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**Personal Property Securities Reform  
Regulations to be made under the Personal  
Property Securities Act  
Discussion Paper  
August 2008**

**Submission to the Commonwealth Attorney-  
General's Department**

**October 2008**

### ***The Australian Privacy Foundation***

The [Australian Privacy Foundation](http://www.privacy.org.au) is the main non-governmental organisation dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians. Since 1987, the Foundation has led the defence of the right of individuals to control their personal information and to be free of excessive intrusions. The Foundation uses the Australian Privacy Charter as a benchmark against which laws, regulations and privacy invasive initiatives can be assessed.

*Please note that postal correspondence takes some time due to re-direction – our preferred mode of communication is by email, which should be answered without undue delay.*

### **Failure to address previous submissions**

The Discussion Paper shows no signs of addressing most of the concerns raised by the Foundation in its August 2008 submission on the Draft Bill1 – most of which concerned the proposed National PPS Register. We note that the Australian Privacy Commissioner also made a submission raising many of the same concerns2. In this submission, we find ourselves having to make many of the same points again, and it is extremely disappointing that so little attention appears to have been paid to these very serious concerns.

In the Draft Bill, privacy was acknowledged as an issue but is supposedly taken care of by a single proposal - to make unauthorised access to the PPS Register an 'interference with privacy' under the Privacy Act, with the normal Privacy Act right of complaint (2.39). As we submitted in August, this supposed safeguard is firstly undermined by the fact that the vast majority of small businesses and individuals who might access the register are *exempt* from the Privacy Act. We refer you to our August submission in which we point to a range of other problems in relying solely on the complaint provisions of the Privacy Act.

The continuing lack of adequate consideration of privacy issues highlights the need for a full Privacy Impact Assessment (PIA) as recommended by the Privacy Commissioner for privacy significant projects, to be made public. While a PIA should have been conducted at a much earlier stage in the PPS project, it is not too late and is essential for properly informed debate about the draft legislation and Regulations.

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1 <http://www.privacy.org.au/Papers/index.html>

2 [http://www.privacy.gov.au/publications/sub\\_ppsb\\_0808.html](http://www.privacy.gov.au/publications/sub_ppsb_0808.html)

## Failure to publish submissions

Contrary to normal and officially recommended practice, the Department has failed to publish submissions on the various rounds of consultation on the PPS reforms – despite giving notice of this as the 'default' when inviting submissions. This makes it very difficult for interested parties to see the evolution of arguments and to understand the positions of other stakeholders. We urge the Department to put all submissions received, both on this Discussion Paper and previously, on its website.

## Premature action on Register

We are extremely concerned that the Department is proceeding with a contract for the design of a Register before some of the critical parameters have been legislated. We note the statement in the DP that “*On 16 May 2008 the Attorney-General’s Department released a request for tender for systems integrator services to design and develop the new national register.*” The DP does not indicate what if any further action has been taken in this respect.

We remind you of recent experience with the proposed Access Card, where millions of dollars were wasted both on direct government expenditure and on aborted industry tender preparation as a result of premature contracting before Parliament had approved the project, which was finally abandoned following the change of government.

We submit that no contract should be let until the legislation has been enacted.

## Scope of the Register

### *Section ^21 – Meaning of security interest*

*“44. The Bill takes a functional approach to the characterisation of personal property securities. It defines a security interest as an interest in personal property that in substance secures payment or performance of an obligation. This broad definition would have the effect of bringing a wide class of transaction within the operation of the Bill - a significant benefit of the reform.” (Our emphasis)*

### *Section ^192/3 – Registration of data other than data in registrations*

At paragraphs 130-131 the DP anticipates Regulations to provide for registration of 'other interests' in personal property such as those arising from motor vehicle confiscation and impoundment legislation and confiscation of proceeds of crime legislation.

These two provisions confirm our concerns about the potential breadth of the Register. As we submitted in August, both the inclusion of so many 'security interests' and the provision for 'other interests' compound the risk that the Register will become a very valuable database of personal information, susceptible both to authorised use 'function creep' and to unauthorised access (including as a target for identity crime).

We raised another 'scope' parameter in our August submission:

*“the Commentary on the draft Bill does not clearly explain the 'reach' of the proposals, particularly in terms of the monetary threshold – para 2.11 (re Clause 83) talk of an interest value threshold of \$5,000 but it is not clear if this translates into an asset value threshold or if this means that interest/asset values below this threshold would not be included in the Register. The Bill provides for registration of all security interests in personal property (10.3) and Clause 21 defining security interest does not contain any value threshold. This is not only unclear but also inconsistent.”*

We cannot find any further explanation in the Regulations DP and again seek clarification.

## Content of the Register

### *Proposed Regulation under Section ^19 – Details about a person*

This would provide for the Register to include details of 'grantors' and 'secured parties' including, where they are individuals, name and date of birth, known to the secured party either pursuant to AML-CTF ID requirements, or from other ID documents.

Under 'rationale' the DP says:

*“28. It is essential that secured parties provide enough information about grantors as is necessary to enable their ready identification in a search of the PPS Register. It is important that the amount of information that is recorded on the PPS Register about an individual is kept to a minimum. This is to ensure that the privacy of individuals is not compromised.*

*29. The accuracy of information recorded for ‘grantors’ will be more critical than the information that is recorded in respect of ‘secured parties’. This is because incorrect grantor details will result in the registration being seriously misleading whereas secured party details may not be (sections 202 and 203). The manner in which search results are to be worked out in response to an application for search (for example, whether the Registrar adopts exact match or fuzzy match search methods) will also be relevant to how accurately information about grantors and secured parties is required to be recorded on the PPS Register (section ^228(2)). “*

We remain unclear about the relationship of the concepts of 'grantor' and 'debtor' – are they synonymous? It seems likely that the Register will contain personal information about a substantial proportion of all consumers in their capacity as grantors/debtors. Presumably some secured parties may also be individuals, and therefore have their personal details included in the Register for this reason. This uncertainty reflects our criticism that the entire consultation to date has been conducted between industry/legal experts, without any real attempt to explain its impact in 'lay' terms. We seek confirmation of the meaning of these terms and an estimate of the number of individuals whose personal details will be included in the Register.

The DP suggests that the accuracy of the identity of 'secured parties' may be 'less critical' than that of 'grantors'. We question the practical effect of this in relation to the Privacy Act rights of any individuals to accurate complete and up to date information (IPPs 3 & 8).

It is still not clear to us why the main objectives of the legislation, and of the Register, cannot be achieved through searches on property details, without the need to allow any searches for named individual grantors or to result in the disclosure of the personal details of individuals who may be grantors. There may be a credible explanation for why this is a necessary functionality, but it has yet to be given.

### *Security risk – ID crime potential*

In relation to the Register containing name and date of birth of many individuals, we repeat our submission from August that this in itself represents a major security risk. These two items of information held together in a widely available public register is an open invitation to identity crime – other registers which contain this information such as Birth Registries and Electoral enrolment databases have tighter access controls. Have the government agencies charged with combating identity crime been consulted about this risk?

### ***Data quality and matching issues unresolved***

As we submitted in August, the apparent exclusion of addresses from the Register content has the positive effect of reducing the attraction and value of the Register to third parties, but paradoxically compounds the data quality issues. The Regulations DP does not answer the question we asked - how will the proposed requirement for grantors to be given notice of 'register events' (Bill Commentary 10.103) be achieved unless there is an address or other contact details on the Register?

We repeat our concern that reliance on names and date of birth alone, when name search is fundamental to the scheme design, is fundamentally flawed. Experience of other public registers and the credit reporting databases shows that name and date of birth alone are not sufficient to achieve required levels of accurate matching. It was necessary for the Privacy Commissioner to make Determinations under Part IIIA of the Privacy Act to allow credit reporting agencies to collect and hold drivers licence numbers to assist in matching, even where they already held addresses as an additional data field. Name and date of birth alone will simply not work.

The proposed Regulations prescribing acceptable identity documents do not address the problem we identified of matching legitimate multiple identities.

It seems clear that the very serious and complex issues of identity verification and matching, with enormous privacy implications, have still not been adequately addressed.

### ***Section ^195 – Table item 4(b) collateral must be described by serial number***

We remain concerned that serial numbers will not play as critical a role in the Register as they could do if they were mandatory for all applicable classes of property – this could reduce the need for searches by general descriptions and/or personal details of individuals.

### ***Section ^212 – Demand to secured party for registration amendment***

The rationale for the proposed Regulation concerning requests for amendments includes a discussion of the scenario where an individual seeks removal of a registration in their name. There is no recognition of the relationship between any such Regulation and the general rights of access and correction of personal information under the Privacy and FOI Acts. At paragraph 180 there is a suggestion that the Registrar should err on the side of leaving a registration in place in circumstances where there may be confusion over identity. This is not good enough – the onus should be on secured parties to defend the accuracy of a registration.

## **Searching the Register**

### ***Section ^227 – Search-general***

The rationale in the DP states

*“83. Ensuring that the establishment of the PPS Register does not unduly impact on the privacy of individuals is a key concern of PPS reform. There is a clear imperative to withhold data about an individual from a search result of the PPS Register in certain circumstances (such as where a court has ordered that the data should be withheld from*

*the search result).* “

This envisages only extremely limited grounds for withholding personal information. If the government is serious about its professed commitment to privacy, it must reconsider its entire approach both to the contents of the Register and to the permitted search parameters and results.

### ***Section ^228 – Search-criteria***

*“86. While section ^228 describes the search criteria, not all searches would be available to every searcher. For example, only the relevant secured party would be able to search against the secured party’s details. This issue will be discussed with users as the PPS Register is developed.”*

We understand that under s^228 and the proposed Regulation, permitted search criteria would not include any debtor details (If it is confirmed that no debtor details are to be included in the Register, then this would not in any case be an option). If there is to be debtor information, then the limitation of the search criteria is very welcome, and limits the extent to which searches could be made to find out information about the commitments of any particular individual in their capacity as a debtor. The potential for the Register to be used to achieve this objective will however also depend on what if any information about debtors is routinely revealed in response to permitted searches, and the ability of searchers to perform 'reverse searches' on results (whether directly or by downloading results for future analysis).

It is completely unacceptable to defer detailed consideration of these issues 'as the Register is developed' – the detailed criteria for who may search and for what (allowable search parameters) must be dealt with in the legislation or at least in Regulations available for scrutiny at the same time as the Bill.

## **Conclusion**

Consideration of the serious privacy issues raised by the proposed national PPS Register remains wholly inadequate, despite the concerns being raised in previous submissions from the Foundation and the Privacy Commissioner, amongst others. The Attorney General's Department must address these concerns, including through a full and public Privacy Impact Assessment (PIA) as recommended by the Privacy Commissioner for privacy significant projects.