

30 July 2009

By email: legcon.sen@aph.gov.au

Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Sir/Madam

Submission to Inquiry into Personal Property Securities Bill 2009 [Provisions]

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the provisions of the Personal Property Securities Bill 2009 (the **Bill**).

The Government has made several important changes to the Bill following the Committee's inquiry into the exposure draft bill. We support the amendments to include a civil penalty regime, which we believe provides the previously lacking enforcement and compliance system needed to encourage compliance with the substantive obligations under the Bill. We also support the amendments to clarify in the Bill that a consumer's address details will not be recorded on the register and to provide the Registrar with much improved powers to remove inappropriate data from the register.

Below we comment on six outstanding issues relating to the Bill:

1. Data mining for credit assessment and marketing purposes;
2. Regulations;
3. Verification statements;
4. Consumer property definition;
5. Enforcement of security interests; and
6. Individual privacy.

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.

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Data mining for consumer credit assessment and marketing purposes

Section 172 sets out the purposes for which searching the register by reference to the details of a grantor who is an individual are authorised. This is a key privacy protection in the Bill.

Consumer Action is very concerned that item 7 (and items 8-10) in the table of authorised purposes effectively permits data mining and should be removed.

The purpose of the register is to assist persons in making decisions about dealing with an item of personal property by enabling them to check for any encumbrances on that item of personal property. It is not being established for the purposes of providing access to an additional source of personal information about potential debtors for lenders who are considering extending credit to a person.

Item 7 is not consistent with the rationale for the Bill and the establishment of a national register. To the extent that a lender was considering whether or not to extend a specific loan secured against one or more specific items of personal property, the lender would be authorised to search the register. However, item 7 goes much further than allowing searches in this situation. It permits searches when making decisions generally about whether to provide credit to a person.

Decisions about what information should or should not be available to lenders for credit assessment purposes are managed through Australia's credit reporting laws under the *Privacy Act 1988* (Cth). The Bill circumvents this regulation by opening up another source of personal information for general credit assessment purposes.

More importantly, item 7 does not clearly limit such searches to credit assessment, providing 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'. Consumer Action is very concerned that this could be interpreted by lenders as permitting searches of the register for credit marketing purposes. Lenders argue that 'pre-screening', where lenders use credit reports to 'exclude' individuals from direct marketing offers, should be allowed because it is not marketing but enables them to withhold marketing offers from those whose applications for credit would be refused. Thus, in fact, pre-screening's main purpose is to enhance direct marketing strategies, as it enables lenders to avoid embarrassing events (such as having to reject an application from someone who received a "special offer") and allows them to target a wider range of profiles (for example big spenders or financially stressed), knowing that there will be some filtering of these offers.

This is a practice that has been the subject of consideration in the credit reporting context. As part of its extensive review of privacy law and practice last year, the Australian Law Reform Commission recommended that the use of credit reporting information for direct marketing purposes should be prohibited, including the use of information for pre-screening.¹

¹ Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108, May 2008, recommendation 57-3, p1917.

The Privacy Impact Assessment (**PIA**) undertaken on the Bill concluded that it did not think the Bill allowed searches for direct marketing purposes and that it was unlikely the register would be widely used for direct marketing activities in any case, but it did agree that this would not be appropriate, recommending that publicity about the register highlight that searching on an individual's name is not permitted for direct marketing purposes.²

We are not as confident as the PIA that items 7-10 in the table under section 172 exclude searches of the register for direct marketing purposes such as pre-screening. It is not appropriate to allow the register to be accessed for direct marketing purposes and the more sensible solution would be to clarify this in the Bill.

Recommendation

Amend items 7-10 in the table under section 172 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.

Regulations

This is a Bill for which the regulations to be made are particularly important, because the regulations will contain a number of important substantive provisions. We are concerned that we cannot fully assess the final impact and effect of the Bill without an opportunity to review the final proposed regulations, and we therefore urge the Committee to seek access to the proposed final regulations to satisfy itself that they will be appropriate.

One important example is found in section 184(1)(e), which provides the Registrar with the power to remove data from the register if the Registrar is satisfied that the removal is required urgently in the public interest or for reasons prescribed by regulations. This provision applies to the situation in which a person may need to ask the Registrar urgently to remove their details from the register, for example a woman leaving a domestic violence situation. However, the regulations will prescribe the process for applying for urgent removal and the circumstances in which it will take place. The PIA considered that it was appropriate that this process be set out in the regulations rather than the primary legislation because it would be easier to amend in future if new and serious circumstances emerged that also needed to be provided for.³ This may well be correct but we cannot assess the actual substance of the provisions without the release of the final regulations. On a related matter, the PIA also made other recommendations to improve the speed and process for seeking emergency removal of data from the register and some aspects of these recommendations may require further amendments to be made to the Bill.

Verification statements

Section 157 of the Bill requires security holders to provide notice of changes to registration details, including the registration or removal of an entry, to grantors.

² Information Integrity Solutions, *Privacy Impact Assessment Report: Personal Properties Securities Register Project*, For Attorney-General's Department, July 2009, p43.

³ As above, p45.

We have supported this requirement throughout the development of the Bill as it is essential that consumer debtors are informed of registrations that affect them.

However, we continue to be concerned that there is no effective incentive for security holders actually to comply with this obligation. The failure to send a notice of a verification statement to a grantor does not affect the validity of a registration, thus the security holder does not have a business incentive to comply. This leaves possible sanctions as an incentive, but these are also weak. The consumer could sue for damages for non-compliance but this is unlikely to occur and is unlikely to deter unscrupulous credit providers. The Bill has included a new provision deeming non-compliance with this obligation to be an interference with privacy, meaning that a consumer could also make a complaint to the Privacy Commissioner. Yet this does not provide much greater incentive to comply, as there are only limited remedies available in relation to investigations into an interference with privacy under the *Privacy Act* and the highest form of sanction available to the Privacy Commissioner under these provisions is a non-binding determination. The Privacy Commissioner or the individual complainant is then forced to take legal action for court orders if they want to enforce the determination, in which case the court must consider the entire complaint as to whether there was an interference with privacy again, further increasing the costs and time associated with the complaint.

Given that the Bill now provides for a civil penalty regime, we do not understand why section 157 has not been made a civil penalty provision. This would significantly improve the effectiveness of the sanction for non-compliance with this key protection for debtors.

Recommendation

Amend section 157 to provide for civil penalties for its breach.

Definition of consumer property

The Bill recognises that consumer grantors require additional protections to business grantors in some circumstances. Most of these protections apply where the collateral is used by a grantor 'predominantly for personal, domestic or household purposes', which we support.

However, the central privacy protection requiring a registration of property that is consumer property and is required by the regulations to be described by serial number to include no grantor details, and the shorter end time for registrations of consumer property on the register, attach specifically to collateral described as 'consumer property'.

Section 13 of the Bill defines 'consumer property' as 'personal property held by an individual, other than personal property held in the course or furtherance, to any degree, of carrying on an enterprise to which an ABN has been allocated'. This means that property must be registered as commercial property if it is used to only a small degree in a business, even if it is used overwhelmingly by an individual for personal purposes, meaning the debtor may lose important privacy protections. Further, we are concerned that unscrupulous creditors may register consumer property as commercial property by claiming that the property is used to a small degree in a business enterprise being carried on by the individual whether this is true or not, as

currently occurs in relation to the use of “business purpose declarations” under the Consumer Credit Code.

The definition of ‘consumer property’ needs to be improved to ensure the intended protections apply to the intended consumers. The definition should ensure that personal property held by an individual is consumer property if it is used predominantly for personal, domestic or household purposes. This would align the definition of consumer property with the other protections in the Bill that extend to consumer grantors.

Recommendation

Amend the definition of ‘consumer property’ in section 13 to mean personal property held by an individual that is used predominantly for personal, domestic or household purposes.

Enforcement of security interests

Section 109(5) of the Bill provides that certain rights and remedies to enforce a security interest in an item of property do not apply to collateral used by a grantor predominantly for personal, domestic or household purposes.

We support this provision, which ensures that the Consumer Credit Code remains the primary source of rights and obligations relating to consumer debts and mortgages.

However, we note that section 142(2) (allowing the debtor to waive their right to redeem property after seizure but before disposal by the security holder) and section 126 (the right in certain circumstances to seize collateral by taking apparent rather than actual possession) are not provisions found in the Consumer Credit Code and their application to consumer property in the Bill expands the enforcement powers available to consumer credit providers. We therefore recommend that these two sections also be included in the list of provisions under section 109(5) that do not apply to collateral that is used by a grantor predominantly for personal, domestic or household purposes.

Recommendation

Include sections 142(2) and 126 in the list of sections that do not apply to household property under section 109(5).

Individual privacy

As a final matter, we note the Government’s clear intention to enable consumer property to be registered by reference to the individual’s name and date of birth if the property cannot be registered by serial number.

The Bill implements this intention, thus we do not make any further comments about the Bill’s provisions in this regard. We simply note that Consumer Action continues to believe that, as a policy matter, property should not be able to be registered on the register if it is consumer property and is not capable of being identified by serial number. We agree with the Government

that the number of individual consumers identified by name on the register in this way may be small, but we consider that this is an argument in favour of preventing, not allowing, this property to be on placed on the register. It demonstrates that the overwhelming purpose of the establishment of the new national regime and register is not to deal with this sort of small-value consumer property, especially not consumer property that is not a vehicle (which can be registered by serial number). There is limited reason to insist in extending the reach of the register to cover *all* personal property security interests just for the sake of completeness, when there is risk from allowing even a few individual names and date of births to be made so easily and publicly accessible.

The true concern here is to enable all types of personal property security interests granted by businesses, including sole traders, to be registrable, which is a legitimate goal but has meant that consumers have been caught up in the provisions. We continue to believe that the Bill should distinguish between commercial and consumer property in this regard and not allow registration of interests in *consumer* property that cannot be registered by serial number. Rules for determining priorities between interests could be used to deal with the handful of cases that might arise in which a new purchaser bought an item of consumer property that was subject to a security interest but was not on the register. Indeed, section 47 of the Bill already provides that a person who buys personal property intending to use it predominantly for personal, domestic or household purposes takes the personal property free of a security interest if the market value of the property is not more than \$5,000. This provision is likely to reduce the incidence of registration of consumer property by reference to individual name and date of birth, a positive measure, but will not prevent such registrations.

In addition, it is responsible lenders who are likely to be influenced by section 47 not to register low-value consumer property. However, unscrupulous lenders are likely to use such registrations as another tool to threaten consumers with repossession of their household goods, placing pressure on low-income and vulnerable consumers struggling to prioritise their payments.

Thank you again for the opportunity to provide a submission on the Bill.

Yours sincerely

CONSUMER ACTION LAW CENTRE

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