

PPSA Review Secretariat
Commercial and Administrative Law Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600
Via email: ppsareview@ag.gov.au

6 June 2014

Dear Sir or Madam,

Statutory Review of the *Personal Property Securities Act 2009* (Cth)

Background to submission

1. This submission for the statutory review of the *Personal Property Securities Act 2009* (Cth) ("**Act**") is made on behalf of Business Law Section of the Law Council of Australia ("**BLS**"). This submission focuses on the impact of the Act on small business.
2. This submission has been assembled with the assistance of three of the specialist committees of the BLS - the Financial Services Committee, the Insolvency & Reconstruction Law Committee and the SME Business Law Committee. These committees are made up of senior legal practitioners working in their respective areas and also highly respected academics who have detailed and relevant experience in dealing with issues arising out of the Act across Australia and many of the practitioners in these committees deal with small businesses on a regular basis.
3. Although this particular submission has small business as its focus, many of the comments and suggestions made in this submission would apply to larger businesses, the finance sector as well as consumers. Accordingly, this submission will be relevant to the broader review of the Act as well.
4. This submission will address some high-level policy issues and concerns with the implementation of the Act initially and will then address more specific areas of the Act that we believe should be considered in the review.
5. In these submissions, where a section is referred to this is a reference to a section in the Act, unless the contrary intention appears.

Policy issues

6. In this part of the submission, several broader issues are raised for consideration in the overall review of the Act.

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Lack of awareness

7. One of the main concerns we have experienced from a small business perspective is the lack of awareness of the impact of the Act on everyday transactions. The impression that has been left with many of the committee members is that while steps were taken by government to spread the message about the impact of the Act, the message did not penetrate to the extent required for many small businesses.
8. Information sheets and other material produced by the Australian Financial Security Authority (“**AFSA**”) have assisted in this regard, but unless small businesses have the level of awareness to access the website this material will not reach those it was intended to benefit. To a great extent, dissemination of such important information for the small business sector was left to professional advisors such as lawyers and accountants, but not all small business operators had sufficient contact with such advisors to ensure that information concerning the Act and how it would affect them was communicated.
9. In our experience, operators of small businesses have a closer relationship with their accountants than other categories of advisors and it is our submission that further support from the government to organisations such as the Institute of Chartered Accountants would assist in spreading awareness of the scope and implications of the Act.
10. We note that the Commonwealth Government has committed to transform the Australian Small Business Commissioner into a Small Business and Family Enterprise Ombudsman (“**Small Business Ombudsman**”) to be a Commonwealth-wide advocate for smaller enterprises. We note some of the key responsibilities of the Small Business Ombudsman are, *inter alia*, to be a concierge for dispute resolution, to contribute to the development of small business-friendly Commonwealth laws and regulations and to be a single entry-point agency through which Commonwealth assistance and information regarding small business can be accessed. The submissions to Treasury as to the scope of the Small Business Ombudsman have recently closed and we submit that the review of the Act should consider whether the Small Business Ombudsman could also be used to spread awareness and provide assistance to small businesses in relation to the Act.

Ease of understanding

11. A common concern raised by small businesses (and larger businesses alike) is that the Act is difficult to interpret. We submit that the review should consider whether a “Small Business Guide”, which provides a summary of the Act, could be published. It is our view that a guide that is similar to the Small Business Guide contained in the *Corporations Act 2001* (Cth) (“**Corporations Act**”) would be appropriate but it is submitted that the guide should not be part of the Act but rather a stand-alone document, as the Act is already a large and complex document. We acknowledge drafting such a guide could prove a challenge, but in our opinion this would greatly assist small businesses in interpreting the key obligations and implications of the Act in connection with their business.

Scope of the Act

12. One of the purposes by the Act, and such systems globally, is that they facilitate access to credit. This benefits small businesses and larger businesses alike, so any improvements to make the Act a more efficient system will benefit small businesses and the wider economy. With this in mind, any amendments to the Act to address a particular concern or sector of the economy should only be made where the amendments contribute to a better system as a whole.
13. The objective of facilitating access to credit will be enhanced by casting the net of ‘personal property’ for the purposes of the Act in very wide terms. The review should consider whether

fixtures, licences (i.e. Commonwealth and State licences) and water rights should be included in the scope of personal property covered by the Act. If more types of property that are considered personal property are covered by the Act, then there will be more certainty and consistency in security arrangements which will assist in making it easier for businesses (large and small) to obtain credit secured against such property.

14. If a particular government is concerned about licensees granting security over a licence then it is always open to that government to place restrictions on granting security over the licence, such as a precondition to obtain the government's consent. As is the case with intellectual property licences under the Act, the licensor can always impose a condition of the licence that it can be cancelled if such consent is not obtained.

Increasing access to justice

15. One of the concerns that those who have contributed to this submission have experienced when working with small businesses is the barrier imposed by the cost of resolving disputes relating to the operation of the Act. Clients have frequently been left in a position where another party is wrongfully refusing to deliver up possession of collateral to which the client is entitled to immediate possession under their priority security interest. The client is left with two alternatives when negotiations break down, which are either to commence costly legal proceedings in a court or not enforce their rights. This is hardly a satisfactory result for small businesses, which often do not have the financial capacity to run a 'test' case on a particular aspect of the Act.
16. The Act has impacted on 'access to justice' for consumers by restricting jurisdiction to 'courts', and thus arguably not tribunals such as those in New South Wales, Queensland, Victoria and ACT which hear small civil claims, or Australian Consumer Law claims. The Act is a Commonwealth Act and invests State courts with jurisdiction through the 'autochthonous expedient' power in the Constitution. However because of the referral method adopted to achieve a national Act, only Federal Courts, or those State or Territory courts invested (in this case under section 207) with Federal jurisdiction, can hear 'PPS matters' (as defined in the Act).
17. Whilst case law suggests that there is a principle that the Commonwealth law 'must take State courts as it finds them', and whilst it may be fairly clear that if something is called a 'court' by the State or Territory legislation that established it, then it probably is a court, the converse is not necessarily true, i.e. that if it is called a Tribunal, Commission, Board etc., it cannot be a court. Ultimately it depends upon whether 'judicial power' is being exercised, and this itself depends on the context and purpose.
18. In practice there is often little to distinguish the way in which the small claims jurisdiction of a Magistrates Court works from that of a Tribunal in another State or area of law. Some of the tribunals may arguably be a 'court' within Part 6.2 of the Act, given that this turns on the power and jurisdiction of each body and its adjudicators and the way they are appointed. We note the limitations imposed by sections 71 and 77(iii) of the Constitution in vesting non-judicial or quasi-judicial institutions with the powers of a court, but it is submitted that the review should consider whether it is possible through other means to extend the scope to which other judicial bodies can consider PPS matters where permitted by the constitution and appropriate to the particular body.

Specific issues with the Act

19. In this part of the submission, several specific provisions of the Act are discussed as requiring attention in the review process. It is submitted that changes to these specific provisions of the Act will benefit small business.

Section 8 – exclusion of ‘fixtures’

20. The definition of ‘fixtures’ should be clarified so that it is clear any degree of affixation will not by itself make something a fixture. That is, the general law meaning of what is, or is not, a fixture should be applied.

Section 10 – definition of ‘consumer property’

21. The definition of ‘consumer property’ in section 10 should make it clear it is referring to an ABN issued to the individual and not someone else, for example an employer of the individual.

Section 10 – definition of ‘interest’

22. The current definition of ‘interest’ includes a right in personal property and this has created some uncertainty regarding the scope and application of the Act. This in turn leads to unnecessary costs being incurred. The New Zealand and Canadian Acts do not define ‘interest’.
23. Our practitioners have observed instances where parties have taken the view that a mere right to possession of collateral, without some interest in that collateral (whether proprietary or otherwise), is a security interest. It is submitted that this is partly due to the definition of ‘interest’ in the legislation.
24. The definition of ‘interest’ in section 10 should be repealed or amended to make it clear an interest must be a proprietary interest not merely any contractual right relating to personal property.

Section 13 – meaning of ‘PPS lease’

25. We submit that the review should consider whether references to ‘bailment’ in section 13 should be deleted. The preferred view is that the ‘PPS lease’ concept should be limited to lease, rental or hiring arrangements where the lessee or bailee pays for the use of the goods (not merely provides ‘value’, as defined). This would address concerns that, despite sections 13(2)(a), 13(2)(b) and 13(3), a PPS lease might apply to incidental bailment arrangements found in many kinds of commercial contracts including construction, transport, storage and maintenance agreements.
26. It is submitted that a bailment that arises as an incidental aspect of a contract where the bailee is providing services to the bailor and the bailor is paying for those services should not be subject to the Act. While the better view is that this is how the Act, as currently drafted, is intended to operate, there has been considerable confusion about this issue which has imposed unnecessary cost and administrative burdens on many small businesses, where parties are in possession of personal property, such as liquidators, refuse to give up possession of the personal property in reliance on the particular wording of the Act instead of the intended effect of the Act.
27. Bailment arrangements that are ‘in substance’ security interests would continue to be subject to the Act (section 12(1)) as would bailment arrangements that constitute ‘commercial consignments’ (section 12(3)(b)).
28. Another concern is the scope of the carve outs in sections 13(2)(a) and 13(2)(b). It is unclear as to whether the lessor or bailor has to be regularly engaged in leasing or bailing goods of the kind leased or bailed to the grantor. Section 46 (ordinary course of business extinguishment rule) only applies where the lessor is leasing property in the ordinary course of the lessor’s business of leasing property of that kind and it is suggested that sections

13(2)(a) and 13(2)(b) (if it remains in the Act) should be amended to be consistent with section 46.

29. Legal practitioners involved in this submission have experienced a number of concerns raised by clients in the motor vehicle rental industry that may also bail or lease goods, not as part of its business, but in one-off or infrequent transactions. Such companies are regularly engaged in the business of leasing or bailing motor vehicles, but are not regularly engaged in the business of leasing or bailing goods of the kind that are provided in these incidental transactions. At present it is arguable that the equipment hire company is required to register two security interests over the one customer (one according to the serial number and the other for the spare parts that may also be provided), which is increasing compliance costs. We submit that the review should consider whether to limit PPS leases to only leases where the lessor is regularly engaged in the business of leasing goods of the kind leased to the purported grantor.
30. It is noted that a Bill has been introduced to parliament to remove the distinction in the definition of PPS leases for serial numbered and non-serial numbered property. We support the removal of the distinction between serial numbered and non-serial numbered property for the purposes of determining at what duration a PPS lease arises and are of the view that this was an unnecessary complication to the Act.
31. Contributors to this submission would appreciate the opportunity to discuss the issues relating to section 13 further, as there are a number of views as to the appropriate method for addressing the concerns raised in these submissions regarding section 13.

Section 13(1)(d) and section 62 – timeframe for registering PPS lease

32. It is unclear as to the timeframe in which a registration of a PPS lease arising pursuant to section 13(1)(d) (where lessee retains uninterrupted possession for a period of more than one year) and where the lease arrangement is not an in substance security interest.
33. The definition of “grantor” lends itself to the interpretation that the lessee is not a grantor until the one year mark and therefore the PMSI registration will not have to be made until 15 business days after the one year mark, but this could be clarified in the legislation to avoid debate regarding this issue arising in the future. For small businesses the cost of being the ‘test case’ on an issue is a major disincentive to enforcing rights they otherwise may have. We submit that the review should consider clarifying this issue in the Act by way of amendment or inclusion of a note in the relevant sections of the Act.

Section 14 – meaning of ‘purchase money security interest

34. We submit that the exclusion for transactions involving non-serial numbered property used predominantly for personal, domestic or household purposes should be deleted. This is an unnecessary complication of the Act. Removing such complications will assist small businesses in understanding the Act.

Section 32 – disposal of collateral subject to security interest

35. We submit that section 32 should be amended to clarify that a secured party may consent to a disposal subject to the original collateral continuing to be subject to its security interest. Section 34(1)(c)(i) suggests this is the intention.
36. Also, the definition of disposal should be clarified. Section 32(1)(a)(i) provides for a security interest to continue in collateral unless the secured party authorised the disposal giving rise to proceeds. The term disposal is used in a number of contexts in the PPSA and includes a disposal by way of lease or licence (for the purpose of the enforcement provisions).

Although the explanatory memorandum to the *Personal Property Securities (Corporations and Other Amendments) Bill 2010* (Cth) states that the relevant section is not intended to apply where the secured party authorises short-term leasing of the goods, it is not clear where, for example, a grantor assigns their interest in a hire purchase agreement to a third party. We submit that the definition of disposal should be clarified and if a disposal pursuant to section 32(1)(a)(i) is intended to be different to a disposal pursuant to the enforcement provisions in the Act, then a different term should be used.

Section 34 – meaning of ‘transfer’ as used in this section

37. We submit that section 34 should clarify that a ‘transfer’ in this context means a sale/transfer of ownership, not a mere transfer of possession including a transfer of possession under a security interest (including a PPS lease). A priority contest between a lessor under a lease that is a security interest and a secured party who has been granted a security interest by the lessee can be resolved under the normal ‘single grantor’ priority rules as between the lessor and the other secured party.
38. We are of the opinion that in respect of a leased asset, subject to the application of the ‘taking free’ rules in Part 2.5 of the Act, the priority of a secured party who has taken security from a lessor as against a secured party who takes security from the lessee should be dependent upon the priority of the lessor (irrespective of whether the Act applies to the lease).

Section 56 – continuous perfection

39. It is a concern that a secured party may be able to claim that it has been continuously perfected via two or more registrations when the earlier registration(s) may not be disclosed by a search. Such an outcome would significantly compromise the efficacy of the Personal Property Securities Register (“PPSR”) in terms of enabling a person searching the PPSR to establish a secured party’s priority time. Neither the Act nor the *Personal Property Securities Regulations 2010* (Cth) (“**Regulations**”) require the linking of prior registrations to a current registration but it appears, on a literal reading of sections 55 and 56, that continuous perfection can be maintained even though:
 - a. an earlier registration has been discharged after a replacement registration has been made;
 - b. the former has not been linked to the latter; and
 - c. there is no way of knowing the registration time of the first (or other previous) registration(s) in the chain of registrations relied upon to establish continuous perfection.
40. It is submitted that the Act and the Regulations should expressly deal with the linking of registrations and how this can be used to preserve the priority time afforded to the initial registration.

Section 62 – meaning of ‘possession’

41. It would be useful to clarify whether ‘possession’ (for the purposes of s62) is intended to mean mere physical possession or *possession of the collateral by the grantor as a grantor* (the latter is preferable in our opinion).

Section 64 – priority for accounts

42. The timing and notice requirements in section 64(1)(b)(ii) pose practical difficulties. Consideration should be given to simplifying these requirements. The notice required to be given to a PMSI secured party under section 64(1)(b) should be able to be given before or after the accounts financier has registered in relation to accounts. The accounts financier's priority could apply to accounts for which it has provided new value at any time from the later of 15 business days after the notice has been given to the PMSI secured party or when the accounts financier's registration is made in respect of accounts.

Section 151 – grounds for registering security interest

43. It is considered that section 151 is unnecessary and inhibits secured parties and their advisors from registering a security interest when they are not sure whether or not it is a security interest. This affects small businesses that do not have the resources to obtain professional advice as to their entitlement to register security interests, for example businesses in the art world in relation to consignments.

Section 153 – financing statements

44. Except in the case of serial number registrations, it should be possible to nominate multiple classes of collateral in a single registration and it should be possible to use the same free text to supplement one or more of the collateral classes nominated in the registration, i.e. to supplement the registration generally. Having to do separate registrations for each collateral class creates an unnecessary administrative and cost burden and can make the interpretation of search results more difficult than it should be. The current approach under our legislation is also inconsistent with the approach in New Zealand and Canada.
45. Many security agreements that are not general security agreements over all assets will nevertheless cover collateral in more than one collateral class. This suggested change recognises this commercial reality, should reduce costs and result in more informative collateral descriptions appearing on the register. It would also allow parties to specify that a security interest is taken over particular collateral, any chattel paper relating to that collateral (if the collateral is subsequently hired out for example) and any accounts arising from dealings with the collateral. Although the one registration may be sufficient to perfect all three security interests as proceeds of the original collateral, the more information that is provided on the register (at minimal inconvenience to secured parties) will provide for a better informed business environment and will assist financiers in deciding whether to extend credit to small businesses.
46. There should also be a new collateral class being 'all present and after acquired property relating to ...'. This could be used where a security interest is created in respect of all of the grantor's assets related to a specific business, location or joint venture. Selecting this collateral class would be supplemented by a free text description of the relevant business, location or joint venture (but not a security agreement as this would be incompatible with a notice based register, and we make some submissions in this regard below).
47. It is also submitted that where a secured party is registering a security interest in respect of multiple items of serial numbered property, the secured party should be able to insert multiple serial numbers in the one registration, whether they relate to the one item of serial numbered property or several items of property. This will make registering security interests easier for secured parties and will hopefully decrease the cost of registering security interests, which will benefit small businesses.

Section 157 – verification statements

48. Where the collateral is consumer property and serial numbered property, the grantor's details are not registered. However, section 157 refers to the "person registered as a grantor in the registration". We submit that this should be clarified.

Section 162 – Transfer of security interests

49. The Act should be clarified to make it clear that a failure to register a financing statement or financing change statement (that updates the details of the secured party) upon the transfer of a security interest is not 'seriously misleading' and does not make the registration defective. Section 276 implies this is the correct interpretation but the language of sections 160 and 163 suggests otherwise.
50. Section 162 also refers to transfers of collateral but this aspect must be read in conjunction with section 34 which does specify timing requirements.

Section 164 – seriously misleading defect

51. We submit that there should be further examples of what constitutes a seriously misleading defect included in section 164 of the Act. This will provide further clarity and understanding to the scope of what defects will make a registration ineffective, which has the potential to improve understanding of the Act for small businesses.

Section 165(c) – particular defects in registration

52. A registration should not be defective pursuant to section 165(c) or considered to be 'seriously misleading' for the purposes of section 164 if it indicates that a security interest is a PMSI (to any extent) and it is not in fact a PMSI (to any extent). Sections 165(c) and 164 should be amended accordingly. (Consequential amendments would be required to sections 62 and 64 if this suggestion is adopted).
53. Consideration should also be given to omitting item 7 in the table in s153(1) or making it optional on the basis it is an unnecessary complication in the registration process.
54. The reasons for this suggested change are as follows:
 - a. Section 165(c) does not apply so long as the security interests to which a registration relates are PMSIs to any extent. This means there could be, and usually will be, security interests that are non-PMSI as well as PMSI covered by the registration. Ascertaining whether a particular security interest is a PMSI and has PMSI priority involves an analysis of a number of factors including the terms of the security agreement, compliance with the timing requirements in section 62 of the PPSA and determining if particular goods have been paid for. Merely indicating a registration could relate to a PMSI does not limit it to PMSI claims nor establish all of the requirements for claiming PMSI priority;
 - b. Checking the PMSI box alone does not establish that the secured party has complied with the timing requirements in section 62 of the PPSA and parties searching the register are no further advanced than if this requirement did not exist. A secured party can have a PMSI, as defined in section 14, but not be entitled to PMSI priority because it has failed to comply with section 62;
 - c. The consequences of not checking the PMSI box in a registration are catastrophic for suppliers of inventory and lessors as section 165(c) is currently drafted;

- d. If (as per paragraph 67 of this submission) a free text description of collateral is made mandatory for non-serial number registrations, secured parties can use the free text to indicate if their security interest is limited to collateral supplied, sold or leased by them to the grantor. This would be much more helpful to persons searching the register than the current PMSI box indicating that a PMSI is being claimed to some extent.

Section 178 – amendment demands

55. The section allowing the grantor to issue amendment demands does not clearly address the situation where a registration is made over ‘all present and after acquired property’ but the actual security interest only relates to specific property. This can delay or prevent small businesses from obtaining credit as subsequent financiers will be reluctant to grant credit where a general security agreement is in place and the business is prevented from disclosing the terms of the existing security due to confidentiality provisions, which are common in secured credit documentation.
56. The grantor should be able to insist on overreaching registrations being replaced (as the collateral description cannot be amended by a financing change statement) by a new registration for the relevant specific collateral class or classes. The secured party’s priority could be preserved by linking its new registration to the earlier overreaching registration.

Part 9.4 – perfected transitional security interests

57. Clarification of the status of and nature of transitional security interests (“**TSIs**”) is required. Security interests arising before the registration commencement time had the benefit of the transitional period for two years, but before the expiration of that period steps needed to be taken to perfect those TSIs. An example some contributors to this submission have experienced is in relation to a liquidator attempting to claim that collateral vested in circumstances where the financing statement did not record that the security interest was a PMSI. Those TSIs that had the features of a PMSI ought to be able to obtain the benefit of the super-priority afforded to PMSIs under the Act. However, it is impossible to register a security interest in relation to a transitional PMSI within the timeframes provided by section 62 of the Act. TSIs all have the registration commencement time of 30 January 2012. Where a secured party has a transitional PMSI, the failure to tick the PMSI box can be of no consequence because the transitional PMSI arose prior to the registration commencement time and the law that applied prior to the commencement of the Act will determine any priority contest between secured parties.

Part 9.5

58. Part 9.5 is unnecessarily complicated and the concept of ‘control’ under Part 9.5 having a different meaning to Part 2.3 causes confusion. If preferred creditor liabilities, such as employee entitlements and an administrator’s lien, are to have a statutory priority in respect of certain assets (e.g. inventory, accounts and certain ADI accounts) then on insolvency simpler rules consistent with the concepts in the Act should be included in the Corporations Act. Part 9.5 of the Act should be repealed, apart from section 339 which should be modified in line with the changes to the Corporations Act contemplated below.
59. Part 9.5 and the definition of ‘circulating security interest’ in the Corporations Act draw a distinction between certain assets based on whether the grantor or secured party owns or has title to them or has ‘control’ of them. This is inconsistent with the general approach of the Act and adds to the complexity of security documentation. For example, a supplier who supplies inventory on a retention of title basis will not have a circulating security interest within the meaning of section 51C of the Corporations Act (because the grantor will not have title to the inventory) but if the same supplier supplies the inventory and instead of retaining title it takes a ‘security interest’ in the inventory supplied it will have a circulating security

interest (because title would normally pass to the grantor on delivery of the inventory). Both of these security interests will be PMSIs to the extent they secure purchase money obligations, but the latter will rank behind preferred creditor entitlements on insolvency and the former will not. In our submission this distinction is artificial. Further, there is confusion amongst small businesses due to misinformation that “title is no longer relevant” after the introduction of the Act.

60. The operation of Part 9.5 and the definition of ‘circulating security interest’ in the Corporations Act have encouraged some law firms to use general security agreements which essentially preserve the distinction between ‘fixed’ and ‘floating’ charge assets and the concept of crystallisation that existed before the introduction of the Act, with an added distinction based on whether the secured party has title to certain assets (e.g. the Five Firm GSA Model Clauses). This adds to the complexity of general security agreements.
61. Instead of distinguishing between security interests in inventory based on title or ‘control’, one alternative approach might be for the Corporations Act to distinguish security interests in inventory (and traceable proceeds) based on whether or not the secured party has a PMSI (irrespective of who has title or ‘control’). Priority for preferred creditor claims, such as employee entitlements and the administrator’s lien, could be limited to inventory (and proceeds) to the extent it is not subject to a PMSI. Similar streamlined alternatives could be devised for accounts and ADI accounts if, as a policy matter, preferred creditor liabilities are to have statutory priority in respect of these types of assets.
62. The objective of any such amendments should be to shift the focus from title and control as the determining factors. This has the potential to reduce the complexity of the interaction between the Corporations Act and the Act, which is something that is lost on a number of small businesses and their advisors. We are of the view that the goal of reducing the complexity of the legislation and documentation that is pushed on small businesses by large financial institutions will have the desired effect of increasing the understanding of the Act by small businesses and their preparedness to obtain secured credit.

Regulations, Schedule 1, regulation 1.2(6) – grantor details

63. The cascade of registration criteria for grantor details does not match expectations and information available to searchers, because now that the transitional period has ended, the first in the hierarchy where applicable, is the details used by the secured party under its AML-CTF compliance procedure. This is not necessarily going to correspond with an individual’s name on their driver’s licence, for example, and a searcher would not be able to have knowledge of what particular practice a bank had in relation to AML-CTF compliance, and it may differ from bank to bank. It is submitted that for grantors who are individuals, the details on their driver’s licence should be at the top of the list in the table at regulation 1.2(6) of Schedule 1 of the Regulations.
64. Another possible solution would be for grantors to be assigned a particular number, similar to a secured party group. This would allow various details of the grantor(s) to be included in the one ‘grantor group’ and a search of the register with respect to one or more of the details of a particular grantor (for example, details from an individual grantor’s passport) would also reveal all security interests that are registered over that grantor and not just the details with respect to the grantor’s details recorded on their passport. This would benefit secured parties, insolvency practitioners and others searching the register, but registration of a ‘grantor group’ may slow down the extension of credit by financiers unless the financier was permitted to create a grantor group on behalf of a particular grantor.
65. It should also be considered whether the use of an individual’s details as they appear on a public register (e.g. the ASIC companies register or the Electoral Roll) would be more appropriate than driver’s licence and passport details, although the ASIC companies register

may not contain accurate information as this is entered by the individual and not extensively checked independently.

66. Whether the suggestion in the preceding paragraph could also apply to companies and other entities would have to undergo careful consideration. It is a common issue arising for small business that have customers operating a trust, as many small businesses are unsure as to whether or not to register against the ACN of the company or the ABN of the trust. If both of these details were included in the one 'grantor group', along with the name of the company and perhaps a trading name then a search of the grantor group would reveal all security interests registered against the grantor. However, the interaction between such an idea and sections 153, 164 and 165 of the Act would have to be carefully considered as well as the implications that it could lead to a less than perfect system of registration becoming commonplace.

Regulations, Schedule 1, Part 2 - further description of collateral to be mandatory for non-serial number registrations

67. For all collateral classes other than 'all present and after acquired property', and except for serial number registrations, it should be mandatory to include a further free text description of the collateral (as is the case in New Zealand). Many secured parties are simply registering against a collateral class without using the free text option and this can make search results quite unhelpful. While not suggesting there should be any prescriptive requirements for the free text description, it should help produce more meaningful search results if a free text description is mandatory.
68. The free text used with a registration over 'all present and after acquired property, with exceptions' needs to describe the exceptions by item or class (Regulation 1.6). However, many secured parties are simply describing the exceptions as "anything the secured party does not have security over" or "any property not covered by a security agreement" or similar wording. Many large financiers are adopting this practice and it can inhibit small businesses from subsequently obtaining finance due to confidentiality restrictions in finance documentation and the unhelpful content of the financing statement registered over the business. This practice is meaningless to searching parties. The Regulations should be amended to clarify that this practice does not satisfy the requirement to describe the exceptions by item or class.
69. The PPSR is designed as a notice register, not a document register. Registration practices that simply refer to a particular security agreement or definitions in a security agreement are inconsistent with a notice based register and should be discouraged.
70. Some interest groups may advocate a mandatory requirement to attach a copy of the relevant security document to the registration to allow those searching the PPSR) to obtain accurate details of exactly what property is secured and any special conditions attaching to the security interest. However, any benefit of being able to search a security agreement on the register is far outweighed by the many benefits of a notice board system which allows for speedy recording of security interests as well as enabling one registration to perfect any security agreements affecting collateral in the relevant collateral class (e.g. retention of title supplies, where documentation may well change over time but the financing statement may not need to change). It is submitted that eliminating the flexibility that a notice board system provides, when compared with a document filing system, would not benefit the system, or the business community, as a whole. Rather, requiring a secured party to provide greater particularity of the description of collateral is consistent with the overall objective of the notice board system and will allow those searching the Register to obtain a better understanding of the collateral that is secured.

Regulations, Schedule 1, regulation 4.1– indicating if collateral might include inventory

71. There is no obvious reason for including the option in a financing statement that the collateral may be inventory for the purpose of the Part 9.5 as it is merely a question of fact that generally only needs to be established on insolvency. Removing this would simplify the registration process.

Regulations, Schedule 1, regulation 4.1– indicating if collateral is subject to control

72. Apart from section 340(2)(a) there is no obvious reason why a secured party needs to nominate whether the collateral might be subject to control in a registration, it is merely a question of fact that generally only needs to be established on insolvency. Removing this would simplify the registration process.
73. Furthermore, 'control' for the purposes of Part 9.5 is primarily relevant to whether the secured party has a 'circulating security interest' under section 51C of the Corporations Act. This is not an issue where the secured party owns the collateral (e.g. retention of title).

Corporations Act, Part 5.7B, Division 2A

74. It is submitted that Division 2A of Part 5.7B of the Corporations Act should be repealed or it should at least be clarified when "the security agreement that gave rise to the security interest came into force" (see section 588FL(2)(b)(ii) in the Corporations Act).
75. Problems with this vesting rule include:
 - a. It is taken to be a duplication with the vesting rule provided by section 267 of the Act, but it is inconsistent with the vesting rule in the Act;
 - b. It is unclear for PPS leases that arise under section 13(1)(d) of the Act as to when the relevant security agreement for such a PPS lease "comes into force"; and
 - c. It creates issues for security agreements that are signed well before the grantor has possession of the relevant collateral. There is confusion because of inconsistency between the timing requirements for PMSIs provided by the section 62 of the Act and the timeframes for registration in section 588FL of the Corporations Act.
76. The potential application of the vesting rule under the Act and the potential loss of priority for a secured party who does not register or otherwise perfect promptly (including complying with section 62 of the Act for secured parties claiming a PMSI), should be sufficient incentive without a further vesting rule in the Corporations Act. Having vesting rules that are not consistent in two pieces of legislation further complicates the otherwise clear instructions that legal advisors give clients, especially small businesses, in relation to timeframes for registering their security interests.

Inconsistent timeframes for registration and vesting

77. There are a number of timeframes prescribed by the Act and the Corporations Act. Failure to comply with these timeframes often results in the loss of perfection of a security interest or a security interest vesting in the grantor. These timeframes are triggered by various events, including from the creation of a security interest (section 588FJ(1)(b)(i) of Corporations Act), the date a "security agreement came into force" (section 588FL(2)(b)(i) of Corporations Act), the date when the grantor obtains possession of collateral (section 62(3) of the Act), from when another security interest attaches to the collateral and is perfected (section 34(1) of the Act) and from when documentation has been issued (in the case of negotiable documents of title section 22 of Act).

78. These timeframes can produce seemingly inconsistent results. One example of this would be where a hire company enters into a long-term lease agreement on 1 August 2013, but the customer does not take possession of the equipment until 1 November 2013. In this example if the hire company registered its security interest on the PPSR as a PMSI on 1 November 2013, it would have the super priority status afforded to a PMSI. However, if the customer was placed into liquidation at any time prior to 1 February 2014, then it is arguable that the hire company's security interest would vest in the customer pursuant to section 588FL of the Corporations Act, as the registration of the security interest was after 20 business days after the security agreement that gave rise to the security interest came into force.
79. It is submitted that the timeframes for registration of security interests and for when certain perfection and vesting events are triggered should be amended to provide consistency across the Act and the Corporations Act.
80. It is also submitted that if Division 2A of Part 5.7B of the Corporations Act is not repealed, then section 588FL of Corporations Act should be amended to require registration within 15 business days of the date on which the security interest first attaches to property of the grantor. This will cover both PMSI and regular security interests and provide consistency with the timeframe for registering a PMSI pursuant to section 62 of the Act.

Further discussion

81. The BLS would be pleased to discuss any aspect of this submission.
82. Please contact Greg Rodgers of the Insolvency & Reconstruction Committee (who is the Law Council's representative on the PPSA Stakeholder Forum) on 07 3009 9303 or the Chairman of the BLS, John Keeves, on 08 8239 7119 if you would like to do so.

Yours faithfully

A handwritten signature in black ink, appearing to read 'John Keeves', with a long horizontal flourish extending to the right.

John Keeves
Chairman, Business Law Section