

Draft

Personal Property Securities (Commonwealth Powers) Bill 2009

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Clause 1

1 Name and purpose of Act

- (1) This Act is the *Personal Property Securities (Commonwealth Powers) Act 2009*.
- (2) The purpose of this Act is to refer certain matters relating to security interests in personal property to the Parliament of the Commonwealth for the purposes of section 51 (xxxvii) of the Constitution of the Commonwealth.

Jurisdictional note. The name and purpose of the proposed Act have been combined in a single section to promote uniformity of numbering throughout the participating jurisdictions. Those jurisdictions that do not have citation sections in their statutes may omit subclause (1).

2 Commencement

- (1) This Act commences on the date of assent to this Act, except as provided by subsection (2).
- (2) Section 6 (1), (2), (3) and (4) commence on a day or days to be appointed by proclamation.
- (3) A day may not be appointed under subsection (2) for the commencement of section 6 (2), (3) or (4) that is earlier than the day on which section 6 (1) commences.

Jurisdictional note. Each participating jurisdiction will need to provide for appropriate commencement provisions. The above commencement provision provides for the proposed Act (other than the provisions that make the references) to commence on assent. Each of the references made by proposed section 6 (1), (2), (3) and (4) will commence on an appointed day or days.

Participating jurisdictions may decide to provide for the commencement of all of the provisions of the Act on one or more appointed days. However, care should be taken to ensure that the initial reference is commenced either before or when an amendment reference is commenced.

It should also be noted that the proposed Act has been drafted on the assumption that the initial reference is enacted and commenced by all participating jurisdictions before the Commonwealth enacts its PPS Act.

3 Definitions

In this Act:

amendment reference means a reference under section 6 (2), (3) or (4).

Commonwealth PPS Act means a Commonwealth Act enacted in the terms, or substantially in the terms, of the tabled text and 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 tabled text.

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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.

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.

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 tabled text.

initial reference means the reference under section 6 (1).

initial referred provisions 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.

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.

reference means:

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- (a) the initial reference, or
- (b) an amendment reference.

referred PPS matters in relation to personal property—see section 4.

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

security interest in personal property—see section 5.

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

[Alternative definitions of tabled text]:

For use by the lead jurisdiction:

tabled text means the text of the proposed *Personal Property Securities Bill 2009* for a Commonwealth Act as tabled by or on behalf of the [title of State Minister introducing this Bill] in the [name of State House of Parliament] at any time during the period between the giving of notice of motion for leave to introduce the Bill for this Act in the [name of State House of Parliament] and the second reading of (or agreement in principle to) that Bill in the [name of State House of Parliament].

For use by other jurisdictions:

tabled text means the text of the proposed *Personal Property Securities Bill 2009* for a Commonwealth Act as tabled by or on behalf of the [title of above State Minister introducing this Bill] of [name of lead State] in the [name of above House of Parliament] of [name of lead State] at any time during the period between the giving of notice of motion for leave to introduce the Bill for the *Personal Property Securities (Commonwealth Powers) Act 2009* in that [name of above House of Parliament] and the second reading of (or agreement in principle to) that Bill in that [name of above House of Parliament].

Jurisdictional note. Different definitions of the term **tabled text** will be required depending on which jurisdiction introduces the referral Bill first. As was the case with the Corporations legislation referral, the lead jurisdiction will provide for the tabling of the tabled text while the other jurisdictions will identify the tabled text by reference to what is tabled in the lead jurisdiction. The matter indicated by bold brackets [txt] will need to be filled in having regard to the lead jurisdiction.

Note that if the text is tabled in the NSW Legislative Assembly reference will be made to the agreement in principle to the Bill rather than the second reading of the Bill.

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

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State in relation to the control, use or flow of water, but does not include an excluded State statutory right.

4 Meaning of “referred PPS matters”

- (1) In this Act, *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).
- (2) However, *referred PPS matters* does not include 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).
- (3) In this section:

forfeiture means confiscation, seizure, extinguishment, cancellation, suspension or any other forfeiture.

5 Meaning of “security interest” in personal property

- (1) In this Act, a *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).
- (2) A *security interest* in personal property also includes the following interests in relation to personal property, whether or not the transaction concerned, in substance, secures payment or performance of an obligation:
 - (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.
- (3) A *security interest* in personal property does not include a licence.
- (4) In this section:

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 tabled text.

6 Initial and amendment references

- (1) The matters to which the initial referred provisions relate are referred to the Parliament of the Commonwealth on the day on which this subsection commences, but only to the extent of the making of a law with respect to those matters by including the initial referred provisions in an Act enacted in the terms, or substantially in the terms, of the tabled text.
- (2) The referred PPS matters in relation to personal property (other than fixtures and water rights) are referred to the Parliament of the Commonwealth on the day on which this subsection commences, but only to the extent of the making of laws with respect to those matters in relation to property of that kind by making express amendments of the Commonwealth PPS Act.

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- (3) The referred PPS matters in relation to fixtures are referred to the Parliament of the Commonwealth on the day on which this subsection commences, but only to the extent of the making of laws with respect to those matters in relation to fixtures by making express amendments of the Commonwealth PPS Act.
- (4) The referred PPS matters in relation to transferable water rights are referred to the Parliament of the Commonwealth on the day on which this subsection commences, but only to the extent of the making of laws with respect to those matters in relation to such water rights by making express amendments of the Commonwealth PPS Act.
- (5) Except as provided by subsection (2), the operation of each of subsections (1), (2), (3) or (4) is not affected by the other subsections.
- (6) The reference of any matter under subsection (1), (2), (3) or (4) has effect only:
 - (a) if and to the extent that the matter is not included in the legislative powers of the Parliament of the Commonwealth (otherwise than by a reference under section 51 (xxxvii) of the Constitution of the Commonwealth), and
 - (b) if and to the extent that the matter is included in the legislative powers of the Parliament of the State.
- (7) For the avoidance of doubt, it is the intention of the Parliament of the State that:
 - (a) the Commonwealth PPS Act may be expressly amended, or have its operation otherwise affected, at any time after the commencement of subsection (1) by provisions of Commonwealth Acts the operation of which is based on legislative powers that the Parliament of the Commonwealth has apart from the references under subsection (1), (2), (3) or (4), and
 - (b) the Commonwealth PPS Act may have its operation affected, otherwise than by express amendment, at any time after the commencement of subsection (1) by provisions of a Commonwealth PPS instrument.
- (8) Despite any other provision of this section, a reference under subsection (1), (2), (3) or (4) has effect for a period:
 - (a) beginning when the subsection under which the reference is made commences, and
 - (b) ending at the end of the day fixed under section 7 as the day on which the reference is to terminate,
but not longer.

7 Termination of references

- (1) The Governor may, at any time, by proclamation published in the Gazette, fix a day as the day on which:
 - (a) all of the references that have effect are to terminate, or
 - (b) any or all of the amendment references that have effect are to terminate.
- (2) A day fixed under subsection (1) must be no earlier than the first day after the end of the period of 12 months beginning with the day on which the proclamation is published under that subsection.
- (3) The Governor may, by proclamation published in the Gazette, revoke a proclamation published under subsection (1), in which case the revoked proclamation is taken (for the purposes of section 6) never to have been published.
- (4) A revoking proclamation has effect only if published before the day fixed under subsection (1).
- (5) The revocation of a proclamation published under subsection (1) does not prevent publication of a further proclamation under that subsection.
- (6) If a proclamation terminating any amendment reference (but not the initial reference) has been published under subsection (1) and has not been revoked, the expression *all of the references* in subsection (1) (a) refers only to the initial reference and such of the other amendment references that have not yet been terminated.

8 Effect of termination of amendment references before initial reference

- (1) If an amendment reference terminates before the initial reference terminates, the termination of the amendment reference does not affect:
 - (a) laws that were made under the amendment reference before that termination (whether or not they have come into operation before that termination), or
 - (b) the continued operation in the State of the Commonwealth PPS Act as in operation immediately before that termination or as subsequently amended or affected by:
 - (i) laws referred to in paragraph (a) that come into operation after that termination, or
 - (ii) provisions referred to in section 6 (7) (a) or (b).
- (2) Accordingly, an amendment reference continues to have effect for the purposes of subsection (1) unless the initial reference is terminated.

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- (3) Subsection (1) does not apply to or in relation to an amendment of the Commonwealth PPS Act that is excluded from the operation of this section by the proclamation that terminates the amendment reference.
- (4) For the purposes of subsection (1):
 - (a) the laws referred to in subsection (1) (a) include Commonwealth PPS instruments, and
 - (b) the reference in subsection (1) (b) to the Commonwealth PPS Act as in operation immediately before the termination of the amendment reference includes that legislation as affected by Commonwealth PPS instruments that have come into operation before that time.

9 Evidence of tabled text

- (1) A certificate of the Clerk of the **[name of State House of Parliament]** of **[name of lead State]** certifying that a document is an accurate copy of the tabled text, or is an accurate copy of a particular part or of particular provisions of the tabled text, is admissible in evidence in any proceedings and is evidence:
 - (a) of the matter certified, and
 - (b) that the text of the proposed Commonwealth Bill was tabled in the **[name of above House of Parliament]** of **[name of lead State]** as referred to in the definition of *tabled text* in section 3.
- (2) Subsection (1) does not affect any other way in which the tabling or content of the tabled text, or the accuracy of a copy of the tabled text or of a part or provisions of the tabled text, may be established.

Jurisdictional note. The matter indicated by bold brackets **[txt]** will need to be filled in having regard to the lead jurisdiction in relation to the tabled text.