

City Insolvency Discussion Group



Chartered Accountant



CHARTERED ACCOUNTANTS
AUSTRALIA • NEW ZEALAND

Wednesday, 1 June 2016

Peak Indebtedness and Preferences – A New Zealand Experience

Presented by Ray Christensen – Zilkens Lawyers

And

Dealing with Landgate – Practical Issues for Trustees

Presented by Rob Wallman – HLB Mann Judd (Insolvency WA)

Running balance defence and
the Peak Indebtedness rule:
New Zealand says we're doing it
wrong

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s 588FA(3), *Corporations Act* (Aus)

(3) Where:

- (a) a transaction is, for commercial purposes, an integral part of a continuing business relationship (for example, a running account) between a company and a creditor of the company (including such a relationship to which other persons are parties); and
- (b) in the course of the relationship, the level of the company's net indebtedness to the creditor is increased and reduced from time to time as the result of a series of transactions forming part of the relationship;

then:

- (c) subsection (1) applies in relation to all the transactions forming part of the relationship as if they together constituted a single transaction; and
- (d) the transaction referred to in paragraph (a) may only be taken to be an unfair preference given by the company to the creditor if, because of subsection (1) as applying because of paragraph (c) of this subsection, the single transaction referred to in the last-mentioned paragraph is taken to be such an unfair preference.

s 292(4B) *Companies Act*, (NZ)

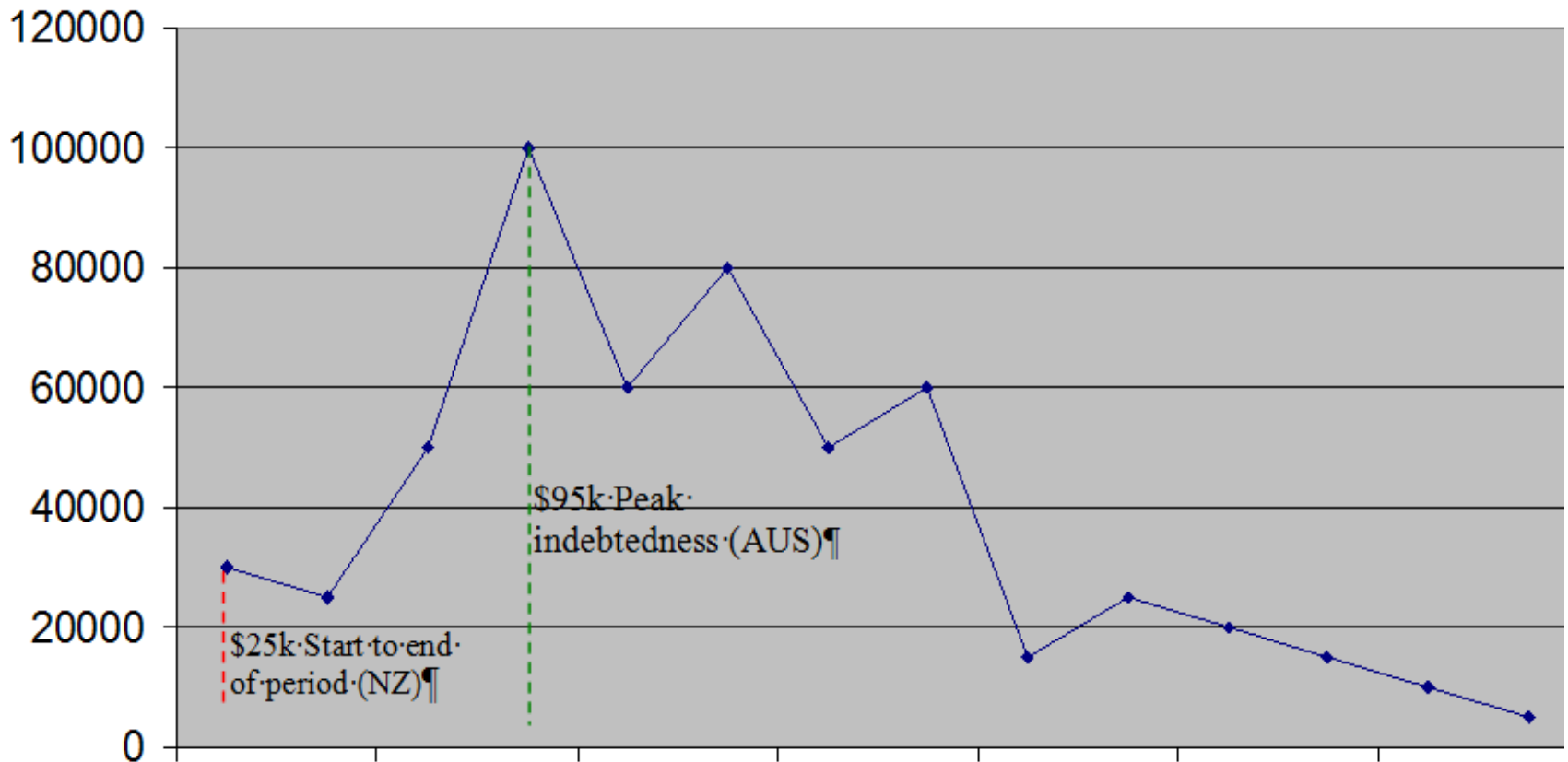
(34B) Where:

- (a) a transaction is, for commercial purposes, an integral part of a continuing business relationship (for example, a running account) between a company and a creditor of the company (including ~~such~~ a relationship to which other persons are parties); and
- (b) in the course of the relationship, the level of the company's net indebtedness to the creditor is increased and reduced from time to time as the result of a series of transactions forming part of the relationship;

then:

- (c) subsection (1) applies in relation to all the transactions forming part of the relationship as if they together constituted a single transaction; and
- (d) the transaction referred to in paragraph (a) may only be taken to be an ~~unfair preference given insolvent transaction voidable~~ by the ~~company to the creditor liquidator~~ if; because the effect of applying subsection (1) ~~in accordance with as applying because of~~ paragraph (c) ~~of this subsection is that;~~ the single transaction referred to in ~~the last mentioned~~ paragraph (c) is taken to be ~~such~~ an ~~unfair preference~~ insolvent transaction voidable by the liquidator.

Graph of Aus v NZ positions

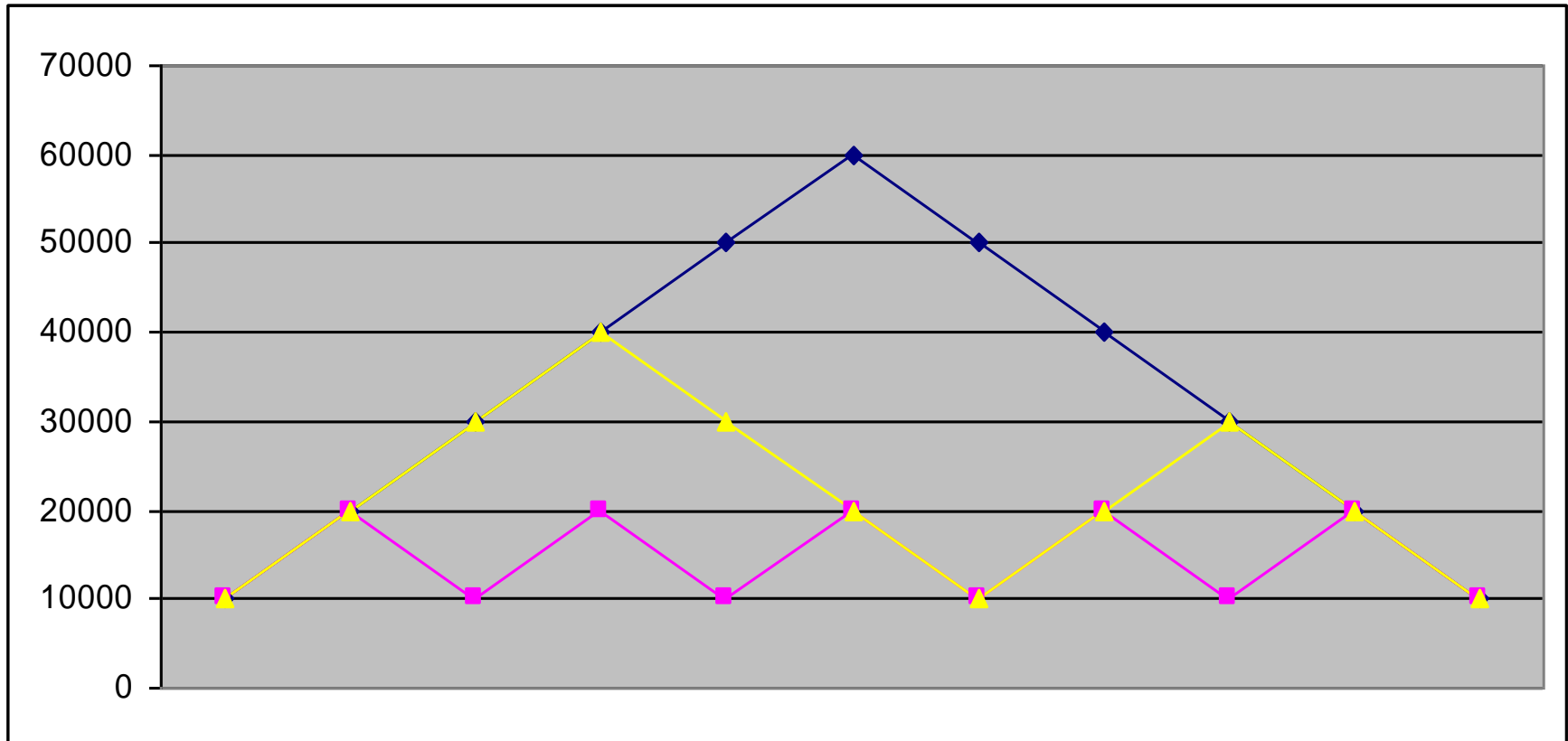


Case citations

- Peak Indebtedness rule: *Rees v Bank of NSW* (1964) 111 CLR 210
- Running balance a/c defence: *Richardson v Commercial Banking Co Sydney Ltd* (1952) 85 CLR 110
- NZ challenge to Peak Indebtedness rule: *Timberworld v Levin* [2015] NZCA 111

Australian Credit Forum example

- 3 companies, each supply and get paid \$50k but with different timings



Questions and discussion

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Dealing with Landgate – Practical Issues for Trustees

- Bankrupt Estates and/or Deceased Estates
- Process to be followed:
 - Apply to Landgate to register Trustees name on title
 - Obtain a letter of consent from Financial Institution
 - Title to be produced at Landgate
 - Withdrawal of caveats
 - Application to be accepted by Landgate
 - Landgate to re-issue title (with Trustees names included)
 - Title (with Trustees names registered available to settlement)
- Can expedite application to Landgate
- Need to have co-operation of Financial Institution

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Next session – Wednesday, 6 July 2016 at 8am

Topic

**Mining Tenements in the Insolvency Context
Brett Molony – Price Sierakowski Lawyers**