PERSONAL PROPERTY SECURITIES BILL

RECEIVABLES & OTHER INTANGIBLES

WORKSHOP CHAIR

Ralph Simmonds
Dean & Professor
Murdoch University

Workshop: Receivables and Other Intangibles under the Draft Personal Property Securities Bill (DPPSB)

Introduction:

These notes map out some seven discussion topics or areas, and provide references to some relevant provisions (clauses) in the DPPSB. Where appropriate, comparative references are made to provision (sections) in the NZ *Personal Property Securities Act* (NZPPSA). Participants are urged to consider the practical issues these topics raise. Do those issues suggest we should make reconsider aspects of the DPPSB?

Topic 1: Categories of Intangible Personal Property: "Chattel Paper"

Should Australia recognise "chattel paper" as a separate category of intangible collateral?

Particularly in the area of intangibles, the DPPSB provides a much richer collection of categories and sub-categories[1] than the NZPPSA[2]. In one respect the Australian Bill is less rich: it does not recognise a separate category for "chattel paper", the NZPPSA term (s 16) for "1 or more writings that evidence both a monetary obligation and a security interest in, or lease of, specific goods or specific goods and accessions", with the example provided of a hire purchase agreement. As the DPPSB would treat this sort of collateral as an "account" (cl 2 (a)), perfection of a security interest in such collateral, necessary for the best priority position under the Bill, can only be by filing (cl 28 read with cl 29 (2)). The NZPPSA permits perfection by taking possession of the chattel paper. It has been suggested that under the NZPPSA financing on chattel paper has "definite advantages over accounts financing"[3].

Topic 2: Categories of Intangible Personal Property: "Investment Property"

Is the provision for this category in the DPPSB a significant advance?

The DPPSB addresses in much richer detail than the NZPPSA this form of collateral, being "a security, whether certificated or uncertificated, security entitlement, or securities account" (Sched 1). In this it has been said to follow recent revisions of Article 9 in better catering for "the indirect holding system for securities and securitisation transactions"[4].

---

1 The Australian list from DPPSB Sched 1 is accounts; commercial tort claims; deposit accounts; instruments (with promissory note a defined subcategory); investment property (with securities, securities entitlements and securities accounts as defined subcategories); letter-of-credit rights; letters of credit; and general intangibles (with payment intangibles and software as defined subcategories). See Widdup, Linda and Mayne, Laurie, *New Zealand's Personal Property Securities Act And Australia's Draft Personal Property Securities Bill [:] An Introductory Comparison* (unpublished, 2 March 2000), para 4.1.

2 The NZ list from NZPPSA s 16 is intangibles (with account receivable as a defined subcategory); investment securities; and chattel paper. See Widdup and Mayne, *supra* note 3, para 4.2

3 See Widdup and Mayne, *supra* note 3, para 4.9.

4 See Widdup and Mayne, *supra* note 3, para 1.2.

Topic 3: Categories of Intangible Personal Property:

"General intangibles ... includes intellectual property"

Will the retention in a post-DPPSB world of the specialised schemes in federal law that affect taking security in such collateral give rise to significant problems? Of what sort?

The inclusion of intellectual property in the category of "general intangibles" (Sched 3) raises the question of the continuing role for special schemes of regulation of security interests in various forms of intellectual property, contained in the statutes concerning such forms, principally patents, copyright and trade marks. Those specialised schemes as they apply to security interests do not appear to have the advantages of the DPPSB, of relative cost, speed, simplicity, ease of use and safety in result.

Topic 4: Proceeds

Is the DPPSB rule that does not extend PMSI superpriority to accounts proceeds appropriate for our financing patterns?

The DPPSB defines "proceeds" as including "whatever" is "acquired" on "disposition" of the collateral (Sched 1). A paradigmatic case would be the sale of inventory collateral generating a receivable[5]. Consider a a contest between the inventory financer and a previously perfected account or other financer whose collateral includes such proceeds. Under the NZPPSA the superpriority of the second-perfected inventory financer extends to proceeds (s 74). Under the DPPSB there is no superpriority in the proceeds of inventory representing receivables (cl 30 (2)[6]). It has been suggested that the choice of rule depends on the relative significance of discrete receivable financing in the relevant jurisdiction[7].

Topic 5: Accommodating Negotiations for a Security Agreement

Should the DPPSB be more accommodating of financers seeking early registration of a financing statement?

Priority under the NZPPSA and the DPPSB between perfected security interests turns on the rule of first to file or perfect[8], unless another rule applies, where there is a much richer array of these in the DPPSB[9]. Filing, by lodgement of a financing statement, is easier under the DPPSB: thus, collateral can be described in the statement by kind[10]. However, under the NZPPSA a financing statement does not require the authorisation of a debtor, who must however be notified of a filing and may have a filing expunged. The DPPSB requires authentication by the debtor. The latter prevents a secured party in negotiations for an agreement filing to protect its likely position without consent.

---

5 The DPPSB categorises this in most cases as an "account": a significant exclusion from this definition is for monetary obligations evidenced by an "instrument", which include a "negotiable instrument" (Sched 1).

6 There are qualified exceptions to this proposition, for an "instrument" and for cash proceeds.

7 See Jacob S. Ziegel & David L. Denomme, *The Ontario Personal Property Security Act [:] Commentary and Analysis* (Toronto: Canada Law Book, 1994) at ¶33.7.

8 See Widdup and Mayne, *supra* note 3, para 8.1.

9 See e.g. Widdup and Mayne, *supra* note 3, para 8.3 (deposit accounts, investment property and letter of credit right).

10 See Widdup and Mayne, *supra* note 3, paras 5.5 – 5.7.

Topic 6: Drafting Style

Should an effort be made to harmonise the DPPSB with the NZPPSA in the relative simplicity and illustration-providing aspects of the latter's drafting style?

The DPPSB is drafted in a much more complex fashion than the NZPPSA, which is faithful to its Canadian inspirations in that respect. See eg the differences in the categories of collateral between the DPPSB and the NZPPSA under Topics 1 and 2. Further, examples are provided in the NZPPSA to illustrate many provisions; none are provided in the DPPSB. At the same time the DPPSB provides for a much more elaborate treatment of the array of collateral in commercial use, particularly intangible collateral: see Topic 2 and references in Topic 7.

Topic 7: Other Matters

Are there other matters with specific application to intangibles in the DPPSB that should be reconsidered?

Consider for example the following matters: priority of security interests in certain intangibles, including deposit accounts, investment property and letter-of-credit rights (cll 31 to 36); rights of ADIs (cll 41 ff); discharge of account debtors and restrictions on assignments of promissory notes and certain intangibles (cll 49 and 51); and collection and enforcement by a secured party (cl 81).

Ralph Simmonds, 25 May 2000