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20 November 2009

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

via email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

Dear Mr Hallahan,

**Inquiry into the Personal Property Securities  
(Consequential Amendments) Bill 2009**

In the Australian Finance Conference's most recent submission of 9 November and our 10 November evidence to the Committee, we noted our major concern that the 10 business days in which a Purchase Money Security Interest (PMSI) must be registered to obtain its priority is triggered by the grantor's **possession** of the goods, rather than by when the financier pays for them (**attachment**).

We emphasised that this is an extremely important issue for members of our kindred associations, who together represent most financial institutions in Australia likely to provide discrete finance to clients for the acquisition of plant and equipment; in so doing they enable new value to be added to those businesses and it is for such transactions that the proposed legislation provides for PMSIs.

Subsequent to our appearance before the Committee, we have received the day's draft Hansard which includes discussion of our concerns by Messrs Richard Glenn and Robert Patch of the Attorney-General's Department with whom we have had a long and constructive working relationship on the development of this legislation, which we have supported from the outset as a major economic reform both in terms of the law and the operational efficiencies which it will allow.

Mr Patch has characterized the issue as "*one where we just have a difference of opinion.*" This is most definitely true and the difference is considerable. In coming to a view on this difference, we believe the Committee needs to balance the consequences on both sides.

The factual scenario put to the Committee by Mr Patch is as follows: a person is looking to buy a car from a car dealership; the dealer gives possession of the car to the person and sends the finance application (paperwork) to the financier; the financier has 10 days from the date of possession to validly register to obtain the PMSI.

Importantly, of the three parties, only the applicant and the dealer know when possession occurs.

Implicit in this scenario is either the financier approves the application and pays the dealer for the car or the application is declined. If declined, the dealer may seek to take back possession of the car or forward the paperwork to a second financier. Like the first financier, the second financier does not know when possession took place. It may approve the loan, pay the dealer and bona fide register the PMSI within 10 days but not within 10 days of the date of possession which it does not know.

Also in this scenario, it is possible that the person in possession of the vehicle could approach (or be independently approached by) a third financier which may approve finance but likewise not know the date of possession. All three financiers can ask for the date and be provided with and/or pay an appropriately dated invoice from the dealer then duly register the PMSI, but they can't be certain of the time of possession.

In the absence of serious fraud and collusion or inadvertent double financing, one or other of the second or third financiers will register the PMSI, not knowing that it is imperfect. As a consequence, should the customer enter insolvency administration and the facts of possession date come to light invalidating the PMSI against a fixed and floating charge (where no subordination has been agreed) and any other interest in the asset, the financier's security is lost. This is the outcome which the PMSI is intended to avoid.

If fraud and/or collusion is considered, securities can be lodged in a range of circumstances and in the knowledge of the correct date, which would defeat the PMSI.

The factual scenario provided concludes with the view that, if our preferred date of attachment was followed, "*there would be in a practical sense an unlimited period of time during which the register would not disclose that the finance company will have an interest in the car*". It is exceedingly difficult to conceive of a commercial circumstance where a business would have an indefinite period of possession of assets it hasn't paid for, the ability to sell them, finance approval in prospect and supplier unpaid. The closest such circumstance is where a high credit quality business takes delivery of assets from the manufacturer/supplier on say 60 days terms in which it tenders for the finance. In any bona fide sense, this will not see that business selling the assets it doesn't own to third parties. In all other circumstances dealers/suppliers are clamoring to be paid and when that occurs the 10 days should commence.

In most normal commercial situations there will only be a few days between possession and attachment. In our view a regime dealing with security interests should have the knowable date of when the security interest is created and funded as the pivotal date for registration, not the unknowable (from the security-taker's position) date of possession.

While "*someone else may acquire an interest in this car in the meantime*" having checked the register and found nothing, yet be trumped by the subsequent PMSI, such instances will be miniscule, if any and then more than likely fraudulent. If the "someone" pays cash, as a bona fide purchaser for value without notice, they gain good title against the PMSI; if they manage to obtain finance in such a limited and unusual circumstance, the other financier deserves to have its security rank behind the PMSI as it will not have done the due diligence that the nature of the transaction warranted. In any event this possibility is there within the 10 day period whenever it commences.

While we cannot point to any published statistics to this effect, we would expect that the number of transactions for new equipment made uncertain by the present focus on possession would be many hundreds of times the number of fraudulent or sloppy loan instances affected by our preferred move to attachment. The so-called losers among our members from this added and unnecessary risk would far and away outnumber any winners. And yes, "*ultimately it is the customer who pays for this.*"

Passing reference is made to used equipment and where this is sold by one business to another and that other business finances the acquisition of its 'new value', the same PMSI timing issues arise albeit with much greater due diligence on the part of the financier as to the equipment's provenance. In these instances it will be vendor terms (not supplier/dealer) arrangements which will add uncertainty to the date of possession for the new financier. If the argued "*indefinite*"/"*indeterminate*" time period for the financier to pay for and register a PMSI is stretched for new equipment, it has snapped altogether for used items.

There are three other issues in the Hansard which warrant AFC response. The first is the suggested solution that financiers require dealers to register the PMSI at the time possession is granted. As noted in earlier submissions, this reflects the business model on which the North American PPSRs are constructed. It is however second best to the attachment basis because the financier for commercial and prudential reasons, may not wish to rely on a third party's compliance systems to guarantee its security.

Second is the suggestion that financiers become "efficient enough to process the transaction within the 10 days". This is fine, except that in the absence of anything in the legislation which allows the financier to rely upon representations as to possession, the financier will not know when the 10 days start; this is all the more difficult for second string financiers, where earlier financiers have already used part of the 10 day time period to consider and decline the application.

The third matter is the most recent PPSR adopter, New Zealand's market response to the possession versus attachment policy approach. Our understanding, as confirmed to the Committee by the Officials is that financiers in NZ eschew seeking PMSI priority for plant, equipment and vehicles financed and instead almost universally seek subordination agreements. These give certainty in relation to fixed and floating charge financiers but don't address the other security leakages noted previously.

It was suggested to the Committee that the size/complexity of the Australian market relative to NZ will militate against that costly and partial response here. That is possible but we simply don't know. Several high profile PMSI-adverse court decisions in the early years of the new Act however, could direct contractual behaviour in the NZ direction.

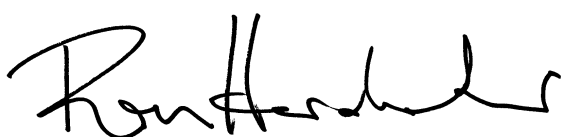
AFC again submits to you that date of attachment, not possession, is the better policy basis. It solves the vast majority of financier concerns with minimal, if any, downside.

We would urge that you recommend this change or, given the "*difference of opinion*" at least recommend an independent third party comment or review.

Thank you again for you time.

Kind Regards,

Yours truly,

A handwritten signature in black ink, appearing to read 'Ron Hardaker', written in a cursive style.

Ron Hardaker  
Executive Director