

The Senate

---

Legal and Constitutional Affairs  
Legislation Committee

---

Personal Property Securities (Corporations and Other  
Amendments) Bill 2010 [Provisions]

May 2010

© Commonwealth of Australia

ISBN: 978-1-74229-286-1

This document was printed by the Senate Printing Unit, Department of the Senate,  
Parliament House, Canberra.

## MEMBERS OF THE COMMITTEE

### Members

Senator Patricia Crossin, **Chair**, ALP, NT

Senator Guy Barnett, **Deputy Chair**, LP, TAS

Senator David Feeney, ALP, VIC

Senator Scott Ludlam, AG, WA

Senator Gavin Marshall, ALP, VIC

Senator Stephen Parry, LP, TAS

### Secretariat

Ms Julie Dennett                      Secretary

Mr Ivan Powell                        Principal Research Officer

Ms Kate Middleton                  Executive Assistant

Suite S1. 61                            Telephone: (02) 6277 3560

Parliament House                  Fax: (02) 6277 5794

CANBERRA ACT 2600    Email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)



# TABLE OF CONTENTS

|   |            |
|---|------------|
| <b>MEMBERS OF THE COMMITTEE .....</b>                         | <b>iii</b> |
| <b>ABBREVIATIONS .....</b>                                    | <b>vii</b> |
| <b>RECOMMENDATIONS.....</b>                                   | <b>ix</b>  |
| <b>CHAPTER 1 .....</b>  | <b>1</b>   |
| <b>INTRODUCTION .....</b>                                     | <b>1</b>   |
| Purpose of the Bill.....                                      | 1          |
| Background.....   | 2          |
| Conduct of the inquiry.....                                   | 2          |
| Acknowledgement.....  | 3          |
| Note on references.....                                       | 3          |
| <b>CHAPTER 2 .....</b>  | <b>5</b>   |
| <b>OVERVIEW OF THE BILL.....</b>                              | <b>5</b>   |
| Key provisions of the Bill.....                               | 5          |
| <b>CHAPTER 3 .....</b>  | <b>11</b>  |
| <b>KEY ISSUES.....</b>  | <b>11</b>  |
| Corporations Act amendments .....                             | 11         |
| <i>Personal Property Securities Act 2009</i> amendments ..... | 19         |
| Committee view.....   | 21         |
| <b>Additional comments from Liberal Senators.....</b>         | <b>23</b>  |
| Engagement with small business.....                           | 23         |

---

|   |           |
|---|-----------|
| <b>APPENDIX 1 .....</b>                                   | <b>27</b> |
| <b>    RESPONSE FROM ATTORNEY-GENERAL'S DEPARTMENT TO</b> |           |
| <b>    SUBMISSIONS RECEIVED FOR THIS INQUIRY .....</b>    | <b>27</b> |
| <b>APPENDIX 2 .....</b>                                   | <b>41</b> |
| <b>    SUBMISSIONS RECEIVED.....</b>                      | <b>41</b> |

## ABBREVIATIONS

|                  |  |
|------------------|--|
| AELA             | Australian Equipment Lessors Association                                   |
| AFC              | Australian Finance Conference  |
| ASIC             | Australian Securities and Investments Commission                           |
| the Bill         | Personal Property Securities (Corporations and Other Amendments) Bill 2010 |
| Corporations Act | <i>Corporations Act 2001</i>   |
| the Department   | Attorney-General's Department  |
| DLAPF            | DLA Phillips Fox   |
| EM               | explanatory memorandum   |
| PMSI             | purchase money security interest   |
| PPS Act          | <i>Personal Property Securities Act 2009</i>                               |





# **RECOMMENDATIONS**

## **Recommendation 1**

**3.51 The committee recommends that the Senate pass the Bill.**



# CHAPTER 1

## INTRODUCTION

### Purpose of the Bill

1.1 On 18 March 2010, the Senate referred the provisions of the Personal Property Securities (Corporations and Other Amendments) Bill 2010 (the Bill) for inquiry and report by 12 May 2010.

1.2 The Bill will implement a second suite of consequential amendments arising from the passage of the *Personal Property Securities Act 2009* (PPS Act) in September 2009. Under the PPS Act, a new personal property securities (PPS) regime will commence in May 2011.<sup>1</sup>

1.3 The Bill's main purpose is to amend the *Corporations Act 2001* to close the Australian Securities and Investments Commission (ASIC) register of company charges once the new PPS register commences. It will also amend the PPS Act to simplify its transitional provisions, and make consequential amendments to other Commonwealth legislation.

1.4 In the second reading speech to the Bill, the Minister for Small Business, Independent Contractors and the Service Economy, Minister Assisting the Finance Minister on Deregulation and Minister for Competition Policy and Consumer Affairs, the Hon. Dr Craig Emerson MP (the Minister), highlighted the principles underlying the introduction of the Bill:

Personal property securities reform is an important part of [the Council of Australian Governments] deregulation agenda.

By harmonising the current laws and creating a single national online register, the reform will have a significant positive impact on business and consumers.

Transaction costs will be reduced and businesses will be able to use more types of personal property to secure lending.

Consumers will be able to protect themselves by more easily checking whether major purchases, such as motor vehicles, have money owing on them.<sup>2</sup>

1.5 The Minister noted that the consequential amendments contained in the Bill 'are necessary to establish a clear and consistent single national legal regime for security interests in personal property'.<sup>3</sup>

---

1 Explanatory memorandum, p. 13.

2 *Senate Hansard*, 10 March 2010, p. 2099.

3 *Senate Hansard*, 10 March 2010, p. 2099.

## Background

1.6 The current inquiry is the fourth inquiry relating to personal property securities reform undertaken by the committee since 2009. The previous inquiries considered:

- the exposure draft of the Personal Property Securities Bill 2009 (March 2009);
- the Personal Property Securities Bill 2009 [Provisions] (August 2009); and
- the Personal Property Securities (Consequential Amendments) Bill 2010 (November 2009).<sup>4</sup>

1.7 The committee's previous reports on the PPS reforms made a number of recommendations intended to improve the processes around the development of the new scheme and, ultimately, its substantive outcomes. These reports provide important context for the inquiry into the Bill.

1.8 In introducing the Bill, the Minister noted that the amendments it contains arise from submissions made to the August 2009 inquiry into the provisions of the Personal Property Securities Bill 2009. He stated:

The bill I introduce today contains amendments to the PPS Act made as a result of submissions to the committee and to the Attorney-General's Department following the committee's August 2009 report on its inquiry into the PPS Bill.<sup>5</sup>

## Conduct of the inquiry

1.9 The committee advertised the inquiry in *The Australian* newspaper on 24 March and 7 April 2010, and invited submissions by 16 April 2010. The committee also wrote to approximately 80 organisations and individuals inviting submissions. Details of the inquiry, the Bill and associated documents were placed on the committee's website.

1.10 The committee received 11 submissions, which were placed on the committee's website for ease of access by the public. The submission from the Attorney-General's Department, which is relied on extensively in this report, is contained in Appendix 1. All of the submissions received are listed in Appendix 2.

1.11 The committee did not hold any public hearings for the inquiry. This was due to the relatively minor and technical nature of the issues raised in submissions. As noted above, many of the broader and substantive issues in relation to the PPS Act were considered in the committee's previous inquiries.

---

4 These reports are available through the committee's website at [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/completed\\_inquiries/index.htm](http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/index.htm)

5 *Senate Hansard*, 10 March 2010, p. 2099.

## **Acknowledgement**

1.12 The committee thanks the organisations and individuals who made submissions to this inquiry.

## **Note on references**

1.13 Submission references in this report are to individual submissions as received by the committee, not to a bound volume. References to the committee *Hansard* are to the proof *Hansard*. Page numbers may vary between the proof and the official *Hansard* transcripts.



# CHAPTER 2

## OVERVIEW OF THE BILL

2.1 This chapter outlines the purpose and key provisions of the Personal Property Securities (Corporations and Other Amendments) Bill 2010 (the Bill).

### **Key provisions of the Bill**

2.2 The Bill contains three schedules:

- Schedule 1 will make changes to the *Corporations Act 2001* (Corporations Act) to align it with the *Personal Property Securities Act 2009* (PPS Act).
- Schedule 2 will amend the PPS Act to simplify its transitional provisions and to make the PPS Act consistent with existing state and territory provisions on the enforcement of security interests in agricultural products.
- Schedule 3 will make minor consequential amendments to a number of other Commonwealth Acts.

### ***Schedule 1***

#### *Amending terminology to incorporate the PPS Act's functional approach*

2.3 The explanatory memorandum (EM) to the Bill notes that, under the existing personal property securities (PPS) and corporations law, transactions creating security interests are treated differently depending on the legal form of the transaction concerned.

2.4 However, on its commencement in May 2011, the PPS Act will introduce a more 'functional approach'.<sup>1</sup> This will mean that any transaction that performs the function of securing payment or performance of an obligation will be treated as a security transaction.

2.5 Currently, only transactions which create charges or mortgages are security agreements under the Corporations Act. Accordingly, Schedule 1 will, where appropriate, replace the existing terminology of the Corporations Act with the more 'functional' terminology that is to be employed under the PPS Act.

2.6 Schedule 1 will also introduce a number of new concepts that are relevant to the scheme to be established under the PPS Act. For example, a broader or 'omnibus concept' of *security interests* will be introduced, which will encompass a number of concepts in the Corporations Act, such as *charges, mortgages, liens* and *pledges*.<sup>2</sup>

---

1 EM, p. 3.

2 EM, p. 6.

2.7 Similarly broad or 'omnibus' concepts to be introduced are *secured party*, *circulating security interest*, and *possessory security interest*.<sup>3</sup>

*Extending Corporations Act concept of property to include PPS Act retention of title property*

2.8 The PPS Act concept of *security interests* will include transactions where the secured party, not the grantor of the security interest, retains title over the property. This includes, for example:

- agreements to sell subject to retention of title;
- conditional sale agreements;
- hire-purchase agreements; and
- leases and consignments that secure the payment or performance of an obligation.<sup>4</sup>

2.9 The Corporations Act will be amended to align it with the PPS Act concept of *security interests*. This will be done by including property which falls under the PPS Act concept of *security interests* in the Corporations Act as *PPSA retention of title property*.<sup>5</sup>

2.10 This will mean that, where it would not prejudice existing rights, *property of the company* for the purposes of the Corporations Act will include *PPSA retention of title property*.<sup>6</sup>

2.11 The EM provides guidance on how the inclusion of this concept would apply in various situations, such as where a secured party holds a security interest over substantially the whole of the property, or in cases involving an administrator or liquidator.<sup>7</sup>

*Repeal of Chapter 2K of Corporations Act (registration of company charges)*

2.12 The EM explains that most charges currently subject to the registration requirements of Chapter 2K of the Corporations Act will be covered by the PPS Act. These charges will be migrated to the PPS Register to be established by the PPS Act, and in future such charges will be registered on the PPS Register.<sup>8</sup>

---

3 EM, p. 7.

4 EM, p. 9.

5 EM, p. 9.

6 EM, p. 10.

7 EM, pp 10-12.

8 EM, p. 13.



2.13 Accordingly, the Bill will repeal Chapter 2K, and consequential amendments will be made throughout the Corporations Act with effect from the time the PPS Act commences (expected to be May 2011).<sup>9</sup>

2.14 Proposed new section 588FL will be inserted into the Corporations Act. This section will replicate, with some changes, section 266 of the Corporations Act, which prevents security interests being granted fraudulently with knowledge of an imminent administration, liquidation or deed of company arrangement and to avoid property falling into the trustee's or administrator's estate or being claimed by unsecured creditors. For security interests entered into after the commencement time, proposed section 588FL will replace section 266.<sup>10</sup>

2.15 Proposed new section 588FL will also largely replicate existing section 267 of the PPS Act.<sup>11</sup> Existing section 267 of the PPS Act and associated provisions provide that:

...most security interests granted by a company which are regulated by the PPS Act will vest in the grantor if not perfected on the date that the winding up of that company commences or the 'section 513C day' (defined in the Corporations Act as, essentially, the date of commencement of administration of a company) in respect of that company...<sup>12</sup>

#### *Transitional and application arrangements*

2.16 The EM explains that Schedule 1 of the Bill will commence when the PPS Register starts to operate (that is, when the PPS Act commences). Because most amendments require the alignment of existing categories of security interests and related concepts in the Corporations Act with the PPS Act, they will apply only to PPS Act security interests that arise under agreements made after the new PPS Act scheme starts to operate.<sup>13</sup>

2.17 The transitional provisions will retain certain aspects of the registration scheme for existing registrable charges.<sup>14</sup>

2.18 The Australian Securities and Investments Commission (ASIC) Register will be closed to further registrations once the PPS Act commences. However, ASIC will be required to retain existing records on its register for seven years. This is intended to

---

9 EM, p. 13.

10 EM, p. 13.

11 *Submission 3*, p. 1.

12 *Submission 3*, p. 1.

13 EM, p. 17.

14 EM, p. 17.

enable chargees, lienees and pledgees of registrable charges to continue to obtain information relating to their charges, liens or pledges.<sup>15</sup>

2.19 The repeal of Chapter 2K of the Corporations will not immediately apply to registrable charges under the Corporations Act (except to the extent necessary to close the Corporations Act register to new registrations, and to limit the effect of retained section 266 (relating to the voiding of registrable charges)). A number of provisions relating to these registrable charges will continue to apply for seven years.<sup>16</sup>

2.20 It is also proposed that registrable charges, notified before the commencement time, will be migrated across to the PPS Register and (as transitional security interests) will retain the priority they had prior to migration.<sup>17</sup>

2.21 Registrable charges not notified before the commencement time will be able to be registered on the PPS Register at any time, but will have priority dating to that commencement day (unless a court order is obtained).<sup>18</sup>

### *Maintenance of existing rights*

2.22 Schedule 1 will maintain the status quo in a number of areas.<sup>19</sup> For example, it will preserve the current (Corporations Act) order of distribution of a company's proceeds, in circumstances where a receiver is appointed on behalf of the holders of debentures in a company secured by floating charge, and takes possession or control of property that is secured by the floating charge.<sup>20</sup>

## **Schedule 2**

### *Simplifying the PPS Act transitional provisions*

2.23 Schedule 2 will amend the PPS Act to simplify its transitional provisions. These amendments are ad hoc measures which cover a range of issues, including:

- clarification of when the PPS Act will apply to a security interest in intangible property;<sup>21</sup>
- clarification that the PPS Act will not apply to rights held in water that are derived from contract (to ensure that the PPS Act will not apply to any rights in water);<sup>22</sup> and

---

15 EM, p. 17.

16 EM, p. 17.

17 EM, p. 17.

18 EM, p. 18.

19 For further information, see EM, p. 19.

20 EM, p. 19.

21 EM, p. 20.

- exclusion from the PPS Act certain security interests taken by pawnbrokers.<sup>23</sup>

*Making the PPS Act consistent in relation to the enforcement of security interests in agricultural products*

2.24 Schedule 2 will also contain a number of ad hoc amendments to make the PPS Act consistent with existing state and territory provisions on the enforcement of security interests in agricultural products.<sup>24</sup>

*Transitional provisions*

2.25 The Bill will also make amendments to the transitional provisions in Chapter 9 of the PPS Act.

2.26 The PPS Act provides for the transition from the current law governing security interests to the PPS Act regime. The PPS Act will apply to security interests existing before the PPS Act comes into force, subject to the transitional provisions.

2.27 The EM notes that the *registration commencement time* is a key event in the transitional provisions. This refers to the time at which the PPS Act and the PPS Register take practical effect. The PPS Act makes provision for the *registration commencement time* to be determined by the Minister or, if the Minister did not make a determination, the first day of the month that is 26 months after the month in which the PPS Act is given royal assent.<sup>25</sup>

2.28 The Bill contains a number of amendments to the PPS Act transitional provisions, including in relation to:

- transitional security agreements;
- intellectual property;
- transitional application of the PPS Act;
- the concept of *control* in inventory and accounts; and
- referral provisions.<sup>26</sup>

---

22 EM, pp 21-22.

23 EM, p. 22. For further information on the amendments contained in Schedule 2, see EM, pp 19-43.

24 For further information on the amendments contained in Schedule 2, see EM, pp 19-43.

25 EM, p. 44.

26 For further information relating to the amendments to the PPS Act transitional provisions, see EM, pp 44-48.

### **Schedule 3**

#### *Amendment of other Acts*

2.29 Schedule 3 of the Bill contains consequential amendments to a number of Commonwealth Acts. These are:

- *Designs Act 2003*;
- *Fisheries Management Act 1991*;
- *Navigation Act 1912*;
- *Patents Act 1990*;
- *Personal Property Securities Act (Consequential Amendments) 2009*;
- *Proceeds of Crime Act 2002*;
- *Torres Strait Fisheries Act 1984*;
- *Trade Marks Act 1995*;
- *Mutual Assistance in Criminal Matters Act 1987*; and
- *Offshore Petroleum and Greenhouse Gas Storage Act 2006*.<sup>27</sup>

---

27 For further information on these amendments, see EM, pp 49-52.

# CHAPTER 3

## KEY ISSUES

3.1 This chapter discusses the key issues raised in the submissions to the inquiry. The issues covered are generally those areas or amendments in the Bill that attracted comments from multiple submitters, or which relate to issues of policy, namely:

### *Corporations Act 1990 (Corporations Act)*

- alignment of terms used in the Corporations Act and the *Personal Property Securities Act 2009* (PPS Act);
- issues relating to the PPS Act's retention of title property;
- proposed section 441EA (Sale of property subject to a possessory security interest); and
- proposed section 588FL (Vesting of PPS Act security interests if collateral is not registered within a specified period of time).

### *PPS Act*

- definitions;
- potential issues for future review; and
- Senate Standing Committee for the Scrutiny of Bills comments.

3.2 Most of the comments received in submissions were responded to in the submission received from the Attorney-General's Department (the Department). Many of these issues were of a relatively minor technical nature, and were specifically addressed and clarified by the Department. The Department's submission is reproduced at Appendix 1.

## **Corporations Act amendments**

### *Alignment of terms used in the Corporations Act and PPS Act*

3.3 As noted in Chapter 2, the Bill will align a number of terms used in the Corporations Act and the PPS Act.

3.4 In its submission, Piper Alderman noted that the approach taken in the Bill means that existing references to *charges*, *liens* or *pledges* in the Corporations Act will be replaced with the broader term *security interest*. This approach was questioned on the grounds that:

...it is not appropriate that all interests in personal property that are security interests for the purposes of the PPS Act are treated, under the Corporations Act, in the same way as charges, liens or pledges.<sup>1</sup>

3.5 However, the Department defended this approach as being consistent with the PPS Act scheme:

Section 440B, Corporations Act currently prevents the enforcement of a charge on property of the company (except in certain circumstances). This would include a charge on a book debt (or an account for the purposes of the PPS Act). Consistently with the functional approach to security interest implemented by s 440B, [the] PPS Act provides equivalent treatment for a charge on a book debt and a transfer of the same book debt.<sup>2</sup>

### ***PPS Act retention of title property***

3.6 As noted in Chapter 2, the Corporations Act will be amended to align it with the PPS Act concept of *security interests*. This will be done by including property defined as *security interests* in the PPS Act in the Corporations Act as *PPSA retention of title property*.<sup>3</sup>

3.7 The submissions to the inquiry raised a number of issues going to the concept of *PPSA retention of title property*.

### ***Inconsistent approach to PPS Act retention of title property***

3.8 DLA Phillips Fox (DLAPF) submitted that 'there appears to be a difference in relation to whether or not property includes [*PPSA retention of title property*] in various chapters of the [Corporations Act]'.<sup>4</sup>

3.9 The DLAPF submission noted that the general definition of *PPSA retention of title property* provides that, unless otherwise specified, a reference to property of a corporation does not include *PPSA retention of title property*. However, *PPSA retention of title property* would be included under the administration provisions. It would also be included under the voluntary winding up, deed of company arrangement and court ordered winding up provisions, if the security interest created by the retention of title arrangements has not been perfected.<sup>5</sup>

---

1 *Submission 3*, p. 4.

2 *Submission 11*, p. 4.

3 Explanatory memorandum (EM), p. 9.

4 *Submission 2*, p. 1.

5 *Submission 2*, p. 2. 'Perfection' is a technical term which means that a security interest has attached to collateral and is effective against third parties. Perfection may occur by, for example, registration, possession or control of the security interest property (Attorney-General's Department, *Submission 8, Inquiry into the exposure draft of the personal properties securities bill 2008*, 19 March 2009, p. 14).

3.10 DLAPF argued that a more consistent approach should be employed:

...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*.<sup>6</sup>

3.11 The Department's submission provided a number of responses outlining the particular reasoning which governs the interaction of *PPSA retention of title property* with various parts of the Bill. Together, these responses indicate that the Department considers the Bill to suitably reflect the policy and legislative intent of the Government in this area (a number of these responses are set out below).<sup>7</sup>

3.12 The EM to the Bill also sets out a number of examples which justify the differential approach to the approach to *PPSA retention of title property* in certain circumstances. For example, where it would not prejudice existing rights, property of the company for the purposes of the Corporations Act will include PPS Act retention of title property, so that *PPSA retention of title secured parties* could enforce their security interests. However:

...there would be circumstances where it would be important to preserve existing rights by not including *PPSA retention of title property* within the definition of *company property*. Where a company is insolvent and the property of the company is insufficient to meet the payment of unsecured creditors, employee entitlements would have preference over floating charges...If *PPSA retention of title property* were included as *company property*, it would be subordinate to employee preferences and *PPSA retention of title property* holders would lose their property. Therefore, *property of the company* would exclude *PPSA retention of title property* in this context.<sup>8</sup>

*Proposed section 124 – secured party who has perfected a security interest in collateral by possession or control*

3.13 Piper Alderman submitted that proposed section 124, which will allow a company to grant a circulating security interest over the company's property, should refer to a 'security interest' rather than a 'circulating security interest, as is proposed in the Bill.<sup>9</sup> Further, it felt that the company's property in this context should include *PPSA retention of title property*.

3.14 The Department rejected this suggested approach. It stated:

---

6 Submission 2, p. 2.

7 See Submission 11, pp 1-5.

8 EM, p. 11.

9 Submission 1, p. 1; Bill, p. 22.

This proposal involves a policy change not related to PPS reform that would extend the ambit of s124(1)(f). Proposed s124(1)(f) allows a company to 'grant a circulating security interest over the company's property' and replaces existing s124(1)(f) which allows a company to 'grant a floating charge over the company's property'. By referring to 'a circulating security interest', and not applying to PPSA retention of title property, proposed s124(1)(f) maintains the effect of existing s124(1)(f).<sup>10</sup>

*Proposed section 441A – secured party acts before or during decision period*

3.15 DLAPF submitted that the inclusion of *PPSA retention of title property* in proposed section 441A of the Corporations Act:

...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.<sup>11</sup>

3.16 DLAPF observed that, because *PPSA retention of title property* was to be included in the definition of *property* for the purposes of the Corporations Act administration provisions, the holders of *PPSA retention of title property* security interests would have priority over the holders of security interests in the whole or substantially the whole of the assets of the corporation. This is because *PPSA retention of title property* is a purchase money security interest.<sup>12</sup>

3.17 Accordingly, DLAPF called for *PPSA retention of title property* to be expressly excluded from proposed subsections 441A(1)(b) and 441(2)(b).<sup>13</sup>

3.18 The Australian Finance Conference (AFC) and the Australian Equipment Lessors Association (AELA), who were also concerned about this issue, called for 'further consideration of the amendments against the underlying policy of the [Corporations Act] external administration provisions and the [PPS Act] objectives'.<sup>14</sup>

3.19 In response to these submissions, the Department stated that it:

...considers that the Bill has the intended effect that the references to property of the company in s441A would not, after the registration

---

10 *Submission 11*, p. 3.

11 *Submission 2*, p. 2.

12 *Submission 2*, p. 2. A 'purchase money security interest' (PMSI) is a security interest in collateral created by, for example, a seller who has secured the obligation to pay the purchase price, a person who provided the value to purchase the collateral, or the interest of a consigner who delivers property under a commercial consignment. A PMSI confers 'super-priority' on the secured party (Attorney-General's Department, *Submission 8, Inquiry into the exposure draft of the personal properties securities bill 2008*, 19 March 2009, p. 15).

13 *Submission 2*, p. 2.

14 *Submission 10*, p. 3.



---

commencement time, in relation to a transitional security interest that is a charge, refer to retention of title property.<sup>15</sup>

***Proposed section 441EA – sale of property subject to a possessory security interest***

3.20 A number of submitters raised concerns in relation to proposed section 441EA of the Corporations Act, which will govern the sale of security interest property in the possession of a secured party.

3.21 DLAPF noted generally that the proposed section is 'inconsistent with the distribution rules in [section] 140 and [is] not subject to the [PPS Act] priority rules or control arrangements'.<sup>16</sup>

3.22 Clayton Utz observed that proposed section 441EA replaces existing section 441JA of the Corporations Act. However it noted that it appears 'there has been a deliberate decision to change the rights of parties under the existing law [in relation to]...proposed new section 441EA'.<sup>17</sup> The Clayton Utz submission stated:

The proposed new section 441EA will replace the existing section 441JA...The existing section 441JA only applies if there is no higher ranking security interest. This requirement is not included in the new section 441JA. The proposed new section 441EA is not consistent with the PPS Act. Although sections 123 and 124 of the PPS Act allow a secured party to seize the secured property, section 127 provides rights in those circumstances to higher ranked secured parties. There is no corresponding provision to section 127 of the PPS Act in the new section 441EA.<sup>18</sup>

3.23 The Clayton Utz submission also observed that the PPS Act does not generally require physical possession of a possessory security interest in order to have control of that property for perfection purposes. However, proposed section 441EA would require that the secured party actually be in possession of a possessory security interest before the secured party could rely on the proposed section. Clayton Utz concluded:

The dual requirement that property be subject to a possessory security interest and also be in the possession of the secured party should be removed from all relevant sections of the Bill. It should be sufficient that the relevant security interest does in fact fall within the definition of possessory security interest.<sup>19</sup>

3.24 In response to the concerns outlined, the Department submitted:

---

15 *Submission 11*, p. 1.

16 *Submission 2*, p. 3.

17 *Submission 3*, p. 6.

18 *Submission 3*, p. 6.

19 *Submission 3*, p. 5.

Currently, a holder of a pledge or lien against a company may enforce their lien or pledge by selling the secured property, applying the proceeds towards the amount owed under the lien or pledge, and paying the balance to the company (see *Corporations Act 2001*, section 441JA).

However, the holder of the pledge or lien may only exercise this power if the pledge or lien is not subordinate to another security. Item 40 of the Bill proposes the substantial re-enactment of section 441JA as section 441EA of the Corporations Act, with adjustments made to reflect the enactment of the PPS Act (for example, the references to lien or pledge are replaced by the term *possessory security interest*). Proposed section [441EA] does not retain the requirement that the lien or pledge not be subordinate to another security. This is consistent with the approach taken in the PPS Act that any secured party with an interest in the collateral may enforce their security interest.<sup>20</sup>

3.25 The Piper Alderman submission also commented on proposed section 441EA:

Proposed new section 441EA(1)(c) (Schedule 1, Part 3, Item 40) should refer to property being in the possession or control of the secured party to be consistent with the definition of 'possessory security interest' (new section 51D).<sup>21</sup>

3.26 However, the Department observed that this approach would effectively extend the ambit of section 441EA beyond its intended limits:

Proposed s 441EA(1)(c) refers to 'the property is in the possession of the secured party' and replaces existing s 440BA(c) which refers to 'the property is in the lawful possession of the holder of the lien or pledge'. The new concept of possessory security interest was premised on the assumption that its only substantive effect (apart from bundling the existing concepts of liens and pledges) would be to add in a reference to PPSA security interests perfected by possession or control. This proposal involves a policy change not related to PPS reform that would extend the ambit of s 441EA beyond that currently provided for by s 440BA.<sup>22</sup>

***Proposed section 588FL – vesting of PPS Act security interests if collateral is not registered within time***

*Vesting of security interests granted by a company*

3.27 The EM explains that most charges currently subject to the registration requirements of Chapter 2K of the Corporations Act will be covered by the PPS Act.

---

20 *Submission 11*, p. 2.

21 *Submission 1*, p. 1.

22 *Submission 11*, p. 2.

These charges will be migrated to the PPS Register to be established by the PPS Act, and in future such charges will be registered on the PPS Register.<sup>23</sup>

3.28 To achieve this, the Bill will repeal Chapter 2K, and consequential amendments will be made throughout the Corporations Act with effect from the time the PPS Act commences (expected to be May 2011).<sup>24</sup> Proposed new section 588FL will be inserted into the Corporations Act. This section will replicate, with some changes, section 266 of the Corporations Act, which prevents security interests being granted fraudulently with knowledge of an imminent administration, liquidation or deed of company arrangement and to avoid property falling into the trustee's or administrator's estate or being claimed by unsecured creditors. For security interests entered into after the commencement time, proposed section 588FL will replace section 266.<sup>25</sup>

3.29 Proposed new section 588FL will also largely replicate existing section 267 of the PPS Act.<sup>26</sup> Existing section 267 of the PPS Act and associated provisions provide that:

...most security interests granted by a company which are regulated by the PPS Act will vest in the grantor if not perfected on the date that the winding up of that company commences or the 'section 513C day' (defined in the Corporations Act as, essentially, the date of commencement of administration of a company) in respect of that company...<sup>27</sup>

3.30 The Clayton Utz submission drew attention to a 'key difference' between proposed new section 588FL and section 267 of the PPS Act. While section 267 would provide that most [relevant] security interests granted by a company will vest in the grantor if not perfected on the commencement of the winding up (or administration) of that company, proposed section 588FL will provide that security interests granted by a company and perfected only by registration will vest in the grantor if registered after the later of:

- 20 business days after the relevant security agreement came into force; and
- six months before the date that the winding up (or administration) of the company commences.<sup>28</sup>

3.31 The effect of this would be that:

---

23 EM, p. 13.

24 EM, p. 13.

25 EM, p. 13.

26 *Submission 3*, p. 1.

27 *Submission 3*, p. 1.

28 *Submission 3*, p.1.

...in the case of certain security interests granted by companies, these will vest in the grantor company under the amended Corporations Act even though, under section 267 of the PPS Act, this would not occur.<sup>29</sup>

3.32 Clayton Utz argued that there were 'no compelling policy reasons for [section 588FL] to apply where the regime in section 267 of the PPS act should apply'. It stated:

Section 267 (and associated provisions) of the PPS Act should apply in preference to the proposed section 588FL of the Corporations Act. It is not appropriate for the 2 pieces of legislation to deal with exactly the same issue in contradictory ways. It is also unclear why companies and individuals should be treated differently in relation to this issue...<sup>30</sup>

3.33 In response to this view, the Department commented:

Section 588FL replaces existing s266 of the Corporations Act, though modified to take account of the PPS Act. It voids a security interest that has been perfected by registration shortly before the grantor company enters into certain forms of external administration. This provision is part of the preference provisions of the Corporations Act, and this is reflected in its proposed relocation to Part 5.7B—*Recovering property or compensation for the benefit of creditors of insolvent company*.<sup>31</sup>

*Section 588FL(3) – foreign law governing security interests*

3.34 Proposed subsection 588FL(3) applies when a company enters into a form of external administration, and a security interest granted by the company is enforceable under the law of another jurisdiction that provides for the public registration or notice of the security interest. This subsection will provide that the security interest will vest in the grantor company if the security interest has not been disclosed in accordance with the law of that other jurisdiction.<sup>32</sup>

3.35 Clayton Utz argued that the purpose of this provision is 'unclear'. In particular:

This subsection purports to invalidate security interests which are not registered in accordance with a public registration regime under a foreign law. The application of this section would have the effect of invalidating certain security interests under Australian law even if those security interests may not be required to be registered under Australian law (or may in fact have been validly registered or otherwise perfected under Australian law) and are perfectly valid and enforceable under the relevant foreign law.<sup>33</sup>

---

29 *Submission 3*, p. 1.

30 *Submission 3*, p. 1.

31 *Submission 11*, p. 4.

32 *Submission 11*, p. 5.

33 *Submission 3*, p. 1.

3.36 In response, the Department submitted:

Section 588FL(3) is consistent with the policy underlying s588FL that a security interest should be void if it is disclosed only shortly before the company enters into external administration.<sup>34</sup>

### ***Personal Property Securities Act 2009 amendments***

#### ***Definitions***

3.37 DLAPF submitted that the proposed amendment to the meaning of *grantor* in section 10 of the PPS Act 'may create uncertainty as to who can grant a security interest'.<sup>35</sup> DLAPF observed that the word *interest* is 'very broadly defined and is not limited to persons who have an equitable interest in personal property'. Its submission argued:

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.<sup>36</sup>

3.38 To address this issue, DLAPF suggested 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' could be limited in this manner.<sup>37</sup>

3.39 However, the Department defended the approach taken in the Bill as being consistent with the broad approach of the new PPS regime:

Confining the 'interest' in which a security interest may be granted to legal or equitable interests in the property would not be consistent with the functional approach to security interests proposed by the Bill.<sup>38</sup>

#### ***Potential issues for future review***

3.40 In its submission, the Department's responses to a number of the issues raised indicated that these issues may be appropriate for consideration in the review of the PPS legislation that is required under section 343 of the PPS Act.<sup>39</sup> This section

---

34 *Submission 11*, p. 6.

35 *Submission 2*, p. 3.

36 *Submission 2*, p. 3.

37 *Submission 2*, p. 4.

38 *Submission 11*, p. 7.

39 PPS Act, p. 293.

requires that a review of the operation of PPS Act be undertaken and completed within three years after the *registration commencement time*.<sup>40</sup>

3.41 The issues identified by the Department as potentially relevant to the section 343 review are:

- whether the scope of the PPS Act should be extended to cover any other type of security interest;<sup>41</sup>
- whether a guarantor should be bound by any priority agreement;<sup>42</sup>
- the suitability of the notice requirements in relation to the holders of purchase money security interests;<sup>43</sup> and
- the effect of section 74 of the PPS Act (Execution creditor has priority over unperfected security interest) on the position of secured creditors, to the extent that it weakens the position of secured creditors.<sup>44</sup>

### ***Senate Scrutiny of Bills Committee comments***

#### *Constructive knowledge and shifting the onus of proof*

3.42 The committee notes that the Senate Standing Committee for the Scrutiny of Bills (the scrutiny committee) considered the Bill in its *Alert Digest No. 4 of 2010*.<sup>45</sup> The scrutiny committee commented on a number of provisions in the Bill which will employ the element of constructive knowledge.

3.43 'Constructive knowledge' involves the imputation or deeming of knowledge to a person or entity. In the case of the Bill, proposed sections 588FL, 588FM, and 588FN, and proposed subsection 267A(2), will rely on provisions in the PPS Act which detail the operation of constructive knowledge for the purposes of that Act.<sup>46</sup>

3.44 The scrutiny committee's *Alert Digest* notes that, in relation to these proposed sections and subsection:

...an additional burden is placed on the defendant when the onus in relation to constructive knowledge is shifted to the defendant by requiring him or

---

40 The EM notes that the *registration commencement time* is a key event in the transitional provisions. This refers to the time at which the PPS Act and the PPS Register take practical effect (p. 44).

41 Clayton Utz, *Submission 3*, p. 10.

42 Clayton Utz, *Submission 3*, p. 12.

43 Australian Securitisation Forum, *Submission 4*, p. 2.

44 Allens Arthur Robinson, Blake Dawson, Freehills Lawyers and Mallesons Stephen Jaques, *Submission 7*, p. 2.

45 Senate Scrutiny of Bills Committee reports may be accessed at <http://www.aph.gov.au/senate/committee/scrutiny/bills/2010/index.htm>

46 *Alert Digest No. 4 of 2010*, 17 March 2010, p. 7.

---

her to prove that property was acquired *without* actual or constructive knowledge.<sup>47</sup>

3.45 While the EM contains an explanation of the intent and effect of the reversal of the onus of proof in relation to proposed sections 588FL, 588FM and 588FN, the scrutiny committee observed that 'there does not appear to be a clear justification for the use of constructive knowledge [in relation to subsections 588FP(7)(b) and 588FP(9)]'.<sup>48</sup> Similarly, there is no explanation of the requirement for the constructive knowledge element in relation to proposed paragraph 267A(2)(b).

3.46 The *Alert Digest* also noted that the PPS Act is 'complex legislation' which relates to a national scheme, but 'considers that these circumstances make it especially important that all provisions are appropriate and that they are adequately explained'.<sup>49</sup> Accordingly, the scrutiny committee called for the Attorney-General to provide advice about 'the need and justification for each instance of constructive knowledge in [the Bill]'.<sup>50</sup>

### **Committee view**

3.47 The committee notes that the inquiry into the Bill represents the culmination of a substantial reform to Australia's PPS regime. On the commencement of the new PPS Act in May 2011, stakeholders in the system will benefit greatly from the economic and administrative benefits that will flow from a streamlined national system. A defining theme throughout the development of the PPS Act has been the importance of simplifying and harmonising Australia's laws in this area, and the committee is confident that the PPS Act will achieve these outcomes.

3.48 The committee notes that the Bill is the second set of consequential amendments to the PPS Act since its passage through the Australian Parliament in 2009. A program of extensive consultation has accompanied the development of the PPS Act and the subsequent consequential amendments, and the committee acknowledges the contributions of the many groups and individuals that made submissions to, or appeared before, the committee through the course of its inquiries. Equally, the committee commends the Department for ensuring that consultation on the new PPS regime has been a comprehensive and worthwhile process. The Department deserves significant credit for having ensured that the PPS Act will commence with what appears to be broad support and understanding, particularly from the financial and legal communities which stand to be most affected by the introduction of the new PPS regime.

---

47 *Alert Digest No. 4 of 2010*, 17 March 2010, p. 7.

48 *Alert Digest No. 4 of 2010*, 17 March 2010, p. 8.

49 *Alert Digest No. 4 of 2010*, 17 March 2010, p. 8.

50 *Alert Digest No. 4 of 2010*, 17 March 2010, p. 8.

3.49 In its previous three reports in relation to the PPS Act, the committee made numerous recommendations to improve the consultation processes and substantive outcomes around the development and implementation of the new PPS regime in Australia. The success of these previous processes was reflected in the submissions to the current inquiry, which, in general, raised issues that were of a relatively minor or technical nature. The majority of these were able to be sufficiently addressed or clarified by the submission provided by the Department. While some matters of policy were raised in submissions, the committee did not regard any of these as warranting a recommendation for action or further consideration by the government at this point, particularly in light of the provision for a statutory review of the scheme within three years of the commencement of the PPS Act.

3.50 Finally, the committee notes the findings of the scrutiny committee in relation to the provisions of the Bill which rely on the element of constructive knowledge, and the scrutiny committee's request that the Attorney-General provide specific advice on the need and justification for each instance of constructive knowledge in the Bill.

### **Recommendation 1**

**3.51 The committee recommends that the Senate pass the Bill.**

**Senator Trish Crossin**

**Chair**



## **Additional comments from Liberal Senators**

1.1 Liberal Senators agree with the majority report's consideration of the evidence, and largely support the majority report's conclusions and recommendation. Liberal Senators understand the benefits and importance of establishing a simplified, national personal property securities (PPS) regime. Liberal Senators have made a significant contribution to the three previous inquiries into the development of the PPS legislation. As noted in our comments to the previous report, we do not intend to obstruct this worthwhile reform, but merely wish to ensure that the Government 'gets it right'.<sup>1</sup>

### **Engagement with small business**

1.2 Liberal Senators note the comments of the majority in relation to the role of the Attorney-General's Department (the Department), and also acknowledge the Department's role in the development of the PPS Act and in assisting the committee and many stakeholders – particularly those in the finance, legal, banking and credit management industries – to better understand and contribute to the intended operation of the new PPS regime. Liberal Senators recognise that the Department continues to engage with relevant stakeholders over the development and implementation of the PPS Register.

1.3 Notwithstanding this acknowledgement of the Department's efforts, Liberal Senators remain concerned that to date there has been insufficient engagement with the many small businesses which will be affected when the PPS Act finally commences in May 2011. Some figures would suggest that there are approximately 2½ million small businesses in Australia, with 700,000 of these being incorporated businesses. It is imperative that this critical element of Australia's productive sector is fully engaged with, and informed about, the new PPS regime. Liberal Senators are not convinced that small business has had and will have the necessary education, support and assistance to negotiate what is a wide-reaching reform to Australia's current financial and legal settings in this area.

1.4 Liberal Senators note that they have previously expressed concerns in relation to the extent and timing of the consultations on the new PPS regime. Notably, a minority report and additional comments to the past two inquiries (on the provisions of the Bill and related consequential amendments respectively) both raised concerns in relation to the inadequate amount of time allowed for the conduct of those inquiries. Although the time allowed for the current inquiry was apparently sufficient – given the relatively minor number and nature of issues that were raised in submissions – Liberal Senators believe that the previous inquiries failed to sufficiently engage with the small business sector. It is likely that many

---

1 *Inquiry into the Personal Property Securities Bill 2009 [Provisions]*, August 2009, p. 36.

small-business people remain uninformed about the pending changes, and are ill-prepared to successfully negotiate the new regime on its commencement.

1.5 In light of these conclusions, Liberal Senators consider that, in the lead up to the commencement of the PPS Act in May 2011, it is vital that the Department pursues a comprehensive implementation agenda which recognises the importance and particular needs of the small business community, particularly in relation to education about preparing for the changes and negotiating the new system on its commencement. Equally, provision should be made for small businesses to receive ongoing information and assistance in relation to the PPS Act system. Accordingly, the Department should be required to publish an implementation plan covering the period of approximately 12 months up to the commencement of the PPS Act in May 2011. This plan should clearly set out a comprehensive strategy for engaging with and educating all stakeholders, and particularly small businesses, about preparing for the new PPS regime and negotiating the new system on its commencement.

1.6 In addition, Liberal Senators consider that, in the three-month period prior to the commencement of the PPS Act, the Minister should report to Parliament on the Department's preparations for the commencement of the new scheme, and in particular the extent to which it has met the benchmarks contained in its implementation plan with regard to engagement with, and education of, the small business sector.

1.7 Finally, Liberal Senators note with concern the issue, raised by the Senate Standing Committee (the scrutiny committee) for the Scrutiny of Bills, in relation to the reliance of certain provisions of the Bill on the element of constructive knowledge. Liberal Senators support the scrutiny committee's calls for the Department to provide a full explanation for each instance of a provision relying on the element of constructive knowledge in the Bill. Any legislative approach that, prima facie, might unduly impact on the rights and freedoms of individuals, must be accompanied by sufficient justification for such an approach.

### **Recommendation 1**

**1.8 That the Department immediately publish an implementation plan for the approximately 12-month period leading up to the commencement of the PPS Act; the plan should detail a comprehensive agenda for engagement with and education of all key stakeholders, including the small business sector, about the operation and potential impacts of the new PPS regime.**

### **Recommendation 2**

**1.9 That, in the three-month period prior to the commencement of the PPS Act, the Minister report to Parliament on the preparations for the commencement of the new scheme; the Minister's report should address the extent to which key stakeholders, and specifically the small business sector,**

**have been assisted with and are prepared for the commencement of the new PPS Act regime.**

**Senator Guy Barnett**

**Deputy Chair**

**Senator Stephen Parry**



# APPENDIX 1

## RESPONSE FROM ATTORNEY-GENERAL'S DEPARTMENT TO SUBMISSIONS RECEIVED FOR THIS INQUIRY<sup>1</sup>

### Schedule 1

| Submission          | Item no. | Issue   | Response  |
|---------------------|----------|---|---|
| Clayton Utz 2.8     | Item 10  | The exclusion of <i>PPSA retention of title property</i> from Part 5.2 should be widened to include transfers of accounts.  | Part 5.2 does not currently apply to <i>PPSA retention of title property</i> . The Bill does not exclude <i>PPSA retention of title property</i> from Part 5.2. It merely maintains the existing scope of the application of Part 5.2, including in relation to transfers of accounts.  |
| AFC / AELA 1        | Item 10  | In the definition of PPSA retention of title property, the words <i>...unless provided otherwise expressly or by necessary implication</i> may unintentionally mean that controllers include secured parties exercising enforcement rights against PPSA ROT property.                                       | The exception is intended to create a strong presumption in the Corporations Act that the references to <i>property of the corporation</i> refers to property to which the company has title. For the exception to apply, it must be an express reference or a necessary implication that the provision refers to retention of title property. Given the availability of other constructions for the term <i>property of the company</i> (ie that it refers to property that the company owns), the exception is unlikely to be relevant. |
| Clayton Utz 8       | Item 10  | Transitional security interests should not be excluded from the definition of PPSA security interests. At the time when a transitional security interest ceases to have the protection of Part 9, PPS Act, it should cease to be a transitional security interest for the purposes of the Corporations Act. | The exclusion of transitional security interests from <i>PPSA security interests</i> is a drafting device that allows the amending Bill to apply to functional approach to security interests prospectively (ie without affecting arrangements that existed at the registration commencement time).   |
| Clayton Utz 10.3    | Item 20  | Section 553E is subject to s 279 (to be repealed). The Bill only deletes the reference to s 279 but s 553E should remain subject to <i>the priority regime for security interests under the PPS Act and the operation of Part 10.13 of the Corporations Act</i> .   | The reference to s 279 is to be repealed because the Bill will repeal s 279. It is not necessary to make s 553E subject to the priority rules in the PPS Act and the operation of the Part 10.13 because s 553E is not inconsistent with those provisions.  |
| DLA Philips Fox 3-4 | Item 36  | <i>PPSA retention of title property</i> should not be included as property of the company in s 441A, because a general security interest  | The Department considers that the Bill has the intended effect that the references to property of the company in s441A would  |

1 'Inquiry into the Personal Property Securities (Corporations and Other Amendments) Bill 2010: Summary of submissions and comments by the Australian Attorney-General's Department', *Submission 11*.

|   |                           |  |   |
|---|---------------------------|--|---|
| <p>AAR, Freehills, MSJ, BD</p> <p>Clayton Utz 2.2</p> <p>Westpac</p> <p>AFC/ AELA 5</p> |                           | <p>would not extend to that <i>PPSA retention of title property</i> (a company can only grant security in the contractual rights it has over property whose title is held by another party). It remains unclear, whether a fixed and floating charge over all of the assets of a company will now extend to this property enabling a secured party (and arguably, holders of future security interests over all the assets of a company) to exercise rights under s 436C and 441A of the Corporations Act.</p> | <p>not, after the registration commencement time, in relation to a transitional security interest that is a charge, refer to retention of title property.</p>   |
| <p>ABA</p>  | <p>Item 36</p>            | <p>The Bill should make it clear that an all present and after acquired security interest and a fixed and floating charge over all the company's assets are sufficient to satisfy the requirements of s 436C and s 441A, Corporations Act.</p>   |   |
| <p>Clayton Utz 10.1</p>   | <p>Item 36</p>            | <p>Under s 441AA, if a grantor acquires assets after the secured party has commenced enforcement, the secured party should be able to enforce against this property even if the security interest is unperfected (because it has not attached) if the security interest is unperfected over the other assets.</p>  | <p>Attachment can occur at any time when the grantor acquires rights in the property, including after the secured party has commenced enforcement action. The security interests will be perfected when it attaches.</p>  |
| <p>Clayton Utz 9</p>  | <p>Items 36,37 and 42</p> | <p>Because the power to appoint a receiver or controller flows from the security interest itself, all references to receiver or controller appointed for the purpose of Part 5.2 should be amended to all <i>receivers or controllers appointed under security interests to which Part 5.2 applies...</i></p>  | <p>The Department considers that the form of words use in the Bill is effective.</p>  |
| <p>Piper Alderman 1</p>   | <p>Item 40</p>            | <p>Proposed new s 441EA(1)(c) should refer to property being in the possession or control of the secured party (to be consistent with the new definition of possessory security interest).</p>   | <p>Proposed s441EA(1)(c) refers to 'the property is in the possession of the secured party' and replaces existing s 440BA(c) which refers to 'the property is in the lawful possession of the holder of the lien or pledge'. The new concept of <i>possessory security interest</i> was premised on the assumption that its only substantive effect (apart from bundling the existing concepts of liens and pledges) would be to add in a reference to PPSA security interests perfected by possession or control. This proposal involves a policy change not related to PPS reform that would extend the ambit of s 441EA beyond that currently provided for by s 440BA.</p> |
| <p>Clayton Utz 7.2</p>  | <p>Item 40</p>            | <p>Section 441EA replaces s 441JA but doesn't provide that it only applies where there is no higher ranking security interest (as does s441JA). There is also no corresponding provision to s 127, PPS Act which sets out the rights of higher ranking secured parties. Furthermore, if there is a higher ranked secured party, no provision has been made for them to claim any proceeds.</p>   | <p>Currently, a holder of a pledge or lien against a company may enforce their lien or pledge by selling the secured property, applying the proceeds towards the amount owed under the lien or pledge, and paying the balance to the company (see Corporations Act 2001, section 441JA). However, the holder of the pledge or lien may only exercise this power if the pledge</p>   |

|                      |             |   |   |
|----------------------|-------------|---|---|
| DLA Philips<br>Fox 6 | Item<br>40  | S 441EA is inconsistent with the distribution rules in s 140 and not subject to the PPSA priority rules or control arrangements.  | or lien is not subordinate to another security. Item 40 of the Bill proposes the substantial re-enactment of section 441JA as section 441EA of the Corporations Act, with adjustments made to reflect the enactment of the PPS Act (for example, the references to lien or pledge are replaced by the term <i>possessory security interest</i> ). Proposed section 441JA does not retain the requirement that the lien or pledge not be subordinate to another security. This is consistent with the approach taken in the PPS Act that any secured party with an interest in the collateral may enforce their security interest. |
| Clayton Utz 5        | Item<br>40  | The dual requirement to have a possessory security interest and be in possession of the property should be done away with. Otherwise, s 441EA requires that a secured party must have possession before they can sell the property and retain the proceeds and control of the property would be insufficient and under s 440B(3), a party with a possessory security interest can only continue to possess the property during administration but not continue to exercise control. |   |
| DLA Philips<br>Fox 8 | Item<br>40  | Because most security interests include enforcement provisions, Subdivision C would not apply to enforcement and it is unclear what s 441EA applies to.   | Subdivision C would apply to, for example, leases that are not PPS leases.  |
| Piper Alderman<br>2  | Item<br>86  | Section 124(1)(f) should refer to a security interest rather than being restricted to a circulating security interest and the company's property in this context should include PPSA retention of title property.   | This proposal involves a policy change not related to PPS reform that would extend the ambit of s124(1)(f). Proposed s124(1)(f) allows a company to 'grant a circulating security interest over the company's property' and replaces existing s124(1)(f) which allows a company to 'grant a floating charge over the company's property'. By referring to 'a circulating security interest', and not applying to PPSA retention of title property, proposed s124(1)(f) maintains the effect of existing s124(1)(f).   |
| Clayton Utz<br>10.2  | Item<br>89  | The new s 443E(1)(b) is unnecessary because the unsecured debts referred to are already covered by s 443E(1)(a).  | Section 443E(1)(b) is included to provide legal certainty concerning the debts covered by the provision.  |
| Clayton Utz 6        | Item<br>125 | The exception in s 440JA, for the enforcement of security interests during administration, should also apply to security interest held by an ADI in its own accounts. Otherwise the exception would apply to the ADI's rights of set-off but not to a possessory security interest over the ADI account.  | The amendments proposed for s440JA do not affect the existing application of Division 6 or Part 5.3A to security interests held by an ADI in its own accounts. Proposed s440B(3), table item 1 will continue the existing prohibition in existing s440B against an ADI enforcing a security interest in an ADI account held with it (except in certain circumstances). The amendment does not affect the ADI's existing right of set-off.   |
| Clayton Utz 7.1      | Item<br>135 | Section 442CB(1) should not extend the duty to act reasonably when selling property subject to liens or pledges to all secured personal property.   | Currently, an administrator is an officer of the company (see s9 (definition of <i>officer</i> ) and s180, Corporations Act, which already require the exercise of a reasonable degree of care and diligence. While the amendment to s442CB extends the circumstances in which the duty owed under that section applies, it does not place additional obligations on an administrator to act reasonably. Also, applying the same  |

|   |             |   |   |
|---|-------------|---|---|
|   |             |   | duty regardless of the nature of the security interest is consistent with taking a functional approach to security interests.   |
| DLA Philips<br>Fox<br>5<br><br>Clayton Utz<br>2.6<br><br>AFC/AELA 4<br><br>AAR, Freehills,<br>MSJ, BD | Item<br>152 | <p>A receiver/ controller should be liable for rents and other amounts payable in respect of PPSA retention of title property, that is PPSA retention of title property should not be excluded from s 419A(1).</p> <p>The amendments to s 443B mean that a voluntary administrator becomes personally liable for payment of amounts under leases which are treated as security interests, effectively giving the holders of leases privileges not enjoyed by the holders of other security interests. The changes also make it difficult for the voluntary administrator to avoid that liability.</p> | The Corporations Act 2001 currently provides that controllers (see section 419A) and voluntary administrators (see section 443B) are personally liable for payments owing under certain transactions entered into by the company before the commencement of the receivership or administration, unless they disclaim the transaction. Item 152 removes a receiver's liability for these transactions, while Item 165 removes the administrator's capacity to avoid the liability for these transactions.              |
| Clayton Utz 4   | Item<br>156 | It is not appropriate that all interests in personal property that are security interests for the purposes of the PPSA are treated the same as charges, liens and pledges. For example, under proposed s 440B, Corporations Act, a secured party can't exercise its rights during administration of the company. This would include the transfer of accounts even where a transfer was not made for the purpose of securing payment or the performance of an obligation.  | Section 440B, Corporations Act currently prevents the enforcement of a charge on property of the company (except in certain circumstances). This would include a charge on a book debt (or an <i>account</i> for the purposes of the PPS Act). Consistently with the functional approach to security interest implemented by s 440B, PPS Act provides equivalent treatment for a charge on a book debt and a transfer of the same book debt.  |
| DLA Philips<br>Fox<br>7   | Item<br>183 | It is unclear why s 588FP (which is intended to replicate s 267) excludes <i>PPSA retention of title property</i> .   | The exclusion of <i>PPSA retention of title property</i> from s588FP has the effect that s588FP (like s267) will not extend to PPSA retention of title property. Including PPSA retention of title property in s588FP would extend the coverage of s588FP beyond that of existing s267.   |
| Clayton Utz<br>1.3  | Item<br>183 | Section 588FL should not be included in the Corporations Act, having regard to PPS Act, s267.   | Section 588FL replaces existing s266 of the Corporations Act, though modified to take account of the PPS Act. It voids a security interest that has been perfected by registration shortly before the grantor company enters into certain forms of external administration. This provision is part of the preference provisions of the Corporations Act, and this is reflected in its proposed relocation to <i>Part 5.7B—Recovering property or compensation for the benefit of creditors of insolvent company</i> . |
| AAR, Freehills,<br>MSJ, BD  | Item<br>183 | The new s 588FL(2)(b)(iii), in order to operate as intended, should be amended so that the registration "clock" ticks for foreign security interests from the time registration could be required under Australian law.   | The validity of a security interest in goods (which includes its enforceability against third parties) is always governed by the law of the jurisdiction in which the goods are located (see PPS Act s 238(1)).   |



|  |  |  |
|--|--|--|
|  | <p>Instead of just referring to the time that a security interest first became enforceable against third parties under the law of Australia, it should refer to the later of that time and the time that under Part 7.2 of the PPSA, the law of Australia first governed the validity, perfection and effect of perfection or non-perfection of the security interest. Section 588FL(3) applies where registration is required under foreign law. Section 588FL(3)(a) and (c)(iii) should be amended in similar fashion to (b)(iii) so that it is consistent with Part 7.2 of the PPSA, and only looks at the effect of foreign law when Part 7.2 says that it should. Subsection (3) should not apply where the security interest is registered on the PPSA register. Finally ss (3) should not apply where a foreign law does provide for the public registration of the security interest, but the security interest is not required to be registered under that foreign law in order to be effective. For example, the foreign law may not provide for vesting in insolvency or may provide for perfection by some other means that has been satisfied (eg because the secured party has possession or control or their equivalent).</p> | <p>Section 588FL applies only when a security interest is granted by a company (see s 588FL(1)).</p> <p>The reference in proposed s 588FL(2)(iii) to a security interest becoming enforceable under a law of Australia refers to the application of Australian law to the security interest. When the collateral is goods, Australian law will apply to the security interest when the collateral is located in Australia or the grantor is an Australian entity (see s 6, PPS Act).</p> <p>Proposed s 588FL(2)(b)(iii) refers to ‘the security agreement giving rise to the security interest came into force under the law of a foreign jurisdiction’. When the collateral is goods, this would occur when both the goods are located outside Australia and the grantor is not an Australian entity</p> <p>Proposed s 588FL(2)(b)(iii) refers to a ‘security interest first became enforceable against third parties under the law of Australia after the time that is 6 months before the critical time’.</p> <p>When the collateral is goods located outside Australia, the law of Australia will begin to apply when the grantor becomes an Australian entity (see s 6(1)(a), PPS Act). Accordingly, s 588FL(2)(b)(iii) has the effect that when goods are located outside Australia, and the grantor converts from being a foreign entity to a company (so that the security interest becomes enforceable against third parties under the law of Australia), and the critical time arises within the following 6 months, then the security interest will not vest in the company provided the security interest was perfected before the earlier of the critical time or 56 days after the grantor became a company. This provision is necessary because of the repeal of s 601BC(6)(c), which requires the registration of any charges when a foreign entity converts to a company. Instead of requiring the immediate registration of the charges, the Corporations Act will visit invalidity on a charge that is not registered within a certain period before the critical day.</p> <p>Proposed s 588FL(3) applies when a company enters into a form of external administration (s 588FL(1)), and a security</p> |
|--|--|--|

|  |             |  |  |
|--|-------------|--|--|
|  |             |  | <p>interest granted by the company is enforceable under the law of another jurisdiction (s 588FL(3)(a)) that provides for the public registration or notice of the security interest (s 588FL(3)(b)). The security interest will vest in the grantor company if the security interest has not been disclosed in accordance with the law of that other jurisdiction. Persons dealing with companies should be able to expect that the company has complied with foreign registration requirements, and may rely on foreign registers to disclose security interests. Section 588FL will vest the security interest in the grantor company when the company enters external administration without having made the registration in accordance with the foreign law.</p>                          |
| Clayton Utz<br>1.4                             | Item<br>183 | Section 588FL(3) should not be included in the Corporations Act.   | Section 588FL(3) is consistent with the policy underlying s588FL that a security interest should be void if it is disclosed only shortly before the company enters into external administration.   |
| Clayton Utz<br>2.1<br><br>DLA Philips<br>Fox 6 | Item<br>183 | It should be possible for <i>PPSA retention of title property</i> to include property that is used or occupied by, or that is in the possession of, the corporation. For example, it should include property that the corporation has leased to another person.  | The term <i>PPSA retention of title property</i> covers property that a company would currently hold as lessee, and not property that the company has leased as lessor (and the rights that the company has as lessor). A security interest will include a PPS lease made to the grantor. When the grantor has in turn leased the property to a 3 <sup>rd</sup> party (whether or not as a PPS lease), the grantor's property will include its interest in that lease. Accordingly, a security interest in all of the company's property will extend to the grantor's rights under the lease, but not to the property itself.  |
| Clayton Utz<br>3                               | Item<br>187 | <p>A registrable charge which is not registered prior to the RCT cannot be registered on the ASIC Register after the RCT and this will prevent them taking advantage of the Chapter 2K priority provisions which confer priority on later registered charges (eg s 279(3), Corporations Act).</p> <p>The ASIC Register of Charges should remain open for 45 days after RCT to allow registrable charges to be registered or the definition of registrable charge should be amended to only include charges actually registered or charges entered into within 45 days prior to RCT where they are registered on the PPSR within 45 days after RCT.</p> | <p>The Bill will prevent a registrable charge created during the 45 days before the registration commencement time from being registered on the ASIC register of company charges after the registration commencement time (see proposed s 1503, Corporations Act).</p> <p>The charge will be a transitional security agreement for the purposes of the PPS Act (see s 307, PPS Act). Transitional security interests will initially be perfected for a period by force of the PPS Act without the need for registration with either ASIC or the PPS Register (see proposed s 322, PPS Act). The transitional security interest will, in effect, be deemed to be registered from immediately before the registration commencement time, and have priority under the PPS Act from that time.</p> |

|                      |             |  |   |
|----------------------|-------------|--|---|
| Clayton Utz<br>10.4  | Item<br>187 | Under s 1504(2), if a registrable charge is void under s 266, then s266 continues to apply. But s266 doesn't render a charge void in its entirety but only <i>void as a security on that property as against a liquidator, the administrator of the company, or the deed's administrator (s266(1)) or void to the extent that it secures the liabilities which were not notified to ASIC or void to the extent that it relates to the same property ...as another particular charge (s266(3)).</i> This needs to be clarified. | The Bill achieves its intended effect that if, as at the registration commencement time, a registrable charge is void as a security as against the liquidator, the administrator of the company, or a deed's administrator, then, despite s 1504(1), it would continue to be void as against the liquidator, the administrator of the company, or a deed's administrator. |
| DLA Philips<br>Fox 1 |             | The structure of Schedule 1 is confusing and all item numbers should be in numerical order   | The structure of Schedule 1 is consistent with normal legislative drafting practices and does not affect the outcomes achieved by Schedule 1.   |
| DLA Philips<br>Fox 2 |             | There should be a consistent approach to the inclusion of PPSA retention of title property in the definition of property in the provisions on receivership, administration, deed of company arrangement, voluntary winding up and PPSA retention of title property should only be included if the security interest is unperfected.  | Please see responses above in relation to particular provisions.  |

## Schedule 2

|   |         |   |   |
|---|---------|---|---|
| DLA Philips<br>Fox<br>1                   | N/A     | The PPSA is to commence on 1 February 2012 or an earlier time approved by the Minister. To provide businesses with as much certainty as possible, the Minister should indicate his intention as to the start date as soon as possible.  | In its response to the Senate Committee's March 2009 recommendations, COAG agreed that the PPS scheme would commence in May 2011.   |
| DLA Philips<br>Fox<br>2                   | Item 17 | The meaning of grantor may create uncertainty as 'interest' is very broadly defined and is not limited to people with an equitable or legal interest in personal property. Multiple security interests could be granted by multiple people creating priority and enforcement problems for security interest holders. Suggest that the definition of grantor or 'interest' be limited to people with a legal or equitable interest in the property.                          | Confining the 'interest' in which a security interest may be granted to legal or equitable interests in the property would not be consistent with the functional approach to security interests proposed by the Bill.   |
| Piper<br>Alderman<br><br>AFC/ AELA<br>2-3 | Item 73 | The proposed amendment to s 116 seems to confirm the enforcement provisions in Chapter 4 will have limited, if any, application where the grantor of the security interest is a company. This is because any seizure or control of the property for enforcement purposes will arguably make the secured party a controller for the purposes of the CA. Replace existing s 166(4) with <i>Despite s 116, while a person is a controller of the property, s 115, s 123, s</i> | Section 116 of the PPS Act excludes the operation of Chapter 4 of the Act in relation to property while a person is a receiver, a receiver and manager, or a controller of the property. This reflects an early consensus reached among stakeholders that, for these security interests, Part 5.2 of the Corporations Act 2001 would apply instead of Chapter 4 of the PPS Act. |

|                      |          |   |   |
|----------------------|----------|---|---|
|                      |          | <i>124, s 128 of Chapter 4 apply.</i>   |   |
| DLA Philips Fox<br>3 | Item 104 | The proposed s 252B could be used against secured parties seeking to exercise their enforcement rights to retain or sell collateral and could be used by secured parties to dispute the entitlement of a third party purchaser who would otherwise have the benefit of the extinguishment rules.  | Proposed section 252B is required to ensure that the PPS Act does not infringe the constitutional guarantee against the acquisition of property otherwise than on just terms (see Constitution s 51(xxxi)).   |
| DLA Philips Fox<br>4 | N/A      | There needs to be a provision that the vesting provisions in the Corporations Act will override the vesting provisions in the PPSA where the grantor is a corporation.  | The vesting provisions in the PPS Act and the Corporations Act apply in different circumstances and are intended to operate concurrently.   |
| DLA Philips Fox<br>5 |          | Where a registrable charge is not migrated because the Registrar does not accept the data the security holder would have to receive notice of the failure to migrate the registration.  | The Department has commenced discussions with ASIC and significant registrants on the registration migration process. At this stage, it is proposed that the Department would provide a facility allowing secured parties to become aware of which registrations had been migrated.   |
| DLA Philips Fox<br>6 | Item 123 | In s 333(5), the reference to personal property should be to security interest.   | The reference to personal property rather than security interest does not alter the effect of the provision.  |
| DLA Philips Fox<br>7 | Item 183 | Where a security lease (the vast majority of leases) vests in the grantor and the administrator/ liquidator sells the property, is the lessor or lessee liable for the tax gain or loss?  | The Department is unable to comment on the taxation matters arising from the particular transactions.   |
| Clayton Utz<br>11    | Item 39  | Under s 21(2)(c)(i), a security interest in an account, can only be perfected by control by the ADI with whom an account is held. But s 25(1) contemplates that control can be obtained by different means. Sections 25(1)(a)(ii)-(iii) and 25(1)(b) suggest that a third party could obtain control of the account and need to be amended. If these provisions are intended to extend the meaning of control for s 25, and not to determine whether a security interest is perfected, these provisions should be included within s 340-341 (similarly to inventory and accounts in s 341). Also s 75 cross refers to s25(1)(a)(ii) which contemplates control by a third party and should be amended to <i>a perfected security interest, held by an ADI, in an ADI account with the ADI has priority over any other perfected security interest in the ADI account.</i> | The location of s25(1)(a)(ii) – (iii) does not affect the operation of the PPS Act. The reference to s25(1)(a)(ii) in s75 recognises that the ADI may agree to subordinate its security interest to another secured party by allowing that other secured party to direct disposition of the funds from the account without further consent by the grantor |
| Clayton Utz<br>12    | Item 110 | Proposed s 267A provides for an unregistered security interest that attaches to collateral after the s 267(1)(b) event, to vest in the grantor in the same way as security interests that attached before the relevant time. This is even though s 267 already provides that such a security interest vests in  | The policy objective of ss267 and 267A is to provide for vesting when a registration has not been made before the critical time. Section 267A is intended to vest in the grantor a security interest that attaches after the critical time in accordance with an agreement made before the critical time, and   |

|                                |                           |   |  |
|--------------------------------|---------------------------|---|--|
|                                |                           | the grantor and it does not address the possibility of a security interest being perfected after the s 267(1) event. Section 267A should provide that <i>a security interest does not vest in the grantor if the conditions in s 267A(1)(a), (b) and (c)(i) apply and there was at the critical time a registration on the PPS Register that would perfect the security interest when it attached and attachment was after the critical time.</i>   | there is no registration at the critical time. It would in part defeat the purpose of s267A to allow the secured party to make a registration after the critical time.   |
| Clayton Utz<br>13              | Not in current Bill or EM | The statement on proceeds in the EM - <i>The effect is that the secured party would lose the benefit of the super-priority when it takes enforcement action to dispose of collateral perfected by control</i> - implies that the proceeds arising from an enforcement action are included within the definition of proceeds. Section 31(3)(b) should be amended to clarify that <i>proceeds received on the enforcement of a security interest, whether enforcement is under Chapter 4 of the PPS Act or otherwise are not proceeds.</i>  | The quoted passage is intended to refer to the Bill's existing effect that while a secured party might have priority because its security interest is perfected by control, it will not have the same priority over any proceeds of the controlled property (and would therefore lose the benefit of the super priority when it takes enforcement action against the proceeds). Proposed s52(2A) will ensure that the secured party retains its control super-priority in the proceeds of controlled collateral (subject to the rights of another person who controls the proceeds).                                     |
| Clayton Utz<br>14.2            | Not in current Bill       | Section 314 provides that Chapter 4 should not apply to a security interest not evidenced by a security agreement for example, a pledge created by the delivery of pledged assets. Therefore s 314 should be drafted in the negative so Chapter 4 will not apply to security agreements made before the registration commencement time.   | Section 314 has the effect that Chapter 4 applies only in relation to security interests arising under security agreements made after the registration commencement time. It follows that Chapter 4 does not apply in relation to security interests arising from a transaction that does not involve a security agreement, such as when the secured party has taken possession or control of the collateral (see s 20(1)(b)(i) and (iii), PPS Act). Whether the Chapter 4 should extend to these kinds of security interests is something that could be considered in the review of the Act required by s 343, PPS Act. |
| Clayton Utz<br>14.3<br><br>ABA | Item 121                  | The Table in s 320 is incorrect because it assumes that all priority disputes are determined under s 55 of the PPS Act whereas s 55 sets out the default priority rules only. Furthermore a perfected transitional security interest will not have priority over a later security interest perfected by control (as stated in the Table). Suggest remove the Table and include a statement that <i>subject to s323 and s 324, the priority of transitional security interest should be determined in accordance with the other provisions of the Act following the application of s 321 and s 322.</i><br><br>Transitional security interests which are either migrated or registered on the PPS Register during the two year transitional period are at risk of losing priority where subsequent security interests over the same collateral are perfected by control. | The Bill provides that a security interest perfected by control has priority over a security interest perfected by any other means.<br><br>Secured parties who are concerned that they will lose their priority after the registration commencement time to another secured party who perfects their security interest by control should consider perfecting their security interest by control before the registration commencement time.   |

|   |             |  |  |
|---|-------------|--|--|
| Clayton Utz<br>14.4<br>Gilbert and<br>Tobin | Item<br>121 | <p>The Regulation to be made under s 322(3) provides that if there is a period in which a transitional security interest must be registered on a transitional register and that period has not yet expired at the registration commencement time, then that transitional security interest is not prescribed. So a security interest created by a company in the 45 days before the registration commencement time would be perfected for up to 24 months even though a third party would have no way of determining if a security interest exists and there would be no incentive for a secured party to register the security interest. Therefore if a transitional security interest is not registered before the registration commencement time, it should not have the benefit of the temporary perfection provisions.</p> <p>The Bill attempts to encourage secured parties to register their interests but deemed security interests will not be able to rely on Chapter 4 for enforcement.</p> | <p>The secured party would have an incentive to register the security interest because the temporary perfection applies only for 24 months. The fact that the security interest would not be discoverable on a search is a feature of the Act in relation to all transitional security interests that are not required to be registered before the registration commencement time. Some registrants may not be able to register charges created during the 45 days before the registration commencement time: especially when the charge is created the day before the registration commencement time.</p> |
| Clayton Utz<br>15                           | Item<br>128 | <p>It is unclear why in determining whether an asset is a circulating asset (s 341), the inventory will have its general law meaning if the s 10 meaning of inventory is intended to be different from the general law meaning (either narrower or broader) then the differences should be stated.</p>   | <p>The term <i>inventory</i> is intended to have its general law meaning so that the expression circulating assets will more closely correspond with the existing concept of property subject to a floating charge (which involves the general law concept of inventory).</p>  |
| Clayton Utz<br>16.3                         |             | <p>Section 61 provides that a secured party may agree to subordinate its security interest in collateral should also provide that any guarantor that is entitled to be subrogated to the rights of that secured party will be bound by any priority agreement agreed to by that secured party.</p>   | <p>Whether a guarantor should be bound by any priority agreement could be considered in the review of the Act required by s343 of the PPS Act. The PPS Act does not currently deal with the rights of guarantors.</p>  |
| Clayton Utz<br>17                           | Item<br>121 | <p>Where a DOCIMAGE number has been assigned but an ASIC search is yet to reflect the registration or provisional registration, of the charge, the charge should be considered to be provisionally registered for the purpose of s 322(c) of the PPS Act</p>   | <p>A charge should be considered to be provisionally registered when ASIC has caused the word 'provisional' to be entered in the register of company charges in relation to the entry (as required by Corps Act s265(4)(b) or s265(6)(a)).</p>   |
| ABA<br><br>Westpac                          | Item 14     | <p>The exclusion of water rights would be extended to rights held by an irrigator and derived from a contract with the operator of the water corporation/co-operative responsible for the distribution of the water which rights are currently registrable on the ASIC Register of company charges (to be repealed). Item 14 should be deleted.</p>  | <p>The PPS Intergovernmental Agreement provides that the PPS Act will not apply to water rights. The proposed amendment would put beyond any doubt that the Act does not apply to water rights of any kind.</p>  |
| AAR,<br>Freehills,<br>MSJ, BD               | Item 4      | <p>In s 6(2)(c), PPS Act, <i>intangible property that consists of</i> should be removed as chattel paper is financial property which is expressly excluded from the definition of intangible property.</p>   | <p>The provision should be read as follows:<br/> 'The security interest is an interest of a transferor under a transfer of<br/> (a) intangible property that consists of an account or</p>   |

|  |                       |  |  |
|--|-----------------------|--|--|
|  |                       |  | <p>(b) chattel paper, and ...'</p> <p>(that is, the words <i>intangible property consists of</i> should be read to qualify the words <i>an account</i> and not the words <i>or chattel paper</i>). The alternative construction presents the difficulties raised by the submission, and should be rejected because it raises those difficulties in the face of the viable construction set out above.</p>  |
| AAR,<br>Freehills,<br>MSJ, BD  | Item 41               | The position of securities in Austraclear and the CHES register needs to be clarified. As CHES operates just the share or securities register of the company which issued the relevant shares or securities and there is no real intermediary or separate register, shares and other securities on CHES should be regarded as investment instruments and not disintermediated securities even though it is operated by a CS facility licence holder (see s 15). The control provisions applying to investment instruments (s 27) are broader than the provisions relating to disintermediated securities in (s 26) and match current market practice, whereas those in s 27 may not. | Securities on CHES are treated as intermediated securities because this reflects the international understanding of the status of these securities, and to adopt another treatment may be misleading in international securities markets. The Department does not agree that s 27 is broader than s 26. Section 26(4) specifically recognises existing market practices. Section 27 is drafted in more general language that includes the cases covered by s 26. |
| AAR,<br>Freehills,<br>MSJ, BD  | Item 42               | The amendments to s 32 do not do enough to preserve a security interest where the dealing is expressed to be subject to the security interest. Similarly, the extinguishment rules should not apply where the dealing that would otherwise attract them is expressed to be subject to the security interest. The law should not override the parties' express intentions regarding the survival of security interests.   | The PPS Act is based on the international precedents. The proposal would allow a secured party and grantor to bind a purchaser of the collateral to the security agreement. A purchaser who is happy to take the collateral subject to an existing security agreement could agree to grant a security interest in the collateral on the same terms as the seller.  |
| AAR,<br>Freehills,<br>MSJ, BD<br><br>Westpac 3<br><br>Gilbert and<br>Tobin | Items<br>47 and<br>52 | In many cases, the transitional period, and the protection afforded by migration, may be illusory, as secured parties will need to register or take other steps to have full protection. This is particularly problematic for serial numbered goods (if a search of the PPS Register immediately before the time of sale does not disclose a serial number, a third party will take the collateral free of the security interest).   | Depending on the outcomes of consultations on the PPS Regulation currently being conducted, the issues raised in relation to serial number goods could be addressed by regulations made under s45 of the PPS Act deferring the application of s45 to certain kinds of motor vehicles (essentially those not registrable on an existing register) under the end of the 24 month transitional period.  |
| ABA  | Items<br>47 and<br>52 | The extinguishment and priority provisions of the PPS Act should not apply to transitional security interests during the 24 month transitional period or alternatively the legislation should provide greater certainty surrounding the continuing validity of migrated security interests and transitional security interests that are registered in the transitional period.   | Subject to specific matters raised elsewhere in this document, the PPS Act retains the priority of security interests established by a security agreement made before the registration commencement time over security agreement made after the registration commencement time. The PPS Act does not affect the validity of security interests established under security  |

|   |                 |  |   |
|---|-----------------|--|---|
|   |                 |  | agreements made before the registration commencement time.  |
| AFC/ AELA   | Items 47 and 52 | The transitional provisions should allow a period of 24 months after the registration commencement time for existing security interests to be registered and ensure that transitional security interests which will be migrated from existing registers retain the priority they had prior to migration.   | The PPS Act allows a transitional period of 24 months for existing security interests to be registered.   |
| AAR, Freehills, MSJ, BD<br><br>ABA<br><br>Westpac 3 | Item 46         | Section 52(1) will apply to all perfected transitional security interests and the effect of this would be that a purchaser or lessee for new value without actual notice that the sale or lease constitutes a breach of a security agreement with respect to a transitional security interest will take the personal property free of the transitional security interest.                            | The 24 month temporary perfection period provides priority for transitional security interests against later registered security interests. Section 52(1) involves balancing the interests of existing secured parties against the interests of persons who buy or lease the collateral after the registration commencement time. The PPS Act currently favours the purchaser over the secured party, as the PPS Register will not disclose a registration of the security interest to a purchaser who searches the PPS Register. |
| ASF   | Item 51         | The process for giving notice to the holders of PMSI's should be straightforward. The holder of an intended priority interest and requiring 15 instead of 5 business days' notice is too onerous for the priority interest holders (assuming it is feasible to give notice to each of the innumerable PMSI holders).   | The PPS Act requires that a person who is purchasing an account give 15 days notice to a person whose interests will be subordinated to the interests of the purchaser. The Department is unable to comment on the practicality of particular business processes for giving notice to holders of purchase money security interests who lose their priority to a transferee of the account. The adequacy of the requirement to give 15 days notice could be considered in the review of the PPS Act required by s343 of the Act.   |
| AFC/ AELA 1<br><br>Westpac 1                        | Item 51         | It may be difficult for PMSI holders to establish the time the grantor obtained possession of the goods, when registering PMSIs, especially in respect of serial numbered goods and refinancing purchases. The starting time for determining the 15 day period should be easily identifiable, such as the date of settlement or provision of finance, rather than date the grantor takes possession. | The PPS Act needs to balance the interests of the PMSI holder against the interests of others who may acquire an interest in the collateral relying on a search of the register. The Act currently allows a secured party 15 business days (ie at least 3 weeks) to register their security interest. This has been increased from the 5 business days provided for by earlier drafts of the Act because of concerns raised by stakeholders.  |
| AAR, Freehills, MSJ, BD<br><br>Westpac 5            |                 | Section 74 considerably weakens the position of secured creditors, in that it gives execution creditors priority over security interests to the extent they relate to goods that attach after the execution order is made.   | It is not clear to the Department whether, in practice, this is likely to be a material issue. This matter could be considered in the review of the PPS Act required by s343 of the Act.  |
| AAR, Freehills, MSJ, BD                             | Item 82         | The example in s 151 appears contrary to the wording of the section and the description may encourage parties to claim that they have security over "all assets" even though they have security only over a specified class. This would make the register  | The examples in s151 are intended to increase certainty concerning the operation of s151 in response to concerns such as those raised by this comment. The requirement in s62(2)(c) that PMSI registrations include a PMSI indicator, and   |



|   |             |   |   |
|---|-------------|---|---|
|   |             | misleading, cumbersome, and very difficult for searching parties to determine the true position.  | the design of the PPS register, and fees payable for a registration, are all matters that could influence the extent to which secured parties rely on “all assets” registrations.   |
| AAR,<br>Freehills,<br>MSJ, BD<br><br>Westpac 5<br><br>ABA | Item<br>125 | Sections 164 and 165 should not render ineffective security interests which are "seriously misleading" when the information was migrated from another register. Section 337 should automatically override s 164 and 165 in relation to migrated security interests. | Proposed section 337(2) would allow the PPS Registrar to determine by legislative instrument that certain registrations are effective.  |
| AAR,<br>Freehills,<br>MSJ, BD                             | Item<br>126 | Section 340(2) unintentionally means that an ADI will need to register its security interest in an ADI account held with it in order to protect it fully.   | Section 340(2) has the intended effect that the ADI will need to disclose by a registration that the ADI account is not a circulating asset. The registration is not required for the ADI to retain its super-priority for security interests in ADI accounts held with it. |



## **APPENDIX 2**

### **SUBMISSIONS RECEIVED**

| <b>Submission Number</b> | <b>Submitter</b>   |
|--------------------------|--|
| 1                        | Piper Alderman Lawyers<br>Supplementary Submission                                   |
| 2                        | DLA Phillips Fox   |
| 3                        | Clayton Utz  |
| 4                        | Australian Securitisation Forum  |
| 5                        | Australian Institute of Credit Management  |
| 6                        | Australian Bankers Association Inc.  |
| 7                        | Allens Arthur Robinson, Blake Dawson, Freehills Lawyers and Mallesons Stephen Jaques |
| 8                        | The Westpac Group  |
| 9                        | Gilbert + Tobin Lawyers  |
| 10                       | Australian Finance Conference and the Australian Equipment Lessors Association       |
| 11                       | Attorney-General's Department  |