

The Senate

Legal and Constitutional Affairs
Legislation Committee

Personal Property Securities Bill 2009 [Provisions]

August 2009

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MEMBERS OF THE COMMITTEE

Members

Senator Patricia Crossin, **Chair**, ALP, NT

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Senator Scott Ludlam, AG, WA

Senator Gavin Marshall, ALP, VIC

Participating Members

Senator Russell Trood, LP, QLD

Secretariat

Mr Peter Hallahan

Secretary

Ms Toni Dawes

Principal Research Officer

Ms Cassimah Mackay

Executive Assistant

Suite S1. 61

Telephone: (02) 6277 3560

Parliament House

Fax: (02) 6277 5794

CANBERRA ACT 2600

Email: legcon.sen@aph.gov.au

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RECOMMENDATIONS

Recommendation 1

1.34 The committee recommends that the Bill be passed subject to a commitment from the government to:

- **thoroughly consider all concerns brought to the government's attention about the Bill until 30 September 2009, including the concerns raised in the submissions to this inquiry;**
- **provide greater transparency by making public its response to the concerns raised and by providing as much information as possible to stakeholders about policy considerations and choices. This could be done using the department's website; and**
- **include in a consequential amendments bill to be debated in the Senate cognately with this Bill and intended to take effect immediately after the commencement of the 2009 Bill all changes to the Bill identified as a result of concerns raised with this committee and subsequently directly with the department during the recommended further period of consultation until 30 September 2009.**

Recommendation 2

1.64 That subject to the foregoing recommendation, the Bill be supported.

CHAPTER 1

Introduction

1.1 On 25 June 2009, the Senate referred the provisions of the Personal Property Securities Bill 2009 to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report due by 7 August 2009.

1.2 The committee presented a short interim report to the Senate out of session on 7 August, indicating that it intended to present its final report on 17 August. On 13 August the Senate granted a further extension of the reporting date to 20 August 2009.

1.3 The Bill was introduced in the House of Representatives on 24 June 2009 by the Attorney-General, the Hon. Robert McClelland MP. The government states that:

... The bill will replace the existing complex, inconsistent and ad hoc web of common law and legislation, involving over 70 Commonwealth, state and territory acts. It will implement a single national law, creating a uniform and functional approach to personal property securities.

Personal property is any form of property other than land. It includes goods such as cars, machinery, even crops and livestock, financial property such as currency and letters of credit and intangibles such as intellectual property rights.

The bill will apply to all transactions which create an interest in personal property that secures a loan or other obligation.¹

Conduct of the inquiry

1.4 The committee advertised the inquiry in *The Australian* newspaper on 1 July 2009. Details of the inquiry, the Bill and associated documents were placed on the committee's website. The committee also wrote to a range of organisations and individuals inviting submissions by 31 July 2009.

1.5 The committee received 26 submissions which are listed at Appendix 1. Submissions were placed on the committee's website for ease of access by the public.

1.6 The committee held public hearings in Sydney on 6 and 7 August 2009. A list of witnesses who appeared at the hearing is at Appendix 2, and copies of the Hansard transcript are available through the internet at <http://www.aph.gov.au/hansard>.

1 Attorney-General, the Hon Robert McClelland, Second Reading Speech, *Hansard*, Wednesday 24 June 2009, p. 14.

Scope of the report

1.7 The structure of the report is as follows:

- Chapter 2 outlines the history of the development of the Bill;
- Chapter 3 identifies the changes between the exposure draft bill reported on by this committee in March 2009 and this 2009 Bill;
- Chapter 4 discusses general issues relevant to the Bill; and
- Chapter 5 considers unresolved technical issues relating to the Bill.

Acknowledgement

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

Note on references

1.9 References in this report are to individual submissions as received by the committee, not to a bound volume.

1.10 Due to delays in the production of the Hansard Transcript, this report was prepared without extensive reference to evidence received at the public hearing.

CHAPTER 2

History of the Bill

Origins

2.1 The process that has led to the 2009 Bill commenced in April 2006 with the release of an options paper, and was followed by a national consultation process. The department released three further discussion papers, in November 2006, March 2007 and April 2007.

2.2 The first exposure draft of the bill was released in May 2008.¹ After significant amendments, a further exposure draft was released in November 2008.² The department also convened a PPS Consultative Group 'to guide the reform process'. The PPS Consultative Group, which met quarterly, comprises experts invited from industry, governments, consumer groups, legal practitioners and academia.³

Exposure draft inquiry

2.3 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 13 November 2008 the Senate, on the motion of the Chair of the committee Senator Crossin, referred the exposure draft provisions of the bill to the committee for inquiry and report by 24 February 2009. The Senate subsequently agreed to an extension of the tabling date to 19 March 2009. The committee invited submissions and held public hearings into the exposure draft bill.

2.4 Like the current inquiry, the exposure draft was examined in a short timeframe, given the complexity of the bill and the importance of the reforms it foreshadowed. This led to vociferous complaints from a range of submitters and intending submitters who argued that it was very difficult to come to grips with the bill in the allotted time. The committee noted in its report:

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

1 Inquiry into the Personal Property Securities Bill 2008 [Exposure draft], Attorney-General's Department, *Submission 8*, p. 18.

2 Appendix B to the Attorney-General's Department submission to the Inquiry into the Personal Property Securities Bill 2008 [Exposure draft] summarises the key changes made to the bill between the May and November drafts.

3 Inquiry into the Personal Property Securities Bill 2008 [Exposure draft], Attorney-General's Department, *Submission 8*, p. 18.

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 [the] reform.

2.5 Notwithstanding the timeframe and resulting limitations on the inquiry, the committee finalised and tabled a report on the exposure draft in March 2009. The committee's report contained 11 recommendations for amendments to the exposure draft and brought a range of other issues to the government's attention for consideration.

The committee's recommendations in relation to the exposure draft

2.6 The committee's key findings and recommendations in its March 2009 report were as follows:

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.

Government response

2.7 The government tabled a response to the committee's report on 8 June, indicating acceptance of all of the committee's recommendations except recommendation 4, which related to privacy protection, and which it indicated was accepted in substance. The government also wholly accepted four of the nine Opposition recommendations, partially accepted a further three, and rejected two. Appendix 3 contains the details of the government's response to each of the majority and Opposition recommendations.

The 2009 Bill (the Bill)

2.8 While the government indicated that it accepted most of the committee's recommendations, including recommendation 2 in which the committee had recommended that the commencement date for the scheme be extended by at least 12 months to May 2011, the final version of the legislation was introduced before advice from stakeholders had been taken into account. The committee had expected that the final draft would be available for a longer period before being introduced.

2.9 The final version of the 2009 Bill was introduced into the House of Representatives on 24 June 2009, which is only three months after the committee had tabled its March report into the Exposure draft. As noted in Chapter 1, the Bill was referred to the committee the following day, on 25 June, for a short inquiry, which initially was to report on 7 August.

2.10 In the committee's opinion, this process has been somewhat foreshortened and has led to the committee still holding a number of unresolved concerns about the Bill which are discussed in the following chapters. The process has also led to many further complaints from stakeholders about the haste with which it is being pursued, including the time that the committee was able to allow for the preparation of submissions. The Bill was very substantially restructured and re-written since the exposure draft, and a number of new sections introduced, and there appears to have been little if any further consultation initiated by the department with stakeholders on the new draft. A number of these stakeholders again raised serious concerns about their capabilities to come to terms with the Bill in the time allowed for consideration, and have also claimed that there are still errors in the Bill and unresolved issues.

2.11 There has been no adequate explanation about why the committee's recommendation to take more time to finalise the Bill was not accepted.

2.12 Notwithstanding concerns about the haste of the process and that advice from stakeholders may not been taken into account in a wholly exhaustive process, the committee acknowledges that the Bill is a vast improvement over the exposure draft. The committee also notes that most witnesses whom the committee questioned about this were of a similar view.

2.13 The committee congratulates the officers of the Attorney-General's department who were responsible for its carriage for the enormous effort made to improve the Bill in the short period since the committee's March report, and for their spirit of co-operation with the committee's processes.

2.14 The following chapter examines in detail the changes made to the exposure draft and incorporated into the version of the Bill now before the Senate.

CHAPTER 3

Changes between the exposure draft and the 2009 Bill

Introduction

3.1 The government's acceptance and implementation of the committee's recommendations of March 2009 required the government to make substantial alterations to the exposure draft bill, and to undertake a number of processes. These included major changes such as simplifying the language and structure of the nearly 300 page draft, undertaking a Privacy Impact Assessment, and reviewing the scope and content of the enforcement provisions.

3.2 The provisions of the 2009 Bill considered by the committee reflect these changes and processes. Because the amendments include substantial restructuring of the Bill, it is not easy to readily identify the substantive changes made to the Bill simply by looking at the new version of the Bill.

Changes

3.3 The department has made a submission to the inquiry which outlines the changes made since the release of the exposure draft bill. The submission and the attachments are clear and relatively brief and they are commended to Senators.

3.4 In its submission the department states that the new Bill reflects:

- the recommendations made by the senate committee in its March 2009 report on the Exposure Draft of the Bill;
- the concerns of the States and Territories, and of other stakeholders; and
- the establishment of the offices of Registrar and Deputy-Registrar of Personal Property Securities.¹

3.5 As an overview of the changes incorporated into the new Bill in response to the committee's March 2009 report, the department has summarised the changes as follows:

- (a) the substantial restructuring of the Bill (significantly to relocate formal provisions previously at the beginning of the Bill, so that the Bill gets to the substantive provisions much more quickly);
- (b) the re-writing of many provisions in the style used in overseas counterparts of the PPS Bill, without any change to their legal effect (principally in the style used in the Saskatchewan Act);
- (c) the inclusion of conflict of laws and privacy protection provisions; and
- (d) policy changes (principally designed to more closely align the Bill with its overseas counterparts).²

1 Attorney-General's Department, *Submission 1*, Attachment A p. 1.

Structural changes

3.6 In response to criticisms of the exposure draft, the structure of the Bill has been changed considerably. By reorganising the provisions, altering the language and making it shorter the Bill is now more readily comprehensible. The key amendments are:

- there has been a philosophical change to the drafting style and this incorporates harmonisation with overseas provisions where possible – in the new Bill many provisions have been written differently to say the same thing in a simpler style and using simpler language;
- chapter and part guides have been introduced;
- technical provisions, particularly about the constitutional aspects of the Bill, have been moved towards the end of the Bill;
- as a result of the new drafting style numerous definitions have become redundant, and where appropriate remaining definitions have been moved closer to the sections to which they are relevant, for example the provisions relating to possession and control; and
- Part 3.5 Intellectual Property has been created to unite related sections that were previously in separate areas of the Bill.

3.7 Overall, the proposed legislation remains lengthy and complex in parts. However, the changes make it markedly easier to understand the intent of the proposed legislation compared to the exposure draft.

Substantive changes

3.8 A number of substantive changes have also been made to the Bill, including in response to the committee's March 2009 report.

Privacy Issues

3.9 The previous inquiry highlighted significant concerns about the operation of the register and whether the proposal adequately protected individual privacy. The department advised that it was undertaking a Privacy Impact Assessment of the proposal. The committee made a number of recommendations in relation to privacy, including that the assessment be undertaken by a suitably qualified, independent person or organisation.

3.10 The government accepted this recommendation and a comprehensive Privacy Impact Assessment was completed by Information Integrity Solutions. The principal of this firm is Mr Malcolm Compton, the former Privacy Commissioner.

3.11 The Assessment made recommendations for a couple of immediate changes to the provisions and quite a number of 'future action' recommendations. The future action recommendations essentially agree with the current approach, but recommend

2 Email from Mr Robert Patch, Attorney-General's Department to Ms Toni Dawes, Principal Research Officer, 30 June 2009.

that they be reviewed after the scheme has been in place for a period of time to check if the provisions are effective.

3.12 The government provided a formal response to the Privacy Impact Assessment on 5 August 2009. A copy of the response is available on the committee's web page at:

<https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=90df11ec-ada3-4e40-9f9a-7aef2a32df44>

3.13 The government response indicated that the government accepted all but one of the 14 recommendations made in the Privacy Impact Statement. Recommendation 3 was rejected on the grounds that such a requirement would impose an unwelcome administrative burden on small businesses adapting to the new PPS regime, and would also impose different obligations on small businesses than the *Privacy Act* does in similar circumstances.³

3.14 The specific changes made in response to issues arising from the previous committee inquiry and the work done for the PIA include:

- confirming that a consumer's address details will not be recorded on the register (see Item 2 of the table in clause 153);
- the Registrar now has improved powers to remove inappropriate data from the register;
- clause 151 now requires that a person registering a matter on the register must have a belief on reasonable grounds that the security arrangement between the parties does, or will exist. If a matter is registered without a belief on reasonable grounds a civil penalty can be imposed;
- verification statements - the positive obligation on a lender to provide a debtor with notification of arrangements placed on the register is now bolstered because there are consequences available if the notification requirements are not met: the federal privacy commissioner's complaints jurisdiction can be invoked; and
- unauthorised searches will now enliven either the jurisdiction of the privacy commissioner or the civil penalty regime. The department is apparently still resolving the details, but the aim is to allow flexibility

3 **Recommendation 3** – IIS recommends that secured parties proposing to register a security interest in consumer property where the registration will include an individual grantor's name and DOB be obliged to first advise the individuals concerned of the disclosure of personal information to the PPSR. To the extent that this obligation would not be satisfied by a secured party's existing obligation under the Privacy Act, IIS recommends that the PPS Bill should provide that failure to provide prior notice of a registration that relates to consumer property and would include name and DOB is an interference with privacy under the *Privacy Act*.

for the most appropriate response to be available in different circumstances.

3.15 In particular, the committee previously recommended that the primary legislation for the PPS reform include the key privacy protections for individuals, including a prohibition on making the address details of any individual public.

3.16 The government substantially accepted the recommendation and amended the Bill to clarify information about individuals that may be included on the register and to better describe the key privacy protections provided to individuals.

3.17 The Bill makes it clear that address details of individual grantors will not be included on the register, rendering a prohibition on making address details public unnecessary.

3.18 Item 2 of the table in clause 153 of the PPS Bill provides that if the relevant collateral is consumer property and is required to be described by a serial number, then no personal information is collected. Where an item is not required to be described by a serial number the only details that can be collected about the grantor are his or her name and date of birth.

International Conflict of Laws

3.19 The committee's March 2009 majority recommendation 8 was 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.

3.20 The government accepted this recommendation. However, the government has not adopted the exact wording of existing international personal property securities conflict of laws provisions. The Explanatory Memorandum notes that the provisions included in the 2009 Bill (Chapter 7 – Operation of Australian and other laws) are 'based on international conflict-of-laws rules. The provisions are based on similar provisions in the New Zealand and Saskatchewan PPS Acts and the UNCITRAL [Legislative Guide on Secured Transactions].'⁴

3.21 Specifically, Part 7.2 of the Bill, entitled *Australian laws and those of other jurisdictions*, includes conflict of law provisions setting out which law, in court proceedings, will govern the validity, perfection and effect of perfection or non-perfection of a security interest. Clause 234(2) makes it clear that Part 7.2 does not affect the law that governs contractual obligations (including any obligations arising under a security agreement).

3.22 The proposed conflict of laws regime does not have the benefit of being identical to existing international models. The government explains that the New Zealand conflict of laws provisions have been criticised as being uncertain.⁵

4 *Explanatory Memorandum*, p. 102. UNCITRAL is the acronym for the United Nations Commission on International Trade Law.

5 Government response to the Senate committee's March 2009 report, tabled on 15 June, p. 5.

Enforcement

3.23 The committee recommended 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. The new Bill includes an enhanced approach to enforcement (in Chapter 4 of the Bill). There are now consequences for not complying with the Bill's requirements: depending on the particular provision the Federal Court can order the payment of a civil penalty or the Privacy Commissioner's complaints jurisdiction can be invoked.⁶

3.24 The Bill was amended to provide enhanced sanctions for improper use of the register and to ensure the registrar can monitor and investigate suspicious register activity. Specifically, Part 6.3 of the PPS Bill would establish a regime for applying civil penalties under the Bill. On application by the PPS Registrar, the Federal Court could order the payment of a civil penalty for a serious breach of a civil penalty provision. The civil penalty provisions are:

- applying to register, or failing to amend an existing registration, where the registrant does not have a reasonable belief that the collateral secures, or will secure, an obligation; and
- searching the register other than for an authorised purpose.

3.25 The Registrar would also have the power to investigate a suspected search of the register other than for an authorised purpose.

3.26 The new provisions are welcome additions to the scheme, but are the subject of discussion in some submissions which question whether there need to be some amendments to ensure the approach is as effective as possible.⁷

Commercially reasonable manner

3.27 The committee recommended retention of the requirement for rights and duties to be exercised honestly and in a commercially reasonable manner, and that the intended scope of these requirements be explained in detail in the Bill's explanatory memorandum.

3.28 The Bill was amended to make clear that the duty to act in a reasonably commercial manner applies only in relation to Chapter 4 of the Bill concerning the enforcement of security interests. The duty to act in a commercially reasonable manner would not apply to the extent that the parties have contracted out of the enforcement provisions of the Bill under proposed section 154.

Review

3.29 The committee recommended that the Bill include a requirement that the operation of the Bill be reviewed three years after it commences in a process that

6 See the Attorney-General Department's *Submission 1*, p 7, for details of the civil penalty sections.

7 For example, the Consumer Action Law Centre is concerned that the sanction for failing to meet the verification statement requirements is inadequate, *Submission 5*, p. 4.

includes extensive consultation with industry, governments, lawyers, consumers and academics.

3.30 The Bill now includes clause 343, which would require the Minister to instigate a review of the operation of the Bill, which must be completed within three years of the new PPS scheme commencing.

State & Territory concerns

3.31 The department's submission advises that the states and territories have raised a number of issues since the exposure draft was considered by the committee. The changes that the government has made to the Bill in response to these matters are outlined in paragraphs 27 to 30 of Attachment A to the department's submission to this inquiry.⁸

Registrar

3.32 Also new in this Bill, there are provisions that establish the legislative foundation for the offices of the Registrar of Personal Property Securities and the Deputy Registrar of Personal Property Securities. See paragraph 31 of Attachment A to the department's submission to this inquiry and Part 5.9 of the Bill.⁹

8 Attorney-General Department, *Submission 1*, Attachment A, p. 5.

9 Attorney-General Department, *Submission 1*, Attachment A, pp. 5 and 6.

CHAPTER 4

General issues

Introduction

4.1 Most submitters to the inquiry acknowledged the substantial amount of work that has been done since the committee's March 2009 report was released. The details of the changes were discussed in the previous chapter. Many consider that the Bill has been greatly improved in various ways. There is general support for the restructuring of the Bill, introduction of the part and chapter guides, the major change to the drafting which has seen the drafting style simplified and more closely aligned with the Canadian and the New Zealand legislation, the expanded articulation of privacy measures and the new enforcement regime have all been broadly welcomed.

4.2 However, the committee heard mixed views about whether the revised Bill improves the legislation to the point where it is ready to proceed. Arising from this the challenge for the committee was to identify the nature of the outstanding concerns, their significance, and what action, if any, needs to be taken in response to these concerns.

4.3 In the committee's view, the major questions which required reflection were:

- what is the character of the concerns raised? Do they primarily reflect (largely unresolvable) policy differences or do they go to the accuracy and effectiveness of the Bill?;
- is it desirable to see the form of the regulations and consequential amendments in order to assess the full scope of the proposed scheme?;
- are the concerns raised about the timeframe for the process legitimate?; and
- given that this Bill forms part of a national legislative scheme, what is the best way to make amendments to the Bill?

Do concerns with the current Bill mainly reflect policy differences?

4.4 Despite general recognition that the 2009 Bill improves markedly on the exposure draft, it is unsurprising that some policy choices reflected in the Bill generated substantial debate. In particular, some representatives of the legal profession who are expert in personal property securities are not reconciled to many of the details in the Bill. In addition to insufficient time to examine the new Bill, they cite concerns about policy choices and inadvertent errors.

4.5 The difficulty for the committee lay in understanding whether or not these are primarily philosophical differences about policy that are unlikely to be reconciled even if there was further extensive consultation because they arise as a result of different interests wanting the legislation to achieve different results.

4.6 Alternatively, does the debate arise from genuine concern that:

- there is a flaw in the policy to the extent that it should be significantly revised or should not proceed;
- the basic policy is sound, but needs to be refined; or
- the intended policy is sound, but the drafting will not achieve the desired effect.

4.7 One challenge arising from the substantial amount of work that the department has undertaken in relation to the Bill since March is that there is a substantial amount of change for those with an interest in the Bill, including this committee, to absorb and understand.

4.8 In short, without going into the particulars, the committee believes that some of the potential problems identified in the submissions simply reflect differences of opinion about policy, but there are also numerous concerns about other aspects of the Bill that are based on one or more genuine concerns about how provisions will operate.

4.9 In relation to the differences of view about the policy it is possible that with more explanation about the policy decision, and more time for people to understand the reasoning and purpose of the particular clauses that are now of concern, they would be at least better understood, or even supported.

Regulations and related amendments to other legislation

4.10 One aspect of the concerns raised with the committee is that it is not possible to assess the complete legislative scheme when the regulations and the proposed amendments to other legislation are unavailable.

4.11 Some amendments to other legislation will be truly consequential and will only involve minor machinery amendments. However, in relation to this scheme it is likely that there will be some significant changes to other legislation that will have an impact on the overall operation of the scheme. Neither the committee nor stakeholders anticipate that these will inherently lead to a bad result – in fact some changes are actively sought - but those who will be affected by the scheme would like to be aware of the scope of the changes so they can properly analyse the full impact. For example, important changes are expected to be made to acts including the *Corporations Act* and the *Shipping Registration Act*.

Timing concerns

4.12 All of the general issues discussed above have an element of concern about timeframes. As discussed in Chapter 2 above, it is not clear exactly why this phase of the project (since the release of the committee's March 2009 report) has been so rushed.

4.13 In relation to timing, there are three substantial points of concern raised by some stakeholders:

- despite earlier extensive consultation, the process relating to finalising the 2009 Bill is too rushed and there is insufficient time to understand the extensive changes to the Bill;

- it is possible that policy choices reflected in the Bill may be appropriate, but there has been insufficient transparency to the policy considerations; and
- there are inadvertent errors in the Bill, but it has not been possible to go through the Bill in detail to be certain that they have all been identified.

4.14 In circumstances where the differences raised with the committee reflect diverging philosophical approaches then extending the process will not progress resolution of the concerns raised. However, a number of submitters have made the case that they, and the Bill, would benefit from more time for consideration on the basis that one or more of the three concerns above apply.

4.15 The department's view is that there has been a long period of consultation. Dr Popple explained:

Perhaps the committee would be assisted to know that during the period of the latest amendments to the bill, and before that, we maintained a very high level of consultation with stakeholders, including many of those you just listed. It would certainly not be true to say that the first they saw of some of these ideas was when the bill that we are currently looking at was introduced into the House. There has been more time beyond that during which the stakeholders who have a particular interest have been engaged in this process with us. We have taken the opportunity to talk to them about what they think needs to be changed. We have responded where we have not necessarily agreed.¹

4.16 However, witnesses expressed a different view. For example, Ms Angela Flannery of Clayton Utz, who expressed strong general support for the exposure draft bill, told the committee:

...perhaps the Attorney-General's Department, as they did before the exposure draft that you considered, could have made a public draft available that people could comment on or meet with the Attorney-General's Department about et cetera. Before the Senate standing committee got the previous exposure draft, the Attorney-General's Department had already had significant input from a variety of sources – industry and legal.²

4.17 When asked how much longer she thought the draft should have been available Ms Flannery's view was that:

Even a month would have been beneficial...If we just had a bit more time to go through the legislation because it is so different, at least on the order of setting out and some drafting, that would be quite beneficial.³

4.18 The department argues that much of the change to the Bill is cosmetic as it involves restructuring and redrafting previous provisions in a simpler style to say the

1 Dr Popple, *Proof Committee Hansard*, Friday August 7, 2009, p. 13.

2 Ms Flannery, *Proof Committee Hansard*, Thursday August 6, 2009, p. 25.

3 Ms Flannery, *Proof Committee Hansard*, Thursday August 6, 2009, p. 26.

same thing. The department's position is that sufficient time has been provided to get across the detail of the Bill and that the current processes are adequate:

We have, as you have said, a large piece of legislation, but we would say its fundamental structure has not changed. The changes that have happened since the last time this was looked at extensively by you and other stakeholders have been predominantly around drafting. The issues that were not predominantly around drafting were in response to stakeholder concerns. Some of the concerns that have been raised since come from those changes. It reflects the fact that there are stakeholders out there who take diametrically opposed views about some of the things that this bill does. But we would say, ultimately, the bill itself is still achieving the global policy end that was intended to be achieved. The concerns that are still being raised are minor when compared to the scope of the bill and the scope of the policy reform. So we would say that there has been sufficient time in the process, and there is process still to come. As we mentioned, there is scope for this change to be made within the parliamentary process. We think that should be sufficient.⁴

4.19 It is true that a large percentage of the change to the Bill is structural, but it is still the case that the Bill is substantial and requires considerable time to even read it, let alone absorb and assess whether the changes achieve what is intended, especially in relation to the new drafting style.

4.20 It is also the case that in addition to the stylistic changes, substantive amendments to the content of some provisions have been made – the Bill proposes different policy outcomes to those in the exposure draft bill. It takes time to simply understand what these are and further time to formulate a response to them.

4.21 On the other hand, the committee is cognisant of the need for this legislation to progress expeditiously, and the calls from some stakeholders for legislative certainty so that they can begin to prepare for implementation of the scheme.

How will any amendments to the Bill be made?

4.22 One aspect of this Bill which has an impact on the way in which it is ultimately considered by Parliament is that the legislation is proposed as a national scheme relying on a single national law. The scheme will rely on a text-based referral of powers from each of the States. Due to the distribution of power in the Constitution no referral is necessary from the two territories.

4.23 Referring legislation has already been passed by New South Wales and in other States the legislative process, which in these circumstances also involved the Council of Australian Governments (COAG) and the Standing Committee of Attorneys-General (SCAG), is well under way.

4.24 The department has indicated that it already suggests some minor amendments to the Bill and is considering some other changes. This committee may

4 Dr Popple, *Proof Committee Hansard*, Friday August 7, 2009, p. 13.

also suggest that there are matters that warrant further consideration. In light of the national scheme proposed it is appropriate to ask: how will any amendments to the Bill best be achieved?

4.25 The two main options for amending the Bill are:

- to follow the usual process of the government amending the Bill and reintroducing it or making amendments to the Bill in Parliament before it is passed; or
- passing the Bill as introduced (and which is in identical terms to that already passed by New South Wales) and making any amendments in a proposed consequential amendments Bill that (when passed) will take effect immediately.

4.26 The committee has been strongly urged by department to adopt the second approach. The department's view is that there will be no practical difference because amendments "can be coordinated in a way that provides comfort."⁵

4.27 The committee notes that there are arguments both for and against this approach. On one hand, it considers that there are some risks associated with passing a Bill which it does not fully support, knowing that it will require amendment. A major consideration for the committee is whether or not any consequential amendment bill will be considered cognately with this Bill.

4.28 On the other hand, because the states and territories have agreed to cooperate and introduce the model bill in exactly the same terms as the Bill being considered, and New South Wales has already passed a bill in identical terms, the benefits of using a consequential amendments bill as a vehicle for making changes to the current Bill are also apparent to the committee.

Committee view

4.29 Some submitters have explicitly requested greater transparency around policy choices to assist them to understand the approach taken in the Bill. The committee believes that the usefulness of providing greater information about policy decisions was readily apparent from the evidence given to the committee by several witnesses, which showed that concerns may often be alleviated where there is an adequate opportunity for communication between stakeholders and the department.

4.30 In relation to the provision of policy justification for the Bill, the department said in evidence to the committee:

We would say that we have done this to a great extent through the explanatory memorandum, through the various submissions we have made here. We concede there is some scope for some more information and we can easily put that out, through our website, for example.⁶

5 Mr Glenn, *Proof Committee Hansard*, Thursday August 6, 2009, p. 4.

6 Dr Popple, *Proof Committee Hansard*, Friday August 7, 2009, p. 8.

4.31 Submitters, particularly some legal practitioners, also hold numerous genuine concerns about aspects of the Bill, including the accuracy and effectiveness of a number of clauses. In the next chapter, the committee considers the range of these concerns.

4.32 The committee acknowledges that it is difficult to balance the genuine needs of all stakeholders in this process: the government and some submitters are ready for the Bill to proceed, but other significant concerns about the Bill, including the recent timeframe, have been brought to the committee's attention. The department itself agrees that a number of the concerns warrant further consideration (see Chapter 5 for details).

4.33 One solution the committee has identified is to recommend that the Bill be passed on the basis that the government commits to:

- thoroughly consider all concerns brought to the government's attention about the Bill until 30 September 2009, including the concerns raised in the submissions to this inquiry;
- provide transparency by making public its response to the concerns raised and by providing as much information as possible to stakeholders about policy considerations and choices. This could be done using the department's website; and
- include in a consequential amendments Bill to be debated in the Senate cognately with this Bill and intended to take effect immediately after the commencement of the 2009 Bill all changes to the Bill identified as a result of concerns raised with this committee and subsequently directly with the department.

Recommendation 1

4.34 The committee recommends that the Bill be passed subject to a commitment from the government to:

- **thoroughly consider all concerns brought to the government's attention about the Bill until 30 September 2009, including the concerns raised in the submissions to this inquiry;**
- **provide greater transparency by making public its response to the concerns raised and by providing as much information as possible to stakeholders about policy considerations and choices. This could be done using the department's website; and**
- **include in a consequential amendments bill to be debated in the Senate cognately with this Bill and intended to take effect immediately after the commencement of the 2009 Bill all changes to the Bill identified as a result of concerns raised with this committee and subsequently directly with the department during the recommended further period of consultation until 30 September 2009.**

CHAPTER 5

Unresolved technical issues

Introduction

5.1 A number of substantive matters which were the subject of recommendations in the March 2009 exposure draft report have been resolved to the general satisfaction of most who were involved in the process of inquiry into the proposed legislation. These matters were discussed in Chapter 3 above.

5.2 However, the committee has been unable to reconcile many of the other technical issues raised with it. Most of these matters have emerged since the 2009 Bill was introduced, but a few remain from the time of the inquiry into the exposure draft.

5.3 Some of the submissions also convey serious concern that in the relatively short period of time available to read and analyse this lengthy Bill it has not been feasible to ensure that all, or even most, issues have been identified. This matter has been discussed earlier in the report, but it is relevant to repeat it here. As the submission from the combined law firms stated:

This is not a comprehensive list. We are concerned that, in view of the amount and significance of the changes, and the limited time, there are many other points that we and others will have missed, similar to those mentioned...below. This is significant legislation which will fundamentally change private commercial rights and financing practice.

...

...It is critical to get it right the first time, there is no urgency, and we strongly urge the senate committee to repeat its initial recommendation to take time to get it right.¹

5.4 As noted in Chapter 4, the timeframe for this report is also quite short and in the time available it is not even possible to describe in detail all of the concerns, let alone to substantively consider them. The approach the committee has taken is to consider a sample of the matters raised in some depth, to provide a brief outline of concerns the department commented on and to list the other issues brought to its attention by stakeholders.

5.5 The committee intends that all of these matters will be responded to by the government in accordance with Recommendation 1 in this report.

Some examples of concerns raised that are discussed in some detail

5.6 These are examples of a couple of concerns which are outlined to demonstrate some of the issues brought to the committee's attention.

1 Allens Arthur Robinson, Blake Dawson, Freehills, Mallesons Stephen Jacques, *Submission 17*, p. 1.

5.7 There are also other concerns that have been raised with the committee which, in the committee's view, are unresolved. However, there is insufficient time to examine them more closely. These are listed later in the chapter.

Paragraph 14(2)(c)- meaning of purchase money security interest in relation to collateral intended for personal, domestic or household purposes

5.8 This proposed clause is new since the exposure draft bill. The effect of paragraph 14(2)(c) has given rise to some comment, including concern about its possible impact on the availability of consumer finance.

5.9 A security taken by a financier for a specific asset is commonly made in the form of a *purchase money security interest* (PMSI). A PMSI is a security interest in collateral. The purpose of a PMSI is to give priority to a security interest for the specific asset. This provides an incentive to the financier for providing security for the asset, especially in circumstances where the purchaser has given an all-assets security to another financier.

5.10 Paragraph 14(2)(c) provides an exception to the usual operation of a PMSI. As Piper Alderman explained in its submission:

The effect of this sub-clause is that it will not be possible to have a purchase money security interest (PMSI) in collateral that the grantor intends to use for personal, domestic or household purposes.²

5.11 For example, paragraph 14(2)(c) would mean that an existing general security over all current and after acquired property (such as is commonly given by a small business to a bank for an overdraft) is given priority over the security of a subsequent financier of non-serial numbered consumer goods (such as an electrical goods store which finances the purchase of a large television).

5.12 In support of this approach, the Australian Institute of Credit Management observed that:

AICM notes the wording of this section and believes its inclusion will be of considerable benefit when a credit provider obtains a guarantee (for example a director's guarantee) as this will preclude the erosion of the value of the guarantee.³

5.13 On the other hand, Piper Alderman argues:

In the absence of sub-clause 14(2)(c) a consumer financier would not need to be concerned about a prior registered non-PMSI security interest. If sub clause 14(2)(c) remains in the Bill a consumer financier's only security is potentially at risk unless they undertake searches and obtain a release or subordination from the holder of the prior registered security interest if that interest could extend to the consumer goods being financed by the consumer financier.

2 Piper Alderman, *Submission 2*, p. 1.

3 Australian Institute of Credit Management, *Submission 12*, p. 4.

While sub-section 14(2)(c) is unlikely to be a concern in the context of financing arrangements for serial numbered goods which the grantor intends to use for personal, domestic or household purposes (due to the operation of other provisions in the Bill), it could increase the cost of consumer finance for non-serial numbered goods.⁴

5.14 Other submitters also expressed concern about the approach taken in the Bill, including the Australian Bankers' Association and the Australian Finance Conference.⁵

5.15 The divergent views held about this clause seem to be based on different ideas about the policy issue the clause seeks to address and both views appear reasonably arguable.

5.16 It is appropriate for the Bill to take a stance and make clear which party is to receive priority (currently the all-assets security holder over the consumer goods financier). However, it seems to the committee that perhaps this is an example of when it would be beneficial for the government to provide greater transparency about the reasoning behind its policy choices to better inform the debate about why the chosen approach was preferred and to assist stakeholders to prepare for its implementation.

“Flawed assets”

5.17 Clause 12 of the Bill, which will prescribe the meaning of *security interest*, now provides that a security interest includes "a flawed asset arrangement".

5.18 The combined law firms' submission asserts that the Bill should not expressly treat flawed assets as security interests. As they explain:

An example of a flawed asset is a debt or other contractual right owed to the grantor which is conditional on satisfaction of another obligation. The condition is the "flaw". It is not an interest in an asset or dealing with an asset nor a right in relation to an asset; it is an intrinsic feature of the asset itself (the debt or right) – one of its terms. Concepts like attachment, perfection, priority, vesting and enforcement have no real meaning in that context, and trying to apply them would only cause uncertainty or confusion.

If the condition is not satisfied, either the debt never becomes payable or it is subject to a set-off (effectively the same thing). Including flawed assets is inconsistent with the exclusion of rights of set-off (clause 8.1(d)).

...

If for some reason something regarded as a "flawed asset" would be regarded as an interest in personal property securing payment or an

4 Piper Alderman, *Submission 2*, p. 4.

5 Australian Bankers' Association, *Submission 14*, p. 2 and the Australian Finance Conference, Additional Information, p. 2.

obligation, then it would be caught by the general provision in clause 12(1).⁶

5.19 The department's response to this concern is that "clause 12(2)(1) provides that a flawed asset arrangement is a security interest when it is a transaction that in substance secures payment or performance of an obligation. This provision is based on an equivalent provision in the New Zealand Act at section 17(3).⁷

5.20 In reply, the combined laws firms noted that:

The fact that [flawed assets] are given as examples can give rise to confusion and uncertainty, as the courts try to make provisions of the Act apply to something to which they don't naturally apply. The treatment of flawed assets as a security interest would be all the more anomalous given that they are most analogous to (and used as an adjunct to) rights of set-off, which are specifically excluded.

What would make the inclusion more serious than in New Zealand is the insolvency vesting provisions (which are absent from the NZ Act).⁸

5.21 In the absence of other information, it seems possible that the clause 12(2)(1) reference to "a flawed asset arrangement" was included by the department in response to the committee's March 2009 injunction in Recommendation 1 to reconsider the Bill with a view to, among other things, "using overseas provisions as often as possible to allow overseas experience to provide guidance for the Australian model".

5.22 As described elsewhere in this report, the committee sincerely commends the department for the considerable reworking of the Bill. It is apparent that the government has sought to genuinely review the Bill in response to the committee's March report. In particular, the drafting style is now similar to that in the Canadian and New Zealand legislation and is relatively simpler and more accessible.

5.23 In many respects the current Bill is closer to overseas provisions, but in other respects the proposed legislation has been drafted to deal with Australian circumstances. This approach has advantages (such as adapting legislation to meet specific Australian needs and improving on overseas legislation where this is desirable), but it also has disadvantages (such as not being able to get the full benefit of overseas experience and precedent).

5.24 Given the importance of this legislation the committee believes that it is appropriate to reconsider the approach taken to "overseas" clauses where significant concerns about the approach have been raised.

6 Allens Arthur Robinson, Blake Dawson, Freehills, Mallesons Stephen Jacques, *Submission 17*, p. 6.

7 Attorney-General's Department, Attorney-General's response to issues raised by Allens Arthur Robinson, Blake Dawson, Freehills and Mallesons Stephen Jacques, *Additional Information*, Wednesday 5 August 2009, p. 2.

8 Allens Arthur Robinson, Freehills, Mallesons Stephen Jacques, *Additional Information*, 10 August 2009, pp 2 and 3.

5.25 For example, if the only reason that clause 12(2)(1) is included in the Bill is to make it similar to overseas provisions then, given that the government has already taken the approach of drafting legislation that incorporates provisions that take into account Australian circumstances rather than directly adopting an existing overseas model, and given the concerns raised about its inclusion, it should be reviewed.

Concerns raised in submissions which the department agrees warrant further consideration

5.26 This section of the report outlines matters which the department commented on in evidence to the committee. In relation to some of these matters, the department conceded that they need serious consideration and will probably result in amendments to the Bill.⁹

5.27 The committee particularly acknowledges the approach the department took to assist the inquiry by identifying a range of issues likely to be of interest to the committee and offering comments on them. The department's responsiveness to the committee and willingness to genuinely engage with the process is greatly appreciated.

5.28 In identifying matters that may be considered further, the department emphasised the point that it is ultimately a matter for government to determine which of these areas, if any, give rise to changes to the final effect of the Bill.

Clause 55(4) - priority time and control

5.29 This clause seeks to allocate priority in certain circumstances, as follows:

55 Default priority rules

(4) Priority between 2 or more security interests in collateral that are currently perfected is to be determined by the order in which the priority time (see subsection (5)) for each security interest occurs.

5.30 The department advised the committee that during the attempt to align this clause with the Saskatchewan approach an inadvertent change was made and this needs to be corrected to give it the effect that it should have.¹⁰

5.31 This is a possible amendment to the Bill that the department considers should not be controversial.¹¹

Clause 268 – Turnover trusts not successfully excluded from vesting provisions

5.32 An issue with this clause raised in the combined law firms submission is that:

Clause 268(2) is designed to cover turnover trusts in subordination arrangements, but may not cover any of them, in particular because such

9 Mr Patch, *Proof committee Hansard*, Friday 7 August 2009, p. 9.

10 Mr Patch, *Proof committee Hansard*, Friday 7 August 2009, p. 9.

11 Mr Patch, *Proof committee Hansard*, Friday 7 August 2009, p. 9.

arrangements are not a security interest in an "account" and because of the cumulative requirements in paragraph (2)(c).¹²

5.33 The department has considered the concern and agrees that this clause:

...needs to be amended so that silent accounts and chattel paper that do not secure performance or paper obligation are exempted from section 267 so that those security interests will not vest in the grantor on insolvency but will be affected by the priority rules.¹³

5.34 This is a possible amendment that the department considers should not be controversial.¹⁴

Clause 79 – transfer of collateral despite prohibition in security agreement

5.35 This clause seeks to provide that collateral can be transferred despite a provision in an agreement 'whether or not a security agreement' prohibiting the transfer.

5.36 The complaint about this clause is that 'it will have a much wider application than described in the Explanatory Memorandum' and has 'a number of serious consequences.'

5.37 In response to the concern raised the department expressed the view that this clause:

...overreaches slightly to the extent that it applies to agreements other than security agreements, and we think we should wind it back a bit to make it consistent with approaches taken in New Zealand and Canada.¹⁵

5.38 This is a possible amendment that the department considers should not be controversial.¹⁶

Sub-clause 39(2) – relocation of collateral

5.39 Proposed section 39 provides for continuous perfection in certain circumstances when an asset is moved from overseas to Australia. It provides the benefit of enforceability against third parties in the originating jurisdiction that would otherwise be lost as a result of moving the asset.

5.40 As currently drafted, if the foreign jurisdiction has a system for registering security interests the clause would apply when registration of the security interest occurs. However, this application of the clause is not quite complete. As the department describes, this sub-clause:

12 Allens Arthur Robinson, Freehills, Mallesons Stephen Jacques, *Additional Information*, 10 August 2009, p.5.

13 Mr Patch, *Proof committee Hansard*, Friday 7 August 2009, p. 9.

14 Mr Patch, *Proof committee Hansard*, Friday 7 August 2009, p. 9.

15 Mr Patch, *Proof committee Hansard*, Friday 7 August 2009, p. 9.

16 Mr Patch, *Proof committee Hansard*, Friday 7 August 2009, p. 9.

...should trigger the benefit of enforceability against third parties in the originating jurisdiction. This relates to where property is moved from, say, New Zealand to Australia. The Bill currently says that you get the benefit of a registration in New Zealand but you do not get the benefit of perfection of a different kind in New Zealand. We think it should be amended so that when property is moved to Australia you get the benefit of the earlier priority time from the earlier registration or earlier perfection in the previous jurisdiction.¹⁷

5.41 This is a possible amendment that the department considers should not be controversial.¹⁸

Clause 77 – Priority of certain security interests if there is no foreign register

5.42 The issues raised in relation to this clause include that it should extend to some other forms of intangible property and that it assumes that the applicable foreign law in a given matter will have concepts of "perfection", which may not be the case.¹⁹

5.43 The department has responded to the complaint with some explanation of the operation of the clause.²⁰ In evidence to the committee the department also stated that this clause raises a drafting question and:

...should be amended so that it applies to all kinds of security interests. The description...of perfection of originating jurisdiction is an error. We think section 77(1) already has the effect that it does not apply to the deemed security interests. The major law firms said they think that is a strange reading of the section. We propose to take it back to the drafters and see if we can do something about that.²¹

5.44 It follows that this is a matter which requires further work in order to make the proposed provision fully effective.

Clause 151 – Registration – belief that collateral secures obligation

5.45 The issue raised in relation to this clause is that on one interpretation it requires parties to register their security interests to perfect them, but in doing so assignees, consignors and others "...would breach clause 151 (because they are not able to believe the relevant arrangement will secure money) and suffer a civil penalty."²²

17 Mr Patch, *Proof committee Hansard*, Friday 7 August 2009, p. 9.

18 Mr Patch, *Proof committee Hansard*, Friday 7 August 2009, p. 9.

19 Allens Arthur Robinson, Freehills, Mallesons Stephen Jacques, *Additional Information*, 10 August 2009, p. 2.

20 Attorney-General's Department, Attorney-General's response to issues raised by Allens Arthur Robinson, Blake Dawson, Freehills and Mallesons Stephen Jaques, *Additional Information*, Friday 7 August 2009, p. 2.

21 Mr Patch, *Proof committee Hansard*, Friday 7 August 2009, p. 9.

22 Allens Arthur Robinson, Blake Dawson, Freehills, Mallesons Stephen Jacques, *Submission 17*, p. 5.

5.46 The department has outlined an alternative construction of the clause as drafted,²³ but acknowledged the issue and '...proposes to go back to the drafters to see whether the drafting can be improved on.'²⁴

Office of the Privacy Commissioner's issues

5.47 The Office of the Privacy Commissioner and the department have given evidence of working effectively together on the PPS legislation.²⁵ In this spirit, the Office of the Privacy Commissioner has outlined a number of issues that it believes still need to be resolved.²⁶

5.48 The department indicated that there are matters that it agrees may require consequential amendments to the Privacy Act and it will discuss these further. In addition:

There are a couple of other issues to do with possible amendments to the PPS Bill. I think we need to have further discussions with the Privacy Commissioner and the Department of the Prime Minister and Cabinet, which administers the Privacy Act, to clarify what needs to happen there and to make sure that the scheme is consistent with the Privacy Act.²⁷

5.49 The department is of the view that no legislative amendments are required to address the recommendations in the Privacy Impact Assessment.²⁸ The government has provided a formal response to the assessment which indicates that 13 of the 14 recommendations have been accepted in full.²⁹

5.50 These are matters that need to be considered further before they are fully resolved.

Clause 267 – Vesting of unperfected security interests in the grantor upon the grantor's winding up or bankruptcy

5.51 This is a lengthy clause that generated a number of concerns.³⁰ The department commented on two aspects raised: attachment after insolvency and the application of the *zero hour rule*.

23 Attorney-General's Department, Attorney-General's response to issues raised by Allens Arthur Robinson, Blake Dawson, Freehills and Mallesons Stephen Jaques, *Additional Information*, Wednesday 5 August 2009, p. 1.

24 Mr Patch, *Proof committee Hansard*, Friday 7 August 2009, p. 9.

25 Mr Pilgrim, *Proof committee Hansard*, Thursday 6 August 2009, p. 13.

26 Office of the Privacy Commission, *Submission 8*, pp 4 to 6.

27 Mr Glenn, *Proof committee Hansard*, Friday 7 August 2009, p. 9.

28 Mr Patch, *Proof committee Hansard*, Friday 7 August 2009, p. 10.

29 A copy of the response can be found at the committee's website at: http://www.aph.gov.au/senate/committee/legcon_ctte/pps_2009/submissions.htm.

30 See for example, Allens Arthur Robinson, Freehills, Mallesons Stephen Jaques, *Additional Information*, 10 August 2009, p. 9.

5.52 In commenting on the attachment after insolvency concern Mr Patch described the problem as follows:

It relates to the continuing effect of a registration after a company becomes insolvent, and whether the registration should stop when insolvent. It is a very technical point. I think we can resolve that in a way that will make [stakeholders] happy; I just need to work out how to do it.³¹

5.53 In commenting on the application of the *zero hour rule* concern Mr Patch described the problem as follows:

The zero-hour rule is a technical rule that says a company is deemed to become insolvent on the first minute of the day the courts make an order for its winding up. So if someone makes a registration at 10 am but the court makes an order winding it up at noon then the company is deemed to have become insolvent the midnight before that. So in a sense the company is insolvent before the registration is made. It is a very technical sort of thing and we need to fix it up. I think the person at Allens who picked this up did very well.³²

5.54 This is a matter the department considers warrants discussions with stakeholders.

Clause 115(2) – successors in title bound by earlier contracting out

5.55 Clause 115 describes circumstances in which the parties to a security agreement can contract out of enforcement provisions in the Bill. The aspect of concern is whether clause 115(2) binds not only the grantor but also anyone who claims through the grantor, such as a transferee.³³

5.56 The department considers that this warrants discussions with stakeholders. The department made the point that:

Successors in title bound by earlier contracting out is something that we need to talk to them about; it is not a feature of New Zealand legislation. If something can be done quickly that does not take up too much space. We think it has this effect already, for the reason we have explained in our response to the Allens submission; we just need to talk to them about it a bit more now.³⁴

Mortgage backed securities and securities lending arrangements

5.57 Some technical issues were raised with the committee in relation to mortgage backed securities and securities lending arrangements. In evidence the department told the committee that this is a matter that:

31 Mr Patch, *Proof committee Hansard*, Friday 7 August 2009, p. 10.

32 Mr Patch, *Proof committee Hansard*, Friday 7 August 2009, p. 10.

33 Allens Arthur Robinson, Freehills, Mallesons Stephen Jacques, *Additional Information*, 10 August 2009, p. 4.

34 Mr Patch, *Proof committee Hansard*, Friday 7 August 2009, p. 10.

...we think could be addressed in the regulations about mortgage backed securities. They want to make it clear that these security interests are governed by the bill. We attempted to put them in the bill but the drafter said it would go to five or six pages. It is a very technical thing that affects maybe half-a-dozen law firms. We thought, "Well, we'll just put it in the regulations rather than spell it out in the bill." The same goes for securities lending arrangements. These are very technical and it is important to get them absolutely right. We have the capacity to amend the regulations if it turns out that we get them wrong. Both these things are incredibly technical and it would be very important to get the slight nuances of the drafting right...What we are saying here is that we are looking to do something that they want us to do, and we need to discuss exactly how to do it.³⁵

Other matters

5.58 The time available for hearings did not allow the department to finish its evidence about matters raised in submissions. To rectify this the department undertook to answer a question on notice to complete its comments on issues it sought to bring to the attention of the committee.

5.59 Further concerns were also raised with the committee that were not specifically commented on by the department.

5.60 The committee has listed many of these issues and concerns in a table at Appendix 4 as it is intended that they will be considered by the government as part of its response to Recommendation 1.

Conclusion

5.61 The committee is aware that its recommendation in Chapter 4 is somewhat unusual. However, this inquiry has some unusual circumstances: there have been several years of policy development and consultation, the level of reform and the magnitude of the Bill are significant and the scheme requires the detailed cooperation of the states and territories for its legislative foundation and also for it to be implemented effectively.

5.62 In formulating its approach the committee has considered the needs of the various stakeholders, including the federal, state and territory governments, business and their advisers as well as consumers. The committee does not want the process to be unnecessarily delayed, but is also conscious of the genuine concerns raised by submitters about the recent timeframe and about some areas of the Bill that would benefit from amendment to correct errors and other aspects of concern. As outlined above, a number of these areas have been acknowledged by the department.

5.63 The purpose of the recommendation is to allow the Bill to proceed, but to also identify a way in which areas that still require improvement can be identified and made quickly and that will take effect at the commencement of the act. The recommended further period of consultation and the provision to stakeholders of more information about policy choices is expected to provide stakeholders with the

35 Mr Patch, *Proof committee Hansard*, Friday 7 August 2009, p. 10.

opportunity to consider the Bill in further detail and for the department to continue its work to review and finalise the scheme through consequential amendments to the Bill.

Recommendation 2

5.64 That subject to the foregoing recommendation, the Bill be supported.

Senator Trish Crossin

Chair

Liberal Senators' Minority Report

Timing and unresolved issues

1.1 Liberal senators acknowledge that this bill is a considerable improvement over the exposure draft considered by the committee during the last inquiry. However, Liberal senators do not consider that enough time has been allowed either for the committee to conduct an adequate inquiry into this complex and important bill, or for stakeholders to be consulted about it. Indeed, it appears from the evidence received by the committee that although the exposure draft was extensively redrafted to produce the current bill, there has been little if any consultation by the department with stakeholders on the new version of the bill.

1.2 It is clear that the bill will require amendment, but as was apparent during the committee's public hearing, the extent of amendments required is only partially known. The evidence of departmental officers in the final two hours of the committee's public hearing on the bill was, of itself, telling:

We have also handed up a few minutes ago a list of matters which we thought we might take you to. They are under different headings: matters that we think might warrant further consideration; questions on drafting issues that arise in relation to various clauses of the bill; matters which we think might warrant further discussion with stakeholders; matters that have come up in the context of the committee's consideration that will need to be dealt with in regulations.¹

1.3 In short, the department itself was acknowledging that there are unresolved technical issues. Yet the committee is being asked to sign off on this bill before its final form is known, a most unusual step.

1.4 Liberal Senators are also concerned that key stakeholders have indicated that they need more time to come to terms with the bill, and have been critical of the timetable forced by the government. For example, Ms Flannery, a partner at Clayton Utz who had previously been supportive of the general thrust of the reform, told the committee that the new draft of the bill should have been made available for a longer period:

Even an additional month would still have enabled the legislation to be passed this year and might still allow some rats and mice amendments to be made that would at least clarify some things. For example, in relation to the priority time in section 55 a couple of words dropped out from that section which I think, from discussions with the Attorney-General's Department, might not have been intended to drop out. If we just had a bit more time to

1 *Committee Hansard*, 7 August 2009, p. 8.

go through the legislation because it is so different, at least on the order of setting out and some drafting, that would be quite beneficial.²

1.5 Similarly, the submission of the four law firms stated that:

We accept that decision has been made on policy to implement the Bill on substantially the terms proposed. Nonetheless, we have some concerns that in a number of areas the drafting of the Bill is not meeting its policy objectives and can have serious consequences.³

1.6 The submission listed principal concerns about the bill but cautioned that:

This is not a comprehensive list. We are concerned that, in view of the amount and significance of the changes, and the limited time, there are many other points that we and others will have missed...

This is significant legislation which will fundamentally change private commercial rights and financing practice. While we acknowledge that the Act will be reviewed after three years, significant damage can be done in the meantime, at a time in the cycle when the ability of financiers to take security, and the operation of financial markets, are crucial. It is critical to get it right the first time, there is no urgency, and we strongly urge the senate committee to repeat its initial recommendation to take time to get it right.⁴

1.7 Liberal Senators are particularly concerned that consultation with small and medium business has not been adequate, although it must be acknowledged that this not necessarily through any fault on the part of the department. However, the bill will, if passed, pose significant risks for some businesses and individuals if they are not aware of its implications. For example, the committee asked the representatives of the four law firms about issues relating to the registration of security interests for the farming community. Mr Loxton of Allens Arthur Robinson used the example of a farmer delivering a shipment of hay to a bulk exporter:

...the view is that, if the farmer is delivering the hay in advance of payment and has a contract with the buyer that the farmer will retain title to the hay until he or she is paid, that is security interest as defined and something the farmer will need to register in order to be protected.⁵

1.8 On the same point, Mr Lowden of Freehills elaborated that it would no longer be enough for the farmer to simply rely on an invoice, and if they did, there was a risk in some circumstances that they could lose title to their goods, without payment:

2 *Committee Hansard* , 7 August 2009, p. 27.

3 *Submission 17*, Allens Arthur Robinson, Blake Dawson, Freehills, Mallesons Stephen Jaques, p. 1.

4 *Submission 17*, Allens Arthur Robinson, Blake Dawson, Freehills, Mallesons Stephen Jaques, p. 1.

5 *Committee Hansard* , 6 August 2009, p.62.

Assuming that it is treated as a security interest at the end of the day, one consequence of the formality requirements in clause 20 is that it will not be enough for the farmer or some other supplier to deliver under an invoice and just rely on the fact that the purchaser took delivery; they actually need to get it signed. So there is an additional hurdle that suppliers will need to jump even if they go off and register. So they have put the world on notice as to the existence of a security interest. The requirement for signing can mean that they lose their title to the goods.⁶

1.9 Mr Lowden did acknowledge that the bill could also be of benefit to farmers:

On the other hand, the rules on commingling, as Mr Loxton referred to earlier, are potentially of benefit because they mean that, if they validly establish an interest, they do not necessarily lose their interest simply because they cannot identify which was their bit of wheat.⁷

1.10 What is clear to Liberal Senators is that education of those who are affected about their rights and what they must do to protect their interests is going to be of absolute importance if major injustices are not to result. This point was made to the committee by representatives of the combined law firms:

Mr Loxton- but I think the general observation is that this bill, while it weakens what we think is one of the standard forms of charge, tips the scales in favour of those people who are sophisticated financiers who protect their interest against those who are not aware of the need to protect their interest and to go through all the various steps.

Mr Stumbles- So the point to respond to is that, for small business and farmers, the educational piece for both of those sets of interest groups is going to be quite significant.⁸

1.11 The transitional arrangements also need to protect the interests of small business operators as well as farmers and others who are not fully up to speed with the requirements of the bill if and when it becomes law. This particularly needs to include circumstances where retention of title issues might arise.

1.12 Nonetheless, Liberal Senators acknowledge that some significant stakeholders also wish to see the current timetable for the introduction of the reform adhered to, to allow them to put in place the necessary changes to their systems before the changes implemented by the bill come into effect. For example the ABA told the committee that:

The ABA's concern is to ensure that the timetable that this reform is currently on stays on that timetable. We were very appreciative of the committee's recommendation that the commencement date be extended to May 2011. That gives our members the opportunity to settle in and develop

6 *Committee Hansard* , 6 August 2009, p. 63.

7 *Committee Hansard* , 6 August 2009, p. 63.

8 *Committee Hansard* , 6 August 2009, p. 64.

in a realistic time frame the sorts of changes that they need to make and which they and their customers will benefit from in the fullness of that time. So, yes, we are happy to see those technical issues sorted out and resolved to the satisfaction of parties but staying with the current timetable that the government has adopted for this reform.⁹

Conclusions

1.13 It is clear that the bill will require major amendments before it becomes law, and that time needs to be allowed for consultation with stakeholders before these changes can be finalised. The favoured means of achieving the necessary changes appears to be the introduction of a consequential amendments bill to make the necessary changes. Substantial details of the new personal property arrangements are also to be introduced by way of regulations which have also yet to emerge.

1.14 Liberal Senators do not consider that it would be responsible to agree to this bill until the changes to be made in the consequential amendments bill are available to stakeholders and to the Senate. Similarly, the draft regulations should also be made available. Only then will it be possible to see if the concerns raised by stakeholders and the committee have been addressed adequately.

1.15 Liberal Senators emphasise that it is not their intention to obstruct this important reform, but only to ensure that the government "gets it right".

Recommendation 1

1.16 Liberal Senators recommend that the government and the department conduct further consultations on the bill until the end of September 2009, and that at the conclusion of that process, the government introduce a consequential amendments bill.

Recommendation 2

1.17 Liberal Senators recommend that the government and the department release the revised draft regulations for public consultation as soon as possible.

Recommendation 3

1.18 Liberal Senators recommend that on introduction of the consequential amendments bill, the Senate refer that bill, together with the proposed regulations, to this committee for inquiry and report.

Recommendation 4

1.19 Liberal Senators recommend that the bill not be passed until the committee's report on the consequential amendments bill and the regulations has

9 *Committee Hansard*, 6 August 2009, p. 17.

been presented, and that the Senate debate the bill and the consequential amendments bill together.

Recommendation 5

1.20 Liberal Senators recommend that the government develop and implement a comprehensive education campaign for small to medium business and others prior to the start-up date for the new personal property securities system.

Senator Guy Barnett

Senator Mary Jo Fisher

Senator Russell Trood

Deputy Chair

APPENDIX 1

SUBMISSIONS RECEIVED

Submission Number	Submitter
1	Attorney-General's Department
2	Piper Alderman
3	James Kimpton AM
4	The Institute for Factors and Discounters of Australia and New Zealand
5	Consumer Action Law Centre
6	Clayton Utz
7	Motor Trades Association of Australia
8	Office of the Privacy Commissioner (Cth)
9	Office of the Victorian Privacy Commissioner
10	Insolvency Practitioners Association
11	Legal Aid Queensland
12	Australian Institute of Credit Management
13	DLA Phillips Fox
14	Australian Bankers' Association
15	Australian Privacy Foundation
16	Anthony Duggan
17	Allens Arthur Robinson, Blake Dawson, Freehills and Mallesons Stephen Jaques
18	Australian Securitisation Forum
19	David Turner
20	Australian Finance Conference
21	Australian Financial Markets Association
22	Women's Legal Service Victoria
23	Queensland Law Society
24	Director of Public Prosecutions Victoria
25	Independent Film and Television Alliance
26	The Victorian Bar

ADDITIONAL INFORMATION RECEIVED

- 1 Attorney-General's Department response to issues raised in part 2.1 of Allens Arthur Robinson, Blake Dawson, Freehills and Mallesons Stephen Jaques submission - *provided Wednesday 5 August 2009*
- 2 Attorney-General's Department response to issues raised by Professor Duggan in his submission to the Committee - *provided by the Attorney-General's Department Wednesday 5 August 2009*
- 3 Attorney-General's Department response to PPS privacy impact assessment - *provided Wednesday 5 August 2009*
- 4 Updated figures for expenditure on PPS reform in 2007-08 and 2008-09 - *provided by the Attorney-General's Department Wednesday 5 August 2009*
- 5 Supplementary submission / Responses to issues raised by the Committee at public hearing on Thursday 6 August - *provided by Allens Arthur Robinson, Freehills & Mallesons Stephen Jacques on Monday 10 August 2009*
- 6 Response to issues raised at Thursday 6 August 2009 public hearing - *provided by the Australian Finance Conference Wednesday 12 August 2009*
- 7 Answer to Question on Notice - *provided by Clayton Utz Monday 10 August 2009*
- 8 Answer to Question on Notice - *provided by Piper Alderman Thursday 6 August 2009*
- 9 Response to comments made by the Attorney-General's Department - *provided by Professor Anthony Duggan, Thursday 6 August 2009*
- 10 Attorney-General's response to issues raised in part 2.2 of Allens Arthur Robinson, Blake Dawson, Freehills and Mallesons Stephen Jaques submission - *provided Thursday 6 August, 2009*
- 11 Answer to Question on Notice - *provided by the Attorney-General's Department on Wednesday 12 August 2009*
- 12 Answer to Question on Notice - *provided by the Attorney-General's Department on Friday 14 August 2009*
- 13 Answer to Question on Notice - *provided by the Office of the Privacy Commissioner (Cth) Monday 17 August 2009*

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Sydney, Thursday 6 August 2009

BILLS, Mr John, Executive Officer
Institute for Factors and Discounters

BOBBIN, Mr Wayne, Principal Legal Officer, Personal Property Securities Branch
Attorney-General's Department

EDWARDS, Mr Stephen, Legal and Market Consultant
Australian Finance Conference

FLANNERY, Ms Angela, Partner
Clayton Utz

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

GLENN, Mr Richard, Assistant Secretary, Personal Property Securities Branch
Attorney-General's Department

LOWDEN, Mr Patrick, Partner
Freehills

LOXTON, Mr Diccon, Partner
Allens Arthur Robinson

PATCH, Mr Robert, Principal Legal Officer, Personal Property Securities Branch
Attorney-General's Department

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

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

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

STUMBLES, Mr John, Consultant
Mallesons Stephen Jaques

TURNER, Mr David C, Barrister
Private Capacity

WAPPETT, Mr Craig, Partner
Piper Alderman

Sydney, Friday 7 August 2009

BOBBIN, Mr Wayne, Principal Legal Officer, Personal Property Securities Branch
Attorney-General's Department

DUGGAN, Professor Anthony
Private Capacity

GLENN, Mr Richard, Assistant Secretary, Personal Property Securities Branch
Attorney-General's Department

PATCH, Mr Robert, Principal Legal Officer, Personal Property Securities Branch
Attorney-General's Department

POPPLER, Dr James, First Assistant Secretary, Civil Law Division
Attorney-General's Department

APPENDIX 3

Exposure draft of the Personal Property Securities Bill 2008 Government Response

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.

Government response:

Accepted. The Government will review the structure and language of the Bill.

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.

Government response:

Consider further. The Government will consider revising the timeframe for commencement of the PPS scheme in consultation with the States and Territories and, following these consultations, make an announcement about the timing of commencement.

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.

Government response:

Accepted.

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.

Government response:

Accepted in substance. The Bill will be amended to clarify the information about individuals that may be included on the register and to better describe the key privacy protections provided to individuals. The Bill will make it clear that address details of individual grantors will not be included on the register. Accordingly, a prohibition on making address details public is not required.

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.

Government response:

Accepted. A Privacy Impact Assessment will be undertaken by an appropriately qualified independent person or organisation. The assessment will be published on the Department's website. Having regard to recommendation 4 of the minority report, this will occur within two months of the completion of the assessment.

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.

Government response:

Accepted. The Privacy Impact Assessment will consider all issues raised by the Office of the Privacy Commissioner in its submission to the Committee.

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.

Government response:

Accepted. This Bill will be amended to make clear that the duty to act in a reasonably commercial manner applies only in relation to Chapter 4 of the Bill concerning the enforcement of security interests. The duty to act in a reasonably commercial manner will not apply to the extent that the parties have contracted out of the enforcement provisions of the Bill under section 154 of the Bill.

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.

Government response:

Accepted. The Government accepts that the Bill should include conflict of laws provisions. The New Zealand conflict of laws provisions have been criticised as being uncertain. To avoid uncertainty in the Bill, the Government will include conflict of laws provisions in the Bill based on the provisions at Appendix A to the Department's submission to the Committee (the revised commentary to the Bill).

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.

Government response:

Accepted. The Bill will be amended to provide enhanced sanctions for improper use of the register and to ensure the registrar can monitor and investigate suspicious register activity. Further consideration will be given to appropriate sanctions for misusing the register which may include civil and criminal penalties.

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.

Government response:

Accepted. The Government will, in consultation with stakeholders, consider the appropriate priority outcomes for unperfected lessors as against unsecured or other unperfected interests.

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.

Government response:

Accepted.

Liberal Senators' Dissenting Report

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

Liberal Senators support in principle the majority recommendations except recommendation 7 (in relation to the commercially reasonable manner test).

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:
 - (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.

Government response:

Accepted in part. The Government will carry out targeted consultation with stakeholders about changes to the Bill raised in the Committee's report. However, further examination of the revised Bill by the Committee would not be consistent with ensuring the final text of the Bill is settled in time to allow stakeholders an adequate period to prepare to transition to the new PPS system. In order to provide certainty to stakeholders, the Government will progress development of the PPS Bill with a view to its passage through Parliament by the end of 2009 and will develop the new PPS register so that its main functionality is complete by May 2010.

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.

Government response:

Not accepted. Reviewing the operation of the reform after only 12 months of operation would not provide useful data about the new PPS system. The Bill will be amended to require that the Government review the Bill after the new PPS system has been operating for three years.

Recommendation 3

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

Government response:

Accepted.

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.

Government response:

Accepted in part. A Privacy Impact Assessment will be undertaken by an appropriately qualified independent person or organisation. The assessment will be made public within two months of its completion.

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.

Government response:

Accepted in part. The Privacy Impact Assessment will consider all issues raised by the Office of the Privacy Commissioner in its submission to the Committee. The assessment will be published on the Department's website within two months of its completion.

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.

Government response:

Accepted. The Government acknowledges the concerns expressed in the report about the operation of section 235 of the Bill as originally drafted. This Bill will be amended to make clear that the duty to act in a reasonably commercial manner applies only in relation to Chapter 4 of the Bill concerning the enforcement of security interests. The duty to act in a reasonably commercial manner will not apply to the extent that the parties have contracted out of the enforcement provisions of the Bill under section 154 of the Bill.

Recommendation 7

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.

Government response:

Accepted. The Government will include conflict of laws provisions in the Bill based on the provisions at Appendix A to the Department's submission to the Committee (the revised commentary to the Bill).

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.

Government response:

Accepted. The Government will amend the Bill to provide enhanced sanctions for improper use of the register and to ensure the registrar can monitor and investigate suspicious register activity. Further consideration will be given to appropriate sanctions for misusing the register which may include civil and criminal penalties.

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(e)(ii)).

Government response:

Not accepted. See response to Liberal Senators' recommendation 1. However, the Government will seek input from stakeholders about the intellectual property provisions in the Bill to address any outstanding concerns about the provisions.

APPENDIX 4

Consolidated table of many of the suggestions made to the committee intended to be considered by the Attorney-General's Department in accordance with Recommendation 1

Clause	Sub no.	Submitter	Issue	Comment
6	21	Australian Financial Markets Association	Need to include <i>investment entitlement</i> in the scope of the bill	
8(1)(f)	18	Australian Securitisation Forum	Clarification of extinguishment of beneficial interests of a transferee back to a transferor	
8(1)(f)(ii)	6	Clayton Utz	Mortgage backed securitisations should be included in the bill	Possible error
10	6	Clayton Utz	Definition of <i>goods</i>	Policy difference
10	10	Insolvency Practitioners Australia	Definition of 'insolvency' and 'bankruptcy'.	
10	17	Combined four law firms	Provisions relating to ADI accounts should extend to accounts with other financial institutions	
10	19	Mr David Turner	Definition of purchase price and value re credit charges and interest payable is confusing	
10	25	Independent Film & Television Alliance	Clarify that the definition of license includes a partial assignment of intellectual property operating like an exclusive license.	
12	26	The Victorian Bar	The definition of <i>security interest</i> is too broad,	

			Associated Alloys Case trust arrangements should be excluded from the operation of the Act	
12(2)	17	Combined four law firms	Confuses position in respect of leases as security interests	
12(2)(1)	17 21	Combined four law firms; Australian Financial Markets Association	Should not treat flawed assets as security interests	
12(3)	13	DLA Phillips Fox	Querying why a transferee of an unsecured monetary interest is taken to have a security interest	
12(4)	6 17 23	Clayton Utz; Combined four law firms Queensland Law Society	Does not apply to ADI – suggests amending to fix	Possible error
13	5	Consumer Action Law Centre	Amend definition of <i>consumer property</i> to ensure protections properly apply to consumers	Refine existing approach
14(1)(b)	25	Independent Film & Television Alliance	Ensure that this section allows a PMSI for intellectual property	
14(2)(b)	6	Clayton Utz	Amended clause is too broad	
14(2)(c)	2, 19 20	Piper Alderman; Mr David Turner; Australian Finance	Whether the clause will increase the cost of consumer finance of non-serial numbered goods	Policy difference

		Conference		
14(2)(c)	14 23	Australian Bankers' Association Queensland Law Society	Retention of provision will diminish choice in finance for consumer.	
14(3), (4) and (5)	19	Mr David Turner	Suggests the bill consider the Canadian <i>Chrysler</i> decision, reconsiders notice requirements	
15	6	Clayton Utz	There may be unintended consequences if the definition of <i>investment entitlement</i> is linked to the corporations legislation definition	Refine existing approach
18(4)	6	Clayton Utz	Unintended ambiguity	
19	26	The Victorian Bar	Needs to be expanded – how does 19(2) operate on after-acquired future property	
20	13	DLA Phillips Fox	Enforceability of security interests re: third parties, even when not perfected with registration	
20	17	Combined four law firms	Insufficient precision of what description should suffice	
21(2)	25	Independent Film & Television Alliance	Allow intellectual property interests subject to a specialised register to be perfected by registration in the specialised register	Policy difference
26(1)(a)	6	Clayton Utz	Clause does not deal with all circumstances	Possible omission
26	21	Australian Financial Markets Association	Should deal with investment instruments registered in the name of a 3 rd party as per clause 27	
28	18	Australian Securitisation	Relationship between 'control' and letter of credit	

		Forum	problematic in securitisation context	
32(2)	13 21	DLA Phillips Fox; Australian Financial Markets Association	Unclear restriction re: market value of collateral	
34(1)(c)(ii)	17	Combined four law firms	Fixing constructive knowledge on transfer is more harsh than overseas	
39(2)	17	Combined four law firms	'Gap' between foreign registration and perfection.	
Part 2.5 41-53	26	The Victorian Bar	Issues of concern relating to sections 46, 47, 49, 50, 51 and 53	
43	19	Mr David Turner	Section 43 is confusing and policy reasoning is not clear	
44	19	Mr David Turner	Complicated drafting	
46	19	Mr David Turner	Wording different from the NZ legislation	
47(1)	14	Australian Bankers' Association	Taking of personal domestic or household property free of security should be at arms length	
50	17	Combined four law firms	'Consensual' transactions; impact on efficacy of takeovers	
51	21	Australian Financial Markets Association	Clarify ambiguity about knowledge of interest in investment entitlement	Possible error
55(5)	6	Clayton Utz	Does not include 'perfection by control'	Possible error
58	26	The Victorian Bar	Concerns about the effect of the section	Policy difference

61	13	DLA Phillips Fox	Subordination as opposed to priority deeds	
62(3)(b)(i)	20	Australian Finance Conference	Change section to requirement to register within 10 days of the <u>finance</u> being provided, not within 10 days of the <u>grantor</u> taking possession	
63(3)	7	Motor Trades Association of Australia	Requirement that 'evidenced by writing, signed by the grantor' is impractical	
64(1)	18	Australian Securitisation Forum	Should clarify that holder of security interest can effect registration referring to future property of grantor	
64	12	Australian Institute of Credit Management	Recommends that the first in time priority rule should apply, or the period for notice be extended to 10 business days	Possible philosophical difference
69	17	Combined four law firms	'Obligor' and not 'debtor' suggested	
74	25	Independent Film & Television Alliance	Clarify the priority position of execution creditor who obtains a transfer of intellectual property rights	
74	26	The Victorian Bar	Should be contingent on the execution creditor having seized the collateral and the rule should be limited to goods	
77	17	Combined four law firms	Priority of unregistered foreign security interests should extend to investment entitlements, ADI accounts and other forms of intangible property.	
77	17	Combined four law firms	'Perfection' doesn't exist in all international jurisdictions	

79	6, 17	Clayton Utz; Combined four law firms	Should this clause apply only to agreements between the grantor and a secured party?	Possible error
79(1)	25	Independent Film & Television Alliance	Requires some clarification	
80(4)	18	Australian Securitisation Forum	subparagraph b should be deleted	
80(7)(b)	18	Australian Securitisation Forum	Requiring proof of transfer is unwieldy.	
80(7)	6	Clayton Utz	Should clause apply to all transfers of an account or chattel paper?	Possible error
81	17	Combined four law firms	Delimitation of rights on transfer of account	
81	26	The Victorian Bar	Include language with respect to the account debtor contained in Article 9-406	Refine existing approach
102	26	The Victorian Bar	Basis for a pro rata outcome should be cost of goods not the sum secured	
105(1)	25	Independent Film & Television Alliance	Remove	
105(2)	25	Independent Film & Television Alliance	Amend to reflect UNCITRAL Recommendation 243	
Part 4 107-144	6	Clayton Utz	The new enforcement regime is too complex	Suggests an alternative approach
109	7	Motor Trades Association of Australia	Requests that the bill explicitly provides that multiple registrations will not	

			be needed. Consider with operation of clauses 59, 67(1) and (2)	
109(1)(a)	18	Australian Securitisation Forum	Should delete 'that does not' and substitute 'the primary purpose of which is not to'	
109(5)	5	Consumer Action Law Centre	Concern that clause 126 and 142(2) should not apply to consumers	Refine existing approach
111	17	Combined four law firms	Contracting out of commercial reasonableness; still not possible to contract out; should at least not require party to disregard its own commercial interests	
111	19	Mr David Turner	Concerns about the <i>commercially reasonable manner</i> test	Policy difference
115	26	The Victorian Bar	Should be subject to a requirement of not being "manifestly unreasonable"	
115(2)	17	Combined four law firms	Where governed by foreign law, parties should be taken to have 'contracted out'	
116	14	Australian Bankers' Association	Corporations Act continues to apply – dual regimes	
123	26	The Victorian Bar	Section 123 notice should also satisfy other notice requirements	Refine existing approach
127(6)	14	Australian Bankers' Association	'Reasonable expenses paid or incurred' should be payable	
136	26	The Victorian Bar	The section needs more safeguards as it is effectively a foreclosure	
142	26	The Victorian	The right of reinstatement	

		Bar	should be limited to the debtor	
143	17	Combined four law firms	Reinstatement provisions cause significant difficulty when a party has to undo acceleration	
151	17, 18	Combined four law firms, Australian Securitisation Forum	Could be breached by assignees or consignors attempting to perfect interest.	
157	5	Consumer Action Law Centre	Believes proposed penalty is insufficient & should be strengthened to provide for civil penalties	
157(4)	8	Office of the Privacy Commissioner	Only individuals can make a complaint to the Privacy Commission, not all grantors	Correct error
166(2)(c)	17	Combined four law firms	Temporary effectiveness of defective registration – onerous on secured parties; continuous checking	
168	26	The Victorian Bar	Fee should accrue as a charge on the secured property	
172	5	Consumer Action Law Centre	Requests that items 7-10 in the table under clause 172 be amended to restrict the use of the PPSR for data mining for consumer credit assessment and marketing purposes	Refine existing approach
173	8	Office of the Privacy Commissioner	Could clarify the Registrar's ability to lodge complaints in 173(2), is 3 rd party misuse covered, plus changes to the Explanatory Memorandum	
Part 7.2 233-241	6	Clayton Utz	The provisions are too complex	Refine existing approach

237(2)	17	Combined four law firms	Types of property should not be quarantined	
267	6	Clayton Utz	Unsecured creditors can receive a windfall gain	
267	6	Clayton Utz	Should not apply to leases, bailments or commercial consignments – why should the interest of the legal owner be defeated where there is no competing perfected security interest	Querying policy intent
267	17, 18	Combined four law firms, Australian Securitisation Forum	Vesting of unperfected security interests on insolvency; drafting problems.	
267	10	Insolvency Practitioners of Australia	Note 2 should refer to s267 of Corporation Act also	
267	26	The Victorian Bar	Unnecessary and should be omitted as it expropriates the property of the secured party in favour of the unsecured creditors and incorporates notions of reputed ownership	
268(2)	17	Combined four law firms	Turnover trusts not successfully excluded from vesting provisions	
297	13	DLA Phillips Fox	Definition of 'constructive knowledge'	
299(1)(a)	6	Clayton Utz	This clause (and others) should refer to <i>an</i> interest in personal property	Possible error
Other	3	James Kimpton	Whether the bill precludes ratification of the Cape Town Convention and Aircraft Equipment Protocol	
	6	Clayton Utz	Time at which knowledge tested – now unclear in many	Seeking amendments

			provisions	to resolve
	6	Clayton Utz	Section 266 and 267 <i>Corporations Act</i>	
	7	Motor Trades Association of Australia	Will an innocent repairer have rights to recover goods from a defaulting supplier? Will repairer encumbrance details be evident from the register?	
	8	Office of the Privacy Commissioner	The coverage of the <i>Privacy Act</i> in relation to 'interferences with privacy' will need to be addressed.	Bill is inconsistent with <i>Privacy Act</i> .
	9	Office of the Victorian Privacy Commissioner	Include a legislative principle to retain personal information for the minimum amount of time, include a provision to prohibit the use of information for pre-screening and direct marketing, any extension of the use of the register should require legislative amendment or a further privacy impact assessment	
	10	Insolvency Practitioners Australia	Insolvency administrators' liens	
	10	Insolvency Practitioners Australia	Service of documents; consistency with <i>Corporations Act</i>	
	11	Legal Aid Queensland	Synchronise commencement of the bill with the National Consumer Credit Protection Bill	
	11	Legal Aid Queensland	Bill should include powers to address pattern of behaviour conduct	
	11	Legal Aid Queensland	Bill should provide for circumstances where volume	

			of requests to registrar leads to delay for example, expand EDR Schemes so they apply.	
	11	Legal Aid Queensland	Bill should outline a clear process for a security interest when the holding company goes into liquidation.	
	12	Australian Institute of Credit Management	Clarify the registering and searching where a trust is involved, fixtures and fittings should be reconsidered by the state and territory governments	
	13	DLA Phillips Fox	Complexity of priority rules	
	13	DLA Phillips Fox	Priority of unperfected lessors – apparently no changes to Bill	
	13	DLA Phillips Fox	Lack of guidance – when a lease secures payment or performance of an obligation.	
	13	DLA Phillips Fox	Definitions of 'New Value', 'document of title', 'financial property', 'investment instrument', 'located', 'constructive knowledge' and 'land' all problematic	
	13	DLA Phillips Fox	Transitional rules – still too complex	
	13	DLA Phillips Fox	'flawed asset arrangement' not defined	
	13	DLA Phillips Fox	PMSI issue	
	13	DLA Phillips Fox	Possession and control – ss 29, 27, 25, 27(3), 27(4), 27(5)	
	13	DLA Phillips Fox	Uncertainty over re-perfection, and apparent lack	

			of consistency between ss 67 and 32(5)	
	13	DLA Phillips Fox	Modification/substitution of contracts between grantor of interest and transferee	
	13	DLA Phillips Fox	Enforcement of security interests – ss 111, 118, 120.	
	13	DLA Phillips Fox	Registration	
	13	DLA Phillips Fox	Provision of information by secured parties – timeframe unreasonable	
	14	Australian Bankers' Association	Lack of clarity – impact on security interest over ships	
	14	Australian Bankers' Association	Possible conflict with s266 of Corporations Act – certain charges void against liquidator	
	14	Australian Bankers' Association	Uncertainty over proceeds when security interest in a company	
	15	Australian Privacy Foundation	Definition of consumer property	
	16, and additional comments	Professor Tony Duggan	Issues raised and commented on by the department: ADI accounts; consumer goods, inventory and equipment; low-value goods; priority time; inventory PMSIs and the notice requirement; clause 64 process; and collateral	
	17	Combined four law firms	Consumer property; reference to businesses should include those without an ABN	
	17	Combined	Intellectual property: should extend to forms of property	

		four law firms	under general law	
	17	Combined four law firms	Clauses 31-52 – inconsistent language and tests of knowledge	
	17	Combined four law firms	Clause 69 and related rules on negotiable instruments; should be moved.	
	17	Combined four law firms	'particular collateral' – requires clarification	
	17	Combined four law firms	Absolute assignments of accounts and chattel paper should not vest on insolvency unless when they don't secure money	
	17	Combined four law firms	Implementation phases insufficient; based on NZ experience	
	17	Combined four law firms	Investment entitlements are absent from Bill	
	17	Combined four law firms Australian Financial Markets Association	Repos, credit support annexes, securities loans and similar should be excluded from scope of Bill	
	17	Combined four law firms	Weakening of asset charges and other security	
	18	Australian Securitisation Forum	Equitable and legal assignment; consistency with other legislation	
	18	Australian Securitisation Forum	Query whether Bill includes or excludes mortgage backed securitisation	
	18	Australian Securitisation Forum	Minor drafting matters at p.5	

	19	Mr David Turner	Concerned about perfection by control in relation to ADIs	
	21	Australian Financial Markets Association	Suggest making bill compatible with other legislation dealing with negotiable instruments	
	21	Australian Financial Markets Association	Suggest regulation power with capacity to support substantive modification of the act similar to the <i>Corporations Act 2001</i> powers	
	22	Women's Legal Service Victoria	Makes suggestions to ensure that the operation of the register especially protects women and children from family violence	
	24	Director of Public Prosecutions Victoria	Requests the ability to be able to register property restraining orders on the PPSR	
	26	The Victorian Bar	'Control' as a method of perfection is problematic	
	26	The Victorian Bar	Floating charges - no ability to register negative restrictions	