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Review of the law on Personal Property Securities

Discussion Paper 1: Registration and Search Issues

<http://www.ag.gov.au/pps>

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The Australian Privacy Foundation

The Australian Privacy Foundation (APF) is the leading non-governmental organisation dedicated to protecting the privacy rights of Australians. We aim to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians.

Since 1987 the Australian Privacy Foundation has led the defence of the rights of individuals to control their personal information and to be free of excessive intrusions. We use the Australian Privacy Charter as a benchmark against which laws, regulations and privacy invasive initiatives can be assessed.

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Introduction

We welcome the opportunity to comment on this important issue and compliment the Department on an Issues Paper which clearly identifies the significant privacy issues. Unfortunately a number of other concurrent enquiries have overloaded our limited all-volunteer resources, and we have not been able to review the paper as thoroughly as we would have liked. We are therefore grateful to Consumer Action Victoria for their analysis of the issues, which we have used in forming our views. We support their main conclusions in relation to privacy.

Comments

Our comments relate to the section of the paper that deals with search options and the information requirements needed to support those options, and specifically to Questions 34-41 and 44-47.

The Paper canvasses in detail issues surrounding the information to be made available on the PPS Register, and recognizes the significant privacy issues that need to be addressed if collateral held by debtor individuals is able to be registered and searched without a unique serial number. The Paper identifies several of these issues, such as: the risk of identity theft; ensuring accurate debtor information; difficulties in limiting access to the PPS Register to legitimate purposes; protecting persons fleeing domestic violence; and how to ensure functional search matching on debtor names.

Any suggestion that privacy concerns would be satisfied because the operators and users of a PPS Register would be subject to the Privacy Act should not be seriously entertained. While the Privacy Act would provide some important 'after the event' protections for any personal information held (including data notice quality and security obligations, and a right of access and correction), other important principles would be rendered ineffective. The statutory requirements for information and any use and disclosure limits would effectively displace the operation of NPPs 1.1, 1.2 & 2, giving individuals no choice about the personal information to be registered and only limited protection from unwelcome, and in some cases dangerous, uses and access.

APF acknowledges that privacy legislation in Australia endorses the idea that protection of the privacy of individuals needs to be balanced against other public interests. However, it is clear that in this case it will be extremely difficult to adequately protect individuals' privacy if their details are publicly searchable on the PPS Register, and we are not persuaded that the other public interests are sufficiently important in the case of collateral not able to be identified by a serial number.

Allowing such collateral to be registered on the PPS Register means that it must be searched by reference to information about debtors.

Where the debtor is a business, there is no privacy issue (privacy laws in Australia do not protect information about 'legal persons' as distinct from 'natural persons'). There are legitimate reasons why collateral not able to be identified by a serial number and held by a business debtor should be allowed to be registered, as set out in the Paper.

However, where the debtor is an individual natural person, allowing registration and search by debtor details necessarily means that the individual's details will be publicly available. There is no practicable means to limit access to the PPS Register if it is to serve its intended purpose. The only sanction against misuse would be penalties that applied 'after the fact' if a search is made for illegitimate purposes, and even then only if a person becomes aware that such a search has been made and by whom.

Further, the Paper does not indicate whether the proposed PPS Register would enable a record or audit trail of all parties that access the registration entry to be kept, available to only the Registrar and the debtor. If no audit trail is kept, it is most unlikely that breaches would be picked up. On the other hand, if an audit trail was kept, this would in itself raise significant privacy issues as it would, in effect, disclose credit applications – raising questions of consistency with the regulation of consumer credit reporting under the Privacy Act.

Unlike credit reference databases, it would not be possible to limit access to a personal properties securities register by class of user (credit providers), as anyone, including individuals, may have a legitimate interest in an item of collateral. In our view, an 'after the fact' penalty regime would be extremely difficult to police and would be unlikely alone to act as an effective deterrent against misuse within such a broad user group.

The Issues Paper notes that in order to ensure accuracy, debtor details available to the public would need to include 'unique' identifiers, with debtor name, address and date of birth the most likely options for individual debtors. We submit that the privacy risks that would arise fall into two main categories:

1. Matching problems

There are always difficulties in matching personal particulars. There is no such thing as a correct or official name or address for individuals, and individuals legitimately use different details in different contexts. The Issues paper acknowledges this issue but does not sufficiently recognise its privacy significance. There would be considerable consumer resistance to being required to conform to some new official definition of 'correct' name or acceptable address – this is becoming a significant issue in relation to the proposed government so-called 'Access Card'.

Dates of birth are common to many individuals and therefore only of value as a tie-breaker. As the experience of the consumer credit reference agencies demonstrates, there are major data quality and security issues associated with any 'searchable' database of individuals details, even when, as is the case

with credit reporting, CRAs are allowed to keep and use drivers licence numbers as an additional identifier. There would no doubt be pressure to add additional identifiers to a PPS register to assist in matching, and this would compound the second privacy risk discussed below.

Matching problems have the potential to significantly adversely affect individuals when a security interest is wrongly attributed, and individuals may either never find out about the adverse consequences, or find out and have to go to considerable trouble to rectify the mistake.

2. Creation of a new high risk database of personal information

The items of information about an individual under consideration – name, address and date of birth (and if allowed, drivers licence number) - are generally not made publicly available together, or if they are, are subject to strict controls (as in the case of Births and Marriages and Electoral Registration data).

This is partly for general privacy protection, including for significant numbers of individuals with personal safety concerns, for whom special arrangements would need to be made – inevitably compromising the function of the register. But there is another reason for not making these items of information together publicly available – that is because it would significantly increase the potential for identity crime. Identity theft or fraud becomes easier as the range of personal details easily accessible increases. Making this combination of information publicly available on the PPS Register for large numbers of individuals would be a major privacy risk.

The consumer groups' submissions draw attention to significant secondary problems that will arise from making this information searchable on a PPS Register, such as companies using the PPS register to find individual debtors subject to secured lending in order to market inappropriate debt consolidation services.

For most secured lending to individuals, these concerns will be overcome if registrations relating to property that has a unique serial number are only able to be searched by serial number. This is due to the fact that most secured lending to consumers is over motor vehicles and boats. Other consumer goods that could be used as collateral may also have unique serial numbers, for example computers, mobile phones and other electrical equipment.

We therefore submit that where the debtor is an individual, registration and search of property should only be permitted by serial number. The consumer groups' submissions conclude that it is doubtful whether there is a significant legitimate need for registration for property that does not have such numbers.

The approach we favour also allays the concerns noted above about the keeping of an audit trail or record of parties that have accessed entries on the PPS Register.

Need for identification of debtor

We have not been able to review another important privacy issue – that is the extent to which a PPS Register would need to include, and release information about the actual identity of the debtor, where it is a natural person, even in those cases where the property concerned was searchable by a unique identifier, and could therefore safely be registered. We are not familiar enough with the operation of the finance industry to assess what 'proportion' of the overall benefit of a register can be provided by knowledge merely of the fact that an item of property is the subject of a security interest, without needing to know the identity of the debtor.

Even where knowledge of debtor identity can be justified, it does not necessarily follow that it needs to be available at the same time, or to the same range of users, or as easily, as the fact of there being a security interest. A system of staged release of information, with appropriate criteria of interest to trigger the release, could be appropriate?

We submit that these issues need to be seriously explored as well as the more obvious 'search' issues discussed above.

Conclusion

There will undoubtedly be many benefits, including to consumers, in the creation of a publicly accessible PPS Register, and the majority of these benefits can be gained from registering secured property which has a unique number (most classes of significant assets), an allowing searches by these numbers, and by debtor name where the debtor is a legal entity.

However, it is not, on balance, in the public interest to pursue the goal of having *all* security interests registered on a PPS Register.

The unsurmountable privacy concerns detailed above require that in the case of security interests where the debtor is an individual and there is no property identifier, the secured property should not be included in the Register.

End.