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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 Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the exposure draft of the Personal Property Securities Bill 2008 (the **Bill**). We apologise for the delay in providing our views.

Introduction

The primary drivers for the Bill have always been business interests in seeing the establishment of a comprehensive and consolidated register for personal property security interests. These are legitimate drivers with clear benefits, including some limited benefits for consumers, particularly purchasers of second-hand motor vehicles. For this reason, we have generally supported the creation of a single personal property securities register (**PPS Register**).

However, any merits to these drivers and the potential benefits of a PPS Register do not negate the fact that the establishment of a PPS Register also brings significant potential unintended and undesirable consequences, particularly for ordinary members of the community. These consequences must be addressed before any PPS Register can be appropriately introduced.

Unfortunately, we consider that the regime proposed by the Bill does not address the substantial and serious concerns previously raised regarding the negative potential consequences of a PPS Register. The Bill seems to press blindly ahead with its desired reforms, while retaining serious flaws particularly surrounding wholly inadequate privacy protections.

Further, it is disappointing to note that even serious privacy problems identified by the Government itself in the first Discussion Paper (**DP 1**) regarding these reforms¹ seem to have

¹ Australian Attorney-General's Department, *Review of the law on Personal Property Securities – Discussion Paper 1: Registration and Search Issues*, November 2006, at 41-56.

been overlooked in the current Bill. It is as if the undesirable consequences of establishing the PPS Register have been deemed “too hard” to address, thus have simply been ignored.

As such, we cannot support the Bill in its current form and would oppose its introduction if it remained unamended.

Our detailed comments are set out below. The primary concern remains that the Bill will allow the PPS Register to be searchable by debtor/grantor name even where the grantor of the security interest is an individual. The creation of such a PPS Register has manifest and serious repercussions, and is at complete odds with recognised concerns and recommended directions in related privacy areas such as the recent review of Australian privacy law and practice by the Australian Law Reform Commission.² The other principal concern is the Bill’s failure to address legitimate concerns about inappropriate blackmail securities that target disadvantaged Australians. We also make some comments about other aspects of the Bill.

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action provides free legal advice and representation to vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice in Australia. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

Searching the register and required privacy measures

There is one basic limitation on the functionality of the PPS Register that, while undoubtedly reducing its scope, must nevertheless be implemented to protect against the manifest and serious risks to individual privacy that will otherwise result.

It is this: personal property being used as collateral by an individual, as opposed to a business, should only be registrable if it has a serial number and should only be searchable by reference to this serial number.

We explicitly recognise that the disadvantage of such a limitation is that it reduces the universality of the PPS scheme introduced by the Bill, because only personal property that is able to be registered by serial number will be able to be registered on the PPS Register where it is to be used as collateral by an individual (businesses could still register such personal property on the PPS Register).

However, this disadvantage simply does not come close to outweighing the problems raised by the alternative, which is (as the Bill currently provides) to allow the PPS Register to enable personal property owned by an individual to be registered by that individual’s name and, thus, for the PPS Register to be searchable by individual name.

² Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108, May 2008.

Section 226(1)(b) of the Bill would allow persons to search the PPS Register by grantor name. In the case of grantor individuals, this will reveal substantial personal information about that individual, including their full name and any assets they own that are subject to a security interest, as well as the grantor's details pursuant to item 2 in the table under section 191 of the Bill. Section 26 proposes that these details be as prescribed by regulations.

According to the discussion paper regarding regulations to be made under the Bill, released in August 2008, it is proposed that the regulations will prescribe that the details will consist of the name and date of birth of the grantor (or secured party), but no address.³ We note that this is an attempt to address privacy concerns by restricting the information available on the PPS Register to protect the privacy of individuals and support that intent.

However, we are not confident that a party's address will, in practice, be able to be withheld from the PPS Register. There is a need for enough data about parties to be registered to ensure the accuracy of information about individual grantors (and secured parties) and addresses are an important piece of information for this purpose. Further, the registration of address details is critical in enabling a party to contact other relevant parties regarding registrations, for example if there is a dispute or complaint about the accuracy of a registration. The accuracy issue has proved to be a problem in the past regarding similar information databases such as personal credit information files and the inclusion of information such as debtor addresses has helped to ensure improved accuracy.

We therefore suspect that the Government may decide that the final regulations should provide for grantor and secured party addresses to be recorded on the PPS Register. Even if this is not the case, it is likely that such a change would be made to the regulations in the future as data accuracy and integrity issues emerged as a concern. If the regulations make this change, to ensure grantor addresses are recorded in registrations, the privacy problems associated with relatively easy access to information about individuals' names, addresses and dates of birth will remain unaddressed.

All of this information about individuals registered on the PPS Register will be made available to anyone – literally any member of the public – who accesses the PPS Register by searching on an individual's name. There is no mechanism in the Bill to limit the accessibility of the PPS Register before the fact. Section 227 sets out the persons who may search the PPS Register and for what purpose, and allows for a very broad range of persons and purposes to search the PPS Register, including *any person* if they wish to establish whether or not personal property that they are intending to purchase or deal with is described in a registration, or to establish whether to invest in, with, or through a person named in the search application. These sorts of categories do not rely on any previous or identifiable connection or relationship between the person searching and the person being searched, thus they essentially make it easy for any person to purport to have an authorised purpose for searching the PPS Register.

³ Australian Attorney-General's Department, *Personal Property Securities Reform Discussion Paper: Regulations to be made under the Personal Property Securities Act*, August 2008, 14-17.

There is no provision in the Bill for the registrar to look behind a person's application under section 225 to search the PPS Register and consider whether the purposes set out in the application are, in fact, legitimate under section 227. Even if the registrar was granted such a power under the Bill, it is difficult to see how, in practice, a busy registrar's office would be able to perform such a function given the volume of search applications that are likely to be made, the lack of indicators to assist the registrar in determining which applications might require further consideration, and the resources and time that would be required to conduct independent inquiries into search applications and the purposes for which they are made.

This can be contrasted with similar repositories of personal information such as credit information files and even telephone number listings and the electoral role. Access to personal credit reports is restricted before the fact to certain businesses, while individuals can at least request a silent listing for telephone listings (although it remains problematic that individuals must pay to protect their privacy through a silent listing). The electoral role is discussed further below.

Further, despite the complete lack of preventative measures in relation to unauthorised searches of the PPS Register, and the manifest privacy implications of establishing a massive body of personal information open to the public at large, the only remedy provided by the Bill against an individual who does improperly search the PPS Register is a right given to affected persons to sue for damages under section 236 after the fact. There is no regulator responsible for ensuring that obligations under the Bill are complied with and neither a penalty nor a compensation regime established under the Bill. The inherent weaknesses in an enforcement and remedies regime that relies solely on private parties to seek private remedies for a legislative breach have been canvassed in numerous forums,⁴ yet these understandings appear to have been disregarded in the Bill's current form.

For agencies and organisations (as opposed to individuals) that conduct an unauthorised search of the PPS Register, section 228 states that their conduct will also constitute an interference with privacy under the *Privacy Act 1988* (Cth), for which a complaint may be made to the Privacy Commissioner. This is only a slight improvement on a mere right to sue granted to private parties under section 236, given the limited remedies available in relation to investigations under Part V of the *Privacy Act*. The highest form of sanction available to the Privacy Commissioner under these provisions is a non-binding determination under section 52 of the *Privacy Act*. The Privacy Commissioner or the individual complainant is forced to commence proceedings in the Federal Court or Federal Magistrates' Court for court orders if they want to enforce a determination, in which case the court must consider the entire complaint as to whether there was an interference with privacy *de novo*, further increasing the costs and time associated with the complaint. Further, no civil or criminal penalties lie under the *Privacy Act* for an interference with privacy, thus remedies are limited to declarations that the organisation or agency breached the law, orders for compensation after the fact, and orders to stop and/or not repeat unauthorised searches of the PPS Register. In addition, as in previous years there were no determinations made under section 52 of the *Privacy Act* in 2006-07, and

⁴ See, eg, Organisation for Economic Co-operation and Development, *OECD Recommendation on Consumer Dispute Resolution and Redress*, 12 July 2007; Productivity Commission, *Final Report – Review of Australia's Consumer Policy Framework*, April 2008, chapters 9-10.

over half of the complaints received by the Privacy Commissioner were not investigated, with a further 36% of complaints closed following only preliminary inquiries.⁵

It is worth setting out some of the obvious risks that arise from allowing searches of the PPS Register by individual debtor name:

- **Identity theft**

Identity theft becomes possible once several unique pieces of information about an individual are collected. For this reason, such information is not generally made publicly available together. The Bill would, however, make such a combination of information publicly available on the PPS Register. This would significantly increase the potential for identity fraud against Australians, particularly the availability of the date of birth information (and address information if this is included in final regulations) together with a person's name.

By doing so, the Bill would also run directly counter to other Government initiatives to combat identity theft, such as the ID Theft Kit⁶ and the work of the Australasian Consumer Fraud Taskforce.⁷ It is unclear to what extent the government agencies involved in these initiatives have been consulted regarding the Bill.

It seems unlikely that the possibility of being sued by a handful of individuals under section 236 of the Bill will provide sufficient deterrence for identity thieves from unauthorised searches of the PPS Register.

- **Violence against women and children**

This is one of the most serious threats posed by the Bill. Unfortunately, the current reality in our community is that some women and families may need to relocate and, essentially, hide from a former partner or family member after being affected by domestic or family violence, for safety reasons.⁸ However, under the regime established by the Bill if a person in this situation then granted a security interest to a credit provider, for example in a motor vehicle or other consumer item such as a computer or whitegoods, their new details would be easily accessible by their former partner or family member. These details would include any collateral they own. Under present proposals their address would not be available,⁹ but we remain sceptical that this position will be tenable if the PPS Register is to be fully functional.

⁵ Office of the Privacy Commissioner, *The Operation of the Privacy Act Annual Report: 1 July 2006 - 30 June 2007*, 2007, at 49-54.

⁶ Australian Government, *ID Theft: A kit to prevent and respond to identity theft*, National Crime Prevention Program – Towards A Safer Australia.

⁷ www.scamwatch.gov.au.

⁸ We are also aware that there have also been instances in which women have had to relocate and/or hide after being the victim of sexual violence not related to a domestic or family situation, for example a stalking scenario. The following comments therefore apply equally to women in that situation.

⁹ See above n3.

We understand that there are numerous examples of former partners and family members using various, sometimes obscure, means and sources of information to track down women and families leaving a domestic or family violence situation.¹⁰ It is likely that some people would discover that the PPS Register is a means of uncovering such information. Again, it seems unlikely that the possibility of being sued after the fact for an unauthorised search of the PPS Register by a victim of violence would provide sufficient (if any) deterrence to former partners and family members from conducting unauthorised searches for these purposes.

Further, given the nature of the circumstances many of these women and families face in restarting their lives, not only must a new home be established but often they must acquire new property, especially a motor vehicle. With often little in accumulated savings taken with them, it is not uncommon that women in these circumstances will need to buy a car or other items with the assistance of finance, meaning that a security interest may well be granted and, under the Bill, registered on the PPS Register.

While the use of the PPS Register by a former partner or family member to find women and children leaving a domestic or family violence situation might not occur every day, it is predictable that it **would** occur, and the consequences of such an occurrence are grave with violence against women and children a likely result. It would only take one such incidence to undermine the operation of the PPS Register.

By allowing for such abuse, the Bill would also run directly counter to other Government initiatives to combat violence against women and children, including the *National Plan to Reduce Violence against Women and Children* currently being drafted by the National Council to Reduce Violence against Women and Children, with support from the Federal Office for Women. Once again, it is unclear to what extent the government agencies and external stakeholders involved in these initiatives have been consulted regarding the Bill, and if consultation has not yet occurred we would strongly urge the Attorney General's Department to request their input.

The inability to search the PPS Register by grantor name where the grantor is an individual would go much of the way to protect women and families leaving a domestic or family violence situation. We note the proposal that, under the regulations, some consumer property will be required to be described by a serial number and only be searchable by serial number, particularly motor vehicles.¹¹ We strongly support the thrust of this proposal but note that it will not address the same privacy concerns in relation to other consumer property registered on the PPS Register, and it will also be more vulnerable to amendment than if it were included in the Bill (hence we recommend that consumer property should only be registrable at all if it can be registered by serial number).

¹⁰ See, eg, the Domestic and Family Violence Prevention Service of Toowoomba's publication, *Moving on...changing personal information and keeping anonymity*, August 2006, which is explicitly designed to provide advice to women and families on protecting personal information and privacy in a relocation situation, identifying a number of risks to such privacy.

¹¹ Section 191, item 2 in table; Australian Attorney-General's Department, *Personal Property Securities Bill 2008: Revised Commentary*, December 2008, 102 at §10.33.

However, there would remain a small risk that a former partner or family member might know the serial number, particularly a motor vehicle VIN, of an item of personal property owned by a woman and encumbered by a security interest. This might enable that person to search the PPS Register by serial number to uncover personal details of the grantor/debtor including other personal property they own, and possibly their address depending on the final form of the regulations and what is provided in a search result. Such a situation is likely to be the case where, for example, a motor vehicle was previously jointly-owned or held by the woman and her former partner.

For this reason, we recommend that the Bill include new provisions that enable a grantor of a security interest to apply to the registrar to suppress their personal details on the PPS Register. Similar provisions are currently in place in relation to the electoral role under section 104 of the *Commonwealth Electoral Act 1918* (Cth), and in relation to the public database of company directors and secretaries under section 205D of the *Corporations Act 2001* (Cth). Such suppression would also need to apply to new verification statements and notices of new verification statements sent to former and current grantors under section 223 of the Bill, which would be triggered upon an amendment to a registration pursuant to sections 220-221 of the Bill, for example in the case of one grantor being removed from a registration or a grantor's address being changed.

- **Sticky beaking/fishing expeditions**

Under the regime established by the Bill, any member of the public would be able to claim that they wished to search an individual's name on the PPS Register because they were contemplating buying an item of personal property owned by that individual. It would be difficult, if not impossible, for the registrar to vet such applications given such a search request does not rely on any prior agreement or relationship between the searcher and the individual being searched.

While people will need to be able to search the PPS Register before buying personal property, enabling searches by individual name allows for persons who do not have a genuine interest in a particular item to nevertheless have easy access to a range of personal information about another individual recorded on the PPS Register including their date of birth and personal property they own, clearly facilitating "fishing expeditions" or "sticky-beaking" by persons from family and friends to neighbours and work colleagues, to business or political rivals.

More generally, a person considering purchasing (or otherwise dealing in) an item of personal property and wanting to find out if the item is encumbered often does not even need to know information about the debtor, only whether the item itself is, in fact, encumbered and if so, by what sorts of security interests. Revealing other information such as the grantor of the security interest's address, date of birth and other encumbered assets may well be unnecessary and excessive. Thus, it seems that allowing searches of the PPS Register by debtor name when the debtor is an individual not only carries unacceptable risks, these risks are hardly justified in terms of legitimate outcomes.

Recommendations

- The Bill should provide that personal property being used as collateral by an individual, as opposed to a business, should only be registrable on the PPS Register if it has a serial number.
- The Bill should provide that personal property being used as collateral by an individual, as opposed to a business, should only be searchable on the PPS Register by reference to its serial number.
- The Bill should include provisions that enable a grantor of a security interest to apply to the registrar to suppress their personal details on the PPS Register, both in relation to searches of the PPS Register and in relation to verification statements and notices of verification statements sent regarding registrations, amendments to registrations and the removal or restoration of data in registrations.

Consumer credit and treatment of inappropriate security interests

This is another area in which serious concerns about the consequences of a PPS Register for ordinary consumers seem to have been ignored in the Bill.

Consumer Credit Code-voided mortgages

DP 1 noted that the Uniform Consumer Credit Code (the **Code**) voids certain security interests over consumer goods, including mortgages that do not describe or identify the property which is subject to the mortgage, mortgages over ‘all property’ of the grantor and mortgages over property acquired after the mortgage is entered into with some exceptions, for example purchase-money security interests and mortgages over property identified or described in the mortgage.¹² Despite these security interests being void, at present the Bill would allow for their registration on the PPS Register.

It should be understood that the underlying purpose for voiding such security interests under the Code is because they otherwise tend to be used by unscrupulous credit providers against disadvantaged consumers, allowing creditors to take inappropriate mortgages over property they have no legitimate business interest in. This allows such creditors to place pressure on the debtors to repay the credit - usually small amount, high cost loans – by threatening repossession of essential items if repayments are not made (often at the expense of other expenditure such as food, rent and utility bills). All jurisdictions have recognised the inherent social policy value in preventing the use of these exploitative security interests against disadvantaged consumers by voiding them under the Code.

We reiterate that we understand the registration of void security interests does not perfect these interests nor permit their enforcement under the Bill. However, by allowing for their registration, the Bill would give unscrupulous creditors new tools for use in their dealings with consumers over such mortgages. Creditors could use verification statements or other records of registration such as PPS Register extracts to “prove” to a consumer that they have a mortgage over the consumer’s property, as the consumers affected by such mortgages are likely to be unaware of their rights under the Bill, the Code or any other laws. The danger is not that the Bill

¹² Australian Attorney-General’s Department, above n1, at 62.

would suddenly validate such mortgages, but that it will facilitate certain types of sharp conduct that the Code is attempting to prevent.

We previously recommended that the Bill explicitly prevent the registration of mortgages voided by the Code, and we continue to recommend that such provisions be inserted into the Bill. However, not only does the Bill fail to restrict such registrations, it appears to a limited degree to further facilitate some of these practices. Section 67 explicitly provides for the attachment of security interests to after-acquired property, including property intended to be used predominantly for personal, domestic or household purposes albeit in this case only with specific appropriation by the grantor (ss.67(2)-(3)). By contrast, the Code voids such security interests outright, whether or not there is specific appropriation by the grantor after the time of entering into the original security agreement.

We note that the discussion paper regarding regulations to be made under the Bill proposes that regulations will be made to 'prevent the attachment of security interests to after-acquired goods to the same extent as the Consumer Credit Code'.¹³ However, section 67(2)(a) would only allow the regulations to prescribe such property for the purposes of providing that security interests in them only attach upon the grantor's specific appropriation, not to prevent a security interest from attaching to them at all.

It is unclear exactly how these provisions would interact with the Code's absolute voiding of certain mortgages under section 41 of the Code. However, it would be of great concern if they operated to override the Code's voiding of inappropriate mortgages over after-acquired property.

Further, for the purposes of determining whether or not attachment requires a grantor's specific appropriation, section 67(4) of the Bill proposes to allow consumers to make declarations either that they do not intend to use the property predominantly for personal, domestic or household purposes or that they intend to use the credit secured by the security interest wholly or predominantly for business or investment purposes pursuant to section 11 of the Code. The effect of a consumer making such a declaration is to allow a security interest to attach to their after-acquired property without their specific appropriation.

The problems associated with the abuse of such "business purpose declarations" under the Code are now widely acknowledged,¹⁴ and there are current proposals being progressed to amend section 11 of the Code to *remove* the conclusive presumption relating to business purpose declarations, and instead provide that a business purpose declaration is of no effect if it is proved that the credit was used predominantly for personal, domestic or household purposes.¹⁵ Yet the Bill seems unaware of these developments and simply proposes to implement now-discredited presumption provisions.

¹³ Australian Attorney-General's Department, *Personal Property Securities Reform Discussion Paper: Regulations to be made under the Personal Property Securities Act*, August 2008, 21.

¹⁴ See, eg, Ministerial Council on Consumer Affairs, *Fringe Credit Providers: Decision-Making Regulatory Impact Statement and Final Public Benefit Test*, March 2006, 23-24,

¹⁵ The Uniform Consumer Credit Code Website, *What's New - August 2007 Consultation Package*, update 27 May 2008, www.creditcode.gov.au/display.asp?file=/content/whatsnew.htm. The amendments to section 11 of the Code proposed in a consultation Bill in August 2007 were initially rejected by both

A better approach would be for section 67(2) of the Bill to provide that a security interest cannot attach to the listed types of after-acquired property at all, and for section 67(4) of the Bill to be deleted, or at least amended to reflect a similar thrust to the proposal to amend section 11 of the Code, namely, that a declaration is of no effect if the property or the credit is used predominantly for personal, domestic or household purposes. However, if section 67(4) were simply deleted this would achieve a similar outcome in a simpler fashion, as it would leave a situation in which a creditor alleging that goods were not used predominantly for personal, domestic or household purposes would need to establish that fact through evidence.

Blackmail securities over household goods

DP 1 also noted that some property is unavailable to a debtor's unsecured creditors in the event of bankruptcy due to the operation of section 116(2) of the *Bankruptcy Act 1966* (Cth) and Part 6 Division 2 of the Bankruptcy Regulations 1996.¹⁶ Such property includes 'household property (including recreational and sports equipment) that is reasonably necessary for the domestic use of the bankrupt's household, having regard to current social standards',¹⁷ which includes, specifically, items such as basic kitchen equipment, furniture, beds for everyone in the household, books and other items wholly or mainly for children's or student's use, one television, one radio, a washing machine and dryer, a refrigerator and a telephone.¹⁸ Other essential goods included in the types of property unavailable to creditors include tools of trade and basic transportation up to certain values.¹⁹

These provisions reflect the underlying public policy that our community considers all persons should live to a basic, decent standard and some household goods are essential for meeting such a standard.²⁰ For this reason, essential household property protected under section 116(2)(b) of the *Bankruptcy Act* is also generally protected from seizure and sale to enforce a judgment for the recovery or payment of money. For example, in Victoria section 42 of the *Supreme Court Act 1986* (Vic) states that the same property covered by section 116(2)(b),(c) and (ca) of the *Bankruptcy Act* must not be seized or taken under any process issued for the enforcement or execution of a judgment for the recovery or payment of money against a judgment debtor.

However, DP 1 correctly noted that these essential household goods may still be made subject to a security interest, meaning that they may be seized and sold by a secured (as opposed to unsecured) creditor in the event that a consumer defaulted on a debt which was secured against such property.

consumer and industry stakeholders and, subsequently, a bipartisan proposal was put to government by a joint consumer and industry association working party. At the last meeting in relation to this issue in early June 2008, the alternative proposal had been accepted in principle by the Ministerial Council on Consumer Affairs and was to be put to Parliamentary Counsel for drafting.

¹⁶ Australian Attorney-General's Department, above n1, at 62.

¹⁷ *Bankruptcy Act 1966* s.116(2)(b) and Bankruptcy Regulations 1996 reg.6.03(2).

¹⁸ Bankruptcy Regulations 1996 reg 6.03(3).

¹⁹ *Bankruptcy Act 1966* s.116(2)(c) and (ca).

²⁰ See, eg, Ministerial Council on Consumer Affairs, above n14, at 54: 'Household goods are generally considered a necessity of life therefore the repossession of these goods is considered unfair by community standards.'

Unfortunately, the practice of taking security over essential household goods does exist in our community. These types of security interests are commonly referred to as “blackmail securities” because they are generally taken over consumer goods of low value in order to secure small amount, high cost loans to disadvantaged consumers, in circumstances in which the creditor has no real intention of enforcing the security interest and repossessing the underlying collateral. Such creditors instead use these security interests to threaten repossession of needed goods, placing pressure on vulnerable consumers to repay the debt even if they are in financial hardship and genuinely unable to make repayments as demanded by the creditor.²¹

In our experience consumers often do not understand what their rights are when threatened with repossession of their property, for example, that the creditor will still require either written consent or a court order before they can repossess any goods on residential premises,²² and must obtain a court order to repossess the goods if the debtor owes less than \$10,000,²³ which is likely to be the case for these sorts of small amount loans. It is in this sense too that the security interests are used more as “blackmail” than as legitimate instruments held by creditors to use as a last-resort guarantee of repayment of monies advanced, given that such creditors do not necessarily take the necessary legal steps to repossess the collateral, instead making threats to repossess that they are aware cannot simply be acted upon. Again, most of the consumers who enter into these sorts of transactions are low-income or otherwise disadvantaged, and generally unaware of the Code or their rights under it.²⁴ A recent Consumer Action case study illustrates how blackmail securities operate:

Blackmail security interest – used as a threat

Our client was a 65 year old man who had significant debt problems and obtained cash advances from three fringe lenders at very high interest rates. His debt spiralled to the point where he would need to spend almost his entire income, a government pension, to meet his repayment obligations. As he could not afford this, he notified his creditors that he would be unable to make repayments. One of the fringe lenders had inserted terms into the loan contract giving it security over our client’s household property, and threatened to come around and repossess his household goods. Our client was extremely worried and reluctant to default on his repayments to this lender, even though he could clearly not afford the repayments, for fear

²¹ See, eg, as above at 20, 54.

²² Consumer Credit Code section 91.

²³ Consumer Credit Code section 83: a credit provider must not, without the consent of the Court, take possession of mortgaged goods if the amount currently owing under the credit contract related to the relevant mortgage is less than 25% of the amount of credit provided under the contract or \$10 000, whichever is the lesser. However, the credit provider can take repossession if it believes on reasonable grounds that the debtor has removed or disposed of the mortgaged goods, or intends to remove or dispose of them, without the credit provider’s permission or that urgent action is necessary to protect the goods.

²⁴ For example, under sections 66-68 of the Code a debtor may apply to the credit provider for a change to their repayment obligations on the grounds of hardship and under section 70 of the Code a debtor may apply to reopen the transaction as unjust with a relevant consideration being whether the credit provider knew, or could have ascertained by reasonable inquiry of the debtor at the time, that the debtor could not pay in accordance with its terms or not without substantial hardship.

of his personal goods being repossessed. He had been unaware that the lender could not repossess his goods without a court order.

Blackmail securities are not currently voided by the Code, as opposed to mortgages over all property or certain after-acquired property. However, current proposals are being progressed to amend the Code to void mortgages over goods that are essential household property (with essential household property to be defined by reference to section 116(2)(b) of the *Bankruptcy Act* or as otherwise prescribed by new regulations under the Code).²⁵

If our recommendation that the Bill explicitly prevent the registration of mortgages voided by the Code were adopted, such provisions in the legislation would extend automatically to blackmail securities once the relevant Code amendments were enacted.

However, in the meantime the Bill to some degree further facilitates the sharp practice of taking blackmail securities by allowing for their registration on the PPS Register. In addition to providing such security interests with a general legitimacy they do not deserve, registration again provides unscrupulous creditors with additional tools to place pressure on vulnerable consumers to repay debts, by allowing them to brandish verification statements or extracts from the PPS Register.

We previously recommended that, until such security interests are voided by the Code, the Bill should at least take the New Zealand approach of exempting such interests from the enforcement provisions of the Bill. The Bill now clarifies that for Code-regulated security interests, the Code's enforcement provisions and requirements will continue to apply. However, we still recommend that the Bill expressly exclude security interests over essential household goods from the enforcement provisions of the Bill for two reasons. First, the Bill should explicitly reject the legitimacy of these types of security interests by refusing to facilitate their enforcement in any manner. Secondly, the Bill may unwittingly provide creditors with additional enforcement rights that they do not currently enjoy under the Code. For example, section 164 of the Bill would allow a secured party to seize collateral by taking 'apparent possession' of it. As with the approach taken by other legislation and the current proposals to amend the Code, essential household property could be defined by reference to section 116(2)(b) of the *Bankruptcy Act*.

Recommendations

- The Bill should explicitly prevent the registration of security interests voided by the Consumer Credit Code.
- Section 67(2) should provide that a security interest cannot attach to after-acquired property of a kind prescribed by the regulations or covered by section 67(3).
- Section 67(4) should be deleted from the Bill.
- The Bill should exempt security interests over essential household property from Part 9 of the Bill. Essential household property should be defined by reference to section 116(2)(b) of the *Bankruptcy Act* 1966 (Cth).

²⁵ Ministerial Council on Consumer Affairs, *Consumer Credit Code Amendment Bill 2007*, *Consumer Credit Amendment Regulation 2007: Consultation Package*, August 2007; The Uniform Consumer Credit Code Website, above n15.

Registrations

Sections 191 and 192 of the Bill operate to prescribe a default registration end time for consumer property and property described by serial number of seven years from the initial registration time. DP 1 had tentatively suggested a default registration period for consumer goods of five years in line with the New Zealand and Ontario legislation, which we supported. It is unclear why a new period of seven years has been chosen in the Bill. Given that most consumer property security interests will be in motor vehicles, and the standard car loan is for a three to five year period, it seems excessive to prescribe a seven year default period. Other consumer property mortgages such as, unfortunately, blackmail securities (described above) have even shorter terms. We recommend that the default registration end time be five years.

Section 194 of the Bill, which permits the registration of collateral on the PPS Register *before* a security agreement is made or a security interest has attached to the property, is also open to abuse particularly with regard to consumer debtors. At the very least, we recommend that this provision should not apply to collateral to be used predominantly for personal, domestic or household purposes.

In terms of the discharge of a registration, we support the Bill's proposed obligation on secured parties under section 206 to apply to end the registration of a security interest in collateral used or intended to be used predominantly for personal, domestic or household purposes within 5 business days after the time the security interest ceases to be perfected. However, as we have previously noted, there may be times when a debtor reasonably requires the discharge of a security interest more promptly and there may be no reason for the security holder to delay. We therefore recommend that section 206 require the secured party to apply for the discharge 'as soon as reasonably practicable' after the unperfection time, with the maximum time period remaining at five business days.

Recommendations

- Item 6 of the table in section 191 should prescribe a default registration period of five years for consumer property or property described by serial number.
- Section 194 should not apply to property to be used predominantly for personal, domestic or household purposes.
- Section 206(2) should be amended to require a secured party to apply for an amendment of a registration to omit collateral or to end its effective registration 'as soon as reasonably practicable' after the unperfection time occurs, and no longer than before the end of five business days after the day the unperfection time occurs.

Verification statements

We support the requirement imposed on secured parties by section 223 of the Bill to send notices of verification statements to grantors. We note that the form of the notice will be important if it is to ensure a grantor is aware of relevant information about a security interest they have granted (or it is purported they have granted) in personal property they own. The

discussion paper regarding regulations to be made under the Bill does not appear to give any guidance as to what form this notice will take.²⁶

Section 223(3) imposes the obligation on the 'statement holder', defined in subsection (1) as the person given the verification statement under section 221. However, we note that section 221 provides for potentially more than one person to be given the same verification statement, for example if there are multiple security holders or if there is a change in the security holder. In those circumstances, section 223 therefore seems to require all the statement holders each to send a notice of the verification statement to the grantor(s). While this is better than an alternative in which it is unclear which statement holder has the obligation to send the notice to the grantor, it might cause some confusion for some grantors if they are unsure whether they are simply receiving multiple copies of the same verification statement or are being informed that they have granted multiple security interests. Given that the obligation to send a notice to a grantor always follows from the giving of a verification statement to a security holder by the registrar, it might be far simpler and more practical for the registrar simply to be required to send notices of verification statements to listed grantors as well as to send verification statements to listed security holders (although we note this may not be possible if grantor addresses are not recorded on the PPS Register).

Section 223(5) requires the statement holder to ensure the notice is given to grantors 'as soon as reasonably practicable'. We support this obligation, but also consider that an explicit maximum time-limit is necessary to ensure there is an objective outer-limit set on unreasonable delays. (Note that section 206 of the Bill, discussed above, takes the opposite approach.) DP 1 noted that the New Zealand regime requires the creditor to give a copy of the verification statement to the debtor not later than 15 working days after the day on which it is received.²⁷ However, 15 working days equates to three full weeks and we do not consider that this would be consistent with a requirement to send the notice as soon as reasonably practicable. We therefore recommend that a maximum time period of 14 days be inserted into section 223(5), consistent with the Code's requirement that a credit provider must give a copy of a credit contract to a debtor not later than 14 days after the contract is made.²⁸

We also commend the Bill for providing that a waiver of the right to receive a notice of a verification statement under section 223(6) cannot be made in relation to collateral that is consumer property (subject to concerns about the definition of consumer property set out below). Otherwise, it seems inevitable that some unscrupulous credit providers would require consumers to sign such waivers as a matter of course, in the same manner in which, for example, business purpose declarations under section 11(2) of the Code are currently presented to borrowers by some credit providers as simply another document to sign as part of a loan transaction.

However, a large weakness in the verification statement regime is the lack of any effective incentive for security holders actually to comply with their obligations. The only sanction for a failure to send a notice of a verification statement is the possibility of being sued for damages in

²⁶ Australian Attorney-General's Department, above n13.

²⁷ Australian Attorney-General's Department, above n1, at 32.

²⁸ Consumer Credit Code section 18.

the future, which is unlikely to deter unscrupulous credit providers. The failure to send a notice of a verification statement does not affect the validity of a registration in any way, so this obligation becomes a side-issue compared to the security holder's efforts to protect their own interests. Again, such problems might simply be avoided if the Bill provided that it was the registrar's duty to send notices of verification statements to grantors, particularly in relation to registrations of collateral registered as consumer property.

Recommendations

- Section 223(5) should be amended to require a statement holder to ensure that the notice is given to each interested person as soon as reasonably practicable after the time of the verifiable event, and no longer than before the end of 14 days after the time of the verifiable event.
- The Bill could require the registrar to send notices of verification statements to grantors.
- Alternatively, the Bill should impose a penalty on a statement holder that does not send a required notice to a grantor, either in the form of a civil penalty or in the form of an ineffective registration.

Amendment demands and information about security holders

We support Part 5.6 of the Bill, which enables a grantor to demand an amendment or end to a registration and provides for a process whereby the registrar can make the amendment if the security holder is unresponsive.

However, section 207 requires a party to give an amendment demand in writing to the secured party, and we are concerned that if secured party address details are not recorded on the PPS Register, as proposed, a grantor may simply have no way of determining how or where to give a written demand. Again, this highlights the problematic nature of excluding address information from the PPS Register as a means of trying to address privacy concerns. In fact, we had previously recommended that the registrar should not be permitted to accept and register an application for registration at all unless the security holder's name and address details had been clearly completed. This flows from our present experience with, for example, ordinary unsecured debt matters in which a consumer wishing to dispute an alleged debt, including one listed on their credit information file, may face difficulty in contacting the alleged creditor given they may have no previous knowledge of the alleged debt or creditor and the contact details for the other party are unavailable.

Recommendation

- The Bill must provide a mechanism for a grantor to gain access to a security holder's contact details to enable amendment demands to be given.

Enforcement provisions

We support the approach under Chapter 4 of the Bill that will see the Code enforcement provisions generally continue to apply to secured consumer credit transactions and/or a consistent approach to enforcement under either the Bill or the Code. For example, we note

that section 149(4) of the Bill sets out enforcement provisions that will not apply to collateral that is used by a grantor predominantly for personal, domestic or household purposes.

However, to be fully effective we note that section 149(4) should also exclude section 180(2) from application to collateral used predominantly for personal, domestic or household purposes, as it allows a grantor to waive their right to redeem collateral and is open to abuse against grantors who are consumers. We also note that the Code does not provide for a security holder to take 'apparent possession' of collateral and the Government's Discussion Paper 2 on these reforms had stated that the power to take apparent possession of collateral would not apply to consumer credit transactions under the Bill,²⁹ yet section 164 of the Bill now allows for this to occur. It should also be excluded under section 149(4) of the Bill.

Again, we also note that there is no regulator under the Bill, nor any penalties for a failure to comply with the Bill's provisions. This means that regardless of the strength of the Bill's enforcement provisions and protections for consumer grantors on paper, there will be little incentive to comply in practice given the only potential sanction for non-compliance is the limited and unlikely risk that the occasional consumer might sue for damages.

Recommendation

- Section 149(4) should also exclude sections 164 and 180(2) from application to collateral that is used by a grantor predominantly for personal, domestic or household purposes.

Consumer property

The Bill recognises that individual or consumer grantors require additional protections to business grantors in some circumstances. Some of these protections apply where collateral is 'used by a grantor predominantly for personal, domestic or household purposes' and others apply to any collateral described as 'consumer property' on the PPS Register. The latter set of protections include privacy protections under item 2 of the table in section 191 that provide for some PPS Register registrations to exclude grantor details if the collateral is consumer property and required by the regulations to be described by a serial number, and item 6 of the table in section 191 which provides for a finite default registration period for registrations of security interests in consumer property collateral.

However, section 26 defines consumer property as 'personal property held by an individual, other than personal property held in the course or furtherance, to any degree, of carrying on an enterprise to which an ABN has been allocated' and we are concerned that this could enable unscrupulous creditors to avoid the consumer protections that apply to consumer property under the Bill by registering a security interest in consumer property as being in 'commercial property'. They could do so by claiming that the collateral is used to even a small degree in a business being carried on by the grantor, whether this is true or not. This sort of conduct currently occurs in relation to the abuse of business purpose declarations under the Code, as discussed above.

²⁹ Australian Attorney-General's Department, *Review of the law on Personal Property Securities – Discussion Paper 2: Extinguishment, Priorities, Conflict of Laws, Enforcement, Insolvency*, March 2007, 75 at §305.

This concern has arisen following the release of the discussion paper regarding the regulations to be made under the Bill. The consultation draft version of the Bill had proposed (under item 2 of the table in previous section 195) that if it was claimed the collateral was held by the grantor in the course or furtherance of carrying on an enterprise to which an ABN has been allocated, the ABN would have to be recorded on the PPS Register.³⁰ This essentially prevented most false claims as an ABN was required as proof. However, the discussion paper on the regulations stated that the Bill would be amended to exclude the requirement to record the ABN due to various concerns.³¹ While these concerns may be valid, the solution of simply removing the ABN requirement in the current Bill has created another problem that must now be addressed.

We are also concerned that personal property can be registered as commercial property if it is used in carrying on an enterprise *to any degree*. This means that if an item of property is used by an individual almost solely for personal purposes but is used for a marginal amount of business activity, it can still be registered as commercial property rather than consumer property by a security holder, avoiding important consumer protections under the Bill. The definition of consumer property under the Bill needs to be strengthened, for example by stating that it covers personal property held by an individual unless held *predominantly* in the course or furtherance of carrying on an enterprise to which an ABN has been allocated.

Recommendations

- The definition of 'consumer property' under section 26 should be amended to provide that it covers personal property held by an individual, other than personal property held *predominantly* in the course or furtherance of carrying on an enterprise.
- Either the requirement to record ABNs should be re-inserted into the Bill or another mechanism should be included to ensure registrations cannot falsely claim that collateral is held in the course or furtherance of an enterprise.

Compliance and enforcement with the Bill

As a final matter, we have noted above that the Bill has inherent weaknesses due to the fact that it provides no penalties for non-compliance with its provisions, and in any case there is no independent regulator charged with ensuring compliance with the legislation's provisions and undertaking enforcement action if there are breaches.

This is a fundamental flaw in the proposed new personal property securities regime as a whole, and we strongly recommend that the Committee consider whether the Bill is appropriate in its current form given the lack of an appropriate compliance and enforcement regime.

Recommendation

- New provisions providing for a compliance and enforcement regime should be developed and inserted into the Bill before it is enacted.

³⁰ Australian Attorney-General's Department, *Personal Property Securities Reform – Personal Property Securities Bill 2008: Consultation Draft*, May 2008, 173.

³¹ Australian Attorney-General's Department, above n13, at 18.

If the Committee would like to discuss any matters raised in this submission, please contact us on 03 9670 5088.

Yours sincerely

CONSUMER ACTION LAW CENTRE

A handwritten signature in black ink, appearing to read 'Nicole Rich', with a stylized, cursive script.

Nicole Rich

Director – Policy & Campaigns