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DEVELOPMENTS IN FINANCIAL SERVICES LAW IN NEW ZEALAND IN THE LAST 30 YEARS

HON JUSTICE MARK O'REGAN
President, Court of Appeal of New Zealand[1]

Thank you for the invitation to speak at the conference.

The scope of the topic, with its 30 year timeframe, is pretty daunting. But it has also offered me the chance to do some reminiscing and I've had some interesting suggestions from former colleagues for which I am really grateful.

I have spent about half the period as a commercial lawyer and half as a Judge. That means my hands on knowledge is focused more on the beginning than the end of our 30 year timeframe.

The sad fact is that as a High Court and Court of Appeal Judge in New Zealand, the cases involving commercial transactions that we see most often are those relating to the manufacture, importation and supply of illegal drugs. And I am not going to inflict tales of those cases on you.

One of the features of the last 30 years is the use of quasi justice systems designed to resolve disputes outside the formal legal system. Many of these are private sector initiatives, albeit with regulatory backing. These schemes, and the use of mediation and similar non-court dispute resolution systems, have limited the influence that the New Zealand courts have had in the recent development of banking law. Most of the significant changes have been legislative.

I mention these factors because they give you due warning about my lack of recent involvement in and experience of banking law in the later half of our 30 year period – which reflects the content of my paper and the selection of topics. This sort of topic requires the speaker to be selective, and I have been. What follows is impressionistic rather than academic.

I am conscious that other speakers are dealing with cross-border insolvency, derivatives regulation, anti-money laundering laws and the leading recent New Zealand case on securities law, *Hickman v Turn & Wave Ltd*.[2] I will not venture into those areas, given the wide open field available to me.

1 I acknowledge with appreciation the contribution of my clerk, Hamish McQueen, to the preparation of this paper.
2 *Hickman v Turn and Wave Ltd* [2012] NZSC 72, [2013] 1 NZLR 741.

Some history

I am going to begin by recounting an episode that took place at the beginning of the 30 year period under review, which I think provides a useful point of reference for what has followed since. It is history now, but I think it is important to know your history so you don't repeat it.

Back then, I was a junior solicitor at Chapman Tripp. The Prime Minister and Minister of Finance of New Zealand was the same person, Rob Muldoon, (later Sir Robert Muldoon) and he ruled the country with an iron fist.

In 1982, he decided that he didn't like the way the economy was going, so he decided to stop it going anywhere. Without reference to Parliament, he had regulations made freezing wages and salaries, the prices of goods and services, professional charges, rents, company dividends, directors' fees and interest charged in respect of certain financial services as well as the interest rates payable on deposits. This freeze was meant to stay in place for a year, but was extended, and then augmented further in November 1983.

Many of the regulations prevented increases in current prices without permission but those relating to the interest payable on deposits and the interest charged on mortgage lending actually prescribed the permitted rates. The regulations relating to mortgage lending limited the rate of interest charged on mortgage loans made after the date of the regulations to 11 per cent per annum for first mortgages and 14 per cent per annum for second mortgages. That sounds pretty high in today's single digit interest rate environment, but in fact the going rate on first mortgages at the time was about 17 per cent, and 20 per cent or higher on second mortgages. Those rates perhaps illustrate why Mr Muldoon thought a freeze was necessary.

As the junior member of the commercial team at Chapman Tripp, I was delegated to write a bulletin for clients about the impact of these regulations, which had come as something of a surprise to the finance industry.[3]

I realised as I wrote the bulletin that the scope of the mortgage loans regulations was much broader than intended, and covered any kind of secured lending rather than just residential mortgages. I pointed this out to the partner I worked for in those days, Michael Walls, and he contacted the president of the Law Society, who in turn contacted the Attorney-General. Within an hour or so Michael and I found ourselves in the office of the Chief Parliamentary Counsel (the head of the office responsible for legislative drafting) with some Law Society and Bankers' Association representatives and Government lawyers, helping with a redraft of the Regulations to limit their scope and avoid potential chaos in the financial markets and potential

[3] Consistently with the other big firms in New Zealand, Chapman Tripp did not have a separate banking and finance law team at that time. Financing transactions were part of the diet for commercial partners and lawyers, and the specialist department for banking and finance work came some time later. Banks had one or two generalist lawyers, in contrast to the significant specialist in-house teams they have now. That is an illustration in itself of how much things have changed in the last 30 years.

disruption of residential conveyancing transactions that were about to settle on the next day, a Friday.

Amazingly, the Parliamentary Counsel Office did not have a word processor at that time, so our redrafting was done by golf ball typewriter. Redrafts had to be prepared from scratch. When we finally agreed on the redraft, the Chief Parliamentary Counsel literally did a cut and paste: he took the Regulations which had been passed initially, cut out the new provisions that we had drafted and stuck them with sellotape in the appropriate places to replace the text that was being deleted. He then put the resulting product through a photocopier, and the new set of Regulations was born. It did not look pretty, but that is what was then taken to Government House at about 7.30 in the morning, for the Governor-General to sign. It was a pretty sobering first look at the inner workings of Government for a junior private sector lawyer.[4]

The overnight redrafting was not the end of the matter. Other problems and unforeseen consequences emerged and the redrafting team was brought back together a couple of weeks later for another refinement. Then, at the end of the first year of the freeze, it was decided to extend the freeze and we were summoned again. At that time, we were told that Sir Robert not only wanted to prescribe the rates of interest for new mortgages, but he wanted to force mortgagees to lower the rates they were charging in relation to existing mortgages.

The Economic Stabilisation Act 1948 and the Reserve Bank of New Zealand Act 1964 gave the Minister of Finance unbelievably wide powers to regulate the economy by ministerial fiat. The Economic Stabilisation Act essentially gave a power to make regulations if considered necessary or expedient to promote economic stability. But our ad hoc group of lawyers thought that overriding contracts already entered into was outside the scope of the even this broadly worded power, and that is what we told the Attorney-General.

We thought we had persuaded the powers that be that it was not possible to override the contracts already entered into for mortgage loans, but we had not counted on the determination of Sir Robert. He introduced legislation in early December 1983 which included a section that permitted stabisilation regulations that regulated the rates of interest payable in respect of mortgage loans to reduce, or require that a reduction be made, to those interest rates in certain defined circumstances.

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4 Although the lack of word processing facilities in the Parliamentary Counsel Office was aberrant, and out of step with what the commercial firms and probably the rest of Government were using, it is worth noting the impact of the changes of technology in the practice of law in this area and the operation of financial markets generally in the last 30 years. Examples are instantaneous communications (emails, video conferencing), electronic banking allowing real time funds transfers domestically and internationally, electronic signatures and electronic registers for both real property securities and securities over personal property. There are many others. It seems hard to believe now, but if you dialed an Auckland telephone number from a phone in Wellington in 1983, you often got a recorded message from the Post Office saying that all circuits were busy and asking you to try again later. And urgent communications were by telex or, if the counterparty had a fax machine that was compatible with yours, by fax. It makes one wonder what will be the ways of communicating in 30 years time.

The legislation was rushed through the House (it became the Finance Act 1983). New regulations, the Economic Stabilisation (Mortgage Loans) Regulations 1983, taking advantage of this new statutory power, were immediately promulgated.

Sir Robert was voted out of power in 1984. He was replaced by David Lange, who led a reforming Government that was true to its Labour roots in foreign policy but drier than a tinderbox in economic matters. The new Government had the task of revoking all of the freeze regulations and, to its credit, also ensured that Parliament repealed the Economic Stabilisation Act 1948, so that a Prime Minister or Minister of Finance would never have the power again to take this kind of action.

So at the beginning of our 30 year period, we had a Government that had, and exercised, power to override market forces and force financial institutions to operate within artificial parameters set by executive fiat. Not an auspicious start, you may think.

The last years of the Muldoon Government had seen a number of reforms in the financial services area. The most prominent of these was the Securities Act 1978 and the Securities Regulations 1983. The Credit Contracts Act 1981 was also a significant reform, repealing the archaic Moneylenders Act 1908 and introducing the informed disclosure requirements and powers for the Court to reopen oppressive credit contracts.

The 1984–1990 Labour Government floated the New Zealand dollar immediately on taking office. I remember a Reserve Bank employee telling me of his unpleasant duty of telling Reserve Bank employees all over the country who had, until then, been responsible for enforcing the exchange control regime, that they no longer had a job. He said many had worked in that role for years, and were stunned to find that, at the stroke of a pen, their life’s work was deemed to be completely unnecessary.

The Securities Act 1978 came into force in 1983, just as our 30 year period began. It was the first of many examples of legislative measures responding to market collapses, in that case the spectacular collapse of the Securitibank Group in the 1970s.

This pattern repeated itself in the 1980s when the sharemarket crash of 1987 led to the reform of the statutory management regime in the Corporations (Investigations and Management) Act 1989 and the Reserve Bank of New Zealand Act 1989, as well as the belated (and ultimately flawed) attempt to deal with insider trading in the Securities Amendment Act 1988. Subsequently there were the major reforms to company law contained in the Companies Act 1993, the Receiverships Act 1993 and the Financial Reporting Act 1993. The codification of the duties of directors of companies was a significant feature of these reforms.

I want to look at three particular areas and trace their development over our 30 year period. These are consumer credit law, banking and financial institution regulation, and secured lending. I have left out the areas that others are covering at this conference. Before I get to my three chosen areas, I want to mention briefly three others that should not be overlooked.

The first is insolvency. The changes in this area have been significant, particularly the introduction of the voluntary administration regime.

The second is the impact of criminal liability being imposed on directors of financial institutions that have failed. That has been an area of controversy. In some cases, the offences have included dishonesty, and criminal sanctions are clearly called for. The controversy has been about imposing criminal sanctions on directors for their part in the issuing of a registered prospectus containing an untrue statement.[5] At least one commentator, Professor Peter Watts QC of the University of Auckland, has criticised the imposition of criminal sanctions, particularly prison terms, for conduct amounting to negligence by directors but not dishonesty or recklessness.[6] The reforms that are currently in train may mean this controversy will be short lived.

The third is tax. The recent wave of tax avoidance cases, particularly those relating to the major banks, have probably been seen as a disincentive to entering into structured financing transactions of the kind seen in the 1990s. But I also see that as too big a topic to cover in this setting.

Back to my three topics.

Consumer credit law

The first is consumer credit law. As I mentioned, the Credit Contracts Act 1981 had come into force just as our 30 year period began. I remember doing a transaction with a rural area lawyer in August 1982, just over two months after the Credit Contracts Act had come into force. When I asked him about his disclosure schedule, he said he was just dating all his documents 31 May, the day before the Act came into force, and waiting until he saw what the big firms did about compliance with the Act.

The Credit Contracts Act allowed for the reopening of credit contracts that were oppressive. This applied to all credit contracts, not just consumer contracts. This replaced the powers in the Moneylenders Act to reopen money lending transactions if excessive interest were charged or if the transaction were harsh and unconscionable.

There was a major reform of consumer finance early in this century, culminating in the enactment of the Credit Contracts and Consumer Finance Act 2003, which came into force in 2005. However, the provisions relating to oppressive contracts in the 2003 Act did not materially alter those that had been in the 1981 Act.

The potential scope of the oppressive contracts regime was tested in the Supreme Court decision in *GE Custodians v Bartle*.[7] I am sure that you have had sessions about that case at previous conferences so I won't dwell on it.

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5 See for example *Jeffries v R* [2013] NZCA 188, which dismissed appeals against conviction by the directors of Lombard Finance and Investments Ltd, including the former Cabinet Ministers Hon Sir Douglas Graham and Hon Bill Jeffries.

6 Peter Watts "Criminal sanctions for commercial negligence" [2012] NZLJ 103.

7 *GE Custodians v Bartle* [2010] NZSC 146, [2011] 2 NZLR 31.

The case arose out of the collapse of the Blue Chip Group, which, along with the collapse of a number of other financial institutions, had an impact in the first years of this century similar to the collapse of Securitibank in the 1970s.

The Bartles had borrowed money from GE to fund their Blue Chip investment and the proceedings arose from GE's attempts to enforce security over the Bartles' home. That GE loan was arranged by a mortgage broker who provided GE with a document verifying that it had not been made aware of any circumstances that would adversely affect the ability of the Bartles to meet repayments. In addition the Bartles had made a declaration that they could afford to make the payments. In fact, neither was true. In addition Blue Chip had referred the Bartles to a solicitor who advised many potential Blue Chip clients. The solicitor was found to have been negligent in his advice to the Bartles but, unfortunately for them, was bankrupt by the time the balloon went up.

The Supreme Court dismissed the Bartles' claims for oppression and refused to reopen the contract. It reversed to the decision of the Court of Appeal which had found for the Bartles, on the basis that GE could not avoid responsibility for oppression by using the mortgage broker as an intermediary and by relying on the fact that the Bartles had what was, at least ostensibly, independent legal advice.[8]

Three reasons underpinned the Supreme Court decision:

1 Although the arrangements had a number of unsatisfactory features, the Court could not give weight to matters which were not known to the lender or its agent and were not sufficient to put them on inquiry. A credit contract could not be seen as oppressive unless the lender had a basis for knowing that to be so.[9]

2 Lenders should generally be excused from making further enquiries into a borrower's circumstances or the purposes underlying a particular loan when they are aware that the borrower has been advised by an independent lawyer.[10]

3 There are issues of economic efficiency in financiers being entitled to act on what they are told by borrowers who appear to be independently advised without having to investigate matters for themselves.[11]

The decision met with both positive and negative feedback. Those in favour welcomed the certainty it brought to the finance industry. The most prominent critic was a former Court of Appeal and acting Supreme Court Judge, Sir Edmund Thomas, criticised the fact that the decision effectively allowed lenders to outsource

[8] *Bartle v GE Custodians* [2010] NZCA 174, [2010] 3 NZLR 601. The High Court found in favour of GE: *Bartle v GE Custodians* HC Auckland CIV-2008-404-3460, 30 September 2009.
[9] At [45]–[47].
[10] At [48].
[11] At [67].

an important part of their responsibilities to a broker and not be held accountable for the broker's acts or omissions.[12]

It would be a surprise if the Blue Chip fiasco did not lead to some legislative response, in the proud tradition of Securitibank, the 1987 share market crash and so on. Changes that are now proposed to consumer finance law do appear to be grounded at least partly in what happened in Blue Chip and in the cases like *Bartle* that followed.

The Credit Contracts and Financial Services Law Reform Bill 2013 would make two significant changes to the law relating to oppressive credit contracts.[13] First, it would prescribe new guidelines to which a Court must have regard in considering whether a contract is oppressive and whether it should be reopened.[14] Secondly, it provides for principles of responsible lending.[15]

In relation to oppression, the intention seems to be to lower the threshold for finding oppression and thereby increase consumer protection. The explanatory note to the Bill refers to the reforms as being designed "both to clarify a difficult area of statutory interpretation and to make the remedy more accessible to consumers who have been wronged".[16]

Of the new guidelines provided for in the Bill, the most significant is the requirement that the Court must take into account whether the creditor has complied with the principles of responsible lending. These principles are a new requirement in New Zealand legislation, but are consistent with developments in both Australian and United Kingdom law.[17]

The principles of responsible lending as currently articulated in the Bill will only apply to consumer credit contracts and will require lenders to:

(a) make reasonable inquiries before entering into the consumer credit contract so as to be satisfied the borrower can be expected to make payments under the contract without substantial hardship;

(b) assist the borrower to reach an informed decision as to whether to enter into the contract by ensuring all advertising or information provided is not misleading, deceptive or confusing;

(c) assist the borrower to reach informed decisions on all subsequent dealings by ensuring any variation is expressed in a clear, concise and intelligible manner;

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12 E W Thomas "A Critique of the Reasoning of the Supreme Court in *GE Custodians v Bartle*" (2011) 17 NZBLQ 97. For more positive commentary see Christopher Hare "Banking Law" [2011] NZ L Rev 121 and Brent O'Callahan "Lenders' Duties" [2011] NZLJ 17.

13 Credit Contracts and Financial Services Law Reform Bill 2013 (104-1).

14 Clause 63, inserting a new s 124.

15 Clause 9, inserting a new s 9B.

16 Credit Contracts and Financial Services Law Reform Bill 2013 (104-1) (explanatory note) at 5.

17 National Consumer Credit Protection Act 2009 (Cth) and the amendments made to the Consumer Credit Act 1974 (UK) by the Consumer Credit (EU Directive) Regulations 2010 (UK).

(d) treat borrowers and their property reasonably and with respect;

(e) ensure that the agreement and the exercise of the creditor's rights are not oppressive;

(f) meet all legal obligations to borrowers.

The Bill also contemplates that a responsible lending code will be prepared.[18] Breaches of the principles of responsible lending can lead to a lender being banned from acting as a lender, and either the borrower or the Commerce Commission can bring civil claims for breach of statutory duty.

The effect these changes would have to outcome in *Bartle* is unclear. The principles apply to "consumer credit contracts" only, and the *Bartle* contract would not have fallen into that category. However, the principles of responsible lending can be expected over time to influence what constitutes "reasonable standards of commercial practice", in a way which could have an impact on the law as articulated in *Bartle*. Of particular interest is the impact of the principle requiring a lender to make reasonable enquiries so as to satisfy themselves of the borrower's ability to repay, which may call into question the sort of delegation to brokers which GE relied on in the *Bartle* case.

The 2013 Bill seems to herald a change in consumer credit law to recognise specifically the vulnerabilities of some consumer borrowers, moving from the previous policy that adequate disclosure would allow informed decision-making, to more active protection of consumers.[19]

The Ministry of Consumer Affairs has made it clear that the consumer credit changes are part of a wider ranging programme of reform of financial sector legislation, most of which has been prompted or at least accelerated by the global financial crisis. These measures include:

(a) the new regulatory regime for financial services providers enacted through the Financial Advisors Act 2008 and the Financial Service Providers (Registration and Dispute Resolution) Act 2008;

(b) prudential regulation of non-bank deposit takers, in part 5D of the Reserve Bank of New Zealand Act 1989 and the licensing regime for deposit takers set out in the Non-Bank Deposit Takers Bill 2011;[20]

(c) prudential regulation of the insurance sector enacted in the Insurance (Prudential Supervision) Act 2010;

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[18] Clause 9, inserting a new s 9C.

[19] See Cabinet Business Committee *Responsible Lending Requirements for Consumer Credit Providers* (Ministry of Consumer Affairs, October 2011).

[20] Non-Bank Deposit Takers Bill 2011 (312-2).

(d) a new licensing regime for securities trustees and statutory supervisors established under the Securities Trustees and Statutory Supervisors Act 2011;

(e) establishment of the Financial Markets Authority with much greater authority than its predecessor, the Securities Commission; and

(f) the Securities Act Review and Financial Markets Conduct Bill 2011.[21]

Banking and financial institution regulation

At the start of our 30 year period we had the Prime Minister telling banks and financial institutions what rate they could charge for mortgage lending and what rate they could pay for deposits. It is unlikely that the field of intervention in the operation of banks will ever reach those giddy heights again, but there have been some significant developments in the last 30 years.

Thirty years ago the market was rigidly segmented with trading banks, savings banks, finance companies and others all having statutory limits on what services they could offer. A trading bank could be established only by a specific Act of Parliament. In the period of deregulation begun by the Labour Government of the 1980s, a new regime for the registration of banks was implemented in 1986 for the first time in decades, new banks entered the market. There was a regime for banks to provide regular reports to the Reserve Bank and Banks were required to comply with the Securities Act in respect of their deposit taking activities. This led to a number of offshore banks entering the New Zealand banking market.

All of this changed in 1996 when a regime requiring banks to publish quarterly disclosure statements was introduced in place of the previous prudential regulatory scheme. These disclosure requirements still exist under the Reserve Bank of New Zealand Act 1989.[22]

The Reserve Bank's powers to register and supervise banks are conferred for the purposes of promoting the maintenance of a sound and efficient financial system and avoiding significant damage to the financial system that could result from the failure of a registered bank.[23] There is no express objective of depositor protection.

The Reserve Bank's approach to regulating and supervising the financial system is based on "three pillars": self discipline, market discipline and regulatory discipline.[24]

Self discipline emphasises the internal risk management and governance systems of financial institutions. Banks are required to make regular financial public disclosure in the form of quarterly disclosure statements and directors are required to sign attestations in those disclosure statements.

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21 Financial Markets Conduct Bill 2011 (342-2).

22 Reserve Bank of New Zealand Act 1989, ss 81–83. See also Registered Bank Disclosure Statements (New Zealand Incorporated Registered Banks) Order 2013 and Registered Bank Disclosure Statements (Overseas Incorporated Registered Banks) Order 2013.

23 Reserve Bank of New Zealand Act 1989, s 68.

24 Reserve Bank of New Zealand *Financial Stability Report* (May 2013) at 38.

Market discipline refers to the requirement on banks to make comprehensive disclosure of their financial performance and compliance with prudential measures.

Regulatory discipline consists of regulatory and supervisory requirements. The Reserve Bank aims to keep regulatory interventions to a minimum.

The collapse of a number of major financial institutions in New Zealand (some of which were guaranteed by the New Zealand Government, to the great cost of New Zealand taxpayers[25]) has led to significant additional legislation in relation to financial institutions. I mention three recent pieces of legislation that emerged from the Government's review of financial sector legislation, which was prompted by the Global Financial Crisis, and all led to greater levels of regulation.

The Financial Service Providers (Registration and Dispute Resolution) Act 2008 introduced a mandatory registration requirement for financial service providers. The purpose of this was said to be to "allow more effective monitoring and evaluation of the financial system" and "provide easy access for consumers to information about financial service providers and their products".[26]

In broad terms there are three requirements that must be satisfied for registration. First, the financial service provider must not be disqualified (for example, where a director is bankrupt). Second, the financial service provider must, if offering services to the public, belong to an approved dispute resolution scheme. Third, the financial service provider must be licensed in relation to any "licensed services", which in the case of a bank will mean maintaining registration as a bank.

The Financial Advisors Act 2008 introduced restrictions on those who may act as a financial advisor, including those providing a "financial service", "an investment planning service" or "a discretionary investment management service". This regime applies to the advisory activities of banks as well as to individual financial advisors. I will not go into the detail, but the requirements are significant for all investment advisors.[27]

The Reserve Bank of New Zealand Amendment Act 2008 changed the Reserve Bank's role as prudential supervisor. The 2008 amendments extended the Reserve Bank's prudential supervision role to "deposit takers", which are defined to include entities that offer "debt securities" to the New Zealand public and that carry on the business of borrowing and lending money or providing financial services or both.[28] The 2008 amendment extends the prudential supervision function of the Reserve Bank to building societies, credit unions, finance companies and others carrying on similar activities, as well as maintaining the position in relation to banks.

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25 See the Crown Retail Deposit Guarantee Scheme Act 2009.

26 Office of the Minister of Commerce *Review of Financial Products and Providers: Registration of Financial Service Providers* (Cabinet Paper).

27 For a summary of the changes brought in by the Financial Service Providers (Registration and Dispute Resolution) Act 2008 and the Financial Advisors Act 2008 see Hare, above n 10, at 126–135.

28 Reserve Bank of New Zealand Act 1989, s 157C(1)(a).

Deposit takers are now required to have a current credit rating, satisfy requirements relating to director and chairperson independence, and to establish and comply with a risk management programme.[29] They also have to meet certain capital adequacy requirements.[30] It is anticipated that the new regulatory requirements for non-bank deposit takers will be incorporated into new specific legislation. The Non-Bank Deposit Takers Bill 2011 is still before Parliament, but on enactment will replace the relevant part of the Reserve Bank of New Zealand Act dealing with non-bank deposit takers.

Personal Property Securities Act 1999

It will not be a surprise to you that one of the topics I have selected is the PPSA. The first time I addressed this conference was about 20 years ago in Adelaide. At that time, I was trying to sell the benefits of a PPSA to a completely disbelieving audience, with the Australian members of the audience only slightly more disbelieving than the New Zealand ones.[31] Well, it may have been a long time coming, but we now have a PPSA regime on both sides of the Tasman.

In New Zealand, the gestation period for this development was inordinately long. I was involved in the writing of the initial report for the Law Commission in 1988,[32] and in the Law Commission's own report in 1989.[33] The Law Commission report was one of a number of reports that the Commission produced in response to its company law reference. All of the other reports led to the enactment of new legislation in 1993, but the PPSA did not see the light of day until the late 1990s, and was not enacted until 1999. Then there was a further delay while the register was established and the regulations drafted, so that the new regime did not take effect until 2002, nearly 15 years after it had first been proposed.

Before this expert audience, there is no need for me to go into any detail about the PPSA. It replaced various common law, equitable and statutory rules which had made the study of security transactions at universities like multiple repetitions of cryptic crosswords. An American academic visiting New Zealand famously described the regime as a "quagmire".[34] Professor John Farrar and I visited Canada and the United States in 1987 and became convinced that it was time for New Zealand to make a sea change from the English model onto which we had engrafted multiple complications. We proposed the adoption of a regime based on Article 9 of the American Uniform Commercial Code and the Canadianised versions of the Code in the PPSAs of a number of Canadian provinces.

I think that New Zealand has been much more successful than the Canadians were in adapting to the "out with the old, in with the new" feature of the PPSA. One of the objectives of the PPSA was to ensure that priority disputes could normally be

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29 Sections 157I–157O.
30 Sections 157P–157ZB.
31 I should record that the late David Allen was a notable exception.
32 Law Commission *Reform of Personal Property Security Law* (NZLC PP6, 1988).
33 Law Commission *A Personal Property Securities Act for New Zealand* (NZLC R8, 1989).
34 S A Riesenfeld *The Quagmire of Chattels Security in New Zealand* (Legal Research Foundation, Occasional Paper 4, 1970).

determined by referring to the register, and that the law would be clear enough to minimise litigation. I think that that objective has been achieved in practice, and that once we got past the cases that dealt with the problems caused by practitioners not adjusting to the new regime, litigation has been relatively limited.[35]

Some important New Zealand cases have been:

(a) *Graham v Portacom New Zealand Ltd*[36] which made it clear that in a contest between a perfected security interest and an unperfected security interest, the holder of the perfect security interest prevailed even if the holder of the unperfected security interest had title to the secured property.

(b) *Waller v New Zealand Bloodstock Ltd*[37] which reinforced that point.

(c) *Healy Holmberg v Grant*[38] which confirmed that priority between two perfected security interests is determined by the first to register a financing statement, not the first to perfect.

(d) *StockCo v Gibson*[39] which clarified the vexed question as to whether a transaction is in the "ordinary course of business" for the purposes of s 53 and also gave guidance on the concept of "knowledge" in s 19(1)(b)(ii).

(e) *Rabobank New Zealand v McAnulty*[40] which clarified some difficulties with the definition of "lease for a term of more than one year" in s 16 with regard to bailments.

(f) *Strategic Finance Ltd (in rec and liq) v Commissioner of Inland Revenue*,[41] which was recently issued by the Court of Appeal and which dealt with the scope of the concept of "account receivable", confirming that this meant any monetary obligation (apart from those excluded) constituting an existing liability to pay with a matching legally enforceable right to recover payment. This included, but was not

35 The Supreme Court, in the only case in which it has considered the PPSA, confirmed that the PPSA introduced "an entirely new set of rules governing priorities in the case of an insolvency": *Stiassny v Commissioner of Inland Revenue* [2012] NZSC 106, [2013] 1 NZLR 453 at [49].

36 *Graham v Portacom New Zealand Ltd* [2004] 2 NZLR 528 (HC).

37 *Waller v New Zealand Bloodstock Ltd* [2006] 3 NZLR 629 (CA).

38 *Healy Holmberg v Grant* [2012] NZCA 451, [2012] 3 NZLR 614.

39 *StockCo v Gibson* [2012] NZCA 330, (2012) 11 NZCLC 98-010.

40 *Rabobank New Zealand v McAnulty* [2011] NZCA 211, [2011] 3 NZLR 192. Note that the language of s 13 of the Personal Property Securities Act 2009 (Cth) appears to be consistent with the result reached in *McAnulty*.

41 *Strategic Finance Ltd (in rec and liq) v Commissioner of Inland Revenue* [2013] NZCA 357. This decision resolved a conflict between two High Court authorities: *Commissioner of Inland Revenue v North Shore Taverns Ltd (in liq)* (2009) 10 NZCLC 264,429 (HC) and *Burns v Commissioner of Inland Revenue* (2011) 10 NZCLC 264,885 (HC).

> limited to, book debts, but excluded mere rights to claim that had not converted into legally enforceable obligations.[42]

The New South Wales Supreme Court has recently issued an interesting PPSA judgment too.[43] It is interesting to see the influence of the New Zealand cases on this decision. No doubt the Australian cases will have similar influence in New Zealand once the jurisprudence on this side of the Tasman increases in scale.

So to summarise

We began the period with a recently introduced securities regime, responding to a market failure. We end the period with a new securities regime about to come into force, responding to market failure.

We began the period with Government control of core services of banks and finance institutions. Given that these controls were made without Parliamentary scrutiny and prescribed interest rates on both lending and borrowing, it could be said they were extreme in nature. We then had a period of de-regulation but now see an increased level of regulation of banks and non-bank deposit takers. This time the regulation has Parliamentary sanction and has a sense of proportion.

We began the period with relatively new legislation regulating credit and end it with substantial credit reforms on the way.

As the French say, “Plus ça change, plus c’est la même chose.”

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42 The definition of “account” in s 10 of the Personal Property Securities Act 2009 (Cth) is materially different from the definition of “account receivable” in the New Zealand statute, and this decision may not be applicable in Australia.

43 *Re Maiden Civil (P & E) Ltd, Albarran and Pleash (as receivers and managers of Maiden Civil (P & E) Ltd) v Queensland Excavation Services Pty Ltd* [2013] NSWSC 852.