



**Australian
Privacy
Foundation**

Inquiry into the Personal Property Securities Bill 2009

Submission to the Senate Standing Committee on Legal and Constitutional Affairs

July 2009

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The Australian Privacy Foundation

The [Australian Privacy Foundation](http://www.privacy.org.au) is the main non-governmental organisation dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians. Since 1987, the Foundation has led the defence of the right of individuals to control their personal information and to be free of excessive intrusions. The Foundation uses the Australian Privacy Charter as a benchmark against which laws, regulations and privacy invasive initiatives can be assessed.

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History and Process

We welcome the opportunity to make a submission on this significant legislation. The Committee will be aware of our December 2008 submission to its earlier inquiry on the Exposure Draft Bill. We were very heartened to see that the Committee took up a number of our concerns in its report of that inquiry. The government has in turn responded to the Committee's recommendations with some significant amendments and by commissioning a Privacy Impact Assessment from IIS Consultants. IIS met with APF during the course of the PIA and we also made a written submission to them.

You will also be aware that we were very concerned that the current Bill was introduced, and referred to the Committee, without the PIA report being available. We wrote to the Attorney-General's Department on 11 July, with a copy to the Committee, requesting that the PIA be released, and it was, on 15 July.

While we welcome the belated release of the PIA, we note that it was not available for the passage of the referral of powers legislation through the NSW Parliament on 17 June, and has only been available to the Committee, and to stakeholders, for less than half of the period of the Committee's Inquiry. We urge the Committee to make the generic point to government that the value of a Privacy Impact Assessment on an initiative or draft law is severely diminished if it is not timed so that their results are available during critical periods of public debate.

The remainder of this submission is in the form of a commentary on the findings and

recommendations of the PIA, as this provides a sound basis for a privacy critique of the current Bill.

We urge the Committee to expressly seek the views of the Commonwealth and Victorian Privacy Commissioners, both of whom shared many of our concerns about the draft Bill.

Overview

While the authors of the Bill and supporters of a national PPS Register have belatedly acknowledged some of the privacy concerns, they remain in our view somewhat blinkered in their assumption that a PPS Register needs to include all personal property securities over a fixed monetary threshold, even where the property concerned is not uniquely numbered, and therefore can only be registered by reference to the individual grantor (borrower). We remain of the view, which is also held by the Consumer Action Law Centre, that the policy objectives of the scheme could substantially be met by a scheme which excluded securities in this category (estimated to be in the order of 140,000 initially) and therefore entirely removed any privacy issue.

While the scheme design has been altered in ways which make it less privacy intrusive, we submit that the recommendations in the PIA report rely too heavily on notice to individuals and on a proposed 3 year review as the main means of addressing outstanding privacy concerns.

We nevertheless support all of the recommendations of the PIA and urge the Committee to recommend that the government at least adopt them all, subject to our further suggestions below.

Volume of personal information on the Register

We welcome the proposed introduction of a \$5,000 property value threshold for registration. This, together with the requirement that no grantor name be registered for property that is uniquely numbered means that the size of the population for whom there will be privacy implications is limited.

However, we remain concerned that there are no firm estimates of the scale of the residual number of expected 'grantor name' registrations. AGD have apparently made a very crude estimate, based on the New Zealand experience of up to 140,000 individuals (PIA Report p.13) but this would appear to be of the initial 4.7 million entries to be migrated from existing registers – after 5 yrs total the total number of entries is predicted to rise to up to 6.9 million (p.15), so one would expect the number of 'grantor name' registrations to increase from 140,000 as well. So it remains the case that many hundreds of thousands of individuals will have their personal details included in the Register.

We are also concerned about the possibility that custom and practice in the lending industries might lead to property with a value of less than \$5,000 being routinely included, even though registration of such items cannot be used to 'perfect' title. The threshold will not be effective in limiting the scale of privacy intrusion unless there is an express prohibition on registration of items under this limit.

Definition of consumer property

We are concerned that the definition of 'consumer property' in the Bill means that even the slightest intended use partially for a business purpose would not be covered, and such property

would therefore lose the protection of the privacy safeguards in the Bill, which apply only to registration of ‘consumer property’. There is also a risk that lending organizations would market loans as having a business purpose even where it did not, in order to avoid some of the constraints that apply to ‘consumer property’ registrations.

We submit that 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.

Contents of the Register

We welcome the proposal to include the permitted contents of the Register in legislation rather than Regulations.

We also welcome the decision not to include grantor address information. On balance this is privacy protective, despite removing the option of the Registrar taking responsibility for verification notices. However, we remain concerned that the reliance on name and date of birth alone will contribute to data quality and matching problems, and foreshadow arguments being made for inclusion of addresses in due course. This is one reason why we support the PIA Recommendation for a further Privacy Impact Assessment before any such changes, and why we favour stronger safeguards in relation to future scheme changes (see below under ‘function creep’).

The contentious issue of date of birth (DoB) information is well canvassed in the PIA Report (pp 24-28). While the scheme now includes some good mitigants, we remain of the view that exclusion of entries based on grantor name is the preferable solution. Limiting identifying content of such entries to name and DoB seems to us to satisfy neither the industry requirements for an efficient register, nor consumer concerns about the privacy risk.

We note the arguments for allowing the inclusion of information on the Register before a transaction is complete and that the Bill now requires the removal of this information if a transaction is not completed.

Notice of registration

The issues around the provision of notice are well canvassed in the PIA Report (4.1.3). We agree that on balance the obligations should lie with secured party not Registrar (to avoid registration of the extra contact details which would be needed). The Report seems to support the need for notice *before* registration but Recommendation 3 seems to accept the AGD view that NPP 1.3(d) may require specific mention of the PPRS, leaving any doubt to a retrospective review (Recommendation 4). We submit that the AGD view runs counter to the approach to NPP 1.3 compliance taken by most organizations and by the Privacy Commissioner, and therefore cannot be relied on. In any case, even if NPP 1.3 did require specific notice it would still be necessary to impose the same obligation through the PPS Act on those secured parties not subject to NPPs. We submit that there should be an express requirement in the PPS legislation for all secured parties to notify individual grantors of the proposed registration, as well as the post registration verification notice.

Even if there is an unambiguous notice requirement, we understand that non-compliance with s.157 would not attract a civil penalty. Given the weakness of the Privacy Act complaint regime, we submit that a civil penalty should apply for non-compliance with the notice

requirements.

Searching the Register

The scheme allows for search by grantor's details (if individuals) where there is no serial number or other unique identifier, but will only give a result if there is a direct match on name and DoB (PIA Report p.18). Filtering by class of collateral may be possible but would not be mandatory. We submit that the Register should include class of collateral wherever possible, and that filtering by class of collateral be made mandatory when searching – this would limit the disclosure of irrelevant registrations – one of the major privacy risks. In most cases, a searcher will only be interested in a particular class or classes of collateral and there is no need for them to see a complete list of all securities registered for a particular individual grantor (borrower).

We note that the scheme also allows for 'retrospective' searches (PIA Report p.19) – it is not clear to us what value this had in relation to the scheme objectives, while it clearly increases the privacy risk.

We note that casual users making a search must give a name but no evidence of identity will be required. There will always be a payment record – of a cheque or credit card payment. The card details will be stored only as a 'hash' meaning we assume that the identity of the payer could only be retrieved via the card issuer. We question whether reliance on payment records rather than evidence of searcher identity provides sufficient information for an effective audit trail (see further below). The PIA Report notes the potential for detecting frequent use of same credit card (p.20) – but audit activity of this sort, while anticipated (PIA Report p.40), does not appear to be mandated.

Application of Privacy Act

We welcome the provisions that make failure to provide a verification notice, and unauthorised access to and use of Register information 'interferences with privacy' under the Privacy Act 1988 (ss 157(4) and 173(2)). However, we note that the Bill provides for Privacy Commissioner investigation of a complaint to cease if it is serious (PIA Report p.21). We assume that the intention is that the Privacy Commissioner would refer such a complaint to the Registrar or DPP for consideration of a civil penalty option, but would like to see this made an express requirement. Otherwise, the scheme would have the bizarre outcome that minor complaints would be pursued but there would be no certainty that serious complaints would be. Also, as already noted under 'Notice requirements' it is not clear that a failure to provide a verification notice would attract a civil penalty – we repeat our submission that it should clearly do so.

Data Quality

We note that it is proposed that there be verification checks against other data sources including the National Exchange of Vehicle and Driver Information System (NEVDIS), but that there will be no checks of grantor name and date of birth (DoB) (PIA Report p.14). We remain concerned that insufficient account has been taken of potential data quality problems and the potential for both type one and type two errors, which could have adverse consequences for individuals (see comments below about searching).

The requirement to enter a name, when registering, in a specified form, e.g. as it appears on their driving licence (PIA Report 4.3.1) may be an aid to data quality but it conflicts with other

privacy principles to the extent that it limits the freedom of individuals to use any legitimate name when entering a transaction. This is a wider identity management issue – many individuals have more than one legitimate identity, but it is always undesirable for individuals to be put under pressure to conform unnecessarily to a single identity ‘label’. We submit that a case has not been made for why this is considered necessary in the context of the register, given that its focus is on the property not the individual.

Retention

We note that Registration is proposed to last for 7 yrs (for personal and serial numbered property), presumably subject to the overriding requirement to remove a registration. The PIA report discusses retention (4.2.2) but makes no recommendation other than leaving it to the archives policy yet to be developed. We submit that this is not good enough and that the government needs to set and justify a specific retention period before the legislation is enacted.

Security

The proposed security arrangements, discussed in the PIA report (4.2.3) appear generally satisfactory, but we query if the proposed audit trail will be adequate – as noted above, it seems that there will be a detailed log of all changes (PIA Report 3.4.2), but not of mere access/search (the report is ambiguous at 4.2.2).

Identity Crime risk

We agree with the PIA consultants that while the Register may not be a preferred source of data for Identity crime, this will remain a risk (PIA Report 4.2.4). The consultants seem to suggest that the provision of notice, so that individuals can decide whether to borrow, is a sufficient response. We disagree – identity crime will clearly not be a consideration for borrowers, and even if they did consider it, choosing not to borrow is an unrealistic option, and it is unfair to put the burden on individuals having to opt out of normal financial life. The risks should be addressed systemically by lenders and by the design of the Register and its operational processes.

Credit reporting issues

In its consideration of the relationship with the credit reporting provisions of the Privacy Act (Pt IIIA), the PIA Report avoids the key issue by (4.4.2) – IIS ducks the s.18N issue – accepting the Attorney-General’s Department’s assurance that PPSR info would not be ‘credit-worthiness’ info under s.18N of the Privacy Act. We find it difficult to see why it would not be, especially when ‘establishing whether to provide credit’ is one of the expressly permitted purposes. The potential for the PPSR to be used to undermine Part IIIA controls remains and is not in our view adequately addressed.

We are also not convinced that direct marketing and pre-screening uses are definitively prohibited – the PIA consultants relies on them not being covered by the ‘permitted purposes’ in the Bill, specifically items 7-10 in the table in s.172 (p.43, Recommendation 10). We note that the ALRC has recommended that the prohibition of direct marketing and pre-screening uses of credit reporting information should be put beyond doubt by amendments to the Privacy Act, and we understand the government is likely to accept this. We submit that for consistency, the PPS Act should also include an express prohibition.

Other issues

In relation to links to other databases, we submit that the PIA report (at 4.4.3) misses the opportunity to recommend a requirement on the Registrar to observe the Privacy Commissioner's Data-matching Guidelines for Commonwealth agencies.

In relation to a facility for requests for suppression of addresses, we disagree with the PIA Report recommendations that provision of this option be left to a general discretion in a Regulation and then a policy (Recommendations 11 & 12). We submit that a right to suppression in certain circumstances should be express at least in a Regulation if not in the Act.

In relation to the potential for 'Function creep' we submit that the PIA Report's Recommendation 14 is too weak, and that there should be an express requirement for a further PIA and parliamentary scrutiny for any significant scope extension. This would give binding effect to the assurances in the Explanatory Memorandum.

For further contact on this submission please contact

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