

Mr Peter Hallahan
Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600



Dear Mr Hallahan,

Personal Property Securities Bill 2008 [Exposure Draft]

I have pleasure in enclosing a submission from the Intellectual Property Committee of the Business Law Section of the Law Council of Australia ('the Committee') on the Exposure Draft of the Personal Property Securities Bill 2008.

The submission has been approved by the Business Law Section. Owing to time constraints, the submission has not been reviewed by the Directors of the Law Council of Australia Limited.

On behalf of the Committee, I apologise for the delay in the lodgement of the submission. Members of the committee were unable to prepare the submission by the preferred date of the Senate Committee. If you have any questions in relation to the submission, in the first instance please contact the Committee Chair, Ian Pascarl, on [03] 9254 2567.

Yours sincerely,

A handwritten signature in blue ink that reads "Bill Grant".

Bill Grant
Secretary-General

22 January 2009

Enc.

Submission of the Intellectual Property Committee of the Business Law
Section of the Law Council of Australia in respect of Personal Property
Securities Review: Consultation Draft

The Intellectual Property Committee of the Business Law Section of the Law Council of Australia ('the Committee') is grateful for the opportunity to make a submission in respect of the issues raised by the Exposure Draft legislation

General Agreement with legislation and objectives

The Committee is in general agreement with the legislation and its objectives. It applauds the attempt at harmonisation of law on the subject. It has some concerns about some specific aspects of the proposed legislation.

Timing of Registration under s194

Relevant provisions

Section 194 of the Exposure Draft provides that personal property may be registered as collateral either before or after a security agreement is made. This provision confers a right on any lender at any time to register a security interest over any personal property of any person without the knowledge, consent or approval of that person.

Comments

The Committee has considerable concern about the granting of such a broad and largely unrestrained statutory right. The right is one that could be used to greatly limit the capacity of any property owner to deal with its property. The Committee's international inquiries reveal that recommended international practice and American legislation provide that registration of a security interest should only occur with the written approval of the borrower. Such agreement usually is inferred by the entering into of a written security agreement. In this regard the Committee refers specifically to the UNCITRAL Legislative Guide on Secured Transactions Recommendation 71 which reads that "The law should provide that registration of a notice is ineffective unless authorized by the grantor in writing. ... A written security agreement is sufficient to constitute authorization for the registration".

The Uniform Commercial Code of the United States of America also requires written permission from a borrower to the registration of a security interest. Normally, this permission is granted by entering into the relevant security

agreement. One of the relevant provisions from the Uniform Commercial Code is set out below. Relevant words have been highlighted in bold and italics.

§ 9-402. Formal Requisites of Financing Statement; Amendments;
Mortgage as Financing Statement.

(1) A financing statement is sufficient if it gives the names of the debtor and the secured party, ***is signed by the debtor***, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral. A financing statement may be filed before a security agreement is made or a security interest otherwise attaches. When the financing statement covers crops growing or to be grown, the statement must also contain a description of the real estate concerned. When the financing statement covers timber to be cut or covers minerals or the like (including oil and gas) or accounts subject to subsection (5) of Section 9-103, or when the financing statement is filed as a fixture filing (Section 9-313) and the collateral is goods which are or are to become fixtures, the statement must also comply with subsection (5). ***A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by the debtor.*** A carbon, photographic or other reproduction of a security agreement or a financing statement is sufficient as a financing statement if the security agreement so provides or if the original has been filed in this state.

The Committee's advice in relation to this matter has been provided by Professor Neil Cohen, Brooklyn Law School, an international expert on personal securities legislation.

Under the proposed legislation, any property owner, including an intellectual property owner, who wished to negotiate with a number of potential lenders would be faced with the possibility that any one of those lenders might register a security interest during negotiations. Upon doing so, that lender would acquire a significant bargaining advantage as other lenders would necessarily be very wary of entering into lending arrangements with a property owner where the Register already indicated that security had been given over the property in question.

The Committee is of the view that the limitations on the exercise of the right to register a security interest at any time are insufficient. The procedures set out in later provisions do allow for the de-registration of a security interest but a minimum of 10 working days would pass before that process is effective. Even then, the process is dependent on the co-operation of the lender and there are no monetary or other consequences of any significance imposed on anyone who wrongly registers a security interest. Alternative lenders are highly unlikely to become involved in borrowing to a property owner embroiled in a dispute with another lender about the registration of a security interest.

Defects in Registration

Relevant Provisions

Section 198(2) provides that defects in the description of collateral will not operate to render a security interest ineffective before the earliest of several stated periods.

Comments

The effect of this provision is that the collateral may be described in a seriously misleading manner and yet the security interest will still be effective. A person who searched the Register would not be able to ascertain that a security interest was held over the property in question, yet the security interest would continue to be valid. This seems to defeat the point of registration.

Summary of Issues

1. Section 194 provides an unreasonably broad and unrestrained right to register a security interest prior to the formation of a security agreement or the borrower's consent to registration. It is inconsistent with recommended international standards and legislation in the United States of America.
2. Section 198(2) provides protection to a security holder despite a seriously misleading error in the description of the collateral.

22 January 2009