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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

PERSONAL PROPERTY SECURITIES BILL 2009

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Attorney-General,
the Honourable Robert McClelland MP)

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GLOSSARY

Accession

A good is an accession to other goods when it is installed in, or affixed to, other property (unless both the accession and the other goods are required or permitted by the regulations to be described by serial number).

Account

A monetary obligation which arises from:

- disposing of property (whether by sale, transfer, assignment, lease, licence or in any other way); or
- granting a right, or providing services, in the ordinary course of a business of granting rights or providing services of that kind (whether or not the account debtor is the person to whom the right is granted or the services are provided)

but excludes an ADI account, chattel paper, investment entitlement, investment instrument or negotiable instrument. It does not matter whether or not the monetary obligation is earned by performance, and, if payable in Australia, whether or not the person who owes the money is located in Australia.

ADI account

An account held with an authorised deposit-taking institution (ADI), such as a bank.

Advance

The payment of currency, provision of credit or giving of value. This would include the liability of a debtor to pay interest, credit costs and other charges or costs payable by the debtor in connection with the advance, or the enforcement of a security interest securing the advance.

After-acquired property

Personal property acquired by the grantor after the security agreement is made.

Attachment

The creation of a security interest in personal property which could be enforced against that property.

Bailment

The delivery of tangible personal property to another party who acquires possession of it. A bailment does not transfer ownership rights and the bailor has the right to take possession at any time or in accordance with the terms of the bailment.

Chattel paper

A writing which evidences both a monetary obligation and a security interest in, or lease of specific goods, for example, a hire-purchase agreement. It would not include a negotiable instrument, an investment instrument, an investment entitlement or a document of title.

Circulating assets

Assets that could be used or transferred in the ordinary course of the grantor's business, even if they are subject to a security interest, including currency, negotiable instruments, inventory and certain accounts (except where the secured party has possession or control).

Collateral

Personal property to which a security interest is attached.

Commingled property

Goods that are mixed with goods of the same kind to become part of a product or mass so as to have lost their original identity in the product or mass.

Consumer property

Personal property that is held by an individual and not used to any extent in the course of an enterprise to which an ABN has been allocated.

Control

One way of perfecting a security interest in controllable property.

Currency

Any currency authorised as a medium of exchange by the laws of Australia or any other country.

Debtor

A person (or their transferee or successor) who owes payment or the performance of an obligation that is secured by a security interest. A debtor would usually be the grantor of the security interest.

Financial property

Chattel paper, currency, documents of title, investment instruments and negotiable instruments (excludes investment entitlements).

Financing statement

The data registered on the Personal Property Securities Register.

Future advance

An advance secured by a security interest which is made after the security agreement has been concluded. In most cases, because advances are only made after a security agreement has been entered into, future advances and advances are the same.

Goods

Tangible personal property including crops, livestock, wool, extracted minerals, satellites and other space objects, but excluding chattel paper, documents of title, investment instruments, negotiable instruments, currency or investment entitlements.

Grantor

A person (or their transferee or successor) who owns or has an interest in the property to which a security interest has attached. A grantor would include a person who receives goods under a commercial consignment, a lessee under a PPS lease and a transferor of an account of chattel paper.

Intangible property

Personal property other than financial property, goods or an investment entitlement.

Intellectual property

Rights in a design, patent, trade mark, copyright, circuit layout or plant breeder right.

Inventory

Personal property used in the ordinary course of business by a business with an ABN, including property held for sale or lease, property held to be provided under a contract for services, property held as raw materials or as work in progress or property used or consumed as materials.

Investment entitlement

The rights held by an investment entitlement account holder arising from the crediting of a financial product to the account.

Investment instrument

A financial product such as a share, stock, debenture, bond, derivative, interest in a managed investment scheme, traded financial product, assignable option (but an assignable option of an assignable option is not an investment instrument) or a foreign exchange contract that is not a derivative, but excludes a negotiable instrument, investment entitlement, document of title and the creation or transfer of a right to payment in connection with interests in land (if the evidencing writing does not specifically identify that land).

Migration time

The time when agencies in charge of existing Commonwealth, State and Territory registers would start to transfer data to the PPS Register. The migration time would be the start of the first day of the month that is 25 months after the month in which the Bill is given Royal Assent, or an earlier time determined by the Minister.

New value

Consideration sufficient to support a contract, other than value provided to discharge of a prior debt or liability.

Perfection

A security interest could be perfected by registration, possession, control or temporary perfection and perfection would always confer priority over unperfected security interests in the collateral.

Personal property

Any form of property, other than land or a right or entitlement under a Commonwealth, State or Territory law that declares that the right or entitlement is not personal property for the purposes of the Bill.

PPS lease

A lease or bailment of goods, for an indefinite term or a term of more than one year. Where goods would be described by serial number, a PPS lease would only need to be a term of 90 days.

Proceeds

The identifiable or traceable personal property derived directly, or indirectly, from dealing with collateral or the proceeds of collateral.

Purchase money security interest (PMSI)

A security interest in collateral created by a seller who secures the obligation to pay the purchase price or a person who provides the value to purchase the collateral. A PMSI could also be the interest of a lessor or bailor under a PPS lease or the interest of a consignor who delivers property under a commercial consignment.

Registration commencement time

The start of the first day of the month that is 26 months after the month in which the Bill is given the Royal Assent, or an earlier time determined by the Minister.

Secured party

The person who holds a security interest in collateral. The secured party would not always be the creditor of the debtor because a security interest could secure the performance of an obligation without the secured party being a creditor, for example, a security trustee could hold the security for the benefit of creditors but not itself be a creditor.

Security agreement

An agreement or other act, such as a deed of execution or a declaration of trust, or writing evidencing the agreement or act, that creates a security interest.

Security interest

An interest in relation to personal property created by a transaction that in substance secures the payment or performance of an obligation, without regard to the form of the transaction.

Value

Consideration sufficient to support a contract including the discharge of an earlier debt or liability.

OUTLINE

Personal property is any form of property other than land and certain licences. It includes motor vehicles, contractual rights and uncertificated shares.

A security interest in personal property arises from a transaction that in substance secures the payment or performance of an obligation. The interest in the personal property, taken as security for a loan or other obligation, is a security interest. The Bill would apply to transactions which have the effect of securing a payment or other obligation, regardless of the form of the transaction, the nature of the debtor or the jurisdiction in which the personal property or parties are located (subject to specified exceptions). This is known as a *functional approach*.

The Bill would establish a single national law governing security interests in personal property. This would result in more certain, consistent, simpler and cheaper arrangements for personal property securities for the benefit of all parties.

Personal Property Security Reform would address the complexity of over 70 Commonwealth, State and Territory laws, common law rules and rules of equity governing personal property securities. It would provide a modern and efficient personal property securities regulatory system which is essential for any modern financial system.

The Bill is modelled on the New Zealand, Canadian and US legislation. It also draws on work by the United Nations Commission on International Trade Law (UNCITRAL) and the International Institute for the Unification of Private Law (UNIDROIT).

The Bill relies on the Commonwealth's own constitutional power and power referred to it by the States under section 51(xxxvii) of the Constitution.

The Bill would also address the relationship between potentially conflicting Commonwealth and State and Territory laws. The Bill specifies where other laws prevail, for example, the Bill would not apply to tradeable water rights, water access entitlements, goods affixed to land or to non-consensual interests such as liens. Furthermore, a State or Territory would be able to expressly exclude a right, entitlement or authority granted by a law of the State or Territory from application by the Bill.

Generally, a security interest would attach to personal property when the grantor has rights in the collateral and value is given or the grantor does an act which creates the security interest (such as by declaring a trust or executing a deed). The Bill would do away with the equitable concept of the crystallisation of floating charges and interests in after-acquired property would attach on the acquisition of the property by the grantor.

Perfection would occur when a security interest attaches to personal property and the secured party takes possession and/or control of the property or registers it on the PPS Register. The Bill would also provide short term 'temporary perfection' following certain events involving the collateral.

The Bill specifies the circumstances when personal property would be able to be acquired free of a security interest.

The Bill includes default rules for determining priority between competing security interests in the same property. There are also special priority rules for specific transactions including 'purchase

money security interests', accounts, ADI accounts, crops, livestock, accessions and commingled goods.

The Bill also provides rules for determining priority between security interests and other interests, such as repairers' liens and the interests of an execution creditor.

The Bill provides a process for enforcing security agreements following default by debtors. These rules would operate together with the enforcement provisions in the Consumer Credit Codes and the parties' own security agreements.

The Bill would establish a public Register of Personal Property Securities to be maintained by a Registrar of Personal Property Securities. The Register would contain details of registered security interests in personal property (financing statements) and include details of the grantor and the secured party; an address for service of notice on the secured party; a description of the collateral and proceeds and the period of registration.

The transitional provisions would provide for the migration of data from existing registers to the newly created PPS Register and priority rules for security interests existing prior to the Bill coming into force.

FINANCIAL IMPACT STATEMENT

The new national Personal Property Securities Register to be established by the Bill would operate on a cost recovery basis. Use of the Register would incur nominal charges, which would be used to cover the costs of operating the Register. Fees are expected to be around thirty million dollars in the first full financial year of operation but revenue estimates cannot be finalised until the design of the Register is complete and a commencement date has been determined.

CHAPTER 1 – INTRODUCTION

Preliminary

- 1.1 Clause 1 contains the short title of the Bill.
- 1.2 The Bill would commence on the day after it receives Royal Assent (clause 2).
- 1.3 The Guide to the Bill would provide an overview of the entire Bill (clause 3). Each Part of the Bill would also have a guide with an overview of that specific part.
- 1.4 Subject to Part 9.3 and 9.4 of the Bill, the Bill would start to apply at the registration commencement time in relation to the following interests:
 - a security agreement made at or after the registration commencement time;
 - a security interest (other than a transitional security interest) arising at or after the registration commencement time;
 - a transitional security agreement;
 - a transitional security interest (whether arising before, at or after the registration commencement time);
 - an interest in personal property (other than a security interest) arising at or after the registration commencement time;
 - personal property of a kind prescribed by the regulations (clause 148(c));
 - personal property, if data in relation to the property is given to the Registrar (clause 330-331). (Clause 310).
- 1.5 The registration commencement time, established in the transitional provisions, would be the day the PPS Register commences operation. The registration commencement time would be the start of the first day of the month that is 26 months after the month in which the Bill is given Royal Assent, or an earlier time determined by the Minister (clause 306(2)). If the Minister determines an earlier time to be the registration commencement time, that time must be at least 28 days after the migration time (clause 306(3)).
- 1.6 Despite the Bill commencing on the day after it receives Royal Assent, the transitional provisions provide that a person would only be able to apply to register a financing statement or a financing change statement and the Registrar would only be able to register a financing statement, or a financing change statement, at or after the registration commencement time. The Registrar would also only be able to register a financing statement or a financing change statement at his or her own initiative at or after the registration commencement time (clause 315).
- 1.7 Part 9.4 of the Bill would set out the rules to support the migration process and early registrations of transitional security interests. The migration time in the Bill would be the start of the first day of the month that is 25 months after the month in which the Bill is given

Royal Assent or an earlier time determined by the Minister (clause 306(1)). If the Minister determines an earlier time to be the migration time, as is expected, the Minister would also determine an earlier time for the registration commencement time. The migration time would be determined having regard to the readiness of the PPS Register and users of the Bill.

General application of this Act

- 1.8 The Bill would apply to security interests in goods or financial property located in Australia or located outside Australia if the grantor is an Australian entity (clause 6(1)).
- 1.9 For this purpose, an Australian entity would be:
- an individual who is located in Australia; (clause 235)
 - a company or registrable Australian body (within the meaning of the *Corporations Act 2001*);
 - a corporation sole formed under a law of Australia;
 - a public authority established under a law of Australia; or
 - an instrumentality or agency of the Crown in right of the Commonwealth, a State or a Territory (clause 10).
- 1.10 The Bill would also apply to security interests in intangible property where:
- the grantor is an Australian entity;
 - the account is payable in Australia;
 - the assignor of an account or chattel paper is an Australian entity;
 - an assigned account or chattel paper is payable in Australia;
 - the intangible property is in an ADI account; or
 - the intangible property is created for by a Commonwealth, State or Territory law, for example, licences created by a law of a State or Territory and intellectual property created by a law of the Commonwealth (clause 6(2)).
- 1.11 The Bill would apply to Norfolk Island, but the application of the Bill to other external Territories would be prescribed by the regulations and could be limited to certain provisions or only be applicable in certain circumstances (clause 7(2)).
- 1.12 A reference anywhere in the provisions of the Bill to ‘Australia’ should be read to include the prescribed external Territory (despite s17 of the *Acts Interpretation Act 1901*), unless the contrary intention appears.
- 1.13 Significant interests to which the Bill would *not* apply include:

- a right under the general law or Commonwealth or State and Territory laws which apply to the control or use of water;
- an interest created by the transfer of land or rights to payment in connection with the transfer of land but only where the writing evidencing the creation or transfer identifies the land (mortgage-backed securities are therefore included in the Bill);
- an interest in goods that are affixed to land; and
- an interest in a right or licence, granted under a law of a Commonwealth, State or Territory, if the right or licence is declared not to be personal property under the Bill.

1.13 Other important exclusions would include:

- the interest of a seller shipping goods under a negotiable bill of lading;
- non-consensual charges and liens created under a law of the Commonwealth, State or Territory;
- approved netting, close-out netting and market netting arrangements under the *Payments Systems and Netting Act 1998*;
- combination of account and set-off arrangements;
- the transfer of future remuneration and unearned rights to payments
- the transfer of an insurance claim;
- certain interests arising under the *Bankruptcy Act 1966*,
- the assignments of an account where the sole purpose is for collection of the account (this does not include the assignment of an account to a factor);
- the assignment of an accounts or negotiable instrument to satisfy a pre-existing indebtedness (clause 8).

1.14 The regulations could also prescribe interests to which the provisions of the Bill would not apply.

CHAPTER 2 - GENERAL RULES RELATING TO SECURITY INTERESTS

Security Agreements

- 2.1 Under the Bill, the parties to a security agreement would be free to draft their security agreement however they wish (clause 18(1)), subject only to the laws of the Commonwealth, State or Territory laws and the general law (common law and equity) (clause 257(1)). However, the Commonwealth, State, Territory or general laws would *not* apply to the extent that they require:
- the registration of a security agreement,
 - the registration of the assignment of a security interest,
 - compliance with other formal requirements; or
 - to the extent that they restrict the attachment and perfection provisions of the Bill (clause 257(3)).
- 2.2 A security agreement would be able to provide for security interests in after-acquired property (clause 18(2)) and security interests in after-acquired property would attach without the need for specific appropriation of that property (clause 18(1)). The Bill therefore does away with the common law requirement that there must be specific appropriation by the debtor for a security interest to attach to property acquired after the security agreement has been entered into (after-acquired property). However, for the security agreement to be enforceable against the debtor's after-acquired property, the security agreement would have to include a description of the collateral, such as 'all after-acquired property' (clause 20(2)).

Security interests

- 2.3 A security interest is an interest in personal property provided for by a transaction that secures the payment or performance of an obligation (clause 12(1)). In determining whether or not an interest is a security interest, the Bill takes a functional approach and focuses on the form of the transaction.
- 2.4 Certain transactions would create security interests *provided that they secure the payment or performance of obligations*, for example: fixed and floating charges; chattel mortgages; conditional sale agreements; hire-purchase agreements; pledges; trust receipts; consignments; leases of tangible property (including PPS leases); assignments, transfers of title and flawed asset arrangements (clause 12(2)).
- 2.5 While a license itself would not be a security interest, (clause 12(5)) a licensee would be able to grant a security interest in a licence which is personal property, that is if:
- It is transferable (whether or not the right is exclusive and whether or not a transfer is restricted); and
 - it is *not* granted under legislation which declares that the licence is not personal property under the Bill (clause 8(1)).

2.6 The following interests are deemed to be security interests *whether or not the transaction secures the payment or the performance of an obligation*:

- the interests of a transferee of accounts or chattel paper;
- the interests of a lessor or bailor under a PPS lease; and
- the interests a of consignor under a commercial consignment.

2.7 However, the enforcement provisions in the Bill would not apply to these transactions (clause 109(1)).

Enforceability against debtors

2.8 A security interest would attach to property when:

- the grantor has rights in the property or the power to transfer rights in the property to the secured party (clause 19(1)), even if this power is subject to limitations, such as the requirement of the another party's consent, and
- the secured party provides value or the grantor confers a security interest through their actions (clause 19(2)) (this alternative to the provision of value is required because a security interest could secure an obligation without value being given).

2.9 Under the Bill, attachment of a security interest is important because once the security interest attaches to the collateral, the grantor's rights in the collateral are limited by the rights of the secured party and the secured party acquires enforceable rights against the collateral (clause 19(1)).

Enforceability against third parties

2.10 Attachment would also be required for a security interest to be enforceable against third parties claiming competing interests in the collateral (clause 20(1)). But attachment on its own would be insufficient for a security interest to be enforceable against third parties, and in addition, the secured party would have to have either control or possession of the collateral or there would have to be a written security agreement between the parties (clause 20(1)).

2.11 Attachment of the security interest could be at any time, including after the other requirements have been complied with (clause 21(3)).

Example

A security interest in the collateral is registered on 1 February but the security agreement is executed later on 1 March. The security interest only becomes enforceable against third parties on 1 March because prior to then the security interest had not attached to the collateral.

2.12 For a written security agreement to be enforceable against third parties:

- it would have to be signed or intentionally adopted by the grantor, in the way which is specified in the agreement (clause 20(2));

- it would have to describe the specific collateral or describe it as ‘the grantor’s all present and after-acquired property’ or ‘the grantor’s all present and after-acquired property’ with specified exceptions (clause 20(2));
 - if collateral were to be described as ‘consumer property’, ‘commercial property or ‘equipment’, it would also need to be described by reference to the item or class (clause 20(4));
 - if collateral were to be described as ‘inventory’, it would only be enforceable while that property is held as inventory (clause 20(5));
 - a description of the proceeds would not be required to be enforceable in respect of proceeds (clause 63(7)).
- 2.13 A security interest could be enforceable against a third party in respect of particular personal property even though the security interest is not enforceable in respect of other personal property to which the security interest has attached.
- 2.14 Unless the parties specify otherwise in a security agreement, a security interest would attach when the requirements for attachment are satisfied (clause 19(3)). The parties could agree to postpone the time for attachment, but merely referring to the security interest as a ‘floating charge’, would not by itself postpone attachment (clause 19(4)).
- 2.15 For the purposes of deemed security interests (that is, security interests in goods which are leased to a lessee under a PPS lease consigned to a consignor or sold to a purchaser under a conditional sale or retention of title agreement) the grantor (lessee, consignor or purchaser) would be deemed to have rights in the goods, for the purpose of attachment, when the grantor obtains possession of the collateral (clause 19(5)).

Perfection

- 2.16 Under the Bill, perfection of security interests would be important to obtain priority over competing security interests in the same collateral.
- 2.17 A security interest would be perfected once the security interest attaches to the collateral (clause 21(1)) and the secured party provides public notice of its security interest by either:
- registering an interest in any collateral;
 - taking possession of goods;
 - temporarily perfecting a security interest in the collateral; or
 - taking control of an investment instrument; an ADI accounts; a right evidenced by letters of credit; an investment entitlement or a negotiable instrument (clause 20(2)).
- 2.18 Some security interests could, therefore, be perfected without registration on the PPS Register. Where the collateral is goods (tangible personal property), possession by the secured party would be sufficient to perfect the security interest and control would be sufficient to perfect a security interest in the case of investment instruments, ADI accounts,

certain rights evidenced by letters of credit, investment entitlements and negotiable instruments (clause 20(2)).

2.19 Where goods are held by a bailee and a security interest has attached to the collateral, the security interest would be able to be perfected by:

- the secured party registering the collateral;
- the bailee taking possession of the collateral on behalf of the bailor;
- the bailee issuing a document of title to the goods in the name of the secured party; or
- the secured party obtaining a perfected security interest, for example by possession, in the negotiable document of title (clause 22(1)).

Example

BankA finances DebtA's purchase of portable steel toilets manufactured in Melbourne. DebtA is located in Sydney, so DebtA arranges for the toilets to be freighted to Sydney. The carrier issues a negotiable document of title and forwards this to BankA. Once BankA receives possession of the negotiable document of title, it has a perfected security interest in the toilets. Where the secured party is able to take possession of the document of title within 5 business days of its issue, the security interest would be deemed to be perfected from the moment the document of title was issued.

2.20 A security interest in any of the following collateral could also be temporarily perfected for the period of time specified in the Bill:

- collateral moved to Australia (clause 39-40);
- proceeds not included in the registered description of collateral or arising from collateral perfected in another way (clause 33(2)-(3));
- transferred collateral (clause 34);
- goods or documents of title, perfected by the bailee's possession and returned to the grantor or debtor for dealing (clause 35);
- negotiable and investment instruments, perfected by the bailee's control or possession, and returned to the grantor or debtor for dealing (clause 36).

2.21 This period of temporary perfection period would give the secured party an opportunity to perfect their interest by registration, possession or control.

2.22 A single registration of collateral would be able to perfect more than one security interest (clause 21(4)).

Possession and control of personal property

2.23 Possession and control of personal property would be important as two of the four ways of perfecting a security interest.

Possession

- 2.24 A secured party would be able to perfect a security interests in collateral by possession (other than possession as a result of seizure or repossession) (clause 21(2)(a)).
- 2.25 It would not be possible to perfect a security interest in an intangible by possession. However, as investment instruments, chattel paper or negotiable instruments are the physical embodiment of intangible rights and possession of these documents would perfect a security interests in the associated intangible property.
- 2.25 A person would have possession of a negotiable instrument not evidenced by an electronic record when physical possession of the instrument is held by the person, or another person on their behalf (clause 24(4)).
- 2.26 A secured party would have possession of chattel paper evidenced by an electronic record only if there is a single authoritative copy of the record that identifies the secured party as the assignee of the record, which is maintained by the secured party (copies would need to be made with the secured party's agreement and be identifiable as authorised copies) (clause 24(5)).
- 2.27 A person would have possession of an investment instrument evidenced by a certificate only if the certificate specifies the person entitled to the investment instrument, it is transferable by registration of the transfer by the issuer of the investment instrument and the person or someone on their behalf (not the grantor or debtor) has possession of the instrument (or, if another person is the registered owner, they have acknowledged in writing, possession on behalf of that person) (clause 24(6)).
- 2.28 Possession of a document of title would constitute possession of the collateral (clause 74(1)).
- 2.29 Possession under the Bill would not equate to the common law meaning of possession. Possession would include both apparent and actual control of the property (clause 24(2)). Even if a secured party has actual possession of collateral, if it appears to be in the possession of the grantor (or another person on behalf of the grantor), the secured party would *not* have possession of the collateral (clause 24(1)). It follows that when goods in the secured party's possession are transferred to the grantor's possession, the security interest becomes unperfected (unless perfected by another means, such as by registration or through temporary perfection of returned collateral (clause 36)).

Example

FinanceA has a security interest in a painting owned by GrantorA. FinanceA perfects the security interest by taking possession of the painting on 1 April 2009. FinanceA returns the painting to GrantorA on 28 April 2009 for a dinner party held by GrantorA. FinanceA resumes possession on 1 May. FinanceA's security interest ceased to be perfected on 28 April. Perfection of the security interest commenced from 1 May 2009.

Control

- 2.30 Perfection by control would occur when a creditor takes all steps necessary to be in a position to sell the collateral without further action by the grantor.
- 2.31 Requiring perfection by registration or possession of ADI accounts; investment entitlements; investment instruments; uncertificated negotiable instruments; rights evidenced by certain letters of credit and satellites would be impractical. Therefore these kinds of collateral could be perfected by control (clause 21(2)(c)).
- 2.32 A secured party would have control of an ADI account where:
- the secured party is the ADI;
 - the secured party could direct dispositions from the ADI without the grantor's agreement (even if the grantor also retains the right to direct dispositions from the account) (clause 25(2)); or
 - the secured party is the ADI's customer for the account, that is, the secured party would have the right (not necessarily exclusive), to direct dispositions from the account. (Clause 25(1)).

Example

BankA gives a loan to its customer DebtorA who already has a deposit account with BankA. BankA does not perfect a security interest in the account. DebtorA then grant's GrantorA the right to instruct BankA to make dispositions from the account subject to DebtorA's consent. DebtorA defaults on its loans to both BankA and GrantorA and both attempt to enforce a security interest in DebtorA's account. Because BankA is the ADI it did not need to take any specific action to obtain a perfected security interest in DebtorA's account. GrantorA did not obtain control (and therefore a perfected security interest) in the account, because it's right to instruct BankA to make dispositions required DebtorA's consent.

- 2.33 A secured party would have control of an investment entitlement while there is an agreement between the secured party, the grantor and the intermediary to the effect that any instructions issued by the grantor are subject to approval by the secured party and permitting the secured party to deal in the entitlement without the consent of the grantor (clause 26(1)). The secured party would have control of an investment entitlement even if the person in whose name the intermediary maintains the account retains the right to make substitutions for the instrument, to originate instructions to the issuer or to otherwise deal with the instrument (clause 26(2)).
- 2.34 A person would have control of a certificated or uncertificated investment instrument while they are registered by the issuer as the registered owner of the investment instrument (clause 27(2)).
- 2.35 A person would have control of a certificated investment instrument while they have possession of the instrument and the power to transfer or otherwise deal with the instrument (clause 27(3)).

- 2.36 A person would have control of an uncertificated investment instrument:
- where they have agreed with the registered owner of the instrument that they may deal in the instrument (clause 27(4));
 - where another person is the registered owner of the instrument on behalf of that person but that person can deal in the instrument (clause 27(5)).
 - if the registered owner acknowledges in writing, that they hold the instrument on behalf of that person and that person is able to deal in the instrument (clause 27(6)).
- 2.41 A secured party would have control even if the registered owner (including the grantor) retains the right to make substitutions for the instrument, to originate instructions to the issuer or to otherwise deal with the instrument (clause 27(6)).
- 2.42 A secured party would have control of the rights evidenced by a letter of credit only to the extent that the issuer consents to assigning the proceeds of the letter of credit to the secured party (clause 28).
- 2.43 A secured party would have control of an uncertificated negotiable instrument while the instrument can be transferred according to the rules of the clearing and settlement facility and the secured party is able to deal in the instrument (clause 29(1)). A secured party would have control even if the registered owner (including the grantor) retains the right to make substitutions for the instrument, to originate instructions to the issuer or to otherwise deal with the instrument (clause 29(2)).

Attachment and perfection: specific rules

Proceeds and transfer

Attachment of security interest to proceeds

- 2.40 When collateral gives rise to proceeds, the security interest would:
- automatically attach to any proceeds arising from a dealing in the collateral unless the security agreement provides otherwise; and
 - continue in the collateral unless the secured party expressly or impliedly authorised the dealing giving rise to the proceeds. (Clause 32(1)).
- 2.41 Personal property would only be proceeds if the grantor had an interest in the proceeds (not an interest arising from the enforcement of the security interest) or the power to transfer rights in the collateral to the secured party (clause 31(3)). This reflects the attachment principle that the grantor must have an interest in the collateral or the power to transfer the collateral to another person (clause 19(2)(a)).

Example

GrantorA grants BankA a security interest in its sapphires. GrantorA then transfers the sapphires to PersonA in exchange for rubies without BankA's authorisation. BankA would have a security interest in the rubies as proceeds of the sapphires.

- 2.42 The Bill would not require that there be a fiduciary relationship between the secured party and the person who deals in the collateral, for the proceeds to be identifiable or traceable (clause 31(2)).
- 2.43 The security interest in the proceeds would have the same priority time as the security interest in the original collateral (clause 32(5)).
- 2.44 Collateral gives rise to proceeds when the proceeds are identifiable or traceable personal property derived directly or indirectly from:
- a dealing with the collateral (or proceeds of the collateral);
 - the right to an insurance payment or other payment as indemnity or compensation for loss or damage to the collateral;
 - a payment made to discharge or redeem the collateral when the collateral was chattel paper, intangible property, an investment instrument, an investment entitlement or a negotiable instrument;
 - the right of a licensor to receive payments under any intellectual property agreement;
 - rights arising out of or property collected or distributed from an investment instrument or investment entitlement (clause 31(1)).

Example

GrantorA is the owner of a patent and has granted a security interest in the patent to BankA. GrantorA has also granted a licence of the patent to ManufacturerA, under which ManufacturerA is obliged to make payments to GrantorA. BankA has a security interest in the patent as original collateral, and in the licence payments as proceeds.

- 2.45 Proceeds would include proceeds of proceeds (clause 31(1)(a)).
- 2.46 When the security interest continues in the collateral, a secured party would be able to enforce their security interest against either or both of the collateral or the proceeds (clause 32(2)).
- 2.47 Where a secured party proceeds against both the collateral and the proceeds, the amount recoverable would be limited to the market value of the collateral immediately before the collateral gave rise to the proceeds, unless the collateral is an investment instrument or, at the time of the transfer, the transferee knew that the transfer was in breach of the security agreement (clause 32(2)-(3)).
- 2.48 Where the secured party proceeds against the collateral alone, an innocent purchaser of the collateral would have rights against the transferor to recover the consideration they provided. Where the secured party proceeds against the proceeds alone, an innocent third party would retain the collateral.

Perfection of security interest in proceeds

2.49 At the time of entering into a security agreement, a secured party cannot always anticipate that proceeds that may arise from the collateral and therefore a security interest in proceeds would be perfected by a registration of the collateral if:

- the description of the collateral includes a description of the proceeds which would be sufficient for a separate perfected security interest in the proceeds;
- the description of the collateral includes a description of the proceeds because they are of the same kind;
- the proceeds consist of currency, cheques, an ADI account, a right to an insurance payment or another payment as indemnity or compensation for loss to the collateral. (Clause 33(1)).

2.50 A registration which describes the collateral as all the grantor's present and after acquired property would perfect a security interest in proceeds held by the grantor.

Example

GrantorA grants a security interest in her funicular car to BankA. GrantorA then exchanges her funicular car for her neighbour's boat. The security interest would automatically attach to the boat. The security interest in the boat would only be perfected if BankA included in the financing statement a description of any proceeds from the funicular car that included the boat.

2.51 A security interest in proceeds that is not perfected, but that arises from a perfected security interest in the collateral, would be temporarily perfected for 5 business days after the collateral gave rise to the proceeds (clause 33(2)). During this period of temporary perfection, the secured party could ensure the continuous perfection of the security interest in the proceeds after the end of the end of the 5 business days, by perfecting the interest in one of the usual ways (registration, possession or control) (clause 33(3)).

Transfers of property

2.52 A security interest would not continue in transferred collateral where the Bill provides that a transferee would acquire collateral free of the security interest (clauses 41-55) or where the secured party has given express or implied authority for the transfer to be made free of the security interest (clause 32(1)).

2.53 In other cases, where collateral which is subject to a perfected security interest is transferred, the security interest would be temporarily perfected for a period starting from the time of transfer and ending at the earliest of:

- the end of the month 24 months after transfer;
- if the security interest was perfected by registration - the end time for registration;
- if another perfected security interest attaches to the collateral and the original secured party consented to the transfer – 5 business days after transfer;

- if another perfected security interest attaches to the collateral and the original secured party did not consent to the transfer of the collateral – 5 business days after the original secured party acquires the knowledge required to perfect their security interest by registration (clause 34(1)).

2.55 The period of temporary perfection would give the secured party time to perfect their security interest in the property.

Example

GrantorA grants BankA a security interest in its orchids. BankA perfects the security interest by registration. GrantorA sells the orchids to PersonB without BankA's authorisation. GrantorA does not take the orchids free of BankA's security interest. The security interest continues in the orchids and is temporarily perfected until the earlier of 24 months, the end of the registration or 5 business days after BankA becomes aware of the transfer.

Collateral returned to grantor or debtor

Collateral returned from bailee

2.56 When a security interest in goods is perfected by the bailee's possession of the goods, or the secured party's possession of the document of title, and the property or document of title is returned to the grantor for sale, exchange or other action in preparation for sale or exchange, the security interest would be temporarily perfected for 5 business days (clause 35).

Negotiable instruments and investment instruments

2.57 When a security interest in a negotiable instrument or in an investment instrument is perfected by possession or control, and possession or control of the document is given to the grantor for sale, exchange, presentation, collection, renewal or registration for transfer, the security interest would be temporarily perfected for a period of 5 business days (clause 36).

Following sale or lease

2.58 When a person acquires goods free of a security interests because of a sale or lease of the goods, the security interest would reattach to the goods when the grantor or a transferee of chattel paper regains possession of the goods as a result of:

- the original contract of sale or lease being rescinded or expiring;
- the transferee having seized the goods to enforce the security agreement;
- the grantor having repossessed the goods to enforce the contract of sale or lease (clause 37(1)).

2.59 If the security interest was perfected by registration prior to acquisition, and the registration is effective at re-possession, then the perfection would be deemed to be continuous (clause 37(2)).

Accounts and chattel paper

2.60 When an account or chattel paper, arising from the sale or lease of goods, is transferred to another person, the transferee would be taken to have a security interest in the goods, if the goods come back into the possession of the transferor or transferee as a result of:

- the original contract of sale or lease being rescinded or expiring;
- the transferee having seized the goods to enforce the security agreement;
- the grantor having repossessed the goods to enforce the contract of sale or lease;
- any other circumstances prescribed by the regulations. (Clause 38(1)).

Example

DealerA sells flaring and beading machines on credit to PurchaserA. DealerA sells the proceeds of these transactions (an account) to DiscountA. The flaring and beading machines turn out to be defective and PurchaserA rescinds the contract and returns the machines to DealerA. DiscountA acquires a security interest in the machines to secure payment of the balance of the account.

2.61 The deemed goods security interest would be deemed to attach at the time of return or re-possession (clause 38(2)). If the transferor or transferee has a perfected security interest in the account or chattel paper when the goods are returned or re-possessioned, then the security interest would be temporarily perfected from the time of possession until 5 days after the time of return or re-possession (clause 38(3)-(4)).

Relocation of collateral or grantor to Australia etc

Main rule

2.62 When collateral continues to be subject to an enforceable security interest after being moved to Australia, the security interest would be taken to be continuously perfected from when the security interest was registered or became enforceable against third parties under the foreign law until the collateral is located in Australia (clause 39(1)-(2)).

2.63 If the security interest is continuously perfected as above, it would also be temporarily perfected from the time of relocation until 56 days thereafter or 5 days after the secured party acquires actual knowledge that the property is relocated in Australia (clause 39(3)).

Intangible and financial property

2.64 If the grantor of a security interest in intangible property or chattel paper, an investment instruments, currency, documents of title (but *not* intellectual property, intellectual property licences or ADI accounts) relocates to Australia or transfers the collateral to a person located in Australia and the security interest becomes governed by Australian law, then the security interest would be taken to be continuously perfected from the time when it was registered under the foreign jurisdiction, or became enforceable against third parties, until relocation (clause 40(2)).

2.65 If the security interest is continuously perfected (as above), then it would be temporarily perfected starting from the time of relocation and ending at the earliest of 56 days thereafter

or 5 business days after the secured party acquires actual knowledge of the relocation (clause 40(3)).

Taking personal property free of security interests

- 2.66 A security agreement would be effective according to its terms (clause 18) and would continue in collateral dealt with by the grantor, unless the secured party expressly or impliedly authorised a dealing giving rise to proceeds (clause 32).
- 2.67 However, a person would acquire an interest in personal property free of a security interest in the circumstances set out in Part 2.5 of the Bill.
- 2.68 The concurrent application of more than one of these rule to the same situation, or the application of only one of the rules to the same situation, would not affect the right of a transferee to take the property free of a security interest.
- 2.69 The provisions on taking free of security interests would not apply where the transferee's interest is also security interest, except where the property is an investment instrument or investment entitlement (clause 42).
- 2.70 The provisions refer to 'taking free of a security interest' and not 'extinguishment' because there may be circumstances where the security interest is attached to more than one item of collateral and the transferee is acquiring only one of those items. Only the acquired item would be taken free of the security interest, which would remain attached to the remaining items.
- 2.71 In some circumstances, a person would have to provide either value or new value in order to acquire an interest in personal property free of a security interest. A person provides 'value' when they provide consideration that is sufficient to support a simple contract. A person could also provide 'value' through a reduction or discharge of an existing liability. However, in order to provide 'new value', the satisfaction of an antecedent debt or liability would be insufficient, and something more would have to be given. (Clause 10) . The requirement for new value ensures that the grantor obtains something that the secured party could proceed against if their property is transferred free of the security interest

Unperfected security interests

- 2.72 A person who acquires personal property that is subject to an unperfected security interest would acquire it free of the security interest if they provide new value and are not a party to the transaction that provides for the security interest (clause 43).

Example

GrantA obtains secured finance from BankA to purchase a forklift. BankA does not register the forklift on the PPS Register or perfect it using the other perfection methods. GrantA sells the forklift to BuyA. BuyA would acquire her interest in the forklift free of BankA's security interest.

- 2.73 These arrangements provide an incentive for secured parties to perfect their security interests.

Serially numbered personal property

2.74 The Regulations would specify the kinds of personal property that may or must be described by serial number on the PPS Register and could include the following:

- motor vehicles;
- watercraft;
- aircraft;
- registered trade marks, patents, designs and plant breeder's rights.

2.75 In order to guarantee the ability of a prospective buyer or lessee to rely on a search of the PPS Register, and to protect a security interest against an innocent acquisition, the Bill would provide that a person would take property free of a security interest when:

- the buyer or lessee provides new value;
- the property is required under the regulations to be described in a registration by reference to a serial number;
- a search of the register immediately before the time of the sale or lease, by reference only to the serial number of the property, would not have disclosed the registration on the PPS Register (clause 44(1)).

Example

PersonA owns a number of collectable motor vehicles in the course of running a business of hiring out vehicles for special events. PersonA secures a loan from BankA against the motor vehicles. BankA perfects its security interest in the vehicles by registering against all of PersonA's motor vehicles, but does not register each motor vehicle individually by their serial numbers. PersonB buys one of the motor vehicles from PersonA. A search of the PPS Register by reference to the motor vehicle's serial number would not disclose that BankA has a security interest. PersonB would take her interest in the motor vehicle free of BankA's security interest in the motor vehicle.

Example

PersonA owns a number of collectable motor vehicles in the course a business of hiring out vehicles for special events. PersonA secures a loan from BankA against the motor vehicles. BankA perfects its security interest in the vehicles by registering against all of PersonA's motor vehicles generally, but does not register each motor vehicle individually by its serial number. PersonB buys one of the motor vehicles from PersonA. A search of the PPS Register by reference to the motor vehicle's serial number would not disclose that BankA has a security interest. PersonB searches the register against PersonA and discovers the Bank's registration against PersonA in relation to motor vehicles generally. PersonB is not aware that her purchase of the motor vehicle constitutes a breach of the PersonA's security agreement with BankA. PersonB would take her interest in the motor vehicle free of BankA's security interest in the motor vehicle.

Example

BuyerA buys a motor vehicle from PersonA. FinanceA has registered against the motor vehicle on the PPS Register by reference to its serial number. BuyerA would not take the car free of FinanceA's security interest, as a search of the PPS Register would have disclosed FinanceA's registration against the motor vehicle. Had BuyerA searched the PPS Register, she would have found FinanceA's registration and been aware that she would not be able to buy the motor vehicle free of FinanceA's security interest.

- 2.76 A buyer or lessee would not take their interest in the property free of the security interest if:
- the transferee holds the property, or holds the property on behalf of another, as inventory for a period after the sale or lease; or
 - the transferee has actual knowledge that the sale or lease constitutes a breach of the relevant security agreement (unless the property is of a kind prescribed by the regulations). (Clause 44(2)).
- 2.77 When personal property is bought or leased with the intention of using it predominantly for personal, domestic or household purposes, the intention of the buyer or lessee is to be determined when the new value is first given for the sale or lease. This might be when the buyer or lessee provides a deposit (which could be in advance of the parties making a binding agreement to buy or lease the property) (clause 44(3)).
- 2.78 This exception against taking inventory free of security interests means that a purchase or lease of serial numbered property (such as a motor vehicle) by a dealer in the property from a person who held the property as commercial property would not be free of the security interest merely because the financier of the seller or lessor had elected to register against the seller's property generally and not in relation to individual serial numbered items.

Example

FinanceA finances motor vehicles held by PersonA as commercial property. Motor vehicles have been prescribed as serial numbered property. FinanceA registers its security interest in PersonA's motor vehicles generally, and not by reference to their individual serial numbers. DealerA buys a motor vehicle from PersonA and holds the vehicle as inventory in the course of its business of buying and selling motor vehicles. DealerA takes the motor vehicle subject to FinanceA's security interest.

Special rules relating to motor vehicle purchases

Incorrect or missing serial number

- 2.79 A person who buys or leases a motor vehicle (of a kind prescribed in the regulations) would take their interest in the vehicle free of a security interest if:
- the person acquires the motor vehicle for new value;
 - the regulations provide that the motor vehicle is of a kind that may or must, be described by serial number;
 - a search of the register immediately before the time of the sale or lease, or on the previous day, by reference only to the serial number of the vehicle, would not have disclosed a registration on the PPS Register; and
 - either:
 - the seller or lessor is the person who granted the security interest; or
 - the seller or lessor is another person who is in possession of the motor vehicle, provided the person who granted the security interest has lost the right to possess the motor vehicle (or is estopped from asserting an interest in the vehicle) (clause 45(1)).

- 2.80 However, the buyer or lessor would not take the motor vehicle free of the security interest if:
- the secured party is in possession of the motor vehicle immediately before the time of the sale or lease;
 - the motor vehicle is bought at a sale held by or on behalf of an execution creditor;
 - the buyer or lessee holds, or holds on behalf of another person, the motor vehicle as inventory; or
 - the person has actual or constructive knowledge of the security interest (clause 45(2)).
- 2.81 Therefore, if the person acquiring the property did not have knowledge of the security interest and a search of the PPS Register at any time on the day that the interest was acquired, or on the previous day, by reference to the serial number would not have disclosed a registered security interest, then that person would acquire the motor vehicle free of the security interest (clause 45).
- 2.82 This provision is based on s7(1A) of the *Chattel Securities Act 1987* (Vic) (the ‘day and a half rule’) and s8(3)(b) of the *Registration of Interests in Goods Act 1986* (NSW), but unlike the existing State provisions, these provisions would not compel a transferee to undertake the search prior to purchase or lease (clause 45(1)).
- 2.83 This provision would have effect only in limited circumstances because in most cases, where personal property is required to be registered by serial number and the serial number is incorrectly recorded or missing, the registration would be ineffective, and the transferee would take their interest free of the security interest.

Taking from prescribed persons

- 2.84 A buyer or lessee of an interest in a motor vehicle would ordinarily acquire it free of a security interest, if the regulations provide that motor vehicles of that kind may or must be described by serial number, and the seller or lessor is in a class of persons prescribed by the regulations (clause 45(3)).
- 2.85 The purpose of this provision is to allow a person to buy or lease a motor vehicle from a motor vehicle dealer, free of a security interest, without the need to search the PPS Register prior to acquiring their interest.

Example

GrantA is a motor vehicle dealer. GrantA has cars in stock financed under a floor plan arrangement with bailment company FinanceA. Under the floor plan arrangement FinanceA purchases the vehicles from ManufacturerA and allows GrantA to retain them on its premises for sale. FinanceA registers its security interest in each vehicle. BuyA wants to purchase a car from GrantA with finance provided by BankB. Neither BuyA nor BankB need to search the PPS Register as the transferor (GrantA) is a motor vehicle dealer. BuyA acquires its interest in the car free of FinanceA’s security interest.

- 2.86 However, the person would not take the vehicle free of the security interest if:
- the secured party was in possession of the vehicle immediately before the buyer or lessee acquired their interest;

- when the vehicle is being sold (not leased) - the person buys the vehicle at a sale held by or on behalf of an execution creditor;
- the buyer or lessee holds the vehicle as inventory, or holds the vehicle as inventory on behalf of another person; or
- the transferee has actual or constructive knowledge that the sale or lease constitutes a breach of the security agreement (clause 45(4)).

2.87 Many buyers or lessees of motor vehicles from motor vehicle dealers would be aware that motor vehicles held by dealers as inventory are subject to a security interest but this knowledge alone would not disqualify buyers and lessees.

Example

GrantA is a motor vehicle dealer. BankA has perfected a security interest in all of the vehicles at GrantA's showroom, by registering each vehicle against its serial number. The security agreement obliges GrantA to sell the vehicles for an amount determined in accordance with a formula agreed to by GrantA and BankA, with a minimum price of \$X for any vehicle. BuyA is an associate of GrantA, though not a motor vehicle dealer, and is aware that GrantA is obliged to sell the vehicles for at least \$X. GrantA sells a motor vehicle to BuyA for an amount significantly less than \$X. BuyA would not acquire the motor vehicle free of BankA's security interest.

Transactions in the ordinary course of business

2.88 Generally, a person who acquires an interest in personal property in the ordinary course of the vendor's business of dealing with property of that kind would acquire the interest free of any security interest granted by the vendor, whether perfected or unperfected (clause 46(1)). This would not give the transferee protection from all security interests, only those security interests that have been granted by the transferor.

2.89 However, this provision would not apply if:

- in the case of personal property that may or must be described by serial number, the transferee holds the property, or holds the property on behalf of another, as inventory; or
- the transferee has actual or constructive knowledge of the security agreement (clause 46(2)).

2.90 Purchasers are only protected when they acquire their interest in the property 'in the ordinary course of the transferor's business of dealing with property of that kind'. Generally, this would be a question of fact in each case but a person would not take free in the ordinary course of the seller's business if the sale is made at a time of financial stress and the sale would not have been made but for the seller's financial stress.

Example

GrantA is primarily in the business of leasing, repairing and rebuilding cranes. GrantA's practice is to sell a crane if it becomes obsolete, deteriorated beyond its useful life, or difficult to lease. GrantA sells one of its cranes to BuyA. The sale is the only sale that occurs that year. While the sale of the crane to BuyA would be in the ordinary course of GrantA's business, the sale would not be in the ordinary course of GrantA's business of dealing with property of that kind.

Example

GrantA is primarily in the business of raising and selling livestock. GrantA and BuyA regularly exchange livestock for feed. The exchange of the livestock for feed would be in the ordinary course of business despite it being secondary to GrantA's primary business of dealing in livestock.

Low value consumer property

2.91 A person who buys or leases personal property that they intend to use predominantly for personal, domestic or household purposes would take the goods free of any security interests provided that:

- their intention to use the personal property predominantly for personal, domestic or household purposes existed at the time of the purchase or lease;
- the person acquires their interest for new value; and
- the market value of the consideration provided by the purchaser or lessee (at the time of payment) is not more than \$5,000 (or a greater amount prescribed in the regulations) (clause 47(1)).

2.92 However, the buyer or lessee would not take the property free of the security interest if:

- the property is required under the regulations to be described in a registration by serial number;
- the person has actual or constructive knowledge that the sale or lease is a breach of the security agreement;
- at the time the contract for sale or lease was entered into:
 - the market value of the personal property is more than \$5,000; and
 - the person believed the market value of the personal property to be not more than \$5,000 (clause 47(2)).

2.93 This provision would enable consumer to purchase low-value consumer goods without the need to search the PPS Register.

Example

MsX buys a chainsaw at a garage sale for \$2,000 with the intention to use it in her hobby workshop. MsX is not aware of any security interest in the chainsaw. The market value of the chainsaw is less than \$5,000. MsX would take the chainsaw free of the security interest.

Example

MrY buys an antique chair at a garage sale for \$4,000. MrY does not believe the market value of the chair to be more than \$5,000 and while similar chairs are selling for \$6,000 at the local antique shop, MrY does not know this. MrY would take the chair free of the security interest.

Example

MrY buys an antique chair at a garage sale for \$4,000. MrY knows that similar chairs are selling for \$6,000 at the local antique shop. MrY would not take the chair free of the security.

Security interests in currency

- 2.94 A transferee of currency would acquire their interest in the currency free of any security interests in that currency if, at the time of acquiring the currency, the transferee had no actual or constructive knowledge of the security interest (clause 48).
- 2.95 This rule recognises the importance of the negotiability of currency in ordinary commerce.

Security interests in investment instrument or entitlement in the ordinary course of trading

- 2.96 A person who buys an investment instrument or entitlement in the ordinary course of trading on a prescribed financial market (within the meaning of the *Corporations Act 2001*) takes an instrument or entitlement free of any security interests (clause 49). This provision protects the integrity of transactions in prescribed markets such as the Australian Stock Exchange.

Security interests in investment instruments

- 2.97 A person would acquire an interest, including a security interest, (clause 42) in an investment instrument free of other security interests if:
- the person acquired their interest by a consensual transaction for value;
 - the person took possession or control of the investment instrument; and
 - the person had no actual or constructive knowledge that the acquisition constituted a breach of the security agreement that provided for the security interest (clause 50).

Security interests in investment entitlements

- 2.98 A person would acquire an interest in an investment entitlement free of a security interest if:
- the person gave value for the interest (unless the interest acquired is a security interest);
 - the person acquired their interest in a consensual transaction;
 - the person had no actual or constructive knowledge that the acquisition of the interest was a breach of a security agreement that provides for a security interest in any investment entitlement or financial product (clause 51).

Temporarily perfected security interests

- 2.99 A security interest would be temporarily perfected in a number of circumstances, despite the secured party not having perfected it by registering a financing statement or by taking possession or control of the collateral, where:
- a bailee takes possession of goods and issues a negotiable instrument of title (clause 22(2));
 - proceeds arise from collateral (clause 33(2));
 - collateral is transferred (clause 34(1));

- goods are returned to a grantor for dealing (clause 35(1));
- negotiable instruments or investment instruments are given to the grantor for sale (clause 36(1));
- goods, which are the subject of transferred account or chattel paper, are returned (clause 38(3));
- collateral is relocated to Australia (clause 39(1)); or
- the grantor moves to Australia (clause 40(2)).

2.100 Transferees that buy or lease collateral in which the security interest is temporarily perfected (other than under clause 322) would acquire their interests free of the security interest where they provide new value and do not have actual knowledge that the purchase or lease constitutes a breach of the security interest (clause 52).

2.101 This protects innocent transferees who acquire collateral subject to a temporarily perfected security interest, as searching the PPS Register would not have revealed a registration with respect to the security interest.

Example

BankA has perfected its security interest in goods by arranging for a bailee to possess the goods on its behalf. The property is returned to GrantA for sale. The security interest would be temporarily perfected for five business days. If GrantA becomes insolvent during those five days, BankA's security interest would not be void because of the temporary perfection. However, if GrantA sells the property to a third party during the five days, in circumstances that constitute a breach of the security agreement, the transferee would take the collateral free of BankA's security interest, despite the secured party's interest being temporarily perfected.

Rights of secured party and transferee

2.102 The ability of transferees to take security interests free of security interests would have consequences for secured parties and transferees as follows:

- the rights of the secured party to the relevant property, or an accession to the property, are subrogated to the rights (if any) of the transferor and any predecessor of the transferor (clause 53(2)); and
- a transferee who makes a part payment before receiving notice of the secured party's rights (clause 53(2)) would have their obligation discharged to the extent of the payment (clause 53(3)).

Priority between Security Interests

Priority of security interests generally

2.103 An item of personal property could secure payments or obligations owed to more than one secured party. When more than one secured party becomes entitled to the collateral under their security agreement, the priority rules determine (for example):

- the order in which proceeds of the collateral realised as part of an enforcement process are to be distributed (clause 140);
- whether a secured party would be entitled to notice that another secured party has commenced enforcement process in relation to the collateral (clause 130);
- whether a secured party would be entitled to take over an enforcement process initiated by another secured party (clause 123).

2.104 The priority rules would apply only if two or more security interests are attached to the same collateral.

2.105 The priority rules would not apply where the collateral has been acquired free of any competing security interests or where only one security interest is attached to the collateral.

Example

GrantA is a dealer in antiquarian books. GrantA grants a security interest in its antiquarian books to BankA. GrantA later grants a security interest in the same antiquarian books to BankB. Neither BankA nor BankB perfect their security interest in the books. GrantA sells one of the antiquarian books to BuyA. BuyA takes the book free of the security interests previously held by BankA and BankB (clause 43). There is no priority contest between BankA and BankB.

Example

GrantA is a dealer in antiquarian books. GrantA grants a security interest in its antiquarian books to BankA. GrantA later grants a security interest in the same antiquarian books to BankB. Both BankA and BankB perfect their security interest. GrantA sells a book to BuyA in the ordinary course of GrantA's business. BuyA knew that the transfer would be a breach of the security agreement with BankA. Therefore, BuyA acquired the books subject to BankA's security interest, but not BankB's security interest. It is not necessary to apply the priority rules because BuyA took the books free of BankB's security interest (clause 48).

2.106 The Bill includes general priority rules (clause 55-61) and specific priority rules for:

- purchase money security interests (clause 62-65);
- security interests in transferred collateral (clause 66-68);
- creditors and purchasers of negotiable instruments, chattel paper and negotiable documents of title (clause 69-72);
- competing security interests and declared statutory interests (clause 73); and
- execution creditors, ADI accounts and returned tangible property (clause 74-77).

Default priority rules

- 2.107 The order in which the security interests attach to the collateral is relevant only if both interests are unperfected, in which case priority would be determined by the order of attachment (clause 55(2)).
- 2.108 When two unperfected security interests attach at the same time, they would have the same priority under the Bill. However, one of the secured parties will be able to achieve priority over the other by registering their security interest.
- 2.109 A perfected security interest would have priority over an unperfected security interest in the same collateral (clause 55(3)).

Example

GrantA grants a security interest in its oil paintings to BankA, and later grants a security interest in the same oil paintings to BankB. BankB registers the security interest, while BankA does not. The security interest held by BankB would have a higher priority than the security interest granted by BankA, despite GrantA having granted the first security interest to BankA.

- 2.110 Where two or more security interests are both perfected, priority would be determined by the priority time for each security interest (clause 55(4)).
- 2.111 The priority time for a security interest would be the initial perfection time only if the security interest remained continuously perfected after that time (clause 55(6)). A security interest would be continuously perfected only if it has been perfected at all times since the initial perfection time (clause 56(1)). A security interest could be continuously perfected through a series of adjacent or overlapping perfections (clause 56(2)).

Example

GrantA purchases a Bentley with finance provided by FinanceA. FinanceA registers the security interest in May and provides the finance to GrantA in June. GrantA later obtains further finance from FinanceB, which is also secured against the Bentley. FinanceB registers this security interest in June. The security interest held by FinanceA would have priority over that held by FinanceB, because the priority time for FinanceA's security interest preceded that of FinanceB's.

Example

GrantA is a dealer in stamps. GrantA purchases a rare stamp with finance provided by BankA. In July, BankA perfects its security interest in the stamp by taking possession of the stamp. In September, GrantA grants security interest in the stamp to BankB. BankB perfects its security interest in the stamp with a registration on the PPS Register. In November, BankA agrees to give GrantA possession of the stamp for 48 hours to allow GrantA to exhibit the stamp at a festival. Before giving GrantA possession of the stamp, BankA registers its security interest in the stamp on the PPS Register. The security interest held by BankA would have priority over that held by BankB, because the priority time for BankA's security interest would be July (when BankA initially perfected its security interest by taking possession of the stamp).

Priority of security interests perfected by control

- 2.112 A security interest that is perfected by control would have priority over a security interest perfected by any other means (clause 57(1)).

2.113 Only the following kinds of property could be perfected by control:

- an ADI account;
- an investment entitlement;
- an investment instrument;
- a negotiable instrument that is not evidenced by a certificate;
- a right evidenced by a letter of credit that states that the letter of credit must be presented on claiming payment or requiring the performance of an obligation; and
- satellites and other space objects.

2.114 A security interest would be perfected by control when the secured party, or another person on behalf of the secured party, has control of the collateral (clause 21(2)). However, controllable property could be perfected otherwise than by control.

Example

GrantA borrows \$10,000 from BankA and grants BankA a security interest in its shares. BankA perfects its security interest by registering a financing statement on the PPS Register. GrantA later borrows \$15,000 from BankB and grants BankB a security interest in the same shares. BankB perfects its security interest by taking control of the shares. BankB's security interest would have priority over BankA's security interest because BankB has perfected its security interest through control while BankA has perfected its security interest through registration.

- 2.115 A security interest perfected by control would have priority over a security interest that is not perfected by control even when the secured party knows that the grant of the security interest was made in breach of a pre-existing security interest. This makes it unnecessary to consider whether a person with control had knowledge of another security interest or the terms of the other security interest.
- 2.116 Secured parties should therefore protect their security interests by perfecting their interests appropriately. As perfection by registration alone would be insufficient to guarantee priority against a competing security interest perfected by control, a secured party with a security interest in controllable property, who is concerned that the grantor might transfer the collateral to another person, should consider taking control of the property.
- 2.117 Where all the competing security interests are perfected by control, the first in time principle would apply and priority would be determined by the order in which the secured parties took control of the collateral (provided that perfection by control has been continuous) (clause 57(2)).
- 2.118 This rule would be subject to one exception where an ADI perfects its security interest in an ADI account held with the ADI (always by control) (clause 25(1)), the security interest held by the ADI would be subordinate to a security interest held by another secured party who has control (clause 75). An ADI which is concerned about this could choose to specify that only an account holder can direct the disposition of funds.

- 2.119 Priority between perfected security interests not perfected by control would be determined by their priority time. The security interest with the earliest priority time would have the highest priority (clause 55(4)).
- 2.120 Over a period of time, a secured party might perfect a security interest by more than one method. For example, the security interest might initially be perfected by possession and then perfected later by registration. Provided that the security interest is been continuously perfected, the priority time would be the earliest priority time (clause 55(5)-(6)).

Example

On 1 July, GrantA grants FinanceA a security interest in a lathe. FinanceA takes possession of the lathe from 1 July until 30 August. On 1 August, FinanceA registers against GrantA in relation to the lathe with an end date of 31 October. On 1 October, FinanceA again takes possession of the lathe until 31 December. At 31 December, FinanceA's security interest in the lathe will have been continuously perfected since 1 July, initially by possession, then by registration and later by possession. The priority time for the security interest will be 1 July.

- 2.121 The priority time for a security interest first perfected by control would be the time when the collateral is first perfected by control. A secured party who has control of the collateral and who wishes to surrender control while retaining a perfected security interest, should satisfy themselves beforehand that the security interest will remain perfected despite the loss of control (clause 55(7)).
- 2.122 If a security interest has priority over a second security interest and that second security interest has priority over a third security interest, then the first security interest would have priority over the third security interest (clause 59). It would not matter whether the second security interest exists.
- 2.123 The priority of a constitutional security interest over a non-constitutional security interest is relevant where a State does not refer the power to enact the Bill to the Commonwealth. Some security interests would be within the constitutional power of the Commonwealth (clauses 242(2)-(3) and clauses 246-249) but others would not be. For example, the Bill would operate in relation to a security interest when the secured party is a constitutional corporation and the grantor is an individual (clause 248(1)). However, the Bill would not operate when both the secured party and the grantor are individuals and the constitution does not apply to the collateral (clause 249).
- 2.124 A security interest that is within the constitutional power of the Commonwealth would have priority over a security interest that is not within the constitutional power of the Commonwealth (clause 252). Accordingly, a security interest granted by an individual over non-constitutional property to a constitutional corporation would have priority over a security interest in the same property granted to an individual.

Example

StateA is a State that has not referred the power to enact the Bill to the Commonwealth. GrantA is an individual, and has granted a security interest in his or her personal property to PersonA, another individual. The security agreement is entered into in StateA. GrantA later grants a security interest in the same personal property to BankA. The security interest held by BankA, as a security interest arising from the Commonwealth's banking power, would have priority over the security interest held by PersonA.

- 2.125 Where a security interest is transferred to another party, the transferred part of the security interest would have the same priority after the transfer that it had immediately before the transfer (clause 60).
- 2.126 A secured party could subordinate their security interest to any other interest (whether or not a security interest) in the same collateral (clause 61(1)). This would sometimes be necessary because a prior perfected security interest could limit further finance available to the debtor.
- 2.127 A subordination agreement would be effective according to its terms. Any third party who is intended to benefit from the subordination agreement would be able to enforce the subordination agreement without being a party to the agreement. (Clause 61(2)).

Example

On 1 July, FinanceA registers a security agreement against GrantA over its inventory in anticipation of future deliveries of inventory to GrantA. On 1 August, GrantA attempts to obtain further finance from FinanceB but FinanceB is aware of FinanceA's registered security interest and concerned that FinanceA would have priority in the event of GrantA's default. FinanceB therefore makes the provision of finance conditional on a subordination agreement between GrantA and FinanceA to ensure that once their security agreement is signed, FinanceB's security interest would not be subordinate to that of FinanceA.

- 2.128 A security interest would not be created by an agreement or undertaking to subordinate the right of a person to the performance of an obligation to the right of another person to the performance of an obligation of the same debtor.

Advances

- 2.129 An advance is the payment of currency, the provision of credit or the giving of value, and would include the liability of a debtor to pay interest, credit costs and other charges or costs connected to the advance or the enforcement of a security interest securing the advance (clause 10, advance). A future advance would be an advance secured by a security interest (if the advance is made after the security agreement) and would include expenses in relation to the enforcement of the security agreement, secured by the security interest (clause 10, future advance).
- 2.130 A security agreement could provide for future advances (clause 18(4)) and the Bill would confer the same priority on all advances (including future advances) and obligations secured by the security agreement (clause 58).
- 2.131 Expenses, in relation to the enforcement of a security interest in collateral, would include advances, costs and taxes for obtaining possession of, protecting (including insuring), maintaining, preserving or repairing the collateral (clause 10). A security agreement would be taken to secure reasonable expenses in relation to the enforcement of the security interest, unless the parties agree otherwise (clause 18(5)).

Purchase money security interests

- 2.132 A security interest would be a purchase money security interest:
- to the extent that it attaches to collateral and secures all or part of the purchase price;

- where the secured party provides the value required by the grantor to acquire the collateral, to the extent that the collateral secures the value;
- where a lessor or bailor acquires an interest under a PPS lease, that is, a lease or bailment of tangible property for an effective period of more than one year, or 90 days in the case of serial numbered goods) (clause 13); or
- where a consignor acquires an interest under a commercial consignment (clause 14(1)).

Example

GrantA leases a jetspa from FinanceA for a term of more than one year. FinanceA has a purchase money security interest.

Example

GrantA is a wholesaler of car radios. GrantA purchases car radios from ManufacturerA, financed by BankB. BankB has a security interest in Grant A's all present and after acquired property but does not have a purchase money security interest. GrantA decides to take up ManufacturerA's offer to supply the car radios on a deferred payment basis. ManufacturerA would have a purchase money security interest in the car radios supplied after this time.

- 2.133 A secured party who has a purchase money security interest would have priority over a perfected security interest in the same collateral, granted by the same grantor, provided the purchase money security interest is perfected by a registration that states that the security interest is a purchase money security interest.
- 2.134 When the collateral is inventory that is goods, the purchase money security interest would have to be perfected by a registration before the grantor obtains possession of the goods (clause 62(2)). A single registration could confer purchase money priority on several later supplies of goods. When goods are shipped to the grantor by a common carrier, the grantor would not obtain possession of the goods until the grantor acquires actual possession of the goods (clause 65). When the collateral is inventory that is not goods, the security interest would have to be perfected by a registration before the security interest could attach to the inventory (clause 62(2)).
- 2.135 When the collateral is goods, but not inventory, the purchase money security interest would have to be perfected by registration before the end of 10 days after the grantor obtains possession of the goods. When collateral is neither inventory nor goods, the purchase money security interest would have to be perfected by registration before the end of 10 days after the security interest attaches to the collateral. (Clause 62(3)).
- 2.136 A purchase money security interest held by a seller, lessor or consignor of the collateral would have priority over another purchase money security interest in the same collateral held by a person who is not the seller, lessor or consignor, provided the priority interest is perfected within the period required to obtain priority over a security interest that is not a purchase money security interest (clause 64).
- 2.137 A PMSI would not include:
- an interest acquired under a sale and lease-back arrangement;
 - an interest in collateral (as original collateral) that is a monetary obligation, chattel paper, investment instrument, investment entitlement or a negotiable instrument;

- a security interest in collateral that the grantor intends to use predominantly for personal, domestic or household purposes (clause 14(2)).

2.138 If a security interest secures purchase money security obligations and other obligations, it would be a purchase money security interest only to the extent that it secures purchase money obligations and not to the extent that it does not secure purchase security obligations (clause 14(3)).

Example

GrantA borrows \$100,000 from DealerA to purchase a front-end loader from DealerA. GrantA is able to purchase the front-end loader for \$75,000 and GrantA uses the balance of the money advanced (\$25,000) to purchase a round-the-world cruise. While the front-end loader would secure the entire \$100,000 advanced, the security interest would only be a purchase money security interest priority to the extent that it secured \$75,000. DealerA would have a security interest in the front-end loader securing the other \$25,000 (but this security interest would not have purchase money security status).

2.139 If a security interest is granted in purchase money security collateral and collateral that is not purchase money security collateral, the security interest would be a purchase money security interest only to the extent that it secures the purchase money collateral (clause 14(4)).

Example

GrantA owes \$5,000 to BankA, but the loan is unsecured. GrantA borrows a further \$10,000 from BankA to purchase a computer. All of the \$10,000 is used to purchase the computer. BankA secures both the \$10,000 loan and the earlier \$5,000 loan against the computer. The security interest in the computer would be a purchase money security interest only to the extent that it secures the \$10,000 advanced by BankA for the purchase of the computer.

2.140 A purchase money security interest would continue to be a purchase money security interest despite the secured obligation being renewed, refinanced, consolidated or restructured (clause 14(5)).

Example

BankA gives GrantA a \$5,000 unsecured loan in addition to an existing \$10,000 purchase money security interest secured against GrantA's wine collection. GrantA and BankA agree to consolidate the loans, to extend the period over which BankA must be repaid and to secure the loans against the wine collection and against some antique prints owned by GrantA. The consolidated loan would be a purchase money security interest, but only to the extent of \$10,000 of the \$15,000 consolidated loan and only to the extent that it is secured against the wine collection.

2.141 When an obligation secures both purchase money security interests and other security interests, the parties could agree on a method of apportioning payments. If the parties don't agree, the payments would be apportioned as intended by the grantor alternatively in the following order:

- to unsecured obligations;
- to secured obligations;
- to obligations secured by purchase money security interests. (Clause 14(6)).

Non-purchase money security interests in accounts

- 2.142 The priority held by an inventory financier in a purchase money security interest could extend to proceeds arising from a dealing by the grantor in the collateral (clause 32(5)) but when the proceeds are in the form of an account, other than an ADI account, the grantor could assign the account to another person for new value.
- 2.143 The accounts financier would have priority provided it registers its security interest against the grantor, before the earlier of:
- the perfection of the purchase money security interest; or
 - the registration time of the purchase money security interest (Clause 64(1)).
- 2.144 Alternatively, the accounts financier would have priority, if it gives notice to each secured party holding a registered purchase money security interest in the inventory at least five business days before the earlier of the day:
- it registers its security interest against the grantor; or
 - the priority interest attaches to the account. (Clause 64(1)).
- 2.145 The requirement that five business days notice be given to the inventory financier would give the inventory financier time to protect its security interest by altering the terms of trade for future inventory finance that would become subordinate to the priority interest.
- 2.146 If the purchase money security interest is subordinate to a priority interest, the purchase money security interest would continue in either the proceeds of the inventory or the new value received by the grantor. This security interest in the new value would be taken to be perfected by the registration that perfected the purchase money security interest in the proceeds. (Clause 64(3)).

Example

ManufacturerA supplies inventory to GrantA on a purchase money security interest basis. ManufacturerA has registered against GrantA in relation to the inventory. GrantA would like to begin transferring the proceeds of its inventory, in the form of accounts, to DiscountA for new value. DiscountA gives 5 business days notice to ManufacturerA of its intention to begin buying accounts from GrantA. DiscountA registers its security interest in the transferred accounts. At the end of the 5 business days, DiscountA begins buying the accounts from GrantA. DiscountA has priority over ManufacturerA in relation to the accounts, but ManufacturerA would have a purchase money priority over the new value GrantA has received on the transfer of the accounts to DiscountA.

- 2.147 More than one purchase money security interest could attach to the same collateral, for example where a grantor acquires collateral that is financed partly by the seller, lessor or consignor of the collateral and partly by another financier.
- 2.148 A purchase money security interest held by a seller, lessor or consignor would have priority over any other purchase money security interest granted by the same grantor, if the purchase money security interest is perfected:
- for collateral that is inventory and tangible property - at the time the grantor obtains possession;

- for collateral that is inventory and intangible property-at the time the priority interest attaches to the collateral; and
- in any other case, before the end of 10 business days after the grantor obtains possession of the collateral (clause 63).

Example

GrantA acquires a lathe from ManufacturerA on a retention of title basis, under which GrantA is obliged to pay 25% on possession and the balance in regular instalments over six months. ManufacturerA has a purchase money security interest in the lathe that secures the 75% balance owing on the lathe. GrantA finances the initial 25% of the purchase price of the lathe through a loan from BankB secured against the lathe also on a purchase money security interest basis. ManufacturerA's purchase money security interest will have priority over BankB's purchase money security interest.

- 2.149 When neither of the purchase money security interests is held by a seller, lessor or consignor, priority would be determined in accordance with the default priority rules, that is, on the basis of the earliest priority time or earliest attachment if neither is perfected.

Example

BankA grants GrantA a loan to purchase equipment for its business. BankA takes a security interest in all GrantA's present and after acquired property, including proceeds, to secure the loan. GrantA then acquires a boat from ManufacturerA, on a retention of title basis, and ManufacturerA registers its purchase money security interest in the boat. GrantA finances the initial down payment on the boat through a loan from BankB, also secured against the boat, and any proceeds, on a purchase money security interest basis.

GrantA sells the boat and acquires proceeds in the form of an account. GrantA sells the account to DiscountA and keeps the new value provided by DiscountA. DiscountA gives notice to ManufacturerA one day before it registers its security interest in the transferred account.

DiscountA has priority over ManufacturerA in the proceeds that were transferred to GrantA. As the seller of the boat, ManufacturerA would have priority over BankB's purchase money security interest in the proceeds but BankB would have priority over BankA which does not have a purchase money security interest in the proceeds.

Priority of security interests in transferred collateral

- 2.150 A grantor could transfer collateral to another person where the transferee does not take the property free of the security interest and the transferee, in turn, grants a security interest in the collateral to another secured party. In these circumstances, it would become necessary to determine which security interest has priority.

- 2.151 The law would need to balance the competing interests of two innocent parties:

- the secured creditor who provided finance to the transferor and who did not consent to and is unaware of the transfer (the transferor's secured party); and
- the secured creditor who provided finance to the transferee and who was not aware of the earlier security interest (the transferee's secured party).

- 2.152 Where the transferor-granted security interest or the transferee-granted security interest is a purchase money security interest, neither interest would have purchase money priority over the other, because purchase money priority applies only when the competing security interests have been granted by the same grantor (clause 62(1)).

- 2.153 The transferor-granted interest would have priority where it was perfected immediately prior to transfer and was continuously perfected since transfer (clause 67).

Example

BankA has a registered security interest in GrantA's worm farm, securing \$100 owed by GrantA to BankA. GrantA transfers the worm farm to GrantB, in circumstances where GrantB takes the worm farm subject to the security interest. BankA has the benefit of temporary perfection (clause 34). Within 24 months of the transfer, GrantB grants BankB a security interest in the worm farm, securing \$150 owed by GrantB to BankB. GrantA is not aware of the transfer. BankA's security interest would have priority over BankB's security interest (clause 67).

Example

BankA has a registered security interest in GrantA's worm farm, securing \$100 owed by GrantA to BankA. GrantA transfers the worm farm to GrantB, in circumstances where GrantB takes the worm farm subject to the security interest. BankA has the benefit of temporary perfection (clause 34). BankA becomes aware of the transfer, but does not register against GrantB within 5 business days. The temporary perfection ends (clause 34(1)(c)(ii)). BankA registers against GrantB. There are no other registrations against GrantB. GrantB later grants a security interest in the worm farm to BankB (who later still perfects its security interest by registration). BankA would have priority on an ordinary first in time basis because its second registration was made before BankB's registration.

- 2.154 On ordinary first in time priority principles, once the transferor-granted interest becomes unperfected, a perfected transferee-granted interest would have priority over a transferor-granted interest.

- 2.155 However, the Bill would allow the transferor-granted interest to have priority over the transferee-granted interest, subject to the transferor's secured party resuming perfection of the security interest and giving notice to the transferee's secured party. The transferee-granted interest would have priority to the extent of any advances made or obligations secured while the transferor-granted interest was not perfected (clause 68). The transferee's secured party would have priority only if it acquired the security interest without actual or constructive notice that the acquisition constitutes a breach of the transferor's security interest (clause 68(2)(c)).

Example

BankA has a registered security interest in GrantA's worm farm, securing \$100 owed by GrantA to BankA. GrantA transfers the lathe to GrantB, in circumstances where GrantB takes the worm farm subject to the security interest. BankA has the benefit of temporary perfection (clause 34). BankA becomes aware of the transfer, but does not register against GrantB within 5 business days. The temporary perfection ends (clause 34(1)(c)(ii)). GrantB is negotiating a loan from BankB. BankB registers against GrantB. BankA becomes aware of the transfer to GrantB and registers against GrantB but before BankB makes an advance to GrantB or comes under an obligation to GrantB that is secured against the worm farm. BankA gives a notice to BankB. BankA's security interest has priority over BankB's security interest (clause 68(1)).

- 2.156 The transferee-granted interest has priority where the transferor-granted security interest:

- is not registered with a serial number;
- was perfected by registration before the transfer, became unperfected and was later re-perfected;
- notice in the approved form was given to other secured parties;

- the transferee-granted security interest was perfected immediately before the transferor-granted interest was re-perfected;
- the transferee acquired their interest without knowledge that it was a breach of a prior security agreement; and
- the transferee-granted interest secured performance of an advance made before the transferor-granted interest is re-perfected (this will apply despite the rule that all advances have the same priority)(clause 58). (Clause 68(2)).

Example

BankA has a registered security interest in GrantA's worm farm. GrantA transfers the worm farm, in the ordinary course of his business, to GrantB who acquires the worm farm free of BankA's security interest. GrantB grants a security interest in the worm farm to BankB. BankB immediately perfects its interest in the worm farm without any knowledge that this is in breach of BankA's prior security agreement and makes a number of advances to GrantB under their security agreement. BankA later becomes aware of the transfer and re-registers its security interest and provides notice to BankB in the approved form. BankA would have priority over BankB's security interest in the worm farm (clause 68(1)). However, BankB would have priority over the BankA's security interest to the extent of the advances made or obligations incurred before BankA re-perfected its security interest and gave the notice to BankB (clause 68(2)).

Priority of creditors and purchasers of negotiable instruments, chattel paper and negotiable documents of title

2.157 The interest of a creditor who is paid by a debtor would have priority over any security interest in:

- the funds paid;
- the intangible that was the source of the payment (for example, a bank account); or
- a negotiable instrument used to effect the payment (clause 69(1)).

2.158 However, the creditor would not have priority if they had actual knowledge that the payment was a breach of the security agreement that provided for the security interest (clause 69(2)).

2.159 A person who acquires an interest in a negotiable instrument, in a consensual transaction, would have priority over security interests in the negotiable instrument provided:

- the person provided value and took possession or control of the instrument;
- if the acquisition was in the ordinary course of the person's business of acquiring instruments of that kind - the person acquired the interest without actual or constructive knowledge that the transaction involved a breach of the security interest; and
- if the acquisition was not in the ordinary course of the person's business of acquiring instruments of that kind - the person lacks actual or constructive knowledge of the security interest (clause 70).

Example

FinanceA perfects its security interest in DealerA's cars by registering a financing statement. DealerA sells a car to a person who pays for the car with a cheque. DealerA

deposits the cheque with BankA. BankA is unaware of FinanceA's security interest in the cheques (as proceeds of the car). BankA's interest in the cheque takes priority FinanceA's security interest in the cheque.

2.160 The interest of a person who acquires chattel paper for new value in a consensual transaction in the ordinary course of their business of acquiring chattel paper of that kind would have priority over:

- a perfected security interest if they lack actual or constructive knowledge of the security interest; and
- a security interest that has attached to proceeds of inventory as original collateral (clause 71(2)).

Example

DealerA leases paintings in the course of a business. DealerA leases a painting to PersonA. The lease agreement is chattel paper. The lease payments are proceeds of DealerA's inventory. DealerA assigns the lease payments to FinanceA. The assignment is deemed to be a security interest and attaches to the payments (which are proceeds of inventory) as original collateral. DealerA also sells the chattel paper to FinanceB. Both FinanceB and FinanceA claim the lease payments made to DealerA. FinanceB's interest in the chattel paper would have priority over FinanceA's security interest in the lease payments.

2.161 The interest of a holder of a negotiable document of title would have priority over a perfected security interest in the document if the holder gives value for the document and:

- where the holder acquired the document in the ordinary course of their business of dealing in documents of that kind - it was acquired without actual or constructive knowledge that the acquisition was a breach of the security interest; or
- where the holder did not acquire the document in the ordinary course of their business of dealing in documents of that kind - it was acquired without actual or constructive knowledge of the security interest (clause 72).

Priority of other interests

Priority between security interests and declared statutory interests

2.162 An interest in personal property would have priority over a security interest where:

- it arises under a law of the Commonwealth, a State or Territory (unless the collateral owner agrees to the interest) or the general law; and
- it arises in relation to providing goods or services in the ordinary course of business;
- no other law provides for priority between the priority interest and the security interest; and
- the holder of the priority interest has no knowledge that the transaction is a breach of the security agreement (clause 73(1)).

- 2.163 Other interests in personal property would have priority over a security interest if, and only if, the Commonwealth, State or Territory conferred priority on the other interests over security interests (clause 73(2)).
- 2.164 The priority between an interest arising under a law of the Commonwealth, State or Territory and a security interest would be determined according to that law, if:
- that law declares these provisions to be applicable to the statutory interest; and
 - the statutory interest arises after the declaration come into effect (clause 73(2)).
- 2.165 These rules do not apply to interests arising before the registration commencement time. Any other interest that currently has priority over a security interest would continue to have priority over a security interest (clause 312).

Priority of execution creditors

- 2.166 A security interest would be subordinate to the interest of an execution creditor provided the security interest is not perfected at the time of execution (clause 74).

Returned goods

- 2.167 A perfected security interest that re-attaches to returned property (clause 37(1)) would have priority over a goods security interest that is granted to the transferee of an account under clause 38(1). (Clause 76(1)) .
- 2.168 A security interest in goods granted to the transferee of chattel paper (clause 38(1)) has priority over:
- a perfected security interest granted to the transferee of an account (clause 38(2));
 - a perfected security interest that re-attaches to returned goods or after-acquired property (if the transferee takes possession of the chattel paper in the ordinary course of business and for new value).

Example

FinanceA grants a loan to DealerA and secures a security interest in all DealerA's motor vehicles. LessorA leases a motor vehicle from DealerA. The lease creates chattel paper which DealerA transfers to FinanceB. LessorA makes the required payments under the lease to FinanceB. LessorA then terminates the lease and returns the motor vehicle to DealerA. FinanceA's pre existing security interest re-attaches to the motor vehicle but this security interest would be subordinate to FinanceB's security interest as the transferee of the chattel paper.

- 2.169 A security interest in goods that is granted by a person who acquires an interest in the property would have priority over a security interest that re-attaches or is granted when the goods are returned, if:
- the attachment occurred while the person possesses the property; and
 - immediately before the possession time, the priority interest was perfected (clause 76(3)).

Priority where no foreign register

- 2.170 Where a foreign jurisdiction does not provide for the registration of security interests, a security interest in an account or financial property (chattel paper; currency; documents of title; investment instruments and negotiable instruments) would have priority over another interest, in proceedings in an Australian court:
- 2.171 in respect of accounts - if the priority interest was perfected prior to the attachment of the other interest (clause 77(2));
- 2.172 in respect of financial property - if the priority interest was perfected by registration prior to the attachment of the other interest and the secured party lacks possession or control of the property (clause 77(3)).

Transfer and assignment of interests in collateral

Transfer of collateral

- 2.173 A provision in a security agreement or other agreement prohibiting the transfer of the collateral by the grantor would not affect any right the grantor has to transfer the collateral either by agreement with the transferee or by operation of law (clause 79(1)).
- 2.174 However, the fact that the transfer of the collateral is effective would not affect the right of a secured party to treat the transfer as a default under the security agreement (clause 79(2)).

Rights on transfer of account or chattel paper

- 2.176 In order to ensure that an account debtor is not in a worse position following the transfer of an account or chattel paper, the rights of a transferee of an account or chattel paper (including a secured party or receiver) would, subject to the account debtor not having agreed not to assert any contractual defences (clause 80(2)), be subject to:
- the contractual terms between the account debtor and the transferor, and any equity, defence or claim arising under their contract;
 - any other equity, defence or claim that the account debtor may have against the transferor, including set-off, that arises before transfer, (clause 80(1)).

Modification or substitution of contract

- 2.177 An account debtor and the transferor of an account may agree to modify the contract giving rise to the account. The modification would be effective against the transferee provided that:
- the account debtor and the transferor acted honestly in modifying the contract;
 - the modification is made in a commercially reasonable way; and
 - the modification does not have a materially adverse effect on the transferee's rights or the transferor's ability to perform under the contract (clause 80(6)).

- 2.178 This rule would apply only to the extent that a transferred right to payment has not been fully earned by performance (or is outstanding) (clause 80(4)).
- 2.179 If a transferor initially agrees with the transferee not to modify or substitute a contract but then later agrees with the account debtor to modify or substitute the contract, contrary to the agreement with the transferee, the transferor would be acting dishonestly.
- 2.180 If collateral is intangible or chattel paper, the account debtor would be able to make payments under the contract to the transferor until the receipt of a notice including the following information:
- the contract under which payment has become due;
 - the amount payable that has been transferred; and
 - that payment needs to be made to the transferee.
- 2.181 An account debtor would be unaffected by the assignment of a debt until notice of the assignment is given directing the account debtor to pay the transferee. After receiving notice, other than a notice from the transferor, if the account debtor requests proof from the transferee and the transferee fails to provide proof within 5 days of the transfer, payment to the transferee discharges the obligation (clause 80(7)).

Example

BuyerA has an agreement with DealerA to purchase equipment and pay on an instalment basis. DealerA agrees that it will not assign any of its rights under the sale agreement. Nevertheless, DealerA grants FinanceA a security interest in the accounts. The anti-assignment agreement would be ineffective. However, if FinanceA notifies BuyerA to make all future payments directly to FinanceA, BuyerA would be obliged to do so in order to discharge its obligations.

Rights on transfer of account or chattel paper

- 2.182 A term in a contract which prohibits the transfer of:
- an account arising from the proceeds of inventory;
 - an account which arises from granting rights (other than under construction contracts) or providing services (other than financial services) in the ordinary course of a business of that kind; or
 - an account that is proceeds of an account arising from providing rights or services in the ordinary course of business

would be binding on the transferor only to the extent of making the transferor liable in damages for breach of contract and is unenforceable against third parties (clause 81(2)).

Example

BuyerA has an agreement with DealerA to purchase equipment and pay on an instalment basis. DealerA agrees that it will not assign any of its rights under the sale agreement. Nevertheless DealerA grants to FinanceA a security interest in its accounts. The anti-assignment agreement would be ineffective.

2.180 This provision acknowledges that it is impractical for transferees of accounts and chattel paper to examine each contract for prohibitions on assignment.

CHAPTER 3 - SPECIFIC RULES FOR CERTAIN SECURITY INTERESTS

Agricultural interests

- 3.1 The Bill deals with the relationship between a security interest in crops and an interest in the land on which the crops are growing (clause 84).
- 3.2 It establishes what could be described as an ‘agricultural PMSI’ (purchase money security interest) that would enable farmers to obtain additional finance on a PMSI-like basis, using crops and livestock as collateral. While an ‘agricultural PMSI’ shares many characteristics with PMSIs, they would have a lower priority than a PMSI in the same property.

Relationship between security interest in crops and interest in land

- 3.3 The Bill would protect the interests of a lessor or mortgagee of land and they would not be adversely affected if:
- a security interest is granted in crops on the land after the creation of the lessor’s or mortgagee’s interest in the land; and
 - the lessor or mortgagee has not consented to the creation of the security interest in the crops (clause 84(1)).

Example

FarmerB borrows money from BankA and provides BankA with a mortgage over his land. FarmerB then borrows money from BankB and grants a security interest to BankB in his crops. BankA does not give written consent to the creation of the security interest in the crops. BankA’s mortgage is not prejudicially affected by BankB’s security interest in the crops.

- 3.4 A perfected security interest in crops would be protected if the land is *subsequently* sold, leased or encumbered (clause 84(2)). This provision reflects similar protection in State and Territory legislation.

Example

FarmerJ borrows money from BankA and grants BankA a perfected security interest in her crops. FarmerJ then grants BankB a mortgage over the land on which the crops are growing. BankA’s security interest in the crops is not prejudicially affected by BankB’s mortgage.

- 3.5 Perfected security interests in crops which secure loans or other value used to produce the crops (a ‘crop PMSI’) would have priority over another security interest in the same crops (clause 85)
- 3.6 A security interest in crops would be a crop PMSI where:
- the security interest is granted for value;
 - the security interest is granted to enable the crops to be produced (for example, seed, fertiliser or chemicals used in crop production); and

- the security agreement providing for the security interest is made six months before the crops are granted or while they are growing (to ensure that the growing of the crops is contemplated at the time the security interest is granted).

Example

FarmerB borrows money from BankA and provides BankA a perfected security interest in his crops. The money is used for general farming purposes not specifically related to producing the crops. FarmerB then purchases fertiliser from AgricSupplies on terms that grant AgricSupplies a security interest in the fertiliser and the crops securing the unpaid purchase price of the fertiliser. The crops PMSI of AgricSupplies would have priority over BankA's security interest in the crops.

- 3.7 A similar rule would be established for livestock, but whereas the crop PMSIs would have priority over other PMSIs, the priority interests in livestock would not have priority over PMSIs (clause 86).

Accessions

- 3.8 Goods are sometimes made up of separate components that may require replacement as they wear out or become obsolete (for example, a sail on a yacht) and the value or utility of these goods may be improved with additional components (for example, a roof rack or trailer hitch to a car).
- 3.9 These substituted or added goods are accessions, which are defined as goods that are installed in, or affixed to, other goods, unless both the accessions and the other goods are required or permitted by the regulations to be described by unique serial numbers (clause 10, accession). For example, an engine installed in a motor vehicle is an accession because the engine is physically attached to the motor vehicle and only the car is described by a unique serial number. This exception for goods permitted or required to be described by a serial number would avoid the application of the accessions provisions where it would be inappropriate to do so: in particular, with the attachment of aircraft engines to airframes.
- 3.10 Accessions raise particular priority issues and therefore the Bill would provide special priority issues for accessions. They would also raise particular enforcement issues (as they become attached to other property). The rules on accessions are closely modelled on those in the New Zealand and Saskatchewan personal property securities legislation.

Priority rules

- 3.11 A security interest in a good would continue in the good after it becomes an accession, despite being affixed or installed to another good (clause 88).
- 3.12 A security interest in an accession would have priority over an interest in the whole unless the interest in the whole falls within an exception (clause 89). For example, the starting position is that a security interest in an engine that is later affixed to a car would have priority over a security interest attached to the car. If the car (including the engine) were dealt with in a way that extinguished the security interest, then the security interest in the engine would be extinguished: for example, if the car were sold by a motor vehicle dealer.
- 3.13 These provisions would protect secured parties with security interests in goods that have the potential to become an accession (because when the security agreement is made the secured

party would have an expectation that the good would later be affixed or installed to another good and that this would not affect their security interest).

3.14 Exceptions to the default priority rule would apply when:

- a person acquires an interest in the whole for value after the accession is affixed, but before the security interest in the accession is perfected;
- a person who buys the whole for value before the security interest in the accession is perfected;
- a person with a perfected security interest in the whole who makes an advance after the accession is affixed and before the security interest in the accession is perfected, but only to the extent of the advance; or
- a person has a perfected security interest in the whole obtained after the goods become an accession, and acquires the right to retain the goods under the security agreement before the security interest in the accession became perfected (clause 90).

3.15 All of these exceptions would apply only when the secured party to the accession has not perfected its security interest in the accession after it became affixed. The exceptions would make it necessary to balance the interests of the secured party to the accession (who has not perfected the security interest) and another person who acquired rights in the whole (including the accession) without the benefit of notice that would have been provided by perfecting the security interest.

Example

GrantA borrows money from FinanceB to buy a new motor for its pump, which is placed into the pump. Before FinanceB registers its security interest in the motor on the PPS Register, GrantA offers the pump as security for a loan from BankA, which advances the money and perfects its security interest in the pump through registration. BankA has priority over FinanceB to the motor because BankA acquired for value an interest in the whole (the pump) before the security interest in the accession (the motor) was perfected. BankA's search of the register would not have disclosed FinanceB's security interest, and BankA was entitled to assume that its perfected security interest would have the highest priority of any security interests attached to the pump.

3.16 Exceptions to the default priority rules would also apply where a security interest in the accession attaches after the goods becomes an accession.

3.17 A security interest in the accession would be subordinate to a security interest attached to the whole before the accession was affixed, unless the person with the security interest in the whole:

- consents to the security interest in the accession;
- disclaims any interest in the accession;
- agrees that a person may remove the accession; or
- has no right to prevent the grantor from removing the accession.

Example

GrantA owns a large telescope at its observatory. BankA has a registered security interest in GrantA's telescope. GrantA orders a replacement mirror from SupplierS. SupplierS supplies and installs the mirror in the telescope before the terms of payment are agreed. GrantA and SupplierS later agree that payment for the mirror is to be made within 30 days of the installation and SupplierS a security interest in the mirror. BankA does not consent to the terms of payment between GrantA and SupplierS. GrantA defaults on its obligations to BankA. BankA seeks to enforce its interest in the telescope (including the recently installed mirror). BankA's security interest would have priority over SupplierS' interest in the mirror.

- 3.18 A security interest in an accession that attaches after the goods become an accession would also be subordinate to the interest of a person who acquires an interest in the whole after the goods become an accession, but before the security interest in the accession is perfected.

Enforcement of security interests in accessions

- 3.19 A secured party seizing an accession would have a duty to minimise any damage caused to the other good and any inconvenience to the person in possession of the other goods (clause 123). Only damage and inconvenience that is necessarily incidental to the removal of the accession would be permitted and the degree of damage and inconvenience that is necessarily incidental to the removal would be a question of fact in each case (clause 92).
- 3.20 Any party other than the grantor with an interest in the goods which are damaged would have a right to be reimbursed for the damage (but not inconvenience) caused by the removal of the accession, even if the damage is necessarily incidental to the removal of the accession (clause 93(1)). The value of the damage would not include the diminished value of the good resulting from the removal of the accession (otherwise the reimbursed party would be unjustly enriched) (clause 93(2)).
- 3.21 The secured party who is removing the accession would have to notify the grantor and any parties with a higher priority security interest in the accession that they intend to remove the accession (clause 95(1)). Notice would give the grantor and any parties with a higher priority security interest in the accession an opportunity to approach the Court to seek a postponement of the removal (clause 97).
- 3.22 A person with an interest in the whole would be entitled to retain the accession if the obligation secured by the security interest in the accession is performed or the removing party is paid the market value of the accession (clause 96). The removing party would be able to obtain a Court order determining the amount payable for the retention of the accession (clause 97).

Processed or commingled goods

- 3.23 Special provisions would apply to goods which are manufactured, processed, assembled or comingled so that they become part of a product of mass and their separate identity is lost.
- 3.24 A security interest in goods would continue in a product or mass even though the identity of the good is lost in the manufacturing, processing, assembly or comingling process (clause 99(1)).

- 3.25 The identity of the good would be lost if it is not commercially practical to restore the good to its original state. This would be a question of fact to be determined by the commercial and practical facts of each case. The identity of the good would not be lost merely because the good are mixed with a good of a different nature or another good (for example, grain that becomes commingled with other grain in a silo will normally lose its identity in the mass of grain and a piece of wood that is manufactured into a fruit bowl will lose its identity in the fruit bowl) (clause 99(2)).
- 3.26 The Bill would therefore provide protection for a secured party who perfects their security interest in a good which is then subsequently transformed into another good.
- 3.27 Any priority continuing in the commingled goods would be limited to the value of the goods on the day on which they became part of the combined product or mass (this would prevent the unjust enrichment of a secured party) (clause 101).

Example

GrantA is a furniture-maker. FinanceA has a perfected security interest of \$1 000 in glue owned by GrantA. FinanceB has a perfected security interest of \$10 000 in timber owned by GrantA. GrantA uses the glue and timber to make a table. The value of the glue that GrantA uses to make the table on the day that GrantA makes the table is \$50. The value of the timber that GrantA uses to make the table on the day that GrantA makes the table is \$200. FinanceA and FinanceB are the only persons with security interests in the table. Because the market for tables collapses, the table is worth \$100. FinanceA and FinanceB have equal priority in the table. On enforcement of their security interests, FinanceA is entitled to recover \$20 (or 50/250th of \$250). FinanceB is entitled to recover \$80 (or 200/250th of \$250).

- 3.28 The priority between security interests continuing in commingled goods would be determined according to three rules:
- a continuing perfected security interest would have priority over a continuing unperfected security interest (clause 102(1));
 - continuing perfected security interests would have equal priority, but only to the extent that the amount secured by the interests would be proportionate to the amount secured by the sum of all perfected interests (clause 102(2)); and
 - continuing unperfected security interests would have equal priority but only to the extent that the amount secured by the interest would be proportionate to the amount secured by the sum of all perfected interests (clause 102(3)).
- 3.29 The priority of security interests continuing in the product or mass would be limited to the value of the goods on the day on which they become part of the product or mass (clause 102(4)).

Example

GrantA is a furniture-maker. FinanceA has a registered security interest of \$1 000 in glue owned by GrantA. The value of the glue that GrantA uses to make a table on the day that GrantA makes the table is \$50. The table is valued at \$1 000, being for the timber, glue, labour and skill of the furniture maker. On enforcement of its security interest, FinanceA could recover no more than \$50.

Intellectual Property

Implied references to intellectual property

- 3.30 If a security interest in goods were perfected by registration, and the exercise of the secured party's rights would necessarily involve the exercise of the intellectual property rights, including those under licence, and the security interest had attached to the intellectual property, then the description of the goods in the security agreement would be taken to include a description of those intellectual property rights. This would be subject to the parties indicating a contrary intention in their agreement (clause 105).

Example

GrantA owns a factory that produces car parts using robots whose only function is to manufacture those particular car parts. The process used to manufacture the car parts was patented by GrantA. GrantA obtains a loan from BankA and received value for a security interest. The security agreement refers to 'the robots'. BankA registers the security interest.

GrantA defaults under the security agreement. BankA enforces the security agreement. The security agreement only refers to a security interest in robots, but the court determines that the security interest extends to the patent to the extent required to permit the robots to operate. The exercise of BankA's rights to the robots under the security agreement necessarily involves the use of the patent rights exploited in the robots. BankA's security interest will therefore be enforceable against both the robots and the patent.

Security interests in intellectual property licences

- 3.31 Where intellectual property is transferred and the licensee or sub-licensee continues to hold the licence or sub-licence after transfer, a security interest in the licence or sub-licence would continue in the licence or sub-licence and bind every successor-in-title to the licensor to the same extent as the security agreement was binding on the licensor (clause 106).

Example

Licensora is the owner of copyright, and has licensed GrantA to exercise the copyright. GrantA has granted a security interest in the licensed rights to BankA. Licensora transfers the copyright to LicensorB. LicensorB will be bound by the security interest granted by GrantA to BankA to the same extent that Licensora was bound by the security interest.

CHAPTER 4 - ENFORCEMENT OF SECURITY INTERESTS

General rules

- 4.1 The Bill would not codify the rights, duties and obligations of the parties to a security agreement as the parties should be able to negotiate their own contractual terms, subject to the provisions of the Consumer Credit Code (the Code), to the extent that it is able to operate concurrently (clause 254(1)).
- 4.2 Any secured party would, regardless of its priority ranking, be able to commence enforcement action under the Bill. This would enable secured parties to negotiate between themselves and reach agreement about enforcement. Higher ranked secured parties would, however, be able to protect their interests by obtaining possession of collateral from a lower ranked enforcing party.
- 4.3 Enforcement under the Bill would not require secured parties to obtain judgment against a debtor before being entitled to exercise rights against the secured assets. Likewise, the enforcement provisions would not prevent persons with an interest in the secured property, other than a security interest, from enforcing their interest, through court proceedings.

Exclusions

- 4.4 The enforcement provisions would only apply to secured goods within Australia. However, it is important to note that the enforcement provisions would not apply to all secured personal property.
- 4.5 Specifically, the enforcement provisions would not apply where:
- the transaction is deemed to be a security interest. A transaction that does not secure the payment or performance of an obligation does not create a security interest and therefore should not be subject to the security interest enforcement remedies; or
 - a party has perfected its security interest in an investment instrument or investment entitlement by taking possession or control. When the secured party has perfected their security interest in an investment instrument or investment entitlement by possession or control they would be able to sell, transfer, use or otherwise deal with the collateral in the manner and to the extent provided in the security agreement. This would allow a secured party to trade in the market without having to comply with the procedures and time limits of the Bill (clause 109(3)).

Exercise of rights

- 4.6 The enforcement provisions would not diminish the rights and remedies available to parties, whether those remedies are provided for by the security agreement, any Commonwealth, State and/or Territory law and/or any rule of law or equity (clause 110). Accordingly, the rights and remedies available to parties may be a combination of right and remedies provided in the Bill, contractual provisions and other legislation.
- 4.7 However, enforcement action under the Bill would require all parties to exercise their rights, duties and obligations arising under the enforcement provisions honestly and in a

commercially reasonable manner (clause 111). The duty would apply in conjunction with the specific duties imposed in the enforcement provisions, and under the general law and other legislation.

- 4.8 In exercising rights a secured party is generally only able to deal with the personal property to the same extent that the grantor would be able to deal with the property. However, a secured party would not be so limited if the secured party had title to the collateral prior to enforcing (for example, a lease arrangement, or where the grantor is contractually prohibited from transferring the collateral to a contract) (clause 112).
- 4.9 If a secured party has obtained judgment or initiated execution proceedings against a grantor these would continue in the collateral and would not prevent the secured party from taking enforcement action under the Bill (clause 113).

Collateral used for consumer purposes

- 4.10 The Bill distinguishes between transactions securing inventory and equipment and those securing consumer goods, particularly in relation to the extent to which parties may contract out of the enforcement clauses.
- 4.11 In describing consumer transactions, the enforcement provisions refer to ‘goods used predominantly for personal, domestic or household purposes’ rather than ‘consumer property’, used elsewhere in the Bill and defined as property used exclusively for a non-ABN activity (clause 10).
- 4.12 Consumer property is defined in the Bill as property used predominantly for personal, domestic or household purposes or intended to be used mostly for those purposes and is not acquired as an investment. The use of the wider definition is consistent with the Code and would ensure that the consumer protections in the Code and the Bill would apply in broadly the same set of circumstances. Certain remedies would not be available where the collateral is used predominantly for personal, domestic or household purposes. The remedies that fall into this category are:
- remedies available under applied provisions of the State and Territory land law (clause 117-118);
 - the collection and application of liquid collateral (clause 120);
 - the disposal of collateral by lease or licence (clause 128(2));
 - the disposal by sale where the collateral is acquired by the enforcing secured party (clause 129); and
 - the retention of collateral by the enforcing secured party (clause 134).

Contracting out

- 4.13 The parties would have freedom of contract over their respective rights and responsibilities in enforcement.

- 4.14 Parties would also be able to contract out of specific enforcement provisions. The rights of parties to contract out would not impact on the rights and remedies affecting third parties who are not parties to the contract.
- 4.15 The extent to which parties would be able to contract out would depend on whether the collateral secured is used predominantly for personal use; and if so, parties would only be able to contract out of the secured party's right to apparent possession (where property cannot be seized or storage facilities are unavailable) (clause 115(4)).
- 4.16 This would ensure that consumers have the full protection of the enforcement provisions and, in particular, the notice provisions. In any event, contracting out of the provisions in respect of personal, domestic and household goods would be of limited use as parties would still have to meet the requirements in the Code.

Example

GrantA obtains a loan from BankB to finance the purchase of business assets secured against her car. GrantA uses the car 90% of the time for personal use. For 10% of the time GrantA uses the car for business purposes. GrantA defaults on the loan and BankB initiates enforcement action. As a result of GrantA's use of the car predominantly for personal, household or domestic purposes, BankB is unable to vary or contract out of most of the enforcement provisions, regardless of the fact that the loan was obtained to meet business needs.

- 4.17 Where collateral is not used predominantly for personal, domestic or household purposes, parties would be able to contract out of most of the enforcement provisions (clause 115).

Relationship with other laws

- 4.18 The Bill would not apply to property of a business that is subject to a receiver or a controller appointed under Part 5.2 of the Corporations Act 2001 (clause 116). These provisions provide comprehensive rules for receivers and other controllers when exercising functions in relation to property.
- 4.19 Security agreements in relation to commercial transactions often use both personal property and land to secure the same obligation. Currently, a secured party must initiate separate enforcement proceedings against the land and the personal property to meet any outstanding debt secured by both. This is costly and can lead to prolonged enforcement proceedings.
- 4.20 In order to reduce costs and to ensure expeditious resolution of enforcement, the Bill would allow a secured party who has a security interest securing the same obligation in relation to both kinds of collateral to apply the land law to the personal property as if the personal property were land (clause 117-118). This is done by reading in the provisions of the relevant land law as if it were a provision of the Bill.
- 4.21 The incorporation of the land laws would not oblige a secured party having an interest in both land and personal property to initiate enforcement action under the applied land laws. A secured party could take separate proceedings against the land under the land law and against the personal property in accordance with their other rights under the Bill, general law and the security agreement (clause 118(2)).

- 4.22 A secured party could make a decision to proceed as if the personal property were land or to proceed under the Bill; but could only make a decision where they have the highest priority or have received written agreement from all the other secured parties (clause 117(1)).
- 4.23 Where a secured party decides to proceed under land law, the land law of the State or Territory in which the land is situated would apply. A secured party who elected to proceed under the incorporated land provisions would not have to comply with the enforcement provisions of the Bill other than the distribution rules (clause 140). The rights of the other secured parties would not be affected by the proceedings under land law. They would have standing in any enforcement proceedings and would be entitled to apply to Court for a judicially supervised sale (clause 118(6)).

Consumer Credit Code

- 4.24 Where collateral is used for consumer purposes, the Bill and the Code would operate concurrently and, in these circumstances, a secured party would have to comply with both the requirements in the Bill and in the Code.
- 4.25 Whether the Code would apply, would depend on the purpose of the credit. The Code establishes the rights and obligations of parties where credit has been provided, or is intended to be provided, wholly or predominantly for personal, domestic, or household purposes.
- 4.26 There would be overlap between the Bill and the Code when the credit is provided, or is intended to be provided, wholly or predominantly for personal, domestic, or household purposes, and the collateral is used wholly or predominantly for personal, domestic, or household purposes. The Code may not apply where the credit was intended for business purposes, even if the credit is secured against personal property that is used wholly or predominantly for personal, domestic or household purposes.
- 4.27 The Code and the Bill contain similar requirements for enforcement, but they also contain requirements on which the other is silent, as well as a number of corresponding requirements.
- 4.28 Where both the Code and the Bill contain similar obligations, regulations under the Bill would provide that a secured party who has complied with the relevant provision of the Code would be deemed to have complied with corresponding obligations in the Bill (clause 119(2)).
- 4.29 The regulations are likely to deem compliance, where the provisions in the Bill and the Code are similar and there would be no significant impact on the rights of parties if there is deemed to be compliance.
- 4.30 The concurrent operation of the Bill means that:
- where there are requirements or rights in the Code on which the Bill is silent the secured party must comply with the requirements in the Code;
 - where there are requirements or rights in the Bill on which the Code is silent the secured party must comply with the requirements in the Bill; and

- where there are corresponding requirements in relation to the same party/s in both the Code and the Bill, the requirements in the Bill may be deemed to be satisfied by a secured party undertaking the requirements in the Code.

Example

BankA has a security interest in GrantA's stereo set. Vikram uses the stereo at home. When GrantA defaults on her loan with BankA, BankA decides to take enforcement action against GrantA's stereo. As GrantA uses the stereo predominantly for personal use, BankA must comply with all the obligations in the Code as well as the requirements in the Bill.

As required by the Code, BankA provides a pre-possession notice to GrantA and gives her 30days to remedy the default. Pursuant to the Consumer Credit Code, BankA obtains a court order allowing it to enter GrantA's residence and take possession of the stereo. As required by both the Code and the Bill, after gaining possession, BankA provides a notice advising GrantA that it intends to dispose of the stereo.

The Code prevents BankA from selling the stereo until 21days have elapsed after giving notice. The Bill requires only a period of 10days to have elapsed before BankA could dispose of the stereo. The regulations could provide, however, that if BankA complies with the requirements in the Code, BankA would be deemed to have complied with the Bill. Accordingly, BankA gives GrantA the pre-disposal notice and waits until 21 days have elapsed before it sells the stereo. BankA would have complied with the Code and would be deemed to have complied with the Bill.

- 4.31 The following Table lists the respective rights, duties and obligations contained in the Code and the Bill and details how the Bill and Code would operate when there are concurrent or conflicting duties.

Table 9: Interaction between the Code and the Bill

The Code

After default, the credit provider would have to provide notice to the debtor specifying the action required to remedy the default. The credit provider would have to wait at least 30 days before taking enforcement action (s80).

A secured party cannot enforce a security interest against a guarantor (a person who executed the security agreement but is not the debtor) unless:

- judgment has been obtained against the debtor and remains unsatisfied; or
- the court has relieved the credit provider from obtaining judgment against the debtor; or
- the debtor cannot be located (s82).

A secured party must seek the consent of a court to seize goods where the amount outstanding is less than 25% of the credit provided or \$10,000 whichever is the lesser amount (s83)

An acceleration clause in a contract or mortgage may only be applied in certain circumstances (s84-85).

Postponement of enforcement action could be negotiated between the parties or ordered by a court (s86-89).

A secured party may seek details of the whereabouts of collateral from a debtor (s90). The concurrent application of the Code and the Bill means that a secured party may, under the Bill seize collateral used predominantly for personal, domestic or household purposes if any applicable preconditions in the Code have been complied with.

A secured party cannot enter residential premises to take possession of collateral without the permission of the occupier or an order from court (s91-93). The Code is silent on apparent possession and accordingly parties could seize by apparent possession under clause 164 of the Bill unless the parties have contracted out of this provision.

Within 14 days of taking possession under a mortgage a secured party must provide notice to the mortgagor with all relevant details and must not sell the goods within 21 days of providing the notice (s94).

Example of Possible Regulation: *The regulations could provide that the requirement in clause 130 would be taken to have been complied with, if a notice to the mortgagor is provided as required by section 94 of the Code.*

A debtor may nominate a person who is prepared to purchase the goods (s95).

The Bill

The Bill doesn't specify the formal requirements for after default and before seizure of the collateral. Therefore the Bill would not prevent the operation of the Code (a secured party enforcing against collateral used as a consumer good would therefore have to send a notice prior to seizure as required in the Code).

The Bill does not provide any pre-seizure conditions where the grantor is not the debtor. Accordingly, the requirements in s82 of the Code would have to be satisfied before a secured party could enforce against a guarantor.

The Bill does not contain any minimum amount that would have to be outstanding before enforcement action could take place. The restrictions in s83 of the Code would apply.

The Bill does not provide any restrictions on the operation of an acceleration clause and where a mortgage document relating to a consumer good contains an acceleration clause, the Code would apply to the acceleration clause.

The Bill is silent on the issue of postponement of enforcement action and where a debtor, mortgagor or grantor sought a postponement, the provisions in the Code relating to postponement would apply.

Nothing would prevent a secured party from seeking information under s90 of the Code.

- A secured party could seize collateral if the debtor is in default (clause 123).
- A secured party with possession or control could seize the collateral by serving a notice on the grantor, or where the collateral is a licence, the licensor (clause 124).
- A secured party with a higher ranking could seize the collateral from the possession of a lower ranking party (clause 127A) .

The Bill provides that a secured party could seize the collateral by any method permitted by law. As a result, a secured party would have to comply with the Code's regulation of seizure. If collateral cannot be readily moved from a grantor's premises or adequate storage facilities are not available a secured party may seize the collateral by taking apparent possession of the collateral (clause 123) and clause 126.

A secured party would have to give notice to the grantor and to any secured party with a higher priority at least 10 business days before the collateral is to be disposed of (clause 130).

The Bill would not prevent the application of s95 of the Code.

The Code

If the outstanding obligation has not been paid within 21 days after receiving the notice under section 94 the secured party must sell the goods, either for the estimated value or a higher price to a nominated buyer or to another person for the best price reasonably obtainable (s96).

Example of Possible Regulation: *The regulations could provide that the requirement in clause 128 and clause 130 of the Bill would be taken to have been complied with if the secured party complied with s96 of the Code.*

After the sale of mortgaged goods a secured party must give the mortgagor a notice stating the gross amount realised, the net proceeds of the sale, the amount required to pay out the credit contract and any further action the secured party intends on taking (s96(3)).

Example of Possible Regulation: *The regulations could provide that clause 132 of the Bill would be taken to have been complied with if a notice is given to the mortgagor (grantor) in terms of s96(3) of the Code*

A secured party is entitled to deduct the following amounts from the money received from the sale:

- the secured amount outstanding;
- the amount payable to discharge any prior mortgage;
- the amounts payable to discharge subsequent mortgages of which the secured party had notice (s97).

Example of Possible Regulation: *While it is arguable that s97 does not provide an order for distribution, it limits the amounts that may be deducted to secured amounts. The regulations could provide that clause 140 of the Bill would be taken to have been complied with s97 of the Code has been complied with.*

The Bill

After seizing collateral, a secured party would have to dispose of the collateral by sale and must obtain the market value or, if the collateral does not have a market value, the best price reasonably obtainable (Clause 128)and (clause 31) **Error! Bookmark not defined.**

A secured party would have to give the grantor, higher secured parties and the debtor a notice with the total amount received from the sale, the enforcement expenses, amounts paid to other secured parties and the balance owing to the grantor or by the debtor to the secured party (Clause 132).

A secured party would have to distribute funds received in the following order:

- interests with a higher priority;
- enforcement costs;
- higher ranking security interests;
- lower priority interests and security interest;
- grantor (Clause 140).

Enforcement rights where there are multiple secured parties

4.40 Any secured party, regardless of its priority ranking, would be able to commence enforcement action under the Bill. To ensure that this does not prejudice higher ranking secured parties, a higher ranking party would be able to ‘take-over’ enforcement proceedings and obtain possession of the collateral from a lower ranking enforcing secured party (clause 121(3)). This would apply to all collateral.

Notice

4.41 The notice provisions would require an enforcing secured party to give notice of its intended action at different stages of the enforcement process:

- before a secured party removes an accession (clause 95);
- before a secured party initiates enforcement action under the incorporated land laws of a State or Territory (clause 118);
- before a secured party takes enforcement action against liquid collateral (clause 121);
- before a secured party disposes of collateral (clause 130);
- after a secured party has seized and disposed of the collateral or keeps the collateral for disposal at a later date it would have to provide a statement of account (clause 132);
- before a secured party can retain the property (clause 135).

4.42 Where the collateral is used predominantly for personal, domestic or household purposes, additional notice requirements contained in the Code would also apply.

4.43 Enforcement notices would generally only be required to be given to the grantor, who stands to lose their rights in the collateral and higher ranking secured parties (who have a right to seize the collateral and commence their own enforcement action). Secured parties would not be required to give notices to lower ranking secured parties, as this would increase the cost burden on the enforcing secured parties, thereby reducing the money available for distribution. Lower ranking secured parties would, however, be able to negotiate additional notice provisions or to extend the provision of notices to themselves.

4.44 There are, however, two circumstances which would require notices to be given to a wider group of persons:

- where a secured party intends to use the incorporated provisions of a State or Territory land law, they need to give notice to the grantor, any person with a perfected security interest and any person who has notified the secured party of their interest in the property (clause 118(2)). This notice is required because the procedures and remedies under the incorporated land law might differ from those in the Bill and lower-ranking secured parties may wish to engage in the proceedings (clause 118(6));
- Where a secured party intends to retain the collateral, they would need to provide notice to the grantor or to a secured party with an interest perfected by registration. This notice is required because where a secured party retains the collateral it does so, without having

to pay other secured parties any obligations still owed to them and notice would enable them to object to retention or negotiate for compensation.

- 4.45 Despite the general requirement for providing notice when undertaking a step in the enforcement action, enforcing secured parties are not required to give notice when:
- the secured party has failed to locate the person to whom the notice must be sent;
 - a person (including the grantor) has waived their right to receive the notice; or
 - a court has ordered that a notice is not required for any other reason.

Enforcement of liquid assets

- 4.46 The Bill would provide for the enforcement rights against collateral consisting of debts due to the grantor from a third party, including accounts, chattel paper, investment instruments in the form of debt obligations or negotiable instruments. Because this collateral is the equivalent of cash, a separate enforcement process would be provided to ensure that the secured party does not have to go through a two-step process, but can realise the collateral by collection directly from the third party (clause 120-121).
- 4.47 When liquid assets are collected, the enforcing secured party would have to apply the assets to discharge the obligation secured by the security interest and distribute any amounts received in accordance with the Bill (clause 140).

Example

GrantA owes FinanceA \$30,000. To secure the loan, FinanceA has taken a security interest in GrantA's bank account held with BankA. FinanceA is the highest ranking secured party. On 1 January 2028, GrantA defaults on his loan repayments to FinanceA. On 6 January 2028, FinanceA gives written notice to BankA requiring it to pay \$30,000 from GrantA's bank account. On 8 January 2028, BankA pays FinanceA \$30,000 from GrantA's bank account, that is, within 5 days of receiving the notice. FinanceA applies the money received from BankA (\$30,000) towards discharging the obligation that GrantA owes it.

- 4.48 The secured party would have to give a written notice to higher ranking secured parties within 10 business days before the day on which third party notice is given or control of the asset is taken (whichever applies) (clause 121). This would allow the higher ranking secured party to take enforcement action in its own right (clause 121(3)). The enforcing secured party would also have to notify the grantor within 5 business days after the day on which action is taken (clause 121(4)).
- 4.49 When liquid assets are collected, the enforcing secured party would have to apply the assets to discharge the obligation secured by the security interest and distribute the balance as required by the Bill (clause 120(5)).

Seizure and disposal or retention of collateral

Seizing collateral

- 4.50 On default by a grantor, when the secured party wishes to initiate an enforcement action, it would need to seize the collateral. The Bill would provide for this right to seize the collateral, in the event that a contract failed to do so. A secured party would be able to seize

the collateral by any method permitted by law where the debtor is in default under the security agreement (clause 123(1)). This would enable parties to determine the method of seizure that is most appropriate to the collateral and to their circumstances.

- 4.51 Where the collateral is an intangible, the secured party cannot physically possess the collateral but the Bill would deem seizure to have occurred if a secured party takes steps to gain control. If the collateral is a licence, the secured party can take steps to effect seizure by giving notice of possession to the licensor and either the grantor or the grantor's successor. If the collateral is any other type of intangible (for example, an investment instrument) a secured party can seize the collateral after giving notice to the grantor (clause 123(2)).
- 4.52 A secured party who has perfected the security interest by possession or control is taken to have seized the collateral (clause 124).
- 4.53 Taking possession of the collateral implies removing it from the grantor's premises to the secured party's premises or control. Physical removal would not always be possible and therefore a secured party could take 'apparent possession' of collateral where it cannot be readily moved from a grantor's or their agents' premises or where adequate storage facilities are not available (clause 126).
- 4.54 Apparent possession would enable a secured party to enforce their interest where they cannot seize the property or have no storage facilities. It provides notice of the transfer of the collateral from the grantor to the secured party. Once a secured party has gained apparent possession any interference with this possession would be an interference with the secured party's rights.
- 4.55 A secured party who takes apparent possession may dispose of the collateral on the grantor's property. To ensure that this provision does not work unfairly against grantors, the Bill would provide that secured parties would not be able to cause to the grantors, any greater cost or inconvenience than is necessarily incidental to the disposal (clause 126(2)).

Example

BankA has decided to enforce its security interest in Olga's grain which is located in a silo on her property. BankA is unable to find adequate storage facilities in the vicinity of her property and, after meeting the notice requirements under the Bill, advertises Olga's grain for public sale by auction, despite not having actual possession of the grain. BankA decides to conduct the auction on Olga's property, and to run a small market at the auction on Olga's property. The market stalls are not 'necessarily incidental' to the sale. BankA does not have the right to operate the market stalls. As the stalls will be on Olga's property, she can prevent BankA from conducting the market stalls.

Seizure by parties with a higher priority

- 4.56 At any time where a secured party has taken possession of collateral, a higher ranking secured party may require that the secured party to give it possession of the collateral (clause 127(2)). To seize collateral from a lower ranking party, a higher ranking party would have to provide it with a written notice requiring possession. A lower ranked enforcing secured party would have to comply with the notice within 5 business days of receiving it or within a reasonable period given the circumstances.
- 4.57 A higher ranked party that has gained possession of the collateral must pay the enforcement costs of the lower ranked party within 20 business days after the later of either:

- disposing of the collateral; or
 - receiving evidence that the lower ranking party has incurred those costs.
- 4.58 If not paid, the outstanding enforcement costs would become a debt due by the higher party and the lower ranked party could initiate court action to recover these costs.
- 4.59 A higher party who has seized the collateral from a lower ranked party would be required to dispose of or retain the collateral.

Example

FinanceA decided to commence enforcement action against Dina who was in default of a security agreement over a small aircraft. FinanceA's security interest was second in priority to that of BankA. FinanceA took possession of the aircraft and gave notice to BankA. BankA gave written notice to FinanceA to give possession of the aircraft to BankA. FinanceA must comply. BankA takes over enforcement action.

- 4.60 By enabling any secured party to seize and enforce against the collateral, the rights of junior secured parties would be protected, in that they would not be reliant on higher ranking parties to take action. Conversely, the right of a higher ranking party to seize would enable a higher ranked party to protect its own interests.

Disposing of collateral (including by purchasing collateral)

- 4.61 Secured parties who seize collateral under the Bill are required to dispose of collateral or retain the collateral themselves (clause 125). Disposal relates to three different types of remedies:
- sale to a third party;
 - sale where the collateral is purchased by the enforcing secured party; and
 - lease or licence to a third party.
- 4.62 The disposal provisions would apply to all collateral including intangibles such as licences. A secured party would be able to dispose of collateral by sale or lease to a third party (clause 128(2)) and any proceeds arising from the disposal would need to be distributed in accordance with the Bill (clause 140).
- 4.63 The Bill would not require immediate disposal after seizure and recognises that disposal may need to be delayed, in whole or in part, to obtain a higher price or for other reasons. The secured party would only be able to delay the disposal where it would be reasonable in the circumstances or in accordance with the security agreement (clause 125(3)). The parties would be able to contract out of this provision.

Disposal by sale

- 4.64 The Bill would provide that a secured party could choose the method of sale, including by private or public sale, auction or closed tender (clause 128(2)).
- 4.65 The secured party would be able to be dispose of the collateral as a whole or in parts, where it would be difficult to dispose of the collateral in its entirety (clause 128(5)). This could result in different components being sold at different times.

- 4.66 Disposal of licences would have to be in accordance with the terms and conditions of the licence (clause 128(6)).

Disposal by lease

- 4.67 A disposal by lease could only occur if expressly provided for by the security agreement (clause 128(2)). The disposal would be at the time the lease is entered into (clause 128(3)) and the terms of a lease would be determined by the security agreement.

Example

ManufacturerA sells new office furniture and leases new and used office furniture. Almost all of its business is aimed at providing office furniture for small to medium sized businesses. GrantA has entered into a conditional sale agreement to buy office furniture from ManufacturerA. Under the agreement, GrantA will pay the purchase price of the office furniture over a period of 9 months.

The sale agreement provides that the office furniture will continue to be owned by ManufacturerA until the last instalment has been paid. The sale agreement also provides that if GrantA defaults on the sale agreement, ManufacturerA is able to dispose of the office furniture either through sale or through a lease arrangement. If the office furniture is leased it must be leased for a minimum of 3 months. GrantA defaults on its sale agreement. Marvellous Manufacturers seizes the desks and chairs under the Bill and leases them according to the terms in the sale agreement.

Purchase of collateral by the secured party

- 4.68 A secured party who seizes commercial collateral would be able to dispose of the collateral by purchasing it (clause 129).
- 4.69 A significant concern of interested parties would be that a secured party could purchase the collateral for less than its market value. The secured party would need to provide notice of its intention to purchase to the grantor and other interested parties, who could then object to the purchase. A secured party would only be able to purchase the collateral if there is no objection to the purchase (clause 130).
- 4.70 A secured party would only be able to purchase collateral by public sale (including auction or closed tender) for an amount which is equal to or more than the market value of the collateral (clause 129(3)).
- 4.71 Regardless of how it intends to dispose of the collateral, a secured party who has seized the collateral would be required to provide notice of its intention to dispose (clause 130). Interested parties would have the opportunity to seek to redeem or reinstate the collateral or to monitor disposal to ensure it is conducted in a commercially reasonable manner.
- 4.72 A secured party would be required to notify the grantor and higher ranking secured parties at least 10 business days before the day on which the collateral is to be disposed of (clause 130(3)).
- 4.73 The secured party would not be required to give notice in certain circumstances (clause 130(5)) including where:
- the secured party believes on reasonable grounds that the secured party was induced to enter the security agreement as a result of a fraud by the grantor or debtor;

- the secured party, after making reasonable attempts to locate the person, has failed to do so;
- financial damage may be suffered if collateral is not immediately disposed of;
- the collateral is perishable and may perish within 10 days after the collateral is seized;
- the secured party reasonably believes that the value of the collateral will materially decline if not disposed of immediately; and
- the collateral is foreign currency.

4.74 The first exemption would enable a secured party who was induced into a security agreement by fraud to dispose of the property without interventions from the grantor or debtor which may delay the disposal process. Other exemptions would ensure that the notice provisions would not prejudice the interests of all parties in obtaining the maximum value to be gained from the collateral.

Duties owed by a secured party when disposing of collateral

4.75 When disposing of collateral to third parties the secured party would owe a duty to exercise reasonable care to:

- obtain at least the market value for the collateral; or
- if there is no market value, to obtain the best price that is reasonably obtainable, having regard to the circumstances that exist at the time (clause 131). This is the same duty on sale required of a controller of corporation property under s420A of the Corporations Act.

4.76 Breach of this provision would not depend on an actual failure to achieve either the market price or the best price reasonably obtainable but would depend on whether all reasonable care was taken to sell the property for its market value, or alternatively for the best price reasonably obtainable.

4.77 The provision requires that the collateral be marketed in a manner appropriate for sale of collateral of that type and each case would depend on its particular circumstances. The secured party exercising a sale would be expected to, where appropriate, obtain proper valuations, advertise appropriately, maintain the collateral in good condition pending sale and choose an appropriate venue for the sale.

4.78 This provision would ensure that the enforcing secured party obtains the best possible price rather than merely satisfying its own interests. This duty operates in conjunction with the requirement for secured parties to exercise their rights honestly and in accordance with ordinary commercial practice (clause 111). This would be in the interests of the debtor (who would need to make good any shortfall in the sale price and outstanding obligations) and other secured parties who would have to take separate legal proceedings to obtain any outstanding debts from the debtor.

4.79 A failure by the enforcing party to attempt to obtain the best possible price could result in a statutory breach and would enable other interested parties to take legal steps to either ensure

that adequate steps are taken or claim for damages suffered as a result of the statutory breach.

Statements of account

- 4.80 The statement of account would be the means by which enforcing secured parties account to interested parties on the disposal of the collateral and distribution of the proceeds.
- 4.81 Where a secured party has disposed of collateral or exercised its collection rights, interested parties would be entitled to all relevant financial information, such as the amount received, the enforcement costs, and the debts outstanding. The enforcing secured party would only be obliged to provide this statement on request from a grantor, debtor or a higher ranking secured party (clause 132(1)).
- 4.82 Where the secured party has not disposed of the collateral within 6 months of seizing the collateral, they would have to provide a written statement of account showing the total amount received for the collateral and the expenses incurred in maintaining the collateral (clause 132(7)). A new statement would need to be given for each 6 month period after seizure if the collateral is not disposed of within this period (clause 132(4)). The secured party would have to give this statement to the grantor, debtor and higher ranking secured parties if they request the statement for that period.
- 4.83 Statements of account would need to be provided within 20 business days following the request or such further period as is reasonable in the circumstances (clause 132(2) and clause 132(6)).
- 4.84 Collateral acquired after disposal would be acquired free of the interests of the grantor of the collateral, the security interest of the enforcing secured party and all security interests lower in priority to the interest of the enforcing secured party (clause 133), subject to the security interests of higher ranked parties. The higher ranking security interests would be able to be discharged in accordance with the security agreement if sufficient funds are available.
- 4.85 The rules relating to an acquirer taking free of security interests would need to be read in conjunction with the distribution rules (clause 186), which require payment to the higher secured party ahead of amounts owed to the enforcing secured party. Where the obligation owed to a higher ranking secured party has been discharged, the person acquiring the collateral would not be subject to that security interest.

Retaining collateral

- 4.86 The Bill would also allow a secured party to enforce their security interest by retaining collateral they have seized (clause 134). However, the collateral may not be retained if it is used predominantly for personal domestic or household purposes (clause 109(5)).
- 4.87 There would be cases where it is commercially advantageous for a secured party to retain collateral rather than sell it and the Bill would allow them to do so. The capacity to retain collateral corresponds to a creditor's existing right to seize and retain collateral on default under a retention of title arrangement. However, retention is not an absolute right and the Bill would provide a process to ensure that the interests of all interested parties are taken into account. This is particularly important given that the remedy of retention would not

require a secured party to compensate other interested parties for the loss of their interest in the collateral.

Objection to purchase or retention

- 4.88 Before a secured party could retain property it would be required to provide notice of its intention to the grantor and other registered secured parties (clauses 135-138).
- 4.89 Persons receiving notice would be able to object to the secured party's proposal of retention by providing notice to the secured party at least 10 business days or a shorter period (agreed to by the objector) before the enforcing secured party takes steps to retain the collateral (clause 137(2)).
- 4.90 On receiving an objection, a secured party would be entitled to seek proof of the objector's interest in the collateral. If such proof is not provided within 10 business days of the request, the notice of objection would be taken not to have been given (clause 138).
- 4.91 If the secured party receives a notice of objection, it could sell or lease the collateral rather than retain or purchase it as had been proposed (clause 135(3)).
- 4.92 If a secured party receives no objections by the end of 10 business days after the day the last notice is given, they would be taken to have irrevocably elected to acquire the collateral (clause 136(1)). Thereafter, the secured party would become the unencumbered owner of the property and would have no rights against the grantor in respect of any outstanding obligation. A secured party would need to ensure that legal title to the property passes to them as this would not occur by operation of law.
- 4.93 Secured parties subordinate to the retaining secured party and the grantor(s) would also be able to object to the retention of the collateral. This is especially important as the retention provision does not provide for subordinate parties or the grantor to receive anything if the value of the retained collateral is greater than the amount owed to the retaining secured party. It is likely that before they agree to retention of collateral by the enforcing secured party, other secured parties would negotiate acceptable terms of compensation.
- 4.94 The Bill would provide that a secured party who acquires title to the collateral acquires the collateral free of their own security interests as well as the security interests of the grantor and subordinate security interests (clause 136(2)).

Rules applying after enforcement

- 4.95 Any proceeds received from the collateral either through enforcement against liquid collateral (clause 120) or by disposal (clause 128) would have to be applied according to the distribution rules in the Bill (clause 140).
- 4.96 This distribution would mean that, where there are insufficient funds, parties lower in the order would not recover the amount due to them. Where a secured party does not receive funds from the distribution or there is a shortfall in the amount received, they would be able to take legal action against the debtor personally for the outstanding obligation.

Redemption

- 4.97 The right of redemption is the right to cure the default and redeem the collateral at any time before the collateral is irrevocably disposed of by sale or foreclosure.
- 4.98 The Bill would provide the debtor, the grantor and higher ranking secured parties with a right to redeem the collateral (clause 142(1)).
- 4.99 A debtor's right to redeem the collateral would have priority over the right of any other party, including that of a higher ranking secured party, to redeem the collateral (clause 142(3)).
- 4.100 Redemption would be given effect when the redeemer pays the amount required to discharge the obligation secured by the collateral and the amount of any enforcement expenses incurred by the secured party, secured by the security interest.
- 4.101 Parties to a non-consumer transaction would be able to contract out of the right of redemption (clause 115). A person entitled to redeem would also be prohibited from accessing the redemption provisions if, after the default occurred they had agreed with the secured party not to seek to redeem the property (clause 142(2)).

Reinstatement of the security agreement

- 4.102 The Bill would provide a right of reinstatement of the security agreement prior to the exercise of enforcement action.
- 4.103 The right to reinstatement would enable a person to reinstate the security agreement by paying the amount of arrears and the amount of any expenses incurred as a result of the enforcement action. The right of reinstatement would protect grantors and debtors where their default is minor, temporary and aberrational. It would also allow other persons to safeguard their interests in the collateral, where such an option is beneficial to them.
- 4.104 The Bill would establish safeguards against possible abuse of the right of reinstatement. A security agreement could only be reinstated once and the person seeking reinstatement would have to pay not only the amount in actual arrears but also cure any other default and reimburse the secured party for their enforcement expenses (clause 143(1)).

CHAPTER 5 - PERSONAL PROPERTY SECURITIES REGISTER

- 5.1 The Bill would establish a single national online Personal Property Securities Register (the PPS Register) under which personal property that is or may be subject to a security interest can be registered. The main object of the PPS Register would be to provide a real-time online noticeboard of personal property over which a security interest has been, or may be, taken. The PPS Register would replace an array of existing electronic and paper-based registers. It would be a voluntary registration scheme, allowing secured parties to weigh up the costs and benefits of registering a financing statement with respect to a security interest or other kinds of personal property prescribed by the regulations.
- 5.2 In most cases, the registrations contained on the PPS Register would relate to security interests. All security interests in personal property would be registrable regardless of the form of the security interest, the legal personality of the grantor of the interest, the nature of the collateral or the jurisdiction in which the property or the parties are located. Registration of security interests will be voluntary. However, parties should be aware that failure to register a security interest on the PPS Register may result in a loss of priority to a third person or unenforceability against a liquidator, administrator, trustee in bankruptcy or the Official Receiver.
- 5.3 A person would also be able to search the PPS Register to determine whether a prior registered interest exists in personal property when deciding whether to purchase that property or to lend money in relation to it.
- 5.4 A simple targeted electronic ‘registration’ would provide notice to the world of any actual or prospective security interests without the need to sift through complex documentary material as occurs in many of the schemes to be replaced by the PPS Register. This approach makes advance registration of security interests possible; that is, property may be registered on the PPS Register before a security agreement is made or the security interest attaches to it.
- 5.5 The PPS Register could also contain information about other interests over personal property prescribed by the regulations. For example, interests that arise in vehicles impounded by State and Territory police or property subject to confiscation orders made under proceeds of crime laws.
- 5.6 While the PPS Register would be accessible using a web browser, it would also be supported by a business to government interface, a physical document lodgement service, a contact centre and SMS message connectivity. PPS Register information would be transmitted using secure, encrypted methods of communication.

Example

GrantA applied for a loan with FinanceA using its business assets to secure the loan. FinanceA registered the business assets on the PPS Register before approving the loan.

- 5.7 During development of the Bill, concerns were expressed about possible scope creep of the PPS Register. These concerns related to two particular functions of the Register. The first concern was a possible increase in the authorised purposes for which a search could be made by reference to the name and date of birth of an individual (clause 172). Consequently, the authorised purposes for searches by reference to the name and date of birth of an individual

could only be altered by the Parliament. It would not be lawful to alter the authorised purposes without Parliamentary scrutiny.

- 5.8 The second concern was the type of interest that could be included on the Register. The definition of security interest (clause 12) could only be amended by the Parliament. However, the Bill would also allow for the registration of other interests in classes of personal property determined under the regulations (clause 148). Any regulations made under this provision would take account of privacy concerns, including the preparation of a Privacy Impact Assessment if appropriate.

Establishment of the Register

- 5.9 The PPS Register would be established and maintained by a Registrar of Personal Property Securities (clause 147(1)). Data that is recorded in the PPS Register would be the property of the Commonwealth (clause 147(2)). While the Registrar may keep the register in any form that he or she considers appropriate (clause 147(3)), the Government proposes to implement a fully electronic register.
- 5.10 The PPS Register would be maintained and operated at all times (clause 147(4)). This means that it would be available day and night, as well as on weekends and public holidays when large numbers of secured transactions take place. However, the Registrar would be able to refuse access to, or suspend the operation of the PPS Register, in whole or in part, where it is not practical to provide access (clauses 147(4)-(5)). If this occurs, the Registrar must publish notice of the suspension or refusal in a way prescribed by the regulations and, if not prescribed, by Gazette (clause 147(6)).

Example

The Registrar may consider that it is not practical to maintain the PPS Register when upgrading the IT system or during an IT failure that closed down part of the PPS Register.

- 5.11 The PPS Register could contain a range of information about personal property that is, or will be, subject to a security interest (clause 148). This would allow buyers and financiers to readily identify property that is subject to an actual or potential security interest.
- 5.12 There would also be scope to register property subject to other kinds of interests: such as those that arise in vehicles impounded by State and Territory police because of their use in unlawful activities or property subject to confiscation orders made under proceeds of crime laws (clause 148). Any such interests could be included on the PPS Register by regulation, with the provisions in Chapter 5 being applied with necessary or desirable modifications. This is designed to help prospective purchasers and lenders to obtain up-to-date information about the status of personal property.

Example

PersonW wants to buy a car from an acquaintance. The acquaintance agrees but advises that he will not be able to deliver the car straight away. PersonW searches the PPS Register. The search result discloses that there are no security interests over the car but that it has recently been impounded by the police.

Registration

- 5.13 A person would be able to apply to the Registrar to register on the PPS Register under a financing statement (or a financing change statement to amend a registered financing

statement) with respect to a security interest or other kinds of interest prescribed in the regulations (clause 150).

- 5.14 The term ‘financing statement’ refers to the data that is, or is to be, registered on the PPS Register (clause 10, financing statement). The term ‘financing change statement’ in turn means data that amends a financing statement that is registered on the PPS Register (clause 10, financing change statement). These terms have been adopted because they are also used in other jurisdictions that have a PPS regime, such as New Zealand and Canada.
- 5.15 The Registrar would have to register the financing statement or financing change statement if:
- the application is in a form approved by the Registrar;
 - the registration fee (if any) has been paid or an arrangement for payment has been made;
 - the Registrar is not satisfied that the application is frivolous, vexatious or offensive, contrary to the public interest or made in circumstances in which the registrant does not believe on reasonable grounds that it holds or will hold a security interest in the property stated in the application; and
 - the registration is not prohibited by the regulations (clause 150(3)).
- 5.16 If the financing statement or financing change statement does not satisfy any of the above, the Registrar would not be required to make the registration. The Registrar’s decision not to make the registration would be reviewable by the Administrative Appeals Tribunal (clause 191).
- 5.17 A person would not be able to apply to register a financing statement, or a financing change statement, in relation to a security interest unless the person believes on reasonable grounds that a security interest in the property is, or would be held by a person stated in the application as a secured party (clause 151(1) and (7)). Where a person registers without such a belief they would be taken to have contravened an obligation owed to any person with an interest in the personal property (clause 151(5)).
- 5.18 A person who applies for a financing statement or financing change statement, would be required to end the registration where:
- the collateral has never (since the statement was registered) secured an obligation owed by a debtor to the person stated in the registration to the secured party; and
 - there are no reasonable grounds for believing that the collateral secures, or would secure, such an obligation
- 5.19 In cases where there have never been reasonable grounds for believing that the collateral secures or would secure the obligation, the registration would have to end as soon as practical or within 5 business days of the day of registration or if there are any no longer any reasonable grounds for that belief, as soon as practical or within 5 business days of the reasonable grounds for the belief ceasing. (Clause 151(2)-(3)).

- 5.20 The failure to discharge the obligation to only register a financing statement, where the person believes on reasonable grounds that the collateral secures or would secure a security interest, would not affect the validity or effectiveness of the registration (clause 151(6)). However, the failure to discharge the obligation would attract a civil penalty (clause 151(1)) and give rise to a claim for damages (clause 271). The onus of proving a breach of clauses 151(1)-(2) would rest on the person making the claim (clause 151(4)).
- 5.21 Civil penalties could apply to breaches of these provisions. The maximum penalty for each breach would be 50 penalty units for an individual, and 250 penalty units for a body corporate (clause 151(1)-(2)). The ‘corporate multiplier’ (that is, maximum fine applicable to individuals would be multiplied by a factor of five for a body corporate) reflects the corporate multiplier in s4B(3) of the *Crimes Act 1914*. The maximum penalty level is considered to be sufficient in light of the potential impact unauthorised registrations could have on those relying on the registrations as well as the ability of persons with an interest to the property to recover for any loss or damage resulting from these breaches.
- 5.22 The Registrar could register a financing statement, or a financing change statement, even if the personal property, or the person who owns or has rights in that property, is located outside Australia (clause 152). This is subject to the necessary connection with Australia being satisfied (clause 6).
- 5.23 While applications for registration would have to be in writing, they would largely be lodged electronically through a web browser or through a business to government interface. The *Electronic Transactions Act 1999* would have the effect that any applications made in accordance with the Bill could be made by electronic transmission of words or data or the display or representation of words or data by any form of communication.

Registration with respect to security interests

- 5.24 When a secured party or its agent registers a financing statement or financing change statement in order to make or amend a registration on the PPS Register, they would be required or authorised to enter the following information:
- details about the secured party and related information such as an address and identifier for giving notices to the secured party (clause 153(1) table items 1 and 3);
 - details about the grantor (clause 153(1) table item 2), (not required for consumer property required by the regulations to be described by a serial number, because the serial number will be sufficient to allow a search of the register to disclose a registration over the collateral without grantor details);
 - a description of the collateral and proceeds (including as prescribed by the regulations (clause 153(1) table item 4), including:
 - a description as either ‘consumer property’ or ‘commercial property’;
 - a serial number where required by the regulations;
 - allocation to a single class as prescribed by the regulations; and

- where proceeds are claimed, a description of proceeds in accordance with the regulations;
- the end time of the registration (or end time ‘not stated’ for commercial registrations where the collateral is not described by serial number)(clause 153(1) table item 5);
- details of any subordination agreements (optional)(clause 153(1) table item 6);
- whether the security interest is (or is to be) a purchase money security interest (optional) (clause 153(1) table item 7), and
- any other matter prescribed by the Bill or regulations (clause 153(1) table item 8).

Grantors, secured parties and giving of notices

- 5.25 The details to be included on the PPS Register about a secured party or grantor would be prescribed by regulations.
- 5.26 The Bill would require that consumer grantors be identified by their name and date of birth (or not at all when the collateral is required by the regulations to be described by serial number) (clause 153, table item 2).
- 5.27 When the secured party or grantor is not an individual, the regulations could require them to identify themselves by their Australian Company Number (ACN) issued under the *Corporations Act 2001* at registration; their Australian Registered Body Number (ARBN) issued to a ‘registrable body’ under that Act; or their Australian Registered Scheme Number (ARSN). The regulations could also prescribe that certain trading arrangements, for example partnerships, could be identified by their Australian Business Number (ABN). For those that are not required to be identified by their ACN, ARBN, ARSN or ABN, the required detail could be the organisation name as it appears on the organisation’s constitution.
- 5.28 The incorrect entry of the identifier of the grantor would be a registration error that would result in a registration being ineffective (and therefore invalid) (clause 164(1)). Sometimes, this may occur because of simple inadvertence (for example entering one incorrect number when entering the ACN). In relation to grantors who are individuals, the error may occur because people are known by more than one name. To promote certainty, the regulations could stipulate the sources of identification from which names and dates of birth could be drawn.
- 5.29 Secured parties would be wholly responsible for the accuracy of all details contained in their registrations. However, to assist users to maintain the accuracy of registrations, the PPS Register system could perform validity checks against other databases (such as the National Names Index or the Australian Business Register administered, respectively, by the Australian Securities and Investment Commission and the Australian Taxation Office). This application of IT technology would help to promote the integrity of information recorded on the PPS Register.
- 5.30 Reflecting commercial realities, the register could be designed so that an application for a financing statement or financing change statement could be made by a secured party group (consisting of one or more secured parties) and/or multiple grantors (clauses 153-154). This would be important where people hold or propose to hold the property jointly, or as tenants

in common when jointly accessing credit. There may also be occasions where credit is offered by multiple secured parties, such as on a joint venture basis.

- 5.31 Secured parties would also be able to record a unique identifier devised by them for the giving of notices in relation to particular registrations (clause 153(1) table item 3(b)). This identifier could be used by secured parties to assist in channelling communications relating to the registration to the appropriate person engaged by the secured party (clause 289).

Collateral descriptions

- 5.32 A focal part of each registration would be the ‘collateral description’ which would describe key attributes of the property that is the subject of the registration (clause 153(1) table item 4).
- 5.33 Personal property registrations over consumer property would have to be described on the PPS Register as either ‘consumer property’ or ‘commercial property’ (clause 153(1) table item 4(a)). This distinction is important because the Bill contains safeguards to ensure that consumers are not subject to the same rules as commercial transactions.
- 5.34 The other collateral descriptions required under clause 153(1) table item 4, are discussed below.

Serial numbered goods – motor vehicles and other goods

- 5.35 It is proposed that the PPS Register would take the place of existing State and Territory schemes for registering encumbrances over motor vehicles (such REVS in New South Wales and VSR in Victoria), and would extend to certain other property assigned a serial number (particularly ships and aircraft).
- 5.36 In circumstances prescribed by the regulations, such as when the collateral is consumer property, it would be mandatory to describe property registered on the PPS Register by its serial number: such as the vehicle identification number (VIN) or chassis number applied to motor vehicles (clause 153(1) table item 4(b)). This would assist PPS Register users to readily identify property. It would also promote privacy protection as such property would be identifiable on the PPS Register by the serial number, rather than by the grantor’s name.
- 5.37 Where serial numbered goods are registered as ‘commercial property’, it would be optional for the secured party to record serial numbers (clause 153(1)). This approach would avoid the inconvenience of requiring secured parties to continually update the PPS Register in relation to car-lot inventory and the like.
- 5.38 The use of serial numbers to describe collateral would enable the PPS Register to link with other databases such as the National Exchange of Vehicle and Driver Information System (NEVDIS), which uses serial numbers. NEVDIS would return information about whether the vehicle has been reported as written off or stolen. Including this information in the search result would give consumers greater confidence that they are buying property that is not subject to a security interest or other restriction.

Example

When GrantA decided to buy a car, he searched the PPS Register for possible registrations. GrantA found that the vehicle was clear of any registrations and had not been reported as written off or stolen.

Allocation of a single class and other descriptors prescribed by regulation

- 5.39 All of the collateral described in a particular registration would have to be allocated a single class as prescribed by the regulations (clause 153(1) table item 4(c)). The types of collateral classes could be agriculture, aircraft, financial property, goods, intangibles, motor vehicle and watercraft. Reflecting current practices in relation to general company charges, the prescribed classes could include ‘present and after-acquired property’ and ‘present and after acquired property except specified property’ (with a capacity to describe the exception in a free text field or attachment).
- 5.40 The PPS Register could be designed so that a user could only ever choose a single collateral class for each registration. This would ensure that registrations are allocated to a single class.
- 5.41 For some collateral classes or registration types, the regulations could allow secured parties to enter free text into a separate data field in the registration in order to provide further particulars of the property. This would make it easier for third parties searching the PPS Register to accurately identify the property.

Example

FinanceA made a registration against GrantA’s wheat crop. It described the collateral as ‘crops’, and entered the description of ‘wheat’ in the free text field.

Example

FinanceA made a registration against GrantA’s present and after acquired property apart from scuba equipment. It allocated the class of ‘all present and after acquired property except’, and placed ‘scuba equipment’ in the free text field.

- 5.42 In addition, for some collateral class or registration types, the regulations could allow the parties to attach documents to their collateral descriptions.

Example

PurchaserA wants to buy accounts from GrantA. PurchaserA searches the PPS Register and discovers that the accounts have already been registered by FinanceA. PurchaserA is able to identify the accounts on the PPS Register by the list of accounts that FinanceA had attached to its registration.

Proceeds

- 5.43 A secured party would be able to describe the collateral as including any proceeds arising from the sale of the property (clause 153(1) table items 4(d)). This would be important because a security interest in the proceeds could be perfected and enforced against third parties. Where proceeds are to be specifically claimed, the secured party would have to indicate this in the registration in order to obtain perfection. The way in which proceeds would be described would be prescribed by the regulations.

End times, default end times and renewal of registrations

- 5.44 Registrations would have a period of registration that commences from the ‘registration time’ and ends at the moment that the registration ceases to be available for a real-time search on the PPS Register (the ‘end time’)(clauses 153(1) table item 5, (clause 160), (clause163) and (clause 166)). Secured parties could renew a registration by amending the registered ‘end time’.

- 5.45 When making a registration, a secured party would have the option of specifying an ‘end time’ for the registration. Where an end time is not specified or does not comply with the rules for default registration periods, the PPS Register would assign a ‘default end time’ according to the type of property and ‘default registration period’ (clause 153(1) table item 5 and clause 153(2)).
- 5.46 For consumer property and other property described in a registration by a serial number, the default registration period would be no later than the end of the day seven years after the registration became available for search on PPS Register (noting that the registration would be extendable by increments of up to seven years) (clause 153(1) table item 5(b)).
- 5.47 Commercial property, such as inventory or equipment, would be registrable for a period of up to 25 years after the end of the day the collateral becomes available for search (clause 153(1) table item 5(a)). Alternatively, the secured party could choose not to state an end time for the registration. Registrations over commercial property could be extended by increments of up to 25 years or by amending the registration to record that there is no stated end time.

Example

FinanceF registers GrantA’s motor vehicle on 1 January 2020. FinanceF does not enter an end time for the registration so that the PPS Register assigns a default end time of 1 January 2027 in accordance with the rules for the ‘default registration period’ for consumer goods. On 1 January 2027, GrantA has not paid out the loan secured against the motor vehicle, and tries to extend the registration by entering an end date of 2 January 2035. Under the ‘default registration period’ rules, the PPS Register assigns a default end time of 1 January 2034.

Subordination, purchase money security interests and matters prescribed by the regulations

- 5.48 A secured party would be able to indicate whether the security interest is (or is to be) subject to subordination agreements that postpone the secured party’s interest to that of another person on the relevant registration or registrations (clause 153(1) table items 6). The indication of subordination would be optional because the subordination would only affect the priority position of those people bound by it.
- 5.49 A secured party would be able to indicate whether the security interest is (or is to be) subject to be a purchase money security interest (clause 153(1) table items 7).
- 5.50 The regulations would allow for matters relating to the contents of a registration to be prescribed (clause 153(1) table item 8). It is envisaged that most matters that would be prescribed by regulation would concern, but would not be limited to, grantor and secured party details and collateral descriptions.
- 5.55 Apart from registrations relating to security interests, the Bill would also allow for the registration of other interests over property, such as those that arise in vehicles impounded by State and Territory police because of their use in unlawful activities, or property subject to confiscation orders made under proceeds of crime laws (clause 154). For such registrations, the required data that needs to be recorded on the PPS Register would include:
- details of the person who owns or has an interest in the property (details of the person recorded as prescribed by the regulations); and

- details relating to the property including the allocation to a single class as prescribed by the regulations and a statement must be included of the reason why the property is registered (clause 154).

Verification statements and registration events

- 5.56 To help parties manage their registrations, the Bill would establish a system for verifying registration events.
- 5.57 ‘Registration event’ refers to the registration of a financing statement or a financing change statement (except where the financing change statement relates to removal of old data under clause 216 or the restoration of incorrectly removed data under clause 217) (clause 155).
- 5.58 Where a registration event occurs, the Registrar would be required to give a verification statement to each person who is or was registered as a secured party immediately after or before the time of the registration event (clause 156(1)). Where a registration event involves an amendment to the secured party address for service, the Registrar must ensure that the verification statement is sent to the secured party at the old and amended addresses (clause 156(2)). Similarly, if the amendment is to omit a secured party, the Registrar would be required to send a copy of the verification statement to the secured party at the previously registered address (clause 156(3)).

Example

CreditA registers a financing statement on the PPS Register on 1 August 2010. Soon after, CreditA registers a financing change statement to add another grantor to the registration. The Registrar would issue a verification statement to CreditA soon after the registration of the financing change statement.

- 5.59 A verification statement would give secured parties a documentary basis on which they could check the accuracy of any data added, altered or removed from the PPS Register by them, their agent or the Registrar. The statement must be given as soon as practicable after the time of the verifiable event or the latest verifiable event where more than one event is notified.
- 5.60 The *Electronic Transactions Act 1999* would operate alongside the Bill to allow the Registrar to provide verification statements and other notices given under the Bill by electronic means. In such cases, that Act would require that the person consented to the information being given by electronic communication. However, consent may be inferred from the person’s conduct. For example, the Registrar would be able to infer consent where a secured party has nominated an email address as the address for giving notices in relation to the registration.
- 5.61 Recipients of a verification statement must ensure that a notice of the statement is given to each person who is registered as a grantor immediately before and/or immediately after the registration event (clause 157(1)). The approved form may authorise specified data in the verification statement not be included in the notice in case the notice contains confidential information such as passwords, but otherwise should contain the same data as that on the verification statement (clause 157(2)). The notice of a verification statement must be given as soon as practicable after the relevant registration event (clause 157(3)).

Example

FinanceA registers a financing change statement to change the grantor from GrantorA to GrantorB. Soon after registration, FinanceA receives the verification statement from the

Registrar. FinanceA must send a copy of the verification statement in the approved form and containing the required information as soon as practical to both GrantorA and GrantorB.

- 5.62 Where the collateral is described as inventory or commercial property, the grantor may waive in writing the right to receive a copy of a verification statement in relation to certain verifiable events (clause 157(4)). For consumer protection purposes, consumer grantors would not be able to waive this requirement.
- 5.63 If a verifiable event occurs which affects a number of persons registered as secured parties (whether before or after the events) and the Registrar considers that it would be inconvenient for verification statements to be sent to each interested person, the Registrar may publish a single verification statement in relation to all verifiable events (clause 158(1)). Where this occurs, the requirement for individual verification statements no longer applies. This process may be used, for example, in relation to data migration from existing registers to the new PPS Register during the transition to the new system.
- 5.64 A failure to send a notice of a verification statement to the grantor as soon as reasonably practicable would not alter the effectiveness of a registration, but would constitute an interference of the grantor's privacy for the purposes of s13 of the *Privacy Act 1988* (clause 157(5)). It could give rise to a claim for damages against the secured party (clause 271).

When a registration is effective

- 5.65 The PPS Register would be based on notice filing rather than document filing. The general rule would be that a registration commences from the moment that the collateral description becomes available for search on the PPS Register in relation to a particular secured party (clause 160(1)).

Example

At noon on 1 January 2020, FinanceA applied to register GrantA's wheat crop on the PPS Register in anticipation of entering a loan agreement. The collateral was registered from when it became available for search on the PPS Register at 1 second after noon on 1 January 2020.

- 5.66 When a financing change statement is registered to amend data in a registration, the amended data (for example, added property (and any proceeds as described)) would only be registered from the moment that the data becomes available for search on the PPS Register (amendment time) (clause 160(2)). The amended registration would not be taken to have commenced at the initial registration time, but at the amendment time.

Example

FinanceA has a registration against FarmerB in relation to crops: wheat that commenced on 1 January 2020. On 1 July 2022, FinanceA amended its registration against FarmerB to describe the collateral as crops: wheat and barley. The crop: wheat registration commenced on 1 January 2020, while the crop: barley registration commenced on 1 July 2022.

- 5.67 Personal property would be registrable before or after a security agreement is made describing the property (clause 161). In addition, the PPS Register would also allow a registration to reflect the transfer of a security interest or of the collateral before or after the transfer (clause 162).

- 5.68 Advance registration would allow secured parties to know their order of registration (and potentially their order of priority) while still negotiating the transaction. This would enhance certainty in commercial arrangements as parties would have a greater awareness of their relative priority over personal property.
- 5.69 Where a security interest in property is transferred to another secured party by registering a financing changes statement, the ‘registration time’ for the property would not be affected. Alternatively, the prospective secured party could apply to register a new financing statement. Here, the registration time would, by operation of law, be the registration time for the original collateral, provided that the property had been continuously perfected since the initial registration time (that is, there is no gap in time between the effective registration of the initial financing statement and the new financing statement).

Example

FinanceF sold its security interest in GrantA’s crops to BankA. The transfer could be reflected in the PPS Register in one of two ways. FinanceF could transfer the registration to BankA, thereby effecting a change of the secured party. Alternatively, BankA could register GrantA’s crops in a new registration. FinanceF would have to end its effective registration against GrantA’s crops. BankA could take a subordination agreement from FinanceF in case FinanceF did not end its registration.

Effective registration

- 5.70 The Bill would apply the concept of ‘effective registration’, which would describe the situation where a person has a financing statement validly recorded on the PPS Register. This would be important for the purposes of establishing, in the context of a priority dispute or a grantor’s insolvency, that the person is a secured party with a security interest in personal property that is perfected by registration.
- 5.71 In the absence of any disqualifying defects, a registration of a financing statement would be effective from the ‘registration time’ of the relevant financing statement until the earliest of the following times: the registration reaches the end time for the registration; the collateral is omitted from the registration; or the description of the collateral otherwise ceases to be available for search (for example, where the Registrar has removed the data because it is frivolous or vexatious) (clause 163). An effective registration could also be brought to an end by the Registrar pursuant to clause 168 for failure to pay a maintenance fee.

Defects in registrations

- 5.72 It is the secured party’s responsibility to ensure that the information registered on the PPS Register is accurate and complete. A registration would be ineffective in certain circumstances (clause 164), for example where a registration contains a seriously misleading defect in any data relating to the registration or another defect that is specified in the Bill as rendering a registration ineffective. A defect would include an irregularity, omission or error in the registration (clause 10, defect).
- 5.73 This policy approach has been adopted to promote the reliability of PPS Register data. This rule would not necessarily make a registration defective on the basis of a simple mistake, such as a typographical error in a free text field. Nor would it be likely to capture errors of a more substantive kind that do not seriously mislead a person. For example, the omission of the name of one secured party in a consortium would not be seriously misleading whereas an incomplete or inaccurate collateral description would be likely to be so.

5.74 In order to establish that a defect is seriously misleading, it would not be necessary to prove that any person was actually misled by the registration (clause 164(2)). This means that parties would need to objectively consider whether certain errors are seriously misleading. This would promote the integrity and reliability of the PPS Register system and minimise recourse to litigation.

5.75 For the same reasons, the Bill would establish specific circumstances in which a registration would be ineffective (clause 165):

- where the collateral is required under the regulations to be described by a serial number in the PPS Register and no search of the PPS Register by reference only to the serial number would disclose the registration (this rule would apply to registrations covering either consumer property or commercial property) (clause 165(a));
- where the collateral is not required under the regulations to be described by a serial number in the PPS Register and the regulations require the grantor's details to be provided and no search of the PPS Register by reference only to the grantor's details would disclose the registration (this rule would apply to commercial property and consumer property not required by the regulations to be described by serial number (clause 153(1), table item 2). (Clause 165(b));
- where the registered financing statement states that the security interest is a purchase money security interest and the security interest is not a purchase money interest in relation to the collateral; (clause 165(c)) and
- a defect in the data prescribed by the regulations (clause 165(d)).

Example

FinanceA made a number of errors when entering data into the PPS Register. For example, it registered: GrantA's motor vehicle (consumer property) using an incorrect serial number (12344 instead of 12345); and GrantB's details using the incorrect ACN. Either of these errors is sufficient to render the registration ineffective.

5.76 One exception to the general rule regarding registration defects arises in relation to the description of particular collateral that forms only part of the property subject to the registration. Specifically, the registration of certain collateral would not be ineffective for the sole reason that the registration of other collateral in the same registration is ineffective (clause 164(3)). This means that a registration may be partly effective and partly ineffective.

Example

After FinanceF registered GrantA's crop:wheat, it intended to add GrantA's barley crop. In the free text description, FinanceF mistakenly entered the phrase 'and canola' (rather than 'and barley'). The misdescription of the barley crop did not affect the registration of the wheat crop, which continued to be effective. The registration would have been effective in relation to any of GrantA's canola.

Registration continues despite certain defects

- 5.77 Registrations would continue to be effective despite certain defects arising over time (clause 166). This might occur, for example, where the grantor's name becomes seriously misleading because of a name change following marriage. In such cases, the registration would remain effective until the earliest of:
- the end time for the registration as registered immediately before the change;
 - the end of the month that is 60 months after the change;
 - the end of 5 business days after the day that the secured party acquires the knowledge of the defect (clause 166(2)).
- 5.78 A secured party would have the knowledge required to correct a defect if the secured party has actual knowledge of the defect, or would have had such knowledge had they made enquiries that would be made by an honest and prudent person (clause 297). Finance providers should not be subject to unduly onerous requirements to update the PPS Register, but could be expected to undertake periodic reviews of their customer loans. Where such reviews reveal a change of circumstances, registrations made by the secured party should be amended to include updated information. This would ensure continuing priority in the property, but is also desirable to assist other PPS Register users.
- 5.79 This rule is not intended to give secured parties the opportunity to correct defects of their own creation, but to allow a grace period to correct registrations for events beyond their control that have introduced a defect into a previously effective registration.
- 5.80 It is important to note that the ineffectiveness of a registration does not affect the validity of the underlying security agreement, but may result in a loss of priority where a competing interest is registered on the PPS Register.

Example

When Gina James changed her name to Gina O'Grady, she forgot to tell BankA. When BankA reviewed Gina's loans some eighteen months later, it discovered Gina's name change and amended its registration to correct the defect within 5 business days. BankA's registrations remained effective throughout the whole period.

Requirement to end the registration of certain property

- 5.81 To ensure that individuals are not prejudiced by outdated registrations, a secured party would be under a statutory obligation to omit collateral or end the effective registration of collateral that is a consumer good or serial numbered property and the security interest that is perfected by registration would become unperfected. The secured party would have to end the registration within 5 business days of the 'unperfection time' (clause 167) or extended time as approved by a court (clause 293). Non-compliance would expose the secured party to liability for statutory damages (clause 271) and would entitle the grantor to seek to end the registration through administrative or judicial processes. This would be important because secured consumer credit transactions tend to be one-off dealings between the parties where there is no reason for the secured party to obtain the benefit of continuing priority status at the expense of the consumer.

- 5.82 In all other cases, there would be no statutory obligation on the secured party to end a registration. This is because commercial financing is typically a medium to long term arrangement, often involving a fluctuating line of credit rather than a lump sum loan, and a series of security agreements rather than a one-time loan or credit transaction. In many commercial arrangements, it would be contrary to the interests and intentions of both parties to require the secured party to end a registration every time there was a short break in their financing relationship.
- 5.83 However, most financing arrangements would come to an end at some point and there is a possibility that negotiations might fall apart after a registration is made and when no security agreement is executed. Similarly, many consumers would not want to pursue damages claims or would have suffered no loss or insufficient loss to warrant court action but would still want old registrations ended. Therefore, the Bill would include an amendment demand process aimed at ensuring that all parties can obtain rectification of the PPS Register in certain circumstances (Part 5.6).

Failure to pay maintenance fee

- 5.84 An effective registration could be brought to an end by the Registrar for the failure to pay a maintenance fee (clause 168(2)). This would only apply where:
- the Minister has determined that a fee is payable to maintain the effectiveness of the registration (clause 190(1));
 - the Registrar has issued a written notice requiring the secured party to pay the stated fee within 28 days after the notice is given; and
 - the secured party has failed to pay the fee stated in the notice, or has failed to make arrangements (clause 190(3)) for the payment of the fee within 28 days after the notice is given (clause 168(1)).
- 5.85 Where the maintenance fee has not been paid, or arrangements have not been made for its payment, the Registrar would be able to bring the registration to an end by registering a financing change statement amending the registration to end its effect (clause 168(2)). As the registration of the financing change statement is a registration event (clause 155), the Registrar would have to give a verification statement to each secured party (clause 156) and the secured party would have to in turn give notice of this registration event to grantor(s) (clause 157).

Searching the register

- 5.86 The availability of reliable, low-cost, fast and accessible search facilities would be a central feature of the PPS Register. This would be important because prospective lenders might wish to know whether particular property is subject to a current or prospective security interest, while prospective purchasers may want to learn whether property they are about to buy is subject to an encumbrance or other restriction. In addition, secured parties may want to search the PPS Register to verify the validity and history of their own registrations, while grantors might like to monitor registrations made against them.
- 5.87 As with all registrations and amendments, the PPS Register could be accessible for search purposes by direct online access 24 hours a day, 7 days per week or by making a written

application lodged with the Registrar. This could be done through a web browser, through a business to government interface, via written application, via SMS message, or via Interactive Voice Response (IVR) (search via SMS and IVR could only be available for searches for collateral described by a serial number). A search result could provide real-time and historic point-in-time information. A person could enlist the services of an agent to perform the searches on her or his behalf. This would mean that all people would be able to access the PPS Register for search and other purposes even where they are located in remote areas.

- 5.88 To this end, the Bill would provide that a person can apply to search the PPS Register for data and to obtain a written search result in relation to that data (clause 170(1)-(2)). Users would not have to be registered to undertake a PPS Register search. However, the Registrar would only be required to give a person access if:
- the search is authorised both in terms the correct search criteria (clause 171) and a search reference to an individual grantor (clause 172);
 - the search application is in the approved form;
 - a search fee has been paid or an arrangement for the payment of fees made in accordance with a determination made by the Minister; and
 - the search is not prohibited by the regulations (clause 170(3)).

Search criteria

- 5.89 The Bill would provide that a person may search the PPS Register by reference to specified criteria, namely:
- a grantor's details;
 - a serial number by which collateral may (or must) be described;
 - the time of the search;
 - an earlier nominated time (point-in-time search), but only with the consent of the Registrar; and
 - any other criteria prescribed by the regulations. (Clause 171(1)).

Example

BankA searches the PPS Register for dairy cattle registered against GrantA, a company that is recorded as the grantor in several PPS Register registrations. BankA enters the GrantA's ACN and indicates in the search request that he is searching for livestock registrations. The search returns two registrations against that ACN—one for dairy cattle against FinanceA and another for goats against BankB.

- 5.90 To improve business efficacy and minimise inconvenience and time wastage, the PPS Register search function would allow users to refine their searches according to their needs. Thus, while a user may search against a particular grantor's name, they may refine their search to a particular class of collateral or other descriptor. It is anticipated that these descriptors might include information, for example, that identifies whether the property is a

purchase money security interest, subject to a subordination agreement, or whether it is a current asset subject to control.

- 5.91 For serial numbered goods (such as motor vehicles used for consumer purposes), users would be able to search the PPS Register by the serial number only. This is in line with the current practice on the REVS and VRS registers, which do not record grantor details.
- 5.92 The regulations will prescribe a number of search criteria. For example, it would be possible to establish the PPS Register so that a person would be able to search the PPS Register by reference to the unique identifier of a registration. This will make searching more efficient as searchers will not have to examine multiple registrations involving material that is irrelevant to their requirements.

Example

BankB makes a registration and is given the unique identification number for the registration. BankA (and other authorised searchers) will be able to enter this unique identification number on the PPS Register to view the registration.

- 5.93 The Registrar must ensure that the way in which the results of a search are worked out in response to a search application is determined in accordance with any regulations made for such purposes (clause 171(2)). This provision would allow the regulations to determine rules for applying technological solutions for working out search results. This would allow the PPS Register to apply an exact match search method, with a correction table for frequently used substitutes (such as Ltd and Limited).

Authorised search purposes

- 5.94 Protecting the privacy of individuals' details recorded on the PPS Register is a paramount concern, given the public nature of the PPS Register. To deter people from interfering with individual grantors' privacy, the Bill would provide that a search by reference to an individual grantor's details could only be for an authorised purpose. These purposes are varied and allow a broad spectrum of searches without compromising an individual's privacy (clause 172(2)).

Example

VendorA is selling a large commercial shopping complex to BuyerA. VendorA made it a condition of its leases that tenants – some of whom are sole traders – not enter into any general security interests. BuyerA would like to search the PPS Register to establish whether the tenants have complied with the lease terms. BuyerA will not be able to search the PPS Register for this purpose. As VendorA made it a condition of the lease agreement that it could search the PPS Register for this purpose, VendorA will be able to undertake the searches and warrant compliance to BuyerA.

- 5.95 In addition, a person who has undertaken an authorised search cannot then use the data obtained as a result of searching the PPS Register, unless the searcher has also obtained the data lawfully from another source (clause 172(3)). This therefore limits the extent to which PPS Register search data can be used, including by information brokers.
- 5.96 Each unauthorised search of the PPS Register or use of PPS Register would attract a civil penalty. The maximum penalty would be 50 penalty units for an individual, and 250 penalty units for a body corporate (clause 172(3)). The maximum penalty level is considered to be sufficient in light of the potential impact unauthorised searches and use of PPS Register data could have on persons whose information is disclosed in a registration, the limited

information about individual persons contained on the PPS Register, and the ability of grantors (by reference to whose details the search is undertaken) to recover for loss or damage in relation to such breaches.

- 5.97 If a person claims that a searcher has undertaken an unauthorised search or use of PPS Register data, that person bears the evidential burden in proving that act (clause 172(4)). The Registrar would be empowered to investigate, decline to investigate, or further investigate, a suspected unauthorised search or use of data (clause 172(5)). The Registrar could also rely on technological evidence to detect transactions on the PPS Register indicating that unauthorised searches or use of data is occurring.
- 5.98 The duty not to conduct unauthorised searches would be an obligation due to the Grantor and the failure to observe that duty which results in loss or damage would give rise to a claim for damages. (Clause 172(3) and (6)).

Interference with privacy

- 5.99 To supplement the civil penalties which may apply to unauthorised searches and unauthorised use of an individual's personal information, the Bill would also provide that an unauthorised search or use of the personal information would constitute an act or practice interfering with the privacy of an individual for the purposes of s13 of the *Privacy Act 1988* (clause 173(2)). The PPS Register would not be a 'generally available publication' for the purposes of the Privacy Act. This means that the full range of Information Privacy Principles would apply to the operation of the Register.
- 5.100 An individual or the Registrar could complain to the Privacy Commissioner if she or he believes that a search of the PPS Register or use of the personal information obtained constitutes interference with an individual's privacy. Where a complaint is lodged, the Privacy Act would apply as though the complaint were a complaint involving a breach of the information privacy principles under s36 of that Act.

Example

PersonA received a phone call from FinanceF offering her cheap finance because she had no registrations on the PPS Register. PersonA complained to the Federal Privacy Commissioner that FinanceF had made unauthorised searches of the PPS Register. The Federal Privacy Commissioner investigated PersonA's complaint and found that the searches constituted a breach of PersonA's privacy. FinanceF agreed to the Federal Privacy Commissioner's recommendations, which included an apology. The Federal Privacy Commissioner reported its decision against FinanceF on its website and in its annual report.

- 5.101 An individual would be able to access his or her personal records in accordance with Information Privacy Principle 6 of the Privacy Act and under the *Freedom of Information Act 1982*. This would enable any person whose personal information appears on the PPS Register to obtain information about them and require any correction where appropriate.

Written search results and evidence

- 5.102 Obtaining accurate and reliable written search results could be expected to become an important part of entering a secured transaction. While a clear PPS Register search result would provide prospective purchasers and lenders with some comfort that the transaction they are about to enter would not be undermined by other registered interests, it would be another matter to prove the status of a registration at a later time, particularly if a priority dispute were litigated.

- 5.103 To this end, a person who makes an electronic search of the PPS Register could elect to obtain a written search result documenting the search (clause 170(2)). The written search result would be admissible as evidence in a court or tribunal and, in the absence of evidence to the contrary, proof of matters stated in the search result (clause 174(1)). Where competing interests are in dispute, a party may need a written search result covering two or more competing registrations which could be obtained consistent with clause 174(2)(c).

Example

FinanceF and BankB both registered GrantA's present and after acquired property on the same day. However, FinanceF's registration was the first to become available for search on the PPS Register. A later written search result issued by the Registrar provided prima facie written evidence that FinanceF was the first to register. This occurred because it was BankB's practice to make all of its registrations at the end each business day, while FinanceF made its registrations as they occurred throughout the day.

- 5.104 A written search result would be provided in the appropriate form if it is issued by the Registrar in the approved form or by Commonwealth, State or Territory officers authorised by the Registrar or other prescribed persons (clause 174(3)).
- 5.105 The Registrar could by legislative instrument determine data relating to the secured party, grantor, or collateral, to be included on the search result (clause 174(4) and (7)). In order to protect personal information, it is envisaged that only necessary information would be shown on the search result about grantors and secured parties.
- 5.106 For secured parties, this will be the identifier (ACN, ARSN etc) or name recorded on the PPS Register in accordance with the regulations, and the address for service nominated by the secured party group. The address for service needs to be shown on the search result as this will be used by interested parties to send notices to that secured party.

Copies of financing statements

- 5.107 The Bill would also allow for secured parties to request, in the approved form, a copy of their financing statement or verification statement from the Registrar (clause 175). A request for a copy of the financing statement or verification statement could incur a fee (clause 190).
- 5.108 The Registrar would have a discretion to issue or refuse to issue a copy of the financing statement or verification statement. This would assist the Registrar to manage its resources and to impose limits on how many requests a secured party could make in relation to a registration for a given period. If the Registrar refuses the request, and the secured party disagrees with the refusal, the secured party could apply to the Administrative Appeals Tribunal to review the Registrar's decision.
- 5.109 A person could also request, in the approved form, a report of matters relating to registered data relating to that person (clause 176(1)). The Registrar would be able to determine the different matters that the report would cover. A request for a report could incur a fee (clause 190). These reports would be intended to assist secured parties to manage their registrations.

Example

To assist secured parties renewing registrations nearing their end date, the Registrar could determine, by written instrument, that a report showing the number of registrations with an end date within the next three months would be provided (clause 176(2)).

5.110 The Registrar would also have the discretionary power to provide a report of matters related to registered data (clause 176(2)).

Amendment demands

5.111 Ideally, secured parties and people with an interest in registered personal property would resolve any difficulties with the registration between themselves. However, in the event that a secured party is unwilling or neglects to omit property from, or end, a registration, a person with an interest in the collateral (other than a security interest) could demand, in writing, that the registration be amended (clause 178). This statutory demand would be known as an ‘amendment demand’. An interested person could demand:

- that the secured party omit the collateral from the registration (clause 178(1), item 1); or
- end the effective registration of the collateral (clause 178(1), item 2).

5.112 This process would be important as a mere registration could limit the person’s ability to deal with the registered property.

5.113 A secured party would not be able to require payment for compliance with a demand for amendment (clause 178(3)). Consumers would be protected against the imposition of hidden loan fees relating to amendment demands.

5.114 Where a dispute remains unresolved, the person seeking amendment could obtain a rectification of the registration through either an administrative or judicial process.

5.115 To commence the amendment process, a person with an interest in property described in a registration would have to give a written demand to the secured party for a amendment of the registration (clause 178). The *Electronic Transactions Act 1999* authorises the giving of a demand by electronic means.

Example

PersonA became aware that FinanceA had registered against all of its present and after-acquired paintings rather than the particular painting offered as security for the loan. PersonA sends an email to FinanceA demanding that it amend the registration to apply only to the particular painting.

5.116 Where the secured party fails to amend the PPS Register in line with the demand by the end of 5 business days after the day of the demand (or such later period as approved by the court (clause 293), the person would generally have a choice of pursuing an administrative process or judicial process to obtain an amendment of the PPS Register. However, if the security agreement that provides for the security interest in the collateral is a security trust instrument, only the judicial process would be available (clause 179(1)-(3)).

Administrative process to demand amendment of a registration

5.117 The Bill would only allow secured parties, their agents and the Registrar (including subject to court order) to amend a registration. Secured parties could therefore expect that registrations would not generally be available for inadvertent or ill-intentioned amendment.

5.118 The administrative process would be available where a person has given a written demand to a secured party to amend the registration and the secured party has failed to apply for the

amendment before the end of 5 business days or a period as extended by the court (clause 179(1)). However, the process would not be available where:

- the security agreement (if any) creating the security interest in respect of the collateral is a security trust instrument; or
- proceedings are before a court in relation to an application concerning the demand (clause 179(2)).

5.119 The exception in relation to security trust instruments would minimise the scope for inadvertent, fraudulent or negligent changes to a registration being initiated as a result of a trustee's act or omission. In cases involving security trust instruments, the beneficiaries of the trust rather than the trustee would suffer the direct loss where a security interest loses priority due to, say, negligent or fraudulent action that brings a registration to an end.

5.120 The administrative process would cease to be available where the financing statement is subsequently amended in accordance with a demand or proceedings come before a court (clause 179(2)).

5.121 To commence the administrative process, a person would have to give a written statement to the Registrar setting out the nature of their demand and anything else prescribed by the regulations (clause 180(3)). As soon as practicable after the statement is given to the Registrar, the Registrar would have to give an amendment notice to the secured party unless the Registrar had already done so (clause 180(4)). In this regard, the Registrar could give an amendment notice to a secured party where the Registrar suspects on reasonable grounds that the amendment demanded is: that is, where the underlying obligation has ceased (clause 180(2)).

5.122 An amendment notice must be in the approved form. If the amendment notice is not in the approved form, the amendment notice would have to:

- state the amendment demanded;
- invite the secured party to submit a response before the end of 5 business days after the day of the Registrar's notice or an extended period approved by the Registrar;
- describe the 'show cause' procedure in the amendment notice (clause 181); and
- include a copy of the written statement of the person who demanded the amendment (clause 180(5)).

5.123 The 'show cause' process would require the Registrar to amend a registration in accordance with the demand described in the amendment notice unless the Registrar suspects on reasonable grounds that the amendment is not authorised under the Bill (clause 181(1) and (2)). In deciding whether to amend or refuse to amend the registration, the Registrar must consider the response (if any) of the secured party as well as any other relevant information (clause 181(4)).

Example

FinanceA failed to comply with GrantA's request to amend the registration over GrantA's painting. GrantA applied to the Registrar setting out the terms of his demand and other

required information. The Registrar gave FinanceA written notice of GrantA's statement and invited FinanceA to show cause why the registration should not be amended.

- 5.124 It is noted that the provision of false or misleading information in any response to the Registrar's invitation may be an offence against Part 7.4 of the Criminal Code. Similarly, providing false or misleading information in an application to the Registrar to initiate the amendment demand process may be an offence against Part 7.4 of the Criminal Code.
- 5.125 A secured party must be notified of the Registrar's decision by verification statement under clause 156)(assuming the Registrar decides to amend the registration. The Registrar's decision would be reviewable by the Administrative Appeals Tribunal.

Judicial process to obtain amendment of a registration

- 5.126 The Bill would provide a judicial process for interested persons who are affected by a PPS Register registration to obtain an amendment to a registration that concerns their interests. These parties would not be required to undergo the administrative process prior to applying to a court.
- 5.127 The judicial process would be available where a written demand for amendment has been made and the secured party has not complied with the demand within 5 business days after being given notice of the demand or a period extended by a court under clause 293. The judicial process would be available in all cases, including where a security trust instrument is involved.
- 5.128 The secured party or the person who gave the demand (usually the grantor) would be able to apply to court for an order relating to the registration (clause 182(1)). Any person with an interest (including a security interest) in the collateral would have the right to appear before the court (clause 182(3)). The Registrar would also have the right to appear in proceedings (clause 218), which would be especially important if other relevant administrative processes relevant were underway.
- 5.129 Where a party has applied to a court in relation to an amendment demand, the court could make orders to amend the registration (clause 182(4)). If the court did not consider the demand was authorised, the court could make orders to:
- restrain the Registrar from amending the registration;
 - restrain the person who gave the amendment demand from making such further amendment demands as specified by the court;
 - restrain the Registrar from giving the secured party amendment notices in relation to such further amendment demands as specified by the court;
 - any other orders that the court thinks fit (clause 182(4)).
- 5.130 The Registrar would have to comply with a court order as soon as practicable after receiving it (clause 182(5)). The Register could also determine that data removed from the PPS Register would not be made available for searching by reference to a time prior to the removal or after the removal (clause 182(6)).

Removal of data and correction of registration errors

- 5.131 Consistent with the Registrar's role of establishing and maintaining the PPS Register, the Registrar would be empowered to: amend registrations; to correct errors and omissions made by the Registrar and registry staff; to remove, restore and archive data; and to implement court orders as authorised.
- 5.132 The Registrar would be empowered to remove data (including an entire registration) from the PPS Register where:
- the application to register the data is frivolous or vexatious, the data is offensive, or the retention of the data in the PPS register is contrary to the public interest;
 - the registration of the data is prohibited by the regulations;
 - the application to register the data was not made in the approved form;
 - the removal is required urgently in the public interest, or for reasons prescribed by the regulations (clause 184).
- Example**
- CreditA applied for a registration against PersonB in which the collateral was described as 'Bartholomew'. As CreditA could not take a security interest in a person, the registration would be frivolous or vexatious and the Registrar could remove it.
- 5.133 The Registrar's power to remove data which is contrary to the public interest would extend to a broad range of data, for example, data that if retained on the PPS Register, would otherwise be unlawful. The Registrar would also have the power to urgently remove data in the public interest.
- 5.134 The Registrar would also be empowered to remove data if the data is prohibited by the regulations for being defamatory or otherwise unlawful.
- 5.135 Where data is removed the Registrar would have to give a verification statement to each secured party (clause 156). The verification statement would serve as notice of the removal of the data. If the secured party believes that the Registrar's decision is wrong, they could apply to the Administrative Appeals Tribunal to review the Registrar's decision (clause 191).
- 5.136 In most cases, where a financing change statement is registered, the historical data about the registration prior to the amendment would be available for search if a user undertakes a point-in-time search or a current search after the removal of the data. Where data has been removed by the Registrar, the Registrar could decide that the data would not be included in any point-in-time search result. If the data has been removed urgently in the public interest or for reasons prescribed by the regulations (clause 184(1)(e)(ii)), the Registrar would be required in all cases not to make such data available for search. Data removed in this way would be treated as if it had never been included in the PPS Register.
- 5.137 The Registrar would also have the capacity to register a financing change statement to remove old data from the PPS Register or data that has been ineffective for 7 years or more after its registered end date (clause 185).

- 5.138 The Registrar would also have the discretionary power to restore data (including an entire registration) to the PPS Register where that data was incorrectly removed (clause 186(1)). The Registrar would need to exercise his discretionary power to protect the rights of third parties. If data is restored to the PPS Register, it would be taken to have never been removed from the PPS Register (clause 186(2)).
- 5.139 To ensure that removed data is not lost, the Registrar would be able to keep a record of any removed data (clause 187). This would allow for old and removed records to be archived and prevent the PPS Register from becoming cluttered with old and ineffective registrations. Parties would be able to gain access to archived records under the *Freedom of Information Act 1982*.
- 5.140 The Registrar would be empowered to amend registrations to correct any errors or omissions made by the Registrar (clause 188).

Fees, administrative review and annual reports

Registration and search fees

- 5.141 The Minister would be able, by legislative instrument, to determine fees for the purposes of the Bill (clause 190(1)-(2)). Fees could be payable on a ‘pay as you go’ basis (through credit card or direct debit arrangements) or by arrangement with the Registrar (in accordance with arrangements determined by the Minister under clause 190(3)-(4)).

Example

FinanceA projected that it would undertake about 1,000 transactions on the PPS Register each month. To overcome the inefficiency of multiple small ‘as you go’ transactions, FinanceA enters an arrangement with the Registrar of Personal Property Securities for the invoicing and payment of fees on a monthly basis.

- 5.142 Any fees imposed by the Bill would be set on a cost recovery basis (clause 190(5)) and could not amount to a taxation (section 55 of the Commonwealth Constitution).
- 5.143 The amount of any fee, other than a fee to maintain a registration, would be a debt due to the Commonwealth, and could be recovered by the Commonwealth by application to a court (clause 190(6)). The fee to maintain a registration would not be a debt to the Commonwealth because the sanction imposed for non-payment would be the ending of the effective registration of the property.

Review of decisions

- 5.144 A person could apply to the AAT for review of any of the following decisions by the Registrar:

- refusing to register a financing statement (clause 150(1));
- refusing to register a financing change statement (clause 150(2));
- amending the PPS Register to end the effect of a registration (clause 150(2));
- refusing to give a person access to the PPS Register to search for data, (clause 170);

- refusing to give a person a copy of a registered financing statement or a verification statement (clause 175);
- refusing to give a person a report (clause 176(1));
- registering, or refusing to register, an amendment demand (clause 181(1));
- removing data from the PPS Register (clause 184(1)(a)-(c));
- not making data removed from the PPS Register available for searching on the PPS Register (clause 178(2), clause 181(5)) or clause 184(2)(a));
- restoring incorrectly removed data to the PPS Register (clause 186);
- correcting an error or omission made by the Registrar (clause 188); and
- removing migrated data from the PPS Register (clause 334(2)).

5.145 Under the *Administrative Appeals Tribunal Act 1975*, a party to AAT proceedings may appeal a decision by the tribunal to the Federal Court of Australia on a question of law.

5.146 The Registrar would have to prepare an annual report at the end of each financial year for tabling by the Minister in the Parliament. The report would have to address the operation of the Bill and provide details of each occasion on which access to the Register was refused or otherwise suspended during the relevant year (clause 147(5)). (Clause 192(2)).

Registrar of Personal Property Securities

5.147 The offices of the Registrar of Personal Property Securities and the Deputy Registrar are established under Part 5.9.

5.148 The clauses in this Part:

- establish the office of Registrar and Deputy Registrar, and provide for how the Registrar and Deputy Registrar are to be appointed (clause 194 and clause 200);
- provide for the functions and powers of the Registrar and Deputy Registrar (clause 195 and clause 201);
- provide for acting Registrar appointments to be made in certain circumstances (clause 196);
- empower the Registrar to delegate the Registrar's powers or functions persons engaged under the *Public Service Act 1999* or another person determined by the Registrar, and allow for the ability to direct or supervise delegates in the exercise of the delegated power (clause 197);
- provide for the resignation of the Registrar and Deputy Registrar (clause 198 and clause 202); and

- provide for the termination of the appointment of the Registrar and Deputy Registrar (clause 199 and clause 203).

5.149 The Registrar may delegate his or her functions or power to a person engaged under the *Public Service Act 1999* or another person determined by the Registrar under this clause. The ability to delegate to non-public servants is necessary in the event that the Registrar outsources functions under the Bill to non-public servants (such as those engaged in a contact centre).

CHAPTER 6 – JUDICIAL PROCEEDINGS

Judicial proceedings generally

- 6.1 The Bill would confer jurisdiction on various Australian courts over ‘PPS matters’, that is matters arising under the Bill or otherwise arising in relation to security agreements or security interests (clause 206(1)). The conferred jurisdiction would not include matters over which the Federal Court or the Federal Magistrates Court has jurisdiction under the *Administrative Decisions (Judicial Review) Act 1977*. (Clause 206(1)).
- 6.2 Chapter 6 would establish specific requirements and procedures for transferring PPS matters between courts, including cross-jurisdictional transfers. The Bill would therefore exclude the operation of the *Jurisdiction of Courts (Cross-vesting) Act 1987* and section 39B of the *Judiciary Act 1903* (clause 206(2)) but not other provisions of the Judiciary Act (clause 206(3)).

Conferral of jurisdiction

- 6.3 The Bill would confer jurisdiction over PPS matters on the following courts, subject to any limits on a particular court’s jurisdiction (clause 207):
- the Federal Court;
 - the Family Court of Australia;
 - the Federal Magistrates Court;
 - a superior court of a State or Territory; and
 - a lower court of a State or Territory.
- 6.4 A lower court of a State or Territory is a court of that State or Territory that is not a superior court (ie, a Supreme Court) (clause 211(3)). Jurisdiction would be conferred on such courts as a means of facilitating access to the court process for parties wishing to enforce their rights under a security agreement regardless of the value of the security interest.
- 6.5 The Bill would not permit cross-jurisdictional appeals (eg from a State court to a federal court) unless expressly provided for by law (clause 208).
- 6.6 The Bill would require that courts and court officers with jurisdiction over PPS matters assist each other (clause 209).

Transfers between courts

- 6.7 PPS matters would be able to be transferred between courts where appropriate or in the interests of justice (clause 212(1)). For a matter to be transferred:
- a PPS matter would need to be pending or before a court;
 - jurisdiction would need to be conferred on the receiving court for either the whole proceeding or an application in the proceeding; and

- the remedies sought would need to be within the power of the receiving court. (Clause 210).
- 6.8 The Bill does not provide for the transfer of PPS matters between the Federal or Family Court and the Federal Magistrates Court (clause 210). Transfers between these courts are already provided for under existing legislation.
- 6.9 The Bill would enable cross-jurisdictional transfers from lower courts through the superior courts (clause 211). For example, a Local Court could transfer a matter to its Supreme Court with a recommendation that the matter be transferred to the Supreme Court of another jurisdiction. On receipt of the transfer, the Supreme Court of the other jurisdiction could transfer the matter to a lower court in its jurisdiction.
- 6.10 A court could transfer a PPS matter on the application of a party or on its own initiative (clause 213) In deciding whether to make a transfer, the court would need to take into account a number of considerations, including but not limited to the following:
- the location or place of business of the parties;
 - where the relevant events took place;
 - the desirability that related hearings be heard in the same State or Territory;
 - any recommendation from a lower court that the matter be transferred; and
 - the suitability of having the matter determined by the receiving court (clause 212(2)).
- 6.9 The receiving court would proceed with a transferred matter as if the matter had been instituted in that court (clause 214). When dealing with a transferred PPS matter a court would be required to apply the rules of evidence and procedures applied in any superior court, which the court considers appropriate in the circumstances (clause 215). Where a PPS matter is transferred, barristers or solicitors entitled to practise in the transferring court would have the same entitlements to practice in the receiving court (clause 216). In addition, appeals are not allowed in relation to the transfer of proceedings under clause 211 and the rules of evidence and procedure to be applied under clause 215. (Clause 217).

Registrar's role in judicial proceedings

- 6.10 The PPS Registrar would be able to intervene in a proceeding on behalf of the Commonwealth (clause 218). If the PPS Registrar considered it to be in the public interest for a person to seek to recover damages resulting from a PPS matter, the Registrar would be able to commence and pursue proceedings in the person's name (clause 219). Where the person was not a constitutional corporation, this would require the person's written consent (clause 219(3)).

Civil Penalty Proceedings

- 6.11 The Bill would include a civil penalty regime for the contravention of certain provisions ('civil penalty provisions') in the Bill. These provisions are aimed at protecting the privacy of individuals. A wrongdoer who contravened a civil penalty provision could be ordered to pay the Commonwealth a monetary penalty. A civil penalty is imposed through the courts

and the standard is a civil, rather than a criminal, standard. Part 6.3 of the Bill sets up the framework for handling civil penalty proceedings.

Application

- 6.12 A civil penalty provision would be identified as such by the relevant provision or by another provision (clause 221).

Obtaining an order for a civil penalty

- 6.13 The PPS Registrar would initiate civil penalty proceedings on behalf of the Commonwealth. The Registrar would need to apply for an order from the Federal Court within six years of the alleged contravention (clause 222(1)). If two or more civil penalty provisions were contravened by the same conduct, proceedings could be instituted under any one or more of the provisions but a person would be liable for only one penalty in respect of the same conduct (clause 222(4)).
- 6.14 In making its decision, the court would need to be satisfied that the wrongdoer had contravened a civil penalty provision and that the contravention was serious (clause 222(2)). When determining the monetary penalty, the court would have regard to the nature and extent of the contravention and of the resultant loss or damage. The court would also consider the circumstances of the contravention and whether the person had previously been found to engage in similar conduct. (Clause 222(3)).
- 6.15 For each contravention, the court could order the wrongdoer to pay the pecuniary penalty that the court considered appropriate. However, the amount payable could not be more than the amount set for contravening the relevant provision (clause 222(2)).
- 6.16 Civil penalties could be applied to persons involved in the acts of others who contravened the civil penalty provisions. For example, a person who aids, abets, counsels or procures a contravention of a civil penalty provision would be liable to incur a civil penalty (clause 224).
- 6.17 If the Federal Court ordered a person to pay a monetary penalty, this would have the same effect as a court judgment and would be enforceable by the Commonwealth as such (clause 225).
- 6.18 The contravention of a civil penalty provision would not constitute an offence (clause 223).

Civil penalty proceedings and criminal proceedings

- 6.19 Where conduct could attract both civil penalty and criminal proceedings, the Bill provides priority over the criminal proceedings.
- 6.20 If the relevant conduct had resulted in a criminal conviction, the Federal Court could not make an order for contravening a civil penalty provision (clause 226). Where criminal proceedings were commenced against a person for conduct which is the subject of civil penalty proceedings, the civil penalty proceedings would be stayed (clause 227(1)). In the event the person was not convicted of the offence the civil proceedings would be resumed, but otherwise they would be dismissed (clause 227(2)).

- 6.21 Criminal proceedings would be able to be instituted against a person despite that person having been found to have contravened a civil penalty provision in respect of substantially the same conduct (clause 228)).
- 6.22 Other than in cases raising allegations of giving false evidence in civil penalty proceedings, the evidence produced in civil proceedings would be inadmissible in criminal proceedings if the conduct alleged to constitute the offence were substantially similar (clause 229).

Enforceable undertakings relating to contraventions of civil penalty provisions

- 6.23 If the PPS Registrar considered a person to have contravened a civil penalty provision, the Registrar could accept a written undertaking to pay an amount to the Commonwealth within a certain period (clause 230). The breach of such an undertaking would enable the Registrar to apply to the Federal Court for an order that the person comply with the undertaking (clause 231).

CHAPTER 7 – OPERATION OF AUSTRALIAN AND OTHER LAWS

Australian laws and those of other jurisdictions

- 7.1 The parties to a security agreement need to know whether the security interest will be governed by the law of a place in Australia or another place . They require certainty and predictability as to the law applicable to the validity, perfection, effects of perfection and non-perfection and enforcement of the security interest. The conflict-of-laws rules have been designed to meet the reasonable expectations of all interested parties to a security agreement.
- 7.2 The rules in Part 7.2 would apply to proceedings in an Australian court (clause 234).
- 7.3 As there are connecting factors which must be met before Australian law is able to determine which law governs a security agreement, Part 7.2 should be read together with clause 6, Connection with Australia.
- 7.4 Part 7.2 is 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].
- 7.5 Clause 234, Scope of this Part, uses the term ‘validity’ in place of ‘attachment’. This concept of validity relates to whether a security interest has been created that is effective and enforceable between the parties, and not whether the security agreement itself is valid as a contract between the parties.
- 7.6 Part 7.2 includes general rules (clause 234-237) and specific rules about security interests in goods (clause 238), intangible property (clause 239), financial property (clause 240) and proceeds (clause 241).
- 7.7 The starting principle is that a security interest in a good would be governed by the law of the location in which the goods are located, that security interests in an intangible would be governed by the law of the location in which the grantor is located and that a security interest in financial property would be governed by the law of the location in which the grantor is located. These principles would be modified in particular situations.

Contractual obligations

- 7.8 Nothing in Part 7.2 of the Bill would affect the law that governs contractual obligations in a security agreement (clause 234). . The contractual rights and obligations of the parties to a security agreement would be subject to the law chosen by the parties and as evidenced in the terms of the contract. The Bill deals only with the law that, in proceedings in an Australian court, would govern property rights created by the security agreement (clause 234).
- 7.9 The distinction between contractual and property rights and the choice of law available to parties to a security agreement is consistent with articles 3 and 4 of the Convention on the Law Applicable to Contractual Obligations (Rome Convention). Article 3 of the Rome Convention provides that the parties have freedom of choice as to what law should govern contractual obligations. Article 4 provides that where a law has not been chosen contractual

obligations will be governed by the law of the country to which the contract is most closely connected. The parties to a security agreement would be able to determine the appropriate law applicable to their personal obligations under the agreement.

Location

- 7.10 The location of personal property, whether in Australia or another jurisdiction, is generally the location where the personal property is situated (clause 235) .
- 7.11 Australia means the Commonwealth of Australia and also includes Norfolk Island and any other external Territories prescribed by the Regulations (clause 7).
- 7.12 There would be exceptions for some specific kinds of personal property, for example, investment instruments not evidenced by certificates would be located in the jurisdiction which governs the transfer of the investment instrument, while the location of negotiable instruments evidenced by electronic records would be the jurisdiction which governs the negotiable instrument. The location of chattel paper would also be the jurisdiction which governs the chattel paper (clause 235).
- 7.13 A person's location would be determined either by where the body corporate is incorporated or the jurisdiction of the body politic or an individual's principal place of residence.

Agreement to apply Australian law

- 7.14 The law of the Commonwealth would be the substantive law governing property rights created by a security agreement when the agreement between the parties expressly states the law of a place in Australia is to apply, and the grantor is an Australian entity (clause 237). The parties would be able to agree that Australian law governs a security interest only when the grantor is an Australian entity at the time the security interest attaches to the collateral (clause 237(1)(a)). For practical purposes, when the grantor is an Australia entity, this clause would apply only when the collateral is goods or a securities entitlement (because the security interest would generally be governed by Australian law when the collateral is an intangible) (clause 239) or financial property (clause 240).
- 7.15 An Australian company with foreign investments would be able to enter into security agreements which expressly apply Australian law and not the law of another jurisdiction, to the company's security interests, no matter where the goods, intangible property or financial property is located when the security interest attaches.
- 7.16 The Bill would not apply when the grantor is not an Australian entity and the collateral is goods that are located outside Australia, as there is not a sufficient connection with Australia (clause 6(1)). For this reason, the Bill does not include provisions about the law that governs these security interests – including parties being able to agree that Australian law applies to the security agreement. Whether a non-Australian entity would be able to agree that Australian law governs a security interest granted by it in goods located outside Australia would be a matter for the law of the location of the grantor or the goods.
- 7.17 There would be some exceptions to the express agreement provision in relation to specific intangible property. A security agreement would be unable to specify that Australian law would apply over security interests in an account, an assignment of an account or chattel

paper, intellectual property or an intellectual property licence. Security interests in this type of intangible property would be governed by the law of the location of the grantor.

Example

Company B incorporated in Country Z exports goods to Australia and a number of other countries and has receivables owed to it from customers in these countries. Company A incorporated in Australia takes a security interest in an accounts receivable of Company B for receivables owed by Australian customers and payable in Australia. As the collateral is an account the governing law is that of the jurisdiction of the grantor at the time the security interest attaches. In this instance the law of Country Z would apply to the security interest.

- 7.18 This approach would be consistent with the United Nations Convention on the Assignment of Receivables in International Trade (UN Assignment Convention). Articles 22 and 30 of the UN Assignment Convention establish the general rule that it is the law of the jurisdiction where the grantor is located which determines the governing law for the assignment of receivables. This rule is required so that the law applicable to receivables is fixed to one location rather than leaving secured parties in the uncertain predicament of trying to ascertain which of a potential multitude of laws may apply to the receivables.
- 7.19 In relation to security interests, Part 7.2 covers the attachment, perfection and effect of perfection or non-perfection of the security interest. Other Commonwealth laws may be passed which may provide for governing laws for security interests (clause 236).

Goods

- 7.20 The main rule applying to goods is that of the jurisdiction where the property is located when the security interest attaches under that law to the goods.

Example

Person A, located in Australia, takes a security interest in a painting owned by Person F, located in Country F. The painting is located in Country F. As the painting is a good located in Country F, the validity, perfection and effect of perfection or non-perfection of the security interest will be governed by the law of Country F,

However, the parties could expressly agree that the law of Australia would apply to the security interest in the painting despite the painting being located outside Australia (clause 237).

- 7.21 The rule applying to goods does not distinguish between possessory and non-possessory security interests.

Goods that are moved between jurisdictions

- 7.22 Difficulties can arise for secured parties taking a security interest in personal property which is capable of being moved from jurisdiction to jurisdiction. If the main rule is adhered to, then it would be up to secured parties to monitor the secured goods throughout transit and to enforce the security interest according to the law of the jurisdiction in which the goods were located when the security interest attached (which may be difficult to determine when the security agreement is enforced some time in the future).
- 7.23 The Bill includes an exception to the main rule for goods that are about to be moved. The law of the jurisdiction to which the goods are moved will apply when the secured party has a reasonable belief that the goods will be moved to the jurisdiction (clause 238(2)).

Example

Person A, located in Australia, takes a security interest in a painting owned by Person F, located in Country F. The painting is located in Country F. When the security interest attached to the painting, Person A held a reasonable belief that the painting would be moved from Country F to Australia. The governing law for goods that are moved is that of the jurisdiction to which they are moved, provided the secured party has a reasonable belief that the goods will be moved to that jurisdiction. Therefore, the law of Australia will govern the security interest in the painting.

Also, because Person A is located in Australia, the parties could have expressly agreed that the law of Australia would apply to the security interest from the outset, regardless of the location of the painting at any particular time (clause 237).

Example

Person F, located in Country F, takes a security interest in a painting owned by Person A, located in Australia. The painting is located in Australia. When the security interest attached to the painting, Person F held a reasonable belief that the painting would be moved from Australia to Country F. In proceedings in an Australian court, the law of Country F will govern the security interest in the painting (so long as the painting is located in Australia) (clause 6(1)(a) and clause 238(3)).

Goods that are normally moved between jurisdictions -

- 7.24 The same problem of strict adherence to the main rule arises for secured parties who take a security interest in goods which are normally moved between jurisdictions. Shipping containers are an example of this type of property
- 7.25 The Bill provides an exception to the main rule for commercial goods that are normally moved between jurisdictions. The exception applies the law of the jurisdiction (including the conflict of law rules) in which the grantor is located when the security interests attaches to the goods under the law of that jurisdiction, (clause 238(3)). This means that secured parties do not have to be concerned with the location of the goods at any particular point in time.

Example

Person A, located in Australia, grants a security interest in shipping containers to Bank A, located in Australia. At any given time the shipping containers are located in various countries, or at sea. As Person A is located in Australia, the law of Australia will govern security interests in the container, unless otherwise expressly agreed by the parties (clause 238(3) and clause 237).

Example

Person F, located in Country F, grants a security interest in shipping containers to Foreign bank, located in Country F. At any given time, the shipping containers are located in various countries, or at sea. In proceedings in an Australian court, as Person F is located in Country F, the law of Country F will govern security interests in the container, unless otherwise expressly agreed by the parties (clause 238(3) and clause 237).

- 7.26 This exception to the main rule takes into consideration the requirement for sufficient connecting factors to the governing law and the reasonable expectation of the parties that for mobile commercial property the location of the goods at any particular time should not dictate what law will apply to the security interest.
- 7.27 A notable difference in this provision is that the law of the debtor's jurisdiction includes a reference to their conflict of laws rule. Similar inclusions are contained in both the New Zealand and Saskatchewan PPS Acts. The inclusion of conflict of laws invokes the doctrine

of renvoi, which essentially means ‘reference back’. Put simply, the law of the forum is required to look not only at the domestic law of the debtor’s location, but also the choice of law provisions in the grantor’s location.

Example

Person F, located in Country F, grants a security interest in shipping containers to Bank A, located in Australia. Bank A commences enforcement action in an Australian court against Person F in relation to shipping containers located in Australia. The Australian court is required to apply the choice of laws rules in Country F. The Australian court is able to resolve the dispute in accordance with Australian law, provided the conflict of law rules in Country F apply the law of Australia to the shipping containers (clause 238(3)).

Example

Person F, located in Country F, grants a security interest in shipping containers to Bank A, located in Australia. Bank A commences enforcement action in an Australian court against Person F in relation to shipping containers located in Australia. The choice of laws in Country F includes the doctrine of renvoi, which creates a circular situation where the laws of each jurisdiction keep referring back to one another. In this instance, the Australian court would apply the law of Country F and resolve the issue as if a court of Country F had exercised its jurisdiction (clause 238(3)).

Intangible property

7.28 The main governing law rule for security interests in intangible property is that the governing law would be the law of the jurisdiction where the grantor is located when the security interest attaches under that law (clause 239(1)).

7.29 The advantage for the parties through this provision is that it provides certainty because:

- it is not always clear where an intangible is located; and
- there will be a single law applicable to the intangible property.

7.30 The Bill takes into consideration a change in the location of the grantor over the life of the security interest and provides that perfection and the effect of perfection or non-perfection of a security interest in intangible property is governed by the law in which the grantor is located at a particular time (clause 239(2)).

Example

Exporter A, located in Australia, grants a security interest over a chose in action it has against persons located in Country D and Country E. The security interests would be governed by the law of Australia, unless the parties agree otherwise (clause 239(2)).

Example

Person A, located in Australia, grants a security interest over accounts due to it by persons located in Country D and Country E. The security interests would be governed by the law of Australia (clause 239(2)). Person A is not able to contract that the security interest is governed by the law of another country (clause 237(2)(a)).

Intellectual property

7.31 The governing law for security interests in intellectual property or an intellectual property licence is the law of the jurisdiction by or under which the intellectual property or licence was granted (clause 239(3)).

Example

GrantA, who is located in Australia, is the author and owner of the intellectual property in a best-selling book. In order to finance her next book, GrantA borrows money from Publisher F, which is located in Country F. GrantA grants Publisher F a security interest in the copyright in GrantA's next book, whether located in Australia or Country F. The security interest does not extend to the copyright in other places. The security interest would be governed by the law of Australia to the extent that the collateral is Australian copyright and the law of Country F to the extent that the collateral is Country F copyright.

- 7.32 A different rule applies to intellectual property and intellectual property licences because it means that the same law will govern both the intellectual property and the associated security interest. This will be particularly important when title to the intellectual property is based on registration in an intellectual property register, such as for patents and trade marks.

ADI accounts

- 7.33 A security interest in an ADI account would ordinarily be governed by the law of the jurisdiction that governs the ADI account (clause 239(4)). The parties to the security interest and the ADI may agree to the law of another jurisdiction applying to the security interest in the ADI account, provided the choice of law is not manifestly contrary to public policy (clause 239(5)).

Financial property

- 7.34 The governing law for the validity of a security interest in financial property is ordinarily that of the jurisdiction where the grantor is located when the security interest attaches, under that law, to the property (clause 240(1)). The location of the grantor is ordinarily also applicable for determining the perfection and the effect of perfection or non-perfection of a security interest in financial property (clause 240(4)).

Example

Company F, located in Country F, grants a security interest to BankB, located in CountryB, in financial property located in Australia. Bank B does not have possession or control of the financial property. In proceedings in an Australian court, the validity, perfection and the effect of perfection or non-perfection of a security interest in the financial property would be governed by the law of Country F (ie the law of the location of the grantor).

- 7.35 However, the law of Australia will govern the validity of a security interest in certain kinds of financial property when the security interest attaches under the law of a place in Australia and at the time the security interest attaches the property is both located in Australia and the secured party has possession or control of the property. This rule applies to investment instruments, negotiable instruments not evidenced by a certificate and a right evidenced by a letter of credit that states that the letter of credit must be presented on claiming payment or requiring the performance of an obligation (clause 240(3)).

Example

Company F, located in Country F, grants a security interest to BankB, located in CountryB, in an investment instrument located in Australia. The security interest has attached under the law of New South Wales. BankB has possession or control of the investment instrument. The validity of BankB's security interest in the shares is governed by the law of Australia.

- 7.36 Australian law would also apply to the perfection of a security interest in financial property in certain situations. The perfection and the effect of perfection or non-perfection is

governed by the law of Australia if at that time the financial property is located in Australia and the secured party has possession or control of the property (clause 240(5)).

Example

Company F, located in Country F, grants a security interest to BankB, located in CountryB, in an investment instrument located in Australia. The security interest has attached under the law of New South Wales. At the time of attachment BankB did not have possession or control of the investment instrument. However, BankB later obtained possession or control of the investment instrument. The validity of BankB's security interest in the shares is governed by the law of CountryF (the location of the grantor, as there was no possession or control at attachment), but the perfection and the effect of perfection or non-perfection is governed by the law of Australia (as the secured party has possession or control of the investment instrument that is located in Australia).

Non-negotiable documents of title

7.37 A security interest in a non-negotiable document of title would be governed by the law of the jurisdiction in which the goods covered by the document of title are located when the security interest attaches under that law (clause 240(6)).

Negotiable instruments

7.38 A security interest in an uncertificated negotiable instrument would be governed by the law of the jurisdiction that governs the negotiable instrument.

Proceeds

7.39 The governing law in relation to a security interest in proceeds is the law of the location of the security interest in the original collateral.

7.40 There is an exception where the proceeds are an account (which is intended to facilitate transfers of accounts) (clause 241).

CHAPTER 8 – MISCELLANEOUS

Vesting of certain unperfected security interests

- 8.1 The Bill specifies the circumstances in which an unperfected security interest in the property would vest in the grantor (clauses 267-269).
- 8.2 These provisions would operate in conjunction with other provisions in the Corporations Act and the *Bankruptcy Act 1966* which specify the circumstances in which a security interest is void as against a trustee, liquidator or administrator. For example, the Corporations Act provides that certain unregistered charges are void as against the liquidator (s266-267).
- 8.3 Unlike the provisions in the Bankruptcy Act and Corporations Act, the provisions in the Bill also apply to transactions where the secured party owns the collateral, for example, under a lease or hire purchase arrangement.
- 8.4 The Bill would provide that a security interest vests in the grantor if the security interest is unperfected at one of the following times occurs in relation to the grantor:
- a company or body corporate is wound up;
 - an administrator is appointed under the Corporations Act (or that Act as applied by a State or Territory law);
 - a company or a body corporate executes a deed of company arrangement;
 - a sequestration order is made under the Bankruptcy Act;
 - the person becomes a bankrupt under the Bankruptcy Act (clause 267).
- 8.5 This outcome is not new to Australian law. The High Court in *Associated Alloys v ACN 001 452 106 (Pty) Ltd (in liquidation)* [2000] HCA 25 and in *General Motors Acceptance Corporation Australia v Southbank Traders (Pty) Ltd* [2007] HCA 19, held that a supplier could lose their security interest as a result of failing to register the interest.
- 8.6 The following kinds of security interests would be exempt from this rule:
- the interest of a senior creditor under a turnover trust (clause 268(2)); and
 - a short term PPS lease (a lease of goods described by serial number, that does not secure the payment or performance of an obligation for a term of 90 days or more and less than 1 year)(clause 268(3)).
- 8.7 Turnover trusts are a feature of a large number of commercial documents and are commonly included in guarantees provided in commercial financing. Requiring the registration of turnover trusts would be onerous on financiers. The Bill would therefore strike a balance by allowing unregistered turnover trusts to survive the grantor's insolvency, but would make the senior creditor's unregistered interest under the trust subordinate to the interest of another secured party who has registered their security interest.

- 8.8 Similarly, it would be onerous to require the registration of short term PPS leases to protect them from a grantor's insolvency. As with turnover trusts, the Bill seeks to strike a balance by allowing unperfected short term PPS leases to survive the grantor's insolvency but subjecting the short term PPS lease to the priority rules of the Bill.
- 8.9 While these transactions would survive the grantor's insolvency, they would remain subject to the relevant priority rules in the Bill.
- 8.10 The Bill would also provide that a person who acquired the personal property from the secured party or the receiver would acquire good title provided they gave new value and had no knowledge that the winding up of the company, administration or the execution of a deed of company arrangement had commenced (clause 267(3)).
- 8.11 A secured party whose security interest has vested in the grantor would be entitled to compensation that would allow them to participate in the grantor's insolvency (clause 269).

Exercise and discharge of rights, duties and obligations

Entitlement to damage for breach of duties or obligations

- 8.12 The Bill would provide a right to recover damages to any person to whom a duty or obligation is owed under the Bill or who reasonably relies on the performance of a duty or obligation and who suffers loss or damage as a result of a failure to satisfy the duty or obligation (clause 271(1)). This right to recover damages would not affect any other liability arising under a law of the Commonwealth, State or Territory or the general law (clause 271(2)).
- 8.13 The right to recover damages could arise in the following situations:
- a breach of the duty to obtain market value when enforcing a security agreement (clause 131);
 - a breach of the duty not to damage property when removing an accession in enforcing a security agreement (clause 92); or
 - a failure to amend a registration (clause 180).
- 8.14 Damages would not be recoverable from the following persons provided that they had acted honestly under a power conferred on them by the Bill:
- the Commonwealth;
 - the Registrar, Deputy Registrar, a delegate, member of staff or person acting as a member of staff or authorised to perform any of the Registrar's functions;
 - a Commonwealth Minister; or
 - a State or Territory Minister performing functions under an agreement to proceed as if personal property is land (clause 118). (Clause 272).

- 8.15 A person who is affected by an error made by any of these people may have recourse under the Commonwealth's Compensation for Detriment caused by Defective Administration Scheme.
- 8.16 The fact that a secured party has title to the collateral, rather than the grantor, would not affect the operation of the Bill (clause 273).

Provision of information by secured parties

8.17 The Bill would allow:

- a grantor of a security interest;
- a person with another security interest in the collateral;
- an execution creditor with an interest in the collateral;
- an authorised representative of any of the above (clause 275(9));

to request the following information from a secured party:

- a copy of the security agreement;
- the amount of the obligation and the terms of payment;
- an approval or correction of an itemised list of secured property as at a day not more than 20 days after the request;
- an approval or confirmation of the amount of the obligation and terms of payment as at a day not more than 20 days after the request. (Clause 275).

8.18 The person providing the information could later be estopped from denying the authenticity of the copy of the agreement they provide or the accuracy of the information they provide (clause 283).

8.19 The secured party would be required to provide the information within 10 days of receiving the request (clause 277(1)) unless:

- the secured party obtains a court exemption from providing the information (clause 278);
- the secured party obtains an extension of time for providing the information (clause 278);
- the secured party had already provided the information under another legal obligation (clause 275(5));
- the secured party has a prior confidentiality agreement with the debtor, the debtor is not in default and the information has not been requested by the grantor or its auditor) (clause 275(7));

- the response would contravene a law of the Commonwealth, State or Territory or the general law (clause 275(6));
 - the response would breach a duty of confidence (clause 275(6)); or
 - the fees requested for responding to the request have not been paid (clause 279(5)).
- 8.20 Where a secured party fails to respond to a request for information within the specified time or provides an incomplete or incorrect response, the person making the request can apply to court for an order ordering the secured party to respond to the request within a specified period (clause 280).
- 8.21 A grantor would be entitled to receive this information free of charge once every 6 months or otherwise if there has been a material change in the information (clause 281(3)). But in other circumstances, secured parties would be able to recover the reasonable marginal costs of responding to requests for information (clause 279). Where a person believes that the requested fee exceeds the reasonable marginal costs of providing the information or that the information has not already been provided in the previous six months or that there has been a material change in the information, the person can apply to court for an order imposing a fee and stating a time within which it is to be paid (clause 281).
- 8.22 When a person fails to comply with a court order made in respect of a failure to provide the information or in relation to the reasonable fees of providing the information, the court would have the power to make an order extinguishing the security interest and directing the Registrar to register a financing statement reflecting this. The court could make any other orders it thinks necessary to obtain compliance (clause 282).
- 8.23 If a person who is no longer a secured party receives a request for information they would be required to provide the requesting party with the name and address of their successor (if known) (clause 276).

Notices and Timing

- 8.24 The provisions on notices and timing would not apply to proceedings before a court or tribunal or to procedures specified in the parties' security agreement (clause 285).
- 8.25 A notice or other document required to be given under the Bill would need to be given:
- in writing (clause 286); and
 - at the address specified in the registration by pre-paid post, fax or email (a registration would specify only one address for service even where there is more than one secured party) (clause 153).
- 8.26 A registration may include an identifier to direct notices to the appropriate person within large organisations (clause 153). If the Registrar approves a specific manner for these identifiers, a notice which failed to include the identifier in the specified manner would be ineffective (clause 289).
- 8.27 A notice that must be served on a person who is deceased could be served on the deceased's legal representative or another person specified by the court (clause 290). The court would

also have the power to make an order directing a notice or document to be given in a particular way or dispensing with any of the notice requirements (clause 291).

Timing requirements

8.28 Provided a Court is satisfied that it would be just and equitable and that there would be no prejudice to third parties, it could extend the number of business days within which a person would be required to comply with the following obligations:

- the perfection of purchase money security interests in collateral other than inventory (clauses 62(3)) and 63);
- the perfection of non-purchase money security interests in accounts (clause 64(1));
- when enforcing security interests in liquid assets:
 - the payment of amounts owing to secured parties (clause 120(3));
 - giving notice to higher priority parties (clause 121(2)) and the grantor (clause 121(5));
 - compliance with notice from higher priority parties (clause 127(9));
 - giving notice of disposal of collateral (clause 130(2));
 - giving statements of account (clause 132(2));
 - giving notice of retention of collateral (clause 135(2)); or
 - giving proof of interests (clause 138(2));
- when registering financing statements:
 - the period of time to amend registration after acquiring knowledge of defect (clause 166(2));
 - application to end effective registration in consumer property or serial numbered goods (clause 167(2));
 - application for amendment of registration after change demand (clause 182(2)); or
 - the day for determining the security interest obligations when requested (clause 275(1)).

8.29 A notice given under the Act may not be invalid as a result of a formal defect or an irregularity (clause 292)).

Onus of Proof and knowledge

Onus of Proof

- 8.30 In any proceedings in an Australian court, the onus of proving that a security interest has attached to personal property, is perfected or has been taken free of a security interest lies with the person making those assertions.
- 8.31 Furthermore, in the following cases, because knowledge about the assertion is generally within the knowledge of the person making the assertions, the onus lies with that person to prove that (clause 296):
- a security interest is attached;
 - a security interest is perfected;
 - personal property is acquired free of security interests (except in relation to taking domestic or household property free of security interests (clause 44(2)));
 - a person acquired property but had no knowledge that a security interest had also been granted by a body corporate and the winding up, administration or execution of a deed of company arrangement of the company or body corporate had commenced (clause 267(3));
 - the fee requested to provide information regarding a security interest does or does not exceed the reasonable marginal costs of providing the information (clause 279(2));
 - information regarding a security interest has been or has not been provided to a grantor within the previous 6 months (clause 281(3));
 - there has been or has not been a material change in the information regarding the security interest provided to a grantor since the information was last provided (clause 281(3)); or
 - the secured party paid the market value when it purchased the collateral (clause 129(3)).

Knowledge

- 8.32 The Bill uses the expressions ‘actual knowledge’ and ‘constructive knowledge’.
- 8.33 The expression constructive knowledge is used in circumstances where a person might gain an advantage by deliberately not making inquiries when a reasonable person would make inquiries. Constructive knowledge therefore includes knowledge that a person would have if they made inquiries that would ordinarily have been made by an honest and prudent person in their situation, or made the inquiries that would be made by an honest and prudent person with their actual knowledge and in their situation (clause 297).
- 8.34 Where it is necessary to prove that a body corporate, or person other than a body corporate, has actual or constructive knowledge of a specific circumstance, it would be sufficient to prove that:

- a director, employee or agent, of the body corporate or person, who has responsibility for the circumstance had that knowledge; or
 - the circumstance was communicated to a director, employee or agent, of the body corporate or person, and reasonable care required them to bring the circumstances to the attention of the person responsible for the circumstance (clause 298).
- 8.35 The Bill would contain certain presumptions that where personal property is transferred between members of the same household, related companies or a company and a company director or officer of that company (clause 299(1)), that they:
- had actual or constructive knowledge of the security interest in the collateral;
 - had actual or constructive knowledge that the transaction was a breach of the security agreement; and
 - did not provide value for the interest.
- 8.36 These presumptions could be disproved if the parties involved could prove otherwise beyond a reasonable doubt (clause 299(2)).
- 8.37 This provision is based on s7(6) in the *Security Interests in Goods Act 2005 (NSW)* and s8 of the *Chattel Securities Act 1987 (Vic)* and is intended to address the risk of fraud in property transfers between related entities. The civil standard of proof would not afford sufficient protection or deterrent in these circumstances. Imposing the criminal standard of proof would better protect financiers holding security interests in personal property and deter fraudulent transactions which are a clear risk where related entities trade with one another.

Forms and Regulations

- 8.38 The Registrar would be able to approve forms required for the Bill (clause 302).
- 8.39 The Governor-General would be able to make regulations for the purposes of the Bill (clause 303).

CHAPTER 9 - TRANSITIONAL PROVISIONS

- 9.1 The Bill would provide for the transition from current law governing the creation, enforcement and priorities of security interests in personal property. Part of this transition would require the migration of data from existing State, Territory and Commonwealth registers recording security interests in personal property to the PPS Register.
- 9.2 The Bill would apply to security interests existing before the Bill comes into force subject to the transitional provisions. The transitional provisions would generally allow security holders to maintain their existing priority and preserve their rights for 24 months from the time the PPS Register commences operation.
- 9.3 In order to preserve existing rights and priorities while ensuring a smooth transition to PPS law, certain parts of the Bill, for example, the provisions relating to enforcement would only apply to new security interests created once the Bill comes into force and not to existing security interests.

Constitutional framework

- 9.4 Under clause 51(xxxi) of the Constitution, the Commonwealth can only make laws acquiring property on just terms, including the provision of just terms compensation. Therefore the Bill cannot confer a higher priority on a security interest relative to another security interest in the same property, than it had prior to the Bill.
- 9.5 It is only where priority is to be determined following a bankruptcy or insolvency, or where an existing secured party has assented to the Bill by voluntarily registering their interest on the PPS Register, that the Commonwealth can alter the existing priorities between competing interests without invoking the just terms requirement. The transitional provisions therefore contain special rules for determining priority in these situations. Apart from insolvency and consent, the Bill would ensure that pre-existing interests maintain the priority they would have had prior to the Bill.
- 9.6 The transitional provisions would preserve for 24 months (the temporary perfection period) existing rights in cases of bankruptcy or insolvency, or assent by a security interest holder whose interest is not migrated to the PPS Register (non-migrated security interest).
- 9.7 However, the transitional provisions would also encourage non-migrated security interest holders to register their interests under the new regime. The Bill would provide that should the grantor become insolvent or bankrupt after the expiry of the temporary perfection period, unless that security interest has been otherwise perfected, it would become an unperfected security interest under the Bill and would have a lower priority than security interests in the same property that had been perfected.
- 9.8 The transitional provisions would apply to existing security interests that had been migrated to the PPS Register without requiring the secured party to indicate their assent to the Bill by voluntarily re-registering or amending the registration. However, in circumstances where this would change the priority of a migrated security interest, resulting in an acquisition of property otherwise than on just terms, the transitional provisions would protect the migrated security interest by ensuring that the secured party retains the priority they would have had if the PPS Act had not been enacted (clause 325).

Key concepts

- 9.9 The migration time would be the start of the month that is 25 months after Royal Assent to the Bill or an earlier time determined by the Minister (clause 306(1)). It is likely that the Minister would determine an earlier migration time.
- 9.10 The registration commencement time would also be determined by the Minister, in which case it would need to be at least 28 days after the day determined as the migration time. If the Minister did not make a determination, the registration commencement time would be the start of the first day of the month that is 26 months after the month in which the Bill is given Royal Assent (clause 306))
- Example**
- If the Bill were given Royal Assent on 10 December 2020, the migration time would be the start of 1 January 2023 and the registration commencement time would be the start of 1 February 2023. If the Minister determined that the migration time would instead be 1 March 2021, the Minister may also determine an earlier time for the registration commencement time to occur but that time must be after 28 March 2021.
- 9.11 A security agreement would be a *transitional security agreement* if the agreement was in force immediately before the registration commencement time and the Bill would have applied to the security interest had the Bill been in force before the registration commencement time (clause 307).
- 9.12 A security interest would be a *transitional security interest* even if the interest arises after the registration commencement time, where the security agreement is entered into prior to the registration commencement time and allows for the creation of the security interest and the Bill would have applied to the security interest had the Bill been in force before the registration commencement time (clause 308).
- 9.13 Whether the relevant State is a referring State would affect whether the Bill would apply to a particular security interest arising after the registration commencement time and the extent to which it would have applied before the registration commencement time. In general terms, if a State does not refer its constitutional powers to the Commonwealth, the Bill would apply only to the extent of the Commonwealth's constitutional power (that is, generally to all secured lending over personal property except as between solvent individuals (where the Commonwealth lacks constitutional power)).
- 9.14 A security agreement could expressly provide for ongoing supplies and therefore result in a series of security interests. Provided the security agreement is in force prior to the registration commencement time and allows for future security interests to be granted, each security interest granted under that security agreement, regardless of whether it is granted before or after the registration commencement time, would be a transitional security interest. The secured party to such an ongoing transaction would only need to register one financing statement to cover the ongoing transitional security interests.
- 9.15 Where there is no formal agreement providing for ongoing supplies, generally each supply would be considered to be a separate contract or security agreement. Supplies made after the registration commencement time in this type of situation would each be made under a new security agreement. Security interests made after the registration commencement time would not benefit from the protection provided in the transitional provisions. The secured party to this kind of arrangement would need to register two financing statements; one to

secure transitional security interests and a further registration to secure security interests arising after the registration commencement time.

Example

Each Friday, SupplierA supplies VendorA, a newsagent, with greeting cards. SupplierA and VendorA signed a contract on 1 February 2007, prior to the first supply, which noted that Mary does not own the cards until she pays for them. The contract provided for the ongoing supply of cards. Three weeks after the Bill commences, a liquidator is appointed to VendorA's business. SupplierA has not registered the collateral on the PPS Register.

The contract between SupplierA and VendorA is a security agreement that provides for future security interests in the cards supplied. The supply each week represents a new security interest under the security agreement. SupplierA will have priority over the liquidator's interest for all supplies made to Mary as the ongoing supplies are transitional security interests provided for by the original transitional security agreement. The transitional security interests therefore receive temporary perfection for 24 months following the registration commencement time.

Example

Facts as above except that the weekly parcels have always come with a prominent notice on the invoice to the effect that Mary does not own the cards until she pays for them. VendorA has never signed a contract with SupplierA. Three weeks after the Bill commences, a liquidator is appointed to Mary's VendorA. SupplierA has not yet registered against VendorA.

The informal nature of the business relationship between SupplierA and VendorA means that a security agreement, and a security interest under that agreement, arises with each supply. There is no security agreement that covers the ongoing supplies. As a result, any supplies made after the registration commencement time will also be new security agreements and SupplierA would not be able to access the protection provided under the transitional provisions for the security interests arising under those agreements. SupplierA would have priority over the liquidator only in relation to supplies made before the registration commencement time. Fred will lose priority in relation to goods supplied after the registration commencement time as his interest in these goods has not been perfected.

Example

Facts as above except that prior to the commencement of the Bill, SupplierA decides that, in order to protect supplies made after the commencement of the Bill, he will require VendorA to enter into a written contract providing for the ongoing supply of cards. The parties enter into the agreement two weeks before the registration commencement time. Three weeks after the Bill commences, a liquidator is appointed to VendorA's business. SupplierA has not yet registered against VendorA.

SupplierA has protected his security interests by having VendorA enter into a written agreement that provides for the ongoing supplies. The agreement would ensure that supplies made after the registration commencement time are protected by the 24 month temporary perfection period. SupplierA would have priority over the liquidator's interest for all supplies made to VendorA.

Initial Application of this Act

9.16 The application provisions would establish the security interests and security agreements to which the Bill would apply as follows:

- security agreements made at or after the registration commencement time;
- a security interest arising at or after the registration commencement time;
- a transitional security agreement and a transitional security interest;

- interests in personal property (other than security interests) arising after the registration commencement time;
- personal property, if data in relation to the property is given to the Registrar as part of the migration process; and
- prescribed personal property. (Clause 310).

Exclusions from initial application

9.17 Several parts of the Bill would apply only in relation to interests that arise after the registration commencement time and would, therefore, not apply as follows:

- transitional security interests would only be enforceable against third parties if they would have been enforceable before the registration commencement time (clause 311);
- priority between security interests and declared statutory interests would not be determined by the priority provisions of the Bill unless the interest was created under a law of the Commonwealth, State or Territory after the registration commencement time (clause 312);
- security interests in intellectual property licences that are created before the registration commencement time (clause 313);
- the enforcement provisions would not apply to security agreements made before the registration commencement time (clause 314);
- application for the registration of a financing statement could not be made, or such a registration made, before the registration commencement time (clause 315);
- the governing laws provisions of the Bill would not apply to security interests that arise before the registration commencement time (clause 316);
- a non-constitutional security interest becoming a constitutional security interest would not be covered by the Bill unless the security interest arose at or after the registration commencement time (clause 317(1));
- charges, fixed charges and floating charges created by security agreements made prior to the registration commencement time, would not be covered by the Bill (clause 318).

Transitional provisions

9.18 In order to encourage secured parties to register their interests, the Bill would limit the period for which holders of transitional security interests (including both migrated security interests and non-migrated security interests) could maintain their priority over newly registered interests.

Migrated security interests and deemed registration

9.19 *Migrated security interests* would be interests that are currently registered on ‘transitional registers’ and the registered data in relation to the interests would be migrated to the PPS

Register (clause 332). These interests would be deemed to be registered on the PPS Register from immediately before the registration commencement time until the earlier of:

- the time when the interest stops being continuously perfected under the Bill;
- the end-time of the registration (clause 323).

9.20 By being deemed to be registered from immediately before the registration commencement time, migrated security interests would have priority over new security interests registered at or after the registration commencement time.

Example

BankB has a security interest in a car owned by GrantA. This security interest was registered on the NSW Register of Encumbered Vehicles and is migrated across to the PPS Register as a migrated security interest. BankB's security interest is taken to be perfected from immediately before the registration commencement time until the time the registration would have ended in accordance with the law under which the Register of Encumbered Vehicles was maintained.

Example

Facts as above except, after the security interest is migrated to the PPS Register, BankB amends the registration to extend the end time. On 6 August 2011, which is before the end date of both the REVS registration and the amended PPS registration, GrantA gives BankB an amendment demand stating that the car does not secure the loan to GrantA. BankB does not respond. On 12 August 2011, the Registrar removes BankB's registration from the PPS Register.

On 20 August 2011, a liquidator is appointed to GrantA's company. By amending its registration, BankB assented to the terms of the PPS Bill. BankB's security interest stopped being continuously perfected on 12 August –its unregistered security interest would be void against the liquidator.

9.21 The process of migrating security interests from transitional registers would not require security interest-holders to re-register their existing registered security interests. However, if the application of the transitional priority scheme would result in an acquisition of property other than on just terms, then the priority would be determined as if the Bill had not been enacted (clause 325).

Non-migrated security interests and temporary perfection

9.22 A non-migrated security interest would be any transitional security interest which is not a migrated security interest. Apart from certain interests excluded by the regulations, non-migrated security interests would be temporarily perfected by the Bill for a period starting immediately before the registration commencement time and ending at the end of the earlier of the following times:

- the time when the security interest ceased to be continuously perfected otherwise than by temporary perfection; or
- the end of the month that is 24 months after the registration commencement time (clause 322).

9.23 Temporary perfection is a form of perfection (clause 21) the purpose of which is to protect the holder of the non-migrated security interest and give them the opportunity to perfect their security interest. Temporary perfection would give secured parties holding

non-migrated security interests priority over parties who register their security interest at or after the registration commencement time.

Example

GrantA is a fruit packer. On 30 August 2009 FinanceA lends GrantA \$5 000 and takes a security interest in GrantA's truck. There is no register on which FinanceA can register its interest in the truck. On 1 May 2010 the new PPS Register commences. On 14 May 2010 FinanceB lends GrantA \$10000 and takes a security interest in the same truck. FinanceB registers its interest on the PPS Register on the same day. On 15 July 2010 GrantA becomes insolvent. The priority between FinanceA and FinanceB comes to be determined. FinanceA's interest is a transitional security interest and would therefore be temporarily perfected by the Bill, for a period starting immediately before 1 May 2010, up until 31 May 2012. FinanceA's interest in GrantA's truck would therefore have priority over FinanceB's interest, even though FinanceA's interest is unregistered.

Example

Facts as above, except on 24 May 2010 FinanceA registers its interest on the PPS Register and as a result agrees to be subject to the terms of the Bill. On 1 June 2010 FinanceA inadvertently removes FinanceA's registration from the PPS Register. On 15 July 2010 GrantA becomes insolvent. FinanceA's continuous perfection ended, and the security interest became unperfected, on the date the registration became ineffective. FinanceA would not have the benefit of temporary perfection until the end of the 24 month period. FinanceB would have priority as a registered security interest over FinanceA's now unregistered security interest.

Priority protection for certain transitional security interests

9.24 The transitional provisions would set up a transitional priority scheme which would apply:

- in bankruptcy or insolvency; or
- in a priority dispute between migrated security interests; or
- where holders of non-migrated security interests have assented to the Bill by registering their interests (clause 320).

9.25 A transitional security interest would be taken to have attached to the collateral immediately before the registration commencement time (clause 321).

Interests prescribed in the regulations excluded from temporary perfection

9.26 The 24 month temporary perfection applying to non-migrated security interests would not apply to interests prescribed in the regulations (clause 320(5)). The regulations could provide that the temporary perfection period would only be available for transitional security interests that were:

- not registrable on any register prior to the registration commencement time; or
- registrable on a register but registration did not confer priority under the legislation.

9.27 Therefore, security interests that were registrable on a transitional register that determined priority but were not registered, would not be temporarily perfected and the priority of these interests would be determined as if the Bill had not been enacted (in the absence of rules establishing priority, priority would be determined by the common law rule that an earlier security interest would have priority over a later security interest).

Example

On 3 March 2009, FinanceF lends GrantA \$20,000 and takes a security interest in GrantA's boat as collateral. The parties and the boat are located in Queensland. The boat is old and does not have a valid Hull Identification Number (HIN). The security interest is registrable on the Queensland Bills of Sale Register but FinanceF registers its interest on the Queensland Register of Encumbered Vehicles (REVS) despite the State legislation requiring that all registrations of interests in boats include the HIN. The registration is therefore not legally valid under the legislation.

FinanceF's registration is not migrated to the PPS Register. The security interest would also not be temporarily perfected as it was registrable on the Queensland Bills of Sale Register. If FinanceF registers on the PPS Register after the registration commencement time, it would have a transitional security interest perfected only from the date of registration. The invalid registration on the Queensland Register would not provide any protection for the security interest.

Example

Facts as above, except that on 19 September 2009, GrantA grants a further security interest in his boat to FinanceS in the sum of \$10,000. FinanceS registers its interest in GrantA's boat on the Queensland Bills of Sale Register. The registration is migrated to the PPS Register and is deemed to be registered on the PPS Register from immediately before the registration commencement time.

Two months after the registration commencement time, GrantA becomes insolvent. These provisions of the Bill would not apply to FinanceF's interest because it was registrable on a register that determines priority by registration. Priority would be determined as if the Bill had not been enacted, under the *Bills of Sale and Other Instruments Act 1955* (Qld), which determines that a registered interest has priority over an unregistered interest. FinanceS's registered interest would have priority over FinanceF's unregistered interest despite the fact that FinanceF's interest was created first.

9.28 The regulations could also provide that if the legislation governing the transitional register provides a time in which secured parties must register their interest, any interests created within that time period *before* the registration commencement time would obtain temporary perfection. However, if the time in which the interest had to be registered under the governing legislation has lapsed at the registration commencement time, the interest would not obtain temporary perfection and would only obtain perfection from the time of registration on the PPS Register.

9.29 If the legislation governing the transitional register does not determine a time by which an interest should be registered, the interest would have perfection from the time it is registered on the PPS Register.

Example

The Corporations Act requires that where a company creates a charge, the company must ensure that it lodges a notice in the prescribed form setting out particulars of the charge within 45 days of the charge being created. Thirty days before the registration commencement time, Company A establishes a charge over Company B's assets in relation to a debt owed by Company B. Five days after the registration commencement time, Company B becomes insolvent. Company A's security interest would have temporary perfection from immediately before the registration commencement time and would have priority over the liquidator.

Example

In January 2008, BankD lends GrantA \$4,000 and takes a security interest in GrantA's car as collateral for the loan. BankD registers its security interest on the NSW Register of Encumbered Vehicles. Five days before the registration commencement time, FinanceF lends GrantA \$5,000 and takes a security interest in GrantA's car as collateral for the loan.

Despite being registrable on the NSW Register of Encumbered Vehicles, FinanceF fails to register its interest. Two months after the registration commencement time, GrantA becomes insolvent. BankD's registration was migrated to the PPS Register and is deemed to be registered from immediately before the registration commencement time. FinanceF has not registered its interest on the PPS Register. The priority would be determined as if the Bill had not been enacted and BankD would have priority over the liquidator and FinanceF as an unregistered security interest.

Priority after temporary perfection period

- 9.30 The effect of limiting the temporary perfection period would be that secured parties are encouraged to register their non-migrated security interests during the 24 month temporary perfection period. Disputes about the priority between security interests most commonly arise in cases of bankruptcy or insolvency, and in these circumstances the Bill would not confer priority on eligible non-migrated security interests for longer than 24 months. After the temporary perfection period, in an insolvency, the priorities would be determined under the substantive provisions of the Bill. However, if secured parties register during the temporary perfection period and maintain that perfection, their interests would have been continuously perfected from immediately before the registration commencement time.

Example

GrantA is a fruit packer. On 5 February 2010, FinanceB lends GrantA \$5,000 and takes a security interest in GrantA's truck. The PPS Register commences on 1 May 2010. On 6 August 2010, FinanceA lends GrantA \$10,000 and takes a security interest in the same truck, which it registers on the PPS Register. GrantA becomes insolvent on 1 October 2012. FinanceB has not registered its interest on the NSW Register of Encumbered Vehicles. FinanceA's registered interest in GrantA's truck would have priority over FinanceB's unregistered interest, because the priority provisions of the Bill would give priority to a perfected interest. The two year temporary perfection period ended on 31 May 2012 without FinanceB registering its interest and FinanceA's interest is perfected by registration.

Example

Facts as above, except FinanceB registers its security interest on 24 June 2012 after the end of the temporary perfection period. GrantA becomes insolvent on 1 October 2012. The first in time rule in the Bill would apply and FinanceA's registered interest in GrantA's painting would have priority over FinanceB's registered interest. FinanceB would not benefit from the temporary perfection period in the Bill because there would be a gap between the temporary perfection period and the registration of the interest.

Priority between transitional security interests, including migrated security interests

- 9.31 The Bill would also provide rules for determining priority between different transitional security interests. The interests would have the same priority they would have had if the Bill had not been enacted. The period for which this rule applies (the priority period) would be limited by the Bill depending on the particular interests involved (clause 324).
- 9.32 After the end of the priority period, the security interests would have priority between themselves that is determined under the Bill (clause 324(3)).
- 9.33 Where two non-migrated security interests compete for priority, the priority period would generally be the 24 month temporary perfection period. However, if one of the security interests had been perfected by registration and the registration had expired during that period, the priority period would end when that registration expired (clause 322(2)). Where both security interests had been registered and both of the registrations expire within the 24

months temporary perfection period, the priority period would finish on the earlier of the dates on which the registrations expire.

Example

On 13 June 2008, FinanceF lends GrantA \$5,000 and takes a security interest in his racing bicycle. On 16 September 2009, FinanceB lends GrantA \$6,000 and also takes a security interest in the same bicycle. On 1 May 2010, the PPS Register commences operation. Prior to the PPS Register there was no register on which interests in bicycles could be registered. On 27 September 2010, within the temporary perfection period, GrantA becomes insolvent. The two interests would have priority determined as if the Bill were not in operation, so FinanceF's earlier interest would have priority.

Example

Facts as above, except on 11 June 2010 FinanceB registers its interest on the PPS Register, and on 27 September 2012 GrantA becomes insolvent. The date of insolvency is no longer within the two year temporary perfection period. FinanceB's interest is now perfected by registration, and FinanceF's is unperfected. The Bill would give FinanceB's registered interest priority.

Example

Facts as above, except on 30 July 2011 FinanceB's registration ends, and on 20 August 2011, GrantA becomes insolvent. The date of insolvency is within the two year temporary perfection period. FinanceF continues to have temporary perfection, and FinanceB's continuous perfection has stopped and its interest will no longer have temporary perfection. The priorities would be determined under the Bill. FinanceB's interest would be unperfected under the Bill and FinanceF's interest would therefore have priority as it is perfected by temporary perfection.

- 9.34 Where a migrated security interest and a non-migrated transitional security interest compete for priority, the priority period would end at the earliest of the expiry of the 24 month temporary perfection period or the time when one of the security interest stops being continuously perfected.

Example

On 1 April 2010, CompanyA establishes a charge over Company B's assets in the sum of \$100,000. CompanyA does not register its charge prior to the PPS registration commencement time on 1 May 2010. Under the Corporations Act, CompanyA has 45 days to register the charge. As a result, CompanyA would be eligible for temporary perfection under the Bill. On 5 April 2010, CompanyL also establishes a charge over CompanyB's assets, in the sum of \$25,000. CompanyL creates the charge despite being aware of CompanyA's charge over CompanyB's property. On 16 April 2010, CompanyL registers the charge on the Australian Securities and Investment Commission Register in accordance with the Corporations Act. CompanyA's registered charge is migrated to the PPS Register.

On 27 September 2010 CompanyB becomes insolvent. As a migrated security interest, CompanyL's security interest would have effective registration from immediately prior to the registration commencement time. As a non-migrated security interest, CompanyA's security interest would have temporary perfection from immediately before the registration commencement time. The priority has come to be determined during the priority period and would therefore be determined as if the Bill had not been enacted. At this time CompanyA's charge would have priority, because the Corporations Act gives priority to an unregistered charge over a registered charge where the registered chargee has notice of the unregistered charge when registering.

Example

Facts as above except, CompanyA does not register during the temporary perfection period and CompanyB becomes insolvent on 2 October 2012. Because the temporary perfection period for CompanyA's transitional interest has ended, the priority between the two interests will be determined by the provisions that apply after the priority period. The

priority will therefore be determined by the Bill. Because CompanyB's interest is taken to be perfected by registration until the registration end date and CompanyL's interest is no longer temporarily perfected, CompanyL's security interest would have priority, as the Bill would give priority to a perfected interest.

- 9.35 Where two migrated security interests compete for priority, the priority period would finish at the earliest date on which one of the registrations expires.

Example

On 5 March 2008, FinanceA lends GrantA \$60,000 to buy a car and takes a security interest in the car. FinanceA registers its interest on 10 March 2008 on the Queensland Register of Encumbered Vehicles, with an end date of 10 March 2015. On 16 June 2009, FinanceB lends GrantA \$5,000 and also takes a security interest in the car. FinanceB registers its interest on the Queensland Register of Encumbered Vehicles, with an end date of 16 June 2016. The start of the day on 1 May 2010 is the registration commencement time, and both FinanceA's and FinanceB's interests appear on the new PPS Register.

GrantA becomes insolvent on 1 March 2015. Because the priority has come to be determined during the priority period, the priority will be determined as if the Bill had not been enacted. FinanceA's interest has priority because the Motor Vehicles and Boats Securities Act 1986 (Qld) would have given FinanceA's earlier registered interest priority.

Example

Facts as above, except GrantA becomes insolvent on 11 May 2015, after the end date of FinanceA's registration. Because the priority has come to be determined after the priority period, the priority will be determined by the Bill. FinanceA's interest is now unregistered, so the Bill would give priority to FinanceB's perfected migrated security interest.

- 9.36 In some cases the Bill would give both interests exactly the same priority. This is because the temporary perfection provisions give exactly the same start time for temporary perfection for all transitional security interests. For example, if two non-migrated interest holders have registered during the temporary perfection period, their interests would have been perfected from exactly the same time, and the Bill would give them equal priority.
- 9.37 In any case where the Bill would apply and would not result in either security interest having priority over the other, the Bill would give the interests the same priority between themselves they would have had if the Bill had not been enacted (clause 324(3)).

Priority not on insolvency/bankruptcy or registration

- 9.38 The priority rules would be different where priority is to be determined between a transitional security interest and a competing interest but:

- priority does not come to be determined because of an insolvency or bankruptcy; and
- priority is to be determined where the secured party holds a non-migrated security interest but they have not registered it (clause 326).

- 9.39 This alternative priority rule applies to a competing security interest whether or not the competing interest is a transitional security interest and whether or not the competing interest is an interest to which these provisions would apply. The competing security interest could be any kind of security interest, including a registered security interest.

- 9.40 Because a determination of the priority in these cases could involve the acquisition of property on just terms, the transitional security interest and the competing security interest

in the collateral would have the priority between themselves that they would have had if the Bill had not been enacted (clause 326(3)).

Taking free and vesting of transitional security interests

9.41 The provisions in the Bill relating to acquiring collateral free of security interests and vesting of unperfected security interests in the grantor would apply to transitional and migrated security interests only in cases of bankruptcy or insolvency or where a secured party has assented to the Bill by registering their transitional security interest or re-registering or amending the registration of their migrated security interest (clauses 327 and 328). As a result, collateral might be transferred free of a security interest under the Bill where, under the law prior to the Bill, the same collateral would have transferred with the security interest continuing. In cases where this did not apply, the law that would have applied before the registration commencement time would apply (clause 329).

Migration provisions

9.42 Registered interests on transitional registers would generally be migrated to the new PPS Register. Migration would be done by an officer or agency of the Commonwealth, a State or a Territory giving data in the approved form to the PPS Registrar and the Registrar accepting that data (clause 330). The Registrar would be able to compel an officer or agency of the Commonwealth to provide data in the approved form to the Registrar (clause 331).

9.43 A security interest would be a migrated security interest if:

- it is a transitional security interest in personal property;
- data is given to and accepted by the Registrar;
- the registration was effective on the transitional register immediately before the registration was given to the Registrar; and
- the registration on the transitional register was authorised by the law under which the transitional register was maintained (clause 332).

9.44 The migration provisions would provide that the Registrar may determine, by legislative instrument, that a class of personal property about which data had been given to the Registrar is registrable, and allow the Registrar to register items in that class before the registration commencement time (clause 333).

9.45 This would involve the Registrar determining that, for example, ‘valid registrations on the Queensland Vehicle Securities Register perfecting security interests at the registration commencement time’ is a class of registrable property. A register may be unsuitable for migration because:

- the information in the register is not clearly set out;
- it is a register of interests to which the Bill does not apply; or
- it does not contain sufficient identifying information.

- 9.46 If a particular interest is not migrated across from an existing register because the Registrar has not determined the information on that register to be a registrable class of property, the interest would be a non-migrated security interest. If the interest is a type of interest governed by the Bill, the transitional provisions would protect the rights of the secured party.
- 9.47 These provisions would not apply to certain transitional security interests prescribed in the regulations and as a result those interests would not obtain temporary perfection (clause 320(5)).
- 9.48 If a particular interest is migrated to the PPS Register despite falling outside the classes of personal property determined by the Registrar to be registrable, the data is taken not to be, and never to have been, included in the PPS Register (clause 334(1)). The Registrar would be able to determine a time before which the Registrar would be able to register a financing change statement to remove data incorrectly registered in the migration process (clause 334(2)) Where data needs to be removed after the determined time, the data would need to be removed under another provision of the Bill.
- 9.49 The Registrar would have to give a verification statement to the secured party in the registration that is removed. There would be no obligation on the secured party to provide a notice of the verification statement to the grantor (clause 335).
- 9.50 Each migrated registration would need to have an end time. This would be the end time in the transitional register, according to the law under which the transitional register was maintained (clause 333(4)). Typically, this end time would be listed on the register from which the information is being migrated. If a particular registration fails to list this information, the Registrar would assign an appropriate end time, for example, the latest end date allowed by the legislation governing the particular register (clause 153).

Preparatory registration for collateral secured by transitional security interests

- 9.51 The migration provisions would allow a non-migrated transitional security interest to be registered between the migration time and the registration commencement time (clause 336). A secured party that registers their security interest in this time would receive the same protection under the Bill as a secured party who registers their security interest within the 24 month temporary perfection period. The registration time for registrations of this nature would be immediately before the registration commencement time.
- 9.52 The holder of a non-migrated security interest that is excluded from temporary perfection would be able to apply for preparatory registration in order to secure perfection from immediately before the registration commencement time.

Registration defects

- 9.53 The Registrar would be able to determine that certain registrations are effective despite defects that would render them ineffective under the Bill (clause 337). This provision is necessary because some transitional registers do not include information that would be required on the PPS register. In the case of other transitional security interests the Registrar may decide that secured parties should be given an opportunity to correct certain details of the registration where they have perfected their interest.

Example

State vehicle registers do not include information about the grantor of the interest. The Bill would enable the Registrar to determine that a migrated State vehicle registration, for a vehicle that is commercial property, is not ineffective merely because a search of the PPS Register, by reference only to the individual or corporate details of the grantor in respect of the collateral, is not capable of returning the relevant registration.

9.54 A registration on the PPS Register is ineffective because of a defect if, and only if, there is a seriously misleading defect in the data or there is a specified defect (clauses 164) and 165). If a registration falls within the scope of the Registrar's determination, the registration would not be ineffective because of the defect until:

- in relation to a non-migrated security interest, the end of the month that is 36 months after the security interest becomes unperfected; or
- in relation to a migrated security interest, the end time included when the security interest is migrated (clause 337).
- Once these times have lapsed the registration would become ineffective unless the registration is amended to correct the defect before the relevant time lapses.

Charges and fixed and floating charges

9.55 The Bill would implement a functional approach to security interests, and apply to all security transactions that in effect secure a payment or performance of an obligation – including fixed and floating charges. As a result, transactions that are currently structured as fixed charges or floating charges would become security interests under the Bill.

9.56 Some statutes currently refer to fixed charges, floating charges or charges and the Bill would maintain the effect of the existing provisions so that parties would not be able to avoid existing provisions governing fixed and floating charges.

9.57 Similarly, some security agreements may refer to fixed or floating charges despite the Bill implementing a functional approach to security transactions.

9.58 The Bill would provide that in any Commonwealth law or security agreement, a reference to a charge will be taken to be a reference to a security interest that has attached to a circulating asset or personal property that is not a circulating asset (clause 339(3)).

9.59 The reference to a charge will apply to a charge only to the extent that the charge has attached to personal property owned by the grantor (clause 339(1)). As a result, a reference to a charge would not apply to property owned by the secured party—such as the collateral in a retention of title arrangement, lease or consignment.

9.60 A reference to a floating charge over property would be taken to be a reference to a security interest that has attached to a circulating asset (clause 339(5)).

9.61 There would be two classes of circulating assets:

- where a secured party has given the grantor express or implied authority for any transfer of the personal property to be made, in the ordinary course of the grantor's business, free of the security interest (clause 340(1)) (the personal property would not be a circulating

asset merely because the secured party has given express authority to transfer specific personal property or a specific class of personal property free of a security interest (clause 340(4)) and

- current assets as follows:
 - accounts that arise from granting a right or providing services in the ordinary course of a business of granting rights or providing services of that kind (whether or not the account debtor is the person to whom the right is granted or the services are provided);
 - accounts that are the proceeds of inventory;
 - ADI accounts (other than term deposits);
 - currency;
 - inventory; and
 - negotiable instruments. (Clause 340(5)).

9.62 However, personal property would not be a circulating asset if:

- the personal property is goods and the security interest in the goods is perfected by possession (clause 340(3));
- the secured party has registered a collateral description in a current asset that discloses that the secured party has control of the personal property and the secured party does have control of the current asset (clause 340(2)).

9.63 A person would have control of inventory if the secured party and the grantor have agreed in writing that the grantor would specifically appropriate the inventory to the security interest and would not remove any specifically appropriated inventory without previously obtaining express authority from the secured party to do so (and it is the grantor's usual practice to comply) (clause 341(1)).

9.64 A person would have control of an account if:

- the secured party and the person to whom the relevant account is owed have agreed in writing that amounts paid to discharge the account must be deposited into a specified ADI account and it is usual practice for those amounts to be deposited in that manner;
- the secured party controls the ADI account and any deposits into the ADI account do not result in any person becoming liable to pay the person to whom the relevant account is owed or, if that person is a body corporate, to pay a related body corporate (clause 341(3)).

9.65 The kinds of account that this applies to are:

- an account that arises from granting a right, or providing services, in the ordinary course of a business of granting rights or providing services of that kind (whether or not the

account debtor is the person to whom the right is granted or the services are provided);
and

- an account that is the proceeds of inventory. (Clause 341(2)).

9.66 These provisions are not intended to be exhaustive of when a person might have control of a current asset.

9.67 The definition of circulating asset confirms the existing case law on floating charges, which provides that in determining whether a floating charge exists over personal property consideration must be given to both the express terms of the agreement between the parties as well as to the actual level of control exerted by the secured party. The provision takes into account current case law on the nature of floating charges so that, in determining whether a charge is a floating charge, consideration would be given to the intention of the parties as demonstrated by both their contract and their practice.

Review of operation of Act

9.68 This Minister would have to arrange for a review of the operation of the Bill to be undertaken and completed within 3 years after the registration commencement time (clause 343). The persons who undertake the review would have to provide a report to the Minister which would be tabled in both Houses of Parliament within 15 sitting days after the report is given to the Minister.

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