

## **AMENDMENTS TO THE EXPOSURE DRAFT OF THE PERSONAL PROPERTY SECURITIES BILL**

### ***BACKGROUND***

On 24 June 2009, the Personal Property Securities Bill was introduced into the Commonwealth Parliament. The PPS Bill as introduced has been significantly amended since the release of the Exposure Draft Bill in November 2008. This paper provides an outline of the changes made.

2. The Bill reflects:
  - the recommendations made by the Senate Committee in its March 2009 report on the Exposure Draft of the Bill
  - the concerns of the States and Territories, and of other stakeholders, and
  - the establishment of the offices of Registrar and Deputy-Registrar of Personal Property Securities.

### ***RECOMMENDATIONS MADE BY THE SENATE COMMITTEE***

3. The Senate Committee recommended that:
  - the language and structure used in the Bill be simplified
  - overseas provisions be used as often as possible
  - the Bill be amended to clarify the information about individuals that may be included on the PPS Register and to better describe the privacy protections given to individuals
  - the Bill adopt New Zealand and international personal property security conflict of law provisions, and
  - the scope of the enforcement provisions in the Bill (ie the provisions dealing with breaches of the Act) be reviewed to ensure that the provisions are comprehensive and adequate.

### ***Simplification of language and structure in Bill***

4. A key recommendation of the Senate Committee was to simplify the language and policy contained in the Bill. To implement this recommendation, the Bill has been significantly re-structured and re-drafted. Also, chapter and part guides have been introduced to aid readability. In general terms this has involved the elimination of paragraph lists and adopting a more prosaic drafting style. Examples of this approach are provided below in the discussion on harmonisation with international PPS regimes.

5. Simplifying the drafting has made it possible to omit the following definitions from the Bill: account holder, add, amendment, controllable property, details, disposition, extinguishment provision, minerals, negotiable document of title, non-negotiable document of title, omit, present value, purchase money collateral, purchase money obligation, quoted

security, registered, registered with a serial number, security interest in crops, security trust instrument, signed, temporary perfection provision, undistributed amount.

6. A number of clauses have been amended to eliminate cross-referencing by incorporating the previously cross-referenced text into the main provision. For example, clause 21 (which corresponds to clause 64 of the former Bill) no longer employs ‘controllable property’ as a defined term and no longer includes cross-references to sections 69 and 74.

7. Provisions addressing similar or related issues have been co-located within the Bill. For example:

- the core principles relating to security agreements have been co-located in clause 18 (see former clauses 58, 59 and 60)
- the main provisions relating to proceeds are now co-located in Division 2 of Part 4
- the provisions relating to intellectual property are now co-located in Part 3.5, and
- the provisions dealing with the perfection of security interests (ie clauses 20 and 21) are now followed immediately by the provisions that set out how a security interest may be perfected by possession or control (ie Part 2.3, comprising clauses 23 to 29).

8. Clause 8(3) of the Bill now includes a power to make regulations making it possible to implement through the regulations matters of a technical nature that would add unnecessary complexity to the Bill: such as applying the Bill to mortgage-backed securities.

### *Harmonisation with international PPS regimes*

9. The Bill is based on the New Zealand *Personal Property Securities Act 1999* and the Canadian personal property securities legislation, primarily the Saskatchewan *Personal Property Securities Act 1993*. However, the Senate Committee recommended that further changes be made to ensure greater harmony between the Australian regime and international precedents.

10. To implement the recommendations of the Committee in this regard, and as a complement to the changes undertaken to simplify the PPS Bill, the Bill has been revised to make language of the Bill more consistent with these laws. This will ensure greater consistency between the Acts and facilitate more seamless business practice for businesses operating in both Australia and New Zealand.

11. The Bill now refers to ‘goods’ instead of ‘tangible property’.

12. Clause 60(2) of the former Bill provided that ‘[a] security agreement may **secure** future advances’. Clause 18(4) of the Bill now provides that ‘[a] security agreement may **provide for** future advances’, and now mirrors PPSA (NZ) s71 — which provides that ‘[a] security agreement may **provide for** future advances’ — and is closer to PPSA (Sask) s14(1), which provides that ‘[a] security agreement or a related agreement may **provide for** future advances’ (emphases added).

13. The registration provisions have been amended so that the language is now closely aligned with the language used in New Zealand. Previously the PPS Bill referred to the registration of personal property as collateral. Consistent with the language used in New Zealand and Saskatchewan the Bill now refers to the registration of a financing statement or financing change statement.

14. Provisions on accessions and commingling have been substantially revised to better harmonise with the New Zealand legislation. In particular, provisions consistent with the New Zealand legislation have now been included detailing the rights of secured parties to remove accessions and outlining the process for parties with a security interest in the whole (see clauses 92–97).

15. The Bill has been amended to provide that, consistent with the Saskatchewan Act, a security interest created as a result of a future advance will attach to personal property without the specific appropriation of the person granting the interest (clause 19). This changed the earlier draft provision which required specific appropriation where the personal property is used for personal, domestic or household use.

16. The Bill now implements the Saskatchewan approach to security interests perfected by temporary perfection, so that now a buyer or lessee for new value would ordinarily take the property free of a security interest that is perfected only by a temporary perfection provision (clause 52).

17. The definition of ‘purchase money security interest’ now includes credit charges and interest payable by the debtor (clause 14(8)), consistent with the approach taken in New Zealand (s16, definition of ‘purchase price’) and Saskatchewan (s2(1)(jj)).

18. The Bill now provides that a purchase money security interest does not include an interest in collateral (as original collateral) that is an investment instrument (clause 14(2)(b)), consistent with the approach taken in Saskatchewan (s2(1)(jj)).

19. Clause 30 of the former Bill has been omitted to reflect the approach taken in New Zealand and Saskatchewan to when a security interest secures payment or performance of an obligation.

20. Clause 233(3)(a) of the former Bill has been omitted so that an unperfected security interest provided for by a transfer of an account that does not secure payment or performance of an obligation will vest in the grantor on the grantor’s external administration, consistent with the approach taken in Saskatchewan.

21. The definition of ‘value’ has been extended to include ‘an antecedent debt or liability’, consistent with the definitions in New Zealand (s16, definition of ‘value’) and Saskatchewan (s2(1)(tt)).

22. Some particular examples of provisions that are now more closely modelled on the corresponding provisions in the New Zealand and Saskatchewan Acts are given in **Attachment B**.

### ***Key privacy protections and enforcement of breaches of the PPS law***

23. Another recommendation of the Committee was that the Bill be changed to clarify the information about individuals that may be included on the PPS Register and to better describe the privacy protections given to individuals. In addition, the Committee recommended the review of provisions relating to the enforcement of breaches of the Act. To achieve this, the following changes have been made:

- new provisions have been included so that a person will be liable for a civil penalty where there has been improper registration (clause 151) or unauthorised search (or use) of data obtained in searches (clause 172(3))
- the Registrar is given the power to investigate suspected breaches of some civil penalty provisions (clause 172(5))
- a scheme is included (based on existing Commonwealth precedents) for the enforcement of serious breaches of the civil penalty provisions (clause 221):
  - the Registrar may apply to the Federal Court for an order requiring payment of a civil penalty
  - if the Court is satisfied that a serious breach has occurred, a pecuniary order may be made for each contravention (this is consistent with provisions in the *Corporations Act 2001*).

24. The Bill has also been amended to give the Privacy Commissioner jurisdiction where a secured party fails to provide a verification statement to the grantor (clause 157(4)).

### ***Specific Changes to the PPS Register***

25. As a result of the recommendations made by the Senate Committee a number of changes have been made to the register provisions. These changes simplify the language of the provisions, harmonise the provisions with existing concepts in overseas laws and implement the Committee's recommendations on privacy. The changes are as follows:

- changes to the data required or permitted to be included on the register (for example, the requirement to specify whether a security interest is a purchase money security interest under item 7 of clause 153)
- where a person applies to register a financing statement without belief on reasonable grounds that the collateral secures or will secure an obligation they may now be subject to a civil penalty (clause 151(1))
- where a person applies to register a financing statement and the collateral is not used to secure the obligation, the person is liable for a civil penalty if the person does not amend the registration (clause 151(2))
- inclusion of a provision that states that the data on the register is the property of the Commonwealth (clause 147), and
- streamlining of the manner in which registration occurs, including how amendments are made.

### ***Conflict of laws***

26. As recommended by the Senate Committee, the Bill now contains provisions based on the NZ personal property securities law that address whether a particular transaction involving a security interest in personal property would be governed by the law of Australia or another jurisdiction in a dispute about the transaction in Australia. Although specific rules apply to particular types of personal property, the rules for determining whether a security interest is subject to the laws of Australia or another jurisdiction revolve around the location of the debtor and the location of the collateral.

***POLICY CHANGES TO THE BILL***

27. A number of changes have been made to the Bill in order to accommodate State and Territory concerns about the Bill. These changes ensure that there is more flexibility for the States and Territories in the operation of the new law, particularly in relation to interests created under their laws. These are as follows:

- the exemptions in the Bill that relate to tradeable water rights and water access entitlements have been broadened to apply to water rights under statute or the general law (clause 8(i))
- States and Territories will be able to determine special priorities for specific classes of security interests arising by operation of their laws (clause 73), and
- provision for the States to refer power to the Commonwealth for a limited period after the enactment of the Bill and to refer power relating to other interests, for example water rights and fixtures, at a later time (if so provided by the State referral law).

28. In consultation with relevant stakeholders, it became apparent that changes were required to reflect existing common law rules and current practice. A significant area of concern was the requirement that a security agreement covers personal property if the agreement is evidenced by writing signed by the grantor. A number of stakeholders commented that this provision was out of step with current commercial practice as it was onerous and burdensome on a grantor to execute signed agreements in an on-going supply arrangement. The Bill has been amended and now enables a grantor to adopt or accept the terms of a security agreement that is evidenced by writing by doing an act specified in the agreement (clause 20(2)).

29. In response to concerns raised by stakeholders, the Bill now provides that:

- a purchase money security interest does not include an interest in collateral (as original collateral) that is chattel paper, a monetary obligation or a negotiable instrument (clause 14(2)(b))
- the definition of the term ‘accounts’ has been amended to narrow the operation of the Bill to better reflect its application to the factoring and discounting of debts, and
- Chapter 4 (concerning enforcement) does not apply to a security interest that is incidental to a transfer of an account or chattel paper that does not secure payment or performance of an obligation (clause 109(1)(b)).

30. To promote the availability of secured credit to small business, the Bill now provides that a purchase money security interest does not include a security interest in collateral that (at the time the interest attaches to the collateral) the grantor intends to use predominantly for personal, domestic or household purposes (clause 14(2)(c)).

***REGISTRAR & DEPUTY-REGISTRAR OF PERSONAL PROPERTY SECURITIES***

31. The Bill establishes the offices of the Registrar of Personal Property Securities and the Deputy Registrar of Personal Property Securities. The main features of these provisions are as follows:

- the Minister may appoint the Registrar and Deputy Registrar by written instrument
- the Registrar and Deputy Registrar are appointed under the *Public Service Act 1999*, and
- the Registrar will be able to delegate functions and powers.