

CHattel SECURITIES LEGISLATION -  
REGISTRATION SYSTEM FOR SECURITY INTERESTS

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I propose to talk principally about the practical aspects of the Registration System for security interests that has been established in Victoria under the Chattel Securities legislation.

In addition, I will comment on the differences (and their practical consequences) between that registration system as finally established and the systems recommended to be established by the Molomby Committee.

The Molomby Committee in 1972, when recommending major reform to consumer credit law, recommended fundamental changes in the law relating to the perfection of securities and the rights of innocent purchasers of encumbered goods.

Essentially what the Molomby Committee recommended in that regard was that the rights as between a mortgagee and a subsequent buyer of goods would be determined by rules which would differ fundamentally according to whether or not the goods were a class covered by a statutory registration and search system.

If the goods were goods covered by a statutory registration and search system, a security holder must either register his security interest under that system or take possession of the goods in order to perfect his security and thus defeat a subsequent purchaser for value without actual notice.

If the goods were not goods covered by the statutory registration scheme, a security holder could only perfect his interest and defeat a subsequent innocent buyer by taking possession of the goods.

It was recommended in each case that an innocent buyer should not prevail over a prior mortgagee if the buyer was a dealer in goods or was a member of the mortgagor's family.

As it turned out, South Australia was the first state to pass legislation which provided that the interest of a private buyer without notice should prevail over the interest of an earlier security holder.

South Australia did not, however, decide to establish a statutory system in which security interests could be registered and searched. In lieu of that the South Australian solution was for financiers to resort to Chattel Mortgage Insurance against loss arising from the extinguishment by force of the legislation of their securities.

When Victoria proceeded in 1981 to enact the Chattel Securities Act, that Act contained provisions establishing a goods based register for the registration and searching of security interests.

The 1981 Act did, however, contain one significant departure from the recommendations of the Molomby Committee. The 1981 Act provided that where the bona fide purchaser for value without notice of goods covered by the registration system was a dealer, he too thereby acquired an interest in the goods free of a prior but unregistered security interest. In practical terms that has meant that a Motor Dealer buying in trade-ins has, provided he searches the register, been able to eliminate the risk of being defrauded by the concealment of an existing goods mortgage, lease or hire-purchase agreement of which he has no actual notice.

The 1981 Act was substantially amended by the Chattel Securities Amendment Act 1983 before it eventually was proclaimed to come into operation on 1 April, 1984. Easily the most significant amendment made in 1983 was an amendment extending the security interests which could be affected by the legislation.

The 1981 legislation provided that it would only affect security interests which were created after the date of commencement of the legislation; that commencement provision applied equally to interests over registerable goods as it did to interests over unregisterable goods.

There were strong feelings in the motor vehicle industry that unless existing as well as new goods mortgages, leases and hire-purchase agreements over registerable goods were capable of being extinguished in favour of a bona fide purchaser without notice, it would be a very long time indeed before the registration system would be of any practical benefit.

It was decided that provided adequate arrangements were made to enable the holders of existing goods mortgages, leases and hire-purchase agreements, to have their interests entered on the register before the Act became fully operative, it would be highly desirable to take the plunge and apply the whole of the Act, including the provisions which operate to extinguish securities to all existing as well as new interests over registerable goods. No change was made however to the Act in relation to security interests over unregisterable goods, with the result that the Act, in relation to unregisterable goods, affects only interests which come into being after the date of commencement.

I think that, on the evidence to date, the Victorian registration scheme appears to have proved to be quite successful.

On the commencement date of the Chattel Securities Act, namely 1 April 1984 some 230,000 interests had been entered on the register. By 31 January, 1985 that number had grown to approximately 260,000 which figure I understand to be net of the cancellations which have also been recorded between 1 April, 1984 and 31 January, 1985.

Considerable effort has been taken to ensure that the scheme would be efficient in terms of the speed of handling registration transactions, cheapness of use and accessibility.

Most applications are received through the mail and are received from financiers who are billed on a monthly basis. Applications to register interests received on any business day are entered on the register before the start of the following business day. Applications for registration made at the counter office of the Registry are processed on the spot and the applicant given an acknowledgement.

Finance companies and others to which account facilities are extended receive with their monthly accounts schedules itemising and identifying the vehicles over which securities in their favour have been recorded. These schedules, whilst primarily designed as an accounting measure to justify the account for which payment is claimed by the Registry, serve as a useful audit tool for financiers who are prudent enough to check vehicle identifiers on the account with their security records of applications made.

Two types of search facility are offered; the Registry provides a telephone service by which, without charge, a financier, motor dealer or any member of the public can enquire whether a security interest is currently registered against an identified vehicle. As the registration system is fully computerised, a response to a telephone search is available and given without charge within a matter of seconds. Certificates stating whether or not a security interest is registered against an identified vehicle are issued immediately to members of the public or industry who attend at the office or on a same day mailing basis to applicants who have account facilities.

Either a buyer or a financier can suffer loss as a result of an error made in the registration and search systems and the legislation provides for compensation in either case.

There seemed to be two possible sources of error. An application to register an interest may be wrongly processed or not processed at all. If that happens and a buyer searches against the correct identifying particulars, the buyer may well be issued with a certificate stating that no security interest is registered against the particular vehicle.

In those circumstances I think that the effect of the Act is to extinguish the security holder's interest and thus it is the financier who will suffer loss for which he is entitled to be compensated under the Act.

The other possible source of error is the issue of a certificate wrongly stating that no interest is recorded in relation to a vehicle when in fact such an interest is correctly recorded in the register. In those circumstances I believe the effect of the Act is that the security interest is not extinguished and it is the buyer who suffers loss. Again the Act provides that in these circumstances the buyer is entitled to compensation.

Since the register became operative on 1 April, 1984 only one claim for compensation has been made and that claim was met in full.

As was clearly recognised by the Molomby Committee, the satisfactory operation of goods based security registration schemes is dependent upon the existence of secure and reliable identification systems of the goods themselves.

It is for that reason that the present Victorian system applies only to motor vehicles, including trailers, registered under the Motor Car Act.

Indeed although the Act contemplates the extension of the system to cover securities over motor boats, reservations about the intrinsic security of motor boat identification have to date prevented the extension of the scheme to securities over boats. Although the Molomby Committee advocated the development of new identification systems for goods other than motor vehicles, the lack of progress in that area makes it unlikely in my view that the scheme will be extended, at least beyond motor boats and vehicles, in the foreseeable future.

However, there do seem to be reasons to be optimistic about the adoption of compatible systems in other states. The operational features of the Victorian system have been closely examined by authorities in a number of mainland states and very recently also by New Zealand authorities. Tasmania has already established a scheme very similar to the Victorian scheme in relation to vehicles.

Accordingly while I doubt that there is much practical prospect of the existing Victorian scheme being extended beyond motor vehicles and possible boats, I do think that there is a real prospect that most, if not all, Australian states will establish similar registration schemes and thus enable the ultimate establishment of a system which would be effective nationwide.