



Government of Western Australia  
Department of Commerce

# **EXPLANATORY MEMORANDUM**

## ***Personal Property Securities (Commonwealth Laws) Bill 2011***

# ***Personal Property Securities (Commonwealth Laws) Bill 2011***

## **Overview of the Bill**

The object of this Bill is to adopt the *Personal Property Securities Act 2009* (Commonwealth), as amended by the *Personal Property Securities (Consequential Amendments) Act 2009* (Commonwealth), the *Personal Property Securities (Corporations and Other Amendments) Act 2010* (Commonwealth) and the *Personal Property Securities (Corporations and Other Amendments) Act 2011* (Commonwealth), and to refer to the Commonwealth Parliament the power to amend the adopted Act. Together with the *Personal Property Securities (Consequential Repeals and Amendments) Bill 2011* (WA), the proposed Act will implement the personal property securities (PPS) reforms in Western Australia.

The *Personal Property Securities Act 2009* (Commonwealth) will create a nationally uniform set of rules for the registration and enforcement of security interests in personal property. In addition, a single national register for personal property securities will be established, replacing more than 25 individual registers which currently exist in the various jurisdictions.

The introduction of the new personal property securities regulatory regime will provide greater certainty for both lenders and borrowers. It will lower the risk for lenders, improve the efficiency of financing against personal property and increase competition among providers of finance. It is expected that the reforms will increase the availability and lower the cost of finance for people and businesses wanting to use personal property as security, in particular small and medium sized businesses.

The Commonwealth Attorney General's Department has affirmed its commitment to consulting all people and bodies with a stake in the personal property securities reforms and has conducted consultation with stakeholders, including the finance and legal sectors, on a national level. Submissions received from these stakeholders contributed to the development of the *Personal Property Securities Act 2009* (Commonwealth).

Three Western Australian registers, all of which are maintained by the Department of Commerce, will be closed upon the commencement of the Personal Property Securities Register:

- the Register of Encumbered Vehicles (REVS), as established under the *Chattel Securities Act 1987* (WA);
- the Bills of Sale Register, as established under the *Bills of Sale Act 1899* (WA); and
- the Register of Co-operative Charges, as established under the *Co-operatives Act 2009* (WA).

The proposed Act contains transitional provisions which will allow for the closing of these registers and the migration of data from the registers to the Personal Property Securities Register.

The migration of data from these three registers, together with data from registers in other jurisdictions that will be closing, will ensure that the new Personal Property Securities Register is accurate and up to date from its commencement.

Security interests that are created prior to the commencement of the Personal Property Securities Register will receive certain protections under the *Personal Property Securities Act 2009* (Commonwealth). The transitional provisions in the Commonwealth Act ensure that any security interests which existed prior to the commencement of the Personal Property Securities Register will maintain the priority they would have had before the Register commenced operation. This includes both interests that are recorded on a register such as the Register of Encumbered Vehicles or the Bills of Sale Register, and interests that exist but are not required to be recorded on a register of this nature.

For example, in the event of a priority dispute regarding a security interest over a motor vehicle that was registered on WA's Register of Encumbered Vehicles prior to it being closed and was then migrated to the Personal Property Securities Register, the priority would be determined according to the law that applied while the Register of Encumbered Vehicles was still in operation.

For security interests which existed prior to the commencement of the Personal Property Securities Register but were not required to be recorded on a register such as the Register of Encumbered Vehicles, this transitional protection will last for 24 months, or until the security interest is registered on the Personal Property Securities Register. Once the security interest has been registered, it will be perfected and receive a higher priority than interests over the same property which were registered after the Personal Property Securities Register commenced.

An Intergovernmental Agreement for the national personal property securities reforms was signed at the Council of Australian Governments (COAG) meeting on 2 October 2008.

The proposed Act relies on section 51(xxxvii) of the Commonwealth Constitution, which enables State Parliaments to refer matters to the Commonwealth Parliament or adopt Commonwealth laws that have been enacted pursuant to such referrals.

The reference to support the enactment of the initial Commonwealth legislation was provided by New South Wales with the enactment of the *Personal Property Securities (Commonwealth Powers) Act 2009* on 17 June 2009. With the exception of Western Australia and Tasmania, all other States enacted referral legislation prior to the enactment of the *Personal Property Securities Act 2009* (Commonwealth).

In view of the enactment of the Commonwealth legislation, it was determined that Western Australia and Tasmania would be required to adopt the Commonwealth laws pursuant to section 51(xxxvi) of the Commonwealth Constitution. The Tasmanian Parliament has now passed the *Personal Property Securities (Commonwealth Powers) Act 2010*, which adopts the text of the *Personal Property Securities Act 2009* (Commonwealth) and refers to the Commonwealth Parliament a power to amend that Act.

## Part 1 – Preliminary

Clause 1 Provides that the short title of the Bill (when enacted) is to be the *Personal Property Securities (Commonwealth Laws) Act 2011*.

Clause 2 Provides for the commencement of the Bill.

Subclause (1)(a) provides that Part 1 of the Bill will commence on the day the Act receives Royal Assent.

Subclause (1)(b) provides that the rest of the Bill, other than clauses 8(2) and (3) and 16, will commence on the day after the day on which the Act receives Royal Assent.

Subclause (1)(c) provides that clause 16 will commence at the registration commencement time, as defined in section 306(2) of the *Personal Property Securities Act 2009* (Commonwealth). Registration commencement time will be the day on which the Personal Property Securities Register commences operation.

Subclause (1)(d) provides that clauses 8(2) and (3) will commence on a day fixed by proclamation. Different days may be fixed for the commencement of each provision.

Subclause (2) provides that, before a proclamation can be made under subclause (1)(d), each House of Parliament must approve a draft of that proclamation.

## Part 2 – Adoption and referral

Clause 3 Provides for the definition of terms used in Part 2 of the proposed Act. The definitions reflect the fact that there is to be an *adoption* of the Commonwealth law together with the conferral of an *amendment reference*.

**adoption** means the adoption of the relevant version of the Commonwealth PPS Act under clause 6(1).

**amendment reference** means a reference under clause 8(1), (2) or (3).

**Commonwealth PPS Act** means the *Personal Property Securities Act 2009* (Commonwealth), as amended by the *Personal Property Securities (Consequential Amendments) Act 2009* (Commonwealth), the *Personal Property Securities (Corporations and Other Amendments) Act 2010* (Commonwealth) and the *Personal Property Securities (Corporations and Other Amendments) Act 2011* (Commonwealth), as in force from time to time.

**Commonwealth PPS instrument** means any instrument (whether or not of a legislative character) that is made or issued under the Commonwealth PPS Act.

**crops** includes (but is not limited to) the kinds of things that are included in the definition of crops for the purposes of the relevant version of the Commonwealth PPS Act.

Section 10 of the relevant version of the Commonwealth PPS Act defines crops as crops (whether matured or not and whether naturally grown or planted) that have not been harvested, including:

- the products of agriculture or aquaculture, if the products have not been harvested; and
- trees (but only if they are personal property), if the trees have not been harvested.

**excluded State statutory right** means a State statutory right that is declared by the law of the State by or under which it is granted not to be personal property for the purposes of the Commonwealth PPS Act.

This includes State statutory rights that may be created in the future, providing the statutory rights have been declared not to be personal property for the purposes of the Commonwealth PPS Act.

**express amendment** of the Commonwealth PPS Act means the direct amendment of the text of that Act (whether by the insertion, omission, repeal, substitution or relocation of words or matter) by another Commonwealth Act, but does not include the enactment by a Commonwealth Act of a provision that has or will have substantive effect otherwise than as part of the text of the Commonwealth PPS Act.

This will ensure that the matters covered by the amendment references cannot be the source of power for other Commonwealth legislation.

**fixtures** means goods, other than crops, that are affixed to land.

**general law** means the principles and rules of the common law and equity to the extent to which they have effect in the State from time to time.

**goods** means personal property that is tangible property, and includes (but is not limited to) the kinds of things that are included in the definition of goods for the purposes of the relevant version of the Commonwealth PPS Act.

Section 10 of the relevant version of the Commonwealth PPS Act defines goods as personal property that is tangible property, including the following:

- crops;
- livestock;
- wool;
- minerals that have been extracted (including hydrocarbons) in any form, whether solid, liquid or gaseous and whether organic or inorganic;
- satellites and other space objects;

but does not include financial property or an intermediated security.

**interest**, in relation to property, includes a right in the property.

**land** includes all estates and interests in land, whether freehold, leasehold or chattel, but does not include goods that are affixed to land.

**law of the State** means any Act of the State or any instrument made under such an Act, whenever enacted or made and as in force from time to time.

**licence** means either of the following –

- (a) a transferable right, entitlement or authority to do one or more of the following –
  - (i) to manufacture, produce, sell, transport or otherwise deal with personal property;
  - (ii) to provide services;
  - (iii) to explore for, exploit or use a resource;
- (b) a transferable authority to exercise rights comprising intellectual property,

but does not include an excluded State statutory right.

**personal property** means property (including a licence) other than –

- (a) land; or
- (b) an excluded State statutory right.

**referred PPS matters**, in relation to personal property, has the meaning given in clause 4.

**register** means any system for recording interests or information (whether in written or electronic form).

**relevant version of the Commonwealth PPS Act** means the *Personal Property Securities Act 2009* (Commonwealth) as originally enacted, and as later amended by the *Personal Property Securities (Consequential Amendments) Act 2009* (Commonwealth), the *Personal Property Securities (Corporations and Other Amendments) Act 2010* (Commonwealth) and the *Personal Property Securities (Corporations and Other Amendments) Act 2011* (Commonwealth).

The proposed Act will adopt the *relevant version of the Commonwealth PPS Act* and refer to the Commonwealth Parliament the power to amend the *Commonwealth PPS Act*.

**security interest** in personal property has the meaning given in clause 5.

**State statutory right** means a right, entitlement or authority that is granted by or under a law of the State.

**transferable**, in relation to a right, entitlement or authority, means transferable under the general law or a law of the State by the holder of the right, entitlement or authority (whether or not the right, entitlement or authority is exclusive, and whether or not a transfer is restricted or requires consent).

**water right** means a right, entitlement or authority, whether or not exclusive, that is granted by or under the general law or a law of the State in relation to the control, use or flow of water, but does not include an excluded State statutory right.

Clause 4 Provides for the definition of the term *referred PPS matters*.

Sub-clause (1) provides that **referred PPS matters**, in relation to personal property, means -

- (a) the matter of security interests in the personal property; and
- (b) without limiting the generality of paragraph (a), each of the following matters –
  - (i) the recording of security interests, or information with respect to security interests, in the personal property in a register;
  - (ii) the recording in such a register of any other information with respect to the personal property (whether or not there are any security interests in the personal property);



- (iii) the enforcement of security interests in the personal property (including priorities to be given as between security interests, and as between security interests and other interests, in the personal property).

Subclause (2) limits the *referred PPS matters* to exclude provisions which exclude or limit the operation of a State law, where that State law provides for –

a. the creation, holding, transfer, assignment, disposal or forfeiture of a State statutory right;

b. limitations, restrictions or prohibitions concerning the kinds of interests that may be created or held in, or the kinds of persons or bodies that may create or hold interests in, a State statutory right; or

c. without limiting the generality of paragraph (a) or (b), any of the following matters -

i. the forfeiture of property or interests in property (or the disposal of forfeited property or interests) in connection with the enforcement of the general law of the State;

ii. the transfer, by operation of that law of the State, of property or interests in property from any specified person or body to any other specified person or body (whether or not for valuable consideration or a fee or other reward).

The first and second exclusions in subclause (2) limit the power of the Commonwealth Parliament to use an amendment reference to legislate in regard to the administration of a State statutory right.

The third exclusion in subclause (2) will preserve the operation of State laws that provide for the forfeiture, confiscation, seizure or transfer of personal property.

Subclause (3) provides that in this clause, **forfeiture** includes confiscation, seizure, extinguishment, cancellation, suspension or any other forfeiture.

#### Clause 5

Provides for the definition of the term *security interest*. This definition is drawn from the definition of security interest in section 12 of the Commonwealth PPS Act.

Subclause (1) provides that **security interest** in personal property means an interest in relation to personal 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).

Subclause (2) extends the definition to include the following types of interests –

- (a) the interest of a transferee under a transfer of a monetary obligation or chattel paper;
- (b) the interest of a consignor who delivers goods to a consignee under a consignment;
- (c) the interest of a lessor or bailor under a lease or bailment of goods.

These types of interests will fall within the definition of *security interest* even if the transaction concerned does not secure the payment or performance of an obligation.

Subclause (3) provides that a security interest in personal property does not include a licence.

Subclause (4) provides that in this clause –

***chattel paper*** means one or more writings that evidence both a monetary obligation and a security interest in, or a lease of, specific personal property.

***writing*** includes, but is not limited to, the kinds of things that are included in the definition of writing for the purposes of the relevant version of the Commonwealth PPS Act.

Section 10 of the relevant version of the Commonwealth PPS Act defines writing as including:

- the recording of words or data in any way (including electronically) if, at the time the recording was made, it was reasonable to expect that the words or data would be readily accessible so as to be usable for subsequent reference; and
- the display, or other representation, of words or data by any form of communication (including electronic), if:
  - the display or representation is recorded in any way (including electronically); and
  - at the time the recording was made, it was reasonable to expect that the words or data would be readily accessible so as to be useable for subsequent reference.

Clause 6 Subclause (1) provides for the adoption of the relevant version of the Commonwealth PPS Act, pursuant to section 51(xxxvii) of the Commonwealth Constitution.

Subclause (2) provides that the adoption will have effect from the date on which clause 6 commences and will terminate at the end of the day fixed for termination in accordance with clause 7.

As a text based referral of power was not passed prior to the passage of the Commonwealth PPS Act, the Western Australian Parliament is required to adopt the text of the Commonwealth PPS Act, as amended by the *Personal Property Securities (Consequential Amendments) Act 2009* (Commonwealth) and the *Personal Property Securities (Corporations and Other Amendments) Act 2010* (Commonwealth).

Clause 7 Subclause (1) allows the Governor, by proclamation published in the Government Gazette, to fix a day as the day on which the adoption is to terminate. This provides the Western Australian Parliament with the capacity to withdraw the adoption at a future date if required.

Subclause (2) provides that a date fixed by the Governor for termination must be at least 12 months after the day on which the proclamation is published. This length of time will ensure that the State Government, the Commonwealth Government and external stakeholders have sufficient time to prepare for the consequences of a termination.

Subclause (3) allows the Governor, by proclamation published in the Government Gazette, to revoke a proclamation made in accordance with subclause (1). In the event that such a revocation occurs, the initial proclamation will be taken never to have been published.

Subclause (4) provides that a revoking proclamation will have effect only if it is published in the Government Gazette before the day fixed for termination under subclause (1).

Subclause (5) provides that the revocation of a proclamation published under subclause (1) does not prevent a further proclamation being made under that subclause.

Subclause (6) provides that, before a proclamation can be made under subclause (1), each House of Parliament must approve a draft of that proclamation.

Clause 8 Provides for the referral of the power to the Commonwealth Parliament to make express amendments to the Commonwealth PPS Act.

Subclause (1) refers to the Commonwealth Parliament the power to make express amendments to the Commonwealth PPS Act in respect of referred PPS matters, except in regard to fixtures and water rights.

Subclause (2) refers to the Commonwealth Parliament the power to make express amendments to the Commonwealth PPS Act in respect of fixtures (to the extent that the amendments fall within the definition of referred PPS matters in clause 4 of the proposed Act).

Subclause (3) refers to the Commonwealth Parliament the power to make express amendments to the Commonwealth PPS Act in respect of water rights (to the extent that the amendments fall within the definition of referred PPS matters in clause 4 of the proposed Act).

Fixtures and water rights are not included within the scope of the Commonwealth PPS Act in its current form. These matters were excluded from the scope of the Commonwealth Act as a result of concerns that the legal and practical implications of their inclusion had not been fully considered.

Subclauses (2) and (3) will not commence until a day fixed by proclamation, and therefore the Commonwealth Parliament will not have the power to make provision for these matters in the Commonwealth PPS Act (unless this can be done in accordance with other legislative powers of the Commonwealth Parliament) until the State determines that power over these matters should be referred. There is currently no intention to proclaim these subclauses in this State. It is understood that other States are adopting the same approach.

The matter of including fixtures within the scope of the Commonwealth PPS Act has been referred to the Australian Law Reform Commission (ALRC), which will produce a report on the implications of such an inclusion.

It is anticipated that the possibility of including fixtures within the scope of the Commonwealth PPS Act will be considered in greater detail once the ALRC report is published.

Subclause (4) provides that the references of power in subclauses (1), (2) and (3) are separate and not intended to affect the operation of the other subclauses, except as provided for in subclause (1) which excludes fixtures and water rights from the general referral of power to make express amendments.

Subclause (5) provides that the references contained in subclauses (1), (2) and (3) have effect only to the extent that –

- the matter is not included within the legislative powers of the Commonwealth Parliament (other than by a reference for the purposes of section 51(xxxvii) of the Commonwealth Constitution); and
- the matter is included within the legislative power of the State Parliament.

Subclause (6) provides that a reference under subclause (1), (2) or (3) will have effect from the day on which the subclause commences until the day on which the reference is terminated in accordance with the procedure established in clause 9.

Clause 9 Subclause (1) allows the Governor, by proclamation published in the Government Gazette, to fix a day upon which any or all of the amendment references are to terminate. It will be possible to terminate one of the references but leave the remaining references in effect.

Subclause (2) provides that a date fixed by the Governor for termination must be at least 12 months after the day on which the proclamation is published. This length of time will ensure that the State Government, the Commonwealth Government and external stakeholders have sufficient time to prepare for the consequences of a termination.

Subclause (3) allows the Governor, by proclamation published in the Government Gazette, to revoke a proclamation made in accordance with subclause (1). In the event that such a revocation occurs, the initial proclamation will be taken never to have been published.

Subclause (4) provides that a revoking proclamation will have effect only if it is published in the Government Gazette before the day fixed for termination under subclause (1).

Subclause (5) provides that the revocation of a proclamation under subclause (1) does not prevent a further proclamation being made under that subclause.

Subclause (6) provides that, before a proclamation can be made under subclause (1), each House of Parliament must approve a draft of that proclamation.

Clause 10 Provides clarity in regard to the referral to the Commonwealth Government of the power to amend the Commonwealth PPS Act.

Paragraph (a) provides that it is the intention of the Western Australian Parliament that the Commonwealth Parliament has the power to expressly amend the Commonwealth PPS Act by reason of -

- the adoption of the relevant version of the Commonwealth PPS Act; or
- the reference of matters by the State Parliament

pursuant to section 51(xxxvii) of the Commonwealth Constitution.

Paragraph (b) provides that it is the intention of the Western Australian Parliament that the Commonwealth Parliament has the power to expressly amend the Commonwealth PPS Act by reason of the legislative powers of the Commonwealth Parliament, separate from the adoption or referral by the State Parliament pursuant to section 51(xxxvii) of the Commonwealth Constitution.

Paragraph (c) provides that it is the intention of the Western Australian Parliament that the operation of the Commonwealth PPS Act may be affected, other than by express amendment, through the enactment of an instrument that is made or issued under the Commonwealth PPS Act.

Clause 11 Subclause (1) provides that, in the event that an amendment reference is terminated but the adoption of the relevant version of the Commonwealth PPS Act remains in effect, the termination does not affect:

- any laws that were made under the amendment reference before the termination, whether or not they have come into operation before the termination, unless those laws have been repealed; or
- the continued operation of the Commonwealth PPS Act in Western Australia, as it operates immediately before the termination or as subsequently amended by laws made before the termination that come into operation after the termination or provisions referred to in clause 10(b) and (c).

Subclause (2) provides that an amendment reference continues to have effect in accordance with the terms of subclause (1), unless the State terminates the adoption of the relevant version of the Commonwealth PPS Act.

Subclause (3) provides that subclause (1) does not apply to an amendment of the Commonwealth PPS Act, where that amendment is excluded from the operation of this clause by the proclamation that terminates the amendment reference.

Subclause (4) provides that, for the purposes of subclause (1) –

- the laws referred to in subclause (1)(a) include instruments that are made or issued under the Commonwealth PPS Act; and
- the reference in subclause (1)(b) to the Commonwealth PPS Act, as it operates immediately before the termination of an amendment reference, includes that Act as affected by Commonwealth PPS instruments that have come into operation before that time.

### Part 3 – Consequential provisions

Clause 12 Subclause (1) provides for the definition of terms used in Part 3 of the proposed Act.

**Commissioner** has the same meaning as given in section 3(1) of the *Chattel Securities Act 1987 (WA)*.

This position is designated by the Minister, by notice published in the Government Gazette. The position is currently known as the Commissioner for Consumer Protection.

**compensation** includes damages and any other form of monetary compensation.

**PPS Register** means the register as defined in section 10 of the Commonwealth PPS Act.

This is the Personal Property Securities Register that will be established in accordance with section 147 of the Commonwealth PPS Act.

**PPS Registrar** means the Registrar as defined in section 10 of the Commonwealth PPS Act.

Section 10 of the Commonwealth PPS Act defines Registrar as the Registrar of Personal Property Securities.

**PPS transitional matter** means any of the following –

- (a) the provision of information to the Commonwealth, the PPS Registrar, any other officer of the Commonwealth or any other person for the purpose of assisting the Commonwealth in establishing the PPS Register;
- (b) a refusal to exercise a registration function under section 6A of the *Bills of Sale Act 1899* (WA), section 3D of the *Chattel Securities Act 1987* (WA) or Schedule 3, clause 4C of the *Co-operatives Act 2009* (WA);
- (c) the administration of Part 3 of the proposed Act;
- (d) the exercise of functions under Part 3 of the proposed Act.

**Registrar** has the same meaning given in section 5 of the *Bills of Sale Act 1899* (WA).

Section 5 of the *Bills of Sale Act 1899* (WA) defines Registrar as any person who may be appointed by the Governor as a registrar for the purposes of the Act. This position is currently held by an officer at the Department of Commerce (Consumer Protection Division).

**Registrar of Co-operatives** means the Registrar as defined in section 4(1) of the *Co-operatives Act 2009* (WA).

The *Co-operatives Act 2009* (WA) provides that the Commissioner as defined in the *Fair Trading Act 2010* (WA), which is the Commissioner for Consumer Protection, is the Registrar of Co-operatives.

**Register Book** means the Register Book referred to in section 11(1) of the *Bills of Sale Act 1899* (WA).

The Register Book is a record maintained by the Registrar of the date of registration and the particulars of all bills of sale required to be registered under the *Bills of Sale Act 1899* (WA).

Subclause (2) provides that, if a term is defined in the Commonwealth PPS Act, it will have the same meaning for the purposes of Part 3 of the proposed Act.

Clause 13 Authorises the provision of information to the Commonwealth Government.

Subclause (1) authorises the Registrar, as defined in section 5 of the *Bills of Sale Act 1899* (WA), to provide information from the Register Book to the Commonwealth, the PPS Registrar or any other officer of the Commonwealth for the purpose of assisting the Commonwealth Attorney General's Department in establishing the PPS Register.

Subclause (2) authorises the Commissioner, as defined in section 3(1) of the *Chattel Securities Act 1987* (WA), to provide information from the Register of Encumbered Vehicles (as established under section 14 of the *Chattel Securities Act 1987*) to the Commonwealth, the PPS Registrar or any other officer of the Commonwealth for the purpose of assisting the Commonwealth Attorney General's Department in establishing the PPS Register.

Subclause (3) authorises the Registrar of Co-operatives, as defined in section 4(1) of the *Co-operatives Act 2009* (WA), to provide information from the Register of Co-operative Charges (as established under Schedule 3, clause 18 of the *Co-operatives Act 2009*) to the Commonwealth, the PPS Registrar or any other officer of the Commonwealth for the purpose of assisting the Commonwealth Attorney General's Department in establishing the PPS Register.

Subclause (4) permits the information provided in accordance with this clause to be provided in any form, including by means of electronic data or in a form approved for the purposes of the Commonwealth PPS Act.

Subclause (5) provides that this clause prevails in the event of an inconsistency with the provisions of any other Act.

The Western Australian Government has made a number of commitments in relation to the provision of data from the Register of Encumbered Vehicles, the Bills of Sale Register and the Register of Co-operatives Charges to the Personal Property Securities Register, both for data testing and migration purposes.



The provision of this data to the Commonwealth Government will assist in the development of the Personal Property Securities Register and will ensure that registrations are accurately transferred from Western Australian registers to the Personal Property Securities Register from its commencement.

This clause ensures that the State can lawfully provide the required data to the Commonwealth Government.

Clause 14 Subclause (1) provides that compensation is not payable by or on behalf of the State, an authority of the State or an officer, employee or agent of the State for an act or omission that is a PPS transitional matter or that arises from a PPS transitional matter.

Subclause (2) provides that the act or omission must be done in good faith for this clause to apply. This clause will not apply to acts or omissions that cause personal injury or death.

Clause 15 Provides that, where an Act confers upon a person or body the power make subsidiary legislation that provides for the grant of licence or other State statutory right, this includes the power to declare that the licence or right is not personal property for the purposes of the Commonwealth PPS Act.

*The Personal Property Securities (Consequential Repeals and Amendments) Bill 2011 (WA)* contains provisions which declare that certain statutory licences, rights and entitlements are not personal property for the purposes of the Commonwealth PPS Act. The declarations will result in the licences, rights and entitlements being excluded from the scope of the Commonwealth PPS Act.

There are a number of reasons why statutory licences, rights and entitlements have been excluded from the operation of the Commonwealth PPS Act. For example, a number of licences are closely linked to the use of land. Land has been excluded from the operation of the Commonwealth PPS Act in order to preserve the traditional State legislative powers over land titles.

When new categories of statutory licences, rights and entitlements are created in the future, it will need to be assessed whether they fall within the definition of personal property in the Commonwealth PPS Act. If they do, it must be determined if a reason exists for those licences, rights or entitlements to be excluded from the operation of the Commonwealth PPS Act.

This clause will ensure that, if it has been determined that a new licence, right or entitlement that is created in subsidiary legislation should be excluded, the person or body responsible for making the subsidiary legislation has the power to declare that the particular licence, right or entitlement is not personal

property for the purposes of the PPS Act.

Clause 16 Is intended to ensure that references to fixed and floating charges in State law remain effective.

The Commonwealth PPS Act, which implemented a functional approach to security interests, applies to all security transactions over personal property that secure payment or performance of an obligation, including fixed and floating charges. As a result, transactions that are currently structured as fixed or floating charges will become security interests under the Commonwealth PPS Act.

Section 339 of the Commonwealth PPS Act deals with references to fixed and floating charges in Commonwealth law by maintaining the effect of existing Commonwealth law so that parties will not be able to avoid existing provisions governing fixed and floating charges.

Clause 16 of the proposed Act will achieve the same effect in relation to Western Australian law.

Subclause (1) provides that this clause applies in relation to a charge, a fixed charge, or a floating charge over property in a State law or in a security agreement, but only to the extent that the charge has attached to personal property owned by the grantor.

Subclause (2) provides that this clause does not apply in relation to section 12(2)(a) and (b) or section 19(4) of the Commonwealth PPS Act.

Section 12(2)(a) and (b) of the Commonwealth PPS Act list fixed charges and floating charges as examples of a transaction that may give rise to a security interest.

Section 19(4) of the Commonwealth Act provides that a reference to a floating charge in a security agreement is not a reference to an agreement that the security interest created by the floating charge attaches at a time other than is provided for in the Commonwealth PPS Act.

Subclause (2) also provides that this clause does not apply to a reference to a charge, a fixed charge or a floating charge if the charge referred to is a perfected security interest that is provided for by a transfer of an account or chattel paper.

Subclause (3) provides that a reference to a charge over property is taken to be a reference to a security interest over –

- a circulating asset; or
- personal property that is not a circulating asset.

Subclause (4) provides that a reference to a fixed charge over property is taken to be a reference to a security interest over personal property that is not a circulating asset.

Subclause (5) provides that a reference to a floating charge over property is taken to be a reference to a security interest over a circulating asset.

Clause 17 Is intended to ensure the continued efficacy of certain State laws that make provision in relation to abandoned, uncollected or impounded goods, criminal assets and proceeds and certain other restricted dealings involving personal property.

Section 123(1) of the Commonwealth PPS Act provides that a secured party (e.g. a creditor) may seize collateral, by any means permitted by law, if the debtor is in default under the security agreement. Collateral is personal property to which a security interest is attached.

There are a number of State laws which allow the Western Australian Government to deal with personal property, such as the impounding of abandoned goods or seizure of criminal assets and proceeds.

To preserve the operation of these State provisions, it is necessary to ensure that a secured party cannot seize goods under section 123(1) of the Commonwealth PPS Act, where those goods have already been seized or detained under a State law.

This clause prevents a person from taking action to enforce a PPS security interest over personal property where such action would be inconsistent with State law provisions of the nature identified above.

Subclause (1) provides for the definition of terms used in clause 17 of the proposed Act.

**order** includes a direction or notice.

**PPS security interest** means a security interest to which the Commonwealth PPS Act applies (including a transitional security interest).

**relevant State property law** means each of the following –

- (a) the *Criminal Property Confiscation Act 2000*;
- (b) the *Land Administration Act 1997*;
- (c) the *Local Government Act 1995*;
- (d) the *Rail Safety Act 2010*;
- (e) the *Residential Parks (Long-stay Tenants) Act 2006*;

- (f) the *Residential Tenancies Act 1987*;
- (g) the *Shipping and Pilotage Act 1967*;
- (h) the *Warehousemen's Liens Act 1952*;
- (i) section 62 of the *Western Australian Marine Act 1982*;
- (j) an Act or subsidiary legislation (or a provision of an Act or subsidiary legislation) that is prescribed by the regulations to be a relevant State property law.

Subclause (2) provides that a person may not take action to enforce or otherwise deal with a PPS security interest:

- (a) if that action would be inconsistent with a relevant State property law that requires, authorises or permits the property to be dealt with in a particular matter (including by disposal through sale or any other means), prohibits or prevents the property being dealt with in a particular manner, or places limitations or restrictions on how the property may be dealt with; or
- (b) if that action would prevent, impede or defeat the making of an application to a court, tribunal or any other person or body under a relevant State property law with respect to how the property is to be dealt with; or
- (c) in such other circumstances as may be prescribed by regulation.

Subclause (3) clarifies that clause 17 does not:

- (a) affect the meaning or operation of a relevant State property law in its application to interests other than PPS security interests; or
- (b) affect the meaning or operation of a relevant State property law to the extent that the State law –
  - is capable of operating concurrently with the Commonwealth PPS Act;
  - makes provision for a matter mentioned in section 245(2)(a)(b) or (c) of the Commonwealth PPS Act; or
  - is covered by section 258(2) of the Commonwealth PPS Act; or
- (c) prevent the enforcement of, or other dealings with, a PPS security interest by the State or a State agency, or by a person or class of persons as prescribed by regulation.

In addition to the Acts included in the definition of *relevant State property law* in subclause (1), certain subsidiary legislation has been identified as providing for the seizure and detention of personal property by the State. It is anticipated that, once the proposed Act is passed, regulations will be made to prescribe this subsidiary legislation to be relevant State property law.

Clause 18 Is intended to ensure that information recorded on the Bills of Sale Register, as established under the *Bills of Sale Act 1899* (WA), can continue to be accessed for seven years from date on which the Personal Property Securities Register commences operation.

The *Personal Property Securities (Consequential Repeals and Amendments) Bill 2011* (WA) provides for the repeal of the *Bills of Sale Act 1899* (WA) from the day on which the Personal Property Securities Register commences operation.

The Bills of Sale Register will be closed from this date, and all current registrations will be migrated to the Personal Property Securities Register. The Personal Property Securities Register will not contain any historical data, therefore the only way to determine if a bill of sale had been registered in Western Australia before the Personal Property Securities Register commenced operation will be to conduct a historical search of the Bills of Sale Register.

The historical search function will be important in the event of legal disputes over the existence of bills of sale and questions surrounding the priority of creditors.

As the *Bills of Sale Act 1899* (WA) will be repealed, and the position of Registrar created under that Act will be abolished, the responsibility for conducting historical searches of the Bills of Sale Register will be transferred to the Commissioner for Consumer Protection.

Subclause (1) provides that, from the day on which the *Bills of Sale Act 1899* (WA) is repealed, the following things will be taken to be a record kept by the Commissioner for Consumer Protection:

- the Register Book (i.e. the Bills of Sale Register);
- any bills of sale lodged with the Registrar under the *Bills of Sale Act 1899* (WA); and
- any affidavits filed under the *Bills of Sale Act 1899* (WA).

Subclause (2) provides that, upon payment of any prescribed fee, a person is entitled to –

- a copy or extract of a bill of sale lodged or an affidavit filed under the *Bills of Sale Act 1899* (WA);
- a copy or extract of a bill of sale or affidavit certified by the Commissioner for Consumer Protection to be a true copy.

Subclause (3) allows regulations to be made which prescribe a fee for the provision of an extract or copy under subclause (2).

Subclause (4) provides that this clause expires seven years after registration commencement time as defined in section 306(2) of the Commonwealth PPS Act. Registration commencement time is the day on which the Personal Property Securities Register commences operation.

Clause 19 Provides authority for regulations to be made in relation to any transitional matters that are not covered in the proposed Act or the *Personal Property Securities (Consequential Repeals and Amendments) Bill 2011* (WA).

Careful consideration has been given to the actions which must be taken by the State as a result of the transition to the new personal property securities regime. Transitional arrangements have been provided for in the proposed Act and, to some extent, in the *Personal Property Securities (Consequential Repeals and Amendments) Bill 2011* (WA).

However, it is possible that matters which must be dealt with through legislation may arise after the passage of the proposed Act. This clause will ensure that any unanticipated transitional matters can be provided for in subsidiary legislation.

Subclause (1) provides for the definition of terms used in clause 19 of the proposed Act.

**commencement day** means the day on which the proposed Act receives Royal Assent.

**Gazettal day** means the day on which transitional regulations are published in the Government Gazette.

**transitional matter** means any matter of a transitional or savings nature which arises from the enactment of the adoption of the relevant version of the Commonwealth PPS Act.

**transitional regulations** means regulations which are made under subclause (2).

Subclause (2) provides that regulations may be made to prescribe all matters that are required, necessary or convenient to be prescribed in relation to a transitional matter.

Subclause (3) provides that transitional regulations can only be made within a 12 month period beginning on the day on which the proposed Act receives Royal Assent.

Subclause (4) allows transitional regulations to provide that a state of affairs is taken to have existed (or not existed) prior to the day on which the transitional regulations are published in the Government Gazette, as long as the day on which the state of affairs is taken to have existed (or not existed) is not earlier than the day on which the proposed Act received Royal Assent.

This subclause will allow transitional regulations to have a retrospective effect, if necessary, but this will not extend to the period before the proposed Act was passed.

Subclause (5) provides that, if transitional regulations are made that have a retrospective effect, as provided for in subclause (4), the retrospective effect does not operate in a way which would –

- prejudicially affect the rights that a person (other than the State) had before the regulation was published in the Government Gazette; or
- impose liabilities on a person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the regulation was published in the Government Gazette.

Clause 20 Provides authority for regulations to be made that prescribe matters that are –

- required or permitted to be prescribed by the proposed Act; or
- necessary or convenient to be prescribed for giving effect to the purposes of the proposed Act.

For example, a regulation may be made which prescribes a fee for requesting copies or extracts from the Bills of Sale Register under clause 18.