REFORM OF PERSONAL PROPERTY SECURITIES LAW IN THE CER CONTEXT

QUESTIONS AND ANSWERS

Question - Mark Sneddon (Monash University, Melbourne):

A comment directed to Jude. Having just heard this outline it seems like a fairly major piece of reform work has been undergone and I am looking forward to reading your report at greater leisure. But one comment that I have now is the proposal to impose civil liability on the holder of the security right who does not register. I can understand that is an extra whip to get them to put their interest on the register. I am just wondering about the wisdom or the necessity of that, given that there is already adequate incentive in the sense that they lose their priority? And secondly, in establishing a claim for damages for loss by a subsequent lender, the failure of the first lender to register is only going to be one of many reasons I would have thought that was going to lead to their loss. There will be a number of intervening causes such as downturn in the business environment, bad management, lowering of commodity prices and so on, so that the establishment of that cause of action is going to be, I would have thought, problematic in many cases. I don't know if you have a response at this stage, but for those reasons just off the top of my head, I am wondering about the necessity and the wisdom for that provision.

Response - Jude Wallace (Speaker):

Perhaps I could be flippant and say: look, we have taken so much away from the lawyers, we had to give them something back! There are however more substantive answers in the draft itself, without referring to it in detail. Those problems of who can sue whom and when are addressed. The provisions are very sparse. When people read them I think you will have reactions saying: my God, it is a floodgates problem. So I would ask for people to review that legislative provision with a great deal of care. It is not uncommon to have a civil remedy in situations of this kind. There are plenty of models around. We do not claim to have been very novel.

Whilst I have got the floor, could I just do one thing I neglected to do? Everyone is aware of the state of Victoria's economy. In deep solidarity with other citizens of my State I should indicate that the errors and lack of vision in this forthcoming publication are all Victoria's. The genius is the Australian Law Reform Commission's.

Question - Neil Scott (Moore & Bevins, Sydney):

Perhaps a comment and a question. The comment is related to the CER framework. Rob made a suggestion that Europe has got along very well with a diversity of systems. I would point out that New Zealand and Australia reached a point of free trade on 1 July 1990 that has not yet been achieved by Europe and I would predict that inevitably

personal property securities law will follow potato crisps, as the subject of an EEC directive at some time soon.

My question is directed to John Farrar and Jude Wallace. It seems from what you were saying that one of the areas of likely difference will be that relating to floating charges. John said that we are not going to have them in New Zealand, that we will have fixed charges over circulating property. I would like him to elucidate that slightly. And Jude suggested that floating charges will continue to be available in Australia. Now if that is to be the case, will they be capable of being created by individuals and not merely companies?

Response - John Farrar (Speaker):

It is not that they will be abolished. It will be that people will choose not to adopt that particular form because they will be able to adopt the form of a fixed charge over circulating assets. The possibility will still be there, but I think practice will just develop in another way.

I think that it will be possible under the PPSA to have something which is regarded as a present fixed charge over circulating assets. You will therefore avoid all these knotty conceptual problems about what you have after the creation of a floating charge before crystallisation and even after crystallisation. What you will have will be a security interest which will be registered and operative and it will attach and it will be perfected and there will be that much clarification. It will be possible to use the old form, but I think that people will just move to the newer form. There will be no reason to use the old form really.

Response - Jude Wallace (Speaker):

We did not have very much trouble with the idea of a floating charge so we just left it alone. The explanatory paper says that the floating chargee is deemed to have consented to postponing its priority. And if you register a floating charge, that is exactly what you have registered, something that is inchoate, it will crystallise in future. And if it does crystallise you let the register know. If you do have a prohibition on further borrowing you let the register know. And it is as simple as that.

Comment - John Farrar (Speaker):

I think another point worth making is that in the US they did not uphold the floating charge. The background to Article 9 was that the floating charge was not recognised. Also in the continent of Europe the floating charge is not recognised. They regard it as a fraud on creditors.

Comment - Rob McInnes (Speaker):

I wonder if I could just jump in on the back of that. My understanding of what the position will be in New Zealand if and when PPSA is enacted is essentially what John has just described. Floating charges as we now know them will not be necessary. Pausing there, it seems to me to be unfortunate and perhaps some of Jude's colleagues might like to reflect on floating charges a little bit longer. It seems to me to be unfortunate that such a concept as fundamental to our existing security laws as floating charges is going to be kept alive on one side of the Tasman and not on the other. And that was really the sort of thing I had in mind in saying that it seems to me that some degree of legal disharmony appears to be inevitable in this area and if that is going to be

the case in respect of floating charges, well, I would not mind betting that there are going to be more than a few other disharmonious areas as well.

Comment - John Farrar (Speaker):

Rob, it does not really matter if the Australians want to be archaic. If little pockets of anachronisms survive within a modern statute, let them do it, it causes no harm, certainly not to New Zealanders.

Comment - Dermot Ross - (Chairman):

I think also one of the pleasures of doing business with another country is that things are different and it would be boring if everything were the same.

Question - Razeen Sappideen (Queensland University of Technology):

Can you take a fixed charge over future book debts under your proposal?

Response - John Farrar (Speaker):

I think the short answer is, yes.

Response - Jude Wallace (Speaker):

As far as I know, yes. I don't think we have restrictions on anyone doing anything.

Comment - Jack Hodder (Barrister-at-Law, Wellington):

I unfortunately feel obliged to offer some pessimism. Much as I agree with what Rob McInnes is saying, although I thought he was far too charitable on a number of topics, I have to say that there is a real problem with the possibility of law reform in New Zealand. I really do not want to repeat what I said yesterday afternoon for those who happened to be here, in which I described some of my colleagues and friends down at the Justice Department, but basically I fear that some urchin in that Department is probably at this moment scribbling out some half-baked attempt to resurrect Part IV of the present Companies Act so that it fits in with the Companies Bill. I have reason to fear that somebody is going to tell the Minister that it is too late to have PPSA come in and pick up the Companies Bill on its way through. Obviously that is a stupid and regrettable state of affairs, but I still fear that it is the case and it would be unfortunate to have anybody leave here under a misapprehension that in fact logic may yet enter into the whole law reform process. I should also mention that insolvency law reform, which again I touched on in passing yesterday as being a matter also on which urchins ought to be working but do not appear to be working, they are down with my friend in the Department, is a topic which will be greatly enhanced once PPSA is in place. It is something that has not been mentioned in the course of discussion this afternoon, but my own perception is that insolvency law reform will be greatly enhanced by having an intelligent state of affairs in relation to identification of security interests.

Question - Stephen Franks (Chapman Tripp Sheffield Young):

It is really prompted as a question to everyone here. In my capacity as a member of a ministerial group looking at the priorities for commercial law reform I can confirm that the Justice Department view is that neither insolvency or PPSA or anything in that area has any particular urgency. And I would be very interested if there is anyone here who has a

strong view one way or the other, if they would either express it to the group, or express it by mentioning it to me, or express it to the Minister, because the message the Minister gets from his own department I am sure will be that there is no particular reason at all to speed up progress in those areas. I do not want to prejudge or pre-advise what the group itself would conclude, but it is an area where the PPSA proposals, I don't think without a nudge and a very strong nudge at that, are not likely to be seen as part of the company law reform exercise.

Response - Rob McInnes (Speaker):

In response to that I would like to say two things. The first is that speaking privately and outside of conference sessions to one or two people who have attended this conference has led me to believe that there is in fact some pressure on them to perform on PPSA and to perform pretty quickly. The second thing is that if that is wrong then it seems to me likely that the inevitable result will be what Jack has just described, somebody sitting in a back room scribbling out Mark II of what is presently Part IV of the 1955 Act, and I think I would have to say that that would be regrettable.

Comment - Dermot Ross (Chairman):

I think this is obviously a subject of some heat amongst certain individuals. Probably it is best that that heat be doused a little out in the bar! And on behalf of you all I would like to thank our three speakers for their excellent contributions this afternoon on what is quite a difficult and esoteric subject. They have attacked it with a certain amount of verve and style and I would like you to thank them in the usual way.

Closing Comment - John King (Committee Member):

Ladies and gentlemen, that brings to an end our formal conference. Our speakers have been thanked as we have gone along. As you will realise with regard to an Association which bases its thrust on education and where the annual conference is the cornerstone you might say, we very much rely on the high quality of the speakers that we have had over the last few years and hope that that will continue. But what I wish to say also for this particular conference in New Zealand where we were concerned as the first time out of Australia (would it be successful? would we get the support?) we are appreciative to our visitors from Australia and we are also appreciative to our home town Auckland as well as the Wellingtonians who have supported the conference so well. So on behalf of the Banking Law Association thank you all of you for your attendance.