

Liberal Senators' Minority Report

Timing and unresolved issues

1.1 Liberal senators acknowledge that this bill is a considerable improvement over the exposure draft considered by the committee during the last inquiry. However, Liberal senators do not consider that enough time has been allowed either for the committee to conduct an adequate inquiry into this complex and important bill, or for stakeholders to be consulted about it. Indeed, it appears from the evidence received by the committee that although the exposure draft was extensively redrafted to produce the current bill, there has been little if any consultation by the department with stakeholders on the new version of the bill.

1.2 It is clear that the bill will require amendment, but as was apparent during the committee's public hearing, the extent of amendments required is only partially known. The evidence of departmental officers in the final two hours of the committee's public hearing on the bill was, of itself, telling:

We have also handed up a few minutes ago a list of matters which we thought we might take you to. They are under different headings: matters that we think might warrant further consideration; questions on drafting issues that arise in relation to various clauses of the bill; matters which we think might warrant further discussion with stakeholders; matters that have come up in the context of the committee's consideration that will need to be dealt with in regulations.¹

1.3 In short, the department itself was acknowledging that there are unresolved technical issues. Yet the committee is being asked to sign off on this bill before its final form is known, a most unusual step.

1.4 Liberal Senators are also concerned that key stakeholders have indicated that they need more time to come to terms with the bill, and have been critical of the timetable forced by the government. For example, Ms Flannery, a partner at Clayton Utz who had previously been supportive of the general thrust of the reform, told the committee that the new draft of the bill should have been made available for a longer period:

Even an additional month would still have enabled the legislation to be passed this year and might still allow some rats and mice amendments to be made that would at least clarify some things. For example, in relation to the priority time in section 55 a couple of words dropped out from that section which I think, from discussions with the Attorney-General's Department, might not have been intended to drop out. If we just had a bit more time to

1 *Committee Hansard*, 7 August 2009, p. 8.

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.²

1.5 Similarly, the submission of the four law firms stated that:

We accept that decision has been made on policy to implement the Bill on substantially the terms proposed. Nonetheless, we have some concerns that in a number of areas the drafting of the Bill is not meeting its policy objectives and can have serious consequences.³

1.6 The submission listed principal concerns about the bill but cautioned that:

This is not a comprehensive list. We are concerned that, in view of the amount and significance of the changes, and the limited time, there are many other points that we and others will have missed...

This is significant legislation which will fundamentally change private commercial rights and financing practice. While we acknowledge that the Act will be reviewed after three years, significant damage can be done in the meantime, at a time in the cycle when the ability of financiers to take security, and the operation of financial markets, are crucial. It is critical to get it right the first time, there is no urgency, and we strongly urge the senate committee to repeat its initial recommendation to take time to get it right.⁴

1.7 Liberal Senators are particularly concerned that consultation with small and medium business has not been adequate, although it must be acknowledged that this not necessarily through any fault on the part of the department. However, the bill will, if passed, pose significant risks for some businesses and individuals if they are not aware of its implications. For example, the committee asked the representatives of the four law firms about issues relating to the registration of security interests for the farming community. Mr Loxton of Allens Arthur Robinson used the example of a farmer delivering a shipment of hay to a bulk exporter:

...the view is that, if the farmer is delivering the hay in advance of payment and has a contract with the buyer that the farmer will retain title to the hay until he or she is paid, that is security interest as defined and something the farmer will need to register in order to be protected.⁵

1.8 On the same point, Mr Lowden of Freehills elaborated that it would no longer be enough for the farmer to simply rely on an invoice, and if they did, there was a risk in some circumstances that they could lose title to their goods, without payment:

2 *Committee Hansard* , 7 August 2009, p. 27.

3 *Submission 17*, Allens Arthur Robinson, Blake Dawson, Freehills, Mallesons Stephen Jaques, p. 1.

4 *Submission 17*, Allens Arthur Robinson, Blake Dawson, Freehills, Mallesons Stephen Jaques, p. 1.

5 *Committee Hansard* , 6 August 2009, p.62.

Assuming that it is treated as a security interest at the end of the day, one consequence of the formality requirements in clause 20 is that it will not be enough for the farmer or some other supplier to deliver under an invoice and just rely on the fact that the purchaser took delivery; they actually need to get it signed. So there is an additional hurdle that suppliers will need to jump even if they go off and register. So they have put the world on notice as to the existence of a security interest. The requirement for signing can mean that they lose their title to the goods.⁶

1.9 Mr Lowden did acknowledge that the bill could also be of benefit to farmers:

On the other hand, the rules on commingling, as Mr Loxton referred to earlier, are potentially of benefit because they mean that, if they validly establish an interest, they do not necessarily lose their interest simply because they cannot identify which was their bit of wheat.⁷

1.10 What is clear to Liberal Senators is that education of those who are affected about their rights and what they must do to protect their interests is going to be of absolute importance if major injustices are not to result. This point was made to the committee by representatives of the combined law firms:

Mr Loxton- but I think the general observation is that this bill, while it weakens what we think is one of the standard forms of charge, tips the scales in favour of those people who are sophisticated financiers who protect their interest against those who are not aware of the need to protect their interest and to go through all the various steps.

Mr Stumbles- So the point to respond to is that, for small business and farmers, the educational piece for both of those sets of interest groups is going to be quite significant.⁸

1.11 The transitional arrangements also need to protect the interests of small business operators as well as farmers and others who are not fully up to speed with the requirements of the bill if and when it becomes law. This particularly needs to include circumstances where retention of title issues might arise.

1.12 Nonetheless, Liberal Senators acknowledge that some significant stakeholders also wish to see the current timetable for the introduction of the reform adhered to, to allow them to put in place the necessary changes to their systems before the changes implemented by the bill come into effect. For example the ABA told the committee that:

The ABA's concern is to ensure that the timetable that this reform is currently on stays on that timetable. We were very appreciative of the committee's recommendation that the commencement date be extended to May 2011. That gives our members the opportunity to settle in and develop

6 *Committee Hansard* , 6 August 2009, p. 63.

7 *Committee Hansard* , 6 August 2009, p. 63.

8 *Committee Hansard* , 6 August 2009, p. 64.

in a realistic time frame the sorts of changes that they need to make and which they and their customers will benefit from in the fullness of that time. So, yes, we are happy to see those technical issues sorted out and resolved to the satisfaction of parties but staying with the current timetable that the government has adopted for this reform.⁹

Conclusions

1.13 It is clear that the bill will require major amendments before it becomes law, and that time needs to be allowed for consultation with stakeholders before these changes can be finalised. The favoured means of achieving the necessary changes appears to be the introduction of a consequential amendments bill to make the necessary changes. Substantial details of the new personal property arrangements are also to be introduced by way of regulations which have also yet to emerge.

1.14 Liberal Senators do not consider that it would be responsible to agree to this bill until the changes to be made in the consequential amendments bill are available to stakeholders and to the Senate. Similarly, the draft regulations should also be made available. Only then will it be possible to see if the concerns raised by stakeholders and the committee have been addressed adequately.

1.15 Liberal Senators emphasise that it is not their intention to obstruct this important reform, but only to ensure that the government "gets it right".

Recommendation 1

1.16 Liberal Senators recommend that the government and the department conduct further consultations on the bill until the end of September 2009, and that at the conclusion of that process, the government introduce a consequential amendments bill.

Recommendation 2

1.17 Liberal Senators recommend that the government and the department release the revised draft regulations for public consultation as soon as possible.

Recommendation 3

1.18 Liberal Senators recommend that on introduction of the consequential amendments bill, the Senate refer that bill, together with the proposed regulations, to this committee for inquiry and report.

Recommendation 4

1.19 Liberal Senators recommend that the bill not be passed until the committee's report on the consequential amendments bill and the regulations has

9 *Committee Hansard*, 6 August 2009, p. 17.

been presented, and that the Senate debate the bill and the consequential amendments bill together.

Recommendation 5

1.20 Liberal Senators recommend that the government develop and implement a comprehensive education campaign for small to medium business and others prior to the start-up date for the new personal property securities system.

Senator Guy Barnett

Senator Mary Jo Fisher

Senator Russell Trood

Deputy Chair

