



9 January 2009

Mr Peter Hallahan
Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Department of the Senate
Parliament House
Canberra ACT 2600

Email: legcon.sen@aph.gov.au

Dear Mr Hallahan

Personal Property Securities Bill 2008 [Exposure Draft]

I appreciate the opportunity to provide Baycorp's views to the Committee on its inquiry into the exposure draft of the Personal Property Securities Bill 2008.

Our comments are limited to the interests or rights of a transferee in a transfer of an account or chattel paper (s28(3)(a)). Our specific concern involves categorization of the transfer as a 'deemed security interest' in relation to purchased debt.

Baycorp

Baycorp provides a comprehensive range of debt recovery services and processes to the private and public sectors. Our services cover both contingent and purchased debt.

Our operations centres in Australia and New Zealand provide an extensive collection network which, together with our global affiliations, allows us to offer debt recovery services both locally and internationally.

In mid-2008 an industry survey estimated that approximately \$4 billion of purchased debt was under collection across several million accounts. We are a significant participant in that market.

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Debt purchasing

Our debt purchasing service allows our clients to sell outright their debt portfolios of customers who are in default in their repayment obligations. We only purchase debt portfolios which have been written off (bad debt) by the selling client. While most purchased debt is unsecured (typically telco, credit card debt and unsecured person loans), a small number of debts are secured over goods, usually a motor vehicle. Clients from who we acquire portfolios of bad debt include the major banks and telcos.

The sellers (transferors) benefit from the immediate payment of an agreed price for the debt portfolio. This assists in cash flow management, profitability and the freeing up of internal resources. The sellers have no further interest in the assigned debts.

As the new owner of a bad debt portfolio, Baycorp is interested only in locating and recovering outstanding monies from the debtors concerned. We do not provide ongoing credit services to the debtors involved.

Given the nature of the transaction, there is no reason for the transferee to be granted a “deemed security interest” in the assigned debts –

- as they were sold by the transferor because they no longer have commercial value as they have been written-off; and
- the future commercial value and risk sits solely with the transferee as purchaser.

Implications

The Bill regards the interests or rights of a transferee in a transfer of an account or chattel paper as a security interest (s28(3)(a)). It is a ‘deemed security interest’ regardless of whether the transaction concerned actually secures payment or performance of an obligation.

Where the purchased debt is unsecured (e.g. credit cards), the Bill regards it as an “account” (s35). Where the purchased debt is secured over goods, the Bill regards it as “chattel paper” (s36). The common element to both is a monetary obligation, with the difference being chattel paper includes a security interest taken over specific personal property to secure payment of the monetary obligation.

In the absence of a statutory exclusion, the purchase of a debt portfolio would be regarded as taking a security interest for the purposes of the Bill. Neither party involved in the assignment of purchased debt would view this as an appropriate outcome given the risks and commercial decisions involved and the fact the underlying debts are unsecured obligations.

We do not consider debt purchase was intended to be caught in this way, given the nature of the contractual arrangements between the parties involved.

As the Bill is currently drafted, a deemed security interest for assigned purchase debt would impose unnecessarily on the contractual arrangements involved and unfairly advantage the transferor or its creditors. It would add risks and costs to the parties involved for no discernable benefit to those parties or the debtors involved or to someone who the Bill regards as a ‘secured party’.

Exclusion

We believe the intention of the Bill is not to include debt purchases by way of assignment of this kind. However, we are not confident this has been achieved in a sufficiently unambiguous way.

Section 6(1) excludes a number of interests from the scope of the Bill, including ‘an assignment of an account made solely to facilitate the collection of the account’ – paragraph (f)(vi).

In our view, it would be difficult to determine whether an assignment of purchased debt is made solely for the purpose of facilitating collection. The purposes of the parties involved are different.

A seller of the account (transferor) assigns the account because it has been unsuccessful in collecting overdue amounts and wishes an immediate return on the value of the accounts involved. From the perspective of the transferor, it is arguable whether the assignment is made “solely to facilitate the collection of the account”.

On the other hand, the purchaser of the account (transferee), such as Baycorp, purchases the account with the intention of collecting the full amount owing under the account. Its purpose is to make a profit on the collection of the account, rather than solely facilitating the collection of the account.

Consequently, the use of the word “solely” compromises the purposes of the transfer. Greater clarity can be gained if purchased debt accounts are considered as “bad debts” rather than assignments “solely to facilitate the collection of an account”.

These considerations are equally applicable to the purchase of secured debt, or in the language of the Bill, the assignment of chattel paper.

Recommendation

We ask the Committee to consider an alternative and clearer approach based on the Australian Taxation Office’s taxation principles outlined rulings such as GSTR 2000/2 – Adjustments for Bad Debts and TR 92/18 Income Tax: Bad Debts. Those rulings provide objective criteria to determine whether a debt can be treated as a bad debt.

In essence, the Rulings accept that a debt is bad if a bona fide commercial decision is taken by a taxpayer as to the likelihood of non-recovery of a debt, whether unsecured or secured. In the context of this submission –

- the taxpayer is the transferee of the account or the chattel paper; and
- debt involved is the monetary obligation under an account or chattel paper.

Purchased “bad debt” can then be excluded on the same criteria, providing appropriate consistency between Commonwealth statutes. It avoids a subjective application of the word “solely” in relation to account transfer purposes.

In our view, the bad debt, whether unsecured or secured, constitutes the writing-off of the monetary obligation under an account or chattel paper.

We recommend the exclusion in s6(1)(f)(vi) of the Bill be revised to include the assignment of “bad debt” accounts and chattel paper acquired by the transferee to collect overdue amounts from account debtors.

We would be pleased to meet with the Committee to discuss our concern and recommendation. If you wish to arrange, please contact the writer on telephone 02 9806 2550 or email susan.james@baycorp.com.au, or Baycorp’s Chief Executive Officer on 02 9806 2402 or email geoff.harper@baycorp.com.au.

Yours sincerely,

A handwritten signature in dark ink, appearing to be 'Susan James', written in a cursive style.

Susan James
General Counsel & Company Secretary
Baycorp (Aust) Pty Ltd