

Review of the Personal Property Securities Act 2009

Call for Submissions

14 April 2014

Contents

Introduction	3
Reasons for the review	3
Conduct of the review.....	3
Terms of reference.....	3
A focus on small business	3
Reports.....	4
Further information	4
What is being reviewed?.....	5
What is the PPS Act?	5
A short history to the PPS Act.....	6
Objectives of the PPS Act.....	7
Call for submissions and next steps.....	8
Call for submissions	8
Closing dates	8
How to make a submission	8
Publication of submissions.....	8
What happens next?	8

Introduction

1. On 4 April 2014, the Attorney-General, Senator the Hon George Brandis QC, announced a review of the *Personal Property Securities Act 2009* (PPS Act). The review is to be completed by 30 January 2015.

Reasons for the review

2. The review is a requirement of section 343 of the PPS Act. That section provides that a review of the operation of the PPS Act is to be completed within the first three years of the PPS Act coming into effect. The PPS Act came into effect on 30 January 2012.
3. The PPS Act made significant changes to secured transactions law in Australia. This required equally significant changes to the practices of Australian businesses, and had impacts for Australian consumers, creditors, financiers, insolvency practitioners, accountants and legal practitioners.
4. In light of the major changes that the PPS Act made to the law and to business practice, the review provides a timely opportunity to assess the impact of the PPS Act, the achievement of its objectives and its ongoing operation.

Conduct of the review

5. The Attorney-General has appointed Mr Bruce Whittaker to lead the review. Mr Whittaker is a partner with the law firm Ashurst and is recognised as one of the world's leading structured finance lawyers with over 30 years' experience in private practice both in Australia and overseas. Mr Whittaker will be supported by a secretariat within the Attorney-General's Department.

Terms of reference

6. The Attorney-General has issued terms of reference to guide the review. The terms of reference provide for a comprehensive review of the operation of the PPS Act, including but not limited to:
 - the effects of the PPS Act on Australian businesses and consumers, and on the market for business and consumer finance,
 - levels of awareness and understanding of the PPS Act amongst business, and
 - opportunities for minimising regulatory and administrative burdens and creating further efficiencies in the PPS Act regime.

The full terms of reference are set out at **Attachment A**.

A focus on small business

7. In addition to reviewing the operation and effect of the PPS Act, the review will pay particular attention to the experiences of **small businesses** with the Act. In particular, the

review seeks feedback on the effect of the PPS Act on small business and will consider the ways in which small business understands and engages with the PPS Act, and explore opportunities for reducing the cost of working with and utilising the regime.

Reports

8. An interim report will be prepared by 31 July 2014. That report will focus on issues raised in the review in relation to small business, and may include recommendations on any priority actions for the Government to consider.
9. A final report will be prepared by 30 January 2015. That report is expected to make recommendations on how to improve the Act, including simplification where appropriate.

Further information

10. Further information on the review is available at ag.gov.au/ppsareview.

What is being reviewed?

11. Section 343 of the PPS Act provides that the review is to consider the operation of the PPS Act. As part of this, the review will also consider the operation of:

- the *Personal Property Securities Regulations 2010*, and
- the functionalities of the Personal Property Securities Register.

What is the PPS Act?

12. The PPS Act created a national regime for secured credit using personal property¹. It did this by establishing a single set of rules for the creation, registration, priority and enforcement of security interests in personal property to which the PPS Act applies. Secured lending against personal property is an important element of the Australian credit market and, accordingly, the broader economy.

13. Prior to the PPS Act, the law governing the taking and enforcement of security interests in personal was fragmented, set out in over 70 Commonwealth, State and Territory Acts. The overlap between the many laws led to duplication and uncertainty. In particular, the rules for registering a security interest, often linked to the protection afforded to a security holder, were different for the Commonwealth and for each state and territory. Whether a personal property security could, or needed to be, or should be registered, depended on certain formal features including the:

- jurisdiction
- type of interest
- class of debtor (e.g. corporation or natural person)
- type of property
- location of the property, and
- type of transaction.

14. Some personal property security transactions had more than one registration requirement in the same jurisdiction or needed to be registered in more than one state or territory.

¹ Personal property is almost any form of property other than land, buildings or fixtures. Common examples of personal property include art, boats, caravans, cars, crops, inventory, livestock, plant and machinery, and shares. Personal property also includes non-material items such as accounts, intellectual property, investment instruments, or licences.

15. The PPS Act sought to dispense, so far as is possible, with considerations of form. Instead, the PPS Act adopted a ‘functional’ approach, focussing on whether an interest in property, in substance, secured payment or performance of an obligation. In adopting a functional approach, the PPS Act also covered arrangements that were not traditionally considered to be security interests, such as retention of title arrangements, commercial consignments and leases.

A short history to the PPS Act

16. Calls for the introduction of legislation like the PPS Act in Australia date back to the 1970s. In 1993, the Australian Law Reform Commission issued a report on personal property securities reform and draft Personal Property Securities Bill. In 2005, the then Standing Committee of Attorneys General (SCAG) formed a working group to examine options for personal property securities reform.
17. In 2007, the Council of Australian Governments (COAG) agreed in-principle to establish a national system of personal property securities, to be implemented by Commonwealth legislation and supported by a referral of legislative power from the states and territories to the Commonwealth. In 2008 COAG signed an intergovernmental agreement formalising its commitment to the reform.
18. Between 2006 and 2009 SCAG publicly released an options paper and a series of four discussion papers examining the creation of a national personal property securities law. Following further public consultation on draft provisions, legislation to create a national personal property securities regime was introduced into the Commonwealth Parliament in 2009. Following passage of that legislation and a number of amendments, the PPS Act came into effect on 30 January 2012.
19. The concepts introduced by the PPS Act are not unique to Australia. Legislation that applies similar concepts has been in place in the United States since the 1950s, in Canada since the 1970s and New Zealand since the early 2000s.

Objectives of the PPS Act

20. The PPS Act's key objectives were to:

- increase consistency and certainty
- reduce complexity and cost, and
- enhance the ability of businesses and consumers to use their assets as security, to improve their ability to access cost-effective finance.

21. By adopting a functional approach to the law of personal property securities and replacing the various Commonwealth, State and Territory laws (many of which only dealt with particular types of personal property), the PPS Act sought to create greater consistency in the treatment of security interests. By establishing a single set of rules for the creation, registration, priority and enforcement of security interests in personal property, the PPS Act also sought to provide greater certainty of outcome for debtors, lenders and third parties and to reduce the complexity generated by the fragmented and multiple sources of law that preceded it.

22. Finally, the PPS Act sought to address concerns about high transaction and compliance costs on debtors, creditors and others with an interest in personal property, resulting from inconsistent treatment of security interests and high levels of legal uncertainty and complexity. It sought to respond to risks that the arrangements that preceded the PPS Act discouraged lenders from taking personal property as security for credit, limited the scope for businesses to use various types of personal property as security, and acted as a barrier to innovation in the creation of new types of personal property and to entry of new participants to the finance business.

23. The PPS Act has replaced a complex myriad of Commonwealth, State and Territory legislation and general law rules. To that extent, it clearly increased the consistency of secured transactions law in Australia. This review provides an opportunity to consider, based on practical experience:

- whether the PPS Act has achieved its other objectives
- whether it has improved the consistency of secured transactions law in Australia as fully as it can or should; and
- whether the policy settings that are given effect to by the legislation are appropriate for the Australian marketplace.

Call for submissions and next steps

Call for submissions

24. This paper calls for written submissions from interested organisations and individuals to the review on the matters set out in paragraphs a) to i) of the terms of reference.
25. Consistent with the terms of reference, the review is interested in particular in receiving submissions on:
- whether the PPS Act has achieved clear and appropriate outcomes for small business, and
 - ways in which the language of the PPS Act can be simplified without compromising desirable policy objectives.

Closing dates

26. The closing date for submissions on **small business issues is 6 June 2014.**
27. The closing date for **general submissions is 25 July 2014.**

How to make a submission

28. Electronic lodgement of submissions in DOC, DOCX, RTF or TXT file formats is preferred. If possible, submissions should be limited to less than 5MB. The Secretariat may create PDF documents from the above formats.
29. Submissions can be emailed to ppsareview@ag.gov.au or sent to:

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

Publication of submissions

30. All submissions, and the names of persons or organisations that make a submission, will be treated as public and will be published on this website, unless indicated by the author.
31. For accessibility reasons, hardcopy submissions received by mail may not be published on the website but can be provided on request.

What happens next?

32. Meetings with stakeholders will be convened during the course of the review, in particular to discuss issues raised in submissions. Further details on meetings as they are scheduled will be available from ag.gov.au/ppsareview.
33. Following receipt and consideration of all submissions received by the 25 July 2014 deadline, there may be a call for further submissions on particular issues. If further submissions are required, it is likely that they will be sought in October 2014 with a

closing date in November 2014. Any call for further submissions will be advertised at ag.gov.au/ppsareview.

ATTACHMENT A

Terms of Reference - Review of the *Personal Property Securities Act 2009*

I, George Brandis QC, Attorney-General, request Mr Bruce Whittaker to undertake a review of the operation of the *Personal Property Securities Act 2009* (PPS Act).

The review should consider:

- a) the effects of the reforms introduced by the PPS Act on:
 - i) Australian businesses, particularly small business
 - ii) Australian consumers
 - iii) the market for business finance in Australia, and
 - iv) the market for consumer finance in Australia
- b) the level of awareness and understanding of the PPS Act at all levels of business, particularly small business
- c) the incidence and, where applicable, causes of non-compliance with the requirements of the PPS Act particularly among small businesses
- d) opportunities for minimising regulatory and administrative burdens, including costs, on businesses, particularly small business, and consumers
- e) opportunities for further efficiencies in the PPS Act regime including (but not limited to) simplification of the Personal Property Securities Register and its use
- f) the scope and definitions of personal property covered by the PPS Act
- g) the desirability of specifying thresholds for the operation of the PPS Act regime in respect of particular types of personal property
- h) the interaction of the PPS Act with other legislation including the *Corporations Act 2001*, and
- i) any other relevant matters.

The review must include consultation with relevant stakeholders.

An interim report is to be provided jointly to me and the Hon Josh Frydenberg MP, Parliamentary Secretary to the Prime Minister, by 31 July 2014 on the impact of the PPS Act on small businesses with recommendations on any priority actions (including legislative) that should be considered by Government in respect of issues raised in the review that concern small business stakeholders.

The final report on the review, which should include recommendations on how to improve the PPS Act, including simplification of the Act where appropriate, must be provided jointly to me and the Hon Josh Frydenberg MP, Parliamentary Secretary to the Prime Minister by 30 January 2015.

George Brandis QC
Attorney-General

