



New South Wales

Personal Property Securities (Commonwealth Powers) Bill 2009

Explanatory note

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

Overview of Bill

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

Summary of the operation of the Bill

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

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

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

The Bill also refers certain matters (the *referred PPS matters*) in relation to different kinds of personal property so as to enable the Commonwealth to make amendments to the Commonwealth PPS Act from time to time concerning security interests in those kinds of property. Each of these references is defined in the Bill to be an *amendment reference*. The amendment references relate to the following kinds of personal property:

- (a) personal property (other than fixtures and water rights),
- (b) fixtures (which are goods, other than crops, that are affixed to land),
- (c) transferable water rights (which are certain transferable rights, entitlements or authorities, whether or not exclusive, that are granted by or under the common law or legislation of the State in relation to the control, use or flow of water).

The Bill provides for exclusions from the referred PPS matters that are intended to limit the power of the Commonwealth Parliament to use an amendment reference to exclude or limit the power of the State to administer, vary and abrogate any State statutory rights (such as licences) that it creates from time to time.

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

Outline of provisions

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

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

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

The expression *law of the State* is defined to mean any Act of the State or any instrument made under such an Act, whenever enacted or made and as in force from time to time. The expression is intended to cover both existing and future Acts and instruments as enacted, made and amended from time to time.

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

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

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

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

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

The term *licence* is defined to mean either of the following:

- (a) a transferable right, entitlement or authority to do one or more of the following:
 - (i) to manufacture, produce, sell, transport or otherwise deal with personal property,
 - (ii) to provide services,
 - (iii) to explore for, exploit or use a resource,
- (b) a transferable authority to exercise rights comprising intellectual property.

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

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

- (a) the matter of security interests in the personal property, and
- (b) without limiting the generality of paragraph (a), each of the following matters:
 - (i) the recording of security interests, or information with respect to security interests, in the personal property in a register,
 - (ii) the recording in such a register of any other information with respect to the personal property (whether or not there are any security interests in the personal property),
 - (iii) the enforcement of security interests in the personal property (including priorities to be given as between security interests, and as between security interests and other interests, in the personal property).

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

- (a) the creation, holding, transfer, assignment, disposal or forfeiture of a State statutory right, or
- (b) limitations, restrictions or prohibitions concerning the kinds of interests that may be created or held in, or the kinds of persons or bodies that may create or hold interests in, a State statutory right, or
- (c) without limiting the generality of paragraph (a) or (b)—any of the following matters:
 - (i) the forfeiture of property or interests in property (or the disposal of forfeited property or interests) in connection with the enforcement of the general law or any law of the State,
 - (ii) the transfer, by operation of that law of the State, of property or interests in property from any specified person or body to any other specified person or body (whether or not for valuable consideration or a fee or other reward).

Paragraphs (a) and (b) of the above exclusions from the referred PPS matters are intended to limit the power of the Commonwealth Parliament to use an amendment reference to exclude or limit the power of the State to administer, vary and abrogate any State statutory rights (such as licences) that it creates from time to time.

Paragraph (c) of the above exclusions from the referred PPS matters is intended, among other things, to preserve the operation of laws of the State that provide for the confiscation of the proceeds of crimes or for the transfer by or under a law of the State of assets from defunct bodies.

Clause 5 defines the expression *security interest* in personal property. Generally speaking, a security interest in personal property is an interest in relation to the property provided for by a transaction that, in substance, secures payment or performance of an obligation (without regard to the form of the transaction or the identity of the person who has title to the property). However, the proposed section also makes it clear that a security interest may encompass certain other interests provided for by a transaction regardless of whether or not the transaction secures payment or performance of an obligation. An example of such an interest is an interest of a lessee or bailor under a lease or bailment of goods.

Clause 6 deals with the references described in the Overview. Clause 6 (1), (2), (3) and (4) make the references.

Clause 6 (1) provides for the inclusion of the referred provisions in a Commonwealth Act enacted in the terms, or substantially in the terms, of the tabled text. The expression “substantially in the terms” of the tabled text will enable minor adjustments to be made to the tabled text.

Clause 6 (2) in effect refers matters to the Commonwealth Parliament in connection with the future amendment of the Commonwealth PPS Act concerning security interests in personal property (other than fixtures or water rights).

Clause 6 (3) in effect refers matters to the Commonwealth Parliament in connection with the future amendment of the Commonwealth PPS Act concerning security interests in fixtures.

Clause 6 (4) in effect refers matters to the Commonwealth Parliament in connection with the future amendment of the Commonwealth PPS Act concerning security interests in transferable water rights (other than excluded State statutory rights).

Clause 6 (5) removes a possible argument that one of the references might be limited by any of the other references (except as provided by clause 6 (2), which excludes fixtures and water rights from the reference made by that proposed subsection).

Clause 6 (6) makes it clear that the reference of a matter has effect only to the extent that the matter is not otherwise within the legislative power of the Commonwealth Parliament and to the extent that the matter is within the legislative power of the State Parliament.

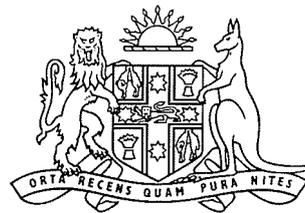
Clause 6 (7) makes it clear that the State Parliament envisages that the Commonwealth PPS Act can be amended or affected by Commonwealth legislation enacted in reliance on other powers (though this may be the subject of provisions in the Intergovernmental Agreement that will underpin the scheme) and that instruments made or issued under the Commonwealth PPS Act may affect the operation of that legislation otherwise than by express amendment.

Clause 6 (8) specifies the period during which a reference has effect. Each reference will begin when the subsection that makes the reference commences and end when the period of that particular reference is terminated under the proposed Act.

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

Clause 8 makes it clear that the separate termination of the period of an amendment reference does not affect laws already in place. Accordingly, the amendment reference continues to have effect to support those laws unless the period of the initial reference is also terminated.

Clause 9 provides for the accuracy of a copy of the tabled text containing the proposed Commonwealth PPS Act to be certified by the Clerk of the Legislative Assembly of New South Wales. Such a certificate is evidence of the accuracy of the tabled text and that the text was in fact tabled as contemplated by the Bill.



New South Wales

Personal Property Securities (Commonwealth Powers) Bill 2009

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New South Wales

Personal Property Securities (Commonwealth Powers) Bill 2009

No. , 2009

A Bill for

An Act 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.

The Legislature of New South Wales enacts:	1
1 Name and purpose of Act	2
(1) This Act is the <i>Personal Property Securities (Commonwealth Powers) Act 2009</i> .	3 4
(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.	5 6 7 8
2 Commencement	9
(1) This Act commences on the date of assent to this Act, except as provided by subsection (2).	10 11
(2) Section 6 (2), (3) and (4) commence on a day or days to be appointed by proclamation.	12 13
3 Definitions	14
In this Act:	15
<i>amendment reference</i> means a reference under section 6 (2), (3) or (4).	16
<i>Commonwealth PPS Act</i> 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.	17 18 19
<i>Commonwealth PPS instrument</i> means any instrument (whether or not of a legislative character) that is made or issued under the Commonwealth PPS Act.	20 21 22
<i>crops</i> includes (but is not limited to) the kinds of things that are included in the definition of <i>crops</i> for the purposes of the tabled text.	23 24
<i>excluded State statutory right</i> 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.	25 26 27
<i>express amendment</i> 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.	28 29 30 31 32 33
<i>fixtures</i> means goods, other than crops, that are affixed to land.	34
<i>general law</i> 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.	35 36 37

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.	1
initial reference means the reference under section 6 (1).	2
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.	3
interest , in relation to property, includes a right in the property.	4
land includes all estates and interests in land, whether freehold, leasehold or chattel, but does not include goods that are affixed to land.	5
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.	6
licence means either of the following:	7
(a) a transferable right, entitlement or authority to do one or more of the following:	8
(i) to manufacture, produce, sell, transport or otherwise deal with personal property,	9
(ii) to provide services,	10
(iii) to explore for, exploit or use a resource,	11
(b) a transferable authority to exercise rights comprising intellectual property,	12
but does not include an excluded State statutory right.	13
personal property means property (including a licence) other than:	14
(a) land, or	15
(b) an excluded State statutory right.	16
reference means:	17
(a) the initial reference, or	18
(b) an amendment reference.	19
referred PPS matters in relation to personal property—see section 4.	20
register means any system for recording interests or information (whether in written or electronic form).	21
security interest in personal property—see section 5.	22
State statutory right means a right, entitlement or authority that is granted by or under a law of the State.	23
tabled text means the text of the proposed <i>Personal Property Securities Bill 2009</i> for a Commonwealth Act as tabled, by or on behalf of the Minister introducing the Bill for this Act, in the Legislative Assembly of New South Wales on 16 June 2009.	24
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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 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).	1 2 3 4
(3)	In this section: <i>forfeiture</i> means confiscation, seizure, extinguishment, cancellation, suspension or any other forfeiture.	5 6 7
5	Meaning of “security interest” in personal property	8
(1)	In this Act, a <i>security interest</i> 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).	9 10 11 12 13
(2)	A <i>security interest</i> 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:	14 15 16 17
(a)	the interest of a transferee under a transfer of a monetary obligation or chattel paper,	18 19
(b)	the interest of a consignor who delivers goods to a consignee under a consignment,	20 21
(c)	the interest of a lessor or bailor under a lease or bailment of goods.	22 23
(3)	A <i>security interest</i> in personal property does not include a licence.	24
(4)	In this section: <i>chattel paper</i> means one or more writings that evidence both a monetary obligation and a security interest in, or a lease of, specific personal property. <i>writing</i> includes (but is not limited to) the kinds of things that are included in the definition of <i>writing</i> for the purposes of the tabled text.	25 26 27 28 29 30
6	Initial and amendment references	31
(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.	32 33 34 35 36 37
(2)	The referred PPS matters in relation to personal property (other than fixtures and water rights) are referred to the Parliament of the	38 39

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- 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. 1
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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. 5
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- (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. 10
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- (5) Except as provided by subsection (2), the operation of each of subsections (1), (2), (3) and (4) is not affected by the other subsections. 15
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- (6) The reference of any matter under subsection (1), (2), (3) or (4) has effect only: 17
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- (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 19
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- (b) if and to the extent that the matter is included in the legislative powers of the Parliament of the State. 23
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- (7) For the avoidance of doubt, it is the intention of the Parliament of the State that: 25
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- (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 27
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- (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. 33
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- (8) Despite any other provision of this section, a reference under subsection (1), (2), (3) or (4) has effect for a period: 37
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- (a) beginning when the subsection under which the reference is made commences, and 39
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- (b) ending at the end of the day fixed under section 7 as the day on which the reference is to terminate, 1
but not longer. 2
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7 Termination of references 4

- (1) The Governor may, at any time, by proclamation published in the Gazette, fix a day as the day on which: 5
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- (a) all of the references that have effect are to terminate, or 7
- (b) any or all of the amendment references that have effect are to terminate. 8
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- (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. 10
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- (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. 13
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- (4) A revoking proclamation has effect only if published before the day fixed under subsection (1). 17
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- (5) The revocation of a proclamation published under subsection (1) does not prevent publication of a further proclamation under that subsection. 19
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- (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. 21
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8 Effect of termination of amendment references before initial reference 26

- (1) If an amendment reference terminates before the initial reference terminates, the termination of the amendment reference does not affect: 27
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- (a) laws that were made under the amendment reference before that termination (whether or not they have come into operation before that termination), or 29
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- (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: 32
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- (i) laws referred to in paragraph (a) that come into operation after that termination, or 35
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- (ii) provisions referred to in section 6 (7) (a) or (b). 37

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- (2) Accordingly, an amendment reference continues to have effect for the purposes of subsection (1) unless the initial reference is terminated. 1
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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. 3
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- (4) For the purposes of subsection (1): 6
- (a) the laws referred to in subsection (1) (a) include Commonwealth PPS instruments, and 7
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- (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
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- 9 Evidence of tabled text** 14
- (1) A certificate of the Clerk of the Legislative Assembly of New South Wales 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: 15
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- (a) of the matter certified, and 20
- (b) that the text of the proposed Commonwealth Bill was tabled in the Legislative Assembly of New South Wales as referred to in the definition of *tabled text* in section 3. 21
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- (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. 24
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