# A REVIEW OF THE IMPACT OF THE NEW ZEALAND COMPANIES ACT 1993 ON NEW ZEALAND BANKING TRANSACTIONS

## QUESTIONS AND ANSWERS

### Comment – Roger Drummond (Chairman):

Before opening up for any general comments or discussion, I think it is very useful to take this opportunity to reaffirm the practice of the lender's lawyers taking responsibility in New Zealand for providing a legal opinion. I think as banking lawyers we accept absolutely Simon Jensen's comment – I know Michael Jonas has expressed a view on this as well: that it is a commercial decision for the banks as to whether they request the opinion from the borrower's solicitors. I think one of the successes of the New Zealand Chapter of the Banking Law Association, whilst acknowledging that point absolutely, is that we actually have been able to remove a fair amount of aggravation and also reduce cost by developing the practice of the lender's lawyers taking responsibility for the supply of a legal opinion. I think that Simon Jensen in his paper very clearly sets out the exceptions to that practice, which I think we have all agreed upon, and that is where obviously there is a complicated or unusual constitution of the borrower where it is more appropriate for the borrower's solicitor to give the opinion in those circumstances. But perhaps before opening up for any general comments or questions, I think it would be very useful just to hear from anyone here who has perhaps got a contrary view to that practice – as I said, once again, accepting the final commercial decision is for the banks, but I think it has been a very useful practice for the reasons I have said – removing aggravation and reducing cost. Is there anyone who has a contrary view to that practice that they would like to express? We are not proceeding on the basis that silence is deemed to be consent, but I think it is useful for us to hear any contrary views on this occasion.

### Comment – Dermot Ross (Speaker):

It is not just, I think, a commercial decision for the bank. It is also a commercial decision for the borrower as to whether or not he is willing to allow his lawyers to address an opinion to the lender. There may be a number of considerations there which the borrower would bring to bear, including cost, deemed knowledge and the like, being transferred over to the lender. I think it is really a consensual decision and I know there are some law firms and even some individuals within law firms who will refuse point blank to give an opinion as well. So they obviously have a view as well.

### Comment – Roger Drummond (Chairman):

I think Simon makes a very valid point about the consistency of the opinions from larger New Zealand legal firms and maybe that is a further topic for our New Zealand Chapter to consider in the not too distant future.

Perhaps just opening the debate wider. Has anyone got any points of view that they would like to express on the papers delivered by our three speakers this morning or any questions they would like to put to our speakers?

## Question – Jonathan Ross (Bell Gully buddle Weir, Wellington):

I have a question for Simon Jensen, and a comment as well. I agree wholeheartedly with you that in your position you are better off not getting an opinion from your lawyers, and I regularly advise my clients to that effect because the clear nature of the opinion (it did not take a rocket scientist to see this) is that as you say, the opinion is short and the qualifications of some things are long. An Australian lawyer who is here now said to me last night that he takes the view that the New Zealand opinions are excessively long – and they are excessively long. So it does seem to me you are right. Your problem is a very clear problem – that you cannot convince your people on the operations side that they can do away with the piece of paper. So I think we are probably stuck with it, unless you take a leading role.

## Response – Simon Jensen (Speaker):

I think you are right Jonathan and it really ultimately is an issue for people like internal auditors. I think as the calibre of internal auditors for banks and credit risk reviewers for banks improve then there is a greater probability that they will understand the risks of actually getting a formal legal opinion and look to other processes. Certainly in my bank that is something that we are looking at in terms of how we manage the risk more effectively of the external documentation process.

## Question – Jonathan Ross (Bell Gully buddle Weir, Wellington):

The second issue Simon, that I would like to take up, is the tension between the retail solicitor's certificate (and I have to say I have never seen a Westpac certificate). If I understood you correctly, you see that very much as a checklist of items which should be followed by your borrower's solicitor. But at the end of the day, I think what you are also looking to is some kind of enforceability or validity opinion from the solicitor. And the tension you face and I think we all face is that on the one hand from Firm A you might be getting a long form major transaction enforceability opinion which doubles the qualifications, but on the same day now you are getting a couple of retail certificates, which of course you alluded to.

What view do you take, if indeed you have an enforceability or validity type opinion in the retail certificate of what that actually means in view of what you are getting from firms generally in a long form?

## Response – Simon Jensen (Speaker):

In relation to the retail solicitor's certificate our intention is really that it largely should just document the terms of the retainer, which is basically that you have acted with the appropriate standard of care and skill having regard to the transaction. And yes, I acknowledge that there are tensions between what you might get in a corporate opinion issued on the same day from what is in a retail opinion. But the issue from the bank's point of view is that retail lending is heavily process driven and that is what makes it economically efficient. Our approach is that in relation to those it is take it or leave it. If you are not prepared to give a certificate on the form that we require in a retail transaction then we do not have the time or resources to negotiate and say we will go and deal with a lawyer and risk reviewer to get the opinion. Obviously what we want to try and do is get some consensus between the banks and the profession as to what is reasonable and where a fair allocation of the risk is, so that the increasing tension that we are getting and the increasing circumstances in which we are getting qualified retail certificates, is reduced, because as I say, if it is not, it affects the overall economics of retail lender.

## Comment – Diccon Loxton (Allen Allen & Hemsley, Sydney):

I am the Australian lawyer that Jonathan was quoting. I would like to echo Simon Jensen's remarks in a number of ways. One is that we have, just after having told people that we have had one for twenty years, adopted an opinions policy. Part one of the opinions policy is that we never, except in a number of well-defined exceptions, give opinions when acting for borrowers to the lenders' lawyers – for the reasons that Simon put up on the board. The one exception to it is the circumstances I would describe when we are a consumer of New Zealand opinions and that is, when there is no other Australian lawyer involved, and where we are giving an opinion to an international lawyer. In a recent series of transactions we have been getting opinions from New Zealand lawyers acting for the borrowers, and it is just extraordinary the level of difference there is between them. There is also at the end of the day from the lender's point of view, very little worth in it, because no-one seems to be willing to give you any advice or any opinion on any of the major issues.

For instance, on the major transaction issue, no-one will tell you whether it is a major transaction or not, and they will just tell you that they are relying on a certificate from the directors. The certificate from the directors will just say it is not a major transaction. There is no way that you can advise your client as to whether there is a risk or not. Some will say, there is a qualification in there that says something like that they assume that they are known to the directors. And when you ask them what an interested director is then there is again no statement as to whether a director is interested in the transaction simply because he happens to be both a director of a guarantor and a subsidiary. And it goes on and on and on. So at the end of the day really you have got no benefit whatsoever from getting this opinion, because every single issue that could possibly arise as a question of law seems to have been qualified out of existence.