

Our Ref: CCW
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10 December 2008

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

Dear Sir/Madam

Personal Property Securities Bill 2008 - Exposure Draft

This submission is made on behalf of Piper Alderman, a national law firm with offices in Sydney, Melbourne, Brisbane and Adelaide, comprising more than 150 lawyers.

We take this opportunity to express our support for the proposed Personal Property Securities Bill 2008 and the establishment of a national electronic personal property securities register.

The current legal regime for personal property securities across Australia, including numerous statutes (which, for historical reasons, take very different approaches on some fundamental issues) and a multiplicity of registers (some of which are electronic and some of which are not) in nine different jurisdictions, is a significant impediment to the conduct of efficient and cost effective commercial transactions. By creating a single comprehensive national law supported by a single national electronic register, the reforms should result in worthwhile efficiency gains and cost benefits.

In addition to rationalising the number of laws and registers, the reforms will also introduce major substantive changes to Australian commercial law. In our view these changes will make the law more consistent, accessible and transparent for secured creditors, debtors, purchasers of property subject to security interests and product suppliers. Enhanced transparency should also assist credit assessment and lending practices as well as insolvency proceedings.

One area in which the Bill is deficient is the omission of conflict of laws rules. The inclusion of a set of rules that state when the Personal Property Securities Act will govern the creation, perfection, priority and extinguishment of a security interest where the personal property concerned (or an element of it) or the grantor has some connection with a jurisdiction outside Australia would be advantageous. The earlier consultation draft of the Bill (published in May 2008) included provisions dealing with these issues but there was a widespread view that those provisions were unclear and possibly more complex than would be necessary to resolve the most common conflict of laws scenarios. The conflict of

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To: Senate Standing Committee on Legal and Constitutional Affairs
Date: 10 December 2008
Our Ref: CCW
Page: 2



laws model in Appendix A to the Commentary on the Bill provides a satisfactory basis for addressing this issue.

In addition to these general observations we have identified some specific issues which require some further amendment to the Bill. These issues are set out in the attached table.

In conclusion, we would also like to acknowledge the extensive and professional consultation process undertaken by the Attorney-General's Department with the broad range of stakeholder groups who will be most affected by these reforms. This process has, we believe, resulted in a proposal that finely balances many competing interests while ensuring that the key objectives of the reforms can be attained.

Yours faithfully
Piper Alderman

Per: 

Craig Wappett
Partner

Specific issues in relation to the Personal Property Securities Bill 2008 – Exposure Draft

| | Section in the PPS Bill | Issue |
|----|-----------------------------|--|
| 1. | Part 1.3, Divisions 4 and 5 | <p>There are two different concepts of 'control' used in the Bill. The first (as used in Part 1.3, Division 4) relates to control of controllable property where control is a means of perfecting a security interest. This concept of control has relevance throughout the Bill. The second concept of control (as used in Part 1.3, Division 5) is used to determine whether property subject to a security interest is to be considered a 'circulating asset', therefore characterising the relevant security interest as a 'floating charge' in respect of that property for the purposes of Commonwealth laws other than the PPSA. This concept is primarily relevant to the interpretation of other laws following the introduction of the PPSA.</p> <p>While having two different concepts of 'control' seems to be causing some confusion, we believe 'control' is the appropriate term to be used in both contexts mentioned above and suggest any confusion may be overcome by the inclusion of a note at the start of each of Divisions 4 and 5 in Part 1.3 of the Bill highlighting that there are two different concepts and briefly stating the purpose of each of them.</p> |
| 2. | 63(3)(b)(iii) | <p>This sub-section provides that a security agreement may contain "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".</p> <p>We understand the intention is to allow a description of a security interest that extends to all of the grantor's present and after-acquired property except for certain specified property. The current wording of sub-section 63(3)(b)(iii) could be more clearly expressed to achieve this outcome including by removing the double negative in parenthesis.</p> |
| 3. | 90(c) | <p>The words "unless the transferee's interest is a security interest" at the beginning of sub-section 90(c) are unnecessary as the Division of which section 90 forms a part does not apply if the transferee's interest is itself a security interest (see section 84(1)).</p> |
| 4. | 125(7) | <p>The first line of section 125(7) commences "if collateral that is intangible property or chattel paper is transferred...". In our view the reference to 'intangible property' should be a reference to 'accounts'.</p> <p>Section 125(7) refers, in a few places, to the 'account debtor'. An 'account debtor' means a person obligated on an account or chattel paper. Section 125(7) deals with accounts and chattel paper not intangible property (a much broader category of personal property).</p> |
| 5. | 235 | <p>This section requires all rights, duties and obligations arising under a security agreement or the Act to be exercised or discharged honestly</p> |

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| | | <p>and in a commercially reasonable manner.</p> |
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| | | <p>We believe existing statutory provisions (eg. in the Trade Practices Act) and equitable principles (eg. unconscionability) provide adequate protection against improper business practices and it is not necessary or desirable to enact additional and differently worded safeguards.</p> |
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