The Constitutional Mechanism for Personal Property Security Legislation in Australia

By Marion Hetherington*

Dennis Rose identifies in his paper three options likely to be available[1] for an Australian personal property security legislative system. The options may be broadly summarised thus –

1. A single Commonwealth Act following reference of powers by the States;
2. A simple State based co-operative scheme involving no Commonwealth legislation in a State other than possibly registry provisions; or,
3. A more elaborate co-operative scheme under which the Commonwealth and the States each enacted personal property securities legislation, with State legislation filling in the unavoidable "gaps" consequent upon the Commonwealth's limited powers.

Mr Rose's view is that, of the three options, the best is either a single Commonwealth Act following reference by the States, or a "simple" State based co-operative scheme involving no Commonwealth legislation in a State other than registry provisions.

In this comment I will venture the opinion that a single Commonwealth Act following reference by the States would be the desirable course, having regard to the objects sought to be pursued by the reform of the law relating to personal property securities, and my perception of where personal property security law properly sits within our legal system.

Goals of Personal Property Securities Law Reform.

The goals of those committed to the pursuit of law reform in this area[2] are both minute and global. They seek to remedy the notorious defects found in the detail of the applicable confused, antiquated and fragmented legal setup, considered to be "clearly uneconomic and dangerous"[3] and to replace it with a new uniform law with a single, computerised nationwide registration system[4], which would be "cheaper, easier, simpler, faster and safer"[5]. In so doing they seek also to enhance economic efficiency by facilitating the taking of security, and thus the granting of credit, thereby

---

*Solicitor, New South Wales; Fellow, Centre for Transnational Business Law, Bond University

[1] Mr Rose also mentions the "theoretical" option of a constitutional alteration at page 2 of his paper

[2] See Goode, *"The Modernisation of Personal Property Security Law"* (1984) 100 LQR 234 and accounts in Edwards, *"Financial Interests in Non-Real Estate Assets and the Prospects of Reforming Personal Property Security Law in Australia"* (1997) 8 Journal of Banking and Finance Law and Practice 93; Cameron, *'Company Charges and the Australian Law Reform Commission: Scrutinising "The Department of Utter Confusion' "* (1994) 12 Company and Securities Law Journal, 357; Everett, *"Personal Property Securities Reform"* (1995) 11 Australian Banking Law Bulletin 17;

[3] Wappett & Allan, *Securities over Personal Property*, (1999) #2.53

[4] See discussions in Gillooly ed, *Securities over Personalty* (1994), especially pp 215-221 (Professor Ralph Simmonds) and pp 295-297 (Professor John Goldring)

[5] Australia New Zealand Banking Law Association, *Personal Property Security Law Reform Committee Progress Report*, 11 September 1999 p3

placing the country in a commercial international position which is relevantly both competitive and harmonious with other players on the international stage[6], with a view to the facilitation both of current commerce and possible later participation in an international securities registration system[7]. The proponents of reform are thus concerned both with global and policy issues, and with the substance and minutiae of the law. Those two aspects merit separate treatment:

- ***Global and Policy Aspects –***

  - ***existing fragmentation of the law***
  - ***need for a nationwide registration system***
  - ***facilitation of commerce***

The larger national global and policy aspects of the desired reform seek to overcome the fragmentation which follows from the existence of separate and diverse applicable State, Territory and Commonwealth laws, the provision of a nationwide registration system harmonious with those developed and developing overseas, and the facilitation of domestic and international commerce through the provision of laws which facilitate the taking of security. It is with those factors in mind that the reformers have produced the draft bill[8], modelled on legislation now in force in the United States of America[9], Canada[10], New Zealand[11], and in harmony with legislation either in force or under consideration for Europe (including both the former Eastern Bloc[12] the EU[13] and the United Kingdom[14]).

---

[6] See discussion in Diamond, *A Review of the Security Interests in Property,* (1989) Chapter 8. At present the United States of America, the Canada, New Zealand and parts of Eastern Europe have personal property security laws of the kind proposed for Australia. Similar changes have long been advocated for the United Kingdom. Developments there and in the EC generally seem likely, when they happen, to follow a similar pattern. See footnotes 9-14 below.

[7] See Hetherington *"Resolving the Company Law Crisis after the High Court's Decision in The Queen v. Hughes"* (2000) 28 Australian Business Law Review 364, 377. UNCITRAL and UNIDROIT are working on a project concerning security for international transactions: see discussion in Allan *"Uniform Personal Property Security Legislation for Australia"* in a paper presented to the Bond University Workshop on 26 April 2002. See also www.uncitral.org.

[8] Provided by the Personal Property Security Law Reform Committee, chaired by Professor David Allan. Professor Allan and Craig Wappett of Mallesons Stephen Jacques were the principal architects of the draft.

[9] Since the 1950s pursuant to Article 9 of the Uniform Commercial Code

[10] Under Personal Property Securities Acts provided by legislation in the various provinces. The Canadian legislation is not entirely uniform, but is based on the United States model

[11] Under the Personal Properties Securities Act 1999, which became operative on 1 May 2002

[12] A Model Law for the former Socialist States of Central and Eastern Europe on behalf of the European Bank for Reconstruction and Development (EBRD) was created with a view to fostering economic development (which required financing transactions to satisfy the requirements of European and American Bankers): see www.ebrd.com/trans/sectrans/about/main.htm. I understand that the personal property securities elements of the Model Law were derived from the North American precedent provided by Article 9 of the UCC

[13] I understand that the EU has commissioned research with a view to formulating a Directive on this subject. I took the opportunity to discuss the issue with participants at the May 2001 IBA Financial Law Conference in Helsinki, and gained the understanding that the enormous diversity of security systems within the EC is seem as justifying comprehensive and unifying reform there.

[14] In the United Kingdom it is currently proposed to introduce a scheme based on the North American models in stages. In the first stage the current scheme of registration of company charges in England and Wales should be replaced by a notice-filing system along the lines of those adopted in Canada and New Zealand (the Scottish Law Commission continuing with its own project on company charge registration). While much of what is proposed remains confidential at this stage, it is apparent that the

Each of the above elements calls for not only uniformity of laws within the Commonwealth, but also for the devising and continuing review of the laws on a national basis, along with the enforcement in all appropriate courts, including the Federal Court of Australia. All of this suggests that the Commonwealth legislature is the appropriate forum in which the relevant laws should be enacted, reconsidered and amended from time to time.

- ***Minutiae and Substance –***

  - ***diversity of laws and powers of change them***
  - ***powers not sufficiently with the States to suggest a co-operative model***
  - ***practical and political hazards***

Under the present law, there are various methods for creating securities over the diverse classes of personal property, including interests in goods, shares, deposits, money, book debts and intellectual property rights. These include chattel mortgages, as are found in bills of sale, in registered equitable mortgages over companies' assets and in other equitable charges. There are other techniques which create what are securities in function, although not in form. These include title retention devices, such as Romalpa clauses, leasing, hire purchase and conditional sales. Some of these require registration under various forms of state legislation in order to gain priority or in some cases validity. The priority rules themselves are complex, depending on factors including priority of time of creation of interests and the state of knowledge of parties asserting competing interests at relevant times. Diverse legislation bears upon the securities in various ways, including such State legislation as the remaining Bills of Sale and Hire Purchase Acts, Warehouseman's Liens Acts, Wool Stock and Crop Liens Acts, Chattel Securities Act and Commonwealth legislation including the Corporations Act 2001, the Life Insurance Act 1995, the Patents Act 1990, the Trademarks Act 1995, the Shipping Registration Act 1981 and the Air Navigation Act 1902.

Even with the benefit of the draft provided, it seems unlikely that achieving uniformity out of all the existing diversity can be managed either initially or on an ongoing basis without the leadership and effective control of the Commonwealth, particularly when it is remembered that various important areas of personal property security are already under federal control. We do have the comfort of Mr Rose's persuasive assurance that problems of the sort encountered in *The Queen v. Hughes*[15] would not afflict co-operative schemes of the sort called for here[16]. Nonetheless, it is legally impossible to provide effectively through a State based co-operative scheme for the classes of personal property securities at present within Commonwealth power

---

process is intended to start by dealing with security interests created by companies by regulations to be made under a possible future Companies Bill

[15] (2000) 74 ALJR 802

[16] Because there would be no conferral by States on Commonwealth authorities of powers and functions that the Commonwealth could not itself have conferred: see Mr Rose's paper p 12 and the Excursus on pp 18-24.

without significant legislative involvement on the part of the Commonwealth[17]. These include all securities granted by companies registrable under the Corporations Act and securities over the various types of intellectual property under the control of the Commonwealth. Thus it does not seem that the existing powers over personal property securities are sufficiently within State power to justify regarding the matter as one clearly apt for State regulation through a co-operative scheme with minimal Commonwealth involvement.

Moreover, as those involved in the finance industry and other areas of commercial law know only too well, there are costs, delays, inefficiencies and frequently defective outcomes from the process of attempting to gain and maintain political and legislative support for uniform laws throughout the States, the Territories and the Commonwealth[18]. In addition, it is highly undesirable that businesses run on a nationwide or international basis should have to contend with the added work, and additional compliance and staff training costs, that follow from any States deciding in some respects not to follow the uniform model.

Thus I contend that the likely difficulties of repairing the minutiae while the substance of the law remains under the present fragmented State and Commonwealth control point to a referral of power to the Commonwealth as the likeliest path to an expeditious successful result.

Place of Personal Property Securities Law in the Legal System.

Where Personal Property Securities Law fits in the legal system is a matter to be determined by both function and government policy.

- ***Government Policy***

While there is no clear government policy in Australia on personal property securities law, policy pursued in related financial and commercial areas may be seen as supporting the view that the appropriate formula would be Commonwealth legislation following a referral of powers.

The government policy manifested in the Financial Services Reform Act 2001 (Commonwealth) and associated legislation, in conjunction with the Corporations Act (Commonwealth) 2001, subjects corporate and financial regulation to a federal regulatory regime, broadly in the manner recommended in the Wallis Report[19]. And, the political decision made in the wake of the *Hughes case* to achieve this by Commonwealth legislation following referral of powers by the States may be interpreted as a further statement of government policy that national commercial regulation should be so achieved in cases where the Commonwealth lacks all necessary powers under the constitution.

---

[17] Rose explains on pp 6 and 10 of his paper mentioned above the need for the "pulling back" of Commonwealth legislation to avoid inconsistency with the new personal property security law

[18] The tortured story of the genesis, progress and deficiencies of the Corporations Law system provides the best example: see discussion in Hetherington *loc cit*

[19] The Corporate Law Economic Reform Program (CLERP) was developed following the Financial System Inquiry Final Report (1997) (the Wallis Report) recommendations, ultimately leading to the Financial Services Reform Act 2001 and associated legislation

The Wallis report, it will be remembered, reanalysed along functional lines the elements of the commercial and financial system thought at that time to be within Commonwealth control or as apt to be subject to Commonwealth control. The Commonwealth Government's adoption and implementation of the report's recommendations caused the Corporations Law to become an element in a co-ordinated legislative set-up covering company and securities law and the financial system generally, with the regulatory bodies, ASIC[20], APRA[21] and the RBA[22], occupying the broadly separate functional domains of, respectively, market integrity (including consumer protection and corporations), prudential regulation (of organisations managing the public's superannuation, insurance and deposit funds) and financial safety (including systemic stability, payment systems regulation and monetary policy).

Government policy thus now identifies the financial system in those aspects that relate to market integrity, prudential management and financial safety as apt to be regulated in conjunction with company law on a national basis. The next logical step would be for policy to embrace those other aspects of commercial life so intimately connected that their inclusion in the same regulatory framework is needed to ensure coherent regulation of commerce. That would fit with the Wallis Report view that –

> "In the face of globalising markets, every effort should be made to ensure that Australia's financial system is able to compete without the impediments of outdated, inadequate or costly regulation (whether financial or otherwise) or discriminatory taxes."[23]

Furthermore, the uniformity pursued by government policy across a range of areas of law affecting commerce, corporations and the financial system, consumer protection and consumer credit, and privacy (to name the most obvious examples) appears to be strongly influenced by a minimalist, functional perspective, with regulation to be based on functional analysis (so that like products or transactions are treated by the law similarly), and as "light touch" and flexible as the context and efficiency allow.

The reform proposed for the law relating to personal property securities harmonises with all of the above mentioned elements of current government policy. It is based on a compatible functional perspective, it simplifies, it enhances flexibility and efficiency, it removes outdated and costly regulation.

- ***Functionality***

When the matter is considered from a functional perspective, it seems that the law relating to personal property securities is one area of law so connected with corporate and financial regulation that it ought to have been drawn into the same regulatory network, although this has not so far been recognised in government policy[24]. The

[20] Australian Securities and Investment Commission
[21] Australian Prudential Regulatory Authority
[22] Reserve Bank of Australia
[23] Wallis Report page 27; see also Recommendation 114 of the Wallis Report, which favoured the establishment of a panel for uniform commercial laws
[24] See also discussion in Hetherington *loc cit* 376-378

large coincidence of subject matter[25] and the need for a modern general uniform securities filing system[26] causes this area to be highly functionally linked with company law, and the association of securities with the financial system justifies their inclusion in the regulatory network on that basis also[27].

Moreover, administering an expanded register for all personal property securities, rather than only those granted by companies, would be a relatively minor augmentation of the already extended federal regulatory role in relation to the finance industry generally that has already occurred[28]. If the Commonwealth were to assume responsibility for legislation and associated administration of the law relating to personal property securities, we would end up with more coherent, functional and efficient national commercial law than we now have.

Finally –

- ***The fact that the problems with personal property securities have been long neglected does not justify the view that the area is not important enough to warrant national attention.***

It is notorious that for some thirty years the reform of the law relating to personal property securities has been advocated, with little significant disagreement that the problems of the present law called for expeditious reform, but with little effective progress[29]. To some extent the lack of progress may be due to the fact that the severity of the problems in the present law have been to a large extent both masked and mitigated by the combination of two factors. First, most personal property securities are taken from companies and are accordingly subject to registration and some regulation under the company law system, which has worked tolerably well. Secondly, the parties most affected, financiers, have learnt to live with the current system and have not pushed for reform[30]. As Professor Goode long ago pointed out, the desire for a "quiet life" or "better the devil you know" should not stand in the way of reform "not simply because bad commercial law militates against business efficiency but also because the law should be just and should be seen to be just."[31]

---

[25] Personal property securities are securities given over all property other than land, while securities subject to registration under the company charges system are all those given by companies. The bulk of company charges are over personal property, and the bulk of personal properties securities granted are granted by companies

[26] See discussions in Gillooly ed, *Securities over Personalty* (1994), especially pp 215-221 (Professor Ralph Simmonds) and 295-297 (Professor John Goldring)

[27] On this basis the inclusion of consumer securities could be justified, so long as problems of privacy could be overcome, but possibly subject to a value threshold, so that the register does not end up swamped with minor dealings

[28] Mr Rose explains at page 11 of his paper that there are no constitutional difficulties for the Commonwealth in establishing such a registry

[29] For a recent treatment see Wappett & Allan, *Securities over Personal Property*, (1999); for some account of the history and difficulties of law reform see Gillooly *op cit* and Goode *loc cit*

[30] At the 17th Annual Banking Law And Practice Conference held on the Gold Coast on 8 and 9 June 2000 Professor David Allan, who chaired the concluding consensus workshop discussion on law reform of the area, concluded, however, that there was within the banking industry support for reform, along with an acceptance of its inevitability. For observations about the British finance industry see Goode *loc cit*

[31] Goode *loc cit* 246 and 251

- ***If there is any residual reluctance on the part of financiers to embrace reform because of concern that they or their clients or customers may end up in one of more ways worse off than under the present law, such concerns should be frankly addressed.***

Of possible concern in this regard may be questions as to whether the new law would operate to the advantage of particular sectors of the finance industry, whether revenue advantages (such as under lease financing arrangements) may be lost to clients, and as to the general hazard of becoming subject to a political process of law reform. I note, however, in this connection that at a recent Sydney seminar on the New Zealand system which became operative on 1 May 2002 New Zealand lawyers were firmly of the view that financiers there, in spite of their initial misgivings, were already appreciating that the new system was generally advantageous to them and their clients[32].

.

[32] The seminar was held in the offices of Clayton Utz on 18 April 2002. The speakers were Steve Flynn and Mariette Van Ryn, partners from the New Zealand firm of Simpson Grierson