

Motor Trades Association of Australia

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

Via email: legcon.sen@aph.gov.au

Dear Sir

The Motor Trades Association of Australia (MTAA) welcomes this opportunity to submit comments to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the *Personal Property Securities Bill (2009)*.

MTAA is a federation of the various state and territory motor trades associations as well as the New South Wales based Service Station Association Ltd (SSA) and the Australian Automobile Dealers Association (AADA). MTAA also has a number of Affiliated Trade Associations (ATAs), which represent particular sub-sectors of the retail motor trades, ranging from motor vehicle body repair to automotive parts recycling.

As the peak national representative organisation for the retail, service and repair sector of the Australian automotive industry, MTAA is well positioned to make comments as to the manner in which it anticipates the proposed PPS regime will operate in a practical sense. MTAA understands that in jurisdictions where national PPS registers similar to that proposed to operate in Australia by this Bill are in operation, 'motor vehicle' connected securities comprise roughly half of all those registered. MTAA has, therefore, a significant interest in the development of the proposed PPS regime.

The Committee would likely be aware of MTAA's concerns regarding the anticipated operation of the proposed personal property securities (PPS) regime. Those concerns were outlined in the Association's submission to the Committee of 19 December 2008 for its Inquiry into the Exposure Draft of the Bill. A copy of that submission is attached for your convenience.

The concerns expressed in that submission were based on the Association's knowledge and understanding of the operating characteristics and nuances of the retail motor trades, as well as its understanding as to how the proposed PPS regime might operate in that context. While the characteristics of the retail motor trades have not changed since that submission was made, the content and structure of the PPS Bill has.

The changes that have been made to the PPS Bill are welcomed by MTAA. The fact that those changes have brought with them a something of an amelioration of a number of MTAA's concerns

about the potential operation of the proposed PPS regime is acknowledged and welcomed by the Association.

One of the Association's major concerns was that the operation of the PPS regime as proposed would impose an unforeseen negative impact upon, for example, the spare parts operations of motor vehicle dealerships. The Association is pleased, therefore, to see that the Bill in its current form appears to acknowledge and more closely reflect the practical, present day, dominant practices of the retail motor trades to such an extent that it would seem now likely that the adoption of the PPS regime as proposed might have little lingering impact on a motor vehicle dealer's front of house *and* back of house operations.


None of which is to say that the Association and its Member bodies are now utterly untroubled by the prospect of the PPS regime's adoption. It would be fair comment to make that it is to be the Regulations for the proposed PPS regime that will inform the actual day-to-day operation of the regime from a 'user' perspective. Given that retail motor trades' operations may well comprise the overwhelming majority of transactions and registrations made on the proposed national PPS register, it would be useful if – at this advanced stage of the proposed regime's overall development – that those Regulations were available in a more developed form.

MTAA acknowledges and appreciates the magnitude of the task that the development of the Regulations represents, particularly since the development of the Regulations also needs to occur with some level of synchronisation with, and regard for, the development of the national PPS register. The Association and its Member bodies are keen, however, to acquire some insight into the actual 'mechanics' of the proposed regime, particularly from the perspective of major points of the Association's interests such as the definition of 'motor vehicle' (which, MTAA notes, with the changes to the Bill has been moved from within its content and into the penumbra of the Regulations).

The Association also welcomes the decision to delay the commencement of the national register until May 2011. This development will provide an opportunity for industry sectors effected by the adoption and commencement of the proposed regime to make the appropriate adjustments to their operating procedures.

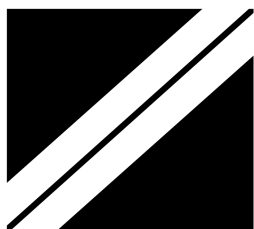
It is my hope that you find these comments instructive in your consideration of the Draft Bill, and I ask of you to contact me at any time of your convenience if you think I can provide you with any further information or if any matters I have raised would benefit from some clarification.

Yours sincerely

A handwritten signature in black ink, reading "Michael Delaney". The signature is written in a cursive, flowing style.

MICHAEL DELANEY
Executive Director

30 July 2009



Motor Trades Association of Australia

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

Dear Sir

The Motor Trades Association of Australia (MTAA) welcomes this opportunity to submit comments to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Personal Property Securities Bill (2008) [Exposure Draft].

MTAA is a federation of the various state and territory motor trades associations as well as the New South Wales based Service Station Association Ltd (SSA) and the Australian Automobile Dealers Association (AADA). MTAA also has a number of Affiliated Trade Associations (ATAs), which represent particular sub-sectors of the retail motor trades, ranging from motor vehicle body repair to automotive parts recycling.

As the peak national representative organisation for the retail, service and repair sector of the Australian automotive industry, MTAA is well positioned to make comments as to the manner in which it anticipates the proposed PPS regime will operate in a practical sense. MTAA understands that in jurisdictions where national PPS registers similar to that proposed to operate in Australia by this Bill are in operation, that 'motor vehicle' connected securities comprise roughly half of all those registered. MTAA has, therefore, a significant interest in the development of the proposed PPS regime.

MTAA acknowledges the enormity of the task that the reform of Australia's personal property security (PPS) law represents and sees a number of benefits that might be derived from the construction of the national PPS register, particularly from the integration within that register of the various state and territory registers of encumbered vehicles (REVS) and the National Exchange of Vehicle and Driver Information Service (NEVDIS).

Nevertheless, the Association does have some concerns in connection with the Draft Bill and its potential operation. The Association also acknowledges, though, that the areas addressed by that Draft Bills can be inordinately complex and broad in scope and that, as such, this will also be reflected in the Bill. The Association's search, therefore, for a clearly defined illustration of the practical, day-to-day operations of the PPS regime as proposed is challenged by the reality. MTAA and the Commonwealth Attorney General's Department continue to work cooperatively on the matters of concern to the Association in an effort to secure satisfactory outcomes.

MTAA is also represented on the Attorney General's Consultative Group for Personal Property Security Law Reform. It is through its engagement with that process that the Association has been assiduous in its efforts to evaluate all aspects of the proposed PPS regime from a prism of practicality, as distinct from what might be considered a theoretical or purely legal perspective.

Understandably, MTAA has made a number of submissions to the Commonwealth Attorney General's Department as part of the reform process leading up to the Bill that is the subject to this Inquiry. Copies of those submissions are attached for your interest. From those submissions it might be understood that the following issues, in the Association's view, need to be acknowledged as considerations of import the equal to any other such issue that carries a significant bearing on the PPS regime in its final form and its subsequent manner of operation. These considerations might be summarised as follows.

First, the manner in which motor vehicle dealership financing is arranged is particular to that sector. Even the characteristics of that financing are particular to the sector and have developed to such an extent as to be highly sophisticated and specific to dealership operations. This aspect of a typical motor vehicle dealers' operations is sufficient in itself to make it reasonable to consider dealings in that sector as 'distinctive' from virtually every other area of retail sales activity in the market.

Second, a typical new motor vehicle dealership is much more than just a vehicle retail outlet. That aspect of the business might be thought of, however, as the 'front of house' component of the operations. Invariably, though, a dealership will also operate a service and spare parts operation. Indeed the need to operate a customer service provision in that manner will invariably be an imperative of the franchise agreement that exists between the dealer and their manufacturer / supplier. That aspect of the business might be thought of as the 'back of house' component of the operations.

Third, a motor vehicle dealerships' profitability and, therefore, sustainability (especially in more recent times) is highly sensitive to a variety factors. Not the least of these factors is any excessive administrative burden and the costs associated with either compliance with regulation or a need to perform actions that are in the best interests of the business.

It might at this point also be worth the Committee noting some of the characteristics of a typical / average motor vehicle dealership. These are generally family-owned and operated franchise businesses. Their stockholding of vehicles is generally facilitated by floor plan financing arrangements, in which the vehicles are 'owned' by a financier that then 'bails' the vehicles to the dealer for sale.

These are capital intensive businesses of modest returns when comparison is made to other retail sectors, where the investment made by the proprietorship in the dealership property itself can be – and usually is – in the many millions of dollars. A typical mid-sized urban new vehicle dealership may have an annual turnover in the order of \$100 million, which may realise a gross profit in the vicinity of 1 – 2 per cent. This is akin to any other retailer of goods in the market selling a product for \$500 for which is realised a maximum profit of approximately \$5: a situation few other retailers would deem remotely viable.

Additionally, a said typical dealership would need to average vehicle sales of somewhere in the vicinity of 30 to 40 units a month in order to realise the capacity to service its obligations. Its most profitable aspects will invariably be in its 'back of house' service and spare parts departments in

which – despite some consumer scepticism – profit margins on activities conducted therein remain only consistent with the majority of the broader retail sector.

Given the issues and characteristics described above, MTAA, and its Member body AADA, are, therefore, perhaps understandably vigilant over any proposal that may have the potential to impact in a deleterious manner upon motor vehicle dealers. At the same time, however, the Association is also vigilant over any proposal that may have the potential to impact in a positive manner, not just upon motor dealers, but also upon retail motor traders generally and the community at large. The Association is of the view that the proposed PPS regime is more likely of the latter category.

One intention of this submission, therefore, is to illustrate to the Committee a number of specific concerns MTAA has, as well as hopefully provide the Committee with some sense of the practical context in which the PPS regime is likely to operate, and with which Committee members may not be all that familiar. During the course of the Department's stakeholder consultations with the Association, the establishment of this context has demonstrated itself to be something MTAA has needed to convey and, significantly, something that the Department – it is imagined – has needed to be receptive to and accept in order for it to comprehend, acknowledge and understand the basis for the Association's view in the proposed PPS regime.

In the main the Association's view and assessment of the PPS regime, as proposed, is that it will likely have little impact on a dealership's 'front of house' operations. At the same time, the Association can see the very real potential for there to be some impact of a negative nature on the dealership's 'back of house' operations. These are views that MTAA has outlined in some detail to the Attorney General's Department, both in the Association's written submissions to it and in the ongoing discussions engaged in between the Department and the Association arising out of MTAA's participation on the Attorney General's Consultative Group.

As declared from the outset of this submission, the Association continues at this time to have a number of concerns in connection with the PPS regime as proposed. These concerns are less connected with the PPS Bill and more connected with possible regulations made under it. Aspects of the Bill nevertheless inform the Association's views, as well as provide an underpinning for any regulations that may be raised. The Association does not propose, however, to specifically raise those issues that are presently the subject of ongoing discussions with the Department, though those issues may be raised in general terms (and can likely be ascertained from the content of the submissions made previously by the Association to the Department).

An issue that continues to trouble the Association surrounds the concept, created by the proposed PPS regime, of a Purchase Money Security Interest (PMSI). Given that it is the proposed intention of PMSIs to replace existing retention of title (ROT) arrangements and that it is those very ROT arrangements that underpin much of a dealership's spare parts operations, the Association needs to be satisfied that the introduction of PMSIs arrangements will not – through their operation – place any retail motor trader at a disadvantage in the market. For example, section 109 of the Draft Bill states:

- (1) The purchase money security interest has priority if:*
 - (a) the interest is in inventory; and*
 - (b) the purchase money security interest is perfected by registration at the time:*
 - (i) for inventory that is tangible property—the grantor, or another person on behalf of the grantor, obtains possession of the inventory; or*

- (ii) *for inventory that is intangible property—the purchase money security interest attaches to the inventory; and*
 - (c) *a notice is given to all other secured parties who, immediately before the inventory is registered, have a registration describing the inventory; and*
 - (d) *the notice is given in accordance with subsection (3); and*
 - (e) *the notice was given before the time mentioned in paragraph (b).*
- (2) *A notice is not required to be given in accordance with paragraph (1)(c):*
 - (a) *in relation to inventory of a class prescribed by the regulations (if any); or*
 - (b) *to persons of a class prescribed by the regulations (if any); or*
 - (c) *in circumstances prescribed by the regulations (if any).*
- (3) *A notice is given in accordance with this subsection if:*
 - (a) *the notice is in the approved form; or*
 - (b) *the notice:*
 - (i) *states that a specified person expects to acquire the purchase money security interest in the inventory; and*
 - (ii) *contains a description of the inventory; and*
 - (iii) *sets out the effect of subsection (1).*

Taken at face value, this section would seem to suggest that there is a need for a dealer to register an interest in any and each supply of spare parts made to any and each customer, as well as possibly undertake efforts to notify all other likely suppliers to that customer of their intention to do so. The question that remains unclear in connection with this section is if ‘inventory’ refers to each supply invoiced to a customer from a dealer, or if ‘inventory’ refers to the aggregation of parts that have been supplied over time by that dealer that form a portion of the customer’s overall parts stock holding.

Additional confusion on this aspect of PMSIs possible operational effects within the retail motor trades is introduced when the above is considered in concert with sections 59 and 67 (1) and (2) of the Draft Bill. Section 59 states:

- (1) *A security agreement may provide for security interests in after-acquired property.*
- (2) *In this Act:*
 - after-acquired property***, *in relation to a security agreement to which a grantor is party, means personal property acquired by the grantor after the agreement is made.*

While section 67 (1) – (2) states:

- (1) *If a security agreement provides for a security interest in after-acquired property, the security interest attaches without specific appropriation by the grantor, except as provided by subsection (2).*
- (2) *However, the security interest attaches to after-acquired property only with specific appropriation by the grantor if:*
 - (a) *the after-acquired property is of a kind prescribed by the regulations; or*
 - (b) *the security interest is covered by subsection (3).*

The notes relating to *Attachment and Perfection: Particular Situations* at page 20 of the PPS Regulations Discussion Paper suggest (at paragraph 55) that this automatic attachment of an interest (refer section 67) with regard to subsequent supplies between a supplier and one of its customers has “ . . . far reaching consequences for a grantor. It means **any** property that the grantor acquires

after entering into a security agreement that gives rise to the security interest will also be subject to the security interest.” (emphasis added).

It must be noted that a dealer’s spare parts department will not simply be dealing, in the main, with one or two third parties, but may despatch a number of ‘bundles’ of parts, to a number of different parties a day, every day. It is also important to consider that some smaller dealer / suppliers may also source almost their entire parts inventory from one or more larger dealer / suppliers. The Association has anecdotal, yet reliable, reports that the invoice value written every day by an average dealer’s spare parts department would be in the vicinity of \$17,000 to \$25,000 while the invoice value written by an ‘apex’ distributor dealer (that might supply the complete parts requirements for smaller dealers) could be in the vicinity of \$1,000,000 per day. These are significant sums at risk that dealers need to protect in order to retain the viability of their operations.

While advice on these matters received by MTAA from the Department suggests that in circumstances such as these a dealer would only have to register one interest, and for that action to be taken at the time of original invoicing, there is little in the Draft Bill that explicitly asserts that to be the case. The Department has also advised that it would be sufficient for a dealer to register their interest in terms of ‘Holden parts’ for example. But, this fails to consider the situation of the repairer sourcing parts from multiple suppliers to effect a single repair. Nor is there any explicit indication in the Draft Bill as to the mechanism that obviates the need for a dealer to specify in detail those parts and / or accessories that it has provided to a repairer. MTAA and its Members would be more comfortable for the Bill to contain some explicit assurances that the advice of the Department in these matters might be relied upon with greater certainty.

Given that it is the intention of PMSIs to replace existing ROT arrangements, concerns might also be raised by the Association in connection with section 63 (3) of the Draft Bill (relating to the enforceability of security interests against third parties), which states:

- (3) A security agreement covers personal property in accordance with this subsection if:*
 - (a) the security agreement is evidenced by writing, signed by the grantor; and*
 - (b) the writing evidencing the agreement contains:*
 - (i) a description of the particular personal property, subject to subsections (4) and (5); or*
 - (ii) a statement that a security interest is taken in all of the grantor’s present and after-acquired property; or*
 - (iii) a statement that a security interest is taken in all of the grantor’s present and after-acquired property except for personal property (other than the particular personal property) described in the writing.*

The practical difficulty that lies within this section for the retail motor trades are the conditionals, ‘evidenced by writing, signed by the grantor’. While ‘evidenced in writing’ may not be such a challenging test, in that virtually any invoice raised within the retail motor trades will satisfy those requirements by having the necessary characteristics (for example, detail / description of goods, payment terms and the like), the issue of ‘signed by the grantor’ may pose a range of difficulties to parties to transaction.

To illustrate an example of relevance from the retail motor trades; the prevailing and ubiquitous practice of the present, which is a continuation of the long standing practice of the past, is for a repairer to contact a supplier, usually by telephone, and ask that supplier’s spare-parts department

for P & A (price and availability) of the following parts to suit 'X' model vehicle. Once that information has been provided, the repairer makes a decision as to whether or not to request supply. If the request is made for supply, then an invoice is raised and the parts dispatched.

While the terms of the invoice might be known to an existing customer of the supplier, and that customer may be party to a long standing arrangement with that supplier, the repairer is just as likely to be a customer of first instance. Indeed, it is that situation that forms a significant part of a dealer / suppliers' daily spare parts business.

The invoices that accompany that parts supply could be COD or on the basis of a seven or 14 day account. Rarely is agreement sought on those terms, except for the parts interpreter informing the customer orally that the goods will be supplied under 'these arrangements'. Those parts are also likely to be dispatched by courier and may be destined to a location interstate. They travel, therefore, under cover of consignment note and not the invoice proper. It is fairly easy to see that these circumstances conspire to limit the opportunity for the supplier to obtain any form of 'signed by the grantor'.

While the Association understands that, under the practice described above, the existing law offers little in the way of securing a supplier's rights in terms of ROT, it also understands there to be a body of case law that may provide some level of security of ROT in these circumstances beyond the vacuum provided by legislation.

In the application of the considerations outlined above to the proposed effect of the Draft Bill, and section 63 (3) in particular, the Association considers the present legal circumstances to be something of an irrelevance. The practical, present day reality as described above is the dominant practice of the retail motor trades and it would be the Association's assertion that it is those circumstances that need to be acknowledged and reflected in and by the manner of the relevant sections of the Bills' construction and import. To 'force' a significant change in the manner and nuances of transactions between parties in the retail motor trades is to court an increase in non-compliance, with a subsequent increase in exposure to risk of loss of rights in property.

It is likely that the point made above has the most particular significance to the MTAA. Any reform that carries with it the potential to demand a significant change in the current operational characteristics and requirements of the retail motor trades also carries with it a degree of risk. While MTAA can see the merits of the proposed PPS regime in the broad and, as indicated earlier, can also see how minimal its impact might be on, say, motor vehicle dealers' 'front of house operations', it can also see the potential for disruption to the practices of the 'back of house' operations. Such an outcome would not be welcomed in the first instance, nor would it be something easily 'balanced' in terms of efficiencies or costs by behavioral changes made by affected businesses at an operational level.

The proposed PPS regime will also not have an impact confined solely to motor vehicle dealers. MTAA considers that there will also be some consequence of the regime's adoption on motor body repairers. For example, a repairer will not necessarily deal with just one supplier representing each manufacturer. Even to effect one repair on one vehicle, a repairer may need to source parts from two or more different dealer / suppliers representing the same manufacturer. This might particularly be the situation faced by a motor body repairer, who might require a parts list comprising upward of 50 line items in order to complete a collision repair on a vehicle to an appropriate standards.

Once again, though, the possible (unclear) operation of section 67 (1) – (2) of the Draft Bill, and the guidance on that section offered by the notes relating to *Attachment and Perfection: Particular Situations* at page 20 of the PPS Regulations Discussion Paper, makes it uncertain as to the manner in which a repairer may find their priority of rights delegated in the event of any priority claim made by the third party over that repairer's spare parts 'holdings'.

MTAA might observe that there is a certain sub-textual 'presumption' contained within the Bill, which seems to be that it is the 'customer' that defaults in these transactions, and that all affects of this then occur 'upstream'. No consideration seems to have been given, however, to the prospect of a supplier (one of perhaps two or three supplier / representatives of the same manufacturer to the one repairer) and the impact that may have upon an 'innocent' repairer and their entitlement rights over parts obtained from that supplier that they might have on hand.

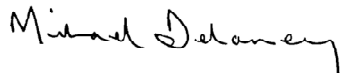
Another area of concern to the Association regarding the interests of repairers relates to the proposed manner of the national PPS register's operation. The Association understands and accepts the need for the national PPS register to act as a register of encumbrances. However, a repairer will invariably source parts from a number of suppliers, which could be as many and as diverse as the number of motor vehicle manufacturers represented in Australia (over 40). It is probable, therefore, for each supplier to have a registered interest in any and all supplies invoiced to that repairer; the details of which would be evident to any entity contemplating supply to an individual repairer.

It is unclear to MTAA from the Draft Bill, however, exactly how the availability of the grantor's (that is, repairer's) details in that regard will be 'managed' in such a way as to prevent the misuse of that information by suppliers; either to the detriment of the repairer or the advantage of one supplier over another. The Association is concerned for the possibility of an individual's encumbrance details, as available from the national PPS register, as being utilised in a manner in which trading confidence may be compromised.

The Association does not believe that the issues in that regard are insurmountable, but it does consider that there needs to be a greater level of clarity and certainty infused into the Draft Bill before any real comfort with the proposed PPS regime can be arrived at by MTAA and its Members.

It is my hope that you find these comments instructive in your consideration of the Draft Bill, and I ask of you to contact me at any time of your convenience if you think I can provide you with any further information or if any matters I have raised would benefit from some clarification.

Yours sincerely



MICHAEL DELANEY
Executive Director

19 December 2008