

# Personal Property Securities (Commonwealth Powers) Bill 2009

## Explanatory Notes

### Short Title

The short title of the Bill is the Personal Property Securities (Commonwealth Powers) Bill 2009.

### Objective of the Bill

The objective of the Bill is to refer certain matters relating to security interests in personal property to the Commonwealth Parliament to make laws about those matters. The proposed Commonwealth personal property securities legislation will be enacted pursuant to the head of power in section 51(xxxvii) of the Constitution of the Commonwealth, which enables State Parliaments to refer matters to the Commonwealth Parliament. The Commonwealth will make laws for the regulation of personal property securities and to establish and maintain a national register for all personal property security interests.

### Reasons for the Bill

*What is a personal property security?*

A personal property security is created when a person or entity, generally a financier, takes an interest in property, other than land, as security for a loan or other obligation, or enters into a transaction that involves the provision of secured finance. These can be loans secured against vehicles, equipment or trading stock, or can extend to liens on crops, lease arrangements or the factoring of book debts.

*Problems with the current personal property security system*

It has been recognised for many years that Australian laws governing security interests in personal property are complex, inadequate, and result in unnecessary compliance and transaction costs. To date, the system involved the Commonwealth, states and territories having their own regimes for registering security interests in various forms of personal

property, encompassing multiple pieces of legislation. This has resulted in the following issues.

- The laws in relation to registration and priority of interests vary depending on the type of personal property over which the security is taken, the legal personality of the security provider (the grantor) and the jurisdiction in which the security interest is taken.
- When a purchaser or a financier wishes to check whether personal property is encumbered, they may need to undertake a number of different searches across multiple jurisdictions. This can be time-consuming and costly, particularly as some registers are only paper-based.
- In some cases, a security interest must be registered in more than one jurisdiction and on multiple registers to be fully effective. This can be the case, for example, where the security provider is a company and the personal property is a patent. It is also an issue when property is moved to another jurisdiction.

#### *The national reform process*

Following initiation of a review of laws governing security interests in personal property by the Standing Committee of Attorneys-General (SCAG), the Council of Australian Governments (COAG) agreed to proceed with the reform of Australian personal property securities law. In April 2006, SCAG released a round of discussion papers on personal property securities reform that garnered significant stakeholder support.

COAG gave in-principle support in April 2007 for the establishment of a national system for the registration of personal property securities, supported by a referral of legislative power by the states to the Commonwealth. COAG further agreed, in principle, that the states and territories would allow the migration of data from existing registers. COAG noted the national system would be funded by the Commonwealth and asked SCAG to provide COAG with an inter-governmental agreement to progress the reforms. The Personal Property Securities Law Agreement was subsequently signed by all states, territories and the Commonwealth.

All jurisdictions have agreed to a text-based referral of power to the Commonwealth for regulation of personal property securities. Model referral legislation upon which the Bill is based was drafted by the Australasian Parliamentary Counsel's Committee on instructions from the New South Wales Attorney-General's Department, and in consultation with

the SCAG Personal Property Securities Working Group. The New South Wales referral legislation was passed on 17 June 2009.

Following passage of the New South Wales referral legislation, the Commonwealth introduced the Personal Property Securities Bill 2009 (the Commonwealth Bill) into the Federal Parliament. The Commonwealth Bill will establish a single, national law governing personal property securities and the national register for all personal property security interests – the Personal Property Securities Register (the PPS Register).

The Commonwealth Bill will apply the same rules for securities in personal property regardless of the kind of property being used as collateral, the form of the transaction providing for the security interest, or the jurisdiction in which the transaction took place. The Commonwealth Bill provides for registration of security interests and sets out the rules for determining priority of competing security interests and enforcement of those interests. It also provides for migration of security interests from existing Commonwealth, state and territory registers to the PPS Register.

The objective of personal property securities law reform is to remove uncertainty around this area of law, open up greater opportunities for business to obtain finance, deliver lower costs for financing, and provide a single national register for the recording of security interests in personal property. By making this referral of power, Queensland will be helping to deliver an historic national reform to improve the way personal property securities are used by traders and consumers. This will lower costs for all affected parts of our community and have a significant positive impact on the economy.

### **Achievement of the Objective**

The establishment of a single national register for the registration of security interests in personal property and uniform national law regulating the creation, priority and enforcement of security interests in personal property are the only reasonable and appropriate means of achieving the aims of the personal property securities law reform.

This Bill is the first step in the reform process for Queensland. The Bill provides for a two-staged approach to the referral of powers for personal property securities matters—a text-based reference and an amendment reference. This is similar to the approach adopted for referral of powers to the Commonwealth in relation to corporations and terrorism.

The Bill is substantially in the same form as the model referral legislation passed by New South Wales. The Bill operates by reference to the text of the Commonwealth Bill, as tabled in the Legislative Assembly of New South Wales. This text is defined in the Bill to be the 'tabled text' (Clause 3). The text of the Commonwealth Bill tabled in the Legislative Assembly of New South Wales is the same as the text of the Commonwealth Bill introduced into the Federal Parliament on 24 June 2009.

As the Commonwealth Bill contains matters that are not within the legislative competence of the states, the Bill also contains a definition of initial referred provisions. The initial reference refers power to the Commonwealth by reference to the tabled text. The reference only relates to the text of the Commonwealth Bill to the extent to which the matters within it are included in the legislative powers of the State. This is because some aspects of the Bill already come within the Commonwealth's heads of power, such as regulation of interstate and international trade or commerce (s.51(i)), foreign corporations and trading or financial corporations (s.51(xx)) and bankruptcy and insolvency (s.51(xvii)).

The Bill also refers certain matters in relation to different kinds of personal property so as to enable the Commonwealth to make amendments to the proposed Commonwealth Personal Property Securities Act (Commonwealth PPS Act) from time to time concerning security interests in those kinds of property. Each of these references is defined in the Bill to be an amendment reference. The amendment references relate to the following kinds of personal property:

- personal property (other than fixtures and water rights);
- fixtures (which are defined to mean goods, other than crops, that are affixed to land); and
- transferable water rights (which are defined to mean certain transferable rights, entitlements or authorities, whether or not exclusive, that are granted by or under the common law or legislation of the State in relation to the control, use or flow of water).

States and territories raised concerns about the application of the Commonwealth PPS Act to fixtures because of concerns about interaction with land laws and the potential for the Commonwealth law to impact on the state-based Torrens Registers. Further consideration will be given to the issue of fixtures through SCAG. Water entitlements in Queensland are also recorded on a state-based Torrens Register - the Queensland Water Allocations Register. This register records a range of information

concerning water licences including volume of water, extraction details, the water source, the expiry date and conditions, as well as ownership details and security interests recorded against the licence. There was a concern that including water entitlements on the PPS Register would result in unnecessary duplication of the Queensland Water Allocations Register and its equivalent in other jurisdictions. Also, the issue of a nationally consistent water access licensing regime is being considered under a separate COAG process.

The Personal Property Securities Law Agreement reflects the agreement reached between states, territories and the Commonwealth to exclude fixtures and water entitlements from the proposed Commonwealth PPS Act upon its commencement. However, both the Agreement and this Bill enable these matters to be included in the Commonwealth PPS Act in the future.

The Bill places the following limits on the amendment references.

- The Bill will prevent the Commonwealth Parliament from amending the Commonwealth PPS Act to exclude or limit the power of the State to administer, vary and abrogate any State statutory rights (such as licences) that it creates from time to time. This might include, for example, taxi licences, mining leases and gaming licences. This reflects the terms of the Personal Property Securities Law Agreement that states and territories should be able to continue to regulate any licence, right, entitlement or authority created pursuant to state and territory legislation.
- The Bill will ensure that the Commonwealth PPS Act cannot be amended to regulate state-based statutory licences, entitlements, rights or authorities that have been opted out of the personal property securities scheme by state law (*an excluded statutory right*). This is achieved by defining ‘personal property’ to exclude an excluded statutory right.
- The Bill will exclude from the referral any law that limits or excludes the operation of Queensland law to the extent that the State law prohibits or limits a person from dealing with personal property or a security interest in personal property. The intention of this provision is to ensure that the Commonwealth PPS Act will not invalidate any state law that enables the Queensland Government’s intervention or action with respect to personal property. Examples of such laws are the *Criminal Proceeds Confiscation Act 2002* and the *Police Powers*

*and Responsibilities Act 2000*, which enable the state to confiscate property obtained through the proceeds of crime, and vehicles used for hooning or in the commission of certain prescribed offences.

The Bill will enable each of the amendment references to be commenced at different times. Each amendment reference can be commenced separately, on a date fixed by proclamation. The amendment references in relation to fixtures and transferable water rights will be able to be commenced after the Commonwealth has enacted the Commonwealth PPS Act pursuant to the initial reference. In accordance with the Personal Property Securities Law Agreement, it is not yet proposed for the regulation of security interests, as it relates to fixtures and water entitlements, to be referred to the Commonwealth. This may change in the future. Accordingly, while the Bill will provide for the amendment reference to include fixtures and water entitlements, these provisions will be prescribed to commence by proclamation, enabling Queensland to choose when, if ever, to refer power to the Commonwealth in relation to these matters.

The Bill also provides for the termination of all of the references that have effect and for the termination of any or all of the amendment references that have effect.

Not proceeding with a referral of power to the Commonwealth would not prevent the Commonwealth from proceeding with the national reforms as it only needs one State to refer power to do so. As indicated above, the New South Wales Parliament has already passed its referral legislation and the Commonwealth has the constitutional power to regulate some personal property securities matters pursuant to its current heads of power regarding interstate and international trade or commerce, foreign corporations and trading, or financial corporations, and bankruptcy and insolvency.

Accordingly, if the Queensland Parliament were to oppose the referral of power in relation to personal property securities, the State would be out of step with the rest of the Australian jurisdictions that are referring power, particularly in relation to the regulation of personal property securities as it relates to individuals. This would reduce the benefits of the national reform and put into jeopardy Commonwealth reward payments due to Queensland for the progression of a range of COAG endorsed business and regulatory reforms, of which personal property securities law reform is one. Details of these payments are outlined below under the 'Estimated Cost for Government Implementation' heading.

With the establishment of a single national register, approximately 40 registers currently maintained by the Commonwealth, state and territory governments will be shut down. This will include the Queensland Bills of Sale Register (including the Register of Liens on Crops of Sugar Cane), the Register of Encumbered Vehicles (known as REVS) and the Register of Cooperative Charges administered by the Department of Employment, Economic Development and Innovation (DEEDI). These Explanatory Notes will refer to these registers as ‘the Queensland Registers’.

The second step in the reform process will be to develop legislation (an Ancillary Provisions Bill) to cease the Queensland Registers and provide for transitional arrangements in relation to the winding down of the registers, for example, to finalise outstanding applications and show-cause processes. The Ancillary Provisions Bill will also facilitate the migration of data from the Queensland Registers to the PPS Register and make consequential amendments to Queensland legislation resulting from the introduction of the national law. Significant work is being done across Queensland government agencies to progress the necessary consequential amendments for inclusion in an Ancillary Provisions Bill in accordance with timeframes agreed to by COAG.

### **Alternative ways of achieving the policy objectives**

The following options were considered by the SCAG Personal Property Securities Working Group to enable the establishment of a national PPS Register and consistent national law in relation to the regulation of personal property securities.

- (i) *Model law* – under this option each jurisdiction would introduce its own model legislation to establish the national register and personal property securities law.
- (ii) *Applied law* – under this option, one jurisdiction would introduce primary legislation with other jurisdictions introducing laws to adopt the primary legislation.
- (iii) *Referral law* – under this option each jurisdiction would introduce legislation referring power to the Commonwealth Parliament to make laws in relation to personal property securities, by reference to the text of a Commonwealth Bill, or by reference to subject matter. This is the preferred option.

- (iv) *Unilateral law* – under this option, the Commonwealth would rely on various heads of power (of the type referred to above) to make laws about personal property securities.
- (v) *Constitutional amendment* – if agreed to by both Federal Houses of Parliament, a referendum would need to be held seeking approval for amendment to the Commonwealth’s heads of power to enable it to regulate personal property securities.

Referring law was decided to be the preferred option because it provided greater certainty regarding the extent of the power of the Commonwealth Parliament to make laws for the registration of personal property securities and the jurisdiction of the federal courts. It also ensures greater uniformity of the law and avoids the necessity to establish complicated inter-jurisdictional arrangements for administration of a single national register. The Commonwealth would not have sufficient power to cover the field by relying on its own heads of power and amending the Constitution via a referendum is a costly, time consuming and uncertain exercise.

Referral by way of a text reference provides greater certainty to the states over the coverage of the proposed Commonwealth PPS Act. The inclusion of an amendment reference gives the capacity for the Commonwealth PPS Act to be amended without the need for amendments to be made to each state’s referral legislation. However, states and territories are given a certain amount of control over future amendments to the national law because the proposed Bill limits the amendments by reference to defined subject matter. Further, the Personal Property Securities Agreement requires the agreement of at least three jurisdictions before the Commonwealth Government progresses amendments to the Commonwealth PPS Act.

### **Estimated Cost for Government Implementation**

The projected net revenue foregone from the closure of the Queensland Registers is expected to be approximately \$9.28M per annum. This estimate is based on actual figures from the 2008/09 year, as net revenue has remained relatively steady over the last three years.

The Commonwealth Government has agreed to pay the states and territories a total of \$550M over five years, allocated on an equal per capita basis, to cover 27 COAG business and regulatory reforms, of which personal property securities law reform is one. There is to be a facilitation



payment totalling \$100M in 2008-09, followed by reward payments in 2011-12 and 2012-13 of \$200M and \$250M respectively.

It is anticipated that the transition to the national personal property securities scheme, including progression of this Bill and the proposed Ancillary Provisions Bill will be funded from within existing resources. However, it is not possible to quantify the potential costs of data migration at this stage because the Commonwealth Government is yet to finalise its data migration plan, nor have the operational details for the PPS Register been released.

Some Queensland Government agencies may incur costs transitioning to the national scheme. For example, some agencies will need to disable the current interface with REVS and establish a new interface with the PPS Register. Until the Commonwealth's systems developer provides detailed information on the technical aspects of the system, it is unknown how agencies will interface with the national PPS Register. The Queensland Government will consider the cost impacts when determining whether interfacing will occur through one access point for the State, or through multiple access points.

Some Queensland and Commonwealth Government agencies currently receive Certificates of Title from REVS at no cost. Other agencies are charged for Certificates of Title. The PPS Register will not provide Certificates of Title in relation to vehicles and boats, and it has not been determined whether the Commonwealth intends to charge state agencies for register searches. If a charge is imposed there will be cost impacts on those agencies that currently receive certificates free.

For those agencies that currently conduct and pay for searches of the existing state and territory registers, there may be cost savings for searching the new PPS Register as it is anticipated that the cost of searching the PPS Register will be set at \$1 to \$2 per search, which is cheaper than searches of the Queensland Registers. The Commonwealth has indicated these amounts to be the likely fee range, based on setting fees on a cost-recovery basis. Also, under the current system, searches may need to be conducted across multiple registers and jurisdictions to determine whether a security interest exists over collateral. With the establishment of a single national PPS Register, fewer searches may be required, which will reduce costs for financiers and other interested parties.

Full details about the operation of the PPS Register and customer contact centre functions are not yet available. It is therefore not possible to

determine whether state agencies might have a role in the operation of the PPS Register once it commences, nor the revenue such a role might generate.

With regard to staffing costs, at present, the delivery of services for REVS and the Bills of Sale Register are provided by Smart Service Queensland (SSQ) and DEEDI. With transition of the scheme not taking place until May 2011, SSQ and DEEDI are planning for the redeployment, within the Queensland Public Service, of staff impacted by the transition of regulatory services to the Commonwealth. This will take into account the impact of all COAG reforms, not just the personal property security reforms.

### **Consistency with Fundamental Legislative Principles**

The Bill is considered to be consistent with fundamental legislative principles for the reasons outlined below.

Section 4(1) of the *Legislative Standards Act 1992* requires legislation to accord with the principles relating to legislation that underlie a parliamentary democracy based on the rule of law. The State's power to refer a matter to the Commonwealth Parliament must fall within the general legislative power of the States to make laws for the peace, welfare and good government of the State.

The Scrutiny of Legislation Committee (the Committee) has previously raised concerns about the ability of the State to terminate a referral in accordance with the provisions such as those in clause 7 of the Bill. For instance, in relation to the *Water (Commonwealth Powers) Act 2008*, the Committee questioned whether a state can revoke its referral of power at any time, by enactment, irrespective of the period of the referral, and the effect of that revocation on the Commonwealth enactment made pursuant to the referral.

In relation to the *Water (Commonwealth Powers) Act 2008*, the Committee noted that it is arguable that the states can revoke a referral, given their incapacity to abdicate legislative power. The Committee further noted that it is also arguable that the effect of a revocation is that it not only terminates the referral of power to the Commonwealth, but it also terminates the operation of any Commonwealth law enacted in reliance on that referral. It is acknowledged that an alternative argument is that State legislation revoking the reference would be rendered ineffective by section 109 for being inconsistent with the Commonwealth legislation enacted pursuant to the original reference.

In response, it is noted that the use of revocation provisions is common in State referral of power legislation. The approach taken in the Bill, enabling the Governor to fix a day, by proclamation, to terminate the reference accords with the vast majority of previous State referral of powers legislation enacted since 1952.

The Bill makes provision for Queensland to terminate both the initial reference and the amendment reference, or just the amendment reference, at any time. Clause 244 of the Commonwealth Bill adequately protects the State's interests in the event that the State no longer wishes the Commonwealth to continue to have power to legislate for Queensland in relation to the referred matters.

Clause 244 of the Commonwealth Bill makes it clear that the termination of the initial reference has the effect of revoking in its entirety the referral of powers (including both initial and amendment reference) on behalf of Queensland, resulting in Queensland ceasing to be a referring State, and consequently terminating the Commonwealth's power to legislate for Queensland in relation to the referred matters. This does not, however, affect the status of other referring states or the Commonwealth power to legislate for them.

Section 4(2)(b) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to the institution of Parliament. It is arguable that the Bill infringes fundamental legislative principles by having insufficient regard to the institution of Parliament. However, for the reasons outlined below, the provisions are considered to be justified.

Firstly, the Bill enables the revocation of a referral power by the publication of a proclamation made by the Governor in Council (clause 7). This clause may be considered to be a 'Henry VIII' clause. This provision is not considered objectionable because Parliament has the opportunity to disallow the proclamation.

The Personal Property Securities Law Agreement prescribes a process for jurisdictions to approve amendments to the personal property securities legislation by the Commonwealth. However, the Personal Property Securities Law Agreement is not strictly enforceable. The only circumstances where it is envisaged a reference would be terminated would be of such an extraordinary kind (for example, the passing of oppressive amendments to the Commonwealth PPS Act that have not been agreed to by state and territory jurisdictions). In such circumstances, it is submitted

the present terminating provision permitting rapid Executive action is warranted.

Secondly, the amendment reference provisions of the Bill (clause 6 (2), (3) and (4)) will commence on proclamation, including in relation to fixtures and water entitlements. This reflects the agreement reached between the states, territories and the Commonwealth Governments under the Personal Property Securities Law Agreement. Jurisdictions agreed to draft their referral legislation this way to avoid the need to return to their respective Parliaments in the future should jurisdictions wish to refer power regarding fixtures and water entitlements. Delaying commencement of the amendment reference in clause 6(2) will enable the State to consider amendments proposed to be made to the Commonwealth PPS Act by the Commonwealth after its enactment, before commencing this amendment reference.

To avoid the automatic commencement of the amendment reference provisions, including in relation to fixtures and water entitlements, the Bill exempts the operation of section 15DA of the *Acts Interpretation Act 1954* applying to clause 6(2), (3) and (4). This may also be considered to have insufficient regard to the institution of Parliament. However, for the reasons outlined below, the exemption of section 15DA is considered to be an appropriate measure.

Delaying the referral of power in relation to fixtures and water entitlements reflects the agreed position in the Personal Property Securities Law Agreement. The Bill is based on a model referral legislation developed by the Australasian Parliamentary Counsel's Committee that is to be adopted by all states, to reflect the agreements reached nationally about personal property securities reform under the Personal Property Securities Law Agreement.

While all jurisdictions have agreed to consider the potential referral of power in relation to fixtures and water entitlements further, the outcome of those deliberations is likely to take a number of years, and the current position is to not refer power in relation to these matters. Also, it is not yet clear how long it will take the Commonwealth Government to progress the amendments proposed to the Commonwealth PPS Act after it is enacted. Queensland should retain the capacity to consider these amendments before commencing the amendment reference in clause 6(2).

## **Consultation**

### Community

The Commonwealth Attorney-General's Department has consulted extensively on the national personal property securities law reform. It released a consultation draft of the Commonwealth Bill and accompanying commentary in May 2008. Submissions were invited from stakeholders and other interested parties. As well as submissions from the states and territories, the Commonwealth Attorney-General's Department received 47 submissions from finance providers, legal practitioners and interested individuals. In response to some of the issues raised in submissions, the Commonwealth Attorney-General's Department released a revised exposure draft on 10 November 2008 inviting further comments.

Also, the Commonwealth Attorney-General's Department established a Personal Property Securities Review Consultative Group comprised of government and industry stakeholders including: officers from the Australian, New South Wales and Victorian Attorneys-General and consumer affairs departments; representatives from academia; the legal profession; the banking and finance sectors; the Motor Traders Association and consumer interest groups. The consultative group has met regularly to oversee the development of the legislation and the national register. The consultative group has examined each released draft of the Commonwealth Bill and uses this forum to raise issues with the Commonwealth Attorney-General's Department.

In a report to the Commonwealth Government on the proposal to introduce a national system for the registration of personal property securities, Access Economics has found that the scheme should improve the ability to create and register a security interest, and be a low cost system with low costs for enforcing security interests. In relation to marketplace competition, the national personal property security system should open up finance options and lower finance costs for businesses that have assets that, traditionally, were unable to be used as collateral. Replacing unsecured finance with secured finance reduces the cost by lowering risk. Access Economics also anticipates benefits for smaller financiers and new market entrants with lower barriers to entry. In fact, in their preliminary assessment, Access Economics were unable to identify any groups in the economy who would lose from the introduction of the scheme. The overwhelming opinion is that all stakeholder groups will recoup net gains.

That said, there is likely to be significant costs for finance businesses in transferring to the new national system. For example, in their submission to the Senate Standing Committee's inquiry into the exposure draft of the Commonwealth Bill, the Australian Bankers' Association (ABA) highlighted that the reforms to personal property securities law will necessitate substantial changes to their IT systems and finance and security documentation, require new manuals and new procedures, and extensive staff training. It is estimated by the ABA that the costs for designing, building and testing of the new interface into the PPS Register will extend to the millions of dollars. Banks and other financiers, as well as other affected businesses such as information brokers that supply data from registers such as REVS, also require a substantial lead time to implement the operational and procedural functions and training required to be ready for a 'go-live' date. The Commonwealth Government is mindful of the costs to industry, as a stated reason for delaying commencement of the scheme by 12 months to May 2011 is to allow businesses to amortise the costs over a longer period.

### Government

All Queensland Government departments have been consulted and support the introduction of the Bill.

As noted above, a SCAG Personal Property Security Working Group comprising of officers from the Commonwealth, states and territories has met regularly to progress the development of the model referral bill and to discuss issues concerning the Commonwealth Bill.

Extensive consultation has been conducted with Queensland Government departments in preparation for the transition to the new personal property securities law. The draft Commonwealth Bill and Commentary was considered by all Queensland Government departments in July 2008 and coordinated feedback was provided to the Commonwealth Attorney-General's Department by the Office of Fair Trading, at that time within the Department of Justice and Attorney-General, on behalf of the Queensland Government. In September 2008, the draft Regulation to be made under the proposed Commonwealth PPS Act was distributed to all departments and feedback was sought. This feedback was also provided to the Commonwealth Attorney-General's Department by the Office of Fair Trading. A Revised Exposure Draft of the Commonwealth Bill was circulated to all departments in December 2008.

On 19 February 2009, officers from the Commonwealth Attorney-General's Department met with representatives from a number of Queensland Government departments to review specific agency queries. A meeting dedicated to data migration issues was also conducted with relevant DEEDI personnel and the Commonwealth Attorney-General's Department in March 2009. Also, in February 2009, all Queensland Government departments considered consequential amendments necessary to their administered legislation as a result of the introduction of the Commonwealth Bill, and to determine which, if any, statutory licences, rights and authorities should be opted out of the national personal property securities scheme.

### **Consistency of Bill with legislation of another jurisdiction**

As noted above, the Bill is substantially in the same form as the model referral legislation, drafted by the Australasian Parliamentary Counsel's Committee, which has been passed in New South Wales. The model referral legislation has been approved by the Queensland Attorney-General through the Standing Committee of Attorneys-General. This is in line with the other Australian states, all of which have referred, or intend to refer, power to the Commonwealth in relation to the regulation of personal property securities.

## **Notes on Provisions**

Clause 1(1) sets out the short title of the Act.

Clause 1(2) sets out the purpose of the Act, which is to refer certain matters relating to security interests in personal property to the Parliament of Commonwealth.

Clause 2 provides for commencement of the Act. Clause 2(1) provides that the Act will commence on assent with the exception of clause 6(2), (3) and (4), which will commence on proclamation. Clause 2(2) provides that the *Acts Interpretation Act 1954*, which provides for the automatic commencement of certain Acts one year after they are assented to, does not apply to Clause 6(2), (3) and (4).

Clause 3 defines certain terms used in the Act.

Clause 4 defines the term *referred PPS matters* in relation to personal property that is the subject of the different amendment references under the Act. Clause 4(2)(a) and (b) aim to limit the power of the Commonwealth Parliament to use an amendment reference to exclude or limit the power of the State to administer, vary and abrogate any State statutory rights (such as licences) that it creates from time to time. Clause 4(2)(c) aims to, among other things, preserve the operation of 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 defines the term *security interest in personal property*. The general meaning under this clause is that a security interest in personal property is an interest in relation to the property provided for by a transaction that, in substance, 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). However, this clause also makes it clear 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 lessee or bailor under a lease or bailment of goods.

Clause 6 outlines the initial and amendment references described under the heading ‘Achievement of the Objectives’ above. Sub-clauses (1), (2), (3) and (4) of Clause 6 make the references. Clause 6(1) provides for the inclusion of the referred provisions in the Commonwealth PPS Act enacted in the terms, or substantially in the terms, of the tabled text. The expression “substantially in the terms” of the tabled text will enable minor adjustments to be made to the tabled text.

Clause 6(2) refers matters to the Commonwealth Parliament in connection with the future amendment of the Commonwealth PPS Act concerning security interests in personal property (other than fixtures or water rights).

Clause 6(3) refers matters to the Commonwealth Parliament in connection with the future amendment of the Commonwealth PPS Act concerning security interests in fixtures.

Clause 6(4) refers matters to the Commonwealth Parliament in connection with the future amendment of the Commonwealth PPS Act concerning security interests in transferable water rights (other than excluded State statutory rights).

Clause 6(5) removes a possible argument that one of the references might be limited by any of the other references (except as provided by clause



6(2), which excludes fixtures and water rights from the reference made by that subclause).

Clause 6(6) clarifies 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 Queensland Parliament.

Clause 6(7) clarifies that the Queensland Parliament envisages that the proposed Commonwealth PPS Act can be amended or affected by Commonwealth legislation enacted in reliance on other powers (though this may be the subject of provisions in the Personal Property Securities Law Agreement that will underpin the scheme) and that instruments made or issued under the Commonwealth PPS Act may affect the operation of that legislation otherwise than by express amendment.

Clause 6(8) specifies the period during which a reference has effect. Each reference will begin when the subsection that makes the reference commences and ends when the period of that particular reference is terminated under clause 7 of the Bill.

Clause 7 deals with the termination of the period of the references specified under clause 6. Clause 7(1) enables the periods of all of the references or any or all of the amendment references to be terminated on a day fixed by the Governor by proclamation. Clause 7(2) provides that a termination date fixed under 7(1) must not be earlier than 12 months after the proclamation is published in the Gazette. Clause 7(3) provides that the Governor may publish a proclamation revoking a termination proclamation made under 7(1). Where this has occurred, the revoked proclamation is taken to not have been published for the purposes of Clause 6. Clause 7(4) provides that it is only possible to effect a revocation if notification has been published before the day that was fixed under 7(1) for the termination. Clause 7(5) provides that the making of a revocation of a proclamation for termination under clause 7(1) does not prevent the publication of a further proclamation under clause 7(1). Clause 7(6) provides that where an amendment reference termination has been published in the Gazette and not revoked, then the expression in clause 7(1)(a) 'all of the references that have effect are to terminate', means the initial reference and those amendment references, if any, still in effect.

Clause 8 makes it clear that the separate termination of the period of an amendment reference does not affect laws already in place. Accordingly,

the amendment reference continues to have effect to support those laws unless the period of the initial reference is also terminated.

Clause 9 provides for the accuracy of a copy of the tabled text containing the proposed Commonwealth PPS Act to be certified by the Clerk of the Legislative Assembly of New South Wales. Such a certificate is evidence of the accuracy of the tabled text and that the text was in fact tabled as contemplated by the Bill.

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