



THIRTY-EIGHTH PARLIAMENT

REPORT 59

**STANDING COMMITTEE ON UNIFORM
LEGISLATION AND STATUTES REVIEW**

**PERSONAL PROPERTY SECURITIES
(COMMONWEALTH LAWS) BILL 2011 AND
PERSONAL PROPERTY SECURITIES
(CONSEQUENTIAL REPEALS AND AMENDMENTS)
BILL 2011**

Presented by Hon Adele Farina MLC (Chairman)

March 2011

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

Date first appointed:

17 August 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

“8. Uniform Legislation and Statutes Review Committee

- 8.1 A *Uniform Legislation and Statutes Review Committee* is established.
- 8.2 The Committee consists of 4 Members.
- 8.3 The functions of the Committee are -
- (a) to consider and report on Bills referred under SO 230A;
 - (b) of its own motion or on a reference from a Minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;
 - (c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;
 - (d) to review the form and content of the statute book;
 - (e) to inquire into and report on any proposal to reform existing law that may be referred by the House or a Minister; and
 - (f) to consider and report on any matter referred by the House or under SO 125A.
- 8.4 For a purpose relating to the performance of its functions, the Committee may consult with a like committee of a House of the Parliament of the Commonwealth, a state or a territory, and New Zealand and similarly, may participate in any conference or other meeting.”

Members as at the time of this inquiry:

Hon Adele Farina MLC (Chairman)	Hon Liz Behjat MLC
Hon Nigel Hallett MLC (Deputy Chairman)	Hon Linda Savage MLC

Staff as at the time of this inquiry:

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ISBN 978-1-921634-60-4

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**REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES
REVIEW**

IN RELATION TO THE

**PERSONAL PROPERTY SECURITIES (COMMONWEALTH LAWS) BILL 2011 AND PERSONAL
PROPERTY SECURITIES (CONSEQUENTIAL REPEALS AND AMENDMENTS) BILL 2011**

1 REFERENCE AND PROCEDURE

- 1.1 On 16 February 2011, Hon Simon O'Brien MLC, Minister for Commerce (**Minister**), introduced the Personal Property Securities (Commonwealth Laws) Bill 2011 (**PPS Bill**) into the Legislative Council.¹ On the same day, Hon Norman Moore MLC introduced the Personal Property Securities (Consequential Repeals and Amendments) Bill 2011 (**Consequentials Bill**) into the Legislative Council.²
- 1.2 Following their Second Readings, the PPS Bill and the Consequentials Bill stood automatically referred to the Uniform Legislation and Statutes Review Committee (**Committee**) pursuant to Standing Order 230A. The Committee is required to report to the Legislative Council on its inquiry into the PPS Bill and the Consequentials Bill not later than 30 days after the day of referral pursuant to Standing Order 230A(4). The report date for the PPS Bill and Consequentials Bill was 22 March 2011.

2 INQUIRY PROCEDURE

- 2.1 Supporting documents were not received until 1 March 2011, 12 days into the 30 days within which the Committee is required to report.
- 2.2 The late provision of supporting documentation to the Committee made it impossible for the Committee to undertake a full and proper inquiry.
- 2.3 Ministerial Office Memorandum 2007/01 requires provision of these documents to the Committee at the time a bill to which Standing Order 230A applies is first tabled in Parliament. The Committee has previously noted the difficulties it faces in meeting its reporting deadline due to a failure to provide supporting documents in a timely manner,³ however this continues to be a problem.

¹ Hon Simon O'Brien MLC, Minister for Commerce, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 16 February 2011, pp380-381.

² Hon Norman Moore, MLC, Leader of the House, on behalf of Hon Simon O'Brien MLC (Minister for Commerce), Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 16 February 2011, pp382-383.

³ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 54, *Annual Report 2009*, 9 September 2010, pp4-5.

2.4 At the time of referral, the Committee was undertaking an inquiry into another substantial bill and had another bill referred to it for inquiry.

2.5 Due to the Committee's workload, the resources available to it, the late provision of supporting documents and the referral of yet another Bill, the Committee determined that it was unable to conduct a full and proper inquiry into the PPS Bill and the Consequentials Bill and report within 30 days.

2.6 Although the Committee did not undertake a full inquiry, the Committee did seek information about a specific aspect of the PPS Bill with the Department of Commerce. This is discussed at paragraph 6.1 to paragraph 6.4 of the report.

2.7 The Committee regrets that it is unable to conduct a full and proper inquiry into the PPS Bill and Consequentials Bill and provide a detailed report to the Parliament. The Committee however provides the following brief overview and comment to assist the Parliament.

3 UNIFORM LEGISLATION

3.1 In terms of the structures for uniform legislation discussed in previous Committee reports,⁴ the PPS Bill is a mixture of Structures 3 and 4. That is, it is adopted complementary legislation and a referral of power under section 51(xxxvii) of the Commonwealth Constitution (**Constitution**).

3.2 The structures are summarised in **Appendix 1**.

4 SUPPORTING DOCUMENTATION

4.1 The Minister for Commerce provided the following supporting documents in respect of the PPS Bill and the Consequentials Bill which was received by the Committee on 1 March 2011:

- *Personal Property Securities Law Agreement 2008*;
- *National Partnership Agreement to Deliver a Seamless National Economy - Implementation Plan*, as at 13 February 2011;
- *Personal Property Securities Act 2009* (Cth); and
- background information on the PPS Bill and Consequentials Bill as required by Ministerial Office Memorandum 2007/01.

⁴ See, for example, Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 58, *Child Support (Adoption of Laws) Amendment Bill 2009*; pp1-2.

- 4.2 The Minister also referred the Committee to the Commonwealth Attorney General's Department website which contains a full set of background papers on Personal Property Securities.⁵

5 BACKGROUND TO THE PPS BILL

- 5.1 In March 2008 the Council of Australian Governments (COAG) agreed to a broad reform agenda, which included personal property securities reform.⁶ An Intergovernmental Agreement (IGA) for the national personal property securities reforms was signed at the COAG meeting in October 2008.

The legislative scheme

- 5.2 The Commonwealth *Personal Property Securities Act 2009 (Cth PPS Act)*, which was passed in November 2009, establishes the Personal Property Securities Register (**Register**) and sets out a system which will apply to the creation, priority and enforcement of security interest in personal property when the Register commences operation.

Commonwealth Constitution

- 5.3 The PPS Bill relies on section 51(xxxvii) of the Constitution, which enables State Parliaments to refer matters to the Commonwealth Parliament or adopt Commonwealth laws that have been enacted pursuant to such referrals.
- 5.4 The reference to support the enactment of the initial Commonwealth legislation was provided by New South Wales with the enactment of the legislation in that jurisdiction in June 2009. With the exception of Western Australia and Tasmania, all other States enacted referral legislation prior to the enactment of the Cth PPS Act.
- 5.5 According to the Second Reading Speech for the PPS Bill:

As Western Australia and Tasmania did not refer power before the Commonwealth Act was passed, some doubt was raised as to whether a referral was still possible. It was subsequently agreed by Western Australia, Tasmania and the Commonwealth that instead of referring power, a legally cautious approach would be to adopt the text of the Commonwealth Act.⁷

⁵ Letter from Hon Simon O'Brien MLC, Minister for Commerce, 25 February 2011, p1.

⁶ "Personal property" is defined in clause 3 of the PPS Bill as any form of property (including a licence) other than land or an excluded State statutory right. The definition includes tangible goods such as cars, machinery, crops and artwork, and intangible property such as statutory licences and intellectual property rights.

⁷ Hon Simon O'Brien MLC, Minister for Commerce, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 16 February 2011, p381.

6 WESTERN AUSTRALIA NOT A PARTICIPANT

6.1 The Committee noted that Western Australia did not enact referring legislation in 2009 when the other States, with the exception of Tasmania, did enact referral legislation.

6.2 Committee staff sought an explanation from the Department of Commerce as to why Western Australia:

- did not enact referring legislation in 2009; and
- is now attempting to do so.

6.3 The Department of Commerce advised that the PPS Bill was not introduced until this year as a result of a policy decision to introduce both the PPS Bill and the Consequential Bill at the same time, to allow Parliament to deal with them cognately. The Department advised that:

The Consequential Bill contains important carve outs from the Commonwealth legislation, and it is important that Parliament has the opportunity to consider the scope of the referral in the context of these exclusions (for example, the Consequential Bill excludes a number of Western Australian statutory licences from the scope of the Commonwealth Personal Property Securities scheme and provides for the preservation of certain statutory priorities which would otherwise have fallen within the new regime).⁸

6.4 The Department advised that if the PPS Bill had been introduced in 2009, Parliament would have been asked to refer power to the Commonwealth Parliament to enact the Cth PPS Act without a clear understanding of how this would impact upon Western Australian legislation. The Department stated that:

Introducing the two Bills as a package allows an understanding of the breadth of the referral and provides confidence that the effect of the Commonwealth Personal Property Securities legislation upon Western Australian legislation has been considered in detail, with amendments to State legislation made where necessary.⁹

⁸ Email from Felicity Smith, Senior Policy Officer, Consumer Protection, Department of Commerce, Western Australia, 28 February 2011.

⁹ Ibid.

7 OBJECTIVES OF THE PPS BILL

7.1 The objects of the PPS Bill are to:

- adopt the Cth PPS Act, as amended by the *Personal Property Securities (Consequential Amendments) Act 2009* (Cth) and the *Personal Property Securities (Corporations and Other Amendments) Act 2010* (Cth); and
- refer to the Commonwealth Parliament the power to amend the adopted Act, in which case the amended Cth PPS Act would apply in Western Australia.

Effect of PPS Bill

7.2 The PPS Bill gives the Commonwealth Parliament full coverage of the legislative field in relation to personal property securities to the exclusion of the State, except for land, fixtures on land and water rights.

7.3 The Commonwealth will have the power to amend the State Act and to make regulations that apply in Western Australia. The Western Australian Parliament will have no role in this process.

8 PARLIAMENTARY SOVEREIGNTY

8.1 Uniform Schemes and resulting legislation by their very nature have the capacity to erode or undermine the sovereignty of the Western Australian State Parliament. As elected representatives of the people of Western Australia to the State Parliament we have an obligation to protect the sovereignty of the Western Australian State Parliament. Legislation that impinges on the State's sovereignty should be passed by the Parliament only when, on balance, it is in the best interests of Western Australians to do so.

8.2 The Committee draws to the Parliament's attention the following aspects of the PPS Bill that impinge on the State's sovereignty for the consideration of members. The PPS Bill:

- provides a 'point in time' adoption of the Cth PPS Act, however the Cth PPS Act is not annexed to the PPS Bill. The State Parliament is not able, therefore, to scrutinise the Cth PPS Act or consider the implications of its adoption in Western Australia;
- provides the Commonwealth Parliament with the power to amend the adopted Cth PPS Act with no mechanism for the State Parliament to scrutinise amendments to the Cth PPS Act or to consider the implications of those amendments in Western Australia;

- at clauses 8(2) and 8(3) refers to the Commonwealth Parliament the power to make express amendments to the Cth PPS Act in respect of fixtures and water rights. Pursuant to clause 2(d) these subclauses come into operation on a day fixed by proclamation. Although the Minister stated in his second reading speech that there is “...currently no intention to proclaim these sections of the bill”¹⁰, the Committee is concerned that if this intention changes, the referral would be by way of proclamation and the matter would therefore not come before the State Parliament for scrutiny; and
- contains Henry VIII clauses. These are discussed below.

9 HENRY VIII CLAUSES

9.1 Henry VIII clauses are clauses of an Act of Parliament which enables the Act to be amended by subordinate or delegated legislation. They are objectionable as they:

- offend the theory of the separation of powers; and
- give insufficient regard to the institution of Parliament as the supreme Legislature by eroding the sovereign function of Parliament to legislate. This means that the capacity of the Parliament to scrutinise Henry VIII clauses is limited.

9.2 In the case of Henry VIII clauses, basic separation of powers breaks down as between the Executive and the Legislature. The object of subsidiary legislation is to complement and carry out the objects and purposes of an Act; to fill in the detail. Henry VIII clauses go beyond this by enabling Acts to be amended by subsidiary legislation.

9.3 The use of Henry VIII clauses is not desirable and should be restricted to only those situations when they are absolutely necessary and not merely to guard against possible inadequate drafting or omissions.

9.4 The Committee identified the following clauses as Henry VIII clauses:

- clause 7(1)
- clause 9(1)
- clause 17(3)(a) and (b)
- clause 20(2)

¹⁰ Hon Simon O’Brien MLC, Minister for Commerce, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 16 February 2011, p381.

9.5 The Committee's published position on Henry VIII clauses, as set out in Recommendation 2 of its Report Number 55, is that when introducing a bill to the Legislative Council that proposes a Henry VIII clause, the responsible Minister provide in the Explanatory Memorandum the rationale for that provision.¹¹

9.6 This Recommendation was subsequently accepted by the Government. During consideration of the Committee's report, Hon Norman Moore MLC stated:

*But, as a general rule, we should not have them, and I agree entirely with the view that if there is going to be one, a justification needs to be provided to the committee and to the Parliament.*¹²

9.7 The Committee draws this to the Parliament's attention and suggests that the Parliament may wish to inquire into the justification for the Henry VIII clauses when considering the PPS Bill.

10 CONCLUSION

10.1 The Committee regrets that it has been unable to undertake a full and proper inquiry into the PPS Bill and Consequential Bill due to the late provision of supporting documents to the Committee, the volume of bills referred to it, the finite resources available to the Committee, and the time constraints under which the Committee is required to operate.

10.2 In order for the Committee to meet its obligations to the Parliament and the people of Western Australia, the Committee respectfully asks:

1. The Legislative Council to immediately consider the reporting time for 230A Bills, with the view to increasing the reporting time from 30 days to 60 days, and not wait on the Procedure and Privileges Committee of the Legislative Council to table its Standing Orders Review.
2. The Premier to issue a Premier's Circular regarding uniform legislation emphasising the need to provide the Committee with supporting documents on the date of tabling a uniform bill in the Parliament.

¹¹ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 55, *Trade Measurement (Amendment and Expiry) Bill 2010*, 11 November 2010, Recommendation 2, p12.

¹² Hon Norman Moore MLC, Leader of the House, Legislative Council, *Parliamentary Debates (Hansard)*, 23 November 2010, p9249.

Recommendation 1: The Committee recommends that the Legislative Council immediately consider the reporting time for 230A Bills, with the view to increasing the reporting time from 30 days to 60 days, and not wait on the Procedure and Privileges Committee of the Legislative Council to table its Standing Orders Review.

Recommendation 2: The Committee recommends that the Premier issue a Premier's Circular regarding uniform legislation emphasising the need to provide the Committee with supporting documents on the date of tabling a uniform bill in the Parliament.

10.3 The Committee returns the PPS Bill and the Consequential Bill to the Legislative Council for its consideration.



Hon Adele Farina MLC
Chairman

Date: 22 March 2011

APPENDIX 1
IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

APPENDIX 1

IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

The former Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements identified and classified nine legislative structures relevant to the issue of uniformity in legislation which were endorsed by the 1996 Position Paper. A brief description of each is provided below.

Structure 1: *Complementary Commonwealth-State or Co-operative Legislation.* The Commonwealth passes legislation, and each State or Territory passes legislation which interlocks with it and which is restricted in its operation to matters not falling within the Commonwealth's constitutional powers.

Structure 2: *Complementary or Mirror Legislation.* For matters which involve dual, overlapping, or uncertain division of constitutional powers, essentially identical legislation is passed in each jurisdiction.

Structure 3: *Template, Co-operative, Applied or Adopted Complementary Legislation.* Here a jurisdiction enacts the main piece of legislation, with the other jurisdictions passing Acts which do not replicate, but merely adopt that Act and subsequent amendments as their own.

Structure 4: *Referral of Power.* The Commonwealth enacts national legislation following a referral of relevant State power to it under section 51 (xxxvii) of the Australian Constitution.

Structure 5: *Alternative Consistent Legislation.* Host legislation in one jurisdiction is utilised by other jurisdictions which pass legislation stating that certain matters will be lawful in their own jurisdictions if they would be lawful in the host jurisdiction. The non-host jurisdictions cleanse their own statute books of provisions inconsistent with the pertinent host legislation.

Structure 6: *Mutual Recognition.* Recognises the rules and regulation of other jurisdictions. Mutual recognition of regulations enables goods or services to be traded across jurisdictions. For example, if goods or services to be traded comply with the legislation in their jurisdiction of origin they need not comply with inconsistent requirements otherwise operable in a second jurisdiction, into which they are imported or sold.

Structure 7: *Unilateralism.* Each jurisdiction goes its own way. In effect, this is the antithesis of uniformity.

Structure 8: *Non-Binding National Standards Model.* Each jurisdiction passes its own legislation but a national authority is appointed to make decisions under that legislation. Such decisions are, however, variable by the respective State or Territory Ministers.

Structure 9: *Adoptive Recognition.* A jurisdiction may choose to recognise the decision making process of another jurisdiction as meeting the requirements of its own legislation regardless of whether this recognition is mutual.