



**UNIDROIT COMMITTEE OF GOVERNMENTAL EXPERTS
FOR THE PREPARATION OF A DRAFT CONVENTION ON
SUBSTANTIVE RULES REGARDING INTERMEDIATED
SECURITIES**

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**INFORMAL WORKING GROUP ON ARTICLE 14 OF THE
DRAFT CONVENTION**

Informal Working Group on Article 14 of the draft Convention
Comments on the questionnaire concerning acquisition by an innocent person
(submitted by the Australian delegation)

The Australian delegation would like to make the following comments on the questionnaire:

(a) On the situation of your national law

1. Special provision. *Does your legal system have a special rule on “innocent/good faith acquisition” for book entry securities?*

No.

1.a *If the answer is no, does it mean that the traditional “good faith clause” applies?*

Australian law applies a good faith requirement in transactions involving tangibles where there is transparency between the seller and the buyer. However, it is uncertain whether a traditional “good faith clause” applies to transactions involving intangibles generally or where there is no transparency between the seller and buyer – such as when the transaction is undertaken on an organised market.

1.b *If the answer is yes,*

Not Applicable.

2. Case law. *In your country or abroad, are you aware of any real cases in which the “good-faith/innocent acquirer clause” has been applied in relation to intermediated securities? If so, please summarise (if possible).*

Not Applicable.

3. Other issues. *Please comment on any other point or issue that, in relation to your national law, you consider relevant for the purpose of this paper.*

The Australian law on “good faith” is complex and developing.

(b) On Article 14 of the Convention**4. Article 14: current text**

4.a *Do you agree with the description of Article 14 of the Draft Convention made in this paper (supra para. n° 2)? If not, please elaborate your answer.*

We generally agree with the description of Article 14 of the Draft Convention made in the paper.

4.b *Leaving aside the standard of care issue, do you have any problems with the current text of that provision, e.g.: (i) as to the differences between the situations described in paragraph 1 and 2, including the reference to article 10 and the special provisions of SSS and account agreements (which are referred to in the second paragraph but not in the first paragraph), (ii) the definition of “defective entry”, (iii) the special rule for organisations, (iv) the relationship of Article 14 with other provisions of the Convention, etc.? Please elaborate your answer.*

No.

5. Standard of care: theoretical approaches

5.a *Do you agree with the description of the possible approaches to the “innocent/good faith acquirer issue” made in this paper (supra para. n° 5-6)? Can you think of other solutions? If so, please describe them.*

We generally agree with the description of the possible approaches described in the paper.

5.b *Do you agree with the summary of the pros and cons of each approach made in this paper? Can you think of other arguments? If so, please describe them.*

Australia believes that the proposal which would refer to domestic law the question of whether an acquisition was an innocent acquisition does not highlight in sufficient detail the disadvantages of this approach. In particular, the lack of uniformity - and with it certainty - that would arise if there were a reference to domestic law has not, we feel, been sufficiently highlighted. Nor do we believe that any harmonised rule will be doomed to failure as is suggested: it may not be simple to achieve this, but the possibility exists.

The paper also suggests that the concept of ‘good faith’ is a well-rooted concept in most legal systems. However, in the Australian context there is very little certainty as to what exactly is meant by good faith. Australia invites the UNIDROIT Secretariat to compile and circulate a document drawn from responses to the questionnaire describing how the good faith concept works in legal systems for which it is a well rooted concept.

5.c *In particular, which approach do you consider more adequate to the world of electronic book-entries? Which one do you consider more neutral and functional?*

In our view, we consider a harmonised approach which includes a knowledge test as the most appropriate. This would deliver greater certainty to market participants. The alternatives would deliver varying results and, in countries such as Australia where ‘good faith’ is not clearly defined, uncertainty as to the outcomes in a given country, even if a choice of law clause were included in any given contract.

5.d *Are you aware of international instruments that, on the acquisition of assets, contain a rule for innocent/bona fide purchaser?*

No.