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Mr Peter Hallahan
Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
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Canberra ACT 2600
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Dear Sir

Personal Property Securities Bill 2009 - Australian Securitisation Forum Submission

Thank you for the opportunity to comment on the revised Personal Property Securities Bill (the "**Bill**").

The Australian Securitisation Forum (the "**ASF**") is the peak industry body for the Australian securitisation industry.

Scope of this submission and support of content of joint law firm submission

The ASF is aware that other bodies and groups who operate within and represent sections of the Australian Financial Markets have provided comments on the Bill. The ASF supports many of the points that they have made. For instance, the joint submission of the law firms Mallesons Stephen Jaques, Allens Arthur Robinson, Freehills and Blake Dawson (a draft of which we have had the opportunity to review) contains many key points that affect the financial markets of which the securitisation industry forms part which are supported by the ASF. These include the submissions that:

- flawed assets should not be expressly included as examples of security interests (consistent with the consultation draft of the Bill);
- the Bill should clarify that repurchase agreements and similar arrangements (eg under credit support annexes for derivative transactions) should not be regarded as security interests (consistent with the consultation draft of the Bill);
- the weakening of the concept of an all assets charge should be reversed; and
- the proposal for the vesting of unperfected interests in the grantor on insolvency is problematic.

We also share their concern that, in view of the significant changes made and the limited time available for comment, there are many other points, including unintended consequences, that we and

others have not had time to consider. This could prove regrettable as and when the full effects of the legislation become known.

Specific submissions

The specific submissions of the ASF on the Bill are as follows:

1 **Other legislation -** At a broader policy level, the ASF is concerned to ensure that there is a co-ordinated approach to the drafting of the Bill and the drafting of other currently proposed legislation (such as the new National Consumer Credit regime and the unfair contract terms regime).

It appears, for example, that the distinction between legal assignments of receivables and equitable assignments of receivables will not survive the passing of the Bill, although this is not as clear as it might be.

As mentioned in the submission to the Attorney-General's Department on the first consultation draft, it is common in securitisations for the initial assignment of receivables to take the form of an equitable assignment. This is for three reasons.

- The first is to avoid the cost of compliance with the requirement to give notice to each obligor.
- The second is to avoid confusion that could arise from such notice when the assignor (grantor) remains the servicer of the assets. An equitable assignment will generally not result in any change to payment arrangements or communications in relation to the ongoing management of the receivables.
- Thirdly, an equitable assignment is more convenient if the receivables end up being repurchased by the seller, for example as part of a clean-up call or because the seller wishes to refinance the receivables.

Legal assignment in these types of transactions will only occur if there is a title perfection event involving credit or operational issues with the seller.

To the extent that other proposed legislation is relying upon the distinction between an equitable and legal assignment remaining as part of Australian law, further co-ordination may be required.

2 **Mortgage backed securitisation** - It is not clear whether a mortgage backed securitisation is intended to be included or excluded in the new regime. The explanatory memorandum suggests that they should be included but it is not clear that any of the categories of interests specified in the Bill include a mortgage loan. We note that in clause 8(1)(f)(ii), the words "and only that land" have been deleted since the previous draft of the Bill but we are not clear on the reason for the deletion of those words. If mortgage backed securitisations are included within the scope of the Bill consequential amendments may be required to other references throughout the Bill to a security interest arising in the context of the transfer of an account or chattel paper to ensure those provisions also extend to mortgage backed securitisations.

3 **Extinguishment -** In previous submissions, we sought clarification that the extinguishment of the beneficial interests of a transferee (a securitisation vehicle) in a financial asset back to the transferor (for example the seller or originator) should not be caught by the legislation (that is, it should not be deemed a security interest for the purposes of the Bill). We therefore submit that an additional paragraph should be added to section or clause 8(1)(f) of the Bill along the following lines:

"(xi) The extinguishment or transfer back to the [assignor/grantor] of the beneficial interest in an account or chattel paper transferred to the assignee;".

As noted in paragraph 2 above, this new provisions should also apply to mortgage backed securitisations, if brought within the scope of the Bill.

4 **Letters of Credit -** Clause 28 of the Bill eliminates the ability of a secured party to control a right evidenced by a letter of credit except to the extent that the issuer of the letter of credit has consented to assigning the proceeds of the letter of credit to the secured party. Securitisation transactions can involve the assignment of accounts which are secured by a letter of credit. To the extent that the letter of credit is unable to be assigned, typically the seller of the account would assign the proceeds once received. Accordingly, a concept of "control" which requires the consent of the issuer of the letter of credit to be obtained in respect of the assignment of the proceeds, as seems to be proposed by clause 28 of the Bill, is problematic in the context of securitisation.

5 **PMSI and "priority interests" -** As to clause 64(1), for the "priority interest" concept to have substance, it should be clear that the holder of the priority interest can effect a registration referring to future property of the grantor. Otherwise, the timing requirements of sub-section (a) will mean that the priority interest concept has little value. The ASF also submits that sub-section (2) of clause 64 needs to be clarified to confirm that inventory can be described in general terms to the extent that a party is relying upon sub-section (b) of clause 64.

6 **Amendment of terms post assignment -**Sub-section (4) of clause 80 should be amended by deleting sub-paragraph (b). From a policy perspective the ASF submits that a debtor should not be able to renegotiate terms with the transferor once the debtor has received notice of the assignment from the transferor. At that point, the debtor can only get a good discharge by paying the transferee and therefore, should be required to deal with the transferee if the terms of the debt are to be renegotiated.

7 **Proof of transfer unwieldy -** The ASF continues to be concerned about sub-paragraph (b) of clause 80(7) which requires proof of transfer upon request by a debtor. In the first instance, the ASF submits that sub-section (b) should be deleted.

Rated securitisation transactions are dependant upon timeliness of payment by the issuer of the securities. Timeliness of payment by the issuer of the securities is a function of timeliness in payment by the debtors under the assets backing the securities. If a debtor has a right to ask for proof of transfer, this has the potential to delay payment by the debtor and therefore delay payment on the underlying securities.

If sub-section (b) is to remain, then the practicalities of providing "proof of the transfer" need to be considered carefully. Often a large pool of, say, accounts will be assigned under

a "clayton's contract" (written offer accepted by payment of cash). In what form should the proof take in that instance? The account that has been assigned may be listed on a large spreadsheet listing numerous other accounts. It would not be appropriate to provide a copy of that spreadsheet to the account debtor for them to identify other customers of the transferor. A record would also need to be found of the funds transfer made to effect acceptance of the written offer. Working through an acceptable means of providing proof will be time consuming and cumbersome (eg to deal with the privacy issue referred to above).

The ASF submits that an alternative to deleting sub-section (b) would be to make provision for certification by the transferee of its ownership in the receivables. This proposal could simply be achieved by adding the words "*certification by the transferee*" after the word "*proof*" in sub-paragraphs (i) and (ii). If sub-section (b) is to be retained, which is the ASF's least preferred option, the ASF requests that these additional words be added.

8 **Securing performance of obligations** - As set out in the ASF's submission dated 22 December 2008, the primary purpose of the securitisation is not to secure an obligation of the transferor but to effect a transfer of the transferor's rights against the debtors. However, in some transactions, the assets transferred may provide some degree of security for performance of certain obligations by the transferor. This might occur, for instance, where the value of the assets transferred exceeds the value of certain notes issued by the transferee (often referred to colloquially as "over-collateralisation"). The additional collateral provided by the seller can, in some cases, be used by the transferee to make itself whole in respect of unsatisfied obligations owed to it by the transferor, and exists as a credit enhancement which is a key consideration for securitisation investors.

On that basis, we submit that clause 109(1)(a) should be amended by deleting the words "*that does not*" and replacing them with the words "*the primary purpose of which is not to*".

9 **Apparent mistake in clause 151 -** Clause 151 clearly needs to be amended. The Bill provides for a regime to enable a transferee of certain interests to protect those interests pursuant to the terms of the Bill and yet section 151 prohibits those persons from doing so.

10 **Vesting of unperfected interests on insolvency -** Clause 267 vests unperfected security interests in insolvency practitioners. The ASF submits that this is problematic in the following respects:

(a) there may be a timing issue in perfecting a security interest under the Bill in respect of "after-acquired property";

(b) holders of security interests governed by foreign laws who have not perfected under the proposed legislation may lose their interest despite having given value and protected themselves according to their own laws; and

(c) there is no grace period for perfection which creates practical timing issues which could prove critical.

11 **Minor drafting amendments -** The ASF submits that the following additional drafting changes be made to the Bill:

(a) the definition of "*debtor*" is limited to where the obligation owed by the person is secured by a security interest. Should the person owing an obligation on, for instance, an unsecured account be treated as a debtor for the purpose of the legislation?;

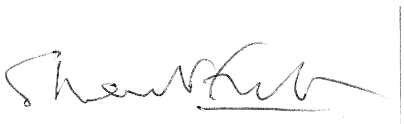
(b) clause 24(5)(c) - please add the words "*or custodian*" at the end to recognise the fact that often a person will appoint a third party as its custodian rather than as its agent to hold possession of chattel paper;

(c) clause 38(3) - we submit that the five business day period should be longer or able to be extended;

(d) as to clause 153, we reiterate the concern that it should be possible, by reference to the Regulations, to undertake a search in respect of a grantor by searching the name of the trust rather than the trustee of the trust.

Thank you for your consideration of this submission. We would be happy to provide further clarification of any of the points raised at your convenience.

Yours sincerely



For the Australian Securitisation Forum
Stuart Fuller
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