

Our Ref: CCW
Your Ref:



14 April 2010

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

Dear Sir

Inquiry into the Personal Property Securities (Corporations and Other Amendments) Bill 2010

We refer to the amendments proposed to be made to:

- the Corporations Act 2001;
- the Personal Property Securities Act 2009 (PPSA); and
- various other statutes,

pursuant to the Personal Property Securities (Corporations and Other Amendments) Bill 2010

We wish to raise the following issues with the Committee

Amendments to the Corporations Act

- 1 Proposed new section 441 EA(1)(c) (Schedule 1, Part 3, Item 40) should refer to property being in the possession or control of the secured party to be consistent with the definition of 'possessory security interest' (new section 51D).
- 2 Schedule 1, Part 4, Item 86 – In our view section 124(1)(f) should refer to a 'security interest' rather than being restricted to a 'circulating security interest' and the company's property in this context should include PPSA retention of title property

Amendments to the PPSA

- 3 Schedule 2, Part 1, Item 73 - The proposed amendment to s 116 (inclusion of new sub-section 3) and the commentary in paragraph 9 112 of the Explanatory Memorandum seem to confirm the enforcement provisions in chapter 4 of the PPSA will have limited, if any, application where the grantor of a security interest is a company. This is because any seizure or control of collateral for enforcement purposes will arguably make the

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secured party a 'controller' for the purposes of the Corporations Act. We think this could create significant drafting and other practical consequences for secured parties. In particular, it may not be possible for the secured party to simply rely on the remedies provided for in chapter 4 if the provisions of chapter 4 do not apply because of section 116. A controller who is not a receiver does not have the benefit of the powers specified in section 420 of the Corporations Act and so its remedial powers would need to be specified in the relevant security agreement, particularly where the 'security interest' is in a generic PPSA form that may not have the benefit of common law remedies available to the holder of a mortgage or charge or other traditional forms of security. This seems at odds with two objectives of the reforms:

- to enable secured parties to rely upon the statutory provisions in the PPSA and minimise the length and complexity of documentation; and
- to emphasise the substance of the security transaction over traditional legal form

If s 116 remains as is, all generic non-title based 'security interests' will probably need to incorporate contractual remedy provisions. While the more sophisticated secured parties will do this anyway, s 116 cuts across the ability to keep documents short and simple for those that wish to do so.

To address this issue we suggest a new s 116(4) be included in the PPSA that could say something like:

Despite s 116(1), while a person is a controller of the property the following provisions of Chapter 4 apply in relation to the property:

- (a) s 115;
- (b) s 123;
- (c) s 124;
- (d) s 128.

This submission is made by Piper Alderman. Piper Alderman has previously undertaken consultancy work for the Australian Attorney General's Department in connection with the PPS reforms. We also note that Craig Wappett is a member of the Attorney General's Consultative Committee on the PPS reforms.

Yours faithfully
Piper Alderman

Per: []

Craig Wappett
Partner