

## Personal Property Securities (Consequential Amendments) Bill 2009

### Supplemental Submission dated 16 November 2009

Towards the end of the public hearings into the *Personal Properties Securities (Consequential Amendments) Bill 2009* that were held by the Senate Standing Committee on Legal and Constitutional Affairs in Melbourne last week, we were asked by Senator Fisher to provide some further commentary on two issues that the Committee raised with both us and representatives of the Attorney-General's department at the hearing:

- **Clauses 85 and 86 of the *Personal Properties Securities Bill 2009 (PPS Bill)*** – whether the PPS Bill needs to provide a circuit-breaker rule for situations where more than one **priority interest** is given over the same crops or livestock.
- **Clause 101 of the PPS Bill** – whether the priority accorded to a pre-existing security interest in goods that continues in a product or mass under clause 99 should be limited to the value of the goods on the day on which they became part of the product or mass (as the clause currently provides), or whether the amount for which that security interest has priority should be determined by reference to the value of the relevant goods from time to time.

Our further comments are set out below.

#### 1. **Clauses 85 and 86 of the PPS Bill**

The representatives from the Attorney-General's department suggested that that was not necessary to provide a circuit-breaker rule where more than one priority interest is given over the same crops or livestock, because the Act would automatically fall back to the default priority rules in clause 55. In this case, the relevant rule would be the rule in clause 55(4), which generally gives priority in these circumstances to the security interest that has the earliest registration time.

We agree that the default priority rules would operate in this way. On that basis, we accept that no further amendment is necessary to address this point.

#### 2. **Clause 101**

In our view, the priority amount for the purposes of clause 101 should be determined by reference to the value of the relevant goods from time to time. Our view can be illustrated by the following example.

*Glenn's Gold Emporium is a wholesale supplier of gold to the jewellery manufacturing market. It supplies gold on retention of title terms, and registers its security interests in accordance with the Act.*

*A small but important customer of Glenn's Gold Emporium is an up-and coming boutique producer of reproduction antique rings, Patchworks. Glenn's Gold Emporium sells \$100 of gold to Patchworks.*

*Patchworks also maintains a number of banking facilities with Bobbin Bank. Patchworks has not given Bobbin Bank an all-assets security, but instead has given Bobbin Bank a security interest over all its stock of rings. Bobbin Bank has also perfected its security interest over the rings by registration.*

*The gold price is notoriously volatile, and shortly after the sale of gold by Glenn's Gold Emporium to Patchworks, the price goes into a slump. Glenn's Gold Emporium is still owed \$100 by Patchworks, but the value of the gold that it sold has now dropped to \$80. This happens to still be the price on the day on which Patchworks uses the gold to make*

*some rings. As a continuation of the price volatility, the slump reverses itself a few days later, and the gold price recovers to its previous level.*

Before Patchworks uses the gold to make rings, Glenn's Gold Emporium clearly has priority, and for its full \$100.

Under clause 99 of the PPS Bill, Glenn's Gold Emporium's security interest in the gold continues into the ring. Because of the vagaries of the world gold price and the coincidental timing at which Patchworks used that gold to make some rings, however, its priority under clause 101 is limited to \$80, even though Glenn's Gold Emporium is owed \$100 and the current market value of the gold in the rings is now back at \$100 as well.

This does not seem a commercially balanced outcome for Glenn's Gold Emporium. Our proposal would redress this.

### **3. Clause 102**

For completeness, we note that we have raised a similar issue in the context of clause 102. Again, we would like to illustrate the point with an example:

*A wheat exporter buys wheat on retention of title terms from Farmer A (3,000 tonnes) and Farmer B (2000 tonnes). The wheat is fungible, and mixed so that it becomes a mass of 5000 tonnes. The price of wheat was different when supplied and added to the mass, and each farmer is owed different amounts because they had different payment terms.*

If the mass is sold, then Farmer A should be able to have priority over, and first recourse to, 3/5 of the sale proceeds of the mass, and Farmer B should similarly have priority over and first recourse to B 2/5 of the mass, regardless of the value at the time of contribution or the amount owed. This is not complex, as suggested by the Attorney General's representatives, but is a simple proposition.

Please let us know if you would like us to expand on any of this.