UCC Influences on the Development of Australian Commercial Law

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UCC INFLUENCES ON THE DEVELOPMENT OF AUSTRALIAN COMMERCIAL LAW

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I. INTRODUCTION

So far as I am aware it has never been suggested that the Uniform Commercial Code (UCC) should be copied in its entirety by Australian legislatures. This is not because of aversion to the idea of codifying commercial law. Rather, it is because differences in local conditions and commercial practices would make such wholesale copying inappropriate. Awareness of some of the shortcomings of the UCC identified in the current series of Symposia may also be a factor. However, this is not to say that Australian lawmakers have ignored the UCC. On the contrary, particular provisions of the Code have profoundly influenced the direction of law reform in Australia.

This Article will canvass three prominent examples: Australian state and federal unconscionability legislation; the Register of Encumbered Vehicles (REV) project; and proposals for an Australian Article 9.

The message is that even if the UCC is flawed in one or more of the ways suggested by its critics, other countries continue to draw inspiration from its central ideas. In this sense, at any rate, the UCC is not dead.2

II. UNCONSCIONABILITY

A. Introduction

Unconscionability legislation has been high on the Australian legislator’s agenda over the past decade or so.

The New South Wales Contracts Review Act of 1980 provides for the reopening of a contract if it is found by a court to be unjust.3 "Unjust" is defined to include "unconscionable, harsh or oppressive."4 In deciding whether a contract is unjust, the court is directed to have regard to the public interest and all the circumstances of the case,5 as well as to a list of other factors, including: (1) whether or not there was any material bargaining inequality between the parties;

4. Id. § 4(1).
5. Id. § 9(1).
whether or not the provisions of the contract were the subject of negotiation; (3) whether or not it was reasonably practicable for the parties seeking relief to negotiate for alteration or removal of any of the provisions of the contract; (4) whether or not any of the provisions of the contract imposed conditions which were unreasonable; (5) whether or not a party to the contract was able to protect their interests because of age or physical or mental incapacity; (6) the relative economic circumstances, educational background, and literacy of the parties; (7) the form and intelligibility of the contract; (8) whether independent advice was obtained by the party seeking relief; (9) the extent to which the contract was explained to, and understood by, the party seeking relief; (10) whether there was any undue influence, unfair pressure, or unfair tactics exerted on the party seeking relief; (11) the conduct of the parties in relation to similar dealings; and (12) the commercial setting of the contract.\footnote{6}

The Act binds the Crown,\footnote{7} but the Crown may not be granted relief under the Act.\footnote{8} Also barred from seeking relief are public and local authorities, corporations, and a person who enters into a contract in the course of, or for the purpose of, a trade, business, or profession—other than a farming undertaking.\footnote{9} In its application to buyers, the Act is therefore effectively limited to consumer dealings.\footnote{10} However, subject to the limitations just mentioned, a supplier can claim relief under the Act in a case where the contract is unjust on the ground of misconduct engaged in by the buyer. In granting relief, the court may refuse to enforce all or any part of the provisions of the contract, declare the contract void in whole or part, or vary the contract.\footnote{11}

The Act may be relied on either by way of application to the court, or as a defense to an action brought against the party claiming relief.\footnote{12} New South Wales is the only Australian state so far to have enacted a Contracts Review Act. However, provisions based on the text of the New South Wales legislation have been included in the

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\footnote{6} Id. § 9(2).
\footnote{7} Id. § 5.
\footnote{8} Id. § 6(1).
\footnote{9} Id. § 6(2).
\footnote{11} Contracts Review Act 1980 § 7(1) (N.S.W.).
\footnote{12} Commercial Banking Co. of Sydney v. Pollard, [1983] 1 N.S.W.L.R. 74 (Sup. Ct.) (Austl.).
uniform state consumer credit laws. The main differences are that the Credit Act provisions catch only credit contracts, such as consumer loans, conditional sales, credit card transactions, and the like; and they give relief to debtors only—credit providers cannot sue.

Section 51AB of the Commonwealth Trade Practices Act of 1974, a federal statute, provides that "A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable." The provision is limited to consumer dealings and, as its text makes plain, applies only to the supplier's conduct. "Conduct" is defined to include the making of a contract, so that entry into a contract which is unconscionable or contains unconscionable terms would be a contravention. "Conduct" also includes giving effect to a contract so that, for example, unfair enforcement or collection tactics might contravene the section. The focus on conduct means that the section may apply even if no contract


14. In determining whether conduct is unconscionable, the court may have regard to the following factors:

(a) the relative strengths of the bargaining positions of the corporation and the consumer;
(b) whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;
(c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;
(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the corporation or a person acting on behalf of the corporation in relation to the supply or possible supply of the goods or services; and
(e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the corporation.


A person who suffers loss or damage by reason of a contravention of § 51AB may apply for relief. Id. § 87. Relief may take the form, for example, of rescission or variation of a contract in whole or part, refusal to enforce a contract in whole or part, or an award of compensation. Id. § 87(2).

15. Id. § 4(1).

16. See id.
ever results. So, for example, the use by a corporation of harassing selling techniques might form the basis of a claim under the section, as might unconscionable conduct in connection with promotional schemes and giveaways. For reasons that have to do with constitutional limitations on the legislative power of the federal parliament, section 51AB is by and large limited to conduct that is engaged in by a corporation. However, mirror-image provisions have been enacted at the state level, and these apply whether the supplier is incorporated or not. 17

B. The Influence of Section 2-302

These statutory initiatives were all substantially influenced by UCC section 2-302. It is true that there are differences in both scope and drafting style, but the underlying idea is the same. References to section 2-302 lie at the heart of reform proposals which led to the enactment of the Australian laws, 18 and the proposals themselves are justified in terms which echo the official comment to section 2-302. 19


The state provisions substitute the word “person” for “corporation.” E.g., Fair Trading Act 1990 § 15(1) (Tas.) (stating “a person shall not, in trade or commerce . . .”).


19. The Adelaide Law School Committee Report, having quoted UCC § 2-302 and the official comment went on to say:

[N]o matter how much legislation is enacted to cope with specific abuses or malpractices in any area of the law, this will never succeed in providing for all abuses which exist, or may develop in that area. Thus there is a need for general residual power vested in the Courts to strike down unreasonable or oppressive practices. . . . A power to re-open consumer credit transactions, or clauses in them, if it is shown that the transaction or clause in question is contrary to reasonable business practice might be appropriate. A provision similar to § 2-302(2) of the U.S. Uniform Commercial Code and § 6.111(3) of the Uniform Consumer Credit Code could spell out what evidence and factors might be relevant to this.

ADELAIDE LAW SCHOOL COMMITTEE REPORT, supra note 18, at 58.

The Peden Report states:

[While often paying lip-service to the sanctity of contract doctrine, the courts have felt the need to respond to changing needs and expectations in the
It is not surprising that in interpreting the legislation, Australian courts have adopted American learning on section 2-302. In an important early case on the New South Wales Contracts Review Act of 1980, the leading judgment stated that:

[A] contract may be unjust under the Act because its terms, consequences or effects are unjust. This is substantive injustice. Or a contract may be unjust because of the unfairness of the methods used to make it. This is procedural injustice. Most unjust contracts will be the product of both procedural and substantive injustice.20

This passage marked the formal reception of Arthur Leff's procedural-substantive unconscionability dichotomy into Australian contract law.21 The distinction has been heavily relied on in later cases. It is generally acknowledged that the legislation provides greater scope than common law and equitable doctrines for granting relief in cases of substantive unconscionability.22 So, for example, it has been said that, notwithstanding the last sentence in the passage just quoted, in an appropriate case gross disparity between the price of goods or services and their value may justify intervention under the community and have developed a number of devices to subvert the doctrine of sanctity of contract in order to do justice in individual cases. These devices include the extension of the existing principles of duress, undue influence and illegality, and principles of construction such as the implication of additional terms, the doctrines of fundamental breach, reading down of exclusion clauses, the collateral oral warranty device, and the doctrines of frustration and equitable estoppel.

The main criticisms of the devices referred to in the last paragraph, are not that they failed to achieve justice in the individual cases to which they were applied, but that

(a) they do not make a frontal attack on the root cause of the problem, and by using technical devices the courts invite the contract draftsman to try again;
(b) they tend to present a multitude of individual decisions which fail to accumulate experience or authority in marking out the minimal requirements of fairness;
(c) since they often turn upon construction of terms which are necessarily misconstrued to avoid injustice, difficulties are created for the construction of similar terms in subsequent wholly legitimate contracts.

PEDEN REPORT, supra note 18, at 5-6.
statute. Under the relevant equity doctrines, by contrast, an excessive price is at best evidence from which procedural unconscionability might be inferred. In a similar connection it has been held that if one contracting party’s consent was affected by a disability, that may be sufficient to make the contract unjust in the statutory sense even if the other party was unaware of the situation. This is a form of substantive unconscionability; procedural unconscionability entails an element of exploitation by the stronger party, but if the stronger party is unaware of the weaker party’s disability, its conduct in making the contract can hardly be characterized as exploitative. In equity, by contrast, proof of knowledge—or at least the means of knowledge—is essential, and this is consistent with the focus of equity on procedural irregularities in the contracting process.

C. Impact of the Legislation

It has been suggested that the enactment of the New South Wales Contracts Review Act of 1980 signalled “the end of much of classical contract theory in New South Wales.” This overstates the position, but there is no doubt that the impact of the legislation has been very substantial.

Nowhere has its effect been more evident than in the context of guarantees, particularly where the borrower and guarantor are members of the same family. A commonly occurring scenario is where the borrower and guarantor are husband and wife, respectively, or the borrower is a corporation which the husband controls. The loan is for the husband’s business purposes, and the husband is asked to put up the family home by way of security. The wife is brought in because the home is in their joint names so that her signature to the security document is required. Financial counselors have coined
the expression "sexually transmitted debt" (STD) to describe this kind of case—the husband contracts the debt, but the wife ends up sharing the burden when things go wrong. Feminists and consumer advocates have combined to mount a vocal campaign against STD. The unconscionability legislation has proved to be an important weapon in their armory. The features of STD, and other family guarantee, cases which tend to attract the legislation are as follows:

- There is often no direct benefit accruing to the guarantor from the contract, but the cost to the guarantor if things go wrong may be very high. The cost may include loss of the guarantor's home in cases where it has been given as security to support the guarantee;\(^\text{29}\)
- The guarantor will often be under considerable pressure from the borrower to agree to the transaction. This may take many forms: bullying, cajoling, whining, flattery, threats, and all the other methods of persuasion that are extant in family circles; or
- Occasionally the borrower and the credit provider will conspire to suppress relevant information from the guarantor. For example, in one leading case, the guarantors, an elderly Italian couple, assumed liability in respect of their son's business overdraft unaware that at the time the bank was already selectively dishonoring the son's checks.\(^\text{30}\)

In an effort to stave off judicial intervention, credit providers have increasingly taken to insisting that the guarantor obtain independent legal and financial advice in advance of transacting. This precaution has proved to be only partly successful. The urge to intervene on compassionate grounds is strong. There are numerous cases where it has been held that the advice was not sufficiently

\(^{29}\) The relevance of this consideration to STD cases is problematical. While it may be true that the immediate benefits of the loan accrue to the husband's business venture, if the business venture succeeds, the wife will recoup benefits in the form of life-style improvements. Bank of Credit & Commerce Int'l S.A. v. Aboody, [1990] 1 Q.B. 923, 966-67 (Eng. C.A. 1989) (Slade, J.). On the other hand, it has been suggested in the context of the New South Wales Contracts Review Act of 1980 that the courts should discount this kind of benefit. Beneficial Fin. Corp. v. Comer, Austl. Consumer Sales & Cred. L. Rep. (CCH) ¶ 56-042, 56-686 (Sup. Ct. N.S.W. 1991) (Austl.) (Rogers, C.J.).

independent, or that it was inadequate. Occasionally, the court may be prepared to draw inferences about the adequacy of the advice from the fact that the guarantor went ahead with the transaction anyway. The reasoning can be reduced to the following syllogism:

31. The cases establish the following:
   • the fact that a lawyer is nominated by the credit provider to advise the guarantor does not itself prevent the advice from being independent. Collier v. Morlend Fin. Corp. (Vic.) Pty., Austl. Consumer Sales & Cred. L. Rep. (CCH) ¶ 55-716, at 58,433 (N.S.W. Ct. App. 1989) (Austl.);
   • the advice is unlikely to be regarded as independent if it is given at the credit provider's office, or in the presence of the credit provider. Nolan v. Westpac Banking Corp., Austl. Consumer Sales & Cred. L. Rep. (CCH) ¶ 55-930 (Sup. Ct. S. Austl. 1989);
   • the adviser should be independent not only of the credit provider, but also of the borrower, and the borrower should not be present when the advice is being given. McNamara, 37 S.A. St. R. at 241 (King, C.J.);
   • the responsibility of an adviser cannot be limited by having the guarantor sign a piece of paper which limits the adviser's functions in the absence of a clear statement to the guarantor that the advice is not comprehensive and may not be sufficient for the guarantor's needs. Collier, Austl. Consumer Sales & Cred. L. Rep. (CCH) ¶ 55-716 at 55, 430 (Hope, J.A.).

32. The cases suggest the following points:
   • clear explanation should be given of the outcome and effect of the transaction, with particular reference to what it means to give a guarantee and the likely consequences if the borrower defaults;
   • the adviser should explain to the guarantor the terms of the relevant documents, and this will usually involve more than just reading them through;
   • unless the guarantor directs otherwise, advice should also be given about the propriety of the transaction from the guarantor's point of view, that is, the nature and extent of the risk confronting the guarantor. Factors relevant to the guarantor's risk include the following:
     ♦ the terms of the document defining the guarantor's liability;
     ♦ the borrower's financial situation;
     ♦ where the guarantee is given as security for a loan to finance a business venture, and it is anticipated that the loan repayments will be met out of the returns from the business, the viability of the venture;
     ♦ any unusual features of the transaction between the credit provider and the borrower that may increase the risk to the guarantor; and
     ♦ the guarantor's financial position.


33. E.g., Beneficial Fin. Corp. v. Adams (Sup. Ct. N.S.W. May 19, 1989) (unreported),
The transaction was foolhardy from the guarantor’s perspective; no person in their right mind and who had been properly advised would have agreed to it; therefore, the advice obtained must have been inadequate—either that, or the guarantor was out of his or her mind. This kind of degenerative analysis puts the credit provider in a no-win situation: If the advice is adequate, the guarantor will refuse to transact; but if the guarantor does transact, the contract will be struck down later on the ground that the advice was inadequate. At this level, procedural unconscionability merges with substantive unconscionability.

For these reasons, the taking of guarantees has become a decidedly more hazardous enterprise for credit providers than it used to be. The consequence no doubt has been to restrict the availability of credit and increase the costs of borrowing for certain classes of customers. In the STD context the courts are beginning to acknowledge explicitly that there is a trade-off involved between the need to protect more vulnerable women from being overborne by their husbands, and “ensure that the wealth currently tied up in the matrimonial home does not become economically sterile.” In other words, a wife’s freedom from contract is at odds with her freedom to contract. The more readily courts intervene in favor of married women, the harder married women will find it in the future to enter “freely” into contracts of the relevant kind. Australian courts are still struggling to determine where the balance should be struck.

D. Conclusion

The Australian unconscionability laws are contentious. The architect of the New South Wales Contracts Review Act of 1980, Professor John Peden, claimed that it was drafted with a view to:

- making the law “sharp in focus, conceptually sound and explicit in its policy underpinnings;”
- preserving judicial rigor in the application of the legislation; and


• avoiding “ad hocery” in decisionmaking.\textsuperscript{35}

These claims have been questioned in academic writings. It has been pointed out that the legislation is:
• not “sharp in focus” because it fails to specify where the balance is to be struck between procedural and substantive unconscionability concerns. In particular, the list of factors which the courts are directed to consider when deciding whether to grant relief is a mish-mash of process-oriented and outcome-oriented considerations and no attempt is made to give them any relative weighting;
• not “conceptually sound” because insofar as proof might be required of procedural unconscionability, no guidance is offered as to how far this proof might legitimately be derived by inference from one-sided outcomes. The more readily such inferences are drawn, the less the distinction between procedural and substantive unconscionability will matter; and
• not “explicit in its policy underpinnings” because it is quite unclear whether the legislation is motivated primarily, or at all, by efficiency considerations, distributional considerations, or paternalistic concerns—depending on how it is interpreted, it could be made to relate to any of these goals.\textsuperscript{37}

In a recent law review article, a justice of the Australian High Court made the following observations about the Contracts Review Act:

Civil litigation has ... increased because courts are increasingly directed by legislatures to re-arrange people's legal rights by reference to vague standards which sound attractive but which are so indefinite that they are extremely difficult to apply to everyday disputes. . . .

The difficulties in applying such vague criteria [as those contained in the Contracts Review Act] mean that parties to contracts have difficulty in knowing what their rights are.


Litigation is forced upon them. When courts have to apply vague standards, consistency of decision-making—which is one of the primary benefits of the rule of law—is difficult to achieve. Moreover, the decision of a court applying such vague criteria often seems arbitrary. Dissatisfaction with the decision-maker in particular cases is often the result. In time, confidence in the judicial system is undermined.38

Contrast the views of another prominent Australian judge:

An important factor, in my opinion, in the growing willingness to use old unconscionability rules more freely, has been the steadily increasing use in Australia this century of expansive definitions of unconscionability in both state and Commonwealth statutes. These have authorised courts to interfere with contractual relations in a way almost scandalous to adherents of nineteenth century Anglo-Australian doctrine and have caused both lawyers and people regularly encountering contract law to become much more comfortable with the court's potential presence as a contract alterer and fixer. In this area of the law the legislatures appear to have been for a period more responsive to overall community sentiment than the courts.39

There are clear strains in all this of the American debate about the efficacy of section 2-302.

III. THE REV PROJECT

A. The Current Legislation

All Australian states and territories have enacted legislation providing for registration of security interests in motor vehicles.40

The legislation does not extend to registration of title. The concern is with the case where a credit provider has a security interest in a motor vehicle owned by a borrower, and the borrower without the credit provider's consent sells the vehicle to a purchaser who buys it without knowing of the security arrangement.

The legislation is not uniform, but it is in substance similar from one jurisdiction to another. It provides for the establishment of an asset-indexed register. In other words, the security interest is registrable against the vehicle in question. The methods used to separately identify vehicles for registration purposes currently vary from state to state and include use of vehicle identification numbers (VIN), registration plate numbers, and engine and chassis numbers.

Registration is not compulsory, but as a general rule an unregistered security interest will be extinguished in the event of a *bona fide* third-party purchase—but not if the security holder has taken possession. Correspondingly, as a general rule, a registered security interest prevails over a *bona fide* third-party purchaser. These rules confront the credit provider with the incentive to register and the purchaser with the incentive to search. If both parties respond appropriately, then the borrower's fraud will be discovered before any transaction with the purchaser takes place. The enactment of the

41. This is in contrast to corresponding United States legislation. See, e.g., UNIF. MOTOR VEHICLE CERTIFICATE OF TITLE & ANTI-THEFT ACT, 11A U.L.A. 175 (1995).

42. The same concern is evident in the provisions governing perfection of security interests to be found in United States motor vehicle certificate of title statutes. See, e.g., id. §§ 20-21, at 206-13.

43. In most jurisdictions, there are two other exceptions to the rule that a registered security interest prevails over a *bona fide* third party purchaser. The first relates to the case where a dealer gives a security interest over its stock-in-trade (inventory security interest).

The second exception relates to the case where a vehicle is purchased from a dealer by a private buyer. In some jurisdictions, a compensation fund has been established to assist the victims of a motor dealer's misconduct. Failure by the dealer to discharge a registered security interest before selling a vehicle to the purchaser amounts to misconduct. If the registered security interest were to prevail in these circumstances, the purchaser would have a claim against the dealer for breach of contract, failure to transfer clear title, and if the dealer were judgment-proof, the purchaser would have a claim against the fund. The end results would be that the credit provider took the automobile, and the purchaser obtained a money payment.

This represents the reverse of the parties' likely preferred outcomes. A swap would then have to be negotiated, involving transactions costs on both sides. These transactions costs can be avoided by giving the credit provider the money claim and the purchaser the vehicle in the first place, and this is what the legislation seeks to achieve. See, e.g., Registration of Interests in Goods Act § 9 (N.S.W.); Chattel Securities Act § 7(2) (Vict.).
REV statutes has led to a substantial reduction in the incidence of fraudulent dealings by debtors in automobiles that are the subject of existing security interests.\footnote{44. John Holloway, National Register of Encumbered Vehicles, Address Before the Business Law Education Centre Third Annual Credit Law Conference (1993), in 2 1993 CRED. L. CONF. 335-36 (1993).}

\section*{B. The Article 9 Influence}

The Australian REV legislation and UCC Article 9 are directed to different policy objectives. The main concern of the Australian laws, as already mentioned, is with disputes between security holders and third-party purchasers. The main concern of Article 9 is with priority disputes between competing security holders. This difference is reflected in the structure of the respective registers. The Australian REV legislation provides for the establishment of asset-indexed registers, while Article 9 is based on the concept of a debtor's name-indexed register. The drawback of a debtor's name-indexed register for the purpose the Australian REV laws are directed to is that, while it enables the purchaser to discover all the transfers the borrower has made, it provides no information about interests in a particular asset that may have been transferred to a third party by previous owners. A prospective purchaser will be less interested in knowing about the borrower's asset dealings at large than about the dealings by the borrower and others in the particular asset to be purchased. On the other hand, the drawbacks of an asset-indexed register for Article 9 purposes are as follows: an asset-indexed register will not disclose information about all the security interests the borrower has created; asset-indexed registration is only possible for assets that have unique identifiers, such as serial numbers and the like; and, more particularly, an asset-indexed registration system does not enable the recording of information relating to unascertained goods until they have become ascertained.

A debtor's name-indexed register is not subject to these limitations. Despite these basic points of difference, the Article 9 influence is still very evident in the Australian REV legislation, particularly the Chattel Securities Acts of Victoria and Western Australia. The most significant debt the Australian laws owe to the American model is the approach of regulating according to the substance rather than the form of security transactions. The legislation catches all transactions intended as security, whether in the
form of a mortgage or a title retention device. As in the case of Article 9, the parties are free to adopt whatever form of transaction they choose, but the form chosen does not determine the statutory outcome.

The Victorian and Western Australian statutes follow the Article 9 lead in adopting the neutral expression "security interest" to describe the range of transactions intended to be covered. In both statutes security interest is defined as follows:

"Security interest" means an interest in or a power over goods (whether arising by or pursuant to an instrument or transaction) which secures payment of a debt or other pecuniary obligation or the performance of any other obligation and includes any interest in or power over the goods of a lessor, owner or other supplier of goods, but does not include a possessory lien or pledge.\(^4\)

The origins of this provision in UCC section 9-102 are clear enough, despite the differences in wording.\(^5\)

The Victorian and Western Australian statutes also borrow the key Article 9 concepts of attachment and perfection. In relation to attachment the legislation provides as follows:

For the purposes of this Act—

(a) a security interest attaches at the time at which value is given by the secured party and the debtor has

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46. UCC § 9-102 provides in relevant part as follows:

(1) Except as otherwise provided in Section 9-104 on excluded transactions, this Article applies

(a) to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper or accounts; and also

(b) to any sale of accounts or chattel paper.

(2) This Article applies to security interests created by contract including pledge, assignment, chattel mortgage, chattel trust, trust deed, factor's lien, equipment trust, conditional sale, trust receipt, other lien or title retention contract and lease or consignment intended as security. This Article does not apply to statutory liens except as provided in Section 9-310. U.C.C. § 9-102 (1994); see also UNIF. MOTOR VEHICLE CERTIFICATE OF TITLE & ANTI-THEFT ACT § 1, 11 U.L.A. 175, 183 (1995) (defining terms as they are used in the Act). The Uniform Motor Vehicle Certificate of Title and Anti-Theft Act defines security interest as "an interest in a vehicle reserved or created by agreement and which secures payment or performance of an obligation. The term includes the interest of a lessor under a lease intended as security." Id. § 1(k).
rights in the goods or at such later time as the secured party and the debtor intend; and
(b) an agreement to which a debtor is party which contains a provision to the effect that the debtor takes the goods on lease or hire-purchase or creates a security interest over the goods shall be deemed to give value to the debtor.\(^4\)

This provision is modeled on UCC section 9-203.

The legislation identifies two ways in which the holder of a security interest in a motor vehicle may obtain protection against third-party claims, namely by taking possession of the vehicle or registering the security interest.\(^4\) The legislation does not actually use the term "perfection" to describe this process, but the notion is implicit in the provision just referred to.\(^4\)

In common with Article 9, registration under the REV statutes is achieved by notice filing. By contrast, other Australian registration schemes provide for document filing.\(^5\) The drafters of the REV statutes recognized the superiority of the Article 9 approach. The information required from a security holder should be the minimum necessary to alert a searcher to the existence of the prior entitlement. If further information is required, it can be obtained upon request from the security holder.\(^5\)

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47. Chattel Securities Act 1987 § 3(4) (Vic.); Chattel Securities Act 1987 § 3(4) (W. Aust.). The concept of attachment is used to determine the application of the statute. So, for example, § 4(1) of the Victorian Act provides:

The provisions of this Part (other than section 5) apply (notwithstanding anything to the contrary in any other Act or law) to and in respect of a security interest (whether created within or outside Victoria) if the goods the subject of the security interest—
(a) are at the date of attachment of the security interest situated in Victoria; or
(b) are for the time being situated in Victoria.

Chattel Securities Act 1987 § 4(1) (Vic.).

48. See id. § 7(2); Chattel Securities Act 1987 § 7(2) (W. Aust.). Whether or not the third party has notice of the security interest is irrelevant. Chattel Securities Act 1987 § 7(2) (Vic.); Chattel Securities Act 1987 § 7(2) (W. Aust.).

49. The requirements for perfection under Article 9 are set out in UCC § 9-302(1).


51. Other disadvantages of document filing include the following:
   i. It is commercially impracticable where the security is of a kind which is constantly changing, such as accounts receivable or dealers' inventory [unless the
under the REV statutes is not compulsory. This feature of the legislation is also consistent with the Article 9 approach. By contrast, under other Australian registration statutes, failure to register is a criminal offense or, alternatively, results in avoidance of the security transaction as between the parties themselves. Where the purpose of registration is to resolve competing claims to personal property, formal sanctions for noncompliance are unnecessary. It is sufficient if priority is made to turn on whether the security interest is registered. Then it will be a matter for the business judgment of the credit provider to decide whether or not the cost of registering the security interest is outweighed by the risk of postponement or extinguishment in the event of nonregistration. By contrast, where registration is compulsory, it falls to the legislature to make this kind of judgment in determining whether or not to grant exemptions from the registration requirement. It is questionable whether legislatures are better placed than the parties themselves to make such cost-benefit assessments.

C. A National Register

The REV legislation led to the establishment of separate registers in each state. This created problems in the commonly occurring case where an automobile, the subject of a security interest created in state 1, was removed by the debtor to state 2 before being sold. The REV statutes have been interpreted as meaning that registration of a security interest in state 1 will not protect the security holder in these cases.

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security is in the form of a floating charge].
ii. It precludes the creditor from getting anything on the file until the debtor has actually signed the security agreement . . . .
iii. Where the security agreement is lengthy, the obligation to prepare an extra copy for filing is inconvenient.
iv. The security agreement may contain provisions which are not relevant to the security and which neither party wishes to make public.
v. The accumulation of lengthy security agreements of varying sizes is administratively inconvenient and impedes computerisation of records.


52. E.g., Corporations Law §§ 263(1), 1131 (Austl.) (registration of company charges).
53. E.g., Instruments Act 1958, No. 6279/1958 pt. IX (Vict.) (Austl.) (providing for registration of assignments of book debts (receivables)).
54. QLRCVLRC DISCUSSION PAPER, supra note 51, ¶ 2.1.4(b).
circumstances. Accordingly, hitherto it has been necessary for a credit provider to register its security interest in each state in order to be sure of obtaining comprehensive protection. If the reverse rule applied, registration in one state would be sufficient, but then there would be the problem of searchers having to search each state register in order to be sure of their position. Either way, therefore, multiple registers result in duplication of effort by system users.

The optimal solution would be to replace the various state registers with a single national register of motor vehicle security interests. There has been strong support from the finance and automobile industries for such a development, but it has not materialized. The main reason is that the two most populous states, Victoria and New South Wales, were unable to agree on the location of the national register. This is a depressing, if familiar enough, outcome in the Australian federal system. Fortunately, the proposal was not abandoned altogether, and a form of compromise has emerged. Under the new arrangements separate data bases will be maintained in New South Wales, Victoria, South Australia, and Western Australia with Queensland and the Territories working off the New South Wales data base. Computer links will be established between all data bases to form a single registration network. The link between the Victorian and New South Wales data bases is already in place. The system works as follows. Within twenty-four hours of a security interest being registered in one state, details of the entry are transmitted to the other state and entered on the register there. The entry is thereupon treated as registered for the purposes of that state's legislation.

56. In 1991 the finance and automobile industries, in conjunction with state and territory governments, commissioned Ernst & Young, a firm of chartered accountants, to carry out a feasibility study for the development of a national register. The study found compelling technical, operational, and financial reasons for the establishment of a central data base to support a national register. It recommended that customer services should continue to be provided by individual states, but using the national data base. The national data base would be operated, as a commercial venture, by a limited liability company formed for the purpose, in which shares would be held by the participating states and territories. ERNST & YOUNG, FEASIBILITY STUDY OF A NATIONAL VEHICLE SECURITY REGISTER: FINAL REPORT TO AUSTRALIAN FINANCE CONFERENCE OPERATORS OF VEHICLE SECURITY REGISTERS, MOTOR TRADES ASSOCIATION OF AUSTRALIA, AUSTRALIAN FEDERATION OF CREDIT UNIONS LTD. (1991) (on file with Loyola of Los Angeles Law Review).
A compensation scheme has been established to cover system errors occurring in the transfer of data from one register to the other. In such a case the security holder is at risk, because the security interest will be unregistered in state 2, and it is therefore liable to be defeated by a third-party purchaser in accordance with the laws of state 2. The basis of the scheme is that compensation for system errors will be payable in the first instance by the state whose law governs the dispute between the security holder and the third-party purchaser. Two main kinds of system error are possible: transmission errors and reception errors.

Victoria and New South Wales have entered into an inter-governmental arrangement to deal with the sharing of responsibility for such errors. The gist is as follows. If Victoria is liable to compensate the security holder, but the case is one of transmission error by New South Wales, then Victoria will be entitled to an indemnity from New South Wales. On the other hand, if the case is one of reception error—in other words, the fault lies at the Victorian end—then Victoria will be left to bear the compensation cost. There is a mirror-image set of provisions to cover the case where compensation is payable to the security holder in the first instance by New South Wales.

D. Conclusion

As already mentioned, the Australian REV legislation is similar in concept to the provisions governing perfection of security interests which are to be found in many motor vehicle certificate of title statutes in the United States. The main difference is that the Australian registers are fully computerized. Also, the main registers have been computer cross-linked in the first stage of a project that it is still hoped will lead ultimately to the establishment of a single national register. These initiatives are directed to resolving the kinds of conflict of laws problems that continue to bedevil the American system.

57. See supra note 42 and accompanying text.
IV. THE AUSTRALIAN ARTICLE 9 PROPOSAL

A. The Current Legislation

Apart from the REV statutes, current Australian laws governing personal property securities are subject to many of the same criticisms that were made of the pre-Article 9 laws in the United States.

There is currently no single comprehensive debtor's name-indexed register of security interests. The Australian Corporations Law establishes a register of company charges. This has the advantage of being a national register, so that multiple registration and search efforts at the state level are avoided. However, its scope is otherwise limited in the following respects: It covers only security interests in the strict sense (mortgages and charges), and it does not extend to functionally equivalent transactions (for example, conditional sales, leases, outright assignments of receivables); it applies only to charges (security interests) created by corporations, and security interests created by other kinds of business debtors are left out of account; and it does not extend to all kinds of personal property (for example, while a charge on a book debt (receivable) is registrable, a charge on a non-trading debt such as a bank account probably is not).

Other criticisms that can be made of the Corporations Law are as follows:

- the registration requirements are heavy-handed and clumsy. In particular, registration depends on document filing (lodgment of the security instrument itself), and registration is compulsory (failure to register is a criminal offense on the part of the debtor company);
- the statutory priority rules set out in the Corporations Law are complex and unsatisfactory. In a dispute between two competing security holders, A and B, in relation to an asset owned by a debtor corporation, under the Corporations Law the general rule is that B will obtain priority over A if A's security interest is not registered, or is registered after B's, and B has no notice of A's security interest at the time of transacting with the debtor corporation. By contrast, under Article 9 knowledge gained outside the filing system is irrelevant: the basic rule is a pure first-to-file rule, and exceptions to the rule
are based on functional considerations rather than formal variables.\textsuperscript{59}

The register of company charges is not the only debtor's name-indexed register of security interests. There are also numerous specialist registers established by state laws relating to particular kinds of property. Examples include bills of sale registers covering assignments of goods both outright and by way of security where the assignor remains in possession; a register for assignments of book debts (receivables); and registers for securities over livestock, wool, sugar cane, and fruit.

In contrast to the Corporations Law, these state laws are not necessarily limited to the case where the debtor is a corporation. They coexist uneasily with the Corporations Law registration requirements. There are provisions governing cases of overlap, to the effect that registration of a security interest under the Corporations Law removes the need for registration also under the relevant state law.\textsuperscript{60} However, while on the one hand these provisions reduce the costs of registration, on the other hand they undermine the state registers and add to the costs of searching. Considerable savings could be made by collapsing the specialist registers and the register of company charges into a single, comprehensive system.

\textbf{B. The Article 9 Proposal}

In 1989 the New Zealand Law Commission (NZLC) produced a report recommending the adoption in that country of legislation based on the Article 9 model.\textsuperscript{61} A draft bill was appended based on the text of the British Columbia version.\textsuperscript{62}

Twelve months later the Australian Law Reform Commission (ALRC) was given a reference on the topic of personal property securities by the Commonwealth attorney-general. The reference gave as one object the desirability of harmonizing Australian and New Zealand laws, and it directed the ALRC to take account of the NZLC's report. The Law Reform Commissions of New South Wales,

\textsuperscript{59} In other words, the Corporations Law is a "notice statute," while Article 9 is a "race statute." For an explanation of why race statutes are superior, see Douglas Baird & Thomas Jackson, \textit{Information, Uncertainty, and the Transfer of Property}, 13 J. LEGAL STUD. 299, 312-18 (1984).

\textsuperscript{60} Corporations Law § 273.

\textsuperscript{61} NEW ZEALAND LAW COMM'N, A PERSONAL PROPERTY SECURITIES ACT FOR NEW ZEALAND REP. NO. 8, at 6-8 (1989).

\textsuperscript{62} Personal Property Security Act, S.B.C., ch. 36 (1989) (Can.).
Victoria, and Queensland were also given references on the topic by their respective governments and it was contemplated that the four commissions would work cooperatively towards the production of a joint report.

All four participating commissions agreed that the present state of the law was unsatisfactory, and that the solution lay in adoption of the Article 9 model. In a departure from the North American scheme, it was agreed that there should be a single national register rather than separate registers in each state. Unfortunately, the commissions were unable to agree on two key points relating to implementation of the proposals.

The first point of disagreement had to do with federal-state relations. The ALRC is a federal body charged with oversight of federal laws. Not surprisingly, it favored implementation of the Article 9 reforms via federal legislation. The trouble with this proposal is that comprehensive personal property securities legislation lies beyond the constitutional reach of the federal parliament. The best that could be achieved at the federal level is legislation covering security interests created by corporate debtors, based on the power of the parliament to make laws with respect to corporations. The ALRC, in recognition of this limitation, recommended the inclusion of Article 9 reforms in the Corporations Law by way of substitution for the existing provisions governing registration of company charges. It expressed the hope that the states would enact mirror-image statutes to cover security interests created by noncorporate debtors. In that way the gaps in coverage would be filled. However, this scheme would require uniform legislation enacted simultaneously in all the states and territories, and the ALRC failed to suggest any mechanism for coordinating the enterprise. (There is no equivalent to the National Conference of Commissioners on Uniform State Laws in Australia.) Experience with legislation in other fields has shown that, in the absence of a formal cooperative arrangement between the states and the Commonwealth, the pursuit of uniformity is likely to prove elusive.

The Queensland Law Reform Commission (QLRC) and Victoria Law Reform Commission (VLRC) proposed a cooperative arrange-

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ment under which a model statute would be developed for adoption by each of the states and territories on a uniform basis. The model statute would cover security interests created by corporate and noncorporate business debtors alike. There would be a single national register of security interests, established pursuant to the cooperative arrangement, and this would act as the register for the purpose of each state and territory law. In the event that a single national register was not achievable, the commissions recommended the establishment of computer-linked state registers along the lines of the REV model. The objective would be to ensure that a single filing in one state was sufficient to secure registration on all registers, and all registers would be covered by a single search.

To the same end, the Article 9 register(s) would be computer linked with the asset-indexed REV registers, and in due course also with the shipping register and other asset-indexed systems.

The second point of disagreement between the commissions was over the drafting approach. The ALRC, attempting to give effect to plain English considerations, drafted a bill which departed radically from the Article 9 text. The QLRC and VLRC were highly critical of the ALRC's bill. They argued that it amounted to reinventing the wheel and that this entailed substantial costs, including loss of the opportunity to key into North American case law and literature on Article 9 and the increased likelihood of error.

As it turned out, the bill was riddled with both conceptual and drafting errors and it was quite unsuitable for enactment. The QLRC and VLRC held out for a statute based on the North American text, with modifications to take account of differences in local conditions. This is consistent with the approach the NZLC had taken and with which the Australians were supposed to have been harmonizing.

The disagreements remain unresolved, and no action has been taken on any of the recommendations. Meanwhile, the New Zealanders have been reluctant to proceed with their initiative in the absence of a corresponding development in Australia. Attempts are continuing in Australia to revive the initiative, but progress is slow. The reason has only partly to do with the unresolved differences between the Law Reform Commissions. Perhaps more important is the lack of enthusiasm in business and legal circles for the reforms. It has proved difficult to persuade industry that the costs of change are outweighed by the costs of persevering with the present system. A “better the devil you know” attitude prevails. So far as many lawyers are concerned, there are two additional influences at work.
Practitioners expert in the field of secured financing have a vested interest in preserving their store of existing legal knowledge, while the inexpert are affected by the customary excess of caution that ignorance inspires. This state of affairs will be familiar enough to American readers. Karl Llewellyn encountered similar obstacles in the course of his campaign on behalf of the UCC. Without a campaigner of Llewellyn's stature, drive, and commitment, reforms of this order will always be difficult to achieve. That is the real problem in Australia and other countries outside North America, including New Zealand and the United Kingdom, where Article 9 law reform proposals are gathering dust.

V. CONCLUSION

The main purpose of this Article has been to demonstrate the influence of the UCC on Australian law reform. However, I have also attempted to highlight the contributions of Australian expertise to the local end product, including the development of computerized asset-indexed registers for security interests in automobiles; the computer-linking of state asset-indexed registers under the REV scheme and the proposals for computer-linking an Article 9 debtors' name-indexed register with existing asset-indexed registers of security interests; and the proposal for a national Article 9 register supported by uniform state laws and a state-Commonwealth inter-governmental agreement.

My colleague, Simon Begg, is keen to see the reforms taken further than this. In particular he argues that there is no logical reason for concentrating on personal property and leaving land out of account. Nor is it sensible to establish asset-indexed registers, such as the REV registers, which deal with disputes involving security interests but leave ownership disputes out of account. His proposal is for a scheme with the following features:

- a comprehensive debtor's name-indexed register of security interests in all kinds of property including land; separate asset-

64. See Goode, supra note 1, at 155.
67. Contrast the United States motor vehicle certificate of title statutes. See supra notes 41-42.
indexed registers for each class of asset that lends itself to indexing, including land; the asset-indexed registers to be registers of title as well as security interests;

• all registers to be computer cross-linked so as to facilitate one-stop registration and searching;
• an integrated system of priority rules;
• all relevant legislation to be drafted on the basis of common concepts and definitions—"security interest," "attachment," "perfection," and the like.  

It is timely to draw these Australian initiatives to the attention of American readers, given that Article 9 is to be revised. If they prove to be relevant in the revision, then the debt Australia owes the UCC will at least partly have been repaid.

68. A fuller account of Begg's proposal is reproduced as an Appendix to this Article.
APPENDIX

REGISTERS OF AUSTRALIAN PROPERTY (ROAP)

A proposal for the establishment of an integrated system of registers incorporating and reforming existing registers.†

I. NAME INDEXED REGISTER (NIR)

Important features and rules

A. Only one NIR for all of Australia indexed with reference to the names of all corporations and registered business names. Individuals who carry on business would be permitted to register; that is include their names in the index;

B. Provides for the registration of security interests over the property of all debtors whose names are included in the index;


D. Provides for the priority that one security interest over any item of property of a debtor, whether the debtor's name is included in the index or not, has vis-à-vis another security interest over that item of property and vis-à-vis creditors of the debtor who do not have a security interest over that item of property;

E. Provides for the circumstances in which a purchase of property which is subject to a security interest will result in the extinguishment of that security interest;

F. Defers to the rules of a relevant property indexed register (PIR) except:
   1. Where security interests over an item of property of a debtor whose name is included in the index compete, or
   2. Where there is a competition between a security interest over an item of property of a debtor whose name is included in the index and creditors of that debtor who do not have a security interest over that item of property

† The following is a summary version of Begg, supra note 66.
[the effect is that PIRs regulate competition between security interests and purchasers];

G. Adopts common features for all ROAPs and in particular
1. Functional definition of security interest;
2. Wide definition of property.

II. PROPERTY INDEXED REGISTERS (PIR)

Important features and rules

A. A separate PIR for each class of property that lends itself to indexing, for example:
   1. Land (Torrens Registers)
   2. Ships (Australian Shipping Register)
   3. Motor vehicles (REVs)
   4. Shares (CHESS)
   5. Aircraft
   6. Patents
   7. Trademarks
   8. Debt instruments traded on the short term money market (Austraclear)
   9. Mortgages of land (Torrens Registers)
  10. Leases of land (Torrens Registers)

B. Each PIR would be indexed with reference to a distinguishing number or numbers of the property (for example, volume and folio with respect to land and registered number and chassis number with respect to motor vehicles);

C. Ideally there would be only one PIR in Australia for each class of property. However, there would clearly be separate PIRs for land in each Australian jurisdiction (and the same would clearly also apply to mortgages of land and leases of land);

D. Each PIR should provide for title to the property that is included in the index and that title should, unequivocally, vest in the person shown by the register to be the proprietor of that title;

E. It is recognized, however, that PIRs that provide for registered title are currently the exception rather than the rule and accordingly, the establishment of PIRs of title will occur over time;

F. Each PIR will also provide for registration of security interests over items of property included in the index;
G. Each PIR will provide for the priority that a security interest over any item of property included in the index has vis-à-vis another security interest over that item of property, whether either or both security interests are registered, recorded in the register, subject to any contrary provision of the rule of the NIR. [The effect is that the NIR regulates competition between security interests over property of debtors whose names are included in the NIR index in priority to the rules of the PIR];

H. Each PIR will provide for the circumstances in which a purchase of property included in the index will result in the extinguishment of a security interest over that property, whether the security interest is registered—recorded—in the PIR or not;

I. Adopt common features of all ROAP registers and in particular:
   1. Functional definition of title
   2. Functional definition of security interest
   3. Functional definition of purchaser and purchase.

III. COMMON FEATURES OF ALL REGISTERS OF AUSTRALIAN PROPERTY

A. Common nomenclature and text including the following key definitions and concepts:
   1. Attachment
   2. Debtor
   3. Extinguishment of security interest
   4. Perfection
   5. Priority
   6. Property
   7. Purchase
   8. Purchaser
   9. Register, or record
   10. Security interest
   11. Secured party
   12. Title

B. Priority accorded to security interests or title according to a first to register, or record, rule and, in the absence of registration, in the order of attachment;

C. Common rules for tacking that the first security interest has priority for all money expressed to be secured thereunder, including future and contingent indebtedness;
D. A security interest registered in a PIR is not usually extinguished by a purchase of the subject property—exceptions to be on rational grounds;

E. In the absence of fraud, priority is not affected by notice of a competing interest;

F. The ability to register—record—proposed transactions so as to secure priority from the date of the transaction; paramountcy of the register with exceptions, if any, to be justified on functional grounds;

G. Immediate indefeasibility, that is persons dealing with a person whose interest is registered to be entitled to registration of that dealing, in the absence of fraud, notwithstanding that the registered interest was wrongly registered;

H. Search certificates and any certificate as to title is merely evidence of what is registered—recorded—in the register;

I. Remote terminal computer access to the registers, NIR and PIRs, for searching, registering—recording—and deleting with appropriate security protection in the latter two cases;

J. Insurance fund to compensate persons who suffer loss of property, security, or money due to system error:
   1. Failure to register—record—or inaccurate registration—recording
   2. Wrongful extinguishment
   3. Inaccurate search certificate;

K. Computer cross-linking:
   1. Between each PIR and the NIR so as to facilitate:
      - Single stop searching, registration—recording—and deleting;
      - Where there are separate jurisdictions based PIRs for a single class of moveable property, ensuring that all items of property are indexed in each PIR;

L. Consistency with Article 9 of the Unites States UCC and its Canadian counterparts except where there is a rational reason to the contrary;

M. Common integrated provisions for review of operation and amendment, including reference to an expert review panel.