



Office of the  
Victorian Privacy  
Commissioner

Office of the Victorian Privacy Commissioner

Submission to the  
Senate Legal and Constitutional Affairs  
Committee

on

***The Inquiry into the Personal Property Securities  
(Consequential Amendments) Bill 2009***

9 November 2009

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## 1 Introduction

The Privacy Commissioner is currently on leave and has delegated all of her powers and functions to me under section 61(1) of the *Information Privacy Act 2000*.

The Personal Property Securities Bill 2009 ('PPS Bill') will harmonise and streamline more than 70 existing pieces of Commonwealth, State and Territory legislation and establish a national Personal Property Securities Register ('PPS Register'). The Bill will provide for electronic registration and search processes that will replace more than 40 different current registers of security interests. While I recognise the benefits of Personal Property Security reform and support the proposed reforms generally, the consolidation of all personal property security interests into a single national "super register" has a significant potential impact on personal privacy. This is due to the number of individuals affected by having their personal information included on the register, together with the nature of the information which may be made publicly available. Thus, privacy protections must be built into the system, both within the PPS Bill and this Personal Property Securities (Consequential Amendments) Bill 2009 [the PPS (Consequential Amendments) Bill].

I refer to the previous submission by the Victorian Privacy Commissioner to the Inquiry into the PPS Bill, dated 31 July 2009.<sup>1</sup>

My comments in relation to the PPS (Consequential Amendments) Bill are as follows.

## 2 Amendment to the *Privacy Act 1988* - Clause 26

Clause 26 amends section 13 of the *Privacy Act 1988* (Cth). It makes '(b) a search of the Personal Property Securities Register that is unauthorised under subsection 173(3) or (4) [of the PPS Bill]' a new interference with an individual's privacy under section 13 of the Privacy Act. In effect, this amendment deems searches not authorised under section 171 of the PPS Bill or prohibited under section 172(3), an interference with an individual's privacy, as well as prohibiting certain subsequent uses of personal information obtained in such a way: (section 173(4)).

The amendment in clause 26 provides individuals with a right of complaint to the Privacy Commissioner for misuse of their personal information on the PPS Register. However, some types of permitted searches set out in section 172(2) of the PPS Bill are overly broad, undermining the usefulness of this right of complaint, and may potentially allow for personal information on the PPS Register to be searched and used for credit profiling and/or direct marketing.

For example, this office has been advised that it is not the intent of the PPS Register to allow credit profiling of an individual grantor's debt history, nor the profiling of a secured parties' clients to facilitate further offers of credit. However, section 172(2), 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."

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<sup>1</sup> Available at [www.privacy.vic.gov.au](http://www.privacy.vic.gov.au)

Consideration should be given to including an express provision in the PPS (Consequential Amendments) Bill addressing the issue of credit profiling and prohibiting the use of PPS Register information for direct marketing.

### 3 Amendment to the *Privacy Act 1988* - Clause 30

Clause 30 inserts section 49A into the Privacy Act. Section 49A requires the Privacy Commissioner, if having formed the opinion that subsection 172(3) of the PPS Bill has been contravened (the civil penalty provision) to advise the PPS Registrar and discontinue the investigation under the Privacy Act. The Privacy Commissioner can only continue the investigation under the Privacy Act if the Registrar does not pursue an order for a civil penalty against a searcher under section 222.

In the event that the Registrar applies for an order, the above provisions may effectively leave individuals whose personal information has been inappropriately searched on the PPS Register without an ability to seek a personal remedy against the searcher. The civil penalty provisions under the PPS Bill may require a searcher to pay a pecuniary penalty to the Commonwealth, however, they do not address the issue of compensation for a complainant. Under section 222, the Registrar has six years from the date of the contravention to decide whether to apply for an order. In the event that the Registrar decides not to pursue an order and the Privacy Commissioner continues the investigation, this time limit may inadvertently result in substantial delays for a complainant.

Consideration should be given to amending the PPS (Consequential Amendments) Bill to ensure that individuals retain the right to seek a personal remedy under the Privacy Act for a breach of section 172(3).

### 4 Right of Complaint against all Searchers

Currently under the Privacy Act, a right of complaint only generally exists against Federal Government Departments and some parts of the private sector.

The PPS (Consequential Amendments) Bill has not effectively addressed the issue of whether a right of complaint to the Privacy Commissioner will exist against all parties conducting unauthorized searches of the PPS Register, including those exempt as "small businesses" from compliance with the Privacy Act (sections 6C, 6D).

As a result, individuals whose details are misused by small businesses searching the Register are left without a sufficient remedy under the current PPS scheme. Indeed, there is no compelling reason for small businesses to effectively be exempt from complying with the authorised search requirements of the PPS Register.

The Australian Law Reform Commission in its September 2007 Issues Paper - 'Review of Australian Privacy Law' recommended that the small business exemption in the Privacy Act be removed, due to the exemption being neither "justifiable nor necessary".

The recent *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) recognised the importance of equality in accountability by creating a precedent for extending privacy obligations to small businesses.

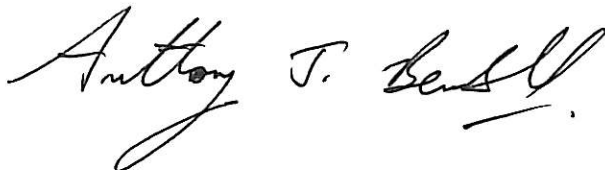
This was achieved by amending the Privacy Act to insert, before subsection 6E(1), the following:

(1A) If a small business operator is a reporting entity (within the meaning of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*) because of anything done in the course of a small business carried on by the small business operator, this Act applies, with the prescribed modifications (if any), in relation to the activities carried on by the small business operator for the purpose of compliance with:

- a) the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*; or
- b) regulations or AML/CTF Rules under that Act;

as if the small business operator were an organisation.

A similar amendment to the Privacy Act should be made to ensure that a right of complaint regarding inappropriate searches of the PPS Register applies against all searchers of the PPS Register, not just some.



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