



NOVEMBER 2008

BANKING & FINANCE UPDATE

PERSONAL PROPERTY SECURITIES (PPS) LAW REFORM -
FURTHER DRAFT OF BILL RELEASED

On 17 November 2008, the Federal Attorney-General, Mr Robert McClelland, released a further draft of the Personal Property Securities Bill (**Revised Bill**) which has been referred to the Senate Standing Committee on Legal and Constitutional Affairs for comment.

The Revised Bill takes account of the results of an extensive public consultation process which included the provision of submissions from interested parties on the Consultation Draft of the Bill, released in May 2008 (**Consultation Draft**).

The purpose of this Update is to highlight some of the significant changes contained in the Revised Bill.

To assist you in your review of the Revised Bill, the Schedule to this Update provides you with cross-references from the previous section numbers of the Consultation Draft to the relevant section numbers of the Revised Bill, and also highlights the new provisions which have been incorporated in the Revised Bill.

In preparing this Update, we have considered the matters identified in our submission on the Consultation Draft (as highlighted in our [Update of August 2008](#)).

IMPORTANT CHANGES

Structure of the Revised Bill

Although the overall structure of the Revised Bill is similar to that of the Consultation Draft, there have been some structural changes to the document resulting in the section numbers being different to that contained in the Consultation Draft. In addition, new provisions have

been included with the result that the Revised Bill now comprises 307 sections rather than the 274 contained in the Consultation Draft.

As mentioned above, to assist you in reviewing the Bill and compare it against the provisions in the Consultation Draft, the Schedule to this Update contains a cross-reference of the sections of the Consultation Draft against the sections in the Revised Bill, and highlights the new provisions which have been incorporated in the Revised Bill.

No certainty of uniform national scheme

The provisions dealing with the interaction of the Revised Bill and state laws have been significantly amended. In particular, section 21 of the Revised Bill expressly provides that a referring state or territory may declare that a matter is to be excluded from the whole of the PPS legislation or specified provisions. There are also provisions in the Revised Bill which provide that if there is any direct inconsistency between certain state laws and the Revised Bill, the state laws will prevail.

The Revised Bill also expressly provides that it is not intended to exclude or limit the operation of any state laws or general laws or other laws of the Commonwealth to the extent that such laws are capable of operating concurrently with the Bill.

As a result of the above provisions, there is potential for significant uncertainty as to which laws must be complied with or apply in relation to the creation, registration and enforcement of security interests. This would appear to be inconsistent with the main objectives of the PPS reforms, which are to:

- Increase certainty.
- Increase consistency.
- Reduce complexity.
- Reduce costs.

New concepts

The Bill introduces a number of new concepts, including:

- PPS Lease.
- PPS Account.

A **PPS Lease** is defined in section 31 and expressly excludes leases or bailments where the lessor or bailor is not regularly engaged in the business of leasing or bailment of tangible property.

Although all leases of tangible personal property are security interests for the purposes of the Bill, it is only a PPS Lease (rather than all leases for a term of more than one year) which are regarded as a purchase money security interest giving the lessor or bailor under such lease the super priority attributable to purchase money security interests.

The enforcement provisions contained in Chapter 4 of the Bill do not apply to a PPS Lease that does not secure payment or performance of an obligation. A new provision has been included in the Bill (section 30) which discusses when a lease secures payment or performance of obligations.

In certain circumstances, the provisions which avoid security interests against liquidators, administrators and trustees in bankruptcy do not apply to PPS Leases that do not secure payment or performance of an obligation.

The **PPS Account** is the account kept by the Commonwealth Government into which a security holder is to pay the proceeds of realisation if such proceeds cannot be paid in accordance with the statutory waterfall of payments on enforcement provided for in the Revised Bill.

Exclusions from the operation of the Bill

Section 6 of the Bill now contains a broader range of transactions which are excluded from the operation of the Bill. These include:

- Fixtures.
- Tradeable water rights or water access entitlements within the meaning of the *Water Act 2007*.

Previously, a flawed asset arrangement was expressly included as a type of security interest subject to the Bill. Although the express reference to flawed asset arrangements has been removed, they may still be caught by the general meaning of security interest. As rights of set-off and rights of combination of accounts are expressly excluded from the operation of the Bill, it would be appropriate for such express exclusion to also extend to flawed asset arrangements.

No statutory registration period and amendments to insolvency provisions

In the Consultation Draft, although there was no statutory timeframe within which a security interest required registration, the consequence of not being continuously perfected by registration from the date being no later than five days after the Security Agreement was created up to the date of administration, liquidation or bankruptcy was that the security interest would be void against the liquidator/trustee in bankruptcy/administrator. The Consultation Draft did not contemplate perfection by other means in relation to this issue, essentially requiring nearly all security interests to be registered no later than five days after their creation to avoid this consequence.

This requirement did not apply to leases for a term of more than one year which secured payment or performance of an obligation, commercial consignment or interests provided for by a transfer of an account or chattel paper.

Under the Revised Bill, security interests (including leases which secure payment or performance of an obligation) which are not perfected by any means at the time that the winding up or administration begins for a company or the date of bankruptcy of an individual will be void against the liquidator, administrator or trustee in bankruptcy. This is a substantial change in relation to the insolvency provisions and essentially requires all security interests to be perfected as soon as possible after their creation.

In addition, except in certain limited circumstances, if the security interest is unperfected at the time of insolvency (as mentioned above), the security interest 'vests in the grantor of the security interest immediately before the relevant insolvency event'. This is a significant change in the current law and one which should cause concern to financiers who may wish to seek to enforce personal covenants contained in the security interest even if it proves to be void against the liquidator/administrator/trustee in bankruptcy.

Improvements in the concept of knowledge

As mentioned in our Update of August 2008, we had a concern as to the ambiguities associated with the meaning of knowledge. As the concept of knowledge has significant consequences under the Consultation Draft and the Revised Bill, we are pleased to report that the concept has been clarified to a large degree. In addition, various provisions which previously referred to knowledge now refer to actual knowledge, the meaning of which is more certain (although it may be difficult to prove whether or not a person has actual knowledge, which may work against the interests of security holders, particularly if they wish to dispute that a third person has taken an interest in personal property without being subject to existing security interests).

Bill extends to interests in all managed investment schemes

Previously, the term investment instrument only referred to an interest in, or a unit in an interest in, a registered managed investment scheme. The Revised Bill has extended this to refer to all managed investment schemes as there are no reasons to distinguish between registered and non-registered schemes for the purposes of the Bill.

Other matters

Although a number of matters raised in our submission on the Consultation Draft have been dealt with in the revised Bill, there are still a number of significant matters which have not, including:

- The absence of the imposition of constructive notice of a security interest if it is registered.
- The continued inclusion of a statutory right for a grantor of a security interest to transfer assets subject to the security interests without seeking the consent of the secured party.

- The need for the holder of the security interest to re-perfect its security interest if the grantor of the security interest transfers any of the collateral to a transferee who itself grants security over the same collateral to another party.

CONTINUING CONSULTATION

The Senate Standing Committee has invited written submissions on the Revised Bill, to be provided no later than 10 December 2008.

DLA Phillips Fox will continue to actively participate in the refinement of these significant reforms and intends to lodge a further submission on the Revised Bill before 10 December 2008. If there are any specific issues arising from the Revised Bill which you believe are of concern to your business and which you would like us to highlight in our submission, please do not hesitate to give us a call.

THE DLA PHILLIPS FOX PPS TEAM

David East, Partner
Sydney
Tel +61 2 9286 8340
david.east@dlaphillipsfox.com

Peter Faludi, Special Counsel
Sydney
Tel +61 2 9286 8159
peter.faludi@dlaphillipsfox.com

George Marques, Partner
Canberra
Tel +61 2 6201 8707
george.marques@dlaphillipsfox.com

Nigel Stranaghan, Partner
Auckland
Tel +64 9 300 3821
nigel.stranaghan@dlaphillipsfox.com

SCHEDULE

Personal Property Securities (PPS) law reform – Quick reference guide Consultation Draft versus Revised Bill

Section in May 2008 Bill	Relevance	Section in November 2008 Bill
Part 1 - Preliminary		
1	Short title	1
2	Commencement	2
3	Act to bind the Crown	3
4	External territories	4
5	Application of Act not affected by secured party having title to collateral	5
6	Constitutional basis for this Act	7
7	Meaning of referring state	8
New section 9: Referred PPS matters		
8	Non-referring state operation - general	10
9	Non-referring state operation - persons	11
10	Non-referring state operation - activities	12
11	Non-referring state operation - interests	13
12	Non-referring state operation - inclusion of data in register	14
13	Relationship with other laws	Expanded into three subdivisions, sections 15-25
14		
15		
16		
17		
18		
Part 2: Interpretation		
19	Definitions	26
20	Application of the <i>Acts Interpretation Act 1901</i>	27
21	Meaning of security interest	28
22	Application of Act to interests	6
23	Postponement or subordination of security interests	29
New sections 30, 31: Whether leases secure payment or performance of obligations; meaning of PPS Lease		
24	Meaning of purchase money security interest	32
25	Purchase money security interests in proceeds of inventory	33
New sections 35, 39, 40, 41: Meaning of account; meaning of investment instrument; meaning of licence; meaning of negotiable instrument. Previously found in section 19 – Definitions		
26	Meaning of proceeds	42
27	Meaning of accession	34

28	Meaning of chattel paper	36
29	Meaning of description of personal property	37
New sections 44, 48: Possession of investment instruments; control of investment entitlements		
30	Description of tangible property includes intellectual property etc	38
31	Possession	43, 44
32	Control of an ADI account	46
33	Control of a letter of credit	47
34	Control of certificated and uncertificated investment instruments	44
35	Control of uncertificated negotiable instruments	49
36	References to fixed and floating charges	50
37	Definition of circulating asset	51
38	Control of a non-ADI account that is the proceeds of inventory	52
39	Control of inventory	53
New section 54: Meaning of investment entitlement and related terms		
40	Knowledge requirements in relation to entities	55
41	Knowledge of circumstances for purposes of certain sections	56
42	Information in the register does not constitute constructive notice	57
43	Governing laws	Absent from Bill
44		
45		
46		
47		
48		
49		
50		
51		
52		
53		
54		
Part 3: Security interests; general principles		
55	Effectiveness of security agreement	58
56	Security interests in after-acquired property	59
57	Security interests in future advances	60
58	When a security interest attaches to collateral	61, 62
59	Enforceability of security agreements against third parties	63
60	How a security interest is perfected	64
61	How a security interest is continuously perfected	65
62	Multiple security interests and multiple registrations	66

Part 4: Attachment and perfection; particular situations		
63	Attachment of security interests in after-acquired property	67
64	Proceeds - when covered by security interest	68
65	Proceeds - perfection when covered by registered description etc	69
66	Proceeds - perfection when not covered by registered description etc	70
67	Proceeds - timing of perfection	71
68	Transferred collateral - attachment after transfer	72
69	Transferred collateral - temporary perfection after transfer	73
70	Transferred collateral - knowledge required to perfect security interest	Absent from Bill
71	Tangible property possessed by bailee - perfection of security interest	74
72	Tangible property possessed by bailee - temporary perfection while negotiable document of title in transit	75
73	Tangible property possessed by bailee - return to grantor or debtor for dealing etc	76
74	Negotiable and investment instruments - return to grantor or debtor for dealing etc	77
75	Returned tangible property - security interest	78
76	Account or chattel paper in returned tangible property - security interest	79

New Division 7 (sections 80-83): Collateral moved to Australia

Part 5: Acquiring personal property free of security interests		
77	Scope of this Division	84
78	Extinguishment provisions do not apply to non-constitutional security interests	95
79	When a non-constitutional security interest becomes a constitutional security interest	94
80	Acquiring personal property free of unperfected security interest	85
81	Acquiring personal property free of security interest if serial number incorrect or missing	86
82	Acquiring personal property free of security interest in ordinary course of business	87
83	Acquiring personal property free of security interest in personal, domestic or household property	88
84	Acquiring personal property free of security interest in currency	89
85	Acquiring personal property free of security interest in investment instrument	90

New section 91: Acquiring personal property free of security interest in investment entitlement

86	Acquiring personal property free of security interest in motor vehicle	92
87	Acquiring personal property free of temporarily perfected security interest in property	93

88	Time that knowledge of security interest etc is required	96
89	Relationship between provisions of this Division	97
90	Rights of secured party and transferee on acquiring personal property free of security interests	98
91	Acquiring intellectual property free of security interests	99
Part 6: Priority between security interests		
92	Priority of security interests in same collateral when Act provides no other way of determining priority	100
New section 101: Priority rules and intervening security interests		
93	Priority of proceeds	102
94	Priority between constitutional and non-constitutional security interests	103
95	Transfer of security interests does not affect priority	104
96	Voluntary subordination of security interests	105
97	Acquiring personal property free of security interests	106
98	Priority of advances	107
99	Application of this Subdivision	108
100	Priority of purchase money security interest in inventory	109
101	Priority of purchase money security interest in consumer property or equipment	Absent from Bill, however, see section 110
New section 110: Priority of purchase money security interest in non-inventory personal property		
102	Non-proceeds security interest in an account	111
103	Priority between competing purchase money security interests in collateral	112
104	Application of Division	113
105	Priority when collateral registered with a serial number	114
106	Priority when collateral not registered with a serial number	115
107	Priority of creditor who receives payment of debt	116
108	Priority of person who acquires a negotiable instrument	117
109	Priority of person who acquires chattel paper	118
110	Acquisition of negotiable instruments and chattel paper	
111	Priority of holder of negotiable document of title	119
112	Priority between security interests and other interests	120
113	Execution creditor has priority over unperfected security interest	121
114	Priority of security interests held by ADIs	122
115	Priority of security interests in returned tangible property	123
Part 7: Transfer and assignment of rights in collateral		
116	Transfer of grantor's rights in collateral	124
117	Rights on transfer of account or chattel paper	125, 126
118	Security interests in intellectual property licences	127

Part 8: Agricultural interests, fixtures, accessions and commingling		
119	Security interest in crops	128
120	Acquiring land free of security interests in crops	Absent from Bill
121		
122		
123	Priority of crops	130
124	Priority of security interests in crops on returned land	Absent from Bill
125	Relationship between security interest in crops and interest in land	129
126	Priority of livestock	131
127	Fixtures	Fixtures no longer subject to PPS
128		
129		
130		
131		
132	Continuation of security interests in accessions	132
133	Accessions	Falls within Chapter 3, Part 3.2 Division 2 (sections 133-136) but different
134		
135		
136		
137		
138		
139		
140		
141		
142		
143		
144	Continuation of security interests in tangible property that becomes commingled etc	138
145	Security interest in tangible property that becomes commingled etc	139
146	Limit on value of obligation secured by an interest in tangible property that becomes commingled etc	140
147	Temporary perfection of security interest perfected by registration	Absent from Bill
148	Knowledge required to perfect security interest in tangible property that becomes commingled etc	
149	When person with interest in improved property or land is prevented from asserting priority	137
150	Part 6 does not apply in relation to certain accessions or commingled etc property	141
151	Application of section 186	142
152	Value of obligations if insufficient proceeds	143

153	Secured party who is entitled to seize property may remove it	144
154	Secured party must give notice of removal of collateral	145
155	When person must not remove collateral	146
156	Secured party must not damage property to which collateral is affixed when removing collateral	147
157	Secured party may apply to court for order in respect of removal of collateral	148
Part 9: Enforcement		
158	Application of this Part	149
159	Rights and remedies in relation to documents of title	151
160	Rights and remedies	150
161	Recovering judgment or issuing execution does not extinguish a security interest in collateral	152
162	Rights and remedies under this Part are cumulative	153
163	Contracting out of enforcement provisions	154
164	Relationship between this Part and the <i>Corporations Act 2001</i>	155
165	Relationship with land laws	156
166	Proceeding as if personal property were land	157
167	Relationship with the Consumer Credit Code	158
168	Enforcement of liquid assets	159
169	Notice to higher priority parties and grantor	160
170	Secured party may seize collateral	161
171	Secured party who has perfected a security interest in collateral by possession or control	162
172	Obligation to dispose of or retain collateral	163
173	Apparent possession of collateral	164
174	Seizure by higher priority parties	165
175	Secured party may dispose of collateral	166
176	Disposal by purchase	167
177	Notice of disposal of collateral	168
178	Duty of secured party disposing of collateral to obtain market value	169
179	Secured party to give statement of account	170
180	Disposing of collateral free of interests	171
181	Proposal of secured party to retain collateral	172
182	Notice of retention of collateral	173
183	Retaining collateral free of interests	174
184	Persons entitled to notice may object to proposal	175
185	Person making objection may be requested by secured party to prove interest	176
186	Distribution of proceeds received by the secured party	177

187	Proceeds must be paid to Commonwealth if secured party cannot determine order of application	178
188	Secured party may act as agent on disposal or retention	179
189	Entitled persons may redeem collateral	180
190	Entitled persons may reinstate security agreement	181

New section 182: When a removal notice is not required

New Part 4.5 (sections 183-185): Personal Property Securities account

Part 10: Personal Property Securities Register

191	Personal Property Securities Register	186
192	What the register contains	187
193	Registration of data other than data in registrations	188
194	Registration - general	189

New section 190: Registration - security interests in personal property

195	Registration - contents	191
196	Registration - application of section 195	192
197	Registration time - general	193
198	Registration time - security agreements and interests	194
199	Registration time - transfers	195
200	End of effective registration - general rule	196
201	End of effective registration - failure to pay maintenance fee	197
202	Defects in registration	198
203	Ineffective registration - particular defects	199
204	Registration continues despite certain defects	200
205	Knowledge required to amend registration	Absent from Bill

New sections 201, 203: Registration amendments- situations in which register may be amended; security interests in personal property

206	Registration amendments - general	202
207	Registration amendments - authorised amendments	204
208	Registration amendments - other matters	205
209	Registration amendments - requirement to end registration of certain property	206
210	Demand to secured party for registration amendment	207
211	Scope of Subdivision	208
212	Statement by person giving demand under section 210	209
213	Amendment of registration	210
214	Scope of Subdivision	211
215	Amendment demands - procedure for court orders	212
216	Amendment demands - court orders	213

217	No payment for compliance with demand	214
218	Removal of data - general grounds	215
219	Removal of data - old data	216
220	Incorrectly removed data - restoration	217
221	Registrar may keep a record of removed data	218
222	Correction of errors or omissions	219
223	Meaning of verification statement and verifiable event	220
224	Verification statements - to be given to secured parties etc	221
225	Verification statements - if data removed	222
226	Verification statements - notice to be given to grantors etc	223

New section 224: Verification statements - publication as alternative to notice

227	Search - general	225
228	Search - criteria	226
229	Search - who may search, and for what purpose	227
230	Search - interference with privacy	228
231	Search - written search results and evidence etc	229
232	Registration and search fees	230
233	Review of decisions	231
234	Annual reports	232

Part 11: Miscellaneous

235	When security interests are void	Replaced by section 233 (but some differences)
236		
237		
238	Certain lessors or consignors entitled to damages	234
239	Rights and duties to be exercised honestly and in a commercially reasonable manner	235
240	Entitlement to damages for breach of duties or obligations	236
241	Liability for damages	237
242	Secured party to provide certain information relating to security interest	238
243	Obligation to disclose successor in security interest when request made	239
244	Time for responding to a request	240
245	Application to court for exemption or extension of time	241
246	Persons may recover costs arising from request	242
247	Application to court for response to request etc	243
248	Application to court in relation to costs charged	244
249	Consequences of not complying with court order	425
250	Estoppels against persons who respond to a request	426
251	Application of this Division	247
252	Notices etc must be given in writing	248
253	Method of giving notices etc to persons registered as secured parties	249

254	Method of giving of notices etc where more than one person is registered as a secured party	250
255	Notices etc must be given to persons registered as secured parties using identifier	251
256	Method of giving notices etc to deceased persons	252
257	Court may make order concerning giving of notices etc	253
258	Meaning of giving notices or documents by fax	254
259	Meaning of giving notices or documents by email	255

New section 256: Formal defect not to invalidate notice

New Part 6.5 (sections 257-258): Timing requirements

260	Operation of Division	259
261	Jurisdiction of courts and cross-jurisdictional appeals	260
262	Courts to act in aid of each other	261
263	Transfers - application of Subdivision	262
264	Transfers - exercise of transfer power	263
265	Transfers - criteria for transfer	264
266	Transfers - how initiated	265
267	Transfers - documents and procedure	266
268	Transfers - conduct of proceedings	267
269	Transfers - entitlement to practise as barrister or solicitor	268
270	Transfers - limitation on appeals	269

New part 6.7 (sections 270-271): Registrar's role in judicial proceedings

271	Onus of proof	272
272	Presumption in cases of related entities etc	273
273	Approved forms	274
274	Regulations	275

New Chapter 7 (sections 276-307): Transitional provisions

ABOUT DLA PHILLIPS FOX

DLA Phillips Fox is one of the largest legal firms in Australasia and a member of DLA Piper Group, an alliance of independent legal practices. It is a separate and distinct legal entity. For more information visit www.dlaphillipsfox.com

DLA Phillips Fox offices are located in Adelaide Auckland Brisbane Canberra Melbourne Perth Sydney and Wellington. A list of DLA Piper offices can be found at www.dlapiper.com

SUSTAINABILITY

In line with our commitment to sustainability, our paper is produced using processes that conform to ISO14001 and EMAS.

COPYRIGHT

If you would like to reproduce any of this publication, please contact:
Sally Peeler, Communications Consultant
on +61 3 9274 5036
sally.peeler@dlaphillipsfox.com

www.dlaphillipsfox.com

© DLA Phillips Fox, November 2008

CZR04/DPF1345/1108

MORE INFORMATION

Contact your nearest DLA Phillips Fox office:

ADELAIDE

Level 14,
100 King William Street
Adelaide SA 5000
Tel +61 8 8124 1811
Fax +61 8 8231 0014
adelaide@dlaphillipsfox.com

AUCKLAND

209 Queen Street
Auckland
Tel +64 9 303 2019
Fax +64 9 303 2311
auckland@dlaphillipsfox.com

BRISBANE

Level 29, Waterfront Place
1 Eagle Street
Brisbane QLD 4000
Tel +61 7 3246 4000
Fax +61 7 3229 4077
brisbane@dlaphillipsfox.com

CANBERRA

Level 1,
54 Marcus Clarke Street
Canberra ACT 2601
Tel +61 2 6201 8787
Fax +61 2 6230 7848
canberra@dlaphillipsfox.com

MELBOURNE

Level 21, 140 William Street
Melbourne VIC 3000
Tel +61 3 9274 5000
Fax +61 3 9274 5111
melbourne@dlaphillipsfox.com

PERTH

Level 32, St Martins Tower
44 St Georges Terrace
Perth WA 6000
Tel +61 8 6467 6000
Fax +61 8 6467 6001
perth@dlaphillipsfox.com

SYDNEY

201 Elizabeth Street
Sydney NSW 2000
Tel +61 2 9286 8000
Fax +61 2 9283 4144
sydney@dlaphillipsfox.com

WELLINGTON

Tower Building
50 - 64 Customhouse Quay
Wellington
Tel +64 4 472 6289
Fax +64 4 472 7429
wellington@dlaphillipsfox.com