. *Id.* § 45(2)(d).

220. *Id.* § 45(3).

221. *Id.* § 47.

222. *Id.* § 46(4) (“*Law of the attachment jurisdiction*, in relation to a security interest in collateral, means the law of the jurisdiction in which the grantor is located at the time the security interest attaches to the collateral.”).

223. *Id.* § 48(3). This section defines minerals to mean “minerals (including hydrocarbons) in any form, whether solid, liquid or gaseous and whether organic or inorganic.” *Id.* § 48(5).

224. PPS DISCUSSION PAPER 2—EXTINGUISHMENT, *supra* note 17, at 46.

225. See Personal Property Securities Bill 2008, Consultation Draft, § 48.

226. An account is “a monetary obligation (whether or not the obligation has been earned by performance) that is not evidenced by chattel paper, an investment instrument or a negotiable instrument.” *Id.* § 19.

227. See *id.* § 43.

are left to the common law and the relevant court rules.<sup>228</sup> Most Australian courts will assume jurisdiction over a party if they can show that “originating process” has been served upon them or that they have “submitted” to the relevant jurisdiction.<sup>229</sup>

*B. How Vague Definitions May Affect Transactional Parties’ Rights and Duties in the Enforcement Context*

Enforcement of a security interest is addressed in the Draft Bill.<sup>230</sup> As is the case in many jurisdictions around the world, the concept of “default” under a security agreement is not defined in the new legislation and is left to negotiations between the parties to a transaction.<sup>231</sup> A senior Australian banking lawyer has highlighted that “events of default are drafted with the recognition that the fortunes of a company may change over time.”<sup>232</sup>

Perhaps with this and other policy considerations in mind, the Draft Bill leaves a great deal of discretion to transactional parties in devising their own rights, duties, and obligations in the enforcement context. There is certainly no attempt at codification and the rights provided are not generally definitive. Nevertheless, there is a very general requirement of “honesty” and “commercial reasonableness” in exercising rights and performing duties and obligations that arise under a security agreement.<sup>233</sup> The same applies to enforcement against

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228. See generally BERNARD CAIRNS, AUSTRALIAN CIVIL PROCEDURE (5th ed. 2002).

229. With leave of the court, originating process may be served on a party who is outside of the jurisdiction. *Id.* at 105.

230. See Personal Property Securities Bill 2008, Consultation Draft, § 158.

231. Default, in broad terms, means any failure to meet an obligation or covenanted promise in a security agreement. For example, the obligation to pay interest, keep the mortgaged property in good condition, or to insure the property against loss.

232. John Stumbles, *General Considerations in Taking Security*, in AUSTRALIAN FINANCE LAW 444 (4th ed. 1999). This chapter contains many useful drafting considerations. For example: “Acceleration clauses should not be automatic;” “A lender’s lawyer should consider the appropriateness of each event [of default] to the particular borrower, the borrower’s group, and the security being offered;” “The relationship between the events of default and the borrower’s covenants and warranties should be recognised.” *Id.* at 444–45.

233. Personal Property Securities Bill 2008, Consultation Draft, § 239 (“All rights, duties and obligations that arise under a security agreement or this Act must be exercised or discharged: (a) honestly; and (b) in a commercially

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collateral.<sup>234</sup> Neither of these broad terms are defined in the Draft Bill. The rights of secured parties, grantors, and others in an enforcement action are set out in Appendix 2.

*C. Whether States Will Refer Power to the Central Government*

Constitutional issues involved in passing a comprehensive law reform across Australia are sometimes very complex. These issues often live under the shadow of High Court challenge which can inhibit the best of intended legal reforms. In 2002, Denis Rose,<sup>235</sup> Marion Hetherington,<sup>236</sup> and Gerard Carney<sup>237</sup> all considered these issues at the Bond University Workshop on Personal Security. The major issues center upon delimiting the precise extent of Commonwealth power under the federal Constitution and States' willingness to refer power to the central government.

This must be seen in the context of the federal-state "balance" as it has developed since federation.<sup>238</sup> As in many federal systems, once a government decides to regulate a particular area of economic activity, two questions arise: (i) can the central government claim control over that area of activity by virtue of the national constitution?, and (ii) does the proposed regulation impinge on a constitution prohibition or protection of some individual or collective right?<sup>239</sup>

The Australian Constitution sets out a list of federal powers. The list includes such areas as defense,<sup>240</sup> marriage,<sup>241</sup> and

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reasonable manner.”).

234. Personal Property Securities Bill 2008, Commentary, para. 9.6.

235. See Dennis Rose, *Uniform Personal Property Security Legislation for Australia – Constitutional Issues*, 14 BOND L. REV. 26 (2002).

236. See Marion Hetherington, *The Constitutional Mechanism for Personal Property Security in Australia*, 14 BOND L. REV. 47 (2002).

237. See Gerard Carney, *Uniform Personal Property Security Legislation for Australia: A Comment on Constitutional Issues*, 14 BOND L. REV. 55 (2002).

238. Australia federated in 1901 when the British Parliament passed the Commonwealth of Australia Constitution Act of 1900.

239. See PETER HANKS, *CONSTITUTIONAL LAW IN AUSTRALIA* 281 (1991).

240. COMMONWEALTH OF AUSTRALIA CONST. § 51 (vi) (granting Parliament the power to make laws for the “peace, order, and good government of the Commonwealth with respect to: the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth”).

241. *Id.* § 51 (xxi) (granting Parliament the power to make laws for the “peace, order, and good government of the Commonwealth with respect to:

indigenous affairs.<sup>242</sup> Various sections confer specific power for the broad control of economic activity. This includes, powers over trade and commerce,<sup>243</sup> corporations,<sup>244</sup> banking,<sup>245</sup> and taxation.<sup>246</sup> Other powers are aimed at more limited but important economic activities. These include powers over “postal,”<sup>247</sup> “bills of exchange and promissory notes,”<sup>248</sup> and powers over “bankruptcy and insolvency” regulation.<sup>249</sup>

It is natural to think that the banking power or the bankruptcy and insolvency power would be used to support regulation or reform of personal property security. However, this would give a false picture. Throughout Australia’s history since federation, the most widely used powers have arguably been the “corporations” power, and the “trade and commerce” power.

The corporations’ power provides wider legislative scope because it regulates a particular legal person, encompassing all of that person’s activities—rather than a particular activity

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marriage”).

242. *Id.* § 51 (xxvi) (granting Parliament the power to make laws for the “peace, order, and good government of the Commonwealth with respect to: the people of any race, for whom it is deemed necessary to make special laws”).

243. *Id.* § 51 (i) (granting Parliament the power to make laws for the “peace, order, and good government of the Commonwealth with respect to: trade and commerce with other countries, and among the States”).

244. *Id.* § 51 (xx) (granting Parliament the power to make laws for the “peace, order, and good government of the Commonwealth with respect to: foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth”).

245. *Id.* § 51 (xiii) (granting Parliament the power to make laws for the “peace, order, and good government of the Commonwealth with respect to: banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money”).

246. *Id.* § 51 (ii) (granting Parliament the power to make laws for the “peace, order, and good government of the Commonwealth with respect to: taxation; but so as not to discriminate between States or parts of States”).

247. *Id.* § 51 (v) (granting Parliament the power to make laws for the “peace, order, and good government of the Commonwealth with respect to: postal, telegraphic, telephonic, and other like services”).

248. *Id.* § 51 (xvi) (granting Parliament the power to make laws for the “peace, order, and good government of the Commonwealth with respect to: bills of exchange and promissory notes”).

249. *Id.* § 51 (xvii) (granting Parliament the power to make laws for the “peace, order, and good government of the Commonwealth with respect to: bankruptcy and insolvency”).

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conducted by a range of persons.<sup>250</sup> In the context of PPS reform, the fact that “[n]early all lenders and commercial debtors are corporations” is very important.<sup>251</sup> However, the “corporations power” is limited by the fact that such corporations must be *already* “formed within the limits of the Commonwealth.”<sup>252</sup> Thus, it is the States and the States alone that have power over actual incorporation and formation procedures.<sup>253</sup>

The “trade and commerce” power practically mirrors that found in the U.S. Constitution.<sup>254</sup> However, it has been interpreted somewhat more conservatively than the U.S. commerce clause.<sup>255</sup> Commentators have noted that, “While the trade and commerce power has been broadly construed, the early rejection of the ‘co-mingling’ doctrine has meant that the power has [not] had . . . the practical scope of its United States counterpart.”<sup>256</sup> Nevertheless, this section has supported a wide

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250. It took a long time and successively broader interpretations for the High Court to reach this conclusion. Early interpretations were very narrow and were based on implied doctrines of “reserve powers” and “intergovernmental immunity” designed to preserve State legislative authority. These doctrines were decisively abandoned in the famous Engineers’ case of 1920. See *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.* (1920) 28 C.L.R. 129; see also Leslie Zines, *Federal Constitutional Power over the Economy*, 20 PUBLIUS 4, 19–34 (1990).

251. Popple, *supra* note 19, at 3.

252. See COMMONWEALTH OF AUSTRALIA CONST. § 51 (xx).

253. See *New South Wales v. Commonwealth* (1990) 169 C.L.R. 482 (“The Corporations Act Case”); see also M. Hetherington, *Resolving the Company Law Crisis after the High Court’s Decision in The Queen v. Hughes*, 28 AUSTL. BUS. L. REV. 364, 377 (2000). This is a complicated saga beyond the scope of this paper.

254. See Note, *The Commerce Power under the Australian Constitution*, 42 COLUM. L. REV. 660, 660–681 (1942) (explaining how the commerce power under the Australian Constitution was inspired by the American equivalent).

255. See Greg Taylor, *The Commerce Clause – Commonwealth Comparisons*, 24 B.C. INT’L. & COMP. L. REV. 235, 236 (2001) (“[N]either Canada nor Australia had adopted as sweeping an interpretation of the equivalent constitutional provisions as had the United States before *Lopez*.”).

256. Neil Williams & Andrew Gotting, *The Interrelationship between The Industrial Power And Other Heads of Power in Australian Industrial Law*, 20 AUSTL. BAR REV. \*1, \*10 (2001). Other commentators have noted:

Even allowing for some recent backtracking, we recognise that the United States Supreme Court has gone further than the Australian High Court in its pro-centre interpretations of the interstate trade and commerce power. However, this is more than counterbalanced by the much smaller list of federal legislative powers contained in the *United*

range of legislative initiatives, including aspects of industrial law,<sup>257</sup> foreign investment,<sup>258</sup> and customs.<sup>259</sup>

Other complicated constitutional issues limit the Commonwealth's power in ways that may require testing before the High Court. To overcome such uncertainty in a major scheme like that applied to personal property, and to produce the desired "perfect uniformity," it has been proposed that the States refer power to the Commonwealth.<sup>260</sup> The Commonwealth would then pass uniform laws for the entire country. Such power reference is provided for in the Constitution which allows for the Commonwealth to pass laws relating to "matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, [however], the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law . . . ."<sup>261</sup>

The Draft Bill addresses this possibility by providing for a two-tiered operation of the legislation to accommodate both "referring" and "non-referring" States.<sup>262</sup> The obvious preference for the federal government would be for all States to "refer" power since this will allow for complete uniformity across the entire country.<sup>263</sup> "Non-referring" states will still be

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*States Constitution*, the relatively much more significant political barriers to federal government activity and intervention in the United States, a political culture which places much greater emphasis upon local and state oriented policy development, and the significantly stronger financial position of the American States.

James Allan & Nicholas Aroney, *An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism*, 30 SYDNEY L. REV. 245, 260 (2008). The commingling doctrine is part of United States Supreme Court case law that accepts that distinctions between inter-State and domestic (intra-State) trade are essentially artificial. For example see *Houston, E. & W. Texas Ry. United States*, 234 U.S. 342 (1914).

257. See Workplace Relations Act, 1996 (Austl.).

258. See Foreign Acquisitions and Takeover Act, 1975 (Austl.).

259. See Customs Act, 1901 (Austl.).

260. See generally Pamela Tate, SC, Solicitor-General for Victoria, *New Directions in Co-operative Federalism: Referrals of Legislative Power and Their Consequences*, available at [http://www.gtcentre.unsw.edu.au/publications/papers/docs/2005/5\\_PamelaTate\\_Table.pdf](http://www.gtcentre.unsw.edu.au/publications/papers/docs/2005/5_PamelaTate_Table.pdf).

261. COMMONWEALTH OF AUSTRALIA. CONST. § 51 (xxxvii).

262. See Personal Property Securities Bill 2008, Consultation Draft, § 6.

263. Cf. David Melinkoff, *The Language of the Uniform Commercial Code*, 77 YALE L.J. 185, 185 (1967) ("Uniformity, like inbreeding, can produce works

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subject to the legislation, but only to the outer extent of federal power.<sup>264</sup> This may be worked out in a High Court challenge. According to the Bill's Commentary:

The Commonwealth and the States and Territories have agreed to the terms of an inter-governmental agreement that will underpin the referral of legislative power from the States to the Commonwealth to enable the Commonwealth to enact the Bill. The Council of Australian Governments is expected to sign-off on the inter-governmental agreement during the latter half of 2008.<sup>265</sup>

Thus, the precise nature of this agreement remains to be seen. The Draft Bill also makes it clear that other laws will still apply to extinguish a security interest, unless the Bill provides otherwise.<sup>266</sup>

It is worth noting that recent New Zealand reform took place without the above constitutional complexities because New Zealand has no states, has enjoyed a unitary system of government since 1876, and has a national Parliament with only a single chamber. If the United Kingdom were to take up PPS reform it would also benefit from the simplicity of a unitary system of government, but would have to cope with the exigencies of an upper house as well as complications associated with membership in the European Union.<sup>267</sup>

To conclude, it is worth repeating that enforcement is a most important aspect of security—without it personal property securities are practically useless. Thus, governing law and its ultimate interpretation must be determined. Even if the Australian States do effectively refer power to the Commonwealth, monitoring enforcement provisions will remain necessary.

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of genius or monsters, sometimes both.”).

264. See PPS DISCUSSION PAPER—REGULATIONS, *supra* note 9, at para. 48 (explaining that in instances “where a State does not refer to the Commonwealth its legislative power over PPS . . . the operation of the Bill would be confined to the constitutional power of the Commonwealth.”).

265. Personal Property Securities Bill, Commentary, para. 11.115.

266. See Personal Property Securities Bill, Consultation Draft, § 17.

267. The European Union regulates financial collateral under Directive 2002/47/EC of the European Parliament and Council. See [2002] OJ L 168, 47.

## CONCLUSION

Australian personal property securities reform goes beyond a mere consolidation or restatement. It is arguably a codification, albeit on a lesser scale than that of the UCC. The results of a comprehensive codification, whatever its extent, are not always unequivocally positive. Sometimes a codification will halt the law's development in unexpected and commercially undesirable ways.<sup>268</sup> At other times it will make matters more complicated than they were before.<sup>269</sup> In addition, unexpected arguments may be made by merchants and specialist lawyers that block the spirit of the reform. Certainly, lawyers' continuing knowledge and judgment will be needed to shepherd a successful transformation of the present system.<sup>270</sup>

How does one measure the success of such a wide-ranging reform? By way of pure economic measures? By measuring the number of suits brought to clarify the new legislation? By counting the number of new financing statements over a particular time period that reflect revenue raised? By some measure of the rise or fall of enforcement proceedings? By counting the number of required statutory revisions after the law is passed? The rights and wrongs of the reform will be judged in many ways and this is an appropriate course of action.

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268. See generally Grant Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 *YALE L.J.* 1341, 1341 (1948). Gilmore notes the difficulty:

The draftsman is called up to build a coherent pattern out of the infinite variety of business customs and practices in an unstable and rapidly changing economy. The more detail and color he loads into his statute, the sooner it will begin to wither on the vine; if, on the other hand, he proceeds from generalization to abstraction, his statute will never be of much use to anyone. The process demands a nice eye, a steady hand, and a sure judgment.

*Id.*

269. See Flannery & Burkett, *supra* note 74, at 143 (noting that the transitional phase for personal property securities reform may take as long as two years as banks and financial systems switch from existing securities registers to the new system).

270. Cf. Coogan, *supra* note 82, at 883. Coogan notes that Article 9 did: not eliminate the need for knowledge and judgment on the part of lawyers and secured parties; certainly it does not eliminate all the pitfalls in an area where pitfalls have been traditionally numerous and treacherous. It does eliminate some of them, however, and it does bring a greater element of reason to an area where the law has not always been conspicuously reasonable.

*Id.*

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Certainly, if some aspects of the reform are unsuccessful there is little likelihood of a wholesale return to the former system and piecemeal “upgrades” will then become necessary. This has been an ongoing process with the UCC and similar Canadian legislation. Furthermore, any changes would need to account for current New Zealand laws, as one of the goals of the reform is to provide harmony in economic relations between Australia and New Zealand.

In similar fashion, reform of the reform can be evaluated by judges who may draw upon a complex set of rules for statutory interpretation. As has been noted in connection with a case arising out of the recent New Zealand reform:

*Graham v Portacom New Zealand Ltd* [2004] 2 NZLR 528 was an important landmark in terms of the Personal Property Securities Act 1999 (“the PPSA”). It is the first case deciding substantive points in respect of the legislation, and adopts a robust approach consistent with sweeping away any old concepts underlying the previous legal regime.<sup>271</sup>

There have already been calls for reform of aspects of the New Zealand PPSA, and no doubt more will follow.<sup>272</sup> This is normal, and often occurs even before or during the legislative process. Australia has a generally good record of coping with law reform and with subsequent changes to reform. Such experiences will be invaluable as this large and opportune transformation becomes a reality.

Law reformers in the United Kingdom will pay close attention to Australian successes and failures in the upcoming transition.<sup>273</sup> Both the Australian and New Zealand PPS legislation have the “look and feel” of a traditional English statute—a far more familiar drafting style than that of Article 9 of the UCC. Given colonial history, aside from Australia’s federal constitutional structure, any reforms will also be laid down on a familiar collection of commercial statutes and case

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271. Duncan Webb, *Review: Commercial Law*, 2 N.Z. L. REV. 251, 259 (2005).

272. See, e.g., Duncan Webb, *Review: Commercial Law*, N.Z. L. Rev. 373, 385 (2007) (noting the problems with the New Zealand PPSA involving ship registration and calling for legislative intervention).

273. United Kingdom reform appears to be “on hold” despite the publication of Professor Aubrey Diamond’s *A Review of Security Interests in Property*, UK Department of Trade and Industry, 1989.

law.

Overall, Australian personal property securities reform is worth the potential complications it may create. The reform will require careful monitoring to ensure that the spirit of its purpose is not lost in its expansive detail. However, after the personal property security laws are changed, the United Kingdom will remain the last great bastion of “security of the sewing machine age.”<sup>274</sup>

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274. David Allan, *supra* note 1, at 181; *see also* Gerard McCormack, *Personal Property Security Law Reform in Comparative Perspective – Antipodean Insights?*, 33 COMM. L. WORLD REV. 3, 34 (2004) (arguing that reform in the United Kingdom should avoid pitfalls of the New Zealand reform experience); *see also* Gerard McCormack, *Personal Property Security Law Reform in England and Canada*, J. BUS. L. 113–142 (Mar. 2002); U.K. LAW COMMISSION, REGISTRATION OF SECURITY INTERESTS: COMPANY CHARGES AND PROPERTY OTHER THAN LAND, A SUMMARY OF THE CONSULTATION PAPER 7 (2002), *available at* <http://www.lawcom.gov.uk/docs/cp164sum.pdf> (“Adopting notice-filing would bring our law into line with developments not only in the United States of America and many Commonwealth jurisdictions but also in modern international instruments.”).

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## APPENDIX 1

Australian Personal Property Security Legislation (as at 1 March 2006). Source: Attachment D to Standing Committee on Attorneys-General (SCAG) Options Paper, April 2006. The survey table below sets out the relevant government (column 1), legislation (column 2), and supervising executive body (column 3).

<b><u>Government</u></b>	<b><u>Legislation</u></b>	<b><u>Supervising Executive Body</u></b>
<b>Commonwealth</b>	Corporations Act 2001 Chapter 2K Designs Act 2003 Patents Act 1990 Plant Breeders Rights Act 1994 Shipping Registration Act 1981 Trade Marks Act 1995	ASIC IP Australia IP Australia IP Australia Australian Maritime Safety Authority IP Australia
<b>Australian Capital Territory</b>	Consumer Credit Code Part 5 Cooperatives Act 2002 s 270 and Schedule 3 Instruments Act 1933 Mercantile Law Act 1962 Sale of Goods Act 1954 s 29(2) Sale of Motor Vehicles Act 1977	ACT Office of Fair Trading Department of Justice and Community Safety Department of Justice and Community Safety Department of Justice and Community Safety ACT Office of Fair Trading ACT Office of Fair Trading
<b>New South Wales</b>	Consumer Credit Code Part 5 Co-operatives Act 1992 s 278 and Schedule 3 Factors (Mercantile Agents) Act 1923 Registration of Interests in Goods Act 1986 Sale of Goods Act 1923 s	NSW Office of Fair Trading NSW Office of Fair Trading Attorney-General's Department NSW Office of Fair Trading Attorney-General's

	28(2) Security Interests in Goods Act 2005 Warehouseman's Liens Act 1935	Department Lands Department NSW Office of Fair Trading / Commerce Department
<b>Northern Territory</b>	Consumer Credit Code Part 5 Co-operatives Act s 264 and Schedule 3 Instruments Act Registrations of Interests in Motor Vehicles and Other Goods Act Sale of Goods Act s 28(2) Warehousemen's Liens Act Workmen's Liens Act	Consumer and Business Affairs Consumer and Business Affairs Department of Justice NSW Office of Fair Trading  Consumer and Business Affairs Consumer and Business Affairs Department of Justice
<b>Queensland</b>	Bills of Sale and Other Instruments Act 1955 Consumer Credit Code Part 5 Cooperatives Act 1997 s 262 and Schedule 3 Credit (Rural Finance) Act 1996 Factors Act 1892 Financial Intermediaries Act 1996 s 97C Goods Act 1896 s 27(2)  Hire-Purchase Act 1959 Liens on Crops of Sugar Cane Act 1931 Motor Vehicles and Boats Securities Act 1986	Office of Fair Trading Office of Fair Trading Office of Fair Trading Office of Fair Trading Treasury Department Office of Fair Trading Office of Fair Trading Office of Fair Trading Office of Fair Trading
<b>South Australia</b>	Bills of Sale Act 1886 Consumer Credit Code Part 5 Co-operatives Act 1997 s 264	Commissioner for Consumer Affairs Office of Consumer and Business Affairs

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	<p>Goods Securities Act 1986          Liens on Fruit Act 1923          Mercantile Law Act 1936          Sale of Goods Act 1895 s 19          Second-hand Dealers and Pawnbrokers Act 1996          Stock Mortgages and Wool Liens Act 1924          Warehouse Liens Act 1990          Worker's Liens Act 1893</p>	<p>Department of Transport          Attorney-General's Department          Attorney-General's Department          Attorney-General's Department          Attorney-General's Department          Attorney-General's Department          Attorney-General's Department          Attorney-General's Department          Attorney-General's Department          Attorney-General's Department          Attorney-General's Department          Attorney-General's Department          Attorney-General's Department</p>
<b>Tasmania</b>	<p>Bills of Sale Act 1900          Consumer Credit Code Part 5          Co-operatives Act 1997 s 271 and Schedule 4            Factors Act 1891          Motor Vehicles Securities Act 1984            Sale of Goods Act 1896 s 30(2)          Stock, Wool and Crops Mortgages Act 1930</p>	<p>Department of Justice          Department of Justice          Department of Consumer Affairs and Business          Department of Justice          Department of Infrastructure, Energy and Resources          Department of Justice          Department of Justice</p>
<b>Victoria</b>	<p>Chattel Securities Act 1987            Consumer Credit Code Part 5          Disposal of Uncollected Goods Act 1961          Goods Act 1958 s 31          Hire Purchase Act 1959          Instruments Act 1958 Parts</p>	<p>Consumer Affairs Victoria / Department of Roads and Ports          Consumer Affairs Victoria          Consumer Affairs Victoria          Consumer Affairs Victoria</p>

	VII and VIII Motor Car Traders Act 1986 Property Law Act 1958 s 134 Second-Hand Dealers and Pawnbrokers Act 1989 Warehousemen's Liens Act 1958	Consumer Affairs Victoria Department of Justice Consumer Affairs Victoria Department of Justice Consumer Affairs Victoria  Department of Justice
<b>Western Australia</b>	Bills of Sale Act 1899  Chattel Securities Act 1987  Consumer Credit Code Part 5  Factors Act 1842 (UK) Factors Act Amendment Act 1878 Hire-Purchase Act 1959  Sale of Goods Act 1895 s 19	Department of Consumer and Employment Protection Department of Consumer and Employment Protection Department of Consumer and Employment Protection Department of the Attorney-General Department of the Attorney-General Department of Consumer and Employment Protection Department of Consumer and Employment Protection

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## APPENDIX 2

**Table 9.1: Rights of secured party, grantor and other s in enforcement action**

<i>Secured Party</i>	<i>Grantor / Debtor</i>	<i>Other parties with an interest in the collateral</i>
<p><b>section 164</b> Right to appoint a receiver pursuant to a security agreement in relation to specific property not covered by the <i>Corporations Act 2001</i>.</p>	<p>Can negotiate the terms and conditions of the appointment as set out in the security agreement</p>	
<p><b>section 65</b> Right to enforce against personal property using the remedies and rights available in relation to land.</p>	<p><b>section 165(5)</b> Right to ensure the proper allocation of funds to personal property if enforcement has been taken under incorporated land laws.</p> <p><b>section 165(5)(b) and (c)</b> Right of other secured parties to have standing in proceedings taken in State or Territory courts using incorporated land laws. Right of secured party to apply to a court for the conduct of a judicially supervised sale of the personal property.</p> <p><b>section 167</b> Right to protective provisions provided in the Consumer Credit Code, but not provided for in the Bill.</p>	

<i>Secured Party</i>	<i>Grantor / Debtor</i>	<i>Other parties with an interest in the collateral</i>
<p><b>section 168</b> A secured party is entitled to collect and apply liquid collateral</p>	<p><b>section 169(5)</b> Right of grantor to notice</p>	<p><b>section 169( 5)</b> Right of higher ranking secured parties to get notice section 169(5) Right of higher parties to veto the collection</p>
<p><b>section 170</b> A secured party is entitled to seize collateral</p>		<p><b>section 174</b> A higher ranking secured party has the right to seize collateral from a lower secured party</p>
<p><b>section 172</b> Right to dispose of collateral after seizure</p>	<p><b>section 172</b> Right to ensure that seized collateral is disposed of by sale, lease or purchase (unless contracted out of)</p>	
<p><b>section 173</b> Right to apparent possession in certain circumstances</p>		
<p><b>section 175</b> Entitled to dispose of collateral by sale or if security agreement provides by lease Right to dispose of collateral by purchase</p>	<p><b>section 81</b> Right to object to secured party's intention to purchase the collateral</p>	
<p><b>section 176</b> Secured party may purchase the collateral</p>	<p><b>section 184</b> Entitled to object to purchase of collateral by a secured party in which case the secured</p>	

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*Secured Party**Grantor / Debtor**Other parties with an  
interest in the  
collateral*if the collateral if the  
collateral is not used  
as a consumer good

party must sell or lease to a third party

**section 174**

Entitled to receive notice prior to disposal

**section 178**Duty of secured party  
to obtain at least the  
market value or,  
where there is no  
market value, the best  
price reasonably  
obtainable**section 178**Right to statement of account once collateral  
has been disposed of**section 180**Right to have  
security interest in  
Collateral preserved  
if the secured party  
has a higher priority  
ranking than the  
enforcing secured  
party**section 181**Secured party is able  
to propose to retain  
the collateral**section 181(2)**Right to receive notice if secured party seeks  
to retain collateral**section 182**Right to object to secured party's proposal to  
retrain collateral**section 186**Right to any surplus remaining after  
distribution

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*Secured Party*

*Grantor / Debtor*

*Other parties with an  
interest in the  
collateral*

**section 189**

Right to redeem the collateral

**section 190**

Right to reinstate the security agreement by  
paying the sum