



**Australian Government**  
**Attorney-General's Department**

**Civil Law Division**

09/18691

14 August 2009

Mr Peter Hallahan  
Secretary  
Senate Standing Committee on  
Legal and Constitutional Affairs  
Parliament House  
CANBERRA ACT 2600

Dear Mr Hallahan

**Stakeholder consultations on PPS Reform**

At the Committee's hearing on 7 August 2009, I took on notice a question from Senator Fisher about stakeholder consultations on personal property securities reform, in particular on the Personal Property Securities Bill 2009 (*Proof Hansard*, L&C 15–16).

I also agreed to provide on notice further information about a number of issues raised before the Committee (*Proof Hansard*, L&C 17). A document providing that information is attached.

The introduction of the PPS Bill in June 2009 followed an extensive period of stakeholder engagement which commenced with the release of a SCAG options paper in April 2006. Since that time, the Department has actively engaged with a range of organisations that have shown an interest in PPS reform, and sought to reach out to other organisations likely to have an interest.

The Department has established an e-mail address dedicated to PPS Reform ([pps@ag.gov.au](mailto:pps@ag.gov.au)) and invited stakeholders to use this address to make any comments, and raise any issues or concerns, they may have in relation to the reform, and to request that they be added to an e-mail list maintained by the Department. The Department has also developed an e-mail newsletter for stakeholders interested in PPS reform. Through these processes we have been able to keep stakeholders informed about the reform.

The release of the SCAG options paper was followed in May 2006 by a public seminar series in State capital cities, which was advertised in the press. An opportunity was provided for public comment on the options paper, and also on three discussion papers that were published between November 2006 and May 2007.

Senator Fisher was especially interested in consultations with:

- the Australian Industry Group
- the Business Council of Australia
- the National Farmers' Federation
- the Australian Chamber of Commerce and Industry, and
- the Council of Small Business of Australia.

In December 2006, the then Attorney-General met with the Deputy Chief Executive of the Business Council of Australia and discussed PPS reform. In March 2008, following the release of its paper *Towards a Seamless Economy: Modernising the Regulation of Australian Business*, the Council wrote to the Attorney-General urging complete harmonisation of the ten COAG regulatory hotspots—of which PPS reform is one—by the end of 2009.

A further public seminar series was held in May and June 2008 following the release of the consultation draft of the PPS Bill in May 2008. The seminar series was notified to every stakeholder on our e-mail list, and it was also advertised in the press. In addition, in May 2008 I wrote to a number of peak bodies representing the interests of inventory suppliers inviting comment on the draft Bill. These bodies included the Council of Small Business of Australia and the Australian Chamber of Commerce and Industry: copies of my letters to them are attached.

In February 2007, ACCI provided a submission on the first of the three PPS discussion papers. During the past few months we have been discussing with ACCI the possibility of establishing a PPS business advisers' forum.

In 2008 we sought to enhance our engagement with a range of peak stakeholders. As part of this process, in August 2008, we provided the National Farmers Federation with a short article on PPS reform for publication in any journal it considered suitable. The article was designed to interest farmers in PPS reform by describing its benefits to them. However, we understand that the article was not published. We have asked the NFF for guidance as to the sort of article on PPS that it might publish.

In November 2008, the exposure draft of the PPS Bill was referred to the Committee, providing stakeholders with a further opportunity to provide input into the Bill's development.

Of the five organisations that Senator Fisher specified, we have contacted all of them directly about PPS reform, except for the Australian Industry Group. However, we have consulted with peak bodies of industries that are represented by the AIG: for example, the Motor Trades Association of Australia, which is represented on the PPS Consultative Group.

Senator Fisher asked about consultations on the Bill as introduced. In its response to the Committee's March 2009 report on the exposure draft of the Bill, the Government indicated that it would carry out targeted consultation with stakeholders about changes to the Bill raised in the Committee's report. In revising the PPS Bill following the Committee's report, the Department has worked closely with the States and Territories and with members of the PPS Consultative Group.

I trust this information is of assistance to the Committee in its consideration of the Bill.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'James Popple', with a long horizontal flourish extending to the right.

James Popple  
First Assistant Secretary  
Civil Law Division

Telephone: (02) 6141 3620  
Facsimile: (02) 6141 3674  
E-mail: [james.popple@ag.gov.au](mailto:james.popple@ag.gov.au)

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13/6/08 JG



**Australian Government**  
**Attorney-General's Department**

**Legal Services and  
Personal Property Securities Division**

08/13028

12 June 2008

Mr Peter Anderson  
Chief Executive  
Australian Chamber of Commerce and Industry  
PO Box 18008  
Collins East Street  
MELBOURNE VIC 8003

Dear Mr Anderson

**Personal Property Securities Bill and Commentary**

I am writing to invite comment from the Australian Chamber of Commerce and Industry on the Personal Property Securities Bill 2008.

As you may be aware, the Attorney-General, the Hon Robert McClelland MP, released the Bill and accompanying commentary on 16 May 2008. Copies of the Bill and commentary, as well as other information on PPS reform, are available at [www.ag.gov.au/pps](http://www.ag.gov.au/pps).

The Bill will provide a national scheme for the registration of security interests in personal property, which would provide notice to financiers, businesses and the public generally of the existence of a security interest in personal property. Additionally, the Bill will establish comprehensive rules regulating security interests including rules:

- for creating valid security interests
- governing the priority between security interests
- establishing the circumstances in which personal property would be acquired free of security interests, and
- providing remedies that may be used by a secured party in the event of debtor default.

The Personal Property Securities Consultative Group provides advice to the Attorney-General on personal property securities reform. The Consultative Group has asked that I draw the attention of peak bodies representing the interests of inventory suppliers to section 102 of the Bill.

Sections 99-103 of the Bill relating to purchase money security interests (PMSIs) may be of particular interest to your organisation. In broad terms, a security interest would be a PMSI if the secured party had provided the finance required by the grantor to acquire the collateral or provided the collateral itself.

In general, the Bill accords a PMSI in collateral a higher priority than another security interest granted by the same grantor in the same collateral. As a result, a secured party holding a PMSI in inventory would have priority over another security interest in the same inventory as long as certain notice provisions are complied with.

A secured party holding a PMSI in inventory (an inventory financier) would have priority over a secured party that has a security interest in all of the grantor's present and after acquired property, including inventory.

The priority held by an inventory financier in a PMSI may extend to the proceeds of inventory if that inventory is sold. However, a grantor may also grant a new security interest in an account that is proceeds of inventory for new value. Section 102 of the Bill establishes the circumstances in which a security interest in the account (the priority interest) taken by a transferee of that account (a factor) will have priority over the PMSI holder's interest in the account as proceeds of inventory.

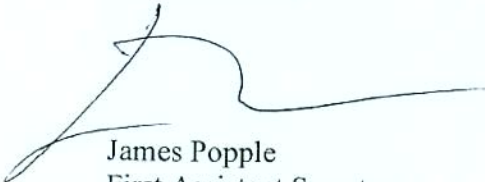
Generally a factor's security interest will take priority over a PMSI in the account. If the PMSI is registered first, the PMSI holder will receive notice from the factor of their impending loss of priority. This will allow them to take appropriate action in relation to the accounts that currently exist as well as to make any necessary change to future supply contracts.

Where this does occur, while the PMSI holder may lose their first priority in the account, they will have a PMSI in the value (ie money) provided by the transferee to the grantor. Where a PMSI holder is provided with notice by a factor of an impending loss of priority, this will allow them to make any further supply of inventory conditional upon receiving payment first.

We would welcome any comments you may have on the Bill, especially in relation to section 102, by 15 August 2008.

The action officer for this matter is Alexander Daniel who can be contacted on 02 6250 6741.

Yours sincerely



James Popple  
First Assistant Secretary

Telephone: 02 6250 6222  
Facsimile: 02 6250 5978  
E-mail: james.popple@ag.gov.au

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**Australian Government**  
**Attorney-General's Department**

**Legal Services and  
Personal Property Securities Division**

12 June 2008

Mr Tony Steven  
Chief Executive  
Council of Small Business of Australia  
PO Box 6336  
KINGSTON ACT 2604

Dear Mr Anderson

**Personal Property Securities Bill and Commentary**

I am writing to invite comment from the Council of Small Business of Australia on the Personal Property Securities Bill 2008.

As you may be aware, the Attorney-General, the Hon Robert McClelland MP, released the Bill and accompanying commentary on 16 May 2008. Copies of the Bill and commentary, as well as other information on PPS reform, are available at [www.ag.gov.au/pps](http://www.ag.gov.au/pps).

The Bill will provide a national scheme for the registration of security interests in personal property, which would provide notice to financiers, businesses and the public generally of the existence of a security interest in personal property. Additionally, the Bill will establish comprehensive rules regulating security interests including rules:

- for creating valid security interests
- governing the priority between security interests
- establishing the circumstances in which personal property would be acquired free of security interests, and
- providing remedies that may be used by a secured party in the even of debtor default.

The Personal Property Securities Consultative Group provides advice to the Attorney-General on personal property securities reform. The Consultative Group has asked that I draw the attention of peak bodies representing the interests of inventory suppliers to section 102 of the Bill.

Sections 99-103 of the Bill relating to purchase money security interests (PMSIs) may be of particular interest to your organisation. In broad terms, a security interest would be a PMSI if the secured party had provided the finance required by the grantor to acquire the collateral or provided the collateral itself.

In general, the Bill accords a PMSI in collateral a higher priority than another security interest granted by the same grantor in the same collateral. As a result, a secured party holding a PMSI in inventory would have priority over another security interest in the same inventory as long as certain notice provisions are complied with.

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Generally a factor's security interest will take priority over a PMSI in the account. If the PMSI is registered first, the PMSI holder will receive notice from the factor of their impending loss of priority. This will allow them to take appropriate action in relation to the accounts that currently exist as well as to make any necessary change to future supply contracts.

Where this does occur, while the PMSI holder may lose their first priority in the account, they will have a PMSI in the value (ie money) provided by the transferee to the grantor. Where a PMSI holder is provided with notice by a factor of an impending loss of priority, this will allow them to make any further supply of inventory conditional upon receiving payment first.

We would welcome any comments you may have on the Bill, especially in relation to section 102, by 15 August 2008.

The action officer for this matter is Alexander Daniel who can be contacted on 02 6250 6741.

Yours sincerely



James Popple  
First Assistant Secretary

Telephone: 02 6250 6222

Facsimile: 02 6250 5978

E-mail: james.popple@ag.gov.au

# ATTORNEY-GENERAL'S DEPARTMENT

## COMMENTS ON SPECIFIC ISSUES

### *Consumer credit code*

The PPS Bill is developed on the basis that the Commonwealth Parliament has not yet enacted the National Consumer Credit Protection Bill 2009. Chapter 4 of the Bill includes a number of provisions that will apply to collateral that is used predominantly for personal, domestic or household purposes. Clause 119 of the Bill allows regulations to be made allowing the Bill to give way to corresponding provisions of the Code. Consideration could be given to more closely aligning the Personal Property Securities Bill 2009 and the consumer protection legislation once the Parliament has enacted the National Consumer Credit Protection Bill 2009.

### *Clause 111—Commercially reasonable manner*

Clause 111 provides as follows:

#### **111 Rights and duties to be exercised honestly and in a commercially reasonable manner**

- (1) All rights, duties and obligations that arise under this Chapter must be exercised or discharged:
  - (a) honestly; and
  - (b) in a commercially reasonable manner.
- (2) A person does not act dishonestly merely because the person acts with actual knowledge of the interest of some other person.

Clause 111 is intended to ameliorate otherwise harsh results that could arise through a literal application of provisions included in Chapter 4. As mentioned in evidence to the Committee, this obligation of a secured party broadly corresponds to the existing duties of a mortgagee.

The following paragraphs provide some examples.

Clause 123 provides as follows:

#### **123 Secured party may seize collateral**

- (1) A secured party may seize collateral, by any method permitted by law, if the debtor is in default under the security agreement.

Note: For seizure of accessions, see sections 95 to 97.

A debtor may be in default under the security agreement, despite having made a payment under the security agreement the day after it was due. Applied literally, clause 123 would allow a secured party to seize collateral when the debtor is in default despite having made the day after it was due a payment required under the security agreement. Clause 111 will require the secured party to consider whether it would be commercially reasonable to enforce the security agreement when the debtor is only a day late in making a payment.



A secured party may seize and sell collateral, and comply with its obligation under clause 131 to obtain the market value for collateral or the best price reasonably obtainable at the time of disposal. However, the Bill does not include an express obligation on the secured party to take reasonable care of the collateral during the period between seizure and disposal. A secured creditor may allow the collateral to deteriorate in value during this period if it is satisfied that it will recover the amount owed to it on the sale of the collateral at its reduced market value. By not taking reasonable care of the collateral, the secured party will reduce the surplus payable to the grantor. Clause 111 will oblige the secured creditor to act in a commercially reasonable manner in caring for the collateral during the period between seizure and disposal.

### ***Clause 101—participation formula for commingling***

The commingling participation formula in clause 111 is the same as that in the New Zealand and Saskatchewan legislation. The Department discussed clause 111 in its comments on the submission by Allens Arthur Robinson, Blake Dawson, Freehills and Malleson Stephen Jaques and agrees generally with the comments made by that submission on the operation of clause 111.

### ***Retention of title clauses***

Clause 12(2)(d) of the Bill makes it clear that a security interest includes a conditional sale agreement (including an agreement to sell subject to retention of title) that in substance secures performance of payment of an obligation.

### ***Clause 62(3)(b)—10 day PMSI rule***

Clause 62(3)(b)(i) provides that a purchase money security interest in equipment has priority over another security interest if it is perfected by registration within 10 business days of the grantor obtaining possession of the goods.

The practical effect is that an obligation secured against goods recently acquired by the grantor will have priority if it is registered and no other registration has been made against the grantor during the first 10 days after the grantor acquired the goods.

For example, a person providing finance secured against a lathe recently acquired by the grantor would wait 10 days after the grantor acquired possession of the lathe before providing the finance. The financier could then be confident that its security interest would not be subordinate to a purchase money security interest given by the grantor when it acquired the lathe.

It has been suggested that the 10 days should run from when the finance is provided. Under this proposal, a financier who provides finance and registers their security interest more than 10 days after the purchaser takes possession of the equipment could have priority over an earlier registered financier who provided finance secured against the equipment.

For example, a financier who provides finance 15 business days after the purchaser takes possession of a lathe, and later registers 25 business days after the purchaser took possession, would have priority over another financier who provided finance secured against the lathe during the 25 business days.

The proposal would allow the financier claiming the purchase money security interest an indefinite period of time—until the finance is provided plus a further 10 business days—to register their security interest and therefore put other financiers on notice that they were claiming the priority.

The proposal undermines the efficacy of the register as a vehicle for putting financiers and others on notice of competing security interests.

Under the proposal, a financier will not be able to determine when the 10 days has begun to run, and therefore when the period ends, because it will not know when the other financier provided its finance (or that there is another financier).

The longer the period available for financiers to register, the greater the opportunity for purchasers to commit a fraud on other financiers by seeking further finance secured against the same collateral.

The proposal does not provide certainty to financiers about when it will be safe for them to lend against recently acquired equipment. The Bill provides a certain 10 days. Financiers will know when the 10 days starts to run because they will be able to independently verify when the grantor has taken possession of the property.

#### ***Clause 14(2)(c)—PMSI over consumer property***

Clause 14(2)(c) provides that a purchase money security interest (PMSI) does not include a security interest in collateral that (at the time the interest attaches to the collateral) the grantor intends to use predominantly for personal, domestic or household purposes.

Clause 14(2)(c) is intended to facilitate the provision of finance to small business: particularly trade credit.

A PMSI is relevant when the purchaser has granted an earlier registered security interest over the collateral being purchased.

The earlier perfected security interest cannot have been granted for finance provided predominantly for personal, domestic or household purposes, because of section 41 of the Consumer Credit Code. That is, the earlier perfected security interest must be for a commercial loan.

The collateral being purchased cannot be a motor vehicle that the purchaser intends to use exclusively for personal, domestic or household purposes, because a registration of this kind must include the vehicle's serial number and the earlier registrant would not know the vehicle's serial number to include it on the register.

Consequently, clause 14(2)(c) is relevant only when the earlier registered security interest is a commercial loan secured against household property (but not a motor vehicle).

A typical example would be finance provided to a small business that is secured against all of the owner's property (including non-business property), apart from a motor vehicle used exclusively for household use. The Department understands that this kind of finance is common in trade or business-to-business finance—such as when one business provides goods or services to another business on credit, of the kind provided by members of the Australian Institute of Credit Management (which supports retaining clause 14(2)(c)).

As the small business owner acquires new household property, the security interest extends to that property. This increases the value of the security interest to the financier and makes it more likely that finance will be provided to the small business.

If clause 14(2)(c) were to be omitted, the security interest would be subordinate to later purchase money security interests over household property granted by the small business owner. This would erode the value of the security interest, and make it less attractive to the secured party providing the finance to the small business.

### ***Shipping Registration Act***

Inclusion of ship mortgages on the PPS Register would be consistent with the functional approach to security interests proposed generally by the Bill.

### ***Clause 47(2)(c)—consumer reasonableness test***

Clause 47(1) allows a buyer of personal property to acquire the personal property free of a security interest if the purchaser intends to use the property predominantly for personal, domestic or household purposes and the purchase price is not more than \$5000. Clause 47(2)(c) provides an exception when the market value of the goods is more than \$5000 and the buyer believes that the goods have a market value more than \$5000.

The provision has the effect that a consumer will buy an item free of a security interest if they pay less than \$5000 and they believe that the item has a market value of less than \$5000.

It has been suggested that the test that the buyer believe the goods have a market value more than \$5000 should be replaced with an objective test that a reasonable buyer in the circumstances of the transaction would believe that the value of the personal property was less than \$5000.

The suggestion would have the effect that a consumer would not buy an item free of a security interest if they honestly but unreasonably believed that the item had a market value of less than \$5000 (and the item had a market value of more than \$5000).

Whether the buyer believed that the market value of the item was less than \$5000 will be a question of fact for the court to determine having regard to the evidence. It would be open to a court to determine that an assertion by the buyer that they believed an item had a market value less than \$5000 was not credible, and to determine having regard to all the evidence before it that the buyer did in fact believe that the item had a market value of more than \$5000.

### ***Clause 62—PMSI Notices***

The Canadian legislation obliges a secured party seeking purchase money security interest priority to send a notice to earlier registered secured parties. The notice puts the earlier registered secured party on notice that their security interest may be subordinate to the later registered purchase money security interest.

The New Zealand legislation does not include this notice requirement.

The Bill previously considered by the Committee included a requirement to give the notice.

The requirement to give the notice was omitted from the Bill because of concerns that it would impose additional compliance costs on small business. Instead, the Department is exploring options for establishing the PPS register on a basis that would allow the register to send a notice to the earlier registered secured party when a later purchase money security interest registration is made against the same grantor.

### ***Governing laws—freedom of contract for governing laws***

Part 7.2 of the Bill deals with whether a security interest will be governed by Australian law (including the Bill) or the law of another jurisdiction.

Clause 234(2) provides that Part 7.2 does not affect the law that governs contractual obligations (including any obligations arising under a security agreement). The parties to a security agreement will therefore have freedom to contract that their contractual obligations are governed by the law of a jurisdiction chosen by them.

Part 7.2 will also establish rules for determining the law of the jurisdiction that governs the validity of a security interest, and the perfection and effect of non-perfection of the security interest. The Bill does this because persons other than the grantor and the secured party have an interest in knowing which law governs the validity of a security interest in particular property, and the perfection and effect of non-perfection of a security interest in the property.

One of the key objectives for the Bill is to make it possible for a person acquiring an interest in personal property to determine whether the property may be subject to a security interest. It will therefore prevent the parties from agreeing that a security interest in goods located in Australia should be governed by the law of another country. Under the Bill, it would not be necessary for a person contemplating acquiring an interest in personal property located in Australia to ask the owner whether the property is subject to a security interest governed by the law of another country, and therefore registrable in that other country.

In the same way that, for real property located in Australia, the land title register is located in Australia—and the consequences of registering, or failing to register, an interest in the land are governed by Australian law—the Bill provides that a security interest in personal property located in Australia is governed by Australian law, and that the consequence of registering, or failing to register, an interest in the personal property is governed by Australian law.

For those contemplating acquiring an interest in personal property, these arrangements will increase certainty concerning the law that governs security interests in that property. It will make it clear which law governs security interests in the property, which register they need to search, and the consequences of there being no existing registrations against the property.

### ***Investment entitlements***

The Department commented on the approach taken by the Bill in relation to investment entitlements in its comments on the key issues raised in Part 2.1 of the submission by Allens Arthur Robinson, Blake Dawson, Freehills and Malleson Stephen Jaques.

## *Flawed Assets*

The Department commented on the approach taken by the Bill in relation to flawed assets in its comments on the key issues raised in Part 2.1 of the submission by Allens Arthur Robinson, Blake Dawson, Freehills and Malleson Stephen Jaques.

### *Definition of ADI account*

The definition of ADI account is significant because:

- (a) a security interest in an ADI account may be perfected by control (clause 21(2)(c)(i)), and
- (b) a perfected security interest held by an ADI in an ADI account has priority over any other perfected security interest in the ADI account, other than a security interest held by another secured party who is able to direct disposition of the funds from the account without further consent by the grantor (clauses 75 and 25(1)(ii)).

These provisions ensure that, if a debtor defaults, an ADI will be able to access the funds held in the ADI account to meet secured obligations owed to it by the debtor. They assist the ADI maintaining liquidity in relation to deposits held in ADI accounts. They confer a significant advantage on the ADI over other secured parties with a security interest in the same ADI account.

The capacity of an ADI to maintain liquidity by accessing funds in an ADI account held with the ADI is an important measure in the prudential regulation of ADIs. The Bill seeks to confine to prudentially regulated ADIs the advantage of having priority over all other security interests attached to the account. It is not clear how the provisions could be confined in this way if the provisions were extended to the activities of foreign entities that are not prudentially regulated ADIs under Australian law. Nor is it clear whether any policy rationale exists for extending the advantages conferred by these provisions to entities that are not prudentially regulated ADIs.