The Senate

Standing Committee on Legal and Constitutional Affairs

Exposure draft of the Personal Property Securities Bill 2008

March 2009

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RECOMMENDATIONS

Recommendation 1

4.19 The committee strongly recommends that the Department reconsiders the balance between certainty of the law and the accessibility of the provisions with a view to:

- **simplifying the language of the exposure draft bill – for example, wording provisions clearly and limiting them to deal only with common circumstances;**
- **simplifying the structure of the exposure draft bill – to minimise the cross-referencing needed;**
- **simplifying the terms used - for example instead of 'tangible goods' use the term 'goods' appropriately defined to ensure the full meaning needed for the reform is ascribed to the term; and**
- **using overseas provisions as often as possible to allow overseas experience to provide guidance for the Australian model.**

Recommendation 2

4.27 The committee recommends that the commencement date for the scheme be extended by at least 12 months to May 2011 for the committee's recommendations to be implemented and for advice from stakeholders to be taken into account before the content of the bill is finalised.

Recommendation 3

4.35 The committee recommends that the bill include a requirement that the operation of the bill be reviewed three years after it commences in a process that includes extensive consultation with industry, governments, lawyers, consumers and academics.

Recommendation 4

5.27 The committee recommends that the primary legislation for the personal property securities reform include the key privacy protections for individuals, including a prohibition on making the address details of any individual public.

Recommendation 5

5.33 The committee recommends that either:

- **(a) a Privacy Impact Assessment be undertaken by a person or organisation that is independent from the government and who has experience in undertaking such assessments and the results of the assessment are made public, or**
- **(b) the Department's Privacy Impact Assessment is reviewed by a person or organisation that is independent from the government and**

who has experience in undertaking such assessments, and the results of the review are made public.

Recommendation 6

5.34 The committee recommends that if any issues raised by the Office of the Privacy Commission in its submission are not considered as part of the Privacy Impact Assessment then these matters should be separately considered by the Attorney-General's Department and a response to the issue be provided to the Office of the Privacy Commission in writing or made public.

Recommendation 7

5.44 The committee recommends retaining the requirement for rights and duties to be exercised honestly and in a commercially reasonable manner. The intended scope of these requirements should be explained in detail in the bill's explanatory memorandum.

5.45 The explanatory memorandum should particularly explain that the requirement to act in a commercially reasonable manner should not fetter or undermine the ability of parties with similar bargaining power to contractually agree about what constitutes commercially reasonable behaviour.

Recommendation 8

5.55 The committee recommends that the bill adopt existing international personal property security conflict of laws provisions, such as the New Zealand conflict of laws model, unless there is a particular reason to depart from those provisions.

Recommendation 9

5.62 The committee recommends that the scope and content of the enforcement provisions of the exposure draft bill be reviewed by the Department with particular attention to ensuring that the provisions are comprehensive and adequate.

Recommendation 10

5.70 The committee recommends that consideration be given to improving the priority of an unperfected lessor as against unsecured or other unperfected interests in the goods.

Recommendation 11

5.78 The committee recommends that the explanatory memorandum and the proposed education campaign adequately explain the purpose and effect of the draft intellectual property provisions, including disseminating the information to appropriately targeted international industries, organisations and stakeholders.

CHAPTER 1

Introduction

Reference

1.1 By letter dated 11 November 2008 the Attorney-General, The Hon Robert McClelland MP, requested that the Senate Legal and Constitutional Affairs Committee inquire into and report on the proposed Personal Property Securities Bill 2008. On 12 November 2008 the Senate, on the recommendation of the Selection of Bills Committee, referred the exposure draft provisions of the bill to the committee for inquiry and report by 24 February 2009. The Committee subsequently obtained an extension of the tabling date to 19 March 2009.

Outline of the reform

1.2 The Government states that the proposed reform, as reflected in the exposure draft bill, would apply to all security interests in personal property and is designed 'to remove the uncertainty arising from the vast amount of Commonwealth, State and Territory legislation and the uneasy interaction of statutes, the common law and equitable legal principles.'[1]

1.3 More background information about the reform is outlined in chapter 2 of this report.

Conduct of the inquiry

1.4 The committee advertised the inquiry in *The Australian* newspaper on 3 December 2008. Details of the inquiry were placed on the committee's website. On 18 November 2008 the committee also wrote to more than 50 organisations and individuals inviting submissions by 10 December 2008.

1.5 The committee received 33 submissions. These are listed at Appendix 1. All submissions published by the committee were placed on the committee's website.

1.6 The committee held public hearings in Sydney on 22 and 23 January 2009, in Melbourne on 29 January 2009 and in Canberra on 6 February 2009. A list of witnesses who appeared at the hearings is at Appendix 2 and copies of the Hansard transcript are available through the Internet at http://www.aph.gov.au/hansard.

Acknowledgement

1.7 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearings.

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1 Attorney-General's Department, *Submission 8*, p. 19.

Structure of the report

1.8 The committee's report is structured in the following way:

- Chapter 2 provides background to the proposal and information about the need for reform, and outlines key concepts and key components of the proposed bill;
- Chapter 3 considers a threshold question raised about which system of reform is appropriate;
- Chapter 4 examines broad concerns with the proposed bill, such as drafting issues and the timetable for finalising and implementing the reform;
- Chapter 5 considers evidence the committee received about particular areas of concern such as the proposed national register, international conflict of laws and the new requirement to act in a *commercially reasonable manner*; and
- Chapter 6 outlines some of the other aspects of the bill that could have been considered if more time had been allocated to the inquiry.

Note on references

1.9 References in this report are to individual submissions as received by the committee, not to a bound volume. References to Committee Hansard are to the proof Hansard: page numbers may vary between the proof and the official Hansard.

CHAPTER 2

Overview of the exposure draft bill

2.1 This chapter provides background to the proposal and outlines key concepts and key components of the proposed bill.

Purpose and objectives of the exposure draft bill

2.2 In a legal sense *personal property* is any form of property that is not land or buildings (which is known as *real property* or less formally as *real estate*). Personal property includes tangible property such as motor vehicles, machinery, office furniture, currency, artworks and stock-in-trade. It also includes intangible property such as contract rights, uncertificated shares and intellectual property rights (for example, trademarks and patents).[1]

2.3 A personal property security is created when a financier takes a legal interest in personal property as security for a loan or other obligation, or enters into a transaction that in substance involves the provision of secured finance.[2] Lending secured by personal security is a multi-billion dollar industry in Australia.[3]

2.4 The overall purpose of the draft bill is to rationalise the current arrangements which include more than 70 pieces of Commonwealth, State and Territory legislation and more than 40 different registers of security interests in personal property. The proposed scheme would be supported by a referral of legislative power by the States to the Commonwealth. The two Australian territories are also involved in developing the reform, but there is no constitutional requirement for them to refer any power to the Commonwealth in order to participate fully.

2.5 The exposure draft bill would establish rules for creating valid security interests as well as rules governing the priority of competing security interests. The draft bill also proposes an enforcement regime to supplement contractual arrangements and the establishment of a modern, technologically advanced register that would provide advance notice to the world of any prospective or actual security interests taken in personal property.[4]

2.6 One purpose of the draft bill is to nationally codify some aspects of the existing law. To achieve harmonisation of the laws in all jurisdictions in these areas of

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1 Attorney-General's Department, *Submission 8*, p 17.

2 Attorney-General's Department, *Submission 8*, p 17.

3 Speech by Mr Ian Govey, Deputy Secretary, Attorney-General's Department, to the Personal Property Securities Consultative Group on 16 May 2008, p. 1.

4 Attorney-General's Department, *Submission 8*, pp 19 and 20.

the law there will necessarily be some changes, but philosophically the purpose of the reform in these areas is to capture the existing law and to devise a nationally consistent approach. In other areas a different purpose of the bill is to take the opportunity to substantively amend the existing law that is intended to apply nationally.

2.7 The scope and significance of the reform cannot easily be overstated. As a witness with extensive experience in the area explained:

> It is a very significant commercial law reform. It is different from some of the other reforms that the financial sector has seen in the last 10 or 15 years, which have been more regulatory focused – for example, consumer credit legislation and the FSR legislation. This is more focusing on fundamental property and security rights and is intended to facilitate the transacting of business relating to those rights.[5]

2.8 And similarly that:

> It is the most substantial reform in the area of law that I practise in, which is commercial banking…It will impact on almost every single transaction that I work on on a day-to-day basis.[6]

2.9 The Department has described the objectives underpinning the development of the content of the proposed bill as "the four c's". The "four c's" are illustrated in this discussion of the merit of the reform in which the Department argues in favour of the exposure draft bill because it:

> …would create a PPS regime that would benefit individuals and consumers by delivering more certain, consistent, less complex and cheaper arrangements applying in relation to personal property securities [emphasis added].[7]

2.10 The extent to which these objectives have been met is considered further in this report.

Support for the reform

2.11 In its Revised Commentary, the Attorney-General's Department outlines the case for personal property securities reform as follows:

> Current finance law is characterised by a complex network of regulation developed over time by Commonwealth, State and Territory parliaments and courts. It is built on artificial distinctions around the legal form of the security taken, the legal personality of the grantor and the nature and location of the collateral. There is now widespread recognition that such considerations are immaterial to the substance of secured transactions.

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5 Mr Craig Wappett, Piper Alderman, *Committee Hansard*, 22 January 2009, p. 14.

6 Ms Angela Flannery, Clayton Utz, *Committee Hansard,* 22 January 2009, p. 26.

7 Attorney-General's Department, *Submission 8*, p. 20.

> To meet the demands of a competitive economy, Australian finance law must be reorientated around the rights of parties to enforce their interests in personal property in the event of a debtor default. The essential concern should be about who gains priority where competing interests exist. The law should not be seized by concerns about whether a grantor is an individual or a company, whether the property is wool, contract rights or a motor vehicle, or the location of that property.
>
> Australian finance law imposes unnecessary red tape on consumers and businesses. In some cases, a security interest must be registered in more than one jurisdiction and on multiple registers to be fully effective. Some registers are electronic, while others are paper-based. In other cases, there is no registration scheme to provide notice of personal property interests to prospective buyers and lenders. This situation is confusing and inefficient. It results in unnecessary compliance and transaction costs for all parties.[8]

2.12 On the other hand, there are some submitters who are not convinced that the types of amendments proposed in the reform are justified and argued strenuously for the scope of the changes to personal property securities law to be reconsidered. One such view was expressed in the combined submission of Allens Arthur Robinson, Blake Dawson, Freehills and Mallesons Stephen Jacques:

> …we do not think an approach akin to article 9 of the US Uniform Commercial Code (the basis of the Bill) is necessary to achieve [a single national register and uniform national law], and has considerable disadvantages, including rigidity and complexity. We think that Australia would have been better served if it had followed the UK example and rejected that approach, for all the reasons that persuaded the relevant authorities in the UK…[9]

2.13 Others also expressed views to a similar effect, including DLA Phillips Fox, the Australian Financial Markets Association and Mr David C. Turner, a Victorian barrister who has practiced extensively in relevant areas of law both in Australia and New Zealand.[10]

2.14 However, the committee also received evidence from a wide range of stakeholders that significant personal property securities reform along the lines proposed in the exposure draft bill is appropriate. An example of this is the evidence from the Consumer Action Law Centre that although in the Centre's view some improvements could be made:

> …we are not opposed to the reforms being proposed by the bill. We actually support the idea of national personal property security laws and a

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8 Attorney-General's Department, *Submission 8*, p. 18.

9 *Submission 30*, pp 3 and 4.

10 Mr David East representing DLA Phillips Fox, *Committee Hansard*, 22 January 2009 p. 41, Australian Financial Markets Association, *Submission 23*, p. 2, and Mr David C. Turner, *Submission 33*, p. 1.

> register that makes that work more efficiently and laws that again create certainty and efficiency in that system.[11]

2.15 Support for the reform was also articulated by the Australian Bankers' Association:

> The association's view is quite a simple one: they are very supportive of the two-pronged PPS reform proposals –register and substantive law reform – and they are keen to see that delivered [on the basis] that there is reasonable time to ensure that we can implement it.[12]

2.16 Although there is considerable support for some reform of the personal property securities laws across Australia, perhaps unsurprisingly there is a range of views about what the exact content of the reform should be. There are some supporters of the draft bill as proposed**;**[13] some supporters of the general approach that is being taken but who believe that there is still considerable work required to get the content right;[14] and some submitters who agree with the idea of reform in this area but who contend that the approach being taken is incorrect.[15]

2.17 More detail about, and the implications of, these divergent views are considered in more detail in chapter three below.

The reform process

The legal framework and the proposed timing

2.18 To be nationally effective a PPS bill requires support from all Australian jurisdictions. This includes legal support such as a statutory referral of powers, as well as practical support such as the transfer of data from existing State and Territory registers. Commitment to the process has been obtained in principle – initially through the Standing Committee of Attorneys-General and most recently through the Council of Australian Government (COAG) when its Ministers signed an inter-governmental agreement on PPS reform.[16]

2.19 The planned implementation date for the commencement of the register is based on the COAG's commitment to implementing the scheme by May 2010.[17]

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11 Ms Rich, *Committee Hansard*, 6 February 2009, p. 36.

12 Mr Gilbert, *Committee Hansard*, 22 January 2009, p. 56. Some additional examples of general support for the reform are found in the following submissions: Piper Alderman, *Submission 12*, p. 1; Australian Institute of Credit Management, *Submission 14*, p. 3 and Motor Trades Association of Australia, *Committee Hansard*, 6 February 2009, p. 38.

13 For example Craig Wappett of Piper Alderman, *Submission 12*.

14 Consumer Action Law Centre, *Submission 20*, p. 1.

15 Professor Anthony Duggan, *Submission 1*, pp 2 and 3.

16 Council of Australian Governments, *Communique*, 2 October 2008.

17 Dr James Popple, Attorney-General's Department, *Committee Hansard*, 6 February 2009, p. 59.

Because the scheme will be underpinned by a statutory referral of power from the States, at least one State needs to have referred power for the scheme to the Commonwealth through the passage of legislation in the relevant State parliament. The Department has advised the committee that once the text of the PPS bill has been finalised it is likely that New South Wales will be the lead State to introduce the referral legislation. To meet an implementation date of May 2010 the State legislation will need to be introduced in April and passed by September this year and the Commonwealth would then introduce and pass its legislation.[18]

2.20 Although it will be possible for the register to proceed with participation by only one State, obviously it will only be a national scheme with the benefit of a single register if all jurisdictions are involved. The view of some submitters is that even a referral of powers by all jurisdictions will not instil total confidence in the scheme because some State and Territory legislation could still operate in the area and because a jurisdiction can exclude matters from the operation of the scheme.[19]

Consultation

2.21 Since the project commenced in 2006 the Commonwealth Attorney-General's Department has undertaken considerable consultation and communication with affected stakeholders. An options paper was first released in April 2006 and national consultation took place. The Department has since issued three further discussion papers in November 2006, March 2007 and April 2007. The first exposure draft of the bill was released in May 2008.[20] After significant amendments the draft of the bill referred to the committee for inquiry was released in November 2008.[21] The Department also convened a PPS Consultative Group 'to guide the reform process". The PPS Consultative Group, which meets quarterly, comprises experts invited from industry, governments, consumer groups, legal practitioners and academia.'[22]

2.22 Different views about the content of the bill and the proposed timing of the project notwithstanding, there has been considerable stakeholder acknowledgement of the process and the Department's level of engagement with stakeholders, including by

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18 Dr Popple and Mr Glenn, *Committee Hansard*, 6 February 2009, p. 61.

19 DLA Phillips Fox, *Submission 2*, pp 2 and 3.

20 Attorney-General's Department, *Submission 8*, p. 18. The primary documents and further information can be found on the Department's personal property securities website at: http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_personalpropertysecuritiesreform_Personalpropertysecurities.

21 Appendix B to the Attorney-General's Department submission summarises the key changes made to the bill between the May and November drafts, *Submission 8*, pp159 to 163. Ms Flannery, Clayton Utz, *Committee Hansard*, 22 January 2009, at p. 26 identified the changes between the drafts as being substantial.

22 Attorney-General's Department, *Submission 8*, p 18. A list of the participants can be found at *Additional Information*, Item 3 at: http://www.aph.gov.au/senate/committee/legcon_ctte/personal_property/add_info/index.htm.

those who are highly critical of the content of the reform itself. For example, the four law firms in their combined submission noted:

> We appreciate the level of work and consultation that has so far gone into providing the draft legislation, and the readiness of representatives of the Attorney-General's Department to make themselves available and allow us to participate in the consultation process.[23]

2.23 Although departmental staff are viewed by stakeholders as accessible and willing to consult, there remains considerable disquiet expressed by some submitters that - given the magnitude of the proposed reform - the process is being unnecessarily 'rushed through'[24] and that although "in the broad context there has been significant consultation, the complexity of the reform proposals is such that…sufficient stakeholder input has been obtained in relation to many…key issues."[25] The issue of the timing for implementation is considered in more detail in chapter 4 below.

International approaches to PPS

2.24 Over the years several international jurisdictions have undertaken significant legislative PPS reform. The United States of America introduced personal property securities reform in 1951 when the National Conference of Commissioners on Uniform State Laws and the American Law Institute promulgated the Uniform Commercial Code. The code was substantially amended in 1972 and 1998, and Article 9 of the Code is law in every US state.[26]

2.25 Article 9 of the code relates to secured transactions.[27] Provinces in Canada started introducing their PPS reform based on Article 9 in 1967, in every province and territory with the exception of Quebec. The first province to introduce the reform was Ontario. On the whole, differences in PPS between the provinces is minimal, although the system used in Ontario is an exception.

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23 Allens Arthur Robinson, Blake Dawson, Freehills and Mallesons Stephen Jacques, *Submission 30*, p. 4.

24 Ms Lang Thai, *Submission 29*. pp 1 and 2.

25 Allens Arthur Robinson, Blake Dawson, Freehills and Mallesons Stephen Jacques, *Submission 30*, p. 2. Other examples of concern that the project is being rushed or the implementation target is too soon were also expressed by the Australian Financial Markets Association, *Submission* 23, p. 2 and the Australian Bankers' Association, *Submission 24*, pp 3 and 5.

26 Craig Wappett, Laurie Mayne, Professor Tony Duggan, *Review of the law on personal property securities An international comparison*, July 2006, p. 9. The paper can be found at http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(427A90835BD17F8C477D6585272A27DB)~PPS+-+International+Comparison+Paper+-+July+2006.pdf/$file/PPS+-+International+Comparison+Paper+-+July+2006.pdf.

27 Craig Wappett, Laurie Mayne, Professor Tony Duggan, *Review of the law on personal property securities An international comparison*, July 2006, p. 9.

2.26 The philosophies, concepts and structure of the Canadian PPS reforms were very similar to those in Article 9, although there were significant differences in terms of drafting, policy on particular issues, and the design of the registration systems. The amendments to Article 9 which took place in 1998 served to accentuate the differences between the Canadian and American systems.

2.27 New Zealand introduced its reform in 2003 based primarily on the Canadian Saskatchewan legislation, but exercising a significantly different style.[28] All of these models are known as Article 9 style systems.

2.28 In the opinion of Wappett, Mayne and Duggan, in their paper on the historical development of PPS reform,

> The general concepts and principles [of the systems under discussion[] are very similar but there are some significant differences in detail and drafting. Some of the differences are deliberate policy choices made by the respective legislatures, others have arisen for historical reasons and a few may be inadvertent… [E]conomic and market change has also played a role. Article 9 and the [PPS] legislation has not been static. As economies and markets have developed the legislation has evolved in response to these changes. Different jurisdictions have been faster than others to react to some market developments and policy decisions have meant that different jurisdictions have sometimes reacted in different ways.[29]

2.29 The Department advises that all of the international models have been considered in detail and the approach proposed in the exposure draft bill is informed by each of them, though the Australian approach does not adhere closely to any of them.[30]

2.30 The differences between the draft bill and its international counterparts are said to reflect issues raised by stakeholders, differences in the Australian consumer and commercial environment, advances in information technology, and drafting styles adopted to improve legal certainty and consistency with Australian drafting practices.[31] However, several submitters are not persuaded that this is the case and are concerned that the draft bill would result in significant costs and unintended consequences.[32]

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28 Craig Wappett, Laurie Mayne, Professor Tony Duggan, *Review of the law on personal property securities An international comparison*, July 2006, p. 10.

29 Craig Wappett, Laurie Mayne, Professor Tony Duggan, *Review of the law on personal property securities An international comparison*, July 2006, p. 45..

30 Attorney-General's Department, *Submission 8*, p. 20.

31 Attorney-General's Department, *Submission 8*, p. 20.

32 For example, Independent Film and Television Alliance, *Submission 22*, p. 1; Mr Loxton, Allens Arthur Robinson, *Committee Hansard*, 23 January 2009, p. 33, and Mr Love, Australian Financial Markets Association, *Committee Hansard*, 22 January 2009, pp 7 and 8.

Key concepts

2.31 It has been noted that personal property securities law is a particularly difficult area[33] and a brief outline of the key concepts underpinning the proposed bill may assist those new to the subject:[34]

2.32 *'in substance' approach* means that the proposed bill will deal with circumstances that are in substance security interests in personal property, regardless of the title, structure, jurisdiction, subject matter et cetera of the transaction. This is an important concept underpinning the proposed legislation as it is a departure (and improvement) on the existing approaches, which have developed over time and not in a cohesive way.

2.33 A *security interest* is any interest in personal property which is created by an agreement that secures the payment or performance of an obligation, without regard to the form of the transaction. A personal property security is created when a financier takes an interest in personal property as security for a loan or other obligation, or enters into a transaction that in substance involves the provision of secured finance. Well known (and relatively simple) examples of personal property securities include car loans and company charges.

2.34 Attachment describes the successful creation of a security interest in personal property that can be enforced against that personal property. Attachment is a prerequisite for creating an enforceable security interest in personal property. A security agreement which has not attached would create merely personal or contractual rights between the parties.

2.35 Perfection means that a security interest has *attached* to collateral and any further steps needed to make the security interest effective against third parties have been taken. Under the exposure draft bill a security interest may be perfected by possession, control, registration or temporary perfection (see next definition) or a combination of these methods. If it is necessary to determine priority between competing security interests a perfected security interest would always have priority over an unperfected security interest. Generally the methods of perfection rank in order of, first, *possession* (if possession is possible), then *control* (the legal ability to deal with the security even though you do not have physical possession. For example, the authority to transfer shares or the right to sell grain held in a silo by another person.) If the personal property involved in the transaction is such that possession or control is not possible, then *registration* will be the third ranking method of perfection.

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33 Professor Anthony Duggan, *Submission 1*, p. 6.

34 This section is based on information in the Attorney-General's Department, *Submission No. 8*, pp 11 to 16.

2.36 Temporary perfection is a proposed feature of the exposure draft bill. The draft bill would provide automatic temporary protection to a secured party for a limited period. It would apply in a range of circumstances, for example, where collateral is moved to Australia, converted into proceeds, or transferred to another party. Its purpose is to allow parties a short period of time to update the register when circumstances in relation to the collateral change.

2.37 A *Purchase Money Security Interest (or PMSI – pronounced 'pimsey')* is a new type of security interest which can allow a subsequent financier to retain title to or have priority over particular collateral even though an earlier financier may have a perfected interest in the grantor's general collateral that would otherwise have priority. A PMSI is created if the perfected security interest meets certain criteria outlined in the bill, including giving notice of the later interest to the holder of the earlier security interest (clause 32 of the exposure draft bill).

2.38 *Deemed security interests* – it is proposed that some transactions that would not usually qualify as a 'personal property security interest' because the transaction does not secure payment or the performance of an obligation would be deemed to be security interests. Examples of this are the interests of a consignor under a commercial consignment, or the interests of a transferee in a transfer of accounts or chattel paper. The Department argues that deeming some transactions to be security interests assists with transparency, ensures that debtors cannot structure transactions to avoid the effect of the proposed bill and makes it possible to determine priority between these deemed security interests and other security interests (clause 28).[35]

2.39 The Attorney-General's Department submission includes a longer glossary at pages 11 to 16 of its submission.[36]

Structure of the proposed draft bill

2.40 A brief outline of the main areas of the draft bill, based on information in the Department's Revised Commentary, follows.[37] Given the length and complexity of the exposure draft bill and the relatively tight timeframe for this inquiry this outline does not refer to relevant provisions individually.

Constitutional application and relationship of the draft bill with other laws (proposed Chapter 1- Preliminary)

2.41 The draft bill would rely on various Commonwealth constitutional powers and the referral of power from the States. In the absence of a referral by a State the bill would still apply except as to transactions between solvent individuals.

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35 Attorney-General's Department, *Submission No. 8*, p. 29.

36 Attorney-General's Department, *Submission No. 8*, pp 11 to 16.

37 Attorney-General's Department, *Submission No. 8*, pp 21 to 27.

2.42 The draft bill deals with its interaction with other laws, particularly conflicting State and Territory laws as well as the general law. The draft bill specifies circumstances under which other laws would prevail over it (such as taxation law) or limit the application of certain provisions. A State or Territory law would be able to expressly exclude a licence, right, entitlement or authority created by or under a State or Territory law from the application of the bill. The bill also specifies when other laws do not prevail over it, for example, in terms of registration requirements, formal requirements relating to agreements, assignment and the attachment and perfection of security interests.

Scope of the application of the bill (proposed Chapter 2- General rules relating to security interests)

2.43 The draft bill would apply to transactions involving personal property that secure payment or the performance of an obligation, apart from some limited exceptions. The draft bill would apply to tangible and intangible property as well as certain writings evidencing rights (such as documents of title, negotiable instruments and letters of credit).

2.44 At the request of the States, the draft bill would **not** apply to a tradeable water right or a water access entitlement within the meaning of the Commonwealth *Water Act 2007* or tangible property that is affixed to land, nor to fixtures. Provisions relating to statutory licences (such as licensing for taxi plates) can be activated or subsequently 'turned off' by individual States.

2.45 A security agreement would be effective according to its terms and would be enforceable between the parties upon attachment of a security interest in the collateral: that is, the essential elements for creating a security interest have been completed. The next step towards establishing priority against anyone else who may have an interest in the security is to 'perfect' the security interest. The methods of perfection that the draft bill proposes to recognise are possession, control, registration or temporary perfection (see the *Key Concepts* section above for information about these concepts). The draft bill contains special perfection rules dealing with security interests in negotiable instruments, investment instruments, returned property, crops and bailees (put simply, in this context a *bailee* is a person who holds possession of - or *bails* - tangible personal property for another person).

2.46 Where collateral is transferred or disposed of prior to enforcement, the draft bill would provide that a security interest continues in the transferred collateral as well as any proceeds of collateral.

Acquiring personal property free of security interests

2.47 The draft bill proposes to establish circumstances in which a security interest in personal property may be extinguished generally, as well as specifically for motor vehicles. This would mean that a third party could take personal property free of a security interest in certain circumstances, including purchasing an item in the ordinary course of business, a consumer item worth less than $5000, money, an investment

instrument or an item that is serial numbered and a search of the proposed register would not have disclosed the registration (the Department says this is known as the 'day and a half rule').

2.48 The onus of proving an attachment or perfection or acquiring an interest free of a security interest, under the draft bill, would rest with the person asserting those facts. The draft bill would contain rebuttable presumptions that a purchaser who acquired an interest in property and was related to the seller, did not give value and had knowledge of the relevant security interest or breach of the security agreement.

Priorities between security interests in personal property

2.49 The draft bill proposes to establish general and specific rules for determining priority among competing security interests in the same property. The draft general rules would provide that a perfected interest has priority over an unperfected interest, and perfection by control has priority over perfection by other means (including registration on the proposed register). If these rules do not resolve claims by competing security interests then priority is basically in chronological order of perfection or the attachment of the security interests.

2.50 There are specific priority rules proposed for PMSIs which would give 'super-priority' so that the PMSI would generally prevail over other security interests provided that it is perfected by registration and relevant notice given to other secured parties. Priority for a later security interest in certain circumstances is the purpose of a PMSI.

2.51 The draft bill also intends to recognise the special nature of negotiable instruments, and documents of title and to introduce the legal concept of *chattel paper*, which is new in Australia. The draft bill would also deal with priority between security interests and other interests such as those held by an authorised deposit-taking institution (also known by the acronym ADI).

2.52 In chapter 3 the exposure draft bill proposes special rules for crops and livestock (giving priority to the giver of value for the purpose of growing, feeding or developing the crops or livestock) though a pre-existing interest in real property would not be prejudiced by these rules. Draft chapter 3 also contains priority rules for accessions (personal property installed in or affixed to another item of personal property such that it has lost its separate identity) and commingled goods (goods part of a product or mass that have lost its original identity such as ingredients in food or a consignment of grain added to a silo containing other grain).

Enforcement of security interests in personal property (proposed Chapter 4 – Enforcement of security interests)

2.53 The draft bill proposes to set out the processes for enforcing a security agreement following debtor default. It is intended that these would operate in conjunction with enforcement provisions in the Consumer Credit Code and security agreements between the parties. It would be provided that parties would be able to

contract out of a number of the enforcement provisions in the bill (though not in relation to consumer transactions).

2.54 In all cases of attempted enforcement a secured party would be required to observe notice requirements. A person entitled to receive notice of disposal (including the grantor) would have an opportunity to redeem the collateral. All remedies are subject to a duty on the enforcing party to act in a commercially reasonable manner. Where disposal occurs by sale the secured party would have an additional duty to obtain at least the market value of the good or the best price reasonably obtainable in the circumstances. A secured party may only purchase collateral at a public sale for the market price of the collateral.

Registration of security interests (proposed Chapter 5 – Personal Property Securities Register)

2.55 A key aspect of the draft bill is the proposal to provide for an online national Register of Personal Property Securities to be established and maintained by a Registrar of Personal Property Securities. It is intended that registrations would be made at the request of secured parties in anticipation of, or to reflect, a security agreement.

2.56 It is not proposed that the register operate as a register of title or validate a secured party's claim to a security interest. The Department describes the intended operation of a register as a 'noticeboard' because it puts subsequent lenders or purchasers on notice of a claim to a security interest. If a security interest is valid the register would also provide significant assistance in resolving competing claims of priority.

2.57 The bill is drafted on the basis that much of the detail for the register requirements will be contained in regulations. The Department has already made progress with this aspect of the project and has released an exposure draft of a number of likely regulations, including those relating to the register.

2.58 It is expected that a registration would include the following information: the secured party's details, the grantor's details, an address for service of notices on secured parties (usually an email address), a description of the collateral and proceeds including if it is consumer or commercial property, the period of registration, the existence of subordination agreements and any amendment details. Some property such as motor vehicles, boats and aircraft used for consumer purposes would have to be identified by a serial number.

2.59 A registration would be ineffective where it contains a seriously misleading error. Where the register is amended it is proposed that the registrar must send a verification statement to the secured party who will be under an obligation to send a copy to the grantor.

2.60 The draft bill would provide that the register can, for a fee, be searched for authorised purposes. The bill would prohibit searching the register or using data from

it for an unauthorised purpose. However, searchers would not be required to establish their identity before conducting a search. It is intended that the register would use an 'exact match' approach rather than a 'fuzzy match' or 'wildcard' approach. The Department contends that this appropriately balances the legitimate needs of users with the privacy needs of grantors. However, some significant concerns have been raised about possible personal safety issues arising from inadequate privacy protection. These are considered in chapter 5 below.

Implementing the new scheme (proposed Chapter 7 - Transitional provisions)

2.61 A major anticipated benefit of this project is the streamlining of numerous pieces of legislation from all Australian jurisdictions. Implementing it will involve significant transition from existing practices to the requirements of the proposed scheme. In general terms the Department states that the proposed transitional provisions would set up a legal framework to migrate data from existing registers to the proposed new register and would provide special priority rules for pre-existing security interests.

2.62 Under the proposed model a pre-existing security interest would need to be registered under the new system within 24 months to protect its priority position. This means that the register will not be fully effective until 2 years after its commencement (at which time the same requirements will apply to new and pre-existing secured lending transactions).

Regulations

2.63 The Department has issued proposed draft regulations for consideration and welcomes feedback on their content.[38] It has not been possible to consider the content of the draft regulations except generally in relation to the examination in Chapter 4 of the proposal for the national PPS register.

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38 A copy of the draft regulations can be found at Item 2 on the Additional Information page of the Senate Legal and Constitutional Affairs website: http://www.aph.gov.au/senate/committee/legcon_ctte/personal_property/add_info/index.htm

CHAPTER 3

What reform is needed?

3.1 Many submissions to the committee commented on not only the content of the exposure draft provisions, but also addressed the threshold question of whether the reform should continue, and if so, in what form. Chapter 3 examines the threshold question of what reform is needed.

Divergent views

3.1 As noted above, the proposed reform is of considerable magnitude. It has been described as 'important microeconomic reform'[1] and some submitters regard it as the most substantial reform in a decade that is not only ambitious in its scope, but will affect many difficult and complex areas of law. For example, Mr Colin Love representing the Australian Financial Markets Association observed that:

> In its scale this is one of the most significant substantive reforms to Australian law in many years. In my previous roles in government over many years I have been involved in working on financial services reform, and I was also involved in putting in place the anti-money-laundering legislation. In its scale I would consider this to be a far more complex and difficult technical and legal drafting task that the drafters of this legislation are attempting. There are numerous complex issues flowing there and there are unresolved consequences that are really not understood or have not been worked through. [2]

3.2 As noted in chapter 2 in the *Support for the reform* section, the committee has been presented with widely differing and strongly held views in relation to the detail of the reform. It was apparent to the committee that these views were developed after considerable thought and their merits were vigorously argued by their proponents. Ultimately, though, it is not possible for the committee to reconcile all of the positions put before it. Described broadly the most divergent positions were, on the one hand, that except for the national register, a case has not been made for the reform and that in the main the status quo should be retained. The other position was that both codifying and substantively amending the law is appropriate and that the exposure bill is well drafted to achieve the intended results.[3] Many views falling somewhere between these positions were also expressed to the committee.

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1 Mr Gilbert, Australian Bankers' Association, *Committee Hansard*, 22 January 2009, p. 53.

2 Mr Love, Australian Financial Markets Association, *Committee Hansard*, 22 January 2009, p. 6. Similar evidence from other submitters about the significance of the reform is outlined in chapter 2 in the section titled *Purpose and objectives of the exposure draft bill*.

3 For example, see Piper Alderman, *Submission 12*, pp 1 and 2.

3.3 As noted in chapter 2, the combined four law firms argue that a move to the proposed style of reform is not justified and that '…there are still a considerable number of concerns that need to be carefully considered and addressed, and we have some overall concerns as to the approach.'[4] Mr David C. Turner offers guarded support:

> …for this radical change which I regard as hasty and ill-conceived. The choice to move to an Article 9 regime simply because New Zealand has followed Article 9 and the Canadian variants of it, using the Saskatchewan model, is of particular concern.[5]

3.4 However, other authoritative witnesses hold an alternative view and sought to explain the difficulty in understanding and appreciating the type of reform proposed in the exposure draft bill. In this regard noteworthy evidence was given by Ms Angela Flannery, representing Clayton Utz, and Mr Craig Wappett of the law firm Piper Alderman. Ms Flannery is a lawyer who described her area of legal practice as 'commercial banking'.[6] Ms Flannery said:

> Initially – two years ago or so – I thought the legislation was terrible; I thought it was a very bad thing. I thought that personal property security law as it stood in Australia was fine. When we saw the first discussion papers we talked to our clients and our colleagues in New Zealand about what they thought of the legislation and how it had been implemented in New Zealand, for example. We were surprised at how generally positive those people were…in New Zealand every time we spoke to either a financier or a lawyer and we put the question to them , 'If you could get rid of the legislation there, would you get rid of it?' everyone said that, no, they would not. That made us look at the legislation with different eyes.'[7]

3.5 Mr Wappett has worked in banking and finance law for more than 20 years and is co-author of a book titled *Securities over Personal Property*.[8] Similarly, he explained:

> …I think it is fair to acknowledge that the proposed PPS reforms do involve a significant shift in people's thinking. Lawyers, in particular, who have been brought up with many of the common-law and equitable principles that underpin our existing law, have considerable difficulty making the conceptual shift in thinking that is involved in adopting the PPS-style reforms. But I have been through that process myself and I know a number of other practitioners, in Canada and New Zealand, who have been through that process and, whilst it does involve some initial difficulties and some

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4 Allens Arthur Robinson, Blake Dawson, Freehills and Mallesons Stephen Jacques, *Submission 30*, p. 2.

5 Mr David C. Turner, *Submission 33*, p. 1.

6 Ms Flannery, Clayton Utz, *Committee Hansard*, 22 January 2009, p. 26.

7 Ms Flannery, Clayton Utz, *Committee Hansard*, 22 January 2009, p. 30.

8 Mr Wappett, Piper Alderman, *Committee Hansard*, 22 January 2009, p. 11.

> conceptual rethinking, my own experience and certainly the experience of the vast majority of practitioners that I have spoken to in those other jurisdictions over the years suggests that you would be hard-pressed to find too many experienced practitioners who would prefer to revert to the pre-PPS reform situation in jurisdictions which have already adopted a similar reform process.[9]

3.6 In addition to support from some lawyers, witnesses representing different parts of industry also presented evidence to the committee strongly supporting the type of reform outlined in the draft bill. For example, the Institute for Factors and Discounters, whose members constitute the main receivables financiers in Australia with a market in 2008 of $66 billion in turnover,[10] argued that PPS reform needs to recognise the legitimate interests of receivables financiers and concluded that 'subject to the suggested changes in this submission, we believe that the Bill strikes an equitable balance in this regard.'[11] The Australian Finance Conference also noted that 'the AFC continues in its support for the reform of Australia's current personal property securities regime. The case for reform has been well made out.'[12] The Australian Bankers' Association also offered firm support.[13]

3.7 Presented with this range of evidence, the committee had a difficult task in finalising a view. Based on the evidence received, the committee considers that there are two broad options for progressing PPS reform from this point and outlines these below.

Options for reform

3.8 The committee believes there is merit in a move to an 'Article 9 style' PPS system, but found it difficult to reconcile the two major perspectives put to it about exactly which Article 9 style approach to take. One approach proposes an international model incorporating a national register, while the other essentially proceeds with the exposure draft bill. In the next sections, the committee outlines and explores the two major options presented in submissions and evidence.

Option 1: the bill as drafted

3.9 As outlined in chapter 2 the exposure draft bill has been developed over a number of years and after considerable consultation. The Department asserts that the bill as drafted reflects an effective combination of learning from overseas experience

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9 Mr Wappett, Piper Alderman, *Committee Hansard*, 22 January 2009, p. 12.

10 Mr Bills, *Committee Hansard*, 23 January 2009, p. 47.

11 Institute for Factors and Discounters, *Submission 4*, p. 8.

12 Australian Finance Conference, *Submission 9*, p. 2.

13 Mr Gilbert, Australian Bankers' Association, *Committee Hansard*, 22 January 2009, p. 56 also referred to at chapter 2, footnote 12.

and modification for Australian conditions.[14] Mr Robert Patch from the Department described the process for the development of the exposure draft bill as follows:

> The very first thing the Office of Parliamentary Counsel did was to write to their counterparts in New Zealand and ask them for an electronic copy of the New Zealand bill. That bill was the template bill where we started drafting from. The next step [was] to listen to our stakeholders and to make changes to the bill reflecting their desires for where the bill should go and what should happen. We discovered that it was not just a simple matter of making [a] minor tinker here or there, and doing that sort of process ended up with a bill that was very complicated. You could not just graft a few sections in the middle of the bill to try to accommodate stakeholders' needs, or the policy outcomes sought by stakeholders.[15]

3.10 In addition to accommodating, where possible, stakeholder requests for the New Zealand model to be adjusted for Australian circumstances, the Department believes that a principal goal of the legislation should be *transparency*, by which it means that the bill details as much as possible any assumptions underlying the provisions.[16]

3.11 This approach has resulted in thorough, but very lengthy and complicated, draft provisions and a bill that is nearly 300 pages long. A number of submitters are not persuaded that this approach has in fact resulted in increased certainty and transparency. The draft bill's detractors argue that:

- given the difficulty of the subject matter and a general lack of expertise in Australia in the operation of PPS-style reform it is unwise to stray far from the provisions that have proven to work overseas;[17]
- despite the Department's intention to increase certainty of the law, the new provisions will actually significantly increase uncertainty about the effect of the law;[18]
- developing a substantially new system drafted especially for Australia (albeit one that is informed by overseas experience) means that there is no knowledge base about the law and its effect, and users of the system and their advisers can't readily draw on international experience. There are also no secondary resources immediately available to assist users of the system to

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14 The Department has advised it is planning to recommend some relatively minor modifications that submitters have raised. For details see the *Committee Hansard*, Friday 6 February, pp 45 to 49, but its argument in support of the bill is not affected by these changes.

15 Mr Patch, *Committee Hansard*, Friday 6 February 2009, p. 56.

16 Mr Patch, *Committee Hansard*, Friday 6 February 2009, p. 58.

17 For example, see Professor Anthony Duggan, *Submission 1*, p. 3 and *Committee Hansard*, 23 January 2009, p. 2; and Mr David C. Turner, *Submission 33*, p. 3.

18 For example, Mr Loxton, Allens Arthur Robinson, *Committee Hansard*, 23 January 2009, p. 28.

understand the law at the time they are most needed (that is, when the system is introduced);[19]

- the bill suffers from significant drafting issues making it difficult to understand the proposed law;[20] and
- stakeholders have had insufficient time to consider such a large and complex bill in detail (the exposure draft version of the bill was released in November 2008). Because the provisions of the draft bill are substantially different to existing PPS reform models it is possible that there are errors and other issues that would become apparent if there had been time for stakeholders to understand whole of bill.[21]

3.12 However, in support of the exposure bill the committee noted the view of Mr Craig Wappett, an experienced and persuasive practitioner, that:

> As a general comment on the bill, it is quite long and it is quite daunting and complex. The key principles underpinning the bill are quite straightforward and once people become familiar with them I think they will find that a lot of the perceived complexity in the bill disappears. The bill is certainly substantially longer than some Canadian or New Zealand counterparts. Even though the substantive approach and the context of the bill are substantially the same, the actual drafting is a much longer style. I know some submissions have commented on that and various people have views about whether that is a good thing or not. I appreciate that obviously the Office of Parliamentary Council has a particular way of drafting and that is reflected across the board in Australian legislation. I was not proposing to really get into commenting on the drafting style per se. But in terms of the substantive issues, my view is that they have been narrowed significantly and I would be surprised if there are more than 15 or 20 issues outstanding at the moment.[22]

Option 2: primarily adopt an existing international model

3.13 The primary advocate of this approach is Professor Anthony Duggan who is an academic with international expertise in personal property securities law. Professor Duggan has particular experience in personal property security law in Australia and Canada.[23] Professor Duggan's suggestion is essentially that Australia adopt and apply nationally one of the Canadian or the New Zealand models and that it only be

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19 Professor Anthony Duggan, *Committee Hansard*, 23 January 2009, p. 2.

20 Drafting issues are discussed in detail in chapter 4.

21 For example, see Professor Anthony Duggan, *Submission 1*, pp 5 and 6, Allens Arthur Robinson, Blake Dawson, Freehills and Mallesons Stephen Jacques, *Submission 30*, p. 2 and Mr David C. Turner, *Submission 33*, p. 2.

22 Mr Wappett, Piper Alderman, *Committee Hansard*, 22 January 2009, p. 14.

23 See Professor Duggan's written submission for more details of his relevant experience: *Submission 1*, p. 1.

amended in ways that will definitely improve it. The main way in which Professor Duggan believes the exposure bill is a definite improvement on other models is that it proposes the establishment of one national register.[24]

3.14 One of Professor Duggan's chief concerns is with unintended consequences. As he explains:

> The New Zealand approach has substantial benefits…Close adherence to the North American model makes sense, because it enables the local lawmaker to free-ride on Canadian and United States learning and experience. By contrast, departure from the model creates uncertainty and increases the risk of error. These concerns are exacerbated if the drafting is done under time constraints and without access to the kind of expertise the Canadians and Americans had at their disposal when drafting their laws.[25]

3.15 The other benefits of this option identified by Professor Duggan are that:

- using an existing model increases certainty;
- international experience and resources are available to inform the law; and
- the international models are not as complex.[26]

3.16 Professor Duggan recommends that this approach could also be complemented by:

> …[including] a provision for a comprehensive review at the end of three to five years and appoint a committee of local and international experts to do the review. One advantage of doing things this way is that, after three to five years experience with the legislation, it should be easier to find local experts in Australia than it is now.[27]

3.17 The perceived disadvantage of this approach articulated to the committee was chiefly a concern that an international model would not adequately meet Australian circumstances.[28] On the basis of the evidence submitted to the committee by several major stakeholders that PPS reform of the scope proposed is unnecessary, the committee considers that it is likely that another disadvantage of this model would be major resistance from some of those affected by the bill due to concern about change and a lack of familiarity with international models and international experience.

3.18 Professor Duggan is familiar with the development of the exposure draft bill and the work invested in its development. He was asked whether, in light of the work

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24 Professor Duggan, *Committee Hansard*, 23 January 2009, p. 2.

25 Professor Anthony Duggan, *Submission 1*, p. 3.

26 Professor Anthony Duggan, *Submission 1*, pp 3 to 5.

27 Professor Duggan, *Committee Hansard*, 23 January 2009, p. 2.

28 For example see Allens Arthur Robinson, Blake Dawson, Freehills and Mallesons Stephen Jacques, *Submission 30*, pp 15 and 16.

already invested in the bill, he still proposed starting again and adopting an international model and his evidence was significant:

> I understand there is pressure to get the new law into place quickly and I also understand that a lot of people would prefer a home-grown product and not just a copy of some other country's efforts. The trouble is that it seems to me there is just not enough time or expertise to achieve this and, even if there were, at the end of the day the differences between the Australian version and the Canadian one probably would not be all that great.[29]
>
> If it were me I would say yes, start again. I understand the difficulties of doing that. But it is a question of going ahead now with this product for the sake of getting in quickly or taking a little bit of extra time, maybe going back to the drawing board, to get it right. I think in the longer term interest of everybody it is better to do the latter. What can I say about other people's views? I have glanced quickly through most of the written versions of the submissions that you have received. Very few of them come to grips with the legislation overall. Most of them just talk about particular issues. Most of them express support for the general idea of a single comprehensive national register. But none of them really engage with the detail of the legislation. Probably the only one that does is the submission from the four large law firms. When people say that they support the legislation and so far as they can see there are only half-a-dozen or so issues that need to be fixed, you really need to ask whether people who are saying this are on top of legislation of this kind and really understand the concepts and how this legislation works.[30]
>
> To wind up, for what it is worth this is what I think Australia might think about doing: for now, to enact a PPSA based on one or another of the Canadian models, build in a provision for a comprehensive review at the end of three to five years and appoint a committee of local and international experts to do the review. One advantage of doing things this way is that, after three to five years experience with the legislation, it should be easier to find local experts in Australia than it is now.[31]

Committee view

3.19 As noted above, the committee believes there is merit in a move to an 'Article 9 style' PPS system, and there are benefits in both options. Option 2 encompasses changes that would definitely improve the chosen overseas model (such as having one national register rather than individual state registers), but essentially copies an existing model. It seems, in the main, that the New Zealand and Canadian models are working effectively, are more simply drafted and offer the assistance of established secondary materials and existing case law. As suggested by Professor Duggan, after

29 Professor Duggan, *Committee Hansard*, 23 January 2009, p. 2

30 Professor Duggan, *Committee Hansard*, 23 January 2009, p. 4.

31 Professor Duggan, *Committee Hansard*, 23 January 2009, p. 2.

the imported model had been in place in Australia for a few years it could be reviewed and any aspects that were unsatisfactory could be amended at that time.

3.20 Alternatively, the approach reflected in the exposure draft bill (option 1) of starting with the New Zealand model and substantially amending it has been undertaken with the intention of better reflecting what are seen as Australian requirements. There are advantages to this approach, but at this stage very serious concerns about the possible adverse effects of the bill have been presented to the committee. These concerns are heightened by the fact that many submitters felt that the timeframe for considering this exposure draft is so tight that they have not had the time to fully analyse and understand all of the provisions in the bill and to identify all possible concerns.[32] If the bill as drafted has unintended consequences then amendments to the exposure draft may be needed relatively soon after its introduction, and the process for this is complicated by the fact that the regime will be based upon a referral of powers from the States. There is also an argument that 'it affects individual business dealings in a way that cannot be altered with a touch of the regulator's brush.'[33]

3.21 The committee is cognisant of the considerable effort that has been invested by the Department, governments and stakeholders in developing the reform and of the challenges in changing course at this stage of the policy development. The committee endorses the idea of an effective Australian PPS model, but has very strong reservations about proceeding with the bill in its current form. In particular, the committee is concerned about the warnings issued by those with considerable experience in the area of personal property securities about the danger of serious adverse consequences.

3.22 The committee considers that the exposure draft bill could form the basis of effective PPS reform legislation. However, the committee is strongly of the view that the bill needs to be substantially redrafted, clarified and simplified before it is presented to Parliament. In Chapters 4 and 5, the committee outlines its views on some specific aspects of the exposure draft and proposes a range of recommendations for changes.

32 This aspect of the process is considered in more detail in the section titled *Timing* in chapter 4.

33 Mr Loxton, Allens Arthur Robinson, *Committee Hansard*, 23 January 2009, p. 27.

CHAPTER 4

Consideration of broad issues

4.1 This chapter discusses some broad concerns with the proposed bill raised in evidence, including drafting issues and the timetable for finalising and implementing the reform. This discussion is predicated on the government proceeding with the bill as drafted, in line with the committee's obligation to examine the exposure draft as referred.

Drafting issues

General

4.2 The committee was cognisant of the many criticisms of the actual drafting of the bill. If a form of the existing draft bill is going to be implemented, it is particularly important that the drafting criticisms be considered further and addressed.

4.3 The overall theme of the drafting concerns raised with the committee is that this is already a difficult and complex area of law and that the drafting needs to be as clear and concise as possible. The main perceived failures of drafting have been identified as the detailed cross-referencing, unnecessarily complex terminology and verbose provisions and that these seriously affect the comprehensibility of the provisions.[1]

4.4 In response to these concerns the Department asserts that much work has been done to make the bill as simple as possible.[2] However, on balance the Department's approach is to give primacy to transparency (providing as much detail as possible to explain each provision) over straightforward simplicity in outlining each provision.[3] The Department explained that the exact drafting of the provisions was also affected by Commonwealth drafting requirements.[4]

4.5 The committee understands the position put by the Department. However, it is concerned that in pursuing its objectives of 'certainty' and 'transparency' – and possibly also constrained by Commonwealth drafting practice – in some respects the Department has sacrificed access to the law. Provisions are frequently convoluted, and the committee believes that the draft could be simplified without a deleterious effect to the bill as a whole.

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1 For example, see Professor Duggan, *Submission 1*, p. 6.

2 Dr Popple, *Committee Hansard*, 6 February 2009, p. 55, and Mr Patch, *Committee Hansard*, 6 February 2009, p. 58.

3 Mr Patch, *Committee Hansard*, 6 February 2009, p. 58. See also Professor Anthony Duggan, *Submission 1*, p. 4.

4 Dr Popple, *Committee Hansard*, 6 February 2009, p. 55.

Terminology used in the exposure draft bill

4.6 One of the particular concerns raised was the use of unnecessarily complex or obscure terminology. Some submissions pointed out that the use of the term *goods* instead of *tangible property* assists to simplify the concepts in provisions that are already complex in other ways. This concern was identified to apply to other provisions in the bill, including *grantor*.[5] Articulating the concern about this approach, Professor Duggan noted:

> The Bill throughout uses the expression "tangible property" in place of "goods"…This idiosyncracy may not have substantive implications, but it does affect the comprehensibility of the legislation because the reader must make a mental note to substitute "goods" every time she reads "tangible property".[6]

4.7 The Department's argument for its approach is that although a benefit of the term 'goods' is that it is in common use and is readily understood, in the PPS context it has a slightly different meaning than when it is used in everyday language. The Department argues that using the simpler term would not alert a reader of the legislation to the fact that the meaning of the word is wider than is generally understood:

> The danger of using terms that already have a well-understood meaning to mean something slightly different is that they may not be alerted to the fact that, for example, trees are included, when they might not be included in a normal definition of 'goods'.[7]

4.8 Professor Duggan suggested that this is also the case in other jurisdictions where it is overcome by defining the simpler term to include the broader meaning required for the circumstances.[8]

4.9 Ultimately it is a question of policy as to which approach is taken. The committee is not convinced that the reasons for using less familiar terms outweigh the added difficulty in accessing the meaning of the provisions through the use of the unfamiliar terms. The committee's view is that even basic legal practice would involve checking the definition of terms in an act you are seeking to apply. Additionally, appropriate education, including relevant information in the explanatory memorandum and the development of secondary material such as textbooks should be enough to ensure that this approach does not undermine the goals of certainty and transparency.

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5 For example, see Professor Anthony Duggan, *Submission 1*, pp 9 to 11 and Mr David C Turner, *Submission 33*, pp 3 to 6.

6 Professor Anthony Duggan, *Submission 1*, p. 9.

7 Mr Patch, *Committee Hansard*, p. 56. Interestingly, Mr David C. Turner notes that the draft bill fails 'to qualify goods as trees which have been *severed* and petroleum or minerals which have been *extracted*. Growing trees, etc are not personal property until severed or extracted in Article 9, Canada and New Zealand (s16).' *Submission 33*, p. 6.

8 Professor Anthony Duggan, *Submission 1*, p. 9.

Length of the exposure draft bill

4.10 A further drafting concern raised with the committee is that of the wordiness of the exposure bill. Again, it appears that this is as a result of the approach taken in the draft bill to value certainty over simplicity. This approach reflects a deliberate policy choice:

> Elegance is a virtue. But then you go home and reflect on it for a bit and you realise that, while [overseas legislation] is written very well, there is a lot of subtlety and complexity masked by that very clear language and some of the concepts within that language that rolls well off the tongue are quite difficult to understand. If our bill has a sin, it is that it is transparent in what those concepts are. We have sought to make it clear and to bring to the forefront some of those underlying concepts that are masked by the sweet-rolling language used overseas.[9]

4.11 However, the concern raised with the committee is that the approach might actually decrease certainty and comprehensibility:

> …while the Bill may improve legal certainty at one level, it increases uncertainty at another level and the statement in the [Department's Revised] Commentary fails to acknowledge this trade-off. The Bill reflects a strong commitment to drafting precision with a view to ensuring that the legislation provides for every possible contingency. It is in this sense that the claim to improved legal certainty is presumably to be understood. However, a commitment to precision is not cost-free. The inevitable by-product is longer, more complex legislation.[10]

4.12 Mr David C. Turner, a barrister at the Victorian Bar with extensive experience in retail and wholesale secured lending, noted:

> Striving for precision can only result in errors and a failure to deal with issues in a simple and clear way with a clear and underlying policy objective.[11]

4.13 One of the examples given of unnecessary length in a provision was that of sections relating to a 'commingling' of goods question. One overseas model addresses the issue in six lines of text, one in 40 lines of text, and the Australian draft bill in approximately 112 lines of text covering four and a half pages.[12]

4.14 Again, it is a question of policy as to the appropriate balance to be struck between the two goals of certainty and simplicity. The committee agrees that it is

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9 Mr Patch, Attorney-General's Department, *Committee Hansard*, 6 February 2009, p. 58.

10 Professor Anthony Duggan, *Submission 1*, p. 3, see also pp 6 to 8. See also DLA Phillips Fox, *Submission 2*, p 2.

11 Mr David C. Turner, *Submission 33*, p. 3. More details about Mr Turner's relevant experience can be found at page 1 of his submission and examples of the problem he cites are on pp 3 to 6.

12 Professor Anthony Duggan, *Submission 1*, pp 7 to 8.

important to ask the question generated by Professor Duggan's submission – are the benefits of greater drafting precision worth the cost?[13]

4.15 This is another area in which the committee's view is that too much weight has been given to certainty at the expense of comprehensibility. The committee acknowledges the point made by the Department that provisions with simpler drafting may include ideas that need judicial explanation, but is not persuaded that this outweighs the benefit of simplicity. In addition, the fact that a concept is outlined in legislation does not necessarily make it immune from requiring judicial interpretation so that it can be understood and applied by those using the legislation. In either case, it is open to the government to include detailed explanation of provisions in the explanatory memorandum that will accompany the final bill and which will be an important extrinsic aid to its interpretation.

Cross-referencing

4.16 The approach to cross-referencing taken in the exposure draft was observed by Professor Duggan as "Byzantine…which forces the reader to skip between different parts of the legislation to find the answer to particular questions."[14] Examples are provided by Professor Duggan and others of needing to identify and refer to many other sections to understand the operation of one section.[15]

4.17 It is likely that the overall structure of the bill could be altered to reduce the necessity for extensive cross-referencing. However, this potentially could require changes in Commonwealth drafting practice and in any case would be a significant undertaking.

4.18 The committee acknowledges the drafting concerns raised by submitters. On balance the committee expects that the exposure bill will be significantly improved if its recommendations in relation to wordiness and the use of simpler definitions are implemented. The committee favourably notes the Department's advice that it is currently working with the drafters to include 'readers' guides' within the bill.[16]

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13 Professor Anthony Duggan, *Submission 1*, p. 5.

14 Professor Anthony Duggan, *Submission 1*, p. 11.

15 Professor Anthony Duggan, *Submission 1*, pp 11 and 12. See also, Ms Lang Thai, *Submission 29*, p. 3; and Mr David C. Turner, *Submission 33*, p. 3.

16 Dr Popple, *Committee Hansard*, 6 February 2009, p. 55.

Recommendation 1

4.19 The committee strongly recommends that the Department reconsiders the balance between certainty of the law and the accessibility of the provisions with a view to:

- **simplifying the language of the exposure draft bill – for example, wording provisions clearly and limiting them to deal only with common circumstances;**
- **simplifying the structure of the exposure draft bill – to minimise the cross-referencing needed;**
- **simplifying the terms used - for example instead of 'tangible goods' use the term 'goods' appropriately defined to ensure the full meaning needed for the reform is ascribed to the term; and**
- **using overseas provisions as often as possible to allow overseas experience to provide guidance for the Australian model.**

Timing

4.20 The PPS reform project commenced in 2006 and has included considerable consultation and information exchange such as discussion papers, a Consultative Group and two exposure draft bills.[17] Stakeholder appreciation of the government's approach to consultation has been regularly expressed.[18] However, although there has been detailed consultation during the development process, there is criticism that the magnitude and complexity of the reform have caused the finalisation and implementation of the bill to be rushed.

4.21 For example, the first exposure draft of the bill was released in May 2008. Following substantial amendment the revised bill (the subject of this inquiry) was released in November 2008. At this point it was referred by the Attorney-General to the Senate with a request that it be considered by this committee with a reporting date in late February 2009. A revised commentary to accompany the revised exposure draft bill was provided to the committee on 19 December 2008.[19] It has been put to the committee that the tight timeframe for the inquiry is required because the implementation date for the reform has been set at May 2010 and this leaves little time for the referral of powers from the States process.[20]

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17 See the *Process* section in chapter 2 above for more detail.

18 For example, see Allens Arthur Robinson, Blake Dawson, Freehills and Mallesons Stephen Jacques, *Submission 30*, p. 4.

19 This was the date on which the Attorney-General's Department submission (*Submission 8*) which is in the form of the Revised Commentary, was received by the Senate Legal and Constitutional Affairs Committee secretariat.

20 Mr Glenn, *Committee Hansard*, 6 February 2009, p. 61. See also the section on *Process* in Chapter 2 above.

4.22 The May 2010 deadline for implementation of the reform was set by the Council of Australian Governments (COAG). Although a COAG deadline is a matter of importance in itself, it is not clear that there is a substantive need for the reform to be in place by May 2010.

4.23 In evidence to the committee there was marked concern expressed by submitters about the May 2010 implementation date. This concern came both from those who support the proposed PPS reform and those who do not.[21] Some examples of the concern expressed include:

- concern even from experts that they have been unable to consider the bill in detail and that there may be many unintended consequences, also that the effect of numerous small variations can, cumulatively, result in onerous burdens on those required to understand and implement the bill; [22]
- some submitters anticipate benefits from the reform, but on the basis that the content of the legislation is 'right';[23]
- a factor which heightened the concern about the proposed timing of the introduction for some who gave evidence is that the Australian and international economies are not currently robust;[24]
- the ability for industries to implement this legislation in the scheduled timeframe is affected by the impact of other government reforms they are dealing with such as anti-money laundering reform;[25]
- in addition to actually understanding the content of the reform, business will also need to undertake substantial and expensive preparation (including creating forms, adapting computer systems and staff training) to work effectively in the new system;[26] and
- although there have been opportunities for consultation with stakeholders who are actively engaged in the process, there is concern that many organisations are not aware of, or do not yet understand, the significance of the reform.[27]

4.24 Even those who are relatively satisfied with the content of the bill as drafted are worried that they will have insufficient time to prepare for its implementation. For

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21 The Australian Bankers' Association Inc supports the reform, but believes that the May 2010 commencement date is too soon: Mr Gilbert, *Committee Hansard*, 22 January 2009, p. 53.

22 For example, Professor Anthony Duggan, *Submission 1*, p. 6.

23 Mr Love, Australian Financial Markets Association, *Committee Hansard*, 22 January 2009, p. 2.

24 For example, Mr Whittaker, Blake Dawson, *Committee Hansard*, 23 January 2009, p. 29.

25 For example, Ms Flannery, Clayton Utz, *Committee Hansard*, 22 January 2009, p. 31.

26 Mr Gilbert, Australian Bankers' Association, *Committee Hansard*, 22 January 2009, p. 57.

27 Mr Faludi, DLA Phillips Fox, *Committee Hansard*, 22 January 2009, p. 52.

example, the Australian Bankers' Association (ABA) supports the proposed reform, but is concerned about timing:

> We anticipate it is unlikely that the terms of the legislation will be finalised until quite late this year, so a commencement date in May 2010 would be far too soon to allow banks to get all their systems, compliance arrangements, documentation and everything else redone to take advantage of the new law. There are other factors also that come into the timing of the commencement. There is the electoral cycle.
>
> As a result the ABA believes that, taking all of those factors into account, a commencement date in the third quarter of 2011 would be an appropriate date for the regime to commence. This would also allow those who have submitted concerns over certain technical and other aspects of the reforms to work through and resolve them leaving adequate time at the end of that for the implementation of this nationally worthwhile project. [28]

4.25 None of the non-government witnesses argued in favour of the proposed timeframe. The arguments put to the committee by the Department in support of the May 2010 implementation are that there would be financial implications and other impact on the States who have already started to prepare for the new scheme and that stakeholders will probably take the opportunity to keep making suggested changes to the system.[29]

4.26 The committee understands that timing for the project is being driven by the COAG deadline, but believes that primacy needs to be given to the importance of getting the detail of the legislation right and for those affected to have time to prepare for its implementation. The committee was persuaded by the weight of concern about timeframe and believes that it is appropriate to extend the process to ensure that the content of the legislation is appropriate and as clearly and concisely drafted as possible. In addition, stakeholders should be allowed sufficient time to understand the effect of the legislation and to have sufficient time to prepare for its implementation.

Recommendation 2

4.27 The committee recommends that the commencement date for the scheme be extended by at least 12 months to May 2011 for the committee's recommendations to be implemented and for advice from stakeholders to be taken into account before the content of the bill is finalised.

4.28 In relation to the timing of the commencement of the reforms, the ABA observed that it is desirable to avoid 1 January and 1 July starting dates, with a preference for March-April or August-September commencement.[30]

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28 Mr Gilbert, Australian Bankers' Association, *Committee Hansard*, 22 January 2009, p. 53.

29 Dr Popple, *Committee Hansard*, 6 February 2009, p. 59.

30 Mr Gilbert, Australian Bankers' Association, *Committee Hansard*, 22 January 2009, p. 58.

Committee inquiry process

4.29 There is another factor in relation to timing about which the committee wishes to comment. The committee is appreciative that the exposure draft bill was referred to it in advance of the introduction of the final bill into the Commonwealth parliament. This is especially welcome given that the reform requires a text-based referral of powers from the States which will fail if the provisions in the Commonwealth bill are not identical to those referred to it.

4.30 However, the relatively short timeframe to the proposed implementation date significantly affected the Senate inquiry process. Given the significance and complexity of the proposed legislation and the brevity of the timeframe for the inquiry – especially as it was over a holiday and shutdown period – the committee feels that the time period in which to complete the referral was significantly unsatisfactory. The committee is of the view that the time allowed for examination of this proposed bill was inadequate, and the timing of the inquiry was unrealistic and unreasonable.

4.31 This criticism notwithstanding, the committee again applauds the initiative shown in referring the exposure draft bill in advance of its introduction into Parliament and would welcome the opportunity to consider a revised bill when it is finalised.

Review

4.32 The exposure bill as drafted does not include a requirement for the legislation to be reviewed. There were a number of calls for the bill to be reviewed, such as by Professor Duggan.[31] The Australian Finance Conference also favours a review of the legislation two years after the legislation commences and the establishment of an expert panel to immediately consider the impact of the legislation so that ad hoc recommendations about amendments to its terms can be made as soon as a need for them becomes apparent.[32]

4.33 The Department advised that although the exposure draft does not include a review of the legislation, the intergovernmental agreement reached between all Australian jurisdictions last year includes a requirement for the bill to be reviewed by the Commonwealth in consultation with the states and territories five years after the legislation commences.[33]

4.34 The committee agrees that a review is warranted and is of the view that it should be required as a provision of the legislation itself.

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31 Professor Duggan, *Committee Hansard*, 22 January 2009, p. 2.

32 Mr Edwards, *Committee Hansard*, 23 January 2009, p. 42.

33 Dr Popple, *Committee Hansard*, 6 February 2009, p. 64.

Recommendation 3

4.35 The committee recommends that the bill include a requirement that the operation of the bill be reviewed three years after it commences in a process that includes extensive consultation with industry, governments, lawyers, consumers and academics.

Process for amending the Act

4.36 The committee notes the Department's advice that the agreement with States and Territories includes the referral of a power for amendments to the made to the legislation. Details provided to the committee by the Department include that:

> The operation of that amendment power is governed in a sense by the intergovernmental agreement that we have with the states and territories, and that involves in all situations that we would consult with the states and territories about a proposed amendment to the bill and, in certain circumstances, we would ask for the consent of the states and territories—consent being able to be given by three jurisdictions, at least two of whom must be states, I think is the formulation—and that is broadly consistent with the models in other intergovernmental agreements that use referral powers.[34]

4.37 Given that the scope of this reform is very significant and that a number of concerns have been raised with the committee about likely unintended consequences of the proposed approach, the committee endorses the development of arrangements between the Commonwealth and the other jurisdictions to facilitate any amendments that need to be made to the final legislation.

34 Mr Glenn, *Committee Hansard*, 6 February 2009, p. 63.

Chapter 5

Consideration of more technical issues

Introduction

5.1 A major implication of the relatively short timeframe for this inquiry was the significant limit on the ability of the committee to consider all, or even the majority, of the bill in detail. As noted elsewhere in this report, this is a lengthy and complex bill which is seeking to implement significant national reform affecting many people, organisations and industries. It was difficult for even experts in the area who had been involved from early in the project to feel that they had time to understand the whole of reform.[1]

5.2 In response, the committee developed a two-pronged approach to the inquiry in relation to technical aspects of the bill. The committee identified some significant issues, and submitters had some broad issues of concern, that were explored in detail by the committee. These matters are discussed in this chapter. Others aspects of the reform could not be considered in detail. For the Senate's benefit many of them are identified in the next chapter, but without analysis by the committee.

5.3 The matters discussed in this chapter reflect commentary on the provisions of the exposure draft bill as referred. If the policy decision is to proceed with the bill then the recommendations in this chapter are directly relevant to the suggested final form of the bill.

5.4 Alternatively, if the policy decision is to adopt an international model with a national register, the recommendations relating to the register and related privacy issues would be directly relevant to the new bill.

5.5 The matters explored in this chapter are:

- the proposed national PPS register, especially privacy aspects of the register;
- the proposed new requirement to act in a *commercially reasonable manner*;
- the need for international conflict of laws provisions and the possible content of any provisions;
- the proposed enforcement provisions;
- aspects of the proposed bill dealing with intellectual property; and
- the proposed chattel paper provisions.

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1 Professor Anthony Duggan, *Submission 1*, pp 5 and 6.

PPS national online register

Introduction

5.6 A central feature of the proposed PPS reform is the establishment of a national online register. The purpose of the register is to provide what the Department describes as:

> …a real-time online noticeboard of personal property over which a security interest has been, or may be, taken. The PPS Register would replace an array of existing electronic and paper-based registers. It would be a voluntary registration scheme, allowing secured parties to weigh up the costs and benefits of registering their security interests.[2]

5.7 By describing the proposed register as a 'noticeboard' the Department is highlighting the fact that, unlike land titles registers, it is not intended to be a register that gives definitive information about the ownership of any particular property. In relation to providing information about security interests, the register is only designed to *alert* the world to an actual or possible interest in personal property. It is then up to the person searching the register to use the register information to make any further inquiries on which to base a purchase or lending decision.

5.8 The second major function of the register is that:

> It is anticipated that registration would be the most commonly used method of perfecting a security interest for the purpose of establishing priority in enforcement and effectiveness on insolvency.[3]

5.9 The other main methods of perfecting a security interest, outlined in more detail above in the explanation of *perfection* in chapter 2, are possession and control. The exposure draft bill would establish that possession and control as methods of perfection in fact have priority over registration as a method of perfection. However, the nature of secured lending transactions often means that possession and control are not available as methods of perfection. For example, if finance is provided for the purchase of a boat, the grantor will want to use the boat before the loan is repaid so it will not be possible for the finance company to have possession or control of the security (the boat). The register will then provide a single national option for registering the lender's security interest.

5.10 The Department observes that use of the register is voluntary - and it is correct that there is no statutory requirement for any party to register a security interest - but those who choose not to register may do so at their peril. In many instances under the proposed reform a person with a security interest who does not obtain perfection through registration will be sanctioned by losing priority against those who do register their security interest in the property. This gives effect to a deliberate policy choice to

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2 Attorney-General's Department, *Submission No. 8*, p. 97.

3 Attorney-General's Department, *Submission No. 8*, p. 97.

motivate parties to use the register and therefore to ensure that the register is effective as a national register of personal property security interests.

About the proposed register

5.11 The establishment of a national register is widely regarded by submitters as a major benefit of the proposed PPS reform. Although there will be significant costs in moving to the proposed new system, the register is one of the key aspects of the reform that is expected to lead to substantial cost savings.[4]

5.12 It is also designed to benefit casual users of the system who will be able to simply and easily access the information they need without having to negotiate their way through multiple jurisdictions and unfamiliar legal concepts.

5.13 Of course, the proposal to establish a register has properly attracted detailed scrutiny by some submitters to the inquiry to ensure that it is appropriately established and managed and contains effective security measures, particularly in relation to the way in which information will be collected and returned in a search of the register.

5.14 The exact details of the way in which the register will function are not yet public. However, the Department has identified its plan for some of the major aspects of its operation. For example, the Department has stated that it is intended that only the minimum amount of information needed for each transaction will be required, essentially using a layered system. For example, if the transaction can be adequately captured using existing identifiers such as a Vehicle Identification Number (VIN) or Australian Business Number (ABN) then it is expected that no additional personal identification information will be required from the grantor. [5]

5.15 If there is no way to identify the property without resort to the inclusion of personal information then the approach is again to keep the recorded details to a minimum:

> In determining the level of personal information required to correctly identify an individual's details, we have sought to balance privacy needs against the need to ensure that information is correctly recorded and searchable. The register has been designed so that only limited personal information, name and date of birth will be recorded and available to be returned in a search. It will not be possible to discover an individual's name or date of birth by using the register. Searchers will need both pieces of that information before they commence a search.[6]

4 Professor Duggan, *Committee Hansard*, 23 January 2009, p. 2.

5 Dr Popple, *Committee Hansard*, 6 February 2009, p. 59 and Mr Glenn, *Committee Hansard*, 6 February 2009, p. 60.

6 Dr Popple, *Committee Hansard*, 6 February 2009, p. 59.

5.16 The Department has stated that in addition to limiting the amount of information recorded for each entry in the register, the way in which the register returns information in response to a search will incorporate important security safeguards. The key aspects of this are that the search function will operate on an *exact match* basis and will not include a 'wildcard' search feature. Information will also be obtained through a challenge-response approach, which means that the person searching the register will enter the terms they want to search against and the system will return any entries exactly matching the search information entered.[7] This is intended to restrict the ability for searches to be undertaken to 'fish' for information.

5.17 There will be a fee for searching the register. The Department has stated that the fee will be determined in accordance with the government's cost recovery approach and this will mean that the impost will be modest.[8]

5.18 A person searching the system will not be required to be identified before a search can be made. However, payment for a search will be required before it can be undertaken and payment will need to be made by an electronic transfer of funds or by credit card. The Department's argument is that in measuring the useability of the register against the incorporation of security features that constrain the effectiveness of the system (and increase the costs associated with using the system) the proposed approach represents an appropriate balance.[9] Particular concerns relating to privacy and security are discussed in more detail below.

Privacy

5.19 Ensuring appropriate security and privacy measures are in place is essential to the success of the proposed national register. The Department has made a point of explaining that it is taking privacy issues very seriously. An officer told the committee that:

> I wanted to start by assuring the committee that privacy issues are of particular concern to the department and are being given careful consideration.[10]

5.20 Some submitters considered the security and privacy aspects of the proposed register in detail.[11] It was important that the committee received this evidence because privacy issues are not areas of priority for all users of the system, especially corporations:

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7 Mr Glenn, Attorney-General's Department, *Committee Hansard*, 21 January 2009, pp 32 to 34.

8 Mr Glenn, *Committee Hansard*, 21 January 2009, p. 34.

9 Mr Glenn, *Committee Hansard*, 21 January 2009, pp 33 and 34.

10 Dr Popple, *Committee Hansard*, 6 February 2009, p. 59.

11 For example, Victorian Privacy Commissioner, *Submission 3*, Women's Legal Service Victoria on behalf of Women's Legal Service Australia, *Submission 16*, Australian Privacy Foundation, *Submission 17* and the Consumer Action Law Centre, *Submission 20*.

> There are always issues with a public register, I think, but we do not really have too many specific concerns. In part, I think that reflects our client base as well. We deal mainly with companies rather than with individuals. I am sure that is part of the reason why we are not so concerned about them.[12]

5.21 The committee notes the Department's efforts to date and its continuing commitment to ensure that privacy concerns are addressed. The committee would like to ensure that before the reform is finalised, government is certain that it has done everything necessary to address real privacy issues. The committee believes that the government needs to convincingly allay fears that information required to be kept in the register can potentially be misused. Some of the possible implications outlined to the committee if privacy needs are not adequately met are extremely serious: they include the system being used for criminal purposes to locate and harm individuals such as in circumstances involving domestic violence orders and victims of crime.[13] Although these scenarios are probably far from the ordinary experience of business-to-business, and even business-to-individual secured lending transactions, the scope of the register is broad reaching. It would be unacceptable for the system to meet the needs of the vast bulk of its users if its design could allow serious harm to anyone.

5.22 Broadly, the important privacy concerns identified to the committee are:

- important details relating to the register being included in regulations rather than primary legislation (especially requirement that address information will not be returned to a searcher);[14]
- an invasion of privacy if too much personal information is required to register a transaction versus the possible mistaken identity of a person if not enough information is obtained,[15] accuracy of register information,[16] the possibility of 'twins' (entries for different people with identical names and dates of birth);[17]
- identity theft;[18]
- function creep, including whether the database will be improperly used to build financial profiles and assess credit worthiness;[19]

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12 Ms Flannery, Clayton Utz, *Committee Hansard*, 22 January 2009, p. 26.

13 For example, see the Women's Legal Service Victoria, *Submission 16*.

14 Ms Rich, Consumer Action Law Centre, *Committee Hansard*, 6 February 2009, p. 36 and Office of the Privacy Commissioner, *Submission 25*, p. 3.

15 Dr Michael, Australian Privacy Foundation, *Committee Hansard*, 22 January 2009, pp 39 and 40.

16 Mr Strassberg, Veda Advantage, *Committee Hansard*, 23 January 2009, p. 13.

17 Dr Popple, *Committee Hansard*, 6 February 2009, pp 49 to 52.

18 Ms Rich, *Committee Hansard*, 6 February 2009, p 37.

19 Dr Michael, *Committee Hansard*, 22 January 2009, pp 33 and 34, and Office of the Privacy Commissioner, *Submission 25*, pp 5 and 6.

- data-mining (individual details being obtained by companies to assist with the marketing of credit to consumers);[20] and
- additional concerns raised by the Office of the Privacy Commissioner, for example in relation to requirements for the registrar, clarification of privacy issues and amendments needed to definitions.[21]

5.23 The committee has not had time to consider all of these issues in detail, but will particularly comment on two areas. These are the use of regulations rather than including requirements in the primary legislation and the privacy impact assessment issue.

5.24 The committee also appreciates the initiative demonstrated by the Department in its evidence to the committee that in advance of the committee's report it is considering some amendments to the exposure bill in light of submissions.[22]

Privacy safeguards: regulations versus primary legislation

5.25 The committee understands that the use of regulations to implement the detail of primary legislation is often appropriate. The practice allows primary legislation to be as concise as possible and permits matters of legislative detail to be finalised and implemented more flexibly than if all legislative requirements had to be included in the primary legislation.[23]

5.26 However, it is of course always necessary to ensure that essential matters are included in primary legislation and not left to regulation. In this regard, the committee agrees with the suggestion that the critical privacy safeguards relating to the register should be included in the primary legislation.[24] For example, while address details of any individual may be recorded in the register, there is intended to be a safeguard in place so that no address details will be returned to a searcher in response to any search of the register. Evidence to the committee is that a change to this safeguard is one of the aspects of the register that could lead to physical harm to individuals and is therefore so important that it should be included in the primary legislation.[25] The

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20 Ms Rich, *Committee Hansard*, 6 February 2009, p. 37.

21 Office of the Privacy Commissioner, *Submission 25*, a summary of the issues is at p. 2.

22 Dr Popple, *Committee Hansard*, 6 February 2009, pp 45 to 49 advised that the particular amendments being considered are: an amendment to the table in section 227 so that it clarifies that a person may search on behalf of another person for any of the purposes listed in that table suggested by Veda Advantage, *Submission 7*, p. 3 and Office of the Privacy Commission suggestions relating to proposed section 228(6) and the privacy impact assessment, *Submission 25*, pp 2 and 10.

23 The Office of the Privacy Commissioner is also of the view that the use of regulations can be appropriate: Office of the Privacy Commissioner, *Submission 25*, p. 3.

24 For example, see Office of the Privacy Commissioner, *Submission 25*, p. 3.

25 Women's Legal Service Victoria, *Submission 16*.

committee agrees with this view and believes that it is important that any other matters of such importance are also included in the final act rather than in delegated legislation.

Recommendation 4

5.27 The committee recommends that the primary legislation for the personal property securities reform include the key privacy protections for individuals, including a prohibition on making the address details of any individual public.

Privacy Impact Assessment

5.28 The Privacy Commission and others recommended that before finalising the PPS reform, and particularly prior to establishing the PPS register, that the government undertake a Privacy Impact Assessment. A Privacy Impact Assessment is:

> …an assessment tool that describes the personal information flows in a project, and analyses the possible privacy impacts that those flows, and the project as a whole, may have on the privacy of individuals…The purpose of doing a PIA is to identify and recommend options for managing, minimising or eradicating privacy impacts.[26]

5.29 The Privacy Commissioner has published guidelines about the purpose of, and recommended process for, carrying out these assessments.[27]

5.30 The committee notes the Department's advice that it has recently commenced a Privacy Impact Assessment. The assessment is being undertaken by staff of the Department in accordance with the Privacy Commission guidelines and is expected to take five or six weeks in total. The Department advised that it is expected that the results of the assessment will be made public.[28]

5.31 The committee believes that in relation to this reform the Department has a genuine commitment to considering privacy issues, but is also of the view that these privacy issues are of such importance that it is appropriate for the Department's approach to be independently assessed by a person or organisation with experience in preparing Privacy Impact Assessments. In the committee's opinion this is necessary to ensure that the reform is objectively assessed from someone with relevant experience and it will protect the Department from possible criticism that the assessment was not undertaken professionally or in good faith.

5.32 The committee recognises that the Department has already invested resources in undertaking the privacy impact assessment. In light of this, it may be convenient

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26 Office of the Privacy Commissioner, *Privacy Impact Assessment Guide August 2006, Additional Information 15*, p. 4.

27 Office of the Privacy Commissioner, *Privacy Impact Assessment Guide August 2006, Additional Information 15*.

28 Dr Popple and Mr Glenn, *Committee Hansard*, 6 February 2009. pp 50 and 51.

without compromising the committee's objective if the assessment is completed by the Department and then reviewed by an independent person or organisation with experience in the field. The committee notes that the Privacy Commission gave evidence that it does not undertake privacy impact assessments, though it is happy to be consulted during the process.[29]

Recommendation 5

5.33 The committee recommends that either:

- **(a) a Privacy Impact Assessment be undertaken by a person or organisation that is independent from the government and who has experience in undertaking such assessments and the results of the assessment are made public, or**
- **(b) the Department's Privacy Impact Assessment is reviewed by a person or organisation that is independent from the government and who has experience in undertaking such assessments, and the results of the review are made public.**

Recommendation 6

5.34 The committee recommends that if any issues raised by the Office of the Privacy Commission in its submission are not considered as part of the Privacy Impact Assessment then these matters should be separately considered by the Attorney-General's Department and a response to the issue be provided to the Office of the Privacy Commission in writing or made public.

New requirement to act in a *commercially reasonable manner*

5.35 Proposed new section 235 of the exposure bill is in Part 6.2 of the bill entitled *exercise and discharge of rights, duties and obligations*. The draft section provides as follows:

> 235 Rights and duties to be exercised honestly and in a commercially reasonable manner
>
> (1) All rights, duties and obligations that arise under a security agreement or this Act mush be exercised or discharged:
>
> (a) honestly; and
>
> (b) in a commercially reasonable manner.
>
> (2) A person does not act dishonestly merely because the person acts with actual knowledge of the interest of some other person.

5.36 A requirement to act 'honestly' is a concept known in Australian law,[30] but a requirement to act in a 'commercially reasonable manner' is not. The Department

29 Mr Pilgrim, Office of the Privacy Commissioner, *Committee Hansard*, 23 January 2009, p. 19.

30 For example, see Ms Flannery, Clayton Utz, *Committee Hansard*, 22 January 2009, p. 28.

advised that the 'commercially reasonable manner' test was included in the exposure draft because it is part of the legislation in the United States, New Zealand and in the legislation in most Canadian jurisdictions.[31]

5.37 Ms Flannery of Clayton Utz argued to the committee that the 'commercially reasonable manner' provision is of concern to stakeholders because there is uncertainty about what it means and whether this would change over time and in different circumstances:

> …a point someone made to me was the fact that what is commercially reasonable changes over time, so what you will get is a court saying one year that something is commercially reasonable and then someone will say two years later, 'We think that the markets have changed'—and, as we all know, financial markets are changing daily at the moment—'and something else is now the normal commercially reasonable standard.' So you will never get a line in the sand.[32]

5.38 There was also evidence given to the committee by Professor Duggan about the situation in Canada where all but one of the Canadian provinces has the 'commercially reasonable manner' requirement. Professor's Duggan's evidence was that the absence of the requirement has not generated any problems in that particular jurisdiction.[33]

5.39 The Department's evidence was that it has considered in detail whether or not to include this obligation in the Australian reform. It accepted that the expression does not have a settled meaning in Australia,[34] but in its view it is appropriate to include the requirement as the Department expected that in some circumstances it will contribute to cost savings for parties and will provide an appropriate safeguard for consumers and businesses where there is currently a gap.[35] Although the committee received considerable evidence against the inclusion of the requirement, this is probably unsurprising given that most of the witnesses who addressed this issue have an interest as the secured party who would be seeking to enforce its interest.

5.40 The Department does not believe that the requirement will increase costs or inappropriately undermine the ability of parties to contractually agree on what constitutes behaving in a 'commercially reasonable manner' in their circumstances. If parties with relatively comparable bargaining power have detailed their agreed

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31 Dr Popple, *Committee Hansard*, 6 February 2009, pp 53 and 54.

32 Ms Flannery, *Committee Hansard*, 22 January 2009, p. 27.

33 Professor Duggan, *Committee Hansard*, 23 January 2009, pp 6 and 7.

34 Dr Popple, *Committee Hansard*, 6 February 2009, p. 53.

35 Attorney-General's Department, answer to questions on notice dated 2 March 2009, *Additional Information 22*, pp 3 and 5.

enforcement arrangements the Department expects that it is likely that a court would find that the agreement between the parties was commercially reasonable.[36]

5.41 The Department anticipates that including the provision will lead to cost savings in relatively simple, low value transactions as these transactions will not need lengthy contracts detailing enforcement provisions. If enforcement of the contract is required then the parties can rely on the section 235 requirements. The Department further considers that the inclusion of the 'commercially reasonable manner' requirement would also appropriately temper overly aggressive behaviour, although based on overseas experience, it is expected that it would only operate in particularly serious circumstances.[37] Because it is expected that only cases of extreme enforcement action would not be considered to be 'commercially reasonable', the Department believes that the provision would not lead to considerable litigation costs.[38]

5.42 The committee is sympathetic to the concerns raised about uncertainty of the meaning of 'commercially reasonable manner'. However, the policy equation needs to take into account more factors than simply a lack of familiarity with the concept: for example, is there a gap that needs to be addressed and does the requirement fill the gap? In wide-ranging reform of this nature what protection should be afforded to borrowers? What are the implications for compliance – including certainty of the law and any direct and indirect costs?

5.43 On the basis that this is an important safeguard that is expected to limit exploitation, but not to fetter the contractual ability of large and commercially experienced parties, there are persuasive arguments to retain it.

Recommendation 7

5.44 The committee recommends retaining the requirement for rights and duties to be exercised honestly and in a commercially reasonable manner. The intended scope of these requirements should be explained in detail in the bill's explanatory memorandum.

5.45 The explanatory memorandum should particularly explain that the requirement to act in a commercially reasonable manner should not fetter or undermine the ability of parties with similar bargaining power to contractually agree about what constitutes commercially reasonable behaviour.

International conflict of laws provisions

5.46 The revised exposure draft bill does not include provisions to determine the law that governs the validity of a security interest where parties disagree about

36 Attorney-General's Department, answer to questions on notice dated 2 March 2009, *Additional Information 22*, p. 2.

37 Mr Patch, *Committee Hansard*, 21 January 2009, pp 27 and 28.

38 Mr Patch, *Committee Hansard*, 21 January 2009, pp 26 and 27.

whether the law of Australia or the law of another country applies to a secured lending transaction. These types of provisions are known as international 'conflict of laws' provisions.

5.47 The Department had included some conflict of laws provisions in the May 2008 exposure draft, but there was apparently severe disagreement about the content of those draft provisions so they were removed from the revised draft bill. [39] Instead of including conflict of laws provisions in the revised bill, the Department has included new provisions at Appendix A to the Revised Commentary. The Department advised that it would welcome feedback on the content of these provisions. [40]

5.48 There is widespread support for the inclusion of some conflict of laws provisions in the final bill, and one succinct example of this support was given by the Mr Gilbert of the Australian Bankers' Association who believes that it 'is important and necessary is to ensure that the international dimension of conflict is dealt with.'[41]

5.49 The development of the Appendix A provisions was informed by existing international practice, but they do not directly adopt an existing international model.[42] There is general agreement that the Appendix A provisions are a significant improvement on the May 2008 provisions. For example, Mr Wappett advised the committee:

> …my view on the new, alternative provisions that are in the appendix is that they are a very significant improvement on what was proposed in the earlier draft, and I think they would be an appropriate set of terms to include.[43]

5.50 However, the four law firms in their combined submission expressed some concern about Appendix A:

> I think you do need some conflicts of law provisions. We are still looking at this latest set of proposals. It is better than the initial set of proposals but it still seems to be extremely complex and going into a degree of detail that nobody else has done. If we go down the route of specifying conflicts of law principles, I have a feeling—and I could not answer off the top of my head because we are still looking at it and have been focusing on other things—that there is a much simpler model. The New Zealanders have a simpler model. I do not think that you need to codify everything.[44]

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39 Mr Patch, *Committee Hansard*, 6 February 2009, p. 47.

40 Attorney-General's Department, *Submission No. 8*. The invitation to consider the content of Appendix A is at p. 17 and Appendix A is at pp143 to 154.

41 Mr Gilbert, Australian Bankers' Association, *Committee Hansard*, 22 January 2009, p. 55.

42 The committee inferred this from evidence to it, including the additional information provided by Professor Anthony Duggan, *Additional Information 13*, pp 1 and 2.

43 Mr Wappett, Piper Alderman, *Committee Hansard*, 22 January 2009, p. 13.

44 Mr Loxton, Allens Arthur Robinson, *Committee Hansard*, 23 January 2009, p. 39.

5.51 The committee understands the importance of conflict of laws provisions being included in the bill and accepts the clear evidence that Appendix A is an improvement on the provisions in the May exposure draft.

5.52 However, the committee's view is that further thought can be given to the final content of the international conflict of laws provisions. The committee was impressed by the evidence to it that a key consideration in assessing the content of any conflict of laws provisions is whether they are consistent with international practice: consistent international practice assists with certainty and efficiency in international dealings. A question beyond whether Appendix A is a better approach than the May draft is whether Appendix A is the most appropriate approach. Professor Duggan's evidence is relevant to this consideration:

> …so far as possible the conflict rules should be uniform with the conflict rules in other jurisdictions because if you have different countries saying different things about how conflict of laws issues should be resolved then you may end up with a different country's law apply depending on where a case happens to be litigated...You really want to avoid that to prevent parties forum shopping. I would go further than saying, yes, there should be conflicts provisions in the bill; I would say that there should be conflicts provisions in the bill and they should track the conflicts provisions in New Zealand, in all the Canadian provinces and in article 9.[45]

5.53 Based on the evidence received, the committee's view is that the Appendix A provisions are acceptable conflict of laws provisions - and they are definitely an improvement on those suggested in the May 2008 provisions, and better than no provisions at all. However, the committee also notes that the Appendix A provisions are substantially longer and more detailed than, for example, the provisions in the New Zealand legislation.

5.54 Given the committee's view that it is critically important to make the legislation as readily understandable as possible, and the recommendation that implementation of the reform be extended by at least 12 months (recommendation 3), the committee considers that the government should reconsider adopting the approach taken in an existing international model such as that in the New Zealand provisions. This approach could have the benefits of increasing certainty, relative simplicity and direct international consistency.

Recommendation 8

5.55 The committee recommends that the bill adopt existing international personal property security conflict of laws provisions, such as the New Zealand conflict of laws model, unless there is a particular reason to depart from those provisions.

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45 Professor Duggan, *Committee Hansard*, 23 January 2009, p. 3.

Hague Convention on intermediated securities

5.56 In addition to general conflict of laws provisions, the topic of the *Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary* which affects a particular category of personal property securities involving intermediated securities was raised with the committee.[46] The purpose of the convention is to harmonise conflict of laws provisions relating to intermediated securities.

5.57 The Australian Financial Markets Association is keen for Australia to become a party to the convention. Mr Love explained:

> I think the main thing to understand about the treaty is that it actually does not change substantive law with regard to people's rights. It is merely a conflicts of law regime where it is just pointing to which jurisdiction's laws are going to govern a particular dispute. It is seen generally, certainly by our members—and we have a large number of the international banks and others—that it is very desirable to have one set of principles governing the settlement of disputes around the world.[47]

5.58 The committee considers that in the interests of international consistency and efficiency the government could explore the ratification of this convention in accordance with the government's usual procedure.

Enforcement

5.59 A number of submitters provided evidence to the committee of their concern with aspects of the proposed approach to enforcement in this reform. Ms Nicole Rich, representing the Consumer Action Law Centre, outlined the centre's misgivings:

> We do not think there is any significant deterrence built into the legislation, and we believe that that is one aspect that could be improved. We think that sanctions are necessary for certain obligations, including that the register should not be accessed in the first place unless it is for an authorised purpose. That is why we think there need to be not only sanctions but a regulator to enforce them. The only regulator we could think of is ASIC, because that is not necessarily the role of the Privacy Commissioner, and we certainly do not believe that the registrar should have those kinds of functions.
>
> …
>
> You do not have to change any of the substantive content of the bill, but you can insert provisions that allow for a regulator to take action to enforce

46 For example, Mr Love, Australian Financial Markets Association, *Committee Hansard*, 22 January 2009, pp 2, 9 and 10.

47 Mr Love, *Committee Hansard*, 22 January 2009, p. 10.

> obligations or to sanction somebody for not complying with their obligations. [48]

5.60 The Office of the Privacy Commissioner also recommends that 'the PPS Bill contain additional offence provisions' due to concerns that the exposure draft provisions may contain legislative gaps and may not be sufficient to deter unauthorised conduct.[49]

5.61 The committee considers that this is another area of the draft bill which deserves significantly more detailed consideration before the terms of the bill are finalised. Some of the keys concerns about enforcement raised with the committee are:

- how the government proposes to ensure that information held in the register is not obtained for an improper purpose;
- if information is obtained for an improper purpose, how the person engaging in the conduct will be identified and sanctioned;
- whether the proposed penalties are appropriate, sufficient and likely to be effective;
- whether the registrar will have the power to initiate inquiries into possible inappropriate activity;
- whether there is a gap in the proposed enforcement because individuals and small businesses are exempt from the provisions of the Privacy Act; and
- whether the proposed reform should include requirements that can override contractual arrangements between the parties, and if so, in what circumstances.

Recommendation 9

5.62 The committee recommends that the scope and content of the enforcement provisions of the exposure draft bill be reviewed by the Department with particular attention to ensuring that the provisions are comprehensive and adequate.

Impact on the leasing industry – especially the position of an unregistered lessor

5.63 The exposure bill deems that certain leases will be subject to the provisions of the PPS reform. A "PPS lease" is explained by the Department as follows:

> A lease or bailment of tangible property, where the lessor or bailor regularly engages in the business of leasing or bailing tangible property, for a term of more than one year, an indefinite term, a term of less than one

48 Ms Rich, Consumer Action Law Centre, *Committee Hansard*, 6 February 2009, p. 38.

49 Office of the Privacy Commissioner, *Submission 25*, pp 8 and 9.

> year that is renewable or a term of up to one year where the lessee or bailee retains possession after one year. Where tangible property may or must be described by a serial number, a PPS lease need only be for a term of 90 days, a term of less than 90 days that is renewable or a term of less than 90 days where the lessee or bailee retains possession for at least 90 days.[50]

5.64 In relation to the definition of a PPS lease, Mr Turner believes that the exposure draft is 'replete with unnecessary definitions and long and complex provisions that rather than simplify and clarify add unnecessarily to its complexity and introduce confusion' and outlines his reasons for identifying this as one of those provisions.[51]

5.65 The committee received evidence that the provisions of the bill in relation to leasing will have a significant effect on the industry. One particular issue that attracted attention from witnesses relates to proposed sections 233 and 234 of the exposure draft and especially their effect on the priority of a lessor with an unperfected security interest. These sections are lengthy but relevant as they have the effect of significantly changing the existing rights of a lessor seeking to recover in situations of the insolvency of the grantor. Ms Flannery helped explain the effect of the draft provisions and the proposed change to existing law:

> I will just give you an example. I am a lessor of manufacturing equipment. I lease it to my colleague Karen for a term of two years but I fail to register it. As the law currently stands today, when Karen became bankrupt, I would just take my equipment back because I own that equipment. I would take it and lease it to someone else. If the PPS regime is introduced, my lease will be a PPS lease and I will have to register it.
>
> …
>
> Even though under general law at the moment I have an asset of $40 million that I can take back because I have legal title to it, I will not be able to take it back if I have forgotten to register. I will have to claim for what I am owed, because section 234 says I can claim that, but I will only get what every other unsecured creditor gets.[52]

5.66 Despite the significance of the change in the position of a lessor with an unperfected security interest, evidence from leasing industry representatives strongly supports the proposed reform. Mr Bills, Associate Director of the Australian Finance Conference (AFC), who for the purpose of giving evidence also represented the Australian Equipment Lessors Association and the Australian Fleet Lessors Association, observed that the big advantages of the reform are that members will be able to put all of their assets on one register rather than on separate registers or being

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50 Attorney-General's Department, *Submission No. 8*, p. 14.

51 Mr David C. Turner, *Submission 33*, p. 4.

52 Ms Flannery, Clayton Utz, *Committee Hansard*, 22 January 2009, p. 24.

unable to register certain property at all, and that the reform establishes clear and transparent priority rules, which will address uncertainties in the current law.[53]

5.67 Mr Bills's evidence is that the AFC members are not troubled by the proposed new requirement to register a lease in order to obtain perfection of the security interest:

> I know one situation in New Zealand that related to [property]. It was a situation where the person did not stick the [property] on the register. It seemed pretty clear to us. We did not really know why this had gone to court. It seemed to be crystal clear. If it has not been stuck on the register, you have not got a security interest in that asset. I think that was what the court decided. Most commentators in New Zealand were not surprised at all with the result. It was quite appropriate that that should occur that way.[54]

5.68 In relation to the effect of the law in other jurisdictions, the AFC's Legal and Market Consultant, Mr Stephen Edwards, observed:

> Talking to others who have watched the implementation of this kind of law across the globe, each country seems to have one or two leasing or title retention cases quite early in the piece where a lessor or a supplier ends up losing out because they have not registered. That gets the message across. In fact, a number of the discussions we have had with the Attorney-General's Department over time have been about making sure that, as far as possible, business is well educated about this bill.[55]

5.69 One other aspect of detail relevant to leases was raised with the committee by Clayton Utz in relation to the loss of priority of a lessor, bailor or consignor. Clayton Utz agrees that it is appropriate for a competing perfected security interest in a lease, bailment or consignment to defeat an unperfected interest, but essentially argues that any value remaining after the perfected interest has been satisfied should be returned to the party with the unperfected interest (the lessor) rather than it becoming an asset available to all unsecured creditors.[56]

Recommendation 10

5.70 The committee recommends that consideration be given to improving the priority of an unperfected lessor as against unsecured or other unperfected interests in the goods.

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53 Mr Bills, Institute for Factors and Discounters, *Committee Hansard*, 23 January 2009, p. 44.

54 Mr Bills, Institute for Factors and Discounters, *Committee Hansard*, 23 January 2009, p. 44.

55 Mr Edwards, Australian Finance Conference, *Committee Hansard*, 23 January 2009, p. 44.

56 Clayton Utz, *Submission 27*, pp 2 and 8 to 10.

Intellectual property

5.71 The basic approach taken by the Department is, in the main, to treat intellectual property in the same way as other property. In the Department's view:

> …when it comes to the rules about the creation of security interests in intellectual property, we would be looking to harmonise that consistent with our functional approach of saying, 'Why is intellectual property different from other forms of property? If this rule works for everything else, then it should work for intellectual property. Why should the rule for intellectual property be any different?' That is the approach we have been taking, and no significant case has been made for saying intellectual property warrants a special rule in terms of creating security interests. But there are a couple of special rules, I can indicate. We have acknowledged the need for a couple of special rules for intellectual property.[57]

5.72 The evidence the committee received which addressed issues in relation to intellectual property was somewhat sketchy. Little evidence was received from intellectual property organisations and representatives in Australia, and two submissions were received from international representative bodies based in the United States.[58]

5.73 In relation to the views of Australian stakeholders the Department advised the committee that:

> The answer to what do Australian stakeholders think about the bill is that initially there was a fair amount of 'If it's not broke, don't fix it,' amongst the intellectual property community. We have met with them and talked to them, and I think they now see that the bill can deliver benefits for them. The committee has before it a submission—I think it is No. 32—from the intellectual property committee of the business law section of the Law Council of Australia, in which they say:
>
> > The committee is in general agreement with the legislation and its objectives. It applauds the attempt at harmonisation of law on the subject.[59]

5.74 A few issues were raised with the committee by Australian organisations about the proposed intellectual property provisions, but these were limited and primarily quite technical concerns.[60]

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57 Mr Patch, *Committee Hansard*, 6 February 2009, p. 65.

58 The Queensland Law Society, *Submission 19*, and the Law Council of Australia Intellectual Property Committee of the Business Law Section, *Submission 32* are the Australian submissions. The two United States based organisations who made submissions were the International Trademark Association, *Submission 21*, and the International Film and Television Alliance, *Submission 22*.

59 Mr Patch, *Committee Hansard*, 6 February 2009, p. 64.

5.75 Despite the relatively sanguine view of Australian organisations, the exposure bill attracted international concern from two industry representative organisations based in the United States. In particular, the committee received a detailed submission, and heard evidence, from one of the organisations based in the United States – the International Film and Television Alliance (IFTA).[61] IFTA was keen to ensure that features of existing intellectual property arrangements for secured lending do not negatively impact on Australian and international secured lending for intellectual property that would jeopardise film industry.[62]

5.76 The Department advised the committee that in relation to international conflict of laws provisions, it agreed with IFTA that 'the territorial level is the basis on which the legislation should proceed.'[63] The Department also stated that it has considered all of the submissions made to it directly and all of the submissions received by the committee.[64]

5.77 The committee has not had time to analyse the merits of the proposed intellectual property provisions and the concerns raised about the effect of the provisions in detail. The committee is reassured by the Intellectual Property Committee's untroubled view of the exposure draft approach. Given the recommended extension of time for the implementation of the reform, the committee encourages the government to remain open to considering any concerns raised with it about these proposed sections. The committee also emphasises the importance of appropriate education about the bill in general and the intended effect of the intellectual property provisions in particular. Such education could include information in the explanatory memorandum and material targeted at relevant international industries and organisations, such as IFTA.

Recommendation 11

5.78 The committee recommends that the explanatory memorandum and the proposed education campaign adequately explain the purpose and effect of the draft intellectual property provisions, including disseminating the information to appropriately targeted international industries, organisations and stakeholders.

Chattel paper

5.79 The exposure bill introduces a concept that is not widely known in Australian personal property secured lending. The new concept is that of a 'chattel paper'. The concept of 'chattel paper' is known in the United States' PPS legislation and the

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60 For example, the Queensland Law Society, *Submission 19*, pp 5 and 6 raises a concern about proposed section 38.

61 International Film and Television Alliance, *Submission 22*.

62 International Film and Television Alliance, *Submission 22*, p. 1.

63 Mr Patch, *Committee Hansard*, 6 February 2009, p. 49.

64 Dr Popple, *Committee Hansard*, 6 February 2009, p. 62.

purpose of including these provisions in the bill is apparently an attempt to create stimulus for a 'chattel paper' industry in Australia.[65]

5.80 The Department describes a *chattel paper* as follows:

> Chattel paper is one or more writings that show the existence of both a monetary obligation and a security interest in or lease of specified tangible property or a security interest in intellectual property or an intellectual property licence. It does not include a negotiable instrument, an investment instrument, and investment entitlement or a document of title. An example of chattel paper is a hire-purchase agreement.[66]

5.81 It was the view of some submitters that these provisions are unnecessary and it would assist to simplify the bill if these provisions were removed. For example:

> So you have a competing issue as to whether, under this legislation, you register the chattel paper before you send off the receivables. Also, you have to assign transfers if you have to register transfers of receivables. It just creates complexity which is not needed. I would submit respectfully that in this market we do not have a chattel paper financing market, and that is one example where we have introduced that into this legislation and it is just not needed.[67]

5.82 Other evidence was given that it is considered unlikely that the provisions will achieve the intended result of generating an Australian industry in chattel papers, but that in the main the provisions are harmless:

> I do not think it would necessarily have the beneficial impacts that the draftspeople expected it to have in the sense of fostering more of a chattel paper industry, but I do not think there is any harm in leaving it in there.[68]

5.83 Still other evidence to the committee was that these provisions are welcome:

> From speaking to a number of people in the finance industry, I think there are some distinct advantages—including the chattel paper concept—in the bill. There may, for example, be some reasonable argument that to perfect a security interest in chattel paper you may not need to take physical possession of it or you may not need to have control of it in the way that the bill currently contemplates. I think the proposed bill provisions will work and will work effectively, and they are closely modelled on the provisions that exist overseas. But, having said that, it is not a part of the bill that is indispensable in terms of whether or not the reform process goes forward.[69]

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65 Ms Flannery, Clayton Utz, *Committee Hansard*, 22 January 2009, p. 31.

66 *Submission No. 8*, p. 11.

67 Mr Canning, Mallesons Stephen Jacques, *Committee Hansard*, 23 January 2009, p. 34.

68 Ms Flannery, Clayton Utz, *Committee Hansard*, 22 January 2009, p. 31.

69 Mr Wappett, Piper Alderman, *Committee Hansard*, 22 January 2009, p. 18.

5.84 As noted above, the committee is of the view that the draft bill should be simplified as much as possible, one aspect of which could be to remove these provisions. The committee considers that if the government is minded to follow Professor Duggan's suggestion to primarily adopt one of the international models then the Australian chattel paper provisions should not be added to the chosen international model. However, if the exposure draft model is retained the committee considers that the Department should reconsider the importance of these provisions and remove them if they are not essential to the reform.

CHAPTER 6

Other technical matters

6.1 The fact that the committee felt that the timeframe for the inquiry was too short to fully investigate the exposure draft bill has been mentioned elsewhere in this report. One of the ramifications of this is that there were a range of matters relating to the bill of potential interest to the committee that have not been considered.

6.2 Although these aspects of the exposure draft bill have not been analysed for the purpose of the inquiry, as this inquiry relates to an exposure draft the committee thought there would be some benefit in identifying them for the Senate, the Department and anyone else with an interest in personal property securities who may wish to provide comments to the Department for consideration.

6.3 Some of the topics that the committee would have liked to consider include:

- the draft provisions relating to *purchased money security interests* (PMSI);
- the draft provisions relating to *all present and after acquired property*;
- the interaction of the draft bill with the Consumer Credit Code; and
- the draft transitional provisions.

Suggestions for technical amendments to be made to the bill

6.4 Submissions to the inquiry made numerous suggestions for amendments to the bill, and many of these were quite technical. The committee also has not had time to consider many of these in detail.

6.5 The Department advised the committee that staff members "have certainly considered all the submissions that we have received thus far, and also we have taken the liberty of considering all the submissions that you have received and published on your website."[1]

6.6 Again, the committee thought there would be some benefit in consolidating them in once place for the Senate, the Department and anyone else with an interest in personal property securities who may wish to provide comments to the Department for consideration. A table containing many of these suggestions is at Appendix 3. The suggestions are drawn directly from many of the submissions made to the committee. Unfortunately there was not time to ensure that the table includes all of matters brought to the committee's attention.

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1 Dr Popple, *Committee Hansard*, 6 February 2009, p. 62.

Senator Trish Crossin

Chair

Liberal Senators' Dissenting Report

Overview

1.1 Liberal senators support the objectives of the Personal Property Securities Exposure Draft Bill, and agree that overall they should boost efficiency and provide cost savings for stakeholders. While acknowledging these potential advantages, Liberal senators are concerned by particular aspects of the reform.

1.2 Liberal senators highlight the committee's concern about the length, complexity and prolixity of the exposure draft bill. Despite the Department's intention to increase certainty of the law, the new provisions will actually significantly increase uncertainty about the effect of the law;[1]

1.3 Furthermore, the bill suffers from significant drafting issues making it difficult to understand the proposed law.[2] The main failures of drafting have been identified as the detailed cross-referencing, unnecessarily complex terminology and verbose provisions which seriously affect the comprehensibility of the provisions.[3]

The majority report

1.4 Liberal senators wholly support recommendations 1, 2, 3 and 10 of the majority report.

1.5 Although differing in degrees of emphasis and detail, Liberal senators also support in principle the majority recommendations except recommendation 7 (in relation to the *commercially reasonable manner* test).

1.6 Particular aspects of the proposed reform of concern to Liberal senators relate to:

- consultation and education;
- interim review of the reform;
- privacy protections and the Privacy Impact Assessment;
- the section 235(1)(b) *commercially reasonable manner* test;
- international conflict of laws provisions;
- enforcement; and
- regulations.

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1 For example, Mr Loxton, Allens Arthur Robinson, *Committee Hansard*, 23 January 2009, p. 28.

2 Drafting issues are discussed in detail in chapter 4.

3 For example, see Professor Duggan, *Submission 1*, p. 6.

More effective consultation and education

1.7 Liberal senators support committee recommendation 2 that commencement of any PPS reform should be deferred for at least 12 months. This time should be used first to undertake new consultations with stakeholders, including educating those who will be affected by the reform but who are not yet engaged in its development. The time should then be used to redraft the bill and to continue to consult stakeholders about it so that a final draft version of the bill can be settled.

1.8 Although the Department has undertaken consultation with stakeholders, Liberal senators are particularly concerned that significant business sectors that will be affected by the reform are not yet engaged with its development. As Mr Peter Faludi, Special Counsel for DLA Phillips Fox, informed the committee:

> …the number of people who are focused on the legislation is a lot less than the number of people who are not. So it is often difficult to engage people in discussions because it is something they have not really focused on.[4]

1.9 This reform is of such significance that it is essential that all affected stakeholders are involved first in the development of the legislation and then in a widespread education campaign. To ensure that the extra time taken is used effectively, Liberal senators advocate a planned program of consultation, education and government response.

Recommendation 1

1.10 In relation to consultation and education Liberal senators recommend that:

- **(a) the government uses the committee report and the Liberal senators' additional recommendations to undertake new consultation about the proposed reform;**
- **(b) the government should particularly identify stakeholders who are not yet engaged with the reform and educate them about the scope and significance of the proposals;**
- **(c) a considerably revised draft bill should be publicly released within six months of the date of this report;**
- **(d) stakeholders should be extensively educated and consulted about the revised exposure draft for three months from the release of the draft; and**
- **(e) a final exposure draft bill should be referred to the Senate within six months of the release of the revised draft bill requesting that the final exposure draft is referred to this committee for consideration accompanied by:**

4 Mr Faludi, *Committee Hansard*, 22 January 2009, p. 31.

(i) the proposed draft regulations; and

(ii) a report that outlines the key concerns raised with the government by stakeholders and the government's response to those concerns and that identifies the differences between the newly referred bill and the November 2008 exposure draft bill.

Review of the reform

1.11 Liberal senators agree that it is critical to check that the final legislation is effective by reviewing its operation. The committee has recommended that it be reviewed within three years of its commencement (committee recommendation 3). However, the scope and complexity of this reform is of such magnitude that Liberal senators believe that an interim assessment of the reform should be made. To do this government should table a report on the first year of operation of the reform within 15 months of the commencement of the Act. The report should include the views of all stakeholder groups and the government's response to these views.

Recommendation 2

1.12 Liberal senators recommend that the government table a report in Parliament on the first year of operation of the reform within 15 months of the commencement of the Act. The report should include the views of stakeholders, including representatives of industry, governments, lawyers, consumers and academics and the government's response to these views.

Privacy protections

1.13 An area of particular concern to some submitters, and to Liberal senators, relates to privacy protections for the proposed national online PPS register. The committee has made an important recommendation that key privacy protections be included in primary legislation and not left to regulations (majority recommendation 4).

1.14 The committee recommendation specifically refers to a prohibition on making the address details of any individual public. Liberal senators agree with this, but also seek to ensure that other key privacy safeguards are included in the primary legislation. To make certain that this occurs, Liberal senators recommend that the Privacy Impact Assessment identifies key privacy protections that should be contained in the primary legislation.

Recommendation 3

1.15 Liberal senators recommend that the Privacy Impact Assessment identify key privacy protections which should be contained in the primary legislation.

Privacy Impact Assessment

1.16 In relation to the Privacy Impact Assessment, Liberal senators believe that it is not enough for the Department to conduct its own Assessment. Without impugning

the integrity of the Department's staff, this is a matter of such importance that it should be conducted by an independent person or organisation with direct experience in undertaking such assessments.

1.17 Moreover, not only should the Assessment be made public, but stakeholders are entitled to be told directly of the government's response to the Assessment.

1.18 If any other privacy issues raised by the Office of the Privacy Commission are considered separately (as per majority recommendation 6) this consideration and the government's view should also be made public.

Recommendation 4

1.19 Liberal senators recommend that:

(a) a Privacy Impact Assessment be undertaken by a person or organisation that is independent from the government and who has experience in undertaking such assessments; and

(b) the Privacy Impact Assessment and the government's response to it should be tabled in Parliament within 2 months of the date the Assessment is completed.

Recommendation 5

1.20 Liberal senators recommend that any issues considered in accordance with majority recommendation 6 and the government's response to them should be tabled in a report to Parliament within 2 months of the date that the Privacy Impact Assessment is completed.

Commercially reasonable manner test - an unnecessary burden on business

1.21 As noted in the committee report, proposed section 235 of the bill will require duties and obligations to be exercised *honestly* and in a *commercially reasonable manner*.

1.22 Liberal senators support the requirement to act honestly, but are not convinced of the need to introduce a new legal test into Australia to act in a commercially reasonable manner. The committee received evidence from a number of submitters that this obligation will increase uncertainty, fetter the contractual ability of parties and increase litigation. In relation to both tests the combined four big law firms observed that:

> These are new tests which will need litigation over many years to define. These can significantly add to the burden of secured parties, when the common law and statute law is adequate in its current form. They will add to uncertainty and the cost of enforcement, and have the potential to give rise to significant amounts of litigation. It decreases flexibility in a party's

> ability to protect its commercial interests. They run counter to the Bill's aim for simplicity and clarity and should be deleted.[5]

1.23 Even Professor Duggan, who is a proponent of the Canadian PPS models (which mostly include this obligation) sees it as:

> …a non-essential provision. I accept the argument that because it is open-ended it may produce uncertainty and litigation. My inclination would be to scrap it.[6]

1.24 Furthermore, Clayton Utz, who generally supported the exposure draft bill, observed that:

> There are no compelling policy reasons for Australia to adopt a statutory standard of 'acting in a commercially reasonable manner'. Also, the inclusion of such a test does not promote commercial certainty.[7]

1.25 Liberal senators are also concerned that because the requirement is unclear and open to different interpretations it is likely to increase red tape: a business may need to take protective steps to document that it is not acting in a commercially unreasonable manner and this has the potential for costs to business to increase.

1.26 In the view of the Liberal senators this provision should not be included in any PPS reform and dissent from committee recommendation 7 in this regard.

Recommendation 6

1.27 Liberal senators recommend that the requirement to act in a *commercially reasonable manner* be removed from proposed section 235 of the bill and be excluded from any future version of the reform.

International conflict of laws provisions

1.28 Evidence to the committee about the need for international conflict of laws provisions was overwhelming. A clear view was expressed to the committee that the provisions outlined in Appendix A to the Department's submission[8] were a marked improvement on earlier draft provisions.[9] However, there was insufficient time for the committee to explore in detail exactly what the content of Australian conflict of laws provisions should be.

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5 Allens Arthur Robinson, Blake Dawson, Freehills and Mallesons Stephen Jacques, *Submission 30,* p. 14.

6 Professor Duggan, *Committee Hansard*, 23 January 2009, p. 7.

7 Clayton Utz, *Submission 27*, pp 1 and 2.

8 Attorney-General's Department, *Submission 8*, pp 143 to 163.

9 For example, see Mr Wappett, Piper Alderman, *Committee Hansard*, 22 January 2009, p. 13.

1.29 Liberal senators were interested in the evidence of Ms Flannery of Clayton Utz who observed that:

> I definitely support a conflict of laws regime going in…it would be a missed opportunity to simplify what is currently an unclear area of the law. But if you compare the regime that is in appendix A with, for example, the New Zealand regime, it is a lot more complex…I can understand the rationale, in part, for some of the complexity in appendix A, but I think that a simpler set of rules would be better.[10]

Recommendation 8

1.30 Liberal senators recommend that the government further considers the content of international conflict of laws provisions and incorporate into the bill either:

- **(a) a simple and effective model of conflict of laws provisions based on an existing international model; or**
- **(b) the conflict of laws provisions at Appendix A to the Department's submission.**

Enforcement

1.31 Discussion in the committee report about enforcement identifies a number of concerns about the proposed approach. The committee report also noted that this is an area of the draft bill which deserves significantly more detailed consideration before the new bill is finalised.

1.32 Liberal senators have particularly identified this as an area requiring detailed consideration by the government and stakeholders.

Recommendation 8

1.33 Liberal senators recommend that the government strengthen the proposed enforcement provisions with a focus on:

- **(a) comprehensive and effective sanctions for improper use of the register;**
- **(b) ensuring the registrar's ability to inquire into suspect activity; and**
- **(c) the availability of civil and criminal action with appropriate penalties.**

Intellectual Property

1.34 Further to the majority recommendation to explain the purpose and effect of the draft intellectual property provisions (majority recommendation 11), Liberal

10 Ms Flannery, *Committee Hansard*, 22 January 2009, pp 25 and 26.

senators are keen to ensure that any outstanding concerns about these provisions are identified and addressed.

1.35 This is an area in which the government should target its further consultation and should report on any concerns.

Recommendation 9

1.36 Liberal senators recommend that the government should identify any outstanding concerns about the intellectual property provisions of the draft bill and should outline the concerns and its response in its report to the Senate (as per Liberal senators' recommendation 1(f)).

Regulations

1.37 Regulations supporting this legislation are expected to be substantial. The Department released draft regulations in May 2008 and sought feedback on them. The Department gave evidence that it is currently reviewing comments it received and expects to issue a revised version in about March 2009.[11]

1.38 Because of the extent and importance of the regulations to this reform, Liberal senators are of the view that they should be independently reviewed. The purpose of the review would be not only to assess the content of the proposed regulations, but also to consider whether it is more appropriate for any aspect to be included in the primary legislation rather than in delegated legislation.

1.39 The content of any regulations is necessarily informed by the content of the supporting legislation so it would seem effective if regulations continue to be developed in parallel with the development of the primary legislation.

1.40 Liberal senators recommend that when the revised draft bill is referred to the Senate for consideration that it is accompanied by the proposed draft regulations (Liberal senators' recommendation 1(e)).

Education campaign

1.41 In addition to the education required immediately to engage stakeholders who are not yet involved in the development of the model (see the *More effective consultation and education* section above) substantial education will be required when a final bill has been settled.

1.42 It is often appropriate for legislation to be passed before undertaking education about it. However, this reform proposes a national scheme that will require a statutory referral of power from the States through the passage of State legislation before the Commonwealth legislation can be enacted. Because of the somewhat

11 Mr Glenn, *Committee Hansard*, 21 January 2009, pp 14 to 16.

cumbersome process required to establish the reform the commencement date is likely to be quite soon after the passage of the Commonwealth Act.

1.43 As a result, it is important that education starts in anticipation of the commencement of the scheme. All stakeholders will need to understand the reform and businesses small and large will particularly need to know what they need to do to prepare for the introduction of the system. Once the bill is ready for passage through a State parliament, Liberal senators strongly support a comprehensive education campaign in preparation for implementation of the reform.

Senator Guy Barnett **Senator Mary Jo Fisher** **Senator Russell Trood**

Deputy Chair

APPENDIX 1

SUBMISSIONS RECEIVED

Submission Number	Submitter
1	Faculty of Law, University of Toronto
2	DLA Phillips Fox
3	Office of the Victorian Privacy Commissioner
4	Institute for Factors and Discounters
5	James Kimpton
6	Computershare
7	Veda Advantage
8	Attorney-General's Department
9	Australian Finance Conference
10	Law Society of NSW
11	Simon Begg
12	Piper Alderman
13	Insolvency and Trustee Service Australia
14	Australian Institute of Credit Management
15	Legal Aid Queensland
16	Women's Legal Service Australia
17	Australian Privacy Foundation
18	Motor Trades Association of Australia
19	Queensland Law Society
20	Consumer Action Law Centre
21	International Trademark Association
22	Independent Film & Television Alliance
23	Australian Financial Markets Association
24	Australian Bankers' Association
25	Office of the Privacy Commissioner
26	Australian Securitisation Forum
27	Clayton Utz
28	Baycorp

29	Ms Lang Thai
30	Allens Arthur Robinson, Blakes Dawson, Freehills and Mallesons Stephen Jaques
31	Insolvency Practitioners Australia
32	Intellectual Property Committee of the Business Law Section of the Law Council of Australia
33	Mr David Turner

ADDITIONAL INFORMATION RECEIVED

1	PPS Reform Newsletter – November 2008. Provided by Attorney-General's Department 22 January 2009
2	Personal Property Securities Reform Discussion Paper 'Regulations to be made under the Personal Property Securities Act' August 2008. Provided by Attorney-General's Department 22 January 2009
3	PPS Consultative Group (as at 14 October 2008) Provided by Attorney-General's Department 22 January 2009
4	Review of the law on Personal Property Securities "An International Comparison" July 2006. Provided by Attorney-General's Department 22 January 2009
5	"The Cost and Benefits of Personal Property Securities (PPS) Reform" Report by Access Economics Pty Ltd for the Australian Attorney-General's Department. Provided by Attorney-General's Department 22 January 2009
6	Banking and Finance Update November 2008. Provided by DLA Phillips Fox 23 January 2009
7	Letter to Committee Secretary. Provided by DLA Phillips Fox 23 January 2009
8	Guidelines for the use of Data-Matching in Commonwealth Administration (February 1998) provided by the Office of the Privacy Commissioner (Cth) 23 January 2009.
9	Hansard transcript 11 November 2002 (Page 8746) regarding public record indicating the Governments proposals to implement the *Hague Convention on the Law Applicable to Certain Rights in Respect of*

Securities Held with an Intermediary in Australia. Provided by the House of Representatives Hansard.

10 Hansard transcript 3 November 2003 (Page 21896-21897) regarding public record indicating the Governments proposals to implement the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary in Australia. Provided by the House of Representatives Hansard.

11 Report by the Law Commission of Canada titled Leveraging Knowledge Assets - Reducing Uncertainty for Security Interests in Intellectual Property. Provided by Professor Anthony Duggan 27 January 2009

12 Personal Property Security Law Reform in Canada. Provided by Professor Anthony Duggan 27 January 2009

13 Note on the proposed conflict of laws provisions in Appendix A to the Revised Commentary. Provided by Professor Anthony Duggan 27 January 2009

14 Equipment Finance Overview. Provided by Australian Finance Conference 27 January 2009.

15 Privacy Impact Assessment Guidelines. Provided by Office of the Privacy Commissioner (Cth) 23 January 2009

16 Effective Matching graph. Provided by Veda Advantage 22 January 2009

17 Independent Film and Television Alliance correspondence received 2 February 2009

18 Australian Bankers Association correspondence received 2 February 2009

19 Personal Property Securities Law Reform - Security and Title Registers. Mr Simon Begg - received 4 February 2009

20 Answer to Question on Notice – Office of the Privacy Commissioner, received 6 February 2009

21 Answer to Question on Notice – Attorney-General's Department, received 12 February 2009

22 Answer to Question on Notice - Attorney-General's Department, received 2 March 2009

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Sydney, Thursday 22 January 2009

EAST, Mr David, Partner
DLA Phillips Fox

FALUDI, Mr Peter, Special Counsel
DLA Phillips Fox

FLANNERY, Ms Angela, Partner
Clayton Utz

GILBERT, Mr Ian, Director, Retail Policy
Australian Bankers' Association

GOUMENIS, Ms Sonia, Partner
Clayton Utz

LEE, Ms Karen, Senior Associate
Clayton Utz

LOVE, Mr David, Director – Policy
Australian Financial Markets Association

MICHAEL, Dr Katina, Board Member
Australian Privacy Foundation

WAPPETT, Mr Craig, Partner
Piper Alderman

Sydney, Friday 23 January 2009

BILLS, Mr John, Executive Officer *and* Associate Director
Institute for Factors and Discounters *and* Australian Finance Conference

CANNING, Mr John, Partner
Mallesons Stephen Jaques

DUGGAN, Professor Anthony, Professor of Law
Private Capacity

EDWARDS, Mr Steve, Legal and Market Consultant
Institute for Factors and Discounters *and* Australian Finance Conference

GREEN, Mr Brendan, Chairman
Institute for Factors and Discounters

HOPKINS, Mr Adam, Representative of Member Company
Australian Finance Conference

LOWDEN, Mr Patrick, Partner
Freehills

LOXTON, Mr Diccon, Partner
Allens Arthur Robinson

PILGRIM, Mr Timothy, Deputy Privacy Commissioner
Office of the Privacy Commissioner

SOLOMON, Mr Andrew, Director Policy
Office of the Privacy Commissioner

STRASSBERG, Mr Matthew, Senior Adviser, External Relations
Veda Advantage

WALKER, Mr Matthew, Consultant
Veda Advantage

WHITTAKER, Mr Bruce, Partner
Blake Dawson

Melbourne, Thursday 29 January 2009

CLEARY, Ms Susan, Vice President and General Counsel
Independent Film and Television Alliance

BRENNAN, Mr Lorin, Legal Consultant
Independent Film and Television Alliance

BEGG, Mr Simon
Private Capacity

WHITTAKER, Mr Bruce, Partner
Blake Dawson

COX, Mr Berkeley, Partner,
Mallesons Stephen Jaques

Canberra, Friday 6 February 2009

DUCKWORTH, Mr Colin, Senior Policy Officer
Motor Trades Association of Australia

MCGILVRAY, Mr Philip, Executive Director
Motor Trades Association of Australia ACT

RICH, Ms Nicole, Director – Policy and Campaigns
Consumer Action Law Centre

BOBBIN, Mr Wayne, Principal Legal Officer
Attorney-General's Department

GLENN, Mr Richard, Assistant Secretary
Attorney-General's Department

PATCH, Mr Robert, Principal Legal Officer
Attorney-General's Department

POPPLE, Dr James, First Assistant Secretary
Attorney-General's Department

APPENDIX 3 Consolidated table of some of the suggestions made to the committee for amendments to the Personal Property Securities Bill 2008 [Exposure Draft]

Organisation	Section	Issue	Example	Recommendations	
Queensland Law Society and Piper Alderman	Part 1.3, Divisions 4 & 5	There are two different concepts of 'control' used in the Bill		While having two different concepts seems to be causing some confusion, we believe 'control' is the appropriate term to be used in both contexts and suggest any confusion may be overcome by the inclusion of a note at the start of each Divisions 4 & 5 in Part 1.3 of the Bill highlighting that there are two different concepts and briefly stating the purpose of each of them	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	6	Application of Act to interests		The term 'interests' should be clarified as to whether or not it applies only to security interests or if it applies more broadly	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	6(1)(f)(vi)	Query why this provision only excludes assignments of accounts rather than assignments of chattel paper made to facilitate collection as well			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	6(1)(j)	Query whether this is intended to exclude "crops" as defined in section 26			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	6	Relationship with other laws – overriding provisions in the *Corporations Act* do not		Inconsistent State legislation should be repealed, if not, Commonwealth PPS Bill should cover the field.	

Organisation	Section	Issue	Example	Recommendations	
		completely match the relevant State laws.			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	26	Definition of 'Account'		Should be limited to actual debt. This would prevent assignments of corporate bonds being registered twice.	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	26	Definition of ADI Account		Needs to be a concept of account with a bank or deposit taking entity which is not Australian	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	26	Definition of Bankruptcy and Insolvency		Would be preferable to not use the constitutional concept and needs more specific definitions referring to voluntary administration, liquidation and bankruptcy under the *Bankruptcy Act.*	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	26	Definition of Chattel Paper		Recommend this term be deleted as it will generate significant uncertainty and confusion	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	26	Definition of Clearing and Settlement Facility	This is made unnecessarily complex as it incorporates a Corporations Act definition which can only be understood by a very time consuming exercise. This is one example of difficulties that		

Organisation	Section	Issue	Example	Recommendations	
			arise when definitions are imported from other statutes		
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	26	Definition of Consumer Property		Query why it is not limited to property acquired for personal, domestic or household purposes and wonder whether this definition is necessary due to its minimal use in the legislation and over-broad definition.	
Consumer Action Law Centre	26	Definition of Consumer Property		Should be amended to provide that it covers personal property held by an individual, other than personal property held *predominantly* in the course or furtherance of carrying on an enterprise	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	26	Definition of Controllable Property		Definition appears to be unduly restrictive and query why it does not also cover performance bonds and bank guarantees	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques		Definition of Control	Legislation difficult to follow because there are two different sets of definitions	Suggest that where additional concepts are necessary in the context of circulating assets, they are expressed in terms of restrictions, rather than control	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques		Definition of Future Advance		Given our view that section 60 would be better served saying that a security interest may secure any obligation, present or future, actual contingent, this current definition of ‘future advance’ unduly narrows what obligations can be secured	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques		Definition of Grantor	Definition is some what counter-intuitive in paragraphs (a) and (f) (and paragraph		

Organisation	Section	Issue	Example	Recommendations	
			(e) to the extent it picks up those paragraphs)		
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques		Definition of Investment Instrument		May be too limited. Should generally be extended to tradable investments and securities	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques		Definition of Licence		Would be better to have a separate provision to explicitly state that licences are property, and may be the subject of a security interest and dealt with by the secured party in accordance with the security interest unless otherwise provided by the Act creating the licence or regulations made under it. It is also not clear the why definition should be limited to licences that are transferable.	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques		Definition of Negotiable Instrument	Definition includes things that are not negotiable in the legal sense (paragraphs (d) and (e)). The intention behind section 41(2)(c) is unclear: does it include transfers of mortgages?		
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques		Definition of New Value		It is not clear why this definition should exclude value that is provided by way of reducing or discharging an existing debt or liability	
Allens Arthur Robinson		Definition of Perfection	Differing uses of	This definition, when it relates to foreign	

Organisation	Section	Issue	Example	Recommendations	
Blake Dawson Freehills Mallesons Stephen Jaques			the word in sections 80 to 83 compared to section 64.	jurisdictions, should relate to the perfection of that security interest under that particular law	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques		Definition of Signed		There should be provision allowing other parties to rely on the assumptions in ss128 and 129 of the Corporations Act, and other rules as to ostensible authority	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	Section 19	Unclear wording		This section and Sub-division C should make it clear that no formality or requirements for granting security under any state law apply.	
Australian Securitisation Forum	28	Transfer of assets under a trust-back or seller trust arrangement		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	
Australian Securitisation Forum	28	Extinguishment of SPV's interest. The operation of the Act is not clear in these circumstances and raises a number of issues including enforceability issues		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	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	Section 28(1)	Meaning of "security interest"	The breadth of the definition undermines certainty for the PPS register and legislation in a number of ways.	Would be useful to clarify what is meant by "in substance" and exclude particular arrangements that might arguably be included in the definition, but (a) are not generally regarded as security interests, or (b) should not be included as security interests, for policy reasons.	

Organisation	Section	Issue	Example	Recommendations	
			First, in reference to arrangements that "in substance" secure payment or performance of an obligation will generate uncertainty. Unless the PPS Bill provides greater clarity about how "substance" is to be assessed, the current definition of "security interest" is likely to unsettle negotiated allocations of contractual risk. Second, in view of the sanctions that apply if something is a security interest but is not registered, parties will be inclined to register everything they could remotely consider as a security interest		
Allens Arthur Robinson	Section	Why an assignment which	Can give rise to		

Organisation	Section	Issue	Example	Recommendations	
Blake Dawson Freehills Mallesons Stephen Jaques	28(3)(a)	is not a security interest be regarded as a security interest, particularly given the width of the definition of "account" and "chattel paper"	unforeseen consequences, in terms of unwritten and voluntary assignments, it will no longer be possible to have an unwritten assignment enforceable against third parties and may add to the complexity and cost of securitisation		
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	Section 28(3)(a)	Relationship with extinguishment provisions	Query why a different policy regime seems to apply with respects to accounts as extinguishment provisions are in many ways more favourable to the holders of security interests than the priority provisions	Suggest there should be a similar concept as provided in subsection (5) so that the secured party is taken to have "possession" of investment entitlements, investment instruments, and negotiable instruments that are evidenced by an electronic record if they are registered in the name of the secured party. At the moment that appears to have been left out of the definition of "control"	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	Section 28(3)(a)	Transfers and novations	We assume that a "transfer" does not include a simple declaration of trust.	Further clarification needed	
Allens Arthur Robinson	Section	Absolute assignments and		If absolute assignments are retained as security	

Organisation	Section	Issue	Example	Recommendations	
Blake Dawson Freehills Mallesons Stephen Jaques	28(3)(a)	control		interests, we suggest that where a notice is given to the party that owes the account, and it is an absolute transfer, that is, of the type referred to in s12 of the *Conveyancing Act 1919* (NSW) and its equivalents, or its equitable analogue, then that should be regarded as "control" or "possession" for the purpose of the provisions of the legislation. In other words, no registration should be necessary	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	Section 28(3)(a)	Chattel Paper		Recommend that a legal assignment of an account of chattel paper (that is an absolute assignment where notice has been given to the account debtor) be excluded.	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	Section 28(3)(c)	Definition of "commercial consignment" will include arrangements which are not functionally security interests	While the example of the auctioneer has been correctly excluded, it leaves in arrangements such as artists leaving their paintings with a gallery for exhibition and sale.		
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	28(5)	This sub-section appears to be designed to overcome the risk that a person cannot take a valid security interest over the benefit of obligations that the person itself owes to the grantor		If the legislature is to take this step, it would be appropriate to extend it to apply to all obligations, rather than just obligations under an account	
Allens Arthur Robinson Blake Dawson	Section 30(1)			Seems to serve no purpose. Should it be deleted?	

Organisation	Section	Issue	Example	Recommendations	
Freehills Mallesons Stephen Jaques					
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	Section 30(2)(a)	Meaning of the words "is an obligation for the term of the lease" is quite unclear		Further clarification needed	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	Section 30(9)(a)	In most lease transactions, the implicit interest rate will not be "specified"		Recommend that the discount be determined by the implicit yield in the lease, and that the section only rely on a specified interest rate where a rate is specified expressly for this purpose	
Australian Securitisation Forum	32	Deferred Purchase Price Arrangements	The assets in connection with a securitisation transaction may sometimes be assigned to the securitisation vehicle on a deferred purchase price basis	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	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	Section 32(1)	Unclear what is meant by "the collateral" when more than one asset is bought under the one arrangement	Example: if one borrows $100,000 to buy 10 cows at $10,000 per cow, do the cows as a group constitute the collateral, or does each cow secure $10,000	Further clarification needed	
Allens Arthur Robinson Blake Dawson	Section 32(1)(b	It is not uncommon in financing transactions for	Similarly, value could be paid to	It is important that this section be sufficiently flexible to accommodate all these types of arrangements	

Organisation	Section	Issue	Example	Recommendations	
Freehills Mallesons Stephen Jaques	)	value to pass through the hands of a number of parties before it is ultimately applied to acquire an asset.	one party, in consideration for that party separately providing funding to the party that ultimately acquires the asset. It is also possible for the value to be provided in a structured financing after the asset has been acquired.		
Australian Finance Conference	32(2)	A sale and leaseback arrangement is excluded from being a PMSI		The AFC recommends a security taken by the financier will be a PMSI where the parties have agreed that, prior to the grantor acquiring personal property, the financier will 'reimburse' the grantor for the purchase price and take a security interest over the property. The AFC also recommends PMSI priority should apply if the secured party registers on the PPSR within a specified period after it advances the finance	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	Section 32(4)	This section may cause confusion	Does it mean that the same security interest has to secure the refinancing or consolidation, even if the secured parties can be	Would be easier if the definition "purchase money obligation" was broader	

Organisation	Section	Issue	Example	Recommendations	
			different?		
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	Section 32(5)	It is not clear how a refinancing would fit into the definition of "purchase money obligation"	In a refinancing, money is provided to repay money which was used to enable the grantor to acquire its interest. The value given by the refinancing lender does not assist the grantor acquire collateral, it has already acquired the collateral		
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	Section 34(1)	Meaning of *Accession*		This should be expressed as the separate identity of the other tangible property being lost. The identity of the improved property will continue	
Australian Securitisation Forum	36	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		Only chattel paper evidenced electronically should fall within the ambit of the regime. 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	

Organisation	Section	Issue	Example	Recommendations	
		not have possession of the paper			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	Section 36	The meaning of Chattel Paper is not familiar in Australian law and will cause confusion.	We understand that the concept of chattel paper was originally developed in the US to facilitate floor plan financing and instalment financing. It was then extended to lease financing. By comparison, under the current law in Australia, if a financier takes collateral over assets and receivables it does so without "chattel paper". Under current Australian law, there is not the existing legal basis for the operation of chattel paper. The Bill does not seem to change that, so that the concept will not be able to		

Organisation	Section	Issue	Example	Recommendations	
			be used in practice.		
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	Section 42(1)	The reference to a "dealing" is perhaps over-broad	Does not specify if it includes granting a new security interest, or letting the property for hire	Needs further clarification	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques ques	Section 42(2)	Unclear what this section is designed to achieve	If it was possible to have a security interest over non-transferable property, then why should it not be possible to obtain a security interest over proceeds (e.g. compensation for termination of a licence)?		
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	Section 43(5)	Meaning of *Possession*	We presume that possession has been used because special priority is given to acquirers of chattel paper who take possession of it under section 118. It may also be helpful to set out when non-electronic chattel	Bill should make it clear whether it is possible to possess such chattel paper and, if so, which copy the acquirer must take possession of to perfect its security interest	

Organisation	Section	Issue	Example	Recommendations	
			paper is possessed. Chattel paper may be executed in counterparts.		
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	Section 47	Drafting of this section is somewhat unclear	Not sure why the definition of "controllable property" only includes a "letter of credit" and does not extend to similar contingent instruments, such as bank guarantees or performance bonds		
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	48	There should be a provision similar to section 45(4) covering the position where someone on the secured party's behalf is registered as owner of the investment entitlement.	Does not seem to be any provision covering the position where the secured party is actually registered as owner of the investment entitlement	That, we suggest, should be regarded as possession	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	49	Unclear how this section deals with a negotiable instrument that is itself an instrument and is not evidenced by a certificate, for instance, a promissory note, letter of credit or a bill	As negotiable instruments are defined by reference to an instrument, in what circumstances would it be		

Organisation	Section	Issue	Example	Recommendations	
		of exchange	represented by a certificate that is not the instrument itself?		
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	51(1)(a)		Current protection of the holder of a floating charge against execution creditors and also against the Australian Tax Office and similar provisions, should continue.	We suggest that control would be sufficient, but also there should be a new test as to dealing with the asset being restricted. This would more accurately reflect current law.	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	51(2)	Under current law, an absolute assignment of accounts could not be a floating charge, and thus would not be available for preferential creditors	If there is an absolute assignment, there is no requirement for the proceeds to be paid into a proceeds account. It should be sufficient if the register indicates that it is an absolute assignment	The same principle should also apply to a transfer to chattel paper (if that concept is retained)	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	51(2)(b)	Definition of "control"		Only applies to a band of assets, and not all possible current assets. This points to the need for a wider definition of restricting dealing. There is, it appears, no definition of control for currency, or a negotiable instrument that is evidenced by a certificate (or is an instrument)	

Organisation	Section	Issue	Example	Recommendations	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	52	Wording in the Annexure	Tests should not be "controlled" which is already used in a different context in relation to what is or is not controlled in the context of "controllable property"	It should be whether dealing with the asset is restricted, with the requirement (as per recent English cases) that proceeds be paid into an account in which there are some restrictions.	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	52(1)	Control of a non-ADI Account that is the proceeds of inventory		The same principles should apply to an account with an offshore bank as apply to an ADI account. Equally in subsection (2), the money should be able to be paid into an account with a non-ADI offshore which is under control. This is not uncommon in foreign currency transactions	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	52(2)(b)	The reference to a person's "usual practice" is unduly restrictive		It may be clearer if the section were expressed the other way around: namely, that the secured party had control unless it is shown that the grantor's usual practice, with the express or implicit consent of the secured party, is to pay the proceeds elsewhere	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	53(2)	Control of inventory	The current relevant test as to whether or not there is a floating charge or a fixed charge over what otherwise might be stock-in-trade, is whether there is a restriction on dealing.	This section should be deleted, there should be no separate test in respect of inventory	

Organisation	Section	Issue	Example	Recommendations	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	59	Question the purpose of Section 59	This section merely states that the agreement may provide for the security interest in after-acquired property – it does not deal in any way with the consequence of the agreement having done so		
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	60	There is no need to clarify that secure interests can secure any liability, as that is the current position		This section could more easily do its job and preserve the existing position by simply stating that a security interest may secure any obligation of any type, whether or not existing or contemplated at the time the security interest is created.	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	61	When a security interest attaches to a personal property		Would be better for the section to say that security interest attaches to the grantor's interest or right in the property. Alternatively it should include a separate subsection that the security interest extends no further than the interest of the grantor in the personal property	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	61(1)	Change of text		Would be clearer if "both of the following have been satisfied" was inserted after "when" in the introduction	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	63(3)(a)	Problem with the requirement of writing		Question whether or not this should be required	

Organisation	Section	Issue	Example	Recommendations	
Queensland Law Society and Piper Alderman	63(3)(b)(iii)			The current wording of sub-section 63(3)(b)(iii) could be more clearly expressed to achieve this outcome including by removing the double negative in parenthesis	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	63(5)	This would mean the effectiveness of a security agreement and a security interest depends on the intention of the grantor, which can change without the knowledge of the secured party		Further clarification is needed otherwise the result will be that there will be defensive registrations and secured parties who do not take this precaution will inadvertently lose out when the grantor does change the use. It would give grantors an easy avoidance measure.	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	64(3)(b)	Unduly restrictive requirement fo particularised description	As drafted, the requirement for particular types of description is a significant restriction on the ability of parties, currently enjoyed, to have security over what they like	Would be helpful if the Bill or regulations contained examples of the sort of description that would satisfy the Bill's requirements (both in relation to the requirements of this section and the requirements of the register) otherwise courts may interpret this strictly, particularly if they believe that the purpose of registration is to give notice of the particular property which should be apparent from the face of the register	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	64	How a security interest is *perfected* – as stated earlier, definition should cover the security interest becoming effective under foreign law (including where they do not have a notion of perfection)		Simply extending the definition of "perfection" to cover perfection overseas will not be sufficient. It may be an artificial concept under many foreign laws and it may not be easy to establish an analogue to the Australian concept of perfection	
Allens Arthur Robinson	67(1)	It is not clear whether the	If a company has		

Organisation	Section	Issue	Example	Recommendations	
Blake Dawson Freehills Mallesons Stephen Jaques		concept of "after-acquired property" encompasses only things that are the property of the grantor at general law, or whether it is intended to capture property that is taken to be "collateral" under any other security interest granted by the grantor	given a charge over its present and after-acquired property, and that acquires possession of an asset by way of finance lease, does the charge attach to the grantor's leasehold interest in he asset, or does it attach to the asset itself?		
Consumer Action Law Centre	67(2)			Should provide that a security interest cannot attach to after-acquired property of a kind prescribed by the regulations or covered by section 67(3)	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	67(3)	See no reason to include this provision		If it is going to be included, it should turn on whether the security interest is regulated by the UCCC or its Commonwealth replacement, rather than the type of goods the security interest relates to	
Consumer Action Law Centre	67(4)			This section should be deleted from the Bill	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	68(4)	We have the greatest difficulty with the policy behind this subclause. IT appears that there are many circumstances in which an asset can be sold subject to a security interest, without the secured party being able to prevent it. This seems to		Sub-sections (4) and (5) have been introduced to since the first consultation draft but they do not address this issue. If it is retained, this sub-section should only apply where the proceeds have arisen because the grantor has transferred the collateral and no longer has an interest in it.	

Organisation	Section	Issue	Example	Recommendations	
		be the policy of section 124. This seems to be particularly unfair on the secured party that it effectively limits the recourse to the asset over which it was counting on security			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	69(3)(b)			Would be helpful to clarify the situation where a security interest perfected under a foreign law gives rise to proceeds in Australia (e.g. when a chattel or an intangible owned by a grantor located outside Australia is sold and the proceeds paid into an ADI Account)	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	70(2),(3)	The reference to 5 business days is too short, particularly as the secured party needs to react to an event of which it may know nothing			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	75	Do not see why a secured party should lose its security interest in collateral simply because the bailee issues a document of title, an event over which the secured party has no control			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	75(1)(c)	In any event, the reference to 5 business days is too short			

Organisation	Section	Issue	Example	Recommendations	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	76	This section seems to apply also so as to remove perfection altogether even though security interest is perfected both by control and registration		If so, it should only apply if the security interest is not registered	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	77	Same comment as earlier, 5 business days is too short			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	78	Unclear why this applies equally to the grantor to whom possession is returned, and to the transferee of chattel paper who is a new party			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	78(3)			In our view, the security interest should also be perfected by control	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	79	We are puzzled by the operation of this section.	How would it work where the assignment of the account (or chattel paper) was absolute, that is it did not secure any obligation. What would the deemed security interest in the returned	This should be left as a matter of contract for the two parties. Once again the reference to 5 business days is too short.	

Organisation	Section	Issue	Example	Recommendations	
			collateral secure? How would the transferee of the account learn of the return of the collateral, in order to be able to perfect it within the 5 business day period referred to? It is unclear why the person who receives a transfer of the debt arising on the sale should automatically receive a security interest over the goods		
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	79(4)	Why is temporary perfection required if the transferee's security interest is already perfected by possession or registration?			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	81			This should have an exception for such items as aircraft and ships only temporarily brought into Australia	
Allens Arthur Robinson Blake Dawson Freehills	83			This needs to provide rules for the location of investment entitlements. Sub-section (3) needs to deal with the portion where the issuer is an individual	

Organisation	Section	Issue	Example	Recommendations	
Mallesons Stephen Jaques				who moves, or has locations in several states. Either a more complex provision is called for or it should be left to general law	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	84	In our view, the Division should not apply when the grantor has nothing left to sell: that is, where the "security interest" is an absolute transfer. Also, it is unclear how the Division is intended to apply in the case of interests acquired for value other than by way of purchase (e.g. a declaration of trust given for value)	Under current law, leasing property other than real property does not give the lessee any interest in the property within the ordinary meaning of that term: a "lease" of personal property is just bailment		
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	85(1)(b)	Don't understand the reason behind deleting that the purchaser would take subject to the unperfected security interest if it knew that the transfer breached a security agreement from the consultation draft		This provision at least should continue. It may be preferable to provide that this rule applies where the transferee has no knowledge of the security interest rather than knowledge of a breach of the security agreement creating the security interest	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	86(1)(a)			This provision should only apply where property must be described by serial number	
Allens Arthur Robinson Blake Dawson Freehills	86(1)(b)	As currently drafted, this provision significantly detracts from the worth of		This provision should not apply when the transferee had actual knowledge of the transferor, and a search against the transferor would have revealed, for	

Organisation	Section	Issue	Example	Recommendations	
Mallesons Stephen Jaques		having an all-assets security		instance, that there was a charge over all its assets.	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	86(1)(e)	See no policy reason in the context of this rule for effectively enabling parties to assume that a known security interest did not prohibit a transfer of the property		Would be preferable to vary this to "The transferee has no knowledge of the security interest".	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	87(c)	This section could have very wide-reaching effects: case law traditionally interprets "ordinary course of business" very widely in this context, far wider than in the ordinary course of trading			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	88(1)(c)	It is unclear whether the threshold is an amount per item, or the amount for an aggregate sale. It is also unclear how this provision would apply if the market value is greater than $5000, but the transferee (reasonably) believes that the market value is less than $5000			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	88(1)(f)			May also be appropriate to limit the definition of "knowledge" that applies to this clause	

Organisation	Section	Issue	Example	Recommendations	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	90(b)	This provision is unsatisfactory as currently drafted.	Schemes of arrangement are the currently favoured method for company takeovers. Similar things can happen with units in trusts and options	It is extremely important to retain this ability.	
Queensland Law Society and Piper Alderman	90(c)	The words "unless the transferee's interest is a security interest" at the beginning of sub-section 90(c) are unnecessary as the Division of which section 90 forms a part does not apply if the transferee's interest is itself a security interest (see section 84(1))			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	92(2)			We support the inclusion of this section in addition to section 81, although it may be possible to combine the two provisions into one.	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	92(1)(h), (2)(g)			May also be appropriate to limit the definition of "knowledge" that applies to this clause.	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	95	In this and other sections referring to security interests to which the Act does not "operate" it is not clear what is referred to		"Does not operate" should be replaced with "does not apply" – the language of Section 6	

Organisation	Section	Issue	Example	Recommendations	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	98(2)	Appears to be unduly wide	Appears to subrogate the secured party to the rights of predecessors in title which relate to the property irrespective of what type of rights they are, and against whom the rights may be exercised	This should be limited to the rights as against the transferee or the rights arising out of the particular transfer	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	100(3)	We do not understand the policy requirement that would allow someone to disregard a pre-existing security interest, particularly one perfected by registration. Also, why do secured interests perfected by control have priority over secured interests perfected by possession?	It would significantly erode the flexibility and value of all assets security, if the security holder had to go to the trouble of obtaining control over every controllable asset in order to avoid losing priority, even to parties who took with notice.		
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	100(4)	Again, if the subsequent security interest holder has notice of the first, it should not get priority			
Allens Arthur Robinson	100(6)			If a secured party has a security interest by control,	

Organisation	Section	Issue	Example	Recommendations	
Blake Dawson Freehills Mallesons Stephen Jaques				but subsequently takes one instead by registration and gives up control or loses control, but at no stage is unperfected, the priority time should perhaps be the date on which it was first perfected by control. However, the register should reflect the earlier priority date	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	100(8)		Priority could be established by the time of attachment, followed by the time of execution of the security agreement as a tie-breaker	Would be helpful to expand or clarify the priority rules that apply in this case, or else state that the general law applies. Tie-breakers would be needed under these rules where there were two security agreements each granting security over an asset which is acquired later. Both would attach when the asset was acquired	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	101	This section does not resolve circular priority positions as there is nothing to say which is the ***first security interest***	That is, where A has priority over B which has priority over C which has priority over A		
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	101(1)(a)	How can a security interest have priority over a security interest which does not exist? How do you select what sort of security interest the putative non-existent security interest would be			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	103	It seems that this section could be deleted without any damage. The heading of the section is misleading,		Should not have the effect of privileging security interests which are covered by the Act over those which are excluded under section 6.	

Organisation	Section	Issue	Example	Recommendations	
		as the question of whether the Act applies to some security interests is not necessarily answered on constitutional grounds (see section 6)			
Australian Finance Conference	105	The Bill permits secured parties to subordinate priorities		The AFC recommends that the Bill's regulations include the power to prescribe a form of subordination agreement.	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	109(1)(c)	The notice requirements would seem to be quite onerous for someone who has a retention of title arrangement in relation to a trading relationship.		If notice remains a requirement, then it should be effective in relation to those secured parties who receive it, whether or not other secured parties receive it. In other words, the holder of the purchase money security interests would rank ahead of those who receive the notice	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	109(3)(b)(ii)	If the description in the notice cannot be general, this could be very time-consuming on behalf of holders of purchase money security interests, particularly suppliers of goods under ROT terms		It should be possible to give a generic description	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	111(3)	This section seems objectionable to us at least to the extent that it applies to assignments are in substance security interests, and we note that it is not found in the NZ legislation. We do not think that this	It is unclear what, if any, steps the holder of the purchase money security interest could take to protect its position once it receives a	In general terms, if absolute assignments are defined as security interests, then assignments of receivables should be dealt with in the same way as other extinguishment provisions even though they are defined as security interests, and the approach should be consistent	

Organisation	Section	Issue	Example	Recommendations	
		provision should give the holder of a security interest priority over an earlier interest of which the holder was aware at the time it took the security interest.	notice. It is also unclear why a purchase money security interest in an asset should lose priority over the proceeds of the asset in this way.		
Australian Securitisation Forum	111(4)	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			
Australian Finance Conference	112	Inadequacy of 5 business day registration time limit for priority		There are a number of options for addressing concerns, including adoption of the New Zealand allowance of 15 days from the grantor acquiring possession. The AFC recommends, taking into account the range of reasons identified to justify a different time limit, that registration before the end of 5 business days after settlement (i.e. when the security interest attaches by value being given by the secured party) should establish the PMSI priority	
Allens Arthur Robinson	112(1)	We understand the logic of		Nevertheless, 5 business days still seems a little short	

Organisation	Section	Issue	Example	Recommendations	
Blake Dawson Freehills Mallesons Stephen Jaques		having a short period because the secured party is aware of the grantor acquiring the possession, and should be prepared for it.			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	Division 4	The rules generally provide for temporary perfection of the transferor-granted interest for 24 months, but it is unclear why this time period was chosen. It seems too long a period to protect third parties and not long enough to protect defrauded financiers.	Why temporarily perfect the transferor-granted interest as against purchasers for 24 months but as against secured parties for only 5 days after knowledge is acquired? Why elevate the commercial interests of financiers over those of other commercial parties? Why provide for temporary perfection, but then make it depend on the very uncertain test contained in clause 70?	We see no reason for a different rule (namely, 5 business days after knowledge is acquired) where another security interest is granted. By including this rule, the Bill therefore favours subsequent secured parties over other parties who may be prejudiced by the continuing security interest, but we see no policy justification for the difference in treatment.	
Allens Arthur Robinson	114(2)	This provision sits strangely		The holder of the transferee's security interest should	

Organisation	Section	Issue	Example	Recommendations	
Blake Dawson Freehills Mallesons Stephen Jaques		with the fact that if the first and second security interest had both been granted by the one party, and the first security interest was not registered according to the serial number, but the second was, the first would still take priority. It seems an odd result if it should be different simply because the grantors are different.		not get priority where it had actual knowledge that the acquisition constituted a breach of the transferor's security interest.	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	116	It is unclear why this section applies only to certain types of payment		This should not expressly prejudice the operation of insolvency legislation (relating to preferences etc.) The provision is generally too wide – it enables creditors who are vaguely aware of security agreements, or that a company might be in trouble, to pursue payment, knowing that if they receive payment, it will be free of security interests. There should be some concept here of payments in good faith in the ordinary course of business. It may also be appropriate to limit the definition of "knowledge" that applies to this clause	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	117	There is no need for any attempt at restatement or modification of these principles in the context of the PPS Bill.	Provisions like the *Bills o Exchange* Act and the law merchant as to negotiability are clearly understood, and well settled. There is no need to	This is extremely important for the operation of the money-market which relies on bills of exchange, and on much of the banking system which relies on cheque clearance. Simply making this Act subject to the Bills of Exchange Act under section 18 would probably not achieve this aim.	

Organisation	Section	Issue	Example	Recommendations	
			depart from them and there is certainly no reason for weakening concepts of negotiability		
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	117(b)(i)	This section makes a new qualification on negotiability and the ability of a party to acquire good title, which significantly erodes the concept of negotiability. Under the current law, only actual knowledge (not constructive knowledge) of defects will undermine negotiability		It may be better that this section simply state that a party who acquires a negotiable instrument (defined to include only instruments that are truly negotiable at law) acquires it free of a security interest if, under the *Bills of Exchange Act* or other relevant law, the holder takes free of all interests.	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	118			Given our views on the utility of the concept of chattel paper, we think it would be preferable to treat these priority issues (if they are retained at all) in the same way as accounts	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	118 (2)(b)	The purpose of this provision is unclear			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	120	It is unclear whether this section is meant to be exclusive. It is also unclear how this section sits with section 103	If it is, it seems implicitly to give an extraordinary privilege to holders of security interests		

Organisation	Section	Issue	Example	Recommendations	
			over holders of other interests in property. Particular difficulties arise when the grantor of the security interest, has higher rights to the asset, than the party whose action created the priority interest		
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	120(1)	It is unclear how this fits in with the extinguishment provisions	That is, it seems to be an extinguishment provision all of its own, at least one in which the new interest (which could be ownership) takes priority over the security interest		
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	120(4)	By expressly referring to section 6(f)(ii) this means that section 120 would be interpreted so as to give priority over security interests which are covered by the Act over any other security interest of the type referred to in section 6.			

Organisation	Section	Issue	Example	Recommendations	
		This is unfair. See our comments on section 102 above			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	121	Currently, an execution creditor has priority over an uncrystallised floating charge, but automatic crystallisation can trump them. This section would effectively replicate the position of an automatic crystallisation clause.			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	121	There does not seem to be any clarification of the position of holders of security interests in circulating assets as against the Australian Taxation Office in relation to accounts and notices (e.g. under section 218 of the *Income Tax Assessment Act 1936)*			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	122(1)	Usually an ADI could simply rely on a combination of accounts or set-off, which is not a security interest, but there is already a security interest over the account which has been perfected, it is unclear			

Organisation	Section	Issue	Example	Recommendations	
		why it should gain priority			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	123(1)	See our comments on section 79. The questions addressed by this section would not arise if the question as to what happened in relation to returned goods where a party has an assignment of the account arising from those goods is left to the parties			
Australian Securitisation Forum	124	Transfer of grantor's rights in collateral		Rather than permitting assignability, this section should provide that a contractual prohibition on assignment is effective to preserve the general law position	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	124(1)	Do not understand the need for this section. Also unclear in relation to collateral/property that courts have regularly said is unassignable e.g. insurance contracts and contracts of employment or assignment to a party incorporated in another jurisdiction, which may or may not result in Australian law ceasing to apply to that security interest	Seems to give a wide-spread licence to parties to ignore contractual prohibitions on transfer of personal property		
Allens Arthur Robinson	125	We see no reason why a		This provision need not be included to achieve the	

Organisation	Section	Issue	Example	Recommendations	
Blake Dawson Freehills Mallesons Stephen Jaques		law designed to reform the law of security interests should so substantially change the position of parties to transactions that are not in the nature of security		policy of the bill, and should not be adopted without very comprehensive review	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	125(1)	The interaction between sections 125(1)(a) and (b) needs to be clarified.	Paragraph (a) contains no temporal restriction in relation to when the defence will have accrued or arisen. On that basis either paragraph (b) is redundant or paragraph (a) needs to be read down.		
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	125(1)(a)	The language has now been modified and since the first consultation draft to resemble more closely the current law. We still query the need for it			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	125(3)	This sub-section will have a significant effect in such things as project finance where the nature of the thing being assigned is important, and in	It introduces considerable uncertainty, and the use of terms such as "commercially reasonably" and	This is an unnecessary departure from current principles: it should be left to the parties to decide	

Organisation	Section	Issue	Example	Recommendations	
		securitisation where set-off against the securitised debts is a major issue.	"material adverse effect" are fertile ground for litigation		
Australian Securitisation Forum	125(3),(4) & (6)	Rights on transfer of account or chattel paper	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	These sub-sections should be removed	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	125(5)	This causes particular difficulty in circumstances of project finance and also in many other areas.	If a party has taken assignment of a debt, or a contract, why is it that the assignor can still change it?	It should not be up to the courts to determine whether or not modification is "commercially reasonable" or has a "material adverse effect". They may be matters on which the parties have their own views. It would be on that basis that they may have entered into the transaction	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	125(7)	The transferor should simply be able to make an irrevocable direction to the account debtor to make payments to the transferee, as is currently the position. This seems to add significant difficulties and uncertainties in an area	Under paragraph (b), it appears that the direction would not work if the transferee fails to provide proof on the 6th Business Day.		

Organisation	Section	Issue	Example	Recommendations	
		where currently there are none. Also, we are not sure why the transferee needs to provide proof when the direction would have come from the transferor			
Australian Securitisation Forum	125(7)	It is not evident why this section should be limited to intangible property or chattel paper		Proof of sale should not be required under section 125(7)(b). 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	
Queensland Law Society and Piper Alderman	125(7)	The first line "if collateral that is intangible property or chattel paper is transferred…" in our view the reference to 'intangible property' should be a reference to 'accounts'. Section 125(7) deals with accounts and chattel paper not intangible property		In our view the reference to 'intangible property' should be a reference to 'accounts'	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	125(8)	We do not understand why this clause is necessary, and why it cannot be left to the general law	Why can't the account debtor ignore any irrevocable direction from the transferor which is not in the form of the Notice? Why is it that the transferee has only five business days to	It simply may not be possible in the five business days. If it eventually provides proof after a longer period then it should be effective from time of proof	

Organisation	Section	Issue	Example	Recommendations	
			provide proof?		
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	126(1)	Further difficulties arise for borrowers who want to restrict the ability of banks to assign their rights in respect of loans made by the borrowers, say, to hedge or vulture funds		The provision, if it is retained, should also permit an account debtor to obtain injunctive relief to prevent a transferor from proceeding with a prohibited transfer. Also if adopted, the provision should not prevent the grant of an injunction to prevent an assignment, or the rights to terminate the contract	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	126(2)	This is unnecessary, even if sub-section (1) is accepted.	The account debtor should have an action against the transferee for inducing a breach of contract, if the transferee took with knowledge of the breach		
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	127(1)	This provision is unnecessary, as it would be a rare security agreement that would be binding on a licensor in those circumstances.	It is hard to imagine how a holder of an intellectual property, who gives a licence to use the intellectual property to a party who then gives a security interest, is bound by the security interest		
Allens Arthur Robinson Blake Dawson Freehills	129(1)	This section seems to leave a few gaps. It does not deal with a sale or "other	It does not seem to cover a position where a security	If the land is sold before the security interest of the crops is perfected, by a mortgagee who is not subject to the security interest in crops, then the sale should	

Organisation	Section	Issue	Example	Recommendations	
Mallesons Stephen Jaques		encumbrance on" the land given before perfection of the security interest in the crops. It does not seem to deal with security interest in crops being granted after the creation of some other form of interest in the land other than a lease or mortgage	interest in crops is granted, but a lease or mortgage of the land is granted after the grant of the security interest in crops, but before the perfection of the security interest in crops	not be subject to the security interest in crops	
Law Society of New South Wales	130	The provisions that crop security interests be limited to crops planted at the time of, or within six months after, the making of the security agreement and excluding progeny from livestock security interests [clause 42(3)]		It is noted that the existing State legislation provides for crops mortgages for crops grown over a five year period (section 7(5) *Security Interests in Goods Act* 2005 (NSW)).	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	130			Recommend that this section be expanded to explain what the priority position is as between two competing security interests that both arise under the clause. Would also be helpful to expand on the meaning of "to enable the grantor to produce the crops" in section 130(b)	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	131			Same comments as for section 130	
Allens Arthur Robinson Blake Dawson	133	The boundary between accessions and			

Organisation	Section	Issue	Example	Recommendations	
Freehills Mallesons Stephen Jaques		commingling are unclear. But are defined by reference to identity being lost			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	134	This seems to apply whether or not the security interest in the accession has been perfected. This seems contrary to the principles in the remainder or the legislation		If there is a security interest over the improved property, then it would seem to follow that the rights of the owner of the accession, such as they are, have priority over a holder of the security interest in the improved property, but not over the improved land itself	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	135(c)	The policy rationale behind the requirement that the security interest have been perfected immediately after the person acquired the security interest, and have been continuously perfected ever since, is not clear.			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	135(e)	This seems to be contrary to the policy of the priority provisions in section 100, in giving protection to an unperfected security interest over a perfected security interest when the perfected security interest takes with knowledge of the breach of the unperfected security interest			
Allens Arthur Robinson Blake Dawson	136(c)	If the security interest is not even attached to the			

Organisation	Section	Issue	Example	Recommendations	
Freehills Mallesons Stephen Jaques		accession, why is this section necessary at all? How could a security interest attach to an accession, after its identity had been lost?			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	139(1)			It would be appropriate for this section to also confirm that the security agreement will also be taken to have satisfied section 67(3)(ii)	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	140	We question whether this is the correct approach, particularly in relation to a mass of fungibles			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	140(b)	There seems to be a drafting issue in Section 140(b) – it refers to the tangible property continuing in the product. We query whether the limit on the value of the continuing security should be referable to the value of the original property relative to the value of the whole product (or the original value of its constituent components) rather than its original value			
Allens Arthur Robinson Blake Dawson Freehills	142(2)	The use of the word "equally" in line 3 appears to be at odds with the "pro-		We recommend it be deleted	

Organisation	Section	Issue	Example	Recommendations	
Mallesons Stephen Jaques		rata" mechanism in section 143			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	Clause 143	Value of obligations if insufficient proceeds		If the property is fungible and becomes part of an undifferentiated mass, then the secured parties should be entitled to a proportionate part of the whole, or the proceeds of the whole	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	Clause 143			Presumably also section 143 should only apply when the security interests are held by different parties	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	144	We query how this section can operate if, by definition, the separate identity of the accession will have been lost			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	145			There should be some general notice provision like s170 of the *Conveyancing Act 1919 (NSW)* to allow deemed service by leaving notices at an address etc. This should apply to all notices required under the Act	
Australian Securitisation Forum	149(1)(a)	Request 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		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	

Organisation	Section	Issue	Example	Recommendations	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	149(4)			We suggest that the regulation of consumer items should be left to the Uniform Consumer Credit Code or its Commonwealth successors	
Consumer Action Law Centre	149(4)			Should also exclude sections 164 and 180(2) from application to collateral that is used by a grantor predominantly for personal, domestic or household purposes	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	150	By listing just three parties, this section begs the question as to what happens to the rights between other parties		It may be better if this section were drafted to make it clear that except where it expressly provides to the contrary, the Part does not derogate from any right that any person may have against another in respect of the security agreement or the collateral, including the parties to the security agreement	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	154			We do not think that the provision should exclude consumer transactions, consumers are sufficiently protected elsewhere. However, to the extent the Bill does deal differently with consumer transactions, this should be by reference to whether the security interest is regulated by the UCCC rather than by reference to the nature of the goods to which the security interests relates	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	154	If the definition of "grantor" is left wide, it may be difficult, if not impossible, to "contract out" as it would require the secured party to contract with everybody with an interest in the collateral			
Allens Arthur Robinson	154(1)			This should refer to goods to be used predominantly	

Organisation	Section	Issue	Example	Recommendations	
Blake Dawson Freehills Mallesons Stephen Jaques				for personal, domestic or household purposes *at the time they were initially acquired*. Otherwise there will be significant uncertainties on enforcement. Also, a secured party should be able to rely on the certificate as to the use of the collateral, similar to section 11 of the UCCC. Clauses 172(2) and 177 should be added to the list	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	154(2)	This appears to take away from the ability to contract out of giving notice because the parties cannot contract out of obligations in relation to person who are not parties to the security agreement	This would remove much of the benefit of being able to contract out, and would impose duties and restrictions in relation to the enforcement of security interests that are not found in the current law. In relation to 154(2) sub-section (5) is not adequate to deal with the issue		
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	155			Would be better for the PPS Bill to recognise the possibility that receivers can be appointed by anyone over property anywhere and, if it is necessary to derogate from this in some cases, by regulation or otherwise to provide for it	
Australian Finance Conference	155	The Bill's enforcement provisions do not apply to the personal property that is		Recommends that the enforcement of a fixed charge or goods mortgage given by a company over specific tangible property be dealt with in accordance with	

Organisation	Section	Issue	Example	Recommendations	
		being dealt with by a controller within the meaning of Part 5.2 of the Corporations Act		Chapter 4 (Enforcement of Security Interests) of the Bill, rather than the controller provisions of the Corporations Act	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	156	This provision could cause significant complexity		If the ability to choose between enforcement regimes is retained, it should not be subject to a requirement that the choice be "reasonable": it would be highly undesirable to suggest that it is "unreasonable" for a secured party to choose the enforcement regime that is most advantageous to it	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	157	It is unclear how this section would operate. We do not understand why there is a need for the elaborate provisions giving all parties a notice that the mortgagee intends to enforce the securities as if it were land		If the secured party is proceeding as if the property is land, the notice requirements should not differ from those applicable to security interests over land.	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	159(3)	This can put the account debtor under a difficult position, if it is unsure as to the efficacy of the security, or the validity of the notice. The timing is also interesting		This entire section 159 seems over-prescriptive. A better provision would be simply one that was general, and said that the secured party can exercise any of the rights of the grantor in relation to the collateral	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	159(4)	Further, this seems to be inconsistent with sub-section 5			
Allens Arthur Robinson	160(5)	The reference to 5 business			

Organisation	Section	Issue	Example	Recommendations	
Blake Dawson Freehills Mallesons Stephen Jaques		days is too short			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	161	This section seems to give the secured party the right to seize collateral, even though another party may have a higher right. This raises the overall question as to whether the "collateral" is the asset, or the right of the grantor to that asset. We note that there is an apparent gap relating to the seizure of shares and any other property excluded from the definition of intangible property		This section should make provision for deemed "seizure" of other intangible assets like accounts. Seizure should be deemed to have occurred if notice has already been given to the account debtor, so that the secured party is in control in the wider sense	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	161	We do not understand the policy behind sub-section (3). If a secured party now has possession and control of an asset, so that all the world knows that it has possession and control, why shouldn't it be taken to have perfected its security interest?		Sub-section (2) should be a general provision and not limited to Chapter 4	
Allens Arthur Robinson Blake Dawson	162	It is unclear what happens if the secured party has			

Organisation	Section	Issue	Example	Recommendations	
Freehills Mallesons Stephen Jaques		possession or control sufficient to be able to sell, but because of the nature of the asset the possession or control does not constitute perfection, but is perfected by other means			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	162(2)	It is unclear what happens if notice cannot be given because the grantor cannot be found. It is also not clear what the notice needs to state		The process should only be initiated if the notice states (for example) that the secured party is to be taken to have seized the collateral	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	163(1)	The conceptual model behind much of the drafting seems to be that there is one asset subject to the security interest which should be sold as soon as possible. Reality is often very different			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	163(3)	This gives a new field of uncertainty. It is a higher duty of care than the normal "good faith"	Currently, secured parties are allowed to have regard to their own interests. Requiring them to have regard to the interests of a large number of other parties is a significant change,		

Organisation	Section	Issue	Example	Recommendations	
			may be onerous and will certainly be a fertile field for litigation		
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	163(3)(a)	We don't see why an express permission for delay is required		The default position should be the current one, namely that the secured party can sell the property at what it thinks it the appropriate moment, subject to its duties.	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	164	In our view, the "necessarily incidental" test is a harsh one, particularly by comparison with other tests which relate to reasonableness			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	165	The reference to 5 business days is too short.		Section 156(1) would not allow the secured parties to enter into an agreement of this type. The "contracting out" list in section 154(1) should be extended to include this section as well. We query whether this should require notice in all circumstances. The provision for seizure by higher ranking parties should not be limited to security interests	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	165(4)	This seems to be drafted so as to always require a longer period than 5 business days	If the collateral is immediately deliverable, and the higher ranking secured party is entitled to it, then it should be immediately delivered. There is no reason why a		

Organisation	Section	Issue	Example	Recommendations	
			lower ranking secured party should have any longer grace period in delivering possession than the grantor		
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	165(5)	This provision significantly tilts the balance in favour of lower ranking secured parties		A higher priority party should not be obliged to pay costs incurred by a lower ranking party: such a rule seems to give a blank cheque to a lower ranking party. The normal rules should apply, namely that a lower ranking security holder should take its chances.	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	165(7)	This timing limit seems unduly restrictive, given that the higher priority party needs to receive and check through invoices. The provision also gives undue leverage to lower ranking parties to put commercial pressure on higher ranking parties who may want to have a work-out or leave a business running in the interests of overall recoveries		The current law position should be preserved, which is that a holder of a security interest only has to compensate grantors of security interests and lower ranking owners of security interests if it breaches its duties as mortgagee	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	166	As mentioned above in relation to section 161, this seems to suggest that a secured party may sell collateral, even though it		Seizure should not be necessary for the secured party to sell collateral	

Organisation	Section	Issue	Example	Recommendations	
		only has limited rights to that collateral			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	166(2)	We do not see why section 166(2)(b) should not apply to some forms of properties for personal, domestic or household purposes, subject to the UCCC		Would be better for the Bill to provide that a secured party may lease the relevant collateral subject to the terms of the security agreement (rather than permit the parties to agree that the secured parties may lease the collateral)	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	166(3)	We wonder why this section is necessary: surely all enforcements of security agreements must be in accordance with the security agreement?			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	166(6)	This seems to be inconsistent with section 124(1)			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	166(7)	We don't understand the note at the bottom of this sub-section		We do not read section 68 and subclauses 42(2) and (3) to have that effect. If they do, they should be changed	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	167(3)(b)	This considerably extends the number of people who can bring a claim. We wonder why the debtor is referred to in the section as the debtor has no interest in the collateral		We think that there should be some limit, otherwise this legislation seems to give a possibility of a great deal of tactical or nuisances litigation.	
Allens Arthur Robinson Blake Dawson	170(1),(2)	This may be burdensome if the sale is being conducted			

Organisation	Section	Issue	Example	Recommendations	
Freehills Mallesons Stephen Jaques		in many lots over a period of time			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	170(3)	This could be burdensome, particularly estimating receipts under a lease		It would be much better simply to give an account after a period which deals with all receipts over that period, rather than an item by item description	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	170(5) &(6)	This effectively requires the secured party to prepare accounts of a business that is taking over a business. Companies are only required to produce accounts annually, and have a significantly longer period than 1 month in which to produce them			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	171(1)(a)	Given the width of the definition of "grantor", this would give the secured party the right to dispose of the asset free of interests which are superior to that of the secured party			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	171(1)(c)			This should relate to all lower ranking interests, not just security interests	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	172(2)	It is unclear why this provision is necessary. This seems to be generally incompatible with the	Parties who are lower down the priority chain can always force a sale		

Organisation	Section	Issue	Example	Recommendations	
		normal provision that a security holder can choose its moment to exercise its power of sale, and also hold onto property in order to extract value from it.	by paying out the higher ranking security interest		
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	174	It is unclear why this provision is necessary, given that there is the remedy of foreclosure, and also that a secured party has an ability to buy the assets under section 167		If the enforcement provisions are excluded for deemed security interests, like commercial consignments and leases, then it would be appropriate for there to be no discharge of the secured obligation. They should be able to exercise their current rights, that is, to keep the property, and to sue for the amount recoverable (albeit, mitigated by their retention of the assets)	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	175			This provision should be more clearly limited to notices where the secured party proposes to acquire the property itself	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	176	This section may not be particularly helpful: if there is a dispute of this kind, it is likely to end up in court			
Australian Securitisation Forum	177(2)(b)	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?		Parties should be able to contract out of this section under section 154. Section 177(2)(c) should contemplate secured creditors ranking pari passu with the enforcing secured creditor	

Organisation	Section	Issue	Example	Recommendations	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	Clause 181	This is a significant and unnecessary departure from existing rights, which should not be retained in the Bill.		This is a concept which should be left to credit regulation, if it appears at all. If the grantor has waived its right under this provision, then this should also apply to everyone else	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	Clause 186(4)	If the Registrar refuses access of suspends the register, the Bill does not offer any guidance about what effect would be had on priorities etc.	This concern applies particularly in relation to temporary perfection		
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	187(c)	What other interests (other than security interests) are contemplated here?			
Australian Finance Conference	189(1)	The Bill refers to the registration of collateral. AFC has a concern that this expression is not consistent with the expectations of secured parties and with the core rationale for the Bill.		Recommend that the Bill should refer to registration of a security interest, not registration of collateral.	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	189(2)(c)(ii)	If the Registrar is satisfied that the application is made in contravention of section 190, what redress does the security party have?			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	190(1)	This is in fact an onerous requirement and will put secured parties into a difficult bind given the		From discussions on the previous exposure draft we think the concern this is trying to address is unscrupulous financiers running out and taking out "pre-emptive" registrations in order to gain a priority	

Organisation	Section	Issue	Example	Recommendations	
		uncertainty of the "in substance" approach		position – this can be addressed by a requirement that the person believe on reasonable grounds that they will obtain the interest for which they are applying for registration – it shouldn't matter whether or not it's a security interest. Alternatively the requirement should be that they believe on reasonable grounds that they will have an interest in the property and that they believe that interest might be regarded as a security interest	
Australian Finance Conference	191	details of subordination may be recorded or changed on the PPSR, but this is not mandatory		The AFC recommends that the Bill's regulations include the power to prescribe a form of subordination agreement.	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	191 – Item 1 – the secured party	Often, security is held by a trustee for a shifting band of secured parties		The requirement should be satisfied simply by mentioning the name of the trustee	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	191 – Item 2 – the grantor	It is unclear how much detail will be required, especially if the secured party does not have all the detail to hand		This seems to put a lot of information onto the register which could slow down the registration of security interests. A solution may be to limit it to the actual party that grants the security interest	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	191 – Item 4 – the collateral and proceeds	It is unclear how an "all assets" charge would fit with this requirement. We also query why the registration must relate to a single class of assets.		It would also help if the permitted descriptions are as broad as possible	

Organisation	Section	Issue	Example	Recommendations	
		It is unclear how the Bill proposes to deal with the transfer of accounts in batches, for instance in a securitisation			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	191 – Item 6 – the end time for registration	Seven years may be an appropriate time for cars or household goods but it may be inappropriately short for many other types of property owned by individuals		As noted previously, it would be better to refer to security interests regulated by the UCCC rather than security interests over particular types of property	
Consumer Action Law Centre	191 – Item 6			Should prescribe a default registration period of five years for consumer property or property described by serial number	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	191 – Item 7 – subordination	We do not see the need for the registration to describe subordination arrangements			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	191 – Item 9 – any matter prescribed			There should be provision for insertion of information about restrictions of dealings with the asset, or the granting of further security interests	
Consumer Action Law Centre	194			Should not apply to property to be used predominantly for personal, domestic or household purposes	
Intellectual Property Committee of the	194	Provides that personal property may be registered			

Organisation	Section	Issue	Example	Recommendations	
Business Law Section of the Law Council of Australia		as collateral either before or after a security agreement is made. This provision confers a right on any lender at any time to register a security interest over any personal property of any person without the knowledge, consent or approval of that person			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	196(1)(c)	This unacceptably puts parties at risk of mistakes or failures by the Registrar or the Registry that cause the description to be unavailable			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	198(2)	It is unclear whether this means that, for example, a registration is ineffective if the secured party fails to disclose all parties interested in the collateral (and therefore currently defined as "grantors") even if it did not know about them		There should be some saving in relation to misleading entries honestly made by the secured party, otherwise there is a very heavy onus on the secured party and a significant risk of misstatement and loss of the security	
Intellectual Property Committee of the Business Law Section of the Law Council of Australia	198(2)	Provides that defects in the description of collateral will not operate to render a security interest ineffective before the earliest of several	The effect of this is that the collateral may be described in a seriously misleading manner		

Organisation	Section	Issue	Example	Recommendations	
		stated periods	and yet the security interest will still be effective. This seems to defeat the point of registration		
Australian Securitisation Forum	199	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			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	199(a)	It is not clear what property is contemplated to be covered by the regulations as to be covered by serial numbers. This could have serious effects in relation to "all assets" charges			
Australian Finance Conference	200	Imposes requirements on a secured party if details on which a registration is based, change		Recommend that, unless a secured party becomes actually aware that registered details have changed, there should be no obligation to change details from those already registered	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	200(2)	The reference to 5 business days is too short			

Organisation	Section	Issue	Example	Recommendations	
Australian Finance Conference	200(2)	The reference to 5 business days is too short		Recommend 10 business days is a more realistic and reasonable tune for change or response	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	203(1)	The same comment applies here as section 189(2) That is, there may be some doubt as to whether an interest of right its security interest		In that case, the party should be entitled to make any defensive registration, and require the Registrar to enter it into the Register	
Consumer Action Law Centre	206(2)			Should be amended to require a secured party to apply for an amendment of a registration to omit collateral or to end its effective registration 'as soon as reasonably practicable' after the unperfection time occurs, and no longer than before the end of five business days after the day the unperfection time occurs	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	207	There seems to be no equivalent requirement here for the party seeking the amendment to have a belief on reasonable grounds			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	208(1)(c)	It is not clear to us why a security trust instrument should be excluded			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	209(5)	Five business days is far too short a period for a large financial institution to respond to the demand, to find the appropriate materials in its files and to compose a response			

Organisation	Section	Issue	Example	Recommendations	
Australian Finance Conference	209(5)	The reference to 5 business days is too short		Recommend 10 business days is a more realistic and reasonable tune for change or response	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	210	This seems to be extraordinarily biased against the secured party			
Australian Finance Conference	210(4)	The reference to 5 business days is too short		Recommend 10 business days is a more realistic and reasonable tune for change or response	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	223(3)	This seems to require that every time a secured party registers a security interest it needs to give notice to the grantors and others, adding to the paperwork			
Consumer Action Law Centre	223(5)			Should be amended to require a statement holder to ensure that the notice is given to each interested person as soon as reasonably practicable after the time of the verifiable event, and no longer than before the end of 14 days after the time of the verifiable event	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	224			If the register is electronic and can be checked electronically by the secured party, the Registrar should not need to add to its costs by giving the secured party a copy of the new registration or amendment initiated by that secured party	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	227 Item 7			This should extend to parties who propose to deal with a person, who are to take an exposure to risk on that person, but not "provide credit" to it	
Allens Arthur Robinson Blake Dawson Freehills	227 Item 14			This should extend to administrators appointed under different laws outside Australia, that are analogous to receivers, administrators, liquidators etc.	

Organisation	Section	Issue	Example	Recommendations	
Mallesons Stephen Jaques					
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	233	The invalidity of the security in liquidation and voluntary administration is a heavy sanction and we are concerned that the current drafting will create unnecessary difficulties			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	233(1)	The sudden death cut-off date is too draconian		It would be better to have the relevant provision providing that the security interest is void as against the relevant insolvency official, rather than vest in the official. An administration is often a temporary appointment. If the administrator is removed, then it still should be possible for the secured creditor to retain its rights. Under this arrangement, it would lose them irreparably. The court should have the discretion to allow perfection after commencement of the winding up etc, as the court currently does in relation to charges	
Australian Securitisation Forum	233(3)(a)			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	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	233(4)	We find this section very difficult to follow			
Allens Arthur Robinson Blake Dawson Freehills	234	We think this section is too narrow in scope. Any person who has their rights		The only qualification on that should be that where the right confiscated secures another obligation it should not entitle them to additional compensation	

Organisation	Section	Issue	Example	Recommendations	
Mallesons Stephen Jaques		vested in the grantor should be entitled to compensation		over and above the other obligation	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	235	This additional duty is unnecessary and may be counterproductive		If such a section must remain, it should simply include an obligation to act in good faith	
Queensland Law Society and Piper Alderman	235	We believe existing statutory provisions and equitable principles provide adequate protection against improper business practices and it is not necessary or desirable to enact additional and differently worded safeguards			
Australian Finance Conference	235 & 236	These provisions are not justified and bring uncertainty to an Act trying to do the opposite. The meaning, scope and application of duty are unclear.		Recommend the omissions of these two sections	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	236	This section is objectionable. It appears to extend the field of parties entitled to damages to those currently owed no duty of care			
Allens Arthur Robinson Blake Dawson Freehills	237	Most legislation providing for registers in relation to land give rights to statutory			

Organisation	Section	Issue	Example	Recommendations	
Mallesons Stephen Jaques		compensation for misstatements in the register, rather than trying to absolve the Registrar from responsibility. The absence of such a statutory compensation scheme, coupled with the immunity from suit, is an unnecessarily retrograde step.			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	241	This seems onerous, particularly the requirement to itemise property when the security may just cover all assets, or a class of assets. The holder of the security interest has no such information.		The provision could be made of little effect if, as we presume would be the case, all parties make an agreement as provided in subsection (6)	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	273	What is the rationale for including presumptions about transactions between related entities? The commentary states that the presumptions “are derived from current state legislation”. Which legislation?		As stated above, "value" should not be a requirement for an effective security interest. It does not seem appropriate to require a criminal standard of proof ("beyond reasonable doubt") to rebut the presumptions in this clause	
Allens Arthur Robinson Blake Dawson Freehills	281			Where parties have agreed between themselves a division between a fixed and floating charge over assets, that should continue so that an asset which is	

Organisation	Section	Issue	Example	Recommendations	
Mallesons Stephen Jaques				subject to a floating charge under an existing fixed and floating charge (that is entered into before the relevant time) should be regarded as circulating assets and fixed charge assets as non-circulating assets The legislation should preserve the existing position in relation to the ATO and execution creditors, that is, that the automatic crystallisation is effective	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	282	This section only provides that an existing interest is enforceable "in respect of particular personal property" if it would have been "so" enforceable before the commencement time. The "so seems to suggest that it must have been enforceable in respect of that particular personal property This seems to leave unprotected existing security interests to the extent they cover assets acquired after the time.		The words "in respect of particular personal property" should be removed	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	284	This provision applies the priority rule in section 120 of the PPS bill to interests arising under legislation or a rule of law or equity after the “registration commencement time”.			

Organisation	Section	Issue	Example	Recommendations	
		What happens to such interests arising before that time? Will the states and territories enact similar legislation which includes a comparable provision for interests arising under states and territories acts and instruments made under them?			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	287	Should the reference to "another security interest": in the second line be to "another **transitional** security interests"? The priority rules in clause 292 apply to priority disputes between transitional security interests			
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	294	The priority between competing security interests will depend on such things as whether the security interests are legal or equitable. It is unclear as to whether this distinction is maintained.		If all new security interests under the bill are to be regarded as legal security interests and deprive existing equitable security interests of priority then query the constitutional effect	
Allens Arthur Robinson Blake Dawson Freehills	294(1)(b)			The specific provisions of the Bill that apply should be stated, ie. parts 2.4 and 3.1 of the Bill	

Organisation	Section	Issue	Example	Recommendations	
Mallesons Stephen Jaques					
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	301(b)	There does not appear to be any obligation on the states to give data in a transitional register to the Registrar.		As noted above, an obligation should be imposed on the states to give data in a transitional register to the Registrar in this bill or if there are constitutional limitations in corresponding legislation enacted by the States and Territories	
Allens Arthur Robinson Blake Dawson Freehills Mallesons Stephen Jaques	302(2)	What happens if the migrated information is migrated incorrectly and parties suffer loss as a result of the incorrect migration? There appears to be no compensation if the Registrar makes a mistake. We know this is consistent with the bill which absolves a Registrar from the responsibility for misstatements in the PPS register. See our comments on section 237.			