Consumer Credit
Legal Centre NSW

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1 August 2008

Assistant Secretary
Personal Property Securities
Australian Attorney-General's Department
By email: pps@ag.gov.au

Dear Sir / Madam,

Personal Property Securities Bill 2008 ("the Bill")

Thank you for the opportunity to respond the Bill.

CCLC is an independent community based legal centre specialising in financial services, particularly matters and policy issues related to consumer credit, banking and debt recovery. It is the only such Centre in NSW, and has been operating for over 19 years.

We provide free legal advice, legal representation, and education to NSW consumers in relation to credit, debt and banking matters. CCLC operates the Credit and Debt Hotline, a financial counselling information and referral service, which is the first port of call for many troubled debtors in NSW. In the 07/08 financial year the CCLC staff consisting of financial counsellors and solicitors took over 13,000 calls.

Our Submission

CCLC is **unequivocally opposed** to the passage of the Bill in its current form. We believe that there is a crucial lack of fundamental consumer protection mechanisms in the Bill which must be addressed in the legislation itself, and not in any subsequent regulations.

Our main concerns regarding the Bill are:

1. Types of consumer property which may be secured

   CCLC strongly advocates for a prohibition on the ability of credit providers to take security over small-value essential household goods such as bedding and kitchenware (otherwise known as "blackmail securities").

   Consumers who are forced into the position of having to agree to the securitisation of essential household items are almost inevitably part of the most disadvantaged and vulnerable section of the community. Given that the secured items are typically used goods with a low resale value, the benefit to credit providers of taking security over these items is vastly disproportionate to the immense psychological burden placed on consumers by the knowledge that these essential items goods could be repossessed.

   Putting in place a security register which applies to these items is to effectively lay an additional burden on consumers if improper entries are made against them. Predatory lenders can take advantage of a consumer's lack of awareness or understanding about their rights, or their inability or lack of resources to stand up for their rights, and combine it with the undue pressure on consumers of threat of repossession in order to force unfair outcomes on consumers.

   Accordingly, CCLC argues against the inclusion of any small-value (ie. market value of under $2000) essential household goods in the security register.

2. Definition of consumer property

   CCLC strenuously calls for an expansion to the definition of consumer property so that personal property does not lose its "consumer" character because of a minute use of the item in furtherance of carrying on an enterprise for which an ABN has been assigned.

   The phrase "*to any degree*" has the potential to produce perverse outcomes for consumers as there is no room for discretion to determine whether an item is truly a "consumer" property in the ordinary meaning of the word. This proposed definition may place essential household items at risk for consumers who work from home or who may have held an ABN at some point in the past, even though 99.99% of the time the item is used for solely personal purposes.

   While the provision as it currently stands could arguably afford more certainty to security holders as to what constitutes consumer property, we do not believe this is fairly balanced with the interests of consumers.

In particular, in terms of s59(3) of the Bill, we are enormously concerned that for property classed as "inventory", a security interest can be taken in all of a grantor's present and after-acquired property, with the only exception being goods specified in the security agreement. This does not afford sufficient protection to consumers because loan and security documents are often long, complex, and difficult to understand, with the effect that most consumers sign the contract without reading or understanding the terms of the agreement.

This would effectively allow security holders to bypass the protections available under s63 for personal property predominately acquired for personal, domestic or household purposes. While we applaud the attempt in s63(4) of the Bill to prevent the use of false business or investment purpose declarations, we note that the flexibility inherent in s63(2) leaves it open for predatory lenders to insert further classes of goods into a written security agreement without the consumer's knowledge or consent. To counteract this, the use of the words "with specific appropriation" in s63(2) needs to be further clarified as it is not defined or used elsewhere in the Bill.

Ultimately, while s59(3) of the Bill may be appropriate for truly commercial endeavours, this provision is unacceptably harsh for consumers in light of the broad definition of "consumer property". While the provision does apply only when collateral is being held as inventory (under s59(5) of the Bill), it remains procedurally disadvantageous to put consumers in the position of contesting the actual use of personal property used for predominately personal purposes.

In terms of s59(4) of the Bill, we are also enormously concerned that even over consumer property, consumer goods or equipment, a security interest can be taken over a *class* of goods. This is in light of our previous opposition to the allowance of security interests over essential household goods for use as "blackmail securities". Allowing a credit provider to take an interest in any class of goods (presumably such as "whitegoods", "bathroom furnishings", "electronic equipment") has the potential to devastate the functioning of an entire household, particularly where a security holder can take over both present and after-acquired property under s59(3)(iii) and where the exclusionary clause in the definition of consumer property is unjustifiably broad.

We are also concerned that although the expression "consumer goods" is used in s59(4) of the Bill, it is not defined and does not appear anywhere else in the Bill.

We have further concerns in relation to the significant difference between the default registration periods between consumer property (7 years) and other types of property (25 years). While this distinction may be justified and necessary for commercial endeavours, it is not appropriate where a minute

use of personal household goods can shift the item from being "consumer property" into "inventory".

The Bill as it currently stands offers the potential for unscrupulous dealers to take security interests in entire classes of essential household goods purely for the purpose of achieving leverage, one which is often psychologically and emotionally distressing for the consumer, and which in the event of repossession and resale of the used household goods is unlikely to provide the security holder with a significant return.

Accordingly, we propose that the definition of "consumer property" be revised so that there is a level of discretion to determine what items are truly for consumer purposes and therefore subject to further protections in the Bill. We propose that "consumer property" be defined as "personal property used for predominately personal or household purposes". This is to ensure uniformity with other provisions of the Bill (for instance s158(4), s163) as well as with the Uniform Consumer Credit Code.

3. Enforcement:

   CCLC strongly supports the retention of all provisions of the Uniform Consumer Credit Code to operate concurrently with the proposed Bill.

   We note however that the federal government's takeover of all areas of credit will necessitate further review and stakeholder consultation into this issue in the next 18-24 months.

4. Privacy implications

   a. There is a need for a far more cautious measured approach than demonstrated by the current Bill. The proposed personal property security register is analogous to the credit reporting system. Both are public registers that, in the interests of facilitating commercial transactions and risk taking, intrudes on an individual's privacy to an extent.

      In recognition of this intrusion on privacy, Part IIIA of the Privacy Act and a Credit Reporting Code of Conduct have both been separately carved out from the universal principal based privacy regulations in order to specify in precise details exactly what is and is not permissible information, and the duties and obligations placed on both credit providers as sources of information and credit reporting agencies as guardians of that information.

      We are concerned that there is no attempt in the Act itself to define what grantor "details" are permitted to be included in the register. This issue is pinnacle to a debate as to whether consumer interests

will be disproportionately prejudiced by the proposed legislation in terms of matters such privacy, data accuracy, potential for identity theft, and protecting persons fleeing from domestic violence. Irrelevant information as to a person's religious or political beliefs, racial or cultural background, sexual orientation, medical history etc. must also be prohibited. As with the credit reporting system, these matters should be cemented in the Act itself, and not be an issue left to be dealt with in further regulations.

Even with all precautions in the credit reporting system, there have been numerous documented systemic breaches of credit reporting regulations in recent years[1], which have highlighted on-mass abuses of the system by organisations seeking to use the system for ulterior motives (such as an unfair leveraging tool to force the payment of disputed debt by bargaining with a person's inability to get a mortgage or other loan).

These effects could potentially be drastically amplified in the proposed personal securities register because of the lack of restrictions on a particular category of people or organisations which can access the register (to credit providers etc). Essentially any individual or corporation will have open access to all the information in the register by simply representing they fall into one of the prescribed categories.

b. The lack of provisions for identifying, enforcing, rectifying and preventing systemic abuses of the register by all individuals and corporations must be addressed. There must be a system of oversight of the register itself and, in particular, complaints against specific individuals and entities in order to identity systemic abuses. There must also be a regulatory authority, whether it be the registrar of the system or another authority such as ASIC or OPC, which can enforce and penalise any category of offenders, whether they be corporations, individuals or any other entity.

   CCLC also proposes the introduction of civil penalties or offences for systemic abuses of the register, as a further deterrent to such conduct;

c. The reliance on consumers to take court action in order to recover compensation for breaches of privacy is inadequate as a means of ensuring the integrity of the register. In many cases of privacy breach, the sole detriment suffered by consumers will be humiliation, anguish and stress. While these are real and acute forms of detriment, these are detriments for which courts rarely award compensation, and even

[1] As detailed in *Complaints soar over Telstra debt collection tactics*, Sydney Morning Herald, June 13 2003, http://www.smh.com.au/articles/2003/06/12/1055220713025.html

were the court to do so, assessing the amount is a highly technical process that would alienate the average consumer.

The practical effect of this is that very few consumers will have the ability, resources or time to litigate grievances. Without any deterrent to do otherwise, this will effectively leave the way open for predatory lenders to abuse the register system and violate the privacy of significant numbers of people;

d. The breadth of categories of people who can access the register is a further concern. The bill in its present form has no safeguards in place to prevent people from simply asserting that they fall into one of the permissible categories. There should be a requirement that the person or organisation seeking access to the information must be capable of establishing on reasonable grounds that they are permitted access for a lawful purpose;

   There also needs to be a record, accessible only by the grantor, detailing the circumstances of each access to their personal information as a further method of individual oversight of the register.

   CCLC also proposes that grantors are permitted free access to the register to ensure that impecunious consumers are not denied the opportunity to inspect their entries for inaccuracies.

e. The potential inclusion of video or picture evidence of the secured good on the register should not be permitted without processes for notifying the grantor and any other interested person and allowing them a statutory period in order to protest to the proposed entry, and for removing embarrassing or inappropriate entries;

f. The reliance placed on security holders to notify grantors of amendments to listings is inappropriate, as these two parties have an inherent conflict of interest with each other. We propose that the Register should be responsible for sending out the relevant notices to all interested parties;

g. The reliance on the Privacy Act to protect consumer interests is inadequate. The Privacy Act only covers an extremely limited field – it does not apply to individuals and to only a limited subset of businesses. While we note that this has the potential to change given the recent release of the Australian Law Reform Commission report into privacy[2], any legislative changes are speculative at present;

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[2] *For Your Information, Australian Privacy Law and Practice,* Australian Law Reform Commission, May 2008

h. The lack of external dispute resolution processes to enable all consumers access to justice. The present proposal relies on existing schemes such as the Office of the Federal Privacy Commissioner or Ombudsman services. Consumers are only able to access these schemes if the person or organisation the subject of the complaint happens to fall into the schemes' jurisdiction.

CCLC has had the opportunity of reviewing a draft of the Australian Privacy Foundation's submission, and we support its comments.

5. Duties and Obligations

The obligation for parties to act in a "commercially" reasonable manner in section 239 severely subrogates the privacy interests of individuals in favour of the fiscal advantage of corporations. There does not appear to be any apparent justification why the duty cannot be expressed as a balanced duty to act in a "reasonable manner" having regard to the interests of all concerned parties. CCLC is unaware of any other legislation in regard to a public register which sacrifices consumer interests in favour of commercial (and typically fiscal) advantage in such a way.

Such a provision can also have a deterrent effect for consumers to pursue legal options against offending conduct. Commercial reasonableness is a vague amorphous concept which can be relied on by predatory lenders to deny basic unfairness to consumers. It is, procedurally, vastly easier for an entity to assert that some form of commercial interest exists and the extent of that interest, than for a consumer to disprove that conduct was commercially reasonable.

This is an issue that will cause both procedural and substantive issues in relation to consumers obtaining remedies for inappropriate conduct. Any form of denial or impediment to access to justice will cause extreme detriment to consumers.

CCLC also argues in favour of a continuous duty to be imposed on people or organisations entering information on the register to ensure that the information remains complete, accurate and not misleading, which is analogous to the duty placed on credit providers for the credit reporting system.

In particular, there should be a duty placed on security holders to remove listings within a reasonable period once their interest is extinguished (where the end date does not coincide with that already specified on the register).

6. Onus of proof

We are strongly opposed to the use of the onus "beyond reasonable doubt" in s272(2) of the Bill. This standard is one reserved for criminal proceedings, and there does not appear to be any justification why the burden of proof cannot be "on the balance of probabilities" as it is with all other civil areas. Furthermore, it is both procedurally and substantively unjust to lay the burden on consumers to disprove a presumption that they were engaging in an attempt to defraud or otherwise deprive a security holder of their interest, and to the standard of a criminal burden of proof.

7. Acquiring personal property free of security interests

   We do not have comment on Part 5 of the Bill.

We have also had the opportunity to review Legal Aid NSW's draft submission into this issue and endorse it.

If you have any questions or wish to discuss our submissions, please do not hesitate to contact Alice Lin, Legal Policy and Education Officer, on (02) 8204 1360.

Yours faithfully,

Consumer Credit Legal Centre

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