

CONSUMER CREDIT LAW REFORM AND UNIFORMITY

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CONFLICTS PROBLEMS IN CONSUMER CREDIT TRANSACTIONS

1. IDENTIFICATION OF THE PROBLEMS

- 1.1 A conflict of laws problem arises when a Court is asked to apply the law of another jurisdiction. There is the potential for conflict of laws problems with respect to every consumer credit transaction which has or might have connection with more than one jurisdiction. In a federation such as Australia every consumer credit transaction potentially raises conflict of laws issues. The parties may be resident or domiciled in different jurisdictions. Even if, initially, all are resident and domiciled in the same jurisdiction, any one or more may change residence or domicile to another jurisdiction. The process of contracting may straddle jurisdictions. Thus an offer to contract may be made in one jurisdiction and accepted in another. Wherever the contract is made, provision may be made for performance in a different jurisdiction of all or part of the obligations of any party. Alternatively, without any prior consideration by the parties, an event which may give rise to rights or obligations may occur outside the jurisdiction in which the contract was made, or with which it otherwise had connection. A contract having some aspect concerned with one jurisdiction may provide that the proper law of the contract is the law of another jurisdiction. Perhaps the contract will not use the expression "proper law" but instead will use some expression which may or may not mean the same thing. For example, it may be stated that the courts of a jurisdiction shall have jurisdiction. Perhaps jurisdiction will purport to be exclusive.

A consumer credit transaction is not necessarily bi partite. Many such transactions are essentially tri partite and this greatly increases the prospect that some aspect of conflict of laws may be involved. Even in the case of a bi partite transaction there may be more than one contract. For example there may be both a contract of sale and a contract for the provision of credit. Alternatively, or perhaps in addition, there may be a contract for the provision of security. The security need not necessarily be situate in or be governed by the laws of the same jurisdiction as would apparently govern the transaction of sale or of credit. In consumer credit transactions where there is security the security is frequently movable and in that case a second or subsequent jurisdiction may be involved at later stages.

- 1.2 The above description of some of the circumstances which may give rise to a conflicts problem suggests - - - that such problems could occur frequently. Yet surprisingly there are few reported cases. Perhaps in many cases the result is the same no matter in

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which jurisdiction the proceedings are brought. This could be because the choice of law rules of all the potential jurisdictions would point to a single law to be applied. Alternatively, it could be because all the prospective substantive laws would produce the same result. Since there are also surprisingly few consumer credit cases, perhaps the real reason is to be found in economics. Cases are not litigated because of cost.

- 1.3 There are said to be three stages in a conflicts problem¹. These are jurisdiction, choice of law and enforcement of judgements. This paper is primarily concerned with choice of law. It is not concerned with jurisdiction in the sense of questioning whether courts of one State or Territory rather than another have jurisdiction to hear a case. It is, however, concerned with jurisdiction in one special sense. It is proposed to examine the possibility of different results dependent upon the choice of forum. It is also proposed to examine a special kind of conflict, namely, where there are laws of different jurisdictions whose commands are mutually inconsistent so that both purport to apply and to apply inconsistently. Ordinarily this question is only examined in considering whether a law of the Commonwealth is inconsistent with the law of a State and thus prevails under Section 108 of the Constitution.
- 1.4 It is proposed in this paper to highlight some features of consumer credit legislation which attract potential conflicts problems and a number of the choice of law rules which may be involved.
- 1.5 It is also proposed to consider some territorial limitations to the competence of State legislatures insofar as these limitations impinge on the construction and validity of consumer credit legislation.
- 1.6 Finally, it is proposed to examine practical methods whereby draftsmen may minimize the risks of choice of law problems arising.
- 1.7 It is proposed to present this paper with reference to a hypothetical example.
 - 1.7.1 Suppose that in August, 1985 an offer to enter into a hire purchase contract is signed by a potential buyer ("Buyer") in Victoria close to the South Australian border.
 - 1.7.2 The offer is transmitted to the credit provider/seller ("Credits") in Mount Gambier (South Australia) and there accepted.
 - 1.7.3 The contract is in respect of a motor car to be delivered in Mount Gambier which costs \$10,000.00. It provides for the payment of interest at 20% per annum on the running balance of the unpaid price, such interest to commence from delivery of the car and for payment of 24 monthly instalments of \$508.96 to be applied in reduction of principal and interest, such instalments to

1 P E Nygh, *Conflict of Laws in Australia*, 4th ed, 3.

commence one month from the date of the signing of the offer.

- 1.7.4 The vehicle is delivered before the offer is accepted.
- 1.7.5 There are many unstated facts with respect to this example which can be varied to create more difficult legal questions.

2. FORMATION OF A CONSUMER CREDIT CONTRACT

- 2.1 In the example the offer is signed by buyer in Victoria and accepted by Credits in South Australia. The first question to consider is whether a valid contract results – valid in the sense of being enforceable according to its terms and whether Credits or the person who, on behalf of Credits or the dealer (“Dealer”), procured the signing of the offer committed any offence. It is realistic to suppose that the form of transaction is chosen by Credits and that Credits has provided a printed form. It may be conceded that Credits has not updated its forms of contract because in South Australia since 1973 and in Victoria since February, 1985, a hire purchase agreement in respect of a motor car whose cost is \$10,000.00 would not be regarded as an appropriate contract. Appropriateness, however, is not the question. The question is validity.
- 2.2 The Credit Act 1984 (Victoria) (“Credit Act”) and the Consumer Transactions Act 1972-1983 (South Australia) (“Transactions Act”) both expressly purport to apply to the transaction. The Credit Act applies because the offer to enter into the hire purchase contract was signed in Victoria (Section 3(1)). The Transactions Act applies because the goods are to be delivered in South Australia (Section 6).
- 2.3 If an issue arises in a Victorian or South Australian Court which is within the language of the Credit Act or the Transactions Act the Court must apply the statute of its own State. It is possible that in addition, if the language of its own statute permits, it may seek to apply the statute of the other State.

If both the Credit Act and the Transactions Act purport to apply and apply inconsistently, a Victorian or South Australian Court must give effect to its own statute in preference to the other. The Courts of a third State faced with inconsistent application of the statutes of two other States can choose between them.

In considering the requirements of Consumer Credit legislation with respect to the form or terms of a contract, it is as well to bear in mind that the legislation might include provisions similar to Section 75 of the Trade Practices Act 1974 (Commonwealth) which provides:

“Sec. 75 –

- (1) Except as provided by sub-section (2), this Part is not intended to exclude or limit the concurrent operation of any law of a State or Territory.
- (2) Where an act or omission of a person is both an offence against Section 79 and an offence under the law of a State or Territory and that person is

convicted of either of those offences, he is not liable to be convicted of the other of those offences.

- (3) Except as expressly provided by this Part, nothing in this Part shall be taken to limit, restrict or otherwise affect any right or remedy a person would have had if this Part had not been enacted."

Whilst the desirability of the concurrent operation of Commonwealth and State statutes each implying terms may be questioned, such operation can occur. The General Motors Acceptance case (*General Motors Acceptance Corporation of Australia v Credit Tribunal and Ors*²) raises the possibility that where the concurrent operation of the legislation of more than one jurisdiction arises inconsistency will not easily be invoked. All legislation will be given effect to in the absence of any direct inconsistency.

In the particular example Section 13(1) of the Credit Act deems the hire purchase agreement to be a credit sale contract. Section 13(3) provides that property passes on the making of the Contract (as the making of the contract follows delivery). The sub-section also provides for a mortgage on the prescribed terms and conditions. These are set out in Form 1 of Schedule 1 of the Regulations. Section 24 of the Transactions Act deems the hire purchase agreement to be a sale by instalment and provides that property passes on delivery. There can hardly be any direct inconsistency in this respect with the Credit Act as property can hardly pass before the agreement is entered into no matter what the Act says. The Transactions Act also provides for a prescribed mortgage. This is prescribed by the 21st Schedule to the Regulations. The mortgages prescribed by the Credit Act and the Transactions Act are remarkably similar but not identical. Each in different respects justify repossession where the other would not. A direct inconsistency could (though it has not yet) arise in a different way. Both the Credit Act and the Transactions Act enable the respective regulations to provide that certain terminology shall be used in credit sale contracts and in sales by instalment. In the case of the Credit Act the regulations do prescribe a number of expressions. It appears that the ability to prescribe expressions in South Australia has not yet been used. If the South Australian regulations prescribe the use of different terms to the Victorian regulations, it obviously would not be possible to comply with both South Australian and Victorian law. In that event, as stated above, a Victorian or South Australian Court must give precedence to its own legislation whereas the Court of the third State must make a choice.

Both because the goods are in South Australia and the contract is made in South Australia Courts of a third State would, it is believed, apply South Australian law.

- 2.4 In the example the effect of the Consumer Credit Act 1972-1983 (SA) ("the South Australian Credit Act") has so far not been considered. This statute makes no express statement as to the

2 (1977) ATPR para 40-022.

transactions to which it applies. For present purposes, if the South Australian Credit Act applies, Section 41 regulates the form of a sale by instalment. There is clear similarity between the information which must be contained in the sale by instalment under Section 41 of the South Australian Credit Act and the information which must be contained in a credit sale contract by virtue of Section 35 of the Credit Act. There are, however, differences. Under the South Australian Credit Act the contract must contain a description of the goods subject to the contract sufficient to identify them. Under the Credit Act a description or identification of the goods is sufficient. Under the South Australian Credit Act the contract must state the amount of the credit charge payable under the contract. Under the Credit Act this information is only required when the amount is ascertainable at the time that the offer is signed. The position under the Credit Act in Victoria is similar to that which obtains under the South Australian Credit Act in respect of a loan (see section 40(2)). In the particular example it is not possible to state the amount of the credit charge payable under the contract at the time at which the offer is signed by Buyer because interest runs from delivery and it is impossible at the time that the offer is signed to tell when delivery will occur. A South Australian Court would have to consider whether, on its proper construction, the South Australian Credit Act applied and if it did there would be a non-compliance with Section 41. A Victorian Court would be commanded to apply the Credit Act (with which it would be possible to comply) and would also have to consider whether Victorian law required compliance with the South Australian Credit Act. It is submitted that a Victorian Court would approach this question in the same way as a question of inconsistency between Commonwealth and State statutes would be judged under Section 108 of the Constitution. The Courts of a third State would have to consider which of Victoria and South Australia State law was the appropriate law to determine the form of the contract and thereafter to consider whether, according to that law, the law of the other State could have concurrent operation. Once again, the Courts of a third State would choose South Australian law.

- 2.5 Subject to any express statute of the Forum and to the construction of any statute of the Forum whose language is not clear, the question is what law should be applied to determine whether a consumer credit contract as entered into is valid and what its form should be? "The basic conflictual rule in relation to contracts is that the proper law of the contract is paramount in determining the creation, validity and effect of a contractual obligation".³ Nygh then asserts that this rule is subject to exceptions.

There is also a presumption that the parties intend to refer the entirety of their obligations to one legal system only. In the consumer credit area the likelihood is that the printed form of contract will embody a choice of the law of one State or Territory. It is not the purpose of this paper to consider choices

3 Nygh, *op cit*, 222.

of the law of a State or Territory to avoid the application of a law which, but for that choice, would have been applicable to the contract. It is assumed that Credits would express a choice of law on a realistic basis (notwithstanding the continued use of archaic forms of transaction). Suppose in the example given that Credits express the choice of law to be that of the State of Victoria. From the point of view of the Credit Act this is a realistic choice since that Act applies if the offer to enter into the credit sale agreement is signed in Victoria. Would a South Australian Court give effect to the choice? Clearly not to the extent that the Transactions Act expressly provides that that Act applies. Also if on its proper construction the South Australian Credit Act applies, that Act would apply regardless of the parties' choice.⁴ What effect would the Courts of some third State give the clause? In any objective sense the transaction has more to do with South Australia than Victoria. The goods are in South Australia and the contract is made there. It could also be supposed that Buyer resides in South Australia. In the absence of a statute of the Forum which dictates a choice, it is suggested that the better view is that the law of the jurisdiction where the contract is made would be applied rather than the proper law. In this case South Australian law would be applied on either basis. Yet there is much to be said on the ground of common sense for the choice of law rule expressed in the Victorian Credit Act. A choice of law rule expressed in terms of the "proper law" must necessarily give rise to uncertainty unless the statement of the parties is conclusive. The law of the jurisdiction where the contract is made is easily able to be manipulated by Credits. The place where the offer is signed by the buyer is certain and moreover is a circumstance which cannot be manipulated against the interests of the buyer except by the expedient of transporting him to a convenient place. Such a choice of law rule must be provided for by statute.

- 2.6 None of the Credit Act, South Australian Credit Act and the Transactions Act impose requirements as to minimum deposits or maximum rates of charges such as were present in the Hire Purchase Agreements Act 1941-1957 (N.S.W.) or the Hire Purchase Act 1961 (N.S.W.). But it is clear that if such provisions were embodied in the South Australian Credit Act which, like the two New South Wales Hire Purchase Acts, contains no express statement as to its territorial applicability, the decision of the High Court in *Kay's Leasing Corporation v Fletcher* would make the South Australian Credit Act applicable on the basis that the contract was made in South Australia. Indeed it might be contended on the basis of that decision that Section 41 of the South Australian Credit Act applies to sales by instalment entered into in South Australia rather than sales by instalment of which the proper law is South Australian.
- 2.7 The Credit Act provides that before signing an offer Buyer must be given a copy of the offer prepared for his signature. This provision is clearly within the competence of the Victorian

⁴ See *Kay's Leasing Corporation Pty Ltd v Fletcher* (1964) 116 CLR 124 at 143 per Kitto J.

Parliament because the Credit Act only applies to offers signed in Victoria. If it were to be included also in the South Australian Credit Act or the Transactions Act it would be beyond the power of the South Australian Parliament insofar as it required compliance where the offer is signed in Victoria; especially if non compliance is made an offence.

3. PROVISIONS REGULATING THE MANNER OF ENFORCEMENT OF CONSUMER CREDIT CONTRACTS

- 3.1 Section 27 of the Transactions Act provides that a mortgagee shall not exercise any right or power to take possession of the goods comprised in a consumer mortgage unless he has served on the consumer a notice in writing in the prescribed form and the period fixed by the notice being a period of not less than seven days from the service of the notice has expired. There are similar provisions in the Credit Act which apply not only to repossession but also to acceleration of the debt owing by Buyer. There are similar provisions also in the Credit Acts of New South Wales, Western Australia and the Australian Capital Territory and in the previous Hire Purchase legislation. Do restrictions on the power of enforcement apply to agreements of which the relevant State is the proper law or in which the relevant contract was entered into or in which the repossession occurs? If the prima facie rule that the same law should govern all aspects of the transaction is to be applied, what will be the result if repossession occurs outside the State? If repossession contrary to the statute is an offence, the statute must be construed so as not to be beyond the power of Parliament and must therefore be restricted to repossession occurring within the State. If therefore repossession occurs in New South Wales, is there no sanction at all? If the South Australian Act does not apply, the New South Wales Credit Act does not purport to apply because its operation is restricted to cases where the mortgage is signed in New South Wales or in certain circumstances where property the subject of the mortgage is at the date of creation of the mortgage in New South Wales.

4. FULL FAITH AND CREDIT

Section 118 of the Constitution provides that :

Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State.

This is supported by section 18 of the State and Territorial Laws and Records Recognition Act 1901 (Cth), which provides :

All public acts, records and judicial proceedings of any State or Territory, if proved or authenticated as required by this Act, shall have such faith and credit given to them in every Court and public office as they have by law or usage in the Courts and public offices of the State or Territory from whence they are taken.

There are circumstances in which the Court of a State would, on the basis of these provisions, depart from the ordinary conflictual

rules applicable in the State and give substantive effect to interstate laws and judgments. *Harris v Harris*⁵ is such a case. Whilst Dumphy J in *Permanent Trustee Co (Canberra) Limited v Finlayson*⁶ held that, by virtue of these provisions, the provisions of the New South Wales Stamp Duties Act 1920 were entitled to full faith and credit in the Australian Capital Territory notwithstanding that according to ordinary conflictual rules the Courts of the Territory would not enforce the revenue laws of another jurisdiction, the High Court construed the relevant provisions of the New South Wales Act as applying only to the administration of estates in which New South Wales law governed the course to be followed. In *Anderson v Eric Anderson (Radio and TV) Pty Ltd*⁷ Kitto J pointed out "Whatever may constitute giving full faith and credit to the laws of the Territory it is faith and credit to these laws as they stand, not as notionally altered." In the present state of the authorities it would seem that Full Faith and Credit does not or at least does not ordinarily require modification of the ordinary conflictual rules.⁸

5. THE DRAFTING OF CONFLICTS RULES IN CONSUMER CREDIT LEGISLATION

- 5.1 The possibilities of difficult questions arising makes it desirable that Consumer Credit legislation embodies express provision as to choice of law rules. These choice of law rules should be made uniformly applicable in the Consumer Credit legislation of all States and Territories.
- 5.2 The following principles are suggested :
- 5.2.1. The rules must be framed so as to avoid both the application of the legislation of more than one State or Territory at the same time ("overlap") and situations where the law of no State or Territory applies ("hiatus").
- 5.2.2 Seeing that the general purpose of Consumer Credit legislation is Consumer Protection, the law which is applicable should be that which the consumer would expect to apply.
- 5.2.3 The same law or at least the law of the same State or Territory should apply to all aspects of a consumer credit transaction except where there is some good reason to the contrary. The relevant aspects include formation, disclosure of information, content (including implied and prohibited terms), operation, assignment and discharge.
- 5.3 It is easy to state the principles which should operate⁹ but far harder to formulate a cohesive set of conflicts rules which satisfy the principles. This is because consumer credit transactions are, despite their frequency, inherently complex. The one transaction may involve a sale of goods or services, a loan and security. In

5 [1947] VLR 44.

6 (1967) 9 FLR 424.

7 (1965) 114 CLR 20 at 33.

8 See Nygh, *op cit*, 8-9.

9 See *Molomby Report* chapter 9.

the example considered in this paper there is a deemed credit sale and a mortgage. The deemed credit sale, however, has credit aspects and sale aspects.

5.4 In respect of the credit contracts the Molomby Committee¹⁰ restricted the choices to the law of the State in which :

- “(i) the Consumer resides;
- (ii) the goods or services are to be provided;
- (iii) the credit contract or offer is signed by the Consumer;
- (iv) the credit contract or offer is received by the Credit Provider.”

The Committee recommended that the law of the State in which the credit contract or offer is signed by the Consumer should be the law to govern the whole consumer credit transaction. The Committee pointed out that it would prevent financiers from ordering their procedures to obtain the advantage of a favourable jurisdiction. In the United States the Uniform Consumer Credit Code Section 1.201 provides that the law of a State applies to a sale where the buyer's agreement or offer to buy is received by the seller in the State and applies to a loan where writing signed by the borrower evidencing the loan is received by the lender in the State. This paper supports the Molomby Committee and indeed this choice is sought to be embodied in the Victorian Credit Act and in the like Acts of New South Wales, Western Australia and the Australian Capital Territory.

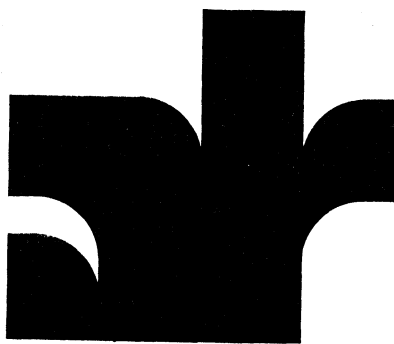
5.5 As the paper seeks to demonstrate the problem is somewhat more complex than each State or Territory expressing its Act to apply where the Consumer signs in that State or Territory. It must be recognised that the occasion for enforcement may arise in a different State or Territory. If the law of the State in which the offer was originally signed is also to govern enforcement an obvious issue arises as to the ability of the legislature of a State or Territory to regulate enforcement which may incur outside its borders. Non-observance of the correct procedures should be made an offence yet the State or Territory lacks the competence to establish the offence. Either each jurisdiction must support the original jurisdiction by creating an offence with reference to the laws of the original jurisdiction or the regulation of enforcement should be left to the jurisdiction in which enforcement occurs. This would mean that the legislation of each jurisdiction should provide that in provisions relating to enforcement the relevant definitions of consumer credit contract apply in respect of enforcement within the jurisdiction wherever the contract may be made. No Consumer Credit legislation has yet faced this issue.

5.6 Reference is also made to the law which should govern securities in respect of consumer credit transactions. Whilst it is proper that any requirements as to the form of a security in respect of such matters as print size disclosure and the like should be governed by the laws which govern the credit contract which the security secures and that procedures for enforcement be governed by the

¹⁰ Para 9.2.2.

laws of the jurisdiction where enforcement takes place, or with the concurrence of that law by the law which governs the credit contract, it is plain that other aspects of the security must be governed by the laws of the jurisdiction where the property subject to the security is situate. In the case of goods the effectiveness of the security against third parties including circumstances in which the security may be extinguished in favour of a bona fide buyer or in which priority may be lost to a competing mortgagee should be determined initially by the law of the jurisdiction where at the date of the creation of the mortgage the goods are situated and subsequently by the law of the jurisdiction in which the goods happen to be situated.”¹¹

¹¹ This principle has been given effect to in s 3(1) and s 3(2) of the Chattels Securities Act 1981 (Victoria).



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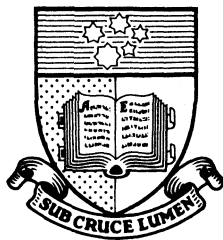
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Books Received

Articles in this issue of the Adelaide Law Review focus on developments in tort and contract law. The issue contains two articles, one by Mr. Baker and one by Mr. Ellinghaus, based on papers delivered at the fortieth annual conference of the Australasian Universities Law Schools Association held in Adelaide in August 1985. Key papers from this conference were featured in the previous issue of the Review. Further papers will be included in future issues. The conference papers are supplemented by an article contributed by Mr. Muir.

Articles in the Adelaide Law Review are predominantly written by academics in Australian Law Schools. The Adelaide Law Review Association welcomes in addition contributions from persons in private legal practice or in legal work in the commercial and government sectors. The Association also hopes to encourage publications based on written work submitted for the course work Master of Legal Studies degree at the Adelaide Law School or dissertations required for the honours degree of Bachelor of Laws at the Law School. Each year the Adelaide Law Review prize is offered for the best contribution of publishable standard from an undergraduate student at the Law School.

This issue contains the regular comment and book review sections omitted from the previous special edition. Historically, the comments section has featured a summary of damages awards in South Australian personal injury cases. The Adelaide Law Review Association hopes to strengthen and expand the comments section of the Review. Expansion of comments sections of law reviews beyond case analyses is now common. The Adelaide Law Review is the only law review based in South Australia and there are many legislative initiatives in the State deserving of analysis. In addition, the Association hopes to include biographical material relating to personalities involved in the academic, judicial, government and practising branches of the South Australian legal profession. Current printing techniques facilitate the use of photographic material to supplement such contributions.

In common with many law school based law reviews, maintenance of regular publication schedules presented difficulties for the Adelaide Law Review Association. The publication of this issue at the end of 1985 brings the Adelaide Law Review back on schedule. It is hoped that a regular two issues a year will be maintained hereafter. Consequently, numbers three and four to complete volume ten should appear in 1986.