Book Launch – "Everett and McCracken's Banking and Financial Institutions Law"
(Eighth edition by Sheelagh McCracken, Joanna Bird, John Stumbles and Greg Tolhurst**)**

The temptation when picking up a work of joint authorship is to engage in the sport of "spot the author". Sometimes it is hard; sometimes not. I well remember subjecting the first edition of Meagher, Gummow and Lehane to that treatment almost forty years ago. Then and since, the measured and penetrating simplicity of John Lehane's style came through very clearly in the parts he had written.

In this case we are not left to guess. The authors of the eighth edition of "Banking and Financial Institutions Law" tell us in the preface who wrote what. And there are no surprises there. They have divided the subject matter in just the way that one might expect, given their respective fields of interest and special expertise.

The chapters on regulators and regulation must have flowed naturally from the pen of Joanna Bird who, for quite some time now, seems to have succeeded in keeping one foot in the academic camp and the other in the regulatory camp or, at least, moving her feet between the two. Joanna's work in the regulatory policy area at ASIC is well known, as is her work at Sydney Law School.

Nor did it come as any surprise that Greg Tolhurst is the author of the chapters on negotiable instruments, a neat fit with his significant work on contracts and the assignment of contractual rights, among other commercial subjects.

John Stumbles' first professional life as one of the country's top finance lawyers with a deep knowledge of clearing systems made him the obvious choice for Chapters 3, 6 and 15.

Andrew Boxall, I see, failed to make the title page but is acknowledged as the author of the chapter on tax.

The rest belongs to Sheelagh McCracken. Sheelagh has seen this work grow and develop over a period of a quarter of a century – much like an additional member of the family, I imagine. Her authoritative stamp appears throughout the book and in particular in the eight core chapters she has written – including, not only the old favourites of subordination, set-off and the like but also the inaugural section on the *Personal Property Securities Act* and its abandonment of everything sensible that everybody ever learned about equitable charges,

equitable mortgages, pledges, pawns, liens and so forth. The new edition does not seem to mention the *Romalpa* case[1] - there is apparently no need now; but inevitably there is resort to Canadian and New Zealand jurisprudence in the personal property connection.

The title of the eighth edition remains "Everett and McCracken's Banking and Financial Institutions Law"; and it was with some sadness that I noted the reference in the preface to the death of Di Everett who co-authored most of the earlier editions with Sheelagh.

Di and I were contemporaries at Law School and became solicitors in the same year. I well remember her drive and enthusiasm as a newly minted academic at Macquarie University. The connection with some of the more recent earlier editions of this book was kept by the collaboration of Annie Everett, Di's daughter. What many may not realise is there are indirect references to Di in the footnotes on pages 216, 219 and 464 of this new edition citing the tax case reported at page 440 of Volume 143 of the Commonwealth Law Reports[2]. Di was the fortunate assignee from her then husband of part of his share in the firm of Dibbs Crowther & Osborne. The assignment worked and the High Court left the Commissioner with less by way of tax than he had hoped for.

The great beauty of this book is the way in which it covers a vast multitude of subjects in an ordered and structured way. Some of the subject matter is far from easy but the treatment makes it digestible. As the book shows, there is an ever-increasing volume of legislation that impinges in one way or another on the activities of financial institutions as they exist today.

When we speak at any point of financial institutions, we are of necessity referring to an indeterminate group. I have on my shelf a copy of J Milnes Holden, "The Law and Practice of Banking" published in 1969. It is, of course, an English book but circumstances in England in those days were, I suppose, roughly similar to those here. We had by then generations of experience of following English models.

Holden devoted some effort to discovering or formulating a definition of "banking" and "bank", concentrating on what had been said by textbook writers and courts and on themes picked up by legislation. He then made a division of banks into categories, being savings banks and commercial banks, with the latter subdivided into deposit banks, merchant banks and industrial banks. He said this about merchant banks

[1] Aluminium Industrie Vaasen BV v Romalpa AluminiumLtd [1976] 1 WLR 676.
[2] Federal Commissioner of Taxation v Everett [1980] HCA 6; (1980) 143 CLR 440

> "At the present day, they finance the movement of goods by acceptance credits or by short term cash advances. … They receive deposits; they act as issuing houses, arranging for the provision of long term capital and advising on company finance; they undertake the supervision of investment portfolios for investment trusts, pension funds and other big investors; and they offer equipment leasing facilities. Some are engaged in factoring and in insurance broking; and some take a direct equity stake in unquoted companies."

Parts of that description might have applied to activities in mediaeval times. The description as a whole applied broadly, I suppose, to the merchant banks that had just begun to emerge here in Australia at about the time Holden wrote in 1969. But in the following years, a number of factors combined to produce a breakdown in barriers and a coalescence of activities that challenged all the traditional classifications.

In 1969, you knew a bank when you saw one, you knew a building society when you saw one; and you knew a finance company, a unit trust company, a life company and a stockbroker. And you could put names to them. In the case of banks, the mind immediately went to the Bank of New South Wales and the Commercial Banking Company of Sydney. Foreign banks probably never entered one's head; or if they did, were perceived dimly behind token brass plates in their tightly regulated representative offices. The building society you would think of was the NSW Permanent which, people said, did not stand for New South Wales but for North South West. When it came to finance company and unit trust company, you thought of Australian Guarantee Corporation and Australian Fixed Trusts. Life company meant AMP or MLC or City Mutual; and stockbroker meant Ord Minnett or Mullins or ABS White.

Of course, this frame of mind was Sydney-centric. If you came from Melbourne or Brisbane or elsewhere, the names were different but the functional divisions were the same. And the parochialism was the same. The State capitals all had their own stock exchanges which co-operated loosely under the umbrella of the Australian Associated Stock Exchanges. Sydney and Melbourne regarded themselves as the leaders and competed with one another – in a very gentlemanly way, of course. I visited Hobart Stock exchange in the early 1980s. The trading floor, as they liked to call it, was a small office where the brokers met briefly each morning. The dominating feature was a large screen plugged in to Melbourne.

All this institutional comfort and stability was to change in a very big way in the wake of various forms of deregulation, including the opening of Australia's borders to foreign competition in the finance field and the breaking down of functional barriers. These were

winds of change that several found too difficult. The late 80s and early 90s saw the demise of the State banks (some of them in highly distressed circumstances) and the emergence of a whole new institutional scene.

Meanwhile, the lawyers toiled on. They, of course, helped their clients keep abreast of the play, whatever it might happen to be. And in doing so, they brought their special skills to bear – skills that questioned and analysed and reduced things to their essential components.

This came home to me with particular force in the mid-1970s, when I helped the Sydney Stock Exchange with the establishment of its market for exchange traded options, based closely on the Chicago model. I was given all the American documents and had the benefit of discussion with people from America who knew the system backwards. None of them, as far as I can remember, was a lawyer. The more I read and the more I heard, the greater became my determination to get beyond the special terminology and the market mystery. There had to be some fairly basic contracts there somewhere. I made it my business to hunt them down.

Although I did not realise it then, I was dealing with derivatives. And the development of that general concept has been quite astonishing in a way that has presented challenges not only to legal understanding and classification but also to prudential regulation. My search all those years ago for the contracts at the bottom of exchange traded options came flooding back when I had occasion, as a member of the Court of Criminal Appeal last year, to delve into the intricacies of contracts for difference (or CFDs) and the question whether they – or, at least, the particular version the court was looking at – were caught by the insider trading laws[3]. Again, there was a quantity of documentation and a special language that needed to be penetrated and reduced to manageable contractual form. Whether the results of that exercise were accurate may be tested further as there is a pending special leave application in that case[4].

As this book makes so clear, the movement of money, the taking of financial risk, safeguards against financial risk and the performance of financial obligations are a composite subject matter in their own right – although with some of the traditional compartmentalisation still existing and needing to be approached with much of the received wisdom in mind.

[3] Joffe v R; Stromer v R [2012] NSWCCA 277 (14 December 2012).
[4] Special leave was refused on 10 May 2013: Joffe v The Queen; Stromer v The Queen [2013] HCATrans 109.

To all the authors – Sheelagh, Joanna, John and Greg – may I offer my congratulations on this new and fully updated edition of what has become a standard text. And may I suggest that you not let your keyboards go cold, as I am sure that you will need to start very soon on the ninth edition.

In the meantime, I am very pleased to declare the eighth edition well and truly launched.

R I Barrett
14 May 2013