

# PERSONAL PROPERTY SECURITIES LAW REFORM

## SECURITY AND TITLE REGISTERS

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### 1. INTRODUCTION

#### 1.1 Scope of this Paper

1.1.1 Tony Duggan's paper will have introduced you to the discussion paper that he and I prepared for the Queensland Law Reform Commission and the Law Reform Commission of Victoria entitled "Personal Property Security Law: A Blueprint for Reform"<sup>1</sup> (QLRC/VLRC Report) and to the report of the Australian Law Reform Commission entitled "Personal Property Securities"<sup>2</sup> (ALRC Report).

1.1.2 Paragraph 1.1.1 of the QLRC/VLRC Report stated:

"The main concern is with competing claims to personal property where one or more of the claims rests on a security interest, and with the need for a coherent set of legal rules to deal with the problem. Some reference will be made to the need for reform of the rules governing the rights and obligations of the parties to a security transaction between themselves. Although the focus is predominantly on personal property security law reform, the paper will also have something to say about the related problem of competing claims to ownership, and about land dealings."

1.1.3 Tony Duggan's paper relates the ALRC Report and the QLRC/VLRC Report to each other and to Article 9 of the United States *Uniform Commercial Code*<sup>3</sup> and deals in depth with moves to establish a national register of security interests over motor vehicles (REV scheme) with particular reference to recent statutory changes in which he played a leading part. This paper picks up the last two sentences of paragraph 1.1.1 of the QLRC/VLRC Report. It seeks to broaden the debate beyond personal property to all property and beyond securities to ownership. It also seeks to broaden

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<sup>1</sup> Queensland Law Reform Commission Discussion Paper No 39, Law Reform Commission of Victoria Discussion Paper No 28.

<sup>2</sup> Australian Law Reform Commission Report No 64 — Interim.

<sup>3</sup> See paragraph 1.2.7.

the territorial scope of the debate beyond State borders to Australia and in some cases beyond Australia. Its thesis is when in doubt expand.

1.1.4 Accordingly, this paper will present the case in favour of the following propositions:

- Should the Article 9 proposal be extended to cover land dealings?
- Should the REV scheme be extended to cover title?
- Should there be an international register relating to title and security interests in ships?

## 1.2 Nomenclature

### 1.2.1 Security

In the sense of this paper, a security or a security interest is a right with respect to property (the United States' description is the "collateral") held by a creditor to support payment of a debt. This paper does not use the expression "security" in the wider sense which would embrace an agreement under which a debt is owed or include a guarantee or indemnity which a creditor might hold as support for payment of a debt.<sup>4</sup>

In this paper, in distinction to the QLRC/VLRC Report, "security" embraces both consensual and non-consensual securities. Thus, it seeks to broaden the debate to consider securities that arise by operation of law such as workmen's liens and statutory charges for rates, taxes and the like. The paper also considers "security" to include both possessory and non-possessory securities and to embrace title retention devices such as hire purchase, credit sale and conditional sale (or Romalpa agreement) and even a finance lease.

A creditor who is owed a debt seeks security to increase the probability that the debt will be paid. The primary reason for taking security is protection against the insolvency of the debtor.

### 1.2.2 Debt, debtor and creditor

For the purposes of this paper a debt can be actual, contingent, present or future. A debtor owes the debt to the creditor.

### 1.2.3 Title and property

Title in the sense of this paper is the bundle of rights with respect to property that entitles the holder to be regarded as the owner of the property. It is important to recognise that the concept of "title" is a difficult jurisprudential concept.<sup>5</sup> It can, for example, be difficult to distinguish title from a security. For different purposes, title retention devices can be regarded either as securities or as ownership.<sup>6</sup> There can also be difficulty in distinguishing title from a tenancy and in distinguishing various forms of shared ownership such as joint tenant, tenancy in common, life tenants, etc.

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<sup>4</sup> For a discussion of the concept of security and an attempted definition see Sykes and Walker *The Law of Securities* 5th Ed 12.

<sup>5</sup> See Sykes & Walker *op cit* 6-10, particularly footnote 10.

<sup>6</sup> See Sykes & Walker *op cit* 5-6.

It is important to recognise that property is a very broad concept. A security over, and a lease of, a parcel of Torrens title land are each as much property as the land comprised in the relevant certificate of title. This paper does not propose in any way to limit what the law would recognise as property.

It is important also to distinguish, on the one hand, registration of title in the sense that what is registered is an owner's title to property that arises outside the register (for an example, see paragraph 5.9 for a description of the Australian Shipping Register) and, on the other, registered title in the sense that the property is the rights that being registered confers on its owner (for example, being registered as a shareholder of a company or as the proprietor of Torrens title land).<sup>7</sup>

If the property being considered is Torrens title land, title is in the registered proprietor. The proprietor of a registered mortgage holds a security interest in the land and title to the mortgage. The proprietor of a registered lease for the purposes of this paper, has an "other interest" in the land. Of course, if the property being considered were a lease of Torrens title land the proprietor of a registered lease would have title to the property.

#### 1.2.4 Register

A register is a record in permanent form, including writing and electronic, in which information can be recorded and searched.

Relevantly, with respect to a security, the minimum information comprises the names of the debtor and creditor and information with respect to the property and security. The expression "information with respect to" is used deliberately to indicate that it is necessary to consider registration with respect to proposed securities and registration of securities with respect to property which may not be ascertained.

In the case of title the minimum information is the name of the owner and a description of the property. In this case, however, the property would necessarily be specific.

To record and search for information it is necessary to consider how the information is organised or indexed. In the case of securities, a register can be indexed against the name of the debtor (name indexed register) or the property (a property indexed register).

In the case of title, a register can be indexed against the name of the owner or against the property.

There are logical limitations to the nature of property which can be the subject of property indexed registers. Torrens title land, motor vehicles, ships, aircraft, patents, trade marks and registered security interests all readily lend themselves to indexation.

In the case of both title and security a register can record an interest that arises outside the register or the register can be the source of the rights that comprise the title or the security in the sense described in paragraph 1.2.3.

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<sup>7</sup> See *Breskvar v Wall* (1971) 126 CLR 376 at 384-6 per Barwick CJ. Compare *Clements v Ellis* (1934) 51 CLR 217 at 240 and 258 per Dixon J. The view of Dixon J, though long regarded as authoritative due to his standing, appears now to have been discarded by the High Court. It was always open for Torrens statutes by the use of clear language to provide for either view. The problem has been, and is, that Torrens statutes do not use clear language, leaving their meaning to be deduced by courts.

### 1.2.5 Priority

Priority arises between securities. The question is to what extent does the debt secured by the one have priority over the debt secured by the other? Logically, the answer is not necessarily that the one ranks entirely ahead of the other. There can be layers of debt sandwiched alternately. If there are three securities it is quite possible for a misdrafted law or priority agreement to provide that a debt owed to  $S_1$  has priority over a debt owed to  $S_2$ , that a debt owed to  $S_2$  has priority over a debt owed to  $S_3$  and that a debt owed to  $S_3$  has priority over a debt owed to  $S_1$ . Sensible legislation or priority agreements will prevent this.

### 1.2.6 Extinguishment

A security interest in, or a title to, property is extinguished when a purchaser purchases the property, and the law is, that the effect of that transaction is to extinguish the security interest or title. Obviously, this occurs in a consummated contract of purchase of property by a new owner from the old owner or by a new owner from a mortgagee. The situation may also arise without the assent of the holder of the interest extinguished.

It is important to bear in mind the distinction between priority and extinguishment.

### 1.2.7 Article 9

The model for a solution to the kinds of problem to be discussed in paragraphs 1.4.5, 1.4.6 and 2 is to be found in Article 9 of the United States *Uniform Commercial Code* (UCC)<sup>8</sup> Paragraph 3.1.2 of the QLRC/VLRC Report is worth repeating:

"The key feature of Article 9 is that it looks to the substance of a security transaction, not its form. As a general rule, it catches all transactions intended as security, whether in the form of a mortgage or a title retention device. The parties are free to adopt whatever form of transaction they choose, but the form chosen does not determine the legal outcome. Article 9 deals with every phase of a security agreement, from its creation to its enforcement, and subjects all kind of agreement to a common set of rules unless a distinction can be justified on functional grounds. Accordingly, the distinctions between legal interests and equitable interests, and between title transfer and title retention cease to carry any significance. The kinds of formal variable that dominate Australian security law play no part in the American scheme."

This paper attempts, by analogy, to extend this solution to ownership disputes, ie the problems discussed in paragraphs 1.4.3 and 1.4.4.

It is important to note, however, that Article 9 provides for the recording of security interests (and the priority that registration confers) but does not provide the source of the security interest in the sense of paragraph 1.2.3.

### 1.2.8 Attachment

The concept of attachment derives from Article 9. It is described in the QLRC/VLRC Report as follows:

"In the case of a non-possessory security interest, there is a minimal formal requirement: the security interest is not enforceable against the debtor or third parties unless the debtor has signed a security agreement

<sup>8</sup> For a brief description of Article 9 see QLRC/VLRC Report, paragraph 3.1.1.

which contains a description of the property subject to the security interest (called 'collateral'). The enforcement of a security interest against the debtor depends upon 'attachment'. In order for a security interest to attach:

- (1) there must be a security agreement signed by the debtor (non-possessory security), or possession held by the creditor (possessory security);
- (2) the creditor must have given value; and
- (3) the debtor must have rights in the collateral.

The third requirement is particularly significant with respect to the giving of security over after-acquired property. It reflects the common law rule that there can be no effective transfer in such a case until the property comes into the debtor's hands."

### 1.2.9 Perfection

Again, the concept "perfection" derives from Article 9. It, too, is described in the QLRC/VLRC Report. Paragraph 3.1.4 states:

"The enforcement of a security interest against the debtor is dependent upon attachment. However, there is an additional requirement which must be satisfied before the security interest will be enforceable against third parties. Third parties include the debtor's trustee in bankruptcy or liquidator, a receiver, an execution creditor, a competing secured creditor and a purchaser of the subject property. This additional requirement is referred to in the legislation as 'perfection'. Article 9 establishes a register of personal property security interests, and in the usual case, perfection is achieved by filing for registration. In the case of a possessory security interest (and in certain other circumstances) perfection can be achieved by the creditor taking possession of the collateral. In many cases perfection will follow attachment, but this is not invariably true. Registration is permissible in advance of attachment. So, for example, in the case of a security agreement relating to future property, the security interest may be registered before the property comes into the debtor's hands. In this kind of case, perfection is retrospective to the date of filing for registration."

### 1.2.10 Indefeasibility and paramountcy of the register

Both of these concepts are concerned with the effect that registration has. In the case of Torrens title land registers, the expression "indefeasibility" is used to connote when the interest of an innocent party who becomes registered is immune from being set aside or postponed due to some fraud or wrongdoing of some other party (whether or not that party's name appears in the register) or some error in the workings of the register. "Paramountcy" of the register is used with respect to the registers established under Article 9 but can be used with respect to other registers. It connotes, essentially, the same concept as indefeasibility but it looks at it from a different point of view. It asserts that as between security interests, a registered interest has priority to an unregistered interest. It is a concept closely linked to perfection. Thus, Article 9, in the usual case, requires that perfection is achieved by filing for registration. Perfection and paramountcy of the register might have been more closely linked still had perfection been described in Article 9 as registration as it is in some Canadian statutes.<sup>9</sup> In the case of a property indexed register such as a

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See *Saskatchewan Personal Property Security Act* section 25.

Torrens title land register, paramountcy of the register must extend to the status which registration confers on the title of an owner whose interest is registered. If an owner whose interest is registered (or, in the sense of paragraph 1.2.3, an owner whose interest is conferred by registration) has a title that ranks ahead of another claimant who would otherwise have priority (eg under the *nemo dat* rule) it can be said that the register is paramount. It can also be said that the interest is indefeasible.

The expressions "indefeasibility" and "paramountcy of the register" cannot infer that in no circumstances can the interest which is registered in the register be set aside. That is to say neither expression can be taken literally. Take the case of a Torrens title land register. Let it be supposed that a rogue X has forged the proprietor's signature to a transfer and has obtained the duplicate certificate of title (or forged it) and has thus procured X to be registered as the proprietor. X cannot be allowed to profit from the wrongdoing. If only X and the previous proprietor are involved, there has to be provision that the register be rectified to restore the previous proprietor to the register.<sup>10</sup> If, as discussed in paragraph 1.5.3, the interests of third parties must be protected so that the previous proprietor cannot be restored to the register, X would remain liable in damages and be subject to prosecution for the appropriate crime.

This writer asserts that there is no self evident set of principles to which anyone can point and say that logic requires that these principles and no other describe the rules by which a registered interest should be defeasible. This is canvassed in greater detail in paragraph 1.5.3.

For present purposes, it suffices to say that indefeasibility and paramountcy of the register describe the situation where, except in the case of fraud or some other similar invalidating circumstance, the interest of a person who is not implicated and whose interest is registered will not be set aside. In addition, a person who deals with the registered proprietor on the faith of the register will not ordinarily be required to make any search or any inquiry beyond a search of the register.

### 1.2.11 Immediate and deferred indefeasibility

This heading describes two different views of the effect of registration of dealings in property indexed registers. The debate has concern with when the interest of an innocent party who deals with a registered party or who becomes registered becomes indefeasible in the sense used in paragraph 1.2.10 that is immune from being set aside or postponed due to some fraud or wrongdoing on the part of a prior party or some error in the working of the register. Immediate indefeasibility confers immediate immunity in this sense. Deferred indefeasibility infers that such immunity

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Provisions of Torrens statutes which provide or have been held to provide to this effect are discussed by P N Wikrama-Nayake "Immediate and Deferred Indefeasibility — The Story Continues" (1993) 67 *LJ* 733 at 734-5. See particularly the discussion of the judgments of Kirby P and Mahoney JA of the New South Wales Court of Appeal in *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 *NSWLR* 32 and of Lord Wilberforce delivering the judgment of the Privy Council in *Frazer v Walker* [1967] 1 *AC* 569 at 585 concerning personal equities and the distinction the author draws at page 735 between a personal equity and an equitable estate or interest. Torrens title registers have, traditionally, maintained "exceptions" for fraud (and implicitly forgery) and to protect tenants in possession (in the nomenclature of this paper tenancies are an "other interest" with reference to the index of the ownership of the land). See *Breskvar v Wall* (1971) 126 *CLR* 376 at 384 per Barwick CJ. The exceptions are not exceptions to the title of the registered proprietor but rather to the dominion that that title confers or, in the case of fraud etc, to the proprietor's entitlement to remain registered.

does arise but not immediately. Neither immediate indefeasibility nor deferred indefeasibility implies that no entry in a register can be set aside notwithstanding an error in the registration process or some fraud or wrongdoing affecting the holder of the registered interest.<sup>11</sup> Similarly, the expressions are not words in a statute and carry no fixed legal meaning. They have been regarded as jargon.<sup>12</sup> Nevertheless, they are often used in cases and in learned articles. This paper seeks to draw out their relationship to paramountcy of the register and perfection. This author, in paragraph 1.5.3, sets out a view of immediate indefeasibility that fits his view of what a sensible registration system should provide for. It is not necessarily a view of that expression expounded in a judicial interpretation of an existing Torrens statute.

### 1.3 Why register or search?

The incentive to register or search is to gain advantage for the registered or searching party. Advantage includes the avoidance of disadvantage.

A registration system may create an offence constituted by a failure to register or it may provide that an unregistered security is void. Such incentives do not justify the **existence** of the registration system. They merely explain motivation for participation in an existing system.

Incentives that, logically, do justify the existence of a registration system are discussed in paragraph 1.5.

### 1.4 What kinds of disputes can arise

#### 1.4.1 The QLRC/VLRC Report

Paragraph 1.4 of the QLRC/VLRC Report identifies three kinds of disputes that can arise in the case of personal property. In order to explain what purpose a register might serve it is desirable to set out equivalent paragraphs broadened to reflect the broadened scope of this paper. It will be remembered (paragraph 1.1.3) that this paper seeks to broaden the debate beyond personal property to all property and beyond securities to ownership.

#### 1.4.2 Convention

In order to make points from the examples which follow, it is helpful to set out the convention which has been used in naming the parties. X is a rogue who causes the dispute. It will be assumed, unless otherwise stated, that X is a man of straw who will leave the consequences of his wrong doing to be borne by others. The other parties act honestly and in good faith. C is a creditor. S is a creditor who is the holder of security and where there is more than one holder of security subscripts are used, thus, S<sub>1</sub>, S<sub>2</sub>, S<sub>3</sub> etc. O is an owner of property. V is a vendor of property. V may well be the same as O but not necessarily so.<sup>13</sup> P is a purchaser of property. I is a person who has an interest in the property other than ownership or security — for example, a tenant. Where there are successive purchasers or persons having interests, other than security interests, in the property, again subscripts are used. X can be any of C, S, O, V, P or I as the case requires. Unfortunately, there is no rule that X acts without accomplices or that there is not a second rogue acting independently.

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<sup>11</sup> See *Breskvar v Wall* (1971) 126 CLR 376 at 385 per Barwick CJ.

<sup>12</sup> See *Breskvar v Wall* (1971) 126 CLR 376 at 385 per Barwick CJ.

<sup>13</sup> See paragraph 1.4.6.

### 1.4.3 Theft

The basic case is X steals the property from O and disposes of it to P or grants a security interest to S or another interest to I.

There are subsidiary cases as follows:

- (a) O has granted a security interest to S<sub>1</sub> or O has granted another interest to I<sub>1</sub>, and
- (b) P grants a security interest in favour of S<sub>2</sub> or another interest in favour of I<sub>2</sub>.

In the absence of any registration system the law must choose whether O wins or P (or S or I) wins. The common law rule is expressed by the Latin maxim *nemo dat quod non habet*. It is important to note that whilst P (or S or I) will strive valiantly for victory against O, nevertheless if P (or S or I) were to win, P (or S or I) would be at risk from a subsequent thief who disposes of the property to P<sub>3</sub> (or S<sub>3</sub> or I<sub>3</sub>).

The consequences in the subsidiary cases should, rationally, follow the basic case. If O loses, it would not be rational that P (or S) takes the property subject to the security interests of S<sub>1</sub> or the other interest of I<sub>1</sub>. Nor, if P loses, would it be rational if O is subject to the security interest of S<sub>2</sub> or the other interest of I<sub>2</sub>. Again, it would not be rational if O wins but the security interest of S<sub>1</sub> or the other interest of I<sub>1</sub> is extinguished or if P wins but the security interest of S<sub>2</sub> or the other interest of I<sub>2</sub> is not valid.

### 1.4.4 Disposition contrary to a prior sale contract

The basic case is that X, who owns property, disposes of the property to P<sub>1</sub> and then purporting still to own the property, disposes of the property to P<sub>2</sub><sup>14</sup> or grants a security interest to S<sub>1</sub> or another interest to I<sub>1</sub>. The subsidiary cases are that P<sub>1</sub> and/or P<sub>2</sub> grants a security interest to S<sub>2</sub> or another interest to I<sub>2</sub>.

In the basic case, in the absence of any registration system the law must choose whether P<sub>1</sub> wins or P<sub>2</sub> (or S<sub>1</sub> or I<sub>1</sub>) wins. Under the *nemo dat* rule, if P<sub>1</sub> had obtained title from X, P<sub>1</sub> wins. Where X remains in possession, the *Factors Act*<sup>15</sup> modified this rule to provide that P<sub>2</sub> wins. The *Factors Act* may also assist S<sub>1</sub> or I<sub>1</sub>.

The consequences in the subsidiary cases should, rationally, follow the basic case. If P<sub>1</sub> wins, the security interest or other interest that P<sub>1</sub> creates are valid. If P<sub>1</sub> loses they are not valid. Similar considerations apply to the security interest or other interest created by P<sub>2</sub>.

### 1.4.5 Disposition contrary to a security interest (or another interest)

The basic case is that X, who owns property subject to a security interest of S<sub>1</sub> (or other interest of I<sub>1</sub>) disposes of the property to P purportedly free of the security interest of S<sub>1</sub> (or other interest of I<sub>1</sub>).

The subsidiary case is that P grants a security interest to S<sub>2</sub> or another interest to I<sub>2</sub>.

<sup>14</sup> This is the case to which section 31 of the *Goods Act* 1958 applies (section 31 of the *Goods Act* is derived from the *Factors Act*). Section 31 does not apply to a subsequent security interest.

<sup>15</sup> See footnote 13.



In the basic case in the absence of a registration system the law must choose whether the interests of  $S_1$  (or of  $I_1$ ) is extinguished or whether P takes the property subject to the interest of  $S_1$  (or of  $I_1$ ).

Where the property is chattels or land the common law lays stress on whether  $S_1$  (or  $I_1$ ) held a legal interest.<sup>16</sup> If so, P takes subject to the interest of  $S_1$  (or  $I_1$ ). However, some title retention devices with respect to goods (hire purchase and finance lease) were effective and others (credit sale) may have been rendered ineffective by the *Factors Act*. More recent legislative changes (*Chattel Securities Act 1987* (Victoria and Western Australia)) have removed some of the previously arbitrary results.

The subsidiary cases logically follow the outcome of the basic case. If the interest of  $S_1$  (or  $I_1$ ) is extinguished, the interest of  $S_2$  (or  $I_2$ ) prevails. On the other hand, if P takes subject to the interest of  $S_1$  (or  $I_1$ ), the interest of  $S_1$  (or  $I_1$ ) would rank prior to the interests of  $S_2$  (or  $I_2$ ).

#### 1.4.6 Wrongful creation of a security interest (or another interest)

The basic case is that X, who owns property, subject to the security interest of  $S_1$  or the other interests of  $I_1$ , wrongfully creates a security interest in favour of  $S_2$  or another interest in favour of  $I_2$ .

The problem here is a priority problem whether the interests either have priority in the order in which they were created or in some other order. Again, it should be noted that if a later interest has priority over an earlier interest, the holder of the later interest will be vulnerable, on the same principle, to a yet later interest.

As in paragraph 1.4.5, the outcome under the common law in the absence of a registration system may depend on whether  $S_1$  or  $S_2$  holds a legal interest in the property. In the case of debts, the outcome may depend on application of the rule in *Dearle v Hall*.<sup>17</sup> The outcome may also turn on common law or statutory tacking rules and the rule in *Clayton's case*. Chattel securities legislation has in recent times changed the law where the property is chattels.

#### 1.4.7 Subsequent dealings

P may, as the subsidiary cases to each of the basic cases set out in paragraphs 1.4.3 and 1.4.5 show, create security interests or other interests. Equally, P, — as referred to in those paragraphs and either  $P_1$  or  $P_2$ , — as referred to in paragraph 1.4.4, may dispose of the property to  $P_3$ .

$S_1$  or  $S_2$ , believing their respective security interests are valid and have priority over any competing security interest or other interest, may enforce the security and dispose of the property to  $P_3$ .

$P_3$  may also enter into transactions with respect to the property.

In determining the efficacy of any subsequent dealings, it will be found that the problems presented in paragraphs 1.4.3, 1.4.4, 1.4.5 or 1.4.6 have been repeated with the exception that, if it turns out that a prior transaction conferred no title on P, P, in the capacity of V, is an innocent party liable to a subsequent party for not

<sup>16</sup> This is not the case where the property is a debt. Here the rule in *Dearle v Hall* (1828) 3 Russ 1, 38 ER 475 applies. The critical question in the case of disputed ownership or priority is who first notifies the debtor.

<sup>17</sup> See footnote 15.

passing a promised interest. That is, V is distinguishable from X because V is innocent.

#### 1.4.8 Forgery and other fraud

The ingenuity of rogues has few limits.

(a) X may:

- (i) forge the signature of O to a transfer or other assurance of O's property to X. X may use a pseudonym.<sup>18</sup> (This is theft as dealt with in paragraph 1.4.3 but is dealt with again in case title to the property is registered in a property indexed register.)
- (ii) obtain by deception O's signature to a transfer or other assurance of O's property to X. (This is not theft as dealt with in paragraph 1.4.3.)
- (iii) misuse or wrongly complete a transfer of other assurance, which O has executed, of O's property so as to purport to transfer or assure it to X (this may well be theft or forgery).

There is a subsidiary case

- (iv) where X sells to P<sup>19</sup> or grants a security interest to S<sub>2</sub>.<sup>20</sup>

There are further subsidiary cases where S<sub>1</sub> has a security interest; X sells to P or grants a security interest to S<sub>2</sub> and

X

- (v) forges,
  - (vi) obtains by deception a discharge of S<sub>1</sub>'s security interest,
  - (vii) misuse or wrongly complete a discharge that S<sub>1</sub> has executed of S<sub>1</sub>'s security interest.
- (b) X may, concurrently with impersonating O or purporting to have O's authority:
- (i) forge a transfer or other assurance of O's property to P or a security interest<sup>21</sup> (or other interest) or a variation of a security interest<sup>22</sup> (or other interest) over O's property to S (or I),

<sup>18</sup> This appears to describe the facts in *Gibbs v Messer* [1891] AC 248 though the court described the person who became registered as a "fictitious person" and the mortgage from that person to mortgagees (the McIntyres) as a "forgery".

<sup>19</sup> This appears to describe the facts in *Breskvar v Wall* (1971) 126 CLR 376 except that there were two rogues, one of whom was the transferee. In addition, the transfer to P was not lodged for registration at the time O sought, by caveat to protect O's equity against X, the transferee.

<sup>20</sup> See footnote 17.

<sup>21</sup> *Chasfield Pty Ltd v Taranto* [1991] 1 VR 225; *Bruce Corbett Whitem v Antonio Arcardi*; *Hugh Cowell Neild v Bruce Corbett Whitem*, unreported decision of the Full Court of the South Australian Supreme Court given on 25 September 1992 (referred

- (ii) obtain by deception O's signature to a transfer or other assurance of O's property to P or a security interest (or other interest) over O's property to S (or I),
- (iii) misuse or wrongly complete a transfer or other assurance or a security interest or other interest, which O has executed, of O's property so as to purport to transfer or assure it to P or to create a security interest (or other interest) over it to S (or I).

Again, as in sub-paragraph (a) there are subsidiary cases where S<sub>1</sub> has a security interest and

X

- (iv) forges,
  - (v) obtains by deception S<sub>1</sub>'s signature to a discharge of S<sub>1</sub>'s security interest,
  - (vi) misuses or wrongly completes a discharge that S<sub>1</sub> has executed of S<sub>1</sub>'s security interest.
- (c) X (who is O) may:
- (i) forge a discharge of S's security interest (or I's other interest),
  - (ii) obtain by deception S's (or I's) signature to a discharge of S's security interest (or I's other interest),
  - (iii) misuses or wrongly complete a discharge that S (or I) has executed of S's security interest (or I's other interest).

The subsidiary cases are that X

- (iv) disposes of the property to P,
  - (v) grants a security interest to S<sub>1</sub>.
- (d) in each of the cases referred to in (a), (b) and (c), if the property is registered title in a property indexed register, a subsequent dealing with P and/or S<sub>2</sub> and/or I<sub>2</sub> may occur whilst the dealing, which is forged, obtained by deception, misused or miscompleted, is unregistered. It may or may not be lodged for registration.

There are subsidiary cases where O and/or S, lodges a caveat before P, S<sub>2</sub> or I<sub>2</sub> obtains a registration.

Alternatively (there may be no provision for lodging of caveats) O and/or S, may bring proceedings to restrain registration before P or S<sub>2</sub> lodges a dealing<sup>23</sup> or obtains registration.

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to by P N Wikrama-Nayake "Immediate and Deferred Indefeasibility — The Story Continues" (1993) 67 *LJ* 733).

<sup>22</sup> See *Gosper's* case (footnote 10).

<sup>23</sup> See *Arcardi's* case (footnote 21).

- (e) in lieu of, or in addition to, forgery of a transfer or assurance, the obtaining of a transfer or assurance by deception or the misuse or miscompletion of such a transfer or assurance, X may produce forged title deeds (or in the case of a registration system) a forged search certificate or certificate of title. Alternatively, again, in the case of a computerised register X, a hacker, may manipulate the register to produce a false search certificate or to make false entries in the register.

If, when the fraud is discovered, title to the property is in X, equity will hold X to be a constructive trustee and require restitution. If X is the owner, and has wrongly obtained discharge of a security interest or another interest, equity can require the restoration of that interest. If, however, title to the property is vested in P, either O or P will lose. Similarly, if S (or I) is registered as proprietor of a security interest (or other interest) O will hold the property subject to the interests of S (or I) or S (or I) will lose. Further, if subsequent to the fraud, S has obtained a security interest or I has obtained another interest, either they or O will lose.

As the examples above indicate, neither name indexed nor property indexed registers eliminate the opportunities for X to find innocent victims. X may use an alias to hide security interests that X has created and which are registered in the name indexed register against X's true name. X may forge the signature of a registered proprietor shown in a property indexed register or misuse a document that the registered proprietor has signed. X may forge a search certificate or a certificate of title. X may procure an electronic register to malfunction so as to alter the register or produce a false search certificate. X can also use undue influence to persuade a registered party to sign a dealing or a proposed party to enter into a transaction.

There is no shortage of reported cases dealing with the consequences of fraud with respect to Torrens title land notwithstanding that such registers provide for registration of title or the security and other interests and, in principle, the register is paramount.<sup>24</sup>

#### 1.4.9 Unsecured creditors

X may obtain unsecured credit from C as a consequence of any one or more of the following falsehoods:

- (a) X is the owner of property;
- (b) X is the unencumbered owner of property;
- (c) X has no other creditors (or X's creditors do not exceed an amount which happens to be less than the amount of X's actual creditors).

In the absence of a registration system, the common law afforded C no protection against S. In the case of insolvency of X, statutory intervention has afforded some limited protection.

#### 1.4.10 Other Cases

In the interests of comprehensiveness it is necessary to mention cases where a dispute arises without the intervention of our familiar rogue X. For example, a public authority with the power to dispose of property may act invalidly, yet in purported exercise of power, P receive a transfer or assurance. If there is a property indexed registration system the assurance may be registered. S or I may take a mortgagee or other interest from O which is *ultra vires*, void under money lending laws, subject to

<sup>24</sup>

See, for example, Sykes and Walker *op cit* 295-305 and 449-454.

renunciation by an infant on attaining majority or otherwise void or subject to being set aside. If there is a registration system the security interest or other interest may be registered and a question arises whether the registered interest is defeasible.

These cases divide into those where the grounds upon which, but for the effect of the registration system, the transaction might be set aside, immediately affect P, S or I and those where the grounds affect a predecessor in title. If the party so immediately affected is ascribed, the designation X (notwithstanding that the party is not a rogue) most, if not all of the cases raised in paragraph 1.4.8 can be reproduced.

A further group of cases concerns statutory charges, resumption orders, liens and the like. These affect property. A purchaser of land traditionally makes searches of relevant authorities. Registration systems traditionally do not require registration as a condition of their efficacy ie their perfection. It is not easy to see why property indexed registration statutes so provide.

## 1.5 Registration systems

### 1.5.1 Prevention is better than cure

In each of the cases discussed in paragraphs 1.4.3 (theft), 1.4.4 (disposition contrary to a prior sale), 1.4.5 (disposition contrary to a security interest), 1.4.6 (wrongful creation of a security interest), 1.4.7 (subsequent dealings), 1.4.8 (forgery and other fraud) and 1.4.9 (unsecured creditors) an innocent party or parties must bear the loss caused by X. In the cases discussed in paragraph 1.4.10, innocent parties may suffer without necessarily any fault, except in some cases want of diligence of their inquiry before transacting. The primary objective of a registration system should be to prevent X from entering into wrongful transactions with respect to property. If title and security interests (and other interests) to property can be registered and the register is available for search by persons with whom X seeks to deal, X will have more difficulty in generating money from wrongful transactions. Put another way, registration offers the opportunity to develop integrated, principled solutions to the problems discussed in paragraph 1.4.

There has never been a fully integrated solution to all the problems discussed in paragraph 1.4. There have been registration systems whose objective is difficult to discern or which can be characterised as unprincipled.<sup>25</sup> Examples are Bills of Sale registers. These are name indexed registers. Some Bills of Sale Acts still exist. There are, in current Australian law, registration systems, which, whilst not integrated or as principled as this author would wish, have some desirable features. Part 3.5 of the *Corporations Law* is an example of a name indexed register. Examples of property indexed registers are the REV scheme with respect to motor vehicles, the Torrens title land registers and the Australian Shipping register.

### 1.5.2 Registration and search systems are a creature of statute

It is obvious that legislation is needed for the establishment and running of a publicly funded registration and search system. Actually, the absence of limitations on access to search the register is more material than who pays for it. The important legislation is the rules that set out the statutory consequences of registration and search and, it should be added, forgery and other fraud.

<sup>25</sup>

For a discussion of Part IX of the *Instruments Act 1958 (Vic)* (a name indexed register of assignment of book debts) and an unprincipled register, see a Report upon the Desirability of the Repeal of Part IX of the *Instruments Act 1958 (Vic)* prepared by Rowan Russell and Tony Browne for the Attorney-General's Law Reform Advisory Council and dated 6 December 1993.

### 1.5.3 The register is paramount and provides for immediate indefeasibility

It must be the guiding principle of any sensible registration system that the register is paramount and provides for indefeasibility. See paragraph 1.2.10. This author also contends that a sensible registration system must provide for immediate indefeasibility in the sense described below.

This author also asserts that if the relevant statute that provides for the consequences of registration does not provide or as a consequence of judicial interpretation is held not to provide that a person who is registered as the proprietor of an interest has title to that interest, notwithstanding that the interest was attained due to fraud or impropriety or might otherwise, as between the parties, be defeasible, the statute does not provide for immediate indefeasibility. It may be that the statute does not even provide for title by registration as opposed to registration of title. See paragraph 1.2.3 above. This author asserts that immediate indefeasibility requires more than merely title by registration. It must require that an innocent person who deals with the registered proprietor of an interest and obtains a dealing from that proprietor is entitled to have it registered notwithstanding that the proprietor's interest is defeasible. The person takes subject to unregistered dealings lodged for registration prior to the person's dealing and to other registered interests. It must also require that registered interests are defeasible only because the wrongdoing<sup>26</sup> of their proprietor or the registration of some subsequent dealing. This means that if the person dealt with a forger who impersonated the proprietor of an interest or a trickster who obtained a dealing by fraud, indefeasibility is attained on registration. It could be lost in the same way.<sup>27</sup> A name indexed register cannot provide for immediate indefeasibility of security interests that are registered in it unless it is a property indexed register with respect to those interests, and even then such a register could provide no assurance that the property, the subject of the security, was owned by the named mortgagor.

Deferred indefeasibility, on the other hand, arises where the statute provides or is held to provide that a person whose interest is defeasible becomes indefeasible (without that person thereby incurring a liability to pay damages) as a consequence of registration of the dealing which gives rise to the interest, some prior dealing, or a subsequent dealing. Registration of a dealing that is forged or improperly obtained without the complicity of the person is excluded from this description of deferred indefeasibility because it is regarded as properly fitting immediate indefeasibility — see above.

The statute could provide for neither immediate nor deferred indefeasibility. This paper deals in paragraph 1.4.8 with the situations which raise the issue of immediate and deferred indefeasibility, and in paragraph 3.2.5 with judicial adoption of a position close to immediate indefeasibility in the case of Australian, New Zealand and English Torrens title land.

The writer thus asserts in the case of a property indexed register (paragraph 1.2.4) which extends to title, the statute ought to provide that the title is registered title.<sup>28</sup> In

<sup>26</sup> See paragraph 1.5.3. Wrongdoing is not intended to have any narrow meaning, though in the interests of certainty it is important that any registration statute define the concept carefully.

<sup>27</sup> Compare Sykes & Walker *op cit* 298-9 who, it seems, do not regard *Gibbs v Messer* [1891] AC 248 as inconsistent with the principle of immediate indefeasibility or paramountcy of the register.

<sup>28</sup> *Real Property Act* 1886 (SA) section 69II provides that fraud is an express exception to the paramountcy principle.

stem and also in a name indexed register (paragraph 1.2.4) a registered interest over property should have priority over an unregistered security interest in the property.

Now it can be seen that a person contemplating taking an interest in property (P, S or I) has an incentive to search such a register. To obtain a valid interest in property the subject of a property indexed register, the person must deal with the registered proprietor O. Having dealt, P, S or I has an incentive to register the dealing in order to obtain the status of registered proprietor (ie title) or the holder of a registered security interest or other interest as the case may be.

To protect C, it may be provided that an unregistered security interest of S may be wholly or partially ineffective vis-a-vis C.

In the case of a Torrens title land transfer where X forges a proprietor's signature and becomes registered, X is the proprietor.<sup>29</sup> That is not to say that X should profit from wrongdoing. X, while he is a proprietor, can be compelled to transfer the property to the person who should be its owner.<sup>30</sup> X would remain liable in damages. And X should be convicted of the appropriate crimes.

If X disposes of the property to P or creates a security interest or other interest in favour of S or I, paramountcy of the register requires that on registration P, S or I become the owner or hold the relevant interests. It is not inconsistent with this view that if any of these parties were accomplices of X, their interest might be defeasible and they might incur civil or criminal liability. Also, defeasibility is not, in principle, limited to persons who are accomplices of X. There is no self evident set of principles to which anyone can point and say that logic requires that these principles and no other set the proper principles for defeasibility. In particular, defeasibility may arise in the cases of infancy,<sup>31</sup> credit laws, invalid exercise of power, and the like as well as cases of overt fraud.<sup>31</sup>

This author also asserts, however, that it is a necessary and integral part of the concept of paramountcy of the register that a registered interest is not defeasible to the detriment of the registered interest of an innocent party (innocent is used in the sense of a party not directly affected by an invalidating circumstance as referred to in paragraph 1.4.10). Civil remedies must be constrained by this requirement.

In the formulation of principles pursuant to which it can be determined whether a registered interest should be defeasible, common sense can be very helpful. The *nemo dat* rule is supported by a powerful public policy objective, namely, the discouragement of crime. If common law rules are replaced by registered title and a forger can become registered and pass an indefeasible registered title to a dealer, a friend or a relative, there would clearly be a tendency to encourage forgery and multiply the number of "fences" available to assist in the disposal of stolen property. It follows that there may need to be special defeasibility rules in regard to interests acquired by friends, relatives and dealers.<sup>32</sup> Whether an interest obtained by a

<sup>29</sup> See footnote 7.

<sup>30</sup> See footnote 10.

<sup>31</sup> See Sykes & Walker *op cit*, 296. See paragraph 1.4.10 which describes a division of parties into those immediately affected by grounds that might lead to defeasibility and those where the grounds pertain only to a predecessor in title.

<sup>32</sup> See *Chattel Securities Act* 1987 (Vic & WA), section 8. Note that car dealers raise quite unique problems. There are no equivalent land dealers. Estate agents are not

volunteer (ie a person who provides no consideration) should be defeasible raises similar issues.

It is a logical consequence of the view that paramountcy of the register should be viewed strictly that true paramountcy of the register can only satisfactorily be achieved in an asset indexed register that provides for title by registration as well as registration of security interests. This is because in a name indexed register and an asset indexed register that does not provide for title by registration a registered security interest created by thief X can only be made paramount at the expense of depriving the owner O of his title. In paragraph 4 this proposition is developed further with respect to the REV scheme and in paragraph 5.9 it is explained why the shipping register does not provide for paramountcy of the register.

The provisions of registration statutes that provide that an interest has efficacy as a registered interest if it is registered within the period of time after its attachment and that efficacy dates back to the date of attachment are in fact inconsistent with the proposition that the register is paramount. Part 3.5 of the *Corporations Law* provides that a security interest (a company charge required to be registered under the *Corporations Law*) is a registered charge as from the time of its creation (in the nomenclature of this paper "attachment") if registered within 45 days and has priority over a subsequent registered charge over the same property which may have been registered first. What this means is that S<sub>2</sub> in whose favour the second charge to attach was given, could not rely on the state of the register at that time. It is as much a part of the concept of the paramountcy of the register that the absence of a registered interest is given paramountcy as the presence of one. Interests must date from the time of registration (though it is permissible that the order of registration be the order of lodgement for registration).<sup>33</sup>

#### 1.5.4 Register error

A registration system implies that on occasion there will be system error. Whilst the system should be designed to minimise error, the legislation must make quite clear which affected party is to lose as a consequence of the error. For example, if a security interest of S is registered but a search certificate issued by the system fails to disclose it, does P acquire the property free from the interest of S with the consequence that the interest of S is extinguished, or does P take the property subject to the interest of S? Whatever the outcome, the system should carry insurance to compensate the loser.

Because loss as a consequence of system error will seldom occur without the concurrent activities of X, it is not always easy to distinguish between system error and fraud. Thus, if the register is to be paramount, is it system error if the signature of O is forged and, in consequence, X is registered as proprietor of property in a property-indexed register? A registration system must include measures to detect forgeries. These days, it would be feasible to contemplate some unique personal identifier (such as DNA testing) less fallible than handwriting recognition or PIN

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usually vendors and buyers from them would make usual conveyancing inquiries which they would not do in the case of a car dealer.

<sup>33</sup>

Article 9 recognises the perfection (ie registration) of a security interest over property which is brought into a State back-dated to that time if the security interest is registered within four months after the property is brought into the jurisdiction. Even though this provision attempts to compensate for the lack of a nation-wide register of security interests equivalent to the Australian register of companies charges, it, in this respect, offends the rule that the register is paramount. Backdating registration to the date of lodgement for registration is really only a semantic difference so long as a search certificate discloses unregistered dealings.



numbers, mother's maiden name, etc. Again, the system should carry insurance or, at the least, the extent that the system has a duty to protect against fraud should be clearly stated so that affected parties can take out insurance.

#### 1.5.5 Forgery and other invalidating circumstances

The possibility of fraud is discussed in paragraph 1.4.8. Other invalidating circumstances are discussed in paragraph 1.4.10. It is important that in drafting the rules that apply to registration systems the consequences of forgery, fraud and other invalidating circumstances are dealt with in a principled way and consistently<sup>34</sup> from register to register. If X cannot be prevented from wrongdoing, the consequences should at least be clear. Parties should have the opportunity to insure.

In principle, manipulation of the register without a dealing should be categorised as system error for which the operators of the register should provide compensation.

On the other hand, reliance upon a forged search certificate or forged documents of title should be the responsibility of the party who relies on the documents. Responsibility in the case of reliance on a forged dealing is more complex. That should be the responsibility of the party who relies on the document unless it is registered. If registered, it should be the responsibility of the operator of the register. That is to say, the register should have provision for detecting forgery and accordingly, if the interest of a registered party is removed due to forgery or manipulation of the register, the party whose interest is removed should be entitled to compensation from the manager of the register.<sup>35</sup>

#### 1.5.6 Caveats and unregistered dealings

Provision for caveating is strictly provision enabling a person with the requisite interest to prevent registration of dealings of the kind described in the caveat not yet lodged for registration. Thus, it is well understood that in dealing with Australian Torrens title land, a purchaser under an executory contract may caveat with a view to preventing registration of a transfer to consummate a fraudulent second sale or security interest. Provision for caveats implies that a prospective buyer or security holder must search not only for registered interests but also for caveats. Because, under present day Australian Torrens statutes, dealings are registered in the order in which they are lodged for registration, a person proposing to deal must also search for unregistered dealings.

It is easier to set out the principles that ought to apply in respect of unregistered dealings than in respect of caveats. An unregistered dealing might not be registered. It might be forgery. A person who deals with a party who would be O if the dealing is registered should get nothing if it is not. Paramountcy of the register should be construed strictly. The only assurance that ought to be given in respect of unregistered dealings is that they will be registered in the order in which they are

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<sup>34</sup> As it is clear that the law as to consequences of forgery, fraud and other invalidating circumstances relating to Torrens title land is very complex, the same law is unlikely to be enacted with respect to other registers. Inconsistency is likely to be a fact of life for some time.

<sup>35</sup> The *Chattel Securities Act* 1987 (Vic & WA), section 7(2) provides that in certain circumstances a purchaser obtains a title free from a registered security interest, that is, the security interest is extinguished. However, under motor dealers legislation (Victoria — *Motor Car Traders Act* 1986, section 48) S, whose registered security interest is extinguished, is entitled to compensation. This is a pragmatic reversal of what the theory should provide for because S is primarily interested in moneys secured whereas P is interested in the property.

lodged for registration. Even that assurance requires that a search certificate disclose such dealings.

A modern electronic register ought to provide almost immediate registration of dealings; the only delay being in respect of verification of authenticity.

Dealings which, in current Torrens systems, take time are subdivisions or amendments to title. It ought to be easy enough with regard to such dealings to provide that they must be authenticated before lodgement for registration and that, so far as the register is concerned, they have no efficacy until registration.

In principle, a caveat should be regarded as "another interest" (ie the right to prevent all or some dealings by O).

On this basis, the only detriment that should be suffered by a party failing to lodge a caveat is the failure to prevent registration of dealings lodged before the caveat. The party having a caveatable interest should not suffer any other prejudice. In particular, the failure to lodge a caveat should not, of itself, lead to the defeasibility of an interest that is later registered.

## **2. THE PRESENT LAW**

### **2.1 What is wrong with the existing registration requirements and priority rules?**

#### **2.1.1 Paragraphs 2.1.1 and 2.2.1 of the QLRC/VLRC Report state:**

"The existing registration requirements are unsatisfactory for three main reasons: (1) they are piecemeal in their application; (2) they overlap in a way that results in duplication of effort on the part of registrants and searchers; and (3) they are in many respects outdated."

"There is little consistency in the rules presently applicable to the kinds of dispute identified in paragraph 1.4, above. The rules vary according to: (1) whether or not registration is required; (2) the form of the security transaction; and (3) the nature of the subject matter."

#### **2.1.2 Defects in existing registration requirements and priority rules are set out in the QLRC/VLRC Report in paragraphs 2.1.2-2.1.4 and 2.2.2-2.2.9 respectively. For present purposes it is sufficient to repeat the summary from paragraph 2.3.1 of that report.**

"In summary, it can be said that the present law governing competing claims to personal property is deficient in the following principal respects:

- Transactions are regulated according to their form rather than their substance. The rights of the immediate parties and third parties are made to turn on variables which have no basis in policy or commercial convenience.
- Existing registration requirements are piecemeal. They discriminate irrationally between different kinds of transactions, different classes of debtor, and different kinds of property.
- On the other hand, there is excessive overlap between existing registration statutes. Some transactions are subject to more than one registration requirement in the same jurisdiction, while others are subject

to separate (though similar) requirements from State to State. The consequence of overlap is duplication of effort on the part of either registrants or searchers (depending on what rule is employed for dealing with the overlap).

- In many cases, the registration process is unduly cumbersome, while the consequences of failing to register are heavy-handed. In both respects, the existing law adds needlessly to the cost of doing business and impedes the free flow of transactions.
- Existing priority rules are an uneasy mix of statutory, common law and equitable inputs. The overall picture is one of inconsistency and unpredictability. Some of the statutory rules detract from the paramountcy of the register and are needlessly complicated, while the non-statutory rules are excessively reliant on formal (technical) considerations."

That summary applies to real property just as validly as it applies to personal property. This paper only proposes to canvass these defects to the extent necessary to debate the issue raised in the next paragraph.

**2.1.3** This paper does propose, however, to assert that:

- the expansion of the Article 9 proposal (a generalised name indexed register) to cover all property (including land)
- the expansion of the Article 9 proposal geographically so as to create a single register for Australia (Part 3.5 of the *Corporations Law* does this for company charges)
- the expansion of the REV scheme to cover title
- the expansion of the REV scheme geographically to embrace the whole of Australia (Tony Duggan's paper describes the extent to which this has been achieved)
- the expansion of other property indexed registers to cover title
- the expansion of other property indexed registers to cover all of Australia (where the subject property may be situate in more than one jurisdiction)
- the modernisation of existing property indexed registers (for example, the REV scheme in respect of motor vehicles and the registers in respect of land and ships) to provide property for paramountcy of the register, tacking, notice, filing and "substance over form"

make it easier, rather than more difficult to develop satisfactory rules for registers as well as greatly enhancing their effectiveness.

### **3. GENERALISING THE ARTICLE 9 SOLUTION**

#### **3.1.1 QLRC/LRC Report and ALRC Report compared**

As stated in paragraph 1.1.3, Tony Duggan's paper relates the ALRC Report and the QLRC/LRC Report to each other and to Article 9. Article 9 is a name indexed register of security interests in personal property. This paper is presently concerned with the breadth of coverage of Article 9 and to compare that breadth of coverage with existing Australian name indexed registers.

### 3.1.2 Australian name indexed registers

As discussed in QLRC/VLRC Report and in Tony Duggan's paper, Part 3.5 of the *Corporations Law* is the principal Australian name indexed register with which to compare Article 9. Other Australian name indexed registers are Bills of Sale Acts so far as they still survive.

### 3.1.3 Debtor coverage of statutes

Article 9 extends to all debtors. Part 3.5 of the *Corporations Law* is limited to corporate debtors.<sup>36</sup> Bills of Sale legislation at various times in its history extended to corporate debtors and at other times left provision for corporate debtors to company law. The current position is that by force of the *Corporations Law* security interests created by corporations are not subject to invalidation by Bills of Sale legislation.

### 3.1.4 Cross border coverage of registers

Whilst Article 9 has been adopted in all American States and similar legislation has been adopted in a number of Canadian provinces and Part 3.5 of the *Corporations Law* applies in all Australian jurisdictions, the American and Canadian statutes establish a name indexed register for each jurisdiction. There is no national register such as is established under the *Corporations Law*. Residual Australian Bills of Sale legislation is effectively restricted to non-corporate debtors with regard to security interests registrable in particular jurisdictions.

### 3.1.5 Land

Neither in North America, nor Australia, do the name indexed registers extend to land.

### 3.1.6 Substance over form

It has already been noted in paragraph 1.2.7 that the key feature of Article 9 is that it looks to the substance of the security transaction of its form. On the contrary, Part 3.5 of the *Corporations Law* requires only the registration of a charge (including a mortgage) given by a corporation. Other transactions which serve the same function are not required to be registered.<sup>38</sup>

### 3.1.7 Tacking

Article 9 provides<sup>39</sup> that where a loan agreement provides for the making of further advances and there is a perfected security interest, the priority accorded to the creditor over subsequently perfected security interests extends to the further advances. The priority can be waived or modified by means of a subordination agreement. Part 3.5 of the *Corporations Law* provides that priority in respect of future advances depends on whether the charge specifies the maximum amount of "prospective liabilities" (possible future advances) or leaves the prospective liabilities

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<sup>36</sup> See QLRC/VLRC Report, paragraph 2.1.2(c) for criticism of this limitation and paragraph 3.1.2 for the correct policy.

<sup>37</sup> See *Corporations Law* section 273.

<sup>38</sup> See QLRC/VLRC Report, paragraph 2.1.2(c). A similar criticism can be made of remaining Australian Bills of Sale legislation.

<sup>39</sup> See QLRC/VLRC Report, paragraph 3.1.10.

unspecified and whether the lodged notice of a charge indicates the nature or maximum amount of prospective liabilities. Priority can also depend on whether the holder of the first charge had actual knowledge of the later charge when making the advance. A further factor is whether there was an obligation to make the future advance.<sup>40</sup> State laws, for example, *Property Law Act 1958* (Vic) section 94, provides for a different tacking rule. Yet another rule applies in regard to mortgages registered under the *Transfer of Land Act 1958* (Vic) (a Torrens title system). *The Chattel Securities Act 1987* (Vic and WA) (property indexed registers) provide for the Article 9 solution in the cases to which they apply.<sup>41</sup> Section 39 of the *Shipping Registration Act 1981* (Cth) which provides statutory priority for registered mortgages of ships or shares in ships according to the order of registration has been held to be subject to the rules of tacking.<sup>42</sup> It is obvious that if there were a single name indexed register for Australia and it applied to security interests in all forms of property there would only be one tacking rule.

### 3.1.8 Notice filing and paramountcy of the register

Article 9 provides for paramountcy of the register (see paragraph 1.5.3) and for notice filing as opposed to filing of the security instrument. Part 3.5 of the *Corporations Law* provides priority rules that depend in part on constructive notice rather than paramountcy of the register.<sup>43</sup> Part 3.5 of the *Corporations Law* also requires lodgement of the security instrument if there is one. The State and Territory statutes concerned with registration of security interests in motor vehicles that are involved in the REV scheme do have some features which are consistent with the principles espoused in paragraph 1.5 and particularly paragraph 1.5.3. This is most true of the *Chattel Securities Act 1987* (Vic) and (WA). However, in many respects all these statutes could be improved. This is most obviously so in regard to the failure of the States and Territories to agree on a simple REV scheme but there are many technical problems also.

## 3.2 What if Article 9 and Part 3.5 of the Corporations Law applied to security interests over all property including land?

### 3.2.1 Effect of limitation of coverage in priority disputes

A limitation on the breadth of coverage of a name indexed registration system creates the need to provide rules to solve priority disputes between securities that are registrable in the register but which extend to property a charge over which, taken alone, would not have required registration in the register.

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<sup>40</sup> For criticism of the *Corporations Law* policy, see QLRC/VLRC Report, paragraph 2.2.4.

<sup>41</sup> *Chattel Securities Act 1987* (Vic and WA) section 10. Note that these provisions are expressed to be subject to the *Corporations Law*. They apply only to registered interests and are thus restricted to motor vehicles.

<sup>42</sup> See paragraph 5.10. In Victoria and Western Australia the statutory provisions (eg *Property Law Act 1958* section 94 (Vic) are not, in the case of a ship, displaced by section 10 of the *Chattel Securities Act 1987* because ships mortgages are not registered under Part III of that Act.

<sup>43</sup> See *Corporations Law* section 278(2).

### Example 1

For example,  $S_1$  and  $S_2$  each take charges over all of the property of a corporation  $O$ , including the land of  $O$  and fixtures upon such land. What rules govern the priority of the charges in respect of  $O$ 's land?

If both the charges are floating charges, section 262(1)(a) of the *Corporations Law* would apply to each of them. Each is, therefore "registrable". By virtue of sections 262(8) and (9) the provisions of Part 3.5 relating to the giving of notice in relation to, the registration of and the priorities of charges, do not apply in relation to "a charge on land" or a charge "on fixtures given by a charge on the land to which they are affixed". Section 279(4) provides that where a charge relates to property of a kind to which a particular paragraph of section 262(1) applies (here section 262(1)(a)) and also relates to other property, sections 280-282 (the priority rules) apply so as to affect the priority of the charge only insofar as it relates to the property to which section 262(1) applies and not so as to affect the priority of the charge insofar as it relates to other property. Accordingly, under the *Corporations Law* the first question is whether land, or fixtures on land, can be the subject of a floating charge. Assuming that the answer is yes, the next question is whether insofar as the charge relates to land or fixtures on the land, the effect of sections 262(8) and (9) and 279(4) is that the priority rules in sections 280-282 do not apply insofar as the charge affects land. This would appear to be the effect of those provisions regardless of whether the land is expressed in the instrument to be the subject of a floating charge or a fixed charge. The answer to the question, therefore, is the appropriate priority rules are those pertaining to the land. These rules are themselves complex even when the land is under the Torrens system (a property indexed register). First, which (if either) of the security interests is registered in the Torrens register? Second, does priority depend solely on registration or is notice, including constructive notice, important? Third, is tacking involved and, if so, what tacking rule applies?

### Example 2

What if the first example is varied so that at the time the issue arises  $O$  had contracted to sell the land? The asset of  $O$  is a chose in action being the debt due from the purchaser. Nevertheless, it is probably a book debt within section 262(4) of the *Corporations Law* and accordingly, registrable by reference to section 262(1)(f) quite apart from the operation of section 262(1)(a). At the same time,  $O$ , as vendor, retains a vendor's lien which is an interest in land. Now the question is to what extent can it be said that the charge "affects" land so as to measure the effect of sections 262(8) and (9) and 279(4) of the *Corporations Law*?

### Example 3

Suppose  $S_1$  takes a charge over all the property of  $O$  including a life insurance policy in respect of the life of its managing director.  $S_2$  takes a charge over the above referred to life insurance policy. The charge taken by  $S_2$  is not within section 262(1) of the *Corporations Law* whereas the charge taken by  $S_1$  is within section 262(1)(a). Therefore, assuming registration, the charge of  $S_1$  is a "registered charge". The charge of  $S_2$  is by virtue of section 278(1) neither a "registered charge" nor an "unregistered charge".

Because of section 279(5)(c) of the *Corporations Law*, any provision of the *Life Insurance Act 1945* which provides for the order of priority of the two charges takes precedence. Even where the *Life Insurance Act 1945* does not provide the answer, sections 280-282 of the *Corporations Law* provides no guidance since the rules there set out do not provide for the priority as between a registered charge and a charge that does not require registration. Nor, if it comes to that, do sections 280-282

provide for priority between an unregistered charge and a charge that does not require registration.

#### Example 4

Suppose  $S_1$  takes a charge over all the property of O including an Australian ship registered under the *Shipping Registration Act* 1981 (Cth).  $S_2$  takes a charge over the ship. As in example 3, the charge taken by  $S_2$  is not within section 262(1) of the *Corporations Law* but the charge taken by  $S_1$  is within section 262(1)(a). Again, as in example 3, assuming registration, the charge of  $S_1$  is a "registered charge". The charge of  $S_2$  is, by virtue of section 278(1) neither a "registered charge" nor an "unregistered charge". In this case, unlike example 3, section 279(5)(c) does not provide that the provisions of the *Shipping Registration Act* 1981 take precedence. However, the decision in *Re North Brisbane Finance and Insurances Pty Ltd*<sup>44</sup> suggests that if there were any inconsistency between the *Corporation Law* (a State law) and the *Registration of Shipping Act* 1981, the State law would, to that extent, be void under section 109 of the Constitution.

The priority for which the *Registration of Shipping Act* 1981 provides is discussed in paragraphs 5.6 and 5.10. In substance, the priority is in order of registration, subject to taking. But as in Example 3, sections 280-282 of the *Corporations Law* make no provision. Thus, there is no conflict between the *Corporations Law* and the *Shipping Registration Act*.

Readers may be disappointed that this paper does not provide full answers to the questions posed by the examples or, perhaps, that there is not an exhaustive list of problems that are raised by limitations in the coverage of Part 3.5 of the *Corporations Law*. To undertake those tasks is not the point of this paper. It suffices to demonstrate that there are real problems and they are not easy to solve.

### 3.2.2 Inference

The examples set out in paragraphs 3.2.1 make it obvious that if there were a single name index register for Australia and it applied to all security interests in all forms of property, it would be easy to draft priority rules that did not raise the difficult questions set out in paragraph 3.2.1 and others like them.

Instead, it would be necessary to determine the relationship between the name indexed register and individual property indexed registers such as might be or are set up under the *Life Insurance Act* or the Torrens title land schemes. The issue for this paper is whether it is more rational to try to resolve questions like those in paragraph 3.2.1 (register coverage problems) or to resolve register relationship problems.

### 3.2.3 Relationship between a name indexed register and individual property indexed registers

The key problem that must be addressed is how to reconcile the priority rules of a generalised name indexed register with the priority rules that apply with respect to property indexed registers. The obvious property indexed registers to consider are State Torrens title land registers, the motor vehicle REV scheme and the Australian shipping register. These registers also provide an appropriate contrast because Part

<sup>44</sup>

(1983) 50 ALR 547. In this case, it was decided that section 100(1)(f) of the *Companies Act* 1961-80 (Qld) read in conjunction with section 100(3)(f) of that Act and section 30(9) of the *Companies (Application of Laws) Act* 1981 (Qld) to the extent it purported to render void against a liquidator, a ship's mortgage registered under the Commonwealth Act and not registered under the State *Companies Act* was invalid under section 109 of the Constitution.

3.5 of the *Corporations Law* extends to motor vehicles (the property covered by the REV scheme) but not land or ships.

It would hardly be useful if the rules pertaining to each register were to the effect that security interests registered in the register had priority in the order of registration if the facts were that in the name indexed register the security of  $S_1$  was registered before the security interests of  $S_2$  whereas in the land register the security interest of  $S_2$  was registered before the security interest of  $S_1$ . To make sense of there being two registers, one register has to prevail over the other.

In addition, and as a practical measure, it should be made easy for  $S_1$  and  $S_2$  each to register their respective security interests in both registers in a single transaction. It would also help if searching could be achieved in a single step. Single stop registering and searching with respect to multiple registers seems possible only in the modern computer age and then only with a degree of sophistication and co-operation between the keepers of the registers. In an Australian context, this must imply co-operation between Federal authorities in regard to a national name indexed register and, presumably, State authorities with respect to State-based property indexed Torrens title registers. Such co-operation will not easily be achieved. However, co-ordination of registering and searching really only address the issue of ease of use rather than the primary issue which is co-ordination of the respective priorities.

Co-ordination of the respective priorities was first raised by the Molomby Report in 1972.<sup>45</sup> It is also addressed in the QLRC/VLRC paper<sup>46</sup> and in Tony Duggan's paper. It is surprising that this issue has not been addressed in North America or in the United Kingdom.

In principle, the answer must be sought in the purposes which are served by the respective registers. A name-indexed register is suited for resolving priority disputes between the holders of security interests created by the **same person**. These disputes are those discussed in paragraph 1.4.6 above (wrongful creation of a security interest). The logical rule is simply that priority goes to the security holder, notice of whose security interest is first entered in the register.<sup>47</sup> A name indexed register can be expanded to embrace any form of property whereas by its nature a property indexed register is limited to particular property within the scope of the register.

The wider the classes of property which are covered by the name indexed register, the more likely it is (absent computer help) that a single search will suffice to resolve relative priorities between security interests created by a particular person.

If on the other hand the issue is whether a sale by X (our rogue) to a purchaser, P should extinguish a security interest of S (the kind of dispute discussed in paragraph 1.4.4 above — disposition contrary to a security interest) a name indexed register is not as well adapted to resolve the problem as a property indexed register indexed with respect to the particular property the subject of the dispute. If the problem were to be resolved by a name indexed register a search may fail to show a registered security held by S. This is because X may not be the owner (paragraph 1.4.3 — theft). And if X is the owner, he may use an alias for one of his transactions.<sup>48</sup> A

<sup>45</sup> Molomby Report Chapter 5.11 and particularly paragraph 5.11.28.

<sup>46</sup> QLRC/VLRC Report paragraphs 3.3.8 and 3.4.

<sup>47</sup> There is a distinction between lodging a notice and its entry in the register. See QLRC/VLRC Report paragraph 3.3.4, paragraph 1.2.10 of this paper, note 9 and note 41.

<sup>48</sup> It is not easy for a corporation to use an alias.



property indexed register, on the other hand, is suited for search by a potential purchaser or creditor who is interested in a particular item of property which is property of a kind for which the register provides an index. The reasoning is equally valid whether the property is land, a motor vehicle or a ship. This paper will address later the enhancement which would be given to a property indexed register if it also provides for title.<sup>49</sup>

The conclusion is as follows. Where the rules of both a name indexed register and a property indexed register could apply to resolve a priority dispute between security interests, the rules of the name indexed register should prevail.<sup>50</sup> On the other hand, if the issue is whether a purchase transaction should extinguish a security interest or an ownership interest, the rules of a relevant property indexed register should prevail over those of a name indexed register.<sup>51</sup>

#### 3.2.4 What about fraud?

It may be contended that Torrens registers have to deal with problems of fraud which are quite different in character from those which arise under the REVS Motor Vehicle Register or under a name indexed register such as is represented by Part 3.5 of the *Corporations Law*. It may safely be presumed that the motivation of rogues remains constant. What does change with a change in the nature of the property is the opportunity to perpetrate a fraud. Moveable property, such as a motor car, can be seized and taken away. In the case of land, other than for removal of fixtures or soil, a thief must concentrate on the documents of title. It is easy to see why Torrens title cases deal with forgery where REV scheme cases involve re-registering vehicles interstate.

The question remains whether the difference between fixed and moveable property should have the consequence that a name indexed register should exclude fixed property such as land? Would including land import the complexities of the Torrens title cases?

Because of the conclusion expressed in paragraph 3.2.3 (namely, that to resolve a priority dispute between security interests the rules of the name indexed register should prevail but that to resolve whether a purchase extinguishes an ownership or security interest, the rules of an applicable property indexed register prevail) it can be seen that excluding fixed property from the scope of a name indexed register should affect only the resolution of priority disputes.

The scope of the issue can thus be narrowed to whether the inclusion of land would import the complexities of Torrens title cases to the resolution of priority disputes?

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<sup>49</sup> See paragraph 4.

<sup>50</sup> *Chattel Securities Act* 1987 (Vic and WA) section 10, which provides for priorities between security interests, also provides that the *Corporations Law* prevails.

<sup>51</sup> It seems probable that the provisions of the *Corporations Law* which provide that charges over some kinds of property do not require registration such as section 262(1)(d) (ship registered in an official register kept under an Australian law relating to title to ships) and sections 262(8) and (9) (land and fixtures on land) are motivated by a similar policy objective. However, by deferring to the asset indexed register both in regard to the issue of extinguishment of a security interest and priority of security interests the *Corporations Law* forces a searcher interested in the priority issue to perform multiple searches. In respect of ships it may well be that section 262(1)(d) is attributable to the decision in *Re North Brisbane Finance and Insurances Pty Ltd* (1983) 50 ALR 547.

### 3.2.5 Fraud under the Torrens system

Torrens title registers were established last century. Therefore, it is necessary to bear in mind that much of the detail and, as well, the key provisions need re-examination.

There has been a long standing debate whether the various Torrens statutes provided for immediate or deferred indefeasibility of title. Sykes & Walker<sup>52</sup> assert that there was a tendency in Australia to repudiate the theory<sup>53</sup> of immediate indefeasibility. They cite *Caldwell v Rural Bank of New South Wales*,<sup>54</sup> *Rowe v B & R Nominees*,<sup>54</sup> *Gibbs v Messer*<sup>55</sup> and particularly the judgment of Dixon J in *Clements v Ellis*<sup>56</sup> and the dissenting judgment of Salmond J in the New Zealand case of *Boyd v Mayor of Wellington*<sup>57</sup> which was approved by Dixon J in *Clements v Ellis*. However, the Privy Council in *Frazer v Walker*<sup>58</sup> established the ascendancy of immediate indefeasibility and this view was decisively adopted by the High Court in *Breskvar v Wall*.<sup>59</sup> In that case Barwick CJ<sup>60</sup> asserted the view, not necessarily obvious from the language of the statutes, that Australian Torrens statutes in fact provide for registered title as opposed to registration of title. Barwick CJ said:

“The Torrens system of registered title of which the Act is a form is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor. Consequently, a registration which results from a void instrument is effective according to the terms of the registration. It matters not what the cause or reason for which the instrument is void. The affirmation by the Privy Council in *Frazer v Walker*<sup>61</sup> of the decision of the Supreme Court of New Zealand in *Boyd v Mayor, & c, of Wellington*,<sup>62</sup> now places that conclusion beyond question. Thus the effect of the *Stamp Act* upon the memorandum of transfer in this case is irrelevant to the question whether the certificate of title is conclusive of its particulars.”

This author accepts that *Breskvar v Wall* established the proposition asserted by Barwick CJ. This point is made in paragraph 1.2.3. However, the accuracy or otherwise of this proposition is a quite separate matter from the assertion made in

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<sup>52</sup> *Op cit* 300.

<sup>53</sup> (1951) 53 SR (NSW) 415.

<sup>54</sup> [1964] VR 477.

<sup>55</sup> [1891] AC 248.

<sup>56</sup> (1934) 51 CLR 217.

<sup>57</sup> [1924] NZLR 1174.

<sup>58</sup> [1967] 1 AC 569.

<sup>59</sup> (1971) 126 CLR 376.

<sup>60</sup> At page 385.

<sup>61</sup> [1967] 1 AC 569.

<sup>62</sup> [1924] NZLR 1174, at page 1223.

paragraph 1.5.3 that a sensible asset indexed registration system must provide to this effect.

In this regard, it is to be noted that a recent draft submission and paper prepared by Simon O'Hanlon complains that recent cases again cast doubt on acceptance of immediate indefeasibility.<sup>63</sup> The paper points also to two recent articles.<sup>64</sup> The paper goes on to point to deficiencies in the Torrens statutes and in entitlements to compensation available to parties whose interests are not recognised or are removed from the register.

For the purposes of this paper, it suffices to say that it adds support to the writer's view that the Torrens statutes need re-examination. The writer advocates a more radical solution, namely, that the statute should be re-written rather than amended. His views as to the applicable principles are set out in paragraph 1.5.

However, simple legislative amendments to Torrens statutes to the effect that priority disputes between registered security interests ought to be determined by the state of the name indexed register (an expanded *Corporations Law* register) in preference to the Torrens register coupled with an expansion of the name indexed register to include priority disputes in respect of land would not import any of the complexities of Torrens title cases to the resolution of priority disputes in the name indexed register. Until the Torrens statutes are updated, complexities of the Torrens system would remain in determining the circumstances in which a security interest might be extinguished and in resolving priority disputes to which the name indexed register does not apply but such provisions do not give rise to any difficulty with regard to priorities in a name indexed register. If one of the security interests involved in the priority dispute in the name indexed register is extinguished that is at the end of the matter. It can have no priority.

### 3.2.6 Conclusion

In an ideal world the rules relating to Torrens title land would be modernised. This is not going to happen quickly. There are two alternatives. One alternative is to include land in property affected by a general name indexed register so that priority disputes in respect of security interests are resolved by reference to registration in that register (that register being new will have updated provisions dealing with fraud) leaving disputes affecting the acquisition of ownership interests and other interests to be resolved according to the existing Torrens title land register with old rules. The other alternative is to exclude land from the scope of the name indexed register leaving all matters concerned with land to be resolved by reference to the Torrens title land register (an antiquated system). This author prefers the former. Logically, no harm emerges from resolving priority disputes according to modern rules and ownership disputes according to antiquated rules, especially if there is a reform

<sup>63</sup> *Vassos v State Bank of South Australia & Ors* (1992) V conv R 54-443, *Eade v Vogiazopoulos & Ors* (1993) V conv R 54-458, *Rogers v RESI - Statewide Corporation Limited* (1991) 29 FCR 219, and *Gosper v Mercantile Mutual Insurance Company Limited* (1992) ANZ conv R 27.

<sup>64</sup> P N Wikrama-Nayake "Immediate and Deferred Indefeasibility" (1993) 67 *LJ* 393, 733; R Edwards "Immediate Indefeasibility and Forgery" (1993) 67 *LJ* 730. The former article advocates immediate indefeasibility and applauds the decisions of Hayne J in *Vassos* and Smith J in *Eade* which hold that the Victorian Act is to the same effect as the Queensland Act upon which *Breskvar* was decided as against the decision of Gray J in *Chasfield* (footnote 21). The latter asserts that the policy of immediate indefeasibility is wrong in principle. With respect, however, Mr Edwards confuses forgery of an instrument which causes a change in the register with the entry in the register. Title, properly viewed, is the interest which registration confers.

program that, over time, will update the antiquated rules. The latter solution, the present system, creates difficult problems in the resolution of priority disputes between securities over property which include land. Such problems are virtually insoluble if, as is in fact the case, there are different tacking rules that apply in respect of Torrens title land and other property.

#### **4. SHOULD THE REV SCHEME BE EXTENDED TO COVER TITLE? MORE GENERALLY, SHOULD PROPERTY INDEXED REGISTERS BE EXTENDED TO COVER TITLE?**

- 4.1** In the absence of registered title, a person seeking to acquire or to obtain a security interest or other interest in property, the subject of a property indexed register, risks not obtaining any interest (in the case of persons proposing to take a security interest or other interest, despite registration) if the party purporting to be O is in fact X, a thief.
- 4.2** In the case of the REV scheme, where the property is a new motor vehicle there is, in practice, seldom a real risk that the first purchaser from the manufacturer's sales company or the retail dealer will not get a good title. Registration of the vehicle under Australian statutes providing for registration of the vehicle<sup>65</sup> usually indicates that the registered owner is O, or a hirer under a hire purchase agreement or a lease but is by no means conclusive that the registered owner is not X, a thief. P, who bought from a motor dealer but does not obtain a good title can sue the dealer and, in Victoria, if the dealer is insolvent, has recourse to the insurance scheme under the *Motor Car Traders Act 1986*.<sup>66</sup> Not all purchases of used vehicles are from dealers and, in any case, the insurance scheme does not apply outside Victoria.
- 4.3** If the REV scheme extended to title (and were assimilated with the scheme for registration of motor vehicles) and the title was paramount in the sense referred to in paragraph 1.5.3, the registered owner of the vehicle would be O regardless of whether O or some predecessor in title was a thief (ie O might be X). In the event of theft or fraud, the only party at risk that a registered interest might prove defeasible would be X, an accomplice or a party upon whom the law imposed a duty of inquiry such as a dealer or a relative.<sup>67</sup>
- 4.4** As discussed in paragraphs 1.4.8 and 1.5.5 registered interests can be obtained by fraud or forgery or manipulated by computer hackers. In such a case, of course, the rightful holder will be dispossessed or made subject to a security interest or other interest that the holder did not authorise. However, if the rules pertaining to the register are clear either the manager of the register must pay compensation or it is evident in what circumstances a party at risk of losing a registered interest or, despite dealing in good faith of obtaining no interest, must insure.
- 4.5** The simplicity and certainty that would be given by a well drawn registration scheme is so evident that it ought to speak for itself. A registered title would not be like a present day registered Torrens title. This author would suggest that there be no hard copy "original" certificate of title nor any "duplicate". A registered party might obtain a search certificate which would show, as at a given date, the state of the register including the name of that party upon the register. Registration would be electronic. As discussed in paragraph 1.5.4 a dealing by O would require a unique personal

<sup>65</sup> See, for example, *Road Safety Act 1986* (Vic).

<sup>66</sup> *Motor Car Traders Act 1986*, section 76. See also footnote 35.

<sup>67</sup> See paragraph 1.5.3.

identifier (or in the case of an attorney, proof of the power and a unique personal identifier of the attorney).

- 4.6 If there were a national REV scheme and if that scheme extended to ownership interests, it would follow that the REV scheme would provide a national register of ownership interests, security interests and other interests in motor vehicles. It would then be evident that provided that the unique identifiers of the vehicle were not erased and substituted with others, rogues would not be able to perpetrate frauds by the simple expedient of re-registering vehicles interstate. The opportunities for forgery and other fraud would not be eliminated entirely (see paragraph 1.4.8) but they would be greatly reduced.<sup>68</sup>
- 4.7 This paper does not propose to analyse the various State and Territory *Chattel Securities Acts* whose inter-relationship comprises the present REV scheme. Tony Duggan's paper has something to say about them.<sup>69</sup> Only the Victorian and Western Australian statutes follow acceptable principles and neither provides for registration of title.
- 4.8 Under existing REV scheme legislation (for example, *Chattel Securities Act 1987* (Vic & WA) section 7(2)) a purchaser who purchases a motor vehicle which is subject to a registered security interest from a dealer (in circumstances that title passes from the previous owner or the previous owner is estopped from asserting that title as against the purchaser) acquires a title free from the security interest. The dealer has the obligation to discharge the security interest. In Victoria, if the dealer is insolvent, the holder of the security interest which is so discharged is entitled to compensation from the Motor Traders Guarantee Fund.<sup>70</sup> The reason for this pragmatic reversal of the ordinary rule that the register is paramount is that in the ordinary course of trade a person who buys a motor vehicle from a dealer does not search the register. Such a purchaser assumes that if a search were made and a registered security interest was disclosed, the dealer would ensure that the security interest was discharged out of the purchase moneys. If it was the law that if the dealer did not in fact discharge the security interest, the holder of the interest kept that interest the holder would be able to repossess the motor vehicle. Given, also, that the Motor Traders Guarantee Fund had an obligation to compensate the disappointed purchaser the result would be that the purchaser would get money whereas what the purchaser bargained for was a vehicle. Conversely, the holder of the security interest would get a vehicle when what the holder bargained for was money. If the REV scheme extended to ownership interests in the way that this author proposes, there might very well need to be a change in the way business was transacted at motor dealers and the desirability of the pragmatic rule above described would need to be reconsidered. This author's present view is that it would be likely that the registration of the purchaser's title would be affected at the time of the sale by accessing the register through a remote terminal from the dealer's premises. To achieve this, the dealer would need to be O, the owner, or have the unique personal identifier of the owner to authorise the transaction. It may be, in such a case, that the most sensible way of proceeding would be for the dealer to promise to pay the amount owed to the holder

<sup>68</sup> It is evident that in the United States where State *Motor Vehicle Codes* (for example, the Illinois *Motor Vehicle Code*) provide both for registration of security interests and registration of title (but not title by registration) considerable effort has been put into devising certificates of title that are hard to forge and also into making owners aware of the need to protect their certificates of title. This author suggests that a new scheme could do better.

<sup>69</sup> See also Duggan Begg and Lanyon, *Regulated Credit — The Credit and Security Aspects*, Law Book Company 1989 Chapter 7.

<sup>70</sup> See footnote 65 and also Duggan Begg and Lanyon *op cit* paragraph 7.3.29.

of a registered security interest and thus the same pragmatic rule would continue. An alternative might be that the dealer would be required to use some means of electronic funds transfer to satisfy the holder of the security interest then and there so as to obtain an immediate discharge. This author's point is simply that the rule would be maintained if it proved sensible in the altered circumstances but otherwise it would have to be changed. There is no absolute necessity that the rule must be the same for Torrens title land and for motor cars. Probably, the extension of the REV scheme to title would make it unnecessary to distinguish between a registered security interest which was given by a motor dealer over his vehicle stock (and over the vehicle, the subject of the particular transaction) and a security interest given to support credit provided to an owner who is not a dealer (for example, an owner who had traded the vehicle in to the dealer).

## 5. SHOULD THERE BE AN INTERNATIONAL REGISTER RELATING TO TITLE, SECURITY AND OTHER INTERESTS IN SHIPS?

- 5.1 Ships are already the subject of a property indexed register, The Australian Shipping register, established under section 56 of the *Shipping Registration Act 1981* (Cth). This register is modelled upon the Shipping register under the *Merchant Shipping Act 1894* (UK) which in turn dates from the *Merchant Shipping Act 1854* (UK). The process of registration under these Acts are said to have inspired the Australian Torrens land registers.<sup>71</sup>
- 5.2 The *Shipping Registration Act* section 12(1) provides, subject to Part II of the Act, that "every Australian-owned ship shall be registered ..." under the Act. By section 13, ships less than 24 metres in tonnage length, government ships, fishing vessels and pleasure craft are exempt from the requirement to be registered under section 12. By section 14, where application is made as provided by the Act, Australian-owned ships as referred to in section 13, and certain other ships, shall be registered. By section 18, the Registrar shall register a ship by entering in the Register such particulars relating to the ship as described. The Register is defined by section 3 to be the Australian Register of Ships referred to in section 56. Upon the registration of the ship under section 18, section 19 requires that the Registrar shall grant a registration certificate in respect of the ship in the prescribed form contained in particulars entered in the Register relating to the ship and such other matters as are prescribed.
- 5.3 Section 20 makes it clear that the registration certificate is to be used only for the purpose of lawful navigation of the ship and is not subject to detention by reason of a claim by an owner, mortgagee, charterer, operator or any other person to any title to lien or charge on or interest in the ship. Aside from the purposes of lawful navigation the certificate must be delivered to the Registrar, a Deputy Registrar or proper officer, or other person entitled by law to require its delivery (section 20(2)).
- 5.4 Section 11(1) provides, inter alia, that for the purpose of registration of the ship, the property in the ship shall be divided into 64 shares. There are limitations on the number of owners and the number of persons who may be registered as joint owners of the ship or share or shares in the ship. However, section 11(1)(b) makes it clear that the limitation on the number of registered owners does not affect beneficial interests of any number of persons claiming under or through a registered owner.

<sup>71</sup> See *General Credits (Finance) Pty Ltd v Registrar of Ships & Anor* (1982) 44 ALR 571 at 574.

- 5.5** Part III deals with transfers, transmissions and mortgages in respect of a registered ship. Section 36 provides for the transfer of the ship or a share in the ship by bill of sale in accordance with the regulations and in respect thereof, a declaration of transfer as to the nationality of the transferee and that the ship will not cease to be an Australian-owned ship by reason only of the transfer. It is mandatory that the bill of sale and declaration be lodged by the transferee with the Registrar within 14 days after execution of the bill of sale (unless an extension is, in special circumstances, granted). It is an offence under section 74 if it is not. Section 37 provides that where a ship or share in the ship is transmitted to a person by any lawful means other than a transfer under section 36, a declaration of transmission together with such evidence of transmission as is prescribed, shall be lodged with the Registrar within 14 days of the transmission or such longer period as the Registrar in special circumstances allows. Again, it is an offence if this provision is not complied with. Section 36(5) does (but section 37 does not) provide that bills of sale lodged under the section shall be registered in the order of their lodgement. Section 37A provides for endorsement of the certificate of registration and for that purpose, for the certificate to be made available to the transferee who is required to furnish it to the Registrar.
- 5.6** Section 38 provides that a ship or share in the ship may be made security for the discharge of an obligation by way of mortgage and that the instrument of mortgage shall be made in accordance with the regulations. As soon as practicable after the lodgement of the mortgage instrument, the Registrar is required to register the mortgage and endorse on the instrument the fact of the entry having been made together with a date and time of making. Section 38(4) provides that mortgage instruments lodged under section 38 shall be registered in the order of their lodgement. Section 39 provides that where two or more mortgages are registered in respect of the same ship or share in the ship, the priority among the mortgagees is in accordance with the order of registration of the mortgages irrespective of the dates upon which they were made or executed and notwithstanding any express, implied or constructive notice. Section 40 provides that a mortgage of a ship or share in a ship does not have the effect of the mortgagee becoming or the mortgagor ceasing to be owner of the ship or share except to the extent necessary to make the ship or share available as a security under the mortgage. The instrument of mortgage, however, involves an assignment of property.<sup>72</sup> Sections 42 and 43 make provisions for transfers of mortgages and transmissions of mortgages which parallel sections 36 and 37 in respect of transfers and transmissions of ownership.
- 5.7** Sections 41 and 45 respectively provide that a mortgagee or owner of a ship or a share in a ship has power absolutely to dispose of the ship or share and to give effectual receipts in respect of the disposal. The power of the owner is expressed to be "subject to this Act and to any rights and powers appearing in the register to be vested in any other person". The power of a mortgagee, other than a first mortgagee, shall not, except under the order of a court of competent jurisdiction, be exercised without the consent of every prior mortgagee.
- 5.8** Sections 46 and 47 provide, respectively, that notice of a trust express, implied or constructive shall not be entered in the register or receivable by the Registrar but, subject to sections 41, 45 and 46 (all mentioned above) beneficial interests may be enforced by or against the owner or mortgagee of a ship or a share in a ship in respect of his interest in the ship or share in the same manner as in respect of any other person or property.

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For a discussion of the effect of registration of the mortgage on ownership of the ship, see Martin Davies and Anthony Dickey *Shipping Law*, LBC 1990, 121-122.

- 5.9 The *Shipping Registration Act* does not contain any express statement that the Register is paramount or for indefeasibility of title. Registration as the owner of the ship or share neither confers nor confirms title.<sup>73</sup> Further, title ordinarily passes on execution of the bill of sale or upon transmission and not upon the entry of the new name in the register.<sup>74</sup> Thus, the names stated in the register may be wrong because a bill of sale may be invalid or title may have passed to someone else. "Registration of ownership concerns simply the registration of existing title; it does not involve title by registration."<sup>75</sup> However, entry of a person's name in the register of ships as that of the owner of a ship or share will always give this person good title provided the person is a bona fide purchaser for value from the person named in the register as the owner of the property. Similarly, if the purchaser buys from a registered mortgagee. These results follow from sections 45 and 41 of the Act.
- 5.10 The priority that section 39 seemingly confers upon a registered mortgagee is subject to tacking rules; that is to say, a prior registered mortgagee who makes a further advance with notice of a subsequently registered mortgage may be postponed to amounts then outstanding in favour of the subsequently registered mortgagee.<sup>76</sup>
- 5.11 To complete the picture, sections 47A-47E of the Act and section 59 provide, respectively, for the lodgement of caveats and for the rectification of the register. Both of these have their parallel in Torrens title land registers but neither were included in the *Merchant Shipping Act 1894* (UK). Section 59 is the subject of a decision in *General Credits (Finance) Pty Limited v Registrar of Ships*.<sup>77</sup>
- 5.12 Paragraphs 5.1-5.11 describe an asset indexed register which provides both for registration of title and of security interests. It is very important that it be recognised that registration of title under the Act does not mean that the registered owner is the owner of the ship — see paragraph 5.9 above. It is clear that the *Shipping Registration Act* requires considerable modernising if it is to satisfy the criteria set out in paragraph 1.5 above. Included are rules to provide for paramountcy of the register (and this phrase is intended to infer that the registered owner is the owner), a sensible tacking rule for insurance in regard to system error and for the consequences of forgery or other fraud. Besides that, of course, the register should be computerised. It must be remembered, however, that the *Registration of Shipping Act* has purposes other than the registration of ownership and security interests in registered ships. Included among its additional purposes is the objective to ensure registration of Australian ships, to prevent registration as an Australian ship of a ship registered in any other jurisdiction and to preserve Australian ownership or at least a majority Australian ownership of Australian ships. In the latter case, however, it seems that incorporation in Australia suffices to establish an "Australian national" (section 3(1)) so that the policy behind this provision is not easy to discern.

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<sup>73</sup> See Davies & Dickey *op cit* 69.

<sup>74</sup> Davies & Dickey *loc cit*.

<sup>75</sup> Davies & Dickey *loc cit*.

<sup>76</sup> See Davies & Dickey *op cit* 120-121 and *The Benwell Tower* (1895) 8 Asp. MLC 13. Statutory provisions such as section 94 of the *Property Law Act 1958* (Vic) would apply if there is the appropriate nexus with the relevant State or Territory.

<sup>77</sup> (1982) ALR 571.



- 5.13 However, the Australian Shipping register does not suffer from the defects of separate registers in each State and Territory, a defect which has bedevilled the REV scheme.
- 5.14 Let it be supposed that the *Registration of Shipping Act* were replaced or amended so as to reflect a registration scheme that does conform with paragraph 1.5 above. The question is whether such a registration scheme could be internationalised. The Lloyds Shipping Index is a publication of Lloyds of London and comprises an alphabetical list of more than 16,000 vessels (as at 1967)<sup>78</sup> showing type, owner, flag, classification, society, year of build, gross net tonnages, voyage, latest position and reference to casualty reports published in Lloyds' list. What is said in paragraph 4 with respect to extension of the REV scheme register to cover title and the benefits that would accrue from expanding that register Australia-wide, applies equally to the expansion of the shipping register world-wide. The wider the ambit of the register, the less opportunity that there is for fraud in re-registration of goods (in this case, ships) in a different register.
- 5.15 As remarked in paragraph 5.12 above, the *Registration of Shipping Act* has objectives beyond the registration of title interests and security interests and the priority thereby conferred. These other objectives are what might be described as nationalistic objectives such as ensuring that Australian ships are owned by Australians and carry the Australian flag. Other countries may also be expected to be concerned to ensure that ships of their nationality carry their flag. Any international register, therefore, would have to make provision for identifying the flag of any given ship and there would need to be an international convention both establishing the register and providing for the registered flag of ships in the register.
- 5.16 In principle, the efficacy given to registration in an international register of ships to that registration could be separately provided for in each of the jurisdictions whose flags are flown by ships included in the register by the national laws of the relevant jurisdiction. Logically, to avoid conflicts between jurisdictions, the effect of the laws of each jurisdiction would be restricted to ships carrying a flag of that jurisdiction. Sensibly, the rules relating to the effect of registration of title interests and security interests would be the same in each jurisdiction, but even if they were not, provided that conflict between the laws of different jurisdictions was avoided, say, by reference to the flag, the international register would still work better than a multitude of national registers. Of course, the processes of registration and search would depend upon modern methods of communication.
- 5.17 Internationalisation of a shipping register should have great appeal in the major economic block of North America and also in the British Commonwealth. Given such a start, there is no reason why it would not appeal to other major maritime powers.
- 5.18 So far as Australia is concerned, if there were such a register and an international convention establishing it, there would be no Australian constitutional difficulty in Australia becoming a party to the convention or in the Australian Parliament enacting any necessary Australian legislation.
- 5.19 What is said with respect to ships is potentially applicable also in the case of aircraft. It might also be able to be applied to items of intellectual property such as patents, copyrights and trademarks.

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<sup>78</sup>See Singh and Colinvaux *British Shipping Laws* Vol 13, paragraph 459.