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

Our reference: 665/21728702

Dear Sirs

Submission on Personal Property Securities Bill 2009

Thank you for this opportunity to make a submission to the Senate Standing Committee on Legal and Constitutional Affairs on the Personal Property Securities Bill 2009 (**PPS Bill**). Enclosed with this letter is our submission.

General comments

As we advised in our previous submission to the Senate Standing Committee in relation to the Personal Property Securities Bill 2008: Exposure Draft, we support the personal property securities (**PPS**) reform as it will simplify a complex area of Australian law. As indicated in our submission, our primary concern is to ensure that the new legislation is as clear and comprehensive as possible and that the new regime is simple to use.

We believe the most significant concerns with the PPS Bill which are required to be addressed are as follows:

1. **Enforcement Regime:** Chapter 4 does not create a simplified enforcement regime. There are some circumstances in which certain of the provisions in the Chapter are mandatory and some circumstances where particular provisions may be contracted out of. On the other hand, in some cases, which will not be known at the time a security agreement is entered into, Chapter 4 will not apply to all. There is also unnecessary overlap with the Consumer Credit Code. Our submission suggests a simplified regime.

2. **Conflicts of Law:** We have suggested a number of simplifications for the conflicts of laws provisions which are included in the new Part 7.2. Again, the primary aim of the suggestions has been to simplify the application of the conflicts of law regime.

3. **Other suggestions:** We have put forward a number of other amendments in our submission. For example, the definition of "priority time" in section 55 of the PPS Bill appears to have been inadvertently amended from the previous Exposure Draft considered by the Senate Standing Committee. As currently drafted, perfection by control is not included in the definition, putting certain secured parties as a significant disadvantage. This should be corrected.

   We have made a number of suggestions to amend particular provisions where, without adequate explanation or consideration of the requirements of stakeholders, changes have been made to the previous Exposure Draft to reflect the position adopted in other jurisdictions. The new exclusions from the purchase money security interest (**PMSI**) regime, such as investment instruments and

investment entitlements, would fall within this category. There are no compelling policy reasons for these exclusions and these new provisions should be removed. There are many other examples in our submission.

To ensure clarity in interpretation and application, we have also suggested a number of drafting changes.

Process and interaction with other legislative instruments

There is one final point we wish to make which relates to the consultation process generally. Over time, there has been extensive consultation by the Attorney General's Department in relation to the proposed reforms, which has in our view been very beneficial. However the following points should be noted:

1. **Consultation with stakeholders:** The finalisation of this new PPS Bill has not involved sufficient consultation with interested stakeholders.

   The PPS Bill, as now being considered by the Senate Standing Committee and as passed by the New South Wales Parliament, incorporates significant amendments to the Exposure Draft. We do not believe that there has been adequate consideration given to the terms of the revised draft (for example, there are some inadvertent errors, such as the change to section 12(4) to exclude ADI accounts) or adequate consultation with stakeholders regarding the commercial ramifications of amendments that have been made (for example, in the case of the exclusions from the PMSI regime referred to above).

   We would support further consultation with stakeholders before the PPS Bill is passed.

2. **Availability of regulations:** The regulations for the PPS Bill are not currently available. It appears that some significant provisions could be included in those regulations. For example, the Attorney General's Department has advised us that the regulations will be likely to include a provision that ensures real property mortgage backed securitisation transactions fall within the operation of the PPS Bill (though, on a reading of the PPS Bill, such transactions would be excluded). It is difficult for those who are making submissions to the Senate Standing Committee to fully consider the PPS Bill without the regulations.

3. **Amendments to other legislation:** There will need to be consequential amendments to a number of other pieces of legislation as a result of the implementation of the PPS Bill. This includes, for example, amendments to the Corporations Act 2001 and the Shipping Registration Act 1981. Again, it is difficult for interested parties to make submissions in the absence of details of the amendments that will be made to such other legislation.

Please note that the views set out in this submission are the views of Clayton Utz and are not the views of any client of Clayton Utz.

Yours sincerely

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Issues

1. Chapter 4

1.1 Chapter 4 does not create a simplified enforcement regime that can easily be used by secured parties and grantors. Even if parties wish to rely on Chapter 4, they may not always be able to do so for the reasons explained below. In addition, to the extent the regime applies to security interests granted by individuals, the regime is inconsistent with the Consumer Credit Code, creating confusion.

1.2 We recommend the following changes:

(a) Chapter 4 should be amended so that it does not apply to security interests granted by corporations (as defined in the Corporations Act) at all.

(b) Chapter 4 applies to all security interests granted by individuals, even if a security interest is enforced by means of the appointment of a receiver.

(c) Provisions that are intended to provide consumer protection are dealt with entirely by the Consumer Credit Code, given that the Commonwealth Government now has responsibility for the Consumer Credit Code.

Application to corporations

1.3 Section 116 of the PPS Bill states that Chapter 4 will not apply in relation to property while a person is a receiver, a receiver and manager or a controller of the property. The Corporations Act defines a controller to include anyone who (whether or not as agent of the relevant corporation) is in possession, or has control of the property of a corporation for the purposes of enforcing a charge.

1.4 Given this expansive definition of controller, there is little scope for Chapter 4 to apply to the enforcement of security interests granted by companies. This is the case as, where enforcement occurs in relation to a security interest granted over the company's own property, enforcement would require a person (whether a receiver, receiver and manager, the secured party itself or an agent of the secured party) to take control of the property in some way for the purposes of enforcement.

1.5 The only circumstances in which Chapter 4 would apply to companies would therefore be where the security interest relates to property owned by a third party (for example, as would be the case under leases and retention of title arrangements). Given the nature of the rights provided by Chapter 4, as compared to the rights that a secured party would have at general law in those circumstances, there is little benefit in retaining Chapter 4 in relation to such types of security interests. Accordingly, for simplicity, enforcement of security interests granted by corporations (within the meaning of the Corporations Act) should be excluded from Chapter 4 entirely.

Application to individuals

1.6 Chapter 4 distinguishes between security interests over collateral that is used predominantly for personal, domestic or household purposes (**Household Collateral**) and security interests over collateral that is not used predominantly for personal, domestic or household purposes (**Business Collateral**).

1.7 The approach in Chapter 4 is inconsistent with the approach used in the Consumer Credit Code. Under the Consumer Credit Code it is the *purpose* for which the financing is provided that will determine whether or not the Consumer Credit Code applies.

1.8 Given this different approach, there are the following possibilities:

(a) Where an individual grants a security interest over Household Collateral in respect of financing provided wholly or predominantly for personal, domestic or household purposes: Chapter 4 (subject to certain exclusions) and the Consumer Credit Code will both apply. There is very limited scope to contract out of the relevant provisions of Chapter 4.

(b) Where an individual grants a security interest over Household Collateral in respect of financing provided for business or investment purposes: Chapter 4 (subject to certain exclusions) will apply but the Consumer Credit Code will not apply. There is very limited scope to contract out of the relevant provisions of Chapter 4.

(c) Where an individual grants a security interest over Business Collateral in respect of financing provided wholly or predominantly for personal, domestic or household purposes: both Chapter 4 (in its entirety) and the Consumer Credit Code will apply. However, many of the provisions in Chapter 4 may be contracted out of.

(d) Where an individual grants a security interest over Business Collateral in respect of financing provided for business or investment purposes: Chapter 4 (in its entirety) will apply but the Consumer Credit Code will not apply. Many of the provisions of Chapter 4 may be contracted out of.

The added complication of course is that, in each of the cases above, if the secured party chooses to enforce by appointing a receiver, Chapter 4 simply will not apply even if the parties could not initially have contracted out of any of the provisions of Chapter 4.

1.9 We do not believe that section 119 (which provides that the regulations may specify that if a particular provision of the Consumer Credit Code has been complied with, a corresponding provision of the PPS legislation will be deemed to be complied with) adequately addresses the question of overlap between the 2 regimes, given the difference circumstances in which the 2 regimes apply.

1.10 Where the legislative intent of particular provisions of Chapter 4 is primarily consumer protection, those provisions should instead be included in the Consumer Credit Code. The remaining provisions in Chapter 4, which allow for a streamlined approach to be taken to enforcement issues, should then apply to all security interests granted by individuals, irrespective of the nature of the secured property and irrespective of the manner in which enforcement occurs. This will provide for simplicity and certainty in the application of Chapter 4.

2. Conflicts of law provisions

2.1 We commented in our previous submission to the Senate Standing Committee on the suggested regime put forward by the Attorney General's Department in relation to conflicts of laws. The regime incorporated in Part 7.2 of the PPS Bill is a simplified version of the regime previously put forward by the Attorney General's Department. Our comments below reflect, in part, our comments in our previous submission to the Senate Standing Committee.

2.2 **Adoption of Conventions:** The Explanatory Memorandum states that certain of the provisions in Part 7.2 are consistent with the United Nations Convention on the Assignment of Receivables in International Trade and the Convention on the Law Applicable to Contractual Obligations. Australia has not adopted either of these Conventions. Therefore there is no

reason for the PPS Bill to be consistent with those conventions where there are sensible reasons to adopt an alternative approach.

2.3 **Investment Entitlements:** Part 7.2 does not include any provisions in respect of investment entitlements. We understand that this is the case because, at the present time, Australia is not a signatory to the Hague Convention on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary. Therefore the intention appears to be to leave the question of determining which law will govern questions of validity, perfection and the effect of perfection and non-perfection of security interests over investment entitlements to the general law until such time as that Convention is adopted by Australia. We do not believe this is a sensible approach. It could be many years before Australia makes a determination to adopt the Convention (if this ever occurs). The PPS Bill should adopt rules that will apply from the time of commencement. We recommend that investment entitlements are dealt with in the same manner as financial property.

2.4 **Section 237:** This section does not provide flexibility to the parties to a security agreement to select a non-Australian law to govern their security agreement. If the grantor is an Australian entity at the time the security interest attaches to the collateral and the parties to the security interest select a law other than Australian law to apply in circumstances where this would not be manifestly contrary to public policy (compare section 239(5)), Australian courts should permit that law to determine questions of validity, perfection and the effect of perfection and non-perfection.

2.5 **Section 238(2):** Reliance on the reasonable belief of the secured party, as is currently provided for in this section, is not practical. For example, take the case where an Australian incorporated company, which carries on business only in Australia, grants a security interest over all of its present and future assets in favour of its financier and does not select Australian law in its security agreement. Assume that this company purchases plant and equipment from a foreign supplier. If title to the property passes to the company whilst the plant and equipment is located in the foreign jurisdiction then, under Australian law, the security interest will attach at that time. If the financier simply has no knowledge of the acquisition, section 238(2)(b) will not be satisfied and the foreign law may govern questions of validity etc (assuming that under that law the security interest attached at the same time it attached under Australian law). This will be the case even though, if the financier had known of the acquisition, Australian law would govern these questions (because clearly in those circumstances the financier would reasonably expect the plant and equipment to be relocated to Australia).

The rule should be changed to look at the question of whether objectively, in light of the surrounding circumstances, it was likely that the goods would be moved to a particular jurisdiction, not the belief of the secured party. We would also support an alternative approach of simply applying the law of the place where the grantor is located at the time the security interest attached (under that law) to the collateral in the case where goods move from one jurisdiction to another.

2.6 **Sections 241(1) and 241(2):** The Explanatory Memorandum states that the exclusions in sections 241(1) and 241(2) for accounts which are proceeds is intended to facilitate transfers of accounts. If that is the intention, then only transfers of accounts that occur separately from the transfer of the collateral that gave rise to the accounts should be excluded. As the section is drafted if, for example, a company gave a security interest over all of its present and future assets, one law may apply to determine questions of validity, perfection and the effect of perfection or non-perfection for all of the collateral other than that company's book debts, with the book debts subject to another law as a result of the exclusions in sections 241(1) and 241(2). This does not promote certainty or simplicity.

2.7 **Flexibility to select governing law**: We do not believe there are sound policy reasons to restrict the ability of the parties to select a law to govern questions of validity, perfection and the effect of perfection or non-perfection on the terms contemplated by section 237(2). Even in the circumstances referred to in sections 237(2), the parties should have the right to select the applicable law.

3. **Section 55(5) - Priority time**

3.1 In the earlier versions of the PPS Bill, "priority time" was defined as the first time the security interest was perfected, including by control, so long as the security interest was continuously perfected. However, "priority time" in the new PPS Bill omits reference to perfection by control. This means that, if a security interest is initially perfected by control and then by another means, for example, registration, the priority time will run from the later time of registration, putting the relevant secured party at a disadvantage as against other secured parties.

3.2 We understand this may be an accidental omission and that the definition of "priority time" may be amended to be the same as in the earlier versions of the PPS Bill. We strongly support that change.

4. **Section 12(4)**

4.1 As a matter of current law, it is uncertain whether a bank or financial institution can take a charge or a mortgage over an account maintained with that bank or financial institution. We understand, from other provisions of the PPS Bill, that the legislative intent is to provide for the possibility that banks and financial institutions may take security over the accounts of their customers.

4.2 Under the earlier drafts of the PPS Bill, this legislative intent was reflected in the equivalent section to section 12(4). In the earlier drafts that section provided the account debtor could take a security interest in the relevant account. In the earlier drafts "account" included an ADI account and therefore the relevant section extended to ADI accounts.

4.3 The definition of account in the new PPS Bill has been amended to exclude ADI accounts. Section 12(4) therefore does not apply to ADI accounts. We strongly support amending section 12(4) to specifically include ADI accounts to ensure the current legal uncertainty regarding security interests over such accounts is removed.

5. **Time at which knowledge tested**

5.1 In certain sections of the PPS Bill there is now a great deal of uncertainty as to the time at which knowledge of a person is relevant.

5.2 For example, sections 45(2)(d), 45(4)(d) and 47(2)(b) test the knowledge of the relevant person as at the time that person "buys or leases" the relevant personal property. It is not clear what that time is. For example, if a person buys personal property by means of an instalment contract, when is that person considered to "buy" that personal property? Is this at the time of first instalment payment or at the time of last payment?

5.3 In the previous version of the Bill considered by the Senate Standing Committee, in each equivalent section the time at which knowledge was considered was when new value was first given for the transferee's interest (see sections 88 and 92 of that Bill). That formulation is very clear and is to be preferred to the wording in sections 45(2)(d), 45(4)(d) and 47(2)(b). The same issue arises in numerous other provisions of the PPS Bill (see for example section 46(2)(b)), notwithstanding that some sections do retain the reference to the giving of value or new value (see for example sections 44(3)(a) and 52(2)(a)).

6. **Application of sections 266 and 267 of the Corporations Act**

6.1 We understand from one of the "Notes" at section 267 of the PPS Bill, the terms of the Explanatory Memorandum and our discussions with the Attorney General's Department that the Corporations Act is to be amended so that sections 266 and 267 of the Corporations Act will continue to apply following the commencement of the PPS legislation.

6.2 We agree that it is sensible to provide for the ongoing application of section 267 of the Corporations Act, given the types of activities that are regulated by that section. Our concern relates to section 266 (other than section 266(5)) of the Corporations Act. Section 266 provides, in part, that charges will be void either in whole or in part if particular registrations under Chapter 2K of the Corporations Act do not occur within particular time frames. The initial grant of a charge is required to be registered under Chapter 2K. Registrations are also required in relation to other matters, including increases in the amount secured by a registrable charge.

6.3 If a security interest granted before the commencement of the PPS regime is perfected under the PPS legislation, this should be sufficient and it should not also be necessary to consider the question of whether the registration requirements of Chapter 2K of the Corporations Act were complied with. This is particularly the case given that no further registrations will be possible under Chapter 2K of the Corporations Act from the commencement of the PPS legislation. Therefore, if the approach of preserving section 266 of the Corporations Act is adopted, if there was a failure to register an existing security interest under Chapter 2K, a secured party will not be able to take any action to remedy this after the commencement of the PPS legislation and will in effect be forced to attempt to take a new security interest, which may not be possible in the circumstances.

6.4 We suggest that section 266 (other than section 266(5)) of the Corporations Act not apply in relation to any security interest, whether granted before or after the commencement of the PPS legislation, that has attached and been perfected in accordance with the PPS legislation.

7. **Mortgage backed securitisations**

Section 8(1)(f)(ii) excludes from the operation of the PPS Bill the creation or transfer of a right to payment in connection with an interest in land if the writing evidencing that creation or transfer specifically identifies the land. This section will have the effect of excluding from the operation of the PPS Bill real property mortgage backed securitisations. We understand that the legislative intent is to include those types of transactions within the PPS regime via the PPS regulations. We support this approach.

8. **Amendments based on other PPS jurisdictions**

8.1 The PPS Bill, as compared to earlier drafts, now more closely follows particular provisions in corresponding legislation in other jurisdictions, notably New Zealand, Canada and the United States of America.

8.2 If the other jurisdictions all adopted a uniform approach to personal property securities legislation, we could see the benefits in adopting a correspondingly consistent approach in Australia. However, this is not the case. For example, the New Zealand regime contains a number of significant differences from the North American regimes and the different Canadian jurisdictions are not uniform. Therefore we strongly support variations from the approaches adopted in other jurisdictions where there are sensible reasons for this.

8.3 By amending the PPS Bill to follow other jurisdictions more closely, a number of provisions which were sensible in the Australian context have been modified. For example:

(a) Section 267 of the PPS Bill provides that unperfected security interests will vest in the grantor upon the winding up, administration or bankruptcy of the grantor subject to a number of exceptions set out in section 268. In the previous draft PPS Bill considered by the Senate Standing Committee the exceptions included security interests provided for by a transfer of an account that does not secure payment or performance of an obligation (section 233(3)(a) of that earlier draft). That exception was included as a result of input provided during the public consultation process. However, that exception is not included in section 268 of the PPS Bill.

We understand from discussions with the Attorney General's Department that the exception was removed because of the amendment made to the definition of "account" to restrict the types of interests that could be caught within that definition. It was therefore thought that the exception from the regime in section 267 was unnecessary. Notwithstanding that the definition of account has been narrowed, we continue to support the exception for transfers of accounts which do not secure the payment or performance of an obligation from the operation of section 267.

This will prevent the unsecured creditors of an insolvent grantor from a "windfall" gain on the winding up of a company. Without the exception, the position will be that the grantor will have received consideration for the transfer of the accounts and will then, on insolvency, also receive the benefit of the accounts. If this type of transfer of account is excluded from the operation of section 267, the legislation still provides an incentive to register such transfers (as a failure to register will result in a loss of priority as against any competing interest) however there will not be a possibility of unsecured creditors of an insolvent grantor obtaining a windfall gain. We note that although to adopt such an approach is inconsistent with some Canadian jurisdictions, it is not inconsistent with the position under the New Zealand legislation.

(b) Section 14(2)(b) of the PPS Bill excludes from purchase money security interests any security interests over chattel paper, investment instruments, investment entitlements, monetary obligations and negotiable instruments. We understand that the amendment has been made in part in response to the submission of the Australian Securitisation Forum. The concern of the Australian Securitisation Forum, as expressed in their previous written submission to the Senate Standing Committee, related to security interests provided for the payment of a deferred purchase price under certain securitisation structures and could easily be dealt with by an agreement entered into between the relevant parties (that is, without a change to the pre-existing PMSI regime). In any event the exclusion extends significantly beyond the amendment requested by the Australian Securitisation Forum. We also understand the other reason for the exclusions in section 14(2)(b) is to ensure consistency with the PPS regimes of other jurisdictions. However there is no consistent approach in other jurisdictions. For example, in New Zealand, there are no such exceptions. As there are no compelling policy reasons for excluding any of these types of property, other than possibly the limited category of assets suggested by the Australian Securitisation Forum, section 14(2)(b) is not supported.

If the exclusion in section 14(2)(b) is not deleted, we suggest, at a minimum, that "monetary obligation" is defined. If monetary obligations is not defined then, in its ordinary meaning, it is much broader than the definition of "account" and will lead to uncertainty in the application of the PMSI provisions.

(c) We also do not support the exclusion from the PMSI provisions of security interests in collateral that, at the time of attachment, the grantor intends to use predominantly for personal, domestic or household purposes, as provided for in section 14(2)(c). This may have a negative impact on (for example) motor vehicle financing. Under

the current law, a financier would expect to obtain a first ranking security interest over a motor vehicle that the financier financed. If section 14(2)(c) is retained, financiers may need to seek specific releases of motor vehicles from pre-existing general security interests prior to providing financing, which would not be required if section 14(2)(c) was removed. We also note that there is no equivalent of section 14(2)(c) in the New Zealand PPS legislation.

8.4 Further consideration should be given to these issues and others where the position adopted in the PPS Bill differs from the earlier version considered by the Senate Standing Committee.

9. **Leases and section 267**

9.1 Although the Senate Standing Committee previously recommended that consideration be given to improving the priority of an unperfected lessor as against unsecured or other unperfected interests in the relevant collateral, no change has been made in this regard under the PPS Bill.

9.2 It remains our view that section 267 should not apply to leases, bailments or commercial consignments within the meaning of section 12(3) of the PPS Bill where there is no competing security interest on the insolvency of the relevant person or company. In each of these cases the distinguishing factor of these types of security interests, which justifies their different treatment, is that at general law the lessor, bailor or consignor is the owner of the relevant property. This approach would also, in our view, be consistent with the New Zealand legislative regime.

9.3 Where there is a competing perfected security interest in the leased, bailed or consigned property, there is a clear policy reason for the unperfected lease, bailment or consignment to be avoided. However, where there is no such competing interest it is difficult to see the policy reasons for the interest of the legal owner of the relevant assets to be defeated. The creditors of the grantor of the security interest would receive a gain in those circumstances that they would not have anticipated (as ownership of the leased, bailed or consigned property would have vested in the grantor). However the grantor would not have paid full consideration for that property. Notwithstanding that the lessor, bailor or consignor would be entitled to claim in the insolvency proceedings against the grantor, it is more likely than not that this person would not recover the full value of the relevant property, given that this person would be treated as an unsecured creditor of the grantor, ranking equally with all other unsecured creditors.

10. **Part 2.7 - Drafting changes**

10.1 We understand that section 79 of the PPS Bill is intended to apply only in relation to agreements between the grantor and a secured party. This is not currently stated in the section and we support the amendment of this section to clarify this.

10.2 We understand that section 80(7) of the PPS Bill is intended to apply to all transfers of an account or chattel paper. This is not clear from the wording of the section. The opening words state: "If collateral that is an account or chattel paper is transferred ...". By referring to collateral, this implies that the section only applies *after* a security interest has already been granted in the account or chattel paper and a subsequent transfer then occurs. The opening words should be "If an account or chattel paper is transferred ..." to clearly reflect the intent of the section.

11. **Definition of investment instrument**

11.1 We have ongoing concerns with the definition of "investment instrument", some of which we raised in our earlier submission to the Senate Standing Committee.

11.2 Our particular concern relates to the unintended consequences of relying on particular Corporations Act definitions. For example, the definition of "investment instrument" refers to debentures within the meaning of the Corporations Act. The Corporations Act definition excludes (amongst other instruments) promissory notes having a face value of at least $50,000. Under the Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 it is proposed that the definition of debenture in the Corporations Act will be amended to *include* such promissory notes. The reasons for the initial exclusion of such promissory notes, and the proposed inclusion of those notes, are unrelated to the proposed PPS regime. How particular instruments are categorised under the PPS legislation should not be affected by how these instruments are categorised under Australian corporations legislation.

12. **Drafting inconsistencies and ambiguities**

12.1 Set out below are a number of drafting inconsistencies and ambiguities that should be corrected. Some of these were present in the earlier version of the PPS Bill considered by the Senate Standing Committee, however a number have arisen from the change in drafting style now adopted in the PPS Bill. These are only a representative example, but indicate that there would be significant benefit in the Attorney General's Department consulting interested parties on the drafting of the PPS Bill to ensure that these drafting inconsistencies and ambiguities are removed.

12.2 *Definition of "goods" - section 10*: We understand the defined term "goods" was introduced into the PPS Bill to address a concern that "tangible property", the defined term previously used, may not be clearly understood by those who use the legislation. The definition of "goods" in the PPS Bill still requires an understanding of "tangible property", as this is expressly referred to in the definition of goods. As "goods", as generally understood, are only one type of tangible property, the use in the PPS Bill of "goods" to mean a broader category of tangible property will lead to ongoing confusion in the interpretation of the legislation.

12.3 *Definition of "investment entitlement":* We assume that the definition of "investment entitlement" in section 15(1) is intended to refer to rights of ownership of the underlying financial product. The definition used in the PPS Bill, unlike the definition in the earlier draft Bill considered by the Senate Standing Committee, captures more than just those ownership rights. The previous definition referred to the rights that "result from crediting an interest in a financial product" to the relevant investment entitlement account. The new definition, which simply refers to "rights of a person" could be interpreted to include other rights the holder has against the intermediary, such as the right to request statements of account and the like. We assume this is not intended and the previous, more concise, definition is preferred.

12.4 *Section 18(4)*: This section provides that a security agreement "may provide for future advances". On a literal "plain English" interpretation, which we believe would be likely to be adopted by a court in considering this section, this would mean that a security agreement may contain a provision pursuant to which the secured party may make further advances to the grantor. However, we assume the intended meaning is that a security interest under a security agreement may *secure* future advances. That was the wording used in the equivalent section in the draft of the PPS Bill previously considered by the Senate Standing Committee. We understand that the reason for this drafting change was to ensure consistency of wording with other jurisdictions, for example, New Zealand. However, the change in drafting has simply introduced an unintended ambiguity.

12.5 *Section 26(1)(a):* This section, which describes how control is taken over an investment entitlement, assumes that the investment entitlement intermediary and the secured party are different entities. This is the case as the relevant agreement needs to be entered into between the secured party, the grantor and the investment entitlement intermediary. It is common for a secured party to also be the investment entitlement intermediary. The section should recognise that, in those circumstances the relevant agreement would be between the grantor and the secured party only.

12.6 *Section 299(1)(a)*: The section refers to a "person [acquiring] personal property" whereas in other sections, the equivalent drafting would be a "person [acquiring] an interest in personal property". "Acquiring an interest in personal property" would be interpreted as a broader concept than "acquiring personal property". The former phrase would include leases and other interests other than full ownership whereas the latter would not. We do not believe this distinction is intended in section 299(1)(a). There are other examples of this inconsistency throughout the PPS Bill.