Bond Law Review

Volume 14 | Issue 1 Article 6

2002

The Perspectives of Borrowing Corporations Under the Personal Property Security Bill

Paul von Nessen
Queensland University of Technology

Follow this and additional works at: http://epublications.bond.edu.au/blr

This Article is brought to you by the Faculty of Law at ePublications@bond. It has been accepted for inclusion in Bond Law Review by an authorized administrator of ePublications@bond. For more information, please contact Bond University's Repository Coordinator.

The Perspectives of Borrowing Corporations Under the Personal Property Security Bill

Abstract
[extract] While there are some matters which may cause concern in the Personal Property Security Bill, the certainty and efficiency which its introduction offers clearly offset these potential sticking points. Moving to registration based upon functionality rather than on the basis of archaic and highly artificial constructs must be an improvement. Further, under the new provision, the question of priority is clear from the time the security interest is created thereby imposing less risk on creditors. This should result in greater willingness to extend credit. With less uncertainty and greater supply, the cost of capital to borrowing corporations should be comparatively less than is currently the case. Who would argue with that result if it transpires?

Keywords
personal property security law, reform, registration of charges, Personal Property Security Bill

This article is available in Bond Law Review: http://epublications.bond.edu.au/blr/vol14/iss1/6

The Perspectives of Borrowing Corporations under the Personal Property Security Bill

by

Paul von Nessen, McCullough Robertson Professor of Corporate Law, QUT*

Introduction

When I first arrived in Australia in 1980. I began my academic career teaching legal process and contracts at Monash University. My initial introductions to Australian law required my to forget much of my American legal education and practical experience for purposes of undergraduate teaching while retaining much of my American perspectives for use in comparative law studies and law reform proposals. In legal process, my experience with contingency fees, class actions, and professional advertising proved a useful counterpoint to the typical Australian perspective. In contract law, despite the assistance of the coordinator of the subject (Professor David Allan), I found myself in some difficulty trying to revert to the pre-UCC position (or even more ancient doctrines) on a number of points of contract law as it still applied in Australia at that time.

On the advice of Professor Bob Baxt, I moved into taxation law which (at that time) was even more divergent from the tax law with which I was familiar than had been Australian contract law. Fortunately, the wisdom of that change became apparent as, within a matter of years, Australia adopted a capital gains tax and introduced numerous elements of international taxation which were quite familiar, if not in actual language, at least in design. There is, to my knowledge, still no comprehensive definition of income in Australia, so there is still some "improvement" left to be made.

* From July 1, Head of the Department of Business Law and Taxation, Monash University and Special Counsel, McCullough Robertson.

After several years of rapid changes in taxation law, I decided to concentrate on an area of law which did not appear to have the same propensity for rapid and dramatic evolution as taxation law. I decided to concentrate on corporate law, and this change of specialty must certainly have been a good example of jumping from the frying pan and into the fire. Responding to the Wallis Report,[1] the Australian government has moved from "simplification" to a "CLERP"[2] process which is now entering phase 8 or 9. As with tax, however, many of the developments reminded my of the legal studies I had undertaken many years earlier: no par value shares, the business judgment rule, securities regulation with legislative design similar to those found in the U.S.

To these examples, we may soon add another: personal property security in Australia may in the near future join that of a number of Canadian Provinces and New Zealand in adopting a model which has evolved from UCC Article 9. Unfortunately, the passage of twenty-five years has meant that my memory of the financing statement and registry search is rather imperfect. I do, however, clearly remember filing my first financing statement to protect an advance of $600 to a friend for the purchase of a Triumph sports car (and the difficulty in hastily removing the statement from the register when the car was sold by my forgetful friend months after the loan was repaid and the discharging documents were provided to him and promptly lost). I also remember failing to complete a check of the register in Atlanta before a client, eager to close on the purchase of a seafood shop, disbursed funds contrary to my instructions. Due to this rush, the client acquired a shop fit out with refrigerator equipment discovered to be heavily encumbered when the search was completed within the hour. I repeat these experiences to you only to point out that no system is totally fool proof, even if it is (or especially if it is, depending upon the view taken) based upon an American model.

---

[1] Wallis (Ch.), *Financial System Inquiry Final Report* (AGPS 1997)

[2] Corporate Law Economic Reform Program, which has addressed a number of discreet areas for corporate reform. This resulted in passage of the *CLERP Act* 1999, covering five areas of interest, and the *Financial Services Reform Act* 2000, the most important of the reforms to date.

The Current System and Its Deficiencies

The current Australian system for registration of charges for corporate borrowers is found in the *Corporations Act* Chapter 2K. Where a company creates a registrable charge, it is required within 45 days of its creation to notify the Australian Securities and Investments Commission,[3] which maintains the register of charges.[4] Registration of the charge protects the chargee's priority over later, registrable charges.[5] Registrable charges which are not registered may be invalidated in winding up.[6]

Those charges which must be registered under the current scheme include the following:

- A floating charge;[7]
- A charge on uncalled capital;
- A charge on shares made but unpaid;
- A charge on personal chattel[8] either unascertained or to be acquired in the future;
- A charge on goodwill, a patent, a trademark, a copyright or a registered design;
- A charge on a book debt; [9]
- A charge on a marketable security; [10]
- A lien or charge on a crop, a lien on wool or a stock mortgage; and
- A charge on a negotiable instrument other than a marketable security.

The deficiencies of the current system have been catalogued and discussed on numerous occasions. One useful summary of these is found in Professor John Farrar's "Reform of the Law of Company Security Interests: Trans-Tasman Perspectives."[11] He identified, at that time, the following deficiencies in the system operating under the *Corporations Law* (as it then was):

---

[3] *Corporations Act* s. 263(1)
[4] *Corporations Act* s. 265(1).
[5] *Corporations Act* ss. 278-282. For priority among unregistered registrable charges see s. 281.
[6] *Corporations Act* s. 266.
[7] Defined in *Corporations Act* s. 9.
[8] Defined in *Corporations Act* s. 262(3).
[9] Defined in *Corporations Act* s. 262(4).
[10] Defined in *Corporations Act* s. 9.
[11] In Gillooly (Ed.), *Securities Over Personalty* (Federation Press, 1994) pp. 168-199.

(a) The current system only covers charges and, therefore, fails to cover other forms of securities such as hire purchase, long term chattel leases, reservation of titles clauses, and absolute transfer of title without transfer of delivery;
(b) The current system excludes intangibles other than book debts and in certain instances negotiable instruments and "marketable securities;"
(c) Section 262(2)(d) excludes transfers in the ordinary course of business;
(d) Registration of the charge must occur within certain time limits; however, failure to register has consequences only against a liquidator or administrator;
(e) The priorities scheme does not deal with priorities between registrable and non-registrable security interests or as between interests which are not registrable. It also fails to deal with the effect of a restrictive clause in relation to non-registrable charges or absolute transfers of property;
(f) Execution creditors are not protected by non-registration of charges;
(g) The scheme permits the realisation of an unregistered charge before winding up;
(h) The effects of automatic and other forms of crystallisation of a floating charge are not dealt with;
(i) Uncertainty continues about the effect of the doctrine of constructive notice on non-registrable charges; and
(j) The scheme is imprecise in its treatment of restrictive clauses.[12]

It is not surprising that, in consequence of the perceived deficiencies in the current system, new and better means should be considered. It is the attempt to provide a more efficient system (informed by international experience), that has brought us together today.

Cheaper, Faster, Easier, Simpler, Safer

In two recent articles,[13] Professor David Allan described a promised land for personal property security law, one not yet achieved. In those articles, he summarized the above descriptors as the criteria for a new national and effective security system over personal

[12] Id pp. 170-171

[13] "Personal Property Security – A Long Long Trail A-Winding" (1999) 11 Bond. L. R. 178 and "Personal Property Security in Australia– A Long Long Trail A-Winding" (2001) 106 Dick. L. Rev. 145.

property articulated by the 1999 Conference of the Australia New Zealand Banking Law Association. From the perspective of a borrower - corporate, individual or whatever - these Olympian-style aspirations for personal property security may not, at first glance, appear to be particularly relevant, representing as they do, traits which are desirable to the banking sector to avoid costs in the provision of credit.

We all know, however, that in Australia much of a credit provider's costs are borne by the credit recipient. From an economist's perspective, this has to do with the elasticity of supply and demand and is likely to continue to be the case so long as the consumer demand for credit remains strong and supply is scarce. Australian banks are no different from other industries in this regard, but they probably suffer consumer backlash because their costs are ever more likely to be separately identified and not hidden as one of many components making up the ultimate cost to the consumer. It is thus in the borrower's as well as the lender's interest to assure a system which is cheaper, faster, easier, and simpler, thereby reducing the transactional costs of borrowing.

Borrowers also understood that the greater the risk which a lender faces, the greater will be the rate of return which the lender will require to justify the loan. For this reason, loans which are provided on the basis of "safe" security will be likely to cost a borrower less than one which is subject to some uncertainty. Thus customers also will benefit from a "safer" personal property security system, one in which priorities are certain and assets covered by the security can be identified in an unambiguous way.

Essentially, neither borrowers nor lenders are served by uncertainty and the risk of litigation. From a borrower's perspective, current banking practice requires the elimination of any such risk, with the result that independent solicitor's letters are required to assure that spouses understand the implications of a guarantee . Similarly, cross security is often required when it may not be strictly necessary. Each of these limits risk, and the cost associated with each (independent solicitor,[14] stamp duties, etc.)

---

[14] Now standard practice as a result of *Commercial Bank of Australia v. Amadio* (1983) 151 CLR 447 and *National Australia Bank v. Garcia* (1998) 194 CLR 395. See E.Stone, "Infants, Lunatics and Married

fall upon the borrower. While these examples arise from real estate transactions, there is clearly common interest in seeing a more efficient system for all forms of security, including personalty.

The specific advantages of the Article 9 approach were summarized by the Australian Law Reform Commission in Report No. 64: *Personal Property Securities* at [3.20]:

> "The Art 9 approach, as applied with local variations in all the jurisdictions mentioned, is attractive in its simplicity and almost universal applicability.
>
> - "Its use of a functional definition — which looks to the substance of the transaction and not the form — overcomes the complicated and confusing rules which previously applied to different kinds of security interests.
> - Ordinary securities and reverse securities which are similar in commercial or economic effect or purpose, but legally different, are treated alike.
> - A single set of rules applies to all kinds of securities to determine when they are enforceable against third parties.
> - Archaic common law priority rules are dispensed with in favour of a more streamlined set of priority rules.
> - Registration is a voluntary act but there is incentive to register since priority as against third parties cannot be assured without registration or possession.
> - A single regime overcomes the difficulties of choosing which register to file in and of searching many different registers within one jurisdiction.

Women: Equitable Protection in *Garcia v National Australia Bank*" (1999) 62 Mod. L. Rev. 604 and Su-King Hii, "From Yerkey to Garcia: 60 Years on and Still as Confused as Ever! (1999) 7 Aust Propt. L J. 47.

- While the single register is open to public inspection, priorities depend not on notice (actual or constructed) but on the date of registration."

The advantages of the proposed Personal Property Security Bill are well recognised.[15] These will benefit both borrowers and lenders if they reduce costs and minimize risk. However, as my anecdotal evidence in the introduction attests, even this system presents some uncertainties which United States, Canadian and New Zealand experience can alert us to.

At this meeting, the "nuts and bolts" of the Personal Property Security Bill will undoubtedly be covered numerous times in detail. For this reason, I do not propose to reiterate many of the clear advantages: the ease of registration, the uniform approach to all forms of personal property security, the benefits of a computer search system, the resolution of multi-jurisdictional issues, etc. I wish to concentrate upon only several key issues, reviewing the implications of the new legislation which are relevant particularly for borrowing corporations:

1. **The assets covered;**
2. **Circulating capital;**
3. **Potential areas of uncertainty in the new system**

One of the great benefits of the proposed legislation is to approach personal property security on a functional basis. Under the proposed section 8, the Act applies:

(a) to every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral; and

---

[15] See D. Allan, "Personal Property Security – A Long Trail A-Winding" (1999) 11 Bond L. R. 178: A. Duggan, "Globalization of Secured Lending Law; Australian Developments" (2001) 12 J. of Fin. Law & Practice 85; A. Duggan, "Personal Property Security Law Reform, the Australian Experience to Date" (1996) 27 Can. Bus. L. J. 176; C. Wappett, "Reforming Personal Property Security Law in Australia" (1996) 7 J. of Fin. Law & Practice 85; and Farrar, Reform of the Law of Company Security Interests: Trans-Tasman Perspectives in Gillooly (Ed.), *Securities Over Personalty* (Federation Press, 1994) pp. 168-199.

(b) without limiting the generality of paragraph (a), to a chattel mortgage, a conditional sale, a hire purchase agreement, a floating charge, a pledge, a trust deed, a trust receipt, an assignment, a consignment,, a lease, a trust, and a transfer of chattel paper if they secure payment or performance of an obligation.

Within this inclusive section are the ambit claims for coverage which form the basis for the following discussions: the extent of the assets which can are covered and the specific types of secured transactions now brought within this legislative scheme.

Assets

The full extent of the coverage expressed in section 8 (and the express inclusions of section 9), can only be fully understood by referring to the exclusionary provisions of sections 10. Excluded from the operation of the Bill by section 10 are:

(a) liens or charges arising by operation of law;
(b) an interest in a contract of annuity or insurance;
(c) the creation or transfer of interests in present or future salary or wages for labour or personal services (other than professional services) prohibited by law;
(d) transfer of an interest in unearned right to payment under a contract where the transferee must perform the transferor's obligations;
(e) the creation or transfer of an interest in land (other than arising under a license);
(f) the creation or transfer of an interest to a right to payment in connection to an interest in land (including rental payments under a lease);
(g) sale of accounts or chattel paper as part of a sale of a business out of which they arose (unless the vendor remains in apparent control of the business);

(h) a transfer of accounts solely to facilitate their collection;
(i) creation or transfer of an interest in a right to damages in tort;
(j) an assignment for the general benefit of creditors in insolvency;
(k) a mortgage under the *Shipping Registration Act* (Cth.); and
(l) a right of set-off (subject to the operation of section 47 of the Bill).

Although assets are categorised within the Bill for various purposes, the effect of the above provisions is to include within the purview of the legislative scheme a broad range of both tangible and intangible personalty. Section 8 indicates that the bill covers every transaction that in substance creates a security interest, without regard to form and without regard to the person who has title to the collateral (defined as "personal property that is subject to a security interest").

This brief review of the legislative provisions indicates that a broad range of intangibles would be subject to the proposed Bill, including a number of conventional intangibles already well exploited by financiers and borrowers such as choses in actions and intellectual property rights. In Professor Jacqueline Lipton's book, *Security Over Intangible Property*,[16] the current limitations upon the use of more unconventional intangibles is addressed in some detail, with specific reference to the evolving notion of "property" in the information age:[17]

> The basic issues underlying the discussion … have been the changing nature of "property" and 'proprietary rights" in the global information age, and the need for financiers to be able and willing to structure secured financing strategies that accommodate the needs of the evolving property concept.[18]

Because the Bill does not specify (and thus limit) the items which would be included in personal property, its potential coverage may increase in the future as the concept of property expands. In spite of the potential for future improvement, the Bill already

[16] *Security Over Intangible Property* (LBC, 2000)
[17] Id at pp. 12 –18.
[18] Id. p. 216.

provides a framework for the securing of intangible property which certainly represents a shift of some significance.[19]

Enabling corporate borrowers to realise the value of their intangible property by providing a comprehensive system to allow it to serve as security for loans will undoubtedly prove a successful development, particularly for technology and start-up corporations whose major assets often consist only of intellectual property and the systems developed to exploit those property rights. The great difficulty as I see it will be in valuing these intangibles so that finance providers do not subject themselves to the insecurity of rapidly lowering values (as experienced two years ago with the deflation of the "dot com" bubble). However, if anyone can be relied upon to provide some rigour to the valuation of intangibles, one would think that the financiers would be likely candidates.

Circulating Capital

The change of greatest importance for borrowing corporations is the alteration of the scheme for providing security over the circulating capital of the corporation. Under current practice in Australia, corporations can usethe long established equitable concept of the "floating charge" to provide security. The charge floats over the assets charged (usually circulating capital assets) enabling the corporation to continue to deal with those assets in the ordinary course of business until an event occurs which crystallises or fixes that charge to the assets which form part of the collective group subject to the charge at the time of the crystallisation. The floating charge has a long history in English law;[20] however, this concept sits uneasily with the Personal Property Security Bill, modelled as it is on the United States system in which the long development of the equitable floating charge is unknown.

---

[19] See D. Allan, "Personal Property Security – A Long Trail A-Winding" (1999) 11 Bond L. R. 178, wherein the historical reticence of financiers to consider such security is mentioned.

[20] From *Holroyd v. Marshall* (1862) 10 HLC; 11 ER 999. See J. Chandler "The Modern Floating Charge," in Gillooly (Ed.) *Security over Personalties* (Federation Press 1994).

The benefits of the floating charge to a borrowing corporation are obvious. It is able to acquire loans on the security of its circulating capital (inventory, accounts receivables,[21] etc.) without inhibiting their use within the business. Inventory may be sold to consumers and credit provided to them without fear that this circulating capital will be syphoned off, leaving the business unable to continue. As stated by Lord Jessell MR in *Re Colonial Trusts Corporation, Ex parte Bradshaw*[22]

> [I]t would be a monstrous thing to hold that the floating security prevented the making of specific charges or alienations of property, because it would destroy the very object for which the money was borrowed, namely, the carrying on of the business of the company.[23]

The floating charge has benefited both borrowers and lenders since its inception, and it is likely that a flexible means of securing capital advances secured by circulating capital should be retained in some form. The Personal Property Security Bill expressly applies to floating charges, and thus may cause some anxiety to Australian lawyers fearful of change. The experiences in Canada and New Zealand indicate that this anxiety also accompanied the introduction of their legislation as well. It is my view that this anxiety is misplaced.

The legislative scheme under the Personal Property Security Bill which covers circulating capital is based upon the following sections, dealing with when a security interest attaches (section 17); security interest in after-acquired property (section 18); security interest in the proceeds of sale (section 33) and protection of buyer or lessee of goods (section 35). :

---

[21] The structure of the charge may cause some difficulty, however. See *Agnew v Comm'r of Inland Revenue* [2001] UKPC 28 and *New Bullas Trading Ltd* [1994] 1 BCLC 449
[22] (1879) 15 Ch. D.465.
[23] Id at 472.

Section 17:

A security interest, including a security interest in the nature of a floating charge, attaches when:

(a) value is given;
(b) the debtor has rights in the collateral; and
(c) except for purposes of enforcing rights between the parties to the security agreement, the security agreement becomes enforceable under section 15

unless the parties have specifically agreed to postpone the time for attachment in which case the security interest will attach at the time specified in the agreement.

Section 18 provides that a security interest in after acquired property attaches in accordance with the terms of the agreement without the need for a specified appropriation by the debtor.

Section 33 indicates that;
where collateral is dealt with or otherwise gives rise to proceeds, the security interest:
(a) continues in the collateral unless the secured party expressly or impliedly authorizes the dealing:
(b) *extends to the proceeds.*

Section 35 protects buyers or lessees of goods subject to a security interest. Of particular relevance are subsections (2) and (3):
(2) A buyer or lessee of goods that are acquired as consumer goods sold or leased in the ordinary course of business of the seller or lessor takes free of any perfected or unperfected security interest in the goods given by the seller or lessor …whether or not the buyer or lessee knows of it, unless the buyer or lessee also know that the sale or lease constitutes a breach of the security agreement under which the security interest is created;

(3) a buyer or lessee of goods that are acquired as consumer goods takes free of a perfected or unperfected security interest in the goods if the buyer or lessee

(a) gave value for the interest acquired; and

(b) bought or leased the goods without knowledge of the security interest.

These provisions have been described as imposing a "floating lien" rather than a floating charge as currently understood.[24] Following United States model (which suffers no confusion by reason of pre-existing "floating charge" jurisprudence), the security interest would attach pursuant to section 17, and be perfected upon filing of the financing statement. After acquired property would be covered by the security interest if it is so specified under section 18. Finally, sale or lease of the collateral would be possible under section 35; however, the secured party would retain rights in relation to the proceeds of sale.

In those jurisdictions in which floating charges were recognized, concerns and confusion have been raised about the continuing effect of the floating charge after the passage of Personal Property Security legislation. In Canada, it has been stated that:

> Although parties are free to use a floating charge form of security agreement, this will not have the effect of invoking the floating charge law. The agreement will be governed by the PPSA. The notion of crystallisation has no counterpart under the Act, nor is there any equivalent to the non-specific pre-crystallisation state of existence. Priority disputes are governed by the priority rules of the Act and not by the complex matrix of priority rules that formerly governed.[25]

While there had been doubts and confusion about the consequences of security interests drafted in the style of a "floating charge," it appears that the English style floating charge

---

[24] H. Gabriel, "The New Zealand Personal Property Securities Act: A Comparison with the North American Model for Personal Property Security" (2000) 34 International Lawyer 1123

[25] R. Cuming and R. Wood, *Saskatchewan and Manitoba Personal Property Security Acts Handbook* (Thomson Canada 1994)

no longer exists under the Ontario Act.[26] Similarly, courts in Ontario, Manitoba, and Saskatchewan have held that the use of a floating charge does not indicate an intention to delay attachment until the occurrence of an event of crystallization.[27] Section 12(1) of the Manitoba Act, in language remarkably similar to the proposed Australian legislation section 17, indicates that the perfection rules apply to a security interest, "including a security interest in the nature of a floating charge." The Manitoba legislative formulation is provides a degree of confirmation that the legislative intention is consistent with the judicial authorities on the point.[28]

The initial confusion which was faced by the Canadian judiciary in interpreting floating charges under its various Personal Property Security Acts has also caused some concern in New Zealand.[29] However, the viewing the Canadian experience through New Zealand eyes has brought one commentator to the following view:

> The answer happens to be that adoption of floating charge language , without more, has no special consequence under the Act. Furthermore, in the words of Hunter J: "to continue to use the language of floating charges and crystallisation which do not exist in the PPSA causes confusion in the interpretation of the unambiguous provisions of the PPSA. This confusion has been contributed to by the use of this archaic language in the cases cited…".[30] Without recourse to Canadian precedents, we will run the risk of creating our own prolonged confusion. Although this may line the pockets of litigators, it will not serve commerce.[31]

---

[26] See J. Ziegel, "Freedom of Contract and the Right to Claim Proceeds under the OPPSA" (1999) 31 Canadian Business Law Journal 299, referring to *Credit Suisse Canada v. 1133 Yonge Street Holdings Ltd,* (1998) 83 ACWS (3d) 402 (Ont. C.A.). See also J. Zeigel, "Floating Charges and the OPPSA: A Basic Misunderstanding" (1994) 23 Canadian Business Law Journal 470.

[27] *Royal Bank v. G.M. Homes Inc.* (1984) 10 DLR (4th) 439 (Sask. C.A.); *Euroclean Canada Inc. v. Forest Glade Investments Ltd* (1985) 49 OR (2d) 769 (C.A.) *Roynat Inc. v. United Rescue Services Ltd* (1982) 2 PPSAC 49 (Man. C.A.). See also R.J. Wood, "The Floating Charge in Canada" (1989) 27 Alta. L. Rev. 191.

[28] R. Cuming and R. Wood, *Saskatchewan and Manitoba Personal Property Security Acts Handbook* (Thomson Canada 1994)

[29] M Gedye, "More PPSA Controversy" [2001] NZLJ 142.

[30] Citing *Rehm v DSG Communications Inc* (1995) 9 PPSAC (2d) 114 at 124.

[31] M Gedye, "More PPSA Controversy" [2001] NZLJ 142.

Notwithstanding the experience in Canada and New Zealand (not to mention the United States), the abandonment of the English style floating charge will face a fear factor in Australia as well:

> It is difficult to see how a company can carry on its business under its constitution if a fixed charge applies to all its present and future property, including book debts. Being able to carry on business was the *quid pro quo* for the courts recognizing the charging by a company of all its undertaking….
>
> The ALRC proposals (and indeed the New Zealand Personal Property Security Act 1999) would seem to destroy the essential functions of the floating charge, the most common and useful form of securities created by companies.[32]

Despite the fears expressed about the effect of the Personal Property Security Bill, much of that concern would appear to be misplaced. The shift away from the classical English-style floating charge to the American style floating lien has not destroyed Canadian or New Zealand corporate borrowers by removing their circulating capital from their control. It will not result in immediate destruction of Australian commercial practice, although some adjustments may be necessary. In this new environment, there may be new challenges and issues to be addressed, but they will proceed on the basis of commercial certainty even if it is a somewhat modified certainty.

Potential Areas of Concern

While corporate borrowers may be generally supportive of the Personal Property Security Bill, there are some matters which are worthy of mention. These are not necessarily deficiencies in the Bill, but rather what might be called the new areas of tension. Many of these may be observed already in the experience of the United States, Canada, or New Zealand:

---

[32] J. Wilkin, "Personal property security reform: registration and the floating charge" (2001) 17 (3) Aust. B & FL Bull 40.

- **Legal resistance to change**: As already mentioned, the use of floating charge terminology may continue. The response of Australian judges will assure the successful implementation of the new system, and a willingness to learn from and apply overseas (particularly New Zealand and Canadian) experience will ease the transition.
- **Freedom of contract**: The ability of borrowers and lenders to be inventive should not be constrained. The Bill preserves this ability to modify security arrangements so long as they fall within the parameters of the new security system;[33]
- **Dealing with collateral**: Because the right to the arrangements which are desirable remain with the parties to the transaction it would appear that the express or implied approval of the financier for the debtor to deal with collateral will be one of the areas of tension in the new system. This may be particularly so in the period immediately after enactment when efforts are made to reproduce the effect of the floating charge under the new legislation.
- **Further advances**: Due to the fact that a security interest for further advances may attach and be perfected at the time of the original transaction, there is the possibility that competition will be eliminated in relation to this particular debtor. Second priority creditors will not be able to protect their security from the effect of later advances by the primary secured creditor;
- **After acquired property**: Although inclusion of after acquired property is permitted under the proposed Bill, the precision with which this must be expressed may be a matter for judicial clarification;

Conclusion

While there are some matters which may cause concern in the Personal Property Security Bill, the certainty and efficiency which its introduction offers clearly offset these potential sticking points. Moving to registration based upon functionality rather than on

[33] J. Ziegell, "Freedom of Contract and the Right to Claim Proceeds under the OPPSA" (1999) 31 Can. B. L. J. 299.

the basis of archaic and highly artificial constructs must be an improvement. Further, under the new provision, the question of priority is clear from the time the security interest is created thereby imposing less risk on creditors. This should result in greater willingness to extend credit.[34] With less uncertainty and greater supply, the cost of capital to borrowing corporations should be comparatively less than is currently the case. Who would argue with that result if it transpires?

[34] H. Gabriel, "The New Zealand Personal Property Securities Act: A Comparison with the North American Model for Personal Property Security" (2000) 34 International Lawyer 1123, 1128