

10 November 2009

The Senate Standing Committee on Legal and Constitutional Affairs  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

Our reference: 665/21728702

Dear Sirs

## **Submission on Personal Property Securities (Consequential Amendments) Bill 2009**

Thank you for this opportunity to make a submission to the Senate Standing Committee on Legal and Constitutional Affairs on the Personal Property Securities (Consequential Amendments) Bill 2009 (**Consequential Bill**). Enclosed with this letter is our submission.

### *General comments*

As we advised in our previous submissions to the Senate Standing Committee, we support the personal property securities reform as it will simplify a complex area of Australian law. Our primary concern is to ensure that the new regime is clear, comprehensive and simple to use. The Consequential Bill addressed a number drafting inconsistencies and ambiguities in the Personal Property Securities Bill 2009 (**PPS Bill**) and we welcome those changes. The Consequential Bill reflects the significant benefit achieved from the consultation process.

### *This submission*

The focus of our submission is on Schedule 4 of the Consequential Bill. Although we support the Consequential Bill, we do not believe the amendments that are to be made to the PPS Bill by Schedule 4 are sufficient to address the problems raised by stakeholders. We have outlined our concerns in greater detail in the enclosed submission. As will be seen from the review of our comments, the issues that we have raised are predominantly issues that we had raised in earlier submissions and which the Senate Standing Committee requested the Attorney-General's Department to address.

The Attorney-General's Department has not addressed the issues identified in our submission and in many circumstances has not provided any reasons for that failure. In this regard, the Attorney-General's Department has prepared and issued a version of the table attached to the Senate Standing Committee's August 2009 report to address some of the comments made to the Committee and those made subsequently to the Attorney-General's Department (**November Paper**). This was only released on 4 November 2009. The November Paper does not respond on all points made in the various submissions and some responses do not actually address the issues raised.

We have not had time to fully consider the amendments to legislation other than the PPS Bill contemplated in the Consequential Bill for the purposes of providing our submission. We note that it is unfortunate that the Consequential Bill does not include amendments to the Corporations Act. This is a key piece of legislation that will be impacted by the new regime.

# CLAYTON UTZ

Sydney Melbourne Brisbane Perth Canberra Darwin

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The views set out in this letter and the enclosed submission are the views of Clayton Utz and are not the views of any client of Clayton Utz.

Yours sincerely

~~Angela Flannery, Partner~~

## Issues

### Amendments to the PPS Bill

#### 1. Mortgage backed securitisations and the operation of section 8

1.1 Section 8(1)(f)(ii) of the Personal Property Securities Bill 2009 (**PPS Bill**) excludes from the scope of the legislation the creation or transfer of a right to payment in connection with an interest in land if the writing evidencing that creation or transfer specifically identifies the land. This section will have the effect of excluding transfers of real property mortgages as part of a mortgage backed securitisation from the operation of the PPS Bill.

1.2 In "A paper on the Regulations to be made under the Personal Property Securities Act" (**Regulations Paper**) released by the Attorney-General's Department (**AGD**) on 4 November 2009, it is stated that the transfers of real property mortgages as part of a mortgage backed securitisation will be prescribed under Regulations made under section 8(3) of the PPS Bill as being interests to which the Bill applies.

1.3 The initial transfer of such mortgages as part of a securitisation transaction is not a transfer made for the purposes of securing payment or performance of an obligation. In other words, such transfers are not security interests under section 12(1) of the PPS Bill. Accordingly, if such transfers are to be within the scope of the legislation, those transfers must be deemed to be "security interests" under section 12(3) of the PPS Bill. This cannot be achieved through the Regulations. Therefore the inclusion of provisions in the Regulations as contemplated by paragraph 1.2 above will be ineffective. We recommend that the Personal Property Securities (Consequential Amendments) Bill 2009 (**Consequential Bill**) both removes the exclusion of such transfers from the scope of the legislation under section 8(1) and amends section 12(3) of the PPS Bill to deem transfers of real property mortgages as part of a mortgage backed securitisation as security interests.

#### 2. Definitions in section 10

2.1 In response to stakeholders' comments, the Consequential Bill amends some definitions in the PPS Bill. However we have ongoing concerns with a number of the definitions in the PPS Bill.

2.2 We recommend the following changes:

(a) "Account"

We understand the Government's policy decision is that this defined term is restricted to accounts which are in the nature of book debts or accounts receivable at general law. Both the definition and the example used should reflect this.

The Consequential Bill should remove or replace the example given in the note under the definition of "account". "Credit card receivable" in the example may be used to refer to amounts owing by a credit card holder to a credit card facility provider. This would not typically be seen as a book debt or account receivable. Instead this would be seen as an amount owing in respect of the provision of financial accommodation. We understand such obligations are not intended to be included in the definition so this example should be removed.

(b) "Advance"

The Consequential Bill should amend this definition in the PPS Bill as follows:

- (i) Paragraph (a) should also refer to the performance of an obligation. This will ensure that the definition is sufficiently broad to encompass all forms of financial accommodation.
- (ii) In paragraph (b) the references to "the advance" should be replaced with references to any type of transaction referred to in paragraph (a). Without this change the definition is circular.

The amended definition should therefore be:

*advance:*

- (a) means the payment of currency, the provision of credit, the giving of value or the performance of an obligation; and
- (b) includes any liability of a debtor to pay interest, credit costs and other charges or costs payable by the debtor in connection with:
  - (i) any type of transaction referred to in paragraph (a) or
  - (ii) the enforcement of a security interest securing any type of transaction referred to in paragraph (a).

(c) "Bankruptcy"

The Consequential Bill should amend the definition of "bankruptcy" to provide that it has the same meaning as in the Bankruptcy Act 1966 so that it is clear that the PPS Bill regulates exactly the same matters as the Bankruptcy Act when dealing with the bankruptcy of individuals.

(d) "Goods"

The PPS Bill defines "goods" (which is a narrow concept) to mean any type of tangible property (which is a broader concept). This is undesirable. In response to our previous submission on this point, the AGD noted in the "Personal Property Securities Bill 2009 - Comments and Responses - September 2009" paper released on 4 November 2009 (**November Paper**) that the issue "is a drafting matter". This is not correct, as indicated by the recent developments in New Zealand case law discussed below.

In *The Commissioner of Inland Revenue v Northshore Taverns Ltd (in liquidation)* [2009] NZCCLR 5 the New Zealand High Court read down the broad definition of "account receivable" in the New Zealand PPS legislation to include only intangibles that at general law would be considered to be accounts receivable. It appears that this was done because the Court took the view that, notwithstanding the broad definition given to this term in the legislation, because "account receivable" has a limited general law meaning, by using that phrase term the drafters of the legislation must have intended the narrow general law meaning to apply.

The Consequential Bill should remove the risk of a similar judicial approach being taken in Australia by adopting appropriate terminology in the PPS Bill.

(e) "Investment entitlement"

"Investment entitlement" has the meaning given by section 15 of the PPS Bill.

It is unclear whether "investment entitlement" is intended to refer to rights of ownership of the underlying financial product (as in the earlier draft of the PPS Bill, which referred to the rights that "result from crediting an interest in a financial product" to the relevant investment entitlement account) or to broader rights.

We commented on this issue in both our previous submission and our subsequent comments to the AGD, but the November Paper does not address why this has not been corrected. To be consistent with international conventions, the definition should be limited only to rights in respect of the underlying financial products.

(f) "Motor vehicle"

The Regulations Paper outlines the definition of motor vehicle. To provide certainty and given a view has been taken by the Government as to what should be included in the definition, the definition of motor vehicle should be included in the PPS Bill, not the Regulations.

(g) "Negotiable instrument"

The reference in paragraph (e) to a letter of credit that must be presented on claiming payment should also include presentation to claim performance to ensure consistency with the other provisions of the legislation dealing with letters of credit. Again, no reason has been given in the November Paper as to why this change, which is necessary, has not been made.

3. **Meaning of purchase money security interest (PMSI) in section 14**

The Senate Standing Committee received a number of submissions in July 2009 regarding section 14 of the PPS Bill.

Although a minor change will be made to section 14 under the Consequential Bill, it remains the case that the exclusions from PMSIs in section 14(2) are inconsistent with other jurisdictions. For example, there is no equivalent of section 14(2)(b) of the PPS Bill in the New Zealand legislation. We recommend section 14(2)(b) is deleted. The November Paper states that the Australian Securitisation Forum (ASF) would be consulted on this issue. We understand no such consultation occurred. In any event, given the broad category of exclusions in section 14(2)(b) there are a significant number of other stakeholders whose interests should be taken into consideration.

4. **Relocation of collateral - sections 39 and 40**

The amendments to these sections of the PPS Bill to be made under the Consequential Bill are unclear. Under the amended section 39(1), a security interest in collateral that is located in a foreign jurisdiction and then relocated to Australia is taken to have been continuously perfected if, immediately before the collateral became located in Australia and at the time it became so located, certain requirements are satisfied. It is unclear whether it is the law of the foreign jurisdiction or the law of Australia (or both) which will determine whether these conditions are satisfied. The same problem appears in section 40. This should be clarified.

5. **Knowledge test**

- 5.1 In our previous submission to the Senate Standing Committee, we commented that the PPS Bill deals with the question of the time at which knowledge of a person is relevant in an inconsistent and unclear manner. For example, sections 45(2)(d), 45(4)(d) and 47(2)(b) of the PPS Bill test the knowledge of the relevant person as at the time that person "buys or leases" the relevant personal property. It is unclear what that time is. For example, if a person buys personal property by means of an instalment contract, is that person considered to "buy" that

personal property at the time of first instalment payment or at the time of last payment? The same issue arises in numerous other provisions of the PPS Bill (see for example section 46(2)(b)), notwithstanding that some sections do retain the reference to the giving of value or new value (see for example sections 44(3)(a) and 52(2)(a)).

5.2 The time at which knowledge should be considered is when value or new value is first given for the transferee's interest. That formulation is very clear.

5.3 The November Paper does not provide any reasons for why this amendment has not been incorporated.

## 6. Chapter 4 - enforcement of security interests

6.1 For the reasons explained in our previous submission, Chapter 4 of the PPS Bill does not create a simplified enforcement regime that can easily be used by relevant parties. Even if the parties to a security interest arrangement wish to rely on Chapter 4, they may not always be able to do so. In addition, to the extent the regime applies to security interests granted by individuals, the regime is inconsistent with the National Credit Code, creating confusion.

6.2 In the November Paper the AGD commented that substantial changes would be necessary to implement the comments we have provided in relation to Chapter 4. It was suggested that the enforcement regime can be considered by the review referred to section 343 of the PPS Bill. It is not legally or commercially sound to delay a review for such a long period of time.

6.3 At a minimum, the Consequential Bill should amend Chapter 4 so that the consumer protection provisions apply in the same circumstances in which the new National Credit Code will initially apply. In particular, section 115(1) should be amended so that it applies in relation to a security interest that secures amounts owing under a financing arrangement where that financing is provided predominantly for personal, domestic or household purposes. In other words, the purpose for which the relevant financing is provided, not the nature of the collateral, should be relevant. This would be a simple and straight forward amendment that would promote certainty in the application of the legislation.

## 7. Part 7.2 - Australian laws and those of other jurisdictions

7.1 The Consequential Bill provides for a number of sensible amendments to Part 7.2 of the PPS Bill, for example, the amendment to section 238 of the PPS Bill which recognises certain circumstances unique to international shipping and shipping registration is sensible.

7.2 In response to the comments contained in our previous submission to the Senate Standing Committee, the AGD commented in the November Paper that the complexity of the conflict of law provisions reflects the complexity inherent in the subject matter. We do not agree with this comment.

7.3 Recommendation 8 of the Senate Standing Committee's March 2009 report was that the PPS Bill should adopt existing international personal property security conflict of law provisions unless there is a particular reason to depart from those provisions. The PPS Bill has not adopted any existing international personal property securities conflict of law provisions. Instead, the Explanatory Memorandum to the PPS Bill comments that Part 7.2 incorporates provisions from the New Zealand and Saskatchewan PPS legislation as well as the UNCITRAL Legislative Guide on Secured Transactions. As such, the conflict of law regime does not have the obvious benefit of being identical to an existing international model.

7.4 We support a simpler regime. The Senate Standing Committee's recommendation that an established international model is adopted, without modification, is one of the ways to achieve this goal.

**8. Section 267 - vesting of unperfected security interests in the grantor upon the grantor's winding up**

- 8.1 We have, in our various submissions to the AGD and the Senate Standing Committee, expressed our view that section 267 should not apply to leases, bailments or commercial consignments within the meaning of section 12(3) of the PPS Bill where there is no competing security interest on the insolvency of the relevant person or company.
- 8.2 The Consequential Bill will amend section 268 of the PPS Bill to exclude additional security interests from the operation of section 267. These exclusions now include commercial consignments that do not secure payment or performance of an obligation. No comment is made in the Explanatory Memorandum to the Consequential Bill as to why such commercial consignments are excluded or why a decision was not made to exclude the broader category of interests that we had suggested.
- 8.3 Section 268 should be amended to exclude security interests described in paragraph 8.1 above. In each of these cases the distinguishing factor of these types of security interests, which justifies their different treatment, is that at general law the lessor, bailor or consignor is the owner of the relevant property. Also, the approach currently adopted is not consistent with the approach in other jurisdictions, for example, New Zealand.
- 8.4 There is another issue that has been raised in other submissions regarding section 267 of the PPS Bill which we believe should be addressed to avoid ongoing confusion.

Section 267 currently provides that certain security interests will be vested in the grantor where those security interests are unperfected at a particular point in time (for example, the time of commencement of administration in the case of a company grantor). The section does not deal with property acquired by the grantor *after* the occurrence of an event referred to in section 267(1)(a) of the PPS Bill.

For example, if a company provided a security interest over all of its assets and the secured party had registered that security interest on the PPS register before the administration commenced, then the security interest would be valid and enforceable under section 267 in respect of all assets held by the company as at the date it went into administration. However, the security interest would not be perfected in relation to assets acquired after the date administration commenced because attachment is also required for perfection. Attachment cannot occur until the grantor has rights in the collateral or the power to transfer rights in the collateral to the secured party (see section 19(2)(a) in the PPS Bill). There seems to be no logical reason why the security interest in the after acquired property should vest in the grantor under section 267(2).

**9. Minor errors**

The following is a list of typographical or other obvious minor errors in the PPS Bill which have not been corrected by the Consequential Bill. We provided similar comments to the AGD in September 2009, but the Consequential Bill does not address these issues and the AGD has not, in its November Paper, provided any reasons for not adopting these changes.

Section	Comment
Section 6(2)(c)	The reference to "intangible property" should be replaced with a reference to the "security interest" (as "intangible property" is not an assignment as referred to in that clause).

Sections 8(1)(f)(vi) and 8(1)(f)(vii)	In each of these sections, there is a reference to assignments of accounts being made "solely" for a particular purpose. This is too prescriptive. It should be sufficient if the primary purpose of the assignment is the relevant purpose. For example, as those sections are currently drafted, where assignment is made to a third party and the third party is entitled to receive some share of the proceeds of the account following that third party taking action to collect it, this arrangement would not fall within the exclusions provided for in these sections.
Section 8(1)(k)	The words "(no matter whether the provision remains in force)" should be deleted from section 8(1)(k). If a provision that a statutory right is not to be personal property for the purposes of the legislation is repealed, indicating a statutory intention that the PPS legislation is to apply, that legislative intention should be given effect to, from the time of the repeal.
Section 14(1)	The reference to "secures" all or part of the purchase price in section 14(1)(a) should be a reference to securing the obligation to pay all or part of the purchase price.
Section 19(5)	The reference to PPS lease should be replaced with any lease or bailment. There are other types of lease that are within the operation of the PPS legislation. If this change is not made, there is no mechanism to determine when the grantor will be deemed to have obtained rights to the leased goods under leases that are regulated under the legislation but which are not PPS leases.
Section 27(3)(a)	The reference to "the controller" in section 27(3)(a) should be replaced with "the controller (or a person who has agreed to act on the instructions of the controller)". This is the consistent approach used in other sections of the PPS Bill and its omission here is clearly a typographical error.
Section 28	The reference to the "proceeds" on the last line of section 28 should be amended to refer to the "benefit" of the letter of credit given that the letter of credit may (as acknowledged earlier in the section) provide for the performance of an obligation.
Section 72	The reference to "negotiable instrument" in section 72(b)(ii) should be a reference to "negotiable document of title".
Section 127(2)	The reference to the "secured party" in the note under section 127(2) should be a reference to the "enforcing party".
Section 140(2)(a)	There may be categories of persons who by operation of law have priority in respect of the proceeds of enforcement of a security interest but who do not actually hold interests in the relevant collateral. For example, employees of a corporation with respect to a security interest granted by that corporation over circulating assets.  The drafting of section 140(2)(a) should be amended to cater for these categories of persons.



<p>Section 314</p>	<p>As currently drafted section 314 states that Chapter 4 <u>only</u> applies in relation to security interests provided for by security agreements made at or after the registration commencement time. Chapter 4 will in fact also apply to security interests created by means other than by security agreements where made at or after the registration commencement time.</p> <p>Section 314 needs to be expressed in the negative. That is, it should state that Chapter 4 does not apply in relation to security interests provided for by security agreements made prior to the registration time.</p>
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