



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  
**Via email:** [ppsareview@ag.gov.au](mailto:ppsareview@ag.gov.au)

14 November 2014

Dear Sir or Madam,

**Statutory Review of the *Personal Property Securities Act 2009* (Cth) – Response to Consultation Paper No. 2**

Reference is made to consultation paper No. 2 issued on 3 October 2014.

This submission is made on behalf of 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.

This submission has been assembled with the assistance of three of the specialist committees of the BLS - the Financial Services Committee, the Insolvency & Reconstruction Committee and the Small Business 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.

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 Chair of the BLS, John Keeves, on 08 8239 7119 if you would like to do so.

Yours faithfully

John Keeves  
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**BLS**

## Review of the Personal Property Securities Act 2009

### Consultation Response Template

#### Consultation Paper 2

#### 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 2. 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
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#### **2.2 Rights in the collateral**

*Should bare possession constitute sufficient rights in collateral to support attachment of a security interest and, if so, on what basis?*

Comments:

Yes. Any kind of property right, including possession, should be sufficient for attachment purposes.

Bare possession should be sufficient for attachment purposes as repeatedly recognised by the courts in Canada, New Zealand and in Australia (see *Maiden Civil* [2013] NSWSC 852). While a security interest may attach to collateral in which the grantor only has a bare right of possession, that security interest can be defeated by the true owner when the PPSA and/or its priority rules do not apply to the owner's interest. We respectfully refer to the commentary on s19 in Wappett, Whittaker & Edwards, *Personal Property Securities in Australia* (LexisNexis), annotated statute at [PPSA.19.A].

Section 19 (5) is illustrative only, it is not intended to be exhaustive. Section 19(5) does not address all cases where there might be questions raised about whether the grantor has rights in the collateral.

#### **2.2 Rights in the collateral**

**Proposed recommendation 2.1:** *That s 19(5) be amended to clarify that it applies to all security interests in favour of a secured party that owns the collateral, where the security interest is founded*

<b>2.2 Rights in the collateral</b>	
<i>on the grantor's possession of the collateral.</i>	
Do you agree with the proposed recommendation?	Yes
Comments:	
Refer comments above. While there is some support for the entire repeal of section 19(5), it is appreciated that it can prove useful as a quick way of ascertaining whether there has been attachment in many common cases (e.g. retention of title, PPS leases).	

<b>2.3 The power to transfer rights in the collateral to the secured party</b>	
<b>Proposed recommendation 2.2:</b> <i>That s 19(2)(a) be amended to read:</i> <i>"(a) the grantor has rights in the collateral; and"</i>	
Do you agree with the proposed recommendation?	Yes
Comments:	

<b>2.4 The need for a security agreement</b>	
<i>Should s 19 make explicit that a security interest can only attach if there is a security agreement?</i>	
Comments:	
No real need to amend s19 to say this. In our view it is clear the Act only applies to consensual transactions.	

<b>3.1 Section 18 - general rules about security agreements</b>	
<b>Proposed recommendation 2.4:</b> <i>That ss 18(2) and (4), and the definition of "future advance" in s 10, be deleted.</i>	
Do you agree with the proposed recommendation?	No
Comments:	
PPSA, s.18(2) makes it clear that the old common law and equitable rules governing mortgages of future property no longer apply. There is now a simple statutory rule, as set out in the provision. A security interest in future property is a statutory security interest and the pre-PPSA distinction between legal and equitable mortgages is no longer relevant.	
Section 18(4) makes it clear that a security agreement may cover future advances and that there are no formal requirements that need to be satisfied, beyond a statement in the security agreement that future advances are covered. Additionally, the provision, read in conjunction with the definition of "future advance" in s.10, makes it clear that a security interest may secure a future advance whether or not the secured party was under an obligation to make the future advance. The repeal of s.18(4) would be more likely to create uncertainty than to reduce complexity.	

<b>3.5 Proposed recommendation - Sections 3.2 to 3.4</b>	
<b>Proposed recommendation 2.5:</b> <i>That s 20(2) be recast along the lines set out above, and that ss 20(4) and (5) be deleted.</i>	

Do you agree with the proposed recommendation?	No
Comments:	
<p>We agree that s.20(4) and (5) are unhelpful and should be repealed. We also agree with proposed new s.20(2)(b)(ii). But we have concerns about paragraph (i) because it is unclear what “terms of the security interest” means. We assume the reference should be read as meaning the terms of the security agreement. But what terms must the writing contain: all the terms or just the essential terms and, if the latter, what are the essential terms? Our preference would be to say simply that the agreement must be evidenced by writing and that the writing must contain a description of the collateral that is sufficient to enable it to be identified.</p>	

<b>3.6 Situation where collateral is transferred</b>	
<b>Proposed recommendation 2.6:</b> <i>That s 20 be amended to make it clear that only the original grantor of a security interest over collateral needs to comply with s 20(2), not a person who becomes the grantor as the result of the collateral being transferred to it.</i>	
Do you agree with the proposed recommendation?	Yes
Comments:	

<b>4.2.1 Seizure or repossession</b>	
<b>Proposed recommendation 2.7:</b> <i>That the language “(other than possession as a result of seizure or repossession)” be deleted from s 21(2)(b).</i>	
Do you agree with the proposed recommendation?	No
Comments:	
<p>The majority Canadian and NZ approach is preferable in our view. Evidentiary issues around the timing of taking possession could be problematic in many enforcement/insolvency scenarios. Time of registration is easy to determine by comparison.</p>	

<b>4.2.2 Bearer investment instruments</b>	
<b>Proposed recommendation 2.8:</b> <i>That s 24(6) be amended to clarify that it only applies to a security interest over registrable investment instruments.</i>	
Do you agree with the proposed recommendation?	Yes
Comments:	

<b>4.3.2.2 Have we jumped the gun?</b>	
<i>Should the Act make specific provision for intermediated securities despite the issues identified in the discussion?</i>	
Comments:	
<p>The consultation paper does not identify specific practical problems arising from the current provisions. The intermediated securities provisions were the subject of extensive consultation prior to the enactment of the PPSA. In the absence of identifiable practical problems we would not support major changes to these provisions without comprehensive industry consultation.</p>	

**4.3.2.3 Are the options for perfecting by control appropriate?**

*Should the options for perfecting by control over an intermediated security be tightened, as identified in the discussion?*

Comments:

The suggestions made in the second paragraph of 4.3.2.3 have merit.

**4.3.2.4 Can the concept of an intermediated security be simplified?**

*Are there suggestions for simplifying the concept of an intermediated security?*

Comments:

We submit that specific industry consultation is required on this suggestion.

**4.3.2.5 What if the intermediary is itself the secured party?**

**Proposed recommendation 2.11:** *That it be made clear, if the concept of perfection by control over intermediated securities is retained, that the intermediary itself can also perfect a security interest by control over intermediated securities held with it.*

Do you agree with the proposed recommendation?

Yes

Comments:

**4.3.2.6 CHESS securities**

**Proposed recommendation 2.12:** *That the Act be amended so that shares or other securities listed on the Australian Stock Exchange and held through the CHESS system are investment instruments, rather than intermediated securities.*

Do you agree with the proposed recommendation?

Yes

Comments:

**4.3.2.7 Cash**

**Proposed recommendation 2.13:** *If the concept of perfection by control over intermediated securities is retained, that the Act be amended to allow a secured party to perfect by control over cash that is held via a custodian in the same way as it can perfect by control over other financial assets.*

Do you agree with the proposed recommendation?

No

Comments:

This change could potentially be used to defeat other secured parties in situations where cash represents the proceeds of other collateral that cannot be perfected by control.

**4.3.3.1 Scope of the concept**

*Should the definition of "investment instrument" be simplified, and if so, how? Should perfection by control be available in all such cases?*

Comments:

The concept should be simplified and defined within the PPSA. We agree with the comments in 4.3.3.1.

#### **4.3.3.2 The options for perfecting by control over an investment instrument**

*Should the options for perfecting by control over an investment instrument be simplified?*

Comments:

We submit this should be subject to consultation with relevant stakeholders. We are not encountering any real issues with these provisions in practice.

#### **4.3.4 Intermediated securities and investment instruments – greater consistency?**

**Proposed recommendation 2.16:** *That the mechanisms for perfection by control in ss 26 and 27 be made more consistent.*

Do you agree with the proposed recommendation?

Yes

Comments:

#### **4.3.5.1 Is the definition too narrow?**

*Is the term "ADI account" too narrow in some contexts?*

Comments:

Yes, it should not be limited to entities authorised to carry on banking business under the Banking Act.

#### **4.3.5.2 Should a secured party other than the ADI itself be able to perfect by control?**

*Should a secured party other than the ADI itself be able to perfect over an ADI account by control, e.g. by entering into a control agreement with the ADI or by taking over the account?*

Comments:

As noted in 4.3.5.2 adequate options are available and it may not be desirable to further expand the categories of secured party who can perfect by control and therefore obtain a super priority. Note our response to proposed recommendation 2.13.

#### **4.3.5.3 Should perfection by control be automatic?**

*Should an ADI's security interest over an ADI account held with it be automatically perfected by control?*

Comments:

Agree with the comments at 4.3.5.3.

**4.3.6 Negotiable instruments that are not evidenced by a certificate****Proposed recommendation 2.18:** *That ss 21(2)(c)(iv) and 29 be deleted*

Do you agree with the proposed recommendation? No

Comments:

The provision for perfection by control of an uncertificated negotiable instrument was intended as a substitute for perfection by possession (possession being impossible if the instrument is uncertificated). Rather than just repealing ss 21(2)(c)(iv) and 29, it might be better to say that, for the purposes of s.21, a secured party is deemed to have possession in the circumstances s.29 describes. Banks routinely have bill facilities with no physical bills although they have powers of attorney to create them if required.

**4.3.7 Letters of credit***Should ss 21(2)(c)(v) and 28 be deleted?*

Comments:

These provisions should remain as is in our view.

**4.3.8 Satellites and other space objects****Proposed recommendation 2.20:** *That s 20(2)(c)(vi) be deleted.*

Do you agree with the proposed recommendation? Yes

Comments:

**4.3.9 Performance bonds and bank guarantees?***Should the ability to perfect by control be extended to performance bonds and bank guarantees?*

Comments:

No.

**4.4.2.1 Five business days****Proposed recommendation 2.22:** *That the references in ss 22(2), 33(2), 34(1), 35, 36, 38, 39 and 40 to "five business days" be replaced with "10 business days".*

Do you agree with the proposed recommendation? Yes

Comments:

**4.4.2.2 56 days****Proposed recommendation 2.23:** *That the references in ss 39 and 40 to "56 days" be replaced with "60 days".*

Do you agree with the proposed recommendation? Yes

Comments:

**4.4.2.3 The effect of expiry of a period of temporary perfection**

**4.4.2.3 The effect of expiry of a period of temporary perfection**

**Proposed recommendation 2.24:** *That ss 22, 39 and 40 be amended to provide that temporary perfection simply expires at the end of the period provided for in the section.*

Do you agree with the proposed recommendation? Yes

Comments:

**4.5 Other methods of perfection**

*Should a transfer of an account or chattel paper also be able to be perfected by notice to the obligor, or by taking control of payments?*

Comments:

No. The existence of a comprehensive electronic register makes *Dearle v. Hall* unnecessary. Furthermore, *Dearle v. Hall* is not practical for the assignment of future accounts and it may not be practicable if the assignment covers multiple existing accounts. We agree with the point made in the consultation paper that the proposal would require a prospective assignee to search twice: once in the PPS register and again by making inquiries of the account obligor.

**4.6.1 Section 56**

**Proposed recommendation 2.25:** *That s 56 be amended to reflect the language of s 23(1) of the Sask PPSA.*

Do you agree with the proposed recommendation? Yes

Comments:

**4.6.2 Re-perfection**

*Should a version of Sask PPSA s 35(7) be included in the Act?*

Comments:

We agree with the comments in the consultation paper on this point.

We disagree with the suggestion that the courts should be given discretion to provide relief for registration errors. A provision along these lines would make the outcome of priority disputes and the like less certain and so it would increase litigation and impede settlements. The recent decision in *SFS Projects Australia Pty Ltd v Registrar of Personal Property Securities [2014] FCA 846* is most unfortunate in our view (s.186 should be amended to address this outcome).

**5.1 Terminology**

**Proposed recommendation 2.26:** *That careful consideration be given to the ways in which the Act refers to dealings in collateral, that consistent terminology be used where appropriate, and that it be made clear, if different terms are used in different contexts, what the differences in meaning are as between those different terms.*

Do you agree with the proposed recommendation? Yes

Comments:

**5.2.1 The effect of a lease on a security interest over the leased goods - Policy issues**

**5.2.1 The effect of a lease on a security interest over the leased goods - Policy issues**

*What should the implications be for a security interest if the collateral is dealt with in different ways, including by lease? What is the conceptual basis for this, and how does it impact on other aspects of the Act?*

Comments:

Any lease that is a security interest subject to the Act (whether in substance or as a PPS lease) should be the same as any other form of security interest. We do not think it is correct to say they are all treated as "sales" because non-finance leases that are still PPS leases do maintain the lessor's reversionary rights, subject to the lessor's interest being properly perfected.

**5.2.2 Fact pattern 3 – effect of s 267**

*As a subset of the question in Section 5.2.1, what should happen to a security interest over leased goods if s 267 applies to the lease?*

Comments:

The PPSA provides, in effect, that an unperfected security interest is ineffective in insolvency proceedings, subordinate to a competing perfected security interest and ineffective against a third party buyer. The lessor's unperfected security interest is vulnerable on all these fronts and the lessor SP's security interest is correspondingly vulnerable. The Lessor SP should ensure that Lessor perfects its security interest.

We are not in favour of the suggestions relating to sublease claims mentioned in 5.2.3.

**5.3.2 The meaning of "continues in the collateral"**

*Should "continues in" in s 32(1)(a) be replaced with "remains attached to"?*

Comments:

We do not think this change is necessary but do not object to it.

**5.3.5 A possible alternative**

**Proposed recommendation 2.28:** *That s 32(1) be amended along the lines described above.*

Do you agree with the proposed recommendation?

Yes

Comments:

**5.3.6.2 Is the limitation appropriate?**

*Is the limitation in s 32(2) appropriate?*

Comments:

Yes. The limitation is only relevant in cases where the secured party did not authorise the disposal giving rise to the proceeds and neither s.46 nor any of the other taking free provisions applies.

The consultation paper suggests that the limitation may penalize the secured party if the market value of the collateral increases after the dealing, because it caps the secured party's recovery to the

**5.3.6.2 Is the limitation appropriate?**

value of the goods at that date. However, the provision only applies if the secured party chooses to enforce its security interest against both the collateral and the proceeds. If the market value of the original collateral has increased, the secured party may choose instead to enforce its security interest against the original collateral alone.

The consultation paper suggests that the provision is inappropriate where the proceeds take the form of, for example, rent earned from hiring out the collateral or royalties earned from licensing the collateral. But we do not see why the provision should be inapplicable in cases like this. The mischief is the same as in cases where the grantor receives cash proceeds or a trade-in from selling the goods. In both types of case, the secured party may obtain a windfall if it can enforce its security interest in the original collateral and the proceeds without the limitation s.32(2) provides for.

The consultation paper suggests that the windfall effect s.32(2) addresses “is more perceived than real, as it is only an issue if the secured party was under-secured”. This may be true, but it is not uncommon for secured parties to be under-secured and in principle it is wrong for an under-secured secured party to benefit from the fact that the grantor happens to have sold the collateral without authority. Removing the limitation would at least partially relieve the under-secured secured party from the consequences of its failure to take adequate security in the first place.

Having regard to the policy underlying s.32(2), s.32(3) makes no sense. Section 32(3) should be repealed.

**5.3.7 Section 32(5) - priority in relation to proceeds**

*Is the rule in s 32(5) too narrow?*

Comments:

We agree with the suggestion to remove the two references to “possession”. In our view no other changes are necessary.

**5.4.1.2.3 Rationale for the variations in usage**

*(a) Should the references to "value" or "new value" in the taking free rules be made more consistent?  
(b) Should any "new value" be required to be more than nominal?*

Comments:

- (a) Yes
- (b) No

**5.4.1.3 The "knowledge qualifier"**

*Should the knowledge qualifiers in the taking free rules be made more consistent?*

Comments:

Yes

**5.4.1.4 Meaning of "buyer" and "lessee"**

*Should the meaning of "buyer" derive from the general law, or be specific to the Act?*

Comments:

We think the general law meaning of buyer is sufficient. In relation to the point about a grantor who does not have title being a seller, we think s79 already deals with this adequately.

**5.4.2.1.2 Non-application to inventory**

**Proposed Recommendation 2.34:** *That s 44(2)(a) be deleted.*

Do you agree with the proposed recommendation?

Yes

Comments:

**5.4.2.1.3 What types of serial-numbered property should s 44 apply to?**

*Should s 44 be limited to motor vehicles?*

Comments:

No. Watercraft also includes many non-business assets so the distinction between motor vehicles and watercraft seems artificial.

Secured parties do not need to register against serial numbers for commercial property (other than aircraft) and most sensible secured parties exercise appropriate discretion as to when there is a benefit in doing so. The current provisions are working satisfactorily.

**5.4.2.2 Section 45(1) - the "day and a half" rule**

*Should the "day and a half" rule be deleted, or limited so that it only operates in favour of individuals?*

Comments:

The purpose of the day and a half rule is to address the case where a prospective buyer searches the register on Day 1, SP registers a financing statement on Day 2 and the buyer completes the purchase on Day 3. The day and a half rule avoids the need for the buyer to conduct a second search on Day 3 to guard against the risk of registrations in the meantime. The rationale is that most buyers are not sophisticated enough to realize the need for the second search. The consultation paper suggests that the provision may no longer be necessary because the PPS Register is very easy to search. On balance, we think the provision should be retained, but we agree that it makes sense to limit the provision to individuals. We also agree that the drafting of the provision could be simplified.

**5.4.2.3 Section 45(3) - prescribed dealers**

**Proposed recommendation 2.37:** *That s 45(4)(c) be deleted.*

Do you agree with the proposed recommendation?

Yes

Comments:

**5.4.3 Section 46 - transactions in the ordinary course of business**

<b>5.4.3 Section 46 - transactions in the ordinary course of business</b>	
<b>Proposed recommendation 2.38:</b> <i>That s 46(2)(a) be deleted.</i>	
Do you agree with the proposed recommendation?	Yes
Comments:	

<b>5.4.3 - Section 46 - transactions in the ordinary course of business</b>	
<i>Should s 46 only allow a buyer or lessee to take free of a security interest granted by the seller or lessor, or of all security interests?</i>	
Comments:	
No. Subject to proposed recommendation 2.38, the current scope of s46 is appropriate, particularly when seen in the context of the other available taking free rules.	
<b>5.4.3 - Section 46 - transactions in the ordinary course of business</b>	
<i>Does it matter that the taking free rules can overlap?</i>	
Comments:	
No.	

<b>5.4.4 Section 47 - the "low-value personal-use property" taking free rule</b>	
<b>Proposed recommendation 2.40:</b> <i>That the taking free rule in the s 47(1) be amended as described above.</i>	
Do you agree with the proposed recommendation?	Yes
Comments:	

<b>5.4.5 Section 50 - investment instruments</b>	
<b>Proposed recommendation 2.41:</b> <i>That s 50 be deleted.</i>	
Do you agree with the proposed recommendation?	No
Comments:	
The section is consistent with control (or possession of share certificates in the case of certificated instruments) providing more effective security for investment instruments. This is consistent with long-standing practices. We agree it should be clarified whether the section operates in favour of another secured party.	

<b>5.4.6 Section 51 - intermediated securities</b>	
<i>Should s 51 be retained?</i>	
Comments:	
Yes, in the absence of compelling reasons to delete it. As noted above, industry consultation is essential if this provision is to be repealed.	

**5.4.7 Section 52 - temporarily perfected security interests**

**Proposed recommendation 2.43:** *That s 52(1) be amended by replacing the references to proceeds, goods or negotiable documents of title with references to "personal property", and that s 52(2) be amended so that any buyer or lessee can rely on s 52(1) unless they had the requisite knowledge at the time that they entered into the agreement to buy or lease the property.*

Do you agree with the proposed recommendation? Yes

Comments:

**5.4.8 Section 69 - creditor who receives payment of a debt**

**Proposed recommendation 2.44:** *That the language of s 69 be tailored more closely to Australian market conditions, and that it be explored whether the rules in ss 48 and 69 can be more closely aligned.*

Do you agree with the proposed recommendation? Yes

Comments:

**5.4.9 Section 70 - negotiable instruments**

(a) *Should the definition of negotiable instrument be aligned with its general law meaning?*  
 (b) *Should s 70 be deleted?*

Comments:

- (a) Yes.
- (b) No. It is useful to retain s70 despite s256.

**5.4.11 Section 72 - negotiable documents of title**

*Is the taking free rule in s 72 appropriate?*

Comments:

We believe s.72 is appropriate.

**5.4.12 Section 53 - subrogation**

**Proposed recommendation 2.47:** *That s 53 be deleted.*

Do you agree with the proposed recommendation? Yes

Comments:

**5.4.13 Section 37 - reattachment of a security interest**

**Proposed recommendation 2.48:** *That s 37 be amended to make it clear that it only applies if the effect of the buyer or lessee taking the goods free of a security interest is that the security interest ceases to be attached to the goods, and that ss 37 and 38 be amended to ensure that they apply appropriately for all types of security interests.*

Do you agree with the proposed recommendation? No

Comments:

**5.4.13 Section 37 - reattachment of a security interest**

We find the commentary on this issue a bit confusing and would like to see the precise wording of the changes proposed before commenting. The effect of s37 should be that if a non-security lease ends for the various reasons indicated the right of possession reverts to the lessor and is subject to the security interest granted by the lessor. The reference to "re-attach" is misleading but we are concerned the proposed amendment might undercut the intended purpose of the section.

**5.4.14 Interaction with taking free rules outside the Act**

*Should the taking free rules in the Act be exhaustive, or should taking free rules outside the Act be able to apply as well?*

Comments:

We think s254 adequately deals with this issue as a practical matter.

**5.5.1 Potential overlap with Part 3.4**

**Proposed recommendation 2.50:** *That the definition of "accession" in s 10 be amended to clarify that goods will not be an accession to other goods if their identity has been lost in the other goods in a way that engages the application of Part 3.4 of the Act.*

Do you agree with the proposed recommendation?

No

Comments:

This is not necessary.

**5.5.2 Terminology - "continues in"**

**Proposed recommendation 2.51:** *That references in Part 3.3 of the Act to a security interest "continuing in" collateral be amended to refer to the security interest "remaining attached to" the collateral.*

Do you agree with the proposed recommendation?

No

Comments:

**5.5.3 Section 90 - competitions with an interest in the whole**

**Proposed recommendation 2.52:** *That s 90(b) be deleted.*

Do you agree with the proposed recommendation?

Yes

Comments:

**5.6.1 Should processed and commingled goods be dealt with separately?**

**Proposed recommendation 2.53:** *That Part 3.4 of the Act be split into two, and that commingled goods be dealt with separately, in accordance with the principles described above.*

Do you agree with the proposed recommendation?

Yes

Comments:

Subject to seeing the proposed drafting.

**5.6.2 Deemed perfection***Should the application of s 100 be expanded?*

Comments:

As currently drafted, s.100 does not apply where the competition is with a party other than a secured party (for example, an ordinary course buyer of the end product or the grantor's liquidator or trustee). The provision also does not apply to the PMSI priority rules in s.62, presumably because s.103 enacts special priority rules for competing purchase-money security interests in commingled goods.

There may be an argument for expanding s.100 to cover s.267. But we think the other cases indicated above should remain outside the reach of the provision.

**5.6.3.1 Competition with a security interest over the whole***(a) Do you agree with the explanation provided for s 101?**(b) Should s 101 apply to the value of the goods when processed, or when the security interest is enforced?*

Comments:

- (a) We think the section should operate as a cap on the amount recoverable, consistent with s32(2).
- (b) The section should apply to the value of the goods when processed.

**5.6.3.2 Competition with another continuing security interest****Proposed recommendation 2.56:** *That ss 102 and 103 be amended to reflect the principles set out above.*

Do you agree with the proposed recommendation?

No

Comments:

The commentary in the consultation paper is not clear enough about the proposed amendments. We do not think the existing provisions are particularly problematic.

**5.7.1 Grantor must have an interest in the proceeds***Of the options provided to explain the role of s 31(3)(a)(i), which is preferred, and why?*

Comments:

The first interpretation is preferred. The provision is referring to the original grantor. The drafting reflects the bifurcated meaning of "debtor" in the overseas PPSAs where the debtor can mean both the obligor in respect of the secured debt and the grantor of the security interest.

**5.7.1 Grantor must have an interest in the proceeds****Proposed recommendation 2.57:** *That the words "an interest" in s 31(3)(a)(i) be replaced with "rights", and that s 19(5) be amended to refer to s 31(3)(a) as well as s 19(2)(a).*

Do you agree with the proposed recommendation?

No

**5.7.1 Grantor must have an interest in the proceeds**

Comments:

We agree with the change to s31(3)(a)(i). As noted earlier, section 19(5) could be repealed.

**5.7.2 Grantor can instead have the power to transfer rights in the proceeds to the secured party****Proposed recommendation 2.58:** *That s 31(3)(a)(ii) be deleted.*

Do you agree with the proposed recommendation?

Yes

Comments:

**5.7.3.1 Description of the proceeds in the financing statement***Should perfection over proceeds be automatic, if the security interest in the original collateral was perfected by registration?*

Comments:

No. Leave the provisions in the Act and the regulations as they are.

**5.7.3.2 Description of the proceeds as original collateral****Proposed recommendation 2.60:** *That s 33(1)(b) be deleted or, if it is retained, that it be amended to make it clear that the security interest is perfected over the proceeds if the proceeds are within the collateral description of any current financing statement made by the secured party against the grantor, not just the same financing statement.*

Do you agree with the proposed recommendation?

No

Comments:

In our view this change is unnecessary.

**5.7.3.3 Liquid proceeds***Is the rule in s 33(1)(c) appropriate?*

Comments:

Yes. No change is required given the other take free and priority rules in the Act.

**5.7.3.4 Temporary perfection****Proposed recommendation 2.62:** *That "in the collateral" be inserted after "interest" in line 3 of s 34(1).*

Do you agree with the proposed recommendation?

Yes

Comments:

We think the meaning is already clear but no harm in making this change.

#### 5.7.3.4 Temporary perfection

#### 5.8.1 Section 79 - transfers of collateral despite a prohibition in the security agreement

(a) *Is s 79 appropriate?*

(b) *If so, should it extend beyond transfers to include security interests?*

Comments:

(a) Yes, it is necessary and consistent with the overall policy objectives of the Act – treating all security interests alike regardless of their legal form and who has title.

(b) Yes.

#### 5.8.2 Section 80 - rights of parties on transfer of an account

*Is s 80(3) appropriate?*

Comments:

Yes.

#### 5.8.3 Section 81 - transfer prohibitions in a transferred account

(a) *Is s 81 appropriate?*

(b) *If so, should it apply to security interests as well as transfers?*

(c) *Should the definition of "currency" be changed?*

Comments:

(a) Yes

(b) Yes

(c) Should refer to money rather than currency.

#### 6.1 When is priority determined?

*What point in time should be used to resolve priority disputes?*

Comments:

We favour the approach that has been taken by the Courts in Canada and New Zealand, ie when the security interests come into conflict. Any other approach is likely to produce unfair results more often.

#### 6.2 - Section 55(2) - priority as between two unperfected security interests

**Proposed recommendation 2.67:** *That the Act be amended to make it clear that priority as between two unperfected security interests that attach to collateral at the same time is to be determined by the order in which the security agreements were entered into.*

Do you agree with the proposed recommendation?

Yes

Comments:

<b>6.2 - Section 55(2) - priority as between two unperfected security interests</b>

<b>6.3 - Section 55(5) - the "priority time" for a security interest</b>
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<b>Proposed recommendation 2.68:</b> <i>That s 55(5) be amended as described above.</i>	
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Do you agree with the proposed recommendation?
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No
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Comments:
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We agree that s.55(5) could be simplified, but we do not agree with the proposed new wording. The reference in proposed paragraph (b) to “the time at which the security interest becomes perfected” is likely to be read as meaning the time at which the security interest achieves perfected status within the meaning of s.21. According to s.21, a security interest becomes perfected when the relevant perfecting step has been taken (registration, possession, etc) and the security interest has attached.

The rules in s.55 should not turn on the order of perfection in the s.21 sense. Rather, they should turn on the order in which the relevant perfecting steps were taken. For example, in a competition between a security interest perfected by registration and a security interest perfected by possession, priority should turn on the dates of registration and possession, respectively.

<b>6.4.1 Should perfection by control enjoy a superior priority?</b>
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<i>Should a security interest perfected by control have a superior priority for each type of collateral for which this is possible?</i>
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Comments:
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We do not think there is a need to change the current priority position for security interests perfected by control. Any proposed changes would need to be subject to stakeholder consultation.

<b>6.4.2 - Section 57(2) - priority as between security interests that are both perfected by control</b>
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<b>Proposed recommendation 2.70:</b> <i>That s 57(2) be deleted if the Act is amended so that only one security interest at a time can be perfected by control over the same item of collateral, or otherwise that it be amended to provide, if more than one security interest is perfected by control over an item of collateral at the same time, that priority is afforded to the security interest for which the control mechanisms are put in place first.</i>	
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Do you agree with the proposed recommendation?
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Yes
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Comments:
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<b>6.4.3 Section 57(2A) - proceeds of collateral under a security interest that is perfected by control</b>
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<i>Should s 57(2A) be deleted?</i>
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Comments:
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Yes.

<b>6.5 - Section 58 - priority of advances</b>	
<b>Proposed recommendation 2.72:</b> <i>That s 58 be amended to read along these lines:</i>	
<i>"A security interest has the same priority for all amounts and obligations secured by it, whether they are incurred or arise before or after the security interest arises."</i>	
Do you agree with the proposed recommendation?	No
Comments:	
This change is unnecessary. Note the response to proposed recommendation 2.4.	

<b>6.6 - Section 59 - circular priority systems</b>	
<b>Proposed recommendation 2.73:</b> <i>That s 59 be deleted.</i>	
Do you agree with the proposed recommendation?	Yes
Comments:	

<b>6.7 - Section 61 - priority agreements</b>	
<b>Proposed recommendation 2.74:</b> <i>That the language of s 61 and other relevant sections in the Act be amended to refer to "priority agreements", rather than "subordination".</i>	
Do you agree with the proposed recommendation?	Yes
Comments:	

<b>6.8.1.1 Leases that are in-substance security interests</b>	
<b>Proposed recommendation 2.75:</b> <i>That s 14(1) be amended to make it clear that it captures all leases that are security interests, whether or not they are a PPS lease.</i>	
Do you agree with the proposed recommendation?	Yes
Comments:	
This is not necessary as it is clearly intended that leases that are "in substance" security interests will be PMSIs. However, we see no harm in making this change.	

<b>6.8.1.2 Sale and lease-backs</b>	
<i>What types of sales and lease-backs, if any, should be able to be PMSIs?</i>	
Comments:	
Sale and leaseback should not qualify as a PMSI in any circumstances for the reasons mentioned in the consultation paper. It is always open to the parties to enter into a priority agreement if a sale and leaseback is necessary.	

<b>6.8.1.3 Personal, domestic or household goods</b>	
<b>Proposed recommendation 2.77:</b> <i>That ss 14(2)(c) and (2A) be deleted.</i>	
Do you agree with the proposed recommendation?	Yes
Comments:	

**6.8.1.3 Personal, domestic or household goods**

We agree with the proposed recommendation. We understand these sections were originally included because there was a concern that if the personal assets of directors could be the subject of a PMSI this would erode the value of directors' guarantees. This always seemed to us to be totally misconceived.

**6.8.1.4 Should PMSIs be able to be cross-collateralised?**

*Should PMSIs be able to be cross-collateralised?*

Comments:

Yes.

**6.8.1.5 Use of the term "PMSI" in the Act**

*Should the use of the term "PMSI" in the Act clarify whether the reference is to any PMSI, or only to a PMSI that has the s 62 priority?*

Comments:

We do not think this is necessary. The intention is evident in the relevant provisions when read in the context of the Act as a whole.

**6.8.1.6 Refinancing a PMSI**

**Proposed recommendation 2.80:** *That s 14(5) be expanded to make it clear that a security interest that replaces a PMSI can also be a PMSI, and can inherit the replaced PMSI's priority status.*

Do you agree with the proposed recommendation?

Yes

Comments:

Subject to seeing the drafting changes proposed.

**6.8.2.1 The timeframe for registration - When should the time period start?**

*Should the PMSI registration timeframe run from when the grantor obtains possession, or from when the secured party provides funds?*

Comments:

From when the grantor obtains possession. The alternative approach would undermine the reliability and utility of the register.

**6.8.2.2 The timeframe for registration - Capacity in which the grantor has possession**

*If the PMSI timeframe runs from when the grantor obtains possession, should the time period only start when the grantor has possession in its capacity as grantor?*

Comments:

Yes.

**6.8.2.3 The timeframe for registration - How long should the time period be?**

*Should the timeframe for all PMSI registrations, including for inventory, be 15 business days?*

Comments:

No. We are in favour of having consistent timeframes wherever possible (and in this regard, we note the suggested abolition of section 588FL of the Corporations Act as noted in consultation paper No. 3 to which we will respond in due course). However, we submit that in respect of inventory suppliers, the existing timeframes in the PPSA should continue. Inventory suppliers usually have an ongoing relationship with the grantor whereas non-inventory PMSI holders often do not. The current arrangements provide greater transparency and are reasonable.

**6.8.3 Should the registration need to indicate that the security interest is a PMSI? Should a PMSI financier be required to take other steps to notify prior secured parties of its PMSI?**

*(a) Should the registration need to indicate that the security interest is a PMSI?*

*(b) Should a PMSI financier be required to take other steps to notify prior secured parties of its PMSI?*

Comments:

(a) No.

(b) No. The consultation paper suggests that if no further steps are required a prior secured party has no means of knowing if subsequent PMSI claims are being made. We do not think this is correct. If the prior secured party searches it will see the subsequent registrations (even though they do not specifically indicate a PMSI is being claimed) and, if the suggestion we have made previously about making a collateral description compulsory is adopted, collateral descriptions can indicate the nature of the claim is a PMSI (market practices seem to be trending strongly in this direction already even without the compulsory collateral description requirement). In our view this approach is relatively simple and more informative for all concerned. As the consultation paper notes, most secured parties with all assets security do not fund against inventory in any event.

**6.9.1 The priority rule, and the policy behind it**

*Is it appropriate for s 64 to allow an accounts financier to rank ahead of prior registered PMSIs, not just later ones?*

Comments:

It is understood that this policy was the subject of consultation prior to the enactment of the PPSA. No response is offered on this point.

**6.9.3.1 Non-PMSI security interests?**

*Should s 64 enable an accounts financier to defeat prior security interests that are not PMSIs, if they are held by a secured party who also has a PMSI?*

Comments:

**6.9.3.1 Non-PMSI security interests?**

If s64 is retained we submit the current limitations in it are appropriate.

**6.9.3.2 PMSIs granted by a different grantor?**

*Should s 64 only apply to PMSIs that are granted by the same grantor?*

Comments:

Yes.

**6.9.3.3 PMSIs perfected other than by registration?**

*Should s 64(1)(a) only refer to PMSIs that have an earlier registration time?*

Comments:

No. The current wording is still useful to determine whether a PMSI holder who does perfect other than by registration has priority.

**6.9.4 The nature of the registration**

**Proposed recommendation 2.85:** *That s 64 be amended to require that the relevant registration be against the collateral class "accounts".*

Do you agree with the proposed recommendation?

Yes

Comments:

It can be argued that s64 already requires this but it is not clear.

**6.9.5 The notice process**

**Proposed recommendation 2.86:** *That s 64(1)(b) be amended to provide that the "priority interest" in an account will take priority over existing perfected purchase money security interests, and purchase money security interests that have an earlier registration time (if that language is retained), if the priority interest is perfected, and the non-PMSI financier's security interest first attaches to the account at least 15 business days after it gives notice to the secured party in accordance with s 64(2).*

Do you agree with the proposed recommendation?

Yes

Comments:

**6.9.6 To whom should the notices be given?**

*Should s 64 only require that notices be given in relation to security interests that claim to be a PMSI?*

Comments:

No.

<b>6.9.7 What should the notices say?</b>	
<b>Proposed recommendation 2.87:</b> <i>That s 64(2)(b) be amended as described above.</i>	
Do you agree with the proposed recommendation?	Yes
Comments:	

<b>6.10 Section 73 - interests that arise by law - trustee's liens</b>	
<i>Should a trustee's lien be subordinated to a perfected security interest over the trust assets?</i>	
Comments:	
Yes. As noted in the consultation paper this issue arises due to the current registration requirements where the grantor is a trustee.	

<b>6.11 Does the section reflect Australian practice?</b>	
<b>Proposed recommendation 2.89:</b> <i>That s 74(4)(a) be deleted.</i>	
Do you agree with the proposed recommendation?	No
Comments:	
It would be better to amend the wording to reflect the precise execution process if required.	

<b>6.11.2 Application to future property</b>	
<b>Proposed recommendation 2.90:</b> <i>That s 74(1) only allow an execution creditor to have priority over a security interest, if the "priority time" for the security interest is after the date specified in the section.</i>	
Do you agree with the proposed recommendation?	Yes
Comments:	
The reference in s.74(1) is, or should be, to the relevant perfecting step, not the state of perfection.	

<b>6.11.3 Application to interests that are not security interests</b>	
<b>Proposed recommendation 2.91:</b> <i>That s 8(2) and reg 1.4(5)(b) be amended to make it clear that s 74 can only afford an execution creditor priority over another interest if that other interest is subject to the Act.</i>	
Do you agree with the proposed recommendation?	No
Comments:	
We do not see that this is necessary.	

<b>6.12 Section 76 - security interests with different grantors</b>	
<b>Proposed recommendation 2.92:</b> <i>That s 76(3) be amended as described above.</i>	
Do you agree with the proposed recommendation?	Yes
Comments:	

**6.13 Sections 85 and 86 - crops and livestock**

*Should s 85 be amended so that it does not override PMSIs?*

Comments:

Yes.

**6.13 Sections 85 and 86 - crops and livestock**

*Should s 85 and s 86 be deleted?*

Comments:

Subject to consultation with stakeholders in the agribusiness sector, we would have no objection to the deletion of ss85 and 86.