Trans-Tasman Financing

Steve Edwards
Associate Director Legal
Australian Finance Conference
Sydney

Introduction

When New Zealand brought its Personal Property Security Act (PPSA) into law on 1 May 2002, it leap-frogged Australia in terms of commercial law reform. The reform of personal property security law has been on various agendas within Australia since the 1960s. Given the presence of Australian-based financial institutions in the New Zealand market, it is inevitable that the changes to secured lending brought about by the PPSA will be felt on the Australian side of the Tasman. However, before examining some perspectives on that, it is useful to provide a context.

The AFC & a Snap Shot of the Australian Market

The Australian Finance Conference (AFC) membership includes financiers who are also in the New Zealand market. In preparing this paper, I obtained feedback from a number of those members about their views on the PPSA.

To give an idea of what PPSA could cover for at least of the Australian secured lending market, a snap shot follows of the market (covering secured consumer credit, equipment finance and factoring and discounting) in Australia that covers the AFC membership and the other finance industry associations it services. Those other associations are the Australian Equipment Lessors Association, the Institute for Factors and Discounters of Australia and New Zealand and the Australian Fleet Lessors Association.

Based on Australian Bureau of Statistics Reports, the total **2001** market for equipment and motor finance, and factoring and discounting was **$A42.4 billion,** comprising –

- General equipment finance – **$A8.5 billion** (including leases, hire-purchase and commercial goods mortgage)
- Motor Vehicle finance – totalled **$A20.9 billion**, comprising:
  - Personal finance - $A9.9 billion ($A3.9 billion new cars, $A5.8 billion used)
  - Finance leases - $A2.6 billion
  - Operating leases - $A1.7 billion
  - Hire-purchase & goods mortgage - $A6.7 billion
- Factoring & discounting – turnover of **$A13 billion**.

Differing Laws

The theme of this segment of the BSLA Conference is "Trans-Tasman Financing". As a starting point I wish to go back a couple of years to the 2000 Banking Law Association (as it then was) Conference, where I posed a rhetorical question to delegates: "Can Australia and New Zealand Live with Different PPS Laws?" – to which I simply answered, "we have been". And, obviously, since 1 May, our two countries continue to do so.

To my mind, the real challenge for trans-Tasman financing will not necessarily be felt in the legal differences. They will be conceptual – almost cultural. Matt Yarnell has just provided a very useful overview of the essence of the PPSA. To most Australian lawyers, Matt has referred to concepts (especially those of attachment and perfection) that are foreign to our ears and minds (and to our clients, except those with North American or New Zealand exposure). Typically, current Australian law requires lawyers to focus attention on the form of commercial transactions. New Zealand puts aside the issue of form to give effect to the substance of the transaction. Or as was recently put to me, "title is no longer a relevant concept, rather, PPSA accords priority between competing security interests by perfection in compliance with the Act". This was reinforced by another observation made to me to the effect that Romalpa clauses no longer exist under PPSA. This absence of title retention will be revisited later in this paper when considering the effect of the PPSA on documents.

But the issue of differing trans-Tasman secured lending laws does not present the same difficulties that arise when one considers that Australia lives with differing secured lending laws across the same country. In Australia, applicable laws (if any) depend on location, nature of the transaction, the nature of debtor, the nature of collateral and constitutional law considerations; also, those laws can overlap and are driven by differing policy imperatives. In short, there is no "Australian law" on secured lending, except for those areas that lie constitutionally with the Commonwealth. This means that for trans-Tasman secured lending, there are ten potential scenarios, depending on which Commonwealth, State or Territory law (if any) is applicable, along of course with New Zealand. To illustrate the intricacy of the Australian secured lending legal regime (and some of its deficiencies) I now intend to outline the operational situation with regard to "security interests" in motor vehicles.

REVS / VSR with overlapping registration obligations and priorities

Legislation exists in each State and Territory to establish registers on which financiers can place their interests in motor vehicles and which intending purchasers can obtain information about the financial status of vehicles[1]. Variously, fair-trading agencies, consumer affairs agencies, transport departments or justice departments administer the registers.

In the most general of terms, the incentive for a financier to register its interest in a vehicle is that it can lose that interest if a vehicle purchaser buys a vehicle in which the interest has not been

[1] Both NSW and WA REVS registers also include financial interests in recreational boats, with Queensland legislation to do so enacted but not yet operational.

registered. Financial interests to be registered include interests arising under charges, mortgages, leases, hire-purchase agreements.

The registers are either known as REVS (register of encumbered vehicles) or VSR (vehicle securities registers). They are established under following legislation –

- Registration of Interests in Goods Act 1986 (ACT)
- Registration of Interests in Goods Act 1986 (NSW)
- Motor Vehicles Securities Act 1986 (Qld)
- Goods Securities Act 1986 (SA)
- Registration of Interests in Motor Vehicles and Other Goods Act (NT)
- Chattel Securities Act 1987 (Vic)
- Chattel Securities Act 1987 (WA)
- Motor Vehicle Securities Act 1984 (Tas)

Having pointed out the multiplicity of laws to achieve a "national coverage", it is pertinent to examine the elements of overlap and dual registration requirements that arise with other legislation.

The starting point is to revisit what is covering by which legislation and what goes on which register –

- REVS/VSR cover fixed charges, mortgages, leases and hire-purchase interests in motor vehicles
- the bills of sale legislation applies to charges and mortgages, and is variously administered by fair trading agencies, consumer affairs agencies, justice departments and land titles offices
- the company charges register under the Corporations Act 2001 applies to charges (fixed or floating) over company assets, and is administered by the Australian Securities and Investments Commission.

As neither the bills of sale registers nor the company charges register apply to leases or hire-purchase (because the legal ownership is with the lessor/financier), the only prospect of overlap and dual registration lies in relation to charges and mortgages.

Given this understanding, the position in Australia is as follows in relation to fixed charges and mortgages over motor vehicles–

- With the exception of Tasmania, there are no dual registration requirements concerning the bills of sale registers and the REVS/VSR services. Simple registration on a REVS/VSR register will suffice. However, in Tasmania, registration of charges and mortgages in required on both registers, otherwise the security cannot be relied upon.
- Where a company gives a fixed charge, a financier's interests are best protected by registration on both a REVS/VSR service and the company charges register. The registers do

different things however, with the REVS/VSR service focussing primarily on the protection of intending purchasers (the risk being for the financier that it will lose its financial interest unless registered) and to a lesser extent creditor priorities, and the company charges register dealing with secured creditor priorities. In practices, there is a tendency to register fixed charges over vehicles just on a REVS/VSR service, rather than on both registers, unless the secured asset is of sufficient value (e.g. over say $100,000).

Observations on Recent New Zealand Experience

Turning now to the other side of the Tasman Sea. The following observations have been sourced from operational people within financiers on both sides of the Tasman who have had responsibility for implementing the PPSA in New Zealand for their companies. They are provided in order to get a feel for what PPSA has meant and how it has been dealt with.

Benefits: Overall, the notions behind the PPSA are very commendable and I believe it would be tremendous if we had a similar outcome over here (i.e. in Australia). The benefits of a single register will not be apparent until 31 October when the transition period ends (Matt Yarnell explains the transition period in his paper). However, at the moment PPSA is a bad word because of the extra work it is creating but eventually there will be an appreciation of its advantages.

Financiers can now churn out debentures without the need for lawyers, saving a lot in time and reducing transaction costs.

Purpose: The overriding view is simple – the personal property securities register is simply a notice board directing the New Zealand community to make further inquiries and that inter-party arrangements are irrelevant in this regard.

Implementation: It is apparent that most financiers were "underdone" for the PPSA's introduction last week and there was a last minute realisation of its impact. This has lead to misinformed advice and limited understanding of the new collateral concepts and priority issues.

Our experience with transition to the PPSA has been reasonably good but a lot of work is entailed due to the need for all existing charges to be re-registered by the financier. In that regards, data printouts have been available from the old registers, but they come with heavy disclaimers about their accuracy – so to be sure, it has been necessary for financiers to go back to original security documents and start the registration process all over.

A key challenge has been to get management to realise this (i.e. PPSA) is a massive change, which has led to a lost opportunity in that financiers may not have taken full advantage to implement customer-friendly aspects.

Re-registration is something to plan well in advance if a financier is to rely on information from the mainframe systems – garbage in, garbage out. Cleansing the database could have been planned well in advance.

The entire database of a financier needs to be cleansed, e.g. to capture leases and other things not required to be registered prior to PPSA. Also, there was a need to capture dates of birth for all customers who are individuals.

Transition: The 6 month transition is too long, because for loans written during the transition period there is a need to search 3 old registers, plus the Personal Property Securities Register (PPSR).

There is a high burden to re-register existing securities within the 6 month transition period.

Registration processes: Operationally with the PPSR, extra work is created by the significant amount of additional information required to be entered on the Register, 3 to 4 times that required for the Motor Vehicle Securities Register. Unfortunately, there are numerous screens to be completed with the requirement to "go back" after completing each one. Also financiers have to make the previously unnecessary decisions as to debtor type and the correct collateral type.

Documentation: On the bright side, documentation is simplified. Securities had to be re-designed and there are not two broad security documents. Chattel mortgages and debentures become a general security agreement and individual and company instruments have been incorporated into a single specific security agreement (which extends to what could have previously been written as an equipment lease). Both types of agreement allow future advances to retain the same priority.

Completely new documents were required, in the process reducing the number from 30 to 15 – the only reason it remains to high are to satisfy the commercial preferences of particular suppliers.

An interesting development: Under PPSA, farmers have been registering their security interests in cattle sent to abattoirs, and vehicle tyre suppliers have been similarly registering security interests in tyres until paid.

What Can Be Gleaned From These Observations?

I would suggest the following thoughts might be drawn from these observations –

- The implementation of PPSA in Australia would be a significant undertaking.
- Implementation is something to be well planned to derive the most in terms of business efficiency from the PPSA
- Documentation is considerably simplified.
- PPSA will not eliminate all concerns with the current secured lending legal regime across Australia, but would seem to significantly reduce them.

- PPSA will introduce its own difficulties to be resolved (but a least it would be only one law).
- PPSA can be used creatively.
- There are significant operational and cost benefits to be enjoyed.

A Trans-Tasman Case Study

I wish to explore a situation that gives rise to –

- The question about whether a PPSA or its register should facilitate the availability of information (e.g. stolen vehicles) other than about security interests.
- To the extent that other information is available, how can it be accessed for the commercial and community benefit of both Australia and New Zealand?
- The shrinking Tasman Sea.
- Market-driven solutions.

Through various REVS / VSR registers in Australia, it is possible to obtain information about whether a vehicle has been stolen (whether or not that vehicle is affected by a security interest). That information is provided to those registers through an arrangement with police and transport authorities, and is a service provided free of charge by REVS / VSR to inquirers. The stolen vehicle information service is regarded as an important part of the REVS / VSR service and it has statutory recognition. I would expect that should a PPSA become law in Australia, a service such as this would be seen as an integral part of it, in the fashion of a one-stop shop. Consumer protection information measures such as this have been extended to include the likes of salt-affected imported vehicles and vehicles that have been the subject of confirmed odometer wind backs.

AFC member companies incur losses from time to time via the theft of prestige vehicles that are placed into shipping containers and sent overseas. Should those stolen vehicles arrive in New Zealand and be offered up a security for finance, data is available in Australia to determine by simple inquiries of a REVS / VSR service if those vehicles have been stolen. Those services are increasingly becoming available in an online format and, accordingly, could be accessed from New Zealand.

Whether or not there is a commonality of secured lending law on both sides of the Tasman Sea, there is an interest in ensuring that the stolen vehicle trade does not grow when information is available and accessible to protect financiers and their customers.

Given that Australia supports six REVS / VSR services (most of which are part of an almost-national information sharing grid), financiers saw a need for a business solution to save them dealing with up to six different administering authorities and processes. Baycorp Advantage (arising from the merger earlier this year of the New Zealand based Baycorp and the Australian based Data Advantage) offers that solution to financiers in Australia. Baycorp Advantage has now announced that it will be seeking to develop a trans-Tasman credit bureau service. Once that is bedded-down, a possible next step would be to extend the current Australian REVS / VSR business service it offers to include the New Zealand PPSR to provide to the service to both countries as an information broker.

All of this is in a state of continual evolution, demonstrating that at least potentially a market-driven solution could be developed to take some of the speed humps out of trans-Tasman secured financing, despite significantly different laws between Australia and New Zealand, and within Australia itself.

What is the AFC doing?

As a finance industry association, the AFC is dealing with secured lending and its reform at several levels within the Australian context –

- First, it participates at every opportunity when consideration of PPSA reform is on the agenda, the most recent of which was a workshop at Bond University, 25-27 April this year to further explore the policy and legal issues, based on the BFSLA draft Bill.

- Secondly, it has played a leading role (and continues to do so) over the last two decades in establishing a regime for security interests in vehicles.

- Thirdly, it has been engaged in policy and operational deliberations about security interests in aircraft and ships mortgages.

- Fourthly, it has adopted a policy this year aimed at assessing what real value bills of sale legislation (where it remains law) provides when extending finance (to non-corporate customers) on the security of a charge or mortgage over chattels. If there is insufficient value and benefit from the perspective of AFC members, especially given the controls, formality and costs involved, consideration will be given to seeking the repeal of that legislation (or at the very least its modernisation).

Conclusion

Whether or when Australia implements a PPSA, trans-Tasman secured financing will continue. Assuming for the moment that Australia does implement a PPSA (after jumping the not-to-be-underestimated constitutional and associated legal hurdles), Australia will have an enormous amount to learn from the experiences of New Zealand financiers and lawyers.

Finally, I acknowledge and thank those AFC members and their New Zealand colleagues who provided the helpful comments about their experiences in implementing the PPSA.