

CHAPTER 3

Changes between the exposure draft and the 2009 Bill

Introduction

3.1 The government's acceptance and implementation of the committee's recommendations of March 2009 required the government to make substantial alterations to the exposure draft bill, and to undertake a number of processes. These included major changes such as simplifying the language and structure of the nearly 300 page draft, undertaking a Privacy Impact Assessment, and reviewing the scope and content of the enforcement provisions.

3.2 The provisions of the 2009 Bill considered by the committee reflect these changes and processes. Because the amendments include substantial restructuring of the Bill, it is not easy to readily identify the substantive changes made to the Bill simply by looking at the new version of the Bill.

Changes

3.3 The department has made a submission to the inquiry which outlines the changes made since the release of the exposure draft bill. The submission and the attachments are clear and relatively brief and they are commended to Senators.

3.4 In its submission the department states that the new Bill reflects:

- the recommendations made by the senate committee in its March 2009 report on the Exposure Draft of the Bill;
- the concerns of the States and Territories, and of other stakeholders; and
- the establishment of the offices of Registrar and Deputy-Registrar of Personal Property Securities.¹

3.5 As an overview of the changes incorporated into the new Bill in response to the committee's March 2009 report, the department has summarised the changes as follows:

- (a) the substantial restructuring of the Bill (significantly to relocate formal provisions previously at the beginning of the Bill, so that the Bill gets to the substantive provisions much more quickly);
- (b) the re-writing of many provisions in the style used in overseas counterparts of the PPS Bill, without any change to their legal effect (principally in the style used in the Saskatchewan Act);
- (c) the inclusion of conflict of laws and privacy protection provisions; and
- (d) policy changes (principally designed to more closely align the Bill with its overseas counterparts).²

1 Attorney-General's Department, *Submission 1*, Attachment A p. 1.

Structural changes

3.6 In response to criticisms of the exposure draft, the structure of the Bill has been changed considerably. By reorganising the provisions, altering the language and making it shorter the Bill is now more readily comprehensible. The key amendments are:

- there has been a philosophical change to the drafting style and this incorporates harmonisation with overseas provisions where possible – in the new Bill many provisions have been written differently to say the same thing in a simpler style and using simpler language;
- chapter and part guides have been introduced;
- technical provisions, particularly about the constitutional aspects of the Bill, have been moved towards the end of the Bill;
- as a result of the new drafting style numerous definitions have become redundant, and where appropriate remaining definitions have been moved closer to the sections to which they are relevant, for example the provisions relating to possession and control; and
- Part 3.5 Intellectual Property has been created to unite related sections that were previously in separate areas of the Bill.

3.7 Overall, the proposed legislation remains lengthy and complex in parts. However, the changes make it markedly easier to understand the intent of the proposed legislation compared to the exposure draft.

Substantive changes

3.8 A number of substantive changes have also been made to the Bill, including in response to the committee's March 2009 report.

Privacy Issues

3.9 The previous inquiry highlighted significant concerns about the operation of the register and whether the proposal adequately protected individual privacy. The department advised that it was undertaking a Privacy Impact Assessment of the proposal. The committee made a number of recommendations in relation to privacy, including that the assessment be undertaken by a suitably qualified, independent person or organisation.

3.10 The government accepted this recommendation and a comprehensive Privacy Impact Assessment was completed by Information Integrity Solutions. The principal of this firm is Mr Malcolm Compton, the former Privacy Commissioner.

3.11 The Assessment made recommendations for a couple of immediate changes to the provisions and quite a number of 'future action' recommendations. The future action recommendations essentially agree with the current approach, but recommend

2 Email from Mr Robert Patch, Attorney-General's Department to Ms Toni Dawes, Principal Research Officer, 30 June 2009.

that they be reviewed after the scheme has been in place for a period of time to check if the provisions are effective.

3.12 The government provided a formal response to the Privacy Impact Assessment on 5 August 2009. A copy of the response is available on the committee's web page at:

<https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=90df11ec-ada3-4e40-9f9a-7aef2a32df44>

3.13 The government response indicated that the government accepted all but one of the 14 recommendations made in the Privacy Impact Statement. Recommendation 3 was rejected on the grounds that such a requirement would impose an unwelcome administrative burden on small businesses adapting to the new PPS regime, and would also impose different obligations on small businesses than the *Privacy Act* does in similar circumstances.³

3.14 The specific changes made in response to issues arising from the previous committee inquiry and the work done for the PIA include:

- confirming that a consumer's address details will not be recorded on the register (see Item 2 of the table in clause 153);
- the Registrar now has improved powers to remove inappropriate data from the register;
- clause 151 now requires that a person registering a matter on the register must have a belief on reasonable grounds that the security arrangement between the parties does, or will exist. If a matter is registered without a belief on reasonable grounds a civil penalty can be imposed;
- verification statements - the positive obligation on a lender to provide a debtor with notification of arrangements placed on the register is now bolstered because there are consequences available if the notification requirements are not met: the federal privacy commissioner's complaints jurisdiction can be invoked; and
- unauthorised searches will now enliven either the jurisdiction of the privacy commissioner or the civil penalty regime. The department is apparently still resolving the details, but the aim is to allow flexibility

3 **Recommendation 3** – IIS recommends that secured parties proposing to register a security interest in consumer property where the registration will include an individual grantor's name and DOB be obliged to first advise the individuals concerned of the disclosure of personal information to the PPSR. To the extent that this obligation would not be satisfied by a secured party's existing obligation under the Privacy Act, IIS recommends that the PPS Bill should provide that failure to provide prior notice of a registration that relates to consumer property and would include name and DOB is an interference with privacy under the *Privacy Act*.

for the most appropriate response to be available in different circumstances.

3.15 In particular, the committee previously recommended that the primary legislation for the PPS reform include the key privacy protections for individuals, including a prohibition on making the address details of any individual public.

3.16 The government substantially accepted the recommendation and amended the Bill to clarify information about individuals that may be included on the register and to better describe the key privacy protections provided to individuals.

3.17 The Bill makes it clear that address details of individual grantors will not be included on the register, rendering a prohibition on making address details public unnecessary.

3.18 Item 2 of the table in clause 153 of the PPS Bill provides that if the relevant collateral is consumer property and is required to be described by a serial number, then no personal information is collected. Where an item is not required to be described by a serial number the only details that can be collected about the grantor are his or her name and date of birth.

International Conflict of Laws

3.19 The committee's March 2009 majority recommendation 8 was 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.

3.20 The government accepted this recommendation. However, the government has not adopted the exact wording of existing international personal property securities conflict of laws provisions. The Explanatory Memorandum notes that the provisions included in the 2009 Bill (Chapter 7 – Operation of Australian and other laws) are 'based on international conflict-of-laws rules. The provisions are based on similar provisions in the New Zealand and Saskatchewan PPS Acts and the UNCITRAL [Legislative Guide on Secured Transactions].'⁴

3.21 Specifically, Part 7.2 of the Bill, entitled *Australian laws and those of other jurisdictions*, includes conflict of law provisions setting out which law, in court proceedings, will govern the validity, perfection and effect of perfection or non-perfection of a security interest. Clause 234(2) makes it clear that Part 7.2 does not affect the law that governs contractual obligations (including any obligations arising under a security agreement).

3.22 The proposed conflict of laws regime does not have the benefit of being identical to existing international models. The government explains that the New Zealand conflict of laws provisions have been criticised as being uncertain.⁵

4 *Explanatory Memorandum*, p. 102. UNCITRAL is the acronym for the United Nations Commission on International Trade Law.

5 Government response to the Senate committee's March 2009 report, tabled on 15 June, p. 5.

Enforcement

3.23 The committee recommended 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. The new Bill includes an enhanced approach to enforcement (in Chapter 4 of the Bill). There are now consequences for not complying with the Bill's requirements: depending on the particular provision the Federal Court can order the payment of a civil penalty or the Privacy Commissioner's complaints jurisdiction can be invoked.⁶

3.24 The Bill was amended to provide enhanced sanctions for improper use of the register and to ensure the registrar can monitor and investigate suspicious register activity. Specifically, Part 6.3 of the PPS Bill would establish a regime for applying civil penalties under the Bill. On application by the PPS Registrar, the Federal Court could order the payment of a civil penalty for a serious breach of a civil penalty provision. The civil penalty provisions are:

- applying to register, or failing to amend an existing registration, where the registrant does not have a reasonable belief that the collateral secures, or will secure, an obligation; and
- searching the register other than for an authorised purpose.

3.25 The Registrar would also have the power to investigate a suspected search of the register other than for an authorised purpose.

3.26 The new provisions are welcome additions to the scheme, but are the subject of discussion in some submissions which question whether there need to be some amendments to ensure the approach is as effective as possible.⁷

Commercially reasonable manner

3.27 The committee recommended retention of the requirement for rights and duties to be exercised honestly and in a commercially reasonable manner, and that the intended scope of these requirements be explained in detail in the Bill's explanatory memorandum.

3.28 The Bill was amended to make clear that the duty to act in a reasonably commercial manner applies only in relation to Chapter 4 of the Bill concerning the enforcement of security interests. The duty to act in a commercially reasonable manner would not apply to the extent that the parties have contracted out of the enforcement provisions of the Bill under proposed section 154.

Review

3.29 The committee recommended that the Bill include a requirement that the operation of the Bill be reviewed three years after it commences in a process that

6 See the Attorney-General Department's *Submission 1*, p 7, for details of the civil penalty sections.

7 For example, the Consumer Action Law Centre is concerned that the sanction for failing to meet the verification statement requirements is inadequate, *Submission 5*, p. 4.

includes extensive consultation with industry, governments, lawyers, consumers and academics.

3.30 The Bill now includes clause 343, which would require the Minister to instigate a review of the operation of the Bill, which must be completed within three years of the new PPS scheme commencing.

State & Territory concerns

3.31 The department's submission advises that the states and territories have raised a number of issues since the exposure draft was considered by the committee. The changes that the government has made to the Bill in response to these matters are outlined in paragraphs 27 to 30 of Attachment A to the department's submission to this inquiry.⁸

Registrar

3.32 Also new in this Bill, there are provisions that establish the legislative foundation for the offices of the Registrar of Personal Property Securities and the Deputy Registrar of Personal Property Securities. See paragraph 31 of Attachment A to the department's submission to this inquiry and Part 5.9 of the Bill.⁹

8 Attorney-General Department, *Submission 1*, Attachment A, p. 5.

9 Attorney-General Department, *Submission 1*, Attachment A, pp. 5 and 6.