

## **SECOND READING SPEECH**

### **Personal Property Securities (Commonwealth Powers) Bill** **2010**

The review of Personal Property Securities legislation is a part of the national business and regulatory law reform agenda agreed to by the Council of Australian Governments.

The Bill I am bringing forward now replaces a similarly named Bill tabled in this House in November 2009 but was not dealt with prior to Parliament rising.

While having the same effect as the 2009 Bill this Bill has had to be redrafted to take into account amending legislation passed by the Commonwealth in November 2009 and June 2010.

The Commonwealth legislation will allow for a uniform system of registration and regulation of security interests in personal property across all States and Territories.

The commitment by the States to refer legislative power to the Commonwealth is reflected in the Intergovernmental Personal Property Securities Law Agreement signed by the Council of Australian Governments on 2 October 2008.

By way of background, Personal Property Securities reform had been considered in some detail in the early 1990s but there was at that stage little interest from the finance sector who would be the main users of the registration scheme.

In 1999 a New Zealand Personal Property Securities system was introduced which subsequently received positive responses from New Zealand business stakeholders when it was reviewed a few years after it commenced. Those stakeholder views were taken up by Australian financiers and banks who raised the question of uniform or national laws to cover securities over personal property in Australia.

As a result the Standing Committee of Attorneys-General reinstated Personal Property Securities law reform on the national law reform agenda and established an officers working group to progress the matter.

In 2007, the Council of Australian Governments elevated the Personal Property Securities reform to become one of its national regulation reform priorities and provided in-principle support for establishing a single national system based on a referral of legislative power from the States to the Commonwealth.

Personal Property Securities can be broadly defined to mean interests in personal property by which a creditor has the right to take or keep possession of, or otherwise deal with that property, on the default of a debtor.

Personal property can mean any type of property that is not land or buildings.

Examples of tangible personal property include goods such as motor vehicles, boats, aeroplanes, office furniture, artworks, business machinery and equipment, stock-in-trade, crops and livestock, and financial property such as currency, chattel paper, and letters of credit.

Examples of intangible personal property include intellectual property rights (such as trademarks, copyright and patents), contract rights, uncertificated shares and transferable statutory rights created under Commonwealth, State and Territory laws.

Security interests in personal property include mortgages, bills of sale, charges and pledges as well as financing leases, hire-purchase agreements and retention of title agreements where a sale does not transfer ownership until full payment is received.

There are approximately 70 Commonwealth, State and Territory Acts governing various types of Personal Property Securities interests with a number of registers in each jurisdiction established under different Acts examples in Tasmania include the Bills of Sale Act and the Motor Vehicle Securities Act as well as legislation dealing with rights over stock, crops, water, mining and marine resources.

The creation, notification and enforcement of a security interest in personal property is currently dependent on the type of personal property being offered as collateral, the jurisdiction in which the property is located or the different laws under which the financing transaction occurs, the availability, or lack of availability, of registers on which these interests can be notified to the 'world at large' and in some instances, the use of outmoded systems of registration.

Related to these matters are some requirements for multiple registrations of security interests on different registers in relation to a single financing transaction (for instance bills of sale and motor vehicle securities), the payment of multiple sets of fees and often cumbersome registration and notification requirements for lenders, borrowers and consumers generally.

An Access Economics report commissioned by the Standing Committee of Attorneys-General in 2006 noted that the establishment of a single national law to govern Personal Property Securities interests with a single national online register would reduce the costs involved with the payment of various fees for multiple registrations and also reduce the hidden transaction costs associated with ensuring compliance with different laws, compliance with different registration requirements and, where necessary, the need to search different registers before determining whether the personal property in question is the subject of a security interest.

The report noted that implementing reforms in this area would increase certainty for lenders and borrowers and facilitate greater confidence in, and access to, secured lending that is characteristic of a competitive modern economy.

To that end, the Standing Committee of Attorneys-General and the Ministerial Council on Consumer Affairs have worked over the past three to four years to develop the scheme.

### ***The Commonwealth Personal Property Securities Act 2009***

The Personal Property Securities Bill was introduced into the Commonwealth Parliament on 24 June 2009 and was passed in late

November 2009. On the same day in November the Commonwealth also passed an Amendment Bill which dealt with a number of matters many of which resulted from the Senate's consideration of the original Bill and suggestions which were taken up by the Commonwealth Government.

Key features of the Commonwealth Personal Property Securities Act are that:

- the Act applies to all types of personal property with limited exceptions where for public policy reasons those types of property will continue to be governed by existing schemes or are not able to be used as collateral in the same way as other property;
- the Act applies the same rules to all types of security interests in personal property regardless of the form of the transaction, who the grantor of the interest is, or which State or Territory in which the transaction takes place;
- the Act sets out default rules for the creation, priority and enforcement of security interests in personal property such as when an interest is enforceable between parties and against third parties, how these rules can be enforced, and when security interests are extinguished;
- the Act provides for a central Personal Property Securities register and establishes rules relating to the lodgement of security interests on the register, the amendment of data on the register and notification requirements for relevant parties;
- the Act provides important privacy protection measures for individual debtors who have granted security interests in personal property and whose details are recorded on the Personal Property Securities register;
- the Act provides that it is intended to operate concurrently with State laws and specifies certain circumstances where State laws will prevail and certain circumstances where the Bill will prevail over State laws;
- the Act allows a State law to designate an interest in property created by that State law, such as a lien, to be a 'priority interest' which places that interest ahead of any competing Personal Property

Securities interests where a secured party seeks to enforce the interest;

- the Act confers concurrent jurisdiction on all levels of federal, State and Territory courts to hear and determine any disputes arising under the Personal Property Securities scheme;
- the Act contains a review clause requiring the Commonwealth government to review the scheme within three years after the date of commencement.

In June this year the Commonwealth passed further amendments to the *Personal Properties Securities Act 2009* to cover a number of matters related to the transition to the new scheme and made consequential amendments to the Corporations Act and other Commonwealth laws.

### **Tasmanian Referral Bill**

The Referral Bill reflects model referral legislation prepared by the Standing Committee of Attorneys-General and the Parliamentary Counsels Committee. Because the Commonwealth has now passed its legislation the terminology of this Bill differs a little from the Bills in Victoria, NSW and the other States which have passed their Referral Acts. Western Australia is developing a Bill similar to the Tasmanian Bill.

As the Commonwealth Act has now been passed the Tasmanian Bill refers to it in terms of “adoption” rather than “referral” although the legal effect will be the same – the Commonwealth will have the power to legislate to regulate the field of personal property securities.

All of the State Referral Bills provide an amendment reference to allow, with State approvals, the Commonwealth to make future legislative amendments to the PPS Act concerning a range of matters including security interests in personal property, the recording of security interests or information with respect to security interests in personal property on a register, the recording of other information with respect to personal property on that register, and the enforcement of security interests in personal property. Consultation with the States and Territories on proposed changes to PPS law will be run through the Standing Committee of Attorneys General.

There are two additional matters in the State Referral Bills in relation to security interests in fixtures and tradeable water rights.

This reflects an agreement between jurisdictions that the Personal Property Securities regime will not apply to security interests taken over tradeable water rights and over fixtures at this time. They may be taken under PPS at a later stage.

### Fixtures

Whilst the results of consultation with industry stakeholders supported allowing security interests in fixtures to be recorded on a national Personal Property Securities register there are matters that need to be addressed when attempting to designate fixtures as 'personal property' for the purposes of this scheme.

First, this would necessitate a substantive revision of current legal principles around the treatment of fixtures as real property under common law and under statute law as fixtures in effect become part of the land to which they have been attached.

The inclusion of fixtures on the Personal Property Securities register has significant potential to undermine the operation of the Torrens land titles system by affecting the indefeasibility of registered land titles on State land titles registers.

As a result, the Standing Committee of Attorneys-General has sought a detailed review of the current laws on fixtures and the implications of treating fixtures as personal property for the purposes of Personal Property Securities prior to any decision being taken over the future inclusion of fixtures in the national scheme.

The review is to be undertaken by the Australian Law Reform Commission in consultation with some of the State Law Reform Commissions. Terms of Reference for the Review are currently being finalised and the Commission is expected to report in by 30 June 2011.

### Tradeable Water Rights

Stakeholders had expressed an interest in the ability of financiers to register security interests in tradeable water rights on the Personal Property Securities register.

It is noted that currently certain water rights are used as collateral for lending under Bills of Sale registered under Tasmanian law. They are also recorded and the interests of creditors are to some extent protected by registers of water interests maintained by the Department of Primary Industry, Parks, Water and Environment.

Work is being undertaken on the development of a national registration scheme for water interests under the auspices of the Council of Australian Governments. The COAG Working Group on Climate Change and Water has agreed that security interests in water rights should be excluded from the Personal Property Securities scheme at least for the time being.

The inclusion of the amendment reference in the State Referral Bill with respect to tradeable water rights, which can if necessary be activated at a later date, will allow for the Personal Property Securities regime to cover such rights should Governments agree in future that the Personal Property Securities register is the best mechanism by which security interests in those rights should be regulated.

The State Referral Bill includes separate commencement provisions for both tradeable water rights and fixtures through proclamation by Governor in Council which can be activated when these matters are resolved.

## **Other rights and licences**

As a means of ensuring that the coverage of the Personal Property Securities scheme captures most personal property of particular commercial value, jurisdictions have agreed that generally statutory licences, rights, entitlements, or authorities created by Commonwealth, State or Territory laws can be dealt with as 'personal property' to enable security interests to be lodged against them on the Personal Property Securities register.

There are a number of commercial licences issued under statute by the Commonwealth and the States - for example, intellectual property licences, fisheries licences or taxi licences, which are currently used as collateral by the licence-holders in order to obtain financing for their business.

The State Referral Bill makes clear, however, that the referral of powers to the Commonwealth does not include provision for the Commonwealth to make laws in a manner that would exclude or limit the operation of a State law that deals with the creation, holding, transfer, assignment, disposal or forfeiture of a State statutory right.

Statutory licences and entitlements are a creation of the State legislation used primarily for regulatory purposes and for the good governance of the State and in many cases such as marine resources and water for the proper husbanding of those resources.

Other Departments are working with the Department of Justice to examine whether specific licences should be excluded from the national scheme and whether any existing provisions relating to securities over or transfer of licences need to be strengthened. Many licences already have safeguards built in about transfers but any licences identified for exclusion or in need of additional safeguards will be the subject of consequential amendments before the national Personal Property Securities scheme comes into effect to prevent inappropriate dealings with licences.



To ensure the State's ability to continue to control its own licences the Referral Bill does not extend to providing the Commonwealth with power to exclude or limit a State law that limits, restricts or prohibits the kinds of interests that may be created or held in such statutory rights or the type of person or body that may create or hold interests in those rights.

Parties to financing transactions using such licences or entitlements as collateral will not be able to circumvent the effective regulation of these licences merely by registering or enforcing security interests under the national Personal Property Securities scheme.

The Referral Bill provides that where a Tasmanian law expressly excludes a licence, right, entitlement or authority from the application of the Personal Property Securities legislation the Tasmanian legislation will prevail and, as a consequence, the purported lodgement of security interests in those excluded matters would be ineffective.

This provision recognises that not all statutory licences or entitlements, even if transferable and of commercial value, should be the subject of registered security interests under the Personal Property Securities scheme where there are countervailing public policy reasons to restrict the interests associated with those statutory rights.

Over the next few months the Tasmanian government will be developing the consequential amendments legislation to various Acts as part of the Personal Property Securities law reform implementation process that will include provisions to clarify which transferable licences and entitlements created by Tasmanian statutes will be expressly excluded from the Personal Property Securities scheme.

That legislation will also provide for appropriate transitional safeguards in relation to Tasmanian registers that currently record security interests that will be modified or closed down as a result of this referral to the Commonwealth.

The Referral Bill does not refer power to the Commonwealth regarding State laws that provide for the confiscation, seizure, extinguishment or

other forfeiture of property or interests in property in connection with the enforcement of State laws.

Examples would include property confiscated under the *Crime (Confiscation of Profits) Act 1993* or motor vehicles forfeited under the 'hooning provisions' of the *Police Offences Act 1935*.

Finally, the State Referral Bill provides for the termination of any, or all, of the initial and amendment references on twelve months notice through a Proclamation.

The passage of this Referral Bill is an important step towards implementing a landmark law reform measure. The establishment of a single national law and an electronic register by which security interests can be recognised will be conducive to greater levels of secured financing of businesses and business activities in Australia.

However, as with any new major reform, the proper implementation and the ongoing monitoring of the Personal Property Securities scheme is critical to the scheme's success.

Under the Personal Property Securities agreement, the States and Territories will play an important role in scrutinising policy developments and ensuring that the Commonwealth provides a scheme that appropriately meets the needs of, and is responsive to, businesses, consumers and other users of the system.

I commend the Bill to the House.