Chapter 5

Consideration of more technical issues

Introduction

5.1 A major implication of the relatively short timeframe for this inquiry was the significant limit on the ability of the committee to consider all, or even the majority, of the bill in detail. As noted elsewhere in this report, this is a lengthy and complex bill which is seeking to implement significant national reform affecting many people, organisations and industries. It was difficult for even experts in the area who had been involved from early in the project to feel that they had time to understand the whole of reform.[1]

5.2 In response, the committee developed a two-pronged approach to the inquiry in relation to technical aspects of the bill. The committee identified some significant issues, and submitters had some broad issues of concern, that were explored in detail by the committee. These matters are discussed in this chapter. Others aspects of the reform could not be considered in detail. For the Senate's benefit many of them are identified in the next chapter, but without analysis by the committee.

5.3 The matters discussed in this chapter reflect commentary on the provisions of the exposure draft bill as referred. If the policy decision is to proceed with the bill then the recommendations in this chapter are directly relevant to the suggested final form of the bill.

5.4 Alternatively, if the policy decision is to adopt an international model with a national register, the recommendations relating to the register and related privacy issues would be directly relevant to the new bill.

5.5 The matters explored in this chapter are:

- the proposed national PPS register, especially privacy aspects of the register;
- the proposed new requirement to act in a *commercially reasonable manner*;
- the need for international conflict of laws provisions and the possible content of any provisions;
- the proposed enforcement provisions;
- aspects of the proposed bill dealing with intellectual property; and
- the proposed chattel paper provisions.

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1 Professor Anthony Duggan, *Submission 1*, pp 5 and 6.

PPS national online register

Introduction

5.6 A central feature of the proposed PPS reform is the establishment of a national online register. The purpose of the register is to provide what the Department describes as:

> …a real-time online noticeboard of personal property over which a security interest has been, or may be, taken. The PPS Register would replace an array of existing electronic and paper-based registers. It would be a voluntary registration scheme, allowing secured parties to weigh up the costs and benefits of registering their security interests.[2]

5.7 By describing the proposed register as a 'noticeboard' the Department is highlighting the fact that, unlike land titles registers, it is not intended to be a register that gives definitive information about the ownership of any particular property. In relation to providing information about security interests, the register is only designed to *alert* the world to an actual or possible interest in personal property. It is then up to the person searching the register to use the register information to make any further inquiries on which to base a purchase or lending decision.

5.8 The second major function of the register is that:

> It is anticipated that registration would be the most commonly used method of perfecting a security interest for the purpose of establishing priority in enforcement and effectiveness on insolvency.[3]

5.9 The other main methods of perfecting a security interest, outlined in more detail above in the explanation of *perfection* in chapter 2, are possession and control. The exposure draft bill would establish that possession and control as methods of perfection in fact have priority over registration as a method of perfection. However, the nature of secured lending transactions often means that possession and control are not available as methods of perfection. For example, if finance is provided for the purchase of a boat, the grantor will want to use the boat before the loan is repaid so it will not be possible for the finance company to have possession or control of the security (the boat). The register will then provide a single national option for registering the lender's security interest.

5.10 The Department observes that use of the register is voluntary - and it is correct that there is no statutory requirement for any party to register a security interest - but those who choose not to register may do so at their peril. In many instances under the proposed reform a person with a security interest who does not obtain perfection through registration will be sanctioned by losing priority against those who do register their security interest in the property. This gives effect to a deliberate policy choice to

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2 Attorney-General's Department, *Submission No. 8*, p. 97.

3 Attorney-General's Department, *Submission No. 8*, p. 97.

motivate parties to use the register and therefore to ensure that the register is effective as a national register of personal property security interests.

About the proposed register

5.11 The establishment of a national register is widely regarded by submitters as a major benefit of the proposed PPS reform. Although there will be significant costs in moving to the proposed new system, the register is one of the key aspects of the reform that is expected to lead to substantial cost savings.[4]

5.12 It is also designed to benefit casual users of the system who will be able to simply and easily access the information they need without having to negotiate their way through multiple jurisdictions and unfamiliar legal concepts.

5.13 Of course, the proposal to establish a register has properly attracted detailed scrutiny by some submitters to the inquiry to ensure that it is appropriately established and managed and contains effective security measures, particularly in relation to the way in which information will be collected and returned in a search of the register.

5.14 The exact details of the way in which the register will function are not yet public. However, the Department has identified its plan for some of the major aspects of its operation. For example, the Department has stated that it is intended that only the minimum amount of information needed for each transaction will be required, essentially using a layered system. For example, if the transaction can be adequately captured using existing identifiers such as a Vehicle Identification Number (VIN) or Australian Business Number (ABN) then it is expected that no additional personal identification information will be required from the grantor. [5]

5.15 If there is no way to identify the property without resort to the inclusion of personal information then the approach is again to keep the recorded details to a minimum:

> In determining the level of personal information required to correctly identify an individual's details, we have sought to balance privacy needs against the need to ensure that information is correctly recorded and searchable. The register has been designed so that only limited personal information, name and date of birth will be recorded and available to be returned in a search. It will not be possible to discover an individual's name or date of birth by using the register. Searchers will need both pieces of that information before they commence a search.[6]

4 Professor Duggan, *Committee Hansard*, 23 January 2009, p. 2.

5 Dr Popple, *Committee Hansard*, 6 February 2009, p. 59 and Mr Glenn, *Committee Hansard*, 6 February 2009, p. 60.

6 Dr Popple, *Committee Hansard*, 6 February 2009, p. 59.

5.16 The Department has stated that in addition to limiting the amount of information recorded for each entry in the register, the way in which the register returns information in response to a search will incorporate important security safeguards. The key aspects of this are that the search function will operate on an *exact match* basis and will not include a 'wildcard' search feature. Information will also be obtained through a challenge-response approach, which means that the person searching the register will enter the terms they want to search against and the system will return any entries exactly matching the search information entered.[7] This is intended to restrict the ability for searches to be undertaken to 'fish' for information.

5.17 There will be a fee for searching the register. The Department has stated that the fee will be determined in accordance with the government's cost recovery approach and this will mean that the impost will be modest.[8]

5.18 A person searching the system will not be required to be identified before a search can be made. However, payment for a search will be required before it can be undertaken and payment will need to be made by an electronic transfer of funds or by credit card. The Department's argument is that in measuring the useability of the register against the incorporation of security features that constrain the effectiveness of the system (and increase the costs associated with using the system) the proposed approach represents an appropriate balance.[9] Particular concerns relating to privacy and security are discussed in more detail below.

Privacy

5.19 Ensuring appropriate security and privacy measures are in place is essential to the success of the proposed national register. The Department has made a point of explaining that it is taking privacy issues very seriously. An officer told the committee that:

> I wanted to start by assuring the committee that privacy issues are of particular concern to the department and are being given careful consideration.[10]

5.20 Some submitters considered the security and privacy aspects of the proposed register in detail.[11] It was important that the committee received this evidence because privacy issues are not areas of priority for all users of the system, especially corporations:

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7 Mr Glenn, Attorney-General's Department, *Committee Hansard*, 21 January 2009, pp 32 to 34.

8 Mr Glenn, *Committee Hansard*, 21 January 2009, p. 34.

9 Mr Glenn, *Committee Hansard*, 21 January 2009, pp 33 and 34.

10 Dr Popple, *Committee Hansard*, 6 February 2009, p. 59.

11 For example, Victorian Privacy Commissioner, *Submission 3*, Women's Legal Service Victoria on behalf of Women's Legal Service Australia, *Submission 16*, Australian Privacy Foundation, *Submission 17* and the Consumer Action Law Centre, *Submission 20*.

> There are always issues with a public register, I think, but we do not really have too many specific concerns. In part, I think that reflects our client base as well. We deal mainly with companies rather than with individuals. I am sure that is part of the reason why we are not so concerned about them.[12]

5.21 The committee notes the Department's efforts to date and its continuing commitment to ensure that privacy concerns are addressed. The committee would like to ensure that before the reform is finalised, government is certain that it has done everything necessary to address real privacy issues. The committee believes that the government needs to convincingly allay fears that information required to be kept in the register can potentially be misused. Some of the possible implications outlined to the committee if privacy needs are not adequately met are extremely serious: they include the system being used for criminal purposes to locate and harm individuals such as in circumstances involving domestic violence orders and victims of crime.[13] Although these scenarios are probably far from the ordinary experience of business-to-business, and even business-to-individual secured lending transactions, the scope of the register is broad reaching. It would be unacceptable for the system to meet the needs of the vast bulk of its users if its design could allow serious harm to anyone.

5.22 Broadly, the important privacy concerns identified to the committee are:

- important details relating to the register being included in regulations rather than primary legislation (especially requirement that address information will not be returned to a searcher);[14]
- an invasion of privacy if too much personal information is required to register a transaction versus the possible mistaken identity of a person if not enough information is obtained,[15] accuracy of register information,[16] the possibility of 'twins' (entries for different people with identical names and dates of birth);[17]
- identity theft;[18]
- function creep, including whether the database will be improperly used to build financial profiles and assess credit worthiness;[19]

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12 Ms Flannery, Clayton Utz, *Committee Hansard*, 22 January 2009, p. 26.

13 For example, see the Women's Legal Service Victoria, *Submission 16*.

14 Ms Rich, Consumer Action Law Centre, *Committee Hansard*, 6 February 2009, p. 36 and Office of the Privacy Commissioner, *Submission 25*, p. 3.

15 Dr Michael, Australian Privacy Foundation, *Committee Hansard*, 22 January 2009, pp 39 and 40.

16 Mr Strassberg, Veda Advantage, *Committee Hansard*, 23 January 2009, p. 13.

17 Dr Popple, *Committee Hansard*, 6 February 2009, pp 49 to 52.

18 Ms Rich, *Committee Hansard*, 6 February 2009, p 37.

19 Dr Michael, *Committee Hansard*, 22 January 2009, pp 33 and 34, and Office of the Privacy Commissioner, *Submission 25*, pp 5 and 6.

- data-mining (individual details being obtained by companies to assist with the marketing of credit to consumers);[20] and
- additional concerns raised by the Office of the Privacy Commissioner, for example in relation to requirements for the registrar, clarification of privacy issues and amendments needed to definitions.[21]

5.23 The committee has not had time to consider all of these issues in detail, but will particularly comment on two areas. These are the use of regulations rather than including requirements in the primary legislation and the privacy impact assessment issue.

5.24 The committee also appreciates the initiative demonstrated by the Department in its evidence to the committee that in advance of the committee's report it is considering some amendments to the exposure bill in light of submissions.[22]

Privacy safeguards: regulations versus primary legislation

5.25 The committee understands that the use of regulations to implement the detail of primary legislation is often appropriate. The practice allows primary legislation to be as concise as possible and permits matters of legislative detail to be finalised and implemented more flexibly than if all legislative requirements had to be included in the primary legislation.[23]

5.26 However, it is of course always necessary to ensure that essential matters are included in primary legislation and not left to regulation. In this regard, the committee agrees with the suggestion that the critical privacy safeguards relating to the register should be included in the primary legislation.[24] For example, while address details of any individual may be recorded in the register, there is intended to be a safeguard in place so that no address details will be returned to a searcher in response to any search of the register. Evidence to the committee is that a change to this safeguard is one of the aspects of the register that could lead to physical harm to individuals and is therefore so important that it should be included in the primary legislation.[25] The

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20 Ms Rich, *Committee Hansard*, 6 February 2009, p. 37.

21 Office of the Privacy Commissioner, *Submission 25*, a summary of the issues is at p. 2.

22 Dr Popple, *Committee Hansard*, 6 February 2009, pp 45 to 49 advised that the particular amendments being considered are: an amendment to the table in section 227 so that it clarifies that a person may search on behalf of another person for any of the purposes listed in that table suggested by Veda Advantage, *Submission 7*, p. 3 and Office of the Privacy Commission suggestions relating to proposed section 228(6) and the privacy impact assessment, *Submission 25*, pp 2 and 10.

23 The Office of the Privacy Commissioner is also of the view that the use of regulations can be appropriate: Office of the Privacy Commissioner, *Submission 25*, p. 3.

24 For example, see Office of the Privacy Commissioner, *Submission 25*, p. 3.

25 Women's Legal Service Victoria, *Submission 16*.

committee agrees with this view and believes that it is important that any other matters of such importance are also included in the final act rather than in delegated legislation.

Recommendation 4

5.27 The committee recommends that the primary legislation for the personal property securities reform include the key privacy protections for individuals, including a prohibition on making the address details of any individual public.

Privacy Impact Assessment

5.28 The Privacy Commission and others recommended that before finalising the PPS reform, and particularly prior to establishing the PPS register, that the government undertake a Privacy Impact Assessment. A Privacy Impact Assessment is:

> …an assessment tool that describes the personal information flows in a project, and analyses the possible privacy impacts that those flows, and the project as a whole, may have on the privacy of individuals…The purpose of doing a PIA is to identify and recommend options for managing, minimising or eradicating privacy impacts.[26]

5.29 The Privacy Commissioner has published guidelines about the purpose of, and recommended process for, carrying out these assessments.[27]

5.30 The committee notes the Department's advice that it has recently commenced a Privacy Impact Assessment. The assessment is being undertaken by staff of the Department in accordance with the Privacy Commission guidelines and is expected to take five or six weeks in total. The Department advised that it is expected that the results of the assessment will be made public.[28]

5.31 The committee believes that in relation to this reform the Department has a genuine commitment to considering privacy issues, but is also of the view that these privacy issues are of such importance that it is appropriate for the Department's approach to be independently assessed by a person or organisation with experience in preparing Privacy Impact Assessments. In the committee's opinion this is necessary to ensure that the reform is objectively assessed from someone with relevant experience and it will protect the Department from possible criticism that the assessment was not undertaken professionally or in good faith.

5.32 The committee recognises that the Department has already invested resources in undertaking the privacy impact assessment. In light of this, it may be convenient

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26 Office of the Privacy Commissioner, *Privacy Impact Assessment Guide August 2006, Additional Information 15*, p. 4.

27 Office of the Privacy Commissioner, *Privacy Impact Assessment Guide August 2006, Additional Information 15*.

28 Dr Popple and Mr Glenn, *Committee Hansard*, 6 February 2009. pp 50 and 51.

without compromising the committee's objective if the assessment is completed by the Department and then reviewed by an independent person or organisation with experience in the field. The committee notes that the Privacy Commission gave evidence that it does not undertake privacy impact assessments, though it is happy to be consulted during the process.[29]

Recommendation 5

5.33 The committee recommends that either:

- **(a) a Privacy Impact Assessment be undertaken by a person or organisation that is independent from the government and who has experience in undertaking such assessments and the results of the assessment are made public, or**
- **(b) the Department's Privacy Impact Assessment is reviewed by a person or organisation that is independent from the government and who has experience in undertaking such assessments, and the results of the review are made public.**

Recommendation 6

5.34 The committee recommends that if any issues raised by the Office of the Privacy Commission in its submission are not considered as part of the Privacy Impact Assessment then these matters should be separately considered by the Attorney-General's Department and a response to the issue be provided to the Office of the Privacy Commission in writing or made public.

New requirement to act in a *commercially reasonable manner*

5.35 Proposed new section 235 of the exposure bill is in Part 6.2 of the bill entitled *exercise and discharge of rights, duties and obligations*. The draft section provides as follows:

> 235 Rights and duties to be exercised honestly and in a commercially reasonable manner
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> (1) All rights, duties and obligations that arise under a security agreement or this Act mush be exercised or discharged:
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> (a) honestly; and
>
> (b) in a commercially reasonable manner.
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> (2) A person does not act dishonestly merely because the person acts with actual knowledge of the interest of some other person.

5.36 A requirement to act 'honestly' is a concept known in Australian law,[30] but a requirement to act in a 'commercially reasonable manner' is not. The Department

29 Mr Pilgrim, Office of the Privacy Commissioner, *Committee Hansard*, 23 January 2009, p. 19.

30 For example, see Ms Flannery, Clayton Utz, *Committee Hansard*, 22 January 2009, p. 28.

advised that the 'commercially reasonable manner' test was included in the exposure draft because it is part of the legislation in the United States, New Zealand and in the legislation in most Canadian jurisdictions.[31]

5.37 Ms Flannery of Clayton Utz argued to the committee that the 'commercially reasonable manner' provision is of concern to stakeholders because there is uncertainty about what it means and whether this would change over time and in different circumstances:

> …a point someone made to me was the fact that what is commercially reasonable changes over time, so what you will get is a court saying one year that something is commercially reasonable and then someone will say two years later, 'We think that the markets have changed'—and, as we all know, financial markets are changing daily at the moment—'and something else is now the normal commercially reasonable standard.' So you will never get a line in the sand.[32]

5.38 There was also evidence given to the committee by Professor Duggan about the situation in Canada where all but one of the Canadian provinces has the 'commercially reasonable manner' requirement. Professor's Duggan's evidence was that the absence of the requirement has not generated any problems in that particular jurisdiction.[33]

5.39 The Department's evidence was that it has considered in detail whether or not to include this obligation in the Australian reform. It accepted that the expression does not have a settled meaning in Australia,[34] but in its view it is appropriate to include the requirement as the Department expected that in some circumstances it will contribute to cost savings for parties and will provide an appropriate safeguard for consumers and businesses where there is currently a gap.[35] Although the committee received considerable evidence against the inclusion of the requirement, this is probably unsurprising given that most of the witnesses who addressed this issue have an interest as the secured party who would be seeking to enforce its interest.

5.40 The Department does not believe that the requirement will increase costs or inappropriately undermine the ability of parties to contractually agree on what constitutes behaving in a 'commercially reasonable manner' in their circumstances. If parties with relatively comparable bargaining power have detailed their agreed

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31 Dr Popple, *Committee Hansard*, 6 February 2009, pp 53 and 54.

32 Ms Flannery, *Committee Hansard*, 22 January 2009, p. 27.

33 Professor Duggan, *Committee Hansard*, 23 January 2009, pp 6 and 7.

34 Dr Popple, *Committee Hansard*, 6 February 2009, p. 53.

35 Attorney-General's Department, answer to questions on notice dated 2 March 2009, *Additional Information 22*, pp 3 and 5.

enforcement arrangements the Department expects that it is likely that a court would find that the agreement between the parties was commercially reasonable.[36]

5.41 The Department anticipates that including the provision will lead to cost savings in relatively simple, low value transactions as these transactions will not need lengthy contracts detailing enforcement provisions. If enforcement of the contract is required then the parties can rely on the section 235 requirements. The Department further considers that the inclusion of the 'commercially reasonable manner' requirement would also appropriately temper overly aggressive behaviour, although based on overseas experience, it is expected that it would only operate in particularly serious circumstances.[37] Because it is expected that only cases of extreme enforcement action would not be considered to be 'commercially reasonable', the Department believes that the provision would not lead to considerable litigation costs.[38]

5.42 The committee is sympathetic to the concerns raised about uncertainty of the meaning of 'commercially reasonable manner'. However, the policy equation needs to take into account more factors than simply a lack of familiarity with the concept: for example, is there a gap that needs to be addressed and does the requirement fill the gap? In wide-ranging reform of this nature what protection should be afforded to borrowers? What are the implications for compliance – including certainty of the law and any direct and indirect costs?

5.43 On the basis that this is an important safeguard that is expected to limit exploitation, but not to fetter the contractual ability of large and commercially experienced parties, there are persuasive arguments to retain it.

Recommendation 7

5.44 The committee recommends retaining the requirement for rights and duties to be exercised honestly and in a commercially reasonable manner. The intended scope of these requirements should be explained in detail in the bill's explanatory memorandum.

5.45 The explanatory memorandum should particularly explain that the requirement to act in a commercially reasonable manner should not fetter or undermine the ability of parties with similar bargaining power to contractually agree about what constitutes commercially reasonable behaviour.

International conflict of laws provisions

5.46 The revised exposure draft bill does not include provisions to determine the law that governs the validity of a security interest where parties disagree about

36 Attorney-General's Department, answer to questions on notice dated 2 March 2009, *Additional Information 22*, p. 2.

37 Mr Patch, *Committee Hansard*, 21 January 2009, pp 27 and 28.

38 Mr Patch, *Committee Hansard*, 21 January 2009, pp 26 and 27.

whether the law of Australia or the law of another country applies to a secured lending transaction. These types of provisions are known as international 'conflict of laws' provisions.

5.47 The Department had included some conflict of laws provisions in the May 2008 exposure draft, but there was apparently severe disagreement about the content of those draft provisions so they were removed from the revised draft bill. [39] Instead of including conflict of laws provisions in the revised bill, the Department has included new provisions at Appendix A to the Revised Commentary. The Department advised that it would welcome feedback on the content of these provisions. [40]

5.48 There is widespread support for the inclusion of some conflict of laws provisions in the final bill, and one succinct example of this support was given by the Mr Gilbert of the Australian Bankers' Association who believes that it 'is important and necessary is to ensure that the international dimension of conflict is dealt with.'[41]

5.49 The development of the Appendix A provisions was informed by existing international practice, but they do not directly adopt an existing international model.[42] There is general agreement that the Appendix A provisions are a significant improvement on the May 2008 provisions. For example, Mr Wappett advised the committee:

> …my view on the new, alternative provisions that are in the appendix is that they are a very significant improvement on what was proposed in the earlier draft, and I think they would be an appropriate set of terms to include.[43]

5.50 However, the four law firms in their combined submission expressed some concern about Appendix A:

> I think you do need some conflicts of law provisions. We are still looking at this latest set of proposals. It is better than the initial set of proposals but it still seems to be extremely complex and going into a degree of detail that nobody else has done. If we go down the route of specifying conflicts of law principles, I have a feeling—and I could not answer off the top of my head because we are still looking at it and have been focusing on other things—that there is a much simpler model. The New Zealanders have a simpler model. I do not think that you need to codify everything.[44]

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39 Mr Patch, *Committee Hansard*, 6 February 2009, p. 47.

40 Attorney-General's Department, *Submission No. 8*. The invitation to consider the content of Appendix A is at p. 17 and Appendix A is at pp143 to 154.

41 Mr Gilbert, Australian Bankers' Association, *Committee Hansard*, 22 January 2009, p. 55.

42 The committee inferred this from evidence to it, including the additional information provided by Professor Anthony Duggan, *Additional Information 13*, pp 1 and 2.

43 Mr Wappett, Piper Alderman, *Committee Hansard*, 22 January 2009, p. 13.

44 Mr Loxton, Allens Arthur Robinson, *Committee Hansard*, 23 January 2009, p. 39.

5.51 The committee understands the importance of conflict of laws provisions being included in the bill and accepts the clear evidence that Appendix A is an improvement on the provisions in the May exposure draft.

5.52 However, the committee's view is that further thought can be given to the final content of the international conflict of laws provisions. The committee was impressed by the evidence to it that a key consideration in assessing the content of any conflict of laws provisions is whether they are consistent with international practice: consistent international practice assists with certainty and efficiency in international dealings. A question beyond whether Appendix A is a better approach than the May draft is whether Appendix A is the most appropriate approach. Professor Duggan's evidence is relevant to this consideration:

> …so far as possible the conflict rules should be uniform with the conflict rules in other jurisdictions because if you have different countries saying different things about how conflict of laws issues should be resolved then you may end up with a different country's law apply depending on where a case happens to be litigated...You really want to avoid that to prevent parties forum shopping. I would go further than saying, yes, there should be conflicts provisions in the bill; I would say that there should be conflicts provisions in the bill and they should track the conflicts provisions in New Zealand, in all the Canadian provinces and in article 9.[45]

5.53 Based on the evidence received, the committee's view is that the Appendix A provisions are acceptable conflict of laws provisions - and they are definitely an improvement on those suggested in the May 2008 provisions, and better than no provisions at all. However, the committee also notes that the Appendix A provisions are substantially longer and more detailed than, for example, the provisions in the New Zealand legislation.

5.54 Given the committee's view that it is critically important to make the legislation as readily understandable as possible, and the recommendation that implementation of the reform be extended by at least 12 months (recommendation 3), the committee considers that the government should reconsider adopting the approach taken in an existing international model such as that in the New Zealand provisions. This approach could have the benefits of increasing certainty, relative simplicity and direct international consistency.

Recommendation 8

5.55 The committee recommends that the bill adopt existing international personal property security conflict of laws provisions, such as the New Zealand conflict of laws model, unless there is a particular reason to depart from those provisions.

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45 Professor Duggan, *Committee Hansard*, 23 January 2009, p. 3.

Hague Convention on intermediated securities

5.56 In addition to general conflict of laws provisions, the topic of the *Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary* which affects a particular category of personal property securities involving intermediated securities was raised with the committee.[46] The purpose of the convention is to harmonise conflict of laws provisions relating to intermediated securities.

5.57 The Australian Financial Markets Association is keen for Australia to become a party to the convention. Mr Love explained:

> I think the main thing to understand about the treaty is that it actually does not change substantive law with regard to people's rights. It is merely a conflicts of law regime where it is just pointing to which jurisdiction's laws are going to govern a particular dispute. It is seen generally, certainly by our members—and we have a large number of the international banks and others—that it is very desirable to have one set of principles governing the settlement of disputes around the world.[47]

5.58 The committee considers that in the interests of international consistency and efficiency the government could explore the ratification of this convention in accordance with the government's usual procedure.

Enforcement

5.59 A number of submitters provided evidence to the committee of their concern with aspects of the proposed approach to enforcement in this reform. Ms Nicole Rich, representing the Consumer Action Law Centre, outlined the centre's misgivings:

> We do not think there is any significant deterrence built into the legislation, and we believe that that is one aspect that could be improved. We think that sanctions are necessary for certain obligations, including that the register should not be accessed in the first place unless it is for an authorised purpose. That is why we think there need to be not only sanctions but a regulator to enforce them. The only regulator we could think of is ASIC, because that is not necessarily the role of the Privacy Commissioner, and we certainly do not believe that the registrar should have those kinds of functions.
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> …
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> You do not have to change any of the substantive content of the bill, but you can insert provisions that allow for a regulator to take action to enforce

46 For example, Mr Love, Australian Financial Markets Association, *Committee Hansard*, 22 January 2009, pp 2, 9 and 10.

47 Mr Love, *Committee Hansard*, 22 January 2009, p. 10.

> obligations or to sanction somebody for not complying with their obligations. [48]

5.60 The Office of the Privacy Commissioner also recommends that 'the PPS Bill contain additional offence provisions' due to concerns that the exposure draft provisions may contain legislative gaps and may not be sufficient to deter unauthorised conduct.[49]

5.61 The committee considers that this is another area of the draft bill which deserves significantly more detailed consideration before the terms of the bill are finalised. Some of the keys concerns about enforcement raised with the committee are:

- how the government proposes to ensure that information held in the register is not obtained for an improper purpose;
- if information is obtained for an improper purpose, how the person engaging in the conduct will be identified and sanctioned;
- whether the proposed penalties are appropriate, sufficient and likely to be effective;
- whether the registrar will have the power to initiate inquiries into possible inappropriate activity;
- whether there is a gap in the proposed enforcement because individuals and small businesses are exempt from the provisions of the Privacy Act; and
- whether the proposed reform should include requirements that can override contractual arrangements between the parties, and if so, in what circumstances.

Recommendation 9

5.62 The committee recommends that the scope and content of the enforcement provisions of the exposure draft bill be reviewed by the Department with particular attention to ensuring that the provisions are comprehensive and adequate.

Impact on the leasing industry – especially the position of an unregistered lessor

5.63 The exposure bill deems that certain leases will be subject to the provisions of the PPS reform. A "PPS lease" is explained by the Department as follows:

> A lease or bailment of tangible property, where the lessor or bailor regularly engages in the business of leasing or bailing tangible property, for a term of more than one year, an indefinite term, a term of less than one

48 Ms Rich, Consumer Action Law Centre, *Committee Hansard*, 6 February 2009, p. 38.

49 Office of the Privacy Commissioner, *Submission 25*, pp 8 and 9.

> year that is renewable or a term of up to one year where the lessee or bailee retains possession after one year. Where tangible property may or must be described by a serial number, a PPS lease need only be for a term of 90 days, a term of less than 90 days that is renewable or a term of less than 90 days where the lessee or bailee retains possession for at least 90 days.[50]

5.64 In relation to the definition of a PPS lease, Mr Turner believes that the exposure draft is 'replete with unnecessary definitions and long and complex provisions that rather than simplify and clarify add unnecessarily to its complexity and introduce confusion' and outlines his reasons for identifying this as one of those provisions.[51]

5.65 The committee received evidence that the provisions of the bill in relation to leasing will have a significant effect on the industry. One particular issue that attracted attention from witnesses relates to proposed sections 233 and 234 of the exposure draft and especially their effect on the priority of a lessor with an unperfected security interest. These sections are lengthy but relevant as they have the effect of significantly changing the existing rights of a lessor seeking to recover in situations of the insolvency of the grantor. Ms Flannery helped explain the effect of the draft provisions and the proposed change to existing law:

> I will just give you an example. I am a lessor of manufacturing equipment. I lease it to my colleague Karen for a term of two years but I fail to register it. As the law currently stands today, when Karen became bankrupt, I would just take my equipment back because I own that equipment. I would take it and lease it to someone else. If the PPS regime is introduced, my lease will be a PPS lease and I will have to register it.
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> …
>
> Even though under general law at the moment I have an asset of $40 million that I can take back because I have legal title to it, I will not be able to take it back if I have forgotten to register. I will have to claim for what I am owed, because section 234 says I can claim that, but I will only get what every other unsecured creditor gets.[52]

5.66 Despite the significance of the change in the position of a lessor with an unperfected security interest, evidence from leasing industry representatives strongly supports the proposed reform. Mr Bills, Associate Director of the Australian Finance Conference (AFC), who for the purpose of giving evidence also represented the Australian Equipment Lessors Association and the Australian Fleet Lessors Association, observed that the big advantages of the reform are that members will be able to put all of their assets on one register rather than on separate registers or being

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50 Attorney-General's Department, *Submission No. 8*, p. 14.

51 Mr David C. Turner, *Submission 33*, p. 4.

52 Ms Flannery, Clayton Utz, *Committee Hansard*, 22 January 2009, p. 24.

unable to register certain property at all, and that the reform establishes clear and transparent priority rules, which will address uncertainties in the current law.[53]

5.67 Mr Bills's evidence is that the AFC members are not troubled by the proposed new requirement to register a lease in order to obtain perfection of the security interest:

> I know one situation in New Zealand that related to [property]. It was a situation where the person did not stick the [property] on the register. It seemed pretty clear to us. We did not really know why this had gone to court. It seemed to be crystal clear. If it has not been stuck on the register, you have not got a security interest in that asset. I think that was what the court decided. Most commentators in New Zealand were not surprised at all with the result. It was quite appropriate that that should occur that way.[54]

5.68 In relation to the effect of the law in other jurisdictions, the AFC's Legal and Market Consultant, Mr Stephen Edwards, observed:

> Talking to others who have watched the implementation of this kind of law across the globe, each country seems to have one or two leasing or title retention cases quite early in the piece where a lessor or a supplier ends up losing out because they have not registered. That gets the message across. In fact, a number of the discussions we have had with the Attorney-General's Department over time have been about making sure that, as far as possible, business is well educated about this bill.[55]

5.69 One other aspect of detail relevant to leases was raised with the committee by Clayton Utz in relation to the loss of priority of a lessor, bailor or consignor. Clayton Utz agrees that it is appropriate for a competing perfected security interest in a lease, bailment or consignment to defeat an unperfected interest, but essentially argues that any value remaining after the perfected interest has been satisfied should be returned to the party with the unperfected interest (the lessor) rather than it becoming an asset available to all unsecured creditors.[56]

Recommendation 10

5.70 The committee recommends that consideration be given to improving the priority of an unperfected lessor as against unsecured or other unperfected interests in the goods.

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53 Mr Bills, Institute for Factors and Discounters, *Committee Hansard*, 23 January 2009, p. 44.

54 Mr Bills, Institute for Factors and Discounters, *Committee Hansard*, 23 January 2009, p. 44.

55 Mr Edwards, Australian Finance Conference, *Committee Hansard*, 23 January 2009, p. 44.

56 Clayton Utz, *Submission 27*, pp 2 and 8 to 10.

Intellectual property

5.71 The basic approach taken by the Department is, in the main, to treat intellectual property in the same way as other property. In the Department's view:

> …when it comes to the rules about the creation of security interests in intellectual property, we would be looking to harmonise that consistent with our functional approach of saying, 'Why is intellectual property different from other forms of property? If this rule works for everything else, then it should work for intellectual property. Why should the rule for intellectual property be any different?' That is the approach we have been taking, and no significant case has been made for saying intellectual property warrants a special rule in terms of creating security interests. But there are a couple of special rules, I can indicate. We have acknowledged the need for a couple of special rules for intellectual property.[57]

5.72 The evidence the committee received which addressed issues in relation to intellectual property was somewhat sketchy. Little evidence was received from intellectual property organisations and representatives in Australia, and two submissions were received from international representative bodies based in the United States.[58]

5.73 In relation to the views of Australian stakeholders the Department advised the committee that:

> The answer to what do Australian stakeholders think about the bill is that initially there was a fair amount of 'If it's not broke, don't fix it,' amongst the intellectual property community. We have met with them and talked to them, and I think they now see that the bill can deliver benefits for them. The committee has before it a submission—I think it is No. 32—from the intellectual property committee of the business law section of the Law Council of Australia, in which they say:
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> > The committee is in general agreement with the legislation and its objectives. It applauds the attempt at harmonisation of law on the subject.[59]

5.74 A few issues were raised with the committee by Australian organisations about the proposed intellectual property provisions, but these were limited and primarily quite technical concerns.[60]

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57 Mr Patch, *Committee Hansard*, 6 February 2009, p. 65.

58 The Queensland Law Society, *Submission 19*, and the Law Council of Australia Intellectual Property Committee of the Business Law Section, *Submission 32* are the Australian submissions. The two United States based organisations who made submissions were the International Trademark Association, *Submission 21*, and the International Film and Television Alliance, *Submission 22*.

59 Mr Patch, *Committee Hansard*, 6 February 2009, p. 64.

5.75 Despite the relatively sanguine view of Australian organisations, the exposure bill attracted international concern from two industry representative organisations based in the United States. In particular, the committee received a detailed submission, and heard evidence, from one of the organisations based in the United States – the International Film and Television Alliance (IFTA).[61] IFTA was keen to ensure that features of existing intellectual property arrangements for secured lending do not negatively impact on Australian and international secured lending for intellectual property that would jeopardise film industry.[62]

5.76 The Department advised the committee that in relation to international conflict of laws provisions, it agreed with IFTA that 'the territorial level is the basis on which the legislation should proceed.'[63] The Department also stated that it has considered all of the submissions made to it directly and all of the submissions received by the committee.[64]

5.77 The committee has not had time to analyse the merits of the proposed intellectual property provisions and the concerns raised about the effect of the provisions in detail. The committee is reassured by the Intellectual Property Committee's untroubled view of the exposure draft approach. Given the recommended extension of time for the implementation of the reform, the committee encourages the government to remain open to considering any concerns raised with it about these proposed sections. The committee also emphasises the importance of appropriate education about the bill in general and the intended effect of the intellectual property provisions in particular. Such education could include information in the explanatory memorandum and material targeted at relevant international industries and organisations, such as IFTA.

Recommendation 11

5.78 The committee recommends that the explanatory memorandum and the proposed education campaign adequately explain the purpose and effect of the draft intellectual property provisions, including disseminating the information to appropriately targeted international industries, organisations and stakeholders.

Chattel paper

5.79 The exposure bill introduces a concept that is not widely known in Australian personal property secured lending. The new concept is that of a 'chattel paper'. The concept of 'chattel paper' is known in the United States' PPS legislation and the

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60 For example, the Queensland Law Society, *Submission 19*, pp 5 and 6 raises a concern about proposed section 38.

61 International Film and Television Alliance, *Submission 22*.

62 International Film and Television Alliance, *Submission 22*, p. 1.

63 Mr Patch, *Committee Hansard*, 6 February 2009, p. 49.

64 Dr Popple, *Committee Hansard*, 6 February 2009, p. 62.

purpose of including these provisions in the bill is apparently an attempt to create stimulus for a 'chattel paper' industry in Australia.[65]

5.80 The Department describes a *chattel paper* as follows:

> Chattel paper is one or more writings that show the existence of both a monetary obligation and a security interest in or lease of specified tangible property or a security interest in intellectual property or an intellectual property licence. It does not include a negotiable instrument, an investment instrument, and investment entitlement or a document of title. An example of chattel paper is a hire-purchase agreement.[66]

5.81 It was the view of some submitters that these provisions are unnecessary and it would assist to simplify the bill if these provisions were removed. For example:

> So you have a competing issue as to whether, under this legislation, you register the chattel paper before you send off the receivables. Also, you have to assign transfers if you have to register transfers of receivables. It just creates complexity which is not needed. I would submit respectfully that in this market we do not have a chattel paper financing market, and that is one example where we have introduced that into this legislation and it is just not needed.[67]

5.82 Other evidence was given that it is considered unlikely that the provisions will achieve the intended result of generating an Australian industry in chattel papers, but that in the main the provisions are harmless:

> I do not think it would necessarily have the beneficial impacts that the draftspeople expected it to have in the sense of fostering more of a chattel paper industry, but I do not think there is any harm in leaving it in there.[68]

5.83 Still other evidence to the committee was that these provisions are welcome:

> From speaking to a number of people in the finance industry, I think there are some distinct advantages—including the chattel paper concept—in the bill. There may, for example, be some reasonable argument that to perfect a security interest in chattel paper you may not need to take physical possession of it or you may not need to have control of it in the way that the bill currently contemplates. I think the proposed bill provisions will work and will work effectively, and they are closely modelled on the provisions that exist overseas. But, having said that, it is not a part of the bill that is indispensable in terms of whether or not the reform process goes forward.[69]

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65 Ms Flannery, Clayton Utz, *Committee Hansard*, 22 January 2009, p. 31.

66 *Submission No. 8*, p. 11.

67 Mr Canning, Mallesons Stephen Jacques, *Committee Hansard*, 23 January 2009, p. 34.

68 Ms Flannery, Clayton Utz, *Committee Hansard*, 22 January 2009, p. 31.

69 Mr Wappett, Piper Alderman, *Committee Hansard*, 22 January 2009, p. 18.

5.84 As noted above, the committee is of the view that the draft bill should be simplified as much as possible, one aspect of which could be to remove these provisions. The committee considers that if the government is minded to follow Professor Duggan's suggestion to primarily adopt one of the international models then the Australian chattel paper provisions should not be added to the chosen international model. However, if the exposure draft model is retained the committee considers that the Department should reconsider the importance of these provisions and remove them if they are not essential to the reform.