



AUSTRALIAN BANKERS' ASSOCIATION INC.

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Mr Peter Hallahan
Committee Secretary
Senate Standing Committee on
Legal and Constitutional Affairs
Department of the Senate
Parliament House
CANBERRA ACT 2600

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Dear Mr Hallahan,

Personal Property Securities Bill 2009 (PPS Bill)

The Australian Bankers' Association (ABA) made a submission to the Committee in connection with the Committee's inquiry into the Exposure Draft of the Personal Property Securities Bill 2008.

In that submission the ABA confirmed its support for the Commonwealth Government's desire to reform the law in Australia relating to personal property securities (PPS) and to establish a single national electronic register under Commonwealth law.

The ABA continues to support the Government's initiative and welcomed the Committee's recommendations in its report on the Exposure Draft in March 2009.

In particular, the ABA was pleased that the Committee recommended an extension to the commencement date of the PPS regime to May 2011.

The Commonwealth Government's response to the Committee's recommendations is generally supported by the ABA. Member banks now look forward, once the PPS Bill has been passed, to a settled period in which there will be consultation on the proposed regulations to be made under the PPS Bill, the development of the national PPS electronic register and the opportunity within a realistic timeframe to make their internal preparations to ensure that the benefits of the regime are achieved by both bank customers and banks.

There are several matters that the ABA wishes to draw to the Committee's attention.

Shipping Registration Act

It is still unclear how the legislation is going to treat the taking of a security interest over ships which fall under the requirements of the Shipping Registration Act.

One approach to obviate dual registration and searching in both the PPS register and the shipping register is for a search to be made once to confirm who the owner of a ship is and if there were any charges registered against the ship. The idea would be to develop some kind of systemic link between the PPS register and the Australian Register of Ships. To achieve this there would need to be amendments made to the Shipping Registration Act which remove the requirement to register a PPS interest over a ship on the Australian Register of Ships.

The PPS Bill is still silent on this issue and it is unclear whether consequential changes to the Shipping Registration Act are being considered to address this issue.

This is a matter that the ABA will follow up with the Attorney-General's Department and brings this to the attention of the Committee for noting the importance of achieving as complete a national model as feasible.

Section 14(2)(c) – Purchase Money Security Interest (PMSI)

This section has been added since the Exposure Draft was considered by the Committee. The section seeks to exclude a PMSI collateral that at the time a PPS interest is granted it is intended to be used by the grantor predominantly for personal, domestic or household purposes.

The Committee will note that under sections 45 and 50 of the proposed National Credit Code, that is a schedule to the National Consumer Credit Protection Bill 2009 currently before the Parliament, there are prohibitions on credit providers taking security over future property and securing consumer credit facilities over certain items of household property and goods used in the earning of income the total value of which falls below a prescribed limit.

In practice, the relevance of section 14(2)(c) will be in respect of non-prohibited items of goods under security instruments in respect of consumer credit facilities and business or commercial credit facilities.

The example is that an individual who is a sole trader may raise credit for the business and provide security for the business credit over both the present and future assets of the business and the personal assets of the individual.

Another financier seeking to provide a consumer credit facility to the individual concerned for the individual to purchase a family motor vehicle, would have to first search the PPS register and, on discovering the first mentioned financier's general security, then seek to negotiate a priority agreement with that financier.

Accordingly, if section 14(2)(c) is retained it could mean less choice for the consumer in seeking finance or less ability to obtain consumer goods finance.

The ABA submits that section 14(2)(c) is removed.

Section 116 - Corporations Act to continue to apply to receiver, receiver manager and controller

Due to the application of section 116, there will be little scope for Chapter 4 of the PPS Bill to apply to the enforcement of charges or mortgages granted by Australian companies. Section 116 will mean that the Corporations Act and not the PPS Bill will apply to property while a person is a receiver, receiver and manager or a controller of the property.

It is unclear why in developing the national PPS regime two differing enforcement regimes, one for companies under the Corporations Act and another for other entities should apply.

It is noted that "property" referred to in section 116 would include real property as well as personal property.

At least, the ABA submits that the definition of "controller" in section 9 of the Corporations Act is amended or that section 116 is modified for the purposes of the PPS Bill so that a credit provider acting as a mortgagee is able to rely upon its security interest in collateral according to the PPS Bill provisions.

The PPS Bill provides a secured party with the option to utilise a single enforcement approach where the assets comprised in the security are both real and personal property.

By amending or modifying, as appropriate, the relevant sections there would be a greater level of consistency in approach in relation to all grantors.

Section 266 Corporations Act – certain charges void against liquidator or administrator

There is a concern over the ongoing operation of section 266 of the Corporations Act.

Under section 266, the initial grant of a charge is required to be registered under the Corporations Act.

It is not clear what is to happen with section 266 once the PPS regime commences.

For the avoidance of doubt, the ABA submits that in respect of the registration of PPS interests after commencement, section 266 has no application to the fact of registration itself so that a requirement for two registrations is avoided.

Proceeds when covered by security interest

It remains unclear in the Bill if a person who claims a security interest over shares held by a registered shareholder in a listed company is entitled to require dividend payments, a distribution, payment, or other asset provided to a shareholder by the issuing company to be paid to the secured party. This could

extend to interest payments, bonus issues, capital returns, rights issues and so on.

This would create an intolerable situation for all listed companies.

The ABA is appreciative of the Attorney-General's Department looking into this matter. It is raised in this submission for the information of the Committee.

By way of example, typically a bank may pay two dividends each year, with each payment totalling very large amounts of money. The number of shareholders of a bank is substantial – hundreds of thousands in many cases.

Those entitled to receive dividend payments are the shareholders on the company's share register as at a nominated date (record date).

The record date concept is supported by the ASX listing rules. What then follows is a very complex and detailed process to ensure the appropriate dividend amounts are paid on the dividend payment date to each individual shareholder, either by direct credit into their bank account or by cheque, or by the issue of new shares if they participate in the company's dividend reinvestment plan. At the same time, dividend payment advices are prepared and despatched to each shareholder. This is a large and time consuming process.

It would be totally impractical if, during the course of the preparations for the dividend payment, third parties were able to contact or notify the company of a third party security interest, and then seek to direct payment of the dividend or other interests to that third party.

It would not be feasible for listed companies to comply. For example, it would be a difficult and time consuming process to identify whether the claim is valid or disputed; whether the third party held the security interest as at the record date, or it was created afterwards and whether the third party held the security interest over the relevant shares as at the record date. Once these matters have been resolved, the company would need to have systems in place to collect addresses, bank account details and so on from the third parties and then somehow 'amend' the payment processing processes accordingly and then be able to print revised dividend advice formats to send to the shareholder and to the third party.

So far as shares in listed companies are concerned, the legislation should ideally oblige listed companies only to pay dividends and other distributions/entitlements to shareholders on the company register as at the record date.

It seems clear that dividends and other entitlements attaching to shares would be considered to be proceeds arising out of the collateral (see section 31(1)(e)) that would be identifiable or traceable property.

The ABA seeks rectification of this matter in the Bill.

Section 127 (6) Reimbursement of enforcement expenses between enforcing parties

This section entitles an enforcing party that has seized collateral to reimbursement of any reasonable enforcement expenses paid, or incurred by it

where a secured party with a higher priority requires the enforcing party to give possession of the collateral seized to the party with the higher priority.

The ABA submits that in describing these expenses the PPS Bill should add that those expenses should not only be "reasonable expenses", but that they should be "reasonably paid or incurred" by the enforcing party.

Section 47 (1) – taking personal domestic or household property free of security interest

Section 47(1) allows a buyer of this class of property to take the property free of a security interest subject to certain conditions.

The ABA is concerned that these conditions should ensure that the transaction is at arm's length.

Relevantly, two conditions in section 47 (1) must be satisfied:

- (1) that the market value of the goods is actually not more than \$5000, and
- (2) that the buyer believed this to be the case.

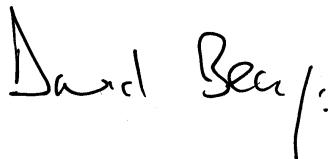
It will be virtually impossible for a financier to prove or disprove the belief of the buyer in these circumstances. In the interests of certainty and to provide confidence that the transaction is conducted at arm's length an element of objectivity should be introduced into this section. For example, a test that a reasonable buyer in the circumstances of the transaction would believe that the value of the personal property was less than \$5,000 or other prescribed amount.

Concluding comment

The ABA concludes this submission to commend the Attorney-General's Department and officers for their commitment to consultation on this important reform project and the responsive approach taken to the concerns of interested parties.

The ABA will be appearing before the Committee on 6 August and trusts that this short submission is helpful in the Committee's deliberations.

Yours sincerely



David Bell