

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument 2011 No. 176**

Issued by the authority of the Attorney-General

*Personal Property Securities 2009*

*Personal Property Securities Amendment Regulations 2011(No. 1)*

Section 303 of the *Personal Property Securities Act 2009* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Act.

The Act implements a single national law creating a uniform and functional approach to personal property securities. It establishes uniform rules for creating a valid security interest, provides coherent rules governing the priority between competing security interests (and other interests), establishes when a person acquires personal property free of a security interest and streamlines the enforcement of security interests.

The Act will be supported by a single national online register of personal property securities (PPS Register). The PPS Register will replace the existing confusing array of both electronic and paper-based national, State and Territory registers of personal property securities.

The proposed additional and amending Regulations are limited to a small number of provisions that clarify and resolve a few outstanding issues.

Details of the proposed Regulations are set out in the Attachment.

The amending Regulations were developed in response to submissions from stakeholders across industry and government on the *Personal Property Securities Act 2009* and the *Personal Property Securities Regulations 2010* (the Regulations). These stakeholders included the major banks and several national law firms represented by the Corporations Committee of the Law Council of Australia, as well as the Department of the Treasury, the Department of Resources, Energy and Tourism, and the relevant transport authorities from the States and Territories.

Meetings were undertaken to further discuss specific issues of concern which in turn led to the circulation of proposed changes to the Regulations to accommodate those concerns. Stakeholders were provided with a significant period, approximately 6 weeks, in which to comment on the proposed changes. The comments received were favourable and the proposed amending Regulations welcomed by industry stakeholders.

Constitutional authority for the Act is partly based on a referral of power from the States and Territories. The Personal Property Securities Law Agreement 2008 (the PPS Law Agreement) provides that the Commonwealth may not make regulations without approval from the State and Territory parties. The PPS Law Agreement provides that the State and Territory parties will be taken to have approved regulations if the Commonwealth has

notification in writing from at least three State or Territory parties (including at least two referring States) that they approve the Regulations. This approval was provided on 12 September 2011.

The Act specifies no other conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations will commence on the day after they are registered on the Federal Register of Legislative Instruments.

## **ATTACHMENT**

### **Details of the Personal Property Securities Amendment Regulations 2011 (No. 1)**

#### **PART 1 – PRELIMINARY**

##### **Division 1 – Preliminary**

###### **Regulation 1 – Name of Regulations**

This regulation provides that the title of the Regulations is the *Personal Property Securities Amendment Regulations 2011 (No. 1)*.

###### **Regulation 2 – Commencement**

This regulation provides for the Regulations to commence on the day after they are registered.

###### **Regulation 3 – Amendment of Personal Property Securities Regulations 2010**

This regulation provides that Schedule 1 amends the *Personal Property Securities Regulations 2010*.

##### **Schedule 1 – Amendments**

###### **Item 1 – After Regulation 1.4(1),**

This item inserts new subregulations 1.4(1A) and (1B) pursuant to paragraph 8(1)(l) which enables certain interests to be identified as being interests to which the Act does not apply.

Subregulation 1.4(1A) excludes all interests, including security interests, in the relevant statutory authorities, leases, licences or permits under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) and the *Offshore Minerals Act 1994* (Cth) from the scope of the Act.

Subregulation 1.4(1B) provides that subregulation 1.4(1A) does not exclude the relevant statutory authorities, leases, licences or permits themselves from the definition of personal property under the Act. Rather, the Act has no application to interests in that property.

###### **Item 2 – Regulation 1.6, definition of ARSN**

This item corrects an error in the definition of ARSN and ensures consistency with the *Corporations Act 2001*.

###### **Item 3 – Paragraph 1.7(3)(b)**

The earlier definition of ‘motor vehicle’ was too broad and had the potential to create uncertainty, in particular when considering whether personal property met the definition of motor vehicle or an accession under the Act; for example, a battery installed in a forklift may have met the definition of a ‘motor vehicle’ under 1.7(3)(b)(i). This item narrows the definition of motor vehicle but it is still wide enough to cover the various definitions of motor vehicle found in State and Territory legislation.

#### Item 4 – After regulation 1.8

Paragraph 13(2)(d) of the Act provides a regulation-making power for the purposes of excluding a particular lease or bailment of personal property from the definition of PPS lease in subsection 13(1).

Certain arrangements for the leasing of equipment permit multiple subsequent transfers between hirers and other users by way of sub-lease, for value. Because the terms of these arrangements may be for an indefinite period, they may fall within the definition of ‘PPS lease’. These types of arrangements can be described as a lease or bailment of goods under a ‘pooling arrangement’.

The transactions are not used to pass title, but are a lease/hire arrangement where fungible equipment is passed between users and eventually returned to the owner. Subsequent users of the equipment may not be party to the original lease/hire arrangement. As a result, the original hirer, although possibly consenting to a subsequent lease/hire by the terms of the original hire arrangement, may be unaware of the identity of the party to whom possession has been passed. This may result in a perfected security interest in the equipment becoming temporarily perfected, and subsequently unperfected, under section 34 of the Act without the original hirer being aware of this occurrence.

The following is an example of a pooling arrangement:

The owner of pallets leases those pallets to a lessee on terms that are for an indefinite period and which permit the sub-lease of the pallets to third parties. The lessee may then sub-lease those pallets as part of the transportation of its goods (stored on the pallets) to a third party who is then free to use those pallets for its own purposes. The pallets may be similarly sub-leased or transferred many times before being returned to the owner.

This item inserts a new regulation 1.9 to exclude a lease or bailment of goods that is part of a pooling arrangement from the definition of ‘PPS Lease’.

#### Item 5 – Regulation 2.1

Subsection 45(1) of the Act provides a regulation making power to specify which kinds of motor vehicle may be sold or leased free of a security interest granted by the seller or lessor to a third party.

The definition of ‘motor vehicle’ in regulation 1.7 is prescribed as the kind of motor vehicle which will be subject to the taking-free provision. However, because the definition of motor vehicle in regulation 1.7, is designed to be sufficiently broad to capture all State and Territory definitions of motor vehicle, security interests in some ‘motor vehicles’ that were not previously registrable by serial number on the relevant State or Territory motor vehicle registers will be registrable by serial number under the Act on the PPS Register after the registration commencement time (RCT). For example, a plough used for agricultural production may meet the definition of motor vehicle in regulation 1.7 but not all state definitions.

The Act is designed to provide a 24 month transitional period for holders of transitional security interests to adjust to the new regime. Accordingly, the amendment provides secured

parties, in respect of those transitional security interests in motor vehicles which were not previously registrable by serial number on State or Territory registers, a period of 24 months within which their motor vehicles would be excluded from the definition in regulation 2.1 and not be transferable free of a security interest under subsection 45(1).

Item 6 – After regulation 5.8

Section 176C of the Act enables the Registrar to make an arrangement with a third party to, among other things, include data held by that third party in verification statements and search results. This item inserts a new regulation 5.8A to identify Austroads Ltd as a third party for the purpose of section 176C. It is intended that Austroads will provide data in respect of motor vehicles through the PPS Register.

Item 7 – Subparagraphs 5.9(c)(i) and (ii)

This is a minor technical amendment that more accurately reflects the wording of section 178.

Item 8 – Regulation 7.1

Under existing law, a bidder who acquires shares in a target following a takeover bid or under a scheme is generally able to acquire those shares free of any security interests. However, under the Act there is uncertainty as to whether a person would ‘take free’ of an investment instrument or an intermediated security because the relevant provisions indicate that a *consensual transaction* is required. As a result, bidders who acquire shares following a compulsory acquisition may not be able to rely on the taking free rule in the Act. As a consequence, the default position in paragraph 32(1)(a) would apply and the bidder would take subject to any security interests in the acquired shares.

Item 8 therefore inserts regulation 7.1 to provide that a provision of the Act would not apply in specified circumstances. This regulation excludes the application of the default proceeds provision in the Act (paragraph 32(1)(a)) in certain circumstances arising under the *Corporations Act 2001*.

Items 9,11, 13,15 – Schedule 1, Part 1

Part 1 of Schedule 1 sets out the identifiers, prescribed under subsection 153(1), to be used in identifying secured parties or grantors in a financing statement. These amendments make clear that Item 1 in each of the tables, which relates to the identification of secured parties or grantors in migrated data, is only referring to the initial registration, made by the Registrar, of the migrated security interest on the PPS Register from the transitional register. Subsequent registrations that amend the secured party or grantor details will need to be made in accordance with details listed in the later items.

Item 10 – Schedule 1, paragraph 1.3(1)(b)

This item would amend paragraph 1.3(1)(b) to make clear that clause 1.3 does not apply to a body corporate where a body corporate was a trustee of a trust that has an ABN. This is consistent with the requirement that where a trust has an ABN the prescribed details are set out in clause 1.5

Item 12 – Schedule 1, after subclause 1.4(3)

Clause 1.4 of Part 1 sets out the identifiers to be used to identify a partnership as a grantor or secured party in a financing statement with respect to a security interest. Item 12 inserts new subclauses 1.4(4) to (6) to make clear that where an individual partner grants an interest over his or her net interest in the partnership, the source of the details are to be found in clause 1.2.

Similarly, item 12 makes an amendment to set out that the details required for a body corporate which is a partner in a partnership that does not have an ABN are those found in clause 1.3.

Item 14 – Schedule 1, clause 1.5

This is a minor technical amendment to clarify the details to be included as part of the migration of transitional security interests.

Item 16 – Schedule 2, paragraph 2.4(3)(a)

This is a minor technical amendment to correct an incorrect cross-reference.