31 July 2009

Mr Peter Hallahan
Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Parliament House
Canberra ACT 2600

Dear Mr Hallahan

Inquiry into the Personal Property Securities Bill 2009

1. This submission is made by the Insolvency Practitioners Association (IPA), which is the peak professional body representing company liquidators, trustees in bankruptcy and other insolvency professionals.

2. We made an earlier submission dated 18 January 2009. To the extent that issues we raised in that submission appear to have been dealt with in the Personal Property Securities Bill 2009 (the PPS Bill 2009), we do not refer to those further. To the extent that issues we raised appear not to have been dealt with in the PPS Bill 2009, we make the following submissions.

Corporations Act issues

3. We earlier cautioned that there was need to avoid inconsistency of defined terms in the PPS Bill with definitions in the *Corporations Act*. We said that consequential amendments to the *Corporations Act* should be drafted concurrently in order to ensure the consistency of the two pieces of legislation. The IPA has been invited by Treasury to advise on the drafting of those consequential provisions and comments made in our earlier submissions will be available for that drafting process.

Other drafting issues

4. As to the drafting of the PPS Bill 2009, we earlier pointed out that "Note 2" to then section 233 (now s 267) said that "(a) security interest might also be void under sections 263 and 264 of the *Corporations Act 2001*" and that the section references should be to sections 266 and 267. The Note 2 to s 267 of the PPS Bill 2009 now says: "See also section 266 of the Corporations Act 2001". We think that it should say: "See also sections 266 and 267 of the Corporations Act 2001".

5. Section 10 of the PPS Bill 2009 says that "*insolvency* has the same meaning as in paragraph 51(xvii) of the Constitution". As examples, s 320 of the PPS Bill 2009 refers to a priority that "comes to be determined because of an insolvency or bankruptcy"; s 327(1) refers to persons who are "insolvent or bankrupt"; s 247(3)

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refers to "a bankrupt or an insolvent". In the case of s 320, we assume that section means that the relevant priority "comes to be determined because of a formal corporate insolvency (encompassing liquidation, administration etc) or a formal personal insolvency (encompassing bankruptcy, a personal insolvency agreement etc)". As we explained in our earlier submission, the term "insolvency" has quite a different, and defined, meaning under the *Corporations Act* (s 9) and under the *Bankruptcy Act* (s 5(2) and (3)). Bankruptcy is defined in the *Bankruptcy Act* as "in relation to jurisdiction or proceedings ... any jurisdiction or proceedings under or by virtue of" the *Bankruptcy Act.* Whether it may be correct drafting to say that "*insolvency* has the same meaning as in paragraph 51(xvii) of the Constitution" we point out that at s 267 of the PPS Bill 2009 the various events in each of personal and corporate insolvency are fully set out. We think this is a better and more precise way to refer to those events, rather than by way of the generic words "bankruptcy and insolvency", as in s 320.

6. We again note that while s 8 provides that the Act does not apply to certain interests in property created under the *Bankruptcy Act*, including vested property, it makes no reference to deceased estates in bankruptcy under Part XI (which has its own vesting provisions).

Insolvency administrators" liens

7. In our earlier submission, we raised the issues of statutory and equitable rights of indemnity and liens which go to support the right of an insolvency practitioner to remuneration. It remains unclear to us whether the PPS Bill has an impact on such liens. A typical statutory lien is that provided by s 443F of the *Corporations Act* in support of a voluntary administrator's right of indemnity against company assets for debts incurred etc and for remuneration: s 443D. That lien can prevail over a floating charge – s 443E.

8. As explained by reference to case law in our 18 January 2009 submission, equitable liens, not based on statute, can also arise. For example, a provisional liquidator has an equitable lien for remuneration over the company assets[1] and an administrator has an equitable lien that may prevail over a prior charge.[2]

9. Section 8 of the PPS Bill 2009 says that the Act does not apply to certain interests, including liens, except as provided in s 8(2). That subsection then appears to allow certain other sections to apply to liens, in particular s 73 in relation to the priority between security interests and priority interests. It appears from this that a lien is regarded as a priority interest.

10. However, s 73 brings in the concept of knowledge in determining the relative standing between a security interest and a priority interest. It is difficult to identify the relevant "knowledge" of an insolvency administrator. Subsection 73(1)(e) can be paraphrased as saying that "the insolvency practitioner acquired the lien without actual knowledge that the acquisition constitutes a breach of the security agreement that provides for the security interest". We do not think it is a

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[1] *Shirlaw* v *Taylor* (1991) 9 ACLC 1,235

[2] *Commonwealth Bank of Australia v Butterell* (1994) 12 ACLC 727; *Coad v Wellness Pursuit* (2009) 27 ACLC 398

relevant inquiry to ask whether an insolvency practitioner "acquires" the interest created by an equitable lien and without knowledge.

11. As to statutory liens, the PPS Bill 2009 says that a law creating a statutory interest (such as an administrator's statutory lien under s 443F of the Corporations Act) may declare that s 73(2) applies, or the Minister may make such a declaration. That may be an issue that will be addressed in the process of the drafting of the consequential *Corporations Act* amendments referred to in paragraph 3 above. As to equitable liens, s 73(1)(d) – as to a law providing "for the priority between the priority interest and the security interest" - may also allow these to be addressed in that same process.[3]

12. Generally, we again raise this as an important issue for insolvency practitioners to ensure that the legal status of equitable and statutory liens in an insolvency remains. There are strong policy reasons for the retention of means by which an insolvency practitioner's remuneration should remain protected.

Service of documents etc

13. The PPS Bill 2009 contains various provisions as to service of documents and notifications to parties, including creditors. We suggested in our earlier submission that these provisions should be drafted in conformity with existing service and notice provisions in the *Corporations Act*, for the sake of consistency. For example s 287 of the PPS Bill refers to giving notice by email; we refer you to s 600G of the *Corporations Act* which is to the same effect but which is drafted differently. Also, any such provisions should nominate not only the means of service but also a date upon which the relevant document is deemed to be "given" or served; see for example s 600G(5). No such dates are nominated in the PPS Bill 2009. We see no reason to have different wording in Commonwealth legislation for the one concept.

Further assistance

14. The IPA is pleased to assist in the consideration of this important legislation and we can provide further input as may be required. For that purpose, please contact the IPA Technical Director, Ms Kim Arnold (02 4283 2402 – karnold@bigpond.net.au) or the IPA Legal Director Mr Michael Murray (02 9080 5826 – mmurray@ipaa.com.au) as necessary.

Yours sincerely

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[3] See also CAMAC Report "Issues in External Administration", November 2008, Recommendation 6, as to the priority between an administrator and a subsequent liquidator.