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# Personal Property Security Law Reform in Australia and New Zealand: The Impetus for Change

Anthony Duggan & Michael Gedye*

Assume a period some time in the early part of the twentieth century. Country A introduced a telephone system some years back. Country B's government is now proposing to do likewise. A consortium of stakeholders, led by postal workers and stationery manufacturers, oppose the initiative on the ground that Country B has a postal service that works perfectly well. They point out that the postal service in Country A was always problematic because vast distances and harsh winters made deliveries unreliable but they say Country B does not have the same problems because it is much smaller and the climate is better. They concede that Country B's communications system could be improved, but they argue that only modest changes are needed: for example, the government might consider centralizing postal operations, which are currently run on a regional basis, and it might consider allowing postmen (no post-women in those days) to ride bicycles. They are ambivalent about a proposal to offer additional services, in particular, a telegram service, because they fear that telegram-writing might corrupt proper letter-writing. They argue that introducing telephones would be a bad idea because some people may have trouble learning to use them. There may be other adverse implications that have not occurred to anyone yet, and at least we know where we stand with the postal service. Question: how should Country B's government respond?[1]

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1. Anthony Duggan, Submission to the Australian Commonwealth Attorney General's Department on Review of the Law on Personal Property Securities: *Discussion Paper 1—Registration and Search Issues*, ¶ 2 (May 2007) (on file with author).

## I. INTRODUCTION

Australian and New Zealand secured transactions laws share a common history. But they took different paths, at least temporarily, in 1999 when New Zealand enacted a Personal Property Securities Act[2] based on the Canadian version of Article 9 of the United States Uniform Commercial Code. Australian personal property security law reform lagged behind, but there has been renewed activity over the past two years or so, culminating in the release of a draft Personal Property Securities Bill a few months ago.

An interesting feature of the Australian and New Zealand experiences is the relative ease with which New Zealand managed the reform process and the equanimity, if not enthusiasm, with which the legal profession and other stakeholders greeted the proposals.[3] In Australia, by contrast, personal property security law reform at least until recently has been dogged by a lack of political will, at best lukewarm support from the banks and other financial institutions and strong opposition from within the legal profession. This difference is curious given the close cultural, economic and political similarities between the two countries, their geographical proximity and their commitment to the harmonization of Australasian business laws *via* the Australia and New Zealand Closer Economic Relations Trade Agreement.

Our aims in this paper are to: (1) explain why lawyers tend to oppose Article 9-type personal property security law reform; (2) critically analyze the reform opponents' main arguments; and (3) identify the key factors behind the impetus for change in Australia and New Zealand. We also comment briefly on the Australian Draft Bill and the New Zealand PPSA, with emphasis on the dangers of re-inventing the wheel. This is a lesson which the New Zealanders, to their credit, for the most part have taken to heart but which, to the potential prejudice of a successful legislative outcome, the Australians continue to ignore.[4]

In Part II, below we provide a short historical account of the reform movements in the two countries. In Part III, we compare and contrast the legal profession's reactions to the reforms in Australia and New Zealand. In Part IV, we identify the factors that provided the impetus for change, looking first at Australia and then New Zealand. In Part V, we make

2. *See* Personal Property Securities Act 1999 (N.Z.) [hereinafter NZPPSA 1999].

3. Although there was a considerable time lag between the date when the proposals for Article 9-type reforms were first floated in New Zealand and the enactment of the legislation. *See* Part II B, below.

4. Although the New Zealand legislation does depart from the Canadian model in a number of respects. *See* Part V B, below.

some brief remarks about the recently released Australian Draft Bill, followed by some observations about the New Zealand PPSA. Part VI concludes.

## II. HISTORICAL BACKGROUND

### *A. Australia*

The defects in the Australian personal property security laws have been well documented.[5] The history of proposals for law reform has been long and tortured and this, too, has been well documented.[6] But for David Allan's unflagging efforts, the cause may well have been lost for good in 1993, following the Australian Law Reform Commission's ill-considered recommendations for a home-grown PPSA.[7] Professor Allan almost single-handedly managed to keep the issue alive, by convening stakeholder workshops at Bond University in 1995 and 2002,[8] by exploiting his connections with the Banking Law Association and, generally, by taking every available opportunity to prod reluctant governments into action.

The current chapter in the saga was sparked by a truly Pythonesque episode. The then Commonwealth Attorney-General, Philip Ruddock, was to be the keynote speaker at a combined Queensland Law Society/Queensland Bar Association symposium in 2005. He arrived early and, to kill time, decided to sit in on one of the presentations currently under way. By chance, the presentation he walked in on was Professor Allan making the case, again, for personal property security law reform. Allan's remarks captured Ruddock's attention and, at the end of the session, in an actualization of every academic's dream, Ruddock introduced himself, congratulated Allan on his presentation and

5. *See* AUSTRALIAN LAW REFORM COMM'N, REPORT NO.64, PERSONAL PROPERTY SECURITIES (1993), *available at* http://www.austlii.edu.au/au/other/alrc/publications/reports/64/Report_64.txt; *see also* Anthony Duggan & Simon Begg, Victoria Law Reform Commission & Queensland Law Reform Commission, *Personal Property Securities Law: A Blueprint for Reform* (QLRC DP, No.39 & VLRC DP No. 28) (1992); David E. Allan, Patrick Quirk & Nicole Martin, *Final Report-Workshop on Personal Property Security Law Reform*, 14 BOND L. REV. 8 (2002); Standing Comm. of Attorneys-General, *Review of the Law on Personal Property Securities—Options Paper* (Austl.) (2006), *available at* http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultations reformsandreviewspersonalpropertysecuritiesreformPPSDownloads; Anthony Duggan, *Globalization of Secured Lending Law: Australian Developments*, 34 INT'L LAW. 1107 (2000); Anthony Duggan, *Personal Property Security Law Reform: The Australian Experience to Date*, 27 CAN. BUS. L.J. 17 (1996).

6. *See id.*

7. *See id.*; *see also infra* text accompanying note 15.

8. The proceedings of the 2002 workshop were published in a special issue of the *Bond Law Review*. *See* 14 BOND L. REV. (2002).

invited him to address the Standing Committee of State and Commonwealth Attorneys-General ("SCAG") at its next meeting.

Following this meeting, the attorneys formed a working group to examine the possibilities for reform and to develop proposals for further consideration.[9] This led to the publication by SCAG in April 2006 of a paper canvassing a range of reform options based on the New Zealand Personal Property Securities Act 1999 and an Allan-sponsored draft Bill.[10] In April 2007, the Council of Australian Governments agreed in principle to establish a national system for the registration of personal property security interests coupled with Commonwealth legislation to be supported by a referral of legislative power by the States to the Commonwealth.[11] Between November 2006 and April 2007 the Commonwealth Attorney-General's Department published three detailed Discussion Papers which signified a clear commitment in principle to Article 9-type reforms,[12] while in the May 2007 federal budget, the Australian government allocated $113.3 million over five years to fund the enactment of legislation and the development of a national on-line register.[13]

The most recent development was the release, on May 16, 2008, of a draft Bill for public comment with a submission deadline of August 15, 2008.[14] Sadly, Professor Allan died before these latest developments took place and so he will not see the fruits of his labours. On the other hand, he must have known that the signs were promising following the 2005 SCAG Meeting and the prospect of movement at last would have given him considerable satisfaction. Ironically, Philip Ruddock has also been denied the opportunity of seeing the project through to completion.

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9. *See* Australian Government Attorney-General's Department, *available at* http://www.ag.gov.au/pps [hereinafter AGA-GD].

10. *See supra* note 5.

11. *See* Personal Property Securities Reform, *supra* note 9.

12. *See* AGA-GD, *Discussion Paper 1: Registration and Search Issues* (2006), *available at* http://www.ag.gov.au/pps (follow "PPS Downloads" hyperlink; then follow "Registration and Search Issues" hyperlink); *see also* AGA-GD, *Discussion Paper 2: Extinguishment, Priorities, Conflict of Laws, Enforcement, Insolvency* (2007), *available at* http://www.ag.gov.au/pps (follow "PPS Downloads" hyperlink; then follow "Extinguishment, Priorities" hyperlink); AGA-GD, *Discussion Paper 3: Possessory Security Interests* (2007), *available at* http://www.ag.gov.au/pps (follow "PPS Downloads" hyperlink; then follow "Possessory Security Interest" hyperlink). For purposes of clarity, hereinafter we refer to these collectively as "Discussion Papers."

13. AGA-GD, *Media Release: Personal Property Securities Reform* (2007), *available at* http://www.ag.gov.au/pps (follow "PPS Downloads" hyperlink; then follow "Media Releases" hyperlink; then follow "Personal Property Securities Reform" hyperlink).

14. *See* Personal Property Securities Bill 2008 (Austl.) (Consultation Draft), *available at* www.ag.gov.au/pps (follow "PPS Downloads" hyperlink; then follow "Exposure Draft Personal Property Securities Bill 2008" hyperlink).

His party was voted out of office in the November 2007 federal election and his opposition counterpart, who is now in the driver's seat, will probably end up getting the credit for the initiative assuming it succeeds.[15]

*B. New Zealand*

The New Zealand reform history is almost as long but somewhat less tortured than in Australia. Defects in New Zealand's prior secured transactions law were documented from as early as the 1950's.[16] In 1967 the Legal Research Foundation, a highly regarded private law reform body that draws its membership from the legal profession, the judiciary and academia, commenced research into the possibility of reforming the New Zealand law by enacting a secured transactions statute based on Article 9, as was then occurring in Ontario. Around the same time, Professor Riesenfeld, a North American academic who was visiting New Zealand, famously described the then New Zealand law as a "quagmire," a metaphor that proved to be enduring.[17] Further calls for reform were made in 1973, 1982 and 1984.[18] But the most important initiatives came from the New Zealand Law Commission in 1988 and 1989 with the publication of its Preliminary Paper No. 6, *Reform of Personal Property Security Law,* and Report No. 8, *A Personal Property Securities Act for New Zealand,* both publications strongly endorsing the enactment of an Article 9 type regime. The authors of the initial report described the problem in the following terms:

> The law relating to security over chattels and intangibles in New Zealand is in a mess. . . . The principal reason for the mess is that New Zealand inherited the English Bills of Sale legislation (itself a

15. The new Attorney-General is Robert McLelland. In an address to the Institute for Factors and Discounters on 6 March 2008, he gave credit to a previous Labor government for initiating personal property security law reform in the 1990s and went on to give his own government credit for "injecting renewed vigour into the regulatory reform agenda." Robert McLelland, Australia Attorney General, Institute for Factors and Discounters (IFD) Annual Luncheon Speech (Mar. 6, 2008), *available at* http://www.ag.gov.au/pps (follow "PPS Downloads" then follow "Media Releases" hyperlink; then follow "IFD Annual Luncheon" hyperlink).

16. *See generally* Cain, *The Chattels Transfer Act: Oddities and Oddments,* 35 NZLJ 86 (1959).

17. *See* S. Reisenfeld, *The Quagmire of Chattels Security in New Zealand* (Auckland: New Zealand, Legal Research Found. 1970). The metaphor was frequently repeated over the years. For example, *see* The New Zealand Law Commission's Preliminary Paper 6, *Reform of Personal Property Security Law,* at 10 (1988).

18. *See* The Contract and Commercial Law Reform Committee 1973 Chattels Securities Report to the Minister of Justice; Mr. D. F. Dugdale's 1982 report on Australian developments; *and* a 1984 Ministerial Working Party review of registration of company charges.

> mess) and the relevant provisions of the companies legislation (an incomplete security system) and adapted them to local needs, sometimes in a desultory way.[19]

Farrar and O'Regan identified the main reasons for the then unsatisfactory state of the New Zealand law as being.

> (a) the lack of any functional basis for the law;
>
> (b) conceptual difficulty and confusion;
>
> (c) the incompleteness and incoherence of the statutory registration schemes.[20]

These reasons are as applicable in Australia and the United Kingdom (and indeed elsewhere) as they then were in New Zealand.

Although the New Zealand Law Commission and its advisers saw an urgent need for reform,[21] another 10 years passed before the New Zealand Personal Property Securities Act was finally enacted in 1999. The delay was not due to any significant stakeholder opposition; in contrast to Australia and the United Kingdom, affected groups either actively supported the reforms or at least did not oppose them. The delay was due in part to the priority given to company law reform at large, in part to the absence of a particular champion within government to promote the reforms and in part to a desire to await the outcome of Australian reform initiatives. However, when by 1993 there still seemed to be no immediate prospect of Australia adopting a similar secured transactions regime, New Zealand decided to go it alone. In March 1993, the Minister of Justice gave the green light to the Law Commission's recommendations. There was no change to this position when later in 1993 the Australian Law Reform Commission produced what New Zealand regarded as unsatisfactory proposals for Australia. But it was not until the commercial law reform responsibilities of the Ministry of Justice were transferred to the Ministry of Economic Development, which doubtless saw the potential economic benefits of the reform more clearly than the Justice Ministry, that real progress was

19. Preliminary Paper No. 6, *Reform of Personal Property Security Law*, at 10 (1988) (reporting by Professor John Farrar and Mark O'Regan to the New Zealand Law Commission).

20. *Id.*

21. "We believe that the time has come to stop talking about the inadequacies of the current law relating to personal property securities which have been recognised for over 20 years, and to take immediate action to reform the law to overcome those inadequacies." *Id.*

made. The Ministry of Economic Development reviewed and endorsed the Law Commission's proposals and the legislation was finally enacted in 1999.

## III. THE LEGAL PROFESSION'S REACTIONS

### A. *Australia*

It is probably fair to say that, up until the most recent events described above, the legal profession in Australia was, by and large, at worst hostile and at best indifferent to Article 9-type reform of the personal property securities laws. There were at least five inter-related factors to which this essentially negative response can be attributed.

#### 1. The Difficulty of the Subject-Matter

The law of secured credit is not easy. It comprises elements of corporate law, sale of goods and hire-purchase law, mortgage law, property law and the law of contracts as well as numerous registration statutes, many of them technical and arcane. Lack of sufficient expertise across all these subject areas almost certainly left many lawyers incapable of properly assessing the case for reform. For those uncertain about change, the *status quo* will often be the most comfortable option. In other words, uncertainty promotes a "better the devil you know" kind of response: see, further, *(No.5)*, below.

#### 2. The Nature of the Legislation and the Unfamiliarity of Key Concepts

Compounding the difficulty of the basic subject-matter is the opaqueness of the Article 9 model and the unfamiliarity of its key concepts. Unlike the ordinary run of statutes, it is not possible to read Article 9 or a Canadian PPSA from cover to cover and come away with a working knowledge of what it is about. Article 9 has its own internal logic which requires mastery before the secrets of the statute can be unlocked.

The key concepts of attachment and perfection and the relationship between them are part of this internal logic. Attachment and perfection are simply old wine in new bottles, in other words, they are no more than new and economical means of expressing well-established common law principles. However, there is a tendency for the novelty of the expressions to mask the familiarity of the ideas they represent and this can make newcomers to the legislation nervous. The Article 9/PPSA priority rules and the relationship between them are another source of

anxiety. The rules are for the most part easy to apply in practice, but they can be hard to understand in the abstract and it is in the nature of things that the newcomer to the legislation is likely first to encounter the rules in the abstract.

3. Distrust of American Law

At least until recently, the Australian legal tradition was a strongly Anglo-centric one. There was a heavy emphasis in law schools on English cases; far more graduate students went to Oxford or Cambridge than to Harvard or Yale. Courts regularly cited English authorities and much less frequently relied on case law from other jurisdictions and much Australian statute law, particularly in the commercial area, was English in origin (the Companies Acts, the Bills of Exchange Act, the sale of goods legislation, the bills of sale statutes and the hire-purchase laws are a few examples that come readily to mind). In summary, if the need arose for law teachers, courts and legislatures to borrow, the tendency was to look to England. The tendency is somewhat less pronounced these days (for example, Australian courts now quite regularly cite Canadian cases and even, occasionally, American ones, while, on the legislative front, the States have replaced their English model money-lending and hire-purchase laws with American style truth-in-lending and consumer credit laws). On the other hand, old habits die hard and the bias persists. American law and legal institutions are more alien than English ones and, therefore, are liable to be treated with suspicion. Article 9 is doubly cursed in this regard: not only is it American, but also it is markedly different in style and approach from the English model laws Australian practitioners are used to.

4. The Irresistible Urge to Reinvent the Wheel

Perhaps partly on account of the factors identified in *(No.2)* and *(No.3)*, above, law reformers who support the basic Article 9/PPSA philosophy have nevertheless proved reluctant to copy the Article 9/PPSA drafting. There is a tendency to think we can do it better ourselves and also to assume, without proper inquiry, that differences in Australian economic conditions, financial transactions and legal practice justify departure from the North American model. The Australian Law Reform Commission's 1993 report on personal property securities is the most prominent example of this way of thinking. One problem with taking a radically different drafting approach is that it increases the risk of error. Article 9 and the PPSAs have been tried and tested and they are the product of careful and extensive deliberation. New legislation, drafted in haste, might not work as well—or at all. A decision to

reinvent the wheel puts a premium on knowing what you are doing and why.[22] The Australian Law Reform Commission's view was that the Article 9/PPSA model was unsuitable for adoption in Australia because it was too radically different in substance and drafting style from current Australian laws. The ALRC preferred to reinvent the wheel, producing a draft bill which looked nothing like Article 9 or the PPSAs. The bill was roundly criticized by the ALRC's North American consultants and, while this was a justified reaction, it had the effect of fuelling stakeholders' doubts about the wisdom of reforming the law at all.[23]

5. Better the Devil You Know

The factors identified in 1-4, above, all contributed to a "better the devil you know" attitude: law reform may make things worse and, to avoid the risk, we should stick with the tried and true. What we have may not be optimal, but at least we know where we stand. The concern with transition costs, including the costs to lenders and their legal advisors of becoming familiar with the new legislation and adapting documents and systems, is a variation on the same theme. There is no denying that Article 9-type reforms involve transition costs but, as the Canadian experience demonstrates, these costs are substantially outweighed by the benefits over the longer term. A fixation on transition costs can easily develop into the "better the devil you know" attitude described above and this, in turn, tends to stultification.[24]

Times have changed and there is more support now for the reforms within the legal profession than there used to be. Nevertheless, there is still some significant opposition, particularly from a number of the larger law firms. The Law Council of Australia's submissions on the 2006-2007 Discussion Papers[25] reveal a sharp division of opinion. The submissions endorse "efforts to reform this area of law" and acknowledge that "the existing system is unnecessarily complex, with gaps, inconsistencies and out-dated formal requirements." However, they go on to say:

> members of the Committee have not been able to reach a consensus as to whether some aspects of the reform should be supported. These include:

22. *See* Jacob S. Ziegel, *Canadian Perspectives on Chattel Security Law Reform in the United Kingdom*, 54 CAMBRIDGE L.J. 430, 441 (1995).

23. *See Personal Property Security Law Reform*, *supra* note 5, at 181-84.

24. The new Attorney-General acknowledged this point in his address to the Institute of Factors and Discounters: "The reforms have encountered several road blocks along the way. For many, it was easier to live with the existing complex and expensive system than to change it." *See* McLelland, *supra* note 15.

25. *See* Discussion Papers, *supra* note 12.

- codification of the general law relating to security interests or otherwise altering the existing substantive law except where a specific need exists;

- enshrining the "in substance" or "functional" approach as a key feature of the reforms; and

- re-characterising interests that are not formally security interests as security interests for the purpose of registration or otherwise.

> While some members of the Committee support these reforms, others oppose them.[26]

Contrary to what the opening words imply, these points of disagreement go to more than matters of detail. They are fundamental to the entire Article 9 endeavour. As such, they are inconsistent with the broad statements of support for the reforms which appear in the submissions' opening paragraph.

The reform opponents' main objections can be summarized as follows:

- the Article 9/PPSA model is too complex;

- Article 9 is not relevant to Australia; and

- Article 9's functional approach to secured transactions confuses ownership with security interests.

These are similar to the objections raised by professional organizations[27] to the Law Commission's 2004 proposals[28] for Article 9-type reforms in England and Wales.[29] The following is a short critical account of the points listed above.

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26. Financial Services Committee, Business Law Section, Law Council of Australia, *Review of the Law on Personal Property Securities: Submission in Response to Discussion Paper 1: Registration and Search Issues* (June 2007), ¶¶ 1, 2. These statements were repeated in the submissions on Discussion Papers 2 and 3.

27. The main opposition came from the Financial Committee of the City of London Law Society, *see* LAW COMM'N, CO. SEC. INTERESTS, 2005, CM. 6654, and the Association of Business Recovery Professionals.

28. *See* LAW COMM'N, CO. SEC. INTERESTS: A CONSULTATIVE REPORT, 2004, Consultation Paper No. 176.

29. *See* Jacob Zeigel, *The Travails of English Chattel Security Law Reform—A Transatlantic View*, 2006 LLOYD'S MAR. & COM. L.Q. 110 (2006) (providing a critical account of both submissions); *see also* Hugh Beale, *The Exportability of North American*

a. The complexity of Article 9

According to the Law Council of Australia's submissions, the main reason for opposition to the proposed reforms is "the significant increase in complexity of the laws" the reforms would entail" and this is "a compelling reason" not to adopt them.[30] The following is a fuller statement of this concern:

> [t]he proposed priorities regime . . . is significantly more complex than the existing rules applying under Australian law. . . . Although there will be a new registration system, covering a broader range of security interests, registration will not determine priority in all cases. The outcome of any particular priority dispute may depend on the order of registration of security interests, the 'category' of personal property over which the competing security interests are held and the way in which both the grantor of the security interest and the holders of the competing security interests held the property.
>
> The complexity of the NZ priority regime is evidenced by the manner in which the legislation classifies personal property. There are seven primary categories of personal property including chattel paper, documents of title, goods, intangibles, investment securities, money and negotiable instruments. The definition of goods alone contains nine sub-classifications, including consumer goods, equipment and inventory.
>
> Under the NZ regime there are approximately 70 priority rules. There is no need to adopt such a complex set of priority rules. This complexity undermines the certainty that a single register system is intended to provide.[31]

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*Chattel Security Regimes: The Fate of the English Law Commission's Proposals*, 43 CAN. BUS. L.J. 178 (2006).

30. *See* Financial Services Committee, *supra* note 26. *See* Financial Services Committee, Business Law Section, Law Council of Australia, *Review of the Law on Personal Property Securities: Submission in Response to Discussion Paper 2*, at 1 (2007). The committee repeats its opposition in its submission on Discussion Paper 3. *See* Financial Services Committee, Business Law Section, Law Council of Australia, *Review of the Law on Personal Property Securities: Submission in Response to Discussion Paper 3*, at 1 (2007).

31. Angela Flannery & Greta Burkett, *Personal Property Securities Reform in Australia*, 23 AUSTL. BANKING & FIN. LAW BULL. 23, 24 (2007). The authors are both with Clayton Utz, a leading law firm. The passage is not a fair or accurate reflection of the New Zealand legislation. We are unsure how Flannery and Burkett arrived at the figures they quote. There are three subcategories of goods: consumer goods, equipment, and inventory. Other types of goods, such as crops, are mentioned out of an abundance of caution to preclude any possible argument they are not goods. Motor vehicles and aircraft are subject to serial number registration requirements, but it is no more accurate

The complaint that there are too many rules calls to mind the Austrian Emperor Joseph II's reputed gripe to Mozart that *Don Giovanni* had too many notes, and it is hardly less fatuous. The key question, of course, is too many compared to what? According to the Attorney-General's Department's reckoning, there are currently "at least 77 separate Acts governing PPS in Australia, administered by 30 separate Commonwealth, State, and Territory government departments and agencies."[32] Moreover, as Discussion Paper 1 points out:

> registration and search vary according to jurisdiction, the nature of the collateral, the kind of security interest or whether the debtor is a natural person or a company. Some interests are required to be registered on more than one register to gain protection while for others there is no available register at all.[33]

It is hard to accept the assertion that the proposed legislation is more complex than the current laws, and it is ironic that the number of priority rules the critics say the proposed legislation contains almost exactly matches the number of registration statutes the new law will replace. Moreover, as Ziegel points out in the context of the English debate on personal property security law reform, the implication that the current laws are "clear, flexible and predictable" relative to the Article 9/PPSA model is belied by the volume of secured lending transactions that are "successfully concluded each year in Canada and the U.S."[34]

b. The Irrelevance of Article 9

A partner in one of the leading Australian law firms was reported in the *Australian Financial Review* 12 months ago as saying that Article 9 was introduced in the United States "in 1951 and in the context of a legal system which didn't recognize equity."[35] The revelation that there was no equity in the United States will no doubt come as a posthumous shock to the likes of James Kent, John Pomeroy, and Joseph Story, and it is

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to refer to them as a subcategory than it would be for any other type of goods. We have never counted the number of priority rules—there seems little point—but the prudent secured creditor who registers need be concerned with only a few.

32. AGA-GD, *Review of Personal Property Securities Information Sheet* (Nov. 2006), *available at* http://www.ag.gov.au/pps (follow "PPS Downloads" hyperlink; then follow "Additional Downloads" hyperlink; then select "PPS reform information sheet"). The legislation is listed in Attachment D of the Department's *Options Paper. See* Standing Comm. of Attorneys-General, *supra* note 5, at 24-25.

33. *See Discussion Paper 1: Registration & Search Issues*, *supra* note 12, at 1.

34. *See* Zeigel, *supra* note 29, at 118.

35. *See* Marcus Priest, *Need for Federal Plan Questioned*, AUSTL. FIN. REV., June 1, 2007, at 63.

unclear whether the speaker was being deliberately mischievous or was simply uninformed.

A third, and perhaps more likely, possibility is that the speaker was misquoted, and what she meant to say was that United States law did not recognize the floating charge and Article 9 was enacted to cure this deficiency. The implication is that, because the floating charge is part of Australian law, there is no need for Article 9-type reforms in Australia. The argument overlooks the fact that the floating charge *was* part of pre-PPSA law in Canada and New Zealand, but this did not stop the Canadians or New Zealanders from going down the Article 9 road.

The truth, of course, is that the need to reverse *Benedict v. Ratner*[36] was only one reason for the enactment of Article 9. Aside from the lack of the floating charge, pre-Article 9 secured lending law in the United States had many of the same features as the current Australian law, including "a multiplicity of legal, equitable and statutory security devices each with its own rules, many of them quite unsuited to modern financing requirements and leading to equally uncommercial results."[37] The need to reduce the number of registers is reason enough for reform, but, as most law reformers have discovered, it turns out to be hard to achieve this objective without also introducing substantive rules that are uniform across the different forms of transaction.

c. The Heresy of Article 9

The third commonly voiced objection to the Article 9 model is that "hire-purchase agreements, conditional sale agreements and other quasi-securities are not true security interests and should not be governed by the same principles as apply to mortgages and charges. To merge the two . . . is to confuse what 'I owe' with what 'I own.'"[38] The argument goes to the heart of Article 9's functional approach to the treatment of secured transactions and, at least as commonly presented, implies that a registration requirement is warranted for mortgages and charges, but not for hire-purchase agreements, conditional sales, and the like. This, of course, amounts to a defence of the *status quo* as represented by the system for registration of company charges.

By way of justification for discriminating between forms of transaction, Flannery and Burkett argue that extending the registration

36. Benedict v. Ratner, 268 U.S. 353 (1925) (determining that debtor could not use proceeds from accounts because using the proceeds would preclude the effective creation of a lien).

37. *See* Ziegel, *supra* note 29, at 115.

38. This is how Ziegel states the argument before dismantling it. *See id.* at 116. For a statement of the argument in the Australian context, see Flannery & Burkett, *supra* note 31.

requirement to title retention arrangements may lead to parties being taken unfairly by surprise:

> the consequences of non-registration are severe. If a security interest is not registered it may be defeated by other secured creditors of an insolvent debtor. For lessors, suppliers and consignors, this will mean that they may lose title to their goods if they inadvertently fail to register their interests on the new register.[39]

As it happens, the first two cases decided under the New Zealand PPSA, *Graham v. Portacom NZ Ltd*[40] and *Waller v. New Zealand Bloodstock*[41] involved this very scenario of lessors failing to register, and, at least in Australia, both cases have become rallying points for opponents of the new law.[42]

However, any concerns these cases have prompted are misconceived. The potential for unfair surprise in the new laws is no more than an aspect of the transition costs parties face in adapting to the new regime.[43] These transition costs are justifiable on the assumption that they will be outweighed by the benefits of the new law in the longer-term. Moreover, if there is a problem, it will likely prove to be self-correcting. It should take only one or two cases like *Portacom* and *New Zealand Bloodstock* for lessors, suppliers and consignors to get the message that the new law applies to them and that they need to register financing statements.[44] It can safely be predicted that there will not be too many more cases like this in New Zealand and that the courts will be free to turn their attention to more interesting questions.

*B. New Zealand*

As mentioned earlier, stakeholder groups in New Zealand, including lawyers, either actively supported the proposed personal property

39. *See* Flannery & Burkett, *supra* note 31, at 23-24.

40. Graham v. Portacom N.Z. Ltd., [2004] 2 NZLR 528 (H.C.).

41. Waller v. N.Z. Bloodstock Ltd., [2004] 2 NZLR 549 (H.C.).

42. The Australian government was sufficiently persuaded by these arguments to include in the draft Personal Properties Securities Bill 2008 a provision aimed at protecting the holder of an unperfected security interest pursuant to a true lease or consignment from the consequences of the rule that an unperfected security interest is invalid in the debtor's bankruptcy or liquidation. *See infra* app. pt. t (k). The provision is arguably misguided for the reasons stated in the text and Appendix.

43. The real surprise in *Portacom* and *New Zealand Bloodstock* is that the lessors failed to register, despite extensive campaigns by government and professional bodies aimed at informing affected persons of the need to do so. *See Portacom*, 2 NZLR ¶ 6; *N.Z. Bloodstock*, 2 NZLR ¶ 7. What is more, in *Portacom* it was clear that the lessor had taken proper legal advice about the new law and, apparently, chose to ignore it. *See Portacom*, 2 NZLR ¶ 5.

44. *See* discussion *supra* note 43.

security law reforms, or at least did not oppose them.[45] How did New Zealand overcome the "better the devil you know" response which dominated the Australian scene for so long? The supportive attitude of the New Zealand legal profession, and the neutrality of New Zealand's financial institutions (to suggest that financial institutions actively supported the reforms may be to put it too highly) represented significant differences from the Australian and British experiences with secured transactions law reform.

But perhaps the defining difference was the grass-roots involvement of the legal profession in New Zealand. Senior members of the profession, who had daily experience of the deficiencies of the old secured transactions regime, often led the reform initiatives. The Legal Research Foundation, one of the early promoters of reform, was a joint venture between practitioners and academics. The Contracts and Commercial Law Reform Committee, which in its 1973 report to the Minister of Justice endorsed the reform proposals, had practitioner membership. The Government commissioned reports from leading practitioners in 1982 and 1984. And, perhaps most significantly, when the Law Commission was tasked with reviewing the law on the registration of company charges, it initially engaged John Farrar and Mark O'Regan (then a senior commercial lawyer) to prepare a preliminary report and subsequently established an advisory committee of specialists comprising five senior practitioners (two of whom were later appointed judges and now sit in the Supreme Court and Court of Appeal) who were partners in five out of the eight largest national law firms, together with Farrar, David McLauchlan and Bob Dugan.[46] The seniority and calibre of the Advisory Committee's members ensured that it had immediate credibility.

Although there was no orchestrated promotion of the reform proposals, the Advisory Committee widely circulated a draft of its report and was encouraged by the support received from stakeholders. The Advisory Committee received no opposing submissions. Prior to this, the recommendation in the Farrar and O'Regan report to adopt an Article 9 regime was presented "and generally applauded"[47] at a series of insolvency law seminars across New Zealand.

The New Zealand reformers not only resisted the urge to reinvent the wheel, but also actively discouraged it. No doubt this was in part due

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45. *See supra* text accompanying note 3.

46. At that the time, Professor Farrar was on the Faculty of Law at University of Canterbury, Christchurch, while Professor MacLauchlan and Mr. Dugan (not to be confused with the co-author of the present paper) were both on the Faculty of Law at Victoria University, Wellington.

47. *See* Preliminary Paper No. 6, *supra* note 19.

to an unrealistic time frame given to the Advisory Committee to submit its recommendations. After Farrar and O'Regan's preliminary report recommending the adoption of an Article 9 regime, the Advisory Committee was given a bare 6 months to come up with a final recommendation and draft legislation. The Committee, working on a *pro bono* basis, essentially met this deadline by working weekends and by basing the draft legislation on the British Columbia model. However, officials could not resist the urge to reinvent the wheel. The New Zealand Ministry of Economic Development's first draft bill departed radically from the North American model. For example, it based priority on the time of perfection (rather than the time of registration) and it required the registration of particulars of individual security agreements rather than merely details of the prospective collateral. A subcommittee of the New Zealand Law Society (the New Zealand practitioner body) spent many hours in meetings with Ministry officials endeavouring to convince the Ministry to return to the tried and tested Canadian model and in the end they substantially succeeded in doing so.[48]

New Zealand's history is characterised by a lack of opposition from financial institutions and industry groups. This is perhaps surprising given that all of the major New Zealand banks are Australian owned and some of the Australian parent banks at least initially opposed similar reforms in Australia. Some of the Australian bankers' opposition was engendered by Dr. William Gough, an expert on company floating charges, who was opposed to the reforms and who advised Australian banks. Gough also made his views known in New Zealand.[49] Perhaps, however, Australian institutional opposition did not take root cross the Tasman, because the financial institutions' local legal advisers were

48. Michael Gedye was a member of the New Zealand Law Society subcommittee. Nevertheless, the Law Society subcommittee was not wholly successful in convincing New Zealand officials to adopt the Canadian model. Officials insisted on following New Zealand drafting conventions as well as adopting some other home grown amendments against the subcommittee's advice. For example, the New Zealand Act lacks any provisions dealing with fixtures. Furthermore, for no good reason, only first ranking secured parties were given the right to enforce security interests. This latter anomaly has subsequently been rectified. *See* Personal Property Securities Act 1999 (N.Z.), 1999/126, s. 109. On the other hand, perversely the subcommittee was responsible for one notable omission from the New Zealand Act. The draft bill included provisions that were equivalent to the Canadian provisions dealing with competing priorities when collateral disposed of by the debtor was subsequently returned to the debtor. For unconvincing reasons, the subcommittee persuaded officials to delete these provisions from the New Zealand Act.

49. *See, e.g.*, William J. Gough, *The Law Relating to Chattel Security III: Toward a New System of Business Security Law*, N.Z. COMPANY DIRECTOR AND PROF'L ADMIN., Nov. 1979, at 72-79.

already on board with the proposed reforms and were able to steer their clients away from the Australian point of view.

It is also possible that New Zealand's experience with partial reforms to its secured transactions laws may have smoothed the way for more fundamental reform. For example in 1974 some relatively insignificant amendments to New Zealand's Chattels Transfer Act introduced New Zealand practitioners to the concept of the functional security interest.[50] Moreover, the 1989 Motor Vehicle Securities Act furthered the partial reforms through the creation of a national computerised registry and the transparent adoption of the time of registration as a priority point.[51] In this connection, Farrar and O'Regan's assessment of the Chattels Transfer Act is instructive:

> There is a core of good sense in the New Zealand Chattels Transfer Act. This is largely the result of indigenous reforms—the assimilation of bailment and hire purchase, the recognition to some extent of purchase money security interests, flexible agricultural securities, facilitation of stock in trade financing, the protection of the bona fide purchaser.[52]

In other words, New Zealand had already begun to reform their secured transaction laws and so the proposal for a fully-fledged Article-9 type regime may not have seemed such a big step.

## IV. THE IMPETUS FOR CHANGE

### A. *Australia*

There are perhaps three main reasons why the Australian proposals are now on the verge of success. The first, and most significant, is Philip Ruddock's conversion to the cause. The lesson the Australasian experience teaches is that good ideas are not enough and that reforms of this nature require broad support from within senior levels of government and from key stakeholders such as the legal profession (as seen in New Zealand). In Australia, Ruddock's arrival on the scene dramatically affected the course of events. The long years beforehand were characterized by a lack of leadership and commitment. The responsible government departments assumed a passive role, being prepared to enact legislation, but only after there were sufficient signs of support from the

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50. *See* s.18A(3) of the now-repealed Chattels Transfer Act, 1924 (N.Z.)

51. Before this, time of registration could affect priorities under the Chattels Transfer Act, but the subject provision was undermined by subsequent provisions where knowledge was relevant.

52. Preliminary Paper No. 6, *supra* note 19, at 50.

banks and other key stakeholders. This was a recipe for inertia, given the prevalence of the "better the devil you know" attitude, and academics, for all their efforts, proved powerless to achieve the necessary momentum. Ruddock put together a team within the Attorney-General's Department to take control of the agenda. This group has been remarkably proactive in championing the case for reform and it appears to have succeeded in brokering a significant measure of stakeholder consensus. In summary, successful law reform requires a coalition of governments, stakeholders and reformers. Australia now seems to have achieved this coalition whereas England clearly has not.[53]

The second factor shaping the Australian developments has been the apparent success of the New Zealand PPSA. The fully electronic remote access New Zealand register has proven to be a significant drawcard with Australian stakeholder audiences and the Australian reformers have taken every opportunity to arrange for demonstrations. The observable efficiency of the New Zealand register as compared to the current Australian registration arrangements speaks more eloquently to the case for reform than any law reform report or law review article ever could. Aside from cases like *Portacom* and *New Zealand Bloodstock*, a related consideration is that financial institutions and legal practitioners in New Zealand appear to have managed the transition to the new regime without undue dislocation. The New Zealanders learned quickly to draw on Canadian secondary materials as an aid to understanding the new law and this lesson will not have been lost on Australian stakeholders.[54] In sum, the New Zealand developments have played an important part in reducing the levels of distrust and anxiety that Article 9-type reforms tend to provoke.

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53. It is also noteworthy that personal property security law reform in Australia achieved a high level of bi-partisan support. Without this development, the project may have died following the change of government in 2007. Furthermore, the success of a national scheme depended on the cooperation of the States and Territories, all of which have had Labor governments since 2005. On the other hand, the Labor Party was not actively pushing for reform in the pre-Ruddock years and it is open to speculation whether it would have taken an interest at all had Ruddock not already put the issue on the political agenda.

54. For example, Mike Gedye teamed with Ron Cuming and Rod Wood to produce a New Zealand version of Cuming and Wood's very successful PPSA Handbook series. *See generally* MICHAEL GEDYE, RONALD C.C. CUMING & RODERICK J. WOOD, PERSONAL PROPERTY SECURITIES IN NEW ZEALAND (2002); *see also* LINDA WIDDUP & LAURIE MAYNE, *PERSONAL PROPERTY SECURITIES ACT: A CONCEPTUAL APPROACH* (2d ed. 2002). Linda Widdup is a Canadian legal practitioner, based in Edmonton and Laurie Mayne is a New Zealand lawyer. Linda Widdup has also collaborated with Tom Telfer on the PPSA sections of MORISON'S COMPANY AND SECURITY LAW (2004). Tom Telfer is a Canadian legal academic who taught for some years at the University of Auckland Faculty of Law.

The third key factor has been the involvement in the Australian reform process of lawyers, such as Craig Wappett and David Krasnostein, who have studied or practiced law in the United States and Canada and are familiar with the Article 9 and PPSA regimes. Wappett is a long-serving member of the Financial Services Committee of the Law Council of Australia's Business Law section, while Krasnostein was until recently Chief General Counsel at the National Australia Bank. Both have been strong supporters of the case for reform and they have proven to be influential in converting some, if not all, of their colleagues to the Article 9 cause.

*B. New Zealand*

The commitment to reform the companies' legislation including, but not limited to, the companies' charges provisions was a factor in the drive for personal property security law reform in New Zealand. This commitment to reform, however, was just the catalyst that got the proposals moving in the wake of many years' criticism of the old secured transactions regime. The Law Commission put it this way:

> The Commission's involvement in reform of this area of the law stems primarily from the Minister of Justice's request for a review of the Companies Act 1955 (Part IV of which deals with security interests created by companies). The need for our involvement has been reinforced by the weight of comments and submissions made to the Commission seeking comprehensive reform of chattel securities law.[55]

Even then, it is likely the reform initiative would have stalled if it were not for the dedication of the Commission's unpaid Advisory Committee comprised of senior practitioners and academics. A cynic might suggest that the Committee was given an unrealistic timeframe to formulate its recommendations and draft legislation in the expectation that it would not succeed. However, it took barely six months to produce a detailed analysis and a draft Act. In its report to the Minister of Justice, the Law Commission noted:

> All members of the [Advisory] Committee are widely experienced and expert in their professions with great demands upon their time. . . . The commitment of the Advisory Committee to the project is in part indicative of the need for reform in this area, and of current circumstances favourable to comprehensive and coherent reform. Prominent among those circumstances are advances in information

55. New Zealand Law Commission, Report No. 8, *A Personal Property Securities Act for New Zealand* (NZLC R8), at 1 (1989).

> technology, experience with reform regimes in various Canadian jurisdictions, and the opportunity provided by a comprehensive review of the Companies Act 1955.

Nevertheless, the Law Commission's plea for urgency was not enough to ensure prompt action. Although the Law Commission envisaged that a Personal Property Securities Act would be "enacted together with our virtually contemporaneous proposals for a new Companies Act,"[56] this did not occur. Instead, when the Companies Act was passed in 1993, it was necessary to bring forward, on a temporary basis, the registration of company charges provisions from the 1955 Companies Act.

While one can assume the Law Commission continued to stir the pot, the final impetus for reform came from the Ministry of Economic Development ("MED"). The MED took over responsibility for commercial law reform from the Ministry of Justice. No doubt mindful of the need to enact a permanent replacement for the temporary registration of company charges provisions, the MED would have been keen to demonstrate its commitment to its new responsibilities, and see an important reform through to a successful conclusion. After reviewing the Law Commission's recommendations, the MED advised the Government to proceed. A bill was drafted in 1998 and the legislation enacted in 1999.[57]

## V. THE LEGISLATIVE OUTCOMES

### *A. Australia*

The battle is not yet over and the most recent developments raise the fear that Australia may yet succeed in snatching defeat from the jaws of victory. The May 2008 draft Bill reveals, once again, the Australian lawmakers' propensity for reinventing the wheel. While the Bill takes the Canadian and New Zealand PPSAs as its starting point, it departs significantly from the model in terms of organization, terminology and general style. This is in contrast to the approach the New Zealanders took, which was for the most part to follow the text of the Saskatchewan PPSA,[58] and incorporate legislative cross-references to the corresponding Saskatchewan PPSA provisions.

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56. *Id.* at 4.
57. For the Law Commission's draft Act and commentary, see *id. See generally* NZPPSA 1999, *supra* note 2.
58. Some of the New Zealand departures from the Saskatchewan model are noted in section 5(b) below.

As discussed in Part III, the New Zealand approach has substantial benefits. The Canadian model is a tried and tested one.[59] It is the product of lengthy and careful deliberations by leading commercial lawyers and it has stood the test of time. The Canadian model, in turn, is based on Article 9 which itself was the product of an exhaustive drafting process involving some of the finest minds in United States commercial law. Close adherence to the North American models makes sense because it enables the local lawmaker to freely utilize Canada's and the United States' learning and experience. By contrast, departure from the model creates uncertainty and increases the risk of error. These concerns are exacerbated if the drafting is done under time constraints and without access to the kind of expertise the Canadians and Americans had at their disposal when drafting their laws.

The Australian decision not to follow the North American model is explained in the commentary which accompanies the Bill as follows:

> The differences between the Bill and its international counterparts reflect issues raised by stakeholders, differences in the Australian consumer and commercial environment, advances in information technology, and drafting styles adopted to improve legal certainty and consistency with Australian drafting practices.[60]

The commentary does not specify what the relevant issues, differences and advances are, and so it is impossible to test the strength of this assertion. Moreover, while the Bill may improve legal certainty at one level, it increases uncertainty at another level; the statement in the commentary fails to acknowledge this trade-off. The Bill reflects a strong commitment to drafting precision with a view to ensuring that the legislation provides for every possible contingency. It is in this sense that the claim to improved legal certainty is presumably to be understood. However, a commitment to precision is not cost-free. The inevitable by-product is longer, more complex legislation. The Australian Bill is at least twice as long as the New Zealand and Canadian PPSAs, it contains numerous definition provisions not found in these other statutes, and it relies on an elaborate system of forward and back referencing which means that the reader is constantly having to look at two or more parts of the legislation at once to get the overall sense of

59. *See* Saskatchewan Personal Property Act, 1993 (Can.), *available at* http://www.qp.justice.gov.sk.ca/orphan/legislation/P6-2.htm; *see also* New Brunswick Personal Property Security Act, 1993 (Can.), *available at* http://www.gov.nb.ca/acts/acts/p-07-1.htm.

60. Personal Property Securities Bill 2008 Commentary ¶ 1.16, *available at* www.ag.gov.au/pps (follow "PPS Downloads" hyperlink; then follow "Personal Property Securities Bill 2008 Commentary" hyperlink).

particular provisions. Furthermore, in the absence of cross-references to corresponding provisions in the other jurisdictions, readers who want to know the origins of particular provisions in the Australian Bill are forced to do their own research.[61]

In summary, while the greater precision of the Australian Bill may save litigation costs by providing answers to questions that might otherwise have been left to the courts, it increases the costs of comprehension and it is not at all clear that the gains exceed the losses. A relevant question to ask in this connection is how much litigation has resulted from the perceived lack of precision in the Canadian and New Zealand PPSAs; particularly in relation to the issues on which the Australian drafters have thought it necessary to elaborate. The answer is "surprisingly little" and this at least suggests that the benefits of greater drafting precision may not be worth the cost.

The complexity of the Australian Bill is itself a source of uncertainty, but this is compounded by the factors identified above. In particular, the failure to adhere closely to the North American model will substantially reduce the usefulness of Canadian case law and secondary sources as a guide to interpretation, and it will make projects like the New Zealand/Canadian academic collaboration much less feasible.[62] In short, Australia may be forced to develop its own body of case law and literature and, in the meantime, parties and their legal advisers will be left to their own resources in determining what the legislation means. Again, the question that needs to be addressed is whether these costs are worth the benefits that flow from the approach the Australian drafters have taken. There is also the very real concern that the costs of the Australian approach may erode stakeholder support for the new legislation by refueling the concerns identified in Part III, and, if that happens, the costs will end up being political as well as economic.

### B. *New Zealand*

The New Zealand PPSA is closely modelled after the tried and tested second generation legislation of the Canadian province of Saskatchewan. Many of the New Zealand sections are worded substantially the same as the corresponding Canadian provisions. But the New Zealand Act does not slavishly follow the Canadian model; it differs in structure and in several matters of substance. Some of the variations represent considered policy choices but others simply reflect

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61. The minutia are likely to be of little interest to an international audience, but see the Appendix *infra* for a critical discussion of some of the respects in which the Australian Bill departs from the New Zealand and Canadian models.

62. *See supra* text accompanying note 54.

the local New Zealand drafting style and may result in unintended consequences. Anecdotal evidence suggests that uncertainty is more likely to arise where New Zealand has, for stylistic reasons, departed from the Canadian wording. Conversely, it is clear from the New Zealand cases that the New Zealand court's ability to rely on Canadian case law has allowed New Zealand law to become settled more quickly than would otherwise have been the case.

Ultimately, the concepts underpinning the New Zealand Act, as with its Canadian parent, are derived from Article 9 of the American UCC. The American functional definition of security interest and the key concepts of attachment, perfection, and the reliance on the time of registration as a priority point are all replicated in the New Zealand Act.

Two of the more significant New Zealand departures from the North American approach are:

1. Greater emphasis is placed on the time of registration as a priority point. Various North American priority rules that turn on the giving of notice or the absence of knowledge of a competing interest have not been adopted in New Zealand.[63] The New Zealand approach is less nuanced than the North American one, but it has the advantage of greater simplicity and certainty and avoids evidential difficulties over the giving of notice and the existence of knowledge;
2. In New Zealand, an unperfected security interest is effective against a trustee in bankruptcy. This departure from the North American position is the most controversial aspect of the New Zealand Act. It probably came about in part because of the tight deadline imposed on the Law Commission's Advisory Committee. In the time available, the Committee was unable to reach consensus on the subject and noted that it was almost evenly divided on the issue. The pros and cons of the New Zealand approach have been set out elsewhere,[64] but the most visible (or perhaps more accurately, invisible) consequence is a reduction in the amount of PPSA litigation. The plethora of North American cases where a trustee in bankruptcy has challenged a defective registration cannot arise in New Zealand.

63. Under s.74 of the NZ Act, in order to take priority, the holder of a purchase money security interest is **not** required to give notice to the holder of a prior security interest. Under s.52 of the NZ Act, a buyer takes free of a prior unperfected security interest whether or not the buyer knew of the earlier interest.

64. *See* GEDYE, CUMING & WOOD, *supra* note 54, at 5.

One useful feature of the New Zealand Act is the cross-referencing of each section to the equivalent Canadian provision on which the New Zealand section is based. A standard text on the New Zealand Act[65] has taken this a step further by cross-referencing the New Zealand sections to multiple Canadian jurisdictions as well as to both the pre and post 1999 versions of Article 9. This allows New Zealand practitioners and judges easy access to relevant North American legislation and cases.

## VI. CONCLUSION

The Australian and New Zealand experiences tell a similar story about the recipe for successful personal property security law reform. Sound policy arguments alone are not enough. Successful law reform requires a coalition of government, stakeholders and reformers. In Australia, there had been support for reform from within academic circles for many years, but the impetus for change did not come until the Commonwealth Attorney-General enthusiastically adopted the cause in 2005. His intervention provided the political leadership necessary to win over stakeholders and neutralize the anti-reform lobby.

In New Zealand, the sequence of events was slightly different, but the end result was the same. There, the impetus for reform came from within the legal profession itself, and this came about at least in part because leading commercial law practitioners were involved in developing the proposals from the outset. In other words, the profession had an ownership stake in the reform agenda and so they did not have to be sold on the reform, as was the case in Australia and England. The government commitment came later through the agency of the Ministry of Economic Development which had its own reasons for wanting the enterprise to succeed.

In both countries, reformers have had to grapple with the urge within government circles to reinvent the wheel. It is not at all clear what basis the local Parliamentary Counsel and their advisers had for thinking that they could do better than the tried and tested model; particularly when they were working under tight time constraints and without access to the range of expertise the American and Canadian drafters had at their disposal. In any event, the New Zealanders by and large managed in the end to overcome the temptation and are now reaping the benefits. On the other hand, the Australians have not, and may, as a consequence, end up reaping the whirlwind.

65. *See id.*

## POSTSCRIPT

The Australian government has announced that, following public consultation, it is likely that there will be "some refinement" to various aspects of the [draft Personal Property Securities Bill]."[66] The redrafted Bill was not available at the time of writing, but it was released not long before this article went to press.[67] The Bill has been referred to the Senate Standing Committee on Legal and Constitutional Affairs for review and the committee is due to report by February 24, 2009. The revised draft does not address the concerns raised in this article.

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66. Property Securities Bill 2008, *supra* note 14,
67. Personal Property Securities Bill 2008: Exposure Draft (10 November 2008).

## *APPENDIX*

EXTRACT FROM ANTHONY DUGGAN, *SUBMISSION TO THE AUSTRALIAN ATTORNEY-GENERAL'S DEPARTMENT ON PERSONAL PROPERTY SECURITIES BILL 2008* (MAY, 2008).

### *(a) Introduction*

The following are some selective comments on particular provisions in the Bill. I cannot claim to have undertaken a comprehensive review of the legislation. A comprehensive review would require careful comparison of the Bill with the New Zealand and Canadian PPSAs and . . . it would involve asking the following questions of each provision: (1) is there a corresponding provision in the other jurisdictions and, if so, is the wording the same? (2) If the wording is different, is the meaning the same? (3) If the meaning is different, was this an intended or unintended consequence and is it justifiable? This kind of analysis would take months and far more resources than I, and I suspect most stakeholders, have at my disposal. The problem is that without this kind of analysis, it is impossible to be sure that the Australian Bill is an improvement on the other models. The best I can do in the time available to me is focus on a few issues I have identified with a view to demonstrating the main point, which is the danger of departing from a tried and true model, particularly when drafting under time constraints and without the opportunity for careful deliberation and consultation.

### *(b) Changes in taxonomy*

The Canadian and New Zealand PPSAs, following Article 9, divide personal property into 7 categories (chattel paper, documents of title, goods, intangibles, investment securities, money and negotiable instruments) and they further subdivide goods into consumer goods, equipment and inventory. This taxonomy serves an important function in the overall scheme of the legislation.

The Australian Bill adopts a different taxonomy. It divides personal property into: (1) intangible property, (2) tangible property and (3) chattel paper, documents of title, investment instruments, currency and negotiable instruments. It further divides personal property into "consumer property," "equipment" and "inventory." "Tangible property" is essentially, goods including fixtures and the like.

These changes were presumably made with specific policy objectives in mind, and they may or may not be an improvement on the

Canadian and New Zealand models. The problem is that this can only be determined by a painstaking analysis of the Bill as a whole read in conjunction with the New Zealand and Canadian model. In other words, while there may be benefits in attempting to improve on the established model, there are also costs and the drafters of the Bill appear to have discounted the costs. The costs are increased uncertainty (because we cannot be sure that the outcomes of the new taxonomy are the same as the outcomes of the old one) and increased risk (because we cannot be sure that the shift to the new taxonomy will not have undesirable commercial implications). The drafters themselves may be confident on both these fronts, but that is little consolation to parties and their legal advisers confronted with the choice of either doing their own research to be on the safe side or, alternatively, running the risk.

*(c) Definitions*

The substitution of "tangible property" for "goods" is open to question. The justification, presumably, was that it is misleading to define goods as including fixtures and the like. On the other hand, referring to goods as "tangible property" throughout the legislation is a potential source of confusion because the reader is constantly required to remind herself what the expression means.

The New Zealand and Canadian PPSAs use the expressions "secured party" and "debtor" to describe the parties to a security agreement and they define "debtor" to include a third party who provides security in support of the loan. The Australian Bill substitutes "grantor" for "debtor" and it defines grantor to include both the debtor and a third party who provides security in support of the loan. The thinking, presumably, was that it is misleading to define "debtor" as including a third party. On the other hand, referring to the debtor as the grantor throughout the legislation is a potential source of confusion because the reader must constantly remind herself what the expression means. Perhaps more importantly, the expression "grantor" is inappropriate for title retention transactions and it is an additional source of confusion and potential misunderstanding for this reason. It is not hard to envisage counsel making the argument that, notwithstanding the functional definition of "security interest" in s.21, the repeated references in the legislation to "the grantor" signify an intention to limit the scope to the traditional forms of security.

The Bill defines "registered" by reference to registration of the collateral, rather than the security interest and it follows through with this approach in other provisions, such as s.60(2), which refers to "registration of the collateral" and s.194(1) which refers to "registration

of personal property as collateral." By contrast, the New Zealand and Canadian PPSAs refer to registration of the security interest. It is unclear why the Australian drafters took a different approach and the Commentary provides no clues.

Registration is one method of perfection. The legislation refers to perfection of the "security interest." To speak of perfecting "the collateral" would be nonsensical. Given that registration is a method of perfection and that the subject-matter of perfection is the security interest, it is conceptually odd to speak of registration of the collateral instead. Perhaps another way of making the same point is to say that what searchers of the register are looking for is not collateral but, rather, security interests.

There is a similar confusion between the security interest and the collateral in other parts of the Bill. For example, s.24(3) provides that:

> If a security interest secures both purchase money collateral and collateral that is not purchase money collateral, the security interest is a purchase money security interest only to the extent that it secures the purchase money collateral.

What it should say is that:

> A security interest in both purchase money collateral and collateral that is not purchase money collateral is a purchase money security interest only to the extent that it is in the purchase money collateral.

The New Zealand and Canadian PPSAs use the expression "financing statement" to describe the instrument for registering a security interest. The Australian Bill uses the expression "registration" instead. It is unclear why the drafters made this change and the Commentary offers no clues. One problem with the Australian approach is that the Bill uses "registration" in two different senses: first to describe a method of perfection and second, to describe the registration instrument. This is, at best, a potential source of confusion and, at worst, a potential source of unintended consequences.

*(d) Conflict of laws*

The conflict of laws provisions in Part 2, Div.7 of the Australian Bill differ substantially in form and, I suspect, also in substance from the New Zealand and Canadian PPSAs. The Canadians have been unable to achieve uniform provincial PPSAs, much less national legislation, but they have at least managed to achieve uniform conflict of laws rules and a high level of harmonization with the conflict of laws rules in Article 9. Uniform conflict of laws rules are important to ensure that the outcomes

of choice of law disputes do not vary depending on the jurisdiction in which the litigation takes place.

Australia will avoid conflicts problems at the inter-state level, given that its proposed PPSA is a national one, but there is still the potential for conflict of laws issues to arise at the international level (for example, between Australia and New Zealand). Closer Economic Relations between Australia and New Zealand was an early impetus for personal property security law reform in Australia, and the CER agenda dictates harmonization of laws. In the absence of uniform conflict of laws rules between Australia and New Zealand, there is a risk of different choice of law outcomes depending on whether the case is litigated in Australia or New Zealand. This prospect is hardly in the spirit of CER.

*(e) Investment entitlements*

The Canadian provinces are in the process of enacting uniform securities transfer legislation, modeled on Article 8 of the United States Uniform Commercial Code. The new legislation contains detailed rules governing the transfer of both directly and indirectly held securities. The legislation refers to the investor's interest in indirectly held securities as a "security entitlement" and it goes on to specify that the investor has a proportionate proprietary interest in the intermediary's holding of the securities in question. It also gives the investor a set of personal rights exercisable against the intermediary for breach of the duties the intermediary owes investors. These rights in combination, make up the "security entitlement" and they are what the investor gets in return for her investment. Cognate reforms to the PPSAs are aimed at facilitating security interests in investment property. The PPSA definition of "investment property" expressly includes a security entitlement. Other parts of the Act spell out the rules for attachment of a security interest in a security entitlement and other kinds of investment property. They also stipulate what the secured party should do to perfect its security interest in investment property and they enact special priority rules for disputes between the holder of a security interest in investment property and competing claims.

"Investment entitlement" is defined in s.50(7) of the Australian Bill to mean, in effect, an investment held by an investor in the indirect holding system. The provision refers to "an interest" in a financial product evidenced by registering the owner on books maintained by a securities intermediary. However, it fails to specify what the interest is and there is no equivalent to Article 8 of the Uniform Commercial Code or the Canadian Securities Transfer Acts to fill the gap. Perhaps such

legislation is under consideration in Australia, but the Commentary makes no mention of it and, in the meantime, the question is at large.

Moreover, the Bill contains no provisions equivalent to the new Canadian PPSA provisions mentioned above. In other words, there are no special provisions for the attachment or perfection of security interests in an investment entitlement or for dealing with priority disputes involving investment entitlements. The Bill does make special provision for security interests in an investment instrument, including provision for perfection by control and priority rules giving precedence to security interests perfected by control over security interests perfected by other methods. However, the definition of "investment instrument" does not include an investment entitlement and so none of these provisions apply.

So far as I have been able to discover, the only provision in the Bill relating specifically to investment entitlements is the conflict of laws rule in s.50. Given, this, what is the Bill's impact on security interests in an investment entitlement? An investment entitlement would fall within the definition of "intangible property" and so, presumably, it would be subject to the legislation on that basis and all the ordinary rules relating to a security interest in intangible property would apply. One consequence is that it would be possible to perfect the security interest by registration, but not control and so the advantages of perfection by control would not be available to the secured party. As a matter of policy it does not make sense to discriminate in this way between security interests in directly and indirectly held investments. Another concern is that the failure to specify the nature of the investor's interest in an indirectly held investment means that a prospective secured party cannot be sure of what it is getting and this, too, may act as a disincentive to security interests in indirectly held investments. It is unclear from either the Bill or the Commentary whether the drafters were aware of these concerns and, if so, what plans, if any, are in train to address them.

*(f) Acquiring personal property free of security interests*

Part 5 of the Bill combines provisions modeled on the New Zealand and Canadian PPSAs and provisions drawn from the Australian state REVs legislation without proper regard to the potential for overlap and inconsistencies. For example, s.86(1), which derives from the REVs laws, overlaps substantially with s.81, which derives from the New Zealand and Canadian PPSAs. Likewise, s. 86(2), imported from the REVs laws, overlaps with s.82 (the sales in ordinary course provision). Both sets of provisions are directed to the same questions and enacting them both smacks of overkill as well as adding unnecessarily to the

length and complexity of the legislation. The drafters may have taken the view that the PPSA-based provisions do not sufficiently protect the consumer—and there are grounds for that concern (particularly in the case where the end purchaser does not buy the goods directly from the debtor). However, a simpler response would have been to make appropriate adjustments to the PPSA-derived provisions, rather than to enact a new layer of provisions on top.

The provisions in Part 5 switch between references to the transferee's knowledge of the security interest and the transferee's knowledge that the transfer is in breach of the security agreement but without any clear indication as to why. In the case of the buyer in ordinary course provision (s.82), the appropriate question is whether the buyer knew that the transfer constituted a breach of the security agreement. This is because the provision typically applies to the case where the subject-matter of the transaction is inventory. In these circumstances, the buyer's knowledge of the security interest is neither here nor there because, provided the sale is in the ordinary course of the transferor's business, the buyer will reasonably expect to take free of the security interest in any event. What does matter in this context is whether the transfer is in breach of the authority the secured party has given the debtor-transferor to sell its inventory and the purpose of the provision is to prevent the buyer from being prejudiced by unpublicized restrictions on the transferor's authority to sell. Section 82 accurately reflects these considerations.

However, the considerations behind the other provisions in Part 5 of the Bill are different. The other provisions are directed to the case where, for one reason or another, the buyer has no means of discovering the security interest (for example, because the security interest is unperfected, or because the registration has omitted the serial number or because in the circumstances it would be unreasonable to expect the buyer to conduct a register search). In these cases, the relevant question is whether the buyer knew about the security interest anyway. On this basis, the references in ss 80, 81, 83, 84, 85, 86 and 87 should all be to the transferee's knowledge of the security interest and, as presently drafted, ss 83-87 have it right, but ss 80 and 81 do not. Incidentally, there is a similar error in s.28(5) of the Ontario PPSA and this may be the source of the confusion in the Australian Bill.

Section 81 provides for cases where the secured party omits the serial number from the registration, or gets it wrong. If the regulations follow the Canadian and New Zealand model, inclusion of the serial number will be mandatory for consumer goods but optional for equipment and inventory. On this basis, s.81 should be limited to cases where the collateral is equipment. If the collateral is consumer goods,

omission or misdescription of the serial number will invalidate the registration. This means the security interest is unperfected, s.80 applies and s.81 is not needed. If the collateral is inventory, the transferee will typically take free of the security interest even if it is perfected and so, again, s.81 is not needed. The corresponding provision in the Canadian PPSAs is directed to the case where the security interest is in equipment and the secured party knows the serial number at the time of registration. The purpose of the provision is to give the secured party an incentive to include the serial number even though failure to include it does not invalidate the registration. The drafting of the provision should reflect this objective.

*(g) Fixtures, accessions and commingled goods*

Part 8, Div.2 contains provisions governing competing claims to fixtures. All the PPSAs except New Zealand have corresponding provisions. The New Zealand PPSA's failure to provide for fixtures means that in cases involving a priority dispute between the holder of a security interest in a fixture and the holder of an interest in the land, the court will have to revert to the common law rules. By contrast, in Canada, the rules are codified in the statute, they are clear and accessible and they give effect to the parties' likely commercial expectations. The rules vary depending on whether: (1) the security interest attaches before or after the goods become a fixture; and (2) the competing party acquired its interest in the land before or after the goods became a fixture.

For example, if the security interest attached before the goods became a fixture and the competing party had already acquired its interest in the land before the goods became a fixture, the security interest has priority. The rationale is that otherwise the competing party would get a windfall at the secured party's expense because the competing party would not have had the fixture in mind at the time it acquired its interest in the land. Note that in this case, the secured party's priority does not depend on perfection: attachment is sufficient. On the other hand, if the goods become a fixture before the competing party acquires its interest in the land and the security interest has already attached at that point, the competing party has priority unless the secured party filed a notice of its interest in the Land Registry Office before the competing party's acquisition. The rationale is that, in the absence of notice, the competing party is likely to assume that its acquisition includes the fixture. Note that in this case, the secured party's priority depends on registration, not in the PPS register, but in the Land Registry Office. This is the place where a prospective purchaser of the land is

most likely to search and it avoids the need for prospective land purchasers to search twice.

The fixtures provisions in the Australian Bill are worded quite differently from the Canadian model. It is unclear whether the drafters changed the wording simply to improve the clarity, whether the change in wording was intended to change the meaning and, whether or not the drafters intended to change the meaning, they have done so anyway. The Canadian provisions have been tried and tested and it makes no sense to adopt a different model unless there are clear policy reasons for doing so. Neither the Bill nor the Commentary suggests any such reason. Paragraph 12 of the Commentary asks whether the Bill should include fixtures provisions along the lines of those included in the draft Bill. The answer is, yes, the Bill should include fixtures provisions (for the reasons stated above) but, no, not along the lines of the provisions in the Bill.

The same observations apply to the provisions in Part 8, Div. 3 of the Bill governing competing claims to accessions and to the provisions in Div.4 relating to commingled goods. (The priority rules for competing security interests in commingled goods (ss 150-152) are significantly different from the Canadian and New Zealand PPSAs and decidedly more complex).

Section 146 limits the secured party's rights in the product or mass to "the value of the obligation" immediately before the commingling. The reference should be to the value of the secured party's collateral immediately before the commingling. As presently drafted, the provision gives a windfall to the secured party who is under-secured.

In a departure from the New Zealand and Canadian PPSAs, s.147 requires the secured party to reperfect its security interest following the commingling within a prescribed grace period. As the Commentary explains, the rationale is to ensure consistency with the perfection requirements for security interests in proceeds. The s.147 grace period is "5 business days after the secured party acquires the knowledge required to perfect [or reperfect]" and s.148 defines "knowledge" to mean information the secured party could have acquired through making reasonable inquiries." There is substantial uncertainty in these provisions, particularly in relation to what amounts to "reasonable inquiries." For example, monitoring of the debtor's operations may enable the secured party to discover the commingling. Do ss 147 and 148 require monitoring and, if so, to what degree? The answers to these questions may vary from case to case, depending on the secured party's level of sophistication and resources. In advance of litigation, the secured party may have no way of predicting the status of its security interest in the end product and this uncertainty is likely to affect both its willingness to give the debtor credit and the amount of its charges. Of

course, there is an offsetting consideration which is that, in the absence of a reperfection requirement, other prospective secured lenders may have no way of discovering the secured party's interest in the product or mass and this may affect both the prospective secured lender's willingness to deal with the debtor and the amount of its charges.

Paragraph 8.47 of the Commentary asks whether it is appropriate to confer temporary perfection on commingled goods. The answer is that it is impossible to know, without reliable empirical evidence as to the costs of doing so relative to the costs of not doing so. It can at least be said, though, that the absence of a reperfection requirement for commingled goods does not appear to have caused undue commercial disruption in Canada and, in the absence of better evidence, the safest course is probably to follow the Canadian lead.

*(h) Notice requirements*

Section 154 applies where there is a security interest in a fixture or accession and the secured party proposes to remove the collateral. The provision requires the secured party to give notice to various persons. In the case of a fixture, the secured party must give notice to the landowner. The Canadian PPSA requirement is broader: the secured party must notify not just the landowner, but any party with an interest in the land and this would include, for example, a mortgagee or tenant. There are obvious reasons why such parties should be entitled to notice and it is unclear why the Australian Bill overlooks them.

In the case of an accession, s.154 requires the secured party to give notice to "any person who has a registration describing the [host goods]." The Canadian PPSA requirement is broader: the secured party must also notify any person the secured party knows to have an interest in the host goods and this would include, for example, the owner or a lessee. Again, there are obvious reasons why such parties should be entitled to notice and it is unclear why the Australian Bill overlooks them.

Section 163 of the Bill permits contracting out of the s.154 notice requirements, but the contract would presumably have to be between the secured party and the person who would otherwise be entitled to the notice, rather than between the secured party and the debtor. Contrast s.96 (subordination agreements), which makes it clear that a subordination provision in the security agreement is enforceable by the intended beneficiary.

*(i) Remedies*

Section 163 allows for contracting out of the enforcement provisions in non-consumer transactions. This distinction makes sense in relation to provisions that benefit the debtor. However, some of the provisions s.163 lists are for the benefit of third parties, not the debtor: for example, s.154, which requires notice to the landowner before removal of a fixture, and s. 169, which requires notice to higher priority parties. Whether or not the security agreement is a consumer transaction has no obvious bearing on these third party rights.

Section 164 provides that the remedies provisions do not apply to receivers. The intention, apparently, is to avoid overlap with the provisions governing receivers in the Corporations Act. However, a receiver who is appointed to enforce a secured party's security interest should be under the same obligations as the secured party itself. Otherwise, receivership may be used simply as a device for avoiding the PPSA enforcement provisions. The PPSA would be a better location than the Corporations Act for the provisions governing receivers first, because the power to appoint a receiver is not limited to cases where the debtor is a corporation and secondly, for the sake of a complete PPSA.

Section 168 deals with the enforcement of a security interest in liquid assets, accounts, chattel paper and the like and it provides that the secured party may "give a written notice to any person obligated on the collateral requiring the person to discharge the secured obligation." There is a corresponding provision in the New Zealand and Canadian PPSAs, but the wording is different. What the provision should say, as it does in the other PPSAs, is that the secured party may require the obligor to pay the amount of the obligation to the secured party. In other words, the reference should be to the obligation the obligor owes to the debtor, not the obligation the debtor owes to the secured party.

Sections 181-185 deal with the secured party's right of foreclosure. There are corresponding provisions in the New Zealand and Canadian PPSAs. However, in contrast to the other PPSAs, the Bill fails to state that foreclosure extinguishes the debt obligation: in other words, the secured party takes the collateral in full satisfaction of the secured obligation. The secured party's right of foreclosure is subject to objection by the debtor and other interested parties but, in contrast to the Canadian PPSAs, the Bill gives the secured party no right to challenge an objection. The secured party can request the objector to provide evidence of his interest, but if the objector complies, that is the end of the matter. The Canadian PPSAs allow the secured party to dispute an objection on the ground that it is frivolous or vexatious, or that the value of the collateral is less than the outstanding amount of the debt.

*(j) Registration*

Section 228 provides for register searches against the secured party's name, the debtor's name, the debtor's ABN, the collateral serial number and any other criteria the regulations specify. This is more generous to searchers than the Canadian PPSAs, which provide for search only against the debtor's name and the collateral serial number. The problem with providing for multiple search options is that, while it no doubt benefits searchers, it also increases the burden on the secured party at the time of registration. A mistake in any of the search criteria is a seriously misleading error and it will invalidate the financing statement. It follows that the more search criteria the legislation allows for, the greater the risk of error for the secured party. With these concerns in mind, the wisdom of providing for searches against the ABN and the secured party's name is questionable.

In my submission on Discussion Paper 3, I said the following:

> "In my submission on Discussion Paper 1, Registration and Search Issues, I argued in favour of a debtor's name index, coupled with a serial number index, along the lines of the Canadian and New Zealand models. I have since come round to Simon Begg's thinking, namely that, the first of these indexes should be based on the ABN rather than the debtor's name. The implication is that security interests in consumer goods would not be registrable unless the goods are serial-numbered goods, in which case the security interest would be registrable against the serial number. In the case of a dispute between the holder of an unregistrable security interest and a subsequent purchaser, the purchaser would win provided she purchased the goods for value, in good faith and without knowledge of the security interest and provided also that the security interest was not perfected by possession at the time of the purchase. However, this rule would be subject to a cut-off figure of, say, $30,000: if the purchaser paid more than the cut-off figure, she would take the goods subject to the security interest: compare Chattel Securities Act 1987 (Vic.), s 7(1) and (5). In the likely rare case of a dispute between two or more unregistrable security interests, priority would depend in the first place on whether any of the competing security interests is perfected by possession or temporarily perfected. Otherwise, priority would turn on the order of attachment. If one of the competing security interests is a purchase-money security interest, it would have priority. An unregistrable security interest would have priority over execution creditors and it would not be ineffective in the debtor's bankruptcy.

> One advantage of providing for registration against the ABN, rather than the debtor's name, is that it avoids the need for elaborate rules identifying the correct name for registration and search purposes. It also avoids the privacy concerns which have been raised at various points in the Discussion Papers. The main disadvantage, as indicated above, is that it would result in security interests given by a non-business debtor being unregistrable, unless the collateral is serial-numbered goods. However, the importance of this consideration should not be over-stated. The consideration matters most if the collateral is valuable, because then the disputing parties have more to lose. However, motor vehicles are by far and away the most common form of high value collateral given by non-business debtors and security interests in motor vehicles would be registrable in the serial-number index. A second disadvantage is that there would need to be special extinguishment and priority rules for disputes involving unregistrable security interests and there is no precedent for such provisions in any of the current PPSAs. However, again as noted above, there is a partial precedent for such provisions in the Victorian and Western Australian Chattel Securities Acts, and this legislation provides a useful model to build on. In this connection, it might be worthwhile asking banking and finance industry representatives whether, based on their experience with the Chattel Securities Acts over the past twenty years, they would be comfortable with the idea of making security interests in consumer goods other than serial-numbered goods unregistrable, assuming a set of priority rules along the lines outlined above.

I still hold these views, but the Bill does not reflect them. My proposal is for registration and search against the debtor's ABN *instead of* registration and search against the debtor's name. By contrast, the Bill provides for both.

*(k) Miscellaneous*

In common with Article 9 and the Canadian PPSAs, but in contrast to New Zealand, the Bill invalidates an unperfected security interest in the debtor's bankruptcy or liquidation. The policy justification for this is to make sure that the entitlements of execution creditors relative to the holder of an unperfected security interest are the same inside and outside bankruptcy and to prevent the holder of an unperfected security interest from using the bankruptcy laws opportunistically as a means of obtaining a priority position it does not have outside bankruptcy: *Re Giffen* [1998] 1 SCR 91 (SCC). In contrast to all the other PPSAs, the Bill also provides that a security interest is void if the debtor is a company and goes into liquidation or administration or executes a deed of

arrangement, unless the security interest was continuously perfected during the preceding 6 months. The Commentary does not explain the policy behind this provision, except to say that it comes from the Corporations Act. Nor does it explain why the rule only applies if the debtor is a company.

Section 238 applies to non-security leases and consignments. Section 238(2) provides that if the lessor's or consignor's interest is void under s.237, the lessor or consignor is taken to have suffered loss or damage and may recover compensation. However, the provision does not indicate who the prospective defendant might be. Typically, if s.237 applies, the lessor or consignor will have only themselves to blame for failing to perfect their security interest and it is hard to see who else should bear the responsibility. Perhaps the section means that the lessor or consignor has a claim in the debtor's bankruptcy or liquidation for the amount of its loss, but the language does not seem appropriate for this purpose and, besides, it is hard to see any reason in principle why the lessor or consignor should have such a claim. Section 238(3) provides that "despite section 237, the leased or consigned property remains the property of the lessor or consignor." This is tantamount to saying that s.237 does not apply at all to the transactions in question: if the property still belongs to the lessor or consignor, it follows that they may recover it from the debtor's liquidator or trustee in bankruptcy. In that event, of course, the lessor or consignor will have suffered no loss and so there will be no basis for any compensation claim under s.238(2).

The reasons for this excess of kindness towards lessors and consignors are unclear, but the provision may have been drafted to allay concerns about unfair surprise arising from *NDG Pine Ltd (in Receivership) v. Portacom NZ Ltd* [2004]2 NZLR 528 and *Agnew & Waller v. New Zealand Bloodstock* [2005] 2 NZLR 549. However, the concerns these cases have prompted are misconceived. The potential for unfair surprise in the new laws is no more than an aspect of the transition costs parties face in adapting to the new regime. These transition costs are justifiable on the assumption that they will be outweighed by the benefits of the new law in the longer-term. Moreover, the problem will likely prove to be self-correcting. It should take only one or two cases like *Portacom* and *New Zealand Bloodstock* for lessors, suppliers and consignors to get the message that the new law applies to them and that they need to register financing statements. It can safely be predicted that there will not be too many more cases like this in New Zealand and that the courts will be free to turn their attention to more interesting questions. The same goes for Australia.