ACQUISITION FINANCING - SECTION 129

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Thanks very much Richard. You raised one subject earlier on which indicated that you thought that Gerry and I might be contestants. Let me assure you that from a commercial point of view, we, when we are concerned with sections like this one, don't see ourselves as contestants with the lawyers. I think in fact we find ourselves in sympathy with them because it is so uncertain and so difficult to understand and so easy to be abused. Needless to say from those comments you recognise that just in case there is a contest on this side of the table that I am about to embrace wholeheartedly the comments of Mr Justice Mahoney so that I have the umpire on my side.

What I would like to talk about is a couple of general subjects related to section 129, matters which are not relevant to any particular contest that you are witnessing in the commercial world of Australia today but which I think are important in the consideration and the proper and timely consideration of a change of section 129. Section 129 was I think assumed to be better than the former section 67 and I would suggest to you that it is worse.

I think from your point of view we are going to see a great deal faster move towards a change in lending practices in Australia. I can assure you from our corporation's point of view we would welcome that change, whether it be cash flow lending or whether it be the concept that the Americans embrace of layering which again comes back essentially to cash flow lending. I think that once you start talking about cash flow lending then the question must always arise "what is going to be the end position of the creditors and remaining shareholders of a corporation that is taken over?".

Whilst we recognise the need in business to carry on tomorrow, then I think, as Mr Justice Mahoney said, the appropriate direction for this kind of section to take is a direction which controls the officers and directors of the company and opens them up to substantial and serious prosecution. You don't do business with a view to not being there tomorrow. You are in business to do better tomorrow and I guess sometimes legislation tries to over-protect and I think this is a classic case.

The problems with section 129 from an acquiring company's point of view are I am sure familiar to you all. But let me stress one of them because it is a matter which I think as lawyers in the field of banking or lending law you must come across all the time and must be as frustrated with as we are in the commercial end. And that is this incredible practice of requiring people to issue certificates.

There was feeling some years ago when people used to be paid for giving proper advice and people assumed that when they went to a practitioner, that practitioner acted in their best interests and they relied upon that. Not so today. We must give a certificate and so must everyone else in most cases; an unfortunate extension of practices adopted in the United States of America.

I refer to that particularly because at the time of a takeover or proposed takeover that, to me, is the most serious practical matter which affects section 129. It is so uncertain that you have no idea whether someone is going to be able to somehow link your financing proposals to those of the corporation you are about to acquire.

That is the sort of problem that in strictly commercial terms I am sure you are all familiar with. You look at it from a slightly different point of view, but I am sure you are equally concerned to resolve the problem. And short of suggesting we do away with certificates, which I am sure some of your clients may not agree with because you have convinced them it gives them great protection, that is another thing we might like to talk about. But section 129 itself is, because of its uncertainty, the area which basically causes the problem.

Mr Justice Mahoney has raised the question of what benefits might arise by a different approach to the original concept of protecting the creditors. And again, I am sure you are all aware of the concepts of Treasury Stock in the United States.

Sometimes this system is abused. All systems, whatever the rules are, will be abused by people who go out of their way to avoid the provisions. What I am suggesting to you is that the rules should be such that if you do abuse them you are the ones who suffer, you the directors of the company, you the officers of the company, and you suffer in a very serious way. In order that you don't prevent action, you simply put people on their mettle so that they have got to justify their position after the event.

We are looking today in the commercial world of Australia at a number of people who are saying all over Australia "takeovers are bad" and therefore it is not going to be easy, I guess, to convince people that there is anything that should be done about section 129, because they would much prefer to get on the band wagon of attacking some of the so-called commercial aspects of takeovers.

But again, let me point out to you that section 129 is in our experience frequently used as a defensive measure. There is no question applied or question raised whether the section is being used for good or bad reasons. It is purely a device in the hands of the defending parties if they like to call themselves that, to avoid what might be a commercially justifiable and good result.

That is probably enough said about takeovers. But section 129, as it is presently structured, really hits at that question. The leveraged buyout of the United States has associated with it some of the types of control that I would envisage on directors and officers and I am sure some of you are aware of the actions that arise in the United States and the particular action of fraudulent conveyances where you defeat, by your own borrowing from the leveraged buyout, the opportunity of existing creditors of the business to be paid.

The reasons for section 129 have, I would suggest to you, long gone past. People who do business in the world today, as I say, are there to do business tomorrow. They want to succeed. You cannot impose sections such as this which may protect a few and control so many actions which would result in a good, or would produce a good result in the future for other people.

The problems that arise in connection with section 129 which we may again discuss later are things such as the effect of group taxation relief. Clearly if you are going to make an acquisition you want to be able to do it in the most convenient commercial way. And I realise again that in raising the question of taxation we are raising an issue which is being discussed across Australia today in connection with some of the takeovers. I would suggest to you that discussion is proceeding on an uninformed basis because people seem to look at the negative side without looking at the positive side. And again, let us not talk about that here.

I have raised with you the question of solicitors' opinion and on specific issues I think that in his address to you this afternoon Mr Justice Mahoney has hit upon the practical problems that are raised under its exemption provisions. In real terms in a takeover type situation I agree with him. There is no such possibility as obtaining the exemption.