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Commonwealth of Australia

HOUSE OF REPRESENTATIVES

Presented and read a first time

Personal Property Securities Bill 2009

No. , 2009

(Attorney-General)

**A Bill for an Act relating to personal property
securities, and for related purposes**

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1 **A Bill for an Act relating to personal property**
2 **securities, and for related purposes**

3 The Parliament of Australia enacts:

4 **Chapter 1—Introduction**

5 **Part 1.1—Preliminary**
6

7 **1 Short title**

8 This Act may be cited as the *Personal Property Securities Act*
9 *2009*.

Section 2

1 **2 Commencement**

2 This Act commences on the day after it receives the Royal Assent.

3 **3 Guide to this Act**

4 *Overview*

5 This Act is a law about security interests in personal property.

6 A security interest is an interest in personal property provided for
7 by a transaction that secures payment or the performance of an
8 obligation. The form of the transaction and the identity of the
9 person who has title to the property do not affect whether an
10 interest is a security interest.

11 Personal property includes many different kinds of tangible and
12 intangible property, other than real property. Examples include
13 motor vehicles, household goods, business inventory, intellectual
14 property and company shares. Personal property is known as
15 collateral if it is (or is anticipated to be) the subject of a security
16 interest.

17 A security interest is enforceable against a grantor when it attaches
18 to collateral. A security interest attaches to collateral when a
19 person gives value for acquiring the security interest (or does
20 something else to acquire it), and in return, the person gains rights
21 in the collateral.

22 A security interest is enforceable against third parties when it has
23 attached to the collateral and either the secured party has
24 possession or control of the collateral, or a security agreement
25 covers the collateral.

26 If a security interest in collateral is perfected, it takes priority over
27 another security interest that is unperfected when the security
28 interest comes to be enforced. A security interest is perfected if:

- 29 (a) it has attached to collateral; and

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- (b) certain extra steps (possession or control of the collateral, or registration on the Register of Personal Property Securities) have been taken to protect the interest, or the interest is perfected by force of this Act.

The secured party whose security interest has the highest priority is entitled to enforce that interest ahead of secured parties with security interests that have a lower priority.

Between perfected security interests, perfection by control has a higher priority than other forms of perfection. The next level of priority is given (subject to certain rules) to perfected purchase money security interests. If no other way of working out priority between perfected interests is provided, the highest priority is given to the security interest that has been continuously perfected for the longest period.

The Register of Personal Property Securities enables secured parties to give notice of actual or prospective security interests. Notice is given by the recording of data about secured parties, grantors and collateral. The register may be kept electronically, for example in a form that is interactive and accessible over the internet.

Summary

Chapter 1 deals with some preliminary matters, including the general application of the Act (Part 1.2) and its interpretation (Part 1.3).

Chapter 2 sets out general rules relating to security interests. These include the following:

- (a) general principles relating to security agreements, security interests, attachment and perfection (Part 2.2);
- (b) interpretation provisions about possession and control (Part 2.3);

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- (c) rules about when attachment and perfection of security interests occurs in particular situations (Part 2.4);
- (d) the circumstances in which personal property is taken free of a security interest in the property (Part 2.5);
- (e) how to work out the priority between competing security interests (and in some cases, other sorts of interests) in personal property (Part 2.6);
- (f) rules about the transfer and assignment of interests in collateral (Part 2.7).

Chapter 3 contains specific rules about the following:

- (a) agricultural interests (Part 3.2);
- (b) security interests in accessions to personal property and their priority (Part 3.3);
- (c) security interests in personal property that is processed or commingled and their priority (Part 3.4);
- (d) intellectual property and intellectual property licences (Part 3.5).

Chapter 4 deals with how to enforce a security interest in personal property. Parties can contract out of some of the provisions of Chapter 4.

Chapter 5 provides for the establishment and maintenance of a register with respect to personal property securities and certain prescribed personal property (the Register of Personal Property Securities).

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The Registrar of Personal Property Securities is responsible for maintaining the register. Chapter 5 also deals with how the register can be searched.

A search by reference to the details of an individual grantor must be made for an authorised purpose set out in the Act. A person who carries out an unauthorised search, or uses data from an unauthorised search, may be liable to pay compensation or a civil penalty (or both).

Chapter 6 deals with the role of the courts in proceedings that relate to security interests in personal property. It confers jurisdiction on courts and provides rules for the transfer of proceedings between courts. It also describes the Registrar's role in judicial proceedings and contains provisions about proceedings for contravention of a civil penalty provision.

Chapter 7 deals with how this Act interacts with foreign laws, the constitutional operation of this Act and the relationship between this Act and other Australian laws.

Chapter 8 deals with the following:

- (a) rules about the vesting of certain unperfected interests (Part 8.2);
- (b) rights to damages and compensation in relation to contraventions of this Act (Part 8.3);
- (c) requests to secured parties for information, how notices may be given and certain other procedural and administrative matters (Parts 8.4 to 8.7).

Chapter 9 deals with the initial application of this Act.

Chapter 9 also deals with references to charges and fixed and floating charges in this Act and in security agreements, and provides for an independent review of the Act within 3 years after it is enacted.

Section 4

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Part 1.2—General application of this Act

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4 Guide to this Part

5

This Part contains general rules about the application of this Act.
These deal with the following matters:

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(a) binding the Crown;

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(b) geographical rules;

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(c) particular interests to which this Act does not
apply.

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5 Crown to be bound

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This Act binds the Crown in each of its capacities.

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6 Connection with Australia

14

(1) This Act applies to a security interest in goods or financial property
if:

15

16

(a) the location of the goods or property is in Australia; or

17

(b) the grantor is an Australian entity.

18

Note: For when personal property is located in a jurisdiction, see
section 235.

19

20

(2) This Act applies to a security interest in intangible property if:

21

(a) the grantor is an Australian entity; or

22

(b) the intangible property is an account that is payable in
Australia; or

23

24

(c) the intangible property is an assignment of an account or
chattel paper if:

25

26

(i) the assignor is an Australian entity; or

27

(ii) the account or chattel paper is payable in Australia; or

- 1 (d) the intangible property is an ADI account; or
2 (e) the intangible property is created, arises or is provided for by
3 a law of the Commonwealth, a State or a Territory.

4 Note: For the application of Australian and foreign law in relation to a
5 security interest, see Part 7.2.

6 **7 Application in the external Territories**

7 *Extension to Norfolk Island*

- 8 (1) This Act extends to Norfolk Island.
9 (2) A reference in this Act to “Australia” includes a reference to
10 Norfolk Island.

11 *Extension to other external Territories*

- 12 (3) This Act extends to such other external Territories (if any) as are
13 prescribed by the regulations for the purposes of this section.
14 (4) Without limiting subsection (3), if an external Territory is
15 prescribed for the purposes of this section, regulations prescribing
16 the external Territory may provide that:
17 (a) only some of the provisions of this Act apply in the external
18 Territory; and
19 (b) provisions that apply in the external Territory only apply in
20 specified circumstances.
21 (5) If:
22 (a) an external Territory is prescribed by the regulations for the
23 purposes of this section; and
24 (b) in a provision of this Act that applies (either generally or in
25 particular circumstances) in the external Territory there is a
26 reference to “Australia” or a reference to a term the definition
27 of which includes a reference to “Australia”;
28 then, unless the contrary intention appears, the reference to
29 “Australia” in that provision as so applying, or in that definition as
30 applying for the purposes of that provision as so applying, includes
31 a reference to that external Territory.

Section 8

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*Acts Interpretation Act 1901 definition of **Australia***

(6) To avoid doubt, this section applies despite paragraph 17(a) of the *Acts Interpretation Act 1901* (definition of **Australia**).

8 Interests to which this Act does not apply

(1) This Act does not apply to any of the following interests (except as provided by subsection (2) or (3)):

- (a) the interest of a seller who has shipped goods to a buyer under a negotiable bill of lading, or its equivalent, to the order of the seller, or to the order of an agent of the seller, unless the parties have otherwise evidenced an intention to create or provide for a security interest in the goods;
- (b) a lien, charge, or any other interest in personal property, that is created, arises or is provided for under a law of the Commonwealth (other than this Act), a State or a Territory, unless the person who owns the property in which the interest is granted agrees to the interest;
- (c) a lien, charge, or any other interest in personal property, that is created, arises or is provided for by operation of the general law;
- (d) any right of set-off or right of combination of accounts;
- (e) any right or interest held by a person, or any interest provided for by any transaction, under any of the following (as defined in section 5 of the *Payment Systems and Netting Act 1998*):
 - (i) an approved netting arrangement;
 - (ii) a close-out netting contract;
 - (iii) a market netting contract;
- (f) an interest provided for by any of the following transactions:
 - (i) the creation or transfer of an interest in land;
 - (ii) the creation of an interest in a right to payment, or the creation or transfer (including a successive transfer) of a right to payment, in connection with an interest in land, if the writing evidencing the creation or transfer specifically identifies that land;
 - (iii) a transfer (including a successive transfer) of an unearned right to payment under a contract to a person

- 1 who is to perform the transferor's obligations under the
2 contract;
- 3 (iv) a transfer of present or future remuneration (including
4 wages, salary, commission, allowances or bonuses)
5 payable to an individual as an employee or a contractor;
- 6 (v) a transfer of an interest or claim in, or under, a contract
7 of annuity or policy of insurance;
- 8 (vi) an assignment of an account made solely to facilitate the
9 collection of the account on behalf of the person making
10 the assignment;
- 11 (vii) without limiting subparagraph (vi), an assignment of an
12 account, if the assignee's sole purpose in acquiring the
13 account is to collect it;
- 14 (viii) an assignment of an account or negotiable instrument to
15 satisfy (either wholly or partly) a pre-existing
16 indebtedness;
- 17 (ix) a sale of an account or chattel paper as part of a sale of
18 business, unless the seller remains in apparent control
19 (within the ordinary meaning of that term) of the
20 business after the sale;
- 21 (x) an assignment of the beneficial interest in an account
22 where, after the assignment, the assignee holds the
23 account on trust for the assignor;
- 24 (g) the following interests in property created under the
25 *Bankruptcy Act 1966*:
- 26 (i) the interest of the Official Trustee or a registered trustee
27 who has taken control (within the meaning of section 50
28 of that Act) of a debtor's or grantor's property under
29 that section;
- 30 (ii) the interest of the Official Trustee or a registered trustee
31 in property of a debtor or grantor that has vested in the
32 Official Trustee or the registered trustee under
33 section 58 of that Act;
- 34 (iii) a charge created under section 139ZN of that Act;
- 35 (iv) a charge created under section 139ZR of that Act;
- 36 (v) an interest created under a personal insolvency
37 agreement under Part X of that Act;

Section 8

- 1 (h) a trust over some or all of an amount provided by way of
2 financial accommodation, if the person to whom the financial
3 accommodation is provided is required to use the amount in
4 accordance with a condition under which the financial
5 accommodation is provided;
- 6 (i) a right entitlement or authority, whether or not exclusive, that
7 is granted by or under the general law or a law of the
8 Commonwealth, a State or a Territory in relation to the
9 control, use or flow of water;
- 10 (j) an interest in a fixture;
- 11 (k) a particular right, licence or authority (the *statutory right*)
12 granted by or under a law of the Commonwealth, a State or a
13 Territory, if, at the time when the statutory right is granted, or
14 at any time afterwards, a provision of that law declares that
15 kind of statutory right not to be personal property for the
16 purposes of this Act (no matter whether the provision
17 remains in force);
- 18 Note: *Personal property* does not include such a statutory right if it has
19 been declared by such a law not to be personal property for the
20 purposes of this Act (see section 10).
- 21 (l) an interest of a kind prescribed by the regulations for the
22 purposes of this section.

23 *Exceptions to subsection (1)*

- 24 (2) The following table has effect:

Provisions of this Act that apply to interests mentioned in subsection (1)		
Item	Despite subsection (1), the following provision:	applies in relation to the following interest mentioned in subsection (1):
1	section 73	(a) a lien, charge or other interest in personal property of a kind described in paragraph (1)(b) or (c); and (b) an interest provided for by a transaction described in subparagraph (1)(f)(ii).
2	section 80	a right of set-off (see

Provisions of this Act that apply to interests mentioned in subsection (1)

Item	Despite subsection (1), the following provision:	applies in relation to the following interest mentioned in subsection (1):
		paragraph (1)(d).
3	sections 117 and 118	an interest provided for by the creation or transfer of an interest in land (see subparagraph (1)(f)(i)).
4	paragraph 140(2)(a)	a lien, charge or other interest in personal property of a kind described in paragraph (1)(b) or (c).
5	paragraph 148(c) and regulations made for the purposes of that paragraph	a lien, charge or other interest in personal property of a kind described in paragraph (1)(b) or (c).

1 (3) The regulations may provide that, despite subsection (1), this Act
2 applies in relation to a kind of interest prescribed by the regulations
3 for the purposes of this subsection.

4 *Transfer and assignments of interests and rights*

5 (4) To avoid doubt, the interest provided for by a transfer or
6 assignment of an interest or right (see paragraph (1)(f)) is the
7 interest that the transferee has to claim against the transferor.

1

2

Part 1.3—Definitions

3

Division 1—Introduction

4

9 Guide to this Part

5

This Part is about the terms that are defined in this Act.

6

Division 2 contains the Dictionary. The Dictionary is a list of every term defined in this Act. A term will either be defined in the Dictionary itself, or in another provision of this Act. If another provision defines the term, the Dictionary will have a signpost to that definition.

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Division 3 contains some longer definitions. These include the definition of *security interest* (in section 12).

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A security interest is an interest in personal property provided for by a transaction that secures payment or the performance of an obligation. The form of the transaction and the identity of the person who has title to the property do not affect whether an interest is a security interest. Certain transactions that do not secure payment or the performance of an obligation may also give rise to a security interest: transfers of accounts, consignments and certain long-term leases and bailments (called PPS leases).

1

2 **Division 2—The Dictionary**

3 **10 The Dictionary**

4

In this Act:

5

ABN (short for Australian Business Number) has the meaning given by section 41 of the *A New Tax System (Australian Business Number) Act 1999*.

6

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8

accession to other goods means goods that are installed in, or affixed to, the other goods, unless both the accession and the other goods are required or permitted by the regulations to be described by serial number.

9

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account means a monetary obligation (whether or not earned by performance, and, if payable in Australia, whether or not the person who owes the money is located in Australia) that arises from:

13

14

15

16

(a) disposing of property (whether by sale, transfer, assignment, lease, licence or in any other way); or

17

18

(b) 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);

19

20

21

but does not include any of the following:

22

23

(c) an ADI account;

24

(d) chattel paper;

25

(e) an investment entitlement;

26

(f) an investment instrument;

27

(g) a negotiable instrument.

28

Example: An account that is a credit card receivable is covered by paragraph (b).

29

30

account debtor means a person who is obligated under an account or chattel paper.

31

32

ADI (short for authorised deposit-taking institution) has the same meaning as in the *Banking Act 1959*.

Section 10

1 **ADI account** means a protected account within the meaning of the
2 *Banking Act 1959*.

3 **advance:**

4 (a) means the payment of currency, the provision of credit or the
5 giving of value; and

6 (b) includes any liability of a debtor to pay interest, credit costs
7 and other charges or costs payable by the debtor in
8 connection with the advance or the enforcement of a security
9 interest securing the advance.

10 **after-acquired property** means personal property acquired by the
11 grantor after a security agreement is made.

12 **agency** includes an authority or instrumentality.

13 **amendment demand** has the meaning given by section 178.

14 **amendment notice** has the meaning given by section 180.

15 **amendment time**, of a registration, has the meaning given by
16 section 160.

17 **approved form** has the meaning given by section 302.

18 **attaches** has the meaning given by section 19.

19 **Australia** has a meaning affected by subsection 7(4).

20 **Australian entity** means any of the following entities:

21 (a) an individual who is located in Australia;

22 Note: For the location of individuals, see section 235.

23 (b) a company or registrable Australian body (within the
24 meaning of the *Corporations Act 2001*);

25 (c) a corporation sole established under a law of the
26 Commonwealth, a State or a Territory;

27 (d) a public authority or an agency or instrumentality of the
28 Crown in right of the Commonwealth, a State or a Territory.

29 **bankruptcy** has the same meaning as in paragraph 51(xvii) of the
30 Constitution.

1 Note: Other parts of speech and grammatical forms of “bankruptcy” (for
2 example, “bankrupt”) have a corresponding meaning (see section 18A
3 of the *Acts Interpretation Act 1901*).

4 ***business day*** means a day other than:

- 5 (a) a Saturday or a Sunday; or
6 (b) a day which is a public holiday for the whole of:
7 (i) any State; or
8 (ii) the Australian Capital Territory; or
9 (iii) the Northern Territory; or
10 (c) a day that falls between Christmas Day and New Year’s Day;
11 or
12 (d) a day on which the Registrar has refused access to the
13 register, or otherwise suspended the operation of the register,
14 in whole or in part (see subsection 147(5)); or
15 (e) a day that is prescribed by the regulations for the purposes of
16 this definition.

17 ***carrying on*** an enterprise has the meaning given by section 41 of
18 the *A New Tax System (Australian Business Number) Act 1999*.

19 ***chattel paper*** means one or more writings that evidence a monetary
20 obligation and either or both of the following:

- 21 (a) a security interest in, or lease of, specific goods, or specific
22 goods and accessions to the specific goods (even if the
23 description of the goods (and accessions) is taken to include a
24 description of intellectual property, or an intellectual property
25 licence, under section 105);
26 (b) a security interest in specific intellectual property or a
27 specific intellectual property licence;

28 but does not include any of the following:

- 29 (c) a document of title;
30 (d) an investment entitlement;
31 (e) an investment instrument;
32 (f) a negotiable instrument.

33 ***circulating asset*** has the meaning given by section 340.

34 ***civil penalty provision*** has the meaning given by section 221.

Section 10

1 **clearing and settlement facility** has the meaning given by
2 Chapter 7 of the *Corporations Act 2001*.

3 **collateral:**

- 4 (a) means personal property to which a security interest is
5 attached; and
6 (b) in relation to a registration with respect to a security
7 interest—includes personal property described by the
8 registration (whether or not a security interest is attached to
9 the property).

10 Note: Section 161 authorises the registration of a financing statement
11 that describes personal property before or after a security
12 agreement is made covering the property, or a security interest
13 has attached to the property.

14 **commercial consignment** means a consignment if:

- 15 (a) the consignor retains an interest in goods that the consignor
16 delivers to the consignee; and
17 (b) the consignor delivers the goods to the consignee for the
18 purpose of sale, lease or other disposal; and
19 (c) the consignor and the consignee both deal in goods of that
20 kind in the ordinary course of business;

21 but does not include an agreement under which goods are delivered
22 to:

- 23 (d) an auctioneer for the purpose of sale; or
24 (e) a consignee for sale, lease or other disposal if the consignee
25 is generally known to the creditors of the consignee to be
26 selling or leasing goods of others.

27 **commercial property** means personal property other than consumer
28 property.

29 **commingled:** goods that are **commingled** include goods that are
30 mixed with goods of the same kind.

31 **company** means:

- 32 (a) a company registered under Part 2A.2 or Part 5B.1 of the
33 *Corporations Act 2001*; or
34 (b) a registrable body (within the meaning of that Act) that is
35 registered under Division 1 or 2 of Part 5B.2 of that Act.

1 **constitutional corporation** means a corporation to which
2 paragraph 51(xx) of the Constitution applies.

3 **constructive knowledge** has the meaning given by section 297.

4 Note: Section 298 deals with knowledge in relation to bodies corporate and
5 other entities.

6 **consumer property** means personal property held by an individual,
7 other than personal property held in the course or furtherance, to
8 any degree, of carrying on an enterprise to which an ABN has been
9 allocated.

10 **continuously perfected** has the meaning given by section 56.

11 **control** has the meaning given by Part 2.3.

12 Note: **Control** has an extended meaning in section 341 (control of inventory
13 and accounts in relation to fixed and floating charges).

14 **crops** means crops (whether matured or not and whether naturally
15 grown or planted) that have not been harvested, including:

- 16 (a) the products of agriculture or aquaculture, if the products
17 have not been harvested; and
18 (b) trees (but only if they are personal property), if the trees have
19 not been harvested.

20 **currency** means currency authorised as a medium of exchange by
21 the law of Australia or of any other country.

22 **debtor** means:

- 23 (a) a person who owes payment or performance of an obligation
24 that is secured by a security interest in personal property
25 (whether or not the person is also the grantor of the security
26 interest); or
27 (b) a transferee of, or successor to, an obligation mentioned in
28 paragraph (a).

29 **defect**, in relation to a registration, includes an irregularity,
30 omission or error in the registration.

31 **Deputy Registrar** means a Deputy Registrar of Personal Property
32 Securities.

33 Note: See Part 5.9 for the office of Deputy Registrar.

Section 10

- 1 ***description*** of personal property (including collateral and
2 proceeds) means:
3 (a) in the case of a particular item of personal property—a
4 description that identifies the item, or that identifies a class to
5 which the item belongs; or
6 (b) in the case of a class of personal property—a description that
7 identifies the class.

- 8 ***document of title*** means a writing issued by or addressed to a
9 bailee:
10 (a) that covers goods in the bailee’s possession that are identified
11 or are fungible portions of an identified mass; and
12 (b) in which it is stated that the goods identified in it will be
13 delivered:
14 (i) to a named person, or to the transferee of that person; or
15 (ii) to the bearer; or
16 (iii) to the order of a named person.

17 ***effective***: a registration is ***effective*** with respect to particular
18 collateral if it is effective with respect to that collateral under
19 Part 5.4.

20 ***enterprise*** has the meaning given by section 9-20 of the *A New Tax*
21 *System (Goods and Services Tax) Act 1999*.

22 ***evidential burden***, in relation to a matter, means the burden of
23 adducing or pointing to evidence that suggests a reasonable
24 possibility that the matter exists or does not exist.

25 ***execution creditor*** means a creditor who has recovered judgment
26 and issued execution against a grantor.

27 ***expenses***, in relation to the enforcement of a security interest in
28 collateral, includes advances, costs and taxes for obtaining
29 possession of, protecting (including insuring), maintaining,
30 preserving or repairing the collateral.

31 Example: For collateral that is intellectual property, ***expenses*** include the costs
32 of legal proceedings against infringers of the intellectual property.

33 Note: Reasonable expenses in relation to the enforcement of a security
34 interest are taken to be secured by a security interest unless the parties
35 agree otherwise (see subsection 18(5)).

1 ***express amendment***, of this Act, has the meaning given by
2 section 244.

3 ***Family Court*** means the Family Court of Australia.

4 ***Federal Court*** means the Federal Court of Australia.

5 ***financial product*** has the meaning given by the *Corporations Act*
6 *2001*.

7 ***financial property*** means any of the following personal property:

- 8 (a) chattel paper;
9 (b) currency;
10 (c) a document of title;
11 (d) an investment instrument;
12 (e) a negotiable instrument.

13 ***financing change statement*** means data amending a registered
14 financing statement.

15 ***financing statement*** means data registered (or that is to be
16 registered) pursuant to an application for registration under
17 subsection 150(1).

18 Note: For requirements relating to financing statements, see Part 5.3
19 (Registration).

20 ***fish*** means any of the following, while alive:

- 21 (a) marine, estuarine or freshwater fish, or other aquatic animal
22 life, at any stage of their life history;
23 (b) oysters and other aquatic molluscs, crustaceans, echinoderms,
24 beachworms and other aquatic polychaetes;

25 but does not include any fish prescribed by the regulations for the
26 purposes of this definition.

27 ***fixtures*** means goods, other than crops, that are affixed to land.

28 ***foreign jurisdiction*** has the meaning given by section 39.

29 ***future advance*** means:

- 30 (a) an advance secured by a security interest (whether or not
31 made pursuant to an obligation), if the advance is made after
32 the security agreement was made; or

Section 10

1 (b) expenses in relation to the enforcement of a security interest
2 that are secured by the security interest.

3 Note: For the meaning of *expenses*, see the definition elsewhere in this
4 section. Reasonable expenses in relation to the enforcement of a
5 security interest are taken to be secured by the security interest unless
6 the parties agree otherwise (see subsection 18(5)).

7 *general law* means the principles and rules of the common law and
8 equity.

9 *goods* means personal property that is tangible property, including
10 the following:

- 11 (a) crops;
- 12 (b) livestock;
- 13 (c) wool;
- 14 (d) minerals that have been extracted (including hydrocarbons)
15 in any form, whether solid, liquid or gaseous and whether
16 organic or inorganic;
- 17 (e) satellites and other space objects;

18 but does not include financial property or an investment
19 entitlement.

20 *grantor* means:

- 21 (a) a person who owns the personal property, or has the interest
22 in the personal property, to which a security interest is
23 attached (whether or not the person owes payment or
24 performance of an obligation secured by the security
25 interest); or
- 26 (b) a person who receives goods under a commercial
27 consignment; or
- 28 (c) a lessee under a PPS lease; or
- 29 (d) a transferor of an account or chattel paper; or
- 30 (e) a transferee of, or successor to, the interest of a person
31 mentioned in paragraphs (a) to (d); or
- 32 (f) in relation to a registration with respect to a security interest:
 - 33 (i) a person registered in the registration as a grantor; or
 - 34 (ii) a person mentioned in paragraphs (a) to (e).

35 *insolvency* has the same meaning as in paragraph 51(xvii) of the
36 Constitution.

1 Note: Other parts of speech and grammatical forms of “insolvency” (for
2 example, “insolvent”) have a corresponding meaning (see section 18A
3 of the *Acts Interpretation Act 1901*).

4 ***intangible property*** means personal property (including a licence)
5 that is not any of the following:

- 6 (a) financial property;
- 7 (b) goods;
- 8 (c) an investment entitlement.

9 ***intellectual property*** means any of the following rights (including
10 the right to be a party to proceedings in relation to such a right):

- 11 (a) the right to do any of the things mentioned in paragraphs
12 10(1)(a) to (f) of the *Designs Act 2003* in relation to a design
13 that is registered under that Act;
- 14 (b) the right to exploit or work an invention, or to authorise
15 another person to exploit or work an invention, for which a
16 patent is in effect under the *Patents Act 1990*;
- 17 (c) the rights held by a person who is the registered owner of a
18 trade mark that is registered under the *Trade Marks Act 1995*;
- 19 (d) the right to do, or to license another person to do, an act
20 referred to in section 11 of the *Plant Breeder’s Rights Act*
21 *1994* in relation to propagating material of a plant variety;
- 22 (e) the right to do an act referred to in section 17 of the *Circuit*
23 *Layouts Act 1989* in relation to an eligible layout during the
24 protection period of the layout;
- 25 (f) the right under the *Copyright Act 1968* to do an act
26 comprised in the copyright in a literary, dramatic, musical or
27 artistic work or a published edition of such a work, or in a
28 sound recording, cinematograph film, television broadcast or
29 sound broadcast.

30 ***intellectual property licence*** means an authority or licence (within
31 the ordinary meaning of that term) to exercise rights comprising
32 intellectual property.

33 ***interest***, in relation to personal property, includes a right in the
34 personal property.

Section 10

- 1 **inventory** means personal property (whether goods or intangible
2 property) that, in the course or furtherance, to any degree, of an
3 enterprise to which an ABN has been allocated:
- 4 (a) is held by the person for sale or lease, or has been leased by
5 the person as lessor; or
- 6 (b) is held by the person to be provided under a contract for
7 services, or has been so provided; or
- 8 (c) is held by the person as raw materials or as work in progress;
9 or
- 10 (d) is held, used or consumed by the person, as materials.
- 11 **investment entitlement** has the meaning given by section 15.
- 12 **investment entitlement account** has the meaning given by
13 section 15.
- 14 **investment entitlement intermediary** has the meaning given by
15 section 15.
- 16 **investment instrument** means any of the following financial
17 products:
- 18 (a) a share in a body, or a debenture of a body;
- 19 (b) a debenture, stock or bond issued or proposed to be issued by
20 a government;
- 21 (c) a derivative;
- 22 (d) a foreign exchange contract that is not a derivative;
- 23 (e) an assignable option to have an allotment of an investment
24 instrument (apart from this paragraph) made to the holder of
25 the option;
- 26 (f) an interest in, or a unit in an interest in, a managed
27 investment scheme;
- 28 (g) a unit in a share in a body;
- 29 (h) a financial product that is traded on a financial market that is:
- 30 (i) operated in accordance with an Australian market
31 licence; or
- 32 (ii) exempt from the operation of Part 7.2 of the
33 *Corporations Act 2001*;
- 34 (i) any other financial product that is prescribed by the
35 regulations;

1 (j) any financial product that consists of a combination of any 2
2 or more of the financial products mentioned in paragraphs (a)
3 to (i);

4 but does not include any of the following:

5 (k) the creation or transfer (including a successive transfer) of a
6 right to payment in connection with interests in land, if the
7 writing evidencing the creation or transfer does not
8 specifically identify that land;

9 (l) a document of title;

10 (m) an investment entitlement;

11 (n) a negotiable instrument.

12 A word or expression used in this definition has the same meaning
13 as in the *Corporations Act 2001*, subject to this Part.

14 **land** includes all estates and interests in land, whether freehold,
15 leasehold or chattel, but does not include fixtures.

16 **land law** has the meaning given by section 117.

17 **law** of the Commonwealth, a State or a Territory means:

18 (a) an Act of the Commonwealth, the State or the Territory; or

19 (b) an instrument made under such an Act.

20 **licence** means either of the following, if it is transferable by the
21 licensee (whether or not the right, entitlement, authority or licence
22 is exclusive, and whether or not a transfer is restricted or requires
23 consent):

24 (a) a right, entitlement or authority to do one or more of the
25 following:

26 (i) to manufacture, produce, sell, transport or otherwise
27 deal with personal property;

28 (ii) to provide services;

29 (iii) to explore for, exploit or use a resource;

30 (b) an intellectual property licence;

31 but does not include a right, entitlement or authority that is:

32 (c) granted by or under a law of the Commonwealth, a State or a
33 Territory; and

34 (d) declared by that law not to be personal property for the
35 purposes of this Act.

Section 10

1 Note: A right, entitlement or authority to which paragraph (c) or (d) applies
2 is not personal property for the purposes of this Act (for the meaning
3 of *personal property*, see elsewhere in this section).

4 *livestock* includes:

- 5 (a) while they are alive—alpacas, cattle, fish, goats, horses,
6 llamas, ostriches, poultry, sheep, swine and other animals;
7 and
8 (b) the unborn young of animals mentioned in paragraph (a).

9 *located*, in relation to personal property, or a person, has the
10 meaning given by section 235.

11 *lower court* has the meaning given by section 211.

12 *matter* includes act, omission, body, person and thing.

13 *migrated security interest* has the meaning given by section 332.

14 *modification* includes addition, omission and substitution.

15 *motor vehicle* has the meaning given by the regulations.

16 *negotiable instrument* means:

- 17 (a) a bill of exchange (within the meaning of the *Bills of*
18 *Exchange Act 1909*); or
19 (b) a cheque (within the meaning of the *Cheques Act 1986*); or
20 (c) a promissory note (within the meaning of section 89 of the
21 *Bills of Exchange Act 1909*); or
22 (d) any other writing that evidences a right to payment of
23 currency and that is of a kind that, in the ordinary course of
24 business, is transferred by delivery with any necessary
25 endorsement or assignment; or
26 (e) a letter of credit that states that it must be presented on
27 claiming payment;

28 but does not include any of the following:

- 29 (f) the creation or transfer (including a successive transfer) of a
30 right to payment in connection with interests in land, if the
31 writing evidencing the creation or transfer does not
32 specifically identify that land;
33 (g) a document of title;
34 (h) an investment entitlement.

1 ***new value*** means value other than value provided to reduce or
2 discharge an earlier debt or liability.

3 ***non-referring State*** means a State that is not a referring State.

4 Note: For the meaning of ***referring State***, see section 244.

5 ***notice of objection*** has the meaning given by section 137.

6 ***penalty unit*** has the meaning given by section 4AA of the *Crimes*
7 *Act 1914*.

8 ***perfected*** has the meaning given by section 21.

9 ***personal property*** means property (including a licence) other than:

10 (a) land; or

11 (b) a right, entitlement or authority that is:

12 (i) granted by or under a law of the Commonwealth, a State
13 or a Territory; and

14 (ii) declared by that law not to be personal property for the
15 purposes of this Act.

16 Note: This Act does not apply to certain interests even if they are interests in
17 personal property (see section 8).

18 ***possession*** has a meaning affected by section 24.

19 ***PPS lease*** (short for Personal Property Securities lease) has the
20 meaning given by section 13.

21 ***PPS matter*** (short for Personal Property Securities matter) has the
22 meaning given by section 206.

23 ***predominantly***: personal property is intended to be used

24 ***predominantly*** for personal, domestic or household purposes if:

25 (a) the personal property:

26 (i) is intended to be used only for those purposes; or

27 (ii) is intended to be used for other purposes as well, but is
28 intended to be mostly used for personal, domestic or
29 household purposes; and

30 (b) the personal property is not acquired as an investment.

31 ***present liability*** means a liability:

Section 10

- 1 (a) that has arisen; and
2 (b) whose extent or amount is fixed or capable of being
3 ascertained;
4 whether or not the liability is immediately due to be met.
- 5 *proceeds* has the meaning given by section 31.
- 6 *provides*: a security agreement *provides* for a security interest if the
7 interest arises under the agreement.
- 8 *purchase money security interest* has the meaning given by
9 section 14.
- 10 *receiving court* has the meaning given by section 210.
- 11 *referring State* has the meaning given by section 244.
- 12 *register* means the Personal Property Securities Register
13 established under section 147.
- 14 *Registrar* means the Registrar of Personal Property Securities.
15 Note: See Part 5.9 for the office of Registrar.
- 16 *registration* means a registered financing statement (as amended
17 by any registered financing change statement) with respect to:
18 (a) a security interest; or
19 (b) personal property prescribed by regulations made for the
20 purposes of paragraph 148(c);
- 21 *registration commencement time* has the meaning given by
22 section 306.
- 23 *registration event* has the meaning given by section 155.
- 24 *registration time*, with respect to collateral described in a
25 registration, has the meaning given by:
26 (a) section 160; or
27 (b) section 336 (preparatory registration with respect to
28 transitional security interests).
- 29 *relevant superior court* has the meaning given by section 211.
- 30 *secured party*:

- 1 (a) means a person who holds a security interest for the person's
2 own benefit or for the benefit of another person (or both); and
3 (b) if the holders of the obligations issued, guaranteed or
4 provided for under a security agreement are represented by a
5 trustee as the holder of the security interest—includes the
6 trustee; and
7 (c) in relation to a registration with respect to a security
8 interest—includes a person registered as a secured party in
9 the registration.

10 ***security agreement*** means:

- 11 (a) an agreement or act by which a security interest is created,
12 arises or is provided for; or
13 (b) writing evidencing such an agreement or act.

14 ***security interest*** has the meaning given by section 12.

15 ***serial number***, in relation to collateral, means a serial number by
16 which the regulations require, or permit, the collateral to be
17 described in a registration.

18 ***State Family Court***, in relation to a State, means a court of that
19 State to which section 41 of the *Family Law Act 1975* applies
20 because of a Proclamation made under subsection 41(2) of that
21 Act.

22 ***superior court*** has the meaning given by section 211.

23 ***term deposit*** means a deposit made with an ADI that matures on a
24 particular date (whether or not the ADI can be required to repay the
25 deposit before that date).

26 ***this Act*** includes the regulations.

27 ***time of execution*** has the meaning given by section 74.

28 ***transfer matter*** has the meaning given by section 210.

29 ***transferring court*** has the meaning given by section 210.

30 ***transitional register*** has the meaning given by section 330.

Section 11

- 1 ***transitional security agreement*** has the meaning given by
2 section 307.
- 3 ***transitional security interest*** has the meaning given by
4 section 308.
- 5 ***value***:
- 6 (a) means consideration that is sufficient to support a contract;
7 and
8 (b) includes an antecedent debt or liability; and
9 (c) in relation to the definition of ***purchase money security***
10 ***interest***—has a meaning affected by section 14.
- 11 ***verification statement*** has the meaning given by section 155.
- 12 ***wool*** means the natural fibre from any livestock that produce fleece
13 that can be shorn (such as sheep, goats, alpacas and llamas).
- 14 ***writing*** includes:
- 15 (a) the recording of words or data in any way (including
16 electronically), if, at the time the recording was made, it was
17 reasonable to expect that the words or data would be readily
18 accessible so as to be useable for subsequent reference; and
19 (b) the display, or other representation, of words or data by any
20 form of communication (including electronic), if:
21 (i) the display or representation is recorded in any way
22 (including electronically); and
23 (ii) at the time the recording was made, it was reasonable to
24 expect that the words or data would be readily
25 accessible so as to be useable for subsequent reference.

26 **11 Application of the Acts Interpretation Act 1901**

- 27 (1) The *Acts Interpretation Act 1901*, as in force at the start of the day
28 on which this Act receives the Royal Assent, applies to this Act.
- 29 (2) Amendments of the *Acts Interpretation Act 1901* made after that
30 time do not apply to this Act.

1
2 **Division 3—Concepts relating to security interests and**
3 **personal property**

4 **12 Meaning of *security interest***

- 5 (1) A *security interest* means an interest in relation to personal
6 property provided for by a transaction that, in substance, secures
7 payment or performance of an obligation (without regard to the
8 form of the transaction or the identity of the person who has title to
9 the property).

10 Note: For the application of this Act to interests, see section 8.

- 11 (2) For example, a *security interest* includes an interest in relation to
12 personal property provided by any of the following transactions, if
13 the transaction, in substance, secures payment or performance of
14 an obligation:

- 15 (a) a fixed charge;
16 (b) a floating charge;
17 (c) a chattel mortgage;
18 (d) a conditional sale agreement (including an agreement to sell
19 subject to retention of title);
20 (e) a hire purchase agreement;
21 (f) a pledge;
22 (g) a trust receipt;
23 (h) a consignment (whether or not a commercial consignment);
24 (i) a lease of goods (whether or not a PPS lease);
25 (j) an assignment;
26 (k) a transfer of title;
27 (l) a flawed asset arrangement.

- 28 (3) A *security interest* also includes the following interests in relation
29 to personal property, whether or not the transaction concerned, in
30 substance, secures payment or performance of an obligation:

- 31 (a) the interest of a transferee under a transfer of an account or
32 chattel paper;

Section 13

- 1 (b) the interest of a consignor who delivers goods to a consignee
2 under a commercial consignment;
3 (c) the interest of a lessor or bailor of goods under a PPS lease.
- 4 (4) An account debtor, in relation to an account or chattel paper, may
5 take a security interest in the account or chattel paper.
- 6 (5) A *security interest* does not include:
7 (a) a licence; or
8 (b) an interest of a kind prescribed by the regulations for the
9 purposes of this section.
- 10 (6) A security interest is not created only by an agreement or
11 undertaking to do either of the following:
12 (a) to postpone or subordinate a person's right to payment or
13 performance of all or any part of a debtor's obligation to
14 another person's right to payment or performance of all or
15 any part of another of the debtor's obligations;
16 (b) to postpone or subordinate all or any part of a secured party's
17 rights under a security agreement to all or any part of another
18 secured party's rights under another security agreement with
19 the same grantor.

20 **13 Meaning of *PPS lease***

- 21 (1) A *PPS lease* means a lease or bailment of goods:
22 (a) for a term of more than one year; or
23 (b) for an indefinite term (even if the lease or bailment is
24 determinable by any party within a year of entering into the
25 lease or bailment); or
26 (c) for a term of up to one year that is automatically renewable,
27 or that is renewable at the option of one of the parties, for one
28 or more terms if the total of all the terms might exceed one
29 year; or
30 (d) for a term of up to one year, in a case in which the lessee or
31 bailee, with the consent of the lessor or bailor, retains
32 uninterrupted (or substantially uninterrupted) possession of
33 the leased or bailed property for a period of more than one
34 year after the day the lessee or bailee first acquired

1 possession of the property (but not until the lessee's or
2 bailee's possession extends for more than one year); or
3 (e) for goods that may or must be described by serial number in
4 accordance with the regulations, if the lease or bailment is:
5 (i) for a term of 90 days or more; or
6 (ii) for a term of less than 90 days, but is automatically
7 renewable, or is renewable at the option of one of the
8 parties, for one or more terms if the total of all the terms
9 might be 90 days or more; or
10 (iii) for a term of less than 90 days, in a case in which the
11 lessee or bailee, with the consent of the lessor or bailor,
12 retains uninterrupted (or substantially uninterrupted)
13 possession of the leased or bailed property for a period
14 of 90 days or more after the day the lessee or bailee first
15 acquired possession of the property, (but not until the
16 lessee's or bailee's possession extends for 90 days or
17 more).

18 (2) However, a **PPS lease** does not include:
19 (a) a lease by a lessor who is not regularly engaged in the
20 business of leasing goods; or
21 (b) a bailment by a bailor who is not regularly engaged in the
22 business of bailing goods; or
23 (c) a lease of consumer property as part of a lease of land where
24 the use of the property is incidental to the use and enjoyment
25 of the land; or
26 (d) a lease or bailment of personal property prescribed by the
27 regulations for the purposes of this definition, regardless of
28 the length of the term of the lease or bailment.

29 *Bailments for value only*

30 (3) This section only applies to a bailment if the bailor provides value
31 for the bailment to the bailee.

32 **14 Meaning of *purchase money security interest***

33 *General definition*

34 (1) A ***purchase money security interest*** means any of the following:

Section 14

- 1 (a) a security interest taken in collateral, to the extent that it
2 secures all or part of its purchase price;
- 3 (b) a security interest taken in collateral by a person who gives
4 value for the purpose of enabling the grantor to acquire rights
5 in the collateral, to the extent that the value is applied to
6 acquire those rights;
- 7 (c) the interest of a lessor or bailor of goods under a PPS lease;
- 8 (d) the interest of a consignor who delivers goods to a consignee
9 under a commercial consignment.

10 *Exceptions*

- 11 (2) However, a ***purchase money security interest*** does not include:
- 12 (a) an interest acquired under a transaction of sale and lease back
13 to the seller; or
- 14 (b) an interest in collateral (as original collateral) that is chattel
15 paper, an investment instrument, an investment entitlement, a
16 monetary obligation or a negotiable instrument; or
- 17 (c) a security interest in collateral that (at the time the interest
18 attaches to the collateral) the grantor intends to use
19 predominantly for personal, domestic or household purposes.

20 *Mixed securities*

- 21 (3) If a security interest in collateral secures obligations covered by
22 subsection (7) (***purchase money obligations***) and other obligations,
23 the security interest is a purchase money security interest only to
24 the extent that it secures the purchase money obligations.
- 25 (4) If a security interest is granted in personal property (***purchase***
26 ***money collateral***) that secures a purchase money obligation,
27 together with other collateral, the security interest is a purchase
28 money security interest only to the extent that it is granted in the
29 purchase money collateral.

30 *Renewal etc.*

- 31 (5) A purchase money security interest does not lose its status as such
32 only because the purchase money obligation is renewed,
33 refinanced, consolidated or restructured (whether or not by the
34 same secured party).

1 *Application of payments to obligations*

- 2 (6) In any transaction, if the extent to which a security interest is a
3 purchase money security interest depends on the application of a
4 payment to a particular obligation, the payment must be applied:
5 (a) in accordance with any method of application to which the
6 parties agree; or
7 (b) if the parties do not agree on a method—in accordance with
8 any intention of the debtor manifested at or before the time of
9 the payment; or
10 (c) if neither paragraph (a) nor (b) applies—in the following
11 order:
12 (i) to obligations that are not secured, in the order in which
13 those obligations were incurred;
14 (ii) to obligations that are secured, but not by purchase
15 money security interests, in the order in which those
16 obligations were incurred;
17 (iii) to obligations that are secured by purchase money
18 security interests, in the order in which those obligations
19 were incurred.

20 *Purchase money obligations*

- 21 (7) This subsection covers an obligation of a debtor incurred:
22 (a) as all or part of the purchase price of the collateral; or
23 (b) for value given to enable the grantor to acquire or use the
24 collateral (provided the collateral is so acquired or used).

25 *References to purchase price and value*

- 26 (8) In this section, a reference to a purchase price, or value, includes a
27 reference to credit charges and interest payable for the purchase or
28 loan credit.

Section 15

1 **15 Meaning of *investment entitlement* and related terms**

2 *Meaning of investment entitlement*

- 3 (1) An ***investment entitlement*** is the rights of a person in whose name
4 an investment entitlement intermediary maintains an investment
5 entitlement account.

6 *Meaning of investment entitlement intermediary*

- 7 (2) An ***investment entitlement intermediary*** is:
8 (a) a person who, in the course of business or other regular
9 activity, maintains investment entitlement accounts on behalf
10 of others, and includes a central securities depository; or
11 (b) a person (a ***CS facility licence holder***) who operates a
12 securities transfer and settlement facility under an Australian
13 CS facility licence (within the meaning of the *Corporations*
14 *Act 2001*).
- 15 (3) To avoid doubt, an investment entitlement intermediary may also
16 maintain an investment entitlement account on its own behalf.
- 17 (4) An investment entitlement intermediary (including a central
18 securities depository) is an ***investment entitlement intermediary***
19 only while acting in the capacity of an investment entitlement
20 intermediary.
- 21 (5) A person is not an ***investment entitlement intermediary*** merely
22 because the person:
23 (a) acts as a registrar or transfer agent for an issuer of a financial
24 product; or
25 (b) records details of interests in financial products in its own
26 books, being interests credited to investment entitlement
27 accounts in the names of other persons for whom the person
28 acts as manager or agent or otherwise in a purely
29 administrative capacity.
- 30 (6) A person is not an ***investment entitlement intermediary***, in relation
31 to particular (or any) financial products issued under the laws of
32 Australia or a foreign country, if:

- 1 (a) the person credits interests in financial products to
2 investment entitlement accounts maintained by the person, in
3 the person's capacity as operator of a system for holding and
4 transferring such interests, on records of the issuer or other
5 records which constitute the primary record of entitlement to
6 them as against the issuer; and
7 (b) the country under which the financial products are issued
8 makes a written declaration that the person is not to be an
9 investment entitlement intermediary for the purposes of this
10 Act in relation to the particular financial product, or in
11 relation to all financial products; and
12 (c) the regulations prescribe the person for the purposes of this
13 subsection.

14 *Meaning of investment entitlement account*

15 (7) In this Act:

16 *investment entitlement account* means:

- 17 (a) an account to which interests in financial products may be
18 credited or debited; or
19 (b) in the case of an account maintained by a CS facility licence
20 holder—writing that records holdings and transfers
21 maintained by the CS facility licence holder in the course of
22 operating the facility.

1

Chapter 2—General rules relating to security interests

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Part 2.1—Guide to this Chapter

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16 Guide to this Chapter

7

This Chapter sets out general rules relating to security interests in personal property.

8

9

Part 2.2 contains some general principles relating to these security interests, the agreements that govern them and their enforceability. The Part describes how a security interest is attached to personal property and perfected.

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Part 2.3 deals with the concepts of possession and control of personal property.

14

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Part 2.4 contains some rules about attachment and perfection of security interests in particular situations.

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Part 2.5 sets out circumstances in which a person takes an interest in personal property free of a security interest in the property.

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Part 2.6 sets out how to work out the priority between competing security interests (and in some cases, other sorts of interests) in personal property. If a specific rule does not deal with the priority between security interests, then the priority is determined in accordance with the default rules in section 55.

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Part 2.7 contains some rules about transferring and assigning interests in collateral.

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Part 2.2—Security interests: general principles

4

17 Guide to this Part

5

This Part sets out some general principles about security interests.

6

These principles relate to the enforceability of security agreements against grantors of security interests and third parties.

7

8

A security interest is only effective if it has *attached* to collateral.

9

A security interest attaches to collateral when the grantor has rights in the collateral, or can transfer it to the secured party, and value is given, or the security interest otherwise arises.

10

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12

A security interest is only enforceable against a third party if it has attached to collateral and the secured party possesses the collateral, has perfected the security interest by controlling the collateral or has entered into a written security agreement that describes the collateral.

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This Part also contains rules about how a security interest is perfected and how it is continuously perfected. A perfected security interest has priority over an unperfected security interest, and the security interest that has been continuously perfected for the longest time generally has the highest priority (see Part 2.6 for priority rules).

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Perfection occurs when a security interest has attached to collateral and any further steps needed to make the security interest effective against third parties have been taken.

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These steps involve registration on the Personal Property Securities Register or possession or control of the collateral. In certain situations this Act provides for perfection, or temporary perfection, by the operation of the Act itself.

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Section 18

1 **18 General rules about security agreements and security interests**

- 2 (1) A security agreement is effective according to its terms.
- 3 (2) A security agreement may provide for security interests in
4 after-acquired property.
- 5 (3) A security interest in after-acquired property attaches without
6 specific appropriation by the grantor.
- 7 (4) A security agreement may provide for future advances.
- 8 (5) A security interest is taken to secure reasonable expenses in
9 relation to the enforcement of the security interest, unless the
10 parties agree otherwise.

11 **19 Enforceability of security interests against grantors—attachment**

12 *Attachment required for enforceability*

- 13 (1) A security interest is enforceable against a grantor in respect of
14 particular collateral only if the security interest has attached to the
15 collateral.

16 *Attachment rule*

- 17 (2) A security interest *attaches* to collateral when:
18 (a) the grantor has rights in the collateral, or the power to
19 transfer rights in the collateral to the secured party; and
20 (b) either:
21 (i) value is given for the security interest; or
22 (ii) the grantor does an act by which the security interest
23 arises.

24 *Time of attachment*

- 25 (3) Subsection (2) does not apply if the parties to a security agreement
26 have agreed that a security interest attaches at a later time, in which
27 case the security interest *attaches* at the time specified in the
28 agreement.

- 1 (4) To avoid doubt, a reference in a security agreement to a floating
2 charge is not a reference to an agreement that the security interest
3 created by the floating charge attaches at a time later than provided
4 under subsection (2).

5 *Goods leased, consigned or sold under a conditional sale*
6 *agreement.*

- 7 (5) For the purposes of paragraph (2)(a), a grantor has rights in goods
8 that are leased to the grantor under a PPS lease, consigned to the
9 grantor, or sold to the grantor under a conditional sale agreement
10 (including an agreement to sell subject to retention of title) when
11 the grantor obtains possession of the goods.
- 12 (6) Subsection (5) does not limit any other rights the grantor may have
13 in the goods.

14 **20 Enforceability of security interests against third parties**

15 *General rule*

- 16 (1) A security interest is enforceable against a third party in respect of
17 particular collateral only if:
18 (a) the security interest is attached to the collateral; and
19 (b) one of the following applies:
20 (i) the secured party possesses the collateral;
21 (ii) the secured party has perfected the security interest by
22 control;
23 (iii) a security agreement that provides for the security
24 interest covers the collateral in accordance with
25 subsection (2).

26 Note: For possession and control of collateral, see Part 2.3.

27 *Written security agreements*

- 28 (2) A security agreement covers collateral in accordance with this
29 subsection if:
30 (a) the security agreement is evidenced by writing that is:
31 (i) signed by the grantor (see subsection (3)); or

Section 20

- 1 (ii) adopted or accepted by the grantor by an act specified in
2 the writing that is done with the intention of adopting or
3 accepting the writing; and
4 (b) the writing evidencing the agreement contains:
5 (i) a description of the particular collateral, subject to
6 subsections (4) and (5); or
7 (ii) a statement that a security interest is taken in all of the
8 grantor's present and after-acquired property; or
9 (iii) a statement that a security interest is taken in all of the
10 grantor's present and after-acquired property except
11 specified items or classes of personal property.

12 *Methods of signing writing*

- 13 (3) Without limiting subparagraph (2)(a)(i), for the purposes of that
14 subparagraph a grantor is taken to sign writing if, with the intention
15 of identifying the grantor and adopting, or accepting, the writing,
16 the person applies:
17 (a) writing (including a symbol) executed or otherwise adopted
18 by the person; or
19 (b) writing wholly or partly encrypted, or otherwise processed,
20 by the person.

21 Note: For the meaning of *writing*, see section 10.

22 *Personal property descriptions—consumer property, equipment*
23 *and inventory*

- 24 (4) If particular personal property is described using the term
25 “consumer property”, “commercial property” or “equipment” in
26 the writing evidencing a security agreement, subparagraph (2)(b)(i)
27 is satisfied only if the personal property is more particularly
28 described, in addition, by reference to item or class.
29 (5) If particular personal property is described using the term
30 “inventory” in the writing evidencing a security agreement,
31 subparagraph (2)(b)(i) is satisfied only while the personal property
32 is held or leased by the grantor as inventory.

1 *Proceeds*

- 2 (6) A security interest in proceeds is enforceable against a third party
3 whether or not the security agreement providing for the security
4 interest contains a description of the proceeds.

5 Note: Section 32 deals with whether a security interest in collateral attaches
6 to proceeds of the collateral.

7 **21 Perfection—main rule**

- 8 (1) A security interest in particular collateral is *perfected* if:
9 (a) the security interest is temporarily perfected, or otherwise
10 perfected, by force of this Act; or
11 (b) both:
12 (i) the security interest is attached to the collateral; and
13 (ii) subsection (2) applies.
- 14 (2) This subsection applies if:
15 (a) for any collateral, a registration is effective with respect to
16 the collateral; or
17 (b) for any collateral, the secured party has possession of the
18 collateral (other than possession as a result of seizure or
19 repossession); or
20 (c) for the following kinds of collateral, the secured party has
21 control of the collateral:
22 (i) an ADI account;
23 (ii) an investment entitlement;
24 (iii) an investment instrument;
25 (iv) a negotiable instrument that is not evidenced by a
26 certificate;
27 (v) a right evidenced by a letter of credit that states that the
28 letter of credit must be presented on claiming payment
29 or requiring the performance of an obligation;
30 (vi) satellites and other space objects.

31 Note: For what constitutes possession and control of collateral, see Part 2.3.

- 32 (3) A security interest may be perfected regardless of the order in
33 which attachment and any step mentioned in subsection (2) occur.

Section 22

1 (4) A single registration may perfect one or more security interests.

2 **22 Perfection—goods possessed by a bailee**

3 *Perfection of security interest*

4 (1) A security interest that has attached to goods in the possession of a
5 bailee (other than the grantor or the debtor) is perfected if any of
6 the following applies, regardless of when the security interest
7 attached to the goods:

8 (a) the security interest is perfected by registration, as provided
9 by section 21;

10 (b) the security interest is perfected by possession, as provided
11 by section 21, because the bailee possesses the property on
12 behalf of the secured party;

13 (c) the bailee issues a document of title to the goods in the name
14 of the secured party;

15 (d) the bailee issues a negotiable document of title to the goods,
16 and the secured party has a perfected security interest in the
17 document.

18 *Temporary perfection while negotiable document of title in transit*

19 (2) A security interest in goods in the possession of a bailee (other than
20 the grantor or the debtor) is temporarily perfected for the period:

21 (a) starting at the time the bailee issues a negotiable document of
22 title to the goods; and

23 (b) ending at the end of the day the secured party takes
24 possession of the document.

25 (3) The security interest in the goods becomes unperfected at the end
26 of the period mentioned in subsection (2), unless the security
27 interest is perfected otherwise than under subsection (2) before the
28 end of the period.

29 (4) However, subsection (2) does not apply, and is taken never to have
30 applied, unless, before the end of the period of 5 business days
31 after the day of issue of the negotiable document of title:

32 (a) the secured party takes possession of the document; or

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2

(b) the security interest is perfected otherwise than under that subsection.

Section 23

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**Part 2.3—Possession and control of personal
property**

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23 Guide to this Part

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This Part deals with the concepts of possession and control of personal property.

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A grantor and secured party cannot both have possession of collateral. There are special rules about possession of the following:

11

(a) goods in the possession of a common carrier;

12

13

(b) negotiable instruments not evidenced electronically;

14

(c) chattel paper evidenced electronically;

15

(d) investment instruments evidenced by a certificate.

16

17

18

Control of certain types of personal property is effective to perfect a security interest in the property (see paragraph 21(2)(c)). This Part includes some special rules about control of the following:

19

(a) ADI accounts;

20

(b) investment entitlements;

21

(c) investment instruments;

22

(d) letters of credit;

23

24

(e) negotiable instruments not evidenced by a certificate.

1 **24 Possession**

2 *Possession by one party exclusive of possession by others*

- 3 (1) A secured party cannot have **possession** of personal property if the
4 property is in the actual or apparent possession of the grantor or
5 debtor, or another person on behalf of the grantor or debtor.
- 6 (2) A grantor or debtor cannot have **possession** of personal property if
7 the property is in the actual or apparent possession of the secured
8 party, or another person on behalf of the secured party.

9 *Timing rule for possession of goods transported by common*
10 *carrier*

- 11 (3) A grantor or debtor to whom goods are transported by a common
12 carrier acquires possession of the goods only when the earlier of
13 the following occurs:
- 14 (a) the grantor or debtor, or another person at the request of the
15 grantor or debtor, actually acquires possession of the goods;
 - 16 (b) the grantor or debtor, or another person at the request of the
17 grantor or debtor, acquires possession of a document of title
18 to the goods.

19 *Possession of certain negotiable instruments*

- 20 (4) A person (the **first person**) has **possession** of a negotiable
21 instrument that is not evidenced by an electronic record if, and only
22 if, the first person, or another person on behalf of the first person,
23 takes physical possession of the instrument.

24 Note: For possession of investment instruments, see subsection 24(6).

25 *Possession of chattel paper that is evidenced electronically*

- 26 (5) A secured party has **possession** of chattel paper that is evidenced
27 by an electronic record if, and only if:
- 28 (a) a single authoritative copy of the record exists which is
29 unique, identifiable and unalterable (except as set out below);
30 and
 - 31 (b) the authoritative copy identifies the secured party as the
32 assignee of the record; and

Section 25

- 1 (c) the authoritative copy is communicated to, and maintained
2 by, the secured party or the secured party's agent; and
3 (d) copies or revisions of the record that change the assignee of
4 the authoritative copy can be made only with the
5 participation of the secured party; and
6 (e) each copy of the authoritative copy (or any copy of such a
7 copy) is readily identifiable as a copy that is not the
8 authoritative copy; and
9 (f) any revision of the authoritative copy is readily identifiable
10 as an authorised or unauthorised copy.

11 *Possession of investment instruments*

- 12 (6) Despite subsections (1) and (2), a person (the *possessor*) has
13 *possession* of an investment instrument that is evidenced by a
14 certificate if, and only if:
15 (a) the certificate specifies the person who is entitled to the
16 investment instrument; and
17 (b) a transfer of the investment instrument may be registered on
18 books maintained for that purpose by or on behalf of the
19 issuer (or the certificate states that a transfer of the
20 instrument may be so registered); and
21 (c) any of the following applies:
22 (i) the possessor has possession of the certificate;
23 (ii) another person (other than the grantor or the debtor) has
24 possession of the certificate on behalf of the possessor;
25 (iii) the registered owner (who is not the grantor or debtor)
26 of the investment instrument acknowledges in writing
27 that he, she or it has possession of the investment
28 instrument on behalf of the possessor.

29 **25 Control of an ADI account**

- 30 (1) A secured party has *control* of an ADI account if:
31 (a) any one or more of the following applies:
32 (i) the secured party is the ADI;
33 (ii) the secured party is able to direct disposition of the
34 funds from the account without further consent by the
35 grantor;

- 1 (iii) the secured party becomes the ADI's customer with
2 respect to the account; and
- 3 (b) except if subparagraph (a)(i) applies—depositing an amount
4 in the ADI account does not result in any person coming
5 under a present liability to pay:
- 6 (i) the debtor; or
- 7 (ii) if the debtor is a body corporate—a related body
8 corporate (within the meaning of the *Corporations Act*
9 *2001*).
- 10 (2) A secured party has **control** under subsection (1) even if the
11 grantor retains the right to direct the disposition of funds from the
12 account.
- 13 (3) To avoid doubt, this section applies in relation to:
- 14 (a) perfecting a security interest by control; and
- 15 (b) determining whether personal property is a circulating asset
16 under section 340.
- 17 (4) Subsection (1) does not limit the ways in which a secured party has
18 control of an ADI account.

19 **26 Control of investment entitlements**

- 20 (1) A secured party has **control** of an investment entitlement that is
21 credited to an investment entitlement account if, and only if:
- 22 (a) there is an agreement in force between the secured party, the
23 grantor and the investment entitlement intermediary who
24 maintains the account; and
- 25 (b) the agreement has the effect that:
- 26 (i) the intermediary must not comply with instructions
27 given by the grantor in relation to the investment
28 entitlement without seeking the consent of the secured
29 party (or a person who has agreed to act on the
30 instructions of the secured party); and
- 31 (ii) the intermediary must comply, or must comply in one or
32 more specified circumstances, with instructions
33 (including instructions to debit the account) given by the
34 secured party in relation to the investment entitlement
35 without seeking the consent of the grantor (or any

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1 person who has agreed to act on the instructions of the
2 grantor).

3 (2) For the purposes of this section, a secured party has **control** of an
4 investment entitlement even if the person (who might be the
5 grantor) in whose name the investment entitlement intermediary
6 maintains the account to which the investment entitlement is
7 credited retains the right:

8 (a) to make substitutions for the instrument; or

9 (b) to originate instructions to the issuer; or

10 (c) to otherwise deal with the instrument.

11 **27 Control of investment instruments**

12 *Main rule*

13 (1) A person has **control** of an investment instrument if, and only if,
14 this section so provides.

15 *Control of any investment instrument*

16 (2) A person, other than the debtor or grantor, has **control** of an
17 investment instrument (whether or not the instrument is evidenced
18 by a certificate) if the issuer of the instrument registers the person
19 as the registered owner of the instrument.

20 *Control of investment instruments evidenced by certificates*

21 (3) A person (the **controller**) has **control** of an investment instrument
22 that is evidenced by a certificate if:

23 (a) the controller has possession of the instrument; and

24 (b) the controller (or a person who has agreed to act on the
25 instructions of the controller) is able to:

26 (i) transfer the instrument to the controller, or to another
27 person; or

28 (ii) otherwise deal with the instrument.

29 *Control of investment instruments not evidenced by certificates*

30 (4) A person has **control** of an investment instrument that is not
31 evidenced by a certificate if:

- 1 (a) there is an agreement in force between the person and the
2 grantor; and
3 (b) the agreement has the effect that the person (or a person who
4 has agreed to act on the instructions of the first person) is
5 able to initiate or control sending instructions by which the
6 investment instrument could be transferred or otherwise dealt
7 with.
- 8 (5) A person (the *controller*) has *control* of an investment instrument
9 that is not evidenced by a certificate if:
10 (a) either:
11 (i) the issuer of the instrument registers another person
12 (who is not the grantor or debtor) as the registered
13 owner of the investment instrument on behalf of the
14 controller; or
15 (ii) the registered owner (who is not the grantor or debtor)
16 of the investment instrument acknowledges in writing
17 that he, she or it holds the investment instrument on
18 behalf of the controller; and
19 (b) there is an agreement in force under which the controller (or
20 a person who has agreed to act on the instructions of the
21 controller) is able to initiate or control the sending of some or
22 all electronic messages or other electronic communications
23 by which the investment instrument could be transferred or
24 otherwise dealt with.
- 25 (6) For the purposes of this section, a person has *control* of an
26 investment instrument even if the registered owner of the
27 investment instrument (who might be the grantor) retains the right:
28 (a) to make substitutions for the instrument; or
29 (b) to originate instructions to the issuer; or
30 (c) to otherwise deal with the instrument.

31 **28 Control of a letter of credit**

32 A secured party does not have *control* of a right evidenced by a
33 letter of credit, to the extent of any right to payment or
34 performance of an obligation by the issuer or a nominated person,
35 unless the issuer or nominated person has consented to assigning
36 the proceeds of the letter of credit to the secured party.

Section 29

1 **29 Control of negotiable instruments that are not evidenced by a**
2 **certificate**

3 (1) A secured party has *control* of a negotiable instrument that is not
4 evidenced by a certificate if, and only if:

5 (a) the instrument is able to be transferred in accordance with the
6 operating rules of a clearing and settlement facility; and

7 (b) there is an agreement in force under which the secured party
8 (or a person who has agreed to act on the instructions of the
9 secured party) controls the sending of some or all electronic
10 messages or other electronic communications by which the
11 instrument could be transferred.

12 (2) For the purposes of subsection (1), a secured party has *control* of a
13 negotiable instrument even if the registered owner (who might be
14 the grantor) retains the right:

15 (a) to make substitutions for the instrument; or

16 (b) to originate instructions to the issuer; or

17 (c) to otherwise deal with the instrument.

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Part 2.4—Attachment and perfection: specific rules

Division 1—Introduction

30 Guide to this Part

This Part contains rules about when attachment and perfection (including, in some circumstances, temporary perfection) of security interests occurs in particular situations.

Division 2 deals with security interests in the proceeds of collateral, and in collateral after it is transferred.

Proceeds of collateral are identifiable or traceable personal property that is derived from dealings with the collateral. Proceeds also includes certain insurance or indemnity rights, payments in redemption of certain intangible collateral, certain rights of licensors of intellectual property, and certain rights relating to investment instruments and investment entitlements.

A security interest in collateral continues in the proceeds (except in certain cases). Division 2 also includes some other rules about the perfection of such interests and their enforcement. Special provisions are made for the perfection and temporary perfection of security interests in proceeds, and for the temporary perfection of security interests in collateral after it is transferred.

Division 3 deals with the perfection (and temporary perfection) of security interests in goods that are returned to the grantor or the debtor. After goods are returned for certain dealings (for example, sale or exchange), a security interest in the goods that had previously been perfected otherwise than by registration may be temporarily perfected for 5 business days. The same period of temporary perfection is provided in similar circumstances if possession or control of a negotiable instrument or investment instrument is returned to the grantor or debtor.

Chapter 2 General rules relating to security interests

Part 2.4 Attachment and perfection: specific rules

Division 1 Introduction

Section 30

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If goods are taken free of a security interest, but are repossessed by the grantor or debtor, the security interest reattaches to the goods, and (if the security interest had been perfected by registration) the perfection status of the security interest is unaffected.

Division 3 also provides special rules for the attachment and perfection of a security interest in goods if a sale or lease of the goods creates an account or chattel paper that is transferred to another person.

Division 4 deals with situations where collateral or a grantor of a security interest is relocated from a foreign jurisdiction to Australia. The security interest in the collateral is temporarily perfected if certain conditions are met.

1

2 **Division 2—Proceeds and transfer**

3 **31 Meaning of *proceeds***

4

(1) In this Act:

5

proceeds of collateral to which a security interest is (or is to be)
6 attached means identifiable or traceable personal property of the
7 following types, subject to subsections (2) and (3):

8

(a) personal property that is derived directly or indirectly from a
9 dealing with the collateral (or proceeds of the collateral);

10

(b) a right to an insurance payment or other payment as
11 indemnity or compensation for loss of, or damage to, the
12 collateral (or proceeds of the collateral);

13

(c) a payment made in total or partial discharge or redemption of
14 the collateral (or proceeds of the collateral), if the collateral
15 (or proceeds) consists of any of the following:

16

(i) chattel paper;

17

(ii) intangible property;

18

(iii) an investment instrument;

19

(iv) an investment entitlement;

20

(v) a negotiable instrument;

21

(d) if the collateral is intellectual property (or an intellectual
22 property licence)—in addition to any other proceeds, the
23 right of a licensor of the property (whether or not the
24 property is itself a licence) to receive payments under any
25 licence agreement in relation to the collateral;

26

(e) if the collateral is an investment instrument or investment
27 entitlement—any of the following:

28

(i) rights arising out of the collateral;

29

(ii) property collected on the collateral;

30

(iii) property distributed on account of the collateral.

31

Note: In section 140 (distribution of proceeds received by secured party)
32 proceeds has its ordinary meaning, so this definition does not apply.

Section 32

1 *Whether proceeds are traceable*

2 (2) Proceeds are traceable whether or not there is a fiduciary
3 relationship between the person who has a security interest in the
4 proceeds, as provided in section 32, and the person who has rights
5 in or has dealt with the proceeds.

6 *Restriction to proceeds in which grantor has a transferable interest*

7 (3) However, personal property is **proceeds** only if:
8 (a) either:
9 (i) the grantor has an interest in the proceeds; or
10 (ii) the grantor has the power to transfer rights in the
11 proceeds to the secured party (or to a person nominated
12 by the secured party); and
13 (b) the interest in the proceeds does not arise because of the
14 operation of paragraph 140(2)(f).

15 Note: Paragraph 140(2)(f) provides for the distribution of an amount or
16 proceeds to the grantor upon the enforcement of a security
17 interest.

18 *Crops and livestock*

19 (4) The **proceeds** of collateral that is crops include the harvested
20 produce of the crops, if the produce is identifiable or traceable.

21 (5) The **proceeds** of collateral that is livestock include products of the
22 livestock (for example, meat or wool), if the products are
23 identifiable or traceable.

24 (6) However, livestock are not the **proceeds** of collateral merely
25 because they are the unborn young, or the offspring, of livestock
26 that are collateral.

27 **32 Proceeds—attachment**

28 *Continuation of security interest in collateral, and attachment to*
29 *proceeds*

30 (1) Subject to this Act, if collateral gives rise to proceeds (by being
31 dealt with or otherwise), the security interest:

1 (a) continues in the collateral, unless the secured party expressly
2 or impliedly authorised a dealing giving rise to the proceeds;
3 and

4 (b) attaches to the proceeds, unless the security agreement
5 provides otherwise.

6 Note 1: The effect of paragraph (a) is to extinguish the security interest in the
7 collateral if the secured party expressly or impliedly authorised the
8 dealing mentioned.

9 Note 2: A transferee can also take the collateral free of the security interest
10 because of the operation of another provision of this Act (for example,
11 under Part 2.5).

12 *Enforcement of security interest against collateral and proceeds*

13 (2) If the secured party enforces a security interest against both
14 collateral (other than an investment instrument) and proceeds, the
15 amount secured by the security interest in the collateral and
16 proceeds is limited to the market value of the collateral
17 immediately before the collateral gave rise to the proceeds.

18 Note: For the enforceability of a security interest against a third party in
19 relation to proceeds, see also subsection 20(6).

20 (3) However, subsection (2) does not apply if, at the time of the
21 transfer of the collateral, the transferee has actual or constructive
22 knowledge that the transfer was in breach of a security agreement
23 that provides for the security interest in the collateral.

24 (4) To avoid doubt, subsection (2) does not affect any right the secured
25 party may have to recover the amount secured without enforcing
26 the security interest.

27 *Priority of proceeds*

28 (5) For the purposes of section 55 (default priority rules), the time of
29 registration or possession in relation to original collateral, or the
30 time of perfection of a security interest in original collateral, is also
31 the time of registration, possession or perfection in relation to the
32 proceeds of the original collateral.

33 Note: The effect of subsection (5) is that the security interest in the proceeds
34 has the same default priority as the security interest in the original
35 collateral.

Section 33

1 **33 Proceeds—perfection and temporary perfection**

2 *Perfection by reference to perfection of security interest in original*
3 *collateral*

- 4 (1) A security interest in proceeds is perfected if the security interest in
5 the original collateral is perfected by a registration that:
- 6 (a) describes the proceeds, if the description complies with any
7 regulations made for the purposes of paragraph (d) of item 4
8 of the table in section 153 (financing statements with respect
9 to security interests); or
 - 10 (b) covers the original collateral, if the proceeds are of a kind
11 that are within the description of the original collateral; or
 - 12 (c) covers the original collateral, if the proceeds consist of
13 currency, cheques or an ADI account, or a right to an
14 insurance payment or any other payment as indemnity or
15 compensation for loss or damage to the collateral or
16 proceeds.

17 *Temporary perfection in other situations*

- 18 (2) If a security interest in original collateral is perfected, but a
19 security interest in the proceeds is not perfected under
20 subsection (1), the security interest in the proceeds is temporarily
21 perfected for the period starting at the time the security interest in
22 the original collateral attaches to the proceeds and ending at the
23 end of 5 business days afterwards.
- 24 (3) However, the security interest in the proceeds under subsection (2)
25 becomes unperfected at the end of the period mentioned in that
26 subsection, unless the security interest in the proceeds is perfected
27 otherwise than under the subsection before the end of the period.

28 **34 Transferred collateral—temporary perfection after transfer**

29 *Security interest is temporarily perfected*

- 30 (1) If collateral is transferred, and at the time of the transfer a secured
31 party held a perfected security interest in the collateral, the security
32 interest is temporarily perfected for the period starting at the time
33 of the transfer and ending at the earliest of the following times:

- 1 (a) the end of the month that is 24 months after the time of the
2 transfer;
- 3 (b) if the security interest was perfected by registration at the
4 time of the transfer—the end time for the registration (as
5 registered at the time of the transfer);
- 6 (c) if another security interest attaches to the collateral at or after
7 the time of the transfer, and the other security interest is
8 perfected:
- 9 (i) in a case in which the original secured party consented
10 to the transfer—the end of 5 business days after the day
11 of the transfer; or
- 12 (ii) in a case in which the original secured party otherwise
13 acquires the actual or constructive knowledge required
14 to perfect the original secured party's interest by
15 registration (or to re-perfect the interest by an
16 amendment of a registration)—the end of 5 business
17 days after the day the original secured party acquires the
18 knowledge.

19 Note: The knowledge required is the knowledge of the transferee's (the new
20 grantor's) details. Unless these are registered, the original secured
21 party's registration may be ineffective under section 165.

22 *Security interest becomes unperfected*

- 23 (2) However, the security interest becomes unperfected immediately
24 after the earliest time mentioned in subsection (1), unless, at or
25 before that time, the security interest is perfected otherwise than
26 under subsection (1).

27 *Transfer free of security interest*

- 28 (3) This section does not apply in relation to a transfer of collateral if
29 the transferee takes the collateral free of the security interest.

Section 35

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2 **Division 3—Collateral returned to grantor or debtor**

3 **35 Returned collateral—from bailee**

4 *Security interest is temporarily perfected*

5 (1) A security interest in goods that is perfected by possession of the
6 goods or a negotiable document of title to the goods under
7 subsection 22(1) is temporarily perfected for the period covered by
8 subsection (2) of this section if possession of the goods or
9 document is given to the grantor or the debtor at a particular time
10 (the *action time*) for the purpose of any of the following actions in
11 relation to the goods:

- 12 (a) sale;
- 13 (b) exchange;
- 14 (c) any other action in preparation for sale or exchange,
15 including (but not limited to) the following:
- 16 (i) loading;
- 17 (ii) unloading;
- 18 (iii) storing;
- 19 (iv) shipping;
- 20 (v) manufacturing;
- 21 (vi) processing;
- 22 (vii) packaging.

23 Note: Subsection 22(1) provides for the perfection of a security interest in
24 goods possessed by a bailee.

25 (2) This subsection covers the period starting at the action time and
26 ending at the end of 5 business days after the day the action time
27 occurs.

28 *Security interest becomes unperfected after 5 business days*

29 (3) However, the security interest in the goods or document becomes
30 unperfected at the end of the period covered by subsection (2),
31 unless the security interest is perfected otherwise than under
32 subsection (1) before the end of the period.

1 **36 Returned collateral—negotiable instruments and investment**
2 **instruments**

3 *Security interest is temporarily perfected*

- 4 (1) A security interest in a negotiable instrument or an investment
5 instrument that is perfected by possession or control is temporarily
6 perfected for the period covered by subsection (2) if possession or
7 control of the goods or document is given to the grantor or the
8 debtor at a particular time (the *action time*) for the purpose of any
9 of the following actions in relation to the goods:
10 (a) sale;
11 (b) exchange;
12 (c) presentation;
13 (d) collection;
14 (e) renewal;
15 (f) registration (other than under this Act) for the purposes of a
16 transfer.
- 17 (2) This subsection covers the period starting at the action time and
18 ending at the end of 5 business days after the day the action time
19 occurs.

20 *Security interest becomes unperfected after 5 business days*

- 21 (3) However, the security interest in the instrument becomes
22 unperfected at the end of the period covered by subsection (2),
23 unless the security interest in the instrument is perfected otherwise
24 than under subsection (1) before the end of the period.

25 **37 Returned collateral—following sale or lease**

26 *Reattachment of security interest*

- 27 (1) If a grantor or debtor sells or leases goods that are subject to a
28 security interest, and the buyer or lessee takes the goods free of the
29 security interest because of the operation of this Act, the security
30 interest reattaches to the goods at a particular time (the
31 *repossession time*) if, at that time, the goods come into the
32 possession of the grantor or debtor, or of a transferee of chattel

Section 38

- 1 paper created by the sale or lease, in any of the following
2 circumstances:
- 3 (a) in the case of a sale—the contract of sale is rescinded;
 - 4 (b) in the case of a lease—the lease expires or is rescinded;
 - 5 (c) the transferee seizes the goods in the exercise of a right in
6 enforcing a security agreement;
 - 7 (d) the grantor or debtor repossesses the goods in the exercise of
8 a right in enforcing the contract of sale or the lease;
 - 9 (e) any other circumstances prescribed by the regulations.

10 Note: Section 76 deals with the priority of a security interest that reattaches
11 under this section.

12 *Perfection of security interest*

- 13 (2) The perfection of the security interest, and the time of registration
14 or perfection of the security interest, are to be determined as if the
15 goods had not been sold or leased, if:
- 16 (a) the security interest reattaches to the goods under
17 subsection (1); and
 - 18 (b) the security interest was perfected by registration
19 immediately before the time of the acquisition; and
 - 20 (c) the registration is effective at the repossession time.

21 **38 Returned collateral—accounts and chattel paper**

22 *Deemed goods security interest*

- 23 (1) If a sale or lease of goods creates an account or chattel paper, and
24 the account or chattel paper is transferred to another person, the
25 transferee is taken to have a security interest (the *deemed goods*
26 *security interest*) in the goods if, at a particular time (the
27 *repossession time*) the goods come into the possession of the
28 transferor, or of the transferee, in any of the following
29 circumstances:
- 30 (a) in the case of a sale—the contract of sale is rescinded;
 - 31 (b) in the case of a lease—the lease expires or is rescinded;
 - 32 (c) the transferee seizes the goods in the exercise of a right in
33 enforcing a security agreement;

1 (d) the transferor repossesses the goods in the exercise of a right
2 in enforcing the contract of sale or the lease;

3 (e) any other circumstances prescribed by the regulations.

4 Note: Section 76 deals with the priority of a security interest that reattaches
5 under this section.

6 (2) The deemed goods security interest attaches to the goods at the
7 repossession time.

8 *Deemed goods security interest temporarily perfected for 5*
9 *business days*

10 (3) If the transferee has a security interest in the account or chattel
11 paper that is perfected by possession or registration at the
12 repossession time, the deemed goods security interest is
13 temporarily perfected for the period starting at the possession time
14 and ending at the end of 5 business days after the day the
15 repossession time occurs.

16 *Deemed goods security interest becomes unperfected after 5*
17 *business days*

18 (4) However, the deemed goods security interest becomes unperfected
19 at the end of the period mentioned in subsection (3), unless the
20 deemed goods security interest is perfected otherwise than under
21 subsection (3) before the end of the period.

22 Note: Section 76 deals with the priority of a deemed goods security interest.

Section 39

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2 **Division 4—Relocation of collateral or grantor to Australia**

3 **etc.**

4 **39 Relocation—main rule**

5 *Continuous perfection prior to move to Australia*

6 (1) A security interest in collateral that has been located in a
7 jurisdiction (the *foreign jurisdiction*) outside Australia, and is
8 relocated to Australia, is taken to have been continuously perfected
9 for the period covered by subsection (2) if:

- 10 (a) immediately before the collateral became located in
11 Australia, the collateral was subject to a security interest, in
12 accordance with a security agreement that was enforceable
13 against third parties; and
14 (b) at the time the collateral becomes located in Australia, the
15 collateral continues to be subject to that security interest in
16 accordance with such a security agreement.

17 Note: For when personal property is located in a jurisdiction, see
18 section 235.

19 (2) This subsection covers the period:

- 20 (a) starting:
21 (i) if the law of the foreign jurisdiction provides for the
22 public registration or recording of the security interest,
23 or a notice relating to the security interest, under law—
24 when the registration occurs under that law; or
25 (ii) in any other case—when the security interest became
26 effective against third parties under the law of the
27 foreign jurisdiction; and
28 (b) ending when the property becomes located in Australia.

29 *Temporary perfection after move to Australia*

30 (3) If a security interest in collateral is continuously perfected under
31 subsection (1), the security interest in the collateral is temporarily
32 perfected for the period:

- 1 (a) starting at the time the property becomes located in Australia;
2 and
3 (b) ending at the earlier of the following times:
4 (i) the end of 56 days after the day the collateral becomes
5 located in Australia;
6 (ii) the end of 5 business days after the day the secured
7 party has actual knowledge that the collateral has
8 become located in Australia.
- 9 (4) However, the security interest in the collateral becomes
10 unperfected at the end of the period mentioned in subsection (3),
11 and is taken never to have been temporarily perfected, unless the
12 security interest is perfected otherwise than under subsection (3)
13 before the end of the period.

14 **40 Relocation—intangible property and financial property**

15 *Continuous perfection prior to relocation event*

- 16 (1) If the perfection, and effect of perfection or non-perfection, of a
17 security interest in intangible property, or financial property, has
18 been governed by the law of a foreign jurisdiction, the security
19 interest is taken to have been continuously perfected for the period
20 covered by subsection (2) if:
21 (a) either of the following events (the *relocation event*) occurs:
22 (i) the grantor becomes located in Australia;
23 (ii) the grantor transfers the collateral to a person who is
24 located in Australia; and
25 (b) as a result of the occurrence of the relocation event, the
26 perfection, and effect of perfection or non-perfection, of the
27 security interest becomes governed by the law of Australia.
- 28 Note 1: For when personal property is located in a jurisdiction, see
29 section 235. For when bodies corporate, bodies politic or individuals
30 are located in a jurisdiction, see section 235.
- 31 Note 2: For when laws of other jurisdictions govern a security interest, see
32 Part 7.2.
- 33 (2) This subsection covers the period:
34 (a) starting:
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Section 40

- 1 (i) if the law of the foreign jurisdiction provides for the
2 public registration or recording of the security interest,
3 or a notice relating to the security interest, under law—
4 when the registration occurs under that law; or
5 (ii) in any other case—when the security interest became
6 effective against third parties under the law of the
7 foreign jurisdiction; and
8 (b) ending when the relocation event occurs.

9 *Temporary perfection after relocation event*

- 10 (3) If a security interest in collateral is continuously perfected under
11 subsection (1), the security interest in the collateral is temporarily
12 perfected for the period:
13 (a) starting at the time of the relocation event; and
14 (b) ending at the earlier of the following times:
15 (i) the end of 56 days after the day of the relocation event;
16 (ii) the end of 5 business days after the day the secured
17 party has actual knowledge of the relocation event.
- 18 (4) However, the security interest in the collateral becomes
19 unperfected at the end of the period mentioned in subsection (3),
20 and is taken never to have been temporarily perfected, unless the
21 security interest is perfected otherwise than under subsection (3)
22 before the end of the period.

23 *Exceptions*

- 24 (5) This section does not apply to:
25 (a) intellectual property, an intellectual property licence or an
26 ADI account; or
27 (b) a negotiable instrument.

28 Note: The property mentioned in paragraph (5)(a) is *intangible property*;
29 negotiable instruments are *financial property* (see section 10).

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Part 2.5—Taking personal property free of security interests

41 Guide to this Part

This Part is about taking personal property free of security interests.

Rules are set out for when personal property may be bought or leased free of a security interest in relation to the following:

- (a) unperfected security interests;
- (b) personal, domestic or household property;
- (c) serial number defects;
- (d) certain motor vehicles;
- (e) currency;
- (f) taking in the ordinary course of business;
- (g) taking investment interests or entitlements in the ordinary course of trading;
- (h) investment instruments;
- (i) investment entitlements.
- (j) temporarily perfected security interests;

If a transferee takes personal property (or an accession) free of a security interest by the operation of this Part, the secured party's rights are subrogated to the rights of the transferor. Payment of the purchase price before the transferee receives notice of subrogation

Section 42

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discharges the transferee's obligation (to the extent of the payment).

42 Application of this Part

This Part:

- (a) applies to a security interest:
 - (i) whether or not the security interest is perfected (except in sections 43 (unperfected interests) and 52 (temporarily perfected interests)); and
 - (ii) whether the security interest attaches to personal property as original collateral or as proceeds; and
- (b) does not apply to the acquisition of an interest in personal property free of a security interest if the interest that is taken is itself a security interest (except in sections 50 (investment instruments) and 51 (investment entitlements)).

Note: Some acquisitions to which section 50 applies, and all acquisitions to which section 51 applies, consist of the taking of security interests (see subsections 50(3) and 51(1)).

43 Taking personal property free of unperfected security interest

Main rule

- (1) A buyer or lessee of personal property, for new value, takes the personal property free of an unperfected security interest in the property.

Exception

- (2) Subsection (1) does not apply if the unperfected security interest was created or provided for by a transaction to which the buyer or lessee is a party, unless the personal property concerned is of a kind prescribed by the regulations for the purposes of this subsection.

1 **44 Taking personal property free of security interest if serial**
2 **number incorrect or missing**

3 *Main rule*

- 4 (1) A buyer or lessee of personal property, for new value, takes the
5 personal property free of a security interest in the property if:
6 (a) the regulations provide that personal property of that kind
7 may, or must, be described by serial number in a registration;
8 and
9 (b) searching the register, immediately before the time of the sale
10 or lease, by reference only to the serial number of the
11 property, would not disclose a registration that perfected the
12 security interest.

13 *Exceptions*

- 14 (2) Subsection (1) does not apply if:
15 (a) the buyer or lessee holds the personal property:
16 (i) as inventory; or
17 (ii) on behalf of a person who would hold the collateral as
18 inventory; or
19 (b) at the time covered by subsection (3), the buyer or lessee has
20 actual knowledge that the sale or lease constitutes a breach of
21 the security agreement that provides for the security interest,
22 unless the personal property is of a kind prescribed by the
23 regulations for the purposes of this subsection.
- 24 (3) The time covered by this subsection is:
25 (a) if the personal property is bought or leased with the intention
26 of using it predominantly for personal, domestic or household
27 purposes—the time new value is first given for the sale or
28 lease; or
29 (b) in any other case—the time of sale or of entry into agreement
30 for the lease.

Section 45

1 **45 Taking motor vehicles free of security interest**

2 *Incorrect or missing serial number*

- 3 (1) A buyer or lessee, for new value, of a motor vehicle of a kind
4 prescribed by the regulations for the purpose of this section, takes
5 the motor vehicle free of a security interest in the motor vehicle if:
6 (a) the regulations provide that motor vehicles of that kind may,
7 or must, be described by serial number; and
8 (b) there is a time during the period between the start of the
9 previous day and the time of the sale or lease by reference to
10 which a search of the register (by reference otherwise only to
11 the serial number of the motor vehicle) would not disclose a
12 registration that perfected the security interest; and
13 (c) the seller or lessor is:
14 (i) the person who granted the security interest; or
15 (ii) if the person who granted the security interest has lost
16 the right to possess the motor vehicle, or is estopped
17 from asserting an interest in the motor vehicle—another
18 person who is in possession of the motor vehicle.
- 19 (2) Subsection (1) does not apply if:
20 (a) the secured party is in possession of the motor vehicle
21 immediately before the time of the sale or lease; or
22 (b) the motor vehicle is bought at a sale held by or on behalf of
23 an execution creditor; or
24 (c) the buyer or lessee holds the motor vehicle:
25 (i) as inventory; or
26 (ii) on behalf of a person who would hold the motor vehicle
27 as inventory; or
28 (d) the buyer or lessee buys or leases the motor vehicle with
29 actual or constructive knowledge of the security interest.

30 *Taking from prescribed persons*

- 31 (3) A buyer or lessee, for new value, of a motor vehicle of a kind
32 prescribed by the regulations for the purpose of this section takes
33 the motor vehicle free of a security interest in the motor vehicle if:

- 1 (a) the regulations provide that motor vehicles of that kind may,
2 or must, be described by serial number; and
3 (b) the seller or lessor is in a class of persons prescribed by the
4 regulations for the purposes of this subsection.
- 5 (4) Subsection (3) does not apply if:
6 (a) the secured party is in possession of the motor vehicle
7 immediately before the time of the sale or lease; or
8 (b) the motor vehicle is bought at a sale held by or on behalf of
9 an execution creditor; or
10 (c) the buyer or lessee holds the motor vehicle:
11 (i) as inventory; or
12 (ii) on behalf of a person who would hold the motor vehicle
13 as inventory; or
14 (d) the buyer or lessee buys or leases the motor vehicle with
15 actual or constructive knowledge that the sale or lease
16 constitutes a breach of the security agreement that provides
17 for the security interest.

18 **46 Taking personal property free of security interest in ordinary**
19 **course of business**

20 *Main rule*

- 21 (1) A buyer or lessee of personal property takes the personal property
22 free of a security interest given by the seller or lessor, or that arises
23 under section 32 (proceeds—attachment), if the personal property
24 was sold or leased in the ordinary course of the seller's or lessor's
25 business of selling or leasing personal property of that kind.

26 *Exceptions*

- 27 (2) Subsection (1) does not apply if:
28 (a) in a case in which personal property of that kind may, or
29 must, be described by serial number—the buyer or lessee
30 holds the personal property:
31 (i) as inventory; or
32 (ii) on behalf of a person who would hold the collateral as
33 inventory; or

Section 47

- 1 (b) in any case—the buyer or lessee buys or leases the personal
2 property with actual knowledge that the sale or lease
3 constitutes a breach of the security agreement that provides
4 for the security interest.

5 **47 Taking personal, domestic or household property free of security**
6 **interest**

7 *Main rule*

- 8 (1) A buyer or lessee of personal property, for new value, that the
9 buyer or lessee intends (at the time of purchase or lease) to use
10 predominantly for personal, domestic or household purposes takes
11 the personal property free of a security interest in the property if
12 the market value (worked out at the time each part of the total new
13 value is given) of the total new value given for the personal
14 property is not more than:
15 (a) \$5,000; or
16 (b) if a greater amount has been prescribed by regulations for the
17 purposes of this subsection—that amount.

18 *Exceptions*

- 19 (2) Subsection (1) does not apply if:
20 (a) the personal property is of a kind that the regulations provide
21 may, or must, be described by serial number in a registration;
22 or
23 (b) the buyer or lessee buys or leases the personal property with
24 actual or constructive knowledge that the sale or lease
25 constitutes a breach of the security agreement that provides
26 for the security interest; or
27 (c) at the time the contract or agreement providing for the sale or
28 lease is entered into, the buyer or lessee believes, and it is
29 actually the case, that the market value of the personal
30 property is more than:
31 (i) \$5,000; or
32 (ii) if a greater amount has been prescribed by regulations
33 for the purposes of this paragraph—that amount.

1 **48 Taking currency free of security interest**

2 A holder of currency takes the currency free of a security interest
3 in the currency if the holder acquires the currency with no actual or
4 constructive knowledge of the security interest.

5 **49 Taking investment interest or entitlement free of security interest**
6 **in the ordinary course of trading**

7 A person who buys an investment instrument or an investment
8 entitlement in the ordinary course of trading on a prescribed
9 financial market (within the meaning of the *Corporations Act*
10 2001) takes the instrument or entitlement free of a security interest
11 in the instrument or entitlement.

12 **50 Taking investment instrument free of security interest**

13 *Main rule*

- 14 (1) A purchaser (see subsection (3)) of an investment instrument, other
15 than a secured party, takes the instrument free of a security interest
16 in the instrument if:
17 (a) the purchaser gives value for the instrument; and
18 (b) the purchaser takes possession or control of the instrument.

19 *Exception*

- 20 (2) Subsection (1) does not apply if the purchaser takes the instrument
21 with actual or constructive knowledge that the taking constitutes a
22 breach of the security agreement that provides for the security
23 interest.
- 24 (3) In this section:
- 25 ***purchaser***, in relation to an investment instrument, means a person
26 who takes the instrument by sale, lease, discount, assignment,
27 negotiation, mortgage, pledge, lien, issue, reissue or any other
28 consensual transaction that creates an interest in personal property.

Section 51

1 **51 Taking investment entitlement free of security interest**

2 *Main rule*

- 3 (1) A person (the *transferee*) who takes an interest in an investment
4 entitlement takes the interest free of a security interest in the
5 entitlement if:
6 (a) the transferee gives value for the interest (unless the interest
7 acquired is itself a security interest); and
8 (b) the credit of the interest in the financial product in relation to
9 which the investment entitlement arises is made in
10 accordance with a consensual transaction.

11 *Exception*

- 12 (2) Subsection (1) does not apply if, at the time the interest is taken,
13 the person in whose name an investment entitlement intermediary
14 maintains the investment entitlement account has actual or
15 constructive knowledge that crediting the interest in the financial
16 product to the account constitutes a breach of a security agreement
17 that provides for a security interest in any investment entitlement
18 or financial product.

19 **52 Taking personal property free of temporarily perfected security**
20 **interest**

21 *Main rule*

- 22 (1) A buyer or lessee, for new value, of the proceeds of personal
23 property, or of goods or a negotiable document of title, takes the
24 proceeds, goods or document free of a security interest that is
25 temporarily perfected by force of this Act (other than section 322)
26 immediately before the time of the sale or lease, if the security
27 interest is not otherwise perfected at that time.

28 Note: Section 322 provides temporary perfection for certain transitional
29 security interests.

1 *Exception*

2 (2) Subsection (1) does not apply if the buyer or lessee has actual
3 knowledge that the sale or lease constitutes a breach of the security
4 agreement that provides for the security interest at:

5 (a) the time new value is first given for the sale or lease, if the
6 personal property is bought or leased with the intention of
7 using it predominantly for personal, domestic or household
8 purposes; or

9 (b) in any other case—the time of sale or of entry into agreement
10 for the lease.

11 **53 Rights of secured party and transferee on taking personal**
12 **property free of security interest**

13 *Scope*

14 (1) This section applies if:

15 (a) a person (the *transferee*) acquires personal property from
16 another person (the *transferor*); and

17 (b) as a result, the transferee takes the personal property, or an
18 accession to the property, free of a secured party's security
19 interest because of the operation of this Part.

20 *Rights of secured party*

21 (2) The rights of the secured party are subrogated, in relation to the
22 property, to the rights (if any) of the transferor and any predecessor
23 of the transferor (including the right to receive any part of the
24 purchase price for the property which has not been paid).

25 *Rights of transferee*

26 (3) If a person who is liable to pay the purchase price of personal
27 property makes a payment before receiving notice of a secured
28 party's right under subsection (2), the payment discharges the
29 obligation of the person to the extent of the payment.

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Part 2.6—Priority between security interests

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Division 1—Introduction

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54 Guide to this Part

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This Part deals with how to work out the priority between competing security interests in collateral (and in some cases, other kinds of interests).

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Priority rules are relevant when the same personal property is subject to 2 or more security interests. If the debtor defaults, the rules determine the order of priority in which the various secured parties can enforce their security interests under Chapter 4.

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Division 2 sets out the default rules that apply if this Act provides no other way of determining that priority.

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Unless otherwise provided:

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(a) perfected interests have priority over unperfected interests; and

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(b) priority between perfected interests amongst themselves, and unperfected interests amongst themselves, is determined on a first-in-time basis.

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The Division contains other rules of general application (such as the priority that applies to the proceeds of collateral). Security interests perfected by control have the highest priority.

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Division 3 deals with the priority rules that apply when one of the security interests is a perfected purchase money security interest. These interests are exceptions to the first-in-time rule (except for certain security interests in an account dealt with in section 64). A perfected purchase money security interest that is granted to a

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seller, lessor or consignor takes priority over a perfected purchase money security interest that is granted to others.

Division 4 deals with priority of security interests in transferred collateral where a transferor and a transferee have both granted security interests in the transferred collateral. Provided the transferor-granted security interest has remained perfected, that security interest will take priority.

Division 5 deals with the priority of certain creditors who have their debts repaid. The priority of those who purchase negotiable instruments, chattel paper and negotiable documents of title is also dealt with. Generally, the purchaser's interest will take priority over a security interest in the negotiable instrument, chattel paper or negotiable document of title.

Division 6 deals with priority between other kinds of interests (such as interests that arise under law, interests of execution creditors and security interests held by ADIs).

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2 **Division 2—Priority of security interests generally**

3 **55 Default priority rules**

4 (1) This section sets out the priority between security interests in the
5 same collateral if this Act provides no other way of determining
6 that priority.

7 Note: For other rules about priorities, see the following:
8 (a) the remaining provisions of this Part;
9 (b) Chapter 3 (agricultural interests, accessions and commingling);
10 (c) Part 9.4 (transitional application of this Act).

11 *Priority between unperfected security interests*

12 (2) Priority between unperfected security interests in the same
13 collateral is to be determined by the order of attachment of the
14 security interests.

15 *Perfected security interest has priority over unperfected security*
16 *interest*

17 (3) A perfected security interest in collateral has priority over an
18 unperfected security interest in the same collateral.

19 *Priority for perfection in other ways*

20 (4) Priority between 2 or more security interests in collateral that are
21 currently perfected is to be determined by the order in which the
22 priority time (see subsection (5)) for each security interest occurs.

23 (5) For the purposes of subsection (4), the **priority time** for a security
24 interest in collateral is, subject to subsection (6), the earliest of the
25 following times to occur in relation to the security interest:

- 26 (a) the registration time for the collateral;
27 (b) the time the secured party, or another person on behalf of the
28 secured party, first takes possession of the collateral;
29 (c) the time the security interest is temporarily perfected, or
30 otherwise perfected, by force of this Act.

1 (6) A time is a **priority time** for a security interest only if, once the
2 security interest is perfected at or after that time, the security
3 interest remains continuously perfected.

4 Note: A security interest in the proceeds of original collateral has the same
5 default priority as the security interest in the original collateral (see
6 subsection 33(5)).

7 **56 How a security interest is continuously perfected**

8 (1) For the purposes of this Act, a security interest is **continuously**
9 **perfected** after a particular time if the security interest is, after that
10 time, perfected under this Act at all times.

11 (2) A security interest may be continuously perfected after a particular
12 time even if, after that time, it is perfected in 2 or more different
13 ways:

14 (a) at any particular time; or

15 (b) at different times.

16 Examples: A security interest could be perfected in 2 or more different ways as
17 follows:

18 (a) by possession and by a registration;

19 (b) by 2 different registrations.

20 **57 Priority of security interests perfected by control**

21 *Priority interests*

22 (1) A security interest in collateral that is currently perfected by
23 control has priority over a security interest in the same collateral
24 that is currently perfected by another means.

25 Note: Only security interests in certain kinds of property can be perfected by
26 control (see paragraph 21(2)(c) and Part 2.3).

27 (2) Priority between 2 or more security interests in collateral that are
28 currently perfected by control is to be determined by the order in
29 which the interests were perfected by control (where the perfection
30 by control has been continuous).

Section 58

1 *Control priority takes precedence over any other priority rule*

2 (3) This section applies despite the application of any other provision
3 of this Part.

4 **58 Priority of advances**

5 A security interest provided for by a security agreement has the
6 same priority in respect of all advances (including future
7 advances), and the performance of all obligations, secured by the
8 agreement.

9 Note: This section is subject to section 68 (transfer of collateral that is not
10 registered with a serial number).

11 **59 Priority rules and intervening security interests**

12 A security interest (the *first security interest*) has priority over
13 another security interest (the *last security interest*) if, by the
14 operation of this Act (including this section):

- 15 (a) the first security interest has priority over security interests of
16 a particular kind (the *intermediate security interests*); and
17 (b) the intermediate security interests have priority over the last
18 security interest.

19 **60 Transfer of security interests does not affect priority**

20 If a security interest in collateral is transferred, the transferred
21 interest has the same priority immediately after the transfer as it
22 had immediately before the transfer.

23 Note: Division 4 deals with transfer of collateral.

24 **61 Voluntary subordination of security interests**

25 (1) A secured party may (in a security agreement or otherwise)
26 subordinate the secured party's security interest in collateral to any
27 other interest in the collateral.

28 (2) An agreement to subordinate a security interest:

- 29 (a) is effective according to its terms between the parties; and

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(b) may be enforced by a third party if the third party is the person, or one of a class of persons, for whose benefit the agreement is intended.

Section 62

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2 **Division 3—Priority of purchase money security interests**

3 **62 When purchase money security interests take priority over other**
4 **security interests**

5 *Scope*

6 (1) This section sets out when a perfected purchase money security
7 interest that is granted by a grantor in collateral or its proceeds has
8 priority over a perfected security interest that is granted by the
9 same grantor in the same collateral, but that is not a purchase
10 money security interest.

11 Note: This section is subject to section 57 (perfection by control).

12 *Inventory*

13 (2) The purchase money security interest has priority if:
14 (a) the purchase money security interest is in inventory or its
15 proceeds; and
16 (b) the purchase money security interest is perfected by
17 registration at the time:
18 (i) for inventory that is goods—the grantor, or another
19 person at the request of the grantor, obtains possession
20 of the inventory; or
21 (ii) for any other kind of inventory—the purchase money
22 security interest attaches to the inventory; and
23 (c) the registration that perfects the purchase money security
24 interest states, in accordance with item 7 of the table in
25 section 153, that the interest is a purchase money security
26 interest.

27 Note: This subsection is subject to sections 64 (non-purchase money security
28 interest in accounts) and 71 (chattel paper).

29 *Personal property other than inventory*

30 (3) The purchase money security interest has priority if:
31 (a) the interest is in personal property, or its proceeds, other than
32 inventory; and

- 1 (b) the purchase money security interest is perfected by
2 registration before the end of 10 business days after
3 whichever of the following days applies:
4 (i) for goods—the day the grantor, or another person at the
5 request of the grantor, obtains possession of the
6 property;
7 (ii) for any other property—the day the interest attaches to
8 the property; and
9 (c) the registration that perfects the purchase money security
10 interest states, in accordance with item 7 of the table in
11 section 153, that the interest is a purchase money security
12 interest.

13 Note: The period mentioned in paragraph (b) may be extended by a court
14 under section 293.

15 **63 Priority between competing purchase money security interests in**
16 **collateral**

17 A perfected purchase money security interest (the *priority interest*)
18 that is granted by a grantor in collateral or its proceeds to a seller,
19 lessor or consignor of the collateral has priority over any other
20 perfected purchase money security interest that is granted by the
21 same grantor in the same collateral if the priority interest is
22 perfected:

- 23 (a) if the collateral is inventory that is goods—at the time the
24 grantor, or another person at the request of the grantor,
25 obtains possession of the collateral; or
26 (b) if the collateral is inventory and is not goods—at the time the
27 priority interest attaches to the collateral; or
28 (c) if the collateral is not inventory, and is goods—before the
29 end of 10 business days after the day the grantor, or another
30 person at the request of the grantor, obtains possession of the
31 collateral; or
32 (d) if the collateral is not inventory, and is not goods—before the
33 end of 10 business days after the day the priority interest
34 attaches to the collateral.

35 Note 1: This section is subject to section 57 (perfection by control).

36 Note 2: The periods mentioned in paragraphs (c) and (d) may be extended by a
37 court under section 293.

Section 64

1 **64 Non-purchase money security interests in accounts**

2 *Non-purchase money security interest in account as original*
3 *collateral has priority over purchase money security interest in*
4 *account as proceeds of inventory*

- 5 (1) Despite subsection 62(2), a non-purchase money security interest
6 (the ***priority interest***) granted for new value in an account as
7 original collateral and perfected by registration has priority over a
8 perfected purchase money security interest that is granted by the
9 same grantor in the account as proceeds of inventory, if:
- 10 (a) the registration time in respect of the priority interest occurs
11 before the earlier of the following times:
 - 12 (i) the time at which the purchase money security interest
13 is perfected;
 - 14 (ii) the registration time in respect of the purchase money
15 security interest; or
 - 16 (b) both of the following conditions are met:
 - 17 (i) the secured party holding the priority interest gives a
18 notice in accordance with subsection (2) to each secured
19 party holding a purchase money security interest in the
20 account in respect of which a registration is effective at
21 the time the priority interest is perfected by registration;
 - 22 (ii) the notice is given at least 5 business days before the
23 earlier of the day on which the registration time for the
24 account occurs and the day the priority interest attaches
25 to the account.

26 Note 1: This section is subject to sections 57 (perfection by control) and 71
27 (chatel paper).

28 Note 2: The period mentioned in paragraph (b) may be extended by a court
29 under section 293.

- 30 (2) A notice is given in accordance with this subsection if:
- 31 (a) the notice is in the approved form; or
 - 32 (b) the notice:
 - 33 (i) contains a description of the inventory to which the
34 notice relates; and
 - 35 (ii) sets out the effect of subsection (1).

1 *Perfected purchase money security interest in both proceeds and*
2 *new value*

3 (3) If a person has a purchase money security interest in an account as
4 proceeds of inventory that is subordinate to a non-purchase money
5 security interest under subsection (1):

6 (a) the person is taken to have a purchase money security interest
7 in both the proceeds of the inventory and in the new value
8 mentioned in subsection (1); and

9 (b) the purchase money security interest in the new value is
10 taken to be perfected by the registration that perfected the
11 purchase money security interest in the proceeds.

12 **65 Possession of goods shipped by a common carrier**

13 For the purposes of this Division, if goods are shipped by common
14 carrier to a grantor, or to a person designated by the grantor, the
15 grantor does not obtain possession of the goods until the grantor, or
16 a third party at the request of the grantor, obtains actual possession
17 of the goods or a document of title to the goods, whichever is
18 earlier.

Section 66

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2 **Division 4—Priority of security interests in transferred**
3 **collateral**

4 **66 Application of this Division**

- 5 (1) This Division sets out the priority between 2 security interests (a
6 transferor-granted interest and a transferee-granted interest) if:
7 (a) a grantor transfers collateral (the *transferred collateral*) to a
8 transferee; and
9 (b) immediately before the transfer, a security interest (the
10 *transferor-granted interest*) is attached to the collateral; and
11 (c) the transferee grants (whether before or after the transfer) a
12 security interest (the *transferee-granted interest*) in the
13 transferred collateral; and
14 (d) neither the transferor-granted interest nor the
15 transferee-granted interest is currently perfected by control.

16 Note 1: If either or both of the interests are currently perfected by control
17 under paragraph 21(2)(c), section 57 applies.

18 Note 2: If the priority between a transferor-granted interest and a
19 transferee-granted interest is not covered by this section, then
20 section 55 applies.

21 Note 3: For attachment and perfection in relation to transferred collateral, see
22 section 34.

23 Note 4: For a grantor's rights in relation to transferring collateral, see
24 section 79.

- 25 (2) This Division does not prevent a secured party from perfecting a
26 security interest in any way in order to have priority over another
27 security interest.

28 **67 Priority when transferor-granted interest has been continuously**
29 **perfected**

30 The transferor-granted interest has priority if:

- 31 (a) it was perfected immediately before the transfer; and
32 (b) it has been continuously perfected since the transfer.

1 **68 Priority when there is a break in the perfection of the**
2 **transferor-granted interest**

3 (1) The transferor-granted interest in the transferred collateral has
4 priority (except as mentioned in subsection (2)) if:

- 5 (a) the transferred collateral is not registered with a serial
6 number (see subsection (4)); and
7 (b) the interest was perfected by registration immediately before
8 the transfer; and
9 (c) the interest becomes unperfected; and

10 Note: See subsection 34(3) for one situation in which a security interest
11 may become unperfected following a transfer of collateral.

- 12 (d) the interest is later re-perfected; and
13 (e) a notice is given (whether before or after the interest is
14 re-perfected as mentioned in paragraph (d)) to all other
15 secured parties who have a registration that describes the
16 transferred collateral; and
17 (f) the notice is given in accordance with subsection (5); and
18 (g) the interest has been continuously perfected since it was
19 re-perfected as mentioned in paragraph (d).

20 (2) However, the transferee-granted interest has priority if:

- 21 (a) subsection (1) applies in relation to the transferor-granted
22 interest; and
23 (b) the transferee-granted interest is perfected immediately
24 before the transferor-granted security is re-perfected as
25 mentioned in paragraph (1)(d); and
26 (c) the transferee acquires the transferee-granted interest without
27 actual or constructive knowledge that the acquisition
28 constitutes a breach of the security agreement that provides
29 for the transferor-granted interest; and
30 (d) the transferee-granted interest secures performance of an
31 advance made, or an obligation incurred, by the transferee's
32 secured party before:
33 (i) the transferor-granted interest is re-perfected as
34 mentioned in paragraph (1)(d); and
35 (ii) the notice is given under paragraph (1)(e);
36 but only to the extent of the advance or obligation.

Chapter 2 General rules relating to security interests

Part 2.6 Priority between security interests

Division 4 Priority of security interests in transferred collateral

Section 68

- 1 (3) Subsection (2) applies despite section 58 (priority of advances).
- 2 (4) For the purposes of this section, the transferred collateral is
3 registered with a serial number at a particular time only if a search
4 of the register by reference to that time and by reference only to the
5 serial number of the collateral is capable of disclosing the
6 registration.
- 7 (5) A notice is given in accordance with this subsection if:
8 (a) the notice is in the approved form; or
9 (b) the notice:
10 (i) states that the secured party expects to perfect a security
11 interest in the transferred collateral; and
12 (ii) contains a description of the transferred collateral; and
13 (iii) sets out the effect of subsections (1) and (2).

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2 **Division 5—Priority of creditors, and purchasers of**
3 **negotiable instruments, chattel paper and**
4 **negotiable documents of title**

5 **69 Priority of creditor who receives payment of debt**

- 6 (1) The interest of a creditor who receives payment of a debt owing by
7 a debtor through a payment covered by subsection (3) has priority
8 over a security interest (whether perfected or unperfected) in:
9 (a) the funds paid; and
10 (b) the intangible that was the source of the payment; and
11 (c) a negotiable instrument used to effect the payment.

12 Example: A bank account from which the funds were paid is an example of an
13 intangible that was the source of the payment.

- 14 (2) Subsection (1) does not apply if, at the time of the payment, the
15 creditor had actual knowledge that the payment was made in
16 breach of the security agreement that provides for the security
17 interest.
- 18 (3) Payments made by a debtor are covered by this subsection if they
19 are made through the use of:
20 (a) an electronic funds transfer; or
21 (b) a debit, transfer order, authorisation, or similar written
22 payment mechanism executed by the debtor when the
23 payment was made; or
24 (c) a negotiable instrument.

25 **70 Priority of person who acquires a negotiable instrument or an**
26 **interest in a negotiable instrument**

- 27 (1) This section applies if, by a consensual transaction, a person
28 acquires an interest consisting of:
29 (a) a negotiable instrument; or
30 (b) an interest in a negotiable instrument.

Chapter 2 General rules relating to security interests

Part 2.6 Priority between security interests

Division 5 Priority of creditors, and purchasers of negotiable instruments, chattel paper and negotiable documents of title

Section 71

- 1 (2) The interest of the person in the negotiable instrument has priority
2 over a perfected security interest in the negotiable instrument if:
3 (a) the person gave value for the interest; and
4 (b) the person:
5 (i) in the case of a person who acquired the interest in the
6 ordinary course of the person's business of acquiring
7 interests of that kind—acquired the interest without
8 actual or constructive knowledge that the acquisition
9 constitutes a breach of the security agreement that
10 provides for the security interest; or
11 (ii) otherwise—acquired the interest without actual or
12 constructive knowledge of the security interest; and
13 (c) the person took possession or control of the negotiable
14 instrument.

15 **71 Priority of person who acquires chattel paper or an interest in**
16 **chattel paper**

- 17 (1) This section applies if:
18 (a) a person acquires an interest consisting of:
19 (i) chattel paper; or
20 (ii) an interest in chattel paper; and
21 (b) the interest is acquired:
22 (i) by a consensual transaction; and
23 (ii) in the ordinary course of the person's business of
24 acquiring interests of that kind; and
25 (iii) for new value.
26 Note: For rights relating to the assignment of chattel paper, see section 80.
- 27 (2) The interest of the person in the chattel paper has priority over the
28 following security interests in the chattel paper:
29 (a) if the person took possession of the chattel paper without
30 actual or constructive knowledge of a perfected security
31 interest in the chattel paper—the perfected security interest;
32 (b) in any case—a security interest that has attached to proceeds
33 of inventory as original collateral.
- 34 (3) This section applies despite sections 62 and 64.

72 Priority of holder of negotiable document of title

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The interest of a holder of a negotiable document of title has priority over a perfected security interest in the document of title if:

- (a) the holder gave value for the document of title; and
- (b) the holder:
 - (i) in the case of a holder who acquired the document of title in the ordinary course of the holder's business of acquiring documents of title of that kind—acquired the interest without actual or constructive knowledge that the acquisition constitutes a breach of the security agreement that provides for the security interest; or
 - (ii) otherwise—acquired the negotiable instrument without actual or constructive knowledge of the security interest.

Section 73

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2 **Division 6—Priority of other interests**

3 **73 Priority between security interests and declared statutory**
4 **interests**

5 *Interests arising under a law etc. in the ordinary course of business*

- 6 (1) An interest (the **priority interest**) in collateral has priority over a
7 security interest in the collateral if:
8 (a) the priority interest arises (by being created, arising or being
9 provided for):
10 (i) under a law of the Commonwealth, a State or a
11 Territory, unless the person who owns the collateral in
12 which the priority interest is granted agrees to the
13 interest; or
14 (ii) by operation of the general law; and
15 (b) the priority interest arises in relation to providing goods or
16 services in the ordinary course of business; and
17 (c) the person who holds the priority interest provided those
18 goods or services; and
19 (d) no law of the Commonwealth, a State or a Territory provides
20 for the priority between the priority interest and the security
21 interest; and

22 Example: A law of the Commonwealth, a State or a Territory to which
23 subsection (2) applies is a law that provides for the priority
24 between the priority interest and the security interest.

- 25 (e) the person who holds the priority interest acquired the
26 interest without actual knowledge that the acquisition
27 constitutes a breach of the security agreement that provides
28 for the security interest.

29 Note: The priority interest might be an interest to which this Act would
30 otherwise not apply (see subsection 8(2)).

31 *Statutory interests declared by law*

- 32 (2) The priority between an interest in collateral (the **statutory**
33 **interest**) that arises, by being created, arising or being provided for,
34 under a law of the Commonwealth, a State or a Territory (the

1 *relevant jurisdiction*) and a security interest in the same collateral
2 is to be determined in accordance with that law if, and only if:

- 3 (a) that law declares that this subsection applies to statutory
4 interests of that kind; and
5 (b) the statutory interest arises after the declaration comes into
6 effect.

7 Note: The statutory interest might be an interest to which this Act would
8 otherwise not apply (see subsection 8(2)).

9 (3) However, for the purposes of subsection (2), as it applies to a law
10 of the Commonwealth:

- 11 (a) the Minister may, by an instrument made under
12 subsection (4), make the declaration required by
13 paragraph (2)(a); and
14 (b) the priority mentioned in subsection (2) may be determined
15 in accordance with that instrument.

16 (4) The Minister may make a legislative instrument containing a
17 declaration, or determining priority, or both, for the purposes of
18 subsection (3).

19 (5) Subsection (2) is subject to subsection (1).

20 *Rights to payment in connection with specifically identified land*

21 (6) An interest (the *priority interest*) in collateral has priority over a
22 security interest in the collateral if the priority interest is an interest
23 of a kind mentioned in subparagraph 8(1)(f)(ii) (certain rights to
24 payment in respect of land).

25 Note: This section does not apply to priorities in relation to interests that
26 arise before the registration commencement time (within the meaning
27 of section 306). Priorities in relation to such interests are unaffected
28 by this Act (see section 312).

29 **74 Execution creditor has priority over unperfected security interest**

30 (1) The interest of an execution creditor in collateral has priority over
31 any security interest in the same collateral that is not perfected at
32 the time covered by subsection (4) (even if such a security interest
33 is later perfected).

Section 75

1 (2) To avoid doubt, an execution creditor does not include a landlord
2 who exercises a right of distress.

3 (3) This section applies despite any other section in this Part.

4 *Time of seizure or execution*

5 (4) This subsection covers the following times:

6 (a) if the collateral is seized by the execution creditor or by
7 another person on behalf of the execution creditor—the time
8 of seizure;

9 (b) in any other case—the time when:

10 (i) an order is made by a court in respect of a judgment in
11 relation to the execution creditor; or

12 (ii) a garnishee order is made in relation to the execution
13 creditor.

14 **75 Priority of security interests held by ADIs**

15 A perfected security interest, held by an ADI, in an ADI account
16 with the ADI has priority over any other perfected security interest
17 in the ADI account, other than a security interest that is perfected
18 by control in accordance with subparagraph 25(1)(a)(ii).

19 Note 1: A security interest that is held by an ADI in an ADI account is
20 perfected by control (see subparagraph 25(1)(a)(i)).

21 Note 2: This provision does not affect any right of set-off the grantor might
22 have in relation to the account (see paragraph 8(1)(d)).

23 **76 Priority of security interests in returned goods**

24 *Security interest held by account transferee*

25 (1) A perfected security interest in goods that has reattached to the
26 property under subsection 37(1) has priority over a security interest
27 in the goods that is granted by the operation of subsection 38(1) to
28 a transferee of an account.

29 Note: Section 37 deals with security interests that reattach when goods are
30 returned. Section 38 provides for a security interest in an account or
31 chattel paper to arise automatically when goods are returned.

- 1 (2) A security interest in goods that is granted by the operation of
2 subsection 38(2) to a transferee of chattel paper has priority over
3 the following perfected security interests:
4 (a) a perfected security interest in the goods that is granted by
5 the operation of subsection 38(2) to a transferee of an
6 account;
7 (b) if the transferee takes possession of the chattel paper in the
8 ordinary course of business of acquiring chattel paper of that
9 kind and for new value:
10 (i) a perfected security interest in the goods that has
11 reattached under subsection 37(1); or
12 (ii) a perfected security interest in the goods as
13 after-acquired property that attaches when the goods
14 come into the possession of the grantor or transferee in
15 the circumstances mentioned in paragraph 37(1)(d).

16 *Security interest granted by buyer or lessee*

- 17 (3) A security interest (the **priority interest**) in goods that is granted by
18 a person who acquires an interest in the property has priority over a
19 security interest in the goods that reattaches under section 37, or is
20 granted by the operation of section 38, if:
21 (a) the priority interest attaches while the goods are in the
22 possession of the person; and
23 (b) immediately before the repossession time (referred to in
24 paragraph 37(1)(d) or 38(1)(d)), the priority interest is
25 perfected.

26 **77 Priority of certain security interests if there is no foreign register**

27 *Scope*

- 28 (1) This section applies to a security interest (the **priority interest**) in
29 an account or financial property if the law of the jurisdiction that
30 governs the perfection, and the effect of perfection or
31 non-perfection, of the priority interest does not provide for the
32 public registration or recording of the priority interest, or a notice
33 relating to the priority interest.

34 Note: For when laws of other jurisdictions govern a security interest, see
35 Part 7.2.

Section 77

1 *Security interests in accounts*

- 2 (2) A priority interest in an account has priority, in proceedings in an
3 Australian court, over another interest in the account (whether or
4 not the other interest is a security interest) if the priority interest is
5 perfected by registration under this Act before the other interest
6 attaches to the account.

7 *Security interests in financial property*

- 8 (3) A priority interest in financial property has priority, in proceedings
9 in an Australian court, over another interest in the financial
10 property (whether or not the other interest is a security interest) if:
11 (a) the priority interest is perfected by registration under this Act
12 before the other interest attaches to the property; and
13 (b) when the other interest arises in the property:
14 (i) the property is located in Australia; and
15 (ii) the secured party does not have possession or control of
16 the property.

17 Note: For when personal property is located in a jurisdiction, see
18 section 235.

19 *Relationship with sections 239 and 240*

- 20 (4) Subsections (2) and (3) apply in proceedings in an Australian court
21 even if the law of another jurisdiction applies in the proceedings in
22 relation to a security interest in an account or financial property
23 under subsection 239(2) or 240(3).

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Part 2.7—Transfer and assignment of interest in collateral

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78 Guide to this Part

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This Part deals with the transfer and assignment of interests in collateral.

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Collateral may be transferred despite a contrary provision in a security agreement (or a provision declaring the transfer to be a default), if the grantor and transferee consent, or by the operation of law.

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The rights of a transferee of an account or chattel paper are subject to the contract between the account debtor and the transferor, and certain general law claims the account debtor may have against the transferor.

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A modification of the contract (or a substituted contract) between the account debtor and the transferor is effective against the transferee except in certain situations (dishonesty, commercial unreasonableness or adverse effects on the transferee's rights or the transferor's ability to perform the contract).

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A term in a contract between an account debtor and a transferor that imposes certain restrictions on the transfer of an account or chattel paper binds the transferor to the extent of making the transferor liable in damages for breach of contract, but is unenforceable against third parties.

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79 Transfer of collateral despite prohibition in security agreement

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- (1) If collateral would be able to be transferred (including by sale, by creating a security interest or under proceedings to enforce a judgment) but for a provision in an agreement (whether or not a security agreement) prohibiting the transfer or declaring the

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Section 80

1 transfer to be a default, the collateral may be transferred, despite
2 the provision:

- 3 (a) by consent between the grantor and the transferee; or
4 (b) by operation of law.

5 Note: See section 32 in relation to security interests in proceeds that arise as
6 a result of a transfer.

- 7 (2) A transfer mentioned in subsection (1) does not prejudice the rights
8 of the secured party under the security agreement or otherwise,
9 including the right to treat a prohibited transfer as an act of default.

10 **80 Rights on transfer of account or chattel paper—rights of**
11 **transferee and account debtor**

12 *Rights of transferee subject to contractual terms and defences*

13 (1) The rights of a transferee of an account or chattel paper (including
14 a secured party or a receiver) are subject to:

- 15 (a) the terms of the contract between the account debtor and the
16 transferor, and any equity, defence, remedy or claim arising
17 in relation to the contract (including a defence by way of a
18 right of set-off); and
19 (b) any other equity, defence, remedy or claim of the account
20 debtor against the transferor (including a defence by way of a
21 right of set-off) that accrues before the first time when
22 payment by an account debtor to the transferor no longer
23 discharges the obligation of the account debtor under
24 subsection (8) to the extent of the payment.

25 (2) Subsection (1) does not apply if the account debtor makes an
26 enforceable agreement not to assert defences to claims arising out
27 of the contract.

28 *Effect of modification or substitution of contract on transferee*

29 (3) Unless the account debtor has otherwise agreed, a modification of,
30 or substitution for, the contract between the account debtor and the
31 transferor is effective against the transferee (including a secured
32 party or a receiver) if:

- 1 (a) the account debtor and the transferor have acted honestly in
2 modifying or substituting the contract; and
3 (b) the manner in which the modification or the substitution is
4 made is commercially reasonable; and
5 (c) the modification or substitution does not have a material
6 adverse effect on:
7 (i) the transferee's rights under the contract; or
8 (ii) the transferor's ability to perform the contract.

9 Note: For the meaning of *modification*, see section 10.

- 10 (4) Subsection (3) applies:
11 (a) to the extent that a transferred right to payment arising out of
12 the contract has not been fully earned by performance; and
13 (b) even if there has been notice of the transfer to the account
14 debtor.
15 (5) If a contract has been modified or substituted in the manner
16 described in subsection (3), the transferee obtains rights that
17 correspond to the rights of the transferor under the contract as
18 modified or substituted.
19 (6) Nothing in subsections (3) to (5) affects the validity of a term in a
20 transfer agreement that provides that a modification or substitution
21 mentioned in subsection (3) is a breach of contract by the
22 transferor.

23 *Payment by account debtor after transfer*

- 24 (7) If collateral that is an account or chattel paper is transferred, the
25 account debtor may continue to make payments under the contract
26 to the transferor:
27 (a) until the account debtor receives a notice that:
28 (i) states that the amount payable or to become payable
29 under the contract has been transferred; and
30 (ii) states that payment is to be made to the transferee; and
31 (iii) identifies the contract (whether specifically or by class)
32 under which the amount payable is to become payable;
33 or

Section 81

- 1 (b) after receiving a notice under paragraph (a) (other than a
2 notice from the transferor), if:
3 (i) the account debtor requests the transferee to provide
4 proof of the transfer; and
5 (ii) the transferee fails to provide proof before the end of 5
6 business days after the day of the request.
- 7 (8) Payment by an account debtor to a transferee in accordance with a
8 notice under paragraph (7)(a) (including in the circumstances
9 described in paragraph (7)(b)) discharges the obligation of the
10 account debtor to the extent of the payment.

11 **81 Rights on transfer of account or chattel paper—contractual**
12 **restrictions and prohibitions on transfer**

13 *Scope*

- 14 (1) This section applies to a term in a contract if:
15 (a) the contract is between an account debtor and a transferor;
16 and
17 (b) the term restricts or prohibits transfer of any of the following
18 for currency due or to become due:
19 (i) the whole of an account that is the proceeds of
20 inventory;
21 (ii) the whole of an account that arises from granting a right
22 (other than a right granted under a construction
23 contract), or providing services (other than financial
24 services), in the ordinary course of a business of
25 granting rights or providing services of that kind
26 (whether or not the account debtor is the person to
27 whom the right is granted or the services are provided);
28 (iii) the whole of an account that is the proceeds of an
29 account mentioned in subparagraph (ii);
30 (iv) chattel paper.

31 *Statutory restriction on contracts*

- 32 (2) The term in the contract:
33 (a) is binding on the transferor, but only to the extent of making
34 the transferor liable in damages for breach of contract; and

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(b) is unenforceable against third parties.

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Chapter 3—Specific rules for certain security interests

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Part 3.1—Guide to this Chapter

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82 Guide to this Chapter

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This Chapter contains specific rules for certain security interests.

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Part 3.2 contains some specific rules relating to agricultural interests (such as security interests in crops and livestock).

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Part 3.3 deals with security interests in accessions to personal property.

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Part 3.4 deals with security interests in personal property that loses its identity by being processed or commingled.

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Part 3.5 deals with security interests in intellectual property.

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Part 3.2—Agricultural interests

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83 Guide to this Part

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This Part includes rules on 2 topics:

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(a) the relationship between a security interest in crops and interests in the land on which the crops are growing;

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(b) rules giving priority to security interests in crops granted to enable the crops to be produced, and security interests in livestock granted to enable the livestock to be fed and developed.

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84 Relationship between security interest in crops and interest in land

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Effect of security interest in crops on lessor or mortgagee of land

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(1) A security interest in crops does not prejudicially affect the rights of a lessor or mortgagee of land on which the crops are growing if:

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(a) those rights existed at the time the security interest was created; and

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(b) the lessor or mortgagee has not consented in writing to the creation of the security interest.

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Effect of sale etc. of land on perfected security interest in crops

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(2) Subject to subsection (1), a perfected security interest in crops is not prejudicially affected by a subsequent sale, lease or mortgage of, or other encumbrance on, the land on which the crops are growing.

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Section 85

1 **85 Priority of crops**

2 A perfected security interest (the *priority interest*) in crops has
3 priority over any other security interest in crops that is granted by
4 the same grantor in the same crops if:

- 5 (a) the priority interest is granted for value; and
6 (b) the priority interest is granted to enable the crops to be
7 produced; and
8 (c) either:
9 (i) the security agreement providing for the priority interest
10 is made while the crops are growing; or
11 (ii) the crops are planted during the period of 6 months after
12 the day the security agreement providing for the priority
13 interest is made.

14 **86 Priority of livestock**

15 A perfected security interest (the *priority interest*) that is granted
16 by a grantor in livestock has priority over any other security
17 interest (other than a purchase money security interest) that is
18 granted by the same grantor in the same livestock if:

- 19 (a) the priority interest is granted for value; and
20 (b) the priority interest is granted to enable the livestock to be
21 fed or developed; and
22 (c) either:
23 (i) the livestock are held by the grantor at the time the
24 security agreement providing for the priority interest is
25 made; or
26 (ii) the livestock are acquired by the grantor during the
27 period of 6 months after the day the security agreement
28 providing for the priority interest is made.

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Part 3.3—Accessions

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87 Guide to this Part

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This Part deals with security interests in accessions to personal property.

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A security interest in goods that become an accession to other goods continues in the accession.

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The Part sets out the priority between an interest (whether or not a security interest) in an accession and the goods to which the accession is affixed.

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A security interest arising in an accession before it is affixed to goods has priority over a security interest in the goods as a whole. However, there are exceptions relating to interests in the whole created after the accession is affixed and before the security interest in the accession is perfected.

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A security interest arising in an accession after it is affixed will ordinarily be subordinate to an existing interest in the other goods (unless, for example, the holder of the existing interest agrees otherwise) and to a later interest in the other goods that arises before the interest in the accession is perfected.

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The Part also deals with the removal of accessions by a secured party who has an interest in the accession.

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88 Continuation of security interests in accessions

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A security interest in goods that become an accession to other goods continues in the accession.

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Note: However, a person might take an interest in the accession free of the security interest because of another provision of this Act.

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Section 89

1 **89 Default rule—interest in accession has priority**

2 Except as otherwise provided in this Act, a security interest in
3 goods that is attached at the time when the goods become an
4 accession has priority over a claim to the goods as an accession
5 made by a person with an interest in the whole.

6 **90 Priority interest in whole—before security interest in accession is
7 perfected**

8 The interest of any of the following persons has priority over a
9 security interest in goods that is attached at the time when the
10 goods become an accession:

- 11 (a) a person who acquires for value an interest in the whole after
12 the goods become an accession, but before the security
13 interest in the accession is perfected;
- 14 (b) an assignee for value of a person with an interest in the whole
15 at the time when the goods become an accession, but before
16 the security interest in the accession is perfected;
- 17 (c) a person with a perfected security interest in the whole who
18 makes an advance under the security agreement relating to
19 the security interest after the goods become an accession, but
20 before the security interest in the accession is perfected, and
21 only to the extent of the advance;
- 22 (d) a person with a perfected security interest in the whole who
23 acquires the right to retain the whole in satisfaction of the
24 obligation secured after the goods become an accession, but
25 before the security interest in the accession is perfected.

26 **91 Priority interest in whole—security interest in accession attaches
27 after goods become accession**

28 A security interest in goods that attaches after the goods become an
29 accession is subordinate to the interest of:

- 30 (a) a person who has an interest in the other goods at the time
31 when the goods become an accession and who:
- 32 (i) has not consented to the security interest in the
33 accession; and
- 34 (ii) has not disclaimed an interest in the accession; and

- 1 (iii) has not entered into an agreement under which another
2 person is entitled to remove the accession; and
3 (iv) is otherwise entitled to prevent the grantor from
4 removing the accession; or
5 (b) a person who acquires an interest in the whole after the goods
6 become an accession, but before the security interest in the
7 accession is perfected.

8 **92 Secured party must not damage goods when removing accession**

9 A secured party who is entitled to remove an accession under
10 section 123 (seizure of collateral) must remove the accession from
11 the whole in a manner that causes no greater damage to the other
12 goods, or that puts the person in possession of the whole to no
13 greater inconvenience, than is necessarily incidental to the removal
14 of the accession.

15 **93 Reimbursement for damage caused in removing accessions**

- 16 (1) A person, other than the grantor, who has an interest in the other
17 goods at the time the goods become an accession is entitled to
18 reimbursement for any damage to that person's interest in the other
19 goods caused by the removal of the accession.
20 (2) Any reimbursement payable under subsection (1) does not include
21 reimbursement for a reduction in the value of the property caused
22 by the absence of the accession or by the necessity of the
23 replacement of the accession.

24 **94 Refusal of permission to remove accession**

25 A person entitled to reimbursement under section 93 may refuse
26 permission to remove the accession until the secured party has
27 given adequate security for the reimbursement.

28 **95 Secured party must give notice of removal of accession**

29 *Notice required to be given by secured party*

- 30 (1) A secured party who is entitled to remove an accession from the
31 whole must give notice of the secured party's intention to remove

Section 95

- 1 the accession to each of the following persons in accordance with
2 subsections (2) and (3):
- 3 (a) the grantor;
- 4 (b) a secured party with a security interest in the accession that
5 has a higher priority.
- 6 (2) The secured party must give a notice to a person:
- 7 (a) at least 10 business days before the day the accession is
8 removed; or
- 9 (b) if the person has given a written notice to the secured party
10 specifying a smaller number of days to apply for the purposes
11 of this section—at least that number of days before the
12 accession is removed.
- 13 (3) A notice must contain the following:
- 14 (a) the name of the secured party giving the notice;
- 15 (b) a description of the accession and of the other goods;
- 16 (c) a statement of the obligation owed to the secured party, and
17 the value of the accession if the accession were removed
18 from the other goods;
- 19 (d) a statement of intention to remove the accession, unless the
20 obligation secured by the security interest in the accession is
21 discharged, or the value of the accession is paid, before the
22 end of the period to which subsection (2) applies.
- 23 (4) The notice may be given in the approved form.
- 24 *When notice is not required*
- 25 (5) The secured party is not required to give a notice to a person under
26 subsection (1) if, after the debtor defaults, the person gives written
27 consent to the secured party to remove the accession without
28 receiving a notice.
- 29 (6) The secured party is not required to give a notice to any person
30 under subsection (1) if:
- 31 (a) the secured party believes on reasonable grounds that the
32 accession will decline substantially in value if it is not
33 disposed of immediately after default; or

1 (b) the cost of expenses for the retention of the accession that are
2 secured against the accession is disproportionately large in
3 relation to its value.

4 Note: In addition, a secured party is not required to give a notice in any of
5 the circumstances set out in section 144 (when certain enforcement
6 notices are not required).

7 (7) A person is not entitled to a notice under subsection (1) in relation
8 to an accession to goods only because the person has an interest in
9 another accession to the same goods.

10 **96 When person with an interest in the whole may retain accession**

11 A person, other than the grantor, who has an interest in the whole
12 of goods that under this Act is subordinate to a security interest in
13 an accession, may retain the accession if:

14 (a) the obligation to the secured party with a security interest that
15 has priority over all other security interests in the accession is
16 performed; or

17 (b) the secured party mentioned in paragraph (a) is paid the value
18 of the accession at the time of payment, if the accession were
19 to be removed from the goods.

20 **97 Court order about removal of accession**

21 A court may, on the application of a person entitled to receive a
22 notice under section 95 (notice of removal of an accession), make
23 an order:

24 (a) postponing the removal of the accession; or

25 (b) determining the amount payable to the secured party under
26 section 96 for the retention of the accession.

27 Note: For which courts have jurisdiction, and for transfers between courts,
28 see Part 6.2.

Section 98

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Part 3.4—Processed or commingled goods

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98 Guide to this Part

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This Part deals with security interests in goods that become an unidentifiable part of a larger product or mass.

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A security interest in the original goods continues in the product or mass. The Part sets out perfection and priority rules that apply in this situation.

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99 Continuation of security interests in goods that become processed or commingled

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- (1) A security interest in goods that subsequently become part of a product or mass continues in the product or mass if the goods are so manufactured, processed, assembled or commingled that their identity is lost in the product or mass.

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Note: A person might take an interest in the product or mass free of the security interest because of the operation of another provision of this Act.

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- (2) Without limiting subsection (1), the identity of goods that are manufactured, processed, assembled or commingled is lost in a product or mass if it is not commercially practical to restore the goods to their original state.

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100 Perfection of security interest in goods that become processed or commingled applies to product or mass

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For the purposes of section 55 (default priority rules), perfection of a security interest in goods that subsequently become part of a product or mass is to be treated as perfection of the security interest in the product or the mass.

1 **101 Limit on value of priority of goods that become part of**
2 **processed or commingled goods**

3 Any priority that a security interest continuing in the product or
4 mass has over another security interest in the product or mass is
5 limited to the value of the goods on the day on which they became
6 part of the product or mass.

7 **102 Priority where more than one security interest continues in**
8 **processed or commingled goods**

- 9 (1) A perfected security interest continuing in a product or mass has
10 priority over an unperfected security interest continuing in the
11 same product or mass.
- 12 (2) If more than one perfected security interest continues in the same
13 product or mass, each perfected security interest is entitled to share
14 in the product or mass according to the ratio that the obligation
15 secured by the perfected security interest bears to the sum of the
16 obligations secured by all perfected security interests in the same
17 product or mass.
- 18 (3) If more than one unperfected security interest continues in the
19 same product or mass, each unperfected security interest is entitled
20 to share in the product or mass according to the ratio that the
21 obligation secured by the unperfected security interest bears to the
22 sum of the obligations secured by all unperfected security interests
23 in the same product or mass.
- 24 (4) For the purposes of this section, the obligation secured by a
25 security interest does not exceed the value of the goods on the day
26 on which the goods became part of the product or mass.

27 **103 Priority of purchase money security interest in processed or**
28 **commingled goods**

29 Despite section 102, a perfected purchase money security interest
30 in goods that continues in the product or mass has priority over:

- 31 (a) a non-purchase money security interest in the goods that
32 continues in the product or mass; and

Chapter 3 Specific rules for certain security interests

Part 3.4 Processed or commingled goods

Section 103

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(b) a non-purchase money security interest in the product or mass given by the same grantor.

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Part 3.5—Intellectual property

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104 Guide to this Part

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This Part includes some rules with a particular application to security interests in intellectual property and intellectual property licences.

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If the exercise of rights by a secured party in relation to goods necessarily involves the exercise of intellectual property rights covered by the security interest, this Act applies to the intellectual property rights in the same way as it applies to the goods.

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The Part also deals with a transfer of intellectual property that is the subject of a licence (or sub-licence) in which a security interest is granted. The security agreement binds the successors in title to the licensor or sub-licensor.

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105 Implied references to intellectual property rights

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Act applies to intellectual property rights etc.

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- (1) This Act applies to intellectual property rights (including rights exercisable under an intellectual property licence), in relation to goods, in the same way as it applies to the goods, if:

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- (a) the exercise by a secured party of rights in relation to the goods arising under a security agreement necessarily involves an exercise of the intellectual property rights; and

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- (b) the payment or obligation secured by the security interest is (in addition) secured by a security interest that is attached to the intellectual property rights.

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Section 106

1 *Description of goods taken to include a description of intellectual*
2 *property rights*

- 3 (2) For the purposes of this Act, if a registration perfects the security
4 interest in goods mentioned in subsection (1), the following
5 descriptions are taken to include a description of the intellectual
6 property rights concerned, or of an intellectual property licence
7 required to exercise those rights:
8 (a) a description of the goods in the security agreement;
9 (b) the registered description of the goods;
10 (c) a description of the goods included in a notice under this Act.
- 11 (3) Subsection (2) applies subject to a contrary intention in the security
12 agreement, registration or notice.

13 **106 Intellectual property licences and transfers of intellectual**
14 **property**

- 15 (1) If:
16 (a) a security interest is granted in an intellectual property
17 licence; and
18 (b) the intellectual property in which the licence is granted is
19 later transferred; and
20 (c) the licensee of the intellectual property licence continues to
21 hold the licence after the transfer;
22 the security agreement that provides for the security interest binds
23 every successor in title to the licensor of the intellectual property
24 licence to the same extent as the security agreement was binding
25 on the licensor.

- 26 (2) If:
27 (a) a security interest is granted in a sub-licence granted under an
28 intellectual property licence; and
29 (b) the intellectual property licence under which the sub-licence
30 is granted is later transferred; and
31 (c) the licensee of the sub-licence continues to hold the
32 sub-licence after the transfer;

Section 106

1 the security agreement that provides for the security interest binds
2 every successor in title to the licensor of the sub-licence to the
3 same extent as the security agreement was binding on the licensor.

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Chapter 4—Enforcement of security interests

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Part 4.1—Guide to this Chapter

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107 Guide to this Chapter

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This Chapter deals with how to enforce a security interest in personal property. Parties can contract out of some of the provisions of this Chapter.

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Security interests in liquid assets can be enforced by giving a notice to the person who owes an amount to the grantor. Other kinds of assets can be seized and disposed of under Part 4.3. A secured party can also retain or purchase the collateral.

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Proceeds arising from the disposal of collateral must be distributed in accordance with Part 4.4. That Part also contains other rules of general application in relation to the enforcement of security interests.

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Part 4.2—General rules

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108 Guide to this Part

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This Part provides general rules about the rights and remedies available to a party to a security agreement for enforcing a security interest in personal property. The Part does not apply to certain kinds of security interests.

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Important rules include the following:

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(a) a general standard of honesty and commercial reasonableness is to apply to enforcement actions;

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(b) parties can contract out of specified provisions of this Chapter;

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(c) if the same obligation is secured by both personal property and an interest in land, a secured party may decide to enforce the personal property interest in the same way as the interest in the land would be enforced, or to enforce the security interest under this Chapter;

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(d) rules for the enforcement of security interests in certain liquid assets (accounts, chattel paper and negotiable instruments) by giving notice to specified persons or seizing proceeds.

24

109 Application of this Chapter

25

Security interests to which this Chapter does not apply

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(1) This Chapter does not apply to security interests that are provided for by the following:

Section 109

- 1 (a) a transfer of an account or chattel paper that does not secure
2 payment or performance of an obligation;
3 (b) a security interest that is incidental to a security interest
4 referred to in paragraph (a);
5 (c) a PPS lease that does not secure payment or performance of
6 an obligation;
7 (d) a commercial consignment that does not secure payment or
8 performance of an obligation.

- 9 (2) This Chapter does not apply to security interests in goods that are
10 located outside Australia.

11 Note: For where personal property is located, see section 235.

12 *Security interests in investment instruments or investment*
13 *entitlements that are perfected by possession or control*

- 14 (3) This Chapter (apart from sections 110, 111, 113 and 140) does not
15 apply in relation to a person who has perfected a security interest
16 in:

- 17 (a) an investment instrument by taking possession or control of
18 the instrument; or
19 (b) an investment entitlement by taking control of the
20 entitlement.

- 21 (4) To avoid doubt, subsection (3) applies whether the person has
22 perfected the security interest only by possession or control, or by
23 another method as well.

24 *Sections that do not apply to household property*

- 25 (5) The following provisions do not apply in relation to collateral that
26 is used by a grantor predominantly for personal, domestic or
27 household purposes:

- 28 (a) sections 117 and 118 (relationship with land laws);
29 (b) section 120 (enforcement of security interests in liquid
30 assets);
31 (c) paragraphs 128(2)(b) and (c) (disposal of collateral by lease
32 or licence);
33 (d) section 129 (disposal by purchase);
34 (e) section 134 (retention of collateral).

1 **110 Rights and remedies**

2 This Act does not derogate in any way from the rights and
3 remedies the following parties to a security agreement have, apart
4 from this Act, against each other in relation to a default by the
5 debtor under the security agreement:

- 6 (a) the debtor;
7 (b) the grantor;
8 (c) a secured party.

9 **111 Rights and duties to be exercised honestly and in a commercially**
10 **reasonable manner**

- 11 (1) All rights, duties and obligations that arise under this Chapter must
12 be exercised or discharged:
13 (a) honestly; and
14 (b) in a commercially reasonable manner.
15 (2) A person does not act dishonestly merely because the person acts
16 with actual knowledge of the interest of some other person.

17 **112 Rights and remedies under this Chapter**

- 18 (1) In exercising rights and remedies provided by this Chapter, a
19 secured party may deal with collateral only to the same extent as
20 the grantor would be entitled to so deal with the collateral.
21 (2) However, subsection (1) does not apply:
22 (a) if the secured party had title to the collateral immediately
23 before starting to exercise any right or remedy provided by
24 this Part; or
25 (b) to the extent that it would otherwise prevent the secured party
26 from dealing with the collateral by way of transfer because a
27 transfer by the grantor would be prohibited or declared to be
28 a default under an agreement (whether or not a security
29 agreement).

30 Note: See section 79 (transfer of collateral despite prohibition in
31 security agreement).

Section 113

- 1 (3) Without limiting subsection (1), under this Chapter a secured party
2 may only seize, purchase or dispose of a licence subject to:
3 (a) the terms and conditions of the licence; and
4 (b) any applicable law of the Commonwealth, a State or a
5 Territory.

6 **113 Recovering judgment or issuing execution does not extinguish a**
7 **security interest in collateral**

8 The fact that a secured party has recovered judgment, or issued
9 execution, against a grantor in relation to collateral does not
10 extinguish the security interest in the collateral.

11 **114 Rights and remedies under this Chapter are cumulative**

12 The rights and remedies provided by this Chapter are cumulative.

13 **115 Contracting out of enforcement provisions**

14 *Collateral not used predominantly for personal, domestic or*
15 *household purposes*

- 16 (1) The parties to a security agreement that provides for a security
17 interest in collateral that is not used predominantly for personal,
18 domestic or household purposes may contract out of the following
19 provisions in relation to the collateral (to the extent, if any,
20 mentioned):
21 (a) section 95 (notice of removal of accession), to the extent that
22 it requires the secured party to give a notice to the grantor;
23 (b) section 96 (when a grantor may retain an accession);
24 (c) section 117 (obligations secured by interests in personal
25 property and land);
26 (d) section 118 (enforcing security interests in accordance with
27 land law decisions), to the extent that it allows a secured
28 party to give a notice to the grantor;
29 (e) section 120 (enforcement of liquid assets);
30 (f) subsection 121(4) (enforcement of liquid assets—notice to
31 grantor);
32 (g) section 123 (right to seize collateral);

- 1 (h) section 125 (obligation to dispose of or retain collateral);
2 (i) section 126 (apparent possession);
3 (j) section 128 (secured party may dispose of collateral);
4 (k) section 129 (disposal by purchase);
5 (l) section 130 (notice of disposal), to the extent that it requires
6 the secured party to give a notice to the grantor;
7 (m) paragraph 132(3)(d) (contents of statement of account after
8 disposal);
9 (n) subsection 132(4) (statement of account if no disposal);
10 (o) subsection 134(1) (retention of collateral);
11 (p) section 135 (notice of retention);
12 (q) section 142 (redemption of collateral);
13 (r) section 143 (reinstatement of security agreement).

- 14 (2) However, if parties to a security agreement contract out of a
15 provision, the provision continues to the extent that it gives rights
16 to, and imposes obligations in relation to, persons who are not
17 parties to the security agreement.

18 Example: Parties to a security agreement contract out of the right to seize
19 property under section 123. A secured party who is not a party to the
20 security agreement may seize the property under section 123.

- 21 (3) Despite subsection (2), if parties to a security agreement contract
22 out of section 142 (redemption of collateral), the provision does
23 not give any person (whether or not the person is a party to the
24 agreement) a right to redeem collateral under section 142.

25 *Collateral that is used predominantly for personal, domestic or*
26 *household purposes*

- 27 (4) The parties to a security agreement that provides for a security
28 interest in collateral that is used predominantly for personal,
29 domestic or household purposes may contract out of section 126
30 (apparent possession) in relation to the collateral.

31 *Contracts between persons other than the grantor*

- 32 (5) A person (including a secured party, but not including the grantor)
33 who is entitled to receive a notice from a secured party under one

Section 116

1 or more provisions in this Chapter may contract with the secured
2 party out of one or more of those provisions.

3 (6) 2 secured parties may contract out of the right of one of the secured
4 parties to receive an amount under subsection 127(6) (payment of
5 enforcing party's expenses) from the other secured party.

6 **116 Chapter does not apply to property in the hands of receivers or**
7 **controllers**

8 (1) This Chapter does not apply in relation to property while a person
9 is a receiver, a receiver and manager, or a controller of the
10 property.

11 (2) Without limiting subsection (1), the meaning of the following
12 terms includes their meaning as given by the *Corporations Act*
13 *2001*:

- 14 (a) receiver and manager;
15 (b) controller, in relation to the property of a corporation.

16 **117 Obligations secured by interests in personal property and land**

17 *Scope*

18 (1) This section applies if:

- 19 (a) the same obligation is secured by:
20 (i) a security interest in personal property; and
21 (ii) an interest in land; and
22 (b) either:
23 (i) the secured party's security interest in the personal
24 property has the highest priority; or
25 (ii) every other secured party with a security interest in the
26 personal property that has a higher priority has agreed in
27 writing to the secured party's making a decision under
28 this section.

29 Note 1: This section does not apply in relation to collateral that is used
30 predominantly for personal, domestic or household purposes (see
31 subsection 109(5)).

1 Note 2: Also, this section does not apply in relation to a security interest in
2 collateral to which consumer credit legislation applies (see
3 section 119).

4 Note 3: The interest in land might be an interest to which this Act would
5 otherwise not apply (see subsection 8(2)).

6 *Decision by secured party*

7 (2) The secured party may:

- 8 (a) make a decision to enforce the security interest in the
9 personal property under this Chapter; or
10 (b) make a decision to enforce the security interest in the
11 personal property in the same way as the interest in the land
12 may be enforced under the land law.

13 (3) In making a decision under subsection (2), the secured party must
14 act reasonably and only take into account the following matters:

- 15 (a) the respective values of the personal property and the land;
16 (b) whether there is any connection between, and the nature of
17 any connection between, the personal property and the land;
18 (c) whether the land and the personal property are both located
19 in the same State or Territory;
20 (d) such other matters as are relevant to the efficient enforcement
21 of the security interest and the interest in the land.

22 *Decision to enforce the security interest under this Chapter*

23 (4) Enforcing the security interest in the personal property under this
24 Chapter, in accordance with a decision under paragraph (2)(a),
25 does not limit the secured party's rights, remedies and duties with
26 respect to the land.

27 *Meaning of land law*

28 (5) In this Act:

29 **land law**, in relation to an obligation mentioned in
30 paragraph (1)(a), means those provisions of a law of a State or
31 Territory, or of the general law, that relate to the enforcement of
32 the interest in land that secures the obligation.

Section 118

1 **118 Enforcing security interests in accordance with land law**
2 **decisions**

3 *Scope*

4 (1) This section applies if:

5 (a) a secured party makes a decision (under paragraph 117(2)(b))
6 to enforce the security interest in the personal property in the
7 same way as the interest in the land may be enforced under
8 the land law; and

9 (b) unless section 144 applies, the secured party gives a notice in
10 accordance with subsection (2) to the following persons:

11 (i) the grantor;

12 (ii) a secured party with a security interest in the personal
13 property that is perfected immediately before the
14 decision under paragraph 117(2)(b) is made;

15 (iii) any person who, by the time the secured party gives the
16 notice, has notified the secured party in writing that the
17 person claims an interest in the personal property.

18 (2) A notice is given in accordance with this subsection if:

19 (a) the notice is in the approved form; or

20 (b) the notice:

21 (i) contains a description of the personal property to which
22 the notice relates; and

23 (ii) sets out the effect of this section.

24 *How security interest is to be enforced*

25 (3) The secured party may enforce the security interest in the same
26 way, with any necessary modification, as the interest in the land
27 may be enforced under the land law.

28 (4) Subject to this section, and with any necessary modification, law in
29 the same terms as that of the land law applies under this Act for the
30 purposes of the enforcement of the security interest.

31 Example: The secured party has the same rights, remedies and duties in relation
32 to the enforcement of the security interest in the personal property as
33 the secured party has in relation to the enforcement of the interest in
34 the land.

Section 118

1 Note: The effect of this subsection is not to adopt the land law as such, but
2 to apply law to the same effect as the land law (with any necessary
3 modification, and subject to this section).

4 (5) The regulations may modify the law that applies by virtue of
5 subsection (4) in order to facilitate its application to the
6 enforcement of security interests in the personal property.

7 Note: For the meaning of *modification*, see section 10.

8 *Additional law that applies*

9 (6) Section 140 (distribution of proceeds), section 117 and this section
10 apply to the enforcement of the security interest in the personal
11 property. Otherwise, this Chapter does not apply to the
12 enforcement of the security interest in the personal property.

13 (7) In addition:

14 (a) the decision of the secured party (the *first secured party*)
15 under paragraph 117(2)(b) does not limit the rights of any
16 other secured party (the *other secured party*) who has a
17 security interest in the personal property (whether granted
18 before or after the first secured party's security interest); and

19 (b) the other secured party has standing in proceedings taken by
20 (or on behalf of) the first secured party in enforcing the first
21 secured party's security interest under this section; and

22 (c) the other secured party may apply to a court for the conduct
23 of a judicially supervised sale for the purposes of enforcing
24 the first secured party's security interest under this section;
25 and

26 (d) the court may grant the application.

27 Note: For which courts have jurisdiction, and for transfers between courts,
28 see Part 6.2.

29 *Exercise of powers etc. under applied law*

30 (8) The Minister may make an agreement with the appropriate
31 Minister of a State or Territory in relation to the exercise or
32 performance of a power, duty or function (not being a power, duty
33 or function involving the exercise of judicial power) by an
34 authority of the State or Territory for the purposes of the law that
35 applies by virtue of subsection (4).

Section 119

- 1 (9) If such an agreement is in force, the power, duty or function may
2 or must be exercised or performed accordingly.
- 3 (10) The Minister may make an agreement with the appropriate
4 Minister of a State or Territory for the variation or revocation of an
5 agreement made under this section in relation to the State.
- 6 (11) An agreement made under subsection (8) or (10) is not a legislative
7 instrument.
- 8 *This section does not affect land laws*
- 9 (12) To avoid doubt, nothing in this section is intended to modify a land
10 law, or to affect its operation.

11 **119 Relationship with consumer credit legislation**

- 12 (1) This Chapter, except sections 117 and 118, applies in relation to a
13 security interest in collateral to which the Consumer Credit Code
14 of a State or Territory applies.
- 15 (2) The regulations may provide that a specified provision of this
16 Chapter is taken to have been complied with in specified
17 circumstances if a specified provision of the Consumer Credit
18 Code of a State or Territory has been complied with in those
19 circumstances.

20 **120 Enforcement of security interests in liquid assets—general**

- 21 (1) This section applies if:
- 22 (a) an obligation (the *secured obligation*) is secured by a
23 security interest in collateral in the form of one of the
24 following:
- 25 (i) an account;
- 26 (ii) chattel paper;
- 27 (iii) a negotiable instrument; and
- 28 (b) one or more persons owe an amount to the grantor on the
29 collateral; and
- 30 (c) the debtor defaults on the secured obligation.

Section 121

1 Note: This section does not apply in relation to collateral that is used
2 predominantly for personal, domestic or household purposes (see
3 subsection 109(5)).

4 *Rights of secured party*

5 (2) A secured party may do either or both of the following:

6 (a) give a written notice to a person mentioned in
7 paragraph (1)(b) that:

8 (i) sets out the effect of subsection (3); or

9 (ii) is in the approved form;

10 (b) seize any proceeds of the collateral to which the secured
11 party is entitled under section 32.

12 Note: A secured party might be prevented from taking action under this
13 subsection by a higher priority party (see subsection 121(3)).

14 (3) A person who receives a notice under paragraph (2)(a) must pay, to
15 the secured party, any amount that the person owes to the grantor
16 on the collateral before the end of 5 business days after the later of:

17 (a) the day the notice is received; or

18 (b) the day the amount becomes due and payable.

19 Note: The period mentioned in this subsection may be extended by a court
20 under section 293.

21 (4) The secured party must apply any amount received under
22 paragraph (2)(b) or subsection (3) towards the secured obligation.

23 (5) If any amount is received under paragraph (2)(b) or subsection (3)
24 in the form of currency, then the amount must be distributed in
25 accordance with section 140.

26 **121 Enforcement of security interests in liquid assets—notice to**
27 **higher priority parties and grantor**

28 *Notice to higher priority parties*

29 (1) Unless section 144 applies, a secured party (the *enforcing party*)
30 who proposes to take action under subsection 120(2) in relation to
31 a security interest in collateral must give a written notice to any
32 other secured party (a *higher priority party*) with a security interest
33 in the collateral that has a higher priority.

Section 121

- 1 (2) The notice must:
- 2 (a) contain the name of the secured party giving the notice; and
- 3 (b) contain a description of the collateral; and
- 4 (c) state that the enforcing party proposes to take action under
- 5 paragraph 120(2)(a) or (b), as the case requires; and
- 6 (d) state the address to which a notice may be given under
- 7 subsection (3); and
- 8 (e) be given to each higher priority party:
- 9 (i) at least 10 business days before the day the action is to
- 10 be taken; or
- 11 (ii) if a higher priority party has given a written notice to
- 12 the enforcing party specifying a shorter period to apply
- 13 for the purposes of this subsection—before the end of
- 14 that period.

15 Note: The period mentioned in paragraph (e) may be extended by a

16 court under section 293.

- 17 (3) A higher priority party who is given a notice under subsection (1)
- 18 may, before any action is taken under subsection 120(2), give a
- 19 written notice to the enforcing party informing the enforcing party
- 20 of the higher priority party's proposal to take action under that
- 21 subsection. If the higher priority party gives such a notice, the
- 22 enforcing party is not entitled to take action under that subsection.

23 *Notice to grantor*

- 24 (4) A secured party must give a written notice to the grantor of any
- 25 action the secured party takes in accordance with subsection
- 26 120(2).
- 27 (5) The notice under subsection (4) must be given:
- 28 (a) before the end of 5 business days after the day the action is
- 29 taken; or
- 30 (b) if the grantor has given a written notice to the secured party
- 31 specifying a shorter period to apply for the purposes of this
- 32 subsection—before the end of that period.

33 Note: The period mentioned in paragraph (a) may be extended by a court

34 under section 293.

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Part 4.3—Seizure and disposal or retention of collateral

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4

Division 1—Introduction

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122 Guide to this Part

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This Part deals with the seizure and disposal or retention of collateral following default by a debtor under a security agreement.

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Division 2 contains rules about when and how a secured party may seize collateral.

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Division 3 deals with the disposal of collateral by a secured party after seizure of the collateral.

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Division 4 deals with the retention of collateral by a secured party after seizure of the collateral.

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If a secured party proposes to dispose of, or retain, collateral, the party must give notice to the grantor and any other secured party with a security interest in the collateral that has a higher priority.

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A person may object to a proposal by a secured party to enforce a security interest by purchasing or retaining the collateral (see Division 5).

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Section 123

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2 **Division 2—Seizing collateral**

3 **123 Secured party may seize collateral**

4 (1) A secured party may seize collateral, by any method permitted by
5 law, if the debtor is in default under the security agreement.

6 Note: For seizure of accessions, see sections 95 to 97.

7 *Seizing intangible property*

8 (2) For the purposes of this Act, unless subsection (3) applies, a
9 secured party may seize intangible property only by giving a
10 notice, stating that the giving of the notice constitutes seizure of the
11 property, to the following persons:

12 (a) the grantor;

13 (b) if the intangible property is a licence—either:

14 (i) the licensor; or

15 (ii) the licensor’s successor.

16 (3) Intangible property may be seized by another method, if so agreed
17 between:

18 (a) the parties to the security agreement; or

19 (b) if the intangible property is a licence—the parties to the
20 security agreement together with the licensor or the licensor’s
21 successor.

22 *No perfection by seizure*

23 (4) A secured party who seizes collateral under this section does not
24 perfect the secured party’s security interest in the collateral.

25 **124 Secured party who has perfected a security interest in collateral**
26 **by possession or control**

27 (1) This section applies if:

28 (a) a secured party has perfected a security interest in collateral
29 by possession or control of the collateral; and

30 (b) the debtor is in default under the security agreement.

- 1 (2) A secured party may seize the collateral under section 123 by
2 giving a notice to:
3 (a) the grantor; and
4 (b) if the collateral is a licence—either:
5 (i) the licensor; or
6 (ii) the licensor’s successor.
- 7 (3) To avoid doubt, this section applies whether the secured party has
8 perfected the security interest only by possession or control, or by
9 another method as well.

10 **125 Obligation to dispose of or retain collateral**

- 11 (1) A secured party who seizes collateral under section 123 must:
12 (a) dispose of the collateral in accordance with Division 3; or
13 (b) take action to retain the collateral in accordance with
14 Division 4.
- 15 (2) Before disposing of or taking action to retain the collateral, the
16 secured party is, subject to the security agreement that covers the
17 collateral, entitled to a reasonable period in which:
18 (a) to secure, store and value the collateral; and
19 (b) to determine how to deal with the collateral.
- 20 (3) The secured party may delay disposing of, or taking action to
21 retain, the whole or part of the collateral beyond the reasonable
22 period mentioned in subsection (2). However, the delay must:
23 (a) if the security agreement providing for the security interest
24 allows for the delay—be in accordance with the security
25 agreement; or
26 (b) otherwise—be reasonable in the circumstances.

27 **126 Apparent possession of collateral**

- 28 (1) If:
29 (a) collateral cannot be readily moved from a grantor’s premises;
30 or
31 (b) adequate storage facilities are not readily available for
32 collateral;

Section 127

- 1 a secured party may seize the collateral under section 123 by
2 taking apparent possession of the collateral.
- 3 (2) A secured party who takes apparent possession of collateral may
4 dispose of the collateral under section 128 on the grantor's
5 premises. However, the secured party must not cause the grantor
6 any greater cost or inconvenience than is necessarily incidental to
7 the disposal.
- 8 (3) To avoid doubt, a secured party who takes apparent possession of
9 collateral in accordance with this section does not perfect the
10 secured party's security interest in the collateral.

11 **127 Seizure by higher priority parties—notice**

12 *Scope*

- 13 (1) This section applies if, at any time while collateral is seized by a
14 secured party (the ***enforcing party***) (whether under section 123 or
15 otherwise) for the purposes of enforcement, another secured party
16 (the ***higher priority party***) has a security interest in the collateral
17 that has a higher priority under this Act.

18 *Notice requiring enforcing party to give possession of collateral to*
19 *higher priority party*

- 20 (2) The higher priority party may give a written notice to the enforcing
21 party, requiring the enforcing party to give the higher priority party
22 possession of the seized collateral.

23 Note: If a person has a perfected security interest in the collateral that ranks
24 higher than that of the secured party, and the person does not give a
25 notice under this section, the person retains a security interest in the
26 collateral.

- 27 (3) However, the higher priority party must not give a notice to the
28 enforcing party under subsection (2) unless the higher priority
29 party would be entitled to seize the collateral (in the higher priority
30 party's own right) in accordance with section 123, had the
31 enforcing party not first seized the collateral.
- 32 (4) An enforcing party who is given a notice under subsection (2) must
33 comply with the notice before the end of the following period:

- 1 (a) the period of 5 business days after the day the notice is
2 received;
3 (b) such further period as is reasonable in the circumstances.

4 Note: The period may also be extended by a court under section 293.

- 5 (5) A higher priority party who is given possession of collateral under
6 this section is taken to have complied with the requirements of
7 subsection 123(2) (notice of seizure) in relation to the seizure of
8 the collateral.

9 *Payment of enforcing party's expenses*

- 10 (6) A higher priority party who is given possession of collateral under
11 this section must, subject to subsections (7) and (8), pay the
12 enforcing party the amount of any reasonable expenses paid or
13 incurred by the enforcing party, in relation to the enforcement of
14 the security interest in the collateral.

15 Note: 2 secured parties can contract out of this provision (see subsection
16 115(6)).

- 17 (7) A higher priority party must pay an amount of expenses under
18 subsection (6) only to the extent that, before the higher priority
19 party disposes of the collateral and any proceeds of the collateral
20 sufficient to meet the expenses, the enforcing party gives the
21 higher priority party evidence showing that the enforcing party
22 incurred the amount.

- 23 (8) The amount payable under subsection (6) is the lesser of the
24 following amounts:

- 25 (a) the amount mentioned in the subsection;
26 (b) the amount of any proceeds from the higher priority party's
27 disposal of the collateral.

- 28 (9) A higher priority party must pay an amount of expenses under
29 subsection (6) before the end of 20 business days after the later of
30 the following days:

- 31 (a) the day the higher priority party disposes of the collateral;
32 (b) the day the enforcing party gives the higher priority party
33 evidence showing that the enforcing party incurred the
34 amount.

Chapter 4 Enforcement of security interests
Part 4.3 Seizure and disposal or retention of collateral
Division 2 Seizing collateral

Section 127

- 1 Note: The period may be extended by a court under section 293.
- 2 (10) The amount under subsection (6) is a debt due to the enforcing
3 party.
- 4 (11) The enforcing party may apply to a court to recover the amount of
5 the debt, and the court may grant the application.
- 6 Note: For which courts have jurisdiction, and for transfers between courts,
7 see Part 6.2.

1
2 **Division 3—Disposing of collateral (including by**
3 **purchasing collateral)**

4 **128 Secured party may dispose of collateral**

- 5 (1) A secured party may dispose of collateral if the secured party has
6 seized the collateral in the exercise of a right to seize the collateral
7 on default by the debtor (whether under section 123 or otherwise).

8 Note 1: A secured party may dispose of collateral by purchasing the collateral
9 (see section 129).

10 Note 2: The person who takes the collateral as a result of the disposal does so
11 free of certain security interests (see section 133).

12 Note 3: The secured party may act as agent for the grantor in transferring title
13 (see section 141).

14 *Method of disposal*

- 15 (2) A secured party may dispose of collateral under this section:
16 (a) by private or public sale (including auction or closed tender);
17 or
18 (b) if the collateral is commercial property, and the security
19 agreement so provides—by lease; or
20 (c) if the collateral is intellectual property—by licence.

21 Note 1: A different rule applies in relation to disposal by purchase (see
22 subsection 129(3)).

23 Note 2: Paragraph (2)(b) does not apply in relation to collateral that is used
24 predominantly for personal, domestic or household purposes (see
25 subsection 109(5)).

- 26 (3) For the purposes of this Act, if collateral is disposed of by lease or
27 licence, the disposal occurs at the time the lease or licence is
28 entered into.

- 29 (4) The power to dispose of collateral by a lease or licence must be
30 exercised in accordance with the terms and conditions of the
31 security agreement.

- 32 (5) A secured party may, under subsection (1), dispose of the whole or
33 part of the collateral.

Chapter 4 Enforcement of security interests

Part 4.3 Seizure and disposal or retention of collateral

Division 3 Disposing of collateral (including by purchasing collateral)

Section 129

1 Note: The secured party must apply any proceeds etc. of a disposal under
2 this section in accordance with section 140.

3 *Disposal of licences*

- 4 (6) The power to dispose of a licence must be exercised subject to:
5 (a) the terms and conditions of the licence; and
6 (b) any applicable law of the Commonwealth, a State or a
7 Territory.

8 **129 Disposal by purchase**

- 9 (1) A secured party may, under subsection 128(1), dispose of collateral
10 that is commercial property by purchasing the collateral.

11 Note: This section does not apply in relation to collateral that is used
12 predominantly for personal, domestic or household purposes (see
13 subsection 109(5)).

- 14 (2) However, the secured party may dispose of the collateral by
15 purchasing it only if:
16 (a) the secured party gives a notice under section 130 stating that
17 the secured party proposes to purchase the collateral; and
18 (b) no notice of objection is given to the secured party in
19 accordance with subsection 137(2).

- 20 (3) Despite subsection 128(2) and section 131, a secured party may
21 purchase collateral only:
22 (a) by public sale (including auction or closed tender); and
23 (b) by paying at least the market value at the time of the
24 purchase.

25 Note: Section 296 deals with the onus of proving matters under this
26 subsection.

27 **130 Notice of disposal of collateral**

- 28 (1) Unless subsection (5) of this section or section 144 applies, a
29 secured party who proposes to dispose of collateral on default by
30 the debtor (whether or not under section 128) must give a notice, in
31 accordance with this section, to:
32 (a) the grantor; and

- 1 (b) any other secured party with a security interest in the
2 collateral that has a higher priority.
- 3 (2) A notice must:
- 4 (a) contain the name of the secured party giving the notice; and
5 (b) contain a description of the collateral; and
6 (c) state that the secured party proposes to dispose of the
7 collateral, unless an obligation is performed, or an amount is
8 paid, to satisfy the obligation secured by the security interest
9 in the collateral, on or before the day specified in accordance
10 with subsection (3); and
11 (d) state that the notice is given for the purposes of this Act; and
12 (e) if the secured party is proposing to dispose of the collateral
13 by purchase:
14 (i) contain details of rights of objection under Division 5;
15 and
16 (ii) contain the address to which a notice of objection may
17 be given under section 137; and
18 (f) contain any other matter required by the regulations for the
19 purposes of this subsection.
- 20 Note: The period under paragraph (c) may be extended by a court under
21 section 293.
- 22 (3) For the purposes of paragraph (2)(c), the day specified in a notice
23 given to a person:
24 (a) must be at least 10 business days after the day the notice is
25 given; or
26 (b) if the person has given a written notice to the secured party
27 specifying a shorter period to apply for the purposes of this
28 section—before the end of that period.
- 29 (4) The notice may be given in the approved form.

30 *When notice is not required*

- 31 (5) The secured party is not required to give a notice to any person
32 under subsection (1) if:
33 (a) the secured party believes on reasonable grounds that the
34 secured party was induced to enter into the relevant security
35 agreement by fraud on the part of the debtor or the grantor; or
-

Section 131

- 1 (b) the secured party believes on reasonable grounds that the
2 collateral might perish before the end of 10 business days
3 after the day the collateral is seized; or
4 (c) the secured party believes on reasonable grounds that there
5 will be a material decline in the value of the collateral if it is
6 not disposed of immediately after the day the collateral is
7 seized; or
8 (d) the secured party believes on reasonable grounds that the
9 expense of preserving the collateral is disproportionately
10 large in relation to its value; or
11 (e) the collateral is foreign currency; or
12 (f) the collateral is to be disposed of in accordance with the
13 operating rules of a clearing and settlement facility.

14 **131 Duty of secured party disposing of collateral to obtain market**
15 **value**

16 A secured party who disposes of collateral under section 128 (other
17 than by purchasing the collateral) owes a duty, to any other person
18 with a security interest in the collateral, and to the grantor,
19 immediately before the disposal, to exercise all reasonable care:

- 20 (a) if the collateral has a market value at the time of disposal—to
21 obtain at least that market value; or
22 (b) otherwise—to obtain the best price that is reasonably
23 obtainable at the time of disposal, having regard to the
24 circumstances existing at that time.

25 Note: A different rule applies in relation to disposal by purchase (see
26 subsection 129(3)).

27 **132 Secured party to give statement of account**

28 *Statement of account following disposal*

- 29 (1) Unless section 144 applies, a secured party must, on request by any
30 other person with a security interest in the collateral, or the grantor,
31 give the person (or grantor) a written statement of account, if the
32 first-mentioned secured party disposes of collateral under
33 section 128 (including by purchasing the collateral in accordance
34 with section 129).

- 1 (2) A statement of account under subsection (1) must be given to a
2 person before the end of:
3 (a) the period of 20 business days after the day the person
4 requests the statement; or
5 (b) such further period as is reasonable in the circumstances.

6 Note: The period may also be extended by a court under section 293.

- 7 (3) A statement of account under subsection (1) must show:
8 (a) in the case of a disposal by a lease or licence—the total
9 amount received, and expected to be received, during the
10 period:
11 (i) starting when the secured party seized the collateral; and
12 (ii) ending at the end of the lease or licence; and
13 (b) in any other case—the total amount received from the
14 disposal of the collateral (or in the case of disposal by
15 purchase, paid by the secured party) during the period:
16 (i) starting when the secured party seized the collateral; and
17 (ii) ending at the time of the disposal of the collateral; and
18 (c) in any case—the amount of expenses relating to the disposal;
19 and
20 (d) any amounts paid to other secured parties; and
21 (e) the balance owing by the secured party to the grantor, or by
22 the debtor to the secured party, as the case may be.

23 *Statement of account if no disposal*

- 24 (4) A secured party who has not disposed of collateral before the end
25 of 6 months after the day the collateral is seized must, in
26 accordance with subsections (5) and (6), give a written statement
27 of account for each period of 6 months after seizing the collateral,
28 until the collateral is disposed of.
- 29 (5) The statement of account for a 6 month period must be given to
30 any other person with a security interest in the collateral, or the
31 grantor, if the other person (or the grantor) requests the statement
32 for that period.
- 33 (6) A statement of account under subsection (4) must be given to a
34 person before the end of:
-

Chapter 4 Enforcement of security interests

Part 4.3 Seizure and disposal or retention of collateral

Division 3 Disposing of collateral (including by purchasing collateral)

Section 133

- 1 (a) the period of 20 business days after the day the person
2 requests the statement; or
3 (b) such further period as is reasonable in the circumstances.

4 Note: The period may also be extended by a court under section 293.

5 (7) A statement of account under subsection (4) must:

6 (a) state that the secured party has not disposed of the collateral;
7 and

8 (b) show the total amount received in relation to the collateral
9 during the period:

- 10 (i) starting when the secured party seized the collateral; and
11 (ii) ending at the time the statement is given; and

12 (c) show the amount of expenses relating to the retention of the
13 collateral before the disposal.

14 **133 Disposing of collateral free of interests**

15 (1) If collateral has been disposed of under section 128 (including by a
16 secured party purchasing the collateral), a person takes the
17 collateral as a result of the disposal free of all of the following
18 interests in the collateral:

19 (a) the interest of the grantor;

20 (b) the security interest of the secured party who disposed of the
21 collateral;

22 (c) all security interests in the collateral that have a lower
23 priority than the security interest of that secured party.

24 Note: If a person has a perfected security interest in the collateral that ranks
25 higher than that of the secured party, the person retains a security
26 interest in the collateral.

27 (2) Subsection (1) applies in relation to a disposal of collateral (other
28 than a disposal by a secured party purchasing the collateral) even if
29 the requirements of this Chapter have not been complied with.

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2 **Division 4—Retaining collateral**

3 **134 Proposal of secured party to retain collateral**

4 (1) A secured party may retain collateral if the secured party has
5 seized the collateral in the exercise of a right to seize the collateral
6 on default by the debtor (whether under section 123 or otherwise).

7 Note 1: This section does not apply in relation to collateral that is used
8 predominantly for personal, domestic or household purposes (see
9 subsection 109(5)).

10 Note 2: The secured party may act as agent for the grantor in transferring title
11 (see section 141).

12 (2) However, the secured party may retain the collateral only if:

13 (a) the secured party gives a notice under section 135 to retain
14 the collateral; and

15 (b) no notice of objection is given to the secured party in
16 accordance with subsection 137(2).

17 **135 Notice of retention of collateral**

18 (1) A secured party (the *retaining party*) who proposes to retain
19 collateral under section 134 must (unless section 144 applies) give
20 a notice of the proposal, in accordance with this section, to:

21 (a) the grantor; and

22 (b) if the security interest of the retaining party is not a purchase
23 money security interest—a secured party who, at the time the
24 retaining party gives the notice, has a registration that
25 describes the collateral; and

26 (c) if the security interest of the retaining party is a purchase
27 money security interest—a secured party over whom (or
28 which) the retaining party has priority under section 62 or 63,
29 but only if, at the time the retaining party gives the notice, the
30 secured party has a registration that describes the collateral.

31 (2) The secured party must give a notice to a person:

32 (a) at least 10 business days before the day the first steps are
33 taken to retain the collateral; or

Section 136

1 (b) if the person has given a written notice to the secured party
2 specifying a shorter period to apply for the purposes of this
3 section—before the end of that period.

4 Note: The period mentioned in paragraph (a) may be extended by a court
5 under section 293.

6 (3) A notice must:

7 (a) contain the name of the secured party giving the notice; and

8 (b) contain a description of the collateral; and

9 (c) state that the secured party proposes to retain the collateral,
10 unless an obligation is performed, or an amount is paid, as
11 mentioned in paragraph (d), on or before a specified day
12 (being a day that is at least 10 business days after the day the
13 notice is given); and

14 (d) state the obligation to be performed, or the amount of the
15 payment required, before the day specified in accordance
16 with paragraph (c), to satisfy the obligation secured by the
17 security interest in the collateral; and

18 (e) contain details of rights of objection under Division 5; and

19 (f) contain the address to which a notice of objection may be
20 given under section 137; and

21 (g) contain any other matter required by the regulations for the
22 purposes of this subsection.

23 (4) The notice may be given in the approved form.

24 **136 Retaining collateral free of interests**

25 *Retaining collateral free of interests if notices have been given in*
26 *accordance with section 135*

27 (1) If:

28 (a) a secured party gives one or more notices in accordance with
29 section 135 to retain collateral; and

30 (b) no notice of objection is given to the secured party in
31 accordance with subsection 137(2);

32 then, at the end of the day specified in accordance with paragraph
33 135(3)(c), the secured party is entitled to take steps to have title to
34 the collateral pass to the secured party.

- 1 (2) At the time the title to the collateral passes to the secured party, the
2 secured party takes the collateral free of all of the following
3 interests in the collateral:
4 (a) the interest of the grantor;
5 (b) the security interest of the secured party to whom title passes;
6 (c) all security interests that have a lower priority than the
7 security interest of that secured party.

8 *Acquiring collateral that has been retained free of interests if*
9 *notices have not been given in accordance with section 135*

- 10 (3) A person takes collateral free of the interests referred to in
11 subsection (2) if:
12 (a) a secured party is required to give one or more notices in
13 relation to the collateral in accordance with section 135; and
14 (b) the secured party has not done so; and
15 (c) the person acquires the collateral from the secured party for
16 new value; and
17 (d) the person has no actual knowledge that the requirements of
18 section 135 have not been complied with.
- 19 (4) Subsection (3) applies in relation to a security interest referred to in
20 paragraph (2)(c) whether or not a registration with respect to the
21 security interest is effective.

Section 137

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2 **Division 5—Objection to purchase or retention**

3 **137 Persons entitled to notice may object to proposal**

- 4 (1) This section applies if:
- 5 (a) a person is entitled to a notice under section 130 or 135; and
- 6 (b) a secured party gives the person one of the following notices:
- 7 (i) a notice under section 130 that the secured party
- 8 proposes to purchase collateral;
- 9 (ii) a notice under section 135 that the secured party
- 10 proposes to retain collateral.

- 11 (2) Before the end of the day specified in accordance with subsection
- 12 130(3) or 135(3), the person may give the secured party a notice
- 13 (the *notice of objection*) objecting to the purchase or retention.

14 Note: The secured party may request the person to provide proof of the

15 person's interest under section 138.

- 16 (3) The secured party must sell or lease the collateral in accordance
- 17 with section 128 if the secured party is given a notice of objection
- 18 in accordance with subsection (2).

19 **138 Person making objection may be requested by secured party to**

20 **prove interest**

- 21 (1) A secured party who, in accordance with subsection 137(2), is
- 22 given a notice of objection by a person (other than the grantor) may
- 23 request the person to provide proof of that person's interest.
- 24 (2) The notice of objection is taken not to have been given by the
- 25 person in accordance with subsection 137(2) if the person does not
- 26 provide proof of the person's interest before the end of 10 business
- 27 days after the day the secured party's request is made.

28 Note: The period may be extended by a court under section 293.

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Part 4.4—Rules applying after enforcement

3

4

139 Guide to this Part

5

This Part contains rules about steps to be taken after a security interest in collateral has been enforced.

6

7

These rules deal with the following:

8

(a) the order of distribution of personal property or its proceeds;

9

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(b) the transfer of title to collateral;

11

(c) redemption of collateral, or the reinstatement of security agreements, before disposal;

12

13

(d) when certain enforcement notices are not required.

14

140 Distribution of proceeds received by secured party

15

Scope

16

- (1) This section applies if any amount, personal property or proceeds (within the ordinary meaning of that term) of collateral is received by or on behalf of a secured party as a result of enforcing a security interest in collateral (whether or not under section 120 or 128).

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Order of application

21

- (2) The amount, personal property or proceeds must be applied in the following order:

22

23

- (a) obligations to persons holding interests (other than security interests) in the collateral that have a higher priority (whether under this Act or otherwise) than the interest of the secured party;

24

25

26

- 1 (a) the secured party applied the proceeds honestly; and
2 (b) the secured party applied the proceeds in a commercially
3 reasonable manner.

4 **141 Secured party may take steps to reflect transfer of title**

5 A secured party who is entitled to dispose of, or retain, collateral
6 under section 128 or 134 may take any steps necessary to reflect
7 the transfer of title resulting from the disposal or retention, if the
8 grantor could take those steps to reflect a transfer of title to the
9 collateral.

10 **142 Entitled persons may redeem collateral**

- 11 (1) At any time before a secured party disposes of collateral under
12 section 128, any other person with a security interest in the
13 collateral, or the grantor, may redeem the collateral:
14 (a) by paying the amounts required to discharge the obligations,
15 or by performing the obligations, secured by security
16 interests in the collateral; and
17 (b) by paying the amount of any expenses in relation to the
18 enforcement of the security interest, the payment of which is
19 secured by the security interest.

20 Note: Reasonable expenses in relation to the enforcement of a security
21 interest are taken to be secured by a security interest unless the
22 parties agree otherwise (see subsection 18(5)).

- 23 (2) However, a person must not redeem collateral under subsection (1)
24 if the person agrees in writing after the default not to do so.
25 (3) The grantor's right to redeem the collateral has priority over any
26 other person's right to redeem the collateral.

27 **143 Entitled persons may reinstate security agreement**

- 28 (1) At any time before a secured party disposes of or retains collateral
29 (whether or not under this Chapter), a person may reinstate the
30 security agreement by:
31 (a) paying the following amounts:

Section 144

- 1 (i) amounts in arrears (disregarding amounts in arrears as a
2 result of an acceleration clause in the security
3 agreement);
4 (ii) the amount of any expenses, in relation to the
5 enforcement of the security interest, the payment of
6 which is secured by the security interest; and
7 Note: Reasonable expenses in relation to the enforcement of a security
8 interest are taken to be secured by a security interest unless the
9 parties agree otherwise (see subsection 18(5)).
10 (b) remedying any other default as a result of which the secured
11 party proposes to dispose of, or retain, the collateral.
12 (2) A security agreement may be reinstated only once during the
13 period in which the security agreement is in force.

14 **144 When certain enforcement notices are not required**

- 15 A secured party is not required to give a notice to a person under
16 section 95, 118, 121, 130, 132 or 135, if:
17 (a) after having made reasonable attempts, the secured party has
18 failed to locate the person; or
19 (b) for the grantor—after the debtor defaults, the grantor waives
20 in writing the grantor's right to receive the notice; or
21 (c) for a person other than the grantor—the person (at any time)
22 waives in writing the person's right to receive the notice; or
23 (d) in any case—on an ex parte application in relation to the
24 person, a court is satisfied that a notice is not required for any
25 other reason.
26 Note: For which courts have jurisdiction, and for transfers between courts,
27 see Part 6.2.

1
2 **Chapter 5—Personal Property Securities**
3 **Register**

4 **Part 5.1—Guide to this Chapter**
5

6 **145 Guide to this Chapter**

7 This Chapter provides for the establishment and maintenance of a
8 register with respect to personal property securities and certain
9 prescribed personal property.

10 Part 5.2 deals with the establishment of the register and what it
11 contains.

12 Registrations consist of *financing statements*, and are amended by
13 the registration of *financing change statements*. Part 5.3 deals
14 with the registration of these statements, including the data to be
15 included and the issue of verification statements confirming their
16 registration.

17 Part 5.4 contains rules about the timing of registrations and when a
18 registration becomes ineffective, including the defects that make a
19 registration ineffective.

20 Part 5.5 is about searching the register.

21 Part 5.6 deals with the amendment of registrations after a demand
22 for amendment is made.

23 Part 5.7 deals with removal of data from the register and the
24 correction of registration errors.

25 Part 5.8 provides for fees for registration and searching the register,
26 the review of registration decisions and annual reports.

Section 145

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Part 5.9 establishes the offices of the Registrar of Personal Property Securities and the Deputy Registrar.

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Part 5.2—Establishment of the register

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146 Guide to this Part

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This Part sets up the Personal Property Securities Register.

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The Registrar of Personal Property Securities is required to establish and maintain the register, and ensure that it is kept operational. However, the Registrar can refuse access to the register, and suspend its operation, in certain circumstances.

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The register contains the following:

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(a) data in registrations with respect to security interests and related data;

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(b) prescribed data in relation to personal property.

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147 Personal Property Securities Register

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(1) The Registrar must establish and maintain a register to be known as the Personal Property Securities Register.

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(2) Data in the register is the property of the Commonwealth.

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(3) The Registrar may keep the register in any form that he or she considers appropriate.

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(4) The Registrar must ensure that the register is operational at all times, except:

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(a) while access is refused, or its operation is suspended, under subsection (5); or

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(b) in other circumstances prescribed by the regulations.

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(5) If the Registrar considers that it is not practical to provide access to the register, the Registrar may:

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(a) refuse access to the register; or

Section 148

1 (b) otherwise suspend the operation of the register, in whole or in
2 part.

3 (6) If the Registrar refuses access to the register, or otherwise suspends
4 the operation of the register in whole or in part, under
5 subsection (5), the Registrar must publish a notice giving details of
6 the refusal or other suspension of operation (including the period of
7 refusal or suspension):

8 (a) in a way prescribed by the regulations; or

9 (b) if regulations are not made for the purposes of
10 paragraph (a)—in the *Gazette*.

11 Note: The office of the Registrar of Personal Property Securities is
12 established under Part 5.9.

13 **148 What the register contains**

14 The register is to contain the following data:

15 (a) data in registrations;

16 (b) data (if any) prescribed by regulations made for the purposes
17 of this paragraph in relation to registrations, or possible
18 registrations;

19 (c) data (if any) in relation to personal property that is prescribed
20 by regulations made for the purposes of this paragraph.

21 Note: If personal property is prescribed by regulations for the purposes of
22 paragraph (c), this Act might not otherwise apply to interests in that
23 property (see subsection 8(2)).

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Part 5.3—Registration

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149 Guide to this Part

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A person may apply to the Registrar to register a financing statement, or a financing change statement, with respect to a security interest or certain personal property.

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A registration may perfect a security interest, which may give the secured party an advantage under this Act in enforcing the interest.

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A person must not make an application with respect to a security interest unless the person believes on reasonable grounds that the security interest is, or will be, held by a person stated in the application to be a secured party.

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This Part also deals with verification statements, which verify the registration of financing statements and financing change statements.

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The Registrar is responsible for giving verification statements to secured parties, who must give notice of the statements to grantors.

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Publication may be used as an alternative to giving verification statements.

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150 Registration—on application

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(1) A person may apply to the Registrar to register a financing statement with respect to:

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(a) a security interest; or

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(b) personal property prescribed by regulations made for the purposes of paragraph 148(c).

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(2) A person may apply to the Registrar to register a financing change statement to amend a registered financing statement.

Section 151

- 1 (3) The Registrar must register the financing statement or financing
2 change statement in accordance with the application, but only if:
3 (a) the application is in the approved form; and
4 (b) the fee (if any) determined under section 190 has been paid;
5 and
6 (c) the Registrar is not satisfied that the application is:
7 (i) frivolous, vexatious or offensive, or contrary to the
8 public interest; or
9 (ii) made in contravention of section 151 (belief that
10 collateral secures obligation); and
11 (d) the registration would not be prohibited by the regulations.

12 Note 1: Section 161 authorises the description of collateral by a registration
13 before or after a security agreement is made covering the collateral, or
14 a security interest has attached to the collateral.

15 Note 2: The Registrar must give a verification statement to each secured party
16 after the registration of a financing statement or a financing change
17 statement (see section 156).

18 Note 3: Application may be made to the Administrative Appeals Tribunal for
19 review of certain decisions of the Registrar about registration (see
20 section 191).

21 Note 4: The requirement to pay a fee is satisfied if an arrangement for its
22 payment has been approved under subsection 190(4).

23 **151 Registration—belief that collateral secures obligation**

24 *Requirements for collateral to secure obligation etc.*

- 25 (1) A person must not apply to register a financing statement, or a
26 financing change statement, that describes collateral, unless the
27 person believes on reasonable grounds that the collateral secures,
28 or will secure, an obligation (including a payment) owed by a
29 debtor to the person described in the statement as the secured party.

30 Civil penalty:

- 31 (a) for an individual—50 penalty units;
32 (b) for a body corporate—250 penalty units.

33 Note: See Part 6.3 (Civil penalty proceedings).

- 34 (2) If a financing statement, or a financing change statement, that
35 describes collateral has been registered on the application of a

1 person, the person must, within the period covered by
2 subsection (3), apply to register a financing change statement to
3 amend the registration to end its effect with respect to the
4 collateral, if:

- 5 (a) the collateral has never, since the statement was registered,
6 secured an obligation (including a payment) owed by a
7 debtor to the person stated in the registration to be the
8 secured party; and
9 (b) there are no reasonable grounds (or there are no longer any
10 reasonable grounds) for believing that the collateral secures,
11 or will secure, such an obligation.

12 Civil penalty:

- 13 (a) for an individual—50 penalty units;
14 (b) for a body corporate—250 penalty units.

15 Note: See Part 6.3 (Civil penalty proceedings).

- 16 (3) The period covered by this subsection is as soon as practicable, or
17 5 business days, whichever is earlier, after:
18 (a) if there never have been, since the statement was registered,
19 reasonable grounds for believing that the collateral secures,
20 or will secure, an obligation mentioned in paragraph (2)(a)—
21 the day of the registration time, or the amendment time, for
22 the financing statement or financing change statement; or
23 (b) if there are no longer any reasonable grounds for that
24 belief—the day when there stopped being reasonable grounds
25 for the belief.

26 Note: The period of 5 business days may be extended by a court under
27 section 293.

- 28 (4) A person who wishes to establish that there were reasonable
29 grounds for the belief mentioned in subsection (1) or
30 paragraph (2)(b) (at any particular time) bears an evidential burden
31 in relation to the matter.

32 Note: For *evidential burden*, see section 10.

33 *Damages for contravention of requirements*

- 34 (5) For the purposes of section 271 (but without limiting that section):

Section 152

- 1 (a) compliance with subsection (1) or (2) is taken to be an
2 obligation imposed on a person who applies, or is required to
3 apply, for the registration of a financing statement or a
4 financing change statement; and
5 (b) any person with an interest in personal property described in
6 the financing statement or financing change statement is
7 taken to be a person to whom that obligation is owed; and
8 (c) a contravention of subsection (1) or (2) is taken to be a
9 failure to discharge that obligation.

10 Note: Section 271 gives a right to recover damages for any loss or damage in
11 relation to such a failure.

12 *Registration unaffected by contravention*

- 13 (6) However, if a person applies for a registration of a financing
14 statement or a financing change statement in contravention of
15 subsection (1), and the statement is registered accordingly, the
16 contravention does not affect the validity or effectiveness of the
17 registration.

18 *Registrations with respect to security interests only*

- 19 (7) This section only applies in relation to a registration with respect to
20 a security interest.

21 **152 Registration—location of personal property and interested**
22 **persons outside Australia**

23 A financing statement, or a financing change statement, may be
24 registered whether or not:

- 25 (a) the personal property to which the statement relates is located
26 in Australia; or
27 (b) any person who owns or has rights in that property is located
28 in Australia.

29 Note 1: For when personal property is located in Australia, see section 235.
30 For when bodies corporate, bodies politic or individuals are located in
31 Australia, see section 235.

32 Note 2: For security interests in personal property outside Australia, see
33 section 6.

1 **153 Financing statements with respect to security interests**

2 (1) A financing statement with respect to a security interest (including
3 such a financing statement as amended by the registration of a
4 financing change statement) consists of data that complies with the
5 following table:
6

Financing statements with respect to security interests

Item	Data about:	Details of data
1	The secured party	The details prescribed by the regulations, in relation to each secured party, of: (a) the secured party; or (b) a person nominated by the secured party who has authority to act on behalf of the secured party.
2	The grantor	Whichever of the following is applicable: (a) if the collateral is consumer property, and is required by the regulations to be described by serial number—no grantor’s details; (b) if the collateral is consumer property, and is not required by the regulations to be described by serial number—the grantor’s name and date of birth, as evidenced in accordance with the regulations, and no other details; (c) in any other case—the grantor’s details as prescribed by the regulations.
3	Giving of notices	The following: (a) an address (including an email address or fax number) for the giving of notices to the secured party (or secured parties) relating to the registration; (b) details of any identifier provided for the giving of notices to the secured party (or secured parties). Note: For identifiers, see section 289.
4	The collateral and proceeds	A collateral description in accordance with all of the following rules: (a) the collateral must be described as one of the following: (i) consumer property; (ii) commercial property;

Section 153

Financing statements with respect to security interests

Item	Data about:	Details of data
		(b) the collateral may or must be described by serial number, if allowed or required by the regulations; (c) the collateral must belong to a single class of collateral prescribed by the regulations; (d) any description of proceeds must comply with the regulations. Note: 2 or more types of collateral that belong to different classes prescribed by the regulations must be described in separate registrations. However, 2 or more registrations can be effected through a single application.
5	The end time for registration	For all the collateral described in the statement, the following data: (a) for collateral other than consumer property or property described by a serial number: (i) no stated end time; or (ii) an end time for the registration no later than the time (the <i>default time</i>) that is the end of the day 25 years after the registration time; or (iii) if the registration is amended to include or change (but not omit) an end time—an amended end time for the registration no later than the time (the <i>default time</i>) that is the end of the day 25 years after the amendment time for that amendment; (b) for consumer property, or property described by a serial number: (i) an end time for the registration no later than the time (the <i>default time</i>) that is the end of the day 7 years after the registration time; or (ii) if the registration is amended to change the end time—an amended end time for the registration no later than the time (the <i>default time</i>) that is the end of the day 7 years after the amendment time for that amendment.
6	Subordination	An indication of whether the security interest is (or is to be) subordinated to any other security interest.

Financing statements with respect to security interests

Item	Data about:	Details of data
		However, this indication need not be included.
7	Security interest	An indication of whether the security interest is, or is to be, a purchase money security interest (to any extent) if the security interest is in respect of a class of collateral prescribed by the regulations for the purposes of this item.
8	Any matter prescribed by the regulations	Details of the matter prescribed by the regulations, whether or not the matter also comes under any of the other items in this table.

- 1 (2) If a person applies to register a financing statement (or a financing
2 change statement) that would otherwise result in the statement of
3 an end time in a financing statement not complying with item 5 of
4 the table in subsection (1), the financing statement is taken to
5 provide for the relevant default time mentioned in that item as the
6 stated end time.
- 7 (3) A statement of end time does not comply with item 5 of the table in
8 subsection (1) if it states an end time earlier than the registration
9 time or amendment time in relation to the financing statement or
10 financing change statement that provided for that end time.

11 **154 Financing statements with respect to prescribed property**

12 A financing statement with respect to personal property prescribed
13 by regulations made for the purposes of paragraph 148(c)
14 (including such a financing statement as amended by the
15 registration of a financing change statement) consists of data that
16 complies with the following table:

Financing statements with respect to prescribed property

Item	Data about:	Details of data
1	The person who owns or has an interest in the property	Details of the person, as prescribed by the regulations.
2	The property	Details relating to the property in accordance with the

Section 155

Financing statements with respect to prescribed property

Item	Data about:	Details of data
		following rules: (a) the property must be of a single class, described in the registration; (b) a statement must be included of the reason why the property is registered.
3	Any matter prescribed by the regulations	Details of the matter prescribed by the regulations, whether or not the matter also comes under any of the other items in this table.

1 **155 Meanings of *verification statement* and *registration event***

2 In this Act:

3 *verification statement* means a written statement in the approved
4 form:

- 5 (a) verifying the registration of a financing statement or a
6 financing change statement (each of which is a **registration**
7 **event**) with respect to a security interest, other than a
8 financing change statement registered under section 185
9 (removal of old data) or 186 (incorrectly removed data); and
10 (b) including other data (if any) approved by the Registrar for
11 that form in relation to the registration event, a secured party,
12 a grantor, or collateral.

13 **156 Verification statements—Registrar to give to secured parties**

14 (1) The Registrar must ensure that a verification statement in relation
15 to a registration event is given to the following persons:

- 16 (a) a person registered as a secured party in the registration
17 immediately before the time of the registration event;
18 (b) a person registered as a secured party in the registration
19 immediately after the time of the registration event.

20 Note: This section does not apply in relation to a registration event if the
21 Registrar publishes a verification statement in relation to the event
22 under section 158.

23 (2) If a registration event involves the amendment of a registration to
24 change an address (including an email address or a fax number) for

1 the giving of notices to a secured party, the Registrar must ensure
2 that the verification statement is given to the secured party at both
3 the previously registered address and the address as changed.

4 (3) If a registration event involves the amendment of a registration to
5 omit a secured party, the Registrar must ensure that the verification
6 statement in relation to the event is given to the secured party at the
7 previously registered address for the secured party.

8 **157 Verification statements—secured parties to give notice to**
9 **grantors**

10 *Requirement to provide verification statement*

11 (1) A person (the *statement holder*) who is, under section 156, given a
12 verification statement in relation to a registration event concerning
13 a registration, must ensure that a notice of the statement, in the
14 approved form, is given to the following persons as soon as
15 reasonably practicable after the time of the registration event:

- 16 (a) a person registered as a grantor in the registration
17 immediately before the time of the registration event;
18 (b) a person registered as a grantor in the registration
19 immediately after the time of the registration event.

20 Note: This section does not apply in relation to a registration event if the
21 Registrar publishes a verification statement in relation to the event
22 under section 158.

23 (2) Without limiting subsection (1), the approved form for notice of a
24 verification statement:
25 (a) may authorise specified data in the verification statement not
26 to be included in the notice; but
27 (b) must otherwise require the data in the verification statement
28 to be included in the notice.

29 *Exception—waiver by interested person of right to receive notice*

30 (3) However, this section does not apply in relation to a person
31 mentioned in paragraph (1)(a) or (b) if:
32 (a) the collateral to which the registration event relates is
33 (immediately before or after the event) described in the
34 registration as commercial property; and

Section 158

- 1 (b) the person has, in writing, waived the right under this section
2 to receive a notice in relation to registration events to which
3 paragraph (a) applies.

4 *Contravention of requirement*

- 5 (4) If the statement holder contravenes subsection (1), the
6 contravention constitutes an act or practice involving interference
7 with the privacy of the individual for the purposes of section 13 of
8 the *Privacy Act 1988*.

9 Note 1: These acts or practices may be the subject of complaints under
10 section 36 of that Act.

11 Note 2: If a statement holder fails to discharge an obligation under this
12 section, an action for damages may be available under section 271.

13 **158 Verification statements—publication as alternative**

- 14 (1) The Registrar may publish, in a way prescribed by the regulations,
15 a single verification statement in relation to a number of
16 registration events if:
17 (b) the events affect a number of persons registered as secured
18 parties (whether before or after the events); and
19 (b) the Registrar considers that it would be inconvenient for
20 verification statements to be given to each registered (or
21 formerly registered) secured party.
- 22 (2) Sections 156 and 157 do not apply in relation to a registration
23 event if the Registrar publishes a verification statement in relation
24 to the event under this section.

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Part 5.4—When a registration is effective

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159 Guide to this Part

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This Part provides for the time at which a description of collateral is registered. The precise timing of a registration may be significant in determining the priority to be given to a security interest in the collateral (see section 55).

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This Part also deals with when a registration is effective and registration defects that may cause it to become ineffective.

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A registration is effective from the registration time until the earliest of:

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(a) the registered end time; or

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(b) an amendment time; or

15

(c) the time when the registration stops being available for search in the register.

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A registration is only ineffective because of a defect if there is a seriously misleading defect in data relating to the registration, or one of a number of particular defects set out in section 165 exists.

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If a security interest in certain property becomes unperfected, the secured party may be obliged to take steps to end the effect of the registration.

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160 Registration time—general

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- (1) A description of collateral starts to be registered in a registration with respect to a security interest, in relation to a particular secured party, at the moment (the *registration time*) when the description becomes available for search in the register in relation to that secured party.

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Section 161

- 1 Note 1: A written search result is evidence of a registration and of the
2 registration time (see section 174).
- 3 Note 2: A registration may stop being effective even if it is available for
4 search in the register (for example, because of a defect—see
5 section 164).
- 6 Note 3: If 2 or more registrations describe the same collateral in relation to the
7 same secured party, there may be different registration times for the
8 collateral in relation to each of the registrations.

- 9 (2) The **amendment time** for an amendment to a registration is the
10 moment when the amended registration becomes available for
11 search in the register.

12 **161 Registration time—security agreements and interests**

13 Personal property may be described in a registration with respect to
14 a security interest before or after:

- 15 (a) a security agreement is made covering the property; or
16 (b) a security interest attaches to the property.

17 **162 Registration time—transfers**

18 A financing statement, or a financing change statement, may be
19 registered to reflect the transfer of a security interest, or of
20 collateral, before or after the transfer.

21 **163 Effective registration**

- 22 (1) A registration with respect to a security interest that describes
23 particular collateral, in relation to a secured party, is effective with
24 respect to that collateral from the registration time for the
25 description of the collateral until the earliest of the following times:
26 (a) the end time (if any) registered for the collateral;
27 (b) if the registration is amended to omit the collateral
28 description—the amendment time;
29 (c) the time when the description of the collateral in the
30 registration stops being available for search in the register (by
31 reference to that time) in respect of the secured party.

32 Note: For the registration time for collateral, see section 160.

- 1 (2) This section is subject to sections 164, 165 and 166 (defects in
2 registration).

3 **164 Defects in registration—general rule**

- 4 (1) A registration with respect to a security interest that describes
5 particular collateral is ineffective because of a defect in the register
6 if, and only if, there exists:
7 (a) a seriously misleading defect in any data relating to the
8 registration; or
9 (b) a defect mentioned in section 165.
- 10 (2) In order to establish that a defect is seriously misleading, it is not
11 necessary to prove that any person was actually misled by it.
- 12 (3) A registration that describes particular collateral is not ineffective
13 only because the registration is ineffective with respect to other
14 collateral described in the registration.

15 **165 Defects in registration—particular defects**

- 16 For the purposes of paragraph 164(1)(b), a defect in a registration
17 that describes particular collateral exists at a particular time if any
18 of the following circumstances exist:
19 (a) in a case in which the collateral is required by the regulations
20 to be described by serial number in the register—no search of
21 the register by reference to that time, and by reference only to
22 the serial number of the collateral, is capable of disclosing
23 the registration;
24 (b) in a case in which the collateral is not required by the
25 regulations to be described by serial number in the register—
26 no search of the register by reference to that time, and by
27 reference only to the grantor's details (required to be
28 included in the registered financing statement under
29 section 153), is capable of disclosing the registration;
30 (c) if the registered financing statement (as amended, if at all)
31 indicates that the security interest in relation to the collateral
32 is a purchase money security interest (to any extent)—the
33 security interest is not a purchase money security interest (to
34 any extent) in relation to the collateral;

Section 166

- 1 (d) in any case—circumstances in relation to the data related to
2 the registration that are prescribed by the regulations.

3 **166 Defects in registration—temporary effectiveness**

4 *Scope*

- 5 (1) This section applies if:
6 (a) one of the following defects in a registration that describes
7 particular collateral arises at a particular time (the *defect*
8 *time*):
9 (i) a defect mentioned in paragraph 165(a) or (d);
10 (ii) a defect mentioned in paragraph 165(b), other than a
11 defect resulting from a change of the grantor in relation
12 to the collateral; and
13 (b) the defect does not arise only because of an irregularity,
14 omission or error in a financing statement or a financing
15 change statement.

16 Example: A defect mentioned in paragraph 165(a) may occur if there is a change
17 in the serial number under which collateral is required to be described
18 in the register. For example, a patent may be required to be described
19 by serial number (a Patent Application Number or a Patent Number).
20 The Patent Application Number may be changed to a Patent Number
21 when the patent is registered on the patents register.

22 Note: A change of the grantor may occur if the collateral described in the
23 registration is transferred. In this case, the secured party's security
24 interest may be temporarily perfected for a certain period (see
25 section 34).

26 *Registration is temporarily unaffected by the defect*

- 27 (2) Despite sections 164 and 165, the defect does not make the
28 registration ineffective for the period starting at the defect time and
29 ending at the earliest of the following times:
30 (a) the end time for the registration (as registered immediately
31 before the defect time);
32 (b) the end of the month that is 60 months after the defect time;
33 (c) the end of 5 business days after the day the secured party
34 acquires actual or constructive knowledge of the defect.

35 Note: The period mentioned in paragraph (c) may be extended by a
36 court under section 293.

1 *Registration becomes ineffective*

- 2 (3) However, the registration becomes ineffective with respect to the
3 collateral under sections 164 and 165 because of the defect
4 immediately after the earliest time mentioned in subsection (2),
5 unless, at or before that time, the registration is amended to correct
6 the defect.

7 **167 Security interest in certain property becomes unperfected**

8 *Scope*

- 9 (1) This section applies in relation to a registration with respect to a
10 security interest if:
11 (a) collateral described in the registration is:
12 (i) used, or intended to be used, predominantly for
13 personal, domestic or household purposes; or
14 (ii) registered with a serial number (see subsection (3)); and
15 (b) a security interest in the collateral that was perfected by the
16 registration becomes unperfected at a particular time (the
17 ***unperfection time***); and
18 (c) the end time for the registration is a time more than 5
19 business days after the day the unperfection time occurs.

20 *Requirement to end effective registration*

- 21 (2) The secured party must, before the end of 5 business days after the
22 day the unperfection time occurs, apply to register a financing
23 change statement under section 150 amending the registration to
24 end its effect.

25 Note 1: The period may be extended by a court under section 293.

26 Note 2: If the secured party fails to discharge the obligation under this section,
27 an action for damages may be available under section 271.

28 *When collateral is registered with a serial number*

- 29 (3) For the purposes of this section, collateral is registered with a serial
30 number at a particular time only if a search of the register by
31 reference to that time and by reference only to the serial number of
32 the collateral is capable of disclosing the registration.

Section 168

1 **168 Maintenance fees**

2 (1) The Registrar may give a secured party in respect of a registration
3 with respect to a security interest a written notice requiring the
4 secured party to pay the fee (determined under section 190) stated
5 in the notice within 28 days after the notice is given in order to
6 maintain the effectiveness of the registration.

7 (2) If the fee is not paid within 28 days after the notice is given, the
8 Registrar may register a financing change statement amending the
9 registration to end its effect.

10 Note 1: The Registrar must give a verification statement to each secured party
11 after the registration of a financing change statement (see section 156).

12 Note 2: Application may be made to the Administrative Appeals Tribunal for
13 review of certain decisions of the Registrar about registration (see
14 section 191).

15 Note 3: The requirement to pay a fee is satisfied if an arrangement for its
16 payment has been approved under subsection 190(4).

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Part 5.5—Searching the register

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169 Guide to this Part

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This Part is about searching and accessing data on the register.

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Anyone may search the register for data with respect to a security interest or personal property. Searches can only be undertaken by reference to certain criteria, for example the details of a grantor, or a serial number.

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A search by reference to an individual grantor's details, and the use of data obtained by a search, is only authorised if the search is undertaken for a purpose stated in this Part.

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A civil penalty applies in respect of unauthorised searches, and damages may be available (under section 271). In addition, an unauthorised search may be investigated under the *Privacy Act 1988*.

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The written search results may be used as evidence in a court or tribunal.

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A person may apply to obtain:

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(a) copies of registered financing statements and verification statements; and

21

22

(b) reports of certain matters relating to registered data in relation to the person.

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170 Search—general

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(1) A person may apply to the Registrar to search the register for data with respect to:

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(a) a security interest; or

Section 171

- 1 (b) personal property prescribed by regulations made for the
2 purposes of paragraph 148(c).
- 3 (2) The Registrar must:
- 4 (a) give the person access to the register to search for the data, in
5 accordance with the application; and
- 6 (b) if, in the application, the person requests a written search
7 result in relation to the data—ensure that the person is able to
8 obtain a written search result in relation to the data, in the
9 appropriate form under section 174.
- 10 (3) However, the Registrar may give the person access to the register
11 to search for the data only if:
- 12 (a) the search is authorised under sections 171 and 172; and
- 13 (b) the application is in the approved form; and
- 14 (c) the person pays the fee determined under section 190; and
- 15 (d) access to the data is not prohibited by the regulations.
- 16 Note 1: Application may be made to the Administrative Appeals Tribunal for
17 review of the Registrar’s decision under this section to refuse to give a
18 person access to the register to search for data (see section 191).
- 19 Note 2: The requirement to pay a fee is satisfied if an arrangement for its
20 payment has been approved under subsection 190(4).

21 **171 Search—criteria**

- 22 (1) A person may search the register by reference to the following
23 criteria:
- 24 (a) a grantor’s details (as required to be included, if at all, in a
25 registered financing statement under section 153);
- 26 (b) a serial number by which collateral may (or must) be
27 described in the register;
- 28 (c) the time of the search;
- 29 (d) an earlier nominated time, but only with the consent of the
30 Registrar;
- 31 (e) any other criteria prescribed by the regulations.
- 32 Note: If a registration is no longer effective, details of the registration
33 can still be found by searching the register by reference to an
34 earlier time when the registration was still effective (see
35 paragraph (e)). However, data removed from the register may not

1 be available for search by reference to an earlier time (see
2 Part 5.7).

3 (2) The Registrar must ensure that the way in which the results of a
4 search are worked out in response to an application for the search
5 is determined in accordance with any regulations made for the
6 purposes of this subsection.

7 **172 Search—by reference to details of grantor who is an individual**

8 *Scope*

9 (1) This section applies if a person proposes to search the register by
10 reference to the details of a grantor (other than that person) who is
11 an individual.

12 *Restriction on who may search*

13 (2) The following table sets out which persons (*searchers*) may search
14 the register, and for what purpose:
15

Who may search the register, and for what purpose		
Item	Searchers	Purpose
1	A person (the <i>first person</i>), or another person with the first person's consent	To disclose any registration in which the first person is registered as a grantor or a secured party.
2	A secured party in relation to a registration	A purpose that relates to a security interest attached to collateral described in the registration.
3	A grantor in relation to a registration	A purpose that relates to a security interest attached to the collateral described in the registration.
4	A person	To disclose any registration in which the person is registered as a secured party.
5	A person	To disclose whether collateral to which a security interest is attached is described in a registration.
6	A person	To disclose whether or not personal property is described in a

Section 172

Who may search the register, and for what purpose		
Item	Searchers	Purpose
		registration, if: (a) the property is to be purchased or dealt with by the person; or (b) the person has an interest in the property.
7	A person	To establish whether to provide credit to, or obtain a guarantee or an indemnity from, a person named in the search application or a person with an interest in the personal property described in the application.
8	A person	To establish whether to provide credit to, or obtain a personal guarantee or an indemnity from an associate (within the meaning of section 11 or subsection 12(2) of the <i>Corporations Act 2001</i>) of a body corporate named in the search application or of a body corporate with an interest in the personal property described in the application.
9	A person	To establish whether to invest in, with, or through, a person named in the search application.
10	A person	To establish whether to invest in, with, or through, an associate (within the meaning of section 11 or subsection 12(2) of the <i>Corporations Act 2001</i>) of a body corporate named in the search application or of a body corporate with an interest in the personal property described in the application.
11	The Registrar	A purpose that relates to the administration of this Act.
12	A person who has taken control of	A purpose that relates to the

Who may search the register, and for what purpose

Item	Searchers	Purpose
	the property of an individual who is insolvent under administration, within the meaning of the <i>Corporations Act 2001</i>	searcher's control of the property.
13	An Official Receiver in Bankruptcy within the meaning of the <i>Bankruptcy Act 1966</i>	A purpose that relates to the exercise of a power, or the performance of a function, of that Official Receiver in Bankruptcy.
14	The legal personal representative of an individual (including a deceased individual)	A purpose that relates to the exercise of a power, or the performance of a function, as legal personal representative.
15	A government entity within the meaning of the <i>A New Tax System (Australian Business Number) Act 1999</i>	A purpose that relates to the exercise of a power, or the performance of a function, of that entity, unless the purpose is covered by another purpose listed in this table.
16	A government entity within the meaning of the <i>A New Tax System (Australian Business Number) Act 1999</i>	A purpose that relates to the maintenance of the law, including the prevention, detection, investigation or prosecution of contraventions of laws (whether the penalty for contravention is criminal or civil).
17	The holder of a lien or charge, or a creditor	A purpose that relates to the enforcement of the lien or charge, or the creditor's rights, as the case may be.
18	A bailiff, or sheriff, of a court of the Commonwealth, a State or a Territory	A purpose that relates to the enforcement of a court order or warrant.
19	A person	To advise another person in connection with any of the purposes referred to in this table.

Section 172

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Search otherwise than for authorised purpose

- (3) A searcher mentioned in an item in the table in subsection (2) must not, otherwise than for the purpose specified in the item:
- (a) search the register; or
 - (b) use data obtained as a result of searching the register, unless the searcher has also obtained the data lawfully from another source.

Civil penalty:

- (a) for an individual—50 penalty units;
- (b) for a body corporate—250 penalty units.

Note: See Part 6.3 (Civil penalty proceedings).

- (4) A person who wishes to establish that a searcher mentioned in an item in the table in subsection (2) did an action mentioned in paragraph (3)(a) or (b) for the purpose specified in the item bears an evidential burden in relation to the matter.

Note: For *evidential burden*, see section 10.

- (5) The Registrar may do either or both of the following:
- (a) investigate a suspected contravention of subsection (3);
 - (b) decline to investigate, or to investigate further, a suspected contravention of subsection (3).

Recovery of damages for contravention

- (6) For the purposes of section 271:
- (a) compliance with subsection (3) is taken to be an obligation imposed on a person who searches the register, or uses data obtained as a result of searching the register; and
 - (b) the obligation is taken to be owed to the grantor by reference to whose details the search is undertaken; and
 - (c) a contravention of subsection (3) is taken to be a failure to discharge that obligation.

Note: Section 271 gives a right to recover damages for any loss or damage in relation to such a failure.

1 **173 Search—interference with privacy**

2 *Scope*

- 3 (1) This section applies if:
- 4 (a) a person obtains access to the register and searches the
 - 5 register for data (whether or not the access is obtained as a
 - 6 result of an application under section 170); and
 - 7 (b) as a result of the search, the person obtains personal
 - 8 information about an individual within the meaning of that
 - 9 Act.

10 *Unauthorised search or use of personal information is an*

11 *interference with privacy*

- 12 (2) If the search, or the use of the personal information, is
- 13 unauthorised under subsection (3) or (4), the search or use
- 14 constitutes an act or practice involving interference with the
- 15 privacy of the individual for the purposes of section 13 of the
- 16 *Privacy Act 1988*.

17 Note: These acts or practices may be the subject of complaints under

18 section 36 of that Act.

- 19 (3) The search is unauthorised if:
- 20 (a) the search is not authorised under section 171; or
 - 21 (b) the search is prohibited under subsection 172(3); or
 - 22 (c) access to the data for a search of that kind is prohibited by
 - 23 regulations made for the purposes of paragraph 170(3)(d).
- 24 (4) The use of the personal information is unauthorised (unless the
- 25 data has been obtained lawfully from another source) if:
- 26 (a) the search is not authorised under section 171; or
 - 27 (b) the use of the personal information is prohibited under
 - 28 subsection 172(3); or
 - 29 (c) access to the data for a search of that kind is prohibited by
 - 30 regulations made for the purposes of paragraph 170(3)(d).

Section 174

1 **174 Search—written search results and evidence etc.**

2 *Search result as evidence*

- 3 (1) A written search result in the appropriate form (see subsection (3))
4 is admissible as evidence in a court or tribunal and is, in the
5 absence of evidence to the contrary, proof of the matters stated in
6 the search result.
- 7 (2) Without limiting subsection (1), the matters that may be stated in a
8 search result include the following:
- 9 (a) the registered description of collateral at a particular time;
 - 10 (b) the time of the registration of a financing statement, any
11 financing change statement and the end time for a
12 registration;
 - 13 (c) in relation to 2 or more registrations—the order of any of the
14 times mentioned in paragraph (b) for all the registrations.

15 *Appropriate form of search result*

- 16 (3) A search result is in the *appropriate form* if:
- 17 (a) it purports to be issued by the Registrar in the approved form;
18 or
 - 19 (b) it purports to be issued by one of the following:
 - 20 (i) an officer or agency of the Commonwealth authorised
21 by the Registrar;
 - 22 (ii) an officer or agency of a State or Territory authorised by
23 the Registrar; or
 - 24 (c) it purports to be:
 - 25 (i) issued by a person prescribed by the regulations; and
26 (ii) if the Registrar approves a form for the purposes of this
27 subparagraph—in the approved form.
- 28 (4) The Registrar may include, or may authorise to be included, in a
29 search result, any data determined by the Registrar in relation to a
30 secured party, a grantor, or collateral.

1 *Evidence of transient electronic communications etc.*

- 2 (5) If a search result is covered by paragraph (b) of the definition of
3 **writing** in section 10, evidence of the search result may be given
4 by the production of a recording of the search result mentioned in
5 that paragraph.

6 *Instruments of approval*

- 7 (6) The Registrar may, by written instrument, authorise an officer or
8 agency for the purposes of subparagraph (3)(b)(i) or (ii).
- 9 (7) The Registrar may, by legislative instrument, determine data for
10 the purposes of subsection (4).

11 **175 Copy of financing statement**

12 On application by a person in the approved form, accompanied by
13 the fee (if any) determined under section 190, the Registrar may
14 give the person:

- 15 (a) a copy of any registered financing statement (as amended by
16 any registered financing change statement) in relation to
17 which the person is registered as a secured party; or
18 (b) a copy of a verification statement that relates to such a
19 registered financing statement.

20 Note 1: Application may be made to the Administrative Appeals Tribunal for
21 review of the Registrar's decision under this section to refuse to give a
22 person a copy of a registered financing statement or verification
23 statement (see section 191).

24 Note 2: The requirement to pay a fee is satisfied if an arrangement for its
25 payment has been approved under subsection 190(4).

26 **176 Reports by Registrar**

27 *Reports about particular persons*

- 28 (1) On application by a person in the approved form, accompanied by
29 the fee (if any) determined under section 190, the Registrar may
30 give the person a report of matters determined under subsection (3)
31 relating to registered data in relation to the person.

Section 176

1 Note 1: Application may be made to the Administrative Appeals Tribunal for
2 review of the Registrar's decision under this section to refuse to give a
3 person a report (see section 191).

4 Note 2: The requirement to pay a fee is satisfied if an arrangement for its
5 payment has been approved under subsection 190(4).

6 (2) The Registrar may, at the Registrar's initiative, give a person a
7 report of matters relating to registered data in relation to the person
8 (whether or not the matters are determined under subsection (3)).

9 (3) The Registrar may, by legislative instrument, determine matters
10 that may be the subject of reports under this section.

11 *Reports for the purposes of the administration of this Act*

12 (4) For the purposes of the administration of this Act, the Registrar
13 may prepare a report of any matter relating to registered data.

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Part 5.6—Amendment demands

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Division 1—Introduction

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177 Guide to this Part

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A person with an interest in collateral may require changes to the registration, by way of an *amendment demand* given to the secured party.

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An amendment demand may be made if:

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(a) the obligation owed by a debtor to the secured party is not secured by collateral described in the registration; or

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(b) the particular collateral in which the person has an interest does not secure any obligation owed by a debtor to the secured party.

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An amendment demand, if not voluntarily complied with, may be pursued by an administrative process activated by the Registrar, or by an application to a court. The secured party may also apply to a court to oppose an amendment demand.

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178 How amendment demands are given

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(1) A person with an interest (including a security interest) in collateral described in a registration with respect to a security interest may give a demand (an *amendment demand*), in writing, to the secured party for a financing change statement to be registered to amend the registration as authorised by the following table:

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Note: If the secured party does not comply with the amendment demand, the demand may be enforced under Subdivision A (administrative process) or Subdivision B (judicial process) of Division 3.

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Section 178

Authorised amendments

Item	When amendment is authorised	What amendment is authorised
1	No collateral described in the registration secures any obligation (including a payment) owed by a debtor to the secured party.	Amendment to end effective registration (including an amendment to remove the registration).
2	The particular collateral in which the person has an interest does not secure any obligation (including a payment) owed by a debtor to the secured party.	Amendment to omit the collateral.

- 1 (2) Data removed from the register because of an amendment in
2 compliance with the amendment demand must not be made
3 available for search in the register by reference to any time before
4 (or after) the time of removal, if the Registrar so decides for the
5 purposes of this subsection.
- 6 Note 1: Application may be made to the Administrative Appeals Tribunal for
7 review of the Registrar's decision that the removed data is not to be
8 made available for search in the register (see section 191).
- 9 Note 2: Incorrectly removed data may be restored under section 186.
- 10 (3) A secured party must not require payment for compliance with an
11 amendment demand in relation to collateral that is consumer
12 property.

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2 **Division 2—Amendment demands: administrative and**
3 **judicial process**

4 **Subdivision A—Administrative process**

5 **179 Scope of Subdivision**

- 6 (1) This Subdivision applies if:
- 7 (a) a secured party is given an amendment demand; and
- 8 (b) an application has not been made to register a financing
- 9 change statement in compliance with the demand before the
- 10 end of 5 business days after the day the demand is given to
- 11 the secured party; and
- 12 (c) there are no proceedings currently before a court (including a
- 13 court of appeal), in relation to an application under
- 14 section 182, that relate to the amendment demanded.
- 15 (2) This Subdivision stops applying if:
- 16 (a) a financing change statement is registered in accordance with
- 17 the amendment demand; or
- 18 (b) proceedings come before a court (including a court of
- 19 appeal), in relation to an application under section 182, that
- 20 relate to the amendment demanded.

21 *No application to security trust instruments*

- 22 (3) This Division does not apply in relation to a security interest if the
- 23 security agreement providing for the interest is an instrument or
- 24 other document:
- 25 (a) by which a person issues or guarantees, or provides for the
- 26 issue or guarantee of, an obligation secured by a security
- 27 interest; and
- 28 (b) in which another person is appointed as trustee for the person
- 29 to whom the obligation secured by the security interest is
- 30 owed.

Section 180

1 **180 Administrative process—amendment notices**

2 *Amendment notice given by Registrar*

- 3 (1) The Registrar may give the secured party a notice (an *amendment*
4 *notice*), in accordance with subsection (5), of the amendment
5 demanded.

6 *At the initiative of the Registrar*

- 7 (2) An amendment notice may be given at the initiative of the
8 Registrar, if the Registrar suspects on reasonable grounds that the
9 amendment demanded is authorised under section 178.

10 *In response to a statement by the person who gave the amendment*
11 *demand*

- 12 (3) The person who gave the amendment demand to the secured party
13 may give a statement in the approved form to the Registrar:
14 (a) stating the amendment demanded; and
15 (b) including anything else prescribed by the regulations.

16 Note: The provision of false or misleading information in the statement may
17 be an offence against Part 7.4 of the *Criminal Code*.

- 18 (4) An amendment notice must be given in response to a statement
19 under subsection (3) as soon as practicable after the statement is
20 given (unless an amendment notice has already been given at the
21 initiative of the Registrar).

22 *Amendment notices*

- 23 (5) An amendment notice is given in accordance with this subsection
24 if:
25 (a) the notice is in the approved form; or
26 (b) the notice:
27 (i) states the amendment demanded; and
28 (ii) invites the secured party to submit a response to the
29 amendment demand in writing to the Registrar before
30 the end of 5 business days after the day the notice is
31 given (or an extended period approved by the
32 Registrar); and

- 1 (iii) sets out the effect of section 181 (amendment of
2 registration); and
3 (iv) if a statement is given under subsection (3)—includes a
4 copy of the statement.
- 5 Note: The provision of false or misleading information in any response to
6 the invitation may be an offence against Part 7.4 of the *Criminal*
7 *Code*.

8 **181 Administrative process—registration amendments**

- 9 (1) If an amendment notice is given to a secured party under
10 section 180, after the end of the period covered by subsection (3),
11 the Registrar must (at his or her initiative) register a financing
12 change statement amending the registration (including an
13 amendment to remove the registration) in accordance with the
14 amendment demand, unless the Registrar suspects on reasonable
15 grounds that the amendment is not authorised under section 178.
- 16 (2) However, the Registrar may register such a financing change
17 statement before the end of the period covered by subsection (3) if:
18 (a) the secured party has responded to the invitation in the
19 amendment notice; and
20 (b) the Registrar has no reason to believe that the secured party
21 intends to give a further response.
- 22 (3) The period covered by this subsection is:
23 (a) 5 business days after the day the amendment notice is given
24 to the secured party; or
25 (b) a longer period approved by the Registrar (in relation to the
26 particular amendment demand, or to a class of amendment
27 demands) after the amendment notice is given to the secured
28 party.
- 29 (4) In making a decision about whether to register a financing change
30 statement amending the registration in accordance with the
31 amendment demand, the Registrar must consider:
32 (a) the response (if any) of the secured party to the invitation in
33 the amendment notice; and
34 (b) any other relevant information.

Section 182

1 (5) Data removed from the register because of an amendment under
2 this section must not be made available for search in the register by
3 reference to any time before (or after) the time of removal, if the
4 Registrar so decides for the purposes of this subsection.

5 Note 1: The provision of false or misleading information in any response to
6 the invitation may be an offence against Part 7.4 of the *Criminal*
7 *Code*.

8 Note 2: The Registrar must give a verification statement to each secured party
9 after the registration of a financing change statement (see section 156).

10 Note 3: Application may be made to the Administrative Appeals Tribunal for
11 review of certain decisions of the Registrar about registration (see
12 section 191).

13 Note 4: This section stops applying if proceedings come before a court under
14 section 182 in relation to the amendment demanded (see subsection
15 179(2)).

16 Note 5: Incorrectly removed data may be restored under section 186.

17 **Subdivision B—Judicial process**

18 **182 Judicial process for considering amendment demand**

19 (1) The following persons may apply to a court for an order in relation
20 to an amendment demand:

- 21 (a) the secured party;
22 (b) the person who gave the amendment demand.

23 (2) The person who gave the amendment demand cannot make an
24 application under this section before the end of 5 business days
25 after the day the demand is given to the secured party.

26 Note: The period may be extended by a court under section 293.

27 (3) A person with an interest (including a security interest) in the
28 collateral described in the registration has the right to appear before
29 the court on an application under this section.

30 Note 1: The Registrar also has the power to intervene in the proceeding (see
31 section 218).

32 Note 2: For which courts have jurisdiction, and for transfers between courts,
33 see Part 6.2.

34 (4) On an application under this section, a court may make the
35 following orders:

- 1 (a) if the court considers the amendment demanded to be
2 authorised under section 178—an order requiring the
3 Registrar to register a financing change statement amending
4 the registration (including an amendment to remove the
5 registration);
6 (b) if the court does not consider the amendment demanded to be
7 so authorised—one or more of the following orders:
8 (i) an order restraining the Registrar from registering a
9 financing change statement amending the registration at
10 the Registrar’s initiative (under section 181);
11 (ii) an order restraining the person who gave the
12 amendment demand from making such further
13 amendment demands as the court specifies;
14 (iii) an order restraining the Registrar from giving the
15 secured party amendment notices under section 180 in
16 relation to such further amendment demands as the
17 court specifies;
18 (c) any other order that the court thinks fit.

- 19 (5) The Registrar must comply with a court order to register a
20 financing change statement as soon as reasonably practicable after
21 receiving the order.

22 Note: The Registrar must give a verification statement to each secured party
23 after the registration of a financing change statement (see section 156).

- 24 (6) Data removed from the register because of an amendment under
25 this section must not be made available for search in the register by
26 reference to any time before (or after) the time of removal, if the
27 Registrar so decides.

28 Note: Incorrectly removed data may be restored under section 186.

Section 183

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Part 5.7—Removal of data and correction of registration errors

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183 Guide to this Part

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The Registrar may remove data in certain situations, for example if its retention is contrary to the public interest.

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The Registrar may also remove old data, restore removed data and correct errors or omissions made by the Registrar.

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184 Removal of data—general grounds

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- (1) The Registrar may (at his or her initiative) register a financing change statement to remove data (including an entire registration) from the register if the Registrar is satisfied that:
- (a) the application to register the data was frivolous or vexatious, the data is offensive, or the retention of the data in the register is contrary to the public interest; or
 - (b) the registration of the data is prohibited by regulations made for the purposes of paragraph 150(3)(d); or
 - (c) the removal of the data is required or permitted by the regulations made for the purposes of this paragraph; or
 - (d) the application to register the data was not made in the approved form; or
 - (e) the removal is required urgently:
 - (i) in the public interest; or
 - (ii) for reasons prescribed by regulations made for the purposes of this subparagraph.

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Note 1: The Registrar must give a verification statement to each secured party after the data is removed (see section 156).

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Note 2: Application may be made to the Administrative Appeals Tribunal for review of the Registrar's decision to remove data from the register under paragraph (a), (b) or (c) (see section 191).

- 1 (2) Data removed from the register under this section must not be
2 made available for search in the register by reference to any time
3 before (or after) the time of removal:
4 (a) in relation to data removed under paragraph (1)(a), (b) or
5 (c)—if the Registrar so decides for the purposes of this
6 paragraph; and
7 (b) in relation to data removed under paragraph (1)(d)—if the
8 Registrar so decides for the purposes of this paragraph;
9 (c) in relation to data removed under paragraph (1)(e)—in all
10 cases.

11 Note: Application may be made to the Administrative Appeals Tribunal for
12 review of the Registrar's decision under paragraph (a) (see
13 section 191).

- 14 (3) If subsection (2) applies in relation to data removed from the
15 register, this Act otherwise applies as if the data is not, and never
16 has been, included in the register.

17 Note: Incorrectly removed data may be restored under section 186.

18 **185 Removal of data—registration ineffective for 7 years or more**

19 The Registrar may (at his or her initiative) register a financing
20 change statement to remove data (including an entire registration)
21 with respect to a security interest from the register to reflect the
22 fact that the registration has been ineffective under section 163 for
23 7 years or more.

24 **186 Incorrectly removed data—restoration**

- 25 (1) The Registrar may (at his or her initiative) register a financing
26 change statement to restore data to the register (including an entire
27 registration) if it appears to the Registrar that the data was
28 incorrectly removed from the register under this Act.
29 (2) If data is restored to the register under subsection (1), for the
30 purposes of this Act the data is taken never to have been removed
31 from the register.

Section 187

1 **187 Records of removed data**

2 The removal of data from the register under this Act does not
3 prevent the Registrar from keeping a record of the removed data in
4 whatever form the Registrar considers appropriate.

5 **188 Correction of registration errors**

6 (1) The Registrar may (at his or her initiative) register a financing
7 change statement to amend a registration to correct an error or
8 omission made by the Registrar.

9 (2) If a registration is corrected under subsection (1), this Act applies
10 as if the error or omission had never been made.

11 Note 1: The Registrar must give a verification statement to each secured party
12 after the registration of a financing change statement (see section 156).

13 Note 2: Application may be made to the Administrative Appeals Tribunal for
14 review of the Registrar's decision to register a financing change
15 statement (see section 191).

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Part 5.8—Fees, administrative review and annual reports

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189 Guide to this Part

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This Part provides for fees for registration and searching the register, the review of registration decisions and the obligation of the Registrar to prepare annual reports on the operation of this Act.

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190 Registration and search fees

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Determination of fees and arrangements

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(1) The Minister may, by legislative instrument, determine fees for the purposes of this Act.

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(2) The Minister may, by a legislative instrument made under subsection (1), determine the kinds of arrangements for the payment of fees under the instrument that may be approved under subsection (4).

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(3) If this Act requires the payment of a determined fee for a particular purpose, without limiting subsection (6), that requirement is satisfied if an arrangement for its payment has been approved under subsection (4).

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Approval of arrangements

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(4) The Registrar may approve an arrangement (of a kind determined under subsection (2)) in relation to the payment of fees by a person for the purposes of this section on application by the person in the approved form, accompanied by the fee (if any) determined under subsection (1).

Section 191

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Miscellaneous

- (5) The fees determined under subsection (1) must not be such as to amount to taxation.
 - (6) The amount of a fee, except a fee to maintain a registration (determined for the purposes of section 168), is a debt due to the Commonwealth, and may be recovered by the Commonwealth by application to a court.
- Note 1: If a fee to maintain a registration is not paid within 28 days, the Registrar may end the effective registration of the collateral (see section 168).
- Note 2: For which courts have jurisdiction, and for transfers between courts, see Part 6.2.

13 **191 Review of decisions**

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An application may be made to the Administrative Appeals Tribunal for review of the following decisions made by the Registrar:

- (a) a decision to refuse to register a financing statement, under subsection 150(1);
- (b) a decision to refuse to register a financing change statement, under subsection 150(2);
- (c) a decision to register a financing change statement to amend the register to end the effect of a registration, under subsection 150(2);
- (d) a decision to refuse to give a person access to the register to search for data, under section 170;
- (e) a decision to refuse to give a person a copy of a registered financing statement in relation to which the person is registered as a secured party, or of a verification statement, under section 175;
- (f) a decision to refuse to give a person a report relating to registered data in relation to the person, under subsection 176(1);
- (g) a decision to register a financing change statement in accordance with an amendment demand, under subsection 181(1);

- 1 (h) a decision to refuse to register a financing change statement
2 in accordance with an amendment demand, under subsection
3 181(1);
4 (i) a decision to register a financing change statement to remove
5 data from the register, under paragraph 184(1)(a), (b) or (c);
6 (j) a decision that data removed from the register is not to be
7 made available for search in the register, under subsection
8 178(2) or 181(5) or paragraph 184(2)(a);
9 (k) a decision to register a financing change statement to restore
10 incorrectly removed data to the register, under section 186;
11 (l) a decision to register a financing change statement to amend
12 a registration to correct an error or omission made by the
13 Registrar, under section 188;
14 (m) a decision to register a financing change statement to remove
15 migrated data from the register, under subsection 334(2).

16 **192 Annual reports**

- 17 (1) The Registrar must, as soon as practicable after the end of each
18 financial year, prepare and give to the Minister, for presentation to
19 the Parliament, a report on the operation of this Act during that
20 financial year.

21 Note: See also section 34C of the *Acts Interpretation Act 1901*, which
22 contains extra rules about annual reports.

- 23 (2) The Registrar must include in the report:
24 (a) details of each occasion on which access to the register was
25 refused, or the operation of the register was otherwise
26 suspended, during the financial year under subsection 147(5);
27 and
28 (b) any information necessary to demonstrate that fees
29 determined under subsection 190(1) do not amount to
30 taxation.

Section 193

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Part 5.9—Registrar of Personal Property Securities

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193 Guide to this Part

5

This Part establishes the offices of the Registrar of Personal Property Securities and the Deputy Registrar.

6

7

Both are appointed by the Minister and engaged under the *Public Service Act 1999*.

8

9

The Part also includes provision for the delegation of the Registrar's powers.

10

11

194 Registrar—establishment of office

12

(1) There is to be a Registrar of Personal Property Securities.

13

(2) The Registrar is to be:

14

(a) engaged under the *Public Service Act 1999*; and

15

(b) appointed as Registrar of Personal Property Securities by the Minister by written instrument.

16

17

(3) The office of the Registrar of Personal Property Securities is not a public office for the purposes of the *Remuneration Tribunal Act 1973*.

18

19

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195 Registrar—functions and powers

21

(1) The Registrar has the functions given under this Act or any other Act.

22

23

(2) The Registrar has power to do all things necessary or convenient to be done for or in connection with the performance of his or her functions.

24

25

196 Registrar—acting appointments

- (1) The Minister may, by written instrument, appoint a person engaged under the *Public Service Act 1999* to act as the Registrar:
- (a) during a vacancy in the office of Registrar (whether or not an appointment has previously been made to the office); or
 - (b) during any period, or during all periods, when the Registrar:
 - (i) is absent from duty or from Australia; or
 - (ii) is, for any reason, unable to perform the duties of the office.
- (2) Anything done by, or in relation to, a person purporting to act under an appointment is not invalid merely because:
- (a) the occasion for the appointment had not arisen; or
 - (b) there was a defect or irregularity in connection with the appointment; or
 - (c) the appointment had ceased to have effect; or
 - (d) the occasion to act had not arisen or had ceased.

Note: For general provisions about appointments, see also sections 20 and 33A of the *Acts Interpretation Act 1901*.

197 Registrar—delegation

- (1) The Registrar may, by written instrument, delegate all or any of his or her functions or powers to:
- (a) a person engaged under the *Public Service Act 1999*; or
 - (b) another person determined by the Registrar, by written instrument, for the purposes of this section.

Note: The Registrar may determine a particular person or a class of persons under paragraph (b), and may apply the determination in relation to particular matters or classes of matters (see subsection 33(3A) of the *Acts Interpretation Act 1901*).

- (2) A delegate must, if required by the instrument of delegation, perform a delegated function, or exercise a delegated power, under the direction or supervision of:
- (a) the Registrar; or
 - (b) a Deputy Registrar; or
 - (c) a person engaged under the *Public Service Act 1999*.

Section 198

1 Note: For further provisions relating to delegations, see sections 34AA and
2 34AB of the *Acts Interpretation Act 1901*.

3 **198 Registrar—resignation**

- 4 (1) The Registrar may resign by writing signed by him or her and
5 given to the Minister.
- 6 (2) The resignation takes effect on the day it is received by the
7 Minister or, if a later day is specified in the resignation, on that
8 later day.

9 **199 Registrar—termination**

- 10 (1) The Minister may terminate the appointment of the Registrar by
11 written instrument.
- 12 (2) The appointment of the Registrar is terminated if the Registrar
13 stops being engaged under the *Public Service Act 1999* for any
14 reason.

15 **200 Deputy Registrar—establishment of office**

- 16 (1) There is to be at least one Deputy Registrar of Personal Property
17 Securities (a *Deputy Registrar*).
- 18 (2) A Deputy Registrar is to be:
19 (a) engaged under the *Public Service Act 1999*; and
20 (b) appointed as a Deputy Registrar of Personal Property
21 Securities by the Minister by written instrument.
- 22 (3) The office of Deputy Registrar of Personal Property Securities is
23 not a public office for the purposes of the *Remuneration Tribunal*
24 *Act 1973*.

25 **201 Deputy Registrar—functions and powers**

- 26 (1) Subject to any direction by the Registrar, a Deputy Registrar has all
27 the functions and powers of the Registrar, except the powers of
28 delegation under section 197.

- 1 (2) A function or power of the Registrar, when performed or exercised
2 by a Deputy Registrar, is taken to have been performed or
3 exercised by the Registrar.
- 4 (3) The performance of a function, or the exercise of a power, of the
5 Registrar by a Deputy Registrar does not prevent the performance
6 of the function, or the exercise of the power, by the Registrar.
- 7 (4) If the performance (or exercise) of a function or power by the
8 Registrar is dependent on the opinion, belief or state of mind of the
9 Registrar in relation to a matter, that function or power may be
10 performed (or exercised) by a Deputy Registrar on his or her
11 opinion, belief or state of mind in relation to that matter.
- 12 (5) If the operation of a provision of this Act or another Act is
13 dependent on the opinion, belief or state of mind of the Registrar in
14 relation to a matter, that provision may operate on the opinion,
15 belief or state of mind of a Deputy Registrar in relation to that
16 matter.

17 **202 Deputy Registrar—resignation**

- 18 (1) A Deputy Registrar may resign by writing signed by him or her
19 and given to the Minister.
- 20 (2) The resignation takes effect on the day it is received by the
21 Minister or, if a later day is specified in the resignation, on that
22 later day.

23 **203 Deputy Registrar—termination**

- 24 (1) The Minister may terminate the appointment of a Deputy Registrar
25 by written instrument.
- 26 (2) The appointment of a Deputy Registrar is terminated if the Deputy
27 Registrar stops being engaged under the *Public Service Act 1999*
28 for any reason.

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Chapter 6—Judicial proceedings

Part 6.1—Guide to this Chapter

204 Guide to this Chapter

This Chapter deals with the role of the courts in proceedings that relate to security interests in personal property.

Part 6.2 is about judicial proceedings generally.

Part 6.3 deals with proceedings for contravention of a civil penalty provision.

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Part 6.2—Judicial proceedings generally

3

Division 1—Introduction

4

205 Guide to this Part

5

This Part is about judicial proceedings in a court with respect to matters arising under this Act or in relation to a security agreement or a security interest.

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8

Jurisdiction is conferred on the Federal Court, the Federal Magistrates Court, courts of States and Territories and the Family Court. PPS matters can be transferred between courts in accordance with procedures set out in this Part.

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The Registrar may intervene in judicial proceedings.

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206 Scope of this Part

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(1) This Part deals with the jurisdiction of a court with respect to a matter (a *PPS matter*):

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(a) arising under a provision of this Act authorising an application to be made to a court; or

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(b) otherwise arising in relation to this Act, other than a matter in respect of which the Federal Court or the Federal Magistrates Court has jurisdiction under the *Administrative Decisions (Judicial Review) Act 1977*; or

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(c) otherwise arising in relation to a security agreement or a security interest.

23

24

(2) This Part operates to the exclusion of:

25

(a) the *Jurisdiction of Courts (Cross-vesting) Act 1987*; and

26

(b) section 39B of the *Judiciary Act 1903*.

27

(3) This Part does not limit the operation of the provisions of the *Judiciary Act 1903* other than section 39B.

28

Chapter 6 Judicial proceedings
Part 6.2 Judicial proceedings generally
Division 1 Introduction

Section 206

- 1 (4) Without limiting subsection (3), this Part does not limit the
2 operation of subsection 39(2) of the *Judiciary Act 1903* in relation
3 to matters arising under this Act.
- 4 (5) Nothing in this Part affects any other jurisdiction of any court.
- 5 (6) This Part does not apply to matters arising under Part 6.3 (civil
6 penalty proceedings).

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Division 2—Conferral of jurisdiction

207 Jurisdiction of courts

Jurisdiction is conferred on a court mentioned in an item in the following table with respect to a PPS matter, subject to the limits on the court's jurisdiction (if any) specified in the item:

Jurisdiction of courts		
Item	Court on which jurisdiction is conferred	Limits of jurisdiction
1	The Federal Court	No specified limits.
2	The Federal Magistrates Court	The court does not have jurisdiction to award an amount for loss or damage that exceeds: (a) \$750,000; or (b) if another amount is prescribed by the regulations—that other amount.
3	A superior court, or lower court, of a State or Territory	The court's general jurisdictional limits, including (but not limited to) limits as to locality and subject matter, to the extent that the Constitution permits.
4	The Family Court	No specified limits.

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208 Cross-jurisdictional appeals

The following table has effect:

Section 208

Cross-jurisdictional appeals		
Item	Unless expressly provided by a law of the Commonwealth, a State or a Territory, an appeal with respect to a PPS matter does not lie from a decision of ...	to any of the following courts:
1	the Federal Court	(a) the Federal Magistrates Court; (b) a court of a State; (c) a court of a Territory; (d) the Family Court.
2	the Federal Magistrates Court	(a) a court of a State; (b) a court of a Territory.
3	a court of a State (other than a State Family Court)	(a) the Federal Court; (b) the Federal Magistrates Court; (c) a court of another State; (d) a court of a Territory; (e) the Family Court; (f) a State Family Court of the same State.
4	a court of the Australian Capital Territory	(a) the Federal Court; (b) the Federal Magistrates Court; (c) a court of a State; (d) a court of another Territory; (e) the Family Court.
5	a court of the Northern Territory	(a) the Federal Court; (b) the Federal Magistrates Court; (c) a court of a State; (d) a court of another Territory; (e) the Family Court.
6	a court of an external Territory	(a) the Federal Magistrates Court; (b) a court of a State; (c) a court of another Territory (whether internal or external); (d) the Family Court.
7	the Family Court	(a) the Federal Court; (b) the Federal Magistrates Court;

Cross-jurisdictional appeals

Item Unless expressly provided by a law of the Commonwealth, a State or a Territory, an appeal with respect to a PPS matter does not lie from a decision of ...

		(c) a court of a State;
		(d) a court of a Territory.
8	a State Family Court	(a) the Federal Court; (b) the Federal Magistrates Court; (c) the Supreme Court of the same State; (d) a court of another State; (e) a court of a Territory.

1 **209 Courts to act in aid of each other**

2 In PPS matters, all of the following must severally act in aid of,
3 and be auxiliary to, each other:

- 4 (a) courts on which jurisdiction is conferred under this Part;
5 (b) officers of, or under the control of, those courts.

Section 210

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Division 3—Transfers between courts

210 Application of this Division

Scope

- (1) This Division applies if all the following conditions are satisfied:
- (a) a proceeding with respect to a PPS matter is pending, or has come, before a court (the *transferring court*) on which jurisdiction is conferred under this Part in relation to the matter;
 - (b) jurisdiction is also conferred on another court (the *receiving court*) under this Part with respect to either of the following (the *transfer matter*):
 - (i) the entire proceeding;
 - (ii) an application in the proceeding;
 - (c) the receiving court has the power to grant the remedies sought before the transferring court in relation to the transfer matter.

Transfers to which other legislation applies

- (2) This Division does not apply to a transfer between the courts mentioned in an item in the following table, except as provided by paragraph 211(2)(b):

Transfers to which other legislation applies

Item	Transferring court	Receiving court
1	The Federal Court	The Federal Magistrates Court.
2	The Family Court	The Federal Magistrates Court.
3	The Federal Magistrates Court	The Federal Court or the Family Court.

Note 1: Paragraph 211(2)(b) gives the Federal Magistrates Court the power to transfer a matter to the Federal Court with a recommendation that the Federal Court transfer the matter to a superior court other than the Federal Court.

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- 1 Note 2: Transfers mentioned in the table are covered by other legislation as
2 follows:
3 (a) for a transfer mentioned in item 1—section 32AB of the *Federal*
4 *Court of Australia Act 1976*;
5 (b) for a transfer mentioned in item 2—sections 33A to 33C of the
6 *Family Law Act 1975*;
7 (c) for a transfer mentioned in item 3—section 39 of the *Federal*
8 *Magistrates Act 1999*.

9 **211 Exercise of transfer power**

10 *General rule*

- 11 (1) If section 212 (which deals with the criteria for transfers) is
12 satisfied, the transferring court may transfer to the receiving court:
13 (a) the transfer matter; and
14 (b) if the transferring court considers it necessary or
15 convenient—any related application (or all related
16 applications) in the proceeding.

17 *Cross-jurisdictional transfers between lower courts and superior* 18 *courts*

- 19 (2) However, if the transferring court is a lower court, and the
20 transferring court considers that section 212 is satisfied in relation
21 to the transfer of a matter mentioned in subsection (1) of this
22 section to a receiving court that is a superior court other than the
23 relevant superior court:
24 (a) the transferring court does not have the power to transfer the
25 matter to that receiving court; but
26 (b) the transferring court may:
27 (i) transfer the matter to the relevant superior court; and
28 (ii) give the relevant superior court a recommendation that
29 the matter be transferred to that receiving court by the
30 relevant superior court.

- 31 (3) In this Act:

32 *lower court* means:

- 33 (a) the Federal Magistrates Court; or
34 (b) a court of a State or Territory that is not a superior court.

Section 212

- 1 **relevant superior court**, in relation to a lower court, means:
2 (a) if the lower court is the Federal Magistrates Court—the
3 Federal Court; or
4 (b) if the lower court is a court of a State or Territory—the
5 Supreme Court of the State or Territory.

- 6 **superior court** means:
7 (a) the Federal Court; or
8 (b) a Supreme Court of a State or Territory; or
9 (c) the Family Court; or
10 (d) a State Family Court.

11 **212 Criteria for transfers between courts**

12 *General*

- 13 (1) The transferring court may make a transfer under section 211 only
14 if it appears to the transferring court, taking into account the
15 considerations covered by subsection (2), that:
16 (a) the transfer matter arises out of, or is related to, another
17 proceeding pending, or that has come, before a receiving
18 court; or
19 (b) it is otherwise in the interests of justice that the transfer
20 matter be determined by a receiving court.

21 *Relevant considerations*

- 22 (2) The considerations covered by this subsection include, but are not
23 limited to, the following:
24 (a) the principal location, or place of business, of the parties in
25 relation to the transfer matter;
26 (b) where the event (or events) that are the subject of the transfer
27 matter took place;
28 (c) the desirability of related proceedings being heard in the
29 same State or Territory;
30 (d) any relevant recommendation received under subsection
31 211(2);
32 (e) the suitability (taking into account the considerations
33 mentioned in paragraphs (a) to (d) and any other

1 consideration) of having the transfer matter determined by
2 the receiving court.

3 **213 Initiating transfers between courts**

4 A court may make a transfer under section 211:
5 (a) on the application of a party made at any stage; or
6 (b) at the court's own initiative.

7 **214 Documents and procedure**

8 If a transferring court transfers a proceeding or application to
9 another court under section 211:
10 (a) the Registrar (or other proper officer) of the transferring court
11 must give the Registrar (or other proper officer) of the other
12 court all documents filed in the transferring court in respect
13 of the proceeding or application, as the case may be; and
14 (b) the other court must proceed as if:
15 (i) the proceeding or application had been originally
16 instituted or made in the other court; and
17 (ii) the same proceedings had been taken in the other court
18 as were taken in the transferring court.

19 **215 Conduct of transferred proceedings**

20 (1) Subject to any applicable rules of court, a court must, in dealing
21 with a PPS matter transferred to the court under section 211, apply
22 rules of evidence and procedure that:
23 (a) are applied in any superior court; and
24 (b) the court considers appropriate to be applied in the
25 circumstances.
26 (2) If a proceeding with respect to a PPS matter is transferred under
27 section 211 from a transferring court to another court, the other
28 court must deal with the proceeding as if, subject to any order of
29 the transferring court, the steps that had been taken for the
30 purposes of the proceeding in the transferring court (including the
31 making of an order), or similar steps, had been taken in the other
32 court.

Section 216

1 **216 Entitlement to practise as barrister or solicitor**

2 *Scope*

3 (1) This section applies if a proceeding with respect to a PPS matter in
4 a transferring court is transferred to another court under
5 section 211.

6 *Right to appear*

7 (2) A person who is entitled to practise as a legal practitioner (however
8 described) in the transferring court has the same entitlements to
9 practise in relation to the matters covered by subsection (3) in the
10 other court that the person would have if the other court were a
11 federal court exercising federal jurisdiction.

12 (3) This subsection covers the following matters:

13 (a) the PPS matter;

14 (b) any other proceeding out of which the PPS matter arises or to
15 which the PPS matter is related, if the other proceeding is to
16 be determined together with the PPS matter.

17 **217 Limitation on appeals**

18 An appeal does not lie from a decision of a court:

19 (a) in relation to the transfer of a proceeding under section 211;
20 or

21 (b) as to which rules of evidence and procedure are to be applied
22 under subsection 215(1).

1

2 **Division 4—Registrar's role in judicial proceedings**

3 **218 Intervention in judicial proceedings**

4 (1) The Registrar may, on behalf of the Commonwealth, intervene in a
5 proceeding in a court with respect to a PPS matter.

6 (2) If the Registrar intervenes in the proceeding:

7 (a) the Registrar is taken to be a party to the proceeding; and

8 (b) subject to this Act, the Registrar has all the rights, duties and
9 liabilities of such a party; and

10 (c) without limiting paragraph (b), the Registrar may appear and
11 be represented by a legal practitioner (however described).

12 **219 Initiation of judicial proceedings**

13 *Scope*

14 (1) This section applies if the Registrar considers it to be in the public
15 interest for a person to bring and carry on a proceeding in a court
16 for the recovery of damages with respect to a PPS matter.

17 *Initiation of proceedings by Registrar*

18 (2) The Registrar may, on behalf of the Commonwealth, cause the
19 proceeding to be begun and carried on in the person's name.

20 (3) If the person is not a constitutional corporation, the Registrar must
21 obtain the person's written consent to the exercise of the
22 Registrar's power under subsection (2).

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Part 6.3—Civil penalty proceedings

3

Division 1—Introduction

4

220 Guide to this Part

5

This Part sets up a framework for determining liability under a civil penalty provision.

6

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On application by the Registrar, the Federal Court of Australia can order the payment of a civil penalty for a serious breach of a civil penalty provision (Division 2).

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Division 3 deals with the interaction of civil penalty proceedings with criminal proceedings.

11

12

Division 4 is about enforceable undertakings relating to contraventions of civil penalty provisions.

13

14

The Registrar may accept a written undertaking for the payment of a specified amount to the Commonwealth within a specified period. The undertaking is given by a person who has taken action that contravenes a civil penalty provision.

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221 What is a civil penalty provision?

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A subsection of this Act (or a section of this Act that is not divided into subsections) is a *civil penalty provision* if:

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(a) the words “civil penalty” and one or more amounts in penalty units are set out at the foot of the subsection (or section); or

22

23

(b) another provision of this Act specifies that the subsection (or section) is a civil penalty provision.

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2 **Division 2—Obtaining an order for a civil penalty**

3 **222 Federal Court may order person to pay pecuniary penalty for**
4 **contravening civil penalty provision**

5 *Application for order*

- 6 (1) Within 6 years of a person (the *wrongdoer*) contravening a civil
7 penalty provision, the Registrar may apply on behalf of the
8 Commonwealth to the Federal Court for an order that the
9 wrongdoer pay the Commonwealth a pecuniary penalty.

10 *Court may order wrongdoer to pay pecuniary penalty*

- 11 (2) If the Court is satisfied that the wrongdoer has contravened a civil
12 penalty provision, and the Court is satisfied that the contravention
13 is serious, the Court may order the wrongdoer to pay to the
14 Commonwealth for each contravention the pecuniary penalty that
15 the Court determines is appropriate (but not more than the relevant
16 amount specified for the provision).

17 *Determining amount of pecuniary penalty*

- 18 (3) In determining the pecuniary penalty, the Court must have regard
19 to all relevant matters, including:
20 (a) the nature and extent of the contravention; and
21 (b) the nature and extent of any loss or damage suffered as a
22 result of the contravention; and
23 (c) the circumstances in which the contravention took place; and
24 (d) whether the person has previously been found by the Court in
25 proceedings under this Act to have engaged in any similar
26 conduct.

27 *Conduct contravening more than one civil penalty provision*

- 28 (4) If conduct constitutes a contravention of 2 or more civil penalty
29 provisions, proceedings may be instituted under this Act against a
30 person in relation to the contravention of any one or more of those
31 provisions. However, the person is not liable to more than one

Section 223

1 pecuniary penalty under this section in respect of the same
2 conduct.

3 **223 Contravening a civil penalty provision is not an offence**

4 A contravention of a civil penalty provision is not an offence.

5 **224 Persons involved in contravening civil penalty provision**

6 (1) A person must not:

7 (a) aid, abet, counsel or procure a contravention of a civil
8 penalty provision; or

9 (b) induce (by threats, promises or otherwise) a contravention of
10 a civil penalty provision; or

11 (c) be in any way directly or indirectly knowingly concerned in,
12 or party to, a contravention of a civil penalty provision; or

13 (d) conspire to contravene a civil penalty provision.

14 (2) This Part applies to a person who contravenes subsection (1) in
15 relation to a civil penalty provision as if the person had
16 contravened the provision.

17 **225 Recovery of a pecuniary penalty**

18 If the Federal Court orders a person to pay a pecuniary penalty:

19 (a) the penalty is payable to the Commonwealth; and

20 (b) the Commonwealth may enforce the order as if it were a
21 judgment of the Court.

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2 **Division 3—Civil penalty proceedings and criminal**
3 **proceedings**

4 **226 Civil proceedings after criminal proceedings**

5 The Federal Court must not make a pecuniary penalty order against
6 a person for a contravention of a civil penalty provision if the
7 person has been convicted of an offence constituted by conduct
8 that is substantially the same as the conduct constituting the
9 contravention.

10 **227 Criminal proceedings during civil proceedings**

- 11 (1) Proceedings for a pecuniary penalty order against a person for a
12 contravention of a civil penalty provision are stayed if:
13 (a) criminal proceedings are started or have already been started
14 against the person for an offence; and
15 (b) the offence is constituted by conduct that is substantially the
16 same as the conduct alleged to constitute the contravention.
- 17 (2) The proceedings for the order may be resumed if the person is not
18 convicted of the offence. Otherwise, the proceedings for the order
19 are dismissed.

20 **228 Criminal proceedings after civil proceedings**

21 Criminal proceedings may be started against a person for conduct
22 that is substantially the same as conduct constituting a
23 contravention of a civil penalty provision regardless of whether a
24 pecuniary penalty order has been made against the person.

25 **229 Evidence given in proceedings for penalty not admissible in**
26 **criminal proceedings**

27 Evidence of information given or evidence of production of
28 documents by an individual is not admissible in criminal
29 proceedings against the individual if:

Chapter 6 Judicial proceedings

Part 6.3 Civil penalty proceedings

Division 3 Civil penalty proceedings and criminal proceedings

Section 229

- 1 (a) the individual previously gave the evidence or produced the
2 documents in proceedings for a pecuniary penalty order
3 against the individual for a contravention of a civil penalty
4 provision (whether or not the order was made); and
5 (b) the conduct alleged to constitute the offence is substantially
6 the same as the conduct that was claimed to constitute the
7 contravention.

8 However, this does not apply to a criminal proceeding in respect of
9 the falsity of the evidence given by the individual in the
10 proceedings for the pecuniary penalty order.

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**Division 4—Enforceable undertakings relating to
contraventions of civil penalty provisions**

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**230 Acceptance of undertakings relating to contraventions of civil
penalty provisions**

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(1) This section applies if the Registrar considers that an action taken
by a person contravenes a civil penalty provision.

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(2) The Registrar may accept a written undertaking given by the
person in relation to the action, in which the person undertakes to
pay a specified amount to the Commonwealth within a specified
period.

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(3) The person may withdraw or vary the undertaking at any time, but
only with the consent of the Registrar.

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231 Enforcement of undertakings

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(1) If the Registrar considers that a person who gave an undertaking
under section 230 has breached any of its terms, the Registrar may
apply to the Federal Court for an order under subsection (2).

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(2) If the Federal Court is satisfied that the person has breached a term
of the undertaking, the Court may make either or both of the
following orders:

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(a) an order directing the person to comply with that term of the
undertaking;

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(b) any other order that the Court considers appropriate.

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Chapter 7—Operation of laws

Part 7.1—Guide to this Chapter

232 Guide to this Chapter

This Chapter deals with how this Act interacts with other laws.

Part 7.2 deals with the interaction of Australian and foreign laws relating to security interests.

Part 7.3 deals with the constitutional operation of this Act.

Part 7.4 deals with the interaction of this Act with other Commonwealth laws and with State and Territory laws.

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2 **Part 7.2—Australian laws and those of other**
3 **jurisdictions**
4

5 **233 Guide to this Part**

6 This Part is about how Australian laws interact with foreign laws.

7 In court proceedings, this Part describes which law will govern the
8 validity, perfection and effect of perfection or non-perfection of a
9 security interest.

10 The Commonwealth may provide that a particular law governs a
11 security interest and parties can agree that the law of the
12 Commonwealth governs a security interest.

13 The rules for determining the governing law in relation to a
14 security interest differ depending on the type of interests.

15 For example, for a security interest in goods, the question of the
16 governing law may be dependent on the location of the goods.
17 However, for certain intangible property and financial property this
18 will generally be determined by the location of the grantor.

19 **234 Scope of this Part**

20 *General rule*

- 21 (1) In proceedings in an Australian court, the law of the jurisdiction
22 specified by this Part in relation to a security interest governs the
23 validity, perfection and effect of perfection or non-perfection of the
24 security interest.

Section 235

1 *Preservation of contractual obligations*

2 (2) However, this Part does not affect the law that governs contractual
3 obligations (including any obligations arising under a security
4 agreement).

5 **235 Meaning of *located***

6 *Location of personal property*

7 (1) For the purposes of this Act, personal property (including chattel
8 paper, an investment instrument and a negotiable instrument) is
9 ***located*** in the particular jurisdiction (whether the jurisdiction of
10 Australia or a foreign jurisdiction) in which the personal property
11 is situated.

12 (2) However:

- 13 (a) an investment instrument that is not evidenced by a
14 certificate is ***located*** in the jurisdiction the law of which
15 governs the transfer of the investment instrument; and
16 (b) a negotiable instrument that is evidenced by an electronic
17 record is ***located*** in the jurisdiction the law of which governs
18 the negotiable instrument; and
19 (c) chattel paper that is evidenced by an electronic record is
20 ***located*** in the jurisdiction the law of which governs the
21 chattel paper.

22 *Location of a person*

23 (3) A body corporate is ***located*** in the jurisdiction in which the body
24 corporate is incorporated.

25 (4) A body politic is ***located*** in the jurisdiction of the body politic.

26 (5) An individual is ***located*** at the individual's principal place of
27 residence.

28 **236 Commonwealth laws may provide for governing law**

29 Despite any other provision of this Part, a law of the
30 Commonwealth may provide that that law, or any other law of the
31 Commonwealth, governs a security interest.

1 **237 Express agreement**

- 2 (1) Despite sections 238, subsections 239(1) and (2) and section 240,
3 the law of the Commonwealth (other than the law relating to
4 conflict of laws) governs a security interest if:
5 (a) the grantor is an Australian entity at the time the security
6 interest attaches to the collateral; and
7 (b) the security agreement that provides for the security interest
8 expressly provides that the law of the Commonwealth, or that
9 law as it applies in a particular State or Territory, governs the
10 security interest.
- 11 (2) However, a security agreement may not provide for the law of the
12 Commonwealth, or that law as it applies in a particular State or
13 Territory, to govern a security interest in the following intangible
14 property:
15 (a) an account;
16 (b) an assignment of:
17 (i) an account; or
18 (ii) chattel paper;
19 (c) intellectual property or an intellectual property licence.

20 Note 1: For the law that governs security interests in such kinds of intangible
21 property, see section 239.

22 Note 2: The parties to a security agreement may provide that the law of the
23 Commonwealth governs a security interest in an ADI account if it
24 would not be manifestly contrary to public policy (see subsection
25 239(5)).

26 **238 Governing laws—goods**

27 *Main rule*

- 28 (1) A security interest in goods is governed by the law of the
29 jurisdiction (other than the law relating to conflict of laws) in
30 which the property is located when the security interest attaches,
31 under that law, to the goods.

32 Note 1: Under section 237, the parties to a security agreement may expressly
33 provide for the law of the Commonwealth to apply instead.

34 Note 2: For when personal property is located in a jurisdiction, see
35 section 235.

Section 239

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Goods that are moved

- (2) Despite subsection (1), a security interest in goods is governed by the law of a jurisdiction (other than the law relating to conflict of laws) if:
 - (a) the goods are moved to that jurisdiction; and
 - (b) at the time the security interest attaches, under that law, to the goods, the secured party reasonably believes that the goods will be moved to that jurisdiction.

Goods that are normally moved between jurisdictions

- (3) Despite subsections (1) and (2), a security interest in goods is governed by the law of a jurisdiction (including the law relating to conflict of laws) if:
 - (a) the grantor is located in that jurisdiction when the security interest attaches, under that law, to the goods; and
 - (b) the goods are commercial property of a kind that is normally used in more than one jurisdiction.

Note: For the location of bodies corporate, bodies politic and individuals, see section 235.

239 Governing laws—intangible property

Main rules

- (1) The validity of a security interest in intangible property is governed by the law of the jurisdiction (other than the law relating to conflict of laws) in which the grantor is located when the security interest attaches, under that law, to the property.
- (2) At a particular time, the perfection, and the effect of perfection or non-perfection, of a security interest in intangible property is governed by the law of the jurisdiction (other than the law relating to conflict of laws) in which the grantor is located at that time.

Intellectual property

- (3) Despite subsections (1) and (2), a security interest in intellectual property or an intellectual property licence is governed by the law

1 of the jurisdiction (other than the law relating to conflict of laws)
2 by or under which the intellectual property or licence is granted.

3 *ADI accounts*

4 (4) Despite subsections (1) and (2), a security interest in an ADI
5 account is governed by the law of the jurisdiction (other than the
6 law relating to conflict of laws) that governs the ADI account.

7 (5) However, the parties to a security agreement may agree in writing
8 that the law of another jurisdiction governs the security interest in
9 the ADI account if applying the law of that other jurisdiction
10 would not be manifestly contrary to public policy.

11 *Rights evidenced by letters of credit not covered*

12 (6) This section does not apply to a right evidenced by a letter of credit
13 that states that the letter of credit must be presented on claiming
14 payment or requiring the performance of an obligation.

15 Note 1: For the priority of a security interest in an account if there is no
16 foreign register, see section 77.

17 Note 2: For the location of bodies corporate, bodies politic and individuals,
18 see section 235.

19 Note 3: Under section 237, the parties to a security agreement may expressly
20 provide for the law of the Commonwealth to apply instead.

21 Note 4: Rights mentioned in subsection (6) are dealt with in the same way as
22 financial property by section 240.

23 **240 Governing laws—financial property and rights evidenced by**
24 **letters of credit**

25 *Validity rules*

26 (1) The validity of a security interest in financial property, or property
27 covered by subsection (2), is governed by the law of the
28 jurisdiction (other than the law relating to conflict of laws) in
29 which the grantor is located when the security interest attaches,
30 under that law, to the property.

Section 240

- 1 (2) This subsection covers property that is a right evidenced by a letter
2 of credit that states that the letter of credit must be presented on
3 claiming payment or requiring the performance of an obligation.
- 4 (3) However, the validity of a security interest to which subsection (1)
5 applies is governed by the law of Australia if:
6 (a) the security interest has attached under the law of a place in
7 Australia; and
8 (b) at the time of attachment:
9 (i) the property is located in Australia; and
10 (ii) the secured party has possession or control of the
11 property sufficient to perfect the security interest under
12 this Act.

13 *Perfection rules*

- 14 (4) At a particular time, the perfection, and the effect of perfection or
15 non-perfection, of a security interest in financial property, or
16 property covered by subsection (2), is governed by the law of the
17 jurisdiction (other than the law relating to conflict of laws) in
18 which the grantor is located at that time.
- 19 (5) However, at a particular time, the perfection, and the effect of
20 perfection or non-perfection, of a security interest mentioned in
21 subsection (4) is governed by the law of Australia if, at that time:
22 (a) the property is located in Australia; and
23 (b) the secured party has possession or control of the property
24 sufficient to perfect the security interest under this Act.

25 *Non-negotiable documents of title*

- 26 (6) Despite subsections (1) to (5), a security interest in a
27 non-negotiable document of title is governed by the law of the
28 jurisdiction (other than the law relating to conflict of laws) in
29 which the goods to which the document of title relates are located
30 when the security interest attaches, under that law, to the document
31 of title.

1 *Negotiable instruments not evidenced by a certificate*

- 2 (7) Despite subsections (1) to (5), a security interest in a negotiable
3 instrument that is not evidenced by a certificate is governed by the
4 law of the jurisdiction (other than the law relating to conflict of
5 laws) that governs the negotiable instrument.

6 Note 1: For the priority of a security interests in financial property if there is
7 no foreign register, see section 77.

8 Note 2: For the location of bodies corporate, bodies politic and individuals,
9 see section 235.

10 **241 Governing laws—proceeds**

- 11 (1) The validity of a security interest in proceeds, other than proceeds
12 that are an account, is governed by the law of the jurisdiction
13 (other than the law relating to conflict of laws) that governed the
14 validity of the security interest in the collateral that gave rise to the
15 proceeds.
- 16 (2) The perfection, and the effect of perfection or non-perfection, of a
17 security interest in proceeds, other than proceeds that are an
18 account, is governed by the law of the jurisdiction (other than the
19 law relating to conflict of laws) that governed the perfection, and
20 the effect of perfection or non-perfection, of the security interest in
21 the collateral that gave rise to the proceeds.
- 22 (3) This section applies despite any other provision of this Part.

Section 242

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Part 7.3—Constitutional operation

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242 Guide to this Part

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This Part is about the constitutional operation of this Act in the States and Territories, and outside Australia, as follows:

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(a) this Act operates in any State that has referred to the Commonwealth power to enact and amend it for the purposes of paragraph 51(xxxvii) of the Constitution;

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(b) this Act operates in that State and any other State, to the extent that other constitutional powers permit its operation;

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(c) this Act operates in a Territory, and outside Australia, to the extent that it can under the Constitution.

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A security interest in collateral in relation to which this Act operates under this Part has priority over a security interest in the same collateral in relation to which this Act does not operate under this Part.

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243 Constitutional basis for this Act

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Operation in a referring State

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(1) It is the Commonwealth Parliament's intention that this Act should operate in a referring State to the extent that it can in accordance with:

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(a) the legislative powers that the Commonwealth Parliament has under section 51 of the Constitution (other than paragraph 51(xxxvii)); and

1 (b) the legislative powers that the Commonwealth Parliament has
2 in respect of matters to which this Act relates because those
3 matters are referred to it by the Parliament of the referring
4 State under paragraph 51(xxxvii) of the Constitution.

5 Note 1: The State reference fully supplements the Commonwealth
6 Parliament's other powers by referring the matters to the
7 Commonwealth Parliament to the extent to which they are not
8 otherwise included in the legislative powers of the Commonwealth
9 Parliament.

10 Note 2: For the meaning of *referring State*, see section 244.

11 *Operation in a non-referring State*

12 (2) It is the Commonwealth Parliament's intention that this Act should
13 operate in a non-referring State to the extent that it can in
14 accordance with the Commonwealth Parliament's legislative
15 powers under section 51 of the Constitution (other than paragraph
16 51(xxxvii)), including (but not limited to) the powers relating to
17 the matters mentioned in sections 246 to 250.

18 *Operation in a Territory*

19 (3) It is the Commonwealth Parliament's intention that this Act should
20 operate in a Territory to the extent that it can in accordance with
21 the Commonwealth Parliament's legislative powers under:
22 (a) section 122 of the Constitution; and
23 (b) section 51 of the Constitution (other than paragraph
24 51(xxxvii)).

25 Note: This Act extends to Norfolk Island, but only extends to other external
26 Territories if regulations are made to provide for that extension (see
27 section 7).

28 (4) Despite subsection 22(3) of the *Acts Interpretation Act 1901*, this
29 Act as applying in a Territory is a law of the Commonwealth.

30 *Operation outside Australia*

31 (5) It is the Commonwealth Parliament's intention that this Act should
32 operate outside Australia to the extent that it can in accordance
33 with the Commonwealth Parliament's legislative powers under:
34 (a) paragraph 51(xxix) of the Constitution; and

Section 244

1 (b) the other legislative powers that the Commonwealth
2 Parliament has under section 51 of the Constitution (other
3 than paragraph 51(xxxvii)).

4 Note 1: For the application of Australian and foreign law in relation to a
5 security interest, see section 6 and Part 7.2.

6 Note 2: For the relationship between this Act and other Australian laws, see
7 Part 7.4.

8 **244 Meaning of *referring State***

9 *General meaning*

10 (1) A State is a ***referring State*** if the Parliament of the State has,
11 before the registration commencement time, referred the matters
12 covered by subsections (3) and (4) in relation to the State to the
13 Parliament of the Commonwealth for the purposes of paragraph
14 51(xxxvii) of the Constitution:

15 (a) if, and to the extent that, the matters are not otherwise
16 included in the legislative powers of the Parliament of the
17 Commonwealth (otherwise than by a reference under
18 paragraph 51(xxxvii) of the Constitution); and

19 (b) if, and to the extent that, the matters are included in the
20 legislative powers of the Parliament of the State.

21 Note 1: For ***registration commencement time***, see section 306.

22 Note 2: Subsections (5) and (6) provide for when a State stops being a
23 ***referring State***.

24 (2) A State is a referring State even if:

25 (a) a law of the State provides that the State's initial reference or
26 any or all of the State's amendment references (or any
27 combination of these) is to terminate in particular
28 circumstances; or

29 (b) any or all of the State's amendment references have not
30 commenced in relation to a particular kind (or kinds) of
31 personal property (or so commence at or after the registration
32 commencement time).

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Initial reference

- (3) This subsection covers the matters to which the referred provisions relate, to the extent of making laws with respect to those matters by including the referred provisions in the referral version of this Act.

Amendment references

- (4) This subsection covers the referred PPS matters (as defined by section 245), to the extent of making laws with respect to those matters by making express amendments of this Act in relation to each of the following kinds of personal property:
- (a) personal property (other than fixtures and water rights);
 - (b) fixtures;
 - (c) transferable water rights.

When a State stops being a referring State

- (5) A State stops being a referring State if the State's initial reference terminates.
- (6) A State also stops being a referring State if the State's amendment reference in relation to personal property (other than fixtures or water rights):
- (a) terminates; or
 - (b) is qualified or restricted to any degree.
- (7) However, a State does not stop being a referring State only because the State's amendment reference in relation to fixtures or transferable water rights (or each of them):
- (a) terminates; or
 - (b) is qualified or restricted to any degree.

Definitions

- (8) In this section:

amendment includes the insertion, omission, repeal, substitution or relocation of words or matter.

amendment reference of a State means a reference by the Parliament of the State to the Parliament of the Commonwealth of

Section 244

1 the referred PPS matters in relation to personal property covered by
2 paragraph (4)(a), (b) or (c).

3 ***express amendment*** means the direct amendment of this Act, but
4 does not include the enactment by a Commonwealth Act of a
5 provision that has, or will have, substantive effect otherwise than
6 as part of the text of this Act.

7 ***initial reference*** of a State means the reference by the Parliament
8 of the State to the Parliament of the Commonwealth of the matters
9 covered by subsection (3).

10 ***referral law***, of a State, means the law of the State that refers
11 matters, as mentioned in subsection (1), to the Parliament of the
12 Commonwealth.

13 ***referral version of this Act***, in relation to a State, means:

14 (a) if, at the time the State's referral law was enacted, this Act
15 had not been enacted, or (if this Act had been enacted)
16 amendments of this Act had not been enacted—this Act as
17 originally enacted; or

18 (b) otherwise—this Act as originally enacted, and as
19 subsequently amended by amendments enacted at any time
20 before the State's referral law was enacted, whether or not
21 the amendments have commenced.

22 ***referred provisions*** means the provisions of the referral version of
23 this Act, to the extent to which they deal with matters that are
24 included in the legislative powers of the Parliaments of the States.

25 ***transferable water rights***, in relation to a State, means any water
26 rights that are transferable under the general law or a law of the
27 State by the holder of the right (whether or not the right is
28 exclusive, and whether or not a transfer is restricted or requires
29 consent).

30 ***water rights***, in relation to a State, means any rights, entitlements
31 or authorities, whether or not exclusive, that are granted by or
32 under the general law or a law of the State in relation to the
33 control, use or flow of water, but does not include any right,
34 entitlement or authority that is:

35 (a) granted by or under a law of the State; and

1 (b) declared by that law not to be personal property for the
2 purposes of this Act.

3 **245 Meaning of *referred PPS matters***

4 (1) In this Act, *referred PPS matters*, in relation to personal property
5 covered by paragraph 244(4)(a), (b) or (c), means:

6 (a) the matter of security interests in the personal property; and

7 (b) without limiting the generality of paragraph (a), each of the
8 following matters:

9 (i) the recording of security interests, or information with
10 respect to security interests, in the personal property in a
11 register;

12 (ii) the recording in such a register of any other information
13 with respect to the personal property (whether or not
14 there are any security interests in the personal property);

15 (iii) the enforcement of security interests in the personal
16 property (including priorities to be given as between
17 security interests, and as between security interests and
18 other interests, in the personal property).

19 (2) However, *referred PPS matters* does not include the matter of
20 making provision with respect to personal property or interests in
21 personal property in a manner that excludes or limits the operation
22 of a law of a State to the extent that the law makes provision with
23 respect to:

24 (a) the creation, holding, transfer, assignment, disposal or
25 forfeiture of a right, entitlement or authority that is granted
26 by or under a law of the State; or

27 (b) limitations, restrictions or prohibitions concerning the kinds
28 of interests that may be created or held in, or the kinds of
29 persons or bodies that may create or hold interests in, a right,
30 entitlement or authority that is granted by or under a law of
31 the State; or

32 (c) without limiting the generality of paragraph (a) or (b)—any
33 of the following matters:

34 (i) the forfeiture of property or interests in property (or the
35 disposal of forfeited property or interests) in connection

Section 246

- 1 with the enforcement of the general law or any law of
2 the State;
3 (ii) the transfer, by operation of that law of the State, of
4 property or interests in property from any specified
5 person or body to any other specified person or body
6 (whether or not for valuable consideration or a fee or
7 other reward).

8 (3) In this section:

9 *forfeiture* means confiscation, seizure, extinguishment,
10 cancellation, suspension or any other forfeiture.

11 *register* means any system for recording interests or information
12 (whether in written or electronic form).

13 **246 Non-referring State operation—overview**

14 *Operation*

- 15 (1) This Act operates in a non-referring State in relation to a security
16 interest, or another interest, in personal property:
17 (a) while the interest in the personal property is covered by any
18 of the following:
19 (i) section 247 (which deals with persons);
20 (ii) section 248 (which deals with activities);
21 (iii) section 249 (which deals with interests); and
22 (b) without limiting paragraph (a), to the extent that Chapter 5
23 (Personal Property Securities Register) applies in relation to
24 the personal property under section 250.
- 25 (2) To avoid doubt, subsection (1) applies to a non-referring State at a
26 particular time even if no State is a referring State at that time.

27 *Constitutional meaning of terms*

- 28 (3) Unless the contrary intention appears, a word or phrase used in
29 sections 247 to 250 that is used in the Constitution has the same
30 meaning as it has in the Constitution.

1 **247 Non-referring State operation—persons**

- 2 (1) This Act operates in a non-referring State, in relation to a security
3 interest in personal property, while:
- 4 (a) the obligation secured by the security interest is owed by or
5 to a person covered by subsection (3); or
- 6 (b) the grantor of the security interest is a person covered by
7 subsection (3).
- 8 (2) This Act operates in a non-referring State, in relation to an interest
9 (other than a security interest) in personal property, while the
10 interest is held by a person covered by subsection (3).
- 11 (3) This subsection covers the following persons:
- 12 (a) a bankrupt or an insolvent;
- 13 (b) an Official Receiver of the estate of a bankrupt, or a
14 registered trustee of a bankrupt, within the meaning of the
15 *Bankruptcy Act 1966*;
- 16 (c) a constitutional corporation;
- 17 (d) the Commonwealth, or an agency of the Commonwealth.

18 **248 Non-referring State operation—activities**

- 19 (1) This Act operates in a non-referring State in relation to a security
20 interest, or another interest, in personal property, if the interest
21 arises in the course of any of the following activities:
- 22 (a) trade or commerce with other countries, or among the States;
- 23 (b) activities undertaken by a constitutional corporation;
- 24 (c) banking, other than State banking;
- 25 (d) State banking extending beyond the limits of the State
26 concerned;
- 27 (e) insurance, other than State insurance;
- 28 (f) State insurance extending beyond the limits of the State
29 concerned;
- 30 (g) using postal, telegraphic, telephonic, or other like services;
- 31 (h) supplying goods or services to the Commonwealth, or an
32 agency of the Commonwealth;
- 33 (i) conduct by the Commonwealth, or an agency of the
34 Commonwealth;

Section 249

- 1 (j) an activity related to a fishery in Australian waters beyond
2 territorial limits.
- 3 (2) However, this Act stops operating under subsection (1) in a
4 non-referring State in relation to a security interest, or another
5 interest, in personal property, if, after the interest arises:
6 (a) the interest is dealt with; and
7 (b) that dealing is not in the course of an activity to which
8 subsection (1) applies.
- 9 (3) Subsection (2) does not limit the operation of this Act in a
10 non-referring State otherwise than under this section.

11 **249 Non-referring State operation—interests**

12 *General rule*

- 13 (1) This Act operates in a non-referring State in relation to a security
14 interest, or another interest, in personal property, if the interest
15 includes an interest in any of the following:
16 (a) a constitutional corporation;
17 (b) money borrowed on the public credit of the Commonwealth;
18 (c) an ADI account, other than an ADI account relating to State
19 banking;
20 (d) an ADI account that relates to State banking extending
21 beyond the limits of the State concerned;
22 (e) a policy of insurance, other than State insurance;
23 (f) a policy of State insurance extending beyond the limits of the
24 State concerned;
25 (g) a bill of exchange or a promissory note;
26 (h) copyright, a patent of an invention or design, or a trade mark;
27 (i) a facility that provides postal, telegraphic, telephonic or other
28 like services;
29 (j) a fishery in Australian waters beyond territorial limits;
30 (k) a lighthouse, lightship, beacon or buoy.

1 *Constitutional interests exclusively—severable operation*

- 2 (2) Without limiting subsection (1), this Act also has the effect it
3 would have if this Act operated in a non-referring State in relation
4 to a security interest, or another interest, in personal property, to
5 the extent only that the interest were in any of the things mentioned
6 in that subsection.

7 **250 Non-referring State operation—inclusion of data in register**

8 Chapter 5 of this Act (Personal Property Securities Register)
9 operates in a non-referring State in relation to personal property.

10 **251 Personal property taken free of security interest when Act**
11 **begins to operate**

12 A person to whom personal property is transferred takes the
13 property free of a security interest in the property at a particular
14 time (the *relevant time*) if:

- 15 (a) this Act did not operate under this Part in relation to the
16 security interest at a previous time; and
17 (b) if this Act had so operated, the person would have taken the
18 property free of the security interest under this Act (other
19 than this section); and
20 (c) at the relevant time, this Act begins to operate under this Part
21 in relation to the security interest.

22 **252 Priority between constitutional and non-constitutional security**
23 **interests**

24 A security interest in collateral in relation to which this Act
25 operates under this Part has priority over a security interest in the
26 same collateral in relation to which this Act does not operate under
27 this Part.

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Part 7.4—Relationship between Australian laws

3

Division 1—Introduction

4

253 Guide to this Part

5

This Part deals with the interaction of this Act with other Australian laws.

6

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This Act is not intended to exclude or limit the operation of any other law if that other law is capable of operating concurrently with this Act.

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If there is an inconsistency between this Act and another law, regulations may be made to resolve the inconsistency.

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Other laws prevail over this Act in certain situations, as follows:

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(a) certain specified Commonwealth laws prevail;

14

(b) other laws may govern security agreements;

15

(c) other laws may include restrictions on acquiring or dealing with personal property or a security interest;

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(d) State or Territory laws may exclude certain matters from coverage under this Act.

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However this Act prevails over other laws in relation to certain requirements relating to the registration and form of security interests, and their assignment, attachment and perfection.

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2 **Division 2—Concurrent operation**

3 **254 Concurrent operation—general rule**

4 (1) This Act is not intended to exclude or limit the operation of any of
5 the following laws (a *concurrent law*), to the extent that the law is
6 capable of operating concurrently with this Act:

- 7 (a) a law of the Commonwealth (other than this Act);
8 (b) a law of a State or Territory;
9 (c) the general law.

10 (2) Without limiting subsection (1), this Act is not intended to exclude
11 or limit the concurrent operation of a concurrent law, to the extent
12 that the law has the effect of:

- 13 (a) providing for whether a matter or other thing that is created,
14 arises or is provided for under the concurrent law constitutes
15 personal property; or
16 (b) subject to section 258, prohibiting or limiting a person
17 creating, acquiring or dealing with personal property or a
18 security interest in personal property; or
19 (c) without limiting paragraph (b):
20 (i) prohibiting or limiting the right of a person to hold,
21 transfer or assign a security interest in personal
22 property; or
23 (ii) imposing limitations or additional obligations or
24 requirements in relation to the enforcement of a security
25 interest in personal property; or
26 (d) subject to sections 261 and 264, requiring or enabling a
27 person to register a security interest (within the meaning of
28 section 261); or

29 Note 1: Section 261 provides that a failure to register the security interest
30 under the law does not limit the effect of the security interest or a
31 security agreement for the security interest.

32 Note 2: Section 264 provides that, to the extent that the law would
33 restrict or otherwise affect the operation of section 19
34 (attachment) or 21 (perfection) of this Act, the operation of the
35 law is excluded.

Section 255

- 1 (e) subject to section 262, requiring or enabling a person to
2 register the assignment of a security interest (within the
3 meaning of that section); or
- 4 Note: Section 262 provides that a failure to register the assignment
5 under the law does not limit the effect of the assignment, the
6 security interest or a security agreement for the security interest.
- 7 (f) subject to section 263, requiring a security agreement for a
8 security interest, or for an assignment of a security interest
9 (within the meaning of that section) to be in a particular
10 form, or to be witnessed or executed in a particular way; or
- 11 Note: Section 263 provides that a failure to comply with such a
12 requirement does not limit the effect of the security agreement,
13 the security interest or the assignment.
- 14 (g) operating to extinguish (however described) a security
15 interest in circumstances other than those provided under this
16 Act; or
- 17 (h) providing for, or in relation to, a matter in a way that is
18 expressly allowed by or under this Act.
- 19 Note: The following provisions of this Act expressly allow for the
20 operation (or the limited operation) of State and Territory laws:
- 21 (a) section 73 (interests arising under laws of the Commonwealth,
22 States and Territories);
- 23 (b) section 110 (rights and remedies of debtors and secured parties);
- 24 (c) section 119 (relationship with credit legislation);
- 25 (d) section 208 (cross-jurisdictional appeals);
- 26 (e) section 271 (entitlement to damages for breach of duties or
27 obligations);
- 28 (f) subsections 275(5) and (6) (secured party to provide certain
29 information relating to security interest);
- 30 (g) section 285 (service or giving of notices).
- 31 (3) To avoid doubt, this section does not apply to a law of a State or
32 Territory, or the general law, to the extent that there is a direct
33 inconsistency between this Act and that law.

255 Concurrent operation—regulations may resolve inconsistency

- 34
- 35 (1) The regulations may:
- 36 (a) provide that a provision of this Act (or an instrument made
37 under this Act) does not apply to a matter that is dealt with by

- 1 a law (the *specified law*) of the Commonwealth, a State or a
2 Territory specified by the regulations; or
- 3 (b) modify the operation of this Act (or an instrument made
4 under this Act) so that no inconsistency arises between the
5 operation of a provision of this Act or the instrument and the
6 operation of a law (the *specified law*) of the Commonwealth,
7 a State, or a Territory specified by the regulations.
- 8 (2) Without limiting subsection (1), regulations made for the purposes
9 of that subsection may provide that a provision of this Act (or an
10 instrument made under this Act):
- 11 (a) does not apply to:
- 12 (i) a specified person; or
13 (ii) a specified body; or
14 (iii) specified circumstances; or
15 (iv) a specified person or body, in specified circumstances;
16 or
- 17 (b) does not prohibit an act to the extent to which the prohibition
18 would otherwise give rise to an inconsistency with the
19 specified law; or
- 20 (c) does not require a person to do an act to the extent to which
21 the requirement would otherwise give rise to an
22 inconsistency with the specified law; or
- 23 (d) does not authorise a person to do an act to the extent to which
24 the conferral of that authority on the person would otherwise
25 give rise to an inconsistency with the specified law; or
- 26 (e) does not impose an obligation on a person to the extent to
27 which complying with that obligation would require the
28 person to not comply with an obligation imposed on the
29 person under the specified law; or
- 30 (f) authorises a person to do something for the purposes of this
31 Act (or an instrument made under this Act) that the person:
- 32 (i) is authorised to do under the specified law; and
33 (ii) would not otherwise be authorised to do under this Act
34 (or the instrument); or
- 35 (g) will be taken to be satisfied if the specified law is satisfied.
- 36 (3) This section does not apply in relation to the following provisions:
-

Section 255

- 1 (a) paragraphs (c) and (d) of the definition of *licence* in
2 section 10;
3 (b) paragraph (b) of the definition of *personal property* in
4 section 10.
5 Note: Certain rights, entitlements and authorities under Commonwealth,
6 State and Territory law, as declared by the relevant law, are excluded
7 from the definitions of *personal property* and *licence* (in section 10).

1

2 **Division 3—When other laws prevail**

3 **256 When other laws prevail—certain other Commonwealth Acts**

4 If there is any inconsistency between this Act and one of the
5 following Acts (the *other Act*), the other Act prevails to the extent
6 of the inconsistency:

- 7 (a) the *Payment Systems and Netting Act 1998*;
8 (b) the *Cheques Act 1986*;
9 (c) the *Bills of Exchange Act 1909*.

10 **257 When other laws prevail—security agreements**

11 *Scope*

- 12 (1) This section sets out restrictions on the extent to which a security
13 agreement is effective according to its terms under subsection
14 18(1).

15 *Operation of other laws dealing with security agreements*

- 16 (2) Subsection 18(1) is subject to each of the following laws:
17 (a) a law of the Commonwealth (other than this Act);
18 (b) a law of a State or a Territory;
19 (c) the general law.
- 20 (3) However, a law mentioned in subsection (2) does not apply:
21 (a) to the extent (if any) to which the operation of the law is
22 affected by Division 4 (when this Act prevails); and
23 (b) to the extent (if any) prescribed by the regulations.

24 Note: Division 4 restricts the operation of State and Territory laws in certain
25 respects, for example by preventing formal requirements under those
26 laws from affecting the validity of security interests.

Section 258

1 **258 When other laws prevail—personal property, security interests**
2 **and matters excluded from State amendment referrals**

3 *Personal property and security interests*

- 4 (1) This Act (apart from Division 4), or any instrument made under
5 this Act, does not have an effect covered by subsection (2) to the
6 extent to which that effect would give rise (apart from this
7 subsection) to a direct inconsistency between this Act, or the
8 instrument, and a law covered by subsection (3).

9 Note: Division 4 restricts the operation of State and Territory laws in certain
10 respects, for example by preventing formal requirements under those
11 laws from affecting the validity of security interests.

- 12 (2) The following effects of a law are covered by this subsection:
13 (a) prohibiting or limiting a person creating, acquiring or dealing
14 with personal property or a security interest in personal
15 property;
16 (b) without limiting paragraph (a):
17 (i) prohibiting or limiting the right of a person to hold,
18 transfer or assign a security interest in personal
19 property; or
20 (ii) imposing limitations or additional obligations or
21 requirements in relation to the enforcement of a security
22 interest in personal property.
- 23 (3) The following laws are covered by this subsection:
24 (a) a law of the Commonwealth (other than this Act, or an
25 instrument made under this Act);
26 (b) a law of a referring State (while the State is a referring State);
27 (c) a law of a Territory;
28 (d) the general law.
- 29 (4) Subsection (1) does not apply to an effect of a law to the extent (if
30 any) prescribed by the regulations.

31 *Matters excluded by State amendment referrals*

- 32 (5) Any provisions of this Act, or an instrument made under this Act,
33 that would (apart from this subsection) operate, or purport to
34 operate, to exclude or limit the operation of a law of a referring

1 State do not operate to exclude or limit the operation of the law to
2 the extent to which the law makes provision for a matter mentioned
3 in paragraph 245(2)(a), (b) or (c).

4 Note: Subsection 245(2) provides exceptions to the scope of the matters
5 (called PPS referred matters) in relation to which referring States have
6 given an amendment reference to the Commonwealth (see subsection
7 244(4)).

8 (6) Subsection (5) only applies in relation to a law of a referring State
9 while the State is a referring State.

10 **259 When other laws prevail—exclusion by referring State law or** 11 **Territory law**

12 *Scope*

- 13 (1) This section applies if a law of a referring State, or of a Territory,
14 declares a matter to be an excluded matter for the purposes of this
15 section in relation to:
- 16 (a) the whole of this Act (or an instrument made under this Act);
 - 17 or
 - 18 (b) a specified provision of this Act (or an instrument made
19 under this Act); or
 - 20 (c) this Act (or an instrument made under this Act), other than a
21 specified provision; or
 - 22 (d) this Act (or an instrument made under this Act), otherwise
23 than to a specified extent.

24 *Matters excluded by declaration*

- 25 (2) This Act (and any instrument made under this Act), apart from
26 Division 4 (when this Act prevails), does not apply in relation to
27 the excluded matter to the extent provided by the declaration.

28 *Regulations under this Act may affect operation of declaration*

- 29 (3) Subsection (2) does not apply to the declaration to the extent (if
30 any) prescribed by the regulations.

Section 260

1 **260 When other laws prevail—no constitutional preference to one**
2 **State over another**

3 This Act is not intended to operate to the extent (if any) to which
4 the operation would give, or result in the giving of, preference
5 (within the meaning of section 99 of the Constitution) to one State
6 or part of a State over another State or part of a State.

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2 **Division 4—When this Act prevails**

3 **261 When this Act prevails—registration requirements**

4 *Scope*

5 (1) This section applies if a law (the *applicable law*) of a State or
6 Territory has the effect of requiring or enabling a person to register
7 a security interest.

8 Example: A law of a State or Territory may have this effect by requiring a
9 person to register any interest acquired by the person in a motor
10 vehicle including, but not limited to, a security interest.

11 (2) For the purposes of this section, a person *registers a security*
12 *interest* under an applicable law if, under (or in accordance with)
13 that law, the person registers, or otherwise discloses, any of the
14 following:

- 15 (a) the security interest;
16 (b) a security agreement providing for the security interest;
17 (c) collateral covered (or to be covered) by the security interest.

18 *Failure to register under applicable law*

19 (3) A failure to register the security interest under the applicable law
20 does not:
21 (a) affect the validity, priority or enforceability of the security
22 interest, or of a security agreement providing for the security
23 interest; or
24 (b) otherwise limit the effect of the security interest, or a security
25 agreement providing for the security interest.

26 Note: In other respects this Act is not intended to exclude or limit the
27 concurrent operation of the applicable law (see section 254).

Section 262

1 **262 When this Act prevails—assignment requirements**

2 *Scope*

3 (1) This section applies if a law (the *applicable law*) of a State or
4 Territory has the effect of requiring or enabling a person to register
5 the assignment of a security interest.

6 (2) For the purposes of this section, a person *registers the assignment*
7 *of a security interest* under an applicable law if, under (or in
8 accordance with) that law, the person registers, or otherwise
9 discloses, any of the following in relation to a security interest that
10 is (or is to be) assigned, however the assignment is described in
11 that law:

- 12 (a) the assignment;
13 (b) a security agreement providing for the assignment;
14 (c) collateral covered (or to be covered) by the security interest.

15 (3) An assignment of a security interest mentioned in this section
16 includes (but is not limited to) the following, however described in
17 the applicable law:

- 18 (a) the transfer of the security interest;
19 (b) the creation of the security interest;
20 (c) the devolution of the security interest from a deceased person
21 to another person upon the death of the deceased person.

22 *Failure to register under applicable law*

23 (4) A failure to register the assignment of the security interest under
24 the applicable law does not:

- 25 (a) affect the validity of the assignment; or
26 (b) affect the validity, priority or enforceability of the security
27 interest, or of a security agreement providing for the security
28 interest; or
29 (c) otherwise limit the effect of the assignment, the security
30 interest or of a security agreement providing for the security
31 interest.

32 Note: In other respects this Act is not intended to exclude or limit the
33 concurrent operation of the applicable law (see section 254).

1 **263 When this Act prevails—formal requirements relating to**
2 **agreements**

3 *Scope*

4 (1) This section applies if a law (the *applicable law*) of a State or
5 Territory:

- 6 (a) relates (whether expressly or by implication) to a security
7 agreement for a security interest in collateral, or for an
8 assignment (however described) of a security interest in
9 collateral; and
10 (b) has the effect of requiring the security agreement:
11 (i) to be in a particular form; or
12 (ii) to be witnessed or executed in a particular way; and
13 (c) is prescribed by regulations made for the purposes of this
14 section.

15 Example: A law of a State or Territory requires a security agreement to be in a
16 particular form if the law requires the instrument evidencing the
17 agreement to use a particular form of words, or to be executed on
18 paper of a particular sort.

19 (2) An assignment of a security interest mentioned in this section
20 includes (but is not limited to) the following, however described in
21 the applicable law:

- 22 (a) the transfer of the security interest;
23 (b) the giving of the security interest;
24 (c) the devolution of the security interest from a deceased person
25 to another person upon the death of the deceased.

26 *Failure to comply with formal requirement under applicable law*

27 (3) Without limiting section 261 or 262, a failure to comply with the
28 requirement under the applicable law does not:

- 29 (a) affect the validity or enforceability of the security agreement;
30 or
31 (b) affect the validity, priority or enforceability of the security
32 interest; or
33 (c) affect the validity of the assignment (if relevant); or
34 (d) otherwise limit the effect of the security agreement, the
35 security interest or the assignment (if relevant).

Chapter 7 Operation of laws

Part 7.4 Relationship between Australian laws

Division 4 When this Act prevails

Section 264

1 Note: In other respects this Act is not intended to exclude or limit the
2 concurrent operation of the applicable law (see section 254).

3 **264 When this Act prevails—attachment and perfection of security**
4 **interests**

5 To the extent that a law of a State or Territory would have the
6 effect of restricting or otherwise affecting the operation of the
7 following provisions, the operation of the law is excluded by force
8 of this section:

9 (a) section 19 (when a security interest attaches to personal
10 property);

11 (b) section 21 (how a security interest is perfected).

12 Example: If a law of a State or Territory would have the effect of requiring a
13 security interest to be registered under the law before it is taken to
14 attach, or to be perfected, under this Act, the operation of the law is
15 excluded by force of this section.

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Chapter 8—Miscellaneous

Part 8.1—Guide to this Chapter

265 Guide to this Chapter

This Chapter contains rules about the following:

- (a) the vesting of certain unperfected security interests (Part 8.2);
- (b) damages and compensation for contraventions of this Act (Part 8.3);
- (c) the provision of information relating to security interests (Part 8.4);
- (d) the giving of notices and rules about timing (Part 8.5);
- (e) the onus of proof in judicial proceedings (Part 8.6);
- (f) approved forms and regulations (Part 8.7).

Section 266

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Part 8.2—Vesting of certain unperfected security interests

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266 Guide to this Part

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This Part provides for the vesting of an unperfected security interest in the grantor in certain circumstances.

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In the event of the bankruptcy of an individual grantor, or the winding up or the entry into administration of a body corporate grantor, a secured party's unperfected security interest vests in the grantor. However, some security interests are unaffected by this rule.

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Some secured parties are entitled to damages or compensation in relation to the vesting of unperfected interests under this Part.

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267 Vesting of unperfected security interests in the grantor upon the grantor's winding up or bankruptcy etc.

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Scope

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(1) This section applies if:

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(a) any of the following events occurs:

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(i) an order is made, or a resolution is passed, for the winding up of a company or a body corporate;

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(ii) an administrator of a company or a body corporate is appointed (whether under section 436A, 436B or 436C of the *Corporations Act 2001*, under that section as it is applied by force of a law of a State or Territory, or otherwise);

27

28

29

(iii) a company or a body corporate executes a deed of company arrangement (whether under Division 10 of Part 5.3A of the *Corporations Act 2001*, under that

- 1 Division as it is applied by force of a law of a State or
2 Territory, or otherwise);
- 3 (iv) a sequestration order is made against a person (the
4 **bankrupt**) under the *Bankruptcy Act 1966*;
- 5 (v) a person (the **bankrupt**) becomes a bankrupt by force of
6 section 55, 56E or 57 of the *Bankruptcy Act 1966*; and
- 7 (b) a security interest granted by the body corporate, company or
8 bankrupt is unperfected on whichever of the following days
9 applies:
- 10 (i) in the case of a company or body corporate that is being
11 wound up—the day the winding up began (whether
12 under section 513A or 513B of the *Corporations Act*
13 *2001*, under that section as it is applied by force of a law
14 of a State or Territory, or otherwise);
- 15 (ii) in the case of any other company or body corporate—
16 the section 513C day as described in that section of that
17 Act (including as described in that section as it is
18 applied by force of a law of a State or Territory, or
19 otherwise);
- 20 (iii) in the case of a bankrupt—the date of the bankruptcy
21 (within the meaning of the *Bankruptcy Act 1966*).

22 Note 1: For the meaning of *company*, see section 10.

23 Note 2: See also section 266 of the *Corporations Act 2001*.

24 *Security interest vested in grantor*

- 25 (2) The security interest held by the secured party vests in the grantor
26 immediately before the event mentioned in paragraph (1)(a)
27 occurs, unless the security interest is unaffected by this section
28 because of section 268.

29 *Title of person acquired for new value without knowledge*

- 30 (3) Subsection (2) does not affect the title of a person to personal
31 property if:
- 32 (a) the person acquires the personal property for new value from
33 a secured party, from a person on behalf of a secured party,
34 or from a receiver in the exercise of powers:

Section 268

- 1 (i) conferred by the security agreement that provides for
2 the security interest; or
3 (ii) implied by the general law; and
4 (b) at the time the person acquires the property, the person has
5 no actual or constructive knowledge of the following (as the
6 case requires):
7 (i) the filing of an application for an order to wind up the
8 company;
9 (ii) the passing of a resolution to wind up the company;
10 (iii) the appointment of an administrator of the company
11 under section 436A, 436B or 436C of the *Corporations*
12 *Act 2001*;
13 (iv) the execution of a deed of company arrangement by the
14 company.

15 Note: Section 296 deals with the onus of proving matters.

16 **268 Security interests unaffected by section 267**

17 *Unaffected security interests*

- 18 (1) The following security interests are unaffected by subsection
19 267(2):
20 (a) a security interest covered by subsection (2) of this section;
21 (b) a security interest of a lessor or bailor under a PPS lease
22 covered by subsection (3) of this section.

23 *Security interests and subordinated debts*

- 24 (2) This subsection covers a security interest in an account if all of the
25 following conditions are satisfied:
26 (a) a person (the *obligor*) owes money to another person (the
27 *senior creditor*);
28 (b) the obligor also owes money to a third person (the *junior*
29 *creditor*);
30 (c) an agreement between the senior creditor and the junior
31 creditor provides (in substance):
32 (i) for the postponement or subordination of the obligor's
33 debt to the junior creditor, to the obligor's debt to the
34 senior creditor; and

- 1 (ii) in the event of the obligor's debt to the junior creditor
2 being discharged (whether wholly or partly) by the
3 obligor transferring personal property to the junior
4 creditor—for the junior creditor to transfer the property,
5 or proceeds of the property, to the senior creditor to the
6 value of the amount owed by the obligor to the senior
7 creditor; and
8 (iii) in the event that the property or proceeds are not
9 transferred—for the junior creditor to hold the property
10 or proceeds on trust for the senior creditor to that value;
11 and
12 (iv) in the event of such a trust arising—for a security
13 interest to be granted by the junior creditor to the senior
14 creditor over the personal property or proceeds securing
15 payment of the obligor's debt to the senior creditor;
16 (d) the security interest is a security interest granted under the
17 agreement, in the circumstances described in
18 subparagraph (c)(iv).

19 *Security interests under certain PPS leases unaffected*

- 20 (3) This subsection covers a PPS lease if all of the following
21 conditions are satisfied:
22 (a) the lease does not secure payment or performance of an
23 obligation;
24 (b) paragraph (e) of the definition of *PPS lease* in subsection
25 13(1) applies to the lease;
26 (c) none of paragraphs (a) to (d) of the definition of *PPS lease* in
27 subsection 13(1) applies to the lease.
28 Example: A PPS lease of goods, if the property leased:
29 (a) does not secure payment or performance of an obligation; and
30 (b) may or must be described by serial number in accordance with
31 the regulations; and
32 (c) is for a term of between 90 days and 1 year.

Section 269

1 **269 Certain lessors, bailors and consignors entitled to damages**

2 *Scope*

- 3 (1) This section applies if either of the following security interests is
4 vested in the grantor under section 267:
- 5 (a) a security interest of a consignor under a commercial
 - 6 consignment (see paragraph 12(3)(b));
 - 7 (b) a security interest of a lessor or bailor under a PPS lease (see
 - 8 paragraph 12(3)(c)).

9 *Entitlement to damages and compensation*

- 10 (2) The consignor, or lessor or bailor:
- 11 (a) is taken to have suffered damage immediately before the
 - 12 event mentioned in paragraph 267(1)(a) (when the security
 - 13 interest was vested in the grantor); and
 - 14 (b) may recover an amount of compensation from the grantor
 - 15 equal to the greater of the following amounts:
 - 16 (i) the amount determined in accordance with the lease,
 - 17 bailment or consignment;
 - 18 (ii) the sum of the market value of the leased, bailed or
 - 19 consigned property immediately before the day referred
 - 20 to in paragraph 267(1)(b), and the amount of any other
 - 21 damage or loss resulting from the termination of the
 - 22 lease, bailment or consignment.

23 Note: The lessor, bailor or consignor may be able to prove the amount of
24 compensation in proceedings related to the bankruptcy or winding-up
25 of the grantor.

1
2 **Part 8.3—Exercise and discharge of rights, duties**
3 **and obligations**
4

5 **270 Guide to this Part**

6 This Part provides a right to recover damages for a failure to
7 discharge a duty or obligation imposed by this Act.

8 **271 Entitlement to damages for breach of duties or obligations**

- 9 (1) If a person fails to discharge any duty or obligation imposed on the
10 person by this Act:
11 (a) the person to whom the duty or obligation is owed; and
12 (b) any other person who can reasonably be expected to rely on
13 performance of the duty or obligation;
14 has a right to recover damages for any loss or damage that was
15 reasonably foreseeable as likely to result from the failure.
- 16 (2) Nothing in subsection (1) limits or affects any liability that a
17 person may incur under any of the following:
18 (a) a law of the Commonwealth, a State or a Territory;
19 (b) the general law.

20 **272 Liability for damages**

21 Despite section 271, none of the following persons is liable to an
22 action, suit or proceeding for damages for, or in respect of,
23 anything done honestly, or honestly omitted to be done, in the
24 exercise, or purported exercise, of any power conferred by this Act
25 or the regulations:
26 (a) the Commonwealth;
27 (b) the Registrar, or a delegate of the Registrar;
28 (c) a Deputy Registrar;
29 (d) the Minister;

Section 273

- 1 (e) a Minister of a State or Territory, or another authority of a
2 State or Territory, in relation to the exercise or performance
3 of a power, duty or function pursuant to an agreement made
4 for the purposes of section 118 (proceeding as if personal
5 property were land);
6 (f) a member of the Registrar's staff;
7 (g) a person who is acting as a member of the Registrar's staff;
8 (h) a person who is authorised to perform or exercise a function
9 or power of, or on behalf of, the Registrar.

10 **273 Application of Act not affected by secured party having title to**
11 **collateral**

12 The fact that title to collateral is in a secured party rather than a
13 grantor does not affect the application of any provision of this Act
14 relating to rights, duties, obligations and remedies.

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Part 8.4—Provision of information by secured parties

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274 Guide to this Part

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This Part enables an interested person to request a secured party who holds a security interest in collateral to provide information about the interest.

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This Part sets out procedural rules for making, and complying with, such requests.

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275 Secured party to provide certain information relating to security interest

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Requests for information

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- (1) An interested person mentioned in subsection (9) may request a secured party who holds a security interest in collateral to send or make available to the interested person, or any other person, any of the following:

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- (a) a copy of the security agreement that provides for the security interest;

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- (b) a statement in writing setting out the amount or the obligation that is secured by the security interest and the terms of payment or performance of the obligation, as at the day specified in the request;

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- (c) a written approval or correction of an itemised list of personal property attached to the request indicating in which items of property the security interest is granted, as at the day specified in the request;

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- (d) a written approval or correction of the following attached to the request, as at the day specified in the request:

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- (i) the amount or the obligation that is secured by the security interest;

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Section 275

1 (ii) the terms of payment or performance of the obligation.

2 (2) A request made under subsection (1) must specify an address to
3 which the information requested under that subsection must be sent
4 or at which the information must be made available.

5 (3) A request made in accordance with paragraph (1)(b), (c) or (d)
6 must not specify a day later than 20 business days after the day the
7 request is made.

8 Note: The period may be extended by a court under section 293.

9 *Compliance with request*

10 (4) Subject to subsections (5) and (6), a person who receives a request
11 made under subsection (1) must respond to the request.

12 Note 1: A person who receives a request but who no longer has a security
13 interest in collateral must respond to the request in accordance with
14 section 276.

15 Note 2: Section 277 deals with the time for responding to a request.

16 Note 3: A person who responds to a request might be prevented from denying
17 the accuracy etc. of information provided (see section 283).

18 (5) A secured party is not required to respond to a request made under
19 subsection (1) if the information requested under that subsection
20 must be, or has already been, made available to the person who
21 made the request, under any of the following:

- 22 (a) a law of the Commonwealth, a State or a Territory;
23 (b) the general law.

24 (6) A secured party is not required to respond to a request made under
25 subsection (1) if:

- 26 (a) subject to subsection (7), the secured party and the debtor
27 have agreed (the *confidentiality agreement*) in writing that
28 neither the secured party nor the debtor will disclose
29 information of the kind mentioned in subsection (1); or
30 (b) the response would contravene any of the following:
31 (i) a law of the Commonwealth, a State or a Territory;
32 (ii) the general law; or
33 (c) the response would disclose information that is protected
34 against disclosure by a duty of confidence.

- 1 (7) Paragraph (6)(a) does not apply if:
2 (a) the confidentiality agreement is made after the security
3 agreement that provides for the security interest is made; or
4 (b) at the time the request is received, the debtor is in default
5 under the security agreement; or
6 (c) the debtor, in writing, authorises the disclosure of the
7 information; or
8 (d) the grantor requests the secured party to give the information
9 to the grantor; or
10 (e) the request is made by an auditor of the grantor, if the grantor
11 is a body corporate.

- 12 (8) If:
13 (a) a request is made in accordance with paragraph (1)(c); and
14 (b) the secured party claims a security interest provided for by a
15 security agreement in any of the following:
16 (i) all of the grantor's present and after-acquired property;
17 (ii) all of the grantor's present and after-acquired property
18 except for an item or class of personal property
19 described in the security agreement;
20 (iii) all of a specified class of personal property of the
21 grantor;
22 the secured party may indicate this instead of approving or
23 correcting the itemised list of property.

24 *Interested persons*

- 25 (9) For the purposes of this section, the following persons are
26 interested persons:
27 (a) the grantor in relation to the collateral in which the security
28 interest is granted;
29 (b) a person with another security interest in the collateral
30 mentioned in paragraph (a);
31 (c) an auditor of a grantor mentioned in paragraph (a), if the
32 grantor is a body corporate;
33 (d) an execution creditor with an interest in the collateral;
34 (e) an authorised representative of any of the above.

Section 276

- 1 (10) A secured party who receives a request made under subsection (1)
2 that purports to be made by an interested person may act as if the
3 person is entitled to make the request, unless the secured party has
4 actual knowledge that the person is not entitled to make it.

5 **276 Obligation to disclose successor in security interest when**
6 **request made**

- 7 (1) This section applies if:
8 (a) a person makes a request under subsection 275(1); and
9 (b) the person (the *previously secured party*) to whom the
10 request was made no longer has a security interest in the
11 collateral.
- 12 (2) The previously secured party must respond to the request by
13 sending, or making available, to the person making the request the
14 name and address of:
15 (a) the immediate successor in interest; and
16 (b) the latest successor in interest (if known).

17 Note: Section 277 deals with the time for responding to a request.

18 **277 Time for responding to a request**

- 19 (1) A person required to respond to a request under section 275 or 276
20 must respond before the end of 10 business days after the day the
21 request is received.
- 22 (2) Subsection (1) does not apply if the person has been exempted
23 from responding to the request, or the time for responding to the
24 request has been extended, under section 278.

25 Note: The time for responding to a request may also be affected by
26 subsection 279(5) or section 281.

27 **278 Application to court for exemption or extension of time to**
28 **respond to requests**

- 29 (1) A person required to respond to a request under section 275 or 276
30 may apply to a court for an order:
31 (a) exempting the person (either wholly or partly) from
32 responding to the request; or

- 1 (b) extending the time for responding to the request.
- 2 Note: For which courts have jurisdiction, and for transfers between courts,
3 see Part 6.2.
- 4 (2) On application by the person for an order under paragraph (1)(a),
5 the court may make the order if it is satisfied that, in the
6 circumstances, it would be unreasonable for the person to respond
7 to the request.
- 8 (3) On application by the person for an order under paragraph (1)(b),
9 the court may make the order if it is satisfied that, in the
10 circumstances, it would be unreasonable for the person to respond
11 to the request:
- 12 (a) within the time allowed under section 277; or
13 (b) within the time (if any) ordered by a court under section 281.

14 **279 Persons may recover costs arising from request**

- 15 (1) A person required to respond to a request under section 275 or 276
16 may charge the person making the request a fee for providing
17 information in response to the request.
- 18 (2) A fee imposed under subsection (1) must not:
- 19 (a) exceed the reasonable marginal costs of providing the
20 information; or
21 (b) be such as to amount to taxation.
- 22 Note: Section 296 deals with the onus of proving matters under this
23 subsection.
- 24 (3) Despite subsection (1), a grantor mentioned in paragraph 275(9)(a),
25 or the grantor's authorised representative, who has requested
26 information under section 275, is entitled to be provided
27 information free of charge unless:
- 28 (a) that information has already been provided to the grantor or
29 the authorised representative under section 275 or 276 in
30 response to a request; and
31 (b) that request was made within the previous 6 months.
- 32 Note: Section 296 deals with the onus of proving matters under this
33 subsection.

Section 280

- 1 (4) The grantor or the authorised representative is also entitled to be
2 provided information free of charge, despite subsection (3), if there
3 has been a material change in the information since the information
4 was last provided to the grantor or the authorised representative.

5 Note: Section 296 deals with the onus of proving matters under this
6 subsection.

- 7 (5) A person is not required to respond to a request under section 275
8 or 276 if:

- 9 (a) the person imposes a fee under subsection (1) for providing
10 the information; and
11 (b) the fee has not been paid; and
12 (c) an order under section 281 that the person charge a nil
13 amount, or provide the information free of charge, has not
14 been made.

15 **280 Application to court for response to request etc.**

- 16 (1) A person who makes a request under section 275 may apply to a
17 court for an order under this section if the person required to
18 respond to the request has:

- 19 (a) not responded to the request:
20 (i) within the time specified in section 277; or
21 (ii) within the time ordered by the court under subsection
22 278(3) or section 281; or
23 (b) provided an incomplete or incorrect response; or
24 (c) refused to respond to the request because of subsection
25 275(5) or (6).

26 Note: For which courts have jurisdiction, and for transfers between courts,
27 see Part 6.2.

- 28 (2) On application, the court may make an order requiring the person
29 who received the request to:

- 30 (a) respond to the request within a specified period; or
31 (b) provide a complete and correct response within a specified
32 period.

1 **281 Application to court in relation to costs charged**

- 2 (1) A person (the *interested person*) who has requested information
3 under section 275 may apply to a court for an order if:
4 (a) the person required to respond to the request imposes a fee
5 under subsection 279(1) for providing the information; and
6 (b) the interested person:
7 (i) believes that the fee exceeds the reasonable marginal
8 costs of providing the information; or
9 (ii) if the interested person is a grantor or the grantor's
10 authorised representative—believes that the information
11 has not already been provided to the grantor or the
12 authorised representative in response to a request made
13 under section 275 within the previous 6 months; or
14 (iii) if the interested person is a grantor or the grantor's
15 authorised representative—believes that there has been
16 a material change in the information since the
17 information was last provided to the grantor or the
18 authorised representative.

19 Note: For which courts have jurisdiction, and for transfers between courts,
20 see Part 6.1.

- 21 (2) If the court is satisfied that the fee imposed under subsection
22 279(1) exceeds the reasonable marginal costs of providing the
23 information, the court may, on application by the interested person,
24 make an order:
25 (a) stating an amount (including a nil amount) that is to be
26 imposed as a fee; and
27 (b) stating a time within which the request must be responded to
28 after the fee has been paid.

29 Note: Section 296 deals with the onus of proving matters under this
30 subsection.

- 31 (3) If the court is satisfied that:
32 (a) the information has not already been provided to the grantor
33 or the grantor's authorised representative in response to a
34 request made under section 275 within the previous 6
35 months; or

Section 282

- 1 (b) there has been a material change in the information since the
2 information was last provided to the grantor or the authorised
3 representative;
4 the court may, on application by the interested person, make an
5 order:
6 (c) that the information be provided to the grantor, or the
7 authorised representative, free of charge; and
8 (d) stating a time within which the request must be responded to.

9 Note: Section 296 deals with the onus of proving matters under this
10 subsection.

11 *Consequential orders*

- 12 (4) If the court makes an order under this section, it may also make
13 any other consequential orders that it considers appropriate.

14 **282 Consequences of not complying with court order**

15 If a person fails to comply with a court order made under
16 section 280 or 281, the court may, on the application of the person
17 who made the request under section 275:

- 18 (a) make an order extinguishing the security interest to which the
19 request relates, together with an order requiring the Registrar
20 to register a financing change statement amending the
21 registration accordingly; or
22 (b) make such other orders as the court thinks necessary to
23 ensure compliance with the request.

24 **283 Estoppels against persons who respond to a request**

- 25 (1) For the purposes of this Act, a person who responds to a request
26 made under section 275 is prevented from denying any of the
27 things mentioned in subsection (2) of this section to any of the
28 following persons to the extent that that person relies on the
29 response:
30 (a) the person who makes the request;
31 (b) any other person who the person who responds to the request
32 actually knows will rely on the response.

- 1 (2) For the purposes of subsection (1), a person is prevented from
2 denying the following things:
- 3 (a) that a copy of a security agreement provided in response to a
4 request made in accordance with paragraph 275(1)(a) is a
5 true copy of the security agreement;
- 6 (b) if the person corrected information in response to a request
7 made in accordance with paragraph 275(1)(b), (c) or (d):
- 8 (i) the accuracy of information provided in response to the
9 request before the correction; or
- 10 (ii) the accuracy of the information provided in response to
11 the request.

Section 284

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Part 8.5—Notices and timing

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284 Guide to this Part

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This Part deals with notices that must be given under this Act, and how those notices must be given.

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The Part also empowers a court to make an order extending a period within which something under this Act must be done.

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A reference to time in this Act is a reference to time by legal time in the Australian Capital Territory.

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285 Application of this Part—notices etc.

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This Part does not apply to notices or other documents served or given:

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(a) in, or for the purposes of, any proceedings in a court or a tribunal of the Commonwealth or a State or Territory; or

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(b) in accordance with a procedure specified in a security agreement for serving or giving notices or other documents.

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286 Notices—writing

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A notice or any other document required or permitted to be given to any person for the purposes of this Act must be in writing.

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Note: **Writing** may include the display or representation of words or data by any form of communication, if recorded in a certain way (see section 10).

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287 Notices—registered secured parties

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A notice or document required or permitted to be given, for the purposes of this Act, to a person registered as a secured party must be given to the person, by one of the following methods, at the

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1 address specified in the registration for the giving of notices to the
2 person:

- 3 (a) leaving it at the address;
4 (b) sending it to the address by pre-paid post;
5 (c) sending it to the address by fax or by email.

6 Note: For the giving of verification statements by the Registrar, see
7 section 156.

8 **288 Notices—more than one registered secured party**

- 9 (1) This section applies if:
10 (a) a registration includes 2 or more secured parties; and
11 (b) a notice or document is required or permitted to be given to
12 each of the secured parties.
- 13 (2) The notice or document may be given to each of the secured parties
14 by giving a single notice in accordance with section 287.

15 **289 Notices etc. must be given to persons registered as secured**
16 **parties using identifier**

17 Despite anything in this Part, a notice or document is, for the
18 purposes of this Act, taken not to have been given to a person
19 registered as a secured party if:

- 20 (a) the Registrar approves a manner of including an identifier in
21 a notice or document; and
22 (b) an identifier is specified in the registration for the giving of
23 notices to the person; and
24 (c) the notice or document does not include the identifier in the
25 manner approved by the Registrar.

26 **290 Notices—deceased persons**

27 If a notice or document is required or permitted to be given to a
28 person for the purposes of this Act and the person is deceased, a
29 copy of the notice or document must be given to:

- 30 (a) the legal personal representative of the deceased person; or
31 (b) on application by the person giving the notice, such person as
32 a court directs.

Section 291

1 Note: For which courts have jurisdiction, and for transfers between courts,
2 see Part 6.2.

3 **291 Notices—Court orders**

- 4 (1) Despite anything in this Part, if a notice or other document is
5 required or permitted by this Act to be given to a person, a court
6 may, on application by a person who is required or permitted to
7 give the notice or document, make an order:
8 (a) directing that the notice or document be given in any manner
9 specified by the court; or
10 (b) dispensing with any requirement to give the notice or
11 document, either unconditionally or subject to conditions.

12 Note: For which courts have jurisdiction, and for transfers between courts,
13 see Part 6.2.

- 14 (2) In considering whether to make an order under subsection (1), the
15 court must have regard to the following matters:
16 (a) the efficient administration of this Act;
17 (b) any other matter that the court considers relevant.

18 **292 Notices—formal defects**

- 19 A notice purportedly given under this Act is not invalid as a result
20 of a formal defect or an irregularity, unless:
21 (a) a person applies to a court objecting on that ground; and
22 (b) the court is satisfied that substantial injustice has been caused
23 by the defect or irregularity; and
24 (c) the court is satisfied that the injustice cannot be remedied by
25 an order of the court.

26 **293 Timing—applications for extension of time**

- 27 (1) On application, a court may make an order extending the number
28 of business days in a period specified in the following provisions if
29 the court is satisfied that it is just and equitable to do so:
30 (a) paragraphs 62(3)(b) (perfection of purchase money security
31 interests);
32 (b) paragraphs 63(c) and (d) (priority between competing
33 purchase money security interests);

- 1 (c) paragraph 64(1)(b) (priority between non-purchase money
2 security interest and purchase money security interest);
3 (d) subsection 120(3) (payment of amount owed to secured party
4 in enforcing security interests in liquid assets);
5 (e) paragraphs 121(2)(e) and (5)(a) (notice to higher priority
6 parties and grantor of enforcement of liquid assets);
7 (f) subsection 127(4) (compliance with notice from higher
8 priority party);
9 (g) subsection 127(9) (payment of amount by higher priority
10 party);
11 (h) paragraph 130(2)(c) (notice of disposal of collateral);
12 (i) paragraphs 132(2)(a) and (6)(a) (giving statements of
13 account);
14 (j) paragraph 135(2)(a) (notice of retention of collateral);
15 (k) subsection 138(2) (giving proof of interest);
16 (l) subsection 151(3) (belief that collateral will secure
17 obligation);
18 (m) paragraph 166(2)(c) (when defect makes registration
19 ineffective);
20 (n) subsection 167(2) (application for amendment of
21 registration);
22 (o) subsection 182(2) (application for amendment after demand);
23 (p) subsection 275(3) (information required by request).
- 24 (2) The court may make the order even if the period has ended.
- 25 (3) In making an order to extend a period under subsection (1), the
26 court must take into account the following:
27 (a) whether the need to extend the period arises as a result of an
28 accident, inadvertence or some other sufficient cause;
29 (b) whether extending the period would prejudice the position of
30 any other secured parties or other creditors;
31 (c) whether any person has acted, or not acted, in reliance on the
32 period having ended.

Section 294

1 **294 Timing—references to time in this Act**

2 (1) In this Act, a reference to a particular time is a reference to that
3 time by legal time in the Australian Capital Territory.

4 (2) To avoid doubt, a reference to a particular time includes a
5 reference to a particular time by reference to the end of period.

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Part 8.6—Onus of proof and knowledge

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295 Guide to this Part

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This Part provides that the onus of proving certain facts lies with the person asserting those facts.

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The Part also defines *constructive knowledge* and provides specific rules about knowledge requirements relating to bodies corporate and other entities and transfers between persons who have close associations with each other.

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296 Onus of proof

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In a proceeding in Australia under this Act, the onus of proving the following facts lies with the person asserting those facts:

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(a) the fact that a security interest attaches to personal property;

15

(b) the fact that a security interest is perfected by registration;

16

(c) the fact that a person takes personal property free of a security interest, except in relation to sections 43 and 47;

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(d) the fact that a person takes personal property free of a security interest under subsection 47(1);

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(e) the fact that a person does not take personal property free of a security interest under subsection 47(2);

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(f) the fact that a person who purchases collateral pays at least the market value of the collateral at the time of the purchase;

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Note: See paragraph 129(3)(b).

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(g) the fact that a person acquires personal property without actual or constructive knowledge as mentioned in paragraph 267(3)(b);

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(h) the fact that a fee referred to in subsection 279(1) does not exceed the reasonable marginal costs of providing information;

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Note: See subsection 279(2).

Section 297

- 1 (i) the fact that information has been provided to a grantor or the
2 grantor's authorised representative under section 275 or 276
3 in response to a request made within the previous 6 months;

4 Note: See subsection 279(3).

- 5 (j) the fact that there has not been a material change in
6 information provided to a grantor or the grantor's authorised
7 representative since the information was last provided to the
8 grantor or the authorised representative;

9 Note: See subsection 279(4).

- 10 (k) the fact that the fee imposed under subsection 279(1) exceeds
11 the reasonable marginal costs of providing information;

12 Note: See subsection 281(2).

- 13 (l) the fact that:

- 14 (i) information has not been provided to the a grantor or a
15 grantor's authorised representative in response to a
16 request made under section 275 within the previous 6
17 months; or

- 18 (ii) there has been a material change in information since
19 the information was last provided to a grantor or a
20 grantor's authorised representative.

21 Note: See subsection 281(3).

22 **297 Meaning of *constructive knowledge***

23 For the purposes of this Act, a person (the *first person*) has
24 *constructive knowledge* of a circumstance if the first person would
25 have had actual knowledge of the circumstance if the first person
26 had:

- 27 (a) made the inquiries that would ordinarily have been made by
28 an honest and prudent person in the first person's situation;
29 or

- 30 (b) made the inquiries that would be made by an honest and
31 prudent person with the first person's actual knowledge in the
32 first person's situation.

1 **298 Actual or constructive knowledge by bodies corporate and other**
2 **entities**

3 (1) If it is necessary to establish that a body corporate has actual or
4 constructive knowledge of a particular circumstance, it is sufficient
5 to show:

6 (a) that a director, employee or agent of the body corporate,
7 being a director, employee or agent who is responsible for
8 acting on behalf of the body corporate in relation to such a
9 circumstance, had that knowledge; or

10 (b) that both of the following apply:

11 (i) the circumstance is communicated to a director,
12 employee or agent of the body corporate;

13 (ii) if the director, employee or agent had exercised
14 reasonable care, the circumstance would have been
15 brought to the attention of a director, employee or agent
16 of the body corporate who is responsible for acting on
17 behalf of the body corporate in relation to such a
18 circumstance.

19 (2) If it is necessary to establish that a person other than a body
20 corporate has actual or constructive knowledge of a particular
21 circumstance, it is sufficient to show:

22 (a) that an employee or agent of the person, being an employee
23 or agent who is responsible for acting on behalf of the person
24 in relation to such a circumstance, had that knowledge; or

25 (b) that both of the following apply:

26 (i) the circumstance is communicated to an employee or
27 agent of the person;

28 (ii) if the employee or agent had exercised reasonable care,
29 the circumstance would have been brought to the
30 attention of an employee or agent of the person who is
31 responsible for acting on behalf of the person in relation
32 to such a circumstance.

33 (3) Paragraphs (1)(b) and (2)(b) do not require a person to bring
34 information to the attention of another person unless:

35 (a) doing so is part of the person's regular duties; or

36 (b) the person has reason to know both of the following:

Section 299

- 1 (i) the transaction to which the circumstance relates;
2 (ii) that the transaction would be materially affected by the
3 information.

4 **299 Actual or constructive knowledge in relation to certain property**
5 **transfers**

- 6 (1) This section applies if:
7 (a) a person (the *transferee*) acquires personal property from
8 another person (the *transferor*); and
9 (b) any of the following applies:
10 (i) the transferee is a member of the same household as the
11 transferor;
12 (ii) the transferee is an associated entity (within the
13 meaning of the *Corporations Act 2001*) of the
14 transferor, or the transferor is such an associated entity
15 of the transferee;
16 (iii) the transferee is a director or officer (within the meaning
17 of the *Corporations Act 2001*) of the transferor, or the
18 transferor is such a director or officer of the transferee.
- 19 (2) For the purposes of this Act, the following is to be presumed,
20 unless the contrary is shown beyond reasonable doubt:
21 (a) the transferee had actual or constructive knowledge that the
22 acquisition constituted a breach of the security agreement
23 that provides for a security interest in the personal property;
24 (b) the transferee had actual or constructive knowledge of a
25 security interest in the personal property;
26 (c) value was not given by the transferee for the interest
27 acquired.

28 **300 Registration of data does not constitute constructive notice**

29 A person does not have notice, or actual or constructive
30 knowledge, about the existence or contents of a registration merely
31 because data in the registration is available for search in the
32 register.

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2 **Part 8.7—Forms and regulations**
3

4 **301 Guide to this Part**

5 This Part enables the Registrar to approve forms for the purposes
6 of this Act. Broad parameters are set out for what may be required
7 by an approved form, including the way in which the form must be
8 given to another person.

9 This Part also empowers the Governor-General to make regulations
10 for this Act.

11 **302 Approved forms**

- 12 (1) This section applies if this Act requires or authorises something to
13 be in the approved form.
- 14 (2) To be in the *approved form*, the thing must:
- 15 (a) be in writing in a form approved by the Registrar; and
 - 16 (b) include the information, statements, explanations or other
17 matters required by the form approved for the purposes of
18 paragraph (a); and
 - 19 (c) include any other material (including documents) required by
20 that form; and
 - 21 (d) be given in accordance with any requirements specified by
22 the Registrar for the purpose.

23 Note: *Writing* may include the display or representation of words or data by
24 any form of communication, if recorded in a certain way (see
25 section 10).

26 Example: Examples of forms that could be approved (see paragraph (2)(a)) are
27 as follows:

- 28 (a) an interactive form provided on the internet;
- 29 (b) a communication exchange provided by an interactive voice
30 recognition telephone system;
- 31 (c) a digital communication enabling computer to computer
32 interaction.

Section 303

- 1 (3) The Registrar may, by written instrument, approve a form for the
2 purposes of paragraph (2)(a).

3 **303 Regulations**

- 4 The Governor-General may make regulations prescribing matters:
5 (a) required or permitted by this Act to be prescribed; or
6 (b) necessary or convenient to be prescribed for carrying out or
7 giving effect to this Act.

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Chapter 9—Transitional provisions

Part 9.1—Guide to this Chapter

304 Guide to this Chapter

This Chapter deals with the way this Act will apply when the positive rules established by this Act begin to operate. It also provides for some other matters that will have less relevance over time (fixed and floating charges, in Part 9.5), or a once-only application (the review in Part 9.6).

Part 9.2 defines key concepts for the Chapter.

Part 9.3 deals with the initial application of this Act. Generally speaking, the Act starts to apply at the **registration commencement time**, which is 26 months after the Act is given the Royal Assent, or an earlier time determined by the Minister.

Part 9.4 contains provisions that relate to transitional security interests. These are interests in existence at the registration commencement time or arising afterwards under security agreements made before the registration commencement time.

This includes rules for determining priority between these interests and the vesting and extinguishment of interests in some situations.

Part 9.4 also deals with the migration of data from existing Commonwealth, State and Territory registers onto the Personal Property Securities Register.

Part 9.5 contains specific rules relating to fixed and floating charges.

Part 9.6 provides for an independent review of the operation of the Act 3 years after its enactment.

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Part 9.2—Key concepts

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305 Guide to this Part

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This Part contains definitions of the following terms used in this Chapter (and elsewhere in this Act):

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(a) migration time;

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(b) registration commencement time;

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(c) transitional security agreement;

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(d) transitional security interest.

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306 Meaning of *migration time* and *registration commencement time*

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Migration time

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(1) For the purposes of this Act, the *migration time* is:

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(a) the start of the first day of the month that is 25 months after the month in which this Act is given the Royal Assent; or

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(b) an earlier time determined by the Minister.

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Example: If this Act were given the Royal Assent on 10 December 2009, the migration time under paragraph (a) would be the start of 1 January 2012.

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Registration commencement time

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(2) For the purposes of this Act, the *registration commencement time* is at:

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(a) the start of the first day of the month that is 26 months after the month in which this Act is given the Royal Assent; or

23

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(b) an earlier time determined by the Minister.

25

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Example: If this Act were given the Royal Assent on 10 December 2009, the registration commencement time under paragraph (a) would be the start of 1 February 2012.

27

28

- 1 (3) The Minister may only determine a time for the purposes of
2 paragraph (2)(b) that is on a day that is at least 28 days after the
3 day on which the migration time occurs.
- 4 (4) If the Minister determines earlier times for both the migration time
5 and the registration commencement time, the Minister may, after
6 the migration time, make a further determination for the purposes
7 of paragraph (2)(b) that has the effect of providing for a later
8 registration commencement time.
- 9 Note: The registration commencement time determined by the further
10 determination must be no later than the time mentioned in
11 paragraph (2)(a), and at least 28 days after the day on which the
12 migration time occurs.
- 13 (5) The Minister may, by written instrument, determine a time for the
14 purposes of paragraph (1)(b) or (2)(b) (including a determination
15 mentioned in subsection (4)).
- 16 (6) A determination made under subsection (5) is a legislative
17 instrument, but section 42 (disallowance) of the *Legislative*
18 *Instruments Act 2003* does not apply to the determination.

19 **307 Meaning of *transitional security agreement***

20 In this Act:

21 ***transitional security agreement*** means a security agreement, if:

- 22 (a) the security agreement was in force immediately before the
23 registration commencement time; and
24 (b) this Act would have applied in relation to a security interest
25 provided for by the security agreement immediately before
26 the registration commencement time, but for section 310.

27 Note: Section 310 provides that this Act only starts to apply in relation to
28 security interests at the registration commencement time.

29 **308 Meaning of *transitional security interest***

30 In this Act:

31 ***transitional security interest*** means a security interest provided for
32 by a transitional security agreement, if:

Section 308

- 1 (a) in the case of a security interest arising before the registration
2 commencement time—this Act would have applied in
3 relation to the security interest immediately before the
4 registration commencement time, but for section 310; or
5 (b) in the case of a security interest arising at or after the
6 registration commencement time:
7 (i) the transitional security agreement as in force
8 immediately before the registration commencement time
9 provides for the granting of the security interest; and
10 (ii) this Act applies in relation to the security interest.
11 Note: Section 310 provides that this Act only starts to apply to security
12 interests at the registration commencement time.

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Part 9.3—Initial application of this Act

4

309 Guide to this Part

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This Act starts to apply to the following at the registration commencement time (26 months after the Act is given the Royal Assent, or an earlier time determined by the Minister):

8

(a) new security agreements;

9

(b) security interests arising after commencement;

10

(c) transitional security agreements and interests;

11

(d) new interests in personal property;

12

(e) prescribed personal property;

13

14

(f) migrated personal property data from Commonwealth, State and Territory registers.

15

Special provision is made for the following:

16

(a) the enforceability of transitional security interests;

17

(b) certain declared statutory interests;

18

(c) intellectual property licences;

19

(d) the enforcement generally of security agreements;

20

(e) the starting time for registrations;

21

(f) governing laws (under Part 7.2);

22

(g) constitutional and non-constitutional interests;

Section 310

1

(h) charges, and fixed and floating charges.

2

310 When this Act starts to apply, and in relation to which matters

3

Subject to this Part and Part 9.4, this Act starts to apply at the registration commencement time in relation to the following matters:

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(a) a security agreement made at or after the registration commencement time;

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(b) a security interest (other than a transitional security interest) arising at or after the registration commencement time;

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(c) a transitional security agreement;

11

(d) a transitional security interest (whether arising before, at or after the registration commencement time);

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(e) an interest in personal property (other than a security interest) arising at or after the registration commencement time;

14

15

(f) personal property of a kind prescribed by regulations made for the purposes of paragraph 148(c);

16

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(g) personal property, if data in relation to the property is given to the Registrar as mentioned in section 330 or 331 (data in transitional registers).

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311 Enforceability of transitional security interests against third parties

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Despite section 20, a transitional security interest is enforceable against a third party in respect of particular personal property if it would have been so enforceable immediately before the registration commencement time.

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312 Declared statutory security interests

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Section 73 (priority between security interests and declared statutory interests) applies in relation to an interest in collateral only if the interest is created, arises or is provided for under one of the following at or after the registration commencement time:

28

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30

(a) a law of the Commonwealth, a State or a Territory;

31

32

(b) the general law.

1 **313 Enforcement of security interests in intellectual property**
2 **licences**

3 Section 106 (security interests in intellectual property licences)
4 applies only in relation to security interests in intellectual property
5 licences that are made at or after the registration commencement
6 time.

7 **314 Enforcement of security interests provided for by security**
8 **agreements**

9 Chapter 4 (enforcement of security interests) applies only in
10 relation to security interests provided for by security agreements
11 made at or after the registration commencement time.

12 **315 Starting time for registrations**

13 (1) A person may only apply to the Registrar for the registration of a
14 financing statement or a financing change statement at or after the
15 registration commencement time.

16 (2) The Registrar may only register a financing statement or a
17 financing change statement (whether on application by a person or
18 at the Registrar's initiative) at or after the registration
19 commencement time.

20 Note: However, the Registrar may, before the registration commencement
21 time, register a financing statement or a financing change statement
22 under Division 6 (migrated security interests) or Division 7
23 (preparatory registration) of Part 9.4.

24 **316 Governing laws**

25 Part 7.2 (Australian laws and those of other jurisdictions) applies
26 only in relation to security interests in collateral (other than
27 transitional security interests) that arise at or after the registration
28 commencement time.

29 **317 Constitutional and non-constitutional interests**

30 (1) Section 251 (when a non-constitutional security interest becomes a
31 constitutional security interest) applies only in relation to security

Section 318

1 interests in collateral (other than transitional security interests) that
2 arise at or after the registration commencement time.

3 (2) Section 252 (priority between non-constitutional security interests
4 and constitutional security interests) applies only in relation to
5 security interests in collateral, in relation to which this Act does not
6 operate, that arise at or after the registration commencement time.

7 **318 References to charges and fixed and floating charges**

8 Part 9.5 (charges and fixed and floating charges) applies only:

- 9 (a) in the case of a reference to a charge, a fixed charge or a
10 floating charge in a law of the Commonwealth (whether the
11 law is made before, at or after the registration
12 commencement time)—in relation to a security interest (other
13 than a transitional security interest) arising at or after the
14 registration commencement time; or
15 (b) in the case of a reference to a charge, a fixed charge or a
16 floating charge in a security agreement—in relation to a
17 security agreement made at or after the registration
18 commencement time.

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Part 9.4—Transitional application of this Act

3

Division 1—Introduction

4

319 Guide to this Part

5

This Part deals with the transitional application of this Act.

6

Division 2 is about the determination of priority between a transitional security interest and another security interest when priority must be determined because of insolvency or bankruptcy, or because of registration. The Division also includes rules about attachment and perfection of the security interest.

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Division 3 is about the determination of priority between a transitional security interests and another security interest when priority must be determined other than because of an insolvency or bankruptcy, or because of registration.

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Divisions 4 and 5 deal with when collateral is taken free of a transitional security interest, and the vesting of unperfected transitional security interests in certain situations.

18

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Division 6 is about the migration of data about personal property from Commonwealth, State and Territory registers onto the Personal Property Securities Register.

21

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Division 7 provides for preparatory registration with respect to transitional security interests in anticipation of the commencement of the Personal Property Securities Register.

24

25

Division 8 provides rules for dealing with defective registrations with respect to transitional securities interests.

Section 320

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Division 2—Priority protection for certain transitional security interests

320 Scope

Insolvency/bankruptcy

- (1) This Division applies to a transitional security interest in collateral if:
- (a) the priority between the transitional security interest in the collateral and another security interest in the same collateral comes to be determined under this Act; and
 - (b) that priority comes to be determined because of an insolvency or bankruptcy.

Registration

- (2) This Division also applies to a transitional security interest in collateral if subsection (3) or (4) is satisfied in relation to the transitional security interest in collateral and another security interest in the same collateral.
- (3) This subsection is satisfied if:
- (a) collateral is covered by a transitional security agreement; and
 - (b) a registration is, or has been, effective with respect to the collateral before the end of the month that is 24 months after the registration commencement time (even if the registration is no longer effective); and
 - (c) that registration discloses that the collateral is covered by a transitional security agreement; and
 - (d) a transitional security interest (other than a migrated security interest) in the collateral arises under the transitional security agreement (whether the interest arises before, at or after the registration time for the collateral); and
 - (e) the priority between the transitional security interest in the collateral and another security interest in the same collateral comes to be determined under this Act.

- 1 (4) This subsection is satisfied if:
- 2 (a) collateral is covered by a transitional security agreement; and
- 3 (b) a registration is, or has been, effective with respect to the
- 4 collateral under section 333 (migrated data) (even if the
- 5 registration is no longer effective); and
- 6 (c) a transitional security interest in the collateral that is a
- 7 migrated security interest has arisen under the transitional
- 8 security agreement; and
- 9 (d) the priority between the migrated security interest in the
- 10 collateral and another security interest in the same collateral
- 11 comes to be determined under this Act.

12 *Exception*

- 13 (5) This Division does not apply to a transitional security interest of a
- 14 class prescribed by regulations made for the purposes of this
- 15 section.

16 **321 Priority protected transitional security interests—attachment**

17 **rule**

18 The transitional security interest is taken to have attached to the

19 collateral immediately before the registration commencement time.

20 **322 Priority protected transitional security interests—temporary**

21 **perfection rule (non-migrated security interests)**

22 *Transitional security interest temporarily perfected*

- 23 (1) Unless the transitional security interest is a migrated security
- 24 interest, the interest is temporarily perfected for the period starting
- 25 immediately before the registration commencement time and
- 26 ending at the earlier of the following times:
- 27 (a) if the interest has been perfected apart from under this
- 28 subsection—the time when the interest would stop being
- 29 continuously perfected (whether under Part 5.4, or for any
- 30 other reason) if it were not perfected under this subsection;
- 31 (b) the end of the month that is 24 months after the registration
- 32 commencement time.

Section 323

1 *Transitional security interest becomes unperfected*

- 2 (2) However, if paragraph (1)(b) applies, the transitional security
3 interest becomes unperfected at the time mentioned in
4 paragraph (1)(b), unless the transitional security interest is
5 perfected otherwise than under this section before that time.

6 **323 Priority protected transitional security interests—perfection by**
7 **registration (migrated security interests)**

8 *Migrated security interests taken to be perfected by registration*

- 9 (1) If the transitional security interest is a migrated security interest,
10 the interest is taken to be perfected by registration for the period
11 starting immediately before the registration commencement time
12 and ending at the earlier of the following times:
13 (a) the time when the interest stops being continuously perfected
14 (whether because the registration stops being effective under
15 Part 5.4, or for any other reason);
16 (b) the end time included in the registration under subsection
17 333(3).

18 Note: A registration may stop being effective under Part 5.4 at the registered
19 end time. The registration may be amended under Part 5.3 to change
20 the registered end time.

21 *Migrated security interests becomes unperfected*

- 22 (2) However, the migrated security interest becomes unperfected at the
23 end of the period mentioned in subsection (1), unless the migrated
24 security interest is perfected otherwise than under this section
25 before the end of that period.

26 **324 Priority protected transitional security interests—priority**
27 **between interests**

28 *Scope*

- 29 (1) This section applies if the priority between 2 transitional security
30 interests to which this Division applies comes to be determined
31 under this Act in relation to the same collateral.

1 Note: For priority involving a transitional security interest to which this
 2 Division does not apply, see section 326.

3 *During perfection period*

4 (2) If the priority between 2 transitional security interests mentioned in
 5 an item in the following table comes to be determined under this
 6 Act during the period to which the item applies, the security
 7 interests have the priority between themselves that they would
 8 have had under the law that applied to such priority immediately
 9 before the registration commencement time, and as if this Act had
 10 not been enacted:

11

Priority between transitional security interests during perfection period

Item	Transitional security interests	Priority period
1	2 transitional security interests (other than migrated security interests) in the same collateral	The shorter of the following periods: (a) the period mentioned in subsection 322(1) for the first transitional security interest; (b) the period mentioned in subsection 322(1) for the other transitional security interest.
2	A transitional security interest (other than a migrated security interest) and a migrated security interest in the same collateral	The shorter of the following periods: (a) the period mentioned in subsection 322(1) for the transitional security interest that is not a migrated security interest; (b) the period mentioned in section subsection 323(1) for the migrated security interest.
3	2 migrated security interests in the same collateral	The shorter of the following periods: (a) the period mentioned in subsection 323(1) for the first migrated security interest; (b) the period mentioned in subsection 323(1) for the other migrated security interest.

12 Note: A migrated security interest is a type of transitional security interest
 13 (see section 332).

Section 325

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After perfection period

- (3) If the priority between 2 transitional security interests mentioned in an item in the table in subsection (2) comes to be determined under this Act at a time after the end of the period to which the item applies:
- (a) the security interests have the priority between themselves that is determined under this Act (apart from this section); but
 - (b) if the application of paragraph (a) would not result in either security interest having priority over the other—the security interests have the priority between themselves that they would have had under the law that applied to such priority immediately before the registration commencement time, and as if this Act had not been enacted.

15 **325 Priority protected transitional security interests—migrated**
16 **security interests and acquisition of property**

17

Scope

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- (1) This section applies if:
- (a) this Division applies to a migrated security interest by virtue only of subsection 320(4) (migrated security interests); and
 - (b) the operation of this Division in relation to the determination of priority between the migrated security interest and another security interest (whatever the nature of the other security interest) in relation to the same collateral would result in an acquisition of property from a person otherwise than on just terms.

27

Priority as if this Act had not been enacted

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- (2) The migrated security interest and the other security interest have the priority between themselves that they would have had under the law that applied to such priority immediately before the registration commencement time, and as if this Act had not been enacted.

1

2 **Division 3—Non-protected priority for other transitional**
3 **security interests**

4 **326 Non-protected priority—general rule**

5 *Scope*

6 (1) This section applies if:

- 7 (a) Division 2 does not apply to a transitional security interest in
8 collateral; and
9 (b) the priority between the transitional security interest in the
10 collateral and another security interest (the ***competing***
11 ***security interest***) in the same collateral comes to be
12 determined under this Act.

13 Note: For when Division 2 applies to a transitional security interest, see
14 section 320.

15 (2) This section applies to a competing security interest:

- 16 (a) whether or not the competing security interest is a transitional
17 security interest; and
18 (b) if the competing security interest is a transitional security
19 interest—whether or not the competing security interest:
20 (i) is a migrated security interest; or
21 (ii) is a security interest to which Division 2 applies.

22 *Priority rule*

23 (3) The transitional security interest and the competing security
24 interest in the collateral have the priority between themselves that
25 they would have had under the law that applied to such priority
26 immediately before the registration commencement time, and as if
27 this Act had not been enacted.

Section 327

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2 **Division 4—Taking free and vesting of transitional security**
3 **interests in certain situations**

4 **327 Scope**

5 *Insolvency/bankruptcy*

6 (1) This Division applies to a transitional security interest in collateral
7 at a particular time if, at the time, a secured party, grantor or debtor
8 in relation to the security interest is insolvent or bankrupt.

9 *Registration*

10 (2) This Division also applies to a transitional security interest in
11 collateral at a particular time (the *applicable time*) if subsection (3)
12 or (4) is satisfied at that time.

13 (3) This subsection is satisfied if:

- 14 (a) collateral is covered by a transitional security agreement; and
15 (b) a registration is, or has been, effective with respect to the
16 collateral (even if the registration is no longer effective); and
17 (c) that registration discloses that the collateral is covered by a
18 transitional security agreement; and
19 (d) before the applicable time, a transitional security interest in
20 the collateral arises under the transitional security agreement
21 (whether the interest arises before, at or after the registration
22 time for the collateral).

23 (4) This subsection is satisfied if:

- 24 (a) collateral is covered by a transitional security agreement; and
25 (b) a registration is effective with respect to the collateral under
26 section 333 (migrated data); and
27 (c) a secured party applies for:
28 (i) a new registration for the collateral; or
29 (ii) an amendment of the registration that was made under
30 section 333; and

- 1 (d) as a result of the application, the Registrar has registered a
2 financing statement, or a financing change statement, to give
3 effect to, or to amend, the registration (even if the registration
4 is no longer effective); and
5 (e) the registration mentioned in paragraph (d) discloses that the
6 collateral is covered by a transitional security agreement; and
7 (f) a transitional security interest in the collateral that is a
8 migrated security interest has arisen under the transitional
9 security agreement.

10 **328 Rules about taking free and vesting**

11 If this Division applies to a transitional security interest:

- 12 (a) a provision of this Act by force of which a person takes
13 collateral free of a security interest applies in relation to the
14 transitional security interest at the applicable time; and
15 (b) in the circumstances set out in subsection 267(1),
16 sections 267, 268 and 269 apply to the interest at the
17 applicable time.

18 Note: Sections 267, 268 and 269 provide for unperfected security interests to
19 vest in the grantor in the circumstances described in subsection
20 267(1).

Section 329

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2 **Division 5—Taking free and vesting of transitional security**
3 **interests in other situations**

4 **329 Existing rules to apply in other situations**

5 If Division 4 (taking free etc. of transitional security interests on
6 insolvency, bankruptcy or registration) does not apply to a
7 transitional security interest in collateral:

- 8 (a) the law that would have applied immediately before the
9 registration commencement time in relation to taking the
10 collateral free of the security interest continues to apply in
11 relation to taking the collateral free of the security interest at
12 or after that time, as if this Act had not been enacted; and
13 (b) in the circumstances set out in subsection 267(1), the law that
14 would have applied immediately before the registration
15 commencement time in relation to the interest continues to
16 apply in relation to the interest at or after that time as if this
17 Act had not been enacted.

18 Note: Sections 267, 268 and 269 would otherwise provide for
19 unperfected security interests to vest in the grantor in the
20 circumstances described in subsection 267(1).

1

2 **Division 6—Migration of personal property interests**

3 **330 Scope of Division**

4 This Division applies if, at or after the migration time, and before
5 the registration commencement time:

- 6 (a) an officer or agency of the Commonwealth, a State or a
7 Territory gives the Registrar data, in relation to personal
8 property, that is held by the officer or agency in a register (a
9 *transitional register*) maintained under a law of the
10 Commonwealth, a State or a Territory; and
11 (b) the data is given in the approved form; and
12 (c) the Registrar accepts the data.

13 **331 Requirement for Commonwealth officers etc. to provide data**

14 Upon a written request by the Registrar at or after the migration
15 time, and before the registration commencement time, an officer of
16 the Commonwealth, or the person in charge of an agency of the
17 Commonwealth, must give the Registrar, in the approved form,
18 data held by the officer or the agency in a transitional register.

19 **332 Meaning of *migrated security interest***

20 An interest in personal property is a *migrated security interest* in
21 the personal property if all the following conditions are met in
22 relation to the interest:

- 23 (a) it is a transitional security interest in the personal property;

24 Note: Transitional security interests are security interests that arise
25 under security agreements made before the registration
26 commencement time, to which this Act will apply at the
27 registration commencement time (see sections 307, 308 and 310).

- 28 (b) data in a transitional register in relation to the property is:

- 29 (i) given to the Registrar as mentioned in section 330 or
30 331; and
31 (ii) accepted by the Registrar;

Section 333

- 1 (c) a registration in that transitional register in relation to the
2 property was effective immediately before the time the data
3 was given to the Registrar;
4 (d) the registration in a transitional register was duly authorised
5 by the law under which the register was maintained.

6 **333 Registration with respect to migrated data**

7 *Determination of registrable personal property*

- 8 (1) At or after the migration time, and before the registration
9 commencement time, the Registrar may, by legislative instrument,
10 determine a class of personal property to be registrable if:
11 (a) data in a transitional register in relation to personal property
12 of that class is given to the Registrar as mentioned in
13 section 330 or 331; and
14 (b) registrations in that transitional register with respect to
15 personal property of that class were effective immediately
16 before the time the data was given to the Registrar.

17 *Registration of determined personal property*

- 18 (2) If, in the opinion of the Registrar, personal property is in a
19 determined class, the Registrar may register a financing statement
20 with respect to the property at or after the migration time, and
21 before the registration commencement time.

22 Note: The Registrar must give a verification statement to each secured party
23 after the registration of a financing statement (see section 156).

24 *Matters to be included in registered data*

- 25 (3) If, in the opinion of the Registrar, a financing statement under
26 subsection (2) describes personal property that is the subject of a
27 transitional security agreement, without limiting any other matters
28 that may be included, the Registrar must, in the statement:
29 (a) include an end time for the effective registration in respect of
30 the personal property; and
31 (b) disclose that:
32 (i) the personal property is covered by a transitional
33 security agreement; and

1 (ii) the transitional security agreement provides for a
2 security interest that is a migrated security interest.

3 (4) The end time to be included in the registered financing statement is
4 the time at which, in the opinion of the Registrar, the registration of
5 the interest in the personal property in the transitional register
6 would have ended in accordance with the law under which the
7 transitional register was maintained (as in force immediately before
8 the migration time).

9 **334 Incorrectly registered migrated data**

10 *Incorrectly registered data taken never to have been registered*

11 (1) If data is registered with respect to personal property in a financing
12 statement under subsection 333(2) on the basis that the property is
13 in a class determined under subsection 333(1), but the personal
14 property is not, in fact, in the determined class, this Act applies as
15 if the data is not, and never has been, included in the register.

16 *Removal of data*

17 (2) Before a time determined under subsection (3), the Registrar may
18 (at his or her initiative) register a financing change statement to
19 remove data from the register, if the Registrar becomes satisfied
20 that subsection (1) applies to the data.

21 (3) The Registrar may, by legislative instrument, determine a time for
22 the purposes of subsection (2).

23 Note 1: Incorrectly removed data may be restored under section 186.

24 Note 2: Application may be made to the Administrative Appeals Tribunal for
25 review of the Registrar's decision under subsection (2) (see
26 section 191).

27 **335 No requirement for notice of verification statement**

28 Section 157 does not apply in relation to a verification statement
29 that relates to a registration event consisting of the registration of a
30 financing statement under section 333 or a financing change
31 statement under section 334.

1
2 **Division 7—Preparatory registration relating to**
3 **transitional security interests**

4 **336 Preparatory registration—transitional security interests**

5 *Scope*

- 6 (1) This section applies if, at or after the migration time, and before the
7 registration commencement time:
- 8 (a) a person applies to the Registrar for the registration of a
9 financing statement that describes collateral (or a financing
10 change statement amending such a financing statement); and
 - 11 (b) the application is in the approved form; and
 - 12 (c) the Registrar is satisfied on reasonable grounds that a
13 transitional security interest will (whether before, at or after
14 the registration commencement time) be:
 - 15 (i) attached to the collateral; and
 - 16 (ii) held by the person.

17 *Registration*

- 18 (2) Chapter 5 (Registration) applies in relation to the application for
19 registration, and the registration of the financing statement (or
20 financing change statement), subject to this section.
- 21 (3) The Registrar may register a financing statement that describes the
22 collateral (or a financing change statement amending such a
23 financing statement), in accordance with the application, at or after
24 the migration time, and before the registration commencement
25 time.
- 26 Note: The Registrar must give a verification statement to each secured party
27 after the registration of a financing statement (see section 156).
- 28 (4) The registration must disclose that the collateral is covered by a
29 transitional security agreement.
- 30 (5) The *registration time* for the collateral is immediately before the
31 registration commencement time.

Chapter 9 Transitional provisions

Part 9.4 Transitional application of this Act

Division 7 Preparatory registration relating to transitional security interests

Section 336

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Note: See Division 2 for other perfection and priority rules that apply to the transitional security interest.

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2 **Division 8—Transitional security interests: registration**
3 **defects**

4 **337 Registration continues despite certain defects**

5 *Scope*

6 (1) This section applies if:

- 7 (a) a registration describes collateral covered by a transitional
8 security agreement; and
9 (b) the registration would not, apart from this section, be
10 effective in respect of the collateral because of a defect (a
11 **section 165 defect**) mentioned in section 165 that arises at a
12 particular time (the **defect time**); and
13 (c) the transitional security agreement has given rise to a
14 transitional security interest; and
15 (d) the Registrar determines that registrations in a particular class
16 are effective despite section 165 defects that are stated in the
17 determination; and
18 (e) the determination applies to the registration mentioned in
19 paragraph (a).

20 (2) The Registrar may, by legislative instrument, make a determination
21 for the purposes of paragraph (1)(d).

22 *Registration temporarily unaffected by the defect*

23 (3) Despite sections 164 and 165, the section 165 defect does not make
24 the registration ineffective for the period starting at the defect time
25 and ending at the following time:

- 26 (a) unless the transitional security interest is a migrated security
27 interest—the end of the month that is 36 months after the end
28 of the period mentioned in subsection 322(1);
29 (b) if the transitional security interest is a migrated security
30 interest—the end time included in the registration under
31 subsection 333(3).

Section 337

1 *Registration becomes ineffective*

2 (4) However, the registration becomes ineffective under sections 164
3 and 165 because of the defect immediately after the time
4 mentioned in subsection (3), unless, at or before that time, the
5 registration is amended to correct the defect.

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Part 9.5—Charges and fixed and floating charges

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338 Guide to this Part

5

This Part contains special rules dealing with references to charges and fixed and floating charges in this Act and in security agreements.

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These rules are expected to have less relevance over time, as the scheme provided for by this Act provides an alternative to reliance on those techniques for security interest transactions.

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339 References to charges and fixed and floating charges

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- (1) This section applies in relation to a reference to a charge, a fixed charge, or a floating charge, over property in a law of the Commonwealth, or in a security agreement, but only to the extent that:

13

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15

16

- (a) the charge referred to has attached to personal property; and

17

- (b) title to the personal property to which the charge has attached is in the grantor.

18

19

- (2) This section does not apply in relation to:

20

- (a) paragraphs 12(2)(a) and (b), or subsection 19(4); or

21

- (b) a reference to a charge, a fixed charge, or a floating charge, if the charge referred to is a perfected security interest that is provided for by a transfer of an account or chattel paper.

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- (3) A reference to a charge over property is taken to be a reference to a security interest that has attached to:

25

26

- (a) a circulating asset; or

27

- (b) personal property that is not a circulating asset.

28

- (4) A reference to a fixed charge over property is taken to be a reference to a security interest that has attached to personal property that is not a circulating asset.

29

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Section 340

- 1 (5) A reference to a floating charge over property is taken to be a
2 reference to a security interest that has attached to a circulating
3 asset.

4 **340 Meaning of *circulating asset***

5 *General definition*

- 6 (1) For the purposes of this Act, if a grantor grants a security interest
7 in personal property to a secured party, the personal property is a
8 ***circulating asset*** if:
9 (a) the personal property is covered by subsection (5) (unless
10 subsection (2) or (3) applies); or
11 (b) in any other case—the secured party has given the grantor
12 express or implied authority for any transfer of the personal
13 property to be made, in the ordinary course of the grantor's
14 business, free of the security interest.

15 *Exceptions*

- 16 (2) Despite paragraph (1)(a), personal property covered by
17 subsection (5) is not a ***circulating asset*** if:
18 (a) an effective registration with respect to the property, in
19 relation to the grantor, discloses, in accordance with the
20 regulations, that the secured party has control of the personal
21 property; and
22 (b) the secured party has control of the personal property.

23 Note: For the meaning of ***control*** in relation to an ADI account, inventory
24 and an account that is proceeds of inventory, see sections 25 and 341
25 respectively.

- 26 (3) Despite subsection (1), personal property covered by subsection (5)
27 is not a ***circulating asset*** if:
28 (a) the personal property is goods; and
29 (b) the security interest is perfected by possession.
30 (4) For the purposes of paragraph (1)(b), personal property is not a
31 ***circulating asset*** merely because the secured party has given
32 express authority to transfer specific personal property, or a
33 specific class of personal property, free of a security interest.

1 *Personal property covered by this section*

2 (5) This section covers the following personal property:

- 3 (a) an account that arises from granting a right, or providing
4 services, in the ordinary course of a business of granting
5 rights or providing services of that kind (whether or not the
6 account debtor is the person to whom the right is granted or
7 the services are provided);
8 (b) an account that is the proceeds of inventory;
9 (c) an ADI account (other than a term deposit);
10 (d) currency;
11 (e) inventory;
12 (f) a negotiable instrument.

13 Example: An example of an account mentioned in paragraph (a) is an account
14 that is a credit card receivable.

15 **341 Control of inventory and accounts**

16 *Control of inventory*

17 (1) For the purposes of determining whether inventory is a circulating
18 asset under section 340, a secured party has **control** of the
19 inventory if:

- 20 (a) the secured party and the grantor have agreed in writing that
21 the grantor:
22 (i) will specifically appropriate the inventory to the
23 security interest; and
24 (ii) will not remove any specifically appropriated inventory
25 without previously obtaining the specific and express
26 authority of the secured party to do so; and
27 (b) the grantor's usual practice is to comply with the agreement.

28 *Control of accounts*

29 (2) For the purposes of determining whether an account is a circulating
30 asset under section 340, a secured party has **control** of the
31 following kinds of accounts (the **relevant account**) in the
32 circumstances set out in subsections (3) and (4):

- 33 (a) an account mentioned in paragraph 340(5)(a);

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- 1 (b) an account that is the proceeds of inventory.
- 2 (3) The secured party has *control* of the relevant account if:
- 3 (a) the secured party, and the person to whom the relevant
- 4 account is owed, have agreed in writing that amounts paid in
- 5 discharge of the relevant account must be deposited into a
- 6 specified ADI account; and
- 7 (b) the usual practice is for such amounts to be so deposited; and
- 8 (c) the secured party controls the ADI account; and
- 9 (d) depositing any such amounts into the specified ADI account
- 10 does not result in any person coming under a present liability
- 11 to pay:
- 12 (i) the person to whom the relevant account is owed; or
- 13 (ii) if the person to whom the relevant account is owed is a
- 14 body corporate—a related body corporate (within the
- 15 meaning of the *Corporations Act 2001*).
- 16 (4) If the secured party is a transferee of the relevant account, the
- 17 secured party has *control* of the relevant account if payment by the
- 18 account debtor to the secured party would discharge the obligation
- 19 of the account debtor under subsection 80(8) to the extent of the
- 20 payment.
- 21 *Section does not limit meaning of control*
- 22 (5) This section does not limit when a secured party has control
- 23 (within the meaning of Part 2.3) of inventory or an account for the
- 24 purposes of determining whether inventory or the account is a
- 25 circulating asset under section 340.

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Part 9.6—Review of operation of Act

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342 Guide to this Part

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This Part provides for the review of the operation of this Act within 3 years after its enactment.
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343 Review of operation of Act

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- (1) The Minister must cause a review of the operation of this Act to be undertaken and completed within 3 years after the registration commencement time.

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Note: For *registration commencement time*, see section 306.

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- (2) The persons who undertake the review under subsection (1) must give the Minister a written report of the review.

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- (3) The Minister must cause a copy of the report of the review under subsection (1) to be tabled in each House of the Parliament within 15 sitting days of the day on which the report is given to the Minister.

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