



New South Wales

Personal Property Securities (Commonwealth Powers) Bill 2009

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to refer certain matters relating to security interests in personal property to the Commonwealth Parliament so as to enable the Commonwealth Parliament to make laws about those matters. The proposed Act will be enacted for the purposes of section 51 (xxxvii) of the Constitution of the Commonwealth, which enables State Parliaments to refer matters to the Commonwealth Parliament.

Summary of the operation of the Bill

The Bill operates by reference to the text of the proposed *Personal Property Securities Bill 2009* of the Commonwealth tabled in the Legislative Assembly of New South Wales. This text is defined in the Bill to be the **tabled text**. Because the proposed Commonwealth Bill contains matters that are not within the legislative competence of the States, the Bill also contains a definition of **initial referred provisions**, which means the tabled text to the extent to which that text deals with matters that are included in the legislative powers of the Parliament of the State.

The Bill refers to the Commonwealth Parliament the matters to which the initial referred provisions relate, but only to the extent of the making of laws with respect

to those matters by including the initial referred provisions in a Commonwealth Act enacted in the terms, or substantially in the terms, of the tabled text. The Bill defines this reference to be the *initial reference* and the Commonwealth Act enacted pursuant to it to be the *Commonwealth PPS Act*.

The Bill also refers certain matters (the *referred PPS matters*) in relation to different kinds of personal property so as to enable the Commonwealth to make amendments to the 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:

- (a) personal property (other than fixtures and water rights),
- (b) fixtures (which are goods, other than crops, that are affixed to land),
- (c) transferable water rights (which are 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).

The Bill provides for exclusions from the referred PPS matters that are intended 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.

The Bill will enable each of the amendment references to be commenced at different times. For example, the amendment references in relation to fixtures and transferable water rights will be able to be commenced after the Commonwealth has enacted an Act pursuant to the initial reference. The Bill also provides for the termination of the initial reference and also for the termination of any or all of the amendment references.

Outline of provisions

Clause 1 sets out the name (also called the short title) and the purpose of the proposed Act.

Clause 2 provides for the commencement of the provisions of the proposed Act (other than proposed section 6 (2), (3) and (4)) on the date of assent to the proposed Act. Proposed section 6 (2), (3) and (4) (which make the amendment references to the Commonwealth Parliament) will commence on a day or days appointed by proclamation of the Governor.

Clause 3 defines certain terms and expressions used in the proposed Act, including the following.

The expression *law of the State* is defined to mean 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. The expression is intended to cover both existing and future Acts and instruments as enacted, made and amended from time to time.

The expression *excluded State statutory right* is defined to mean a right, entitlement or authority that is granted by or under a law of the State (which is referred to in the

proposed Act as a *State statutory right*) that is declared by that law not to be personal property for the purposes of the Commonwealth PPS Act. As a result of the ambulatory nature of the definition of *law of the State* referred to above, the expression will extend to declarations that are made in relation to both existing and future State statutory rights.

The expression *express amendment* is defined to mean the direct amendment of the text of the Commonwealth PPS Act, but as not including enactment of a provision having substantive effect otherwise than as part of the text of that Act. Each of the amendment references is limited to the express amendment of the Commonwealth PPS Act. This ensures that the matters covered by the amendment references cannot be the source of power for other Commonwealth legislation.

The expression *personal property* is defined to mean property (including a licence) other than:

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

The term *licence* is defined to mean 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.

The term *licence*, however, does not include any excluded State statutory right.

Clause 4 defines the expression *referred PPS matters* in relation to personal property that is the subject of the different amendment references under the proposed Act. The expression is defined to mean:

- (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).

The proposed section, however, excludes from the expression the matter of making provision with respect to personal property or interests in personal property in a manner that excludes or limits the operation of a law of the State to the extent that the law makes provision with respect to:

- (a) the creation, holding, transfer, assignment, disposal or forfeiture of a State statutory right, or
- (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 or any 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).

Paragraphs (a) and (b) of the above exclusions from the referred PPS matters are intended 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.

Paragraph (c) of the above exclusions from the referred PPS matters is intended, among other things, to 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 expression *security interest* in personal property. Generally speaking, 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, the proposed section 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 deals with the references described in the Overview. Clause 6 (1), (2), (3) and (4) make the references.

Clause 6 (1) provides for the inclusion of the referred provisions in a Commonwealth 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) in effect 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) in effect 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) in effect 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 proposed subsection).

Clause 6 (6) makes it clear 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 State Parliament.

Clause 6 (7) makes it clear that the State Parliament envisages that the 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 Intergovernmental 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 end when the period of that particular reference is terminated under the proposed Act.

Clause 7 deals with the termination of the period of the references specified under clause 6 (namely, the period ending on a day fixed by the Governor by proclamation). The clause enables the periods of all references to be terminated at the same time or only the periods of any or all of the amendment references.

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.