

Liberal Senators' Dissenting Report

Overview

1.1 Liberal senators support the objectives of the Personal Property Securities Exposure Draft Bill, and agree that overall they should boost efficiency and provide cost savings for stakeholders. While acknowledging these potential advantages, Liberal senators are concerned by particular aspects of the reform.

1.2 Liberal senators highlight the committee's concern about the length, complexity and prolixity of the exposure draft bill. Despite the Department's intention to increase certainty of the law, the new provisions will actually significantly increase uncertainty about the effect of the law;¹

1.3 Furthermore, the bill suffers from significant drafting issues making it difficult to understand the proposed law.² The main failures of drafting have been identified as the detailed cross-referencing, unnecessarily complex terminology and verbose provisions which seriously affect the comprehensibility of the provisions.³

The majority report

1.4 Liberal senators wholly support recommendations 1, 2, 3 and 10 of the majority report.

1.5 Although differing in degrees of emphasis and detail, Liberal senators also support in principle the majority recommendations except recommendation 7 (in relation to the *commercially reasonable manner* test).

1.6 Particular aspects of the proposed reform of concern to Liberal senators relate to:

- consultation and education;
- interim review of the reform;
- privacy protections and the Privacy Impact Assessment;
- the section 235(1)(b) *commercially reasonable manner* test;
- international conflict of laws provisions;
- enforcement; and
- regulations.

1 For example, Mr Loxton, Allens Arthur Robinson, *Committee Hansard*, 23 January 2009, p. 28.

2 Drafting issues are discussed in detail in chapter 4.

3 For example, see Professor Duggan, *Submission 1*, p. 6.

More effective consultation and education

1.7 Liberal senators support committee recommendation 2 that commencement of any PPS reform should be deferred for at least 12 months. This time should be used first to undertake new consultations with stakeholders, including educating those who will be affected by the reform but who are not yet engaged in its development. The time should then be used to redraft the bill and to continue to consult stakeholders about it so that a final draft version of the bill can be settled.

1.8 Although the Department has undertaken consultation with stakeholders, Liberal senators are particularly concerned that significant business sectors that will be affected by the reform are not yet engaged with its development. As Mr Peter Faludi, Special Counsel for DLA Phillips Fox, informed the committee:

...the number of people who are focused on the legislation is a lot less than the number of people who are not. So it is often difficult to engage people in discussions because it is something they have not really focused on.⁴

1.9 This reform is of such significance that it is essential that all affected stakeholders are involved first in the development of the legislation and then in a widespread education campaign. To ensure that the extra time taken is used effectively, Liberal senators advocate a planned program of consultation, education and government response.

Recommendation 1

1.10 In relation to consultation and education Liberal senators recommend that:

- (a) the government uses the committee report and the Liberal senators' additional recommendations to undertake new consultation about the proposed reform;**
- (b) the government should particularly identify stakeholders who are not yet engaged with the reform and educate them about the scope and significance of the proposals;**
- (c) a considerably revised draft bill should be publicly released within six months of the date of this report;**
- (d) stakeholders should be extensively educated and consulted about the revised exposure draft for three months from the release of the draft; and**
- (e) a final exposure draft bill should be referred to the Senate within six months of the release of the revised draft bill requesting that the final exposure draft is referred to this committee for consideration accompanied by:**

4 Mr Faludi, *Committee Hansard*, 22 January 2009, p. 31.

- (i) **the proposed draft regulations; and**
- (ii) **a report that outlines the key concerns raised with the government by stakeholders and the government's response to those concerns and that identifies the differences between the newly referred bill and the November 2008 exposure draft bill.**

Review of the reform

1.11 Liberal senators agree that it is critical to check that the final legislation is effective by reviewing its operation. The committee has recommended that it be reviewed within three years of its commencement (committee recommendation 3). However, the scope and complexity of this reform is of such magnitude that Liberal senators believe that an interim assessment of the reform should be made. To do this government should table a report on the first year of operation of the reform within 15 months of the commencement of the Act. The report should include the views of all stakeholder groups and the government's response to these views.

Recommendation 2

1.12 Liberal senators recommend that the government table a report in Parliament on the first year of operation of the reform within 15 months of the commencement of the Act. The report should include the views of stakeholders, including representatives of industry, governments, lawyers, consumers and academics and the government's response to these views.

Privacy protections

1.13 An area of particular concern to some submitters, and to Liberal senators, relates to privacy protections for the proposed national online PPS register. The committee has made an important recommendation that key privacy protections be included in primary legislation and not left to regulations (majority recommendation 4).

1.14 The committee recommendation specifically refers to a prohibition on making the address details of any individual public. Liberal senators agree with this, but also seek to ensure that other key privacy safeguards are included in the primary legislation. To make certain that this occurs, Liberal senators recommend that the Privacy Impact Assessment identifies key privacy protections that should be contained in the primary legislation.

Recommendation 3

1.15 Liberal senators recommend that the Privacy Impact Assessment identify key privacy protections which should be contained in the primary legislation.

Privacy Impact Assessment

1.16 In relation to the Privacy Impact Assessment, Liberal senators believe that it is not enough for the Department to conduct its own Assessment. Without impugning

the integrity of the Department's staff, this is a matter of such importance that it should be conducted by an independent person or organisation with direct experience in undertaking such assessments.

1.17 Moreover, not only should the Assessment be made public, but stakeholders are entitled to be told directly of the government's response to the Assessment.

1.18 If any other privacy issues raised by the Office of the Privacy Commission are considered separately (as per majority recommendation 6) this consideration and the government's view should also be made public.

Recommendation 4

1.19 Liberal senators recommend that:

- (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**
- (b) the Privacy Impact Assessment and the government's response to it should be tabled in Parliament within 2 months of the date the Assessment is completed.**

Recommendation 5

1.20 Liberal senators recommend that any issues considered in accordance with majority recommendation 6 and the government's response to them should be tabled in a report to Parliament within 2 months of the date that the Privacy Impact Assessment is completed.

Commercially reasonable manner test - an unnecessary burden on business

1.21 As noted in the committee report, proposed section 235 of the bill will require duties and obligations to be exercised *honestly* and in a *commercially reasonable manner*.

1.22 Liberal senators support the requirement to act honestly, but are not convinced of the need to introduce a new legal test into Australia to act in a commercially reasonable manner. The committee received evidence from a number of submitters that this obligation will increase uncertainty, fetter the contractual ability of parties and increase litigation. In relation to both tests the combined four big law firms observed that:

These are new tests which will need litigation over many years to define. These can significantly add to the burden of secured parties, when the common law and statute law is adequate in its current form. They will add to uncertainty and the cost of enforcement, and have the potential to give rise to significant amounts of litigation. It decreases flexibility in a party's

ability to protect its commercial interests. They run counter to the Bill's aim for simplicity and clarity and should be deleted.⁵

1.23 Even Professor Duggan, who is a proponent of the Canadian PPS models (which mostly include this obligation) sees it as:

...a non-essential provision. I accept the argument that because it is open-ended it may produce uncertainty and litigation. My inclination would be to scrap it.⁶

1.24 Furthermore, Clayton Utz, who generally supported the exposure draft bill, observed that:

There are no compelling policy reasons for Australia to adopt a statutory standard of 'acting in a commercially reasonable manner'. Also, the inclusion of such a test does not promote commercial certainty.⁷

1.25 Liberal senators are also concerned that because the requirement is unclear and open to different interpretations it is likely to increase red tape: a business may need to take protective steps to document that it is not acting in a commercially unreasonable manner and this has the potential for costs to business to increase.

1.26 In the view of the Liberal senators this provision should not be included in any PPS reform and dissent from committee recommendation 7 in this regard.

Recommendation 6

1.27 Liberal senators recommend that the requirement to act in a commercially reasonable manner be removed from proposed section 235 of the bill and be excluded from any future version of the reform.

International conflict of laws provisions

1.28 Evidence to the committee about the need for international conflict of laws provisions was overwhelming. A clear view was expressed to the committee that the provisions outlined in Appendix A to the Department's submission⁸ were a marked improvement on earlier draft provisions.⁹ However, there was insufficient time for the committee to explore in detail exactly what the content of Australian conflict of laws provisions should be.

5 Allens Arthur Robinson, Blake Dawson, Freehills and Mallesons Stephen Jacques, *Submission 30*, p. 14.

6 Professor Duggan, *Committee Hansard*, 23 January 2009, p. 7.

7 Clayton Utz, *Submission 27*, pp 1 and 2.

8 Attorney-General's Department, *Submission 8*, pp 143 to 163.

9 For example, see Mr Wappett, Piper Alderman, *Committee Hansard*, 22 January 2009, p. 13.

1.29 Liberal senators were interested in the evidence of Ms Flannery of Clayton Utz who observed that:

I definitely support a conflict of laws regime going in...it would be a missed opportunity to simplify what is currently an unclear area of the law. But if you compare the regime that is in appendix A with, for example, the New Zealand regime, it is a lot more complex...I can understand the rationale, in part, for some of the complexity in appendix A, but I think that a simpler set of rules would be better.¹⁰

Recommendation 8

1.30 Liberal senators recommend that the government further considers the content of international conflict of laws provisions and incorporate into the bill either:

- (a) a simple and effective model of conflict of laws provisions based on an existing international model; or**
- (b) the conflict of laws provisions at Appendix A to the Department's submission.**

Enforcement

1.31 Discussion in the committee report about enforcement identifies a number of concerns about the proposed approach. The committee report also noted that this is an area of the draft bill which deserves significantly more detailed consideration before the new bill is finalised.

1.32 Liberal senators have particularly identified this as an area requiring detailed consideration by the government and stakeholders.

Recommendation 8

1.33 Liberal senators recommend that the government strengthen the proposed enforcement provisions with a focus on:

- (a) comprehensive and effective sanctions for improper use of the register;**
- (b) ensuring the registrar's ability to inquire into suspect activity; and**
- (c) the availability of civil and criminal action with appropriate penalties.**

Intellectual Property

1.34 Further to the majority recommendation to explain the purpose and effect of the draft intellectual property provisions (majority recommendation 11), Liberal

10 Ms Flannery, *Committee Hansard*, 22 January 2009, pp 25 and 26.

senators are keen to ensure that any outstanding concerns about these provisions are identified and addressed.

1.35 This is an area in which the government should target its further consultation and should report on any concerns.

Recommendation 9

1.36 Liberal senators recommend that the government should identify any outstanding concerns about the intellectual property provisions of the draft bill and should outline the concerns and its response in its report to the Senate (as per Liberal senators' recommendation 1(f)).

Regulations

1.37 Regulations supporting this legislation are expected to be substantial. The Department released draft regulations in May 2008 and sought feedback on them. The Department gave evidence that it is currently reviewing comments it received and expects to issue a revised version in about March 2009.¹¹

1.38 Because of the extent and importance of the regulations to this reform, Liberal senators are of the view that they should be independently reviewed. The purpose of the review would be not only to assess the content of the proposed regulations, but also to consider whether it is more appropriate for any aspect to be included in the primary legislation rather than in delegated legislation.

1.39 The content of any regulations is necessarily informed by the content of the supporting legislation so it would seem effective if regulations continue to be developed in parallel with the development of the primary legislation.

1.40 Liberal senators recommend that when the revised draft bill is referred to the Senate for consideration that it is accompanied by the proposed draft regulations (Liberal senators' recommendation 1(e)).

Education campaign

1.41 In addition to the education required immediately to engage stakeholders who are not yet involved in the development of the model (see the *More effective consultation and education* section above) substantial education will be required when a final bill has been settled.

1.42 It is often appropriate for legislation to be passed before undertaking education about it. However, this reform proposes a national scheme that will require a statutory referral of power from the States through the passage of State legislation before the Commonwealth legislation can be enacted. Because of the somewhat

11 Mr Glenn, *Committee Hansard*, 21 January 2009, pp 14 to 16.

cumbersome process required to establish the reform the commencement date is likely to be quite soon after the passage of the Commonwealth Act.

1.43 As a result, it is important that education starts in anticipation of the commencement of the scheme. All stakeholders will need to understand the reform and businesses small and large will particularly need to know what they need to do to prepare for the introduction of the system. Once the bill is ready for passage through a State parliament, Liberal senators strongly support a comprehensive education campaign in preparation for implementation of the reform.

Senator Guy Barnett

Senator Mary Jo Fisher

Senator Russell Trood

Deputy Chair