

Better Regulation Statement

Personal Property Securities (Commonwealth Powers) Bill 2008 and the Personal Property Security Bill

Introduction

Over the last few years the Commonwealth, State and Territory Governments have been working cooperatively to reform the law relating to personal property securities (PPS).

The reforms will establish national comprehensive rules governing security interests in personal property. Central to the reforms will be a clear set of rules for security interests in personal property and for ordering priorities between competing secured interests in personal property, and the creation of a single national personal property securities register.

The proposed PPS reforms, which are currently scheduled to commence in May 2010, will significantly change the way information on personal property securities is held in Australia. Similar reforms have already been introduced in overseas jurisdictions, including Canada, New Zealand and the United States. The proposed reforms draw upon the laws and experience of these and other jurisdictions.

To give effect to the proposed national reforms each Australian State must enact legislation that refers the relevant legislative powers to the Commonwealth to enact a single national scheme for the regulation and registration of security interests in personal property. The referral of power legislation – the Personal Property Securities (Commonwealth Powers) Bill 2008, is made in accordance with s.51(xxxvii) of the Commonwealth Constitution.

The referral legislation is supported by an Intergovernmental Agreement (IGA) which provides that the States agree to establish a national system to be implemented by Commonwealth legislation, supported by a State text-based referral of certain matters to the Commonwealth Parliament.

Personal Property Security Bill (PPS Bill)

Where a lender provides a loan or credit to a borrower, the debt may be secured by that lender taking a security interest in property the borrower/third party owns or in which the borrower/a third party has an interest. Security can be given over personal property or real property. Personal property is any form of property, other than land or buildings. It includes tangibles (for example, cars, boats, machinery and agricultural produce) and intangibles (for example, contract rights, uncertificated shares, intellectual property such as trademarks and patents and receivables) and extends to commingled goods. However, the PPS scheme will not cover real property, which will continue to be covered by the Torrens system.

Early securities took the form of legal mortgages, but personal property securities now extend to a variety of transactions, including a fixed or floating charge, finance lease, hire purchase agreements, commercial consignments, and retention of title arrangements, in which a company sells goods to a client but retains the title to those goods until they are fully paid for.

The PPS Bill takes a functional approach to the characterisation of personal property securities. This means that the legislation will apply to security interests in personal property that secure payment or the performance of an obligation regardless of the form of the transaction, the legal personality of the grantor, or the jurisdiction in which the property or parties are located or in which the transaction occurred. This approach contrasts with, and will be a significant improvement on, the current formal approach to securities in personal property where the form of the transaction largely determines the nature of the interest held.

The PPS Bill will codify rules concerning the creation of security interests in personal property as well as rules for determining priority between competing interests in personal property. This will remove the uncertainty arising from the patchwork of existing legislation and the uneasy interaction of that legislation with the common law and equitable legal principles.

These rules will be complemented by provisions in the PPS Bill that establish when a person acquires personal property free of a security interest, such as where the transaction occurs in the ordinary course of business or in relation to low value consumer goods. A streamlined and effective enforcement regime has also been developed to supplement contractual arrangements in this area. However, the PPS Bill would preserve the operation of the Consumer Credit Code.

In preparing the PPS Bill careful consideration has been given to similar reforms that have occurred in New Zealand, Canada and the United States of America. It also draws on work by the United Nations Commission on International Trade Law (UNCITRAL) and the International Institute for the Unification of Private Law (UNIDROIT). The differences between the Bill and its international counterparts reflect issues raised by stakeholders, differences in the Australian consumer and commercial environment, advances in information technology, and drafting styles adopted to improve legal certainty.

The national framework established by the PPS Bill will benefit businesses, individuals and consumers by delivering more certain, consistent, less complex and cheaper arrangements for the financing of personal property.

The new registration system will help prospective purchasers and lenders to determine whether personal property may be subject to a security interest and will facilitate the resolution of priority disputes.

Principle 1 The need for government action should be established

In recent decades, personal property securities have become increasingly important for business finance. In Australia, the current regime regulating

personal property securities is a mixture of statute, common law and equity. At the moment, there are over 70 separate Acts governing personal property securities in Australia, administered by 30 separate Commonwealth, State and Territory government departments and agencies. The legislation is fragmented and this has created legal uncertainty and high transaction and compliance costs which may discourage lenders from accepting personal property as security for loans. Different registration requirements and priority rules apply depending on the form of the security interest, the nature of the debtor, the nature of the security provider and the location of the property.

The existing PPS law is built on artificial distinctions around the legal form of the security taken, the legal personality of the grantor and the nature and location of the collateral. The PPS Bill applies to all security interests in personal property that secure payment or the performance of an obligation regardless of the form of the transaction, the legal personality of the grantor, or the jurisdiction in which the property or parties are located, or in which the transaction occurred. The proposed PPS Register will be a publicly accessible electronic record of personal property securities and will provide a single access point for financiers and others to determine the securities held over particular assets. The PPS Register will be updated and searchable in 'real time' and will provide a more streamlined registration process with reduced fees.

In 2005 the Standing Committee of Attorneys General (SCAG) agreed to establish a SCAG officers' working party to examine the possible options for reform of the law of personal property securities and develop proposals for consideration by Ministers. A series of discussion papers were issued and industry feedback showed positive support for reform of the law in this area.

On 13 April 2007, the Council of Australian Governments (COAG) agreed in principle to establish a national system for the registration of PPS to be implemented by Commonwealth legislation, supported by a referral of legislative power by the States to the Commonwealth.

The key objective of the reforms is to remove the uncertainty arising from the vast amount of Commonwealth, State and Territory legislation and the uneasy interaction of this with the common law and equitable legal principles governing personal property securities. The PPS Register would replace the more than 40 existing registers currently administered by Commonwealth, State and Territory agencies, including the Register of Encumbered Vehicles (REVS) and register under the Security of Interest in Goods Act 2005 (NSW).

The proposed new arrangements will apply consistently throughout Australia and make it easier for businesses to operate across State and Territory borders. They should promote more certain and consistent outcomes, lower transaction and compliance costs for all parties involved in PPS transactions and encourage more diverse financing options.

Principle 2 The objective of government action should be clear

The proposed reforms will establish national comprehensive rules governing security interests in personal property. Central to the reforms will be a clear

set of rules creating security interests in personal property and for ordering priorities between competing secured interests in personal property, and the creation of a single national personal property securities register.

In its communiqué of 3 July 2008 COAG acknowledged that Australia's overlapping and inconsistent regulations impede productivity growth. Without change Australia's future living standards would be compromised, the competitiveness of the economy reduced and our ability to meet the challenges posed by an ageing population, diminished.

The communiqué states that many of the challenges facing the economy can only be addressed through more effective Commonwealth–State arrangements. By moving towards a seamless national economy through the reform of business and other regulation, COAG's reforms will make it easier for businesses to operate across State and Territory borders. These reforms will make life simpler for businesses and consumers, while continuing to provide the necessary protections and access for consumers and the community.

The Business Regulation and Competition Working Group of COAG identified personal property securities as a “regulatory hotspot” to be given priority for reform.

Principle 3 The impact of government action should be properly understood by considering the costs and benefits of a range of options, including non-regulatory options

The report on the general costs and benefits of PPS reform prepared by Access Economics for the Commonwealth Attorney General's Department can be viewed on the Commonwealth Attorney General's Department's PPS website: <http://www.ag.gov.au/pps>.

As discussed in the report, the key benefit of PPS reform is lower costs for both lenders and borrowers. The main cause of high costs under the present system is the existence of multiple regimes and, more specifically, multiple registers. Lenders are subjected to the high cost of having to search multiple registers to check whether pledged property is already subject to a claim. Having one universal register would reduce costs as lenders would only have to pay one access fee for the information required, and may be able to reduce staff costs as the search and verification process would be less time consuming under the reforms. A more streamlined registration process would further reduce costs to lenders, as less paperwork would result in less time and money being spent on satisfying legal requirements.

Debtors would also benefit from lower costs, as lenders cost savings would be passed on. This could occur by way of lower fees or lower interest rates.

Reform to current PPS regulation would also result in greater access to lending. Aside from reduced costs, the proposed reforms should encourage lenders to take a security interest in personal property. At present, the scales are tipped in favour of real property, meaning that businesses not requiring

large holdings of real property (such as IT companies) are at a disadvantage when seeking debt financing. Further, this imbalance is not reflective of the changing economic environment, in which “non-traditional” personal properties, such as intellectual property, are increasing in value relative to real property.

Greater access to lending would have the flow-on effect of better borrower screening. Aside from increasing the pool of potential borrowers, lenders would get a more complete and accurate picture of a borrower’s real worth and capacity to repay. By expanding the types of property that can practically be used to secure debt, there is greater scope for “good” lenders to signal their credit worthiness, reducing lenders’ risk.

The proposed reforms will result in greater certainty, particularly for lenders. One comprehensive regime will fill in the “gaps” in the current piecemeal system and provide greater clarity of claims to property. The possibility for conflicting claims will be greatly reduced. This means there will be fewer legal disputes which, while not common under the existing system, tend to be very costly.

The Access Economics report supports PPS reform. It identifies key benefits of such reforms as lower costs for lenders and borrowers, greater access to lending and improved certainty. Consequently, these reforms have the potential to stimulate growth in areas currently squeezed out of lending by the current system.

Principle 4 Government action should be effective and proportional

The PPS project will not impose any additional compliance costs on business or individuals or have any adverse impacts on competition. The proposed new regime does not compel business or individuals to register security interests on the PPS Register. It will generally be a commercial decision as to whether securities are put onto the PPS Register.

On 13 April 2007, COAG agreed in principle to establish a national system for the registration of PPS to be implemented by Commonwealth legislation, supported by a referral of legislative power by the States to the Commonwealth. In its communiqué of 3 July 2008 COAG acknowledged that Australia’s overlapping and inconsistent regulations impede productivity growth.

Principle 5 Consultation with business and the community should inform regulatory development

The PPS Bill has been developed as a result of extensive consultation with business groups, community and government agencies through a range of mechanisms.

Between November 2006 and April 2007 the Commonwealth Attorney General’s Department publicly released a series of three discussion papers covering various aspects of the proposed PPS legislation and sought submissions from interested industry and community groups, as well as State

and Territory officers on the Standing Committee of Attorney General's PPS working group. The Commonwealth conducted a series of public seminars before the release of the discussion papers. The public was given an opportunity to comment on public consultation drafts of the PPS Bill, which were published in May and November 2008.

The Commonwealth Government also established a PPS Review Consultative Group. Members of the Consultative Group included a SCAG nominee, a nominee of the Ministerial Council on Consumer Affairs, Commonwealth agencies, the Law Council, relevant industry bodies, including the Motor Traders Association of Australia, Australian Bankers Association, Australian Finance Conference, the Inspector-General in Bankruptcy, the Australian Consumers Association and other experts in the area.

Close consultation has been undertaken with other Ministerial Councils, including the Ministerial Council on Consumer Affairs and the Australian Transport Council. All NSW Ministers and Privacy NSW were consulted regarding the consultation draft of the PPS Bill.

On 12 November 2008 the Federal Attorney General, the Hon Robert McClelland MP requested that the Senate refer an exposure draft of the Personal Property Securities Bill 2008 to the Standing Committee on Constitutional and Legal Affairs for inquiry and report by 24 February 2009. The inquiry provided a further opportunity of stakeholders and interested parties to make submissions on the proposed legislative scheme.

The Commonwealth Government will also be undertaking a comprehensive public relations and education campaign ahead of the commencement of the national system in 2010. This campaign is expected to involve amongst other things, media advertising, seminars, workshops and other change management techniques.

Principle 6 The simplification, repeal, reform or consolidation of existing regulation should be considered

As discussed under principle 1, the proposed reforms will consolidate a range of existing laws covering personal property securities.

Principle 7 Regulation should be periodically reviewed, and if necessary reformed to ensure its continued efficiency and effectiveness

The PPS reforms will be underpinned by an Intergovernmental Agreement (IGA) and a referral of power by the States and Territories to the Commonwealth Parliament.

The IGA provides for a review of the national scheme 5 years after commencement and any subsequent review thereafter if deemed necessary by agreement of a majority of the parties.