



9 February 2007

By email: pps@ag.gov.au

Personal Property Securities Review
Office of Legal Services Coordination
Attorney-General's Department
Robert Garran Offices
3-5 National Circuit
BARTON ACT 2600

Dear Sir/Madam

Review of the law on Personal Property Securities – Discussion Paper 1: Registration and Search Issues (Paper)

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the above Paper prepared under the auspices of the Standing Committee of Attorneys-General.

We generally support the creation of a single personal property securities register (**PPS Register**) and agree that there will be benefits in terms of efficiency, certainty and costs if a PPS Register is created. In terms of the consumer interest we note that, in particular, consumers purchasing second hand motor vehicles and boats will benefit from the availability of a single source to check that the property they are considering purchasing is not encumbered by a security interest, particularly if the PPS Register also allows the searcher to check that the property is not a stolen or written off vehicle.

However, we have some serious concerns regarding the use of the PPS Register to register goods if the debtor is an individual, not a business, and the goods are not identifiable and searchable by reference to the goods themselves, for example by a serial number, and instead persons are able to search the register by debtor name.

We consider that the goal of having all security interests registrable on the PPS Register (starting point 2 for reform) is commendable in theory, but in practice serious privacy concerns justify a departure from this goal in the case of security interests where the debtor is an individual and the secured property is not able to be registered and searched by unique serial number.

Our comments on the Paper are detailed more fully below.

About Consumer Action

Consumer Action is a campaign-focused consumer casework and policy organisation, dedicated to advancing the interests of low-income and vulnerable consumers, and of consumers as a whole. Based in Melbourne, it was formed in 2006 by the merger of the Consumer Law Centre Victoria and the Consumer Credit Legal Service and is funded jointly by Victoria Legal Aid and Consumer Affairs Victoria.

Consumer Action Law Centre

Level 7, 459 Little Collins Street
Melbourne Victoria 3000

Telephone 03 9670 5088
Facsimile 03 9629 6898

info@consumeraction.org.au
www.consumeraction.org.au

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 throughout the community directly.

General comments – asset based lending

As stated above, we endorse the proposal for a single PPS Register. We see large benefits in the proposal for business and also for consumers purchasing second hand motor vehicles and boats.

However, the Paper notes that one of the rationales for reform is to enable access to cheaper finance for borrowers who are able to enter into secured lending (for example, paragraphs 1 and 11). This rationale may apply to borrower businesses and to some consumers, but our experience is that secured lending to consumers is often entered into where *no* loan would be made otherwise.

For many consumers, particularly low-income or vulnerable consumers, asset-based lending does not offer a choice between a higher interest rate on an unsecured loan and a lower interest rate on a secured loan. Instead, asset-based lending is often engaged in by lenders who do not adequately assess, or do not care, whether the consumer will be unable to repay the loan or not without substantial hardship, because the consumer has an asset to which the lender can have recourse if default occurs. Such asset-based lending is not only unfair and exploitative, it is also maladministration of a loan and, in the case of consumer credit, grounds to reopen a loan contract under section 70(2)(l) of the Consumer Credit Code (**Code**), if 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'.

As the Paper itself notes, reform would reduce costs for lenders, including in relation to assessing the borrower's capacity to repay (paragraph 9). We would not like to see an improved system for registering and enforcing security interests lead to a greater volume of inappropriate asset-based lending to consumers, with lenders even less concerned about conducting a full assessment of a consumer's capacity to repay the loan given the increased ease of enforcing a security interest.

In the case of security interests in general household goods, there is the additional concern that lenders do not take such security in good faith to secure repayment, but rather in order to pressure consumers to repay even if they are in financial hardship by threatening repossession of household items (termed 'blackmail securities'), when there is no real intention to enforce the security interest. This issue is canvassed to some degree in Part 11 of the Paper and we address it further below. However, we note here that there is little public interest in allowing such security interests to be registrable.

Q16: Information about motor vehicles

Consumer Action strongly supports the creation of a PPS Register as the single source to check whether a second hand motor vehicle or boat that a consumer is considering purchasing is not subject to a security interest. This is arguably the most beneficial aspect of the reforms for consumers.

We also strongly agree with the National Motor Vehicle Theft Reduction Council's suggestion that a search of the PPS Register relating to a motor vehicle should disclose whether the vehicle has been reported as stolen or written off. In fact, a failure to include such a linkage would undermine the benefits to consumers of having a single register to check the status of a

vehicle they are considering purchasing. This is because it is the consumer as subsequent purchaser who generally bears the loss if a vehicle's status is not clear and the vehicle is later repossessed, either as stolen or subject to a security interest, often at great distress and financial hardship for the consumer.

While we note that a search of the PPS Register that included this additional information would require a search of the National Exchange of Vehicle and Driver Information System, we are unsure as to why an additional fee would need to be charged to the searcher. It would be in the public interest to include information about stolen and written off vehicles in searches as this would help in reducing the unknowing trade in stolen and rebirthed vehicles.

We also note that as this is the one feature of the PPS Register that is likely to be commonly used by consumers, whereas the rest of the PPS Register would be primarily a business tool, the practical effect of an additional fee on motor vehicle searches would generally be to unfairly charge more to consumers who use the PPS Register than businesses.

Financing and verification statements

Our consumer legal practice has helped many consumers who have discovered an inaccurate or false record of a debt has been placed on their credit report, often also meaning they are subject to repayment demands by a debt collector. In these cases, our experience has been that it can be difficult to challenge the debt as the alleged creditor may be hard to find or contact, with contact details for the creditor out of date, unclear or missing.

This highlights the need to ensure that creditor details on a registrable financing statement are clear and complete, including a full name and address and, in the case of companies, a company number. We recommend that the Registrar should not be permitted to accept and register a statement where all such details have not been clearly completed.

In these sorts of cases, the problem is compounded by the fact that the consumer will not have a copy of the contract or instrument allegedly creating the debt, either because no such instrument exists, the creditor failed to give the consumer a copy or the consumer has lost or misplaced their copy (and the creditor cannot be contacted to demand a copy). The need for a consumer debtor to have access to a copy of the contract creating the debt is recognised in the Code, which obligates the creditor to provide a copy both at the time the contract is made (section 18) and at any time upon the debtor's written request (section 163).

We therefore agree that, as under the New Zealand scheme, a person who registers a financing statement and receives a verification statement from the Registrar should be required to give a copy of the verification statement to the debtor. A time period of 15 working days seems unnecessarily large for this requirement, however, and we suggest that a time restriction of 14 days, consistent with the Code, be adopted instead.

It may be appropriate to give business debtors the ability to waive their right to receive a copy of the verification statement. However, we do not agree that consumer debtors should be able to waive their right to receive it. Such a provision would inevitably lead to unscrupulous credit providers requiring consumers to sign such a waiver at the time of entering into a contract creating a secured debt. Inserting such a requirement will therefore only lead to a need to remove it from the legislation down the track as more and more examples of such conduct emerge.

In case of any doubt as to whether this would occur, we note that our consumer legal practice has much experience of such conduct occurring in relation to, for example, used motor vehicle sales in Victoria, where the consumer has cooling-off rights after entering into a sale contract unless they sign a waiver of these rights (section 43, *Motor Car Traders Act 1986 (Vic)*), and

consumer credit contracts, where a consumer is covered by the protections of the Code unless they declare before entering into the contract that the credit is to be applied wholly or predominantly for business and/or investment purposes (section 11).

Q20-22: Serial numbered collateral

Consumer Action supports a requirement that registration of serial numbered collateral include the serial number.

In fact, due to privacy concerns (detailed further below), we consider that personal property being used as collateral by an individual, as opposed to a business, should **only** be registrable by reference to a serial number.

A person considering purchasing or otherwise dealing in an item of personal property and wanting to find out if the item is encumbered does not 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.

Otherwise it is necessary to search by debtor name, which in the case of individuals reveals other information not necessarily relevant to the searcher's needs, including other assets held by the debtor that are encumbered, as well as the debtor's address and possibly date of birth to ensure the correct debtor has been found. The PPS Register would risk becoming similar to a credit report, without the legal protections that apply to credit reporting.

For motor vehicles specifically, Consumer Action agrees that there will be confusion if they are required to be registered in a different category if they are secured as 'inventory'. All motor vehicles used as collateral should be registered as motor vehicles on the PPS Register.

Whilst we have no firm view as to whether it should be possible to specify that registered motor vehicles are consumer goods, equipment or inventory, we do consider that registration of a motor vehicle should always require a serial number if it is intended that registration will perfect the interest and prioritise it ahead of the interests of a subsequent purchaser. If a security interest is not extinguished upon sale to an (unknowing) third party, often a consumer, it is unreasonable to expect the consumer to know to search the register not only for the motor vehicle itself but also under the vendor's name just in case the vehicle was held by the vendor as equipment (or inventory if such an interest is also prioritised). Even if an entry was found under a vendor's name showing a general security interest over the vendor's equipment, it is unclear how a consumer would be able to ascertain if that entry applied to the vehicle in question.

This will not be a concern to consumers if registered security interests over motor vehicles that are not searchable by serial number are not prioritised over the interests of a subsequent purchaser. However, it may be that the most logical way to protect the interests of all parties is to require that registration of all security interests over motor vehicles be by serial number.

If serial number registration is not ultimately required, security interests over motor vehicles that do not specify the vehicle's serial number should not take priority over the interests of a subsequent purchaser of the vehicle, as such a purchaser would not discover the security interest in searching the PPS Register for the vehicle.

However, in any case, as noted above (and detailed further below) all registrations of motor vehicles should be required to be by serial number where the debtor is an individual rather than a business, due to serious privacy considerations.

Q24-25 Debtor initiated changes to register entries

In Consumer Action's view it is indisputable that a debtor or other person with an interest in property registered on the PPS Register should have the ability to demand discharge or amendment in certain circumstances.

The interests of a debtor or other person with an interest in property registered on the PPS Register are directly affected by a registered financing statement and it would be a complete denial of fairness and natural justice to prevent any challenges to a statement. In addition, Australia's experience from its credit reporting system is that errors and inaccuracies in a register relating to debtors but with information provided by creditors do occur. It is therefore necessary for there to be a change demand process for debtors to have their records corrected.

We support the New Zealand scheme's process whereby a person may have changes to a registration made directly by the Registrar if the creditor does not comply with a change demand, unless the creditor obtains a court order maintaining the registration. We do not consider that the alternative approach put forward, in which a decision not to make the change is shifted from the court to the Registrar, is appropriate. In all other ways the Registrar will be performing a purely administrative function, whereas assessing whether a creditor should or should not be entitled to maintain a registration in the event of a dispute requires the ability to assess evidence and make a decision as to underlying substantive matters, a function in which the courts have the relevant expertise. Indeed, the Paper explains that under the New Zealand scheme the Registrar does not look behind the financing statement when it is first registered to confirm that a person is entitled to register it, and there is no suggestion that this aspect of the scheme would be different for the Australian PPS Register (paragraph 187).

While Consumer Action does not have any firm view as to whether a charge should be made for amending a financing statement, any such charge should not be payable by the debtor or other person requesting the change.

We are unsure from the Paper as to how it is intended that change statements and change demand statements will be reflected on the PPS Register. Will they be viewable alongside the original financing statement, or will there be one registration entry, the details of which are amended by a change or change demand statement? From a consumer viewpoint, it would be preferable to have one registration entry, as it is unfair to leave inaccurate or false details on a public register, regardless of whether a subsequent change statement is also on the register. We also consider that all parties would benefit from being able to view one consolidated entry for each registration.

For the same reasons, we recommend that the Registrar be able to remove a registration from the PPS Register once the registration is no longer effective or has been discharged (Q33).

Q27-30 Discharge of registration for consumer goods

We agree that a default registration period for consumer goods of five years is an appropriate and reasonable period and note it is similar to the default listing period for consumer debts generally on credit reports.

Once all obligations relating to a security agreement have been discharged, creditors should be required to discharge the corresponding registration 'as soon as practicable'. In terms of imposing a maximum time period on creditors, creditors will require some time to effect a discharge, however, 15 days seems more than enough time and a long period in which an out of date registration continues on foot. We agree that seven days is a more appropriate period, not only for motor vehicles but for all consumer goods, and better balances the interests of the creditor and debtor.

We also note that there will be circumstances in which a debtor has repaid a loan and discharged their obligations under a security agreement because they need to sell the collateral quickly. There could be scope within the PPS Register regime to include provisions so that a creditor is obliged to discharge a registration immediately if the debtor advises the creditor that discharge is urgent.

In addition, we detailed above the difficulties that some consumers face in locating and contacting an alleged creditor, and recommended that the Registrar should not be permitted to accept and register a financing statement where creditor details such as name and address have not been clearly completed. In terms of discharge, we similarly recommend that the Registrar should be obliged to remove a registration if the creditor is unable to be contacted on the contact details registered. This may be achieved under the proposed change demand process in any case, so long as a debtor is taken to have given the creditor a copy of the change demand statement if it is sent to the contact details listed on the registration.

Q 34-36; 41; 44-45 Privacy considerations

The Paper devotes considerable space to grappling with issues surrounding the information to be made available on the PPS Register, with good reason. This is because there are considerable privacy issues that need to be addressed if collateral held by debtor individuals is able to be registered and searched without a unique serial number. The Paper identifies several, such as: the risk of identity theft; ensuring accurate debtor information; difficulties in limiting access to the PPS Register to legitimate purposes; protecting persons fleeing domestic violence; and how to ensure functional search matching on debtor names.

While Consumer Action agrees that privacy legislation in Australia does not set out the protection of the privacy of individuals as an absolute goal, instead balancing this important interest with other public interests, it is clear that in this case it will be extremely difficult to adequately protect individuals' privacy if their details are publicly searchable on the PPS Register.

Allowing collateral not able to be identified by a serial number to be registered on the PPS Register automatically means that it must be searched by reference to debtor details.

This obviously does not raise concerns over individual privacy where the debtor is a business, and there are legitimate reasons why collateral not able to be identified by a serial number and held by a business debtor should be allowed to be registered, as set out in the Paper.

However, allowing registration and search by debtor details where the debtor is an individual necessarily means that the individual's details will be publicly available. There is no means to limit access to the PPS Register, only the ability to punish after the fact if a search is made for illegitimate purposes, and even then only if a person becomes aware that such a search has been made and by whom. Further, it is not stated whether the PPS Register will enable a record or audit trail of all parties that access the registration entry to be kept, available to only the Registrar and the debtor. If no audit trail is kept, it is most unlikely that breaches would be picked up. On the other hand, if recorded and available to all, this would in itself be a real breach of privacy as it would, in effect, disclose credit applications.

As the Paper notes, in order to ensure accuracy, debtor details available to the public need to include unique identifiers, with debtor name, address and date of birth the most likely options. However, three unique pieces of information about an individual are generally not made publicly available together - not only for general privacy protection (including in cases of domestic violence), but because identity theft becomes possible once three such pieces of information

can be collected. Making such a combination of information publicly available on the PPS Register would significantly increase the current potential for identity fraud.

There is also a significant risk that making this information searchable on the PPS Register will create other problems. For example, it is quite likely that companies would use the PPS register to find individual debtors subject to secured lending in order to market inappropriate debt consolidation services, with all the consequent problems that this entails.

For most secured lending to individuals, these concerns will be overcome if registrations relating to property that has a unique serial number are only able to be searched by serial number. This is due to the fact that most secured lending to consumers is over motor vehicles and boats. Other consumer goods that could be used as collateral may also have unique serial numbers, for example computers and other electrical equipment.

Consumer Action's view is, therefore, that where the debtor is an individual, registration and search of property should only be permitted by serial number. This does not restrict the market for secured lending, only the security interests that may be registered. Further, secured lending over other consumer goods will generally be low value lending and it is doubtful whether many lenders who engage in this form of lending will have much legitimate need for registration in any case. Such an approach also allays the concerns noted above about the keeping of an audit trail or record of parties that have accessed entries on the PPS Register.

There will undoubtedly be many benefits in the creation of a publicly accessible PPS Register. However, the unsurmountable privacy concerns detailed above mean that the goal of having all security interests registrable on the PPS Register will need to be departed from in the case of security interests where the debtor is an individual and the secured property is not able to be registered and searched by unique serial number.

Quite apart from the privacy considerations, such an approach would also reduce the risks that the creation of a PPS Register will lead to an increase in inappropriate asset-based lending and an increase in the use of bad faith blackmail securities, problems discussed earlier.

Q49 Compensation arrangements

Consumer Action agrees that there should be a penalty regime alongside a compensation regime to deal with breaches of the legislation. Penalties and compensation have different functions, with penalties representing the public interest aspect of ensuring a well-functioning register and preventing inappropriate conduct, and compensation directly assisting any party that suffers harm as a result of a breach. The simultaneous operation of penalty and compensation regimes works effectively in numerous other areas, including fair trading, companies regulation and consumer credit.

Q50 Access to the instrument creating the security interest

We consider that the rules outlined in the Paper generally provide an appropriate regime for access to a copy of the security agreement. However, we recommend that there be no exemption from the requirement for the secured creditor to supply information on the grounds that the creditor no longer has an interest in the obligation or collateral, at least for consumer goods. A possible exception could be where the creditor no longer has the documentation or information but has provided it to the successor in interest, and provides the contact details for this party.

The experience of our consumer legal practice is that creditors often sell or factor alleged debts to a third party debt collection company, which then pursues the debtor for repayment. However, when proof of the debt is requested, the debt collection company may not have

access to the original documentation proving the debt and it may be necessary to request such information from the original creditor. Unfortunately, the original creditor may have little interest in the matter and may fail to provide the requested information or documentation.

Q52 Consumer Credit issues – blackmail securities

Consumer Action commends the review team for including a discussion of consumer credit issues in the Paper.

We agree that the Code should remain the principal means by which protection should be provided against the inappropriate taking of security over household goods. However, we recommend that the registration rules prevent the registration of security interests over consumer goods voided by the Code, such as mortgages over all property and mortgages over future property (noted in the Paper at paragraph 333). While we understand that registration does not perfect or permit enforcement of security interests that are void, many consumers will not be so aware and it is likely that unscrupulous creditors would seek to use verification statements or other records of registration as “proof” of these void security interests to unconscionably and misleadingly pressure or “blackmail” consumers into repayment.

In addition, there is the issue of the taking of security interests over household goods that are not voided by the Code, but are nevertheless over consumer goods of low value and of a sort that would otherwise be unavailable to the debtor’s unsecured creditors due to the *Bankruptcy Act 1966* (Cth) (correctly identified by the Paper at paragraph 334).

These types of security interests are commonly referred to as blackmail securities because the creditor generally has no real intention of enforcing the security interest, however, uses the security interest and the threat of repossession to unconscionably pressure consumers into repayment even if they are in financial hardship. Often in these circumstances the consumer would also have good grounds for reopening the transaction as unjust under section 70(2)(l) of the Code, due to their being unable to repay the loan or not without substantial hardship. However, most of the consumers who enter into these sorts of transactions are low-income and/or otherwise disadvantaged, and generally unaware of their rights under the Code (indeed, unaware of the Code’s existence), and thus highly vulnerable to the conduct engaged in by lenders as described above.

Consumer Action therefore considers that there is merit in applying the New Zealand approach to security interests in essential household goods not otherwise voided by the Code. As described by the Paper, the New Zealand approach is to permit registration of security interests over certain consumer goods but exempt those interests from the enforcement provisions.

While the PPS Register should not be the principal means to restrict the unconscionable taking of security interests, and the Paper notes that the Ministerial Council on Consumer Affairs (**MCCA**) is currently considering amending the Code to address these issues, applying the New Zealand approach to valid (not void) security interests over essential household goods would at least meet basic consumer protection needs for the most vulnerable consumers in our community. This approach would also be consistent with the spirit of the *Bankruptcy Act* provisions, which recognise that certain goods are essential and should not be forcibly removed from a person, even if the person is a debtor owing repayment to creditors.

In defining the household goods to be covered under such an approach, consideration could be given to using the definition of essential household goods being considered by the MCCA, as well as the definition of goods not divisible amongst the unsecured creditors of a bankrupt under the *Bankruptcy Act*.

However, we note that the issue of the registration of blackmail securities ceases to be a large concern if our recommendation is adopted to prevent registration of security interests in personal property where the debtor is an individual and the secured property is not able to be registered and searched by unique serial number, detailed above in relation to privacy considerations.

Should you have any questions, please contact me on 03 9670 5088.

Yours sincerely

CONSUMER ACTION LAW CENTRE

A handwritten signature in black ink, appearing to read 'N. Rich', written in a cursive style.

Nicole Rich
Director – Policy & Campaigns



9 February 2007

By email: pps@ag.gov.au

Personal Property Securities Review
Office of Legal Services Coordination
Attorney-General's Department
Robert Garran Offices
3-5 National Circuit
BARTON ACT 2600

Dear Sir/Madam

Review of the law on Personal Property Securities – Discussion Paper 1: Registration and Search Issues (Paper)

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the above Paper prepared under the auspices of the Standing Committee of Attorneys-General.

We generally support the creation of a single personal property securities register (**PPS Register**) and agree that there will be benefits in terms of efficiency, certainty and costs if a PPS Register is created. In terms of the consumer interest we note that, in particular, consumers purchasing second hand motor vehicles and boats will benefit from the availability of a single source to check that the property they are considering purchasing is not encumbered by a security interest, particularly if the PPS Register also allows the searcher to check that the property is not a stolen or written off vehicle.

However, we have some serious concerns regarding the use of the PPS Register to register goods if the debtor is an individual, not a business, and the goods are not identifiable and searchable by reference to the goods themselves, for example by a serial number, and instead persons are able to search the register by debtor name.

We consider that the goal of having all security interests registrable on the PPS Register (starting point 2 for reform) is commendable in theory, but in practice serious privacy concerns justify a departure from this goal in the case of security interests where the debtor is an individual and the secured property is not able to be registered and searched by unique serial number.

Our comments on the Paper are detailed more fully below.

About Consumer Action

Consumer Action is a campaign-focused consumer casework and policy organisation, dedicated to advancing the interests of low-income and vulnerable consumers, and of consumers as a whole. Based in Melbourne, it was formed in 2006 by the merger of the Consumer Law Centre Victoria and the Consumer Credit Legal Service and is funded jointly by Victoria Legal Aid and Consumer Affairs Victoria.

Consumer Action Law Centre
Level 7, 459 Little Collins Street
Melbourne Victoria 3000

Telephone 03 9670 5088
Facsimile 03 9629 6898

info@consumeraction.org.au
www.consumeraction.org.au

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 throughout the community directly.

General comments – asset based lending

As stated above, we endorse the proposal for a single PPS Register. We see large benefits in the proposal for business and also for consumers purchasing second hand motor vehicles and boats.

However, the Paper notes that one of the rationales for reform is to enable access to cheaper finance for borrowers who are able to enter into secured lending (for example, paragraphs 1 and 11). This rationale may apply to borrower businesses and to some consumers, but our experience is that secured lending to consumers is often entered into where *no* loan would be made otherwise.

For many consumers, particularly low-income or vulnerable consumers, asset-based lending does not offer a choice between a higher interest rate on an unsecured loan and a lower interest rate on a secured loan. Instead, asset-based lending is often engaged in by lenders who do not adequately assess, or do not care, whether the consumer will be unable to repay the loan or not without substantial hardship, because the consumer has an asset to which the lender can have recourse if default occurs. Such asset-based lending is not only unfair and exploitative, it is also maladministration of a loan and, in the case of consumer credit, grounds to reopen a loan contract under section 70(2)(l) of the Consumer Credit Code (**Code**), if 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'.

As the Paper itself notes, reform would reduce costs for lenders, including in relation to assessing the borrower's capacity to repay (paragraph 9). We would not like to see an improved system for registering and enforcing security interests lead to a greater volume of inappropriate asset-based lending to consumers, with lenders even less concerned about conducting a full assessment of a consumer's capacity to repay the loan given the increased ease of enforcing a security interest.

In the case of security interests in general household goods, there is the additional concern that lenders do not take such security in good faith to secure repayment, but rather in order to pressure consumers to repay even if they are in financial hardship by threatening repossession of household items (termed 'blackmail securities'), when there is no real intention to enforce the security interest. This issue is canvassed to some degree in Part 11 of the Paper and we address it further below. However, we note here that there is little public interest in allowing such security interests to be registrable.

Q16: Information about motor vehicles

Consumer Action strongly supports the creation of a PPS Register as the single source to check whether a second hand motor vehicle or boat that a consumer is considering purchasing is not subject to a security interest. This is arguably the most beneficial aspect of the reforms for consumers.

We also strongly agree with the National Motor Vehicle Theft Reduction Council's suggestion that a search of the PPS Register relating to a motor vehicle should disclose whether the vehicle has been reported as stolen or written off. In fact, a failure to include such a linkage would undermine the benefits to consumers of having a single register to check the status of a

vehicle they are considering purchasing. This is because it is the consumer as subsequent purchaser who generally bears the loss if a vehicle's status is not clear and the vehicle is later repossessed, either as stolen or subject to a security interest, often at great distress and financial hardship for the consumer.

While we note that a search of the PPS Register that included this additional information would require a search of the National Exchange of Vehicle and Driver Information System, we are unsure as to why an additional fee would need to be charged to the searcher. It would be in the public interest to include information about stolen and written off vehicles in searches as this would help in reducing the unknowing trade in stolen and rebirthed vehicles.

We also note that as this is the one feature of the PPS Register that is likely to be commonly used by consumers, whereas the rest of the PPS Register would be primarily a business tool, the practical effect of an additional fee on motor vehicle searches would generally be to unfairly charge more to consumers who use the PPS Register than businesses.

Financing and verification statements

Our consumer legal practice has helped many consumers who have discovered an inaccurate or false record of a debt has been placed on their credit report, often also meaning they are subject to repayment demands by a debt collector. In these cases, our experience has been that it can be difficult to challenge the debt as the alleged creditor may be hard to find or contact, with contact details for the creditor out of date, unclear or missing.

This highlights the need to ensure that creditor details on a registrable financing statement are clear and complete, including a full name and address and, in the case of companies, a company number. We recommend that the Registrar should not be permitted to accept and register a statement where all such details have not been clearly completed.

In these sorts of cases, the problem is compounded by the fact that the consumer will not have a copy of the contract or instrument allegedly creating the debt, either because no such instrument exists, the creditor failed to give the consumer a copy or the consumer has lost or misplaced their copy (and the creditor cannot be contacted to demand a copy). The need for a consumer debtor to have access to a copy of the contract creating the debt is recognised in the Code, which obligates the creditor to provide a copy both at the time the contract is made (section 18) and at any time upon the debtor's written request (section 163).

We therefore agree that, as under the New Zealand scheme, a person who registers a financing statement and receives a verification statement from the Registrar should be required to give a copy of the verification statement to the debtor. A time period of 15 working days seems unnecessarily large for this requirement, however, and we suggest that a time restriction of 14 days, consistent with the Code, be adopted instead.

It may be appropriate to give business debtors the ability to waive their right to receive a copy of the verification statement. However, we do not agree that consumer debtors should be able to waive their right to receive it. Such a provision would inevitably lead to unscrupulous credit providers requiring consumers to sign such a waiver at the time of entering into a contract creating a secured debt. Inserting such a requirement will therefore only lead to a need to remove it from the legislation down the track as more and more examples of such conduct emerge.

In case of any doubt as to whether this would occur, we note that our consumer legal practice has much experience of such conduct occurring in relation to, for example, used motor vehicle sales in Victoria, where the consumer has cooling-off rights after entering into a sale contract unless they sign a waiver of these rights (section 43, *Motor Car Traders Act 1986 (Vic)*), and

consumer credit contracts, where a consumer is covered by the protections of the Code unless they declare before entering into the contract that the credit is to be applied wholly or predominantly for business and/or investment purposes (section 11).

Q20-22: Serial numbered collateral

Consumer Action supports a requirement that registration of serial numbered collateral include the serial number.

In fact, due to privacy concerns (detailed further below), we consider that personal property being used as collateral by an individual, as opposed to a business, should **only** be registrable by reference to a serial number.

A person considering purchasing or otherwise dealing in an item of personal property and wanting to find out if the item is encumbered does not 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.

Otherwise it is necessary to search by debtor name, which in the case of individuals reveals other information not necessarily relevant to the searcher's needs, including other assets held by the debtor that are encumbered, as well as the debtor's address and possibly date of birth to ensure the correct debtor has been found. The PPS Register would risk becoming similar to a credit report, without the legal protections that apply to credit reporting.

For motor vehicles specifically, Consumer Action agrees that there will be confusion if they are required to be registered in a different category if they are secured as 'inventory'. All motor vehicles used as collateral should be registered as motor vehicles on the PPS Register.

Whilst we have no firm view as to whether it should be possible to specify that registered motor vehicles are consumer goods, equipment or inventory, we do consider that registration of a motor vehicle should always require a serial number if it is intended that registration will perfect the interest and prioritise it ahead of the interests of a subsequent purchaser. If a security interest is not extinguished upon sale to an (unknowing) third party, often a consumer, it is unreasonable to expect the consumer to know to search the register not only for the motor vehicle itself but also under the vendor's name just in case the vehicle was held by the vendor as equipment (or inventory if such an interest is also prioritised). Even if an entry was found under a vendor's name showing a general security interest over the vendor's equipment, it is unclear how a consumer would be able to ascertain if that entry applied to the vehicle in question.

This will not be a concern to consumers if registered security interests over motor vehicles that are not searchable by serial number are not prioritised over the interests of a subsequent purchaser. However, it may be that the most logical way to protect the interests of all parties is to require that registration of all security interests over motor vehicles be by serial number.

If serial number registration is not ultimately required, security interests over motor vehicles that do not specify the vehicle's serial number should not take priority over the interests of a subsequent purchaser of the vehicle, as such a purchaser would not discover the security interest in searching the PPS Register for the vehicle.

However, in any case, as noted above (and detailed further below) all registrations of motor vehicles should be required to be by serial number where the debtor is an individual rather than a business, due to serious privacy considerations.

Q24-25 Debtor initiated changes to register entries

In Consumer Action's view it is indisputable that a debtor or other person with an interest in property registered on the PPS Register should have the ability to demand discharge or amendment in certain circumstances.

The interests of a debtor or other person with an interest in property registered on the PPS Register are directly affected by a registered financing statement and it would be a complete denial of fairness and natural justice to prevent any challenges to a statement. In addition, Australia's experience from its credit reporting system is that errors and inaccuracies in a register relating to debtors but with information provided by creditors do occur. It is therefore necessary for there to be a change demand process for debtors to have their records corrected.

We support the New Zealand scheme's process whereby a person may have changes to a registration made directly by the Registrar if the creditor does not comply with a change demand, unless the creditor obtains a court order maintaining the registration. We do not consider that the alternative approach put forward, in which a decision not to make the change is shifted from the court to the Registrar, is appropriate. In all other ways the Registrar will be performing a purely administrative function, whereas assessing whether a creditor should or should not be entitled to maintain a registration in the event of a dispute requires the ability to assess evidence and make a decision as to underlying substantive matters, a function in which the courts have the relevant expertise. Indeed, the Paper explains that under the New Zealand scheme the Registrar does not look behind the financing statement when it is first registered to confirm that a person is entitled to register it, and there is no suggestion that this aspect of the scheme would be different for the Australian PPS Register (paragraph 187).

While Consumer Action does not have any firm view as to whether a charge should be made for amending a financing statement, any such charge should not be payable by the debtor or other person requesting the change.

We are unsure from the Paper as to how it is intended that change statements and change demand statements will be reflected on the PPS Register. Will they be viewable alongside the original financing statement, or will there be one registration entry, the details of which are amended by a change or change demand statement? From a consumer viewpoint, it would be preferable to have one registration entry, as it is unfair to leave inaccurate or false details on a public register, regardless of whether a subsequent change statement is also on the register. We also consider that all parties would benefit from being able to view one consolidated entry for each registration.

For the same reasons, we recommend that the Registrar be able to remove a registration from the PPS Register once the registration is no longer effective or has been discharged (Q33).

Q27-30 Discharge of registration for consumer goods

We agree that a default registration period for consumer goods of five years is an appropriate and reasonable period and note it is similar to the default listing period for consumer debts generally on credit reports.

Once all obligations relating to a security agreement have been discharged, creditors should be required to discharge the corresponding registration 'as soon as practicable'. In terms of imposing a maximum time period on creditors, creditors will require some time to effect a discharge, however, 15 days seems more than enough time and a long period in which an out of date registration continues on foot. We agree that seven days is a more appropriate period, not only for motor vehicles but for all consumer goods, and better balances the interests of the creditor and debtor.

We also note that there will be circumstances in which a debtor has repaid a loan and discharged their obligations under a security agreement because they need to sell the collateral quickly. There could be scope within the PPS Register regime to include provisions so that a creditor is obliged to discharge a registration immediately if the debtor advises the creditor that discharge is urgent.

In addition, we detailed above the difficulties that some consumers face in locating and contacting an alleged creditor, and recommended that the Registrar should not be permitted to accept and register a financing statement where creditor details such as name and address have not been clearly completed. In terms of discharge, we similarly recommend that the Registrar should be obliged to remove a registration if the creditor is unable to be contacted on the contact details registered. This may be achieved under the proposed change demand process in any case, so long as a debtor is taken to have given the creditor a copy of the change demand statement if it is sent to the contact details listed on the registration.

Q 34-36; 41; 44-45 Privacy considerations

The Paper devotes considerable space to grappling with issues surrounding the information to be made available on the PPS Register, with good reason. This is because there are considerable privacy issues that need to be addressed if collateral held by debtor individuals is able to be registered and searched without a unique serial number. The Paper identifies several, such as: the risk of identity theft; ensuring accurate debtor information; difficulties in limiting access to the PPS Register to legitimate purposes; protecting persons fleeing domestic violence; and how to ensure functional search matching on debtor names.

While Consumer Action agrees that privacy legislation in Australia does not set out the protection of the privacy of individuals as an absolute goal, instead balancing this important interest with other public interests, it is clear that in this case it will be extremely difficult to adequately protect individuals' privacy if their details are publicly searchable on the PPS Register.

Allowing collateral not able to be identified by a serial number to be registered on the PPS Register automatically means that it must be searched by reference to debtor details.

This obviously does not raise concerns over individual privacy where the debtor is a business, and there are legitimate reasons why collateral not able to be identified by a serial number and held by a business debtor should be allowed to be registered, as set out in the Paper.

However, allowing registration and search by debtor details where the debtor is an individual necessarily means that the individual's details will be publicly available. There is no means to limit access to the PPS Register, only the ability to punish after the fact if a search is made for illegitimate purposes, and even then only if a person becomes aware that such a search has been made and by whom. Further, it is not stated whether the PPS Register will enable a record or audit trail of all parties that access the registration entry to be kept, available to only the Registrar and the debtor. If no audit trail is kept, it is most unlikely that breaches would be picked up. On the other hand, if recorded and available to all, this would in itself be a real breach of privacy as it would, in effect, disclose credit applications.

As the Paper notes, in order to ensure accuracy, debtor details available to the public need to include unique identifiers, with debtor name, address and date of birth the most likely options. However, three unique pieces of information about an individual are generally not made publicly available together - not only for general privacy protection (including in cases of domestic violence), but because identity theft becomes possible once three such pieces of information

can be collected. Making such a combination of information publicly available on the PPS Register would significantly increase the current potential for identity fraud.

There is also a significant risk that making this information searchable on the PPS Register will create other problems. For example, it is quite likely that companies would use the PPS register to find individual debtors subject to secured lending in order to market inappropriate debt consolidation services, with all the consequent problems that this entails.

For most secured lending to individuals, these concerns will be overcome if registrations relating to property that has a unique serial number are only able to be searched by serial number. This is due to the fact that most secured lending to consumers is over motor vehicles and boats. Other consumer goods that could be used as collateral may also have unique serial numbers, for example computers and other electrical equipment.

Consumer Action's view is, therefore, that where the debtor is an individual, registration and search of property should only be permitted by serial number. This does not restrict the market for secured lending, only the security interests that may be registered. Further, secured lending over other consumer goods will generally be low value lending and it is doubtful whether many lenders who engage in this form of lending will have much legitimate need for registration in any case. Such an approach also allays the concerns noted above about the keeping of an audit trail or record of parties that have accessed entries on the PPS Register.

There will undoubtedly be many benefits in the creation of a publicly accessible PPS Register. However, the unsurmountable privacy concerns detailed above mean that the goal of having all security interests registrable on the PPS Register will need to be departed from in the case of security interests where the debtor is an individual and the secured property is not able to be registered and searched by unique serial number.

Quite apart from the privacy considerations, such an approach would also reduce the risks that the creation of a PPS Register will lead to an increase in inappropriate asset-based lending and an increase in the use of bad faith blackmail securities, problems discussed earlier.

Q49 Compensation arrangements

Consumer Action agrees that there should be a penalty regime alongside a compensation regime to deal with breaches of the legislation. Penalties and compensation have different functions, with penalties representing the public interest aspect of ensuring a well-functioning register and preventing inappropriate conduct, and compensation directly assisting any party that suffers harm as a result of a breach. The simultaneous operation of penalty and compensation regimes works effectively in numerous other areas, including fair trading, companies regulation and consumer credit.

Q50 Access to the instrument creating the security interest

We consider that the rules outlined in the Paper generally provide an appropriate regime for access to a copy of the security agreement. However, we recommend that there be no exemption from the requirement for the secured creditor to supply information on the grounds that the creditor no longer has an interest in the obligation or collateral, at least for consumer goods. A possible exception could be where the creditor no longer has the documentation or information but has provided it to the successor in interest, and provides the contact details for this party.

The experience of our consumer legal practice is that creditors often sell or factor alleged debts to a third party debt collection company, which then pursues the debtor for repayment. However, when proof of the debt is requested, the debt collection company may not have

access to the original documentation proving the debt and it may be necessary to request such information from the original creditor. Unfortunately, the original creditor may have little interest in the matter and may fail to provide the requested information or documentation.

Q52 Consumer Credit issues – blackmail securities

Consumer Action commends the review team for including a discussion of consumer credit issues in the Paper.

We agree that the Code should remain the principal means by which protection should be provided against the inappropriate taking of security over household goods. However, we recommend that the registration rules prevent the registration of security interests over consumer goods voided by the Code, such as mortgages over all property and mortgages over future property (noted in the Paper at paragraph 333). While we understand that registration does not perfect or permit enforcement of security interests that are void, many consumers will not be so aware and it is likely that unscrupulous creditors would seek to use verification statements or other records of registration as “proof” of these void security interests to unconscionably and misleadingly pressure or “blackmail” consumers into repayment.

In addition, there is the issue of the taking of security interests over household goods that are not voided by the Code, but are nevertheless over consumer goods of low value and of a sort that would otherwise be unavailable to the debtor’s unsecured creditors due to the *Bankruptcy Act 1966* (Cth) (correctly identified by the Paper at paragraph 334).

These types of security interests are commonly referred to as blackmail securities because the creditor generally has no real intention of enforcing the security interest, however, uses the security interest and the threat of repossession to unconscionably pressure consumers into repayment even if they are in financial hardship. Often in these circumstances the consumer would also have good grounds for reopening the transaction as unjust under section 70(2)(l) of the Code, due to their being unable to repay the loan or not without substantial hardship. However, most of the consumers who enter into these sorts of transactions are low-income and/or otherwise disadvantaged, and generally unaware of their rights under the Code (indeed, unaware of the Code’s existence), and thus highly vulnerable to the conduct engaged in by lenders as described above.

Consumer Action therefore considers that there is merit in applying the New Zealand approach to security interests in essential household goods not otherwise voided by the Code. As described by the Paper, the New Zealand approach is to permit registration of security interests over certain consumer goods but exempt those interests from the enforcement provisions.

While the PPS Register should not be the principal means to restrict the unconscionable taking of security interests, and the Paper notes that the Ministerial Council on Consumer Affairs (**MCCA**) is currently considering amending the Code to address these issues, applying the New Zealand approach to valid (not void) security interests over essential household goods would at least meet basic consumer protection needs for the most vulnerable consumers in our community. This approach would also be consistent with the spirit of the *Bankruptcy Act* provisions, which recognise that certain goods are essential and should not be forcibly removed from a person, even if the person is a debtor owing repayment to creditors.

In defining the household goods to be covered under such an approach, consideration could be given to using the definition of essential household goods being considered by the MCCA, as well as the definition of goods not divisible amongst the unsecured creditors of a bankrupt under the *Bankruptcy Act*.

However, we note that the issue of the registration of blackmail securities ceases to be a large concern if our recommendation is adopted to prevent registration of security interests in personal property where the debtor is an individual and the secured property is not able to be registered and searched by unique serial number, detailed above in relation to privacy considerations.

Should you have any questions, please contact me on 03 9670 5088.

Yours sincerely

CONSUMER ACTION LAW CENTRE

A handwritten signature in black ink, appearing to read 'N. Rich', written in a cursive style.

Nicole Rich
Director – Policy & Campaigns