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Dear Mr Glenn

**Comments on Personal Property Securities – Cost Recovery Impact Statement - Consultation**

Thank you for the opportunity to make a submission to the Attorney General's Department on the Personal Property Securities – Cost Recovery Impact Statement. We enclose our submission with this letter.

The views in this submission are the views of Allen & Overy and are not the views of any client of Allen & Overy.

Yours sincerely

**Angela Flannery**  
Partner

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## COMMENTS ON PERSONAL PROPERTY SECURITIES – COST RECOVERY IMPACT STATEMENT

### 1. Ongoing monitoring and review of fees

1.1 Operational responsibility for personal property securities (PPS) will transfer from the Attorney-General's Department (AGD) to the Insolvency and Trustee Services Australia (ITSA) on commencement of the new PPS regime in May 2011. The Cost Recovery Impact Statement (CRIS) proposes that ITSA will monitor the cost recovery arrangements on a regular basis by comparing costs incurred (and the subsequent fees charges) with the estimated costs to be incurred.

1.2 ITSA does not seem to be the obvious choice for a PPS cost analysis and we suggest that this responsibility is transfer to another agency to ensure each review is undertaken impartially.

1 It is intended that ITSA will publish the information in its Annual Report and Portfolio Budget Statement. ITSA's Annual Report is typically released in September and contains financial and other data relating to the immediately preceding financial year. We support ongoing monitoring but recommend that the cost information be released earlier than the publication dates of ITSA's Annual Reports and Portfolio Budget Statements every two years. The Personal Property Securities Act 2009 (Cth) (the Act) provides for the review of the operation of the Act within 3 years after it commences operation. At least up to the review, the cost information should be released annually by 30 June.

### 2 Design of the proposed charging arrangements

2.1 One of the aims of PPS reform is to increase the availability and reduce the costs of finance through the establishment of a single national PPS regime and a single national electronic register for all personal property security interests. The amount of fees that parties have to pay in a transaction is an important determinant of the costs of finance.

2.2 While the Commonwealth Government's Bills Digest (15 October 2009, no. 36, 2009-10) on the PPS Bill 2009 stated that the use of the PPS register will incur "nominal charges" which will be used to cover the operating costs of the register, some of the proposed fees are clearly not nominal, which is discussed further below.

2.3 Also we believe certain data may have been excluded when developing the proposed charging arrangements, meaning the fees set do not accurately reflect demand, or possibly, operational costs. For example:

(a) In forecasting demand levels, it is unclear whether allowance had been made for the many interests which under the current law do not require registration on any statutory register. Some examples of these non-traditional security interests are certain finance leases, factoring arrangements, conditional sale agreements, consignments, hire-purchase agreements and title retention arrangements. Data on these interests would not have been made generally available to the AGD by the States and Territories or by ASIC. The registration of these interests will impact on the volume of PPS register activities and consequently the financial forecast relating to the operation of the PPS register. We recommend that the forecast demand levels be reviewed and the proposed charging arrangements in paragraph 6 of CRIS be adjusted as appropriate.

(b) Under the transitional arrangements, in the case of existing security interests which are not currently on a register, the secured party will need to arrange registration itself. The AGD in its general information document on the PPS register (released in June 2010) stated that a fee

will not apply when registering a transitional security interest on the PPS register. Again, it is unclear whether in forecasting demand levels of PPS register activities and the cost of the PPS register, any allowance had been made for this.

### **3. Proposed level of fees**

3.1 While the basis for determining fees is the whole of life cost of the PPS register, paragraph 3.2 of the CRIS also provides that by the imposition of appropriately structured fees, it signals to users to consider when and how they use the PPS register and in turn curb excess demand which will, for example, increase maintenance and data storage costs in the longer term. There is no statistical support given for the proposition that higher fees will in fact curb excess demand and therefore fee levels designed for this purpose are questionable.

3.2 In determining the level of fees to be charged for a particular PPS register activity, consideration should be given to the requirements of different kinds of financing. Currently, ASIC imposes a \$139 fee to lodge a charge. Late lodging fees of \$67 (1 month) and \$278 (more than 1 month) apply if lodgement takes place past the prescribed period. Under the new PPS regime, the proposed fee for the online registration of a financing statement for an indefinite period is \$130 (and \$144.80 if the service is provided by the contact centre). However, ASIC fees are high and other registrations cost significantly less.

3.3 In addition to being inconsistent with existing fees, consideration should be given to the following:

(a) Subject to limited exceptions, the new PPS regime effectively forces the lodgement of financing statements to preserve the priority of a personal property security interest. This means non-traditional security interests, which we referred to above, will be captured. Under the current law, these non-traditional security interests may not require any registration and so incur no registration costs.

(b) The proposed fee for registering a financing statement increases with the length of the registration. Security interests to be registered by a financing statement of an undefined duration are likely to be associated with larger corporate financings. While a higher fee may be justifiable for the protection of, for example, major secured lenders, it is difficult to comprehend the need for a 3.5 to 17.5 fold increase in fees when the \$130 online fee is compared to those financing statements of a shorter duration.

If the principle behind charging the much higher fee is to curb excess demand (as we referred to above), it does not take into account that, for some secured parties, due to the nature of the transaction it is a necessity to register their financing statement for an undefined duration. And while certain secured parties may have the resources to absorb a higher fee, the imposition of a high fee is contrary to the Commonwealth Government's intention to operate the PPS register on a cost recovery basis.

For comparison purposes, to register a financing statement on the New Zealand PPS register, it currently costs NZ\$3, to increase to NZ\$3.07 on 1 October 2010. Even though there is a limitation on the maximum duration of 5 years for a registration in New Zealand, the fact that in Australia parties can opt for an undefined duration does not justify the significantly higher fees.

**23 September 2010**