

**17<sup>th</sup> Annual Banking Law & Practice Conference**  
*[8 & 9 June 2000]*

**Banking Law Association**

**Trans Tasman Person Property Security – Workshop Session 3**

**Equipment & Inventory Finance**  
*in context of draft BLA Australian Personal Property Security Bill*

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### **General observations & context**

The draft bill seeks, no matter what the legal form of the equipment or inventory finance transaction (refer s. 4(1)), to provide a regime with consistent rules and procedures for the effectiveness, priority, recording and enforcement of the transaction. As a general approach, the draft bill regards all forms of equipment or inventory finance as secured transactions.

Under current practice, equipment finance transactions can be effected by way of lease, hire purchase, goods mortgage, equitable charge or conditional sale; inventory finance can be provided by way of floorplan bailments, loans (secured by fixed & floating charges) and deferred purchase terms.

Under the draft bill, each of these forms of transaction would be embraced by the fundamental concept of 'security interest' (refer Sch 1), which for present purposes means:

- (a) an interest in personal property that secures payment or performance of an obligation, without regard to:
  - (i) the form of the transaction; and
  - (ii) the identity of the person who has title to the collateral;
- (b) without limiting paragraph (a), and to avoid doubt, the interest of:
  - (i) a chargee under a fixed charge or a floating charge or a mortgagee under a chattel mortgage;
  - (ii) a consignor who delivers goods to a consignee under a consignment;
  - (iii) a lessor under a lease for a term of more than one year;
  - (iv) an owner under a hire purchase agreement, instalment purchase agreement or conditional sale agreement (including an agreement to sell subject to retention of title);
  - (v) .....
  - (vi) a buyer under a sale of goods without change in possession;
  - (vii) .....

The draft bill would apply to consensual security interests, but not those such as liens, charges, etc, arising by operation of law, unless the statute creating such an interest provides otherwise (refer s. 4(2)(a)).

### **Draft bill – relevant key concepts**

For the purposes of the Equipment & Inventory Finance Workshop, the following key concepts are defined in Schedule 1 to the draft bill (pp.55-67):

accession, authenticate, buyer in ordinary course of business, collateral, debtor, equipment, future advance, goods, inventory, lease for a term of more than one year, lessee, lessor's residual interest, obligor, obligations secured, personal property, proceeds, purchase, purchase money security interest, secured party, security agreement, security interest, serial-numbered goods.

## Issues for workshop consideration

### Nature of the Personal Property Security Register

General Comments: Part 5 of the draft bill provides the processes under which financing statements will be created, filed, altered, withdrawn and information contained in them managed and retrieved (ss. 53 to 75). Indexing of financing statements would generally be under the name of the debtor, and in the case of serial-numbered goods (i.e. motor vehicles, boats and aircraft), by that number (s. 69(3) & (6)). To any person who requests it, the 'filing office' must provide (for a fee) any information from a financing statement about the requested debtor or serial numbered-goods (s. 73). The proposed filing office would therefore appear to be required to operated a mixed debtor indexed and asset indexed register. Currently, a national grid of asset-indexed registers operates from the purpose of security interests in motor vehicles (REVS/VSR). To adopt the draft bill approach would necessitate security holders in motor vehicles providing more information than is currently the case for REVS/VSR (which does not keep any debtor details) and which is now frequently effected electronically without the production of any written application or financing statement.

Issues: How is a person requesting information from the filing office to know whether to make a request based on the name of the debtor or the serial number of the goods – would s. 27 provide sufficient confidence for both security holders in respect of serial-numbered goods and inquirers of the filing office? What other goods could or should be regarded as serial-numbered goods? Is there a need for debtor information for asset-indexed security interests?

### Controls on terms of equipment leases

General Comments: The draft bill would render ineffective any term of a lease of goods to the extent that it prohibits or restricts the assignment, attachment, etc, of an interest of a party under the lease or in the lessor's residual interest in the goods, or (with limited exceptions) a term that specifies that an assignment, etc would give rise to a default, remedy, termination, etc, of the lease (ss. 45(1), 49(6) & 50).

Issues: Are these restrictions warranted?

### Default

General Comments: A security agreement would be effective according to its terms (subject to the draft bill and insolvency laws) (s. 6). In addition, the draft bill would give a secured party rights under Part 7 (ss. 76-98), in addition to those arising by agreement between the parties (s. 76). The draft bill prevents waiver or variation of the specific rights by the debtor or obligor (ss. 77 & 96(4)). Part 7 contains rights and duties including collection and enforcement, application of proceeds, taking possession, disposal after default (including notice to debtor/obligor before disposal). There are remedies available to exercised against a secured party who fails to comply with the draft Bill (ss. 96-98).

Issues: Should the draft bill provide for secured party remedies and control enforcement procedures or should that be left for the parties to agree? Are these remedies and controls, taking into account those rights that cannot be waived or varied, adequate/appropriate for enforcement of security over inventory in particular?

### Priority for purchase money security interests

General Comments: Equipment and inventory finance would both be regarded as purchase money security interests (PMSIs) under the draft bill (Sch 1). Except where a buyer in ordinary course of business (s. 25) or a lessee in ordinary course of

business (s. 26(3) & (4)) is relevant, a financing statement filed for a PMSI within 20 days of the debtor receiving delivery of the *collateral* would result in the PMSI taking priority over the rights of a buyer, lessee, execution creditor, liquidator, administrator, or trustee in bankruptcy which arise between the time the PMSI attaches and the time of filing (s. 22(5)). PMSIs that are *equipment finance* (over collateral or identifiable proceeds) would be given under the Bill priority over any other security interest in the same *equipment* given by the debtor if the PMSI is perfected not later than 20 days after the debtor obtains possession of the equipment (s. 30(1)). The PMSI priority afforded to *inventory* over certain competing interests would only apply if the PMSI were perfected when the debtor receives possession of the inventory and the PMSI holder sends the required authenticated notification to the holder of the conflicting security holder (s. 30(2)).

Issues: What is the basis for the priority afforded to purchase money security interests – to what extent would that priority differ from current practice? Given that current legislation concerning security interests in motor vehicles determines the rights of buyers and competing security holders according to the state of the relevant statutory register on a particular day, is 20 days for filing a PMSI reasonable? In the case in inventory PMSIs, why is the requirement needed that the PMSI holder notify prior security holders?

### **Other priority rules - buyers and lessees of secured goods**

General Comments: Except where a PMSI is held in goods, a buyer (who is not a secured party) or a lessee would take goods free of a security interest if the buyer or lessee gives value and receives delivery of the collateral without knowledge of the security interest and before it is perfected (s. 22(2) & (3)). Also, a buyer in the ordinary course of business takes free of a security interest created by the buyer's seller, even if the security is perfected (s.25(1)) – in this situation the buyer prevails over a PMSI in the same collateral (s. 22(5)) – in addition there are special rules where the collateral involved is a serial-numbered motor vehicle, boat or aircraft (s. 27). In terms of a lessee of goods, except where a PMSI is held in goods, a lessee in ordinary course of business takes its leasehold interest free of a security interest in the goods created by the lessor, even if the security interest is perfected and the lessee knows of its existence (s. 26(3) & (4)).

Issues: Do these rules sufficiently facilitate retail commercial transactions?

### **Other priority rules – fixtures, accessions & commingling**

General Comments: The draft bill would facilitate the taking of securities over fixtures and accessions or collateral that would become fixtures or accessions and provides priority rules for these circumstances (ss. 38 & 39). Similarly, there are provisions to address commingled goods, being goods that are physically united with other goods so that their individual identity is lost in a product or mass (s. 40) – while there can be no security interest in commingled goods as such, a security interest could attach to the resulting product or mass.

Issues: To what extent do these provisions provide benefits to financiers of equipment and inventory over current law and practice?

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