



30 September 2009

By email: [pps@aq.gov.au](mailto:pps@aq.gov.au)

Personal Property Securities Branch  
Attorney-General's Department  
3-5 National Circuit  
BARTON ACT 2600

Dear Sir/Madam

### **Submission on Personal Property Securities Bill 2009**

Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to provide further comment on the Personal Property Securities Bill 2009 (the **Bill**) to the Attorney-General's Department, following the report by the Senate Legal and Constitutional Affairs Legislation Committee (the **Senate Committee**) on the Bill.

We confirm that the comments set out in our submission to the Senate Committee regarding certain provisions of the Bill remain our views on those matters. Thus, rather than simply repeat those comments, we set out below a précis of our views as requested by the Department. Where relevant, the summaries set out below also address the Department's response to our views as set out in the table of comments and responses dated 14 September 2009 produced by the Department.

### **Definition of consumer property**

We agree that most substantive protections for consumers in the Bill are not affected by the definition of 'consumer property', which we support. However, this does not change the fact that three important consumer protections are dependent on the collateral being registered as 'consumer property', being: the critical privacy protections preventing inappropriate registration of grantor details; the more appropriate maximum end time for the registration of 7 years rather than 25 years or indefinite; and the prohibition on the secured party demanding payment for compliance with an amendment demand (cl.178(3)).

The current definition of 'consumer property' may provide certainty for security holders but the purpose of having a separate collateral category of consumer property is supposed to be to provide additional protections for grantors of this sort of property (Explanatory Memorandum §5.33). Thus, the success of the definition should be judged against whether it delivers this protection, not whether it is easier for security holders to manage. At present, even if collateral is used overwhelmingly by an individual for personal purposes, the individual will not have access to the intended protections if the collateral is used to even the tiniest degree in carrying on a business enterprise. Either the definition of 'consumer property' should be amended to align with the other consumer protections in the Bill by stating that it means personal property held by an

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individual that is used *predominantly* for personal, domestic or household purposes; or the three protections dependent on registration as consumer property should be redrafted to apply where personal property is used predominantly for personal, domestic or household purposes.

### **Clause 109(5) - enforcement of security interests in household property**

Clause 109(5) of the Bill excludes certain enforcement rights and remedies in the Bill from applying to collateral used by a grantor predominantly for personal, domestic or household purposes, reflecting the intention that consumer credit laws remain the primary source of rights relating to consumer debts and mortgages. However, it does not exclude clauses 126 (seizure by apparent possession) or 142(2) (ability of debtor to waive right to redeem seized property before disposal), even though these clauses provide for new enforcement rights that do not currently apply in relation to household property. These two clauses should therefore be included in the list of clauses that do not apply to household property under clause 109(5).

### **Clause 157 - verification statements**

There is no effective incentive for security holders to comply with clause 157, which requires security holders to provide notice of changes to registration details to grantors, including the initial registration or removal of a registration. This is the only way in which the Bill attempts to ensure grantors are informed of registrations that affect them, meaning that grantors are wholly reliant on security holders in this regard. The Bill now provides for a civil penalty regime in recognition that the compliance provisions in previous drafts of the Bill were inadequate. Clause 157 should be included in this civil penalty regime for the same reasons, which would significantly improve the effectiveness of the sanction for non-compliance with what is one of the most important protections for grantors under the Bill. There is no reason to wait three years for a review of the new law before making this improvement, as this amendment would not change the substantive obligations of security holders under the Bill in any way, it would merely provide a better guarantee of compliance.

### **Clause 172 – data mining for consumer credit assessment and marketing purposes**

We do not agree with the Department that item 7 (and items 8-10) in the table of authorised purposes under clause 172(2) do not permit searching the register for general credit assessment or marketing purposes. Item 7 clearly states that a person can search for an individual on the register to ‘establish whether to provide credit to, or obtain a guarantee or an indemnity from, a person’, *not* merely to establish whether to provide credit or obtain a guarantee or indemnity secured against a particular item of personal property.

Further, pre-screening of marketing offers could also be encompassed in the overly broad authorised purposes under items 7-10, as explained in the context of the extensive review of general credit reporting laws conducted last year. This would be clearly inappropriate and we do not accept that there is any justification to leave this unaddressed for three years when it could be clarified now.

Items 7-10 in the table under clause 172(2) should be amended to clarify that searches by reference to the details of a grantor are not permitted for general credit assessment purposes nor for credit direct marketing purposes including pre-screening, and are only permitted for

assessment of whether to lend against an item of personal property held by the grantor. There is no reason to wait three years for a review of the new law before making these amendments given there appears to be general agreement that searches should not be permitted for credit assessment and marketing purposes, and the disagreement here relates merely to the drafting not to the underlying policy intention. The drafting could therefore be clarified given legitimate concerns.

### **Addressing patterns of behaviour**

We agree with Legal Aid Queensland that the Registrar should be able to identify and address systemic conduct engaged in by a security holder in breach of their obligations under the new Act. One way to help deal with this issue might be to clarify in the Explanatory Memorandum to the Bill that the Registrar's powers under clause 184 to remove registrations from the register at the Registrar's own initiative if they are satisfied that the retention of the data in the register is contrary to the public interest, might apply where the Registrar has concerns about systemic unfair conduct by a registrant, including registering security interests in personal property that are not valid, for example because such security interests are void under consumer credit laws regardless of registration. The regulations to be made under clause 184 could also address the Registrar's power to remove data from the register due to this sort of systemic conduct.

### **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.

Please contact us on 03 9670 5088 or at [nicole@consumeraction.org.au](mailto:nicole@consumeraction.org.au) if you have any questions about this submission.

Yours sincerely

**CONSUMER ACTION LAW CENTRE**



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