



Personal Property Securities Reform
Revised Personal Property Securities Bill 2008

Personal Property Securities Reform

BY EMAIL

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Dear Sir/Madam

Personal Properties Securities Reform - Australian Securitisation Forum Submission

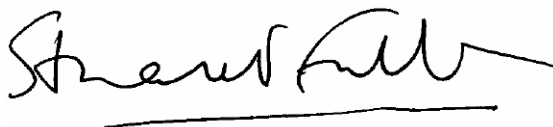
Thank you for the opportunity to comment on the revised Personal Property Securities Bill (the **PPS Bill**). As noted in our earlier submission on the Personal Property Securities Bill, the Australian Securitisation Forum (the **ASF**) is the peak industry body for the Australian Securitisation industry.

The ASF is aware that other bodies and groups who operate within, and represent sections of, the financial markets have provided comments on the PPS Bill. We support many of the points that they have made. However, rather than focusing on issues that affect the finance industry more broadly, we propose to deal specifically with the issues that most affect securitisation.

The ASF's submission on the revised PPS Bill is set out below.

Yours sincerely,

For the Australian Securitisation Forum

A handwritten signature in black ink, appearing to read 'Stuart Fuller', with a horizontal line underneath it.

Stuart Fuller

Co-Acting Chair of the Australian Securitisation Forum

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General Comment

As a general comment, we submit that a provision should be added to the Act that clarifies that any section of the Act that excludes certain provisions of the Act from applying to or otherwise refers to “a transfer of an account or chattel paper that does not secure payment or performance of an obligation” will exclude or otherwise refer to a transaction involving a transfer, where there are incidental rights given by the transferor to the transferee which secure payment or performance of an obligation. The primary purpose is not to secure an obligation of the transferor but that may be an incidental result in certain limited respects. An example of this is where there is a true sale of accounts to a transferee by a transferor. The value of the assets transferred may exceed the value of the senior notes issued to the market the proceeds of which are used to acquire the assets. The balance may be funded by way of a subordinated loan from the seller. If there are outstanding claims by the transferee against the transferor under the sale and purchase agreement (e.g. claims for costs and indemnities) often the transferee will be entitled to set off the amounts owed to it against amounts owed by the transferee to the transferor. In this limited sense the assets secure and obligation to pay amounts owing under the cost clause or the indemnity but this is not the primary purpose of the transaction (which is to buy debts from the transferor where the recourse is to the debtors rather than to the transferor).

1. Part 1.1 – Preliminary

1.1 Section 6 – Application of Act to interests

<i>Mortgage-backed securitisations</i>	Section 22(e)(ii) of the Act seeks to exclude from its operation the transfer of a right to payment in connection with an interest in land, where the land is specifically identified. We are concerned to ensure that this does not have the effect of excluding the transfer of mortgage loans as part of a mortgage-backed securitisations from the operation of the Act. Mortgage-backed securitisations may be excluded because the writing evidencing the transfer may identify the land secured by the mortgages which are being transferred. In our view inclusion of mortgage-backed securitisations could be achieved by carving out of section 22(e)(ii) the transfer of a right to payment in connection with a pool of mortgages for creating, issuing, marketing or securing a mortgage-backed security or facility. We refer you to the stamp duty exemptions in connection with mortgage-backed securities in the Queensland Stamp Duty Act in section 130I and the definition of mortgage-backed security in that Act for an example of language that could be used to achieve this outcome. We believe this is preferable to the approach suggested currently documented of limiting the exclusion to circumstances where the writing evidences one mortgage transfer. There are many non-securitisation transfers that affect more than one mortgage that should not be caught by the operation of the Bill.
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2. Part 1.3 – Interpretation

2.1 Section 28 – Meaning of *Security Interest*

<p><i>Transfer of assets under a trust-back or seller trust arrangement</i></p>	<p>In most securitisation transactions the company that acts as trustee of the securitisation trust (the trustee) also agrees to act as trustee of a bare trust the sole beneficiary of which is seller of the assets in connection with the securitisation (the seller trust). The seller assigns receivables and securities relating to those receivables to the securitisation trust and where those securities by their terms also secure other moneys owing to the seller (for instance other loans made by the seller to the relevant obligor and which are not being assigned to the securitisation trust (other receivables)), those other receivables may be assigned to the seller trust. Each security (relating to the receivables and other receivables) assigned to the trustee is held by the trustee:</p> <ul style="list-style-type: none">• on trust for the securitisation trust, to the extent required to repay the relevant receivable assigned to the securitisation trust to which it relates; and• as to the balance, on trust for the seller trust. <p>This ensures that on enforcement of a security the seller will continue to have some benefit from that security in connection with the other receivables.</p> <p>Notwithstanding the sole beneficiary of a seller trust is the seller, who will continue to hold bare legal title to the seller trust assets, the transfer of assets into the seller trust will be deemed by the Act to be a security interest. The operation of the Act is not clear in these circumstances and raises a number of issues, including enforceability issues as no provision is made for possession or control of these types of accounts by the Act.</p> <p>We repeat our earlier submission that the transfer of these accounts, where they will continue to be held on bare trust for the transferor, should not be deemed to be a security interest in accordance with section 28(3)(a) of the Act.</p>
<p><i>Extinguishment of SPV's interest</i></p>	<p>In certain circumstances during the term of a securitisation transaction the securitisation vehicle's interest in the assets assigned to it will be extinguished in favour of the seller or the assets transferred back to the seller (who will have generally continued to hold bare legal title to the assets). For instance, the seller may "re-purchase" assets in the following circumstances:</p> <ul style="list-style-type: none">• where the seller makes a further advance to the underlying obligor and the receivable cannot remain in the securitisation structure;• where the seller breaches a representation and warranty made in relation to the assets when they were assigned to the securitisation vehicle; or• where the seller exercises its rights to buy the assets when the securitisation transaction is almost near the end of its term (and its assets have amortised down to a relatively small percentage of their original

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	<p>value).</p> <p>The operation of the Act is not clear in these circumstances and raises a number of issues including enforceability issues - as no provision is made for possession or control of these types of accounts by the Act and the "security agreement" is unlikely to comply with the requirements in section 63(3) of the Act on the basis that for stamp duty reasons there is generally no writing evidencing the transfer (other than the written agreement evidencing the obligation to "re-purchase" the assets in the circumstances described above).</p> <p>We repeat our earlier submission that the extinguishment of a securitisation vehicle's interest in the securitised assets in favour of the seller should not be deemed a security interest for the purposes of the Act in accordance with section 28(3)(a) of the Act. In our view, in these circumstances the records retained by the seller and/or the securitisation vehicle should be the conclusive register of the beneficial owner of the relevant collateral.</p>
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2.2 Section 32 – Meaning of *Purchase Money Security Interest*

Deferred Purchase Price Arrangements	<p>The assets in connection with a securitisation transaction may sometimes be assigned to the securitisation vehicle on a deferred purchase price basis. In this regard, the vehicle pays the seller an initial purchase price for the assets at the time of their transfer to the vehicle and the seller is then a creditor of the vehicle for payment of the balance of the purchase price. The vehicle will grant a security interest over its assets (generally in favour of a security trustee, to be held on trust for certain creditors of the vehicle). A creditor having the benefit of that security interest may include the seller, in respect of the balance of the purchase price owing to it.</p> <p>We repeat our earlier submission that security interests arising in connection with deferred purchase arrangements in relation to the transfer of receivables should be excluded from paragraph (a) of the definition of a purchase money security interest. The seller generally does not have priority for the balance of the purchase price and so it is not appropriate that it be afforded priority on the basis that its interest would constitute a purchase money security interest.</p>
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2.3 Section 36 – Meaning of *Chattel Paper*

Certificated chattel paper	<p>We repeat our earlier submission that only chattel paper evidenced electronically should fall within the ambit of the regime.</p> <p>As previously submitted, one of the primary concerns with the current treatment of chattel paper in the Bill is that if chattel paper is in a physical paper form, a person with a security interest having possession of that paper will have priority under the default priority rules over a person that has a registered security interest but does not have possession of the paper. This would be an issue in securitisations where, on the initial transfer of the chattel paper which is not</p>
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	<p>evidenced electronically, the SPV securitisation vehicle would not take physical possession of that paper. Therefore there is a risk that another security interest in the chattel paper could be subsequently created by the originator and the SPV would lose priority.</p> <p>If the definition is to be limited to chattel paper evidenced electronically consideration will be required as to how a determination is made that the chattel paper is evidenced electronically.</p> <p>If the current definition of chattel paper is to be retained, we believe it should be amended to cater for instances where the terms of the relevant agreement are evidenced in writing but the agreement itself is created by another form of action, for example, oral acceptance, delivery of leased equipment or the like. In those circumstances, because acceptance is not evidenced in writing, it is arguable the entire arrangement would not constitute chattel paper.</p>
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3. Part 2.4 – Priority between security interests

3.1 Section 111 – Non-proceeds security interest in an account

111(4)	<p>We repeat our earlier submission that it is critical from a securitisation perspective that notices to be given under section 111(4) are sufficiently flexible so that the holder of a priority interest would not have to notify a holder of a PMSI each time additional collateral in the same category was acquired for new value (e.g. in a trade receivables securitisation where receivables are often sold on a daily or weekly basis). In this scenario blanket notices would be appropriate. Having to notify the relevant PMSI holders under section 111(4) each time trade receivables are acquired by the holder of the priority interest would be an unnecessary administrative burden.</p>
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4. Part 2.5 – Transfer and Assignment of Rights in Collateral

4.1 Section 124 – Transfer of grantor’s rights in collateral

124	<p>We repeat our earlier submission (in respect of previous section 116). Rather than permitting assignability, this section should provide that a contractual prohibition on assignment is effective to preserve the general law position.</p>
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4.2 Section 125 – Rights on transfer of account or chattel paper - general

125(3), (4) & (6)	<p>We repeat our earlier submission (in respect of previous section 117) that these sub-sections should be removed. If a secured party has an assignment of all or</p>
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	<p>any of the rights under a contract, the parties should not be free to deal with it.</p> <p>Rating agencies and investors will have insufficient certainty as to the nature and contractual terms underpinning a securitisation if the seller and debtor are able to change the terms of the contract after assignment even if there are qualifications on the extent to which it can be changed.</p> <p>Use of terms such as "commercially reasonably" and "material adverse effect" are open to broad interpretation by the transferor and may not provide sufficient comfort to rating agencies and investors.</p> <p>Making express provision for recourse to the seller for a breach of the terms of the assignment agreement (as contemplated by sub-section (6)) will not assist in a securitisation transaction. The fundamental feature of a securitisation transaction is to isolate the assets from the insolvency risk of the seller. Accordingly a transaction cannot be structured on the basis that a claim for damages against the seller for breach of contract is sufficient protection.</p>
125(7)	<p>We repeat our earlier submission on this section. It is not evident why section 125(7) should be limited to intangible property or chattel paper. To the extent it is extended to relate to accounts then for certain asset classes it may not add value and create a road block to enforcement to require (as under 125(7)(a)(iii)) identification of the account (e.g. the particular invoice) in respect of which the notice is given.</p> <p>We repeat our earlier submission that proof of sale should not be required under section 125(7)(b). Often a securitisation transaction is effected by way of a written offer accepted by payment of the purchase price in cash. There is often no legal assignment which contains a description of the assets sold. We submit that proof of sale should also not be required as the risk of an assignee wrongfully asserting a right to a debt against a debtor is slim.</p>

5. Part 4.1 – General Rules

5.1 Section 149 – Application of this Chapter

149(1)(a)	<p>We repeat our earlier submission requesting clarification that securitisation transactions where accounts or chattel paper are transferred or assigned to an SPV not in connection with the securing of a payment or performance of an obligation (but rather a true sale of the accounts or chattel paper) are not covered by this Chapter (i.e. due to the language in section 149(1)(a)). This should be the case even where the transferee may have indemnity rights or other rights against the transferor in connection with the transfer of the accounts or chattel paper.</p>
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6. Part 4.4 – Common rules relating to enforcement

6.1 Section 177 – Distribution of proceeds received by the secured party

177(2)(b)	<p>We repeat our earlier submission that parties should be able to contract out of this section under section 154.</p> <p>We acknowledge the changes made to this section in response to submissions. Is the new reference to “future advances” in section 177(2)(b) duplicative of the remaining words in that paragraph?</p> <p>We submit that section 177(2)(c) should contemplate secured creditors ranking <i>pari passu</i> with the enforcing secured creditor.</p>
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7. Part 5.4 – Effective registration

7.1 Section 199 – Ineffective registration - particular defects

199	<p>We submit that reference to “grantor’s details” in section 199(b) be clarified so that a trustee as grantor is required to state the trust in respect of which it is the grantor. This will facilitate pin-pointing a particular trust debtor where the debtor acts as trustee for numerous trusts.</p>
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8. Part 6.1 – Vesting of certain unperfected security interests

8.1 Section 233 – When certain unperfected security interests vest in the grantor

233(3)(a)	<p>We submit that chattel paper should also be included in section 233(3)(a) as there is no reason to distinguish between a transfer of an account that does not secure payment or performance of an obligation from a transfer of chattel paper in the same circumstances.</p>
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