

Security Interests in Goods Bill 2005

Explanatory note

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

Overview of Bill

The *Bills of Sale Act 1898* currently requires the registration of certain bills of sale within a specified time after their execution. Bills of sale generally fall into 2 broad categories. Firstly, they include documents that assign a legal or equitable interest in personal goods as a security for a debt. The assignment may be either conditional or absolute, provided that the grantor retains possession of the goods. Secondly, they include documents that confer powers or authorities to take possession of personal goods as a security for a debt.

The *Bills of Sale Act 1898* distinguishes between bills of sale given by traders (**trader's bills of sale**) and other bills of sale (**ordinary bills of sale**). Unregistered trader's bills of sale are absolutely void and confer no security on grantees over the goods to which they relate. However, unregistered ordinary bills of sale are valid as between grantor and grantee, but void against certain judgment creditors and other third parties.

The mischief to which the *Bills of Sale Act 1898* was principally directed was to prevent third parties from being misled into believing that the goods to which the bill related were unencumbered because the grantor retained possession of them.

The *Liens on Crops and Wool and Stock Mortgages Act 1898* currently provides for the following matters:

- (a) a landholder may grant a preferable lien over crops to be grown on the land to a person who advances money or goods to the landholder as a security for the advance,
- (b) an owner of sheep may grant a preferable lien over the wool of the sheep to a person who advances money or goods to the owner as a security for the advance,
- (c) an owner of sheep, cattle or horses may grant a stock mortgage over such stock.

The *Liens on Crops and Wool and Stock Mortgages Act 1898* sought to overcome doubts at common law about the efficacy of securities granted over goods that were still in the course of production, namely, crops before harvest and wool before it is shorn. It also sought to clarify the rights of the holders of stock mortgages.

The objects of this Bill are:

- (a) to repeal the *Bills of Sale Act 1898* and the regulations made under that Act and to enact instead provisions that modify the existing law as follows:
 - (i) the outdated distinction between trader's bills of sale and ordinary bills of sale is dispensed with and the concept of a security interest in goods is used instead,
 - (ii) the registration of certain instruments relating to the creation of security interests in goods (including interests created by bills of sale) will be optional rather than mandatory,
 - (iii) the period of registration will not be limited to the current period of 5 years,
 - (iv) the registration of a security interest in goods will generally confer priority over unregistered interests and subsequently registered interests over the same goods, but a failure to register an otherwise valid interest will not affect its validity, and
- (b) to repeal the *Liens on Crops and Wool and Stock Mortgages Act 1898* and the regulations made under that Act and to enact instead provisions that modify the existing law as follows:

- (i) the registration of certain kinds of instruments will create mortgages over existing and future crops and wool instead of liens over such goods,
- (ii) the kinds of animals over which a stock mortgage may be granted under the proposed Act is extended beyond sheep, cattle and horses,
- (iii) the owners of fish that are cultivated or kept for the purposes of aquaculture will be permitted to grant a mortgage under the proposed Act over such fish, and
- (c) to make consequential amendments to certain Acts and Regulations, and
- (d) to enact provisions of a savings and transitional nature.

Outline of provisions

Part 1 Preliminary

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

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 defines certain terms and expressions used in the proposed Act. In particular, the following terms are defined:

An **agriculture goods mortgage** is defined to mean any of the following:

- (a) a crop mortgage granted under proposed section 7,
- (b) a stock mortgage (including a wool mortgage) granted under proposed section 12,
- (c) an aquaculture fish mortgage granted under proposed section 15.

The term **goods** is defined to mean any chattels personal, fixtures or other things capable of complete transfer by delivery (whether immediately or at any future time), but is defined not to include any of the following:

- (a) title deeds, negotiable instruments, choses in action or chattel interests in real estate,
- (b) shares or interests in the stock, funds or securities of any of the following:
 - (i) a Government (whether of this State or otherwise),
 - (ii) the Crown or a body representing the Crown (whether in right of this State or otherwise),
- (c) shares or interests in the capital or property of a body corporate (wherever constituted),
- (d) access licences in respect of water granted under the *Water Management Act 2000*,
- (e) any other thing prescribed by the regulations for the purposes of the definition.

The term **security instrument** is defined to mean any instrument (including an instrument granting an agricultural goods mortgage) by or under which a security interest is reserved or created, or otherwise arises, in respect of goods (whether existing or future).

The term **security interest**, in relation to goods (whether existing or future), is defined to mean an interest or power:

- (a) reserved in or over an interest in the goods, or
- (b) created or otherwise arising in or over an interest in the goods under a bill of sale, mortgage, charge, trust or power, by way of security for the payment of a debt or other pecuniary obligation or the performance of any other obligation, but is defined not to include an interest or a power reserved or created, or otherwise arising, by or under any of the following:
 - (c) a letting of goods with an option to purchase the goods,
 - (d) an agreement for the purchase of goods by instalments (whether described as rent or hire or otherwise) not being an agreement by which the property in the goods being purchased passes at the time of the agreement or on, or at any time before, delivery of the goods,
 - (e) any other contract for the hiring of goods,

(f) any other agreement, arrangement, instrument or circumstance of a kind prescribed by the regulations.

Clause 4 specifies the circumstances in which an instrument will be treated as being duly executed for the purposes of the proposed Act.

Clause 5 explains the inter-relationship between the proposed Act and other Acts and laws. In particular, the proposed section makes it clear that the proposed Act will not:

(a) affect any rule or principle of the common law or equity in relation to security interests in goods except to the extent that the proposed Act provides otherwise (whether expressly or by necessary implication), or

(b) prevent any person from granting a mortgage or other security interest over agricultural goods under another law (for example, at common law) instead of in accordance with the provisions of Part 2 of the proposed Act, or

(c) apply to or affect any security interest in prescribed goods within the meaning of the *Registration of Interests in Goods Act 1986*, except to the extent provided by certain regulations made under that Act.

The proposed section also makes it clear that the proposed Act is not intended to limit or affect the operation of Chapter 2K or any other provisions of the *Corporations Act 2001* of the Commonwealth. Chapter 2K of that Act provides for the registration of charges over certain property of companies and the order of priority of such charges.

Clause 6 provides that the proposed Act binds the Crown in all of its capacities.

Part 2 Agricultural goods mortgages

Division 1 Crop mortgages

Clause 7 enables a person to grant a mortgage under the proposed section over crops (a **crop mortgage**) that grow or are grown on land by way of security for payment of a debt or other pecuniary obligation if the person:

(a) owns the land, or

(b) has exclusive possession of the land and a right to harvest crops that grow or are grown on the land, or

(c) holds a lease over the land granted under the *Western Lands Act 1901* (whether or not the lease confers exclusive possession of the land) and has a right to harvest crops that grow or are grown on the land, or

(d) is entitled under a sharefarming agreement with the owner or lessee of the land to crops (or a share of the crops) that grow or are grown on the land and has obtained the written consent of the owner or lessee to grant the mortgage.

A crop mortgage granted under the proposed section must be in the prescribed form (as specified in proposed section 17 (1)) and comply with certain other formal requirements. In particular, it must be registered within the period of 45 days after it is executed and only has effect when it is registered. The period during which a crop lien under the *Liens on Crops and Wool and Stock Mortgages Act 1898* must be registered is 30 days after its execution.

Under the *Liens on Crops and Wool and Stock Mortgages Act 1898*, a crop lien may only be granted over agricultural or horticultural crops that have already been sown. However, a crop mortgage may extend to existing or future crops on the land concerned and also to crops that will be produced on the land in the ordinary course of nature.

The maximum period for the duration of a crop mortgage is 5 years (including any renewals). The maximum period for a crop lien under the *Liens on Crops and Wool and Stock Mortgages Act 1898* is only one year.

Clause 8 confers the following rights on a mortgagee under a crop mortgage if the mortgagor fails or refuses to pay the debt or other pecuniary obligation secured by the mortgage:

(a) the right to take possession of any crops to which the mortgage applies,

(b) the right to cut, gather, harvest, sell or otherwise deal with the crops,

(c) the right to enter the land on which the crops are growing, or grew, for the purpose of exercising any such power,

(d) the right to require the mortgagor to pay to the mortgagee the proceeds of any sale of the crops if the mortgagor has already harvested and sold the crops.

The rights conferred by the proposed section are subject to any contrary provision made by the parties in the crop mortgage. They are also subject to the requirements imposed by or under other legislation that circumscribe dealings with the kinds of crops to which the mortgage applies.

Clause 9 requires a mortgagee under a crop mortgage in respect of land that is mortgaged to another person (the **land mortgagee**) to pay the land mortgagee a certain amount of interest due under the land mortgage before exercising a power of sale over the crops.

The proposed section is based on section 7 of the *Liens on Crops and Wool and Stock Mortgages Act 1898*, which imposes a similar obligation on a lienee under a crop lien.

Clause 10 requires a mortgagee under a crop mortgage in respect of land over which the mortgagor has a lease to pay the lessor a certain amount of rent due under the lease before exercising a power of sale over the crops.

The proposed section is based on section 6 of the *Liens on Crops and Wool and Stock Mortgages Act 1898*, which imposes a similar obligation on a lienee under a crop lien.

Clause 11 provides that a right or other entitlement of a sharefarmer under a sharefarming agreement over crops that are the subject of a crop mortgage has priority over the security interest of the mortgagee under the crop mortgage unless the sharefarmer is a party to the mortgage.

A **sharefarming agreement** is defined in proposed section 3 (1) to mean an agreement between the owner or lessee of land and another person under which the other person undertakes:

(a) to cultivate or otherwise utilise the land, and

(b) to share with the owner or lessee in agreed proportions any crops or other produce, or profits derived from crops or other produce, grown on or derived from the land.

Division 2 Stock mortgages and wool mortgages

Clause 12 enables a person to grant a mortgage under the proposed section (a **stock mortgage**) by way of security for payment of a debt or other pecuniary obligation over either or both of the following:

(a) stock owned by the person,

(b) wool produced by stock owned by the person.

A stock mortgage granted under the proposed section must be in the prescribed form (as specified in proposed section 17 (2)) and comply with certain other formal requirements. In particular, it must be registered within the period of 45 days after it is executed and only has effect when it is registered.

A stock mortgage granted under the proposed section differs from wool liens and stock mortgages granted under the *Liens on Crops and Wool and Stock Mortgages Act 1898* in the following respects:

(a) Both wool from stock and the stock can be the subject of a single stock mortgage under the proposed section. Under the *Liens on Crops and Wool and Stock Mortgages Act 1898*, it would be necessary to execute both a wool lien and stock mortgage.

(b) A wool lien granted under the *Liens on Crops and Wool and Stock Mortgages Act 1898* may only be granted over the wool of sheep. However, under the proposed Act, **wool** is defined in proposed section 3 (1) to mean the natural fibre from the fleece of sheep, goats, alpacas, llamas or any other kind of stock that produces fleece that can be shorn. Accordingly, a stock mortgage over

wool under the proposed section extends beyond the wool of sheep.

(c) A stock mortgage under the proposed section can be granted over any stock. The term **stock** is defined widely in proposed section 3 (1) to include any sheep, goats, cattle, horses, swine, poultry, alpacas, llamas, ostriches or other animals (except fish). However, stock mortgages may be granted under the *Liens on Crops and Wool and Stock Mortgages Act 1898* only in respect of sheep, cattle or horses.

Clause 13 provides that a stock mortgage that relates only to wool may be referred to as a **wool mortgage** for the purposes of the proposed Act.

Clause 14 confers the following rights on a mortgagee under a stock mortgage if the mortgagor fails or refuses to pay the debt or other pecuniary obligation secured by the mortgage:

(a) if the mortgage applies to or includes the wool of stock—the right to do any or all of the following:

- (i) take possession of the wool wherever it is located,
- (ii) shear the wool from the stock,
- (iii) sell or otherwise deal with the wool,
- (iv) enter the land on which the stock is located for the purpose of exercising any such power,

(b) if the mortgage applies to or includes stock—the right to do any or all of the following:

- (i) take possession of the stock wherever it is located,
- (ii) slaughter, sell or otherwise deal with the stock,
- (iii) enter the land on which the stock is located for the purpose of exercising any such power.

The proposed section also confers the right to recover certain expenses consequent on taking possession of the stock because of a refusal or failure to shear or deliver wool under the mortgage.

The rights conferred by the proposed section are subject to any contrary provision made by the parties in the stock mortgage. They are also subject to the requirements imposed by or under other legislation that circumscribe dealings with the kinds of stock or wool to which the mortgage applies.

Division 3 Aquaculture fish mortgages

Clause 15 enables a person to grant a mortgage under the proposed section (an **aquaculture fish mortgage**) over any fish owned by the person that are cultivated or kept for the purposes of aquaculture by way of security for payment of a debt or other pecuniary obligation. The terms **aquaculture** and **fish** are defined in proposed section 3 (1) to have the same meanings as they have in the *Fisheries Management Act 1994*. In this regard, it should be noted that section 144 of the *Fisheries Management Act 1994* prohibits a person from undertaking aquaculture except under the authority of an aquaculture permit issued under that Act even if the person owns the fish concerned.

An aquaculture fish mortgage granted under the proposed section must be in the prescribed form (as specified in proposed section 17 (3)) and comply with certain other formal requirements. In particular, it must be registered within the period of 45 days after it is executed and only has effect when it is registered.

Clause 16 confers the following rights on a mortgagee under an aquaculture fish mortgage if the mortgagor fails or refuses to pay the debt or other pecuniary obligation secured by the mortgage:

- (a) the right to take the fish to which the mortgage applies wherever it is located,
- (b) the right to sell or otherwise deal with the fish,
- (c) the right to enter the land or water source on or in which the fish is located for the purpose of exercising any such power.

The rights conferred by the proposed section are subject to any contrary provision

made by the parties in the aquaculture fish mortgage. They are also subject to the requirements imposed by or under other legislation that circumscribe dealings with the kinds of fish to which the mortgage applies. In this regard, the provisions of the *Fisheries Management Act 1994* (particularly those in Part 6 of that Act dealing with aquaculture management) are of particular relevance.

Division 4 Prescribed forms for agricultural goods mortgages

Clause 17 sets out the circumstances in which an agricultural goods mortgage is in the prescribed form for the purposes of the proposed Act. Basically, a mortgage will be in the prescribed form if the instrument that creates the mortgage:

- (a) is in or to the effect of the relevant Form for the kind of mortgage concerned set out in Schedule 1 (Form for crop mortgage), 2 (Form for stock mortgage or wool mortgage) or 3 (Form for aquaculture fish mortgage), or
- (b) is not in or to the effect of the relevant Form, but nevertheless specifies or describes certain matters (including that it is granted under the proposed Act) set out in the proposed section.

Clause 18 enables the Governor to make regulations that replace or amend Schedule 1, 2 or 3 (or any combination of them).

Division 5 Dealings concerning agricultural goods mortgages

Clause 19 provides that an agricultural goods mortgage is not extinguished or otherwise prejudicially affected by any of the following:

- (a) the death, bankruptcy or insolvency of the mortgagor,
- (b) the sale of, or the creation of a mortgage or other encumbrance over, the goods or land or water sources to which the mortgage relates.

However, the proposed section makes it clear that it has effect subject to any contrary provisions of a law of the Commonwealth. In this regard, the *Bankruptcy Act 1966* and the *Corporations Act 2001* of the Commonwealth are of particular relevance in situations of bankruptcy and company insolvency.

Clause 20 enables the parties to an agricultural goods mortgage to vary the provisions of the mortgage on the registration of certain duly executed instruments.

Clause 21 enables the parties to an agricultural goods mortgage to provide for the renewal of the mortgage for a further period on the registration of a duly executed instrument of renewal.

Clause 22 enables the parties to an agricultural goods mortgage to assign the security interest created by the mortgage on the registration of certain duly executed instruments.

Clause 23 enables the parties to an agricultural goods mortgage to discharge the mortgage on the registration of certain duly executed instruments.

Part 3 Registration of security interests in goods

Division 1 General

Clause 24 specifies the matters that a security instrument must set out for it to be a **registrable security instrument** for the purposes of the proposed Act.

Clause 25 provides that an instrument is **registered** for the purposes of the proposed Act if it is recorded in the General Register of Deeds kept under the *Conveyancing Act 1919*.

Division 2 Registration of registrable security instruments

Clause 26 enables the Registrar-General to register a security instrument if satisfied that it is a registrable security instrument.

Division 3 Dealings with registered security interests

Clause 27 enables the Registrar-General to register certain instruments that vary the terms of registered security instruments.

Clause 28 enables the Registrar-General to register certain instruments that assign security interests in goods created by registered security instruments.

Clause 29 enables the Registrar-General to register certain instruments that effect or evidence the devolution of security interests in goods created by registered security instruments. The proposed section defines a **devolution** of such an interest to mean the passing of the interest from a deceased grantor or holder of the interest to a living heir of the grantor or holder.

Clause 30 enables the Registrar-General to register certain instruments that effect a partial or full discharge of security interests in goods created by registered security instruments.

Division 4 Effect of registration on priority of security interests

Clause 31 sets out rules governing the determination of priority between registered security interests and registered and unregistered security interests unless the holders of the interests concerned have agreed otherwise.

A registered security interest will generally rank in priority over an unregistered security interest over the same goods. However, an unregistered security interest will rank in priority over a registered security interest if the holder of the unregistered interest takes possession of the goods before the registered interest is registered.

An earlier registered security interest ranks in priority over a later registered security interest over the same goods.

Part 4 Miscellaneous

Clause 32 makes it an offence for a mortgagor under an agricultural goods mortgage (or an employee, contractor or agent of the mortgagor) to do certain acts or things that defeat, destroy or prejudice the security interest created by the mortgage unless the mortgagor or person has a reasonable excuse for doing it.

The maximum penalty for the offence will be 100 penalty units (currently, \$11,000) or imprisonment for 2 years, or both.

Clause 33 provides that if a corporation contravenes any provision of the proposed Act or the regulations, each director or other person concerned in the management of the corporation is also taken to have contravened the provision if the director or person knowingly authorised or permitted the contravention.

Clause 34 provides that an offence under the proposed Act may be dealt with summarily before a Local Court.

Clause 35 enables the Governor to make regulations for the purposes of the proposed Act.

Clause 36 repeals the following Acts and Regulations:

(a) the *Bills of Sale Act 1898*,

(b) the *Liens on Crops and Wool and Stock Mortgages Act 1898*,

(c) any regulation made under an Act referred to in paragraph (a) or (b).

Clause 37 gives effect to Schedule 4 containing savings, transitional and other provisions.

Clause 38 gives effect to consequential amendments made to certain Acts and Regulations set out in Schedule 5.

Clause 39 provides for a review of the operation of the proposed Act to be undertaken after 5 years from the date of assent to the proposed Act.

Schedule 1 Form for crop mortgage

Schedule 1 contains a Form for a crop mortgage granted under Part 2 of the proposed Act.

Schedule 2 Form for stock mortgage or wool mortgage

Schedule 2 contains a Form for a stock mortgage or a wool mortgage (or both) granted under Part 2 of the proposed Act.

Schedule 3 Form for aquaculture fish mortgage

Schedule 3 contains a Form for an aquaculture fish mortgage granted under Part 2 of the proposed Act.

Schedule 4 Savings, transitional and other provisions

Schedule 4 contains provisions enabling the Governor to make regulations of a savings or transitional nature. It also provides that the *Bills of Sale Act 1898*, the *Liens on Crops and Wool and Stock Mortgages Act 1898* and the regulations made under those Acts continue to apply to bills of sales, liens and mortgages executed (or purportedly executed) before the repeal of those Acts and regulations.

Schedule 5 Amendment of other Acts and Regulations

Schedule 5 makes amendments to certain Acts and Regulations that are consequential on the enactment of the proposed Act.

In particular, Schedule 5.5 amends the *Registration of Interests in Goods Act 1986*:

(a) to make it clear that it does not apply to or affect security interests in agricultural goods, and

(b) to enable savings and transitional regulations to be made if goods to which the proposed Act applies become prescribed goods under the *Registration of Interests in Goods Act 1986*.