



10 December 2008

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra, ACT, 2600
Australia

GPO Box 5057
Melbourne Victoria 3001
Australia
DX 210643 Melbourne
Level 11
10-16 Queen Street
Melbourne Victoria 3000
Australia
Telephone +61 3 8619 8719
Local Call 1300 666 444
Facsimile + 61 3 8619 8700
Local Fax 1300 666 445
www.privacy.vic.gov.au
enquiries@privacy.vic.gov.au

Dear Sir/Madam,

Inquiry into the Personal Property Securities (PPS) Bill 2008 - Exposure Draft

I refer to the above-mentioned inquiry by the Senate and Constitutional Affairs Committee. Thank you for the opportunity to comment on this Bill. My comments in relation to it are as follows:

Construction of the Register - Information contained on the register – Clauses 187, 188 & 191

Throughout Part 5 of the Bill (which establishes the PPS Register) terms which appear to set out what information will form the content of the PPS Register are not defined within the Bill itself.

The term "details" (clause 191) is left to be defined by the regulations.

The terms "interests in personal property, other than security interests" (clause 187(c)) and "Registration of data other than data in registrations" which allow interests unrelated to security interest to be registered (clause 188) are similarly not defined.

The Bill is too silent on the content of the PPS Register. Crucial terms that define information that will appear on it should be dealt with within the Bill itself and not be left to the regulations.

The Grantor's 'details' – Clause 191

It is understood that a grantor's date of birth (DOB) is to be included in a registration of a security interest. It also appears that a high level of information will be allowed to identify *collateral* that is subject to a registered security interest. For example, registrants may provide descriptive material about the collateral, may attach electronic files identifying it, provide serial numbers for some forms of collateral, and to disclose the secured party's

level of control over the collateral (amongst other information); the Register may also assign a unique identification number to a registration that would provide a high level of specificity. It is not clear therefore, why it is necessary to record an individual's DOB as a further identifier.

If the intention to record DOB is to reduce the likelihood of identity fraud, DOB details should not be returned via an initial public search of the Registrar. Where an individual's full name is not conclusive and further clarification is required to properly identify a security interest, then provision could be made for subsequent access to DOB to be provided only on further application to the Registrar. This "layered approach" prevents personal information being disclosed unnecessarily and is therefore a more privacy enhancing method of confirming identity where doubt arises.

The provision of notices – Clause 221

Under clause 221 of the Bill, grantors (who are more likely to be individuals) do not receive key notices direct from the Registrar (e.g. of "notifiable events" such as their information being placed on the PPS Register via new registrations or changes which may involve their personal information). The Bill also does not provide an adequate system for notices to people who have interests in existing registered encumbrances if these are to be migrated from State registers to a new national PPS Register.

It is inappropriate to rely on the National Privacy Principles (NPPs) as the means by which secured parties will provide prior notice to individual grantors that their personal information will be placed on the PPS Register, as not all secured parties will be bound by the NPPs. This is particularly concerning in light of the lack of monetary threshold on registering interests (e.g. for consumer items such as normal household goods). No threshold will enable interests in low value goods such as jewellery, televisions and stereos held as security by small money lending businesses (e.g. 'pawned' items) to be registered. Small businesses and individuals not bound by the NPPs notice requirements will therefore be able to register their own interest and disclose a grantor's personal information on the PPS Register without a requirement to inform a grantor prior to this. While this may protect the secured party's commercial interest, it may adversely affect the privacy interests of grantors.

In short, consideration should be given to making the PPS Registrar responsible for provide notices to the grantors.

Searching the Register - Results returned in a search – Clause 226

Clause 226(2) states that "the Registrar must ensure that the way in which the results of a search are worked out in response to an application for search is determined in accordance with any regulations made for the purposes of (the) section." However, there is little indication as to how information might be returned on the PPS Register when a search is conducted (e.g. what information a searcher has the right to access). This is concerning. It is clear that how searches are to be conducted is to be left to be discussed with users as the Register develops.

It is normal when creating a new public register to state *within the legislation* itself what information is able to be accessed by the general public. Clause 226(2) effectively leaves

the release of personal information to be decided by the Registrar - which for a public register of this size and scope is wholly inappropriate. It is unacceptable from a privacy perspective that the form of the Register is to be worked out *after* the Bill is enacted.

Improper searches - Safeguards and consequences – Clauses 227 & 228

In effect, the Bill only requires larger businesses to conduct searches of the PPS Register for a proper purpose (see below). Therefore the Registrar should be provided with better powers to deter individuals and small businesses from using personal information on the PPS Register improperly. For example, where an individual or organisation has searched the PPS Register for an unauthorised purpose, the Registrar should have the power to refuse that individual or organisation the right to conduct further searches in general, or further searches in relation to specific categories of property for a set period of time.

Further, it is important that an individual have the ability to apply to the PPS Registrar to have their personal information withheld from appearing on the Register. Individuals should be notified directly by the Registrar of this right, and this suppression mechanism should be detailed within the Act itself, rather than possibly being left to regulations.

It is also my understanding that it is not the intent of the PPS Register to allow general credit profiling of an individual grantor's debt history, nor the profiling of a secured parties' clients to facilitate further offers of credit unrelated to the registered collateral. However, clause 227(1), Item 7 allows a person to search the Register "*to establish whether to provide credit to, or obtain a guarantee or an indemnity from, a person named in the search application or a person with an interest in the personal property described in the application.*" The breadth of this clause may inadvertently allow credit profiling.

Improper searches - The right of complaint – Clause 228

From the privacy perspective the greatest concern with Exposure Draft of the Bill is that under clause 228, only those organisations falling within the jurisdiction of the *Privacy Act 1988* which conduct improper searches of the PPS Register can be the subject of a complaint to the Federal Privacy Commissioner. Individuals whose details are misused by small businesses and other individuals searching the Register are without a sufficient remedy. Leaving an individual to pursue an action for damages under clause 236 but providing others with the opportunity to complain to the Federal Privacy Commissioner is wholly inadequate.

Part 7.4 of the *Criminal Code Act 1995*, which makes false or misleading statements an offence (e.g. when a searcher falsely affirms that their search is for an authorised purpose), relies on the willingness of the Federal Police to take action upon a false statement.

There is no reason for small businesses to effectively be exempt from complying with the authorised search requirements of the PPS Register. The Australian Law Reform Commission (ALRC) in its May 2008 Report - 'For your information – Australian Privacy Law and Practice' recommended that the small business exemption in the *Privacy Act 1988* be removed. Recent *Anti-Money Laundering and Counter-Terrorism Financing* legislation recognised the importance of equality in accountability by creating a precedent for extending privacy obligations and protections to small businesses. Similar protections should be included in this Bill.

Data Quality

To assist in the accuracy of registrations on the Register, it is proposed that validity checks are performed as against other databases. Specifically, it is proposed to cross reference the PPS Register against ACN details on the Register of Companies administered by the Australian Securities and Investment Commission, as well as VINs of motor vehicles on NEVDIS.

Data matching between government databases for the purpose of data cleansing inevitably raises privacy concerns. Other databases may not be an accurate source of information by which to cross reference data. Road traffic authorities' databases are known to contain significant inaccuracies. Proposals to cross reference and 'cleanse' data should be treated with caution, with appropriate limitations placed on the ability to data match within the Bill itself.

Privacy Impact Assessment

Due to the potential volume of personal information contained on the Register and the nature of the security interests registered, it is essential that a Privacy Impact Assessment (PIA) be undertaken of the PPS Register by an external body. In light of the extended scope of the PPS law reform proposal, failure to conduct an external PIA may diminish the credibility of the PPS Register's implementation from a privacy perspective.

Thank you for the opportunity to provide comments on these issues.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Helen K. Versey". The signature is fluid and cursive, with a large loop at the end.

HELEN VERSEY
Privacy Commissioner