CHAPTER 4

Consideration of broad issues

4.1 This chapter discusses some broad concerns with the proposed bill raised in evidence, including drafting issues and the timetable for finalising and implementing the reform. This discussion is predicated on the government proceeding with the bill as drafted, in line with the committee's obligation to examine the exposure draft as referred.

Drafting issues

General

4.2 The committee was cognisant of the many criticisms of the actual drafting of the bill. If a form of the existing draft bill is going to be implemented, it is particularly important that the drafting criticisms be considered further and addressed.

4.3 The overall theme of the drafting concerns raised with the committee is that this is already a difficult and complex area of law and that the drafting needs to be as clear and concise as possible. The main perceived failures of drafting have been identified as the detailed cross-referencing, unnecessarily complex terminology and verbose provisions and that these seriously affect the comprehensibility of the provisions.[1]

4.4 In response to these concerns the Department asserts that much work has been done to make the bill as simple as possible.[2] However, on balance the Department's approach is to give primacy to transparency (providing as much detail as possible to explain each provision) over straightforward simplicity in outlining each provision.[3] The Department explained that the exact drafting of the provisions was also affected by Commonwealth drafting requirements.[4]

4.5 The committee understands the position put by the Department. However, it is concerned that in pursuing its objectives of 'certainty' and 'transparency' – and possibly also constrained by Commonwealth drafting practice – in some respects the Department has sacrificed access to the law. Provisions are frequently convoluted, and the committee believes that the draft could be simplified without a deleterious effect to the bill as a whole.

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1 For example, see Professor Duggan, *Submission 1*, p. 6.

2 Dr Popple, *Committee Hansard*, 6 February 2009, p. 55, and Mr Patch, *Committee Hansard*, 6 February 2009, p. 58.

3 Mr Patch, *Committee Hansard*, 6 February 2009, p. 58. See also Professor Anthony Duggan, *Submission 1*, p. 4.

4 Dr Popple, *Committee Hansard*, 6 February 2009, p. 55.

Terminology used in the exposure draft bill

4.6 One of the particular concerns raised was the use of unnecessarily complex or obscure terminology. Some submissions pointed out that the use of the term *goods* instead of *tangible property* assists to simplify the concepts in provisions that are already complex in other ways. This concern was identified to apply to other provisions in the bill, including *grantor*.[5] Articulating the concern about this approach, Professor Duggan noted:

> The Bill throughout uses the expression "tangible property" in place of "goods"…This idiosyncracy may not have substantive implications, but it does affect the comprehensibility of the legislation because the reader must make a mental note to substitute "goods" every time she reads "tangible property".[6]

4.7 The Department's argument for its approach is that although a benefit of the term 'goods' is that it is in common use and is readily understood, in the PPS context it has a slightly different meaning than when it is used in everyday language. The Department argues that using the simpler term would not alert a reader of the legislation to the fact that the meaning of the word is wider than is generally understood:

> The danger of using terms that already have a well-understood meaning to mean something slightly different is that they may not be alerted to the fact that, for example, trees are included, when they might not be included in a normal definition of 'goods'.[7]

4.8 Professor Duggan suggested that this is also the case in other jurisdictions where it is overcome by defining the simpler term to include the broader meaning required for the circumstances.[8]

4.9 Ultimately it is a question of policy as to which approach is taken. The committee is not convinced that the reasons for using less familiar terms outweigh the added difficulty in accessing the meaning of the provisions through the use of the unfamiliar terms. The committee's view is that even basic legal practice would involve checking the definition of terms in an act you are seeking to apply. Additionally, appropriate education, including relevant information in the explanatory memorandum and the development of secondary material such as textbooks should be enough to ensure that this approach does not undermine the goals of certainty and transparency.

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5 For example, see Professor Anthony Duggan, *Submission 1*, pp 9 to 11 and Mr David C Turner, *Submission 33*, pp 3 to 6.

6 Professor Anthony Duggan, *Submission 1*, p. 9.

7 Mr Patch, *Committee Hansard*, p. 56. Interestingly, Mr David C. Turner notes that the draft bill fails 'to qualify goods as trees which have been *severed* and petroleum or minerals which have been *extracted*. Growing trees, etc are not personal property until severed or extracted in Article 9, Canada and New Zealand (s16).' *Submission 33*, p. 6.

8 Professor Anthony Duggan, *Submission 1*, p. 9.

Length of the exposure draft bill

4.10 A further drafting concern raised with the committee is that of the wordiness of the exposure bill. Again, it appears that this is as a result of the approach taken in the draft bill to value certainty over simplicity. This approach reflects a deliberate policy choice:

> Elegance is a virtue. But then you go home and reflect on it for a bit and you realise that, while [overseas legislation] is written very well, there is a lot of subtlety and complexity masked by that very clear language and some of the concepts within that language that rolls well off the tongue are quite difficult to understand. If our bill has a sin, it is that it is transparent in what those concepts are. We have sought to make it clear and to bring to the forefront some of those underlying concepts that are masked by the sweet-rolling language used overseas.[9]

4.11 However, the concern raised with the committee is that the approach might actually decrease certainty and comprehensibility:

> …while the Bill may improve legal certainty at one level, it increases uncertainty at another level and the statement in the [Department's Revised] Commentary fails to acknowledge this trade-off. The Bill reflects a strong commitment to drafting precision with a view to ensuring that the legislation provides for every possible contingency. It is in this sense that the claim to improved legal certainty is presumably to be understood. However, a commitment to precision is not cost-free. The inevitable by-product is longer, more complex legislation.[10]

4.12 Mr David C. Turner, a barrister at the Victorian Bar with extensive experience in retail and wholesale secured lending, noted:

> Striving for precision can only result in errors and a failure to deal with issues in a simple and clear way with a clear and underlying policy objective.[11]

4.13 One of the examples given of unnecessary length in a provision was that of sections relating to a 'commingling' of goods question. One overseas model addresses the issue in six lines of text, one in 40 lines of text, and the Australian draft bill in approximately 112 lines of text covering four and a half pages.[12]

4.14 Again, it is a question of policy as to the appropriate balance to be struck between the two goals of certainty and simplicity. The committee agrees that it is

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9 Mr Patch, Attorney-General's Department, *Committee Hansard*, 6 February 2009, p. 58.

10 Professor Anthony Duggan, *Submission 1*, p. 3, see also pp 6 to 8. See also DLA Phillips Fox, *Submission 2*, p 2.

11 Mr David C. Turner, *Submission 33*, p. 3. More details about Mr Turner's relevant experience can be found at page 1 of his submission and examples of the problem he cites are on pp 3 to 6.

12 Professor Anthony Duggan, *Submission 1*, pp 7 to 8.

important to ask the question generated by Professor Duggan's submission – are the benefits of greater drafting precision worth the cost?[13]

4.15 This is another area in which the committee's view is that too much weight has been given to certainty at the expense of comprehensibility. The committee acknowledges the point made by the Department that provisions with simpler drafting may include ideas that need judicial explanation, but is not persuaded that this outweighs the benefit of simplicity. In addition, the fact that a concept is outlined in legislation does not necessarily make it immune from requiring judicial interpretation so that it can be understood and applied by those using the legislation. In either case, it is open to the government to include detailed explanation of provisions in the explanatory memorandum that will accompany the final bill and which will be an important extrinsic aid to its interpretation.

Cross-referencing

4.16 The approach to cross-referencing taken in the exposure draft was observed by Professor Duggan as "Byzantine…which forces the reader to skip between different parts of the legislation to find the answer to particular questions."[14] Examples are provided by Professor Duggan and others of needing to identify and refer to many other sections to understand the operation of one section.[15]

4.17 It is likely that the overall structure of the bill could be altered to reduce the necessity for extensive cross-referencing. However, this potentially could require changes in Commonwealth drafting practice and in any case would be a significant undertaking.

4.18 The committee acknowledges the drafting concerns raised by submitters. On balance the committee expects that the exposure bill will be significantly improved if its recommendations in relation to wordiness and the use of simpler definitions are implemented. The committee favourably notes the Department's advice that it is currently working with the drafters to include 'readers' guides' within the bill.[16]

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13 Professor Anthony Duggan, *Submission 1*, p. 5.

14 Professor Anthony Duggan, *Submission 1*, p. 11.

15 Professor Anthony Duggan, *Submission 1*, pp 11 and 12. See also, Ms Lang Thai, *Submission 29*, p. 3; and Mr David C. Turner, *Submission 33*, p. 3.

16 Dr Popple, *Committee Hansard*, 6 February 2009, p. 55.

Recommendation 1

4.19 The committee strongly recommends that the Department reconsiders the balance between certainty of the law and the accessibility of the provisions with a view to:

- **simplifying the language of the exposure draft bill – for example, wording provisions clearly and limiting them to deal only with common circumstances;**
- **simplifying the structure of the exposure draft bill – to minimise the cross-referencing needed;**
- **simplifying the terms used - for example instead of 'tangible goods' use the term 'goods' appropriately defined to ensure the full meaning needed for the reform is ascribed to the term; and**
- **using overseas provisions as often as possible to allow overseas experience to provide guidance for the Australian model.**

Timing

4.20 The PPS reform project commenced in 2006 and has included considerable consultation and information exchange such as discussion papers, a Consultative Group and two exposure draft bills.[17] Stakeholder appreciation of the government's approach to consultation has been regularly expressed.[18] However, although there has been detailed consultation during the development process, there is criticism that the magnitude and complexity of the reform have caused the finalisation and implementation of the bill to be rushed.

4.21 For example, the first exposure draft of the bill was released in May 2008. Following substantial amendment the revised bill (the subject of this inquiry) was released in November 2008. At this point it was referred by the Attorney-General to the Senate with a request that it be considered by this committee with a reporting date in late February 2009. A revised commentary to accompany the revised exposure draft bill was provided to the committee on 19 December 2008.[19] It has been put to the committee that the tight timeframe for the inquiry is required because the implementation date for the reform has been set at May 2010 and this leaves little time for the referral of powers from the States process.[20]

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17 See the *Process* section in chapter 2 above for more detail.

18 For example, see Allens Arthur Robinson, Blake Dawson, Freehills and Mallesons Stephen Jacques, *Submission 30*, p. 4.

19 This was the date on which the Attorney-General's Department submission (*Submission 8*) which is in the form of the Revised Commentary, was received by the Senate Legal and Constitutional Affairs Committee secretariat.

20 Mr Glenn, *Committee Hansard*, 6 February 2009, p. 61. See also the section on *Process* in Chapter 2 above.

4.22 The May 2010 deadline for implementation of the reform was set by the Council of Australian Governments (COAG). Although a COAG deadline is a matter of importance in itself, it is not clear that there is a substantive need for the reform to be in place by May 2010.

4.23 In evidence to the committee there was marked concern expressed by submitters about the May 2010 implementation date. This concern came both from those who support the proposed PPS reform and those who do not.[21] Some examples of the concern expressed include:

- concern even from experts that they have been unable to consider the bill in detail and that there may be many unintended consequences, also that the effect of numerous small variations can, cumulatively, result in onerous burdens on those required to understand and implement the bill; [22]
- some submitters anticipate benefits from the reform, but on the basis that the content of the legislation is 'right';[23]
- a factor which heightened the concern about the proposed timing of the introduction for some who gave evidence is that the Australian and international economies are not currently robust;[24]
- the ability for industries to implement this legislation in the scheduled timeframe is affected by the impact of other government reforms they are dealing with such as anti-money laundering reform;[25]
- in addition to actually understanding the content of the reform, business will also need to undertake substantial and expensive preparation (including creating forms, adapting computer systems and staff training) to work effectively in the new system;[26] and
- although there have been opportunities for consultation with stakeholders who are actively engaged in the process, there is concern that many organisations are not aware of, or do not yet understand, the significance of the reform.[27]

4.24 Even those who are relatively satisfied with the content of the bill as drafted are worried that they will have insufficient time to prepare for its implementation. For

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21 The Australian Bankers' Association Inc supports the reform, but believes that the May 2010 commencement date is too soon: Mr Gilbert, *Committee Hansard*, 22 January 2009, p. 53.

22 For example, Professor Anthony Duggan, *Submission 1*, p. 6.

23 Mr Love, Australian Financial Markets Association, *Committee Hansard*, 22 January 2009, p. 2.

24 For example, Mr Whittaker, Blake Dawson, *Committee Hansard*, 23 January 2009, p. 29.

25 For example, Ms Flannery, Clayton Utz, *Committee Hansard*, 22 January 2009, p. 31.

26 Mr Gilbert, Australian Bankers' Association, *Committee Hansard*, 22 January 2009, p. 57.

27 Mr Faludi, DLA Phillips Fox, *Committee Hansard*, 22 January 2009, p. 52.

example, the Australian Bankers' Association (ABA) supports the proposed reform, but is concerned about timing:

> We anticipate it is unlikely that the terms of the legislation will be finalised until quite late this year, so a commencement date in May 2010 would be far too soon to allow banks to get all their systems, compliance arrangements, documentation and everything else redone to take advantage of the new law. There are other factors also that come into the timing of the commencement. There is the electoral cycle.
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> As a result the ABA believes that, taking all of those factors into account, a commencement date in the third quarter of 2011 would be an appropriate date for the regime to commence. This would also allow those who have submitted concerns over certain technical and other aspects of the reforms to work through and resolve them leaving adequate time at the end of that for the implementation of this nationally worthwhile project. [28]

4.25 None of the non-government witnesses argued in favour of the proposed timeframe. The arguments put to the committee by the Department in support of the May 2010 implementation are that there would be financial implications and other impact on the States who have already started to prepare for the new scheme and that stakeholders will probably take the opportunity to keep making suggested changes to the system.[29]

4.26 The committee understands that timing for the project is being driven by the COAG deadline, but believes that primacy needs to be given to the importance of getting the detail of the legislation right and for those affected to have time to prepare for its implementation. The committee was persuaded by the weight of concern about timeframe and believes that it is appropriate to extend the process to ensure that the content of the legislation is appropriate and as clearly and concisely drafted as possible. In addition, stakeholders should be allowed sufficient time to understand the effect of the legislation and to have sufficient time to prepare for its implementation.

Recommendation 2

4.27 The committee recommends that the commencement date for the scheme be extended by at least 12 months to May 2011 for the committee's recommendations to be implemented and for advice from stakeholders to be taken into account before the content of the bill is finalised.

4.28 In relation to the timing of the commencement of the reforms, the ABA observed that it is desirable to avoid 1 January and 1 July starting dates, with a preference for March-April or August-September commencement.[30]

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28 Mr Gilbert, Australian Bankers' Association, *Committee Hansard*, 22 January 2009, p. 53.

29 Dr Popple, *Committee Hansard*, 6 February 2009, p. 59.

30 Mr Gilbert, Australian Bankers' Association, *Committee Hansard*, 22 January 2009, p. 58.

Committee inquiry process

4.29 There is another factor in relation to timing about which the committee wishes to comment. The committee is appreciative that the exposure draft bill was referred to it in advance of the introduction of the final bill into the Commonwealth parliament. This is especially welcome given that the reform requires a text-based referral of powers from the States which will fail if the provisions in the Commonwealth bill are not identical to those referred to it.

4.30 However, the relatively short timeframe to the proposed implementation date significantly affected the Senate inquiry process. Given the significance and complexity of the proposed legislation and the brevity of the timeframe for the inquiry – especially as it was over a holiday and shutdown period – the committee feels that the time period in which to complete the referral was significantly unsatisfactory. The committee is of the view that the time allowed for examination of this proposed bill was inadequate, and the timing of the inquiry was unrealistic and unreasonable.

4.31 This criticism notwithstanding, the committee again applauds the initiative shown in referring the exposure draft bill in advance of its introduction into Parliament and would welcome the opportunity to consider a revised bill when it is finalised.

Review

4.32 The exposure bill as drafted does not include a requirement for the legislation to be reviewed. There were a number of calls for the bill to be reviewed, such as by Professor Duggan.[31] The Australian Finance Conference also favours a review of the legislation two years after the legislation commences and the establishment of an expert panel to immediately consider the impact of the legislation so that ad hoc recommendations about amendments to its terms can be made as soon as a need for them becomes apparent.[32]

4.33 The Department advised that although the exposure draft does not include a review of the legislation, the intergovernmental agreement reached between all Australian jurisdictions last year includes a requirement for the bill to be reviewed by the Commonwealth in consultation with the states and territories five years after the legislation commences.[33]

4.34 The committee agrees that a review is warranted and is of the view that it should be required as a provision of the legislation itself.

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31 Professor Duggan, *Committee Hansard*, 22 January 2009, p. 2.

32 Mr Edwards, *Committee Hansard*, 23 January 2009, p. 42.

33 Dr Popple, *Committee Hansard*, 6 February 2009, p. 64.

Recommendation 3

4.35 The committee recommends that the bill include a requirement that the operation of the bill be reviewed three years after it commences in a process that includes extensive consultation with industry, governments, lawyers, consumers and academics.

Process for amending the Act

4.36 The committee notes the Department's advice that the agreement with States and Territories includes the referral of a power for amendments to the made to the legislation. Details provided to the committee by the Department include that:

> The operation of that amendment power is governed in a sense by the intergovernmental agreement that we have with the states and territories, and that involves in all situations that we would consult with the states and territories about a proposed amendment to the bill and, in certain circumstances, we would ask for the consent of the states and territories—consent being able to be given by three jurisdictions, at least two of whom must be states, I think is the formulation—and that is broadly consistent with the models in other intergovernmental agreements that use referral powers.[34]

4.37 Given that the scope of this reform is very significant and that a number of concerns have been raised with the committee about likely unintended consequences of the proposed approach, the committee endorses the development of arrangements between the Commonwealth and the other jurisdictions to facilitate any amendments that need to be made to the final legislation.

34 Mr Glenn, *Committee Hansard*, 6 February 2009, p. 63.