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FOREWORD: TEACHING-RESEARCH NEXUS IN LAW

The nexus, or conflict, between teaching and research will resonate with many legal academics. The existence of a positive nexus cannot be assumed. Many of us have had to deal with conflict between our teaching commitments and our research, such as when a deadline for marking and a research submission clashes, or when we have to decide whether to prepare for a class or finish an article.

In 2013 the connection between teaching and research in law was the focus of a special edition of the Legal Education Review. This provided an opportunity for an in-depth consideration of the issues raised by the connection, which confirmed that there was a common, but not universal, individual and institutional perception that there is a conflict between teaching and research commitments. For example, Marina Nehme pointed to the culture in many universities that has historically valued and rewarded research at the expense of teaching. 1 Sarah Ailwood, Patricia Easteal, Maree Sainsbury and Lorana Bartels considered the positive contribution that research-led education (‘RLE’) could make and examined the ways RLE was used at the University of Canberra Law School. 2

This special edition of the Adelaide Law Review continues the examination of the connection between teaching and research in law. The articles are drawn from a 2013 Symposium on the theme jointly presented by the Adelaide Law School, the Legal Education Review, and Bond University’s Centre for Law, Governance and Public Policy. The articles are unified not only by the common focus on the nexus between teaching and research, but also by the positive approach that is taken to it. In each case the author explores a strategy to ensure a productive nexus between research and teaching.

In his article ‘Let’s Talk About Lex’ Leon Wolff explores the utility of using narrative analysis to bridge the teaching-research divide. By integrating a research methodology into andragogical practice, Wolff’s analysis presents an opportunity for creating a productive nexus between these two spheres of academic work even when the substantive legal content of teaching and research may differ. As a consequence,

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2 Sarah Ailwood et al, ‘Connecting Research and Teaching: A Case Study from the Law School, University of Canberra’ (2013)(2) Legal Education Review 317,
his article offers a practical suggestion for those of us whose teaching and research are not in the same field. Wolff also convincingly argues that harnessing narrative analysis as a teaching-and-learning technique can be an effective tool to empower novice law students, and engage them in the diverse, challenging and complex legal world.

Molly Townes O’Brien takes a very different approach. She posits that teaching and research are complementary aspects of learning, and that if we ‘take our students with us’ on our research journeys both research and teaching will profit and prosper. This approach, of considering academics and students as being on a common quest for knowledge, creates hope that a positive and productive link between research and teaching can be developed.

In their article ‘Bridging the Divides’ James Arvanitakis and Ingrid Matthews take a multi-disciplinary approach to the problem of bringing research and teaching together. They begin by reconceptualising the traditional academic focus on teaching and research and suggest that community engagement is a necessary third leg to the tripod, which cannot and should not be neglected. Arvanitakis and Matthews go on to suggest that by applying ‘design thinking’ principles to each of these areas, academics facilitate the development of a positive and reciprocal relationship between teaching, research and community engagement which benefits their students, the community and the academic as well. Their analysis is informed by a case study of Arvanitakis’ own prize-winning work involving young people and civic engagement.

We recognise that the challenges to maintaining a balance between teaching and research, and, indeed, to the very assumption that all academics should engage in both teaching and research, remain valid and real. However, we have found these articles both informative and inspiring. We hope other academics in Australia and internationally who face these challenges can also draw encouragement from these innovative ideas and approaches.
LET’S TALK ABOUT LEX: NARRATIVE ANALYSIS AS BOTH RESEARCH METHOD AND TEACHING TECHNIQUE IN LAW

ABSTRACT

Law is saturated with stories. People tell their stories to lawyers; lawyers re-tell their clients’ stories to courts; legislators develop regulation to respond to their constituents’ stories of injustice or inequality. This article describes an approach to first-year legal education that respects this narrative tradition. In particular, it outlines the curriculum design and assessment scheme that deploys narrative methodology as the central teaching and learning device.

This narrative approach to legal education is a fresh twist on the teaching-research nexus. The link between teaching and research has occupied growing interest in the scholarship of higher education. Initially cast as a clash of civilizations, more recently, teaching and research are seen as inter-related and complementary: research outputs can inform curriculum content, research skills can be incorporated in the course design, research on teaching effectiveness can guide course instruction, and research-specific values of critical inquiry and evidence-based reasoning can steer the learning approach. However, this article argues that a narrative approach to legal education goes further than this. It does more than simply incorporate research into teaching; it transforms a recognised qualitative research method — narrative analysis — into a teaching technique.

INTRODUCTION

Law is narration: it is narrative, narrator and the narrated. As a narrative, the law is constituted by a constellation of texts — from official sources such as statutes, treaties and cases, to private arrangements such as commercial

* Associate Professor of Law, Faculty of Law, Bond University. This article is an expanded version of a successful 2012 application for a Citation for Outstanding Contributions to Student Learning, one of five award programs for Australian university teaching offered by the Australian Government Office for Learning and Teaching. The original application is published in Leon Wolff, ‘The Pioneering Use of Narrative Methodology in a First-Year Law Course to Provide an Authentic, Inquiry-Based Entry into the Discipline of Law’ in Kayleen Wood, Diana Knight and Shelley Kinash (eds), Scholarship of Teaching and Learning @ Bond: Fostering Early Career Research (Bond University, 2012) vol 2, 183.
contracts, deeds and parenting plans. All are a collection of stories: cases are narrative contests of facts and rights; statutes are recitations of the substantive and procedural bases for social, economic and political interactions; and private agreements are plots for future relationships, whether personal or professional. As a narrator, law speaks in the language of modern liberalism. It describes its world in abstractions rather than in concrete experience, universal principles rather than individual subjectivity. It casts people as ‘parties’ to legal relationships, structures human interactions into ‘issues’ or ‘problems’, and tells individual stories within larger narrative arcs such as ‘the rule of law’ and ‘the interests of justice’. As the narrated, the law is a character in its own story. The scholarship of law, for example, is a type of storytelling with law as its central character. For positivists, still the dominant group in the legal genre, law is a closed system of formal rules, with an ‘immanent rationality’ and its own ‘structure, substantive content, procedure and tradition,’ dedicated to finality of judgment. For scholars inspired by the interpretative tradition in the humanities, law is a more ambivalent character, susceptible to influences from outside its realm and masking a hidden ideological agenda under

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2 In a literature too voluminous to cite, critical theorists, from feminists and critical race scholars to postmodernists, have sharply rebuked law’s claims to neutrality and objectivity. The criticism is that these claims cloak the law in a false universality when, in fact, it privileges the interests and world-view of dominant groups in society. See, eg, Rosemary J Coombe, ‘Context, Tradition, and Convention: The Politics of Constructing Legal Cultures’ (1990) 13(2) APRA Newsletter 15.

3 This does not necessarily make the narrative perspective interesting or compelling. For example, in what could easily apply to most positivist accounts of law, Fineman criticizes ‘bland portraits’ of workplaces that focus on governance structures, hierarchies, resources and processes — where the ‘human’ is abstracted (‘human resources’, ‘human capital’), boxed and categorised into ‘variables’, and subsumed under larger categories such as entities, firms, production and profits. For Fineman, this misses the point that an organization — and, by analogy, so too law — is a site rich with emotional subjectivity. See Stephen Fineman, *Understanding Emotion at Work* (Sage, 1993) 1.


its cloak of universality and neutrality. For social scientists, law is a protagonist on a wider social stage, impacting on society, the economy and the polity in often surprising ways.

New law students enter this complex web of intersecting narratives when they enter law school. Little wonder the first-year experience in law has been described as a ‘struggle’. Like all first-year university students, new law students confront the shock of the new: navigating a new campus, choosing and enrolling in courses, locating classrooms, finding new friends and establishing new social networks, buying armloads of textbooks, making sense of subject outlines, balancing work with study and completing multiple assignments on time. They must also experience the growing pains associated with intellectual development, from assuming responsibility for their own learning, to accepting that there are no ‘right’ or ‘wrong’ answers or ‘good’ or ‘bad’ positions but judgements to make and defend through analysis, reasoning and argument. But beyond this is the sink-or-swim immersion in a swirl of legal stories. To survive, new students need to achieve literacy in the language of law. But this raises the question: how do law schools prepare students to ‘talk about lex’?

This article argues that the solution to the problems narratives create in law lie in harnessing its inherent narrativity. More specifically, the article submits that narrative analysis, a well-established qualitative research method, can be re-interpreted and applied as a teaching-and-learning technique to empower novice law students to embrace and engage in the plots, characters, settings and themes of the law. Indeed, such a narrative approach to legal education can furnish an effective method.

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14 Kidwell, above n 12, 254.
entry into the professional and disciplinary traditions of law for new students. There are two chief reasons why. First, a narrative approach can lend coherence to the assortment of topics that typically inform an introductory law course. Such topics include the design, history and contexts of the legal system; the structure of the legal profession and basics of professional practice; and the research, analysis, interpretation and application of primary legal texts. This is important because, unlike substantive law courses, introductory law courses cannot draw on doctrine to provide a unifying theme or overarching structure. Instead, story-telling devices, such as narrative arcs, character development and plot progression, can lend logic to the sequence of topics. Second, a narrative approach can give effect to the central pedagogical principle that students should be at the centre of their learning experience. This is achieved by students re-telling and re-framing law stories as their legal knowledge grows and their mastery of legal skills grow more sophisticated.

Beyond the pedagogical benefits, a narrative approach to the first-year learning experience is a fresh contribution to the teaching-research nexus. The higher education literature argues that research should ‘infuse’ teaching by informing curriculum content, incorporating research skills within the course design, guiding effective teaching and even imparting research-specific values of critical inquiry and evidence-based reasoning. A narrative approach to teaching law takes the next step: it ‘fuses’ narrative analysis, a recognised qualitative research method, with teaching delivery. As a qualitative research method, narrative analysis unmasks the cultural and social meanings people apply to their social worlds. Re-interpreted as a teaching approach, the narrative method deploys hypothetical stories as the device by which students plot the design, operation and society-wide impact of the legal system. By adopting and adapting a research method to a teaching approach, this article rejects the rather negative portrait in the literature of a tension between research and teaching.

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in the legal academy\textsuperscript{20} — that of an unhappy marriage-of-convenience that requires strategies and plans to keep together.\textsuperscript{21} Instead, this article demonstrates that teaching and research can co-exist naturally, happily and effortlessly.

To be sure, story-telling is not new in legal education. In Socratic classes, for example, professors devise hypothetical scenarios to test student understanding of legal doctrine. In the more traditional lecture-tutorial format that dominates the delivery of legal education in Australian law schools,\textsuperscript{22} the tutorial usually features a client problem that students seek to resolve by reference to the lecture material. In law examinations and assignments, students are required to advise fictional clients.

This article, however, describes a more ambitious narrative approach to law teaching, one in which stories frame the overall curriculum rather than illustrate individual doctrinal points. Part II of this article concretely illustrates this technique. Specifically, it describes how Australian Legal System, a compulsory introductory law course in the Faculty of Law at Bond University, integrated course-length client stories within its curricular and assessment design. Part III then explores the theoretical basis for this approach. Focused on narrative analysis, a well-recognised research method in the social sciences,\textsuperscript{23} this part outlines the key elements to

\textsuperscript{20} Griggs is particularly despairing of the research-teaching nexus in law: ‘The hypothesis that the university academic must have both a research and a teaching component to their work is under attack … Today, we observe, at times with concern, moves by senior university management to create teaching intensive and research intensive positions, the establishment of research-only centres, and a bifurcation that good teaching and good research don’t always need to be seen as the hand that fits the glove.’ Lynden Griggs, ‘Foreword — Special Issue on the Research/Teaching Nexus’ (2012) 22 Legal Education Review 237.


\textsuperscript{23} See generally Jane Elliott, \textit{Using Narrative in Social Research: Qualitative and Quantitative Approaches} (Sage, 2006). Elliott distinguishes between the cultural and the social-scientific study of narratives: at 3, 5. In the former, humanities scholars apply literary methods to explore the artistic, ideological and thematic properties within the fictional and non-fictional narratives. In the latter, social scientists apply a narrative-based analytical method to develop insights into the social world. Like Elliott, I adopt the social-scientific view of narrative analysis. My aim is to explore the prospects of adapting the social-scientific method to legal education in a way that empowers novice students to make sense of how law functions in the professional world (of lawyering) and the social world (of constituting a normative order). This is not to suggest that the alternative — insight into the multiple representations and meanings of the law — is less deserving, but, as Clarke argues in a different legal field, critique should never preface contextual understanding: see Donald Clarke, ‘Puzzling Observations in Chinese Law: When is a Riddle Just a Mistake?’ in C Stephen Hsu (ed), \textit{Understanding China’s Legal System} (NYUP, 2003) 93, 112–13.
narrative analysis, its applicability to the discipline of law and its potential for re-interpretation as a teaching and learning method. Part IV evaluates the teaching and learning benefits of a narrative approach to legal education. This part demonstrates that a narrative-informed curriculum is consistent with good practice in higher education because it entrenches student-centred learning, embraces the full power of the cognitive-apprenticeship model of student learning and ensures authenticity in the learning experience. A mix of evaluative data, from student surveys and unsolicited student feedback to an analysis of mid-semester student assessment, lends empirical support to these theoretical claims. Finally, Part V considers the implications this approach has for the teaching-research nexus in law.

II The Course

*Australian Legal System* is a compulsory first-semester subject for LLB and JD students in the Faculty of Law, Bond University. The course is available in each of Bond University’s trimesters (since students may enter Law School at any time during the year); and, since 2012, the course is further divided into two: a masters-level learning experience for postgraduate JD students and an undergraduate course for the LLB cohort. This means that up to six teachers may design and deliver *Australian Legal System* in any given calendar year. Although there is general consensus among the teaching staff about the core skills and content that the course is expected to convey, 24 individual teachers may, and do, differ in their approach, emphasis and assessment, depending on their scholarly and professional experiences and personal preferences. This part describes my own approach to the curriculum design since I first coordinated the course in the January trimester of 2010.

Stories are the heart and soul of my version of *Australian Legal System*. Both my curriculum design and assessment scheme in the subject deploy narrative methodology as the central teaching and learning device. Throughout the course, students work on resolving the problems of four hypothetical clients. Like a murder mystery, pieces of the puzzle come together as students learn more about legal institutions and the texts they produce, the process of legal research, the analysis and interpretation of primary legal sources, the steps in legal problem-solving, the principles of legal writing style, the practical skills and ethical dimensions of professional practice, and critical inquiry into the normative underpinnings and impacts of the law. The assessment scheme mirrors this design. In their portfolio-based assignment, for example, students devise their own client profile, research the client’s legal position and prepare a memorandum of advice.

24 The consensus is that the course should cover Australia’s system of government, including the Australian Constitution; the Australian court system; navigation and analysis of statutes, including principles of statutory interpretation; the interpretation and evaluation of case law, including the role of the doctrine of precedent in lending coherence to the Australian common law system; and legal research and writing. Most teachers also cover the legal profession, professional responsibility and ethical practice, some basic professional legal skills (such as negotiation, client interviewing or court advocacy) and Australian legal history.
My first foray into a narrative approach to legal education was in 2004. I used a single hypothetical client — a victim of sexual harassment — for a two-week intensive pre-law program for Indigenous students at the University of New South Wales. The technique proved successful in engaging students, many from disadvantaged backgrounds, in legal analysis and problem-solving and giving them a sense of accomplishment when they were able to answer the client’s legal problem at the end of the program. Importantly, this experience provided me with the inspiration to develop and expand the concept for a full-semester first-year law course.

I expanded both the number and complexity of the client problems in *Australian Legal System*. This was to deliver a more comprehensive introduction to law as both a field of professional practice and a scholarly discipline in its own right. The course now had four clients. Some client scenarios were simple: a single complainant, a single defendant, a single issue. Others were more complex, involving more parties or more than one legal problem. In each year, the first client problem served as the ‘demonstration’ client. This is the client who I, as the teacher, used as a model to demonstrate particular legal skills each week (such as research into statutes or preparing a case note). In weekly two-hour seminars (of approximately 25 students) and one-hour tutorials (of approximately 11 students), students worked in small groups to apply these skills to the other three client problems. Consistently with the cognitive-apprenticeship model of learning, the demonstration client allowed students to observe how experts use particular legal skills before practicing them on their own terms. They received feedback on their work both from peer discussion and teacher support during the small-group learning activities and, later, during the whole-of-cohort debriefing sessions at the close of each class.

The client problems covered an array of legal fields: human rights, corporate and commercial law, professional responsibility and public law. For example, the 2014 course included problems about religious vilification, the law of unjust enrichment, the implications of academic dishonesty on admission to the legal profession, and grants for first-homeowners. In previous years, the client stories have covered disability discrimination, the obligations of sleeping directors, strata title, the obligations of lawyers to avoid conflicts of interests, the standing of local councils to sue for defamation, and the constitutionality of liquor restrictions in Indigenous communities. The choice of client stories was more than simply an exercise in imagination or personal preference. As far as possible, my selection of client problems was designed to raise legal issues that might appeal to a diverse range of students, achieving a fair mix of social and commercial disputes. I was also conscious of ensuring that the cases would resonate with novice students who had no disciplinary background in the law and limited personal experience with corporate, commercial and property transactions. This is why, for example, I chose not to expose students

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to technical areas of law (such as equitable choses in action), advanced business structures (such as trusts) or complex transactions (such as hostile takeovers). Instead, my client scenarios involved social, economic or political stories, such as the sexual harassment of a female IT consultant, the ability of a young client to access a first home owner grant and the power of state governments to restrict liquor supply and ownership in Indigenous local communities. Such stories would be comprehensible to most people who read the daily press or watch the nightly news.

Further, the client problems were designed so that students could exercise the full panoply of legal research, analytical and critical-thinking skills. These skills include: finding cases, statutes and regulations; isolating ambiguity in statutory language and using canons of statutory interpretation to resolve such ambiguity; exploring the implications of court hierarchy and judicial reasoning on the legal persuasiveness of common law judgments; engaging practice-oriented oral and writing skills; raising questions of professional responsibility and ethical decision-making; and debating the power and limits of law in achieving justice. For example, the ‘demonstration’ client for the 2012 and 2013 versions of the course was a private school at which two science teachers, one a Sikh, the other a Scientologist, both complained that they were vilified by the headmaster at a staff meeting on the basis of their faith. From this client problem, students learnt how to:

- locate the relevant legislation on religious vilification and to find the key sections that furnish the scheme of regulation;
- identify and resolve any ambiguous language in the statute (such as whether the words ‘humiliate’, ‘intimidate’, ‘offend’ and ‘insult’ in s 18C of the Racial Discrimination Act 1975 (Cth) cover any mere slight or only serious smears);
- research precedents that judicially interpreted the legislation;
- identify the ratio, obiter and reasoning in the relevant case law and evaluate the persuasive strength of each case;
- apply the legislative and judicial law to provide legal advice to the client;
- compare the advantages and disadvantages of formal litigation to alternative forms of dispute resolution;
- respond ethically to follow-up instructions from the client to negotiate a settlement as ‘ruthlessly’ as possible;
- contextualise the Australian response to religious vilification by comparing it with that of other major legal systems; and
- explore the tension between regulating for a tolerant society and ensuring freedom of political and artistic speech, and critically evaluate whether Australian law strikes an appropriate balance between these competing policy goals.
The assessment scheme replicated this curriculum design, requiring students to demonstrate their learning on their own terms. The major assignment, a portfolio-based client file worth 30 per cent of the final grade, entailed students designing their own client problem after consultation with the course coordinator. In the portfolio, students presented a research journal in which they documented their research strategy to locate the relevant law; a statutory scheme analysis in which they isolated any applicable statute and the relevant sections that regulated the problem and, where appropriate, identified and interpreted any vague or ambiguous language; a case note summarising the best, most recent case on point; and a memorandum of advice setting out their legal opinion of the dispute. During the semester, students observed how to complete each of these steps with the ‘demonstration’ client and practised with the other course clients in small-group learning activities. The client file assignment, therefore, reinforced this learning scheme by encouraging students to demonstrate independently their learning in the context of a new client problem of their own design. The end-of-semester examination introduced the students to another new client. A week in advance of the examination, I provided students with a ‘document file’ containing a brief profile of the new client (but not the client’s problem) and extracts of legislation, cases and other legal materials necessary to provide the client with advice. In the examination, students were told the problem for which the client sought legal advice and were expected to apply the legal material disclosed in the ‘document file’ to provide the advice. They also had to write a brief essay reflecting on the broader contextual, ethical or policy issues that arose from the client’s situation.

In short, stories saturate the curricular and assessment design of my first-year law course. They provide the narrative hook into the course themes; they shape the narrative arc in which different topics — from statutory interpretation to the doctrine of precedent — comprise course plot-points; and they lend narrative authenticity to the learning environment because students assume the role of lawyers in resolving the course clients’ problems. The client stories also ensure deep learning outcomes. This is because client stories are subject to ‘re-narration’ by students. As students achieve a deeper understanding of the legal system, they re-frame their thinking about the client problem and re-tell the story within the disciplinary traditions of law. They do so from multiple points of view: from the practical (the processes for finding the law that resolves the client dispute and the techniques for analysing the relevant primary sources), to the professional (the ethical dimensions to advising the client), to the scholarly (the values that give shape to the law and the broader implications that law has on society). This is important given that law is both a professional field as well as a research discipline. More crucially, re-narration empowers the students to tell their own journey of learning and discovery about law. To borrow from *To Kill a Mockingbird*, it allows the students to ‘stand in [the] shoes’ of the legal system and ‘walk around in them’.

III The Method

The social world, not just the domain of law, is a nexus of narratives. Social science researchers study these stories because they offer insights into how people understand and experience the world. As William Cronon explains: ‘Narrators create plots from disordered experience, give reality a unity that neither nature nor the past possess so clearly. In so doing, we move well beyond nature into the intensely human realm of value.’ Narrative analysis enjoys prominence in the social sciences literature. Following a long tradition in literary studies dating back to Russian formalism in 1928, narrative analysis emerged in social sciences in the 1980s and entrenched itself as a popular method by the 1990s.

Put simply, narrative analysis is the analysis of people’s stories. Data typically comes from oral sources, such as interviews, observations of conversations in self-help groups, oral histories and sermons. But written sources may also reveal narratives, such as diaries, letters, trial transcripts and newspaper accounts.

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28 Lewis P Hinchman and Sandra K Hinchman, ‘Introduction’ in Lewis P Hinchman and Sandra K Hinchman (eds), Memory, Identity, Community: The Idea of Narrative in the Human Sciences (State University of New York, 1997) i, xvi; Catherine Kohler Riessman, Narrative Analysis (Sage, 1993) 2.


32 Elliott, above n 23, 5.


36 Riessman, above n 28, 69.

Although most researchers locate narratives within qualitative data, Jane Elliott has recently proposed that quantitative data collected using sample methods, especially longitudinal data, may also be rich with narrative potential.

Epistemologically, narrative analysis assumes that meanings are fluid and contextual, not fixed and universal:

\[\text{Narrative knowledge tells the story of human intentions and deeds, and situates them in times and space. It mixes the objective and the subjective aspects, relating the worlds as people see it, often substituting chronology for causality. In contrast the logico-centric knowledge looks for cause-effect connections to explain the world, attempts to formulate general laws from such connections, and contains procedures to verify/falsify its own results.}\]

There is no set procedure for analysing and interpreting narratives. Researchers agree that narrative ‘imposes order on a flow of experiences’ and its analysis involves mapping out ‘how it is put together, the linguistic and cultural resources it draws on and how it persuades a listener of authenticity’. They differ, however, on how to do this. Techniques range from formal analytic narrative, narrative explanation, narrative structural analysis and sequence analysis to poetics, hermeneutic triad and deconstruction. As Peter Abell notes, ‘[a]lthough the term narrative and cognate concepts … are widely used … no settled definition is yet established.’

Barbara Czarniawska goes further:

\[\text{In my rendition, narrative analysis does not have a ‘method’; neither does it have a ‘paradigm’, a set of procedures to check the correctness of its results. It gives access to an ample bag of tricks — from traditional criticism through formalists to deconstruction — but it steers away from the idea that a ‘rigorously’ applied procedure would render ‘testable’ results.}\]

One of the strengths of narrative analysis is that it provides rich insight into social life. This is because of the authenticity that comes from respondents

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38 Bryman, above n 31, 412.
39 Elliott, above n 23, 60–96.
40 Riessman, above n 28, 15.
41 Ibid 2.
42 Czarniawska, above n 30, 660.
44 Czarniawska, above n 30, 660.
being empowered to tell their own stories in their own words. It also comes from analysing stories holistically rather than fragmenting the data.\textsuperscript{46} However, as Elliott notes, narrative methods are more useful for constructivist research questions (what an experience means to subjects) rather than realist questions (what is the state of reality).\textsuperscript{47} Narrators necessarily distort reality because they are making sense of, rather than reporting on, the real world.

In legal scholarship, unlike in the social sciences, narrative analysis occupies only niche status. It appears only in some feminist legal writing\textsuperscript{48} and critical race theory.\textsuperscript{49} This is puzzling, because narrative analysis seems well-suited to much work on law: policy-driven legal research is directed to understanding the normative framework and utility of the law; socio-legal scholarship is concerned with how society experiences and engages with the law; and the legal literature on human rights is interested in law’s impact on disadvantaged or vulnerable groups. And as Michael Patton observes, ‘[t]he central idea of narrative analysis is that stories and narratives offer especially translucent windows into cultural and social meanings.’\textsuperscript{50}

For legal education, the potential for narrative analysis is even more potent. Harnessed as a legal education tool rather than a scholarly method, narrative

\textsuperscript{46} Punch, above n 34, 217.
\textsuperscript{47} Elliott, above n 23, 24–7.
\textsuperscript{49} Delgado, ‘Beyond Critique’, above n 37; Delgado, ‘Campus Antiracism Rules’, above n 37; Delgado, ‘Rodrigo’s Final Chronicle’, above n 37; Delgado, ‘Making Pets’, above n 37; Harris, above n 48; Williams, above n 35. To be fair, legal scholarship is also embracing the study of narratives within the cultural legal studies movement. An example of this is the interdisciplinary study of law and popular culture. For a literature review, see Douglas J Goodman, ‘Approaches to Law and Popular Culture’ (2006) 31 Law & Social Inquiry 757. However, popular culture studies remain marginalised in a legal academy where the ‘hegemony’ of black-letter doctrinal analysis still anchors legal education and research (see Steve Greenfield and Guy Osborn, ‘Law, Legal Education and Popular Culture’ in Steve Greenfield and Guy Osborn (eds), Readings in Law and Popular Culture (Routledge, 2006) 1, 1–3). Further, where legal scholars have engaged with popular culture, they have largely employed humanities-style textual analysis, focusing on the semiotic, ideological or jurisprudential messages embedded in its texts (see, eg, Naomi Mezey and Mark C Niles, ‘Screening the Law: Ideology and Law in American Popular Culture’ (1986) 28 Colombia Journal of Law and the Arts 91; William P MacNeil, Lex Populi: The Jurisprudence of Popular Culture (Stanford University Press, 2007) 5). They have largely ignored its socio-legal potential for explicating the social operation of law (cf Lawrence Friedman, ‘Law, Lawyers and Popular Culture’ (1989) 98 Yale Law Journal 1587). For the distinction between social-scientific and humanities approaches to narratives, see above n 23.

\textsuperscript{50} Patton, above n 19, 116.
analysis offers students a window into the world of the law. Law, after all, is a storyteller. It re-frames people’s stories according to legislative and judicial standards. It intervenes in people’s personal and professional lives according to its own living logic that — with each amendment to a statute by Parliament or a re-interpretation of past precedent by a superior court — is open-ended and evolving. And it creates its own set of values from among the vast array of available choices for determining relationships, rights and remedies. In legal education, a narrative-centred law curriculum allows law teachers to ‘reverse-engineer’ the law. Rather than describing or theorising the law in terms of its abstract properties, it empowers students to see how law’s institutions, texts, practices and norms function in specific practical contexts.

Moreover, by making use of course-length client problems, a narrative approach to legal education provides a holistic, rather than fragmented, view of the legal system. As students become more sophisticated in their understanding of legal institutional design, textual analysis, legal reasoning, professional practice and legal scholarly inquiry, they can see the larger narrative arc within which the law locates each specific client story. They observe how the law applies different lenses — doctrinal, ethical, material or cultural — to give each story its significance. For example, in the 2011–13 versions of Australian Legal System, one client is a law graduate seeking admission to the legal profession with a record of academic dishonesty on her university transcript. Students learn to find and interpret the legislation and regulations that determine admission to the legal profession and the case law that defines and illustrates these provisions. They identify the rationale behind the requirement that law graduates disclose to admitting authorities any prior acts of plagiarism and they link this rationale to the broader role lawyers play in society and their professional responsibility and ethical obligations. They then debate the competing policy goals at stake, such as the integrity of the legal profession, consumer protection in the multi-million dollar legal services industry, and the rights of young people to make — and learn from — their mistakes. This simple story of a plagiarist law graduate opens up larger narratives about law’s regulatory reach, cultural values and professional practices.

IV The Benefits

A narrative approach to curriculum design promotes student learning. The narrative method deployed in Australian Legal System, for example, takes seriously the central pedagogical principle that students should be at the centre of their learning experience. They are the lawyers, they are the ones assisting clients with their legal disputes, and, as students acquire more knowledge of the design of the legal system and the skills of research, analysis, writing, problem-solving and critique, they are the ones who prepare the legal opinions.

51 Biggs and Tang, above n 16.
For students, this brings the law to life.\footnote{The student quotes in this section are edited only for length. Punctuation and phrasing are not edited for grammar or style.}

Professor Wolff … brought with him a fresh new teaching style that I was not to see again throughout the rest of my degree. Professor Wolff structured the ALS course material around several fictional clients … The actual content of ALS focuses on core legal skills necessary for first year law students to succeed at law school. The content deals with statutory interpretation, legal research and writing, and the overall design of the Australian legal system. Professor Wolff brought those areas of law to life by introducing each topic then applying what we learned to his fictional clients. (JD student, 2010)

It was only later that I could truly appreciate the uniqueness of your teaching style — namely, the use of fictional clients throughout the entire course. As opposed to relying on a text book to dictate the flow of your course material, you actually used your imagination. It proved to be an effective learning style for me as the answers were not to be found by accessing one source but the many resources that we were discovering along the way. … The written assignment, involving the creation of my own fictional client, was a very useful and practical experience. In allowing me to focus on an area of law that I found interesting, it provided me with an enjoyable (if stressful) experience of researching the law from the Constitution to the criminal courts. (JD student, 2010).

The client story based method of teaching legal concepts has helped me to understand the concepts much more easily and quickly because I can apply it to the real world and see its use in context. It reminds me a little of mathematics[: you can learn the formula but unless you use it in context and practise it, it won’t make nearly as much sense or sink in as easily. (LLB student, 2012)

I have found the use of the clients in ALS extremely useful and interesting. Personally I struggle absorbing large amounts of theory and concepts that one receives in normal lectures. I find the Client studies most useful in applying the theory that we are taught. It really broadens my understanding of how the legal system works and how the rules are applied. The hands on aspect also makes the course a whole lot more exciting and fun. (LLB student, 2012)

Further, client stories lend structure to the learning experience. One of the disadvantages of designing an introductory law curriculum is the lack of an overarching theme that can give it unity or coherence. This is because the subject is a launching pad: an academic preparation for the substantive law courses students will take for the rest of their law degree. It is not a self-contained treatment of any given content, skills or theory. As such, the topics are typically wide-ranging: legal history, the legislature, the judiciary, legal research and writing, the structure and design of primary legal texts, legal analysis and problem-solving, professional responsibility
and ethical practice, and the descriptive and normative properties of the law.\textsuperscript{53} Textbook writers use a variety of techniques to give thematic shape to a first-semester law course.\textsuperscript{54} Some emphasise the historical trajectory of the law,\textsuperscript{55} others focus on its normative or theoretical underpinnings,\textsuperscript{56} and an emerging approach is to focus on threshold learning outcomes.\textsuperscript{57} But there is no escaping the impression that an introduction to Australian law is, by necessity, a grab-bag of topics.\textsuperscript{58}

Course-length client stories, by contrast, lend structure to the material. This is because each topic becomes a new plot-point in the legal re-narration of each client scenario. Students begin with research into the basic legislative framework (if applicable) to each client problem. They then flesh out the meaning of these regulations using statutory interpretation techniques and case law research. Next, they apply this primary legal material to advise the client, explore the ethical dimensions of any advice they give and follow-up instructions they might receive, and critically evaluate the influences, impacts and processes of the law. Finally they debate whether they achieved justice both for the client specifically and other stakeholders.

This increasingly more sophisticated foray into law’s processes and operations means that students are constantly revisiting their clients’ cases. As they do so, they extend their \textit{quantitative} knowledge of legal doctrine and skills, and, by integrating this new knowledge into their existing stock, they deepen their \textit{qualitative} understanding of the law.\textsuperscript{59} According to the teaching and learning literature, quality student learning is achieved when students re-structure their existing knowledge in light of new content and skills.\textsuperscript{60} Students themselves recognise this:

> Professor Wolff’s novel approach to teaching ALS at Bond was successful in overcoming one of the principle problems that most law students encounter in their first semester; namely a sense of confusion and frustration at being unable to relate what they are learning in introductory courses to what they will be doing for the rest of their law studies. By setting up a series of fake

\textsuperscript{53} See Cook \textit{et al}, above n 15; Ellis, above n 15; James and Field, above n 15; Laster, above n 15; Macken and Dupuche, above n 15; Parkinson, above n 15; Sanson \textit{et al}, above n 15; Vines, above n 15.

\textsuperscript{54} Some texts, however, merely introduce the Australian legal system without any overarching theory. See, eg, Cook \textit{et al}, above n 15; Macken and Dupuche, above n 15.

\textsuperscript{55} Parkinson, above n 15; Vines, above n 15.

\textsuperscript{56} Bottomley and Bronitt, above n 15; Laster, above n 15.

\textsuperscript{57} James and Field, above n 15.

\textsuperscript{58} For example, the two textbooks which take an explicitly historical approach to explicating the Australian legal system add chapters on, \textit{inter alia}, statutory interpretation and the doctrine of precedent, not because they cohere with their historical account but because they are essential topics to cover in any introductory law course: see Parkinson, above n 15; Vines, above n 15.

\textsuperscript{59} Biggs and Tang, above n 16, 90.

\textsuperscript{60} John Biggs and Kevin Collis, \textit{Evaluating the Quality of Learning: The SOLO Taxonomy} (Academic Press, 1982).
clients, Professor Wolf introduced his students to a range of different legal areas (encompassing torts, restitution), and demonstrated efficaciously how students could directly apply the skills they were learning in ALS to different client scenarios. By taking this approach, ALS did not seem like a disjointed subject that was taken independently of other legal studies, but rather, Professor Wolff was able to integrate the skills learnt in ALS to the kind of scenarios that students might encounter later in their law degree. Above all, Professor Wolff should be commended for his enthusiasm, creativity, and ability to introduce students to the reality of legal studies, without making the process too overwhelming or incomprehensible. (LLB student, 2011)

As a student, the methodology Leon uses brings the law to life and makes the Australian Legal System subject engaging. Leon is able to link concepts such as statutory interpretation, the doctrine of precedent and legal problem solving together by using 4 mock clients. Leon’s approach to ALS works simply, by making the course identical to working in the legal profession. By using 4 mock clients with a variety of different problems, Leon is able to neatly intertwine all legal skills and principles resulting in a course which is concise and coherent. (LLB student, 2012)

A common refrain in the student testimonials is the authenticity of the learning environment. By allowing students to play the character of lawyers in the clients’ stories, they become involved in the curriculum. The learning activities engage cognitive, performative and affective skills students know they will need to become professional lawyers. This ensures that their learning is ‘meaningful’ and ‘worthwhile’, thereby enhancing intrinsic motivation to learn.61

I was just thinking the other day about how the client-based structure of the course is a great idea. The structure helps me become more engaged in the course materials because everything is linked to real-world type cases. Overall, the client-based structure is an effective way to provide students with a practical and interesting learning experience. (JD student, 2012)

I thought your design of the Australian Legal System course … has certainly been a unique experience compared with the other courses I have taken in my legal education. Although I was initially unsure what to think of the fact that we would be ‘assisting’ three fictional clients throughout the course of the semester, with hindsight I believe [that] this may have been the best way to teach the material. Since the clients were fictional, the different problems they had and the facts of their situations were constructed in a way that allowed us to explore all of the major topics of ALS; at the same time, this was the first taste of what being a practicing lawyer would be like, and so the course had a much more practical feel to it than I imagine it otherwise would have. Also, since the scenarios were constructed, they involved much more interesting and remarkable situations than I imagine most actual clients would have. This made

61 Biggs and Tang, above n 16, 37.
a course that could easily have been dry and monotonous much more enjoyable. In addition, since both the assignment and the final exam involved assisting fictional clients, it ensured that we were not simply tested on our ability to rote learn, but rather our ability to think like a real lawyer and to apply all the skills and concepts we had learned in the course in a meaningful way. I think that many courses do not put enough emphasis on this. The fact that your ALS class did, and since it is a course taken at the beginning of the law degree, really helped demonstrate what a future career as a lawyer would be like. I found this was very useful way of learning the material, as well as offering an insight into what being a practicing lawyer would be like. (JD student, 2010)

V The Implications for the Teaching-Research Nexus

A narrative approach to the first-year experience in law also makes a contribution to the literature on the teaching-research nexus. The nexus between teaching and research has attracted a sizable corpus of scholarship in the higher education literature. Initially, the relationship was cast as a ‘clash of civilisations’: quantitative studies, for example, demonstrated a low correlation between research performance and teaching effectiveness; and qualitative studies conceptualised teaching and research as distinct enterprises. More recently, a rapprochement is emerging. The case is now put that teaching and research lie on a ‘continuum’; that they share a ‘vital link’.

Unlike the broader higher education literature, the discipline-specific literature about the teaching-research nexus in law is sparse. And what little there is seems remarkably downbeat about the nature of the relationship. For example, Michael Chesterman and David Weisbrot, in their intellectual history of law schools in Australia, draw a negative correlation between teaching and research in law, arguing that Australian law schools’ mission to train the next generation of professionals ‘has been a major factor contributing to the predominantly positivist, unquestioning character of much of Australian legal scholarship.’ For Lynden Griggs research and teaching ought to go hand in glove:

66 Brew and Doud, above n 63.
At one stage it would have been said that every academic is by definition a researcher — that a research component is fundamental to the ethos of a tertiary institution and, specifically, the development of the teaching criteria for assessment and the setting of levels within that assessment. After all, how could one be comfortable that the grade for a particular piece of work was set at the appropriate level unless the assessor was knowledgeable in the research area? How could a marker confidently conclude that a student has applied the law correctly to a problem-based scenario if they were not an active researcher in the relevant area of law? Universities were not to be seen as a college of teaching experts, but as experts teaching and disseminating the fruits of their research labour. It was the research component that allowed an institution to be its own benchmark and standard setter.68

But, in practice, the nexus requires strategies, both at the faculty and university level, to ensure its connectedness.69

This article, however, has shown that research and teaching can inform and inspire one another with little more than the creative industry of the individual researcher-teacher. It does not require the heavy hand of regulation or policy for active researchers to invest their research practices (and not simply the fruits of their research) into their teaching programs.

VI Conclusion

Narratives are everywhere in law: stories of disputes source the common law; chronicles of inefficiency, injustice or unaccountability inspire legislative reform; and debates about the findings, explanations, meanings, scope, influences and impacts of the law inform legal scholarship. The reverse is also true: law is everywhere in stories. Popular culture is replete with legal references. From To Kill a Mockingbird (1962) to The Lincoln Lawyer (2011), Hollywood movies depict lawyers as heroes. From LA Law (1986–1992) to The Good Wife (2010–), high-rating television series use the court-room to debate contemporary social and political issues. And from Bob Dylan’s Blowin’ in the Wind (1963) to Christina Aguilera’s Beautiful (2003), chart-topping popular music lyrics frequently champion civil rights. It is even possible to argue that law itself is narrative. Using its own vocabulary, grammar and idiomatic expressions, the law is a story-teller: it re-casts characters into plaintiffs and defendants; it re-orders sequences of events into legal issues; and it re-sets scenes by imposing its own architecture of normative values.

Legal education can do more with this inherent narrativity. In this article, I have argued that a first-year law course can make innovative use of course-length stories to introduce new law students to the institutions, texts, practices and norms of the legal system. Such a narrative approach to the curriculum can connect seemingly

68 Griggs, above n 20, 237. See also Nehme, above n 21, 242.
69 Nehme, above n 21. See also Ailwood et al, above n 21.
disparate topics into a coherent plot. Further, it can immerse students in the learning experience, both by making them characters in the stories (as the hypothetical clients’ legal advisors) and also as omniscient narrators (exploring the doctrine at work in the specific problem as well as law’s broader influences, impacts and processes). Finally, it is a fresh twist on the teaching-research nexus, re-inventing an established research method into a device for learning and teaching the law.
Molly Townes O’Brien*

THE LEARNING JOURNEY:
PLEASE TAKE ME WITH YOU

ABSTRACT

In the academy, we need not take our learning journeys alone. We can take our students with us. We can teach as we research and research as we teach. While it may seem that teaching and research compete for our time, energy and focus, they are also excellent collaborators. Research allows us to infuse the classroom with our values, new ideas and enthusiasm. Teaching assists our research by prompting us to tell stories that clarify our research, and by giving us reasons to keep up with developments, update materials and design activities. Both give us a chance to hone our expertise, to gather motivation, to attract collaborators and to try out fresh perspectives. Teaching and research both prosper on the learning journey together.

I INTRODUCTION

Teaching and research are complementary aspects of learning. Each contributes immeasurably to our learning journey as we navigate its wandering pathways, scale the mountains and arrive at eureka moments. Teaching can lead the learning journey down well-worn paths or it can blaze ahead along the trail, cutting back the overgrowth and leaving a clear path. Research can survey the same terrain for an overview or it can blaze a new trail through an unexplored landscape.

Learning can be a difficult journey. We can travel too lightly in solitude, or too heavily burdened with the baggage of collaborators. But learning is a journey to the wonderful places our minds may wander. Discovery and insight are the journey’s joys and destinations. As Mark Twain exclaimed when he was travelling in Italy:

To give birth to an idea — to discover a great thought — an intellectual nugget, right under the dust of a field that many a brain-plow had gone over before. To find a new planet, to invent a new hinge, to find a way to make the lightnings carry your messages. To be the first — that is the idea. To do something, say something, see something, before anybody else — these are the things that confer a pleasure compared with which other pleasures are tame and commonplace, other ecstasies cheap and trivial.¹

¹ Mark Twain, *The Innocents Abroad* (American Publishing, 1869) 188.

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Learning is a marvellous journey; it is the journey we embark upon each time we set out to do research. Each one of us has become engaged with this journey. It is one of the reasons we work in law. We enjoy the many kinds of research required by legal scholarship. For our purposes, research may be defined most simply as ‘the systematic investigation into and study of materials and sources in order to establish facts and reach new conclusions.’ In law, we undertake research when we write a paper, an article, a book, a submission or a brief, but also when we represent a new client, interview a witness or give legal advice. Each piece of research requires systematic investigation of a topic or set of circumstances and the laws that govern them, or investigation and creative inquiry into the likely results if the law were changed. As legal academics, we engage in many kinds of research involved in the creation or advancement of knowledge. My own recent academic research has involved conducting psychological surveys, undertaking historical and theoretical inquiry, performing pedagogical review and engaging in dialogue with faculty and students. When I practiced law, a typical day involved theoretical and practical investigation into the law and facts that impacted my clients. Legal research travels varied pathways, through books, archives and interviews, and engages both academics and practitioners. What we may not realise is that research is not a journey best taken alone.

There are many good ways to do research. Alone is one of them. But by involving or including our students in our research, we spread the benefits to more people

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3 This view of research is broad and takes in various aspects of experience and professional research undertaken in the practice of law. For alternative definitions of research, see Tom Stehlik, Final Report: The Teaching-Research Nexus in the Division of Education, Arts and Social Sciences (February 2008) University of South Australia <w3.unisa.edu.au/academicdevelopment/engagement/nexus.asp>.


8 Some academics assert that researchers like to work alone, while teachers are gregarious: see Marina Nehme, ‘The Nexus Between Teaching and Research: Easier Said Than Done’ (2012) 22 Legal Education Review 241, 246.
and over a longer period. Research is a journey best shared. Students in particular benefit from seeing our motivation and excitement about a research topic. They need to know how to do research and to find out what they do not know. Students need illustrative material to understand ideas, concepts and theories. When students see how we became involved in a particular field, they no longer see it as a parched topic from an old book. Sure, they may have to read old books to understand it, but our involvement brings the law to life for them. Giving the students a front row seat in the learning journey takes them along with us.

II Why Bring the Students Along?

Many of us react like the Grinch when we are faced with students and their issues. ‘Just read the cases!’ we grumble with impatience when a student poses a thorny question. We would rather be alone in our research: uninterrupted, travelling lighter and faster over difficult terrain, left to ourselves to wander in the mazes of learning. We believe that our students will catch on to the main ideas if they try hard and focus on what is written in the textbook and in the case opinions. We are tempted by the idea that the ‘close interconnection of teaching and research’ is ‘merely a shibboleth or an inefficient relic of the past.’

Surely there is no necessary connection between teaching and research! Just look at how many businesses do research and invent new products — like mobile phones or software apps — without doing any teaching. And look at all those university teaching programs that lack current or specialised research. There is no mystery to learning basic material. ‘[L]arge, mainstream undergraduate courses often seem to have no room for modules based on the specialised research interests of the academic staff.’ No wonder we do not want to spend our time doing research related to those courses.

We would rather believe that there is an inherent conflict between teaching and research. Teaching and research have different goals and require different

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9 Other examples of benefits students gain from being taught by a researcher are included in Kerri-Lee Krause, Sophie Arkoudis and Ali Green, ‘Teaching-Research Linkages: Opportunities and Challenges for Practice and Policy’ (Stimulus paper presented at Carrick Institute Teaching-Research Nexus Forum, Adelaide, August 2007) 3.


approaches, talents and materials. A person might be quite skilled at one but not at the other. Research often represents energy expended on knowledge that cannot yet be taught because it is still under development or investigation. Meanwhile, the university’s reward system is oriented around successful research and publication; time spent teaching students is not time spent writing papers to be refereed and published. Academics have to juggle research, teaching and administration. For some, ‘the job can feel never-ending.’ Given the time pressures on academics, students may be seen as a hassle and teaching like eating from a diet menu.

Teaching is perceived to take valuable time away from research. One recent survey found academics to be ‘suffering from growing stress levels as a result of heavy workloads, management issues and a long-hours culture.’ When we spend time on teaching, we may not have time to engage in meaningful research. Time away from research may decrease the opportunity for a promotion or a pay raise. As Marina Nehme points out, ‘[i]f academics are not research active, they are required to undertake an increased teaching load.’ We are all familiar with the phrases ‘teaching load’ and ‘research opportunity’. These phrases are commonplace and indicate that some institutions view teaching ‘as a punishment.’

III How Teaching Assists Research

There are compelling reasons to spend our time and energy teaching. Each of us has struggled to understand unfamiliar areas of law. We know that the law is a complex structure. It is huge, historical, convoluted and difficult. We have read obscure histories of the 12th century trial by ordeal. We have looked at the maze of current and amended tax and procedure provisions. We know that the greatest minds — even those of justices of the High Court — may disagree on the meaning of a statute. Like our students, we have struggled to understand even the most basic legal provisions. For example, who has not felt a sense of inner panic on reading the following evidence rule?


14 Lifestyle as an Academic, The University of Manchester <http://www.academiccareer.manchester.ac.uk/about/do/lifestyle/>.

15 Ibid.


17 Nehme, above n 8, 247.

18 Ibid.

19 Ibid.
Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.\textsuperscript{20}

We have all felt despair as we tried to work out the ramifications of a statute similar to this short legal section governing the exclusion of certain opinion evidence. And like our students, we have breathed a sigh of relief when we figured out that the rule means that opinion evidence is not admissible to prove the content of the opinion, but may be admissible to prove something else. Like our students, we have fought to determine the future impact of a lengthy High Court opinion or of a lower court’s ruling that might seem to thwart justice. We have asked ourselves in frustration, ‘How could the court decide that?!’

In other words, we know that the law may be indecipherable without a guide, sufficient motivation, context and memory cues. As teachers, we can provide these things for our students. For the law to become meaningful to students, and for them to feel comfortable to take a legal issue into their own hands, they need a learning guide. More than that, they need to be encouraged by our motivation, our excitement and our success with the law. They need to see both our frustration and our hope.

This is not a burden to most academics. For many, the ‘most enjoyable part of the job is seeing the students succeed.’\textsuperscript{21} As much as we enjoy learning, we also enjoy teaching. When we teach, we facilitate inquisitive minds, listen to questions, engage thinking, support struggle, cultivate dreams, encourage risk and learn every day. Teaching is, in essence, a learning journey similar to research. Like research, it has its own rewards and meaning.

Happily, teaching is not just good for the students. It is also good for our research. It does not simply subtract from our research time and add nothing. Instead, as will be discussed, teaching supplements our research ideas. It keeps our minds alive and our research up to date. Teaching and research are essentially linked facets of learning. Both involve understanding intellectually difficult material and communicating that understanding. Learning is the ‘essential link between teaching and research.’\textsuperscript{22}

Of course, there are downsides to combining research and teaching. Teaching takes time that could otherwise be used on original research. Teaching requires us to examine and re-examine basic rules and basic theories. Teaching requires us to depart from our focus on the cutting-edge of knowledge and redirect our intellectual energy to explaining material that is appropriate for students. Nevertheless, the benefits of teaching to research should not be downplayed or overlooked. In addition to the benefits explored under Part IV, below, using research in teaching may help us gather collaborators, gain a fresh perspective on an old issue, develop expertise in a new field and access student evaluations of our field.

\textsuperscript{20} Evidence Act 1995 (Cth) s 76(1).
\textsuperscript{21} Lifestyle as an Academic, above n 14.
\textsuperscript{22} Nehme, above n 8, 252.
A Collaborators

When I was teaching a seminar in education law, I had 24 new students every autumn. Most of the students worked on their own research project and went on with their lives. I remember one student, however, who was excited by my research. Amanda Woodrum was genuinely interested in my research on early American public schools and religion. Not only did she complete her seminar paper, but she also continued to research with me. Ultimately, we published a co-authored article in a law review.23 I would not have had time to search the library archive material that documented the 19th century views of schooling embraced by the Protestant school crusaders and the Catholic Church. But Amanda did.24 She gave me her notes from the archives and read my drafts of the article. She was an excellent collaborator who would not have had the opportunity to work with me if not for the seminar course.

My experience in this regard is not unique. My husband is an astrophysicist. He gives a large number of public lectures that showcase his research findings. More than a few students are interested in and excited by his research. As a result of his presentations, he usually has more graduate students who want to work with him than he can take. His public lectures not only give the public a good idea of what he is doing, they also attract young researchers and future collaborators.

B Perspective

Because each of us has been engaged in research in a particular field for many years, we may feel that our perspective on that field is set. If we bring our research into the classroom, we may, however, gain a new perspective. When I use a research-based scenario as the basis for student argument, I often invite a practitioner or a judge to class. With the judge at the front of the room, students proceed to present their positions and arguments. The judge may ask questions or issue a ruling at the end of the student argument. I find that students generally appreciate these opportunities, conduct serious research and present heartfelt arguments. Whatever side of the controversy they have been assigned to, students find its emotional core and address it. The invited practitioner or judge also injects a perspective into the discussion. Thus, without venturing into practice or into the courtroom, I can keep up to date with the views of my students, the practice and the court. I may think my perspective is set, but when I hear student arguments and a judge’s or practitioner’s questions, I discover that there are aspects of the problem I had ignored. Class time can reset my perspective.

C New Expertise

As a member of the law faculty, I am sometimes asked to teach a subject with which I am unfamiliar. I might have thought there was nothing more boring in the world

24 Ibid 581.
than international dispute resolution, but as I prepared to teach it, I found myself caught up in the new readings. First, I refreshed my law school knowledge of public international law, arbitration and mediation. Then I learned about areas that were new to me, like diplomacy, law and economics, and public discussion of settlement. Often, reading done to prepare to teach a new course has sparked connections in my mind. I connected what I learned about international dispute resolution to what I already knew about other areas of law. Areas where there is no clarity stand out to the novice. Questions that lack consensus answers beg for research. By teaching in an unfamiliar area of law, I gain not only a new field of expertise, but also new subjects for research. Teaching has the capacity to keep my research from growing stale.

**D Evaluation**

An often neglected benefit of teaching is the value of student comments about a research project. Preparing to teach an area of research requires me to break the topic down into manageable bits. Once this is done, students can listen or read about the research and then be asked about it. When students respond to a question about my research, they generally give unvarnished responses. Student reactions to my research have caused me to re-think and re-do on more than one occasion.

**IV How Research Assists Teaching**

Research is an excellent partner to teaching. It provides stories and examples, keeps content up to date and allows us to infuse the lessons with our values.

**A Stories**

Based on our research and experience, we can describe relevant examples and tell anecdotes that contextualise complex material. Being engaged in research allows us to teach what we know and to use stories to do it. Stories can contextualise a concept for students, making the idea real and memorable. Stories can provide teachers with an opportunity to connect with students and engage them in the world of learning.

When I teach criminal law, for example, I spend some time discussing the ethics of client confidentiality. Stated in the abstract, the ethics of confidentiality sounds like a dry topic — it certainly was dry for me in law school when my criminal law teacher lectured about it. But, remembering that most students lack context for discussion of issues like client confidentiality, I sometimes fall back on a story from my work as a

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public defender. I recall for the class that I once had a client who was charged with raping ‘Sheila’. He came to my office after being released on bail. We chatted for a few minutes about possible defences. We talked over the possibilities of mistaken identity and alibi. At some point in the conversation, the client reached over to his jacket, pulled a pair of lace undies out of a pocket, and put them on my desk. ‘These are Sheila’s,’ he said, ‘I don’t want to keep them on me.’ Now the classroom is quiet; the students’ eyes are open wide. Our discussion of client confidentiality is no longer just an arcane abstraction as I ask the students: ‘Ethically, what could I tell my client? What could I do with the undies? Should I say anything to the prosecutor about the undies? Would the undies have any effect on the decision to run a particular defence?’

In this situation, my own experience makes the confidentiality issue spring to life. After my client left my office, I had to do research before deciding what to do with the undies. Believe it or not, I left the underwear on my desk while I picked up books and made telephone calls to help me determine what to do with them. With a story, a dry class lecture can become a contextual ethical problem. I can listen to the students as they try to tease out the ethical issues, and I can tell them how I resolved the problems myself. In this story, my spur-of-the-moment research in practice substitutes for a piece of written research.

There are many times when research, whether undertaken as an academic or as a practitioner, yields a story that can be helpful in teaching. Research on teaching confirms that ‘[m]any people learn better and faster, and retain information longer, when they are taught concepts in context.’ To make the most of my story-telling in class, I look through the class outline and try to pinpoint the particularly difficult or conceptually challenging aspects of the material. When I identify a difficult concept, I think through my years of research and practice to pick out an event that will clarify or problematise the subject. I might decide to tell a story in class, or I might ask questions that will prompt students to volunteer a story. In this way, I have had classes in which I talked about the fact investigation I did before negotiating a settlement, and students have volunteered stories about their own experiences with banks, businesses, police or prisons.

In general, the content of the story is unimportant. What is important is that the stories give the law context and make the students realise that the material in the

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28 I could not leave the underwear in my office (obstruction of justice) or give it to the prosecutor (client confidentiality). After consulting with an ethics expert, I borrowed a set of kitchen tongs and used them to put the underwear in a paper bag, which I left in the hallway near a court officer. I assumed the bag would be found and delivered to the prosecutor’s office because my office was in the same building as that of the prosecutor. I do not know if the bag was ever identified as evidence of a crime because the next week the client pled guilty to the rape charge. The undies were not mentioned at the plea hearing.

text is not a meaningless abstraction. I often learn from students’ comments and stories. Stories provide a basis for connection between us. Student questions may open my mind to a different perspective on a legal issue. Their troubles with the outcome remind me that law is imperfect and constantly needs revision. Occasionally, a student will have heard of a proposed reform and argue that it should be enacted. Connecting and interacting with students helps me keep a fresh perspective on the law. More importantly, the course, the text and the stories together articulate the law’s powerful effect on real people.

B Updates

The law is constantly changing. For me, updating my notes to teach a class can be a form of research.\(^{30}\) Often I have become so engaged with the detailed issues of a recent article that I have missed a development that may be quite basic. Thus, updating my notes can help me keep up with new legal developments and design activities. When I revisit a topic as a learner, I remember what was hard to understand. I also see the position of the law in its theoretical perspective. Updating my knowledge makes me approach and teach it differently. After approaching a subject as a learner, I can teach with a fresh eye and point out the most obvious potholes that the expert in me would have driven around without a thought.

A content novice is also more likely than a content expert to relate difficult concepts to everyday, common knowledge — to something the student already knows — simply because the [content novice] doesn’t have a vault of specialized knowledge on the topic from which to draw.\(^{31}\)

Reviewing and updating my knowledge of the most basic topics prompts me to explore the way I explain them. When I can explicitly state the reasons for a certain rule, my own coherence and communication skills improve. This improvement in my oral communication has a positive impact on my ability to communicate in writing.\(^{32}\)

Every year that I teach evidence or civil procedure, there are new rule provisions that I need to learn and teach. As I update, I review the former provisions and focus on the reason for the change. I refresh my understanding of the theoretical basis for the law. Preparing to describe new rules to the class requires me to break the rules down into their simplest parts. Describing the new provisions and the reasons for them opens the floor to student discussion of the changes and the need for other changes. In this way, students begin to appreciate the fluidity of the law. They start to see the basis for law reform and social change. They begin to think critically about the law.

\(^{30}\) Updating teaching material through research is often cited as one of the core benefits of having researchers engaged in teaching: see, eg, Krause, Arkoudis and Green, above n 9, 5.

\(^{31}\) Huston, above n 26, 51.

\(^{32}\) Krause, Arkoudis and Green, above n 9, 5.
My annual updates for teaching also keep me abreast of the recent changes in the law. Sometimes, the updating process will spark a research question for a paper. Other times, reviewing the rules gives me more confidence to teach them. The update reminds me of the problems that remain unaddressed. It may also bring new articles or books to my attention. My updating is complete when I can design an assignment that will require the students to read and discuss a recently published academic article.

C Research Assignments

Updating my knowledge of the law’s basic provisions also allows me to design assignment activities that involve the students in research. As I update my knowledge of Australia’s immigration laws, for example, I am inclined to formulate a small-scale research task for students. I will ask students to choose from a list of imaginary clients with imaginary occupational skills and an imaginary family. I might then ask the students to outline the procedures that the clients would have to complete to emigrate from their home countries and settle in Australia. When my students are engaged in research assignments like this, my own research may be advanced while the students’ research skills are honed. A student might email me or ask me after class what could be done if the client from Malaysia had a chronic medical condition and a spouse in Australia. Such a question could require new research on my part to discover an answer.

Even first year law students can be challenged with a research assignment. At the end of a criminal law class, for example, I might ask for four volunteers to make up and present the closing arguments for the case in the next class’s assigned reading. In the next class, I will set up the room like a court and seat six students as members of the jury. Following the student-delivered closing arguments, the mock jury spends a few minutes deliberating in the open classroom, attempting to reach a verdict. The deliberation discussion can often be surprising to me and to the class. The exercise not only involves a number of students in active research and argument, but it also brings the entire class into the jury deliberation room. The discussion following the close of jury deliberations engages the class and enlightens the presenting students about which of their arguments were persuasive.

Of course, the entire class can be assigned a research project that does not include library research. I might, for example, instruct students to attend and summarise a court hearing, or I might assign them to interview a lawyer about their practice. If I assign an interview, I will present a short model interview in front of the class. My sample interview not only gives the students a real-life scenario to learn

34 Ibid.
from, but it also provides guidance for handling difficult moments in an interview conversation.

D Theory and Practice

Being research-active allows us to infuse the course with our values as researchers, including the importance of curiosity, of creativity, of objectivity and of 'openness to the new, the unlikely, the unpredictable, [and] even the unwelcome'. When I teach something from my research, I have to hold myself back. My critical judgment, respect for evidence and willingness to admit uncertainty must be apparent in my teaching that involves my research.

Because we are engaged in research, we are aware of the most recent controversies in law. We can use that knowledge to construct hypothetical problems for the students to resolve — either in a tutorial or on a test. I often use a research-based situation to design a hypothetical fact scenario. I may assign the students to role-play. In a tutorial session, I might ask some of the students to assume a role and to participate in a settlement discussion or hearing. When they role-play, they see the law and the proceedings from the perspective of the assigned role. The role-shift may allow them to engage in some creative or critical thinking that they might have avoided if they were being themselves. Often simulation sessions result in students learning skills and attitudes that will assist them when they graduate from law school and begin to practice. Students who do not assume roles in these classes can be asked to take notes and critique. This allows for the discussion of a hypothetical problem from a variety of viewpoints. It always surprises me which details are important to students.

In sum, using research in teaching gives us a chance to gather new information, reinforce and demonstrate our expertise in a field, improve our ability to communicate, and update our research. It also prompts students to do their own research and gather new ideas. As teachers, we need research stories to contextualise the material and give it a recognisable relevance. We also need research to help us keep up with developments, update material and design activities. In-class discussion of research helps us infuse values and enthusiasm and demonstrate expertise. Using our own research allows us to both teach what we know and teach as a novice.

V Conclusion

Teaching and doing research simultaneously can be very confusing. You may feel like you will get mixed up along the way. But in his book, Oh, the Places You'll Go!, Dr Seuss reassures us:

35 Baldwin, above n 11, 9.
You have brains in your head. You have feet in your shoes.
You can steer yourself any direction you choose.
You're on your own. And you know what you know.
And YOU are the guy who'll decide where to go.
You'll look up and down streets. Look 'em over with care.
About some you will say, “I don't choose to go there.”
With your head full of brains and your shoes full of feet,
you're too smart to go down any not-so-good street.\(^{37}\)

As we choose where to go, we will facilitate minds, listen to questions, engage thinking, support struggles, cultivate dreams, encourage risk and learn. As it turns out, research is an excellent partner in collaborating on each of these teaching tasks. Research provides examples and stories to contextualise material. It helps us keep up with developments and design activities and materials. Research allows us to infuse our classes with our values and motivations. Using our research in teaching gives us a chance to demonstrate and practice our expertise and gather new ideas. Teaching benefits research, providing collaborators, fresh perspective, evaluation and new areas in which to apply our expertise. As our good luck would have it, we need not walk our learning journeys alone. We can bring our students along for the adventure. Both teaching and research can prosper in a friendly, mutual proximity.

BRIDGING THE DIVIDES: AN INTERDISCIPLINARY PERSPECTIVE ON THE TEACHING-RESEARCH NEXUS AND COMMUNITY ENGAGEMENT

Abstract

This paper examines the application of ‘design thinking’ principles to the teaching-research nexus, and argues for extending this nexus to community engagement, in the context of an ongoing interdisciplinary research project. The research is investigating young people and civic engagement, and is an ideal site for building a positive and reciprocal relationship between teaching, research and community engagement. These relationships are not axiomatic but must be nurtured with commitment and strategically managed. Drawing on teaching experiences in sociology and law, and reflecting on a co-design methodology developed for investigating youth citizenship, we conclude that ‘design thinking’ principles can be applied more broadly to strengthen the teaching-research nexus. Finally, we argue that universities must develop and implement genuine community engagement to remain relevant in the contemporary world.

Introduction

It is well recognised that research tends to be favoured over teaching at many universities. From the prestige associated with major research grants to promotion criteria, the status of research is placed above that of both teaching

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** Session academic, UWS School of Law and research officer, UWS Institute for Culture and Society. The authors would like to extend their profound thanks to Anne Hewitt for her patience and valuable insights. All views and any errors are ours alone. The citizenship research discussed in this article was made possible by the funding of the Australian Research Council (Discovery Project DP120104607) and the Office of Learning and Teaching (Prime Minister’s University Teacher of the Year Award, 2012).

and community engagement. This is not a new phenomenon. In their edited volume on the role of universities and community engagement from mediaeval times to the present day, Peter Cunningham, Susan Oosthuizen and Richard Taylor show that universities have always had such priorities.\(^2\) In the collection, David Watson notes the long history of ‘binary systems of higher education’, which see a ‘division as largely constructed around the separate realms of research and teaching’.\(^3\) Watson quotes Yves Mény, President of the European University Institute on the French experience:

> Where the Napoleonic model was imposed in a radical way, the fundamental division was not so much between teaching and research but between the university system on the one hand and the professional schools in charge of educating and training the future civil servants of the State.\(^4\)

These binaries, teaching-research and scholar-practitioner, are recognisable to anyone involved in higher education today, including or perhaps especially in law, where the movement between practice and academia is a more ‘high traffic area’ than in most disciplines. In Australia, recent discussions have been largely focused on the national standardisation of the core curriculum,\(^5\) but Napoleon’s university-profession binary has long been of interest in the USA and elsewhere.\(^6\) In this article, we argue from a socio-legal perspective that the further split between teaching and research is reductionist and risks the production of graduates who lack a comprehensive understanding of the system as a whole, whether law or society. Two strategies to strengthen the teaching-research nexus are presented in this article: the application of ‘design thinking’ principles and the strengthening of genuine community engagement. Design thinking offers a range of strategic and practical approaches to creativity and innovation, including an understanding of stages of thinking and reflection; an evaluation of the dynamics of team work; the workings of conversation and dialogue to generate new thinking about complex problems. Community engagement has long carried a multitude of meanings. Here we start by noting that authentic community engagement is not merely a ‘consultative process’ initiated by the state, is not a top-down strategy and includes both initiative and response. An engaged university is simultaneously engaged in the communities of students,


\(^3\) David Watson, ‘Foundations, Funding and Forgetfulness: Reflections on the Pattern of University Histories’ in Cunningham, Oosthuizen and Taylor, above n 2, 11.

\(^4\) Ibid.


its geographic location, research, teaching, and its international groups and institutions. Together, design thinking and community engagement strategies are essential to the relevance of contemporary universities when confronted with massive online and other private sector competition.

II UNIVERSITY CULTURE AND THE TEACHING-RESEARCH NEXUS

Those appointed to ‘teaching only’ positions, even those with distinguished practice experience, are considered to be in an inferior situation to research-teaching and research-only appointments. Marina Nehme finds that ‘within many universities there is a culture that values and rewards research at the expense of teaching.’ From emerging academics to professors approaching retirement, research positions are perceived as the ideal. Research-only appointments provide the opportunity for scholars to establish their careers without the ‘distractions’ that come from undergraduate subject coordination, teaching and marking. These distractions grow exponentially in parallel with participation programs, in Australia and elsewhere, that have seen the massification of tertiary education. Entire student cohorts that historically would have been excluded from tertiary education are now attending university. Our own institution, the University of Western Sydney, is not only comprised of many such cohorts, but was specifically formed for the purpose of delivering local tertiary education to the population of Greater Western Sydney, which, traditionally, is the lower socioeconomic region of our wealthy global city. This student demography can place greater demands on teaching time and further limit capacity for peer-recognised research.

Most debates around these issues presuppose that teaching and research are at best competing for academics’ time and expertise and are at worst mutually exclusive. Yet this establishes a false binary between teaching and research. While everyone’s time is scarce, a rigid divide between the two activities is unhelpful and ignores the continuous nature of both roles. Good teachers are constantly observing, analysing and testing their conclusions about assessments, class activities or student-teacher communication. It is a sometimes lamented but widespread truism that most

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8 Margaret Thornton, Privatising the Public University: The Case of Law (Routledge, 2012).
academics are seeking the next research project or grant opportunity between class preparation and marking tasks.

A false teacher-researcher binary also overlooks the third, essential role of scholars and tertiary institutions: community engagement. Universities are situated in a range of communities across a vast scale, from the geographical location of the buildings to virtual and global groupings of scholars, practitioners and activists. Yet Cunningham, Oosthuizen and Taylor, Nehme and Watson (among others) demonstrate that research, teaching and engagement can be managed to reinforce each other, to make better teachers and researchers who are more actively engaged with the various communities to which universities belong.12

To answer the question how does one bridge the teaching-research divide?, it is also necessary to ask what is the role of universities in the contemporary world? and include community engagement as a core function alongside teaching and research.13 In many disciplines, and particularly in law, there is frequent movement between the universities and the professions through student placements, careers fairs, pro bono work, and reference to scholarly texts in judgments and other real world contexts. This rich conduit of knowledge transfer between the academy and society is generally only applied sporadically and by individuals, rather than at an institutional level or in a strategic way.14 A university that is genuinely engaged with the communities in which it operates will harness the experiences of scholars, practitioners and students to strengthen teaching and research outcomes. Adding community engagement to the teaching-research nexus is essential for another reason: to maintain relevance in these times of increasing competition, such as from Massive Open Online Courses (‘MOOCs’) and other private sector providers. Below, we outline some of the strategies we have tested in an effort to see the teaching-research-engagement nexus strengthened. First, we outline what design thinking principles offer in our respective disciplines of sociology and law and reflect on whether these approaches can be applied more broadly.15

12 Cunningham, Oosthuizen and Taylor, above n 2; Nehme, above n 7; Watson, above n 3.
14 It is more common to see discussion of knowledge transfer from the academy to industry, however, knowledge transfer generally is gaining more attention. See the European Commission guidelines: Improving Knowledge Transfer between Research Institutions and Industries Across Europe (Office for Official Publications of the European Communities, 2007); and the ‘Innovation Through Knowledge Transfer’ Special Edition: (2012) 5 Innovation Impact 1.
III AN INTERDISCIPLINARY FRAMEWORK

The research project team developing the co-design methodology reported here is comprised of five people who teach or have taught across the humanities, sociology and cultural studies, design, international relations and law.\(^\text{16}\) Social justice is a shared and guiding ethos. The central aim is to identify ‘threshold moments’, when a person sees the world anew and starts making more active decisions about themselves and others. The analysis centres on the ethnography of a workshop program and has expanded to include the co-design methodology, where both content and delivery are designed in partnership with youth agency staff and representative young people.\(^\text{17}\) Because we are teaching and learning ‘active citizenship’, we do not want to roll out workshops on democracy that are undemocratic in nature. Active citizenship goes beyond ‘the two Vs’, voting and volunteering. The ‘surplus model’, also recognised in ‘content co-creation’ practices, where teachers and students embark together on a teaching and learning journey, is being tested beyond the lecture hall, in a community engagement setting. Like most academics, we are simultaneously reflecting on the relationships between practices — teaching, research, and community engagement.

Commencing with sociology, it is well known that there is a band of traditional topics that have always been taught: class, gender, power, race and the nation. But unless Margaret Thatcher’s philosophy that ‘there is no such thing as society’\(^\text{18}\) is adopted, the traditional approach tends to deprioritise the complex bonds that create societies, between and beyond the individual. This does not mean that the individual does not matter. Rather, it means we must understand the big issues — class, gender, race — in terms of relationships between each other and how each relates to individuals, including our students.

Similarly, there is little time or space in a law degree for developing a thorough understanding of the relationship between subject areas, and thus the various divisions of the legal system. Yet all lawyers must be aware of the messy reality, where clients do not demarcate which of their problems is a matter for contract law, or the criminal court, or best resolved by an equitable remedy. That being the lawyer’s job, our students will enter the profession much better prepared if we frame our teaching with principles that promote critical understanding of the relationships between these different areas.

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\(^\text{16}\) The members of the team are James Arvanitakis, Mitra Gusheh, Anna Powell, Bob Hodge and Ingrid Matthews.

\(^\text{17}\) These decisions range from the general to the specific and from the seemingly trivial to the obviously serious. We might cover an immediate problem, such as young people’s use of public space and police move-on powers, or changing the world, such as global hunger and climate change. The workshops may be outdoors, over two days or one, or in school holidays.

\(^\text{18}\) Douglas Keay, Interview with Margaret Thatcher (IPC Media Woman’s Own Interview, 31 October 1987).
There are questions of resources here, but it is essential to move beyond funding, which is unlikely to be expanded in the near future. Instead, it is essential to think creatively about teaching to ever-increasing class sizes and address the limitations of some traditional teaching practices. These include the vertical, or broadcast model and reductionism, where disciplines are broken down into basic fragments and each degree, and in turn each subject, is essentially taught as the sum of its parts. In the vertical model, where the ‘teacher is the broadcaster’, communication is one-way and linear. The lecturer sits up the top and passes information downwards to the students. The MOOCs sector is already going the same way: ‘the movement to MOOCs reinforces a mode of learning that otherwise was coming to seem dated, with one authoritative figure lecturing to large groups of passive learners.’

There is no room for genuine engagement in such models.

One example of resisting reductionism is the topic ‘the individual, class and class relations’, which can be found in first year sociology lectures. Rather than setting many pages of theoretical text to be read each week, the material was reframed under the heading what limits our life choices? This draws on the class relations literature, and invites students to bring their personal experiences to the lecture hall and to online discussion. Their observations in turn provide insights and deliberations that may enhance, de-stabilise or confirm research findings in the youth citizenship project. An earlier output of the citizenship research was a series of exercises designed to lead students to identify issues that can expand their life choices, such that they can ‘make a difference’. The classroom responses encourage reflection on the relevance of these empowerment exercises, represent a measure against which to locate our cultural referents (climate change, 9/11, the Arab Spring, refugees) and potentially identify new areas to pursue. Research and teaching are in dialogue around an enduring question of contemporary society: what do young people think?

While not every research area overlaps with teaching as neatly as class, youth and citizenship, it is a truism that all students are subject to the rule of law. In this context, instead of introducing law with theoretical readings on what is law?, first year students can be invited to share their experiences or knowledge of law. Nehme finds that a student-centred approach to teaching facilitates integration of teaching and research. She cites Patrick Terenzini, who noted, ‘learning occurs best when it

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19 Don Tapscott and Anthony Williams, Macrowikinomics: Rebooting Business and the World (Portfolio Hardcover, 2010) 2.
21 ‘Promoting Young People’s Citizenship in a Complex World’ is a three year ARC Discovery project headed by James Arvanitakis with Professor Bob Hodge. Ingrid Matthews is the project research officer. See James Arvanitakis and Bob Hodge, Promoting Young People’s Citizenship in a Complex World, University of Western Sydney <http://www.uws.edu.au/ics/research/projects/young_peoples_citizenship>.
22 Nehme, above n 7, 266.
is “situated”, when the challenge encountered has real meaning in a real context’. The great question for jurisprudence scholars and first-year law students alike, what is law?, attracts a wide array of responses, from speeding fines to school excursions to court. These answers represent rich data on which the lecturer can reflect and then consider how best to make the readings relevant and applicable to students’ own varied experiences and levels of insight. Some students have been witnesses, a few have been defendants, and most have a view on the process of obtaining a driver’s licence. Even television shows are not off the agenda. Whether they watch Crownies, Rake, CSI or Law and Order, examples from these shows are most likely to illustrate a legal concept in a way that will be better understood and remembered. This exercise is also an entry point to observing the similarities and differences between real-life and television courts and police stations. Furthermore, this process facilitates reasoning by analogy.

These approaches combine the surplus model with co-design principles. The deficit model assumes that students are ‘empty vessels’, waiting to be filled with knowledge. In contrast, the surplus model recognises that students are in fact experienced individuals with ideas, perceptions and opinions of the world and the subject area they have chosen to study. Using the surplus model includes drawing on the experiences and views of students to co-develop course content, a process that is consistent with co-design principles.

Partly in response to fragmentation and specialisation, inter-disciplinarity (and its variants, multi-, cross-, and trans-disciplinarity) has emerged in research culture over the past two decades or so. Alongside developments in systems analysis and complexity theory, this underscores the importance of understanding whole systems and not merely individual components, regardless of the discipline.

Tim Brown’s discussion of Thomas Edison’s signature invention, the electric light bulb, illustrates the relationship between individual ‘design’ and systems thinking. Brown writes: ‘Edison understood that the bulb was little more than a parlour trick without a system of electric power generation and transmission to make it truly

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23 Patrick Terenzini, ‘Research and Practice in Undergraduate Education: And Never the Twain Shall Meet’ (1999) 38 Higher Education 33, 35.
24 Anecdotally, more students tune into American forensic shows than Australian lawyer shows.
useful'.\textsuperscript{30} Edison’s brilliance was that he did not simply see a light bulb as a discrete device, but saw it in the context of restructuring the way people lived and how the economy ran. Ultimately, Edison reconsidered and reframed the purpose of a single product by consideration of how users’ needs and preferences would develop.\textsuperscript{31}

Investigating and implementing the ‘full spectrum of innovation activities’ from a human-centred ethos epitomises design thinking.\textsuperscript{32} It requires a deep understanding of the needs of people in order to resolve problems and to innovate.\textsuperscript{33} Another example where design thinking informs sociology and law comes from a research project based with the University of Technology Sydney (UTS). The ‘Designing Out Crime’ project\textsuperscript{34} is investigating the high level of violence that occurs in Sydney’s Kings Cross.\textsuperscript{35} The linear approach of the New South Wales government to confronting this challenge is to increase security and police numbers, place a freeze on the number of entertainment venues and lock out patrons.\textsuperscript{36} Yet those familiar with ‘lock ’em up’ culture and ‘law and order auctions’ know that these responses are not evidence-based. Most amount to little more than political posturing (and opportunities for earning overtime),\textsuperscript{37} while a heavier police and security presence can in fact inflame tensions and violence.\textsuperscript{38}

Design thinking identifies and demonstrates that security-oriented solutions are counter-productive. A design thinking-based analysis produced alternative, including counter-intuitive, strategies. In the UTS study, analysis of the number of patrons and the reasons people go to Kings Cross revealed that each and every Friday and Saturday night should be considered an ‘event’. While security plays its role, Kings Cross patrons are not best managed by being primarily treated as a security ‘problem’. Rather, Friday and Saturday nights in ‘the Cross’ are an event management challenge. The movement of large numbers of people through venues across the district is akin to hosting the Olympics or the football finals. The key is well-resourced and efficient management of transport, safety, hydration, waste and

\textsuperscript{30} Ibid.
\textsuperscript{31} Paton and Dorst, above n 15.
\textsuperscript{32} Brown, above n 29.
\textsuperscript{33} Tromp and Hekkert, above n 13.
\textsuperscript{36} Ibid.
\textsuperscript{37} Nicholas Cowdery, Getting Justice Wrong: Myths, the Media and Crime (Allen and Unwin, 2001).
catering. The results point to measures such as increasing the number and variety of venues and live music sites and introducing late night markets and ‘recovery’ tents. In contrast, limiting the number of venues distorts the market and protects operators who badly manage their outlets.39

How do these examples relate to the teaching-research-engagement nexus? The principles of design thinking set out below assist us to move on from simply delivering ‘individual components of knowledge’ to promoting scholarship in its richest sense. In her review of the teaching-research literature, Nehme points to the ‘conventional wisdom’ model, in which academics assume that research and teaching ‘are mutually enriching: efficient teachers are active researchers who use their research to enliven the classroom’.40 This would be ideal, but a positive correlation between teaching and research is not axiomatic and is certainly not automatic.41 To ensure that the relationship is mutually beneficial, active agency by individuals and groups and strategic planning and resourcing by institutions are all required.

While individual academics are continually addressing specific challenges, cultural change towards better ‘valuing the scholarship of teaching’42 is a central strategy here. Nehme cites the ‘approaches to the scholarship of teaching’ offered by Trigwell et al, including ‘investigating the learning of one’s own students and one’s own teaching’ and ‘collecting and communicating results of one’s own work on teaching and learning within the discipline’.43 We go further by emphasising the importance of communicating results beyond as well as within disciplines and beyond as well as within universities.

Before proceeding, we emphasise that design thinking is no silver bullet, nor is it formulaic, or necessarily transferable to every discipline. As with the common law itself, we rely on general principles, to be applied to seemingly new or unique circumstances and problems, to strengthen the teaching-research nexus and to overcome false binaries.44

**IV Principles of Design Thinking**

The general principles outlined here draw primarily on the work of Julian Jenkins45 and Kees Dorst,46 and are illustrated by experiences from lectures and tutorials in

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39 The Designing Out Crime Research Centre, above n 34.
40 Nehme, above n 7, 251.
41 Ibid 261–71.
42 Ibid 267.
44 Tromp and Hekkert, above n 13.
45 Jenkins, above n 13.
sociology and law. We apply the principles under another broad question: what are we aiming to achieve?

Jenkins stresses that the first major challenge any individual or organisation faces is to convince colleagues that a new approach is required.\(^\text{47}\) Radical changes to teaching are likely to be criticised by colleagues who see the path to delivering a subject today as no different from the path in 1970, despite the social, cultural, demographic, political and technological changes.\(^\text{48}\) It is therefore essential to gain the support of some senior colleagues.\(^\text{49}\) Some methods may be considered controversial and all are open to criticism, for this is an essential component of peer-reviewed research processes.\(^\text{50}\) To confront controversy, criticism and risk-averse environments, it is crucial to build a strong case for change that at least some senior colleagues can support. This also goes to ensuring that the exact goals have been clearly articulated and that innovative methodologies meet professional and ethical guidelines.\(^\text{51}\) Transparency here also promotes compliance with oversight from external bodies that monitor quality and content. The excitement of innovation can often distract from formal approvals, load allocation and other administrative requirements. Building support structures and networks of practice provide checks and balances on whether the innovations meet institutional policies and other rules.

The second area to reflect on and recalibrate is the learning outcomes, including the role of students in achieving these.\(^\text{52}\) If we insist on the lecturer as broadcaster, it follows that the only role for students is to be ‘empty vessels’.\(^\text{53}\) However, if we redefine students as active agents who, as Paulo Freire argued, have important experiences that the teacher should recognise and incorporate into teaching and learning practices,\(^\text{54}\) then the way we approach teaching changes dramatically. Individual and collective student experiences inform teaching methods and content.

This ‘non-empty vessel’ approach has been tested in conjunction with application of principles of design thinking in a first year sociology subject.\(^\text{55}\) "Contemporary

\(^\text{47}\) Jenkins, above n 13, 2.


\(^\text{49}\) Jenkins, above n 13.

\(^\text{50}\) Arvanitakis and Hodge, above n 21.

\(^\text{51}\) It may also be appropriate to seek ethics guidance where teaching experiences become research inputs, such as comparative guidelines for research results.

\(^\text{52}\) Dorst, above n 46.


\(^\text{54}\) Ibid 209.

Society’ introduces students to basic sociological concepts: class, power, gender, race, technology and globalisation. It is a core unit for humanities and liberal arts students, many of whom are wondering how Marx, for example, is relevant to their lived experience. As one student said, ‘I am over learning about old, dead white guys who lived 100 years ago.’

The learning outcomes of the subject would be familiar to anyone in the liberal arts:

• analyse social structures and the cultural practices and discourses that mediate them;

• learn to apply general methods of analysis and key concepts to specific real-life problems and issues;

• critically analyse academic and popular texts that interpret social realities;

• develop and expound an argument in written form and apply referencing conventions; and

• conduct research and demonstrate skills of social analysis.

Along with many colleagues, we have spent agonising hours trying to ensure that learning outcomes are clear to students and meet institutional and sector-wide graduate attribute requirements. Though it is an essential academic discipline to list these outcomes in a clear and concise way, it is also important to ask what are we aiming to achieve? This open-ended question is designed for maximum input and flexibility; no response is prematurely positioned (skewed, dominant) or ignored. The question also demands a series of specific, meaningful answers if it is to be answered at all. By reframing the learning outcomes into a synthesised understanding of what we are trying to achieve, we reconceptualise teaching and learning as a participatory, shared process. A parallel aim here — and it must operate in parallel — is to develop student-teacher engagement across all the content, with an emphasis on continuity and links between the constituent parts of the course. Without specific strategies that promote continuity and connection, the standard weekly reading model is inherently fragmented and linear.

Drawing on citizenship research and reflecting on the subject goals, the learning outcomes for students were reframed as follows:

• promote a sense of active and engaged citizenship; and

• introduce students to academic research and writing disciplines.

The new aim was to see how students’ lived experience could be actively deployed as an input to the teaching and learning process and applied to different theoretical areas. Students become more active participants in the learning process and in a follow-up exercise are encouraged to discuss how they use the new knowledge in their own lives. This exercise asks: what has changed for you, if anything, in
acquiring this knowledge? and how relevant is this knowledge for navigating contemporary society, in our case, a multicultural Australia?

This led to identification of ‘everyday acts of citizenship’ as conduits to the empowerment and engagement of young citizens. For example, one student, after discussing the issue of race and racism in class, instigated a proposal to introduce multicultural days at her children’s pre-school to break down misconceptions and stereotypes. This powerful act of citizenship is well beyond the traditional civic measures of volunteering and voting and is clearly an example of navigating multicultural Australia. Her story became one of many referents for the citizenship research project, reinforcing the nexus between teaching and research and the value of student-focused content and delivery.

Shifting the focus from class and class structures to what can limit life choices opened a wider communication channel, allowing ‘thicker’ (at least two-way) exchanges. The classroom content is co-created by students, which in turn provides invaluable insight to empowerment and human agency. In terms of our youth citizenship research, students’ stories and experiences can provide some measure for checking the accuracy and relevance of results. We are far less likely to draw misguided conclusions or miss a looming barrier to a student’s participation when we are in regular communication with the students we see every week.

Jenkins’ third principle is to be a ‘systems thinker’. To establish this position, he discusses the reductionist history of the sciences and argues that while individual parts are important, the relationship between components as well as the overall system must be understood. So a complex system such as climate, for example, cannot be explained by its individual parts or by the individual impacts of human activity. We must understand both cumulative and compound effects. Systems thinking is amenable to wide adaption, whether applied to transport planning, climate science or statutory interpretation.

Many first year law students struggle with seemingly contradictory concepts. A classic example is: every statute must be read as a whole, while every word must be assumed to carry meaning. Yet in law and in life, we must negotiate contradictory instructions. One approach is to expect students to absorb this essential piece of understanding over the course of their degrees. Another is to embed salient examples and techniques in introductory classes. Many introductory legal concepts lend themselves to explanation in terms of lived experience, not least those concepts that have made their way into the vernacular. ‘Finders, keepers’ is perfectly illustrated by *Armory v Delamirie*, while ‘the exception that proves the rule’ illustrates

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56 See Arvanitakis and Hodge, above n 21.
57 Bob Hodge and Ingrid Matthews, ‘New Media for Old Bottles: Linear Thinking and the 2010 Australian Election’ (2011) 44(2) *Communication, Politics & Culture* 95.
58 Jenkins, above n 13, 20.
59 Ibid.
60 (1722) 1*Strange* 505; 93 ER 664.
all manner of challenges in legal reasoning. The principle of charity, the precautionary principle and the criminal standard of proof are all associated with the broad concept of who gets ‘the benefit of the doubt’, which in turn can be illustrated by cricketing allegory. This may sound frivolous, but cricket and the common law are in many ways peculiarly English: understanding the principles of one complements an understanding of the other. ‘It’s just not cricket’ epitomises the ‘spirit of the law’ and few law schools would advocate for confining the curriculum to black letter law.

Design thinking builds the capacity to identify and comprehend relationships between branches of a subject, a crucial skill in legal practice. By unpacking everyday sayings for their roots in legal concepts, a broader picture of the overall system emerges. This approach relies on what Vygotsky has conceptualised as the ‘zone of proximal development’, which ‘bridges the gap between the existing knowledge of a person and the discovery of new knowledge’. It further complements the ‘process of facilitating students’ construction of knowledge’ another of the strategies identified by Nehme as actively ‘creating a positive nexus between teaching and research’.

The systems principle of design thinking assists with reconciling seemingly inconsistent or overlapping content by reframing the teaching experience to include students as part of the whole. Again, what appears at first frivolous — do you like Law and Order? Have you seen Twelve Good Men? — elicit information that can operate as entry points for delivering content on theory and practice. The relationship between the police and the prosecution (and defence), the role of citizen-jurors, our duty to clients and the court, ultimately the rule of law itself, can be linked by connecting, comparing and distinguishing popular depictions of law with course content. A useful reflection here for future lawyers is that many of their clients will also know little about the law proper, but would have been exposed to multiple fictional versions of it. Conversely, in Legal Aid practice particularly, clients will know a great deal about legal processes and outcomes, in contrast to the young lawyer. Students with a working understanding of the surplus model are better equipped to recognise client experiences and how such experiences of the law influence client stories, fears and decisions.

A typical topic ripe for the ‘systems’ approach is the role of juries. This lecture might begin with Henry VIII and work through to the 21st century, by which time many students will be on Facebook, or have stopped taking notes, or be asleep. An alternative is to deliver a brief, functional overview, set five minutes to look up the words ‘majority’ and ‘unanimous’ (by any means available, whether it be phones, laptops, the person sitting next to them, text or dictionary) and ask: should we allow majority verdicts? What about for murder? The answers provide an overview of the students

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62 Nehme, above n 7, 266.

63 Ibid 267.

64 Ibid 261.
in the room — the compassionate, the cautious, the risk takers — and introduce content that will be delivered later in the semester: presumption of innocence, beyond reasonable doubt, evidence and proof, tribunal of fact, fact and law.

Student input also improves continuity for both teacher and learner. Rather than focus on each individual week’s reading in delivering a subject, systems thinking embraces the entire narrative of the subject. By reinforcing the big picture as well as the relationships between each week’s topic, students can build memory pathways for retaining the material and add richer meaning as each new pathway is forged or relationship understood.

Fourthly, Jenkins and Dorst describe the critical role of ‘human interactions and social processes’. In the juries example, when the associated concepts come to be addressed in more detail, students’ memories can be triggered: remember when we discussed majority verdicts and some people said this and others thought that? Their classmates are in many ways more real to them than we are, and either way, the content is reinforced by genuine human exchange, something that prompts most humans to retain at least part of what has been said. In their clinical study on ‘conversational memory’, Laura Stafford, Vincent Waldron and Linda Infield found that ‘participants reported more thematic and evaluative statements while observers produced more errors and elaborations’. The latter are clearly two characteristics we seek to avoid, whether in exams, research or court.

It is imperative that as academics we take into account the human-centred aspect of our work. That is, we are not simply delivering content, but building a citizen/student body able to confront some of the world’s most difficult and complex problems, be it in ethics, the humanities, sciences or engineering. We must be preparing students for even those challenges we are not yet aware exist. In the 1970s, few engineers would have learnt of climate change resilient systems, or law students imagined the complex legal battles over patenting human genes or suicide pacts formulated via social media. What is important here is not so much the specific content but the human interactions required to understand, define and confront new challenges.

One of the highest profile new challenges at our university (for lecturers, students and perhaps most of all for the technical staff) was the decision to provide all first year students with an iPad. Due to universal distribution of the device, we were able to side-step many of the access problems associated with the digital distribution of lecture materials. It also opens up opportunities for more interactive teaching methods, such as class exercises designed to interpret real life events in real time. The topics of race, racism, marginalisation and life chances, for example, were pursued by looking at the racial abuse of Sydney football star Adam Goodes by a member of the crowd and, subsequently, a high profile commentator. The words used, the player’s reaction, social media comment threads and mainstream coverage

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65 Dorst, above n 46; Jenkins, above n 13.
are all immediately available for critical thinking exercises. How do we respond to subtle racism? What is our obligation to the stranger as fellow citizen? How do we break cycles of abuse, marginalisation and exclusion? How do we perpetuate these issues? How do they limit our life chances? By raising these questions in the same week of the incident, we confirm that university study is not about ‘dead white men’ from the distant past but our contemporary lived experience.

In first year law, race and racism are usually introduced with regard to the impact of colonial law on Australia’s first peoples. Again, theory-based lectures are much less likely to engage students than approaching the topic via lived experiences in our multicultural society. In general terms, the same content is communicated, but the way it is communicated and shared with the students is radically different. Whether interrogating the many ways to negotiate the different dimensions of multicultural societies, or running a group mooting of Mabo,67 we discuss the complexities, consider how to avoid pitfalls of the past and seek to promote a sense of agency, in mainstream society and beyond. Some lecturers may decide to mark students on participation: either way, they are asked to give something of themselves during class, an important skill for future advocates and a motivator for the peer-sensitive majority.

Given the same tools, law lecturers can apply similar techniques for co-creation of content, for gaining greater insight into the student cohort and for subsequently forming further research questions, not just in pedagogical inquiry but on the operation of the law and public perceptions of its efficacy. One of the easiest exercises is to scan the day’s news. Sentencing or release of serious criminals is usually available and useful for some classes, while legislative reform, policy announcements or any other legal news affecting young people or students will serve others. A couple of key words later, the class warm-up exercise is ready. First, ask students to search for the story and any commentary or public reaction and read it. Second, ask themselves if they understand the legal reasoning or issues. Third, identify different legal categories and divisions (whether substantive/procedural, legislative/common law, or administrative, corporate, criminal and so on). Finally, invite comment on the differences between the legal and popular interpretations of the event. This simple exercise introduces students to the critical thinking that we demand of them in assessments and exposes them to more sophisticated research techniques, such as using media for critical discourse analysis. It can also be framed by emphasising that words are our tools and that argument rather than violence is the exact point of our enterprise. Finally, we are employing a surplus model in the sense of building on students’ existing strengths: news stories and comments pour through their social media accounts every day. The class exercise simply sharpens and resources the mind, putting an existing social practice to scholarly use.

The fifth and sixth principles we adopt from Jenkins are in some ways less classroom and more staff room, or at least are located at the intersection of innovative teaching and learning and the sometimes rigid nature of institutional systems. This space must be recognised and reconciled. Disciplinary standards must be maintained.68

67 Mabo v Queensland [No. 2] (1992) 175 CLR 1 (‘Mabo’).
68 Jenkins, above n 13, 21.
There must be nothing in the reframing of the subject and learning outcomes that compromises graduate attributes and other academic requirements.

Jenkins cautions that design thinking includes being prepared to confront (and kill) some ‘sacred cows’.\(^6^9\) One aspect is to comprehend that some traditions that define an area can also limit our capacity (and inspiration) to innovate. The obvious example for sociologists is the special place held by thinkers such as Marx and Hegel. While we may enjoy reading their work, the reality is that there is little room for Marx in the first year mind, or little that can be adapted, applied and made relevant among the multiple competing interests of a young person’s first year at university. As such, it is justifiable to remove the readings from the first year curriculum and mention them only in passing. Those students who are interested can pursue the heavier theoretical underpinnings once they have a working grasp of what the theory is trying to explain, and a strong grip on how theory relates to everyday life — theirs and others’.

Other sacred cows might include dialectical materialism, or the master/slave analogy, the Magna Carta, natural law and positivism or habeas corpus. None of these are discussed by young people in our citizenship research — and there is no pressing need for students to learn about them immediately and directly in first year. The key is the conceptual canvas and its relationship and relevance to students. This is how we understand the individual and the system, not by week after week of impenetrable, often foreign-sounding theory. Removing the theorists opens up teaching space to pursue questions around life choices and opportunities. These questions include who can access the law? Who most benefits from it? And if prisons are overwhelmingly populated by the poor, the homeless, the mentally ill or the illiterate, what does that tell us? This content in turn creates multiple entry points to theory and principle, whether Gibbons’ structure and agency, Marx’s materialism, parliamentary sovereignty or the ‘right’ to a fair trial. Some may suggest that this is a betrayal of academic discipline. We argue that this approach confirms the relevance of academic discipline in the contemporary world. When its conceptual framework and everyday relevance has been confirmed in the student mind, theoretical intricacies can be more successfully added in later years.

The final principle we adapt here is to be reflective, honest and to share experiences genuinely and generously.\(^7^0\) Just as there is no single way to pursue and apply design thinking, we are bound to make mistakes and errors as well as discoveries and innovations.\(^7^1\) Each step requires honest assessment, personal reflection and discussion around the processes, with colleagues and with students.

Opportunities to publish one’s insights and findings regarding one’s own teaching will not only mean that teaching is informed by research; it will also mean that teaching is ‘research at all levels’.\(^7^2\)

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\(^6^9\) Ibid.

\(^7^0\) Dorst, above n 46.

\(^7^1\) Tromp and Hekkert, above n 13.

\(^7^2\) Nehme, above n 7, 271.
When our approaches are not well received, we seek counsel to again reframe and re-innovate, to adapt and respond. Our citizenship research project aims to develop innovative ways to grow engagement and empowerment through the human agency of young people. As such, consultation and co-creation of content, with the staff of partner agencies, the academics, the youth leaders and their more marginalised peers, ensures that the practices promoted are actually followed. These discussions inform teaching and research together, just as good pedagogical research informs better quality teaching practices.

As noted above, these principles are drawn from various sources with the work of Julian Jenkins providing the foundation. There is no simple or linear way to apply them to different subjects, disciplines or contexts. Rather, the illustrations from two disciplines promote this ‘genuine sharing’ principle. The purpose is to invite review and critique, as well as to prompt reflection on why we teach, the relevance of our research, and the interaction between the two. Understanding the various ways that teaching and research interact promotes engagement with the student body and recognises students as a valuable and resourceful community. They are one of many communities with whom we engage, and this is where we turn in conclusion.

V TO ENGAGE

Cunningham, Oosthuizen and Taylor argue that universities must (re)establish connections with the various communities in which their teaching and research are located. Engagement is a neglected but important role of all universities. Community engagement is fundamental to the future existence of universities. The authors tell us that ‘relentless policy changes by successive governments’ have led universities to often take a ‘defensive stance that can emanate from an inward-looking and self-referential academic culture’. They argue that what we do has significant resonance beyond the classroom and should be promoted that way.

As mentioned, some areas of teaching and research engage with and reach out to communities more easily than others. Nonetheless, design thinking can provide insight into how our work always has an engagement aspect to it. Students discuss their experiences with friends and families outside the university. In these discussions, they are testing, applying, challenging and reflecting on their learning. Likewise, their friends and families sitting around the dinner table or at cafes are assessing the value of this knowledge and its relevance.

At this real-life roundtable, the value of higher education is being assessed. This is critical at the University of Western Sydney and in our student population, who

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73 Cunningham, Oosthuizen and Taylor, above n 2.
75 Cunningham, Oosthuizen and Taylor, above n 2, 1.
predominantly arrive directly from local high schools. Higher education is a way of promoting active citizenship among those sections of the population who have not, traditionally, considered university as a possibility or a life choice. This is repeatedly confirmed by new students who share that they have come to university because their children, friends or partners raised many of the issues discussed in class, through feedback from workshops with western Sydney high school students, including Aboriginal-only groups and institutional data and recruitment programs.

By ensuring that our research can be understood, we ensure that it has relevance in the classroom and beyond. One strategy to use with higher degree research students, for example, is to ask them to discuss their work as if the audience was educated to the age of sixteen. The Australasian three-minute thesis competition is based on a similar ethos. This does not ‘dumb down’ the content, but ensures it is accessible and jargon free: simplified language does not necessarily mean simplified knowledge. Using this approach increases the likelihood that the work we undertake can be seen as valuable and applied by various communities with which universities interact, whether for student recruitment, research partnerships or broad dissemination of knowledge.

Additionally, this accessibility goes to academics’ capacity to quickly enter public debates — the third dimension of community engagement. The value of higher education in the contemporary context, government funding of universities and relevance of various research outputs all are, and should be, open to public scrutiny and debate. That universities are accused of being ‘ivory towers’ and pursuing aesthetic research is nothing new. Sydney’s tabloid newspaper, The Daily Telegraph, often accuses the Australian Research Council of funding inward looking or irrelevant projects. In the recent federal election campaign, the then-shadow Treasurer generated a flood of headlines with the claim that the Australian Research Council ‘wastes taxpayers’ money’ by funding ‘futile’ investigations. In a time when budgetary constraints and austerity measures define the global economy, the relevance of universities as publicly funded institutions is regularly questioned.

76 Matthews, above n 10.


78 The three-minute thesis competition is an initiative of the University of Queensland, and has now gone global, with regional events in the United States, the United Kingdom, Canada, Fiji, Hong Kong and Vietnam. See, eg, Desley Blanch, ‘Three Minute Thesis Competition Goes Global’ (28 February 2012) ABC Radio Australia <http://www.radioaustralia.net.au/international/radio/onairhighlights/three-minute-thesis-competition-goes-global>.


80 Miranda Devine, ‘Price is Right’ (Opinion), The Daily Telegraph (Sydney), 18 April 2011, 21.

Regardless of the motivation of raising such questions, and given the rapidity with which the 24-hour news cycle can generate outrage and as quickly move on, usually leaving little more than a sense of distrust and betrayal in its wake, we must be able to succinctly articulate the relevance of what we are pursuing. This justifies our existence in a language that multiple and diverse audiences can hear.

The design principles discussed here have been actively applied in the citizen engagement research project, a work-in-progress. Fundamental to the concept of engagement is the reciprocated relationship established, in this case between teacher-researchers and community. Engagement must always be mutually beneficial. Just as we have discussed the need to draw on our students’ experiences in delivering content, engaging a community should begin by drawing on the experiences and knowledge of community members. Echoing the teaching example, engagement is about mutual learning as well as accessing case studies to enhance our research. How do we work together with the community to co-develop and operationalise an active research project?

It became quickly apparent that in seeking to identify ways to improve civic engagement among marginalised young people, the project was largely place-based. After much discussion with the partner agencies, two youth organisations in western Sydney, we recognised that the diversity of the research sites meant that the strategy might fail to meet its aims. One site is located in the inner west of Sydney, whereas the other is on the very outskirts of the city. Because the demographic, economic, social and cultural experiences of each community are radically different, we risked missing the fundamental challenges that each group confronts. The strategy we developed here is one of iterative improvement, or in design terms, ‘rapid proto-typing’. This involves meeting with partner agency staff with a skeleton outline and sample exercises that convey our overall ethos of co-development, and finding out from them what the urgent and important issues of the day are among their client group. The next step is to run a sample workshop with staff and some of the potential young leaders who use or have used their service and devise the rest of the content, which is then rolled out together with the project team, unless or until staff felt confident to run it in-house.

This reflects the teaching examples above. It involves each one of us coming together with the experiences and knowledge we have, to build from a starting point that

82 Arvanitakis and Hodge, above n 21.
84 The content of the program we are co-designing with youth agencies is based on an earlier series of workshops, run with high schools and members of university leadership programs (as opposed to marginalised young people), and distributed through a Creative Commons licence, reflecting our commitment to participatory, mutually beneficial dissemination of knowledge. See James Arvanitakis and Mitra Gusheh with Oxfam Australia, ‘From Sitting on the Couch to Changing the World’ (Creative Commons Australia, 2008).
recognises everyone as having a role in both teaching and learning. The process of sharing these practices across teaching and research, and writing up results from both the classroom and the research site, is recognised as an active strategy for strengthening the teaching-research nexus, which in turn is understood to be necessary. Academics cannot assume there is a positive or even any correlation between teaching and research (although many do), but rather must simultaneously undertake both and promote a healthy relationship between two sometimes competing, and not always complementary, activities. 85

While a lengthy description of the project is outside the scope of this paper, we present this brief example as drawing together both the application of design thinking principles in the classroom or lecture hall with a project that has the twin qualities of overlapping with and informing curriculum and practice. This overlap has created a space to test the teaching-research nexus using a particular iteration of the principles, through co-development. Fundamental to understanding co-development is understanding it as a process in which all partners design, develop, implement and deliver. Such practices involve long-term commitment of time and resources. In a time when academics are required to regularly produce research outputs, this is challenging and risky. But such a commitment should be at the very core of the teaching-research nexus and any community engagement strategy that we pursue.

VI Conclusion

This article brings seven principles of design thinking to the important job of building and strengthening a robust and meaningful nexus between teaching and research in universities. In addition, we argue that we are simultaneously pursuing an engagement agenda, which involves our work travelling beyond the walls of the university or the pages of academic publications.

For too long there have been artificial lines drawn between teaching, research and engagement. This article reports and discusses ways to remove these lines to promote better teaching, more informed research and the engagement of the various communities with whom we work. There is no single approach, rather, there is a set of principles that can be employed or adapted to suit different disciplinary areas, student cohorts and academic contexts.

More important than simply outlining ways to bridge these artificial divisions, is the very survival of our institutions as homes of the pursuit of knowledge. The broader issue here is the future of universities. As academics, we cannot justify our existence on the simplistic basis that we have always existed. We need to show the social and cultural value that makes our institutions an essential part of a vibrant and authentic community. This is the challenge we face in the 21st century.

85 Nehme, above n 7.
FOREWORD:
PERSONAL PROPERTY SECURITY LAW: LOCAL AND GLOBAL PERSPECTIVES

I have great pleasure in introducing this special section of the Adelaide Law Review. In February 2012, the Personal Property Securities Act 2009 (Cth) (‘PPSA’) came into operation in Australia. It was said by many to be the most crucial commercial law reform in Australia in the last 25 years. The PPSA established as its central plank a national register of security interests in personal property based on an economic or ‘functional’ concept of a single security interest. It was the culmination of prolonged negotiation between Commonwealth and state governments, and drew heavily on similar legislation in North America and New Zealand. In fact, many of the provisions of the Australian legislation are identical, or substantially similar, to those in New Zealand, which themselves drew on Western Canadian models.

The legislation involves a paradigm shift from previous concepts and approaches to notification of security interests, scattered as they were throughout hundreds of pieces of Commonwealth and state legislation, as well as rules of common law and equity. In order to ease the process of absorption of the new concepts and framework in Australia, it is necessary for us to acknowledge and be informed by the experience and precedent in the growing spread of jurisdictions which have adopted this type of system. This spread commenced in the United States during the 1950s (in art 9 of their Uniform Commercial Code), then found its way to the Canadian provinces from the 1980s onwards and to New Zealand in 2002. More recently, various Pacific Islands have enacted Personal Property Securities Acts, and there are a number of influential international and European initiatives.

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1 The operative provisions of the 2009 Act, and in particular the launch of the Personal Property Securities Register, were effective from midnight on 30 January 2012.
2 For example, see A Duggan, ‘A PPSA Registration Primer’ (2011) 35 Melbourne University Law Review 865, 866.
3 See Personal Property Securities Act 1999 (NZ) and, for example, Personal Property Security Act 1993, SS 1993, c.P-62 (Saskatchewan).
4 Uniform Commercial Code art 9 (Secured Transactions).
5 For example, Personal Property Security Act 2012 (Papua New Guinea), Secured Transactions Act 2012 (Palau).
6 The most important general ones are the UNCITRAL Legislative Guide on Secured Transactions Law, 2010, European Bank for Reconstruction and Development Model Law on Secured Transactions (2004).
The commencement of the PPSA in 2012 created the need for affected Australian professionals to be rapidly informed of these global strands from which the 2009 legislation was sourced. In February 2013, I organised the first ever international conference on this system on behalf of the Adelaide Law School, ‘Personal Property Security Law: Local and Global Perspectives’. The articles in this special section of the *Adelaide Law Review* are an edited selection of the papers from that conference.

The selected articles reflect the dual local and global theme. Firstly, the authors comprise two Australians, a US academic, a European scholar and the pre-eminent English authority on security interests in personal property. Secondly, of the range of papers, one covers an international approach, another a European prognosis, whilst all of the papers adopt a comparative approach. It can be confidently predicted that this new area of legislation will lead to a significant place for Canadian and New Zealand jurisprudence in our courts’ judgments, more so than in any other area of Australian law to date.

Turning to the specific papers, the section commences with a version of the Keynote Address by Sir Roy Goode, CBE, QC, Emeritus Professor, St John’s College, Oxford. Sir Roy is renowned for his long-standing contribution to commercial and insolvency law and is a proponent of the US art 9-based system, despite being based in the UK where, notwithstanding the sterling efforts of himself (over 40 years) and more recently, the Law Commission of England and Wales,7 and many others, no such legislation has yet been introduced. In this particular paper, Sir Roy focuses on a successful international achievement in which he has played a leading role, the inception of the Cape Town Convention on Security Interests in Mobile Goods (that is, goods which commonly travel across jurisdictional borders),8 and in particular the Convention’s Aircraft Protocol. Sir Roy explains the legal and commercial problems that led to the need for an international solution, and the political and drafting challenges of achieving this, particularly in both common law and civil code jurisdictions. In 2013, after the conference was held, Australia passed enabling legislation for the Convention and Aircraft Protocol to be ratified and effective here, so this is no matter of mere academic interest.

As stated above, the PPSA in Australia has heralded a new way of thinking and talking about security interests. Though the system is designed to promote a simpler, more comprehensive and efficient solution to the complexities that went before it, in the short-term, as Sheelagh McCracken, Professor of Finance Law at the University of Sydney demonstrates so thoroughly, there is a whole new ‘lexicon’ to comprehend, though it seems from her study that the lexicon is not entirely new and is not entirely a complete dictionary. McCracken’s article shows us that the legislation not only forces us to rethink or adapt existing concepts, some of which have been ingrained in commercial law and its documentation for a century, but presents an ongoing challenge to academics, practitioners and the judiciary to interpret the new terms in their statutory context.

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David Turner, Barrister and Adjunct Lecturer at Monash University, examines a specific aspect of the Australian legislation in its comparative context. The PPSA is designed to promote efficiency and commercial certainty, and not to disrupt commercial transactions or priorities. This is not just a question of individual transactions, but of upholding general confidence in commercial markets and the flow of everyday transactions. Therefore payments by cash or cheque, commercial bills or ordinary payments of debts should be able to occur swiftly without the need to search for them on the Register, and not be at risk of being unwound later because someone is claiming a security interest which the recipient did not know about or search. Nevertheless as Turner shows, the Australian legislation needs to be road-tested against similar provisions in other jurisdictions with personal property security legislation, as it appears to have departed from these in important detail. One theme running through the papers is the relative advantages and disadvantages of importing overseas provisions verbatim.

Professor Patrick Quirk, Ave Maria Law School, Florida, examines an important form of collateral for banks and other credit providers, namely bank deposits. Whilst we may be tempted to think of personal property as tangible items, bank accounts into and out of which the proceeds of commercial and consumer activity largely flow are one of the most important sources of collateral against which security can be taken, and the PPSA, in common with the US art 9, facilitates the concept of perfection by ‘control’. This approach is not followed in Canada and New Zealand at present. This gives banks and financiers, particularly those at which the account is held, a significant commercial advantage over others who take and register security over that form of collateral. Given that the PPSA has adapted this concept from the US, Quirk’s insight into the revised art 9 provisions will be most instructive as we in Australia grapple with the complexities of this new concept of control in its application to financial collateral.

Lastly, Professor Tibor Tajti, from the Central European University, provides a thorough and provocative analysis of the difficulties of adopting this type of system in Europe, given the existing variety of commercial credit and, in particular, the different cultural heritage of civil code and common law systems.

Taken together, these essays show that Australia is now part of a growing global family of jurisdictions which have adopted this system, and that whilst there are specifically local twists, and plenty of areas for clarification and debate, we would be unwise to attempt to meet the challenges of this new mindset without recognition that the personal property securities wheel has largely been invented by our North American and New Zealand forebears. It can be confidently predicted that Canadian and New Zealand jurisprudence will be utilised in our courts in this area, far more than has ever happened in Australia in any other field, and also that in time we will need to similarly pass our new-found experience on to Australia's commercial partners, and in regional and international fora. This selection puts down the marker that the PPSA is here to stay, in Australia and increasingly wider afield, and its impact on domestic and international finance law is far-reaching.
SECURITY INTERESTS IN MOBILE EQUIPMENT:
LAWMAKING LESSONS FROM THE CAPE TOWN
CONVENTION

Abstract
The announcement by the Australian government of Australia’s intention to ratify the Cape Town Convention and its associated Aircraft Protocol provides a timely opportunity to describe the key elements of these two important international instruments adopted in November 2001 which, as will be seen later, have already attracted strong support which is steadily increasing. The Cape Town Convention has already received 61 ratifications and the Aircraft Protocol 55 ratifications. With its enactment of the Personal Property Securities Act 2009 (Cth), Australia joined the many jurisdictions that have adopted a modern, functional approach to security interests based on art 9 of the United States Uniform Commercial Code and the Canadian Personal Property Security Acts. But domestic laws are not well suited to high-value equipment that moves regularly across national borders, such as aircraft objects and railway rolling stock, or to equipment that is not on Earth at all, such as satellites and other space assets. The conflict rule designating the lex situs as the applicable law does not work for objects having no fixed situs or for assets in space where no private law exists. Moreover, even if a uniform conflict rule could be devised it would not overcome major differences in national laws governing secured transactions. Hence the need for an international regime governing the creation, perfection and priority of interests in mobile equipment, with an international registry for the registration of such interests and priority rules based on the order of registration. This paper describes the key features of the Cape Town Convention and Aircraft Protocol and their relationship to national law.

Introduction
This is a particularly opportune time to discuss personal property security law. Australia has not only become a Personal Property Security Act jurisdiction but has also announced its intention to ratify the Convention on International Interests

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in Mobile Equipment (‘Cape Town Convention’) and its associated Aircraft Protocol during the course of 2014. Many here today took part in the work leading to the Personal Property Securities Act 2009 (Cth) (‘PPSA’). But there is one person who is not here today, one person whose drive, incurable optimism and sheer bloody-mindedness drove this project forward when others were faltering. I refer, of course, to David Allan, whose commitment to the project over many years finally led to the enactment of the PPSA, though sadly David did not live to see it. He can truly be regarded as the architect of the modernisation of Australian personal property security law.

Others in this symposium edition discuss national laws governing security in personal property, including the progenitor of the modern regime, art 9 of the United States Uniform Commercial Code (‘UCC’), and equivalent legislation in force in about 80 jurisdictions, which now includes Jersey in the Channel Islands but not yet the United Kingdom. My focus will not be on national laws but on the international scene, and particularly the Cape Town Convention and Aircraft Protocol.

A International Developments

Over the past 25 years, there has been an explosion of international and regional activity in the field of, or including, security in movable property. Almost none of it has been successful, though with some recent instruments it is perhaps still too early to dismiss them as failures. If designing national laws is hard, the formulation and adoption of international instruments is harder still and usually takes many years of effort. There are several reasons for this. First, the work involves participation by practising and academic lawyers from numerous legal systems based in several legal families, each with widely differing approaches to secured transactions. Second,

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3 Whether he would have been wholly enthusiastic about the drafting of the legislation is another matter!
4 The Security Interests (Jersey) Law 2012, which deals with security interests in intangible movable property, was enacted some two years ago and came fully into force in February 2014. Its extension to tangible movables has already been drafted and sent out for consultation and is expected to be enacted within the next two years.
5 At the time of this address, I was the founder and Executive Director of the Secured Transactions Law Reform Project, which was established to resuscitate the proposals of the English Law Commission for the adoption of a Personal Property Security Act-style law in its Consultative Report: ‘Company Security Interests’ (Consultation Paper No 176, English Law Commission, 2004). The proposals, which broadly followed Personal Property Security Act legislation elsewhere, were considerably watered down in the Law Commission’s final report: ‘Company Security Interests’ (Final Report No 296, English Law Commission, 2005). In the end, even the modified proposals failed to reach the statute book. I have now been succeeded as Executive Director by my Oxford colleague, Professor Louise Gullifer.
a significant amount of time and expense is involved in organising international
meetings to carry a project forward. Third, it is difficult to balance both the needs
of creditors with safeguards for debtors and the concerns of industry with those of
government. Finally, governments around the world display inertia when it comes to
ratifying an adopted instrument.

Let me give some examples. The International Institute for the Unification of Private
Law (‘UNIDROIT’) Convention on International Factoring,6 concluded in 1988, is in
force but has secured few ratifications, mainly because its scope is too narrow: it is
confined to notification factoring, which went out of favour soon after its conclusion
following a strong move towards non-notification invoice discounting. The UNIDROIT
Convention on International Financial Leasing,7 adopted at the same diplomatic
Conference, is also in force but has not been a success, though there are greater hopes for
the 2008 UNIDROIT Model Law on Leasing.8 The 2006 Hague Convention on the Law
Applicable to Certain Rights in Respect of Securities Held with an Intermediary,9 which
came close to success after a mere two and a half years from start to finish, largely
due to the driving force of Australian lawyer Richard Potok, came unstuck because of
a significant change in approach and formulation at the diplomatic Conference, which
upset the Europeans. Finally, the 2001 United Nations Convention on the Assignment of
Receivables in International Trade10 has secured only a single ratification (by Liberia)
in more than 11 years, which is perhaps because it is too wide-ranging and unfocused,
though there are rumours that the US will ratify it.

So in the quarter of a century of international lawmaking in the field of secured
transactions there are only two instruments that have really taken off: the Cape
Town Convention and the Aircraft Protocol, with 61 ratifications of the former and
55 ratifications of the latter.11

II The Cape Town Convention and Aircraft Protocol

A Genesis

Way back in 1988, a former Canadian member of the Governing Council of
UNIDROIT proposed that UNIDROIT embark on a study of secured transactions

8 Adopted on 13 November 2008 by the Joint Session of the UNIDROIT General
Assembly and the UNIDROIT Committee of Governmental Experts for the finalisation
and adoption of a draft model law on leasing (Rome, 10-13 November 2008).
10 United Nations Convention on the Assignment of Receivables in International Trade,
GA Res 56/81, UN GAOR, 6th Comm, 56th sess, Agenda Item 161, UN Doc A/
11 Current as at 29 August 2014. Full details of ratifications and accessions are available
on the UNIDROIT website: <www.unidroit.org>.
law with a view to producing an international convention. Following a survey and paper prepared by Professor Ron Cuming of the University of Saskatchewan, the Governing Council authorised a project for an international convention on security and related interests in mobile equipment — that is, equipment of a kind regularly crossing national borders in the course of business, or not on Earth at all — falling into three categories: aircraft objects, railway rolling stock and space assets. The project was strongly supported by the aviation industry for several reasons. First, default remedies freely available in one jurisdiction might be much more restricted in a different, debtor-oriented jurisdiction and speedy relief pending final determination of a claim might not be available. Second, the requirements for perfection of a security interest varied widely from one jurisdiction to another, and the traditional *lex situs* rule for determining the law applicable to perfection and priorities of security interests in equipment was unsuited to security interests in mobile equipment. Third, even if a uniform conflicts rule could be established, that would not address substantial differences in national legal systems. This meant that a creditor taking and perfecting a security interest in one jurisdiction might find that its interest was subordinate to an earlier, or even a later, security interest taken and perfected in another. Finally, it was not always certain that a security interest would remain effective in the event of the debtor’s insolvency.

The consequent uncertainty surrounding creditors’ rights resulted in increased risk, meaning that potential borrowers, particularly those in developing jurisdictions, either could not access credit for the acquisition of aircraft objects or had to pay heavily for the privilege. In addition, the cost to creditors of procuring export credit insurance could be high. By contrast, borrowers in the US, which had developed a strong creditor protection rule in insolvency under § 1110 of the federal *Bankruptcy Code*,12 were less dependent on bank finance and could access the capital markets by the issue of enhanced equipment trust certificates.

A study undertaken for UNIDROIT by Anthony Saunders and Ingo Walter,13 under the auspices of INSEAD14 and the New York University Salomon Center for the Study of Financial Institutions, showed that adoption of an international instrument along the lines developed during the course of their study could be expected to lead to savings of billions of dollars per year, a prediction which proved well-founded.15 Furthermore, the importance of creditors’ rights was obvious given that the two major aircraft manufacturers, Airbus and Boeing, have projected deliveries of USD3–4 trillion over the next 20 years.

12 11 USC § 1110 (2012).
14 Institut Européen d’Administration des Affaires (European Institute of Business Administration).
B Development of the Project

The project began modestly enough with an initial draft of a mere five articles — my new definition of an optimist! The Cape Town Convention would be confined to aircraft objects, railway rolling stock and space assets. It had been hoped that it would include ships, but the Comité Maritime International opposed this, instead taking the view that existing maritime conventions were adequate. Initially the plan was to follow the functional approach to security interests embodied in art 9 of the UCC and in the Canadian Personal Property Security Acts, so that conditional sale agreements and types of leases structured to provide security would be treated as security interests. This approach was quickly abandoned in the light of opposition from participants from continental Europe. Accordingly, the Cape Town Convention adopted a threefold classification of international interests: security interests in the classical sense (mortgages, charges, etc), title reservation agreements (conditional sale agreements), and leases, with or without an option to purchase. The Cape Town Convention also found a neat way to accommodate the different approaches to the concept of security by providing that once an agreement was found to fall within one of the three categories as defined in the Cape Town Convention, it would be for the applicable law to determine the characterisation of the agreement. For example, a title reservation agreement governed by French law would be treated as such, while if the agreement was governed by New York law it would be characterised as a security agreement.

With the involvement of key figures in the aviation industry and the creation of the Aviation Working Group ('AWG') under the direction of UNIDROIT’s consultant Jeffrey Wool, the project became increasingly ambitious, with a number of strikingly original features. The international interest as a product of a convention rather than of national law was itself unique. It could also be created with very little formality, so that most interests created under national law would meet the formal requirements for an international interest. A second point of departure was that the planned International Registry would be asset-based, not debtor-based. On the one hand, this of course meant that for the purpose of registration at least, the asset had to be uniquely identifiable, thus precluding security over classes of an asset or unidentified future assets; on the other hand, the register would show all international interests in the asset, whether given by the debtor or by anyone else.

C Unique Features

Reference has already been made to the sui generis nature of the international interest. Among the many other innovations introduced by the Cape Town Convention, five deserve particular mention.

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16 For brevity, ‘security interest’ will hereafter be used to include the interests vested in a person who is a conditional seller under a title reservation agreement or a lessor under a leasing agreement. The differences in the three categories are relevant primarily to default remedies, where the rules for conditional sales and leases are much simpler, to reflect that on default the conditional seller or lessor should be free to repossess its own equipment and do what it likes with it, retaining any surplus resulting from sale.
The most crucial element of the whole package is the establishment of an International Registry for the registration, assignment, subordination, etc of international interests in aircraft objects. In a Contracting State, a registered interest has priority over both a subsequently registered interest and an unregistered interest. This is true even if the latter was not capable of registration because, for example, it did not fall within one of the registrable categories or because the debtor was not situated in a Contracting State at the time of the relevant agreement. So a registered international interest trumps all interests created under national law except non-consensual rights or interests covered by a declaration of a Contracting State under art 39 of the Cape Town Convention or pre-existing rights or interests, which in general fall outside the scope of the Cape Town Convention altogether.

Soon after the conclusion of the Cape Town Convention and Aircraft Protocol, the Commission of the European Community (‘EC’), as it then was, initiated steps to secure ratification by the Community. Things were moving forward quite swiftly until an unexpected blockage occurred following a dispute between two EC Member States, wholly unrelated to the two instruments. This caused delay for several years until the dispute was resolved. At the time this seemed a disaster. In retrospect it proved a blessing, because the technological difficulties involved in establishing the International Registry were much greater than had been anticipated. Indeed, if the EC ratification had proceeded according to plan and Member States had in turn ratified, the Cape Town Convention and Aircraft Protocol would have become operative without the International Registry. I would love to know what the international lawyers would have made of that! We learnt from the experience. This problem cannot arise under either the Luxembourg or Space Protocols because both condition their coming into force on the deposit by the Supervisory Authority with the Depositary (UNIDROIT) of a certificate confirming that the International Registry is fully operational.

The original plan was to have a single convention covering all three categories of equipment. However, several problems began to emerge. First, the aviation industry was well ahead of the rail and space industries and did not want to be held up by them. Second, there was concern that the drafting of the Cape Town Convention, which we wanted to be as light as possible, would be encumbered by a mass of technical details

17 Article 61(1) of the Vienna Convention on Treaties deals with the issue of temporary impossibility but it is not altogether clear how its provisions would have applied in this situation.
19 Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets, opened for signature 9 March 2012, UNIDROIT.
concerning the definitions of aircraft, airframes and helicopters, and on what these should contain to exclude light aircraft, not to mention definitions of railway rolling stock and space assets. Third, while the first two problems could be overcome by having separate conventions for each of the three categories, this itself would produce serious problems. For example, there would be significant time, labour and expense involved in the holding of three diplomatic conferences instead of one and the drafting of different instruments by different hands at different times could produce inconsistencies even in the drafting of provisions that were equipment-neutral.

These problems were brilliantly solved by Lorne Clark (then the General Counsel of the International Air Transport Association (‘IATA’)) who came up with the idea of a two-instrument approach. This would comprise of the Cape Town Convention, which would be equipment-neutral, and separate Protocols for each of the three categories, which would enable each industry to proceed at its own speed without being held up by the others and would allow the Cape Town Convention provisions to be modified to suit the needs of the particular industry concerned. Unusually, therefore, the Protocols do not merely supplement the Cape Town Convention, they control its coming into force and they can modify it as necessary.

Despite these obvious advantages, the two-instrument approach proved controversial and it was not until the first day of the diplomatic Conference\(^2\) that it quickly became clear that it was supported by a great majority of delegates.

3 Invasion of New Areas

Certain parts of commercial law had traditionally been regarded as off-limits to private commercial law conventions, among them property rights, priority rules and the modification of national insolvency laws. All these taboos were broken by the Cape Town Convention and Protocols, which laid down rules for perfecting an international interest (primarily through registration), priority rules and rules for the protection of a creditor in the event of a debtor’s insolvency.

4 Treatment of Non-Consensual Rights or Interests

The Cape Town Convention was originally conceived as applicable only to consensual interests. But most states have a battery of non-consensual rights and interests, such as legal liens, statutory mortgages, preferential claims of employees for wages and of states for taxes, judicial attachments and the like, which they would be reluctant to subordinate to a registered international interest. So art 39 of the Cape Town Convention makes provision for a Contracting State to make a declaration that categories of rights or interests which under that State’s law have priority over the equivalent of registered international interests are to retain such priority without themselves having to be registered in the International Registry. In this way,

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\(^2\) ‘Diplomatic Conference to Adopt a Mobile Equipment Convention and an Aircraft Protocol’ held at Cape Town from 29 October to 16 November 2001 (‘the diplomatic Conference’).
the position of non-consensual rights or interests can be protected, while prospective creditors are alerted to the need to be aware of possible rights or interests that might trump their international interests.

5 The Declarations System

The Cape Town Convention and Aircraft Protocol are designed to provide creditors with speedy and effective remedies. However, it was felt that some of these might run counter to the long-established public policy of states and thus deter them from ratifying. This problem has been neatly overcome by a system of declarations, by which a Contracting State can opt out of certain provisions that run counter to its public policy — for example, the exercise of self-help remedies, speedy relief for the creditor pending final determination of its claim, or prorogation of jurisdiction — whilst other provisions do not apply at all in a Contracting State unless it has made a declaration opting into them — for example, choice of law or the enforcement of creditors’ rights in insolvency. Thus, the declarations system follows the two-instrument approach in providing a good deal of flexibility for Contracting States.

D Some Facets of the Registration System

The Aircraft Registry has developed a highly efficient, speedy and cheap registration system. As stated earlier, the system is asset-based. It is also wholly electronic. There are tight security controls over registration, but anyone is free to search the Registry on paying the prescribed fee. The Registry is run by Aviareto, a jointly owned subsidiary of SITA21 and the Irish Government, and the Supervisory Authority is the Council of ICAO.22 There have been some 500,000 registrations.

On average, online registration becomes searchable within 38 seconds of the registration being effected. The fee for registration is USD100 and the fee for searches USD35. The Registrar is strictly liable for errors and omissions on the part of the Registry and for system malfunction, which did occur from time to time in the early days. But in a period of over eight years since the Registry went live, it has not received a single claim.

New regulations herald further sophistication, including an electronic closing room facility. This facility simulates a physical closing, whereby a series of prospective registrations can be marshalled and modified while the closing room is open, and after it is closed the planned registrations can be released to the Registry in the agreed sequence.

E Priorities

Leaving aside the priority rules for assignments, which are a little complex, the basic priority rules are remarkably simple and are gathered together in art 29 of the Cape Town Convention.

21 Société Internationale de Télécommunications Aéronautiques.
22 International Civil Aviation Organization.
First, a registered interest has priority over any subsequently registered interest and over an unregistered interest. There is an exception for an outright buyer who acquires its interest prior to registration of the international interest because under the Cape Town Convention outright sales are not registrable. However, art III of the Aircraft Protocol extends the registration system to such sales and thus removes the exemption. Second, there is also protection for conditional buyers and lessees, who are protected against registrable third-party interests that are registered after the conditional seller or lessor has registered its own interest. Third, parties may vary priorities by agreement. Finally, the priority of an international interest extends to proceeds, though these are narrowly defined as money or non-money proceeds arising from the loss or physical destruction of the object, its compulsory acquisition and the like.

These represent the totality of the priority rules, apart from non-registrable, non-consensual rights or interests covered by a Contracting State’s declaration, assignments and pre-existing rights or interests.

F Insolvency

If the International Registry is a central plank of the Cape Town Convention, of almost equal importance are the provisions on insolvency. The Cape Town Convention itself provides in art 30(1) that an international interest is effective in the debtor’s insolvency if registered prior to the commencement of insolvency proceedings. Accordingly, it is not open to a liquidator or creditors to attack a registered international interest as not duly perfected. Moreover, the only grounds of avoidance in insolvency proceedings are that the transaction was a preference or a transaction in fraud of creditors. However, the Cape Town Convention does not affect rules of procedure restricting enforcement, for example, where the property of the debtor is under the control or supervision of an insolvency administrator with a view to reorganisation.

Of much greater significance are the provisions of the Aircraft Protocol relating to insolvency. Article XI, which depends on an opt-in by the Contracting State that is the primary insolvency jurisdiction, has two alternative forms: Alternative A and Alternative B. Alternative A is based on § 1110 of the US federal Bankruptcy Code and provides that unless the debtor or the insolvency administrator cures all defaults (other than the insolvency) and agrees to perform all future obligations under the agreement before the end of the waiting period, possession must be given to the creditor. There can be no judicial stay and no extension of time. Experience has shown that the availability of this powerful remedy, which significantly assists financing, has had the beneficial effect of restoring US airlines to profitable trading. In contrast, Alternative B leaves it to the court to determine whether to order the giving up of possession. Every Contracting State except Mexico has so far opted for Alternative A; however, Contracting States have an option to make no declaration and continue to apply their domestic insolvency law.

G Benefits of the Cape Town Convention and Aircraft Protocol

There is no doubt that airlines operating in Contracting States which have adopted Alternative A and have selected other appropriate declarations such as the provisions on self-help and speedy advance relief have secured substantial savings in financing costs. Meanwhile, creditors have benefited from the effect of the Cape Town discount on export credit insurance. 24

In addition, the existence of a central international registry, coupled with an international legal regime providing speedy advance relief on default and clear priority rules, will undoubtedly strengthen security, increase certainty and reduce the expenses involved in having to ensure perfection and priority in multiple jurisdictions.

H The Official Commentary

It is quite common to have Explanatory Reports prepared for the approval of a diplomatic Conference describing the objectives of an international convention and analysing its provisions for the benefit of delegates. However, it is less common for a diplomatic Conference to approve of the preparation of an Official Commentary by a single individual after the diplomatic Conference. Nevertheless, it was a sensible decision here because, though an Explanatory Report was prepared for the diplomatic Conference, it could not have addressed the range of issues that arose five and a half years later when the Cape Town Convention and Aircraft Protocol entered into force and the International Registry became operative. Indeed, when the first edition of the Official Commentary appeared in 2002 neither of these events had occurred, so it was very much a transitional publication. A revised edition was published in 2008 and a substantially expanded third edition in the summer of 2013,25 the last of which took account of a range of issues raised by the aviation industry in light of its experiences, as well as huge advances in the registry system.26

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24 The Cape Town discount is the discount that members of the Organisation for Economic Co-operation and Development offering export credits for civil aircraft are permitted by the Sector Understanding on Export Credits for Civil Aircraft (the ASU, September 2011). The discount allows such members to take advantage of the minimum premium rate after ratifying the Cape Town Convention and Aircraft Protocol with a specified set of qualifying declarations.


26 A further reason for the preparation of new editions was that I was also mandated to prepare similar Official Commentaries covering the Luxembourg and Space Protocols, and each time a new Protocol was adopted, which required a new Official Commentary, it was necessary to revise the earlier publications so as to ensure that in their treatment of the Cape Town Convention provisions all the Official Commentaries said the same thing!
The Official Commentary, being of persuasive value only, is not binding on courts. However, several statutes enacting the Cape Town Convention and Aircraft Protocol expressly provide that in interpreting these instruments courts may have regard to the Official Commentary.27

I Reasons for Success

The success of the Cape Town Convention and Aircraft Protocol is in large measure due to extensive consultation, a focus on clear rules uncluttered by the complexities of domestic legislation and the investment by the aviation industry of a huge amount of effort and resources to ensure a high quality product that met the industry’s needs and to promote ratification of the two instruments around the world. Led by an American lawyer, Jeffrey Wool (who became UNIDROIT’s consultant on the project), AWG developed into a powerful force, which with others (including IATA) contributed greatly to the shaping of these two instruments and to their adoption by states in a form that would give maximum benefits. Their work is a testament to the maxim: the more you put in, the more you get out.

J The Cape Town Convention, Aircraft Protocol and National Interests

Given the primacy of the Cape Town Convention and Aircraft Protocol over national security interests, the question has been posed whether there remains any point in taking and perfecting a security interest under national law where, at the time of the agreement, the debtor is situated in a Contracting State or the alternative connecting factor is satisfied.28 If one is focusing on the particular items of equipment that are the subject of registration in the International Registry, the answer is that for the most part perfection under national law is of limited value. However, there are still uses for national security interests. One is to cover situations where there is doubt whether the requirements for the Cape Town Convention to apply have been satisfied. Another is where it is desired to take security over additional assets to which the Cape Town Convention does not apply, for example, components or after-acquired property. A third is to pick up security in general proceeds, such as proceeds of sale of an aircraft object that has been given in security, where such proceeds fall outside the Cape Town Convention definition.

The converse question relates to registration of non-Cape Town Convention interests in the International Registry. This was probably not envisaged when the Cape Town Convention was adopted; nevertheless, it is not at all uncommon for interests to

27 Among the states whose implementing legislation has included such an interpretative provision are Canada, Ireland and Singapore.

28 See art 3(1) of the Cape Town Convention. In order for the Cape Town Convention to apply, the debtor must be situated in a Contracting State at the time of the agreement creating or providing for the international interest. Article IV(1) of the Aircraft Protocol provides that the Cape Town Convention shall also apply in relation to a helicopter, or to an airframe pertaining to an aircraft, registered in an aircraft register of a Contracting State which is the state of registry (as defined by art I(2)(p)).
be registered that fall outside the Cape Town Convention. This could be done, for example, to play safe because of doubt as to whether the Cape Town Convention was applicable or because it was thought that registration might constitute constructive notice for the purpose of national rules on priority. For its part, the International Registry, operating an electronic system, is not equipped to investigate the validity of registrations, and, indeed, is perfectly happy to accept non-Cape Town Convention registrations anyway, since these produce additional income and help to keep down the level of fees.

III The Cape Town Convention, Aircraft Protocol and the Australian Personal Property Securities Act

I was very happy to see the Australian Government’s announcement of its intention to ratify the Cape Town Convention and Aircraft Protocol in 2014. The Australian Government released three alternative models for consultation. The first would give the Cape Town Convention and Aircraft Protocol the force of law in Australia, prevailing over the PPSA in case of inconsistency. The second would amend the PPSA to incorporate provisions corresponding to those of the Cape Town Convention and Aircraft Protocol. The third would combine the first two models, enacting parts of the Cape Town Convention while implementing the rest by amending the PPSA.

The Government opted for the first model for reasons of simplicity, and in my respectful view it was entirely right to do so. There is no need to trawl through all the provisions of the PPSA, inserting additions and amendments to an already lengthy enactment. To do so would merely cause confusion and added complexity, as well as risking error and quite possibly jeopardising the discounts and other economic benefits of ratification. Equally, there is little to be said for examining every other statute that could possibly be affected by the Cape Town Convention and Aircraft Protocol and modifying its provisions. It is much easier to do what the Government proposes, namely to provide that where they apply the Cape Town Convention and Aircraft Protocol have an overriding effect. I expect that there will be some situations where it will be found necessary or desirable to amend existing legislation, for example, in relation to aviation legislation, the operation of the Civil Aircraft Register, direct entry points, de-registration and export. However, these should be exceptional.

Of critical importance is the choice of declarations that will give maximum economic benefits. Australia will have its own experts on these, but I am sure that if called upon AWG will be happy to offer assistance.

Ratification by such a major jurisdiction as Australia gives a powerful boost to these two instruments, and I believe this move will serve Australian airlines and financiers well.

29 Statement by the Australian Minister for Infrastructure, Anthony Albanese, 12 October 2012.
Grant Gilmore, co-draftsperson of art 9 of the United States Uniform Commercial Code, from which Australia’s Personal Property Securities Act 2009 (Cth) is partly derived, likened approaching art 9 to mastering a foreign language. More recently, the Supreme Court of Canada observed, in the context of a discussion of the meaning of ‘property’ under equivalent legislation: ‘For particular purposes Parliament can and does create its own lexicon.’ Focusing primarily on the ‘Dictionary’ contained in the Personal Property Securities Act 2009 (Cth), this article analyses some of the new definitions and vocabulary. It also examines terms whose meanings are only partly defined or simply assumed, terms which appear to lack a statutory definition, and terms whose previously accepted meaning appears to have changed. The underlying theme is that the Personal Property Securities Act’s operation cannot properly be understood without a close knowledge of the language in which the legislation is couched. Finally, the article also briefly explores how the language shapes the manner in which the legislative concepts are intellectualised.

In university seminars on statutory interpretation throughout common law jurisdictions, one literary quote is often discussed by way of introduction to the subject — the observation by Humpty Dumpty to Alice in Through the Looking Glass: ‘When I use a word … it means just what I choose it to mean … neither more nor less.’ From this, commentators typically draw the clearly accurate proposition that statutes may choose to give a word a meaning different from its ordinary meaning. Perhaps less frequently encountered in such discussions, but nonetheless potentially apposite, is a rather more philosophical quote from Wittgenstein’s Tractatus.
"Logico-Philosophicus": ‘Whereof one cannot speak, thereof one must be silent’.\(^2\)

Removed entirely from its original context and placed in the rather more prosaic setting of statutory interpretation (and in the process no doubt thereby distorted), such an aphorism resonates with those grappling with new legislative frameworks. It suggests that without a knowledge and understanding of the words used by a statute to frame its concepts, it becomes impossible to discuss those concepts. In no other modern commercial law statute in Australia has this become more evident than in the Personal Property Securities Act 2009 (Cth) (‘PPSA’), which is the focus of this article.

Much of the language found in the PPSA is sourced from equivalent personal property securities (‘PPS’) legislation in other countries. Those countries include New Zealand and Canada as well as the US, whose art 9 of the Uniform Commercial Code is the legislation from which Australian, Canadian and New Zealand legislation is ultimately derived. At first encounter, some of the language can seem strange and even sound quite alien. The terms ‘chattel paper’ and ‘account’ are two examples that spring to mind. ‘Chattel paper’ is entirely new to Australian lawyers (as it was indeed in the 1950s to American lawyers).\(^3\) ‘Account’, in the technical sense of a particular kind of debt, may be a more readily comprehensible term, although its precise scope has caused some discussion in New Zealand in its form of ‘account receivable’.\(^4\) In Australia, ‘account’, based seemingly on Canadian usage, nonetheless sounds awkward to those more accustomed to confronting it in the context of a bank account. Furthermore, and somewhat confusingly, the term is also used in that latter sense in the PPSA when it occurs in the phrase ‘ADI account’. The statutory definition of ‘ADI account’ in s 10 of the PPSA actually commences with the words ‘an account, within the ordinary meaning of that term’ (emphasis added).

Professor Grant Gilmore, a co-draftsperson of the original art 9, emphasised in his seminal text, *Security Interests in Personal Property*, the deliberate decision to break from the past and adopt new vocabulary.\(^5\) Indeed, he likened learning the vocabulary to mastering a foreign language, stressing the desirability of being able to think directly in that language.\(^6\) He set a test, completion of which he suggested would demonstrate proficiency.\(^7\) It consisted of reading the following passage in which defined terms were placed in quotation marks, without having to refer to the dictionary:


\(^3\) See text below.


\(^6\) Ibid 302.

\(^7\) Ibid.

Gilmore’s analogy with the learning of a foreign language is telling. In the learning of any new language, tension inevitably arises. On the one hand, acquisition of the new language enables learners to converse with those already fluent in the language. On the other hand, it creates a potential barrier between the learners and those with whom they previously conversed. Unfamiliar with the new language, the latter are unable to participate in the new conversation.

A parallel can readily be drawn with the development of recent PPS-style legislation in an increasing number of jurisdictions, which is resulting in enhanced communication across borders and in intensified discussion of the potential for harmonisation of secured transactions law globally. Nonetheless, the developing global language comes at some cost to those within a specific jurisdiction who are familiar only with the old language, at least in the early stages of the development. It is therefore perhaps no coincidence that initial litigation in both New Zealand and Australia has concerned lessors who failed to appreciate that the legal title to their property was categorised by the new legislation as a ‘security interest’ (or, in some cases, the consequences of that categorisation) and hence did not take the appropriate steps to protect that interest against a loss of priority.

Furthermore, just as the words and expressions in one shared language can vary from country to country, so too may PPS terms vary. Words do not necessarily command the same acceptance across all jurisdictions. First, the precise content of the terms may differ from jurisdiction to jurisdiction. The term ‘PPS lease’ in Australia, whose meaning includes ‘a term of more than one year’, corresponds

8 Ibid. The equivalent under the PPSA would read slightly differently: A ‘secured party’ and a ‘grantor’, by entering into a ‘security agreement’ create a ‘security interest’ in ‘collateral’. The ‘collateral’ may consist of ‘goods’, ‘financial property’, an ‘intermediated security’ or ‘intangible property’.


10 For early New Zealand cases, see Graham v Portacom New Zealand Ltd [2004] 2 NZLR 528 (‘Graham’); Waller v New Zealand Bloodstock Ltd [2006] 3 NZLR 629 (‘Waller’). See also Rabobank New Zealand Ltd v McAnulty [2011] 3 NZLR 192 (‘Rabobank’). In Australia, the consequences are even more severe as failure to take protective action through perfecting the security interest would also generally lead to a vesting of the security interest in the grantor on insolvency (PPSA s 267, subject to s 268). For the first Australian example, which was the first substantive case on the PPSA, see Re Maiden Civil (P&E) Pty Ltd; Albarran v Queensland Excavation Services Pty Ltd (2013) 277 FLR 337 (‘Maiden Civil’).

11 PPSA s 13(1)(a).
only in part to the more common ‘lease for a term of more than one year’ found in New Zealand and Canadian statutes. Second, there is a risk that courts may interpret a term differently. For example, there is differing judicial debate over the meaning of the phrase ‘regularly engaged [in the business of leasing goods]’ in the context of determining whether a lessor’s interest under a lease is to be classified as a deemed security interest — both nationally within Canada, as between provinces, and internationally, as between Canada and New Zealand. Differences in interpretation may be frowned upon and criticised for detracting from any move towards harmonisation; yet if individual PPS legislation is to be successfully bedded down in a specific jurisdiction, it has to accommodate local interpretation.

This topic of language in PPS-style legislation is obviously substantial and it is not my intention to try to address all issues. Rather, as the first in what might hopefully become an occasional series, this article focuses at a general level on the ‘lexicon’ of the PPSA, attempting to give some direction to those grappling with it. It is an underlying theme of the article that the lexicon impacts significantly on how the PPSA is understood to operate and hence how security arrangements are structured. At a conceptual level, language shapes how we think about the security; at a practical level, it determines how the rules apply.

The use of the term ‘lexicon’ in this context is deliberate. It comes from an observation by the Supreme Court of Canada in the case of Saulnier v Royal Bank of Canada. The Court had to consider whether a number of fishing licences held by Mr Saulnier amounted to property and hence fell within the scope of a general security agreement held by his bank over his property. Mr Saulnier contended that the licences were rather a ‘privilege’. In holding that the licences were personal property for the purposes of the Nova Scotian PPS legislation (and indeed also for federal bankruptcy legislation), the Court made it clear that the fact that the licences might not amount to property at common law was not decisive. Hence the Court observed:

\[\text{[2008] 3 SCR 166 ("Saulnier")}.\]

\[\text{Ibid [2].}\]

\[\text{Personal Property Security Act, SNS 1995–96, c 13.}\]

\[\text{Bankruptcy and Insolvency Act, RSC 1985, c B-3.}\]

\[\text{Saulnier [2008] 3 SCR 166, [16].}\]
'Because a fishing licence may not qualify as ‘property’ for the general purposes of the common law does not mean that it is also excluded from the reach of the statutes. For particular purposes Parliament can and does create its own lexicon.’

This article is divided into five parts. While Part II briefly considers the use and limitations of the legislative Dictionary in the PPSA, Part III puts forward a working draft of a Table of Fundamental Terms encountered in the PPSA, many of which are defined in the PPSA but some of which are not. Part IV outlines several examples of how the manner in which the language is introduced or used in the PPSA may shape the legal concepts and, more generally, conceptual thinking. The article concludes in Part V.

II THE LEGISLATIVE ‘DICTIONARY’

Many, but certainly not all, of the key terms in the PPSA are set out, or at least signposted, in s 10 of the PPSA, which is headed ‘The Dictionary’. The term ‘Dictionary’ appears peculiar to the PPSA, although it is itself located in a part of the legislation which bears the more general heading ‘Definitions’. In other PPS jurisdictions, the equivalent terms are found in provisions with headings such as ‘Interpretation’, as in the Saskatchewan and New Zealand legislation, or ‘Definitions and Interpretation’, as in the Ontario and British Columbian legislation.

The use of a dictionary is a not uncommon drafting technique that has been adopted by Australian parliamentary draftspeople since at least the 1980s. It can be found in other commercial legislation such as the Corporations Act 2001 (Cth) and the Life Insurance Act 1995 (Cth). Thus, while there may be no particular legal significance as such in its use in the PPSA, the description may nonetheless be important at a practical level. For example, our common collective understanding of how a dictionary is generally used may well colour our approach to the statutory Dictionary.

There are at least two assumptions commonly made with regard to using a dictionary that could prove unhelpful if made in the context of the PPSA. The first assumption is that it is only necessary to consult a dictionary in relation to a particular term

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20 Ibid.
21 See Part III C in text below.
22 PPSA ch 1 pt 1.3.
23 Personal Property Security Act, SS 1993, c P-6.2, s 2.
24 Personal Property Securities Act 1999 (NZ) s 16.
26 Personal Property Security Act, RSBC 1996, c 359, s 1.
where, for example, the meaning of a particular word is unknown or unclear. Readers generally consider it unnecessary to read a dictionary from beginning to end. The second assumption is that a dictionary is complete. Readers assume that if they were to read a dictionary from beginning to end, they would come across all necessary words.

In the case of the PPSA Dictionary, neither assumption holds true. It is critical to read the Dictionary in full to find out which terms used in the PPSA are actually defined. Otherwise, a definition may be missed. It is true that some terms are obvious and that a reader would have an expectation that they would be defined. That might be because the term is one that tends to vary from statute to statute. For example, terms such as ‘business day’ or ‘writing’ are likely to send a reader straight to the Dictionary to confirm the meaning in the new context. A reader will also clearly have an expectation that a new term, such as ‘chattel paper’, would be defined. Other terms are, however, less obvious, particularly when they draw on pre-PPSA terms in common usage. Would a reader, for example, necessarily immediately check the meaning of ‘intangible property’ or ‘negotiable instrument’? Yet the PPSA gives both terms new meanings.

It is thus clearly important to know that a particular term is included in the Dictionary. It is nonetheless equally important to know that a particular term is not defined. Even only a passing familiarity with the Dictionary soon reveals that a number of key terms are missing. ‘Rights in the collateral’ is a prominent, albeit only one, example.28 It is a fundamental principle that a grantor must have such rights (or at least the power to transfer such rights to the secured party) for the security interest to attach to the property.29 Yet the lack of a definition means that it is not clear what constitutes such rights.30 Terms that are not defined may provoke uncertainty.

While this article focuses on the Dictionary and other key terms used in the PPSA but not defined, it should be noted that the PPSA is not the only source of terms used in discussion in this field. In Australia, the Corporations Act introduces further definitions for use under that legislation. They become relevant to security interests given by a corporate grantor that subsequently goes into administration or liquidation. The Acts Interpretation Act 1901 (Cth) also impacts, although interestingly s 11 of the PPSA confines its application to its provisions as in force at the date of Royal Assent (14 December 2009).

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28 It is found in s 19 of the PPSA in the context of when attachment occurs, rendering a security interest enforceable against the grantor.
29 PPSA s 19(2).
Furthermore, the experience of other jurisdictions, especially in Canada, suggests that both the judiciary and the academic community may introduce new terminology in their discussion of concepts. The typical distinction that is drawn between an ‘in substance’ security interest and a ‘deemed’ security interest under PPS-style legislation does not, for example, reflect the express language of the legislation. Nor is there to be found in the legislation any reference to lessees having ‘implied’ or ‘deemed’ ownership when they have possession of property under certain leases for a term of more than one year. It is not clear who was first responsible for this terminology, but certainly references to such security interests and such ownership can now be found in both cases and commentary. They have been picked up not only by New Zealand courts and commentators but also by their Australian counterparts.

It can also be expected that practitioners drafting security documentation may themselves introduce new language or adapt statutory language for their particular purposes. Already it is not uncommon to find Australian practitioners referring to ‘collateral’ as a synonym for property to be secured, even though the PPSA gives that term a rather narrower meaning, being generally ‘personal property to which a security interest is attached’. Reference to the ‘registration of security interests’ is also common. Technically, however, it is financing statements that are ‘registered’ and security interests that are ‘perfected by registration’.

One final point on the Dictionary: the meaning given to words in the Dictionary will inevitably be impacted by the judicial approach to interpretation of the PPSA. This was evident in Saulnier. In construing the term ‘personal property’ beyond the traditional common law meaning of that term, the Supreme Court of Canada was strongly influenced by its perception of the scope of the legislation:

‘Our concern is exclusively with the extended definitions of “personal property” in the context of a statute that seeks to facilitate financing by borrowers and the protection of creditors.’

31 This assumes satisfaction of other conditions that a lease must satisfy in order to be so classified.


33 See, eg, ‘Collateral Definition’ in ‘PPSA Model Clauses for a General Security Agreement’ dated 16 May 2013, prepared by Allens Linklaters, Ashurst, Herbert Smith Freehills, King & Wood Mallesons and Norton Rose Fulbright, available on their respective websites.

34 PPSA s 10. At the date of agreement, the security interest may attach to existing property of the grantor if, for example, the grantor has ownership of the property and does an act by which the security interest arises: at s 19(2). It cannot, however, attach to future property in which the grantor does not yet have rights.

35 Such usage now appears in some early judgments. See, eg, Re Cardinia Nominees Pty Ltd [2013] NSWSC 32 [8]; Maiden Civil (2013) 277 FLR 337 [41].

36 Saulnier [2008] 3 SCR 166, [51].
It is still too early to assess how Australian courts will approach the PPSA, both in terms of the primacy that they may give to the actual text of the statute and the extent to which they may be willing to look at material from other PPS jurisdictions as an extrinsic aid to interpretation. This appears to have been a recurring, and at times controversial, issue in New Zealand. There is no reason to doubt that it will also be an issue in Australia.

III A Working Table of Fundamental Terms

This article commences preparation of a Table of Fundamental Terms (‘Table’) and uses as its starting point the Dictionary contained in s 10, which is located in div 2 of pt 1.3 of the PPSA. The Guide to pt 1.3 on Definitions indicates that the Dictionary is an exhaustive list of defined terms, either defining a term itself or furnishing a signpost to a provision where it is defined. However, as noted in Part II of this article, the Dictionary is not an exhaustive list of legislative terms. There are, as Columns 3 and 4 of the Table indicate, a considerable number of undefined legislative terms.

While the initial division between those terms that are defined and those that are not is objectively ascertainable and easy to make, it is not always simple for the purposes of the Table to determine whether the language in which a particular term is couched is best explained as old language introducing a new concept or as new language introducing a new concept. The term ‘proceeds’ is one such example. The term has an existing meaning outside the PPSA, but is used in such a novel way


39 PPSA s 9.
under the PPSA that it may be better to think of it as new language introducing a new concept.\textsuperscript{40}

Although the listing of particular terms in the Table should be treated as having some flexibility and although some terms may arguably fall within several categories, the purpose of the Table is to attempt to give an overall sense of what are new terms and what are old terms and whether those terms reflect a new concept or an old concept. ‘Old’ in this context refers to general usage pre-PPSA.

An initial important point clearly emerges from the first working version of the Table: the Table strongly suggests that some common statements made about the impact of the PPSA are open to challenge. It is often said, for example, that the old terminology relating to secured transactions law has been replaced. Certainly, in the US, Gilmore indicated that art 9 used ‘its own terminology’ and pointed to the Comment to the then art 9-105, which referred to the selection of terms without any ‘common law or statutory roots’.\textsuperscript{41} Whatever the position may have been in the US and indeed whatever it may be elsewhere, the statement that old terminology is replaced is only partly true in relation to the PPSA.

In the case of both defined and undefined terms, new language has certainly been introduced not only for new concepts but also for some old concepts. Nonetheless, old language is very much still in evidence. In some instances that old language is expressly defined to take on a new meaning for the purposes of the legislation; in other instances it is left undefined. The problem is that while that old language does not grate on the ear, as Gilmore conceded the new unfamiliar language might,\textsuperscript{42} it does lull us into — dare one say — ‘a false sense of security’. The old familiar language is certainly less alarming. It is, however, a potential cause of confusion, both when a term is given a specific but unexpected new meaning (the proverbial \textit{faux ami}) and when a term is left undefined, with it being unclear whether the term is to bear the old meaning or some new meaning. Saulnier, acknowledging in Canada the possibility of a wider meaning of ‘property’ than that attributed by the common law, is a case in point.\textsuperscript{43}

The role played by these old language terms raises again the debate as to whether it is better to approach the PPSA with knowledge of the previous law, or not. The manner in which terms are used suggests that it is critical to know that the language used in the PPSA may have other meanings, and not just in situations where the PPSA is not operative. It is also critical to appreciate that established pre-PPSA meanings may, but not necessarily will, influence the interpretation of undefined terms and that the PPSA’s undefined terms cannot necessarily be construed as if the previous meaning did not exist.

\textsuperscript{40} Ibid s 31.
\textsuperscript{41} Gilmore, above n 5, 301–2.
\textsuperscript{42} Ibid 301.
\textsuperscript{43} See text in Part I above.
A Working Table of Fundamental Terms

1 Use of New Language

<table>
<thead>
<tr>
<th>Column 1</th>
<th>Column 2</th>
<th>Column 3</th>
<th>Column 4</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Defined Terms</strong></td>
<td><strong>Undefined Terms</strong></td>
<td><strong>Defined Terms</strong></td>
<td><strong>Undefined Terms</strong></td>
</tr>
<tr>
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<td>New language for old concepts</td>
<td>Enforceable against third parties</td>
<td>New language for old concepts</td>
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<td>Chattel paper</td>
<td>Account</td>
<td>Flawed asset arrangement (?)</td>
<td>Disposal of collateral</td>
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<td>Circulating asset</td>
<td>Account debtor [in part – excluding chattel paper]</td>
<td>Honestly and in a commercially reasonable manner</td>
<td>Redeem collateral</td>
</tr>
<tr>
<td>Collateral</td>
<td>Intermediated security</td>
<td>Regular engagement (?)</td>
<td>Retention of collateral</td>
</tr>
<tr>
<td>Continuously perfected(^{45})</td>
<td>Investment instrument</td>
<td>Reinstatement of security agreement</td>
<td></td>
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<tr>
<td>Control</td>
<td></td>
<td>Rights in collateral</td>
<td></td>
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<tr>
<td>Effective registration</td>
<td></td>
<td>Seizure</td>
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<td>Financial property</td>
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<td>Taking free</td>
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<tr>
<td>Financing (change) statement</td>
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<td>Temporary perfection</td>
<td></td>
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<td>New value</td>
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<td>Vests in the grantor</td>
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<tr>
<td>PPS lease</td>
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<tr>
<td>Proceeds (?)</td>
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<tr>
<td>Purchase money security interest</td>
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<td>Serial number</td>
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<tr>
<td>Verification statement</td>
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</tbody>
</table>

See Appendix 1 for other terms contained in the Dictionary but not placed in the Table. The notation ‘[?]’ indicates some uncertainty as to the term’s correct place in the Table.

This is a new phrase, although the term ‘perfection’ is an example of old language used for a new concept.
2 Use of Old Language

<table>
<thead>
<tr>
<th>Column 1</th>
<th>Column 2</th>
<th>Column 3</th>
<th>Column 4</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Defined Terms</strong></td>
<td><strong>Old language for new concepts</strong></td>
<td><strong>Old language for old concepts</strong></td>
<td><strong>Old language for old concepts</strong></td>
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<tr>
<td>Accession</td>
<td>General law</td>
<td>Ordinary course of business</td>
<td>Assignment</td>
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<td>After-acquired property</td>
<td>Interest</td>
<td>Registration</td>
<td>Bailment</td>
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<td>Attaches</td>
<td>Value</td>
<td>Subordination</td>
<td>Buyer [?]</td>
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<td>Commingled</td>
<td>Document of title</td>
<td>Traceable [?]</td>
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<td>Financial product</td>
<td>Transfer</td>
<td>Conditional Sale</td>
</tr>
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<td>Fixtures [?]</td>
<td>Fixtures [?]</td>
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<td>Hire Purchase</td>
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<td>Goods</td>
<td>Goods</td>
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<td>Lease</td>
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<td>Grantor</td>
<td>Intangible property</td>
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<td>Mortgage</td>
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<tr>
<td>Intellectual property (IP licence)</td>
<td>Intellectual property (IP licence)</td>
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<td>Pledge</td>
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<tr>
<td>Intermediary [?]</td>
<td>Intermediary [?]</td>
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<td>Possession</td>
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<tr>
<td>Inventory</td>
<td>Inventory</td>
<td></td>
<td>Retention of title</td>
</tr>
<tr>
<td>Land</td>
<td>Land</td>
<td></td>
<td>Set-off</td>
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<tr>
<td>Licence</td>
<td>Licence</td>
<td></td>
<td>Subrogation [?]</td>
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<td>Livestock</td>
<td>Livestock</td>
<td></td>
<td>Trust receipt</td>
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<td>Negotiable instrument</td>
<td>Negotiable instrument</td>
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<tr>
<td>Perfected</td>
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<td>Personal property</td>
<td>Personal property</td>
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<td>Possession</td>
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<td>Secured party</td>
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<td>Security agreement</td>
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<td>Security interest</td>
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<td>Writing [?]</td>
<td>Writing [?]</td>
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</table>

<table>
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<tr>
<th><strong>Undefined Terms</strong></th>
<th><strong>Old language for new concepts</strong></th>
<th><strong>Old language for old concepts</strong></th>
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</thead>
<tbody>
<tr>
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<td>General law</td>
<td>Ordinary course of business</td>
</tr>
<tr>
<td>Subordination</td>
<td>Registration</td>
<td>Subordination</td>
</tr>
<tr>
<td>Traceable [?]</td>
<td>Traceable [?]</td>
<td>Transfer</td>
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<tr>
<td>Transfer</td>
<td>Transfer</td>
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</tr>
</tbody>
</table>

46 Registration under the PPSA involves registration of a financing statement as distinct from registration of the security interest.

47 See Whittaker, above n 36.

48 See PPSA s 24. ‘Possession’ is placed in both Column 1 as a defined term representing old language for new concepts and Column 4 as an undefined term representing old language for old concepts. This is because the PPSA states that possession has ‘a meaning affected by section 24’: at s 10.
While the Table uses the headings ‘defined terms’ and ‘undefined terms’, the PPSA appears to draw a further distinction between ‘definitions’ and ‘concepts’. Such a distinction is not reflected in the Table. The PPSA does, however, describe those concepts in the Guide to pt 1.3 as merely ‘longer definitions’.49 There are four such concepts: security interest,50 PPS lease,51 purchase money security interest52 and intermediated security.53 This distinction appears unique to the PPSA but it does not appear to impact on the classification adopted in the Table.

Finally, it should be noted that the amount of detail in the defined terms varies across the terms. It is often de rigueur in seminars for the definition of ‘fish’ to be examined. ‘Fish’ means:

any of the following, while alive:
(a) marine, estuarine or freshwater fish, or other aquatic animal life, at any stage of their life history;
(b) oysters and other aquatic molluscs, crustaceans, echinoderms, beachworms and other aquatic polychaetes;
but does not include any fish prescribed by the regulations for the purposes of this definition.54

In light of the ambiguity of some other key terms, such as ‘rights in the collateral’, and in the absence of any attempt at definition, the level of detail given to ‘fish’ seems initially surprising. It has been explained, anecdotally at least, as reflecting issues that have arisen in the past with regard to financing fish farming.

B Defined Terms

1 New Language for New Concepts

It is inevitable that there should be new language for new concepts. This new language is typically (but not exclusively)55 found in three contexts: in several of the arrangements amounting to a security interest, in the property over which the security interest arises and in some of the mechanisms for making the security interest effective.

49 PPSA s 9.
50 Ibid s 12.
51 Ibid s 13.
52 Ibid s 14.
53 Ibid s 15.
54 Ibid s 10.
55 See, eg, PPSA ch 2 pt 2.5. ‘New value’ occurs in the context of the operation of the ‘taking free’ rules.
(a) Arrangements

Although most of the arrangements in s 12(2) of the PPSA are couched in old language and represent old concepts, prominent examples of new concepts in new language are the ‘PPS lease’ and the ‘purchase money security interest’. A ‘PPS lease’ includes an operating lease of a particular duration and kind. A lessor’s interest under such a lease is deemed to be a security interest. A ‘purchase money security interest’ arises in specified circumstances and has the potential, assuming procedural requirements are complied with, to confer what is often described as ‘super priority’ on its holder.

(b) Property

Perhaps the most obvious example is that of ‘chattel paper’. Gilmore noted that this was a ‘novel term coined by the Code draftsmen to describe a species of property which had previously managed to exist without a name’, giving by way of example a conditional sale contract. ‘Collateral’ is another new term, having a limited and somewhat circular meaning, being described as ‘personal property to which a security interest is attached’. ‘Financial property’ is a new category of property, although it excludes some property which might commercially have been expected to be included, such as debts. A ‘circulating asset’ is the description now given to property that formerly was likely to be the subject-matter of a floating charge, such as debts and inventory. Although the process of determining whether a specific asset is covered by the term can prove difficult, the underlying rationale for its inclusion is clear: to equate secured parties having security interests in these assets with holders of floating charges pre-PPSA, thereby precluding them from avoiding other existing statutory provisions that impacted chargees under a floating charge.

(c) Mechanisms for Making a Security Interest Effective

The vocabulary includes a number of terms relevant to the perfection of the security interest. For example, ‘control’ and ‘effective registration’ are methods of perfection, the latter involving the use of a ‘financing statement’ (or a ‘financing change statement’, depending on the circumstances).

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56 See Part III B 3(b) below.
57 PPSA s 13.
58 Ibid s 12(3).
59 Ibid s 14.
60 Ibid ss 62–3.
62 PPSA s 19(1).
63 Debts (some of which may be ‘accounts’) are ‘intangible property’: see below.
64 Replacement Explanatory Memorandum, Personal Property Securities Bill 2009 (Cth) ‘Chapter 9 — Transitional Provisions’ [56]– [67].
2 New Language for Old Concepts

Far less prevalent has been the introduction of new language for old concepts. It can be found in relation to property. A share, for example, may be either an ‘intermediated security’ or an ‘investment instrument’, depending on whether or not it is held through an appropriately licensed central securities depository or traded through an authorised clearing and settlement facility.\(^\text{65}\) If it is so held or traded, it falls within the former category.

One concept that seems initially quite difficult to come to grips with, and which frequently does seem to grate on the ear, is ‘account’ (and hence ‘account debtor’). ‘Account’ refers to certain types of debt and is more expansive than the old concept of a ‘book debt’.\(^\text{66}\) The New Zealand term ‘account receivable’ is perhaps more appealing,\(^\text{67}\) although that may simply be attributable to the phrase being already familiar to us through its common commercial usage.

3 Old Language for New or Modified Concepts

Typically, the old language has been used to describe some types and categories of, and interests in, property, the security interest itself and the parties to it, some of the mechanisms to make the security interest effective and the reach of the security interest.

(a) Property

‘Personal property’ is defined in such a way that it includes ‘fixtures’,\(^\text{68}\) which were traditionally part of real property at common law, and certain types of ‘licences’, which might not necessarily have been property at common law. ‘Document of title’ is given a more limited meaning than traditionally would be recognised. It does not, for example, include a share certificate. By contrast, ‘negotiable instrument’ is defined more broadly to include electronic writing transferable by assignment and a specified type of letter of credit. ‘Inventory’, not itself a legal term, appears...

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\(^\text{65}\) \textit{PPSA} s 15(1) defines an intermediated security as ‘the rights of a person in whose name an intermediary maintains a securities account’. Section 15(2)(b) defines an intermediary to include ‘a person who operates a clearing and settlement facility under an Australian CS facility licence’, thus capturing scripless shares traded through the Australian Securities Exchange’s Clearing House Electronic Subregister System (‘CHESS’).

\(^\text{66}\) See Gedye, above n 4, discussing the equivalent New Zealand term ‘account receivable’, which is defined more broadly than the Australian term. See also \textit{Strategic Finance} [2013] NZCA 357.

\(^\text{67}\) See \textit{Personal Property Securities Act 1999 (NZ)} s 16. Although, as noted in above n 66, the term is defined differently.

\(^\text{68}\) Although an interest in a fixture is currently excluded from the scope of the legislation (\textit{PPSA} s 8(1)(j)), ‘fixtures’ are nonetheless defined in the legislation as ‘goods, other than crops, that are affixed to land’: at s 10. ‘Land’ specifically excludes ‘fixtures’ under s 10.
to be wider than its generally understood commercial sense. Interestingly, the
PPSA, in the context of determining whether assets are circulating assets, distin-
guishes between the Dictionary meaning in s 10 and what s 341(1B) describes as ‘its
ordinary meaning’.

As far as categories of property are concerned, the meaning given to the term
‘intangible property’ is of particular note. At common law, such a term would be
understood to refer to all property that does not have a physical manifestation (viz, a
choice in action). In contrast, s 10 of the PPSA defines it as a residual category of
personal property excluding not only ‘goods’ but also ‘financial property’ and ‘an
intermediated security’, both of which would generally be intangibles at common
law. ‘Goods’ is also a term that initially appears more suited to classification as
‘old language for old concepts’ rather than for new concepts. The term has tradi-
tionally been used in a range of statutes, generally to refer to choses in possession
although its precise meaning may differ from statute to statute. Section 10 of the
PPSA certainly defines it as meaning ‘tangible property’. Its meaning is none-
thless extended through, for example, its express inclusion of ‘livestock’, which
covers unborn animals. Both intangible property and goods would potentially fall
within the scope of ‘after-acquired property’. While not surprising in its reference to
property acquired by the grantor after the date of the security agreement, the term is
explicitly limited to personal property.

Also altered, albeit only partially, is the property interest of ‘possession’, whose
meaning is stated in s 10 to be ‘affected’ by s 24. On the one hand, the meaning
is narrowed through the exclusion of some forms of constructive possession; on
the other hand, the meaning is extended through recognition of possession of
chattel paper evidenced by an electronic record and possession of shares through
possession of the certificates.

(b) Security Interest

Traditionally at common law the term ‘security interest’ is used generically to
include consensual arrangements such as the mortgage, charge and pledge as well as
interests arising by operation of law, such as the common law lien. Under the PPSA,

See text below.

See, eg, Sale of Goods Act 1923 (NSW) s 5 where it excludes money; Competition and
Consumer Act 2010 (Cth) s 4 where it includes gas and electricity.

In Strategic Finance [2013] NZCA 357 [25], the New Zealand Court of Appeal applied
the equivalent definition under s 16 of the Personal Property Securities Act 1999 (NZ)
to the general security agreement. Such an application, in the absence of an express
incorporation of the statutory term into a document, would be regarded in Australia
as controversial.

See PPSA ss 24(1)–(2). The secured party is precluded from having possession where
the debtor or grantor (or their agent) has actual or apparent possession, and vice versa.

Ibid s 24(5).

Ibid s 24(6).
of course, the definition in s 12(1) limits its scope to consensual transactions while at the same time extending its scope to include functionally equivalent arrangements. In s 12(3) it even includes interests arising under certain transactions that do not in substance secure payment or performance of an obligation. These changes have led to the nomenclature for parties becoming more neutral, being the ‘secured party’ and the ‘grantor’, terms that initially seem to sit uneasily together where the transaction involves a reservation of title.75

(c) Effectiveness of Security Interest

‘Attachment’ and ‘perfection’ are terms that were in common usage pre-PPSA. ‘Attachment’ was, for example, used to describe the crystallisation of a floating charge into a fixed charge, with the charge said to attach to the assets on the crystallising event. ‘Perfection’ was used in the context of precluding a registrable security interest granted by a company from being challenged by an administrator or liquidator for lack of registration. Now both terms have become more technical. ‘Attachment’ occurs when the grantor has rights in the collateral (or power to transfer rights) and either value is given or the grantor does an act by which the security interest arises.77 Therefore, it is the moment at which the security interest becomes enforceable against the grantor.78 ‘Perfection’ represents a status, being the ‘optimal level of protection’ available to a secured party, while also indicating a means by which that very status can be achieved.79 Hence, it is said that the secured party may perfect by taking possession or control (where such methods are available on the facts) or by making an effective registration.80 The status is relevant in terms of not only precluding the security interest from being vested in the grantor upon insolvency,81 but also of determining priority,82 and of narrowing the circumstances in which a third party may take free of the security interest.83

75 Ibid s 10. A ‘grantor’ may, but need not necessarily, be the ‘debtor’. Under New Zealand and Canadian legislation, the term ‘debtor’ is used to refer to both the person who owes the obligation as well as the person who owns (or has another sufficient interest in) the property. See, eg, Personal Property Securities Act 1999 (NZ) s 16; Personal Property Security Act, SS 1993, c P-6.2, s 2; Personal Property Security Act, RSO 1990, c P-10, s 1.

76 See Gilmore, above n 5, 302–3, for a description of how the terms ‘secured party’ and ‘debtor’ in art 9 of the US Uniform Commercial Code were selected, having initially started their statutory life as ‘financier’ and ‘borrower’.

77 PPSA s 19(2).

78 Ibid s 19(1).

79 Graham [2004] 2 NZLR 528, 532 [12].

80 PPSA s 21.

81 Ibid s 267, but subject to s 268.

82 Ibid s 55.

83 Ibid ss 43 and 52.
(d) Reach of the Security Interest

The terms ‘accession’ and ‘commingling’ are used in the PPSA in the context of a security interest continuing in circumstances where the goods to which it is attached are installed in other goods or so mixed with other goods that their identity becomes lost. The PPSA provides rules for determining when the security interest continues despite the mixing and for working out the priority position. This is a very different sense to the way in which those terms are used at common law where they occur in the context of determining whether ownership has been involuntarily transferred. It has been pointed out by Canadian commentators that many cases in which the doctrine of accession was successfully raised at common law would now be dealt with under the heading of ‘commingling’.84

4 Old Language for Old Concepts

Old language is of course also used for defining old and familiar concepts. ‘General law’ is now a common term that is found in statute to refer to the principles of common law and equity. ‘Value’ is familiar as meaning consideration sufficient to support a contract and its extension in s 10 of the PPSA to an antecedent debt or liability echoes its usage in other statutes, such as the Bills of Exchange Act 1909 (Cth).

C Undefined Terms

As discussed, the Dictionary is an exhaustive list of defined terms but not of all the legal terms used in the legislation. It is interesting to note what the legislature has chosen not to define. Where the legislation does not give a definition, a question immediately arises as to meaning. In such discussion, it should not be forgotten that the PPSA acknowledges that it is not an exclusive code. Section 254 emphasises that general law and statute operate concurrently with the PPSA to the extent that they are capable of so doing. While judicial and academic admonishments abound, emphasising the need to take care not to import pre-PPSA concepts into construction of the PPSA, the PPSA itself clearly does so in its continuing use of old language for old concepts.

1 New Language for New and Old Concepts

These new terms are spread throughout the PPSA and are not always easy to classify. Reference has already been made to the uncertainties provoked by ‘rights in collateral’. Ambiguities proliferate in the ‘flawed asset arrangement’.85 while poten-

85 For a discussion of such arrangements, see generally Diccon Loxton, ‘One Flaw Over the Cuckoo’s Nest — Making Sense of the “Flawed Asset Arrangement” Example, Security Interest Definition and Set-Off Exclusion in the PPSA’ (2011) 34(2) University of New South Wales Law Journal 472.
tially another new concept,\textsuperscript{86} it can be argued to be new language for an old concept. The outcome depends on how restricted a meaning is given to it. To the extent that it is construed to mean simply a deposit made with a bank that the depositor agrees not to withdraw until performance of a specified obligation (either of the depositor or a third party), the arrangement may be viewed as a pre-PPSA concept, although it was not a term of art. If the arrangement requires additional restrictions, such as an obligation to maintain the deposit for a certain period and an obligation not to encumber it,\textsuperscript{87} it takes on the appearance of a new concept.

A clearer example of a new term for a new concept is that of ‘taking free’,\textsuperscript{88} which alludes to a series of statutory rules under which a third party may take property unencumbered by a security interest. These ‘taking free rules’ are sometimes characterised as ‘extinguishment rules’, an additional label that itself risks confusion insofar as it implies that the security interest is necessarily terminated when in fact it may, for example, attach to the proceeds.\textsuperscript{89} The concept of ‘enforceability against third parties’ is more limited than the wording might initially suggest,\textsuperscript{90} containing criteria directed essentially at corroborating the existence of the security interest by requiring a secured party to have possession or control of the collateral or a security agreement in the requisite form with the requisite coverage.\textsuperscript{91}

In the context of remedies, further terminology has been introduced to describe a new standard of conduct for their exercise,\textsuperscript{92} as well as the process by which a default in a security agreement may be cured.\textsuperscript{93} New language is used both to describe and to expand old remedial concepts. The two major remedies are ‘disposal of collateral’\textsuperscript{94} and ‘retention of collateral’.\textsuperscript{95} Disposal covers the notion of sale but also includes, in certain circumstances, leasing and licensing. Retention embraces the notion of foreclosure in the sense of enabling a secured party to retain the property as its own. It moves away, however, from the technical operation of foreclosure as the extinction of the equity of redemption and makes retention a general remedy, rather than a remedy that was only available at common law to the mortgagee.\textsuperscript{96} Also expanded

\textsuperscript{86}PPSA s 12(2)(l).
\textsuperscript{88}PPSA ch 2 pt 2.5.
\textsuperscript{89}Ibid s 32.
\textsuperscript{91}PPSA s 20.
\textsuperscript{92}Ibid s 111. ‘Honestly and in a commercially reasonable manner’.
\textsuperscript{93}Ibid s 143. ‘Reinstatement of a security agreement’.
\textsuperscript{94}Ibid s 128.
\textsuperscript{95}Ibid s 134.
\textsuperscript{96}It was only under the common law or equitable mortgage that title (legal or equitable, respectively) was transferred. See generally Sheelagh McCracken et al, Everett & McCracken’s Banking and Financial Institutions Law (LawBook Co, 8th ed, 2013) 568–70.
is the notion of ‘redeeming collateral’.\textsuperscript{97} Previously the term ‘redeem’ was typically only used in respect of a mortgagor’s equity of redemption.\textsuperscript{98}

2 Old Language for New and Old Concepts

The use of old language to describe new concepts is exemplified by the term ‘subordination’. ‘Subordination’ is used to encompass the ranking of secured debt rather than confined to its more usual meaning of ranking unsecured debt.\textsuperscript{99} Pre-PPSA ranking of secured debt tended to attract the language of ‘priority’, although commercially the term was probably used more loosely. More technical is the term ‘ordinary course of business’, which is used in the PPSA in the context of a buyer or lessee taking free of a security interest when personal property is sold or leased ‘in the ordinary course of the seller’s or lessor’s business of selling or leasing personal property of that kind’.\textsuperscript{100} Although the phrase ‘ordinary course of business’ is reminiscent of language used in the context of a floating charge, the qualification introduced by the reference to the seller’s or lessor’s business indicates that it is more limited in scope.\textsuperscript{101}

Not surprisingly, however, it is in relation to the old concepts that the old language is most commonly found. In particular, it is used in relation to the old forms of arrangements that have been embraced by the new statutory term ‘security interest’. These include the old security interests, such as the ‘mortgage’, the ‘charge’ and the ‘pledge’. They also include those arrangements that were regarded as functionally equivalent to security, such as ‘conditional sale’, ‘retention of title’, ‘hire purchase’, ‘(finance) lease’ and ‘assignments by way of security’. Most of these arrangements are straightforward, with the terms being well understood. One perhaps more complex term is the ‘trust receipt’. It is not clear whether this bears the rather limited meaning that it has developed under Anglo-Australian law,\textsuperscript{102} or whether it reflects a broader American usage.\textsuperscript{103}

Ambiguity in old terms is also found elsewhere in the PPSA. ‘Set-off’ is a classic example. A right of ‘set-off’ is expressly excluded under s 8 of the PPSA. Yet, under Australian law at least, the meaning of ‘set-off’ is unclear. To the extent that it means a discharge from a personal obligation, its exclusion is logical. Where it is used to mean an appropriation of property, the position is more difficult. For example, where a contractual arrangement provides for an appropriation of property under the guise

\begin{footnotes}
\item\textsuperscript{97} \textit{PPSA} s 142.
\item\textsuperscript{98} It has admittedly been used in a more general sense. See, eg, \textit{Re Bank of Credit and Commerce International SA (No 8)} [1998] AC 214, 227.
\item\textsuperscript{99} See, eg, \textit{PPSA} ss 61 and 12(6)(b), although it refers to ‘unsecured debt’ in s 12(6)(a) and s 268(2).
\item\textsuperscript{100} Ibid s 46.
\item\textsuperscript{102} See \textit{Re David Allester Ltd} [1922] 2 Ch 211; McCracken et al, above n 96, 576–8.
\item\textsuperscript{103} See, eg, Gilmore, above n 5, ch 4.
\end{footnotes}
of a ‘set-off’, it may be argued that the arrangement is in fact a charge under s 12(2), or (depending on the circumstances) a flawed asset arrangement under s 12(2), or simply a security interest under s 12(1), given that the appropriation amounts in any such case to an interest in property.104

Two other old, undefined terms that have been discussed in other PPS jurisdictions, both in case law and academic commentaries, are ‘possession’105 and ‘buyer’. Each term appears controversial. When the legislation enables ‘possession of goods’ on the part of the grantor under specified transactions such as a lease for a term of more than one year to amount to ‘rights in the collateral’ for the purpose of attachment of the security interest,106 must ‘possession’ be understood in terms of possession amounting to implied or deemed ownership?107 When the legislation enables a ‘buyer’ to take free of a security interest,108 is the buyer a person who has agreed to buy the property or a person to whom title to the property has passed under sale of goods legislation?109 The answer to this latter question is critical where the grantor becomes insolvent after entry into the contract of sale but prior to transfer of title.

IV Shaping Concepts and Conceptual Thinking

In its manner of introducing and using language, the PPSA encourages, if not on occasions even forces, the reader to consider (and indeed reconsider) both the legal concepts themselves and the way in which they are intellectualised.
Under the *PPSA*, the general understanding of a security interest has clearly changed, given in particular its focus on functionality. The words we use to explain its operation, and accordingly the manner in which we now think about it, have also changed.

Pre-*PPSA*, an analysis of security transactions would have typically provoked the following major questions under Australian law:

- What is the nature of the security interest?
- Is the security interest valid?
- Is the security interest registrable and, if so, has it been registered?
- What is the priority of the security interest?
- What are the remedies conferred by the security interest?

Now the focus has shifted to:110

- Does a security interest exist?
- Is the security interest effective?
  - Is it attached?
  - Is it enforceable against third parties?
  - Is it perfected?
- What is the priority of the security interest?
- What is the reach of the security interest?
  - Does the security interest continue in some manner by reason of an accession, commingling or proceeds?
  - Does a third party take free of the security interest?
- What are the remedies conferred by ch 4 or by the security agreement?

At a conceptual level, the broad definition of ‘security interest’ leaves open the question of whether there is simply one type of security interest. It is commonly said

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that the statutory security interest is a unitary interest, but commentators seem divided as to what that means. Does it simply mean that each transaction falling within the definition should be treated in the same way (except as provided otherwise by the statute) or does it mean that it is always to be analysed as a charge (or an encumbrance on title)? The latter approach seems too narrow. I argue elsewhere that the security interest should be seen as having a content that changes according to the nature of the particular transaction. Sometimes the security interest is a charge or encumbrance, at other times it amounts to title or possession. Recognition that its content may differ according to the transaction does not preclude acceptance that it is subject to the same statutory regime.

Considerably less controversial is the proposition that the PPSA classification of personal property emerges from the s 10 definitions. Section 10 offers new words for thinking about property, not only in terms of the individual items of property, but also in terms of how different types of personal property fit together. Under the PPSA, personal property is divided into four categories: goods, financial property, intermediated security and intangible property. Financial property is itself further subdivided into five sub-categories: chattel paper, currency, document of title, investment instrument and negotiable instrument.

The s 10 definitions also indicate that this scheme is not the only possible basis for classification or for thinking about the personal property. Cutting across the principal classification are further classifications, such as distinctions between consumer property and commercial property, property as original collateral and as proceeds of that original collateral, inventory and non-inventory, and circulating and non-circulating assets.

Interestingly, none of these statutory classifications reflect the traditional division between choses in possession and choses in action. Yet that classification may still on occasions be relevant. One example arises where a transaction purports to involve

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111 See references in ibid.
113 Acceptance of a broader notion of ‘property’ in the case of the particular fishing licences in Saulnier (see Part I above) prompts, for example, a different conception of the term and its scope. Should property, by way of further example, include domain names or email accounts for the purpose of the PPSA? This is a question still unresolved at common law in Australia. See Lim Yee Fen, ‘Is An Email Account “Property”?’ (2011) 1 Property Law Review 59.
114 Confusingly, the regulations provide for an intermediated security to be treated as financial property for the purposes of item 4 of the table set out in s 153 of the PPSA relating to the content of financing statements. See Personal Property Securities Regulations 2010 (Cth) sch 1 pt 2 cl 2.1.
a transfer of possession by way of security. Historically, a problem arises under Australian common law where a particular form of security, namely a pledge, is sought over assets such as a bank deposit or shares. A pledge requires physical possession of the property. Accordingly, the property to be secured must have a physical manifestation. A deposit is simply a debt that is a chose in action; it has no physical manifestation and cannot be possessed. Similarly, shares have no physical manifestation, even when evidenced in share certificates. An attempt to argue that there is a pledge over shares and, for that reason, a security interest, must be incorrect.\footnote{Cf i Trade Finance Inc v Bank of Montreal [2011] 2 SCR 360.} Rather, the argument should be that rights are given over the shares and that such rights amount to either a mortgage or charge over shares under s 12(2) and hence a security interest under s 12(1) or, more simply, that the rights amount to an interest in property that secures payment or performance of an obligation and hence are a security interest under s 12(1).

\section*{V Conclusion}

At a practical level, the ‘moral’ of this article has been essentially twofold. Before analysing any question relating to security interests, it is incumbent on a person approaching the \textit{PPSA} to read the Dictionary in \textit{PPSA} s 10 from beginning to end and to refrain from making any assumptions as to what terms might be found. While it might be said that a lawyer, and indeed a law student, will adopt such an approach as a matter of course, anecdotal evidence of dealings with the \textit{PPSA} to date suggests that the meaning of particular words is often presumed and that the Dictionary is not as frequently consulted as might be anticipated. This is a matter of some concern, particularly when the making of either of the two common assumptions as to when and how to use a dictionary can prove unfortunate in the context of the \textit{PPSA}.

The Table, which this article has started to develop, highlights not just the defined terms but also the undefined terms. In doing so, the Table makes clear that while reading the Dictionary is a necessary first step in coming to grips with the \textit{PPSA} lexicon, it is by no means the only step. The undefined terms used in the legislation are also important. Their potential ambiguities should be identified. This is evident where the terms use the old language for new concepts which, in the manner of \textit{faux amis} in any foreign language, may produce unexpected outcomes. Interestingly, the UNCITRAL \textit{Legislative Guide on Secured Transactions} strongly recommends States proposing to enact a secured transactions law on the basis of the Guide to fully define ‘terms and concepts [that] do not already form part of national law’.\footnote{UNCITRAL, \textit{Legislative Guide on Secured Transactions}, United Nations (New York, 2010) 5 [16].} Ambiguities in old language describing old concepts should, however, also be resolved. Such issues of definition are issues that could usefully be referred for the review of the \textit{PPSA}.\footnote{\textit{PPSA} s 343 requires a review to be undertaken and completed within three years of the registration commencement date of 30 January 2012. The Attorney-General announced the review on 4 April 2014: \url{http://www.ag.gov.au/Consultations/Pages/}}
At a more conceptual level, the lexicon of the *PPSA* plays a significant part in causing practitioners and academics, let alone judges, to think more deeply about *PPSA* concepts. Much of the language, both old and new, challenges all to articulate the scope of the concepts as precisely and fully as possible.
### APPENDIX 1

**Terms set out in the Dictionary that have not been included in the Table of Fundamental Terms**

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David C Turner*

DEBTOR-INDUCED PAYMENTS

ABSTRACT

The Australian Personal Property Securities Act 2009 (Cth), as do the other personal property security acts of New Zealand and the Canadian provinces, clearly states that the recipient of a debtor-induced payment made by a grantor of a security interest in collateral is immunised from a proceeds claim or priority entitlement by a secured party. The policy behind debtor-induced payments is primarily to ensure that a debtor is able to pay his or her general unsecured creditors in priority to the debts owed to a secured party. An additional policy reason is the protection of the economy through the maintenance of the payments system generally. This article critically examines the legislation in the various Personal Property Securities Acts, including the case law, identifies the policy arguments in support of a broad application of the rule and suggests that the American provision in Article 9 of the Uniform Commercial Code provides a better solution as it will enhance the ability of a debtor to pay his or her unsecured debts and thereby ensure the free flow of cash and negotiable instruments used to pay debts.

INTRODUCTION

The purpose of this article is to explore the interrelationship between a secured party’s right to collateral secured by a security interest, including proceeds, and the right of third party creditors to receive payments of their unsecured debts free of the secured party’s security interest. In particular, this article explores whether or not the personal property security legislation (in those jurisdictions, including Australia, that have adopted a form of legislation modelled on art 9 of the United States’ Uniform Commercial Code)...

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Code1 (‘Article 9’) has changed the way courts deal with conflicting rights outside the insolvency laws. Those statutes will be collectively referred to as the ‘PPSAs’.2 Do those rights of an unsecured creditor withstand the rights of a bank that has a security interest in the account perfected by control,3 or the rights of a bank to set off any proceeds payment paid to the debtor’s account with it? Such rights being accorded to a bank would defeat the object of ensuring that a debtor is able to pay his unsecured creditors free of any security interest granted in favour of a bank or a third party financier.

The Australian Personal Property Securities Act 2009 (Cth) (‘AustPPSA’),4 like the other PPSAs, gives a secured party an automatic right to proceeds of collateral whether or not the instrument creating the security interest provides for proceeds as a class of collateral5 or a description of the proceeds.6 This proceeds entitlement therefore arises

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1 (‘UCC’). The UCC was first promulgated in 1952 under the joint sponsorship of the American Law Institute and the National Conference of Commissioners on Uniform State Laws. For a summary of the amendments, see Uniform Law Commission, UCC Article 9 Amendments (2010) Summary <http://www.uniformlaws.org>: ‘Article 9 was substantially revised in 1998, and the 1998 revisions are in effect in all states and the District of Columbia. The 2010 amendments to Article 9 modify the existing statute to respond to filing issues and address other matters that have arisen in practice following over a decade of experience with the revised Article 9 … [T]he 2010 amendments provide greater guidance as to the name of a debtor to be provided on a financing statement. … More importantly … provide significantly greater clarity as to the name of an individual debtor to be provided on a financing statement.’

2 The Canadian provinces have adopted a model developed by the Canadian Conference on Personal Property Security Law, with the exception of Ontario whose legislation is distinctively different. New Zealand adopted the Saskatchewan legislation with minor changes. The Canadian and New Zealand models predate the Article 9 revision in 1998. The Australian legislation is somewhat idiosyncratic although modeled on the New Zealand legislation but has been substantially redrafted to include a number of the Article 9 1998 revision changes, significantly perfection by control. The drafting style and change of terminology, such as ‘grantor’ for ‘debtor’ and ‘personal property’ in place of ‘goods’, and significant policy differences make the legislation difficult to compare with the overseas jurisdictions and to comprehend.

3 Under AustPPSA, s 12(4)(a) a bank that is an authorised deposit-taking institution (an ADI) is able to take a security interest in an ADI account held with it and perfect the security interest by control (s 21(2)(c)(i)). Perfection by control trumps perfection by any other means, usually perfection by registration, because of ss 57 and 75. Apart from Article 9, the other PPSA jurisdictions do not permit perfection by control. The idea of control derives from UCC § 8-106. It was originally confined to investment securities and other investment property under Article 8. It was applied to deposit accounts under § 9-104 under the 1999 Revision of Article 9. See UCC Article 9 § 9-104 Official Commentary. Perfection is automatic with a signed control account agreement. Perfection by registration of a financing statement is not required.

4 This Act commenced operation on 30 January 2012.

5 AustPPSA s 32(1).

6 Ibid s 20(6). A secured party must also comply with the requirements of s 153 Item 3 and the regulations when completing the financing statement. See Ronald CC Cuming, Catherine Walsh and Roderick J Wood, Personal Property Security Law
by operation of the statute. It does this by providing that if collateral gives rise to proceeds, the security interest (a) continues in the collateral, unless the secured party authorised the disposal; and (b) attaches to the proceeds unless the security agreement provides otherwise. The first part of the provision allows the secured party to follow the collateral into the hands of a third party transforee, while the second part allows the secured party to trace or follow the collateral proceeds in the debtor’s hands and beyond. If a sale of inventory occurs in the ordinary course of business of the seller (debtor), the secured party will have expressly or impliedly authorised the disposal. The right to the original collateral is therefore lost and the secured party must rely on the proceeds. Proceeds can be represented by cash, a substitution (trade in goods or an exchange), cheques and other negotiable instruments, but not real property.

This article originally arose in response to the New Zealand Court of Appeal decision in 2012 in Commissioner of Inland Revenue v Stiassny (‘Stiassny’). There were two main issues in the case, one involving the operation of s 95 of the New Zealand Personal Property Securities Act 1999 (NZ) (‘NZPPSA’) and the other in relation to the recovery of a mistaken GST payment. The receiver unsuccessfully appealed to the Supreme Court of New Zealand. These decisions are discussed below.

II Background

One objective of the PPSAs is to enable inventory financiers to secure more effectively their reservation of title supplies or loans against new or used inventory. Prior to the enactment of the PPSAs, there were a number of uncertainties in relation to proceeds claims and protecting a proceeds-secured inventory financier. The uncertainties apply to the two main types of inventory financing; namely, the supply of inventory on a reservation of title basis to a trader or a provision by a financier of a line of credit to enable a trader to acquire inventory. In each case, the supplier or financier will want access to the proceeds of sale represented by cash, cheques or proceeds in a bank account or any trade-in received by the trader to satisfy its security interest. This entitlement to proceeds is contrasted with the need of the trader to pay his or her general creditors.

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7 If not for this statutory entitlement a security agreement would require an after-acquired property clause or, in the case of a reservation of title arrangement, a trust proceeds clause.

8 Proceeds are extensively defined in AustPPSA s 31. They include identifiable or traceable personal property that is derived directly or indirectly from a dealing with the collateral or proceeds of collateral. See Cuming, Walsh and Wood, above n 6, 562–567; Duggan and Brown, above n 6, [11.08]–[11.14].

9 Cuming, Walsh and Wood, above n 6, 562.

10 [2013] 1 NZLR 140.

As we have seen a proceeds claim or security interest is automatic under the PPSAs. It arises on dealing with the original collateral (or the proceeds of collateral) to which a security interest has attached that results in identifiable or traceable personal property. By contrast, an after-acquired property clause in a debenture or general or specific security agreement will also attach to these items of personal property and they will be easily claimed. If the proceeds comprise a trade-in vehicle, or another item of personal property is swapped, there will be no difficulty for the secured party claiming it, as it will automatically be caught by the after-acquired property clause as original collateral and not as proceeds, which are substitute collateral. The question will be: does the charging or collateral clause cover the personal property that is represented by the proceeds, or must the secured party rely on the statutory entitlement to proceeds? The policy behind a proceeds rule is that the secured party should be able to keep or have a claim to the resultant proceeds.

Under the prior Anglo-Australian law, the after-acquired property clause in a debenture charge would attach to any property obtained by the debtor as proceeds of sale or as a substitution, such as a trade-in. The position was different under a sale of inventory on a retention-of-title basis, as the supplier’s rights would be limited to the unsold goods in the possession of the buyer. Any claim to proceeds (book debts), or new products obtained in substitution, was treated by the courts as subject to a charge and in most cases the charge would not be registered as a charge on book debts and thus was void for want of registration under the Corporations Act 2001 (Cth). Despite this, the High Court of Australia in Associated Alloys Pty Ltd v ACN 001 452 06 Pty Ltd upheld a proceeds clause drafted as a trust for proceeds (to prevent a windfall to the supplier) requiring a debtor to hold the part of the proceeds on trust for the supplier that corresponded to the amount owing to the supplier for the original goods.

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12 AustPPSA s 31.
13 This was important under the prior law but does not matter under the PPSA because of AustPPSA ss 20(6) and 32(1)(b); NZPPSA s 45(1)(b); SaskPPSA s 28(1). Under AustPPSA s 20(6) it is not necessary to describe or define proceeds but the requirements of s 153(1) item 4 must be complied with when completing a financing statement.
14 See Caldwell, above n 11, 168.
18 Ibid 611. The proceeds claim failed as the majority described the inability to trace to the proceeds to the relevant invoices as ‘the lacuna in the evidence’ at [54].
Under the prior law, a debtor was empowered to use the proceeds of sale generated in his or her business to pay his or her creditors. This idea comes from the licence theory associated with the floating charge whereby the charge hovers over the assets of the business charged, thus enabling the grantor to deal with his or her assets until the charge crystallises because an event of default has occurred. At this time the charge fixes upon the then property of the chargor. Until crystallisation the chargee has no property interest in the assets of the chargor that are subject to the floating charge, which would include cash at bank. With the fixed charge the chargee has a fixed interest or real right that can only be cut off by a disposition to a bona fide purchaser for value without notice.

This licence theory endures under the PPSAs despite the security interest being a fixed legal interest. Iacobucci J in Royal Bank of Canada v Sparrow Electric Corp expressed the licence theory in the following terms:

Briefly, the licence theory holds that a bank’s security interest in the debtor’s inventory, though it be fixed and specific, is subject nevertheless to the licence in the debtor to deal with that inventory in the ordinary course of business … Consequently, says the theory, the bank’s claim to the inventory must give way to any debts incurred in the ordinary course of business … The security interest in inventory disappears only if the debtor actually sells inventory and applies the proceeds to a debt to a third party.

A further objective of the PPSAs is to ensure that, subject to issues of insolvency law, a debtor is free to pay his or her unsecured creditors. The PPSAs in Canada, New Zealand and Australia, as well as UCC Article 9, provide a statutory solution to this objective in respect of negotiable instruments and credit transfers initiated by a debtor. Essentially these provisions are intended to replicate the prior law. The power given to a debtor by these provisions is equivalent to the power of a chargor under a floating charge before crystallisation, as absent this power the chargor’s

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19 Stiassny [2013] 1 NZLR 140, [37]; Stiassny [2013] 1 NZLR 453, [53]; Duggan and Brown, above n 6, [10.9]; Michael Gedye, Ronald CC Cuming and Roderick J Wood, Personal Property Securities in New Zealand (Thomson Brookers, 2002) [95.1].

20 Goode, above n 16, 4–10.


22 [1997] 1 SCR 411 (‘Sparrow’), [91]–[93].

23 Ronald CC Cuming and Roderick J Wood, Saskatchewan and Manitoba Personal Property Security Acts Handbook (Carswell, 1994) 244. The same authors suggest at the sole purpose of the provision in relation to instruments is to remove any suggestion that a secured party can succeed in an action against an unsecured creditor who receives a negotiable instrument in payment of a debt that is covered by the collateral of a secured party of the debtor: Ronald CC Cuming and Roderick J Wood, Alberta PPSA Handbook, (Carswell, 1990) 183. See also Gedye, Cuming and Wood, above n 19, [95.1].
business would come to a grinding halt. Absent this statutory right, a debtor would need to seek the consent of the secured party to each cheque, electronic transfer or cash payment of a third-party debt.

III Policy

The policy behind the statutory solution is found in *Flexi-Coil Ltd v Kindersley District Credit Union Ltd* ("Flexi-Coil"), 25 a decision of the Saskatchewan Court of Appeal, where it was said: ‘The goal of these sections is to leave money and cheques largely free from security interests to preserve the integrity of the payment system in Canada which now includes credit transfers.’ This policy can be refined to reflect two goals: first, the need to maintain finality in the payment system; and, secondly, to ensure that the debtor’s right to pay his or her ordinary creditors is preserved. These two goals do not give way to the existence of the right of a secured party to take security over the debtor’s authorised deposit-taking institution (‘ADI’) account. 27

In these circumstances, the existence of a security interest over the debtor’s deposit account should not affect the broad policy goals. This is important because if the rule were otherwise, the existence of a security over an ADI account or the accounts of an inventory purchase money security holder would severely impair the free flow of funds. This freedom also minimises the likelihood that a secured party will enjoy a claim to the recipient’s purchase with the funds. 28 As will be seen later in this article, the policy objectives are somewhat undermined by reason of the special protection given to ADIs in the AustPPSA. 29 There is a tension between the policy objectives of certainty in the banking system and preserving the rights of debtors to pay their creditors on the one hand, while on the other, protecting the proceeds of a secured party, particularly inventory financiers.

IV Proceeds

A security interest in personal property continues in the proceeds by operation of AustPPSA s 32(1). Proceeds of collateral to which a security interest is attached

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24 [2013] 1 NZLR 453, [53]–[54].


26 Barkley Clark and Barbara Clark, *The Law of Secured Transactions under the Uniform Commercial Code* (A.S. Pratt, 3rd ed, 2012) [1.08][12][b].

27 Defined in AustPPSA s 10 to mean an account with an authorised deposit taking institution licensed under the *Banking Act 1959* (Cth).

28 Note 3 to UCC § 9-332 official commentary.

29 See above n 3.
means identifiable or traceable personal property. Proceeds include property that is derived directly or indirectly from a dealing with the collateral (or proceeds of the collateral). Proceeds include intangible property and negotiable instruments. Notably, intangible property referred to in AustPPSA s 31(1)(c)(ii) includes financial property, which in turn includes currency. Negotiable instruments include cheques. Proceeds also include a negotiable instrument such as a cheque.

When considering a proceeds claim we are looking at two distinct things. One is following, which is the identification of an original asset in a different time or place. The other is tracing, the identification of a new asset as the exchange product of the original asset. Tracing is not a remedy or a claim as commonly thought; it is a process undertaken by the court to determine an entitlement. The entitlement is conferred by the PPSA but the remedy may be enforced by way of a restitutionary claim for money had and received, a constructive trust, an equitable lien or subrogation.

AustPPSA s 32(1) allows a secured party to assert its security interest in the traceable proceeds by stipulating that the security interest:

(a) continues in the collateral, unless:
   (i) the secured party expressly or impliedly authorised a disposal giving rise to the proceeds;
   (ii) the secured party expressly or impliedly agreed that a dealing with giving rise to proceeds would extinguish the security interest, and
(b) attaches to the proceeds unless the security agreement provides otherwise.

Personal property that falls within AustPPSA s 31 will not be proceeds unless it is derived directly or indirectly from a dealing with the collateral (or proceeds of the collateral) by the debtor. The debtor must have or acquire an interest in those proceeds, or have the power to transfer rights in the proceeds to the secured party.

30 AustPPSA s 31.
31 AustPPSA s 31(a).
32 AustPPSA s 10. Intangible property includes financial property and financial property includes currency and negotiable instruments.
33 AustPPSA s 10.
34 AustPPSA s 31(1)(c)(v) because a cheque is a negotiable instrument.
36 Boscawen v Bajwa [1996] 1 WLR 328, 334 per Millet LJ: ‘A process where a person traces what happened to his property, identifies the persons who have handled or received it, and justifies his claim that the money which they handled or received (and, if necessary, which they still retain) can be properly regarded as representing his property.’
or a person nominated by the secured party. The wording ‘the power to transfer rights in the proceeds’ is not present in the Canadian or New Zealand PPSAs.

It is important to recognise that a payment initiated by a debtor, by way of negotiable instrument or electronic funds transfer, is not proceeds of the deposit account to which a security interest in an ADI account has attached. This means that the proceeds provisions in the PPSAs will not apply to such a transfer. The existence of a security interest in the ADI account itself does not give rise to a security interest in a cheque drawn on it by the debtor. The same is true of the debtor-initiated debit from the ADI account. If it were not so, it would limit the effect of the provisions and defeat the second policy goal. These provisions only protect a creditor after payment has been made. In the case of a cheque, only after clearance as a cheque is provisional payment until paid. This is because until actual payment, the drawer can countermand the cheque.

### V Transferees of Negotiable and Other Property

The PPSAs provides a number of ways whereby a general security agreement holder or an inventory financier’s priority interest in proceeds is lost. These special priority rules are designed to protect holders of negotiable instruments and money. They include rules protecting creditor payments, negotiable instruments, chattel paper and negotiable documents of title. This article will deal mainly with creditor payments in AustPPSA s 69. Negotiable instruments are dealt with in AustPPSA s 70. The difference between the payment of a debt by means of a negotiable instrument to which AustPPSA s 69 relates and the purchase of a negotiable instrument under AustPPSA s 70 is that this latter section is concerned with a bona fide purchaser for value without notice.

AustPPSA s 70 is concerned with a consensual transaction whereby a person acquires an interest consisting of (a) a negotiable instrument or (b) an interest in a negotiable instrument for value. An acquirer’s interest has priority over a perfected security interest in the negotiable instrument if he or she (i) gave value and (ii) took possession or control of the negotiable instrument and (iii) lacked knowledge in the relevant sense. In the ‘relevant sense’ deals with a person whose business it is to acquire interests of this kind. If so, did he or she acquire the interest without actual or constructive knowledge that the acquisition constituted a breach of the

37 AustPPSA s 31(3).
38 This wording derives from the definition of attachment in s 19, which in turn comes from UCC § 9-203(b)(2). Article 9 was amended to include this wording in order to facilitate securitisation. They include limited rights in collateral short of full ownership: see Note 6 UCC § 9-203 Official Commentary.
39 Duggan and Brown, above n 6, [10.67]–[10.81]. See also AustPPSA s 10 (definition of financial property).
40 NZPPSA s 95; SaskPPSA s 31; UCC § 9-332(b).
41 AustPPSA s 70(2).
security agreement? Where the acquirer is not in the business the test is higher as it requires an acquisition without actual or constructive knowledge of the security interest.

A consensual transaction would include both a buyer and a secured party. Presumably these rules are designed to ensure that the default priority rules do not come into conflict with the general law, i.e., the holder in due course rules under the *Cheques Act 1986* (Cth) and *Bills of Exchange Act 1909* (Cth).

The example given at paragraph 2.161 of the Replacement Explanatory Memorandum on the *Personal Properties Securities Bill 2009* (Cth) appears to be incorrect as it presupposes that the bank acquires an interest in the cheque. In reality, the bank in the example is simply a collecting bank. The bank would be an acquirer (holder) if it gave its customer immediate credit for the face value of the cheque and then collected the cheque on its own behalf and not as agent for its customer. Similarly, a security interest in currency (money) is lost if a holder of currency acquires currency with no actual or constructive knowledge of the security interest. This is dealt with in *AustPPSA* s 48.

The *PPSAs* deal specifically with the priority of the recipient of debtor-initiated payment (a general unsecured creditor) by providing rules that immunise a general unsecured creditor from any claim that a security party might have who seeks priority on the basis that the relevant payment represents proceeds of collateral that was secured by the security party’s perfected security agreement.

*AustPPSA* s 69 protects a creditor who takes payment of a debt either:

(a) in money by an electronic funds transfer; or
(b) by contemporaneous authorisation or by a negotiable instrument.

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44 Note that *AustPPSA* s 256 provides that if there is conflict, the other Act prevails over the *AustPPSA*.

45 Replacement Explanatory Memorandum on the Personal Property Securities Bill 2009 (Cth), [2.161].


47 Money is a personal chattel in possession but once paid into a bank account it is replaced by a chose in action. See generally Bridge et al, above n 14, [1-016]–[1-020]; Charles Proctor, *Mann on the Legal Aspect of Money* (Oxford University Press, 6th ed, 2005), [1.28 – 1.31]; David Fox, *Property Rights in Money* (Oxford University Press, 2008), [1.59 – 1.110].
For convenience AustPPSA s 69 provides:

69 Priority of creditor who receives payment of debt
   (1) The interest of a creditor who receives payment of a debt owing by a
debtor through a payment covered by subsection (3) has priority over
a security interest (whether perfected or unperfected) in:
   (a) the funds paid; and
   (b) the intangible that was the source of the payment; and
   (c) a negotiable instrument used to effect the payment.
Example: A bank account from which the funds were paid is an
example of an intangible that was the source of the payment.
   (2) Subsection (1) does not apply if, at the time of the payment, the
creditor had actual knowledge that the payment was made in breach
of the security agreement that provides for the security interest.
   (3) Payments made by a debtor are covered by this subsection if they are
made through the use of:
   (a) an electronic funds transfer; or
   (b) a debit, transfer order, authorisation, or similar written
payment mechanism executed by the debtor when the payment
was made; or
   (c) a negotiable instrument.

The function of AustPPSA s 69 is to allow the debtor the freedom to pay his or
her unsecured creditors but this freedom is restricted to the means set out in
subsection (3). In some respects this freedom preserves negotiability while in others
it reflects the need to preserve the payment system generally. If it were otherwise,
the section and the licence to sell inventory would eviscerate the secured party’s
security interest.48

An example of how AustPSSA s 69 is intended to work is as follows:

SP under a general security agreement holds a security interest in all of Debtor’s
present and after-acquired personal property that has been perfected by registra-
tion of a financing statement. Debtor buys two new Apple computers on invoice
from S. In accordance with its usual practice, Debtor’s account department pays
the invoiced amount by BPAY from its trading account.49

Debtor holds its bank account with National Australia Bank (‘NAB’). SP’s security
agreement will cover the NAB account. Any funds paid into that account by Debtor
will, in the ordinary course, be the proceeds of the sale of inventory that are part
of the all present and after-acquired collateral covered by the security agreement.
Any credit balance in the NAB account is part of SP’s security, as are any cheques
or cash deposited to the account. These items will be proceeds of the inventory sold,

49 This example is a modification of the example in Duggan and Brown, above n 6,
[10.67].
as well as being original collateral secured by the after-acquired property clause. If Debtor were to default, SP would be entitled to any credit balance in the account. This would also include any cheques paid to third parties that had not been paid when SP appointed a receiver or otherwise enforced his security interest.

The position may be different in the case where Debtor’s account with the bank is in debit.50 There is no ‘balance owing’ to the debtor to which a proceeds claim could attach. This is because the requirement in AustPPSA s 31(3) that personal property is proceeds only if the grantor has rights in the proceeds or the grantor has rights to transfer proceeds to the secured party.51

Ordinarily, unless AustPPSA s 32(1) applies where SP expressly or impliedly authorised the dealing enabling Debtor to buy the Apple computers, S would take the BPAY payment subject to the security interest. This is because the definition of proceeds includes cheques (a negotiable instrument) and cash (financial property) under AustPPSA s 31(1)(c). A BPAY payment is usually a transfer from a bank account rather than a credit card account but AustPPSA s 69 is not restricted in this way by use of the term ‘funds’. If AustPPSA s 32(1) does not apply (SP did not authorise the use of the proceeds), S has priority because of AustPPSA s 69 provided that S did not know that the payment was in breach of the security agreement.

The NZPPSA provision is worded differently. Section 95 of the NZPPSA provides:

(1) A creditor who receives payment of a debt owing by a debtor through a debtor-initiated payment has priority over a security interest in-
   (a) the funds paid;
   (b) the intangible that was the source of the payment:
   (c) a negotiable instrument used to effect payment.
(2) Subsection (1) applies whether or not the creditor had knowledge of the security interest at the time of payment.
(3) In sub-section (1), a debtor-initiated payment means a payment made by a debtor through the use of-
   (a) a negotiable instrument; or
   (b) an electronic transfer; or
   (c) a debit, transfer order, an authorisation, or a similar written payment mechanism executed by the debtor when the payment was made.

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50 Linda Widdup, in Personal Property Securities Act: A Conceptual Approach (LexisNexis, 3rd ed, 2012) [18.40] suggests that there was no proceeds claim in Flexi-Coil because the funds were deposited into an overdrawn account. This statement is clearly correct.

51 See also CFI Trust v Royal Bank of Canada 2013 BCSC 1715, [185]. This is because if there is a debit balance no property right arises because the customer is the debtor of the bank. If there is a credit balance the bank is the debtor of the customer.
This section replicates the current Saskatchewan provision, s 31(2), which was amended to include payments by electronic funds transfer following the Flexi-Coil decision.\footnote{SaskPPSA 31(3)(a) now includes ‘an instrument or an electronic funds transfer’. Note that with the exception of Ontario all the Canadian statutes have similar provisions. Ontario provides that transfers of negotiable instruments and money are to be determined without regard to the Ontario PPSA: Personal Property Security Act, RSO 1990, c P-10, s 29.}

Under the Saskatchewan provision\footnote{The Personal Property Security Act, SS 1993 c P-6.2, s 31 (‘SaskPPSA’).} and NZPPSA s 95, S would take the payment free of the security interest even if S knew of the security interest.\footnote{But see Stiassny [2013] 1 NZLR 453 in the Supreme Court of New Zealand, [57] (Blanchard J).} Under\footnote{Neither NZPPSA s 95 nor SaskPPSA s 31 contain a knowledge requirement. Both provisions provide that the creditor takes free of the security interest whether or not he or she has knowledge of any security interest.} AustPPSA s 69, S would take free of SP’s security interest unless S had actual knowledge that the payment was made in breach of debtor’s security agreement with SP.\footnote{Cuming and Wood, above n 23, 252. See also Belurus (1995) 24 Alta LR (3d) 125, [120]–[121].} Ronald Cuming and Roderick Wood assert that this provision:

was designed to deal with situations where a broadly based security interest in personal property has been given by the debtor. The debtor’s property may include instruments, securities, or negotiable documents or title. In the absence of this special provision, no one who was aware of the existence of such a security interest could deal with the debtor in the ordinary course of business without the consent of the secured party. This would paralyse the business of the debtor.\footnote{AustPPSA ss 267–267A; Corporations Act 2001 (Cth) s 588FL, subject to s 588FN.} \footnote{AustPPSA ss 18(1), 20(1); NZPPSA ss 35–36, SaskPPSA s 10.}\footnote{See above n 37.} AustPPSA s 69 refers to both unperfected and perfected security interests. Unperfected ones are more likely to be defeated by third parties on the insolvency of the debtor. Where the security interest is perfected by registration, defeat is less likely as it will generally prevail over the interests of third parties, including liquidators, administrators and trustees.\footnote{AustPPSA ss 18(1), 20(1); NZPPSA ss 35–36, SaskPPSA s 10.} No doubt the reference to ‘unperfected’ is to provide certainty of the validity of an unperfected security interest against unsecured creditors generally.\footnote{AustPPSA ss 18(1), 20(1); NZPPSA ss 35–36, SaskPPSA s 10.} As a result both unperfected and perfected secured parties will have the benefit of AustPPSA s 31 and will be able to follow or trace his or her collateral or its proceeds. Despite this, the PPSAs strip away the rights of secured parties in order to protect the interests of third parties with the buyer transferee or cut-off rules and the payment of unsecured debts. It will not be possible to follow the proceeds if\footnote{AustPPSA ss 18(1), 20(1); NZPPSA ss 35–36, SaskPPSA s 10.} AustPPSA s 32(1)(a) applies or if\footnote{AustPPSA ss 18(1), 20(1); NZPPSA ss 35–36, SaskPPSA s 10.} AustPPSA s 69 applies, or if the debtor does not acquire an interest in the proceeds (s 31(3)(a)(i)) or a right to transfer rights in them (s 31(3)(a)(ii)).\footnote{AustPPSA ss 18(1), 20(1); NZPPSA ss 35–36, SaskPPSA s 10.}
payment for personal property paid for at the time of acquisition because the transaction is a sale not the payment of a debt.60

VI The Cases

The Courts in some of the Canadian provinces have considered the various debtor-initiated payments provisions and have taken differing interpretative approaches. The approach of the New Zealand courts differs even though the New Zealand provision is taken directly from the Saskatchewan PPSA (‘SaskPPSA’) with minor stylistic changes.

Flexi-Coil Decision

Flexi-Coil illustrates how the Saskatchewan equivalent to AustPPSA s 69 operates.61 In Flexi-Coil Churchill dealt in farm equipment. Flexi-Coil provided inventory finance to it. Flexi-Coil’s security interest was perfected by registration. Churchill banked with Kindersley Credit Union (‘Kindersley’) where it had an overdraft facility that was almost always in debit. Churchill sold certain inventory and paid the proceeds of $86,659 to its account with Kindersley. Some were cheques but $28,249 was paid into the overdraft account by electronic funds transfer.

Flexi-Coil claimed the $86,659 as proceeds of the inventory. It was common ground that Flexi-Coil held a security interest in the proceeds but that this was destroyed at the point when Kindersley received the moneys into the Churchill account with it. This was because the account was a line of credit account and was never in positive balance. The Court said at [39]:

[T]here was never a point at which Churchill could have called for the proceeds of the cheque to be paid to him. The account was never in positive balance. . . . Since it was in negative balance, the result was the netting of two amounts. When an account is in overdraft . . . no property right arises. The customer is the debtor of the deposit taking institution.

As a consequence of this finding, the Court of Appeal accepted Kindersley’s argument that it was protected by SaskPPSA s 31(2). This section protects a creditor who receives payment of a debt either in money or by an instrument drawn by the debtor even where the creditor is aware of the existence of a security interest in the money or the instrument.62

The Court of Appeal took the view that Kindersley gave value to Churchill when the cheques were deposited to the overdraft account without notice of Flexi-Coil’s

60 The other transferee or cut-off rules in Part 2.5 of AustPPSA and their equivalents in the other PPSAs will apply to a sale or lease transaction.
61 SaskPPSA s 31.
62 Instrument has a similar meaning to negotiable instrument in AustPPSA s 10.
proceeds claim. Value was either credit on which Churchill could draw or a reduction in the overdraft account balance. The giving of value made Kindersley a purchaser for value without notice within the meaning of Saskatchewan Personal Property Security Act s 31(3) (now Saskatchewan Personal Property Security Act s 31(3)(a)). The Court of Appeal also decided, rejecting Flexi-Coil’s argument, that protection afforded by the section, which only applied to an instrument or a security, was capable of applying to credit transfers. Jackson JA for the Court of Appeal said that:

when the PPSA was drafted credit transfers were relatively new … The goal of these sections is to leave money and cheques largely free from security interests to preserve the integrity of the payment system in Canada which now includes credit transfers. … Accordingly, it is my opinion that the credit transfers and the cheques should be treated alike judicially.63

CFI Trust v Royal Bank of Canada 2013 BCSC 1715 (18 September 2013)

This is a first instance decision of Myers J of the Supreme Court of British Columbia. The Court declined to follow the decision in Flexi-Coil. CFI provided financing to Totem Ford (‘Totem’). Motor vehicles were leased by Totem to customers. Totem permitted 242 customers to terminate their finance contracts with it early and received from its customers early termination fees totalling $5.97 million. Totem failed to repay those funds to CFI and instead paid the early termination fees into its operating account with the Royal Bank of Canada (‘RBC’). RBC debited Totem’s operating account to reduce an operating line of credit whenever the line of credit was in a negative balance. RBC financed Totem’s floor plan and held a registered general security agreement. CFI also had an earlier registered security agreement but had entered into a priority agreement with RBC.

There were two issues before Myers J. First, CFI claimed the early termination fees as proceeds under its security agreement. Secondly, it argued that the funds were trust funds and RBC was liable to account to it in knowing receipt and unjust enrichment. In either case, CFI claimed it was entitled to trace the early termination fees as proceeds. Myers J did not accept CFI’s claims. The unjust enrichment failed because RBC was a bona fide purchaser for value. The claim based on s 31(3) of the Personal Property Security Act RSBC 1996 (‘BCPPSA’) (AustPPSA s 69 equivalent) partly failed. Myers J found that RBC had priority in respect of lease payments because of the existence of a priority agreement and, also, because the payments were received by cheque. RBC was not accorded priority in respect of payments received by electronic funds transfer. The case is interesting because of the BCPPSA s 31(3) issue. BCPPSA s 31(3) is equivalent to the Saskatchewan provision considered in Flexi-Coil.

In the course of his analysis Myers J stated that Flexi-Coil focused on the issue of the account being in negative balance.64 He said that in Flexi-Coil when the account

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63  Flexi-Coil 107 DLR (4th) 129, [50].
64  CFI Trust 2013 BCSC 1715, [185].
is an overdraft account, no property right (proceeds claim) arises because the
customer is the debtor of the bank but when the account is in credit, cheques paid
in are proceeds because the bank is in a debtor relationship with the account holder.

Myers J found that because of the RBC system, Totem’s account was never in a
negative balance and could never be in negative balance unless Totem impermissi-
ably attempted to exceed its loan limits.65 Myers J found that RBC had priority for the
cheques despite its knowledge of the security agreement in favour of CFI. In relation
to the payments to RBC by electronic funds transfer (‘EFT’), Myers J declined
to follow Flexi-Coil and approached the question on the basis of statutory inter-
pretation. Because the definition of instrument did not include the word ‘account’
Myers J concluded that an EFT was not an instrument for the purposes of BCPPSA
s 31(3) and it was up to the legislature to fill the gap.66

The Stiassny Decision in the NZ Court of Appeal

The case is of interest to unsecured creditors, competing secured parties, receivers,
administrators and liquidators. The decision concerned a dispute between the
Commissioner of Inland Revenue and the receivers and managers of two partners in
a partnership called Central North Island Forest Partnership (‘CNIFP’) involving The
Forestry Corporation of New Zealand (‘FCNZ’) and CITIC New Zealand Limited
(‘CITIC’) in relation to a payment by cheque in respect of a GST liability. The receivers
and managers had been appointed by the Bank of New Zealand (‘BNZ’) to each of the
individual members of the partnership and not to the partnership itself. Commissioner
of Inland Revenue v Stiassny67 involved a strike out action by the Commissioner
in relation to a recovery action by the receivers of a payment of a GST68 debt of
NZ$127.5m mistakenly made by them following the sale of substantial forestry assets
in 2003. CITIC traded in partnership in the name of CNIFP. A syndicate of banks had
provided funding to CNIFP. The syndicate held security over the individual assets of
the two partners FCNZ and CITIC. BNZ (one of the syndicate) appointed Stiassny and
Graham as receivers and managers of the collateral owned by FCNZ and CITIC but
not to the partnership itself. Effective 26 February 2001, FCNZ and CITIC appointed
one of the two receivers as their representative to CNIFP’s board.

In October 2003 CNIFP sold all of its assets for US$621m plus GST of NZ$127.5m.
The sale proceeds were insufficient to repay the secured debts and the GST. The
deed evidencing the sale provided for the sale proceeds to be deposited to the CNIFP
bank account. The receivers were concerned that they might be personally liable for
the GST and therefore drew a cheque on their receivers account styled ‘For Central
North Island Forestry partnership (Receivers A/C)’ for the GST amount and paid it
to the Commissioner. The receivers then sought to recover the payment as they had
paid it in the mistaken belief that they were personally liable for the GST.

65 Ibid [187].
66 CFI Trust 2013 BCSC 1715, [212]–[217].
67 [2013] 1 NZLR 140.
68 Payable under the Goods and Services Tax Act 1985 (NZ) (‘GST Act’).
In the High Court, Allan J found that the receivers were not personally liable for the GST. He further held that as the payment was made by CNIFP from its own funds by negotiable instrument, NZPPSA s 95 had the effect of giving the Commissioner priority ahead of the secured creditors. A third finding was that NZPPSA s 95 did not preclude an in personam claim against the Commissioner for the recovery of the GST. These three findings were the subject of an appeal to the Court of Appeal.

The Court of Appeal found that the receiver was not personally liable as the activity in question related to CNIFP and not the two entities over which they had been appointed receivers. In other words CNIFP was not the incapacitated entity referred to in s 58 of the GST Act. Therefore the receivers could not be agents for CNIFP for GST purposes but they were agents for the chargors under the terms of their appointment by BNZ. The deed of charge contained the usual provision that the receiver was agent of the chargor.

The central question was whether NZPPSA s 95 conferred priority on the Commissioner ahead of the secured creditors. The Court of Appeal agreed with Allan J that the purpose and effect of NZPPSA s 95 was:

\[T\]o facilitate ordinary trade and commerce by ensuring that a creditor who receives payment of a debt in the manner stipulated by s 95(3) takes priority over any security interests in the funds so paid, the intangibles that were the source of the payment, and the negotiable instrument itself. Such priority arises whether or not the creditor had knowledge of the security interest at the time of payment . . .

In analysing the position under NZPPSA s 95, the Court of Appeal said that the legal ownership of the proceeds of sale was in CNIFP subject to the security interest of the secured creditors. But relying on NZPPSA s 24, which provides that the PPSA does not rely on notions of title, the Court of Appeal said this did not matter so long as the debtor-initiated payment to the creditor is accorded priority by force of NZPPSA s 95 over a security interest in the funds paid. The bank account of CNIFP was the intangible and source of the payment and the negotiable instrument was the cheque used to effect payment. If title to the payment was relevant, then the purpose of NZPPSA s 95 would be defeated. Thus if CNIFP itself made the payment in the manner effected, then NZPPSA s 95 would operate to give priority to the Commissioner.

The Court of Appeal also referred to the trial judge’s comments that ‘Secured parties should not be given the power to prevent debtors from paying other creditors out of

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70 Commissioner of Inland Revenue v Stiassny [2013] 1 NZLR 140.
71 Ibid [62].
72 Ibid [59].
73 Ibid.
74 Ibid [60].
liquid assets held by them. If this were allowed, great disruption in commercial activity would result.\footnote{Ibid [36].} The section and its effect is equivalent to ‘the power of a debtor under prior law to pay it creditors where the debtor had given an uncrystallised floating charge.’

The Court of Appeal further said (agreeing with the trial judge) that ‘issues as to whether the security interests had crystallised and whether the payment was made in the ordinary course of business are not relevant to the operation of s 95’ (AustPPSA s 69).\footnote{Ibid [66], [69].} As pointed out above, the justification for these provisions is the policy expressed in *Flexi-Coil*.

The Court of Appeal then went on to consider the question: does NZPPSA s 95 apply where a receiver has been appointed? It was argued that receivers were appointed to FCNZ and CITIC and that the receivers had control of the normal business of CNIFP. On this basis the payment was not debtor-initiated but rather a payment initiated by a creditor as an act of enforcement of its security interest. This argument was rejected on the basis that while the receivers were in control of the FCNZ and CITIC (‘CNIFP’), they were at all times agents for the partnership member companies. The payment was from funds owned by CNIFP with the consent of BNZ on behalf of the syndicate members. The fact that the receivers thought they might be personally liable for the GST made no difference. Also, even though the Commissioner had notice of the security itself at the time it received the GST payment this did not affect the priority afforded to the Commissioner in respect of a debtor-initiated payment because of NZPPSA s 95(2).\footnote{Ibid [69].}

The Court of Appeal’s decision confirms the position that NZPPSA s 95 deals with priority of payments that are debtor-initiated and does not prevent in personam claims, such as a claim for a payment made under mistake. Importantly, NZPPSA s 95 operates to protect a creditor whether he or she is secured or unsecured and whether or not he or she has notice of the security interest granted by the debtor in favour of a third party.

Notwithstanding the Court of Appeal’s view, NZPPSA s 95 had no application on the facts because the payment was made from the moneys belonging to CNIFP and it was made with the consent of the secured party banks. Further, it appears that the syndicate of banks did not hold security over the assets of the partnership that included the partnership account; rather they held security over the interests of each individual member in the partnership. This point seems to have eluded counsel who acted in the appeal.\footnote{Blanchard J at [2] referred to this as a ‘potentially important issue’ which was not argued in the Supreme Court appeal. The effect of the security being over the aliquot interest of each member of the partnership meant that the secured parties only had a right to whatever was owed to the individual members on the dissolution of the partnership account.} Despite the reach of NZPPSA s 95,
a debtor-initiated payment is subject to the preferential claims regime on the
insolvency of the debtor.\textsuperscript{79}

\textit{Stiassny v Commissioner of Inland Revenue} in the NZ Supreme Court\textsuperscript{80}

The Supreme Court dismissed the receivers’ appeal in relation to the debtor-initiated payment of the GST essentially on the same basis as the Court of Appeal. The decision of the Court was given by Blanchard J who began by stating that ‘[a]ny payment made by or on behalf of the debtor from the proceeds of sale of the collateral is a debtor-initiated payment for the purposes of s 95.’\textsuperscript{81} Blanchard J went on to endorse the policy reasons for the existence of \textit{NZPPSA} s 95 and said that if a secured creditor could reclaim payments made by a debtor, it would be difficult for the debtor to obtain credit.\textsuperscript{82}

\textit{NZPPSA} s 95 can therefore be seen as operating in circumstances where the partnership was insolvent as there was nothing in the section that disqualified a payment made during an insolvency, nor was there a requirement that the payment be made in the ordinary course of business. Despite these statements, Blanchard J said that as a practical matter payments made out of the ordinary order in an insolvency would not be covered by the section without good reason.\textsuperscript{83}

The receiver argued that the Commissioner could not rely on \textit{NZPPSA} s 95 because he had actual knowledge or notice of the terms of the security agreements as well as notice of the competing claims of BNZ and CNI. Knowledge of the existence of the security agreement is not sufficient to remove the protection of the section. Blanchard J said that this:

\begin{quote}
must be taken to include also any knowledge the creditor had of the terms of the competing security interest. But the protection of that provision would not extend to a creditor with actual knowledge or notice at the time of receipt that a payment is being received in breach of the security agreement. (A creditor could in fact have gained knowledge or notice of a breach without necessarily becoming aware of the detailed terms of the security agreement.)\textsuperscript{84}
\end{quote}

partnership. This meant that the secured parties’ security was essentially illusory as they were in effect secured shareholders or unitholders/beneficiaries in the case of a trust. See \textit{United Builders Pty Ltd v Mutual Acceptance Ltd} (1980) 144 CLR 673, 679 (Stephen J). A charge taken by a lender over the assets of individual members of a partnership rather than the partnership assets themselves was fatal in \textit{Bailey v Manos Breeders Farms Pty Ltd} South Australian Supreme Court (Unreported, Full Court Supreme Court of South Australia, 4 April 1991); BC910048.

\textsuperscript{79} See comments of Blanchard J in \textit{Stiassny} at [54].

\textsuperscript{80} \textit{Stiassny v Commissioner of Inland Revenue} [2013] 1 NZLR 453 (‘\textit{Stiassny No 2’}).

\textsuperscript{81} \textit{Stiassny No 2} [2013] 1 NZLR 453, [52]. A payment by an agent is not ‘debtor initiated’ within the section. See below under XII Receivers.

\textsuperscript{82} Ibid [53].

\textsuperscript{83} Ibid [54].

\textsuperscript{84} Ibid [57].
Blanchard J went on to say that the Australian provision states expressly that the subsection does not immunise the creditor against knowledge of a breach and that in the Court’s view NZPPSA s 95(2) implicitly has the same limitation. Clearly this is incorrect as NZPPSA s 95 states that the section “applies whether or not the creditor had knowledge of the security interest at the time of the payment”.

The Court said by way of obiter dictum that the test of whether a creditor had knowledge was an objective one. The question is what did the Commissioner objectively know at the time of receipt? The Court found that the Commissioner knew nothing more than that the BNZ and CNI had competing claims to the GST payment. No inference was to be made that this meant the Commissioner knew it was a breach of the terms of the security agreements at the time of the payment. This was not enough to disentitle the Commissioner to rely on the protection afforded by NZPPSA s 95.

Blanchard J said, by way of an obiter dictum, with respect to knowledge that ‘the sense of the section is consistent with s 53 which provides for a buyer or a lessee of goods sold in the ordinary course of business to take them free of a security interest over them unless the buyer or lessee knows that the sale or lease constitutes a breach of the security interest’.

The policy in relation to the transferee or cut off rules is different to the policy underlying the payment of a debt. The reason why a buyer or lessee takes free is because the inventory financier expects the goods to be sold in the ordinary course of the debtor’s business. In the interests of commercial certainty and the flow of commerce, a retail buyer or lessee of inventory should not have to search the register as it would have the effect of impeding commerce. A buyer or lessee would expect that a bank or other financier has financed the floor plan but he or she expects to buy free of that security interest. This is not the case if he or she knows that the sale is forbidden. Grant Gilmore suggests that the reason for the rule is that a secured party expects that the retailer will sell the personal property subject to the security interest and the loan or part or the loan will be repaid from the proceeds of sale.

Despite the clear wording in NZPPSA s 95(2), it is plainly not open to a court to interpret a section of legislation by adding words (where the wording of the section is to the contrary) by reference to what is contained in another section of the same legislation or in light of what is contained in the same or similar legislation of another jurisdiction.

85 Ibid [58].
86 Ibid [57].
87 Cuming, Walsh and Wood, above n 6, 385. See generally Clark and Clark, above n 26, [3.04].
VII Protected Transactions: Australian and New Zealand Contrasted

This part considers whether or not there is any substantial difference in interpretation of the AustPPSA and NZPPSA in light of the stylistic differences in drafting between the provisions. AustPPSA s 69 is drafted differently to NZPPSA s 95. It differs in three respects:

1. It does not use the expression ‘debtor-initiated payment’. It refers to a payment made by a debtor.
2. It qualifies security interest with the words ‘(whether perfected or unperfected)’; 89 and
3. Subsection (2) provides that ‘subsection (1) does not apply if, at the time of the payment, the creditor had actual knowledge that the payment was made in breach of the security agreement that provides for the security interest.’

However, apart from the question of a no knowledge requirement in NZPPSA s 95(2), the New Zealand and Australian provisions are essentially the same: both deal with payment by a debtor by way of instrument or electronic funds transfer or other debit order, authorisation or similar written payment mechanism, at the time payment is made. The Australian, New Zealand and Saskatchewan provisions, only sanction payments by negotiable instrument, electronic funds transfer or debit authorities initiated (executed) at the time of the payment. Logically, therefore, they exclude automatic debt authorities of the type usually employed by creditors in Australia and New Zealand. 90

The limitation in AustPPSA s 69(3)(b) to a debit, transfer order, authorisation or similar written payment mechanism executed by the debtor when the payment is made is designed to prevent abuse. It would eviscerate the secured party’s security interest. 91

The upshot of this limitation appears to be that a debtor cannot consent in advance to deductions from an account by way of automatic debit, automated BPAY payments (whether from credit accounts or credit card accounts) and letters of credit. Further post-dated cheques, bills of exchange payable to a future date, purchase of a bank cheque to pay a creditor or the like would all seem to be outside the scope of the sections. A cheque drawn by a third party payable to the debtor and endorsed to a creditor also will not qualify as a debtor-initiated payment as the drawer is the third party not the debtor. 92

89 An unregistered security interest will not affect the payment except on the insolvency of the debtor.
90 See below in relation to the Manitoba provisions.
92 Cuming, Walsh and Wood, above n 6, 407; Gedye, Cuming and Wood, above n 19, [95.1].

Similarly, a set off provision or right to combine accounts contained in a facility agreement or bank authority or otherwise would not be permitted if pre-arranged. But it could be if a set off letter was signed at the time of payment. This is because it would be within the section as ‘an authorisation . . . executed at the time of when the payment was made’. Again this highlights the policy of the PPSAs to ensure that a debtor has the ability to pay his or her creditors. If he or she is unable to do so, he or she will cease to be able to carry on business. He or she will not be able to obtain other goods, nor will he or she be able to obtain secured or unsecured credit.

If one allows automatic debit authorities, one difficulty is that banks can defeat the proceeds interests of inventory financiers by requiring them to bank all moneys, whether by cheque or cash, from the sale of inventory into trading accounts with them that are generally in debit balance. The bank is then able to sweep those proceeds in reduction of the debit balance or against another obligation owed to the bank, such as under a lease purchase agreement or term loan facility. In Flexi-Coil, Jackson JA said that this requirement ‘would significantly affect the priority given to inventory suppliers . . . This was of concern to the Court, but since the Court did not have before it any evidence of such dealings, this issue is best left to another day without further comment’. This is of greater concern in Australia where an ADI is able to take a security interest in the bank account of its customer and perfect by control.

VIII Knowledge

The New Zealand provision, consistently with the Canadian PPSA statutes, provides that knowledge of a security interest given by the debtor in favour of a third party does not affect the status of the payment, but according to the NZ Supreme Court in Stiassny, actual knowledge that the payment when received was in breach of the security agreement will. AustPPSA s 69(2) is at odds with the New Zealand and Canadian provisions. It provides that the payment will not be ‘immunised’ if the recipient had actual knowledge that the payment was made in breach of the security agreement. The reason is mystifying but it is thought that the Attorney-General’s Department failed to understand the policy difference between the purchaser of an instrument in the ordinary course of business and the policy behind the need to protect creditors of a debtor.

93 Caldwell, above n 11, 172.
94 Effectively this is what occurred in CFI Trust as under the operating loan system revolving multiples of $10,000 were automatically transferred at the end of each business day to pay down the loan so that the account from which payments were made was never in a negative balance.
95 Flexi-Coil (1993) 107 DLR (4th) 129, [52].
96 [2013] 1 NZLR 453 (Blanchard J). See also discussion above.
97 The Replacement Explanatory Memorandum on the Personal Property Securities Bill 2009 (Cth), does not provide any reason for this policy choice other than to state that what is contained in s 69(2): [2.158].
If the integrity of the payment system and business efficacy is to be preserved, knowledge should not matter, subject to questions of preferential payment on the insolvency of the debtor. The knowledge requirement is also at odds with Article 9 of the UCC. UCC Article 9 is much simpler in its terms: a transferee of money or of funds from a deposit account takes the funds free of a security interest or the security interest in the deposit account unless the transferee acts in collusion with the debtor in violating the rights of the secured party.\textsuperscript{98} The collusion test is seen as more protective of transferee unsecured creditors who receive payment of a debt from a bank account. Unless collusion occurs which has the effect of violating a secured party’s claim to proceeds deposited to the bank account the general creditor payee prevails. The collusion test makes it more difficult for a secured party to challenge the debtor payment that would otherwise be the case if the test was simply one which required proof of a payment made with knowledge that the payment violated the rights of a secured party under the security agreement.

As discussed above, the Supreme Court in \textit{Stiassny} provides some guidance on the meaning of ‘knowledge of a security interest’ and ‘actual knowledge that the payment was made in breach of the security agreement’. This guidance is limited to the formulation of an objective test of what the recipient creditor understood at the time of receipt of the payment and no more.

Further guidance can be found in some of the Canadian cases, notably, \textit{Belarus} and \textit{CFI Trust}. Notice of the existence of a security interest will not be sufficient to remove protection as the test is too low. In \textit{Belarus} (Alberta), Master Funduk stated that actual knowledge is required. Actual knowledge is not defined in any of the \textit{PPSAs}. Where there is no statutory definition of actual knowledge the common law test will apply.\textsuperscript{99} Cuming and Wood say that mere knowledge of the existence of a security interest would paralyse a business as no one could deal with the debtor in the ordinary course of business without the consent of the secured party.\textsuperscript{100}

\textsuperscript{98} UCC § 9-332(a) and (b). A classic example of a buyer who had actual knowledge that the sale was a breach of the terms of the security agreement occurred in \textit{Quinn v Scheu} 675 P2d 1078, 38 UCC Rep 367 (Oregon CA 1984). In this case the court found that a holder of a perfected security interest in respect of a printer’s inventory of books defeated a buyer in due course. This was because the buyer was an author for whom the printer produced books under an earlier contract in circumstances where the secured party sent a notice to that buyer to pay the secured party who was an assignee of printer’s accounts. Patently, collusion may consist of an act where a buyer was also intending to acquire the business. The same would likely obtain where a special relationship existed between a employee of the seller and a buyer. See Clarke, above n 26, 3.04(1). The receipt of the notice of assignment by Quinn was knowledge imputed to his partner-father which was seen as being adequate as a matter of law to inform the plaintiff that payment to anyone other Heller would violate Heller’s security agreement.

The expression with ‘actual knowledge that the payment it was in breach of the terms of the security agreement’, appears to mean that the person relying on the section must in fact know the underlying transaction to each cheque before it can be said he or she has actual knowledge.\textsuperscript{101}

In \textit{Belarus}, Master Funduk said that:

Certainly, a banker might speculate about what a cheque is for and he might even be on the mark in his speculation. But that is not what subs. (4.1) is about. Speculation is not knowledge. He must know that the cheque is the sale proceeds of collateral that is subject to a security interest. Nothing less will do.\textsuperscript{102}

Section 4.1 states that a person ‘has knowledge only if he acquired his interest with knowledge that the transaction violated the terms of the security agreement creating or providing for the security interest.’\textsuperscript{103}

These statements on the meaning of knowledge in \textit{Belarus} were expressly adopted by Myers J in \textit{CFI Trust}. Myers J said:

I agree with Belarus. Knowledge of the existence of a security agreement with a bank’s customer is not enough to disentitle the bank from relying on the protection afforded by s 31(3). There must be knowledge that the transaction violates the terms of the relevant security agreement.\textsuperscript{104}

While the statements assist with an understanding of the requirement of knowledge, they do not really assist an unsecured creditor or purchaser in relation to other transactions covered by these special priority rules designed to protect unsecured creditors or buyers and lessees. The differing requirements discriminate between the types of transactions rather than being a uniform requirement. Part of this problem can be explained by the deliberate use of the words ‘personal property’ in place of ‘goods’ in most of the transferee rules in Part 2.5 of the \textit{AustPPSA}. The use of the term ‘personal property’ means that there is a substantial overlap between the differing provisions. For convenience, the following table illustrates the inconsistencies.

\textsuperscript{101} Belorus (1995) 24 Alta LR (3d) 125, [128].
\textsuperscript{102} Ibid.
\textsuperscript{103} Ibid [27].
\textsuperscript{104} CFI Trust 2013 BCSC 1715, [206].
The PPSA requires that the transfer or payment is debtor-initiated so that if the debtor uses its own funds to obtain a bank cheque that is then used to pay a creditor the bank cheque will not qualify as a debtor-initiated payment. The payment would be proceeds under AustPPSA s 31 (NZPPSA s 16) and therefore traceable and

105 This requirement is correct policy. In the case of unperfected security interests (AustPPSA s 43), the absence of a knowledge requirement is designed to encourage secured parties to perfect by registering financing statements. In the case of s 44, the rule is designed to encourage the inclusion of a serial number in the financing statement.

106 Note 3 to UCC § 9-332 official commentary.
recoverable by the secured party whose security interest extends to the ADI account of the debtor. The reason for this is that the payment is by means of the bank cheque drawn by the bank, not a cheque drawn by the debtor. The bank cheque is proceeds of the debtor’s account.107

Although there is a general test for knowledge in the PPSAs for the purposes of the priority and transfer rules in particular, it has no place in circumstances where the provision itself is intended to replicate the existing law. In relation to cheques and other negotiable instruments a purchaser (holder) is one who takes free of equities. A holder for value and without notice of defects in the transferee’s title takes free of equities.108 What this means is that it is possible in the ordinary course of transferring rights in a negotiable instrument to pass a better title to the holder or transferee than the one held by the transferor. A bank cannot be a holder where it collects a cheque as agent for the payee.

The proper place for the requirement replicated in AustPPSA s 69(2) is s 70 (NZPPSA s 96). AustPPSA 48 deals with currency (money) (NZPPSA s 94). The New Zealand provision replicates s 31(1) of the Saskatchewan legislation. A modification of the example given at the end of NZPPSA s 94 is the use of money to buy a computer that represents the proceeds of the sale of cars subject to a security interest in inventory and their cash proceeds. The vendor of the computer takes-free even though the cash is proceeds and would be subject to a perfected security interest. The purpose of this provision is to ensure that the rights of the holder for value of the money (the vendor of the computer) are not interfered with by the PPSA.109 The problem with AustPPSA s 48 is that it confuses the policy goal, as it fails to provide that the holder acquires the currency whether or not he or she had knowledge of the security interest.110

Despite the above comments, our present inquiry does not relate to the acquisition of an instrument or currency in the ordinary course of business. The purpose to which AustPPSA s 69 is directed is the payment of unsecured creditors generally. This point seems to have eluded the draftsperson when AustPPSA s 69(2) was drafted.

X EXCLUDED TRANSACTIONS

As Cuming, Walsh and Wood point out the excluded transaction provision exists to enable a debtor to pay his or her debts and the creditor will take free of the security

107 Cuming, Walsh and Wood, above n 6, 407.
108 Cuming, Walsh and Wood, above n 6, 382. See also E P Ellinger, E Lomnicka and C Hare, Ellinger’s Modern Banking Law (Oxford University Press, 4th ed, 2006), 353; Alan Tyree, Banking Law in Australia (LexisNexis, 6th ed, 2008), [4.10].
110 This can be partly attributed to the failure of the draftsperson to differentiate between a holder who takes money if the holder (1) acquired the money without knowledge of the security interest or (2) is a holder for value where knowledge does not matter. See NZPPSA s 94 and SaskPPSA s 31(1).
interest so long as the transaction is one by the debtor, whether or not the creditor is aware of a security interest or that the payment might be in breach of it.\textsuperscript{111} The provision has the effect of empowering a debtor to use a negotiable instrument to pay debts, even though, as property of the debtor, the instrument is subject to the security interest.\textsuperscript{112}

The section seems to be limited in its ambit. It will not apply to the following:\textsuperscript{113}

\begin{itemize}
  \item[(a)] an automatic debit that is not made at the time of the payment, thus excluding debit authorities signed at the time of a loan facility as the required method of payment by the lender bank;
  \item[(b)] a cheque payable to the debtor that is subsequently endorsed to the creditor;
  \item[(c)] a bank account upon which is cheque is drawn by the debtor;
  \item[(d)] an instrument not paid at the time a secured party enforces in respect of the account (a cheque is conditional payment until paid).
\end{itemize}

\section*{XI \textsc{Manitoba Provisions}}

According to Cuming and Wood\textsuperscript{114} the Manitoba \textsc{PPSA} was amended to include a number of additional excluded transactions designed to enable a bank to debit a customer's account in disregard of a security interest that another secured party might have in that account. Despite the obvious exclusions, the Manitoba \textsc{PPSA}\textsuperscript{115} sets out a number of transactions that qualify as statutory protected 'debtor-initiated' transactions where a third party secured party holds a security interest in the account. These include:

\begin{itemize}
  \item[(a)] a payment between accounts in the same financial institution, initiated by the debtor at the time the debt is payable or thereafter. This would include a payment from a deposit account to repay a term loan facility or other credit transaction;
  \item[(b)] the repayment of an overdraft account by specific authorisation where demand has been made;
  \item[(c)] payment effected through a post-dated cheque.
\end{itemize}

A payment via post-dated cheque will be subject to the same limitation where the security interest in the account is enforced before the date for presentment and actual payment. It is also subject to the written authorisation signed by the debtor specifying the amounts and the times or intervals of the payments, or the authorised

\begin{itemize}
  \item[111] Cuming, Walsh and Wood, above n 6, 408.
  \item[112] Ibid, 407.
  \item[113] Ibid, 384.
  \item[114] Cuming and Wood, above n 23, 245.
  \item[115] \textit{Manitoba Personal Property Security Act} 2012 CCSM c. P35, s 31(3).
\end{itemize}
debit being paid from a credit balance that exceeds the amount of the debit.\textsuperscript{116} In respect of the last point, the view of Cuming and Wood is that it will apply to a revolving loan arrangement under which the agreement between the ‘depositor and the deposit-taking institution provides that when the amount in the account drops below a certain amount the institution will credit the account so as to bring it up to that amount, but if through deposit credits in the account exceeds the amount, the excess will be taken by the deposit-taking institution in payment of the debt owing to it under the arrangement.’\textsuperscript{117} Debits authorised by an ADI as agent of the debtor are excluded from the special priority given by Manitoba \textit{PPSA} s 31(2).

A troubling aspect of \textit{AustPPSA} s 69 for banks is that absent equivalent provisions to the Manitoba provisions permitting payments by automatic debit, any expansive reading of \textit{AustPPSA} s 69(3)(a) would be tantamount to allowing a banker’s set off.\textsuperscript{118} In the \textit{Transamerica Commercial Finance Corp Canada v Royal Bank of Canada} case,\textsuperscript{119} the RBC, that held a security interest from its account holder, applied receipts to its customer’s current account in reduction of the customer’s loan debt to it. Some of those moneys were purchase money security interest (‘PMSI’) proceeds of inventory that had been deposited to the customer’s current account with the bank. The Saskatchewan Court of Appeal found there was no evidence that the bank was the recipient of money that was deposited to the current account (the proceeds of inventory were paid to the debtor’s account with it), nor did the bank receive an instrument drawn and delivered by the debtor to it. Consequently, the equivalent to \textit{AustPPSA} s 69 (\textit{NZPPSA} s 95) did not apply. The PMSI financier had priority for the proceeds as it could trace the inventory to the proceeds paid into the bank account.

Jacob Zeigel and David Denomme point out that had the Court of Appeal given an expansive reading of the section, effectively permitting set off, this would seriously undermine the purchase money financier’s claim to proceeds.\textsuperscript{120} As discussed below, this issue may not arise in Australia where an ADI has control of the relevant accounts with it. An ADI’s super priority because of \textit{AustPPSA} s 57 will trump a security interest (which includes a PMSI) perfected by any other means.\textsuperscript{121}

\textsuperscript{116} This provision would sanction automatic debit authorities.
\textsuperscript{117} Cuming and Wood, above n 23, 245.
\textsuperscript{118} According to RCC Cuming, ‘Security Interests in Accounts and the Right of Set-Off’ (1990) 6 \textit{Banking and Finance Law Review} 299 at 310, the case law in the USA appears to support the position that set-off cannot be exercised so as to defeat a security interest in proceeds except where there the account is original collateral.
\textsuperscript{119} (1990) 70 \textit{DLR} (4th) 627, 636.
\textsuperscript{120} Jacob D Ziegel and David L Denomme, \textit{The Ontario Personal Property Security Act Commentary and Analysis} (Butterworths, 2nd ed, 2000) § 25.4.8.3.
\textsuperscript{121} One solution for the inventory financier might be to enter into a blocked account agreement with the ADI to ensure that the inventory financier gets the sale proceeds of his or her inventory in priority to any claim by the ADI.
Although the additional Manitoba provisions do not exist in the New Zealand or Australian legislation, it is possible that an Australian court faced with a factual situation involving any one of these scenarios might interpret A\textit{ustPPSA} s 69 as protective of one of those types of additional debtor payments. This would replicate the approach taken in \textit{Flexi-Coil}.

\section*{XII Interaction Between the Debtor Payment Provisions and the Perfection by Control Rules}

There is a significant interaction between the debtor-initiated payment provisions and the perfection by control rules. The debtor-initiated provisions, except in the case of Manitoba, were designed to prevent a bank from obtaining priority over an inventory supplier by use of automated debt authorities or other pre-authorised transfer orders used by banks to sweep funds from debtor trading accounts to debtor loan accounts with the bank.\footnote{This limitation should remain but is effectively cancelled out because of the super priority given to banks that are able to control ADI accounts.}

In Australia, in particular, as well as in America by virtue of Article 9, perfection by control of a bank account is permitted. An ADI under the A\textit{ustPPSA} is able to take a security interest in the deposit account\footnote{A\textit{ustPPSA} s 12(4)(b).} and perfect it by control.\footnote{A\textit{ustPPSA} ss 57(1), 21(2)(c)(i), 25.} Potentially, this gives a bank a super priority over the PMSI claim of the inventory supplier even though the bank may have actual notice of the PMSI security interest. For policy reasons, and to ensure a level playing field, the current position is untenable as it gives the bank a super priority because of its status as an ADI. Absent this special status a bank will not be able to assert any set off rights if it has actual notice of a competing secured party’s inventory security interest or security interest over the debtor’s bank account. If it controls the ADI account of its debtor it has priority simply because of its status as an ADI. The New Zealand, Saskatchewan and Manitoba P\textit{PSAs} do not presently provide for perfection by control of bank accounts and therefore banks in these jurisdictions do not enjoy this privileged position.

As a result of the ability of an ADI to take security over a bank account of its debtor, it will be in a superior position and be able to defeat any debtor-initiated payment. An ADI security interest is automatically perfected by control under A\textit{ustPPSA} s 25. This security interest will have priority over any other security interest in the ADI account under A\textit{ustPPSA} s 75. The ADI will also have priority because of A\textit{ustPPSA} ss 21(2) and 57.

If the debtor has granted a security interest in his account to his ADI, the ADI will necessarily have priority over any proceeds deposited to the account by its debtor.\footnote{Roderick J Wood, ‘Acquisition Financing of Inventory: Explaining the Diversity’ (2013) 13 \textit{Oxford University Commonwealth Law Journal} 49.}
An ADI will therefore be able to defeat a creditor who receives a debtor-initiated payment by enforcing its ADI security interest or by set off, unless it has actual notice of competing secured party’s interest in the account and/or its proceeds. An ADI will also be able to defeat a garnishee order or an ATO garnishee notice because the interest is a fixed statutory interest not a floating charge interest.126 As a result of the ADI control account security interest and set off, a creditor will not be protected by s 69 until actual payment of his or her debt.

A feature of s 25 is that an ADI has control simply by being an ADI.127 This is to be contrasted with the Article 9 provision which provides that control occurs automatically if a debtor has granted a security interest in favour of the bank which covers the account.128 Under the UCC § 9-340(a) a bank’s right of set off has priority over a security interest held by another secured party. The position is different if the third party secured party has a control agreement with the bank in respect of the debtor’s deposit account.129 Here a secured party obtains priority for proceeds of accounts deposited into a bank account.130

XII Receivers

In Stiassny, both the New Zealand Court of Appeal and the Supreme Court decided that the payment initiated by a receiver as agent for the debtor was covered by NZPPSA s 95. The better view is that this is not correct. An authorisation by an agent is not the same. If the same facts came before an Australian court it is likely that the result would be different. First, the definition of ‘debtor’131 in AustPPSA s 10 does not include a receiver or agent of the debtor. Secondly, a payment by a receiver

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126 Cf Commissioner of Taxation v Park [2012] FCAFC 122.
127 The requirements of control in AustPPSA ss 341 and 341A only apply in respect of circulating assets. See Duggan and Brown, above n 6, 5.23–5.24. It is implicit in AustPPSA s 25 that the ADI’s customer must have granted a security interest to the ADI which covers ADI accounts. Despite this, AustPPSA s 25 should be amended to require a control account agreement to gain priority under s 75 over another secured party who has perfected by registration of a financing statement. The control account requirements in ss 341 and 341A should be moved to s 25.
128 UCC § 9-104. According to the Official Commentary, Note 3, all actual and potential creditors of the debtor are always on notice that the bank with which the debtor’s deposit account is maintained may assert a claim against the deposit account. A secured party which is not a bank must enter into a control account agreement with the bank or become the bank’s customer.
129 UCC § 9-340(c).
130 Clarke, above n 26, [3.11[1]]. As to the Australian position, see Rory Derham, Derham on the Law of Set-off (Oxford University Press, 4th ed, 2010) [17.58]–[17.59]. See also AustPPSA s 80 in relation to transfers of accounts and the right of set off.
131 The position is the same in respect of the term ‘grantor’ in s 10. AustPPSA uses the term ‘grantor’ idiosyncratically in place of ‘debtor’, which in itself causes confusion. The term ‘grantor’ is not used any of the other PPSAs.
is not a payment by the debtor as a matter of general law.\textsuperscript{132} This is so despite the fact that, generally, the debenture charge or general security agreement will provide that a receiver or receiver and manager is agent of the debtor/grantor. After liquidation it will provide that the receiver is agent of the chargeholder or secured party because upon the making of the winding up order the agency ceases.\textsuperscript{133}

During the course of a receivership, a receiver will open an account of his own with the ADI and bank all moneys received by him or her during the receivership to that account. The account established by a receiver will necessarily be the receiver’s account and any cheques and other debits made to the account can only be made by the receiver. As a consequence, any payments made by the receiver from that account can only be characterised as payments by the receiver,\textsuperscript{134} not the debtor. If made by a receiver, the payment would, in any event, be made with consent of the secured party and would therefore operate as a release. \textit{NZPPSA} s 95 and \textit{AustPPSA} s 69 could only apply if the security interest had not been enforced.

There is a further difficulty with the \textit{Stiassny} decisions: the receivers were receivers of FCNZ and CITIC, not CNIFP. Consequently, they were not agents of CNIFP. The Court of Appeal and the Supreme Court found that as the sale proceeds belonged to CNIFP, not FCNZ or CITIC, they were subject to the security granted by CNIFP.\textsuperscript{135} The moneys were paid to the Commissioner from the partnership bank account in the name of the receivers. The receivers were agents of the two members of the CNIFP partnership. FCNZ and CITIC had appointed one of the receivers to the management board of CNIFP. Even if you accept that the payment was made from the sale proceeds belonging to CNIFP, the payments were made from an account of the receivers by the receivers not by the partnership itself.

The statement by Blanchard J that any payment made by or on behalf of the debtor from the proceeds of sale of the collateral is a debtor-initiated payment for the purposes of s 95 cannot be correct.\textsuperscript{136} On this basis, if a case came before a Court here in Australia that considered the same fact situation as in \textit{Stiassny}, \textit{AustPPSA} s 69 may not be engaged if the characterisation of the account is as decided by the High Court in \textit{Sheahan}.\textsuperscript{137}

This is because in \textit{Sheahan}, the High Court said that it was important to have regard to the source of the funds. Because the account was in the receivers name any payments from it could only be characterised as payments by the receiver and

\textsuperscript{132} In \textit{Shehan v Carrier Air Conditioning Pty Ltd} (1997) 189 CLR 407, Dawson, Gaudron and Gummow JJ said (at 435) if the payments were from an account maintained by a receiver then it was correct to characterise them as payments made by the receiver. Brennan CJ agreed (at 421).

\textsuperscript{133} Shehan v Carrier Air Conditioning Pty Ltd (1997) 189 CLR 407.

\textsuperscript{134} Ibid 435.

\textsuperscript{135} \textit{Stiassny} [2013] 1 NZLR 140, [58]; \textit{Stiassny No 2} [2013] 1 NZLR 453, [48].

\textsuperscript{136} \textit{Stiassny No 2} [2013] 1 NZLR 453, [52].

\textsuperscript{137} Ibid.
no one else.\(^{138}\) This is so despite the fact that the proceeds technically remained the property of CNIFF.\(^{139}\) Nevertheless the payment to the Commissioner was made with the consent of BNZ on behalf of the secured creditors. Section 95, therefore, was not engaged as the payment was made with consent of the secured parties and hence operated as a release.

Apart from this, it is bewildering that counsel in Stiassny all the way through the various courts failed to analysis the legal position correctly. If the security taken by the BNZ and CNI was only over the aliquot share of each individual member of the partnership,\(^{140}\) the secured parties did not have security over the partnership assets themselves that included the proceeds of sale in the bank account and as a consequence had no entitlement to the partnership moneys as secured creditors. Further, if the receivers were invalidly appointed they had no legal right or entitlement to make the GST payment to the Commissioner.

**XIII CONCLUSION**

One characteristic of the PPSA is its treatment of the priority rules. They generally provide clarity, predictability and certainty when contrasted with what was a foggy state of affairs under the prior law. But the poor drafting and policy choices in the AustPPSA sections considered in this article do not meet these requirements of clarity, certainty and predictability. Unsecured creditors appear to be in a slightly better position than they were under pre-PPSA law once payment by one of the methods stipulated has been made. However, this position is seriously undermined by the position given to ADI’s by the AustPPSA through the ability to take a security interest in an ADI account kept with them that is automatically perfected by control.

We await with interest the likely outcome of the agitation of s 69 before an Australian court. In the meantime, it is hoped that the review incorporated in the AustPPSA by s 343 will bring some sense to the uninformed drafting by a view of the various knowledge requirements referred to above and repeal of s 69(2).\(^{141}\) Knowledge of a security interest or a payment received with knowledge that it is in breach of the terms of the security agreement should not matter for the policy reasons stated above. The SaskPPSA s 31(2) has the balance right but this is not assisted by the decision of

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\(^{138}\) Ibid 435 (Dawson, Gaudron and Gummow JJ).

\(^{139}\) [2012] 1 NZLR 140, [41]. See above n 72, where it was observed by the Court of Appeal, relying on NZPPSA s 24, that title did not matter.

\(^{140}\) See above n 78.

\(^{141}\) The review of the AustPPSA is to be undertaken and completed within three years after the registration commencement time (30 January 2012).
Stiassny in the New Zealand Supreme Court. The special priority rule should be the same as UCC § 9-332(b): ‘A transferee of funds from a deposit account takes free of a security interest in the deposit account unless the transferee [creditor] acts in collusion\textsuperscript{142} with the debtor in violating the rights of the security party.’

\textsuperscript{142} See Banner Bank v First Community Bank 854 F.Supp. 2d 846 (D.Mont. 2012). In this case where a debtor company’s principals enabled a fraud on a first creditor where a second creditor knew that the debtor was bypassing the first secured party creditor’s security interest by keeping the creditor completely in the dark about a potential bank conflict over the debtor’s assets or about the possibility that the debtor might want to sell the encumbered assets. Cf Keybank NA v Ruiz Food Products Inc 59 UCC Rep. 2d 870 (D. Ida 2005); Kentucky Highlands Inv Corp v Bank of Corbin 60 UCC Rep. 2d 1307 (Ky Ct App 2006) where collusion was not found on the facts.
STOP ‘SLIMING’ YOUR LIQUID ASSETS:
SECURITY OVER DEPOSIT ACCOUNTS — US PERSPECTIVES

ABSTRACT

This article discusses the role played by art 9 of the United States’ Uniform Commercial Code in the Global Financial Crisis, and outlines the method for taking security over deposit accounts held in US banks. It compares the process for taking such security in Australia with that used in the US, and places particular emphasis on the detailed provisions of the Uniform Commercial Code relating to attachment, collateral description, consumer exceptions, perfection by control, standard control agreements, priorities and proceeds. It is submitted that the set-up, workings and side effects of the Uniform Commercial Code art 9 regime will be instructive for practitioners in non-US jurisdictions, and may prompt useful questions and insights about their own rules and commercial conventions. Relevant portions of the American Bar Association’s Joint Taskforce on Deposit Account Control Agreements are discussed, and some comparative observations are made for those involved in international transactions.

What this means is that many of the concerns expressed on the Drafting Committee and out of the Drafting Committee about the potential to simply throw deposit accounts into a security agreement, file a financing statement covering everything and thereby, in effect, casting the slime of Article 9 over all of the liquid assets of the company is no longer there.1

The new world is upon us. Repent. Revised Article 9 is the law in every state.2

I INTRODUCTION

In the 2011 film Margin Call, Zachary Quinto plays Peter Sullivan, a risk analyst responsible for bringing dire news to his superiors working in a Wall Street investment bank. Towards the end of the film, he openly worries about ordinary citizens going about their business: ‘[l]ook at these people. Wandering around with absolutely no idea what’s about to happen.’

In various ways the Global Financial Crisis (‘GFC’), also known as the subprime mortgage crisis, took hold of public imagination during the 2007 recession and beyond. It is now a part of financial folklore. Originating in the US domestic housing market, it spread to many parts of the world and adversely affected Australia, although not to the extent that it did in other countries.

Any accurate description of the crisis as it unfolded in the Pacific Rim would likely include the Australian parliamentary debate about the guarantee of bank deposits, as well as the possible effects on ordinary Australians who stood to lose their life savings in the event of a global financial meltdown. The Guarantee Scheme for Large Deposits and Wholesale Funding Appropriation Act 2008 (Cth) was passed during November of that year after only a few hours of Senate debate. The Act implemented a scheme designed to guarantee large deposits and wholesale funding of banks and followed on from an earlier Financial Claims Scheme designed to calm the markets and the nerves of harried investors. Many other countries took similar measures.

If investors were nervous, banks were even more so. The potential for systemic collapse forced regulators to bring the entire securitisation process into sharp focus to determine where the system had ‘failed’. The candidates for blame included the borrowers themselves, loan originators and brokers, the loan servicers, the large rating agencies, investment banks, various regulatory bodies themselves, as well as the relevant accounting standards. All these (and more) built their financial house on the sand of ‘bankruptcy-remoteness’ and were caught in its collapse. One often-neglected source of this collapse is an obscure portion of the Uniform Commercial Code (‘UCC’) that provided the on-sale of income streams with legal certainty.

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6 The UCC is model legislation and must be implemented by a state to be considered law. For a review of recent amendments to UCC art 9 see David Frisch, ‘The Recent Amendments to UCC Article 9: Problems and Solutions’ (2011) 45 University of
Thus, one of the important nails holding the house together (until its collapse) was UCC §9-318(a), which provides that:

A debtor that has sold an account, chattel paper, payment intangible, or promissory note does not retain a legal or equitable interest in the collateral sold.

This section, when combined with other provisions, allowed the Special Purpose Vehicle (‘SPV’) companies to claim ownership of an income stream and gave rise to the important fiction that the assets were ‘bankruptcy remote’, and so safe from the insolvency fallout if a loan originator should collapse. Revised Article 9 of the UCC (‘Article 9’) was critical in achieving this result. No less important now that we are (or believe ourselves to be) beyond the GFC, is the role of Article 9 in taking security over bank deposits in the ordinary course of lending. It is to this that we now turn.

A Funds on Deposit

The sensitivity of funds on deposit is no less marked in situations where money is lent and a bank account is used as security for the loan. The relationship between banker and customer was set out admirably in *Foley v Hill* (1848) and is worth repeating in its entirety:

The money paid into the banker’s, is money known by the principal to be placed there for the purpose of being under the control of the banker; it is then the banker’s money; he is known to deal with it as his own; he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places. The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with it as he pleases; he is guilty of no breach, of trust in employing it; he is not answerable to the principal if he puts it into jeopardy, if he engages in a hazardous speculation; he is not bound to keep it or deal with it as the property of his principal, but he is of course answerable for the amount, because he has contracted, having received that money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands.\(^7\)

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\(^7\) *Foley v Hill* (1848) 2 HLC 28 (citations omitted).
Given the contractual reality set out above, it is critical that depositors feel a level of confidence in their bank’s liquidity and ability to repay the debt owed to the customer. Government guarantees supply just such confidence.

A creditor in a loan arrangement secured against a deposit also feels better with such knowledge. Building such confidence might follow the following line of questions put by creditors and customers alike:

(i) Am I safe in the event that the bank goes broke?

(ii) Even if the bank does not go broke, am I properly secured as a matter of law so as to be able to proceed against the deposited money and win a judgment easily and quickly?

The second question is the focus of this article.

**B Security Over Deposit Accounts: Australia and the US**

Taking security over Australian bank accounts has recently changed following the introduction of the *Personal Property Securities Act* (‘*PPSA*’) scheme in 2009. Previous methods of taking security (via charge, flawed asset or set-off arrangement) continue to operate under the new system, with the additional need to register a security interest in some cases. The *PPSA* introduced many new concepts such as the purchase money security interest and left some feeling slightly worse-for-wear, for example, the famous *Romalpa* clause. To date, there has been only limited consideration of the origins of the provisions that relate to taking security over bank accounts.

This article explores some essential aspects of taking security over ‘Deposit Accounts’ under Revised Article 9 of the UCC. Taking a descriptive approach, it will define essential terms, survey the process of attachment and perfection by control (including control agreements), examine questions of priority and provide a brief discussion of deposit accounts as proceeds. It is submitted that the set-up, workings and side effects of the Article 9 regime will be instructive for practitioners in non-US jurisdictions, and may prompt useful questions and insights about their own rules and commercial conventions. Some comparative observations will be offered below.

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8 *Personal Property Securities Act 2009* (Cth).

9 *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676. This case settled the effectiveness as a security device of title retention clauses in contracts for the sale of goods. Their practical effects were sometimes called into question.
C Taking Security Prior to 1999

Before the 1999 revisions to Article 9, deposit accounts were effectively excluded from its coverage, at least as far as original collateral was concerned. This did not mean deposit accounts were not available at all as collateral, merely that there was no uniformity in approach. In the search for uniformity, and for commercial certainty, the 1999 revisions finally brought deposit accounts firmly within the boundaries of Article 9.

There were many other changes made at that time, and the revisions were substantial. They included, inter alia, changes to the rules on the following issues: filing of financing statements, debtor location, collateral definitions, duties of secured parties and rules for collateral descriptions. The drafters also reorganised and renumbered the statute. Not all changes went smoothly.

The revisions also brought Article 9 into the electronic age. In addition, the modifications brought aspects of the securitisation business under Article 9— with worldwide implications. While fascinating, these aspects of the revisions will not be discussed in this paper.

10 See Official Comment 4. a. to § 9-101: ‘Scope of Article 9. This Article expands the scope of Article 9 in several respects. Deposit accounts. Section 9-109 includes within this Article’s scope deposit accounts as original collateral, except in consumer transactions. Former Article 9 dealt with deposit accounts only as proceeds of other collateral.’ ‘Proceeds’ sitting in deposit accounts remain within the scope of the UCC. See below. Note: Official Comments are influential but not usually binding. The UCC is state law.

11 Some states did place deposit accounts within reach of their various statutes, and common law approaches were also available. See Bruce A Markell, ‘From Property to Contract and Back — An Examination of Deposit Accounts and Revised Article 9’ (1999) 74 Chicago-Kent Law Review 963, 972–73. For an example of outdated common law approaches see Ellefson v Centech Corp. 606 N.W2d 324, 40 U.C.C. Rep. Serv. 2d (West) 1142 (Iowa 2000).

12 See Official Comment 2 to § 9-101.

13 To cite one example involving the IRS, see Lynn M LoPucki, ‘The Spearing Tool Filing System Disaster’ (2007) 68 Ohio State Law Journal 281, outlining the difficulties that arose from a Sixth Circuit decision that a federal tax lien was valid despite the IRS’s failure to adhere to the name requirements of UCC Revised Article 9.


15 See further, Kenneth C Kettering, ‘Securitization and its Discontents: The Dynamics of Financial Product Development’ (2008) 29 Cardozo Law Review 1553–1728 arguing ‘The 1999 revision altered Article 9 in a number of ways favorable to the securitization industry, including by expanding the class of receivables outright sale of which is governed by Article 9, and by adding a provision that reinforces the industry’s conventional wisdom by suggesting, as strongly as state law can do so, that a receivable that is the subject of a true sale should be considered to be outside the
D Taking Security Over Bank Accounts in Australia

Various authors have offered comprehensive commentary on this aspect of the PPSA. Thus, only a brief survey is offered here.

Section 12(1) of the PPSA defines security interest broadly and somewhat echoes the UCC Article 1 definition. Side by side, they appear quite similar:

Section 12(1): A security interest means an interest in personal property provided for by a transaction that, in substance, secures payment or performance of an obligation (without regard to the form of the transaction or the identity of the person who has title to the property),

Article 1: UCC § 1-201(b)(35) ‘Security interest’ means an interest in personal property or fixtures which secures payment or performance of an obligation.

So far as deposit accounts are concerned, the other principal Australian sections include s 12(3A) and 12(4)(b) (specifying that a bank can take a charge over its own indebtedness), s 12(2)(l)16 (allowing a flawed asset arrangement to be a security interest), s 21(2)(c)(i) (allowing for perfection by control of an authorised deposit-taking institution (‘ADI’) account) and s 25 (stating that a secured party has control of an ADI for the purposes of s 21 if, and only if, the secured party is the ADI).17

II UCC Provisions — Defining Terms

A Definition of ‘Account’ Excludes ‘Deposit Account’

The definition of ‘Account’ under § 9-102(a)(2) of the UCC specifically excludes ‘Deposit Account’, which is separately defined in § 9-102(a)(29) as ‘a demand, time, savings, passbook, or similar account maintained with a bank.’18

Section 9-102(a)(29) also provides a number of exclusions by making clear that ‘[t]he term [Deposit Account] does not include investment property or accounts evidenced

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16 Note this sub-section comes immediately after 12(2)(k) — the letter ‘l’ (el) should not be mistaken for the number ‘1’ (one).


18 According to § 9-102(a)(8), the term ‘Bank’ means ‘an organization that is engaged in the business of banking. The term includes savings banks, savings and loan associations, credit unions, and trust companies.’ Official Comment 9 to § 9-109 notes ‘The definition derives from the definitions of ‘bank’ in Sections 4-105(1) and 4A-105(a)(2), which focus on whether the organization is ‘engaged in the business of banking.’
by an instrument.\textsuperscript{19} For example, this means that money market accounts, certificated and uncertificated securities (‘investment property’) and certificates of deposit (an ‘account evidenced by an instrument’) are wholly excluded from this definition. This is in keeping with the organisation of Article 9 whereby collateral must fit (or be ‘made to fit’) into one and only one of the available statutory collateral-types.\textsuperscript{20} ‘Deposit Account’ is also specifically excluded from the definition of ‘General Intangible’ under § 9-102(a)(42) (a residual category).\textsuperscript{21}

In the process of characterisation of collateral, care is always needed to avoid assumptions about the names that banks sometimes give to their financial products. For example, the mere labeling of an account as ‘money market’, where there is no actual investment in money-market securities, will not satisfy the requisite definition.\textsuperscript{22}

It is also noteworthy that the definition of ‘Deposit Account’ does not explicitly provide for security to be taken over such collateral under Article 9. There is, in fact, no UCC provision allowing for this. Instead, the drafters have relied on the circumstance that such property falls under the primary ‘scope’ provision found in UCC § 9-109:

\begin{verbatim}
9-109. SCOPE
(a) [General scope of article.]
   Except as otherwise provided in subsections (c) and (d), this article applies to:
   1. a transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract;
   2. an agricultural lien;
   3. a sale of accounts, chattel paper, payment intangibles, or promissory notes;
   4. a consignment;
   5. a security interest arising under Section 2-401, 2-505, 2-711(3), or 2A-508(5), as provided in Section 9-110; and
\end{verbatim}

\textsuperscript{19} Section 9-102(29). ‘Deposit account’ means ‘a demand, time, savings, passbook, or similar account maintained with a bank. The term does not include investment property or accounts evidenced by an instrument.’ (emphasis added)

\textsuperscript{20} There are two main residual categories: ‘Equipment’ in the case of goods (see § 9-102(a)(33)), and ‘General Intangibles’ in the case of non-goods (see §§ 9-102(a)(42), (61)).

\textsuperscript{21} ‘General intangible’ means any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-certificate rights, letters of credit, money, and oil, gas or other minerals before extraction. The term includes payment intangibles and software. See § 9-102(a)(42).

\textsuperscript{22} See Lawrence, Henning and Freyermuth, \textit{Understanding Secured Transactions} (LexisNexis, 5th ed, 2012) 58, 1.07[H], footnote 342.
Perhaps as a precautionary measure, the drafters did provide an overt statement in Official Comment 16 to § 9-109 warranting that ‘deposit accounts may be taken as original collateral.’

This Official Comment also makes the following important points:

- it highlights the need for sufficient (reasonable) identification of the deposit accounts;
- it highlights the need for ‘control’ when considering banks other than the bank where the account is actually maintained; and
- it adverts to a raft of new rules that affect perfection, priority, rights of set-off, rights of transferees, enforcement, and the duties of both bank and secured party.

New students of Article 9 are sometimes surprised to learn that many relevant definitions are contained in other Articles of the Code. For example, ‘certificated security’ (§ 8-102), ‘contract for sale’ (§ 2-106), ‘customer’ (§ 4-104), ‘lease’ (§ 2A-103), ‘negotiable instrument’ (§ 3-104), ‘sale’ (§ 2-106) and ‘issuer’ (with respect to a security) (§ 8-201). UCC art 1 also contains many important provisions that are relevant and applicable throughout the entire Code.

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23 The Official Comment to this section calls it a ‘Basic Scope Provision’ and notes that ‘Subsection (a)(1) derives from former Section 9-102(1) and (2). These subsections have been combined and shortened. No change in meaning is intended. Under subsection (a)(1), all consensual security interests in personal property and fixtures are covered by this Article, except for transactions excluded by subsections (c) and (d). As to which transactions give rise to a ‘security interest,’ the definition of that term in Section 1-201 must be consulted. When a security interest is created, this Article applies regardless of the form of the transaction or the name that parties have given to it. Likewise, the subjective intention of the parties with respect to the legal characterization of their transaction is irrelevant to whether this Article applies, as it was to the application of former Article 9 under the proper interpretation of former Section 9-102.’

24 ‘16. Deposit Accounts. Except in consumer transactions, deposit accounts may be taken as original collateral under this Article. Under former Section 9-104(f), deposit accounts were excluded as original collateral, leaving security interests in deposit accounts to be governed by the common law. The common law is non-uniform, often difficult to discover and comprehend, and frequently costly to implement. As a consequence, debtors who wished to use deposit accounts as collateral sometimes were precluded from doing so as a practical matter. By excluding deposit accounts from the Article’s scope as original collateral in consumer transactions, subsection (d)(13) leaves those transactions to law other than this Article. However, in both consumer and non-consumer transactions, sections 9-315 and 9-322 apply to deposit accounts as proceeds and with respect to priorities in proceeds.’

25 See UCC § 9-102(b).
B The Consumer Exception

Section 9-109(d) provides 13 exceptions to the applicability of Article 9. The last of these excludes ‘an assignment of a deposit account in a consumer transaction, but Sections 9-315 and 9-322 apply with respect to proceeds and priorities in proceeds.’

This is the sole exclusion for deposit accounts. A ‘consumer transaction’ is defined in § 9-102(a)(26) as:

- a transaction in which (i) an individual incurs an obligation primarily for personal, family, or household purposes, (ii) a security interest secures the obligation, and (iii) the collateral is held or acquired primarily for personal, family, or household purposes. The term includes consumer-goods transactions.

Consumer transactions are thus left to the common law and other relevant statutes.²⁶

III ATTACHMENT OF SECURITY INTEREST

The provisions dealing with attachment (in particular, the seminal § 9-203) apply to all forms of collateral. A security interest attaches when ‘it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.’²⁷ Under § 9-203(b) enforceability against the debtor and third parties arises only when:

1. value has been given;
2. the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and
3. one of the following conditions is met:
   - the debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned;

²⁶ See Jason M Ban, ‘Deposit Accounts: An Article 9 Security Interest’ (1998) 17 Annual Review of Banking Law 493, 497–9. On the issue as to why consumers get special treatment: ‘One possible explanation for not including consumer transactions secured by deposit accounts within the scope of Revised Article 9 is the possibility that depositary institutions will routinely include provisions in their deposit agreements to take a security interest in all deposit accounts. Since Revised Article 9 provides great advantages to the depositary institution as against competing security interests in such collateral, depositary institutions may wish to take deposit accounts it holds as collateral for ‘all current and future obligations’ of the depositor to the depositary, even if no such obligations exist or are contemplated at the time the account is opened. Alternatively, as suggested by the Revised Article 9 Deposit Account Task Force, the exception for consumer transactions may be a result of the drafters’ disfavor of deposit accounts as collateral, not a specific objection to such collateral being governed by Article 9.’ Ben Carpenter, ‘Security Interests in Deposit Accounts and Certificates of Deposit Under Revised UCC Article 9’ (2001) 55 Consumer Finance Law Quarterly Report 133, footnote 20.

²⁷ UCC § 9-203(a).
(B) the collateral is not a certificated security and is in the possession of the secured party under Section 9-313 pursuant to the debtor’s security agreement;

(C) the collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under Section 8-301 pursuant to the debtor’s security agreement; or

(D) the collateral is deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights, and the secured party has control under Section 9-104, 9-105, 9-106, or 9-107 pursuant to the debtor’s security agreement.28

Leaving to one side the questions of value and rights in the collateral, the UCC imposes a clear choice upon anyone seeking to take security over a deposit account (‘attachment’): either obtain an authenticated security agreement (with proper description of the collateral), or obtain control of the deposit account pursuant to the debtor’s security agreement. For the purpose of this discussion, we shall label these two methods as ‘authenticate and describe’ and ‘taking control.’

It should be noted that the concept of ‘control’ can serve two functions with respect to deposit accounts. First, it can act as a substitute for an authenticated security agreement as an element of attachment (see below). Second, it can serve as the only means of perfection when taking a deposit account as original collateral (see Perfection by Control, below).29

**A Authenticate and Describe**

Authentication of the security agreement by a debtor is a critical stage in attachment and requires compliance with § 9-102(a)(7).30 This is a Statute of Frauds provision,31 but with an important exception for cases where, in the case of ‘deposit accounts’ the secured party has control ‘pursuant to the debtor’s agreement.’ (See § 9-203(b) cited in full above). This will ‘dispense with the requirement of an authenticated security agreement and provide alternative evidentiary tests.’32

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28 UCC § 9-203(b) (emphasis added).
29 See Official Comment 2 to § 9-104. ‘Why ‘Control’ Matters. This section explains the concept of ‘control’ of a deposit account. ‘Control’ under this section may serve two functions. First, ‘control … pursuant to the debtor’s agreement’ may substitute for an authenticated security agreement as an element of attachment. See § 9-203(b)(3)(D). Second, when a deposit account is taken as original collateral, the only method of perfection is obtaining control under this section. See § 9-312(b)(1).’
30 UCC § 9-102(a)(7). ‘**Authenticate**’ means: (A) to sign; or (B) with present intent to adopt or accept a record, to attach to or logically associate with the record an electronic sound, symbol, or process.
31 The Statute of Frauds requires that certain kinds of contract be written down.
32 Official Comment 3 to § 9-203. See also Official Comment 4 to § 9-203. **Possession, Delivery, or Control Pursuant to Security Agreement.** The other alternatives in subsection (b)(3) dispense with the requirement of an authenticated security agreement.
The reason for using the ‘authenticate and describe’ method of attachment over that of ‘taking control’ has to do with issues of proof and the avoidance of litigation. Ben Carpenter has noted that ‘[t]he security agreement must exist but may be created orally, or through implication, course of dealing, a change in terms notice, or any other method sufficient to create a binding contract.’

Such arrangements can take a party by surprise. A written and authenticated security agreement can help avoid this situation.

Description can be a problematic concept and care must be taken to comply with § 9-108(a), which states ‘a description of personal property … is sufficient, whether or not it is specific, if it reasonably identifies what is described.’ This usually means a description along the lines of ‘all the debtor’s deposit accounts’ or ‘all debtor’s deposit accounts maintained with BigBank’ or ‘debtor’s deposit account #12345-04 maintained at BigBank.’

The enduring issue is to get the collateral type correct — (for example, do not confuse an ‘account’ with a ‘deposit account’ or do not rely on a claim over a ‘general intangible’) — and then to get the description correct so as to satisfy § 9-108. Super-generic descriptions are deemed insufficient.

and provide alternative evidentiary tests. Under paragraph (3)(B), the secured party’s possession substitutes for the debtor’s authentication under paragraph (3)(A) if the secured party’s possession is ‘pursuant to the debtor’s security agreement.’ That phrase refers to the debtor’s agreement to the secured party’s possession for the purpose of creating a security interest.

The phrase should not be confused with the phrase ‘debtor has authenticated a security agreement,’ used in paragraph (3)(A), which contemplates the debtor’s authentication of a record. In the unlikely event that possession is obtained without the debtor’s agreement, possession would not suffice as a substitute for an authenticated security agreement. However, once the security interest has become enforceable and has attached, it is not impaired by the fact that the secured party’s possession is maintained without the agreement of a subsequent debtor (eg, a transferee).

Possession as contemplated by Section 9-313 is possession for purposes of subsection (b)(3)(B), even though it may not constitute possession ‘pursuant to the debtor’s agreement’ and consequently might not serve as a substitute for an authenticated security agreement under subsection (b)(3)(A). Subsection (b)(3)(C) provides that delivery of a certificated security to the secured party under Section 8-301 pursuant to the debtor’s security agreement is sufficient as a substitute for an authenticated security agreement. Similarly, under subsection (b)(3)(D), control of investment property, a deposit account, electronic chattel paper, or a letter-of-credit right satisfies the evidentiary test if control is pursuant to the debtor’s security agreement.’


UCC § 9-108(a).

I have borrowed these examples from Hillinger, Batty and Brown, above n 2, 20.

UCC § 9-108(c). Eg, ‘all the debtor’s assets’ or ‘all the debtor’s personal property.’
**B Taking Control**

As indicated above, taking control will relieve the need for an ‘authenticated security agreement.’ Agreement will of course be necessary, but there is no need for authentication. As Bruce Markell has observed:

Thus attachment... [in relation to a deposit account] has no signed writing requirement. As a consequence, a security interest in favor of a bank in a deposit account can arise by implication as well as by express oral agreement — a fact that third party creditors will have to face each time they seek to garnish a deposit account.37

Hence it is far better to reduce such things to writing.38

**IV Perfection by Control**

The original concept of ‘control’ originates in Revised Article 8.39 This concept was then taken up by the drafters of Article 9 in reference to ‘Deposit Accounts’, ‘Electronic Chattel Paper’, ‘Investment Property’ and ‘Letter-of-Credit-Rights’.40 The Official Comments to § 9-104-107 are particularly instructive.

Section 9-104 is headed ‘Control of Deposit Account.’ Since control is the only way to perfect a security interest in a deposit account,41 filed financing statements will not achieve perfection. Nor will pre-filing.42 Similarly, ‘taking possession’ of the

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37 Markell, above n 12, 982 as cited by Hillinger et al *supra*.
38 Hillinger, Batty and Brown, above n 2, 18.
39 Adopted 1994. See generally Rogers, ‘Policy Perspectives on Revised UCC Article 8’ 43 UCLA Law Review 1431, 1477. ‘The rule of Section 9-115(5)(a), that a control security interest has priority over a non-control security interest, is the statutory expression of the fundamental structural principle that underlies the secured transactions rules of Revised Article 8/9. Stated in general terms, the principle is as follows: If A seeks an advance of value from B, offering as collateral securities that are held in such fashion that B has the power to have the securities sold off without further act by A, then B should be able to proceed without fear that A may have granted a conflicting interest to some other party. That basic principle provides a simple and clear basis for secured transactions rules covering the wide range of transactions in which investment securities are used as collateral for obligations.’
40 UCC § 9-104 — Control of Deposit Account; § 9-105 — Control of Electronic Chattel Paper; § 9-106 — Control of Investment Property; § 9-107 — Control of Letter-of-Credit Right.
41 Filing is effective for proceeds. Note that filing is an allowed method of perfecting over chattel paper, negotiable documents, instruments, and investment property. See UCC § 9-312(a).
42 Pre-filing (‘precautionary filing’) refers to the practice of filing a UCC Form 1 prior to attachment as permitted under § 9-502(d): ‘A financing statement may be filed before a security agreement is made or a security interest otherwise attaches.’ This practice
collateral is ineffective. Only control can achieve this vital end. Section 9-104 provides:

(a) [Requirements for control.] A secured party has control of a deposit account if:
   (1) the secured party is the bank with which the deposit account is maintained; ['Method One']
   (2) the debtor, secured party, and bank have agreed in an authenticated record that the bank will comply with instructions originated by the secured party directing disposition of the funds in the deposit account without further consent by the debtor; ['Method Two'] or
   (3) the secured party becomes the bank’s customer with respect to the deposit account. ['Method Three']

(b) A secured party that has satisfied subsection (a) has control, even if the debtor retains the right to direct the disposition of funds from the deposit account.

Contrary to common assumption, it is possible to have (and maintain) control over a deposit account even if the debtor ‘retains the right to direct the disposition of funds from the deposit account.’ The inter-party arrangements for control will, of course, often prevent such disposition by the debtor, but retention by the debtor of the right to dispose will not automatically destroy the secured party’s ‘control’.

The above three methods will be considered separately and — for reasons of clarity — slightly out of order.

A. Method Two

Shorthand designations for this method include ‘Perfection by Control Agreement’ or ‘Tripartite Agreement’. The agreement must make it clear that instructions will be complied with in the absence of debtor consent (that is; ‘debtor consent is no longer required’). This means the control agreement must be ‘condition-less,’ and yet Official Comment 3 does contemplate ‘Certificates of default’ being allowed, provided they do not breach the wording of the section. Ingrid Hillinger, David
Batty and Richard Brown opine that requiring a certificate of default would not breach the section, ‘so long as the bank must follow the creditor’s instructions [and this is so] regardless of the certificate’s underlying truth or falsity.’48

Section 9-342 makes it clear that a bank is not required to enter into a control agreement even if the customer requests (or directs) it to do so. A bank need not confirm the agreement’s existence to a third party unless the customer so requests.49

Importantly, there is nothing requiring the bank to disclose the existence of such an agreement.50 This raises the possibility of a secret lien.

**B Method Three**

In this case, the secured party (‘SP’) becomes the ‘name’ on the deposit account (that is their ‘customer’). While Revised Article 9 does not define ‘customer,’ the Official Comment refer to the definition in art 4-104:

> (5) ‘Customer’ means a person having an account with a bank or for whom a bank has agreed to collect items, including a bank that maintains an account at another bank;

Joint account holders are not ruled out.51

**C Method One**

Section 9-104(a)(1): ‘Automatic Control.’ Here, perfection is automatic. The time of perfection will coincide with attachment.52 Again, this raises the spectre of a secret lien. The Official Comment acknowledges the danger by noting:

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48 Hillinger, Batty and Brown, above n 2, 22.
49 UCC § 9-342. **Bank’s Right To Refuse To Enter Into Or Disclose Existence Of Control Agreement.** ‘This article does not require a bank to enter into an agreement of the kind described in Section 9-104(a)(2), even if its customer so requests or directs. A bank that has entered into such an agreement is not required to confirm the existence of the agreement to another person unless requested to do so by its customer.’ According to Official Comment 2 this provides protection for the bank: ‘This section protects banks from the need to enter into agreements against their will and from the need to respond to inquiries from persons other than their customers.’
50 See McDonnell and Nehf, above n 47.
51 Official Comment 3 to § 9-104: ‘As the customer, the secured party would enjoy the right (but not necessarily the exclusive right) to withdraw funds from, or close, the deposit account. See Sections 4-104(a), 4-403(a).’
52 The critical time will be when value is given. ‘Value’ is defined in Article 1: ‘Value. Except as otherwise provided in Articles 3, 4 and 5 of the Uniform Commercial Code, a person gives value for rights if the person acquires them:
   (1) In return for a binding commitment to extend credit or for the extension of immediately available credit, whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection;
The effect of this provision is to afford the bank automatic perfection. No other form of public notice is necessary: all actual and potential creditors of the debtor are always on notice that the bank with which the debtor’s deposit account is maintained may assert a claim against the deposit account.53

Julian McDonnell and James Nehf consider this harmless. They observe that ‘it is known that the depositary bank may have a common law right of set-off against an account, adding a “secret” security interest does no harm. That is the public justification for Revised § 9-104(a)(3).’54

At this juncture, it is worth repeating Professor Mooney’s quote provided at the beginning of this paper: control agreements are necessary for perfection and the mere filing of an all-encompassing (slimy) financing statement, while enough to attach, will not be enough to perfect an interest over a deposit account.55

V Control Agreements

The content of control agreements was the subject of a lengthy inquiry by the American Bar Association’s Joint Taskforce on Deposit Account Control Agreements (joint with UCC, Commercial Finance, Consumer Financial Services and Banking Law) (‘DACA’).56 The DACA Report dealt with some issues that had become ‘problematic in practice’57 — in particular the persistent ‘battle of the forms’ in which depositary banks tried to enforce favourable terms in the face of comparable

(2) As security for, or in total or partial satisfaction of, a preexisting claim; (3) By accepting delivery under a preexisting contract for purchase; or (4) In return for any consideration sufficient to support a simple contract.’

53 Official Comment 3 to UCC § 9-104.
54 See McDonnell and Nehf, above n 47.
55 McDonnell and Nehf provide the following policy insights: ‘Originally, the revisers had planned to permit permissive filing as to deposit accounts. But there was opposition from the bankruptcy forces to the whole concept of allowing an Article 9 security interest in the general bank accounts of the debtor. It was feared that if a floating lien could insist on a security in all of the debtor’s bank accounts, it would leave even fewer resources for unsecured creditors or to support a reorganisation. By way of counter-attack, Professor Elizabeth Warren launched the ‘carve-out’ proposal under which a creditor levying on collateral would be given a priority claim to 20 percent of the value of the collateral even though the property was already subject to a perfected security interest. In an effort to buy a margin of peace, the Article 9 revisers decided to back off permissive filing for deposit accounts. Under the scheme adopted by the revisers, a secured creditor is not able to obtain a perfected interest in all of the debtor’s bank accounts simply by filing a financing statement. It is required to establish control over each account to have an interest that will be effective in bankruptcy.’ (citations omitted).
56 Reports, Final Annotated DACA, Inserts and other information available online: <http://apps.americanbar.org/dch/committee.cfm?com=CL710060>.
demands from secured parties. The depositary banks viewed their own position as paramount since they were, after all, doing ‘everyone’ a favour by making accommodations and exposing themselves to ‘potential liability to a third party that they would not otherwise have.’ Likewise, secured parties wanted ‘assurance of the priority of the security interest, as well as ongoing monitoring, enforcement and other rights; all without undue exposure to themselves.’

One consequence of such intense negotiation is deferral of the deal or — an arguably worse scenario — the continuation of negotiation after closing. The latter would lead to debtors being burdened by ‘impending events of default in their loan documents with secured parties unless the deposit account control agreements are finalised and executed by certain dates set forth in the post-closing arrangements.’

The DACA Report made the following observations regarding the DACA as drafted (and made freely available):

- the DACA should be read in conjunction with the General Terms (incorporated by reference);
- the DACA is meant to be highly elastic, in accordance with the parties’ wishes and needs;
- the General Terms can be modified in the DACA;
- too much modification of the General Terms (in deference to the overall consensus reached) should be discouraged;
- Part A of the DACA incorporates the General Terms;
- Part B of the DACA contains the specific terms including identifying the Deposit Account (by account number) as well as providing certain default provisions; and
- Part C of the DACA refers to the Exhibit containing the Initial Instruction.

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58 Ibid. ‘Secured parties and depositary banks have developed their own forms of control agreements that largely focus on their own needs and concerns. On the one hand, secured parties generally seek in control agreements not only to achieve control for purposes of perfection but also to obtain assurance of the priority of the security interest, as well as ongoing monitoring, enforcement and other rights, all without undue exposure to themselves.’

59 Ibid. ‘On the other hand, depositary banks view the control agreement structure largely as an administrative accommodation to their customers that exposes them to potential liability to a third party that they would not otherwise have. As a result, depositary banks desire that the control agreement provide them with appropriate exculpatory and indemnification protections against liability for operational and other risks.’

60 Ibid.

61 Ibid.
The DACA assumes that the parties to the agreement ‘intend for the debtor to have access to the funds in the deposit account unless and until the secured party instructs the depositary bank otherwise’62 (there is no standing instruction for a cash sweep at the start of the transaction). It is also assumed that the ‘demand deposit account is not associated with a postal lock box and is not linked to a related securities account in which the funds are invested.’63 The DACA does not cover foreign deposit accounts. The Report discusses the DACA provisions in detail.

VI PRIORITY OF SECURITY INTERESTS IN DEPOSIT ACCOUNTS

The UCC’s priority rules are designed to ‘determine the order in which competing creditors may satisfy their claims from particular assets belonging to their common debtor’s estate.’64 Priority in deposit accounts is regulated under § 9-327. The baseline rule is that control trumps lack of control.65 Critically, this sets up priority for the control-perfected party ahead of the party seeking to assert an interest in ‘identifiable cash proceeds under § 9-315.’66 The Official Comment indicates how this provision would function in practice:

Secured parties for whom the deposit account is an integral part of the credit decision will, at a minimum, insist upon the right to immediate access to the deposit account upon the debtor’s default (i.e., control). Those secured parties for whom the deposit account is less essential will not take control, thereby running the risk that the debtor will dispose of funds on deposit (either outright or for collateral purposes) after default but before the account can be frozen by court order or the secured party can obtain control.67

The next rule (§ 9-327(2)) covers a situation where there is more than one secured party making a claim over the deposit account. In such cases, interests will rank according to the order in which control is successfully acquired (that is, first in time prevails).68 This situation would of course be very rare and contemplates more than one § 9-104(a)(2) control agreement.

62 Ibid 751.
63 Ibid.
64 Thomas H Jackson and Anthony T Kronman, ‘Secured Financing and Priorities Among Creditors’ (1979) 88 Yale Law Journal 1143, 1143–4. This article is also known for the following perceptive comments on PMSI priority: ‘… the analytic justification for many of Article 9’s most important priority rules remains obscure. This is especially true of the overriding priority enjoyed by purchase money lenders’: at 1144.
65 UCC § 9-327(1).
66 Official Comment 2 to UCC § 9-327.
67 Official Comment 3 to UCC § 9-327.
68 UCC § 9-327(2).
Section 9-327(3) goes on to describe two important exceptions:

(i) a security interest ‘held by the bank with which the deposit account is maintained has priority over a conflicting security interest held by another secured party’;\(^69\) and

(ii) a security interest ‘perfected by control under 9-104(a)(3) has priority over a security interest held by the bank with which the deposit account is maintained.’\(^70\)

The first exception applies to give the bank priority, ‘regardless of whether the deposit account constitutes the competing secured party’s original collateral or its proceeds.’\(^71\) This rule saves banks the trouble of checking public records, or, for that matter, their own records, to see if another party might have a security interest.

The second exception gives priority to a control-perfected party provided they become the customer with respect to the account (this will trump the first exception).

The priority given by § 9-327 does not cover the situation where one is dealing with the proceeds of a deposit account.\(^72\)

**VII Deposit Accounts as Proceeds**

Disposition of proceeds is a diverse and challenging area so my comments will be confined to the specifics of deposit accounts.\(^73\)

If a secured party has a security interest in original collateral, they will also have a security interest in the proceeds of that collateral.\(^74\) Proceeds must be identi-

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\(^69\) UCC § 9-327(3).

\(^70\) UCC § 9-327(4).

\(^71\) Official Comment 4 to UCC § 9-327.

\(^72\) As to deposit accounts as proceeds see below. Official Comment 5 to § 9-327 notes ‘The priority afforded by this section does not extend to proceeds of a deposit account. Rather, § 9-322(c) through (e) and the provisions referred to in § 9-322(f) govern priorities in proceeds of a deposit account. Section 9-315(d) addresses continuation of perfection in proceeds of deposit accounts. As to funds transferred from a deposit account that serves as collateral, see Section 9-332.’

\(^73\) Debates concerning calves conceived by cows and hog feed consumed by hogs will be ignored for present purposes. See, eg, Citizens Sav Bank v. Miller 515 NW 2d 7, (1994), holding that a calf is not ‘proceeds’ of the cow that bore it. See also First NB of Brush v. Bostron 39 Colo App 107, 564 P. 2d 964, 966 (1977), holding that hogs are not ‘proceeds’ of the animal feed they consume.

\(^74\) UCC § 9-203(f). ‘[Proceeds and supporting obligations.] The attachment of a security interest in collateral gives the secured party the rights to proceeds provided by Section 9-315 and is also attachment of a security interest in a supporting obligation for the collateral.’
fiable. Section 9-315(c) provides ‘[a] security interest in proceeds is a perfected security interest if the security interest in the original collateral was perfected.’ This automatic perfection in proceeds lasts for 20 days (perfection is lost on the 21st day) unless the requirements of § 9-315(d) are met. Those requirements provide an extension for ‘identifiable cash proceeds’ which includes deposit accounts. As always, it is possible to file a financing statement.

It is also theoretically possible to become the bank’s customer or obtain a control agreement in less than 20 days, but this is not recommended. Automatic perfection remains the safer path.

**VIII Comparative Observations**

Comparative lawyers rightly warn that ‘[i]t is not enough simply to compare words on the page.’ The following observations are made with an awareness that comparisons are necessarily difficult, often tangential and rarely complete.

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75 UCC § 9-315(a)(2). The process of identification can be intricate, involving rules of tracing. Arguably the most common form of tracing is known as the ‘lowest intermediate balance test’ — as to which see § 9-315(b)(2) which refers to ‘method[s] of tracing, including application of equitable principles, that is permitted under law other than this article with respect to commingled property of the type involved.’ The ‘lowest intermediate balance test’ has been summarized as follows: ‘Under the [rule], a court recreates the daily balances in the disputed account, noting when deposits were made and the sources of those deposits. It then applies the presumption that the debtor will spend his or her own money first, ‘leaving’ the secured party’s proceeds portion behind for the secured party. The secured party then gets the lowest balance of ‘pure’ proceeds during the relevant time.’ Markell, ‘Symposium: From Property to Contract and Back: An Examination of Deposit Accounts and Revised Article 9’ (1999) 74 Chicago-Kent Law Review 963, 971–72. Markell cites Universal C.I.T. Credit Corp. v. Farmers Bank, 358 F. Supp. 317, 325–27 (E.D. Mo. 1973) as a helpful case example.

76 Recall, the only way to perfect a security interest in a deposit account is via control: UCC § 9-312(b).

77 UCC § 9-315(d)(2).

78 UCC § 9-102(a)(9). ‘Cash proceeds’ means proceeds that are money, checks, deposit accounts or the like. Official Comment 13 states ‘The definition of ‘cash proceeds’ is substantially the same as the corresponding definition in former § 9-306. The phrase ‘and the like’ covers property that is functionally equivalent to ‘money, checks, or deposit accounts,’ such as some money-market accounts that are securities or part of securities entitlements. Proceeds other than cash proceeds are noncash proceeds.’ Under UCC § 9-102 (a)(58) ‘Noncash proceeds’ means proceeds other than cash proceeds.

First, it would seem that quasi-security arrangements are treated the same in both jurisdictions and so will be swept into the scope of each regime. Deposit accounts are no exception. However, the history and underlying framework of the security arrangements will vary considerably. For example, sale and leaseback, retention of title, hire purchase, factoring and set off are known to both systems, but their histories are quite different, especially in light of the diversity of state laws in both countries. The floating charge is unknown in the US. 80

Second, registration of a Financing Statement is the default position for careful lenders in the US; the downside of failing to complete this step is too large compared to the relatively easy process for its accomplishment. It is submitted that this will become so in Australia, even if not strictly necessary in all cases involving ADIs.

Third, all PPSA-type registries in the US are state-based, usually under the auspices of the relevant Secretary of State. This makes registration a harder process since the rules can vary in small ways.

Fourth, state regulation of banks in the US, and at even more local levels (for example, city regulations) is a cause for complication. Australia is relatively simply regulated, which has associated advantages.

Fifth, the UCC was born out of the move towards legal realism of the 1930s. As Karl Llewellyn himself has noted, realism was always meant to be ‘a methodology.’ 81 This implies further changes in accordance with the realist creed as market conditions change and demand alterations in the law.

IX Conclusion

The new world of Revised Article 9 did much to clarify the process for taking security over deposit accounts. It will remain a source of thought-provoking commentary and case law for other personal property security systems based on the original ‘Lex Llewellyn.’ 82

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82 Original drafters of the UCC: ‘Article 1, General Provisions, Karl N. Llewellyn; Article 2, Sales, Karl N. Llewellyn; Article 3, Commercial Paper, William L. Prosser; Article 4, Bank Deposits and Collections, Fairfax Leary, Jr.; Article 5, Letters of Credit, Fredrich Kessler; Article 6, Bulk Sales, Charles Bunn; Article 7, Documents of Title, Louis B. Schwartz; Article 8, Investment Securities, Soia Mentschikoff; Article 9, Secured Transactions, Allison Dunham and Grant Gilmore.’ 12 Tex. Prac., Texas Methods of Practice § 24:1 (2013 ed).
Tibor Tajti (Thaythy)*

COULD CONTINENTAL EUROPE ADOPT A UNIFORM COMMERCIAL CODE ARTICLE 9-TYPE SECURED TRANSACTIONS SYSTEM? THE EFFECTS OF THE DIFFERING LEGAL PLATFORMS

ABSTRACT

With the entry into force of the Australian Personal Property Securities Act 2009 (Cth) in 2012, the Unitary Model of secured transactions law on personal property became part of the legal system of another major economy of the world. Australia joined the United States of America (the source-jurisdiction), Canada and New Zealand. Given the success of the Unitary Model, it is natural to question whether a similar breakthrough is to be expected in Europe as well. From a legal perspective, the key dilemma is whether the Continental European civil law systems — the majority of Europe’s jurisdictions — are compatible with the Unitary Model at all. This depends to a great extent on the inherited yet differing legal platforms — the concepts, principles and rules characteristic of common law or civil law systems. This article aims to exemplify the discrepancies that might prove to be obstacles to transplanting the Unitary Model and which still have not yet been properly analysed in comparative scholarship.

I INTRODUCTION

[I]t is now time for fundamental reform with a view to a new and unified European [personal property security law] system …1

The end result of the different systems will often be the same. Lawyers have a tendency to overstate the importance of a legal concept. For businessmen [sic], a property and security is merely a means to an end. They work around the problem: in practice very few problems occur …2

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A The Unitary Model in Continental Europe: What Has Been Achieved So Far?

With the entry into force of the Australian Personal Property Securities Act 2009 (Cth) (‘APPSA’) in 2012, the Unitary Model of secured transactions law on personal property became part of the legal system of another major economy of the world. The quintessential feature and innovation of this model is the so-called unitary concept of security interest, bringing all secured transactions on personal property and fixtures under the same roof if a transaction ‘in substance secures payment and performance of an obligation … regardless of its form or who has title to the collateral.’ Although there are meaningful differences among the jurisdictions that have taken over this model with adaptations to local conditions and expectations, the building blocks and crucial features — in particular the unitary concept of security interests — remain the same. Hence, it makes sense to refer to these jurisdictions as ‘Unitary Systems’. The group includes, besides Australia, the United States (the birthplace of the model), the Canadian provinces and New Zealand. One should also add to this list Book IX of the sui generis soft law instrument named the ‘Draft Common Frame of Reference’ (‘DCFR’) because it represents that farthest reaching project made in the direction of the Unitary Model in Europe.

Unfortunately, in Continental Europe today, there is no indication that the modernisation of personal property security laws (‘PPSL’) will be given top priority any time soon. The adaption of the Unitary Model appears even less likely. This is notwithstanding the many developments in this area, owing in part to the groundbreaking work of many international organisations. These organisations include the European Bank for Reconstruction and Development (‘EBRD’), the United Nations Commission on International Trade Law (‘UNCITRAL’) and the International Institute for the Unification of Private Law (‘UNIDROIT’). Mention ought to be made also of the work of many enthusiast comparative scholars. After the orchestrated secured transactions reforms in Central and Eastern Europe (‘CEE’) in the 1990s, the hesitant, incremental changes in France in the first decade of the 21st century, as well as the appearance and subsequent laying aside of the DCFR with its Unitary Model-inspired Book IX, the steam of reform and modernisation seems to have lost its strength. Despite the still unfolding Common European Sales Law

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3 Craig Wappett, Essential Personal Property Securities in Australia (LexisNexis, 2012) xxvii.

4 The DCFR was planned to become Europe’s first common civil code, but the idea was soon dropped. Consequently, it has the size and features of a traditional civil code. It was drafted by a large group of scholars from EU Member States, led by those from the economically strongest countries. See Christian von Bar et al (eds), Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) — Outline Edition (2009) European Commission <http://ec.europa.eu/justice/policies/civil/docs/dcf Produto o oline_0ution_en.pdf>.

5 ‘PPSL’, ‘secured transactions law’ and ‘security law’ will be used interchangeably in this article.
(‘CESL’)⁶ project that grew out of the DCFR, the European Union’s lawmakers in Brussels do not intend to repeat that with Book IX. Changes may naturally ensue if the prospective elected politicians come to Brussels with different preferences. All the same, it is highly uncertain given that in Europe no meaningful discourse on the need to harmonise the diverging national PPSL regimes has even been initiated, excepting in the academe and the United Kingdom.

As this article is interested only in the prospects of the Unitary Model in Continental Europe, the basic feature of which is comprehensiveness, achieved through the unitary concept of security interests, two preliminary observations ought to be added. First, though quite a number of Continental European countries have already undertaken reforms in this domain, none of them was comprehensive and none of them was based on such a unitary concept of security interests as known by any of the Unitary Systems. Consequently, economically pivotal financing forms (typically title and receivables financing) continue to subsist as distinct PPSL segments. Second, the reforms were uncoordinated and aided by international organisations or governments supporting more or less differing models. This therefore leads to varying levels of incompatibility among the national systems of Continental Europe, creating barriers to cross-border trade.

The prohibitive complexity generated by Continental Europe’s colourful legal systems suggests that things will only change for pressing economic reasons. At the moment nothing foreshadows such a scenario; rather, the overall climate is unfavourable to the cause. Casting a favourable word on the Unitary Model in Europe today is an almost certain recipe for being perceived as a harbinger of United States legal hegemony. This could, to a great extent, be attributed to the present crisis of neoliberalism as manifested by the sovereign-debt crisis, the after-effects of the Global Financial Crisis (triggered by the US credit crunch) and the resulting International Monetary Fund (‘IMF’) and European Union (‘EU’)-dictated austerity measures, as well as singular local calamities like the burst of the foreign-currency-denominated housing mortgage bubbles in a number of European countries.⁷

Such aversion to the Unitary Model is blind to the fact that US law is not the only source that could be consulted with respect to the potential economic benefits of a common European PPSL. This applies especially to the advantages of the recent APPSA, which has a drafting style much closer to European standards than the over-technical Revised Version of art 9 of the United States Uniform Commercial

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⁶ The CESL is an optional instrument for cross-border (including online) sales transactions. It is hoped that the single, more predictable and heavily consumer-protective CESL will boost cross-border sales within the EU and will become favoured especially by small and mid-scale businesses. See Common European Sales Law to Boost Trade and Expand Consumer Choice (11 October 2011) European Commission <http://ec.europa.eu/justice/newsroom/news/20111011_en.htm>.

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The Code (‘Article 9’). The APPSA also contains solutions that draw from earlier modernising efforts in Canada and New Zealand, many potentially of use to Europeans as well.

In this economically important domain of commercial law, Europe is incapable of agreeing on a common model. So far, very few seem to have realised the economic consequence of this. Notwithstanding the growing popularity of law and economics, the causal link between the relentless financing problems of the Continent and the quality of PPSL regimes is not seen. This is despite myriad recent reports on the problems Europe has faced due to lack of access to finance (especially by small and mid-scale enterprises) and the fact that, contrary to the EU’s basic pillars — known as the fundamental principles or ‘four freedoms’ — capital still does not cross borders as seamlessly as it should. The inertia of European scholars, causing them to lag behind the developments, is also an impediment that should be reckoned with on the road towards a version of the Unitary Model.

B The Missing Pieces of the Puzzle

Despite the small number of PPSL reform projects that have been undertaken in Continental Europe, it would be a mistake to think that Europe has simply remained immune to the idea of realignment with the Unitary Model. Nonetheless, Europe has even failed to address, let alone firmly resolve, related key legal and economic issues. As far as the legal aspects are concerned, first and foremost, debates that could resemble the intensity of the ones in the United Kingdom have not yet even been launched. This justifiably leads to the conclusion that there is a significant insensitivity to thinking that instead of formal elements of law, the emphasis should be placed on the law and growth nexus. While the leading economies, which are also the major legal systems that serve as models for others, seem to be satisfied with what they have, the rest are struggling with the continuing challenges caused by the sovereign-debt crisis and local problems such as reform fatigue and EU scepticism.

8  (‘UCC’). Frisch noted that the 1999 Revised Version of Article 9 added 66 new sections to the ‘pre-revision text [that] was unquestionably simpler [because] the drafting committee had to weigh the implications of judicial decisions spanning more than four decades, as well as the societal changes they reflected.’ This adds up to 133 sections (compared to the 57 of the earlier version), a number that may only partially be indicative of the complexity of the system: David Frisch, ‘Commercial Law’s Complexity’ (2011) 18(2) George Mason Law Review 245, 245–6.


10 Reference is made here to the decades-old ‘battle’ between the supporters of reforming the system following the American Unitary Model and ‘[p]ractitioners [who] have been at best, indifferent, and at worst, outrightly hostile to the idea’ — and which has been repeatedly won by the latter (at least this was the verdict in 2013). See Gerard McCormack, ‘Pressured by the Paradigm — the Law Commission and Company Security Interests’ in John de Lacy (ed), The Reform of UK Personal Property Security Law: Comparative Perspectives (Routledge-Cavendish, 2010) 83, 83.
The often-reiterated paradigm that a good PPSL system is the token of increased access to cheaper financing and, through that, to economic prosperity, is wisdom materialised only within national borders (if at all) rather than at an EU-level. The EBRD, once at the forefront of PPSL reforms in Europe, keeps its related activities at a low profile in Europe and has instead expanded its activities to Central Asia and North Africa. Enthusiasm in CEE in the 1990s for the EU and everything that came from the West has also subsided significantly by now. Moreover, forceful competing philosophies have surfaced on the direction that the secured transactions and related reforms should take.11

It must also be understood that the economic and practical justifications that were sufficient to tilt the balance for the benefit of the Unitary Model proponents in Australia, Canada or New Zealand are inferior to the underlying sociopolitical considerations in Continental Europe. In other words, what is normal and commonly presumed in Australia is not necessarily so in Continental Europe. For example, the new Australian system’s biggest practical advantage — the radical simplification through the substitution of 75 separate statutes with the APPSA and the myriad registries with a centralised one12 — is not an issue in Europe as most civil law systems only have extant real property registries. In Europe, the question is whether the benefits of establishing brand new registries for personal property securities would outweigh the concomitant costs.

The same also applies to the traditionally accepted economic justifications of secured credit and the Unitary Model: they apply mutatis mutandis but are insufficient to cause the major breakthrough that the realignment of Continental Europe with the Unitary Model requires. The economic analysis and justification of the benefits that the Unitary Model could generate for Europe is in its infancy.

C Lack of a Common Legal Platform

While differences had existed among the Unitary Systems themselves, the transplantation of the Unitary Model in these countries was largely possible because

11 Ralph Atkins, ‘Right Financial Medicine for West is Not Best for EM [Emerging Market] Nations’, *Financial Times*, 15 May 2013, 24, highlighting, on the one hand, that it is more and more realised — as suggested by the article’s title — that what works in the West does not necessarily work elsewhere and, on the other hand, that the approach to credit known by common law systems so far promoted by the EBRD is now confronted by the German savings culture. The latter tries to replicate the pattern of German savings banks (*Sparkassen*) in Africa by ‘stress[ing] the importance of building a domestic savings culture [especially] targeting the young.’

of significantly uniform legal platforms\textsuperscript{13} and the close economic ties of these countries. As will be shown, such a high degree of commonality does not exist between civil law systems in Continental Europe and the common law in other Unitary Model countries. The discrepancies, in other words, are more significant and more profound. As a consequence, it is harder to answer whether and how the two differing legal stratospheres could be reconciled. Further, it ought to be noted that, perhaps with the exception of the DCFR, none of the international projects attempted to forge a monolithic common legal platform in this sense. The UNCITRAL Legislative Guide, for example, is a systematised matrix of known solutions offered by a select national system from which States ‘that [either] do not currently have efficient and effective secured transactions laws … [or] wish to modernize their laws and harmonize them with the laws of other States’\textsuperscript{14} can cherry-pick the most sympathetic solutions.

The greater differences in the legal platforms, however, should not necessarily doom the idea of rapprochement to the dustbin of history. The achievements, even if imperfect, of those civil legal systems that have attempted to reform their laws by integrating elements from common law systems should be seen as encouraging. The appearance of the DCFR itself, Book IX of which is clearly a huge step towards the Unitary Model, is similarly promising. This instrument, especially if read together with its Comments,\textsuperscript{15} is a valuable, albeit not impeccable, starting point. For example, in some important respects it displays the tenets of English law,\textsuperscript{16} yet in other cases it tilts towards German solutions,\textsuperscript{17} potentially making it irreconcilable with the Unitary Model. It is pertinent, however, that Europe already

\textsuperscript{13} Reflecting on Quebec’s amendment of its Civil Code (Book Six, Title Three of the Quebec Civil Code) along the lines of the Unitary Model, Ronald Cuming not only listed the main Canadian differences as compared with UCC Article 9 but also noted that ‘[i]t would be unreasonable to expect that every aspect of Article 9 will find acceptance in jurisdictions that have legal traditions and public policy choices that differ from those of the United States.’ Ronald C C Cuming, ‘Article 9 North of 49°: The Canadian PPS Acts and the Quebec Civil Code’ (1996) 29 Loyola of Los Angeles Law Review 971, 989. Each of the subsequent models deviated from the earlier model(s) relied on as well.


\textsuperscript{16} This applies especially to enforcement of contracts relying on retained title — named ‘acquisition finance devices’ by the DCFR — in which case out-of-court enforcement (self-help repossession) cannot even be excluded by the parties to such contracts, in sharp contrast to all the other secured transactions covered by the system. Ibid art IX 7:103.

\textsuperscript{17} For example, the provisions on the so-called ‘global security’ which only partially overlap with the Unitary Model’s floating lien concept.
has a version of the Unitary Model, even if only in the form of soft law that could serve as a suitable platform in the future.

The tasks of European legal scholars pondering the possibilities of the adaption of the Unitary Model follow on from the above and revolve around two central questions. First, which are the crucial conceptual and other idiosyncratic building blocks of civil law systems that seem to be irreconcilable with the Unitary Model and why? After having identified these key elements, the second question is how these could be reconciled with the Unitary Model (if at all)?

Even though books could be written about the above queries, this article will be limited to mapping and exemplifying all the tensions that prevent rapprochement, rather than resolving them. Proceeding from the general and abstract towards the specific and concrete, the following layers of discrepancies ought to be differentiated and dealt with: inter-branch as well as intra-branch and then principles-based differences to be followed by industrial practices, conceptual, and finally terminology related ones. The justification and most important examples of each of the categories are outlined below.

The first, most abstract and general layer of systemic differences concerns the way civil law systems perceive the relation of PPSL and other branches of law (inter-branch systemic differences). For our purposes, of utmost importance is the nexus of PPSL with two branches of law: bankruptcy and enforcement (and in particular the role of self-help).

The second, an already more exact layer, relates only to systematic differences between PPSL and civil law concepts (conditionally yet conveniently thus it will be referred to as intra-branch systemic differences). Three presumptions of civil law systems ought to be mentioned here: the indivisibility of real property and PPSL, the relationship of personal and real securities and the *numerus clausus* of proprietary rights.18

Third, as, contrary to the Unitary Model, civil law systems continue to attribute key importance to some securities-related principles, there are potential tensions with civil law systems’ requirements that the debt to be secured must be specific, that security interests are of accessory nature and that overcollateralisation is prohibited. Here, one should mention also the declining publicity principle and the lack of tracing in civil law.

Fourth, differing industry-dictated practices are quite concrete obstacles as well. Some of these — like the use of investment property as collateral — fit well with

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18 The Latin phrase *numerus clausus*, quite often used by civil law scholars, means a closed or laundry list. Thus, the *numerus clausus* of proprietary rights expresses that a legal system recognises only a limited number of proprietary rights and besides the ones listed in the civil code (or in other source of law of equal importance) new ones cannot be invented.
the Unitary Model, yet others differ significantly, in particular title and receivables financing.

The fifth degree of difference is generated by the fact that some — for the Unitary Model, quintessential — legal concepts are (or seem to be) unknown by civil law systems, like the tandem concepts of floating lien and purchase-money security interest or attachment and perfection. The concepts like notice filing, title and bailment deserve attention as well.

Finally, terminology discrepancies require heightened attention. As was demonstrated yet largely remained unrecorded, the heedless neglect of terminology was the source of many headaches and misunderstandings during the CEE secured transactions reforms.

In this article I shall explain and exemplify the essence of these important civil law discrepancies and develop thoughts on the possible solution. As will be demonstrated, some of the discrepancies could peacefully coexist (for example, the *numerus clausus* of security rights), while others would require some minor alterations (such as accessoriness). In certain instances, the discrepancy is false or without practical repercussions (for example, retained ownership versus title). There is also another group of conflicting solutions where more significant sacrifices are inevitable. This seems to be the case with all the changes the adaptation of floating lien requires from civil law systems. On the other hand, the civil law functional equivalent of self-help repossession (the law of preliminary and provisional measures, ex parte or otherwise), while imperfect, should satisfy the requirements of Unitary Systems.

Lawyers accustomed to the pragmatic language of secured transactions law undoubtedly question the focus on abstract doctrines and principles, given that the Unitary Model is largely devoid of them. This is more than a platonic question because herein lies an important character of the Unitary Model as compared with civil law systems: the Unitary Model is based on the philosophy that *predictability* is the supreme value that hardly tolerates the inherent vagueness of principles. As a consequence, principles were affected in two ways: while some manifestations of principles have been solidified and morphed into concrete provisions of the Unitary Model, the reach of the remainder was reduced to the minimum. In contrast, principles survive unrestricted in civil law systems, except those specific security forms that have become subject to statutory regulation. Thus, for system-thinking

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19 Principles as obstacles to adopting the Unitary Model have been only very indirectly hinted at by the doyen of German and European commercial law, Ulrich Drobnig, who also noted that ‘in Europe the problems are on a much greater scale.’ Yet in his formulation, the main impediments are great diversity of ‘substantive and formal differences between the legal regimes for proprietary security rights in the member states,’ the differing general laws surrounding PPSL (property, contract, enforcement and bankruptcy) and linguistic dissimilarities: Drobnig, above n 1, 452–3.

20 See, eg, UCC § 1-103 on the Supplementary General Principles of Law, which reads: ‘Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant … shall supplement its provisions.’
civil law practitioners, these cannot be bypassed. For them, principles must apply
generally no matter what kind of security device is at stake and regardless of the fact
that their exact contour may be difficult to distinguish.

Transplantation of the Unitary Model, without proclaiming what exactly is to be
done with the civil law systems’ principles and other abstract and general corol-
laries, would be a mistake. Yet this is exactly what has happened with the DCFR.
While the text of Book IX (the PPSL part) resembles the exactness of UCC Article 9
or the APPSA, the inextricable web of cross-references to the general principles
common to personal securities is clearly a trace of the civil-law way of thinking.
The problem is that the exact status and the correlation of the general principles and
Book IX remain unclear.

II THE DIFFERING LEGAL PLATFORMS: DISCREPANCIES FROM THE
GENERAL AND ABSTRACT TO THE SPECIFIC AND CONCRETE

A Inter-Branch Systemic Discrepancies

1 Secured Transactions versus Bankruptcy Law

The relationship between PPSL and bankruptcy law is neither readily visible nor
quantifiable, yet it is an important distinguishing factor that should be considered
when attempting to adapt the Unitary Model. Due to the impact of system-think-
ing and a philosophy (still) not tolerant of business failures, in Continental Europe
these two fields of law are looked upon, taught, and often written about, separately.
Ulrich Drobnig is absolutely right that ‘[t]he acid test of security is … its status
and effectiveness in the event of the debtor’s insolvency’. However, this is a link
and wisdom that is a typical corollary of common law systems only. Consequently,
most civil law practitioners today still perceive security interests as creditor-protective
tools for the non-bankruptcy context. This conclusion should go uncontested
even though Grant Gilmore speaks of the ‘uncertain correlation of the provisions of
Article 9 of the [UCC] with those of the Bankruptcy Code.’ Notwithstanding the
unfathomable nature of the relationship, however, he did find it important to devote

21 See, eg, DCFR Comments, above n 15, art IX 2:401 sub-s (3) on the so-called ‘global
security’, the definition of which may be found in Book IV on personal securities and the
Comments thereto (Comments A to F on art IV G 2:104). As per the DCFR Comments
art IV G 1:101, global security ‘is a dependent personal security which is assumed in
order to secure a right to performance of all the debtor’s obligations towards the creditor
…’ The only difference between sub-s (3) of DCFR art IV G 2:104 and IX 2:401 is that
while the former speaks of ‘obligations’, the latter speaks of ‘rights’.

22 Drobnig, above n 1, 449.

23 Grant Gilmore, Security Interests in Personal Property (Little, Brown and Co, 1965)
§ 45.1, 1283. In a related note on the same page he also admits that his views ‘on many
specific points [may be] at variance with what may be considered to be the standard or
conventional position of [US] experts in bankruptcy law.’
The close ties of PPSL and bankruptcy law is a common feature of all Unitary Systems, the national variations of which are worth examining by civil law practitioners as well. For example, the 1988 Ziegel and Garton Study could be very instructive in Europe, where the overall importance of insolvency has grown exponentially since the 1990s, and where the perception is gradually changing from the fatalistic stigmatisation of bankrupts to a regular business risk for which solutions do exist. Open-minded businesspeople also now know in Europe that the recovery by a secured creditor versus the unsecured one in North American bankruptcy proceedings is roughly in the ratio of 43 cents versus 5 cents in the dollar. Unfortunately, as in many civil law jurisdictions, the bankruptcy system does not function properly; despite the visible focus and the recent wave of amendments, the outcomes are still quite unpredictable. The pathology ranges from mass scale resort to bankruptcy as a means of escaping from creditors (‘bustouts’ and ‘bleedouts’) to the milder problems with the domestication of the US law-inspired reorganisation (‘fresh start’ and ‘second chance’) culture. This applies also to Germany, where ‘bankruptcy of the bankruptcy system’ emerged as a problem in the 1970s. Even though the new German Insolvency Act was enacted in 1994 (but came into force in 1999), Germans are still looking for appropriate solutions.

24 The Study examined ‘95 business bankruptcy files chosen at random from business bankruptcies that occurred in Metropolitan Toronto over a five year period.’ See Jacob S Ziegel, ‘The New Personal Property Security Regimes — Have We Gone Too Far?’ (1990) 28 Alberta Law Review 739.

25 Such perception of bankruptcies in many CEE countries could be indirectly deduced from the fact that in this region it is not private creditors but tax authorities that initiate bankruptcy proceedings. See generally Katharina Pistor, ‘Who Tolls the Bells for Firms? Tales from Transition Economies’ (2008) 46 Columbia Journal of Transnational Law 612.

26 This was suggested, for example, by the mentioned Ziegel and Garton study: see Ziegel, above n 24, 745.

27 The difference between ‘bustouts’ or ‘planned bankruptcies’ and ‘bleedouts’ — which both lead to depletion of the company’s assets — is that in the latter, removal of the assets is attributed to company insiders who materialise their plans over a longer period of time. See, eg, Stephanie Wickouski, Bankruptcy Crimes (Beard Books, 3rd ed, 2007).

28 Insolvenzordnung [Insolvency Act] (Germany) 5 October 1994, BGBl I, 1994, 2866.

However, Germany is emblematic in criminalising both risk-taking and delayed filing (Insolvenzverschleppung). Continental European scholars could very easily notice not only that in the US the two subjects are often taught together, but also that the overwhelming number of secured-transactions-related cases occur in the context of bankruptcy. In Europe, it is telling that Book IX of the DCFR and its related Comments, developed by an elite group of scholars with predominately civil law backgrounds, do not mention bankruptcy. Since these sources are proposed to be used for teaching European private law, one may wonder how teachers, let alone students, may realise why this link is important. Or, as Drobnig suggested — how would teachers and students realise that Book IX is primarily to be exploited as a protection in the context of bankruptcy?

This may be attributed to the different approaches to bankruptcy, most visible in the contrast between the US ‘fresh start’ and ‘second chance’ philosophy and the ‘one failure only’ climate still prevalent in Continental Europe. The special emphasis given to the problems associated with stigmatisation of bankrupts within the EU is not just evidence of the meaningful presence of this dichotomy but also of the inca-pability of the law to change people’s attitude. It is also evidence of the inevitable conclusion that promotion of the Unitary Model in Europe could hardly proceed without satisfactorily resolving the tensions caused by the complexities of the PPSL and bankruptcy interface. The growing number of cross-border bankruptcies that challenge the parochialism of local laws and courts, in addition to other side effects of globalisation, undoubtedly drive developments in the same direction.

A final observation ought to be made here. Though it is difficult to quantify the ‘intensity’ of stigmatisation of bankrupts, what has been said about stigmatisation in Continental Europe applies also to Australia, Canada and England if compared

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30 See Strafgesetzbuch [Criminal Code] (Germany) § 283(1).
31 The member of the management board or the managing director bears tortious and criminal liability for not filing, filing incorrectly or for not filing in time. Under § 15a para 1 of the Insolvency Act, it is their duty ‘to file for insolvency without undue delay, but in no event later than three weeks following the occurrence of illiquidity or over-indebtedness of the company.’ See Daniel Gubitz, Tobias Nikoleyczik and Ludger Schult, Manager Liability in Germany (Beck, 2012) 117.
33 Tellingly, Niall Ferguson noted in relation to his 2007 visit to Memphis how fascinated he was ‘by the ubiquity and proximity of both easy credit and easy bankruptcy.’ See Niall Ferguson, The Ascent of Money (Penguin, 2009) 60.
34 See, eg, the 2007 Commission Communication, Why and How to Overcome the ‘European Stigma’.
with the US (though with less intensity).\textsuperscript{36} Figuratively speaking, it is not without reason that Niall Ferguson speaks only of the US as the ‘bankrupt nation’\textsuperscript{37} and does not extend the qualification to other common law systems. For this reason, the study of English insolvency law might not be as illuminating as the study of US bankruptcy law and is insufficient for grounding law reform in Continental European jurisdictions.

2 Secured Transactions, Self-Help and its Functional Equivalents in Civil Law Systems

Civil law systems display open hostility to self-help, an indispensable element of the Unitary Model. This position stems from civil law systems’ very limited concept of self-help.\textsuperscript{38} The concept hardly goes beyond averting imminent threats to one’s property or life and only with proportionate measures. This hostility is more than a minor conceptual discrepancy as it demonstrates the entire civil law system’s view of enforcement by reducing the role of self-help to a minimum. The policy is evident in the small number of related court cases in Europe and stands in stark contrast to the US, where even issues such as the abuse of arbitration as a means for resolving the disputes of consumer debtors and private debt collectors has reached the Congress.\textsuperscript{39} In other words, what Continental European systems have is a far cry from their common law kin and something that could not serve as an acceptable substitute. On the level of jurisprudence, the two legal families and the respective PPSL are quite distinct. While self-help is a fundamental principle encouraged in common law systems and the Unitary Model, the opposite is true for civil law systems.\textsuperscript{40}

\textsuperscript{36} See, eg, Nathalie Martin, ‘Common-Law Bankruptcy Systems: Similarities and Differences’ (2003) 11 \textit{American Bankruptcy Institute Law Review} 367, 368 which states that ‘[w]hile in most parts of the world business failure causes less stigma than personal financial failure, both forms are viewed far more negatively in England, Australia, and Canada than in the United States.’

\textsuperscript{37} See Ferguson, above n 33.

\textsuperscript{38} German law (which could be taken as the prototype) recognises the categories of ‘Besitzwehr’ (§ 859(1) BGB) (protection of possession) and ‘Besitzkehr’ (§ 859(2) BGB) (return of possession). While the first is ‘a specific form of self-defense,’ the latter is entitlement of the possessor ‘to recover the object from the dispossessor immediately after the interfering act.’ See Sjef van Erp and Bram Akkermans, \textit{Cases, Materials and Text on Property Law} (Hart Publishing, 2012) 115.

\textsuperscript{39} The conclusion of the Federal Trade Commission document \textit{Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration} (2010), Executive Summary, at i, is telling of the dimensions of the problem as it concluded that ‘the current [US] system for resolving consumer debts is broken, … because consumers are not adequately protected in either debt collection litigation or arbitration.’

\textsuperscript{40} As far as the common law is concerned, this was most clearly expressed in Roy Goode, ‘The Codification of Commercial Law’ (1998) 14 \textit{Monash University Law Review} 136, 148.
The reality is that the discrepancies are diminishing, even if only in a piecemeal manner, unnoticed by scholars. On the one hand, the role of self-help has shrunk in the UK, due in particular to increasing consumer protection regulation.\(^4^1\) In CEE countries, on the other hand, with the penetration of the common-law-inspired PPSL, some forms of out-of-court enforcement have become acceptable. The tolerated out-of-court enforcement forms range from disposition of the collateral by a professional auctioneer to outright statutory blessing of a self-help repossession variant. Good examples can be seen in Hungary and Romania. The former has opted for a cautious approach, introducing only a soft version of self-help repossession in the 2013 Civil Code. The latter daringly (advised and supported by the United States Agency for International Development) introduced its first Unitary-Model-inspired reform Act in 1999.\(^4^2\) What has not been properly noted yet is that private debt collection has long been present in Scandinavia, and has been regulated for decades.\(^4^3\) Further, there is a growing market share of private debt collection companies across Europe. The 2008 passage of the German Law on Out-of-Court Provision of Legal Services (Gesetz über aussergerichtliche Rechtsdienstleistungen) listed debt collection as one category of out-of-court legal services. This proves how meaningful these changes have become, notwithstanding the limited nature of these services, which clearly exclude self-help repossession.\(^4^4\) There is a reality versus academic mismatch. In a sense, the scholarly rhetoric on these forms of private ordering is misleading. The exception is the DCFR, which foreshadows an increasing role for out-of-court enforcement in Europe.\(^4^5\) Interestingly, and contrary to UCC Article 9 or the APPSA, the DCFR offers a more powerful position to creditors relying on retention of ownership (‘ROT’).\(^4^6\) (that is, acquisition finance).\(^4^7\)

\(^4^1\) See, eg, John MacLeod, Consumer Sales (Cavendish, 2002) s 24.27, 763.


\(^4^3\) For example, the Inkassoloven [Debt Collection Act] (Denmark) passed in 1997, the English version of which seems to be unavailable. For a brief English synopsis see Erik Werlauff, Civil Procedure in Denmark (Wolters Kluwer, 2010).

\(^4^4\) See Michael Kleine-Cosack, Rechtsdienstleistungsgesetz (RDG) (C F Müller Verlag, 2008) 143.

\(^4^5\) As DCFR Comments, above n 15, 5613, Comment A to art IX 7:101 states, ‘[r]ules on the substantive aspects of security in movables would be toothless, or would fail to achieve the goal of harmonizing proprietary security in movable assets in Europe, if they left enforcement of those rights entirely to the — diverging — procedural laws and rules of the Member States.’

\(^4^6\) Or retained title — in civil law systems the concept of ‘title’ is not used, replaced with ‘ownership’. As a consequence, retained title is known as retained ownership.

\(^4^7\) See DCFR Comments, above n 15, 5613, Comment A to art IX 7:103(3), stating that in cases of ‘retention of ownership devices the parties may not agree to exclude extra-judicial enforcement’ — what they may do whenever non-ROT-based secured transactions are at stake.
There are other problems as well. For example, Continental European legal scholars have written very little about self-help. This is to be attributed primarily to the above-mentioned narrow concept that, as such, does not seem to have any connection to PPSL.

Furthermore, very little is known about the potential functional equivalents of self-help: those devices that could be resorted to for prompt — and, ideally, ex parte — protection of the secured creditors’ interests. This is related to the law specifically on various preliminary and provisional measures, whether issued ex parte or not. Notwithstanding that all Continental European civil procedure acts contain a chapter on these measures, it is hard to determine from the otherwise similarly formulated provisions in exactly what circumstances and with what chances one could resort to them. Even without an exact test for comparing various laws, it can be validly presumed that in some jurisdictions it is easier to obtain such measures than in others. The additional caveat to civil law systems is that a court decision awarding such a measure may not guarantee its efficient implementation. Likewise, though it seems that there is no civil law equivalent of the English Mareva injunction, it should not be concluded that civil laws cannot offer appropriate substitutes. In any event, on the road towards the Unitary Model, all these issues should be properly addressed.

B The Complicating Dictates of System Thinking

Theodor Viehweg’s *Topics and Law*[^48] tries to demystify the system-thinking of civil law as compared with the topics-focused pragmatism of common law. Although complex, what system thinking means, and thus what the difference between the two ways of perceiving law is, is susceptible to an easy explanation. In a sense, system thinking resembles Darwin’s systematisation of species. It is based on an understanding that every legal institution has a defined place in the hierarchy of law, which should not be disturbed without reason. This also means that if two legal institutions share a key feature, they should be treated and should rank equally. Examples may properly show what this denotes.

In the context of security laws, two such presumptions must be highlighted: the civil law systems’ unwillingness to separate, first, real property mortgage and personal property security law and, second, personal (in personam) from proprietary (in rem) securities. Although exceptions exist, it suffices to examine the structure of civil codes and textbooks that deal with security laws, or even the DCFR, to realise that, in civil laws, PPSL is almost always ancillary to its two mentioned relatives.

[^48]: See Theodor Viehweg, *Topics and Law — A Contribution to Basic Research in Law* (Peter Lang Verlag, 1993), translated into English and foreword written by Cole Durham. See also Tibor Tajti, ‘Viehweg’s Topics, Article 9 UCC, the “Kautelar-ische Sicherheiten” and the Hungarian Secured Transactions Law Reform’ (2002) *6 Vindobona Journal* 93 which tries to express that successful transplantation of the Unitary Model to Hungary is predicated on tilting the balance for the benefit of pragmatic thinking instead of the inherited dictates of system thinking — known in Hungary (as well as in German-speaking jurisdictions) as ‘legal dogmatism’.
Because of the presumed infallibility of the system, it comes naturally to civil law that the various securities should be linked even by artificial and practically unnecessary ‘bridges’.

It is well-known in the US and Australia (after the passage of the APPSA) that none of these presumptions is necessary for the Unitary Model, which has no more links with either real property mortgage law or personal securities than those necessary for business. These include, for example, rules on fixtures and a section or two for settling the priorities between conflicting security interests and sureties.

1 The Inseparability of Real versus Personal Property Security Law

One of the idiosyncrasies of civil laws is their uniformity as compared with the common laws’ fragmented approach to proprietary securities. This is why, in the latter, PPSL can survive undisturbed by real property mortgage law as demonstrated by the laws of any jurisdictions belonging to the Unitary Group.\(^{49}\) As opposed to that, for civil law the two are still not perceived as distinct, and the historically more venerable real property mortgage law continues to serve as the benchmark. Consequently, Continental European civil codes or their equivalents\(^{50}\) typically regulate both in the same chapter, though some of the reform countries have opted for a special statute to introduce the common-law-inspired PPSL. The contrary regulatory pattern speaks for itself; while in Australia, Canadian common law provinces and New Zealand, a completely distinct PPSL was enacted, the American UCC does not extend to transactions in real property. Indeed, in Article 9 of the UCC only the rules on fixtures denote the link to real property.\(^{51}\) Moreover, the real property mortgage laws of the American states remain, conceptually and otherwise, substantially different and largely unreformed. The separate life of PPSL has even brought with it variations in the terminology. Another consequence of the divide is that specialisation in secured transactions law in civil law systems is almost unheard of and would be considered too narrow.

Underlying the divergent views, there is a further fundamental yet mundane dichotomy: the importance the different physical features of personal property should be given in designing the contours of security laws. It is not without reason that the Unitary Model, like common law systems themselves, gives clear priority to these. Contrary to that, civil law systems attribute little (if any) importance to these. The best example is self-help repossession, the efficiency of which could hardly be

\(^{49}\) Van Erp and Akkermans, above n 38, list land law, trust law, personal property law and claims as those self-standing fields of law that make the property law of common laws fragmented: at 64.

\(^{50}\) For example, the successor countries of Yugoslavia have, in lieu of a single civil code, a set of statutes, the most important being the *Act on Obligations* (often mistakenly named the ‘Code of Obligations’).

\(^{51}\) UCC § 9-102(41) defines fixtures as ‘goods that have become so related to particular real property that an interest in them arises under real property law’ and the APPSA s 10 as ‘goods, other than crops, that are affixed to land’.
substituted by court processes. While the common law departs from the realisation that personal property is ‘much more susceptible to dealings by one who has no right to sell’ as compared with real property, to civil law this is of little relevance. As a result, while common law tolerates self-help, civil law systems do the exact opposite. The ultimate dilemma is, in other words, whether efficiency, or rather the neatness of the abstract system of legal categories, is to be given priority in light of what would better suit the needs of the 21st century.

2 Personal versus Proprietary Securities

The few explicit provisions in UCC Article 9 that mention personal securities are a response to a specific circumstance: conflict of the financing bank and the surety company issuing a performance or payment bond. This seemingly straightforward set of circumstances had generated a series of cases in the US requiring courts to judge whether the rights of secured creditors with a perfected security interest trump those of the subrogating surety. Resolution of this dilemma found its expression in the 1999 Revised Version’s category of ‘supporting obligation’ and ‘secondary obligor’. Apart from the resolution of this pragmatic problem, for Article 9 — or (it seems) also for the APPSA — personal securities are distinct and out of scope.

As opposed to that, civil law systems — finding the common denominator or the genus proximus in the ‘security’ function of all security devices — tend to exploit that as a reason for forging common rules, no matter how abstract and ill-suited they may be. The inextricable web of cross-references, significantly worsening the transparency of the entire system, between the parts on real versus the part of personal securities in the DCFR could be attributed to the inexplicable dictate of system thinking. This is so notwithstanding that the Comments themselves declare that the degree and nature of concomitant risks is different in the case of the two groups of security devices. If under the Unitary Model the primary benefit of an efficient

53 For a detailed description of the problem, see Gilmore, above n 23, ch 36, 947.
55 As point (f) of the Comments to UCC § 9-102 reads: ‘This new term covers the most common types of credit enhancements — suretyship obligations (including guarantees) and letter-of-credit rights that support one of the types of collateral specified in the definition.’
56 See UCC § 9-102(71) and point 2 of the Comments thereto pointing to ‘the law of suretyship to determine whether an obligation is secondary [more concretely to] [t]he Restatement (3d), Suretyship and Guaranty § 1 (1996).’
57 DCFR Book IX contains PPSL (ie proprietary securities) and Book IV Part G the law on personal securities.
58 The DCFR Comments, above n 15, 5422, to art IX 2:107 note two crucial differences between personal and real securities, applicable, however, only to consumer debtors or grantors of personal securities: first, the greater risks due to the potentially unlimited reach of personal securities, and second, the fact that in case of personal securities the security is given by a person other than the principal debtor as a rule.
PPSL is that security interests survive bankruptcy, for civil laws the priorities are elsewhere. As the DCFR Comments reveal for civil law systems — unwittingly presuming a legal system devoid of floating liens and ignoring bankruptcy completely — personal securities are perceived to be ‘more powerful’ and, for the debtor, ‘more dangerous’ given that proprietary security ‘exposes the security provider only with respect to the specific encumbered assets’. This unwritten presumption then requires lawmakers to ensure proper protection for providers of personal securities which, if extended to PPSL, may turn out to be nothing but obstacles diminishing the efficiency of the system. Even this brief outline may properly show that some of the fundamental values civil law practitioners uncritically adhere to could, indeed, be easily bypassed by simply giving greater recognition to the requirements of business interests and the nature of things.

3 The Numerus Clausus Doctrine of Civil Laws

The doctrine of *numerus clausus* of proprietary rights is invariably listed as an inevitable element of civil laws. Moreover, it is mistakenly considered irreconcilable with the Unitary Model. As the conventional explanation goes, the doctrine means that only by mandatory law determined nominated (Typenzwang or limitation by type) and content-fixed (Typenfixierung or content fixing) property rights may be enforceable against third parties (*erga omnes effect*). This applies equally to security interests as peculiar forms of proprietary rights with at least two important consequences for PPSL. First, the doctrinal starting position is that private parties can neither invent new proprietary security devices nor vary the content of the known ones. The second repercussion is that lawyers trained in the civil law tradition still think in terms of nominated transactions like those which used to be the case in the Unitary Systems before the adoption of the Unitary Model. Similar to English law, civil law systems still deal primarily with ‘pledge,’ ‘mortgage’ or ‘enterprise charge’ transactions rather than with the general category of ‘secured transactions’.

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59 See DCFR Comments, above n 15, Comment A to art IV G 1:101, 2486.
60 As one venerable German source put it, the principle requires the legislature — given that in civil law systems per definition courts only apply but do not make law — to first enshrine in law the possible in rem rights, and second to determine ‘at least the outlines of the content’ of those: F Baur, J F Baur and R Stürner, *Sachenrecht* [Property Law] (C H Beck’sche Verlagsbuchhandlung, 18th ed, 2009) 3, quoted in van Erp and Akkermans, above n 38, 69.
61 As the Explanation to the Draft of a Civil Code for the German Nation — Property Law (1888) formulated, ‘[t]he parties … cannot be free to create any right, which sees to an object, and provide property effect to it. The starting point of the freedom of contract, that governs the law of obligations, does not apply to the law of property. Here, the opposite applies: the parties involved can only create those rights, which are allowed by the law. The number of property rights is therefore necessarily closed.’ Reproduced in van Erp and Akkermans, above n 38, 65.
This limitation creates, in the eyes of civil law practitioners, the false impression that the dizzying list of security devices appearing in writings or statutory texts on PPSL cannot be reconciled with the *numerus clausus* doctrine. One might contrast the single possessory pledge of the German Civil Code with the non-exhaustive list of nominated secured transactions in any of the Unitary Systems. However, the apparent incompatibility between the two is false. They share two quintessential common denominators: the basic underlying policy choices and the main challenge faced by both. In fact, the drafters of the DCFR have recognised that they were in a position to bring every known type of secured transaction under the same roof in Europe.

The essential policy choice inherent to both models is that only those proprietary security devices are afforded in rem (proprietary) effects that satisfy the requisite rules of the system. Even under the Unitary Model, parties are not given the opportunity to invent such new devices that would have in rem effects without satisfying the attachment and perfection and other rules. Both, in other words, rest on *mandatory* rules in this sense, even if this policy choice is not explicitly spelled out, statutorily or otherwise. In the context of PPSL this means that unperfected security interests cannot be enforced against third parties, yet they are valid and enforceable between the parties to the transaction (*inter partes*). This, in effect, means nothing else but reduction to a mere obligation.

The two legal models also share common concerns, given that both traditions struggle with such innovations that try to bypass the burdens imposed by the system without losing the proprietary effects. The best example of this is the rent-to-own business model spreading in some countries these days. The difference between the two approaches is that while, historically, common laws and the Unitary Model have never closed the doors to innovation, the civil law systems have tried to do that by the sheer force of law — primarily through the *numerus clausus* doctrine. If one is pondering which method is the right one for the swiftly changing 21st century, suffice to refer to the recognition of the so-called non-code-based security devices on personal property (*kaufmännische Sicherheiten*) by German courts: namely, these came into being exactly by bypassing the *numerus clausus* doctrine in the second half of the 20th century. In other words, as these idiosyncratic German proprietary

62 See, eg, Gilmore, above n 23, ch 1, which lists — besides the possessory pledge — the ‘independent security devices’ (ie chattel mortgage), conditional sale (discussed together with consignments and leases), trust receipts, factor’s liens, field warehousing as well as receivable financing. He then discusses, hidden in the text, the concept of ‘floating lien’ — the US equivalent of the English floating charge (and with respect to the priority point — crystallisation also resembling the fixed charge): at § 11.7, 359.

63 To lawyers from unreformed civil law systems, who know only mortgage on real property and possessory pledges of tangible goods as proprietary securities, the non-exhaustive list — made of 12 nominated secured transactions — of already known and utilised security devices in s 12(2) of the *APPSA* indeed looks dizzying.

64 Here the reference is not made to the common law’s closed list (*numerus clausus*) of property rights in land. See, eg, van Erp and Akkermans, above n 38, 302 referring also to the English case of *Hill v Tupper* (1863) 2 H & C 121.
security devices prove, the list of proprietary security devices is, in reality, not closed, even in Germany or in the civil law systems that follow it. In any event, if the registration-hostile German secured transactions law has an advantage over the Unitary Model, that advantage is definitively not the principle of the numerus clausus of property rights with all of its discussed ramifications.

C Principles-Level Discrepancies

The policy choices of civil laws and of the Unitary Model differ fundamentally concerning the roles of principles as well. The Unitary Model, in the name of simplification and predictability, reduced their role to the bare minimum. The UCC, for example, mentions only the freedom of contract principle and then explicitly entrusts general principles with only a supplementary role.65 Perhaps the drafters of Article 9 have materialised this idea most radically, not just by eliminating ‘equitable liens’ but also by creating a system based on explicit rules; a principle-free world of its own. The courts also subscribe to this idea, which in the US has allowed equity to triumph over statutory law only in very few secured transactions cases, led by the recognition that ‘a predictable system of priorities ordinarily outweighs the disadvantage of the system’s occasional inequities.’66 Put simply, the token of the predictability and stability inherent to the Unitary Model was the maximal reduction of the role general principles — ranging from equity to unjust enrichment — could play.67 The same approach was adopted by the other Unitary Systems.68

As opposed to this, in civil law doctrines, principles and similar general, abstract and thus inherently less predictable creatures known to law have not lost their importance. Textbooks still open with and devote significant attention to them. This means, in other words, that in civil laws the reach of security interests is still to a great extent dependent on the interpretation of principles, in addition to the concrete provisions (if any) of the agreement of the parties. As a result, in civil law systems both invoking principles and prevailing based on them is more realistic — even if exact formulae for the exploitation of principles could hardly be forged.69 Notwithstanding the heightened role, principles fit best with security interests on fixed collateral, like possessory pledge or chattel mortgage, whereas their application to shifting collateral is already problematic. This prestige and omnipresence of

65 UCC § 1-103.
66 Knox v Phoenix Leasing Inc, 35 Cal 2d 141 (Ct App, 1994).
67 Ibid.
68 For example, the Ontario PPSL Act ‘prescribes a single system of law in place of the [earlier] disparate and sometimes conflicting structures of common law, equity and statutory law relating to security agreements.’ See Jacob S Ziegel, Bejamin Geva and Ronald C C Cuming, Commercial and Consumer Transactions — Cases, Text and Materials (Emond Montgomery Publications, 1995) vol III, 16.
69 Van Erp and Akkermans, above n 38, ch 5(II), list (without necessarily fully explaining) five features of security interests: the accessory nature of security interests; specificity of security interests; prohibition of disproportionate securities; prohibition of unjust enrichment; and publicity of proprietary security rights.
principles in civil laws makes their juxtaposition to the Unitary Model inevitable. The ensuing exercise will reveal that many of the dichotomies are false and reconcilable, and that the two systems overlap. A useful example is the secured creditor’s duty to account for surplus in case of disposition of collateral. This is common to both sides.

Reconciliation of the two systems is not hopeless. The two most far-reaching examples are the German contract-based security devices (*kautelarische Sicherheiten*)70 and the fact that a number of civil law countries have a version of enterprise mortgage that could be taken as the substitute of the floating lien.71 These represent nothing else but living examples of the extension or breaking of the confines dictated by general principles. Some of the dilemmas are in reality easily resolved as they do not represent any practical problem.72 Europeans would certainly have to reconsider whether excessive reliance on principles is the solution in this domain.

Making the system entirely predictable, however, should not necessarily require Europeans to relinquish some of their venerable principles. The best illustration is the issue of paternalistic European rules against excessive security that could survive even though being foreign to the Unitary Model as the two are not mutually exclusive. The challenge is rather to develop a model that successfully reconciles the two, and does not leave the protection of debtors against excessive exposure to incumbent governments, national banks and their ad hoc policies.

A final observation: the list and designation of principles may vary depending on the jurisdictions covered and even of authors’ choices in comparative works. For example, it is questionable whether the prohibition of unjust enrichment should be listed as a general securities-related principle at all,73 as this legal institution is

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70 These are in particular simple ROT (*Eigentumsvorbehalt*), security transfer (*Sicherungsübereignung*) — the so-called expanded and extended versions of these (amounting to nothing else but expansion to after-acquired property up to a level and to future advances) — as well as security assignment (*Sicherungsabtretung*). The security transfer resembles the common law chattel mortgage except that no public notice is provided on its existence. See, eg, Tibor Tajti, *Comparative Secured Transactions Law* (Akadémiai könyvkiadó, 2002).

71 The so-called small enterprise mortgage is known in Belgium and France and the big version in Finland and Sweden: Drobnig, above n 1, 448. These variations of the enterprise lien were introduced in the CEE reform countries like Hungary and, more recently, Croatia. Interestingly, Hungary abolished it in the brand new Civil Code of 2013. The reasons for the change are, at least to this author, unclear.


73 See, eg, van Erp and Akkermans, above n 38, 436, who merely declare the omnipresence of the principle without clarifying how it relates to the principles of accessoriness or excessive security.
part of law in both civil and common law systems. Likewise, while some systems have more exact rules against excessive securities (for example, Germany), this is not necessarily the case in others. Yet there is no need to get lost in this abstract quagmire; the Unitary Model is about prioritising predictability, achieved also by reducing the role of principles. Unfortunately this has not been realised by either the drafters of the DCFR (who have rather followed the inertia dictated by civil law systems) or by European scholarship. This lacuna makes a theoretical issue a pragmatic one and justifies examination of the main principles through the lens of the Unitary Model hereinafter.

1 The Accessoriness of Security Interests in Civil Law Systems

Accessoriness of security interests is, as a general principle, presumed by civil laws and hence no reputable textbook on property or security law is devoid of it. As opposed to that, accessoriness is neither proclaimed to be a general principle nor can it be easily tracked down in statutory texts or scholarly publications on common laws; the same applies also to the Unitary Model. The Unitary Model and common law systems, it may seem, survive without making a fundamental principle out of accessoriness. Andrew Steven attributed this to two historic reasons: the nature of the conventional mortgage, which presumed transfer and retransfer of title, and the ‘division in English law between the common law and equitable rules relating to mortgage.’ As real property was in a sense the benchmark for PPSL centuries ago, it is legitimate to presume that the same reflections and principles applied by analogy in the PPSL context as well. This should not, however, lead to the conclusion that the relationship of the obligation and the linked security is of no relevance whatsoever to common law systems or to the Unitary Model.

The gist of civil law accessoriness, inherited from ancient Roman law, is expressed in the shortened legal maxim ‘accessorium sequitur principale’: the security interest depends on or follows the obligation it secures. Accessoriness may be

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74 As a rare exception see Andrew J M Steven, ‘Accessoriness and Security over Land’ (2009) 13 Edinburgh Law Review 387, an article devoted to Scottish (thus a mixed system) real estate mortgage law. With respect to English law, he refers to Goode, above n 52, who defines guarantees (personal securities) as ‘accessory engagements.’ In the case of real securities, the word ‘accessory’ is not even used. His examples from the US include the American Law Institute’s Restatement of the Law: Property: Mortgages, which makes mention of accessoriness solely with respect to the effects of the transfer of the obligation secured by the mortgage and a 19th century US Supreme Court case (Carpenter v Longan 83 US (16 Wall) 271, 21 L Ed 313 (1872)) proclaiming that ‘the debt is the principal and the mortgage is the accessory.’

75 Steven, above n 74, 391.

76 Bryan A Garner (ed), Black’s Law Dictionary (West, 7th ed, 1999), in the Appendix ‘Legal Maxims’, mentions two sententias that might have been the sources of the shortened version: ‘Accessorium non ducit, sed sequitur, suum principale’ (An accessory does not lead, but follows, its principal) and ‘Accessorius sequitur naturam sui principalis’ (An accessory follows the nature of its principal): at 1616.

77 See van Erp and Akkermans, above n 38, 432.
thought of in terms of a tripartite formula: existence, scope and identity. *Existence* denotes that a security interest attaches (gets created), follows, extinguishes and can be enforced if and as long as the underlying obligation (debt) exists. *Scope* implies that the amount the security interest secures is dependent on the amount of a *specific* obligation (debt). *Identity* expresses that the claim-holder is simultaneously the secured creditor.

If research is not conducted based on the use of the ‘accessoriness’ catchword but is instead based on the content of the earlier listed features of accessoriness, its presence becomes visible both in English law and the Unitary Systems. The difference is that those features of accessoriness that serve the policy choices of the Unitary Model have become enshrined into concrete provisions and, contrary to civil laws, the role of accessoriness ends there. Examples include the preconditions for attachment of security interests, the definitions of the ‘debtor’ and the ‘secured party,’ the duty to account for surplus and the liability for deficiency.

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78 In other words, if the debt is transferred, the security follows it. See UCC § 9-203(d) and pt 9 of the Official Comment to this section, codifying ‘the common-law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien.’ This may arise, as point 1 of the Official Comment to UCC § 9-508 exemplifies, when the sole proprietorship operated by an individual debtor later becomes incorporated or in cases when the debtor corporation is merged into another one. See also *APPSA* s 10(b), which contains the definition of ‘debtor’ that includes ‘a transferee of, or successor to, an obligation’ that is secured by a security interest in personal property. This also means that the transfer of collateral does not extinguish the security interest. See UCC § 9-315 and *APPSA* s 79.

79 As Gilmore states:

> On default the amount of what the Code calls the ‘obligation secured’ becomes of importance from two points of view. It determines the extent of the secured party’s claim against the collateral and also determines the amount which the debtor must pay or tender in order to redeem the collateral or reinstate the security transaction. (Emphasis added)

Gilmore, above n 23, § 43.5, 1199.

80 See, eg, Goode, above n 52, where he discusses the ‘ingredients of attachment’ of security interests (as in rem securities) in English law: at 679. He lists as the fourth precondition of attachment that ‘[t]here must be some current obligation of debtor to creditor which the asset is designed to secure.’ As an example he mentions that if ‘at a given time there is no current indebtedness … attachment ceases and the security interest again becomes inchoate, reviving ab initio as soon as the missing element is once more supplied.’

81 As White and Summers put it, ‘[l]ending money is giving value; and a binding obligation to make a loan is value sufficient to support a security interest.’ Moreover, even if the debtor and secured creditor sign an agreement that the secured creditor is not obliged to lend money, ‘in those cases there will almost never be an issue whether value has been given because there will be no Article 9 dispute unless a loan is made.’ See James J White and Robert S Summers, *Uniform Commercial Code* (West, 6th ed, 2010) 1192. For similar attachment rules see UCC § 9-203 and *APPSA* s 19.

82 See UCC § 9-615(d); *APPSA* s 132(3)(e); DCFR art 9-7:215(5).
as well as in all forms whereby a security gets discharged \(^{83}\) (though some specific rules could also be found). \(^{84}\) It should not come as a surprise, therefore, that the ‘visibility’ of accessoriness differs in various Unitary Systems. Moreover, its presence began to fade with the new versions of Article 9, which shows that the drafters follow the dictates of industrial practices and not general principles that have never been pronounced in the US. \(^{85}\) This presumably unnoticed development in US law, however, may be a double-edged sword, as the ultimate function of accessoriness is the protection of the debtor. In the age of consumer protection \(^{86}\) — speedily expanding also to the protection of the small and mid-scale business sectors — this is obviously a consideration worth reflecting upon. Such corollaries of the Unitary Model like the floating lien (or similar non-fixed comprehensive securities) together with the rules on after-acquired property, future advances and proceeds (or ‘proceeds of proceeds’) do cause some unease for accessoriness. But even in these cases, the amounts collectible by secured creditors are linked to the size of the obligation secured. Additionally, no major problem is caused by the otherwise commonly subscribed to rule that the costs of enforcement of a security interest may be collected in addition to and in priority of the basic debt. \(^{87}\)

Yet for our purposes the ultimate question is whether this principle is an obstacle to adopting the Unitary Model in Continental Europe; the answer could be as straightforward as ‘no’. The DCFR has, indeed, already managed to reconcile the approaches of the two legal families. The principle is declared as generally applicable to all

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\(^{83}\) Sometimes the relationship of the two is explicitly spelled out, like in s 140(5) of the APPSA, which reads: ‘An amount paid, or personal property or proceeds applied, in accordance with subsection (2) [ie the order in which the price must be distributed] discharges an obligation secured by an interest in the collateral to the extent of the amount paid or the value of the proceeds or property applied.’ Yet in most cases discharge is presumed from the rules on disposition, redemption and strict foreclosure. See, eg, APPSA: ‘Retention of collateral’ (ss 134–6); DCFR on ‘appropriation of encumbered asset by secured creditor’ (art IX 7:216).

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\(^{84}\) See, eg, in UCC Article 9 the very specific case of ‘pledging’ of the so-called ‘supporting obligation’ that occurs automatically upon the attachment and perfection of a security interest in the ‘supported collateral.’ See UCC §§ 9-203(g) and 9-308(e). See also Harry C Sigman and Eva-Maria Kieninger, Cross-Border Security over Receivables (Sellier, 2009) 21.

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\(^{85}\) Gilmore initially clearly expressed that there cannot be a security interest without a debt by referring to the definition of ‘debtor’ saying that ‘the Code ‘debtor’ must owe something to someone.’ Gilmore, above n 23, 303 (emphasis added). The same follows from the UCC definition of security: at 334.

However, the definition of ‘debtor’ in the 1999 Revised Version does not reflect accessoriness so clearly because it achieves the same ends through the combination of the definition of ‘debtor’ (emphasising having interest in the collateral) and of the ‘obligor.’ See UCC Revised Version § 9102(28) and (59).

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\(^{86}\) As Steven puts it, ‘security restricted to a fixed debt is extinguished by the payment of that debt; an unrestricted, all-sums security is suspended by repayment.’ See Steven, above n 74, 416.

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\(^{87}\) APPSA s 140(2)(b); UCC § 9-608(a)(1)(A); DCFR art IX 7:216(2).
securities and yet its concrete meaning is not left to indeterminate interpretation but is expressed in the detailed provisions in Book IX on secured transactions. Further, it has been recognised in Europe that departure from accessoriness opens new financing opportunities, as exemplified by the German land charge, the French ‘rechargeable hypothec’ and the Eurohypothec project.

2 The Lack of the Principles of Tracing and the Resulting Limited Concepts of Fruits and Products

The starting position of Continental European systems is typically that a security interest extends only to the ‘first generation’ of proceeds generated by the collateral and not to the subsequent ones. This is in stark contrast to the Unitary Model, which explicitly proclaims that ‘proceeds of proceeds’ are themselves ‘proceeds’. As a result, the civil law functional equivalents — the concept of ‘fruits and products’ — are inherently narrower, not just from the Unitary Model but also from common law kin. It is not without reason, then, that international projects on secured transactions take over the broader common law concept and vouch for automatic extension of security interests to proceeds of proceeds. What is less known is that such expansion of the concept of proceeds ‘for an indefinite period or number of transactions’ in common laws was possible due to its inseparable companion: the equitable principle of ‘tracing’.

Tracing serves as a tool to reach the cutoff point in a series of transactions — going beyond the ‘first generation’ — whereby the security interests cease to

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88 See DCFR art III 5: 115(1), which states that ‘[t]he assignment of a right to performance transfers to the assignee not only the primary right but also all accessory rights and transferable supporting security rights’, and III 5:105(2), which adds that ‘[a] right to performance which is by law accessory to another right is not assignable separately from that right.’ The Official Comment confirms the accessory nature of security interests in movables hidden in the comments to Article IX 5:301 on transfer of the secured right, proclaiming that this Article ‘contains the generally accepted principle that proprietary security devices as accessory rights follow the secured right if the latter is transferred to another creditor …’ (emphasis added). See DCFR Comments, above n 15, 5591.


91 In the context of Article 9, it is to be noted that contrary to the pre-1999 version that had separate provisions on that (§§ 9-203(3) and 9-306), in the Revised Version ‘[t]he definition of ‘proceeds’ no longer provides that proceeds of proceeds are themselves proceeds. That idea is [rather] expressed in the revised definition of ‘collateral’ in Section 9-102. No change in the meaning was intended.’ In the APPSA see s 31(1)(a).

92 See Fleisig, Safavian and de la Peña, above n 90, 34.
exist. No such general ‘nominated’ principle is known to civil law, which instead typically makes use of a complex set of rules developed typically on a case-by-case basis. These are in fact contractual clauses extending and expanding the reach of the security interest up to a relatively fixed cut-off point, at least as demonstrated by German practices. The weakest point of this approach is that instead of a clear priority point benefitting a single creditor, it may make the creditors co-owners—a clear disadvantage given that in case of co-ownership two parties, not one, are entitled to a priority or to make decisions. In unreformed systems, moreover, co-ownership often ends in a stalemate if the titleholders cannot agree. Given the growing complexity of business life and the increased speed and number of transactions that may occur, the rules on proceeds admittedly cannot be anything but complex no matter which of the described approaches is examined. Yet in the race between competing models, the system offering co-ownership over a clear priority to the secured creditor—who is supposed to be interested to extend credits at favorable terms and conditions—is doomed to lose. It is exactly because of this that UNCITRAL is right in concluding that ‘in reality these labels are of little use: what matters is the policy decision a jurisdiction makes on how far the system allows the security interest to extend.’

Admittedly, the limited civil law concepts might have served the expectations well in the 19th century, the age of the enactment of venerable Continental European civil codes, but it obviously cannot properly serve the complex needs of the 21st

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93 For example, APPSA s 31(1) defines proceeds as ‘identifiable and traceable personal property’ of the listed sort.

94 For example, ‘real subrogation, comparable to tracing in English law, is unknown to the German legal system, except in a limited number of statutory grounds.’ See K Lipstein, ‘Introduction: Some Comparisons with English Law’ in Rolf Serick, Securities in Movables in German Law — An Outline (Kluwer, 1990) 1.

95 See, eg, one of the landmark German cases of the Federal Supreme Court of Germany (Bundesgerichtshof) from 1957 — BGH NJW RR 2003, 1490 — in which a longer retention of title of clause is quoted including an anticipatory assignment of the claims ‘resulting from a resale of the merchandise subject to the retention-of-title clause, even if and to the extent that the merchandise has been processed.’ Case reproduced in English in Stefan A Riesenfeld and Walter J Pakter, Comparative Law Casebook (Transnational Publishers, New York, 2001).

96 BGH NJW RR 2003, 1490. The third sentence of point (d) of the aforementioned clause reads as follows: ‘If the merchandise subject to the retention-of-title clause is processed together with goods not belonging to the seller, the seller becomes co-owner of the new merchandise in proportion of the value of the merchandise subject to the retention-of-title clause to the other processed goods.’ (emphasis added).

century. The practical advantage of the Unitary Model is that it ensures the security interest automatically extends to all identifiable and traceable proceeds. Under civil law systems, this could require negotiation and the conclusion of two separate secured transactions, entailing the doubling of risks and transaction costs.\textsuperscript{98} In other words, the Unitary Model’s formula better serves the realities of present times: a general presumption that the security interest extends to all identifiable and traceable proceeds. This additionally does not exclude the right of parties to fix the cutoff point or to agree that some specific categories of proceeds are treated as a separate transaction. Sometimes it was the courts that had set the cutoff rules.\textsuperscript{99}

In unreformed systems, these antiquated rules stymie the emergence of floating lien (or equivalent)\textsuperscript{100} and of chattel paper financing.\textsuperscript{101} The drafters of the DCFR seem to have realised this, as they have not heeded mechanically to civil law but have...

\textsuperscript{98} See Fleisig, Safavian and de la Peña, above n 90, 34.

\textsuperscript{99} In the US, for example, the initial position was that proceeds are lost when commingled with non-proceeds. See Gilmore, above n 23, 736. Yet later courts have changed this, mainly by borrowing equitable principles from other areas of law. For this specific situation finally the so-called ‘lowest intermediate balance rule’ was accepted and eventually enshrined into § 9-315(a)(2) of the Revised Version of UCC Article 9. For the meaning see, eg, \textit{Chrysler Credit Corp v Superior Court} 22 Cal 2d 37 (1949).

\textsuperscript{100} Unlike the fixed or floating charge — as nominated transactions — known in Australia, Canada, New Zealand or the United Kingdom and its followers, it is only a ‘concept’ under UCC Article 9 that rests on five pillars, or five different sets of provisions that (a) validate the after-acquired property interest and (b) future advance arrangements, as well as (c) those that allow for automatic extension of the security interest onto identifiable and traceable proceeds. Finally, the overruling of \textit{Benedict v Ratner}, 268 US 353 (1925) and introduction of simple notice filing was also needed. See, eg, Gilmore, above n 23, § 117 and note 1, 359. The key section in Article 9 today is § 9-315(a).

German law, for example, knows neither a nominated equivalent nor such a more or less formed concept. Yet through contractual clauses — as referred to above — it could achieve similar effects, though of limited reach exactly because each new transaction that may qualify as ‘proceeds’ presumes negotiation and contracting. Moreover, as these rules are statutorily not defined but are based to a great extent on court rulings, they are plagued by unpredictability.

\textsuperscript{101} Jackson argued that the creation of the special subcategory of collateral — chattel paper — is justified primarily by the advantages that ‘paperizing’ of an obligation brings. Put simply, besides increased predictability, the benefit is its increased negotiability — which means a further financing method. See Thomas H Jackson, ‘Embodiment of Rights in Goods and the Concept of Chattel Paper’ (1983) 50 \textit{University of Chicago Law Review} 1051, 1058—59. McCormack questioned the legitimacy of carving out chattel paper from receivables financing, criticising the Canadian and New Zealand drafters for uncritically following the American solution that presumably is ‘more a historical remnant than a barometer of contemporary financing and industry practices.’ This applies mutatis mutandis to the \textit{APPSA} given that s 10 contains the definition of this specific collateral category. See Gerard McCormack, ‘Reforming the Law of Security Interests: National and International Perspectives’ (2003) \textit{Singapore Journal of Legal Studies} 1, 26.
extended the reach of security interests from the first generation of proceeds by way of exceptions. To wit, the basic rule remains that security interests extend only to the originally encumbered asset. It may extend further, however, in a restricted number of specific cases. In the end, as this soft law instrument proves, the two systems can be reconciled and the divergent law on fruits versus proceeds is not an insurmountable stumbling block for the Unitary Model.

3 The Civilian Requirement that the Secured Claim must be Specified and the Rules against Excessive Security (Overcollateralisation)

It is claimed that a common characteristic of many civil law systems, distinct from accessoriness, is that they possess rules against excessive security. This applies to both proprietary and personal securities. These rules allow the secured creditor to collect no more than the principal debt, the interest, as well as enforcement and some other justified ancillary costs. It may be presumed that their function is to defend the debtor by making the value of the collateral and the money to be collected proportionate to the credit. The requirement that the secured claim be specified (the specificity principle) — by case law moderated to the standard of ‘determinable’ — is obviously a prerequisite benchmark for determining the value of the collateral. Both principles seem to be foreign to the Unitary Model, a model that does not aim to be paternalistic and which, in its US version, suggests that ‘[t]he law should not impair the ability of debtors to secure as much or as little of their debts with as much or as little of their existing and future property as they deem appropriate.’ Indeed, it is sufficient to examine a financing statement to see the materialisation of this policy; the definition of attachment does not require specification of the amount of credit, but only that value has been given for the security interest.

In fact, the rules against overcollateralisation also show how paradoxical some of the general principles and doctrines are, given that, notwithstanding the high esteem surrounding them, they could be bypassed in business life. It is especially unclear

102 For the definition of ‘proceeds’ in the DCFR see art IX 1:201(11). The system goes beyond what paradigm civil law principles dictate only by way of three exceptions, ‘each [having] a rationale and scope of its own.’ For example, the security interest will extend to proceeds of proceeds only if the parties so agree, which reflects the influence of the referred to German contractual practices. See DCFR Comments, above n 15, 5458–9.

103 See van Erp and Akkermans, above n 38, 434.

104 See Bank Lambert et Banque industrielle et commercial de Charleroi v Assurances du Crédit en Bottriaux, Cour de cassation, 28 March 1974, excerpts in van Erp and Akkermans, above n 38, 434.


106 See UCC § 9-203(b)(1) and, for the definition of ‘value’, § 1:204. It is also indicative, as White and Summers, above n 81, note, that ‘[t]here are few cases on what is value and fewer yet are noteworthy’: at 1192. For APPSA see s 19(2). The filing requirements do not list the value of the credit either: see UCC § 9-516(b); APPSA ss 153, 154.
how the rules against excessive security could be enforced and monitored in reality. Needless to say, the related statutory bases, the methods of measurement and the thresholds themselves differ from jurisdiction to jurisdiction — eventually leading also to the inevitable conclusion that this element of civil law does not necessarily rest on solid footholds. German law seems to have the most articulated rules, yet, curiously, they are based primarily on Federal Supreme Court positions rather than on specific statutory laws. Further, the divergence of the positions taken by different divisions of the Supreme Court adds a layer of uncertainty. One of the established corollary rules is the obligation of the secured creditor to release part of the collateral if, for a longer period of time, the security becomes excessive while the underlying credit is outstanding. One may conclude that the determination of what constitutes excessive security, or for what period of time the distortion should exist, generates both controversy and a voluminous literature. Put simply, the rule is far from simple. This tension is visible even on the DCFR, which does not seem to pronounce such a threshold percentage in an explicit rule, though it contains a number of provisions whereby it protects consumer debtors.

Whether this sui generis form of paternalism could be deemed a minor mosaic reflecting the social sensitivity inherent in the social-market economy model of Europe is uncertain. What is clear, however, is that common laws and the Unitary Model do not fix the upper limits of the security compared to the credit extended. On the contrary, as was stated in a US case, overcollateralisation is a tool in the hands of the secured creditor to ‘hedge against credit risk’ in addition to providing

107 For example, while French law grounds this type of principle ‘in the wrongful act of a professional credit-lender,’ for German law this is a good-faith issue: van Erp and Akkermans, above n 38, 443.

108 Because in Germany the law on excessive security is based on changing case law, it is not easy to determine the exact content of it. As Bülow put it, ‘when the total value of the security is 120% of the credit, in most cases that would not amount to excessive security.’ See Peter Bülow, Recht der Kreditsicherheiten (C F Müller Verlag, 1996) § 947. Overcollateralisation could be attacked as resulting in ‘immoral transactions’. The last publicised case of the Federal Court seems to be Bundesgerichtshof [German Federal Court of Justice], IX ZR 218/02, 15 May 2003 reported in (2003) BGHZ 1490, 1492.


110 See Riesenfeld and Pakter, above n 95, 428.

111 See DCFR art IX 2:107, where consumer debtors are protected by three means: first, requiring that all the assets used as collateral must be identified individually to prevent abuse; second, after-acquired property can be offered as collateral only if the credit was extended exactly for the acquisition of such items; and third, such future regular payments as salary, wages, pensions or similar income is exempt and cannot be used as collateral up to the minimum necessary for subsistence of the debtor and his family. For a similar provision in the APPSA see s 8(1)(iv).

112 For English law, see van Erp and Akkermans, above n 38, 444.
them with more flexibility. A fuller panoply of dilemmas surrounding overcollateralisation (or excessive security) often arise in relation to the liability of secured creditors having control of collateral. In particular, investment property is extremely sensitive to changes on the capital markets. In that specific context, the hardships and pitfalls of the application of a formula known to German law are not just more readily visible but show that similar results could also be achieved using less rigid rules. Simply, on the increasingly volatile capital markets, the ‘lasting for a sufficiently long period of time’ precondition of the German rules against excessive security could hardly be applied. In any event, the rules against excessive security deserve merit, yet are neither necessary nor irreconcilable per se with the Unitary Model.

4 Publicity of Proprietary (In Rem) Securities

Paradoxically, it is questionable in Continental Europe whether this principle is generally applicable in the case of personal property securities, as in more jurisdictions latent (secret) securities could validly be created, contrary to real property security interests (ie mortgages). The mentioned German contract-based securities (kautelarische Sicherheiten) — which have been exported to a number of neighbouring countries as well — are paradigmatic examples. It is paradoxical how German courts could have validated them and how they could have gained such a wide popularity in the most system-thinking jurisdiction of Europe, where bypassing the Civil Code is almost unimaginable.

This is interesting as both common and civil law systems (including German law, one of the major civil law jurisdictions) have departed from the same concern: to wit, ostensible ownership (false wealth). Later development took different routes. Common laws have tended to impose the precondition of public notice on all new security devices, while German law and its followers have tried to provide protection by way of the numerus clausus doctrine (that is, the doctrine of statutorily limited proprietary rights prohibiting ‘invention’ of new proprietary rights, including new in rem security devices) which was then broken by the mentioned contract-based non-registrable securities. Yet from the perspective of the prospects of Europe adopting the Unitary Model, it is of utmost importance that the common roots are visible also from the DCFR, which was positioned to find the common denominator,

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113 See Layne v Bank One, Kentucky, N A 395 F 3d 271 (US Ct App 6th Cir, 2005) (‘Layne’).

114 The facts of Layne are telling of the sui generis nature of investment property as collateral. Here, according to the agreement of the parties, the loan-to-value ratio provided that the market value of the stock used as collateral must have always been at least twice the outstanding balance of the credit owed. In case of changes, the debtors had five days to remedy the situation or risk the bank declaring default at its discretion — including the right to sell the shares subject to ten days’ prior notice. After the Internet Bubble and months of vacillation (February 2001 through July 2001) the Bank finally sold the stock at a large deficit. The issue was whether the bank as the holder of shares had the duty to sell the collateral because of a market decline — regardless of the overcollateralised loan — which was answered in the negative by the Court.
II Conclusion: Or Why There Is Still Much To Do

The legal platform that serves as the foundation for the introduction of the Unitary Model differs radically along the line of common law systems versus Continental European civil law systems. However, the answer to whether common and civil law systems could reconcile their PPS laws has changed radically from a decisive ‘no’ in 1980, through the timid, limited and contingent ‘yes’ in the 1990s, to a quite encouraging affirmation — best materialised in the soft law instrument DCFR and the PPSL reforms in some of the European civil law countries during the last two decades. Roughly 32 years were needed to reach this point; less time might be needed to show that Europe can have a common PPSL that is potentially compatible with the Unitary Model. This article is a modest attempt to make headway in that direction through pinpointing a number of key discrepancies in the common versus civil law legal platforms affecting PPSL that have not been properly explored yet. It has hopefully ad minimum proven what Mary Hiscock warned us when writing on the internationalisation of law: ‘there is [still] much to do.’

115 See DCFR art IX 1:102(4) listing the German kautelarische Sicherheiten.

116 Mary Hiscock and William van Caenegem (eds), The Internationalisation of Law (Edward Elgar, 2010) xxv.
I N T R O D U C T I O N

In Unions New South Wales v New South Wales, the High Court of Australia considered the constitutional validity of amendments to the Election Funding, Expenditure and Disclosures Act 1981 (NSW) (‘EFED Act’). The plaintiffs’ contention was that provisions restricting political donations and electoral communication expenditure impermissibly burdened the freedom of political communication implied by the Commonwealth Constitution. This case note draws comparisons between Unions and Australian Capital Television Pty Ltd v Commonwealth, a 1992 case that considered legislation remarkably similar to the law in Unions. This comparison provides the backdrop for a critical analysis of the provisions challenged in Unions and the policies that underpinned the amendments. After exploring the High Court’s approach to these issues, this case note concludes with a brief discussion of the implications of Unions within the context of electoral system reform.

B A C K G R O U N D

A The Implied Freedom of Political Communication and the Lange Test

The implied freedom of political communication is an integral element of representative and responsible government. It derives chiefly from ss 7 and 24 of the Constitution, which dictate that Members of Parliament shall be ‘directly chosen by the people’. In electing representatives to govern, communication between voters and current Members of Parliament, running candidates and other voters is essential to ensure that voters can ‘exercise a free and informed choice’. This freedom is not a personal right, nor is it absolute. It is a limitation...
on legislative power: a law is invalid if it impermissibly burdens political communication.\(^8\)

The two-limbed test to determine whether a law unjustifiably restricts free political communication was developed in *Lange*.\(^9\) The first limb asks: ‘does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?’\(^10\) If it does, the second limb asks: ‘is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with … representative and responsible government?’\(^11\) A law is invalid where the first limb is answered affirmatively and the second negatively.\(^12\)

### III The Decision in *Unions*

#### A The Challenge

In *Unions*, industrial associations brought proceedings against the State of New South Wales challenging the constitutional validity of two sections recently inserted into the *EFED Act*. Section 96D made it unlawful for ‘a party, elected member, group, candidate or third-party campaigner’ to accept a political donation unless it was from an individual enrolled to vote.\(^13\) This disallowed political donations from individuals not enrolled, as well as individuals and entities not qualified to enrol, such as corporations.\(^14\) Section 95G(6) extended the *EFED Act*’s existing cap on electoral communication expenditure by including in the calculation of a political party’s total the expenditure of ‘affiliated organisations’.\(^15\) An ‘affiliated organisation’ was one authorised ‘to appoint delegates to the governing body of that [political] party or to participate in pre-selection of candidates for that party’.\(^16\)

The plaintiffs contended that these two sections impermissibly burdened the implied freedom of political communication derived from the *Constitution*.\(^17\)

#### B The Decision

Both the plurality of French CJ, Hayne, Crennan, Kiefel and Bell JJ, and the separate judgment of Keane CJ, applied the *Lange* test to determine the validity

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8. Ibid. This also applies to the exercise of executive power.
10. Ibid 567.
15. Ibid [12].
16. Ibid [13], quoting the *EFED Act* s 95G(7).
17. Ibid 272 [16].
of the EFED Act’s challenged sections. Both sections challenged were held to be invalid. It was unanimously held that s 96D burdened political communication and therefore satisfied the first limb of the Lange test.\(^1\) Restricting donations to political parties limited the funds available to parties for campaigning, an integral element of political communication.\(^2\) The Court was also unanimous in its decision that s 96D did not meet the requirements of the second limb,\(^3\) though the judgments differed in their reasoning.

The limitation of electoral communication expenditure under s 95G(6) met the Lange test’s first limb requirements.\(^4\) It was obvious to the Court that restricting expenditure would in effect restrict electoral (and hence political) communication.\(^5\) Neither judgment could find support for s 95G(6) under the second limb.\(^6\)

C The Reasoning of French CJ, Hayne, Crennan, Kiefel and Bell JJ

In applying the second limb of the Lange test to s 96D of the EFED Act, the plurality could not identify a legitimate end served by the section.\(^7\) Though their Honours acknowledged the broad anti-corruption purposes of the EFED Act,\(^8\) they were unable to determine how allowing only those enrolled to vote to make political donations might achieve this purpose.\(^9\)

Similarly, the plurality held that s 95G(6) did not, under the second limb, serve a legitimate end.\(^10\) Their Honours were unable to connect the EFED Act’s anti-corruption aims with s 95G(6) as it was not clear how aggregating the electoral communication expenditure of political parties and their affiliated organisations would reduce corruption.\(^11\)

D Keane J’s Rationale

Keane J took a different approach in applying the second limb of the Lange test. His Honour focussed on both sections’ compatibility with ‘the free flow of political communication’.\(^12\) By allowing donations from some sources but prohibiting

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\(^{12}\) Ibid 277 [38] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 292 [121] (Keane J).
\(^{11}\) Ibid.
\(^{10}\) Ibid 281 [60] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 294–5 [134] (Keane J).
\(^{9}\) Ibid 281 [61] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 300 [163] (Keane J).
\(^{8}\) Ibid.
\(^{7}\) Ibid 282 [65] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 302 [168] (Keane J).
\(^{6}\) Ibid 281 [60].
\(^{5}\) Ibid 279 [49].
\(^{4}\) Ibid 280 [56].
\(^{3}\) Ibid 282 [65].
\(^{2}\) Ibid [64].
\(^{1}\) Ibid 294 [133].
others, s 96D was discriminatory in nature and distorted the free flow of political communication.30 And by including some electoral communication expenditure in a party’s aggregate but excluding other forms of third party expenditure, s 95G(6) was discriminatory in a similar manner.31 Keane J did not believe either section was ‘calibrated’ to achieve the government’s anti-corruption aims, and so his Honour could not regard the distortion of political communication as ‘appropriate and adapted’ in the furtherance of free political communication.32

IV Discussion

A The Echoes of ACTV

What is perhaps most remarkable about Unions is its similarity to a case decided over two decades ago.33 In ACTV,34 the High Court struck down legislation that introduced ‘sweeping prohibitions’ on political advertising while providing political parties with ‘free time’ to advertise that varied in length depending on their success at the previous election.35 While the Court recognised that the provisions served a legitimate purpose — providing free advertising would, ideally, reduce the pressure on political parties to raise money, thereby reducing the risk of corruption — the discriminatory nature of the scheme counteracted rather than enhanced the political process.37

The similarity between ACTV and Unions may be considered from two perspectives. On a favourable (but perhaps naïve) view, the governments involved in each case were seeking to reduce corruption and mitigate the influence of wealth within the political sphere.38 The law in ACTV sought to improve the electoral system by attempting to eliminate the consequences of financial disparities between political parties.39 In Unions, the inserted provisions ostensibly aimed to promote political equality and reduce corruption by restricting the source and amount of funding
available to and used by political parties. As determined in ACTV, and upheld in Unions, reducing corruption and the undue influence of the wealthy within the electoral system is an entirely legitimate end, not only compatible with the implied freedom of political communication but arguably necessary for that freedom to flourish. It is from this perspective that some have criticised the High Court in its interpretation and application of the implied freedom of political communication. The ‘irony of ACTV’ is echoed in Unions. Instead of safeguarding the function and integrity of Australia’s democratic system of governance, the implied freedom was used to invalidate legislation sympathetic to its cause.

This perspective, however, considers neither the context nor the political tensions at play. On a critical (or perhaps cynical) view, the respective governments in ACTV and Unions enacted legislation that ‘unduly favoured’ those in power and discriminated against their opposition. In ACTV, 90 per cent of the free advertising time available was granted to incumbent political parties. The provisions challenged in Unions were less overtly discriminatory but more disproportionate as they primarily impacted upon (or targeted) one political party. By preventing all political donations but those of electors, and aggregating the electoral expenditure of parties and their affiliated organisations, the amendments to the EFED Act had a significant effect on the Australian Labor Party (‘ALP’) owing to its extensive union affiliations. While it may be conceded that s 96D impacted upon all political parties (though perhaps not equally), s 95G(6) was quite obviously tailored to damage the ALP’s unique relationship with industrial bodies; no other political party allows third party involvement in the appointment of delegates or the pre-selection of candidates. On a critical view of the governments in ACTV and Unions, anti-corruption legislation was used as a pretext to hamstring the opposition.

B The Concerns of the High Court

That there is no mention of these (ulterior) motives in the judgments of Unions should not come as a surprise. Keane J provided a timely reminder that it has never

42 See generally Campbell and Crilly, above n 38.
43 Ibid 62.
been the role of the judiciary to engage in political disputes or question the reasons and policies that underpin a specific law.\textsuperscript{48} The Court is solely concerned with the matters before it; in this case, the constitutional validity of the challenged provisions. Hence, the issue for the plurality was not that they were unable to identify an end or purpose met by the provisions, but that their Honours could not identify a legitimate end. The issue was one of incongruence; there was a purpose served that lacked legitimacy, and a legitimate end that was not served.

Similarly, the issue for Keane J was not that the provisions discriminated against the ALP, but that they discriminated against some sources of funding but not others.\textsuperscript{49} The political agenda behind the amendments was irrelevant; the distortion of the free flow of political communication brought about by excluding certain sources of funding was fundamental.\textsuperscript{50} This is not to suggest that discriminatory provisions will always be invalid; indeed, Keane J implied in his judgment that some discrimination may be permissible or even necessary for political communication to freely flow.\textsuperscript{51} But any law that operates in a discriminatory manner must be appropriate and adapted to serve a legitimate end;\textsuperscript{52} if there is no proper basis for the discrimination, the law will not satisfy the second limb of the \textit{Lange} test.

\textbf{C No Legitimate End?}

Was the High Court correct in its assessment that the provisions of the \textit{EFED Act} challenged in \textit{Unions} did not serve a legitimate end? If the favourable view of \textit{Unions} is conflated with the critical perspective, it is possible to accept that the government’s amendments justifiably targeted the ALP. After all, the ALP is idiosyncratic in its extensive affiliations with unions. Perhaps the government was merely attempting to eliminate an advantage uniquely enjoyed by the ALP. There is concern that political parties are circumventing the statutory caps on electoral communication expenditure by ‘using closely related bodies to campaign on their behalf’.\textsuperscript{53} Could targeting a political party that appeared to be exploiting a legal loophole, and thereby providing a ‘level playing field’ in the electoral process,\textsuperscript{54} be considered a legitimate end compatible with the implied freedom of political communication?

The High Court has provided qualified support for governmental attempts to ‘level the playing field’.\textsuperscript{55} In \textit{ACTV}, it was held that a party would need to present
compelling evidence that ‘the ability of the electors to make reasoned and informed choices in electing their parliamentary representatives’ was threatened before such interventionist legislation could be upheld.56 In Unions, Keane J endorsed unchallenged provisions of the EFED Act that ‘enhance[d] the prospects of a level electoral playing field’.57

The problem in Unions was that the government’s amendments were too narrow. By targeting only the ALP and its affiliates, the provisions did not effectively level the playing field because other parties could continue to avoid the statutory caps by, for example, using closely related bodies not deemed ‘affiliated organisations’.58 It seems reasonable to assume, as Anne Twomey does, that general amendments affecting all political parties exploiting the loophole in statutory caps would have been upheld by the Court;59 they would have served a legitimate end in a discriminatory but justified manner. Or, to use Keane J’s turn of phrase, such amendments would have prevented wealthy donors from distorting the free flow of political communication.60

D Forewarned but not Forearmed

The decision to insert ss 96D and 95G(6) into the EFED Act is somewhat baffling. These provisions were remarkably similar to the legislation challenged in ACTV. Why the NSW government believed it would succeed where the federal government failed is anyone’s guess. Indeed, the constitutional validity of the amendments to the EFED Act had been considered in depth on several occasions prior to the Unions challenge.61 Academics were highly critical of the provisions — in particular the disproportionate effect the provisions would have on the ALP — and most concluded that the new sections would not withstand a constitutional challenge.62 Amendments to resolve the provisions’ incompatibility with the implied freedom of political communication were suggested but largely ignored.63 For all that is said about the

57 Unions (2013) 304 ALR 266, 295 [136].
60 Unions (2013) 304 ALR 266, 295 [136].
62 Legislative Council Select Committee on the Provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011, above n 47, 95–105.
unpredictability of the High Court generally, and the indefinite and unclear nature of the Lange test specifically, in this case the outcome of a constitutional challenge was accurately predicted.

V Implications

The issues raised in ACTV and Unions — wealth disparities among political parties, expenditure during election periods, and the potential for political donations to corrupt, or at least influence, democratically elected representatives — are as old as democracy itself. The NSW EFED Act is one of many state laws that seek to reduce corruption, improve transparency and equalise the electoral system. And the provisions challenged in Unions were the latest in a string of substantial amendments, beginning in 2008, that sought to remedy the erosion of public confidence in the government.

In this regard, it is useful to have a recent High Court decision that considers the validity and legitimacy of electoral funding legislation in the context of the implied freedom of political communication, a legislative limitation that has lay dormant for many years. The judgments in Unions unanimously endorsed the position taken in ACTV that reducing corruption and undue influence in the political sphere is a legitimate end consistent with free political communication. Keane J’s decision is of particular value. His Honour lent support to provisions of the EFED Act that cap political donations and electoral communication expenditure by explaining the manner in which they might be considered appropriate and adapted. By effectively applying the Lange test to unchallenged provisions and finding them entirely valid, Keane J has given hope to those that fear that any attempts to ‘counter the corrosive impact of disparate wealth’ are doomed to fail. At a time where concerns about corruption are especially prominent, it is vital that governments feel confident that they can pursue aggressive initiatives without those initiatives falling at the final hurdle.

64 Campbell and Crilly, above n 38; Legislative Council Select Committee on the Provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011, above n 47, 92.
65 See Keane J’s discussion in Unions (2013) 304 ALR 266, 293–4 [129]–[134].
67 Unions (2013) 304 ALR 266, 270 [8]–[9].
68 See, eg, New South Wales, Parliamentary Debates, Legislative Assembly, 25 June 2008, 9323 (Barry O’Farrell, Leader of the Opposition).
69 Campbell and Crilly, above n 38, 66.
71 Ibid 295 [136], 301 [164].
72 Campbell and Crilly, above n 38, 60.
VI Conclusion

In *Unions*, the High Court struck down amendments to the *EFED Act* because they impermissibly burdened the implied freedom of political communication. *Unions* is a curious case, not least because of the déjà vu experienced by those familiar with the decision in *ACTV*. It is also a useful case, providing insight into the Court’s view of anti-corruption legislation and the current application of the *Lange* test. This is particularly pertinent as governments continue to implement measures to counter the effect and influence of wealth in the political sphere.
Alexander Reilly*

THE PRICE OF RIGHTS: REGULATING INTERNATIONAL LABOR MIGRATION

By Martin Ruhs
Princeton University Press, 2013
272 pp
ISBN 978 0 691 13291 4

For 10 years, Martin Ruhs has consistently analysed the ethics and appropriateness of labour migration programs by weighing up the interests of workers, employers, and states of origin and destination. Ruhs’ starting point is the ethical dilemma inherent in labour migration programs. Migrant workers from poor countries are prepared to sacrifice rights and equal treatment with domestic workers in developed countries for the opportunity to work. As the title, The Price of Rights, encapsulates, rights come at a price. If migrant labourers have too many rights, the cost to employers increases and work opportunities decrease. But Ruhs recognises there must be a limit to this trade-off. There must be a minimum level of protection for migrant workers to avoid overt exploitation and conditions of work akin to slavery.

Drawing on Joseph Carens, Ruhs makes a distinction between realistic and idealistic policy analysis. The idealist focuses on what ought to be the normative constraints on policy making and discusses appropriate policy settings within these constraints. The idealist will establish a view on the universality and inalienability of rights and then be constrained to evaluating policy within the limits of this position. The realist is more pragmatic, focused on providing practical input into policy debate. Ruhs falls firmly into the realist camp, focusing his analysis on existing state practice in the implementation of labour migration policies. Ruhs establishes a hypothesis to drive an empirical analysis of state practice: that there is a direct relationship

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between the openness of migrant labour programs and the skill levels required to enter the programs and an inverse relationship between skill levels and the extent of migrant worker rights.4

Within this framework, Ruhs questions the appropriate level of rights protection for temporary migrant workers. He answers theoretically, through an analysis of rights, combining this with a comprehensive survey of migrant worker programs around the world. In relation to his rights analysis, it is immediately clear that Ruhs understands rights to be alienable, at least to a degree. In determining optimum policy settings for labour migration programs, Ruhs advocates for a balance between rights-based and consequentialist approaches. Ruhs argues that outside core civil and political rights, such as the right to access the courts of the receiving country, most rights have instrumental value only and can be weighed against other competing interests, values and policy objectives.5 This means, for example, that it is possible to sacrifice the right to free choice of employment or the right to be united with family6 in order to achieve other benefits. Such benefits include greater economic gains for employers and receiving states, more open labour migration policies that offer opportunities to a greater number of migrant labourers and consequential economic benefits to their countries of origin resulting from the flow of remittances.

Ruhs also tackles the ethical question of rights through the lens of globalisation and citizenship theory. What entitlements and rights of membership are inherent in the fact of residence and work in a place? Is there a point in time when a person’s length of stay and contribution is such that it is unethical to deny them permanent residency and citizenship? Ruhs is not satisfied with formal claims to state sovereignty to answer this question. He advocates for a balance between nationalist and cosmopolitan perspectives.7 Ruhs accepts that, in formulating labour migration policies, states prioritise the interests of their citizens and maintain border control to protect those interests.8 However, by working in the state and contributing to its economic prosperity, migrants necessarily accrue some of the benefits that flow from membership in the state, such as equal protection under state laws regulating employment conditions, and basic civil and political rights. While Ruhs accepts that it is not legitimate for states to disregard the interests of non-members completely, he does not accept the extreme cosmopolitan perspective that calls for the dismantling of state restrictions on migration and the equal treatment of citizens and aliens.

Although Ruhs recognises the range of stakeholders in international labour migration, the perspective he develops most comprehensively is that of receiving states. It is implicit in The Price of Rights that Ruhs is appealing to policy-makers in receiving countries and offering them a way to conceptualise their responsibilities

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5 Ibid 172–3.
6 Ibid 175–6.
7 Ibid 160.
8 Ibid 164.
to migrant workers when exploiting the economic benefits of migrant labour. His modified rights approach has particular resonance from this perspective.

*The Price of Rights* is an important contribution to the migrant worker debate. Ruhs’ discussion of the issues is assured and acknowledges the many perspectives that must be considered in establishing policy settings. Although his approach is a provocation to those who advocate for states to accede to obligations in the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* and other rights-based international treaties, Ruhs’ approach recognises the place of this perspective and leaves space for its advocates to argue the case for rights protection against the interests of states and migrant workers. What he requires, though, is a proper acknowledgement of the cost of rights on the economic and other interests of migrant workers.

The empirical work in *The Price of Rights* is impressive in its breadth, covering 46 countries. However, I am uncertain of its enduring value. One immediate shortcoming of the empirical work is the decision to limit the definition of migrant workers to those who are on a visa ‘for the primary purpose of work’. This constraint puts form over substance. It is the fact of migrant work, and not the official purpose of a visa, that determines the extent and scope of migrant work. A substantial amount of low- and semi-skilled work is done by migrants on visas that are for a different primary purpose but that still provide for limited work rights. Furthermore, the stated purpose of a particular visa category might hide that the visa is in fact being used primarily as a vehicle for work. In Australia, for example, migrant workers contribute to low- and semi-skilled work through a range of migration pathways. Despite a clear and express policy preference for highly skilled migration, working holiday-makers and international students perform a large amount of low- and semi-skilled work and have a direct impact on the extent and operation of dedicated labour migration programs, such as the sub-class 457 Business Long Stay visa.

In my view, Ruhs’ empirical work would have had greater value if it had focused on a smaller sample group and drilled down further into the categories of migrant work in each country. This would have given a deeper sense of how state policies provide incentives for migrant labourers, protect their rights, and further the economic interests of the state and private employers. More useful and interesting observations are derived from Ruhs’ qualitative analysis in chapter 5 than from his empirical analysis in chapter 4.

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11. Ibid 10.
Australian policy settings confirm Ruhs’ hypothesis that there is a correlation between higher skilled work and migrant rights. Unlike working holiday-makers and international students, sub-class 457 visa holders have specific rules protecting their pay and conditions of work. However, policy settings in Australia do not confirm the correlation Ruhs draws between the level of skill required and the openness of the labour migration pathway, in light of the easy access of international students and working holiday-makers to the Australian labour market. In fact, Ruhs’ framework for analysis offers a useful way to critique the policy settings in Australia. There is widespread concern that the level of openness to unskilled work in Australia through the international student and working-holiday visa pathways is leading to a high level of exploitation of vulnerable workers on these visas, and contributing to unemployment.13

There were points in the theoretical discussion that would have benefitted from further analysis. Ruhs lists a number of categories of rights — civil and political rights, economic rights, social rights, residency rights and access to citizenship — and argues that some are fundamental and others are not. But the allocation of rights to one or other of these categories was intuited rather than justified theoretically. Some rights were described as accruing over time, but why and to what extent was not explored in depth. A key issue in relation to the conferral of membership is if and when temporary labour migrants ought to have the right to apply for full membership in the state. Ruhs argues that there is a limit to how long a state should be able to offer work to a migrant as a temporary resident, after which permanent residency ought to be offered or the employment relationship terminated. Ruhs settles on four years as the appropriate maximum length of time for temporary work, but does not offer a justification for this position. Is it because of the extent of the migrant worker’s contribution, the level of integration that occurs within this time, or the degree of separation from the worker’s country of origin? Could there be a distinction between high- and low-skilled workers in relation to this length of time, based on their contribution to the receiving state, their vulnerability to exploitation or their level of integration? Having committed to a particular limit for temporary work, further explanation was warranted.

In an area of policy with such a diverse range of interests and policy perspectives, Ruhs contributes an important framework for analysis that recognises the complexity of the ethical issues surrounding the employment of migrant workers within the geopolitics of economic migration and state practice. The Price of Rights is a valuable resource for policy-makers in choosing settings for labour migration programs and for academics grappling with the appropriate terms of analysis.

Matthew Stubbs*

SIR RICHARD HANSON

By Greg Taylor
Federation Press, 2013
244 pp
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I INTRODUCTION

The latest book from the extraordinarily prolific and always interesting Greg Taylor is a biography of Sir Richard Hanson (1805–76). An impressive figure in early South Australia, Hanson was involved in London in the promotion of the enterprise that was the Province of South Australia, and although overlooked for appointment as the first judge of the Province, he arrived in Adelaide in 1846 and went on to serve as South Australia’s fourth Premier (1857–60), second Chief Justice (1861–76) and Acting Governor (1872–73).

Sir Richard Hanson makes a welcome contribution to the field of nineteenth-century South Australian legal history. Taylor remains one of the preeminent experts in this field. With a striking photograph of its subject on the dust jacket, Sir Richard Hanson also features a superb foreword by Emeritus Professor Horst Lücke, which admirably sets the scene for the extended analysis that follows.

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II Hanson’s Path to South Australia

Hanson was an intellectual from an early age,⁴ although not a poet: his sonnets are derided as ‘of execrable quality’.⁵ Legal practice proved less exciting to the young Hanson than journalism,⁶ but both appear to have taken a back seat to his advocacy in favour of the South Australian project.⁷ Hanson’s consolation for not being appointed the first South Australian judge was to be appointed to the staff of the Earl of Durham for the controversial Report on the Affairs of British North America prepared in response to the Patriote Rebellion in Lower Canada in 1837–8, which took Hanson to Canada in 1838.⁸ Taylor makes a convincing case for Hanson acting diligently in difficult circumstances, although this is but a minor deviation on the journey.

Hanson was the founder of two colonies, the first being New Zealand, where he arrived in early 1840.⁹ Taylor presents a balanced assessment of Hanson’s performance, revealing the more ambitious and sharp aspects of Hanson’s business ventures during his early years in New Zealand,¹⁰ where he was engaged in the entirely private venture of the New Zealand Company to establish a settlement at Port Nicholson (now Wellington). Hanson parted ways with the company in 1840, remaining in Wellington but returning to the legal profession in 1841. He switched allegiance to the government that same year, taking up part-time positions as magistrate and Crown Prosecutor.¹¹ Taylor observes that ‘conflicts of interest marked Hanson’s every move’,¹² although in a small settlement with a tiny legal profession this was to be expected.

Taylor offers little by way of explicit reflection at the end of the chapter addressing Hanson’s time in New Zealand, but the chapter itself is an excellent study in the maturation of Hanson as a professional and public figure between the ages of 34 and 40. Hanson’s experience in New Zealand saw him transition from his (relatively) youthful idealistic commitment to colonisation in private hands, to a more mature understanding of the significance of the colonial enterprise and the role of colonial governments in it. It also gave Hanson broad experience in private enterprise, journalism, the legal profession and the judiciary. These understandings of colonial theory, life and governance were an important foundation on which Hanson would later build as a statesman in South Australia.

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⁴ Taylor, Sir Richard Hanson, above n 1, 13–14.
⁵ Ibid 28; see also 14, 198.
⁶ Ibid 20–1.
⁸ Ibid 33–46.
⁹ Ibid 49.
¹⁰ Ibid 54–5, 60–2.
¹¹ Ibid 70, 72.
¹² Ibid 78.
Hanson as a Great South Australian

Given his involvement in the genesis of South Australia, Hanson must have already felt a remarkable connection to Adelaide when he arrived in 1846. He appears to have settled quickly into journalism and legal practice, not to mention civil society. That other great occupation of colonial lawyers – politics – also beckoned, and Hanson was quickly involved in a brisk campaign to stop state aid to religion. As was commonplace in a time when politicians were unpaid, Hanson maintained his private legal practice throughout his political career, even when serving simultaneously as Premier and Attorney-General. In 1851, Hanson was elected to the newly-formed Legislative Council, the first taste of representative democracy in South Australia. Ironically, given his relatively liberal views, Hanson immediately resigned his elected seat to take up appointment (and a nominated seat on the Legislative Council) as Advocate-General. Another surprise in the planning for responsible government was Hanson's preference for an appointed upper house (although this did not eventuate).

With a new constitution and the introduction of responsible government in 1856 came an update in title: Hanson won strong public support in securing election to the representative Parliament (there being no further appointed members), and became Attorney-General. The first Parliament of the new era met in April 1857, and remarkably Hanson was already the fourth Premier when he assumed the role in September of that year. Against that background, one significant achievement of Hanson’s Premiership was that it lasted until May 1860, providing relative stability in the chaos of colonial politics.

Hanson’s years as Advocate/Attorney-General and Premier produced many important reforms. These achievements include the successful countering of the population drain to Victoria brought on by the gold rush of 1851, one of the most extensive (male) franchises for lower house elections in any polity at that time, and
elected upper house (albeit with a property franchise),\textsuperscript{23} the secret ballot,\textsuperscript{24} legislation permitting suits against the Crown in place of the petition of right procedure,\textsuperscript{25} the abolition of the grand jury,\textsuperscript{26} the abolition of public executions,\textsuperscript{27} the introduction of the Torrens system of land registration,\textsuperscript{28} and the establishment and structuring of the departments of the executive government under the new constitution.\textsuperscript{29} Hanson, of course, was not the sole driver of these reforms. At the very least, however, during his political career Hanson was a significant influence in seeing these important South Australian reforms and innovations to fruition.

Hanson had one more period of service in the executive government, serving as Acting Governor from December 1872 to June 1873, during which time Justice Gwynne was appointed Acting Chief Justice.\textsuperscript{30} Taylor reports that the Colonial Office was so pleased with Hanson’s performance that it formalised the arrangement.\textsuperscript{31} Indeed, from then on, Chief Justices served as acting Governor until a separate Lieutenant-Governor of South Australia was appointed in 1973.\textsuperscript{32} Hanson therefore served as Advocate/Attorney-General, Premier and acting Governor — a notable contribution to statesmanship in the fledgling Province.

IV Hanson as Chief Justice: Reflections on Colonial Judiciaries

Hanson became the second Chief Justice of South Australia on Sir Charles Cooper’s retirement in 1861.\textsuperscript{33} The most notable incidence of his Chief Justiceship was the protracted battle with Justice Benjamin Boothby, whose personal conduct was ‘egregiously offensive’\textsuperscript{34} and who as a judge had a predilection for invalidating

\begin{footnotes}
\item[23] Ibid 128. As Taylor notes, the property franchise remarkably remained until 1973.
\item[24] Ibid.
\item[25] Ibid 122.
\item[26] Ibid 126. This might be thought a retrograde step, but as Taylor has explained elsewhere, it reflects the fact that ‘citizens of the very young Province of South Australia were already confident enough in the institutions [of government] … that they were willing to forgo the extra safeguard of the grand jury in the interests of convenience’: Greg Taylor, ‘The Grand Jury of South Australia’ (2001) 45 American Journal of Legal History 468, 516.
\item[27] Taylor, Sir Richard Hanson, above n 1, 169.
\item[28] Ibid 134–5.
\item[29] Ibid 143–4. Hanson also opposed primogeniture (at 126, 137) although that would not be successfully removed until the Intestate Real Estate Distribution Act 1867 (SA).
\item[30] Taylor, Sir Richard Hanson, above n 1, 194.
\item[31] Ibid.
\item[33] Taylor, Sir Richard Hanson, above n 1, 155.
\item[34] Ibid 161.
\end{footnotes}
laws (often) on the basis of arguments Taylor describes as ‘tendentious rubbish’.\(^{35}\) Taylor succinctly summarises this well-known episode, adding the following useful reflection:

> Boothby appears to have thought that human society existed for the sake of allowing technical points of law to be argued … Hanson appreciated that the ultimate aim of the law was to serve society and that the validity of laws should be assessed not only against technical requirements but also having regard to the shape of the society in which the law operated.\(^{36}\)

Taylor’s point about Boothby and Hanson can be generalised to other colonial judiciaries. In the circumstances of a developing colonial society, the imperative of considering the broader context in which the law operates is abundantly clear.

Unusually for a judicial biography written by a lawyer, *Sir Richard Hanson* contains relatively little examination of its subject’s judicial work. Taylor notes in his introduction that ‘the vast scope of [Hanson’s] extra-legal activities and intellectual interests sometimes claims the lion’s share of attention’.\(^{37}\) Nonetheless, Taylor does usefully examine some key judgments of Chief Justice Hanson.\(^{38}\) However, given that only the rarest of judgments remain relevant after more than a century and a half, that Hanson is studied primarily for the broader perspective that he brings to early South Australia is a strength of Taylor’s biography.

In any event, evaluating the performance of Hanson as Chief Justice is an intriguing task. Horst Lücke’s foreword perceptively nominates a frame for such an evaluation, indicating that: ‘Among Hanson’s greatest assets as a judge were his thorough understanding of the problems of colonial government and his skill in dealing with them’.\(^{39}\) Lücke notes that, when appointed Chief Justice, Hanson ‘had gained a sober and mature appreciation of the needs of the young community’.\(^{40}\) Lücke commends him as a great judge if measured by impartiality, empathy and a ‘sense of fairness and justice’.\(^{41}\) Although Taylor regards Hanson as ‘an insightful jurist’,\(^{42}\) one of the messages of *Sir Richard Hanson* is that it was more important for a colonial judge to understand the societal needs of their polity than to be a talented doctrinal scholar. This is particularly so if the legislature is active and reforming, as it was in the Province of South Australia during Hanson’s time.

\(^{35}\) Ibid 159.  
\(^{36}\) Ibid 156–7.  
\(^{37}\) Ibid 2.  
\(^{38}\) Ibid 166–75.  
\(^{40}\) Ibid.  
\(^{41}\) Ibid vi.  
\(^{42}\) Taylor, *Sir Richard Hanson*, above n 1, 165.
The judges sent to the colonies were a varied group, a point well illustrated by the impecunious Justice John Jeffcott (who beat Hanson to the first judicial appointment in South Australia, despite having been previously stripped of his role as Chief Justice of Sierra Leone after narrowly escaping a murder conviction in England for killing a man in a duel, and notwithstanding the efforts of his creditors, but spent only a few months in Adelaide before his death at sea in December 1837) and the extraordinary Boothby. One aspect of Hanson’s success in South Australia that should not be overlooked is his dedication and commitment to the Province and its high ideals. Moreover, one reason this commitment was able to result in Hanson’s appointment was that, in keeping with the spirit of the grant of responsible government, he was chosen by the South Australian government and not by the Colonial Office. Hanson was the right man at the right time — a South Australian statesman of considerable legal ability to guide its Supreme Court through the great difficulties of the Boothby years and contribute to the advancement of the Province through bringing stability and independence to its judiciary.

V Hanson and Indigenous Peoples

Taylor is to be highly commended for frequently drawing attention to Hanson’s views on, and treatment of, Indigenous peoples. Taylor generally praises Hanson’s approach, although the picture that emerges is complex, and again highlights the difficulty of making comprehensive assessments of the treatment of Indigenous peoples by English settlers.

Hanson was originally a promoter of colonisation and subscribed to the Benthamite view that settlement in Australia, with its abundance of ‘uncultivated land’, was an acceptable solution to the ‘crisis of overpopulation in England’. Hanson was also uncomfortable with early New Zealand settlement being under the authority of Maori chiefs, objecting to the rule of ‘a few ignorant, though well-disposed individuals’. Further, there is evidence of Hanson possessing (not uncommonly for the time) a racialised view of intelligence and capacity.

Yet, in New Zealand, Hanson ‘deplored the “ignorant contempt” of the “labouring class”’ towards the Maori. Taylor demonstrates that Hanson’s youthful disregard of Maori interests in the original negotiation of land purchases gave way to a more

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44 Taylor, *Sir Richard Hanson*, above n 1, 28
46 As Taylor acknowledges: ibid 83–4.
48 Ibid 51.
49 Ibid 182–3.
50 Ibid.
empathetic approach, in which he recognised the New Zealand Company’s ‘unprin-
cipled’ and ‘grasping’ expansion of land purchases (in which he had played a leading
part) as involving significant injustice to the Maori.51 Hanson was clearly sympa-
thetic to the plight of the Maori,52 being the voice of reason in defusing passions for
violent revenge after the Wairau massacre,53 and ending up advocating Maori land
rights in his professional capacity and publicly, both within New Zealand and by
correspondence back to England.54

The good intentions of the settler government towards South Australia’s Aboriginal
peoples are clear;55 but settler violence towards Aboriginal people, both in accordance
with and outside the law, sometimes belied those intentions in practice.56 In South
Australia, Hanson pursued no great reforms to benefit Aboriginal peoples.57 He was
practicing law in Adelaide at the time of the Avenue Range Station Massacre in
1849,58 where murder charges against the settler James Brown for the killing of a
group of Aboriginal people were not pursued because the uncorroborated evidence
of an Aboriginal witness was inadmissible.59 Hanson is not recorded as responding
to the case. However, Taylor records instances of Hanson acting to reduce settler
violence against Aboriginal peoples by opposing police instructions and the arming
of explorers, which he feared would result in the killing of Aboriginal people, and
successfully opposing a reduction in spending on Aboriginal welfare.60 Taylor
gives the powerful example of Hanson’s charge to the jury as Chief Justice in 1866,
which resulted in a jury acquittal for two Aboriginal men charged with the killing
of a member of a party of settlers pursuing a group of Aboriginal people to exact
revenge for cattle stealing.61 This is to be contrasted, however, with the fact that four
of the six defendants executed whilst Hanson was Advocate-General (1851–6) were
Aboriginal men.62

51 Ibid 66–7.
52 Ibid 22.
53 Ibid 91–2
55 Letters Patent of 19 February 1836 GRG 2/64; Order in Council of 23 February 1836
GRG 40/6; Proclamation of 28 December 1836 GRG 24/90/401.
56 See, eg, Robert Foster, Rick Hosking and Amanda Nettelbeck, Fatal Collisions:
The South Australian Frontier and the Violence of Memory (Wakefield Press, 2001);
Robert Foster and Amanda Nettelbeck, Out of the Silence: The History and Memory
of South Australia’s Frontier Wars (Wakefield Press, 2012); S D Lendrum, ‘The
“Coorong Massacre”: Martial Law and the Aborigines at First Settlement’ (1977) 6
57 Taylor, Sir Richard Hanson, above n 1, 146–8.
58 See, eg, Foster, Hosking and Nettelbeck, above n 56, 74–93.
59 Supreme Court — Criminal Side, 11 June 1849 in South Australian Register (Adelaide)
13 June 1849, 3.
60 Taylor, Sir Richard Hanson, above n 1, 147.
62 Ibid 169.
For his time, Hanson was undoubtedly enlightened in his approach to Indigenous peoples, and Taylor identifies many instances where Hanson’s actions are deserving of praise. Nonetheless, we should not forget that the good intentions and actions of Hanson (and others) were part of a complex picture that also involved less creditable opinions and actions, and were in any event insufficient to save Aboriginal peoples from extraordinary hardships and deprivations arising from settlement that in many ways remain unresolved today.

VIRELIGION, SCIENCE AND FAMILY

Hanson lived through a period of extraordinary technological change. Growing up before the railway age, by 1858 as Premier he welcomed to Adelaide his friend Rev Thomas Binney (who had been preacher at the church he attended in his youth in London) as part of a tour of Australia. As Acting Governor, Hanson later reported on the opening of the overland telegraph (1872), probably the greatest single communications advancement in Australian history. Sadly, Taylor does not address Hanson’s response to these innovations — although it may be assumed that as a man of intellectual curiosity and dedication to education, Hanson was struck by the technological progress of the era.

In one profound respect, however, Taylor shows how scientific advancements affected Hanson. An intriguing, but rewarding, aspect of Sir Richard Hanson is its examination of religion. Notwithstanding his strict Dissenter upbringing, and his youthful Sunday school teaching, Hanson eventually lost his faith. Advancements in geological knowledge regarding the age of the earth and the science of Darwinian evolution convinced Hanson that the biblical version of creation was not literally true. Hanson had publicly revealed his disbelief of the creation story as early as 1860, although it was in 1864 that controversy arose with the publication of substantial works outlining his views during his Presidency of the Bible Society. By the late 1860s, Hanson’s disbelief in the creation story had broadened to become a publicly acknowledged total loss of faith.

Taylor outlines the quality of Hanson’s religious scholarship, viewing Hanson’s religious texts as just as important a legacy as his legal achievements. As befits a

63 Ibid 9.
64 Ibid 8.
65 Ibid 195.
67 Ibid 8.
68 Ibid 176, 179.
69 Ibid 176–8.
70 Ibid 201.
71 Ibid 180, 184–5.
72 Ibid 201.
lawyer and judge, Hanson’s religious scholarship was (perhaps ironically) conducted in much the same way a trial would be, with a detailed analysis of the evidence for various alleged facts. With the exception of the loss of the Presidency of the Bible Society, Hanson’s loss of faith had little (if any) impact on his public standing — a striking tribute to the strength of the ideals of religious freedom that had been an essential part of the South Australian enterprise from the very beginning.

Although he lost his faith in religion, Hanson never lost his faith in education, a cause he had long championed. Indeed, it was Hanson’s commitment to intellectual pursuits that led to his loss of faith. Hanson was therefore an excellent candidate when elected the first Chancellor of the University of Adelaide, although his sudden death on 4 March 1876 came before the University was formally inaugurated.

Religious belief is the main area in which any insight can be gained into Hanson’s personal life, there being sadly little material from which to draw an understanding of Hanson’s family. He married Ann (a young widow) in 1851, and was later forced to defend his wife’s honour against unfair slights arising from her humble background and her family’s involvement in a minor criminal matter in New Zealand when she was a child — which became the basis for yet another attack by Boothby and also delayed Hanson’s knighthood until 1869. Clearly, family was an important part of his life — in the end, his three brothers and two of his three sisters joined Hanson in South Australia. Ann and their five children survived him. The Hanson family’s Adelaide Hills property Woodhouse remains familiar to generations of South Australian children and continues to be operated as an activity centre by Scouts Australia.

VII Conclusion

Greg Taylor’s Sir Richard Hanson illustrates for a modern audience the life and times of one of the great Australasian colonial statesmen. Hanson made contributions as a supporter of the South Australian enterprise in London, as a leading figure in the establishment of the settlement at Wellington in New Zealand, and as Advocate/Attorney-General, Premier, Chief Justice, acting Governor and public intellectual in the young Province of South Australia. Taylor concludes his excellent book with the

73 Ibid 204.
74 See also: ibid 203.
75 Ibid 133, 155, 223.
76 Ibid 222.
77 Ibid 198, 200.
78 Ibid 115.
79 Ibid 69–70, 187.
80 Ibid 185–7.
81 Ibid 198–9.
reflection that Hanson deserves a prominent public memorial.\textsuperscript{83} Whether or not that hope is realised, in \textit{Sir Richard Hanson}, Taylor has created a worthy literary tribute to a great South Australian. Hanson also enjoys a fitting geographical tribute in the ruggedly beautiful Hanson Bay on the south-west coast of Kangaroo Island.\textsuperscript{84}

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{83} Ibid 228.
\item\textsuperscript{84} Named for Hanson, then Premier of South Australia, by Captain William Bloomfield Douglas in his 1858 survey aboard the \textit{Yatala}. See, eg, \textit{The Discovery of Australia: Naming Australia's Coastline}, The Discovery and Exploration of Australia <http://www.australiaforeveryone.com.au/discovery/names2.htm>.
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\end{footnotesize}
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In preparing manuscripts for submission, authors should be guided by the following points:

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2. Authors are expected to check the accuracy of all references in their manuscript before submission. It is not always possible to submit proofs for correction.

3. Biographical details should be starred (*) and precede the footnotes. They should include the author’s current employment.


5. An abstract of between 150 and 200 words should also be included with submissions (excluding case notes and book reviews).

6. Any figures in manuscripts that are of too low a resolution to produce a suitable print quality will be re-drawn by the Adelaide Law Review’s typesetters at the author’s cost.

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