

# CHAPTER 4

## General issues

### Introduction

4.1 Most submitters to the inquiry acknowledged the substantial amount of work that has been done since the committee's March 2009 report was released. The details of the changes were discussed in the previous chapter. Many consider that the Bill has been greatly improved in various ways. There is general support for the restructuring of the Bill, introduction of the part and chapter guides, the major change to the drafting which has seen the drafting style simplified and more closely aligned with the Canadian and the New Zealand legislation, the expanded articulation of privacy measures and the new enforcement regime have all been broadly welcomed.

4.2 However, the committee heard mixed views about whether the revised Bill improves the legislation to the point where it is ready to proceed. Arising from this the challenge for the committee was to identify the nature of the outstanding concerns, their significance, and what action, if any, needs to be taken in response to these concerns.

4.3 In the committee's view, the major questions which required reflection were:

- what is the character of the concerns raised? Do they primarily reflect (largely unresolvable) policy differences or do they go to the accuracy and effectiveness of the Bill?;
- is it desirable to see the form of the regulations and consequential amendments in order to assess the full scope of the proposed scheme?;
- are the concerns raised about the timeframe for the process legitimate?; and
- given that this Bill forms part of a national legislative scheme, what is the best way to make amendments to the Bill?

### **Do concerns with the current Bill mainly reflect policy differences?**

4.4 Despite general recognition that the 2009 Bill improves markedly on the exposure draft, it is unsurprising that some policy choices reflected in the Bill generated substantial debate. In particular, some representatives of the legal profession who are expert in personal property securities are not reconciled to many of the details in the Bill. In addition to insufficient time to examine the new Bill, they cite concerns about policy choices and inadvertent errors.

4.5 The difficulty for the committee lay in understanding whether or not these are primarily philosophical differences about policy that are unlikely to be reconciled even if there was further extensive consultation because they arise as a result of different interests wanting the legislation to achieve different results.

4.6 Alternatively, does the debate arise from genuine concern that:

- there is a flaw in the policy to the extent that it should be significantly revised or should not proceed;
- the basic policy is sound, but needs to be refined; or
- the intended policy is sound, but the drafting will not achieve the desired effect.

4.7 One challenge arising from the substantial amount of work that the department has undertaken in relation to the Bill since March is that there is a substantial amount of change for those with an interest in the Bill, including this committee, to absorb and understand.

4.8 In short, without going into the particulars, the committee believes that some of the potential problems identified in the submissions simply reflect differences of opinion about policy, but there are also numerous concerns about other aspects of the Bill that are based on one or more genuine concerns about how provisions will operate.

4.9 In relation to the differences of view about the policy it is possible that with more explanation about the policy decision, and more time for people to understand the reasoning and purpose of the particular clauses that are now of concern, they would be at least better understood, or even supported.

### **Regulations and related amendments to other legislation**

4.10 One aspect of the concerns raised with the committee is that it is not possible to assess the complete legislative scheme when the regulations and the proposed amendments to other legislation are unavailable.

4.11 Some amendments to other legislation will be truly consequential and will only involve minor machinery amendments. However, in relation to this scheme it is likely that there will be some significant changes to other legislation that will have an impact on the overall operation of the scheme. Neither the committee nor stakeholders anticipate that these will inherently lead to a bad result – in fact some changes are actively sought - but those who will be affected by the scheme would like to be aware of the scope of the changes so they can properly analyse the full impact. For example, important changes are expected to be made to acts including the *Corporations Act* and the *Shipping Registration Act*.

### **Timing concerns**

4.12 All of the general issues discussed above have an element of concern about timeframes. As discussed in Chapter 2 above, it is not clear exactly why this phase of the project (since the release of the committee's March 2009 report) has been so rushed.

4.13 In relation to timing, there are three substantial points of concern raised by some stakeholders:

- despite earlier extensive consultation, the process relating to finalising the 2009 Bill is too rushed and there is insufficient time to understand the extensive changes to the Bill;

- it is possible that policy choices reflected in the Bill may be appropriate, but there has been insufficient transparency to the policy considerations; and
- there are inadvertent errors in the Bill, but it has not been possible to go through the Bill in detail to be certain that they have all been identified.

4.14 In circumstances where the differences raised with the committee reflect diverging philosophical approaches then extending the process will not progress resolution of the concerns raised. However, a number of submitters have made the case that they, and the Bill, would benefit from more time for consideration on the basis that one or more of the three concerns above apply.

4.15 The department's view is that there has been a long period of consultation. Dr Popple explained:

Perhaps the committee would be assisted to know that during the period of the latest amendments to the bill, and before that, we maintained a very high level of consultation with stakeholders, including many of those you just listed. It would certainly not be true to say that the first they saw of some of these ideas was when the bill that we are currently looking at was introduced into the House. There has been more time beyond that during which the stakeholders who have a particular interest have been engaged in this process with us. We have taken the opportunity to talk to them about what they think needs to be changed. We have responded where we have not necessarily agreed.<sup>1</sup>

4.16 However, witnesses expressed a different view. For example, Ms Angela Flannery of Clayton Utz, who expressed strong general support for the exposure draft bill, told the committee:

...perhaps the Attorney-General's Department, as they did before the exposure draft that you considered, could have made a public draft available that people could comment on or meet with the Attorney-General's Department about et cetera. Before the Senate standing committee got the previous exposure draft, the Attorney-General's Department had already had significant input from a variety of sources – industry and legal.<sup>2</sup>

4.17 When asked how much longer she thought the draft should have been available Ms Flannery's view was that:

Even a month would have been beneficial...If we just had a bit more time to go through the legislation because it is so different, at least on the order of setting out and some drafting, that would be quite beneficial.<sup>3</sup>

4.18 The department argues that much of the change to the Bill is cosmetic as it involves restructuring and redrafting previous provisions in a simpler style to say the

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1 Dr Popple, *Proof Committee Hansard*, Friday August 7, 2009, p. 13.

2 Ms Flannery, *Proof Committee Hansard*, Thursday August 6, 2009, p. 25.

3 Ms Flannery, *Proof Committee Hansard*, Thursday August 6, 2009, p. 26.

same thing. The department's position is that sufficient time has been provided to get across the detail of the Bill and that the current processes are adequate:

We have, as you have said, a large piece of legislation, but we would say its fundamental structure has not changed. The changes that have happened since the last time this was looked at extensively by you and other stakeholders have been predominantly around drafting. The issues that were not predominantly around drafting were in response to stakeholder concerns. Some of the concerns that have been raised since come from those changes. It reflects the fact that there are stakeholders out there who take diametrically opposed views about some of the things that this bill does. But we would say, ultimately, the bill itself is still achieving the global policy end that was intended to be achieved. The concerns that are still being raised are minor when compared to the scope of the bill and the scope of the policy reform. So we would say that there has been sufficient time in the process, and there is process still to come. As we mentioned, there is scope for this change to be made within the parliamentary process. We think that should be sufficient.<sup>4</sup>

4.19 It is true that a large percentage of the change to the Bill is structural, but it is still the case that the Bill is substantial and requires considerable time to even read it, let alone absorb and assess whether the changes achieve what is intended, especially in relation to the new drafting style.

4.20 It is also the case that in addition to the stylistic changes, substantive amendments to the content of some provisions have been made – the Bill proposes different policy outcomes to those in the exposure draft bill. It takes time to simply understand what these are and further time to formulate a response to them.

4.21 On the other hand, the committee is cognisant of the need for this legislation to progress expeditiously, and the calls from some stakeholders for legislative certainty so that they can begin to prepare for implementation of the scheme.

### **How will any amendments to the Bill be made?**

4.22 One aspect of this Bill which has an impact on the way in which it is ultimately considered by Parliament is that the legislation is proposed as a national scheme relying on a single national law. The scheme will rely on a text-based referral of powers from each of the States. Due to the distribution of power in the Constitution no referral is necessary from the two territories.

4.23 Referring legislation has already been passed by New South Wales and in other States the legislative process, which in these circumstances also involved the Council of Australian Governments (COAG) and the Standing Committee of Attorneys-General (SCAG), is well under way.

4.24 The department has indicated that it already suggests some minor amendments to the Bill and is considering some other changes. This committee may

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4 Dr Popple, *Proof Committee Hansard*, Friday August 7, 2009, p. 13.

also suggest that there are matters that warrant further consideration. In light of the national scheme proposed it is appropriate to ask: how will any amendments to the Bill best be achieved?

4.25 The two main options for amending the Bill are:

- to follow the usual process of the government amending the Bill and reintroducing it or making amendments to the Bill in Parliament before it is passed; or
- passing the Bill as introduced (and which is in identical terms to that already passed by New South Wales) and making any amendments in a proposed consequential amendments Bill that (when passed) will take effect immediately.

4.26 The committee has been strongly urged by department to adopt the second approach. The department's view is that there will be no practical difference because amendments "can be coordinated in a way that provides comfort."<sup>5</sup>

4.27 The committee notes that there are arguments both for and against this approach. On one hand, it considers that there are some risks associated with passing a Bill which it does not fully support, knowing that it will require amendment. A major consideration for the committee is whether or not any consequential amendment bill will be considered cognately with this Bill.

4.28 On the other hand, because the states and territories have agreed to cooperate and introduce the model bill in exactly the same terms as the Bill being considered, and New South Wales has already passed a bill in identical terms, the benefits of using a consequential amendments bill as a vehicle for making changes to the current Bill are also apparent to the committee.

### **Committee view**

4.29 Some submitters have explicitly requested greater transparency around policy choices to assist them to understand the approach taken in the Bill. The committee believes that the usefulness of providing greater information about policy decisions was readily apparent from the evidence given to the committee by several witnesses, which showed that concerns may often be alleviated where there is an adequate opportunity for communication between stakeholders and the department.

4.30 In relation to the provision of policy justification for the Bill, the department said in evidence to the committee:

We would say that we have done this to a great extent through the explanatory memorandum, through the various submissions we have made here. We concede there is some scope for some more information and we can easily put that out, through our website, for example.<sup>6</sup>

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5 Mr Glenn, *Proof Committee Hansard*, Thursday August 6, 2009, p. 4.

6 Dr Popple, *Proof Committee Hansard*, Friday August 7, 2009, p. 8.

4.31 Submitters, particularly some legal practitioners, also hold numerous genuine concerns about aspects of the Bill, including the accuracy and effectiveness of a number of clauses. In the next chapter, the committee considers the range of these concerns.

4.32 The committee acknowledges that it is difficult to balance the genuine needs of all stakeholders in this process: the government and some submitters are ready for the Bill to proceed, but other significant concerns about the Bill, including the recent timeframe, have been brought to the committee's attention. The department itself agrees that a number of the concerns warrant further consideration (see Chapter 5 for details).

4.33 One solution the committee has identified is to recommend that the Bill be passed on the basis that the government commits to:

- thoroughly consider all concerns brought to the government's attention about the Bill until 30 September 2009, including the concerns raised in the submissions to this inquiry;
- provide transparency by making public its response to the concerns raised and by providing as much information as possible to stakeholders about policy considerations and choices. This could be done using the department's website; and
- include in a consequential amendments Bill to be debated in the Senate cognately with this Bill and intended to take effect immediately after the commencement of the 2009 Bill all changes to the Bill identified as a result of concerns raised with this committee and subsequently directly with the department.

### **Recommendation 1**

**4.34 The committee recommends that the Bill be passed subject to a commitment from the government to:**

- **thoroughly consider all concerns brought to the government's attention about the Bill until 30 September 2009, including the concerns raised in the submissions to this inquiry;**
- **provide greater transparency by making public its response to the concerns raised and by providing as much information as possible to stakeholders about policy considerations and choices. This could be done using the department's website; and**
- **include in a consequential amendments bill to be debated in the Senate cognately with this Bill and intended to take effect immediately after the commencement of the 2009 Bill all changes to the Bill identified as a result of concerns raised with this committee and subsequently directly with the department during the recommended further period of consultation until 30 September 2009.**