

CHAPTER 2

OVERVIEW OF THE BILL

2.1 This chapter outlines the purpose and key provisions of the Personal Property Securities (Corporations and Other Amendments) Bill 2010 (the Bill).

Key provisions of the Bill

2.2 The Bill contains three schedules:

- Schedule 1 will make changes to the *Corporations Act 2001* (Corporations Act) to align it with the *Personal Property Securities Act 2009* (PPS Act).
- Schedule 2 will amend the PPS Act to simplify its transitional provisions and to make the PPS Act consistent with existing state and territory provisions on the enforcement of security interests in agricultural products.
- Schedule 3 will make minor consequential amendments to a number of other Commonwealth Acts.

Schedule 1

Amending terminology to incorporate the PPS Act's functional approach

2.3 The explanatory memorandum (EM) to the Bill notes that, under the existing personal property securities (PPS) and corporations law, transactions creating security interests are treated differently depending on the legal form of the transaction concerned.

2.4 However, on its commencement in May 2011, the PPS Act will introduce a more 'functional approach'.¹ This will mean that any transaction that performs the function of securing payment or performance of an obligation will be treated as a security transaction.

2.5 Currently, only transactions which create charges or mortgages are security agreements under the Corporations Act. Accordingly, Schedule 1 will, where appropriate, replace the existing terminology of the Corporations Act with the more 'functional' terminology that is to be employed under the PPS Act.

2.6 Schedule 1 will also introduce a number of new concepts that are relevant to the scheme to be established under the PPS Act. For example, a broader or 'omnibus concept' of *security interests* will be introduced, which will encompass a number of concepts in the Corporations Act, such as *charges, mortgages, liens* and *pledges*.²

1 EM, p. 3.

2 EM, p. 6.

2.7 Similarly broad or 'omnibus' concepts to be introduced are *secured party*, *circulating security interest*, and *possessory security interest*.³

Extending Corporations Act concept of property to include PPS Act retention of title property

2.8 The PPS Act concept of *security interests* will include transactions where the secured party, not the grantor of the security interest, retains title over the property. This includes, for example:

- agreements to sell subject to retention of title;
- conditional sale agreements;
- hire-purchase agreements; and
- leases and consignments that secure the payment or performance of an obligation.⁴

2.9 The Corporations Act will be amended to align it with the PPS Act concept of *security interests*. This will be done by including property which falls under the PPS Act concept of *security interests* in the Corporations Act as *PPSA retention of title property*.⁵

2.10 This will mean that, where it would not prejudice existing rights, *property of the company* for the purposes of the Corporations Act will include *PPSA retention of title property*.⁶

2.11 The EM provides guidance on how the inclusion of this concept would apply in various situations, such as where a secured party holds a security interest over substantially the whole of the property, or in cases involving an administrator or liquidator.⁷

Repeal of Chapter 2K of Corporations Act (registration of company charges)

2.12 The EM explains that most charges currently subject to the registration requirements of Chapter 2K of the Corporations Act will be covered by the PPS Act. These charges will be migrated to the PPS Register to be established by the PPS Act, and in future such charges will be registered on the PPS Register.⁸

3 EM, p. 7.

4 EM, p. 9.

5 EM, p. 9.

6 EM, p. 10.

7 EM, pp 10-12.

8 EM, p. 13.

2.13 Accordingly, the Bill will repeal Chapter 2K, and consequential amendments will be made throughout the Corporations Act with effect from the time the PPS Act commences (expected to be May 2011).⁹

2.14 Proposed new section 588FL will be inserted into the Corporations Act. This section will replicate, with some changes, section 266 of the Corporations Act, which prevents security interests being granted fraudulently with knowledge of an imminent administration, liquidation or deed of company arrangement and to avoid property falling into the trustee's or administrator's estate or being claimed by unsecured creditors. For security interests entered into after the commencement time, proposed section 588FL will replace section 266.¹⁰

2.15 Proposed new section 588FL will also largely replicate existing section 267 of the PPS Act.¹¹ Existing section 267 of the PPS Act and associated provisions provide that:

...most security interests granted by a company which are regulated by the PPS Act will vest in the grantor if not perfected on the date that the winding up of that company commences or the 'section 513C day' (defined in the Corporations Act as, essentially, the date of commencement of administration of a company) in respect of that company...¹²

Transitional and application arrangements

2.16 The EM explains that Schedule 1 of the Bill will commence when the PPS Register starts to operate (that is, when the PPS Act commences). Because most amendments require the alignment of existing categories of security interests and related concepts in the Corporations Act with the PPS Act, they will apply only to PPS Act security interests that arise under agreements made after the new PPS Act scheme starts to operate.¹³

2.17 The transitional provisions will retain certain aspects of the registration scheme for existing registrable charges.¹⁴

2.18 The Australian Securities and Investments Commission (ASIC) Register will be closed to further registrations once the PPS Act commences. However, ASIC will be required to retain existing records on its register for seven years. This is intended to

9 EM, p. 13.

10 EM, p. 13.

11 *Submission 3*, p. 1.

12 *Submission 3*, p. 1.

13 EM, p. 17.

14 EM, p. 17.

enable chargees, lienees and pledgees of registrable charges to continue to obtain information relating to their charges, liens or pledges.¹⁵

2.19 The repeal of Chapter 2K of the Corporations will not immediately apply to registrable charges under the Corporations Act (except to the extent necessary to close the Corporations Act register to new registrations, and to limit the effect of retained section 266 (relating to the voiding of registrable charges)). A number of provisions relating to these registrable charges will continue to apply for seven years.¹⁶

2.20 It is also proposed that registrable charges, notified before the commencement time, will be migrated across to the PPS Register and (as transitional security interests) will retain the priority they had prior to migration.¹⁷

2.21 Registrable charges not notified before the commencement time will be able to be registered on the PPS Register at any time, but will have priority dating to that commencement day (unless a court order is obtained).¹⁸

Maintenance of existing rights

2.22 Schedule 1 will maintain the status quo in a number of areas.¹⁹ For example, it will preserve the current (Corporations Act) order of distribution of a company's proceeds, in circumstances where a receiver is appointed on behalf of the holders of debentures in a company secured by floating charge, and takes possession or control of property that is secured by the floating charge.²⁰

Schedule 2

Simplifying the PPS Act transitional provisions

2.23 Schedule 2 will amend the PPS Act to simplify its transitional provisions. These amendments are ad hoc measures which cover a range of issues, including:

- clarification of when the PPS Act will apply to a security interest in intangible property;²¹
- clarification that the PPS Act will not apply to rights held in water that are derived from contract (to ensure that the PPS Act will not apply to any rights in water);²² and

15 EM, p. 17.

16 EM, p. 17.

17 EM, p. 17.

18 EM, p. 18.

19 For further information, see EM, p. 19.

20 EM, p. 19.

21 EM, p. 20.

- exclusion from the PPS Act certain security interests taken by pawnbrokers.²³

Making the PPS Act consistent in relation to the enforcement of security interests in agricultural products

2.24 Schedule 2 will also contain a number of ad hoc amendments to make the PPS Act consistent with existing state and territory provisions on the enforcement of security interests in agricultural products.²⁴

Transitional provisions

2.25 The Bill will also make amendments to the transitional provisions in Chapter 9 of the PPS Act.

2.26 The PPS Act provides for the transition from the current law governing security interests to the PPS Act regime. The PPS Act will apply to security interests existing before the PPS Act comes into force, subject to the transitional provisions.

2.27 The EM notes that the *registration commencement time* is a key event in the transitional provisions. This refers to the time at which the PPS Act and the PPS Register take practical effect. The PPS Act makes provision for the *registration commencement time* to be determined by the Minister or, if the Minister did not make a determination, the first day of the month that is 26 months after the month in which the PPS Act is given royal assent.²⁵

2.28 The Bill contains a number of amendments to the PPS Act transitional provisions, including in relation to:

- transitional security agreements;
- intellectual property;
- transitional application of the PPS Act;
- the concept of *control* in inventory and accounts; and
- referral provisions.²⁶

22 EM, pp 21-22.

23 EM, p. 22. For further information on the amendments contained in Schedule 2, see EM, pp 19-43.

24 For further information on the amendments contained in Schedule 2, see EM, pp 19-43.

25 EM, p. 44.

26 For further information relating to the amendments to the PPS Act transitional provisions, see EM, pp 44-48.

Schedule 3

Amendment of other Acts

2.29 Schedule 3 of the Bill contains consequential amendments to a number of Commonwealth Acts. These are:

- *Designs Act 2003*;
- *Fisheries Management Act 1991*;
- *Navigation Act 1912*;
- *Patents Act 1990*;
- *Personal Property Securities Act (Consequential Amendments) 2009*;
- *Proceeds of Crime Act 2002*;
- *Torres Strait Fisheries Act 1984*;
- *Trade Marks Act 1995*;
- *Mutual Assistance in Criminal Matters Act 1987*; and
- *Offshore Petroleum and Greenhouse Gas Storage Act 2006*.²⁷

27 For further information on these amendments, see EM, pp 49-52.