

# CHAPTER 2

## History of the Bill

### Origins

2.1 The process that has led to the 2009 Bill commenced in April 2006 with the release of an options paper, and was followed by a national consultation process. The department released three further discussion papers, in November 2006, March 2007 and April 2007.

2.2 The first exposure draft of the bill was released in May 2008.<sup>1</sup> After significant amendments, a further exposure draft was released in November 2008.<sup>2</sup> The department also convened a PPS Consultative Group 'to guide the reform process'. The PPS Consultative Group, which met quarterly, comprises experts invited from industry, governments, consumer groups, legal practitioners and academia.<sup>3</sup>

### Exposure draft inquiry

2.3 By letter dated 11 November 2008 the Attorney General, the Hon Robert McClelland MP, requested that the Senate Legal and Constitutional Affairs Committee inquire into and report on the proposed Personal Property Securities Bill 2008. On 13 November 2008 the Senate, on the motion of the Chair of the committee Senator Crossin, referred the exposure draft provisions of the bill to the committee for inquiry and report by 24 February 2009. The Senate subsequently agreed to an extension of the tabling date to 19 March 2009. The committee invited submissions and held public hearings into the exposure draft bill.

2.4 Like the current inquiry, the exposure draft was examined in a short timeframe, given the complexity of the bill and the importance of the reforms it foreshadowed. This led to vociferous complaints from a range of submitters and intending submitters who argued that it was very difficult to come to grips with the bill in the allotted time. The committee noted in its report:

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

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1 Inquiry into the Personal Property Securities Bill 2008 [Exposure draft], Attorney-General's Department, *Submission 8*, p. 18.

2 Appendix B to the Attorney-General's Department submission to the Inquiry into the Personal Property Securities Bill 2008 [Exposure draft] summarises the key changes made to the bill between the May and November drafts.

3 Inquiry into the Personal Property Securities Bill 2008 [Exposure draft], Attorney-General's Department, *Submission 8*, p. 18.

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 [the] reform.

2.5 Notwithstanding the timeframe and resulting limitations on the inquiry, the committee finalised and tabled a report on the exposure draft in March 2009. The committee's report contained 11 recommendations for amendments to the exposure draft and brought a range of other issues to the government's attention for consideration.

### **The committee's recommendations in relation to the exposure draft**

2.6 The committee's key findings and recommendations in its March 2009 report were as follows:

#### **Recommendation 1**

4.19 The committee strongly recommends that the department reconsiders the balance between certainty of the law and the accessibility of the provisions with a view to:

- simplifying the language of the exposure draft bill – for example, wording provisions clearly and limiting them to deal only with common circumstances;
- simplifying the structure of the exposure draft bill – to minimise the cross-referencing needed;
- simplifying the terms used - for example instead of 'tangible goods' use the term 'goods' appropriately defined to ensure the full meaning needed for the reform is ascribed to the term; and
- using overseas provisions as often as possible to allow overseas experience to provide guidance for the Australian model.

#### **Recommendation 2**

4.27 The committee recommends that the commencement date for the scheme be extended by at least 12 months to May 2011 for the committee's recommendations to be implemented and for advice from stakeholders to be taken into account before the content of the bill is finalised.

#### **Recommendation 3**

4.35 The committee recommends that the bill include a requirement that the operation of the bill be reviewed three years after it commences in a process that includes extensive consultation with industry, governments, lawyers, consumers and academics.

#### **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.

### **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.

### **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.

### **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.

### **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.

### **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.

### **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.

### **Government response**

2.7 The government tabled a response to the committee's report on 8 June, indicating acceptance of all of the committee's recommendations except recommendation 4, which related to privacy protection, and which it indicated was accepted in substance. The government also wholly accepted four of the nine Opposition recommendations, partially accepted a further three, and rejected two. Appendix 3 contains the details of the government's response to each of the majority and Opposition recommendations.

### **The 2009 Bill (the Bill)**

2.8 While the government indicated that it accepted most of the committee's recommendations, including recommendation 2 in which the committee had recommended that the commencement date for the scheme be extended by at least 12 months to May 2011, the final version of the legislation was introduced before advice from stakeholders had been taken into account. The committee had expected that the final draft would be available for a longer period before being introduced.

2.9 The final version of the 2009 Bill was introduced into the House of Representatives on 24 June 2009, which is only three months after the committee had tabled its March report into the Exposure draft. As noted in Chapter 1, the Bill was referred to the committee the following day, on 25 June, for a short inquiry, which initially was to report on 7 August.

2.10 In the committee's opinion, this process has been somewhat foreshortened and has led to the committee still holding a number of unresolved concerns about the Bill which are discussed in the following chapters. The process has also led to many further complaints from stakeholders about the haste with which it is being pursued, including the time that the committee was able to allow for the preparation of submissions. The Bill was very substantially restructured and re-written since the exposure draft, and a number of new sections introduced, and there appears to have been little if any further consultation initiated by the department with stakeholders on the new draft. A number of these stakeholders again raised serious concerns about their capabilities to come to terms with the Bill in the time allowed for consideration, and have also claimed that there are still errors in the Bill and unresolved issues.

2.11 There has been no adequate explanation about why the committee's recommendation to take more time to finalise the Bill was not accepted.

2.12 Notwithstanding concerns about the haste of the process and that advice from stakeholders may not been taken into account in a wholly exhaustive process, the committee acknowledges that the Bill is a vast improvement over the exposure draft. The committee also notes that most witnesses whom the committee questioned about this were of a similar view.

2.13 The committee congratulates the officers of the Attorney-General's department who were responsible for its carriage for the enormous effort made to improve the Bill in the short period since the committee's March report, and for their spirit of co-operation with the committee's processes.

2.14 The following chapter examines in detail the changes made to the exposure draft and incorporated into the version of the Bill now before the Senate.

