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Uniform Personal Property Security Legislation for Australia - Introduction to the Workshop on Personal Property Security Law Reform

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Abstract
This is a Report, as an Introduction to this Special Issue of the Bond Law Review, on the history of the campaign in Australia to introduce sensible reforms of personal property security law, culminating in a Workshop held at Bond University on 25 – 27 April 2002. The Proceedings of the Workshop are included in this Special Issue in some detail, but it is also necessary to provide an account and explanation to the background to those Proceedings.

Keywords
personal property security law, reform, Workshop on Personal Property Security Law Reform, Bond University, 25 – 27 April 2002

UNIFORM PERSONAL PROPERTY SECURITY LEGISLATION FOR AUSTRALIA

INTRODUCTION TO THE WORKSHOP ON PERSONAL PROPERTY SECURITY LAW REFORM

Bond University 25 – 27 April 2002

By

DAVID E. ALLAN[1]

1. Introduction

This is a Report, as an Introduction to this Special Issue of the Bond Law Review, on the history of the campaign in Australia to introduce sensible reforms of personal property security law, culminating in a Workshop held at Bond University on 25 – 27 April 2002. The Proceedings of the Workshop are included in this Special Issue in some detail, but it is also necessary to provide an account and explanation to the background to those Proceedings.

I am writing this Introduction in my former capacity, but at the time of the Workshop, of Chairman of the Banking and Financial Services Law Association (BFSLA). The BFSLA has, over a period of years and through the Committee that I chaired, sponsored the law reform work, including the preparation of a Draft Bill, and the Workshop itself. Since the Workshop, advancing years have taken a toll on my ability to devote the time and energy that this cause requires. I have

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therefore handed over the chair to Professor Ralph Simmonds, Dean of the Law School at Murdoch Law School and Chairman of the Western Australian Law Reform Commission. I do remain an active member of this Committee.

2. A Little History

The Need for Reform

The law on this topic in all Australian jurisdictions at present is basically English 19th century law , but with some local variations. It is meaningless in Australia (and, dare I suggest in England too) in the 21st century, particularly for harnessing the value of many assets, private or commercial, for capital and commercial purposes. Historically, the formal law recognised only freehold land as an asset capable of securing financial and other obligations, and the political and economic system depended on this. Very slowly through the centuries, by a mixture of ad hoc legislation and rather spurious devices, tangible movables came to perform a similar function in spite of their ability to move between jurisdictions. But the challenge in a credit economy, such as we have today in Australia and in most parts of the world, is to maximize all available assets to secure credit. Today, even security over tangible movables is inadequate. Much wealth is today found

increasingly in intangible assets such as accounts receivable and intellectual property rights. These can certainly not be ignored for the purpose of securing credit. But the forms and devices for securing against personal property will vary considerably between jurisdictions – and for assets that have no fixed situs, this is a serious disadvantage. Even cash money has little purpose today – debits and credits are transferred, nationally or internationally, electronically. Today we live not only in a credit economy but in a digital one. We can not ignore these changes, and our law must respond to them.

This problem is, in today's world, most serious. And the defence and justification by some financers, that they are used to the present system and know how to make it work, is no justification for keeping it as it is when it can be demonstrated how badly it does work. Not only does it suffer from reduced safety factors, but also from increased transaction costs.

The Chronology of Reform

The reforms in this area started in the 1950s in the USA with Article 9 of the Uniform Commercial Code (UCC), replacing the nineteenth century common law structure that Australia still has. The American Law Institute has recently completed the task of revision of Article 9 of

the UCC which deals with personal property security. The strategy of Article 9 in respect of personal property security law is to concentrate on the substance of a transaction rather than its form – a return to the ancient methods of Equity – and to treat all security transactions over personal property in the same way. The UCC also introduced a system of notice filing for publicity rather than registration of documents. The time of filing governs all questions of priority and determines when the transaction is effective. Without adopting Art.9, the concepts and methods have now been implemented in the Canadian provinces and in New Zealand.

In Australia, the reform was initiated by the 1971-72 Report of the Molomby Committee (an ad hoc committee of the Law Council of Australia (LCA). It was considered at a national conference in Melbourne and received only limited support and some non-uniform State legislation resulted. However, LCA Business Law Section (BLS) established a PPS sub-committee of its Banking and Finance Committee. In Victoria and Queensland, there were also State Law Reform Commissions which, in the late 1980s and early 1990s, produced very useful Reports urging reform.

In 1992, the Australian Law Reform Commission (ALRC) published a Report and a Draft Bill. These received little support from relevant industry and legal sectors. In 1995, the federal Attorney-General's Dept published a Discussion Paper to revive the ALRC Report. In response, the first Workshop at Bond University was held, financed

largely by the then Banking Law Association (BLA) and the Australian Finance Conference (AFC).

The Workshop generated substantial support for reform but concluded that there was a need for a completely new Draft Bill to be prepared by a responsible Committee in the light of the Workshop discussions. An enlarged Committee was therefore established by the BLA, consisting of representatives of the major banks and other financial service providers, consumer interests, relevant government departments, infrastructure agencies, and individual lawyers from legal practice and Universities, and from NZ as well as Australia. .

To assist in the production of a new draft Bill by the Committee, the BLA financed a visit to Australia in 1999 by Harry Sigman of the American Law Institute, who had been a draftsman of the Revised UCC Art. 9. This new Bill was considered at the BLA Conference in June 2000. That conference affirmed the need for reform, but referred the draft Bill back to the Committee as being too American in its language and concepts.

The Committee then prepared another new draft Bill which was circulated to all constituent members of the Committee in 2001 and received clear support from all of them. On that basis, it was referred to the federal, State, and Territory Attorneys-General with a recommendation that a second Workshop should be convened to consider the implementation of the legislation and the supporting

infrastructure. This draft Bill was the subject of the Workshop at Bond University on 25-27 April 2002 and of this Special Issue.

It must be stressed that the new Draft Bill, while embodying many of the concepts of UCC Article 9 in the same way as the Canadian and the New Zealand legislation, is in no sense merely a copy of Article 9. We now have an Aussie Bill in Aussie language and with Aussie concepts. We do acknowledge, however, that we have taken into account the reforms in other jurisdictions, particularly in Canada where the problems of different national laws in a federal system are not dissimilar to ours. Compatibility with other systems is one of our principal aims.

The central concept of a "security interest" was adopted by the Provinces of Canada, with some local variations. It is now the law in New Zealand since 1 May 2002. England is working on a draft that will deal with reform in two stages: first, by way of regulation for corporate borrowers; and secondly by statute for all lenders and borrowers. The English provisions are also based on the same model as the Australian draft Bill – an amalgam of Canada and New Zealand. The European Union and the United Nations Commission on International Trade Law (UNCITRAL) are working respectively on a Directive and a Model Law on Security Interests in Personal Property. Laws in relation to specific items of property and specific transactions, such as financial leasing and factoring, have been produced internationally within the last decade.

Personal property security law reform has become a globalised activity, and compatibility of regimes is a primary goal. Our brief, from the bankers and others at the Banking Law Association Conference in 2000 was “Cheaper, Faster, Simpler, Easier, Safer” than anything we have at present, and “Compatible” with the laws of those countries with which we have financial relations and transactions. We think we have now demonstrated that our proposed Bill is cheaper, faster, easier, simpler, and safer than our present systems - but just to recap it, we did it again on Day 1 at the Workshop, as the relevant papers will testify.

So far as “Compatibility” is concerned, we have worked with Law Reform bodies and lawyers in other countries. We have obviously maintained close links with New Zealand; The Canadians have been very helpful; We have worked with Professor Hugh Beale of the English Law Reform Commission, which has recently started on this road to reform in England. Laurie Mayne of the New Zealand Law Society Law Reform Committee on PPSA attended the Workshop, and we particularly welcomed his explanations of the new law in New Zealand.

3. The Aims of the Workshop

The aims of the Workshop should now be clear.

- The Draft Bill which the Committee has prepared is destined for consideration by the Standing Committee of Attorneys-General [SCAG]. It was not proposed therefore that we should at the Workshop engage in lengthy debate on the merits or demerits of various aspects of the Draft Bill, except where they were relevant to the major issues which were discussed. Instead we sought to demonstrate that all affected interests now support this measure.

  For this purpose, we see 'affected interests' as including financers of all sorts (i.e. banks and other financial service providers); borrowers large and small, and whether incorporated or not, and including the small business and private consumer sectors; and the community and the economy at large. The message must be sent to SCAG that not only can all these affected interests live with this reform, but that they regard it as better than anything we have at present and as essential if our commerce and economy are to grow as they should in the 21st Century.

- The second purpose of this Workshop is to consider how our proposed Draft Bill can be implemented as a uniform law throughout Australia, in spite of the constitutional problems which we have seen demonstrated in recent case law.[2] This problem goes beyond the law itself because the reform will require

[2] The Queen v Hughes (2000) 171 ALR 155; Re Wakim; ex parte McNally (1999) 198 CLR 511.

national infrastructure as well as uniform law. The problems here, therefore, are constitutional and political. We were very fortunate in getting support from Dennis Rose Q.C.who wrote a most important Paper, and from a number of distinguished commentators. I certainly hope that, as a result of all this work, this Workshop will be able to make a firm recommendation on a model of uniform legislation to SCAG.

- Provision of national infrastructure may be an even bigger problem. But the need for one national system of electronic notice filing in lieu of the many different forms of registration of documents that we currently have can hardly be denied. The Canadian experience is that the initial capital cost of the new system is soon compensated by the operational savings.

Acknowledgments

I would like to acknowledge the help, assistance, advice and support we have had from so many people and organisations.

Sponsors

The Banking and Financial Services Law Association of Australia and New Zealand, the Australian Finance Conference, the Australian Equipment Lessors' Association, The Institute for Factors and

Discounters for Australia and New Zealand, Baycorp Advantage Ltd, and the Bond University Law School. We have also had support from the Australian Bankers' Association and the Australian Law Reform Commission.

Contributors to the Workshop

The names of participants, whose work we greatly appreciate, is set out in full in the Final Report of the Workshop which is included in this Special Issue.

I have already named the overseas organizations and individuals who have never hesitated to come to our assistance. Within Australia, there have been so many willing helpers that it may be invidious to name any. However -

> Rowan Russell of Mallesons Stephen Jaques was the first Chair of the Committee, and I am very much aware that without all the work he did we would not now be knocking on the door of SCAG;
>
> Tony Duggan and Jacqui Lipton did a tremendous amount of advisory and drafting work before they were tempted to overseas positions;
>
> Commissioner Ian Davis of the Australian Law Reform has been of tremendous assistance, and much of our present position is due to his advice, support, and encouragement.

I would also pay very sincere tribute to the members of the Committee which I chaired, but particularly to the Deputy Chair- Craig Wappett of Mallesons Stephen Jaques – for their continued support over a long period and their never failing willingness to come to the party. Also to the Resource Groups on several key aspects of our proposed reforms, such as intellectual property and consumer affairs.

I would like to make special mention of my colleague, Professor John Farrar, who has played many roles in this work. He is General Editor of the Bond Law Review. Whilst Acting Vice-Chancellor of Bond University, he instigated, encouraged, and supported the holding of the first Workshop at Bond in 1995. He was also an author of the Reports of the Victorian and New Zealand Law Reform Commissions on Personal Property Security Law Reform.

In terms of support, I would like to conclude by quoting, with his permission, from a letter I received early in 2002 from Professor David Weisbrot, President of the Australian law Reform Commission:-

> "You can report that, unlike many other sad parts of the world, peace has broken out all over Australia with respect to personal property security. I am very pleased that this area is being advanced through your efforts, including the workshop which Professor Anne Finlay will be attending as the ALRC's representative. (and you can quote me on that.)"

In Conclusion –

Let us join the rest of the world and take steps to ensure that we have laws which are suitable for the credit economies of the 21st century. The laws and the models are there. All we need is the will and the determination to implement them.