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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
Australia

Dear Sir/Madam

Submission to Inquiry into Personal Property Securities Bill 2008

Legal Aid Queensland (LAQ) welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Personal Property Securities Bill 2008 – Exposure Draft.

LAQ's civil law services seek to make legal rights a reality for disadvantaged people. We provide community legal education, legal information, legal advice, extended assistance and casework services in relation to consumer issues.

LAQ provides advice to approximately 50,000 people each year across all legal areas. Around 30% of those advices are in relation to civil law issues. We also have a specialist Consumer Protection Unit (CPU) with a focus on consumer credit which is staffed by 3 lawyers. That unit provides direct advice to over 1000 Queenslanders each year and conducts limited casework to the extent our resources permit. The unit gives priority to matters where there may be a more wide-ranging beneficial effect for all consumers and where clients have been victims of consumer injustices.

LAQ would like to thank the interest of the Senate Legal and Constitutional Affairs Committee in personal property securities law. We propose to respond to the proposals that are relevant to us in our work as Consumer Advocates for vulnerable consumers.

Chapter 5 – Personal Property Securities Register

LAQ supports the basic premise which underpins Chapter 5 and section 191 of the exposure draft which requires the same amount and quality of information to be entered on the PPS Register for both grantor and secured parties of a security.

However, LAQ is concerned by the rationale behind Chapter 5 expressed in Paragraphs 28 and 29 of ASIC's Discussion Paper on Personal Property Securities Reform which suggests that the accuracy of information recorded for Grantors will be more critical than the accuracy of the information that is recorded for secured parties as there is a greater risk of the information about the Grantor being seriously misleading. It also focuses in paragraph 28 on it being essential that enough information about grantors is provided on the PPS Register to enable their ready identification without a similar importance being placed upon the information being recorded on the PPS Register about secured parties.

LAQ does not accept that incorrect information on the PPS Register about grantors can be anymore seriously misleading to secured parties or the Community than incorrect information about Secured Parties on the PPS Register can be to Grantors of Security or the Community. In the current economic climate LAQ recognises that it is just as critical for grantors of securities and the community to have access to accurate information on the PPS Register about who secured parties are as it is for information about the grantors of security on the PPS Register to be accurate. The importance of these reforms is not just on increasing the accuracy of the information available about grantors to potential secured parties. It must also be on increasing the availability of accurate information concerning secured parties so that persons or entities that are considering granting a security can make a more fully informed decision about the person or entity they are considering granting security to.

It is important that the formulation of any regulation concerning the PPS Register takes place in the context of the recognition that more accurate information about both grantors and secured parties on the PPS Register is essential to better decisions being made by both parties potentially involved in a security about whether to enter into that security. Better decisions will not be made by focusing only on improving the accuracy of information recorded on the PPS Register about grantors because this will risk an asymmetry of information occurring in the granting of securities. Practically the effect of this would be that the grantors of security may be unable to readily identify the correct person or entity holding the security over an asset that they are seeking to sell. The consequence of this is that it may also be difficult for a grantor to identify the amount of the security that they must discharge in order for a secured party to release the security.

A grantor's inability to identify the correct entity as the secured party or to confirm the amount of a security will occur if the same attention is not given to ensuring the accuracy of information concerning secured parties as is proposed to be given to ensuring the accuracy of information about grantors on the PPS Register. A potential consequence of this is that contracts of sale that a grantor may be attempting to enter will be held up and in some cases are likely to fall through because the holder of the security cannot be readily identified and as a result a timely release cannot be secured from the secured party.

Process for Discharging Security/Selling Secured Property

LAQ supports the processes in Parts 5.4-5.7 of the exposure draft which sets out the procedure that must be followed to achieve effective registration of a security and the circumstances in which both grantors and a secured party may amend the registration of a security on the PPS Register. LAQ also supports the proposed processes for how data may be removed from the PPS Register and errors corrected in entries that have been made on the PPS Register.

In LAQ's view, of critical importance is the process set out in part 5.6 of the exposure draft which allows a grantor to make a written demand for the amendment of the PPS Register in specified circumstances pursuant to section 207 of the exposure draft. This process is complemented by Division 3 of the exposure draft which gives grantors the ability to make an application to the Court for the amendment of the PPS Register in the event that the secured party does not agree to the amendment of the PPS Register.

This process is vitally important to grantors because it sets out a clearly defined process by which a grantor of security will be able to seek the amendment of the PPS Register and release of the secured party in the event that the secured party refuses or delays in considering an amendment request.

LAQ's concern in this respect is highlighted when grantors are seeking to sell property that is secured on the PPS Register. In these circumstances grantors will find it difficult to obtain amendments of the PPS Register using the process that has been set up for amending entries on the PPS Register in sufficient time to allow a sale to proceed promptly.

The difficulty for grantors seeking to sell property is that in addition to the difficulties discussed above in identifying the relevant party to request the amendment of the register from, the process of actually obtaining the amendment of the PPS Register may take a significant period of time.

A potential consequence of this is that contracts of sale that a grantor may be attempting to enter will be held up and in some cases are likely to fall through because the release of the security from the PPS Register may not be able to be obtained in a timely manner.

To overcome this problem, LAQ submits that a requirement should be added to section 207 that a secured party must respond to an amendment demand that is made pursuant to section 207 within 7 days. If the secured party fails to do so, the secured party is subject to a fine and it will also allow the grantor to make an application to the PPS Registrar of the relevant Court on 2 days notice to the secured party seeking the amendment of the Register where they can show there is an unconditional contract of sale of the secured item and that the secured party will have their interest that is secured by the goods registered on the PPS Register paid out.

Exploitation of Vulnerable Consumers

LAQ understands that the rationale behind the adoption of a PPS Register is that it will give secured parties a more complete picture of the financial position of grantors who are seeking loans. As a result, it will allow secured parties to make better and more responsible lending and other financial decisions concerning whether they should lend money to a grantor.

At the same time, in theory the PPS Register should give grantors a more complete picture of their obligations and clearly identifies the items that they have given security over.

However, LAQ remains concerned that the introduction of a PPS Register, despite its good intentions, is likely to significantly disadvantage the most vulnerable people in our society because in our view it will not lead to fewer loans being made to consumers who are over-committed and cannot afford to repay them. Instead, it will allow lenders to more easily identify those consumers who might be under debt stress and default on a loan and ensure that more security over a loan is taken than might otherwise have been required.

LAQ's first concern is that if it is easier for secured parties, under the new proposed regime, to register security interests, there is a risk that companies are likely to take security over as many items as possible instead of what is actually necessary to secure a loan or investment. LAQ recognises that there is a system contained in Part 5 of the exposure draft for removing inappropriate listing on the PPS Register, however, LAQ is concerned that the grantors of security may suffer economic or other damage as a result of inappropriate listings before they are removed.

Ultimately, the key aim of a PPS Register is to make it easier for secured parties to register their interests in secured property on one central register which can be searched by the grantors of security and secured parties. The effect of this is that it is arguably easier for secured parties and potential secured parties to assess the risk of making a loan or a further loan to a consumer that is seeking a loan because lenders should be more easily able to identify those consumers who are already over-committed and as a consequence not lend to them because they will not be able to afford to repay the loan. In theory, this should discourage bad loans from being

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made to consumers, who are already under loan or debt stress, even if there is potential security available for the Loan available to be taken by a lender.

On this point, LAQ would point to the similarities between how FICO scores were used in the United States and how the PPS Register may be used by secured parties here in Australia. In the United States, despite the intention of FICO scores being to allow lenders to identify more risky borrowers and as a consequence have enough information so that they did not make bad loans, what actually happened was that the lenders still made the bad loans, they just charged the riskier clients, who could not afford the loans, a high rate of interest, which ultimately lead to many of them defaulting on the Loans and in many cases the lenders being unable to recoup the money that they had lent.

Similarly, LAQ is concerned that potential secured parties will use the PPS Register in a similar manner to the way that FICO scores were used in the United States. In theory if a party is considering making a loan to a consumer or company searches the PPS Register and sees that the party is already the grantor of security over a number of items, they should be put on notice about the potential grantor's financial situation and should be very wary of making the loan because it is unlikely that the person or business seeking the loan can afford it. This is the basic idea behind responsible lending practices.

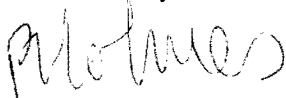
Unfortunately, LAQ fears that when a potential secured party is faced with these circumstances what is more likely to happen is that more security than would usually be required for the loan will be requested of the grantor. In other words, the cost of obtaining the loan will be much higher than one might have otherwise expected. The result of this is that even more assets of the grantor will be tied in providing security for loans, in circumstances where they are already likely to be in financial difficulty. Although this is not the way that the PPS Register is intended to be used, from a practical perspective it is more likely to be used in this manner.

LAQ sees that the solution to this problem is to introduce strong responsible lending requirements as a vital part of the reform to Consumer Credit Law Reform that is being undertaken as a part of the transfer of credit to the Commonwealth. Similarly, responsible lending practices should also be considered for investment loans (Part 2 of the Review) and for loans given to small businesses.

Thank you for the opportunity to provide submissions to this inquiry.

If you have any questions please contact either me on 1300 65 11 88 or (07) 3227 7124.

Yours sincerely



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