Law Council
OF AUSTRALIA
Business Law Section

PPSA Review Secretariat
Commercial and Administrative Law Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600
Via email: ppsareview@ag.gov.au

28 November 2014

Dear Sir or Madam,

Statutory Review of the *Personal Property Securities Act 2009* (Cth) – response to consultation paper No. 3

Reference is made to consultation paper No. 3 issued on 17 October 2014.

This submission is made on behalf of Business Law Section of the Law Council of Australia ("**BLS**"). While the submission sets out responses to the specific queries raised in the consultation paper and is in the requested template form, this submission is in addition to the earlier submissions lodged by the BLS.

This submission has been assembled with the assistance of three of the specialist committees of the BLS - the Financial Services Committee, the Insolvency & Reconstruction Law Committee and the SME Business Law Committee. These committees are made up of senior legal practitioners working in their respective areas and also highly respected academics who have detailed and relevant experience in dealing with issues arising out of the Act across Australia and many of the practitioners in these committees deal with small businesses on a regular basis.

The BLS would be pleased to discuss any aspect of this submission. Please contact Greg Rodgers of the Insolvency & Reconstruction Committee (who is the Law Council's representative on the PPSA Stakeholder Forum) on 07 3009 9303 or the Chair of the BLS, John Keeves, on 08 8239 7119 if you would like to do so.

Yours faithfully

John Keeves, Chairman
Business Law Section

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

BLS

Review of the Personal Property Securities Act 2009

Consultation Response Template

Consultation Paper 3

Instructions:

Please use the form below to provide feedback with respect to the proposed recommendations and issues listed in each section of the form. Please refer and respond to the proposed recommendation or issue as set out in Consultation Paper 3. The heading and paragraph number of the relevant sections of the consultation paper are included to help guide you.

Please note your agreement or disagreement with the proposed recommendation by deleting either 'Yes' or 'No' where indicated. Comments can be provided in the box below each proposition. There is no word limit for comments but succinct responses clearly setting out the reasons for agreement or disagreement with the proposed recommendation will be of most use for the purposes of the review.

You may respond to as many or as few propositions as you wish.

Name: Business Law Section
Organisation: Law Council of Australia
Background/Expertise/Interest in PPSA Review: Legal Practitioners
Contact Details: Greg Rodgers (greg.rodgers@rbglawyers.com.au; (07) 3009 9300)

2.2.1 Should Chapter 4 be mandatory, where it applies?
In what circumstances, if any, should the Chapter 4 enforcement mechanisms be mandatory?
Comments: **The approach suggested in (c) in the Consultation Paper is preferred, i.e. "Mandatory application of the Chapter, where it applies, to security interests that are granted by particular types of grantor, such as individuals". This is the approach underlying section 115 and is consistent with underlying policy adopted for other types of consumer protection legislation where special consideration is given to goods used for personal, domestic or household purposes. Therefore, it would not result in a major change in policy and would satisfy several of the underlying principles set out in Annexure B to the Consultation Paper.**

2.2.2 The meaning of "default"	
Proposed recommendation 3.2: *That the Act be amended by replacing references to "default by the debtor" (or similar) with "default" or "default under the security agreement", and that the term "default" be defined in s 10 along the lines of the corresponding definition in the NZ PPSA.*	
Do you agree with the proposed recommendation?	**Yes**/~~No~~
Comments:	

2.2.3 Section 109(1)(b) - incidental security interests
Should s 109(1)(b) be retained? If so, why?
Comments: **Yes. S.109(1)(b) refers to (a) ("a transfer of an account or chattel paper that does not secure payment or performance of an obligation"). It seems that the thinking behind the exclusion is that if there is no payment or other obligation secured by the particular security interest, then the question can be posed, "Why should there be enforcement mechanisms when there is no payment or other performance to enforce?"**

2.2.4 Section 109(2) - property located outside Australia	
Proposed recommendation 3.4: *That s 109(2) be deleted.*	
Do you agree with the proposed recommendation?	**Yes**/~~No~~

Comments:

Subsection 109(2) of the PPSA provides that the enforcement provisions in the PPSA do not apply to a security interest in goods that are located outside Australia. Where a grantor and secured party are both Australian entities and a contract is governed by Australian law, subs 109(2) can give rise to difficulties when determine the proper law for the enforcement of a security interest in property of the grantor located outside Australia. Paragraph 6(1)(b) provides that the Australian PPSA applies to a security interest in goods if the grantor is an Australian entity, even if the goods are located outside Australia. Reading subss 6(1) and 109(2) together, the PPSA, with the exception of the enforcement provisions, applies to the secured party's security interest. The Explanatory Memorandum sheds no light on whether it is intended that the foreign law or general law principles will apply to the enforcement of the security interest.

The Saskatchewan PPSA at subs 8(1) provides for procedural issues involved in the enforcement of a security interest to be governed by the law of the jurisdiction in which the enforcement rights are exercised, while substantive issues are governed by the proper law of the contract between the secured party and the debtor. Although the Saskatchewan approach is not without its flaws (for example drawing a line between procedure and substantive issues), it is suggested that a similar approach to the Saskatchewan PPSA be adopted in the Australian PPSA.

If enforcement is sought in another jurisdiction then obviously attention will to be paid to local procedural laws.

2.2.5 Section 109(3) - investment instruments and intermediated securities
Is s 109(3) too wide, too narrow, or both? How should it be amended?

Comments:

This issue needs to be considered in the context of a comprehensive review of the PPSA's provisions relating to investment instruments and intermediated securities. In the absence of such a review or specific stakeholder concerns we are not in favour of any change.

2.2.6 Section 109(5) - personal, domestic or household collateral
Is s 109(5) necessary?

Comments:

We do not see any need to omit the provision.

2.2.7 Section 111 - exercise rights under Chapter 4
Should s 111 also apply to rights duties and obligations under a security agreement or at law generally, in addition to those under Chapter 4?

Comments:

We see no need to change the current provision.

2.2.8 Section 115 - contracting out - when should the "use" be determined, and how?	
Proposed recommendation 3.8: *That the words "is not used" in line 2 of s 115(1) be replaced with "the grantor does not intend, at the time it entered into the security agreement, to use".*	
Do you agree with the proposed recommendation?	**Yes**/~~No~~
Comments: **However, this may open up an area for dispute between a secured party and a grantor where the grantor later asserts that he/she held the requisite intention at the time of entering into the security agreement. Consideration could be given to introducing some objectivity to the assessment of the existence of the intention.**	

2.2.8 Section 115 - contracting out - the expression "contract out"	
Proposed recommendation 3.9: *That s 115(1) be amended by replacing "may contract out of" in s 115(1) with "may agree that a party need not comply with", and that a corresponding amendment also be made to s 115(7).*	
Do you agree with the proposed recommendation?	**Yes**/~~No~~
Comments:	

2.2.8 Section 115 - contracting out - Section 115(1)(q) - the right of redemption
Should parties be allowed to contract out of the grantor's right to redeem collateral under s 115(1)(q)?
Comments: **The contracting out of the right of redemption does not apply to personal, domestic or household property. Therefore, there is considerable attention already given to consumer protection policy. We see no need to go further.**

2.2.9.1 The meaning of the section	
Proposed recommendation 3.11: *That s 116 be amended to set out the principles described in Section 2.2.9.1 more clearly and succinctly.*	
Do you agree with the proposed recommendation?	**Yes**/~~No~~
Comments: **But see our comments in 2.2.9.2 below.**	

2.2.9.2 Are the exclusions appropriate?
Is the current exclusion of corporate receivers from Chapter 4 appropriate?
Comments: **We stated in our earlier submissions:** **Section 116 provides that Chapter 4 does not apply if there is a receiver or receiver and manager in control of the collateral except if the grantor is an individual. Exempting receivers from Chapter 4 of the PPSA in cases of corporations makes enforcement of PPSA subject to arbitrary variables, namely whether it is an individual/corporate receivership.** **It is submitted that the distinction between individuals and companies where receivers are appointed should be removed.**

2.2.10 Section 112(3) - licences	
Proposed recommendation 3.13: *That s 112(3) be deleted.*	
Do you agree with the proposed recommendation?	**Yes**/~~No~~
Comments:	

2.3.1 Terminology	
Proposed recommendation 3.14: *That the headings to ss 120 and 121 be amended to refer to security interests in "certain payment obligations" (or a similar expression), rather than to security interests in "liquid assets".*	
Do you agree with the proposed recommendation?	**Yes**/~~No~~
Comments:	

2.3.2 Collateral to which the sections apply
Would it be appropriate to expand ss 120 and 121 to apply to some other types of payment obligations as well, or to payment obligations generally? Should the Act simply permit a secured party to exercise any of a grantor's rights in relation to any collateral that is subject to the security interest?
Comments: **We reiterate our comments from our earlier submission:** **Subsection 120(4), which is one of the provisions that applies to enforcement of security interests in liquid assets, provides that the secured party must apply any amount received under s 120 towards the secured obligation, while subs 120(5) provides that if any amount received is in the form of currency, it must be distributed in accordance with s 140. It our view it makes no sense for s 140 to apply if the obligor pays in cash but not if, for example, she pays by cheque. Besides, subss 120(4) and (5) appear to contradict subs 140(1), which clearly states that s 140 applies in any case where the secured party receives an amount under s 120. It is suggested that s 140 applies to all amounts received pursuant to s 120.** **Consistently with that view, we see no reason for s. 120 to be restricted to its current form.**

2.3.3 Should the availability of the remedy be tightened?
Should s 120 be improved to mitigate its impact on obligors? If so, how?
Comments: **Notice of the exercise of the right conferred under s. 120 should be given to the grantor at the same time or as soon as practicable after giving notice to the obligor so that the grantor has a reasonable opportunity to, for example, apply to court to prevent the payment being made by the obligor. By providing such opportunity to the grantor, there is adequate protection given. The obligor, being a third party, should simply then pay in accordance with the direction of the secured party without the need for any inquiry.** **Currently, the time period for giving notice to the grantor under s. 121(4) and (5) does not seem to be adequate.** **Also, s.80(7) enables the account obligor to verify the entitlement of the secured party.** **Section 120 should perhaps reflect the terms of s.80(7) more closely.**

2.3.4 Effect of the five business day period in s 120(3)	
Proposed recommendation 3.17: *That s 120(3) be amended to read as set out in Section 2.3.4.*	
Do you agree with the proposed recommendation?	**Yes**/~~No~~
Comments:	

2.3.5 Sections 120(4) and (5) - the application of amounts collected	
Proposed recommendation 3.18: *That s 120(4) be deleted, and that s 120(5) be amended to require that all amounts recovered under s 120 be applied in accordance with s 140.*	
Do you agree with the proposed recommendation?	**Yes**/~~No~~
Comments: **This is consistent with our comments noted in 2.3.2 above.**	

2.4.1 Sections 123(2) and (3) - seizing intangible property - licences
(a) Should ss 123(2) and (3) be amended to apply to all personal property other than goods? *(b) Is there a reason for singling out licences under ss 123(2) and (3)?*
Comments: **We agree with the observations made in the Consultation Paper. For those reasons, we respond:** **(a) Yes.** **(b) No.**

2.4.2 Section 124 - security interests that are perfected by possession or control
Should s 124(2)(b) be amended or deleted?
Comments: **Yes**

2.4.3 Accessions	
Proposed recommendation 3.21: *That the Act be amended to provide that a secured party with a security interest in an accession can remove that accession when enforcing its security interest.*	
Do you agree with the proposed recommendation?	**Yes**/~~No~~
Comments:	

2.4.4 Section 126 - disposal of collateral from the grantor's premises
Should s 126(2) refer to "reasonably required by" rather than "necessarily incidental to"?
Comments: **No. The term "necessarily incidental" is intended to be a far stricter test than simply what is "reasonably required". The general proposition is that a secured party should take possession of the goods and remove them. It should only be in the rarest of instances that disposal from the premises can be undertaken. Consider that there may be several secured parties having goods on the premises. By making it a less stringent test for determining when disposal can be done at the premises, you could have a situation giving rise to disputes between secured parties.**

2.4.5.1 Priority agreements
Should s 127 clarify that a higher ranking secured party can still be bound by an agreement to allow enforcement by a junior secured party?
Comments: **No clarification is necessary. Secured parties can always reach agreement to allow a junior party to take the enforcement action. If a senior secured party then stepped in, contrary to the previously agreed position, then the junior party could resort to legal action if necessary to enforce what had been agreed or represented.**

2.4.5.2 Competitions with non-security interests
Should the Act be amended to resolve who can control enforcement procedures as between a security interest and an encumbrance which is not a security interest but which is superior?
Comments: **No. If another party has superior rights that are not governed by the PPSA then there is no need to include provisions in the Act dealing with this situation. This should be left to the general law.**

2.4.5.3 Section 127(4) - the hand-over period
Where a senior secured party gives notice to a junior secured party that it proposes to take over enforcement proceedings under s 127, the junior secured party has five business days to hand over the collateral. Is this appropriate?
Comments: **We see no reason to change the current section.**

2.4.5.4 Section 127(6) - recovery of costs

Should s 127(6) be deleted?

Comments:

No. The subsection (which is read with subs. (7) and (8)) should remain. The section provides a fair position and reflects the policy behind statutory liens such as those available to a company administrator under 443D and F of the Corporations Act and is consistent with the thinking in *Shirlaw v Taylor* (1991) 102 ALR 551. However, if s.127(6) is deleted, then we are concerned that it would invite disputes such as was seen in *Jefferson and Joiner v Shirlaw* [2006] QSC153 which dealt with real property mortgages.

2.5.1.1 Section 128(1) - need for seizure?

Should a secured party be able to dispose of collateral without seizing it first?

Comments:

The concern here seems to stem from the perhaps incorrect belief that "seizure" equates to "possession".

Part 5.2 of the Corporations Act dealing with receivers and other controllers uses the expression "A person who appoints another person to enter into possession, or take control, of property of a corporation (whether or not as agent for the corporation) for the purpose of enforcing a security interest" (for example in section 419). Taking possession is not the only way to take control of an asset.

We see no need to amend the section. The expression "seizure" is akin to taking control of the asset whether by possession or otherwise. Such control is necessary in order to deal with it such as by sale.

2.5.1.2 Section 128(2) - method of disposal

Should a lease or licence of collateral be characterised as a "disposal"?

Comments:

We see no need for amendment.

2.5.1.3 Section 128(3) - timing of disposal

Is there a need for s 128(3)?

Comments:

The need for subsection 128(3) is to cover the situation where the lease or license may provide for a commencement date different from the date of entering into the lease or licence. Given that the need to establish a date of disposal is to assess the extent to which the secured party has complied with its obligations, it is reasonable to assess the disposal as taking place when the lease or licence is entered into rather than when the lease or licence is agreed between the secured party and the lessee/licensee to commence.

2.5.2.1 Restrictions on the right
Is s 129(3)(b) useful, or should it be deleted?
Comments: **The subsection should be retained. Imposing such a stringent duty is consistent with the position of a mortgagee seeking to foreclose.**

2.5.2.2 Notice of objection
Is the objection procedure set out in s 130(1) necessary, given the protections available in s 129(3)?
Comments: **We consider that the section should be retained for the reason set out in our comments in 2.5.2.1.**

2.5.3.1 Section 130(1) - notice to the debtor	
Proposed recommendation 3.32: *That s 130(1) be amended to require the secured party to also provide the notice contemplated by that section to the debtor.*	
Do you agree with the proposed recommendation?	**Yes**/~~No~~
Comments:	

2.5.3.2 Sections 130(1) and 144 - notice to higher-ranking secured parties
Should the obligation to provide notice of intention to dispose of collateral to higher ranking secured parties in s 130(1) be included in s144 as an obligation of which a secured party is relieved where it is not able to ascertain the status or existence of the higher ranking secured party?
Comments: **It may be more appropriate to require that notice be given to a secured party who has registered a financing statement or who has perfected its security interest by possession.**

2.5.3.3 Section 130(2) - the contents of the notice
Section 130(2) appears to require notices to specify the amount that will be owing on a particular day. This is not always ascertainable in advance especially where the collateral secures amounts owing under a derivative, where an interest rate fluctuates or where the collateral secures an overdraft facility. How might the section accommodate this?
Comments: **There is no easy solution to this issue, but it is not an issue solely for PPSA, as the same issue arises whenever default notices are required as a prerequisite for a mortgagee to exercise rights. We do not see any need to try to deal with this issue here in isolation.**

2.5.3.4 Section 130(5) - exclusions	
Proposed recommendation 3.35: *That s 130(5)(b) be deleted, and that s 130(5)(c) be amended to reflect the above discussion.*	
Do you agree with the proposed recommendation?	**Yes**/~~No~~
Comments:	

2.5.4.1 Section 132(1) - timing of the statements
Should the obligation in s 132(1) apply only when all the collateral has been disposed of?
Comments: **Yes. We agree with the commentary in the Consultation Paper.**

2.5.4.2 Section 132(3) - content of the statements
Should the content of a statement of account provided under s 132(3) be limited to reporting what has been received or incurred to date, rather than requiring the secured party to make forward projections of amounts that are likely to be received in the future?
Comments: **Yes.**

2.6.1 Section 135(1) - notice requirements
Section 134 allows a secured party to retain collateral in satisfaction of the obligations secured, however the notice which must be given to other secured parties differs depending on whether they hold a PMSI or other security interest. It would be simpler if s 135(1) just required the retaining secured party to give the notice to each secured party with a registration that describes the collateral. Would this change be worthwhile?
Comments: **Yes.**

2.6.2 Section 135(3)(b) - statement of amount secured
Section 135(2) requires the notice to state what the amount secured will be 10 business days after the notice is given. In certain circumstances this may not be possible to ascertain as described in relation to 2.5.3.3 above. How could this be dealt with?
Comments: **For the reasons stated in our response to 2.5.3.3, we see no need to deal this here.** **The section could require the method of calculation to be specified if the actual amount cannot be determined.**

2.6.3 Sections 136 and 141	
Proposed recommendation 3.40: *That ss 136 and 141 be amended to accommodate the fact that title to the collateral may be with the secured party, rather than the grantor.*	
Do you agree with the proposed recommendation?	**Yes**/~~No~~
Comments:	

2.6.4 Sections 137 and 138 - notice of objection	
Proposed recommendation 3.41: *That ss 137 and 138 be amended to reflect s 61 of the Sask PPSA.*	
Do you agree with the proposed recommendation?	**Yes**/~~No~~
Comments:	

2.7.1.1 Terminology	
Proposed recommendation 3.42: *That s 140 be amended as described in Section 2.7.1.1.*	
Do you agree with the proposed recommendation?	**Yes**/~~No~~
Comments:	

2.7.1.2 Section 140(2) - interplay with s 133
(a) Should s 133 be amended to provide that the buyer takes the collateral free of higher-ranking security interest? *(b) Should the Act take the Canadian approach, and not require a junior-ranking secured party to use its recoveries to pay out the senior-ranking secured parties first?* *(c) Should we just accept the potential incongruity between ss 133 and 140 and leave the provisions in their current form?*
Comments: **The position should be clarified by amendment to the effect to the sensible position that would be understood by all, namely that the buyer would only take free of higher ranking security interests if the higher ranking security interest has been released at the time of the sale.**

2.7.2 Section 142 - right to redeem collateral	
Proposed recommendation 3.44: *That s 142 be amended as described in Section 2.7.2.*	
Do you agree with the proposed recommendation?	**Yes**/~~No~~
Comments:	

2.7.3 Section 143 - reinstatement of security agreement	
Proposed recommendation 3.45: *That s 143 be deleted.*	
Do you agree with the proposed recommendation?	~~Yes~~/**No**
Comments: **The provision is similar to the rights granted to a mortgagor seeking to be relieved of the consequences of default, such as is provided in section 95 of the Property Law Act (Qld) and similar sections in other States. It provides a way of simply restoring the position between the parties. It is also a practical solution for credit providers who may not necessarily want to dispose of collateral but would prefer that the customer remedy all defaults, cover costs etc and put the account back to what it should be.**	

2.7.5 Deficiency claims
Does the Act need to make clear that a secured party is entitled to pursue its debtor for any shortfall between what it is owed, and what it recovers by enforcing against the collateral?
Comments: **Yes.**

3.2 The policy behind the provisions
Should ss 267 and 267A be retained?
Comments: **Yes. If the section were to be deleted, then it would represent a greater departure from currently accepted principles.**

3.3 Terminology - "vests in the grantor"
Is the term "vests in the grantor" sufficiently clear? Would there be any benefit in amending the terminology to say that the security interest is "void" or "ineffective"?
Comments: **Yes. We do not think any amendment is necessary.**

3.4.1 PPS leases	
Proposed recommendation 3.49: *That s 268(1)(a)(ii) be amended to read:* "(ii) *a PPS lease;".*	
Do you agree with the proposed recommendation?	**Yes**/~~No~~
Comments: **There is no good reason to treat PPS leases differently at a conceptual level. In most cases if the lessor has not perfected they will still lose out to a secured party with all assets security simply on the basis of the priority rules so any perceived benefit to the hiring industry is likely to be illusory.**	

3.4.2 Serial-numbered property
Should s 267 not apply to a security interest in goods if, at the time of insolvency, there is any registration on the Register that identifies the specific goods? If so, should this be limited to serial-numbered goods? If it should be broader, how should it work?
Comments: **No. It is difficult enough for insolvency practitioners to fully investigate the asset and security position of insolvent grantors without making any ad hoc variations to extend protection for some claimants.**

3.5 Turnover trusts	
Proposed recommendation 3.51: *That s 268(2)(c) be amended by deleting sub-paragraphs (ii) and (iv).*	
Do you agree with the proposed recommendation?	**Yes**/~~No~~
Comments:	

3.6 Deeds of company arrangement	
Proposed recommendation 3.52: *That s 267(1)(a)(iii) be deleted, and that any necessary consequential amendments be made to the related provisions.*	
Do you agree with the proposed recommendation?	**Yes**/~~No~~
Comments:	

3.7 Innocent purchasers	
Proposed recommendation 3.53: *That ss 267(3) and 267(A2) be expanded to include to the bankruptcy-related events referred to in ss 267(1)(a)(iv) and (v).*	
Do you agree with the proposed recommendation?	**Yes**/~~No~~
Comments:	

3.8 Foreign security interests	
Proposed recommendation 3.54: *That s 268(1)(aa) be deleted.*	
Do you agree with the proposed recommendation?	**Yes**/~~No~~
Comments:	

4.1.2 Should s 588FL be repealed?	
Proposed recommendation 3.55: *That s 588FL of the Corporations Act be repealed.*	
Do you agree with the proposed recommendation?	**Yes**/~~No~~
Comments:	

4.1.3 If s 588FL is retained
If s 588FL is retained, should the amendments discussed in Section 4.1.3 be made to it?
Comments: **If s. 588FL is retained (which we do not agree with) then at the very least it would need to be amended to make it consistent with s. 267 PPSA and practical in the context of ongoing relationships such as ROT supplies and relationships where there is a lead time between documentation (or first documentation) and actual transaction. That is, mirror the timing of requirement for registration.** **Note s.588FN in relation to deemed security interests.**

4.1.4.1 Sections 340 to 341A of the Act - circulating assets - the concept
Do you support the suggested recasting of ss 340 to 341A, as set out in Section 4.1.4.1?
Comments: **We agree that the underling policy behind the sections should remain. However, some amendments to simplify drafting of the definition of "circulating asset" is critical. We would be prepared to consider any specific amendment being drafted in a separate consultation.**

4.1.4.2 Sections 340 to 341A of the Act - circulating assets - the location of the provisions	
Proposed recommendation 3.58: *That ss 340 to 341A, in whatever form they may ultimately take, be removed from the Act and relocated to the Corporations Act.*	
Do you agree with the proposed recommendation?	**Yes**/~~No~~
Comments:	

4.1.4.3 Detailed comments on the provisions - ADI accounts - registration to indicate control	
Proposed recommendation 3.59: *If the Register continues to allow a person registering a financing statement to indicate whether or not the secured party may have control, that s 340(2) be amended to make it clear that an ADI that is perfected by control over an ADI account does not need to register a financing statement and indicate that it has control, in order to cause that ADI account not to be a circulating asset for the purposes of s 340.*	
Do you agree with the proposed recommendation?	**Yes**/~~No~~
Comments:	

4.1.4.3 Detailed comments on the provisions
Would s 341 be clearer and more meaningful if it were to be expressed that the secured party would have control of an account unless it is shown that the grantor's usual practice is not to deposit the proceeds into the ADI account, and that it has the express or implied consent of the secured party to this?
Comments: **We agree.**

4.1.4.3 Detailed comments on the provisions	
Proposed recommendation 3.60: *That ss 341(3)(d) and 341A(1)(b) be deleted.*	
Do you agree with the proposed recommendation?	**Yes**/~~No~~
Comments:	

4.1.4.3 Detailed comments on the provisions	
Proposed recommendation 3.61: *That s 341(1)(a)(i), and the corresponding reference in s 341(1)(a)(ii) to "specifically appropriated" inventory, be deleted.*	
Do you agree with the proposed recommendation?	**Yes**/~~No~~
Comments:	

4.1.5 Compulsory acquisitions
Should the Act deem the types of transactions mention in the section to be consensual so that s 50 can apply to them, or should the issue be dealt with in the Corporations Act?
Comments: **It is preferred that this important issue be more readily identifiable by having reference to it in the *Act* rather than in regulation but we agree the suggestion to deem a compulsory acquisition to be a consensual transaction is not appropriate.**

4.1.6 Verification of claims in an insolvency proceeding	
Proposed recommendation 3.63: *That the question referred to in Section 4.1.6 be referred to the arm of Government responsible for insolvency law reform for its consideration.*	
Do you agree with the proposed recommendation?	~~Yes~~/**No**
Comments: **This is an issue of immediate concern to the insolvency profession and has caught difficulties in numerous administrations, of which Hastie was only one. It is a matter that can be dealt with in this review.**	

4.1.7 Liquidator's remuneration	
Proposed recommendation 3.64: *That the arm of Government responsible for insolvency law reform be asked to consider the question referred to in Section 4.1.7.*	
Do you agree with the proposed recommendation?	**Yes**/~~No~~
Comments: **Although, we comment that the issue of liquidator's lien for remuneration has been widely accepted.**	

4.2 The Shipping Registration Act 1981	
Proposed recommendation 3.65: *That the Shipping Registration Act 1981 be amended to allow a secured party to lodge a caveat on the Shipping Register.*	
Do you agree with the proposed recommendation?	**Yes**/~~No~~
Comments:	

4.3 The International Interests in Mobile Equipment (Cape Town Convention) Act 2013
Are there any particular issues arising out of the Cape Town Act that need to be considered in the context of this review?
Comments: **We do not believe so at this time.**

4.4 Other state and territory legislation
Is it desirable to eliminate the uncertainty in the interplay between the Act and other taking free rules, either by way of clarification in the Act or by making appropriate amendment to the relevant state and territory legislation?
Comments: **The taking free rules in Part 2.5 should be an exhaustive code. We believe the relevant State and Territory legislation should be amended to clarify this issue.**

5.1 Section 6 - the gateway to the Act
Is s 6 necessary, or should the Act simply rely on the rules in Part 7.2 to determine whether the Act applies?
Comments: **We think s.6 should be repealed and it should be left to Part 7.2.**

5.2.1 Equivalent concepts in other jurisdictions
Would it be helpful to include a provision in the Act that corresponds to s 8(2) of the Sask PPSA, in relation to either or both of "attachment" and "perfection"?
Comments: **We agree. The concepts of "attachment" and "perfection" are still causing difficulties and anything that can be done to provide greater clarity would be an improvement.**

5.2.2 Consistency with other parts of the Act
Would it be desirable to align the language used in Part 7.2 (and ss 39 and 40) with the language used in the Act more generally?
Comments: **Consistency is to be preferred but this is not considered to be a high priority issue.**

5.2.3 Meaning of "effect of perfection or non-perfection" - priority rules
Would it be desirable to clarify whether the meaning of "effect of perfection or non-perfection" encompasses the effect of the priority and taking free rules, even though not all those rules are determined by whether or not a security interest is perfected?
Comments: **Clarification may be helpful but this is not considered to be a high priority issue.**

5.3 Rules for enforcing a security interest
Would it be desirable to provide a governing law rule in the Act for the enforcement of security interests? If so, what should the rule be?
Comments: **Yes. The UNCITRAL approach is preferred as it would lead to greater certainty of application.**

5.4 Intermediated securities	
Proposed recommendation 3.73: *That Part 7.2 be amended to provide that questions relating to the validity, perfection and effect of perfection or non-perfection of a security interest over an intermediated security be determined by the law (other than the law relating to conflict of laws) of the jurisdiction of the intermediary, or of the jurisdiction in which the intermediary maintains the securities account.*	
Do you agree with the proposed recommendation?	**Yes**/~~No~~
Comments:	

5.5.1 Section 235(5) - individual grantors
Should the Act do more to accommodate the risk for a secured party that its grantor could relocate to Australia?
Comments: **No.**

5.5.2 Sections 235(1) and (2)(a) - certified investment instruments, chattel paper and negotiable instruments
Should s 235 have the effect that a certificated investment instrument, chattel paper or negotiable instrument is located where the document is physically located?
Comments: **In relation to shares, the position consistent with the Corporations Act should be adopted.** **In relation to chattel paper and negotiable instruments, we think the location of the instrument should be determinative.**

5.6 Section 237 - express choice of Australian law
Is s 237 appropriate?
Comments: **No. The rationale outlined by UNCITRAL is to be preferred. Validity of a security interest should be transparent to third parties.**

5.6 Section 237 - express choice of Australian law
If s 237 is retained in the Act, are the exclusions in s 237(2) appropriately framed or should they, for example, exclude all non-tangible property from the section?
Comments: **We agree that if the section is retained then all non-tangible property should be excluded.**

5.7.1 Section 238(2) - goods intended for another jurisdiction
Does s 238(2) need to be amended? If so, how?
Comments: **The section only applies if the goods have in fact been moved to the destination jurisdiction. Hence, the issue raised does not seem to warrant any special consideration.**

5.7.2 Section 238(2A)
Can you explain the role of s 238(2A)?
Comments: **No explanation is offered.**

5.7.2 Section 238(2A)	
Proposed recommendation 3.78: *That s 238(2A) be deleted.*	
Do you agree with the proposed recommendation?	**Yes**/~~No~~
Comments:	

5.7.3 Section 238(3) - moveable goods	
Proposed recommendation 3.79: *That the words "(including the law relating to conflict of laws)" in s 238(3) be replaced with "(other than the law relating to conflict of laws)", and that s 238(3)(c) be deleted.*	
Do you agree with the proposed recommendation?	**Yes**/~~No~~
Comments:	

5.8 Section 239(5) - ADI accounts	
Proposed recommendation 3.80: *That s 239(5) be deleted.*	
Do you agree with the proposed recommendation?	**Yes**/~~No~~
Comments:	

5.9.1 Section 240(2)
Should s 240(2) be deleted?
Comments: **Yes.**

5.9.2 Section 240(3)
What is the purpose of s 240(3)? Should it be deleted?
Comments: **If the provision intends to say that the validity of a possessory security interest in negotiable instruments etc. is governed by the law of the jurisdiction in which the collateral is situated it should be re-drafted to say this more clearly.**

5.10 Section 241 - proceeds
Should s 241 be amended to incorporate the Canadian model or the UNCITRAL Guide recommendations in relation to the governing law rules for proceeds?
Comments: **We favour the UNCITRAL approach.**

5.11 Section 40(5)
Can you explain s 40(5)? Should it be deleted?
Comments: **We agree it should be deleted.**

6.1 Other provisions in the Act - Section 339
Can you explain s 339 in the Act? Should it be deleted?
Comments: **It can be deleted, but it is recognised that it may still be of some assistance for interpretation in the foreseeable future to those unfamiliar with the *Act*.**

6.2 Letters of credit
Do you have suggestions for ways in which the Act should treat security interests over rights under letters of credit in a manner that is different to security interests over other forms of collateral?
Comments: **Consistency is to be preferred.**

6.3.2 The meaning of "intellectual property"
Is it appropriate to define the term "intellectual property" as at present, or should it be defined in a more general way?
Comments: **We are not aware of any issues having a reason from the current definition.**

6.3.2 The meaning of "intellectual property"
Is it appropriate for the definition of "intellectual property" to provide for "the right to be a party to proceedings" in relation to any of the types of intellectual property listed in the definition?
Comments: **We do not believe the definition should be amended.**

6.3.3 Section 105 - intellectual property relating to goods
Do you have any comments or suggestions in relation to s 105?
Comments: **We do not consider any change is necessary.**

7.1 Location of mechanical and other supporting provisions	
Proposed recommendation 3.89: *That the constitutional, judicial and other supporting provisions in the Act be relocated into a separate piece of supporting legislation.*	
Do you agree with the proposed recommendation?	~~Yes~~/**No**
Comments: **To gain a proper understanding of the operation of the *Act* it would still be necessary to refer to other provisions (such as constitutional, judicial and other supporting provisions). By locating some provisions elsewhere may lead to confusions and mistakes.**	

7.2.1 Other changes relating to presentation - the use of the term "grantor"
Should the term "grantor" to be changed to "debtor" to conform to overseas models?
Comments: **We believe the term "grantor" should be retained.**

7.2.2 Other changes relating to presentation - the name of the Act
Do you agree that the name of the Act should not be changed?
Comments: **We favour retaining the current name. "Personal property" is an expression that has been well recognised under Australian Law.**