

Personal Property Securities (Consequential Amendments) Bill 2009 Submission dated 10 November 2009

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 (Consequential Amendments) Bill 2009 ("**CA Bill**").

Our comments on the CA Bill are set out in schedule 1.

We are pleased that the CA Bill addresses a number of the issues that we have previously raised on the Personal Property Securities Bill 2009 ("**PPS Bill**"). However, in our view it will be desirable to extend the CA Bill, and in due course to have a further Consequential Amendments Bill for the following reasons:

- Only a few of the comments in our earlier submissions on the PPS Bill have been addressed so far. We provided a submission to the Committee on 3 August 2009 followed by a separate submission setting out our responses to questions raised by the Committee at the August hearings on the PPS Bill. We also raised further issues in another submission on the PPS Bill dated 30 September 2009. For your convenience, schedule 2 contains a summary of the issues raised in those submissions indicating whether those matters have been addressed in the CA Bill. In some cases, changes have been made but they do not fully address the comments made in our submissions, and we have indicated these in the schedule as well.

While we consider that each of these outstanding items is important and should be addressed, it is critical that the issues we have identified in relation to the vesting provisions in section 267 of the PPS Bill are addressed. In their current form, these provisions will prevent security interests over future property acquired after the commencement of a winding up. This would be a radical change from the current position, and a substantial weakening of the value of security, particularly all assets security.

We should acknowledge that the Attorney-General's department has indicated that it is continuing to consider at least a number of our comments.

- Finally, there are a number of other issues relating to the PPS Bill which we have identified since our last discussions with the Attorney-General's department. Again, these issues may need to be addressed in a further bill or regulations. They are set out in schedule 3.
- As we all become more familiar with the PPS Bill, and we start to work with it in preparing for its implementation, answering questions from our clients and consideration of practical issues, further issues will come to light. It will be important that these issues be addressed in the legislation, or possibly regulations, and we hope to be able to continue to engage with the Attorney-General's department as they arise.

As a result of our appearances before the Senate Committee and extensive consultation with the Attorney-General's department on the PPS Bill, we understand a decision has been made to proceed with the policy considerations underlying the legislation. The issues set out in the schedules are not intended to revisit policy considerations but rather to help ensure that they are effectively implemented in practice.

Schedule 1 - Comments on Personal Property Securities (Consequential Amendments) Bill 2009

Section of the Act	Issue	Explanation
151	Amend sections 151(2) and (3), and possibly also the heading to the section, to reflect the changes being made to section 151(1) by the <i>Personal Property Securities (Consequential Amendments) Bill 2009</i> .	The proposed amendments to section 151(1) respond to our concern that the holder of a "deemed" security interest might be prohibited from registering that security interest by the section. Consequential amendments also need to be made to other parts of the section.
177, 178(1)	Consequential amendments should be made to these sections to reflect the change made to section 151.	See our previous comment.
239(5)	Delete paragraph (a) or perhaps modify it so that it only applies if the choice of the other law adversely affects the rights or obligations of the ADI.	It should not be necessary to obtain the ADI's consent unless it is adversely affected by the choice of law. This should simply be a matter for agreement between the secured party and the grantor.

Schedule 2 - Summary of our earlier submissions on Personal Property Securities Bill 2009

Clause	Issue	Current Position
8(1)(d)	Combination of accounts.	Addressed.
8(1)(f)(ii)	Interaction of PPS register and Torrens title register.	Not addressed.
8(1)(f)(x)	Scope of "trust-back" exclusion.	Not addressed.
10	ADI accounts.	Not fully addressed.
	Definition of "chattel paper".	Not addressed.
	Definition of "intellectual property"	Not addressed.
	Definition of "consumer property".	Not addressed.
	Definition of "grantor".	Not addressed.
	Definition of "investment instrument".	Not addressed.
	Definition of "negotiable instrument".	Not addressed.
	Definition of "new value".	Not addressed.
12(2)	Reference to leases confusing.	Not addressed (see our comment in schedule 3 on Chapter 4).
12(2)(l)	Flawed asset should not be treated as security interest.	Not addressed.
12(4)	Security over own obligations.	Not fully addressed.
12(5)(b)	Flawed assets.	Not addressed.
	Repos, credit support annexes, securities loans.	Not addressed.

Clause	Issue	Current Position
	Novations.	Not addressed.
13(2)(a) and (b)	Business of leasing goods.	Not addressed.
14(2)(c)	PMSIs for consumer purposes.	Not addressed.
20	Collateral descriptions.	Not addressed.
20(2)(a)(ii)	Acceptance of security agreement.	Not addressed.
21(1)(b)	Relevance of clause 20 to perfection.	Not addressed.
26(1)	Control of investment entitlements.	Not addressed.
31 to 52	Need for more consistent terminology.	Not addressed.
32	Proceeds from dealings with collateral.	Not addressed.
34(1)(c)(ii)	Fixing constructive knowledge on transfer is more harsh than overseas.	Not addressed.
39(2)(a)	'Gap' between foreign registration and perfection.	Addressed.
50	Consensual transactions; impact on efficacy of takeovers.	Not addressed.
69	Reference to 'debtor' rather than 'obligor'.	Not addressed.
69	Clause 69 and related rules dealing with negotiable instruments should be moved to the extinguishment provisions.	Not addressed.
77	Priority of unregistered foreign security interests should extend to investment entitlements, ADI accounts and other forms of intangible property.	Not fully addressed.
77	'Perfection' doesn't exist in all international jurisdictions; concept should be extended to equivalent processes under foreign law.	Not addressed.
79	Should this clause apply only to agreements between the grantor and a secured party?	Addressed.

Clause	Issue	Current Position
81	Delimitation of rights on transfer of account.	Not addressed.
85, 86	Competition between agricultural PMSIs.	Not addressed.
101	Limit on value of priority of goods that become part of processed or commingled goods.	Not addressed.
102	Priority where more than one security interest continues in processed or commingled goods.	Not addressed.
111	Contracting out of commercial reasonableness.	Not addressed.
115(2)	Where governed by foreign law, parties should be taken to have 'contracted out'; successor in title should be bound by predecessors 'contracting out'.	Not addressed.
143	Reinstatement provisions cause significant difficulty when a party has to undo acceleration.	Not addressed.
151	Deemed security interests not registrable.	Addressed.
153(1)	End time for registration for property described by a serial number.	Not addressed.
153(1)	Need to register subordination arrangements?	Not addressed.
163, 164 and 165	References to 'particular collateral'.	Not addressed.
166(2)(c)	Temporary effectiveness of defective registration – onerous on secured parties; continuous checking.	Not addressed.
237(2)	Types of property should not be quarantined.	Not addressed.
267	Vesting of unperfected security interests on insolvency.	Not fully addressed.
268(2)	Turnover trusts not successfully excluded from vesting provisions.	Not addressed.
268(3)	PPS leases that are not affected by clause 267.	Not addressed.
269	Entitlement to damages.	Not addressed.
Part 9.5	References to fixed and floating charges.	Not addressed.

Clause	Issue	Current Position
	Weakening of asset charges and other security.	Not addressed.
	Investment entitlements are absent from Bill.	Not fully addressed.

Schedule 3 - Other comments on Personal Property Securities Bill 2009

Clause	Comment	Explanation (where relevant)
13(3)	Reverse the references in this clause to "bailor" and "bailee".	These references appear to be the wrong way around.
14(1)(c)	After "PPS lease", insert "or other lease that is a security interest".	It is not clear whether the interest of a lessor under a lease that is not a PPS lease can be a PMSI, as a lease may not fall within any of the other categories of PMSI that are listed in section 14(1). If leases other than PPS leases are to be treated as security interests (see our previous comment on s 12(2)) it is important that it be clarified that in such circumstances they would also be PMSIs.
19(5)	After "PPS lease", insert "or other lease that is a security interest".	The issue of when a lessee acquires sufficient rights in collateral for the purposes of attachment will be relevant to all leases that are security interests, not just PPS leases.
28	Replace "the proceeds of the letter of credit" with "that right".	The "proceeds" of the letter of credit will be the cash that the issuer pays when the letter of credit is drawn, rather than the beneficiary's right to make that draw. The issuer's consent should relate only to an assignment of the benefit of the LC, rather than to what happens with the cash once the LC has been paid out.
36(1)	Replace "goods or document" in line 4 with "instrument".	The existing wording seems to be a transcription error from clause 35(1).
53(2)	Replace "rights of the secured party are" in line 1 with "secured party is".	It is not correct to speak of the secured party's "rights" being subrogated – rather, the secured party itself is subrogated to the transferor's rights. (The current language may have been adopted in error from other provisions that talk about a secured party's rights being "subordinated".)
57(3)	Replace "this section" with "subsection (1)".	Clause 57(2) is otherwise in conflict with clause 75.
64(1)(b)	Address timing disjunct between subparagraphs (b)(i) and (b)(ii).	It is currently not clear what happens to PMSIs that are registered within the 5 business day period.

Clause	Comment	Explanation (where relevant)
	In clause 64(1)(b)(ii), replace "the registration time for the account" with "the registration time for the priority interest".	The second change corrects a drafting error.
76(2)	The cross-references to subsection 38(2) should instead cross-refer to subsection 38(1).	
84(1)(a)	Should this clause refer to the time at which the security interest "attached", rather than "was created"?	
Chapter 4, 115, 140(2)(f)	Review Chapter 4 in the context of leases; for example expand section 115(1) to allow parties to contract out of the operation of section 140(2)(f).	<p>If it is possible that leases may be treated as security interests to which Chapter 4 applies (see our previous comment in relation to s12(2)) then the provisions of Chapter 4 need to be reviewed carefully because they would not appear capable of applying properly to a lease transaction.</p> <p>For example, it is common in leasing transactions to provide, if the lease expires or is terminated early for any reason (including on default), that the lessor retain any upside value in the leased assets, rather than the lessee. This can be important for tax purposes, for example, where a company or person leases assets for business purposes – if the upside were to flow to the lessee, this might compromise the lessee's ability to claim a full tax deduction for the rent payments.</p> <p>If s140(2)(f) is applied to leases in its current form, the lessee would also (somewhat perversely) give a lessee an incentive to default under its lease, as this would enable the lessee to get the benefit of any increase in value of the leased asset (which it might not get if the lease were to run to its scheduled maturity).</p> <p>It is also not clear what could in fact be recovered by the lessor from the sale. The expected 'residual value' under a lease is commonly not actually payable by the lessee, and so may not even be something that the lessor would be entitled to retain. This would be a serious problem.</p>
120(1)(a)	Expand subparagraphs 120(1)(a)(i), (ii) and (iii) to encompass any payment obligation.	The policy underlying section 120 should apply with equal force to all payment obligations owed to the grantor.

Clause	Comment	Explanation (where relevant)
135(1)(c)	Amend the section to require notice to prior-ranking security interests as well.	This section appears to assume that a PMSI will be first-ranking. This may not always be the case, however – for example, if there is more than one PMSI over the same collateral.
136	Amend the section to address the situation where the secured party already has title.	Under some security interests, the secured party will already have title to the collateral. Section 136 should make it clear that a secured party can rely on section 136, even if it is already the owner.
179(3)	This section needs to be amended to reflect the way in which security trusts are structured in practice.	
237(2)(b)	Should "an assignment" read "a transfer"?	This would keep the terminology consistent with clause 12(3).
298	Replace "such a circumstance" wherever appearing with "the circumstance".	In large companies such as banks, it is common for more than one arm of the organisation to deal with similar circumstances. In the context of a bank, for example, different branches of the bank will deal with similar circumstances, but in relation to different customers. It would not be appropriate to require that knowledge that is held by an employee in one branch be taken to be knowledge held by employees at all other branches as well.
326(3)	Clarify that this rule only applies where no other rule applies.	If (for example) the secured party under the transitional security interest has opted in to the PPS regime by registering on the PPS register, then it would be appropriate for the general rules in the Act to apply instead.
327, 328	Amend these provisions so that two-year temporary perfection is available here as well.	As these provisions are currently drafted, an unperfected transitional security interest is at risk of being extinguished at any time after the registration commencement time. Unless a transitional security interest is migrated, it will be unperfected, for the purposes of this Division, from the registration commencement time until the secured party opts into the PPS regime by registering. The two-year temporary perfection under section 322 will not apply, as it sits in Division 2 which, under section 320(1), only applies to priority disputes.