

Our ref: PRF01

9 April 2010

The Committee Secretary  
Standing Committee on Legal & Constitutional Affairs  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600  
By email [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

Dear Sir

## **Personal Property Securities (Corporations and Other Amendments) Bill 2010 (Bill)**

We thank you for providing us with the opportunity to make a submission to the Parliamentary inquiry being undertaken in relation to the Bill.

Our firm has been an active participant in the consultation process in relation to the proposed PPS regime, having lodged submissions on the original discussion papers, and each of the previous Bills and also having appeared before the Committee and on Legal and Constitutional Affairs in relation to its inquiry into the November 2008 Bill.

We have reviewed the Bill and set out below the main matters we have identified from our review. The purpose of our comments is to simplify the operation of the Bill and also to ensure consistency with the approach taken in amending the *Corporations Act* relative to the *Personal Property Securities Act (PPSA)*.

### **Schedule 1 - amendments to Corporations Act**

#### ***Main matters identified***

- 1 The structure of Schedule 1 is confusing, as there are references to section numbers in the *Corporations Act* throughout the Schedule which are not in numeric order. Although we understand it is necessary for amendments to be made to a number of provisions of the *Corporations Act* (which can apply in a number of different chapters, divisions, parts or sections of that Act), we recommend that to the extent possible, the amendments be shown in the correct numeric sequence.
- 2 There appears to be a difference of approach in relation to whether or not property includes PPSA retention of title property in various chapters of the *Corporations Act*. The general definition of PPSA retention of title

property (proposed section 51F(2), see Paragraph 10 of Schedule 1)), provides that unless otherwise specified, a reference to property of a corporation does not include a reference to any PPSA retention of title property.

In the administration provisions, the change to Section 435B (see Paragraph 154 of Schedule 1) results in all of the administration provisions applying to PPSA retention of title property unless excluded.

In relation to voluntary winding up (see proposed section 489F, at Paragraph 174 of Schedule 1), deed of company arrangement provisions (see proposed section 444F(4A), at Paragraph 169 of Schedule 1), court ordered winding up (see proposed section 465, at Paragraph 171 of Schedule 1) and other provisions, a reference to property will only include PPSA retention of title property if the security interest created by the retention of title arrangements has not been perfected.

We believe a consistent approach (being that PPSA retention of title property only be included in the administration, winding up, deed of company arrangement and receivership provisions if the security interest created by the retention of title arrangements has not been perfected) would make it easier for people to understand the operation of the Bill and its impact on the *Corporations Act*.

As it is proposed that a PPSA security interest which is a retention of title type security interest should only lose its effect in insolvency circumstances if it is not perfected, it is not appropriate that administrators be entitled to deal with PPSA retention of title assets even if the PPSA security interest in relation to such assets has been perfected. This is also consistent with the priority rules contained in the PPSA which clearly grants priority to security holders that hold a perfected security interest over an asset relative to security holders that have an unperfected security interest in the same asset.

- 3 The inclusion of 'PPSA retention of title property' in proposed section 441A (see Paragraph 36 of Schedule 1) may prevent the holders of security interests in the whole or substantially the whole of the assets of a corporation from enforcing their security interest during the decision period, where a large part of the assets of the corporation are subject to PPSA retention of title arrangements. As the holder of a PPSA retention of title arrangement would normally have a superior priority under the PPSA (due to its security being a purchase money security interest) and given the abovementioned approach in relation to PPSA retention of title property in receiverships, we do not believe that PPSA retention of title property should be included in section 441A(1) (b) or section 441(2)(b). Indeed, it should be expressly excluded.
- 4 In circumstances where a lessor of property to a Corporation also takes a general security interest over all assets of the Corporation, is unclear whether such lessor would be able to take advantage of section 441A (if it were to include PPSA retention of title property, as currently contemplated by section 441A(1)(b) and (2)(b)). Where the Corporation which has leased the assets/granted the security interest is in the business of hiring assets leased in the ordinary course of its business, the lessor may not be able to enforce its security interest in relation to those assets as they will be in the possession of (and subject to third party contracts

with) customers of the Corporation. This however should not prevent the lessor from exercising its security rights over the balance of the assets of the Corporation. In this scenario, it would appear that the lessor would not be entitled to exercise such rights, potentially due to its inability to enforce against the PPSA retention of title property.

- 5 The amendment to section 419A(1) (Paragraph 152 of the Bill) seems to have the effect that a receiver will not be liable for rent or other amounts payable by a Corporation in relation to PPSA retention of title property. We do not see why this type of property should be excluded from section 419A and be treated differently from other property used or occupied or in the possession of the Corporation.
- 6 The proposed section 441EA (see Paragraph 40 of Schedule 1) seems to be inconsistent with the distribution rules in section 140 of the PPSA. In particular, the application does not appear to be subject to any priority rules applicable under PPSA or as set out in any document between security holders (see section 140 of PPSA).
- 7 Proposed section 588FP (see Paragraph 183 of Schedule 1) deals with the circumstances currently contained in Section 267 of the Corporations Act. Despite this, subsection 5 provides that the section does not apply in relation to a PPSA security interest in PPSA retention of title property. We query why this exclusion is contained in the Section.

#### ***Other matters***

- 8 We do not understand what circumstances proposed section 441EB (see Paragraph 40 of Schedule 1) refers to. As nearly all security interests would contain enforcement provisions, it seems that the matters the subject of the new Subdivision C would therefore not apply to most enforcement activity. It is also not clear which sections are subject to the rule referred to in proposed section 441EB. The purpose and scope of this provision needs to be clarified.

## **Schedule 2 - amendments to PPSA**

#### ***Main matters identified***

- 1 The amendments provide that the PPSA is to start on 1 February 2012 or an earlier time determined by the Minister. In order to provide businesses with certainty as to the timeframe they have to prepare for the changes to their business processes and procedures arising from the introduction of PPSA, it would be desirable if the Minister would indicate his intention as to the start date as soon as possible.
- 2 The meaning of "grantor" in section 10 of PPSA is proposed to be amended (see Paragraph 17 of Schedule 2). The amendment may create uncertainty as to who can grant a security interest as the word "interest" is very broadly defined and is not limited to persons who have an equitable or legal interest in personal property. Accordingly, it would be possible for multiple security interests to be granted by multiple people, each of whom claims to have an "interest" in the relevant asset.

This may then cause significant problems for the holders of the security interests in relation to priority and enforcement issues.

We suggest that paragraph (a) of the definition of grantor in section 10 of the PPSA be limited to persons having an equitable or legal ownership interest in the relevant personal property. Alternatively, the term "interest" should be limited in this manner.

- 3 A new section 252B is to be included in the PPSA (see Paragraph 104 of Schedule 2) which is to read as follows:

A provision of this Act does not apply to the extent that the operation of the provision would result in an acquisition of property from a person otherwise than on just terms.

The inclusion of this provision appears to be to ensure that the PPSA is consistent with the Constitution. Nonetheless, the current wording of this provision leaves it open to interpretation and it may be used in a way which had not been intended by those drafting the Bill. For example, it may be used adversely on financiers seeking to exercise their rights to retain collateral on enforcement or sell collateral on enforcement to third parties. Other secured parties may seek to use these provisions to dispute the entitlement of a third party purchaser of collateral who would otherwise have the benefit of the extinguishment rules.

- 4 There is no inconsistency provision in the 2010 Bill which expressly provides that the Corporations Act provisions regarding vesting will override the PPSA provisions where the grantor of the security is a corporation. We recommend this be expressly provided for in the PPSA.
- 5 Although not specifically an issue arising from the proposed amendments, we query the position of a security holder which has an existing security registered on a current register, where the existing security is not migrated (for example because the PPS Registrar does not accept the data for registration or the transferring registrar fails to provide the data to the PPS Registrar). It is unclear whether the security holder would receive notice on non-migration. If such notice were given, the security holder could then itself effect registration. We would appreciate if this issue was clarified by the Attorney-General as it may have a significant impact on current security holders.

#### ***Other matters***

- 6 The proposed section 333(5) (see Paragraph 123 of Schedule 2) appears to be incorrect. The reference to 'personal property' should be amended to refer to 'security interest'.

#### ***Tax consequences of PPSA***

- 7 In considering the 'vesting' rules which are included in section 267 of the PPSA and are now to be included in Division 2A of Part 5.7B of the *Corporations Act* (see paragraph 183 of Schedule 1 of the Bill), a potential unintended tax consequence has come to light.

Under the abovementioned vesting provisions of the *Corporation Act* and the PPSA, a PPSA security interest is vested in the grantor of the security interest in certain circumstances.

For the purposes of the PPSA (and therefore the *Corporations Act*), a security interest includes a lease of goods which in substance secures payment or performance of an obligation (which in our view will be the vast majority of leases).

In the context of a leasing arrangement, it appears that the vesting provisions will result in the interest of the lessor in the leased assets vesting in the lessee allowing the administrator or liquidator of the lessee to deal with the asset as if the lessee was the owner of the asset. This raises an interesting question of who bears the tax consequence flowing from the dealing with the asset. If the asset is sold by the administrator or liquidator of the grantor (in circumstances where the vesting provisions have resulted in the interest of the lessor passing to the lessee), will the tax gain or loss resulting from such sale need to be accounted for by the lessor or the lessee for tax purposes? We do not believe that the PPSA intends to affect the title to the asset for any purposes other than those specifically provided for in the PPSA (and the *Corporations Act*). However this is by no means clear.

It is beyond the scope of this submission to suggest the appropriate policy setting for this issue however we believe this uncertainty needs to be dealt with either in the PPSA and/or the tax legislation.

We appreciate being given the opportunity to comment on this significant piece of legislation and look forward to receiving your responses to the matters mentioned above at your earliest convenience.

Yours sincerely

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