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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**PERSONAL PROPERTY SECURITIES (CORPORATIONS AND OTHER  
AMENDMENTS) BILL 2011**

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Attorney-General,  
the Honourable Robert McClelland MP)

## **PERSONAL PROPERTY SECURITIES (CORPORATIONS AND OTHER AMENDMENTS) BILL 2011**

### **OUTLINE**

The Personal Property Securities (Corporations and Other Amendments) Bill 2011 (the Bill) is the final set of amendments to the *Personal Property Securities Act 2009* (PPS Act) and consequential amendments to other Commonwealth legislation prior to the Personal Property Securities (PPS) regime coming into effect this year.

The PPS legislation will rationalise the current Commonwealth, state and territory laws on securities in personal property. It will create one single national set of rules and a single national online register. There will be one comprehensive law with clear rules governing the validity, priorities, enforcement and extinguishment of security interests in all personal property.

The *PPS (Corporations and Other Amendments) Act 2010* (2010 PPS Act) contained a set of consequential amendments arising from the passage of the PPS Act. This Bill will make a number of amendments which have been raised by stakeholders and practitioners following an inquiry by the Senate Standing Committees on Legal and Constitutional Affairs into the 2010 PPS Act.

The Bill contains two schedules:

- Schedule 1: *Corporations Act 2001*; and
- Schedule 2: Personal Property Securities Act 2009.

### **Amendments to the Corporations Act**

The PPS Act made a number of amendments in order to align the Corporations Act with the functional approach in the PPS Act. These amendments are intended in no way to interfere with existing rights of parties under the Corporations Act. They are intended to incorporate the new PPS Act concepts but also retain existing concepts under the Corporations Act, to the extent that they apply to property or transactions not covered by the PPS Act.

The Bill will therefore make it absolutely clear that the intention of the 2010 PPS Act is not to interfere with existing rights of parties under the Corporations Act. The Bill will do this in particular by confirming that:

- the 2010 PPS Act will not affect a secured party's capacity to appoint or veto the appointment of a company administrator under a transitional security agreement
- the liability of receivers and the ability of administrators to avoid liability for transactions entered into by the company before their appointment will be retained

- the existing ability of the holder of a pledge or lien to enforce is subject to the pledge or lien not being subordinate to another security interest.

### **Amendments to the PPS Act**

Amendments to the PPS Act will provide important practical measures to ensure that the regime is appropriate for users.

The Bill will make a number of amendments to:

- provide exemptions to the rules on taking personal property free of security interests for temporarily perfected transitional security interests and transitional security interests which were not previously registered by serial number
- ensure that the definition of *security interest* is consistent with the New Zealand legislation and remove any potential for confusion
- clarify that CHESSE securities are intermediated securities and the means by which CHESSE securities can be subject to control
- ensure access to third party data through the Register as an important consumer protection measure
- impose conditions on accessing and using data on the Register to ensure that parties cannot sell this data and undermine the Commonwealth's ability to recover costs associated with the implementation and ongoing administration of the PPS system
- enable the Registrar to investigate breaches of the rules authorising searches of the Register and registration of security interests on the Register
- clarify the provisions on security interests in authorised deposit-taking institutions and the provisions on control of inventory and accounts.

Amendments proposed in the Bill would also provide an additional method for states that have not yet referred power to the Commonwealth with respect to PPS to be able to 'adopt' the relevant version of the PPS Act (including this Bill) and refer power to the Commonwealth to make subsequent amendments to the PPS Act. Existing referrals of power will not be affected by the amendments.

### **FINANCIAL IMPACT STATEMENT**

There is no direct financial impact on Government revenue from this Bill.

## **NOTES ON CLAUSES**

### **Clause 1: Short title**

1. Clause 1 is a formal provision specifying the short title of the Bill. It provides that when the Bill is enacted, it is to be cited as the *Personal Property Securities (Corporations and Other Amendments) Act 2011*.

### **Clause 2: Commencement**

2. This clause provides for the commencement of the various proposed amendments.

### **Clause 3: Schedules**

3. This is a formal clause that enables Schedules to amend an Act. It provides that each Act that is specified in the Schedule is amended or repealed as set out in the applicable items in the Schedule, and that any other item in a Schedule has effect according to its terms. The Bill contains two Schedules.

## **SCHEDULE 1 – *Corporations Act 2001***

### **Clarify references to registrable charges**

#### **Items 1, 2 and 13**

4. The Corporations Act provides that there can be constructive knowledge of documents lodged with ASIC which relate to charges that are registrable under the Corporations Act (s 130).
5. However, because after the registration commencement time (RCT) the Corporations Act will no longer require the lodgement of charge notices for registration, charges may no longer be registrable (in terms of the definition in the Corporations Act).
6. While this amendment will delete the constructive knowledge provision, the second part of item 13 will retain the rule in s 130 after the RCT in relation to charges that were registrable charges and registered with ASIC before the RCT.

### **Retain the existing liability of receivers and voluntary administrators for transactions entered into by the company before their appointment**

#### **Items 3, 4 and 6**

7. The Corporations Act currently provides that controllers and voluntary administrators are personally liable for payments owing under certain transactions entered into by a company before the commencement of the receivership or administration, unless the controller or voluntary administrator specifically disclaims the transaction (s 419A and 443B).
8. The 2010 PPS Act removed a receiver's liability for these transactions in respect of retention of title property and also removed the administrator's ability to avoid liability for transactions in respect of retention of title property (PPSA retention of title property is personal property that is used or occupied by, or in the possession of a corporation where the corporation does not have title to the property and a PPSA security interest is attached to the property, within the meaning of the PPS Act and the corporation is the grantor of the PPSA security interest).
9. Therefore, these measures amend s 419A and s 443B so that receivers and administrators would continue to be liable and be able to disclaim transactions in respect of retention of title property to the same extent as they can for other property. That is, the status quo would apply to all future secured transactions, including those in respect of retention of title property.

### **Retain existing arrangements for the enforcement of liens and pledges**

#### **Item 5**

10. Currently, the holder of a pledge or lien against a company may enforce their lien or pledge by selling the secured property, applying the proceeds towards the amount owed under the lien or pledge, and paying the balance to the company (s 441JA). However,

the holder of the pledge or lien may only exercise this power if the pledge or lien is not subordinate to another security interest.

11. The 2010 PPS Act replaced s 441JA with a new s 441EA, which replaced references to liens and pledges with the term possessory security interests. However, the new s 441EA failed to retain the requirement that the lien or pledge not be subordinate to another security interest.
12. The proposed amendment to s 441EA would retain the requirement that the lien or pledge may only be enforced if it is not subordinate to another security interest.

### **Removing vesting of security interests that are registered late under a foreign law**

#### **Items 7, 8, 9, 10 and 11**

13. Existing s 266 of the Corporations Act encourages the registration of company charges, as the failure to do so could result in a charge becoming void.
14. Because Chapter 2K of the Corporations Act has been repealed (it will be replaced with Chapter 5 of the PPS Act, s 266 will be replaced with s 588FL, which will have the same purpose as s 266.
15. Section 588FL(2) applies where a security interest has been registered in Australia and provides that a security interest will vest in the grantor where they have not been perfected by registration within six months of the winding up of the company, an administrator being appointed or a deed of company arrangement being executed. Section 588FL(3) is analogous to s 588FL(2) but applies where a security interest has been registered under the law of another country before the company enters into certain forms of external administration.
16. However, it would be preferable for the consequences for failing to register on a foreign register to be determined by the jurisdiction that established the registration requirement. Therefore this measure repeals s 588FL(3).

### **Clarify that the Bill does not affect a secured party's capacity to appoint a company administrator under a transitional security agreement (or veto the appointment)**

#### **Item 13**

17. Under the Corporations Act, persons with a charge over the whole or substantially the whole of a company's assets have the power to appoint an administrator to the company.
18. However, it may not be clear that the transitional arrangements under the 2010 PPS Act retain the status quo and that a person who currently has a charge over the whole or substantially the whole of the company property would have a security interest over the whole or substantially the whole of the company property after the RCT, and retain their right to appoint an administrator.
19. The inclusion of this proposed provision in the Corporations Act would clarify that, when determining whether a person has a charge arising under a security agreement entered into before the RCT, PPSA retention of title property is to be disregarded.

## **Minor technical amendments**

### **Item 12**

20. This amendment corrects an incorrect section reference.

## **SCHEDULE 2 – *Personal Property Securities Act 2009***

### **Harmonise the definition of security interest with NZ law**

#### **Items 2, 6, 7, 25, 36 and 37**

21. Section 12 of the PPS Act defines a security interest to mean an interest ‘in relation to personal property...’, and various other provisions in the PPS Act refer to security interests in a similar way.
22. The corresponding provisions in the New Zealand personal property securities legislation do not include the words *in relation to* and the addition of the words in relation to may suggest that the definition in the PPS Act is different, and broader, to that in the New Zealand legislation.
23. Because the definition of security interest is fundamental to the PPS scheme and because it is desirable to harmonise the scheme with the corresponding New Zealand legislation, the proposed amendments would remove all references in the definition of security interest to in relation to personal property.

### **Clarify that CHESS falls within the definition of an intermediated security**

#### **Item 8**

24. ASX Settlement and Transfer Corporation Pty Limited (ASTC) operates the Clearing House Electronic Subregister System (CHESS) which is a computerised register of securities holdings. The definition of intermediary (a person who operates a clearing and settlement facility under an Australian CS facility licence) under s 15(2) of the PPS Act is intended to include the ASTC.
25. Existing s 15(5) and (6) of the PPS Act may create confusion as to whether the ASTC is in fact an intermediary because they provide that neither the right to maintain a securities account on behalf of others, nor the right to operate a clearing and settlement facility under an Australian CS licence, both of which apply to the ASTC, are themselves sufficient to meet the definition of intermediary.
26. This amendment would clarify that ss 15(5) and 15(6) do not apply to the ATSC and therefore clarify that the ASTC falls within the definition of intermediary.

#### **Items 9, 13**

27. Further confusion may be caused by the definition of a securities account, which is defined as an account to which interests in financial products may be credited or debited. This does not accord with the kind of securities accounts held by the ASTC because accounts held by the ASTC are not accounts to which interests can be debited or credited. Rather, the securities accounts held by the ASTC are a record of holdings and transfers of interests in financial products.
28. The proposed amendment would clarify that the definition of securities account in the context of intermediated securities includes the securities accounts held by the ASTC.

## **Clarify the classification of property in the PPS Act**

### **Item 10**

29. A previous version of the PPS Bill deleted all references to equipment but the reference to equipment in s 20(4) of the PPS Act remained. This reference to equipment is therefore anomalous and this amendment would remove it.

## **Clarify how control is taken over CHESSE securities**

### **Item 14**

30. The most common way in which secured parties take control of CHESSE securities is by sponsorship agreements entered into with participants (such as brokers). The participants agree with the secured parties and grantors not to deal with the securities without the consent of the secured parties.
31. However, s 26 (control of intermediated securities) currently does not make provision for this kind of control in sponsorship agreements.
32. Therefore this amendment would provide, similarly to the provision in s 27 for the control of investment instruments, that a secured party would have control of an intermediated security if there is an agreement under which the secured party is able to control electronic communications for dealing with the intermediated security.

## **Ensure that secured parties of serial-numbered goods have the benefit of the 24 month transitional period where not currently registered by serial number**

### **Item 15**

33. Section 44 provides that a buyer or lessee can take property, which may or must be described by reference to a serial number, free of a security interest where the serial number on the registration is incorrect or missing.
34. However, certain transitional security interests that are presently registered on a State or Commonwealth register; for example, a charge over aircraft on the ASIC Register of Company of Charges; are not registered by serial number. When these transitional security interests are migrated to the PPS Register they will not be registered by serial number and a buyer or lessee of the property would be able to take free of the transitional security interest in the property.
35. Consequently, s 44 will be amended so as not to apply to transitional security interests, but only for a period of 24 months after the RCT.
36. This amendment would provide parties with security interests in serial-numbered property, which are not currently registered by serial number, an assurance that they have 24 months after the RCT to register by reference to the serial number of the goods without losing their security interest in the property.
37. However, there are some existing registers which provide that charges which ought to have been registered by reference to their serial numbers are subject to an analogous taking free rule to s 44 where the serial number is missing or incorrect (for example, interests registered on the State Registers of Encumbered Vehicles (REVs)).

38. Therefore an exception will be provided to maintain the law as it presently operates in respect of those interests.

**Ensure that secured parties have the benefit of a 24 month transitional period in relation to buyers or lessees of property**

**Item 16**

39. The transitional arrangements in the PPS Act provide up to 24 months temporary perfection (perfection is the additional step of registration, possession, control or temporary perfection, for determining priority over competing security interests), for existing security interests, in order to allow secured parties time to register their existing security interests on the PPS register.
40. However, s 52 enables a person to buy or lease certain personal property free of a security interest that is temporarily perfected by the 24 month temporary perfection method.
41. Therefore, in order to retain the existing position during the 24 month transitional period, this amendment would ensure that a person who buys or leases personal property cannot take it free of a security interest that is perfected only by the 24 month temporary perfection method.

**Allow the simplification of security agreements involving grantors who are sole traders and partnerships**

**Item 23**

42. Section 116 of the PPS Act excludes the operation of Part 4.3 of the PPS Act in relation to property while a person is a receiver, a receiver and manager, or a controller of the property.
43. The intention was that for these security interests, Part 5.2 of the Corporations Act would apply instead. However, a number of the provisions in Part 5.2 apply only to receivers and managers and not to controllers.
44. It was therefore considered desirable to apply Part 4.3 to controllers who are not receivers or receivers and managers.
45. This amendment would enable small and medium sized enterprises to have simpler security agreements by relying on the enforcement provisions in the PPS Act rather than having to incorporate detailed enforcement provisions into their security agreements.

**Item 22**

46. This amendment is consequential to the amendment in item 23 and would enable controllers (other than receivers and receivers and managers) to contract out of s 116 (so that Part 4.3 would not apply to them) should they so choose.

## **Belief that collateral secures obligation**

### **Items 30, 31, 32, 33 and 55**

47. The PPS Act requires that a person cannot register a financing statement unless the person has a reasonable belief that the registered secured party is or will become a secured party (s 151). This applies to both true security interests (where the security interest secures an obligation and there is that belief) and to deemed security interests (where the security interest does not actually secure an obligation but there is the belief that the party registered as a secured party is or will become a secured party).
48. However, some provisions only refer to the requisite belief in respect of true security interests and not the belief in respect of deemed security interests.
49. These amendments will clarify that the person registering a financing statement must have the belief that the person described as the secured party is or will become the secured party in relation to the collateral.
50. The proposed amendment in item 53 is consequential to these amendments.

## **Allow regulations to be made prescribing circumstances in which a registration is not seriously misleading and therefore ineffective**

### **Item 35**

51. The PPS Act (paragraph 164(1)(a)) provides that where a security interest is seriously misleading, it will be ineffective.
52. However, it will not always be completely clear whether a security interest is seriously misleading and therefore ineffective.
53. This amendment would provide a regulation-making power for registrations not to be seriously misleading, and therefore ineffective, in the prescribed circumstances.

## **Registrar—investigations**

### **Item 49 and 53**

54. The PPS Act provides the Registrar with a number of specific powers and functions. These include:
  - to register financing statements that are not contrary to s 151 (registration – belief that collateral secures an obligation);
  - to investigate unauthorised searches of the PPS Register (s 172(5)); and
  - to apply to the Federal Court for an order that a wrongdoer has contravened a civil penalty provision in s 151 or s 72 (ss 222(1)).
55. The performance of these powers and functions requires an investigatory power.
56. Proposed s 195A will provide the Registrar with the power to conduct an investigation into any matter for the purpose of performing his or her functions.

57. Furthermore, because the Registrar has no specific investigatory powers, s 195A would confer a power on the Registrar to require a person (except the Commonwealth, a State or Territory or their agencies and authorities) who the Registrar reasonably believes has information relevant to an investigation, to provide that information to the Registrar. In order to make the Registrar's investigatory power enforceable, a failure to comply with the Registrar's request for information could incur a civil penalty.
58. Item 49 amends s 172(3) to ensure that the source of power to conduct the investigation is the proposed s 195A (and not, independently, s 172(5)) (this is intended to avoid any doubt about whether the power to require information under s 195A will apply to an investigation of a s 172(3) contravention).
59. The privilege against self-incrimination and client legal privilege are intended to apply with respect to the Registrar's information gathering powers.

## **Conditions on data access**

### **Item 52**

#### Access to registered data – conditions

60. The PPS Register will alert subscribers when any registration for a nominated organisational grantor that is described by its ACN, ARSN or ARBN is made or amended.
61. This would allow parties to rely on old searches of the PPS Register where they have not received an alert in the meantime. This is appropriate where the person commissioning the searches is the same in both cases but it is undesirable for agents to be able to resell old search results to third parties and affect the Commonwealth's ability to recover its costs of implementing, and the ongoing administrative costs of, the PPS Register.
62. The proposed provisions on the conditions of use of data registered on the PPS Register would therefore prevent the unauthorised 'derivative' use of that data; for example, by warehousing the data for sale to third parties in direct competition with the Commonwealth.

#### Access to third party data

63. A search of the PPS Register for security interests in motor vehicles may include access to third party data, that is, data that is not owned by the Commonwealth. For example, access to data on stolen and written-off motor vehicles, an important consumer protection measure, will be provided by the National Exchange of Vehicle and Driver Information System (NEVDIS) which is administered by AustRoads (an incorporated entity comprised of the State and Territory roads and traffic authorities).
64. Proposed s 176C will provide that users of third party data may be required to agree to conditions as part of the approved form set under s 302. A breach of the terms and conditions could result in an action for damages by the third party against the user under s 271 (entitlement to damages for breach of duty or obligations). This is because AustRoads is a statutory body, jointly owned by the States and Territories, and access to the 3rd party data will be provided automatically on acceptance of the terms and

conditions. Furthermore, the public would have access to the terms and conditions prior to commencing a transaction on the PPS Register.

65. This measure will also allow for the regulations to prescribe third party data providers.

### **Items 1, 3, 4, 5, 24, 34, 38, 39, 40, 41, 42, 44, 45, 47, 48, 50, 51 and 56**

66. The proposed amendments in these items are consequential to the proposed amendments relating to the access and use of third party data. They are either definitional or amend references like *search the register* to *accessing the register to search for data*, reflecting that third party data is to be provided through the PPS Register.

67. Item 51 would also correct the reference in s 174(4) to *collateral*, which should instead refer to *personal property*.

### **Meaning of referring state**

#### **Item 54**

68. Section 244 of the PPS Act defines referring State. A referring State is, generally speaking, a State that has agreed that the PPS Act, including future Commonwealth amendments, applies in that State in any areas that would otherwise be outside of the Commonwealth's Constitutional powers. A State is a referring State if it both adopts or refers the relevant version of the Act (as defined in s 244) and provides a referral of power to amend it. As Western Australia is expected to do so after the enactment of this Bill, the definition of relevant version would be amended to add the new Act to those which have amended the PPS Act.

69. The Bill also provides for Western Australia to adopt the PPS Act as amended from time to time. This provides a more flexible way for Western Australia to adopt the PPS Act, particularly if Western Australia has passed general adoption provisions that have not commenced.

### **Clarify that a continuously perfected transitional security interest can have priority over a non-transitional security interest perfected by control.**

#### **Items 57, 58**

70. The PPS Act confers priority on security interests perfected through control (s 57).

71. This would include priority over transitional security interests which have had the benefit of the 24 month temporary perfection period and which have been perfected during this period in some other way.

72. However, this priority conflicts with the purpose of the temporary perfection transitional provisions, which are intended to ensure that transitional security interests do not lose their existing priority as a result of the PPS Act (provided that secured parties take adequate steps before the end of the 24 month temporary perfection period to protect their security interests).

73. The protection conferred on transitional security interests should include priority over subsequent, non-transitional security interests perfected by control. Therefore this amendment will make it clear that a perfected transitional security interest has priority over a security interest perfected only by control that is not a transitional security interest.
74. Item 57 is a consequential amendment to the above amendment.

### **Meaning of circulating security interests**

#### **Item 59**

75. Section 51C in the Corporations Act incorporates a definition of circulating security interest.
76. However, the definition could be read as inferring that the interest of an assignee under an equitable assignment of an account or chattel paper is a circulating security interest and it would therefore rank behind preferential creditors (such as employee entitlements) following a company insolvency.
77. This would change the existing law under which equitable assignments are not subject to the interests of preferential creditors.
78. Therefore, this proposed amendment to the definition of circulating asset in s 340 would clarify that the transfer of an account or chattel paper does not give rise to a circulating asset.

### **Minor Technical amendments**

#### **Items 11, 12, 17, 18, 19**

79. The proposed amendments of s 21(2)(c)(i), 25 and 75 would clarify that a security interest in an authorised deposit-taking institution (ADI) is only subject to control, for the purposes of perfection, where the secured party is the ADI.

#### **Item 20**

80. The proposed amendment of paragraph 112(2)(b) would correct an anomaly as the provision should be consistent with s 79 (transfer of collateral despite prohibition in security agreement).

#### **Item 26, 27, 28 and 29**

81. The proposed amendments to paragraphs 148(a) and (c) would ensure consistency with other provisions in the PPS Act relating to the definitions of financing statement and financing change statement, and the process of registration (for example, ss 10 and 150).

82. It would also clarify that s 148(c) does not, in effect, mandate the registration of data in relation to personal property prescribed by the regulations made for the purposes of that paragraph. It would make it clear that the register will only hold data in financing statements registered under s 150 of the PPS Act (that is, a person may apply to register a financing statement (ss 150(1)).

**Item 21**

83. The proposed amendment of section 115 would correct an anomaly in a reference to s 96.

**Item 43**

84. The note to s 171(1)(e)) requires a minor amendment to a paragraph reference (the reference to paragraph (e) is amended to refer to paragraph (d)).

**Item 46**

85. This proposed amendment would make the purpose of the table in s 172 (2) clearer.

**Items 60, 61 and 62**

86. The proposed amendments to the provisions on control of inventory and accounts would clarify that the provisions on the control of ADIs in this context are for the purposes of determining whether a security interest is circulating or non-circulating.