

PPSA Alert

Review of the *Personal Property Securities Act 2009*: Interim report (Report)

WHAT YOU NEED TO KNOW

- On Friday 15 August the Attorney-General released Bruce Whittaker's *Interim Report on the Review of the Personal Property Securities Act*.
- The Report:
 - proposes that the next step in the review will be the preparation and release of a series of consultation papers discussing areas for reform;
 - suggests a list of topics to be covered by consultation papers; and
 - lists criteria to be used to guide the assessment of the merits of proposed amendments to the Act

The consultation process will provide the material for the content of specific recommendations to be included in the final report. The changes suggested in submissions so far will be developed into the consultation papers and be considered as part of the broader second phase of the review process.

- The Report can be downloaded from the [PPSA review website](#).

What do the submissions reveal?

- the Act and the register need to be clarified and simplified; and
- many businesses had not appreciated the extent to which the Act can impact on their activities.

These concerns have been particularly acute for small businesses. Generally, the lack of resources mean that they are less able to access advice on how to manage the complexities of the Act and the register.

Has the Act delivered on its objectives?

The over-arching goals of the Act were to:

1. Increase the consistency and certainty of secured finance

The Act has significantly improved the consistency of the law relating to secured finance, replacing a

patchwork of Commonwealth, state and territory statutes and general law with a single set of rules that apply consistently.

2. Reduce the complexity and cost of secured finance

The submissions reveal levels of frustration and anxiety that go beyond the mere "teething problems". More can and should be done to further this objective.

3. Enhance the ability of business and consumers to use their assets as security, and access cost-effective finance

The full potential of this objective has yet to be realised. Whilst there have been many savings by larger financiers in standardisation of documents, they have all incurred significant costs in preparation for the Act. The volume and content of information on the register have increased cost.

What conclusions and proposals were made?

The Report concluded that a series of consultation papers be released which will identify and discuss potential areas for reform and suggest opportunities to simplify or clarify the operation of the Act. Workshops may be considered to facilitate interactive discussion of the issues. **A list of topics that might be covered by the consultation papers is set out in Annexure B to the Report, and include:** transactions to which the Act applies; creation of a security interest; modes of perfection; dealings in collateral; priority rules; enforcement of security interests; the register; particular types of collateral (chattel paper, documents of title, accounts, intermediated securities, investment instruments); and interaction with the Corporations Act (circulating assets and s 588FL of the Corporations Act).

The report also concluded that there should be a set of criteria to guide the assessment of the merits of proposed amendments. The criteria are set out in **Annexure C to the Report**, and include:

- **The overall objective of the Act** – being to facilitate the creation and enforcement of security interests in personal property, and to provide rules to regulate their legal effect. The rules for the creation of security interests should not attempt to prescribe the form that parties must use, but rather identify the outcome a transaction needs to achieve. The legal effect should deal with the effectiveness of the security interest against third parties (eg buyers, lessees). Enforcement should be facilitative, providing a set of enforcement remedies available to use where the security agreement itself does not contain enforcement mechanisms, but should not limit remedies that the parties agree to include in their transaction. In considering whether the Act should apply to deemed security interests, consideration should be given to whether the interest is of a type that is sufficiently common or important that it is appropriate to consider extending the regime to include it.
- **Balance** – the rules need to find a balance between the legitimate expectations of secured parties and other affected stakeholders (eg buyers and lessees).
- **Simplicity** – rules should produce clear and predictable outcomes for business and other stakeholders. Uncertainties and complexities should be dealt with through careful primary rules, rather than by exceptions or qualifications.
- **Comprehensiveness** – rules should apply to all types of personal property and all types of security interests, unless there are clear policy reasons for an exception. Excluding a type of property or transaction means a different set of rules need to be identified and applied, which could result in increased complexity and uncertainty.
- **Flexibility** – the rules need to accommodate current market structures and business practices, but also respond to changes to them.
- **Transparency** – provide transparency in relation to the existence of security interests. This targets the "evil of apparent ownership". The role of perfection is to make it possible for third parties to determine whether a security interest may exist over a particular item of property. However, it will not always be possible for a third party to detect whether property is subject to a perfected security interest. It is important to remember why perfection is there, and to ask whether it is achieving its purpose.
- **Fit** – the Rules should produce meaningful outcomes when applied against the background of our laws generally. Terminology or structures that achieve meaningful outcomes in overseas legislation may not work here.

Two recommendations made by the report were:

- that the review continue to engage with the Australian Financial Security Authority (**AFSA**) in particular on the practicalities of any proposed changes to the register; and
- AFSA, in consultation with small business representatives and their advisers, should develop a short term multi-faceted education and awareness campaign designed to make affected small businesses familiar with how the Act can affect them and to provide guidance on registrations for the most common types of security interests.

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