

# Banking Finance & Consumer Credit Committee — Current Activities

The Committee's current work is in the following areas:

## 1. Review of Consumer Credit Laws

In the past the Committee has made both formal and informal proposals to Consumer Affairs Departments for changes to the consumer credit laws which have been enacted in various jurisdictions. In 1986 the Standing Committee of Consumer Affairs Ministers formed a Uniform Credit Working Party of officials to co-ordinate the preparation of proposals for uniform, simplified credit laws, and the Working Party invited general submissions on the legislation from the Business Law Section as well as other interested parties. The Committee is in the course of making a submission to the Working Party, stressing two basic principles. The legislation should regulate particular types of consumer transactions in the same way i.e. so as to be competitively neutral between different types of financial institutions, and should be confined to true consumer transactions. The Committee also agreed that uniformity, not only in the terms of legislation, but also in its interpretation was most desirable. The Melbourne members of the Committee recently expressed to the Victorian Minister for Consumer Affairs and the Working Party their concern that, whilst the "rule of 78" clearly continues to apply to the calculation of interest to be paid by a consumer on termination of a credit contract under the legislation in some jurisdictions, the applicability of the rule to the legislation in other States has been challenged with the support of the authorities. Since then, the Victorian Supreme Court has in fact decided in *Anderson v. H.F.C. Financial Services Ltd.* (as yet unreported) that the rule is applicable in that State.

The submission to the Working Party covers specific discussion papers circulated by the Working Party on areas such as variable interest rates, bank finance, building societies and credit unions, home finance, credit for business use and small retail credit. In addition John O'Keeffe of Brisbane is preparing comments for the Committee on the recently introduced Queensland Credit Bill.

## 2. Laws Relating to Securities

Bill Gough has prepared an extremely comprehensive submission relating to the Charges Division of the Companies Code. The submission identifies specific defects in the present legislation and in addition raises some broader questions, for example:

- (a) Whether the doctrine of constructive notice should be abolished in relation to company charges.
- (b) Whether the Code should expressly regulate priorities as between *all* charges over property of the kind listed in Section 200(1) of the Code, whether or not the charges are registrable, and also absolute purchases of such property.
- (c) Whether other types of financing transactions, such as hire purchase, finance leases, credit sales and "Romalpa" and other title retention arrangements, should be assimilated to charges for registration and priority purposes.

Following extensive and constructive discussion of this complex area within the Committee it is expected that a submission dealing with defects in the existing Division will be made shortly, and will be followed by a separate submission setting out the advantages and disadvantages, as identified in the discussions, of the broader proposals.

The Committee has also been concerned with the impact, on securities over shares in listed companies, of vesting orders of the kind recently made on the application of the National Companies and Securities Commission. A summary of its submission on this issue appears on page [3].

The Committee is also looking into other areas of the general law affecting the enforceability of financing contracts. It is reviewing a submission by John Stumbles on the need for reform of the "third party protection" provisions of the Companies Codes (Sections 68A and 68C) and is looking at the doctrine of penalties insofar as it applies to financing contracts in the light of recent cases such as *Citicorp Australia Ltd. v. Henry* (1938) 4NSWLR 1 and *AMEV-UDC Finance Ltd. v. Austin* (1986) 60 ALJR 741. Consideration is also being given to a discussion paper by Chin Yen Lee concerning contractual and statutory set off and the availability of set off for future or contingent indebtedness.

In addition, the Committee is preparing a submission in relation to the reform of legislation containing statutory restrictions on the exercise of mortgagees' powers of sale in order to overcome difficulties and obscurities in the legislation.

## 3. Banking Law

A submission is being drafted on the desirability of changes to the Cheques and Payment Orders Act which came into force on 1st July, and also on the residual effect of Regulation 5(2) of the Banking (Foreign Exchange) Regulations.

In addition the Committee is considering recent governmental proposals affecting the structuring of banks and financial institutions, in particular the further statement of 9th April on the availability of interest withholding tax exemptions for Offshore Banking Units and the 30th April statement proposing amendments to the Income Tax Assessment Act restricting deductibility of interest payable by "thinly capitalised" financial and other institutions having substantial foreign shareholdings. The Committee has noted the Treasurer's 19th May announcement foreshadowing amendments to the Banking Act to give the Reserve Bank legislative backing for its role in the supervision of banks, and has requested the opportunity to comment on the proposed legislation. The Committee is also preparing a comparative survey of the regimes for banking supervision, prudential requirements and cost in terms of local taxation, applicable to international financing transactions entered into in New York, Hong Kong and Australia with a view to facilitating the implementation of such transactions in this country.

#### 4. Stamp duty

The Sydney members of the Committee made submissions concerning the recent amendments to the New South Wales Stamp Duties Act. In particular they expressed concern that the new Section 44G of the Act, imposing on legal advisers the obligation to assist in revenue collection will be in clear conflict with the duty of confidence, and other duties, owed by them to their clients.

## Banking Law and Consumer Credit Committee

# The Vesting of Shares in the National Companies and Securities Commission

### Introduction

The following summarises a submission made by the Law Council on the above topic. The submission was

prepared by the Banking, Finance and Consumer Credit Committee and reviewed by the Companies and Securities Committee before its despatch. The matters, the subject of the submission are under consideration by the National Companies and Securities Commission and Securities Law Review Committee. The NCSC has stated that the submission covers a number of matters and considerable importance which have exercised its attention in the past.

The national companies and securities legislation in four places empowers a court to make an order "vesting in the Commission shares or any interest in shares" — sections 146(1)(ea) and 261A(2)(e) of the Companies Act and Codes (the "Code") and sections 45(1)(da) and 60(4)(b)(v) of the Companies (Acquisition of Shares) Act and Codes (the "Takeover Code"). These sections relate, respectively, to the substantial shareholding provisions, section 261 notices, prohibited acquisitions and unacceptable conduct.

Only one such vesting order, under section 261A, has actually been made, and it was set aside on appeal (in *Re North Broken Hill Holdings Ltd.* (1986) 4 ACLC 181). The possibility of orders has, however, arisen in many other large takeover battles, including those for BHP and Humes, in connection with very valuable shareholdings.

A feature of recent Australian contested takeovers has been the large amount of bank credit, usually secured on shares to be acquired, extended to offerors. The effect of vesting orders on the security interest of lenders in vested shares is not specifically addressed by the legislation and has led to considerable doubt as to secured lenders' rights. The submission identifies the problem areas and advances policy recommendations.

The fundamental approach of the submission is that vesting orders should be analysed as instruments for the enforcement of relevant statutory obligations rather than the achievement of other policies relating to takeovers.

The vesting mechanism raises problems other than those which strictly concern lenders' securities. The submission does not analyse them but identifies some for concurrent review by interested authorities. They include questions as to the consequences of vesting on registration, voting rights, dividend and accretion rights and on-sales.

### The Problems for the Secured Lender

The submission identifies five principal problems. These are:

1. Can a vesting order be made, notwithstanding a lender's security interest?
2. If a vesting order is made, what are the respective priorities of the NCSC and any secured lender?
3. Can a secured lender enforce its security rights, notwithstanding the vesting order?
4. Can a secured lender exercise any control over the manner and timing of the exercise by the NCSC of its power of sale?