PERSONAL PROPERTY SECURITIES LAW REFORM

QUESTIONS AND ANSWERS

Question - Tom Bostock (Mallesons Stephen Jaques, Melbourne):

I would like to ask the panel whether anybody has done anything in the nature of a cost-benefit analysis of the proposals they have been discussing at this session? Let me elaborate for a second. There are undoubtedly costs involved in staying with the *nemo dat* and *bona fide* purchaser principles with their various embellishments and refinements. Those costs undoubtedly are increased by the legislative mish-mash we have got at the moment. On the other hand, the costs of extending registration to a whole lot of different items of property, the establishment of a shield will be very great, the costs of running it and the costs incurred by the community in keeping and having to look at it are going to be very large. That cost, of course, all comes back on to the cost of doing business in our country. North America can afford more legislative lunacy than Australia, I say. But has anyone done any cost-benefit analysis?

Response - Mark O'Regan (Commentator):

Certainly in New Zealand there has not been any comprehensive cost-benefit analysis of that kind, although we have been very conscious of the need to do that. There has been some law and economics writing in the United States on the efficiency of the Article 9 regime and whether it is the most efficient solution, which generally comes to the view that it is the most efficient solution. We were very conscious in New Zealand to ensure that this regime was cost-effective. We envisaged, for example, that the registration cost would be about $3 or $4 as opposed to $60 under our *Companies Act* at the moment. I think it is $7 under the *Motor Vehicle Securities Act*. So you can certainly do that with computer registries. We were conscious of building on the Canadian models and even building on their computer systems, and the Saskatchewan Register actually gave us a tape of their software, which somewhere is sitting in the Justice Department rotting. I think that the cost-benefit analysis would probably show that (and you need the statistics first really), but as long the regime is efficient and cheap then you probably do get the most effective solution from that. And that is certainly the American experience.

Response - Tony Duggan (Speaker):

Could I perhaps just add a comment to that. I think that any comprehensive and reliable cost-benefit analysis would be very difficult to do, because you would have to build into it not just the costs and benefits of the proposal, but also the costs and benefits of the existing system, and match the two sets up. Measuring the costs of the existing system, which include the costs of what we called them before — the complex overlapping rules, the quagmire and the jungle. It would be very hard, I think, to quantify in dollar and cent terms. It is easy enough to state that there is no doubt a cost there, but to put a figure on it I think would be very difficult.

At a more general level, Mark mentioned the work that has been done in the American law and economics literature which tries, not in dollar and cent terms but in terms of principles, to

weigh the costs and benefits of this sort of initiative. I even made an attempt last year to do a paper which translated those considerations to the Australian context and that was presented at a conference in Perth on Securities over Personal Property in September last year (that will be published in the conference proceedings in the next few weeks). Whether that fills the gap that you are identifying, Tom, I do not know, but it goes some of the way. In America, interestingly, one of the issues is the very basic one which all of us have assumed, namely that the taking and giving of security, is that it is self-efficient, and that has got economists quite excited. The notion, in theory at any rate, for giving security is a zero sum game — who benefits? why do financiers take security in the first place? — and some of the criticisms that have been made of the Article 9 approach. From that perspective it assumes an affirmative or a beneficial answer to that very basic question.

Response - Simon Begg (Commentator):

I could add one final word to it. This kind of issue arose back in 1971-1972 when the Molomby Committee reported. You may recall that part of its recommendations in Chapter 5 of that report, in essence, were schemes along the lines of what Tony and I have been presently advocating. One aspect of that was the establishment of what is now the present REVS scheme, and to make that work we clearly contemplated a computerised register and so on. But we indicated that first it would be necessary to do a feasibility study to work out what the cost of doing it would be — setting it up and so on. We had some figures on what the cost would be in the States of doing this (and remember at that time the States' schemes were paper-based schemes). At the time neither industry nor government was prepared to pay the $50,000 that was necessary to pay for the feasibility study into all this, and the whole scheme therefore foundered on the footing that there could not be a register established. There was a subsequent supplementary Molomby Report (I think published in December 1973) which picked up a South Australian suggestion for an alternative "no registration" scheme, and in fact that is partly built into, at least, the Victorian legislation. It was not until the mid-1970s that somebody thought that the computerised register might be worthwhile and the original scheme was revived. I think, looking back on it now, despite all the parochialism about where the National Register is to be kept, people would accept that it has been of economic benefit. The incidence of theft and other misappropriation of motor vehicles has been substantially reduced. And the South Australian scheme, which did not depend on registration but instead depended on insurance, foundered, apparently, because the cost of the insurance was so prohibitive that economics forced the registration alternative to be reconsidered.

Question - Steven Brown (Parish Patience, Sydney):

What happens under the PPSA scheme for liens and other forms of possessory securities? Is there a role for them or are they abrogated? And in particular in regards to situations of negotiable instruments where there is a pledge of that negotiable instrument, how does that fit in?

Response - Mark O'Regan (Commentator):

In the New Zealand context, liens are excluded from the PPSA on the basis that they arise by operation of law rather than by agreement in most cases. So the PPSA really deals with security agreements. For negotiable instruments, the PPSA regime would work simply because possession of the instrument is perfection. It is an alternative to registration. In most cases where you have negotiable instruments the financier will perfect its security interest by taking possession of the instrument.

Response - Simon Begg (Commentator):

Our schemes, on one variant of it, would have the same consequence, although I had contemplated in my paper expanding the scheme to embrace both consensual and non-consensual and possessory and non-possessory securities. That is to broaden the debate by

providing for registration of securities that arise by operation of the law such as workers liens and statutory charges for rates and the like.

Question - Steven Brown (Parish Patience, Sydney):

A supplemental question therefore — what would happen in the case of repairmen's liens? Would they then get a supplemental security or second ranking security in the case of a repairman?

Response - Simon Begg (Commentator):

Their lien would prevail.

Question - Steven Brown (Parish Patience, Sydney):

So notwithstanding that there was say a financed motor vehicle, there would be a first financier, he would have his security registered, it was then taken to a repairman who would then register his security as that, the second security in time would nevertheless have priority over the first?

Response - Simon Begg (Commentator):

No, that was not the proposition. The proposition was that the repairman's lien would not be registered, but would nevertheless prevail. My variant on the scheme would require registration and in which case, of course, the ordinary rules would apply. But that is really only a peripheral part of what I was contemplating. But the traditional schemes would all not register repairmen's liens and they would all prevail.

Response - Mark O'Regan (Commentator):

In New Zealand, in fact, the legislation regarding liens has been repealed, and so the position has changed to some extent since 1989. I think the result of that is there are still common law liens, but not statutory liens for workers and contractors.

Comment - Pip Colman (Chairperson):

I think we had better finish there. Would you please join me in thanking Professor Duggan and Messrs Begg and O'Regan for their wonderful contribution to the conference.