



Personal Property Securities Bill 2009

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Law and Bills Digest Section

Contents

Purpose	3
Background	3
What are ‘personal property’ and ‘personal property securities’?	3
The need for a register	5
Australian Law Reform Commission	6
Commonwealth-State Co-operation	6
Senate Committee consideration of exposure draft	7
Senate Committee consideration of the bill	8
Technical flaws	8
Majority recommendation	9
Liberal Senators’ minority report	9
Scrutiny of Bills Committee	9
Opposition policy	10
Financial implications	10
Main provisions	10

Chapter 1—Introduction	10
Chapter 2—General rules about security interests.	13
Chapter 3—Specific rules for certain security interests	16
Chapter 4—Enforcement of security interests.	17
Chapter 5—Personal property securities register.	18
Chapter 6—Judicial proceedings	20
Chapter 7—Operations of laws	21
Chapter 8—Miscellaneous	22
Chapter 9—Transitional provisions	24
Concluding comments.	26

Personal Property Securities Bill 2009

Date introduced: 24 June 2009

House: House of Representatives

Portfolio: Attorney-General

Commencement: On the day after the Royal Assent.¹

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The purpose of the Bill is to establish a register of personal property securities in place of separate registers tracking whether there is any mortgage or loan or other financial encumbrance over assets. The Bill will apply to all transactions which create an interest in personal property that secures a loan or other obligation.²

Background

What are ‘personal property’ and ‘personal property securities’?

Personal property is any property other than land and buildings—the latter are referred to in law as ‘real property’ or ‘real estate’. Personal property is not only tangible things such as motor vehicles, machinery, office furniture, currency, artworks and stock-in-trade.³ It

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1. However the Legal and Constitutional Affairs Legislation Committee has recommended that the commencement date for the scheme be no earlier than May 2011. Legal and Constitutional Affairs Legislation Committee, *Personal Property Securities Bill 2009 [Provisions]*, Senate, Canberra, 20 August 2009, recommendation 2, p. 4, viewed on 17 September 2009, http://www.aph.gov.au/Senate/committee/legcon_ctte/pps_2009/report/report.pdf
 2. R McLelland (Attorney-General), ‘Second reading speech: Personal Property Securities Bill 2009’, House of Representatives, *Debates*, 24 June 2009, p. 6960.
 3. The Bill refers to tangible property as ‘*goods*’.

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also includes *intangible* things such as contract rights, uncertificated shares and intellectual property rights.⁴

Mortgages,⁵ charges,⁶ liens⁷ and pledges⁸ are referred to as ‘ordinary securities’. They occur where a debtor grants a creditor an interest in the personal property.

Leases, hire purchase agreements, bailments, sales by instalment and reservation of title arrangements are referred to as ‘reverse securities’. Unlike ‘ordinary security’ interests, ‘reverse security’ interests do not involve the borrower or debtor transferring an interest in property to the creditor. The creditor keeps the ownership of the property but gives possession of the property to the debtor. The obligation is ‘secured’ because the owner keeps ownership until the obligation is performed.⁹

As can be seen from above, there is a wide variety of arrangements in commercial use which enable a lender to have recourse to particular property should a debtor default in the payment of money or performance of an obligation.

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4. Standing Committee on Legal and Constitutional Affairs, *Exposure Draft of the Personal Property Securities Bill 2008*, Senate, Canberra, March 2009, p. 3, viewed 22 September 2009, http://www.aph.gov.au/Senate/committee/legcon_ctte/personal_property/report/report.pdf
 5. A mortgage gives the creditor rights over the mortgaged property although the debtor will generally keep possession of the property.
 6. A debtor who ‘charges’ his property contracts with the creditor that he will not deal with the property in a way which is inconsistent with the creditor’s rights. Unlike a mortgage where title to the property is transferred, creditors in whose favour a charge has been given must generally take legal action to enforce their rights. A fixed charge affects specified property, while a floating charge affects property in the debtor’s hands for the time being, and generally becomes fixed when some specified event occurs, such as default. Only when a charge becomes fixed can the creditor exercise its rights over the property.
 7. A lien is a security interest which depends on the existence of a contract between parties. For example, a person who has done work for another may retain the other person’s goods in his or her possession until charges for the work have been paid so that a shoe repairer may retain the shoes that have been repaired until paid for repairing them.
 8. The most common example of a pledge is the pawn. Pawns are characterised by a transfer of possession from the borrower to the lender. The borrower retains full ownership of the pledged goods. If he or she does not redeem the pawn within a specified time, then, at common law, the pawnbroker can sell the goods and pass good title.
 9. The Law Reform Commission, ‘Personal Property Securities’, *Report No. 64*, Sydney, 1993, p. 10, viewed 17 September 2009, <http://www.austlii.edu.au/au/other/alrc/publications/reports/64/>

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The need for a register

A secured party who has possession of the goods has a measure of protection. However, in many security arrangements the borrower has possession. In that case, there is a risk that the property could be used as security for subsequent borrowings and that the second lender will not be made aware of the existing security interest. To protect a potential creditor in these circumstances, the current law provides for public registration of certain security interests. However the existing registration requirements are unsatisfactory because:

- there are different registers for different kinds of debtor
- there are different registers for different kinds of property
- there are different registers for different forms of security arrangement
- the registers overlap
- there are no registers for some kinds of securities
- there are different rules for registering securities, and
- the different registers have different consequences of non-registration.¹⁰

A further problem arises where, for example, personal property is sold without regard to a secured party. The question arises as to whether the interests of the secured person or the new owner should have priority.

The Bill deals with the following matters:

- how lenders secure their interest over tangible and intangible property so that they can recover the debt owed in the event that the borrower defaults
- whether ownership of personal property, as opposed to possession of personal property, affects the security of the interest
- what action lenders can take to enforce their interest over the relevant personal property in the event that a borrower defaults
- in the event that personal property is sold or passed to a third person, whether the lender's interest has priority over the interest of the new owner, and
- how these new rules fit with existing bankruptcy/insolvency law which already contains rules about priority of debts.

10. The Law Reform Commission, *op. cit.*, p. 12–13.

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Australian Law Reform Commission

In June 1990, the then Attorney-General referred a review of the adequacy of personal property securities to the Australian Law Reform Commission (the Commission). In its 1993 Report, the Commission recommended the establishment of a single regime to apply in all jurisdictions for the regulation of priorities between personal property security interests; and for the determination of competition between security interest holders and purchasers.¹¹

Although the then Attorney-General released a discussion paper on the draft legislation proposed by the Commission's report and there were further consultations, no legislation eventuated from that process.

Commonwealth-State Co-operation

The Standing Committee of Attorneys-General prepared an options paper gauging the level of support for personal property securities reform which was issued in April 2006.¹² Another three detailed discussion papers were released for comment in November 2006, and in March and April 2007.

The Council of Australian Governments (COAG) meeting of 13 April 2007 gave in-principle agreement to the establishment of a national system for registration of personal property securities by 2009.¹³ Arising from that preliminary agreement, on 16 May 2008 the Attorney-General circulated the *Consultation Draft Personal Property Securities Bill 2008*.¹⁴

The Commonwealth and State governments signed the Personal Property Securities Law Agreement on 2 October 2008, to:

... establish a national system for the registration of personal property securities to be implemented by Commonwealth legislation, supported by a State text-based referral

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11. The Law Reform Commission, *op. cit.*
 12. Standing Committee of Attorney-General, 'Review of the Law of Personal Property Securities', *Options Paper*, Canberra, April 2006, viewed 17 September 2009, [http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(B60171F51F850FBEA2A49F8C5FEC137E\)~Review+of+the+Law+on+Personal+Property+Securities.pdf/\\$file/Review+of+the+Law+on+Personal+Property+Securities.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(B60171F51F850FBEA2A49F8C5FEC137E)~Review+of+the+Law+on+Personal+Property+Securities.pdf/$file/Review+of+the+Law+on+Personal+Property+Securities.pdf)
 13. Council of Australian Governments, Communiqué, Canberra, 13 April 2007, viewed 17 September 2009, http://www.coag.gov.au/coag_meeting_outcomes/2007-04-13/index.cfm#nra
 14. The Consultation Draft can be viewed at [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(371CAD123B18948FF076D2F02E9A217C\)~PPS+Bill+consultation+draft.pdf/\\$file/PPS+Bill+consultation+draft.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(371CAD123B18948FF076D2F02E9A217C)~PPS+Bill+consultation+draft.pdf/$file/PPS+Bill+consultation+draft.pdf)

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of certain matters to the Commonwealth Parliament, in accordance with subsection 51 (xxxvii) of the Constitution.¹⁵

Senate Committee consideration of exposure draft

It is a measure of the complexity of the subject matter of this Bill, that the Attorney-General referred an exposure draft of the Personal Property Securities Bill 2008 to the Senate Standing Committee on Legal and Constitutional Affairs (the first Committee) stating that:

the Senate's early consideration of the draft will provide important scrutiny in the development of this significant piece of legislation.¹⁶

The first Committee reported on 19 March 2009 making 11 recommendations.¹⁷ The Government responded to the report on 18 June 2009.¹⁸ According to the Attorney-General following from this:

[T]he bill has been reviewed to simplify its language and structure. It is more consistent with comparable legislation in Canada, New Zealand and the United States, while taking into account some of the unique circumstances surrounding Australian consumer law, commercial practices and recent technological advances. As far as can be done in this relatively complex area, the bill has been prepared in plain English terms.

Privacy concerns raised by the committee have also been addressed.

In addition, the government has carefully considered the committee's recommendation to delay the implementing the new register to May 2011.¹⁹

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15. Council of Australian Governments, Personal Property Securities Law Agreement, 2 October, 2008, viewed 17 September 2009, http://www.coag.gov.au/coag_meeting_outcomes/2008-10-02/docs/personal_property_securities_IGA.pdf
 16. R McLelland (Attorney-General), *Further Consultation on Personal Property Securities Bill*, News/media release, 17 November 2008, viewed 17 September 2009, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F4G4S6%22>
 17. Standing Committee on Legal and Constitutional Affairs, *Exposure Draft of the Personal Property Securities Bill 2008*, Senate, Canberra, 19 March 2009, viewed on 17 September 2009, http://www.aph.gov.au/Senate/committee/legcon_ctte/personal_property/report/report.pdf
 18. P Wong, 'Government Response', Senate, *Speech*, 18 June 2009, p. 3737, viewed 17 September 2009, http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/2009-06-18/0176/hansard_frag.pdf;fileType%3Dapplication%2Fpdf

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The current bill, introduced on 24 June 2009, is the product of significant redrafting in response to the first Committee's recommendations.

Senate Committee consideration of the bill

On 25 June 2009 the provisions of final form of the Bill were referred to the Senate Legal and Constitutional Committee (the second Committee) for inquiry and report.²⁰ The second Committee received further significant submissions from previous submitters, and also held hearings in Sydney on 6 and 7 August 2009. At these hearings, the Attorney-General's Department indicated that it would seriously consider many of the recommendations made in the submissions. In light of this, it can be expected that there will be Government amendments prepared for this Bill at some stage, and subject also to the second Committee's recommendations.

Technical flaws

The second Committee has flagged the following clauses as containing unresolved technical issues which require redrafting or further consultation:

- **subclause 39(2)** which relates to relocation of an asset from overseas to Australia²¹
- **subclause 55(4)** which is about the allocation of priority in certain circumstances²²
- **clause 77** which relates to priority of certain security interests if there is no foreign register²³
- **clause 79** which the second Committee considered may have a much wider application than described in the Explanatory Memorandum²⁴
- **subclause 115(2)** which describes circumstances in which the parties to a security agreement can contract out of enforcement provisions in the Bill²⁵

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19. R McLelland (Attorney-General), 'Second reading speech: Personal Property Securities Bill 2009', op. cit, pp. 6961-2.
 20. Details of the inquiry are available on the Senate Legal and Constitutional Affairs Committee website, viewed 17 September, 2009, http://www.aph.gov.au/Senate/committee/legcon_ctte/pps_2009/index.htm
 21. Legal and Constitutional Affairs Legislation Committee, *Personal Property Securities Bill 2009 [Provisions]*, Senate, Canberra, 20 August 2009, p. 26, viewed on 17 September 2009, http://www.aph.gov.au/Senate/committee/legcon_ctte/pps_2009/report/report.pdf
 22. Legal and Constitutional Affairs Legislation Committee, op. cit., p. 25.
 23. Legal and Constitutional Affairs Legislation Committee, op. cit., p. 27.
 24. Legal and Constitutional Affairs Legislation Committee, op. cit., p. 26.
 25. Legal and Constitutional Affairs Legislation Committee, op. cit., p. 29.

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- **clause 151** as it is considered to be capable of two alternative interpretations²⁶
- **clause 267** which raises issues about security interests in circumstances where the grantor is the subject of winding up or bankruptcy,²⁷ and
- **clause 268** in relation to turnover trusts.²⁸

Majority recommendation

The second Committee report was published on 20 August 2009 with a majority recommendation that the Bill be passed subject to a commitment from the government to, amongst other things, extend the period of consultation about the Bill until 30 September 2009 and to introduce a consequential amendments bill incorporating all of the changes that have been identified that will be debated in the Senate cognately with this Bill.²⁹

Liberal Senators' minority report

The Liberal Senators were less supportive of the Bill on the grounds that it will require major amendments before it becomes law, and that time needs to be allowed for further consultation with stakeholders before the relevant changes can be finalised.³⁰

Scrutiny of Bills Committee

In addition, the Bill was examined by the Scrutiny of Bills Committee on 12 August 2009.³¹ The Scrutiny of Bills Committee highlighted the following concerns:

- The bill contains several 'Henry VIII' clauses. These clauses provide for regulations to be made which effectively change responsibilities and entitlements conferred by the principal Act. They are to be found in **subclause 8(3)**, **subclause 118(5)**, **clause 255**, **subclause 258(4)** and **subclause 259(3)**.
- **Clauses 147** and **197** contain wide delegation powers in relation to the form which the Register will take and the capacity of the Registrar to delegate his or her power to either a public service officer or any other person.
- **Clause 299** contains a shifting onus of proof.

26. Legal and Constitutional Affairs Legislation Committee, op. cit., p. 27.

27. Legal and Constitutional Affairs Legislation Committee, op. cit., p. 28.

28. Legal and Constitutional Affairs Legislation Committee, op. cit., p. 25.

29. Legal and Constitutional Affairs Legislation Committee, op. cit., recommendation 1.

30. Legal and Constitutional Affairs Legislation Committee, op. cit., p. 33.

31. Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 9 of 2009*, 12 August 2009, pp. 76–81.

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As all of the above matters have been carefully considered and commented upon by the Senate Committees it is not intended to discuss them further within this Digest.

Opposition policy

It has been reported that the Opposition will support the Bill subject to the findings of the Senate inquiry into the issue.³² However the Liberal Senators' minority report states:

Liberal Senators do not consider that it would be responsible to agree to this bill until the changes to be made in the consequential amendments bill are available to stakeholders and to the Senate. Similarly, the draft regulations should also be made available. Only then will it be possible to see if the concerns raised by stakeholders and the committee have been addressed adequately.³³

Financial implications

According to the Explanatory Memorandum, the Personal Property Securities Register which is established by the Bill will operate on a cost recovery basis. Use of the Register will incur nominal charges, to be used to cover the operating costs of the Register.

Fees are expected to be around thirty million dollars in the first full financial year of operation but revenue estimates cannot be finalised until the design of the Register is complete and a commencement date has been determined.³⁴

Main provisions

Chapter 1—Introduction

Chapter 1 of the Bill sets out where the Act will apply and the interests to which it specifically does not apply.

Subclause 6(1) provides that the Act will apply to a security interest in **'goods'**³⁵ or **'financial property'**³⁶ which are located in Australia or where the **'grantor'**³⁷ is an

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32. F Anderson, 'Plenty of tax changes on agenda', *Australian Financial Review*, 12 August 2009, p. 9, viewed 21 September 2009, http://parlinfo.aph.gov.au/parlInfo/download/media/pressclp/07DU6/upload_binary/07du60.pdf;fileType=application%2Fpdf#search=%22personal%20property%20securities%22
 33. Legal and Constitutional Affairs Legislation Committee, op. cit., p. 36.
 34. Explanatory Memorandum, Personal Property Securities Bill 2009, p. 12.
 35. **'Goods'** are defined in **clause 10** to include crops, livestock, wool, minerals that have been extracted and satellites and other space objects.

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Australian entity. **Subclause 6(2)** provides that the Act will apply to security interests in *'intangible property'*³⁸ if:

- the grantor is an Australian entity
- the account is payable in Australia
- the assignor of an account or chattel paper is an Australian entity
- an assigned account or chattel paper is payable in Australia
- the intangible property is in an authorised deposit-taking institution (ADI) account, or
- the intangible property is created, arises or is provided for by a Commonwealth, State or Territory law.

Clause 8 sets out those interests to which the Act will not apply. Amongst other things, it does not apply to a lien or charge which is not consensual: **paragraph 8(1)(b)**, an interest in real property such as land: **paragraph 8(1)(f)**, certain interests created under the *Bankruptcy Act 1966*: **paragraph 8(1)(g)**, water rights: **paragraph 8(1)(i)**, fixtures: **paragraph 8(1)(j)** or an interest which may be prescribed by regulation: **paragraph 8(1)(l)**. **Subclause 8(2)** contains some variations to the general rules established by subclause 8(1).

Clause 10 contains an extensive dictionary. In particular, **clause 10** distinguishes between *'consumer property'* and *'commercial property'*.³⁹ *'Consumer property'* means personal property held by an individual, other than personal property held in the course or furtherance, to any degree, of carrying on an enterprise to which an ABN has been allocated, whereas *'commercial property'* means personal property other than consumer property.

In addition to the terms which are contained in the dictionary in **clause 10**, chapter 1 of the Bill also defines some of the other more complex terms which are used throughout the Bill.

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36. *'Financial property'* is defined in **clause 10** to include chattel paper, currency, a document of title, an investment instrument and a negotiable instrument.
37. *'Grantor'* is defined in **clause 10** as, amongst other things, the person who owns the personal property, or has the interest in the personal property to which a security interest is attached.
38. *'Intangible property'* is defined in **clause 10** as personal property that is not financial property, goods or an investment entitlement.
39. This distinction is important in the context of the information which is contained in a financing statement which is contained on the Personal Property Securities Register under **clause 153**.

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Clause 12 sets out the meaning of ‘*security interest*’. In essence, a transaction will create a security interest provided that it secures the payment or performance of obligations. **Clause 10** defines ‘*collateral*’ as personal property to which a security interest is attached. **Subclause 12(2)** provides a list of examples of security interests which include fixed and floating charges, a chattel mortgage, a hire purchase agreement and a lease of goods.

In addition, **subclause 12(3)** deems that each of the following is a ‘*security interest*’ whether or not the transaction secures the payment or the performance of an obligation:

- the interests of a transferee of accounts or chattel paper⁴⁰
- the interests of a consignor under a commercial consignment
- the interests of a lessor or bailor under a PPS lease.

Clause 13 provides the meaning of the term Personal Property Securities lease (‘*PPS lease*’) as a lease or ‘bailment’ of goods for any of the terms set out in that clause. Bailment is the delivery of goods by their owner into the possession of another person on the promise that they will be redelivered to their owner or dealt with in a specific way. A common example of bailment is hiring a car. In that case the hire care company owns the car but allows the customer to take possession of it on the promise that it will be returned to the hire car company at the end of the period of the hire contract.

Clause 14 introduces the phrase ‘*purchase money security interest*’ (PMSI) which is a security taken by a financier for a specific asset. According to the second Committee:

A PMSI is a security interest in collateral. The purpose of a PMSI is to give priority to a security interest for the specific asset. This provides an incentive to the financier for providing security for the asset, especially in circumstances where the purchaser has given an all-assets security to another financier.⁴¹

Paragraph 14(2)(c) provides an exception to the usual operation of a PMSI so that it will not be possible to have a PMSI in collateral that the grantor intends to use for personal, domestic or household purposes. A number of submitters to the second Committee expressed concerns about this provision. In response, the second Committee stated that it would be beneficial if the reasoning for the exception was made known.⁴²

40. ‘*Accounts*’ and ‘*chattel papers*’ are defined in **clause 10**. Essentially these terms relate to purchased debts—that is, where one company purchases the debt portfolio of another. Where the purchased debt is unsecured, such as credit card debt, the Bill refers to it as an ‘account’. Where the purchased debt is secured over goods, the Bill refers to it as ‘chattel papers’.

41. Legal and Constitutional Affairs Legislation Committee, op. cit., p. 22.

42. Legal and Constitutional Affairs Legislation Committee, op. cit., p. 23.

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Clause 15 introduces the term *‘investment entitlement’* and related terms. An *‘investment entitlement’* is the right of a person in whose name an investment entitlement account is maintained by another—referred to in the Bill as an *‘investment entitlement intermediary’*.

Chapter 2—General rules about security interests

Chapter 2 of the Bill sets out general rules relating to security interests.

Clause 19 sets out the conditions in which a security interest can be enforced against a *grantor*. Specifically the security interest must have *‘attached’* to collateral. This generally occurs when the grantor enters into a security agreement which gives the security interest in the personal property in exchange for *‘value’*.⁴³ The attachment occurs at the time of the agreement or some later time specified in the agreement.

Clause 20 sets out the conditions in which a security interest can be enforced against a *third party*. In addition to the security interest being attached to the collateral, one of the following must also apply:

- the secured party possesses the collateral
- the secured party has *‘perfected’* the security interest by control, or
- there is a written security agreement that fully and accurately describes the collateral in accordance with **subclauses 20(2)–(5)**.

Clause 21 details how a security interest is *‘perfected’*. Under **paragraph 21(1)(b)** this will occur where a security interest is attached to collateral and one of the following applies:

- there is an effective registration in respect of the collateral or
- the secured party has possession of the collateral⁴⁴ or
- for certain types of collateral such as investment entitlements or investment instruments, the secured party has control of the collateral.⁴⁵

Clause 22 contains separate rules for perfection in the case of bailment.

43. *‘Value’* is defined in **clause 10** as including consideration that is sufficient to support a contract and an antecedent debt or liability.

44. **Clause 24** specifies for the avoidance of doubt that possession by one party is exclusive of possession by another.

45. **Clauses 25–29** detail what constitutes control of specified intangible property.

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According to **clause 31**, *'proceeds'* of collateral to which a security interest is attached means identifiable or traceable personal property which are listed in the clause. The simplest examples are in **subclauses 31(4)** and **(5)** relating to crops and livestock.

Clause 31 introduces for the first time a reference to 'tracing'. The doctrine of tracing provides that in certain circumstances a person may follow property into the hands of third parties who have received it, or trace it into whatever different form it has taken.⁴⁶ As this is not an unlimited right, it has become commercial practice to insert a 'retention of title' clause (known as a 'Romalpa' clause) into a contract stating that title in the goods does not pass from the seller to the buyer until the purchase price is paid. If, for example, a company which has received goods on consignment becomes insolvent before the goods are paid for, the seller of the goods will seek to rely on the 'retention of title' clause for the return of their goods or to give it a priority interest, rather than merely having the same rights as any other unsecured creditor.

The question of the effect of the Bill on retention of title clauses was raised by the second Committee at their hearings as follows:

Senator FISHER—What, if anything, will be the effect of this bill on situations in which there might today be an argument about retention of title and Romalpa clause-type issues—for example, delivery of hay to an exporter by a farmer or delivery of grain? Do you have a view?

Mr Loxton—Yes, the view is that, if the farmer is delivering the hay in advance of payment and has a contract with the buyer that the farmer will retain title to the hay until he or she is paid, that is security interest as defined and something the farmer will need to register in order to be protected.⁴⁷

It would appear therefore, that the use of a retention of title clause in certain transactions will be only be effective where it is registered as a security interest and *'perfected'* in accordance with **clause 21**.

Where collateral gives rise to proceeds the security interest will continue in the collateral and will attach to the proceeds unless the security agreement between the parties provides otherwise: **clause 32**. As with collateral itself, proceeds can be perfected by registration: **clause 33**. **Subclause 33(2)** provides for a five day period of *'temporary perfection'* in order for a security interest in proceeds to be registered.

Clauses 35–38 detail how the return of certain collateral can affect the security interest which is attached to it. **Clause 39** contains the main rule about relocation of collateral or a

46. M Evans, *Outline of Equity and Trusts*, Butterworths, Sydney, 1988, p. 290.

47. Legal and Constitutional Legislation Committee, Personal Property Securities Bill 2009: Public Hearings, *Senate Hansard*, 6 August 2009, p. 62, viewed 7 October 2009, <http://www.aph.gov.au/hansard/senate/commtee/S12297.pdf>

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grantor to Australia. The effect is that a security interest which was registered and enforceable against third parties under a foreign law, is taken to be *'continuously perfected'* until the collateral is located in Australia. In that case, the security interest becomes 'temporarily perfected' from the time of relocation either for a period of 56 days, or until five days after the secured party acquires actual knowledge that the property is relocated. This gives the owner the opportunity to register the security interest in Australia. As already stated the second Committee has commented on that the drafting of **subclause 39(2)** may need to be amended as the application of the clause is not quite complete.⁴⁸

Clauses 43–47 set out the circumstances in which a buyer or lessee, for new value,⁴⁹ can take personal property free of a security interest. Notably **clause 45** relates to motor vehicles. The effect of this clause is that a person who buys or leases a motor vehicle of a kind prescribed in the regulations would take their interest in the vehicle free of a security interest in the following circumstances:

- the motor vehicle is acquired for new value
- the regulations provide that the motor vehicle is of a kind that may or must, be described by serial number but a search of the register immediately before the time of the sale or lease, or on the previous day, by reference only to the serial number of the vehicle, does not disclose a registration on the PPS Register, and either:
 - the seller or lessor was the grantor or the security interest, or
 - the seller or lessor is another person who is in possession of the motor vehicle.

Clauses 48–53 set out the circumstances in which various types of intangible property may be taken free of a security interest.

Clauses 55–77 describe how to work out the priority between competing security interests. This is relevant where the same personal property may be subject to more than one security interest. The rules apply in the event that a debtor defaults. The general rule is contained in **clause 55** which provides that:

- priority in unperfected security interests is based on the order of attachment so that the first unperfected security interest to be attached takes priority of later ones.⁵⁰ **subclause 55(2)**
- a perfected interest has priority over an unperfected interest: **subclause 55(3)**

48. Legal and Constitutional Affairs Legislation Committee, op. cit., p. 26.

49. Under **clause 10** the term *'new value'* means value other than value provided to reduce or discharge an earlier debt or liability.

50. See **clause 19** for the definition of *'attachment'*.

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- priority between perfected interests is worked out having regard to the *‘priority time’* for each, based on registration time, the time the secured person takes possession or the time when the security interest is temporarily perfected, whichever is the earliest: **subclauses 55(4)–(5)**.⁵¹

Clause 62 contains a priority rule for PMSIs which gives priority to a secured party who provides new value to enable the grantor to acquire the collateral. ‘A secured party with a PMSI would have a super-priority in the collateral, where the PMSI will prevail over other security interests.’⁵² According to David Turner:

There are good commercial reasons for the super priority. First, the transaction is economically neutral. Secondly, to allow the holder of a prior registered security interest [to have] priority would result in the first being unjustly enriched at the expense of the second.⁵³

Clause 77 relates to the priority given to certain security interests if there is no foreign register. As already noted under the heading ‘Technical flaws’, the second Committee has stated that **clause 77** ‘requires further work in order to make the proposed provision fully effective’.⁵⁴

Chapter 3—Specific rules for certain security interests

Chapter 3 of the Bill contains specific rules, including those dealing with priority of security interests about:

- agricultural interests—so that priority is given to security interests in crops granted to enable the crops to be produced, and security interest in livestock granted to enable the livestock to be fed and developed: **clauses 84–86**
- security interests in accessions to personal property:⁵⁵ **clauses 88–97**

51. Note that the second Committee has indicated that **subclause 55(4)** is a possible amendment which should not be controversial. Legal and Constitutional Affairs Legislation Committee, op. cit., p. 25.

52. S Mudaliar, ‘Personal property securities reform: Implications for existing Australian finance laws,’ *Journal of Business and Finance Law and Practice*, Vol. 20, 2009, pp. 5–17 at p.10.

53. D Turner, *Submission: Inquiry into the Exposure Draft of the Personal Property Securities Bill 2008*, 24 February 2009, p. 7, viewed 7 October 2009, <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=90448012-0e6c-4a13-a7e7-f0ef9b5eebaf>

54. Legal and Constitutional Affairs Legislation Committee, op. cit., p. 26.

55. ‘*Accession*’ is defined in **clause 10**. Accession to other goods means goods that are installed in, or affixed to, the other goods, unless both the accession and the other goods are

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- security interests in personal property that has been processed or commingled⁵⁶ and their priority: **clauses 99–103**
- intellectual property and intellectual property licenses: **clauses 105–106**.

Chapter 4—Enforcement of security interests

Chapter 4 of the Bill deals with how to enforce a security interest in personal property. The enforcement provisions do not apply to all security interests—**clause 109** lists the types of security interest which are excluded from the application of the enforcement provisions. In particular, **subclause 109(5)** sets out specific provisions which do not apply to collateral that is used by a grantor predominantly for personal, domestic or household purposes. It is not clear whether the reference should be to ‘*consumer property*’ as defined.

Clause 111 provides that all the rights, duties and obligations which arise in relation to the enforcement provisions must be exercised honestly and in a ‘commercially reasonable manner’. There is no definition of the term ‘commercially reasonable manner’ and its inclusion was the subject of some criticism by the submitters—in particular, that it would promote commercial uncertainty.⁵⁷ Nevertheless, the second Committee recommended that the requirement be retained and that the intended scope of the requirement be explained in detail in the Bill’s explanatory memorandum.⁵⁸

It should be noted that the parties can contract out of some of the provisions: **clause 115**⁵⁹ and the enforcement provisions do not apply to property in the hands of receivers or controllers: **clause 116**.

Clauses 120–121 set out the rules for enforcement of security interests in **liquid assets**, such as an account, chattel paper or negotiable instrument. In the event that the debtor defaults on the secured obligation, the secured party must do the following:

required or permitted by the regulations to be described by serial number. An example is where a person leases a tractor and then installs a new engine in it.

56. ‘**Comingling**’ is defined in **clause 10** so that goods that are commingled include goods that are mixed with goods of the same kind. An example is where a manufacturer buys steel from a number of sources all of which are mixed together to make steel products.
57. Clayton Utz, *Submission: Inquiry into the Exposure Draft of the Personal Property Securities Bill 2008*, 24 December 2008, p. 7, viewed 7 October 2009, <https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=0ff36ae0-d9b1-47c3-9757-c12c3bd45ed4>
58. Legal and Constitutional Affairs Legislation Committee, op. cit., recommendation 7, p. 5.
59. As already noted under the heading ‘Technical flaws’, the second Committee has stated that the contents of **subclause 115(2)** warrants further discussion with stakeholders. Legal and Constitutional Affairs Legislation Committee, op. cit., p. 29.

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- give notice to any other secured party where the secured interest has a higher priority: **subclause 121(1)**
- give notice to the grantor of the action the secured party proposes to take: **subclause 121(4)**.

Having issued the notices and allowed for the required time limits to expire, the secured party may then either issue a notice to the debtor in the approved manner and form demanding payment before the end of five business days: **paragraph 120(2)(a)**, or seize any proceeds of the collateral to which the secured party is entitled: **paragraph 120(2)(b)**.

When a secured party seizes collateral from a debtor in default, they may dispose of it, purchase it or retain it. **Clauses 123–127** set out the rules to be followed in seizing collateral including the obligation to give notice to any parties who may have a higher priority.

Clause 128 confirms the right of a secured party to dispose of collateral that has been seized from a debtor who has defaulted. The disposal may be by way of private or public sale, by lease in the case of commercial property, or by licence in the case of intellectual property: **subclause 128(2)**. In addition, a secured party may dispose of commercial property by purchasing it—but only if the sale is a public sale and the secured party pays at least market value for the commercial property: **clause 129**. However, it should be noted that at any time before a secured party disposes of collateral under clause 128, any other person with a security interest in the collateral, or the grantor, may redeem the collateral by paying the amounts required to discharge the obligations and by paying the amount of any expenses in relation to the enforcement of the security interest: **clause 142**.

Clauses 134–138 contain the rules to be followed if the secured party wishes to retain the seized collateral for themselves. They must give a notice in the approved manner and form to the grantor and to any other party with a registered interest which describes the collateral: **clause 135**.

Where a person has received a notice of an intention to purchase or retain seized property that person may give the secured party a notice of objection: **clause 137**. Where no notice of objection is lodged, the seized collateral may be purchased or retained by the secured party: **subclause 134(2)**. Where a notice of objection is lodged the secured party must sell or lease the collateral in accordance with **clause 128** as outlined above.

Once enforcement action has been taken, any amount, personal property or proceeds of collateral must be distributed in the order of priority set out in **subclause 140(2)**.

Chapter 5—Personal property securities register

Chapter 5 of the Bill provides for the establishment and maintenance of a register of personal property securities and certain prescribed personal property.

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Clauses 194–203 establish the office of the Registrar of Personal Property Securities (the Registrar) and the Deputy Registrar of Personal Property Securities (the Deputy Registrar), both of whom are engaged under the *Public Service Act 1999* and appointed by the Minister by written instrument. As already pointed out by the Scrutiny of Bills Committee, **clause 197** allows the Registrar to delegate all or any of his powers to a Commonwealth public servant, or to any other person by written instrument.

Clause 147 provides for the establishment and maintenance of the Personal Property Securities Register (the Register) by the Registrar. Under **clause 148**, the Register is to contain the data in registrations (that is, financing statements or financing change statements) as well as any other information specified in regulations.⁶⁰

The rules about registration are as follows:

- it is not compulsory—but registration is one of the three ways to *‘perfect’* a security interest and an interest is not enforceable unless it is perfected
- an application for registration must be in the approved manner and form and accompanied by any relevant fee: **clause 150**
- there is a requirement that a person who applies to register a financing statement or financing change statement that describes collateral must believe on reasonable grounds that the collateral will secure an obligation owed by a debtor. Civil penalties of up to \$5 500 for an individual or \$27 500 for a body corporate will apply for a breach of this requirement: **subclause 151(1)**⁶¹
- where the collateral does not secure an obligation owed by a debtor or there are no longer reasonable grounds for believing that it will do so, the person must register a financing change statement within five business days or face civil penalties in the same amounts as above: **subclauses 151(2) and (3)**⁶²
- financing statements or financing change statements may be registered whether or not the personal property to which they relate is in Australia, and whether or not the person who owns or has rights in the property is in Australia: **clause 152**
- financing statements in relation to security interests must contain the data which is outlined in the table in **clause 153**—in particular, item 2 of the table sets out the detail required in relation to consumer property

60. Note that the Scrutiny of Bills Committee expressed concern at this broad regulation making power.

61. As already noted under the heading ‘Technical flaws’, the second Committee has stated that the department proposes to go back to the drafters to see whether the drafting [of **clause 151**] can be improved on. Legal and Constitutional Affairs Legislation Committee, op. cit., p. 28.

62. One of the purposes of this provision is to ensure that the Register is cleared of any financial statements which are no longer valid.

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- financing statements in relation to prescribed property must contain the data which is outlined in the table in **clause 154**
- **clauses 156–158** require the Registrar to provide a written statement verifying that a financing statement or financing change statement has been registered
- **clauses 164–166** set out the rules relating to any defect of registration.

Under **clause 170** a person may apply to the Registrar to search the Register. **Clause 172** sets out who may search the Register and for what purpose. **Clause 173** provides that any unauthorised search of the Register or any use of personal information contained in the Register is an interference with privacy in accordance with the *Privacy Act 1988*.

Clauses 178–182 provide a process by which a debtor may demand (referred to as an *amendment demand*) that a secured party register a financing change statement to amend a registration in certain circumstances. **Clauses 184–188** provide for the removal of data from the Register or for correction of registration errors. In particular clause 184 provides that the Registrar may remove data from the Register in circumstances where he is satisfied that the removal is required urgently and is in the public interest. Whilst there is no definition of ‘public interest’, the explanatory memorandum states that:

The Registrar’s power to remove data which is contrary to the public interest would extend to a broad range of data, for example, data that if retained on the PPS Register, would otherwise be unlawful.⁶³

Chapter 6—Judicial proceedings

Chapter 6 of the Bill deals with the role of the courts in proceedings that relate to a security agreement or security interests in personal property.

Clause 207 contains a table setting out the court on which jurisdiction is conferred and the limits of that jurisdiction. The courts specified are the Federal Court, the Family Court of Australia, the Federal Magistrates Court and both superior and lower courts of a State or Territory. **Clause 208** sets out which courts are to determine cross jurisdictional appeals. **Clauses 210–217** contain the rules for the transfer of proceedings between courts.

Clause 222 empowers the Registrar to make an application on behalf of the Commonwealth to the Federal Court for an order that a person pay a pecuniary penalty for contravention of a civil penalty provision.

63. Explanatory Memorandum, op. cit., p. 94.

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Chapter 7—Operations of laws

Chapter 7 of the Bill deals with how the proposed Act will interact with foreign laws, the constitutional operation of the Act and the relationship between the proposed Act and other foreign laws.

In particular **clauses 238–241** set out the governing laws for goods, intangible property, financial property and rights evidenced by letters of credit, and proceeds, respectively.

The underlying constitutional basis for the proposed Act lies in section 51(xxxvii) of the *Commonwealth of Australia Constitution Act* (the Constitution) which empowers the Commonwealth to make laws with respect to matters **referred** to the Commonwealth Parliament by the Parliament of any State/s, but only to the extent that those State Parliaments adopt the law. At the time of writing this Digest referring legislation had already been passed by New South Wales.⁶⁴

However, the operation of the proposed Act is not limited to referring states. **Clauses 246–248** expand the operation of the proposed Act to non-referring states. In particular, **clause 248** relies on other heads of constitutional power so that the proposed Act will operate in relation to a security interest in personal property if the interest arises in the course of the following activities:

- trade or commerce with other countries, or among the States: section 51(i) of the Constitution
- activities undertaken by a constitutional corporation: section 51(xx) of the Constitution
- banking, other than State banking and State banking extending beyond the limits of the State concerned: section 51(xiii) of the Constitution
- insurance, other than State insurance and State insurance extending beyond the limits of the State concerned: section 51(xiv) of the Constitution
- using postal, telegraphic, telephonic, or other like services: section 51(v) of the Constitution
- supplying goods or services to the Commonwealth, or an agency of the Commonwealth and conduct by the Commonwealth, or an agency of the Commonwealth: section 51(xxxix) of the Constitution, and
- an activity related to a fishery in Australian waters beyond territorial limits: section 51(x) of the Constitution.

The operation of the proposed Act in a Territory is based on the legislative powers in sections 51—excepting 51(xxxvii)—and 122 of the Constitution: **subclause 243(3)**. The operation of the proposed Act outside Australia is based on the legislative powers in

64. [Personal Properties Securities \(Commonwealth Powers\) Act 2009](#) (NSW)

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sections 51 of the Constitution, in particular the external affairs power in paragraph 51(xxix): **subclause 243(5)**.

Clause 250 provides that the Personal Property Securities Register will operate in a non-referring state. Under **clause 252** a security interest that is within the constitutional power of the Commonwealth will have priority over a security interest that is not within the constitutional power of the Commonwealth.

Clause 254 provides that the proposed Act will operate concurrently with other laws of the Commonwealth, States or Territories as well as the general law. However, should there be any inconsistency between the proposed Act and the *Payments Systems and Netting Act 1998*, the *Cheques Act 1986* or the *Bills of Exchange Act 1909* then the provisions of those Acts will prevail: **clause 256**. **Clauses 257–260** set out the circumstances in which other laws will prevail. In particular **subclause 259(1)** empowers a referring State or a Territory to declare a matter to be excluded from the operation of the proposed Act. **Subclause 259(2)** confirms that the proposed Act will not apply in relation to the excluded matter. This clause reverses the usual situation where Commonwealth law overrides inconsistent State law. However **subclause 259(3)** provides for the making of regulations which appear to have the effect of nullifying the relevant State declaration.

Chapter 8—Miscellaneous

Clause 267 of the Bill provides that unperfected security interest will vest in the grantor upon the winding up, administration or bankruptcy of the grantor subject to a number of exceptions set out in **clause 268**.⁶⁵ According to the explanatory memorandum:

This outcome is not new to Australian law. The High Court in *Associated Alloys v ACN 001 452 106 (Pty) Ltd (in liquidation)* [2000] HCA 25 and in *General Motors Acceptance Corporation Australia v Southbank Traders (Pty) Ltd* [2007] HCA 19, held that a supplier could lose their security interest as a result of failing to register the interest.⁶⁶

However, **paragraph 267(3)(b)** applies so that this rule does not apply to a person's title to personal property if at the time the person acquires the property the person has no '**actual or constructive knowledge**'⁶⁷ of the following:

- the filing of an application for an order to wind up the company
- the passing of a resolution to wind up the company

65. Note that this is one of clauses listed under the heading 'Technical Flaws' in this Digest and is likely to be subject to some amendment.

66. Explanatory Memorandum, op. cit., p. 109.

67. For a discussion of what constitutes '**actual or constructive knowledge**' see **clause 298**.

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- the appointment of an administrator of the company under section 436A, 436B or 436C of the *Corporations Act 2001* or
- the execution of a deed of company arrangement by the company.

Clause 271 provides for the payment of damages where a person fails to discharge any duty or obligation imposed by the proposed Act, for example:

- a failure to obtain market value when enforcing a security agreement under clause 131
- causing damage property when removing an accession in enforcing a security agreement under clause 92, and
- a failure to amend a registration as required by clause 180.

The amount payable is the amount of any loss or damage that was reasonably foreseeable as a result of the failure. The damages are payable to the person who is owed the duty or any other person who can reasonably be expected to rely on the performance of the duty.

Clause 275 is about the provision of information as follows:

- **subclause 275(9)** lists those persons who are *‘interested persons’*
- **subclause 275(1)** lists the sorts of information which an *‘interested person’* may request that a secured party who holds a security interest in collateral make available
- **subclauses 275(5) and (6)** provide that a secured party is not required to respond to the request if either the information has already been made available to the person under a law of the Commonwealth, a State or a Territory or the general law; or if the debtor and the secured party have entered into a confidentiality agreement that neither will disclose that information
- in all other cases the person who receives the request must respond to it: **subclause 275(3)**.

Where a request under section 275 is not responded to, or the response is incomplete or inaccurate, **clause 280** provides that the person who made the request may apply to a court for an order that the request be appropriately satisfied within a specified period. If the court order is not complied with, **clause 282** empowers the court to make an order extinguishing the security interest to which the request relates, or any other order which the court things necessary.

Clauses 284–294 set out the various rules relating to giving notices and the timing of those notices.

Clause 296 contains a list of those facts that, in a proceeding in Australia, the onus of proof lies with the person asserting the fact. Of note is **paragraph 296(g)** which relates to the acquisition of personal property without *‘actual or constructive knowledge’* of certain

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matters.⁶⁸ **Clause 297** deems the person to have *‘constructive knowledge’* if by making the same inquiries that an honest and prudent person would have made in their situation, they could have had actual knowledge.

Clause 303 allows for the making of regulations in relation to matters which are necessary or convenient to be prescribed for carrying out or giving effect to the proposed Act.

Chapter 9—Transitional provisions

Clauses 306–308 introduce the four key concepts in relation to the transitional provisions:

- There will be a *‘migration time’* during which data from existing State, Territory and Commonwealth registers recording security interests in personal property will be migrated to the Register. **Subclause 306(1)** provides that this is from the start of the month that is 25 months after Royal Assent to the Bill or an earlier time determined by the Minister.
- There will be a *‘registration commencement time’*. **Subclause 306(2)** provides that this is from the start of the month that is 26 months after Royal Assent to the Bill or an earlier time determined by the Minister.
- Under **clause 307** a *‘transitional security agreement’* is a security agreement which was in force immediately before the registration commencement time to which the Bill would have applied, had the Bill been in force before the registration commencement time.
- **Clause 308** provides that security interest is a *‘transitional security interest’* even if the interest arises after the registration commencement time, where the security agreement is entered into prior to the registration commencement time and allows for the creation of the security interest and the Bill would have applied to the security interest had the Bill been in force before the registration commencement time.

Clause 310 sets out the matters to which the proposed Act will apply at the registration commencement time. **Clauses 311, 313** and **314** detail which security interests are enforceable if they are made at or after the registration commencement time.

Clauses 320–325 provide priority protection for certain transitional security interests. The transitional provisions would set up a transitional priority scheme which would apply:

- in bankruptcy or insolvency
- in a priority dispute between migrated security interests, or
- where holders of non-migrated security interests have assented to the Bill by registering their interests.

68. These are the matters listed in **paragraph 267(3)(b)**.

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In particular, **clause 324** contains a table setting out the priority between transitional security interests in relation to the same collateral.

Clauses 330–335 relate to the migration of personal property interests from existing Commonwealth, State or Territory registers to the Register under the proposed Act. In particular, **clause 334** provides for the Registrar to register a financing change statement to remove data from the Register if the Registrar is satisfied that the data is of a class that is not, and never has been, included in the Register.

Clauses 339–341 contain special rules about fixed and floating charges. A fixed charge attaches to specific property owned by the borrower. The term ‘floating charge’ is defined in the *Corporations Act 2001* and used widely in that Act. Floating charges can be explained as follows:

Floating charges are charges which float above specific categories of assets such as inventory. On default, the floating charge is said to crystallise and becomes, in effect, a fixed charge over the assets of the company ...

A floating charge provides a very practical device for companies to secure debts. A company may already have granted a mortgage over specific assets, or it may not own land or other assets suitable for a fixed charge. However, its other assets, particularly its trading stock, may be of considerable value. Such assets are acquired for the purpose of resale or manufacture and it is not practical for the company to retain such assets or seek the consent of [lenders] every time trading stock is sold. A floating charge enables a company to dispose of its trading stock in the ordinary course of business, while still giving the [lender] a good security by floating over any trading stock which may be acquired.⁶⁹

Subclause 339(3) provides that a reference to a charge over property is a reference to a security interest attached to a ‘*circulating asset*’ or personal property that is not a circulating asset. **Clause 340** sets out what is, and what is not a circulating asset for the purposes of the proposed Act. **Clause 341** provides that in determining whether inventory and accounts are circulating assets the question of whether the secured party has control of the inventory or account is relevant. **Clause 318** provides that these rules do not apply to fixed and floating charges made prior to the registration commencement time.

The question of whether there would need to be consequential amendments arising from this Bill was raised by the second Committee at their hearings and was answered as follows:

Mr Patch—We can say that there are a few acts that have to be amended. Apart from the amendments to the Corporations Act, the thrust of the amendments is to essentially retain the effect of the existing law. So, to give an example, some acts use

69. P Lipton and A Herzberg, *Understanding Company Law*, 8th edition, LBC Information Services, Sydney, 1999, p.219.

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the expression ‘floating charge’, which this act does away with. We are looking at amending that act by omitting the term ‘floating charge’ and we are currently thinking about inserting the term ‘circulating security interest’.⁷⁰

Clause 343 provides that a review of the operation of the proposed Act is to be undertaken and completed within three years after the registration commencement time. The report of the review is to be tabled by the Minister in each House of the Parliament within 15 sitting days of the day on which it is given to the Minister.

Concluding comments

According to the second reading speech:

The Bill will replace the existing complex, inconsistent and ad hoc web of common law and legislation involving over seventy Commonwealth, State and Territory Acts. It will implement a single national law creating a uniform and functional approach to personal property securities.⁷¹

The Bill has been given qualified support on the grounds that ‘by creating a single comprehensive national law supported by a single national electronic register, the reforms should result in worthwhile efficiency gains’.⁷²

However it has also been stated that ‘the reform will introduce major substantive change to Australian commercial law’.⁷³ The extent of that change should not be underestimated.

70. Legal and Constitutional Legislation Committee, Personal Property Securities Bill 2009: Public Hearings, op. cit., p. 6.

71. R McLelland (Attorney-General), ‘Second reading speech: Personal Property Securities Bill 2009’, House of Representatives, *Debates*, 24 June 2009, p. 6960.

72. Piper Alderman, *Submission: Inquiry into the Exposure Draft of the Personal Property Securities Bill 2008*, 10 December 2008, p. 1, viewed 7 October 2009, <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=b55cbbd8-3c27-48e5-8e8e-56f332b2556f>

73. Piper Alderman, op. cit.

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