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Uniform Personal Property Security Legislation for Australia: A Comment on Constitutional Issues

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Abstract

In his paper, Dennis Rose has comprehensively identified the three basic options by which a uniform Act for the registration of personal property securities might be validly enacted – absent an appropriate constitutional amendment. Since the Commonwealth currently lacks the power to enact comprehensive securities legislation, each of the options involves some degree of Commonwealth and State co-operation.

In this comment, I wish to highlight the respective advantages and disadvantages of each of those options. In my view, option 1 is clearly the preferable one. In considering that option, the nature of State references of power to the Commonwealth is discussed.

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A Comment on Constitutional Issues

by

Gerard Carney*

In his paper, Dennis Rose has comprehensively identified the three basic options by which a uniform Act for the registration of personal property securities might be validly enacted – absent an appropriate constitutional amendment. Since the Commonwealth currently lacks the power to enact comprehensive securities legislation, each of the options involves some degree of Commonwealth and State co-operation.

In this comment, I wish to highlight the respective advantages and disadvantages of each of those options. In my view, option 1 is clearly the preferable one. In considering that option, the nature of State references of power to the Commonwealth is discussed.

Option 1 A single Commonwealth law

This option requires a reference of power from one or more States to the Commonwealth to enable it to enact a national personal securities law pursuant to s 51(xxxvii) of the Constitution. This paragraph empowers the Commonwealth to make laws with respect to:

Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.

As Dennis Rose has suggested, such a reference might simply be “the matter of security interests in personal property”.

If all States refer the power, the obvious advantages with option 1 include:

- uniform national legislation
- a central national registry
- continued uniformity (at least so long as the reference exists)
- legal disputes within federal and state jurisdiction
- certainty

The only obvious disadvantage is the need to obtain agreement from all the States to refer the power to the Commonwealth. This has involved in the past

considerable political lobbying and negotiation. It should also be noted that Commonwealth legislation enacted pursuant to a referred power is subject to all constitutional restrictions on Commonwealth power. Accordingly, a national personal securities law would need to avoid infringing the requirement of just terms in any compulsory acquisition of property under s 51(xxxi), as well as avoid infringing the separation of judicial and non-judicial power mandated by Ch III.

If some but not all States refer the power, the Commonwealth legislation will only operate in those States which have referred the power. However, the other States can later adopt the Commonwealth law for the purposes of s 51(xxxvii) whereby it would then extend to those States. But it appears from the terms of s 51(xxxvii) that any Commonwealth amendments to that law would also need to be adopted¹ by those States, until they actually make the necessary reference of power themselves.

So, in what form can a reference be made under s 51(xxxvii)? Although not expressly stated in the head of power, for a State Parliament to refer a power, it must obviously be done by legislation. A State can refer a power over any matter which lies within its legislative power. The referred power has, at times, been confined to the enactment of a specific bill (attached in a schedule to the State Act or otherwise identified) with power to amend that bill. However, a reference can be given in general terms without being confined to the enactment of any bill.² Such a reference effectively becomes an additional head of Commonwealth legislative power - subject to the terms of the reference.

Since federation, most references of State power have been made by one or more States, rather than by all of them. Those references have concerned, for example, air navigation in 1920³ and 1950, family law in 1986, state banking in 1992, and industrial relations in 1996. References from all States include meat inspection in 1983, mutual recognition in 1992, and poultry processing in 1993. The most recent and most significant references from all States are those for the Commonwealth's new *Corporations Act* 2001 and the *Australian Securities and Investments Commission Act* 2001 (considered further below).

Until the High Court decision in *Graham v Paterson*⁴ in 1950, references within s 51(xxxvii) were rare on account of various uncertainties about their effect on State power.⁵ One concern was whether the States retained a referred power

¹ This could be expressly provided for in the State's adoption legislation.

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² *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1965) 113 CLR 207 at 224-5. Cf Ross Anderson, "Reference of Powers by the States to the Commonwealth" (1951-52) 2 Univ of WA Annual Law Review 1 at 4.

³ See *Report of the Royal Commission on the Constitution* 1929 at 183.

⁴ (1950) 81 CLR 1.

⁵ *Final Report to the Constitutional Commission, 1988* Vol 2 at 753-5. See also Mr Justice J T Ludeke, "The Reference of Industrial Powers from the States to the Commonwealth" (1980) 54 ALJ 88.

or lost it. *Graham v Paterson*⁶ established that States retain concurrent power except in so far as a Commonwealth law, enacted pursuant to the reference, ousts or restricts the State power under s 109.

Another concern, still unresolved, is whether a State can repeal an unconditional and indefinite reference of power.⁷ If s 51(xxxvii) is given full scope, it can strongly be argued that once the Commonwealth enacts legislation in reliance on an indefinite State reference, it prevails by virtue of s 109 over any legislative attempt by the State to revoke that reference. Revocation by a State might be possible, however, *before* the Commonwealth legislates in reliance on the power.⁸ Thereafter, it would depend on whether the Commonwealth legislation allowed a State to effectively terminate the operation of the Commonwealth law.⁹

Given this uncertainty over the capacity of States to revoke their referrals of power, the common practice has been to refer a power for a limited period or terminable on a future event. For instance, the corporations reference is for five years unless the period is extended by proclamation.¹⁰ Although the accepted view is that a reference for a limited time is within the reference power,¹¹ this has never been authoritatively determined. It seems likely, however, that s 51(xxxvii) contemplates within “matter” any temporal restriction imposed by the State reference, since it clearly encompasses other types of restrictions or conditions.¹²

To encourage each State to maintain its reference, a legally non-binding governmental agreement between the States and the Commonwealth can be used to spell out the terms on which a reference might be terminated. For instance, the Corporations Agreement provides that no State can terminate its reference of the power to amend the Corporations Law and remain in the new scheme unless all States terminate at the same time. This occurs if four States vote to terminate.¹³

⁶ (1950) 81 CLR 1.

⁷ In *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1965) 113 CLR 207, the issue was left open but the joint judgment noted at 226 the principle that what a parliament enacts, it may repeal. On that principle see also *Kartinyeri v Commonwealth* (1998) 152 ALR 540 per Brennan CJ and McHugh J. In *Sande v Registrar, Supreme Court (Qld)* (1996) 64 FCR 123 at 131, Lockhart left the issue open. Cf Moens and Trone, *Lumb & Moens' The Constitution of the Commonwealth of Australia Annotated*, 6th ed 2001 Butterworths at 175-6.

⁸ And after the termination of the Commonwealth law: W A Wynes, *Legislative, Executive and Judicial Powers in Australia*, 5th ed, 1976, at 171-172.

⁹ See *Airlines of New South Wales Pty Ltd v New South Wales* (1964) 113 CLR 1 at 53 per Windeyer J.

¹⁰ Surprisingly, the Commonwealth legislation does not refer to this sunset clause.

¹¹ See *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1965) 113 CLR 207 at 226; *Airlines of New South Wales Pty Ltd v New South Wales* (1964) 113 CLR 1 at 38 per Taylor J, at 53 per Windeyer J; *Sande v Registrar, Supreme Court (Qld)* (1996) 64 FCR 123 at 131 per Lockhart J.

¹² eg the corporations reference excluded the power to regulate industrial relations.

¹³ See Govey and Manson, “Measures to Address Wakim and Hughes: How the Reference of Powers Will Work” (2001) 12 Public Law Review 254.

For those States which want quite specific practices peculiar to their State to be exempted from a uniform national Act on personal securities, the *Corporations Act 2001* (Cth) provides a model for three mechanisms: a provision which permits concurrent State regulation (s 5E); an automatic “roll-back” mechanism (s 5G), and provision for additional “roll-back” by regulation (s 5I).¹⁴

I agree with Denis Rose that the reference over matters with respect to the “regulation of financial products and services” is unlikely to empower the Commonwealth to enact national personal securities legislation. Even if it did, the reference requires any such law to be enacted as an express amendment to the Corporations legislation.

Option 2 Simple co-operative scheme

This option involves either a State or Territory enacting, for its jurisdiction, the personal securities legislation (the primary or template legislation) which is then adopted by all other jurisdictions as their own law. Complementing this legislation, is a legally non-binding governmental agreement on uniform amendments.

The primary legislation could also provide for the registry to be established in the enacting State or Territory with branches in the other jurisdictions. A variation on this is that the registry provisions are enacted separately by the Commonwealth under s 122 with the principal registry established in a Territory or a State and branches in the other jurisdictions.

The only advantage of this option is initial national uniformity without the States actually having to refer any power to the Commonwealth.

The disadvantages include:

- separate legislation in each State and the Territories which is susceptible to different changes in each jurisdiction
- few legal disputes falling within federal jurisdiction
- artificial and complex registry arrangements
- enforcement only in specific jurisdiction concerned

The preferable registry arrangement under this option seems to be the establishment by the Commonwealth under s 122 of a Territory registry, such as in the ACT, with branches established in the other jurisdictions. The only constitutional issue this raises is in relation to the establishment of branches in the States. This should be within the wide scope accorded the power in s 122

¹⁴ Ibid at 262.

to “make laws for the government of any territory”.¹⁵ But to establish the principal Territory registry in a State tests, in my view, the outer limits of s 122.

As for *The Queen v Hughes*,¹⁶ no difficulty arises here unless the States confer powers or duties on Commonwealth officers. This appears not to be the case if all that the State legislation does is to give effect in each State to the registration and any other decisions made by the registry. *Hughes* is likely to have a similar effect in relation to territory officers.

Option 3 Commonwealth and State Co-operative Scheme

This option essentially involves the Commonwealth and the States enacting complementary securities legislation which is made operational within their respective spheres of power. The Commonwealth would either extend the legislation to the full extent of its power or confine it to its undisputed heads of power.

The only advantages of this option (apart from initial uniformity) appear to be Commonwealth legislation over a limited area of securities law, and consequent federal jurisdiction.

The disadvantages include the potential for disputes over the breadth of Commonwealth power, as well as, to some degree, all of the disadvantages listed for Option 2 above.

Conclusion

It is apparent after a consideration of the comparative advantages and disadvantages of the three options that the first of them, a single Commonwealth law, would potentially produce the neatest outcome. This, however, depends on the agreement of all the States. And unfortunately, that agreement might be hampered by the uncertainty which still exists over the scope of the Commonwealth’s reference power in s 51(xxxvii).

¹⁵ See *Lamshed v Lake* (1958) 99 CLR 132 at 146 per Dixon CJ.

¹⁶ (2000) 171 ALR 155.