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11 December 2008

Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

BY MAIL AND EMAIL

Dear Sir/Madam

Inquiry into the Personal Property Securities Bill 2008
Submission on the Exposure Draft (10/11/2008) of the Personal Property Securities Bill 2008

Thank you for the opportunity to comment on the Exposure Draft (10/11/2008) of the Personal Property Securities Bill 2008 (PPS Bill) and the Revised Commentary released on 4 December 2008.

We set out below our comments on the PPS Bill in relation to investment instruments (eg shares, interests in managed investment schemes, debentures, stocks or bonds issued by a government, derivatives etc).

For completeness we enclose the submissions we made to the Personal Property Securities Branch of the Attorney-General's Department – many of those observations apply to the Exposure Draft (10/11/2008) of the PPS Bill.

Please treat this entire submission as confidential and do not make it publicly available.

1. Background

About Computershare

Computershare Limited together with its related bodies corporate is a global leader in securities registration, employee equity plans and other specialised financial and communication services. Many of the world's largest corporations employ our innovative solutions to maximise the value of their relationships with investors, employees, customers and members.

One of our businesses, Computershare Investor Services Pty Limited, principally establishes and maintains registers of security holders for companies and registered Managed Investment Schemes (MIS) in accordance with the Corporations Act 2001 (Corporations Act). Generally these entities are listed on the Australian Securities Exchange. The registry function includes the recording of the details of registered security holders – notably their name, address and holding balance.

2. Exclude investment instruments from the PPS Bill

We note that the Commentary to the May 2008 PPS Bill at 3.10 stated that:

"It is likely that the regulations would exclude lending arrangements in relation to investment instruments from the definition of security interest."

We support this proposal.

We expressed strong support for the exclusion of investment instruments from the PPS Bill in our 8 February 2008 submission to the Attorney-General's Department.

Australia currently has an investment property system which is well established and adequately deals with investment property. The law recognises legal ownership and this is recorded in the relevant issuer's register. Australia also has a well developed margin lending system.

The PPS reform would add an additional layer of complexity on top of the current system (which the average security holder in our experience already finds rather bewildering) and is not supported.

Interests in companies and registered MISs are clearly maintained, subject to national legislation and regulatory bodies, and are cost and time effective. As noted, even with the current level of clarity and certainty surrounding the registration of such interests, investors can still find understanding the regime for the legal transfer of interests difficult to understand. To make these systems more complex, as the PPS reforms would entail, would not, in our view, promote greater investor confidence or certainty in the securities markets.

Further, in order to meet the levels of disclosure and monitoring required under the Corporations Act and other instruments (relevant ASIC policy, for example), the PPS reform proposed would significantly increase issuer and registrar costs.

3. If PPS Bill is to apply to investment instruments

The following observations are made on the basis that it is decided that the PPS Bill will cover security interests in respect of investment instruments.

3.1 Clear guidance in Commentary required on how PPS Bill applies to investment instruments

It is critical that the securities industry is clear on how the PPS Bill will work in relation to investment instruments. This is especially the case if PPS legislation covering investment instruments encourages new lending practices in relation to investment instruments.

We note that the Government's June 2008 Green Paper on Financial Services and Credit Reform notes at page 29 that *"... with the stock market moving into a time of more uncertain growth, there has been some recent concern surrounding retail clients' understanding of how their margin loan product operates."*

If the PPS Bill is to apply to investment instruments it is important that it operate as a replacement of the current provisions contained in the Corporations Act and consistently with market practice that

has evolved, particularly since the creation of the concept of paperless securities and paperless securities transfers, for the taking of security over investment instruments.

We suggest the Commentary contains some worked examples – this will give the grantor, secured party, issuers, brokers, registrars and others in the securities industry clarity on how the legislation is intended to work in practice.

An important consideration in this context will be to ensure that security provision over investment instruments is a matter between the grantor and security provider, and does not involve issuers of securities or their registries. Involvement of issuers in private security arrangements will detract significantly from current market efficiencies, which are world class. It is important that best in class efficiency is maintained to ensure the ongoing competitiveness of Australia's financial markets.

3.2 Default – making payments owed on investment instrument to secured party – exclude investment instruments

We note that under section 159(1) and (2) if an investment instrument provides an obligation to pay the grantor and the grantor defaults, the secured party may do either or both of the following:

(a) give a written notice to a person mentioned in paragraph (1)(b) that sets out that the person must pay the secured party the amount owed to the grantor***;***

(b) seize any proceeds of the collateral to which the secured party is entitled under section 68.

Under section 159(3) ***a person who receives a notice must pay, to the secured party, any amount that the person owes to the grantor before the end of 5 business days after the later of:***

(a) the day the notice is received; or

(b) the day the amount becomes due and payable.

We believe that this clause will impose an unnecessary and unworkable obligation on issuers if it is intended to apply to dividends/distribution payments on investment instruments.

We strongly recommend that investment instruments that provide an obligation to pay the grantor be excluded from section 159. This is particularly the case with shares and registered interests.

This is because it will be difficult to make this work in practice given that large number of distributions made by issuers. The compliance costs for issuers will far outweigh the funds retrieved by the secured party given that usually distributions are for quite small amounts.

In Australia during the 2006/2007 financial we made approximately 857 payments comprising 1.7 million cheques and 11.7 million direct credits. In addition, approximately 7,800 fixed interest payments were made. In addition there are other registrars in Australia who would also have made a significant number of payments.

The issuers' obligation to make a distribution to a person such as a dividend only arises when the dividend is declared by the issuer or the payment date for a dividend authorised by the issuer occurs.

In each case the person must hold the shares on the record date, whether or not the person continues to hold the shares (or any of them) on the payment date. Accordingly, the notice would have to be provided by the secured party to the issuer after each dividend. The issuer would have to record the secured party's bank account on the holding (or record the secured party's address on the holding in order to pay by cheque) and then remove the secured party's details immediately after the payment and reinstate the holder's payment details.

This process would necessarily be a manual process which would be costly and time consuming to perform. In addition, there is a risk errors will be made resulting in distributions being paid to the wrong bank account.

We note that under section 160(4) and (5) a secured party must give written notice to the grantor of any action taken under section 159(2) before the end of 5 business days after the action is taken or if the grantor has given a written notice to the secured party specifying a shorter period to apply – before the end of that period. Accordingly, there is a very high likelihood of the grantor calling the issuer (or their registrar) to enquire why their distribution was not paid either by cheque or into their bank account. We find that holders are well aware when to expect payments to be made into their bank accounts and they often plan to use those amounts on the day received.

Accordingly, investment instruments should be excluded from section 159. If a secured party wishes to receive distributions they should simply structure their security arrangements accordingly, by being, or having their nominee, registered as the holder of the investment instruments.

3.3 Default - secured party seizing collateral – secured party acts may take steps to reflect the transfer of title on books or registers that evidence title to the collateral

Where the grantor defaults we note that if the secured party has perfected a security interest in collateral by possession or control (or by any other method) and the secured party gives a notice to the grantor then the secured party is taken to have seized the collateral (sections 161 and 162).

The secured party may dispose of the collateral (section 166) or retain the collateral (section 172).

Section 179 states that:

"A secured party who is entitled to dispose of, or retain, collateral under section 166 or section 172 may take any steps necessary to reflect the transfer of title resulting from the disposal or retention, if the grantor could take those steps to reflect a transfer of title to the collateral."

We suggest that section 179 be amended to clearly state that the secured party who is entitled to dispose or retain collateral is, by force of the section, appointed the grantor's agent.

This is because the issuer and its registrar need to be certain it is legally entitled to take instructions from the secured party and amend the register. Currently the legal ownership of investment instruments are only transferred on instructions from the legal holder or their attorney – a certified copy of the power of attorney is sighted before instructions from the attorney are acted upon.
The consequences of transferring the legal ownership of investment instruments without authority has serious implications for the issuer and their registrar.

For example, section 175(1) of the Corporations Act provides that the company or registered scheme or a person aggrieved may apply to the court to have the register corrected. If the Court orders the company or scheme to correct the register it may also order the company or scheme to compensate a party to the application for loss or damage suffered (section 175(2)).

In the case of shares held on an issuer's issuer sponsored sub-register, where the secured party lodges an off market transfer form to transfer the shares as agent to the secured party or other party an explanation of the circumstances will have to accompany the off market transfer form. This is because instructions are only taken from the legal holder of the shares or their attorney. Section 1071B(2) provides that the company must only register a transfer of securities if a proper instrument of transfer has been delivered to the company (failure to comply with this subsection is an offence under section 1311(1) of the Corporations Act).

On current drafting of the PPS Bill it seems that the issuer and their registrar will have to look behind the arrangement to ensure that the secured party can as a matter of fact (rather than by force of law) act as agent before the off market transfer form is processed.

The types of matters the issuer and their registrar would have to address will include:

- does the secured party have an entitlement to dispose or retain collateral under section 166 or section 172 ie has the grantor been given a seizure notice?

- is there a higher priority interest which has given the secured party notice of that interest under section 165?

Given that it is likely that investment instruments will become a common form of security and given the large number of holders on a register, this will be a time consuming and expensive task for the issuer and their registrar.

Accordingly, we suggest that detailed consideration be given to the following.

1. The secured party being required to provide the issuer with a notice in a prescribed form and a copy of the seizure notice provided to the grantor to confirm that it is by force of the section acting as agent (this would be akin to a holder appointing a power of attorney in which case the issuer requests to sight the power of attorney before acting on instructions of the attorney).

2. The PPS Bill providing that if the issuer and its registrar act in good faith based on information provided by the secured party then no action can be taken by the grantor or any other party (eg a buyer) against the issuer or their registrar under the Corporations Act.

3.4 PPS Register – exclude investment instruments

We note that the Revised Commentary at 10.3 states that all security interests in personal property would be registrable, regardless of the form of the security interest. We also note that a security interest perfected by control would have a priority over a security interest that is perfected by any other means (section 100(3)). Accordingly, registration would be an inferior way of perfecting a security interest.

If investment instruments are subject to the PPS regime, we strongly suggest that investment instruments are not registrable as it would add an extra layer of complexity to the securities industry

and make it very difficult for issuers and registrars to identify who has the ability to act in relation to investment instruments.

3.5 Investment entitlements

We see from the Revised Commentary that the definition of 'investment entitlement' has been reframed and it now focuses on the rights that arise from the crediting of a financial product to a financial product account (B.26).

Investment entitlements are defined in section 54(1) as:

*"An **investment entitlement** is the rights of an account holder of an investment entitlement account that result from crediting an interest in a financial product to the account."*

We also note that in the Glossary under 'Investment entitlement' that the rights include but are not limited to dividends and voting rights.

It seems that this would mean that under section 48 a secured party would have control of an investment entitlement only if there is an agreement in force between the secured party, the grantor and the investment entitlement intermediary who maintains the account to the effect that the intermediary:

(a) must not comply with instructions in relation to the investment entitlement given by the grantor without consent of the secured party; and

(b) must comply with the instructions of the secured party in relation to the investment entitlement.

We welcome the clarification that a registrar is not an 'investment entitlement intermediary' (section 54(5)).

We further note that the definition of an investment instrument does not include an investment entitlement (section 39(2)(b)).

3.6 Liens

We note that section 6(b) and (c) provide that the PPS Bill does not apply to:

"(b) a lien, charge, or any other interest in personal property, that is created, arises or is provided for under a law of the Commonwealth (other than this Act), a State or Territory, unless the person who owns the property in which the interest is granted agrees to the interest;

(c) a lien, charge, or any other interest in personal property, that is created, arises or is provided for by operation of the general law;"

We noted in our 8 February 2008 submission that we suggest that the PPS legislation should also not apply to liens created under the constitutions of issuers (eg in relation to partly paid securities). We still hold that view.

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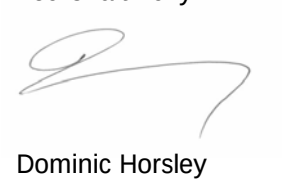
We would be happy to discuss any matter raised in this submission. Please contact me by email (dominic.horsley@computershare.com.au) or telephone (Ph 03 9415 5162).

Yours faithfully



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