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10 December 2008

Mr Peter Hallahan
Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Department of the Senate
Parliament House
Canberra ACT 2600 Email: legcon.sen@aph.gov.au

Dear Mr Hallahan

Personal Property Securities Bill 2008 [Exposure Draft]

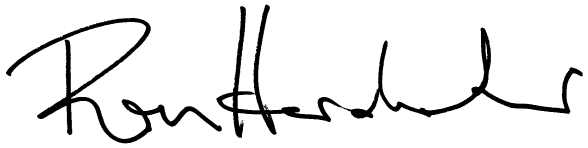
I am pleased to provide for your consideration the AFC's submission on the November 2008 Exposure Draft of the Personal Property Securities Bill.

The reform of Australia's personal property securities regime has the support of the AFC and we look forward to continuing working with all Australian Governments, in the transition from the current law and the implementation of the new regime.

Should you wish to discuss any aspect of our submission, please do not hesitate to contact AFC's Legal and Market Consultant, Steve Edwards, at email steve@afc.asn.au, or me at ron@afc.asn.au. We can both be contacted on telephone 02 9231 5877.

Kind Regards,

Yours truly,



Ron Hardaker
Executive Director

Personal Property Securities Bill 2008 [Exposure Draft – November 2008]

This submission is divided into 2 parts –

- Part 1 – Introductory Comments
- Part 2 – Specific AFC Issues

Part 1 – Introductory Comments

The Australian Finance Conference (AFC) welcomes the release of the Exposure Draft Bill ("the Bill") and the chance to provide our comments to the Senate Standing Committee on Legal and Constitutional Affairs (the Committee).

The AFC is the national finance industry association, representing some 60 member companies, covering finance companies, banks and building societies.

The Bill represents a most significant and comprehensive reform of Australian commercial law, replacing long standing concepts and principles.

The AFC wishes to acknowledge the approach of, and processes used by, the Australian Attorney-General's Department in developing the reform evinced in the Bill. The degree of consultation and accessibility, albeit within tight timeframes, has been exemplary.

We also acknowledge the support and agreement of Commonwealth, State and Territory Governments in driving this reform through the Council of Australian Governments and the Standing Committee of Attorneys-General.

We also appreciate the endeavours of those involved over many years in the management and delivery of security registration services, such as vehicle securities, company charges and bills of sale, that will be replaced by the future Personal Property Securities Register.

The AFC continues in its support for the reform of Australia's current personal property securities regime. The case for reform has been well made out. Overall, the Bill addresses key concerns AFC members have with the existing regime and provides sensible proposals for change.

While supporting the reform, the AFC and its members have found the one-month consultation on the Exposure Draft too short, given the scope and detail of the reform. There has been insufficient time to realistically analyse the operational impacts in detail. While members appreciate they will, in large measure, be able to continue to provide products and take security as they do currently, the consequences and operational and risk management of that will be different and not yet fully appreciated.

This submission draws the attention of the Committee to key areas we have been able to indentify so far with members to better manage the operations and risk consequences of the Bill. The AFC outlines its concerns and provides the Committee with recommendations for changes to the Bill. In our view, these recommendations are consistent with the objectives of the Bill to deliver benefits through efficiency improvements to processes and greater certainty through improved transparency about security interests in personal property.

At a higher level, the AFC also recommends for the Committee's consideration the following –

- once the Personal Property Securities Act becomes law, it be subject to a review after the first 2 years of operation to assess its operation and effect; and

- an expert advisory committee be established to provide advice and commission research into the Act and its policy, including ongoing assessment of international developments.

The AFC would be pleased to assist the Committee in its deliberations by providing further comment or appearing before it.

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Part 2 – Specific AFC Issues

Issue	AFC Comment	AFC Recommendation
1. PMSI – inadequacy of 5 business day registration time limit for priority	In order for a purchase money security interest (PMSI) over tangible property to obtain priority over prior-registered non-PMSIs, the security interest must be registered before the end of 5 business days after the debtor acquires possession of the property – s112. By comparison, in New Zealand 15 business days is allowed. The AFC is unclear why 5 business days has been inserted by the Bill, other than a view that technology should facilitate a quick registration process. AFC believes this view is based on a misconception of increased timeliness flowing from electronic registration, without regard to necessary operational requirements associated with transacting finance. New Zealand's register is also electronic, but, as noted above, provides a longer period. Attorney-General's Department officers who attended a series AFC PPS workshops received consistent feedback from AFC members that 5 business days was inadequate operationally and realistically to provide enough time for operations and processing by financiers. Reasons advanced for this include – • financiers cannot be confident of when possession of consumer property or equipment is given to a grantor by a supplier of tangible property • a supplier may give possession to a grantor before settlement, once conditional loan approval has been given by the financier • a financier may have provided a large corporate grantor with a loan facility which the grantor is authorised to draw upon to acquire equipment as required – in this situation, the financier is not aware of either the transaction or the equipment until the relevant documents arrive at the financier from the grantor • with serial numbered goods, especially motor	There are a number of options for addressing concerns, including adoption of the New Zealand allowance of 15 days from the grantor acquiring possession. The AFC recommends, taking into account the range of reasons identified to justify a different time limit, that registration before the end of 5 business days after settlement (i.e. when the security interest attaches by value being given by the secured party) should establish the PMSI priority.

	vehicles, financiers defer registering their security interests until the correctness of the identifying serial number has been verified, frequently by reference to a government data base • the processing of transactions, which includes the execution of contract/security documents, the obtaining and verification of customer and goods identity, provision and confirmation of customer financial details, and the movement of documents from introducers (e.g. dealers, retailers, supplier, brokers) to financiers cannot be necessarily and prudently completed within the 5 business day period allowed by the Bill to ensure PMSI priority. While the ability to register a PMSI security interest prior to attachment would be available, it is not the most efficient method if the efficacy of registration depends on the correctness of a serial number. Also, AFC members advise that up to 20% of approved finance applications do not proceed to settlement. As a consequence, to register a PMSI at the time of finance approval would necessitate a significant and unproductive operational burden on financiers in removing non-settled registrations and would increase the amount of traffic and data on the register.	
2. PMSI – sale and leaseback exclusion	A sale and leaseback arrangement is excluded from being a PMSI – refer s32(2) of the Bill. This results in a sale and leaseback being afforded a general priority, even if the security interest is registered within the time required for a PMSI priority. While AFC appreciates the conceptual basis for this approach, it is contrary to sensible commercial practice. In particular, a sale and leaseback can be facilitated by arrangement between the grantor and the secured party. There are times when time pressures and opportunities do not allow for financing in the usual way. To allow the grantor to take advantage of those circumstances, the parties will agree the	The AFC recommends a security taken by the financier will be a PMSI where the parties have agreed that, prior to the grantor acquiring personal property, the financier will 'reimburse' the grantor for the purchase price and take a security interest over the property. The AFC also recommends PMSI priority should apply if the secured party registers on the PPSR within a specified period

	grantor buys the property confident in its agreement with the financier that it will be financed or purchased by the financier as soon as circumstances permit after the purchase by the grantor. This allows the grantor to release funds that would otherwise be tied up in capital. These circumstances can arise both in arranging the financing of a particular asset as well as in floorplan financing. In particular, the exclusion of sale and leaseback from the PMSI concept would have an adverse impact on used vehicle dealers financing their stock and dealers taking trade-ins. These circumstances apply not only to leaseback, but also other forms of finance, such as hire-purchase and mortgage.	after it advances the finance. Alternatives to the current proposed time periods in the Bill are discussed earlier in this submission. Floorplan financing on used vehicles can be regarded under the Bill as inventory financing by way of "PPS lease" rather than commercial consignment. In light of this, the AFC recommends the sale and leaseback exclusion from a PPS lease should not apply where the tangible property involved is to be used as inventory.
3. Registration of security interest	The Bill refers to the registration of collateral. AFC has a concern that this expression is not consistent with the expectations of secured parties and with the core rationale for the Bill. Secured parties will expect to register their security interests, not the personal property to which the security interest applies. Also, registration of collateral suggests the PPS Register is a register of title in personal property, which clearly it is not. In addition, it gives rise to what AFC regards as awkward expression, such a 'registration of personal property as collateral' (s189(1)), instead of 'registration of a security interest'.	The AFC recommends that the Bill should refer to registration of a security interest, not registration of collateral.
4. Giving of notices	The Bill imposes a number of obligations on a secured party to give a notice to another secured party recorded on the Personal Property Securities Register (PPSR). Those obligations usually involve a set time frame for giving or responding to the notice. Consistent with the efficiency and effectiveness	The AFC recommends the giving of notices to secured parties should be facilitated by electronic means through the PPSR.

	of an electronic PPSR, there is considerable interest in the PPSR providing the facility through which notice can be given or responded to. This could be achieved by encouraging secured parties to establish and use a standard format, dedicated electronic address, e.g. pps@securedparty.com.au. This arrangement is efficient in the sense of a special address and facility for the flow of notices and associated information. It is effective in the sense the PPSR will have an independent and permanent record of notices. AFC supports s249, which mandates the only methods for giving notices to a secured party. This avoids, for instance, notices being given to a corporate secured party at its registered office, which would militate against the timeliness and efficiency the Bill expects in the giving of notices.	
5. Subordin-ation agreements	The Bill permits secured parties to subordinate priorities – s105. Also, details of subordination may be recorded or changed on the PPSR – s191, but this is not mandatory. Consistent with the Bill's policy objective to improve efficiency in taking security interests, AFC members are attracted to a standard form of subordination agreement to facilitate the making of those agreements between secured parties in a cost efficient and timely manner. A standard form would ensure all relevant information required for a security interest registration is collected. It is thought that a standard form provided from the commencement of the PPSR would assist secured parties significantly in adapting to the new system and regime. Equally any perceived shortfalls/confusion in the form/process through the initial implementation and rollout of the PPSR could be managed centrally with the Registrar. AFC members have expressed the view that no	The AFC recommends that the Bill's regulations include the power to prescribe a form of subordination agreement. The form of this agreement should be developed collaboratively with key industry associations, with regulations giving effect to it.

	other form (regardless of form of security) should be allowed under the new register. This should serve to avoid any inconsistencies or confusion around the registration and other requirements.	
6. Release of security interest	AFC members need a quick and simple process for releasing security interests over personal property, and in obtaining such a release. This need arises from the following situations – • where the grantor wishes to sell and rent back its equipment; • where a grantor wishes to re-finance with a different financier; • where a grantor wishes to sell its non-circulating property, such as in the case of a sale of a business or part of a business; • where a grantor wishes to assign its debts. Under the Corporations Act, the usual way of evidencing such releases is by the use of a Form 312. The Form 312 process has worked efficiently to date and AFC members see merit in its continuation under the Bill.	The AFC recommends the Bill should make provision for a document equivalent to the current Form 312 to be executed by secured parties, with provision to be recorded on the PPSR. The form of that document should be prescribed by the regulations.
7. Imposition of statutory duty & damages	The Bill requires that all rights, duties and obligations that arise under a security agreement or under the Act must be exercised or discharged honestly and in a commercial and reasonable way – s235. This covers contractual as well as statutory rights, etc, including enforcement action, and cannot be contracted out. It also applies to deemed security interests which are based on ownership. Section 236 provides for statutory damages for a breach. AFC is firmly of the view these provisions are not justified and bring uncertainty to an Act trying to do the opposite. Also, it appears to impose a duty where there is no articulated mischief to address nor clear statement of policy objective. The meaning, scope and application of the duty are unclear. It invites litigation to resolve these. In AFC's view, there are sufficient legal obligations and remedies, provided through –	The AFC recommends the omissions of ss 235 & 236.

	• The Consumer Credit Code, and related administration laws, deal with unsatisfactory credit provider conduct involving secured consumer transactions and their enforcement. • The general law, along with the Trade Practices Act and the Australian Securities and Investments Commission Act, provide standards and remedies for the conduct of parties to consumer and commercial transactions.	
8. Changes in registered details	Section 200 imposes requirements on a secured party if details on which a registration is based, change. The discussion about s200 in the Commentary to the Bill suggests a duty on secured parties to regularly review their loans with customers, with knowledge attributed to the secured party either because it has actual knowledge of a change or could have known if it had asked. There is no such duty, nor should there be. Also, many loans are not reviewed if payments continue to be made by the debtor, particularly if a fixed term, or a consumer, transaction.	The AFC recommends that, unless a secured party becomes actually aware that registered details have changed, there should be no obligation to change details from those already registered.
9. Time periods to effect change	Sections 200(2), 209(5) and 210(4) specify 5 business days within which a secured party must change registered details or respond to an amendment request from the registrar of the PPSR. This time-frame does not take account the process of internal operations and communications – nor does it take into account the need to verify the accuracy of information.	The AFC recommends 10 business days is a more realistic and reasonable time for change or response.
10. Controllers under the Corporations Act	The Bill's enforcement provisions do not apply to the personal property that is being dealt with by a controller within the meaning of Part 5.2 of the Corporations Act – refer s155 of the Bill. On many occasions, that property is a specific piece of tangible property secured by a fixed charge or goods mortgage given by a company. The AFC has had concern for some time that the controller requirements of the Corporations Act are inappropriate where the security is only over	The AFC recommends that the enforcement of a fixed charge or goods mortgage given by a company over specific tangible property be dealt with in accordance with Chapter 4 (Enforcement of Security Interests) of the Bill, rather than the controller

	specific tangible property rather than the more substantive assets of the company. The exemption in s155 of the Bill will maintain this situation, resulting in goods mortgages given by companies being enforced in accordance with the Corporations Act and other "in substance" security interests such as hire-purchase agreements, being subject to the Bill. This outcome is inconsistent with a key policy objective of the Bill. The AFC is currently in deliberations with the Attorney-General's Department. Submissions have also been made to Treasury's Corporations and Markets Advisory Committee.	provisions of the Corporations Act.
11. Trans-Tasman considerations	The AFC believes that there is considerable benefit in pursuing consistent policy, and to the extent achievable, legislation, between the Personal Property Securities Acts of Australia and New Zealand. Increasingly there is trans-Tasman management of business which involves the taking of security interests. The improved consistency of law and registry operations will contain operational, risk and compliance costs, and enhance commercial dealings between the countries. Also, based on AFC member experience, there is a trans-Tasman market in secured assets, particularly motor vehicles, being moved from one jurisdiction to the other. This results in the sale of secured vehicles in circumstances where the secured financier suffers a loss because the security interest in the vehicle is not registered in the country to which it is moved. In due course, AFC believes there will be benefit in the sharing of security interest data between the 2 countries.	The AFC recommends the Australian Government encourage shared policy and legislative development with New Zealand on personal property securities. The AFC also recommends the PPSRs of Australia and New Zealand provide access to the data of each other, especially in relation to motor vehicles.

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