PERSONAL PROPERTY SECURITIES BILL – EXPOSURE DRAFT

NOTE FOR SENATE COMMITTEE ON CONFLICT OF LAWS

1. In the course of my testimony on Friday, January 23, the Committee asked me to provide a note on the proposed conflict of laws rules set out in Appendix A to the Revised Commentary on the Personal Property Securities Bill 2008, with particular reference to the Clayton Utz submission.

2. In my own submission, I said (at pp 14-15):

> "uniform conflict of laws rules between jurisdictions are important to avoid the risk of forum shopping created by the prospect of different case outcomes depending on where the litigation takes place … there is a strong argument for saying that: (1) the legislation should include conflict of laws provisions; and (2) as far as possible, the provisions should be uniform with New Zealand and the Canadian provinces".

3. Clayton Utz say, "we favour the adoption of an approach which is consistent with the New Zealand regime, which is clear and simple". I agree so far. However, the next sentence in the submission goes on to summarize s.26 of the New Zealand statute, creating the impression that s.26 is the only relevant provision. As it happens, there are 8 relevant provisions (ss 26-33) and, while the regime is relatively clear and simple, it is not quite so clear and simple as the Clayton Utz submission seems to suggest.

4. Furthermore, having endorsed the New Zealand regime, the Clayton Utz submission goes on to also support the Appendix A provisions. These are inconsistent positions because the Appendix A provisions are neither "clear and simple" nor "consistent with the New Zealand regime".

5. The first point to note about the Appendix A provisions is that, consistently with the rest of the Bill, they are substantially longer and more detailed than the corresponding provisions in the other jurisdictions. Some of the Appendix A provisions seem to be in substance the same as provisions in New Zealand and Canada. However, because the drafting is so different, it is impossible to be sure without detailed analysis.

6. On the other hand, there are also many substantial differences. Here are some examples:

   (a) according to A.10, the Bill would apply to security interests in tangible property or financial property located outside Australia if the grantor is an Australian entity. By contrast, the other models provide that where the collateral is goods or the like, local law applies if the collateral is located in the jurisdiction at the time the security interest attaches regardless of the debtor's location. Incidentally, none of the other models uses the expressions "tangible personal property" or "financial property";

(b) according to A.13, the Bill would apply, in relation to accounts, to an account that is payable in Australia. By contrast, the other models provide that the application of local law depends on the location of the debtor at the time the security interest attaches;

(c) according to A.13, the Bill would apply to an assignment of chattel paper if the assignor is an Australian entity or the chattel paper is payable in Australia. By contrast, the other models provide, in relation to chattel paper, that the application of local law depends on the location of the chattel paper at the time the security interest attaches;

(d) according to Rule 2, the Bill would apply if the grantor of the security interest is an Australian entity and the security interest expressly provides that it is governed by Australian law. There is no corresponding provision in the other models. The other models do provide that issues relating to the enforcement of a security interest are governed by the proper law of the security agreement, but Rule 2 does not seem to be limited to issues relating to enforcement;

(e) Rule 5 governs the application of the Bill to security interests in mobile goods. It enacts a location of the debtor test. In other jurisdictions, the mobile goods rule is limited to goods that are equipment or inventory leased or held for lease by the debtor. By contrast, Rule 2 would apply to any kind of "commercial property" (an expression not used in any of the other models).

(f) Rule 5 governs security interests in intellectual property. It provides that the governing law is the law of the jurisdiction in which the intellectual property is "granted". By contrast, in the other jurisdictions, the relevant test is the location of the debtor at the date the security interest attaches.

7. The Appendix A model includes a number of provisions that have no counterpart in the other jurisdictions. These include Rule 2 (see above), Rule 6, Rule 7, Rule 10, Rule 11, Rule 12 (see above), Rule 13, Rule 14 and Rule 15.

8. There seem to be some mistakes in the Appendix A model. For example, Rules 6 and 7 distinguish between security interests perfected by possession and control and security interests not so perfected. However, this distinction presupposes that we know which law governs the perfection issue and this is the very question Rules 6 and 7 are supposed to be addressing. Another example: Rule 10 would apply to "a security interest in an assignment of an account". This expression makes no sense: in the scheme of the Bill, the assignment of an account *is* a security interest.

9. I should stress that these are random observations based on a fairly quick reading of Appendix A. As I indicate above, a proper comparison of Appendix A with the other models would require a detailed analysis. It is possible that Appendix A may in some respects be an improvement on the other models but, again, it is impossible to be sure without detailed analysis and without a clearer indication than the Revised Commentary

provides of the thinking behind the Appendix A provisions. Furthermore, the benefit of any such improvements would need to be weighed against the costs from loss of uniformity with other jurisdictions (see para.2, above).

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