



**Australian
Privacy
Foundation**

Inquiry into the Personal Property Securities Bill 2008 [Exposure Draft]

Submission to the Senate Standing Committee on Legal and Constitutional Affairs

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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.

Please note that postal correspondence takes some time due to re-direction – our preferred mode of communication is by email, which should be answered without undue delay.

Failure to address previous submissions

We are extremely disappointed that the Attorney-General's Department has failed to address the concerns we have raised in our submissions firstly in August 2008 on the Draft Bill¹ and then in September 2008 on the PPS Regulations Discussion Paper². These concerns relate primarily to the proposed National PPS Register. We note that the Australian Privacy Commissioner also made a submission on the Draft Bill raising many of the same concerns³, and that the Victorian Privacy Commissioner has made a critical submission to your inquiry. In this submission, we find ourselves having to ask many of the same questions that we have asked twice before, and we are alarmed that so little attention appears to have been paid to these very serious concerns. In places below, we refer to the Regulations Discussion Paper as the most recent source of information on relevant details – information which is not to be found in the Revised Commentary on the Exposure Draft Bill.

We gain the distinct impression that the PPS Reforms have been designed and driven by a large community of corporate lawyers who are doing a very thorough and professional job but from a very narrow and blinkered perspective that completely fails to take account of some important

1 <http://www.privacy.org.au/Papers/index.html>

2 <http://www.privacy.org.au/Papers/PPSRegs-AGs-0810.pdf>

3 http://www.privacy.gov.au/publications/sub_ppsb_0808.html

wider implications of the reforms. This community also uses arcane and specialist language which makes it very difficult for lay persons to understand and comment on the proposals.

In the earlier Draft Bill, privacy was acknowledged as an issue but was supposedly taken care of by a single proposal - to make unauthorised access to the PPS Register an 'interference with privacy' under the Privacy Act, with the normal Privacy Act right of complaint (2.39). This provision appears to have been modified in the Exposure Draft Bill to include unauthorised use of data (see Commentary B53), although it is not at all clear how this would work – see our detailed comments below. However, as we submitted in August (and the Victorian Privacy Commissioner also emphasises), this supposed safeguard is substantially undermined by the fact that the vast majority of small businesses and individuals who might access the register are currently *exempt* from the Privacy Act (and while the ALRC has recommended the removal of this exemption the government does not propose to even consider this before 2010). We refer you to our August submission in which we point to a range of other problems in relying solely on the complaint provisions of the Privacy Act.

Our other main concern is that the creation of a new National Register will to some extent duplicate large parts of the consumer credit reporting databases which are strictly regulated under the Privacy Act. Following the ALRC's recent Report of Privacy in Australia, the Departments of Prime Minister and Cabinet and Treasury are currently consulting on reform of the credit reporting provisions, and yet the significant potential of a PPS Register to circumvent some of the protections is not being considered.

The revised Commentary on the Exposure Draft Bill (December 2008) devotes only two paragraphs – B51 and B53 on page 162 – (in a 163 page document) to changes since the May 2008 Draft to address privacy concerns. While this belated recognition of some of the privacy issues is welcome (and we refer to specifics below), it is in itself wholly inadequate.

The continuing lack of adequate consideration of privacy issues highlights the need for a full Privacy Impact Assessment (PIA), as recommended by the Privacy Commissioner for privacy significant projects, to be conducted and made public. While a PIA should have been conducted at a much earlier stage in the PPS project, it is not too late and is essential for properly informed debate about the draft legislation and Regulations.

Failure to publish submissions

Contrary to normal and officially recommended practice, the Department has failed to publish submissions on the various rounds of consultation on the PPS reforms – despite giving notice of this as the 'default' when inviting submissions. This makes it very difficult for interested parties to see the evolution of arguments and to understand the positions of other stakeholders. We urge the Department to put all submissions received, both on the Regulation Discussion Paper and previously, on its website.

The summaries of consultations on the PPS website, and in the Newsletter, refer only to industry concerns – it is as though the Department has not even recognised the consumer and privacy concerns.

Premature expenditure on the Register

We are extremely concerned that the Department is proceeding with a contract for the design of a Register before some of the critical parameters have been legislated. The first PPS Reform Newsletter notes that in November, a systems integrator was appointed and a tender for a

Contact Centre was to be released.

We refer to recent experience with the proposed Access Card, where millions of dollars were wasted both on direct government expenditure and on aborted industry tender preparation as a result of premature contracting before Parliament had approved the project, which was finally abandoned following the change of government.

We submit that no further contracts should be let, and work suspended under any contracts already signed, until the legislation has been enacted, and call on the Committee to support this, not least so as to re-assert the primacy of Parliament over the Executive, but also because the design of the scheme may change as a result of parliamentary debate, and substantial taxpayer funds could be wasted on premature design and implementation.

Scope of the Register

Draft Regulations DP Section ^21 – Meaning of security interest

“44. The Bill takes a functional approach to the characterisation of personal property securities. It defines a security interest as an interest in personal property that in substance secures payment or performance of an obligation. This broad definition would have the effect of bringing a wide class of transaction within the operation of the Bill - a significant benefit of the reform.” (Our emphasis)

Draft Regulations DP Section ^192/3 – Registration of data other than data in registrations

At paragraphs 130-131 the DP anticipates Regulations to provide for registration of 'other interests' in personal property such as those arising from motor vehicle confiscation and impoundment legislation and confiscation of proceeds of crime legislation.

These two provisions confirm our concerns about the potential breadth of the Register. As we submitted in August, both the inclusion of so many 'security interests' and the provision for 'other interests' compound the risk that the Register will become a very valuable database of personal information, susceptible both to authorised use 'function creep' and to unauthorised access (including as a target for identity crime).

We raised another 'scope' parameter in our August submission:

“the Commentary on the draft Bill does not clearly explain the 'reach' of the proposals, particularly in terms of the monetary threshold – para 2.11 (re Clause 83) talk of an interest value threshold of \$5,000 but it is not clear if this translates into an asset value threshold or if this means that interest/asset values below this threshold would not be included in the Register. The Bill provides for registration of all security interests in personal property (10.3) and Clause 21 defining security interest does not contain any value threshold. This is not only unclear but also inconsistent.”

We could not find any further explanation in the Regulation DP and again sought clarification in our October submission.

Content of the Register

Draft Regulations DP Section ^19 – Details about a person

This would provide for the Register to include details of 'grantors' and 'secured parties'

including, where they are individuals, name and date of birth, known to the secured party either pursuant to AML-CTF ID requirements, or from other ID documents.

Under 'rationale' the DP says:

“28. It is essential that secured parties provide enough information about grantors as is necessary to enable their ready identification in a search of the PPS Register. It is important that the amount of information that is recorded on the PPS Register about an individual is kept to a minimum. This is to ensure that the privacy of individuals is not compromised.

29. The accuracy of information recorded for ‘grantors’ will be more critical than the information that is recorded in respect of ‘secured parties’. This is because incorrect grantor details will result in the registration being seriously misleading whereas secured party details may not be (sections 202 and 203). The manner in which search results are to be worked out in response to an application for search (for example, whether the Registrar adopts exact match or fuzzy match search methods) will also be relevant to how accurately information about grantors and secured parties is required to be recorded on the PPS Register (section 228(2)). “

We remain unclear about the relationship of the concepts of 'grantor' and 'debtor' – are they synonymous? It seems likely that the Register will contain personal information about a substantial proportion of all consumers in their capacity as grantors/debtors. Presumably some secured parties may also be individuals, and therefore have their personal details included in the Register for this reason. This uncertainty reflects our criticism that the entire consultation to date has been conducted between industry/legal experts, without any real attempt to explain its impact in 'lay' terms. We seek confirmation of the meaning of these terms and an estimate of the number of individuals whose personal details will be included in the Register.

The Regulations DP suggests that the accuracy of the identity of 'secured parties' may be 'less critical' than that of 'grantors'. We question the practical effect of this in relation to the Privacy Act rights of any individuals to accurate complete and up to date information (IPPs 3 & 8). It is also essential for the identity of secured parties to be accurate and readily available to the debtor/grantor, especially in the event of any complaint or dispute.

It is still not clear to us why the main objectives of the legislation, and of the Register, cannot be achieved through searches on property details, without the need to allow any searches for named individual grantors or to result in the disclosure of the personal details of individuals who may be grantors. There may be a credible explanation for why this is a necessary functionality, but it has yet to be given.

We note that paragraph B51 of the Revised Commentary states that “... where property is serial numbered consumer property, the grantor’s details will not be recorded.” This would appear to partially reduce the privacy risk associated with the Register, but we remain unclear as to what proportion of registrations are likely to fall into this category, and therefore as to the size of any residual problem. We submit that the Committee should specifically request an estimate, pending the findings of a wider Privacy Impact Assessment.

We note that there is a related concern if there is to be no requirement for businesses to record their ABN. This could allow property which should be registered as 'consumer property' – being 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. Without the requirement to state an ABN, it may be possible to register property as inventory or

equipment when it really is consumer property. This would mean that certain protections under the Bill that rely on the property being consumer property (including that serial numbered consumer collateral shouldn't be registered by grantor name and date of birth) would not apply. We refer you to the submission from the Consumer Action Law Centre for more details of this concern.

Security risk – ID crime potential

In relation to the Register containing name and date of birth of many individuals, we repeat our submission from August that this in itself represents a major security risk. These two items of information held together in a widely available public register is an open invitation to identity crime – other registers which contain this information such as Birth Registries and Electoral enrolment databases have tighter access controls. Have the government agencies charged with combating identity crime been consulted about this risk?

Data quality and matching issues unresolved

As we submitted in August, the apparent exclusion of addresses from the Register content has the positive effect of reducing the attraction and value of the Register to third parties, but paradoxically compounds the data quality issues. The Regulations DP does not answer the question we asked - how will the proposed requirement for grantors to be given notice of 'register events' (May 08 Bill Commentary 10.103) be achieved unless there is an address or other contact details on the Register?

We repeat our concern that reliance on names and date of birth alone, when name search is fundamental to the scheme design, is fundamentally flawed. Experience of other public registers and the credit reporting databases shows that name and date of birth alone are not sufficient to achieve required levels of accurate matching. It was necessary for the Privacy Commissioner to make Determinations under Part IIIA of the Privacy Act to allow credit reporting agencies to collect and hold drivers licence numbers to assist in matching, even where they already held addresses as an additional data field. Name and date of birth alone will simply not work.

The proposed Regulations prescribing acceptable identity documents do not address the problem we identified of matching legitimate multiple identities.

It seems clear that the very serious and complex issues of identity verification and matching, with enormous privacy implications, have still not been adequately addressed. While the proposal to not record debtor/grantor addresses is superficially attractive as a privacy protection, it may prove to be adversely affect the desired functionality of the Register. If this proves to be the case, pressure will grow to include addresses, perhaps without the privacy safeguards that could be built into a system that was better designed from the outset. Again, a Privacy Impact Assessment is required to analyse these issues.

Draft Regulations DP Section ^212 – Demand to secured party for registration amendment

The rationale for the proposed Regulation concerning requests for amendments includes a discussion of the scenario where an individual seeks removal of a registration in their name. There is no recognition of the relationship between any such Regulation and the general rights

of access and correction of personal information under the Privacy and FOI Acts. At paragraph 180 there is a suggestion that the Registrar should err on the side of leaving a registration in place in circumstances where there may be confusion over identity. This is not good enough – the onus should be on secured parties to defend the accuracy of a registration.

Searching the Register

Authorised purposes

The Revised Commentary (at paragraph B53) suggests that privacy is to be protected by making access to and use of data from the Register for unauthorised purposes an 'interference with privacy' under the Privacy Act. Apart from the problem of all individuals and most small businesses not being subject to the Privacy Act already mentioned in our Introduction above, this supposed safeguard depends on the practical effect of clause 227 in defining and limiting 'authorised purposes'. We do not fully understand the way in which section 228 is supposed to work as it defines 'unauthorised' by reference only to the search criteria (s.226) and the prohibited purposes (s.227(2)) but not to the authorised purposes (s.227(1)). Since s.227(2) only applies to persons listed in the table in s.227(1), there would appear to be no effective sanction against any other person accessing the Register, or using data obtained from it, for any purpose?

Section 227(3) and the reference to it in the Revised Commentary are incomprehensible and we urge the committee to seek a 'plain english' explanation.

The other way in which the Bill addresses the risk of unauthorised searches is to allow persons to sue for damages. This is also totally inadequate. First, there is nothing that prevents such searches in first place, only a right to sue after the fact. Second, there is no penalty nor compensation regime established under the Bill and no regulator responsible for ensuring that obligations under the Bill are complied with. So it relies on individuals suing in individual cases. Third, in how many cases is it going to be worth an individual suing for damages, given the costs of litigation? This provision simply doesn't provide either any incentive to stop someone conducting an unauthorised search, or effective remedies if they do.

Search parameters

The rationale in the Regulations DP concerning section ²²⁷ – ***Search-general*** stated
“83. Ensuring that the establishment of the PPS Register does not unduly impact on the privacy of individuals is a key concern of PPS reform. There is a clear imperative to withhold data about an individual from a search result of the PPS Register in certain circumstances (such as where a court has ordered that the data should be withheld from the search result).”

This envisages only extremely limited grounds for withholding personal information. If the government is serious about its professed commitment to privacy, it must reconsider its entire approach both to the contents of the Register and to the permitted search parameters and results.

The whole issue of who can get access to the register, for what purpose, and what information about individuals might be returned in response to a search, remains very unclear and yet is essential to an understanding of the privacy implications.

It is completely unacceptable to defer detailed consideration of these issues 'as the Register is developed'. The Exposure Draft Bill only addresses privacy issues to a very limited and wholly inadequate extent.

Conclusion

Consideration of the serious privacy issues raised by the proposed national PPS Register remains wholly inadequate, despite the concerns being raised in previous submissions from the Foundation and Privacy Commissioners, amongst others. The Attorney-General's Department must address these concerns, including through a full and public Privacy Impact Assessment (PIA) as recommended by the Privacy Commissioner for privacy significant projects.