

08 February 2008

Mr Richard Glenn  
Personal Property Securities Branch  
Australian Attorney-General's Department  
Robert Garran Offices  
3-5 National Circuit  
BARTON ACT 2600

Dear Mr Glenn

**Personal Property Securities Reform (PPS Reform)  
Submission in response to Discussion Paper 3 - Possessory Security Interests**

Thank you for considering this submission after the closing date for submissions.

Our comments on Discussion Paper 3 are set out below. Our comments are limited to investment property (ie shares in a company or an interest in a Managed Investment Scheme (MIS)).

**1. Background**

**About Computershare**

Computershare is a global leader in securities registration, employee equity plans and other specialised financial and communication services. Many of the world's largest corporations employ our innovative solutions to maximise the value of their relationships with investors, employees, customers and members.

One of our businesses, Computershare Investor Services Pty Limited (CIS), principally establishes and maintains registers of security holders for companies and registered managed investment schemes in accordance with the Corporations Act 2001 (Corporations Act). Generally these entities are listed on the Australian Securities Exchange. The registry function includes the recording of the details of registered security holders – notably their name, address and holding balance.

**About Minters**

Minter Ellison is one of the largest full-service law firms and a recognised market leader in the Asia Pacific region. With more than 280 partners and 900 legal staff located in Australia, Hong Kong, The People's Republic of China, Indonesia, New Zealand and the United Kingdom, Minter Ellison supports leading industry and government clients, acting as a key adviser to leading multinationals and Future 500 companies.

We have extensive expertise in the securitisation industry, including advising on all types of securities and financial products, specifically:

- MIS interests
- Commercial mortgage-backed securities
- CDOs, CLOs and other synthetic products
- Asset-backed securitisations including auto receivables, margin loans, rental fleet receivables, commodity receivables, licence and management fee receivables and other trade receivables
- Infrastructure project bonds
- Whole business securitisations
- Margin loan securitisations
- Residential mortgage-backed securitisation.

## **2. Further consideration about whether PPS Reform should extend to investment property required**

We submit that the PPS Reform should not extend to investment property as the current system works well.

Australia currently has an investment property system which is well established and adequately deals with investment property. The law recognises legal ownership and this is recorded in the relevant issuer's register. Australia also has a well developed margin lending system.

The PPS Reform it is submitted would add an additional layer of complexity on top of the current system (which the average security holder in our experience already finds rather bewildering) is not supported.

The reasons for the proposed PPS Reform set out at paragraphs 5 – 16 of Discussion Paper 3 do not apply to the systems for registering interests in the types of investment property in respect of which we are commenting.

Interests in both shares in a company and a registered MIS are clearly maintained, subject to national legislation and regulatory bodies, and cost and time effective. As noted, even with the level of clarity and certainty surrounding the registration of such interests, investors can still find understanding the (for example) regime for the legal transfer of interests difficult to understand. To make these systems more complex, as the PPS Reforms would entail, would not, in our view, promote greater investor confidence or certainty in the securities markets.

Further, in order to meet the levels of disclosure and monitoring required under the Corporations Act and other instruments (relevant ASIC policy, for example), the PPS Reform proposed would significantly increase issuer and registrar costs.

### **3. If PPS Reform extended to investment property further consideration of how PPS Reform will interact with regulatory requirements and industry practice required**

If it is decided that there is a need to extend PPS Reform to investment property, we encourage further consideration as to how the PPS Reform will interact with the current legal obligations of issuers and their registrars under the Corporations Act, ASX Listing Rules, ASTC Settlement Rules and other relevant legislation and industry practice.

For example, the registered holder of the shares has an absolute right of ownership in regard to their shares. Accordingly, within the securities industry systems are set up so that instructions (eg change of name, banking instructions, transfers of shares) are required from the registered holder of shares and instructions from a person other than the registered holder are not acted upon (unless there is a Power of Attorney, the holder is bankrupt, deceased or a court order has been received).

Under the Corporations Act a person transferring shares remains the holder of the shares until the transfer is registered and the name of the person to whom they are being transferred is entered in the register of members (section 1072F(1)).

### **4. Minimise compliance costs**

We strongly suggest that any PPS Reform in regard to investment property be straightforward and minimise compliance costs. For example, the rules would be more straightforward if the same rule applied regardless of whether or not the nominee acts as nominee in the ordinary course of their business. We are not entirely clear why the distinction has been made.

The securities industry currently works on the basis that the registered holder owns the shares and provides the issuer/registrar with instructions in relation to the holding. The computer systems and processes are structured on this basis.

PPS Reform will potentially impose substantial compliance costs on issuers and registrars. Some of these costs include:

- issuers (or their registrar) will be required to investigate each situation to determine whether or not to record agreements between the holder and purchasers in the circumstances described in paragraph 57 (further comment on paragraph 57 below);
- extensive system development would be required to modify computer systems which maintain the share register so agreements between purchasers and the registered holder of securities as paragraph 57 of the discussion paper proposes can be recorded. Currently systems only record the legal owner of shares. There is no functionality to record other interests;

- process development and implementing new procedures;
- training staff, holders and purchasers about the requirements; and
- additional time and costs resulting from staff dealing with investor queries.

## 5. Securities entitlements and control of them

### a) *Paragraph 56, 57 and 58 - Control of quoted uncertificated investment property*

If PPS Reform is extended to investment property it is suggested that control of quoted uncertificated investment property should only be recognised in the situation outlined in paragraph 56. That is, when the issuer registers the purchaser or nominee of the purchaser as the holder of the investment and the nominee does not act as a nominee in the ordinary course of business.

From an industry perspective it is not practicable to recognise control in the circumstances set out in paragraph 57.

Paragraph 57 states that *“A purchaser would also control quoted uncertificated investment property when **the person who administers the relevant holder’s register has agreed with the registered holder of the investment property that it will comply with instructions originated by the purchaser or a nominee of the purchaser concerning the transfer of the investment property to another person without the further consent of the registered holder, and that it will not comply with the instructions initiated by the registered holder.** A purchaser would have control of uncertificated investment property even if the registered holder retains the right to originate instructions to the issuer or to otherwise deal with the investment property security in a way not related to the transfer of the investment property to another property (for example, to give instructions concerning the payment of dividends) .”*

We do not consider that an issuer or registrar be placed in a situation where it is required to recognise control in the circumstances set out in paragraph 57 for the following reasons:

- a company must only register a transfer of securities (not being a proper ASTC transfer, ie, an electronic transfer regulated by ASX Settlement & Transfer Corporation Pty Ltd as a prescribed CS facility) if a proper instrument of transfer has been delivered to the company (though the company can register a person to whom the right to the securities has devolved by will or by operation of law (sections 1071B(2) and (5)). If there is no proper instrument of transfer (or operation of law) or a proper ASTC transfer, the registrar has no legal basis to comply with transfer instructions from the purchaser or its nominee;
- ASX Listing Rule 8.10 states that no interference with registration by the registered holder of securities of paper-based transfers should arise (there are only certain exceptions to this rule which do not apply in these circumstances);
- in a high volume, automated industry such as the securities industry, issuers/registrars do not have the systems or resources to investigate arrangements, review security agreements and determine whether such agreements should be made

(some companies have millions of holders so the number of agreements to be investigated and noted could potentially be very large time-consuming and expensive). The appropriate platform for the establishment and maintenance of security positions is away from the register, as is currently the case;

- the issuer/registrar would potentially be exposing themselves to legal risk by entering into such agreements. There seems to us to be a high risk of the issuer/registrar potentially being caught in the middle of disputes between holders and purchasers in relation to actions taken in relation to investment property. These costs would invariably have to be passed on to issuers, thus entrenching a higher cost structure and potentially commensurably affecting Australia's international competitiveness in this industry; and
- it would be unfairly burdensome and an inappropriate allocation of legal responsibility to make the issuer/registrar effectively responsible for determining the legal rights of contesting holders/purchasers.

Accordingly it is submitted that control should only be recognised as set out in paragraph 56.

***b) Paragraph 58 – CHESS***

If PPS Reform is extended to investment property we strongly recommend that you speak with Australian Securities Exchange Limited and broker associations (if you have not already) to discuss whether the proposal in paragraph 58 is possible or feasible. CHESS is a highly automated, complex and regulated electronic messaging system and we query how any agreements between CHESS Participants and holders would be recorded/acted upon.

Again, in our view the proposed PPS Reform substantially:

- increases the investigative and administrative burdens on CHESS participants;
- potentially exposes CHESS participants to increased legal liability; and
- seems likely to increase investor confusion, uncertainty and (intentional or otherwise) misuse of the system.

**6. Question 7 - Classes of property included in definition of investment property**

Given the impact any PPS Reform would have on the securities industry we suggest that the classes of property included in the definition of "investment property" be limited to shares and MISs.


**7. Question 41 - PPS reform applicability to liens**


We agree that any PPS legislation should not apply to a lien or other interest in personal property created by operation of any rule of law or by any Act. We submit that it should also not apply to liens created under the constitutions of issuers (eg, in relation to partly paid securities).

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We would be happy to discuss any matter raised in this submission and review any further discussion papers or draft legislation. Please contact us by email or phone Dominic Horsley

Yours sincerely

  
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