Bond Law Review

Volume 4 | Issue 1 Article 2

1992

Registration and Validity of Company Charges - Some Problem Areas

Graham Corney

Registration and Validity of Company Charges - Some Problem Areas

Abstract
Recent judicial pronouncements upon the area of registration and validity of company charges and the need for recent amendments effected by the legislature have served to highlight the continuing anomalies evident in this area of the law. To a large extent these anomalies impact the wider area of chattel securities but this paper is restricted to those with effect upon the sphere of company securities.

Until remedies in the form of national legislative changes are applied, the laudable object of the Corporations Law will not be achieved in this sphere. The realities of the Australian federal system still impinge.

Keywords
Corporations Law, securities, company charges,

REGISTRATION AND VALIDITY OF COMPANY CHARGES - SOME PROBLEM AREAS

By
Graham Corney
Corney & Neumann
Solicitors

Introduction

Recent judicial pronouncements upon the area of registration and validity of company charges[1] and the need for recent amendments effected by the legislature[2] have served to highlight the continuing anomalies evident in this area of the law. To a large extent these anomalies impact the wider area of chattel securities but this paper is restricted to those with effect upon the sphere of company securities.

Until remedies in the form of national legislative changes are applied, the laudable object of the *Corporations Law*[3] will not be achieved in this sphere. The realities of the Australian federal system still impinge.

It will be seen that a lending authority reasonably requiring security against company assets for advances, or a supplier wanting such security in normal trade financing situations are both faced with the prospect of running the gauntlet between the *Corporations Law*, numerous state and territory legislative registration and validity requirements and uncertainty as to the meaning of some of the terms involved.

A charge on certain property of a company is required to be registered under the *Corporations Law*.[4] Registration serves to eliminate secret credit arrangements involving security over property as well as to protect and prioritise the interests of the credit providers and other third parties such as the execution creditor and the trustee in bankruptcy.

State or territory legislation other than the *Corporations Law* is also

1 Re *Bauer Securities Pty Ltd & Anor* (1990) 8 ACLC 230: *Austral Mining Construction Pty Ltd v NZI Capital Corporation Limited* [1991] 4 A C S R 57.
2 Corporations Legislation Amendment Act 1991 assented to 27.6.91.
3 Ie to constitute a single national corporations law applying in its own force throughout Australia - s8(1) *Corporations Law*.
4 *Corporations Law* s 262(1).

concerned with registration of security interests in personal property. This legislation[5] (Bills of Sale or Instrument Legislation) has been with us for the whole of this century[6] and the intricacies of our corporate regulatory legislation, especially since 1961, were not contemplated by those who framed and enacted such. The *Corporations Law*, of course, applies only to company securities whilst the other legislation applies to security interest created by individuals and companies[7]. The *Corporations Law*, like uniform company legislation before it, has sought to exempt company charges from the other legislation but these attempts have not been totally successful.

In addition to the 'bills of sale' or 'instrument' legislation which have more general application to a security interests over property other than land, the states have enacted more specific legislation[8] relating to security interests over particular types of property. Security interests over motor vehicles attract the requirements of such specific legislation.[9]

Apart from the impact and effect of the various statutory registration formats it must also be borne in mind that the general law relating to the mortgage of chattels, both legal and equitable, still applies to the extent that it has not been statutorily varied.[10]

The Corporations Law Requirements

Before examining the bills of sale legislation and the effect which the formality requirements thereof may have on the validity of company charges, a brief survey of *Corporations Law* registration requirements is necessary. The registration requirements of the *Corporations Law* are found in Division 2 of Part 3.5.

Section 262(1) enumerates the charges (whether legal or equitable) on the

5 The general ambit of such state legislation is set out in detail in the schedules to Application Order No 2 of 1990. For the general provisions concerning application orders see Part 1.3 of the *Corporations Law*.

6 With the exception of that of the territories.

7 See discussion infra p 8.

8 Eg in Queensland *Liens on Crops of Sugar Cane Act* 1931-1975: South Australia *Liens on Fruits Act* 1923-1975.

9 Eg *Motor Vehicle Securities Act* 1986 (Old.) - s 11A was inserted in the *Bills of Sale and Other Instruments Act* 1955 (as amended) whereby Part 2 relating to registrations to the extent that the instrument relates to a motor vehicle: see also s 5A(1) of the Tasmanian Act which states 'a bill of sale relating; or partialy relating. to a motor vehicle or trailer registered under this act is void to the extent to which it relates to the motor vehicle or trailer unless the person making or giving that bill of sale is registered as the holder of a security interest in respect of that vehicle or trailer under the *Motor Vehicles Securities Act* 1984'. In other states this type of legislation is called *Chattel Securities Registration Act* or *Registration of Chattel Securities Act*. In South Australia see *Goods Securities Act* 1986.

10 Eg *Corporations Law* s 262(1) As did its precursor *Companies Code* s 200 does not distinguish between a legal or equitable charge: see also *Corporations Law* s 280 et seq whereby priority is established according to the time of registration rather than the nature of the charge.

property of a company which require the giving of notice in relation to and which are required to be registered. The charges are as follows:

(a) A floating charge on the whole or a part of the property, business or undertaking of the company;
(b) A charge on uncalled share capital or uncalled share premiums;
(c) A charge on a call, whether in respect of share capital or share premiums, made but not paid;
(d) A charge on a personal chattel, including a personal chattel that is unascertained or is to be acquired in the future, but not including a ship registered in an official register kept under an Australian law relating to title to ships;[11]
(e) A charge on goodwill, on a patent or licence under a patent, on a trademark or service mark or a licence to use a trademark or service mark, on a copyright or a licence under a copyright or on a registered design or a licence to use a registered design;
(f) A charge on a book debt;[12]
(g) A charge on a marketable security, not being:
    (i) a charge created in whole or in part by the deposit of a document of title to the marketable security; or
    (ii) a mortgage under which the marketable security is registered in the name of a chargee or a person nominated by the chargee;
(h) A lien or charge on a crop, a lien or charge on wool or a stock mortgage;[13]
(i) A charge on a negotiable instrument other than a marketable security.

These provisions do not require registration or the giving of notice in relation to other charges.

These provisions do not apply to a charge, or a lien over property, arising by operation of law,[14] a pledge of a personal chattel or of a marketable security,[15] a charge created in relation to a negotiable instrument or a

11 See also s 262(3). This is a reference to a charge of any article capable of complete transfer by delivery whether at the time of the creation of the charge or at some later time and includes a reference to a charge on a fixture or a growing crop that is charged separately from the land to which it is annexed or on which it is growing but does not include a reference to a charge on a document evidencing title to land a chattel interest in land; a marketable security; a document evidencing a thing in action or stock or produce on a farm or land that by virtue of a covenant or agreement ought not to be removed from the farm or land whether stock or produce is at the time of the creation of the charge.

12 See also s 262(4) - this is a reference to a charge on a debt due or to become due to the company at some future time on account of or in connection with a profession, trade or business carried on by the company, whether entered in a book or not and includes a reference to a charge on a future debt of the same nature although not incurred or owing at the time of the creation of the charge, but does not include a reference to a charge on a marketable security, on a negotiable instrument or on a debt owing in respect of a mortgage, charge or lease of land.

13 See also s 262(s) - this also includes a reference to a security that is registrable under a prescribed law or a state or territory. See application orders No 2 of 1990 - Schedule 1.

14 Section 262(2)(a).

15 Section 262(2)(b).

document of title to goods, being a charge by way of a pledge, deposit, letter of hypothecation or trust receipt,[16] a transfer of goods in the ordinary course of the practice of any profession or the carrying on or any trade or business, or a dealing, in the ordinary course of the practice of any profession or the carrying on of any trade or business,[17] in respect of goods outside Australia.

Registration is required notwithstanding the instrument of charge also charges other property not caught by s 262(1).[18]

The registration requirements do not apply in relation to a charge on land[19] or to a charge on fixtures given by a charge on the land to which they are affixed[20] nor do they apply to a company in its capacity as legal personal representative of a deceased person or as trustee of the estate of a deceased person.[21]

Notwithstanding the requirements of notice and registration, a charge is not invalidated by failure to do so.[22] Nor, it is submitted, does the fact of registration and notice cure an inherent invalidity in the document creating the charge in circumstances where it breaches the validity requirements of specific state legislation[23] even though registration pursuant to that legislation is dispensed with under the *Corporations Law*.[24]

Prior to the amendment to section 8(5)(c)[25] the relief under section 273(1)(a) from double registration requirements was ineffective. Prior to this amendment the reference to 'a specific law of this jurisdiction' in section 275(1)(a) was not automatically applied to 'the corresponding provision of the Corporations Law of another jurisdiction'[26] as section 8(5)(c) excluded the operation of section 8(3) from applicability to Part 3.5.[27] The amending legislation specifically excepts section 273 from the excluding provisions of section 8(5)(c). Before this situation was remedied a company registering a charge over property situated in another State would also have to register under the Bills of Sale Act of the State in which the property was situated. The amendment is retrospective to the commencement of the *Corporations Law* on 1 January, 1991.

Another problem (which still exists) concerns the registration of joint charges.

---

16 Section 262(2)(c).
17 Section 262(2)(d).
18 Section 262(7).
19 Section 262(8).
20 Section 262(9).
21 Section 262(10).
22 Section 262(11).
23 Eg *Bills of Sale and Other Instruments Act* 1955-1986 (Qld) Part III.
24 Section 273(1)(a) and see Application Order No 2 of 1990
25 Ibid note 2.
26 Section 83.
27 Which contains s 273(1).

Section 273(5) excludes 'a charge given by a company jointly with another person who is not, or other persons, at least one of whom is not, a company'.

A company means 'a company incorporated, or taken to be incorporated, under the Corporations Law of this jurisdiction and...'[28] and for the purpose of Part 3.5, unless the contrary intention appears, is defined to include 'a registered body other than a registrable local body.' A registered body and a registrable or local body are both defined elsewhere[29] but even the expanded definition of company for the purposes of Part 3.5 does not include a company incorporated in another jurisdiction. Accordingly, a charge given jointly by two companies incorporated in different jurisdictions will be required to be registered under a specified law of both of those jurisdictions. This situation will continue until rectified by legislation.

This paper will now focus upon registration and validity problems caused by the effects of other legislation which impacts upon company charges.

The Bills of Sale Legislation

'A bill of sale is an assignment of chattels, whereby the property in such chattels is intended to pass, but without possession of them being given'.[30] It has been noted that Bills of Sale Acts strike, not transactions, but at documents.[31] The word bill is one of the most general that can be used wherever it is not confined by other terms.[32] In every kind of business the word bill occurs as representing any writing.[33]

It is very difficult to generalise as to the effect of the bills of sale or instrument legislation except that they operate to vitiate a bill of sale, or in the case of Queensland, an instrument, whereby a power to seize chattels is given to a third party not in possession, unless registration requirements are complied with.

As an example of this vitiating effect, the Tasmanian Act[34] provides, so far as is relevant, that :

> ...every bill of sale of personal chattels..., and whereby the grantee or holder thereof shall have power either with or without notice...., to seize or take possession of the personal chattels comprised in...such bill of sale, shall be registered...; otherwise such bill of sale shall be null and void to all intents and

28 Section 9.
29 Section 9.
30 Strouds *Judicial Dictionary of Words and Phrases* (5th ed) Sweet & Maxwell Limited London 1986 quoting Esher M R *Johnson v Diprose* [1893]1 A B 512.
31 Ibid p 279.
32 Ibid p 276.
33 Ibid.
34 *Bills of Sale Act* 1900-1987 s 5.

> purposes whatsoever, so far as respects the personal chattels comprised in such bill of sale.

Thus, in Tasmania, in the event of non-registration (or ineffective registration) the security is made absolutely void even between the parties.

In South Australia,[35] section 28 provides:

> Every bill of sale in which there shall be a material omission or mis-statement of any of the particulars required by the ninth section hereof, or which shall not be registered..., shall be void, as against
>
> (a) the official receiver or the trustee in insolvency of the grantor;
>
> (b) the trustee of the estate of such grantor under any statutory assignment for the benefit of his creditors;
>
> so far as regards the property in or right to possession of any personal chattels comprised in such bill of sale...and shall be void as against -
>
> (c) all sheriffs officers and other persons seizing any personal chattels comprised in such bill of sale in the execution of the process of any court against the goods of the grantor, and all judgement creditors on behalf of whom such process is executed;

There are further provisions in that statute which provide that until the expiration of the period allowed for registration, every bill of sale shall be deemed to have been registered within the period. Where the material omission or mis-statement of particulars relates to part only of the chattels, the bill of sale is avoided only to the extent of those chattels.

New South Wales and Western Australia have similar provisions which make the effect of non-compliance with registration simply to render the bill of sale void as against certain named third persons. The bill of sale is not rendered void as between the parties nor, presumably, against third parties not specifically named. The Queensland Act[36] adopts a different approach and provides that an unregistered instrument shall have no effect as to the chattels comprised therein or subject thereto, against any person other than the grantor and the grantee.[37]

Does the Bills of Sale Legislation Apply to Companies?

It has been argued before the Full Court of Queensland that the Bills of Sale Acts do not apply to companies.[38] The point had been raised, but not

35 *Bills of Sale Act* 1886-1990.
36 *Bills of Sale and Other Instruments Act* 1955-1986.
37 Ibid s 7(1).
38 *Geo Myers & Company Limited* [1931] St R Qd 83 at 112.

disposed of, in an earlier case.[39] The court was obviously not impressed by the argument and came to the conclusion that 'our Bills of Sale Acts[40] do apply to the instruments of companies other than instruments of a class ordinarily known as debentures'.[41] The Bills of Sales Acts themselves assume this state of affairs with provisions especially applicable to companies.[42]

Further reinforcement of the argument that Bills of Sale Acts apply to companies is found in provisions in specialist company legislation making dual registration unnecessary.[43]

Other Specialist State Legislation

When taking security over property (including property of a company), the nature of the property should be carefully considered as specific legislation applies in many cases according to the nature of the property itself.[44]

Motor Vehicles

Some mention has already been made of motor vehicles.[45] Various Motor Vehicles Securities Acts are not mentioned in the application orders specifying legislation of the jurisdiction which are relieved from dual registration requirements.[46] The requirements of these acts clearly apply to motor vehicles owned by companies.[47] On the basis that there is no legislative relief, registration of security given over a company owned motor vehicle must be effected, it seems, under the Corporations Law and under Motor Vehicles Securities Acts.

Taking the Queensland act as an example, a curious interplay between the separate legislative requirements is put into place in the event of failure to register under one or the other. If[48] the security interest is required to be registered pursuant to the *Corporations Law*,[49] the priority of instruments established by section 12(1) does not apply. It should be particularly noted that the trigger for this mechanism is that the security interest is a registrable charge, not a registered charge. It if the charge is not registered pursuant to

39 *Bergl v The Mount Chalmers Copper Mines Ltd and Tompson* [1902] St R Qd 35.
40 The 1891 Act.
41 Ibid note 38.
42 See Queensland Act 19(1)(i) which outlines special provisions to record the place of business of a corporation which is either grantor or grantee. See almost identical wording in s 9(1)(a) *Bills of Sale Act* 1886-1990 (SA) - these are but examples.
43 See s 211(1) Companies Code and s 273 of the *Corporations Law*.
44 Supra p 2.
45 Ibid note 9.
46 See *Corporations Law* s 273 and Application Order No 2 of 1990.
47 See Queensland Acts 27 and see *Australian Central Credit Union v Commonwealth Bank of Australia* (1990) 8 ACLC 775.
48 *Motor Vehicle Securities Act 1986* s 12(2).
49 Section 262(1).

the *Corporations Law* it not only bears the consequences of failure under that law but also those whereby any priority under section 12(1) of the *Motor Vehicles Securities Act* 1986 (hereinafter in this part called 'the Act') are also lost.

The principal advantage of registration under the Act is that it amounts to notice both for the purposes of priority in section 12(1)[50] and for the purpose of section 26 whereby such notice defeats the claim of a purchaser for value in good faith. The latter is not obtainable by registration under the *Corporations Law*.

If the security interest over a company owned motor vehicle is registered under the Act but not under the *Corporations Law*, does such registration amount to notice for the purpose of section 280(2)(b) of the latter whereby a registered charge on the property of a company is postponed to an unregistered charge (ie for the purpose of the *Corporations Law*) created before the creation of the registered charge, where the chargee in relation to the unregistered charge proves that the chargee in relation to the registered charge had notice of the unregistered charge at the time when the registered charge was created?

An unregistered charge is defined[51] to mean 'a charge that is not registered under Division 2 but does not include a charge that is not a registrable charge'. In turn, a registrable charge is defined[52] to mean 'a charge in relation to which, by virtue of section 262, the provisions of this part mentioned in subsection 262(1) apply'[53]

A charge over a company owned motor vehicle clearly qualifies for the purpose of section 280(2)(b). A security interest registered under the Act over a company owned motor vehicle could postpone a registered charge on the same property (or a floating charge over the property of the company) but this priority would be obtained under the *Corporations Law* as it is lost under section 12(1) of the Act.

The question of notice was recently considered by a single judge of the Supreme Court of South Australia in *Australian Credit Union v Commonwealth Bank of Australia*.[54] The case involved a security over a company owned motor vehicle registered under the *Goods Securities Act* 1986 by the Australian Central Credit Union and a subsequent charge over all of the property of the company registered by the Commonwealth Bank under the Companies Code.

50 Which provisions, in turn, do not apply if the motor vehicle is the property of a company - see s 12(2).
51 Section 278(1).
52 Section 261(1).
53 Supra chapter 3.
54 Ibid note 47.

Despite the fact that much of the Court's reasoning revolved around the principle of statutory interpretation involving an earlier general Act (the Code) and a later special Act (the *Goods Securities Act* 1986), the decision is authority for the proposition that registration under such an act does amount to notice for the purpose of section 280(2)(b) of the *Corporations Law*.[55]

The decision makes it clear[56] that the reasoning in relation to the interpretation of an earlier general Act and a later special Act dealt with the 'obvious conflict in their respective requirements as to registration of security interests' (emphasis added).

The court clearly found[57] that

> '...registration, ..., gave universal notice of its existence to all other creditor providers who subsequently took security interests which included or purported to include the same vehicle.'

The courts robust finding in this case that only registration under the *Goods Securities Act*, and not dual registration, was required must be confined to its facts for the following reasons.

Firstly, as and from 1 January, 1991 the Corporations Law applies and the same rule of statutory interpretation[58] would not now be applicable even in South Australia and, secondly, motor vehicles securities legislation throughout Australia is not, by any means, uniform. The detailed provisions of each State legislation must be considered carefully (depending upon where the motor vehicle is situated).[59] This relationship between the motor vehicles securities legislation and the general bills of sale legislation in the particular state should also be carefully checked.

The *Goods Securities Act* 1986-1987 which was the subject of consideration in *Australian Credit Union v Commonwealth Bank of Australia*[60] adopts an entirely different scheme of priorities from that adopted by the Queensland legislation. There is, for example[61] no reference at all to companies legislation. The court note[62] that the Goods Securities Act had just repealed the necessity for dual registration under itself and bills of

55 The case actually dealt with the pre-cursor to this section in cl 1 (1)(b) of the Fifth Schedule to the Code.

56 At 777.

57 At 778.

58 Ie that any earlier general Act will yield to a later special provision dealing with the same subject matter.

59 See *Douglas Financial Consultants Pty Ltd v Price* Qld Law Reporter November 2.1991 at 990 which found, in relation to the *Queensland Motor Vehicles Securities Act* 1986, inter alia, that by the rules of private international law the proprietary effect of a transfer of a tangible moveable was governed by the law of a country where it was situated at the time of the transfer.

60 Ibid note 47.

61 Section 12.

62 Page 779.

sale legislation, and asked:

> 'Why should the parliament abolish that kind of dual registration yet impliedly require dual registration at the companies register?'

It is submitted that those comments could not have general application although the case is good authority as to the question of notice.

Motor Vehicles Securities Legislation and Bills of Sale Acts

Motor vehicle securities registration encroaches upon the scope of bills of sale legislation. A pattern has emerged in each state whereby provisions of the former amend the provisions of the latter, under which bills of sale over motor vehicles were formerly registered. Section 4 of the *Motor Vehicles Securities Act* 1986 (Qld) amends the *Bills of Sale and Other Instruments Act* 1955-1986 by inserting section 11A which states

> 'Upon the commencement of section 4 of the Motor Vehicles Securities Act 1986, this part shall not apply to any instrument (whether executed before or after that commencement) to the extent that the instrument relates to a motor vehicle within the meaning of that Act and to that extent any such instrument shall cease to be registered.' (emphasis added)

Section 11 A is found in Part ll - Registrations of the *Bills of Sale Act.* Whilst section 11 A may have the effect of excluding Part ll, it is quite arguable that it does not exclude the other parts of the Queensland Act including the interpretation provisions of Part I and the validity requirements of Part lll. Possible circuitous interpretation problems could arise.

Does Registration Cure Bill of Sale Invalidity?

In Re *Bauer Securities Pty Ltd and Anor*[63] (referred to afterwards as *Bauer Securities*) the matter before McPherson J concerned a deed registered under division 9 of the Companies (Queensland) Code but not under the provisions of the *Bills of Sale and Other Instruments Act* 1955-1986 (hereafter called the Act). The bill of sale concerned did not meet the requirement of the Act in section 19(1)(3), one of the validity requirements. McPherson J accepted that failure to comply with the requirements of section 19(1)(3) invalidated a bill of sale notwithstanding its registration under this Act.[64] It was contended before him that the provisions of section 211 of the Code[65] operated to cure the invalidity arising by non-compliance with the provisions of section 19(1)(3). McPherson J concluded:[66]

63 Ibid note 1.

64 *Ex Parte Esanda Limited* [1977] Qd R 162. His Honour distinguished *Ex Parte Citicorp Australia Limited* [1983] 1 Qd R 509 as did Moynihan J in *Olsen v General Credits Limited* [1985] 2 Qd R 506 and see s 7(3).

65 See *Corporations Law* s 273.

66 At p 233.

> 'Registration of the deed under division 9 does not add to or improve its validity or affect but gives it the same efficacy as an assignment, and no more than, it would have derived from registration under the Act.'

It has already been demonstrated that registration under the Act does not cure invalidity.[67]

After considering in detail the effect of section 211(1)(b)[68] in relation to the exclusion of the application of the priority provisions of the Act, he concluded[69] that the security would be valid and effectual only inter partes and not against third parties.

After reaching this conclusion the court went on to consider whether the validity provisions in section 19(1)(3) applied to the deed at all and concluded, in the event for other reasons, that they did not.

His Honour noted that the requirements of section 19 apply to an instrument,[70] the definition of which includes a bill of sale,[71] but since the definition of bill of sale[72] does not encompass 'debentures...issued by any...corporation...', he was able to find that the provisions of section 19, and thus the effect of the Act, did not apply.

The eventual finding upon the debenture conclusion does not, however, militate against or exclude his earlier conclusion that registration under division 9 of the Code or, it is submitted, under Part 3.5 of the *Corporations Law*, does not cure an otherwise invalid security. It may therefore be concluded that unless a document is excluded from the definition of 'bill of sale, then',[73] a charge that is registered pursuant to Part 3.5 may, nevertheless, still be invalid if it does not comply with the validity requirements of the Act.

The Debenture Finding

What *Bauer Securities* has made abundantly clear is that whilst the Australian Register of Company Charges has simplified registration requirements under the *Corporations Law*, the perfection of a security over company property may still necessitate study of bills of sale legislation in the jurisdiction in which company property is situated to check validity requirements, and, whether a debenture finding is available.

It has been seen that the Queensland legislation contains the debenture

67 Ibid note 64.
68 *Corporations Law* s 273(1)(b).
69 At p 234.
70 Section 19(1).
71 Section 6.
72 Section 6.
73 Such as, for example, an assignment for the benefit of the creditors of the grantor - s 61A.

exclusion.[74] After *Bauer Securities* it is clear that a document capable of being found to be a debenture is excluded from the operation of the Queensland Act. In Queensland, whilst debentures, as property, are excluded from being the subject of a bill of sale, a bill of sale itself, when given over property of a company which is included within the definition of personal chattels, may, itself, also amount to a debenture.

Whilst relief from registration under the bills of sale Acts is given by the *Corporations Law*[75] it is clear that a document so registered may still be assailable under the formality requirements of the former. A charge created by a document which is capable of being either a bill of sale or a debenture which is required to be lodged under Division 2 of Part 3.5 of the Corporations Law and which is duly registered thereunder, is 'as valid and effectual...as if it had been duly registered under that specified law (the bills of sale legislation)'.[76]

As *Bauer Securities* has demonstrated, this provision[77] does not cure invalidity arising from failure to comply with the requirements of bills of sale legislation. The transaction is given, by *Corporations Law* registration, the same effect as registration under the bills of sale Act.

With this in mind it is important to survey the various states as to validity requirements and whether the debenture exclusion is available as it is in Queensland.

South Australia

The provisions of section 28 of the South Australian *Bills of Sale Act* 1886-1990 have already been considered[78] and it is clear that 'a material omission of mis-statement of any of the particulars required by the ninth section' renders the charge void as against particular third parties.

---

74 Queensland excludes debentures from the definition of bill of sale in s 6(1). The same section defines instruments as 'bills of sale, stock mortgages, liens upon crops, and liens upon wool' and, whilst not overtly requiring an instrument to be registered, it visits the consequences of failure to register (ie invalidity and lack of notice) upon unregistered instruments - see the provisions of ss 7 and 8. The Act also excludes debentures from the definition of chattels.

Whilst South Australia excludes debentures from the definition of personal chattels it does not exclude same from the definition of bill of sale. However s 9 provides that 'every bill of sale must contain or state...a description of the personal chattels comprised therein'. Not being in the class of things included in the definition of personal chattels a debenture may not be comprised within a bill of sale. The possibility that a bill of sale itself may be a debenture is considered elsewhere.

Tasmania has adopted a similar mechanism - see s 4(1).

75 Section 273(1).

76 Section 273(2).

77 In its identical form in the Companies (Queensland) Code.

78 At p 3.

The particulars required by that section include such mundane details as the names of the grantor and grantee, their residences or places of business and occupations, and, in the case of a corporation, the place or one of the places whereby business of the corporation is usually carried on, the consideration and what portion (if any) it an antecedent debt or contemporaneous advance, a description of the personal chattels comprises therein (including the brands or some other distinctive marks of horses or cattle), where such personal chattels are situated, the sums (if any) thereby secured or in the case of a running account or proposed further advances, the maximum amount of the credit balance or advances to be covered by the bill of sale.

Debentures are excluded from the definition of personal chattels[79] and are thereby excluded from being the subject of a bill of sale. There is no exclusion (as is the case in Queensland) of a debenture from the definition of bill of sale.[80]

On the basis of *Bauer Securities*, in the absence of the debenture exclusion, it is likely that a company charge duly registered under the *Corporations Law* may, nonetheless, be invalid and ineffectual as against third parties if it fails to comply with the formal requirements of the South Australian *Bills of Sale Act* 1900-1987.

Western Australia

Unlike corresponding legislation in other states, the *Bills of Sale Act* 1899 contains extensive provisions for the registration of a debenture as well as of a bill of sale.

The act was originally framed so as to 'apply to every bill of sale and debenture executed on or after 1 March, 1900, whereby power is given or conferred..., to seize or take possession of any chattels comprised in or made subject to such bill of sale or debenture'.[81]

After the passage of the 1961 *Companies Act* (and consistently thereafter following the passage of legislation establishing each new companies scheme) the act was amended so as not to be applicable (in any respect) to a charge required to be registered under companies legislation. Prior to these amendments this act had, arguably, the best provisions of all the states to accommodate security over company chattels.

Part XIII of the act contains the specific registration requirements relating to debentures and section 52(2) substitutes the word debenture for the expression bill of sale in the general registration provisions of the act.

79 Section 2(1).
80 Ibid.
81 Section 3(1).

It must be noted, however, that the definition in the act of debenture means

> 'a document containing a floating charge over any of the chattels.....of a company or other corporate body'.

Presumably, prior to the Uniform *Companies Act* of 1961, a fixed charge was simply registered as a bill of sale. The Seventh Schedule to the Act even went so far as to provide for the separate format for the registration of a bill of sale by way of security when the grantor was an incorporated company but, in those circumstances, a debenture was specifically excluded from the definition of a bill of sale by way of security.

The definition of bill of sale in the interpretation provisions of section 5 did not exclude debentures per se, only 'debentures issued by any company or other corporate body, and registered under the provisions hereinafter contained;' (emphasis added). Since the definition of debenture relates to a document containing a floating charge, it can reasonably presumed that documents containing fixed charges were registered as ordinary bills of sale.

Western Australia has excluded any provision of the 1899 act from applicability to companies.[82] This provision also excludes the deemed covenants in the eleventh and twelfth schedules so it would be important to ensure that the documentation containing the company charge is adequate in the circumstances.

Registration of a company charge under the *Corporations Law* in Western Australia would not be susceptible to invalidity in the same way as it is in South Australia.

New South Wales

In New South Wales a debenture is not excluded from the definition of bill of sale[83] nor, by that name, excluded from the definition of personal chattels (which may be the subject of bills of sale).

Because of the way the definition of personal chattels is framed,[84] it is unclear whether debentures are excluded. After the inclusive portion of the definition comes the following:

---

82 The legislation applicable to the *Corporations Law* was not available at the time of writing this paper. Prior to the amendments to paragraph 8(5)(c) effected by the *Corporations Legislation Amendment Act* 1991 (assented to 27 June 1991) the excluding provisions may have encountered difficulties with the definition of company as, prior to the latter amendment, the definition in s 9 of the *Corporations Law* of Western Australia would only have applied to companies incorporated in Western Australia. Companies incorporated elsewhere may not have been excluded from the operation of the 1899 Act.

83 *Bills of Sale Act* 1898 s 3.

84 Ibid.

'...; and shall not include chattel interests in real estate, nor shares or interest in the stock, funds, or securities of any government, or in the capital or property of any incorporated joint stock company,...'.

Whilst it is not entirely clear, it appears that this exclusion relates to shares or interests in 'the capital or property or any incorporated or joint stock company' and it will be a matter or interpretation as to whether this includes a debenture such as is found in other bills of sale legislation.

Whatever may be the meaning of the exclusion from the definition of personal chattels it is highly likely, given the current definition of bill of sale, that a company charge duly registered under the Corporations Law may, as in the case of South Australia, be invalid and ineffectual as against third parties if it fails to comply with the formal requirements of the Act of 1898.

Tasmania

The Tasmanian legislature has adopted a similar approach to that of Western Australia by providing that the Act does not apply (presently or in the past), to

'(a) a debenture issued by any incorporated company (wherever incorporated) and secured upon the capital, stock, goods, chattels, effects, rights, claims, and property of such company; or

(b) trust deed, mortgage deed, or other deed or instrument for securing any such debentures, or to any document which, but for this section, would be a bill of sale If it were not also a charge to which div 9 of Part IV of the Companies (Tasmanian) Code applies.'[85]

On the *Bauer Securities* understanding of the debenture exclusion this provision provides haven for a company charge from an attack on its validity by bills of sale provisions. The use of the universal (wherever incorporated) also circumvents any difficulties with the interpretation of the term company in the *Corporations Law*.

Northern Territory

The *Instruments Act* of the Northern Territory does not exclude a debenture from the definition of a bill of sale[86] nor are they, as such, excluded from the definition of personal chattels.[87] The wording of the exclusion from the definition is similar to New South Wales. Unless a debenture is included as an '...interest...in the capital or property of any incorporated or joint stock

85 The words in bold were inserted by the *Companies and Securities (Miscellaneous Amendments) Act* No 9 of 1982. The author has been unable to obtain amendments (if any) which may have been made subsequent to the *Corporations Law*.

86 Section 81.

87 Ibid.

company,...' they are not excluded from the definition of personal chattels.

Thus the debenture exclusion is not available in the Northern Territory.

Debentures

In order to have a valid and unassailable company charge the draftsman must either create a debenture (in those jurisdictions where the debenture exception is available) or comply with the requirements of bills of sale legislation as to form. It is no simple matter to be sure that one has created a debenture. The characteristic most commonly associated with any attempt to define the term debenture is the particular court admission of its inability to adequately do so.

For our purposes, foremost amongst these is the High Court of Australia. The majority in *Handevel Pty Ltd v Comptroller of Stamps (Vic)*[88] (hereinafter *Handevel*) prefaced consideration of the term with the words 'any discussion of the nature of a debenture must begin with the statement that English judges of great authority have confessed that the term defies accurate description'. The High Court, in that case, went on to summarise the two generally agreed characteristics of a debenture as

> '...first, that it is issued by a company and, secondly, that it acknowledges or creates a debt.'

There is no need, for these purposes, to repeat the citations of the many leading cases referred to by the High Court in that judgment. Handevel has also confirmed that security on the assets of the company is not an essential characteristic of a debenture. What is also clear is that there has been little judicial progress in the attempt at definition since the time of Chitty J, over 100 years ago. All modern judgements which concern the subject defer to Chitty J and, in particular, to his judgements in *Edmonds v Blaina Furnaces Company* [89] and *Levy v Abercorris Slate and Slab Company*.[90]

McPherson J in *Bauer Securities* notes:

> '...what I have quoted from the judgments of Chitty J was spoken without reference to the particular terms of the English legislation but proceeded from the extensive experience of the subject which that learned judge possessed.'

Closer to Chitty's time was the comment of Warrington LJ in *Lemon v Austin Friars Investment Trust Limited* [91] to the effect[92] where he noted that it has been said 'by a wiser man than myself' that it was impossible to give an

88 (1985) 157 CLR 177.
89 (1887) 26 ChD 215.
90 (1887) 37 ChD 260.
91 [1926] Ch 1.
92 At p 17.

exhaustive definition of the word debenture and went on to remark that he did not propose to incur the reproach of venturing where wise men fear to tread.[93]

Perhaps the most foundational feature of a debenture is the notion of indebtedness. An English court has said 'you may have a debenture which is nothing more than acknowledgement of indebtedness'.[94] It is perhaps at this level that some departure from the scheme of bills of sale legislation may be observed. That scheme is not primarily concerned with mere acknowledgement of indebtedness but concerns itself with rights to the grantee or holder of a bill of sale of personal chattels involving the power to seize or take possession of such personal chattels and it is this factor which triggers the requirement of registration.[95] This, of course, must be seen against the original rationale for registration requirements, that being, to eliminate the social ill whereby a party offers a chattel for security outside of the possessory security environment by retaining possession. Debentures escaped the original British Bills of Sale Registration requirement on the basis that a record of debenture holders was held by the company itself.[96]

Debentures may or may not be secured.[97]

Authority for the proposition that a simple debenture may be issued to one man is also traced to Chitty.[98]

From Chitty J again we have the requirement that a debenture must be issued. In *Levy v Abercorris Slate and Slab Company*[99] he defined issue 'as meaning 'the delivery over by the company to the person who has the charge'.

All of these elements were helpfully summarised by McPherson J as follows:-[100]

> 'In the end, I am disposed to the view that the deed of 6 May, 1986 is a debenture according to the ordinary acceptation of that term as explained by Chitty J in the extracts from the two cases referred to:-
>
> (1) It is an acknowledgement of indebtedness delivered by a company;
>
> (2) It is secured, although admittedly by an assignment subject to redemption, or 'old system' mortgage, of a number of chattels;

93 As quoted in *Australian Company Law* at p 56,101 - Butterworths.
94 *British India Steam Navigation Co v Inland Revenue Commissioners* (1881) 7 QBD 165 at 173.
95 See for example the discussion of the Tasmanian Act at p3 supra.
96 *Brocklehurst v Railway Printing and Publishing Company* [1884] WN 70.
97 Chitty J, *Edmonds v Blaina Furnaces Company* note 89 and see *Re Shipman Box Board Limited* [1942] OR 121.
98 Edmonds v Blaina Furnaces Company, ibid at 221.
99 Ibid note 90 at p 264.
100 *Bauer Securities* at 236.

(3) It contains covenants to pay or repay loans made under the loan agreement dated 25 June, 1987;

(4) It is more than a mere promissory note;

(5) It was 'issued' in the sense of being delivered as a deed on 6 May, 1986;

(6) It is, I think, fairly capable of being described as a debenture even though it was delivered to a single person, meaning the respondent.

I therefore hold that it is a debenture.' (numbering added)

Having found that the document was a debenture, His Honour's consideration of whether the document was then a debenture within the meaning of the exemption in the Queensland *Bill of Sale Act*[101] considered the use of the plural 'debentures' and admitted that the collocation with 'interest coupons...' suggestive of something more like an ordinary debenture than of a mortgage of chattels.[102] He observed the Queensland draftsman's tendency to use the plural thereby distinguishing *Automobile Association (Canterbury) Inc v Australasian Secured Deposits Limited (Inliq) & Anor*[103] and concluded 'it is not an instance like that, in which the word issued cannot fairly be read to mean delivered'.[104]

The issued concept also arises from Chitty[105] who indicated that issued is not 'a technical term, it is a mercantile term well understood; issue here means the delivery over by the company to the person who has the charge;'.

There is no doubt that the class of documents which come within the definition of debenture is extraordinarily wide. It has been applied to income stock certificates[106] and deposit receipts.[107] In *Re Shipman Boxboards Ltd*[108] the term was defined to include 'merely a speciality debt of a corporation'.

There is no reason why a promissory note could not shoulder the burden of the definition. A promissory note, having a face value of not less than $50,000.00, is specifically excluded from the definition of debenture for the purpose of the *Corporations Law*.[109] The scope is unlimited. In *Spever Bros v IRC*.[110] it was accepted that Mexican treasury notes could be both

101 Section 6(1)(g).
102 Ibid at 236.
103 [1973] 1 N Z L R at 424.
104 Ibid.
105 *Levy v Abercorris Slate & Slab Co* at 264.
106 *Lemon v Austin Friars Investment Trust Limited*, ibid note 91.
107 *United Dominions Trust v Kirkwood* [1966] 1 All E R 968 at 988C-in that case the deposit receipts were described as debentures rather than as accounts as a test of whether United Dominions Trust Limited was carrying on the business of banking.
108 [1942] O R 121.
109 Section 9.
110 [1908] A C 92.

promissory notes and marketable securities for stamp duty purposes.

According to *Palmers Company Law*[111] promissory notes and other simple bills of exchange would not be described as debentures. There seems to be no reason, despite the perversity of such a result, why a bill of exchange also could not constitute a debenture.

Is there no end to what can be described as a debenture? In 1881 Grove J. pointed out that the term 'has somehow crept into the English language'.[112] One hundred and ten years later not much progress has been made.

Perhaps the legislature ought to forsake its usage altogether or adopt the term public debenture to mean what general commercial usage knows as a 'longer term borrowing usually under seal, often secured by fixed or floating charges, usually supported by a trust deed (where a large number of persons holds the debentures) and often expressed to be one of a series'[113] and used the term private debenture to mean the type of document considered in Bauer Securities (and old system mortgage by assignment subject to redemption) issued or delivered to an individual.

Some distinctions could be made between the public fundraising environment of the former and the ordinary course of business or mere credit environment of the latter especially now that distinction has been put in place in the Corporations Law definition of the term.[114]

There are clear opportunities for distinction between the fundraising aspects and the provision of credit which are now both encompassed within the terminology.

The law, in this regard, has not kept pace with the changing financial climate.

Conclusion

The lender requiring security over the property of a company must, depending upon the nature of the property secured, and its location, look beyond the ambit of the Corporations Law in order to perfect its security. If joint property is involved it will have to take into consideration the anomalies which still exist within the Corporations Law itself.

If the property secured is a motor vehicle it may well have to register in two different places.

111 Vol 1 para 43-02 (23rd ed).
112 *British India Steam Navigation Co v I R C* note 94 at p 168.
113 Per Alum Bati - What is a Debenture? v 1986 British Tax Review p 255 at 259.
114 Section 9.

Depending upon where the property is located it must look to the provisions of state registration legislation[115] and to the nature of the security documentation itself as to whether it has managed to create a debenture. In the light of the difficulty which learned jurists have had with the term and the need, in a number of jurisdictions, of certainty that a debenture has been created, it is of vital importance that the law relating to this aspect of company charges be reformed either within the ambit of the Corporations Law or the wider ambit of securities over personal property.

115 Other than the Corporations Law.