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Mr Nick Davison
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Dear Mr Davison

ASF Response to Consultation Paper - Statutory Review of the Personal Property Securities Act 2009 (PPS)

On behalf of the Australian Securitisation Forum (ASF) and its members, we are writing to provide industry feedback on the Attorney-General's Department's consultation on the proposed legislative reforms to the PPS framework; in particular the recommendations that are not currently implemented in the existing PPS legislative package. Our comments and proposed responses are set out in the submissions annexed to this letter.

By way of background, the ASF is the peak body representing the securitisation industry in Australia and New Zealand. The ASF's role is to promote the development of securitisation in Australia and New Zealand by facilitating the formation of industry positions on policy and market matters, representing the industry to local and global policymakers and regulators and advancing the professional standards of the industry through education and local and international market outreach opportunities.

We would appreciate your careful consideration of the issues that the ASF has put forward in the submissions and look forward to hearing from you. Of course, if you would like to discuss the submissions with us, we would be more than happy to arrange a meeting.

Yours sincerely,

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Australian Securitisation Forum: Submissions on PPSA reforms

Topic	Submission
Registration – grantor details for trusts PPSA, s 153; PPSR, s 14[1]	Most securitisation vehicles in Australia take the form of special purpose trusts to which ABNs are required to be allocated. The risk of security interests vesting in the insolvency of the trustee as a result of technical defects in registration has been a cause of concern in the industry, and has been known to cause delays in closing transactions where parties have insisted on waiting for an ABN to be issued rather than accepting the risk of initial registrations against the trustee's ACN becoming defective when the ABN issues. We are supportive of reforms to address this risk. However, the proposal that registrations be made in the same way as against the trustee, without more, would lead to a significant loss of functionality of the register as a means of protecting and regulating the priority of competing security interests. This loss of functionality arises from the fact that there would be no way of distinguishing between security interests granted by the trustee in different capacities. In the context of the securitisation industry, where trustees are typically professional trustees who act as trustee of hundreds or even thousands of trusts, this loss of functionality would be nearly total. *Example: Trustee Co has a single migrated security interest registration registered against its ACN as an 'All PAP' registration in favour of XZY Bank with an effective time of 12AM on 30 January 2012. Any security interest ever taken by XYZ Bank over an asset of a trust of which Trustee Co is trustee will necessarily have an earlier priority time than any other security interest, even if XYZ Bank's security interest is only taken after the other security interest has been registered. It will be impossible for other secured parties dealing with Trustee Co as trustee of a trust to protect the priority of their security interest against a security interest which might subsequently be taken by*

[1] References to sections of the PPSA and PPSR are to the PPSA and PPSR as proposed to be amended in the consultation drafts unless otherwise indicated.

XYZ Bank without entering into a specific priority agreement with XYZ Bank.

In addition to the damage caused to the current priority regime, the proposal would lead to a proliferation of registrations against the ACN of trustee companies, diminishing the utility of the register for users seeking information about the trustee company in its person capacity. It may make it more difficult for trustee companies to raise finance on a secured basis.

We consider these concerns outweigh the benefit of addressing the risks which exist under the current system.

Accordingly, if the change in grantor details is to be adopted then we consider it important that other measures be implemented to address the resulting priority issues and we would request the opportunity to engage in further consultation to devise a workable solution.

Registration – end time

PPSA, s 153

We oppose the proposed abolition of the option to register security interests using the 'no stated end time' option.

Securitisation transactions typically involve at least the following security interests:

- an 'allpaap' security interests over the assets of the securitisation trust; and
- a transfer of an account from the seller of a receivable to the securitisation vehicle.

Many securitisation transactions have a legal maturity of considerably longer than the proposed maximum end times, can cover multiple asset classes and can be extended multiple times. In particular, warehouse facilities may be extended again and again to finance new underlying loan transactions with very long terms (eg 30 years for mortgage loans). The introduction of a mandatory end time creates the risk of administrative oversight leading to a loss of security. This is disproportionate to the goal of reducing clutter on the register, which could be adequately managed by grantors issuing amendment demands requiring obsolete registrations to be removed. The proposal to allow registrations against multiple asset classes should also lead naturally to a reduction in clutter.

If, despite the concerns expressed above, end times are to be made mandatory then a longer maximum end time should be permitted for all collateral classes where the grantor is not an individual. From the perspective of the securitisation industry, a period of at least 35 years should be permitted in order to accommodate the legal maturity of residential mortgage-backed securitisation transactions. Such transactions (which represent a substantial majority of securitisation transactions in the Australian capital markets)

are required to have a legal maturity longer than that of the underlying mortgage loans, which are typically up to 30 years.

The proposed end times of 7 years for transfers of accounts and 25 years for 'allpaap' registrations are too short for securitisation transactions.

If end times are made mandatory, secured parties should also receive notification a reasonable period (not less than 10 business days) prior to the stated end time as a prompt to renew their registrations if necessary.

Registration – classes and description

PPSA, s 15A; PPSR, s 20

The proposed collateral description requirements in relation to accounts include the requirement for a 'further description' of the account as an account to which s 64 of the PPSA applies where the security interest is a non-PMSI in the account as original collateral.

The further description appears to be intended to engage the priority rule in s 64 of the PPSA, but the consequences of failing to include it would appear to be that the registration is defective rather than simply that the registration fails to engage the s 64 priority rule. This would be of significant concern to the securitisation industry, as failure to include the required statement could invalidate registrations.

We submit that the proposed further description of accounts should be optional, with the consequence of failing to include it being limited to loss of the benefit of s 64 of the PPSA.

More generally, we note the requirements of s 15A change the current collateral description requirements which must be satisfied in a financing statement. Although s 15A(2) excludes the requirement that the description be sufficient to enable the collateral to be identified, this is expressed to be 'subject otherwise to this Act' – the meaning of this exception is unclear and should be omitted. In addition, s 15A(1) introduces a requirement for a description by 'item or kind' in contrast to the current rules which require collateral to be described by item of class – it is unclear whether 'kind' is intended to have a different meaning to 'class', but the change in terminology creates uncertainty and may require far greater particularity than is currently adopted in the market or even permissible within the text limits of the collateral description fields. We submit that the current requirements should not be changed.

Registration – secured party nominee

PPSA, s 153

The flexibility currently included in item 1 of the table in s 153, which allows a nominee of the secured party to be named as secured party, is of utility in securitisation transactions where an originator sells the benefit of a security interest to the trustee of a securitisation trust but continues as servicer of the asset. This avoids the need for

the securitisation trustee to become registered as the secured party, which would be a significant burden given the number of underlying security interests typically involved and potentially cause confusion to borrowers (often individuals) who continue to deal only with the originator and may know nothing of the securitisation arrangement.

The proposal to limit this flexibility to situations where the nomination occurs before the initial registration would mean this is no longer possible, as the sale of the security interest to the trustee would typically occur only some time after the initial registration. Securitised assets are regularly also subsequently re-sold or reallocated to other securitisation vehicles, or back to the originator, at even later points in time.

The proposed limitation also seems inconsistent with the policy of the PPSA in respect of defects in the description of the secured party. Currently, a defect in secured party details does not automatically invalidate a registration and courts have found such defects not to be seriously misleading. It is difficult to see how a registration naming as secured party a party who has in fact been nominated to represent the secured party (whenever that nomination occurred) could be seriously misleading.

We submit that the proposed amendment should not be made.

Continuation of security interests in transferred collateral

PPSA, s 32

Currently, s 32 operates to extinguish existing security interests in collateral that is transferred with the express or implied authority of the secured party. We believe this is appropriate as it reflects the usual expectations of commercial parties participating in such transactions and facilitates the execution of transactions without requiring undue formalities.

The revised section treats all ‘dealings’ in the same way, and requires that the secured party ‘agree’ that the dealing will be free of the security interest. This introduces unnecessary formality, which if not observed will result in security interests continuing in circumstances when all parties would expect them to be extinguished. We submit that s 32 should distinguish between:

- transfers of collateral with the express or implied authority of the secured party, which should be free of the security interest *unless* the transferee agrees to take subject to the security interest; and
- other dealings, which should only be free of the security interest if the secured party has agreed that the dealing would be fee of the security interest.

Transfer of account provisions

PPSA, ss 80-81B

Section 81B(1) – invalidation of dealings

The proposed replacement of ss 80-81 with the proposed ss 80-81B leads to a number of changes of concern to the securitisation industry.

Of greatest concern is the proposed s 81B(1). This section invalidates dealings where they make performance by the account debtor 'more onerous'. This is not a concept known to the current law in relation to dealings with debts, and its meaning is unclear. An account debtor whose debt is assigned may need to make payments in a different way, and will lose the benefit of general law rights of set off arising after they receive notice of the assignment or in an insolvency of the account creditor. These are fundamental requirements for account financing transactions, but it is not clear that they could not be said to make performance 'more onerous'.

Given the consequence under s 81B(1) is to invalidate the dealing, this level of uncertainty is unreasonable and may be unacceptable to investors in securitisation transactions.

We strongly submit that this amendment should not be made. If, despite this submission, s 81B(1) is included, its application should at least be limited under s 81B(2) to accounts arising under contracts containing a provision to which s 81 applies. The PPSA should not restrict dealings in debts which are assignable without the benefit of the PPSA.

Section 81B(4) – grace period

Section 81B(4) introduces a 10 business day grace period during which the account debtor can delay payment. What is the policy justification for this? Securitisation transactions are highly sensitive to the timing of cashflows and triggering a potential 10 business day delay in collections when debtors are notified of a transfer would have adverse consequences for investors and in an extreme case could cause a transaction to default.

The grace period also:

- indirectly extends the time in which further rights of set off may accrue in favour of an account debtor under s 81A(1)(b); and
- in conjunction with s 81B(6)(a), allows the account debtor to continue to get a good discharge for its debts by paying the transferor.

Both of these changes are adverse to the commercial expectations of parties to securitisation transactions. In particular, investors in securitisation transactions will be concerned by the ability for the debtor to continue to pay the transferor, as notices would typically only be given to debtors where the transferor has become insolvent or materially breach its obligations under the transaction documents.

We note the draft explanatory memorandum explains this grace period as consistent with (although it is longer than) the period currently allowed to debtors under the existing s 160 when a secured party enforces a security interest in respect of liquid collateral. We submit the function of notice under the existing s 160 and notice under s 81B (or the existing s 80) are quite different. The existing s 160 is an enforcement provision, whereas the giving of notice by the transferee of an account under s 81B (or the existing s 80) reflects the fact that the transferee is the owner of the account and has become the debtor's creditor. Section 160 also does not allow the debtor to continue to accrue the benefit of rights of set off or to obtain a discharge of its debt by paying a person to whom it is no longer owing, which is the effect of the proposed s 81B(4).

We submit that these changes should not be made.

Section 81B(4) – requirement for proof

The new requirement for proof of the dealing to be included with notice to the debtor makes the giving of notice more onerous, with a risk of invalidity (and consequently the risk that the debtor may continue to make payments to the account creditor) if the proof is found to be inadequate. Proof in the context of securitisation transaction may be far from straightforward, and require the disclosure of complex and confidential transaction documents and potentially series of successive transfers; as transfers are typically documented by way of written offers accepted by payment, proof may also require evidence of payments having been made,

We submit that the current regime whereby the account debtor may request proof but is otherwise bound to pay the transferee strikes a better balance and should be retained.

Section 81B(5) – requirement for notice to account creditor

What is the reason for requiring notice to the account creditor? The account creditor will know it has dealt with the account, and the requirement (if any) for the transferee to give notice to the transferor is a matter that can be properly dealt with the agreement between them. At the very least, the parties should be able to exclude the requirement for notice to the transferor by agreement.

Chattel paper provisions

PPSA, ss 10, 12, 14, 23, 24, 30, 31, 37, 38, 54, 71 (existing), 76, 78, 80, 81, et al

We are generally supportive of removing the chattel paper provisions, the effect of which is unclear and tends to create uncertainty.

However, it would be unhelpful to the securitisation industry if the perfection requirements applicable to transfers of receivables differed depending on the nature of the receivable. To ensure continued consistent treatment of transfers of different types of receivables, the exclusion of chattel paper from the definition of 'accounts' should be

removed, so that monetary obligations as currently referred to in the definition of chattel paper will be 'accounts'.

For the same reason, we would be concerned if any changes to the definition of 'account' were made which added further complexity to securitisation industry practice. Accordingly, we would ask that any proposed changes to the definition of 'account' be subject to further consultation.

Further consideration should also be given to the treatment of a security interest in personal property which is transferred with an account secured by that security interest. With the proposed changes, the priority of competing interests in the account would be determined in accordance with the PPSA, whereas the priority of competing interests in the security interest would be determined in accordance with the general law. We would welcome further consultation on this point.

Rights to payment in connection with interests in land

PPSA, s 13B, s 73; PPSR, s 9.

We understand the drafting of the existing s 8(1)(f)(ii) and related regulations reflects an intention to facilitate transfers of pools of mortgage loans being treated under the PPSA as transfers of accounts, but to exclude other transfers of rights to payment connected with interests in land. Industry practice has proceeded on that basis, and it would be beneficial to industry to ensure this continues.

It is unclear that the revised provisions have the same effect. The 'carve in' regulatory power under s 13B(2) applies only to the extent that the relevant property would be personal property under s 18A. As rights to payment under a registered mortgage may form part of the mortgagee's estate under land titles' legislation, they may be excluded as a result of the exclusion of 'land' from the meaning of personal property under s 13A. We submit it would be preferable for s 13B(2) to operate independently of s 13A, so that personal property prescribed by the regulations as personal property is deemed to be personal property whether or not it would be within the definition of that term under s 13A.

We also suggest that the priority rule in s 73(6) be reconsidered. The rule currently relates to the exclusion in s 8(1)(f)(ii) of interests in rights to payment related to land, *where the agreement specifically identifies the land*. The priority rule deals with the priority conflict that would arise where there were two different dealings with rights to payment connected with land, one of which specifically identified the land, and one of which did not. The former would not be subject to the PPSA and would be afforded priority over the latter by s 73(6). The policy rationale of s 73(6) in the context where s 8(1)(f)(ii) is replaced by s 13B(1)(c) is unclear.

Description of collateral in security agreements PPSA, ss 15A and 20	The prescription of further formalities in relation to the description of collateral under s 20 is unhelpful, and risks invalidating transfers of accounts and other dealings giving rise to security interests if the formalities are unsatisfied. The new requirements that the security agreement contain a description 'sufficient to enable the property to be identified' and that it identify the collateral by 'item or kind' will create significant uncertainty as to whether current forms of agreement will be valid. Depending on how these words are construed, they could require detailed descriptions of the collateral which would be impractical in many cases, and raise risks that a drafting slip or oversight renders the security agreement ineffective. We submit there is no good policy reason for parties to be exposed to this risk. The security agreement is a private document between the parties to it, not a public disclosure document. If an agreement is sufficient to take effect between the parties to it, that should be sufficient subject only to any registration requirements.
Transition General	Transition will be a critical issue for our industry given the large volume of outstanding transactions and the speed and regularity of entry into new transaction. Adequate time will be needed for industry to adjust after the amendments have been legislated and before they commence application. In addition, the transition arrangements which apply after the amendments commence application must provide clarity and workable solutions to address how the transition of existing security interests will be effected (to the extent a temporary perfection model applies), what proactive action will be required from secured parties (under both models), how data migration (if required to transition existing security interests from the existing Register to the new/upgraded Register) will be executed, the timeframe for transition and the temporary perfection period (under the temporary perfection model), and whether cost relief will be provided for costs associated with any required searches or re-registration to effect the transition. The transition regime should be subject to further stakeholder consultation once details of the proposed regime have been formulated.
Other matters General	We have limited our submission to matters relating directly to the features of securitisation transactions. Other aspects of the PPSA affect the securitisation industry indirectly, by impacting the quality of securitised assets. We leave it to others to make submission on aspects of the proposed changes which may affect the origination of

secured loans and other financial assets, but ask that the government have due regard to those submissions.

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