Mr Peter Hallahan
Committee Secretary
Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA

Our Ref: 0029

Dear Mr Hallahan,

Inquiry into the Personal Property Securities Bill 2009

The Victorian Bar wishes to contribute to the Committee's review of this Bill.

This submission on behalf of the Victorian Bar consists of four parts: this letter; the Bar's 24 April 2009 submission on the November 2008 Exposure Draft (sent originally to the Australian Attorney-General's Department because this Committee had, by then, concluded its Inquiry into that version of this Bill and tabled its Report); a submission by Peter Fox on behalf of the Victorian Bar; and the personal submission to the Committee already submitted by David Turner, also of this Bar.

That is the package of four documents that constitute this submission on behalf of the Bar. The fifth is the two submissions by Professor Anthony Duggan of the University of Toronto, which, as will be seen below, the Victorian Bar respectfully adopts.

The Committee and its researchers will, no doubt, have seen in the various submissions it has received different and conflicting opinions on the interpretation of various sections of the November 2008 Exposure Draft (in the Committee's earlier Inquiry), and now in the 2009 Bill (in this Inquiry).

In our submission, neither the Committee, nor the Parliament, should see that as bringing such submissions into question.

Rather, such differences and conflicts reflect and illustrate the point of this submission – see, for example, paragraphs (2) and (3) below – that lengthy, costly and, most importantly, unnecessary litigation is inevitable because of the foundationally flawed approach in re-inventing the wheel rather than basing this proposed Australian legislation in an established model or models such as, for example, the Canadian model. Such differences and conflicts in interpretation are inevitable because the provisions are new and different from those in other parallel local and international statutory formulations covered by existing judicial authorities.

Whilst we applaud the government's objectives in this project, we do not believe they will be met by the current form of this Bill.

It is our understanding that the government wishes to codify this area of law, making it uniform not just within Australia but consistent with the innovative and well tested reforms which have been adopted in international jurisdictions.

We acknowledge that the current Bill represents an improvement on the Exposure Draft. The Bill has been simplified and some of the provisions have been more closely aligned with the New Zealand and Saskatchewan provisions.

Nevertheless, the Bill fails to meet what we understand to be its primary objectives. In very brief summary:

(1) There is still a magnitude of errors and inconsistencies. We have had the advantage of reviewing the submissions of Professor Anthony Duggan of the University of Toronto and of Mr David Turner of this Bar – whose comments in this regard the Bar respectfully adopts and endorses.

(2) The Bill fails to take advantage of the significant potential for the cost effective and efficient use of authority from other jurisdictions by the fundamental flaw of beginning from a clean slate rather than drawing on the body of modern legislation; the experience of its operation in jurisdictions with a similar jurisprudential and commercial framework to our own in Australia; and the decided authorities by courts similar to our own. This will inevitably result in costly and unnecessary litigation in order to test these new and different provisions and establish new precedents.

(3) This Bill does not sufficiently build on the excellent work done by other jurisdictions in this area. This would have had the significant advantage of being able to codify and integrate a significant reform without untoward disruption and adjustment – all at a very high cost to the Australian people and Australian institutions – and at a very high cost to Australian courts, both State and Commonwealth, that will have to hear and determine a high volume of very likely complex and lengthy litigation.

(4) Imposing costs such as these upon the financial services industry at this time seems most inadvisable and likely to outweigh any perceived advantages of uniformity within Australia (there being little or no international uniformity in this Bill).

(5) Moreover, the sort of litigation that will arise from this Bill will be less susceptible to settlement by mediation and other forms of alternative dispute resolution because, being an entirely new code, its interpretation will first have to be resolved by the courts. Only once the interpretation of even slightly new and different provisions has been set in litigation tried to judgment is there a framework for rational and sensible settlement in future cases.

(6) Nor is there any comfort in the provision for a review at the end of three years. This is not the sort of legislation that can be amended or reversed easily, if at all. The flood of litigation to ascertain and test the meaning of the new and different provisions will be well under way – and very likely not yet resolved. People and institutions will have ordered their affairs as best they may under the new

provisions. Rights will have accrued, or been extinguished, or not come into existence, for three years. A substantive review at the end of three years is clearly both impractical and improbable..

(7) The Australian Parliament should not enact this Bill in its present form.

(8) As Professor Duggan has pointed out in paragraph 1 of his first submission to this Inquiry: "5 weeks is an impossibly short time for inquiry and report on such a long and complex piece of legislation". The consultation period has been too truncated and rushed for a Bill of this complexity and importance.

(9) As noted in the 24 April 2009 cover letter with which I sent the Bar's 24 April 2009 submission on the November 2008 Exposure Draft Bill to the Legal Services and Personal Property Securities Division of the Australian Attorney-General's Department, the November Exposure draft "is nearly 300 pages in length and embraces the most comprehensive reform of property law since the statutory regime that introduced Torrens Title, and we received the Bill only a month before the deadline for submissions."

(10) The tracked-changes version – showing the mark-up from the November 2008 Exposure Draft to the present Bill is 534 pages.

(11) The Committee Secretariat has had the Bar 24 April 2009 submission on the November 2008 Exposure Draft. We put that earlier submission before the Committee now because the "General Observations" in paragraphs 8 to 25 of that submission remain crucially true about this Bill.

(12) Indeed the process of this Committee's Inquiry into and Report on the November 2008 Exposure Draft, the Government's response and amendments producing the current Bill, and the submissions now before the Committee in the present Inquiry surely constitute proof positive of the fundamental flaw in the approach to drafting this legislation.

(13) As Professor Duggan said in paragraph 2 of his first submission to this Inquiry: "the Government took the wrong approach to the drafting of this legislation . . . the far better approach would have been to enact legislation based closely, if not exactly, on the Canadian model . . . rather than attempting to re-invent the wheel".

(14) It is surely now apparent that the amendments to the November 2008 Exposure Draft have not worked. They may have cured some difficulties, but they have created others in some of the new provisions that have been introduced. The 2009 Bill is fundamentally flawed because of its foundation in the "wrong approach" of trying to re-invent the wheel rather than draw on overseas experience – in particular the Canadian model.

(15) It is, at the very least, not at all clear that this Bill will improve the current Australian Law in this area. On the contrary, it appears that, until there can be a proper review and substantial re-think on this Bill, the existing regime, albeit with variations between States, is to be preferred.

(16) We note also that the potential advantages of consistency with NZ law will be lost if the Bill passes in its current form.

(17) I attach or enclose the Bar's 24 April 2009 submission on the November 2008 Exposure Draft, and the 17 August 2009 submission on the present 2009 Bill prepared by Peter Fox for the Victorian Bar. The Committee already has the personal submission of David Turner. These three items together with this submission-and-cover letter constitute the materials the Victorian Bar is putting to the Committee and are to be read together.

Yours truly,

John Digby QC
Chairman
Victorian Bar Council