



Law Council
OF AUSTRALIA

Business Law Section

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

10 November 2014

Dear Sir or Madam,

Statutory Review of the *Personal Property Securities Act 2009 (Cth)* – response to consultation paper No. 1

Reference is made to consultation paper No. 1 issued on 22 September 2014.

This submission is made on behalf of the Financial Services Committee, the Insolvency and Reconstruction Law Committee and the SME Business Law Committee of the Business Law Section of the Law Council of Australia ("**BLS**"). While the submission sets out responses to the specific queries raised in the consultation paper and is in the requested template form, this submission is in addition to the earlier submissions lodged by the BLS.

The BLS would be pleased to discuss any aspect of this submission. 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

John Keeves
Chairman, Business Law Section

Enc.

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BLS

Review of the Personal Property Securities Act 2009

Consultation Response Template

Consultation Paper 1

Instructions:

Please use the form below to provide feedback with respect to the proposed recommendations and issues listed in each section of the form. Please refer and respond to the proposed recommendation or issue as set out in Consultation Paper 1. The heading and paragraph number of the relevant sections of the consultation paper are included to help guide you.

Please note your agreement or disagreement with the proposed recommendation by deleting either 'Yes' or 'No' where indicated. Comments can be provided in the box below each proposition. There is no word limit for comments but succinct responses clearly setting out the reasons for agreement or disagreement with the proposed recommendation will be of most use for the purposes of the review.

You may respond to as many or as few propositions as you wish.

Name: Business Law Section
Organisation: Law Council of Australia
Background/Expertise/Interest in PPSA Review: Legal Practitioners
Contact Details: Greg Rodgers (E: greg.rodgers@rbglawyers.com.au ; T: (07) 3009 9303)

2.1.2 The ostensible ownership concern

In my view, the concept of perfection and the existence of the Register are integral components of the Act, and the publicity function that they are designed to serve, by providing outsiders with an opportunity to determine whether an item of personal property might be subject to an encumbrance, is a central function of the regime established by the Act and should be preserved. I would however be interested to hear whether others share this view.

Comments:

Agree that the PPSA promotes commercial transparency which is highly desirable.

2.2 Should the Act be repealed?

Proposed recommendation 1.1: *That the Act not be repealed, but rather that it be amended, to enable it to better achieve its potential.*

Do you agree with the proposed recommendation? Yes/No

Comments: Many of the wider economic and other benefits for which the Act was rightly passed will not be immediately apparent in the short-term, or when judged from the perspective of a particular user.

3.2 Does a security interest need to be a proprietary interest?

Proposed recommendation 1.2: *That the definition of "interest" in s 10 of the Act be deleted.*

Do you agree with the proposed recommendation? Yes/No

Comments:

3.3.1 Interpretation of s 12(2)

[T]he correct approach to the interpretation of s 12(2) is that the list of transactions does not expand the meaning of the term "security interest", but only provides examples of transactions that can give rise to a security interest if they otherwise fall within the definition of the term.

Comments:

Agree with the interpretation that s12(2) only provides a list of examples but not all of the comments regarding the characterisation of "conditional sale agreements" and "flawed asset arrangements". We would also support the deletion of s12(2) entirely as an alternative to the selective deletions/changes to s12(2) contemplated below.

3.3.2 Conditional sale agreements – s 12(2)(d)

Proposed recommendation 1.3: *That s 12(2)(d) be amended to read:*

(d) an agreement to sell subject to retention of title;

Do you agree with the proposed recommendation? Yes/No

Comments:

3.3.3 Trust receipts – s 12(2)(g)

Proposed recommendation 1.4: *That s 12(2)(g) be deleted.*

Do you agree with the proposed recommendation? Yes/No

Comments:

3.3.4 Interests that might also be deemed security interests – ss 12(2)(h) and (i)

Proposed recommendation 1.5: *If a transfer of an account or chattel paper continues to be a transaction that is deemed by s 12(3) to give rise to a security interest whether or not the transaction in substance secures payment or performance of an obligation, that a new paragraph be inserted in s 12(2), in substitution for current s 12(2)(g) (as to which, see Proposed recommendation 1.4 above):*

(g) a transfer of the benefit of a monetary obligation (whether or not an [account] or [chattel paper]);

Do you agree with the proposed recommendation? Yes/No

Comments:

We agree with the general thrust of the recommendation, but the definition should be limited to transfers of an account or chattel paper, as per s12(3). Otherwise, it introduces a wide and undefined 'monetary obligation' into the Act, and is not consistent with the suggestion that s12(2) should cover the security versions of all three 'deemed' security interests found in s12(3)

3.3.5 Assignments, and transfers of title – ss 12(2)(j) and (k)

Proposed recommendation 1.6: *None at this stage, pending further consideration.*

Comments:

No objection to the deletion of s12(2) (k) but would prefer not to add provisions excluding the application of the Act to “outright transfers of title” or other arrangements. The “in substance” definition in s12(1) is perfectly adequate, particularly if proposed recommendation 1.2 is adopted.

3.3.6 Flawed asset arrangements – s 12(2)(l)

Proposed recommendation 1.7: *That s 12(2)(l) be deleted.*

Do you agree with the proposed recommendation?

Yes/No

Comments:

We agree with the proposed recommendation but not necessarily all of the commentary in 3.3.6.

4.1 Deemed security interests – Policy rationale

[T]he primary factor in deciding whether a particular interest should be considered for inclusion in s 12(3) are whether it engages the ostensible ownership concern and, if it does, whether it would produce significant disruption if the interest were not captured.

Comments:

Agree that this is the primary factor. However, the “too hard to tell the difference” argument is important in practice. To take leasing as an example, a lessor is not thinking about whether chapter 4 applies when they enter into a lease; they want to know if they need to register when the lease is entered into. They are generally not thinking about the details of enforcement, rather registration – for priority and potential vesting reasons. The commentary suggests it may still be necessary to determine whether a particular transaction secures payment or performance of an obligation and this is correct. However, there is an element of circularity in this reasoning. Deeming certain transactions to be security interests promotes commercial certainty at the commencement of a transaction when certainty might otherwise be lacking. The extensive number of “true lease” cases in Canada prior to the introduction of the “lease for a term of more than one year” concept highlights the practical problems that can arise in trying to distinguish a true lease from a finance lease.

Also, deeming certain transactions to be subject to the Act is important because it means the attachment and priority rules in the Act will apply. These rules provide greater consistency and certainty than the general law. In addition, if these ‘too hard to tell’ transactions are not captured, it will undermine the primary rationale and produce disruption.

4.2.1.1 Should the Act deem a transfer of an account (however defined) to be a security interest if it does not secure payment or performance of an obligation?

Proposed recommendation 1.8: *That s 12(3)(a), which provides that a transfer of an account can be a security interest whether or not it in substance secures payment or performance of an obligation, be retained.*

Do you agree with the proposed recommendation?

Yes/No

Comments:

There are consistency and certainty benefits in having the PPSA attachment and priority rules apply to all transfers of accounts, and to revert to the complex common law and equitable rules would undermine these benefits.

4.2.1.2 The meaning of "account"

Proposed recommendation 1.9: *None at this stage, pending further consideration.*

Comments:

The meaning of "account" should be defined more broadly as in Canada and New Zealand. There should not be limitations on the definition of 'account' of the type mooted on p21.

NB There are different definitions of 'account' in PPSAs in New Zealand and as between various Canadian provinces. The Australian definition does currently follow several of the Canadian models by including provision of goods or services. The New Zealand definition, using the term 'account receivable, has been found to be very broad, see Strategic Finance Ltd. v Bridgman [2-13] NZCA 357.

4.2.1.3 The meaning of "transfer" – outright legal transfers

Proposed recommendation 1.10: *That s 12(3)(a) not apply to a transfer of an account that is an outright legal transfer.*

Do you agree with the proposed recommendation?

Yes/~~No~~

Comments:

It is desirable to have consistent attachment and priority rules for all transfers of accounts (whether or not the account debtor is notified of the transfer).

4.2.1.3 The meaning of "transfer" – novations

Proposed recommendation 1.11: *That the Act not be amended to clarify that a novation is not a "transfer" for the purposes of the Act.*

Do you agree with the proposed recommendation?

Yes/~~No~~

Comments:

4.2.1.3 The meaning of "transfer" – declarations of trust

Proposed recommendation 1.12: *That the Act not be amended to clarify that a declaration of trust is not a "transfer" for the purposes of the Act.*

Do you agree with the proposed recommendation?

Yes/~~No~~

Comments:

Some declarations of trust have been and will be found by courts (eg in tax contexts) to amount to 'dispositions' of equitable interests, and thus arguably transfers. It is therefore agreed that it would be inappropriate to make a blanket exception to the contrary.

4.2.2 Transfer of chattel paper

Proposed recommendation 1.13: *That the definition of "chattel paper" in section 10, and all references in the Act to chattel paper (including s 71), be deleted.*

Do you agree with the proposed recommendation?

Yes/No

Comments:

4.3 Commercial consignments

Proposed recommendation 1.14: *None at this stage, pending further consideration.*

Comments:

In our experience commercial consignments are quite common in distribution and servicing arrangements. We are not in favour of any change in the treatment of commercial consignments. The recent Arcadi case illustrates that the exceptions and restrictions in the definition of 'commercial consignment' are sufficient to filter out those cases which should not be treated as security interests. Moreover, the position of the consignee is not the same as that of a lessee under a PPS lease, as suggested at the foot of p28, first bullet point. In cases other than where the consignee is publicly known to its creditors to be taking goods on consignment, the ostensible ownership problem explains the need for the extension to non-security consignments under s12(3), see Duggan and Brown page 54-55.

4.4.2 Personal Property Securities Amendment (Deregulatory Measures) Bill 2014

The Personal Property Securities Amendment (Deregulatory Measures) Bill 2014 is currently before Parliament. If passed, it will remove paragraph (1)(e) from the definition of PPS lease in s 13, and make consequential amendments to other provisions in the Act. As Government has already responded to the issue of s 13(1)(e), I am proceeding on the basis that I will not need to address it in my report. However, I would note my support the proposed deletion of paragraph (e) from the definition of PPS lease, and subject to the Bill's passage through Parliament, the prompt commencement of the amendments.

Comments:

Agree with these views. We would also support changing the "PPS lease" concept to "lease for more than one year" as a transparency measure once s.13(1)(e) is repealed.

4.4.3 Should the Act apply to leases at all, if they do not operate in substance as security?

Proposed recommendation 1.15: *That the Act continue to apply to some types of longer-term leases, whether or not they operate in substance as security for payment or performance of an obligation.*

Do you agree with the proposed recommendation? Yes/~~No~~

Comments:

4.4.4 Should the Act apply to bailments?

Proposed recommendation 1.16: *That the definition of PPS lease in s 13 be amended to remove all references to "bailments".*

Do you agree with the proposed recommendation? Yes/~~No~~

Comments:

4.4.5 Should the Act apply to leases with an indefinite term of less than one year?

Proposed recommendation 1.17: *That section 13(1)(b) of the Act be deleted.*

Do you agree with the proposed recommendation? Yes/No

Comments:

It would not be sufficient to merely delete s13(1)(b).

We believe it would be preferable to require parties who wish to avoid the application of the Act to specify a maximum term of one year. We think the proposed recommendation would create more problems than it solves and it would seriously undermine the black line test that the "PPS lease" definition is intended to promote. The recommendation would encourage parties to try to draft their way around the deeming provisions (notwithstanding that the in substance test could still apply).

If this is not accepted, then we believe s13 should expressly state that a lease for an indefinite term becomes a lease subject to the Act when the lessee retains possession of the leased property for more than one year.

4.4.6 Should the "one year" test be changed?

Proposed recommendation 1.18: *That references in s 13 of the Act to "one year" not be changed.*

Do you agree with the proposed recommendation? Yes/~~No~~

Comments:

4.4.7 Leases that can be terminated early by agreement

Proposed recommendation 1.19: *None at this stage, pending further consideration.*

Comments:

No change required.

4.4.8 The “regularly engaged in the business of leasing” requirement

Proposed recommendation 1.20: *That s 13(2)(a) not be amended to insert "of that kind" after the phrase "regularly engaged in leasing goods".*

Do you agree with the proposed recommendation?

Yes/~~No~~

Comments:

5.2 The meaning of "property"

The Act does not separately define "property", but leaves its meaning to the general law. This, in my view, is appropriate – the concept of property will continue to evolve over time, and it is desirable that the Act be able to move in tandem with that evolution, rather than set a pre-determined meaning in stone.

Comments:

Agree with this view.

5.3 Licences

Proposed recommendation 1.21: *That the definition of "licence" in s 10 be amended to make it clear that it applies whether or not the relevant right, entitlement, authority or licence is transferable.*

Do you agree with the proposed recommendation?

Yes/~~No~~

Comments:

It is unclear why this specific amendment is necessary or helpful. Transferable licences are within the PPSA even if the licence is transferable only with consent. If a licence is not transferable at all, it is unlikely to be characterised as 'property', even though the definition of property does depend on context. Saskatchewan has enacted a provision similar to that of the Australian definition of licence, and it too is limited to transferrable licences. The reason is because transferability is one of the hallmarks of property, as the reviewer acknowledges.

It is necessary to ensure that any definitional changes do not suggest that ALL licences are 'property', as clearly the PPSA only applies to property, not personal rights. Whether or not a receiver can use a licence would depend on whether it was property of the corporation under Part 5 Corporations Act, and thus effectively on whether or not it was regarded as property at general law.

We note that some States and Territories have declared certain licences to be not transferable so as to take them outside the scope of the PPSA, rather than taking the alternative approach of declaring them to be licences to which the PPSA does not apply (ie. relying on s8(1)(k) or the exception in paragraph (b) of the definition of "personal property" in s10).

The main problem is the attitude of Governments who wish to control licence regimes and think erroneously that removing them from the scope of 'personal property' in the PPSA will help them do so. This is dealt with by recommendation 1.24.

5.4 Land

Proposed recommendation 1.22: *That the definition of "land" in s 10 be deleted.*

Do you agree with the proposed recommendation?

Yes/No

Comments:

This is not considered to be a significant issue.

5.5 Trees

Proposed recommendation 1.23: *That the definition of "crops" in s 10 not be amended to clarify when trees can be within the definition.*

Do you agree with the proposed recommendation?

Yes/No

Comments:

5.6 Statutory licences

Proposed recommendation 1.24: *That State, Territory and the Commonwealth Governments consider reversing legislation that removes statutory rights from the operation of the Act, and that consideration also be given to deleting the provisions in the Act that allow such licences to be removed from its ambit.*

Do you agree with the proposed recommendation?

Yes/No

Comments:

5.6 Statutory licences

However, there are a variety of policy considerations and industry practices that may be relevant to a State/Territory's preparedness to take this step in relation to particular types of licence. This issue should not delay the more important recommended changes to the PPSA.

6.2 General structure of s 8

Proposed recommendation 1.25: *That s 8(1) be split into two provisions: one listing interests that are not "security interests" for the purposes of the Act, and the other listing interests that are not "personal property" for the purposes of the Act.*

Do you agree with the proposed recommendation? Yes/No

Comments:

6.3 Close-out netting contracts – s 8(1)(e)

Proposed recommendation 1.26: *None at this stage, pending further consideration.*

Comments:

No change required.

6.4 Interests in or in connection with land – s 8(1)(f)(ii)

Proposed recommendation 1.27: *None at this stage, pending further consideration.*

Comments:

No change required.

6.5 Unperformed contracts – s 8(1)(f)(ii)

Proposed recommendation 1.28: *That the language "(including a successive transfer)" be deleted from s 8 (1)(f)(ii).*

Do you agree with the proposed recommendation? Yes/No

Comments:

6.6 Transfers of remuneration – s 8(1)(f)(iv)

Proposed recommendation 1.29: *That s 8(1)(f)(iv) be deleted.*

Do you agree with the proposed recommendation? Yes/No

Comments:

Possible privacy implications need to be considered.

6.7 Transfers of annuity or insurance policies – s 8 (1)(f)(v)

Proposed recommendation 1.30: *None at this stage, pending further consideration.*

Comments:

No change required.

6.8.1 Sections 8(1)(f)(vi) to (viii)

Proposed recommendation 1.31: *That ss 8(1)(f)(vii) and (viii) be deleted.*

Do you agree with the proposed recommendation?

Yes/No

Comments:

6.8.2 Section 8(4)

Proposed recommendation 1.32: *That s 8(4) be deleted.*

Do you agree with the proposed recommendation?

Yes/No

Comments:

6.9 Water rights – s 8(1)(i)

Proposed recommendation 1.33: *That ss 8(1)(j) and (5) be deleted.*

Do you agree with the proposed recommendation?

Yes/No

Comments:

Recommendation should refer to s(8)(1)(i) rather than (j). Support is contingent on States approval. This issue should not delay implementation of other proposed recommendations and is considered to be of secondary importance.

6.10.1 The meaning of "fixture"

Proposed Recommendation 1.34: *That the definition of "fixture" in s 10 be deleted.*

Do you agree with the proposed recommendation?

Yes/No

Comments:

6.10.2 Should fixtures be excluded from the Act?

Proposed recommendation 1.35: *That Government engage with the States and Territories to explore whether a regime can be developed, potentially along the lines of the principles applied in the Canadian PPSAs, to enable fixtures to be brought within the Act.*

Do you agree with the proposed recommendation? Yes/No

Comments:

This should not delay other more important recommended changes to the PPSA.

6.11 Pawnbrokers – s 8(1)(ja) and (6)

Proposed recommendation 1.36: *None at this stage, pending further consideration.*

Comments:

We would support the application of the Act to pawnbrokers other than in relation to the enforcement rules. However, this issue is considered to be of secondary importance.

6.12 Interests in superannuation – s 8(1)(jb)

Proposed recommendation 1.37: *That s 8(1)(k) be deleted.*

Do you agree with the proposed recommendation? Yes/No

Comments:

Possible privacy implications need to be considered.

7.2 Cash deposits

Proposed recommendation 1.38: *That the Act not be amended to clarify whether the making of a deposit under an agreement for the sale of property will give rise to a security interest.*

Do you agree with the proposed recommendation? Yes/No

Comments:

Agree with the commentary at 7.2.

7.3 Supplies of fit-out or other goods as part of a real property lease

Proposed recommendation 1.39: *That the Act not be amended to exclude or otherwise modify the rules for a lease of fit-out or other goods as part of a lease of real property, beyond what is already*

7.3 Supplies of fit-out or other goods as part of a real property lease
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<i>provided in s 12(2)(c).</i>

Do you agree with the proposed recommendation?	Yes/No
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Comments:

7.4 Turnover trusts

Proposed recommendation 1.40: <i>None at this stage, pending further consideration.</i>
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Comments:

Turnover trusts should not be excluded from the PPSA.

7.5 Minimum thresholds

Proposed recommendation 1.41: <i>None at this stage, pending further consideration.</i>
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Comments:

We are not in favour of minimum thresholds.
