Submissions by AICM to the Federal Attorney General’s review as to the operation of the Personal Property Securities Act 2009 (PPSA)

Submission by AICM (with the assistance of Thomson Geer Lawyers) as to the Consultation Paper #1 - Reach of the Act

3 November 2014
Name: Peter Mills
Organisation: Australian Institute of Credit Management (AICM) with the assistance of Thomson Geer Lawyers

Background/Expertise/Interest in PPSA Review:

AICM and the writer (as a member and Vice President (Qld) of AICM) previously participated in:

• the pre PPSA commencement discussions concerning the draft bill and regulations and the AG’s consultations papers for same.
• education of AICM and other industry group members as to PPS.
• making first and second round written submissions to the interim report (ie both as to the small business issues and then subsequently)

The writer personally:

• is Special Counsel in the Brisbane office of Thomson Geer Lawyers, whose clients are spread throughout Australia (as well as overseas) and involved in multiple industries;
• is also a current member of the Banking & Finance Committee of the Qld Law Society.
• regularly advises small, medium and mid market businesses (including subsidiaries of large national and multi national companies), as well as small and boutique law and accounting firms and industry groups, representing their clients and members in relation to PPS compliance and disputes.
• regularly presents seminars to professional credit managers small, medium and mid market businesses (including subsidiaries of large national and multi national companies) and industry groups them in relation to PPS compliance and disputes.
• regularly advises insolvency practitioners as to the PPS and other insolvency related issues.
• regularly communicates with colleagues in other PPS jurisdictions as to their own developments and publishes regular newsletter on PPS issues with practical case scenarios for use by businesses;
• regularly presents seminars to small and medium sized legal and accounting firms on PPS as to their CPD programs, both through the Qld Law Society as well as private education providers such as Legalwise and The Education Network
• has committed much of the last 7 years since early 2007 to the PPSA discussion and implementation and has been recognised as such for his expertise (eg by AICM awards and the QLS CPD programme)
• drafted the previous AICM submissions to the interim report.

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### 2.1.2 The ostensible ownership concern

In my view, the concept of perfection and the existence of the Register are integral components of the Act, and the publicity function that they are designed to serve, by providing outsiders with an opportunity to determine whether an item of personal property might be subject to an encumbrance, is a central function of the regime established by the Act and should be preserved. I would however be interested to hear whether others share this view.

Comments:
Strongly agree.

As previously stated in AICM submissions, the concept of perfection (by its various means) and the Register (as to public notice of the most common security interests) serves an important service as to transparency and enterprises being able to effectively provide and use capital (other than land) to secure obligations in businesses which do not acquire real property as their principal asset.

### 2.2 Should the Act be repealed?

**Proposed recommendation 1.1:** That the Act not be repealed, but rather that it be amended, to enable it to better achieve its potential.

Do you agree with the proposed recommendation? Yes/No

Comments:
Agree most strongly.

### 3.2 Does a security interest need to be a proprietary interest?

**Proposed recommendation 1.2:** That the definition of "interest" in s 10 of the Act be deleted.

Do you agree with the proposed recommendation? Yes/No

Comments:

As stated in our earlier submissions, “... the definition should be repealed or amended to make it clear an “interest” must be a proprietary interest not merely a contractual right relating to personal property.”

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### 3.3.1 Interpretation of s 12(2)

The correct approach to the interpretation of s 12(2) is that the list of transactions does not expand the meaning of the term "security interest", but only provides examples of transactions that can give rise to a security interest if they otherwise fall within the definition of the term.

Comments:
Agree.

### 3.3.2 Conditional sale agreements – s 12(2)(d)

**Proposed recommendation 1.3:** That s 12(2)(d) be amended to read:

   (d) an agreement to sell subject to retention of title;

Do you agree with the proposed recommendation? Yes/No

Comments:

Not strongly opposed to the recommended amendment however do not think it goes anywhere, and if anything reduces the readers understanding of “security interest”.

The current example provided by section 12(2)(d) states:

“(d) a conditional sale agreement (including an agreement to sell subject to retention of title);

The terminology “conditional” and “sale” and “agreement to sell” comes to us from the Sale of Goods Act (see sections 4(2) and (3) and the rules as to passing of title in section 21).

Removal of the terms “conditional sale agreement” from section 12(2)(d) would likely reduce the readers understanding of the intention of the section for no apparent benefit except reduction of the wording of the section NB see difference in section 4 Sale of Goods between “sale” and “agreement to sell”, and that the PPSA contains no definition of either term or “retention of title”. Eg would a lease (where not a PPS lease) to use goods with an option to purchase be an “agreement to sell subject to retention of title” and therefore an in substance security interest under section 12(2)(d)?
### 3.3.3 Trust receipts – s 12(2)(g)

**Proposed recommendation 1.4:** That s 12(2)(g) be deleted.

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<th>Do you agree with the proposed recommendation?</th>
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<tr>
<td>Comments: The example given of financiers of sellers is common also in trade credit (under terms and conditions of trade), whereby goods are often provided by secured parties/wholesalers to sellers not only under ROT, but also under a trust and for the seller to acquit for proceeds of such sales.</td>
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<td>If section 12(2)(g) PPSA were deleted, it is submitted that such arrangements would still be considered an “in substance” security interest and so its deletion would not affect the outcome or application of the PPSA. It is considered better to leave the term within the section, and perhaps to provide a definition in section 10 PPSA to clarify its purpose and application as set out in the Consultation Paper 1 at 3.3.3.</td>
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### 3.3.4 Interests that might also be deemed security interests – ss 12(2)(h) and (i)

**Proposed recommendation 1.5:** If a transfer of an account or chattel paper continues to be a transaction that is deemed by s 12(3) to give rise to a security interest whether or not the transaction in substance secures payment or performance of an obligation, that a new paragraph be inserted in s 12(2), in substitution for current s 12(2)(g) (as to which, see Proposed recommendation 1.4 above):

\[
\text{(g)} \quad \text{a transfer of the benefit of a monetary obligation (whether or not an [account] or [chattel paper]);}
\]

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<th>Do you agree with the proposed recommendation?</th>
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<tr>
<td>Comments: Agree with comments made in the Consultation Paper #1 at 3.3.4.</td>
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3.3.5 Assignments, and transfers of title – ss 12(2)(j) and (k)

**Proposed recommendation 1.6:** None at this stage, pending further consideration.

Comments: Agree, but for differing reasons. The issue of the transfer of title as an in substance security interest was discussed in *Carey v. Smith* [2013] NZHC 2291. It is thought that better view is that if “in substance” the transfer of title or assignment is a security interest, the PPSA should apply. Removal of its inclusion from section 12 (2)(j) and (k) would lend confusion. See as follows in Carey’s Case at par 72:

[72] There is a real issue as to whether the sale and buy-back agreement was a sale transaction at all, rather than a financing instrument. As noted by Professor Gedye in “A Hoary Chestnut Resurrected: The Meaning Of ‘Ordinary Course of Business’ In Secured Transactions Law” [2013] MelbULawRw 1; (2013) 37 MULR 1 at 8:

It is only if a ‘buyer’ is truly a buyer, and not a disguised secured creditor, that the buyer protection rules apply, including the rule protecting buyers in the ordinary course of business.

In view of what Professor Gedye states, it may seem that by focusing on whether the sale and buy-back agreement was a sale in the ordinary course of business first, rather than to determine if Brumac and the Careys were truly buyers, is to put the cart before the horse. However, that is how the argument was developed by them, perhaps because they realised that if the transaction were seen to function as a finance security, rather than a true sale, the fact it was not registered would mean that the GSA would take priority over it. To argue that they were buyers of peat in the ordinary course of NZ Peat’s business is the only way that they can avoid the detrimental impact that the GSA would otherwise have on their case. Accordingly, the functional character of the sale and buy-back agreement will be dealt with later.

3.3.6 Flawed asset arrangements – s 12(2)(l)

**Proposed recommendation 1.7:** That s 12(2)(l) be deleted.

Do you agree with the proposed recommendation? Yes/No

Comments: Agree, that the comments as to the imprecision and uncertainty as to the term “flawed asset arrangements” justifying its removal.

4.1 Deemed security interests – Policy rationale

The primary factor in deciding whether a particular interest should be considered for inclusion in s 12(3) are whether it engages the ostensible ownership concern and, if it does, whether it would produce significant disruption if the interest were not captured.

Comments: Agree strongly.
### 4.2.1.1 Should the Act deem a transfer of an account (however defined) to be a security interest if it does not secure payment or performance of an obligation?

**Proposed recommendation 1.8:** That s 12(3)(a), which provides that a transfer of an account can be a security interest whether or not it in substance secures payment or performance of an obligation, be retained.

Do you agree with the proposed recommendation? | Yes/No
--- | ---
Comments: Agree strongly. 
See comments also as to 3.3.5.

### 4.2.1.2 The meaning of "account"

**Proposed recommendation 1.9:** None at this stage, pending further consideration.

Comments: Agree, however we submit that the definition should not be reduced to only those where “the transferee is regularly engaged in the business of purchasing accounts”, as that would limit the persons to whom the benefits and transparency of registration would apply eg sale of such accounts in a one off occasion would not fall under and would reduce transparency eg see recent developments in the trade invoices market such as “The Invoice Market” whereby sellers interact with casual buyers of invoices. This growing market for capital able to be raised would be hampered if transparency was removed.

### 4.2.1.3 The meaning of "transfer" – outright legal transfers

**Proposed recommendation 1.10:** That s 12(3)(a) not apply to a transfer of an account that is an outright legal transfer.

Do you agree with the proposed recommendation? | Yes/No
--- | ---
Comments: the assignment of accounts often is conditioned with the right of the assignee to require the assignor to take back and assignment and repay funds advanced. The transparency, especially as to PMSI holders (who would otherwise seek to have superior rights over “proceeds” which would normally include such “accounts” under current and proposed changes to application of “accounts”). this would possibly reduce the collateral available in priority to PMSI holders which is adverse to normal trade creditors, and generally all AICM members interests.
### 4.2.1.3 The meaning of "transfer" – novations

**Proposed recommendation 1.11:** That the Act not be amended to clarify that a novation is not a "transfer" for the purposes of the Act.

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<th>Do you agree with the proposed recommendation?</th>
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**Comments:** Agree generally for the reasons stated in the Consultation Paper #1. It is noted however that the take free provisions would normally not apply if not done in the ordinary course of the grantor’s business. NB as a novation is traditionally done as to chattel paper (in addition to simply debt obligations assignment) on a sale of a business or to introduce a buyer of an enterprise and not in the ordinary course of a business.

### 4.2.1.3 The meaning of "transfer" – declarations of trust

**Proposed recommendation 1.12:** That the Act not be amended to clarify that a declaration of trust is not a "transfer" for the purposes of the Act.

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<th>Do you agree with the proposed recommendation?</th>
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**Comments:**
It would appear that the position of the broad “in substance” test would still apply as set out above concerning such accounts, and so lack of perfection may arise still in most cases (if to secure an obligation).

### 4.2.2 Transfer of chattel paper

**Proposed recommendation 1.13:** That the definition of “chattel paper” in section 10, and all references in the Act to chattel paper (including s 71), be deleted.

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**Comments:** This is not a “strong” representation by the AICM, as traditionally its members do not acquire contracts as collateral. Having said that, and potentially where same might arise in tripartite arrangements, the concern is as to ensuring the ability to assign the accounts receivable under a contract as collateral, but not the contract itself, and the ability of the grantor to use each as a category of collateral as opposed to having to bundle both together or not be able to use the contract as separate collateral.

This clarity of the chattel paper being instinct from the accounts receivable (perhaps by clarify its definition) should be maintained even if the term “chattel paper” is removed. It is noted that the register would also need to be clarified as to such collateral class.
## 4.3 Commercial consignments

**Proposed recommendation 1.14**: None at this stage, pending further consideration.

**Comments**: Agreed with comments at 4.3 as to same.

## 4.4.2 Personal Property Securities Amendment (Deregulatory Measures) Bill 2014

The Personal Property Securities Amendment (Deregulatory Measures) Bill 2014 is currently before Parliament. If passed, it will remove paragraph (1)(e) from the definition of PPS lease in s 13, and make consequential amendments to other provisions in the Act. As Government has already responded to the issue of s 13(1)(e), I am proceeding on the basis that I will not need to address it in my report. However, I would note my support the proposed deletion of paragraph (e) from the definition of PPS lease, and subject to the Bill’s passage through Parliament, the prompt commencement of the amendments.

**Comments**: Agreed. Removal of the need to register short fixed term lease, bailments and hires of serial numbered goods is consistent with other overseas Acts.

## 4.4.3 Should the Act apply to leases at all, if they do not operate in substance as security?

**Proposed recommendation 1.15**: That the Act continue to apply to some types of longer–term leases, whether or not they operate in substance as security for payment or performance of an obligation.

**Do you agree with the proposed recommendation?**

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**Comments**: Agree strongly as to transparency as to apparent ownership, and as to indefinite lease, hire and bailments of goods by common means of registration.
### 4.4.4 Should the Act apply to bailments?

**Proposed recommendation 1.16:** That the definition of PPS lease in s 13 be amended to remove all references to "bailments".

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<th>Do you agree with the proposed recommendation?</th>
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<td>Comments:</td>
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<tr>
<td>As stated in our previous submissions, AICM strongly oppose the removal of the references to “bailment” in PPS leases, given that:</td>
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<td>• other legislation refers to a PPS Lease being a “lease or bailment” (eg see Saskatchewan PPS Laws definition of “lease”),</td>
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<td>• the lack of definitions and preference for uniformity on this key issue (and unlikely effect of thereby excluding “hire” if “bailment” were removed and vice versa), and</td>
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<td>• to remove the term “bailment” (given that neither it, “hire” or “Lease” are currently defined under the PPSA) may lead to confusion as to whether or not an arrangement is a security interest, especially if they are in substance security interests (see eg the issue discussed at par 72 in Carey v. Smith [2013] NZHC 2291).</td>
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### 4.4.5 Should the Act apply to leases with an indefinite term of less than one year?

**Proposed recommendation 1.17:** That section 13(1)(b) of the Act be deleted.

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<td>As stated in our previous submissions, despite likely support to the recommendation by the hire industry, AICM strongly oppose the removal of section 13(1)(b). The reason for this are that:</td>
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<td>• the risks which arise are due to apparent documentation drafting and practice by the hire industry, which can be overcome by compliance;</td>
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<td>• other legislation refers to a PPS Lease “… including a lease for an indefinite term that is determinable by 1 or both of the parties not later than 1 year…” (eg see section 16 definition of “lease for more than a year” in New Zealand PPS Act and section 2 Saskatchewan PPS Act.</td>
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### 4.4.6 Should the “one year” test be changed?

**Proposed recommendation 1.18:** That references in s 13 of the Act to “one year” not be changed.

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<td>The reference in section 13 of the Act to “one year” not be changed (noting we agree as to the removal of the 90 day test by removing section 13(1)(e) PPSA).</td>
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### 4.4.7 Leases that can be terminated early by agreement

**Proposed recommendation 1.19:** None at this stage, pending further consideration.

Comments:
We agree with the initial comments by the Consultation paper (4.4.7) that the early termination power should be able to exclude leases which would otherwise fall under the definition of PPS Lease.

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### 4.4.8 The “regularly engaged in the business of leasing” requirement

**Proposed recommendation 1.20:** That s 13(2)(a) not be amended to insert "of that kind" after the phrase "regularly engaged in leasing goods".

Do you agree with the proposed recommendation? Yes/No

Comments:
Agree and adopt the reasons made at 4.4.8 of the Consultation Paper #1.

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### 5.2 The meaning of "property"

The Act does not separately define "property", but leaves its meaning to the general law. This, in my view, is appropriate – the concept of property will continue to evolve over time, and it is desirable that the Act be able to move in tandem with that evolution, rather than set a pre-determined meaning in stone.

Comments:
Agree

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### 5.3 Licences

**Proposed recommendation 1.21:** That the definition of "licence" in s 10 be amended to make it clear that it applies whether or not the relevant right, entitlement, authority or licence is transferable.

Do you agree with the proposed recommendation? Yes/No

Comments:
Strongly agree for the reasons stated at 5.3 of the Consultation Paper #1, especially that it would enable greater collateral to be available for secured parties (whether or not assignable).
### 5.4 Land

**Proposed recommendation 1.22:** *That the definition of "land" in s 10 be deleted.*

Do you agree with the proposed recommendation? | Yes/No
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**Comments:**
Given the possibility that a leasehold interest could otherwise be considered to not be “realty” and therefore not land, this might lead to confusion. Also, given the carve outs in section 8 (f) in relation to “land” this recommendation is not agreed with.

### 5.5 Trees

**Proposed recommendation 1.23:** *That the definition of "crops" in s 10 not be amended to clarify when trees can be within the definition.*

Do you agree with the proposed recommendation? | Yes/No
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**Comments:** The common law meaning of “crops” still would apply it appears, being as to such plants propagated and intended for harvesting.

### 5.6 Statutory licences

**Proposed recommendation 1.24:** *That State, Territory and the Commonwealth Governments consider reversing legislation that removes statutory rights from the operation of the Act, and that consideration also be given to deleting the provisions in the Act that allow such licences to be removed from its ambit.*

Do you agree with the proposed recommendation? | Yes/No
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**Comments:**
Agree strongly. The state by state variations to various licenses (eg taxi licenses in WA excluded) and mining licenses removal is not of assistance as to the use of such property as collateral eg what as to fixtures upon such permits as discussed in TEC Desert? It would appear that they might or might be excluded by virtue of the statutory exclusion by the states.

### 6.2 General structure of s 8

**Proposed recommendation 1.25:** *That s 8(1) be split into two provisions: one listing interests that are not "security interests" for the purposes of the Act, and the other listing interests that are not "personal property" for the purposes of the Act.*

Do you agree with the proposed recommendation? | Yes/No
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**Comments:**
Agree that it would help with the reading of the PPSA.
### 6.3 Close-out netting contracts – s 8(1)(e)

**Proposed recommendation 1.26:** *None at this stage, pending further consideration.*

**Comments:**
- Agree.

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### 6.4 Interests in or in connection with land – s 8(1)(f)(ii)

**Proposed recommendation 1.27:** *None at this stage, pending further consideration.*

**Comments:**
- Agree.

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### 6.5 Unperformed contracts – s 8(1)(f)(ii)

**Proposed recommendation 1.28:** *That the language "(including a successive transfer)" be deleted from s 8 (1)(f)(ii).*

Do you agree with the proposed recommendation? [Yes/No]

**Comments:**
- Agree for the reasons stated at the Consultation Paper #1 at 6.5.
- Agree (that the language "(including a successive transfer)" be deleted from s 8 (1)(f)(iii)) for the reasons stated at the Consultation Paper #1 at 6.5.

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### 6.6 Transfers of remuneration – s 8(1)(f)(iv)

**Proposed recommendation 1.29:** *That s 8(1)(f)(iv) be deleted.*

Do you agree with the proposed recommendation? [Yes/No]

**Comments:**
- Agree that uncertainty arises (especially as to individuals who are sole traders) as to the ability to obtain and grant a security interest over their accounts.
- Given the protections of the consumer credit legislation already afforded, the removal of this provision is recommended by AICM.

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### 6.7 Transfers of annuity or insurance policies – s 8 (1)(f)(v)

**Proposed recommendation 1.30:** *None at this stage, pending further consideration.*

**Comments:**
- Agree with recommendations. No further comment at this stage as to transfer of an interest or claim in or under a contract of insurance (which is a likely...
### 6.7 Transfers of annuity or insurance policies – s 8(1)(f)(v)

To be limited to only interests in insurance as to trade credit risk insurance. It is noted that proceeds includes the proceeds from insurance so that no additional registration is required as to same as specifically included as collateral/ personal property to which the PPSA applies.

### 6.8.1 Sections 8(1)(f)(vi) to (viii)

**Proposed recommendation 1.31:** *That ss 8(1)(f)(vii) and (viii) be deleted.*

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<td>Agreed for the reasons stated in the Consultation Paper #1 at 6.8.1.</td>
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### 6.8.2 Section 8(4)

**Proposed recommendation 1.32:** *That s 8(4) be deleted.*

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<td>The terms “to avoid doubt” sufficiently clarify the purposes of section 8(1)(f) PPSA and section 8(4) should not be removed, or if removed should be placed as a note to section 8(1)(f) PPSA.</td>
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### 6.9 Water rights – s 8(1)(i)

**Proposed recommendation 1.33:** *That ss 8(1)(j) and (5) be deleted.*

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<td>It is highly desirable that such water rights are brought under the PPSA so as to enable greater ability to raise capital against same, despite possible double registration (whereby such interest have state registers - see also definition of licenses and comments above as to state exclusion of same at Consultation Paper #1 at 5.6 comments above). See comments above.</td>
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### 6.10.1 The meaning of "fixture"

**Proposed Recommendation 1.34:** That the definition of "fixture" in s 10 be deleted.

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<th>Do you agree with the proposed recommendation?</th>
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**Comments:**
Strongly disagree. The definition of ‘fixtures’ should be clarified so that it is clear any degree of affixation will not by itself make something a fixture. Having said this, the tenure of the land, license or interest held by the grantor or another in the land should not determine whether it is capable at law of being part of the land or a fixture eg TEC Desert Pty Ltd v Commissioner of State Revenue [2010] HCA 49 (15 December 2010) at http://www.austlii.edu.au/au/cases/cth/HCA/2010/49.html

The degree and purpose of attachment tests under the common law meaning of what is, or is not, a “fixture” should be applied, but still denote that the nature of the tenure, license or interest in the land will not determine whether it is a “fixture” or part of the “land”.

### 6.10.2 Should fixtures be excluded from the Act?

**Proposed recommendation 1.35:** That Government engage with the States and Territories to explore whether a regime can be developed, potentially along the lines of the principles applied in the Canadian PPSAs, to enable fixtures to be brought within the Act.

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**Comments:**
This discussion should be continued, and consideration also given to the mechanic liens type registration system which is at play in many of the USA states so as to better protect subcontractors and suppliers who provide the working capital which becomes the fixtures to the land.

It is noted that the Qld government (as well as possibly other states) are currently reviewing the BCIPA (security of payment) and Subcontractors Charges Act as to assisting the subcontractor to obtain prompt adjudication and security for payment on land.

### 6.11 Pawnbrokers – s 8(1)(ja) and (6)

**Proposed recommendation 1.36:** None at this stage, pending further consideration.

**Comments:**
Agree.
### 6.12 Interests in superannuation – s 8(1)(jb)

**Proposed recommendation 1.37:** That s 8(1)(k) be deleted.

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<td>Do you agree with the proposed recommendation?</td>
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<td>Comments: That this is a matter of policy for government as to whether to protect the superannuation assets for retirement. This is beyond the scope of the AICM’s current policies for comment.</td>
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### 7.2 Cash deposits

**Proposed recommendation 1.38:** That the Act not be amended to clarify whether the making of a deposit under an agreement for the sale of property will give rise to a security interest.

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<td>Comments: Agreed.</td>
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</table>

### 7.3 Supplies of fit-out or other goods as part of a real property lease

**Proposed recommendation 1.39:** That the Act not be amended to exclude or otherwise modify the rules for a lease of fit-out or other goods as part of a lease of real property, beyond what is already provided in s 12(2)(c).

<table>
<thead>
<tr>
<th>Questions</th>
<th>Yes/No</th>
</tr>
</thead>
<tbody>
<tr>
<td>Do you agree with the proposed recommendation?</td>
<td></td>
</tr>
<tr>
<td>Comments: See comments above however as to definition of “fixtures” and “land” as to clarity.</td>
<td></td>
</tr>
</tbody>
</table>

### 7.4 Turnover trusts

**Proposed recommendation 1.40:** None at this stage, pending further consideration.

<table>
<thead>
<tr>
<th>Questions</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Comments: Agreed.</td>
<td></td>
</tr>
</tbody>
</table>
7.5 Minimum thresholds

**Proposed recommendation 1.41:** *None at this stage, pending further consideration.*

Comments:
Would strongly oppose any review as to value, as this would only likely make the costs of compliance greater in trying to determine each security interest on a case by case basis eg by turnover of secured party, value of collateral under each supply, or by number of supplies.

AICM would oppose the difficulties inherent in such tests, and given a threshold it is not applied elsewhere to our knowledge.