

Trans Tasman Perspectives on select issues of financing stock and debtors
Questions & Answers

PROFESSOR ALLEN: It's not so much a question, Mr Chairman, but I feel that after all that's been said about PPSA in Australia, as chairman of the committee that is promoting it, I ought to say a very brief word about it. Yes, we did have the big workshop at Bond University a couple of weeks ago. It was attended by all affected interests: banks, financial service providers, consumers including small business, corporate borrowers, law reform agencies, government departments, Attorney-Generals departments in particular and we now have the support of the Commonwealth Treasury.

We had terrific support for it. We looked at how it should be implemented in a federal system like ours, and we looked at the infrastructure and we certainly - we were told that what was happening in New Zealand on 1 May and we also, it's pretty clear, are going for a national electronic notice filing system instead of all our registrations. I don't think, with all respect to Steve Edwards who is sitting there, that we're going to get it through this year. We will be putting it up to the standing committee of Attorneys-General, but I understand they have on their plate a topic called the uniform legal practice in Australia, and that's going to cause so much controversy that I expect we're going to have to wait until 2003.

Part of the trouble is in a federation it has to be re-drafted, of course, in every state, pretty well, but on the particular substantive points, I'm sorry I didn't bring the draft bill down here with me; it's in my room at the moment. I'll bring it to the session on Trans Tasman Financing tomorrow, and we can raise some of these points, but broadly, you could have been reading from the Australian draft bill. Both of us, New Zealand and Australia, worked very closely with Canadian precedents, I think, particularly Saskatchewan, and we have taken the view, yes, we just have a security. We don't divide it up.

We don't have distinguished a floating charge. We do say that security has to attach to the property, the collateral. The collateral may be a shifting collateral but it's a fixed attached charge. We do deal at great length with purchase money security interest - I don't think I should go on further, but you have virtually been quoting from our draft bill also. So I think I could add that point to a comment that was made earlier about the need for closer economic and political relations between Australia and New Zealand. Thank you, Mr Chairman.

CHAIR: Thank you, Professor Allen. Any questions?

ALAN STONES: My name is Alan Stones from Minter Ellison Wrightways in Auckland. A question for Steven and my apologies to Australians about our PPSA, purchase money security interest commonly known as PMSI, and ROT clauses, I understood you to say that you saw ROT clauses as now somewhat redundant and of not much relevance because they create security interests.

My question is in relation to the second category of PMSI which is known as Financiers PMSI in New Zealand where one of the things that a financier must establish is that the purpose of the value provided to the debtor is to enable the debtor to acquire rights in the collateral and one of the situations that comes up in practice is where a debtor already has acquired rights or are already in possession of collateral subject to an ROT provision and it did seem to me that, from a financier's point of view, that's quite important because the acquisition of rights, unless those rights are acquired, then the financier is not going to be providing value to enable the debtor to acquire rights, and hence, from my perspective thought that ROT clauses in that context and for that purpose, are still quite important from a financier's perspective, and I wondered if you had any comment on that?

STEVE FLYNN: As I understand your question - well, in fact, no, I'm not sure I do understand your question. Are you asking me whether it's relevant from a financier's perspective or from the ROT supplier's perspective?

ALAN STONES: No, I was commenting more on your statement, if I understood you correctly, that you saw ROT provisions of really becoming somewhat meaningless in the context of PPSA, whereas it did seem to me that it remains quite important from a financier's point of view, in terms of the second category of PMSI because of the need to establish that the value provided by the financier is used to acquire rights, and one of those rights could be ownership, for instance.

STEVE FLYNN: Yes. The major issue with the purchase money security interest is it's a question of fact and the use of wording and statements which try to - or self-serving statements which try to reinforce the presence or absence for purchase money security interests are not going to get you too far so it requires a factual analysis. An example is if I lend you money to go and buy a car, get a security agreement from you, I'm going to need to draw the cheque in favour of the vendor of the car not in favour of you because I don't know what you're going to do with the money after you leave my office.

So it's the factual based analysis, the need for me to be able to trace my money through to the collateral as a matter of fact which will generate a purchase money security interest. Now, if your question is going on to say, well, what are the kinds of rights, what bunch of rights do you need to fund the buyer, the debtor, to get an order to establish purchase money security interest, it's a very good question. The whole question of what rights need to be acquired to even give rise to a security interest is probably the biggest problem under PPSA.

For example, does a bare trustee in his or her personal capacity have rights in the object of the trust - the subject of the trust. Does a thief of goods have rights in those goods sufficient to found a security interest? There's going to be, I would suspect, some early cases on the extent of rights which will either give rise to a security interest at all or which will give rise to a purchase money security interest by definition, if that answers your question.

ALAN STONES: Yes, my question was more aimed at whether you saw the acquisition of ownership as a right in the context of the second category of PMSI.

STEVE FLYNN: Well, yes. I hoped I'd answered that and given that the debtor already has possession and that we are not allowed to talk about ownership. Ownership is not a meaningful concept. All a debtor is getting, once they pay for a RAMALPA thing, subject to another security interest, is the goods free of that particular security interest. I'm not sure that a title based ownership based analysis would get us that far. If there's already two security interests existing on the existing collateral, one to a ROT supplier and one to a bank, I'm not sure that the bank, simply by funding the debtor to get rid of the purchase money security interest reservation of title clause can be said to allow the debtor to acquire rights in the collateral. They've already got sufficient rights to the collateral to give rise to the two security interests by virtue of possession.

MARIETTA VAN RYN: I'm Marietta Van Ryn from Simpson Grierson in Auckland. I've got a question for Professor Collier. When you were talking about Brumark and its effect in Australia, you made the comment that if wage and salary earners were elevated to preferential status as a result of legislation, in an insolvency setting, then the results of Brumark may be otiose. I just wonder where does GST fit in in terms of those comments?

PROF BERNA COLLIER: It's a very good question. I must say I'm not a tax lawyer. I guess my awareness of GST - I'm not sure whether other people in the room - where they're at, but I lost interest in GST after the cooked chook versus raw chook debate, but it's my understanding though the tax - if you're looking at the Corporations Act, and I'm not sure if there's something in the new tax system legislation, my understanding is that the Tax Department is not a preferential creditor. They used to be until 1993. Until 1993, the Tax Department had, or the ATO, had - it was a preferential creditor, number one in fact, in respect of unpaid group tax, withholding tax and so on, but I don't think they've been reinstated in relation to - in fact, to any other tax including GST.

MARIETTA VAN RYN: Well, can I just ask you to perhaps drill down a little bit on that point because in New Zealand, of course, the legislation provides that GST comes after fixed charges but before floating charges insofar as there's not enough to pay.

PROF BERNA COLLIER: I don't think it's the case in Australia. I just don't - I don't think the Tax Department has a cut. I think that even in respect to GST - I could be wrong on this, but I'm quite sure

MARIETTA VAN RYN: So effectively unsecured creditor status.

PROF BERNA COLLIER: They are an unsecured creditor. Now, the Tax Department has a priority - I'm just trying to think what section it is. I think in a section 588F(h) of the Corporations Act, so if a company pays tax and then it's deemed to be a voidable preference because the Tax Department knows, so the

Tax Department has to refund it to the liquidator of the company which is now in liquidation and the directors are personally liable to reimburse the Tax Department. There have been a couple of cases in Australia on that but I think, apart from that, they're in the same boat as everybody else unlike in New Zealand.