

CHAPTER 2

Background

2.1 The inquiry into this Personal Property Securities (Consequential Amendments) Bill 2009 is the third inquiry the committee has conducted in the previous 12 months relating to personal property securities reform. In March this year the committee reported on its inquiry into the exposure draft of the Personal Property Securities Bill 2009 and in August reported on its inquiry into the provisions of the Personal Property Securities Bill 2009. All of these inquiries were conducted in what were, for the complexities of the subject matter, compressed timeframes.

2.2 The August 2009 majority report recommended that:

Recommendation 1

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

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

2.3 It is not common for a Senate committee to inquire into a consequential amendment bill because, by their nature, these types of bills primarily make legislative changes that are consequential to reform that has already been approved by Parliament. However, this bill is unusual as, in addition to many genuinely consequential amendments, it also contains proposed amendments to the primary bill. This is in accordance with the third component of Recommendation 1 above.

2.4 The reasons for this approach were explained by the Attorney-General in this Bill's Second Reading Speech:

Following consideration of the submissions made to the [August] Senate committee [inquiry] and subsequently to my department, a small number of minor amendments to the Personal Property Securities Bill were identified and are included in the bill that I introduce today.

The amendments will, among other things, address stakeholder comments that the operation of some provisions could be clarified and correct drafting errors.

The amendments have been included in this bill because the PPS Bill is supported by a referral of legislative power by the states.

Moving government amendments to the PPS Bill itself would cause some states to have to revisit their referral legislation.

The method adopted here - which provides the parliament with the same opportunity to consider the changes to the bill as government amendments - will allow the states to continue the referral process without interruption.

I am pleased to advise that New South Wales, Queensland, South Australia and Victoria have all passed their referral legislation. I anticipate Western Australia and Tasmania will introduce their referral legislation shortly.¹

Timing and scope of this report

2.5 The inquiry into this Bill has proceeded swiftly because the government is seeking to have both it and the Personal Property Securities Bill 2009 (which the Senate is able to debate cognately with this bill) passed this year.² The final parliamentary sitting day currently scheduled for this year is Thursday 26 November.

2.6 This timeframe means that there has been less than a month between the date the provisions of the bill were referred by the Senate committee and the last date for passage of the legislation this year.

2.7 It will be apparent from this that the ability of submitters and the committee to consider this highly technical bill has been significantly constrained by the timeframe of the inquiry. In this report the committee has sought, to the extent possible, to examine the general thrust of issues and to articulate a few of the major concerns in more detail. The committee has had to devote the brief time available to the provisions of concern raised with it by submitters. These were primarily confined to the amendments contained in Schedule 4 of the Bill – amendments to the Personal Property Securities Act 2009. Although a number of submitters were able to comment on other schedules in the bill, in the main these comments did not raise issues of concern.³

2.8 For further detail about the entirety of the Bill the committee commends the Explanatory Memorandum to Senators. Background to many of the issues can be

1 The Hon. Attorney-General Robert McLelland MP, Personal Property Securities (Consequential Amendments) Bill 2009, Second Reading Speech, Proof Parliamentary Debates 21 October 2009, p. 13.

2 See, for example, Senator Crossin, *Committee Hansard*, 10 November 2009, p. 3.

3 For example, the Australian Bankers' Association, *Submission 4*, pp 1 to 3, comments favourably on the intellectual property and the maritime consequential amendments. In addition, the Insolvency Practitioners Association sees 'no problems' with the proposed amendments to the *Bankruptcy Act 1966*: *Submission 5*, p. 1.

found in the committee's March and August 2009 reports into personal property securities reform.

2.9 The committee would like to particularly acknowledge the efforts submitters and witnesses made to contribute to this inquiry in the very short time available.

Comment on the August 2009 recommendations

2.10 As outlined above, the three components to Recommendation 1 of the Committee's August report were to consider further matters raised with the Department, to increase the transparency of policy decision-making and to include any amendments in this consequential bill. The committee notes that the government response to Recommendation 1 was:

Accepted: The Government will consider the concerns raised by stakeholders in submissions to the inquiry and otherwise until 30 September 2009. Responses to those concerns will be made available on the Attorney-General's website at www.ag.gov.au/pps. Any changes to the Bill identified in that process will be included in a consequential amendments Bill which will be introduced into Parliament to facilitate a cognate debate with the main Bill in the Senate, should the Senate decide to consider the Bills cognately.⁴

2.11 In accordance with its commitment, the government appears to have considered many, but not all, of the matters brought to its attention until 30 September. As anticipated, the government has included changes identified as a result of that process in this Consequential Amendments Bill.

2.12 In addition to stakeholder concerns that not all issues have been addressed, concerns have also been raised with the committee about the government's response to the remaining component of Recommendation 1 - to 'provide greater transparency by making public its response to the concerns raised'. For example, Clayton Utz, which supports PPS reform and has been a constructive participant in each of the PPS inquiries, observed that:

The Attorney-General's Department has not addressed the issues identified in our submission and in many circumstances has not provided any reasons for that failure...The November Paper does not respond on all points made in the various submissions and some responses do not actually address the issues raised.⁵

2.13 To meet its commitment to increase transparency the Attorney-General's Department has adopted the committee's consolidated table (Appendix 4 to the August report) and, '...used a version of it to address the comments made to the committee

4 *Government Response to the Senate Committee on Legal and Constitutional Affairs Inquiry into the Personal Property Securities Bill 2009 [Provisions]*, tabled 21 October 2009, p. 1.

5 Clayton Utz, *Submission 9*, covering letter, p. 1. The combined submission of Allens Arthur Robinson, Blake Dawson, Freehills and Mallesons Stephen Jacques makes a similar point: *Submission 10*, p. 1.

and those made subsequently to the Department by 30 September 2009.⁶ The table comprises 115 pages and it is available to download from the department's website.⁷

2.14 The committee acknowledges the considerable effort the department has made to compile this table in the short space of time available and to meet the government's commitment to publicly respond to concerns. However, in some instances the response to issues raised is extremely brief: for example, matters have been 'noted' or the department's advice is that 'the Bill reflects the intended policy outcome' without the further explanation envisaged by the committee in its Recommendation 1.⁸ The Department observed in relation to the table that, '...by necessity, some of the comments...are a little cryptic. It runs to 115 pages as it is, so we were just trying to keep it in check.'⁹

2.15 While the committee appreciates the point the Department makes and the difficulties involved, the committee draws the government's attention to the second dot point of Recommendation 1, which requested a commitment that included 'providing as much information as possible to stakeholders about policy considerations and choices.'

2.16 The committee is aware that this will require the use of departmental resources, but believes that it is important to keep stakeholders fully informed in reform of this significance.

Recommendation 1

2.17 That the government continues to provide transparency about policy decisions in relation to PPS reform by making public its response to all concerns raised about the reform brought to its attention in writing and by providing as much information as possible about the reasons for the policy choice in each instance.

Major themes

Accepting the overall framework

2.18 Over the course of the three inquiries into this topic, the committee has observed that stakeholders have generally had one of three approaches to the proposed PPS reform:

- a small number of submitters have supported the purpose of the reform and its detail from the exposure draft stage;

6 Attorney-General's Department website <http://www.ag.gov.au/pps> accessed on 14 November 2009.

7 Attorney-General's Department website <http://www.ag.gov.au/pps> accessed on 14 November 2009.

8 For example, the entries on p.33 Part 2.3 (The Department has noted this comment) and p.42 section 47(1) (The Bill reflects the intended policy outcome).

9 Mr Glenn, *Committee Hansard*, 10 November 2009, p. 18.

- most submitters supported the policy intention, but have expressed disagreement with aspects of the reform in the detail of its implementation; and
- some commentators have consistently expressed fundamental concern about the policy direction.

2.19 The Australian Bankers Association (ABA) has consistently expressed a view generally in favour of both the purpose and content of the reform. This bill is no exception, with Mr Gilbert noting that:

...it is fine tuning and a lot of the detail amounts to fairly sensible technical tidying up and clarification and those sorts of things. We think that it is good sense to do it now rather than later on.¹⁰

2.20 However, most submitters to this and the previous inquiries are in the category where they support the policy intention, but disagree with aspects of the reform in the detail of its implementation.

2.21 In the third category of submitters – those who are not yet persuaded that the reform is needed and who retain considerable concern about the fundamental policy and direction of the reform - the committee has observed a degree of understandable frustration that the government has appeared to be unresponsive to attempts to revisit the need for reform of this scope and magnitude. However, there has been a recognition that there is now little to gain from persisting with opposition. As the combined law firms explained:

As a result of our appearances before the Senate Committee and extensive consultation with the Attorney-General's [D]epartment on the PPS Bill, we understand a decision has been made to proceed with the policy considerations underlying the legislation. The issues set out in [our] schedules are not intended to revisit policy considerations but rather to help ensure that they are effectively implemented in practice.¹¹

2.22 The committee commends this realistic approach as it assists the committee to focus on the most relevant issues at this advanced point in the reform process.

Legislative certainty

2.23 Perhaps a factor that has encouraged submitters to concentrate their analysis on practical matters arising from the bill is the growing level of awareness of the importance of finalising the legislative detail of the reform so that business can begin preparing for commencement of the scheme in May 2011.

2.24 The ABA made this point in previous inquiries and Mr Gilbert again emphasised this point on behalf of the ABA's member banks:

10 *Committee Hansard*, 10 November 2009, p.3. The Australian Finance Conference has also consistently supported the policy intention of the reform.

11 Allens Arthur Robinson, Blake Dawson, Freehills and Mallesons Stephen Jacques, *Submission 10*, p. 2.

...we are looking forward to the legislative phase being completed as quickly as it possibly can so that our people can get some certainty and get on with the job of implementing the regime, which they are looking forward to doing.¹²

2.25 This sentiment was echoed by the Australian Finance Conference¹³ and Mr Whittaker representing the combined law firms who noted that:

...it is not possible to overemphasise the importance of getting the remaining issues resolved and, importantly, getting the IT build processes completed as quickly as we possibly can to give industry as good a chance as it possibly can have of being ready for May 2011.¹⁴

2.26 This approach is also endorsed by the Department:

I reinforce the comments made by earlier witnesses around the desire for stakeholders to have the final form of the substantive PPS Bill available to them through the parliament so that they can have some certainty about making the business decisions and investment decisions that they need to make right now to prepare themselves for the commencement of the PPS regime in May 2011. The sorts of comments that have been made today have been repeated to us often. It is clearly of concern to the business community to have the certainty that the passage of this package of legislation would provide, and the momentum that that would provide for the reform as a whole, so that they can progress the work that they need to do at their end to take advantage of PPS reform.¹⁵

2.27 The committee appreciates the need for legislative certainty and has facilitated this by expediting this report to the extent possible. The committee is also mindful of the importance of this legislation and the substantial resources that will need to be allocated to it by industry, business and their advisers in order to implement the reform effectively. However, the committee also cautions those involved in the process to give due regard to the view expressed by Mr Loxton:

We want things to be effective and quick, but given the choice between something that is quick and wrong and something that is effective I think we would make the choice of taking the time to make sure we have something that works well. We would not want to sacrifice efficacy and getting the legislation right for speed.¹⁶

2.28 The committee retains some disquiet that the balance between the speed of reform and getting the legislation right has been struck correctly. The haste with which it has been required of each of its three inquiries into this legislation heightens this disquiet.

12 *Committee Hansard*, 10 November 2009, p. 2.

13 Mr Edwards, *Committee Hansard*, 10 November 2009, p. 5.

14 *Committee Hansard*, 10 November 2009, p. 12.

15 Mr Glenn, *Committee Hansard*, 10 November 2009, p. 16.

16 *Committee Hansard*, 10 November 2009, p. 15.

Prioritising issues

2.29 Because of the magnitude of this reform, a difficulty that has faced the committee in analysing the many issues raised with it is how to prioritise the concerns brought to its attention. Over the course of the three inquiries, the committee has received some comprehensive and thoughtful submissions that have raised a substantial number of matters. For example, Clayton Utz and the combined law firms have consistently taken a thorough approach to analysing the proposed reform, and have identified numerous issues and suggested relevant amendments.

2.30 An observation about the difficulty of then prioritising the importance of these matters was made to the committee by the combined law firms. In replying to a question about the relative urgency of the various issues, Mr Whittaker advised the committee:

We did have quite a long discussion about this yesterday as we suspected you might ask us a question along those lines. Frankly we were not able to effectively prioritise them. Part of the reason for that is that the issues we have raised will be of differing degrees of significance for different types of clients. Some of the comments, for example, relating to leasing, will be particularly interesting to lessors; others will be more relevant for banks, but in our view they are all important.¹⁷

2.31 The committee agrees with this view, and considers that this means that it would not be prudent for the government to relegate any of these issues to being considered after the scheme has commenced or until the statutory review process proposed in the PPS Bill 2009 takes place. However, it appears that there is a possible solution that could adequately meet the needs of those requiring certainty and those who believe that the legislation still requires some legislative tidying up before it commences in May 2011.

Possible future reform

2.32 The committee appreciates both the government and business imperative to establish legislative certainty, but also understands that there are still a considerable number of issues of concern to stakeholders that submitters assert need resolving before the legislation is fully workable.

2.33 One course of action available to the government to meet the needs of the widest number of stakeholders is to finalise the majority of the legislative framework and for Parliament to pass the two PPS bills currently before it, but to continue to refine the detail of some aspects of the reform.

2.34 For example, the combined law firm submission suggests that 'it will be desirable...in due course to have a further Consequential Amendments Bill' for the following reasons (summarised):

- to resolve issues previously raised with the government that have not been addressed;

17 *Committee Hansard*, 10 November 2009, p. 13.

- to resolve new issues identified to date; and
- to resolve further issues that are identified as organisations 'become more familiar with the PPS Bill, and...start to work with it in preparing for its implementation, [answer] questions from clients and [consider] practical issues...'¹⁸

2.35 On behalf of the combined law firms Mr Whittaker further observed that:

...it may not be practicable to address all...issues in the current amending bill and we also acknowledge that the department has indicated that it may be amenable to addressing some of our issues through the regulations—and indeed the discussion paper on the regs that came out last week takes some steps towards that end. We hope that we will be able to continue the discussions with Robert Patch and his colleagues in the department to see whether our remaining concerns can be addressed either through the regs or, potentially, through the additional piece of legislation that we are aware will need to be passed early in the new year to effect the necessary amendments to the Corporations Act.¹⁹

2.36 This approach seems to the committee to be a practical one that balances the competing needs of stakeholders. As Mr Glenn advised the committee, the Department is open to considering future amendments:

If any amendments arise out of these further considerations, the vehicle for that would be the bill amending the Corporations Act, so that is the next piece of the PPS legislative scheme.²⁰

2.37 The committee welcomes the fact that the government is willing to continue to consider some modifications and is not simply leaving outstanding matters to be considered in the proposed three year review. The committee agrees that any bill amending the Corporations Act is a legislative vehicle that could be used for further amendments agreed to by the government. In addition, some minor aspects of legislative clarification sought by stakeholders may be appropriately achieved through the regulation making process. The process for the draft regulations is discussed below in the next section of this chapter.

2.38 The committee also notes that in light of the scope and magnitude of this reform, additional amendments may continue to be identified and another consequential amendments bill may be warranted next year.

Recommendation 2

2.39 The committee recommends that the government continue its approach of completing the majority of the PPS reform while continuing discussions on the

18 Allens Arthur Robinson, Blake Dawson, Freehills and Mallesons Stephen Jacques, *Submission 10*, p. 1.

19 *Committee Hansard*, 10 November 2009, p. 12.

20 *Committee Hansard*, 10 November 2009, p. 17.

outstanding issues and undertaking further legislative action where this is needed.

Regulations

2.40 In relation to the proposed PPS regulations Mr Glenn explained to the committee that:

A revised regulations paper has been published on our website which is our current thinking on the content of the regulations, and it will form the drafting instructions for the drafters to proceed to put them together. Our intention would be to begin releasing actual drafts of the regulations early in the new year for stakeholders to look at. They may come progressively. Ultimately, the regulations as a whole will need to be considered by the states and territories, pursuant to the PPS intergovernmental agreement.²¹

2.41 It is relevant to note that, as described by the Department, the PPS statutory package will broadly include two kinds of regulations:

- regulations that 'go to the operation of the [PPS] register'; and
- regulations relating to 'the treatment of a number of market based transactions.'²²

2.42 The Department's view is that the form of the PPS register regulations is 'fairly well outlined in the regulations paper' and Mr Patch does not expect that the detail of the regulations themselves will provide any greater information than the paper itself.²³ Draft regulations 'are expected to be made available for public comment by March 2010.'²⁴

2.43 The second broad category outlined by the Department will constitute another, later, tranche of regulations 'dealing with matters other than the PPS Register, for example regulations underpinning the application of the PPS Bill to 'mortgage backed securities''.²⁵ These will require further consultation with stakeholders.²⁶ The Department has advised the committee that:

Subject to the progress of those consultations, we expect the second tranche of regulations to be available for comment in the second quarter of 2010.²⁷

2.44 Because the PPS reform is being progressed by a referral of powers from states and territories, there are consultation requirements that need to be factored into

21 *Committee Hansard*, 10 November 2009, p. 18.

22 Mr Patch, *Committee Hansard*, 10 November 2009, p. 19.

23 *Committee Hansard*, 10 November 2009, p. 19.

24 Attorney-General's Department, *Additional Information*, 12 November 2009, p. 1.

25 Attorney-General's Department, *Additional Information*, 12 November 2009, p. 1.

26 Attorney-General's Department, *Additional Information*, 12 November 2009, p. 1.

27 Attorney-General's Department, *Additional Information*, 12 November 2009, p. 1.

the process of making the regulations and which affect the timeframe for their implementation:

The PPS Intergovernmental Agreement requires that the Commonwealth consult, and in some cases seek the agreement of, the States and Territories in advance of any regulations being made under the PPS Act. We expect to be in a position to present the PPS Regulations to the States and Territories for approval before the middle [of] 2010. This would allow the regulations to be tabled in Parliament early in the third quarter of 2010.²⁸

2.45 In relation to this category of regulations Mr Glenn assured the committee that:

... [while] they are admittedly important matters for the particular areas that they are dealing with. They are not necessarily matters that go to the broad sweep of the reform. They are in particular market segments and in particular transactions. The shape of the PPS scheme is described in the legislation and it is that which the business community is asking us to produce and give certainty about so that they can move on in their business planning.²⁹

2.46 The committee notes the Department's advice about the status of the regulations and intended process for their implementation.

Comment on the Attorney-General's Department contribution

2.47 As in the previous inquiries, a number of submitters made a particular point of acknowledging the level of consultation with stakeholders undertaken by the department. For example, Mr Gilbert offered:

...a commendation to the department themselves, the Attorney-General's Department, for the work and the consultation process that they undertook as well. It has been of a very high standard, and I think I have said once before it is a model that other parts of government might like to give strong consideration to.³⁰

2.48 The committee also acknowledges the considerable time and effort the Department has invested in the Senate inquiry process over the three inquiries. In particular, Departmental representatives have attended all of the public hearings. The committee believes this has greatly assisted the inquiry process as officers have been able to anticipate questioning and, where appropriate, could also discuss issues directly with stakeholders.

28 Attorney-General's Department, *Additional Information*, 12 November 2009, p. 2.

29 *Committee Hansard*, 10 November 2009, p. 19.

30 *Committee Hansard*, 10 November 2009, p. 4.