

## CLAUSE NOTES

### Personal Property Securities (Commonwealth Powers) Bill 2009

**Clause 1: Short Title**

Name of the proposed Act

**Clause 2: Commencement**

Provides that the Bill other than proposed sections 8(2) and 8(3) commences on the day on which it receives the Royal Assent.

Proposed sections 8(2) (fixtures) and 8(3) (water rights) will commence on a day or days appointed by proclamation when the State is satisfied that they should be dealt with under the PPS scheme.

It is possible that water rights will not be referred for some time and whether coverage of fixtures will be referred will be determined after the Australian Law Reform Commission's examination of the issues

**Clause 3: Interpretation**

Defines certain terms and expressions used in the proposed Act, including the following:-

**“Commonwealth PPS Act”** covers both the *Personal; Property Securities Act 2009* and the subsequent amendments (two separate Amendment Acts) to that Act already passed by the Commonwealth.

**“law of the State”** is defined to mean any Act of the Tasmanian Parliament or any instrument made under such an Act, whenever

enacted or made and as in force from time to time. The expression is intended to cover both existing and future Acts and instruments as enacted, made and amended from time to time.

**“excluded State statutory right”** is defined to mean a right, entitlement or authority that is granted by or under a law of the State that is declared by Tasmanian law not to be personal property for the purposes of the Commonwealth PPS Act. As a result of the ambulatory nature of the definition of “law of the State” the expression will extend to declarations that are made in relation to both existing and future State statutory rights.

**“express amendment”** is defined to mean the direct amendment of the text of the Commonwealth PPS Act, but it does not include the enactment of a provision having substantive effect otherwise than as part of the text of that Act. Each of the amendment references is limited to the express amendment of the Commonwealth PPS Act. This means that the matters covered by the amendment references cannot be the source of power for other Commonwealth legislation.

**“licence”** covers a range of rights and entitlements which the Government might grant to licence holders – the rights conferred include taxis, mining, fishing, gaming, water and others. The term licence, however, does not include any excluded State statutory right (see above).

**“personal property”** is defined to mean property (including a licence) other than land or an excluded State statutory right. Licences could be as diverse as taxis and hire cars, commercial fishing licences and gaming licences.

**Clause 4:**

**Meaning of “referred PPS matter”**

Defines the expression **“referred PPS matters”** in relation to personal property that is the subject of the different amendment references under the proposed Act.

The expression is defined to mean:-

- security interests in personal property; and
- the recording of security interests, or information with respect to security interests, in the personal property in a register;
- the recording of any other information with respect to personal property (whether or not there are any security interests in the personal property)(this could include information about stolen and written off motor vehicles currently recorded in other registers) ;
- the enforcement of security interests in the personal property (including priorities to be given as between security interests, and as between security interests and other interests).

The definition, excludes from “referred PPS matters” any powers that might exclude or limit the operation State laws to the extent

that the State law makes provision with respect to:-

- the creation, holding, transfer, assignment, disposal or forfeiture of a State statutory right (licences etc); or
- limitations, restrictions or prohibitions concerning the kinds of interests that may be created or held in, or the kinds of persons or bodies that may create or hold interests in, a State statutory right; or
- the forfeiture of property or interests in property (or the disposal of forfeited property or interests) in connection with the enforcement of the general law or any law of the State;
- the transfer, by operation of that law of the State, of property or interests in property from any specified person or body to any other specified person or body (whether or not for valuable consideration or a fee or other reward).

The first and second exclusions from the referred PPS matters limit the power of the Commonwealth Parliament to use an amendment reference to exclude or limit the power of the State to administer, vary or abrogate any State statutory rights (such as licences) that the State creates from time to time.

This means controls over licences such as how and to whom they may be transferred etc are not to be displaced by the Commonwealth PPS

Act should a financier need to enforce a security interest over the licence.

The third exclusion from the referred PPS matters is intended, among other things, to preserve the operation of the laws of the State that provide for the confiscation of the proceeds of crimes or for the transfer by or under a law of the State of assets from defunct bodies.

**Clause 5:       Meaning of “security interest” in personal property**

Defines the expression “**security interest**” in personal property.

Generally, a security interest in personal property is an interest created by a transaction that secures payment or performance of an obligation (without regard to the form of the transaction or the identity of the person who has title to the property) against the property.

The proposed section also provides that a security interest may encompass certain other interests provided for by a transaction regardless of whether or not the transaction secures payment or performance of an obligation. An example of such an interest is an interest of a lessor or bailor under a lease or bailment of goods.

**Clause 6:       Adoption of Commonwealth PPS Act**

The clause provides that the PPS Act (as amended in 2009 and 2010) is adopted by Tasmania. This provides the power for the

Commonwealth to apply the PPS law to security transactions in Tasmania.

The Australian Constitution provides for “adoption” where the Commonwealth legislation is already in place and a referral of powers is made after it has been put in place).

The adoption (like a referral) can be terminated by the State (see section 7).

**Clause 7: Termination of Adoption**

Covers the termination of the adoption made under clause 6 by proclamation. The date specified for termination is to be no earlier than 12 months and one day from the date the proclamation is published in the Government Gazette. Additional references (eg to amend) can be terminated under section 9.

**Clause 8: Reference of matters**

Subclause 8(1) in effect allows the future amendment of the Commonwealth PPS Act concerning security interests in personal property (other than fixtures or water rights) by specific amendment to the Commonwealth PPS Act (and does not allow the referral to be used for other purposes).

Subclause 8(2) will enable referral of security interests in fixtures to the Commonwealth Parliament at some point of time in the future if Tasmania considers it appropriate (on Proclamation of commencement of the subsection). It will allow amendment of the Commonwealth PPS Act concerning fixtures at and from that time.

Subclause 8(3) in effect provides for the future referral of matters to the Commonwealth Parliament of coverage of security interests in transferable water rights in the PPS Act. Again this will only occur when it is considered appropriate for the subsection to be activated and is subject any exclusions of dealings with State statutory rights.

Subclause 8(4) provides that each of the references is not limited by any of the other references.

Subclause 8(5) provides that the reference of a matter has effect only to the extent that the matter is not otherwise within the legislative power of the Commonwealth Parliament and to the extent that the matter is within the legislative power of the State Parliament. The intent being that the referral supplements the Commonwealth's constitutional powers (eg Inter-State trade; corporations etc) which could cover part of the PPS scheme.

Subclause 8(6) specifies the period during which a reference has effect. Each reference will begin when the subsection that makes the reference commences (which may be different dates) and ends when the period of that particular reference is terminated under the proposed section 9.

**Clause 9: Termination of reference**

Covers the termination, by proclamation, of the amendment references made under clause 8. As agreed between the States and the Commonwealth the date specified for

termination is to be no earlier than 12 months and one day from the date the proclamation is published in the Government Gazette.

**Clause 10: Amendment of Commonwealth law**

Clause 10 is to make it clear that the State Parliament envisages that the Commonwealth PPS Act can be amended or affected by Commonwealth legislation enacted in reliance the referral or adoption under this Act (subclause (a)) or enacted on the basis of any of the Commonwealth's other Constitutional powers.

Provisions in the intergovernmental Agreement on Personal Property Securities Law that underpin the scheme may require consultation with and possibly agreement through the Standing Committee of Attorneys General on some matters where the Commonwealth proposes to change the PPS Act.

**Clause 11 – Effect of termination of amendment references before termination of adoption of Commonwealth Act**

The clause provides that the separate termination of an amendment reference does not affect Commonwealth laws already in place. Accordingly, the amendment reference continues to have effect to support those laws until the initial adoption on the PPS scheme is also terminated.

**Clause 12 – Administration of the Act**



Provides for the administration of the Act by the Minister for Justice and the Department of Justice.