# Personal Property Securities (Corporations and Other Amendments) Bill 2010 Submission dated 21 April 2010

## 1. Introduction

We are grateful to the Senate Standing Committee on Legal and Constitutional Affairs for giving us the opportunity to submit comments on the Personal Property Securities (Corporations and Other Amendments) Bill 2010 ("**Bill**") and the impact of the amendments it makes to the Personal Property Securities Act 2009 ("**PPSA**").

We provided a submission to the Attorney-General's department on a draft of the Bill. Most of the comments in our submission have not appeared in the drafting.[1] There also remain a significant number of other comments from previous submissions on the amendments to the Corporations Act and the PPSA itself that we believe should be addressed. However, in this submission we will concentrate on the key points concerning the amendment legislation.

## 2. Summary of main points

(a) ***The transitional provisions*** are designed to give holders of existing security interests 2 years to perfect them by registration, by deeming them to be perfected for that period. They are also intended to ensure that transitional security interests which will be migrated from existing registers retain the priority they had prior to migration. In many cases, the transitional period, and the protection afforded by migration, may be illusory, as secured parties will in any event need to register or take other steps to have full protection. This will create a significant workload for financial institutions.

For example, if a grantor tries to sell or lease the collateral, the amendments to ***section 52*** will treat the transitional security interest as if it were unperfected and cause the transitional security interest to be stripped away. The only way a secured party can protect itself against this risk is to register immediately. The application of this rule to lessors and other 'secured parties' under arrangements that are not currently treated as security interests will be particularly harsh.

Further, there are a number of other rules which will apply to transitional security interests during the transitional period (and in the case of migrated security interests, immediately after they are migrated), which will mean that the holders of such security interests will need to take extra steps to protect their security.

(b) ***Sections 164 and 165*** should not render ineffective security interests which are "seriously misleading" when the information was migrated from another register.

[1] We provided comments on the amendments to the Corporations Act in our submission dated 27 January 2010. We also provided separate comments on the amendments to the Personal Property Securities Act 2009 as these amendments were set out in a separate bill at that time.

(c) ***Holders of current all assets charges prejudiced*** Currently, a key part of the operation of 5.3A of the Corporations Act dealing with voluntary administrators is the ability of a holder of a charge over all or substantially all of the assets of the company to appoint a receiver within a short decision period after the appointment of a voluntary administrator, or to appoint an administrator itself. We are concerned that the extension of the concept of "property" of a company in ***sections 436C and 441A*** of the Corporations Act may mean that many holders of existing fixed and floating charges as currently drafted (and arguably, holders of future security interests over all the assets of a company) will lose that right. It is important that the ability to enforce be preserved where a person holds security over all or substantially all of the property *owned* by a company.

(d) ***Voluntary administrator's automatic non-disclaimable liability for leases*** The amendments to ***section 443B*** mean that a voluntary administrator becomes personally liable for payment of amounts under leases which are treated as security interests, giving effectively the holders of leases privileges not enjoyed by the holders of other security interests. The changes also make it difficult for the voluntary administrator to avoid that liability.

(e) ***Example of description in Section 151***. While having an example can be a great help, the example given appears contrary to the wording of the section and we are very concerned that the description will encourage parties to say on the register that they have security over "all assets" even though they have security only over a specified class. This makes the register misleading, cumbersome, and very difficult for searching parties to determine what is the true position.

(f) ***Vestigial need for ADI to register security over ADI Account Section 340(2)*** in its operation unintentionally means that an ADI will need to register its security interest in an ADI account with it in order to protect it fully.

(g) ***Austraclear and CHESS register unclear*** The position of securities in Austraclear and the CHESS register needs to be clarified. As CHESS operates just the share or securities register of the company which issued the relevant shares or securities and there is no real intermediary or separate register, shares and other securities on CHESS should be regarded as Investment Instruments and not disintermediated securities even though it is operated by a CS facility licence holder(see ***section 15***) and the control provisions applying to investment instruments (in section 27) are broader than the provisions relating to disintermediated securities in (section 26) and match current market practice, whereas as those in section 27 may not.

(h) ***Execution creditors given new priority. Section 74*** in its current drafting considerably weakens the position of secured creditors, in that it gives execution creditors priority over security interest to the extent they relate to goods that attach after the execution order is made.

(i) ***Vesting provisions on insolvency under the Corporations Act in item 183 of Schedule 1***

(i) The new section 588FL(2)(b)(ii), in order to operate as intended, should be amended so that the registration "clock" ticks for foreign security interests from the time registration could be required under Australian law. Instead of just referring to the time that a security interest first became enforceable against third parties under the law of Australia, it should refer to the later of that time and the time that under Part 7.2 of the PPSA, the law of Australia first governed the validity, perfection and effect of perfection or non-perfection of the security interest.

(ii) Section 588FL(3) applies where registration is required under foreign law. Section 588FL(3)(a) and (c)(iii) should be amended in similar fashion to (b)(iii)so that it is consistent with part 7.2 of the PPSA, and only looks at the effect of foreign law when part 7.2 says that it should.

(iii) Sub-section (3) should not apply where the security interest is registered on the PPSA register.

(iv) Finally sub-section (3) should not apply where a foreign law does provide for the public registration of the security interest, but the security interest is not required to be registered under that foreign law n order to be effective. For example, the foreign law may not provide for vesting in insolvency or may provide for perfection by some other means that has been satisfied (eg because the secured party has possession or control or their equivalent).

(j) ***Dealings subject to security interests*** The amendments to ***section 32*** do not do enough to preserve a security interest where the dealing is expressed to be subject to the security interest.

Similarly, the extinguishment rules should not apply where the dealing that would otherwise attract them is expressed to be subject to the security interest. The law should not override the parties' express intentions regarding the survival of security interests.

(k) ***In the amended section 6(2)(c) of the PPSA***, to correct an apparent error, the words "intangible property that consists of" should be removed as chattel paper is financial property which is expressly excluded from the definition of Intangible property.

## 3. Amendments relating to the transitional period

The transitional provisions are designed to allow a period of 24 months after the registration commencement time for existing security interests to be registered. This is designed to avoid a rush, and also to avoid significant costs, to avoid the need, as one banker has put it, to "employ thousands of back packers" to attend to the urgent registration of hundreds of thousands of security interests.

The transitional provisions are also intended to ensure that transitional security interests which will be migrated from existing registers retain the priority they had prior to migration (see the Explanatory Memorandum to the Bill at [7.5]).

A number of provisions weaken this.

### 3.1 Section 52

In particular, item 46 of Schedule 2 of the Bill will amend section 52 so that, in a contest between the holder of the security interest and a buyer or lessee for new value, transitional security interests over proceeds, goods or negotiable documents of title are deprived of the benefit of the 24-month perfection under the transitional provisions, and treated as unperfected.

That means the holders of such security interests will need to register immediately to protect them and will not be able to rely with confidence on the transitional provisions. In the case of lessors, who currently frequently do not need to register and would be protected by reason of holding legal title, the application of this rule is particularly harsh because they will be faced with a radical change to their security position from the registration commencement time.

This position seems anomalous with the existing rights of security holders and the stated transitional protection purportedly offered by the PPSA.

### 3.2 Early application of rules requires early protective measures

There are a number of other rules which will apply from the registration commencement time. While it may be consistent as a matter of policy to apply them immediately to transitional security interests, the result is that they will force the holders of transitional security interests to perform a great deal of work in a short time frame to check whether they need to take extra steps to preserve their security interest, and to perform those steps.

We suggest that consideration be given to providing that such rules do not apply to transitional security interests during the transitional period.

#### (a) Serial numbered collateral

If a transitional security interest is over serial numbered collateral and the security interest is not registered with the serial number for that collateral, a buyer or lessee of the serial numbered collateral may take the collateral free of the security interest (s44(1) of the PPSA). Similar rules apply in relation to motor vehicles (see s45 of the PPSA).

This poses risks for transitional security interests which will be migrated from existing registers because many of these registers will not record the required serial numbers. For example:

- Many existing all assets charges which have been registered on the ASIC Register of Company Charges will not include serial numbers for serial numbered collateral. Such charges are registered with a Form 309. The Form 309 requires a description of the "property charged" but there is no requirement to include the

relevant serial number. It is possible that the charge which is lodged with the ASIC form may include the serial number (for example, this may be more likely in relation to aircraft or intellectual property) but in many cases it will not (for example, this is likely to be the case in relation to motor vehicles).

- Security interests recorded on vehicle security registers such as REVS and VicRoad currently provide for a VIN, chassis number and registration number to be recorded on the register. For the registration to be effective, it is only necessary for one of these to be accurate. As a result, where the secured party only has one of the relevant numbers, they will often insert dummy data (such as 0000) so that all the fields required for registration are completed.

If these security interests are migrated without the serial numbers, other persons with competing interests may take free of those security interests. In order to protect such security interests against the "taking free" risk, the secured parties would need to collect the relevant serial numbers and register them (and verify that all existing serial numbers they have recorded on existing registers are correct). This would need to be done before the registration commencement time but it is not clear whether this is even possible for all registers (for example, it is not possible to update an ASIC registration to include serial numbers). It is also not clear whether secured parties could provide serial numbers as part of the migration process.

**(b) Security interests which have been perfected by control**

If a transitional security interest is over collateral that can be perfected by control and the secured party does not have control over the collateral in accordance with the PPSA's requirements, another security interest in the same collateral which has been perfected by control will take priority (s57(3)).

In some cases, secured parties will not have taken the necessary steps to establish control under their existing securities and where this is the case, they risk losing priority to other secured parties who have taken control.

One common example is where a bank has a security interest over the assets by the company, which includes shares. Quite often it would not have obtained control over those shares, but would still have had priority over subsequent security interests. Now the holder of such a security interest will lose priority to the holder of a subsequent security interest who takes control over those shares whether or not the controlling security interest holder had notice of the transitional security interest. This means in relation to all such securities, the secured parties will need to consider taking control on or before the registration commencement date.

**(c) PMSI priority to proceeds and commingled goods**

Under current law the holder of a first ranking all assets charge would usually have security over receivables or other proceeds of supplied goods which ranked in priority to claims of suppliers. Under the tracing rules that extend the super-priority of PMSIs in the original collateral to the proceeds and commingled goods arising from the original collateral, that

priority will be lost. This will represent a significant weakening of the security position of many existing all assets security holders. The super-priority of PMSI's as against transitional security interests should perhaps be confined to the original collateral during the transitional period to allow secured parties time to adjust to the new regime.

## 4. Risks under rules concerning defective registration

The rules about defective registrations also expose secured parties to the risk that the registration of transitional security interests may be ineffective. This issue is particularly significant for transitional security interests which will be migrated from existing registers.

For example, security interests on existing registers may not include serial numbers, or include incorrect serial numbers. If migrated security interests are migrated without the serial numbers, or with incorrect serial numbers, there is potential for the registration to be rendered ineffective under s164 or s165. These sections provide that a registration will be ineffective if there is a seriously misleading defect in any data relating to the registration (s164) or there is a specified defect (s165). If the collateral is required under the regulations to be described by a serial number, and the collateral is registered without a serial number, or an incorrect serial number, the registration will be ineffective (s165(a)). It is also possible that a missing or incorrect serial number would result in the registration being ineffective under s164 on the basis that it is "seriously misleading". If the registration is ineffective, this will render the security interest unperfected.

It is also not clear how the descriptions of the secured property on the ASIC register (which can vary greatly in detail) will be able to be converted into the classes of collateral that need to be used in PPS registrations.

Section 337(2) provides that the Registrar may determine that certain registrations are effective despite defects in the registration (including the omission of data).

However, secured parties do not have any indication that the Registrar would exercise its discretion to determine, for example, that omissions or errors in serial numbers would not render ineffective any registrations of migrated security interests. Further, secured parties will need to be able to make decisions now as to what level of resources they will need. They should not need to wait for the decision of an official who has not yet been appointed.

Also, s 337 can only apply to a registration if the "registration describes collateral covered by a transitional security agreement". It is not clear whether the section can apply if the description of the collateral itself is defective. This should be clarified.

## 5. Voluntary administration

### 5.1 The rights of holders of all assets charges in a voluntary administration

The proposed changes to the Corporations Act may have the effect of depriving holders of existing fixed and floating charges over all assets of a company of a very important right,

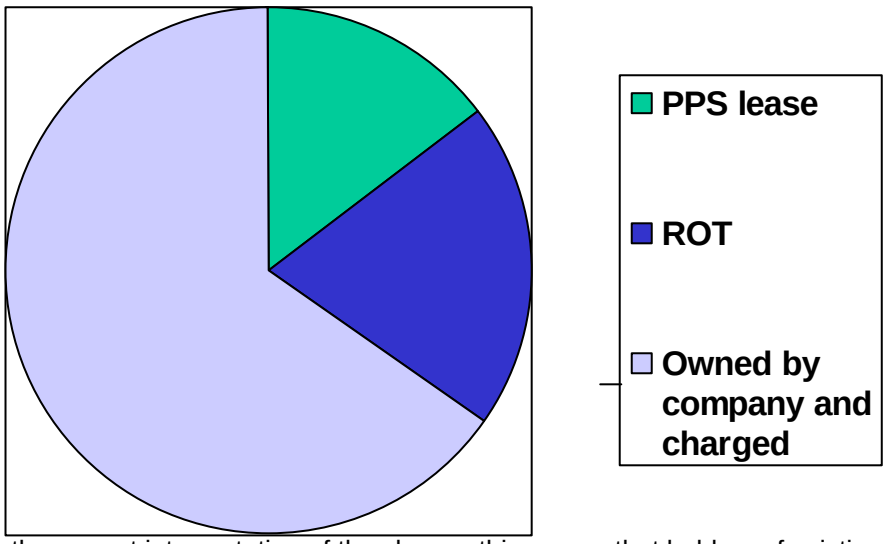
that is, to appoint a receiver within a decision period after the appointment of a voluntary administrator to the company, or to appoint a voluntary administrator themselves.

Those charges typically provide that they charge "all assets" or "all property" of the company. Under current law this would not include property which has been leased to the company or which the company has acquired subject to retention of title terms (as it is not the company's property under current law). Quite often, such property is quite extensive.

Under current law, the holder of such an all assets security would be regarded as having security over "substantially the whole" of the property of the company. However, we are concerned that this may not be the case after the commencement of the PPS amendments, because of the extension of the concept of “property” of a company to include “PPSA retention of title property” for the purposes of s436C and s441A of the Corporations Act. PPSA retention of title property is property that is not owned by the company but owned by the person whose interests will be treated as a security interest under the PPSA. It could include property sold to it on retention of title terms or leased to it.

The drafting of existing charges may not (and on a plain reading of a typical charge would not) catch PPSA retention of title property because the charge will only cover property owned by the company. There are arguments that a new all assets security still might not cover PPSA retention of title property.

If the property leased by the company or subject to retention of title arrangements is a significant portion of the “property” of the company, then the holder of such an all assets charge would not have a security interest in the whole, or substantially the whole, of the ‘property’ of the company (as so defined) unless it could establish that its charge extended to property the company did not own. It may be unable to do so, for the reasons given above.




If that is the correct interpretation of the charge, this means that holders of existing all assets charges may not be able to appoint an administrator to the company, or appoint a receiver within the decision period after the appointment of an administrator.

We are aware of the cases in other jurisdictions where all assets securities have been held to attach to property that was not owned by the grantor. However, the issues raised are

complicated and we do not think it is by any means safe to assume that the decisions in these cases would be followed in Australia. The issue is significant enough to warrant clarification. The easiest way to achieve this would be to "grandfather" existing security interests so they will continue to have the rights under ss436C and 441A that they would have had but for the amendments. We would be happy to discuss this with the Attorney-General's department.

### 5.2 Position of lessors

Also, the amendments to Part 5.3A of the Corporations Act exclude giving an administrator an option to hand back to a lessor property subject to a PPS lease.

Under the current administration provisions:

- an administrator is personally liable for rent for goods under a lease from 5 business days after the administration (s443B(2) of the Corporations Act);
- an administrator may notify, within 5 business days after the beginning of the administration, a lessor or owner that the company does not wish to exercise rights in respect of the property (s443B(3) of the Corporations Act) ("**Administrator's Election**").

There is a proposal to exclude the Administrator's Election under the new s443B(3A) so s443B(3) does not apply to a PPS lease.

The Explanatory Memorandum at paragraph 5.11 states that this would only allow a withdrawal of "true operational leases" (this is presumably intended to refer to short term operating leases and leases of real property).

It is difficult to see the purpose behind this policy in making any administrator automatically personally liable for debts of a company under a PPS lease without the opportunity to disclaim. This will have an impact on an administrator's appetite for taking on roles where this would be the case.

Also s443B in practice is used as an important tool between lessors and lessees (in administration) to negotiate and establish what is to occur with property in the early days of an administration. This option has now disappeared to the detriment of an administrator who is now personally liable and a lessor who may want property back and not to be leased to a lessee (in administration). There seems to be no policy reason for this change in the treatment of lessor/lessees in an administration.

## 6. Section 151 - example about collateral description

We appreciate the efforts at clarification in s151 by giving examples. However, the one example that is given could lead to significant concerns.

Example 1 of s151 states that a person can apply to register a financing statement that describes collateral as "all present and after-acquired property" of the grantor even if the applicant believes that the secured party described in the statement will take a security interest only in a class of items of personal property held by the grantor.

We are concerned that this will result in all financing statements describing collateral as covering all assets irrespective of whether they do so. In other words, a holder of a retention of title over paper clips would say it has security over "all assets". This, we gather, is the practice in New Zealand. This usually increases the administrative costs and burdens for businesses who would need to undertake further enquiries to determine the actual scope of the security interest. When making searches for due diligence on businesses of any size, this is impracticable. In New Zealand parties take a "guess" at what is secured when doing due diligence on an acquisition and take the risk of being wrong, rather than making enquiries of hundreds of secured parties. This is not satisfactory and defeats the whole purpose of the PPSA.

We also note that the example does not appear consistent with the text of the section. The section requires the secured party to have a reasonable belief that it will have a security interest in the collateral described in the registration. This requirement would not be satisfied by a description of an overly broad class of property. If a broader description is intended to be permitted, s151 should be amended to allow it.

## 7. Other issues

### 7.1 Section 10 - Negotiable instruments and Austraclear securities and securities registered in CHESS

It is not clear how securities (whether dematerialised or not) in Austraclear will be characterised under the PPSA. Under the current drafting, it is not clear whether will they be investment instruments, intermediated securities or negotiable instruments. The characterisation of the collateral is significant because different priority and other rules apply to these different types of collateral. Any clarification would be welcome.

The classification of securities registered in CHESS as intermediated securities or investment instruments is also clouded by the inclusions of CS licence holders within the definition of 'intermediary'. CHESS does not operate as an intermediary, it is the actual register of the issuing company. The distinction is important because of the different rules that apply. If CHESS securities are intended to be treated as investment instruments this should be clarified. If they are intended to be treated as intermediated securities then that should also be clarified and, in addition, further changes will be required to facilitate the effective operation of control tests and related priority and extinguishment rules. A classification as investment instruments would be more consistent with their true character.

### 7.2 Section 74 - Priority of execution creditors

This provision should be amended so that security interests which are not perfected at the time of the court order only because they attach after the court order (because the asset is acquired after the court order), do not lose priority to the execution creditor. This would reflect the current position. That is, the execution creditor should not get priority over a perfected security interest over after-acquired property.

We consider that this is an extremely important weakening of the value of a security, and unprecedented in the sense that it means that unsecured execution creditors get priority over perfected security.

### 7.3 Section 340(2) - Security interests in ADI account held by the ADI

As a result of the amendments in the Bill, the ability to perfect a security interest in an ADI account by control is limited to an ADI in respect of which the ADI is the secured party. The ADI is taken to have perfected its security interest taking control (s21(2)(c)(i)) and as a result has priority over any other security interest perfected by any other means (s57(3)) and over any other perfected security interest in the ADI account (s75). The explanatory memorandum states that the amendments are intended to ensure that the ADI will have the highest priority in relation to the ADI account.

However, if the ADI wishes to preserve its priority against preferential creditors under the Corporations Act, the ADI will also need to register its security interest under s340(2). An ADI account will be taken to be a circulating asset for the purposes of the Corporations Act unless an effective registration with respect to the ADI account discloses that the ADI has control and the ADI has control (see s340(1)(a) and 340(5)(c)). Is this outcome intended? We suspect that it may be unintended because it seems inconsistent with the super-priority given to an ADI in relation to ADI accounts simply by virtue of the fact that it is an ADI. An ADI in these circumstances will always have control of the ADI account and as such, there seems little point in requiring the ADI to register its security interest to confirm that it has control. Also, security interests over other personal property which can be perfected by control (such as investment instruments) are not subject to the registration requirement in s340(2).

We also note that as a result of the changes to s21(2)(c)(i), consequential changes should be made to s25 and s75 as these sections both still contemplate that a person other than an ADI which is the secured party can perfect by control.

### 7.4 Section 32 and extinguishment rules - dealings subject to security interests

The extinguishment provisions in section 32 and Part 2.5 and the limitations on recourse in section 32 should not apply to dealings that are expressly subject to the security interest concerned.

The extinguishment rules currently apply regardless of whether or not the parties actually intended the security interest to be extinguished. This can raise problems in numerous contexts, particularly priority problems. For example, the grantor may be in the business of leasing property on leases and be permitted to do so by the terms of its security agreement provided that it does so subject to the prior security interest. If the grantor notified customers of the existing security interest and made the dealing subject to that security interest there would be no breach of the security agreement; consequently the lessees would take their leases free of the security interest despite the express stipulation of the parties. Although the Act contains rules for re-attachment at the end of the lease, this does not overcome the difficulty that the secured party could not enforce during the term of the

lease (even though that outcome was intended) and would be at risk of losing the collateral if the lessee dealt with it during the term of its lease. The extinguishment rules should not apply to dealings that are expressly subject to the security interest.

Similar issues arise under section 32. As currently drafted (including the proposed amendments), section 32 will apply to limit the recourse of a secured party who enforces against both the original collateral and proceeds in many circumstances that are not appropriate. For example, the holder of an all assets security over the property of a business that is in the business of leasing goods out would expect to have the full benefit of its security over both the leased goods and the rent that is received from leasing them out. The current provisions mean that if goods are leased to a third party and the secured party enforces against both the proceeds and the original collateral, recourse of the secured party becomes limited to the value of the goods at the time of the grant of the lease. This may be justifiable from a policy perspective where the third party lessee takes the lease unaware of the existence of the prior security interest, but makes no sense where the lease has been expressly granted subject to the security interest.

A second problem with section 32 is that it appears to make assumptions that will frequently be incorrect. One assumption appears to be that a secured party that enforces against both the original collateral and proceeds is 'double dipping'. However, it will often be commercially appropriate that the secured party has recourse to both the original collateral and the proceeds – the all assets financier in the previous example would legitimately expect such recourse because it is financing a business of leasing out goods and expects recourse to both the capital and the revenue of the business. Another apparent assumption is that the secured party can protect its recourse to the original asset by choosing not to enforce against the proceeds, but this will also often not be the case – the proceeds will frequently be indistinguishable from other property over which the secured party has security (eg bank accounts), and the secured party may as a practical matter be required to enforce against the proceeds (as part of the property of the company) in order to be able to enforce its security following the appointment of an administrator. We would suggest that a more appropriate balance would be struck by limiting the application of the limitations on recourse to cover the situation where the secured party enforces against proceeds as proceeds (as opposed to original collateral).

## 8. Vesting provisions on insolvency under the Corporations Act

Item 183 of Schedule 1 introduces a new Division 2A into the Corporations Act.

The new provision places a time limit on registration security interests created by companies. The idea, as we understand it, is to replicate the current time limits which operate under the Corporations Act relating to the registration of charges, so that publicity is given to charges created by companies soon after they become effective or well before the company becomes insolvent, to avoid sudden registrations at the death rattle of the company.

The manner in which these provisions have been drafted is a considerable improvement on the initial draft circulated by the Attorney-General's department and we think generally do their job well.

However, there a few points that need to be addressed:

(a) The new section 588FL(2)(b)(iii) needs to be tweaked to deal effectively with the issue it is designed to cover. Subsection (2)(b)(iii) deals with the possibility that security interests covered by the section may initially be governed by a foreign law, which does not require registration, and only subsequently become subject to a registration requirement. In that case, the time limit should operate not from the time that the security interest became effective, but from the time that the registration requirement applied to it.

At the moment, the relevant test for that time is that the security interest first becomes enforceable against third parties under the law of Australia. For a security interest to be enforceable under Australian law only requires the things set out in section 20 of the PPSA, which will in turn apply whenever the PPSA applies to the security interest under section 6 of the PPSA. Under Part 7.2 of the PPSA, the laws relating to perfection and non-perfection of security interests (and therefore registration) only apply to a narrower class of security interests than those covered by section 6 and the Act. For example, section 6 applies to goods if either the goods are located in Australia, or the grantor of the security interest is an Australian entity. Part 7.2 only applies when the goods are located in Australia (with certain exceptions for goods that move between jurisdictions).

If, say, an Australian company grants security interests over artwork in its Beijing and Hong Kong offices, under local law, which are in writing and given for value, then under section 20, under Australian law the security interest will be enforceable against third parties. However, they do not need to be perfected or registered under Australian law as under section 238(1A) of the PPSA, perfection and non-perfection of the security interests are governed by the laws of China or Hong Kong, respectively. If Chinese law does not require the Beijing security interest to be registered, then it will not be registered. If Hong Kong law requires the Hong Kong security interest to be registered in Hong Kong, then it will be registered there. However, if, following a restructuring, the artwork is brought into Australia, then it will become registrable in Australia because of section 238(1A). The relevant time limits under the new section 588FL should apply from the time that the artwork is brought into Australia and Australian law became relevant to questions as to whether or not it should be registered.

To achieve that end, section 588FL(2)(b)(iii) should be amended by replacing the words " the security interest first became enforceable" with words like " the later of the time at which the security interest became governed by Australian law under Part 7.2 and the time at which it first became enforceable against third parties under the law of Australia".

(b) Section 588FL(3) covers the situation where the relevant collateral is required to be registered under a foreign law. In that case, a similar time limit is applied to that registration requirement **whether or not it is registered under Australian law**.

We suggest that as a matter of policy the Australian registration gives sufficient notice to creditors, and it should be enough to address the apparent possession and last minute publicity issue on insolvency, and so sub-section (3) should not apply to security interests registered under Australian law.

(c) Further sub-section (3) should only apply when under part 7.2 of the PPSA perfection is governed by the relevant foreign law. Sub-section (3) (a) says that sub-section (3) applies when the security interest is enforceable under a foreign law. Paragraph (c)(iii) fulfils a similar function to sub-section (2)(b)(iii).

The subsection would apply to take an example a plane operated by the company's Hong Kong branch flies between Beijing and Hong Kong and under Hong Kong law, there is a registration requirement. While the plane is in Hong Kong the security interest is enforceable under Hong Kong law but s238(3) of the PPSA (in part 7.2) says the effect of perfection (and thus registration) should be governed by Australian law.

To take another example, if a security interest affected a plane that was being built in Hong Kong for delivery and use by an Australian company in China, then under section 238(2) of the PPSA, perfection is to be governed by Chinese law.

A similar change should be made to those paragraphs to that suggested for su-section (2)(b)(iii) so that they only apply to registrations under a foreign law, where Part 7.2 says that it is relevant, that is in the second example, Chinese law

(d) Further if in the second example in paragraph (c) Chinese law was like the PPSA and provided that as an alternative to registration, the secured party could take possession of the collateral, and the secured party did take possession, then subsection (3) would operate so as to still require registration in Hong Kong.

Sub-section (3) should not apply where a foreign law does provide for the public registration of the security interest, but the security interest is not required to be registered under that foreign law to be effective for example, because the secured party has possession or control or their equivalent, or because it is not required to preserve the security interest in insolvency.