



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

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| 10 | Non-referring state operation - activities | 12 |
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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

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Sally Peeler, Communications Consultant
on +61 3 9274 5036
sally.peeler@dlaphillipsfox.com

www.dlaphillipsfox.com

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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