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19 December 2008

Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Department of The Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Sir/Madam

PERSONAL PROPERTY SECURITIES BILL 2008 - EXPOSURE DRAFT

The Queensland Law Society takes this opportunity to express our support for the proposed Personal Property Securities Bill 2008 and the establishment of a national electronic personal property securities register.

The current legal regime for personal property securities across Australia, including numerous statutes and a multiplicity of registers in nine different jurisdictions, is a significant impediment to the conduct of efficient and cost effective commercial transactions. By creating a single comprehensive national law supported by a single national electronic register, the reforms should result in worthwhile efficiency gains and cost benefits.

In addition to rationalising the number of laws and registers, the reforms will also introduce major substantive changes to Australian commercial law. In our view these changes will make the law more consistent, accessible and transparent for secured creditors, debtors, purchasers of property subject to security interests and product suppliers. Enhanced transparency should also assist credit assessment and lending practices as well as insolvency proceedings.

One area in which the Bill is deficient is the omission of conflict of laws rules. The inclusion of a set of rules that state when the Personal Property Securities Act will govern the validity, perfection, priority and extinguishment of a security interest where the personal property concerned (or an element of it) or the grantor has some connection with a jurisdiction outside Australia would be advantageous. The earlier consultation draft of the Bill (published in May 2008) included provisions dealing with these issues but there was a widespread view that those provisions were unclear and possibly more complex than would be necessary to resolve the most common conflict of laws scenarios. The conflict of laws model suggested in Appendix A to the Commentary on the Bill appears to be a significant improvement on the earlier proposals.

In addition to these general observations we have identified some specific issues which may require some further amendment to the Bill. These issues are set out in the submission document attached to this letter.

We also consider that the Bill may have some unintended effects upon intellectual property rights that need attention. These matters are also addressed in the submission document attached to this letter.

Yours sincerely



Megan Mahon
President



Submission

**The Proposed Commonwealth
*Personal Property Securities Bill 2008***

*A Submission of the
Queensland Law Society
Banking and Finance Law Committee &
Intellectual Property and IT Law Committee*

19 December 2008

SPECIFIC ISSUES IN RELATION TO THE PERSONAL PROPERTY SECURITIES BILL 2008 – EXPOSURE DRAFT

	SECTION IN THE PPS BILL	ISSUE
1.	Part 1.3, Divisions 4 and 5	<p>There are two different concepts of 'control' used in the Bill. The first (as used in Part 1.3, Division 4) relates to control of controllable property where control is a means of perfecting a security interest. This concept of control has relevance throughout the Bill. The second concept of control (as used in Part 1.3, Division 5) is used to determine whether property subject to a security interest is to be considered a 'circulating asset', therefore characterising the relevant security interest as a 'floating charge' in respect of that property for the purposes of Commonwealth laws other than the PPSA. This concept is primarily relevant to the interpretation of other laws following the introduction of the PPSA.</p> <p>While having two different concepts of 'control' seems to be causing some confusion, we believe 'control' is the appropriate term to be used in both contexts mentioned above and suggest any confusion may be overcome by the inclusion of a note at the start of each of Divisions 4 and 5 in Part 1.3 of the Bill highlighting that there are two different concepts and briefly stating the purpose of each of them.</p>
2.	63(3)(b)(iii)	<p>This sub-section provides that a security agreement may contain "a statement that a security interest is taken in all of the grantor's present and after-acquired property except for personal property (other than the particular personal property) described in the writing".</p> <p>We understand the intention is to allow a description of a security interest that extends to all of the grantor's present and after-acquired property except for certain specified property. The current wording of sub-section 63(3)(b)(iii) could be more clearly expressed to achieve this outcome including by removing the double negative in parenthesis.</p>
3.	90(c)	<p>The words "unless the transferee's interest is a security interest" at the beginning of sub-section 90(c) are unnecessary as the Division of which section 90 forms a part does not apply if the transferee's interest is itself a security interest (see section 84(1)).</p>
4.	125(7)	<p>The first line of section 125(7) commences "if collateral that is intangible property or chattel paper is transferred...". In our view the reference to 'intangible property' should be a reference to 'accounts'.</p> <p>Section 125(7) refers, in a few places, to the 'account debtor'. An 'account debtor' means a person obligated on an account or chattel paper. Section 125(7) deals with accounts and chattel paper not intangible property (a much broader category of personal property).</p>
5.	235	<p>This section requires all rights, duties and obligations arising under a security agreement or the Act to be exercised or discharged honestly and in a</p>

		<p>commercially reasonable manner.</p> <p>We believe existing statutory provisions (eg. in the Trade Practices Act) and equitable principles (eg. unconscionability) provide adequate protection against improper business practices and it is not necessary or desirable to enact additional and differently worded safeguards.</p>
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INTELLECTUAL PROPERTY ISSUES IN RELATION TO THE PERSONAL PROPERTY SECURITIES BILL 2008 – EXPOSURE DRAFT

1. The Commonwealth, with the co-operation of the States, seeks to introduce a central repository of recorded information reflecting particular security interests in personal property in Australia.
2. Given the plethora of State enactments dealing with the issue, the goal has obvious advantages. The subject of this outline of submission relates to the perceived impact of relevant aspects of the *Personal Property Securities Bill 2008* (the Bill)¹ on intellectual property rights.

OVERVIEW

3. Although there appears to be some variation to the form of the main deeming provision section 38 in the Bill from the May 2008 version (s 30), the substance of the objectionable aspects remains. In essence the perceived difficulties are:
 - (a) The automatic inclusion of the intellectual property rights as part of the description of the tangible property in the security agreement;²
 - (b) The limitation of documents or notifications which may displace the prima facie position. In this regard, the only matters which may be considered to distil a contrary intention to automatic inclusion will be the security document itself, the registration or the description of tangible property in a notice under the Act.³

ISSUES

4. As a matter of practice unless the IP rights are specifically excluded it will be unlikely that a contrary intention will be gleaned from the limited list in the Act. Although this presents no problem for express exclusions in the security instrument, it is most likely that the issue will be overlooked, leaving the operation of the Act to incorporate IP rights in the security.
5. Of course, this presents difficulties in tiered models where the contracting party with the financier is the trading entity and the IP ownership is in a separate repository not a party to the security agreement.
6. The present position reflected in the Bill of course provides a level of comfort to the banking sector who is relieved of the responsibility of identifying the IP rights associated with the tangible property and possibly valuing them.
7. Of a lesser concern, is the situation where a person acquires tangible property (or an accession) free of a security interest and because of the operation of an extinguishment provision the IP rights are transferred as well.⁴ In that situation, the person also acquires any intellectual property, or intellectual property licence, relating to the tangible property. 'Extinguishment provisions' are in general provisions where by force a person acquires collateral free of a security interest.⁵

¹ Exposure Draft 10/11/2008.

² The Bill s38(2)(a).

³ The Bill s 38(3).

⁴ The Bill s 99; the definition of extinguishment provision is contained in s 26.'ext

⁵ The term 'extinguishment provision' is defined in s 26 of the Bill.

RECOMMENDATION

8. There is something inequitable with a situation where the secured party and the IP owner might agree verbally that there is no interest in the IP rights and then if those rights increase in value, the secured party may rely on the operation of law to avoid the agreement orally or even made in writing but not being recognised in the security agreement, registration or notice.
9. The recommendation is if there is inflexibility on the imposition of the prima facie position, that the depth of documents from which to more accurately identify the agreement between the parties be expanded.

CONFLICT OF LAWS

10. The Bill provides a Conflict of Laws model.⁶
11. The Rule provides that in relation to proceedings in Australian Courts considering the validity or enforcement of security interests in IP, the applicable law is the law of the jurisdiction in which the IP rights are granted.⁷
12. The Rule applies when the intellectual property is created under an Australian Act, the grantor is an Australian entity or Australian IP has foreign ownership.
13. Further consideration should be given to the impact of IP rights existing in Australia not by virtue of being granted in Australia, but by virtue of international convention. In the case of the Berne Convention for example, copyright may exist by virtue of the international convention, regardless of whether the rights exist in the country of origin.

⁶ Appendix A to the Commentary to the Bill Part 6 Rule 12.

⁷ Rule 12 A40.