REFORM OF PERSONAL PROPERTY SECURITIES LAW IN THE CER CONTEXT

ROB McINNES

Rudd, Watts & Stone
Solicitors, Wellington

One consequence of being the third of three speakers on a topic involving law reform in only two countries is that much of what I might have said has been said. Since Professor Farrar and Jude Wallace have already addressed the result thus far of law reform on either side of the Tasman in some detail, I propose largely to leave alone the specifics arising from the reports of the respective law reform agencies. To a degree, that approach is born of a desire on my part not to bore you by repeating what someone else has already said; to a degree, it is an approach born of necessity: only this morning have I ascertained what the Australian law reform agencies are proposing. While I must say that what I now know of the direction that Australia seems likely to take is good news, and is encouraging in terms of CER, I must also say that the period of time has not been sufficient to undertake the comparative analysis of proposed New Zealand and Australian reforms that I might otherwise have attempted.

Instead, I propose to address some wider CER issues, of perspective and context, with a view to identifying answers to some basic questions such as:

(a) how are personal property security laws of relevance to CER, and to what degree are they relevant? and

(b) given that Australian and New Zealand personal property securities laws differ now, and to some degree must inevitably continue to do so, to what extent does this frustrate the objectives of the CER Treaty, if at all?

These questions seem to me to be fundamental to the very topic of this session, and yet to some degree answers to them are assumed both by the topic itself, and by the emphasis on trans-Tasman harmony in law reform that presently abounds.

Accordingly, I thought it might be interesting to push and prod those questions a little in this address.

The starting point is that the object of the CER Treaty is to facilitate trade between Australia and New Zealand, and to remove existing impediments to free trade between the two countries. The relevance of personal property securities reform to this flows in two ways: first, there is the need for a buyer of goods - or perhaps his financier - to known if he can obtain good title. More of this later. The second aspect is that, essentially, the concept of security exists to facilitate credit. Credit does of course

operate to stimulate and facilitate trade - both domestically and between nations. That being so, transaction costs involved in taking security must therefore be a barrier to the free trade that CER seeks to foster, to some degree at least.

Few would disagree with that justification for the commitment, in CER (more correctly in the July 1988 Memorandum of Understanding) to harmonise trans-Tasman business laws. If CER is a desirable objective, so too must be the harmonisation of business laws - including the harmonisation of personal property securities laws that may impact on, or impede, trans-Tasman trade in the way just mentioned.

So where are we now, and what are the prospects for harmonisation of trans-Tasman personal property security laws? One can make a number of observations. In New Zealand, our personal property security laws are undoubtedly a mess at present. There are some half a dozen different security registries, whichever is appropriate depending on the status of debtor (whether it is incorporated or not) or on the type of property involved. Some securities do not have to be registered anywhere, and distinctions based on form abound in respect of securities that may be indistinguishable in terms of economic effect. Some time ago, a visiting US professor described New Zealand personal property securities laws as a quagmire - he was right. Mercifully, legislation to get us out of the quagmire appears imminent.

Perhaps more relevant to my topic is that it is clear that personal property security systems on either side of the Tasman presently differ markedly. The jurisdictions even answer fundamental questions - such as whether registration of a company charge confers priority - in different ways. What is more, even within Australia, the State security systems appear to differ significantly.

My perception is that differences of that kind certainly operate as barriers to the objectives of CER. In many trans-Tasman transactions, there is inevitably a need for involvement of professional advisors on both sides of the Tasman, and sometimes for several, depending on the number of States involved. The resulting transaction costs certainly mean that present personal property security systems are, to some degree, an impediment to free trade. Many of us are probably able to tell horror stories about past files where, in order to be certain clear title was obtained to property being acquired or secured in a trans-Tasman transaction, costs have escalated alarmingly, sometimes to a degree rather out of proportion to the transaction.

However, while transaction barriers of that kind exist, it seems to me that they are nevertheless already being overcome regularly. I have not yet encountered a trans-Tasman transaction that did not proceed solely because of the diversity of security systems involved. However, that is not a reason to accept the status quo; if the objects of CER are worth pursuing, it must also be worth harmonising personal property securities laws in order to facilitate the Treaty's objectives as much as possible.

What are the prospects of such a harmonisation occurring? First, there seems to be universal acceptance that the inadequacy of present security systems on either side of the Tasman makes change inevitable in both jurisdictions; one jurisdiction changing its laws to coincide with those of the other is not an option. That much seems certainly to be accepted on both sides of the Tasman.

In New Zealand it seems that PPSA will proceed, one way or another. The Companies Bill has already passed through Select Committee stage on that assumption. Given New Zealand's apparent commitment to the Article 9 concepts suggested by the NZ Law

Commission, until this morning, it seemed likely that the most significant question might be as to the prospects for Australian legislation similar to PPSA. This morning I was given a draft copy of the proposed report of the Australian Law Reform agencies. I have had little time to consider the draft report, but in it, the Australian agencies appear to favour Article 9-based reforms similar to those proposed in New Zealand. That is encouraging. Article 9 based personal property securities laws on either side of the Tasman will certainly make for more accessible information as to the state of title of particular property, and will more readily be able to be accessed by traders and financiers alike, on both sides of the Tasman. Because of those things, it is likely to be cheaper for those who need to access personal property security information to do so, and that will certainly lower trans-Tasman barriers to free trade, and that is good for CER - even if it may not be good for my business!

In New Zealand, the political will for change and for trans-Tasman harmonisation is apparent: the Companies Bill before Parliament presupposes PPSA in some form, albeit that an appropriate Bill has been deferred pending the report of the Australian law reform agencies. One expects however that greater difficulties may exist in Australia than in New Zealand: there are the constitutional issues that arise in a federal system, as well as the possible impact of related issues such as stamp duty, neither of which is an obstacle in New Zealand. As well, the political climate may possibly be different: New Zealand experienced its crash rather sooner than Australia.

As well as that, personal property securities reform on a harmonious trans-Tasman basis could well become interwoven with monetary and fiscal issues as to the availability of credit. While facilitating the availability of trans-Tasman credit may have a certain appeal - especially given that the ownership of many banks in both countries is truly Australasian - there is at least the potential for weighty issues such as exchange rate and common currency to impact on personal property security reform in some way. However, presently it seems unlikely that those wider questions will delay reform - certainly, they need not do so.

At this point, it is appropriate for me to make some observations as to whether a commitment to CER necessarily involves a commitment to identical - or even similar - laws. In that regard, it is worth noting that some recent New Zealand legislation based on Australian models has not been universally well received in New Zealand (the Commerce Act 1985, for example, in both its original and recently amended forms). There are those that feel that harmonisation of trans-Tasman business laws may be desirable, but less so than the objective of having the best possible laws for the particular circumstances of each country. I agree. In that regard, while many of the issues identified by Ms Wallace have a familiar look about them on this side of the Tasman, as yet there can still be no certainty that each jurisdiction will resolve those issues in the same way. That seems particularly likely when PPSA legislation appears imminent in New Zealand, but realistically, any corresponding reform in Australia seems likely to be rather more distant, at least in terms of the timing of legislation.

I think it is also appropriate to comment on what appears to me to be the widely held misconception that a commitment to CER involves a commitment to similar laws. I do not believe that is so. The ANZ Business Council recognised that CER does not necessarily require similar laws in a resolution passed at its 1988 Wellington conference, and the New Zealand Law Commission, in its report, also noted that there was no evidence that our differing personal property security laws were actually impeding free trade.

What CER does involve is a commitment to removal of barriers to free trade, and different security laws do not necessarily represent a significant barrier to free trade at all. Consider, for example, the diversity of business laws within the EEC - by comparison with which NZ and Australia are harmonised already. Differing business and security laws have not prevented the EEC from becoming a real force, and it seems to me that there is no reason why the same should not also be true of CER.

To put all of what I have said in its proper context, one has to ask how much differing personal property security laws do fetter the attainment of CER's objectives.

The Treaty has already boosted trans-Tasman trade, apparently unfettered by the present diversity of Australasian business laws; so perhaps diverse personal property laws are not an impediment to the attainment of CER's objectives after all?

More specifically, what proportion of trans-Tasman trade actually involves personal property securities issues in any real way? I suspect the proportion is in fact not that large. Much trans-Tasman trade is financed by letters of credit and the like, the terms of which are already largely standardised - both on a trans-Tasman basis and internationally - by bank practice and by broad acceptance of the Uniform Customs for Documentary Credits.

Further, regular trans-Tasman traders and their trading partners have developed standard practices that are satisfactory to them, and which minimise the extent to which the diversity of Australasian security laws represent a barrier to trade. Alternatively, they find the transaction costs involved in legal disharmony to be acceptable. As well, where bank credit is required, security issues can often be confined to one side of the Tasman, simply because the bank involved is satisfied with the adequacy of its security in its customer's home jurisdiction, and does not need to take security in more than one jurisdiction. To some degree that is likely to continue, of necessity, whatever occurs.

So perhaps the barriers to free trade represented by our present diverse personal property security laws are not so high after all. Moreover, even if those barriers can be made smaller by what now seems likely to be harmonious law reform in this area on either side of the Tasman, in those transactions that do involve personal property securities laws on both sides of the Tasman, for so long as New Zealand and Australia remain politically separate states having different legal systems, there will inevitably be some need to involve professional advisors in each jurisdiction. While some reduction in the transaction costs of trans-Tasman transactions can be expected to flow from harmonisation, realistically, where transaction costs flow from the diversity of personal property security systems at present, they are likely to continue to do so to some degree, no matter how harmonious our respective laws may ultimately be.

So perhaps the proper perspective in which reform of personal property securities laws needs to be seen in the CER context is that while similar personal property securities laws are undoubtedly desirable, they are not absolutely vital to the success of CER. That said, New Zealand's chattel securities laws are presently in need of a major overhaul of the type likely to be represented by PPSA. From a distance, my impression is that the same is true of Australia - perhaps even more so. Even if one does not take CER into account, reform of our respective personal property securities laws is desirable, and may be imminent, in both countries. That being so, hopefully the likely outcome of the processes presently at work in both countries will be to produce more harmonious security laws which, while they may not be vital to achieving CER's objectives, will certainly help. In view of what we have heard today, that certainly also appears to be likely.

To the extent that my comments have had a thesis, this is it: each of Australia and New Zealand needs change in this area urgently, and needs better laws than those that apply at present. But it is not likely that they will be identical, and it is not necessary that they should be identical in order to achieve the goals of CER.

However, given the directions of Australian law reform now apparent, it does seem likely that we will ultimately have more harmonious personal property securities laws than at present, and in terms of achieving CER's goals, that can only be beneficial.

A final comment, primarily for New Zealand consumption: now that the direction of Australian law reform is known and is complementary to that of New Zealand, I would get ready for some more of our famous fast law making, particularly since the Companies Bill is now past Select Committee stage. Given the linkage between PPSA and the Companies Bill, PPSA can be expected to move quickly. One cannot help but wonder if CER's objectives might have been better served by a PPSA Bill being introduced simultaneously with the Companies Bill, so as to allow the affected business community rather longer to consider it, and thereby allowing the Australian law reformers the benefit of the resulting comment and submissions.

Thank you.

POSTSCRIPT: Following Mr McInnes' address, from the floor Mr Hodder made the point that he understood that the Department of Justice was seriously considering not proceedings with the Law Commission's PPSA proposals at this time, due to the time pressures exerted by the progress of the Companies Bill. He said he understood the Companies Bill might, instead, be amended so as to include a revised version of the present Part IV of the 1955 Companies Act (dealing with the registration of Company Charges). Mr McInnes said that, if that occurred, that would be regrettable.