



NSW Legislative Council Hansard (Proof)

Security Interests in Goods Bill

Extract from NSW Legislative Council Hansard and Papers Tuesday 11 October 2005 (Proof).

Second Reading

The Hon. TONY KELLY (Minister for Justice, Minister for Juvenile Justice, Minister for Emergency Services, Minister for Lands, and Minister for Rural Affairs) [8.01 p.m.]: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

Leave granted.

The Bills of Sale Act 1898 and the Liens on Crops and Wool and Stock Mortgages Act 1898 are two of the oldest statutes still in use in NSW.

Both Acts deal with loans that are advanced by using goods as security.

The first Act is applicable to loans over personal property, such as the stock in trade of a business or a personal art collection, whilst the second Act deals with agricultural goods such as stock, a growing crop, or wool still on the sheep's back.

The Security Interests in Goods Bill will repeal both Acts and replace them with one combined piece of legislation.

This new legislation contains a number of substantial improvements, which will ensure that these types of financial instruments continue to evolve with the modern financial marketplace.

The Security Interests in Goods Bill introduces the concept of a security interest which can be created over goods to secure the payment of a debt or other pecuniary obligation.

The bill makes a distinction between security interests granted over goods generally, and those granted over agricultural goods.

In outlining some of the substantive changes introduced, I will look at these two types of securities separately, starting with securities over agricultural goods.

The Liens on Crops and Wool and Stock Mortgages Act was originally introduced to validate securities granted over assets such as wool and crops.

At common law, it is not possible to grant a mortgage over property not yet in existence.

A farmer looking to raise money to plant a crop or maintain a flock of sheep will need to secure a loan before the asset has yet been produced.

This is a problem still faced by farmers today and explains the need for this legislation.

The Security Interests in Goods Bill replaces crop liens, wool liens and stock mortgages with a new security instrument known as an "agricultural goods mortgage".

The bill identifies three different types of agricultural goods mortgages, each with its own specific characteristics.

The three mortgages are:-

- A crop mortgage;
- A stock mortgage (which may also include a wool mortgage); and
- An aquaculture fish mortgage.

Traditionally, crop mortgages have been used primarily for crops of grain and cereal, such as wheat, barley and rice.

These types of crops are annual products and consequently a crop lien has always been limited to a term of one

year.

However, given the diversification in modern agriculture, the new Bill will expand the time frame for crop mortgages to a maximum of 5 years, so that the cultivation of non-traditional crops, such as olives, can be undertaken.

The new provisions will make it clear that, in addition to a landowner, a person who has exclusive possession of land or the holder of a Western Lands lease may also grant a valid crop mortgage.

New provisions have also been included in the Bill to address the needs of sharefarmers.

A sharefarmer will be able to grant a valid crop mortgage, but only with the written consent of the owner or lessee of the land.

The legislation also deals with the entitlement to profits derived from crops that are subject to both a crop mortgage and a sharefarming agreement.

In this regard, the right of a sharefarmer will have priority over the security interest of the mortgagee unless the sharefarmer is a party to the mortgage.

Two provisions of the present legislation will be carried forward in the new Act.

The first of these will require a mortgagee under a crop mortgage over land that is mortgaged to another person, to pay to that person a certain amount of interest due under the land mortgage, before exercising a power of sale over the crops.

The second provision will require a mortgagee under a crop mortgage over land, which is subject to a lease, to pay the lessor a certain amount of rent due under the lease, before exercising a power of sale over the crops.

Substantial amendments have been made in the area of stock mortgages.

At present, a stock mortgage can only be granted in respect of sheep, cattle or horses.

The Bill gives the term "stock" a much wider definition.

Some of the more exotic species of animals, such as ostriches, llamas and alpacas have been added to the present definition, along with more traditional species, such as goats, swine and poultry.

A stock mortgage may be granted over stock, or it may be granted just over the wool produced by the stock.

It will also be possible for a stock mortgage to cover both the stock and the wool.

Where a stock mortgage relates only to wool it can be referred to as a wool mortgage.

The definition of "wool" has also been expanded to mean the natural fibre from the fleece of sheep, goats, alpacas, llamas or any other kind of stock producing fleece that can be shorn.

The expanded definition will allow more farmers to use this type of security in the course of their businesses.

Unless a stock mortgage expressly provides otherwise, it will extend to any progeny of the stock, any sperm and embryos of the stock, and to any stock of the kind identified in the mortgage that is acquired after the mortgage is granted.

Under proposed section 12 (4) of the new legislation, stock that are mortgaged may be described in the mortgage by reference to the number of stock and the brand, earmark or other mark on them, or in another way that reasonably allows the stock to be identified.

During the consultation process on the Bill, the NSW Farmers' Association suggested that there was a need for a mortgage over farmed fish.

The proposal has been adopted and, as the particular features of a stock mortgage were not all relevant to fish, a new category of mortgage has been introduced for use by farmers engaged in the cultivation of fish.

This type of security instrument will be known as an aquaculture fish mortgage.

The definition of fish is to have the same meaning as is used in the Fisheries Management Act 1994.

This definition includes not only marine, estuarine or freshwater fish but also other aquatic animal life such as oysters and crustaceans and even some types of beachworms.

An aquaculture fish mortgage can, however, only be granted in respect of fish cultivated, kept and harvested by a person with a view to sale.

It will not apply to wild caught fish or to fish kept in a pet shop.

The fish that are comprised in an aquaculture fish mortgage may be described by reference to the species of fish, or in another way that reasonably allows the fish to be identified.

Proposed section 17 and Schedules 1-3 of the new Act set out the essential elements of a crop, stock and aquaculture fish mortgage, as a guide to the preparation of these instruments.

Changes may be made to the Schedules by regulation.

Various provisions of the proposed legislation will extend the period for the compulsory registration of "agricultural goods mortgages" to 45 days instead of the present 30 days.

Proposed sections 8, 14 and 16 will confer rights and remedies on mortgagees in the event of a default under an agricultural goods mortgage.

An agricultural goods mortgage will not be extinguished or otherwise prejudicially affected by the death, bankruptcy or insolvency of the mortgagor; or the sale of, or the creation of a mortgage or other encumbrance over, the goods or land, or water source to which the mortgage relates.

However, this provision is subject to the Commonwealth Bankruptcy and Corporations law protecting secured creditors.

Proposed sections 20-22 will allow the variation, renewal and assignment of agricultural goods mortgages.

Under proposed section 32, it will be an offence for a mortgagor of an agricultural goods mortgage—or an agent of the mortgagor—to do certain things that defeat, destroy or prejudice the security interest created by the mortgage, unless the mortgagor or person has a reasonable excuse for doing so.

The maximum sanction for the offence is 100 penalty units or imprisonment for 2 years, or both.

The final aspect of agricultural goods mortgages that I need to address is the interaction of the present Bill with the Commonwealth Corporations Act 2001.

Because the Commonwealth has exclusive powers in regard to corporations, any charges that are granted by companies as stock mortgages, or liens on crops or wool, must be registered under Part 2K of the Corporations Act rather than the New South Wales legislation.

This state of affairs is to continue under the proposed legislation, and arrangements have been made with Commonwealth officials to ensure that they have appropriate regulations in place at the commencement of the Security Interests in Goods Act.

I shall now deal with mortgages granted over non-agricultural goods.

A mortgage of chattels, traditionally known as "a bill of sale", has always taken the form of an absolute transfer of the goods mortgaged, with a provision allowing for the re-transfer of the goods upon repayment of the debt.

The bill of sale would also have contained a provision allowing the borrower to retain possession of the goods, despite their complete legal transfer to the lender.

The first Act passed relating to bills of sale in New South Wales was called "an Act for preventing Frauds upon Creditors by secret Bills of Sale of personal Chattels."

The aim of the Act was to prevent borrowers from holding themselves out as prosperous, when in reality all of their possessions had been transferred or mortgaged to another.

For this reason the Act did little to facilitate financial transactions, and instead imposed an overly prescriptive and cumbersome regime on those looking to borrow money on the security of goods.

A further problem with the Bills of Sale Act is that it requires instruments to be registered within strict time frames and imposes elaborate procedures for signing the documents.

When a Discussion Paper was circulated outlining proposals for reform of the law on bills of sale, there were some respondents who suggested that the legislation should be repealed completely.

Both Victoria and South Australia have repealed their equivalent legislation.

Most respondents, however, saw the benefits of retaining a Register in which bills of sale and other security interests in goods could be recorded.

It was therefore decided to preserve the bills of sale Register, but remove as much of the formality as possible.

The Bills of Sale Act makes a distinction between two different types of bills: those given by traders, known as "trader's bills of sale" and all other bills, commonly known as "ordinary bills of sale".

With greater consumer protection provided by alternative legislative means, and more sophistication in the commercial financial market place, there is no longer a need to treat bills of sale differently, whether they are granted by a trader or an individual.

The proposed legislation will thus do away with the artificial distinction between traders and ordinary bills of sale, greatly simplifying procedures in the process.

The term "bill of sale" itself will be replaced with the more up-to-date concept of "security interest in goods".

A security interest in relation to goods will be defined as being "an interest reserved or otherwise created over goods by way of security for the payment of a debt".

A security interest may be created under a bill of sale, mortgage, trust or power.

The definition of "goods" will remain largely unchanged.

"Goods" means personal chattels, fixtures or other things capable of complete transfer by delivery, whether immediately or at any future time.

By this definition "goods" can include goods to be acquired by the borrower after creation of the security interest, provided that the goods have been adequately described in the security instrument.

The current legislation requires that all bills of sale be registered.

However, under the new Bill the registration of security interests in goods will be optional, except in the case of "agricultural goods".

The benefit of registration will be priority.

A registered security interest in goods will generally have priority over unregistered security interests over the same goods, and will rank in priority ahead of security interests registered subsequently.

By using the Register to ensure priority, lenders will be encouraged to register their interests, rather than being compelled to do so.

A security interest that is not registered, either deliberately or through inadvertence, will not be rendered invalid under the new legislation.

A bill of sale registered under the current legislation must be renewed every 5 years to retain its validity against certain third parties.

The banking sectors has advised that loans made to small business typically have a 10 year term, making the requirement to renew every 5 years an unnecessary impost.

Under the proposed legislation the period of registration will not be limited and there will be no need to renew it.

The Security Interests in Goods Bill also makes provision for the registration of a variety of transactions that affect a security interest.

For example, it will be possible to register a variation, assignment or discharge of a registered security interest.

The proposed Act will not interfere with the current system for registration of security interests in motor vehicles and boats.

The Office of Fair Trading will continue to operate the Register of Encumbered Vehicles (REVS) which provides a central system enabling car buyers to check, not only whether a car is encumbered but whether it has been reported as stolen or recorded as de-registered.

Security interests registered under the proposed Security Interests in Goods Act will be recorded in the General Register of Deeds kept by the Registrar-General.

Searches of the General Register are not currently available on-line and are required to be made by attending the Office of the Registrar-General.

However, as part of the current reforms, the Registrar-General will make searches in respect of security interests in goods available electronically, via the internet.

The reforms being made by this Bill are clearly significant.

Some of these reforms have been put forward by the registration and legal staff in the Registrar-General's Office.

Others have come from various interest groups and individuals, such as the Rural Issues and Property Law Committees of the Law Society of New South Wales, Rachael King and Joe Sullivan of the NSW Farmers' Association, John Snell of the Westpac Banking Corporation and L E Taylor of the Commonwealth Bank.

The contribution made by these, and others who furnished written submissions to the Registrar-General, have proved to be invaluable.

Finally, I must thank the Parliamentary Counsel for updating the legislation and providing a clear explanation of its terms.

I commend the Bill to the House.