



6 June 2014

Mr Matt Minogue
PPSA Review Secretariat
Commercial and Administrative Law Branch
Attorney General's Department
3-5 National Circuit
BARTON ACT 2600

By email: ppsareview@ag.gov.au

Dear Mr Minogue

Review of Personal Property Securities Act (2009)

Thank you for the opportunity to provide a submission to this review.

The NSW Business Chamber (the Chamber) is one of Australia's largest business support groups, with a direct membership of more than 16,000 businesses, providing services to over 30,000 businesses each year. Tracing its heritage back to the Sydney Chamber of Commerce established in 1825, the Chamber works with thousands of businesses ranging in size from owner operators to large corporations, and spanning all industry sectors from product-based manufacturers to service provider enterprises.

Although the Chamber does support a national legal regime and single register for personal property interests, the substance of the Personal Property Securities Act (2009) (the PPS Act) and Personal Property Security Register (the PPS Register) puts legal rights over property at odds with the way that businesses have traditionally understood ownership.

The Chamber notes that in 2013 the Productivity Commission estimated that the creation of a single regime and register would result in significant savings in registration and search fees and compliance costs (offset by one-off adjustment costs). However, it is important to be clear that these estimated benefits relate to the creation of a unified regime rather than the substance of the PPSA Act and PPS Register.

With respect to the PPS Act, its key substantive effect is that title has become largely irrelevant to determining rights over personal property where third parties are involved, with precedence now given to the perfection of a security interest over the property through registration on the PPS Register.

The Chamber appreciates that the new regime provides legal certainty to financiers and insolvency practitioners, and that this may lead lenders to accept a wider range of property as security, which could reduce borrowing costs for some businesses.

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However, we are concerned that the legal certainty achieved by the PPS Act is at the cost of widespread confusion in the real economy and unintended exposure to risk for many business owners.

Additionally, businesses that understand the new regime are forced to choose between compliance costs associated with ongoing registrations and exposure to additional risk that is associated with the failure to register. Under the PPS Act there appear to be a very wide range of circumstances where perfection of a security interest through registration on the PPS Register would be required to protect the rights of a property owner. For example, under the PPS Act, all businesses that allow delayed payment for goods, with retention of title, may be unable to reclaim those goods without registration. Similar risks apply to goods being transported or stored on premises owned by another party, and to a range of other commercial arrangements. To fully protect their interests, a business that wished to sell goods with a retention of title clause may actually need to register a security interest against any transportation or warehousing companies in addition to the actual buyer of the goods. The cost of checking and issuing takedown notices for incorrect registrations further adds to the compliance burden for business.

Arguably, the PPS Register would not work if businesses did choose to register all of their security interests. Searches of the register would deliver a large number of results, and an analysis of the underlying contracts would be required to understand whether any of these interests were material. For potential financiers, too much information could be just as confusing as too little. Moreover, businesses would need to keep track of whether there were any outstanding security interests registered against them incorrectly, that could affect their capacity to access finance.

The underlying question for the Review is whether higher risks and compliance costs for business owners outweigh lower risks for financiers (and any associated reductions in borrowing costs) and simpler disposal of assets in the event of an insolvency.

Clearly gathering the data that would be required to make this assessment is difficult. To assist in this task, the Chamber will include questions related to the PPS Register in its quarterly business conditions survey, which will be in the field from 17 June to 1 July 2014. This will add to the data on the use of the PPS Register that is already available to the Government.

Notwithstanding the lack of data, it appears far more likely that situations where businesses will be exposed to greater risk through failure to register greatly outnumber the situations where they can receive access to cheaper credit.

On the assumption that the review will not choose to fundamentally dismantle the new regime (and we are not necessarily saying that this would be appropriate), the key issue for the Review is whether the cost the PPS Act imposes on everyday business activities can be reduced without

having an undue effect on the legal certainty it provides to insolvency practitioners and financiers.

The Chamber notes and supports the changes that have already been proposed by the Government and are currently before parliament.

With respect to further changes, a simple way to reduce the burden on everyday business is to provide greater guidance and certainty around the use of general registrations, whereby the security interest that is registered covers all property in the grantors possession that is owned by the registering party. This is a common method for businesses to mitigate risk in a more low cost way, but the effectiveness of these general registrations is uncertain as they have not been tested in court. Moreover, businesses are unlikely to be aware that this approach is available as it is not promoted on the PPS Register website.

Recommendation 1: Provide greater certainty to businesses on the use of general registrations to register a security interest over all assets owned by one party and held by another.

Another option is to provide more time for an interest to be registered. This is a particular issue with goods sold as inventory, because the registration must be made before the goods change hands. The value of an individual's labour is not uniform at all times. At some times, registering a security interest may involve foregoing key business planning decisions. At other times, registering a security interest may mean foregoing a coffee break. Longer timeframes allow individuals to choose low cost times in which to undertake required tasks.

We appreciate that the reason that the registration timeframe is so short is that otherwise the final buyers of the goods have no way to know that the goods are still owned by the original seller. However, it is not clear how often this situation is likely to arise, and it seems unlikely that many buyers will check such matters, particularly where the goods are low value. As such, the primary consequence of the requirement to register retention of title over goods sold as inventory is that the sellers will lose title in the event that the buyer becomes insolvent.

In any case, it seems that the PPS Act could differentiate between the timeframe for registration required to gain priority over the subsequent buyer of the goods, and the timeframe for registration to perfect a security interest against other creditors.

Recommendation 2: Where possible, provide longer timeframes for registration, particularly with respect to goods sold as inventory. If necessary, consider allowing a longer timeframe for registration of security interests against goods sold as inventory to provide priority against other creditors, as compared to providing priority over the end buyers of goods.

A third option is to provide clear exemptions for certain types of activity. A business should not need to be concerned that their goods could be seized by the creditors of the companies that provide them with transportation or warehousing. This creates a risk for both the buyer and the seller of the good, and it also creates some uncertainty as it is unclear whether the buyer would still be obliged to pay for the goods if this were to occur.

Similarly, subcontractors that leave equipment on a construction site should not need to register these items to protect themselves.

We acknowledge that such changes would limit certainty for lenders, but it would significantly mitigate risk and reduce red tape for other businesses. Moreover, it would be difficult for a business to challenge the ownership of such assets and such assets would not normally be accepted as collateral by financiers.

Certainty for insolvency practitioners could still be provided by setting out the steps they would need to take to contact potential title holders before assets can be made available to all creditors.

Recommendation 3: Exempt goods that are in transit, being warehoused or are simply located on someone else's property, from the need to register to perfect a security interest.

Further simplicity could also be provided by introducing a minimum threshold for the value of goods or consignments that require registration. This would prevent the risk of loss of low value goods – where time and cost associated with registration would be prohibited, from being passed from financiers to small businesses. An option for determining this threshold is the value of claims that can be heard by state & territory small claims tribunals, which is currently \$10,000.

Recommendation 4: Consider the feasibility of introducing a minimum threshold for the value of a security interest that must be registered to be perfected.

Finally, the register itself should be made as simple and easy to use as possible. For example, many businesses will be confused by the requirement to select a collateral class – in particular it is not intuitively clear how to differentiate between tangible property (other goods), general property (no exceptions), and general property (with exceptions). If such distinctions are unavoidable in the legislation, then greater guidance should be provided to allow businesses to make their decision. The process of simplification should be undertaken with reference and testing by businesses or members of the public with no expertise or knowledge of the underlying legislation.

Recommendation 5: Review the registration process to improve simplicity, including by testing the process with businesses and members of the public with no knowledge of the PPSA.

The introduction of the PPS Act also provides lessons that should be learnt for future legislative change. There continues to be limited knowledge of the PPS Act and its implications in the business community, and there appear to have been limited efforts to educate businesses about such a fundamental change to the legal environment in which they operate.

In the future, the introduction of such significant legislative changes should be accompanied by a more concerted effort to improve knowledge. This should include robust surveys to test whether education campaigns have been successful. If the results fail to meet a reasonable benchmark, then the date of effect for new legislation should be deferred until further efforts have been taken to improve knowledge levels.

Recommendation 5: Ensure that major legislative change is accompanied by better education campaigns, with minimum levels of knowledge, tested through independent surveys, to be required before new legislation takes effect.

For further information, please contact the Chamber's business regulation and economics adviser, Mr Tim Hicks on (02) 9458 7259 or at tim.hicks@nswbc.com.au.

Yours sincerely

[signed, Luke Aitken, Senior Manager, Policy]

for Paul Orton
Director, Policy and Advocacy