

2010

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

PERSONAL PROPERTY SECURITIES BILL 2010

EXPLANATORY STATEMENT

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Personal Property Securities Bill 2010

Overview of Bill

The Personal Property Securities Bill 2010 (the Bill) introduces consequential amendments to support the operation of the Commonwealth *Personal Property Securities Act 2009* (the Commonwealth PPS Act). The Commonwealth PPS Act replaces all State and Territory legislation governing transactions which use personal property to secure payment or performance of an obligation. The result is that there will be a single, national law in Australia to regulate the business of using personal property to secure financing.

Under the terms of the Inter-Governmental Agreement on Personal Property Securities, the ACT is required to enact this consequential legislation in support of the broader reform. ACT legislation concerning personal property securities must be repealed or amended to reflect the centralisation of this area of law in the Commonwealth PPS Act.

A Commonwealth register will be established to replace all State and Territory registers of security interests (the Commonwealth PPS register). The new Commonwealth register will replace all registrations under the *Instruments Act 1933* (ACT), and will also contain registrations of interests in vehicles. These interests were previously registered in the New South Wales Register of Encumbered Vehicles (REVS) by agreement with the ACT.

The Commonwealth PPS Act and PPS register will have effect over all personal property securities beginning at the “registration commencement time”, which is the date fixed by the Minister under the Commonwealth PPS Act.

To support the creation of the new Commonwealth register, and the inclusion of ACT data, amendments are included in this Bill to give the registrar-general transitional powers and protections.

This Bill will ensure that ACT legislation is consistent with the national reform, will support the creation of a new register of interests at the Commonwealth level, and will assist the registrar-general in completing the transition. The details of these consequential amendments are listed below.

Savings and transitional provisions

The savings and transitional provisions of this Bill protect existing security agreements, and ensure that the ACT will be capable of transitioning to the new Commonwealth system.

The Commonwealth PPS legislation will not operate retroactively to govern secured transactions involving personal property. If an agreement is concluded under existing ACT law, that agreement will continue to be governed by ACT laws even after the Commonwealth PPS Act becomes operative. An example of this is an automobile loan over a term of years. The agreement may be executed under existing ACT law, but the term of the repayments may extend beyond the time at which the

Commonwealth PPS Act will supersede the relevant State and Territory laws. This means that ACT legislation which is currently applicable to these matters will need to be preserved in effect, so that the law under which the parties executed the agreement remains unchanged.

The national reform requires the cooperation of States and Territories in creating the Commonwealth PPS register. The transitional provisions authorise the registrar-general to give any information and assistance necessary to the Commonwealth for this purpose. These provisions will ensure an orderly transition to the use of the new register for the ACT.

The transitional regulation making power included has been drafted to allow for modifications of this Act as necessary. Due to the scope and comprehensive nature of the Commonwealth PPS reform project, it is possible that unforeseen circumstances will present over the course of the transition. As such instances arise, transitional regulations may modify this Act to ensure that the ACT is able to participate in the reform effectively. This regulation making power is also necessary because changes in other jurisdictions' legislation, including the Commonwealth, may impact directly upon the operation of this Act. The transitional regulations will give the Executive the capability of responding to these changes and continuing the ACT's participation in the broader reform.

Interests in motor vehicles

Encumbrances on motor vehicles will be registered under the Commonwealth PPS Act, on the Commonwealth PPS register. These interests are currently included in the New South Wales Register of Encumbered Vehicles (REVS), by agreement between the ACT and New South Wales. This Bill will allow for the transfer of all ACT specific REVS data to the Commonwealth PPS register, and will update the *Sale of Motor Vehicles Act 1977* accordingly.

The savings provisions will ensure that the law applicable to all encumbrances created before the registration commencement time remains effective.

Interests to which the *Instruments Act 1933* applies

Bills of sale and all similar instruments relating to personal property will also be required to be registered under the Commonwealth PPS Act. The *Instruments Act 1933* will be repealed to support this change, but continued in effect only with respect to instruments and interests created before the registration commencement time.

Amendments—interests not personal property for the Commonwealth PPS Act

The Commonwealth PPS Act allows for the ACT to exclude certain types of property from the new scheme. If something is declared not to be personal property under the PPS Act, the law of the ACT will continue to apply unchanged. The Commonwealth PPS Act presumptively treats all transferrable licences as personal property that may be used as collateral to secure financing.

Liquor licences will be excluded to maintain the integrity of the existing licensing system. These licences are granted in accordance with strict public interest criteria, and are not intended to be used as instruments to secure financing.

Minerals licences are also excluded by this Bill. These licences are intended to operate in conjunction with Territory leases, and this Bill will clarify that the Planning and Development and land laws will continue to apply to any such licences.

Amendments—statutory interests for the Commonwealth PPS Act

The Commonwealth PPS Act also allows for the ACT to declare certain statutory interests under section 73(2) as having special priorities. These declarations are intended to allow States and Territories to preserve the operation of statutory liens and other similar interests.

The items included in this Bill preserve the Territory's rights to payment in cases where it is required to handle or dispose of personal property under various pieces of legislation.

Other amendments

This Bill also contains updates to references and definitions, to ensure that all references to repealed legislation are removed.

Clause Notes

PART 1 – Preliminary

Clause 1 Name of Act

Provides that the title of the Act is the *Personal Property Securities Act 2010*.

Clause 2 Commencement

Provides that part 2.1 commences on the day after notification of the Act, and that the remaining provisions commence on a day fixed by the Minister by written notice. The default commencement date will, if a date is not fixed by the Minister, be the registration commencement time under the Commonwealth PPS Act, section 306.

The commencement dates are intended to ensure that this Act commences only when the Commonwealth PPS Act begins to apply to security interests. Automatic commencement has been displaced to prevent any possibility of this Act commencing prior to the Commonwealth PPS Act.

Clause 3 Notes

Provides that a note included in this Act is explanatory and is not part of this Act.

Clause 4 Expiry—Act

Provides that this Act expires 2 years after division 2.1 commences.

PART 2 – Savings and transitional provisions

Division 2.1 - General

Clause 5 Definitions

Provides definitions for the purposes of this Act for the following terms:

existing Act;
existing motor vehicle provisions;
director-general;
migration time;
NSW Act;
PPS Act;
PPS register;
PPS registrar;
pre-PPS transitional;
registration commencement time; and
transitional security interest.

These terms incorporate definitions from relevant New South Wales legislation and from the Commonwealth PPS Act.

Clause 6 Giving information to the Commonwealth

Provides that the registrar-general is authorised to give information held under the *Instruments Act 1933* to the Commonwealth. This provision is intended to enable the registrar-general to cooperate in designing, and facilitate the inclusion of ACT registration information in the new Commonwealth PPS register.

Clause 7 Territory not liable – PPS transitional matters

This clause is intended to provide protection from liability for acts done in the course of PPS transitional matters. Protection from liability is necessary to ensure that the registrar-general is able to fully participate in the design and implementation of the new Commonwealth PPS register. Although disputes about the information transferred under clause 6 are unlikely, this provision will ensure that the registrar-general is able to give information over without being unfairly exposed to liability.

Clause 8 Transitional regulations

Provides that a regulation may prescribe transitional matters for this Act. This clause allows broad discretion to create transitional regulations to facilitate the transition to the Commonwealth PPS Act and register. The transitional regulations may modify part 2 of this Act to deal with unforeseen circumstances.

This broad transitional regulation making power is necessary because of the scope and complication of the reform. As the transition from ACT to Commonwealth legislation and registration progresses, there may be events that require modifications to this Act. Also, the overall reform involves changes in legislation in other jurisdictions, including the Commonwealth. As these changes occur, there may be a need for corresponding modifications to this Act to allow for a harmonious and efficient transition.

Clause 9 Application of Legislation Act, s 88

Provides that the Legislation Act, section 88, applies to this part of the Act. This will ensure that repeal does not end the effect of these transitional provisions.

Division 2.2 - Interests in motor vehicles

Clause 10 Existing motor vehicle provisions cease to have effect at registration commencement time

Provides that those sections of the *Sale of Motor Vehicles Act 1977* dealing with encumbrances on vehicles will cease to have effect when the Commonwealth PPS Act begins to govern security interests in motor vehicles. All sales and encumbrances created before the registration commencement time will continue to be governed by the existing ACT law. After the registration commencement time, the Commonwealth PPS Act will govern all of these transactions.

Clause 11 Search certificates and notices

Provides that section 32D of the *Sale of Motor Vehicles Act 1977* continues in effect after the registration commencement time, but only in regard to search certificates issued before the registration commencement time. This provision is consistent with the Commonwealth PPS Act, Chapter 9, which lists transitional provisions. This is important to ensure that, if a transaction involving a motor vehicle search certificate was concluded under the existing Territory law, any disputes or issues related to that transaction will continue to be governed by the same Territory laws in the future.

Clause 12 Enforcement of interests in motor vehicles

Provides that the enforcement provisions of the *Sale of Motor Vehicles Act 1977* continue to apply after the registration commencement time. The purpose of this is identical to the purpose of clause 11. This provision ensures that transactions that pre-date the registration commencement time continue to be governed by the relevant law at the time the transaction was completed.

Division 2.3 Interests to which Instruments Act 1933 applies

Clause 13 Existing Act ceases to have effect at registration commencement time

Provides that the *Instruments Act 1933* ceases to have effect at the registration commencement time. The Instruments Act governs bills of sale and other instruments that secure payment or performance of an obligation in the Territory. As a result, it will be superseded by the Commonwealth PPS Act. All transactions that previously would have involved registrable instruments will in the future be governed under the Commonwealth Act.

Clause 14 Registrar-general may refuse to exercise registration functions

This provision empowers the registrar-general to refuse to exercise registration functions under the *Instruments Act 1933* during the migration time, which under the Commonwealth PPS Act, section 306, is a period of time immediately before the registration commencement time. During this time period, it is anticipated that new registrations of instruments will be made on the Commonwealth PPS register, rather than on the Territory's registers.

Clause 15 Registrable instruments executed before commencement time

Provides that instruments registered under the *Instruments Act 1933* before the registration commencement time continue to be valid and enforceable. This will ensure that the law under which an instrument was created continues to govern that instrument in the future.

Clause 16 Enforcement of interests

Provides that enforcement of interests under any transitional security interest, as defined in section 308 of the Commonwealth PPS Act. This provision ensures that any interest affected by the *Instruments Act 1933* will continue to be governed by the law as it applied at the time the interest was created.

Clause 17 Fees payable

Provides that fees payable under the *Instruments Act 1933* may be collected even after the registration commencement time. This will ensure that the registrar-general is able to collect fees owing for functions that were performed prior to the repeal of the *Instruments Act 1933*.

PART 3 - Legislation amended and repealed

Clause 18 Legislation amended – schs 1-3

Provides that this Act amends the legislation included in Schedules 1 through 3.

Clause 19 Legislation repealed

Repeals the *Instruments Act 1933*, and all legislative instruments under the *Instruments Act 1933*.

SCHEDULE 1 - Amendments—interests not personal property for PPS Act

PART 1.1 - Liquor Act 1975

Clause 1.1 New section 176

Inserts new section 176 into the *Liquor Act 1975*. New section 176 provides that a licence or permit issued under the Liquor Act does not fall within the definition of *personal property* under the Commonwealth PPS Act. This will preclude liquor licences from being registered as securities under the terms of the Commonwealth PPS Act. All existing ACT legislation applicable to liquor licences will remain unchanged.

PART 1.2 - Planning and Development Act 2007

Clause 1.2 New section 417(3)

Inserts new section 417(3) into the Planning and Development Act 2007. New subsection (3) provides that a right granted by licence issued under subsection (1) does not fall within the definition of *personal property* under the Commonwealth PPS Act. This amendment has the effect of excluding minerals licences from the new scheme. Existing ACT regulations and laws regarding minerals will remain unchanged.

SCHEDULE 2 - Amendments—statutory interests for PPS Act

PART 2.1 - Confiscation of Criminal Assets Act 2003

Clause 2.1 New section 94(4)(ba)

Inserts new section 94(4)(ba) into the Confiscation of Criminal Assets Act 2003. New paragraph (ba) declares the charge created under this section in favour of the Territory to be a statutory interest under the Commonwealth PPS Act, with the result that its priority will be determined according to existing ACT law.

PART 2.2 - Criminal Code 2002

Clause 2.2 New section 377(6A)

Inserts new section 377(6A) into the Criminal Code 2002. New subsection (6A) declares the interest of the Public Trustee in payment under this section to be a statutory interest under the Commonwealth PPS Act, with the result that its priority will be determined according to existing ACT law.

PART 2.3 - Hemp Fibre Industry Facilitation Act 2004

Clause 2.3 Section 42(5)

Substitutes a new section 42(5), declaring the interest of the chief executive in the proceeds of a crop sale to be a statutory interest under the Commonwealth PPS Act. This will ensure that the chief executive's right to payment from sales under this part of the Act is given priority over other interests.

The amended section 42(5) also updates a reference to the *Instruments Act 1933*, which is repealed by this Act. Interests in crops, including hemp, will be registered under the Commonwealth PPS Act in the future.

PART 2.4 - Public Trustee Act 1985

Clause 2.4 New section 72(2)

Inserts new section 72(2) into the *Public Trustee Act 1985*. New subsection (2) declares the Public Trustee's interest in insurance proceeds to be a statutory interest under the Commonwealth PPS Act. The Commonwealth PPS Act treats insurance payments for lost or damaged collateral as proceeds of collateral. This amendment ensures that the priority of the Public Trustee's interest in insurance proceeds under this section will be determined according to existing ACT law.

PART 2.5 - Road Transport (Safety and Traffic Management) Regulation 2000

Clause 2.5 New section 112(7)

Inserts new section 112(7) into the Road Transport (Safety and Traffic Management) Regulation 2000. New subsection (7) preserves the existing rules for distributing proceeds from the sale of a seized vehicle, by declaring the interest of the Territory in those proceeds to be a statutory interest under the Commonwealth PPS Act.

SCHEDULE 3 - Other amendments

PART 3.1 - Cooperatives Regulation 2003

Clause 3.1 Section 44

Removes section 44 of the Cooperatives Regulation 2003. Section 44 prescribed laws for registration of securities for the purposes of section 3.8, Schedule 3 of the *Cooperatives Act 2002*. Section 44 is now redundant as a consequence of the Commonwealth PPS Act, as these laws will be repealed or significantly amended in other jurisdictions.

PART 3.2 - Mercantile Law Act 1962

Clause 3.2 Section 20(2)(b)

Replaces section 20(2)(b) of the *Mercantile Law Act 1962*. This amendment updates a reference to the *Instruments Act 1933*, which will be repealed, and introduces a requirement for warehouse persons to search the new Commonwealth PPS register in its place.

PART 3.3 - Registration of Deeds Act 1957

Clause 3.3 Section 4A(1), new note

Inserts a note into subsection 4A(1) of the *Registration of Deeds Act 1957*. The new note references the new Commonwealth PPS Act and explains that the Commonwealth PPS Act prevails to the extent that the *Registration of Deeds Act 1957* is inconsistent with it.

PART 3.4 - Sale of Motor Vehicles Act 1977

Clause 3.4 Sections 32A to 32F

Removes existing sections 32A, 32B, 32C, 32D, 32E and 32F and replaces with new subsection 32A, preserving the liability of dealers to a non-dealer for losses as a result of encumbrances on the vehicle in certain circumstances. The remaining provisions governing encumbrances on vehicles are omitted, as encumbrances on vehicles will be governed under the Commonwealth PPS Act.

Clause 3.5 Dictionary

Amends the dictionary in the *Sale of Motor Vehicles Act 1977* to remove the definitions of the following terms:

creditor;
debtor;
director-general;
hirer;
lease;
non-dealer;
notice; and
NSW Act.

These terms all relate to encumbrances and registrations in the New South Wales REVS. The Commonwealth PPS Act will replace these pieces of legislation and govern these matters, with its own applicable definitions.

Clause 3.6 Dictionary, definition of *owner*

Amends the dictionary in the *Sale of Motor Vehicles Act 1977* to update the definition of *owner*. This amended definition excludes references to those provisions of the *Sale of Motor Vehicles Act 1977* that are repealed by this Act.

Clause 3.7 Dictionary

Amends the dictionary in the *Sale of Motor Vehicles Act 1977* to remove the definitions of the following terms:

participating state;
payment;
purchase;
registered;
register of interests;
registrable interest; and
security interest.

These definitions relate to encumbrances and registrations in the New South Wales REVS, and the relationship between New South Wales legislation and the *Sale of Motor Vehicles Act 1977*. The Commonwealth PPS Act will govern these matters, with its own applicable definitions.