



Office of the  
Victorian Privacy  
Commissioner

Office of the Victorian Privacy Commissioner

Submission to  
the Senate Standing Committee on  
Legal and Constitutional Affairs

on

*The Inquiry into the Personal Property Securities Bill*  
**2009**

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## 1. Introduction

The Personal Property Securities Bill 2009 ('the Bill') will harmonise and streamline more than 70 existing pieces of Commonwealth, State and Territory legislation and establish a national personal property securities register (PPSR) with 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 in the Bill generally, the consolidation of all personal property security interests into a single national "super register" has a significant potential impact on personal privacy, 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.

I acknowledge that the proposal has been progressively modified in its various iterations, from the Standing Committee of Attorneys-General *Discussion Paper* in November 2006, through a Consultation Draft Bill in July 2008, and an Exposure Draft in November 2008. Many of these modifications have addressed privacy concerns previously raised by this Office and others. However, some remain and these are outlined below.

I also acknowledge the Privacy Impact Assessment (PIA) conducted by Information Integrity Solutions Pty Ltd (IIS), released earlier in July 2009. I support most of the recommendations contained in the PIA. In particular, I support the proposal that the legislation be reviewed in order to assess the impacts on personal privacy and the effectiveness of privacy protections. However, given the inherent uncertainties involved in the process and its impact on individual privacy, I suggest that this should occur within two years of the legislation commencing, rather than after the recommended three years.

## 2. Personal information held on the register

As provided for in the Bill (clause 153), the PPSR will now contain relatively limited, although still sensitive, information about grantors. Most significantly, the PPSR will not contain personal information about a grantor (i.e. the borrower) where the personal property is categorised as "consumer property" and it is possible (and required by regulations) for the collateral to be described by a serial number. For consumer property which is not required by the regulations to be described by serial number, the register will contain the grantor's name and date of birth (DOB) and no other details.

The information to be held on the PPSR is of critical importance from the point of view of personal privacy. While I acknowledge that the amount of personal information to be included on the PPSR has been reduced and privacy protections increased in the current Bill, the inclusion of *any* personal information in the PPSR raises privacy issues. In particular, the inclusion of DOB will necessitate the collection of DOB information by a prospective purchaser from a prospective seller of personal property, to allow the PPSR to be searched. A prospective purchaser would not otherwise have access to this information. However, given the increased privacy risks involved in only recording and searching by name and thus increasing the possibility of incorrect matches and the disclosure of information about all individuals with the same name, it would appear that inclusion of DOB can, on balance, be justified.

This is particularly so, given that it is proposed that the register will be structured in such a way as to only allow search by direct matches (see below). This means that a person searching the PPSR will need to have the grantor's exact name and DOB, or no record will be returned in the search. This prevents anyone's DOB from being "looked up" on the system.

### 3. Searching the PPSR

The Bill provides that the Registrar must give an applicant access to the PPSR to search for data if the search is authorised, the application is in the approved form and the fee paid.<sup>1</sup> The PPSR may be searched by reference to:

- The secured party's details;
- The grantor's details;
- The serial number of the collateral;
- The time of the search or with the consent of the Registrar an earlier nominated time; or
- Any other criteria prescribed by the regulations.<sup>2</sup>

According to the Explanatory Memorandum (EM)<sup>3</sup>, for serial numbered goods like motor vehicles and boats, users would only be able to search the PPSR by serial number. This is in line with current State registers (e.g. REVS and VRS), which do not record grantor details. The EM also states that, while the search criteria to be prescribed by regulations have not yet been finally settled, it is proposed that a person will be able to search the PPSR by reference to the unique identifier of the registration.<sup>4</sup>

The Commonwealth Attorney-General's Department has stated that the PPSR will be developed to only allow direct match searching. "Fuzzy" searches using only partial name or DOB will apparently not be possible. This means that for a search in respect of an individual grantor, a successful match will require exact first name, exact last name and exact DOB. It will not be possible to enter a name and have DOB returned. This substantially reduces the privacy risks involved in including name and DOB – since this information will not be accessible unless the searcher already knows both pieces of information. However, if both name and DOB are known, it will be possible to discover any personal property the individual has used as security for a loan and details of the secured party, whether or not for an authorised purpose.

Another important consideration in assessing the privacy impact involved in searches of the PPSR is the distinction made between "consumer" and "commercial" property. The breadth of the definition of "commercial property" and the inverse narrowness of "consumer property" means that personal property that is used largely for personal, household or domestic purposes may nevertheless be categorised as "commercial". This will mean that the limitation on searching by reference to information about the grantor, where an item has a serial number, will not apply and the privacy risks will be greater. A possible solution to this is to define "commercial property" as property held for the dominant purpose of carrying on

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<sup>1</sup> Clause 170(2)

<sup>2</sup> Clause 171(1)

<sup>3</sup> Para 5.91, page 88

<sup>4</sup> Para 5.92, page 88

an enterprise to which an ABM has been allocated, thus significantly narrowing its application.

#### 4. Notice of inclusion on the PPSR

Privacy principles almost universally contain provisions requiring collecting organisations to notify the individual concerned of the identity of the collecting organisation, the fact of the collection, the purposes for collection, the types of individuals or organisations to which the collecting organisation usually discloses the information, any law requiring collection and the consequences for that individual if the information is not provided.<sup>5</sup> This is based on the fact that the individual will be in a stronger position to control and protect their own personal information if he or she knows what is happening to it.

The Bill provides that when a registration is made, amended, removed or restored the Registrar must inform the secured party by giving it a verification statement.<sup>6</sup> The secured party must then notify the grantor as soon as is reasonably practicable.<sup>7</sup> If the secured party fails to notify the grantor, this constitutes an “interference with privacy” for the purpose of section 13 of the *Privacy Act 1988 (Cth)*. This would mean that a complaint could be made about such conduct to the federal Privacy Commissioner under section 27 of the *Privacy Act*, irrespective of whether or not the secured party would otherwise be subject to the *Privacy Act* (i.e. where the secured party is a small business, an individual or a political party).

The PIA by IIS also recommends that secured parties proposing to register a security interest in consumer property where the registration will include the individual’s name and DOB be obliged to first advise the individual concerned of the proposed disclosure to the PPSR and that failure to do so constitutes an interference with privacy under section 13 of the *Privacy Act*. I strongly support this recommendation.

#### 5. Data retention

The Bill in its current form does not make provision for destruction of personal information after it has been deleted from the PPSR or after a specified period of time. Instead, it contains a provision that removal of information from the PPSR does not prevent the Registrar from keeping a record of the removed information in whatever form the Registrar considers appropriate.<sup>8</sup> The Information Privacy Principles (IPPs) in the *Privacy Act*, to which the PPSR and the Registrar will be subject, do not contain a provision requiring destruction or permanent de-identification, either. I understand that the Commonwealth Attorney-General’s Department is currently developing a records framework for the PPSR, as required by the *Archives Act 1983 (Cth)*. I support the recommendation by IIS that a principle be included in the framework that personal information be held for the minimum time possible once a registration is no longer active. However, it would be preferable to have such a principle included in the legislation itself.

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<sup>5</sup> E.g. Information Privacy Principle 1.3, *Information Privacy Act 2000 (Vic)*

<sup>6</sup> Clause 156

<sup>7</sup> Clause 157

<sup>8</sup> Clause 187

The privacy risks associated with indefinite retention of data are amplified by the fact that the Bill provides for searches of the PPSR by reference to the time of the search and, with the consent of the Registrar, an earlier nominated time (point-in-time-search)<sup>9</sup>. The value and justification for point-in-time searches is not set out in either the Bill or the EM and they will increase the risks to personal privacy.

## 6. Use and disclosure of personal information on the PPSR

The Bill provides that anyone can apply to the Registrar to search the PPSR. The Registrar must give the person access as long as the search is authorised, is in the approved form, the fee paid and access is not prohibited by the regulations.<sup>10</sup> Where searches will reveal personal information, there is a need to balance the objective of maximising market transparency with potential privacy impacts. This means searches should only be permitted where authorised.

The list of authorised purposes for searches in the Bill is a long one and includes:

- A purpose that relates to a security interest attached to collateral described in the registration;
- Establishing whether or not to provide credit; and
- A purpose that relates to enforcement of a lien or charge or of creditor's rights.<sup>11</sup>

The Bill provides that, except for the specified purpose, a person must not search the PPSR or use information obtained from such a search, unless the information has been lawfully obtained from another source.<sup>12</sup> The Bill also provides that an unauthorised search would amount to an interference with privacy and remedies under the *Privacy Act* will apply, irrespective of whether or not the searcher would otherwise be subject to the *Privacy Act*.<sup>13</sup>

Of particular concern is the fact that authorised searches include searches to find a named individual with an interest in personal property in relation to making decisions about providing credit, or to make investment decisions, as they may conflict with the credit reporting provisions in Part IIIA of the *Privacy Act*. Authorising searches for general decisions about whether or not to provide loans is too broad. Searches should not be permitted when making general decisions such as to whom to send credit marketing offers to. A provision should be inserted into the Bill similar to that recommended by the Australian Law Reform Commission in its review of Australian privacy laws, that the use of credit reporting information for direct marketing purposes, including the use of information for pre-screening, is prohibited.<sup>14</sup>

As well, I support the recommendation made by IIS in its PIA that the PPSR be designed so as to ensure that every person making a search of the register is required to confirm that he or

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<sup>9</sup> Clause 171(1)

<sup>10</sup> Clause 170(2)

<sup>11</sup> Clause 172

<sup>12</sup> Clause 172(3)

<sup>13</sup> Clause 173

<sup>14</sup> Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, recommendation 57-3.

she is doing so for an authorised purpose and advising him or her of the consequences of making a false declaration about the nature of a proposed search.<sup>15</sup>

## 7. Suppression of personal information

The Bill envisages that there may be circumstances in which information on the PPSR needs to be suppressed or made inaccessible. Clause 170 (2) provides that access to the data on the PPSR may be prohibited by the regulations.

In its *Discussion Paper: Regulations to be made under the Personal Property Security Act*, issued in August 2008, the Commonwealth Attorney-General's Department proposed that access would be prohibited in two circumstances:

- Where a court has ordered that information should be withheld from a search result and the individual involved applies to the Registrar to have the information withheld, or other circumstances provide sufficient basis on which to withhold data; and
- The Registrar considers in all the circumstances that it would be appropriate to withhold data.

The PPSR is now designed to contain limited personal information. However, there may be some circumstances in which the consequences of having additional personal information available to anyone who knows a person's name and DOB might be significant, including potential risks to personal safety. In discussions with this office, the Commonwealth Attorney-General's Department has indicated that the focus of the Registrar's role is envisaged as being the provision of an efficient PPSR and would generally involve very limited decision making or discretion as to the contents of the PPSR or access to it. The Department indicated that the Registrar would act on the basis of a court order, but that other circumstances, involving a greater degree of discretion, might be problematic. Given that in some circumstances, there may be neither the time nor the opportunity to obtain a court order, this situation will need to be provided for. I support the recommendation by IIS in its PIA<sup>16</sup> that, if the Registrar is not the most appropriate person to act where necessary, other options be considered to exercise this discretion, including the federal Privacy Commissioner or the Commonwealth Ombudsman.

## 8. Enforcement of privacy protections

The Bill currently provides for two main ways of dealing with breaches of individual privacy associated with the PPSR: civil claims for damages and remedies under the *Privacy Act*. This has been significantly strengthened in the current version, when compared with previous iterations, as actions that are expressed to constitute an "interference with privacy" under section 13 of the *Privacy Act* (e.g. unauthorised search: clause 173; failure to give notice: clause 157), do so regardless of whether or not the offending party would otherwise be covered by the *Privacy Act*. Coupled with the possibility of civil penalties for failure to discharge any duty or obligation imposed by the Bill (Clause 271), this means that, on balance, the enforcement of privacy protections now appears adequate.

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<sup>15</sup> Recommendation 9

<sup>16</sup> Recommendation 12

However, I support the recommendation by IIS that the review of the legislation consider whether the enforcement mechanism is effective, or whether additional measures are needed.

## 9. Function creep

The Bill defines a “security interest” as “an interest or right in relation to personal property provided for by a transaction that in substance secures payment or performance of an obligation (without regard to the form of the transaction or the identity of the person who has title to the property).<sup>17</sup>” This is a very broad definition and could potentially be made broader by regulations, which could prescribe certain interests other than security interests to be included on the PPSR. This could potentially lead to the PPSR becoming a repository of large amounts of personal information that could be used, alone or in combination with other sources, to develop profiles of individuals. This is particularly so, given the broad range of authorised purposes for which the PPSR can be searched (see section 3, above).

Paragraph 5.9 of the EM indicates that , before any regulations are made to allow for the registration of other interests in classes of personal property account would be taken of “...privacy concerns, including the preparation of a Privacy Impact Assessment if appropriate.” This statement in the EM, while reassuring, is not binding. The inclusion of interests other than security interests should either require legislative amendment, which would ensure proper parliamentary scrutiny (by amending clause 153), or the requirement for a further PIA should be included in the legislation itself.



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<sup>17</sup> Clause 12(1)