

APPENDIX 3

Exposure draft of the Personal Property Securities Bill 2008 Government Response

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.

Government response:

Accepted. The Government will review the structure and language of the Bill.

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.

Government response:

Consider further. The Government will consider revising the timeframe for commencement of the PPS scheme in consultation with the States and Territories and, following these consultations, make an announcement about the timing of commencement.

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.

Government response:

Accepted.

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.

Government response:

Accepted in substance. The Bill will be amended to clarify the information about individuals that may be included on the register and to better describe the key privacy protections provided to individuals. The Bill will make it clear that address details of individual grantors will not be included on the register. Accordingly, a prohibition on making address details public is not required.

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.

Government response:

Accepted. A Privacy Impact Assessment will be undertaken by an appropriately qualified independent person or organisation. The assessment will be published on the Department's website. Having regard to recommendation 4 of the minority report, this will occur within two months of the completion of the assessment.

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.

Government response:

Accepted. The Privacy Impact Assessment will consider all issues raised by the Office of the Privacy Commissioner in its submission to the Committee.

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.

Government response:

Accepted. This Bill will be 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 reasonably commercial manner will not apply to the extent that the parties have contracted out of the enforcement provisions of the Bill under section 154 of the Bill.

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.

Government response:

Accepted. The Government accepts that the Bill should include conflict of laws provisions. The New Zealand conflict of laws provisions have been criticised as being uncertain. To avoid uncertainty in the Bill, the Government will include conflict of laws provisions in the Bill based on the provisions at Appendix A to the Department's submission to the Committee (the revised commentary to the Bill).

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.

Government response:

Accepted. The Bill will be amended to provide enhanced sanctions for improper use of the register and to ensure the registrar can monitor and investigate suspicious register activity. Further consideration will be given to appropriate sanctions for misusing the register which may include civil and criminal penalties.

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.

Government response:

Accepted. The Government will, in consultation with stakeholders, consider the appropriate priority outcomes for unperfected lessors as against unsecured or other unperfected interests.

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:

Accepted.

Liberal Senators' Dissenting Report

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

Liberal Senators support in principle the majority recommendations except recommendation 7 (in relation to the commercially reasonable manner test).

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:
 - (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.

Government response:

Accepted in part. The Government will carry out targeted consultation with stakeholders about changes to the Bill raised in the Committee's report. However, further examination of the revised Bill by the Committee would not be consistent with ensuring the final text of the Bill is settled in time to allow stakeholders an adequate period to prepare to transition to the new PPS system. In order to provide certainty to stakeholders, the Government will progress development of the PPS Bill with a view to its passage through Parliament by the end of 2009 and will develop the new PPS register so that its main functionality is complete by May 2010.

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.

Government response:

Not accepted. Reviewing the operation of the reform after only 12 months of operation would not provide useful data about the new PPS system. The Bill will be amended to require that the Government review the Bill after the new PPS system has been operating for three years.

Recommendation 3

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

Government response:

Accepted.

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.

Government response:

Accepted in part. A Privacy Impact Assessment will be undertaken by an appropriately qualified independent person or organisation. The assessment will be made public within two months of its completion.

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.

Government response:

Accepted in part. The Privacy Impact Assessment will consider all issues raised by the Office of the Privacy Commissioner in its submission to the Committee. The assessment will be published on the Department's website within two months of its completion.

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.

Government response:

Accepted. The Government acknowledges the concerns expressed in the report about the operation of section 235 of the Bill as originally drafted. This Bill will be 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 reasonably commercial manner will not apply to the extent that the parties have contracted out of the enforcement provisions of the Bill under section 154 of the Bill.

Recommendation 7

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.

Government response:

Accepted. The Government will include conflict of laws provisions in the Bill based on the provisions at Appendix A to the Department's submission to the Committee (the revised commentary to the Bill).

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.

Government response:

Accepted. The Government will amend the Bill to provide enhanced sanctions for improper use of the register and to ensure the registrar can monitor and investigate suspicious register activity. Further consideration will be given to appropriate sanctions for misusing the register which may include civil and criminal penalties.

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(e)(ii)).

Government response:

Not accepted. See response to Liberal Senators' recommendation 1. However, the Government will seek input from stakeholders about the intellectual property provisions in the Bill to address any outstanding concerns about the provisions.

