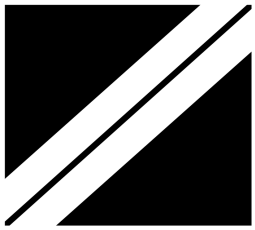

Motor Trades Association of Australia

Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Sir

The Motor Trades Association of Australia (MTAA) welcomes this opportunity to submit comments to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Personal Property Securities Bill (2008) [Exposure Draft].

MTAA is a federation of the various state and territory motor trades associations as well as the New South Wales based Service Station Association Ltd (SSA) and the Australian Automobile Dealers Association (AADA). MTAA also has a number of Affiliated Trade Associations (ATAs), which represent particular sub-sectors of the retail motor trades, ranging from motor vehicle body repair to automotive parts recycling.

As the peak national representative organisation for the retail, service and repair sector of the Australian automotive industry, MTAA is well positioned to make comments as to the manner in which it anticipates the proposed PPS regime will operate in a practical sense. MTAA understands that in jurisdictions where national PPS registers similar to that proposed to operate in Australia by this Bill are in operation, that 'motor vehicle' connected securities comprise roughly half of all those registered. MTAA has, therefore, a significant interest in the development of the proposed PPS regime.

MTAA acknowledges the enormity of the task that the reform of Australia's personal property security (PPS) law represents and sees a number of benefits that might be derived from the construction of the national PPS register, particularly from the integration within that register of the various state and territory registers of encumbered vehicles (REVS) and the National Exchange of Vehicle and Driver Information Service (NEVDIS).

Nevertheless, the Association does have some concerns in connection with the Draft Bill and its potential operation. The Association also acknowledges, though, that the areas addressed by that Draft Bills can be inordinately complex and broad in scope and that, as such, this will also be reflected in the Bill. The Association's search, therefore, for a clearly defined illustration of the practical, day-to-day operations of the PPS regime as proposed is challenged by the reality. MTAA and the Commonwealth Attorney General's Department continue to work cooperatively on the matters of concern to the Association in an effort to secure satisfactory outcomes.

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MTAA is also represented on the Attorney General's Consultative Group for Personal Property Security Law Reform. It is through its engagement with that process that the Association has been assiduous in its efforts to evaluate all aspects of the proposed PPS regime from a prism of practicality, as distinct from what might be considered a theoretical or purely legal perspective.

Understandably, MTAA has made a number of submissions to the Commonwealth Attorney General's Department as part of the reform process leading up to the Bill that is the subject to this Inquiry. Copies of those submissions are attached for your interest. From those submissions it might be understood that the following issues, in the Association's view, need to be acknowledged as considerations of import the equal to any other such issue that carries a significant bearing on the PPS regime in its final form and its subsequent manner of operation. These considerations might be summarised as follows.

First, the manner in which motor vehicle dealership financing is arranged is particular to that sector. Even the characteristics of that financing are particular to the sector and have developed to such an extent as to be highly sophisticated and specific to dealership operations. This aspect of a typical motor vehicle dealers' operations is sufficient in itself to make it reasonable to consider dealings in that sector as 'distinctive' from virtually every other area of retail sales activity in the market.

Second, a typical new motor vehicle dealership is much more than just a vehicle retail outlet. That aspect of the business might be thought of, however, as the 'front of house' component of the operations. Invariably, though, a dealership will also operate a service and spare parts operation. Indeed the need to operate a customer service provision in that manner will invariably be an imperative of the franchise agreement that exists between the dealer and their manufacturer / supplier. That aspect of the business might be thought of as the 'back of house' component of the operations.

Third, a motor vehicle dealerships' profitability and, therefore, sustainability (especially in more recent times) is highly sensitive to a variety factors. Not the least of these factors is any excessive administrative burden and the costs associated with either compliance with regulation or a need to perform actions that are in the best interests of the business.

It might at this point also be worth the Committee noting some of the characteristics of a typical / average motor vehicle dealership. These are generally family-owned and operated franchise businesses. Their stockholding of vehicles is generally facilitated by floor plan financing arrangements, in which the vehicles are 'owned' by a financier that then 'bails' the vehicles to the dealer for sale.

These are capital intensive businesses of modest returns when comparison is made to other retail sectors, where the investment made by the proprietorship in the dealership property itself can be – and usually is – in the many millions of dollars. A typical mid-sized urban new vehicle dealership may have an annual turnover in the order of $100 million, which may realise a gross profit in the vicinity of 1 – 2 per cent. This is akin to any other retailer of goods in the market selling a product for $500 for which is realised a maximum profit of approximately $5: a situation few other retailers would deem remotely viable.

Additionally, a said typical dealership would need to average vehicle sales of somewhere in the vicinity of 30 to 40 units a month in order to realise the capacity to service its obligations. Its most profitable aspects will invariably be in its 'back of house' service and spare parts departments in

which – despite some consumer scepticism – profit margins on activities conducted therein remain only consistent with the majority of the broader retail sector.

Given the issues and characteristics described above, MTAA, and its Member body AADA, are, therefore, perhaps understandably vigilant over any proposal that may have the potential to impact in a deleterious manner upon motor vehicle dealers. At the same time, however, the Association is also vigilant over any proposal that may have the potential to impact in a positive manner, not just upon motor dealers, but also upon retail motor traders generally and the community at large. The Association is of the view that the proposed PPS regime is more likely of the latter category.

One intention of this submission, therefore, is to illustrate to the Committee a number of specific concerns MTAA has, as well as hopefully provide the Committee with some sense of the practical context in which the PPS regime is likely to operate, and with which Committee members may not be all that familiar. During the course of the Department's stakeholder consultations with the Association, the establishment of this context has demonstrated itself to be something MTAA has needed to convey and, significantly, something that the Department – it is imagined – has needed to be receptive to and accept in order for it to comprehend, acknowledge and understand the basis for the Association's view in the proposed PPS regime.

In the main the Association's view and assessment of the PPS regime, as proposed, is that it will likely have little impact on a dealership's 'front of house' operations. At the same time, the Association can see the very real potential for there to be some impact of a negative nature on the dealership's 'back of house' operations. These are views that MTAA has outlined in some detail to the Attorney General's Department, both in the Association's written submissions to it and in the ongoing discussions engaged in between the Department and the Association arising out of MTAA's participation on the Attorney General's Consultative Group.

As declared from the outset of this submission, the Association continues at this time to have a number of concerns in connection with the PPS regime as proposed. These concerns are less connected with the PPS Bill and more connected with possible regulations made under it. Aspects of the Bill nevertheless inform the Association's views, as well as provide an underpinning for any regulations that may be raised. The Association does not propose, however, to specifically raise those issues that are presently the subject of ongoing discussions with the Department, though those issues may be raised in general terms (and can likely be ascertained from the content of the submissions made previously by the Association to the Department).

An issue that continues to trouble the Association surrounds the concept, created by the proposed PPS regime, of a Purchase Money Security Interest (PMSI). Given that it is the proposed intention of PMSIs to replace existing retention of title (ROT) arrangements and that it is those very ROT arrangements that underpin much of a dealership's spare parts operations, the Association needs to be satisfied that the introduction of PMSIs arrangements will not – through their operation – place any retail motor trader at a disadvantage in the market. For example, section 109 of the Draft Bill states:

> *(1) The purchase money security interest has priority if:*
> *(a) the interest is in inventory; and*
> *(b) the purchase money security interest is perfected by registration at the time:*
> *(i) for inventory that is tangible property—the grantor, or another person on behalf of the grantor, obtains possession of the inventory; or*

(ii) for inventory that is intangible property—the purchase money security interest attaches to the inventory; and
(c) a notice is given to all other secured parties who, immediately before the inventory is registered, have a registration describing the inventory; and
(d) the notice is given in accordance with subsection (3); and
(e) the notice was given before the time mentioned in paragraph (b).

(2) A notice is not required to be given in accordance with paragraph (1)(c):
(a) in relation to inventory of a class prescribed by the regulations (if any); or
(b) to persons of a class prescribed by the regulations (if any); or
(c) in circumstances prescribed by the regulations (if any).

(3) A notice is given in accordance with this subsection if:
(a) the notice is in the approved form; or
(b) the notice:
(i) states that a specified person expects to acquire the purchase money security interest in the inventory; and
(ii) contains a description of the inventory; and
(iii) sets out the effect of subsection (1).

Taken at face value, this section would seem to suggest that there is a need for a dealer to register an interest in any and each supply of spare parts made to any and each customer, as well as possibly undertake efforts to notify all other likely suppliers to that customer of their intention to do so. The question that remains unclear in connection with this section is if 'inventory' refers to each supply invoiced to a customer from a dealer, or if 'inventory' refers to the aggregation of parts that have been supplied over time by that dealer that form a portion of the customer's overall parts stock holding.

Additional confusion on this aspect of PMSIs possible operational effects within the retail motor trades is introduced when the above is considered in concert with sections 59 and 67 (1) and (2) of the Draft Bill. Section 59 states:

(1) A security agreement may provide for security interests in after-acquired property.
(2) In this Act:
***after-acquired property**, in relation to a security agreement to which a grantor is party, means personal property acquired by the grantor after the agreement is made.*

While section 67 (1) – (2) states:

(1) If a security agreement provides for a security interest in after-acquired property, the security interest attaches without specific appropriation by the grantor, except as provided by subsection (2).
(2) However, the security interest attaches to after-acquired property only with specific appropriation by the grantor if:
(a) the after-acquired property is of a kind prescribed by the regulations; or
(b) the security interest is covered by subsection (3).

The notes relating to *Attachment and Perfection: Particular Situations* at page 20 of the PPS Regulations Discussion Paper suggest (at paragraph 55) that this automatic attachment of an interest (refer section 67) with regard to subsequent supplies between a supplier and one of its customers has " *. . . far reaching consequences for a grantor. It means **any** property that the grantor acquires*

after entering into a security agreement that gives rise to the security interest will also be subject to the security interest." (emphasis added).

It must be noted that a dealer's spare parts department will not simply be dealing, in the main, with one or two third parties, but may despatch a number of 'bundles' of parts, to a number of different parties a day, every day. It is also important to consider that some smaller dealer / suppliers may also source almost their entire parts inventory from one or more larger dealer / suppliers. The Association has anecdotal, yet reliable, reports that the invoice value written every day by an average dealer's spare parts department would be in the vicinity of $17,000 to $25,000 while the invoice value written by an 'apex' distributor dealer (that might supply the complete parts requirements for smaller dealers) could be in the vicinity of $1,000,000 per day. These are significant sums at risk that dealers need to protect in order to retain the viability of their operations.

While advice on these matters received by MTAA from the Department suggests that in circumstances such as these a dealer would only have to register one interest, and for that action to be taken at the time of original invoicing, there is little in the Draft Bill that explicitly asserts that to be the case. The Department has also advised that it would be sufficient for a dealer to register their interest in terms of 'Holden parts' for example. But, this fails to consider the situation of the repairer sourcing parts from multiple suppliers to effect a single repair. Nor is there any explicit indication in the Draft Bill as to the mechanism that obviates the need for a dealer to specify in detail those parts and / or accessories that it has provided to a repairer. MTAA and its Members would be more comfortable for the Bill to contain some explicit assurances that the advice of the Department in these matters might be relied upon with greater certainty.

Given that it is the intention of PMSIs to replace existing ROT arrangements, concerns might also be raised by the Association in connection with section 63 (3) of the Draft Bill (relating to the enforceability of security interests against third parties), which states:

> *(3) A security agreement covers personal property in accordance with this subsection if:*
> *(a) the security agreement is evidenced by writing, signed by the grantor; and*
> *(b) the writing evidencing the agreement contains:*
> *(i) a description of the particular personal property, subject to subsections (4) and (5); or*
> *(ii) a statement that a security interest is taken in all of the grantor's present and after-acquired property; or*
> *(iii) a statement that a security interest is taken in all of the grantor's present and after-acquired property except for personal property (other than the particular personal property) described in the writing.*

The practical difficulty that lies within this section for the retail motor trades are the conditionals, '*evidenced by writing, signed by the grantor'*. While 'evidenced in writing' may not be such a challenging test, in that virtually any invoice raised within the retail motor trades will satisfy those requirements by having the necessary characteristics (for example, detail / description of goods, payment terms and the like), the issue of 'signed by the grantor' may pose a range of difficulties to parties to transaction.

To illustrate an example of relevance from the retail motor trades; the prevailing and ubiquitous practice of the present, which is a continuation of the long standing practice of the past, is for a repairer to contact a supplier, usually by telephone, and ask that supplier's spare-parts department

for P & A (price and availability) of the following parts to suit 'X' model vehicle. Once that information has been provided, the repairer makes a decision as to whether or not to request supply. If the request is made for supply, then an invoice is raised and the parts dispatched.

While the terms of the invoice might be known to an existing customer of the supplier, and that customer may be party to a long standing arrangement with that supplier, the repairer is just as likely to be a customer of first instance. Indeed, it is that situation that forms a significant part of a dealer / suppliers' daily spare parts business.

The invoices that accompany that parts supply could be COD or on the basis of a seven or 14 day account. Rarely is agreement sought on those terms, except for the parts interpreter informing the customer orally that the goods will be supplied under 'these arrangements'. Those parts are also likely to be dispatched by courier and may be destined to a location interstate. They travel, therefore, under cover of consignment note and not the invoice proper. It is fairly easy to see that these circumstances conspire to limit the opportunity for the supplier to obtain any form of 'signed by the grantor'.

While the Association understands that, under the practice described above, the existing law offers little in the way of securing a supplier's rights in terms of ROT, it also understands there to be a body of case law that may provide some level of security of ROT in these circumstances beyond the vacuum provided by legislation.

In the application of the considerations outlined above to the proposed effect of the Draft Bill, and section 63 (3) in particular, the Association considers the present legal circumstances to be something of an irrelevance. The practical, present day reality as described above is the dominant practice of the retail motor trades and it would be the Association's assertion that it is those circumstances that need to be acknowledged and reflected in and by the manner of the relevant sections of the Bills' construction and import. To 'force' a significant change in the manner and nuances of transactions between parties in the retail motor trades is to court an increase in non-compliance, with a subsequent increase in exposure to risk of loss of rights in property.

It is likely that the point made above has the most particular significance to the MTAA. Any reform that carries with it the potential to demand a significant change in the current operational characteristics and requirements of the retail motor trades also carries with it a degree of risk. While MTAA can see the merits of the proposed PPS regime in the broad and, as indicated earlier, can also see how minimal its impact might be on, say, motor vehicle dealers' 'front of house operations', it can also see the potential for disruption to the practices of the 'back of house' operations. Such an outcome would not be welcomed in the first instance, nor would it be something easily 'balanced' in terms of efficiencies or costs by behavioral changes made by affected businesses at an operational level.

The proposed PPS regime will also not have an impact confined solely to motor vehicle dealers. MTAA considers that there will also be some consequence of the regime's adoption on motor body repairers. For example, a repairer will not necessarily deal with just one supplier representing each manufacturer. Even to effect one repair on one vehicle, a repairer may need to source parts from two or more different dealer / suppliers representing the same manufacturer. This might particularly be the situation faced by a motor body repairer, who might require a parts list comprising upward of 50 line items in order to complete a collision repair on a vehicle to an appropriate standards.

Once again, though, the possible (unclear) operation of section 67 (1) – (2) of the Draft Bill, and the guidance on that section offered by the notes relating to *Attachment and Perfection: Particular Situations* at page 20 of the PPS Regulations Discussion Paper, makes it uncertain as to the manner in which a repairer may find their priority of rights delegated in the event of any priority claim made by the third party over that repairer's spare parts 'holdings'.

MTAA might observe that there is a certain sub-textual 'presumption' contained within the Bill, which seems to be that it is the 'customer' that defaults in these transactions, and that all affects of this then occur 'upstream'. No consideration seems to have been given, however, to the prospect of a supplier (one of perhaps two or three supplier / representatives of the same manufacturer to the one repairer) and the impact that may have upon an 'innocent' repairer and their entitlement rights over parts obtained from that supplier that they might have on hand.

Another area of concern to the Association regarding the interests of repairers relates to the proposed manner of the national PPS register's operation. The Association understands and accepts the need for the national PPS register to act as a register of encumbrances. However, a repairer will invariably source parts from a number of suppliers, which could be as many and as diverse as the number of motor vehicle manufacturers represented in Australia (over 40). It is probable, therefore, for each supplier to have a registered interest in any and all supplies invoiced to that repairer; the details of which would be evident to any entity contemplating supply to an individual repairer.

It is unclear to MTAA from the Draft Bill, however, exactly how the availability of the grantor's (that is, repairer's) details in that regard will be 'managed' in such a way as to prevent the misuse of that information by suppliers; either to the detriment of the repairer or the advantage of one supplier over another. The Association is concerned for the possibility of an individual's encumbrance details, as available from the national PPS register, as being utilised in a manner in which trading confidence may be compromised.

The Association does not believe that the issues in that regard are insurmountable, but it does consider that there needs to be a greater level of clarity and certainty infused into the Draft Bill before any real comfort with the proposed PPS regime can be arrived at by MTAA and its Members.

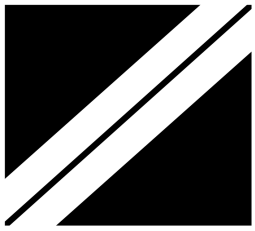
It is my hope that you find these comments instructive in your consideration of the Draft Bill, and I ask of you to contact me at any time of your convenience if you think I can provide you with any further information or if any matters I have raised would benefit from some clarification.

Yours sincerely

Michael Delaney

MICHAEL DELANEY
Executive Director

19 December 2008



Motor Trades Association of Australia

Attachments

- Submission to Attorney General's Department on PPS Discussion Paper 1: *Registration and Search Issues;*

- Submission to Attorney General's Department on PPS Discussion Paper 2: *Extinguishment, Priorities, Conflict of Laws, Enforcement, Insolvency;*

- Submission to Attorney General's Department on PPS Discussion Paper 3: *Possessory Security Interests;*

- Submission to Attorney General's Department on Version I of PPS Draft Bill;

- Submission to Attorney General's Department on PPS Regulations Discussion Paper

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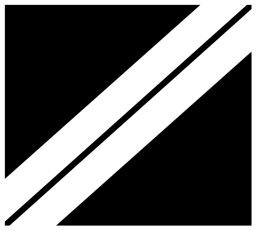


Motor Trades Association of Australia

Mr Stuart Woodley
Principal Legal Officer
Office of Legal Services Coordination
Attorney-General's Department
Robert Garran Offices
National Circuit
BARTON ACT 2600

Personal Property Securities Discussion Paper: 'Registration and Search Issues' Comments

Dear Mr Woodley

From the outset, let me thank you for providing Motor Trades Association of Australia (MTAA) with the opportunity to comment on the proposed Securities Register (PPS) regime. Thank you, too, for providing MTAA with the ongoing opportunity to be involved with the consultation process for the development of the PPS reform initiative.

MTAA is the peak national representative organisation for the retail, service and repair sector of the Australian automotive industry. The Association is the largest 'stand-alone' small business association in Australia, representing over 100,000 businesses in a sector which turns over more than $120 billion each year and employs over 316,000 people. The Association has a significant interest in the environment in which motor vehicle dealers operate in Australia.

As you will be aware, motor vehicles throughout Australia comprise a substantial proportion – both in number and in value – of personal property over which a financing statement, or security interest, might be held. Presently, the registration of such interests is the purview of the states and territories. Any proposal to move towards a national register is, therefore, of obvious interest to MTAA and its Member Bodies.

Such a proposal is also of significant interest to motor vehicle dealers, as any alteration to the current security register arrangements will necessitate changes to aspects of their operations. Consequently, it is from the perspective of motor vehicle dealers from which the comments provided by MTAA on this first discussion paper can be taken as having been principally informed.

It may also be prudent at this stage to signify MTAA's awareness of the proceedings currently before the High Court of Australia in the matter of *GMAC v Southbank*: on the details of which I have no doubt you will be familiar. At the time of writing, these proceedings have only just commenced, and a judgement of the Court is anticipated to be made available at some short time hence; albeit after the submission of these comments. I am sure you will agree that the findings of the Court in this matter have the potential to alter not just aspects of the proposed PPS regime,

but also the legal environment in which motor vehicle dealers find themselves in terms of their contractual arrangements for transfer of ownership and other obligations with which they need to be compliant.

It is possible, then, that some of the comments provided herein may be in need of reconsideration and further development in light of the Court's determination of this matter. MTAA has no capacity, or desire, to 'second guess' the Court in this regard, and some comfort is taken in suggestions from the Department that the possibility will exist for further comments to be made – with cognisance of the Court's decision -- if the need exists to do so.

The comments following focus on the areas of pertinence to MTAA Members following discussions with them. The comments first address some of the discussion paper's guiding questions. Comments then following are more general and observational in nature.

Q13 (p19): *Should the legislation deem retention of title arrangements, commercial consignments and leases of more than one year to be security interests?*

This is an example where an appropriate response may well be contingent upon the findings of the High Court of Australia in the matter of *GMAC v Southbank*. It is understood the outcome of this matter will hinge to a large extent on the Court's interpretation of the status and effect of retention of title arrangements in the form of Romalpa clauses, within the context of their use within the motor vehicle sales chain.

Q15 (p20): *Should the PPS Register include notices of judgements, or writs or warrants of execution obtained from unsecured creditors?*

Again, it might seem that the determination in *GMAC v Southbank* will provide clarity in this regard and would prove instructive towards the development of a preferred position. Despite this, consultation with the Association's Members reveals some concerns associated with repairer's liens. Currently under the *Goods Securities Act* 1986 (SA); section 12(3); a repairer's lien, whether or not registered, has priority interest over a security interest in the goods, whether or not the security interest is registered. Additionally, the *Worker's Liens Act* 1983 (SA) gives the right to sell the vehicle in certain situations, and to register this interest. It must be made clear how this legislation will compete with registered security interests on the National PPS register.

Q16 (p21): *Should a search of the PPS register relating to a motor vehicle include information from NEVDIS about whether a vehicle has been reported as stolen or written off? Alternatively, should searchers be able to specify whether they want their search to include information about wether the vehicle has been reported as stolen or written off?.*

It is MTAA's understanding that dialogue has been engaged in between officers of; Attorney General's Department; those of the Department of Transport and Regional Services (DoTARS); and, one of the state Register of Encumbered Vehicles (REVs) with a view to the incorporation of registry data they currently hold within the proposed PPS register. Given the likelihood of all motor vehicle securities being for all intents and purposes effectively a 'sub-set' within the broader PPS regime (discussed elsewhere), such an arrangement might prove of particular benefit to motor vehicle dealers -- and consumers generally -- leading to greater efficiencies in their operations.

Q20 (p28): *For goods registered under the collateral description 'goods: motor vehicles', should it be possible to specify that the motor vehicles are:*
(a) consumer goods
(b) equipment, or
(c) inventory.

This would likely cover most considerations in terms of the nature of security held over a motor vehicle. Generally, motor vehicles travel through a chain of distribution, with examples of 'way points' along this chain including manufacturer, importer / distributor, dealer and end purchaser. Obviously, a vehicle's encumbrance 'status' will be determined to some degree by its position within the distribution chain.

This might also be equally applicable for used vehicles that might 'circulate' through the market through a variety of agents before eventually being offered for sale to consumers. Further, it is conceivable that such an accommodation would also allow for a greater measure of confidence that clear 'title' might be offered to a consumer with the sale of a used vehicle.

Q29 (p38): *Should the period within which creditors must de-register a financing statement relating to a motor vehicle be less than 15 days? If so, would 7days be an appropriate period?*

A period of seven days would be far more appropriate, unless another mechanism can be employed to realise evidence of 'clear title' within an even shorter timeframe. It is worth noting that delays of de-registration of financing statements is already an issue of concern to many motor dealers under the various states and territories current arrangements.

Q34 (p44): *Should the debtor be able to give an address other than a residential address for registration purposes?*

Q35 (p44): *Are there other unique identifiers besides debtor address or date of birth that could be used to enable a searcher to discriminate between search results where there is more than one person with the same name?*

Q36 (p44): *Should financing statements which relate to serial numbered collateral be able to be registered without including debtor details?*

Clearly there would be a variety of considerations in these regards. As a passing commentary in relation to these points, however, it would seem that there may be a 'philosophical' basis for determining a prudent course of action in this regard.

If it is to be assumed that the focus of a security inquiry is to be upon the 'collateral' or property in question and, therefore, any encumbrances upon it, then *whoever* (and their details) is bound by an encumbrance over property is likely subordinate – in some respects – to the nature and priority of the actual 'arrangement' held over said property. That is to say, the status of the property in terms of encumbrance is possibly of a higher value to a searcher than a person's encumbrance burden. Similarly, there would appear to be no real need for creditor searches, as any information recovered could only be of use vicarious to the Register's intent (being the point of determination of encumbrances, their nature and their priorities).

Q44 (p54): *If a financing statement can be located by either debtor name or asset serial number, should the legislation address whether the reasonable searcher would search against either one or both of the possible search criteria?*

It is conceivable the reasonable searcher might benefit from being able to search against both debtor name and serial number (despite the comments expressed above). Such an option might serve to strengthen any claims of 'due diligence' as might be asserted by a 'purchaser' in the event of competing interest priorities. Again, this question may be better settled from a motor vehicle dealer's perspective in subsequence of the findings in *GMAC v Southbank*.

Issues concerning Registry error are of interest to all stakeholders and users of the intended regime. It is imagined that issues relating to the states and territories current compensation arrangements in relation to the sales of motor vehicles would be addressed in concert with other discussions, including those canvassing the possibility of 'incorporating' National Exchange of Vehicle and Driver Information System (NEVDIS) / REVs data into the PPS structure. Nevertheless, this aspect of the proposed regime stands to be a matter of some further interest to MTAA Members, and it is disappointing that the discussion paper has made no real effort to countenance potential scenarios (except to declare it as a matter with the, " . . . *need of further consideration*."). Obviously, motor vehicle dealers in the various states and territories of Australia would prefer to be provided with some guidance on what arrangements they might be required to engage with in this regard.

To offer some comments more general in nature, there is an obvious acknowledgment within the discussion paper of the significant numbers of Registry entries that would be attached to motor vehicles. Reports of motor vehicle registry entries representing in the vicinity of 48 per cent of all registered security interests in New Zealand would tend to underscore the potential significant numbers appearing within a similar regime operating in Australia.

Given the consultations underway concerned with the possibility of the proposed PPS register incorporating data from the existing NEVDIS and state and territory REVs registers, it is possible to anticipate a situation whereby 'motor vehicles' exist essentially as a distinct and significant 'sub-set' within the broader proposed PPS regime. If such a situation proved to be an outcome and if, by extension, an output of the proposed regime was access by motor vehicle dealers and purchasers to a national 'one-stop-shop' for a motor vehicle's status in terms of encumbrance, registration, or if it had ever been stolen or written off, the efficiency gains -- both direct and vicarious -- would have to be regarded as potentially substantial.

Arrival at such a desirable situation, however, is recognised as not being without a range of challenges that would need to be overcome. Indeed, some MTAA Member Bodies have relayed advice from their members of their satisfaction with the existing state-based encumbrance registers, which, while conceding they are not perfect in operation, nevertheless provide them with a satisfactory standard of utility and functionality for their purposes. It is reasonable to suggest their reluctance to fully support a national PPS register as being attributable to the 'one-stop' nature of the existing arrangements.

Last, while acknowledging the starting point as enunciated in the discussion paper as reasonable, there nevertheless remains to be made within the document a compelling argument as to the existence of a specific need for reform, possessed of the characteristics proposed, within the Australian context. Acknowledging the efficiency gains and other benefits following the

adoption of a similar regime in New Zealand might be seen as insufficient to support the adoption of essentially 'mirror' arrangements in Australia.

Similarly, the disparate nature of the structures of government that can be evidenced between Australia and New Zealand realises a distinct set of circumstances for each Australia state and territory in regards to security interest registration. It is hardly contentious to suggest the architects of the New Zealand legislation would have had no need to address many of the challenges presenting in Australia; particularly those relevant to the nuances and practical operation of the current financial interest arrangements within the various states and territories.

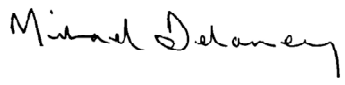
The efforts for incorporation of the states and territories existing data – particularly that already also provided in parallel with security interest details -- may ultimately reveal a number of issues that prove intractable at the worst, or at best lead to a level of complexity militating against the intent of the reform (in terms of efficiency for example). If these issues can be satisfactorily addressed, then the benefits of the reform ought to be realised.

In summary, MTAA has no strenuous objections to the PPS proposal as presented in this first discussion paper. Given the possibility for a National PPS Register to effectively – even if by mere circumstance rather than deliberate intent – operate as a central data point for a variety of status information relating to a particular motor vehicle, then MTAA would consider the outcome of the regime's adoption as desirable.

MTAA also acknowledges the scope of the challenges to be encountered in the consolidation of the Australian states and territories existing data sets under the umbrella of a national PPS register.

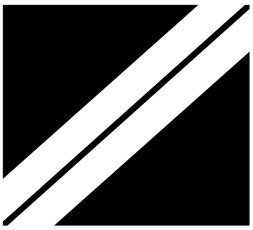
Again, the point must be made that aspects of MTAA's comments are somewhat contingent upon the High Court of Australia's findings in the matter of *GMAC V Southbank*. As such, MTAA may wish to avail itself of a future opportunity to provide additional comments in relation to the outcome in that matter.

I trust you find these comments of some use in the ongoing development of the proposed PPS Register, and in the ongoing PPS reform exercise generally. Again I thank you for the opportunity to be engaged in this process, and invite you to contact me if there is any other assistance I might be able to provide.



MICHAEL DELANEY
Executive Director

9 February 2007



Motor Trades Association of Australia

Comments provided by MTAA: PPS Discussion Paper Two

These comments provided by the Motor Trades Association of Australia (MTAA) propose to discuss the operation of the proposed PPS rules within the context of the Australian motor vehicle sales sector.

From the outset it must be acknowledged that in many respects the financing sector servicing the motor vehicle sales industry has 'evolved' in step with the demands of the sales industry itself. Accordingly, the characteristics of the arrangements for this sector of financing present as something of a 'specialist' or 'particularist' area.

Similarly, motor vehicle sales operations are by their very characteristics and nature quite distinct from the normal retailing models that might be found, for instance, in the sale of electrical appliances. Additionally, the level of complexity increases when full attention is given to the manner in which used vehicles may be treated in the broader vehicle sales market.

It is also fair to say that the typical operations of a motor vehicle dealership (and, thus, operations within the motor vehicle retail sector in general), and those of the financing sector servicing it, have something of a symbiotic relationship. Each sector has characteristics that, in many respects, are a product of each other. The size of the effect of this is impossible to ignore, with comments provided to MTAA, in the course of consultation with its Members on Discussion Paper 2, suggesting that somewhere in the vicinity of 90 percent of the Australian motor industry's stock holding – in retail and wholesale inventories – might be subject to financing arrangements. In view of Australian new vehicles sales alone being anticipated to be close to 1,000,000 units in 2007, the potential exists for significant disruption within the industry to occur if transitional arrangements are not well considered.

Acknowledgment is also needed that the operation of a motor vehicle dealership also occurs against the backdrop of the current operation of various motor vehicle dealers' Acts (and other relevant legislation such as for the sale of goods generally) in the states and territories. While these Acts may be similar in intent and purpose, they are in some respects quite distinct. Similarly, dealers in the various states and territories may also need to comply with other legislation regulating the sale of goods generally. It must be remembered that typically a new vehicle dealership will also operate a used vehicle sales department.

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MTAA estimates that an average, mid-sized dealership in a major metropolitan or capital city might have an annual turnover in the vicinity of $70 million - $100 million. This turnover might not, however, include income generated by the operation of the dealership's service and parts departments. The net profit before tax for the new vehicle department might not be much more than 1.2 percent. With margins of this nature, most dealerships seek to optimise their service and spare-parts operations, and maximise any benefit they gain through the sale of a range of finance and insurance products that they are able to sell to their new vehicle customers at the time of purchase.

Dealerships also remain under considerable vehicle manufacturer influence. As a franchised business, new vehicle dealerships are often compelled to undertake significant investment in capital works in order for them to remain compliant with their agreements with their franchisors. Motor vehicle dealerships, therefore, are businesses run on very fine margins with financing arrangements particular to the industry.

What follows, then, is a hypothetical situation that makes an effort to describe the characteristics of the transactions in the motor vehicle retail sector as they are currently. An attempt is then made to illustrate those operations as they might be within the proposed PPS framework, as it is outlined within Discussion Paper 2. In the examples below, the Association offers some comments and raises further issues which it believes are in need of consideration and clarity. The Association trusts that this approach provides the Department with some assistance in the further development of the PPS proposal. For convenience in the examples below, the following 'key' is used.

<u>The Possible Situation under the Proposed PPS Rules</u>

D = Dealer
B = Bailment company (finances D's new and used car stock / assets)
F = Finance company (may or may not have arrangement with D)
P = Purchaser

D has new and used vehicles in stock, which are financed under floor-plan arrangements with B (albeit under slightly differing arrangements applying to D's 'new' and 'used' stock). Floor plan arrangements are those whereby a finance company effectively purchases vehicles from the supplier and allows a dealer to retain them on the dealer's premises for sale. B likely has a perfected security interest over each vehicle comprising D's new stock. B's arrangements with D regarding D's used vehicle stock is in the form of a perfected interest over D's circulating assets.

P intends on acquiring a new vehicle from D. P's acquisition is to be financed by F. F naturally seeks an interest over P's vehicle with the intention of perfection of it. P anticipates acquiring the vehicle unencumbered from D under the provisions of a relevant Motor Vehicle Dealer's Act (and / or by operation of the proposed PPS regime's 'ordinary course of business of a motor vehicle dealer' (OCBMVD) rule).

It seems possible, however, that the vehicle in question could remain effectively encumbered to B. B's interest (in the vehicle P seeks to acquire) is, therefore, not

effectively extinguished until D pays its obligations to B. In likelihood, D needs consideration via P (provided from F) in order to comply with the effect of its arrangements with B. In assessing P's application for finance, F searches the PPS register and finds a perfected interest in the vehicle P seeks to acquire. F withholds its approval of (or rejects P's application for) funds for P's purchase, pending clear title. Thus, a 'stalemate' ensues.

To contrast with current practice, in the situation described above there is an understanding within the industry that D will immediately make good its obligation to B to enable extinguishment of any interest B has in the vehicle in question. The situation presents with few issues if it is the case that F and B are essentially the same entity, as might be the case with 'dealer finance'. In that circumstance any interest attached to the vehicle becomes essentially a matter of B's 'in-house' transfer of that interest to F.

Currently, if it is the case that F is a separate entity (P's normal banking institution for example), then the same 'understanding' that D will secure a release of B's interest is made. In the event of D's failure to do so, B's recourse is solely with D, as the operation of the various motor vehicle dealers Acts generally prohibits a transfer of encumbrance to accompany the sale of a motor vehicle to a consumer.

Q: Does vehicle remain, though, in reality encumbered to B ?

That is, will the 'status' of the retention of title arrangements between B and D, or B's perfected interest, be sufficiently upheld as to override the operation of the OCBMVD rule?

It is not entirely clear from Discussion Paper 2 that the current situation would remain in effect. It would seem that the practical operation of this situation, under the proposed PPS regime, hinges on the ability of the OCBMVD rule to guarantee with certainty that, irrespective, P can acquire the vehicle free of an interest (other than any subsequently obtained by F).

To ensure this requires arguably more than the circumstances described as those in NZ whereby, "*The New Zealand legislation reflects the policy that a consumer who buys or leases a motor vehicle through a licensed motor vehicle dealer should be entitled to assume that the vehicle is free from any security interest . . .*"[1] It must be noted that the example provided above also makes little allowance for the possible additional complexities that may be associated if the object of the transaction between D and P were a used vehicle.

A reading of section 58 of the PPSA (New Zealand) reveals:

> "*A buyer or lessee of a motor vehicle who acquires the motor vehicle for value takes the motor vehicle free of any security interest in the motor vehicle if . . . (c) before the transaction to which the buyer or lessee is a party is completed, the security interest was not . . . (ii) . . . disclosed in writing to the buyer or lessee.*"

[1] PPS Discussion Paper 2, p26 (111): Emphasis added.

In effect this section appears not dissimilar to the operation of section 29B of the *Motor Dealers Act* (NSW) *1974* in that an opportunity is created for a D in New South Wales to sell an encumbered vehicle providing notification of the encumbrance is given to the intending purchaser (if any limitations on doing so, established through the operation of s17 of the *Sale of Goods Act* (NSW) *1923*, are momentarily set aside).

It could be argued that this is something of a lessening of the present obligations upon dealers in some Australian states and territories, where purchasers of a vehicle can be as close to certain as possible that any vehicle in question is free from any security interest. See, for example:

- section 48 of the *Motor Car Traders Act* (Vic) *1986*;
- sections 233 and 295 of the *Property Agents and Motor Dealers Act* (Qld) *2000*, and;
- section 32E of the *Sale of Motor Vehicles Act* (ACT) *1977*.

Returning to the 'stalemate' situation described above; there are two (and, in likelihood, more) possible responses to this. These responses are:

A) D undertakes to P (and possibly F) to fulfil its monetary obligation to B in advance regarding the vehicle in question and immediately does so. B's interest in the vehicle is extinguished. This would clear the way for F to approve P's finance, but in the event of P deciding to not continue with the purchase (or F nevertheless refusing P's finance application) then D may be significantly disadvantaged.

B) D undertakes to P (and F) to fulfil its obligation to B regarding the vehicle in question, but does not immediately do so. D chooses to wait until consideration has been received from F / P. On the basis of D's undertaking, F approves finance for P and provides consideration directly to D. F then registers a security interest over the vehicle -- despite there continuing to be a perfected interest over the vehicle by B -- which P now has in their possession. D does not remit the required amount derived from proceeds of sale to B. D then becomes insolvent.

Despite the possible operation of law similar to that of s59 of the PPSA (New Zealand) in Australia, this raises two questions.

1. *Is B's only available recourse to seek restitution through a statutory Fidelity Guarantee Fund?*[2]

2. *Do priority rules also have affect?*

It would appear as if both questions could exist as possibilities under the PPS proposal as outlined in Discussion Paper 2. Again, much hinges on the force of the 'ordinary course of business' rule. It also tends to suggest a policy issue arises in that -- depending upon the responses to the questions posed above -- circumstances are produced that might be considered as undesirable.

[2] PPS Discussion Paper 2, p28 (117)

For example, if B's appropriate recourse is through a statutory Fidelity Guarantee Fund, then P's possession of the vehicle is an issue removed from any of those arising between B and D. D, it is imagined, would also then be subject to any laws relating to insolvency and B's claims could be subject to any priority rules arising as a result. In this manner, the proposed PPS rules would be the result of a policy response aligned favourably towards consumer protection.

While this may seem appropriate, it is questionable that this example represents a set of circumstances that promote sound business principles. It might, for instance, allow financiers an 'easy option' for the reclamation of their debts through a Fidelity Guarantee Fund, with little need for them to 'pursue' an insolvent dealer through the exercise of remedies available through insolvency law. By extension, it might also absolve financiers (such as B) from exercising a certain level of diligence with respect to the manner in which an assessment is made of the risk they could be exposed to when considering a financing proposal from a dealer. Dealers – despite other actions possibly faced under insolvency laws – could also be relieved of a certain rigour and responsibility attendant to their dealings. This situation might also lead to circumstances whereby any potential market value for chattel paper associated with the motor vehicle trade (as discussed in Discussion Paper 3) could be deleteriously affected.

If, however, the priority rules were to take effect, then P's ongoing possession of the vehicle in this example is less certain. Under those circumstances B could claim priority over F due to having a prior perfected security interest. It is also conceivable B could apply its 'retention of title' rights and commence efforts to reclaim possession of the vehicle presently in P's hands. Clearly, this outcome is not in the interests of consumer protection. It might be argued, however, that it would provide clarity and certainty in regards to transactions as might occur between motor vehicle dealers, wholesalers, and financiers.

From the discussion above, it is clear that there is a need for the PPS regime to consider rules particular to the sale of motor vehicles. It is agreed that this is a matter that requires consideration as part of the PPS proposal's development, but the examples above – constructed as they were from the proposed outline of future arrangements in Discussion Paper 2 – illustrate that it has some way to go before these matters are settled. These rules may well also have to offer a differentiation in terms of their applicability to either a consumer, or a dealer (or, perhaps more accurately, a non-consumer). As a starting point for example, the following suggestions might be worthy of further consideration.

1. That a clear distinction be made between; vehicle trade between a dealer and a consumer, and; vehicle trade between dealers, wholesalers and financiers.
2. That for the purposes of vehicle trade between a dealer and a consumer, that the concepts of; the OCBMVD rule, and; the normal priority rule would apply, but with an emphasis on the former of these concepts.
3. That the PPS rules described in (2) above are constructed in such a manner as to ensure that a purchaser acquires a vehicle with an assurance they do so free of any encumbrance (except, naturally, any which might be raised subsequent to a purchase made under any enabling financing arrangements).

4. That for the purposes of vehicle trade between dealers, wholesalers and ('specialist') motor industry financiers, there exists a need for rules particular to these dealings, which balance priority rules with the OCBMVD rule.

In the discussion above, the Association has not commented on proposed arrangements for a 'fidelity guarantee fund', such as that established by the PPSA (NZ). Most Australian states and territories have already established Funds similar to New Zealand's Fidelity Guarantee Fund. These Funds, however, are for the purposes of access, quite rightly, by consumers. These funds serve as a 'failsafe' in the event of a consumer having a need for recourse in circumstances where they are entitled to monetary compensation, but no avenue might readily exist for them to secure that compensation. It is not necessarily the case – as suggested in Discussion Paper 2 – that these funds are created and designed to, " . . . *compensate secured creditors whose security interest is extinguished on the sale of a motor vehicle by a motor vehicle dealer*."[3]

A typical example of these funds might be found in the Motor Car Traders' Guarantee Fund in Victoria. This Fund is established under Part 5 of the *Motor Car Traders Act* (Vic) *1986*. Section 76 of this Act outlines the circumstances under which a claim might be made against the Fund. Section 76(2) does make some provision for a financier to make a claim for, " . . . *loss incurred from the failure of a licensed motor car trader to procure the cancellation of a security interest in a motor car (<u>other than an inventory security interest</u>[4]) registered under the Chattel Securities Act 1987 or any corresponding previous enactment before the motor car trader acquired or took possession of the motor car*." Section 76(1), however, is clearly aimed at providing consumer protection.

To create a fund where one of its purposes is to provide an avenue for a finance company to pursue recourse would not be considered as desirable for the reasons mentioned previously.

<u>Equipment, Inventory or Goods</u>

The proposed PPS regime intends on making a distinction between security interests held variously as equipment, inventory or goods. It might be said that doing so and having rules particular to each 'designation' could clarify the manner in which the hypothetical transaction, described earlier, might be conducted if certain priorities were to be applied.

In this suggestion, these designations would exist as essentially artificial constructs, which operate in the background of a transaction involving motor vehicles and which take into account the transaction's nature (that is, whether the exchange for consideration is in the direction of; dealer to consumer; dealer to dealer; bailment company to dealer; dealer to wholesaler; consumer to dealer in the form of a trade in and so on).

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[3] PPS Discussion Paper 2, p28 (118)
[4] Emphasis added

For example, a security interest over 'goods' (as might be created as a result of F's financing of P's vehicle purchase) may need to be accorded a priority over that of 'inventory' (as might be created by B over D's new and used vehicle stock holding). This priority would need to be upheld irrespective of the date on which B obtained perfection of its interests over D's stock.

It is possible for this to also hold when P is offering D a vehicle as a trade-in or part payment for P's acquisition of another vehicle. For P, the vehicle remains essentially as a 'good' that is being obtained by D as 'inventory'. Any interest existing over the vehicle in question would still need to retain priority over a subsequent interest B might raise as part of its 'vicarious' acquisition of the vehicle under the terms of any financing arrangements between D and B. In effect, it would be B that extinguishes F's interest in the vehicle held by P.

Similarly, a security interest over 'inventory' (as might be created as a result of B's bailment over vehicles held by a vehicle wholesaler as stock) would have priority over a further security interest over 'inventory' (as might be created as a result of the wholesale company subsequently providing vehicles to D under bailment) on the basis of date of perfection. This priority could be challenged, however, if D was unaware of any existing interest over the vehicles held by B, which is an outcome consistent with the High Court of Australia's judgement in the matter of *GMAC v Southbank*. In other words, here is an instance where the OCBMVD rule would see the extinguishment of any prior interests.

In the context of the motor vehicle retail sector, the concept of 'equipment' might have limited application. This could particularly be the case when actual trade of vehicles is considered. In most cases, even a dealer's stock of demonstrator vehicles remain on bailment and are considered as 'inventory'; albeit recorded against a different accounting listing by the dealer (for example, the bailment conditions for a demonstrator vehicle might simply move from being a wholesale bailment to that of a retail bailment, and the vehicle would be considered as a used car under some states and territories motor vehicle dealers Acts).

Generally, 'equipment', in the context understood within a new motor vehicle dealership and its operations, would include workshop equipment. These items – if happening to be under a security interest – are more likely currently to be subject to an interest over a floating charge. Under the proposed PPS regime, it is imagined these items would become subject to an interest as circulating assets. It is unlikely that a dealer might ever hold a vehicle for sale in stock as 'equipment'.

This does not preclude the possibility of a purchaser acquiring a vehicle with its end use being easily identifiable as equipment. In these circumstances, however, this is an issue distant from the transaction between P and D. Whether any security interest is raised over the vehicle by F as 'equipment' as a result of P's acquisition (and intended use) of the vehicle does not need to have any bearing on any existing interest between D and B. In effect, the same priority rules as if the vehicle was considered as 'goods' would apply.

Inclusion of motorcycles on proposed PPS register.

Section 57 of the PPSA (NZ) defines a motor vehicle as:

(a) means a vehicle, including a trailer, that---

(i) is equipped with wheels, tracks, or revolving runners on which it moves or is moved; and

(ii) is drawn or propelled by mechanical power; and

(iii) has a registration number or a chassis number, or both of those numbers; but

(b) does not include---

(i) a vehicle running on rails; or

(ii) an aircraft; or

(iii) a trailer (not being a trailer designed solely for the carriage of goods) that is designed and used exclusively as part of the armament of any of Her Majesty's forces; or

(iv) a trailer running on 1 wheel and designed exclusively as a speed measuring device or for testing the wear of vehicle tyres; or

(v) a vehicle designed for amusement purposes and used exclusively within a place of recreation, amusement, or entertainment to which the public does not have access with motor vehicles; or

(vi) a pedestrian-controlled machine designed to perform some mechanical operation and not designed for the carriage of persons or goods; or

(vii) a pedestrian-controlled forklift

Such a definition would seem to capture motorcycles, including those motorcycles used for farm, agricultural or recreational use that might not be registered for use on the road (a possible interpretation of s 57 (b)(v) notwithstanding). Many motorcycles sold in Australia are purchased with this end use in mind. Some may not even comply with the Australian Design Rules for road going vehicles and, hence, are ineligible for registration for use on the road.

Motorbikes of this non-ADR compliant type and sold for non-road use may, however, have been acquired under financing arrangements by a purchaser. In that case, these motorcycles will also have a security interest registered over them and it might be reasonable to imagine this practice would become more prevalent under the proposed PPS regime.

MTAA's preference would be for all motorcycles with the potential to be subject to a security interest to be regarded as a 'motor vehicle' and, as such, to be registered on the PPS Register. Given that such registration is likely to be linked with the NEVDIS, motorcycles of this category would need to have their identification details (engine number and frame number for example) referenced on this database also.

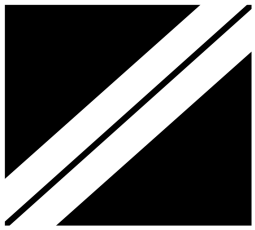
Conclusion

MTAA remains supportive of the Department's PPS reform. As has been demonstrated, though, MTAA considers there to be some areas, relating specifically to the motor vehicle retail sector, which require some further analysis and consideration. The Association is happy to provide the Department with any assistance it requires in this regard, and trusts this submission makes a contribution in those terms.

National Secretariat
MTAA

Canberra

25 May 2007



Motor Trades Association of Australia

Personal Property Securities: Discussion Paper 3 Comments.

These comments are provided, further to the Association's earlier comments on Discussion Papers 1 and 2. The Association's comments on this Discussion Paper 3, like those previously provided, will be confined to those aspects considered likely to be applicable within the retail motor trades.

Chattel Paper

The concept of a 'chattel paper', as outlined and discussed in Discussion Paper 3, would seem to capture a number of financing arrangements currently operating within the motor vehicle sales sector. Examples of these might be a lease agreement, hire purchase agreement, or a contract that includes a retention of title clause. The latter of these, in particular, is especially prevalent; given that arrangements such as these often represent the principal elements of financing arrangements existing between a bailment finance company and a motor vehicle dealer. MTAA has in principle no issue, therefore, with the proposal for 'chattel paper' to be defined in a similar manner to that adopted in New Zealand and Canada, in that it would relate to specific goods or specific goods and accessions.

It can be inferred from Discussion Paper 3 that the adoption of the Personal Property Security regime as proposed could see the development in Australia of a 'market' in chattel paper. In consultation with its Members while preparing these comments, MTAA encountered no objections *per se* to a development of this sort. MTAA, therefore, has no in-principle objection to a development of this sort. Before any comment might be made on such a market, however, the Association would need more detail on such a market's characteristics and operations. MTAA would need to be assured that the operation of any market for chattel paper would have no detrimental impact on retail motor traders. Insofar as transfers of chattel paper are discussed in this Paper, though, MTAA would agree that the rights of a transferee of chattel paper need to be subject to:

- the terms of the contract between the account debtor and the assignor and any defence or claim arising from the contract or any closely connected contract, and;
- any other defence of claim of the account debtor against the assignor that accrues before the debtor acquires knowledge of the assignment.

The Association would also agree that the interest of a purchaser of chattel paper, who takes possession of the chattel paper for new value in the ordinary course of the purchaser's business, needs to have priority over a security interest in the chattel

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paper that was perfected; if the purchaser took possession of the chattel paper without knowledge of the security interest.

The Association believes, though, that any transfer of chattel paper should not present an opportunity for, say, a motor vehicle dealer's bailment-finance conditions and obligations to be adversely affected as a result of such a transfer.

Liens

As indicated in Discussion Paper 3, most states and territories have in place legislation relating to the creation and operation of repairers' liens. In the context of the motor trades, repairer's liens offer a level of security for repairers for the settlement of unpaid remuneration with respect to work carried out in relation to goods where the work has improved (or rectified fault with) the goods.

Repairers need to be confident that they will receive remuneration for work that they have carried out on a vehicle. This work could also involve the outlay of significant amounts of funds by the repairer in order to procure parts or other services necessary to affect a repair. It also needs to be immaterial to a repairer that an interest may already exist over a vehicle

MTAA would suggest, therefore, that the PPS legislation needs to provide that a security interest established under the PPS legislation be subordinate to a lien arising out of providing materials in the ordinary course of business and in circumstances where:

- the person who provided the materials or services did not know that the agreement that created the security interest prohibited the establishment of a lien by the debtor, and;
- legislation does not provide that the lien is subordinate to the security interest.

MTAA would not support a proposal that any Commonwealth, state or territory legislation establishing a lien be amended to provide that the lien is subordinate to a security interest established under the PPS legislation.

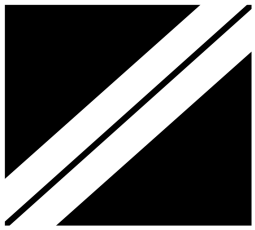
Conclusion

MTAA remains supportive in principle of the Department's PPS reform. The Association is happy to provide the Department with any assistance it requires in the development of the proposed PPS legislation, and trusts this submission makes a contribution in those terms.

National Secretariat
MTAA

Canberra

20 June 2007



Motor Trades Association of Australia

Mr Richard Glenn
Personal Property Securities Review
Australian Attorney-General's Department
Robert Garran Offices
3 – 5 National Circuit
BARTON ACT 2600

Dear Mr Glenn

I write to you today on behalf of the Motor Trades Association of Australia (MTAA) in response to the request for comments on the Draft PPS Bill (and the proposed PPS regime generally). These comments are provided against the background that the retail motor trades are anticipated to generate a significant portion of the proposed PPS registers' activity.

Despite the acknowledgement by the Department of the 'centrality' and possible dominance of motor vehicles within the proposed PPS regime and its register, uncertainty still surrounds the definition that is to be accorded to the term 'motor vehicle' for the purposes of the proposed legislation. It is stated in section 19 of the PPS Bill that 'motor vehicle', " . . . *has the meaning given by the regulations*."

Advice received from the Department is that the definition of 'motor vehicle', for the purposes of the proposed PPS regime, will be to some degree influenced by the mechanics of the development and construction of the register itself. The Association also understands that this aspect of the register's development will, to some varying extent, have an effect across the development of the PPS Regulations generally. In other words, the development of the register will be guided to some degree by the development of the regulations, which in turn may have a reciprocal impact on the development of the register.

In effect, then, both the register and the regulations (including the definition of the term 'motor vehicle') are to be developed in some form of symbiotic manner, with some limitations perhaps being imposed on both based on factors such as technological limitations (more specifically, information technology) and, the structure of the existing registers to be incorporated into the national register (data migration issues).

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The Association continues to maintain, however, that the definition of 'motor vehicle' to be adopted by the PPS Scheme needs to be not dissimilar to that applied in the *Sale of Motor Vehicles Act* (ACT) *1977*, which states:

> *"motor vehicle" means any motor car, motorcycle, or other vehicle used on land that is propelled wholly or partly by any volatile spirit, steam, gas, oil or electricity, or by any means other than human or animal power, whether or not that vehicle is in working condition or is incomplete but does not include any vehicle used on a railway or tramway or a vehicle included in a class of vehicles that the Minister has, under section 92, declared not to be a motor vehicle for this Act.*

That definition is not significantly dissimilar to that employed in Section 57 of the PPSA (NZ), which defines a motor vehicle as:

(a) means a vehicle, including a trailer, that---
- *(i) is equipped with wheels, tracks, or revolving runners on which it moves or is moved; and*
- *(ii) is drawn or propelled by mechanical power; and*
- *(iii) has a registration number or a chassis number, or both of those numbers; but*

(b) does not include---
- *(i) a vehicle running on rails; or*
- *(ii) an aircraft; or*
- *(iii) a trailer (not being a trailer designed solely for the carriage of goods) that is designed and used exclusively as part of the armament of any of Her Majesty's forces; or*
- *(iv) a trailer running on 1 wheel and designed exclusively as a speed measuring device or for testing the wear of vehicle tyres; or*
- *(v) a vehicle designed for amusement purposes and used exclusively within a place of recreation, amusement, or entertainment to which the public does not have access with motor vehicles; or*
- *(vi) a pedestrian-controlled machine designed to perform some mechanical operation and not designed for the carriage of persons or goods; or*
- *(vii) a pedestrian-controlled forklift*

While the Association appreciates the challenges and complexities involved in the creation of the PPS register itself, it is nevertheless something of a disappointment to the Association – this far into the reform process – that no real certainty can be provided in terms of what will arguably be the definition of most significance, in actual pragmatic and practical terms, to a great many businesses; most specifically motor vehicle dealers. It must also be considered that the majority of these businesses will be exposed to the operation of the proposed PPS legislation, and the PPS register, on a daily basis.

It is not just the scope of the term 'motor vehicles' as it might be represented in any future PPS law that has been raised to MTAA as a concern. The normal operations of a motor vehicle dealership can, and often do, extend beyond that of being merely a 'vehicle retailer'. Invariably, any sale of a vehicle (particularly, for example, a commercial vehicle) may require a dealer to employ the services of a third party. That dealer may need, for instance, for a tray to be fitted to a light truck, or for a car to have its windows tinted.

Throughout any exercise of that sort, however, the contract of sale for that vehicle will not be completed and, thus, the vehicle technically remains on bailment with the dealer. Nevertheless, it

will be the dealer that makes the necessary financial outlay (invariably on account) to satisfy that aspect of the vehicle 'specification' covered by the sales contract. Where, in that situation described, would responsibility for the registration of the accession (or accessions) on the PPS register fall? Would registration of the accessions on the PPS register even be needed?

Circumstances such as these represent an area of uncertainty within the PPS Bill, in that it might also be possible to argue that the fitment of a tray to a light truck (for example) represents more a 'co-mingling' of goods than an accession. The Association would, therefore, be grateful for any urgent clarification that the Department could offer in that regard.

Motor vehicle dealerships also invariably operate a spare parts department as a 'condition' of their supplier's franchise arrangements. This means that, besides the retailing of motor vehicles, they can also supply quantities of genuine replacement spare parts to third parties. Supplies of this sort might take the form of parts purchases made by private citizens, the supply of parts to repair workshops, or the supply of parts to other dealers and non-dealer-network parts retailers. Often, supplies such as these could be of significant monetary value and invariably the supply is made under the terms of some form of credit arrangement. The dealer will also be in the situation of not being in physical possession of the parts, but would wish to retain title to them. Under current law, a 'Rompala' or 'retention of title' clause has been sufficient in these circumstances to protect a dealer's interests.

Association Members have, however, questioned the capacity of the proposed PPS laws to guarantee the priority of their interests. Some Association Members have also expressed concern that any and each supply of the sort described above may itself have to be registered on the proposed PPS register. This course of action is seen by some Association Members as being a potential 'necessity' under the proposed PPS regime. They see this as needed in order to minimise their exposure to risk in situations where they have supplied parts to a third party that might subsequently become insolvent and their 'rights' become jeopardised by the existence of a floating charge / interest in circulating assets of a financier in relation to that third party's property.

A situation such as this might be further complicated when the manner of operation of some motor body repairers is also considered. In that sector, it is not unheard of for businesses to 'factor' their accounts owing, which can take the form of insurance-company reimbursement of work performed on their behalf to repair an accident damaged vehicle. A vehicle that might only be repairable through the use of genuine parts, and which parts are only able to be procured from a dealer of the vehicle in question's manufacture.

If it proves to be the case whereby this 'perceived' need for registration of each and any supply is validated as necessary, it would represent a significant administrative burden upon dealers to ensure their property (parts) becomes registered pursuant to existing arrangements and then on an ongoing basis for each transaction. It must also be noted that a dealer's spare parts department will not simply be dealing, in the main, with one or two third parties, but may despatch a number of 'bundles' of parts, to a number of different parties a day, every day.

Again, urgent advice from the Department as to how it anticipates the proposed PPS Bill to operate within the situation described above would be most helpful and instructive to the Association and its Members and would be gratefully received.

With the PPS Bill and its attendant Regulations at their current stages of development, MTAA is in something of a difficult situation. On the one hand, there is a proposed *legislative* framework, as embodied in the Bill, which seems – at this conjecture and at the level of analysis possible of it – to

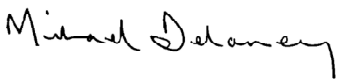
not obviously create any real substantial change to the operations of the businesses the Association represents. Indeed, advice that has been provided by the Department on a number of matters queried in the Bill's development tends to support that assumption.

On the other hand, there remains a paucity of clarity around the possible contents of the *regulatory* framework. The Association is concerned that it is here that the potential exists for a very real impact on business operations to inadvertently come to pass. The Association is also concerned that, thus far, much of the proposed PPS regime's anticipated operation in the market is based on theory (albeit backed up with the observable experiences of other jurisdictions) rather than any actual practical, domestic, experience.

In summary then, MTAA would wish to reserve its position on the proposed PPS Bill until such time as it has had the opportunity to critically evaluate any relevant information that might come to light in the development and finalisation of the PPS Regulations.

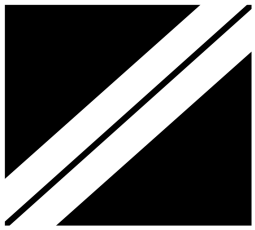
Thank you for the opportunity to comment on the draft Bill.

Yours sincerely



MICHAEL DELANEY
Executive Director

15 August 2008



Motor Trades Association of Australia

Mr Richard Glenn
Personal Property Securities Review
Australian Attorney-General's Department
Robert Garran Offices
3 – 5 National Circuit
BARTON ACT 2600

Dear Mr Glenn

I write to you today on behalf of the Motor Trades Association of Australia (MTAA) in response to the request for comments on the Draft Personal Property Security (PPS) Regulations (and the proposed PPS regime generally). These comments are provided against the background that the retail motor trades are anticipated to generate a significant portion of the proposed PPS registers' activity.

MTAA does not possess the specialist knowledge in-house to enable it to make an assessment of the Draft PPS Bill and PPS Regulations from a perspective familiar to a legal practitioner. What value MTAA does bring to the PPS development process, however, is based on its detailed knowledge of the retail motor trades and the realities and practicalities of those businesses' operations. This might particularly be the situation in regards to the operations of motor vehicle dealers through the Australian Automobile Dealers Association (AADA), which is a foundation Member of MTAA.

As a peak representative body for the retail motor trades, it is understandable that MTAA would seek the views of its Members on potentially far-reaching developments such as the proposed PPS regime. In the circumstances of the proposed PPS regime, the recent circulation of the proposed Draft Regulations has – to some extent – 'completed the picture' for the Association and its Members in terms of how the Scheme might look and operate on the ground from a retail motor trader's, or motor vehicle dealer's, perspective. From that consultation with its Members, the Association has been able to make a reasonably informed assessment as to the manner in which it appears the Scheme will practically operate.

In that regard, the Association's Members have a number of concerns in relation to the PPS regime as it is currently proposed. Those concerns extend across a number of areas and at times involve the operating interaction between sections of the Draft Bill and of the Draft Regulations. The Association also queries the rationale underpinning one of the major definitions within the Draft Regulations; that of a 'motor vehicle'.

It is proposed, I understand, that the Regulations will specify that a motor vehicle (for the purposes of section 86 of the PPS Bill) would include 'Registrable Motor Vehicles' and 'Unregistrable Motor Vehicles'. A 'Registrable Motor Vehicle' would be defined by the Regulations as any vehicle that:

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- *is registrable under the road transport vehicle registration laws of a State or Territory to be used on public roads, and;*
- *has a Vehicle Identification Number (VIN) allocated to it or, if it does not have a VIN, a number affixed to the vehicle by its manufacturer intended to uniquely identify the vehicle; or if there is no such number, a single number affixed to it by another person.*

An 'Unregistrable Motor Vehicle' would be defined by the regulations as any vehicle that is not a 'Registrable Motor Vehicle' that:

- *has a VIN allocated to it or, if it does not have a VIN, there is a number affixed to the vehicle that identifies the vehicle, and;*
- *is built to be propelled on land by a motor that forms part of the vehicle or a vehicle with a motor, and may include a vehicle designed for use exclusively in the mining industry, a trailer, tractor or farm machinery, a self-propelled wheel-chair, a self-propelled vehicle designed for off-road work in construction, maintenance or warehouse operation.*

The Association can see no reason for the construction of a definition for 'motor vehicle' to be made in such terms. While I acknowledge that the development of the Regulations for the proposed PPS regime will to some degree have been influenced by the mechanics of the development and construction of the register itself, and that the integration of existing data sets into that register will also introduce specific issues for consideration, I cannot see any obvious reason for a distinction to be made between 'Unregistrable' and 'Registrable' motor vehicles. I also understand that no other comparable PPS Scheme operating in another jurisdiction makes such a distinction.

MTAA continues to believe that the definition of 'motor vehicle' adopted by the PPS Scheme needs to be not dissimilar to that applied in the *Sale of Motor Vehicles Act* (ACT) *1977*, which states:

> *"motor vehicle" means any motor car, motorcycle, or other vehicle used on land that is propelled wholly or partly by any volatile spirit, steam, gas, oil or electricity, or by any means other than human or animal power, whether or not that vehicle is in working condition or is incomplete but does not include any vehicle used on a railway or tramway or a vehicle included in a class of vehicles that the Minister has, under section 92, declared not to be a motor vehicle for this Act.*

Given MTAA's interests and experience in a diversity of policy areas, it is the above definition that has repeatedly been shown to the Association – and its Members – to best reflect the meaning of the term 'motor vehicle' for a range of public policy, regulatory and legislative purposes.

For example the Association has, for some time now, sought to have non-Australian Design Rule (ADR) compliant motorcycles able to be registered on the National Exchange of Vehicle and Driver Information Service (NEVDIS) data base. Its reason for advocating this was to hopefully provide some measure of mitigation against the disproportionately high theft rate (and low recovery rate) of non-ADR compliant motor bikes. It is, however, a measure that has been resisted by the Department responsible for the management of NEVDIS for reasons (I am told) of data base 'integrity'. Of the approximately 130,000 motorcycles sold in Australia last year, slightly more than half (approximately 70,000) were considered 'off-road' (as either a dedicated off-road motorcycle, an All Terrain Vehicle, or a mini-bike). Of the 'off-road' bikes sold, a reasonable assumption would be for a significant number of those to be 'non-ADR compliant' and, hence, in the 'Unregistrable' category.

Nevertheless, it is also reasonable to assume that a considerable number of off-road and non-ADR compliant motorbikes sold will also be subject to an encumbrance and, hence, be subject to a registration on the proposed PPS register. Given that there will likely be no distinction made by creditors in their encumbrances between registrable and unregistrable motor vehicles (be they motor cycles or otherwise), then it is questionable as to why such a distinction is elsewhere considered necessary.

The Association is also aware of circumstances whereby there are motor vehicles that are non-ADR compliant, but which nevertheless are registered (albeit conditionally) for use, " . . . *under the road transport vehicle registration laws of a State or Territory to be used on public roads . . .*" While MTAA has no information in terms of how many of these vehicles may be subject to an encumbrance, the possibility of any number of them being so subjected again brings into question the need for such a distinction to be made in the definitions contained in the regulations.

The circumstances described above illustrate some of the issues that have led this Association to consider the definition of 'motor vehicle' as contained in the *Sale of Motor Vehicles Act* (ACT) *1977* as a more appropriate one. Under that provision, a 'motor vehicle' is a 'motor vehicle' by simple infallible logic, with little or no opportunity for an interpretation otherwise, and with no additional layer of complexity or confusion with respect to 'registrability' or otherwise.

Some of MTAA's Member bodies also represent boat dealers. The proposed definition of 'boat' for the purposes of the Regulations is, therefore, also of interest to the Association.

As I understand, it is currently proposed that the Regulations will define a boat as, " . . . *a vessel designed for transporting persons or things on water that has a Hull Identification Number*." As MTAA understands matters, boats are not registrable on an encumbrance register in every state and territory and that this definition would ensure that boats that are currently registered would be registrable on the proposed PPS register as serial numbered collateral.

There may be, however, a number of deficiencies that the Association can see with this approach. First, it makes no recognition that a boat sold as a complete unit may comprise not just a boat, but also an engine (and even also a trailer), each with their own identification numbers. Second, the Association is aware of some manufacturers of vessels (notably sailing craft of 'off-the-beach' design and size such as NACRA or Hobie) that have – as a craft identifier – the boat's sail number.

Finally, it is curious that the definition proposed for the term 'boat', is one anticipated to be all encompassing and subject to infallible logic as to just what constitutes a boat: a vessel designed for use on water that has an identification number. The suggestion here is of the principle that there is no need for any differentiation to be made in terms of registrability or otherwise. If there is to be no distinction made in these circumstances why, then, is there a need in the circumstances attributable to a motor vehicle? Additionally, if there is to be recognition of the need to have the proposed PPS register have the capacity to have boats registered as a combination of hull and motor, or hull number and sail number why, then, can not the same accommodations be made for non-ADR compliant motorcycles (without a VIN) in terms of their frame and engine numbers?

MTAA is well placed to appreciate the challenges inherent with defining the term 'motor dealer' for the purposes of the proposed PPS regime, given the differences in that term that might be already evidenced across the states and territories. The Association can understand, then, the rationale underpinning the proposed regulations that uses the issuance of 'trade plates' as a basis for the definition of a 'motor dealer'. It needs to be pointed out, however, that trade plates may – in most jurisdictions – also be issued to businesses that are not motor dealers, do not trade in motor vehicles

and will not trade in motor vehicles. Vehicle dismantlers and recyclers or mechanical repairers may, for instance, have trade plates assigned to their businesses.

MTAA would not support the adoption of any measure that has the potential to establish a precedent whereby the definition of a 'motor dealer' is extended beyond that normally associated with the issuance of a licence as such. The Association is of the belief, therefore, that the definition of 'motor dealer' needs to be reflective of that ascribed by virtue of the motor vehicle dealer licensing regimes operating across most Australian jurisdictions. The utilisation of a definition in those terms can also be facilitated by the adoption of a definition of 'motor vehicle' as suggested by MTAA (that is, with no distinction made between registrable and un-registrable vehicles).

Both MTAA and AADA have a number of concerns in relation to the manner in which the proposed PPS regime may impact upon the operations of a motor vehicle dealership. It would be fair comment to make that, as far as MTAA can reasonably ascertain, the impact on the 'front of house', or sales area of a dealership will result in little difference to current operations. It would seem to the Association, however, that there is some likelihood for there to be significant impacts within dealerships' 'back of house' operations

The normal operations of a motor vehicle dealership can, and regularly do, extend beyond that of being merely a 'vehicle retailer'. Invariably, any sale of a vehicle (particularly, for example, a commercial vehicle) requires a dealer to employ the services of a third party. That dealer may need, for instance, for a tray to be fitted to a light truck, or for a car to have its windows tinted.

Throughout any exercise of that sort, however, the contract of sale for that vehicle will not be completed and, thus, the vehicle technically remains on bailment with the dealer. Nevertheless, it will be the dealer that makes the necessary financial outlay (invariably on account) to satisfy that aspect of the vehicle 'specification' covered by the sales contract. Where, in that situation described, would responsibility for the registration of the accession (or accessions) on the PPS register fall? Would registration of the accessions on the PPS register even be needed? I find myself not being able to satisfactorily report any answers to these questions to my Members, or to be able to make what I would regard as a satisfactory interpretation of the manner in which the PPS Bill and / or Regulations would apply in those circumstances. I would appreciate your urgent clarification of this matter.

Motor vehicle dealerships also invariably operate a spare parts department as a 'condition' of their supplier's franchise arrangements. This means that, besides the retailing of motor vehicles, they will also supply quantities of genuine replacement spare parts to third parties. Supplies of this sort might take the form of parts purchases made by private citizens, the supply of parts to repair workshops, or the supply of parts to other dealers and non-dealer-network parts retailers.

Often, supplies such as these will be of significant monetary value and invariably the supply is made under the terms of some form of credit arrangement. The dealer will also be in the situation of not being in physical possession of the parts, but would wish to retain title to them. Under current law, a 'Romalpa' or 'retention of title' clause has been sufficient in these circumstances to protect a dealer's interests.

As I understand matters, under the proposed PPS arrangement, the concept of a Purchase Money Security Interest (PMSI) will replace existing retention of title and bailment arrangements in these circumstances. Additionally, in order for a supplier / dealer to have the comfort of the protection of their interests to the same level as enjoyed presently, that they would be well advised to consider section 100 of the draft PPS Bill, which states:

Priority of purchase money security interest in inventory

(1) The purchase money security interest has priority if:

(a) the interest is in inventory; and

(b) before the purchase money security interest in the inventory is perfected a notice is given to all other secured parties who have a registration describing the inventory; and

(c) the notice:

(i) states that a specified person expects to acquire the purchase money security interest in the inventory; and

(ii) contains a description of the inventory; and

(iii) sets out the effect of this subsection; and

(d) the purchase money security interest is perfected at the time:

(i) for inventory that is tangible property—the grantor, or another person on behalf of the grantor, obtains possession of the inventory; or

(ii) for inventory that is intangible property—the purchase money security interest attaches to the inventory.

(2) A notice is not required to be given in accordance with paragraphs (1)(b) and (c) in relation to inventory of a class, or in circumstances, prescribed by the regulations (if any).

This suggests that there is a need for a dealer to register an interest in any supply made, as well as possibly undertake efforts to notify all other likely suppliers of their intention to do so. This might well result in a dealer have to take that extremely burdensome, but necessary protection step given the likelihood of the following example.

Two suppliers 'representing' the same manufacturer (two Ford dealers for instance) supply the same motor body repair shop. Each supplies a similar quantity of parts for the same make and model of car, two of which are having similar accident damage repaired, by that panel shop, at the same time. If the need arose, however, it would be virtually impossible to determine which like parts were sourced from which dealer. All that could be made certain is the *number* of like parts supplied, which could be compared with the number of parts on hand at the repairer matching a particular descriptor (for example, 'MY2008 FG Falcon G6E left hand side headlight assembly').

The point being made here is that it would appear prudent for a dealer / supplier to register an interest in each supply made, and for that registration to be in quite significant detail.

Advice received by the Association from the Department suggests the need, however, for the parts supplier to simply make one registration per 'customer' in order to secure their interests in that, and each subsequent, supply made. It is MTAA's understanding that this circumstance is constructed through the operation of sections 56 and 63 of the Draft PPS Bill, which respectively state:

56 Security interests in after-acquired property

(1) A security agreement may provide for security interests in after-acquired property.

Note: Section ^63 deals with the attachment of security interests in after-acquired property.

(2) In this Act:

***after-acquired property**, in relation to a security agreement to which a grantor is party, means personal property acquired by the grantor after the agreement is made.*

63 Attachment of security interests in after-acquired property

General rule

(1) If a security agreement provides for a security interest in after-acquired property, the security interest attaches without specific appropriation by the grantor, except as provided by subsection (2).

Note: Section ^56 allows security agreements to provide for security interests in after-acquired property.

The notes relating to *Attachment and Perfection: Particular Situations* at page 20 of the Regulations Discussion Paper suggest (at paragraph 55) that this automatic attachment of an interest (refer section 63) with regard to subsequent supplies between a supplier and one of its customers has " . . . *far reaching consequences for a grantor. It means* ***any*** *property that the grantor acquires after entering into a security agreement that gives rise to the security interest will also be subject to the security interest*." (emphasis added).

It must be noted that a dealer's spare parts department will not simply be dealing, in the main, with one or two third parties, but may despatch a number of 'bundles' of parts, to a number of different parties a day, every day. It is also important to consider that some smaller dealer / suppliers may also source almost their entire parts inventory from one or more larger dealer / suppliers. The Association has anecdotal, yet reliable, reports that the invoice value written every day by an average dealer's spare parts department would be in the vicinity of $17,000-00 to $25,000-00, while the invoice value written by an 'apex' distributor dealer (that might supply the complete parts requirements for smaller dealers) could be in the vicinity of $1,000,000-00 per day. These are significant sums at risk that dealers need to protect in order to retain the viability of their operations.

Similarly, at the other end of the supply chain, a repairer (for instance) will not necessarily deal with just one supplier representing each manufacturer either. Even to effect one repair, a repairer may need to source parts from two or more different dealer / suppliers representing the same manufacturer.

The circumstances described above may also have an additional layer of complexity overlaid when the manner of operation of some motor body repairers is also considered. In that sector, it is not unheard of for businesses to 'factor' their accounts owing, which in the main take the form of insurance-company reimbursement of work performed on the insurance company's behalf, to repair an accident damaged vehicle. Invariably this will be a vehicle that is only repairable through the use of genuine parts, and which parts are only able to be procured from a dealer of the vehicle in question's manufacturer.

Thus, with the legislative and regulatory framework as currently proposed for the PPS regime, and as the Association and its Members understand matters, dealers would likely be compelled to undertake a significant additional administrative burden in order to ensure that – following the subordination of Rompala and retention of title arrangements by PMSIs – their interests in parts supplies are protected to an extent comparable to that presently enjoyed. Additionally, it would seem that this added level of administration does not appear to be 'short term' in the sense that it would prevail over a period of adjustment following the commencement of the proposed PPS regime. Rather, it would be ongoing in nature and in demand of constant vigilance and monitoring by possibly additional staff dedicated to that function at a dealership.

Again, urgent advice from the Department as to how it anticipates the proposed PPS Bill to operate within the situations described above would be most helpful and instructive to my Members and would be gratefully received.

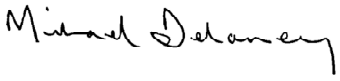
With the PPS Bill and its attendant Regulations at their current stages of development, MTAA remains in something of a difficult situation. On the one hand, there is a proposed *legislative* framework, as embodied in the Bill, which seems to the Association – at this conjecture and at the level of analysis possible of it – to not obviously create any real substantial change to the operations of the businesses the Association represents. Indeed, advice that has been provided by the Department on a number of matters queried in the Bill's development tends to support that assumption. This, however, may be the situation as confined to a motor vehicle dealers' 'front of house operations'.

On the other hand, there appears to the Association the very real prospect of a significant impact arising from the construction of the regulatory framework as currently proposed. This impact it would seem would be most keenly witnessed in a dealer's 'back of house' operations in terms of a significant increase in administrative burden. This would be a distinctly unwelcome situation. The Association is also concerned that, thus far, much of the proposed PPS regime's anticipated operation in the market is based on theory (albeit backed up with the observable experiences of other jurisdictions) rather than any actual practical, domestic, experience. One purpose of this submission has been to illustrate the extent to which the Association considers the practical operation of the proposed PPS regime will be evidenced within the operations of the retail motor trades.

In summary then, MTAA would wish to indicate that it is in need of serious and clear answers to its concerns regarding the practical operation of the proposed PPS regime. The Association and its Members remain quite concerned as to the potential impact of the potential regime upon the retail motor trades sector. If it proves likely that the regime's operation will be as the Association anticipates, then this would appear to result in a significant increase in the administrative burden placed upon motor vehicle dealers in particular. This is a burden that will not be welcomed and which may also cause the Association and its Members to oppose the proposed PPS regime.

I thank you for the opportunity to comment on the proposed PPS regulatory framework and welcome any opportunity to discuss these comments further with you.

Yours sincerely



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15 October 2008